BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

JULY 1, 2004 • VOLUME 43, NO. 26

*Julie Schwartz* *Gallup District Court House, Gallup, NM*

# Notice of Construction in the Supreme Court Building

The Supreme Court Building in Santa Fe will be under construction until mid-October. All domestic water pipes will be removed and replaced and the electrical system will be upgraded in the 1934 original building. Patrons are asked to use the south entrance to access the Supreme Court clerk's office through July. Both appellate courtrooms will be unaffected. Questions should be directed to Kathleen J. Gibson, chief clerk, (505) 827-4860.

In the Matter of the Amendments of Rules 2-104, 3-104, 6-104, 6-506, 7-104, 7-506, 8-104, and 8-506 and Adoption of New Rules 6-506A, 7-506A, and 8-506A for Courts of Limited Jurisdiction

**2004-NMCA-019:** State v. Joe Barber

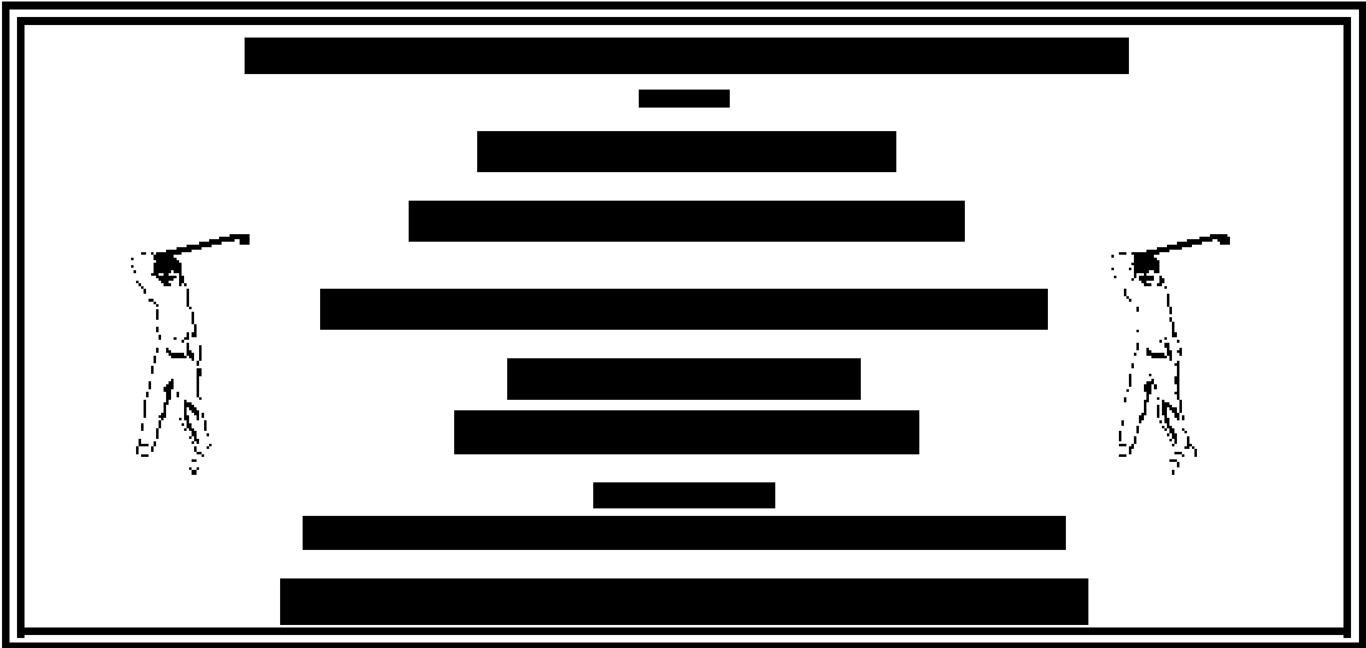
**2004-NMCA-067:** State v. Jeuang Van Dang

**2004-NMCA-068:** Eric E. Fernandez and Veronica R. Fernandez, personal representatives for the Estate of Leon A. Fernandez v. the Española Public School District and the Board of Education for the Española Public School District

**2004-NMCA-066:** State v. Reymundo Carlos Garcia

**2004-NMCA-065:** City of Albuquerque v. Reneé Sachs

**Second Judicial District Court Chief Judge William F. Lang Addresses Membership**
**See page 6**



CENTER FOR
LEGAL
EDUCATION

# SEMINAR REGISTRATION FORM

State Bar Center

# Table of Contents


| | |
|---|---|
| Notices | 7-9 |
| Ask Pat | 10 |
| Legal Education Calendar | 11-12 |
| Writs of Certiorari | 13-14 |
| Rules/Orders | 15-20 |
| Opinions | 21-41 |
| Advertising | 42-52 |


**Professionalism Tips**

With respect to parties, lawyers, jurors and witnesses:

I will be courteous, respectful and civil to parties, lawyers, jurors and witnesses. I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner.


In the Matter of the Amendments of Rules 2-104, 3-104, 6-104, 6-506, 7-104, 7-506, 8-104, and 8-506 and Adoption of New Rules 6-506A, 7-506A, and 8-506A for Courts of Limited Jurisdiction 15

**From the New Mexico Court of Appeals**

**No. 27,938:** State v. Joe Barber 21

**No. 22,982:** State v. Jeuang Van Dang 26

**No. 23,032:** Eric E. Fernandez and Veronica R. Fernandez, personal representatives for the Estate of Leon A. Fernandez v. the Española Public School District and the Board of Education for the Española Public School District 30

**No. 23,353:** State v. Reymundo Carlos Garcia 32

**No. 23,632:** City of Albuquerque v. Reneé Sachs 38



**BAR BULLETIN**



Board of Bar Commissioners - Officers
Daniel J. O'Brien, President; Charles J. Vigil, President-Elect; Virginia R. Dugan, Vice President; Dennis E. Jontz, Secretary- Treasurer;
Colin C. Alcott, Immediate-past President

Board of Editors
Frances C. Bassett, Esq., Cathrynn Novich Brown, Esq., Robert G. Cates, Esq., Germaine R. Chapelle, Esq., The Hon. Thomas G. Fitch, Barbara Glenn Momaday, Esq., Mary Catherine McCulloch, Esq., Steve A. Sandoval, William D. Winter, Esq.

Executive Director – Joe Conte
Editor – Diana Sandoval
Layout – Diana Sandoval / Julie Schwartz
Account Executive – Marcia C. Ulibarri, (505) 797-6058; fax: (505) 797-6075
Printer – Brian Sanchez



Cite officially as Bar Bulletin (ISSN 1062-6611). Vol. 43, No. 26, July 1, 2004.
Subscription price $80 per year. Subscriptions are nonrefundable once purchased.
Published weekly by the State Bar, 5121 Masthead NE, Albuq., NM 87109
(505) 797-6000 • 1-800-876-6227 • Fax: (505) 828-3765
E-mail: bb@nmbar.org • www.nmbar.org
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.
Periodicals Postage Paid At: Albuquerque, NM 87101 • © 2004, State Bar of New Mexico Postmaster send address changes to: Systems Manager • Bar Bulletin • PO Box 92860, Albuquerque, NM 87199-2860


# Meetings

## July

**7**
**Employment & Labor Law Section Board of Directors,** noon, State Bar Center

**8**
**Public Law Section Board of Directors,** noon, New Mexico Municipal League, Santa Fe

**9**
**Appellate Practice Section Board of Directors,** 3 p.m., AG Conference Room, 3rd floor, 111 Lomas NW

**9**
**Real Property, Probate & Trust Section Board of Directors,** 4 p.m., State Bar Center

**10**
**Ethics Advisory Committee,** 10 a.m., Dines & Gross, P.C.

**12**
**Taxation Law Section Board of Directors,** noon, via teleconference

# State Bar Workshops

## July

**14**
**Family Law & Consumer Debt/ Bankruptcy Workshop***
Judge John Pope's Courtroom, Thirteenth Judicial District Court, 444 Luna Ave., Los Lunas, NM

**22**
**Consumer Debt/Bankruptcy Workshop***
5:30 – 7:30 p.m., Branigan Library. Las Cruces, NM

**28**
**Family Law Workshop**
5:30 – 7:30 p.m., Branigan Library, Las Cruces, NM

**28**
**Consumer Debt/Bankruptcy Workshop***
6 – 8 p.m., State Bar of New Mexico, State Bar Center, Albuquerque, NM

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

# NOTICES

## COURT NEWS

### N.M. Supreme Court

#### Court Approves Rule Change to Reduce Case Dismissals in DWI Prosecutions

The New Mexico Supreme Court has approved rule changes within the magistrate courts, Bernalillo County Metropolitan Court and municipal courts that will reduce the number of case dismissals in DWI prosecutions. The revised rules will allow courts more time to hear DWI cases beyond the previous rule limitation, which required that DWI trials begin within six months of arraignment. The new rules simplify the method by which the time for taking the case to trial is determined while balancing the defendant's constitutional right to a speedy trial with the need for prosecutors to timely and adequately prepare for trial. Under the new rules, defendants may request one 60-day extension without obtaining the state's approval. The rules are effective for cases filed on or after Aug. 1, 2004.

#### Notice on Address Changes

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Information may be e-mailed to the State Bar, at address@nmbar.org; faxed to (505) 828-3755; or mailed to the State Bar, PO Box 92860, Albuquerque NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

#### Proposed Revision of Rule 16-701 NMRA and the Comment to Rule 16-303 NMRA of the Rules of Professional Conduct

The Supreme Court is considering a revision to Rule 16-701 of the Rules of Professional Conduct. It is also proposed that the Code of Professional Conduct Committee Comment to Rule 16-303 be revised. Attorneys and/or judges who would like to comment on the proposed amendments should send written comments by July 9 to: Kathleen J. Gibson, chief clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

***For reference:*** *The proposed amendments were published in the June 17 (Vol. 43, No. 24)* 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., July 23, at the State Bar Center in Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

### First Judicial District Court

#### Family Law Brownbag Meeting

The First Judicial District Court will host a family law brownbag meeting at noon, July 13 at the Judge Steve Herrera Judicial Complex in Santa Fe. Second Judicial District Court Judge John Romero will discuss court recognition of the collaborative law process.

### Second Judicial District Court

#### Arbitrator Pool Being Updated

Attorneys who may have recently qualified for inclusion in the Arbitrator Pool, as required under LR2-603, will receive a letter from the presiding civil judge, Robert L. Thompson and David Leven, director of Court Alternatives. The local rule, in effect since June 1988, provides that attorneys who are residents of or maintain an office in Bernalillo County and who have practiced for five or more years in New Mexico and/or any other jurisdiction (with a few exceptions) are required to be part of the Arbitrator Pool for the Court Annexed Arbitration Program.

Enclosed in the mailing will be forms entitled "Attorney Certification Regarding Arbitrator Pool," which attorneys need to review and return to the court within 15 days from the date of the letter. Among other things, the form asks for verification of the attorney's employment and address and the length of time the attorney has been licensed to practice law in New Mexico, as well as any other jurisdiction. For more information, contact David P. Leven or Janyl L. Mooney, (505) 841-7412.

#### 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, July 6 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, 1985-90

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 domestic cases for years 1985-90 (excluding cases on appeal). Counsel for parties are advised that exhibits may be retrieved through July 21. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 841-7596/6711, 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.

## U.S. District Court for the District of New Mexico
### Electronic Noticing by the U.S. District Court

Effective Aug. 1, all notices sent out by the U.S. District Court will be in electronic form, via facsimile or through the ACE mailbox, with exceptions allowed for indigent and pro se litigants. All attorneys must notify the court in writing by July 15 of their preferred electronic transmission method using the Election of Electronic Noticing Preference, available at the court's Web site, www.nmcourt.fed.us. Attorneys presently enrolled with the court to receive notice electronically are not required to resubmit their preference.

# State Bar News

## Bankruptcy Law Section
### Town Hall Meeting

The Bankruptcy Law Section will host a town hall meeting from 3:30 to 5 p.m., July 9 in the Animas Courtroom (room 13012), of the Dennis Chavez Federal Building, 500 Gold SW. Judges Mark B. McFeeley and James S. Starzynski will engage attendees in discussions concerning practices and policies in appearing before the U.S. Bankruptcy Court.

## Board of Bar Commissioners
### Appointments to New Mexico Commission on Access to Justice

The Board of Bar Commissioners will make three appointments to the newly created New Mexico Commission on Access to Justice. The commission is an independent, statewide body dedicated to expanding and improving civil legal assistance in New Mexico and is composed of 18 members representative of the bar, judiciary and legal aid providers. The commission will also consider relevant topics, including expansion of resources, increased public awareness through communications and message development, pro bono matters and other areas including training and technology. The commission will initially meet to organize and thereafter as necessary at the call of the co-chair persons or at the request of a majority of the committee members.

For information on what other states are doing, visit the Access to Justice Support Project Web site, www.ATJsupport.org. Members wishing to serve on the commission should send a letter of interest and brief resume by July 9 to Joe Conte, executive director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

## Business Law Section
### Upcoming Luncheon and CLE

The State Bar Business Law Section will hold a luncheon and CLE program from 11:30 a.m. to 1:30 p.m., July 29 at the State Bar Center. Lunch will be at 11:30 a.m., followed by "Engagement Letters: The Gateway to Better Client Relations and Professionalism" with John Bannerman, member of the State Bar's Lawyers Professional Liability Committee at 11:50 a.m. The cost of the program, including lunch, is $39 standard and non-attorney, and $29 for Business Law Section members, government lawyers and paralegals. The seminar offers 2.0 professionalism CLE credits. For more information or to register, call (505) 797-6020.

## 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 July 7. (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) 995-1017.

## Lawyers Assistance Committee
### Monthly Meeting

Due to the July 5 holiday, the Lawyers Assistance Committee will meet at 5:30 p.m., July 12 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.

## Public Law Section
### Board Meeting

The next Public Law Section board meeting will be held at noon, July 8 at the New Mexico Municipal League in Santa Fe. Contact Randy Van Vleck, (505) 982-5573, or Deborah Moll, (505) 827-2000, for more information.

## State Bar of New Mexico
### Las Cruces Office

On June 4, the State Bar of New Mexico opened a satellite office in the Third Judicial District Courthouse, 201 W. Picacho, Las Cruces, NM 88005. With the support of Chief Judge Robert E. Robles and the judges of the Third Judicial District Court, the satellite office will be open two days per month, usually on a Thursday and Friday. The satellite office will be open to all State Bar members and will offer general bar services and public service programs and information. Programming also will be available from the State Bar Center for Legal Education on most days at the Thomas Branigan Memorial Library, 200 E. Picacho. Members will receive a CLE schedule via mail and e-mail. The office schedule is as follows:

**July**
8 1 - 5 p.m.
9 9 - 3 p.m.

**August**
12 1 - 5 p.m.
13 9 - 3 p.m.

**September**
9 1 - 5 p.m.
10 9 - 3 p.m.

**October**
14 1 - 5 p.m.
15 9 - 3 p.m.

**November**
12 9 - 3 p.m.

**December**
9 1 - 5 p.m.
10 9 - 3 p.m.

# OTHER BARS

## Albuquerque Association of Legal Professionals

Albuquerque Association of Legal Professionals, the local chapter of the National Association of Legal Secretaries (NALS), holds its monthly general meetings at 6 p.m. on the third Tuesday, at Shoney's Restaurant at Menaul and Louisiana. All members are encouraged to attend and all visitors are welcome. NALS/AALP membership is open to anyone employed in any capacity in a law office or court office, or with any law-related employer, such as court reporters.

The next monthly general meeting will be at 6 p.m., July 20. The evening's topic will be "Document Retention and Destruction for the Law Office," with Ardy Skinner from Adelante Document Destruction.

The August general meeting will be at 6 p.m., Aug. 17. Leigh Anne Chavez, co-chair of the Paralegal Studies Program at T-VI, will speak on the state of the paralegal profession, where it has been and where it is going.

No reservations are required for the meeting. For more information either on NALS/AALP or meeting location, call Nancy Laird, (505) 837-9200 or (505) 249-3751.

## Albuquerque Bar Association

### Upcoming Events

The Albuquerque Bar Association will host an ethics seminar from 12:30-1:30 p.m., July 6 (after lunch). Peter Pierotti, chair of the State Bar Ethics Committee, and Jason Bousliman, Lisa Carrillo, Jim Reist, Alex Wold will be the presenters.

"Professional Handling of Unprofessional Behavior: Judges and Attorneys," a professionalism seminar, will follow from 1:30 to 3:30 p.m., led by Peter Pierotti, former Justice Gene Franchini (retired), former Judge Susan Conway (retired), Bill Stratvert, chair of the State Bar Lawyers Assistance Committee, and Jim Noel, Judicial Standards Commission. The seminar will offer 2.0 professional CLE credits.

The cost for lunch only is $15 for members/$20 for nonmembers. The cost for the ethics CLE and lunch is $30 for members/$45 for nonmembers. The cost for the professionalism program is $30 for members/$45 for nonmembers.

Reservations can be made by visiting the Albuquerque Bar Web site, www.abqbar.com; by e-mail to abqbar@aol.com; by telephone or fax to (505) 243-2615 or 842-1151; or by standard mail to 400 Gold SW, Ste. 620, Albuquerque, NM 87102.

## N.M. Defense Lawyers Association

### Nominations Sought for Outstanding Civil Defense Lawyer

Nominations are being accepted for the 2004 Outstanding Civil Defense Lawyer. The award will be presented at the 2004 DLA Annual Meeting on Oct. 28 in Albuquerque. The criteria for the Outstanding Civil Defense Lawyer is as follows: This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability. Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199; fax to (505) 797-6017; or e-mail nmdefense@nmdla.org. Deadline for nomination submission is July 31.

# OTHER NEWS

## New Mexico Center on Law and Poverty

### Statewide Legal Services Training 2004

The New Mexico Center on Law and Poverty will host its annual statewide training for legal service providers from 8 a.m. to 5 p.m., July 21 and 22 at the State Bar Center in Albuquerque. The conference is geared toward individuals who work for civil legal service providers as a professional or volunteer, or who do pro bono work in this area. Some of the topic areas to be covered include: consumer law, Indian law, domestic relations, Medicaid and other public benefits, worker's compensation, medical debt and more.

The registration fee is $50 for one day of the conference and $100 for both days. For more information, including how to register for the event, visit the "Trainings" section of the Center on Law and Poverty Web site, www.nmpovertylaw.org; or contact Stacey Leaman, (505) 255-2840 or stacey@nmpovertylaw.org. CLE credit is pending.

## Workers' Compensation Administration

### Destruction of Exhibits and Depositions

The New Mexico Workers' Compensation Administration will be destroying all exhibits and depositions filed in causes closed in 2002 (excluding causes on appeal). The exhibits and depositions are stored at 2410 Centre Ave. SE, Albuquerque, and can be picked up until July 30. For more information, contact the Workers' Compensation Administration, (505) 841-6843 or 1(800) 255-7965, Alex Maestas, clerk of the court. Exhibits and depositions not claimed by the specified date will be destroyed.


**2003-04 Bench & Bar Directory**

*Now available at reduced rate!*

The ***2003-04 Bench & Bar Directory*** is still available — now only $10 (plus $2.50 per copy, third-class postage). Purchase copies at the State Bar to avoid shipping fees.

To order, contact Veronica Cordova, vcordova@nmbar.org; or (505) 797-6039.

# Ask Pat

Dear Pat:

I am a young mid-level female associate in a medium-sized firm. My practice to date has been fairly general, encompassing a number of legal areas. Recently, however, I have attempted to focus on employment law working under a partner in my firm who primarily does plaintiffs' work. I would like to continue practicing in the employment law area, but would prefer to build a practice advising corporate clients. I have been attending local chamber of commerce meetings and chamber-sponsored socials in order to meet decision makers for potential corporate clients. Although I have given and received dozens of business cards and have followed up with promising contacts both over the telephone and in writing, my efforts have failed to produce a single client. I also must admit that I really do not enjoy networking. The chamber events have had an "old boys' club" atmosphere in which I feel overlooked due to my age, relative inexperience and (dare I say) gender. Please help me make it rain! /s/ Frustrated but Eager

Dear Frustrated, but Eager:

First and foremost, don't give up. Any type of marketing takes time. Second, to make it rain, you need a plan. Your practice is essentially a start-up business, and studies show that entrepreneurs who have a written business plan do far better financially than those who do not.

Given that you probably do not need to share your plan with others (e.g., prospective lenders), your business plan can be formal or as simple as some handwritten notes. Whether formal or not, your plan should contain at a minimum: (1) a description of the market you want to serve, (2) an analysis of how you fit into that market and (3) an outline of objectively verifiable goals and specific actions you will take to reach those goals.

- **Describe Your Target Market:** Because you already have identified your target market, I will only pause to provide a word of caution against over specialization. Although it is a good idea to develop expertise in an area, you need to maintain sufficient variety to weather changing economic conditions. Your broad background will help you here. I would encourage you to identify complementary practice areas that will enable you to diversify while enhancing your proficiency as an employment law practitioner.
- **Analyze How You Fit Into Your Target Market:** To analyze how you fit into your target market, first make a list of your strengths and weaknesses. Next, identify the top 10 (plus or minus) needs of your target market and how your skills are uniquely suited to meet those needs. For example, your experience in handling plaintiffs' work can be used to assist business clients to identify problem areas proactively and develop policies and procedures to minimize the potential for litigation in these areas. The by- product of your analysis will be the framework for your general marketing pitch, which you can later tailor for specific potential clients. Finally, don't ignore your weaknesses. If you need more experience in a particular area, consider taking on a substantively appropriate pro bono matter and/or seek out Continuing Legal Education and industry seminars to supplement your knowledge base.
- **Outline Your Goals and Create an Action Plan for Achieving Them:** In preparing this outline, try to identify specific and objectively verifiable goals. The goal of building "a successful practice," for example, is neither. Try breaking this general concept into more concrete short-term, medium-term and long-term pieces. A specific and verifiable short-term goal might be to make one new contact per week. A medium term goal might be to develop an ongoing client relationship with five small- to-medium sized businesses over the next year. A long term goal might be to make partner or become in house counsel within five years.

At this stage of your career, the action plan for achieving your goals will need to focus on building your reputation for being a knowledgeable practitioner who provides competent and caring service. The cornerstone for all of this is, of course, to focus on actually providing knowledgeable, competent and caring services to your existing clients. Word of mouth is crucial. Other tools for building your reputation include lecturing, publishing articles and joining groups. The important thing is to choose what works for you.

You mentioned that you have not enjoyed chamber of commerce events because of their "old boys club" atmosphere. In line with my foregoing comment, if you don't enjoy these events, don't attend them. Find something that works for you. For example, become involved with a local women's business group or pursue the complementary goals of philanthropy and networking by volunteering for a charitable organization in an area of concern to you. Finally, don't overlook bar activities since your best source of referrals can be other lawyers. The keys to networking success are patience and participation. Give others a tangible demonstration of your best qualities through your volunteer work and let them get to know you so they can feel comfortable referring work to you.

For more ideas, look at the ABA Section on Law Practice Management publication *Women Rainmakers' 101+ Best Marketing Tips* (Theda C. Snyder, Ed., 1994). Hope this helps! /s/ Pat

(NOTE: The Committee for Women in the Legal Profession will be co-sponsoring a CLE on October 1, 2004, at the State Bar on Rainmaking for Women: Breaking Through the Glass Ceiling.)

**Ask Pat is a feature provided by the Committee on Women and the Profession. This is a question and answer column with a twist – "Pat" will answer questions about gender bias in the legal profession. All of the letters are loosely based on real events. Readers are invited to send their comments or letters to "Ask Pat," State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. "Pat" responses are provided by members of the committee.**

**NOTICE**

Your attention is drawn to several differences between the amendments published for comment in the January 29, 2004, *Bar Bulletin,* and the rules as adopted by the court. The commentary to Rules 6-506,7-506 and 8-506, regarding exceptional circumstances, has been added to explain what type of exceptional circumstances are intended by paragraph (C)(5) of the Supreme Court approved rules. Paragraph (B)(8) in the January publication has been rewritten and is now paragraph (C)(4) in the Supreme Court approved rules. Paragraph (C)(2) was added after the January publication for comments. Paragraph (C)(2) permits the court to extend the 182-day time period for an additional 30 days for good cause shown on motion of the defendant. Paragraph (C)(3) in the January publication relating to "exceptional circumstances" is now paragraph (C)(5) in the Supreme Court approved rule amendments." The committee commentary explaining what is intended by "exceptional circumstances" was added.

**NO. 04-8300**

**IN THE MATTER OF THE AMENDMENTS OF RULES 2-104, 3-104, 6-104, 6-506, 7-104, 7-506, 8-104, AND 8-506 AND ADOPTION OF NEW RULES 6-506A, 7-506A, AND 8-506A FOR COURTS OF LIMITED JURISDICTION**

**ORDER**

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules for Courts of Limited Jurisdiction Committee to adopt amendments to Rules 2-104, 3-104, 6-104, 6-506, 7-104, 7-506, 8-104, and 8-506 and to approve new Rules 6-506A, 7-506A, and 8-506A for Courts of Limited Jurisdiction, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments to Rules 2-104, 3-104, 6-104, 6-506, 7-104, 7-506, 8-104, and 8-506 for Courts of Limited Jurisdiction hereby are APPROVED subject to re-evaluation within one year from the effective date;

IT IS FURTHER ORDERED that new Rules 6-506A, 7-506A, and 8-506A hereby are APPROVED subject to re-evaluation within one year from the effective date;

IT IS FURTHER ORDERED that Rules for Courts of Limited Jurisdiction Committee shall reevaluate operation of the amendments and new rules and submit statistics with commentary on or before thirty (30) days prior to the expiration of the period;

IT IS FURTHER ORDERED that the amendments to Rules 2-104, 3-104, 6-104, 6-506, 7-104, 7-506, 8-104, and 8-506 and new Rules 6-506A, 7-506A, and 8-506A shall be **effective for cases filed on or after August 1, 2004**;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments and provisional adoption of new rules by publishing the same in the *Bar Bulletin* and NMRA.

DONE at Santa Fe, New Mexico, this 15th day of June, 2004.

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

**2-104. Time.**

A. **Computation**. In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents' day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

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

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

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for commencement of trial under Rule 2-305 NMRA or for taking an appeal under Rule 2-705 NMRA, except to the extent and under the conditions stated in them.

C. **For motions**. A written motion, other than one which may be heard ex parte, and notice of the hearing on the motion shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

D. **Additional time after service by mail**. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

E. **Applicability.** This rule shall not apply to any statutory notice that is required to be given prior to the filing of an action.
[As amended, effective August 1, 2004.]

**3-104. Time.**

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents' day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday..

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

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

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for commencement of trial or for taking an appeal, except to the extent and under the conditions stated in them.

C. **For motions**. A written motion, other than one which may be heard ex parte, and notice of the hearing on the motion shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

D. **Additional time after service by mail**. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

E. **Applicability.** This rule shall not apply to any statutory notice that is required to be given prior to the filing of an action.
[As amended, effective August 1, 2004.]

**6-104. Time.**

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents' day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

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

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

(2) upon motion made after the expiration of the specified period permit the act to be done; but it may not extend the time for commencement of trial or for taking an appeal.

C. **For motions.** A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereon shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.
[As amended, effective August 1, 2004.]

**6-506. Time of commencement of trial**.

A. **Arraignment.** The defendant shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after whichever of the following events occurs latest:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order or remand is filed in the magistrate court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the magistrate court;

(4) in the event of a remand from an appeal, the date the mandate or order is filed in the magistrate court disposing of the appeal;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the magistrate court that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions or requirements of the program.

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding thirty (30) days;

(3) upon stipulation of the parties and approval of the court for a period not exceeding sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to sixty (60) days; or

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period, provided that the aggregate of all extensions granted pursuant to this subparagraph may not exceed thirty (30) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial pursuant to subparagraph (5) of Paragraph C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.** In event the trial of any person does not commence within the time specified in Paragraph B of this rule or within the period of any extension provided in this rule, the complaint or citation filed against such person shall be dismissed with prejudice.

[As amended, effective August 1, 2004.]

**COMMITTEE COMMENTARY**

**Exceptional circumstances**

"Exceptional circumstances", as used in this rule, would include conditions which are unusual or extraordinary such as: death or illness of the judge, prosecutor, or a defense attorney immediately preceding the commencement of the trial; and circumstances which ordinary experience or prudence would not foresee, anticipate or provide for.

**Speedy trial**

This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico.

**Duty of prosecutor**

It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule.

**6-506A. Voluntary dismissal and refiled proceedings.**

A**. Voluntary dismissal.** The prosecution may dismiss a citation or criminal complaint by filing a notice of dismissal. The notice of dismissal shall be substantially in the form approved by the Supreme Court. Unless otherwise stated in the notice, the dismissal is without prejudice. A notice of dismissal shall be filed:

(1) prior to commencement of the trial if the charges are within magistrate court trial jurisdiction; or

(2) prior to the commencement of a preliminary examination in the magistrate court, if the charges are not within magistrate court trial jurisdiction.

B. **Bail bond.** The filing of a notice of dismissal under Paragraph A of this rule shall not exonerate a bond prior to the expiration of the time for automatic exoneration pursuant to Subparagraphs A(1) or A(2) of Rule 6-406 NMRA of these rules. If the dismissed charges are later filed in the district court, the state shall notify the magistrate court and the magistrate court shall transfer any bond to the district court.

C. **Refiled complaints; cases within magistrate court trial jurisdiction.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the refiled complaint shall be clearly captioned "Refiled Complaint" and shall include the following:

(1) the court in which the original charges were filed;

(2) the case file number of the dismissed charges;

(3) the name of the assigned judge at the time the charges were dismissed; and

(4) the reason the charges were dismissed.

D. **Procedure after refile.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the case shall be treated as a continuation of the same case, and the trial on the refiled charges shall be commenced within the unexpired time for trial pursuant to Rule 6-506 NMRA, unless the court, after notice and a hearing, finds the refiled complaint should not be treated as a continuation of the same case.

[Approved, effective August 1, 2004.]

**COMMITTEE COMMENTARY**

In 2004, Rule 6-506 NMRA was split into two rules. This rule is former Paragraphs A through D of Rule 6-506 NMRA.

For what is required for a showing of good faith, *see State v. Vigil*, 114 N.M. 431, 839 P.2d 641 (Ct. App. 1992) (state has the burden of demonstrating good-faith that it was not intent to circumvent the operation of the six-month rule); and *State v. Lucero*, 108 N.M. 548, 550, 775 P.2d 750, 752 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240 (1989) (amended complaint containing significant changes in the offenses charged superseded the original complaint for purposes of six-month rule). *See also State v. Bolton*, 1997-NMCA-007, 122 N.M. 831, 932 P.2d 1075 *(analysis of Lucero, Delgado and Coburn cases)*.

---

**7-104. Time.**

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents' day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

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

may, at any time in its discretion:

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

(2) upon motion made after the expiration of the specified period, permit the act to be done, but it may not extend the time for commencement of trial, or for taking an appeal.

C. **For motions.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[As amended, effective August 1, 2004.]

**7-506. Time of commencement of trial**.

A. **Arraignment.** The defendant shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after whichever of the following events occurs latest:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order is filed in the metropolitan court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the metropolitan court;

(4) in the event of a remand from an appeal, the date the mandate or order is filed in the metropolitan court disposing of the appeal;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the metropolitan court that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions or requirements of the program.

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding thirty (30) days;

(3) upon stipulation of the parties and approval of the court for a period not exceeding sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to sixty (60) days; or

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period, provided that the aggregate of all extensions granted pursuant to this subparagraph may not exceed thirty (30) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial pursuant to subparagraph (5) of Paragraph C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.** In event the trial of any person does not commence within the time specified in Paragraph E of this rule or within the period of any extension provided in this rule, the complaint or citation filed against such person shall be dismissed with prejudice.

[As amended, effective August 1, 2004.]

**COMMITTEE COMMENTARY**

**Exceptional circumstances**

"Exceptional circumstances", as used in this rule, would include conditions which are unusual or extraordinary such as: death or illness of the judge, prosecutor, or a defense attorney immediately preceding the commencement of the trial; and circumstances which ordinary experience or prudence would not foresee, anticipate or provide for.

**Speedy trial**

This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico.

**Duty of prosecutor**

It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule.

**7-506A. Voluntary dismissal and refiled proceedings.**

A**. Voluntary dismissal.** The prosecution may dismiss a citation or criminal complaint by filing a notice of dismissal. The notice of dismissal shall be substantially in the form approved by the Supreme Court. Unless otherwise stated in the notice, the dismissal is without prejudice. A notice of dismissal shall be filed:

(1) prior to commencement of the trial if the charges are within metropolitan court trial jurisdiction; or

(2) prior to the commencement of a preliminary examination in the metropolitan court, if the charges are not within metropolitan court trial jurisdiction.

B. **Bail bond.** The filing of a notice of dismissal under Paragraph A of this rule shall not exonerate a bond prior to the expiration of the time for automatic exoneration pursuant to Subparagraphs A(1) or A(2) of Rule 7-406 NMRA of these rules. If the dismissed charges are later filed in the district court, the state shall notify the metropolitan court and the metropolitan court shall transfer any bond to the district court.

C. **Refiled complaints; cases within metropolitan court trial jurisdiction.** If a citation or complaint is dismissed without

prejudice and the charges are later refiled, the refiled complaint shall be clearly captioned "Refiled Complaint" and shall include the following:

(1) the court in which the original charges were filed;

(2) the case file number of the dismissed charges;

(3) the name of the assigned judge at the time the charges were dismissed; and

(4) the reason the charges were dismissed.

D. **Procedure after refile.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the case shall be treated as a continuation of the same case, and the trial on the refiled charges shall be commenced within the unexpired time for trial pursuant to Rule 7-506 NMRA, unless the court, after notice and a hearing, finds the refiled complaint should not be treated as a continuation of the same case.
[Approved, effective August 1, 2004.]

**COMMITTEE COMMENTARY**

In 2004, Rule 7-506 NMRA was split into two rules. This rule is former Paragraphs A through D of Rule 7-506 NMRA.

For what is required for a showing of good faith, *see State v. Vigil*, 114 N.M. 431, 839 P.2d 641 (Ct. App. 1992) (state has the burden of demonstrating good-faith that it was not intent to circumvent the operation of the six-month rule); and *State v. Lucero*, 108 N.M. 548, 550, 775 P.2d 750, 752 (Ct. App.), *cert. denied,* 108 N.M. 433, 773 P.2d 1240 (1989) (amended complaint containing significant changes in the offenses charged superseded the original complaint for purposes of six-month rule). *See also State v. Bolton*, 1997-NMCA-007, 122 N.M. 831, 932 P.2d 1075 *(analysis of Lucero, Delgado and Coburn cases)*.

**8-104. Time.**

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents' day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

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

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

(2) upon motion made after the expiration of the specified period permit the act to be done; but it may not extend the time for commencement of trial or for taking an appeal.

C. **For motions.** A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereon shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may, for cause shown, be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.
[As amended, effective August 1, 2004.]

**8-506. Time of commencement of trial**.

A. **Arraignment.** The defendant shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after whichever of the following events occurs latest:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order or remand is filed in the municipal court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the municipal court;

(4) in the event of a remand from an appeal, the date the mandate or order is filed in the municipal court disposing of the appeal;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the municipal court that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions or requirements of the program; or

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding thirty (30) days;

(3) upon stipulation of the parties and approval of the court for a period not exceeding sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to sixty (60) days; or

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period, provided that the aggregate of all extensions granted pursuant to this subparagraph may not exceed thirty (30) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial pursuant to subparagraph (5) of Paragraph C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.** In event the trial of any person does not commence within the time specified in Paragraph B of this rule or within the period of any extension provided in this rule, the complaint or citation filed against such person shall be dismissed with prejudice.
[As amended, effective August 1, 2004.]

**COMMITTEE COMMENTARY**

**Exceptional circumstances**

"Exceptional circumstances", as used in this rule, would include conditions which are unusual or extraordinary such as: death or illness of the judge, prosecutor, or a defense attorney immediately preceding the commencement of the trial; and circumstances which ordinary experience or prudence would not foresee, anticipate or provide for.

**Speedy trial**

This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico.

**Duty of prosecutor**

It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule.

**8-506A. Voluntary dismissal and refiled proceedings.**

A. **Voluntary dismissal.** The prosecution may dismiss a citation or criminal complaint by filing a notice of dismissal. The notice of dismissal shall be substantially in the form approved by the Supreme Court. Unless otherwise stated in the notice, the dismissal is without prejudice. A notice of dismissal shall be filed prior to commencement of the trial.

B. **Bail bond.** The filing of a notice of dismissal under Paragraph A of this rule shall not automatically exonerate a bond prior to the expiration of six (6) months after the date the bond was executed. If, prior to the expiration of six (6) months the dismissed charges are filed in another court, the state shall notify the municipal court and the municipal court shall transfer any bond to that court.

C. **Refiled complaints.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the refiled complaint shall be clearly captioned "Refiled Complaint" and shall include the following:

(1) the court in which the original charges were filed;
(2) the case file number of the dismissed charges;
(3) the name of the assigned judge at the time the charges were dismissed; and
(4) the reason the charges were dismissed.

D. **Procedure after refile.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the case shall be treated as a continuation of the same case, and the trial on the refiled charges shall be commenced within the unexpired time for trial pursuant to Rule 8-506 NMRA, unless the court, after notice and a hearing, finds the refiled complaint should not be treated as a continuation of the same case.
[Approved, effective August 1, 2004.]

**COMMITTEE COMMENTARY**

In 2004, Rule 8-506 NMRA was split into two rules. This rule is former Paragraphs A through D of Rule 8-506 NMRA.

For what is required for a showing of good faith, *see State v. Vigil*, 114 N.M. 431, 839 P.2d 641 (Ct. App. 1992) (state has the burden of demonstrating good-faith that it was not intent to circumvent the operation of the six-month rule); and *State v. Lucero*, 108 N.M. 548, 550, 775 P.2d 750, 752 (Ct. App.), *cert. denied,* 108 N.M. 433, 773 P.2d 1240 (1989) (amended complaint containing significant changes in the offenses charged superseded the original complaint for purposes of six-month rule). *See also State v. Bolton*, 1997-NMCA-007, 122 N.M. 831, 932 P.2d 1075 *(analysis of Lucero, Delgado and Coburn cases)*.

FROM THE NEW MEXICO SUPREME COURT

**Opinion Number: 2004-NMSC-019**

STATE OF NEW MEXICO,
Plaintiff-Respondent,
versus
JOE BARBER,
Defendant-Petitioner.
No. 27,938 (filed: May 19, 2004)

**ORIGINAL PROCEEDING ON CERTIORARI**
RALPH W. GALLINI, District Judge

JOHN BIGELOW,
Chief Public Defender
SHEILA LEWIS,
Assistant Appellate Defender
Santa Fe, New Mexico
for Petitioner

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

## OPINION

RICHARD C. BOSSON, JUSTICE

{1} Defendant Joe Barber appeals from his conviction of possession of methamphetamine with intent to distribute. *See* NMSA 1978, § 30-31-22 (1990). Our primary issue is whether the absence of a jury instruction defining possession constitutes fundamental error and requires a new trial. Defendant claims that the failure to define possession addressed a "critical determination akin to a missing elements instruction" and created the possibility of jury confusion. The Court of Appeals declined to find fundamental error. *See State v. Barber*, 2003-NMCA-053, ¶¶ 9-11, 133 N.M. 540, 65 P.3d 1095. We granted certiorari to review that question. Although Defendant would have been entitled to a jury instruction defining possession, we hold that absent his defense counsel's request, the trial court was not required to provide the instruction sua sponte. We further hold that the evidence of possession and intent was sufficient to support Defendant's conviction. Accordingly, we affirm the judgment and conviction below.

**BACKGROUND**

{2} On January 4, 2001, police went to the Budget 7 Motel in Lovington, New Mexico, in response to a confidential tip. Audrey Watson, who was staying in one of the motel rooms with her children, was standing in the parking lot with D'Lisa Dudley and two men. Watson gave the officers consent to search her room. Defendant was in the bathroom.

{3} In the motel room, the police found syringes in Watson's purse and Dudley's jacket. On top of the toilet in the bathroom, the officers found a small set of scales, a crumpled piece of foil, three plastic baggies containing methamphetamine, and a Cellular One business card folded in half with traces of methamphetamine in the crease. The business card had the name of a Cellular One sales representative printed on it and some notations handwritten on the back. In the medicine cabinet, the police found a box of baking soda, empty corners cut from plastic bags, and an empty Marlboro box with the foil removed. Tests revealed no fingerprints on any of the evidence.

{4} In Defendant's pockets, police found a plastic notebook cover, two calendar pages, and various business cards. These cards included eight from Cellular One, two of which were printed with the name of the same sales representative as the card found on the toilet. Written on the back of these cards and on the calendar pages were names or initials, dates, and dollar figures. The officers found no drugs, money, or paraphernalia on Defendant's person. He was carrying a soft pack of Marlboros. Based on the contraband, drug paraphernalia, and other evidence found in the bathroom, the district attorney charged Defendant with possession of methamphetamine with intent to distribute.

{5} At trial, an expert on drug investigation testified that the notations on the Cellular One cards found in Defendant's wallet were consistent with drug transaction records and included names of known drug users. The officer also testified that the amount of methamphetamine found on the top of the toilet, and the way it was laid out, indicated to him that it was being packaged for sale.

{6} Defendant denied possessing the contraband in the bathroom or intending to distribute it. Defendant said that he went to the motel to take a shower before his afternoon shift as a roughneck on an oil rig. He did not bring a change of clothes or a shower kit. Defendant testified that he saw the methamphetamine in the bathroom but did not touch it because it did not belong to him. Defendant and three defense witnesses testified that Defendant often borrowed and loaned money and made notations on business cards to keep track of these lawful transactions.

**PROCEDURE**

{7} After a two-day trial, a jury convicted Defendant of one count of possession of methamphetamine with intent to distribute, contrary to Section 30-31-22. The jury was given the following Uniform Jury Instruction (UJI) without objection or any request for amplification or definition from Defendant:

> For you to find the defendant guilty of Possession with Intent to Distribute, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
> 1. The defendant had Methamphetamine in his possession;
> 2. The defendant knew it was Methamphetamine;
> 3. The defendant intended to transfer it to another;
> 4. This happened in New Mexico on or about the 4th day of January, 2001.

UJI 14-3104 NMRA 2004. On appeal, Defendant argues for the first time that the trial judge should also have defined "possession" for the jury.

**DISCUSSION**

**Standard of Review**

{8} Because Defendant failed to preserve any error with respect to the definition of possession, we review only for fundamental error. *See* Rule 12-216(B)(2) NMRA 2004 (providing appellate court discretion as an exception to the preservation rule to review questions involving fundamental error or fundamental rights); *State v. Sosa*, 1997-NMSC-032, ¶ 23, 123 N.M. 564, 943 P.2d 1017. The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice. *State v. Jett*, 111 N.M. 309, 314, 805 P.2d 78, 83 (1991). Error that is fundamental, we have said,

> must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

*State v. Garcia*, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942). Although we exercise the power to review for fundamental error guardedly, we also recognize that "[t]here exists in every court . . . an inherent power to see that a man's fundamental rights are protected in every case." *State v. Garcia*, 19 N.M. 414, 421, 143 P. 1012, 1014-15 (1914) (opinion upon rehearing).

**Defendant would have been entitled to a jury instruction defining possession**

{9} We must first determine whether Defendant would have been entitled to a definition of possession had he requested it. The State denies Defendant's entitlement to the instruction based on the strength of the evidence against him.

{10} The Use Note to UJI 14-3104, the instruction for possession with intent to distribute, states that the UJI definition of possession "should be given if possession is in issue." Because possession was not defined, the jury was not informed that a "person is in possession [of methamphetamine] when he knows it is on his person or in his presence, *and he exercises control over it*." UJI 14-3130 NMRA 2004 (emphasis added). As part of that definition, the jury also was not told that "[a] person's presence in the vicinity of the substance or his knowledge of the existence or the location of the substance, is not, by itself, possession." *Id.* In other words, the jury was never told that mere presence or proximity, even with knowledge, is not enough; there must be proof of "control" over the contraband for the jury to convict of possession. The Committee Commentary to UJI 14-3130 says this definition *must* be given when possession is in issue.[1]

{11} Defendant denied possessing the illegal drugs or exercising any control over them which, he argues, puts the element of possession "in issue" and makes the instruction defining possession mandatory. According to Defendant's theory of the case, and his testimony at trial, he went to the motel to take a shower. He saw the drugs and knew what they were, but did not touch them because they were not his. Defendant emphasizes that four admitted methamphetamine users were also in and around the motel room, and two of them had the paraphernalia to use methamphetamine. In other words, the drugs in the bathroom could have belonged to one or all of them. No witnesses testified that the drugs belonged to Defendant. Defendant also emphasizes that during trial, the prosecutor repeatedly relied on his physical proximity to the drugs as evidence of possession. Thus, the missing definition that proximity alone is *not* enough would have been important to the jury's understanding of Defendant's case.

{12} The parties' different theories and divergent views of the same evidence strongly suggest that possession was "in issue." Whether Defendant possessed the drugs or was simply in proximity to them was a vital issue in the case. Because this issue was in dispute, an instruction defining the difference between possession and mere proximity would have been important to Defendant's case and a helpful aid to the jury in understanding the legal implications of mere proximity. *Cf. State v. Brown*, 1996-NMSC-073, ¶ 34, 122 N.M. 724, 931 P.2d 69 ("When evidence at trial supports the giving of an instruction on a defendant's theory of the case, failure to so instruct is reversible error."). Despite the State's opinion that it had a strong case in support of possession, under these facts the issue remained for the jury to determine. Therefore had Defendant requested this definition at trial, it would have been reversible error for the court to deny him.

**Fundamental Error**

{13} Having determined it would have been error not to define possession for the jury, we exercise our discretion to examine whether the trial court's failure to give the definition constituted fundamental error. *See* Rule 12-216(B)(2).

{14} The State argues that, given the strength of the evidence, Defendant cannot show, as he must, that his conviction is so doubtful that it shocks the conscience. "The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand." *State v. Rodriguez*, 81 N.M. 503, 505, 469 P.2d 148, 150 (1970). Although, as we later discuss, the strength of the evidence belies any claim of Defendant's indisputable innocence, not all questions of fundamental error turn solely on guilt or innocence. Our inquiry must probe deeper.

{15} The doctrine of fundamental error began in 1914 with a barroom brawl that ended badly and a defendant who was unconscious at the time the murder was committed, a murder for which he was nonetheless convicted. On those facts, which conclusively established defendant's innocence, this Court felt compelled to use its inherent power to cut through procedure in order to protect the defendant's substantive rights. *Garcia*, 19 N.M. at 421-22, 143 P. at 1014-15.

{16} Although we have written numerous opinions that turn on the obvious innocence of the defendant, *see, e.g.*, *State v. Salazar*, 78 N.M. 329, 331, 431 P.2d 62, 64 (1967), we also recognize that another strand runs through the fundamental error doctrine that focuses less on guilt and innocence and more on process and the underlying integrity of our judicial system.

{17} In 1942, this Court recognized the two strands in the fundamental error doctrine when it said fundamental error went to the foundation of a defendant's rights. "*Also*," the Court continued, "there may be such a case, as the [1914] *Garcia* case, . . . which would so shock the conscience of the court as to call for a reversal." *Garcia*,

[1] We note that unlike use notes, which are adopted by this Court, committee commentary is not binding authority. *State v. McCrary*, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984). To the extent that this commentary conflicts with Use Note 4 of UJI-3104, the use note prevails.

46 N.M. at 309, 128 P.2d at 462 (emphasis added). This "shock the conscience" language has been used both to describe cases with defendants who are indisputably innocent, and cases in which a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused. *Compare id.* (referring to *Garcia*, 19 N.M. at 421, 143 P. at 1014-15), *with State v. Osborne*, 111 N.M. 654, 663, 808 P.2d 624, 633 (1991) (holding that a conviction shocked the conscience where instructions did not require the jury to resolve the lawfulness of the defendant's actions). Both types of cases may result in a miscarriage of justice.

{18} In *State v. Cunningham*, 2000-NMSC-009, ¶ 21, 128 N.M. 711, 998 P.2d 176, we said we would not uphold a conviction if an error implicated "a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." Thus, we must ask whether the court's failure to define the essential element of possession for the jury caused such a "fundamental unfairness" in Defendant's trial.

{19} Our analysis of whether the failure to define possession rose to the level of fundamental error in Defendant's case begins at the same place as our analysis for reversible error. We must determine whether a reasonable juror would have been confused or misdirected by the jury instruction. *Compare Cunningham*, 2000-NMSC-009, ¶ 14 (fundamental error), *with State v. Parish*, 118 N.M. 39, 42, 878 P.2d 988, 991 (1994) (reversible error). Fundamental-error analysis then requires a higher level of scrutiny. *Cunningham*, 2000-NMSC-009, ¶ 21. If we find error, our obligation is "to review the entire record, placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the Defendant's conviction was the result of a plain miscarriage of justice." *State v. Benally*, 2001-NMSC-033, ¶ 24, 131 N.M. 258, 34 P.3d 1134 (Baca, J., dissenting).

{20} The State maintains that the failure to instruct on a definition or amplification of an essential element, even when called for in an official UJI Use Note, does not rise to the level of fundamental error. Therefore, a missing definition cannot result in the sort of "fundamental unfairness" that undermines the integrity of the judicial system. In most cases, we would agree. *See State v. Doe*, 100 N.M. 481, 483, 672 P.2d 654, 656 (1983) (holding that not following a use note that states a UJI for general criminal intent must be given does not automatically require reversal absent a defendant's request or objection); *State v. Stephens*, 93 N.M. 458, 462, 601 P.2d 428, 432 (1979) (finding that the failure to give an unrequested instruction defining proximate cause is not fundamental error even though the use note requires it whenever causation is in issue), *overruled on other grounds by State v. Contreras*, 120 N.M. 486, 491, 903 P.2d 228, 233 (1995); *State v. Padilla*, 90 N.M. 481, 482-83, 565 P.2d 352, 353-54 (Ct. App. 1977) (refusing to find error in the failure to give an unrequested instruction defining intent to kill or do great bodily harm despite mandatory use note). In contrast, failure to instruct the jury on an essential element, as opposed to a definition, ordinarily is fundamental error even when the defendant fails to object or offer a curative instruction. *See* Rule 5-608(A), (D) NMRA 2004; *Osborne*, 111 N.M. at 662, 808 P.2d at 632.

{21} Defendant urges that his case differs from the general rule pertaining to definitional instructions. He argues that possession has a legal meaning different from the commonly understood lay interpretation of possession, which often equates possession with mere proximity. Given this difference, Defendant sees the instruction defining possession as a crucial warning to the jury not to rely on proximity alone in finding the essential element of possession. In Defendant's view, giving the instruction for possession with intent to distribute but without defining possession leaves the meaning of possession in doubt. Because possession is susceptible to more than one meaning among lay jurors, this ambiguity casts uncertainty over whether the state truly proved the element of possession beyond a reasonable doubt. According to Defendant, the State then exacerbated this ambiguity when at trial it repeatedly emphasized Defendant's proximity to the drugs as the functional equivalent of being in possession of those drugs.

{22} We acknowledge that the potential for jury confusion exists. The legal definition of possession is not necessarily rooted in common discourse. As two legal scholars have said, "The word 'possession,' though frequently used in both ordinary speech and at law, remains one of the most elusive and ambiguous of legal constructs." Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 Va. L. Rev. 751, 751 (1972). Courts differ on whether the legal concept of possession is "a common term with no artful meaning" or "the most vague of all vague terms." Walter B. Raushenbush, *The Law of Personal Property*, § 2.6, at 20 (3d ed. 1975). Part of the problem "is that the word possession 'is interchangeably used to describe actual possession and constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins.'" Wayne R. LaFave, *Substantive Criminal Law* § 6.1(f), at 433 (2d ed. 2003) (quoting *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914)). When actual physical control cannot be directly proven, constructive possession is a legal fiction used to expand possession and include those cases "where the inference that there has been possession at one time is exceedingly strong." Whitebread & Stevens, *supra*, at 755 (quoted authority omitted).

{23} To support the argument that an ambiguous jury instruction can potentially confuse the jury, Defendant points to our recent decision in *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221, in which we acknowledged that, in certain special instances an ambiguous definitional instruction can cause fundamental error. In *Mascarenas*, {the defendant was convicted of negligent child abuse. At issue was shaken baby syndrome, in which repeated shaking could cause death. Mascarenas admitted to shaking the baby hard one time, but claimed he did not know that shaking a baby could cause such harm. Although Mascarenas did not object to the jury instruction at trial, he appealed his conviction claiming fundamental error because "the jury instructions failed to adequately define the requisite criminal negligence standard." *Id.* ¶ 6.

{24} On appeal, this Court agreed with Mascarenas and reversed his conviction, finding that the trial court's failure to provide the jury with an adequate instruction defining criminal negligence constituted fundamental error. *Id.* ¶ 21. The inadequate definition created "a distinct possibility that Mascarenas was convicted of child abuse based on the improper civil negligence standard." *Id.* ¶ 13. Even if the jury believed Mascarenas' story, the jury nonetheless could have convicted him due to the confusion about the proper negligence standard required for conviction.

{25} While most definitional instructions merely amplify an element instruction, a few, we concluded in *Mascarenas*, can be of central importance to a fair trial. Thus,

considered in light of the facts and circumstances of the trial, the instruction provided a determination critical to understanding the elements instruction. *Id.* ¶¶ 18-20. Although *Mascarenas* involved a definition that affirmatively misstated the law, as opposed to the mere silence in the present case, this distinction is of little consequence if the resulting jury confusion places the verdict in doubt. Therefore, we must place all the facts and circumstances under close scrutiny to see whether the missing instruction caused such confusion that the jury could have convicted Defendant based upon a deficient understanding of the legal meaning of possession as an essential element of the crime. *Cf. State v. Armijo*, 1999-NMCA-087, ¶¶ 5-6, 127 N.M. 594, 985 P.2d 764 (discussing the necessity of an omitted instruction to clarify the slight, but critical distinction between felony and misdemeanor aggravated battery).

{26} In this case, we conclude that the missing definition of possession does not implicate "a critical determination akin to a missing elements instruction," as occurred in *Mascarenas*, 2000-NMSC-017, ¶ 20. Even though the jury was not instructed that it must find Defendant had both knowledge and control over the drugs, no distinct possibility exists from the evidence that the jury convicted Defendant without finding all the elements beyond a reasonable doubt. As an initial matter, we believe that if the jury misunderstood the meaning of "possession," it would probably not be because the jury equated "possession" with "mere proximity," rather it would be because the jury equated "possession" with "ownership." Such a misunderstanding actually would have placed a greater burden on the prosecution, because ownership would be more difficult to prove than possession alone.

{27} To prove either actual or constructive possession, the State had to show Defendant had both knowledge and control of the illegal drugs in the bathroom. *See State v. Montoya*, 85 N.M. 126, 127, 509 P.2d 893, 894 (Ct. App. 1973). Evidence of control includes the power to produce or dispose of the narcotic. *Id.* Proof of possession in controlled substances cases may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting defendant with the crime. *State v. Donaldson*, 100 N.M. 111, 119, 666 P.2d 1258, 1266 (Ct. App. 1983).

{28} While possession may not be proven by proximity alone, the evidence elicited at trial demonstrates far more than that. Under the circumstances of this case, the jury could properly infer control from the circumstantial evidence introduced by the state. "In a broad sense, the term 'possession' denotes facts pertaining to the relationship between a person and an item of property, as well as the consequences that attach to those facts." *State v. Sizemore*, 115 N.M. 753, 758, 858 P.2d 420, 425 (Ct. App. 1993) (quoted authority omitted). The most telling fact linking Defendant to the methamphetamine was the business card found on top of the toilet tank, a business card remarkably similar to cards found in Defendant's wallet. That link, among other pieces of evidence, persuades us that there is no reasonable likelihood that the jury was confused, or confused enough to convict on proximity alone. To the contrary, we are satisfied that the jury convicted Defendant because of what he likely did and was planning to do with the drugs while they were in his presence. In so doing, the jury correctly followed the instructions, drew reasonable inferences from the evidence, and showed no likelihood of any material confusion of the kind that would place in doubt whether the jury actually found the essential elements of the crime.

{29} Moreover, even assuming the jury instruction was defectively ambiguous without the definition of possession, we would then evaluate whether the jury instructions as a whole cured the ambiguity. *See Benally*, 2001-NMSC-033, ¶ 15. Error is not fundamental when the jury could not have reached its verdict without also finding the element omitted from the instructions. *State v. Orosco*, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992). In addition to possession, the State was required to prove that Defendant intended to transfer the methamphetamine to another. *See* UJI 14-3104. The jury so found.

{30} We agree with the State that under the facts of this case the jury could not have found that Defendant intended to transfer the methamphetamine in the bathroom without also finding that Defendant was exercising some degree of control over the drugs. *Cf. State v. Gonzales*, 86 N.M. 556, 558, 525 P.2d 916, 918 (Ct. App. 1974) (holding that failure to define possession was not error because a defendant could not have intentionally possessed or sold heroin without *knowledge* that the item possessed and sold was heroin), *overruled on other grounds by State v. Bender*, 91 N.M. 670, 671, 579 P.2d 796, 797 (1978). This was not a mere possession case; the charge was both possession and intent to distribute, and the jury found Defendant guilty of both elements. Substantial evidence supports the jury's determination.

{31} In this case, the jury could infer intent to distribute from the amount and packaging of the drugs. In order to find that Defendant was preparing the drugs for sale, the jury had to find first that the drugs were within his knowledge and control. The notations on Defendant's cards, coupled with the matching card on the toilet, certainly permit an inference that Defendant was a drug dealer, and that he was in that bathroom to package drugs for sale. Therefore, in this case, the third element of the jury instruction, intent to distribute, necessarily subsumes a finding on the element of control.

{32} For all the foregoing reasons, therefore, we conclude that the essential-elements jury instruction, even though arguably ambiguous without defining possession, did not create confusion in the jury that would undermine the reliability of the verdict and the integrity of our judicial system.

**Sufficiency of Evidence**

{33} Defendant argues that there was insufficient evidence to support his conviction for possession of methamphetamine with intent to distribute. We disagree and also affirm the Court of Appeals on this issue. To determine whether there is enough evidence to support a verdict, we view the evidence in the light most favorable to the judgment, resolving all conflicts and indulging all inferences in favor of upholding the verdict. *State v. Hernandez*, 115 N.M. 6, 26, 846 P.2d 312, 332 (1993); *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). We ask whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cunningham*, 2000-NMSC-009, ¶ 26 (quoted authority omitted). We have already discussed the evidence in the preceding section. Viewed in the light most favorable to the State, the evidence was sufficient so that a reasonable jury could have found the essential elements of the crime. Based upon the record, the State presented enough circumstantial evidence to support an inference of both knowledge and control, and therefore possession of methamphetamine. Furthermore, there was sufficient evidence from which a rational jury could have found that Defendant intended to distribute that methamphetamine.

**CONCLUSION**

{34} For the reasons stated, we affirm the

conviction and judgment below.

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

**RICHARD C. BOSSON, Justice**

**WE CONCUR:**

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

**SERNA, Justice (specially concurring).**

{36} I concur in the majority's conclusion that the failure to instruct on the definition of possession did not constitute fundamental error. In New Mexico, "[a] distinction is made . . . between the status of jury instructions on essential elements and definitional jury instructions." *Doe*, 100 N.M. at 483, 672 P.2d at 656. "[T]he failure to instruct the jury on the definition or the amplification of the elements does not constitute error." *Stephens*, 93 N.M. at 462, 601 P.2d at 432; *accord State v. Allen*, 2000-NMSC-002, ¶ 76, 128 N.M. 482, 994 P.2d 728; *State v. Gonzales*, 112 N.M. 544, 817 P.2d 1186 (1991); *State v. Crain*, 1997-NMCA-101, ¶¶ 10-12, 124 N.M. 84, 946 P.2d 1095; *State v. Lucero*, 118 N.M. 696, 700-01, 884 P.2d 1175, 1179-80 (Ct. App. 1994); *State v. Ramos*, 115 N.M. 718, 726, 858 P.2d 94, 102 (Ct. App. 1993); *State v. Tarango*, 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987); *State v. Jennings*, 102 N.M. 89, 93, 691 P.2d 882, 886 (Ct. App. 1984).

{37} I do not read *Mascarenas* as being inconsistent with this principle. We held in *Mascarenas* that the omitted instruction was akin to a missing elements instruction because the jury was not informed of the essential statutory element of criminal negligence. 2000-NMSC-017, ¶ 20. This missing element created fundamental error both because "it is the duty of the court, not the defendant, to instruct the jury on the essential elements of a crime," *Osborne*, 111 N.M. at 662, 808 P.2d at 632, and because, "if the instruction omitted an element which was at issue in the case, the error could be considered fundamental: The question of guilt would be so doubtful that it would 'shock the conscience' of this Court to permit the conviction to stand." *Orosco*, 113 N.M. at 783, 833 P.2d at 1149.

{38} "In determining what is or is not an essential element of an offense, we begin with the language of the statute itself, seeking of course to give effect to the intent of the legislature." *Osborne*, 111 N.M. at 657-58, 808 P.2d at 627-28 (citation omitted). "[I]f the jury instructions substantially follow the language of the statute or use equivalent language, then they are sufficient." *Doe*, 100 N.M. at 483, 672 P.2d at 656. In this case, the jury instruction contained all of the statutory elements of the crime. There is no indication that the Legislature intended for the definition of possession to be an element of the crime, notwithstanding Use Note 4 of UJI 14-3104.

> The language in a Use Note, like a definitional jury instruction, cannot elevate a jury instruction to the status of an *essential element*. This is not to imply that Use Notes may be ignored. Nevertheless, . . . a defendant cannot sit back and insert error into a trial by his or her inaction and receive an automatic reversal when the crime has been fairly instructed on.

*Doe*, 100 N.M. at 483-84, 672 P.2d at 656-57 (citation omitted).

{39} While I agree with the majority that constructive possession has complex legal contours, this concept is certainly no more complex than the issue of proximate cause, for which we have held that the failure to define, in amplification of the essential elements of felony murder, does not constitute fundamental error. *Stephens*, 93 N.M. at 462, 601 P.2d at 432. Moreover, the lay definition of "possession" includes the basic concept of exercising control over the item. Thus, the jury's application of the common meaning of the term would not have resulted in a failure to find a statutory element of the crime. *See State v. Aragon*, 99 N.M. 190, 193, 656 P.2d 240, 243 (Ct. App. 1982) (rejecting the defendant's argument that the failure to instruct on the definition of "possession," as currently set out in UJI 14-130 NMRA 2004, which explained constructive possession, constituted error in the absence of a request for the instruction).

{40} For the more onerous standard of fundamental error, which requires a miscarriage of justice, as with the less stringent standard of plain error, which does not require a miscarriage of justice, this Court will not reverse a conviction unless an alleged error "constituted an injustice that creates grave doubts concerning the validity of the verdict." *State v. Lucero*, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993). Because the trial court adequately instructed the jury on the essential elements of the crime, there is no fundamental unfairness that would make the question of guilt so doubtful as to shock the conscience to permit the conviction to stand. *See Rodriguez*, 81 N.M. at 505, 469 P.2d at 150 ("The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand."), *quoted in Cunningham*, 2000-NMSC-009, ¶ 13. As a result, there is no fundamental error.

**PATRICIO M. SERNA, Justice**

*Certiorari Granted, No. 28,634, June 4, 2004*

From the New Mexico Court of Appeals

**Opinion Number: 2004-NMCA-067**

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JEUANG VAN DANG,
Defendant-Appellant.
No. 22,982 (filed: April 5, 2004)

**APPEAL FROM THE DISTRICT COURT OF QUAY COUNTY**
STEPHEN K. QUINN, District Judge

PATRICIA A. MADRID
Attorney General
ANN M. HARVEY
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JOHN B. BIGELOW
Chief Public Defender
TRACE L. RABERN
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

## Opinion

### Roderick T. Kennedy, Judge

{1} Police officers may not extend the scope of a traffic stop beyond the reasonable and articulable basis for the initial detention unless there arises a separate reasonable and articulable suspicion of criminal activity. If this happens, separate articulable facts must be present, leading to a reasonable suspicion of additional criminal activity. Further investigation of newly occurring suspicions must in turn be reasonably limited to the articulable facts at hand. If the scope of investigation is not reasonably limited by the articulable facts known to the investigating officer, evidence obtained thereby can be suppressed.

{2} Defendant appeals the denial of his motion to suppress MDMA/Ecstasy tablets found during a search of a rented automobile following a traffic stop on Interstate 40 (I-40). Defendant entered a conditional plea and was found guilty of possession of a controlled substance with intent to distribute contrary to NMSA 1978, § 30-31-22(A)(2) (1990). We hold that the district court's finding that the length and scope of Defendant's detention was reasonable under the circumstances of this case was not supported by substantial evidence, and further, that contrary to the district court's ruling, Defendant had standing to contest the search. For the reasons discussed below, we reverse the denial of Defendant's motion to suppress and remand for further proceedings.

**FACTS AND BACKGROUND**

{3} Corporal Darrick Shaw (Shaw), of the Tucumcari Police Department, is one of two Tucumcari officers who are members of the Region V Narcotics Task Force operating in the Tenth Judicial District. He has been so assigned for six years. He has participated in about fifteen drug arrests on I-40, 80 to 85% of which involved rental cars.

{4} On Thursday, October 12, 2000, at 12:20 p.m., Shaw was driving west on I-40 near the Tucumcari city limits when he saw a maroon Chevrolet going east that appeared to be exceeding the speed limit. Shaw made a U-turn in the median and pursued the Chevrolet for about ten miles before pulling it over. Upon stopping the car, Shaw approached and requested that Defendant, who was driving the car, produce his driver's license and registration. Defendant produced a California driver's license and a rental contract for the car. When asked, Defendant knew that he had been stopped for speeding.

{5} Immediately upon stopping Defendant, Shaw asked Defendant to get out of the car while he "looked over the documents and asked [Defendant] some more, a little more detailed information about the trip he was taking to make sure there was no further criminal activity taking place other than the minor speeding." Shaw did not look at the rental contract carefully until after he questioned Defendant about his travel plans. He then noted that Defendant was not the person who rented the car, nor was Defendant listed on the rental contract as an additional driver authorized to use it. Shaw questioned Defendant further to "make sure everything was legit. [That Defendant] had legal possession of the vehicle and it wasn't possibly a stolen rental vehicle." Shaw asked where Defendant and his passenger were going and the purpose of the trip, who the passenger was, and how long Defendant had known the passenger. Defendant stated that his uncle in Houston had rented the car, and that he was going to Amarillo for a few days to visit another uncle with his girlfriend, who was the passenger in the car. From Amarillo, they were going to Houston to return the car and visit the uncle who had rented it. The documents showed that the car had been rented out of Houston.

{6} Shaw then left Defendant, approached the rental car and talked to Defendant's girlfriend. He felt there were discrepancies between her story and what he had been told by Defendant, particularly that he understood her to say that they were going to Amarillo and then back to California. Shaw asked her if she and Defendant lived together, and if she was going to Houston. Shaw said she talked about moving to Houston with Defendant if she was promoted and transferred by her company. Because of the discrepancies Shaw perceived between the stories, Defendant's nervousness and lack of eye contact, and what Shaw viewed as a problem with the rental contract, Shaw began to get suspicious. He never testified specifically as to the character of that suspicion.

{7} Shaw asked Defendant to join him in the police car while he wrote out the traffic citations. He gave them to Defendant. While in the car, Shaw checked Defendant's information for warrants, finding nothing.

{8} Shaw considered the absence of Defendant's name on the rental contract to be a "major flag" that there might be something wrong with Defendant "to be actually in custody of this vehicle." Shaw unsuccessfully tried to contact Avis, the rental company, to ascertain the status of the car and Defendant's authorization to drive it. Shaw testified that he requested dispatch to contact Avis because "the person that actually rented the vehicle was not present." However, Shaw acknowledged that driving a car while not being on the contract is not in and of itself a crime. Defendant was never charged with possessing a stolen car. Defendant testified

that he believed he had a legitimate right to be driving the vehicle.

{9} Shaw and Defendant got out of the police car; Defendant went to the rental car to get his address in Houston, returned and again stood at the roadside with Shaw. Shaw returned Defendant's license to him at this time. Shaw then instructed Defendant to wait there between the rental car and police car while he went back to talk further with Defendant's girlfriend.

{10} Shaw returned to Defendant after talking with his girlfriend and asked Defendant if there were any narcotics in the vehicle; Defendant responded that there were no narcotics. Shaw asked Defendant if there was any marijuana in the car; Defendant responded in the negative. Shaw asked if there was any cocaine, and Defendant again answered that there was not. Shaw continued, asking specifically if there was any heroin, methamphetamine, or a large amount of currency in the car; for the fourth time, Defendant responded in the negative. Shaw then asked Defendant if he would mind if Shaw searched the car "for drugs or narcotics." Defendant said "no" and opened the trunk with the remote opener. Before looking in the trunk, Shaw asked Defendant's girlfriend if she knew of any drugs in the car. She said "no." Shaw told her that Defendant had given permission to search the car and asked for her permission, which she also gave him. Shaw then asked her to step out of the car, and she joined Shaw and Defendant by the trunk of the rental car.

{11} Shaw looked in the open trunk and saw what he considered "normal luggage." He removed the luggage from the trunk and searched it. The four bags contained "normal clothing" and items associated with people taking a "normal" trip. He then searched what he called the "area that the spare tire is not kept in." (Shaw did not recall whether he "checked the spare tire or went immediately to the area where the evidence was located.") Once Shaw pulled back the carpeting from the sides of the trunk, he found two nylon bags containing several thousand pills. The pills turned out to be Ecstasy, which is a controlled substance. The seizure occurred some thirty-two minutes after Defendant was first pulled over. At no time during the stop or its activities was Defendant uncooperative, nor did he try to flee.

{12} Defendant filed a motion to suppress the fruits of the search, asserting that the scope and duration of his detention was unlawful under both the United States and New Mexico Constitutions. The State responded alleging only that Defendant did not have standing and that he had consented to the search. Defendant's motion was denied. Defendant preserved his arguments concerning the duration and scope of the detention. He entered a conditional plea, retaining his right to appeal the denial of his motion to suppress, and timely filed this appeal.

{13} The district court's order denying the motion to suppress stated two legal conclusions: (1) that the length of the detention of Defendant's "person prior to the search" was reasonable given Shaw's attempts to contact Avis concerning the status of the car, and (2) Defendant had no standing to "contest the legality of the search of the vehicle itself."

**DISCUSSION**

{14} This case involves the proper scope of a roadside search under *State v. Taylor*, 1999-NMCA-022, 126 N.M. 569, 973 P.2d 246, *State v. Jutte*, 1998-NMCA-150, 126 N.M. 244, 968 P.2d 334, and other similar cases, most recently *State v. Duran*, 2003-NMCA-112, 134 N.M. 367, 76 P.3d 1124, *cert. granted*, 134 N.M. 320, 76 P.3d 638 (Sept. 3, 2003). A district court's ruling concerning the legality of an initial stop and seizure presents a mixed question of law and fact. "Findings of fact are reviewed to determine if they are supported by substantial evidence and legal conclusions are reviewed de novo. . . . The legal conclusion that the officer's actions were reasonable or justified is a mixed question of law and fact which we review de novo." *State v. Romero*, 2002-NMCA-064, ¶ 6, 132 N.M. 364, 48 P.3d 102. We are not bound by a trial court's ruling when predicated upon a mistake of law.

**Defendant Has Standing to Contest His Detention and Police Actions That Flow From It**

{15} Standing to contest a search is reviewed de novo.

> In ascertaining the standing of an individual to challenge the propriety of a search, the focus is on the person's legitimate expectations of privacy. In making this determination we ask first whether Defendant has exhibited a subjective expectation of privacy, and second, whether Defendant's expectation is one society will recognize as reasonable.

*State v. Soto*, 2001-NMCA-098, ¶ 7, 131 N.M. 299, 35 P.3d 304 (internal quotation marks and citation omitted).

{16} Although Defendant may not have standing to contest the search of the car because he may not have had a possessory or property interest in the car, he argues he has standing to seek suppression of the drugs seized because they were the fruit of his unlawful detention. *See United States v. DeLuca*, 269 F.3d 1128, 1132 (10th Cir. 2001). To demonstrate standing in this way, Defendant must first demonstrate that he was unlawfully detained under the Fourth Amendment, and that there is a factual nexus between the unlawful detention and the challenged evidence; namely that the evidence is the fruit or derivative evidence of that illegal detention. *Id.* at 1134. For the reasons outlined below, we hold that the detention of Defendant became constitutionally untenable when Shaw could no longer articulate suspicions that there was criminal activity afoot, and that the search of Defendant's car was the result of the impermissible detention. As a result, Defendant had standing to contest the search. We hold that Defendant met his burden of demonstrating standing to contest Shaw's search of the car under either method.

**Traffic Stops Are Seizures Implicating the Fourth Amendment. Further Activity Is Proscribed by the Extent to Which Particular Articulable Facts Support Suspicion of Other Criminal Activity**

{17} Shaw, in pulling Defendant over for speeding after following him for ten miles, could lawfully detain him to check his license, registration, and insurance. *See State v. Romero*, 2002-NMCA-064, ¶ 9, 132 N.M. 364, 48 P.3d 102. Upon receiving Defendant's driver's license and the rental contract, Shaw had everything he needed to write up the traffic violations. *See State v. Anderson*, 107 N.M. 165, 167, 754 P.2d 542, 544 (Ct. App. 1988).

{18} A traffic stop that detains a car and its occupants is a seizure that implicates the Fourth and Fourteenth Amendments. *See Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979). Where a police officer has a reasonable and objective basis for believing that criminal activity is afoot, he or she may briefly detain the subject to confirm or dispel the suspicion. *State v. Werner*, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994). However, this Constitutional permission granted officers exists as an exception to the general rule that Fourth Amendment seizures must be supported by probable

cause to arrest. *Terry v. Ohio*, 392 U.S. 1, 17 n. 12 (1968). The officer executing the stop "may not expand the scope of questioning beyond the offenses justifying the stop unless the officer can identify particularized and objective factors giving rise to an objectively reasonable suspicion" that the subject is engaging or about to engage in other criminal behavior. *Duran*, 2003-NMCA-112, ¶ 19; *see also State v. Taylor*, 1999-NMCA-022, ¶¶ 18, 20, 22.

{19} Shaw did not confine his concern to the traffic violations, but testified that he immediately had Defendant exit the car for questioning "to make sure there was no further criminal activity taking place other than the minor speeding." He did not testify what he then believed the "further criminal activity" might be. Prior to knowing anything about the rental contract, Shaw questioned Defendant about his travel plans. We have held this to be an impermissible expansion of an otherwise "routine" traffic stop. *Duran*, 2003-NMCA-112, ¶ 19.

**The Rental Contract**

{20} An officer may expand the investigation beyond the initial circumstances justifying detention "if the officer has a reasonable and articulable suspicion that other criminal activity has been or may be afoot." *Romero*, 2002-NMCA-064, ¶ 10; *Taylor*, 1999-NMCA-022, ¶ 20. "If evidence of another crime surfaces during a routine investigatory stop, the officer may proceed in a reasonable manner to investigate." *Romero*, 2002-NMCA-064, ¶ 10. We measure reasonable suspicion by an objective standard, examining the totality of the circumstances in order to determine whether the officer reasonably expanded the scope of the stop. *Id.* ¶ 11.

{21} After removing Defendant from the car and questioning him about his travels, Shaw noticed that Defendant's name did not appear on the car rental contract. He next extensively questioned Defendant's girlfriend. Shaw then took Defendant to his car, where he checked Defendant's license. Defendant was not wanted, nor was his driver's license suspended. Shaw had his dispatcher try to call Avis to ascertain the relationship between Defendant and the car.

{22} In the face of a rental contract that did not list Defendant as an authorized driver of the car, the facts available to Shaw expanded to allow him to ascertain the nature of Defendant's possession of the car. Shaw's inquiry into Defendant's possession of and driving the rental car was inconclusive, perhaps leaving him with a suspicion that Defendant should not be in the car or driving it, but not probable cause to arrest Defendant for doing so. Going on this evidence, however, Shaw did not act unreasonably in detaining Defendant at this point. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985) (stating that police detention in an investigatory stop is appropriate where "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly"); *Werner*, 117 N.M. at 319, 871 P.2d at 975 (stating the importance of diligence in an investigation). Shaw agreed on cross-examination that he did not have enough information to infer that the car was stolen, but believed he had enough to inquire further. We agree.

**Detention Beyond the Speeding Ticket and "Authorized Driver" Problem**

{23} Entering into the "totality of the circumstances" calculation for us at this point is the extent of questioning Shaw engaged in at the roadside. Shaw's conduct separating driver and passenger and subjecting them to extensive and repeated questioning about their travel plans and purpose, the addresses of persons they saw or would see, their residence, and their relationship is far beyond the scope of information relating to the speeding ticket, but arguably related to whether a rental car is stolen or not.

{24} The problem with Shaw's conduct lies in the expansion of the investigation from unauthorized use of a rental car to a full-blown search for drugs. Following Shaw's writing up the tickets, Defendant went back to his car to get his Houston address, and returned to stand with Shaw at the roadside. Shaw returned Defendant's driver's license but then told Defendant to wait there between the rental car and the police car while he went back to talk with Defendant's girlfriend. Clearly at this point the traffic stop had ended, and Shaw was no longer dealing with the rental contract problem. At that time, Shaw had no legitimate further reason to detain Defendant, yet he specifically told Defendant that he was not to leave while he pursued further investigation by talking to Defendant's girlfriend yet again. At that point, approximately half an hour had expired, and Shaw had reached the factual limits of any reasonable suspicion to investigate further.

{25} On his return from talking to Defendant's girlfriend, Shaw immediately began questioning Defendant about drugs. Defendant answered that he possessed no drugs or large amounts of cash. Shaw then requested a search of the trunk for drugs or narcotics. To justify such an expansion of his investigation and Defendant's detention, there must be separate, objectively reasonable grounds giving rise to a reasonable suspicion that criminal activity is afoot. *See State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 21, 130 N.M. 386, 25 P.3d 225.

{26} Again, we view the facts available to Shaw by an objective standard. The State attempts to rely on *State v. Chapman*, 1999-NMCA-106, ¶ 16, 127 N.M. 721, 986 P.2d 1122, to turn nervousness and a lack of eye contact into a reason for further investigation, but *Chapman* hinged on a detailed comparison between Chapman's behavior and that of other persons involved in minor traffic stops, leading the officer to believe that Chapman was "nervous, hostile, and aggressive." *Id.* ¶¶ 17-18. This is much more objective behavioral testimony than Shaw provided. Shaw's testimony amounts to no more than a degree of nervousness that our courts have consistently regarded as being innocuous behavior that is equally consistent with no culpable state of mind. *See State v. Vandenberg*, 2003-NMSC-030, ¶ 31, 134 N.M. 566, 81 P.3d 19; *State v. Pierce*, 2003-NMCA-117, ¶ 12, 134 N.M. 388, 77 P.3d 292. Here, we balance the character of Defendant's detention against the justification Shaw provided for continuing it to initiate the search. *Id.*; *State v. Williamson*, 2000-NMCA-068, ¶ 14, 129 N.M. 387, 9 P.3d 70.

**Expanding the Scope of the Detention to Search for Drugs Was Impermissible**

{27} Looking at the totality of circumstances surrounding Shaw's conduct in this case, from the outset, we see something significantly more than just an investigation centered on speeding and a questionable rental car contract. Shaw followed Defendant for ten miles. Upon pulling him over for speeding, Shaw immediately removed Defendant from the car because of a concern for other "criminal activity." He extensively questioned Defendant about where he had come from, his destination, and whom he was going to see before Shaw even checked the rental contract. *See Duran*, 2003-NMCA-112, ¶¶ 1, 19 (holding such questioning to be constitutionally impermissible).

{28} Under *Taylor*, police officers may expand their investigation to "include matters unrelated to the initial reason for the stop," if their observations "cause the officer[s] reasonable suspicion." 1999-NMCA-022,

¶ 21. However, where nothing has occurred during the lawful portion of the stop based on reasonable and articulable facts arising from the situation to justify expanding the questioning, the officer is precluded from beginning an investigation of things he is not able to articulate. *City of Albuquerque v. Haywood*, 1998-NMCA-029, ¶¶ 15-16, 18, 124 N.M. 661, 954 P.2d 93. In *Jutte*, we pointedly stated that "[d]iligence in the investigation is key, and the expansion of the investigation to look, search, or fish elsewhere is not contemplated for investigatory stops." 1998-NMCA-150, ¶ 18 (internal quotation marks and citation omitted).

**The Search Was the Extension of an Unlawful Detention**

{29} In this case, the detention of Defendant became illegal at the point Shaw's facts justifying further detention based on his suspicion concerning the car had petered out. Although finished with the speeding ticket and unable to justify further detention based on the discrepancy in the car rental contract, Shaw instructed Defendant to wait further and launched a new investigation for drugs. *Cf. State v. Hernandez*, 1997-NMCA-006, ¶ 25, 122 N.M. 809, 932 P.2d 499 (noting that "the expansion of the investigation to look search, or fish elsewhere is not contemplated for investigatory stops").

{30} His testimony shows his subjective basis expanding his detention of Defendant, considering that he had served three years on an interagency drug task force and 80-85% of the drug arrests he had made involved rental cars. He immediately separated Defendant and his passenger upon stopping him for speeding to investigate "further criminal activity." Shaw described the well in the car's trunk as "an area that the spare tire is *not* kept in[,]" without then recalling if he ever looked in that particular place at all. His previous drug arrests and his experience that car rental companies usually request impoundment of a car do not lead to his surmising that in the absence of other proof, Defendant was not a proper driver of the car. Articulable facts are required to back up these assumptions if we are to allow them to support the detention of Defendant. This Court recently discussed this issue stating:

> While evidence of an officer's training and experience may be relevant to the officer's ability to derive particularized and objective indicia of criminal activity from seemingly innocent circumstances, the State bears the burden of demonstrating that the officer's training and experience have in fact resulted in a heightened awareness as opposed to merely reinforcing the officer's personal biases.

*Duran*, 2003-NMCA-112, ¶ 19 (citations omitted).

{31} When Shaw had exhausted the means of investigation by which he could confirm or dispel his suspicion quickly, he had no reasonable basis to detain Defendant any longer. *See Sharpe*, 470 U.S. at 686; *Jutte*, 1998-NMCA-150, ¶ 19. Apart from a hunch, Shaw had no specific reason to undertake a drug investigation once he could not make a case for car theft.

{32} The State argues that Shaw was aware of specific articulable facts and had rational inferences based on those facts. Specifically, Shaw testified that Defendant was driving a rental car which he could not show that he had the authority to drive, he was nervous and avoided eye contact, and he and his girlfriend had different stories concerning their destination. The State argues that this constitutes a drug courier profile, although it did not make this argument below and does not sufficiently demonstrate the rationality of Shaw's inferences.

{33} Shaw's reference to his training and experience was insufficient to show that the observations and circumstances surrounding the traffic stop—Defendant's nervousness, the car rental contract without Defendant's name, and inconsistent stories between the passenger and Defendant—gave rise to a reasonable suspicion of criminal activity. "When the State relies upon an officer's training and experience to convert innocent circumstances into indicia of criminal activity, the officer must explain how the officer's training and experience enabled him to attribute special significance in facts that would seem innocent to a layperson." *Duran*, 2003-NMCA-112, ¶ 20. Here, Shaw did not sufficiently explain how the circumstances surrounding the routine traffic stop gave rise to an objectively reasonable suspicion of drug-smuggling or other criminal activity when he questioned Defendant's travel plans. Shaw had not even read the rental contract when he questioned Defendant about his itinerary.

{34} We hold that Shaw's interrogation of Defendant about drugs, after all reasons to hold him further were gone, expanded the stop into an unconstitutional fishing expedition for evidence of criminal activity. Under *Taylor*, this is impermissible conduct, and consequently, Defendant's apparent consent to the search of his trunk was the fruit of Shaw's illegal questioning of Defendant. 1999-NMCA-022, ¶¶ 28-29. Accordingly, the drugs found as a result of the search must be suppressed.

**Defendant's Consent to Search Was Unconstitutionally Tainted**

{35} The State argues that the search is validated by Defendant's consent. However, admission of evidence obtained after an illegal arrest or detention is excluded "except in very limited circumstances." *Jutte*, 1998-NMCA-150, ¶ 22. The evidence obtained by Defendant's consent is admissible "only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality." *Id.* ¶ 21 (internal quotation marks and citation omitted). Defendant's consent removes the taint of Shaw's illegal action only if there is "sufficient attenuation" between the detention and consent. *Id.* ¶ 22 (internal quotation marks omitted). In this case, as in *State v. Bedolla*, 111 N.M. 448, 456, 806 P.2d 588, 596 (Ct. App. 1991), there was no attenuation. Under the facts of this case, Shaw went from territory where he had specific facts that indicated a possible criminal impropriety about Defendant's possession of a rental car, to interrogation about and a detailed search for drugs without a reasonable suspicion of drug possession.

**CONCLUSION**

{36} We reverse the district court's order denying Defendant's motion to suppress. We hold that suppression was warranted, and remand this case so Defendant can withdraw his plea, and for further proceedings consistent with this opinion. *See State v. Hodge*, 118 N.M. 410, 415, 882 P.2d 1, 6 (1994) (stating that where a defendant enters a conditional guilty plea, he or she is permitted to withdraw the plea after prevailing on appeal).

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

**RODERICK T. KENNEDY, Judge**

**WE CONCUR:**

**JAMES J. WECHSLER, Chief Judge**

**CYNTHIA A. FRY, Judge**

*Certiorari Granted, No. 28,648, June 4, 2004*

From the New Mexico Court of Appeals

**Opinion Number: 2004-NMCA-068**

ERIC E. FERNANDEZ and VERONICA R. FERNANDEZ, Personal Representatives for the ESTATE OF LEON A. FERNANDEZ,
Plaintiffs-Appellants,
versus
THE ESPAÑOLA PUBLIC SCHOOL DISTRICT and the BOARD OF EDUCATION FOR THE ESPAÑOLA PUBLIC SCHOOL DISTRICT,
Defendants-Appellees.
No. 23,032 (filed: April 13, 2004)

**APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY**
JAMES A. HALL, District Judge

JOSE A. SANDOVAL
Española, New Mexico

BRUCE H. STOLTZE
BRICK, GENTRY, BOWERS, SWARTZ, STOLTZE, SHULING & LEVIS, P.C.
Des Moines, Iowa
for Appellants

H. NICOLE WERKMEISTER
NARVAEZ LAW FIRM, P.A.
Albuquerque, New Mexico
for Appellees

## Opinion

### Ira Robinson, Judge

{1} In November 1998, Plaintiffs Eric and Veronica Fernandez, as personal representatives for the estate of their minor son Leon Fernandez, brought a wrongful death action against the Espanola Public School District, the Board of Education for the Espanola Public School District, Honda Motor Company, Ltd., and American Honda Motor Company, Inc., seeking damages for the death of their son in an accident involving an ATV on school grounds. On March 2, 2001, the Espanola Public School District and the Espanola Board of Education (Defendants) made an offer of judgment for $95,000, plus costs accrued to that date, to settle the claims against Defendants, and Plaintiffs accepted. In August 2001, Plaintiffs settled their claims against Honda Motor Company and American Honda Motor Company. That settlement is not at issue in this appeal. On appeal, Plaintiffs argue that the district court erred as a matter of law when the court concluded that it did not have the discretion to award as costs the fees paid by Plaintiffs to several expert witnesses. We affirm the district court.

**BACKGROUND**

{2} After Plaintiffs accepted the offer of judgment from Defendants, the district court entered judgment in favor of Plaintiffs in the amount of $95,000 plus costs accrued by Plaintiffs to March 2, 2001. Plaintiffs filed their first cost bill and claimed costs totaling $117,999.48, of which the amount of $89,274.25 was for expert witness fees. Defendants filed objections to Plaintiffs' cost bill, arguing that when expert witnesses do not testify in person or in a deposition, their fees are precluded from being taxed as costs under NMSA 1978, § 38-6-4(B) (1983). A hearing on the cost bill was held in December 2001. In February 2002, the district court, in an order granting in part and denying in part Plaintiffs' cost bill, awarded Plaintiffs the sum of $19,441.13 in costs. The district court concluded that because none of Plaintiffs' expert witnesses had testified in the cause either in person or in a deposition prior to the time that Plaintiffs had accepted Defendants' offer of judgment, the court lacked discretion to award costs under the express language of Section 38-6-4(B). The Plaintiffs appeal the district court's decision.

**DISCUSSION**

{3} Although Plaintiffs raised other cost issues in their docketing statement, the sole issue Plaintiffs briefed on appeal is whether the district court erred when it concluded that it did not have discretion under Section 38-6-4(B) to award costs for the non-testifying expert witnesses. Therefore, this is the only issue we address. *See Fleming v. Town of Silver City*, 1999-NMCA-149, ¶ 3, 128 N.M. 295, 992 P.2d 308 (stating that "issues raised in the docketing statement, but not argued in the brief in chief are deemed abandoned").

{4} With respect to awarding costs for the services of expert witnesses, Section 38-6-4(B) provides the following:

> The district judge in any civil case pending in the district court may order the payment of a reasonable fee, to be taxed as costs, in addition to the per diem and mileage as provided for in Subsection A of this section, for any witness who qualifies as an expert and who testifies in the cause in person or by deposition. The additional compensation shall include a reasonable fee to compensate the witness for the time required in preparation or investigation prior to the giving of the witness's testimony.

The interpretation of a statute is a question of law, and our review is de novo. *Public Serv. Co. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860. When interpreting a statute, our purpose is to determine and give effect to the judgment of the legislature. *Roth v. Thompson*, 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992).

{5} Defendants argue that the decision of the district court should be upheld because the provisions of Section 38-6-4(B) and Rule 1-054(D)(2)(g) NMRA 2004 regarding when expert witness fees may be taxed as costs are clear. Although we agree that Section 38-6-4(B) and Rule 1-054(D)(2)(g) are relevant, we do not rely on Rule 1-054(D)(2)(g) for this case. The proviso contained in Subsection (D)(2)(g) that expert witness fees are recoverable "as limited by Section 38-6-4(B)" was an amendment to the Rules of Civil Procedure, approved by the Supreme Court by Order No. 99-8300 on October 27, 1999, effective for cases filed on and after December 15, 1999. Because Plaintiffs filed this action in November 1998, amended Rule 1-054(D)(2)(g) would not apply to their case.

{6} Defendants point out that under NMSA 1978, § 39-3-30 (1966), "the taxation of costs is in the discretion of the reviewing court except in those cases in which a different provision shall be made by law." They argue that Section 38-6-4(B)

constitutes a different provision made by law and, therefore, the district court was correct in concluding that it did not have the discretion to disregard Section 38-6-4(B) in making a cost award. Defendants also rely on *Jimenez v. Foundation Reserve Insurance Company*, 107 N.M. 322, 757 P.2d 792 (1988), for support. In that case, the plaintiff attempted to recover costs for two experts who were unable to testify at a hearing through no fault of their own. *Id.* at 323-24, 757 P.2d at 793-94. The New Mexico Supreme Court, in resolving the question of whether an award of costs was appropriate, observed that "[t]he right of a prevailing party to recover costs incurred in litigation is by virtue of statutory authority, or by rule of the court as authorized by statute." *Id.* at 327, 757 P.2d at 797; *accord Pierce v. State*, 121 N.M. 212, 231, 910 P.2d 288, 307 (1995) (concluding that a challenged award of costs "[was] not authorized by statute or precedent"). The Supreme Court then stated that Section 38-6-4(B) was the statute applicable to costs "for any witness who qualifies as an expert and who testifies in the cause in person or by deposition." *Jimenez*, 107 at 327, 757 P.2d at 797 (internal quotation marks omitted). Relying upon the plain language of the statute, the Court concluded that because the experts had not testified, Section 38-6-4(B) did not authorize their fees being taxed as costs. *Id.*

{7} In this case, Plaintiffs maintain that, although Section 38-6-4(B) allows a district court to award costs for the fees of expert witnesses who testify, the statute does not expressly prohibit the court from exercising its discretion to award fees when expert witnesses do not testify. This contention is not a reasonable view of the statute and is particularly untenable in light of the plain language in the statute. The section describes the two conditions that are to be met before fees for an expert witness may be taxed as costs: (1) the witness "qualifies as an expert" and (2) the witness "testifies in the cause in person or by deposition." Section 38-6-4(B); *accord Jimenez*, 107 N.M. at 327, 757 P.2d at 797. Although the witnesses in question may have been qualified as experts, thus meeting the first condition, it is undisputed that the experts did not testify in person or in a deposition, leaving the second condition unmet. The district court did not err in its interpretation of Section 38-6-4(B). *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (6th ed. 2000) ("A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way.").

{8} As we understand Plaintiffs' argument, they maintain that *Gillingham v. Reliable Chevrolet*, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197, should control on the question of award of costs for non-testifying experts. In support of this claim, they argue that *Gillingham* relied on *Dunleavy v. Miller*, 116 N.M. 353, 862 P.2d 1212 (1993), a case decided by the Supreme Court after *Jimenez*. They contend that *Dunleavy* demonstrated a move away from the *Jimenez* interpretation of costs. They base this claim on the statement in *Dunleavy* that a district court should exercise its discretion sparingly "when authorizing costs not specifically authorized by statute and precedent." *Dunleavy*, 116 N.M. at 362-62, 862 P.2d at 1221-22. However, the *Dunleavy* Court followed that statement by then listing those costs which have been authorized by statute and referred specifically to Section 38-6-4 as authorizing recovery of costs for an expert witness on liability and an expert witness on damages. *Id. Dunleavy* further observed that the statute also permitted additional expert witness fees if the district court finds "'that the additional expert witness *testimony* was reasonably necessary to the prevailing party and the expert witness *testimony* was not cumulative.'" *Id.* (quoting Section 38-6-4) (emphasis added). Contrary to Plaintiffs' claim, *Dunleavy* does not stand for the principle that the expenses of non-testifying expert witnesses may be taxed as costs. Furthermore, the Supreme Court went on to caution the district courts to carefully scrutinize costs with an eye to reducing the burdensome cost of litigation. *Id.*

{9} In *Gillingham*, the appellant had challenged the award of costs by the district court, and this Court relied upon Section 38-6-4(B) to affirm an award of costs for the fees of experts who testified at the trial, as authorized by the statute. *Id.* ¶¶ 25-26. However, the district court had also awarded costs for two potential expert witnesses who had not testified at the trial. *Id.* ¶ 27. With regard to the costs for those experts, the *Gillingham* Court did not rely again upon Section 38-6-4(B) or *Jimenez* for authority, but rather turned, without explanation, to *Bower v. Western Fleet Maintenance*, 104 N.M. 731, 739, 726 P.2d 885, 893 (Ct. App. 1986), to justify the award of costs for the expert witnesses who had not testified. *Gillingham*, 1998-NMCA-143, ¶ 27. The difficulty with relying upon *Bower* for authority is that *Bower* was not addressing costs for expert witnesses under Section 38-6-4(B). Instead, it dealt with expert witness fees under a then valid provision of the Workers' Compensation Act. *Bower*, 104 N.M. at 738, 726 P.2d at 892 (relying on NMSA 1978, § 52-1-35(B) (1983)). However, the relevant part of Section 52-1-35(B) begins with the language "[n]otwithstanding the provisions concerning expert witness fees as provided in Section 38-6-4 NMSA 1978[.]" This provision upon which the holdings of *Bower* and then *Gillingham* rested was, as it plainly states, an exception to the requirements contained in Section 38-6-4(B) intended to accomplish the purposes of the Workers' Compensation Act. Moreover, Section 52-1-35(B) has since been repealed. *See* 1986 N.M. Laws ch. 22, § 102. In any event, because *Bower* was a workers' compensation case, it would not be controlling authority for a district court case governed by Section 38-6-4(B). *See Lopez v. Am. Airlines, Inc.*, 1996-NMCA-088, ¶ 8, 122 N.M. 302, 923 P.2d 1187 (stating that a case resting on a provision of the Workers' Compensation Act was not controlling authority for a case interpreting Rule 1-054). For these reasons, we do not find *Gillingham* to be controlling or persuasive authority on this question.

{10} Plaintiffs also assert that the district court found exceptional and unusual circumstances which led it to believe that in this case the fees for the non-testifying experts should be awarded as costs. The order does not reflect this claim. Additionally, we do not believe that the scheduling order in this case, requiring Plaintiffs to summarize the anticipated testimony of their expert witnesses, created an exceptional and unusual circumstance. *See* Rule 1-016 NMRA 2004.

**CONCLUSION**

{11} An award of costs for the fees of expert witnesses who do not testify in person or in a deposition is not authorized by New Mexico statute, the Rules of Civil Procedure, or competent case law. The district court did not have discretion under Section 38-6-4(B) to award as costs the fees for the non-testifying expert witnesses. We therefore affirm the district court's order denying those costs.

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

**IRA ROBINSON, Judge**

**WE CONCUR:**

**JONATHAN B. SUTIN, Judge**

**CYNTHIA A. FRY, Judge**

*Certiorari Granted, No. 28,631, May 24, 2004*

From the New Mexico Court of Appeals

**Opinion Number: 2004-NMCA-066**

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
REYMUNDO CARLOS GARCIA,
Defendant-Appellant.
No. 23,353 (filed: April 5, 2004)

**APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY**
JOHN W. POPE, District Judge

PATRICIA A. MADRID
Attorney General
Santa Fe, New Mexico
M. VICTORIA WILSON
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

JOHN B. BIGELOW
Chief Public Defender
KATHLEEN T. BALDRIDGE
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

## Opinion

### A. Joseph Alarid, Judge

{1} Defendant, Reymundo Carlos Garcia, appeals from his convictions for being a felon in possession of a firearm, contrary to NMSA 1978, § 30-7-16 (1981, as amended through 1987) and for possession of an alcoholic beverage in an open container while in a motor vehicle, contrary to NMSA 1978, § 66-8-138 (1989). We reverse Defendant's conviction for being a felon in possession of a firearm on the ground that the evidence was insufficient to establish beyond a reasonable doubt that Defendant was in possession of a firearm; we affirm Defendant's conviction for possession of an alcoholic beverage in an open container.

**BACKGROUND**

{2} At around midnight on the evening of April 25, 2001, Sgt. Jason Hatch and Officer John Emmons of the Bosque Farms Police Department and Deputy Donald Derrick of the Valencia County Sheriff's Department were taking a coffee break at a convenience store. They observed a car slowly drive through the parking lot. Defendant was seated in the front passenger's seat of the car, a 1986, two-door Buick Regal sedan. Sgt. Hatch became suspicious because the car displayed a "dealer demonstration tag" while being driven after normal business hours. Sgt. Hatch followed in his patrol car. Officer Emmons and Deputy Derrick followed in separate vehicles. Sgt. Hatch observed the subject car swerve across the white "fog line," almost hitting the curb. Sgt. Hatch engaged his emergency equipment. The subject car pulled into a gas station, stopping near one of the gas pumps.

{3} Before Sgt. Hatch's car had come to a full stop, Defendant left the subject car and faced to the rear with the right side of his body "slouched down towards the side of the vehicle." Defendant looked at Sgt. Hatch, giving him a "thousand yard stare . . . . [k]ind of a blank look . . . almost as if . . . just looking through me as if I'm not there." Because of the way in which Defendant was leaning against the car, Sgt. Hatch could not see the right side of Defendant's body. Sgt. Hatch left his patrol car, drew his gun holding it at "a low ready position," and ordered Defendant back into the car. Defendant did not immediately comply and Sgt. Hatch again ordered Defendant to get back into the car.

{4} When Defendant was again seated in the car, Sgt. Hatch approached the driver and requested a driver's license, registration, and proof of insurance. By this time Officer Emmons and Deputy Derrick had arrived. The driver had a New Mexico I.D. card, but no driver's license, registration, or proof of insurance. After learning that the driver had no license, Sgt. Hatch directed Officer Emmons to identify the passenger and determine whether the passenger had a valid driver's license. Defendant told Officer Emmons that he was "Ray[—]Reymundo." Officer Emmons ran a check on Defendant by radio and the dispatcher identified Defendant as Reymundo Garcia.

{5} As Officer Emmons was writing out citations to the driver, Sgt. Hatch stood at the rear of the car on the passenger's side. He observed a handgun in a holster on the floor of the car protruding from beneath the rear of the passenger seat. The occupants were ordered from the car and were frisked and handcuffed. Sgt. Hatch observed a one inch by five inch by one-quarter inch clip of bullets lying in the "palm" of the front passenger seat, which was badly worn and covered with a towel or other cloth. Next to the gun on the floor was a partially empty bottle of beer. The officers seized the gun, which was loaded, and the extra clip. Deputy Derrick, who was familiar with the type of gun, unloaded it. The beer bottle was not seized. Defendant denied any knowledge of the handgun, explaining to the officers that because of prior felony convictions he was not allowed to be around firearms. Defendant admitted that he had been drinking in the car. Because Defendant had admitted to a prior felony, the officers ran his name through records a second time and were informed by dispatch that Defendant's record showed a prior felony conviction. Defendant was charged with concealing identity, an open container violation, and being a felon in possession of a firearm. In addition to various Motor Vehicle Code violations, the driver was charged with negligent use of a firearm.

{6} Defendant's case was tried to the court without a jury. Neither occupant of the car testified at trial. The State called Sgt. Hatch and Deputy Derrick as its only witnesses. The State offered no evidence as to who actually owned the car or how the driver and Defendant came to be in it. There was no evidence of the nature of the relationship of the driver and Defendant. The State stipulated that no fingerprints were found on the gun. Defense counsel stipulated that Defendant was a convicted felon. Defendant objected on hearsay grounds to Sgt. Hatch's testimony as to what Defendant had told Officer Emmons. The district court ruled that Sgt. Hatch's testimony as to Defendant's statements to Officer Emmons would be admitted "just to establish why he's doing what he did." Toward the end of the State's direct examination of Sgt. Hatch, the State informed the trial court that it would not proceed on the concealing identity charge. At the conclusion of the State's case, the trial court

denied Defendant's motion for a directed verdict on the remaining charges. Defendant did not put on any evidence. The trial court found Defendant guilty of possession of a firearm by a felon and possession of an open container containing an alcoholic beverage in a motor vehicle.

**DISCUSSION**

**1. Sufficiency of the Evidence of Possession of a Firearm**

{7} Section 30-7-16(A) makes it unlawful for a felon to "possess" a firearm. The State concedes that it did not prove that Defendant had the gun on his person. The State relies on a theory of "constructive" possession: i.e., that Defendant knew the gun was present and exercised control over it. *See State v. Morales*, 2002-NMCA-052, ¶¶ 28-29, 132 N.M. 146, 45 P.3d 406 (discussing constructive possession in the context of a prosecution for possession of heroin); *see also* UJI 14-130 NMRA 2004. We focus on the sufficiency of the evidence establishing that Defendant had actual knowledge of the presence of the firearm and exercised control over it.

{8} Sufficiency-of-the-evidence claims in criminal cases are reviewed under the following standards:

> [W]e review the record, marshaling all evidence favorable to [the] trial court's findings. If evidence is in conflict, or credibility is at issue, we accept any interpretation of the evidence that supports the trial court's findings, provided that such a view of the evidence is not inherently improbable. We determine whether the evidence supports any conceivable set of rational deductions and inferences that logically leads to the finding in question. We must be satisfied that the evidence was sufficient to establish the facts essential to conviction with the level of certainty required by the applicable burden of proof. To support a conviction under a beyond a reasonable doubt standard, the evidence and inferences drawn from that evidence must be sufficiently compelling so that a hypothetical reasonable factfinder could have reached a subjective state of near certitude of the guilt of the accused.

*State v. Wynn*, 2001-NMCA-020, ¶ 5, 130 N.M. 381, 24 P.3d 816 (internal citations and quotation marks omitted).

{9} In conducting sufficiency-of-the-evidence review in a criminal case, we are constitutionally required to take into account the heightened, beyond-a-reasonable-doubt burden of proof: evidence that is sufficient to allow a rational juror to make a finding adverse to a defendant under a preponderance-of-the-evidence standard will not necessarily suffice to allow a rational factfinder to reach the subjective state of certitude required by the beyond-a-reasonable-doubt standard. *State v. Garcia*, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992) (noting that constitutional review of the sufficiency of the evidence to support a criminal conviction requires appellate court to consider the heightened level of certitude required by proof beyond a reasonable doubt).

{10} The requirement of proof beyond a reasonable doubt derives from the distinction between "demonstrative" and "moral" evidence. *Victor v. Nebraska*, 511 U.S. 1, 10 (1994):

> Demonstrative evidence has for its subject abstract and necessary truths, or the unchangeable relations of ideas. Moral evidence has for its subject the real but contingent truths and connections, which take place among things actually existing . . . .

*Id.* (quoting 1 *Works of James Wilson* 518 (J. Andrews ed. 1896) (ellipsis in quoted material and internal quotation marks omitted)). Proof beyond a reasonable doubt is equivalent to proof "to a moral certainty," and refers to the highest degree of confidence with which an historical or physical fact can be known. *Id.* at 11-12; Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1178-80 (2003).

{11} The requirement of proof beyond a reasonable doubt "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358 (1970).

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.

*Id.* at 364 (citations and internal quotation marks omitted; ellipses in quotation). A trial court "has the right, and it is its duty," to enter judgment for a defendant when the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt. *State v. Tipton*, 57 N.M. 681, 682, 262 P.2d 378 (1953).

{12} Applying the standards set out above, we are persuaded that the State's evidence would have permitted a rational factfinder to rule out beyond a reasonable doubt everyone but Defendant and the driver as the source of the handgun found under Defendant's seat. The State's problem is that its own uncontradicted evidence establishes that the driver had roughly equal access with Defendant to the location where the gun was found. Thus, the State's own evidence supports the competing theory that the driver, not Defendant, placed the gun behind Defendant's seat. *Cf. Morales*, 2002-NMCA-052, ¶ 30.

{13} Cases involving prosecutions for unlawful possession or transportation of a weapon or contraband when the defendant had non-exclusive access to the location where the weapon or contraband was found underscore the difficulty of conceptualizing reasonable doubt and of articulating standards for deciding when a reasonable doubt is present as a matter of law. *See, e.g.*, *State v. Sizemore*, 115 N.M. 753, 858 P.2d 420 (Ct. App. 1993); *see also Smith v. State*, 805 A.2d 1108 (Md. Ct. Spec. App. 2000) (reversing conviction for knowingly transporting an illegal handgun with four judges joining in plurality opinion, three judges joining in an opinion concurring in the result and five judges joining in three separate dissenting opinions), *rev'd by* 823 A.2d 664 (Md. 2003) (reversing Court of Special Appeals and affirming conviction with five judges concurring and one judge dissenting); *see also Branch v. Common-*

*wealth* 2002 WL 31688803 (Va. Ct. App. 2002) (en banc) (affirming defendant's conviction for unlawful possession of a firearm by a felon on rehearing en banc with two judges dissenting; vacating prior opinion by a unanimous panel which reversed defendant's conviction on the ground of insufficient evidence that the defendant constructively possessed handgun found in vehicle). Non exclusive access cases require us to decide whether the evidence adduced by the State in addition to mere proof of non exclusive access was sufficient to elevate what would otherwise be an inferential flip of a coin into proof beyond a reasonable doubt. *See State v. Brietag*, 108 N.M. 368, 371, 772 P.2d 898, 901 (Ct. App. 1989) (discussing requirement in non-exclusive access cases of "additional facts" to support an inference of constructive possessions); *see also* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv. L. Rev. 1187, 1192-93 (1979) (discussing "Prisoner's case" hypothetical in which there is an absolute certainty that one of multiple defendants is innocent; contrasting scenario in which state's best case is "purely statistical" with cases involving issues of credibility or motive).

{14} Not every imaginable doubt is a reasonable doubt. *Victor*, 511 U.S. at 1. Here, however, the State's own evidence, viewed in the light most favorable to the State, immediately suggests a competing hypothesis that is inconsistent with guilt: i.e., that the driver placed the gun behind the seat. This alternative hypothesis was sufficiently likely in the light of normal human experience as to necessarily give rise to a reasonable doubt in the absence of evidence more strongly linking Defendant to the gun or more convincingly ruling out the driver as the source of the gun. *See State v. Johnson*, 839 So.2d 1247,1253 (La. Ct. App. 2003) (observing that "when evaluating the evidence in the light most favorable to the prosecution, the court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under *Jackson v. Virginia*"); *see also* Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 Tex. L. Rev. 105, 133 (1999) (observing that in a criminal case the government must accomplish the interrelated tasks of creating a model of events that is consistent with the evidence and that supports its case while also demonstrating the unreasonableness of any competing models of events consistent with innocence).

{15} The State argues that the location of the gun behind Defendant's seat permits an inference of control based upon Defendant's closer physical proximity to the gun. Of course a roughly equal inference would attribute possession to the driver based upon the inference that the driver of a car controls the objects that are introduced into the car. *Cf. Smith*, 823 A.2d at 677-82. The fact that these inferences are so easily manipulable demonstrates why they cannot of themselves establish constructive possession to the level of certitude required by proof beyond a reasonable doubt. The State argues various other inferences of guilt may be drawn from the facts of Defendant's aggressive behavior, his admission that he had been drinking and the fact that a beer bottle was found on the floor behind the passenger's seat next to the gun. We are satisfied that the evidence and reasonable inferences drawn from the evidence, viewed in the light most favorable to the State, would support a strong suspicion that Defendant was in constructive possession of the gun, and might well support a finding of guilt under a mere preponderance-of-the-evidence standard. However, in a criminal case the evidence and any inferences from the evidence must establish the existence of the elements of the offense to a level of confidence amounting to near certitude. We are persuaded that the State's evidence and the inferences from that evidence were insufficient to eliminate a reasonable doubt that the driver placed the gun behind Defendant's seat.

{16} We emphasize that our conclusion that the evidence of constructive possession was insufficient is not based on disbelief of the State's witnesses. The trial court, as factfinder, was entitled to accept the testimony of the State's witnesses as both truthful and accurate. *See State v. Till*, 78 N.M. 255, 430 P.2d 752 (1967). Nor are we basing our holding that the evidence was insufficient on Defendant's denial of any connection to the handgun, as reported by the State's witness. The trial court was entitled to disbelieve Defendant's denial of any connection to the gun. *Wynn*, 2001-NMCA-020, ¶ 6. Lastly, we are not basing our decision on qualitative distinctions between "direct" and "circumstantial" evidence. In *State v. Bell*, 90 N.M. 134, 560 P.2d 925(1977), our Supreme Court emphasized that the traditional distinction between direct and circumstantial evidence in evaluating the sufficiency of the evidence had been disapproved. The sufficiency of the evidence justifying the denial of a motion for a directed verdict of acquittal is measured by the same standard regardless of whether the State relies on direct or circumstantial evidence. *Id.* at 137, 560 P.2d at 928. As we noted in *State v. Sanchez*, sufficiency of the evidence review requires us to determine whether on the evidence viewed in the light most favorable to the State a factfinder reasonably could find that evidence is "inconsistent with every *reasonable* hypothesis of innocence." 98 N.M. 428, 430, 649 P.2d 496, 498 (Ct. App. 1982) (emphasis added). Where the evidence viewed most favorably to the State *necessarily* supports a *reasonable* hypothesis of innocence, the State, by definition, has failed to prove its case beyond a reasonable doubt, and this is so regardless of whether the State has relied on direct or circumstantial evidence or a combination of both:

> It is true that "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt," but it is equally true that if a hypothesis of innocence is sufficiently reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt about guilt.

*United States v. Bell*, 678 F.2d 547, 550 (5th Cir. 1982) (Anderson, J., specially concurring) (citation omitted).

{17} The Dissent asserts that "the issue for this Court to resolve upon review is not whether it was 'sufficiently likely' that the driver put the gun under Defendant's seat, but whether, viewing the evidence in the light most favorable to the prosecution and considering the reasonable inferences to be drawn from the undisputed facts, 'any rational trier of fact could have found the essential elements of the crime established beyond a reasonable doubt.'" Dissent ¶ 36. The Dissent's statement of the standard for determining the sufficiency of the evidence is largely circular: evidence is sufficient if it allows a rational factfinder to find a fact beyond a reasonable doubt . . . a rational factfinder is a person who will not find a fact established beyond a reasonable doubt unless he or she is presented with sufficient evidence . . . the presence of a reasonable

doubt means that a rational factfinder has not been provided sufficient evidence. We agree with the Dissent that due process is not violated by a conviction that is supported by substantial evidence, made by a rational factfinder drawing reasonable inferences to the exclusion of a reasonable doubt of innocence. Stating the standard is the easy part; the difficulty comes in deciding and explaining why the evidence was or was not "substantial", why the factfinding was or was not "rational," why inferences necessary to sustaining the conviction were or were not "reasonable," and ultimately, whether or not the State's evidence precludes any reasonable doubt of innocence.

{18} As we have pointed out before, "beyond a reasonable doubt" refers to the highest level of confidence with which an historical or physical fact can be known. We are confident that the Dissent would agree that evidence that two convicted felons were found in a car with a gun on the floor behind the front seat cannot, without more, support a conviction of either occupant for illegal possession. On such limited facts a rational factfinder would not claim to know with near certitude who controlled the gun anymore than he or she would claim to know whether heads or tails will come up on the next flip of a coin, and a conviction based on such limited evidence would be overturned, notwithstanding the broad latitude traditionally afforded factfinders in drawing inferences from the evidence.

{19} Here, the State's case was not quite as bare-bones as the two-men-in-a-car-with-a-gun hypothetical described above. The State's case was substantially strengthened in comparison to the two-men-in-a-car hypothetical by evidence that a spare clip of bullets was found in the palm of the passenger's seat. This evidence would support a reasonable inference that Defendant was aware that a gun was present in the car. However, knowledge and control are conjunctive requirements for constructive possession. In the present case, the sufficiency of the evidence supporting a finding of constructive possession ultimately depends upon the sufficiency of the evidence establishing that Defendant exercised control over the gun.

{20} Whether a factfinder is rational in making a finding depends in part on the level of confidence the factfinder claims to have in the finding. On a given quantum of evidence it may be rational to assert that one knows a fact to be more likely than not, yet on the same evidence it can be irrational to assert that one knows that fact with near certainty. As we noted above, if this were a civil case and the State merely had to prove that it was more likely than not that Defendant exercised control over the gun, it would be much more difficult to disagree with the Dissent's assertion that the record contains sufficient evidence of constructive possession. But this is a criminal case, and we must decide whether, on the State's evidence, a trier of fact would be acting rationally in maintaining that he knows with a level of confidence amounting to near certitude that Defendant exercised control over the gun. "[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). We are persuaded that this is just such a case.

{21} It is possible that our disagreement with the Dissent stems from differing views of what it means to "exercise control over" an object. *See* UJI 14-130. As the Dissent observes, two or more persons can constructively possess an item of property, and therefore it was open to the State to attempt to prove that both the driver of the car and Defendant were in constructive possession of the gun. *See* UJI 14-130 ("Two or more people can have possession of an object at the same time."). However, on the record before us, we do not perceive how analyzing the evidence under a theory of joint constructive possession assists the State in demonstrating that Defendant`s conviction is supported by sufficient evidence of control. Analyzing the evidence under a theory of joint constructive possession merely underscores the insufficiency of the evidence as to either occupant. If the Dissent means to suggest that a hitchhiker or other passenger may be presumed to exercise control over any piece of property that is within reach within the passenger compartment of a car in which he is a guest, we categorically reject any such presumption. *See* UJI 14-130 (stating that a jury may not find possession merely because a person is in the vicinity of an object or is aware of its location); *Sizemore*, 115 N.M. at 758, 858 P.2d at 425 (observing that when persons other than the defendant have equal access to location where contraband is located, possession may not be inferred solely from the defendant's access).

**2. Section 66-8-138 Violation**

{22] Defendant argues that his convictions were based on evidence obtained in the course of an unconstitutional warrantless search of the car. Our conclusion that the evidence was insufficient to support Defendant's conviction for possession of a firearm by a felon renders this point moot as to that conviction. Therefore, we consider Defendant's claims under the Fourth Amendment to the United States Constitution and Article II, § 10 of the New Mexico Constitution only as they may affect the conviction for possession of an alcoholic beverage in an open container while in a motor vehicle.

{23} A ruling on a motion to suppress presents a mixed question of fact and law. *State v. Vandenberg*, 2003-NMSC-030, ¶ 17, 134 N.M. 566, 81 P.3d 19. We review the trial court's findings of historical fact under a substantial evidence standard; we review the trial court's application of the law to those facts under a de novo standard. *Id.*

{24} Prior to trial, Defendant filed a motion to suppress evidence, arguing that the warrantless entry into the car violated Defendant's rights under the Fourth Amendment and Article II, § 10. Defendant referred the trial court to *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1. The parties agreed to conduct the evidentiary hearing on Defendant's motion at the same time as the trial on the merits.

{25} Sgt. Hatch testified that at the time the gun was seized, both the driver and Defendant were out of the car and had been "secured." He conceded that he had not requested consent to search the car, that there were three officers present, and that there was no reason why someone could not have obtained a search warrant. Sgt. Hatch testified to his belief that the seizure of the gun was justified because it was in plain view. Defendant argued that the trial court should suppress "all evidence following the search of the car" due to the failure of the officers to obtain a warrant and the absence of exigent circumstances.

{26} The State responded that the gun and magazine were in plain view and that because of safety concerns it was reasonable for the officers to retrieve the gun. The State initially disclaimed any reliance upon a theory of exigent circumstances, whereupon the trial court interjected "Well you better be claiming exigent circumstances, or you're going to lose this motion." The trial court denied the motion to suppress, ruling that "I'm going to find that there is [sic] exigent circumstances because I think in the nature of things, a loaded gun even though the suspects are handcuffed, creates

a situation where something could happen, and that gun should be secured."

{27} On appeal, Defendant maintains his argument that the facts do not establish exigent circumstances for a warrantless seizure. The State argues that the seizure of the gun was not a warrantless seizure of evidence, but rather a protective sweep. The State argues that the circumstances characterized by the trial court as "exigent" suffice to establish that the arresting officers reasonably feared that Defendant might be armed and dangerous and justified securing the weapon while the investigatory stop proceeded. While ultimately we agree with the State, we first address a serious misstatement of the law of search and seizure contained in the State's brief.

{28} The State asserts that the seizure of the gun was justified because the presence of a firearm in an automobile during a late-night traffic stop automatically supplies grounds to believe that the subject is armed *and dangerous*. We do not agree. To justify a frisk of a person or a protective sweep of an automobile on officer safety grounds, the officer must be confronted with circumstances that support a reasonable suspicion that the subject is *both* armed *and* dangerous. *Vandenberg*, 2003-NMSC-030, ¶ 22. Our Supreme Court emphasized in *Vandenberg* that this is not an either-or test; both prongs must be satisfied. *Id.* The right to bear arms "for security and defense, . . . and for other lawful purposes" is guaranteed by Article II, § 6 of the New Mexico Constitution. New Mexico law permits adults to carry a loaded handgun "in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property." NMSA 1978, § 30-7-2(A)(2) (2001). We presume that the Legislature, in enacting Section 30-7-2(A)(2), was aware of the inherent characteristics of firearms, but nevertheless concluded that lawfully carried firearms do not present an unreasonable risk of harm to persons in the vicinity of the firearm. In a state such as New Mexico, where the carrying of a firearm in a car is entirely lawful, it would be anomalous to treat the mere presence of a firearm in an automobile as supporting a reasonable suspicion that the occupants are inclined to harm an officer in the course of a routine traffic stop. *Cf. State v. Arredondo*, 1997-NMCA-081, ¶¶ 17-18, 123 N.M. 628, 944 P.2d 276 (discussing circumstances justifying a protective search of a vehicle for weapons). We have previously recognized that a motorist's acknowledgment that he is armed does not of itself justify the further detention of the motorist, a search for the weapon, the seizure of a weapon, or "any further infringement on [the motorist's] . . . freedoms of movement and privacy." *City of Albuquerque v. Haywood*, 1998-NMCA-029, ¶ 17, 124 N.M. 661, 954 P.2d 93. We therefore reject the State's argument that the presence of a firearm in an automobile automatically supports a reasonable suspicion that the occupants will use the firearm to harm the officer.

{29} Our holding takes into account the United States Supreme Court's decision in *Adams v. Williams*, 407 U.S. 143 (1972). In *Adams* the Supreme Court observed that a frisk for weapons may be reasonable even though applicable state law authorizes the carrying of the weapon. *Id.* at 146. We do not understand *Adams* as creating an exception to the rule that a *Terry* frisk must be justified by a reasonable belief that the subject is *both* armed *and* dangerous. Rather, *Adams* merely recognizes that an officer may entertain a reasonable belief that a subject is dangerous even though the subject is not violating state law by possessing a firearm.[1]

{30} Notwithstanding our rejection of the per se rule proposed by the State, we conclude that in the present case, the circumstances facing the officers supported a reasonable suspicion that Defendant might pose a danger to the officers. We find particularly persuasive Defendant's failure when confronted by an officer with his gun drawn to immediately comply with the officer's instructions to get back into the car. This behavior on its face suggests aggressiveness and rashness. The arresting officer testified, albeit somewhat inartfully, that "[t]hrough my experience and training as well as knowledge of other incidents that have happened in police departments or the sheriff's department, similar things have happened where gunfire is exchanged resulting in someone being injured."[2]

{31} Defendant points out that by the time the gun was seized, both the driver and Defendant had been frisked, handcuffed and detained away from the car. Defendant argues that under these circumstances no reasonable officer could have believed that the driver or Defendant continued to present a threat to officer safety, and therefore officer safety did not justify the entry into the car to seize the gun.

{32} An officer's conduct during an investigatory detention must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Here, the officers' observation of the gun coupled with the prior observation of Defendant's aggressive behavior gave rise to a reasonable suspicion that Defendant was both armed *and dangerous*. At that point retrieving the gun and unloading it clearly was a constitutionally-reasonable response to the situation facing the officers. However, as long as Defendant and the driver remained in the car, an officer reaching in to retrieve the gun would have been vulnerable to attack. By restraining Defendant and the driver away from the car, the officers reduced the risk of being attacked while securing the gun. We are persuaded that the officers' conduct was "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*

{33} Defendant also argues that we should reverse the denial of his motion to suppress because the officers believed that they could seize the gun inside the car simply because it was in plain view from outside the car. We agree with Defendant that the officers' understanding of the law was erroneous: even where an object is in plain view inside a car, a warrantless entry into the car to seize the object is valid only where the entry is justified by exigent circumstances or some other exception to the warrant requirement.

[1]The record indicates that the officers did not discover that Defendant was a convicted felon until after they had seized the gun. Thus, at the point that they seized the gun, they had no reason to believe that it was unlawful for Defendant to possess a firearm.

[2]We have previously recognized that the State bears the burden of demonstrating the relevance of an officer's training and experience to search and seizure issues. *State v. Duran*, 2003-NMCA-112, ¶ 19, 134 N.M. 367, 76 P.3d 1124. Here, Defendant did not object to the officer's testimony on the ground that the State had not laid an adequate foundation for the admission of testimony linking the officer's training and experience to his awareness of officer safety concerns. Our reliance on the officer's conclusory assertion of experience and training in the present case should not be understood as a general endorsement of boilerplate or conclusory invocations of experience and training or officer safety concerns.

*State v. Jones*, 2002-NMCA-019, ¶ 15, 131 N.M. 586, 40 P.3d 1030. However, we may uphold a search or seizure if the facts known to the officer conducting the search or seizure, viewed objectively, would provide valid constitutional grounds for the officer's actions even though the officer subjectively relied on a legally-insufficient theory. *State v. Vargas*, 120 N.M. 416, 418, 902 P.2d 571, 573 (Ct. App. 1995). Because the facts known to the officers established a reasonable suspicion that Defendant was both armed and dangerous—thereby justifying a protective seizure of the gun—the officers' subjective reliance on an erroneous justification does not invalidate the entry into the car to secure the gun.

{34} The entry into the car to seize the gun is important to the Section 66-8-138 conviction because it was in the course of seizing the gun that the arresting officer observed the open beer bottle on the floor of the car next to the gun and it apparently was in response to the recovery of the gun and the discovery of the beer bottle that Defendant admitted that he had been drinking. At trial, the trial court explained that it was basing Defendant's conviction on the open container charge solely on Defendant's admission as recounted by the arresting officer. In view of our conclusion that the warrantless entry into the car to seize the gun was supported by exigent circumstances—the officers' reasonable suspicion that Defendant was armed and dangerous—we hold that Defendant's admission that he had been drinking was the fruit of a lawful entry into the car. We therefore reject Defendant's claim that his Section 66-8-138 conviction was based upon evidence obtained in violation of his constitutional rights.

**CONCLUSION**

{35} We reverse Defendant's conviction for possession of a firearm by a felon; we affirm Defendant's conviction for possession of an alcoholic beverage in an open container while in a motor vehicle. We remand for entry of an amended judgment consistent with this opinion.

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

**A. JOSEPH ALARID, Judge**

**I CONCUR:**

**CELIA FOY CASTILLO, Judge**

**IRA ROBINSON, Judge (dissenting)**

**IRA ROBINSON, Judge (concurring in part and dissenting in part).**

{37} I concur in part and dissent in part. I agree with the Majority that the officers' search of the car was proper and that Defendant's conviction for possession of an open container of alcohol in a motor vehicle should be affirmed. I also consider Defendant's chain of custody claim to be without merit. However, I cannot concur in the Majority's reversal, on the basis of insufficient evidence, of Defendant's conviction for possession of a firearm by a felon. Because I believe the Majority has inappropriately reweighed the evidence and then substituted its judgment for that of the trial court, I must respectfully dissent.

{38} An appellate court reviews the sufficiency of the evidence under a substantial evidence standard. *State v. Sutphin*, 107 N.M. 126, 130-31, 753 P.2d 1314, 1318-19 (1988). In making this determination, a reviewing court "does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict." *Id.* at 131, 753 P.2d at 1319. Rather, we must determine whether, after reviewing the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the verdict, any rational trier of fact could have found the essential elements of the crime established beyond a reasonable doubt. *State v. Sanders*, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994) (relying upon *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Furthermore, "[a]n appellate court does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence." *Sutphin*, 107 N.M. at 130-31, 753 P.2d 1314, 1318-19. "The fact that another district court could have drawn different inferences on the same facts does not mean this district court's findings were not supported by substantial evidence." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856.

{39} To establish the essential elements of the crime, the State was required to prove that Defendant possessed a firearm and that he was a felon. Section 30-7-16(A); *see State v. Haddenham*, 110 N.M. 149, 155-56, 793 P.2d 279, 285-86 (Ct. App. 1990). Defendant stipulated that he was a convicted felon, so the only element before the trial court was whether Defendant was in constructive possession of the gun found in the car. In New Mexico, constructive possession is defined by UJI 14-130 in the following manner: "[e]ven if the object is not in [a person's] physical presence, he [or she] is in possession if he [or she] knows what it is and where it is and he [or she] exercises control over it." The jury instruction also provides that "[t]wo or more people can have possession of an object at the same time." UJI 14-130; *accord State v. Muniz*, 110 N.M. 799, 802, 800 P.2d 734, 737 (Ct. App. 1990) ("Even if someone else had knowledge of [the object] and exercised some control over it, defendant could also have had sufficient knowledge and control to be in constructive possession.").

{40} The direct evidence before the trial court, presented by the undisputed testimony of the police officers, was that upon being stopped, Defendant jumped out of the passenger side of the car and slouched down at the side of the car, concealing his right side and hand from the officers; did not readily obey the officer's instructions to get back in the car; and initially gave the officers a false name. The gun and its holster were protruding from under the back of Defendant's seat in the car, and Defendant had been sitting upon a magazine clip containing ammunition for the gun in question. The clip was in plain view on Defendant's seat after he was removed from the car for reasons of officer safety. After an officer found the loaded gun and an open bottle of beer under Defendant's seat, Defendant admitted to the officer that he had been drinking in the car. The officer testified that the bottle of beer was directly next to the gun under Defendant's seat. At the close of testimony, the trial court concluded beyond a reasonable doubt that Defendant had constructive possession of the gun, based on inferences drawn from the circumstances of Defendant's sitting on the magazine and the location of the gun under Defendant's seat. The trial court found Defendant guilty of possession of a firearm by a felon and also guilty of possession of an alcoholic beverage in a motor vehicle.

{41} Notwithstanding these facts, however, the Majority has arrived at a different conclusion, deciding that it was "sufficiently likely" the driver may have placed the gun under the passenger seat. Majority Op. ¶ 14. The Majority also appears to fault the State for offering no evidence to explain the ownership of the car, the relationship of its occupants to one another, or how they came to be in the car, *id.* ¶ 6, although these facts are not elements of the crime of felon in possession of a firearm. The Majority reversed Defendant's conviction because it has persuaded itself that "the State's evidence and the inferences from that evidence were insufficient to eliminate a reasonable doubt that the driver placed the gun behind Defendant's seat." *Id.* ¶ 15.

{42} In so holding the Majority has abandoned our appellate standard of review.

Instead, it has created a conflicting supposition, weighed this newly created supposition against the facts and inferences drawn by the proper factfinder–the trial court–and then concluded that this supposition created reasonable doubt. However, the issue for this Court to resolve upon review is not whether it was "sufficiently likely" that the driver put the gun under Defendant's seat, but whether, viewing the evidence in the light most favorable to the prosecution and considering the reasonable inferences to be drawn from the undisputed facts, any rational trier of fact could have found the essential elements of the crime established beyond a reasonable doubt. *See Sanders*, 117 N.M. at 456, 878 P.2d at 874. Because it was rational for the trial court to have found beyond a reasonable doubt that Defendant had constructive possession of the gun, I cannot concur with the contrary holding of the Majority. Thus, I respectfully dissent.

**IRA ROBINSON, Judge**

***Certiorari Denied, No. 28,659, June 4, 2004***

From the New Mexico Court of Appeals

**Opinion Number: 2004-NMCA-065**

CITY OF ALBUQUERQUE,
Plaintiff-Appellee,
versus
RENEÉ SACHS,
Defendant-Appellant.
No. 23,632 (filed: March 23, 2004)

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
RICHARD J. KNOWLES, District Judge

ROBERT M. WHITE
City Attorney
DONALD F. HARRIS
Assistant City Attorney
Albuquerque, New Mexico
for Appellee

JEFFREY J. DEMPSEY
Albuquerque, New Mexico
for Appellant

## Opinion

### Michael E. Vigil, Judge

{1} In this case we determine whether the City of Albuquerque Ordinance (the City Ordinance) which prohibits public nudity discriminates against women in violation of the Equal Rights Amendment in the New Mexico Constitution because it prohibits a woman from showing her breast in a public place without a fully opaque covering of her entire nipple when there is no such prohibition against men. N.M. Const. art. II, § 18; Albuquerque, N.M., Ordinance ch. 46, § 11-8-3(B) (1994). We hold that it does not. We also hold that the ordinance does not violate the New Mexico Human Rights Act (Human Rights Act) which in general prohibits an establishment that offers services to the public from discriminating on the basis of sex. Finally, we hold that the conduct in this case is not a form of expression and communication of ideas, protected by the First Amendment of the United States Constitution or by Article II, Section 17 of the New Mexico Constitution. We therefore affirm Defendant's conviction for public indecency and her sentence to 90 days probation.

**FACTS**

{2} The case originated in the Bernalillo County Metropolitan Court where the Defendant was charged with violating the City Ordinance which prohibits public nudity. The parties stipulated to the operative facts. Defendant is the owner and operator of a tattoo and body modification establishment. She published a gender-neutral advertisement offering customers free nipple piercing on the condition the customers agreed to have their nipples pierced while sitting in the front window of the business. Numerous persons availed themselves to the offer and had their nipples pierced while sitting in the window. The piercings were plainly visible from the public sidewalk. The first customer was male; the second was a female. When the police officer arrived, he observed a female sitting in the store window exposing her breasts in full public view as she had her nipples pierced with several people on the sidewalk watching.

{3} Section 11-8-3 of the City Ordinance at issue states in pertinent part:

> (A) No person shall knowingly or intentionally, in a public place . . . appear in a state of nudity;
>
> (B) No person who owns or operates a public place shall knowingly or intentionally permit or allow another person to violate the provisions of this article in that public place.

Section 11-8-2 of the City Ordinance defines "nudity" as:

> The showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

{4} Defendant was convicted of violating Section 11-8-3(B) of the City Ordinance on the basis of the stipulated facts and she received a sentence of 90 days probation. She appealed to the district court where she was entitled to a de novo trial. She again stipulated to the foregoing facts.

{5} In the district court, Defendant filed a motion to dismiss "because the City Ordinance prohibits only the showing of the female breast and not the male breast" and it is therefore "unconstitutional on its face" because it violates Article II, Section 18 of the New Mexico Constitution which provides, "[e]quality of rights under law shall not be denied on account of the sex of any person."

{6} Defendant also argued that the charge should be dismissed because the City Ordinance requires her to violate the Human Rights Act in that it requires her to discriminate on the basis of sex in offering her services to the public.

{7} Finally, Defendant filed a pretrial motion in which she argued that, because

her conduct was protected under the First Amendment and Article II, Section 17, Section 11-8-3(B) required the state to prove that her conduct was obscene before it could prohibit the conduct.

{8} The district court denied Defendant's motions and found her guilty on the basis of the foregoing facts. The judgment and sentence of the metropolitan court was therefore affirmed. Defendant appeals.

**DISCUSSION**

**A. New Mexico Equal Rights Amendment**

{9} In 1972, the New Mexico Equal Rights Amendment was adopted as part of Article II, Section 18 of the New Mexico Constitution, effective July 1, 1973. It states: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18. Defendant argues that the City Ordinance prohibits public exposure of the female breast but not the male breast and therefore it violates the New Mexico Equal Rights Amendment. We review this argument de novo. *See State v. Lasner*, 2000-NMSC-038, ¶ 24, 129 N.M. 806, 14 P.3d 1282 (stating review of a claim that constitutional rights violated presents an issue of law which is reviewed de novo).

{10} In this case, the district court took judicial notice that the female breast is different than a male breast and relied on *N.M. Right to Choose* for the proposition there is not a flat prohibition on "classifications based on physical characteristics unique to one sex." In concluding that "we are talking about a physical characteristic which is unique to one sex as opposed to another," the district court looked to the purpose of the City Ordinance and found that it was to protect the morals of the community of Albuquerque. The district court then evaluated the City Ordinance's effect on women and concluded that it does not result in a disadvantage to women unlike the regulations in *N.M. Right to Choose*. The district court determined that the classification in the City Ordinance is properly based on a unique characteristic and therefore constitutional on its face.

{11} Defendant did not object to the district court's reliance on judicial notice at the trial level, nor is there any argument on appeal challenging the district court's reliance on judicial notice. Defendant does not challenge the district court's conclusion that the City Ordinance is not disadvantageous to women. Defendant's argument is that a strict scrutiny analysis is required and that the case should be remanded for dismissal or for a new trial at which the City should be required to rebut the presumption that the City Ordinance is unconstitutional. We agree with the district court's approach and hold that the classification in the City Ordinance is properly based on a unique characteristic.

{12} The New Mexico Equal Rights Amendment "is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it. As such, the Equal Rights Amendment requires a searching judicial inquiry concerning state laws that employ gender-based classifications." *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 36, 126 N.M. 788, 975 P.2d 841. This is because "[w]e construe the intent of this amendment as providing something beyond that already afforded by the general language of the Equal Protection Clause." *Id.* ¶ 30.

{13} The City Ordinance prohibits public nudity by distinguishing between males and females on the basis of unique physical characteristics attributable to each. *N.M. Right to Choose* teaches that such a classification is neither automatically allowed or automatically prohibited by the New Mexico Equal Rights Amendment, *id.* ¶¶ 39-43, and that "[a] flat prohibition of such classifications may lead to absurd results." *Id.* ¶ 38 (internal quotation marks omitted). To determine whether men and women are similarly situated with respect to a classification, we look beyond the classification to the purpose of the law. *Id.* ¶ 40. Further, *N.M. Right to Choose* requires that we ascertain whether the classification "operates to the disadvantage of persons so classified." *Id.* (internal quotation marks omitted). When the classification is based on a unique physical characteristic, but the classification operates to the disadvantage of the persons so classified, a presumption exists that the New Mexico Equal Rights Amendment is violated. *Id.* ¶ 47. The law will be deemed unconstitutional unless the state is able to show both a compelling justification for the classification and that the law accomplishes its purpose by the least restrictive means. *Id.* ¶¶ 43, 47; *Marrujo v. N.M. State Highway Transp. Dep't*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994) (stating that for inherently suspect classification, burden is on the state to show delineation of classes supports a compelling state interest and that legislation accomplishes its purpose by least restrictive means).

{14} The City Ordinance Section 11-8-3(A) clearly states its purpose: it is to prohibit any person from knowingly or intentionally being nude in a public place. Section 11-8-3(B) also prohibits the owner or operator of a public place from permitting or allowing persons to be nude in that public place. Enacting such an ordinance is clearly within the police powers of the City of Albuquerque. *See City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 415, 389 P.2d 13, 17 (1964) (stating police power is exercised to protect and promote the safety, health, morals and general welfare); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (stating public indecency statutes are designed to protect morals and public order which fall within the realm of traditional police power); *City of Erie v. PAP's A.M.*, 529 U.S. 277, 296 (2000) (stating ordinance prohibiting nudity in public places reflected city's efforts to protect public health and safety which were clearly within police powers). In fact, public indecency, including nudity was a criminal offense at common law, and public nudity was considered an act *malum in se.* The common law root of the offense was "gross and open indecency." *Barnes*, 501 U.S. at 568 (citations omitted). *See generally State v. Ciancanelli*, 45 P.3d 451, 455-458 (Or. Ct. App. 2002) (en banc), which surveys the historical disdain for public nudity, and states that regulation of public nudity has been a regular feature of the legal landscape for several hundred years, at least as early as 1663.

{15} We now determine whether the City Ordinance operates to the disadvantage of women in accomplishing its purpose of prohibiting public nudity. In doing so, we have reviewed cases decided throughout the United States which admittedly involve different provisions of law and do not engage in the same analysis required by *N.M. Right to Choose* to determine if the Equal Rights Amendment has been violated. However, these decisions convincingly make the point that prohibiting public exposure of the female breast but not the male breast does not operate to the disadvantage of women. Generally, courts that have considered laws that prohibit only females from publicly exposing their breasts have concluded that such laws do not violate federal or state equal protection clauses. *See generally* Kimberly J. Winbush, Annotation, *Regulation of Exposure of Female, But Not Male,*

*Breasts*, 67 A.L.R. 5th 431 § 2, at 442 (1999). These cases generally uphold the sex-based distinction on the basis of the differing physical characteristics of men and women. *Id. See also Buzzetti v. City of New York*, 140 F.3d 134, 143 (2d Cir. 1998) (rejecting an equal protection challenge and stating public reactions to exhibition of the female breast and male breast are highly different; ordinance could properly prohibit topless dancing only by females); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1256 (5th Cir. 1995) (noting that ordinance stated city council reviewed "convincing documented evidence regarding the physiological and sexual distinctions between male and female breasts[;]" city ordinance excluding male breasts from definition of nudity upheld under the state's equal rights amendment) (internal quotation marks omitted); *Tolbert v. City of Memphis*, 568 F. Supp. 1285, 1290 (W.D. Tenn. 1983) (stating in our culture, female breasts are a justifiable basis for a gender-based classification; topless dancing properly prohibited under the equal protection clause); *City of Tucson v. Wolfe*, 917 P.2d 706, 708 (Ariz. Ct. App. 1995) (agreeing that gender classification based on clear differences between sexes is not invidious, and a legislative classification based upon those differences is not unconstitutional; ordinance prohibiting females from exposing nipple and areola regions of their breasts not a violation of equal protection); *Locker v. Kirby*, 107 Cal. Rptr. 446, 451 (Cal. Ct. App. 1973) (recognizing in an equal rights amendment challenge "the obvious physical differences between mature male and female breasts," and upholding prohibition against topless waitresses where liquor sold); *State v. Turner*, 382 N.W.2d 252, 256 (Minn. Ct. App. 1986) (agreeing that equal protection does not mean that physiological differences between men and women must be disregarded; ordinance prohibiting female from topless sunbathing upheld); *City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So. 2d 742, 751-52 (Miss. 1996) (agreeing that physical differences between sexes may be reflected in laws recognizing those differences without offending equal protection guarantee; regulation of female but not male breasts upheld); *State v. Vogt*, 775 A.2d 551, 558 (N.J. Super. Ct. App. Div. 2001) (agreeing that prohibition against exposure of female breast but not male breast not violative of equal protection because of physical differences between sexes); *MJR's Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 575 (Tex. Ct. App. 1990) (holding the law allows sex-based distinctions if physical characteristics require these distinctions, and city introduced undisputed testimony that physiological and sexual distinctions exist between male and female breasts, and that female breasts differ both internally and externally from male breasts, and that the female, but not male, breast is mammary gland; ordinance requiring complete and opaque covering of areola of female breast but not male breast upheld against equal rights amendment challenge); *City of Seattle v. Buchanan*, 584 P.2d 918, 920 (Wash. 1978) (en banc) (asserting common knowledge tells us there is a real difference between the sexes with respect to breasts; upholding conviction for public exposure of female breasts in face of equal rights amendment challenge). The foregoing authorities persuade us that the physical characteristic distinctions made by the City Ordinance do not operate to the disadvantage of women.

{16} We therefore conclude that the City Ordinance does not treat men and women differently in violation of the New Mexico Equal Rights Amendment. The City Ordinance does not prohibit public nudity by women while allowing public nudity by men. It recognizes that females and males have different anatomies, so the objective is accomplished in a non-discriminatory manner. In this context, we agree with the United States Supreme Court that, "[t]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks and citation omitted). We therefore hold that the City Ordinance does not make an invidious gender classification that operates to the disadvantage of women and it does not violate the New Mexico Equal Rights Amendment.

**B. New Mexico Human Rights Act**

{17} Defendant argues that the Human Rights Act makes it an unlawful discriminatory practice for any establishment that provides or offers its services to the public to make a distinction, directly or indirectly in offering or refusing to offer its services to any individual because of sex. *See* NMSA 1978, § 28-1-2(H) (2003) (defining "public accommodation" in part as "any establishment that provides or offers its services, facilities, accommodations or goods to the public"); § 28-1-7(F) (stating it is an unlawful discriminatory practice for "any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of . . . sex"). Defendant asserts that the City Ordinance requires her to discriminate on the basis of sex in offering her services to the public, in violation of the Human Rights Act. We have already held that the City Ordinance does not discriminate on the basis of sex in violation of the New Mexico Equal Rights. We therefore reject Defendant's contention that she is discriminating against women in violation of the Human Rights Act by complying with the City Ordinance.

**C. Form of Expression and Communication of Ideas**

{18} Defendant asserts that she was engaged in a form of expression and the communication of ideas in three ways: (1) the expression on an age-old human art form (body art-artistic expression), (2) the display of one of the many procedures that her business offers so that prospective customers would be better able to judge for themselves whether or not they wanted to undergo such a procedure (nipple piercing-education), and (3) the general communication of the nature of her business to the public (advertisement-commercial speech). Therefore, she argues, her conduct was permitted by the City Ordinance in the absence of a finding of obscenity.

{19} The argument is based on the language of Section 11-8-3(B) of the City Ordinance which states in pertinent part that "this article [prohibiting public nudity] shall not apply to forms of expression and the communication of ideas, such as theatrical appearances, which may not be prohibited absent a finding of obscenity." The district court ruled that Defendant's conduct did not fall under this provision of the City Ordinance and she was therefore not entitled to a determination of whether the conduct was obscene. Defendant argues on appeal that this ruling was erroneous. We review her contention de novo, *Acosta v. City of Santa Fe*, 2000-NMCA-092, ¶ 16, 129 N.M. 632, 11 P.3d 596 (stating interpretation of an ordinance presents a question of law, which is reviewed de novo). We affirm the district court.

{20} The City Ordinance means that public nudity may not be prohibited when a person is engaged in conduct constitutionally protected by the First Amendment. *See Spence v. Washington*, 418 U.S. 405, 409 (1974) (stating that conduct "sufficiently imbued

with elements of communication" falls within scope of First Amendment); *State v. Johnson*, 104 N.M. 430, 431, 722 P.2d 681, 682 (Ct. App. 1986) (noting United States Supreme Court holding that obscenity is not expression protected by First Amendment). *See also City of Farmington v. Fawcett*, 114 N.M. 537, 541, 843 P.2d 839, 843 (Ct. App. 1992) (stating Article II, Section 17 of New Mexico Constitution recognizes that obscenity may be an abuse of free speech). In determining whether particular conduct merits First Amendment protection, the Supreme Court has "asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The issue here is whether the process of piercing a female nipple is "sufficiently imbued with elements of communication." *Spence*, 418 U.S. at 409. We do not believe that exposing the female body this way for this purpose is an artistic, dramatic, or educational form of expression entitled to First Amendment protection. We agree with other jurisdictions that the *process* of piercing the nipple is not itself communicative. *See State ex rel. Med. Licensing Bd. v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986) (concluding courts presented with the issue have found that the process of tattooing is neither speech nor even symbolic speech); *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002) (stating defendant made no showing that process of tattooing is communicative).

{21} Nor is there anything in the record showing that there was any "communication" of the type Defendant says she was engaged in. All this record shows is that people were on the sidewalk watching the female customer with her breasts exposed getting her nipples pierced. *See Yurkew v. Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980) (stating there was no showing that normal observer or recipient regarded process of tattooing as communicative).

{22} We affirm the district court's decision that Defendant's conduct did not involve a form of expression and the communication of ideas meriting constitutional protection. The City, therefore, was not required to establish that the conduct was obscene.

**CONCLUSION**

{23} The judgment and sentence of the district court is affirmed.

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

**MICHAEL E. VIGIL, Judge**

**I CONCUR:**

**CELIA FOY CASTILLO, Judge**

**MICHAEL D. BUSTAMANTE, Judge (specially concurring)**

**BUSTAMANTE, Judge (specially concurring).**

{25} This case presents a surprisingly difficult issue under our Equal Rights Amendment. The interest at issue here can be viewed as trivial, especially in comparison to the interests considered in *N.M. Right to Choose*. On the other hand, the City has criminalized behavior differently on a gender-based characteristic. *N.M. Right to Choose* can be read to require the City to prove a compelling state interest supporting the classification. The Opinion refuses to label the classification as suspect. I agree with that approach though perhaps for a slightly different reason. The activity and interest at stake is the polar opposite of what *N.M. Right to Choose* considered. No court has recognized any general right or license to public nudity, whereas equal and fair access to health care is of critical importance to us all. The potential harm to women flowing from this classification is slight enough not to warrant or require the kind of judicial intervention inherent in strict scrutiny review.

**MICHAEL D. BUSTAMANTE, Judge**