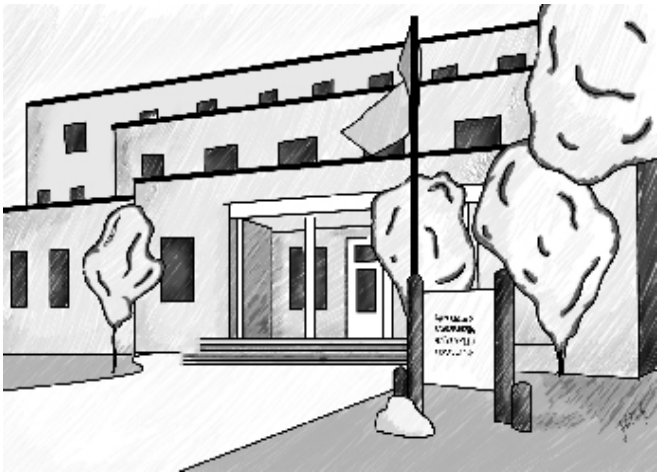
BAR BULLETIN

OFFICIAL PUBLICATION OF THE STATE BAR OF NEW MEXICO

JULY 15, 2004 • VOLUME 43, NO. 28



Julie Schwartz *San Miguel County Courthouse, Las Vegas, NM*

Inside This Issue:

Special Insert
CLE AT • A • GLANCE

Just for members...

State Bar

Bill Kitts Mentor Program

Creating Partnerships for Professional Development

What is the Mentor Program?

The Bill Kitts Mentor Program pairs New Mexico lawyers statewide so that less experienced practitioners can gain insight from a more seasoned colleague.

Mentorship arrangements generally last six months although many participants continue relationships far beyond the mentorship.

Mentor Program Application Form

For office use only:

Date received: _____ Date Matched: _____

Name of Match: _____

CENTER FOR LEGAL EDUCATION

SEMINAR REGISTRATION FORM

[redacted]

State Bar Center

[redacted]

[redacted]

[redacted]

[redacted]

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Professionalism Tips

With respect to the courts and other tribunals:

Before dates for hearings or trials are set, or immediately after dates have been set, I will verify the availability of participants and witnesses, and I will also notify the court (or other tribunal) and opposing counsel of any problems

BAR BULLETIN

Board of Bar Commissioners - Officers
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Cite officially as Bar Bulletin (ISSN 1062-6611). Vol. 43, No. 28, July 15, 2004.
Subscription price $80 per year. Subscriptions are nonrefundable once purchased.
Published weekly by the State Bar, 5121 Masthead NE, Albuq., NM 87109
(505) 797-6000 • 1-800-876-6227 • Fax: (505) 828-3765
E-mail: bb@nmbar.org • www.nmbar.org

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

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

21
Membership Services Committee, 1:30 p.m., State Bar Center

Law Office Management Committee, noon, State Bar Center

23
Board of Bar Commissioners, 10 a.m., Best Western Hilltop House, Los Alamos, NM

26
Natural Resources, Energy, and Environmental Law Section Board of Directors, noon, State Bar Center

August

4
Employment and Labor Law Section Board of Directors, noon, State Bar Center

State Bar Workshops

July

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

24
Consumer Debt/Bankruptcy Workshop* 10 a.m., Best Western Steven's Inn, 1829 S. Canal St., Carlsbad, NM

27
Estate Planning Workshop 5:30 – 7:30 p.m., Branigan Library, Las Cruces, NM

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

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

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.

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.

Second Judicial District Court

Announcement of Vacancy

A vacancy on the Second Judicial District Court exists due to the retirement of Judge W. John Brennan.

The chair of the Second Judicial District Court Nominating Commission now solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://www.unm.edu/~nmjudsel, or requested to be e-mailed/faxed/mailed by calling Reva Chapman, (505) 277-4700. The deadline for applications/nominations is 5 p.m., July 23.

The commission will meet at 9 a.m., Aug. 6 at the Second Judicial District Courthouse.

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 Tapes and Logs, Domestic Cases, 1970-1986

Pursuant to the Supreme Court Ordered Judicial Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes and logs filed with the court in domestic cases for years 1970 to 1986. Attorneys who may have cases with tapes and logs and wish to have duplicates made may verify tape and log information with the Special Services Division, (505) 841-6787, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes and logs will be destroyed after July 29.

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.

Settlement Facilitation Conference

The Second Judicial District Court Alternatives Program and the UNM School of Law will hold the 2004 Settlement Facilitation Conference Oct. 14-15 at the UNM School of Law. Further information will be provided through mailings and future issues of the *Bar Bulletin*.

Settlement Week Deadlines

The Second Judicial District Court's 16th Annual Settlement Week is scheduled for Oct. 18 through 25. Family Law cases will be set for Oct. 18 through 22 and on Oct. 25 if necessary. The deadline for requesting a civil or domestic relations case to be referred to Settlement Week 2004 is July 30. For complete details regarding referral requests, refer to LR2-602, Section C, of the Second Judicial District Court's Local Rules governing the Settlement Facilitation Program, or call Court Alternatives, (505) 841-7412. When using a Settlement Week Request Form, include names, addresses and telephone numbers of all attorneys/parties (especially pro se parties) and individuals requiring notice of the settlement facilitation.

Thirteenth Judicial District Court

Announcement Of Vacancy

A vacancy on the Thirteenth Judicial District Court will exist as of July 31, due to the resignation of Judge Kenneth G. Brown.

The chair of the Thirteenth Judicial District Court Nominating Commission solicits nominations and applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated. Applications may be obtained at: www.unm.edu/~nmjudsel; the UNM School of Law, 1117 Stanford NE, Albuquerque, NM; or mailed/emailed/faxed to attorneys by calling Reva Chapman at (505) 277-4700. The deadline for applications/nominations is 5p.m., Aug. 9.

The Thirteenth Judicial District Court Nominating Commission will interview applicants on Aug. 26 in Bernalillo, N.M.

U.S. District Court for the District of New Mexico

Announcement of Investiture

The Judges of the United States District Court for the District of N.M. invite you to attend the investiture of the Honorable Judith C. Herrera as U.S. District Judge at 4 p.m., August 5 at the United States Courthouse, Main Courtroom, Second Floor, 120 South Federal Place, Santa Fe, NM. There will be a reception from 5:30 p.m. to 7:30 p.m. at the Eldorado Hotel, 309 W. San Francisco, Santa Fe, N.M. Please RSVP to (505) 348-2001; or e-mail to jbullington@nmcourt.fed.us.

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

Board of Bar Commissioners

Meeting Agenda

The State Bar Board of Bar Commissioners will meet at 10 a.m., July 23 at the Best Western Hilltop House in Los Alamos. The meeting agenda is as follows:

1. Approval of May 7, 2004 meeting minutes
2. Finance Committee report
3. Acceptance of financials
4. Casemaker update
5. President's report
   A. Other state bar conventions
   B. Commission on Professionalism facilitation/strategic planning meeting report
   C. Discussion of Supreme Court order denying the deunification petition
   D. Common Cause meeting regarding funding for judicial campaigns
   E. Other
6. Executive director's report
7. Personnel Committee report
   A. Approval of revised employee handbook
8. Appointments to New Mexico Commission on Access to Justice
9. CLE Oversight Committee Report
10. Annual Convention Planning Committee report
11. Reciprocity Committee report
12. Discussion regarding Board of Bar Commissioners composition
13. Approval of membership services contracts
14. Discussion of discrepancy between State Bar bylaws and Supreme Court Rule 24-101 regarding criteria of YLD membership
15. Approval of Client Protection Fund recommendation
16. Division reports
    A. Young Lawyers Division
    B. Senior Lawyers Division
    C. Paralegal Division
17. New business
18. Long range planning retreat

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 Aug. 4. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Eric Miller, section chair, (505) 995-1017.

Lawyers Assistance Committee

Monthly Meeting

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

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

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, 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:

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
11 Closed for Veterans' Day
12 9 - 3 p.m.

December

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

Other Bars

Albuquerque Association of Legal Professionals

Upcoming Meetings

Albuquerque Association of Legal Professionals, the local chapter of the NALS ... the association for legal professionals, 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.

N.M. Defense Lawyers Association

Nominations Sought for Outstanding Civil Defense Lawyer

Nominations are being accepted by the New Mexico Defense Lawyers Association 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. The deadline for nomination submissions is July 31.

Sandoval County Bar

July Meeting

The Sandoval County Bar Association will hold its next monthly luncheon meeting from noon until 1 p.m., July 22 at the Pasta Café Italian Grill, 3201 Southern Boulevard SE in Rio Rancho. Lunch will be followed by a presentation from Theresa Valencia, chief clerk of the Thirteenth Judicial District Court, and staff. Members are welcome to bring staff who work with the clerk's office. Reservations should be made before 5 p.m., July 20 by calling Cari, legal assistant to President Brad L. Hays, at 892-1050.

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.

UNM Law School Establishes Ramo Lecture Series on International Justice

Great Britain's Attorney General to Speak Oct. 28

Dr. Barry and Roberta Cooper Ramo of Albuquerque have established the Ramo Lecture on International Justice at the University of New Mexico School of Law. The attorney general for Great Britain, the Honorable Lord Peter Goldsmith QC, will give the inaugural Ramo Lecture on International Justice on Thursday, Oct. 28. The time and location will be announced at a later date.

The free, public lectures will be held biannually. World-renowned speakers will give talks regarding the international impact of the Rule of Law.

Dr. Ramo is a member of the New Mexico Heart Institute and clinical professor at the UNM School of Medicine and at Duke University. Cooper Ramo is a lawyer at Modrall Sperling law firm and former president of the UNM Board of Regents. She was the first woman president of the American Bar Association.

Workers' Compensation Administration

Destruction of Exhibits and Depositions

The New Mexico Workers' Compensation Administration will be destroying all exhibits and depositions filed in cases closed in 2002 (excluding cases 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.

Call For Nominations
2004 Annual Awards

Nominations are being accepted for the 2004 annual awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar in 2003 or 2004. Awards will be presented at the 2004 Bench & Bar Conference, November 5-6.
A letter of nomination for each nominee should be sent to: Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or faxed to (505) 828-3765.

Deadline for nomination submissions is August 18, 2004.

Consideration should be given to the following award descriptions and criteria when submitting nominations. ***(Previous recipients for the past five years are listed below, unless otherwise noted.)***

1. Professionalism Award: This award is given to one or more attorneys or judges who, over long and distinguished legal careers, have, by their ethical and personal conduct, exemplified for their fellow attorneys, the epitome of professionalism. This award is limited to one per year, with the exception of an additional posthumous award. Nominations will be reviewed by the Commission on Professionalism to be recommended to the Board of Bar Commissioners for selection. *Recipients for last five years:* William S. Dixon; Richard L. Gerding; Paul A. Kastler; Neil P. Mertz; Betty Reed; Felix Briones, Jr.; James C. Ritchie; Rozier E. Sanchez; Stuart D. Shanor; Joseph J. Mullins; Robert E. Sabin; and Matias A. Zamora.

2. Seth D. Montgomery Distinguished Judicial Service Award: This award is given to judges who have distinguished themselves through long and exemplary service on the bench. The award is generally given to judges who have or soon will be retiring and is not necessarily an annual award. This award is limited to one per year, with the exception of an additional posthumous award. *Recipients for last five years:* Gene E. Franchini; Joseph F. Baca; Rudy S. Apodaca; Thomas A. Donnelly; and Robert M. Doughty II.

3. Outstanding Judicial Service Award: This award is given to judges whose recent activities have significantly advanced the administration of justice or improved the relations between the bench and the bar. This award is limited to one per year, and is not necessarily given annually. *Recipients for last five years:* Anne Kass; Lynn Pickard; Geraldine E. Rivera; Albert S. Murdoch; Neil P. Mertz; Rudy S. Apodaca; Diane Dal Santo; and Graden W. Beal.

4. Courageous Advocacy Award: This award is given to one or more members of the bar who have distinguished themselves, during their legal careers, by courageous advocacy of unpopular causes, often without compensation and without concern for the impact of such advocacy upon their own practice. This award is not necessarily given annually. *Recipients for last five years:* Randolph H. Barnhouse; Carmen E. Garza; Victoria W. Doom; and Carlos Vigil.

5. Robert H. LaFollette Pro Bono Award: This award is presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance to people who could not afford the assistance of an attorney. It is intended to reflect such contribution over an attorney's career, rather than during the past year. This award is not necessarily given annually. *Recipients for last five years:* Albert W. Schimmel, III; Nicholas T. Leger; Cristen Conley; Barbara V. Johnson; and James T. Locatelli.

6. Distinguished Bar Service Award - Lawyer: This award is given to attorneys who have given long and valuable service to the State Bar of New Mexico over a significant period of time. It is intended to recognize long-term commitment to bar services and significant contributions to the legal profession. This award is not necessarily given annually. *Recipients for last five years:* Michael T. Murphy; Joyce Stowers; James R. Crouch; Robert J. Desiderio; Jan B. Gilman-Tepper; Raymond Hamilton; Henry F. Narvaez; Presiliano A. Torrez; Arturo L. Jaramillo; Farrell Lines; Martin B. Paskind; and Edward R. Ricco.

7. Distinguished Bar Service Award - Nonlawyer: This award is given to one or more nonlawyers who, over a period of time, have served or assisted the legal profession of the State Bar of New Mexico in a significant way. This award is not necessarily given annually. *Recipients for last five years:* Edwina Logan Hambor; Carol Herrera; Louise Kodituwakku; Garry Spencer; Harold Daum; Arturo G. Bastidos; Dorothy S. Peters; and John Arango.

8. Outstanding Contribution Award: This award is given annually to those members of the bar who have made outstanding and extraordinary contributions of their time and talents to bar activities during the past year. *Recipients for last three years:* 2003 - Daniel J. Behles; Michael F. Hacker; Ronald E. Holmes; Thomas J. "Budd" Mucci; and Jason Neal. 2002 - Roger Eaton; Jeffrey L. Lowry; Gary O'Dowd; Peter H. Pierotti; Robert E. Sabin; Barbara L. Shapiro; Sarah M. Singleton; Alan M. Varela; Elizabeth S. Vencill; Mitchel L. Winick; and Geno Zamora. 2001 - Ann Halter.

9. Outstanding Contribution Award - Nonlawyer: This award is given to nonlawyers who have made outstanding and extraordinary contributions of their time and talents to bar activities during the past year. This award is not necessarily given annually. *Recipients for last five years:* Christiane Wilson; Bee J. Clem; Eileen I. Irish; Kathleen F. Campbell; Linda A. Murphy; and Legal Assistants Division.

10. Outstanding Local Bar Award: This award is given to one or more local bar associations that have had the most outstanding programs and activities for their members and for the public at large. This award is not necessarily given annually. *Recipients for last five years:* Colfax-Union County Bar; Curry-Roosevelt County Bar; Chaves County Bar; Lea County Bar; and Eddy County Bar.

11. Outstanding Program Award: This award is given to recognize programs of the bar that serve the mission of being a united, inclusive organization serving the legal profession and the public. This award is not necessarily given annually. *Recipients for last five years:* Consumer Debt Workshops; Consumer Attorney Assistance Program (CAAP); Cross-Cultural Exchange Project; Lawyers Care Referral Program; Southwest Bench and Bar Conference; Summer Law Clerk Program; KOB-TV Lawline 4; YLD FEMA Program; New Mexico Trial Lawyers Association; Attorney-Client Fee Arbitration Program; Bridge the Gap Program; and First Judicial District *Pro Se* Challenge Project.

12. Pioneer Award: This award is presented to an attorney who has, on his/her own initiative and through considerable creativity, made an exemplary contribution to the State Bar in an area considered to be new, relatively unexplored and of considerable interest and benefit to members of the bar. This award is not necessarily given annually. *Recipients for last five years:* Stephen E. Doerr; Justice Gene E. Franchini; John M. Greacen; Rex D. Throckmorton; and Sarah M. Singleton.

13. Outstanding Young Lawyer of the Year Award: This award is given to one or more attorneys who have during the formative stages of their legal careers by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism. In addition to a commitment to clients' causes, this attorney has demonstrated a commitment to public service and in so doing has enhanced the image of the legal profession in the eyes of the public. To qualify for this award, an attorney must have practiced no more than five years or must be no more than 36 years of age. *Recipients for last five years:* Roxanna M. Chacon; H. Nicole Schamban; Trent A. Howell; Devon Fooks; Jeffrey H. Albright; and Christopher Hassan.

14. Outstanding Contribution to People with Disabilities Award: This award is intended to recognize and honor exceptional achievements and contributions to further promote and protect the rights of people with disabilities. It is intended to acknowledge contributions to furthering the rights, dignity, and access to justice for people with disabilities. This award is not necessarily given annually. Nominations will be reviewed by the Committee for the Delivery of Legal Services to People with Disabilities to be recommended to the Board of Bar Commissioners for selection. *Recipients for last five years:* Albert T. Gonzales, Sr.; Ann T. Sims; Peter M. Cubra; V. Colleen Miller; Therese E. Yanan; Margaret E. Davidson; Anne B. Thomas; and J. Alex Valdez.

15. Quality of Life - Legal Employer Award: This award is intended to honor and recognize legal employers who have demonstrated exemplary commitment in supporting programs designed to enhance the quality of life for employees. The employer must show a commitment to the quality of life of the individuals employed there through programs, activities, office policies or other means. Additional criteria may be requested from Kris Becker at (505) 797-6038. Nominations will be reviewed by the Standing Committee on Quality of Life to be recommended to the Board of Bar Commissioners for selection. This award is not necessarily given annually. *Previous recipients:* New Mexico Environmental Law Center; Swaim, Schrandt & Davidson, P.C.; New Mexico Court of Appeals and Daniel J. O'Brien.

16. Quality of Life - Lawyer Award: This award is intended to recognize an attorney who demonstrates exemplary commitment to and value of an overall balance/quality of life. It is intended to honor and publicly recognize an attorney who demonstrates to colleagues, family and friends that he/she consistently works to improve quality of life, and has an ongoing commitment to personal *and* professional fulfillment. Additional criteria may be requested from Kris Becker at 797-6038. Nominations will be reviewed by the Standing Committee on Quality of Life to be recommended to the Board of Bar Commissioners for selection. This award is not necessarily given annually. *Previous recipients:* Charles W. Daniels; Philip B. Davis and JoAnn S. Jaramillo.

NO. 28,313

**IN THE MATTER OF A PETITION
TO MODIFY RULE 12-401**

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion to modify Rule 24-101 NMRA, response thereto, and reply, and the Court having considered said pleadings 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 petition hereby is DENIED; and

IT IS FURTHER ORDERED that the State Bar of New Mexico shall confer with all voluntary bar associations in order to recommend a process by which this Court can consider useful, relevant, and meaningful information on the issues raised in the petition.

IT IS SO ORDERED.

Done at Santa Fe, New Mexico, this 28th day of June, 2004.

Chief Justice Petra Jimenez Maes

FROM THE NEW MEXICO SUPREME COURT

Opinion Number: 2004-NMSC-020

TOPIC INDEX:
Contracts: Adhesion Contract; Ambiguous Contract; and Public Policy
Insurance: Insurance Contract; Motor Vehicle Insurance; Stacking; and Uninsured or Underinsured Motorist

JOHN MONTANO,
Plaintiff-Petitioner,
versus
ALLSTATE INDEMNITY COMPANY,
Defendant-Respondent.
No. 27,966 (filed: May 20, 2004)

ORIGINAL PROCEEDING ON CERTIORARI
JAY G. HARRIS, District Judge

RANDI MCGINN
CLAY CAMPBELL
MCGINN & CARPENTER, P.A.
Albuquerque, New Mexico
for Petitioner

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
LISA MANN
JENNIFER A. NOYA
Albuquerque, New Mexico
for Respondent

RUDOLPH A. LUCERO
RUTH FUESS
MILLER STRATVERT, P.A.
Albuquerque, New Mexico
for Amicus Curiae National Association of Independent Insurers

JANET SANTILLANES
Albuquerque, New Mexico
for Amicus Curiae New Mexico Consumer Action and New Mexico Trial Lawyers Association

OPINION

EDWARD L. CHÁVEZ, JUSTICE

{1} In this case we are required, once again, to determine whether an insurance company effectively precluded its insured from stacking the policy limits of all of his vehicles insured under the policy for his uninsured motorist ("UM") claim. Although we have reviewed several such attempts by the insurance industry in the past, each case has presented a new wrinkle. Yet, this Court has never upheld an anti-stacking clause in UM policies because in each case we found either an ambiguity in the policy or the payment of multiple premiums. We have done so in order to protect the reasonable expectations of the insured and because the insured should only get what he or she pays for. In this case we decline Plaintiff's invitation to declare all anti-stacking provisions void as against public policy. However, to further the important principles previously described, and influenced by NMSA 1978, § 66-5-301(A) and (C) (1983), we modify *Rodriguez v. Windsor Insurance Co.*, 118 N.M. 127, 879 P.2d 759 (1994) and *Lopez v. Foundation Reserve Insurance Co.*, 98 N.M. 166, 646 P.2d 1230 (1982), and hold that insurance companies must obtain written rejections of stacking in order to limit their liability. Such a modification to our judicially-created stacking doctrine will ensure that the insured's reasonable expectations are met and that an insured gets what he or she pays for and no more. Such a change should also, we hope, end the seemingly constant litigation in this area of law. Because, however, we recognize that this represents a new direction in our stacking jurisprudence, we will resolve the stacking question in this case under *Rodriguez*, which we read to require a plain and affirmative declaration that the amount charged represents a single premium for a single amount of coverage. This policy lacks such a declaration, and in the absence of such a declaration, Plaintiff is entitled to stack all four coverages.

I. Facts

{2} Plaintiff was injured in a single-car accident allegedly caused by an unidentified truck who negligently sprayed rocks onto the road. As a result, Plaintiff filed suit against his insurer, Defendant Allstate Indemnity Company ("Allstate"), alleging that he was contractually entitled to compensation under his UM policy, as well as other independent causes of action. Plaintiff further claimed that he was entitled to "stack," or aggregate the UM coverage limits of his four insured automobiles. Allstate, on the other hand, contends that under the contract Plaintiff is only entitled to stack the coverage limits of two policies, and that the contract is enforceable under New Mexico law. After resolving all other claims, the parties submitted the resolution of the stacking question to the District Court on cross-motions for summary judgment, agreeing that the matter be submitted on the basis of "stipulated facts by the parties, affidavits and sworn deposition testimony." The District Court granted Allstate's motion and denied Plaintiff's. Plaintiff appealed, and the Court of Appeals, with Judge Bustamante specially concurring, affirmed the District Court. *Montano v. Allstate Indemnity Co.*, 2003-NMCA-066, 133 N.M. 696, 68 P.3d 936. In a lengthy but lucid opinion, a majority of the Court of Appeals concluded that: (1) it would not advance this state's public policy to require stacking in every instance, *id.* ¶ 77; (2) courts should not look at the actuarial data behind a policy's premium structure, *id.* ¶¶ 58-59; and (3) the relevant provisions of Montano's insurance contract were not ambiguous, *id.* ¶ 47.

{3} The parties stipulate that the relevant contractual provisions are the declarations page, the policy itself, an amendatory endorsement, and an explanatory insert. The first page of Plaintiff's declarations lists separate premiums for each of Plaintiff's

four covered automobiles, including a separate charge for UM property damage coverage, but one single charge for "additional coverages." That "additional coverage" is explained on a separate sheet to be UM coverage for bodily injury, and the limits of the coverage ($25,000 per person / $50,000 per accident) are indicated next to a single premium figure of $114.30.

{4} The relevant "Limits of Liability" policy provision, as amended by a later endorsement, provides in part:

> The Uninsured Motorists Insurance for Bodily Injury limit stated on the declarations page is the maximum amount payable for this coverage by this policy for any one accident, except when two or more vehicles are insured under this policy, **we** will stack or aggregate up to two, but no more than two, uninsured motorist insurance for **bodily injury** coverages under this policy. This means the insuring of more than one auto for other coverages or under Section II of this coverage will not increase **our** limit of liability beyond the amount shown in the declarations, except when two or more vehicles are insured under this policy, we will stack or aggregate up to two, but no more than two, Uninsured Motorist Insurance for Bodily Injury coverages under this policy.

Along with the amendatory endorsement came an explanatory insert, which provided:

> We have revised the "Limits of Liability" provision under "Bodily Injury Caused by Uninsured Motorists" . . . :
>
> If you insure two or more vehicles under this policy, you can now "stack" the limits of Uninsured Motorists Insurance for Bodily Injury for two of the vehicles. For example, if you have two or more vehicles, which are each insured under this policy at $100,000 per accident for this coverage, we will pay up to $200,000 (subject to the "per person" limit) for injuries sustained as the result of an accident with a legally-liable uninsured motorist.

{5} After the amendment, therefore, Allstate's policy no longer contained an absolute anti-stacking clause, but rather a limitation-of-stacking clause. Allstate changed its former absolute anti-stacking policy as a result of court decisions in Kentucky and Oklahoma. *See Kramer v. Allstate Ins. Co.*, 909 P.2d 128 (Okla. Ct. App. 1994); *Wilson v. Allstate Ins. Co.*, 912 P.2d 345 (Okla. 1996); *Swartz v. Metropolitan Prop. & Cas. Co.*, 949 S.W.2d 72 (Ky. Ct. App. 1997). In *Wilson*, one of the two Oklahoma cases, Allstate issued a single insurance policy covering the plaintiff's two vehicles. The policy provided for $25,000.00 per person and $50,000.00 per accident in UM coverage and contained language purporting to limit Allstate's liability to pay only one UM amount per accident, regardless of the number of automobiles covered under the policy. However, Allstate charged nearly twice the premium to multiple-car policyholders than it charged to single-car policyholders for identical UM coverage limits. Allstate had argued that, even with a higher premium for multi-vehicle policies, it charged a single premium and unambiguously precluded stacking; thus, stacking should not be required. *Wilson*, 912 P.2d at 346; *see also Kramer*, 909 P.2d at 129. The Oklahoma Supreme Court disagreed and concluded that, because the premium for a multi-vehicle policy was nearly twice as large as for a single-vehicle policy, Allstate should be required to stack two coverage limits for UM claims. *Wilson*, 912 P.2d at 347; *see also Kramer*, 909 P.2d at 129; *Swartz*, 949 S.W.2d at 76-77. The original policy issued to Plaintiff by Allstate contained the same provisions rejected by the *Wilson* court.

{6} The parties in this case also stipulate that Allstate charges a "single uninsured motorist bodily injury cover premium," for a multiple-car policy, although they also stipulate that Plaintiff paid $114.30 "in premiums" for his coverage. The parties further stipulate that Allstate also charged, at the same time, a single premium of $61.80 for a single-vehicle policy. The parties now dispute the legal significance of Allstate's "single" premium and the relevance of actuarial justifications for this premium structure, but both agree that the dispute should not prevent the determination of this case on summary judgment.

{7} On appeal, Plaintiff argues: (1) that all anti-stacking clauses should be declared void as against New Mexico's public policy; and alternatively, (2) that under the circumstances of this case, he should be permitted to stack four coverage limits, Allstate's limitation-of-stacking clause notwithstanding. For the following reasons, we reverse the Court of Appeals and hold that Allstate's limitation-of-stacking clause is unenforceable.

II. Plaintiff's Public Policy Argument

{8} Plaintiff first argues that we should follow *United States Fidelity & Guaranty Co. v. Ferguson*, 698 So. 2d 77 (Miss. 1997), and declare that all anti-stacking clauses are void as against New Mexico's stated policy in favor of stacking. In *Ferguson*, the Mississippi Supreme Court held that its public policy required stacking of UM coverage for every vehicle insured under every policy regardless of the number or amount of premiums paid for the coverage. *Id.* at 79. The Mississippi Supreme Court had previously determined that the intent of Mississippi's UM statute was "to provide the insured with *adequate protection* against injury caused by an uninsured motorist," *id.* (emphasis added), and that stacking had become a "positive gloss" on the UM statute. *Id.* (quoted authority omitted). The court was skeptical of traditional notions of freedom of contract because insurance contracts are contracts of adhesion: "When the entire insurance industry writes its policies to preclude stacking of UM coverage, attempting to circumvent case law and defeat public policy, the insured is denied any choice whatsoever." *Id.* at 80. For these reasons the Court determined that, no matter the premiums paid, stacking would be required.

{9} Although our cases have expressed a public policy in favor of stacking as broadly as did the cases in Mississippi prior to *Ferguson*, we are not willing to expand this public policy at this time to require stacking in all cases. We have always understood stacking to be the remedy for an ambiguous contract or the charging of multiple premiums. This Court's intra-policy stacking jurisprudence begins with *Lopez*, 98 N.M. at 166, 646 P.2d at 1230. In *Lopez* the insured had purchased an insurance policy covering two automobiles and had paid separate premiums for UM coverage on each vehicle. Despite the clarity of the limitation-of-liability clause in that case, we found the policy ambiguous because it did not explain the effects of multiple premiums paid for UM coverage under the multi-vehicle policy. Having found an ambiguity, we determined that judicial construction of the policy was required. In deciding to allow the insured to stack his coverage limits, we relied primarily on two

rationales which we found to be closely related: (1) intra-policy stacking fulfills the reasonable expectation of the insured, and (2) paying two premiums entitles an insured to two recoveries. We noted that "[w]here an insurance company charges a separate full uninsured motorist premium for each vehicle under a single or several policies, it is only fair that the insured be permitted to stack the coverages for which he has paid," even when the second premium is reduced. *Id.* at 171, 646 P.2d at 1235. Our rationale was guided by the simple fact that UM personal injury coverage does not follow the automobile. Instead we recognized that general UM coverage also insures one against bodily injury while a pedestrian or a passenger in someone else's vehicle. *Id.* at 169, 646 P.2d at 1233.

{10} One option available to the insurance industry following our holding in *Lopez* was simply to accept that charging multiple premiums would result in stacking. The industry could then have adjusted its premiums accordingly while giving the insured the right to accept or reject stacked coverages. Instead, insurance companies have sought only to avoid stacking coverages. These efforts continued to meet with the disapprobation of the courts, due primarily to the ambiguities that persisted with anti-stacking provisions. *See Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 757 P.2d 792 (1988); *Rodriguez*, 118 N.M. at 127, 879 P.2d at 759.

{11} In *Jimenez* we held that, although the policy at issue unambiguously precluded stacking, that exclusion violated public policy because multiple premiums had been charged. In so doing, we emphasized the second rationale in *Lopez* over the first:

> [T]he law in New Mexico . . . has been clear that when an injured insured is the beneficiary of a policy and either the insured or another has paid premiums for the benefit of the injured insured, then all policy coverages under which he or she is a beneficiary may be stacked.

Jimenez, 107 N.M. at 325, 757 P.2d at 795.

{12} In *Rodriguez* we had the opportunity to determine exactly the question presented in this case, specifically, whether we would preclude stacking when the insurance policy purports to preclude it and it appears that only one premium was charged. We initially noted that:

> [P]remium structures for uninsured motorist benefits in multi-car policies that purport to avoid a separate charge for the coverage with respect to each car . . . lay[] heavy stress on the rationale in many of our cases predicating stacking, in significant part, on the insured's payment of multiple premiums for multiple coverages—i.e., a separate premium for the uninsured motorist coverage "on" each car insured under the policy.

118 N.M. at 127, 879 P.2d at 759. Because of a different ambiguity in the policy, however, we did not have to determine whether we would require stacking when a true single premium had been paid.

{13} The policy at issue in *Rodriguez* included a declarations page that stated that "insurance is provided where a premium is shown for the coverage," and included a chart with types of insurance on one axis and cars on the other. *Id.* at 128, 879 P.2d at 760. In the row labeled uninsured motorist, the policy listed the full price of the coverage in the first car's column, and listed "INCL" in each other column. The parties disputed whether the insurer charged separate premiums for each automobile. We determined that, when deciding whether more than one premium has been paid, "the essential factor . . . is whether a reasonable insured . . . would think that she was paying more than one premium for more than one coverage." *Id.* at 130, 879 P.2d at 762. We concluded that the policy was ambiguous as to whether more than one premium was paid because: (1) it was unclear what "INCL" meant in the policy declarations page; (2) because, although UM insurance follows the insured, not the car, the UM coverage was listed on a car-to-car basis; and (3) because the figures used in the limitation of liability section contradicted those on the declaration page. Because of these ambiguities, we construed the policy against the insurer and concluded that stacking was permitted. *Id.* at 133, 879 P.2d at 765; *see also Allstate Ins. Co. v. Stone*, 116 N.M.464, 863 P.2d 1085 (1993) (declining to determine whether stacking would be required when the policy purports to charge only one premium, because other aspects of the contract remained ambiguous).

{14} Importantly, however, we further stated that "it is [not] impossible for an insurance company to issue uninsured motorist coverage that is immune to stacking." *Rodriguez*, 118 N.M. at 133, 879 P.2d at 765. Noting that we had given effect to an unambiguous clause providing that medical payments coverages could not be stacked in *Sanchez v. Herrera*, 109 N.M 155, 783 P.2d 465 (1989), we indicated that

> it may be possible to give effect to a *truly* unambiguous antistacking clause, provided it plainly notifies the insured that only one premium has been charged for one insurance coverage, that the coverage provides personal accident insurance that cannot be stacked regardless of the number of vehicles covered by the policy, and that the insured should bear this feature in mind when purchasing insurance.

Rodriguez, 118 N.M. at 133, 879 P.2d at 765.

{15} We have never held that anti-stacking clauses violate public policy when unambiguous and when only one premium has been charged for the coverage. In fact, the above dicta in *Rodriguez* strongly suggested that we would give effect to anti-stacking clauses in UM policies—as we had in *Sanchez* for a med-pay provision—when they are truly unambiguous and plainly only charge one premium for one coverage limit. Plaintiff asks us to modify our case law and declare that *all* anti-stacking clauses are void as against public policy. We think that such a determination would expand the public policy in favor of stacking beyond what these earlier cases have declared it to be. Our public policy in support of stacking, rather, has always been tied to the notion that it is unfair not to allow stacking *when multiple premiums are paid* or when the policy is otherwise ambiguous. It would thus be an expansion of that policy to also require stacking when the policy clearly only charges a single premium and unambiguously precludes stacking. We decline to modify our case law in order to expand our expression of the public policy underlying stacking.

{16} Further, requiring stacking in all cases on a take-it-or-leave-it basis would reduce the freedom of the parties to contract for less coverage and thus their freedom to decide how much coverage they can afford. This could frustrate, rather than advance, the legislative intent behind the UM statute. By requiring insurers to offer UM coverage, *see* NMSA 1978, § 66-5-301 (1983), the legislature wanted to encourage insureds to purchase such coverage. Requiring stacking for all vehicles would put

the insured who owns multiple vehicles in the position of paying for all of the coverages or rejecting UM coverage altogether, rather than deciding how much coverage they can afford. This could result in some lower-income insureds who own multiple vehicles being effectively "priced out" of UM coverage.

{17} Stacking is a judicially-created doctrine, which thus far has not met the disapproval of the Legislature. *Rodriguez*, 118 N.M. at 127, 879 P.2d at 759 (noting that our past cases have "evolved a strong judicial policy" favoring stacking). Although we have declined to adopt *Ferguson* and declare anti-stacking provisions void as against public policy, the facts of this case convince us that our traditional case-by-case ambiguity analysis has proved unworkable. For that reason, we take this opportunity to chart a new course. Bearing in mind that it is a judicial doctrine, we conclude that the protracted litigation over the validity of anti-stacking clauses in this State demands our continued efforts to clarify when and under what circumstances those provisions might be enforced. In doing so, we must re-evaluate the dicta in *Rodriguez* that suggested that it was possible for an insurer to draft standard contract language that would preclude stacking. In the face of increasingly complex insurance contracts and pricing strategies, we have become convinced that our case law, which includes the suggestion in *Rodriguez* of a safe harbor, is no longer sufficient to protect the reasonable expectations of insureds and to ensure that they get what they pay for. The history of this litigation and the facts of this case convince us that a new approach is needed to satisfy these twin goals of our stacking jurisprudence.

{18} For this new approach, we find Chief Justice Dan Lee's special concurrence in *Ferguson* persuasive. The Chief Justice was uncomfortable with the approach of the majority, which, in his words, "steps across the fine line dividing interpretation of the law [and] promulgation of the law." *Ferguson*, 698 So. 2d at 82 (Dan Lee, C.J., specially concurring). Instead, he looked to the language of Mississippi's UM statute, which, like that in this State, allowed the insured to opt out of UM coverage in writing. In order to clarify and make explicit the intention of the parties,

> the solution is to treat stacked coverage as extra coverage for which the parties have contracted, and to which the insured is entitled by default, unless the insurance company undertakes the burden of obtaining a separate, comprehensible, and written disclaimer of stacking. Under this rationale those who want stacked coverage pay for it, and those who don't want it don't pay for it.

Id. at 84. Such a rule, reasoned the Chief Justice, "best balances the interests in permitting private contractual relations between the parties, and honoring the broad intent of the [UM] statute." *Id.* We agree.

{19} In following the special concurrence in *Ferguson*, we also take guidance from Sections 66-5-301(A) and (C), which together suggest that insurance companies obtain the written rejection of each stacked coverage from its insureds in order to limit that coverage. Section 66-5-301(A) provides that no vehicle liability policy shall be delivered with respect to *any* vehicle registered or principally garaged in New Mexico unless UM coverage is provided therein. Although this Court interpreted this provision in *Lopez* as requiring "only that each of several vehicles insured under a single policy be covered by one minimum coverage," the court also acknowledged that such an interpretation did not preclude an insured from purchasing additional coverage. *Lopez*, 98 N.M. at 170, 646 P.2d at 1234. Before this case we have not been called upon to decide the implications of Section 66-5-301(C) on stacking. That provision has been interpreted as requiring an insured to reject UM coverage in writing. *Romero v. Dairyland*, 111 N.M. 154, 803 P.2d 243 (1990). When these two provisions are read together, we discern a solution to the seemingly inherent ambiguities in anti-stacking clauses: an insurance company should obtain written rejections of stacking in order to limit its liability based on an anti-stacking provision.

{20} As an illustration of our holding, in a multiple-vehicle policy insuring three cars, the insurer shall declare the premium charge for each of the three UM coverages and allow the insured to reject, in writing, all or some of the offered coverages. Thus, hypothetically, in the case of a $25,000 policy, if the premium for one UM coverage is $65, two coverages is an additional $60, and three coverages $57 more, the insured who paid all three (for a total premium of $182) would be covered up to $75,000 in UM bodily injury coverage. However, the insured may reject, in writing, the third available coverage and pay $125 for $50,000 of UM coverage; or the insured may reject, in writing, the second and third coverages and pay $65 for $25,000 of UM coverage; or the insured may reject all three UM coverages. In any event, the coverage would not depend on which vehicle, if any, was occupied at the time of the injury. Thus, the insured's expectations will be clear, and an insured will only receive what he or she has paid for.

{21} Although we recognize this holding expands the holding in *Lopez*, or perhaps even calls it into doubt, we deem it necessary in order to effectuate the two functions of our stacking jurisprudence: fulfilling the reasonable expectations of the insured and ensuring that the insured receive what he or she pays for. In all future cases, an insurance policy that complies with this requirement will avoid the conclusion we now draw from the history of stacking litigation in this State, namely, that anti-stacking clauses are almost inherently ambiguous and are no longer effective at precluding stacking. With written waivers, insureds will know exactly what coverage they are receiving and for what cost; if an insurer is charging a higher premium based on the risk created by multiple vehicles, we will leave that to the market to resolve.

III. Plaintiff's Ambiguity Argument

{22} Although we have set forth the policy language requirements for future stacking cases, we must now determine whether the particular contract at issue in this case effectively limits Plaintiff's right to stack to "two, but no more than two" coverage limits. We recognize that our holding described above is a new, and not easily foreshadowed, aspect to our jurisprudence on stacking and that it would be inequitable to apply it against Allstate before it has had an opportunity to alter its policy language; for those reasons, we choose to give it a purely prospective application. *See Beavers v. Johnson Controls World Servs.*, 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994) (listing as factors we consider when deciding to exercise our inherent authority to give our decisions prospective effect whether the rule is new, whether retroactive application would advance or retard the new rule, and whether it would be inequitable to apply the new rule against the parties). To resolve this case, we will instead rely on our traditional ambiguity analysis, as described in *Rodriguez*. Plaintiff argues: (1) we should, on the basis of Allstate's premium structure, find the limitation-of-stacking clause unenforceable; and (2) the limitation-of-liability clause

is ambiguous and therefore unenforceable under our case law. Because of Allstate's premium structure, it is no simple matter for a reviewing court, much less an insured, to determine whether Allstate charges a single premium or multiple premiums. We therefore hold that Allstate's insurance contract fails to meet the requirements set forth in *Rodriguez*.

{23} As the District Court in this case concluded, Allstate charged a multiple-vehicle rate that is less than twice the single vehicle rate. On this basis, Allstate argues that Plaintiff should not be permitted to stack more than two coverages, precisely as the insurance policy now indicates. Plaintiff argues, however, that we should look behind the text and consider Allstate's methods in establishing its premium rates. As noted, when multiple premiums are charged for UM coverage on multiple cars, even in the face of a truly unambiguous limitation-of-liability clause, stacking will be required. In *Lopez* we suggest that the reasons for such a rule are: (1) it is only fair to give the insured what was paid for, and (2) it would give effect to the reasonable expectation of the insured to allow stacking. For most cases, these two closely related rationales are cumulative; when, however, the policy appears to charge one premium but it is alleged that the one premium contemplates multiple vehicles, then the rationales diverge. If the primary goal is to fulfill the reasonable expectations of the insured, then there is no need to look at anything beyond the language of the policy itself. If, on the other hand, the primary goal is to give insureds what they pay for, then we should, at the very least, be concerned with the actuarial methods used to arrive at the premium and should look behind the policy language itself. Indeed, the parties dispute much regarding how the premiums were calculated in this case and what the primary policy behind our stacking jurisprudence is. For the following reasons, we conclude that we need not resolve which rationale to give primary effect.

{24} We are convinced, however, that to resolve this case we should not ignore everything behind the policy language itself. To do otherwise might encourage actuarial ruses, such as has been alleged by Plaintiff, in order to defeat our stated public policy in favor of stacking when multiple premiums are charged. Indeed, if courts followed the suggestion of the Court of Appeals and refused to review the insurer's actuarial methods, Allstate would likely never have amended its policy in response to case law and permitted its customers to stack at least two coverages. Because Allstate did not increase the premium for UM coverage, but rather amended the policy to allow the stacking of up to two coverages, a reasonable inference is that prior to the mandates of the courts in Oklahoma, Allstate insureds may not have been receiving what they paid for.

{25} Allstate argues that we have determined that the reasonable expectation of the insured is the guiding policy behind our stacking jurisprudence, and as such any actuarial evidence suggesting that multiple premiums have been paid under the guise of a single premium is irrelevant. In support, Allstate relies on *Shope v. State Farm Insurance Co.*, 1996-NMSC-052, 122 N.M. 398, 925 P.2d 515, where we had to determine whether to apply Virginia law to an UM policy when the insured purchased the contract in Virginia, but the accident occurred in New Mexico. Ordinarily, Virginia law, as the lex loci contractus, would apply unless the application of that law would violate a fundamental public policy of New Mexico. Under Virginia law the insurance contract, which clearly prohibited stacking, would be enforced. In deciding to apply Virginia law, we noted that, although New Mexico public policy favors stacking, "our rationale in establishing this policy did not concern fundamental principles of justice, but focused on the expectations of the insured." *Id.* ¶ 7. Furthermore, "[w]hile we interpret New Mexico insurance contracts to avoid repugnancy in clauses that prohibit stacking of coverages for which separate premiums have been paid, this rule is one of contract interpretation that does not rise to the level of a fundamental principle of justice." *Id.* ¶ 9.

{26} We find *Shope* distinguishable, in that it does not appear that in that case there was any allegation that the premium structure used by the insurer charged multiple premiums under the guise of a single-premium charge. Further, that our policy in favor of stacking is not "fundamental" for purposes of a choice-of-law analysis does not mean that it is unimportant.

{27} Under *Rodriguez* we suggested that to be truly unambiguous, an insurance contract should, among other things, "plainly notif[y] the insured that only one premium has been charged for one insurance coverage." 118 N.M. at 133, 879 P.2d at 765. The contract at issue failed this requirement. A reasonable insured simply cannot determine whether or not "one premium has been charged for one insurance coverage." Although the contract purports to charge a single premium for a single coverage, the amendatory endorsement allows the insured to aggregate two coverages. Compounding the ambiguity is the fact that Allstate, in setting its premium, admits that it has factored into its premium calculation the average number of vehicles on all multi-vehicle policies, including those policies insuring three or more vehicles. We read *Rodriguez* to require a plain and affirmative declaration that the amount charged represents a single premium for a single amount of coverage; unquestionably, this contract has not done so. As such, we hold that it fails to meet the requirements set forth in *Rodriguez* for a truly unambiguous policy, and that Plaintiff is entitled to stack his four coverages.

IV. Conclusion

{28} We conclude that the insurance contract at issue fails to satisfy the requirements of *Rodriguez*, and Plaintiff is entitled to stack his four coverages. Further, taking the lead from the special concurrence in *Ferguson* and Section 66-5-301(C), we require insurance companies in future cases to obtain written rejections of stacking in accordance with this opinion in order to eliminate ambiguity and to effectively limit their liability. We reverse the Court of Appeals and remand this case for further action consistent with this opinion.

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

EDWARD L. CHÁVEZ,
Justice

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

Certiorari Denied, No. 28,697, June 22, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-078

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
THOMAS BOBLICK,
Defendant-Appellant.
No. 23,160 (filed: May 10, 2004)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ROSS SANCHEZ, District Judge

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OPINION

CYNTHIA A. FRY, JUDGE

{1} Defendant Thomas Boblick appeals the denial of a motion to suppress evidence seized from his person subsequent to a law enforcement officer's patdown search for weapons. The State claims that the search was not a Fourth Amendment seizure but instead was a voluntary "community caretaking" encounter. The State further argues that officer safety concerns justified the patdown. Defendant contends that the officer's actions exceeded the bounds of a voluntary welfare check, and that in any event the patdown violated his constitutional rights because the officer had no articulable reasons for the weapons check. We agree with Defendant and reverse.

BACKGROUND

{2} The events leading to this appeal were set into motion when law enforcement officers responded to a dispatch regarding a suspicious parked car. Two deputies from the Bernalillo County Sheriff's Department arrived at the scene, a vacant lot behind an auto parts store. Because it was night, the officers aimed their vehicle spotlights at the car. The officers then approached the car and observed Defendant, who appeared to be unconscious, seated inside the car. They could see that Defendant's hands were in his lap and there was nothing in his hands. The officers knocked several times on the windows. The knocking roused Defendant, who appeared dazed and had a questioning facial expression. One of the officers, Deputy Medrano, asked whether Defendant was okay, and Defendant did not respond verbally. Nevertheless, when Medrano opened the car door, Defendant followed Medrano's instructions to step out of the car. There was conflicting testimony about whether Defendant got out of the car on his own or whether Medrano physically helped Defendant out of the car. In any event, Defendant got out of the car and complied with Medrano's subsequent request that he produce his driver's license.

{3} Medrano then asked Defendant whether "he had any weapons or anything illegal on him that [Medrano] needed to know about." After getting no verbal response from Defendant, Medrano conducted a patdown. He felt a bulge in one of Defendant's pockets. Medrano asked Defendant what it was, and Defendant replied with words along the lines of "go ahead and check." Inside the pocket, Medrano discovered a quantity of cash along with some baggies containing white powder.

{4} The white powder obtained from Defendant's pocket provided the basis for the State to charge him with one count of possession of methamphetamine with intent to distribute. As for why Defendant was unconscious, it appears that his condition resulted from diabetes. Testimony in the trial court indicated that while sitting in his car on the evening in question, he had eaten ice cream, which caused a disturbance in his blood-sugar level that rendered him temporarily unconscious. The State apparently does not dispute that Defendant is diabetic and that he carries in his wallet a card identifying himself as such.

{5} Defendant filed a motion to suppress the methamphetamine as the fruit of an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution and Article II, § 10 of the New Mexico Constitution. The trial court denied his motion. Defendant entered a conditional guilty plea, reserving the right to appeal the trial court's denial of the motion to suppress. This appeal followed.

DISCUSSION

Jurisdiction

{6} Preliminarily, we resolve a question about this Court's jurisdiction to hear Defendant's criminal appeal. The events underlying this case resulted in a civil forfeiture proceeding as well as a criminal prosecution. Pursuant to the constitutional requirements set out in *State v. Nunez*, the two actions were consolidated into a single, bifurcated proceeding. 2000-NMSC-013, ¶104, 129 N.M. 63, 2 P.3d 264. In March 2002, Defendant filed his notice of appeal from his criminal conviction. At that time, however, the trial court had not entered a final order in the civil forfeiture. In the absence of a final order, the trial court retained jurisdiction over the entirety of the bifurcated proceeding, and this Court lacked appellate jurisdiction over the purported appeal. *See Curbello v. Vaughn*, 76 N.M. 687, 687, 417 P.2d 881, 882 (1966) (holding that the trial court retains exclusive jurisdiction until entry of a proper judgment or order); *see also Martinez v. Martinez*, 101 N.M. 493, 495, 684 P.2d 1158, 1160 (Ct. App. 1984) (recognizing that although the filing of a notice of appeal ordinarily divests the trial court of its jurisdiction, the trial court retains narrow, residuary power for the purpose of effecting an appeal).

{7} This state of affairs persisted through the calendaring and briefing phases of the appeal process, prompting the State to argue in its answer brief that we must dismiss the appeal for lack of jurisdiction. Subsequent to briefing, however, the trial court entered an order releasing the seized property and declaring all proceedings in this matter concluded. Upon the entry of that order, this Court acquired jurisdiction based on the notice of appeal that was already filed. *Southwest Research & Info. Ctr. v. State*, 2003-NMCA-012, ¶¶ 20-21, 133 N.M. 179,

62 P.3d 270 (indicating that the premature filing of a notice of appeal does not divest this Court of jurisdiction that it obtains upon the final adjudication of the controversy below). We will not unnecessarily postpone this Court's review by remanding solely for the purpose of requiring a new notice of appeal. *See State v. Esparza*, 2003-NMCA-075, ¶ 38, 133 N.M. 772, 70 P.3d 762. Instead, we construe the notice of appeal as timely filed subsequent to the final order.

Motion to Suppress

{8} Turning now to the trial court's ruling on the motion to suppress, we review de novo whether the law was correctly applied to the facts, giving deference to the trial court's factual findings. *State v. Nemeth*, 2001-NMCA-029, ¶ 20, 130 N.M. 261, 23 P.3d 936; *State v. Leyba*, 1997-NMCA-023, ¶ 8, 123 N.M. 159, 935 P.2d 1171.

{9} The State argues that the trial court properly denied Defendant's motion because his encounter with law enforcement was a voluntary community caretaking encounter that involved no coercion or detention, also known as a welfare check. Therefore, the State contends, Fourth Amendment constraints on search and seizure never came into play. We disagree.

{10} To be sure, law enforcement officers are free to "approach an individual, ask questions, and request identification without the encounter becoming a seizure under the Fourth Amendment." *State v. Walters*, 1997-NMCA-013, ¶ 18, 123 N.M. 88, 934 P.2d 282. Whether a police-citizen encounter becomes a seizure in the constitutional sense depends on the objective test of whether an innocent, reasonable person, under the totality of the circumstances, would have felt free to refuse an officer's requests. *Id.* ¶ 12. Although the trial court made no specific findings about whether Defendant was seized, *see State v. Baldonado*, 115 N.M. 106, 108, 847 P.2d 751, 753 (Ct. App. 1992) (stating that we apply substantial evidence review to the trial court's determination of whether a reasonable person would feel free to leave), we doubt that a reasonable person would feel free to leave after officers knocked on his car window, asked him to exit the vehicle, and questioned him about weapons. *See Walters*, 1997-NMCA-013, ¶ 18 (indicating that the presence of several officers and displays of authority are factors tending to show that a police-citizen encounter is a seizure). These facts represent a greater show of authority than in *Walters*, where a driver voluntarily stopped his vehicle on a deserted road, and the police officer who was following him in a nonthreatening manner approached his car and asked him why he stopped. *Id.* ¶¶ 2-6. In Defendant's case, when Medrano asked him to get out of the car and began questioning him, the encounter resembled an investigatory detention more than it did a welfare check. Medrano himself testified that after Defendant produced his driver's license he was not free to leave.

{11} More important, regardless of whether the community caretaker doctrine justified the officers' actions beyond the initial contact with Defendant, an officer who acts in the community caretaker capacity is still subject to state and federal constitutional constraints with respect to a weapons frisk because it is distinct from a welfare check. *See id.* ¶ 10 (drawing the distinction between a community caretaker encounter and an investigatory stop, which is a type of seizure); *see also Nemeth*, 2001-NMCA-029, ¶ 27 ("[I]t is clear that many community caretaker actions can and do implicate the Fourth Amendment."). In order to subject a citizen to a protective frisk for weapons, the officer "must have a sufficient degree of articulable suspicion that the person being frisked is both armed *and* presently dangerous." *State v. Vandenberg*, 2003-NMSC-030, ¶ 22, 134 N.M. 566, 81 P.3d 19 (emphasis added).

{12} Case law establishes that officer safety concerns can arise from a variety of fact patterns other than the obvious situation of a "characteristic bulge" that appears to be a weapon concealed in a suspect's clothing. *See* 4 Wayne R. LaFave, *Search & Seizure* § 9.5(a) (3d ed. 1996). For example, in *Vandenberg*, a defendant's physical manifestations of anxiety that exceeded mere "simple nervousness," coupled with other specific officer observations, invoked officer safety. 2003-NMSC-030, ¶¶ 27-31. In *State v. Haddenham*, a store clerk's report of hostile and harassing actions by an intoxicated individual who was known to cause disturbances was sufficient to justify a patdown. 110 N.M. 149, 154, 793 P.2d 279, 284 (Ct. App. 1990). "[T]he officer does not have to await the glint of steel before he can act to protect his safety." *Id.* This does not, however, change the basic legal proposition that a weapons frisk requires balancing individual rights against the public interest in maintaining officer safety, *State v. Blakely*, 115 N.M. 466, 468, 853 P.2d 168, 170 (Ct. App. 1993), and that in striking this balance, the concern for officer safety must have some basis in the circumstances at hand. *See Vandenberg*, 2003-NMSC-030, ¶ 23 ("[W]e must balance the threat posed to officer safety *under the circumstances*" (emphasis added)). Thus, the weapons frisk was justified only if the officers had some specific, articulable safety concerns.

{13} In this case, the State presented no evidence of articulable safety concerns, nor did the trial court make findings of articulable safety concerns. The officers were responding to a dispatch regarding a suspicious parked car; they had no indication that a serious crime was in progress. *Cf. State v. Cobbs*, 103 N.M. 623, 628, 711 P.2d 900, 905 (Ct. App. 1985) (in analyzing the necessity of a weapons frisk, observing that risk to officers "increases immeasurably when the officer is called upon to investigate a serious crime"). The trial court found that Defendant appeared dazed and did not respond verbally to the officers, but that he complied with the request that he exit the car, and he complied with the request that he produce his driver's license. In addition, according to the testimony of Medrano, Defendant did not smell of alcohol, did not raise his voice, and did not threaten himself or the officers. *Cf. Blakely*, 115 N.M. at 469-70, 853 P.2d at 171-72 (finding that a weapons frisk was justified where the defendant called 911, volunteered that he had been injecting drugs, and threatened suicide). The officers ran a National Crime Information Center check that revealed no information about Defendant. *Cf. Vandenberg*, 2003-NMSC-030, ¶¶ 37-38 (taking into account that an officer had information from a "be-on-the-lookout bulletin" that contributed to his perception of safety concerns). The sole rationale offered for the search was Medrano's testimony that he considers any person with whom he comes into contact to be an unknown threat. Although this may be a prudent assumption, this assumption alone cannot justify a patdown. *See* 4 LaFave, *supra* §9.5, at 254 ("The police are frequently cautioned to assume that every person encountered may be armed, which is sound advice if it means only that the officer should remain alert in every case; but it cannot mean and has not been interpreted by the police to mean that a search for weapons may be undertaken in every case."). In its findings and conclusions, the trial court adopted this erroneous rationale, stating that the patdown was justified because the officer did not know what he was dealing with. In striking the balance between personal privacy and officer safety, a general supposition that all citizens pose an unknown threat is not enough to tip the scales against the privacy of the individual.

See State v. Affsprung, 2004-NMCA-038, ¶¶ 4, 15, 20, ___ N.M. ____, 87 P.3d 1088 (acknowledging legitimacy of officers' generalized concerns about their safety, but holding that such are insufficient to override Fourth Amendment privacy considerations).

{14} Nor do we believe that Defendant's lack of response to Medrano's question about weapons provided any articulable justification for the patdown. Medrano's question was not solely about weapons, and its ambiguity could likely have prevented Defendant from giving a response. Importantly, Medrano did not articulate the lack of response as a reason for the patdown. Therefore, Defendant's lack of response did not justify the patdown. Because the trial court misapplied the law to the facts, we reverse.

CONCLUSION

{15} For the foregoing reasons we reverse the denial of the motion to suppress and remand for further proceedings consistent with this opinion.

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

CYNTHIA A. FRY, Judge

WE CONCUR:

LYNN PICKARD, Judge

MICHAEL E. VIGIL, Judge

Certiorari Granted, No. 28,670, June 10, 2004

From the Court New Mexico of Appeals

Opinion Number: 2004-NMCA-077

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
LEON JOSEPH SHAY,
Defendant-Appellant.
Nos. 23,594 and 23,554 (Consolidated cases) (filed: April 21, 2004)

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
STEPHEN BRIDGFORTH, District Judge

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JAMES EDWARD VONBEHREN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
STEPHEN BRIDGFORTH, District Judge

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Opinion

James J. Wechsler, Chief Judge

{1} In separate appeals, Defendants Leon Joseph Shay and James Vonbehren appeal their sentences as habitual offenders. We address both appeals together in this opinion because both Shay and Vonbehren argue that the amendment to NMSA 1978, § 31-18-17 (2002), which had an effective date of July 1, 2002, should apply to their cases. The 2002 amendment to Section 31-18-17 changes the prior statute by prohibiting the use of a conviction more than ten years old in enhancing sentences for habitual offenders. We determine that the legislature intended Section 31-18-17 to apply as amended to cases when the sentence for the underlying crime is imposed after July 1, 2002. We reverse the habitual offender sentences and remand for re-sentencing in both cases.

Background

{2} The habitual offender statute provides for the enhancement of a sentence based on a defendant's prior felony convictions. *See* § 31-18-17 (2002). Prior to the 2002 amendment, the imposition of this enhancement was mandatory in all cases in which there was a prior felony conviction, regardless of the date of the conviction. *See* NMSA 1978, § 31-18-17 (1993). In 2002, the legislature amended Section 31-18-17 to allow the district court some discretion in imposing the habitual enhancement to cases in which there is one prior felony conviction. Section 31-18-17(A) (2002). It also redefined "prior felony conviction" to mean:

> (1) a conviction, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for a

prior felony committed within New Mexico whether within the Criminal Code [30-1-1 NMSA 1978] or not; or

(2) any prior felony, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for which the person was convicted other than an offense triable by court martial if:

(a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;

(b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or

(c) the offense would have been classified as a felony in this state at the time of conviction.

Section 31-18-17(D) (2002) (alteration in original). This new definition excludes prior felonies when the sentence and any period of probation or parole in the prior felony was completed ten or more years before the current conviction. *Id.*

State v. Shay

{3} Shay was indicted on December 7, 2001 on charges of having committed felony residential burglary and misdemeanor larceny on November 15, 2001. On August 26, 2002, he pleaded guilty to these crimes, resulting in his conviction. The State filed a supplemental information on October 21, 2002, charging Shay with being a habitual offender based on three prior felony convictions in 1997, 1990, and 1985. Shay admitted that he was convicted of these felonies. The district court held a sentencing hearing on October 21, 2002, and on October 22, 2002, entered its judgment and sentence. It enhanced Shay's sentence for the residential burglary offense by eight years under Section 31-18-17 as it read prior to the 2002 amendment. In doing so, the district court used all three prior felony convictions to enhance Defendant's sentence, including the 1985 felony conviction.

State v. Vonbehren

{4} Vonbehren was indicted on October 11, 2001 for felony shoplifting. He was convicted following a jury trial on July 3, 2002. The State filed a supplemental information on July 8, 2002, charging Vonbehren as a habitual offender due to four prior felony convictions in 1989, 1988, 1983, and 1981. After Vonbehren admitted to the four prior felonies, he filed a motion requesting the court to determine that the habitual offender statute was no longer applicable to three of the felonies because of the amendment to Section 31-18-17. The district court denied Vonbehren's motion, and on October 15, 2002, sentenced Vonbehren as a habitual offender, enhancing his sentence based on all four prior felony convictions.

Shay's Failure to Preserve Issue for Appeal

{5} The State argues that Shay waived the issue of the applicability of the 2002 amendment by pleading guilty to the charges against him, agreeing in writing to an eight-year habitual offender enhancement of his sentence, and failing to reserve the issue for appeal. The State argues that, even if the sentence is unlawful, Shay's remedy is limited to bringing actions under Rules 5-801 or 5-802 NMRA 2004. Shay counters that the issue was argued at the plea and sentencing hearings and that he was never informed that he was waiving his right to appeal the enhancement. He asserts that all parties, including the district court, knew he would appeal the enhancement. The transcripts of the change of plea and sentencing hearings confirm this assertion.

{6} Although Shay properly preserved the issue, he failed to reserve the issue in writing as required by Rule 5-304(A)(2) NMRA 2004. *See State v. Hodge*, 118 N.M. 410, 416, 882 P.2d 1, 7 (1994) (discussing the need to preserve and reserve the issue of sufficiency of the evidence when pleading guilty). This Court, however, has allowed both the state and defendants to challenge illegal sentences for the first time on appeal. *See, e.g.*, *State v. Bachicha*, 111 N.M. 601, 605-06, 808 P.2d 51, 55-56 (Ct. App. 1991). This result is based on the rationale that the district court does not have jurisdiction to impose an illegal sentence and the appellate rules allow jurisdictional issues to be raised for the first time on appeal. *See* Rule 12-216 NMRA 2004. Our Supreme Court in *Hodge* recognized that a guilty plea does not waive the right to appeal jurisdictional issues. *See Hodge*, 118 N.M. at 414, 882 P.2d at 5 (stating "a voluntary guilty plea ordinarily constitutes a waiver of the defendant's right to appeal his conviction on other than jurisdictional grounds"). Because the issue involves an illegal sentence, which is a jurisdictional issue, we address the merits.

Applicability of the 2002 Amendment

Interpretation of Legislative Intent

{7} In enacting the 2002 amendment to Section 31-18-17, the legislature was silent as to the event which would trigger the application of the amendment, leaving us to search "for the spirit and reason the [l]egislature utilized in enacting the statute." *State v. Davis*, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. *See generally State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (stating that the main goal of statutory construction is to give effect to the intent of the legislature and that interpreting a statute is a question of law that is reviewed de novo). By deliberately changing the statute to allow the district court some discretion in imposing the enhanced penalty based on a single prior felony conviction and in narrowing the definition of a prior felony conviction, the legislature indicated its dissatisfaction with the old scheme and an intent to depart from that scheme. *See State v. Morrison*, 1999-NMCA-041, ¶ 11, 127 N.M. 63, 976 P.2d 1015 ("We . . . assume that the legislature intends to change the existing law when it enacts a new statute with substantial rewording."). Consistent with this shift in policy, the legislature subsequently limited the definition of "prior felony conviction" in its 2003 amendment to the habitual offender statute by excluding felony convictions for driving while intoxicated from the definition of "prior felony conviction." *See* NMSA 1978, § 31-18-17(D)(1) (2003); *cf. Davis*, 2003-NMSC-022, ¶¶ 8-12 (interpreting an amendment to NMSA 1978, § 31-18-21(A) (1977), as requiring mandatory stacking of sentences because the legislature removed discretionary language and enacted other provisions of the Criminal Sentencing Act that imposed longer periods of incarceration, leading to the "inescapable conclusion" that the legislature intended harsher and more certain punishment for crimes committed while incarcerated). All of these changes indicate a legislative intent to reduce the enhancements required by Section 31-18-17.

{8} Another statute indicates that the legislature intends that reductions in criminal penalties should apply if the penalty has not already been imposed. NMSA 1978, § 12-2A-16(C) (1997) states: "If a criminal penalty for a violation of a statute or rule is reduced by an amendment, the penalty, if not already imposed, must be imposed

under the statute or rule as amended." The State argues that because habitual offender proceedings do not result in a separate conviction and the enhanced penalty is for the underlying crime committed, the enhanced penalty is necessarily determined by the law in effect on the date of the commission of the crime. *See State v. Mondragon*, 107 N.M. 421, 423, 759 P.2d 1003, 1005 (Ct. App. 1988); *see also Hernandez v. State*, 96 N.M. 585, 586, 633 P.2d 693, 694 (1981); *State v. Gonzales*, 84 N.M. 275, 279, 502 P.2d 300, 304 (Ct. App. 1972). Based on Section 12-2A-16(C), we view the conclusion to be reached differently. Applying Section 12-2A-16(C) to the 2002 amendment, mindful that an enhanced sentence is part of the punishment for the crime to which the enhanced sentence attaches, *see Mondragon*, 107 N.M. at 423, 759 P.2d at 1005, the 2002 amendment effectively reduces the potential enhanced penalties for violating felony statutes by narrowing the definition of "prior felony conviction."

{9} Therefore, as a result of the legislative intent to reduce the potential penalties under the habitual offender provisions as indicated by the 2002 amendment to Section 31-18-17 and the intent to apply reduced penalties when the penalty has not already been imposed as indicated by Section 12-2A-16, we construe the intent of the legislature to be that it did not intend to delay the effect of its 2002 amendment by applying it only to crimes committed after its effective date. Using Section 12-2A-16(C) as a guide to the legislature's intent, the date a sentence is imposed is the appropriate date to determine whether the 2002 amendment to Section 31-18-17 applies to a given case. Because we apply the 2002 amendment prospectively to cases in which the sentence is imposed after the effective date of the amendment based on the legislature's intent, we need not address the parties' arguments concerning retroactive or prospective application of the amended statute. *See State v. Mears*, 79 N.M. 715, 716, 449 P.2d 85, 86 (Ct. App. 1968) (stating that an act concerning presentence confinement credit was not being applied retroactively when the conviction and sentence occurred after the act became effective); *see also State v. Perea*, 2001-NMSC-026, ¶ 4, 130 N.M. 732, 31 P.3d 1006 (stating the general proposition that a statute is to be applied prospectively unless the legislature clearly intends otherwise).

{10} Other cases relied on by the State are distinguishable. For instance, in *Williams v. State*, 81 N.M. 605, 607, 471 P.2d 175, 177 (1970), the issue involved a change in the law increasing the penalty for a crime when the defendant had already served 13 years incarceration. In stating that the law at the time of the commission of the crime controlled, the Court took note that Williams had been convicted, orally sentenced, and incarcerated under the law in effect in 1953, although no written judgment and sentence was entered until 1966. It determined that basic fairness prohibited the imposition of a greater sentence in the latter proceedings. *Id.* at 607-08, 471 P.2d at 177-78; *see also State v. Armstrong*, 61 N.M. 258, 260-61, 298 P.2d 941, 943 (1956) (determining that an amendment to the Parole Act, which merely advanced the eligibility date for parole, did not change the penalty provision, which remained the same, i.e., not less than one year nor more than ten years).

Inapplicability of Section 30-1-2

{11} The State argues that the legislature made a clear, unambiguous statement about the laws applicable to criminal offenses when it enacted NMSA 1978, § 30-1-2 (1963). This statute provides:

> The Criminal Code has no application to crimes committed prior to its effective date.
>
> A crime is committed prior to the effective date of the Criminal Code if any of the essential elements of the crime occurred before that date.
>
> Prosecutions for prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed.

Id. We note that Section 12-2A-16 was enacted in 1997 and that Section 30-1-2 was enacted in 1963. To the extent they conflict, the later enactment supersedes the prior. *See generally State v. Encinias*, 104 N.M. 740, 742, 726 P.2d 1174, 1176 (Ct. App. 1986) (applying the latest expression of legislative intent regarding probation).

{12} The State relies on *State v. Tipton*, 78 N.M. 600, 435 P.2d 430 (1967) (*Tipton III*), to support its argument that Section 30-1-2 requires application of the pre-2002 habitual offender statute. In *Tipton III*, our Supreme Court relied on the identical 1953 version of this savings clause to determine that the district court did not err in resentencing the defendant under the repealed habitual offender statute. *Tipton III*, 78 N.M. at 603, 435 P.2d at 433. The history of Tipton's case is a convoluted history, reported in three appellate opinions. In brief, Tipton was convicted of rape in April 1962 in cause no. 5141. *Id.* at 601, 435 P.2d at 431. The next day he was charged as a habitual offender. *State v. Tipton*, 73 N.M. 24, 25, 385 P.2d 355, 355 (1963) (*Tipton I*). The information charging Tipton as a habitual offender was filed in a separate cause, no. 5154. *State v. Tipton*, 77 N.M. 1, 3-4, 419 P.2d 216, 217 (1966) (*Tipton II*). The habitual offender statute was repealed by the 1963 Criminal Code. *Tipton III*, 78 N.M. at 603, 435 P.2d at 433.

{13} At the time of the 1966 opinion in *Tipton II*, no judgment or sentence had been imposed in the original cause, no. 5141, but Tipton had been sentenced as a habitual offender in the separate habitual offender cause, no. 5154. *Tipton II*, 77 N.M. at 4, 419 P.2d at 217. Our Supreme Court remanded Tipton's second appeal with instructions "to vacate the sentence and commitment in No. 5154 and to enter its judgment imposing sentence upon defendant as an habitual offender in No. 5141." *Id.* at 4, 419 P.2d at 218.

{14} In the third and last reported appeal, the Court rejected Tipton's argument that he should not be sentenced under the habitual offender statute because it had been repealed prior to the time the sentence was imposed in the original cause, no. 5141. The Court relied on the 1953 version of the savings clause to determine that the repealed law applied to Tipton's sentencing in the original cause. *Tipton III*, 78 N.M. at 603, 435 P.2d at 433.

{15} The facts in Tipton's case differ dramatically from the facts in this case. Most significantly, Tipton was originally sentenced under the later, repealed habitual offender statute. The fact that this sentence had been imposed in the wrong case and Tipton was later sentenced in the correct case after the statute had been repealed, should not render the statute inapplicable to the later sentence. In this case, no sentence was imposed prior to the effective date of the 2002 amendment to Section 31-18-17.

{16} In addition to the factual differences between *Tipton III* and this case, it appears that Section 30-1-2 was enacted as a transitional rule prior to the enactment of the Criminal Code. In a more recent case, *State v. Hargrove*, 108 N.M. 233, 234-35, 771 P.2d 166, 167-68 (1989), our Supreme Court applied a different transitional rule to determine that the defendant was properly sentenced under the laws in effect at the time he committed the crimes. Those laws

provided for a life sentence for first degree felonies, which the defendant had committed in 1976 and 1978. *Id.* at 234, 771 P.2d at 167. On July 1, 1979, the sentencing law changed to provide for eighteen years imprisonment for first degree felonies. *Id.* The Court noted that the legislature "specifically enacted a transitional rule to provide sentencing guidelines for crimes committed prior to the enactment of the Criminal Sentencing Act," which clearly expressed the legislature's intent "that for crimes committed prior to July 1, 1979, the sentencing provision in effect at the time of the commission of the crime controls." *Id.* at 235, 771 P.2d at 168. This transitional rule was embodied in a statute with language similar to that in Section 30-1-2. *See Hargrove*, 108 N.M. at 235, 771 P.2d at 168.

{17} We do not perceive any distinction between the terms "savings clause" articulated in *Tipton III* about Section 30-1-2 and "transitional rule," relating to the enactment of the Criminal Sentencing Act, as articulated in *Hargrove*. *See Hargrove*, 108 N.M. at 235, 771 P.2d at 168 (citing favorably *In re Estrada*, 408 P.2d 948, 955 (1965) (en banc), a case discussing a savings clause). Both terms refer to the linkage of prior and newly enacted law. The significance in this case is that the legislature did not enact any transitional rule or savings clause expressing an intent to have the 2002 amendment to the habitual offender statute apply to crimes committed prior to July 1, 2002. Instead, we are left with the legislative intent embodied in Section 12-2A-16, which indicates a policy decision to apply a reduced sentence if the penalty has not been imposed. Because of this statutory policy, the out-of-state cases cited by the State in Vonbehren's case are not applicable.

Inapplicability of Article IV, Sections 33 and 34

{18} The State also asserts that applying the 2002 amendment to Defendants would violate the New Mexico Constitution. In Shay's case, the State relies on New Mexico Constitution Article IV, Section 33, which states, "No person shall be exempt from prosecution and punishment for any crime or offenses against any law of this state by reason of the subsequent repeal of such law." The State argues that Section 12-2A-16 conflicts with this constitutional provision. The 2002 amendment, however, does not repeal any law proscribing a crime or offense. Instead, it amends the definition of "prior felony conviction" and allows some judicial discretion in sentencing habitual offenders with one prior felony conviction. Article IV, Section 33 does not apply to the 2002 amendment or to our interpretation of the amendment through Section 12-2A-16.

{19} The only reported cases considering Article IV, Section 33 in the context of habitual offender proceedings involve the repeal of the habitual offender statute. *See Tipton III*, 78 N.M. at 603, 435 P.2d at 433. Our Supreme Court in *Tipton III* stated without discussion that it relied on Article IV, Section 33 as well as the 1953 savings clause to determine that the repealed habitual offender statute should apply to Tipton. *Tipton III*, 78 N.M. at 603, 435 P.2d at 433. But this result does not necessarily lead to the conclusion that Section 12-2A-16 conflicts with Article IV, Section 33 or that the legislature is barred from changing the definition of prior felony conviction for habitual offenders and applying the new definition to cases in which the penalty for the underlying crime has not yet been imposed. Again, we distinguish *Tipton III* on its facts. In *Tipton III*, the separate habitual offender proceedings, in which Tipton was originally sentenced as a habitual offender, were conducted under the repealed law. *Id.* at 603, 435 P.2d at 433. The Court correctly determined that the subsequent repeal of this law did not exempt Tipton from its provisions. *Id.* In this case, the habitual offender act was not repealed and Article IV, Section 33 is not implicated.

{20} The State contends in Vonbehren's case that the New Mexico Constitution Article IV, Section 34 prohibits application of the 2002 amendment. This provision states: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." *Id.* According to the State, the 2002 amendment changed the right or remedy available to the State in seeking habitual enhancements. However, this right or remedy is entirely contingent upon and does not ripen until a defendant is convicted of a crime. *See* NMSA 1978, § 31-18-19 (1977) (stating that the district attorney shall bring an information charging a defendant as a habitual offender after "sentence or conviction"), *and* NMSA 1978, § 31-18-20 (1983) (outlining the procedure for habitual offender proceedings that occur after conviction). Shay and Vonbehren were not convicted of the crimes for which they were sentenced until after the effective date of the amendment. Moreover, although the underlying cases were pending prior to the effective date of the 2002 amendment, no habitual proceeding was pending in either case until after the effective date of the 2002 amendment. Our Supreme Court has observed that the definition of "pending" for the purpose of Article IV, Section 34 depends on the statute in question and that a case is pending if it is "depending," "remaining undecided" and "not terminated." *Stockard v. Hamilton*, 25 N.M. 240, 244-45, 180 P. 294, 295 (1919); *DiMatteo v. County of Dona Ana*, 109 N.M. 374, 377, 785 P.2d 282, 285 (Ct. App. 1989). The supplemental information in each case raised to each court the issue of habitual offender status, which then needed to be decided. *See generally In re Held Orders of US W. Communications, Inc.*, 1999-NMSC-024, ¶ 14, 127 N.M. 375, 981 P.2d 789 (discussing the intent of Article IV, Section 34 as rooted in the territorial history of New Mexico and its purpose to maintain an independent judiciary; applying this principle to determine that the cases at issue were not pending within the meaning of Article IV, Section 34 because there was no legislative intent to interfere with the merits of the cases).

{21} Because no habitual offender proceedings were pending at the time the 2002 amendments became effective and because any right or remedy the State may have to prosecute habitual offenders does not ripen until after the conviction in the underlying case, there is no constitutional prohibition to applying the 2002 amendment to cases in which the supplemental information charging habitual offender status was not filed before July 1, 2002.

Proof of Prior Felony Convictions

{22} Under the 2002 amendment, a prior felony conviction does not include felony convictions when the sentence was completed ten years or more before the current conviction. *See* § 31-18-17(D). Because the district court in each case ruled that the 2002 amendment did not apply as a matter of law, the record does not establish when Shay completed his sentence on the 1985 felony conviction or when Vonbehren completed his sentence on his 1988 and 1989 convictions. *See generally State v. Elliott*, 2001-NMCA-108, ¶ 35, 131 N.M. 390, 37 P.3d 107 (stating the standard and burdens of proving prior felony convictions for purposes of habitual offender enhancements). On remand, the district court will need to make these determinations.

Conclusion

{23} The 2002 amendment to Section 31-18-17 applies to all cases in which the defendant has not been sentenced before July 1, 2002, the effective date of the amendment, if the supplemental information charging habitual offender status was filed after the amendment went into effect. Because Shay and Vonbehren were sentenced in October 2002, we reverse and remand these cases for further proceedings to resentence pursuant to the 2002 amendment to Section 31-18-17.

{24} **IT IS SO ORDERED.**
JAMES J. WECHSLER,
Chief Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
CYNTHIA A. FRY, Judge

Certiorari Denied, No. 28,711, June 24, 2004

FROM THE NEW MEXICO COURT OF APPEALS

Opinion Number: 2004-NMCA-079

TOPIC INDEX:
Appeal and Error: Abandonment; and Fundamental Error
Criminal Law: Attempt; Forgery; and Fraud

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
LARRY CEARLEY,
Defendant-Appellant.
No. 23,707 (filed: May 14, 2004)

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY
KAREN L. PARSONS, District Judge

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OPINION

LYNN PICKARD, JUDGE

{1} This case presents the question of whether an inauthentic document that has been presented to opposing counsel during discovery in a civil matter and that has no legal efficacy apart from its potential evidentiary value can be the subject of a forgery prosecution. Interpreting the forgery statute, NMSA 1978, § 30-16-10 (1963), and surveying pertinent case law, we hold that it cannot. Accordingly, we reverse Defendant's conviction for forgery. Defendant also appeals his conviction for attempted criminal fraud, contrary to NMSA 1978, § 30-16-6 (1987), arguing that (1) Defendant did not have the required specific intent, (2) Defendant had a valid defense of impossibility, (3) the State did not show reliance as the fraud statute requires, (4) the State did not show that Defendant attempted to take something of value as the fraud statute requires, and (5) the State cannot prosecute attempted fraud for actions that take place in the context of a judicial proceeding. Finding no merit in these arguments, we affirm Defendant's conviction for attempted fraud.

FACTS AND PROCEEDINGS

{2} Defendant was involved in a child support dispute in which his ex-wife contended that Defendant owed $3584 in back payments. Defendant was ordered to appear at a hearing to show cause why he should not be cited for contempt of court for failing to pay child support. Defendant argued that he had fulfilled his child support obligation by issuing checks to his ex-wife, but that she had never deposited them. In a hearing before the district court, Defendant's attorney told the court that he was prepared to offer the non-carbon records (NCRs) of twelve child support checks that Defendant had written to his ex-wife. Ex-wife's attorney responded that he would contact the bank directly and obtain official documentation of any payments made.

{3} After the hearing, Defendant's attorney delivered to ex-wife's attorney photocopies of NCRs that indicated the twelve payments to ex-wife, despite the fact that ex-wife's attorney had not wanted them. Ex-wife's attorney contacted the bank to obtain information on the checks that matched the check numbers on the photocopied NCRs. Ex-wife's attorney discovered that the original checks with those numbers had been made out to different payees and for different amounts, meaning that Defendant had altered the NCRs in order to make the photocopies. Ex-wife's attorney turned over the photocopies to the police.

{4} Defendant was charged with twelve counts of forgery, contrary to Section 30-16-10. He was also charged with one count of attempted fraud over $2500, contrary to Section 30-16-6, based on the notion that he made misrepresentations with the intent to defraud his ex-wife of the amount of the child support owed.

{5} Defendant filed a motion to quash and dismiss the information, which the district court denied. Thereafter, Defendant entered a conditional plea of no contest to one count of forgery and one count of attempted fraud over $2500. The plea reserved Defendant's "right to appeal all motions heard by [the] trial court." Defendant now appeals from the judgment and sentence entered pursuant to the plea agreement.

DISCUSSION

1. Preservation

{6} Before we begin our discussion of the merits of the appeal, we address the issue of preservation in light of Defendant's apparent attempt to rely on arguments made at the calendaring stage without further briefing. Defendant briefed only the issues relating to the attempted fraud

conviction. As to the forgery conviction, his brief asks only "to reverse his conviction for [f]orgery for the reasons stated in the Summary Calendar Notice and in his Docketing Statement."

{7} Once a case is assigned to the general calendar, the appellant must brief all the issues that he or she wishes the court to review. The docketing statement alone does not provide a basis for review of an issue, and issues listed in the docketing statement but not briefed are deemed abandoned. *State v. Gonzales*, 111 N.M. 590, 593-94, 808 P.2d 40, 43-44 (Ct. App. 1991) (detailing the requirements of the brief in chief), *modified on other grounds by State v. Dominguez*, 115 N.M. 445, 450, 853 P.2d 147, 152 (Ct. App. 1993). Similarly, once the case has been assigned to the general calendar, previous calendar notices are a nullity and the issues raised by those notices are abandoned unless they are briefed. *Id.* at 594, 808 P.2d at 44.

{8} In the present case, Defendant preserved several issues in the district court through his motion to dismiss, including his argument that the photocopies of the NCRs did not have legal efficacy, as the forgery statute requires. On appeal, Defendant included the legal efficacy issue in his docketing statement, which we cited as the basis for proposed summary reversal of the forgery conviction in our first calendar notice. When the case was subsequently placed on the general calendar and Defendant submitted his brief in chief to this Court, he did not include the legal efficacy issue. Instead, he attempted to bootstrap the arguments made at the calendaring stage into his appeal with the statement quoted above.

{9} Because calendaring notices become a nullity once a case is assigned to the general calendar, this approach to briefing could have resulted in Defendant's abandonment of the legal efficacy argument. *Gonzales*, 111 N.M. at 593-94, 808 P.2d at 43-44. However, this Court can review a question not preserved below if it involves fundamental error or fundamental rights of a party. Rule 12-216(B)(2) NMRA 2004; *State v. Stein*, 1999-NMCA-065, ¶ 9, 127 N.M. 362, 981 P.2d 295. "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Baca*, 1997-NMSC-045, ¶ 41, 124 N.M. 55, 946 P.2d 1066. We have held that when a defendant is convicted of an offense based on facts that do not meet the definitions of the elements required for that offense, this constitutes fundamental error. *See Stein*, 1999-NMCA-065, ¶¶ 8-9 (allowing for review of a conviction for battery of a household member to determine whether the victim fell within the statutory definition of "household member"). Thus, we will review Defendant's forgery conviction for fundamental error based on Defendant's contention that his actions did not constitute the elements of this crime as a matter of law.

{10} The State expresses concern that the issue of preservation is especially critical in this case because Defendant entered a conditional plea that expressly waived his right to appeal any matters not presented in a motion to the trial court. *See State v. Hodge*, 118 N.M. 410, 416-17, 882 P.2d 1, 7-8 (1994) (explaining the steps necessary to reserve an issue for appeal through a conditional plea). We note that Defendant raised the legal efficacy issue to the trial court through his motion to dismiss, and, therefore, our review of this issue does not violate the terms of his conditional plea. As to the other issues relating to the attempted fraud conviction, we view Defendant's submissions below to have raised, if only in a conclusory fashion, each and every issue raised on appeal.

2. Forgery

{11} The New Mexico forgery statute, Section 30-16-10, defines the type of forgery charged in this case as:

> A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud[.]

Legal efficacy is an essential element of the forgery offense and a purely legal issue. UJI 14-1643 NMRA 2004 Comm. Commentary. We review the issue of whether an instrument has legal efficacy de novo. *State v. Wasson*, 1998-NMCA-087, ¶ 6, 125 N.M. 656, 964 P.2d 820. In the present case, if the photocopies of the altered NCRs do not have legal efficacy, then Defendant's actions do not constitute forgery as a matter of law, and Defendant's conviction is fundamental error. *See State v. Doe*, 92 N.M. 100, 102, 583 P.2d 464, 466 (1978) (explaining that if the defendant's words and actions did not constitute the offense of disorderly conduct, then his conviction was fundamental error).

{12} Our courts have defined an instrument with legal efficacy in the context of the forgery statute as "an instrument which upon its face could be made the foundation of liability" and "an instrument good and valid for the purpose for which it was created." *State v. Cowley*, 79 N.M. 49, 52, 439 P.2d 567, 570 (Ct. App. 1968). We have also stated that a "document required by law to be filed or recorded or necessary or convenient to the discharge of a public official's duties" meets the forgery requirements. *Wasson*, 1998-NMCA-087, ¶ 7 (quoting 4 Charles E. Torcia, *Wharton's Criminal Law* § 491, at 94 (15th ed. 1996)). However, we have avoided a strictly categorical approach to defining the instruments of forgery, agreeing that "[n]o definition of forgery can be comprehensive enough to include all the crimes that may be committed by simple use of pen, paper and ink." *State v. Nguyen*, 1997-NMCA-037, ¶ 12, 123 N.M. 290, 939 P.2d 1098 (quoting *Muhammad v. Commonwealth*, 409 S.E.2d 818, 821 (Va. Ct. App.1991)).

{13} We begin our application of the law to the present case by observing that the NCRs do not purport to have legal efficacy in and of themselves. An NCR "entail[s] chemically treated paper, and the impact of a typing head or pressure of a pen or pencil on the top sheet, transmitted downward through the copy pages [to] produce[] duplicate images on the latter." 5 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 561, at 272 (2d ed. 1994). The NCR of a check is non-negotiable and is essentially a record-keeping device by which a person can keep track of the checks he or she writes without entering them in a separate log. Because the NCR is created at the time the check is written, it does not speak to whether a check is tendered, cashed, deposited, returned, or otherwise used. For these reasons, the photocopies of the NCRs that Defendant produced could not on their face "be made the foundation for liability." *See Cowley*, 79 N.M. at 52, 439 P.2d at 570. An NCR is also not "required by law to be filed or recorded" and is completely unrelated to "the discharge of a public official's duties." *See Wasson*, 1998-NMCA-087, ¶ 7 (internal quotation marks and citation omitted). An NCR is not necessary to any transaction and creates no obligations on the part of the indicated maker or payee. *See Nguyen*, 1997-NMCA-037, ¶ 15.

{14} In this case, however, Defendant offered the photocopies of the NCRs as evidence that he had written child support checks to his ex-wife. Since Defendant contended that he gave checks to his ex-

wife that she never cashed, other evidence of payment by check like a bank record or cancelled check would not have been available had Defendant's contentions been true. Furthermore, Defendant tendered the photocopies to his ex-wife's attorney during the course of pending litigation on his child support obligations. Thus, the State argued at trial, while the NCRs may not have legal efficacy per se, they purport to have legal efficacy in that Defendant could have gained a legal advantage by introducing the copies at trial, creating a delay in the proceedings, or gaining a tactical advantage in settlement negotiations.

{15} Our case law does not support an interpretation of the legal efficacy requirement that would expand forgery to encompass the falsification or alteration of any item with potential evidentiary value. We have adopted an approach in which "the proper basis for analyzing whether forgery has occurred is the actual role the document plays in the fraudulent transaction between victim and defendant." *State v. Torres*, 2000-NMCA-038, ¶ 10, 129 N.M. 51, 1 P.3d 433. In this case, the NCRs could not have possibly excused Defendant of his child support obligations. Even if authentic, the only potential value of the NCRs would be to prove that Defendant had written checks to his ex-wife. Defendant would still have to establish, at a minimum, that he tendered the checks to his ex-wife in order for his version of events to be true. Furthermore, while we agree with the State that the failure of Defendant's plan does not by itself negate the possibility of a forgery, *see Nguyen*, 1997-NMCA-037, ¶ 14, we note that the potential value of the copies in this case is highly speculative. We hesitate to expand the definition of an instrument purporting to have legal efficacy to include this circumstance.

{16} We are also concerned with the ramifications of criminalizing the alteration of an item, the only legal value of which is its potential to be used as corroborating evidence in a legal proceeding. While we strongly disapprove of this type of conduct, we note that there are other sanctions available when a party is untruthful during discovery or at trial. *See* § 30-16-6 (fraud, or attempted fraud in conjunction with NMSA 1978, § 30-28-1 (1963)); Rule 1-037 NMRA 2004 (providing for sanctions against a party who violates discovery rules); *see also Reed v. Furr's Supermarket, Inc.*, 2000-NMCA-091, ¶¶ 7-8, 129 N.M. 639, 11 P.3d 603 (explaining that dismissal is an appropriate sanction for false answers to interrogatories or depositions); *cf.* Rule 1-011 NMRA 2004 (providing for sanctions against an attorney who submits any pleading, motion, or other paper without the belief that there is good ground to support it); Rule 16-303 NMRA 2004 (providing that a lawyer shall not knowingly introduce false evidence); NMSA 1978, § 30-22-5 (2003) (providing criminal sanctions for tampering with evidence with the intent to interfere in a criminal investigation or prosecution).

{17} As the Supreme Court stated in *State v. Carbajal*, 2002-NMSC-019, 132 N.M. 326, 48 P.3d 64, "Forgery is a crime aimed primarily at safe-guarding confidence in the genuineness of documents relied upon in commercial and business activity." *Id.* ¶ 18 (internal quotation marks and citation omitted). A photocopy of what is essentially a check register is not a check, a receipt, or another type of document that is relied upon in business activity or made the foundation of liability. At most, it is some corroborating evidence of testimony or an assertion that money has been paid.

{18} In summary, we do not believe that the element of forgery requiring that the defendant has falsely made or altered an instrument "purporting to have legal efficacy" should be expanded to include instances where the sole legal value of the instrument is its potential use as evidence. We reverse Defendant's conviction for forgery because his conduct does not meet the statutory definition of forgery and is fundamental error. Because we reverse the conviction, we do not examine the other issues Defendant raises with respect to the forgery conviction.

3. Fraud

{19} Defendant challenges his attempted fraud conviction on a number of points. Because the underlying facts are not in dispute, we review Defendant's legal contentions de novo. *State v. Esparza*, 2003-NMCA-075, ¶ 13, 133 N.M. 772, 70 P.3d 762.

{20} First, Defendant argues that he lacked the required specific intent to commit fraud required by the attempt statute. The attempt statute requires "an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." Section 30-28-1. The fraud statute defines fraud as "the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations." Section 30-16-6. "The gravamen of the crime [of attempted fraud] focuses on words or conduct which misrepresented a fact intending to deceive or cheat for the purpose of obtaining an amount in excess of $2500." *State v. Olguin*, 118 N.M. 91, 96, 879 P.2d 92, 97 (Ct. App. 1994), *aff'd in part, rev'd in part*, 120 N.M. 740, 906 P.2d 731 (1995).

{21} Here, Defendant's words and conduct included his claim that he had already tendered child support payments to his ex-wife and his offer of the photocopied NCRs to his ex-wife's attorney to bolster that claim. The intent was to evade payment of the amount he owed. If he had succeeded, Defendant would have benefitted by the $3584 that he would not have been forced to pay. The fact that he did not succeed results only in the lessening of the conviction to attempted fraud. It does not show an absence of intent to defraud. There is no error here as a matter of law.

{22} Defendant next contends that he had a valid defense of impossibility because the photocopied NCRs "could not extinguish ex-wife's right to payment of the moneys in question." This is not a correct interpretation of the impossibility doctrine. Our Supreme Court has explained that criminal liability for attempt is appropriate when the defendant has done everything in his power to commit the crime but did not complete the crime due to a factual impossibility. *State v. Lopez*, 100 N.M. 291, 292, 669 P.2d 1086, 1087 (1983). "When the objective is clearly criminal, impossibility is not a proper defense." *Id.* at 293, 669 P.2d at 1088. Such was the case here. Although, as discussed above, the NCRs may not have been enough to relieve Defendant of his child support obligations, that does not alter the fact that Defendant produced the NCRs with the intent to achieve just that. As with Defendant's arguments regarding specific intent, the fact that he was prevented from achieving his goal lessens the conviction to an attempt, but it does not create the type of impossibility that precludes criminal liability.

{23} Next, Defendant argues that reliance is an essential element of fraud that was missing in this case. Accordingly, he argues that the conviction was improper as a matter of law. Although reliance is an element of fraud, UJI 14-1640(2) NMRA 2004, it is important to note again that Defendant was convicted of attempted fraud. The fact that he did not succeed in inducing reliance on the photocopied NCRs is not the issue. The fact remains that he intended to induce reliance on them, as an attempt conviction

requires. Along the same lines, Defendant argues that another essential element of fraud is missing in that his actions do not constitute attempted fraud because owed child support payments do not constitute the property of another. This is also unpersuasive because if Defendant had been successful, his actions could have taken away both his ex-wife's child support, as well as his ex-wife's right to child support, which are things of value that belonged to ex-wife for the benefit of her children. In the context of attempt, this is all that the fraud statute requires.

{24} Finally, Defendant argues that the State is barred from prosecuting attempted fraud that takes place during a judicial proceeding under the case of *State v. Kelly*, 27 N.M. 412, 202 P. 524 (1921). In that case, the defendant presented a falsified bond to a state loan board that had been created to manage the debts and loans of the State of New Mexico that had been accrued during the territorial era. *Id.* at 414-15, 202 P.2d at 525. Defendant relies on the Court's following statement:

> [I]f the board of loan commissioners of the state of New Mexico constituted a court, and the presentation of the claim to such board and the proceedings had before such board upon such claim constituted a judicial inquiry and resulted in a judicial judgment or decree, there could be no prosecution for false pretenses made to such board in regard to any claim, and that the remedy would be a prosecution for perjury instead.

Id. at 417, 202 P.2d at 526. This hypothetical statement is inapplicable to the present case. Here the photocopied NCRs were presented to an attorney during discovery. They were not presented to a court and did not form the basis of a judicial judgment or decree. A prosecution for perjury under our modern perjury statute, NMSA 1978, § 30-25-1 (1963), which requires a false statement under oath, would not have been appropriate. We are unpersuaded by Defendant's assertion that *Kelly* bars the current conviction. We make no comment on whether a prosecution for attempted fraud is permissible in cases where a perjury prosecution is possible because we are not presented with the facts to make such an assessment.

CONCLUSION

{25} We reverse Defendant's conviction for forgery because the instrument that he altered did not purport to have legal efficacy. We affirm Defendant's conviction for attempted fraud.

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

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

IRA ROBINSON, Judge