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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
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Mark Reynolds

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v. **No. A-1-CA-43081**

ALEXANDER DURAN,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY
Michael Aragon, District Court Judge

Raúl Torrez, Attorney General
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for Appellant

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for Appellee

MEMORANDUM OPINION

IVES, Judge.

{1} Defendant Alexander Duran was charged with one count of possession of a visual medium of sexual exploitation of a victim under thirteen—a type of child sexual abuse material (CSAM)—contrary to NMSA 1978, Section 30-6A-3(A)

(2016).[1] At a preliminary hearing, defense counsel raised Defendant's competency as a potential issue and requested a court-ordered evaluation. The district court stayed the proceedings, including arraignment, so that a competency evaluation could take place. Dr. Susan Cave conducted Defendant's evaluation and compiled her findings in a report, opining that Defendant was not competent to stand trial and diagnosing him with "Mild Intellectual Disability."

{2} The State objected to Dr. Cave's evaluation and, after a competency hearing, the district court found that Defendant was not competent to stand trial. The State moved for a dangerousness hearing and for reconsideration of the incompetency determination. After a hearing on the motions, the court denied both and dismissed the case without prejudice.

{3} The State appeals, raising several issues that pertain to determinations made and procedures followed both during the competency hearing and the subsequent hearing on the State's motions. We affirm in part and reverse in part, remanding to the district court only to determine whether Defendant is "dangerous" pursuant to NMSA 1978, Section 31-9-1.2 (1988, amended 1999).

[1]We use the term child sexual abuse material rather than child pornography. *See State v. Eaker*, 2026-NMSC-011, ¶ 6 n.1, 593 P.3d 582 (recognizing that the term child sexual abuse material reflects the abuse inflicted on the child and resulting trauma).

DISCUSSION

I. The Competency Hearing

A. Exclusion of the State's Witness

{4} The State argues that the district court erred in excluding the State's witness from testifying at the competency hearing. We consider whether the court's decision to exclude the witness for violation of the witness sequestration rule, Rule 11-615 NMRA, was an abuse of the court's discretion, *see State v. Ruiz*, 1995-NMCA-007, ¶ 22, 119 N.M. 515, 892 P.2d 962, and conclude it was not.

{5} After Dr. Cave testified about her evaluation of Defendant, the State sought to call Agent Benjamin Zwiebel, the lead investigative agent on Defendant's case, to testify about his interview of Defendant as foundation for entering the recorded interview as evidence. The defense objected that Agent Zwiebel was not an expert, so he could not offer an opinion on competency, and he had not been identified on a witness list for the competency hearing.[2] The court initially agreed to let him testify and called Agent Zwiebel to the stand. The defense again objected after realizing that Agent Zwiebel had been in the courtroom while Dr. Cave testified, which it

[2] The State did not submit a witness list specifically for the competency hearing, but prior to the hearing it had listed Agent Zwiebel on a general witness list and a preliminary hearing witness list, both of which put Defendant on notice of the State's intent to call the listed witnesses "in any evidentiary hearing and/or trial in this cause."

argued was not allowed as the competency hearing was a sealed proceeding. The court agreed with the defense and excluded Agent Zwiebel from testifying.

{6} "We will not disturb the decision of the trial court absent a clear abuse of this discretion and prejudice to the complaining party." *State v. Hernandez*, 1993-NMSC-007, ¶ 36, 115 N.M. 6, 846 P.2d 312. Rule 11-615 provides that, upon a party's request or sua sponte, "the court must order witnesses excluded so that they cannot hear other witnesses' testimony," subject to enumerated exceptions. The Rule's purpose is "to maintain the effectiveness of cross-examination by preventing witnesses from using knowledge of prior testimony to recast their own testimony, perhaps even with honorable motives, to conform to what other witnesses have said or to otherwise anticipate possible cross-examination." *State v. Reynolds*, 1990-NMCA-122, ¶ 27, 111 N.M. 263, 804 P.2d 1082.

{7} The State invokes the following exception to the sequestration rule: investigative agents may sit "at counsel table throughout the trial even though the agent is or may be a witness." *State v. Chavez*, 1983-NMCA-120, ¶ 12, 100 N.M. 730, 676 P.2d 257. It is unclear from the record and briefing where in the courtroom Agent Zwiebel was seated, but even if he was seated at counsel table, at no time before the hearing began did the State seek permission for him to sit at counsel table, announce its intent to call him as a witness, or even note that he was present in the courtroom, even though the defense had indicated at the beginning of the hearing

that the State had not offered a witness to counter Dr. Cave's evaluation. *See id.* ¶ 5 (noting that the state had moved before trial to apply the exception to the sequestration rule). In fact, the State did not at any point argue before the district court that the exception for investigative agents applied. *See Chavez*, 1983-NMCA-120, ¶ 11 ("Upon request for exclusion of witnesses, the party seeking to have witnesses remain has the burden of proving to the court that an exception should be made."). It appears from the record that Defendant is correct that neither the defense nor the court could have known to ask Agent Zwiebel to leave the courtroom because they were not alerted to his presence in the room until the State called him to testify.

{8} Even assuming for the sake of discussion that the district court abused its discretion by excluding Agent Zwiebel's testimony, the State has not carried its burden of establishing the ruling was prejudicial to the State. *See Robey v. Parnell*, 2017-NMCA-038, ¶ 31, 392 P.3d 642 (recognizing that the appellant has the burden of establishing prejudice and that appellate courts do not correct harmless errors). The State asserts that Agent Zwiebel would have laid a foundation for a recorded interview, and that the interview, and Agent Zwiebel's testimony about the interview, would have "directly contradicted Dr. Cave's finding that Defendant did not know what a lie is" because, according to the State, "Defendant used the word 'lied' to describe his own conduct in the interview and specifically discussed the charges and circumstances of his case." The State's assertions fall short first and

foremost because the State has not explained how the recording or Agent Zwiebel's testimony about the interview would have undermined the district court's conclusion that the legal standard for competency was not met—a conclusion that rested on far more than Defendant's lack of understanding of what a lie is or his lack of understanding of the charges against him, as we explain below. And, in the absence of argument to the contrary, it appears to us that the excluded evidence would have, at best for the State, called into question only a sliver of the evidence presented to and relied on by the district court. We also note that the evidence the State hoped to introduce about lying—that Defendant characterized something he said as a lie—was redundant of evidence that was, in fact, considered by the district court before it ruled on the competency question. Specifically, Dr. Cave's report states that, during an IQ assessment, Defendant was asked a question about what he would do in a hypothetical situation, and Defendant "indicated that he would choose to lie." The district court nevertheless accepted Dr. Cave's testimony and found that Defendant was incompetent, and the State has provided us with no basis for concluding that the district court might have reached a different result if it had also considered testimony that Defendant used the word "lie" during the interview.

{9} We are not persuaded that the district court abused its discretion in excluding Agent Zwiebel as a witness at the competency hearing for violation of Rule 11-615 or that, even if it did abuse its discretion, that its ruling was prejudicial to the State.[3]

B. *Rotherham* Analysis

{10} Next, the State argues that the district court erred by concluding that Defendant was not competent to stand trial because the court did not analyze New Mexico's three-part competency test on the record. Reviewing for an abuse of discretion, *see State v. Garcia*, 2000-NMCA-014, ¶ 20, 128 N.M. 721, 998 P.2d 186, we are not persuaded because precedent establishes that a lack of on-the-record analysis of the competency test is not error as long as substantial evidence supports the court's incompetency determination.

{11} A defendant is competent to stand trial when they have (1) a "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational

[3]The State also argues that the *Harper*/*Le Mier* factors for excluding a witness are not satisfied and that the district court failed to address the factors. *See State v. Harper*, 2011-NMSC-044, ¶ 15, 150 N.M. 745, 266 P.3d 25; *State v. Le Mier*, 2017-NMSC-017, ¶ 15, 394 P.3d 959. But as the State acknowledges, the *Harper*/*Le Mier* analysis considers the appropriateness of excluding a witness *as a discovery sanction*. *See Le Mier*, 2017-NMSC-017, ¶ 1. Here, the court was prepared to let Agent Zwiebel testify even after the defense argued that he had not been identified on a witness list, but ultimately excluded him because he was not sequestered while Dr. Cave testified. In other words, the exclusion was not a sanction for late disclosure of a witness; it was a remedy in light of neither Defendant nor the court being on notice of a need to invoke Rule 11-615. We therefore decline to apply the *Harper*/*Le Mier* analysis.

understanding," (2) "a rational as well as factual understanding of the proceedings against [them]," and (3) "the capacity to assist in [their] own defense and to comprehend the reasons for punishment." *State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131 (internal quotation marks and citation omitted). The State argues that the court abused its discretion in proceeding directly to an intellectual disability determination after finding Defendant incompetent without analyzing the *Rotherham* factors on the record. *See* Rule 5-602.3 NMRA.

{12} At the end of the hearing, the court found—"based on the testimony of Dr. Cave"—that Defendant "suffer[ed] from an intellectual disability . . . combined with autism" and was "incompetent to proceed with trial at this point." This statement appears similar to that made in *State v. Linares*, where the district court concluded that the defendant was "not competent to stand trial due to [developmental or intellectual disability]." 2017-NMSC-014, ¶ 35, 393 P.3d 691 (internal quotation marks and citation omitted). Our Supreme Court noted that "[a]t first blush, the court appear[ed] to have done precisely what is impermissible: conclude that [the defendant] is incompetent *solely because* she [has a developmental or intellectual disability]." *Id.*; *see id.* ¶ 33 (holding that developmental or intellectual disability, "in and of itself, is not conclusive evidence that a defendant is incompetent"). However, our Supreme Court affirmed the competency determination despite a lack of on-the-record analysis of the *Rotherham* requirements because the court "heard

evidence bearing directly on the faculties, identified in *Rotherham*, a defendant must possess to be deemed competent and the extent to which [the defendant] possessed these faculties." *Id.* ¶¶ 35, 38. Thus, "[o]ur inquiry is limited only to whether substantial evidence supports the conclusion the court reached." *Id.* ¶ 39.

{13} Here, the district court was also presented with substantial evidence that supported a finding of incompetence. Dr. Cave's report, which was admitted as evidence, addressed each *Rotherham* requirement. Regarding Defendant's present ability to consult with his lawyer, *see Rotherham*, 1996-NMSC-048, ¶ 13, Dr. Cave found that Defendant "appeared to have a solid understanding of the roles of various participants in the courtroom," including that of his attorney, but that he "remained unable to categorize his charge correctly" as a felony or misdemeanor and had "a limited understanding of the plea process."

{14} Related to Defendant's rational and factual understanding of the proceedings, *see id.*, Dr. Cave found that Defendant "acknowledged the court's authority over him" and "[f]ollowing further clarification, he defined a plea bargain as an agreement that may lead to a sentence of probation rather than incarceration," but "faced significant difficulty in recalling and articulating the specifics of the charge against him," including struggling "to explain the precise nature of the offense."

{15} Finally, as to Defendant's "capacity to assist in his own defense and to comprehend the reasons for punishment," *see id.*, Dr. Cave found that Defendant

"recognized that he could assist his attorney by providing a comprehensive account of the events that transpired; however, he indicated that he would likely encounter challenges in fully disclosing all the information he possessed." And "[Defendant] was unable to explain the circumstances that led to his arrest or the statements he made during that time," and "believed he would face 'detention' should he speak out or move within the courtroom without obtaining permission."

{16} At the hearing, when questioned about these faculties, Dr. Cave testified that Defendant was "so cognitively impaired, he doesn't get it. He doesn't really understand." Specifically, she noted that Defendant did not know the meaning of the terms "misdemeanor" or "felony," which she identified as "the most basic, fundamental level of comprehension." The State cross-examined Dr. Cave about the findings in her report that supported competency, such as Defendant's understanding of the difference between guilty and not guilty pleas and his stated preference for pleading no contest. Notably, as mentioned, the State did not present expert testimony or other evidence contradicting Dr. Cave's testimony or report. Viewing the evidence "in the light most favorable to the district court's decision, resolv[ing] all conflicts and indulg[ing] all permissible inferences to uphold that decision, and disregard[ing] all evidence and inferences to the contrary," *Linares*, 2017-NMSC-014, ¶ 24, we conclude that substantial evidence supports the district court's determination that the three *Rotherham* competency requirements are not satisfied,

and that Defendant is therefore not competent. The absence of an on-the-record analysis of the competency factors does not warrant reversal.

C. Intellectual Disability Determination

{17} The State argues that the district court erred in the procedure it followed and the reliability of the evidence relied upon in making the determination that Defendant's incompetency was due to an intellectual disability. Reviewing for an abuse of discretion, *see State v. Jacob F.*, 2019-NMCA-042, ¶ 3, 446 P.3d 1237, we agree with the State that the court's procedure in making that determination was not in strict compliance with Rule 5-602.3(B) (2024).[4] However, we decline to reverse on these procedural grounds because there is evidence in the record to support the court's determination, and the State does not clearly explain how it was prejudiced by the court's error. Nor has the State persuaded us that the district court erred by concluding that Defendant is intellectually disabled based on the evidence presented about Defendant's various scores on intelligence quotient (IQ) tests. We address these arguments in turn.

{18} The State contends that the court did not hold a hearing to determine whether Defendant's incompetency was due to a developmental or intellectual disability, in violation of Rule 5-602.3(B) (2024). Subsection (B) of the Rule provides that "[i]f a defendant is charged with a felony and found incompetent to stand trial, on motion

[4] Rule 5-602(B) was amended in 2025, after Defendant's competency hearing.

of the defense, the court shall hold a hearing to determine if the defendant's incompetency is due to developmental or intellectual disability." The plain language suggests that a determination of developmental or intellectual disability should be made after a determination of incompetency and after the defense so moves.[5] *See State v. Lopez*, 2023-NMSC-011, ¶ 10, 529 P.3d 893 (explaining that we examine the plain language of a procedural rule).

{19} The defense did not move for a disability determination after the court found Defendant incompetent to stand trial. Rather, concurrently with its incompetency finding, the court determined that Defendant was "suffering from an intellectual disability." We agree with the State that the court erred in doing so. *Cf. State v. Sanchez*, 1969-NMSC-090, ¶ 5, 80 N.M. 438, 457 P.2d 370 (holding that competency "proceedings are required to be in strict compliance with the statutory requirements").

{20} Nonetheless, we must consider whether that error is reversible. "For error to be reversible, it must be prejudicial." *State v. Bonham*, 1998-NMCA-178, ¶ 23, 126 N.M. 382, 970 P.2d 154, *abrogated on other grounds by State v. Traeger*, 2001-NMSC-022, ¶ 20, 130 N.M. 618, 29 P.3d 518. At most, the State argues that the court erred as a matter of law because it bypassed the process in which the court

[5]The current version of Rule 5-602.3(B) allows either party or the court to move for a determination of incompetency due to intellectual or developmental disability.

"makes the required findings on the record" before deeming a defendant "incompetent on the basis of intellectual disability, a finding with significant legal consequences including potential commitment and dismissal." We are not persuaded that the State was prejudiced. There is evidence in the record to support the court's conclusion: Dr. Cave testified that Defendant had a mild intellectual disability that was "lifelong and permanent" and "probably cannot be remediated." *See* Rule 5-602.3(B) (explaining that the purpose of the disability hearing is to determine whether there is a preponderance of the evidence that (1) "the defendant has developmental or intellectual disability" and (2) "there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable time, not to exceed nine (9) months from the original finding of incompetency"). The State cites *Rivera-Platte v. First Colony Life Insurance Co.*, 2007-NMCA-158, ¶¶ 31, 45-46, 76, 143 N.M. 158, 173 P.3d 765, as an example of this Court reversing "for a lack of findings required by rule." However, in that case, this Court recognized that findings are encouraged but not required of the district court and, in their absence, "we look to the record for explanation of the district court's rationale and evidence to support its decision." *Id.* ¶ 45. Because the State has not clearly demonstrated prejudice and because there was evidence in the record to support the district court's conclusion that Defendant's incompetency was due to an intellectual disability, such that the conclusion was not "against logic" or "clearly

untenable or not justified by reason," *see Jacob F.*, 2019-NMCA-042, ¶ 3 (internal quotation marks and citation omitted), we are not persuaded that reversal is warranted on this ground.

{21} The State also takes issue with the correctness of the court's ruling given the statutory presumption in Rule 5-602.3. Subsection (A)(2) of the Rule explains that "[a]n intelligence quotient of seventy (70) or below on a reliably administered intelligence quotient test shall be presumptive evidence of developmental or intellectual disability." Three IQ scores were discussed in Defendant's evaluation: two previous external evaluations which scored his IQ at 81 and 77, and Dr. Cave's evaluation, which scored Defendant's IQ at 45 using the Slosson Intelligence Test-4. Dr. Cave applied the 45 IQ score to conclude that Defendant's IQ is below the Rule's presumptive maximum quotient of 70. *See* Rule 5-602.3(A)(2). Dr. Cave noted that the 45 IQ score was two standard deviations below the prior scores and the 95 percent confidence interval for the score ranged from 41 to 54 IQ points. The State argues that the court improperly relied on the 45 IQ score to determine that Defendant had an intellectual disability because (1) the test that gave that score was not "reliably administered," nor did the court make a finding that the test was "reliably administered," and (2) the court did not explain why it relied on the 45 IQ score rather than the 81 and 77 IQ scores Defendant had previously received.

{22} As to the first argument, we begin by noting that the State provides no authority to suggest that the court was required to make an explicit finding that the test was "reliably administered." And although Dr. Cave found that the prior two scores of 81 and 77 "are more likely to be a reliable indication of [Defendant's] intellectual functioning," this Court has previously held that "the legislative requirement of a 'reliably administered' IQ test is directed at the manner in which the test is given to the subject, rather than the accuracy of the results reached." *Jacob F.*, 2019-NMCA-042, ¶ 10. The State's argument appears to attack the result of the Slosson Intelligence Test-4, rather than how Dr. Cave administered the test. For example, the State argues that "[a] score [Dr. Cave's] report flags as potentially reflecting suboptimal effort, produced by an instrument described as a 'quick peek,' cannot constitute a score on a 'reliably administered' test." We conclude that the circumstances of the IQ test administered by Dr. Cave did not compel the district court to find that the test was unreliable.

{23} Second, the State argues that the court erred because it "made no findings explaining why it disregarded the more reliable scores in favor of the 45 IQ score," and "the fact[-]finder who declines to follow an expert's opinion must engage with the conflicting evidence and provide some basis for its resolution." The State again cites no authority suggesting the court was required to address the distinct IQ scores on the record. It is the role of the district court to resolve conflicts in the evidence,

and we will not second-guess its resolution of those conflicts. *See State v. Roybal*, 1992-NMCA-114, ¶ 9, 115 N.M. 27, 846 P.2d 333 ("It was for the trial court as fact-finder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lay."). Further, Dr. Cave's own evaluation yielded the 45 IQ score result, which was the most up-to-date score, a fact that the court explicitly mentions in its ruling. We are not persuaded that the court erred in how it weighed and resolved the differing IQ scores. Finding no reversible abuse of discretion, we affirm the court's disability determination.

II. The Hearing on the State's Motion to Reconsider and Motion for a Dangerousness Hearing

A. Conclusion about Expert Testimony

{24} The State argues that the district court erred in denying the State's motion to reconsider by holding that Agent Zwiebel's testimony would not be relevant to the competency determination because he was not an expert. Reviewing again for an abuse of discretion, *see White Sands Constr., Inc. v. City of Las Cruces*, 2023-NMCA-056, ¶ 24, 534 P.3d 1015, we agree with the State because our law does not require the state to counter a competency evaluation with expert testimony, yet it was on that basis that the court declined to allow Agent Zwiebel to testify at the motion hearing, and partially on that basis that the court denied the motion to reconsider. However, we do not reverse on this issue because reversal would not change the result. *See Wright v. Brem*, 1970-NMCA-030, ¶ 7, 81 N.M. 410, 467 P.2d

736 ("Our function is to correct an erroneous result, and not to correct errors which, even if corrected, will not change the result."). The result—exclusion of Agent Zwiebel's testimony—was not erroneous because, as we have explained, reaching that result was within the district court's discretion under Rule 11-615.

{25} In its motion, the State argued that "essential evidence of Defendant's competency, which would have been provided through Agent Zwiebel's lapel footage, was excluded by the Court and never reviewed by Dr. Cave." At the hearing on the State's motion, the court said that

> the threshold determination is whether . . . Defendant is competent to stand trial or not. And the parties stipulated that Dr. Cave was an expert in this field . . . . So any testimony that Investigator Zwiebel will provide to the court would not have any determination as to . . . Defendant's competency. . . . I don't see how that would be relevant under a Rules of Evidence analysis as to . . . Defendant's competency.

And in its order denying the State's motion, the court listed the following findings of fact:

> (A) Investigator Zwiebel was never listed as a witness on a witness list for the competency determination.
>
> (B) The State had the opportunity to petition the court for its own expert because this comes down to expert testimony as to . . . Defendant's competency.
>
> (C) Investigator Zwiebel's interaction with . . . Defendant does not go to the ultimate fact that . . . Defendant's IQ as determined by Dr. Susan Cave is below the presumptive IQ of 70 and therefore . . . Defendant has an intellectual disability.

{26} The State argues that these "oral and written statements support an inference that the court believed the State had to present an expert witness at the evidentiary hearing." We consider de novo whether the district court's statement manifests a "misapprehension of the law" upon which the otherwise discretionary ruling on the motion to reconsider was based. *See State v. Fernandez*, 2023-NMSC-005, ¶ 8, 528 P.3d 621 (internal quotation marks and citation omitted).

{27} Precedent suggests that the state is not required to present expert testimony in a competency hearing. *See, e.g.*, *State v. Rael*, 2008-NMCA-067, ¶ 8, 144 N.M. 170, 184 P.3d 1064 (acknowledging, in the context of a competency hearing in which the state presented only non-expert testimony, that a factfinding court "may reject expert testimony, even when the opposing party has not countered with expert testimony of its own"); *State v. Jason F.*, 1998-NMSC-010, ¶ 29, 125 N.M. 111, 957 P.2d 1145 (affirming the factfinding court's competency determination where the defendant presented expert testimony and the state presented lay testimony from a detective who had interviewed the defendant). We therefore agree with the State that the court misstated the law on this point. *See Fernandez*, 2023-NMSC-005, ¶ 8.

{28} Even so, "a district court does not abuse its discretion in denying a motion for reconsideration that was merely a restatement of the arguments [the movant] had already advanced." *Unified Contractor, Inc. v. Albuquerque Hous. Auth.*, 2017-NMCA-060, ¶ 77, 400 P.3d 290 (internal quotation marks and citation omitted). In

the motion and subsequent hearing, the State sought to admit Agent Zwiebel's testimony on the same basis it relied on to call him in the competency hearing—that the testimony about his interaction with Defendant was relevant as rebuttal to Dr. Cave's testimony. Because the State pursued the same relevance argument for calling Agent Zwiebel in both hearings and because we have concluded that the district court properly excluded Agent Zwiebel in the competency hearing for violation of Rule 11-615, we are not persuaded that reversal on the court's misstatement of the law in the motion hearing would be necessary or appropriate. *See Wright*, 1970-NMCA-030, ¶ 7.

B. Need for a Dangerousness Hearing

{29} Lastly, the State argues that the district court erred in denying the State's motion for a dangerousness hearing before dismissing Defendant's case. Section 31-9-1.2 outlines the requirement for a dangerousness hearing in competency proceedings. The statute was amended in June 2025, *see* 2025 N.M. Laws, ch. 4, § 3, after Defendant was charged but shortly before his competency hearing; because of the amendment, one issue in the motion hearing was which version of the statute to apply. The district court applied the 1999 version of the statute—the most recent version before the 2025 amendment—concluding that a dangerousness hearing was "not necessary" before dismissal for three reasons that we consider in turn. We

consider this issue of statutory construction de novo. *See State v. Morales*, 2010-NMSC-026, ¶ 6, 148 N.M. 305, 236 P.3d 24.

{30} The court's first reason for declining to hold a dangerousness hearing was that the 1999 version did not enumerate CSAM whereas the 2025 amendment does, and the general-specific rule of statutory construction does not allow reading CSAM into the 1999 version. *See In re Estate of McElveny*, 2017-NMSC-024, ¶ 21, 399 P.3d 919 ("A conferral of specific authority trumps any previous conferral of general authority."). It appears that the parties and the court believed the necessity of a dangerousness hearing was contingent upon Defendant's charge being among the statute's enumerated crimes that establish dangerousness. *Compare* § 31-9-1.2(D) (1999) ("'[D]angerous' means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating [NMSA 1978,] Section[s] 30-9-11 [(1995)] or 30-9-13 [(1991)]."), *with* § 31-9-1.2(A) (2025) (explaining that "[a] defendant who is not competent is dangerous if the court finds by clear and convincing evidence that the defendant presents a serious threat of" enumerated crimes, including "violating a provision of the Sexual Exploitation of Children Act").[6] For example, in the motion hearing, the State said that "the [amended] legislation better articulates which charges should be considered as far as

[6]Defendant was charged with violating Section 30-6A-3, which is part of the Sexual Exploitation of Children Act. *See* NMSA 1978, §§ 30-6A-1 to -4 (1984, as amended through 2016).

when we go to a dangerousness hearing." And the defense argued that the law "did not allow for and still does not allow for a dangerousness hearing to proceed because the State would have to show either great bodily harm or that [Defendant] is charged with one of the enumerated crimes outlined in Section 31-9-1.2."

{31} On the contrary, under both versions of the statute, a dangerousness hearing is required after a determination of incompetency before the court can dismiss without prejudice; the predicate event for such a hearing is not a certain type of crime allegedly committed. Section 31-9-1.2(A) (1999) provides: "When, after hearing, a court determines that a defendant is not competent to proceed in a criminal case and the court does not find that the defendant is dangerous, the court may dismiss the criminal case without prejudice in the interests of justice." As amended, Section 31-9-1.2(A) (2025) provides: "If, after a competency hearing, a court determines that a defendant is not competent to stand trial, the court shall determine if the defendant is dangerous." Subsection (B) of the 2025 version similarly allows the district court to dismiss without prejudice only if it determines the defendant is not dangerous. Thus, having found Defendant incompetent, the district court was required to hold a dangerousness hearing, and it therefore erred by denying the State's motion for such a hearing.[7]

[7] The enumeration of CSAM in the 2025 amendment is unrelated to the requirement for a dangerousness hearing—rather, it relates to the definition of "dangerous." *See* § 31-9-1.2(D) (1999); § 31-9-1.2(A) (2025). Specifically, the

{32} The court's second reason for declining to hold a dangerousness hearing was that the 2025 amendment was not in effect at the time Defendant committed the alleged offenses, and its third reason was that the 2025 amendment is punitive and subject to ex post facto analysis. *See Yepa v. N.M. State Tax'n & Revenue Dep't*, 2015-NMCA-099, ¶ 14, 358 P.3d 268 ("The constitutional prohibition against ex post facto laws is violated when a statute involving retroactivity is passed that makes criminal a previously innocent act, increases the punishment, or changes the proof necessary to convict the defendant." (internal quotation marks and citation omitted)). We conclude that the 1999 version is applicable, rather than the 2025 version, because the 1999 version was in effect when the alleged unlawful conduct occurred and when Defendant's case was filed. We therefore decline to reach the ex post facto analysis of whether the 2025 amendment is retroactive and punitive. *See id.*

{33} The court's reasoning that the 2025 amendment was not in effect when Defendant committed the alleged offense is consistent with the general rule that "the law, at the time of the commission of the offense, is controlling." *State v. Lucero*, 2007-NMSC-041, ¶ 14, 142 N.M. 102, 163 P.3d 489 (internal quotation marks and citation omitted). Defendant's conduct allegedly occurred between December 2023

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statute indicates that a defendant is dangerous "if the court finds by clear and convincing evidence that the defendant *presents a serious threat of*" committing CSAM or one of the other offenses identified in the statute. *See* § 31-9-1.2(A) (2025) (emphasis added).

and July 2024 and, at that time, the 1999 version of Section 31-9-1.2 was still in effect.

{34} The State argues that the *Lucero* rule does not control here because the 2025 version of Section 31-9-1.2 "attaches legal consequences to the finding of incompetency—not to the commission of the offense" by amending "the procedural framework governing competency proceedings," rather than "the substantive elements of the crime and its punishment." *See Morales*, 2010-NMSC-026, ¶ 9. Substantive rights are "determined by the law in effect at the time of the conduct in question," *Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶ 17, 110 N.M. 314, 795 P.2d 1006, in accordance with the *Lucero* rule. On the other hand, "[t]here are no vested rights in a particular remedy or method of procedure," *Romero v. N.M. Health & Env't Dep't*, 1988-NMSC-073, ¶ 8, 107 N.M. 516, 760 P.2d 1282, and so procedural or remedial rights are applied retroactively, *see Hale*, 1990-NMSC-068, ¶ 18. Still, even if Section 31-9-1.2 is procedural or remedial rather than substantive, "[n]o act of the [L]egislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." N.M. Const. art. IV, § 34. In other words, the Legislature can "redefine[] the parameters" of procedure or remedy "up until [a defendant]'s case [i]s pending." *Romero*, 1988-NMSC-073, ¶ 8. "For a case to be pending, it must be filed on the docket of some court." *Id.*

{35} We therefore perceive two relevant events in this case: the alleged commission of the offense, if Section 31-9-1.2 is substantive, *see Hale*, 1990-NMSC-068, ¶ 17, and the filing of the case, if Section 31-9-1.2 is procedural or remedial, *see Romero*, 1988-NMSC-073, ¶ 8. Because the 1999 version was in effect both when the alleged conduct occurred and when Defendant's case was filed, we agree with the district court that the 1999 version of Section 31-9-1.2 applies to Defendant's case rather than the 2025 version. We do not decide whether Section 31-9-1.2 is substantive or procedural or remedial; nor do we decide whether the 2025 amendment is retroactive and punitive under the ex post facto analysis. *See Yepa*, 2015-NMCA-099, ¶ 18.

{36} A dangerousness hearing was required under the 1999 version and the district court erred in declining to hold such a hearing. The State was prejudiced by that error because it potentially impeded the State's "parens patriae powers to provide care to its citizens when necessary," here, in the form of "treatment to attain competency to stand trial," as well as its "police power—its authority to provide its citizenry a safe community in which to live." *See Rotherham*, 1996-NMSC-048, ¶ 52. The State has a "compelling interest" in exercising these powers in the context of competency proceedings. *See id.* Because the court's error was prejudicial, we reverse, *see Bonham*, 1998-NMCA-178, ¶ 23, and remand for the district court to hold a hearing and make a dangerousness determination.

CONCLUSION

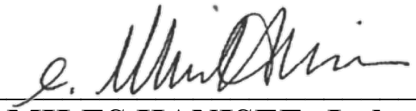
{37} We remand for the district court to determine whether Defendant is dangerous pursuant to Section 31-9-1.2 (1999). We otherwise affirm.

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



ZACHARY A. IVES, Judge

WE CONCUR:



J. MILES HANISEE, Judge



KRISTOPHER N. HOUGHTON, Judge