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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2           **STATE OF NEW MEXICO,**

3                 Plaintiff-Appellant,

4           **v.**

**No. 35,184**

5           **VALENTIN GARCIA,**

6                 Defendant-Appellee.

7           **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

8           **Charles W. Brown, District Judge**

9           Hector H. Balderas, Attorney General

10           Santa Fe, NM

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12           Albuquerque, NM

13           for Appellant

14           Bennett J. Baur, Chief Public Defender

15           Becca Salwin, Assistant Appellate Defender

16           Santa Fe, NM

17           for Appellee

18   **MEMORANDUM OPINION**

19           **SUTIN, Judge.**

1 {1} The State has appealed from an order dismissing the underlying case with  
2 prejudice. We previously issued a notice of proposed summary disposition in which  
3 we proposed to reverse. Defendant has filed both a memorandum in opposition and  
4 a motion to supplement the record. The State has responded in opposition to the  
5 motion. After due consideration, the motion is denied. With respect to the merits, we  
6 remain unpersuaded by Defendant’s arguments. We therefore reverse and remand.

7 {2} We previously set forth the pertinent background information and relevant  
8 principles of law in the notice of proposed summary disposition. To very briefly  
9 summarize, the underlying case was dismissed with prejudice as a sanction pursuant  
10 to LR2-400 NMRA (recompiled and amended as LR2-308 NMRA, Dec. 31, 2016),  
11 as a consequence of the State’s untimely production of bench notes associated with  
12 scientific testing that was performed to establish the identity of a controlled substance.  
13 [RP 75-77] The bench notes were produced 84 days prior to the trial setting, rather  
14 than 120 or 90 days in advance thereof, as specified in LR2-308(G)(4)(a)(viii). [DS  
15 3-4]

16 {3} In the notice of proposed summary disposition, we observed that historically  
17 the imposition of severe sanctions such as exclusion of evidence or dismissal with  
18 prejudice has been “improper absent an intentional refusal to comply with a court  
19 order, prejudice to the opposing party, and consideration of less severe sanctions.”

1 *State v. Harper*, 2011-NMSC-044, ¶ 15, 150 N.M. 745, 266 P.3d 25. Insofar as the  
2 district court remains at liberty to impose any sanction that conforms to the  
3 requirements of the existing case law, including *Harper*, we proposed to hold that  
4 these authorities may be harmonized, and as such, *Harper* should guide our analysis.  
5 *See* LR2-308(A) (providing that “existing case law on criminal procedure continue to  
6 apply to cases filed in the Second Judicial District Court, but only to the extent [the  
7 existing case law does] not conflict with [the local] rule”).

8 {4} In his memorandum in opposition, Defendant argues that *Harper* should be said  
9 to conflict with the local rule, and as such, *Harper* should be deemed inapplicable.

10 [MIO 10-16] We considered and rejected similar arguments recently, in the cases of  
11 *State v. Seigling*, No. 34,620, 2017 WL 361661, 2017-NMCA-\_\_\_\_, ¶¶ 22-24, \_\_\_\_  
12 P.3d \_\_\_\_ (Jan. 24, 2017), and *State v. Navarro-Calzadillas*, No. 34,667, 2017 WL  
13 361662, 2017-NMCA-\_\_\_\_, ¶¶ 13-15, \_\_\_\_ P.3d \_\_\_\_ (Jan. 24, 2017).

14 {5} We acknowledge that the local rule requires the imposition of sanctions for the  
15 State’s failure to comply with the applicable deadline relative to the production of  
16 scientific evidence. *See* LR2-400(I). However, lesser sanctions were still available to  
17 the district court. *See* LR2-400(I)(1), (3)(a), (c), (e) (indicating that the court shall  
18 impose whatever sanction that it “may deem appropriate in the circumstances[.]”  
19 including but not limited to reprimand by the judge, a monetary fine, or dismissal

1 without prejudice). Under these circumstances, we have held that no conflict between  
2 the local rule and *Harper* exists, and as such, *Harper* continues to limit the district  
3 court's discretion to impose the severest sanctions. *See Navarro-Calzadillas*, 2017-  
4 NMCA-\_\_\_\_, ¶¶ 13-15.

5 {6} As described at greater length in the notice of proposed summary disposition,  
6 in this case the district court's imposition of the severe sanction of exclusion of  
7 evidence and resultant dismissal with prejudice is not adequately supported. Although  
8 Defendant may take issue with our suggestion that the State's violation of the  
9 discovery deadline was not intentional [MIO 1-4, 6-8], Defendant neither contends  
10 that he suffered any specific form of prejudice nor suggests that the district court  
11 considered less severe sanctions. [MIO 15] Because these prerequisites were not  
12 satisfied, we conclude that the district court abused its discretion.

13 {7} In his memorandum in opposition, Defendant argues that the State engaged in  
14 other misconduct by violating LR2-308(D)(3) for failing to make a key witness  
15 available for interview and for failing to transport Defendant to a scheduling  
16 conference. [MIO 4, 5, 9] *See id.* (imposing a five-day disclosure deadline with  
17 respect to evidence possessed by the prosecution). However, none of these alleged  
18 violations formed the basis for the dismissal of the case. [RP 77] To the extent that  
19 Defendant may suggest that these alleged violations supply an alternative basis for

1 affirmance, the apparent lack of development below persuades us otherwise. *See*  
2 *generally State v. Ortiz*, 2009-NMCA-092, 146 N.M. 873, 215 P.3d 811 (declining to  
3 consider a number of arguments concerning alleged discovery violations by the  
4 prosecution where those arguments were not adequately developed at the district court  
5 level).

6 {8} Accordingly, we reverse the district court's order and remand for consideration  
7 of the *Harper* criteria and imposition of appropriate sanction(s).

8 {9} **IT IS SO ORDERED.**

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**JONATHAN B. SUTIN, Judge**

11 **WE CONCUR:**

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**LINDA M. VANZI, Chief Judge**

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**STEPHEN G. FRENCH, Judge**