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

**STATE OF NEW MEXICO,**

Plaintiff-Appellee,

**v.** **No. 32,140**

**FRANCISCO R. HERRERA,**

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY**
**Steven L. Bell, District Judge**

Gary K. King, Attorney General
Yvonne M. Chicoine, Assistant Attorney General
Santa Fe, NM

for Appellee

Bennett J. Baur, Acting Chief Public Defender
Allison H. Jaramillo, Assistant Public Defender
Santa Fe, NM

for Appellant

**MEMORANDUM OPINION**

**FRY, Judge.**

**{1}** Summary affirmance was proposed for the reasons stated in the calendar notice. No memorandum opposing summary affirmance has been filed, and the time for doing so has expired.

**{2}** Defendant has filed a response to the second calendar notice, stating that he will not be filing a memorandum in opposition to the second calendar notice. The State has also filed a response, stating that it will not be filing a memorandum in opposition to the second calendar notice. Therefore, for the reasons set forth in the first and second calendar notices, we affirm on Issues 1-4 and we reverse on Issues 5 and 6.

**{3}** Defendant admits that he was sentenced correctly because the parties agreed that this was Defendant's fourth DWI, and therefore a felony, as is aggravated DWI(.16 or above). [Def. MIO 10, RP 153] In accordance with the second calendar notice, however, we remand this case to the district court to correct the judgment and sentence to reflect Defendant's conviction for simple DWI (fourth offense) rather than aggravated DWI (.16 or above), pursuant to the jury's verdict forms. [RP 135, 136]

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

**CYNTHIA A. FRY, Judge**

**WE CONCUR:**

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**JONATHAN B. SUTIN, Judge**

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**LINDA M. VANZI, Judge**