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BAR BULLETIN

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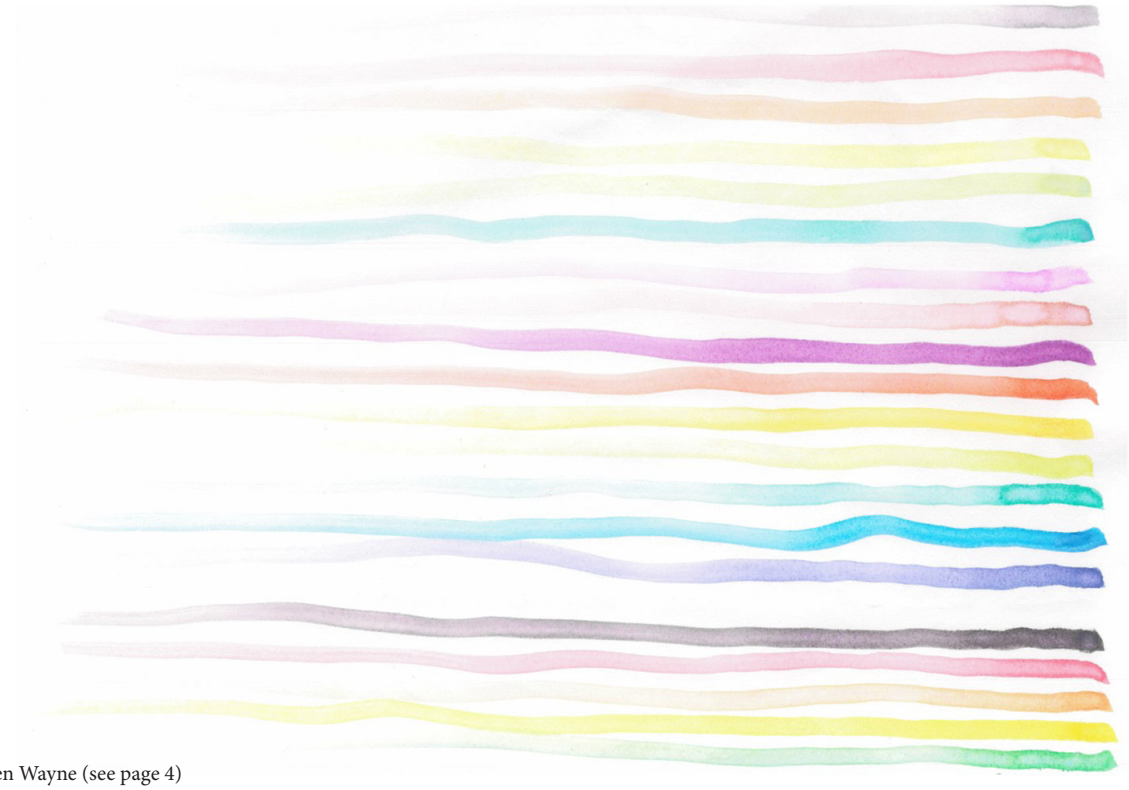

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www.sbnm.org

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About Cover Image and Artist: Stephen Wayne is a Farmington-based artist who dabbles in the law. He works alongside his daughters for inspiration.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m.(MT). Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. (MT). For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Third Judicial District Court

Notice of Right to Excuse Judge

Third Judicial District Court Chief Judge Manuel Arrieta provides notice that as a result of an appointment of Mark D. Standridge to Division IV of the Third Judicial District Court, the Court is re-assigning all cases previously assigned to Division IV to the Honorable Mark D. Standridge effective March 20.

Fifth Judicial District Court Judicial Nominating Commission

Announcement of Vacancy

A vacancy on the Fifth Judicial District Court in Lovington, NM will exist as of May 2 due to the retirement of the Honorable Judge William Shoobridge, effective May 1. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Camille Carey, Chair of the Fifth Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 8 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: https://lawschool.unm.edu/judsel/application.html, or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for April 17 by 5 p.m. (MT). Applications received after that date and time will not be considered. The Fifth Judicial District Court Nominating Commission will meet beginning at 10 a.m. (MT) on May 8 to interview applicants for the position at the Lea County District Court located at 100 N. Love St., Lovington, N.M. 88260, to evaluate the applicants for this position. The Commission meeting is open to the public, and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:

I will willingly participate in the disciplinary process.

Eleventh Judicial District Court Judicial Nominating Commission

Announcement of Candidates

The Eleventh Judicial District Court Judicial Nominating Commission reconvened in Gallup, New Mexico on March 27 to interview additional applicants for the position in the Eleventh Judicial District Court due to the retirement of the Honorable Judge Robert Aragon, effective Jan. 31. The Commission recommends two additional candidates to Gov. Michelle Lujan Grisham, including **John Bernitz** and **Levon Henry**.

U.S. District Court, District of New Mexico

Notice of Judicial Appointment

Judge Damian L. Martínez has been appointed as a United States Magistrate Judge, effective March 10. Judge Martinez's duty station will be in Las Cruces, N.M., and there will be a formal investiture ceremony at the U.S. Courthouse in Las Cruces in the coming weeks.

State Bar News

Access to Justice Fund Grand Commission

Request for Proposals Open

The Access to Justice Fund Grant Commission announces the 2023-2024 Request for Proposals. If your organization intends to apply for an Access to Justice Fund Grant, send an email to Donna Smith at donna.smith@sbnm.org and provide a statement of intent to apply, the organization contact person and his/her email, telephone number and mailing address. Donna will respond by email acknowledging receipt of the intent to apply and provide the application materials. Upon notification of a statement of intent to apply, prospective applicants will receive application materials and any further instructions, copies of all of the questions asked by potential applicants and the question responses. Submitting an "Intent to Apply" does not obligate your organization to submit an application, but you should notify Donna by email if you decide not to apply. Proposals are due by April 17.

Board of Bar Commissioners

Appointment to DNA - People's Legal Services, Inc. Board

The Board of Bar Commissioners will make one appointment to the DNA – People's Legal Services, Inc., Board for a four-year term. Attorneys licensed in New Mexico who wish to serve on the board should send a letter of interest and brief resume by May 1 to bbc@sbnm.org.

Appointment of Young Lawyer Delegate to American Bar Association House of Delegates

Pursuant to the American Bar Association Constitution and Bylaws (Rules of the Procedure House of Delegates) Article 6, Section 6.4, the Board of Bar Commissioners will make one appointment of a young lawyer delegate to the American Bar Association (ABA) House of Delegates for a two-year term, which will expire at the conclusion of the 2025 ABA Annual Meeting. Members wishing to serve as the young lawyer delegate to the ABA HOD must have been admitted to his or her first bar within the last five years or be less than 36 years old at the beginning of the term; they must also be a licensed New Mexico attorney and a current ABA member in good standing throughout the tenure as a delegate and be willing to attend meetings or otherwise complete his/her term and responsibilities without reimbursement or compensation from the State Bar; however, the ABA provides reimbursement for expenses to attend

the ABA mid-year meeting. Qualified candidates should send a letter of interest and brief resume by May 31 to bbc@sbnm.org.

Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners of the State Bar of New Mexico met on Feb. 24 at the State Bar Center in Albuquerque, N.M. Action taken at the meeting follows:

- Approved the Dec. 14, 2022 meeting minutes;
- NM Supreme Court Justice Briana Zamora conducted the swearing-in of President-Elect Erinna M. "Erin" Atkins, who was unable to be sworn-in in December, and the new commissioners as follows: Rosenda Chavez-Lara - Third and Sixth Judicial Districts, Damon J. Hudson - Young Lawyers Division Chair, Jessica A. Perez and Simone M. Seiler - Seventh and Thirteenth Judicial Districts, and Steven S. Scholl - Second Judicial District;
- Received a report on the Executive Committee and Senior Staff Retreat held on Jan. 27; the committee discussed the Client Protection Fund Commission's request regarding random audits of trust accounts and will be obtaining more information from the CPF Commission and the Disciplinary Board;
- Reappointed Kyle Harwood to the Legal Specialization Commission for a three-year term;
- Appointed Howard Thomas as chair of the State Bar's Medical Review Committee;
- Approved applications from the New Mexico Legal Aid VAP and the NM State Bar Foundation Legal Resources for the Elderly Program and the Modest Means Helpline for Accredited Provider Status to Award Self Study Credit under Rule 18-204(C)(1) NMRA for pro bono work;
- Received a report from the Executive Committee as follows: approved the agenda for the meeting; appointed Carolyn A. Wolf as the liaison to the UJI Civil Committee and Rosenda Chavez-Lara as the liaison to the Children's Court Rules Committee; and reviewed a request from Attorney General Raul Torrez to provide FEMA assistance to people in northern New Mexico affected by the Hermit's Peak/Calf Canyon Fires;
- Received a report from the Finance Committee, which included: 1) acceptance of the 2022 Year-end Financials; 2) approved reimbursement for CLE provided to members in 2022 for the Annual Meeting and two free CLE programs in the amount of $135,000 to the NM State Bar Foundation; 3) reviewed the Finance Committee Policy/Mission and approved the Annual Recurring Electronic Credit Card Payments; received 2022 Year-End Financials for the Client Protection Fund, Access to Justice Fund and Judges and Lawyers Assistance Program; and 4) received an update on the audit which will be presented at the May 12th Finance Committee meeting to the Audit Committees of the State Bar and the Bar Foundation;
- Received a report from the Policy and Bylaws Committee; the committee reviewed the new procedures of NM Legal Aid for filling vacancies on their board and approved giving deference to the organization to which the Board is making appointments and to include all applicants and supporting materials for the Board's review; and a policy will be developed for all appointments that the Board makes to organizations;
- Received a report on the Bar Leader Recruitment Committee;
- Received an update on the Elder Law Section;
- Received the 2022 Annual Reports for the Sections and Standing Committees;
- Received a reminder/update on the Professional Practice Program 2023 Roadshow, which will be visiting outlying areas to meet with members and provide resources and information on the PPG;
- Received reports from the President, NM State Bar Foundation President and Executive Director, which included a demonstration on the State Bar Demographics, which members will be able to access on the website and view current data; and
- Received reports from the Senior Lawyers, Young Lawyers, and Paralegal Divisions and bar commissioner districts, as well as the State Bar's representative to the ABA House of Delegates.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Feb. 24th meeting.

Equity in Justice Program

— Featured —

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Have Questions?

Do you have specific questions about equity and inclusion in your workplace or in general? Send in questions to our Equity in Justice Program Manager, Dr. Amanda Parker. Each month, Dr. Parker will choose one or two questions to answer for the Bar Bulletin. Go to www. sbnm.org/eij, click on the Ask Amanda link and submit your question. No question is too big or too small.

Listening Session on Disability

If you are a lawyer with a disability or a primary caretaker of a person with a disability, we invite you to a candid conversation regarding your experiences in the legal profession and legal settings and your recommendations for improvement. Please reach out to Dr. Amanda Parker at amanda.parker@sbnm.org or call 505-797-6085 to be part of or help facilitate this session.

Fee Arbitration Program

Be a Volunteer Arbitrator

The State Bar of New Mexico Fee Arbitration Program is an out-of-court method to resolve fee disputes that is expeditious, confi-

dential, inexpensive and impartial. Attorneys who volunteer to be arbitrators review case materials, hold fee arbitration hearings and issue awards that are final and binding. The arbitrating attorney may decline a case for any reason. For more information, visit https://www.sbnm.org/For-Public/Client-Protection-and-Fee-Arbitration/Fee-Arbitration/Volunteer-to-Be-an-Arbitrator-in-the-Fee-Arbitration-Program.

Historical Committee

Tour of the Glorieta Battlefield

Join the Historical Committee of the State Bar on April 29 for a tour of the Glorieta Civil War Battlefield. The tour will begin at 9 a.m. and end between 3 and 4 p.m. (MT). The tour is limited to the first 30 persons to register. Registration will close on April 22 or when 30 people have registered. Register by emailing memberservices@sbnm.org. The tour leader is Henry M. Rivera who has led this tour many times; has led tours of many other Civil War Battlefields; is a member of the Civil War Roundtable of the District of Columbia and has previously addressed the Historical Committee on Civil War subjects. Tour details, maps and other material will be provided to registrants closer to the event date.

Legal Specialization Commission

Notice of Commissioner Vacancy

The State Bar of New Mexico is accepting applications for one available commissioner seat on the Legal Specialization Commission. Applicants must be lawyers who have passed the bar examination, are licensed and in good standing to practice law in New Mexico and have practiced law for a minimum of seven years. To apply, please send a letter of intent and resume to kate.kennedy@sbnm.org.

New Mexico Lawyer Assistance Program

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. (MT) on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pam.moore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. (MT) on May 18, July 13, Oct. 5 and Jan. 11, 2024. The NM LAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NM LAP Committee has expanded their scope to include issues of depression, anxiety, and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Lawyer Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

The New Mexico Well-Being Committee

The N.M. Well-Being Committee was established in 2020 by the State Bar of New Mexico's Board of Bar Commissioners. The N.M. Well-Being Committee is a standing committee of key stakeholders that encompass different areas of the legal community and cover state-wide locations. All members have a well-being focus and concern with respect to the N.M. legal community. It is this committee's goal to examine and create initiatives centered on wellness.

UNM School of Law

Law Library Hours

The Law Library is happy to assist attorneys via chat, email, or in person by appointment from 8 a.m.-8 p.m. (MT) Monday through Thursday and 8 a.m.-6 p.m. (MT) on Fridays. Though the Library no longer has community computers for visitors to use, if you bring your own device when you visit, you will be able to access many of our online resources. For more information, please see lawlibrary.unm.edu.

The New Mexico Law Review Call for Abstracts

Announcement

The UNM School of Law's *New Mexico Law Review* is calling for abstracts examining the impacts and implications of the New Mexico Civil Rights Act (NMCRA) passed in 2021. Topics may include communities protected by the NMCRA, how the NMCRA works with other New Mexico laws, its ramifications for rural areas and how it will pave the way for future legislative acts. The authors of selected papers will be featured in a special edition journal published in Spring 2024. Selected authors may also be invited to present their work at a potential symposium to be hosted by the *New Mexico Law Review* at the University of New Mexico School of Law. Further details about the event will be announced once confirmed. Please submit your abstract to Symposium Editor Shannel Daniels at nmlrarticles@gmail.com with "NCMCRA Abstract" in the email's subject line no later than April 30. You may also submit questions at the same email address.

Announcement of 75th Anniversary Gala Ticket Sale

The UNM School of Law invites you to join them as they celebrate 75 years of success of their alumni, faculty, students, staff and friends who have contributed to making the UNM School of Law the vibrant community it is. The 75th Anniversary Gala will be taking place on April 14 at the New Mexico Museum of Natural History & Science from 6-10 p.m. The gala will feature hors d'oeuvres, beer and wine, music, and dancing. Formal and/or festive attire is required for attendance. For more information, contact lawadvancement@law.unm.edu or visit lawschool.unm.edu/75/.

Other News

New Mexico Christian Legal Aid

Virtual Training Seminar

Announcement

New Mexico Christian Legal Aid will be hosting a Virtual Training Seminar on April 28 from 1-5 p.m. (MT) via Zoom on the topics of justice for the poor and assisting the needy. Attendants will receive free CLE credits and up-to-date training in providing legal aid. For more information and registration, contact Jim Roach at 505-243-4419 or Jen Meisner at christianlegalaid@hotmail.com.

Call for Nominations

STATE BAR OF NEW MEXICO 2023 Annual Awards

Nominations are being accepted for the 2023 State Bar of New Mexico Annual Awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in the past year. The awards will be presented at the 2023 Annual Meeting on Thurs., July 27, at the Hyatt Regency Tamaya Resort & Spa. All awards are limited to one recipient per year, whether living or deceased, with the exception of the Justice Pamela B. Minzner Professionalism Award, which can have two recipients, an attorney and a judge. Nominees may be nominated for more than one award category. Previous recipients for the past three years are listed below.

To view the full list of previous recipients, visit
https://www.sbnm.org/CLE-Events/State-Bar-of-New-Mexico-Annual-Awards

— Distinguished Bar Service Award - Nonlawyer —

Recognizes nonlawyers who have provided valuable service and contributions to the legal profession over a significant period of time.

Previous recipients: Juan Abeyta, Bernice Ramos, Renee Valdez

— Excellence in Well-Being Award —

Many individuals have made significant contributions to the improvement of legal professional well-being including destigmatizing mental health, strengthening resiliency, and creating a synergic approach to work and life. This new award was created to recognize an individual or organization that has made an outstanding positive contribution to the New Mexico legal community's well-being. As the State Bar of New Mexico is committed to improving the health and wellness of New Mexico's legal community, we strongly encourage self-nominations and peer nominations for any lawyer, judge or nonlawyer working in some capacity with the NM legal community.

Previous recipient (created in 2022): Pamela Moore

— Judge Sarah M. Singleton* Distinguished Service Award —

Recognizes attorneys who have provided valuable service and contributions to the legal profession, the State Bar of New Mexico and the public over a significant period of time.

Previous recipients: Michael P. Fricke, Joey D. Moya, Deborah S. Dungan

**This award was renamed in 2019 in memory of Judge Singleton (1949-2019) for her tireless commitment to access to justice and the provision of civil legal services to low-income New Mexicans. She also had a distinguished legal career for over four decades as an attorney and judge.*

— Justice Pamela B. Minzner* Professionalism Award —

Recognizes attorneys and/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.

Previous recipients: Judge James J. Wechsler and Quentin P. Ray, Frederick M. Hart (posthumously) and F. Michael Hart, William D. Slease

**Known for her fervent and unyielding commitment to professionalism, Justice Minzner (1943–2007) served on the New Mexico Supreme Court from 1994 to 2007.*

— Outstanding Legal Organization or Program Award —

Recognizes outstanding or extraordinary law-related organizations or programs that serve the legal profession and the public.

Previous recipients: Pueblo of Pojoaque Path to Wellness Court, Intellectual Property Law Section Pro Bono Fair, New Mexico Center on Law and Poverty, New Mexico Immigrant Law Center

— Outstanding Young Lawyer of the Year Award —

Awarded to 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; nominee has demonstrated commitment to clients' causes and to public service, enhancing the image of the legal profession in the eyes of the public; nominee must have practiced no more than five years or must be no more than 36 years of age.

Previous recipients: Lauren E. Riley, Maslyn K. Locke, Veronica C. Gonzales-Zamora

— Robert H. LaFollette* Pro Bono Award —

Presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance over his or her career to people who could not afford the assistance of an attorney.

Previous recipients: Darlene T. Gomez, Torri A. Jacobus, Julia H. Barnes

**Robert LaFollette (1900–1977), Director of Legal Aid to the Poor, was a champion of the underprivileged who, through countless volunteer hours and personal generosity and sacrifice, was the consummate humanitarian and philanthropist.*

— Seth D. Montgomery* Distinguished Judicial Service Award —

Recognizes judges who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and the bar; generally given to judges who have or soon will be retiring.

Previous recipients: Judge Henry A. Alaniz, Judge Mary W. Rosner, Judge Alvin Jones (posthumously)

**Justice Montgomery (1937–1998), a brilliant and widely respected attorney and jurist, served on the New Mexico Supreme Court from 1989 to 1994.*

Nominations should be submitted through the following link:
https://form.jotform.com/sbnm/2023amawards
Additional information or letters may be uploaded with the form and submitted with the nomination.

Deadline for Nominations: Thursday, June 1st

For more information or questions, please contact Kris Becker at kris.becker@sbnm.org or 505-797-6038.

STATE BAR OF NEW MEXICO

2023 ANNUAL MEETING

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July 27–29

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www.sbnm.org/AnnualMeeting2023

State Bar of New Mexico
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The State Bar of New Mexico Fee Arbitration Program **Seeks Volunteer Arbitrators**

About the Program: Provides attorneys and clients with an out-of-court method of resolving fee disputes that is expeditious, confidential, inexpensive and impartial. The State Bar offers this program as a free service. For more information please visit **www.sbnm.org/FeeArbitration.**

Your Role: Attorneys who volunteer to be arbitrators review case materials, hold fee arbitration hearings and issue awards, that are final and binding. The arbitrating attorney may decline a case for any reason.

State Bar *of* New Mexico
Fee Arbitration Program

The Committee on Diversity in the Legal Profession (CDLP) is beginning another cycle of the Bar Exam Attorney Coaching Program for the next cohort of Bar Exam test takers. The CDLP is proud to offer this program for those taking the exam in July 2023 and we need attorney coaches. We know your lives and professional careers continue to get busier each passing year, but we are hoping you can participate in this incredible program and help support the next generation of the New Mexico bar.

Program Overview
The program is designed to match an applicant with a committed attorney who will serve as a resource for the applicant. Coaches and applicants will communicate in person or via phone, e-mail or Zoom during the applicant's bar preparation. Attorney coach and applicant matches will be made based on information provided on the form below.

If you are interested in participating, please use the following link to sign up:
https://form.jotform.com/230715896704059

Coaches will be doing the following:
✓ Helping applicants develop a study plan.
✓ Holding applicants accountable to their study plan.
✓ Offering advice on best practices for preparing for the bar exam.
✓ Offering general support and encouragement with the goal of reducing stress and anxiety.
✓ Understanding the commitment necessary for bar exam success.

Resources:
You will be provided brief training materials.

Deadline for Application:
Please fill out the application by close of business on **May 17**. Bar applicants from historically underrepresented and excluded groups have already received notification of this program and we will need to complete the matching process by the end of May to allow for at least two months of engagement between the coach and bar applicant.

If you have any questions or concerns, please feel free to contact CDLP Chair Helen B. Padilla at hbpadilla@msn.com.

State Bar *of* New Mexico
Committee on Diversity in the Legal Profession

EQUITY IN JUSTICE

Orlando Lucero, Vice-President and Regional Counsel for the FNF Family of Companies, has been elected to the American Law Institute. Mr. Lucero is a nationally recognized expert in title insurance law and is a Fellow of the American College of Real Estate Lawyers and a leader in the American Bar Association, the American Bar Foundation, the ABA Fund for Justice and Education, and the New Mexico Land Title Association.

Gallagher & Kennedy is pleased to announce that **Dominick San Angelo** has been elected the firm's newest shareholder, effective January 1, 2023. A corporate transactional attorney, he represents business owners, investors, and franchisees/franchisors in mergers and acquisitions, securities, corporate governance, commercial finance, equity holder buyouts, and intra-company disputes. In addition to his legal practice, Dom is an adjunct professor of business at the Colangelo College of Business at Grand Canyon University.

The Board of Directors of New Mexico Legal Aid, Inc. is pleased to announce that it has hired **Sonya Bellafant** as its new Executive Director. Sonya will join NMLA on April 12, 2023. Previously, Sonya was the founder and Executive Director of 603 Legal Aid in Concord, NH. 603 Legal Aid is the gateway for civil legal aid to streamline the process for low-income individuals in New Hampshire.

Tina Muscarella Gooch, a shareholder at Sutin, Thayer & Browne, has been named the Chair-Elect of the State Bar of New Mexico's Cannabis Law Section. She has served as a member of the Cannabis Law Section's Board since 2019. Tina's practice involves representing a variety of clients in civil and commercial litigation. She serves as head of the cannabis law practice group at Sutin.

Gallagher & Kennedy is pleased to announce that attorney **Dalva "Dal" L. Moellenberg** has been appointed to the Board of Regents for Western New Mexico University. New Mexico Gov. Michelle Lujan Grisham appointed Dal to a six-year term, effective immediately. In addition to his appointment on WNMU's Board of Regents, Dal serves as Chair of the New Mexico Mining Association's Environment Committee and Vice-Chair of the New Mexico Chamber of Commerce Environment, Water and Land Use Policy Committee. His environmental law practice has been recognized by Chambers USA, *The Best Lawyers in America* and *Southwest Super Lawyers*.

Robert J. Johnston has been elected shareholder at Sutin, Thayer & Browne. He practices in public finance and New Mexico tax law, providing counsel on taxable and tax-exempt financings, tax assessments and audits by the Taxation and Revenue Department, refund claims, and administrative tax protests. He serves on the Board of the State Bar's Tax Law Section and the New Mexico Chamber of Commerce's Tax Policy Committee.

For the fourth year in a row, **Sutin, Thayer & Browne** has been recognized on the ABA's Health Law Section Regional Law Firm List. The Firm's healthcare group, headed by **Deborah Mann**, tied for 7th in the West region. Lawyers **David Johnson**, now in a consultative role, and **Jesse Hale** round out the core of the practice.

Bardacke Allison LLP is pleased to welcome **Rose Cowan** as an associate. Rose represents clients in intellectual property and commercial litigation matters. She joined Bardacke Allison after clerking for Judge Lawrence P. Fletcher-Hill on the Circuit Court for Baltimore City. Rose graduated from the University of Maryland Francis King Carey School of Law, where she earned the Ward Kershaw Clinical Advocacy Prize.

Maria Montoya Chavez, of Sutin, Thayer & Browne, has been elected President of Del Norte Rotary Club for the 2023/2024 term. She currently heads the family law group at Sutin, a majority women-owned law firm, where she also serves as a Vice President. She is a Board Member of the New Mexico Collaborative Practice Group and is a frequent presenter on family law and collaborative law seminars.

In Memoriam

Theordore "Ted" Trujillo, 77, passed away peacefully in his home in Chimayó on October 25, 2022. After suffering through a long, difficult fight with dementia, in the end Ted achieved una muerte dichosa, which he prayed for as a penitente for almost 50 years. Ted was born on Christmas Eve, 1944 in Los Angeles to Cipriano DeAguero Trujillo of Chimayó and Nellie Miranda of Lincoln. He was an idealist, unafraid to fight for what he believed in, no matter the personal consequences to him. He joined the Peace Corps in 1966, was assigned to Colombia and was immediately disillusioned with its lack of regard for the working people of Colombia. He fought to change the program from within and failed, leaving the program early to return to New Mexico where he got a teaching job in Truchas and found his calling. Thus began a professional career marked by resiliency to obstacles and rooted in his love for the people of northern New Mexico. Ted met his future wife, Marisela, in the Teacher Corps Program at NMSU. They both strived to use innovative teaching methods to make learning fun for their students and they recruited likeminded friends to join them teaching at Coyote Elementary. Despite their success, after a few years they butted heads with the conventional leadership and were forced out after a showdown between the superintendent and the school board. They moved to Chimayó to restore the adobe house that Cipriano had built in the 1930's, and Ted was Principal and teacher at Mountain View Elementary and then later taught at Chimayó Elementary. He called these years his finest moments of teaching. Ted became an administrative aide at Northern New Mexico Community College and quickly worked his way up to Vice-President, playing a critical role in it becoming accredited. After he was pressured to use his authority to hire someone at Northern and was threatened that Marisela would be fired from her position with the public schools if he didn't play ball, Ted of course refused, and Marisela was fired. Ted and his colleagues then fought and lost a political coup for control of Northern and were forced out, and Ted reinvented himself by going to law school at UNM in his early 40's. He graduated from law school at the age of 43 and began to practice law out of an upstairs apartment behind his house. He returned to teaching Spanish at Pojoaque High School while also practicing law until he retired from teaching in 1999. Ted had an exceptional gift for connecting with his students and making education fun, and he is fondly remembered by his former students and teacher colleagues alike, who lit up when they saw him. Ted began representing Rio Arriba County at the invitation of his mentor, Dennis Luchetti. Ted earned the trust of the County leadership and after Dennis passed away, Ted represented Rio Arriba County until 2015, during which time he won a case before the New Mexico Supreme Court. Ted also loved advocating for land and water issues on behalf of his people. He represented almost 50 mutual domestic water associations throughout northern New Mexico, including one in his beloved Chimayó. He litigated grazing and water rights cases on behalf of the Northern New Mexico Stockman's Association and was a staunch advocate for land grants and acequias. Ted was a deeply spiritual man, a proud member of La Hermandad and was happy to see his morada's membership grow in his final years. He prayed every day, during which he said he empathized with the hardship and suffering he saw around him, human and animal alike, and would think in one form or another, "There, but for the Grace of God, go I." Ted endeared himself easily to people and was effortlessly funny, charming and approachable. He was enthusiastic about everything, brimming with hopeful energy. He was both a cautionary tale and an inspiration. He was an intellectual and a ladies' man, private about his personal life to the point that it contributed to his undoing. He was generous with his time, fifteen minutes early to everything, and always willing to attend an evening meeting and stay until there were no more questions or discussion to be had. His parents didn't teach him Spanish, but he worked hard to learn it as an adult and helped teach his children and students to continue the tradition. He was a vault of historical information and a storyteller of the olden days of New Mexico. He was a poet, a philosopher, a beautiful writer, a good chess player and an average fisherman. He was a dreamer who spent decades acquiring ancestral farmland in El Rincón de los Trujillo, remodeling adobe house after adobe house, which he delighted to see his children and grandchildren live in. He got up before the crack of dawn every day because "a beautiful new day is awaiting you." He was enamored with all his grandchildren and lit up whenever he saw them. Whatever flaws he had were forgiven, and the things he failed to provide were nothing compared to the raw materials of the legacy that he leaves: of being rooted in place and tradition; of showing up for your people; of being a lifelong learner; of being idealistic and believing in the greater good and fighting for what you believe in; of having true compassion for the less fortunate. He will be sorely missed by all those whose lives he had an impact on. Ted is survived by his sister, Marcia Medina; his children and grandchildren, son Adán (wife Ashley, grandsons Felix and Alonso), son Omar (wife Masha, grandchildren Verona, and Teo), daughter Pilar (granddaughter Sabina), and son Elias; and many family members who loved him and who he loved. Pallbearers are: sons Adán, Omar and Elias Trujillo; grandsons Felix and Alonso Trujillo; nephews Pablo and Gene Medina; cousin Rodney Bustos. Honorary pallbearers are: grandson Teo Trujillo Dogadaev; nephew Steven Medina; special cousins Eli and Danny Jaramillo, Michael Melendrez and Carlos, Claudio and Gerald Chacon; lifelong friends Jose Lucero and Joe Ciddio; longtime friends Adrian Ortiz and Juan Garcia. Ted's family sincerely thanks all who visited Ted before his passing, all who reached out afterwards, and special thanks to Los Hermanos de la Morada de Nuestro Señor de Esquipula and Luis Peña for prayers; The Legacy at Santa Fe for lovingly caring for Ted in his difficult final months, especially Janet Garcia, Yessenia Acosta and Iris Lemus; and Ambercare and Hospice Nurse Eloida Martinez for the expert care and support.

Samuel Francis peacefully passed away in Denver, Colorado on December 20, 2022. A life-long resident of Albuquerque, New Mexico, Sam moved to Denver in 2022 to be cared for by his family. Sam was born on June 17, 1936, in Del Norte, Colorado. At a very young age, he and his parents his father an immigrant from Lebanon moved to Albuquerque to explore opportunities for Sam and his four siblings. Growing up, he was independent, self-motivated, and resourceful. He learned early to use his natural talents to pursue his dreams. He served in the Army before attending the University of New Mexico Law School. Being a lawyer in private practice afforded Sam the opportunity to indulge his hobbies and passions: travel, languages, golf, cooking, and fitness. He taught himself Italian using Berlitz cassette tapes so his family could travel with added confidence. He spoke

Italian so well that people thought he was a local. Sam loved to golf. He played Pebble Beach, competed in multiple Pro-Ams, and played hundreds of rounds at the Albuquerque Country Club as a member for over 25 years. He worked out 5 days per week at Liberty Gym until he was 85. For all of his hobbies, his biggest passion was spoiling and being with his family. Whatever he learned, gained or made, he gave back. Teaching the sports, he'd grown to love, writing and self-publishing five books about the law, taking his late wife Karen on trips around the world. He was a person who gave cash to strangers who needed it and told a corny joke to make you smile (or grimace). He lived for his children and leaves millions of happy memories. Sam was preceded in death by his parents, Sam and Andrea Francis, his siblings Lee Francis, Albert Francis and Tony Francis, and his wife Karen Francis. He is survived by his sister, Esther Bush, and his children and grandchildren: daughter Julie Colclough and her sons Brenden and Colin, daughter Michelle (Matt) Lewis and her sons William, Jake and Hunter, son Sam Francis and his sons Sammy and Joey and daughter Lisa Francis. A private service for family & friends will be held later in the year.

Former New Mexico State Liquor Director and Assistant Attorney General **Mary Ann. S. Hughes** passed on 9/5/22 after a long battle with vascular dementia. The family and all of New Mexico lost a special one, a fighter, a mother, a nana, a survivor, an advocate, a provider, and a comedian to the end. Mary Ann was most proud of her family. Her children; Betsy Temple (Hughes) (Albuquerque), Jon Hughes (Seattle), and David Hughes (El Paso). She loved and spoiled her grandchildren; Jeremy Hughes, Rylee, Drumm, Emma Hughes, Miquela Hughes, Gabriella Hughes, Kelsey Smith (Hughes), and Wiley Hughes. Mary Ann was one of a kind. Born in Chicago in 1944, she was adopted shortly thereafter by Hubert A. and Mary P. Schneider growing up just outside Washington D.C. with her siblings Betsey Backe and Peter Schneider. She got married very young, had three children, and went through some adversity as a young single mom. She never looked back to the east coast after going west and settled in New Mexico. Her children remember her working several jobs at once and going to UNM. She would burn the mid-night oil studying for UNM law school final exams. But then made sure her kids were off to school or little league or wherever. She bought her first house in Santa Fe after landing an asst. attorney general job after law school. Her career then took off. Chief attorney for the corporation commission, the state police, and Governor Bruce King selected her as the first ever female State Liquor Director (Alcohol and Gaming Commission). Lawyers and politicians knew her by her initials... MASH. Her love of politics began in Washington D.C. encouraged by her father "Red." She was a 1976 National Delegate to the Democratic Convention in Miami. When she ran for New Mexico state legislature in 1996, her lead supporters were both Republican and Democrat, as she was respected by all. She was a proud member of the Red Hat Society in Albuquerque and cherished her friends and all their activities together. Holidays were special to her and her green chile chicken enchiladas and posole recipes are still used by the family. Thanksgiving was always centered around football and family, never missing a play. As a grandmother, she spoiled the heck out of all the grandkids...they all loved their NANA so much. The last year and half in memory care was difficult for her and her family. The family would like to especially thank Mary Ann's daughter Betsy for being there for her and visiting her weekly and taking on so much. The family knows that she was very appreciative of Betsy's amazing efforts, time, and love. Even as her dementia worsened, she would consistently bring out comical zingers to family and medical staff. Mary Ann was funny! As a single mom, Mary Ann worked so hard to make sure her kids had it all. She pushed to make sure the kids did activities: ballet, little league, fishing and more. She was a regular at Santa Fe High Demon football games cheering on the family high school. When her grandchildren went on to play sports she would attend and support in whatever way possible (Sandia High, Eldorado High, Garfield High, etc.) She cheered on her Lobos and on Sundays the Cowboys and Seahawks.

Vincent Art Bova, age 76, born and raised in Pittsburg, PA. and a longtime resident of Albuquerque, passed away on January 14 after a tough battle with ALS. He is survived by his wife Breda Murphy Bova, his daughter Kate Van Yperen, married to David, grandchildren, John, Adam, and Natalie; his brother, Dr. Charles Bova and wife Jan Watts; niece, Melissa Williams and husband Bryan and children Claire and Addi ; nephews, Mikell Bova and wife Alli and son Henry; Christopher Bova and wife Lindsay, and daughter Evie Mae. Art graduated from Alma College, Michigan with BA in Bus Admin; he went on to receive a MPA from The Ohio State University and a JD from Oklahoma City University. He was admitted to US Supreme Court, the 10th Circuit Court of Appeals, State and Federal Court in NM and State Court in OK and US Tax Court. He served in the US Air National Guard in OH and OK from 1969-1975 in Accounting and Finance. Art was a trial attorney for 41 years working for Attorney Bill Carpenter, the Threet Law Firm, Lill and Bova and Art Bova Law Firm. He was a member of The Enchanted Lens Camera Club, Photographic Society of America, Professional Photographers of America and numerous clubs such as The Ohio State Alumni Association, SW Arts and Crafts Festival, Oasis, and Day Lilies Garden Club. He became an Eagle Scout at age 12, enjoyed fine art, music, photography, gardening, beautiful scenery, scuba diving, swimming, football, basketball, baseball and racket sports and judging the NM Mock Trail for High School students. He enjoyed traveling and explored all 7 continents, 128 countries, and all 50 states. The family would like to thank Tom and Missy Rinker, our neighbors, Dr. Jacqueline O'Neill, Reverend Matthew Miller, the Silva family and Pam and Dennis Verstynen for all their support and help.

Alfred Joseph Martin, Jr. (Al or AJ to friends and family) passed away this last Sunday, January 8, 2023 at the age of 84 in his beloved Santa Fe, New Mexico. Al was born to Alfred Joseph Martin, Sr. and Jane Martin in Omaha, Nebraska on June 12, 1938. His family had been prominent citizens of Omaha since the City's founding. Notwithstanding having been raised a Husker, Al had the good sense to attend college at the University of Colorado in Boulder, Colorado and matriculated a Golden Buffalo. While at CU, Al met fellow Buff and his first wife Amilu Stewart, both were pre-med students. They married on June 14, 1959 shortly after graduation and both went on to medical school at Jefferson Medical School in Philadelphia, Pennsylvania, from which they both graduated and embarked on careers as general surgeons, practicing in private partnership

together for many years. During their time together they had four children, Joe Martin, Bill Martin, Beth Galeo and Anne Pigman. Al went to college through the equivalent at the time of an ROTC program and graduated as an officer in the United States Navy. He was on active duty for two years during the Vietnam Conflict during which he was stationed at Bethesda Naval Hospital in Rockville, Maryland. Following Al and Amilu's divorce in 1980, Al went back to active duty in the Navy and was again stationed at Bethesda. He remained on active duty until 1985, achieved the rank of Captain and was deployed at sea several times, many as the ranking medical officer in his deployed fleet. Several of his deployments were to the Mediterranean Sea in connection with the Reagan Administration's efforts in Lebanon. Al was among the first responders to the scene in the aftermath of the US Embassy bombing in Beirut, Lebanon on April 18, 1983, and in recognition of his bravery and service during that event was awarded special commendation by the Navy. He went inactive/reserve status from 1986 to 1990 and was then again on full-time active duty from 1990 to 1991 during Operation Desert Storm stationed at the Naval Hospital in Portsmouth, Virginia, while also supporting full-time his private medical practice in Suffolk, Virginia.While stationed at Bethesda, Al met and fell in love with his second wife, Thomasine (Tommie) Burke and her two daughters Amy Solo and Tracy Grady. Al and Tommie were married on August 17, 1985. When Al went inactive from the Navy in 1986, Al and Tommie moved first to Suffolk, Virginia, with Al again in private medical practice (and for a period also full-time active duty with the Navy), and then in 1991 they moved to Santa Fe, New Mexico. In Santa Fe, the couple opened Al's private medical practice (with Al as doctor and Tommie as everything else (CEO to copier repairperson)), which they grew together until [1998] when Al was diagnosed with a lymphoma. A chronic hard worker and bad patient (prevalent among medical practitioners), Al did not follow his doctor's orders regarding rest following radiation treatments (electing to stand at the operating table caring for patients for hours on end instead) and as a result developed arthritis and pain in his feet that prevented him from continuing his career as a surgeon, though he did beat the cancer. Undaunted and ever the student, at the age of 60 Al decided to go to law school (much to the satisfaction of his son Bill, an attorney (and author of this piece), who had endured years of derision from his physician father for having chosen a career associated with ambulance chasing), attending the University of New Mexico Law School in Albuquerque. Following graduation from law school, Al was hired as counsel with the State of New Mexico Health Department in Santa Fe where (much to Al's satisfaction) he oversaw compliance by various hospitals with the State's health care regulations, which afforded Al an opportunity to reward countless hospital senior administrators (who had been a bane to him when in private practice) with his scrutiny. Al retired from the active practice of law in 2013. Al and Tommie lived in Santa Fe constantly from 1991, with Al loving every minute from the beginning and Tommie (who had lived most of her prior life on the East Coast) succumbing to the City's charm and falling in love with it as well. As a child, Al and his family had vacationed in Santa Fe annually and it had always been his goal to live and retire there. Al and Tommie thrived together in the City and made many, many true and beloved friends. Al had a long, full and interesting life. Tommie pre-deceased Al on December 21, 2021 and, broken-hearted, he carried on without her for as long as he could but was looking forward to being with her again. We will all miss him greatly, but are very happy that they are re-joined. Al is survived by his children Beth (and husband Tony Galeo), Anne (and husband Chip) Pigman, Amy (and husband Brian) Solo, Tracy (and husband David) Grady, Joe (and wife Karen) Martin and Bill (and wife Melani) Martin, grandchildren Dante Galeo, Tyler Pigman, Dillon (and wife Kayleigh) Pigman, Burke Solo, Marjorie Solo, Jake (and wife Allyson) Grady, Ginna Grady, Ben Grady, Clay Grady, Gentry (and wife Emily) Martin, Rebecca (and wife Astrid) Martin, Hailey Martin and Claire Martin, and great-grandchildren Brooks Pigman, Georgette Grady, Hunter Martin and Ethan Martin, his aforementioned Santa Fe circle of friends and his best friend and German Shepherd, Marisol.

The **Honorable Kenneth H. Martinez**, retired District Court Judge, passed away peacefully on January 5, 2023, at the age of 68, after a ten-year battle with Alzheimer's Disease. He blessed us with an amazing final week, filled with visits from his closest friends and family. He rallied and gave his loved one's beautiful final goodbyes! Kenneth was born on October 21, 1954, in Albuquerque, NM, to parents, Bennie Martinez and the late Helen Martinez. He graduated from Manzano High School in 1972, received his undergraduate degree in 1977 and Juris Doctorate in 1980 from the UNM School of Law. He had a distinguished career starting as a prosecutor for San Juan, McKinley, Taos and Bernalillo County, where he finally became Deputy District Attorney supervising the Violent Crimes Division. He was highly regarded for his trial skills and was successful in prosecuting many criminals. After working for several defense law firms, he opened his own law practice in 1997. While in private practice, he tried and won several police brutality civil rights cases in Los Angeles, California. In September 2005, Governor Bill Richardson appointed him to the Second Judicial District Court bench where he presided over many high profile criminal cases. He was extremely proud to serve as a criminal judge. Sadly, after nine years on the bench, Ken was diagnosed with Younger-Onset Alzheimer's disease and was forced to step down from his dream job. Ken is survived by his loving wife of 34 years, Vivian Martinez; daughters Savannah (Ryan) King, Gabriella Martinez (Anthony Hunter), Penelope (Tim) Parham, and his son Tim Roybal; ten grandchildren, Melanie King, Malcolm Hunter, DeWuan, Terrance, Elijah, Caileb, Josiah, Jireh and Nathaneal Parham, Timothy Roybal; father Bennie Martinez; three siblings, Robert, Shirley, and David (Sheryl) Martinez, and a long list of deeply-saddened nieces, nephews, cousins, family friends, colleagues, and extended family. He is preceded in death by his beautiful mother Helen Martinez, brothers Donald and Michael Martinez, Granny Lorraine Green, Gramita Josephine Martinez, his mother-in-law Lillian Lopez, sister-in-law Lupita Rodarte and his best friend, Gary Romero (aka Daddy Romero).

Legal Education

April

1-30 **Self-Study - Tools for Creative Lawyering: An Introduction to Expanding your Skill Set**
1.0 G, 2.0 EP
Online On-Demand
The Ubuntuworks Project
www.ubuntuworksschool.org

12 **Wellness Wednesday: REPLAY: Resiliency (2021)**
1.0 EP
Webcast
Center for Legal Education of NMSBF
www.sbnm.org

13 **REPLAY: Drug Testing and the Chain of Custody (2022)**
2.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

13 **In for a Penny, In for a Pound: The Risks (and Benefits?) of Serving as Local Counsel**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

14 **2023 Health Law Legislative Update**
2.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

14 **Family Mediation**
30.0 G, 2.0 EP
Live Program
University of New Mexico
School of Law
lawschool.unm.edu

19 **Wellness Wednesday: REPLAY: Emotional Intelligence (2021)**
1.0 EP
Webcast
Center for Legal Education of NMSBF
www.sbnm.org

19 **New Mexico Water Districts**
1.5 G
Live Program
New Mexico Office
of the State Engineer
www.ose.state.nm.us

19 **Utilizing Life Care Plans and Vocational Assessments in Litigation**
1.0 G
Web Cast (Live Credits)
New Mexico
Defense Lawyers Association
www.nmdla.org

20 **REPLAY: The Business of Cannabis (2022)**
1.0 G
Webcast
Center for Legal Education of NMSBF
www.sbnm.org

20 **Trial Skills Workshop - Crimes Decoded: Emerging Digital Technology Litigation Strategies**
18.5 G
Live Program
Administrative Office of the U.S. Courts
www.uscourts.gov

21 **REPLAY: Wait, My Parents Were Wrong? It's Not all About Me? (2022)**
3.0 EP
Webcast
Center for Legal Education of NMSBF
www.sbnm.org

24 **Tools for Creative Lawyering: An Introduction to Expanding your Skill Set**
1.0 G, 2.0 EP
Video Replay with Monitor Credits (Live Credits)
The Ubuntuworks Project
www.ubuntuworksschool.org

26 **Wellness Wednesday: REPLAY: Policing the Mentally Ill (2021)**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

26 **How Secondary Trauma Affects Attorney Mental Health**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

27 **REPLAY: Cybersecurity: How to Protect Yourself and Keep the Hackers at Bay (2022)**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

27 **The Mentally Tough Lawyer: How to Build Real-Time Resilience in Today's Stressful World**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

27 **Tools for Creative Lawyering: An Introduction to Expanding Your Skill Set**
1.0 G, 2.0 EP
Video Replay with Monitor (Live Credits)
The Ubuntuworks Project
www.ubuntuworksschool.org

28 **REPLAY: Determining Competency and Capacity in Mediation (2022)**
2.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

28 **Practical Tips & Strategies To Combat Implicit Biases In Law Firms and Society**
1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

May

5 **The Question Spectrum: From Cross to Voir Dire**
6.5 G
In-Person
Law Offices of Michael L. Stout
www.mlstoutlaw.com/home/the-question-spectrum
Contact: erporter@mlstoutlaw.com

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@sbnm.org. Include course title, credits, location/course type, course provider and registration instructions.

From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-017
No: S-1-SC-38418 (filed July 14, 2022)

STATE OF NEW MEXICO,
Plaintiff Petitioner,
v.
OLIVER TSOSIE, a/k/a OLIVER O. TSOSIE, a/k/a OLIVER OLIN TSOSIE,
Defendant Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Alisa A. Hart, District Judge

Hector H. Balderas, Attorney General
Maris Veidemanis,
Assistant Attorney General
Santa Fe, NM

for Petitioner

Bennett J. Baur, Chief Public Defender
Kimberly Chavez Cook,
Appellate Defender
Santa Fe, NM

for Respondent

OPINION

BACON, Chief Justice.

{1} This case requires that we apply evolving Confrontation Clause jurisprudence following *Crawford v. Washington*, 541 U.S. 36 (2004), to statements made by an alleged victim, now unavailable, in the course of a sexual assault nurse examiner (SANE) exam. On interlocutory appeal, the State challenges the Court of Appeals' affirmance of the district court's pretrial ruling that almost all statements made by Declarant Kimbro Talk to SANE nurse Gail Starr were inadmissible as violating Defendant Oliver Tsosie's confrontation rights under the Sixth Amendment. The district court concluded that Declarant's statements sought by the State for use at Defendant's trial were testimonial in nature, and thus inadmissible, pursuant to *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2006). We reverse and, without ruling on other considerations of admissibility, hold that almost all of the excluded statements are nontestimonial in nature and thus do not violate Defendant's rights under the Confrontation Clause.

I. BACKGROUND

A. Factual Background

{2} Based on events on or about December 18, 2017, Defendant was charged with kidnapping, criminal sexual penetration, aggravated burglary, aggravated battery, aggravated assault, and bribery of a witness. The State's allegations included that Declarant argued with Defendant after admitting Defendant and an unknown male into his apartment. Defendant allegedly held a knife from Declarant's kitchen to Declarant's throat, struck and kicked Declarant, and then strangled Declarant to unconsciousness. Upon regaining consciousness, Declarant allegedly was restrained on the floor by the unknown male while Defendant was anally penetrating Declarant with his penis. Defendant and the unknown male allegedly tied up Declarant and then stole some of his belongings. Before leaving, Defendant allegedly threatened to return with the unknown male to kill Declarant if he reported the events to police. Declarant subsequently freed himself and called 911 from his neighbor's apartment.

{3} Following treatment that night at the University of New Mexico Hospital (UNMH) emergency room, Declarant was referred for additional examination and treatment by the SANE department. Declarant was transported by law enforcement to the Family Advocacy Center where he underwent the SANE examination conducted by Starr. The eighteen-page SANE exam report in which Starr recorded Declarant's statements was admitted as State's Exhibit 3 ("SANE exam report") at a motion hearing on October 9, 2018.

{4} Because Declarant died in June 2018, he is unavailable to testify, and the record offers no evidence that Defendant had an opportunity to cross-examine Declarant regarding his statements recorded in the SANE exam report.

Procedural Background

{5} Following a pretrial hearing regarding various evidentiary issues, the district court concluded that it required testimony from Starr before making a determination about the admissibility of Declarant's statements in the SANE exam report. Accordingly, the district court held a hearing for that purpose.

{6} At the hearing, Starr was qualified as an expert in the area of sexual assault nurse examinations. Starr's testimony included the purpose of a SANE exam generally:

> [W]e are a medical exam. It's very important to treat somebody who has been a victim of trauma . . . to give them support and psychosocial support . . . to do a safety assessment, make sure they're not at risk for re-offense, re-harm . . . to give them medications to prevent sexually transmitted diseases, to help their body and help them feel . . . less dirty . . . to give them resources to assist them to heal. We also do forensic photography . . . and . . . for sexual assault, we also do the sexual assault evidence kit as a part of the exam, as well.

Starr testified as to her specialized training as a SANE nurse, her limited ability to make a nursing diagnosis rather than a physician's medical diagnosis, and the circumstances of the SANE program's medical clinic. Starr also testified at length as to the underlying purposes of each portion of the SANE exam report the State sought to admit in the instant case. We include this testimony below where it is relevant to the analysis.

1. The district court's order regarding admissibility of statements in the SANE exam report

{7} Central to this appeal, the district court issued an order recounting Starr's hearing testimony. The order specified statements within nine portions of the SANE exam report which the State intended to elicit at trial through Starr's testimony. Then, the court set forth a testimonial analysis under *Crawford*, stated as findings of fact and conclusions of law. The court's order admitted four statements made in the SANE exam that had "an ascertainable purpose that was primarily for medical treatment." Eight portions of the SANE exam report were ruled inadmis-

sible—challenged here by the State—due to those statements "not [being] made for the primary purpose of seeking medical treatment and [being] testimonial hearsay and a violation of Defendant's right to confrontation."

{8} Starr's testimony as recounted in the order included that she "has received specialized training to assess genital injuries and injuries caused by strangulation" and that "[a]s a SANE nurse, she can treat but cannot diagnose a patient." The order noted Starr's testimony that the SANE clinic "is located in the same building" as law enforcement "but in a separate area" and that Declarant "was brought to the clinic by law enforcement." The order also noted that "[a] CT scan of [Declarant] was conducted by UNMH prior" to the SANE exam. It further noted that "[a] SANE examination will be performed regardless of whether the patient reports the assault to law enforcement." The order included a nonexclusive list from Starr's testimony as to underlying medical purposes for Declarant's statements sought by the State for use at trial.

{9} For legal authorities guiding its analysis, the district court quoted portions of *State v. Romero* regarding testimonial analysis. *See Romero*, 2007-NMSC-013, ¶ 7, 141 N.M. 403, 156 P.3d 694 ("'Statements are . . . *testimonial* when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" (quoting *Davis*, 547 U.S. at 822)); *id.* ¶ 21 ("[T]he level of formality of the interrogation is a key factor in determining whether statements are 'testimonial' within the meaning of *Crawford*." (citing *Davis*, 547 U.S. at 830)). The district court also cited *State v. Largo* for the proposition that "[t]he actions and statements of both the interrogator and the declarant may illuminate the *primary* purpose of the interrogation." *See* 2012-NMSC-015, ¶ 16, 278 P.3d 532. The district court did not cite United States Supreme Court confrontation jurisprudence subsequent to *Davis*.

{10} The district court set out six findings of fact. These findings provided that "[t]he examination occurred in a structured setting," that the SANE exam report's multiple "forms suggest[ed] structured questioning," that Declarant "consent[ed] to release all records and evidence to law enforcement," that Declarant "had been seen and treated at UNMH emergency room prior to" the SANE exam, that "[a]lthough [Declarant had been] seen at UNMH and received a CT scan, genital examinations are referred to [the] SANE" program, and that "[a]lthough there is a dual purpose in a SANE examination, including a medical evaluation and police investigation, the majority of statements by [Declarant] recount[ed] what the abusers did, who did it, and what [Declarant] did that might affect collection of evidence in the *Post-Assault Hygiene Activity* section of the structured [SANE exam report] form" on page 3.

{11} The order's analysis then set out four apparent legal conclusions:

> [1] The primary purpose of a majority of the examination by the SANE nurse was not for medical treatment of [Declarant] but for purposes of forensic investigation, collection of physical evidence, and to ascertain the identity of the assailants.
>
> [2] Other than the genital examination, the primary purpose of the SANE examination was to prove some past fact for use in criminal trial rather than to meet an ongoing emergency making the majority of [Declarant's] statements to the SANE nurse testimonial in nature.
>
> [3] Viewed objectively, the majority of statements given to the SANE nurse were not given for the primary purpose of medical diagnosis. The SANE nurse testified she is not able to make a diagnosis. [Declarant] had already been seen at UNMH and there was no indication that UNMH lacked necessary medical equipment for proper medical examination, diagnosis, and treatment.
>
> [4] Because the SANE nurse receives specialized training in assessing genital injuries and it is not uncommon for a SANE nurse to receive a referral from emergency rooms for genital examinations, limited statements made by [Declarant] to the SANE nurse would qualify as nontestimonial hearsay falling under the exception in Rule 11-803(4) [NMRA].

{12} The district court's order then set out the four statement categories ruled both as admissible under the Confrontation Clause and as exceptions to hearsay, accompanied by the court's reasoning. Declarant's statements regarding not having prior genital symptoms were admitted, because "[a]lthough [Declarant] had been seen at UNMH prior to the SANE exam, [Declarant] was referred to [the] SANE [program] for the genital exam." Declarant's statements were admitted regarding both "penile penetration of the anus and ejaculation inside a body orifice." The former statement was admitted regarding "[t]he [bodily] location of penetration and the object used" because, "[a]lthough it is a statement of a past event," Declarant "had been referred for a genital examination that was being conducted by" Starr. The latter statement was admitted because Starr "testified that this question is asked to address a concern about illness and disease, making the primary purpose for this statement for medical treatment." Finally, Declarant's statements describing his pain and the level of pain were admitted, because neither statement regarded past events and both "directly relate[d] to [Declarant's] medical treatment."

{13} The district court's order ruled statements in eight portions of the SANE exam report inadmissible under the Confrontation Clause:

a. Statements regarding consent for services [in the page 1] *Albuquerque SANE Collaborative Exam Consent Form*.
b. Statements contained in the top portion of the [page 2] *Sexual Assault Intake* form.
c. Statements contained in the page 3 [*History* form,] . . . except for the statement that [Declarant] had no prior genital symptoms prior to the assault.
d. Statements contained in [the] page 5 . . . *Strangulation Documentation*. The State seeks to introduce the statements of [Declarant] describing method and manner of strangulation. Although[] [Starr] has specialized training in injuries caused by strangulation, objectively, the primary purpose of these structured questions [is] not for medical treatment and focus[es] on past events, not current symptoms.
e. Statements contained in [the] page 7 . . . *Patient Narrative*.
f. Statements contained in [the] page 8 . . . *Acts Described by Patient* . . . except . . . penile penetration of the anus and ejaculation inside a body orifice.
g. Statements contained in [the] page 9 . . . *Physical Exam* . . . except for the description of [Declarant's] level of pain.
h. Statements contained [in the page] 11 . . . *Body Map – Physical Exam/Assessment* [that explain how the injuries noted on the page 10 *SANE Body Map* occurred].[1]

These constitute the statements challenged by the State before this Court.

2. The Court of Appeals' opinion

{14} In a memorandum opinion, the Court of Appeals agreed with the district court that admission of the challenged statements would violate Defendant's Sixth Amendment right to confrontation. *State v. Tsosie*, A-1-CA-37791, mem. op. ¶ 1 (N.M. Ct. App. July 21, 2020) (nonprecedential).

{15} For its legal framework, the Court of Appeals relied on the seven principles we articulated in *State v. Navarette*, 2013-NMSC-003, ¶¶ 7-13, 294 P.3d 435, as "'essential' to an analysis under the Confrontation Clause." *Tsosie*, A-1-CA-37791, mem. op. ¶ 13 (quoting *Navarette*, 2013-NMSC-003, ¶ 7 (citing *Crawford*, 541 U.S. at 36)). Relevant here is the second *Navarette* principle that "'a statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution.'" *Id*. (quoting *Navarette*, 2013-NMSC-003, ¶ 8). The Court also cited, among others, *Ohio v. Clark*, 576 U.S. 237, 249 (2015), and *State v. Mendez*, 2010-NMSC-044, ¶ 29, 148 N.M. 761, 242 P.3d 328. *Tsosie*, A-1-CA-37791, mem. op. ¶ 13. The Court concluded from the foregoing authorities that it should apply "a totality of the circumstances approach: interpreting the testimonial nature of each statement individually, guided by the circumstances in which it was made, and evaluating both the intent of the declarant and the interviewer." *Tsosie*, A-1-CA-37791, mem. op. ¶ 14.

{16} The Court of Appeals rejected the State's argument that a SANE nurse's questioning is sufficiently distinct from a law enforcement officer's "'interrogat[ion]'" to preclude the primary purpose of a SANE exam being "'to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* ¶ 15 (quoting *Davis*, 547 U.S. at 822). The Court agreed that a SANE nurse is "'not principally charged with uncovering and prosecuting criminal behavior,'" *id.* (quoting *Clark*, 576 U.S. at 249), but cited their "'dual role'" against a presumption that statements made to a SANE nurse must be nontestimonial, *id.* (quoting *Mendez*, 2010-NMSC-044, ¶ 42).

{17} Analyzing the surrounding circumstances, the Court of Appeals concluded "that [Declarant] understood that at least some of his statements would be used to prosecute Defendant." *Id.* ¶ 16. The key circumstances considered in the Court's analysis were that Declarant "was taken . . . by law enforcement" to the SANE exam, "was asked in detail about the assault during the examination, was asked to provide forensic genital and anal swabs, and consented to the release of information to law enforcement." *Id.* ¶ 16.

{18} Applying its analysis above "to each individual statement," the Court of Appeals held that Declarant's "narrative account of the encounter" and his "description of the method and manner of strangulation" are "testimonial in that [they] identif[y] Defendant and accuse[] him of specific acts." *Id.* ¶ 17. The Court also held that "the remaining statements the district court excluded are testimonial because they focus on past events rather than current symptoms." *Id.*

{19} Finally, the Court of Appeals rejected the State's argument that, based on the district court's failure to indicate its rejection of uncontradicted evidence, the district court disregarded Starr's uncontradicted testimony. *Id.* ¶ 18 n.1. The Court stated that "[i]n cases such as this where a district court does not explicitly make any findings regarding the credibility of a witness, '[a]ll reasonable inferences in support of the district court's decision will be indulged in, and all inferences or evidence to the contrary will be disregarded.'" *Id.* (quoting *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856).

{20} Pursuant to the State's petition in compliance with Rule 12-502, NMRA, we issued a writ of certiorari to review this case. On appeal to this Court, the State advances three primary arguments in support of the admissibility of the challenged statements. First, no prior New Mexico law governs here, thus rendering admissibility of statements to the SANE nurse in this case an issue of first impression. Second, a trend in confrontation caselaw from other jurisdictions supports the admissibility of statements made in the course of a SANE exam. Third, the district court and the Court of Appeals in this case improperly disregarded Starr's uncontradicted testimony concerning the primary purpose of the SANE exam.

II. DISCUSSION

{21} Because *Crawford* fundamentally altered Confrontation Clause jurisprudence regarding the admissibility of statements made by unavailable declarants, we first discuss relevant admissibility standards developed under *Crawford* and its progeny. Because the United States Supreme Court has not applied those standards to statements made in the course of a SANE exam, we turn also to New Mexico caselaw, which is consistent with *Crawford* and its progeny. Finally, we apply these considerations to the instant case and analyze the rulings of the courts below.

{22} We note as a preliminary matter that constitutional confrontation analysis is merely the threshold consideration for admissibility in this circumstance. *Cf. State v. Attaway*, 1994-NMSC-011, ¶ 8, 117 N.M. 141, 870 P.2d 103 (recognizing "threshold constitutional issues" that require determination before other considerations). The admissibility of any statement that survives confrontation analysis remains subject to state and federal rules of evidence, including hearsay and balancing of probative value versus prejudicial effect. *See Michigan v. Bryant*, 562 U.S. 344, 370 n.13, 378 (2011); *cf. Mendez*, 2010-NMSC-044, ¶ 28 ("The hearsay rule and the Confrontation Clause are not co-extensive and must remain distinct."); *Giles v. California*, 554 U.S. 353, 376 (2008) (distinguishing between Confrontation Clause analysis and state law considerations).

A. Standard of Review

{23} "[W]hether out-of-court statements are admissible under the Confrontation Clause is a question of law, subject to de novo review." *Largo*, 2012-NMSC-015, ¶ 9; *State v. Lasner*, 2000-NMSC-038, ¶ 24, 129 N.M. 806, 14 P.3d 1282.

B. The Confrontation Clause Under *Crawford* and Its Progeny

1. Crawford v. Washington

{24} The Confrontation Clause of the Sixth Amendment to the United States Constitution, binding on the states through the Fourteenth Amendment, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amends. VI, XIV; *Bryant*, 562 U.S. at 352; *Clark*, 576 U.S. at 243. Under the Confrontation Clause standard announced in *Crawford*, "'witnesses' . . . are those 'who bear testimony,' and [*Crawford*] defined 'testimony' as 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Clark*, 576 U.S. at 243 (quoting *Crawford*, 541 U.S. at 51). "The Sixth Amendment . . . prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Id.* (quoting *Crawford*, 541 U.S. at 54); *accord Navarette*, 2013-NMSC-003, ¶ 7. Under *Crawford* and its progeny, "a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Clark*, 576 U.S. at 245.

[1] We note that the fourth and fifth actual pages of the SANE exam report were not numbered in the document's numbering sequence at the bottom left margin, leading to the sixth actual page being identified at its bottom left margin as "Page 4 of 13," and all subsequent pages being numbered correspondingly. In accordance with the district court's order, we refer to each page by the sequence number of the actual page.

{25} Examining the historical background of the Confrontation Clause, the *Crawford* Court identified "testimonial hearsay" as the "primary object" of the Sixth Amendment, 541 U.S. at 53, and identified "*ex parte* examinations as evidence against the accused" as "the principal evil at which the Confrontation Clause was directed," *id.* at 50. The *Crawford* Court "noted that in England, pretrial examinations of suspects and witnesses by government officials 'were sometimes read in court in lieu of live testimony.'" *Bryant*, 562 U.S. at 353 (quoting *Crawford*, 541 U.S. at 43). Such pre-Constitutional ex parte examinations were conducted by justices of the peace who "had an essentially investigative and prosecutorial function." *Crawford*, 541 U.S. at 53. Such "investigative functions [are] now associated primarily with the police," and today "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." *Id.*

{26} "*Crawford* did not offer an exhaustive definition of 'testimonial' statements [but] . . . stated that the label 'applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.'" *Clark*, 576 U.S. at 243-44 (quoting *Crawford*, 541 U.S. at 68). "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 68. Accordingly, the statements in question in *Crawford*—made in the course of a station house police interrogation—were ruled testimonial and thus inadmissible under the Confrontation Clause. *Id.* at 61, 65, 68. "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard," *Crawford*, 541 U.S. at 52, where such "interrogations [are] solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator," *Davis*, 547 U.S. at 826 (stating that the *Crawford* Court "had [such interrogations] immediately in mind (for that was the case before us)").

2. *Davis v. Washington* and *Hammon v. Indiana*

{27} In *Davis*, the United States Supreme Court addressed two domestic violence cases (*Davis v. Washington*, No. 05-5224 and *Hammon v. Indiana*, No. 05-5705) in a single opinion. In doing so, the United States Supreme Court "took a further step to 'determine more precisely which police interrogations produce testimony' and therefore implicate a Confrontation Clause bar." *Bryant*, 562 U.S. at 354 (quoting *Davis*, 547 U.S. at 822). The *Davis* Court considered the testimonial nature of the *Davis* declarant's statements that specified the identity and continuing assaultive actions of her former boyfriend to a 911 operator deemed an "agent[] of law enforcement." 547 U.S. at 817-18, 823 n.2. Concurrently, the *Davis* Court considered the testimonial nature of the *Hammon* declarant's statements that specified her husband's earlier-occurring violent actions to a police officer taking notes while another officer required her husband to remain in a separate room. *Id.* at 819-20.

{28} Applying *Crawford* to these disparate factual circumstances, the *Davis* Court announced what has become known as the "primary purpose" test:

> Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the [police] interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822 (emphasis added);[2] *Clark*, 576 U.S. at 244. The *Davis* Court made clear that these primary purpose conclusions were a sufficient approach for both *Davis* and *Hammon* "[w]ithout attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial." *Davis*, 547 U.S. at 822. However, other than providing the key factors underlying the *Davis* and *Hammon* holdings, the *Davis* Court did not further define the testimonial nature of statements falling outside those cases' factual circumstances.

{29} In *Davis*, the key factors rendering the statements to police nontestimonial, and thus in harmony with the Confrontation Clause, included that the victim "was speaking about events *as they were actually happening*, rather than describing past events, that there was an ongoing emergency, that the elicited statements were necessary to be able to *resolve* the present emergency, and that the statements were not formal." *Bryant*, 562 U.S. at 356-57 (text only) (citation omitted).[3] The *Davis* Court noted that "a 911 call[] is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Davis*, 547 U.S. at 827 (second and third alterations in original).

{30} In *Hammon*, the following were key factors rendering the statements to police testimonial and thus in violation of the Confrontation Clause:

> There was no emergency in progress. The officer questioning [the declarant] was not seeking to determine what is happening, but rather what happened. It was formal enough that the police interrogated [the declarant] in a room separate from her husband where, some time after the events described were over, she deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed.

Bryant, 562 U.S. at 357 (ellipsis, internal quotation marks, and citation omitted).

{31} Davis contemplated that a police "interrogation to determine the need for emergency assistance" could "evolve into testimonial statements once that purpose has been achieved." *Davis*, 547 U.S. at 828 (internal quotation marks and citation omitted). The *Davis* Court recognized that "after the [911] operator gained the information needed to address the exigency of the moment," answers to the operator's subsequent questions may have become testimonial. *Id.* at 828-29. The Court advised,

> This presents no great problem. . . . [T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure,

[2] We note that some courts, including the district court in this case, quote the second sentence of this Davis excerpt in isolation, without acknowledgement that "Davis confined its discussion of interrogation to situations involving law enforcement officers and their agents." Romero, 2007-NMSC-013, ¶ 7; see Bryant, 562 U.S. at 354 (quoting Davis, 547 U.S. at 822). By recognizing that the holding in Davis focused on police interrogation, however, we do not suggest that the principles of testimonial analysis in Davis must be applied only to police interrogations. See Davis, 547 U.S. at 822 ("[T]hese cases require us to determine more precisely which police interrogations produce testimony.").

[3] The "text only" parenthetical used herein indicates the omission of any of the following-internal quotation marks, ellipses, and brackets-that are present in the text of the quoted source, leaving the quoted text itself otherwise unchanged.

> they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

Id. at 829; *see Bryant*, 562 U.S. at 365 n.10 (affirming *Davis*'s recognition of "the evolutionary potential of a situation in . . . the Confrontation Clause context").

3. Michigan v. Bryant

{32} In *Bryant*, five years after *Davis*, the United States Supreme Court further expounded on the primary purpose test, directing that "when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." 562 U.S. at 370 (quoting *Davis*, 547 U.S. at 822). *Bryant* specified that a court conducting this objective inquiry should "beg[i]n its analysis with the circumstances in which" the parties interacted, *id.* at 362, then conduct "a combined inquiry that accounts for [the statements and actions of] both the declarant and the interrogator," *id.* at 367.[4] As we discuss below, the *Bryant* Court applied these principles to the victim's statements to police officers who discovered him in a gas station parking lot mortally wounded by a gunshot. *Id.* at 370-78. Despite identifying and describing the shooter and the location of the shooting, the statements of the declarant were held to be nontestimonial, and their admission in the defendant's trial, therefore, did not violate the Confrontation Clause. *Id.* at 377-78.

{33} Noting that *Davis* did not define "'ongoing emergency,'" *id.* at 363, the *Bryant* Court analyzed that factor at length, *id.* at 359-78, as "among the most important circumstances informing the 'primary purpose' of an interrogation" "between an individual and the police," *id.* at 361 (quoting *Davis*, 547 U.S. at 828-30) (citing *Crawford*, 541 U.S. at 65). The *Bryant* Court stated that "[w]hen, as in *Davis*, the primary purpose of an interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause." *Id.* at 358 (internal quotation marks omitted). "The existence of an ongoing emergency . . . focuses the participants on something other than 'proving past events potentially relevant to later criminal prosecution.' Rather, it focuses them on 'ending a threatening situation.'" *Id.* at 361 (brackets, footnote, and citation omitted) (quoting *Davis*, 547 U.S. at 822, 832).[5]

{34} In overturning the ruling of the Michigan Supreme Court that statements of the declarant were testimonial, the *Bryant* Court stated that the Michigan Supreme Court, under its misreading of *Davis*, "failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 363. The *Bryant* Court cautioned against "employ[ing] an unduly narrow understanding of ongoing emergency that *Davis* does not require." *Id.* at 362 (internal quotation marks omitted).

> {35} The *Bryant* Court further cautioned that its discussion of the Michigan Supreme Court's misunderstanding . . . should not be taken to imply that the existence *vel non* of an ongoing emergency is dispositive of the testimonial inquiry. As *Davis* made clear, whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the primary purpose of an interrogation.

Id. at 366 (internal quotation marks omitted). Additionally, the Court noted that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 358. Moreover, in determining whether a statement is testimonial, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.*

{36} In arriving at its testimonial ruling, the *Bryant* Court emphasized that the primary purpose "inquiry is objective." *Id.* at 360 ("*Davis* uses the word 'objective' or 'objectively' no fewer than eight times in describing the relevant inquiry."). The Court noted that the objective test applies even to determining the purposes of a severely injured victim in making statements to police. *Id.* at 368-69. "The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state." *Id.* at 369. Under the circumstances in *Bryant*, including the ongoing emergency and need for medical treatment, the Court could not "say that a person in the [the victim's] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 375 (quoting *Davis*, 547 U.S. at 822).

{37} In relation to its ongoing emergency analysis, *Bryant* also addressed the relative "importance of *informality* in an encounter between a victim and police." *Id.* at 366. The Court noted that "although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is" testimonial, "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." *Id.* (citing *Davis*, 547 U.S. at 822, 826). The informality of the parking lot police interrogation in *Bryant*, however, made that case "distinguishable from the formal station-house interrogation in *Crawford*" and weighed toward the Court's nontestimonial ruling. *Id.* at 366.

{38} Under the foregoing analysis of the encounter's circumstances, the *Bryant* Court then conducted its inquiry into the statements and actions of the parties to the encounter. *Id.* at 367-68. "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator," as "the contents of both the questions and the answers" are relevant to ascertaining the primary purpose. *Id.* at 367-68. The Court stated that such a "combined approach also ameliorates problems that could arise from looking solely to one participant," such as "the problem of mixed motives on the part of both interrogators and declarants." *Id.* at 368. Police officers' "dual responsibilities" "as both first responders and criminal investigators . . . may mean that they act with different motives simultaneously or in quick succession." *Id.* Similarly, "[v]ictims are also likely to have mixed motives when they make statements to the police . . . [or]

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[1] We note that the Bryant Court considered the responding officers' subsequent testimony in its objective inquiry. 562 U.S. at 372-73, 375, 377. Contrary to the dissent's suggestion, dissent ¶ 155, consideration of such testimony from the participants does not render the inquiry subjective, as we discuss further below.

[5] Regarding the importance of emergency to the testimonial inquiry, we note that elsewhere Bryant equated "[t]he existence of an emergency" with "parties' perception that an emergency is ongoing." 562 U.S. at 370 (emphasis added). The Court also stated,

> The existence of an ongoing emergency *must be objectively assessed from the perspective of the parties to the interrogation at the time*, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the primary purpose of the interrogation because of the effect it has on the parties' purpose, not because of its actual existence.

Id. at 361 n.8 (emphasis added) (internal quotation marks omitted).

may have no purpose at all in answering questions posed." *Id.* at 368-69. "[C]ourts making a primary purpose assessment should not be unjustifiably restrained from consulting all relevant information, including the statements and actions of interrogators." *Id.* at 369-70.

{39} Under this combined approach, the statements and actions of the gunshot victim and the law enforcement officers in *Bryant* supported the conclusion that "the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency." *Id.* at 378 (internal quotation marks and citation omitted). The injured declarant "was obviously in considerable pain and had difficulty breathing and talking" but answered police questions and asked when medical services would arrive. *Id.* at 375. "The questions [police] asked—what had happened, who had shot him, and where the shooting had occurred—were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* at 376 (internal quotation marks and citations omitted). "In other words, they solicited the information necessary to enable them 'to meet an ongoing emergency.'" *Id.* (quoting *Davis*, 547 U.S. at 822). Weighing the "circumstances of the encounter," the *Bryant* Court held the challenged statements to law enforcement to be nontestimonial. *Id.* at 377-78.

4. Ohio v. Clark

{40} The United States Supreme Court applied and refined the primary purpose test next in *Clark*, four years after *Bryant*. In *Clark*, a three-year-old victim's statements to his preschool teachers that identified the child's adult assailant were ruled nontestimonial under the primary purpose test. 576 U.S. at 240. Because of the interrogators' identity as teachers, the *Clark* Court addressed for the first time a question the United States Supreme Court had "repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause." *Id.* at 246; *cf. Davis*, 547 U.S. at 823 n.2 (considering 911 operators' interrogations of 911 callers as "acts of the police"); *Bryant*, 562 U.S. at 357 n.3 (same). The Court "decline[d] to adopt a categorical rule excluding [such statements] from the Sixth Amendment's reach" but stated that "such statements are much less likely to be testimonial than statements to law enforcement officers." *Clark*, 576 U.S. at 246. "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'create an out-of-court substitute for trial testimony.'" *Id.* at 245 (brackets omitted) (quoting *Bryant*, 562 U.S. at 358).

{41} Following *Bryant*, the *Clark* Court objectively evaluated the surrounding circumstances of the encounter and the statements and actions of the parties. *Id.* at 246-49; *see Bryant*, 562 U.S. at 359. Based on the victim's visible injuries, "the teachers needed to know whether it was safe to release [the child] to his guardian at the end of the day, [and thus] they needed to determine who might be abusing the child." *Clark*, 576 U.S. at 246. The Court noted, "As in *Bryant*, the emergency in this case was ongoing, and the circumstances were not entirely clear. [The] teachers were not sure who had abused him[,] . . . how best to secure his safety[, and] . . . whether any other children might be at risk." *Id.* at 247. The Court determined that the teachers' questions and the victim's answers "were primarily aimed at identifying and ending the threat." *Id.* Additionally, the Court noted that the conversation between the parties "was informal and spontaneous . . . in the informal setting of a preschool lunchroom and classroom, and [thus] . . . nothing like the formalized station-house questioning in *Crawford* or the police interrogation and battery affidavit in *Hammon*." *Id.*

{42} Concluding its testimonial analysis, the *Clark* Court reiterated that the questioners being "individuals who are not law enforcement officers . . . remains highly relevant" to Sixth Amendment analysis. *Id.* at 249. Citing *Bryant*, 562 U.S. at 369, the Court noted a "questioner's identity" as part of the context in which statements must be evaluated when challenged under the Confrontation Clause. *Clark*, 576 U.S. at 249. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* ("It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police. We do not ignore that reality.") (citing *Giles*, 554 U.S. at 376 (classifying "[s]tatements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment" as nontestimonial)).

C. Testimonial Inquiry into Statements Made in the Course of a SANE Exam

{43} Because the identity of the questioner is a relevant surrounding circumstance under *Bryant*, we next discuss the testimonial relevance of the identity of a SANE nurse as questioner and the testimonial context of a SANE exam. *See* 562 U.S. at 368-70 (noting that the identity of the interrogator "can illuminate" a primary-purpose assessment). Because the United States Supreme Court has not applied testimonial inquiry to statements made in the course of a SANE exam—*see State v. Burke*, 478 P.3d 1096, 1102 (Wash. 2021) (holding under the circumstances of a SANE "exam with both medical and forensic purposes" that "the primary purpose of nearly all of the statements [made in the course of the SANE exam] was to guide the provision of medical care, not to create an out-of-court substitute for trial testimony"), *cert. denied*, *Burke v. Washington*, 142 S. Ct. 182 (2021)—we analyze the testimonial relevance of the identity of a SANE nurse as questioner under New Mexico caselaw.

1. The dual role of a SANE nurse and its testimonial implications

{44} We note at the outset that the complexity of testimonial analysis is further complicated by the "*dual* role" of a SANE nurse, which we have recognized in the hearsay context.[6] *See Mendez*, 2010-NMSC-044, ¶¶ 42, 46 n.5. This dual role consists of "the provision of medical care and the collection and preservation of evidence." *Id.* ¶ 42. On the one hand, the medical care role includes a SANE nurse's professional "'role as a nurse, in a [medical care setting], performing a medical examination of a victim of a sexual assault.'" *Id.* ¶ 45 (quoting *United States v. Gonzalez*, 533 F.3d 1057, 1062 (9th Cir. 2008)). A SANE nurse under this medical care role retains their medical care role as a nurse generally, *cf. id.* ("SANE nurses regularly treat victims of sexual abuse that require critical medical attention."); accordingly, a SANE nurse's identity under this medical care role weighs toward a nontestimonial ruling, *see Giles*, 554 U.S. at 376 (classifying "statements to physicians in the course of receiving treatment" as nontestimonial). On the other hand, the SANE nurse's forensic role in "collecting and preserving evidence of value to the legal system," "[w]hen compared with [the roles of] other medical providers, . . . can [thus] seem more closely aligned with law enforcement," *Mendez*, 2010-NMSC-044, ¶ 42 (internal quotation marks and citation omitted), and accordingly a SANE nurse's identity under this forensic role weighs toward a testimonial ruling. *See Clark*, 576 U.S. at 249. As we have recognized, "SANE nurses . . . provid[e] critical treatment to patients at a time of great physical, emotional, and psychological vulnerability . . . [b]ut they also have special expertise in gathering evidence for subsequent prosecution of the offender, which raises appropriate concerns about whether the statement was made for the purposes of seeking medical care." *Mendez*, 2010-NMSC-044, ¶ 41.

{45} Since *Bryant*, our discussion in *Mendez* of a SANE nurse's dual role has been cited favorably by other jurisdictions. *E.g.*, *State v. Miller*, 264 P.3d 461, 487 (Kan. 2011) (applying the reasoning of *Mendez*

to confrontation analysis where a SANE nurse's medical and forensic purposes "[o]ften . . . will require examination of individual questions and responses"). A SANE nurse's dual role has been otherwise recognized by additional courts in the confrontation context. *E.g.*, *Thompson v. State*, 2019 OK CR 3, ¶ 11, 438 P.3d 373 ("SANE nurses perform both a medical and investigatory function in almost every interaction with an alleged sexual assault victim.").

{46} In the confrontation context, New Mexico courts have implicitly recognized the dual role of a SANE nurse in two pre-*Bryant* cases, the precedential value of which we discuss below. *Romero*, 2007-NMSC-013, and *State v. Ortega*, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929, *overruled on other grounds by Mendez*, 2010-NMSC-044, ¶ 1. The courts in both *Romero* and *Ortega* reached testimonial rulings based upon distinct forensic facts while in the process impliedly recognizing that the roles of a SANE nurse typically include both medical care and forensic purposes. *See Romero*, 2007-NMSC-013, ¶¶ 12-18; *Ortega*, 2008-NMCA-001, ¶¶ 19, 26, 32-33.

{47} In *Romero*, this Court affirmed the Court of Appeals' exclusion under the Confrontation Clause of narrative statements made by the victim when "asked to tell the SANE nurse what happened, so the SANE nurse would know how to proceed." 2007-NMSC-013, ¶¶ 16, 17. Prominent to the Court's testimonial ruling, the SANE exam in question "occurred several weeks after the assault" and with significant "assistance and encouragement" from law enforcement. *Id.* ¶ 17. We recognized there that the "victim's narrative" included portions that both "accuse[d the d]efendant of specific criminal acts" and were "relevant to medical treatment" or "could be viewed as relevant to seeking medical treatment." *Id.* ¶ 15. Impliedly, the challenged statements elicited by the SANE nurse potentially served both a forensic purpose and a medical care purpose. *See id.* ¶¶ 15, 17. Based on "[t]he [forensic] facts in th[e] record" regarding the elapsed time and the role of law enforcement, we rejected the state's argument that the primary purpose of the victim's statements was for the purposes of medical treatment. *Id.* ¶¶ 13, 17. Our recognition, despite those forensic facts that the challenged statements held potential medical relevance, impliedly points to "an examination by a SANE nurse" typically including a medical care purpose. *See id.* ¶¶ 14-15, 17.

{48} Our implicit recognition in *Romero* of the SANE nurse's medical care role is bolstered by three other points. First, we recognized there that "*Davis* confined its discussion of interrogation to situations involving law enforcement officers and their agents" and did not consider "'when statements made to someone other than law enforcement personnel are testimonial.'" *Romero*, 2007, NMSC-013, ¶ 7 (quoting *Davis*, 547 U.S. at 823 n.2). This recognition would have been immaterial had the *Romero* Court viewed a SANE nurse's identity as simply forensic or as an agent of law enforcement. Second, we recognized there that a SANE exam does not resemble the police interrogations envisioned by *Crawford*, as it "is not typically 'designed primarily to establish or prove some past fact, but to describe current circumstances requiring [medical] assistance.'" *Romero*, 2007, NMSC-013, ¶ 14 (quoting *Davis*, 547 U.S. at 827). Third, we agreed in *Romero* with the state that nontestimonial portions of the narrative could have survived redaction had the state advanced a proper basis for redaction of the testimonial portions. *Id.* ¶ 18; *see also Ortega*, 2008-NMCA-001, ¶ 23 (citing the *Romero* Court's "suggestion that medical portions might be separated from testimonial portions in the victim's narration").

{49} In *Ortega*, our Court of Appeals affirmed the district court's exclusion under the Confrontation Clause of statements transcribed in a SANE exam where the victim "was not provided medical treatment." *Id.* ¶ 5. Analogizing the forensic facts there to those in *Romero*, the *Ortega* Court described the SANE exam there as "nothing more than a description of the sexual abuse [the victim] suffered, with no medical purpose behind it." 2008-NMCA-001, ¶ 12. Additionally, the *Ortega* Court appears to have reached a legal conclusion that a SANE exam is "[c]learly . . . geared for" and "exists in concert with" forensic purposes. *See id.* ¶ 21. However, *Ortega*'s discussion in support of that conclusion nonetheless identified several aspects of a SANE nurse's medical care role: (1) "first assess the victim's need for emergency medical care and ensure that serious injuries are treated," (2) possibly "treat medical conditions requiring immediate attention for a victim's safety," (3) possibly provide medications to the victim which are "prophylactic . . . for the prevention of sexually transmitted diseases . . . and other care needed as a result of the crime," and (4) provide medical treatment "relative to the patient being a victim of a sexual crime." *Id.* (omissions in original) (internal quotation marks and citation omitted). The Court also acknowledged that "cases [may] arise where identifying an offender or searching for physical evidence of sexual victimization" is "secondary to an overarching medical purpose in obtaining a victim's statement." *Id.* ¶ 34.

{50} We conclude that the foregoing supports our recognition in *Mendez* of a SANE nurse's dual role, and we adopt this standard to guide a district court's analysis of SANE nurse testimony where applicable.

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[6] We cite *Mendez*, a hearsay case, for its reasoning where relevant, while mindful of its admonition not to conflate "[t]he hearsay rule and the Confrontation Clause [as they] are not co-extensive and must remain distinct." 2010-NMSC-044, ¶ 28. The Court of Appeals was correct to recognize "the importance of separating these analyses in cases where both rules are implicated by the nature or source of the evidentiary material." Tsosie, A-1-CA-37791, mem. op. ¶ 7.

We disagree with the dissent's contention that this opinion conflates confrontation and hearsay analysis notwithstanding our statements otherwise. *See dissent* ¶¶ 164-65. To be sure, a statement may be admissible under both analyses where a statement in response to a question from a SANE nurse in her medical care role contains medically relevant information. Nonetheless, the two analyses are distinct even if the results coincide. "The touchstone of admissibility under Rule 11-803([4]) [NMRA] is the trustworthiness of each statement." *Mendez*, 2010-NMSC-044, ¶ 19 (heading). Admissibility under the Confrontation Clause, in contrast, requires that a statement's primary "purpose is not to create a record for trial," regardless of the statement's degree of trustworthiness. *Bryant*, 562 U.S. at 358; *cf. Crawford*, 541 U.S. at 51.

In applying Rule 11-803(4), trustworthiness sufficient for admissibility is predicated on the content of the statement, without regard to the primary purpose of the encounter. *Mendez*, 2010-NMSC-044, ¶¶ 29-31 ("Surrounding circumstances are certainly relevant, but the focus must center on the individual statement": "under Rule 11-803([4]), a declarant could make a statement for entirely medical purposes even if the primary purpose of the interview has become forensic. The converse is also true."). In applying confrontation analysis, however, admissibility is more contextual. *Bryant*, 562 U.S. at 360 ("An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment."). Stated differently, application of Rule 11-803(4) focuses primarily on "close[] examin[ation of] the *substance* of the statement," whereas under testimonial inquiry the content of the statement is only part of the analysis. *Mendez*, 2010-NMSC-044, ¶¶ 29-31.

2. The surrounding circumstance of a SANE nurse's identity may shift consistent with their dual role

{51} The foregoing establishes that either of the dual roles of a SANE nurse may be present when eliciting an individual statement in the course of a typical SANE exam. Further complicating testimonial analysis, *which* of the dual roles is *more* present is likely to change multiple times over the course of a SANE exam, as a typical SANE exam is not partitioned into one medical care component and one forensic component. Under this reality, a court cannot indulge either testimonial or nontestimonial presumptions based on the identity of a SANE nurse regarding the primary purpose of statements made in the course of a SANE exam.

{52} Regardless of which role is more present in eliciting an individual statement, the identity of a SANE nurse is merely one of the surrounding circumstances to be weighed by a district court and thus is not dispositive of the testimonial nature of the resulting statement. In mischaracterizing this opinion's logic as "circular," the dissent conflates a SANE nurse's *questions* with a declarant's *responses*. *See dissent* ¶ 163. We do not assert that "the statements Starr *elicits* [in her role] as a medical caregiver" are necessarily nontestimonial. *Id.* (emphasis added). To the contrary, we recognize that a responding statement may be testimonial notwithstanding the nontestimonial character of the question eliciting that statement where a SANE nurse is acting in their medical care role, as we discuss further below.

3. Under *Davis*, district courts must redact testimonial portions of otherwise nontestimonial statements

{53} Notwithstanding such complications, *Davis* made clear that district courts bear the responsibility to "recognize . . . point[s] at which, for Sixth Amendment purposes, statements in response to interrogations" evolve or change in their testimonial nature. *Davis*, 547 U.S. at 828-29; *see also Bryant*, 562 U.S. at 365-66.

{54} We note that *Davis* and *Bryant* envisioned a clear point of demarcation at which the circumstance of law enforcement needing to resolve an emergency might end, thereby signaling a distinct transition from nontestimonial statements to testimonial statements. *See Davis*, 547 U.S. at 828-29; *Bryant*, 562 U.S. at 365-66. While, in contrast, the circumstance of a SANE nurse's identity pursuant to a dual role may shift multiple times within a SANE exam, the burden of determining that circumstance's proper weight within primary purpose analysis nonetheless remains with our district courts. *See Davis*, 547 U.S. at 828-29; *see also Mendez*, 2010-NMSC-044, ¶ 46. We agree with the Supreme Court of Kansas, quoting *Mendez*, 2010-NMSC-044, ¶ 46, in the confrontation context, that "New Mexico [district] courts must 'shoulder the heavy responsibility of sifting through statements, piece-by-piece, making individual decisions on each one.'" *Miller*, 264 P.3d at 487.

{55} We note also that, contrary to the dissent's reading, *dissent* ¶ 154, nothing in *Davis* supports the proposition that Sixth Amendment redaction by a district court is only proper where an encounter begins with a clearly *nontestimonial* primary purpose and then "evolves" into *testimonial* statements. *See Davis*, 547 U.S. at 828. To the contrary, *Davis*'s direct analogy of Sixth Amendment redaction to a district court's well-established role in redacting unduly prejudicial evidence counsels that such exercise may be proper regardless of whether the primary purpose of an encounter has evolved or shifted. *Id.* at 829. The fact that no such shift occurred in *Hammon* does not preclude the possibility that a nontestimonial purpose could arise even in such an encounter involving law enforcement, much less an encounter *not* involving law enforcement. *Cf. Clark*, 576 U.S. at 246.

{56} Concurrent with the foregoing responsibilities, a district court must also be vigilant that a SANE nurse's dual role is not used by the prosecution to end-run the Confrontation Clause by introducing SANE exam statements made for a testimonial primary purpose under the guise of having been made for a medical care primary purpose. This concern is heightened in cases where, as here, the SANE nurse is admitted as an expert witness and so could be "used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." *United States v. Gomez*, 725 F.3d 1121, 1129 (9th Cir. 2013) (describing other circuits' confrontation concerns regarding a testifying expert witness).

{57} District courts must be mindful of their role in preventing such potential abuses. A district court "has the prerogative to insist that all facts be presented that will insure a fair trial." *State v. Crump*, 1981-NMSC-134, ¶ 12, 97 N.M. 177, 637 P.2d 1232. If facts necessary for the testimonial inquiry are not elicited by direct examination or cross-examination during the admissibility hearing, "[t]he court may examine a witness" to complete the record. *See* Rule 11-614(B), NMRA; *State v. Paiz*, 1999-NMCA-104, ¶ 17, 127 N.M. 776, 987 P.2d 1163. Such material facts may include circumstances surrounding the SANE exam or underlying purposes of individual questions that elicited challenged statements.

{58} In addition, as discussed above, *Bryant* directs that "standard rules of hearsay, designed to identify some statements as reliable, will be relevant." 562 U.S. at 358. It follows from this direction that a district court should be alert to considerations of a SANE nurse's testimony that raise credibility concerns, especially where such testimony is uncontradicted and is the sole evidence regarding the testimonial nature of an unavailable declarant's statements. Accordingly, we hold that a district court must articulate any credibility concerns regarding a SANE nurse's uncontradicted testimony where the district court determines that testimony regarding the SANE nurse's medical care role is pretextual in masking a forensic primary purpose. *See Medler v. Henry*, 1940-NMSC-028, ¶ 20, 44 N.M. 275, 101 P.2d 398 (rejecting uncontradicted testimony as allowable only under certain circumstances).

4. The precedential value of *Romero* and *Ortega*

{59} The State argues that the instant case is one of first impression, asserting that "there is no prior controlling New Mexico authority." The State argues that *Romero*, 2007-NMSC-013, and *Ortega*, 2008-NMCA-001, are distinguishable on their facts and that therefore the testimonial rulings in those cases do not direct the result here. The State specifically points to the SANE exam in this case "occur[ring] on the same night as the assault" and including medical treatment whereas, in *Romero*, "several weeks" elapsed between the assault and the SANE exam while, in *Ortega*, the SANE exam occurred four days after the initial physical examination and included no medical treatment. *See* 2007-NMSC-013, ¶ 17; 2008-NMCA-001, ¶¶ 4-5. In both prior cases, the State argues, "'any necessity for medical treatment as a result of the abuse had ended' by the time the [SANE] examination took place" (quoting *Ortega*, 2008-NMCA-001, ¶ 35), in contrast to the instant case.

{60} Defendant, while conceding some factual distinction, argues that *Romero* and *Ortega* nonetheless "provide the controlling legal analysis" by "apply[ing] the primary purpose test to statements made to a SANE nurse." Defendant argues that factual distinctions "do[] not prevent a court from reasonably and judiciously applying established legal principles." Defendant argues that the "more immediate" timing in this case "does not establish an overriding medical purpose," as "[i]t equally reflects a desire for prompt evidence gathering to avoid the spoliation of physical evidence and ensure an accurate memory of events." Defendant suggests that Declarant's statements here "'accus[ing] [D]efendant of specific criminal acts'" (quoting *Romero*,

2007-NMSC-013, ¶ 15), "are functionally indistinguishable from those in *Romero*."

{61} We hold that *Romero* is precedential for the instant case. We read *Romero* to abide with *Bryant* in "objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occur[red]." 562 U.S. at 370.

{62} In *Romero*, we applied *Crawford* and *Davis* to determine the testimonial nature of two narrative statements made in the course of the assault victim's SANE exam. 2007-NMSC-013, ¶¶ 1, 12. The facts central to our testimonial ruling on those statements included that (1) approximately three weeks elapsed between the assault and the SANE exam and (2) the SANE exam "occurred . . . with the assistance and encouragement" of law enforcement. *Romero*, 2007-NMSC-013, ¶¶ 2, 17 ("The facts underlying this appeal are stated clearly and thoroughly in the Court of Appeals' Opinion. We do not restate them." (citation omitted)); *State v. Romero*, 2006-NMCA-045, ¶¶ 53, 56, 139 N.M. 386, 133 P.3d 842.

{63} The statements in question were included within a larger narrative statement to the SANE nurse that "recounted the entire incident." *Romero*, 2006-NMCA-045, ¶ 59. We concluded that under the circumstances of the time elapsed between the assault and the SANE exam and of the degree of involvement of the law enforcement officer, "the portions of the victim's narrative specifically accusing Defendant of sexual assault and other charges should have been excluded." *Romero*, 2007-NMSC-013, ¶ 17. We further analogized the testimonial facts there as closer to the "after-the-fact inquiry" in *Hammon* than the "ongoing emergency" in *Davis*. *Id.* As previously discussed, "[w]e agree[d] with the [s]tate that redaction of [testimonial] portions of the narrative might have been appropriate" had the state "identified portions of the narrative that might have been likely candidates for redaction." *Id.* ¶ 18. In the absence of such a basis for specific redaction, however, we affirmed the Court of Appeals' exclusion of the entire narrative. *Id.*

{64} For these reasons, we conclude that *Romero*, 2007-NMSC-013, is precedential in applying the primary purpose test of *Davis* to statements made in the course of a SANE exam and in providing guidance for redaction of testimonial portions of such statements. Because of our conclusion, the instant case is not a matter of first impression, and thus we need not further address the precedential nature of *Ortega*. Accordingly, we also need not further consider the State's arguments regarding the persuasive value of other jurisdictions' cases concerning the issues before us.[7]

5. SANE exam statements do not require emergency or informality to be nontestimonial

{65} *Crawford*'s progeny have focused on the existence of an ongoing emergency as an important contextual circumstance that "focuses the participants on something other than 'proving past events potentially relevant to later criminal prosecution.'" *Bryant*, 562 U.S. at 361 (brackets omitted) (quoting *Davis*, 547 U.S. at 822); *see also Davis*, 547 U.S. at 826-28; *Bryant*, 562 U.S. at 361-66; *Clark*, 576 U.S. at 246-47. As discussed above, *Bryant* recognized that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." 562 U.S. at 358. We hold that where it centers on the provision of medical care, a SANE exam similarly "focuses the participants on something other than 'proving past events potentially relevant to later criminal prosecution.'" *See id.* at 361 (brackets omitted) (quoting *Davis*, 547 U.S. at 822).[8]

{66} We apply *Davis*, *Bryant*, and *Clark* in support of our conclusion. In each of those cases, nontestimonial statements given during an ongoing emergency included identification of defendants and accusations regarding specific criminal acts. *Davis*, 547 U.S. at 817-18, 822; *Bryant*, 562 U.S. at 349, 377-78; *Clark*, 576 U.S. at 241, 249. Clearly, then, the testimonial inquiry cannot turn simply on the content of the statements as relating to identification or accusations of criminal acts. Instead, these cases represent that the *focus or motive of the participants* is a relevant factor in determining whether the primary purpose of challenged statements was to "creat[e] an out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 358.

{67} In the process of clarifying *Davis*, the *Bryant* Court recognized that a law enforcement officer's first responder responsibility correlates to the nontestimonial motive of responding to or resolving an emergency situation. *Cf.* 562 U.S. at 368. The *Bryant* Court also recognized that nontestimonial motives are likely to be present in victims in an emergency situation. *Id.* at 368-69.

{68} The *Bryant* Court's recognition that an ongoing emergency can provide a nontestimonial focus for participants abides with *Davis*'s explanation of differences between the nontestimonial 911 call there and the testimonial station house interrogation in *Crawford*. *See Davis*, 547 U.S. at 827. The *Davis* participants' nontestimonial focus was bolstered by the informality of the situation, indicated by the victim's "frantic answers . . . in an environment that was not tranquil, or even safe." *Id.*; *see Bryant*, 562 U.S. at 366. These factors presumably contributed to the participants being focused on the emergency situation rather than on creating an out-of-court substitute for trial testimony.

{69} Our conclusion regarding the possible nontestimonial focus of a SANE exam also abides with the proposition consistently supported by the United States Supreme Court in dicta, as noted by the Washington Supreme Court, "that statements made to medical providers for the purpose of obtaining treatment have a primary purpose that does not involve future prosecution and that such statements are therefore nontestimonial." *State v. Scanlan*, 445 P.3d 960, 967 (2019) (citing *Giles*, 554 U.S. at 376; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 672 (2011) (Sotomayor, J., concurring in part)). It follows from this proposition that an encounter directed at the provision of medical care can focus the participants on something other than proving past events potentially relevant to later criminal prosecution. However, it does not follow that the factors necessary for participants' nontestimonial focus on medical care are the same as the factors necessary for participants' nontestimonial focus on emergency. Applying the reasoning in *Davis*, we hold that a significant factor for the former is whether the information sought was important to enable the provision of medical care. *See Davis*, 547 U.S. at 827. Where the objective circumstances demonstrate the information sought was indeed important in that regard, the focus of the participants is likely to have been on something other than creating an out-of-court substitute for trial testimony. We also recognize that, whereas formality in a law enforcement encounter may suggest a testimonial purpose, *Bryant*, 562 U.S. at 366, formality in a medical care encounter may enable the provision of medical care.

[7] We nevertheless recognize the weight of persuasive post-Romero authorities that have held statements made in the course of a SANE exam to be nontestimonial. E.g. Burke, 478 P.3d at 1102; United States v. Barker, 820 F.3d 167, 169-70, 172 (5th Cir. 2016); Miller, 264 P.3d at 490.

[8] The State's central argument for the challenged statements being nontestimonial is that "the primary purpose of [Starr's] examination was medical." Under this argument, we need not and do not address whether the unresolved medical issues facing a SANE examinee also constitute an ongoing emergency under Davis and Bryant.

{70} We recognize that *Clark* applied emergency and formality analysis to statements made to individuals who were not law enforcement officers. *See* 576 U.S. at 246-47. Such analysis was clearly warranted there, given the circumstances under which the victim's statements were made to his preschool teachers. However, *Clark* does not establish that those factors are dispositive, nor that they are required elements for a nontestimonial finding. *Clark* affirmed without reference to emergency or formality that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at 249; *see United States v. Barker*, 820 F.3d 167, 172 (5th Cir. 2016) ("A nurse, unlike a police officer, is principally tasked with providing medical care, not 'uncovering and prosecuting criminal behavior.'" (quoting *Clark*, 576 U.S. at 249)). We agree with our Court of Appeals in the instant case that a SANE nurse, like the teachers in *Clark*, "is 'not principally charged with uncovering and prosecuting criminal behavior.'" *Tsosie*, A-1-CA-37791, mem. op. ¶ 15 (quoting *Clark*, 576 U.S. at 249).

{71} Our holding abides with our recognition in *Romero* that a SANE exam, while not necessarily analogous to a 911 call, similarly "is not typically 'designed primarily to establish or prove some past fact, but to describe current circumstances requiring . . . assistance.'" 2007-NMSC-013, ¶ 14 (quoting *Davis*, 547 U.S. at 827). This recognition suggests the potential of a typical SANE exam to include participants' nontestimonial focus on the provision of medical care. As we have discussed, the *Romero* Court made this distinction while also recognizing that "*Davis* confined its discussion of interrogation to situations involving law enforcement officers and their agents." *Romero*, 2007-NMSC-013, ¶ 7. Because the testimonial facts in *Romero* cast doubt on whether medical care was actually provided in the SANE exam, the testimonial ruling in *Romero* does not conflict with our holding here.

{72} In sum, we conclude that a declarant's statements to someone other than law enforcement do not require circumstances of ongoing emergency or informality to be nontestimonial if creating a record for future prosecution is not the primary purpose of the interaction. *Cf. Burke*, 478 P.3d at 1111 ("[W]hen declarants speak to someone other than law enforcement, there may be a multitude of purposes for the statements.").

D. Application

{73} We next apply the foregoing to the facts of the instant case. In the course of our application, we address the parties' remaining arguments and the approaches of the courts below. Objectively viewing the statements and actions of Declarant and Starr in light of the surrounding circumstances of the SANE exam, we hold as nontestimonial almost all of the challenged statements. On remand, those nontestimonial statements must still survive state and federal evidentiary considerations in order to be admissible at Defendant's trial.

{74} In its remaining argument, the State contends that the district court and the Court of Appeals improperly disregarded Starr's uncontradicted testimony regarding the SANE exam. The State contends that "[w]hen a court makes no finding that any part of a witness'[s] testimony is incredible and there is no other evidence, but then disregards that testimony, its decision is not supported by substantial evidence." Defendant contends that the courts below properly considered Starr's testimony.

{75} As required by *Bryant*, we begin our "highly context-dependent inquiry" with objective analysis of the circumstances in which the parties interacted, then conduct an objective and combined inquiry into the parties' statements and actions. *See* 562 U.S. at 363, 370. The relevant surrounding circumstances here include the time elapsed between the alleged assault and the SANE exam, the location of the SANE exam, the role of law enforcement in the SANE exam, and the identity of the SANE nurse as Starr's dual role bears on the challenged statements.

1. The circumstance of the time elapsed between the alleged assault and the SANE exam

{76} In this case, the close proximity in time of the SANE exam to the alleged predicate assault weighs toward a nontestimonial primary purpose. As we have discussed, the separation of the exam and assault events by several weeks in *Romero* and by several days in *Ortega* weighed significantly toward the testimonial rulings in those cases: the time elapsed suggested that any necessity for medical treatment pursuant to the assault had ended by the time of the SANE examination. *See* 2007-NMSC-013, ¶ 17; 2008-NMCA-001, ¶¶ 4-5. In contrast, the SANE exam here, on referral from UNMH, occurred in the same night as the alleged assault, thereby supporting the relevance of the exam to the provision of medical care. Starr testified that she assessed multiple considerations of Declarant's medical situation—including prophylaxis, safety plan, suicide assessment, and homicide assessment—that objectively suggest the relevance of recency of the assault to the medical purposes of the SANE exam.

{77} We agree with Defendant that the "more immediate" timing here compared to that in *Romero* is not dispositive of "an overriding medical purpose," as forensic goals are also served by gathering evidence promptly. Nonetheless, we conclude that the evidence regarding this timing circumstance supports the primary purpose of the SANE exam being nontestimonial.

2. The circumstance of the location of the SANE exam

{78} The location of the SANE exam also weighs toward a nontestimonial primary purpose, as the clinic at the Family Advocacy Center is a setting conducive to providing trauma-informed medical treatment. Starr testified that SANE exams can be done in a hospital setting but that the clinic setting is "absolutely" better in allowing the examinee to "be really relaxed and comfortable" for the exam. While we agree with the district court's finding that "[t]he examination occurred in a structured setting," we recognize the medical care purposes that are served by the deliberate conditions of the clinical setting. As we have discussed, informality is not a requirement for a medical care purpose to weigh toward statements being nontestimonial.

{79} The district court and the Court of Appeals noted Starr's testimony that the clinic "is located in the same building" as law enforcement "but in a separate area." Without more, however, we conclude that law enforcement's presence within a separate area of the same building does not dissipate the medical care relevance of the clinic location as a circumstance weighing toward the primary purpose of the SANE exam being nontestimonial.

3. The circumstance of law enforcement involvement in the SANE exam

{80} Relatedly, the degree of involvement of law enforcement in the SANE exam here does not weigh toward a testimonial primary purpose. While it is noteworthy that Declarant was transported to the clinic by law enforcement, the record does not demonstrate significant further involvement to support Defendant's claim that "the statement was the product of an investigation by the authorities" "[involving] government officers" or that the "SANE interview [was] taken at police instigation."[9] Relevant to our analysis, Starr

[9] We note that here Defendant's citations of Crawford, 541 U.S. at 56 n.7, and Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion) are inapposite. Both cases specifically considered police interrogations. In addition, as a pre-Crawford case, Lilly, 527 U.S. at 135, applied the indicia of reliability standard for confrontation under Ohio v. Roberts, 448 U.S. 56 (1980), which Crawford overturned.

testified that law enforcement officers are not allowed in the SANE exam, that APD detectives are housed in a different area of the building, that SANE nurses "do not work for the police," and that the Family Advocacy Center is a "nonprofit and . . . separate" from the police. *See Mendez*, 2010-NMSC-044, ¶ 37 (stating in the hearsay context that "[a]bsent some evidence that the police were attempting to manipulate the [SANE] examination, we would not place dispositive weight on their presence on the premises or even in the examination room").

{81} Also unpersuasive is Defendant's argument that law enforcement involvement is established by Declarant "having filed a police report and [having] authorized the release of evidence . . . to the police." Nothing in *Crawford* or its progeny supports the proposition that filing a police report can be viewed as a fact transforming the actions taken by a purported victim of sexual assault into testimonial actions. While consenting to the release of evidence to law enforcement is noteworthy, Starr testified that she conducts the SANE exam regardless of whether a patient wants to report to police. In addition, the release in question was one of two sections signed by Declarant in the SANE exam consent form, the other of which included his consent to multiple medical care and forensic components of the exam. Under *Bryant*'s objective test, the question for this circumstance is whether a reasonable declarant signing the two portions of the consent form would have understood that law enforcement was so involved in the SANE exam as to render the primary purpose of his statements to be the creation of evidence for Defendant's prosecution. *See Clark*, 576 U.S. at 245-46. Given the mixed nature of the matters consented to by Declarant therein, we disagree with Defendant that, due to his signed release, a reasonable person in Declarant's position would have known that his statements were testimonial in nature.

{82} In sum, we conclude that the level of involvement of law enforcement in the SANE exam here does not implicate the "assistance and encouragement" concerns recognized in *Romero*. *See* 2007-NMSC-013, ¶ 17.

4. The circumstance of the SANE nurse's identity as it bears on the challenged statements

{83} Because the SANE nurse's identity may shift between their dual roles during a SANE exam, we analyze Starr's identity in relation to the underlying purposes of each of the forms of the SANE exam which elicited the challenged statements. For this circumstance to weigh toward a testimonial primary purpose for an individual statement, the forensic purpose of the relevant SANE exam question must be more important than its medical care purpose, thus rendering Starr's forensic role greater than her medical care role regarding that question. *See Langham v. State*, 305 S.W.3d 568, 578-79 (Tex. Crim. App. 2010) ("It is . . . likely that, by 'primary purpose,' the Supreme Court [in *Davis*] meant to convey the purpose that is 'first' among all potentially competing purposes 'in rank or importance.'" (citing *Davis*, 547 U.S. at 822)). In this regard, the Court of Appeals correctly concluded that "Starr's identity as a SANE [nurse] . . . as it has particular relevance in this case" does not establish a presumption either toward testimonial or nontestimonial weight. *Tsosie*, A-1-CA-37791, mem. op. ¶ 15.

{84} Starr testified as to the purposes underlying each of the eight SANE exam forms that elicited the challenged statements. For each form, we consider Starr's testimony as relevant to determining what a reasonable SANE nurse's underlying purpose—and thus their role—would be for each of the SANE exam forms that elicited challenged statements.

{85} First, regarding the *Consent Form*, Starr testified that, as discussed above, "the top part [of the form] is very much all about medical treatment," an intermediate paragraph acknowledges "that we shared [with Declarant] a notice of privacy," and the final part "is so that we can release this to law enforcement." She also testified that Declarant "signed for STI prevention [medical care] and photography [forensics] as well as talking about what happened and allowing me to do a basic medical assessment on him." The foregoing evidence indicates that, as regards the *Consent Form* as a whole, Starr's identity was informed as much or more by her medical care role than her forensic role, thus weighing more toward a nontestimonial ruling. As regards the law enforcement release portion alone, Starr's identity was forensic.

{86} Second, regarding the *Sexual Assault Intake* form, Starr testified that its purpose is to "[g]et a basic medical background . . . [including] statistical data." She testified that the information obtained in the form is not different from that obtained in a typical intake form in a hospital. On cross-examination, Starr testified that the form's inclusion of the police report case number was relevant for the forensic purpose of cataloguing evidence properly. The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *Sexual Assault Intake* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.

{87} Third, regarding the *History* form, Starr testified that its purpose is "[m]edical":

> to know . . . [his] baseline, how a patient is, if they had any injuries or issues . . . prior to the assault that would affect how their body is, what medications they're on, how they're doing health-wise, . . . basic medical background stuff [including] [a]llergies to medications . . . [and] offer[ing] the tetanus shot . . . [and] the hepatitis B shot as well.

Starr testified that the *History* form's "Past Medical History/Surgeries" question is potentially relevant to her medical treatment, such as if signs or symptoms were to arise in relation to Declarant's reported seizure disorder or back injury. Starr testified that the *History* form's "Post-Assault Hygiene Activity" section is both medically relevant regarding a patient's ability to perform activities of daily living and forensically relevant regarding DNA evidence. Starr testified that the *History* form's "Offender Information" section is medically relevant to her risk assessment:

> It's very important, safety-wise, to know who was the offender. We're not looking so much for names, in general [beyond state domestic violence law requirements]. . . . [F]or our sexual assault [victims], we typically don't have the name. We want to know if the person who assaulted them has access to them again. . . . [W]e want our patients to be safe. That's standard medical care.

On cross-examination, Starr confirmed that she had asked Declarant whether Defendant was a household member. The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *History* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.

{88} Fourth, regarding the *Strangulation Documentation* form, Starr testified at length to its medical importance:

> Strangulation is a very specific kind of assault . . . [and] is very dangerous because it's . . . underassessed medically. As a [non-SANE] nurse, I didn't learn about strangulation. Doctors are typically not trained around strangulation. . . . And medically, it's very important because it's highly correlated to lethality.

[10] We note that the district court expressed no credibility concerns regarding Starr's testimony and that the record does not include contrary evidence for this analysis.

Starr testified that, based on her specialized training in strangulation, the information regarding its method and manner was relevant to her treatment to "really assess the neck carefully" and to assess possible brain injury. Starr testified that her ability to assess injury resulting from strangulation is informed by "symptoms that the patient will report, and . . . signs that [the SANE nurse] can see, and we want to document both of those." It follows logically that in posing the questions in the *Strangulation Documentation* form that would elicit information regarding such symptoms and signs, Starr's medical care role informed her identity as much as or more than her forensic role. The evidence here weighs more toward a nontestimonial ruling.

{89} Fifth, regarding the *Patient Narrative* form, Starr testified that it was medically necessary to learn "what happened to [Declarant], what happened to his body and how he felt, [and] how he's doing." Starr affirmed that the SANE exam medical history is not different from taking a general history at a general wellness visit, because "[w]e want to know . . . what the scenario was when patients are talking about their illness or their issues." The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *Patient Narrative* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.

{90} Sixth, regarding the *Acts Described by Patient* form, Starr testified that knowing "what went where" is important for medical purposes relating to prophylaxis and locations of injuries to treat, as well as for forensic purposes relating to locations to swab for evidence. Starr testified that ejaculation is medically relevant because "we're worried about illness, disease, [and] . . . cleanliness." The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *Acts Described by Patient* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.

{91} Seventh, regarding the *Physical Exam* form, Starr testified that "[t]his is a basic medical screen. We want to make sure that the patient is healthy, is safe to go home, [and] is otherwise medically stable" by assessing factors including blood pressure, pulse, and ketones. The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *Physical Exam* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.

{92} Eighth, regarding the *Body Map – Physical Exam/Assessment* form, Starr testified to the medical importance of its general descriptions to help assess the injuries she observed. We note that these descriptions appear to be largely Starr's statements of observation but include some statements from Declarant about those injuries. Starr testified that she treats injuries described in this form "if it's necessary." The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *Body Map – Physical Exam/Assessment* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.

{93} In sum, Starr's testimony offers medical care purposes underlying each of the forms in the SANE exam that elicited the challenged statements. To the extent that the SANE exam questions reflect Starr's identity pursuant to her medical care role as a SANE nurse, we conclude that this circumstance weighs toward the challenged statements being nontestimonial.

5. Analysis of the surrounding circumstances by the district court and Court of Appeals

{94} The district court seemingly relied on a narrow reading of *Davis* and did not consider the implications of *Bryant* or *Clark*. Under such a reading, a court can easily and improperly infer that circumstances supporting a law enforcement officer's first responder role are requirements for a SANE nurse's medical care role. While both roles are focused on something other than creating an out-of-court substitute for trial testimony, conflating the factors attendant with these distinct roles results in a stunted analysis and reliance on presumptions.

{95} The district court's legal conclusions regarding the surrounding circumstances appear to have relied on presumptions that (1) emergency or informality is required for a nontestimonial primary purpose, whereas statements made outside of such circumstances are categorically testimonial where they refer to past events,[11] and (2) medical care that is duplicative of prior emergency care weighs toward a testimonial primary purpose.[12] To the extent that the district court did apply such presumptions, we clarify that they are improper, as discussed above. To the contrary, *Bryant* requires that the primary purpose test be applied objectively, considering "all of the relevant circumstances," without applying such presumptions. 562 U.S. at 360, 369-70. As to the majority of the challenged statements, the surrounding circumstances in this case support the conclusion that the SANE exam was motivated toward the provision of medical care as a primary purpose.

{96} We conclude that the Court of Appeals applied *Navarette*'s second confrontation principle to the surrounding circumstances to determine Declarant's *subjective* "level of understanding of the purpose of his statements to Starr," rather than applying an objective test. *Tsosie*, A-1-CA-37791, mem. op. ¶ 16 ("[W]e conclude that [Declarant] understood that at least some of his statements would be used to prosecute Defendant."). While *Bryant* expressly requires that the primary purpose test is an *objective* test, 562 U.S. at 360, we recognize that the second *Navarette* confrontation principle may appear to require otherwise. *See* 2013-NMSC-003, ¶ 8 ("[A] statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution."). We read this principle in *Navarette* to fit within *Bryant*'s requirement of an objective and combined inquiry into the statements and actions of the participants. *See Bryant*, 562 U.S. at 360. We clarify that *Navarette*'s second confrontation principle cannot be applied to alter or reduce the requirements of the primary purpose test as provided in this opinion.

6. Combined inquiry into the participants' statements and actions

{97} In light of the foregoing analysis of the surrounding circumstances, we next analyze the statements and actions of Starr and Declarant to determine the testimonial nature of each of the challenged statements. The State contends that Declarant's statements are all nontestimonial based on the primary purpose of the examination being medical. Defendant contends that statements accusing Defendant of specific criminal acts are facially testimonial.

{98} Without repeating our analysis, we incorporate our discussion of Starr's questions posed in the SANE exam forms as they related to the surrounding circum-

[11] As discussed, the district court cited Romero, 2007-NMSC-013, ¶ 21, for the proposition that "the level of formality of the interrogation is a key factor" in testimonial analysis. This citation was taken from the Romero Court's discussion of the declarant's statements made to the responding law enforcement officer, id. ¶¶ 19-22, which followed its discussion regarding statements made to the SANE nurse, id. ¶¶ 12-18. Romero did not invoke formality in its primary purpose analysis of the statements made in the course of the SANE exam. See id. ¶¶ 12-18.

[12] The flaw of the second presumption is demonstrated, albeit anecdotally, by the facts in Burke, 478 P.3d at 1105, 1111, wherein the SANE nurse discovered a cervical laceration in the declarant that had not been discovered by the emergency department physician.

stance of her identity in her dual role as a SANE nurse. We reiterate that medical care purposes underlay each of the SANE exam forms that elicited the challenged statements. Logically, in the absence of contrary evidence, Starr's medical care role was more present in conveying those questions than was her forensic role. Accordingly, Starr's statements conveying those questions generally weigh toward a nontestimonial result, with the specific exception of the law enforcement release.

{99} Evidence of Declarant's statements and actions in the SANE exam is limited to his responses as recorded by Starr in the SANE exam report. The majority of Declarant's responses to Starr's questions provided information that was important to guide the provision of medical care in relation to the medical care purposes of the particular questions. As *Davis* and *Bryant* demonstrate, statements that identify or accuse a defendant of specific criminal acts may nonetheless be rendered nontestimonial by virtue of a primary purpose that "focuses the participants on something other than 'proving past events potentially relevant to later criminal prosecution.'" *Bryant*, 562 U.S. at 361 (brackets omitted) (quoting *Davis*, 547 U.S. at 822). Declarant's statements within that scope are nontestimonial. A response by Declarant exceeding that scope became testimonial where it also identified Defendant or accused him of specific criminal acts. *See Romero*, 2007-NMSC-013, ¶¶ 15-17. We identify below those testimonial statements where they appear in each of the eight relevant SANE exam forms.

{100} First, in the *Consent Form*, we hold to be testimonial only Declarant's consent to release records and evidence to law enforcement, for reasons previously discussed.

{101} Second, in the *Sexual Assault Intake* form, we hold to be testimonial only Declarant's statement that Defendant "stole his phone." That statement is not important to the provision of medical care and is accusatory, presumably toward Defendant.

{102} Third, in the *History* form, we hold to be testimonial only Declarant's statement identifying Defendant as "Oliver." The alleged assailant's identity was important to the provision of medical care regarding his relationship and continued access to Declarant in order for Starr to complete her risk assessment. However, Starr testified that the scope of such information important to her risk assessment for Declarant did not include the perpetrator's name. This statement identifying and accusing Defendant is therefore testimonial. Apart from that statement, the statements within the *History* form, including the remaining statements in the *Offender Information* section, were within the scope of information important to guide Starr's provision of medical care.

{103} Fourth, in the *Strangulation Documentation* form, we hold all of the relevant statements to be nontestimonial. We recognize that Declarant's statements specifying the alleged method and manner of strangulation might be prejudicial, such as in specifying that Defendant used two hands and that his grip was "really strong." However, we also recognize that Starr logically would use such statements to guide her discovery and assessment of signs of strangulation, thus rendering the statements important to her provision of medical care. Because "every strangulation is different," Starr logically would rely on all such details to inform her assessment of Declarant's injury. Albeit a close call, we deem the method and manner statements to serve a medical care purpose more than a forensic purpose, thus rendering them nontestimonial. We also note that any prejudicial nature within such statements is a matter for the district court's post-confrontation analysis under Rule 11-403, NMRA.

{104} Fifth, in the *Patient Narrative* form, we hold the following statements to be testimonial as exceeding the scope of the medical care purposes underlying the form and as identifying Defendant or accusing him of specific criminal acts:

> I asked how they got in there. They said they crawled over the gate.
>
> The way they were saying things to me, trying to make me mad. Things like why don't I let them in, or take their calls. Asking about my "new boyfriend" I said he is just a friend, nothing going on.
>
> I went to the bedroom, then they both came into the bedroom and tied me up. They used a trash bag, they used a towel over my mouth so I wouldn't yell . . . They tied my feet too . . . Oliver . . . was trying to get his friend to take part, he just watched and held me down. (First and second omissions in original.)
>
> He took my clothes off, I noticed when I got up, I was naked, they stole my TV, DVD player, stereo system and my phone. I don't know what else they took.

Apart from those statements, the statements within the *Patient Narrative* form were nontestimonial as within the scope of information important to guide Starr's provision of medical care.

{105} Sixth, in the *Acts Described by Patient* form, we hold all of the relevant statements to be nontestimonial as within the scope of information important to guide Starr's provision of medical care.

{106} Seventh, in the *Physical Exam* form, we hold all of the relevant statements to be nontestimonial as within the scope of information important to guide Starr's provision of medical care.

{107} Eighth, regarding the *Body Map – Physical Exam/Assessment* form, we hold all of the relevant statements to be nontestimonial. Declarant's statements included accusatory descriptions regarding particular injuries of "where he punched me" and "where I was tied." However, those descriptions also convey the nature of the injuries and thus are within the scope of information that was important to guide Starr's provision of medical care.

7. Analysis of the participants' statements and actions by the district court and Court of Appeals

{108} The district court appears to have attributed undue significance to Starr's testimony that she cannot "diagnose," concluding that "the majority of statements given [by Declarant] to the SANE nurse were not given for the primary purpose of medical diagnosis." The district court appears to have applied the well-established hearsay exception for medical diagnosis and treatment in calling on Rule 11-803(4) to define medical care as a nontestimonial purpose under the Confrontation Clause.

{109} Placing Starr's relevant testimony in context, we take notice of her testimony on redirect examination distinguishing between her ability to make a limited *nursing diagnosis* and a physician's purview to make an official *medical diagnosis*. We discern no legal basis on which to conclude that the limited nature of a nursing diagnosis would render that diagnosis incapable of enabling the provision of medical care. Our research reveals no Confrontation Clause cases in which statements were excluded due to being relevant to a nursing diagnosis but not to a medical diagnosis. Even in the hearsay context, weighing the medical diagnosis and treatment exception therein, our research similarly reveals no cases in which statements were excluded due to being elicited in a nursing diagnosis. To the contrary, courts in multiple cases have accepted statements under the hearsay exception for medical diagnosis or treatment that were made within the scope of a nurse's limited ability to diagnose. *E.g.*, *Commonwealth v. Jennings*, 2008 PA Super 230, ¶ 16, 958 A.2d 536.

{110} Concurrently, apart from her ability to *diagnose*, Starr's testimony included no such limitation on her ability to provide medical *treatment*. Her testimony includes multiple examples of Starr in fact providing medical treatment to Declarant-specifically, treatment related to physical trauma, sexually transmitted disease, and safety assessment. It follows reasonably

that questions and answers related to such treatment were provided to assist in the provision of medical care at least as regards *treatment*, regardless of the precise definition of *diagnosis* applied. Thus, any conclusion that Starr's provision of medical care did not meet the standard set by the hearsay exception for medical diagnosis or treatment is improper.

{111} Notwithstanding the foregoing, there is no obvious requirement in law for applying the hearsay exception for medical diagnosis or treatment to define the medical content standard for statements satisfying the Confrontation Clause. While we need not decide whether the two standards are identical, there is no basis for concluding that the standard for a SANE nurse's medical care role is narrower than that recognized under Rule 11-803(4). Therefore, we conclude that Starr's provision of treatment and nursing diagnosis—notwithstanding her statement regarding an inability to diagnose—constitutes medical care for the purposes of confrontation analysis. To the extent that the district court inferred some limitation on the relevance of Declarant's statements to Starr's provision of medical care in her dual role as a SANE nurse, we reject such an inference.

{112} The Court of Appeals gave testimonial weight to Declarant being "asked in detail about the assault during the examination, [and] asked to provide forensic genital and anal swabs." *Tsosie*, A-1-CA-37791, mem. op. ¶ 16. As we have discussed, information regarding details of a sexual assault can certainly fall within the scope of information that is important to guide the provision of medical care, and accordingly we do not agree that questions about the assault were necessarily testimonial. The issue is whether such questions were important to the SANE nurse's ability to provide medical care. We agree with the Court of Appeals that statements relating to the requested swabs were clearly for forensic purposes, but those statements were not among the statements sought by the State for use at trial.

{113} The Court of Appeals also appears to have applied a presumption that statements are testimonial if their content "identifies Defendant [or] accuses him of specific acts" or "focus[es] on past events rather than current symptoms." *Tsosie*, A-1-CA-37791, mem. op. ¶ 17. However, as we have discussed, *Bryant*'s context-dependent inquiry requires that the primary purpose test be applied objectively, considering "all of the relevant circumstances," without such presumptions. *See* 562 U.S. at 369-70. Under *Bryant*, the content of a statement does not alone determine its testimonial nature. *Id.*

III. CONCLUSION

{114} We conclude that the primary purpose of the majority of Declarant's statements made in the course of the SANE exam was nontestimonial, and thus admission of those nontestimonial statements at trial does not violate Defendant's constitutional right to confrontation. Accordingly, we reverse and remand to the district court for further proceedings consistent with this Court's opinion. We reiterate that testimonial inquiry merely establishes an analysis threshold for admissibility of Declarant's statements sought by the State for use at trial. Where a statement has been determined to be nontestimonial, "'the admissibility of [that] statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Clark*, 576. U.S. at 245 (quoting *Bryant*, 562 U.S. at 359).

{115} IT IS SO ORDERED.
C. SHANNON BACON, Chief Justice
WE CONCUR:
DAVID K. THOMSON, Justice
JULIE J. VARGAS, Justice
MICHAEL E. VIGIL, Justice, dissenting

VIGIL, Justice (dissenting).

{116} In my opinion, the majority misapplies the "primary purpose" test to conclude that the entirety of the SANE examination report is nontestimonial under the Confrontation Clause of the Sixth Amendment to the United States Constitution. In arriving at its conclusion, the majority also ignores the "primary purpose" of the SANE report by looking only at individual parts of the report instead of the objective circumstances under which it was produced. Finally, viewed in its entirety, the majority opinion improperly equates the medical diagnosis or treatment exception to the hearsay rule with confrontation under the Sixth Amendment. Since I cannot agree with these conclusions, I respectfully dissent.

{117} I conclude, for the reasons set forth herein, that the SANE examination report is testimonial and that its admission into evidence is barred by the Sixth Amendment. I therefore join several other courts in arriving at a similar conclusion. *See Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009) ("We believe their function of evidence gathering, combined with their close relationships with law enforcement, renders SANE nurses' interviews the functional equivalent of police questioning."); *see also Medina v. State*, 143 P.3d 471, 476 (Nev. 2006) (defining a SANE as a "police operative" because a SANE "gathers evidence for the prosecution for possible use in later prosecutions," thus leading "an objective witness to reasonably believe that the statements would be available for use at a later trial"); *see also State v. Cannon*, 254 S.W.3d 287, 305-06 (Tenn. 2008) (excluding statements of an unavailable witness previously made to a sexual assault nurse as testimonial because emergency room personnel had examined and stabilized that witness before the nurse conducted the structured interview). Courts that have declined to adopt a per se rule regarding the primary purpose of SANE examinations have still found that a SANE acted as a law enforcement agent when acting in her evidence-collecting role. *See, e.g.*, *State v. Bennington*, 264 P.3d 440, 452, 455 (Kan. 2011) (explaining that the SANE asked a victim questions from a state-provided questionnaire as part of completion of the sexual assault evidence collection kit); *State v. Miller*, 264 P.3d 461, 488 (Kan. 2011) (same); *People v. Vargas*, 178 Cal. App. 4th 647, 662 (2009) (concluding that the SANE who examined a victim hours after an assault did so "for the primary purpose of documenting the nature of the sexual assault and gathering evidence for transmittal to the police and for possible later use in court"); *State v. Hooper*, 176 P.3d 911, 917-18 (Idaho 2007) (determining several factors indicating that the examiner worked in concert with police); *Hernandez v. State*, 946 So. 2d 1270, 1280-83 (Fla. Dist. Ct. App. 2007) (concluding that the nurse's questions were the functional equivalent of police interrogation).[13]

I. THE PRIMARY PURPOSE TEST

{118} The Confrontation Clause of the Sixth Amendment directs, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." When the state seeks to introduce "testimonial evidence" the Confrontation Clause "demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The command of the Confrontation Clause is "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. While *Crawford* specifically declined to provide a comprehensive definition of "testimonial," it stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 68.

{119} Then, in *Davis v. Washington*, 547 U.S. 813 (2006), the United States Supreme Court elaborated on how to determine a statement's testimonial nature. The *Davis*

[13] The sources and parentheticals in this paragraph were compiled by Justice Gordon McCloud in her concurrence in State v. Burke, 478 P.3d 1096, 1121 n.8, 1123 (Wash. 2021) (Gordon McCloud, J., concurring).

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APRIL 11
Webinar
Cybersleuth Investigative Series: Using Free Public Records and Publicly Available Information for Investigative Research
1.0 EP
11 a.m.–noon

APRIL 13
In-Person and Webinar
In for a Penny, In for a Pound: The Risks (and Benefits?) of Serving as Local Counsel
2.0 G
Noon–1 p.m.

Webinar
REPLAY: Drug Testing and the Chain of Custody (2022)
2.0 G
1:30–3:30 p.m.

APRIL 19
Teleseminar
2023 Wage & Hour Update: New Overtime Rules
1.0 G
11 a.m.–noon

APRIL 20
Webcast
REPLAY: The Business of Cannabis (2022)
1.0 G
Noon–1 p.m.

APRIL 21
Webcast
REPLAY: Wait My Parents Were Wrong? It's Not All About Me? (2022)
3.0 EP
Noon–3:15 p.m.

APRIL 25
Teleseminar
Lawyer Ethics and Investigations for and of Clients
1.0 EP
11 a.m.–noon

APRIL 27
Webinar
REPLAY: Cybersecurity: How to Protect Yourself and Keep the Hackers at Bay (2022)
1.0 EP
Noon–1 p.m.

Webinar
The Mentally Tough Lawyer: How to Build Real-Time Resilience in Today's Stressful World
1.0 EP
1–2 p.m.

APRIL 28
Webinar
REPLAY: Determining Competency and Capacity in Mediation (2022)
2.0 G
Noon–2 p.m.

Webinar
Practical Tips & Strategies To Combat Implicit Biases In Law Firms and Society
1.0 EP
1–2 p.m.

MAY 3
Webinar
Your Inbox Is Not a Task List: Real World Task Management for Busy Lawyers
1.0 EP
11 a.m.–noon

MAY 5
Webcast
Hot Topics in Copyright Law: Artificial Intelligence, Computer Code, Fair Use (Google v. Oracle), and NFTs (Non-Fungible Tokens)
1.0 G
11 a.m.–noon

MAY 10
Webinar
Impeach Justice Douglas!
1.0 EP
11 a.m.–noon

MAY 12
Webinar
REPLAY: Extraordinary Circumstances for Resorting to your Right to Writ (2021)
1.0 G
Noon–1 p.m.

MAY 17
In-Person and Webinar
You're Hired – Check That, Your Fired! Best Practices in Intaking and Terminating Client Relationships
1.0 EP
Noon–1 p.m.

MAY 18
Webinar
REPLAY: Due Diligence in Commercial Real Estate Acquisitions and Leasing (2022)
1.0 G
Noon–1 p.m.

MAY 26
Webinar
How to Stay "Professional" When Videoconferencing: It's Not As Hard As You Think!
1.0 EP
11 a.m.–noon

MAY 26
Webinar
REPLAY: Special Immigrant Juvenile Status: An Update on Regulations and Deferred Action (2022)
1.0 G
Noon–1 p.m.

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Webcast
Wellness Wednesday – REPLAY: Resiliency (2021)
1.0 EP
Noon–1 p.m.

APRIL 19
Webcast
Wellness Wednesday – REPLAY: Emotional Intelligence (2021)
1.0 EP
Noon–1 p.m.

APRIL 26
Webinar
How Secondary Trauma Affects Attorney Mental Health
1.0 EP
1–2 p.m.

Webinar
Wellness Wednesday – REPLAY: Policing the Mentally Ill: A Brief History and Today's Liabilities (2022)
1.0 EP
Noon–1 p.m.

MAY 3
Webcast
Wellness Wednesday – REPLAY: The Enneagram (2021)
1.0 EP
Noon–1 p.m.

MAY 10
Webinar
Wellness Wednesday: REPLAY: Mental Health and Well-Being in the Legal Profession (2021)
1.0 EP
Noon–1 p.m.

MAY 17
Webcast
Wellness Wednesday – REPLAY: The Utilization of Mental Health Professionals & Appropriate Interventions in Family Law (2022)
1.0 G
10–11 a.m.

MAY 24
Webcast
Wellness Wednesday – REPLAY: Being a Lawyer Should Not Hurt! (2022)
1.0 EP
Noon–1 p.m.

MAY 31
Webcast
Wellness Wednesday – REPLAY: Emerging Legal Issues and Opportunities in Behavioral Health (2022)
1.0 G
Noon–1 p.m.

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- Oct. 20: **2023 Elder Law Institute**
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- Nov. 3: **2023 Real Property Institute**
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Court recognized that comprehensively classifying testimonial statements was futile, and instead established the "primary purpose test":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. By focusing on the "primary purpose" for the interrogation, the test recognizes that an interrogation is not necessarily limited to a single purpose, and when other contemporaneous purposes also exist, the "primary purpose" dominates. This test therefore requires a court to ascertain what the "primary purpose" for the interrogation is and not focus on any specific question or answer. This is supported by the use of the word "Statements" in the test. When the "primary purpose" for the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution, *all* of the *statements* that result are deemed to be "testimonial." *Id.* There is no subsequent line-by-line or word-by-word assessment. Thus, the focus is on the "primary purpose of the interrogation" and not on any specific question or answer.

{120} The *Davis* Court also insisted that the "primary purpose" determination must be made on an objective basis. *Id.* at 822. This was reiterated in *Michigan v. Bryant*, when the United States Supreme Court emphasized that an "objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.'" 562 U.S. 344, 360 (2011). First, the circumstances under which the encounter occurs are "clearly matters of objective fact." *Id.* These include whether the encounter is at a crime scene or during an ongoing emergency or afterwards. Second, in conducting an objective analysis of the statements and actions of the parties, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* Stated in another way, a court makes this determination "by objectively evaluating the statements and actions of the parties to the encounter in light of the circumstances in which the interrogation occurs." *Id.* at 370.

{121} Encounters potentially producing testimonial statements are not limited to encounters with police officers. In *Davis*, statements were given in response to a 911 operator's questions. 547 U.S. at 817-18. The Court recognized that although not law enforcement officers themselves, 911 operators "may at least be agents of law enforcement when they conduct interrogations of 911 callers." *Id.* at 823 n.2. *Ohio v. Clark*, 576 U.S. 237, 240-41 (2015), addressed statements made by a three-year-old student to his teacher. The United States Supreme Court specifically declined to categorically exclude statements made to individuals who are not principally charged with uncovering and prosecuting criminal behavior, while noting that "such statements are less likely to be testimonial." *Id.* at 246.

{122} From this precedent, the following general principles emerge. First, if the "primary purpose" of the encounter is to identify a perpetrator or to "establish or prove past events potentially relevant to later criminal prosecution," then all of the statements produced during that encounter are testimonial under the Confrontation Clause. *Davis.* 547 U.S. at 822. The focus is on the primary purpose of the encounter and not on any individual statement. *Id.* Second, a proper assessment of the primary purpose of the encounter is viewed from the objective perspective of a reasonable participant *at the time of the encounter* and "not with the benefit of hindsight." *Bryant*, 562 U.S. at 360, 361 n.8.

II. APPLICATION OF THE PRIMARY PURPOSE TEST

{123} It is clear that the primary purpose of the SANE examination was forensic: to establish or prove facts relevant to a later criminal prosecution of Defendant. I arrive at this conclusion by objectively considering (1) the circumstances of the encounter, (2) Starr's objective purpose in conducting the examination, (3) Declarant's purpose in submitting to the examination, and (4) the formality of the examination.

A. Circumstances of the Encounter

{124} Critical factors to objectively consider are the circumstances under which the encounter took place and whether the encounter was to address an emergency. The facts leading up to the SANE examination are as follows.

{125} On December 18, 2017, at approximately 8:00 p.m., Declarant went to his neighbor's home to contact 911. Law enforcement arrived about thirty minutes after the 911 call. Declarant told them that around 7:00 p.m. that night, Defendant and another man came to his apartment, and Defendant was angry, apparently because he believed that Declarant had a new boyfriend. Declarant said he was repeatedly punched in the face, kicked, choked, tied up, threatened with a knife, and penetrated in his mouth and anus by Defendant with his penis while the other man held him down. Before leaving, they stole his television, DVD player, stereo system, and phone. Declarant said he then went to his neighbor's home to contact 911 after he freed himself.

{126} Declarant initially refused medical attention after law enforcement arrived. Still, the officers suggested that the paramedics should be called to examine Declarant. Paramedics subsequently arrived at Declarant's apartment and treated him. Around 9:00 p.m. the paramedics transported Declarant to the University of New Mexico Hospital (UNMH). At UNMH, doctors and nurses examined and treated Declarant. He also received a CT scan apparently because he had a swollen eye.

{127} At 12:35 a.m., Detective Gomez asked Declarant, "I know you had talked to the officer about it but are you willing to see a sexual assault nurse?" Declarant responded, "Yes." The detective then asked, "Is that something you would like to do tonight?" Declarant said, "Okay." Around 2:25 a.m. a police officer asked Declarant to sign a document giving Albuquerque Police Department (APD) officers permission to search his apartment "for evidence, things that might pertain to this case." As Declarant signed that consent-to-search form, the officer stated, "We will get going to the Family Advocacy Center in just a moment, OK?"

{128} The APD officer then walked with Declarant out of UNMH to his squad car and drove Declarant to the Albuquerque SANE Collaborative at the Family Advocacy Center (Center). The Center is located in downtown Albuquerque at 625 Silver Avenue SW. Offices of APD detectives are in the same building. Gail Starr, a SANE, greeted the officer and Declarant inside. While riding in the elevator up to the examination rooms, Starr asked the officer if he knew which detectives were working on the case and if they were coming to the Center. Before leaving, the officer told Starr, "I will probably meet up with the detectives and see what else they need." The SANE examination started at approximately 3:00 a.m.

{129} Based on the foregoing facts, I conclude Declarant was not facing an ongoing emergency during his SANE examination. An "ongoing emergency" is an active threat at the time the statements are made. *See*, *e.g.*, *Bryant*, 562 U.S. at 374 (contemplating an active shooter whose location and motivations were unknown during the interrogation). The closer the events of

an alleged crime are to the statements describing the events, the more likely there is an ongoing emergency. *See State v. Soliz*, 2009-NMCA-079, ¶ 20, 146 N.M. 616, 213 P.3d 520 (assessing "temporal proximity" to distinguish an ongoing threat from a past incident). For example, in *Hammon*—the companion case to *Davis*—the Indiana police responded to a "domestic disturbance" that had ended before their arrival. *Davis*, 547 U.S. at 819. Even though the attacker was still in the home, the victim and the attacker were separated during questioning, and the victim was in no present danger. *Id.* at 819-21. Because there was no ongoing emergency, the questioning was a criminal investigation.

{130} Here, there was no medical emergency. Declarant was able to untie himself and go to his neighbor to call 911 at around 8:00 p.m. Officers responded, and Declarant initially refused medical attention, but at the responding officer's suggestion, Declarant agreed, and the paramedics were contacted. They responded, treated him, and transported him to UNMH at around 9:00 p.m. Doctors and nurses at UNMH treated and released Declarant. The SANE examination commenced at 3:00 a.m. There is no indication at any time prior to his arrival for the SANE examination that there was a medical emergency of any sort, and the examination took place around eight hours after Declarant said he was assaulted, tied up, and robbed. Moreover, there is no suggestion whatsoever that Declarant was in any danger at the time of the SANE examination. At around 2:25 a.m. the day after the incident, a police officer transported Declarant from UNMH to the SANE Collaborative at the Center, which is located inside the same building on the same floor as APD detectives. Finally, Starr testified that SANEs are trained to be "very slow and careful with the patient" so that the patients are "really relaxed and comfortable in [the] space," spending at least two hours with a patient per examination.

B. Starr's Objective Purpose

{131} Starr's primary objective purpose in conducting the examination was forensic, which means "used in legal proceedings or in public discussions." *Webster's Third New International Dictionary of the English Language*, unabridged (1993) at 889. I begin with an overview of the role of SANEs, nationally and locally, in sexual assault investigations. Generally, to become a SANE, registered nurses must complete more than sixty hours of forensic, medical, and psychological training. New Mexico Coalition of Sexual Assault Programs (NMCSAP), *Roles and Responsibilities of a New Mexico SANE*, 1-2 (*Roles and Responsibilities*).[14] Together, this training covers assessment of injuries from sexual assaults, treatment for sexually transmitted diseases, forensic photography, fact and expert witness testimony skills, and crisis intervention training. *See* Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of SANE Testimony Under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 Am. Crim. L. Rev. 277, 280 (2013); *see also* Jennifer A. Ort, *The Sexual Assault Nurse Examiner*, 102 Am. J. Nursing 24, 24GG (2002). Nationally, the International Association of Forensic Nurses (IAFN) trains and oversees forensic assault nurses (or SANEs) for all fifty states. Almost 2,000 SANEs are certified by the IAFN in the United States. IAFN, *SANEs Trained and Certified by IAFN in 2020*;[15] *see* IAFN, Homepage.[16]

{132} The SANE Task Force and, NMCSAP outline the qualifications for becoming a New Mexico SANE. *Roles and Responsibilities*, *supra*, at 2-4;[17] *see*, NMCSAP, Homepage.[18] These required qualifications include current New Mexico Registered Nurse Licensure, a minimum of two years of nursing experience, completion of the SANE six-day didactic training, and proof of demonstrated competency. *Roles and Responsibilities*, *supra*, at 4.[19] Trainees are expected to obtain courtroom observation hours of violent crime, sexual assault, homicide, or domestic violence cases and to understand the chain of custody protocols for forensic evidence.[20]

{133} SANEs do not provide general medical diagnoses or care, nor are they first responders. Starr testified that she could not prescribe medications or diagnose or treat Declarant beyond the injuries associated with the alleged assault. Instead, SANE examinations involve a physical assessment of the victim that includes a forensic exam identifying and recording injuries specifically related to the alleged assault or rape., NMCSAP, Sexual Assault Evidence Kit (SAEK) Instructions (2005) at 1.[21] Photographs document visible injuries like bruises, lacerations, and other abrasions; the SAEK contains swabs and samples of specimens.[22] The SANE turns this evidence over to the appropriate law enforcement agency if the patient consents to the release of the records. SANE training objectively suggests a forensic purpose.

{134} With the foregoing background in mind, I turn to the location of the examination and its relationship to law enforcement. *See Bryant*, 562 U.S. at 360 ("An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.' The circumstances in which an encounter occurs . . . are clearly matters of objective fact.") An APD officer drove Declarant from UNMH to the SANE Collaborative, which is located in the same building and on the same floor as APD detectives. This colocation of the examination objectively suggests a forensic purpose.

{135} Objectively, the circumstances surrounding the SANE examination are that there was no medical necessity for Declarant to see Starr. He first refused medical treatment and then agreed to medical attention at the suggestion of the police. The paramedics treated Declarant and took him to UNMH, where he was further treated and released. The lack of a medical necessity suggests that the SANE examination was for forensic purposes.

{136} I now turn to the examination itself. Before the actual examination commenced, Declarant signed a form, the first page of the SANE examination report, giving "consent to release all records and evidence pertaining to this case to the pertinent law enforcement agency, Crime Victim Reparation Commission, Children, Youth, & Families Div., Adult Protective Services, District Attorney's Office & the APD Crime Lab." The examination report's second page, the *Sexual Assault Intake* form, notes both the name of the detective who responded to the sexual assault and the police report case number. This is consistent with Starr's testimony, "We work with the police."

{137} Starr's questions focused on recording and collecting forensic information.

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15 Available at https://nmcsap.org/wp-content/uploads/Roles_Responsibilities_New_Mexico_SANE.pdf (last visited July 1, 2022). Available at https://rise.articulate.com/share/Dr3MMRtTTQoRrtQAc3iitqCEkaP-Ny2h#/lessons/9BtMW0qnH-XOW0y6E-1oIg9omDZ052KL (last visited July 1, 2022).

16 Available at https://www.forensicnurses.org/ (last visited July 1, 2022).

17 Available at https://nmcsap.org/wp-content/uploads/Roles_Responsibilities_New_Mexico_SANE.pdf (last visited July 1, 2022).

18 Available at https://nmcsap.org/ (last visited July 1, 2022).

19 Available at https://nmcsap.org/wp-content/uploads/Roles_Responsibilities_New_Mexico_SANE.pdf (last visited July 1, 2022).

20 Id. at 2-4.

21 Available at http://www.ncdsv.org/images/SexAssaultEvidenceKitInstructions.pdf (last visited July 1, 2022).

22 Id. at 4-6.

Declarant was asked to describe in detail the events before the attack began-who was involved, the beating, the sexual assaults, and the robbery-which Starr recorded verbatim as best she could. The narrative included that "offender" performed oral and anal copulation on Declarant with ejaculation inside Declarant's anus.

{138} An entire page of the SANE examination report is dedicated to information about the alleged perpetrator and past abuse. Here Starr noted that Defendant and Declarant "dated a month," Defendant "lived [with Declarant for] ~ 2 weeks," Defendant "was acting jealous," and Defendant was "stealing from [Declarant] before—why relationship ended." Further questions included, (1) "Does your abuser have access to a gun?" to which Declarant answered "no"; (2) "Has the violence increased in frequency/severity over the last year?" where Declarant's response was "first time"; (3) "Does your abuser use alcohol or drugs?" to both of which the response was "yes" noting "Meth"; (4) "Have you been strangled by your abuser in the last year?" where the response was "First time"; and (5) "Does your abuser have a mental illness?" where the response was "Think so."

{139} On a subsequent page with line sketches of human bodies, Starr placed numbers showing eighteen locations where she observed abrasions, bruises, swelling, cuts, pain, scratches, and redness that Declarant reported. The numbers were noted on the front, back, sides, head, and face of the body sketches similar to those on autopsy reports. Starr then explained each number in greater detail in the corresponding numbered text on the next sheet. Starr also examined Declarant's anus and documented a tear and skin tag at two locations on the anus in a diagram and description of the diagram. Starr took more than sixty photographs of the areas of Declarant's body she examined.

{140} As a result of her examination, Starr put together an SAEK. Starr's kit included Declarant's consent form, the undergarments he was wearing when he was sexually assaulted ("collected, air dried if necessary, and placed loosely in prelabeled large brown bag"), air-dried oral swabs ("collected, air dried and two swabs placed in Oral envelope"), air-dried anal swabs ("collected, air dried and two swabs placed in Anal envelope"), skin swabs of hickeys, and photographs.

{141} Special instructions for the SAEK are checked as being followed by Starr. Those instructions require the following: "All small white envelopes sealed, taped, initialed, dated, and placed in the large white envelope along with Undergarments small brown bag, also stapled, taped, with integrity seal. Large white envelope sealed, taped, initialed, and dated with integrity seal. The information on the front labels of both the SAEK white envelope and large brown bag is completed and signed by Examiner. Chain of custody is maintained throughout." The SAEK was sealed with an integrity seal, affixed with the police report case number in accordance with evidence collection protocols, and given to the police along with the SANE examination report.

{142} We have previously observed, "When compared with other medical providers, the goals of SANE nurses and SANE examinations can seem more closely aligned with law enforcement . . . ." *State v. Mendez*, 2010-NMSC-044, ¶ 42, 148 N.M. 761, 242 P.3d 328. That is decidedly the case here. Starr said she spends at least two hours with a sexual assault patient. During that two hours, in contrast to all the forensic tasks she performed during the SANE examination, the only medical treatment Starr provided to Declarant was an ice pack for his swollen eye and prophylactic vaccinations. Taking all the circumstances together, I conclude that the *primary* purpose of Starr's SANE examination was to establish or prove past events potentially relevant to a subsequent criminal prosecution. That is *not* to suggest in any way that Starr would not treat any medical conditions she came across during the course of her examination. However, objectively observed, that was decidedly not her *primary* purpose.

C. The Declarant's Objective Purpose

{143} I now undertake what the facts show the Declarant's purpose was in submitting to the SANE examination. While there is no direct evidence as to what Declarant's purpose was, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter," but rather it is the purpose that a "reasonable participant[] would have had" in the same situation. *Bryant*, 562 U.S. at 360. I conclude that under the circumstances a reasonable participant would have understood that the process of collecting and preserving evidence was for a potential criminal case. *See Davis*, 547 U.S. at 822.

{144} First, we know that a detective spoke to Declarant at UNMH about seeing a SANE, and when he was later asked, he said he was willing to do so and assented to speaking to the SANE later that same night. We also know that a police officer asked Declarant to sign a form consenting to a search of his apartment for evidence, and as he signed the form, the officer said the police were going to get Declarant to the Center "in just a moment."

{145} Second, a law enforcement officer drove Declarant to the Family Advocacy Center, an "environment that focuses on the needs of victims of interpersonal crime,"[23] which is colocated in the same building, and on the same floor, that houses APD detectives.

{146} Third, before Starr began the examination, Declarant had to read and sign the SANE examination report's consent form that included a release of information to law enforcement, the APD crime lab, and the District Attorney's Office. Then, Declarant provided a detailed narrative about the assault, which prompted Starr to collect forensic genital and anal swabs as well as to identify on diagrams his alleged injuries and to take over sixty photographs of those alleged injuries. When Starr was asked if the purpose of taking certain swabs was to give them to the police, Starr agreed and added, "And it is to support the patient's desire to report this assault to the police."

{147} Fourth, at the end of the examination, Starr provided Declarant with discharge instructions that included "Police Investigative Information." Since Declarant consented to reporting the alleged sexual assault, the discharge paperwork included instructions on how to launch an investigation into the alleged crimes, contact information for the APD, the designated contact agent, and the APD police report case number associated with the SAEK. While Starr testified, "We work with the police. We do not work for the police," the inclusion of law enforcement contact information would lead a reasonable participant to believe the evidence collected during the exam could serve an evidentiary purpose.

{148} Thus, the objective circumstances of the exam would have alerted a reasonable participant to the potential future prosecutorial use of that participant's statements. The primary purpose of the examination was to create a record "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. For these reasons, Declarant's primary purpose in submitting to the SANE examination was to provide "testimony" supporting his allegations rather than to receive medical attention.

D. Formality of the Examination

{149} The formality of the SANE examination weighs in favor of concluding that the SANE examination report is testimonial. Declarant was in a formal, safe, and tranquil environment during the examination. Formality "is a key factor in determining whether the statement is testimonial" and suggests the absence of an emergency.

[23] Available at https://www.cabq.gov/albuquerque-family-advocacy-center (last visited July 1, 2022).

State v. Romero, 2007-NMSC-013, ¶ 21, 141 N.M. 403, 156 P.3d 694; *see Bryant*, 562 U.S. at 366, 377. Formality is a function of the location where the statement was made (for example, in a courthouse or at a crime scene) and the manner of recording (such as signing under oath or tape-recording). *Compare Crawford*, 541 U.S. at 38-39 (involving police interrogations at the police station), *with Bryant*, 562 U.S. at 349 (considering the statement of a gunshot victim in a parking lot).

{150} The formalities and structure surrounding the SANE examination report are more than adequate to qualify the report—and Declarant's assertions within it—as testimonial. Declarant was questioned in a methodical, calm, and structured examination far-removed from harm. Declarant understood that evidence would be collected during the SANE examination—and included in an SAEK—and still consented to the release of records to law enforcement agencies including the District Attorney's Office and the APD Crime Lab.

{151} Additionally, the method of recording Declarant's assertions emphasizes the examination's formality. The "core class" of testimonial statements exemplified in *Crawford*, 541 U.S. at 51-53, is not limited to sworn testimony alone. In *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011), the United States Supreme Court reasoned that a "certified" unsworn report of the defendant's blood alcohol levels was testimonial hearsay because a "document created solely for an 'evidentiary purpose' . . . made in aid of a police investigation ranks as testimonial." (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009), for the laboratory report at issue). The *Bullcoming* Court used the following factors to support its conclusion: (1) law enforcement conveyed the evidence to the crime laboratory for testing, (2) a laboratory analyst tested the evidence and recorded the results in a "formalized" signed document, and (3) the formal report referred to court rules that provided for the document's admission into evidence. *Id.* at 665.

{152} Similarly, the SANE examination report's status as a formal statement stems from the process that created it, despite the absence of an official certification. The SANE examination occurred after police brought Declarant to the Center. Starr collected the forensic evidence and recorded medical and forensic information in the structured and uniform report. Starr was trained to know how evidence is admitted at trial through her SANE training. The report's "SAEK Checklist" also contains chain of custody protocols to be checked off as accomplished. When completed, the report and the SAEK were shared with APD.

{153} Further, Starr certified the validity of the SANE examination report and the information therein by initialing each page of the report and signing her name as a representative of the Albuquerque SANE Collaborative on the report's consent form, "Discharge Instructions," and SAEK Checklist. To *certify* is to "attest as being true." *Black's Law Dictionary* (11th ed. 2019) 284, 158 (defining *attest* as "[t] o bear witness; testify" or "[t]o affirm to be true or genuine; to authenticate by signing as a witness"). The SAEK Checklist emphasized the proper collection of evidence stating, "Examiner: The evidence you collect will be examined by either the New Mexico State Crime Lab or the Albuquerque Police Dept. Crime Lab. Accurate documentation provided in this Checklist significantly increases the value of the evidence collected should patient consent to investigation." Such formality suggests a forensic purpose.

III. THE MAJORITY OPINION

{154} The majority provides that because "a SANE nurse's identity pursuant to a dual role may shift multiple times within a SANE exam, the burden of determining [a] circumstance's proper weight within primary purpose analysis nonetheless remains with our district courts." *Maj. op.* ¶ 54. This statement reflects the primary flaw in the majority's reasoning. While it is true that district courts must shoulder the heavy responsibility of sifting through statements, piece-by-piece, making individual decisions on each one, such sifting is done only after it has been concluded that the primary purpose of the encounter is something other than to establish or prove past events potentially relevant to later criminal prosecution. *See Davis*, 547 U.S. at 822, 828 (establishing that an interrogation to determine the need for emergency assistance can evolve into testimonial statements, but only after concluding the circumstances of the "interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency"). Rather than looking to the primary purpose of *the encounter*, the majority looks to *each statement* made, plus testimony made by Starr about the statements (testimony that was made after the encounter), to determine the primary purpose of each statement, and then extracts that information to determine the primary purpose of the encounter. This is incorrect. Moreover, if what the majority says in paragraph 55 is correct—that a district court may redact testimonial statements at any time, regardless of the primary purpose—it eviscerates the primary purpose test. In other words, simply go and redact any testimonial statements, as the majority does here.

{155} The majority begins its analysis stating half of the rule for the primary purpose test, "we begin our 'highly context-dependent inquiry' with objective analysis of the circumstances in which the parties interacted, then conduct an objective and combined inquiry into the parties' statements and actions." *Maj. op.* ¶ 75 (quoting *Bryant*, 562 U.S. at 363). However, this Court must objectively evaluate "the statements and actions of the parties to the encounter, in light of the circumstances *in which the interrogation occurs*." *Bryant*, 562 U.S. at 370 (emphasis added). Further, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances *in which the encounter occurred*." *Id.* at 360 (emphasis added). The majority attempts to cloak its reliance on Starr's subsequent testimony and her subjective purpose as being "relevant to determining what a reasonable SANE nurse's underlying purpose" would be. *Maj. op.* ¶¶ 32 n.3, 84.

{156} By examining the statements and actions and circumstances of the encounter, not testimony made subsequent to the encounter, this Court then determines if the primary purpose of the encounter is to establish or prove past events potentially relevant to later criminal prosecution. *See Bryant*, 562 U.S. at 357. If it is, there is no sifting or parsing through statements line-by-line. *See Davis*, 547 U.S. at 828-29. The entire SANE examination report is deemed testimonial and within the scope of the Confrontation Clause. *See id.* at 821-22 (holding that all the statements of an encounter are testimonial when the circumstances objectively indicate "that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"). Thus, this Court must look to the statements made and the actions and circumstances that occurred during the encounter, not statements from one of the participants made after the encounter on the "subjective or actual purpose" of the statements made and the actions that occurred during the encounter. *Bryant*, 562 U.S. at 360. This is where I believe the majority goes awry.

{157} The majority concludes that a SANE has dual roles under the examination's "medical care component" and its "forensic component." *Maj. op.* ¶ 51. The majority states that because a SANE's predominant role in an examination "is likely to change multiple times over the course of a SANE exam," a court cannot use a SANE's identity to *presume* either the testimonial or nontestimonial primary purpose of the *statements*. *Id.* Instead,

according to the majority, Starr's identity as a SANE—and in a SANE's dual role in general—is informed by the underlying purpose of individual statements in the SANE examination. *See id.* ¶¶ 51, 83-93.

{158} So, the majority evaluates to what extent the nature of the questions from the SANE examination "informed" whether Starr was acting in a medical care role or a forensic role. *Id.* ¶¶ 85-93. To determine the primary purpose of a particular *statement*, the majority reasons that if the statement is relevant for a medical care component, then "Starr's medical care role informed her identity . . . as much as or more than her forensic role, thus weighing toward a nontestimonial ruling." *Id.* ¶ 86. In other words, the classification of a statement as either medical or forensic determines if Starr was acting in a "medical care role" or a "forensic role," thereby determining whether the statement is nontestimonial or testimonial. *Id.* ¶ 83.

{159} The majority concludes that each of the eight challenged examination forms "informed" Starr's medical care role more than her forensic role. *Id.* ¶¶ 85-93. The majority concludes, "To the extent that the SANE exam questions reflect Starr's identity pursuant to her medical care role . . . , we conclude that this circumstance weighs toward the challenged statements being nontestimonial." *Id.* ¶ 93. The release of records portion of the examination form is the only section relative to which the majority deems Starr's identity to be forensic. *Id.* ¶ 85.

{160} Later, the majority purports to engage in a combined analysis of the statements and actions of the participants☐Starr and Declarant. *Id.* ¶¶ 97-107. The majority incorporates its "discussion of Starr's questions posed in the SANE exam forms as they related to the surrounding circumstance of her identity in her dual role as a SANE nurse." *Id.* ¶ 98. The majority concludes that Declarant's statements that "provided information that was important to guide the provision of medical care in relation to the medical care purposes of the particular questions" are nontestimonial. *Id.* ¶ 99. When Declarant's statements exceeded that scope, and identified Defendant or any criminal acts, the statements became testimonial. *See id.* Again, the majority evaluates Starr's testimony based on her stated subjective reasons for determining the purposes of her examination questions, rather than from a reasonable participant's perspective. *See id.* ¶¶ 102-07.

{161} The United States Supreme Court precedent evaluating the primary purpose of encounters with state actors is clear and remains unchanged since the creation of the primary purpose test. *See Davis*, 547 U.S. at 822. The analysis does not concern the subsidiary or corollary purpose of the SANE examination. *See id.* The case law addresses the SANE examination's *primary*, or fundamental, purpose. *See id.* Instead of evaluating the totality of an alleged sexual assault encounter, as prescribed by precedent, the majority opts to segment the encounter and task the district courts with evaluating each utterance of the encounter. Further, the majority relies entirely on Starr's testimony to support its conclusions that the statements are nontestimonial. I determine the plain language and format of the SANE examination report alone, beginning with the *Sexual Assault Intake* form, to be sufficient as evidence of a testimonial primary purpose of the examination.

{162} I strongly disagree with the majority's conclusion that the record does not demonstrate "significant" further involvement by law enforcement to support Declarant's claims. *See maj. op.* ¶ 80. Footage captured on the lapel videos and recorded interviews with APD demonstrates that Declarant first learned of SANE examinations from the officers, and the officers coordinated with Starr as to when the examination would be finished. This footage, combined with Declarant's signed release of records to the APD, is evidence a reasonable participant would have understood the depth of APD's involvement with the SANE examination and with this case.

{163} I also determine that the majority's logic is circular in evaluating the relationship between a SANE's role and the testimonial nature of the statements. *See id.* ¶¶ 51, 83-93. The majority first establishes that statements that are made for the purpose of medical care or treatment are nontestimonial. *See id.* ¶ 69. Then, the majority says, a nontestimonial medical purpose informs Starr's medical caregiving role as a SANE. *See id.* ¶ 85. So, when Starr is acting as a medical provider, her purpose when asking Declarant questions during the exam cannot be to collect evidence for a forensic purpose. Since the statements Starr elicits as a medical caregiver do not have a primary purpose of producing testimonial statements, the reasoning goes, the statements are nontestimonial.

{164} Finally, while the majority asserts it is not equating its medical diagnosis Confrontation Clause exception with the medical diagnosis or treatment exception for hearsay, *id.* ¶¶ 44 n.5, 108-13, the result it reaches belies that assertion. Rule 11-803(4), NMRA states, "A statement that (a) is made for—and is reasonably pertinent to—medical diagnosis or treatment, and (b) describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause," is "not excluded by the rule against hearsay."

{165} In *Mendez*, we held that the "hearsay rule and the Confrontation Clause are not co-extensive and must remain distinct" when conducting Sixth Amendment testimonial analysis and considering the admissibility of statements. 2010-NMSC-044, ¶ 28. While the majority acknowledges this rule, *see maj. op.* ¶ 44 n.5, the majority proceeds to conclude that many of the statements made during the SANE examination are nontestimonial because they "were within the scope of information important to guide Starr's provision of medical care." *See maj. op.* ¶¶ 101-07. The majority's focus on the statements and whether they were important to guide Starr's "provision of medical care," rather than a focus on the primary purpose of the entire encounter, improperly meshes hearsay analysis under Rule 11-803(4) with Confrontation Clause analysis. *See maj. op.* ¶¶ 102-11; *see also Mendez*, 2010-NMSC-044, ¶ 21 ("[I]f a statement is pertinent to a medical condition, such that a medical care provider reasonably relies upon it in arriving at a diagnosis or treatment, the statement is deemed sufficiently reliable to overcome hearsay concerns."). Further, the majority supports its reasoning by citing *Miller*, 264 P.3d at 487 (Kan. 2011), a case that erroneously applied our hearsay rules from *Mendez*, 2010-NMSC-004, ¶ 46, to its Confrontation Clause analysis, *see maj. op.* ¶ 45, and by using the hearsay exception to evaluate a SANE's dual role, *see maj. op.* ¶ 109. The majority overly relies on the hearsay analysis of Rule 11-803(4) in *Mendez* in direct contradiction of this Court's precedent.

IV. CONCLUSION

{166} The *Crawford* Court described "'testimonial'" statements as "'solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.'" 541 U.S. at 51 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). While the *Crawford* Court specifically declined to provide a comprehensive definition of *testimonial*, it created a nonexhaustive list of a "core class of 'testimonial' statements" which trigger Confrontation Clause concerns. *Id.* This core class includes "pretrial statements that declarants would reasonably expect to be used prosecutorially" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52.

{167} It is clear from the objective circumstances that the overarching primary purpose of the SANE examination was to establish past facts potentially relevant to Defendant's criminal prosecution. The core characteristic of SANE examinations is the collection and preservation of evidence irrespective of necessary medical

treatment. A sexual assault victim with no apparent injuries will undergo examination and evidence collection procedures similar to those of a victim with injuries. *Compare State v. Ortega*, 2008-NMCA-001, ¶ 25, 143 N.M. 261, 175 P.3d 929 (explaining that a child never received medical treatment during the SANE examination), *overruled on other grounds by Mendez*, 2010-NMSC-044, ¶¶ 1, 40, *with Mendez*, 2010-NMSC-044, ¶¶ 1-9 (describing the SANE examination of a child who was bleeding vaginally following an alleged assault). SANEs are trained to follow the same procedures for each patient—notwithstanding a patient reporting the alleged assault to law enforcement. *See* SAEK Instructions, *supra*, at 2.[24] If a patient does not file a police report at the time of the SAEK collection, the SAEK will be stored as a "collected . . . but not reported" sexual assault kit which the patient may eventually choose to report. *See id.*[25]

{168} The primary purpose of the SANE examination was to collect and preserve statements and corroborating evidence for the purpose of proving Declarant's claims made to the police. The SANE examination report is therefore testimonial. Further, it is the only evidence the State has to prove its case against Defendant, and Defendant has never had an opportunity to confront and cross-examine Declarant who is deceased. The Sixth Amendment prohibits this result. Since the majority disagrees, I respectfully dissent.

MICHAEL E. VIGIL, JUSTICE

ORDER ON SUGGESTION OF DEATH AND MOTION TO ABATE OR APPOINT SUBSTITUTE PARTY

BACON, Chief Justice.

{1} WHEREAS, this matter came on for consideration by the Court upon the Appellate Defender's Suggestion of Death and Motion to Abate or Appoint Substitute Party ("the motion") pursuant to Rule 12-301, NMRA;

{2} WHEREAS, on July 14, 2022, this Court issued an opinion in State v. Tsosie, 2022-NMSC-017, ___ P.3d ___, resolving pretrial admissibility issues raised on interlocutory appeal by Plaintiff State of New Mexico concerning felony charges against Defendant Oliver Tsosie in State v. Tsosie, D-202-CR-2018-00597 (2d. Jud. Dist. Ct.);

{3} WHEREAS, on July 21, 2022, the motion before the Court informed us that Defendant had passed away on December 15, 2021, which assertion was later confirmed by the Office of the Medical Investigator of the State of New Mexico;

{4} WHEREAS, the circumstance of the death of a party in a case before this Court is governed by Rule 12-301(A) of our Rules of Appellate Procedure, which provides in pertinent part:

> If a party dies after notice of appeal is filed or while a proceeding is otherwise pending, the personal representative of the deceased party may be substituted as a party on motion filed in the appellate court by the representative or any other party. . . . If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appellate court directs.

(Emphasis added.)

{5} WHEREAS, the language in Rule 12-301 of "as the appellate court directs" has been interpreted by this Court in State v. Salazar, 1997-NMSC-044, ¶ 25, 123 N.M. 778, 945 P.2d 996, as "giv[ing a] court substantial discretion in determining how . . . a substitution should be conducted after death has been noted on the record";

{6} WHEREAS, the motion asks this Court to enter an order abating the proceeding to its inception (abatement ab initio) or substituting a party for Defendant;

{7} WHEREAS, the proposed remedy of abatement ab initio would vacate the opinion, whereas the proposed remedy of substitution of the deceased Defendant would leave the opinion in place;

{8} WHEREAS, the Salazar Court recognized that substitution of a deceased party may serve "the best interests of society" where the resulting nonvacated opinion "clarifies important issues involving the law . . . in New Mexico," 1997-NMSC-044, ¶ 27;

{9} WHEREAS, the opinion clarifies admissibility issues of first impression under the Confrontation Clause of the Sixth Amendment to the United States Constitution;

{10} WHEREAS, allowing substitution here involves no prejudice suffered by Defendant or his interests, see Salazar, 1997-NMSC-044, ¶ 27;

{11} WHEREAS, Defendant's death during pendency of the appeal had no effect on this Court's handling of the issues in the opinion, see id.;

{12} WHEREAS, abatement ab initio is "a court-created common law doctrine" applied by courts where a criminal "defendant's death . . . occurs while his criminal conviction is pending on direct appeal," People v. Griffin, 2014 CO 48, ¶ 4, 328 P.3d 91 (emphasis added), and is not applied where there has been no verdict at trial, see Salazar, 1997-NMSC-044, ¶ 30 (recognizing that substitution is not an available remedy where a criminal defendant "die[s] during pendency of discretionary post-conviction remedies," in which case "the petition will be dismissed as moot, and the verdict will stand" (emphasis added));

{13} WHEREAS, the issues in the opinion satisfy both of our well-established exceptions to mootness, said issues being "of substantial public interest, and . . . capable of repetition yet evad[ing] review." Jones v. N.M. Dep't of Pub. Safety, 2020-NMSC-013, ¶ 30, 470 P.3d 252 (internal quotation marks and citation omitted);

{14} WHEREAS, the Court having considered the foregoing and having determined pursuant to Rule 12-301(A) and Salazar, 1997-NMSC-044, that substituting a party for Defendant serves the best interests of society; Chief Justice C. Shannon Bacon, Justice David K. Thomson, and Justice Julie J. Vargas concurring; Justice Michael E. Vigil dissenting;

{15} NOW, THEREFORE, IT IS ORDERED that the motion to substitute a party for Defendant is GRANTED;

{16} IT IS FURTHER ORDERED that we appoint defense counsel of record as Defendant's substitute for the remainder of the proceeding.

{17} IT IS SO ORDERED.

C. SHANNON BACON, Chief Justice

WE CONCUR:

DAVID K. THOMSON, Justice

JULIE J. VARGAS, Justice

MICHAEL E. VIGIL, Justice, dissenting

VIGIL, Justice (dissenting).

{18} On July 14, 2022, this Court issued an opinion in this criminal case, ordering a remand to the district court for further proceedings. One week later, appellate counsel for Defendant filed a suggestion of death, stating she learned that Defendant had passed away, while the case was pending, on December 15, 2021. Counsel asked this Court to enter an order abating the proceeding or substituting a party for Defendant. I respectfully submit that abatement is proper. Since the majority disagrees, I dissent.

{19} There has never been a trial in this case. The alleged victim is deceased. Prior to trial, the district court entered an order excluding from evidence certain statements made by the alleged victim to a Sexual Assault Nurse Examiner (SANE) on grounds that its admission would violate Defendant's confrontation rights under the Sixth Amendment to the United States Constitution. The State exercised its right to pursue an interlocutory appeal under, NMSA 1978, Section 39-3-3(B)(2) (1972). The Court of Appeals affirmed the district court, and after granting certiorari, we

[24] Available at http://www.ncdsv.org/images/SexAssaultEvidenceKitInstructions.pdf (last visited July 1, 2022).
[25] *Id.*

issued our opinion reversing the Court of Appeals and remanding the case to the district court for further proceedings.

{20} As matters stand, the alleged victim and Defendant are both deceased. With no alleged victim and no defendant, there is no case. The appeal is absolutely moot. See Gunaji v. Macias, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008 ("A case is moot when no actual controversy exists, and the court cannot grant actual relief." (internal quotation marks and citations omitted)). Furthermore, as matters stand, if the opinion is not withdrawn, we leave in place a purely advisory opinion. See City of Las Cruces v. El Paso Elec. Co., 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 ("We avoid rendering advisory opinions.") In addition, by substituting another party for the deceased Defendant, this Court effectively cuts off and prevents any further review of its opinion. The United States Supreme Court will not grant certiorari in a criminal case when the defendant has died. See Dove v. United States, 423 U.S. 325 (1976) (dismissing the petition for certiorari review because the petitioner died).

{21} The general rule is that "the prosecution abates from the inception of the case upon death of a criminal defendant." State v. Salazar, 1997-NMSC-044, ¶ 20, 123 N.M. 778, 945 P.2d 996. I recognize that Rule 12-301(A), NMRA states in part that when the death of a party is suggested on the record, "proceedings shall then be had as the appellate court directs." Exercising this discretion, Salazar modified, but did not abrogate, the general rule. Salazar only excluded from the general rule cases where the defendant dies while exercising the constitutional right to a direct appeal as a matter of right following a conviction. Salazar, 1997-NMSC-044, ¶ 30 ("This holding applies only to cases involving the death of a defendant who possesses a direct appeal as of right to a criminal conviction."); see also N.M. Const. art. VI, § 2 (providing a right of appeal from a sentence of death or life imprisonment). The case is now before us on a discretionary grant of certiorari, and not as a matter of right. Salazar does not apply. Because the direct appeal as of right requirement is not satisfied in this case, the general rule of abatement ab initio applies. The lack of any conviction weighs heavily in favor of applying the general rule of abatement ab initio, and I do not see any good reason for exercising our discretion to issue an advisory opinion in a case that is moot. Respectfully, asserting that the opinion addresses an issue of first impression is not, by itself, sufficient.

{22} I respectfully submit that the appropriate course in this case is to withdraw the opinion and remand the case to the district court to abate the entire proceeding ab initio. Since the majority disagrees, I dissent.

MICHAEL E. VIGIL, Justice

From the New Mexico Supreme Court

Opinion Number: 2022-NMSC-018
No: S-1-SC-38437 (filed July 21, 2022)

STATE OF NEW MEXICO,
Plaintiff-Petitioner/Cross-Respondent,
v.
GREGORY MARVIN HOBBS,
Defendant-Respondent/Cross-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Freddie J. Romero, District Judge

Hector H. Balderas, Attorney General
Lauren Joseph Wolongevicz, Assistant Attorney General
Santa Fe, NM

for Petitioner and Cross-Respondent

New Mexico Innocence & Justice Project
University of New Mexico School of Law
Barbara Louise Creel
Albuquerque, NM

for Respondent and Cross-Petitioner

OPINION

ZAMORA, Justice.

{1} In this case of first impression, we clarify the analysis district courts must apply in determining whether to grant postconviction relief based on deoxyribonucleic acid (DNA) test results obtained after a guilty verdict under, NMSA 1978, Section 31-1A-2(I) (2019). Section 31-1A-2(I) provides that "[i]f the results of the DNA testing are exculpatory, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief."[1] *Id.* We hold that in analyzing whether to grant postconviction relief, the district court must first make a threshold determination as to whether the test results are "exculpatory," that is, they reasonably tend to establish the petitioner's innocence or negate the petitioner's guilt. Second, if the district court finds the DNA evidence is exculpatory, the controlling inquiry under Section 31-1A-2(I) is whether and to what extent the evidence would have changed the result of the petitioner's trial. In determining whether to order relief, the district court's analysis should be guided by the standard that applies to the specific form of postconviction relief requested. *See, e.g.*, *State v. Garcia*, 2005-NMSC-038, ¶ 8, 138 N.M. 659, 125 P.3d 638 (setting forth requirements for ordering a new trial); *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 1, 142 N.M. 89, 163 P.3d 476 (requiring a petitioner claiming actual innocence to demonstrate by clear and convincing evidence that no reasonable juror would have convicted the petitioner in light of the new evidence).

{2} In this case, we conclude that the postconviction DNA test results obtained by Respondent/Cross-Petitioner Gregory Marvin Hobbs are exculpatory because they corroborate his claim that he acted in self defense when he shot and killed Ruben Archuleta Sr. (Ruben Sr.). While it is a close question, we also conclude that the district court did not abuse its discretion when it granted Hobbs's motion for a new trial based on its determination that the evidence would likely have resulted in a different verdict had it been available at trial. Because we disagree with the analysis set out and applied by the Court of Appeals and its resolution of this appeal, we reverse its decision and reinstate the district court's order for a new trial.

I. BACKGROUND

A. Hobbs's Conviction for Voluntary Manslaughter

{3} This case arises from an altercation that resulted in two deaths.[2] As summarized by the district court, the evidence at trial showed that Hobbs and his friend, Juan Gonzales, were standing outside with a group of people when Ruben Sr. drove up and started yelling at Juan. Ruben Sr.'s son, Ruben Jr., lived nearby. Shortly after the altercation began, Ruben Sr.'s wife sent her other son, Max, to retrieve his older brother, Ruben Jr. Ruben Jr. grabbed his shotgun and entered the fray. Juan retreated to the passenger seat of his car in an apparent attempt to escape, but Ruben Sr. pursued him into the car. Ruben Jr. then stood outside the passenger's side of Juan's vehicle and pointed his shotgun at Juan. Hobbs testified that, because he believed his friend's safety was threatened, he pulled out his handgun and shot Ruben Jr.

{4} The focus at trial was on what happened next between Hobbs and Ruben Sr. It was undisputed that Hobbs shot Ruben Sr. soon after he shot Ruben Jr. However, the jury considered conflicting evidence about whether Ruben Sr. and Hobbs were struggling for Hobbs's handgun at the time of the second shooting. An expert witness for the State testified on the basis of autopsy results that Hobbs shot Ruben Sr. four times. According to the witness, the shot that likely killed Ruben Sr. was fired at a downward angle into Ruben Sr.'s left chest from an estimated six to eight inches away. The witness further testified that a gunshot that entered at the bridge of Ruben Sr.'s nose was fired from more than two or three feet away. A third shot grazed Ruben Sr.'s right shoulder, corresponding to a defect in the t-shirt he was wearing when he was killed. Finally, Ruben Sr. had a superficial gunshot wound on the right side of his chest "involving skin and soft tissue."

[1] Section 31-1A-2 was amended in 2019, after the district court proceedings and during the Court of Appeals proceedings. See 2019 N.M. Laws, ch. 211, § 4. Among other things, the amendments inserted a new Subsection (C) and renumbered the rest of the statute, including the subsections at issue in this appeal. See id. The amendments do not affect our analysis, and for ease of future reference and application, we cite the 2019 version of the statute throughout this opinion.

[2] The State did not charge Hobbs in connection with the death of the first person, Ruben Archuleta Jr. (Ruben Jr.), after determining the killing was legally justified.

{5} Hobbs testified that Ruben Sr., who was eight to nine inches taller and approximately sixty pounds heavier than Hobbs, physically attacked him and tried to grab the gun. He further testified that he attempted to retreat but that Ruben Sr. grabbed him and began wrestling for the gun. Two eyewitnesses testified they saw Hobbs and Ruben Sr. "wrestling" or "fighting" for the gun.

{6} The central thrust of the State's argument was that the physical evidence did not match Hobbs's claim that he shot Ruben Sr. in self defense. The State emphasized that Hobbs lacked any physical injuries indicative of a struggle, such as scrapes, scratches, or bruises, and argued that the physical evidence presented at trial did not support his testimony that he was "in a fight for his life over this gun." According to the State, the evidence showed that Hobbs merely "turned and shot Ruben Archuleta Sr., who was unarmed."

{7} The jury found Hobbs guilty of voluntary manslaughter after being properly instructed on self defense. The district court sentenced Hobbs to six years imprisonment, plus an additional year due to the use of a firearm in the commission of the offense.

B. Hobbs's Request for DNA Testing Pursuant to Section 31-1A-2

{8} Two years later, Hobbs petitioned under Section 31-1A-2 for DNA testing of the handgun with which he shot Ruben Sr. and of the t-shirt that Hobbs was wearing at the time of the incident. The State did not oppose the petition. Section 31-1A-2 establishes the procedures by which "[a] person convicted of a felony, who claims that DNA evidence will establish the person's innocence, may petition the district court . . . to order the disclosure, preservation, production and testing of evidence that can be subjected to DNA testing." Section 31-1A-2(A). As a condition of filing, the petitioner must agree to submit to DNA testing and must "authorize the district attorney's use of the DNA test results to investigate all aspects of the case that the petitioner is seeking to reopen." Section 31-1A-2(B).[3]

{9} The statute also requires a petitioner to establish by a preponderance of the evidence that:

> (1) the petitioner was convicted of a felony;
>
> (2) evidence exists that can be subjected to DNA testing;
>
> (3) the evidence to be subjected to DNA testing:
>
> (a) has not previously been subjected to DNA testing;
>
> (b) has not previously been subjected to the type of DNA testing that is now being requested; or
>
> (c) was previously subjected to DNA testing, but was tested incorrectly or interpreted incorrectly;
>
> (4) the DNA testing the petitioner is requesting will be likely to produce admissible evidence; and
>
> (5) identity was an issue in the petitioner's case or that if the DNA testing the petitioner is requesting had been performed prior to the petitioner's conviction and the results had been *exculpatory*, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty.

Section 31-1A-2(D) (emphasis added). Section 31-1A-2(H) provides that, if the petitioner satisfies the requirements set out in Subsections (B) and (D), the district court "shall order DNA testing" to be performed.

{10} Of particular importance in this case is the requirement that a petitioner demonstrate both that the evidence sought would have been "exculpatory" had it been available prior to the petitioner's conviction, *and* that, based on this additional evidence, there is a reasonable probability that the petitioner would not have been adjudicated guilty. Section 31-1A-2(D)(5). The Legislature has not defined the meaning of "exculpatory" for purposes of this statute, but in his petition, Hobbs averred that if (as he postulated) the DNA test results demonstrated that Ruben Sr. touched the handgun and/or the t-shirt, the evidence would have been exculpatory had it been presented at trial because it would have contradicted the State's contention that no physical evidence supported Hobbs's claim of self defense. According to Hobbs, if the State's "central argument" had been rendered implausible by the presence of Ruben Sr.'s DNA on the handgun and t-shirt, "it is likely that the jury would have acquitted . . . Hobbs of voluntary manslaughter."

{11} In declining to oppose the petition, the State necessarily declined to litigate both the meaning of "exculpatory" within Subsection (D)(5) and the issue of whether the DNA petition satisfied the required reasonable probability that the evidence, had it been available prior to conviction, would have resulted in a not-guilty plea or verdict. *See* § 31-1A-2(D)(5).[4] Thus, prior to ruling on the petition, the district court held only a brief hearing and confirmed the State did not oppose it. At the conclusion of the hearing, the district court stated that, having reviewed the statute, it appeared "the criteria ha[d] been met" and issued an order to submit the t-shirt and handgun for DNA testing.

C. Hobbs's Motion for a New Trial Based on the Results of DNA Analysis

{12} Once a district court has granted a Section 31-1A-2 petition and ordered DNA testing, the court's authority to award postconviction relief is governed by Section 31-1A-2(I), the main provision at issue in this case. Under that subsection, "[i]f the results of the DNA testing are *exculpatory*, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief." *Id.* (emphasis added).

{13} Approximately a year after the district court granted his petition to test the handgun and t-shirt for DNA, Hobbs filed a motion to vacate his conviction or, in the alternative, to grant him a new trial. According to the motion, the results of the DNA analysis demonstrated that Ruben Sr. could not be excluded as a contributor to two mixtures of DNA found on the handgun and t-shirt, respectively. Consistent with his argument in support of his initial request for DNA testing, Hobbs argued that the newly obtained DNA results were exculpatory because they directly contradicted the State's claim at trial that Hobbs's theory of self defense lacked support from the physical evidence. He requested that the court vacate his conviction and dismiss

[3] Adopted with the 2019 amendments, Section 31-1A-2(C) provides that a petitioner's DNA samples "shall be submitted for DNA testing according to the procedures in the DNA Identification Act, and the DNA record shall be entered into the federal bureau of investigation's national DNA index system for storage and exchange of DNA records submitted by forensic DNA laboratories." Section 31-1A-2(C) was not in effect at the time of the proceedings in this case.

[4] At the district court's hearing on the petition, the State asserted that, in declining to oppose the petition requesting DNA testing, it was not "conced[ing] that such testing would be grounds for a new trial or . . . would in any way call into question the jury's verdict." Nonetheless, by failing to oppose the petition, the State declined an important opportunity to challenge Hobbs's claim that the evidence—if it demonstrated that Ruben Sr. had touched the gun or t-shirt—would be sufficient to create a reasonable probability that, had the evidence been available at trial, Hobbs would not have been found guilty. Merely asserting that it was not conceding the point surely did not substitute for the State's vigorously litigating it when the State had the opportunity to do so.

the charges with prejudice because, in light of the DNA evidence, the State could no longer prove beyond a reasonable doubt that Hobbs did not act in self defense as a matter of law. In the alternative, Hobbs requested a new trial to permit a jury to "hear and weigh all of the evidence in the case, including the DNA test results."

{14} This time, the State mounted an opposition, arguing that the results were not exculpatory because they demonstrated at most "a possible link" between Ruben Sr. and the two pieces of physical evidence. According to the State, because the testing was based on "touch DNA,"[5] which can result from either actual touching or from the secondary transfer of skin cells, the mere presence of Ruben Sr.'s DNA on the gun and t-shirt did not "necessarily corroborate" Hobbs's claim that Ruben Sr. grabbed the gun. The State contended that the presence of Ruben Sr.'s DNA on the gun and t-shirt could have resulted from his having attempted to push Hobbs away during their struggle. Moreover, the State argued, the DNA evidence "fail[ed] to justify [Hobbs's] repeated shooting of [Ruben Sr.]."

{15} Prior to ruling on Hobbs's motion, the district court held an evidentiary hearing. Forensic scientist Eve Tokumaru, who performed the DNA testing on behalf of the New Mexico Department of Public Safety Forensic Laboratory, was the sole witness. Ms. Tokumaru explained that she had analyzed DNA mixtures she recovered from swabs taken from the slide on the top of the handgun, the ejection port of the handgun,[6] a magazine from the firearm, the front of Hobbs's t-shirt, and a DNA sample taken from Ruben Sr. as a standard. She concluded that Ruben Sr. "[could not] be eliminated as a possible contributor" to the DNA recovered from the ejection port of the handgun and that he was a "minor contributor" to the DNA recovered from the t-shirt. Based on her statistical analysis of the DNA mixtures, Ms. Tokumaru opined that Ruben Sr.'s DNA was present on both the ejection port of the handgun and the t-shirt. On cross-examination, Ms. Tokumaru clarified that she would not say "to a reasonable degree of scientific certainty" that the samples contained Ruben Sr.'s DNA because her laboratory does not use that terminology anymore, but that it was her opinion that Ruben Sr. "could not be eliminated" as a contributor to the DNA found on the handgun or t-shirt. The district court, seeking to understand the findings in terms of whether they met the legal definition of "more likely than not," inquired whether Ms. Tokumaru could state that there was more than a fifty percent probability that Ruben Sr.'s DNA was on the gun or the t-shirt. Ms. Tokumaru said that she could not.

{16} At the conclusion of the hearing, the district court expressed a concern that, based on the expert witness's testimony, the DNA evidence might not meet the threshold for admissibility. The court denied Hobbs's request to vacate his conviction but requested additional briefing on the issue of admissibility and the effect of the evidence on any other possible relief. The district court later denied Hobbs's motion. The court agreed that the evidence at issue would be admissible at trial, but because Ms. Tokumaru was unable to state that there was a greater than fifty percent probability that Ruben Sr.'s DNA was on the gun or the t-shirt, the court could not conclude that "the evidence would reasonably support Hobbs's claim of self defense." For the same reason, the district court determined the evidence was of "low probative value" due to other evidence of a struggle between Hobbs and Ruben Sr. and the firing of multiple gunshots. As a result, the court concluded that the test results were insufficient to create a reasonable probability that the jury would have found Hobbs not guilty.

D. Hobbs's Motion to Reconsider

{17} Hobbs filed a motion to reconsider, requesting leave to supplement the record with a more refined statistical analysis of the DNA test results. Hobbs's motion to reconsider included an affidavit from Dr. Greg Hampikian, a biology professor whose research focuses on DNA analysis. Dr. Hampikian stated in his affidavit that the method of DNA analysis used by Ms. Tokumaru was appropriate and had produced "a critical piece of evidence in this case," but is generally not conducive to the kind of probability determination requested by the district court at the original hearing. He also represented that he had reviewed Hobbs's test results and had begun a reanalysis of Ms. Tokumaru's data[7] using a computer program that performs probabilistic genotyping. Dr. Hampikian suggested that probabilistic genotyping would "produce likelihood ratios for the DNA inclusions and exclusions that may satisfy the [c]ourt's desire for statistical clarification." The State opposed Hobbs's motion to reconsider as "an untimely objection to the [c]ourt's question to [Ms.] Tokumaru's testimony regarding her DNA testing." The State also argued that the motion presented no new reasons "as to how or why the DNA results are exculpatory and reasonably tend[] to negate [Hobbs's] guilt."

{18} The district court held a hearing at which Dr. Hampikian testified about probabilistic genotyping and the results of his reanalysis of the data from Hobbs's DNA test results. According to Dr. Hampikian, Ruben Sr.'s DNA is a "very strong match" with the DNA found on the ejection port of the handgun. Specifically, Dr. Hampikian estimated a one in ten million chance that someone other than Ruben Sr. had contributed the DNA sample recovered from the handgun. He stated that the corresponding 99.99999% chance that the DNA on the ejection port included Ruben Sr.'s DNA is a likelihood "far beyond" the standard for a paternity test.

{19} After the hearing, the district court issued an order granting Hobbs's motion to reconsider and ordering a new trial. The court concluded that the DNA test results, including Dr. Hampikian's additional analysis and conclusions, are admissible and "probative [of Hobbs's]'s claim of self defense and could be exculpatory." The court further concluded that, although it was "a close case," Hobbs had "met the standard under, NMSA 1978, [Section] 31-1A-2 for a new trial" because the burden was on the State to prove beyond a reasonable doubt that Hobbs did not act in self defense and because the DNA test results are "probative of the issue that [Ruben Sr.] at some point touched [Hobbs's] weapon." The State appealed and, following the Court of Appeals' reversal, we granted review on all questions raised in the State's petition and Hobbs's cross-petition for writs of certiorari.

II. DISCUSSION

A. DNA Evidence is Exculpatory Under Section 31-1A-2 When It Tends to Establish Innocence or Negate Guilt

{20} Our first task is to clarify the Legislature's intended meaning of the word "exculpatory" in Section 31-1A-2(I). The meaning of an undefined statutory term presents a question of statutory interpretation, which we review de novo. *State v. Vest*, 2021-NMSC-020, ¶ 7, 488 P.3d 626. When construing a statute, our primary aim is to further the intent of the

[5] According to the forensic scientist who conducted the DNA analysis, "touch DNA" is any sample of DNA that is not specifically collected "from a visible stain." It can result from, among other things, skin brushing against a fabric or directly touching an object.

[6] Ms. Tokumaru testified that the ejection port on the handgun she tested was on the top of the weapon, on the right side.

[7] Dr. Hampikian did not collect additional samples from the t-shirt or handgun, but instead subjected the data produced by Ms. Tokumaru to additional analysis using a software program that first identifies all genomic profiles present in a sample and then compares those profiles to those submitted by persons of interest in a case (Hobbs and Ruben Sr. in this case).

Legislature. *Id.* ¶ 14. To that end, "we first consider the plain meaning of the statute," giving undefined terms "their ordinary meaning absent clear and express legislative intention to the contrary." *Id.* (internal quotation marks and citation omitted). "When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Chakerian*, 2018-NMSC-019, ¶ 10, 458 P.3d 372 (internal quotation marks and citation omitted).

{21} Section 31-1A-2(I) provides that "[i]f the results of the DNA testing are exculpatory, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief." The State argues that DNA evidence is exculpatory when it "*directly negates* guilt or *establishes* innocence." *See* § 31-1A-2(A) ("A person convicted of a felony, who *claims* that DNA evidence will *establish the person's innocence*, may petition the district court . . . to order the . . . testing of evidence that can be subjected to DNA testing." (emphasis added)). As such, the State's proffered definition equates evidence that is *exculpatory* with evidence that *exculpates*, that is, "frees the petitioner from blame." *See Exculpate*, Black's Law Dictionary (11th ed. 2019) (defining "exculpate" as "[t]o free from blame or accusation").

{22} We readily dispense with the State's proposed definition as contrary to the plain language of Section 31-1A-2(I). To start, we agree with the Court of Appeals that commonly used definitions of exculpatory do not define it as exoneration or exculpation. *See State v. Hobbs*, 2020-NMCA-044, ¶ 31, 472 P.3d 1276 (noting that common definitions of exculpatory include "a variation of the verb phrase 'tends to' when discussing the required effect of the DNA evidence on a defendant's guilt"); *see also Vest*, 2021-NMSC-020, ¶ 14 (noting that "we consult common dictionary definitions" in determining a word's ordinary meaning). Exculpatory means "*tending* to exculpate," that is, *tending to* establish innocence or negate guilt. *Exculpatory*, Webster's Third New International Dictionary (1993) (emphasis added); *see also, e.g.*, *Evidence*, Black's Law Dictionary (11th ed. 2019) (defining "exculpatory evidence" as "[e]vidence *tending* to establish a criminal defendant's innocence" (emphasis added)); *cf. Buzbee v. Donnelly*, 1981-NMSC-097, ¶ 45, 96 N.M. 692, 634 P.2d 1244 (considering whether, in the context of the former grand jury statute, "'[e]xculpatory evidence is evidence reasonably *tending* to negate guilt'" (emphasis added) (quoting *State v. Gonzales*, 1981-NMCA-023, ¶ 3, 95 N.M. 636, 624 P.2d 1033, *overruled on other grounds by Buzbee*, 1981-NMSC-097, ¶ 46)). Tending to exculpate is fundamentally different from actually doing so, and we defer to the Legislature's use of the adjectival form "absent clear and express legislative intention to the contrary." *Vest*, 2021-NMSC-020, ¶ 14 (internal quotation marks and citation omitted). Put simply, had the Legislature intended to limit postconviction relief to when the DNA test results in fact *exculpate* the petitioner—rather than when they are merely *exculpatory*—it would have clearly said so.

{23} Moreover, adopting the State's proffered definition of exculpatory would introduce a needless conflict with Section 31-1A-2(D)(5). As we have noted, that provision also uses the term "exculpatory" in setting forth the requirements for a petition for DNA testing. *See id.* (requiring petitioner seeking postconviction DNA testing to demonstrate "that if the DNA testing the petitioner is requesting had been performed prior to the petitioner's conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty"). "[I]t is considered a normal rule of statutory construction to interpret identical words used in different parts of the same act [as having] the same meaning." *State v. Jade G.*, 2007-NMSC-010, ¶ 28, 141 N.M. 284, 154 P.3d 659 (second alteration in original) (internal quotation marks and citation omitted). Applied to Subsection (D)(5), the State's definition of exculpatory would impermissibly render a portion of that provision surplusage. *See, e.g.*, *Ashlock v. Sunwest Bank of Roswell, N.A.*, 1988-NMSC-026, ¶ 9, 107 N.M. 100, 753 P.2d 346 ("[T]he language of a statute must be construed so that no part of the statute is rendered surplusage."), *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶ 16, 120 N.M. 133, 899 P.2d 576. If the hoped-for DNA test results would establish a petitioner's innocence, there would never be a need for a petitioner to demonstrate that the results would create "a reasonable probability that the petitioner would not have pled guilty or been found guilty." Section 31-1A-2(D)(5). Evidence that meets the State's definition of exculpatory would exceed the reasonable probability standard in every case and effectively nullify the requirement to meet that standard under the statute.

{24} Finally, the State's proffered definition of exculpatory is incompatible with the Legislature's decision to grant the district court broad discretion to award postconviction relief after a finding that DNA evidence is exculpatory. *See* § 31-1A-2(I) (providing that "the district court *may* set aside the petitioner's judgment and sentence, *may* dismiss the charges against the petitioner with prejudice, *may* grant the petitioner a new trial or *may* order other appropriate relief" (emphases added)). *Compare,* NMSA 1978, § 12-2A-4(B) (1997) ("'May' confers a power, authority, privilege or right."), *with* § 12-2A-4(A) ("'Shall' and 'must' express a duty, obligation, requirement or condition precedent."). Were relief available only when the evidence actually establishes a petitioner's innocence, the district court would have little to no discretion about the appropriate remedy; in that circumstance, the conviction must be set aside and the petitioner set free. *See Montoya*, 2007-NMSC-035, ¶ 1 ("[T]he continued incarceration of an innocent person is contrary to both due process protections and the constitutional prohibition against cruel and unusual punishment within the New Mexico Constitution."). The district court's discretion under Section 31-1A-2(I) to award lesser relief, including "a new trial or . . . other appropriate relief," necessarily means that DNA test results can be exculpatory under that section without establishing a petitioner's innocence.

B. To Be Exculpatory, Postconviction DNA Evidence Does Not Need to Satisfy the Four Requirements Adopted by the Court of Appeals

{25} The Court of Appeals properly held that DNA evidence is exculpatory under Section 31-1A-2(I) "when it reasonably tends to negate the petitioner's guilt." *Hobbs*, 2020-NMCA-044, ¶ 33. The Court obtained that definition from *Buzbee*, 1981-NMSC-097, a case that considered the prosecution's duty to present contradictory evidence to the grand jury under the former grand jury statute. *Id.* ¶ 5. *See Hobbs*, 2020-NMCA-044, ¶ 30 (citing *Buzbee*, 1981-NMSC-097, ¶¶ 44-46). However, instead of applying *Buzbee*'s definition of exculpatory to the facts of Hobbs's case, the Court of Appeals opted to provide "guidance on *how* to apply that definition." *Hobbs*, 2020-NMCA-044, ¶ 34 (emphasis added). In so doing, the Court of Appeals effectively supplanted *Buzbee*'s definition with four requirements that it adapted from the standard for granting a new trial based on newly discovered evidence. *Hobbs*, 2020-NMCA-044, ¶¶ 34-42; *see also Garcia*, 2005-NMSC-038, ¶ 8 (setting forth requirements for ordering a new trial based on newly discovered evidence). In the pivotal language of the opinion, the Court of Appeals held:

> DNA evidence is exculpatory under Section [31-1A-2(I)]—that is, it reasonably tends to negate the petitioner's guilt—when it (1) is material; (2) is not merely cumulative; (3) is not merely impeaching or contradictory; and

> (4) raises a reasonable probability that the petitioner would not have pled guilty or been found guilty had the DNA testing been performed prior to the conviction.

Hobbs, 2020-NMCA-044, ¶ 42. The Court further held that in any order granting or denying relief under Section 31-1A-2(I), "the district court *shall* enter findings of fact and conclusions of law addressing each of the four requirements." *Hobbs*, 2020-NMCA-044, ¶ 43 (emphasis added).

{26} We disagree that the requirements for granting a new trial are germane—let alone essential—to whether evidence is exculpatory under Section 31-1A-2(I). The Court of Appeals' analysis conflates the threshold question under Section 31-1A-2(I) of whether the evidence is exculpatory with the central question of whether post-conviction relief is appropriate. The result is a redundant definition, effectively requiring the district court to conclude that the evidence supports a new trial *before* the court may consider whether, for example, to grant a new trial. In our view, the two inquiries are distinct: "*If* the results of the DNA testing are exculpatory," only then *may* the district court award relief, including "grant[ing] the petitioner a new trial or . . . order[ing] other appropriate relief." Section 31-1A-2(I) (emphasis added); *see also, e.g.*, *State v. Almanzar*, 2014-NMSC-001, ¶ 15, 316 P.3d 183 ("When interpreting a statute, we are also informed by the . . . overall structure of the statute, as well as its function within a comprehensive legislative scheme." (internal quotation marks and citation omitted)).

{27} Thus, whether DNA evidence is exculpatory is the beginning, rather than the end, of the inquiry under Section 31-1A-2(I). A threshold finding that evidence is exculpatory—that is, that it *tends* to negate guilt or establish innocence—merely allows the district court to consider the essential question of whether to grant relief, which must be determined under the standard that applies to the particular form of relief at issue. *See, e.g.*, *Garcia*, 2005-NMSC-038, ¶ 8 (setting forth the standard for ordering a new trial based on newly discovered evidence); *Montoya*, 2007-NMSC-035, ¶ 1 (requiring a petitioner seeking habeas relief based on actual innocence to demonstrate by clear and convincing evidence that no reasonable juror would have convicted him or her in light of the new evidence). Accordingly, we disavow the Court of Appeals' conclusion that evidence is not exculpatory under Section 31-1A-2(I) unless it satisfies the standard for granting a new trial.

C. Hobbs's DNA Test Results Are Exculpatory

{28} Under established New Mexico law, exculpatory evidence includes the broad swath of evidence that would be relevant to the defendant's innocence at trial. *See Buzbee*, 1981-NMSC-097, ¶ 48. Whether evidence reasonably tends to establish innocence or negate guilt "is to be determined by objectively analyzing the . . . evidence to determine whether, in fact, it tended to [establish innocence or] negate guilt." *State v. Herrera*, 1979-NMCA-103, ¶ 10, 93 N.M. 442, 601 P.2d 75, *overruled on other grounds by Buzbee*, 1981-NMSC-097, ¶ 46; *cf. State v. Pacheco*, 2008-NMCA-131, ¶¶ 40-41, 145 N.M. 40, 193 P.3d 587 (holding that evidence of a driver's flight from a vehicle containing methamphetamines should have been admitted as evidence tending to negate a defendant's guilt because it was probative of whether the driver, and not the defendant, was the guilty party). Conversely, when evidence supports the defendant's guilt rather than negates it, the evidence fails to meet the standard. *See Gonzales*, 1981-NMCA-023, ¶¶ 4-5 (holding that testimony was not exculpatory when it was consistent with the victim's, rather than the defendant's, version of events).

{29} We have little trouble concluding that Hobbs's DNA test results are exculpatory under the standard we have adopted. The results reasonably tend to establish Hobbs's innocence or negate his guilt by confirming the presence of physical evidence that corroborates his version of events, which was critical to his self-defense claim. Evidence of Ruben Sr.'s DNA on the gun and t-shirt is relevant and probative of Hobbs's testimony that Ruben Sr. physically attacked him and tried to grab the gun. *See* Rule 11-401, NMRA ("Evidence is relevant if [(A)] it has any tendency to make a fact more or less probable than it would be without the evidence, and [(B)] the fact is of consequence in determining the action."). While there was eyewitness testimony at trial supporting Hobbs's claim that he and Ruben Sr. struggled before the fatal shot was fired, given the complete absence of any other physical evidence to corroborate Hobbs's version of events, we agree with the district court that the test results would have been admissible on the question of whether Hobbs acted in self defense.

D. The District Court Did Not Abuse Its Discretion in Granting a New Trial

{30} Having determined that the evidence was exculpatory, our final task is to determine whether the district court erred when, in applying Section 31-1A-2(I), it ordered a new trial in this case. We have long held that "the function of passing upon motions for new trial on newly discovered evidence belongs naturally and peculiarly, although not exclusively, to the trial court." *State v. Romero*, 1938-NMSC-027, ¶ 15, 42 N.M. 364, 78 P.2d 1112. Accordingly, "we will not disturb a trial court's exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion." *Garcia*, 2005-NMSC-038, ¶ 7. "[A] trial court abuses its discretion when it acts in an obviously erroneous, arbitrary, or unwarranted manner." *State v. Aguilar*, 2019-NMSC-017, ¶ 30, 451 P.3d 550 (internal quotation marks and citation omitted). Significantly in this case, "a much stronger showing is required to overturn an order granting the new trial than denying a new trial." *Id. ¶ 29 (internal quotation marks and citation omitted).*

{31} To order a new trial based on newly-discovered evidence, the evidence must satisfy the following requirements:

> [(1)] it will probably change the result if a new trial is granted; [(2)] it must have been discovered since the trial; [(3)] it could not have been discovered before the trial by the exercise of due diligence; [(4)] it must be material; [(5)] it must not be merely cumulative; and [(6)] it must not be merely impeaching or contradictory.

Garcia, 2005-NMSC-038, ¶ 8. We generally treat these requirements as mandatory. *See id.* ("A motion for a new trial on grounds of newly-discovered evidence will not be granted unless the newly-discovered evidence fulfills all of [the stated] requirements.") However, the Legislature has decided to grant the district court discretion to order a new trial for a defendant who successfully petitions for relief based on DNA evidence that may or may not be newly discovered. Accordingly, the second and third requirements are obviated for motions pursued under the statute. *See* § 31-1A-2(D) (authorizing petitioning for postconviction relief based on the existence of evidence that may be subjected to DNA testing); § 31-1A-2(I) (authorizing the district court to grant postconviction relief if DNA test results are exculpatory). The central question under Section 31-1A-2(I) is whether and to what extent the

[8] The standard that applies to a motion for postconviction relief necessarily depends upon the relief at issue. In this case, the State is challenging the district court's decision to grant Hobbs a new trial. We therefore examine whether the district court abused its discretion in evaluating the DNA evidence in this case under the standard for granting a new trial. See Aguilar, 2019-NMSC-017, ¶¶ 25-26 (setting out the standards for new-trial motions pursued under Rule 5-614, NMRA).

postconviction DNA evidence would have changed the result of the petitioner's trial, taking into consideration whether such evidence is (a) material, and (b) not merely cumulative, impeaching, or contradictory.[8] *See Montoya*, 2007-NMSC-035, ¶ 29 ("In order to warrant a new trial on the basis of newly discovered evidence, a petitioner must show that the evidence 'will probably change the result if a new trial is granted.'" (quoting *Garcia*, 2005-NMSC-038, ¶ 8)). "The probability of the new evidence changing a verdict is a question addressed to the sound discretion of the trial court." *Garcia*, 2005-NMSC-038, ¶ 9 (internal quotation marks and citation omitted).

{32} The State argues that Hobbs's DNA evidence is "merely cumulative" and therefore cannot support a new trial. The State points out that the jury convicted Hobbs despite evidence that included: (1) expert and eyewitness testimony that there was a physical struggle between Hobbs and Ruben Sr., (2) expert testimony that at least one shot was fired from close range, and (3) expert testimony that the gunpowder on Ruben Sr.'s shirt did not line up with the wound to his left chest, suggesting that Ruben Sr. was being held when he was shot by Hobbs. The State argues that, having already heard and discounted this trial evidence, the jury would not have been persuaded by Hobbs's DNA evidence showing that Ruben Sr. had touched the gun.

{33} The State's argument has considerable force. However, we are charged solely with determining whether the district court's decision to grant Hobbs a new trial was "clearly against the logic and effect of the facts and circumstances of the case." *Aguilar*, 2019-NMSC-017, ¶ 28 (internal quotation marks and citation omitted). Moreover, "when [an] appellate court is reviewing a grant of a new trial, the grant can be affirmed as within the trial court's discretion even where the trial court would also have been acting within its discretion to deny the new trial motion." *Id.* ¶ 29. That instruction is apt in this instance; as the district court observed, whether Hobbs's DNA test results support a new trial is a "close case."

{34} Indeed, the central question for the jury—whether Hobbs killed Ruben Sr. after "sufficient provocation" or acted reasonably in self defense—can be a particularly close question. *See State v. Kidd*, 1917-NMSC-056, ¶¶ 5-6, 24 N.M. 572, 175 P. 772. The line between voluntary manslaughter and justifiable homicide in self defense "is not always clearly defined and depends upon the facts of each case as it arises." *Id.* ¶ 6; *cf. State v. Lopez*, 1968-NMSC-092, ¶ 13, 79 N.M. 282, 442 P.2d 594 ("[W]hen facts are present which give rise to a plea of self-defense, it is not unreasonable that if the plea fails, the accused should be found guilty of voluntary manslaughter."); *State v. Melendez*, 1982-NMSC-039, ¶ 9, 97 N.M. 738, 643 P.2d 607 (discussing the difference between self defense and the provocation required to prove voluntary manslaughter and noting that the two are "not mutually incompatible").

{35} Importantly, it is the State's burden to prove beyond a reasonable doubt that Hobbs did *not* act in self defense, as evidenced by the following jury instructions given at trial:

> **INSTRUCTION NO. 3**
>
> For you to find [Hobbs] guilty of voluntary manslaughter as charged in Count 1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. [Hobbs] killed [Ruben Sr.];
> 2. [Hobbs] knew that his acts created a strong probability of death or great bodily harm to [Ruben Sr.];
> 3. [Hobbs] acted as a result of sufficient provocation;
> 4. [Hobbs] did not act in self defense;
>
> . . .
>
> INSTRUCTION NO. 7
>
> . . .
>
> The burden is on the state to prove beyond a reasonable doubt that [Hobbs] did not act in self defense. If you have a reasonable doubt as to whether [Hobbs] acted in self defense you must find [Hobbs] not guilty.

See UJI 14-221, NMRA; UJI 14-5171, NMRA. The question of whether to order a new trial in this case thus turns on whether the presence of Ruben Sr.'s DNA on Hobbs's handgun and t-shirt will likely change the result of Hobbs's trial by creating "a reasonable doubt as to whether [Hobbs] acted in self defense." *See* UJI 14-5171.

{36} The DNA results elicited by Hobbs's successful Section 31-1A-2(A) petition are the only physical evidence tending to corroborate his testimony that Ruben Sr. was trying to grab the gun when Hobbs shot him in self defense. While there was testimonial evidence at trial describing Hobbs and Ruben Sr. "wrestling" or "fighting" for the gun, the existence of evidence that Ruben Sr.'s DNA was on the gun could be sufficient to "turn the scales" in Hobbs's favor in a new trial. *Contra Garcia*, 2005-NMSC-038, ¶ 12 ("[M]erely cumulative means cumulative evidence the weight of which would probably be insufficient to turn the scales in defendant's favor." (emphasis, internal quotation marks, and citation omitted)); *see also State v. Melendez*, 1981-NMCA-027, ¶ 7, 97 N.M. 740, 643 P.2d 609 (finding that recovery of a bullet from the hood of the defendant's car and evidence of its angle of entry was not merely cumulative evidence because it bolstered the defendant's theory of self defense and bore on the credibility of two witnesses at trial), *rev'd on other grounds*, 1982-NMSC-039, ¶¶ 9-13, *holding modified by State v. Baca*, 1992-NMSC-055, ¶ 7, 114 N.M. 668, 845 P.2d 762. This determination is strengthened by the fact that the central thrust of the State's argument against Hobbs's self-defense claim at trial was that Hobbs's account lacked support in the physical evidence. In its closing argument, the State argued that "none of the testimony exactly matches the physical evidence" and asked the jury "where is there any evidence of a strike, where are the scrapes, where are the scratches, where are the bruises . . . if [Hobbs] is in a fight for his life over this gun?" In these circumstances, and recognizing that a different court might reasonably have determined otherwise, we cannot say that physical DNA evidence supporting Hobbs's claim that Ruben Sr. grabbed the handgun would be merely cumulative, such that the district court's decision to grant Hobbs a new trial was "obviously erroneous, arbitrary, or unwarranted." *Aguilar*, 2019-NMSC-017, ¶ 30 (internal quotation marks and citation omitted).[9]

{37} The Legislature has determined that postconviction relief is available when the evidence considered by the jury did not include DNA evidence that probably would have changed the result at trial. *See* § 31-1A-2(D)(5). Because reasonable minds may differ about the probable effect of Hobbs's DNA evidence on the jury's verdict, we defer to the district court's determination that the evidence supports a new trial. *See State v. Ferry*, 2018-NMSC-004, ¶ 2, 409 P.3d 918 ("If proper legal principles correctly applied may lead to multiple correct outcomes, deference is given to the district court judge because if reasonable minds can differ regarding the outcome, the district court judge should be affirmed.").

{38} The State's remaining arguments about why the DNA test results do not merit a new trial raise factual issues that fail as a matter of law. The jury at Hobbs's new trial may consider the appropriate weight of the DNA test results in the

[9] The State did not argue the other factors for granting a new trial based on newly discovered evidence—that is, that the evidence was not material or was merely impeaching or contradictory—and we therefore do not consider those factors in our analysis.

context of all of the other evidence presented at trial, including whether the DNA evidence actually proves that Ruben Sr. touched the gun,[10] whether it sufficiently corroborates Hobbs's version of events, whether Hobbs's reaction was reasonable or evidence of overkill, and whether Hobbs or Ruben Sr. initiated the altercation.

E. The State's Procedural Argument Was Not Preserved

{39} As a final matter, the State argues the district court's order granting a new trial must be reversed because the district court relied on evidence obtained from a "second round" of DNA testing without requiring a second petition for DNA testing under Section 31-1A-2(D).

{40} "To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked." Rule 12-321(A), NMRA. Here, the district court considered Dr. Hampikian's testimony in the context of deciding Hobbs's timely motion to reconsider, which explicitly requested leave to reopen the record to submit additional evidence. The State opposed the motion to reconsider on various grounds without arguing that a second petition and order were required. In fact, after performing a brief voir dire of Dr. Hampikian at the hearing, the State did not object to his qualification as an expert witness or to the admission of his expert testimony and report. Because the State failed to raise its argument below, we decline to address the State's argument on appeal.

{41} Likely anticipating our conclusion that this argument was not preserved, the State urges us to consider its argument under our authority to review for fundamental error. *See* Rule 12-321(B)(2) (listing exceptions to the preservation requirement including "issues involving . . . fundamental error"). "The doctrine of fundamental error is invoked when a court considers it necessary to avoid a miscarriage of justice." *State v. Alingog*, 1994-NMSC-063, ¶ 10, 117 N.M. 756, 877 P.2d. 562. "Our rules requiring the preservation of questions for review are designed to do justice, and it is only when the merits of applying those rules clearly are outweighed by other principles of substantial justice that we will apply the doctrine of fundamental error." *Id.* ¶ 11.

{42} The State claims that fundamental error review is warranted in this case because "the district court's consideration of the probabilistic genotyping evidence implicates a fundamental unfairness in the judicial system that undermines judicial integrity." The premise of the State's claim is that the district court permitted Hobbs to violate the plain language of Section 31-1A-2 by considering the new DNA analysis without first requiring Hobbs to submit a second petition for additional testing. However, the State has offered no explanation of how the district court's consideration of the evidence resulted in a miscarriage of justice. *See Alingog*, 1994-NMSC-063, ¶ 15 (holding that review of unpreserved error was improper where error did not result in a miscarriage of justice). Additionally, the State has cited no authority in support of its position that a district court's departure from the plain language of a statute, without more, constitutes an injustice warranting fundamental error review. We therefore decline to apply the doctrine in this case.

III. CONCLUSION

{43} We reverse the Court of Appeals, reinstate the district court's order for a new trial, and remand to the district court for further proceedings consistent with this opinion.

{44} IT IS SO ORDERED.

Briana H. Zamora, Justice

WE CONCUR:

C. Shannon Bacon, Chief Justice

Michael E. Vigil, Justice

David K. Thomson, Justice

Edward L. Chávez, Justice, Retired, Sitting by Designation

[10] The State argues that, because "touch DNA" may result from secondary transfer, it does not establish that Ruben Sr. actually touched the gun. This argument goes to the weight of the DNA evidence and therefore is a matter for the jury at Hobbs's new trial. See, e.g., State v. Duran, 1994-NMSC-090, ¶ 14, 118 N.M. 303, 881 P.2d 48 (holding that where DNA evidence was admissible, "[a]ny debate over the resulting probabilities that the 'match' is random goes to the weight of the evidence and is properly left for the jury to determine").

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-043
No: A-1-CA-38255 (filed April 21, 2022)

DANIEL LIBIT,
Plaintiff-Appellee,
v.
UNIVERSITY OF NEW MEXICO LOBO CLUB; JALEN DOMINGUEZ, in his capacity as Custodian of Records for the University of New Mexico Lobo Club; UNIVERSITY OF NEW MEXICO FOUNDATION, INC.; BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO; CHRISTINE LANDAVAZO, in her capacity as the Interim Custodian of Records for the University of New Mexico,
Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Nancy J. Franchini, District Judge

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for Appellee

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for Amici New Mexico Foundation for Open Government and Brechner Center for Freedom of Information

OPINION

DUFFY, Judge.

{1} This consolidated appeal arises from two lawsuits brought by Plaintiff Daniel Libit against Defendants the University of New Mexico Foundation, the University of New Mexico Lobo Club,[1] and the Board of Regents of the University of New Mexico under the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1 to -12 (1947, as amended through 2019). The Foundation and the Lobo Club are private, nonprofit corporations that raise funds exclusively for the University—a relationship governed by NMSA 1978, Section 6-5A-1 (2011) of the Public Finances Act. The common issue presented in these appeals is whether Section 6-5A-1(D) exempts records of the Foundation and the Lobo Club from public inspection. Section 6-5A-1(D) states: "Nothing in this section subjects an organization[2]

[1] See Libit v. Univ. of N.M. Found. (Libit I), No. D-202-CV-2017-01620 (2d Jud. Dist. Ct. June 26, 2018); Libit v. Univ. of N.M. Lobo Club (Libit II), No. D-202-CV-2019-00290 (2d Jud. Dist. Ct. Dec. 9, 2019). The Lobo Club was not a party to Libit I.

[2] The term "organization" is defined in Section 6-5A-1(A)(2) and is used throughout the opinion strictly with this meaning in mind. There is no dispute that the Foundation and Lobo Club are organizations within the meaning of the statute.

to the provisions of the Open Meetings Act . . . or makes its records, other than the annual audit required under this section, public records within the purview of Section 1421 [of IPRA]." In both cases, the district court ruled that Section 6-5A-1(D) did not serve as a statutory exemption to IPRA. We agree and affirm both rulings.[3]

BACKGROUND

I. Libit I

{2} In late 2016 and early 2017, Plaintiff sent a number of IPRA requests to the Foundation and the University. Plaintiff sought records and communications related to a naming agreement between the University and WisePies Pizza, a restaurant chain that obtained naming rights to a major sporting facility operated by the University. The University denied Plaintiff's requests, stating that it did not possess the requested records. The University further stated that Plaintiff should contact the Foundation directly, since the Foundation was a separate entity that may have been in possession of the records. Plaintiff did so, and in response, the Foundation provided a copy of a gift agreement and a press release, but refused to release any electronic communications or financial records related to the WisePies naming agreement. The Foundation justified its refusal by stating that it was a nonprofit entity not subject to IPRA's disclosure requirements.

{3} Plaintiff filed a complaint in district court, alleging that the Foundation and the University had violated IPRA by failing to provide records responsive to his request. After completing discovery, Plaintiff and Defendants filed competing motions for summary judgment. Plaintiff argued that the Foundation was not a private entity exempt from IPRA's disclosure requirements because the Foundation functioned as an extension of the University under the nine-factor test announced in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 13, 287 P.3d 364. Defendants argued *Toomey* was inapplicable because Section 6-5A-1(D) served as a statutory exemption to IPRA, thus making the records exempt from disclosure under any circumstance. The district court granted Plaintiff's motion, ruling that the Foundation was subject to IPRA under *Toomey* and that Section 65A1(D) did not serve as a statutory exemption for the Foundation. The court ordered the Foundation to produce the records. The court simultaneously denied Plaintiff's motion against the University, ruling that disputed factual issues precluded summary judgment.

{4} The Foundation produced the records in accordance with the order, and Plaintiff and the University settled their remaining claims.[4] The Foundation appeals the district court's ruling that Section 6-5A-1(D) does not serve as a statutory exemption to IPRA.[5]

II. *Libit II*

{5} In 2018, Plaintiff filed another series of IPRA requests seeking records, including donor lists, from the Lobo Club, the Foundation, and the University. The Lobo Club denied Plaintiff's requests, stating that the records were exempt from disclosure under Section 6-5A-1(D), and further, that the records were not public records under IPRA. The Foundation denied Plaintiff's requests for the same reasons, and the University stated that it did not possess the requested records.

{6} Plaintiff filed suit against all three Defendants for IPRA violations. Defendants filed separate motions to dismiss but advanced a common argument: Section 6-5A-1(D) exempted the records sought by Plaintiff from disclosure under IPRA. After a hearing, the district court ruled that Section 6-5A-1(D) did not function as an exemption to IPRA and denied the motions. In its order, however, the court certified the case for interlocutory appeal on the issue of whether Section 6-5A-1(D) serves as an IPRA exemption. Defendants filed a consolidated application for interlocutory appeal, which we accepted and now consider.

DISCUSSION[6]

{7} "IPRA provides that, with only very limited exceptions, 'every person has a right to inspect public records of this state.'" *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, ¶ 5, 148 N.M. 934, 242 P.3d 501 (alteration omitted) (quoting Section 14-2-1(A)). This right applies equally to public records held or created by a private entity on behalf of a governmental entity, *see Toomey*, 2012-NMCA-104, ¶ 10, and "is limited only by the Legislature's enumeration of certain categories of records that are excepted from inspection." *Dunn v. Brandt*, 2019-NMCA-061, ¶ 6, 450 P.3d 398 (internal quotation marks and citation omitted). Among IPRA's enumerated exceptions is a "catch-all" category that exempts records "as otherwise provided by law." Section 14-2-1(H). This category has been construed to include bars to disclosure found outside of IPRA. *See Republican Party of N.M. v. N.M. Tax'n & Revenue Dep't*, 2012-NMSC-026, ¶ 13, 283 P.3d 853 (stating that the "'catch-all' exception includes statutory and regulatory bars to disclosure," constitutionally mandated privileges, and privileges established by the rules of evidence). Putting aside questions that are not at issue in this appeal—i.e., whether the documents sought by Plaintiff are "public records" and whether the Foundation and the Lobo Club's records are subject to IPRA's disclosure requirements under *Toomey*—the narrow question presented is whether Section 6-5A-1(D) is a statutory bar to disclosure. This is a matter of statutory interpretation that we review de novo. *Cox*, 2010-NMCA-096, ¶ 4.

{8} Defendants argue that by its plain language, Section 6-5A-1(D) exempts all records created or maintained the Foundation and the Lobo Club other than their annual audits. Defendants further contend that persuasive authority and public policy justify an interpretation of Section 6-5A-1(D) to exempt records of the Foundation and the Lobo Club from IPRA's disclosure requirements. We are unpersuaded by Defendants' arguments and hold as a matter of first impression that the Section 6-5A-1(D) is not a statutory exemption to IPRA's disclosure requirements under Section 14-2-1(H).

I. Section 6-5A-1(D) Does Not Function as a Statutory IPRA Exemption

{9} We turn first to the language of the statute as the primary indicator of legislative intent. *See Toomey*, 2012-NMCA-104, ¶ 9. Section 6-5A-1(D) states that

[3] We express our appreciation to amici for filing briefs in this matter. Their contributions have been of help to this Court.

[4] Although the Foundation's compliance with the order and the University's settlement arguably render Libit I moot, we nonetheless review Libit I on the merits. While we generally do not decide moot questions, we "may do so as a matter of discretion when an issue is of substantial public interest or capable of repetition yet evading review." White v. Farris, 2021-NMCA-014, ¶ 34, 485 P.3d 791 (internal quotation marks and citation omitted). Given that Libit II arose within two years of Libit I, we conclude that both exceptions are applicable in this case.

[5] The Foundation has not challenged any other aspect of the district court's ruling in Libit I on appeal, including the court's Toomey ruling.

[6] Defendants raise a conclusory argument that the district court lacked subject matter jurisdiction in Libit I because Plaintiff did not name a Foundation records custodian in the lawsuit. However, none of the authorities cited by the Foundation support the contention that a district court lacks subject matter jurisdiction over an IPRA lawsuit if a records custodian is not named. Further, we find it inconsistent that the Foundation argues that it is a private entity exempt from IPRA while also asserting that Plaintiff must have sued the Foundation's records custodian—a position that IPRA only requires public bodies to designate. See § 14-2-7.

"[n]othing in this section . . . makes [an organization's] records, other than the annual audit required under this section, public records within the purview of Section 14-2-1." Defendants argue that the statutory language places "*all* Foundation and Lobo Club records, other than their annual audits, beyond the purview of IPRA." In support of this view, they offer only a common dictionary definition for the term "purview" before restating their conclusion that "the intent and effect of the language used in Section 6-5A-1(D) could not be more clear: it places Foundation and Lobo Club records, other than the annual audit, beyond the limit, purpose, scope, range of authority, or concern of IPRA."[7]

{10} The problem with Defendants' construction, and the reason we cannot accept it, is that it rests on a rephrasing of the statutory language that materially changes both the wording and the meaning of the statute. Defendants read the statutory language to say, in essence, an organization's records are not within the purview of IPRA. But this is not the language chosen by the Legislature, and Defendants have not argued that it is necessary to depart from the plain language of the statute to understand its meaning or to resolve an ambiguity. *See Bd. of Cnty. Comm'rs of Cnty. of Rio Arriba v. Bd. of Cnty. Comm'rs of Cnty. of Santa Fe*, 2020-NMCA-017, ¶¶ 9, 16, 460 P.3d 36 (stating that it is the responsibility of the judiciary to apply the statute as written and declining to depart from the plain language of a statute unless it is necessary to resolve an ambiguity or uncertainty).

{11} We find the language of Section 6-5A-1(D) to be clear and unambiguous: Section 6-5A-1 does not cause the records of organizations like the Foundation or Lobo Club to be "public records," except for their annual audit. *Cf.* § 6-5A-1(B)(4)(a) (stating that the organization's annual audit, "exclusive of any lists of donors or donations, *shall be a public record*" (emphasis added)). Put another way, a plain reading of the statutory language is that records of an organization are not affirmatively designated as public records under IPRA. Defendants question why the Legislature would have any reason to enact a statute saying that an organization's records "*might or might not*" be subject to public records laws. We think the answer is readily apparent: the Legislature expressly designated organizations' annual audits as public records in Section 6-5A-1(B)(4)(a), but also made clear that it was not doing the same for other records. Thus, while an organization's records might be public records subject to inspection, it is not because Section 6-5A-1 makes them so.

{12} Defendants also contend that the statute must be construed as an IPRA exemption because it does not use express language stating that an organization's records *might* be subject to IPRA. However, we are aware of no authority, and Defendants have cited none, suggesting that an exemption exists unless the Legislature affirmatively states that records are subject to disclosure under IPRA. Such an approach would turn the notion of a statutory IPRA exemption on its head and runs counter to the approach taken by this Court in prior cases, which have looked at whether the statute bars disclosure. *E.g.*, *Bd. of Comm'rs of Doña Ana Cnty. v. Las Cruces Sun-News*, 2003-NMCA-102, ¶ 21, 134 N.M. 283, 76 P.3d 36 (holding that the statutory exemption in NMSA 1978, Section 15-7-9 (1981, amended 2020), which makes certain records created or maintained by the risk management division confidential, does not suggest the confidentiality provision relates to records held by any other insurer), *overruled on other grounds by Republican Party of N.M.*, 2012-NMSC-026, ¶ 16.

{13} Relatedly, we note that Section 6-5A-1 does not specifically exempt any records from disclosure. When the Legislature has intended to exempt records from public inspection in other enactments, it has done so expressly by stating either that records are not public records or that records are not subject to disclosure under IPRA. *See, e.g.*, NMSA 1978, § 51-1-56 (1991) (providing that "[death reports] shall be confidential and *shall not be considered as public records* under [IPRA]" (emphasis added)); NMSA 1978, § 30-51-3(G) (1998) (stating that money laundering reports obtained by the department of public safety or other agency are "*not subject to disclosure* pursuant to [IPRA]" (emphasis added)).[8] The direct language in these statutes stands in stark contrast to the language used in Section 6-5A-1(D). Given the Legislature's near-uniform treatment of IPRA exemptions in a multitude of other enactments, both before and after Section 6-5A-1 was adopted and last amended, the lack of express language in Section 6-5A-1(D) is a compelling indication that the Legislature did not intend to categorically exempt the records of organizations governed by Section 6-5A-1 from IPRA. *See State v. Greenwood*, 2012-NMCA-017, ¶ 38, 271 P.3d 753 ("The Legislature knows

[7] Defendants additionally rely on a 2007 letter ruling authored by the New Mexico Attorney General in support of the notion that Section 6-5A-1(D) serves as a blanket IPRA exemption. The letter appears to advance the same reasoning as Defendants do in this case, and that we now reject. Further, we note that the Attorney General filed an amicus curiae brief in this appeal stating that the 2007 letter does not accurately reflect the current position of the Office of the Attorney General. The Attorney General points out that the 2007 letter was issued before this Court's decision in Toomey, which clarified that public records for purposes of IPRA include those held by private entities "on behalf of" public bodies. 2012-NMCA-104, ¶ 10. Accordingly, we do not find the 2007 letter persuasive here. See Bd. of Cnty Comm'rs, Luna Cnty. v. Ogden, 1994-NMCA-010, ¶ 15, 117 N.M. 181, 870 P.2d 143 (recognizing that "statements and opinions of the New Mexico Attorney General are not binding law," but finding an Attorney General compliance guide persuasive).

[8] See also NMSA 1978, § 14-6-1(A) (1977) (stating that "[a]ll health information that relates to and identifies specific individuals as patients is strictly confidential and shall not be a matter of public record or accessible to the public," even though the information is held by a government agency (emphasis added)); NMSA 1978, § 24-14A-8(C) (2015) (stating that "individual forms, electronic information or other forms of data collected by and furnished for the health information system shall not be public records subject to inspection pursuant to [IPRA]" (emphasis added)); NMSA 1978, § 61-4-10(C) (2006) (complaints against chiropractors "are not public records for the purposes of [IPRA]" (emphasis added)); NMSA 1978, § 6-32-7(B) (2021) (stating that small business loan information obtained by the New Mexico Finance Authority "is confidential and not subject to inspection pursuant to [IPRA]" (emphasis added)); NMSA 1978, § 15-7-9(A) (2020) (stating that certain records created by the Risk Management Division "are confidential and shall not be subject to any right of inspection by any person except the New Mexico legislative council or a state employee within the scope of the New Mexico legislative council's or state employee's official duties" (emphasis added)); NMSA 1978, § 27-2E-1(B) (2003) (stating that a person who manufactures a prescription drug that is sold in New Mexico shall file certain information with the human services department but that such information is confidential and "shall not be subject to public inspection pursuant to [IPRA]" (emphasis added)). The New Mexico Foundation for Open Government filed an amicus brief cataloguing a nonexhaustive list of twenty-four other instances where the Legislature used similar language to expressly exclude records from IPRA.
from the registration and reporting requirements of the Charitable Solicitations Act). Accordingly, this argument does not persuade us that Section 6-5A-1(D) was intended to be an IPRA exemption.

how to include language in a statute if it so desires." (alteration, internal quotation marks, and citation omitted)).[9]

{14} As a final matter, Defendants contend that public policy concerns support an interpretation of Section 6-5A-1(D) that exempts the Foundation and the Lobo Club from IPRA. Defendants point to a variety of sources in support of the idea that donor information is private and should be exempt from disclosure. However, after our Supreme Court's decision in *Republican Party of New Mexico*, courts no longer apply the "rule of reason" as a basis to determine whether records should be withheld from the requester for reasons of public policy. 2012-NMSC-026, ¶¶ 14-16. Instead, courts "restrict their analysis to whether disclosure under IPRA may be withheld because of a specific exception contained within IPRA, or statutory or regulatory exceptions." *Id.* ¶ 16.

{15} Analytic restrictions notwithstanding, we acknowledge, as did the district court, that this case implicates strong and competing policy interests, including "a strong public policy in favor of encouraging charitable giving and protecting private information related to charitable giving." We are not unmindful of Defendants' concerns regarding the release of private donor information in the event the district court on remand determines that such records are public records. Nevertheless, it is "the responsibility of the judiciary to apply the statute as written and not to second-guess the [L]egislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objective." *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 22, 117 N.M. 346, 871 P.2d 1352; *see also M.D.R. v. State ex rel. Hum. Servs. Dep't*, 1992-NMCA-082, ¶ 13, 114 N.M. 187, 836 P.2d 106 ("[I]t is not the function of the court of appeals to legislate. Correction of whatever inequity exists in [a] situation is best left to the legislature." (citation omitted)).

{16} For all of these reasons, we hold that Section 6-5A-1(D) is not a statutory bar to the disclosure of public records held by Defendants.

II. The District Court Did Not Err in *Libit I* or *Libit II*

{17} In light of our holding, we affirm the district courts' rulings in both *Libit I* and *Libit II*. Because Defendants have not challenged any other aspect of the district court's ruling in *Libit I*, we simply affirm.

{18} In *Libit II*, we affirm the district court's denial of Defendants' motion to dismiss and remand for further proceedings. Nothing in this opinion should be construed as a determination of whether Defendants are subject to IPRA under the analysis required by *Toomey*, whether the records sought by Plaintiff—including the names of specific donors—are public records within IPRA's definition, *see* § 14-2-6(G), or whether Defendants' first amendment affirmative defenses have merit.

CONCLUSION

{19} We affirm the district court's ruling in *Libit I*. We also affirm the district court's ruling in *Libit II*, and remand for further proceedings consistent with this opinion.

{20} IT IS SO ORDERED.

MEGAN P. DUFFY, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

KRISTINA BOGARDUS, Judge

[9] Defendants contend the district court's interpretation of Section 6-5A-1 runs contrary to the canon of statutory construction that statutes in pari materia must be read together. Given the plain meaning of Section 6-5A-1, we question the utility of this canon to our analysis. See United Rentals Nw., Inc. v. Yearout Mech., Inc., 2010-NMSC-030, ¶ 22, 148 N.M. 426, 237 P.3d 728 (providing that "where a plain language analysis does not provide a clear interpretation, we can look to other statutes in pari materia in order to determine legislative intent" (emphasis added) (internal quotation marks and citation omitted)). Regardless, we are not persuaded by Defendants' argument here. Defendants argue that the New Mexico Charitable Solicitations Act, NMSA 1978, §§ 57-22-1 to -11 (1983, as amended through 1999), contains numerous provisions that "manifest the . . . Legislature's intent to regulate charitable organizations and professional fundraisers while protecting their donor information from public disclosure." While we see support for Defendants' former point, we do not see support for the latter—i.e., that the Charitable Solicitations Act evinces a statutory IPRA exemption for donor records under Section 6-5A-1(D). Further, it is not clear how the two statutory schemes interact, if at all, other than in certain registration and reporting requirements. See § 57-22-4(B)(1) (exempting organizations defined in Section 6-5A-1 from the registration and reporting requirements of the Charitable Solicitations Act). Accordingly, this argument does not persuade us that Section 6-5A-1(D) was intended to be an IPRA exemption.

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A UNM School of Law alum, Ben comes to us following two federal clerkships, one at the District of New Mexico and the other at the United States Court of Appeals for the Fifth Circuit.

Katherine and Ben both practice on behalf of plaintiffs in the areas of labor and employment, federal appeals, personal injury, sexual abuse, harassment, and civil rights.

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The Thirteenth Judicial District Attorney's Office is seeking both entry level and experienced attorneys. Positions available in Sandoval, Valencia, and Cibola Counties. Enjoy the convenience of working near a metropolitan area while gaining valuable trial experience in a smaller office, providing the opportunity to advance more quickly than is afforded in larger offices. The 13th Judicial District offers flex schedules in a family friendly environment. Competitive salary depending on experience. Contact Krissy Fajardo @ kfajardo@da.state.nm.us or visit our website for an application @https://www.13th.nmdas.com/ Apply as soon as possible. These positions fill fast!

Associate Attorneys

Hinkle Shanor LLP is seeking two associate attorneys to join their Santa Fe medical malpractice defense team in 2023! Ideal candidates will demonstrate strong academic achievement, polished writing skills, and a desire to be a litigator. Substantial consideration will be given to candidates with prior medical litigation and experience. Interested candidates should submit a resume, cover letter, writing sample, and unofficial transcript. Highly competitive salary and benefits. All inquiries will be kept confidential. Please email application documentation to Recruiting@hinklelawfirm.com.

Associate Position

The Santa Fe office of Hinkle Shanor LLP is looking for an experienced attorney to join the firm. Hinkle Shanor has multiple practice groups with a large volume of work and is looking for an attorney who can contribute in a meaningful way to our busy practices in the areas of oil and gas regulation, environmental law, public utility law, the ski industry, and commercial litigation. We are passionate about our work and clients and would love to find someone who has the same excitement for litigation. The attorney's job duties will be focused on legal research and writing, motions practice and discovery, communicating with clients, court and deposition appearances, and working closely with other attorneys on matters. Experience in litigation is preferred, and candidates should have a strong academic background, excellent research and writing skills, and the ability to work independently. The individual must live in or be willing to relocate to Santa Fe. Please send resume, law school transcript, and writing sample to Hinkle Shanor LLP's office manager, Gilbert Romero, at gromero@hinklelawfirm.com.

Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new and/or experienced attorneys. Salary will be based upon the New Mexico District Attorney's Salary Schedule with salary range of an Assistant Trial Attorney ($ 65,000.00) to a Senior Trial Attorney ($76,600.00), based upon experience. These positions are located in the Carlsbad, NM office. Please send resume to Dianna Luce, District Attorney, 100 N Love Street, Suite 2, Lovington, NM 88260 or email to 5thda@da.state.nm.us

Prosecutors

Immediate openings for Prosecutors in Las Vegas, New Mexico. Work with a diverse team of professionals, a manageable caseload with a competitive salary in a great workplace environment. If you are interested in learning more about the positions or wish to apply, contact us at (505) 425-6746, or forward your letter of interest and resumé to Thomas A. Clayton, District Attorney, c/o Mary Lou Umbarger, Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701 or e-mail: mumbarger@da.state.nm.us

Prosecutor

Pueblo of Laguna, NM – Great employer and benefits, competitive pay DOE! Seeking full-time attorney to prosecute adult criminal defendants and juveniles in delinquency cases in Laguna Pueblo Court. Leisurely commute from Albuquerque metro, Los Lunas, or Grants. Apply now, will fill quickly. Application instructions and position details at: Employment | Pueblo of Laguna (lagunapueblo-nsn.gov)

Attorneys

The City of Albuquerque Legal Department is hiring attorneys with the primary responsibility of advising the Albuquerque Police Department (APD). Duties may include: representing APD in the matter of United States v. City of Albuquerque, 14-cv-1025; reviewing and providing advice regarding policies, trainings and contracts; reviewing uses of force; drafting legal opinions; and reviewing and drafting legislation, ordinances, and executive/administrative instructions. Attention to detail and strong writing skills are essential. Additional duties and representation of other City Departments may be assigned. Salary and position will be based upon experience. Please apply on line at www.cabq.gov/jobs and include a resume and writing sample with your application.

Court Of Appeals Staff Attorney

THE NEW MEXICO COURT OF APPEALS is accepting applications for one or more full-time permanent Associate Staff Attorney or Assistant Staff Attorney positions. The positions may be located in either Santa Fe or Albuquerque, depending on the needs of the Court and available office space. The target pay for the Associate position is $84,000, plus generous fringe benefits. The target pay for the Assistant position is $79,000, plus generous fringe benefits. Eligibility for the Associate position re-quires three years of practice or judicial experience plus New Mexico Bar admission. Eligibility for the Assistant positions requires one year of practice or judicial experience plus New Mexico Bar admission. Either position requires management of a heavy caseload of appeals covering all areas of law considered by the Court. Extensive legal research and writing is required. The work atmosphere is congenial, yet intellectually demanding. Interested applicants should submit a completed New Mexico Judicial Branch Resume Supplemental Form, along with a letter of interest, resume, law school transcript, and writing sample of 5-7 double-spaced pages to Cynthia Hernandez Madrid, Interim Chief Appellate Attorney, c/o AOC Human Resources Division, aochrd-grp@nmcourts.gov, 237 Don Gaspar Ave., Santa Fe, New Mexico 87501, no later than 5:00 p.m. on Friday, April 21, 2023. More information is available at www.nmcourts.gov/careers. The New Mexico Judicial Branch is an equal-opportunity employer.

Civil Litigation Attorney

Rodey, Dickason, Sloan, Akin & Robb, P.A. is currently interviewing lawyers with 2 or more years of Civil Litigation experience to work in our Albuquerque office. Qualifications: Ideal candidate must have strong academic credentials, excellent references, solid writing skills, and must be licensed in New Mexico. Rodey offers comprehensive benefits package, including health, dental and vision; professional development and multi-faceted mentoring program; FSA and HSA plan option(s); 401K plan/employer match; group life and long-term disability insurance; employee assistance program; wireless phone/services stipend. We are excited about our opportunity to partner with qualified candidates looking to advance their legal career. Please send cover letter, resume, law school transcript and writing sample and submit to Adrian Salazar, Human Resources Director, via email to jobs@rodey.com with "Litigation Attorney" in the subject line, or PO Box 1888 Albuquerque, NM 87103. All inquiries will be kept confidential. Rodey is an Equal Opportunity Employer.

City Attorney

Full-Time Regular Exempt position. The chief legal advisor to the City Manager and City Council, and Director of the Legal Department. Provide legal opinions and strategy, minimize risk and liability, manage legal issues, and represent the City in administrative proceedings and legal actions. Juris Doctor Degree AND seven (7) years of experience in a government legal practice, including three (3) years of administrative and management experience to include supervising personnel. Must be a member of the New Mexico State Bar Association, licensed to practice law in the State of New Mexico, and remain active with all New Mexico Bar annual requirements. If not licensed in the State of New Mexico at the time of hire, applicant must apply for a Public Employee Limited License issued under NMRA 15-301.1 and must obtain a regular State of New Mexico bar license within one (1) year of the date of hire Associated costs will be the responsibility of the applicant. Individuals should apply online through the Employment Opportunities link on the City of Las Cruces website at www.lascruces.gov . Resumes and paper applications will not be accepted in lieu of an application submitted via this online process. This will be a continuous posting until filled. Applications may be reviewed every two weeks or as needed. SALARY: $148,239.79 - $217,571.79 / Annually OPENING DATE: 12/28/22 CLOSING DATE: Continuous

Associate General Counsel

Albuquerque-based Gridworks seeks an outstanding Associate General Counsel candidate. This position will partner with the General Counsel and executive leadership to help structure and negotiate Gridworks' EPC prime contracts, shape legal success strategy, and support other legal needs of a rapidly growing company. This role offers the opportunity to work in a supportive and flexible work environment, with great people, and towards the meaningful mission of fostering a sustainable clean-energy future. For more information and to apply, visit www.gridworks.com/careeers/.

Deputy District Attorney, Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys

The Third Judicial District Attorney's Office in Las Cruces is seeking a Deputy District Attorney, Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys. You will enjoy the convenience of working in a metropolitan area while gaining valuable trial experience alongside experienced Attorney's. Please see the full position descriptions on our website http://donaanacountyda.com/ Submit Cover Letter, Resume, and references to Whitney Safranek, Human Resources Administrator at wsafranek@da.state.nm.us

Attorney With 1-4 Years' Experience

Houser LLP, a litigation law firm, is looking to add an attorney with 1-4 years' experience for its New Mexico office. Remote, hybrid or reduced schedule options are available. The ideal candidate will have strong writing, research and communication skills. We offer competitive compensation, which includes a great benefits package. Houser LLP lawyers take pride in their work, deeply value their clients, and the firm. If you're interested in this position, please submit your resume to rnorman@houser-law.com.

Attorney

The New Mexico Foundation for Open Government (FOG) seeks a full-time attorney. We seek a highly motivated self-starter with civil trial court experience to strategically select and pursue lawsuits that will advance FOG's mission, which includes enforcing and protecting the New Mexico Inspection of Public Records Act (IPRA), Open Meetings Act (OMA), and The First Amendment. Remote work is an option. Some travel. Candidates are asked to send a cover letter detailing experi-ence, education and background and a sample legal brief to info@nmfog.org. Salary range $80,000 to $100,000.

Briefing/Research/Writing Attorney

Scherr Law is currently seeking an excellent and career-driven Briefing/Research/Writing Attorney with strong education, experience and appellate qualifications to join our team! Duties include drafting motions, appeals, pleadings, memos as well as preparation and research for depositions, hearings and at trial for both state and federal Courts, including Texas, New Mexico and other states. This role requires a JD, licensure as an attorney, strong research and writing skills along with creative critical analysis skills. Full-time salary range: $80,000.00 - $150,000.00+ per year. Please submit resume and writing sample to jim@jamesscherrlaw.com

Full-Time Associate Attorney

Gallagher, Casados & Mann, PC is an Albuquerque law firm with a primary focus on defending clients in civil litigation. We are looking for a full-time associate attorney. The ideal candidate will have 2 to 5 years of experience. Our lawyers and staff enjoy a congenial working environment with a healthy and happy work-life balance. Candidates should have excellent academic credentials and communication skills. Compensation depends on experience and is competitive with other firms. Please direct inquiries together with a resume to wjackson@gcmlegal.com.

Litigation Associate/ Senior Associate

Well established civil defense firm is seeking an attorney with litigation experience for an associate position to become part of our team. We value both our employees and our clients, working together to meet their needs. We are flexible, team oriented and committed to doing excellent work. We have long standing clients and handle interesting matters, in the areas of labor/employment, construction, personal injury, medical malpractice, commercial litigation, civil rights, professional liability, insurance defense, and insurance coverage. Associates work on a variety of matters in a friendly collegial environment. Attorneys work in the office or a combination of office work and working from home. We are looking for a dedicated team player with a solid work record and a strong work ethic. Excellent pay and benefits and opportunities for bonuses. All replies will be kept confidential. Interested individuals should e-mail a letter of interest and resume to Conklin, Woodcock & Ziegler, P.C. at: jobs@conklinfirm.com.

Associate Attorney

Stiff, Garcia & Associates, insurance defense firm, seeking full time experienced attorney for immediate opening. Must have excellent writing and communication skills. We offer medical, dental, life and disability insurance plus 6% 401K. Salary, DOE. We will consider remote and or part-time depending upon qualifications. Please send resume to agarcia@stifflaw.com

Associate Attorneys

MDZ Legal Group, In-house counsel for Loya Insurance Group, has openings for associate attorneys with 0-5 years of experience. We offer a collegial office environment; a good work / life balance, and many excellent employment benefits. Our Albuquerque office is growing and offering a competitive salary as well. Please send your resume to: Ulibarri@mdzlegalgroup.law.

ISO Litigation Attorney

ISO litigation attorney, minimum 2 years experience, who wants to advocate for injured people. We are looking for someone who is independent, energetic, detail oriented, hard-working, organized and committed to Plaintiff's personal injury work. We love what we do and are looking for an attorney who can jump in and be part of our dedicated, creative and diverse team. Spanish speaking is a plus. Salary DOE, medical/dental/vision insurance, PTO/sick leave and 401k. If this sounds like the right fit for you, please send a letter of interest to: staff@lrioslaw.com. All inquiries are kept strictly confidential.

Plaintiff Associate Attorney- Parnall Law Firm

OPENING STATEMENT: $25,000 sign-on bonus; Excellent compensation, up to $200,000 to $400,000 per year or more; Outstanding environment/culture/dynamic; "Top Place to Work". MISSION STATEMENT: Fighting for Justice for the wrongfully hurt. VALUES: The 5 'T's: Team, Talent, Truth, Tenacity, and Triumph; We believe these values are the reason we are the largest personal injury firm in NM and have received the Best Places to Work Award (Albuquerque Business First) in 2019, 2020, 2021, and 2022, and Top Place to Work Award (Albuquerque Journal) in 2020, 2021, 2022. RESPONSIBILITIES: You will be representing clients injured from the beginning (intake) to the end (disbursement) of their cases and all stages in between, resolving cases through negotiation before litigation, through litigation, and trial; You will be able to concentrate on "attorney" work, with the support of a team of assistants, including intake, investigators (retired police officers), pre-litigation case managers, medical records/demand drafting assistants, litigation paralegals, and settlement/subrogation paralegals. You will also have the support of a team of collaborative and creative attorneys; Organization and attention to detail are paramount to this position, along with the willingness and ability to regularly interact with clients, adjusters, and other lawyers/paralegals over the phone and/or in person. QUALIFICATIONS: 3 + years experience in litigating personal injury cases (plaintiff or defense); ·Ability to become licensed in New Mexico, either through reciprocity, transferring UBE score to New Mexico, or taking the bar exam; ·Ability to relocate to Albuquerque, New Mexico (relocation assistance provided) ·Be available in the office from Monday through Friday, 8 to 5 (and more as required for caseload). BENEFITS: · Sign-on bonus (as described above); Relocation Assistance; Compensation range $200,000- $400,0000 per year; A positive, fulfilling, caring environment where learning and growing are encouraged; Opportunities for community outreach throughout the year; Medical/Dental/Vision Benefits, 401k, PT, Bonus Pay. CLOSING ARGUMENT: Parnall Law is the largest and best-reviewed personal injury law firm based in New Mexico. We treat our clients with compassion and advocate for them by maximizing compensation caused by the wrongful actions of others. Our goal is to ensure our clients are satisfied and know Parnall Law has stood up and fought for them by giving them a voice. We are seeking highly motivated and passionate attorneys to join our growing team to represent more injured New Mexicans in the fight for Justice. Watch a two minute video at HurtCallBert.com/attorney-careers or contact JennyGarcia@ParnallLaw.com.

Litigation Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 36 states, is currently seeking an experienced litigation attorney for an immediate opening in its office in Albuquerque, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The firm offers 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume to Hamilton Hinton at hhinton@cordelllaw.com

Attorney(s) Licensed 3 – 5 Years

Walsh Gallegos Treviño Kyle & Robinson PC is a law firm devoted to serving public education. Since 1983, we have worked in partnership with leaders in public education, and we strive to make a difference in the boardroom, the courtroom, and most importantly, the classroom. Our office is currently seeking an attorney(s) licensed 3 – 5 years to help us continue our work. The position calls for an attorney who can successfully work to defend public schools and other governmental entities on issues involving special education/disability rights litigation as well as provide advice and consultation to public schools in the area of special education/disability rights. Attention to detail and excellent research and writing skills are required. Public speaking experience, strong interpersonal skills, IDEA due process proceeding and litigation experience, State and OCR Complaint experience, and experience with school districts or other governmental entities are preferred. A background in special education or education is a plus, as is experience representing governmental entities in federal litigation. Please send resume and writing sample to jobs@wabsa.com. Because we sometimes have openings in multiple offices, please indicate the city in the subject line of your email.

In-House Attorney

Pueblo of Laguna, NM – Great employer and benefits, competitive pay DOE! Seeking full-time attorney to provide legal advice, draft codes and policies, and protect government interests. Leisurely commute from Albuquerque metro, Los Lunas, or Grants. Apply now, will fill quickly. Application instructions and position details at: https://www.lagunapueblo-nsn.gov/elected-officials/secretarys-office/human-resources/employment/

General Counsel Water Authority

The Albuquerque Bernalillo County Water Utility Authority is the largest water and sewer utility in New Mexico, serving some 600,000 people in the metro area. We are currently recruiting for General Counsel to perform complex executive and professional level work as legal advisor to the Water Authority Board, the Executive Director and upper management on all issues related to Water Authority operations. Applicants must have a Juris Doctorate Degree from an accredited law school and 10 years of increasingly responsible professional experience practicing law, including trial experience and managerial or supervisory experience. Experience in the public sector with emphasis on federal, state and municipal law as it applies to the operation of a publicly owned utility is preferred. Membership in the New Mexico State Bar and ability to maintain membership is a condition of continued employment. Applicants must apply on-line. For complete requirements and to apply online, www.abcwua.org/careers/

Attorney

Madison, Mroz, Steinman, Kenny & Olexy, P.A., an AV-rated civil litigation firm, seeks an attorney with 3+ years' experience to join our practice. We offer a collegial environment with mentorship and opportunity to grow within the profession. Salary is competitive and commensurate with experience, along with excellent benefits. All inquiries are kept confidential. Please forward CVs to: Hiring Director, P.O. Box 25467, Albuquerque, NM 87125-5467.

Immigration Attorney

Rebecca Kitson Law is seeking an Associate Attorney with passion and commitment to help immigrants in family based and humanitarian immigration relief. Our firm values compassion, teamwork, excellence, and fierce advocacy. Our team works collaboratively to create a warm and supportive work environment that provides the opportunity to transform people's lives, bring families together, and protect the vulnerable. We are proud to be inclusive firm that embraces and honors diversity in our staff and clients. We offer robust tiered benefits after probationary periods to include: extensive time off, fully funded health insurance, dental, vision, short- and long-term disability and life insurance and a 401k with employer contribution. Flexible hybrid work options are available, as well as a relocation budget if needed. Experience in immigration law is welcomed but not required. MUST be fully fluent in Spanish. Must have a law license in any state and be in good standing. Salary DOE. To be considered for the position, please submit a resume, letter of intent, and writing sample via email to Becca Patterson, lp@rkitsonlaw.com.

Civil Litigation Defense Firm Seeking Associate and Senior Associate Attorneys

Ray Pena McChristian, PC seeks both new attorneys and attorneys with 3+ years of experience to join its Albuquerque office either as Associates or Senior Associates on a Shareholder track. RPM is an AV rated, regional civil defense firm with offices in Texas and New Mexico handling predominantly defense matters for businesses, insurers and government agencies. If you're a seasoned NM lawyer and have clients to bring, we have the infrastructure to grow your practice the right way. And if you're a new or young lawyer we also have plenty of work to take your skills to the next level. RPM offers a highly competitive compensation package along with a great office environment in Uptown ABQ and a team of excellent legal support professionals. Email your resume and a letter of interest to cray@raylaw.com.

Various Assistant City Attorney Positions

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney – Employment/Labor; Assistant City Attorney – Property & Finance; Assistant City Attorney – Office of Civil Rights. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Associate Lawyer – Commercial

Sutin, Thayer & Browne is looking to hire a full-time associate, with at least 3 years of transactional experience, for our Commercial Group. The successful candidate must have excellent legal writing, research, and verbal communication skills. Competitive salary and full benefits package. Send letter of interest, resume, and writing sample to sor@sutinfirm.com.

Senior Trial Attorneys, Trial Attorneys, and Assistant Trial Attorneys

The Eleventh Judicial District Attorney's Office, Div. II, in Gallup, New Mexico, McKinley County is seeking applicants for Assistant Trial Attorneys, Trial Attorneys and Senior Trial Attorneys. You will enjoy working in a community with rich culture and history while gaining invaluable experience and making a difference. The McKinley County District Attorney's Office provides regular courtroom practice, supportive and collegial work environment. You are a short distance away from Albuquerque, Southern parts of Colorado, Farmington, and Arizona. We offer an extremely competitive salary and benefit package. Salary commensurate with experience. These positions are open to all licensed attorneys who have knowledge in criminal law and who are in good standing with the New Mexico Bar or any other State bar (Limited License). Please Submit resume to District Attorney Bernadine Martin, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to Bmartin@da.state.nm.us. Position to commence immediately and will remain opened until filled.

Attorneys/Law Firms to Provide Legal Services

The New Mexico Office of Superintendent of Insurance, through its Title Insurance Bureau, is soliciting proposals from attorneys/law firms to provide legal services for the Title Insurance Bureau specifically related to the biennial setting of uniform premium rates and the promulgation of all policy forms, including endorsement forms. All interested attorney or law firms may obtain a copy of the Request for Qualifications and Statement of Interest ("RFQ/SOI") from the Office of Superintendent of Insurance's website, Office of Superintendent of Insurance (state.nm.us). The deadline for submitting an RFQ/SOI is May 26, 2023 5:00 P.M. MST.

Assistant County Attorney Position

Sandoval County seeks applications for an Assistant County Attorney position. Minimum qualifications include one year experience in the practice of law and a New Mexico law license or eligible for admission on motion. Attorney's primary responsibility will be overseeing Inspection of Public Record Act requests. Salary based on qualifications and experience. For detailed job description, full requirements, and application visit http://www.sandovalcountynm.gov/departments/human-resources/employment/

Lawyers

Montgomery & Andrews, P.A. is seeking lawyers with 3+ years of experience to join its firm in Santa Fe, New Mexico. Montgomery & Andrews offers enhanced advancement prospects, interesting work opportunities in a broad variety of areas, and a relaxed and collegial environment, with an open-door policy. Candidates should have strong written and verbal communication skills. Candidates should also be detail oriented and results-driven. New Mexico licensure is required. Please send resumes to rvalverde@montand.com.

Legal Assistant/Paralegal- Parnall Law Firm

MISSION STATEMENT: Paralegal/Legal Assistant collaborates with all attorneys to provide them with information on assigned personal injury cases. We treat our clients with compassion and advocate for them by maximizing compensation caused by wrongful actions of others. Our goal is to ensure our clients are satisfied and know Parnall Law has stood up and fought for them by giving them a voice. RESPONSIBILITIES: Partner closely with our passionate attorneys; Following up with clients or insurance providers/carriers by phone, email, or mail; Ensuring all liability, UIM, and Med Pay claims are opened; Determine when to open or not to open health insurance subrogation claims; Complete analysis of case; Review and modify, update or edit demand packages; Collaborate with billing analysts to verify balances and coordinate benefits; Partner with settlement paralegal on settlement issues including reductions on subrogation claims and/or provider balances. QUALIFICATIONS: Significant interpersonal relationship skills; able to communicate by phone, email, text and in-person with a diverse group of personalities; Strong proven ability to work in a team collaborative environment; Self-starter with outgoing and results-oriented personality; Organization to work on multiple projects is strongly needed; Ability to listen, ask questions and make decisions; Desire to go the extra mile for the team and our clients; Possesses a strong working knowledge of Microsoft WORD and Excel; Experience in case management for plaintiffs preferred. BENEFITS: A positive fun, caring environment where learning and growing are encouraged; Opportunities for community outreach throughout the year; Medical/Dental/Vision Benefits, 401k, PTO, Bonus Pay. To apply submit resume to jennygarcia@parnalllaw.com or visit: www.hurtcallbert.com/careers

Paralegal

MARRS GRIEBEL LAW, LTD. is an Albuquerque law firm serving businesses and their owners who find themselves dealing with business disputes. We aim to provide our clients with responsive, sensible, and efficient legal services that meet their broader business objectives. Come join our growing team. Paralegal Job Responsibilities: Document review, organization, and analysis; preparing document summaries and indices; Working directly with clients regarding document retrieval and discovery response; Assisting with the preparation, filing and service of pleadings; Coordinating the collection, review and production of documents and responding to discovery requests; Assisting with trial preparation including the assembly of exhibits, witness binders and appendices for depositions and court filings; Summarizing deposition transcripts and exhibits; Researching case-related factual issues using in-house files and outside reference sources. Benefits of Working with our Firm: We are a small firm that rewards hard work Salary begins at 50K and up depending on experience and production; We offer a generous compensation plan and full benefit package; Hours can be flexible and working remotely is allowed if desired. Skills, Education and Experience Requirements:; Research and investigation skills; Ability to prioritize workload and assignments with moderate level of guidance; Bachelor's Degree preferred; Paralegal certificate from an ABA accredited program preferred, or a combination of education and/or experience; 2+ years of significant and substantive litigation experience as a paralegal; Basic legal drafting skills for less involved filings – simple motions; Managing medium to large-scale document production experience; Proficiency with Document Review Software (Adobe) and MS Suite; SharePoint experience preferred. To apply, please send resume to hiring@marrslegal.com.

Member Services Projects & Events Manager

The State Bar of New Mexico (SBNM) seeks qualified applicants to join our team as a full-time (40 hours/week) Member Services Projects & Events Manager. The successful applicant will support the activities of State Bar practice sections, committees, commissions, and divisions ("groups") and coordinate implementation of the groups' and other State Bar/Bar Foundation programs and events. $45,000-$47,000 annually , depending on experience and qualifications. Generous benefits package included. This position qualifies for partial telecommuting. Qualified applicants should submit a cover letter and resume to HR@sbnm.org. Visit https://www.sbnm.org/About-Us/Career-Center/State-Bar-Jobs for full details and application instructions.

Legal Assistant

Stiff, Garcia & Associates, LLC, a successful downtown insurance defense firm, seeks Legal Assistant. Must be detail-oriented, organized, and have excellent communication skills. Bilingual in Spanish a plus. Competitive salary. Please e-mail your resume to karrants@stifflaw.com

Paralegal

The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is $24.68 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to $25.89 per hour. Competitive benefits provided and available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq.

Paralegal

Paralegal position in established commercial civil litigation firm. Prior experience preferred. Requires knowledge of State and Federal District Court rules and filing procedures; factual and legal online research; trial preparation; case management and processing of documents including acquisition, review, summarizing, indexing, distribution and organization of same; drafting discovery and related pleadings; maintaining and monitoring docketing calendars; oral and written communications with clients, counsel, and other case contacts; proficient in MS Office Suite, AdobePro, Powerpoint and adept at learning and use of electronic databases and legal software technology. Must be organized and detail-oriented professional with excellent computer skills. All inquiries confidential. Salary DOE. Competitive benefits. Email resumes to e_info@abrfirm.com or Fax to 505-764-8374.

Paralegal For Busy Medmal Practice
Hinkle Shanor LLP is seeking an experienced paralegal to join their Albuquerque office in 2023! The Albuquerque office of Hinkle Shanor is heavily specialized in medical malpractice defense litigation. Ideal candidates will have 2-3 years of experience. Substantial consideration will be given to candidates with prior medical malpractice litigation paralegal experience. Interested candidates should submit a resume and cover letter. Highly competitive salary and benefits. All inquiries will be kept confidential. Please email resumes and cover letters to recruiting@hinklelawfirm.com.

Office Manager/Legal Assistant
MARRS GRIEBEL LAW, LTD. is an Albuquerque law firm serving businesses and their owners who find themselves dealing with business disputes. We aim to provide our clients with responsive, sensible, and efficient legal services that meet their broader business objectives. Come join our growing team. Office Manager/Legal Assistant Responsibilities: Manages all aspects of firm business, including accounts payable, accounts receivable, payroll, account reconciliation, trust account management, insurance (business, health, and malpractice) and firm's SEP IRA records; Processes payroll and tax deposits; Coordinates vendors/repair technicians for building and/or equipment; Maintains the firm's billing system, including client information; Production of monthly invoices, account collection, and trust account records for each client; Manages paper client files, including daily filing, closing/storing paper files, shredding of files that have reached retention dates; Assists attorneys and paralegals with document production and management such as proofreading, e-filing and forwarding documents to clients; Manages electronic client files; maintains and monitors calendaring. Skills, Education and Experience Requirements: Collegiality and flexibility in a small office work environment; Strong bookkeeping skills and previous office management experience required; High school diploma required; some college level courses preferred. Benefits of Working with our Firm: We are a small firm that rewards collegiality and hard work; Salary begins at $50K; negotiable depending on experience and production; We offer a generous compensation plan and full benefit package. To apply, please send resume to hiring@marrslegal.com.

File Clerk
Professional Real Estate firm located downtown has an immediate need for 3 file clerks. Must be professional in appearance and demeanor and interested in long- term employment. For complete job description and details, please go to: http://www.beststaffabq.com/career portal/#/jobs/1711

Paralegal
The Santa Fe office of Hinkle Shanor LLP seeks a paralegal for the practice areas of litigation and administrative law. Candidates should have a strong academic background, excellent research skills and the ability to work independently. Competitive salary and benefits. All inquiries kept confidential. Santa Fe resident preferred. Please email resume to: gromero@hinklelawfirm.com.

Legal Secretary/Legal Assistant
Hinkle Shanor LLP is hiring a legal secretary/legal assistant for a busy medical malpractice defense group in its Santa Fe office. Applicants must have strong typing and computer skills. Experience in calendaring deadlines and court filings in all courts is required. Duties include reviewing, responding to and processing e-mails on a daily basis, reviewing correspondence and pleadings, keeping all files and filing up to date, scheduling depositions, management of electronic files and opening of new files. Familiarity with LMS time and billing software for time entry is a plus. Please send resume and letter of interest to gromero@hinklelawfirm.com.

Paralegal/Legal Assistant
Solo practitioner of 47 years with established clientele is newly relocated from Taos to Albuquerque and seeks Paralegal/Legal Assistant for Part-time leading to Full-time position, available immediately. Practice is mostly virtual and is limited to Wills, Trusts, Probate and Non-Litigation Real Estate (buy-sell agreements). Hours are flexible and work from home is negotiable. Pay will be based on experience. Send current resume with three references to TaosAtty@gmail.com along with schedule of availability

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