

# BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

February 24, 2016 • Volume 55, No. 8



*Stunning Bobcat* by Barbara Meikle

Barbara Meikle Fine Art, Santa Fe

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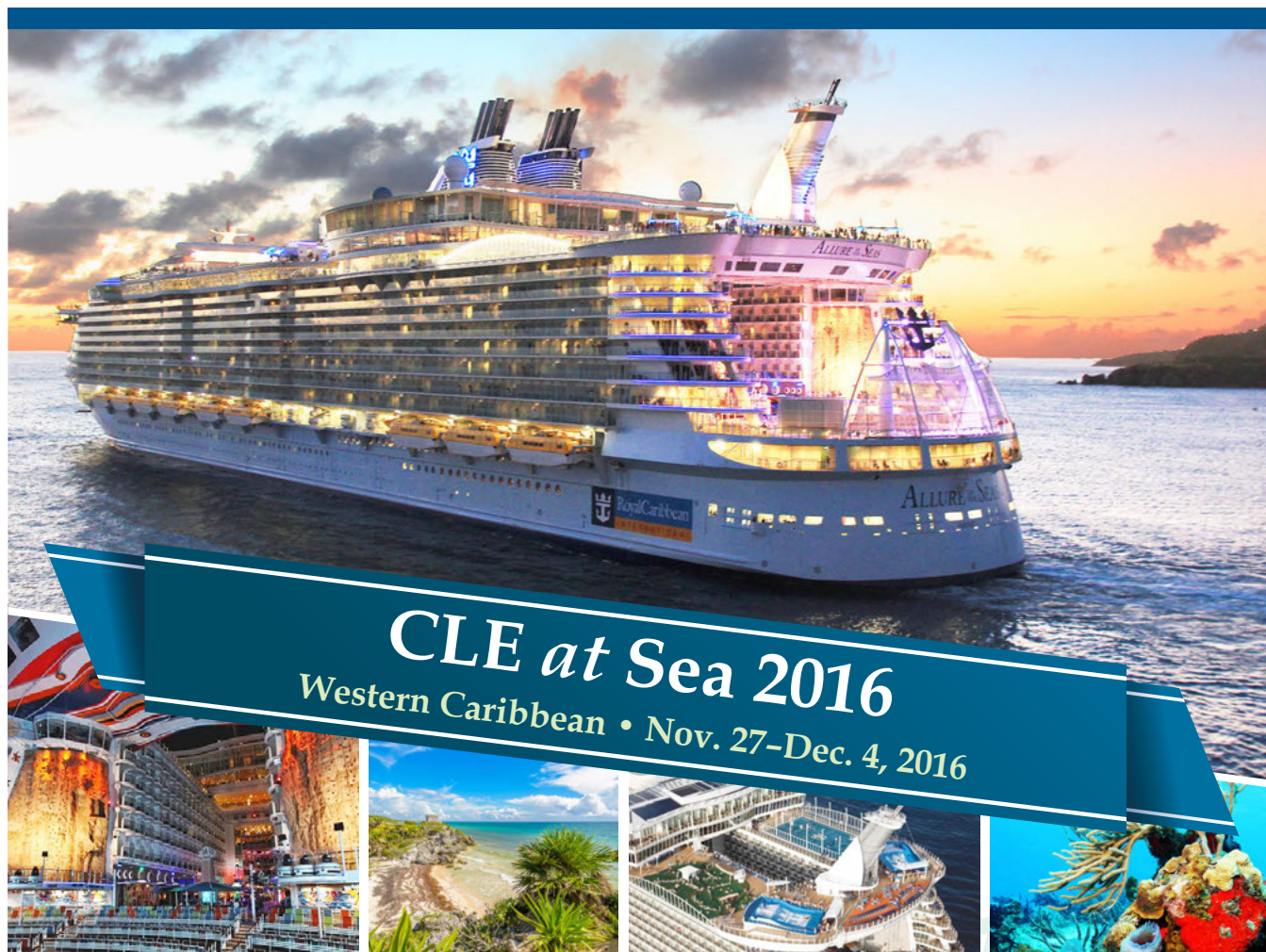
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*You're Invited!*

Friday, Feb. 26 • 4 p.m.  
See back cover for details.

—SPECIAL INSERT—  
YLD ... In Brief



Join State Bar President Brent Moore for this incredible trip and enter the holiday season CLE stress free. One year's worth of CLE credits will be provided.



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CLE course information is forthcoming.

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Send proposals to Christine Morganti, [cmorganti@nmbar.org](mailto:cmorganti@nmbar.org).







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## Meetings

### February

**26**  
**Immigration Law Section BOD,**  
Noon, teleconference

### March

**1**  
**Health Law Section BOD,**  
9 a.m., teleconference

**2**  
**Employment and Labor Law Section BOD,**  
Noon, State Bar Center

**4**  
**Bankruptcy Law Section BOD,**  
Noon, U.S. Bankruptcy Court

**4**  
**Criminal Law Section BOD,**  
Noon, Kelley & Boone, Albuquerque

**9**  
**Animal Law Section BOD,**  
Noon, State Bar Center

**9**  
**Children's Law Section BOD,**  
Noon, Juvenile Justice Center

**9**  
**Taxation Section BOD,**  
11 a.m., teleconference

**10**  
**Business Law Section BOD,**  
4 p.m., teleconference

**10**  
**Elder Law Section BOD,**  
Noon, State Bar Center

## State Bar Workshops

### February

**17**  
**Family Law Clinic:**  
10 a.m.–1 p.m., Second Judicial District  
Court, Albuquerque, 1-877-266-9861

**24**  
**Consumer Debt/Bankruptcy Workshop:**  
6–9 p.m., State Bar Center, Albuquerque,  
505-797-6094

### March

**2**  
**Divorce Options Workshop:**  
6–8 p.m., State Bar Center, Albuquerque,  
505-797-6003

**2**  
**Civil Legal Clinic:**  
10 a.m.–1 p.m., Second Judicial District  
Court, Albuquerque, 1-877-266-9861

**8**  
**Legal Clinic for Veterans:**  
8:30–11 a.m., New Mexico Veterans  
Memorial, Albuquerque,  
505-265-1711, ext. 3434

**16**  
**Family Law Clinic:**  
10 a.m.–1 p.m., Second Judicial District  
Court, Albuquerque, 1-877-266-9861

**23**  
**Consumer Debt/Bankruptcy Workshop:**  
6–9 p.m., State Bar Center, Albuquerque,  
505-797-6094

**Cover Artist:** Barbara Meikle is an artist who paints the simple world outside of her door in Tesuque, N.M. Meikle has been an artist from childhood, sketching the horses she loved and took care of in order to ride. True to her art, in college she earned a bachelor's degree in painting and printmaking at the University of Denver and studied watercolor at Cambridge University in England. Her dream was always to make her living as an artist and in 1990, she returned to New Mexico to pursue that dream. Meikle's art may project peace and harmony exemplified as a colorful burro or explode in the riot of energy of galloping horses. For more of her work, visit Barbara Meikle Fine Art in Santa Fe or [www.meiklefineart.com](http://www.meiklefineart.com).

# Notices

## COURT NEWS

### New Mexico Supreme Court Board of Legal Specialization Comments Solicited

The following attorneys are applying for certification as a specialist in the areas of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, attorneys and others are encouraged to comment upon any of the applicant's qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

*Employment/Labor Law*  
John Paul Valdez

*Immigration Law*  
John Lawit

*Workers' Compensation Law*  
Mark Jarner

### Second Judicial District Court David Williams Appointed to Fill Vacancy

On Feb. 12, Gov. Susana Martinez announced the appointment of David Williams to Division IX of the Second Judicial District Court in Bernalillo County. Williams' appointment fills the vacancy created by the appointment of Judge Judith Nakamura to the New Mexico Supreme Court.

### Ninth Judicial District Court Notice of Exhibit Destruction

The Ninth Judicial District Court, Roosevelt County, will destroy the following exhibits by order of the court if not claimed by the allotted time: 1) All unmarked exhibits, oversized poster boards/maps and diagrams; 2) Exhibits filed with the court, in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for the years 1993-2012 may be retrieved through April 30; and 3) All cassette tapes in criminal, civil, children's court, domestic, competency/mental health, adoption and probate cases for years prior to 2007 have been exposed to hazardous toxins and extreme heat in the Roosevelt County Courthouse and are ruined and cannot be played, due to the exposures. These cassette tapes have either been destroyed for environmental health

## Professionalism Tip

### With respect to my clients:

I will charge only a reasonable attorney's fee for services rendered.

reasons or will be destroyed by April 30. For more information or to claim exhibits, contact the Court at 575-359-6920.

### Pueblo of Jemez Tribal Court Tribal Judge Opening

There is an opening for a tribal judge with the Pueblo of Jemez. The position will be responsible for direction and administration of justice for the Pueblo of Jemez' Tribal Court and judiciary functions; advises executive leadership on judicial system management and strategic planning, develops, modifies and enforces judicial safeguards. Qualifications include a law degree from an ABA accredited law school, five years of general judicial experience to include court procedures, three years of experience in specified duties and responsibilities and experience and/or practice in the field of Indian law with emphasis on federal Indian law, tribal law, tribal sovereignty, tribal government and jurisdiction. For more information, visit the [www.jemeztribal.org](http://www.jemeztribal.org) or call the Human Resources Department at 575-834-7359.

## STATE BAR NEWS

### Attorney Support Groups

- March 14, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (the group meets on the second Monday of the month). To increase access, teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.
  - March 21, 7:30 a.m.  
First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the third Monday of the month.)
  - April 4, 5:30 p.m.  
First United Methodist Church, 4th and Lead SW, Albuquerque (the group meets the first Monday of the month.)
- For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

### Animal Law Section Rescue Adoption Contracts Animal Talk

Guy Dicharry will present "Animal Rescue Adoption Contracts and the

Uniform Commercial Code" at the next Animal Talk at noon on Feb. 24 at the State Bar Center. Cookies and drinks will be provided. R.S.V.P. to Evann Kleinschmidt, [ekleinschmidt@nmbar.org](mailto:ekleinschmidt@nmbar.org).

### Public Law Section Accepting Award Nominations

The Public Law Section is accepting nominations for the Public Lawyer of the Year Award, which will be presented at the state capitol on April 29. Visit [www.nmbar.org](http://www.nmbar.org) > About Us > Sections > Public Lawyer Award to view previous recipients and award criteria. Nominations are due no later than 5 p.m. on March 10. Send nominations to Sean Cunniff at [scunniff@nmag.gov](mailto:scunniff@nmag.gov). The selection committee will consider all nominated candidates and may nominate candidates on its own.

### UNM Law Library Hours Through May 14

#### Building & Circulation

Monday-Thursday	8 a.m.-8 p.m.
Friday	8 a.m.-6 p.m.
Saturday	10 a.m.-6 p.m.
Sunday	Noon-6 p.m.

#### Reference

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Saturday-Sunday	Closed

### Women's Law Caucus Justice Mary Walters Award

Each year the Women's Law Caucus at UNM School of Law chooses two outstanding women in the New Mexico legal community to honor in the name of former Justice Mary Walters, who was the first woman appointed to the New Mexico Supreme Court. In 2016 the WLC will honor Judge Cynthia Fry and Bonnie Stepleton. The WLC invites the New Mexico legal community to the awards dinner on Feb. 24 at Hotel Andaluz in Albuquerque. Individual tickets for the dinner can be purchased for \$90. Tables can be purchased for \$600 and seat approximately eight people. Event sponsorship is also available for \$600 and includes a table for eight. To purchase tickets, visit [www.lawschool.unm.edu/students/organizations/wlc/](http://www.lawschool.unm.edu/students/organizations/wlc/). For more information, contact

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### Santa Fe Municipal Court Retirement Celebration for Judge Ann Yalman

Members of the legal community are invited to celebrate the retirement of Judge Ann Yalman of the Santa Fe Municipal Court. A reception will be held from 5:30-7:30 p.m., March 3, at the City of Santa Fe Convention Center, 201 West Marcy Street, Santa Fe, New Mexico 87501.

### Pueblo of Jemez Tribal Court Tribal Judge Opening

There is an opening for a tribal judge with the Pueblo of Jemez. The position will be responsible for direction and administration of justice for the Pueblo of Jemez' Tribal Court and judiciary functions; advises executive leadership on judicial system management and strategic planning, develops, modifies and enforces judicial safeguards. Qualifications include a law degree from an ABA accredited law school, five years of general judicial experience to include court procedures, three years of experience in specified duties and responsibilities and experience and/or practice in the field of Indian law with emphasis on federal Indian law, tribal law, tribal sovereignty, tribal government and jurisdiction. For more information, visit the [www.jemeztribal.org](http://www.jemeztribal.org) or call the Human Resources Department at 575-834-7359.

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## OTHER BARS

### Albuquerque Lawyers Club March Luncheon and Meeting

The Albuquerque Lawyers Club invites members of the legal community to its lunch meeting at noon, March 2, at Seasons Rotisserie and Grill in Albuquerque. Jeffrey Lewine, Ph.D., of the Mind Research Network, and Lyn Kiehl, director of MINDSET will present "Neuroscience: From the Laboratory to the Courtroom." The luncheon is free to members and \$30 for non-members. For more information, email Yasmin Denig at [ydennig@Sandia.gov](mailto:ydennig@Sandia.gov).

### First Judicial District Court Bar Association Ski Day in Santa Fe

Join the First Judicial District Bar Association at Ski Santa Fe on Feb. 27. Families are welcome. Enjoy discounted half- and full-day lift tickets (half-day: \$35, full-day: 45, beginner's chairlift: \$20). To purchase tickets, contact Erin McSherry at [erin.mcsherry@state.nm.us](mailto:erin.mcsherry@state.nm.us). Payment for all guests is due by Feb. 25. Discounted tickets may not be purchased through Ski Santa Fe.

### New Mexico Criminal Defense Lawyers Association Trial Skills College

Need to brush up on trial tactics? In the New Mexico Criminal Defense Lawyers Association's "Trial Skills College" (15.5 G) on March 17-19 in Albuquerque, students will hear lectures and practice with each other in small focus groups on every aspect of a trial, from voir dire to closing statements. New and seasoned practitioners alike will benefit from this course. Only 30 seats are available. Register at [www.nmcdla.org](http://www.nmcdla.org).

## White Collar Crime CLE

Learn the latest updates and trends in charging health care cases, grand jury practice, and submitting budget requests for adequate funding at the New Mexico Criminal Defense Lawyers Association's upcoming CLE "White Collar Crime & Complex Cases" on March 11 at the Garrett's Desert Inn in Santa Fe. Hear from some of the leading practitioners in the state on these issues and more. Visit [www.nmcdla.org](http://www.nmcdla.org) for more information and to register.

## OTHER NEWS

### New Mexico Lawyers for the Arts Volunteers Needed for Pro Bono Legal Clinic

New Mexico Lawyers for the Arts and WESST/Albuquerque seek attorneys to volunteer for the New Mexico Lawyers for the Arts Pro Bono Legal Clinic from 10 a.m. to 1 p.m., March 19, at the WESST Enterprise Center, 609 Broadway Blvd. NE, Albuquerque. Continental Breakfast will be provided. Clients will be creative professionals, artists or creative businesses. Attorneys are needed to assist in many areas including contracts, business law, employment matters, tax law, estate planning and intellectual property law. For more information and to participate, contact Talia Kosh at [tk@thebennettlawgroup.com](mailto:tk@thebennettlawgroup.com).

### Society for Human Resource Management of New Mexico 2016 Conference in Albuquerque

The Society for Human Resource Management of New Mexico has announced its 2016 conference "Picture the Future... BE the Future" on March 7-9 at the Embassy Suites Hotel and Spa in Albuquerque. The conference includes speakers and topics of interest to HR professionals, legal professionals, and business professionals of all disciplines. Keynote speakers include Louis Efron, former head of global engagement and leadership development at Tesla Motors, Ann Rhoades, president of People Ink, and former vice president of the People Department for Southwest Airlines, Dr. Richard Pimentel, senior partner with Milt Wright & Associates Inc. and Cy Wakeman, author and president and founder of Reality Based. More information and registration is available at [www.shrmnm.org](http://www.shrmnm.org).

## —Featured— Member Resource



### BRIDGE THE GAP MENTORSHIP PROGRAM

This mandatory program approved by the N.M. Supreme Court offers new lawyers a highly experienced attorney member to teach real-world aspects of practice. Both earn a full year of CLE credits. For more information, call 505-797-6003.



### New Mexico Lawyers and Judges Assistance Program

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Judges

888-502-1289

[www.nmbar.org](http://www.nmbar.org) > for Members >  
Lawyers/Judges Assistance

## 2016-2017 Bench & Bar Directory

Update Your Contact Information  
by March 25

Verify your current information:  
[www.nmbar.org/FindAnAttorney](http://www.nmbar.org/FindAnAttorney)

#### Submit changes in writing:

**online:** [www.nmbar.org](http://www.nmbar.org) > for  
Members > Change of Address;  
by **mail:** Address Changes, PO Box  
92860, Albuquerque, NM 87199-  
2860; by **fax:** 505-828-3765; or by  
**email:** [address@nmbar.org](mailto:address@nmbar.org)

WLC President Dana Beyer at [beyalda@law.unm.edu](mailto:beyalda@law.unm.edu).

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## First Judicial District Court

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#### for the Arts

#### Volunteers Needed for

#### Pro Bono Legal Clinic

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## Society for Human Resource

### Management of New Mexico

#### 2016 Conference in Albuquerque

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## —Featured—

### Member Resource



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## New Mexico Lawyers

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## 2016-2017

### Bench & Bar Directory

Update Your Contact Information  
by March 25

Verify your current information:  
[www.nmbar.org/FindAnAttorney](http://www.nmbar.org/FindAnAttorney)

#### Submit changes in writing:

**online:** [www.nmbar.org](http://www.nmbar.org) > for  
Members > Change of Address;  
by **mail:** Address Changes, PO Box  
92860, Albuquerque, NM 87199-  
2860; by **fax:** 505-828-3765; or by  
**email:** [address@nmbar.org](mailto:address@nmbar.org)

# Legal Education

## March

- |  |   |   |
|--|---|---|
| <p><b>2 Strategies to Prosecute Sexual Assault Cases in New Mexico</b><br/>13.2 G<br/>Live Seminar<br/>New Mexico Coalition of Sexual Assault Programs<br/>www.nmcsap.org</p>    | <p><b>11 The Future of Cross-commissioning: What Every Tribal, State and County Lawyer Should Consider post Loya v. Gutierrez</b><br/>2.5 G, 1.0 EP<br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>18 Ethics and Keeping Your Paralegal and Yourself Out of Trouble</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                                   |
| <p><b>4 31st Annual Bankruptcy Year in Review Seminar</b><br/>6.0 G, 1.0 EP<br/>Live Seminar and Webcast<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>           | <p><b>11 White Collar Crime &amp; Complex Cases: The Clients, the Charges, the Costs</b><br/>6.7 G<br/>Live Seminar, Santa Fe<br/>New Mexico Criminal Defense Lawyers Association<br/>www.nmcdla.org</p>                          | <p><b>17-19 Trial Skills College</b><br/>15.5 G<br/>Live Seminar, Albuquerque<br/>New Mexico Criminal Defense Lawyers Association<br/>www.nmcdla.org</p>  |
| <p><b>4 How Ethics Still Apply When Lawyers Act as Non-Lawyers</b><br/>1.0 EP<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                      | <p><b>15 Estate and Trust Planning for Short Life Expectancies</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>23 Avoiding Family Feuds in Trusts</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  |
| <p><b>9 Foreclosure Litigation Defense</b><br/>6.0 G<br/>Live Seminar, Albuquerque<br/>Gleason Law Firm LLC<br/>gleasonlawfirm@gmail.com</p>                                     | <p><b>18 2015 Tax Symposium (2015)</b><br/>7.0 G<br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>25 Legal Technology Academy for New Mexico Lawyers</b><br/>4.0 G, 2.0 EP<br/>Live Seminar and Webcast<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                             |
| <p><b>10 Estate and Gift Tax Audits</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>18 The Trial Variety: Juries, Experts and Litigation (2015)</b><br/>6.0 G<br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>28 Tech Tock, Tech Tock: Social Media and the Countdown to Your Ethical Demise</b><br/>3.0 EP<br/>Live Seminar and Webcast<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>        |
| <p><b>11 Navigating New Mexico Public Land Issues (2015)</b><br/>5.5 G, 1.0 EP<br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                     | <p><b>18 Ethically Managing Your Practice (Ethicspalooza Redux – Winter 2015)</b><br/>1.0 EP<br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>28 What NASCAR, Jay-Z &amp; the Jersey Shore Teach About Attorney Ethics—2016 Edition</b><br/>3.0 EP<br/>Live Seminar and Webcast<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>11 Federal Practice Tips and Advice from U.S. Magistrate Judges (2015)</b><br/>2.0 G, 1.0 EP<br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>18 Civility and Professionalism (Ethicspalooza Redux – Winter 2015)</b><br/>1.0 EP<br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>29 Drafting Demand Letters</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  |
| <p><b>11 Law Practice Succession-A Little Thought Now, a Lot Less Panic Later (2015) 2.0 G</b><br/>Live Replay<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>     |   |   |



## April

5	<b>Planning Due Diligence in Business Transactions</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	8	<b>Federal Practice Tips and Advice from U.S. Magistrate Judges</b> 2.0 G, 1.0 EP Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	22	<b>Ethics for Estate Planners</b> 1.0 EP Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
7	<b>Treatment of Trusts in Divorce</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	8	<b>Invasion of the Drones: IP – Privacy, Policies, Profits (2015 Annual Meeting)</b> 1.5 G Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	26	<b>Employees, Secrets and Competition: Non-Competes and More</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
8	<b>2015 Land Use Law in New Mexico</b> 5.0 G, 1.0 EP Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	14	<b>Governance for Nonprofits</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	28	<b>Annual Advanced Estate Planning Strategies</b> 11.2 G Live Program Texas State Bar <a href="http://www.texasbarcle.com">www.texasbarcle.com</a>
8	<b>More Reasons to be Skeptical of Expert Witnesses Part VI (2015)</b> 5.0 G, 1.5 EP Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	18	<b>Disciplinary Process Civility and Professionalism</b> 1.0 EP Live Program First Judicial District Court 505-946-2802		

## May

4	<b>Ethics and Drafting Effective Conflict of Interest Waivers</b> 1.0 EP Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	19	<b>2016 Retaliation Claims in Employment Law Update</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>Social Media and the Countdown to Your Ethical Demise (2016)</b> 3.0 EP Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
11	<b>Adding a New Member to an LLC</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>The New Lawyer – Rethinking Legal Services in the 21st Century</b> 4.5 G, 1.5 EP Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>What NASCAR, Jay-Z &amp; the Jersey Shore Teach About Attorney Ethics (2016 Edition)</b> 3.0 EP Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>
17	<b>Workout of Defaulted Real Estate Project</b> 1.0 G Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>Legal Writing – From Fiction to Fact: Morning Session (2015)</b> 2.0 G, 1.0 EP Live Replay Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>	20	<b>Ethics and Virtual Law Practices</b> 1.0 EP Teleseminar Center for Legal Education of NMSBF <a href="http://www.nmbar.org">www.nmbar.org</a>

# Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective February 12, 2016**

<b>Petitions for Writ of Certiorari Filed and Pending:</b>				No. 35,661	Benjamin v. State	12-501	12/16/15
			Date Petition Filed	No. 35,654	Dimas v. Wrigley	COA 35,654	12/11/15
No. 35,754	Valenzuela v.			No. 35,635	Robles v. State	12-501	12/10/15
	A.S. Horner Inc.	COA 33,521	02/12/16	No. 35,674	Bledsoe v. Martinez	12-501	12/09/15
No. 35,753	State v. Erwin	COA 33,561	02/12/16	No. 35,653	Pallares v. Martinez	12-501	12/09/15
No. 35,751	State v. Begay	COA 33,588	02/12/16	No. 35,637	Lopez v. Frawner	12-501	12/07/15
No. 35,750	State v. Norma M.	COA 34,768	02/11/16	No. 35,268	Saiz v. State	12-501	12/01/15
No. 35,749	State v. Vargas	COA 33,247	02/11/16	No. 35,612	Torrez v. Mulheron	12-501	11/23/15
No. 35,748	State v. Vargas	COA 33,247	02/11/16	No. 35,599	Tafoya v. Stewart	12-501	11/19/15
No. 35,742	State v. Jackson	COA 34,852	02/05/16	No. 35,593	Quintana v. Hatch	12-501	11/06/15
No. 35,747	Sicre v. Perez	12-501	02/04/16	No. 35,588	Torrez v. State	12-501	11/04/15
No. 35,743	Conger v. Jacobson	COA 34,848	02/04/16	No. 35,581	Salgado v. Morris	12-501	11/02/15
No. 35,741	State v. Coleman	COA 34,603	02/04/16	No. 35,586	Saldana v. Mercantel	12-501	10/30/15
No. 35,740	State v. Wisner	COA 34,974	02/04/16	No. 35,576	Oakleaf v. Frawner	12-501	10/23/15
No. 35,739	State v. Angulo	COA 34,714	02/04/16	No. 35,575	Thompson v. Frawner	12-501	10/23/15
No. 35,733	State v. Meyers	COA 34,690	02/02/16	No. 35,555	Flores-Soto v. Wrigley	12-501	10/09/15
No. 35,732	State v. Castillo	COA 34,641	02/02/16	No. 35,554	Rivers v. Heredia	12-501	10/09/15
No. 35,746	Bradford v. Hatch	12-501	02/01/16	No. 35,540	Fausnaught v. State	12-501	10/02/15
No. 35,371	Citimortgage v. Tweed	COA 34,870	01/29/16	No. 35,523	McCoy v. Horton	12-501	09/23/15
No. 35,730	State v. Humphrey	COA 34,601	01/29/16	No. 35,522	Denham v. State	12-501	09/21/15
No. 35,727	State v. Calloway	COA 34,625	01/28/16	No. 35,495	Stengel v. Roark	12-501	08/21/15
No. 35,728	Brannock v. Lotus Fund	COA 33,950	01/27/16	No. 35,479	Johnson v. Hatch	12-501	08/17/15
No. 35,725	State v. Ancira	COA 34,556	01/27/16	No. 35,474	State v. Ross	COA 33,966	08/17/15
No. 35,724	State v. Donovan W.	COA 34,595	01/27/16	No. 35,466	Garcia v. Wrigley	12-501	08/06/15
No. 35,723	State v. Lopez	COA 34,602	01/26/16	No. 35,440	Gonzales v. Franco	12-501	07/22/15
No. 35,722	James v. Smith	12-501	01/25/16	No. 35,422	State v. Johnson	12-501	07/17/15
No. 35,711	Foster v. Lea County	12-501	01/25/16	No. 35,416	State v. Heredia	COA 32,937	07/15/15
No. 35,714	State v. Vega	COA 32,835	01/22/16	No. 35,415	State v. McClain	12-501	07/15/15
No. 35,713	Hernandez v. CYFD	COA 33,549	01/22/16	No. 35,374	Loughborough v. Garcia	12-501	06/23/15
No. 35,710	Levan v.			No. 35,372	Martinez v. State	12-501	06/22/15
	Hayes Trucking	COA 33,858	01/22/16	No. 35,370	Chavez v. Hatch	12-501	06/15/15
No. 35,709	Dills v.			No. 35,353	Collins v. Garrett	COA 34,368	06/12/15
	N.M. Heart Institute	COA 33,725	01/22/16	No. 35,335	Chavez v. Hatch	12-501	06/03/15
No. 35,708	State v. Hobbs	COA 33,715	01/21/15	No. 35,371	Pierce v. Nance	12-501	05/22/15
No. 35,718	Garcia v. Franwer	12-501	01/19/16	No. 35,266	Guy v.		
No. 35,717	Castillo v. Franco	12-501	01/19/16		N.M. Dept. of Corrections	12-501	04/30/15
No. 35,707	Marchand v. Marchand	COA 33,255	01/19/16	No. 35,261	Trujillo v. Hickson	12-501	04/23/15
No. 35,706	State v. Jeremy C.	COA 34,482	01/19/16	No. 35,159	Jacobs v. Nance	12-501	03/12/15
No. 35,705	State v. Farley	COA 34,010	01/19/16	No. 35,097	Marrah v. Swisstack	12-501	01/26/15
No. 35,702	Steiner v. State	12-501	01/12/16	No. 35,099	Keller v. Horton	12-501	12/11/14
No. 35,682	Peterson v. LeMaster	12-501	01/05/16	No. 34,937	Pittman v.		
No. 35,677	Sanchez v. Mares	12-501	01/05/16		N.M. Corrections Dept.	12-501	10/20/14
No. 35,669	Martin v. State	12-501	12/30/15	No. 34,932	Gonzales v. Sanchez	12-501	10/16/14
No. 35,665	Kading v. Lopez	12-501	12/29/15	No. 34,907	Cantone v. Franco	12-501	09/11/14
No. 35,664	Martinez v. Franco	12-501	12/29/15	No. 34,680	Wing v. Janecka	12-501	07/14/14
No. 35,657	Ira Janecka	12-501	12/28/15	No. 34,777	State v. Dorais	COA 32,235	07/02/14
No. 35,671	Riley v. Wrigley	12-501	12/21/15	No. 34,775	State v. Merhege	COA 32,461	06/19/14
No. 35,649	Miera v. Hatch	12-501	12/18/15	No. 34,706	Camacho v. Sanchez	12-501	05/13/14
No. 35,641	Garcia v. Hatch Valley Public Schools	COA 33,310	12/16/15	No. 34,563	Benavidez v. State	12-501	02/25/14

No. 34,303	Gutierrez v. State	12-501	07/30/13
No. 34,067	Gutierrez v. Williams	12-501	03/14/13
No. 33,868	Burdex v. Bravo	12-501	11/28/12
No. 33,819	Chavez v. State	12-501	10/29/12
No. 33,867	Roche v. Janecka	12-501	09/28/12
No. 33,539	Contreras v. State	12-501	07/12/12
No. 33,630	Utley v. State	12-501	06/07/12

## Certiorari Granted but Not Yet Submitted to the Court:

(Parties preparing briefs)	Date Writ Issued
No. 33,725 State v. Pasillas COA 31,513	09/14/12
No. 33,877 State v. Alvarez COA 31,987	12/06/12
No. 33,930 State v. Rodriguez COA 30,938	01/18/13
No. 34,363 Pielhau v. State Farm COA 31,899	11/15/13
No. 34,274 State v. Nolen 12-501	11/20/13
No. 34,443 Aragon v. State 12-501	02/14/14
No. 34,522 Hobson v. Hatch 12-501	03/28/14
No. 34,582 State v. Sanchez COA 32,862	04/11/14
No. 34,694 State v. Salazar COA 33,232	06/06/14
No. 34,669 Hart v. Otero County Prison 12-501	06/06/14
No. 34,650 Scott v. Morales COA 32,475	06/06/14
No. 34,784 Silva v. Lovelace Health Systems, Inc. COA 31,723	08/01/14
No. 34,812 Ruiz v. Stewart 12-501	10/10/14
No. 34,830 State v. Mier COA 33,493	10/24/14
No. 34,929 Freeman v. Love COA 32,542	12/19/14
No. 35,063 State v. Carroll COA 32,909	01/26/15
No. 35,130 Progressive Ins. v. Vigil COA 32,171	03/23/15
No. 35,148 El Castillo Retirement Residences v. Martinez COA 31,701	04/03/15
No. 35,183 State v. Tapia COA 32,934	05/11/15
No. 35,145 State v. Benally COA 31,972	05/11/15
No. 35,121 State v. Chakerian COA 32,872	05/11/15
No. 35,116 State v. Martinez COA 32,516	05/11/15
No. 34,949 State v. Chacon COA 33,748	05/11/15
No. 35,298 State v. Holt COA 33,090	06/19/15
No. 35,297 Montano v. Frezza COA 32,403	06/19/15
No. 35,296 State v. Tsosie COA 34,351	06/19/15
No. 35,286 Flores v. Herrera COA 32,693/33,413	06/19/15
No. 35,255 State v. Tufts COA 33,419	06/19/15
No. 35,214 Montano v. Frezza COA 32,403	06/19/15
No. 35,213 Hilgendorf v. Chen COA 33,056	06/19/15
No. 35,279 Gila Resource v. N.M. Water Quality Control Comm. COA 33,238/33,237/33,245	07/13/15
No. 35,289 NMAG v. N.M. Water Quality Control Comm. COA 33,238/33,237/33,245	07/13/15
No. 35,290 Olson v. N.M. Water Quality Control Comm. COA 33,238/33,237/33,245	07/13/15
No. 35,318 State v. Dunn COA 34,273	08/07/15
No. 35,386 State v. Cordova COA 32,820	08/07/15
No. 35,278 Smith v. Frawner 12-501	08/26/15
No. 35,398 Armenta v. A.S. Homer, Inc. COA 33,813	08/26/15
No. 35,427 State v. Mercer-Smith COA 31,941/28,294	08/26/15

No. 35,446 State Engineer v. Diamond K Bar Ranch COA 34,103	08/26/15
No. 35,451 State v. Garcia COA 33,249	08/26/15
No. 35,438 Rodriguez v. Brand West Dairy COA 33,104/33,675	08/31/15
No. 35,426 Rodriguez v. Brand West Dairy COA 33,675/33,104	08/31/15
No. 35,499 Romero v. Ladlow Transit Services COA 33,032	09/25/15
No. 35,456 Haynes v. Presbyterian Healthcare Services COA 34,489	09/25/15
No. 35,437 State v. Tafoya COA 34,218	09/25/15
No. 35,395 State v. Bailey COA 32,521	09/25/15
No. 35,515 Saenz v. Ranack Constructors COA 32,373	10/23/16
No. 35,614 State v. Chavez COA 33,084	01/19/16
No. 35,609 Castro-Montanez v. Milk-N-Atural COA 34,772	01/19/16
No. 35,512 Phoenix Funding v. Aurora Loan Services COA 33,211	01/19/16
No. 34,790 Venie v. Velasquez COA 33,427	01/19/16
No. 35,680 State v. Reed COA 33,426	02/05/16

## Certiorari Granted and Submitted to the Court:

(Submission Date = date of oral argument or briefs-only submission)	Submission Date
No. 33,969 Safeway, Inc. v. Rooter 2000 Plumbing COA 30,196	08/28/13
No. 33,884 Acosta v. Shell Western Exploration and Production, Inc. COA 29,502	10/28/13
No. 34,093 Cordova v. Cline COA 30,546	01/15/14
No. 34,287 Hamaatsa v. Pueblo of San Felipe COA 31,297	03/26/14
No. 34,613 Ramirez v. State COA 31,820	12/17/14
No. 34,798 State v. Maestas COA 31,666	03/25/15
No. 34,630 State v. Ochoa COA 31,243	04/13/15
No. 34,789 Tran v. Bennett COA 32,677	04/13/15
No. 34,997 T.H. McElvain Oil & Gas v. Benson COA 32,666	08/24/15
No. 34,993 T.H. McElvain Oil & Gas v. Benson COA 32,666	08/24/15
No. 34,726 Deutsche Bank v. Johnston COA 31,503	08/24/15
No. 34,826 State v. Trammel COA 31,097	08/26/15
No. 34,866 State v. Yazzie COA 32,476	08/26/15
No. 35,035 State v. Stephenson COA 31,273	10/15/15
No. 35,478 Morris v. Brandenburg COA 33,630	10/26/15
No. 35,248 AFSCME Council 18 v. Bernalillo County Comm. COA 33,706	01/11/16
No. 35,016 State v. Baca COA 33,626	02/17/16
No. 35,101 Dalton v. Santander COA 33,136	02/17/16
No. 35,198 Noice v. BNSF COA 31,935	02/17/16
No. 35,249 Kipnis v. Jusbasche COA 33,821	02/29/16
No. 35,302 Cahn v. Berryman COA 33,087	02/29/16
No. 35,349 Phillips v. N.M. Taxation and Revenue Dept. COA 33,586	03/14/16



## Petition for Writ of Certiorari Denied:

		Date Order Filed	
No. 35,704	State v. Taylor	COA 33,951	02/10/16
No. 35,703	Roblez v. N.M. Correctional Facility	COA 33,786	02/08/16
No. 35,701	State v. Asarisi	COA 33,531	02/08/16
No. 35,700	State v. Delgarito	COA 34,237	02/08/16
No. 35,699	State v. Lundvall	COA 34,715	02/08/16
No. 35,698	State v. Carmona	COA 34,696	02/08/16
No. 35,694	State v. Baca	COA 34,133	02/08/16
No. 35,693	State v. Navarette	COA 34,687	02/08/16
No. 35,692	State v. Wiggins	COA 33,915	02/08/16
No. 35,689	State v. Griego	COA 34,394	02/08/16
No. 35,521	State v. Shoemaker	12-501	02/08/16
No. 35,256	Dees v. Wrigley	12-501	02/08/16
No. 35,068	Jessen v. Franco	12-501	02/08/16
No. 35,686	State v. Romero	COA 34,264	02/04/16
No. 35,656	Villalobos v. Villalobos	COA 32,973	02/04/16
No. 35,531	Bookhamer v. Sanchez	12-501	02/04/16
No. 35,480	Ramirez v. Hatch	12-501	02/04/16
No. 35,685	State v. Gipson	COA 34,552	01/29/16
No. 35,678	TPC, Inc. v. Hegarty	COA 32,165/32,492	01/29/16
No. 35,676	State v. Sears	COA 34,522	01/29/16
No. 35,675	National Roofing v. Alstate Steel	COA 34,006	01/29/16
No. 35,617	State v. Alanazi	COA 34,540	01/29/16

# Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals  
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

**Effective February 12, 2016**

## Published Opinions

No. 34343	13th Jud Dist Cibola CV-14-80, M BODLEY v C GOLDMAN (affirm)	2/9/2016
No. 33983	2nd Jud Dist Bernalillo CV-09-13108, WELLS FARGO v J PYLE (affirm)	2/9/2016
No. 33350	5th Jud Dist Chaves CR-12-494, STATE v A MESTAS (affirm)	2/11/2016

## Unpublished Opinions

No. 33208	1st Jud Dist Santa Fe CV-10-218, F VENETICO v BANK OF NEW YORK	2/8/2016
No. 34528	WCA-10-66173, L JARAMILLO v DEPT OF CORRECTIONS (affirm)	2/8/2016
No. 34905	9th Jud Dist Curry CR-11-113, STATE v D BROWN (affirm)	2/8/2016
No. 33320	2nd Jud Dist Bernalillo CR-11-1734, STATE v J GARCIA (affirm)	2/8/2016
No. 34611	3rd Jud Dist Dona Ana CV-14-976, CITIBANK v R DE PIAZZA (affirm)	2/8/2016
No. 34725	1st Jud Dist Santa Fe DM-10-751, R MASTRANTONI v V MASTRANTONI (affirm)	2/10/2016
No. 35079	9th Jud Dist Curry CR-11-630, STATE v C DIAZ (affirm)	2/9/2016
No. 34546	1st Jud Dist Santa Fe CV-13-1202, MESA STEEL v S DENNIS (affirm)	2/9/2016
No. 34643	5th Jud Dist Lea CV-13-603, S CASTILLO v NOR-LEA GENERAL (affirm in part, dismiss in part)	2/9/2016
No. 33867	12th Jud Dist Otero CR-11-101, STATE v C PEDROZA (affirm)	2/10/2016
No. 34499	9th Jud Dist Roosevelt PB-12-17, PB-12-16, S RUSSELL v ESTATE OF D RUSSELL (affirm)	2/10/2016
No. 34686	5th Jud Dist Chaves CR-12-187, STATE v J BERSANE (affirm)	2/11/2016

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>

# Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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# Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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**Effective February 24, 2016**

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## **PENDING PROPOSED RULE CHANGES OPEN FOR COMMENT:**

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Comment Deadline

*None to report at this time.*

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## **RECENTLY APPROVED RULE CHANGES SINCE RELEASE OF 2015 NMRA:**

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### **SECOND JUDICIAL DISTRICT COURT LOCAL RULES**

LR2-400 Case management pilot program  
for criminal cases.

02/02/16

To view all pending proposed rule changes (comment period open or closed),  
visit the New Mexico Supreme Court's website at <http://nmsupremecourt.nmcourts.gov>.  
To view recently approved rule changes, visit the New Mexico Compilation Commission's website  
at <http://www.nmcompcomm.us>.



From the New Mexico Supreme Court

**Opinion Number: 2015-NMSC-033**

No. S-1-SC-34995 (filed October 15, 2015)

STATE OF NEW MEXICO,  
Plaintiff-Petitioner,

v.

DeANGELO M.,  
Child-Respondent.

**ORIGINAL PROCEEDING ON CERTIORARI**

DREW D. TATUM, District Judge

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for Petitioner

ROBERT E. TANGORA  
ROBERT E. TANGORA, L.L.C.  
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for Respondent

## Opinion

**Edward L. Chávez, Justice**

{1} DeAngelo M. (Child) was thirteen years and eight days old when during a custodial interrogation by three law enforcement officers, he made inculpatory statements regarding a burglary, which connected Child to a murder. Had Child made his statements nine days earlier, his statements would not have been admissible against him in any delinquency proceedings. NMSA 1978, § 32A-2-14(F) (2009). Had Child been fifteen years old at the time of his statement, his statement would be admissible if the prosecution proved by a preponderance of the evidence that Child's statement was elicited after his knowing, intelligent and voluntary waiver of his constitutional and statutory rights. Section 32A-2-14(D), (E); *State v. Martinez*, 1999-NMSC-018, ¶ 14, 127 N.M. 207, 979 P.2d 718. However, because Child was thirteen years old and his statement was given to a person in a position of authority, there is a rebuttable presumption that his statement is inadmissible in any delinquency proceedings. Section 32A-2-14(F). {2} How does the prosecution rebut this presumption? The Court of Appeals held that the prosecution must prove by clear and convincing evidence, through expert testimony, that "Child had the maturity

and intelligence of an average fifteen-year-old child to understand his situation and the rights he possessed." *State v. DeAngelo M.*, 2015-NMCA-019, ¶¶ 21, 23-24, 344 P.3d 1019. The Court of Appeals reversed the district court's denial of the motion to suppress because the prosecution did not meet this burden and remanded for a new trial. *See id.* ¶¶ 23, 24. We granted the State's petition for certiorari, *State v. DeAngelo M.*, 2015-NMCERT-002, to consider the following issues: (1) whether the Court of Appeals erred by holding that the State can only rebut the presumption of inadmissibility by showing that the thirteen- or fourteen-year-old child has the intellectual capacity of an average fifteen-year-old; (2) whether the Court of Appeals erred by holding that the State must rebut the presumption of inadmissibility by clear and convincing evidence rather than by a preponderance of the evidence; and (3) whether the Court of Appeals erred by holding that the State can only rebut the presumption of inadmissibility through expert testimony.

{3} We hold that Section 32A-2-14(F) requires the State to prove by clear and convincing evidence that at the time a thirteen- or fourteen-year-old child makes a statement, confession, or admission to a person in a position of authority, the child (1) was warned of his constitutional and statutory rights, and (2) knowingly, intelli-

gently, and voluntarily waived each right. To prove the second element, the recording of the custodial interrogation which resulted in the statement, confession, or admission must prove clearly and convincingly that the child's answer to open-ended questions demonstrated that the thirteen- or fourteen-year-old child has the maturity to understand each of his or her constitutional and statutory rights and the force of will to insist on exercising those rights. Expert testimony may assist the fact-finder in understanding the evidence or determining the facts necessary to satisfy this requirement, but it is not essential. We conclude that the evidence in this case does not prove that Child knowingly, intelligently, and voluntarily waived each right. Therefore, his statement should be suppressed.

### **I. Section 32A-2-14(F) requires the State to rebut the presumption of inadmissibility by clear and convincing evidence**

{4} The Fifth Amendment to the United States Constitution provides individuals a constitutional right against self-incrimination by providing that an individual shall not "be compelled in any criminal case to be a witness against himself [or herself]." U.S. Const. amend. V. In *Miranda v. Arizona*, the United States Supreme Court articulated warnings that law enforcement must give to a suspect before the suspect can be subjected to a custodial interrogation without compromising his or her privilege against self-incrimination. 384 U.S. 436, 479 (1966). The Court explained that:

Prior to any questioning, the person must be warned that he [or she] has a right to remain silent, that any statement he [or she] does make may be used as evidence against him [or her], and that he [or she] has a right to the presence of an attorney, either retained or appointed.

*Id.* at 444. "After such warnings have been given, and such opportunity afforded him [or her], the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* at 479. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease." *Id.* at 473-74.

{5} "[W]hile the federal constitution provides a minimum level of protection below

which the states may not descend, states remain free to provide greater protection.” *State v. Javier M.*, 2001-NMSC-030, ¶ 24, 131 N.M. 1, 33 P.3d 1 (alteration in original) (internal quotation marks and citation omitted). “Hence, it is completely within the Legislature’s authority to provide greater statutory protection than accorded under the federal Constitution.” *Id.* The New Mexico Legislature did just that by its enactment of the Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33(1993, as amended through 2009).

{6} The Delinquency Act provides children with “greater protections than those constitutionally afforded [to] adults with regard to the admissibility of a child’s statements or confessions.” *State v. Adam J.*, 2003-NMCA-080, ¶ 3, 133 N.M. 815, 70 P.3d 805 (citing § 32A-2-14(C)-(G)). Relevant to our inquiry in this case, Section 32A-2-14(F) provides:

Notwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition. There is a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible.

{7} What is not clear from the text is how the prosecution is expected to rebut the presumption. What is the prosecution’s burden of proof? What evidence will overcome the presumption? This case requires us to construe Section 32A-2-14(F). “Statutory interpretation is a question of law, which we review de novo.” *State ex rel. Children, Youth & Families Dep’t v. Djamila B. (In re Mahdjid B.)*, 2015-NMSC-003, ¶ 12, 342 P.3d 698, 702 (internal quotation marks and citation omitted). “We look first to the plain language of the statute.” *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm’n*, 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105. “However, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied.” *Djamila B.*, 2015-NMSC-003, ¶ 25 (internal quotation marks and citation omitted). “In doing so, we examine the plain language of the statute as well as the context in which it was promulgated, including the history of the statute and the object and purpose the Legislature sought to accomplish.” *State v. Office of the Pub. Def. ex rel. Muqqaddin*,

2012-NMSC-029, ¶ 13, 285 P.3d 622 (internal quotation marks and citation omitted). {8} One of the express purposes of the Delinquency Act is “to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions to the extent of the child’s age, education, mental and physical condition, background and all other relevant factors.” Section 32A-2-2(A). This express purpose is consistent with the overarching legislative goals of the Children’s Code, NMSA 1978, §§ 32A-1-1 to -24-5 (1993, as amended through 2009), which ensures that children’s constitutional and statutory rights are recognized and enforced:

The Children’s Code shall be interpreted and construed to effectuate the following legislative purposes:

A. first to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children’s Code . . . ; [and]

B. to provide judicial and other procedures through which the provisions of the Children’s Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced . . .

Section 32A-1-3(A)-(B).

{9} Prior to 1993 no confession, statements or admissions made by a child under the age of fifteen could be introduced against the child. NMSA 1978, § 32-1-27(F) (1992). The legislative rationale for categorically excluding such statements was because

[c]hildren of tender years lack the maturity to understand constitutional rights and the force of will to assert those constitutional rights. Children are encouraged to respect and obey adults and should not be expected to assert their constitutional rights even under the most perfunctory questioning by any adult, particularly an adult of authority. By prohibiting the admission of statements made by children under age fifteen, Section 32-1-27(F) encourages children to freely converse with adults without fear that their statements will be used against them at a later date. In contrast,

an adult or a child over age fifteen is unlikely to make an involuntary statement in a noncustodial, noncoercive atmosphere or after receiving *Miranda* warnings. The additional protection that Section 32-1-27(F) grants children under age fifteen helps to balance these differences in sophistication.

*State v. Jonathan M.*, 1990-NMSC-046, ¶ 8, 109 N.M. 789, 791 P.2d 64.

{10} However, in 1993 the Legislature revised the Children’s Code, and along with it replaced Section 32-1-27 with Section 32A-2-14(F). Rather than excluding from evidence all statements made by children under fifteen, the Legislature decided to exclude from evidence only statements made by children younger than thirteen years old. *See* § 32A-2-14(F). The Legislature chose to treat thirteen- and fourteen-year-old children differently than children older than fourteen or younger than thirteen. *See* NMSA 1978, § 32A-2-14(F) (1993); *State v. Jade G.*, 2007-NMSC-010, ¶ 16, 141 N.M. 284, 154 P.3d 659 (“The fact that the Legislature drew a distinction between children [of different ages] demonstrates its clear intent to treat the . . . groups differently, and the plain language of this statute explains the nature of that difference.”).

{11} By categorizing children into different age groups, the Legislature distinguished between the different age groups’ intellectual and developmental capacities to knowingly, intelligently, and voluntarily waive their *Miranda* and statutory rights. *See Adam J.*, 2003-NMCA-080, ¶ 20 (Alarid, J., specially concurring). For example, although Section 32A-2-14 provides greater protections for all children than does *Miranda*, the Legislature treats children fifteen and older as having the intellectual and developmental capacity of adults to waive their constitutional and statutory rights. *See Jonathan M.*, 1990-NMSC-046, ¶ 8 (explaining that like adults, children over fifteen are unlikely to make involuntary statements after *Miranda* warnings due to their higher level of sophistication).

{12} On the opposite end of the age groups are children younger than thirteen. Unlike children fifteen and older, the Legislature precludes the introduction of confessions, statements, or admissions against a child under the age of thirteen on the allegations of a delinquency petition, regardless of the context in which or to whom the statements were made. Section

32A-2-14(F); see *Jade G.*, 2007-NMSC-010, ¶ 16. The Legislature has made the policy decision that children younger than thirteen lack the maturity to understand their constitutional and statutory rights and the force of will to assert those rights. Accordingly, Section 32A-2-14(F) provides no exceptions permitting “the admission of statements made by children under thirteen.” *Jade G.*, 2007-NMSC-010, ¶ 16.

{13} By creating fundamentally distinct protections for children fifteen and older and for children younger than thirteen, the Legislature intended to “‘draw [a] line between children who are too young to waive their rights and those who are not.’” *Adam J.*, 2003-NMCA-080, ¶ 8 (citations omitted). The Legislature chose not to treat thirteen- and fourteen-year-old children categorically as belonging at one end or the other of this childhood developmental spectrum. Some may lack the maturity to understand their constitutional and statutory rights and the force of will to assert those rights, and some may not.

{14} To address this uncertainty, under Section 32A-2-14(F) any statement, admission, or confession of a child thirteen or fourteen years old is presumed to be inadmissible unless the State rebuts the presumption. The State’s burden of proof is not defined in the statute; therefore, it is our responsibility to make that determination. *State v. Valdez (In re Valdez)*, 1975-NMSC-050, ¶ 12, 88 N.M. 338, 540 P.2d 818 (citing *Woodby v. Immigration Serv.*, 385 U.S. 276, 284 (1966)). The State argues that it should only have to prove “by a preponderance of the evidence, that [Child] was advised of [his] rights and knowingly, intelligently, and voluntarily waived those rights.” The State maintains that it can rebut the presumption of inadmissibility when “the district court determines that the child made a knowing, intelligent, and voluntary waiver of rights” by utilizing the totality of circumstances factors listed under Section 32A-2-14(E). If we were to agree with the State’s argument, we would in essence be treating thirteen- and fourteen-year-old children the same as fifteen-year-old children. We conclude that the Legislature did not intend this result. The purpose of a burden of proof is to “‘instruct the factfinder concerning the degree of confidence our society thinks he [or she] should have

in the correctness of factual conclusions for a particular type of adjudication.’” *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The legislative history of Section 32A-2-14(F) and the importance of protecting children younger than fifteen years of age from unknowing or involuntary waivers of their rights leads us to conclude that clear and convincing evidence is the proper burden of proof for rebutting the presumption of inadmissibility under Section 32A-2-14(F). *DeAngelo M.*, 2015-NMCA-019, ¶¶ 14-16.

**II. To overcome the presumption, the State must prove by clear and convincing evidence that the thirteen- or fourteen-year-old child had the maturity to understand his or her constitutional and statutory rights and the force of will to invoke such rights**

{15} We next address what clear and convincing evidence must be introduced by the State to rebut the presumption of inadmissibility under Section 32A-2-14(F). The State maintains that evidence relating to the Section 32A-2-14(E) factors should suffice. Section 32A-2-14(E) provides:

In determining whether the child knowingly, intelligently and voluntarily waived the child’s rights, the court shall consider the following factors:

- (1) the age and education of the respondent;
- (2) whether the respondent is in custody;
- (3) the manner in which the respondent was advised of the respondent’s rights;
- (4) the length of questioning and circumstances under which the respondent was questioned;
- (5) the condition of the quarters where the respondent was being kept at the time of being questioned;
- (6) the time of day and the treatment of the respondent at the time of being questioned;
- (7) the mental and physical condition of the respondent at the time of being questioned; and
- (8) whether the respondent had the counsel of an attorney,

friends or relatives at the time of being questioned.

{16} The Court of Appeals held generally that “the state must present evidence as to both the benchmark to be reached and the qualities of the child that meet it and that the thirteen-year-old child possessed personal faculties equivalent to what is required to find an ability to waive rights that would satisfy an adult standard for waiver.” *DeAngelo M.*, 2015-NMCA-019, ¶ 13. The Court of Appeals determined that lay witnesses lack the expertise to determine whether a thirteen- or fourteen-year-old child has the intellectual characteristics that would render him or her the equal of an average fifteen-year-old in understanding and appreciating the significance of a *Miranda* waiver. See *id.* Consequently, the Court of Appeals would require expert testimony, although it did not identify the type of expertise required. *Id.* ¶¶ 13-15.

{17} Although we do not agree entirely with the Court of Appeals, we conclude that the Legislature intended a different analysis by drawing a distinction between fifteen-year-old children and thirteen- and fourteen-year-old children, although the Subsection E factors are also relevant. We hold that the State must first prove by clear and convincing evidence that at the time the thirteen- or fourteen-year-old child made his or her statement to a person in a position of authority, the child had the maturity to understand his or her constitutional and statutory rights and the force of will to assert those rights. It is not necessary to prove that the child had the maturity and intellectual capacity of an average fifteen-year-old child. How such a determination could be made is not evident from the Court of Appeals’ opinion.

{18} The Court of Appeals stated that expert testimony would be required. However, Child did not introduce evidence to the trial court to establish what kind of expert might be able to derive an opinion about children’s capacity to waive their *Miranda* and statutory warnings. In his brief in chief Child cited Thomas Grisso, *Adolescents’ Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 New Eng. J. on Crim. & Civ. Confinement 3, 12 (2006) as an example of potentially useful expert testimony.<sup>1</sup> However, without

<sup>1</sup>See also Thomas Grisso, *Instruments for Assessing Understanding & Appreciation of Miranda Rights* (1998); Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134 (1980); I. Bruce Frumkin, et. al., *The Grisso Tests for Assessing Understanding and Appreciation of Miranda Warnings with a Forensic Sample*, 30 Behav. Sci. L. 673 (2012). In 2012, Dr. Thomas Grisso published *The Miranda Rights Comprehension Instruments (MRCI)*, which provides instruments that have been updated since the publication of his original *Instruments for Assessing Understanding & Appreciation of Miranda Rights*.

a record that establishes the validity and reliability of the expert's methodology, we are unable to make an informed decision about the utility of such expert testimony. The undeveloped record before this Court prevents us from categorically affirming the Court of Appeals' broad holding, which would require expert testimony and evaluations of the child, most likely by mental health professionals, in all cases involving statements made by thirteen- or fourteen-year-old children to persons in a position of authority.

{19} Absent an evaluation by an expert, interrogators in a position of authority can preserve the evidence needed by the State to rebut the presumption of inadmissibility for thirteen- and fourteen-year-old children under Section 32A-2-14(F). NMSA 1978, Section 29-1-16 (2006) requires law enforcement officers, with limited exceptions, to electronically video and audio record their custodial interrogations. *See, e.g., State v. Spriggs-Gore*, 2003-NMCA-046, ¶¶ 14-15, 133 N.M. 479, 64 P.3d 506 (noting that the interrogating law enforcement officer recorded and transcribed "approximately five and one-half hours of conversation with Defendant"). In order to obtain the clear and convincing evidence needed to rebut the presumption of inadmissibility, the interrogator who is in a position of authority must first adequately advise the thirteen- or fourteen-year-old child of his or her *Miranda* and statutory rights and then invite the child to explain, on the record, his or her actual comprehension and appreciation of each *Miranda* warning. This could be done by having the child explain in his or her own words—without suggestions by the interrogator—what each of the rights means to the child. An effective inquiry into a thirteen- or fourteen-year-old child's actual comprehension and appreciation of each right under *Miranda* requires more than simple "yes" answers or a signed *Miranda* notification and consent form on the child's part, when the child may or may not be able to fully process a formal recitation of the four warnings. It is through the child's articulation of his or her understanding that a fact-finder could assess whether the child appreciated the function and significance of each right in the context of not only police questioning, but in future court proceedings. A court deciding a motion to suppress pursuant to Section 32A-2-14(F) would be able to assess the child's actual understanding of the *Miranda* rights and whether the child

made a rational choice based on the child's appreciation of the consequences of his or her decision from evidence developed at the time of his or her interrogation. Ultimately, a district court judge should suppress any statement made by a thirteen- or fourteen-year-old child unless the judge finds that the child clearly and convincingly demonstrated his or her maturity to understand his or her constitutional and statutory rights and possessed the force of will to assert those rights.

### III. The agents failed to produce sufficient evidence to rebut the presumption

{20} Child was born on July 15, 1997. On July 26, 2010, the State charged Child with one count of residential burglary contrary to NMSA 1978, Sections 30-16-3(A) (1963) and 32A-2-3(A) (2009); one count of tampering with evidence contrary to NMSA 1978, Sections 30-22-5 (2003) and 32A-2-3(A); and one count of larceny of over \$250 (but not more than \$500) contrary to NMSA 1978, Sections 30-16-1(C) (2006) and 32A-2-3(A). Around noon on July 23, 2010, eight days after Child's thirteenth birthday, Agent Daniel Blair transported Child and Child's mother to the Roosevelt County Law Enforcement Complex to interrogate Child. Child's mother was present during the entire interrogation.

{21} Agents Dan Aguilar and Daniel Blair, who are investigators with the District Attorney's office, and Detective John Mondragon, who is a detective with the Portales Police Department, interrogated Child. When Agent Blair began advising Child of his *Miranda* rights, Agent Blair appeared to agree with the Legislature's presumption that a thirteen-year-old child does not have the maturity to understand his or her *Miranda* rights when he stated "[y]ou have to be advised of your rights pursuant to rule 32A-2-14 of the Children's Code Rules of Procedure and the constitution. You probably don't understand that because I don't understand part of that but it's a rule that we gotta do. Okay?"

{22} The following exchange occurred between Agent Blair and Child as Agent Blair attempted to read and explain to Child the right to remain silent:

Agent Blair: It tells us—you have the right to remain silent. You don't have anything—if you . . . you do not have to say anything if you do not want to. I've been up for a little while so I'm not reading properly. Like I'm

reading at a second grade level—just tell me. You can probably read better. Do you understand that?

Child: Kind of. Yeah.

Agent Blair: What do you think that means?

Child: Don't talk on your own behalf.

Agent Blair: Or you don't have to talk to us if you don't want to and your mom will explain that.

Agent Blair initially and correctly invited Child to explain in his own words what Child understood the right to remain silent means rather than accept Child's unclear response of "Kind of. Yeah." Apparently dissatisfied with Child's explanation of his right to remain silent, Agent Blair simply corrected Child without inviting Child to further explain his actual comprehension and appreciation of the right for a second time. It is not clear from this exchange whether Child fully comprehended his right to remain silent. Agent Blair also erroneously suggested to Child that his mother could counsel Child as an equivalent substitute to an attorney. In any event, during the entire exchange regarding Child's right to remain silent, it was never developed whether Child was able to use the information provided by the warning, grasp the significance of his right to remain silent, and weigh his options and the consequences of his decisions.

{23} Agents Blair and Aguilar hurriedly and equivocally warned Child of his remaining rights.

Agent Blair: Anything you say can be used against you in court. Okay on TV when they read these—they read them to adults and that means that they've arrested them but that's not happening here okay? That's, that's why I didn't want to—uh—do you understand what that means? Okay, you can talk to your parents, your guardian, and an attorney. You got your parent/guardian right here with you um. [Y]ou have the right to have you [sic] parent/guardian parent present during any questioning. If you can not afford a lawyer, one may be appointed for you before any questioning. These are the ones on TV. Um, if you decide to answer questions um, without an attorney, you can—you still have the right to stop answering questions anytime. You

have the right to stop answering questions any time till you talk to an attorney. Now you understand what I just said?

Child: Not really.

Agent Blair: You didn't understand those? Which ones?

Child: —I think I understand that you can talk to the Judge—no, you can talk without an attorney. And then you can stop if it's just like—too getting out of hand. You can stop.

Agent Blair: —You're right on the—

Child: —answering questions. Until you get an attorney.

Agent Blair: You're absolutely right.

Agent Aguilar: —Correct.

Child: Okay.

This exchange failed to capture Child's actual comprehension and appreciation of his remaining rights. Agent Blair's description of these rights can only be characterized as confusing. Persons in a position of authority must advise thirteen- and fourteen-year-old children of their constitutional and statutory rights in a clear and intelligible manner if they want to rebut the presumption under Section 32A-2-14(F). The manner in which a child is informed of his or her constitutional and statutory rights is relevant to whether the child knowingly waived his or her rights. In this case, it is impossible to ascertain Child's comprehension and appreciation of his rights without a clear and intelligible advisement of such rights. First, the manner in which Agent Blair advised Child of the three remaining *Miranda* warnings, which included mentioning rights read on television, suggesting that the rights only apply when people are arrested, and explaining that Child was not under arrest, was at best confusing and at worst clearly erroneous. Thirteen- or fourteen-year-old children possess these constitutional and statutory rights whether or not they are under arrest. It is not surprising that Child responded that he did "[n]ot really" understand his rights as they were presented by Agent Blair.

{24} Second, Agent Blair asked Child to identify which warnings Child did not understand. In response, the interrogation transcript appears to indicate that Child confused the right to remain silent with the right to an attorney. Child explained that he thought he understood that he had a right to talk without an attorney, but that

Child could then stop the interrogation only if Child thought the interrogation was "getting out of hand" and not answer the questions until he obtained an attorney. Agents Blair and Aguilar simply told Child that he was absolutely correct and moved on. Given this exchange, we are left without any clear indication of whether Child actually comprehended and appreciated each of the *Miranda* warnings.

{25} As he read Child his *Miranda* rights, Agent Blair also presented Child with a notification and waiver form listing those rights, and Child wrote his initials next to each right listed on the form. Both Child and his mother signed the notification and waiver form.

{26} Child's lack of understanding of his rights and his inability to invoke his rights was also demonstrated by what occurred during the interrogation after the forms were signed. Child initially admitted that he broke into the victim's home and stole personal items identified by Agent Blair that belonged to the victim. However, Child denied taking a gun or any ammunition from the victim's home, and also denied involvement in the victim's shooting. When Agent Blair told Child that he believed Child had shot and killed the victim, Child denied killing the victim, became very upset, and started to cry. Child eventually told Agent Blair "I don't want to talk anymore." Agents Blair and Aguilar acknowledged and confirmed Child's invocation of his right to remain silent. Agent Blair specifically responded, "You don't want to talk anymore? Okay," while Agent Aguilar stated, "We're done. Then." The interrogation stopped while Agents Blair and Aguilar collected a saliva swab sample from Child and Child used the restroom.

{27} Following the break, Agents Blair and Aguilar reinitiated the interrogation, reminding Child that he could ask to stop any further questions if he did not want to talk.

Agent Aguilar:

DeAngelo we want to—we just, I just want to ask you a few questions okay? You admitted that you went into the house and took some things and stuff like that—that's all we want to talk to you about okay? We don't want to talk to you about a gun or we don't want to talk to you about any of that other stuff. Okay? Is that alright?

Child: (inaudible response)

Agent Aguilar:

Okay, um, with that in mind—you just keep in mind this, you can do exactly what you did the last time, okay? When you've had enough and you don't want to talk to us anymore, you just tell us you don't want to talk anymore. Okay? Is that alright? (inaudible response) Okay, now, when, when you into uh . . . their house on Sunday—you remember? Yes? Sunday or whatever day—over the weekend. While they were gone. And the things that you took, where did you hide them till you got rid of them? Or did you get rid of everything?

In response, Child provided more details about the specific circumstances of how he stole certain items from the victim's home. Resuming the interrogation of Child after Child said he did not want to talk does not scrupulously honor the invocation of an individual's right to remain silent that the law requires. *State v. King*, 2013-NMSC-014, ¶ 8, 300 P.3d 732. "The moment that the unambiguous statement is made, the interrogator must 'scrupulously honor' the suspect's or person's right by ceasing the interrogation." *Id.* When Child continued to answer questions after stating that he did not want to talk, this provided additional evidence that Child did not possess either the maturity to understand his rights or the force of will to assert those rights.

{28} Following this interview, Child's charges were amended to (1) one count of first degree murder contrary to NMSA 1978, Sections 30-2-1(A)(1) (1994) and 32A-2-3; (2) one count of aggravated burglary contrary to NMSA 1978, Sections 30-16-4(B) (1963) and 32A-2-3; (3) two counts of tampering with evidence contrary to Sections 30-22-5 and 32A-2-3; and (4) one count of larceny over \$250 (but not more than \$500) contrary to Sections 30-16-1 and 32A-2-3. Prior to trial, Child timely filed a motion to suppress the inculpatory statements he made during the July 23, 2010 interview, arguing that the State failed to adequately rebut the presumption that his statements were inadmissible pursuant to Section 32A-2-14(F).

{29} During the suppression hearing, the State presented testimony from Agents Blair and Aguilar and Child's teacher at the detention center where Child was held. The district court found their testimony persuasive, noting in its decision letter that Agents Blair and Aguilar both testified that "based on their experience in interview-



ing children of similar age, [Child] was articulate, inquisitive and fully aware of his constitutional rights, and [Child] appeared to be more mature and intelligent than children of his age.” The district court noted that Child’s teacher testified that Child was “well-read, inquisitive and readily corrects the grammar and vocabulary of other juveniles detained in the Curry County Juvenile Detention Center, and in his opinion, [Child] is more intelligent than the average juvenile detainees in his age group.” The district court denied Child’s motion and determined that Child “knowingly, voluntarily and intelligently waived his constitutional rights prior to speaking with law enforcement, and, as a result, the State has overcome the rebuttable presumption that the statements of [Child] are inadmissible.”

{30} On this record, we conclude that the State failed to meet the burden of proof necessary to overcome the statutory presumption against admitting Child’s state-

ments. The testimony of the interrogating officers is not the type of evidence that could overcome this presumption. What must be considered is the evidence from the recorded interview, not the officers’ characterization of Child’s maturity to understand and invoke his constitutional and statutory rights. The State’s evidence concerning whether Child reads books, converses with adults, corrects other children’s vocabulary and grammar, and seems more intelligent and mature than other children is only indirectly related to whether Child actually comprehended and appreciated each *Miranda* warning that he was given. While such evidence is relevant, the court must first determine whether at the time of the interrogation the child exhibited the maturity to understand each of his or her constitutional and statutory rights and possessed the force of will to invoke such rights. Absent clear and convincing evidence which proves that Child understood each right, Child’s school

performance is not material evidence. In this case, the transcript of the interrogation falls far short of establishing any of the required showings. Accordingly, the district court erred in denying Child’s motion to suppress because the State did not meet its burden of rebutting the presumption of inadmissibility under Section 32A-2-14(F) by clear and convincing evidence.

#### **IV. Conclusion**

{31} For the foregoing reasons, we affirm the Court of Appeals on different grounds and reverse the district court’s denial of Child’s motion to suppress. We remand for further proceedings in accordance with this opinion.

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

**EDWARD L. CHÁVEZ, Justice**

#### **WE CONCUR:**

**BARBARA J. VIGIL, Chief Justice**

**PETRA JIMENEZ MAES, Justice**

**RICHARD C. BOSSON, Justice**

**CHARLES W. DANIELS, Justice**

From the New Mexico Supreme Court

**Opinion Number: 2015-NMSC-034**

No. S-1-SC-34548 (filed October 19, 2015)

STATE OF NEW MEXICO,  
Plaintiff-Petitioner,  
v.  
NORMAN DAVIS,  
Defendant-Respondent.

**ORIGINAL PROCEEDING ON CERTIORARI**

JOHN M. PATERNOSTER, District Judge

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MARC ROTENBERG  
ALAN J. BUTLER  
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Washington, D.C.  
for Amicus Curiae Electronic  
Privacy Information Center

## Opinion

**Richard C. Bosson, Justice**

{1} Defendant Norman Davis was convicted of possession of marijuana after New Mexico State Police officers consensually searched his greenhouse and seized 14 marijuana plants. That search was the result of “Operation Yerba Buena 2006,” a comprehensive aerial surveillance of Davis’ property and the surrounding area conducted by a coordinated law enforcement effort that allegedly discovered marijuana plants growing on Davis’ property. We decide whether that aerial surveillance, and the manner in which it was conducted, amounted to a warrantless search of Davis’ property contrary to rights secured to him under the Fourth Amendment to the U.S. Constitution. Concluding that his federal constitutional rights were violated in this instance, we reverse the opinion of the Court of Appeals to the contrary as well as Davis’ conviction below.

### BACKGROUND

{2} Over a period of time during 2005 and 2006, the New Mexico State Police received

several reports that residents were growing marijuana plants throughout rural areas of Taos County, New Mexico. The informants, however, were unable or unwilling to provide the police with specific locations where marijuana was growing due to the remoteness of the area and fear of retaliation. In investigating the reports, the New Mexico State Police, Region Three narcotic agents, and the New Mexico National Guard organized Operation Yerba Buena, described as “a collaborative effort in the identification of marijuana plantations in Taos County with the use of two Army National Guard OH 58 Jet Ranger helicopters.”

{3} Prior to the execution of Operation Yerba Buena, the State Police developed an operation plan to provide a common working framework for everyone participating in the operation and to ensure that all participating agencies followed State Police policies and procedures. The plan divided the search areas of Carson Estates and Twin Peaks—vast rural tracts in Taos County—between two separate search teams. Each team consisted of an

Army National Guard helicopter with an observer and a ground team comprised of individuals from various law enforcement agencies. All ground team officers were required to carry standard issue State Police tape recorders to be used during any “interviews/arrests, [and] during [any] contacts from which there are reasons to believe a complaint could result in an arrest.” (Emphasis in original.)

{4} During the operation, the helicopter observers were instructed to fly over the assigned portions of the search area to look for potential “marijuana plantations.” Once an observer spotted marijuana plants, he was instructed to contact the corresponding ground team staged at a pre-identified area and guide the team to the location of the plants. The ground team would then approach and make contact with the particular house to confirm or deny the existence of marijuana. The helicopter was to remain in the vicinity to provide cover and safety to its ground team.

{5} On August 23, 2006, at approximately 9:00 a.m., the helicopters departed the Taos Regional Airport. The total operation lasted approximately ten hours. During that time, the helicopter observers identified possible marijuana plantations at eight properties and directed the ground teams accordingly.

### The Davis residence

{6} Observer Travis Skinner, upon identifying a potential marijuana plantation, directed his ground team—five vehicles containing at least six armed law enforcement officers—to the Davis residence. Davis’ property was enclosed from ground level view by fences that ran along the property line, several large trees and bushes, and a “shade screen.” However, when looking down on Davis’ property from the helicopter, Sergeant Skinner was able to see and relay to the ground team the presence of a greenhouse as well as what appeared to be marijuana plants located at the back of Davis’ property near the house. Sergeant Skinner also informed the team that there were dogs on the property.

{7} Davis stated he was “in bed and not feeling very well when [he] heard a helicopter hovering very low, right on top of [his] house.” He stated that the helicopter was making “a considerable racket” and that when the sound did not go away, he went outside to see “what . . . was going on.” He observed the helicopter hovering approximately 50 feet above his head “kicking up dust and debris that was swirling all around.”

# YLD...In Brief

The Official Newsletter of the State Bar of New Mexico Young Lawyers Division

February 2016

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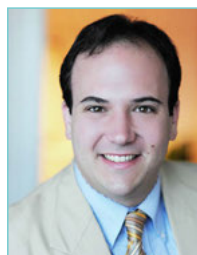
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## Message from the YLD Chair...

By *Spencer Edelman*



Seven years ago I left the comfort and familiarity of home to start a new career and new life in New Mexico. It is a decision I am thankful for every day. Despite the initial difficulty of adjusting to new surroundings, I quickly adapted in no small part because I was welcomed with open arms by a group of colleagues and a group of young lawyers committed to extending New Mexican hospitality to me. As the 2016 chair of the Young Lawyers Division I hope to extend that same hospitality and ensure that all members of our division know that they have a home in the YLD.

Accordingly, this year we will be placing extra focus on getting CLEs that are useful, interesting and entertaining for YLD members, in particular. We will also be doing our best to bring Wills for Heroes clinics, judicial brown bag lunches and networking opportunities around the state. I am fortunate to be guided, surrounded and supported by committed board members from all parts of New Mexico who will be spearheading this effort. If you have questions about upcoming events or want to get more involved by helping set something up, don't hesitate to ask. YLD is the home for young lawyers and everyone is welcome!

All members of the State Bar that are 36 years old or younger or that have been practicing for five years or less are members of the YLD. Our YLD is among the most active divisions in the nation because of the commitment of the leadership and our membership to public service and member service. Two of our recent initiatives demonstrate this commitment. The Veterans' Civil Justice Initiative, a partnership with the VA, the City of Albuquerque, the New Mexico Veteran's Memorial and the Paralegal Division of the State Bar, has provided free legal advice to veterans—giving back to those who have given so much to us. The UNM School of Law Mentorship Program has helped prepare the next generation of young lawyers for practice while also ensuring that law students are welcomed into the State Bar and know all of the services that it provides. In addition, 2015 was a tremendous year for our Wills for Heroes, Constitution Day and Law Day Call-In programs. All five of these programs will continue to grow in 2016 because of the stewardship of your elected board members from around the state and because of all of your volunteer efforts. To get involved (or stay involved) be on the lookout for emails from the State Bar or simply get in touch with me or any YLD board member.

With all of this activity there is still room to grow. My goal in 2016 is to have 100 percent of our YLD membership participate this year. The welcome I received from the New Mexico legal community should reach each and every YLD member. Whether it is volunteering, meeting colleagues at a happy hour, attending a CLE

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## Meet the Board



**Spencer Edelman**  
Chair  
Region 5 Director

**Spencer Edelman** is an associate at the Modrall Sperling law firm, where his practice deals with creditors' rights and litigation with a focus on bankruptcy. His practice also includes representing defendants in asbestos litigation and handling real estate disputes. Edelman's efforts with YLD include organizing Wills for Heroes events for first responders, assisting with the Veterans Civil Justice Initiative, organizing volunteers for the Law Day Call-in Program, and coordinating volunteers and schools for Constitution Day. Edelman serves on the board of the non-profit organization Law Access New Mexico. He plays tennis regularly and attends as many Isotopes games as possible. In 2013-2014 he served as a law clerk for U.S. Bankruptcy Judge David Thuma. He is a graduate of the James E. Rogers College of Law at the University of Arizona and Macalester College in St. Paul, Minn.



**Tomas Garcia**  
Chair-elect  
Director-at-Large, Position 2

**Tomas J. Garcia** is the chair-elect of the Young Lawyers Division. He is a litigation associate at Modrall Sperling in Albuquerque. Before joining Modrall Sperling, Garcia clerked for Justice Charles W. Daniels of the New Mexico Supreme Court. Tomas is a fellow of the American Bar Association Business Law Section and he serves as the vice chair of the Section's Communications and Technology Subcommittee. He is also vice director of the American Bar Association YLD's Affiliates Assistance Team. An Albuquerque native, Garcia received his law degree from Georgetown University Law Center, his master's degree from the Kennedy School of Government at Harvard University and his bachelor's degree from Yale University.



**Sean FitzPatrick**  
Vice Chair  
Director-at-Large, Position 3

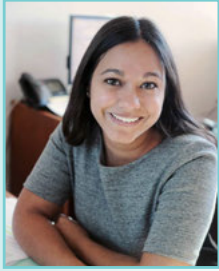
**Sean FitzPatrick** graduated from the UNM School of Law in 2012 with clinical honors for his work in a foreclosure litigation case. After graduation, he worked as a prosecutor in Farmington, handling a range of misdemeanor and felony cases. In 2015, his focus shifted to civil litigation. While his work has shifted over the years, his commitment to the YLD and to New Mexico's legal community has not. He serves in many YLD programs including Wills For Heroes, Constitution Day, UNMSOL Speed Networking, UNMSOL Mentorship Program, UNM Mock Interview Program and the Summer Law Camp. In his spare time, Fitzpatrick enjoys exercising with his wife and going on wilderness adventures in the 10th mountain division and the Grand Canyon.



**Allison Block-Chavez**  
Director-at-Large, Position 1

**Allison Block-Chavez** is an associate attorney at Aldridge, Hammar, Wexler & Bradley, PA, where her law practice focuses on business transactions, commercial litigation, creditors' rights, real estate law, guardianships and conservatorships, wills, trusts and probate matters. Block-Chavez was admitted to the State Bar in September 2014 and served as the judicial law clerk for Chief Judge Michael E. Vigil of the New Mexico Court of Appeals from 2014-2015. As a student at the UNM School of Law, Block-Chavez founded and served as the president of the UNM Law Women's Golf Association, the vice president of community affairs for the Mexican-American Law Student Association and was the student articles editor of the *New Mexico Law Review*. She currently serves on the board for the Elder Law Section and is an American Bar Association Minorities in the Profession Scholar.

## Meet the Board



**Sonia Raichur Russo**  
Director-at-Large, Position 4

**Sonia Raichur Russo** is an assistant district attorney in the Second Judicial District Attorney's Office in Albuquerque and is responsible for prosecuting felony violent crimes. Previously, Russo was with the Modrall Sperling law firm. She currently serves as a 2015-2016 American Bar Association Young Lawyers Division Scholar, co-chairs the Wills for Heroes project, the Homeless Legal Clinic, the Law Day Call-In event and coordinates volunteers for the week of Constitution Day. She earned her Bachelor of Arts in Political Science from Brown University and law degree from Boston College Law School. She served as an extern for Hon. James A. Parker and Hon. C. LeRoy Hansen of the U.S. District Court for the District of New Mexico. At her law school commencement ceremony, Russo was awarded the Susan Grant Demarais Award for Excellence in Clinical Work for her work as a student attorney in the BC Law Prosecution Clinic. Her interests include travel, tennis and myriad visual and performing arts.



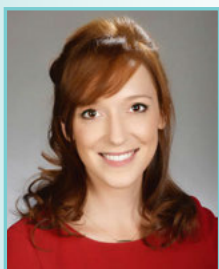
**Robert Lara**  
Director-at-Large, Position 5

**Robert Lara** serves as the staff attorney for the Third Judicial District Court in Las Cruces. He provides the District Court with legal analysis and recommendations on a variety of subject matters. Lara specializes in administrative law, election law and domestic relations. He also supervises the daily operations of the Third Judicial District Court's Self Help Center, which provides assistance to pro se litigants in civil and domestic relations cases. Along with his service on the YLD board, Lara is an officer for the New Mexico Statewide Alumni Chapter of Phi Alpha Delta Law Fraternity International and the treasurer for the Democratic Party of New Mexico. Lara is a 2007 graduate of the University of New Mexico School of Law. When not in the office, he can be found advocating for the New Mexico Dachshund Rescue Association, peddling his bike in a triathlon or on the nearest dance floor.



**Evan Cochnar**  
Region 1 Director

**Evan Cochnar** is originally from California. He earned his Bachelor of Arts in Political Science and History from the University of New Mexico and his law degree from Syracuse University College of Law. He is an assistant district attorney in the 11th Judicial District Attorney's Office prosecuting general adult felonies, including homicide and serious sexual offense cases. While attending law school, he interned at the Albuquerque City Attorney's Office as well as the U.S. Attorney's Office for the District of New Mexico. As a YLD board member, he sits on the Wills for Heroes Committee, Law Day Essay Contest Committee, Constitution Day Committee, 2018 ABA/YLD Annual Convention and Annual Public Service Project in Outlying Areas. His interests include travel, theater, film criticism and reading.



**Jordan Kessler**  
Region 2 Director

**Jordan Kessler** is an attorney at the Santa Fe office of Holland & Hart where she practices natural resources regulatory law. A graduate of UNM School of Law and Tufts University, Kessler enjoys traveling and spending time with family and friends. She was named a 2015 Rising Star by Super Lawyers in energy and natural resources. In addition to her work with the YLD, Jordan is involved in a number of pro bono clinics, including Wills for Heroes and the First Judicial District Legal Fair.



## Meet the Board



**Anna Rains**  
Region 3 Director

**Anna Rains** is a Hobbs native. She earned her Bachelor in Business Administration from New Mexico State University, her Masters of Science in Personal Financial Planning degree from Texas Tech University and her law degree from Texas Tech University School of Law. She is a third year associate at Sanders, Bruin, Coll & Worley PA in Roswell. Rains is a civil litigation attorney who primarily focuses her practice on family law and estate planning. She is an active member of the Chaves County Bar Association, was the 2015 Chaves County Law Day Chair, participates in Big Brothers Big Sisters and is a 2014 Roswell Leadership graduate.



**Erinna Marie "Erin" Atkins**  
Region 4 Director

**Erinna Atkins** is an attorney in Alamogordo. She practices law with her father, S. Bert Atkins. Atkins specializes in criminal defense and children's law. She works in public defender and indigent defense cases in Lincoln and Otero counties. She proudly serves as the guardian ad litem in abuse and neglect cases and maintains a busy family law practice. Atkins is currently the co-president for the 12th Judicial District Bar Association, vice-chair of the Legal Education Committee for New Mexico State University of Alamogordo, a commissioner for the New Mexico Commission for Community Volunteerism, a board member of the Children's Law Section, a board member of the Otero County Juvenile Justice Board, a board member for a non-profit service organization and serves as the substitute Adult Drug Court judge. Atkins is a 2009 graduate of the University of New Mexico School of Law.



**Ken Stalter**  
Past Chair

**Ken Stalter** is an assistant attorney general in the New Mexico Office of the Attorney General. Specializing in criminal appeals, he represents the people of the State of New Mexico in a range of felony and misdemeanor cases, including prosecutions for homicide, sex offenses, and white collar crime. He received his law degree with honors from Harvard Law School. Prior to joining the Office of the Attorney General, he held positions a trial prosecutor, a policy advisor and a public finance attorney. He serves on the board of the New Mexico Young Lawyers Division and the Committee for Rules of Criminal Procedure for the District Courts.

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### Message from the Chair *continued from cover*

or getting to know a judge over an informal basis, I urge all of you to get involved and it is my job to make that as easy as possible.

It is undeniable that time is a scarce resource for everyone and especially for young lawyers trying to establish a practice, however, participating in a YLD event is something that everyone should make time for. Sharing your time

with other members of the bar either in social events, at a CLE, or volunteering will yield dividends for years to come and, on top of that, it will be fun! I look forward to a tremendous year full of fostering existing relationships and establishing new ones. If you have any questions about the YLD or how you can get involved, please don't hesitate to email me at [spencer.edelman@modrall.com](mailto:spencer.edelman@modrall.com) or call me at 505-848-1857. ■

{8} Sergeant Bill Merrell of the New Mexico State Police confronted Davis near Davis' front door. Other officers were present on either side of his driveway. Sergeant Merrell, as heard on the tape recording, approached Davis, identified himself, and said "it appears that the helicopter . . . [was] looking for marijuana plants and they believe they've located some at your residence." Sergeant Merrell asked Davis for permission to search the residence for the marijuana plants seen by the observer. The noise from the helicopter was audible in the background of Sergeant Merrell's recording.

{9} In response to Sergeant Merrell's accusation, Davis admitted that he was growing marijuana in his greenhouse and allowed the officers to search his property. Davis signed a written consent authorizing a complete search of his greenhouse and residence. This Court previously upheld the validity of Davis' consent. *See State v. Davis*, 2013-NMSC-028, ¶ 35, 304 P.3d 10 (*Davis II*). The officers seized 14 marijuana plants from Davis' greenhouse. Neither the flyover of Davis' property nor the resulting search was accompanied by a search warrant.

{10} Several nearby residents characterized the helicopter flyovers during Operation Yerba Buena as terrifying and highly disruptive. Kelly Rayburn watched a helicopter fly around his house about "half a dozen times." Rayburn said the helicopter flew so close to his roof that the downdraft lifted off a solar panel and scattered trash all over his property. Victoria Lindsay observed a helicopter sweeping back and forth over her property, sending debris and personal property all over the yard. Lindsay also observed the helicopter hovering very close to the ground at a neighbor's greenhouse. Merilee Lighty observed a helicopter flying over her property for about 15 minutes. She said it was so close that the downdraft affected her trees and her bushes.

{11} William Hecox did not notice any real dust flying at the time of the flyover, but after the helicopter left he noticed that one of his four-by-four beams was broken at the ground and another one was broken three feet up from the ground. Hecox specifically stated that the beams were not broken prior to the helicopter flying over. He also stated that the noise and effect

from the helicopter upset his turkey and fowl and caused them to "squawk[] and run[] around."

#### Suppression hearing

{12} A grand jury indicted Davis on possession of marijuana contrary to NMSA 1978, Section 30-31-23(A) and (B)(3) (2005), and possession of drug paraphernalia contrary to NMSA 1978, Section 30-31-25(A) (2001), based on the items found during Operation Yerba Buena. Davis filed two suppression motions, arguing that 1) the helicopter surveillance violated his constitutional right to be free from unreasonable searches, and 2) his consent for the subsequent search of his property was involuntary.

{13} Davis requested that the suppression hearing be consolidated with a suppression hearing in a separate case involving Steve Hodges, another Carson resident also charged with possession of marijuana seized from his property as part of Operation Yerba Buena. Although each defendant made additional arguments for suppression (invalid warrant by Hodges and invalid consent by Davis), both presented a similar challenge to the constitutionality of the helicopter surveillance of their property. The district court granted Davis' consolidation request and held an evidentiary hearing on the motions to suppress.

{14} Several Carson residents testified during the hearing, as previously discussed in this opinion. Some residents testified that the surveillance felt like an invasion with the helicopter hovering so close to the ground that the rotor wash and ground effects kicked up dust and blew debris around their property. Others focused their testimony specifically on the noise disruption from the helicopter, stating that they were unable to go outside and work or have a conversation. Still others alleged that the helicopter physically damaged their property, and recounted the damage to the solar panel and the broken support beams discussed above.

{15} Some of the participating officers also testified during the hearing. Sergeant Matthew Vigil, the officer in command of Operation Yerba Buena, testified that the helicopters were flown at a reasonable height above the residents' properties and stated that the pilots "were real strict on guidelines as far as altitude." When asked

generally whether a helicopter ever spent "like five minutes or ten minutes over a property in an altitude of less than a hundred feet," Sergeant Vigil responded in the negative. Sergeant Vigil stated that he was unaware of and did not observe any of the damage or disturbance created by the helicopter's rotor wash alleged by the individual residents.

{16} Sergeant Adrian Vigil, one of the ground officers, testified that the helicopter probably came down to "a couple hundred feet" to confirm its original observations and provide the ground team with cover. He also testified that the helicopter did not go so low that it would cause interference, and said he could not feel any wash from the helicopter. Sergeant Merrell, the ground team officer in charge of the investigation at Davis' residence, gave testimony describing his encounter with Davis, and his audio recording of the encounter, including the audible noise from the hovering helicopter, was submitted into evidence.

{17} After considering all testimony, exhibits, and arguments, the district court denied Davis' suppression motion and issued findings and conclusions in support of its decision. The court analyzed the facts of this case under what it characterized as the *Riley/Ciraolo* rule, a list of factors used by the United States Supreme Court to assess the constitutionality of aerial surveillance.<sup>1</sup> *See Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

{18} According to the district court's findings, the helicopter circled over certain locations and then swooped in for closer looks. The court concluded that "[a] greater degree of intrusion is permissible if aerial surveillance is used to confirm facts, rather than flying around generally in an effort to spot greenhouses, then swooping in lower to see what could possibly be seen." But the district court was "troubled by the testimonial descriptions of rotor wash and flying debris." Although the court believed that some of the testimony was "overly dramatic and anti-police state rhetoric," it found merit to the claim that "the police swooped in as if they were in a state of war . . . [which] can be terrifying and intimidating to most normal persons."

{19} Because surveillance was in response to general vague complaints,

<sup>1</sup>The factors the district court considered were "[e]fforts of the [resident] to protect from aerial intrusions, presence in navigable airspace, the extent of physical intrusion, location of the property, [and] altitude and frequency and circumstances around the means of surveillance."

however, the district court found that “[i]t was not confirmatory activity” and “[t]he claims of dust and destruction [were] negligible, in comparison.” In totality, the court concluded as a matter of law that the helicopter surveillance “just barely” made it over the threshold of validity. The district court then found that Davis’ subsequent consent to the search was valid and not given under duress or coercion. The court denied both of Davis’ motions to suppress. {20} Following the hearing, Davis entered a conditional plea of guilty reserving his right to appeal the district court’s pretrial denial of his motion to suppress. On Davis’ first appeal, our Court of Appeals reversed the district court on the consent finding, concluding that the State failed to establish that Davis’ consent was voluntary. *State v. Davis*, 2011-NMCA-102, ¶ 1, 150 N.M. 611, 263 P.3d 953 (*Davis I*). We granted certiorari and reversed, concluding that substantial evidence supported the district court’s finding that Davis voluntarily consented to the search of his residence. *Davis II*, 2013-NMSC-028, ¶¶ 2, 34. We remanded the case to the Court of Appeals to address remaining issues. *Id.* ¶ 35.

{21} On remand, the Court of Appeals considered the validity of the aerial surveillance under both the U.S. and the New Mexico Constitutions. *State v. Davis*, 2014-NMCA-042, ¶ 4, 321 P.3d 955 (*Davis III*). The Court of Appeals found the surveillance permissible under the Fourth Amendment to the U.S. Constitution, but impermissible under Article II, Section 10 of the New Mexico Constitution. *Davis III*, 2014-NMCA-042, ¶¶ 1, 11, 27. As justification for its holding, the Court of Appeals stated: “The privacy interest protected by Article II, Section 10 is not limited to one’s interest in a quiet and dust-free environment. It also includes an interest in freedom from visual intrusion from targeted, warrantless police aerial surveillance, no matter how quietly or cleanly the intrusion is performed.” *Id.* ¶ 19.

{22} Having determined that the aerial surveillance was unconstitutional, the Court of Appeals then concluded that there was insufficient attenuation to purge Davis’ consent from the illegal search. *Id.* ¶¶ 28-31. Reversing the district court, the Court of Appeals suppressed all evidence obtained from the Davis search. *Id.* ¶¶ 1, 32.

{23} We again granted the State’s petition for certiorari review, *State v. Davis*, 2014-NMCERT-003, this time to determine 1) whether aerial surveillance is a

violation of Article II, Section 10 of the New Mexico Constitution and, if so, 2) whether Davis’ subsequent consent to search his property was sufficiently attenuated from the illegal search.

#### DISCUSSION

**Under our interstitial analysis, we must first consider whether the claimed right is protected under the U.S. Constitution before considering whether the New Mexico Constitution offers broader protection**

{24} When interpreting independent provisions of our New Mexico Constitution for which there are analogous provisions in the U.S. Constitution, New Mexico utilizes the interstitial approach. *State v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1. Under that approach, before reaching the state constitutional claim, we must first determine whether the right being asserted is protected under the Federal Constitution. *Id.* ¶ 19. If the right is protected under the Federal Constitution, our courts do not reach the state constitutional claim. *Id.* In this case, therefore, we must first determine whether the aerial surveillance conducted during Operation Yerba Buena violated the Fourth Amendment. If so, we do not address Davis’ state constitutional claim.

{25} “The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy [in the area searched],” in this case the curtilage of a private home. *Ciraolo*, 476 U.S. at 211 (internal quotation marks and citation omitted). This inquiry normally embraces two discrete questions: “whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy, . . . [and] whether the individual’s subjective expectation of privacy is [objectively] one that society is prepared to recognize as reasonable.” *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks and citations omitted). The determination is based on the totality of circumstances in each particular case. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

**Whether Davis had a reasonable expectation of privacy from a helicopter conducting aerial observation over the curtilage of his home**

{26} The curtilage of a house is considered an extension of the home for Fourth Amendment purposes. *State v. Sutton*, 1991-NMCA-073, ¶ 8, 112 N.M. 449, 816 P.2d 518, *modified on other grounds by Gomez*, 1997-NMSC-006, ¶ 32. As

such, the curtilage has “long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.” *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986). *See also State v. Bryant*, 2008 VT 39, ¶ 13, 950 A.2d 467 (“A home’s curtilage—the ‘area outside the physical confines of a house into which the ‘privacies of life’ may extend”—merits ‘the same constitutional protection from unreasonable searches and seizures as the home itself.’” (first quoting *State v. Rogers*, 638 A.2d 569, 572 (Vt. 1993); then quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984))).

{27} Falling within the curtilage of a home, however, does not automatically warrant protection from all observation under the Fourth Amendment. The U.S. Supreme Court has consistently maintained that the Fourth Amendment offers no protection— even within the home or curtilage—if the observed area is knowingly exposed to public view. *Kyllo v. United States*, 533 U.S. 27, 32 (2001). *See also Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”); *Dow Chem. Co.*, 476 U.S. at 234-35 (visual observation is no search at all). In order to claim protection under the Fourth Amendment, therefore, an individual must take affirmative steps to exhibit an expectation of privacy.

{28} In this case, Davis did take affirmative steps to exhibit an expectation of privacy from ground level surveillance. He fully enclosed his property with ground level “fencing,” using a combination of vegetation and artificial devices. But, exhibiting a reasonable expectation of privacy from ground level surveillance may not always be enough to protect from public or official observation from the air under the Fourth Amendment. *Riley*, 488 U.S. at 450-51.

{29} In two cases remarkably similar to the case at bar, the U.S. Supreme Court addressed the constitutionality of warrantless aerial observation of the curtilage of a home that, like Davis’, was blocked from ground-level observation but left open to observation from the air. In the first case, *California v. Ciraolo*, the police attempted to observe the backyard of a private residence where marijuana was allegedly being grown. *Ciraolo*, 476 U.S. at 213. High double fences completely enclosed the yard, prohibiting all ground

level observation, so officers secured a private plane and flew over the house. *Id.* at 209. From the air, the officers identified marijuana plants and photographed the plants with a standard 35 mm camera. *Id.* {30} The U.S. Supreme Court granted certiorari to determine whether officers violated the Fourth Amendment when they observed the fenced-in backyard within the curtilage of a home from a fixed-wing aircraft at an altitude of 1,000 feet. *Id.* The Court determined there was no reasonable expectation of privacy when the observations “took place within public navigable airspace, in a physically nonintrusive manner.” *Ciraolo*, 476 U.S. at 213 (internal citation omitted).

{31} In support of its holding, the Court stated “[t]he test of legitimacy is not whether the individual chooses to conceal assertedly ‘private activity,’ but instead whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.” *Id.* at 212 (alteration in original) (internal quotation marks and citation omitted).

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

*Ciraolo*, 476 U.S. at 213 (internal quotation marks and citations omitted).

{32} Three years later in *Florida v. Riley*, the U.S. Supreme Court again addressed aerial observation under the Fourth Amendment. 488 U.S. at 447-48. In that case, the officer utilized a helicopter to observe a targeted area. *Id.* at 448 The Court granted certiorari to determine whether warrantless surveillance of a partially covered greenhouse in a residential backyard from a helicopter 400 feet above the greenhouse constituted a search under the Fourth Amendment. *Id.* at 448.

{33} The opinion in *Riley* was badly fractured, but a majority of the Court agreed that the observation was not a search under the Fourth Amendment. *Id.* at 447, 452 (O’Connor, J., concurring). Justice White wrote an opinion for a plurality of four justices. *Id.* at 447. Following the reasoning advanced in *Ciraolo*, the plurality reiterated that:

[T]he home and its curtilage are not necessarily protected from inspection that involves no physical invasion. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. As a general proposition, the police may see what may be seen from a public vantage point where they have a right to be. Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace.

*Riley*, 488 U.S. at 449-50 (internal alterations omitted) (internal quotation marks and citations omitted). The plurality determined that the helicopter, like the airplane in *Ciraolo*, was hovering within the prescribed navigable airspace. *Riley*, 488 U.S. at 451. In making that determination, the plurality relied on Federal Aviation Administration regulations that permit helicopters to operate at less than the minimum altitude for fixed-wing aircraft, as long as the “operation is conducted without hazard to persons or property on the surface.” *Id.* at 451 n.3 (internal quotation marks and citation omitted).

{34} Significantly for our case, the plurality emphasized that the helicopter was not violating the law, and there was no indication in the record that “the helicopter interfered with respondent’s normal use of the greenhouse or of other parts of the curtilage,” or caused undue noise, wind, dust, or threat of injury. *Id.* at 451-52. The plurality thus found that the police did no more than any member of the public could do flying in navigable airspace, and the Court held that the surveillance did not violate the Fourth Amendment. *Id.* at 451. Justice White cautioned, however, that not every inspection of the curtilage of a house from an aircraft will “pass muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law.” *Id.*

{35} Although we avoid the temptation to draw too much settled legal principle from either of these two opinions, we believe certain inferences are appropriate. First, it appears after *Ciraolo* and *Riley* that the Fourth Amendment affords citizens no reasonable expectation of privacy from aerial surveillance conducted in a disciplined manner—mere observation from navigable airspace of an area left open to public view with minimal impact on the ground. It also seems, however, that warrantless surveillance can go beyond benign observation in a number of different ways, one of those being when surveillance creates a “hazard”—a physical disturbance on the ground or unreasonable interference with a resident’s use of his property. In that case, surveillance more closely resembles a physical invasion of privacy which has always been a violation of the Fourth Amendment. See *Riley*, 488 U.S. at 449-52. See also *United States v. Jones*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 945, 955 (2012) (“[A] search within the meaning of the Fourth Amendment occurs, at a minimum, ‘[w]here . . . the Government obtains information by physically intruding on a constitutionally protected area.’” (Sotomayor, J., concurring, quoting 132 S. Ct. at 950 n.3.) (second alteration in original)). For reasons that follow, this distinction, referenced in both *Ciraolo* and *Riley*, informs our constitutional analysis of what occurred on Davis’ property.

{36} We do not consider this question in a vacuum. Many state courts base their determination of whether a particular aerial surveillance violates the Fourth Amendment on the degree of physical intrusion on the ground below. In assessing intrusion, courts look at the legality of the flight, the altitude of the aircraft, the frequency and duration of the flight, and the nature of the area observed—factors similar to *Ciraolo* and *Riley* and factors employed by the district court in this very case. See *United States v. Bassford*, 601 F. Supp. 1324, 1330 (D. Me. 1985) (“[C]ourts have taken a case-by-case approach to the [F]ourth [A]mendment problems implicated by aerial surveillance [considering factors such as] the height of the aircraft, the size of the objects, the nature of the area observed, . . . the frequency of flights over the area, and the frequency and duration of the aerial surveillance.” (internal citations omitted)). See also *Bryant*, 2008 VT 39, ¶¶ 23-26 (“Since the rulings in . . . *Ciraolo* and *Riley*, . . . some state courts have relied solely on the legality of a helicopter’s position in

public airspace to determine whether the aerial surveillance at issue was a search. . . . Some courts . . . consider the legality and intrusiveness of the surveillance flight. . . . Still other state courts attempt to give effect to all of the *Riley* opinions by evaluating legality, intrusiveness, and the frequency of flight at the altitude at which the surveillance took place. . . . A remaining group of state courts rely on a multitude of factors of their own articulation.” (internal citations omitted)).

{37} Consistent with the general trend of focusing on the degree of intrusiveness, our Court of Appeals over 30 years ago found no Fourth Amendment violation based partly on the district court’s finding that the aerial observation was accomplished “without disturbing defendant’s premises.” *State v. Rogers*, 1983-NMCA-115, ¶¶ 3, 5, 100 N.M. 517, 673 P.2d 142 (internal quotation marks omitted). Although decided three years before the first of the U.S. Supreme Court opinions on aerial surveillance, the Court of Appeals’ opinion in *Rogers* presaged the analysis eventually undertaken by that Court.

{38} Much as with this case, *Rogers* involved aerial observation of a greenhouse within the curtilage of a home from a helicopter looking for marijuana plants. *Id.* ¶ 2. *Rogers* and his neighbors testified that the helicopter hovered as low as 30 feet and that the noise of the helicopter awakened them and kicked up dust. *Id.* ¶¶ 5, 12. The helicopter pilot testified, however, that the total surveillance lasted for only 15 to 30 seconds and the helicopter stayed above 100 feet, hovering over an adjacent field several hundred feet from the residence. *Id.* ¶ 12. As finder of fact, the district court found the State’s witnesses persuasive. *Id.* ¶ 5. Our Court of Appeals concluded that “[w]hile the facts of this case teeter dangerously close to exceeding the limitations implicit in the Fourth Amendment, we do not believe that defendant may claim constitutional protection under these circumstances. . . . [T]he surveillance methods used by the police were not unreasonable.” *Id.* ¶ 13. Substantial evidence supported the district court’s finding of no disturbance to the defendant’s property, and the Court of Appeals affirmed. *Id.* ¶¶ 5, 14.

{39} As in *Rogers*, in most cases courts find that the aerial observation was not sufficiently intrusive as to invade a reasonable expectation of privacy, and sustain the warrantless aerial surveillance. *See, e.g., People v. McKim*, 263 Cal. Rptr. 21,

25 (Ct. App. 1989) (upholding a helicopter surveillance where there was no evidence the helicopter interfered with the defendant’s use of his property or “created any undue noise, wind, dust, or threat of injury”); *Henderson v. People*, 879 P.2d 383, 389-90 (Colo. 1994) (en banc) (upholding helicopter surveillance where there was little evidence of wind, dust, threat of injury, or interference and there was no indication the neighbors felt compelled to go outside and observe the commotion); *State v. Rodal*, 985 P.2d 863, 867 (Or. Ct. App. 1999) (upholding surveillance where the helicopter was operated in a lawful and unintrusive manner).

{40} There are instances, however, where “the means of surveillance [were] sufficiently intrusive so as to give rise to a constitutional violation.” *See* 1 Joseph G. Cook, *Constitutional Rights of the Accused* § 4:5 n.6 (3d ed. 2015). We have found two state court cases from other jurisdictions concluding that the degree of physical invasiveness from warrantless aerial surveillance amounted to an unconstitutional search under the Fourth Amendment.

{41} In *Commonwealth v. Ogialoro*, the Supreme Court of Pennsylvania held that aerial surveillance of a barn violated the Fourth Amendment due to the risk of harm to the resident and her property during the search. 579 A.2d 1288, 1294 (Pa. 1990). In that case, the police hovered over a barn located within the curtilage of a home at an altitude of 50 feet for “approximately 15 seconds and made a total of three or more passes over the . . . property, lasting approximately five minutes.” *Id.* at 1290. The wife of the defendant testified that she was “present in the home at the time [and] experienced various sensations caused by the helicopter[’]s proximity, such as loud noise, and vibration of the house and windows.” *Id.* The Court stated:

While the police had a right to fly above [defendant’s] property and he had no reasonable expectation of privacy that they would not peer into his barn, it remains to be decided whether the conduct of the police in flying at 50 feet above the barn was hazardous to persons or property on the surface. If so, the search would be unreasonable . . . . When weighing the issue of whether or not a helicopter surveillance is intrusive to the point of being hazardous, or non-intrusive, a trial court should ask

whether or not a risk of harm or danger exists in regards to the person(s) present or property being observed, whether or not a danger, or threat of injury exists, in regards to persons present within the area being searched.

*Id.* at 1293. There was no testimony from the police to refute the wife’s testimony. *Id.* at 1294.

{42} The Pennsylvania Supreme Court determined under the evidence presented that the “helicopter’s presence at 50 feet above the barn represented a hazard to persons and property on the ground and that the conduct of the police in flying at this level was unreasonable.” *Id.* at 1294. The Court concluded that the surveillance was intrusive and that flying at that low level created a risk of harm, and noted that the police did not produce any evidence rebutting the wife’s testimony or explaining why it was necessary to conduct observation from such a dangerously low altitude. *Id.*

{43} The Colorado Court of Appeals, also finding a violation of the Fourth Amendment, held that aerial surveillance of a backyard went beyond mere observation when a helicopter 1) “descended to 200 feet,” 2) “hovered in the area for several minutes,” and 3) created “enough noise that numerous people ran out” to see what was happening. *People v. Pollock*, 796 P.2d 63 (Colo. Ct. App. 1990). The defendant and several neighbors testified that the helicopter was extremely noisy and that one child asked if the army was invading. *Id.* at 65.

{44} The Colorado Court of Appeals characterized *Pollock* as a close case but determined that two critical factors in the record distinguished *Pollock* from *Ciraolo* and *Riley*: 1) infrequency of helicopter flights at that altitude, and 2) excessive noise from the helicopter. *Pollock*, 796 P.2d at 64. The Court held that, “on this record, with unrefuted evidence, the type of which was notably absent in both *California v. Ciraolo* and *Florida v. Riley*, . . . defendant had a reasonable expectation of privacy that no such surveillance would occur.” *Id.* at 65.

#### **The aerial surveillance during Operation Yerba Buena in light of these Fourth Amendment cases**

{45} Our review of these and other cases involving aerial observation of marijuana plants, both pre- and post-*Ciraolo* and *Riley*, leads us to certain conclusions. First, unobtrusive aerial observations of space



open to the public are generally permitted under the Fourth Amendment. Even a minor degree of annoyance or irritation on the ground will not change that result. If that were all that occurred in the surveillance of the Davis property, this would likely not constitute an unreasonable search under the Fourth Amendment.

{46} Our second conclusion, however, is that when low-flying aerial activity leads to more than just observation and actually causes an unreasonable intrusion on the ground—most commonly from an unreasonable amount of wind, dust, broken objects, noise, and sheer panic—then at some point courts are compelled to step in and require a warrant before law enforcement engages in such activity. The Fourth Amendment and its prohibition against unreasonable searches and seizures demands no less. Obviously, the line drawn between activity permitted with or without a warrant is fact-dependent; any further definition is elusive. For that reason, we must return to the evidentiary hearing conducted in this case and the resulting observations of the district court.

{47} Although the district court concluded as a matter of law that Operation Yerba Buena did not amount to an unconstitutional search, many of its findings and much of the evidence suggest that the police went beyond mere observation as that term has been defined by Fourth Amendment jurisprudence. The district court's findings make multiple references to the degree of noise and disturbance on the ground and suggest that the helicopter swooped down low enough to cause panic among the residents.

{48} In addition to the district court's findings, evidence from Davis and the other residents suggests that the officers in the helicopter did more than merely observe. There were multiple allegations regarding other properties that the helicopter caused property damage—the broken beams and the damaged solar panel—and produced excessive noise and kicked up dust and debris. The noise allegations in particular are supported by Sergeant Merrell's audio recording where the helicopter is clearly heard hovering over Davis' home. And it is clear from all testimony that the helicopters were there to do more than just observe; they were also there to provide aerial cover and protection for the officers on the ground—in other words, to participate actively in the investigation. In so doing, the police increased the risk of actual physical intrusion as occurred in this case.

{49} We acknowledge testimony to the contrary, primarily from law enforcement officers who were there on the ground. For example, police officers testified that the helicopter was operating at a lawful altitude and emphasized that the pilots strictly adhered to altitude guidelines. However, as the U.S. Supreme Court said in *Riley*, an observation will not always be lawful under the Fourth Amendment simply because the plane is operating within navigable airspace. *Riley*, 488 U.S. at 451. Like in *Pollock* and *Ogliodoro*, the police here failed to provide testimony rebutting the specific claims of damage and disruption as described by Davis and the other residents at the suppression hearing.

{50} For example, Sergeant M. Vigil stated that he was *unaware* of any damage to any resident's property, and Sergeant A. Vigil stated that he did not *feel* any wash from the helicopter. Both of these accounts imply that the officers either may not have recalled or were not particularly focused on whether there was damage or wash. These vague recollections are not the type of conclusive evidence that can effectively rebut the specific allegations made by the residents. Further, and perhaps more importantly, neither Sergeant M. Vigil nor Sergeant A. Vigil was present for the surveillance of Davis' property. They were assigned to searches of properties located elsewhere in the search area.

{51} Regrettably for the State, Sergeant Skinner, the observer for the team that did fly over Davis' property, did not testify at the suppression hearing. Sergeant Merrell, who was also present at Davis' property, testified but did not address or refute Davis' allegations of disturbance, excessive noise, and dust. Perhaps most importantly, the district court, having personally witnessed all testimony and other evidence elicited at the suppression hearing, did not disregard the residents' testimony as not credible, did not find that the dust and disturbance never happened, and did not find that the police officers' testimony was exclusively reliable.

{52} Based on the evidence, therefore, we conclude that the official conduct in this case went beyond a brief flyover to gather information. The prolonged hovering close enough to the ground to cause interference with Davis' property transformed this surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into Davis' expectation of privacy. We think what happened in this case to Davis and other

persons on the ground is precisely what *did not* occur in either *Ciraolo* or *Riley* and what *did* occur in both *Ogliodoro* and *Pollock*. Accordingly, we hold that the aerial surveillance over Davis' property was an unwarranted search in violation of the Fourth Amendment.

#### **The New Mexico Constitution**

{53} Under our interstitial approach to the New Mexico Constitution as explained previously, because we find the asserted right to be protected under the Federal Constitution we do not reach the same claim under our New Mexico Constitution. In resolving this dispute on federal grounds, two consequences for the Court of Appeals' opinion become clear. First, we reverse the Court of Appeals' holding with respect to the Fourth Amendment because we find an unreasonable, unconstitutional search under the U.S. Constitution. Second, it is now unnecessary to reach the same question posed under the New Mexico Constitution, which renders the Court of Appeals' discussion of that subject moot though informative. In the end, however, we uphold the result achieved by the Court of Appeals, which is to suppress all evidence obtained from the search of Davis' property and to reverse his conviction.

{54} As an aside, we note that the Court of Appeals, when reviewing the district court's order in this case, suggested that when considering privacy interests under our State Constitution we move away from an intrusion analysis in anticipation of future surveillance conducted by "ultra-quiet drones" and other high-tech devices. *Davis III*, 2014-NMCA-042, ¶ 19. Because this case only involves surveillance by helicopters, technology that has been with us for nearly 80 years, we find it unnecessary to speculate about problems—and futuristic technology—that may or may not arise in the future. Instead, we reserve judgment and await a proper case with a developed record.

#### **Davis' consent was not sufficiently attenuated from the unconstitutional search**

{55} As this Court decided in *Davis II*, Davis validly consented to the search of his home and greenhouse after Sergeant Merrell informed him that a helicopter spotter had identified marijuana plants growing on his property. 2013-NMSC-028, ¶¶ 19-20, 35. However, having now determined that the helicopter flyover was an illegal search, we are left to decide whether Sergeant Merrell obtained Davis' consent by means "sufficiently distinguishable

to be purged of the primary taint of the illegal helicopter surveillance.” *Davis III*, 2014-NMCA-042, ¶ 30 (internal quotation marks and citation omitted).

{56} “The fruit of the poisonous tree doctrine bar[s] the admission of legally obtained evidence derived from past police illegalities.” *State v. Monteleone*, 2005-NMCA-129, ¶ 16, 138 N.M. 544, 123 P.3d 777 (alteration in original) (internal quotation marks and citation omitted). “In order for evidence obtained after an illegality, but with the voluntary consent of the defendant, to be admissible, there must be a break in the causal chain from the [illegality] to the search[.]” *State v. Taylor*, 1999-NMCA-022, ¶ 28, 126 N.M. 569, 973 P.2d 246 (alterations in original) (internal quotation marks and citation omitted), *overruled on other grounds by State v. Leyva*, 2011-NMSC-009, ¶ 17 n.1, 149 N.M. 435, 250 P.3d 861. “In deciding whether the consent is sufficiently attenuated from the Fourth Amendment violation, we consider the temporal proximity of the illegal act and the consent, the presence or absence of intervening circumstances, and the purpose and flagrancy of the official misconduct.” *Taylor*, 1999-NMCA-022, ¶ 28.

{57} In this case, Sergeant Merrell’s contact with Davis and his subsequent request to search Davis’ greenhouse were made in direct response to, and simultaneously with, the information provided by the helicopter spotter, information obtained as a result of the illegal helicopter search. Sergeant Merrell told Davis that “the helicopter . . . [was] looking for marijuana plants and they believe they’ve located some at your residence.” Sergeant Merrell then asked Davis for permission to search his property.

{58} Further, the helicopter was present and was continuing to provide information to Sergeant Merrell as Sergeant Merrell approached Davis. The helicopter is clearly audible on Sergeant Merrell’s belt tape during his discussion with Davis and remained over the house until Davis gave verbal consent to search his property.

{59} We affirm the Court of Appeals’ determination that Sergeant Merrell entered “[Davis’] property solely as a result of information obtained in the helicopter search,” and there were no “intervening circumstances between the aerial search and [Davis’] consent.” *Davis III*, 2014-

NMCA-042, ¶ 31. As a result we hold that there was insufficient attenuation to purge Davis’ consent of the taint resulting from the warrantless aerial search.

#### CONCLUSION

{60} For the foregoing reasons we hold that this aerial surveillance amounted to an unconstitutional search under the Fourth Amendment and reverse the Court of Appeals’ determination to the contrary. We affirm the ultimate determination of the Court of Appeals to suppress all evidence seized as a result and reverse the conviction in this case.

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

**RICHARD C. BOSSON, Justice**

#### WE CONCUR:

**BARBARA J. VIGIL, Chief Justice**

**PETRA JIMENEZ MAES, Justice**

**EDWARD L. CHÁVEZ, Justice,**

**specially concurring**

**CHARLES W. DANIELS, Justice**

**CHÁVEZ, Justice, specially concurring.**

{62} I concur in the result of the majority opinion which suppresses the evidence in this case, but I respectfully disagree with the analysis employed by the majority. In this case, law enforcement officers conducted an indiscriminate aerial surveillance over large areas in Taos County based on outdated, vague reports from anonymous sources whose reliability is unknown, that some undisclosed people were growing marijuana in unspecified locations. Utilizing helicopters for aerial surveillance, the law enforcement officers swooped down on house after house, including Defendant’s house, as if the occupants did not have an expectation of privacy in and around their homes. The district court believed “that the police swooped in as if they were in a state of war, searching for weapons or terrorist activity,” which “can be terrifying and intimidating to most normal persons.” The majority concludes that people would not have a reasonable expectation of privacy in their homes and curtilage<sup>2</sup> from aerial surveillance as long as during the surveillance law enforcement is disciplined enough not to be too noisy, kick up too much dust, cause too much wind, or otherwise unduly interfere with the owners’ or occupants’ use of the property. Majority op. ¶¶ 35, 36, 45, 46. In this case the majority concludes that the law enforcement officers were not

disciplined enough, and they therefore violated Defendant’s Fourth Amendment rights, requiring suppression of the evidence.

{63} Unlike the majority, I doubt that Defendant has a protected privacy interest under the Fourth Amendment of the United States Constitution, and I therefore would analyze this case under Article II, Section 10 of the New Mexico Constitution. I would hold that an individual’s subjective expectation of privacy in his or her home from ground-level surveillance is coextensive with his or her subjective expectation of privacy from aerial surveillance. If an individual has taken steps to ward off inspection from the ground, the individual has also manifested an expectation to ward off inspection from the air.

{64} I would decline to follow the flawed analysis of the federal courts. Whether an individual has a reasonable expectation of privacy in his or her home and curtilage should not turn on whether the government’s invasion is too noisy or kicked up too much dust. Equally unilluminating criteria such as whether the altitude of the aircraft is in compliance with Federal Aviation Administration (FAA) regulations or the regularity of flights over an individual’s home should also be rejected. FAA regulations address safety concerns, not privacy concerns. In addition, to suggest that in New Mexico privately owned helicopters or other aircraft regularly fly at the altitudes that the helicopters in this case were flown strains credulity. In any event, members of the public utilize airspace for travel, not to intently scrutinize other peoples’ residential yards; at most, such travelers only gain a fleeting glimpse of a property owner’s backyard. The New Mexico Constitution should not be interpreted to give the government the authority to conduct an aerial surveillance over a property owner’s home and curtilage when the owner has taken steps to exhibit an expectation of privacy in those areas, unless the government complies with the warrant requirement—a requirement that we have carefully guarded for at least the last quarter of a century.

{65} New Mexico covers a large geographic area, almost 122,000 square miles, and much of it is rural. People living in rural communities enjoy the absence of noise and light pollution. To be clear, they have a heightened expectation of privacy.

<sup>2</sup>“Generally, the curtilage is the enclosed space of the grounds and buildings immediately surrounding a dwelling house.” *State v. Hamilton*, 2012-NMCA-115, ¶ 16, 290 P.3d 271 (internal quotation marks and citation omitted).

Our courts have acknowledged as much since at least 1991. See *State v. Sutton*, 1991-NMCA-073, ¶ 24, 112 N.M. 449, 816 P.2d 518 (concluding that the prevalence of large rural lots and plentiful land has given rise to uniquely heightened expectations of privacy in the homes and curtilages of our citizens), holding modified on other grounds by *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

{66} I would hold that in New Mexico, when a property owner takes steps to exhibit a subjective expectation of privacy from ground-level observations into the curtilage of his or her property, society would recognize the owner's subjective expectation of privacy from aerial observations as reasonable. Under such circumstances, pursuant to Article II, Section 10 of the New Mexico Constitution, before law enforcement officers may conduct an aerial surveillance, they must obtain a search warrant or have some recognized exception to the warrant requirement. The interest protected by Article II, Section 10 is the privacy interest of all citizens, including law-abiding citizens, and a citizen's privacy interest is not diminished if a search uncovers evidence of a crime.<sup>3</sup>

**A. Article II, Section 10 of the New Mexico Constitution provides greater privacy protections than the Fourth Amendment of the United States Constitution against the government-initiated aerial surveillance of Defendant's property**

{67} The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Similarly, Article II, Section 10 of the New Mexico Constitution guarantees that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures."

{68} "Because both the United States and the New Mexico Constitutions provide overlapping protections against unreasonable searches and seizures, we apply our interstitial approach." *State v. Ketelson*, 2011-NMSC-023, ¶ 10, 150 N.M. 137, 257 P.3d 957 (internal quotation marks and citations omitted). Under our interstitial approach, "we first consider whether the right being asserted is protected under the

federal constitution." *Id.* (internal quotation marks and citation omitted). "If the right is protected by the federal constitution, then the state constitutional claim is not reached." *Id.*; see also *State v. Jean-Paul*, 2013-NMCA-032, ¶ 5, 295 P.3d 1072 ("Under New Mexico's interstitial approach to state constitutional interpretation, this Court should only reach the state constitutional question if the federal constitution does not provide the protection sought by the party raising the issue."). If the right is not protected by the federal constitution, "we next consider whether the New Mexico Constitution provides broader protection, and we may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Ketelson*, 2011-NMSC-023, ¶ 10 (internal quotation marks and citation omitted). For the reasons that follow, I cannot agree with the majority that the Fourth Amendment protects Defendant's reasonable expectation of privacy from government aerial surveillance.

**1. Defendant's expectation of privacy against aerial surveillance is likely not protected by the Fourth Amendment**

{69} "In determining whether a particular form of government-initiated . . . surveillance is a 'search' within the meaning of the Fourth Amendment," *Smith v. Maryland*, 442 U.S. 735, 739 (1979), the United States Supreme Court adopted a two-prong test that was first articulated in Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), limitation of holding recognized by *United States v. Oliver*, 686 F.2d 356, 359-60 (6th Cir. 1982). *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). Under this two-prong test, courts must first determine "whether the individual, by his [or her] conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). If the individual exhibited a subjective expectation of privacy, courts next determine "whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.'" *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation marks omitted)).

{70} United States Supreme Court precedent establishes that a defendant does not have a reasonable expectation of privacy under the Fourth Amendment if the aerial surveillance of a home and its curtilage is conducted within navigable airspace, in a non-intrusive manner, using commercially available technology, and the aerial surveillance reveals something that the defendant has not protected from aerial scrutiny. The Court first analyzed the constitutionality of aerial surveillance in *Dow Chemical Co. v. United States*, 476 U.S. 227, 229 (1986), where the Environmental Protection Agency, without Dow's consent, contracted with a commercial aerial photographer to provide images of a 2,000-acre Dow manufacturing facility from altitudes of 1,200 feet, 3,000 feet, and 12,000 feet.

{71} The Court first noted that "Dow plainly ha[d] a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe." *Id.* at 236. However, the Court reasoned that the "intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant." *Id.* The Court reasoned that the open areas in the 2,000-acre industrial facility were more akin to an open field than to the curtilage of a home, *id.* at 235-36, and as a result, were "open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras." *Id.* at 239. Accordingly, the Court held that "the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment." *Id.*

{72} In a second opinion filed on the same day the Court decided *Dow*, the United States Supreme Court also decided *California v. Ciraolo*, a case where police conducted an aerial surveillance operation after they received a tip regarding backyard marijuana cultivation on the defendant's property. 476 U.S. 207, 209 (1986). After finding that the high fencing surrounding the defendant's yard obstructed their view from the street, the police obtained a small airplane and flew over the residence at an

<sup>3</sup>See, e.g., *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 18, 130 N.M. 386, 25 P.3d 225 (noting that Article II, Section 10 embodies "the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusion" (emphasis added) (internal quotation marks and citations omitted)).

altitude of 1,000 feet. *Id.* The police officers in the airplane observed and photographed what they concluded to be marijuana plants growing in the defendant's backyard. *Id.* This evidence was used to obtain a search warrant to seize the marijuana plants. *Id.* at 209-10.

{73} The Court reasoned that although the presence of a ten-foot fence clearly conveyed a "desire to maintain privacy," and indeed, it successfully did so "as far as the normal sidewalk traffic was concerned," the marijuana plants might well have been visible from "the top of a truck or a two-level bus." *Id.* at 211. Under the second prong of the *Katz* test, the Court reasoned that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *Id.* at 213. As a result, the Court concluded that "the mere fact that an individual has taken measures to restrict some views of his [or her] activities [does not] preclude an officer's observations from a public vantage point where he [or she] has a right to be and which renders the activities clearly visible." *Id.* Because the observations were made from "public navigable airspace in a physically nonintrusive manner," *id.* (citation omitted), the Court held that the defendant's expectation of privacy from such aerial observations was not one "that society is prepared to honor," *id.* at 213-14 ("Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.").

{74} The dissent written by Justice Powell took issue with the majority's sole reliance "on the fact that members of the public fly in planes and may look down at homes as they fly over them." *Id.* at 223 (Powell, J., dissenting). Justice Powell observed that this reasoning was flawed because "the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass." *Id.*

{75} Nearly three years after *Ciraolo*, the Court again addressed the constitutionality of government-initiated aerial surveillance operations in *Florida v. Riley*, 488 U.S. 445 (1989). *Riley* arose from a tip to police involving marijuana cultivation in a greenhouse located behind the defendant's

house where the plants could not be seen from the street. *Id.* at 447-48. The aerial observations were made from a helicopter at an altitude of 400 feet, which allowed the police officers to see marijuana plants through openings in the roof and sides of the greenhouse. *Id.* at 448. In a fractured opinion, the majority of the justices in *Riley* concluded that these observations were constitutional. *Id.* at 452.

{76} Writing for the plurality, Justice White acknowledged that the defendant had a subjective expectation of privacy because "the precautions he took protected against ground-level observation." *Id.* at 450. However, Justice White concluded that the defendant's subjective expectation of privacy was not reasonable because "the sides and roof of his greenhouse were left partially open," and "what was growing in the greenhouse was subject to viewing from the air." *Id.* Justice White reasoned that the defendant "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft." *Id.* at 450-51. Justice White noted that the Court "would have a different case if flying at that altitude had been contrary to law or regulation." *Id.* at 451. Justice White also concluded that it was important that "no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury." *Id.* at 452.

{77} Justice O'Connor's concurrence raised concerns about relying only upon compliance with FAA regulations as a litmus test for an individual's privacy interest against government-initiated aerial surveillance. *Id.* at 452-53 (O'Connor, J., concurring). Justice O'Connor instead reasoned that "consistent with *Katz*, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that [the defendant's] expectation of privacy from aerial observation was not 'one that society is prepared to recognize as reasonable.'" *Id.* at 454 (O'Connor, J., concurring) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation marks omitted)). Justice O'Connor concluded that because there is "considerable public use of airspace at altitudes of 400 feet and above," the defendant did not have a reasonable expectation of privacy from "naked-eye aerial observation from that altitude." *Id.* at 455 (O'Connor, J.,

concurring). However, Justice O'Connor also cautioned that "public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations." *Id.* (O'Connor, J., concurring).

{78} Justice Brennan's dissent similarly took issue with tying an individual's privacy interest to FAA flight safety regulations, stating that "[i]t is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety." *Id.* at 458 (Brennan, J., dissenting). To Justice Brennan, the question was not whether the flights were in compliance with the FAA regulations, "but whether public observation of [the defendant's] curtilage was so commonplace that [the defendant's] expectation of privacy in his backyard could not be considered reasonable." *Id.* at 460 (Brennan, J., dissenting). In answering this question, Justice Brennan departed from Justice O'Connor's conclusion, and he noted that while privately-owned helicopters occasionally fly over populated areas at 400 feet, "such flights are a rarity." *Id.* at 465 (Brennan, J., dissenting). Justice Brennan attributed this observation in part on the fact that the police officer's "ability to see over [the defendant's] fence depended on his [or her] use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access." *Id.* at 460 (Brennan, J., dissenting). Justice Blackmun's dissent also cited the rarity of helicopter overflights at 400 feet, and he therefore reasoned that the prosecution should have the burden of proving that the defendant lacked a reasonable expectation of privacy "for any helicopter surveillance case in which the flight occurred below 1,000 feet." *Id.* at 468 (Blackmun, J., dissenting).

{79} Under the leading federal precedent, it is questionable whether Defendant in this case has a protected privacy interest under the Fourth Amendment. Although I agree with the majority that Defendant exhibited a subjective expectation of privacy under the first prong of the two-prong test in *Katz*, majority op. ¶ 28, it is questionable whether Defendant's "subjective expectation of privacy is 'one that society is prepared to recognize as reasonable.'" *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (internal quotation marks omitted)).

{80} Concerning Defendant's subjective expectation of privacy, I first note that Defendant's property is located in a remote area of Carson Estates in Taos County which, as the district court found, "is accessed by poorly maintained dirt roads with few directional signs." The evidence introduced during the hearing on Defendant's motion to suppress indicates that Defendant constructed the greenhouse in question at a distance from the single dirt road into his property, which runs parallel to his southern property line. The evidence also indicates that Defendant posted three signs at the only entrance into his property that read "Caveman Way Private Road," "No trespassing," and "Beware of Dog," and he erected two fences that extended 12 feet to the east and west of the driveway along his southern property line. In addition to the two fences and several large trees and bushes obstructing the view of Defendant's greenhouse from the dirt road, the evidence presented at the suppression hearing indicated that he constructed a garden with a shade screen along the southern wall of the greenhouse, and he covered the north wall of the greenhouse with black plastic. Unlike *Ciraolo*, where the marijuana plants might well have been visible from "the top of a truck or a two-level bus," 476 U.S. at 211, the evidence presented at Defendant's suppression hearing substantially supports the district court's finding that "[t]he overwhelming volume of testimony is that one could not see into the greenhouse[] from the ground."

{81} In addition, the district court was not convinced that the State Police officers were able to definitively see into the greenhouse from the helicopter. This finding is attributed to the fact that Defendant covered the roof of his greenhouse with opaque plastic, which the district court found "is described at best as translucent, though light and dark may be distinguished, but only as a pattern of shadows and light." Unlike *Riley*, there is no evidence of openings in the opaque plastic covering the ceiling of Defendant's greenhouse. Because no photographs of the greenhouse were taken from the helicopter, the State presented testimony suggesting that the spotter in the helicopter could easily see marijuana plants inside Defendant's greenhouse because the plants pressed up against the ceiling and filled the entire greenhouse. However, although the spotter reported seeing plants growing in back of the greenhouse (which actually were corn, sunflowers, and echinacea

plants) and a greenhouse with vegetation, the spotter never confirmed any marijuana sightings. In addition, photographs taken by Sergeant Merrell of the interior of Defendant's greenhouse during the State Police search do not support the State's assertion that marijuana plants were pressed up against the ceiling of the greenhouse. In fact, when presented with these photographs during the suppression hearing, Sergeant Merrell conceded that none of them shows marijuana plants pressing up against the ceiling and filling Defendant's entire greenhouse.

{82} This evidence supports the district court's findings that "[w]ith the unaided eye it is not likely that anything other than a belief that it was marijuana was possible" and that "the visibility of 'suspected marijuana' plants inside the greenhouse[] is improbable." Accordingly, I conclude that Defendant took steps that exhibited a subjective expectation of privacy under the Fourth Amendment.

{83} However, under the second prong in the *Katz* test, it is questionable whether the United States Supreme Court would conclude that Defendant's "subjective expectation of privacy is 'one that society is prepared to recognize as reasonable'" under the Fourth Amendment. *Smith*, 422 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (internal quotation marks omitted)). First, although the district court found suspect "[t]he testimony that naked eye examination from 500 feet revealed marijuana plants" and the spotter in the helicopter "probably had to get closer to try to see what he was seeing from afar," the district court ultimately concluded that "[t]his factor does not weigh against the police surveillance, standing alone." The district court found "no competent evidence that the police were violating flight laws" because "[t]he FAA permits much lower flight by helicopter than by fixed wing" aircraft. See 14 C.F.R. § 91.119(d)(1) (1996) ("If the operation is conducted without hazard to persons or property on the surface . . . [a] helicopter may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section . . .").

{84} Second, the district court was "troubled by the testimonial descriptions of rotor wash and flying debris" relevant to the intrusiveness of the operation. Defendant's neighbors testified that the helicopter "frightened and annoyed" them and the downdraft created by the helicopter lifted a solar panel off a roof and blew trash all over neighboring front yards. However,

Sergeant Adrian Vigil, who was in charge of supervising portions of the operation, testified that the helicopter team is trained to hover at a high enough altitude to avoid picking up rotor wash and flying debris that would create a dangerous situation for the ground teams. The district court found that some of the testimony by Defendant's neighbors was "overly dramatic and anti-police state rhetoric," but the court also "believe[d] that there is merit to the claim that the police swooped in as if they were in a state of war, searching for weapons or terrorist activity." The district court ultimately concluded that "[t]he claims of dust and destruction [were] negligible, in comparison" to the heightened degree of intrusion created by aerial surveillance "in response to general vague complaints." Nevertheless, apart from "negligible" claims of dust and destruction, the district court found that the aerial surveillance did not interfere with Defendant's use of his greenhouse. *Cf. Riley*, 488 U.S. at 452 (determining that a surveillance helicopter did not interfere with using a greenhouse to grow marijuana in ultimately holding that aerial surveillance was not a search under the Fourth Amendment).

{85} Finally, the district court found that the spotter in the helicopter "was not using optical enhancements like binoculars." Although the operation's procedures required helicopter spotters to "utilize optic devices in the course of locating marijuana plantations," the helicopter that provided aerial surveillance on Defendant's property did not have such devices installed. Because the State Police spotter made a naked-eye observation of Defendant's property, the district court's finding on this factor favors the State, although I note that the helicopter spotter's sightings of allegedly suspicious plants growing outside the greenhouse and allegedly suspicious vegetation growing inside the greenhouse were either incorrect or improbable.

{86} Although the aerial surveillance sightings over Defendant's property were incorrect or improbable, the district court found that the surveillance was conducted within navigable airspace and in a negligibly intrusive manner, which makes it questionable whether Defendant has a protected privacy interest under the Fourth Amendment. Because "there is serious uncertainty regarding whether the United State Supreme Court would suppress the evidence in this case under the Fourth Amendment's protections against unreasonable searches and seizures," *State*



*v. Garcia*, 2009-NMSC-046, ¶ 25, 147 N.M. 134, 217 P.3d 1032, “we turn to Article II, Section 10 to resolve this issue.” *State v. Paul T.*, 1999-NMSC-037, ¶ 12, 128 N.M. 360, 993 P.2d 74 (“Because of this gap in Fourth Amendment jurisprudence, together with the possibility that the Fourth Amendment does not protect [the defendant] in the circumstances of this case, we turn to Article II, Section 10 to resolve the issue . . .”).

## 2. Defendant has a protected privacy interest against aerial surveillance under Article II, Section 10

{87} “When interpreting Article II, Section 10, the New Mexico Supreme Court has emphasized its strong belief in the protection of individual privacy . . .” *State v. Granville*, 2006-NMCA-098, ¶ 19, 140 N.M. 345, 142 P.3d 933. “Accordingly, New Mexico courts have long held that Article II, Section 10 provides greater protection of individual privacy than the Fourth Amendment.” *State v. Crane*, 2014-NMSC-026, ¶ 16, 329 P.3d 689; *State v. Leyva*, 2011-NMSC-009, ¶ 51, 149 N.M. 435, 250 P.3d 861 (“It is well-established that Article II, Section 10 provides more protection against unreasonable searches and seizures than the Fourth Amendment.”).

{88} In light of the New Mexico Constitution’s strong belief in the protection of individual privacy, “[t]he foremost distinct state characteristic upon which this Court has elaborated New Mexico’s search and seizure jurisprudence under Article II, Section 10 is ‘a strong preference for warrants.’” *Crane*, 2014-NMSC-026, ¶ 16 (quoting *Gomez*, 1997-NMSC-006, ¶ 36). This Court “has emphasized New Mexico’s strong preference for warrants in order to preserve the values of privacy and sanctity of the home that are embodied by” Article II, Section 10. *Granville*, 2006-NMCA-098, ¶ 24. Because an individual’s “‘curtilage is the area to which extends the intimate activity associated with the sanctity of a . . . home and the privacies of life,’” it enjoys the same privacy protections of the home. *State v. Hamilton*, 2012-NMCA-115, ¶ 16, 290 P.3d 271 (citations omitted).

{89} We premise our strong preference for warrants on the basic principle that a “judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.” *Gomez*, 1997-NMSC-006, ¶

36 (internal quotation marks and citations omitted). Based on our strong preference for warrants, I would depart from federal jurisprudence and hold that Article II, Section 10 of the New Mexico Constitution provides greater protection than the Fourth Amendment of the United States Constitution against government-initiated aerial surveillance over an individual’s home and curtilage.

{90} To begin the analysis, a court must apply the two-prong test set out in *Katz* to the facts of this case. First, did Defendant exhibit an actual subjective expectation of privacy, and second, was Defendant’s subjective expectation of privacy “‘one that society is prepared to recognize as reasonable.’” *Crane*, 2014-NMSC-026, ¶ 18 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). Under the first prong, courts address which steps an individual must take to manifest a subjective expectation of privacy from aerial surveillance. *Id.* I would hold that an individual’s subjective expectation of privacy from ground-level surveillance is *coextensive* with his or her subjective expectation of privacy from aerial surveillance. If an individual has taken steps to ward off inspection *from the ground*, the individual has also manifested an expectation that the visibility of his or her property that he or she sought to block off from the ground *should also be private when seen from the air*. This is because members of the general public generally do not intently scrutinize other peoples’ curtilages, even when they do fly over private property. *Riley*, 488 U.S. at 460 (Brennan, J., dissenting) (noting that an officer “positioned 400 feet above [the defendant’s] backyard” enjoyed a vantage point that “was not one any citizen could readily share”); *see also Ciruolo*, 476 U.S. at 223-24 (Powell, J., dissenting) (“[T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards.” (footnote omitted)). Instead, aerial surveillance

is usually conducted with “expensive” equipment by police officers. *See Riley*, 488 U.S. at 460 (Brennan, J., dissenting). Thus, in most situations, an individual who desires complete privacy on his or her property can usually establish such privacy by *merely* taking steps to ward off ground-level surveillance because aerial surveillance usually is conducted only by law enforcement personnel, and not by the general public.

{91} This holding acknowledges that “even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards *without entirely giving up their enjoyment of those areas*.” *Riley*, 488 U.S. at 454 (O’Connor, J., concurring) (emphasis added). I would refuse to require individuals to give up enjoyment of their curtilage areas so as to manifest a subjective expectation of privacy from aerial surveillance “that society is prepared to recognize as reasonable.” *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (internal quotation marks omitted). A contrary holding would require individuals to roof their backyards and “encourage the transformation of our open society into a garrison state, [where] each individual [is] obsessed with shielding private activities in presumptively private areas from all possible observation.” *People v. Cook*, 710 P.2d 299, 305 (Cal. 1985). Moreover, measures to block off curtilages from aerial view would generate “intangible cost[s] of shutting out the sunlight and fresh air which gives such . . . space[s] their precious character.” *Id.*

{92} Applying the first *Katz* prong to the facts in this case, I conclude that the evidence presented during the motion to suppress hearing establishes that Defendant held a subjective expectation of privacy from aerial surveillance because of the steps he took to ward off ground-level surveillance. Defendant chose to live in a remote area of Carson Estates in Taos County, an area difficult to access due to “poorly maintained dirt roads with few directional signs or markings.” Moreover, the evidence presented at the motion to suppress hearing indicates that Defendant posted signs and erected fencing at the single entrance into his property which notified any passersby of his expectations of privacy. The evidence also indicates that Defendant constructed a garden with a shade screen along the southern wall of his greenhouse and covered the north wall of his greenhouse with black plastic. This

evidence substantially supports the district court's finding that "[t]he overwhelming volume of testimony is that one could not see into the greenhouse[] from the ground." Based on this evidence, we hold that the Defendant took sufficient steps to exhibit a subjective expectation of privacy from ground-level observation, and therefore from aerial surveillance as well.

{93} The second prong of the *Katz* test requires a court to determine whether Defendant's subjective expectation of privacy is one that society is prepared to recognize as reasonable. Only two New Mexico cases have evaluated the second prong to determine the constitutionality of government-initiated aerial surveillance. See generally *State v. Rogers*, 1983-NMCA-115, 100 N.M. 517, 673 P.2d 142; *State v. Bigler*, 1983-NMCA-114, 100 N.M. 515, 673 P.2d 140. As *State v. Davis* (*Davis III*) recognized, both of these cases were decided before we began interpreting Article II, Section 10 more broadly than the Fourth Amendment. 2014-NMCA-042, ¶ 16, 321 P.3d 955. *Rogers* and *Bigler* appeared to anticipate the multi-factored analysis taken in *Dow*, *Ciraolo*, and *Riley* and focused on the aircraft's altitude, what aspects of the curtilage were openly visible to the public from the air, and the regularity of public flights over the defendant's property. See *Rogers*, 1983-NMCA-115, ¶¶ 7, 9 (holding that the "defendant did not have a justifiable expectation of privacy with respect to marijuana plants protruding through holes in his greenhouse roof to the extent of their visibility from the air" by focusing on the "altitude of the aircraft, use of equipment to enhance the observation, frequency of other flights and intensity of the surveillance"); *Bigler*, 1983-NMCA-114, ¶¶ 8-9 (holding that the defendant had no reasonable expectation of privacy in his marijuana crop to the extent it was visible from the air because, among other considerations, the "defendant's property [lay] within two or three miles of a municipal airport and the fact that crop dusters [flew] in the area at will").

{94} These factors are not helpful in determining whether an individual's subjective expectation of privacy from aerial surveillance is recognized as reasonable under Article II, Section 10. First, the altitude at which an aircraft may be operated is governed by the FAA's flight regulations under 14 C.F.R. Section 91.119. In an aspect that is relevant to this case, helicopters may operate at lower altitudes than the minimums prescribed in Sec-

tion 91.119(b)-(c) "[i]f the operation is conducted without hazard to persons or property on the surface." 14 C.F.R. § 91.119(d)(1). The plain language of these flight regulations concerns physical safety, not whether an individual has a reasonable expectation of privacy in his or her home and curtilage. See *id.*; cf. *Riley*, 488 U.S. at 453 (O'Connor, J., concurring) ("[T]here is no reason to assume that compliance with FAA regulations alone determines whether the government's intrusion infringes upon the person and societal values protected by the Fourth Amendment." (internal quotation marks and citations omitted)).

{95} Individuals "likely expect that law enforcement personnel as well as other air travelers will abide by safety rules and other applicable laws and regulations when flying over their homes," but simply abiding by these regulations is not "an adequate test of whether government surveillance from that same spot is constitutional." *State v. Bryant*, 2008 VT 39, ¶ 28, 950 A.2d 467; see also *Crane*, 2014-NMSC-026, ¶¶ 26-27 (refusing to guide its constitutional analysis by conflicting public ordinances that regulate the manner in which household trash is collected and disposed of in New Mexico).

Because FAA regulations allow helicopters to fly at any altitude "if the operation is conducted without hazard to person or property on the surface," 14 C.F.R. § 91.119, the inevitable result of this reasoning—in the absence of more restrictive state aviation laws—is that the *dangerousness* of police surveillance may become the yardstick by which constitutional privacy protection is measured.

*Bryant*, 2008 VT 39, ¶ 23 (first emphasis added). As a result, I decline to utilize an aircraft's altitude to evaluate the constitutionality of government-initiated aerial surveillance.

{96} The factor analyzing what is openly visible in a curtilage from the air is similarly not helpful, regardless of whether the aircraft was flying within navigable airspace or whether its occupants were utilizing optical equipment. If courts were to analyze what was openly visible from the air, individuals may be induced to "completely cover and enclose their curtilage." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring). These "precautions" would exceed the measures "customarily taken by those seeking privacy." *Id.* (O'Connor, J., concurring) (internal quotation marks

and citation omitted). Article II, Section 10 does not require the residents of this state to employ extraordinary means to maintain their constitutional privacy rights. See N.M. Const. art. II, § 10; cf. 1 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(c), at 898-99 (5th ed. 2012) ("It would be a perversion of *Katz* to interpret it as extending protection only to those who resort to extraordinary means to keep information regarding their personal lives out of the hands of the police."). We also note that the measures required to cut off aerial views would entail "considerable monetary expense." *Cook*, 710 P.2d at 305. Thus, a criterion that focuses on what is openly visible would imply that individuals who have greater financial resources would possess a greater expectation of privacy than others who do not; the protections of the New Mexico Constitution should not vary with an individual's financial resources. See *Crane*, 2014-NMSC-026, ¶ 28.

{97} I also would decline to utilize the regularity of flights over an individual's home or its proximity to an airport to inform our constitutional analysis under Article II, Section 10. Neither *Rogers* nor *Bigler* addressed the difference between government-initiated overflights and those made by members of the general public. See *Rogers*, 1983-NMCA-115, ¶ 6 ("[A]ir traffic is not uncommon in the area, although the town apparently does not lie below any prescribed air corridor. Defendant and one of his neighbors on occasion had seen aircraft, including helicopters, in the area."); *Bigler*, 1983-NMCA-114, ¶ 8 ("The fact that defendant's property lies within two or three miles of a municipal airport and the fact that crop dusters fly in the area at will also support the trial court's finding that he had no reasonable expectation of privacy in his field to the extent of [its] visibility from the air."). There is a "qualitative difference between police surveillance and other uses made of the airspace. Members of the public use the airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards." *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting). As Justice Brennan observed in *Riley*, the ability of the State Police to see on to a defendant's property "depended on [their] use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access." 488 U.S. at 460 (Brennan, J., dissenting). The factors

of flight regularity and airport proximity fail to comport with our recognition that “Article II, Section 10, protects citizens from governmental intrusions, not intrusions from members of the general public.” *Granville*, 2006-NMCA-098, ¶ 29.

{98} Furthermore, I agree with Justice Powell’s dissent in *Ciraolo* and also conclude that any actual risk to privacy from commercial or private aircraft is tenuous at best. See 476 U.S. at 223 (Powell, J., dissenting). “[T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent. Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass.” *Id.* (footnote omitted). “One’s yard may unavoidably be exposed to casual glances from passing aircraft, but he [or she] may still reasonably assume that it will not be intently examined by government agents who are flying over it for that specific purpose.” *Cook*, 710 P.2d at 304 (footnote omitted). Accordingly, I also reject using the regularity of overflights and a property’s proximity to an airport to inform our constitutional analysis.

{99} The Court of Appeals also rejected these factors. See *Davis III*, 2014-NMCA-042, ¶¶ 18-20. The Court of Appeals was understandably concerned with the likelihood that “ultra-quiet drones will soon be used commercially and, possibly, for domestic surveillance,” *id.* ¶ 19, and that “[s]uch advances in technology demonstrate the increasingly diminished relevance of intrusiveness factors, as courts have regarded them in the past, in the analysis of what constitutes a search.” *Id.* As a result, the Court of Appeals adopted the following test to determine whether aerial surveillance constitutes a search under Article II, Section 10:

[I]f law enforcement personnel, via targeted aerial surveillance, have the purpose to intrude and attempt to obtain information from a protected area, such as the home or its curtilage, that could not otherwise be obtained without physical intrusion into that area, that aerial surveillance constitutes a search for purposes of Article II, Section 10.

*Davis III*, 2014-NMCA-042, ¶ 20 (emphasis added).

{100} I would decline to perpetuate a multi-factored analysis to inform consti-

tutional privacy protections. This Court has long interpreted the protections of Article II, Section 10 by acknowledging the need to balance governmental interests against individual privacy interests. See *State v. Attaway*, 1994-NMSC-011, ¶ 24, 117 N.M. 141, 870 P.2d 103 (“Article II, Section 10 embodies the disparate values of privacy, sanctity of the home, occupant safety, and police expedience and safety.”), *holding modified on other grounds by State v. Lopez*, 2005-NMSC-018, ¶¶ 18-19, 138 N.M. 9, 116 P.3d 80. To evaluate whether a search and seizure violates the protections of the New Mexico Constitution, courts judge “the facts of each case by balancing the degree of intrusion into an individual’s privacy against the interest of the government in promoting crime prevention and detection.” *State v. Jason L.*, 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted).

{101} I would hold that under the second prong in the *Katz* test, an individual’s reasonable expectation of privacy from aerial surveillance is coextensive with the scope of his or her reasonable expectation of privacy from ground surveillance. Therefore, the reasonableness of an individual’s expectation of privacy from aerial surveillance is determined by the steps he or she took to ward off ground surveillance. My analysis is guided by the long-held notion that society recognizes that an individual’s curtilage enjoys the same privacy protections as his or her home. *Hamilton*, 2012-NMCA-115, ¶ 16. In addition, Article II, Section 10 does not require that extraordinary steps be taken to protect against ground-level observation for an individual to assert a reasonable expectation of privacy against government-initiated aerial surveillance. See N.M. Const. art. II, § 10; 1 LaFave, *supra*, § 2.6(c), at 898-99. “[T]he fact that government officials or the civilian public might be expected, for one reason or another, to enter a place or see or hear the activities within, does not necessarily preclude reasonable claims of privacy from intensive spying by police officers looking for evidence of crime.” *Cook*, 710 P.2d at 304. Ultimately, “while an inhabitant of the modern world is deemed to expect . . . the expectable, the Constitution still shields him [or her] from governmental intrusions he [or she] has legitimate grounds not to expect.” *Id.* (omission in original) (emphasis added) (internal quotation marks and citation omitted).

{102} For example, although an individual may expect the government to electronically eavesdrop on a private telephone conversation, an individual still exhibits an expectation of privacy that society recognizes as reasonable by secluding himself or herself when placing such a phone call. *Katz*, 389 U.S. at 353. Similarly, although an individual may expect the government to rummage through the contents of garbage bags placed in a communal dumpster, an individual still exhibits an expectation of privacy that society recognizes as reasonable by concealing his or her trash in an opaque garbage bag. *Crane*, 2014-NMSC-026, ¶ 27. Finally, hotel guests may also expect that housekeeping staff may enter their room or that police officers may open their unlocked hotel room door, but hotel guests still exhibit an expectation of privacy that society recognizes as reasonable by simply closing the hotel room door. See, e.g., *Stoner v. California*, 376 U.S. 483, 489-90 (1964).

{103} Using the same reasoning, the citizens of New Mexico may expect any passerby to glance at the intimate details of their curtilage, but our citizens also exhibit an expectation of privacy that society recognizes as reasonable if the individuals took reasonable steps to prevent ground-level observation. In this case, Defendant not only obstructed the view into his greenhouse by constructing it some distance away from his southern property line behind trees and a screened garden, but he also covered the exterior walls with black plastic. These steps were not only reasonable in protecting against ground-level observation, but they were ultimately effective in preventing anyone from seeing “into the greenhouse[] from the ground.” Based on these actions alone, society would recognize that Defendant’s expectation of privacy was reasonable. I would therefore conclude that this reasonable expectation of privacy precludes aerial surveillance without a warrant. It is also significant that by constructing the greenhouse close to his home and completely enclosing it, Defendant’s greenhouse more closely resembled an enclosed structure similar to a residential garage than an open backyard. Society clearly would find it reasonable for Defendant to have an expectation of privacy in the contents of a fully enclosed greenhouse located on his curtilage. See *Taylor v. United States*, 286 U.S. 1, 5-6 (1932) (holding that a garage was protected from a warrantless search because the garage was adjacent

to the defendant's home); *United States v. Mullin*, 329 F.2d 295, 298 (4th Cir. 1964) (holding that an outdoor smokehouse was protected from a warrantless search because the smokehouse was 75 feet from the defendant's residence and there was no intervening barrier between the two buildings to remove it from the curtilage); *but cf. United States v. Dunn*, 480 U.S. 294, 302 (1987) (holding that the defendant did not have a reasonable privacy interest in a barn located 60 yards from his home because the barn lay outside the fence enclosing the home, and thus it was not part of the curtilage).

{104} I would conclude that Defendant's subjective expectation of privacy from aerial surveillance is reasonable because of the steps he took to prevent ground-level surveillance. The State Police were required to obtain a warrant prior to conducting an aerial or ground search of the contents of Defendant's greenhouse during the operation. I accordingly would hold that the aerial surveillance of Defendant's property was unconstitutional.

**B. The evidence seized from Defendant's greenhouse was not sufficiently attenuated from the warrantless aerial search**

{105} I am in complete agreement with the majority that the evidence seized by the State Police was not sufficiently attenuated to purge it of the unconstitutional warrantless search. Majority op. ¶ 59. To preface this discussion, I would emphasize that I am not foreclosing the ability of law enforcement personnel to use constitutional investigative efforts in similar cases. The operation in this case was conducted as a result of anonymous tips reporting

that marijuana was being grown in rural areas of Taos County. The anonymous tips did not provide either any names or the specific residences of the people who were allegedly growing marijuana. Based on these anonymous tips, the State Police narrowed its search to the Carson Estates and Twin Peaks areas of Taos County. As this Court recognized in *State v. Urioste*, "[a]n anonymous tip may justify an investigatory stop if the information is sufficiently corroborated by subsequent investigation to establish reliability." 2002-NMSC-023, ¶ 16, 132 N.M. 592, 52 P.3d 964 (quoting *State v. Flores*, 1996-NMCA-059, ¶ 8, 122 N.M. 84, 920 P.2d 1038). However, "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.* ¶ 17 (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

{106} The uncertain reliability of the anonymous tips in this case, coupled with "[t]he overwhelming volume of testimony . . . that one could not see into the greenhouse[] from the ground," required State Police personnel to investigate further using constitutional methods. *Id.* In the absence of reasonable suspicion, we have encouraged police officers to either (1) utilize a confidential informant or an undercover officer to observe suspicious activity; (2) "attempt to gain consent to search the residence or perform a 'knock and talk' to try and gain information"; or (3) speak with neighbors about whether they had observed any suspicious activities. *State v. Nyce*, 2006-NMSC-026, ¶ 23, 139 N.M. 647, 137 P.3d 587 (emphasis added), *holding limited on other grounds by*

*State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376. In this case, the State Police officers relied on non-specific tips that they received over two years to conduct indiscriminate aerial surveillance of all private property in a vast area of Taos County. The New Mexico Constitution requires law enforcement officers to employ constitutional methods to develop probable cause to believe that a specific property contains evidence of a crime. I would make it clear that aerial surveillance is not a constitutional method.

{107} Even where consent is voluntary, consent is not constitutionally free of illegal taint where the police misconduct was "directly related to the ensuing event of . . . giving consent." *Davis v. Commonwealth*, 559 S.E.2d 374, 380 (Va. Ct. App. 2002). Because Defendant took reasonable steps to protect his privacy that exhibited a reasonable expectation of privacy, the State Police should have attempted to corroborate their anonymous tips by employing one of the three listed constitutional methods. The State Police then likely would have established probable cause to support a search warrant. However, the subsequent utilization by the State Police of the constitutional "knock and talk" investigative tactic cannot purge Defendant's consent from the original taint of the unconstitutional warrantless aerial search. Accordingly, I agree that all evidence seized from Defendant's property must be suppressed.

{108} For the foregoing reasons, I respectfully concur with the result reached by the majority.

**EDWARD L. CHÁVEZ, Justice**



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## Annual Estate Planning Update 2016

Wednesday, May 4, 2016  
7:45 a.m. – 5:00 p.m.

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**To Register:** Mail a check for \$75 to the Independent Community Foundation, Inc. We will not be accepting registration by phone or email this year.

**Seating is limited, so you must register to attend.**

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**Note:** CE Credits for CFPs may only be available for attendees who are present the entire day, per the CFP regulations.

### Agenda

<i>Sign-in</i>		7:45 – 8:15 a.m.
What's New in New Mexico? Overview of Statutory and Regulatory Changes and Judicial Decisions for New Mexico Estate Planners in 2016	Vickie R. Wilcox, J.D., LL.M.	8:30 – 9:00 a.m.
Uncovering New Opportunities in Estate Planning: Undoing Discounts, Revoking the Irrevocable, and Other Ideas for Income Tax Planning	Vickie R. Wilcox, J.D., LL.M.	9:00 – 10:00 a.m.
<i>Break</i>		10:00 – 10:15 a.m.
Estate Plans of Dead Celebrities: How the Intellectual Property of the Rich and Famous Was (Not) Handled – and How YOU (and therefore your Clients) Can Learn from Their Mistakes	Jeffrey D. Myers, J.D.	10:15 – 11:15 a.m.
Hot Topics: Litigation Risks in the Uniform Prudent Investor Act and Uniform Trust Code for Fiduciary Investment	Gregory W. MacKenzie, J.D.	11:15 – 12:15 p.m.
<i>Lunch: Pizza, Drinks, and Networking in the Charity Exhibit Hall</i>		12:15 – 1:15 p.m.
<b>Federal Gift and Estate Planning Update/Special Guest Speaker</b>	<b>Steve R. Akers, J.D.</b>	<b>1:15 – 2:45 p.m.</b>
Ethical Issues and Risks for Attorneys, CPAs, and Financial Advisors under HIPAA (YES! It Does Apply to You)	Madison R. Jones, M.B.A. Vickie R. Wilcox, J.D. LL.M.	2:45 – 3:45 p.m.
<i>Break</i>		3:45 – 4:00 p.m.
Buy Sell Agreements/Insurance Overview for Estate Planners and Family Advisors	James J. Widland, J.D.	4:00 – 5:00 p.m.

#### Presented By:

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Albuquerque, New Mexico 87197

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**To RSVP, please mail your \$75 registration fee and your contact information to the address on the left. This year, we will not accept registration by email or phone.**





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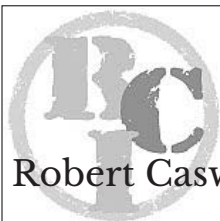
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Official Publication of the STATE BAR of NEW MEXICO

## SUBMISSION DEADLINES

All advertising must be submitted via e-mail by 4 p.m. Wednesday, two weeks prior to publication (*Bulletin* publishes every Wednesday). Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by the publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, 13 days prior to publication.**

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## Positions

### **13th Judicial District Attorney Assistant Trial Attorney, Associate Trial Attorney Sandoval and Valencia Counties**

Assistant Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for entry to mid-level attorney to fill the positions of Assistant Trial Attorney for Sandoval (Bernalillo) or Valencia (Belen) County Offices. These positions require misdemeanor and felony caseload experience. Associate Trial Attorney - The 13th Judicial District Attorney's Office is accepting applications for entry level positions for Sandoval (Bernalillo) or Valencia (Belen) County Offices. These positions require misdemeanor, juvenile and possible felony cases. Upon request, be prepared to provide a summary of cases tried. Salary for each position is commensurate with experience. Send resumes to Reyna Aragon, District Office Manager, PO Box 1750, Bernalillo, NM 87004, or via E-Mail to: [RAragon@da.state.nm.us](mailto:RAragon@da.state.nm.us). Deadline for submission of resumes: Open until positions are filled.

### **Associate Attorney**

Montgomery & Andrews, PA, with offices in Albuquerque and Santa Fe, is seeking applications from attorneys who have at least two years of experience for full-time associate positions in the firm. The firm serves a wide variety of national, state, and local clients in growing and dynamic practice areas, including construction law, commercial transactions, environmental law, insurance defense, water law, government relations, employment law, medical malpractice, and health law. Applicants should mail cover letters and resumes to: Hiring Attorney, Montgomery & Andrews, P.A., Post Office Box 2307, Santa Fe, New Mexico 87504-2307 or email them to [tgarduno@montand.com](mailto:tgarduno@montand.com). Inquiries will be kept confidential upon request.

### **Associate Attorney**

Established Albuquerque law firm seeking an Associate Attorney with 0-5 years' experience possessing strong writing and critical thinking skills for work in Med Mal and Catastrophic Injury Plaintiffs' practice. Email resume and references to [vlawofficenm@gmail.com](mailto:vlawofficenm@gmail.com).

### **Immediate Opening for Law Clerks**

Guebert Bruckner P.C. looking for law clerks to review documents in Santa Fe. This is a temporary position approximately 3-6 months. Must have own transportation. Hourly + mileage reimbursement. Apply to Kathleen A. Guebert @ [kathleen@guebertlaw.com](mailto:kathleen@guebertlaw.com) NO PHONE CALLS PLEASE

### **Attorney**

The Third Judicial District Attorney's Office, located in Dona Ana County, is now accepting resumes for an attorney. This position is open to experienced attorneys. Salary will be based upon the New Mexico's District Attorney Personnel and Compensation Plan with a starting salary range of \$42,935.00 to \$74,753.00. Excellent benefits available. Please send a cover letter, resume, and references to Whitney Safranek, Human Resources, 845 N. Motel Blvd. Second Floor, Suite D., Las Cruces, NM 88007 or via e-mail [Wsafranek@da.state.nm.us](mailto:Wsafranek@da.state.nm.us).

### **Associate**

Established Albuquerque plaintiff personal injury and wrongful death litigation firm seeks associate for its growing statewide practice. Ideal candidate should have minimum 2 years of personal injury litigation experience. Taking/defending depositions and arbitration/trial experience required. Bilingual Spanish is a plus. Salary dependent on experience. Submit resumes to 4302 Carlisle NE, Albuquerque, NM 87107. Please include sample of legal writing.

### **9th Judicial District Attorney-Senior Trial Attorney, Assistant Trial Attorney, Associate Trial Attorney**

The Ninth Judicial District Attorney is accepting resumes and applications for an attorney to fill one of the following positions depending on experience. All positions require admission to the New Mexico State Bar. Senior Trial Attorney- This position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence, as well as the ability to handle a full-time complex felony caseload. A minimum of five years as a practicing attorney are also required. Assistant Trial Attorney - This is an entry to mid-level attorney. This position requires misdemeanor and felony caseload experience. Associate Trial Attorney - an entry level position which requires misdemeanor, juvenile and possible felony cases. Salary for each position is commensurate with experience. Send resumes to Dan Blair, District Office Manager, 417 Gidding, Suite 200, Clovis, NM 88101 or email to: [Dblair@da.state.nm.us](mailto:Dblair@da.state.nm.us).

### **Associate Attorney**

Chapman and Charlebois, P.C., is seeking an experience and motivated attorney to join our growing litigation team, providing legal advice and analysis and trial representation to local and national clients. Must have 1 to 5 years of experience and be licensed in NM. Civil defense experience is preferred. Please submit resume and salary requirements to: [Roxanna@cclawnm.com](mailto:Roxanna@cclawnm.com).

### **Court Of Appeals Staff Attorney**

THE NEW MEXICO COURT OF APPEALS is seeking applications for a full-time permanent Associate Staff Attorney in the Court's Prehearing Division. The position may be located in either Santa Fe or Albuquerque, depending on the needs of the Court and available office space. Regardless of experience, the beginning salary for the position is limited to \$66,000, plus generous fringe benefits. New Mexico Bar admission as well as three years of practice or law clerk experience is required. This 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 Application for Employment, along with a letter of interest, resume, law school transcript, and short writing sample of no more than 5 pages, to Paul Fyfe, Chief Staff Attorney, P.O. Box 2008, Santa Fe, New Mexico 87504, no later than 4:00 p.m. on Tuesday, March 1, 2016. To obtain the application please call 827-4875 or visit [www.nmcourts.com](http://www.nmcourts.com) and click on "Job Opportunities." The New Mexico Judicial Branch is an equal-opportunity employer.

### **Proposal Request for Public Defender Services**

The Mescalero Apache Tribe is seeking proposals to provide Public Defender Services to the Mescalero Tribal Court for criminal cases. SUMMARY: The Mescalero Apache Tribal Court is a court of general jurisdiction addressing crimes under the Mescalero Apache Law and Order Code. All crimes do not exceed one year sentencing. Attorneys licensed and in good standing with the State of New Mexico Bar is required; Proposed fees may be based on an hourly rate or a flat rate; Proposed fees may NOT exceed \$60,000.00 per budget year; Final terms of submitted proposals are negotiable. SUBMIT PROPOSALS TO THE MESCALERO TRIBAL ADMINISTRATOR: DUANE DUFFY, MESCALERO APACHE TRIBE, MESCALERO, NM 88340 575-464-4494 EXT. 211

### **Attorney**

Non-profit agency providing civil legal services to children and youth seeks to fill staff attorney position in Albuquerque, NM. Some experience in abuse/neglect, children's law, family law and/or trial experience preferred. English/Spanish speaker preferred. Must have excellent writing skills, be organized and detail-oriented, excellent people skills, and motivated to help children and youth improve their circumstances; excellent references. Salary commensurate with experience. Please send cover letter and resume to Cynthia Gibbons at [cgibbons@pegasuslaw.org](mailto:cgibbons@pegasuslaw.org). No phone calls please.

### **Request For Proposal RFP# 2016-0259-LD/KE Hearing Officer for Santa Fe County**

Santa Fe County is requesting proposals from licensed New Mexico attorneys to act as a Hearing Officer in quasi-judicial Land Use Public hearings in accordance with the Sustainable Land Development Code, Ordinance No. 2015-11. All proposals must be received by 2:00PM on March 25, 2016, at the Santa Fe County Purchasing Division, 142 W. Palace Avenue (Second Floor), Santa Fe, NM 87501. A Pre-Proposal Conference will be held on Wednesday, March 2, 2016 at 10:00AM at the Santa Fe County Administrative Offices located at 102 Grant Street, second floor, Suite 102, Santa Fe, New Mexico 87501. Interested Offerors are directed to view the RFP on the County's website. [http://www.santafecountynm.gov/asd/current\\_bid\\_solicitations](http://www.santafecountynm.gov/asd/current_bid_solicitations)

### **National Nuclear Security Administration-General Attorney**

Would you like to have a job that can help ensure national security? If so, the U.S. Department of Energy, National Nuclear Security Administration (NNSA), Sandia Field Office (SFO) in Albuquerque, NM has an employment opportunity for a General Attorney. The NNSA maintains and enhances the safety, security, and effectiveness of the U.S. nuclear weapons stockpile without nuclear testing; works to reduce the global danger from weapons of mass destruction; provides the U.S. Navy with safe and effective nuclear propulsion; and responds to nuclear and radiological emergencies in the U.S. and abroad by providing support to the nation's nuclear weapons stockpile stewardship activities. SFO provides operations, production, and program oversight, and contract administration for Sandia National Laboratories activities. Sandia National Laboratories is a multidisciplinary national laboratory and federally funded research and development center (FFRDC) sponsored by, and supporting the missions of, the NNSA. As a General Attorney at SFO you will provide legal advice and counsel on complex areas of law arising out of NNSA programs, projects and functions conducted at SFO. Interested attorneys must have their applications fully completed, including all required supporting documentation, by February 29, 2016. For a complete list of application requirements, go to <https://www.usajobs.gov/> and search for announcement 16-0072-NAT.

### **Assistant General Counsel – Req. #1600042S**

The New Mexico State University General Counsel Office (UGC) office in Las Cruces, NM seeks enthusiastic and industrious attorney for position as Assistant General Counsel. The selected candidate will work with two other attorneys in UGC as well as outside counsel and university administrators in providing legal advice and document review and drafting on a broad range of legal issues, including those related to academic and student affairs, athletics, contracts, litigation support, civil rights, international programs, real estate, employment matters and other legal issues in higher education. The attorney will also assist in coordinating the University's responses to subpoenas and open records requests, and drafting of a variety of transactional documents. All applications must be submitted online and submitted by March 1. The online posting for this position with additional details can be found at <http://jobs.nmsu.edu/postings/24418>. Call 575-646-2446 with questions.

### **Family Law Attorney**

The Law Office of Jill V. Johnson Vigil LLC., a Las Cruces based family law practice, is seeking to expand and add an attorney to our team. Applicants should have 2-3 years experience in family law, be highly motivated, able to multi-task and manage a large case load. The Law Office of Jill V. Johnson Vigil LLC. offers a comfortable and friendly work environment with benefits and competitive salary commensurate with your qualifications and experience. Applicants must be in good standing with NM Bar and willing to relocate to Las Cruces. Spanish speaking is preferred, but not required. If you are ready for the next step in your career, please send your cover letter, resume and three references via email to [careers@jvjvlaw.com](mailto:careers@jvjvlaw.com) before March 31, 2016. Check us out online at [www.jvjvlaw.com](http://www.jvjvlaw.com) and "like" us on Facebook Law Office of Jill V. Johnson Vigil.

### **Attorney**

The civil litigation firm of Atkinson, Thal & Baker, P.C. seeks an attorney with strong academic credentials and 2-10 years experience for a successful, established complex commercial and tort litigation practice. Excellent benefits. Tremendous opportunity for professional development. Salary D.O.E. All inquiries kept confidential. Send resume and writing sample to Atkinson, Thal & Baker, P.C., Attorney Recruiting, 201 Third Street NW, Suite 1850, Albuquerque, NM 87102.

### **Lawyer – Advanced Position**

The New Mexico Department of Workforce Solutions (NMDWS), Office of the General Counsel, is accepting applications from New Mexico licensed attorneys possessing a minimum of five years legal experience for a Lawyer – Advanced position to represent NMDWS in federal and state court litigation. The successful candidate must provide the highest level of professional legal services to NMDWS in litigation, interpretation of law, research, analysis, and administrative hearings. This position requires a hard-working, self-motivated attorney who works well with others. Superior writing, litigation abilities and admittance to practice law in New Mexico are required. Primary areas of practice will include unemployment insurance, bankruptcies, collections, foreclosures, employment, union/labor relations, contracts, Inspection of Public Records Act requests, and other civil law matters. The position is located in Albuquerque. Must apply on-line via the New Mexico State Personnel Office website, located at [www.spo.state.nm.us](http://www.spo.state.nm.us), no later than March 8, 2016. The agency contact is Marshall Ray, Deputy Secretary/General Counsel, (505) 841-8471. The State of New Mexico is an equal opportunity employer.

### **Request for Proposals:**

Mountain States Insurance Group, located in Albuquerque, seeks proposals from law firms or licensed NM attorneys to provide legal services in the defense of our insureds related to civil claims and workers' compensation in New Mexico and Texas. Firms or attorneys interested in submitting a proposal may request a packet from Stacey Scherer, [sscherer@msig-nm.com](mailto:sscherer@msig-nm.com). Proposals will be due by May 1, 2016.

### **Legal Assistant**

GUEBERT BRUCKNER P.C. busy litigation firm looking for experienced Legal Assistant to support 11 attorneys. Candidate will coordinate with various members of the staff to accomplish the needs of attorneys. Duties include but are not limited to: Filing, finalizing documents for submission to clients, State and Federal courts. Excellent communication skills required in order to meet deadlines and to comply with various client guidelines. Strong writing and proof reading skills, as well as knowledge of court rules required. Hours 8:30 to 5:30. Firm uses Microsoft Word, Excel, and Outlook. Please submit resume and salary requirement to Kathleen A. Guebert, POB 93880, Albuquerque, NM 87109.

### Legal Assistant/Paralegal

Albuquerque law firm focused on civil catastrophic injury litigation seeking a full-time paralegal/legal assistant to join our trial team. Bachelor's degree and legal experience preferred. Candidate should have strong organizational skills and a positive attitude. Send resume to vlawofficenm@gmail.com.

### Paralegal

Personal Injury/MedMal/Bad Faith Litigation Law Firm in Albuquerque is looking for an experienced, energetic paralegal to join our team! We offer great benefits, positive and friendly environment. If you have 5 or more years' experience, please submit your cover letter, resume and salary history, in confidence, to kdc@carterlawfirm.com.

### Experienced Paralegal

Experienced paralegal for insurance defense downtown law firm, 5+ years experience. Strong organizational skills and attention to detail necessary with experience in litigation and medical records. Windows, including Outlook and Word. Full time/salary DOE. Great benefits. Fax resume to Human Resources at 505-764-6099 or mail to Civerolo, Gralow, Hill & Curtis, P.A., P.O. Box 887, Albuquerque, NM 87103.

### Court Administrator

Manage and administer the activities, programs and staff of the Pueblo of Jemez' Tribal Court. Education and experience required: Bachelor's Degree in criminal justice, or a closely related field; AND five (5) years of managerial experience in court operations. To learn more about this position and the Pueblo of Jemez, visit our website at www.jemezueblo.org. Or call the Human Resources Department at (575) 834-7359. Submit a completed tribal application with your resume to: HR@jemezueblo.org

### Secretary/Legal Assistant

F/T secretary/legal assistant for litigation and business matters. Applicants should have a minimum of 3 years of experience. Must be detail oriented, organized, self-motivated & able to undertake a variety of tasks in a fast-paced environment. Salary DOE. Please email your resume to lori@srklawnm.com.

## Positions Wanted

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## Miscellaneous

### Search for Will

Please contact attorney Kristi A. Wareham at (505) 820-0698 if you have any information about a will prepared for and executed by Janet M. Montoya, who resided in Santa Fe County, New Mexico upon her death on December 6, 2015.



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*Attorneys at Law*

## We are pleased to welcome to the firm **Christina S. West**



**Ms. West** brings with her 15 years of experience practicing in the areas of federal Indian law, tribal governance, construction projects, contract law, and liability defense, as well as employment matters. **Ms. West** is licensed in New Mexico, the U.S. District Court for the District of New Mexico, the Tenth Circuit Court of Appeals, and in the tribal courts of the Pueblos of Isleta, Laguna, Ohkay Owingeh and Tesuque, the Ute Mountain Ute Tribe, the Hopi Tribe and the Navajo Nation.

**Ms. West** serves as the Director at Large of the New Mexico Women's Bar Association. She is also an Associate Member of the Tribal In-House Counsel Association. She graduated from the University of Tulsa in 1998 and obtained her law degree from Arizona State University in 2000. **Ms. West** is of Southern Cheyenne descent.

**Ms. West** may be reached at 505-842-6123 or via email at [cwest@indiancountrylaw.com](mailto:cwest@indiancountrylaw.com)

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## *You're Invited!*

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We hope you will join us for this important celebration.

### **Supreme Court Justice Edward L. Chávez**

will address attendees.

### **State Bar President J. Brent Moore**

will honor attorneys celebrating 25 and 50 years of service.

**What:** State Bar of New Mexico's 130th Birthday

**Where:** State Bar Center, 5121 Masthead NE, Albuquerque, NM

**When:** 4 p.m., February 26



For more information or to R.S.V.P., contact Abbey Daniel, [adaniel@nmbar.org](mailto:adaniel@nmbar.org).