BAR BULLETIN

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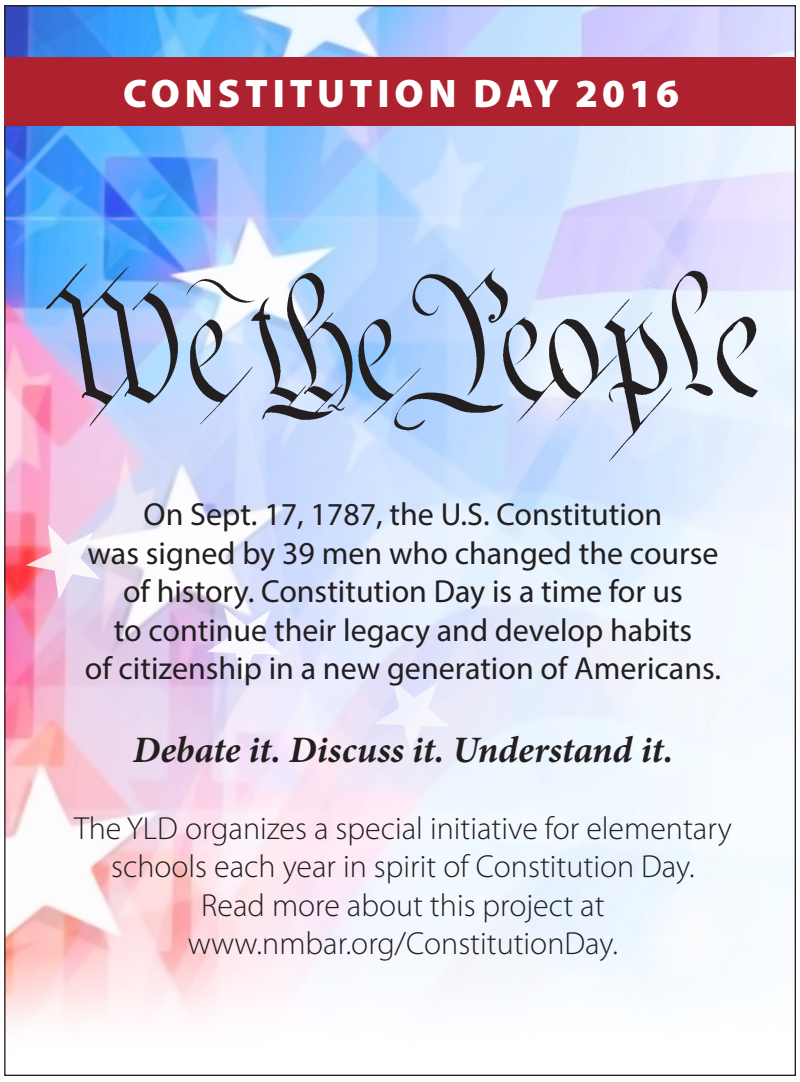

CLE Planner

Oct. 6

2016 New Mexico Health Law Symposium

5.9 G 1.0 EP

Thursday, Oct. 6, 2016 • 9 a.m.–4:45 p.m.
State Bar Center, Albuquerque

Co-sponsor: *Health Law Section*

The 2016 Health Law Symposium will be held at the State Bar Center and will also be offered by Live Webcast. Don't miss this important program covering topics like the New Mexico legislative update, physician practice compliance programs and ethics. Reduced fee for non-members is available.

Oct. 7

Employment and Labor Law Institute

6.5 G

Friday, Oct. 7, 2016 • 8:30 a.m.–4:45 p.m.
State Bar Center, Albuquerque

Co-sponsor: *Employment and Labor Law Section*

This program will address a number of issues that arise in the workplace and how they relate to employment and labor law. It will also cover recent updates in state law and include a panel discussion of mediation ethics related to the practice area. Reduced fee for non-members is available.

Oct. 14-15

2016 New Mexico Family Law Institute: When Worlds Collide: Crossover Litigation in Family Law Cases

Friday, Oct. 14, 2016 • 8:30-4:30 p.m. and Saturday, Oct. 15, 2016 • 8:30-3:30 p.m.
State Bar Center, Albuquerque

5.0 G 1.5 EP **Friday Only**
5.0 G .5 EP **Saturday Only**
10.0 G 2.0 EP **Both Days**

Co-sponsor: *Family Law Section*

The two-day Family Law Institute will once again be held in 2016 at the State Bar Center and will be offered by Live Webcast. Sessions for the institute include treatment of social security benefits in family law matters, criminal acts committed during marriage and after divorce and bankruptcy: property rights in bankruptcy for the non-bankrupt spouse. More information regarding CLE credits and speakers coming soon. Save the date for this popular two-day event!

Register online at **www.nmbar.org** or call 505-797-6020.

STATE BAR of NEW MEXICO
CENTER FOR LEGAL EDUCATION

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email: address@nmbar.org • www.nmbar.org

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Common Legal Issues for Senior Citizens Workshop
Workshop: 10–11:15 a.m. POA AHCD Clinic: noon–1 p.m., Bonnie Dallas Senior Center, Farmington, 1-800-876-6657

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5
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5
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10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

5
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Notices

Court News

New Mexico Supreme Court

Commission on Access to Justice

The next meeting of the Commission on Access to Justice is noon–4 p.m., Sept. 16 at the State Bar Center. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at www.nmcourts.gov/access-to-justice-commission.aspx.

Second Judicial District Court

Exhibit Destruction

Pursuant to 1.21.2.6.17 Records Retention and Disposition Schedules-Exhibits, the Second Judicial District Court will destroy exhibits filed with the Court, the Domestic Matters/Relations and Domestic Violence cases for the years of 1999–2002 including but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through Oct. 1. Individuals who have cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717, from 8 a.m.–5 p.m., Monday–Friday. Plaintiff's exhibits will be released to counsel of record for the plaintiff(s) and defendant's exhibits will be released to counsel of record for defendants(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by order of the Court.

Sixth Judicial District Court

Announcement of Vacancy

A vacancy on the Sixth Judicial District Court, Luna County, will exist as of Aug. 27 due to the retirement of Hon. Daniel Viramontes, effective Aug. 26. The assignment for this position is a general bench assignment, Division IV, and will be located in Deming. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Alfred Mathewson, chair of the Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may found at lawschool.unm.edu/judsel/application.php. The deadline is 5 p.m., Sept. 14. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The District Court Judicial Nominating Committee will meet at 8:30 a.m., Sept. 22, to interview applicants for the position at the Luna County Judicial Complex, 855 South Platinum Avenue, Deming. The Commission meeting is open to the public and anyone who has comments will have an opportunity to be heard.

Professionalism Tip

With respect to the public and to other persons involved in the legal system:
I will commit to the goals of the legal profession, and to my responsibilities to public service, improvement of administration of justice, civic influence, and my contribution of voluntary and uncompensated time for those persons who cannot afford adequate legal assistance.

Bernalillo County Metropolitan Court

Mediation's 30th Anniversary Celebration

Members of the legal community and the public are cordially invited to a reception celebrating Metro Court's Mediation Division's 30th year of operation. The event will take place from 5:30-7:30 p.m. on Oct. 13 in Metro Court's Rotunda. Join the court as it takes a look back: honoring those who spearheaded the program, recognizing those who have given countless hours to the program's mission and reflecting on the invaluable service mediation provides to the community. For more information, contact Camille Baca at 505-841-9897.

U.S. District Court, District of New Mexico

Magistrate Judge Appointment

The Judicial Conference of the U.S. has authorized the appointment of a full-time U.S. magistrate judge for the District of New Mexico at Las Cruces. The current annual salary of the position is $186,852. The term of office is eight years. The full public notice and application forms for the magistrate judge position are posted in the U.S. District Court Clerk's Office of all federal courthouses in New Mexico, and on the Court's website at www.nmd.uscourts.gov. Application forms may also be obtained by calling 575-528-1439. Applications must be received by Sept. 30. All applications will be kept confidential unless the applicant consents to disclosure.

Proposed Amendments to Local Rules of Criminal Procedure

Proposed amendments to the Local Rules of Criminal Procedure of the U.S. District Court for the District of New Mexico are being considered. The proposed amendments apply to D.N.M.LR-Cr. 32, Sentencing and Judgment. A "redlined" version (with proposed additions underlined and proposed deletions stricken out) and a clean version of these proposed amendments are posted on the Court's website at www.nmd.uscourts.gov. Members of the bar may submit comments by email to localrules@nmcourt.fed.us or by mail to U.S. District Court, Clerk's Office, Pete V. Domenici U.S. Courthouse, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102, Attn: Local Rules. Comments must be submitted by Sept. 30.

Reappointment of Incumbent United States Magistrate Judge

The current term of office of U.S. Magistrate Judge Gregory B. Wormuth is due to expire on May 17, 2017. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be addressed as follows: U.S. District Court, CONFIDENTIAL—ATTN: Magistrate Judge Merit Selection Panel, 333 Lomas Blvd. NW, Suite 270, Albuquerque, NM 87102. Comments must be received by Oct. 28.

State Bar News

Attorney Support Groups

- Sept. 19, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the third Monday of the month.)

- Oct. 3, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (group meets the first Monday of the month.)
- Oct. 10, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (group meets on the second Monday of the month). Teleconference participation is now available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Hilary Noskin, 505-449-7984 or Bill Stratvert, 505-242-6845.

Paralegal Division

Criminal Law/Civil Liabilities CLE

The State Bar Paralegal Division invites members of the legal community to attend the Division's Criminal Law/Civil Liabilities CLE program (3.0 G) from 9 a.m.–12:15 p.m., Sept. 24, at the State Bar Center. Topics include the unauthorized practice of law and increasing liabilities for paralegals, financial discovery, figuring out what you do and don't have and an update on case management deadline changes. Remote connections for audio or video will not be available. Registration is $35 for Division members, $50 for non-member paralegals, $55 for attorneys. For more information and registration instructions, visit www.nmbar.org > About us > Divisions > Paralegal Division > CLE Programs (click on "See Flyer" at the bottom of the page) or contact Carolyn Winton, 505-858-4433 or Linda Murphy, 505-884-0777.

Solo and Small Firm Section

Fall Luncheon Presentation Schedule Begins with Former Sheriff Darren White

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and this fall's schedule opens with former Department of Public Safety Secretary and Bernalillo County Sheriff Darren White. White will present "The Journey from Drug War Warrior to Legalized Marijuana" on Sept. 20. Albuquerque attorney Matt Coyte will discuss various penal issues on Oct. 18 with "New Mexico's Prisons and Jails—Are We Making Things Worse?" On Nov. 15 Fred Nathan, executive director of Think New Mexico, a results-oriented think tank serving New Mexicans, will discuss the work of Think New Mexico and various policy issues facing the 2017 legislative session. On Jan. 17, 2017, Ron Taylor will share his lawyerly insights as a juror in a long murder trial. All presentations will take place from noon-1 p.m. at the State Bar Center. Contact Breanna Henley at bhenley@nmbar.org to R.S.V.P.

Young Lawyers Division

Volunteers Needed for Roswell Wills for Heroes Event

The Young Lawyers Division and UNM School of Law Alumni Association seek volunteer attorneys for its Wills for Heroes event from 8:30 a.m.-noon, on Sept. 17, at Fire Station 1, 200 S. Richardson, Roswell. Attorneys will provide free simple wills, powers of attorney, and advanced medical directives for first responders and their spouses. Breakfast, coffee and lunch will be served. Even though volunteers need no prior experience with wills, those uncomfortable providing advice in this area can still volunteer to conduct intake or serve as witnesses or notaries. Contact Anna Rains at acrains@sbcw-law.com or 575-622-5440 to volunteer.

UNM

Law Library

Hours Through Dec. 18

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10a.m.–6p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Saturday–Sunday	Closed
Holiday Closures	
Nov. 24–25 (Thanksgiving)	

Other Bars

First Judicial District Bar Association

September Buffet Luncheon

Join the First Judicial District Bar Association for its next buffet luncheon from noon–1 p.m., Sept. 26, at the Hilton Hotel, 100 Sandoval Street, Santa Fe. Kyle Harwood, partner at Egolf + Ferlic + Harwood, will give a Santa Fe land and water update, including a discussion of the Aamodt case and the impact of recent amendments to the county code. Attendance is $15 and includes a buffet lunch. R.S.V.P. by 5 p.m., Sept. 22, to erin.mcsherry@state.nm.us. Payment should be made upon arrival at the event with cash, card or check to the "First Judicial District Bar Association" or "FJDBA".

Oliver Seth American Inn of Court

Meetings Begin in September

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from September until May. Meetings address a pertinent topic and conclude with dinner. Those who reside and/or practice in Northern New Mexico and want to enhance skills and meet some good lawyers should send a letter of interest to the Honorable Paul J. Kelly Jr., U.S. Court of Appeals—Tenth Circuit, PO Box 10113, Santa Fe, NM 87504-6113.

Board of Bar Commissioners Meeting Summary

The Board of Bar Commissioners met at 8 a.m. on Aug. 18 at the Buffalo Thunder Resort in Santa Fe. Action taken at the meeting was as follows:

- Approved the May 6 meeting minutes as submitted;
- Accepted the July 2016 financials and executive summaries;
- Accepted the 2015 audit;
- Approved a recommendation to close an old health savings plan account at U.S. Eagle;
- Approved making an additional $50,000 payment on the mortgage;
- Approved a proposal on the intercompany payable/receivable repayment from the Bar Foundation to the State Bar;
- Approved a proposal from Research & Polling in the amount of $15,000 to perform a compensation survey in 2017;
- Approved investing the Bank of America funds in two CDs, one for $1 million in a three-month CD and one for $1 million in a one-year CD;
- Approved the renewal of the contract for the executive director for one year;
- Approved a donation request policy and will include a line item in the 2017 budget in the amount of $5,000;
- Approved bylaw amendments to Article IX, Section 9.1, of the State Bar Bylaws to limit the non-lawyer members and not permit non-lawyers to serve as officers on section boards, and an amendment to Section 9.5 for all future section bylaw amendments to be reviewed by the general counsel;
- Appointed Erinna M. Atkins to the vacancy in the Sixth Bar Commissioner District through the end of the year;
- Due to Dustin Hunter's appointment to the Bench, appointed Wesley O. Pool to the Vice President vacancy through the end of the year;
- Nominated Gerald G. Dixon as Secretary-Treasurer and Wesley O. Pool as President-elect for 2017; the election will be held at the September Board meeting;
- Received a report on the New Mexico Legal Aid access to justice portal and referred it to the Board's Access to Justice Fund Committee;
- Received the 2016 interim report on racial and ethnic diversity in the legal profession and recommendations from the Diversity Committee;
- Received the 2015 Client Protection Fund Annual Report;
- Received a report from Ian Bezpalko regarding a new Supreme Court policy pertaining to online case access; the Court will be issuing an Order that will contain additional information;
- Received an update on the ECL (Entrepreneurs in Community Lawyering) Project; the faculty and curriculum are in place; four applicants have been selected and the program begins Sept. 28.

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Sept. 30 meeting.

Address Changes

All New Mexico attorneys must notify both the Supreme Court and the State Bar of changes in contact information.

Supreme Court
Email: attorneyinfochange@nmcourts.gov
Fax: 505-827-4837
Mail: PO Box 848
Santa Fe, NM 87504-0848

State Bar
Email: address@nmbar.org
Fax: 505-797-6019
Mail: PO Box 92860
Albuquerque, NM 87199
Online: www.nmbar.org

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

State Bar Annual Awards

Honored for Excellence in the Legal Profession

Six remarkable members of the New Mexico legal community and one legal program were recognized at the Aug. 19 Annual Awards Ceremony at the Buffalo Thunder Resort in Santa Fe. The presentation of the Annual Awards is one of the State Bar's most special traditions. To make it even more memorable, this year's ceremony included a video with interviews from the honorees' nominators explaining just how meaningful their contributions have been.

State Bar President J. Brent Moore presented the awards in a ballroom filled to the brim with friends, colleagues, family members and Annual Meeting attendees. Moore presented Hannah Banks Best with the Distinguished Bar Service Award, which recognizes attorneys who have provided valuable service to the legal profession over a significant period of time. Best is a co-founding member of the New Mexico Black Lawyers Association and was a social worker before enrolling at the UNM School of Law at age 40. In her acceptance speech, Best mentioned her father's advice and one of the tenants by which she lives her life, "it's not what's right, it's what's just."

Next, Tina L. Kelbe was honored with the Distinguished Bar Service Non-lawyer Award. As a founding member of the Paralegal Division, Kelbe has been active on the board since its inception in 1995. "All I can do is thank you… I don't know what I'd do without them," Kelbe said of the members of the Paralegal Division in her acceptance.

Billy Burgett, Arturo Jaramillo, Hanna Best, Tina Kelbe, Denise Chanez, Robert Lara and Brent Moore

Arturo L. Jaramillo received the Justice Pamela B. Minzner Professionalism Award which is presented to an attorney who, over a long and distinguished career, has exemplified the epitome of professionalism. Jaramillo served as the first Hispanic president of the State Bar. He is a soon to be retired partner at Cuddy & McCarthy LLP and is the founder of the State Bar Committee on Diversity in the Legal Profession's summer law clerk program that bears his name. Jaramillo said Justice Minzner is the highest standard one could try to meet and he was honored to be recognized.

Hannah Best and guests

Tina Kelbe, center, stands with her family. From left is her daughter, Kim; son, Frank; Tina; daughter, Kris; and son, Jim.

Art Jaramillo and family

Look for more special coverage of the Annual Meeting!
Sept. 21: Keynote Address with Justice Ginsburg, the President's Reception, Friday programming and more
Sept. 28: Annual Meeting Golf Tournament, Opening Reception, Saturday programming and more

The Outstanding Legal Program Award recognizes outstanding law-related organizations or programs that serve the legal profession and the public. This year's winner, the Self-Help Center at the Third Judicial District Court, provides Pro Se litigants with general information on how to file a court case, respond to a suit, and obtain assistance from other agencies. The Center serves a primarily Spanish speaking and poverty-stricken community. Robert Lara, a recent staff attorney, accepted the award on behalf of the Self Help Center's staff including Elizabeth Vasquez, Beverly Zubia, and Lilliana Atencio.

Currently a director at the Rodey Law Firm, co-chair of the State Bar Committee on Diversity in the Legal Profession and past president of the New Mexico Hispanic Bar Association, Denise M. Chanez was honored with the Outstanding Young Lawyer of the Year Award. It is presented to a young lawyer who exemplifies professionalism, demonstrates a commitment to their clients and public service and enhances the image of the legal profession. Chanez spoke of her passion for increasing diversity in the legal profession, saying that working towards this passion and finding the next generation of leaders is what keeps her going.

Billy K. Burgett received the Robert H. LaFollette Pro Bono Award. It is presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance to people who could not afford the assistance of an attorney. Burgett has been a practicing attorney in Albuquerque for more than 34 years and works with many legal assistance programs including the Volunteer Attorney Program and the Legal Resources for the Elderly Program. In his acceptance of the award, Burgett thanked his family and the Second Judicial District Pro Bono Committee.

The final award of the evening, the Seth D. Montgomery Distinguished Judicial Service Award, recognizes members of the judiciary who have distinguished themselves through long and exemplary service on the bench and who have significantly advanced the administration of justice or improved the relations between the bench and bar. This year's recipient, recently retired Justice Richard C. Bosson, was on a well-deserved vacation at the time of the event and was unable to attend. In a pre-filmed acceptance speech, he said was very pleased and surprised to have received it. Justice Edward L. Chávez accepted the award on Justice Bosson's behalf saying that this would make just another unnecessary excuse to have lunch with an old and dear friend.

Brent Moore and Robert Lara.

Denise Chanez (third from left) with her father, Gabe Chanez; mother, Diana Chanez, partner, Tim Atler, and son, Aiden Chanez-Atler

Billy Burgett stands with his wife, Paula, daughter, Zoe, and son, Chase.

To view more photos of the event and the video shown, visit www.nmbar.org/AnnualMeeting.

Legal Education

September

14 **Vehicle Forfeiture Conference for New Mexico Communities**
5.0 G, 1.0 EP
Live Seminar, Santa Fe
City of Santa Fe
505-955-6967

15 **Liquidated Damages in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Workers' Compensation Law and Practice Seminar**
5.6 G, 1.0 EP
Live Seminar, Santa Fe
Sterling Education Services
www.sterlingeducation.com

16 **27th Annual Appellate Practice Institute**
6.4 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Santa Fe Land Institute**
6.0 G, 1.0 EP
Live Program
American Association of Professional Landmen
817-231-4556

20 **2015 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Legal Writing—From Fiction to Fact (Morning Session 2015)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Legal Writing—From Fiction to Fact (Afternoon Session 2015)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Spring Elder Law Institute (2016)**
6.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

20 **Estate Planning for Firearms**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **EEOC Update, Whistleblowers and Wages (2015 Employment and Labor Law Institute)**
3.2 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **The New Lawyer – Rethinking Legal Services in the 21st Century (2015)**
4.5 G, 1.5 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Law Practice Succession – A Little Thought Now, a Lot Less Panic Later (2015)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

22 **Guardianship in NM: the Kinship Guardianship Act (2016)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **2016 Tax Symposium**
6.0 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **Ethics and Keeping Secrets or Telling Tales in Joint Representations**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **The 22nd Annual Conference of the National Association for Civilian Oversight of Law Enforcement**
18.0 G
Live Program, Albuquerque
National Association for Civilian Oversight of Law Enforcement
http://www.nacole.org/

26–29 **Bankruptcy From a Government Perspective**
19.8 G, 1.5 EP
Live Seminar, Santa Fe
National Association of Attorneys General
www.naag.org

29 **Estate Planning for Liquidity**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Legal Technology Academy for New Mexico Lawyers (2016)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Civility and Professionalism (Ethicspalooza Redux – Winter 2015 Edition)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **The US District Court: The Next Step in Appealing Disability Denials (2015)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Invasion of the Drones: IP-Privacy, Policies, Profits, (2015 Annual Meeting)**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

September

30 **Powerful Non-Defensive Communication: Cutting Edge Tools for Collaborative Law Professionals**
6.3 G
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

October

1 **New Mexico American College of Trial Lawyers Chapter Seminar**
2.0 G, 1.0 EP
Live Program
American College of Trial Lawyers
949-752-1801

3 **Mastering Microsoft Word in the Law Office**
6.2 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Indemnification Provisions in Contracts**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Attorneys Information Exchange Group 2016 Fall Conference**
14.0 G
Live Seminar, Santa Fe
Attorneys Information Exchange Group
www.aieg.com

5 **New Mexico Film Industry and Film Tax Credit**
1.0 G, (0.5 CPE credits)
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **Managing Employee Leave**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

5 **Ahead of the Curve: Risk Management for Lawyers**
3.0 G
Live Seminar, Albuquerque
CNA/Health Agencies
www.healthagencies.com/lawyers/cna-seminars/

6 **Ahead of the Curve: Risk Management for Lawyers**
3.0 G
Live Seminar, Santa Fe
CNA/Health Agencies
www.healthagencies.com/lawyers/cna-seminars/

6 **2016 New Mexico Health Law Symposium**
5.9 G, 1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

7 **Employment and Labor Law Institute**
6.5G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

10–14 **Basic Practical Regulatory Training for the Natural Gas Local Distribution Industry**
24.5 G
Live Seminar, Albuquerque
Center for Public Utilities New Mexico State University
business.nmsu.edu

10–14 **Basic Practical Regulatory Training for the Electric Industry**
26.2 G
Live Seminar, Albuquerque
Center for Public Utilities New Mexico State University
business.nmsu.edu

13 **Joint Ventures Between For-Profits and Non-Profits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

13–14 **34th Annual Advanced Oil, Gas & Energy Resources Law**
10.3 G, 1.7 EP
Video Replay, Santa Fe
State Bar of Texas
www.texasbarcle.com

14 **Citizenfour—The Edward Snowden Story**
3.2 G
Live Seminar
Federal Bar Association, New Mexico Chapter
505-268-3999

14–15 **2016 New Mexico Family Law Institute**
10.0 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
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Opinions

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

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
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Effective September 2, 2016

Published Opinions

No. 34261	3rd Jud Dist Dona Ana JR-11-371, STATE v TAYLOR E (reverse and remand)	8/29/2016
No. 34345	1st Jud Dist Santa Fe CV-13-3219, C QUEVEDO v NMCYFD (reverse and remand)	8/31/2016
No. 34327	4th Jud Dist Mora SA-13-4, ADOPTION OF DARLA D & PATTY R (reverse)	8/31/2016

Unpublished Opinions

No. 33839	4th Jud Dist San Miguel DM-11-157, K ESQUIBELv J ESQUIBEL (affirm)	8/29/2016
No. 35343	1st Jud Dist Santa Fe CV-11-3710, CV-12-238, V ARELLANO v NMDOH (reverse and remand)	8/29/2016
No. 35531	2nd Jud Dist Bernalillo CR-14-4843, STATE v A GALLEGOS (affirm)	8/29/2016
No. 35200	2nd Jud Dist Bernalillo CV-15-7765, G KRAMER v ALLSTATE (reverse and remand)	8/29/2016
No. 35274	1st Jud Dist Santa Fe CV-11-3710, CV-12-238, V ARELLANO v NMDOH (reverse and remand)	8/29/2016
No. 33489	3rd Jud Dist Dona Ana CR-11-281, STATE v J CONTRERAS (affirm)	8/30/2016
No. 34234	2nd Jud Dist Bernalillo CR-12-1493, STATE v N HUERTA (affirm)	8/30/2016
No. 33419	3rd Jud Dist Dona Ana CR-12-1414, STATE v R TUFTS (affirm)	8/31/2016
No. 35539	1st Jud Dist Santa Fe CV-14-53, BROKER v P ARCHULETA (affirm)	9/01/2016

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective September 14, 2016

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2016 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
Rule 1-079	Public inspection and sealing of court records	05/18/16
Rule 1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Civil Forms		
Form 4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the District Courts		
Rule 5-123	Public inspection and sealing of court records	05/18/16
Rule 5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Rules of Criminal Procedure for the Magistrate Courts		
Rule 6-506	Time of commencement of trial	05/24/16
Rules of Criminal Procedure for the Metropolitan Courts		
Rule 7-506	Time of commencement of trial	05/24/16
Rules of Procedure for the Municipal Courts		
Rule 8-506	Time of commencement of trial	05/24/16
Criminal Forms		
Form 9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
Children's Court Rules and Forms		
Rule 10-166	Public inspection and sealing of court records	05/18/16
Rule 10-171	Notice of federal restriction on right to receive or possess a firearm or ammunition	05/18/16
Form 10-604	Notice of federal restriction on right to possess or receive a firearm or ammunition	05/18/16
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: 2016-NMSC-024

No. S-1-SC-34042 (filed June 20, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
TRUETT THOMAS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
SAMUEL L. WINDER, District Judge

BENNETT J. BAUR
Chief Public Defender
KARL ERICH MARTELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

HECTOR H. BALDERAS
Attorney General
M. VICTORIA WILSON
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Santa Fe, New Mexico
for Appellee

Opinion

Charles W. Daniels, Chief Justice

{1} The Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution guarantee a criminal defendant the right to confront adverse witnesses. Defendant Truett Thomas appeals from his convictions of first-degree deliberate murder and first-degree kidnapping on multiple grounds, including an asserted violation of the Confrontation Clause through the admission of two-way video testimony of a prosecution witness. We reverse Defendant's convictions on this basis but remand for a new trial on the murder charge only, having concluded that there was insufficient evidence to support the kidnapping conviction. Although we need not decide whether social media posts by the district court judge about the case before him also would have required reversal, we caution judges to avoid both impropriety and its appearance in their use of social media.

I. BACKGROUND

{2} On June 3, 2010, Guadalupe Ashford's body was found partially hidden behind a trash can at the edge of a small parking lot. Drag marks and blood spatter indicated that Ashford had initially been assaulted in the lot and then dragged a short distance to its edge where her body was found. The drag marks were contained within the span of one parking space and extended less than ten feet. Ashford's body had significant head injuries, including lacerations, skull fractures, and a dislodged tooth. The medical investigator determined that Ashford died from blunt force injuries to her head, but he could not identify which of the several injuries was the cause and could not calculate a specific time of death. Police testimony indicated that there were no known witnesses to the assault and that no one reported seeing Defendant in the area.

{3} An Albuquerque Police Department (APD) forensic scientist analyst performed DNA measurements of samples collected from Ashford's body and from a six-inch by six-inch bloodied brick described as "paver stone" and believed to be the murder weapon, generating DNA profiles of Ashford and of the presumed perpetrator. Unidentified DNA was also discovered on the paver stone, though in smaller amounts than the DNA evidence matching either of the full profiles. The forensic analyst entered the presumed perpetrator's profile into the CODIS database, which resulted in a match to Defendant. "Authorized by Congress and supervised by the Federal Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level . . . [and] collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes." *Maryland v. King*, __ U.S. __, ___, 133 S. Ct. 1958, 1968 (2013). Defendant was arrested and charged on the basis of this DNA evidence, but he denied ever having met Ashford.

{4} Defendant was held in pretrial custody for twenty-two months before he moved to dismiss the charges for violation of his right to a speedy trial. The district court denied the motion and set the trial to begin approximately twenty-six months after Defendant's arrest.

{5} By the time the case came to trial, the State's forensic analyst had moved out of New Mexico. At a hearing two weeks before trial, the prosecutor expressed concerns about securing the presence of that forensic analyst at trial and suggested that she be allowed to testify over the live, two-way audio-video communications application Skype as an alternative. *See State v. Schwartz*, 2014-NMCA-066, ¶ 5, 327 P.3d 1108 (describing Skype as "an Internet software application[] that . . . allow[s] users to engage in real time video and audio communications between two or more locations" (alterations and omission in original) (internal quotation marks and citation omitted)). When the court asked about defense counsel's "thoughts with regard to Skype," counsel, who had previously interviewed the witness through Skype, responded,

> I don't like it, but I think it will work. . . . It's just weird. She's really just going to be there to establish the chain of custody, so she's not—I mean, she's important, obviously, for the State, but she's not too important. I don't really have a problem with Skyping it, as long as there's no technical issues. If there's technical difficulties, then they're not going to be able to establish the chain of custody. Then it's game over.

At another pretrial hearing in the following week, the court asked if there were "any other matters" that needed to be addressed before trial. In response, defense counsel expressed hesitation at the use of Skype testimony, stating,

> We are going to do the research on this. I don't think we have

> enough research on the Skype issue[,] . . . and we have rethought our position on that, and we're thinking it's going to cause a confrontation problem.

The prosecutor replied that the State had not sought an enforceable subpoena for the witness in reliance on defense counsel's statement a week earlier that Skype would "work." The district court judge took the position that Defendant had waived any objection to the use of two-way video by defense counsel's initial informal acquiescence.

{6} At trial seven days later, the State called the absent forensic analyst to testify via Skype. During her testimony, a computer image of the forensic analyst faced the jury, but she was able to see only an image of the attorney questioning her and could not see Defendant, the jury, or the district court judge at any time. A second APD forensic scientist analyst did testify in person for the State. She had reviewed and interpreted the measurements performed by the forensic analyst who testified by Skype but had not performed any of the DNA measurements herself.

{7} The jury found Defendant guilty of first-degree murder and first-degree kidnapping. The district court imposed consecutive sentences of life imprisonment for the murder and eighteen years for the kidnapping. Defendant moved for a new trial based on additional DNA evidence developed after trial that, according to Defendant's argument, suggested that one or more other individuals could have had contact with Ashford or with the murder weapon.

{8} At the hearing on that motion, before a successor district court judge, Defendant also raised the issue of social media posts made by the original district court judge during the pendency of the trial. The posts, made on a Facebook page used for the unsuccessful election campaign of the original district court judge, discussed Defendant's case. During trial, the district court judge had posted, "I am on the third day of presiding over my 'first' first-degree murder trial as a judge." After trial, but before sentencing, the district court judge posted, "In the trial I presided over, the jury returned guilty verdicts for first-degree murder and kidnapping just after lunch. Justice was served. Thank you for your prayers." The district court denied the motion for a new trial, and Defendant appealed his convictions directly to this Court pursuant to the New Mexico Constitution. *See* art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court.").

II. DISCUSSION

A. Defendant's Right to a Speedy Trial Was Not Violated

{9} We first address Defendant's argument that his twenty-six months of pretrial custody violated his constitutional right to a speedy trial. *See* U.S. Const. amend. VI (guaranteeing a speedy trial "[i]n all criminal prosecutions"); N.M. Const. art. II, § 14 (same). The Due Process Clause of the Fourteenth Amendment applies the Sixth Amendment speedy trial right to state prosecutions. *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967). Because Defendant makes no claim that his rights under the New Mexico Constitution should be interpreted more broadly than those guaranteed by the Fourteenth Amendment of the United States Constitution, "we base our discussion of this issue on the constitutional requirements established under federal law." *State v. Coffin*, 1999-NMSC-038, ¶ 54 n.2, 128 N.M. 192, 991 P.2d 477.

{10} Pretrial delay may trigger a speedy trial inquiry but is not alone determinative of a constitutional violation. *State v. Samora*, 2013-NMSC-038, ¶ 24, 307 P.3d 328. Instead, in accordance with the federal constitutional guidelines established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), we must review the individual circumstances of the case, including the conduct of both prosecution and defense, and the actual harm that a defendant may have suffered as a result of pretrial delay. *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387. Factors in this analysis are (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) the actual prejudice to the defendant incurred from the delay. *Barker*, 407 U.S. at 530. "Each of these factors is weighed either in favor of or against the State or the defendant, and then balanced to determine if a defendant's right to a speedy trial was violated." *State v. Spearman*, 2012-NMSC-023, ¶ 17, 283 P.3d 272. While we give deference to the factual findings of a trial court in performing this analysis, we review the application of the factors de novo. *Id* ¶ 19.

{11} The district court found that this was a complex case due to the required DNA analysis and the average time required to process a homicide case in the jurisdiction, and the parties do not dispute that finding. Because a "trial court [is] familiar with the factual circumstances, the contested issues and available evidence, the local judicial machinery, and reasonable expectations for the discharge of law enforcement and prosecutorial responsibilities," we defer to the district court's finding on the question of complexity when that "finding[] . . . [is] supported by substantial evidence." *State v. Manzanares*, 1996-NMSC-028, ¶ 9, 121 N.M. 798, 918 P.2d 714.

{12} The delay in this case was sufficient to trigger a speedy trial inquiry, *see Garza*, 2009-NMSC-038, ¶¶ 47-48 (stating that a delay of over eighteen months is sufficient to trigger an inquiry in a complex case), but it was not sufficiently beyond the guideline that may trigger further inquiry that it would weigh heavily against continuation of the prosecution. *See id.* ¶¶ 23-24 (stating that "the greater the delay the more heavily it will potentially weigh against the State," and concluding that a ten-month delay in a simple case "scarcely crosse[d] the bare minimum [of nine months] needed to trigger judicial examination" and was not so extraordinary that it would weigh heavily (internal quotation marks and citation omitted)); *State v. Montoya*, 2011-NMCA-074, ¶ 17, 150 N.M. 415, 259 P.3d 820 (stating that a delay of six months beyond the presumptive period weighed only slightly against the State). Much of the delay here was administrative, due to a vacancy on the bench and due to the unavailability to the defense of the forensic analyst for pretrial interviews. Although this type of delay is characterized as negligent and weighs against the State, it does not weigh heavily where, as here, there is no evidence of bad-faith intent to cause delay. *Garza*, 2009-NMSC-038, ¶¶ 25-26.

{13} Defendant asserted his right to a speedy trial when his counsel filed an entry of appearance one month after his arrest and then again twenty-one months later in a motion to dismiss. We assess the timing and manner of Defendant's assertions and give weight to the frequency and force of his objections. *Id.* ¶ 32. Defendant here initially asserted his speedy trial right in a pro forma manner but made no focused assertion until almost two years had passed. This history weighs only slightly in his favor. *See id.* ¶ 34 (weighing a speedy trial demand slightly in favor of a defendant who asserted the right once, and not vigorously, before filing a motion to

dismiss); *State v. Urban*, 2004-NMSC-007, ¶ 16, 135 N.M. 279, 87 P.3d 1061 (stating that pro forma pretrial motions filed upon counsel's entry of appearance are generally afforded relatively little weight in the analysis of a claimed violation of the right to a speedy trial).

{14} Concerning the fourth *Barker* factor, "generally a defendant must show particularized prejudice of the kind against which the speedy trial right is intended to protect." *Garza*, 2009-NMSC-038, ¶ 39. The first three *Barker* factors all weigh slightly in Defendant's favor, but "only where the length of delay and the reasons for the delay weigh heavily in [a] defendant's favor and [the] defendant has asserted his right and not acquiesced to the delay [does] the defendant need not show [particularized] prejudice in order to prevail on a speedy trial claim." *Samora*, 2013-NMSC-038, ¶ 27 (fourth alteration in original) (internal quotation marks and citation omitted). In analyzing prejudice, we consider a defendant's interests in (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern, and (3) limiting the possibility that the defense will be impaired. *Garza*, 2009-NMSC-038, ¶ 35. "The burden of showing all types of prejudice lies with the individual claiming the violation[,] and the mere 'possibility of prejudice is not sufficient to support [the] position that . . . speedy trial rights [are] violated.'" *Id.* (second and third alterations and omission in original) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986)).

{15} Defendant argued in the district court that pretrial incarceration had caused him to suffer from depression and to lose his ability to work and survive on the streets, had diminished his social skills so that he might not be able to assist in his own defense, and might cause witness memories to fade before trial. Because the effects of pretrial incarceration are experienced by every jailed defendant awaiting trial, we weigh this factor in the defendant's favor only where the pretrial incarceration or the anxiety suffered is "undue." *Id.* ¶ 35; *see* Black's Law Dictionary 1759 (10th ed. 2014) ("undue" is "[e]xcessive or unwarranted").

{16} On appeal, Defendant makes no argument as to why his anxiety was beyond that generally suffered by incarcerated defendants, nor does he point to any evidence indicating that he was unable to assist in his own defense in any way, that any witnesses were unable to remember any information needed for his defense, or that he was impaired in his defense in any other demonstrable manner as a result of the time that elapsed before he was brought to trial. "[W]ithout a particularized showing of prejudice, we will not speculate as to the impact of pretrial incarceration on a defendant or the degree of anxiety a defendant suffers." *Garza*, 2009-NMSC-038, ¶ 35. Because the other factors do not weigh heavily in his favor, and because Defendant has failed to demonstrate any particularized prejudice, we conclude that Defendant's speedy trial claim does not call for reversal of his convictions.

B. The Skype Testimony Violated the Confrontation Clause

{17} The Confrontation Clause of the Sixth Amendment to the United States Constitution, like its counterpart in the New Mexico Constitution, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. Under this Court's interstitial mode of constitutional analysis, we first consider whether the United States Constitution provides Defendant relief before determining whether it is necessary to address a counterpart protection under the New Mexico Constitution. *See State v. Lopez*, 2013-NMSC-047, ¶ 8, 314 P.3d 236 (noting that where an asserted right is protected by the United States Constitution, there is no need to reach the counterpart State constitutional claim). "[Q]uestions of admissibility under the Confrontation Clause are questions of law, which we review de novo." *State v. Montoya*, 2014-NMSC-032, ¶ 16, 333 P.3d 935 (internal quotation marks and citation omitted).

1. Defendant did not knowingly and voluntarily waive his right to object to violation of his right to confrontation

{18} As an initial matter, the State argues that Defendant waived his right to raise the issue of violation of his confrontation rights. A fundamental right, even a constitutional right, may be waived. *State v. Padilla*, 2002-NMSC-016, ¶ 12, 132 N.M. 247, 46 P.3d 1247. "Waiver is the intentional relinquishment or abandonment of a known right or privilege." *State v. Zamarripa*, 2009-NMSC-001, ¶ 38, 145 N.M. 402, 199 P.3d 846 (internal quotation marks and citation omitted). But "[t]here is a presumption against the waiver of constitutional rights." *Id.* To be valid, waivers "must be voluntary[,] . . . knowing, [and] intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Padilla*, 2002-NMSC-016, ¶ 18 (internal quotation marks and citation omitted). This Court reviews de novo whether a waiver was knowing and voluntary, considering the facts and circumstances of the case. *Id.*

{19} The district court judge apparently accepted that Defendant had waived his right to object to violation of his confrontation rights when defense counsel initially acquiesced to the admission of two-way video testimony, seemingly based on counsel's stated belief that the witness would only establish the chain of custody for the DNA evidence. A week later and just one week before trial, defense counsel had more thoroughly considered the issue and asserted that the video testimony would violate Defendant's right to confrontation. The district court judge refused a continuance and advised defense counsel to "note [his] objections on confrontation grounds." Later, the district court judge stated that he believed the right to object had been waived, but at no time did either the district court or defense counsel discuss any permanent waiver of confrontation rights with Defendant directly.

{20} "The duty to protect fundamental rights 'imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.'" *Id.* ¶ 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)). Although no particular form is required, it is the court's obligation to make sure that a waiver is valid and predicated upon a meaningful decision by the defendant. *Padilla*, 2002-NMSC-016, ¶ 19. "[T]here must be a sufficient colloquy to satisfy the trial court's responsibilities; a knowing and voluntary waiver cannot be inferred from a silent record." *Id.* With no discussion in the record between the district court and Defendant concerning his confrontation rights, there is no evidence that Defendant understood those rights or that he voluntarily agreed to waive them, and we must conclude that no intentional waiver occurred.

{21} The State also argues that defense counsel should be deemed to have permanently waived his client's confrontation rights because counsel's "prior waiver of [the out-of-state witness's] physical presence at trial caused her unavailability." But the State points to nothing in the record indicating that the one-week period between defense counsel's initial acquiescence and

his reconsideration and objection had anything to do with the State's failure to invoke the complex and time-consuming procedures in the courts of two states required by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, NMSA 1978, §§ 31-8-1 to -6 (1937, as amended through 1953) (Uniform Act). The State apparently never initiated any procedures under the Uniform Act, either before defense counsel's initial acquiescence to the Skype testimony or after counsel's reversal of that position one week later. The State has made no showing that it could have secured the in-person attendance of the witness had counsel objected instantly when the State first raised the unavailability problem just two weeks before trial, and the State did not argue how the one-week period made a difference in its ability to do so. We therefore find no factual support for the State's waiver by estoppel theory.

2. Defendant's objection to the violation of his confrontation rights was preserved because the district court was alerted to the error

{22} Even in the absence of a formal waiver of rights, our law still requires that a defendant preserve a question for appellate review by fairly invoking a ruling or decision by a trial court. Rule 12-216(A) NMRA. "A party must assert its objection and the basis thereof with 'sufficient specificity to alert the mind of the trial court to the claimed error.'" *Zamarripa*, 2009-NMSC-001, ¶ 33 (citation omitted). We therefore address the State's argument that defense counsel failed to preserve the confrontation issue by not making a specific objection to the Skype testimony during trial.

{23} The record reflects that the district court was alerted to the confrontation issue in the hearing a week before the trial began when defense counsel specifically advised the court on the record that he had been rethinking the Skype testimony issue raised the previous week and stated, "[W]e're thinking it's going to cause a confrontation problem." The court clearly addressed the issue when it responded to the confrontation claim by ruling that defense counsel had waived his client's right to object and telling counsel, "You can note your objections on confrontation grounds." The issue was therefore sufficiently brought to the attention of the court and preserved for appellate review, whether or not counsel articulated a repeated objection during the trial. *See Samora*, 2013-NMSC-038, ¶ 14 ("[W]e review an issue for reversible error only when the defendant has properly raised the issue in the district court. . . . 'Unless the trial court's attention is called in some manner to the fact that it is committing error, and given an opportunity to correct it, cases will not be reversed because of errors which could and would have been corrected in the trial court, if they had been called to its attention.'" (citation omitted)); *State v. Mason*, 1968-NMCA-072, ¶ 12, 79 N.M. 663, 448 P.2d 175 (holding that a defendant need not renew an objection at trial when the issue is fully preserved prior to trial).

3. The presentation of Skype testimony violated Defendant's confrontation rights

{24} The central purpose of the Confrontation Clause, to ensure the reliability of evidence, is served by "[t]he combined effect of . . . physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 846 (1990). In *Craig*, the United States Supreme Court considered whether the Confrontation Clause allows a child victim of abuse to testify at trial over one-way closed circuit television while physically located in a room separate from the judge, the jury, and the defendant who nevertheless hear and see the testimony. *Id.* at 840-41, 850 (holding that "the face-to-face confrontation requirement is not absolute . . . , [but neither is it] easily . . . dispensed with. . . . [A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured"). *Craig* emphasized that the video testimony was given under oath, was subject to cross-examination, and allowed the fact-finder to observe the demeanor of the witness. *Id.* at 851. In declining to hold that the child's testimony was given as an out-of-court statement, the Court noted that the "assurances of reliability and adversariness [were] far greater than those required for admission of hearsay testimony under the Confrontation Clause." *Id.*

{25} Then, in *Crawford v. Washington*, 541 U.S. 36, 61-65 (2004), the United States Supreme Court abandoned its previous reliability-focused approach and "adopted a fundamentally new interpretation of the confrontation right, holding that [t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine," without regard to the reliability of particular substitutes for confrontation. *Williams v. Illinois*, ___U.S.___, ___, 132 S. Ct. 2221, 2232 (2012) (alterations in original) (internal quotation marks and citation omitted). *Crawford* reaffirmed that "the Clause's ultimate goal is to ensure reliability of evidence" but relied on the history of the common-law right to confrontation to interpret the Confrontation Clause as "a procedural rather than a substantive guarantee [that] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61.

{26} *Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony. But the face-to-face aspect of confrontation was not at issue in *Crawford*, and *Crawford* did not overrule *Craig*. *See United States v. Yates*, 438 F.3d 1307, 1314 n.4 (11th Cir. 2006) (stating that *Craig* remains the proper test for the admissibility of live two-way video testimony under the Confrontation Clause and declining to apply *Crawford*); *People v. Gonzales*, 281 P.3d 834, 863 (Cal. 2012) (rejecting the argument that *Craig* was no longer good law after *Crawford*); *State v. Jackson*, 717 S.E.2d 35, 39-40 (N.C. Ct. App. 2011) (acknowledging that part of *Craig*'s rationale seems inconsistent with *Crawford* but explaining that they address distinct confrontation questions and agreeing with the weight of authority that *Crawford* did not overrule *Craig*); *State v. Henriod*, 2006 UT 11, ¶ 16, 131 P.3d 232 (reasoning that *Crawford* did not implicitly overrule *Craig* because *Crawford* did not mention video transmission of testimony given during trial, which had previously been a subject of debate among the Justices and so was unlikely to have been inadvertently overlooked). We conclude that *Craig* remains controlling law when a witness does testify at trial but the defendant is nevertheless denied physical face-to-face confrontation.

{27} Under *Craig*, the necessity of the substitute procedure to further an important state interest is the critical inquiry. *See* 497 U.S. at 852. A trial court must hear evidence and make a case-specific determination of necessity as it pertains to the particular witness. *See id.* at 855. *Craig* dealt with one-way video transmission, and we have not previously applied it to a live two-way video connection. *See State v. Fairweather*, 1993-NMSC-

065, ¶¶ 25-26, 34, 116 N.M. 456, 863 P.2d 1077 (holding, pre-*Crawford*, that the admission of deposition testimony videotaped out of the presence of the defendant, who sat at a remote monitor to see and hear the testimony live, was consistent with *Craig* after the trial court made individualized findings of necessity in furtherance of public policy). The United States Supreme Court has never adopted a specific standard for two-way video testimony, but we doubt it would find any virtual testimony an adequate substitute for face-to-face confrontation without at least the showing of necessity that *Craig* requires. The United States Supreme Court rejected a proposed amendment to Rule 26(b) of the Federal Rules of Criminal Procedure that would have allowed unavailable witnesses to testify via two-way video. *See Order of the Supreme Court*, 207 F.R.D. 89 (2002). In a filing related to the rejection, Justice Antonin Scalia wrote,

> I cannot comprehend how one-way transmission . . . becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig*, [497 U.S.] at 846-47, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

Id. at 94; *see also* Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 Wm. & Mary Bill Rts. J. 769, 786 (2004) (providing perspectives of an experienced federal trial judge and cautioning that "in live testimony, face-to-face transmission plainly increases the information available to the fact-finder").

{28} Our Court of Appeals has consistently applied *Craig* when analyzing the admissibility of live two-way video testimony under the Confrontation Clause. *See Schwartz*, 2014-NMCA-066, ¶¶ 6, 14 (determining error under the Confrontation Clause in the admission of two-way video testimony where findings of necessity in the service of public policy were insufficient); *State v. Smith*, 2013-NMCA-081, ¶¶ 8, 12, 308 P.3d 135 (same); *State v. Chung*, 2012-NMCA-049, ¶¶ 11-12, 290 P.3d 269 (same). The vast majority of courts from other jurisdictions, both federal and state, are in accord. *See, e.g.*, *United States v. Abu Ali*, 528 F.3d 210, 240-41 (4th Cir. 2008) (applying *Craig* to an analysis of the admissibility of two-way video testimony under the Confrontation Clause); *Yates*, 438 F.3d at 1313-16 (applying *Craig* to test the admissibility at trial of two-way video and listing cases from the Sixth, Eighth, Ninth, and Tenth Circuits that have done the same); *State v. Rogerson*, 855 N.W.2d 495, 503-04 (Iowa 2014) (acknowledging that live two-way video testimony is different than the one-way connection addressed in *Craig* but relying on cases from numerous state and federal jurisdictions to conclude that *Craig* is still applicable); *State v. Stock*, 2011 MT 131, ¶¶ 25, 30, 361 Mont. 1, 256 P.3d 899 (applying *Craig* to determine the admissibility of two-way video testimony after holding that *Crawford* did not overrule *Craig*). *But see United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999) (declining to adopt *Craig*'s requirement of necessity for two-way video testimony but nevertheless requiring a finding of exceptional circumstances where the use of two-way video testimony will further the interests of justice).

{29} We adopt the *Craig* standard here in our analysis of the admissibility of two-way video testimony. A criminal defendant may not be denied a physical, face-to-face confrontation with a witness who testifies at trial unless the court has made a factual finding of necessity to further an important public policy and has ensured the presence of other confrontation elements concerning the witness testimony including administration of the oath, the opportunity for cross-examination, and the allowance for observation of witness demeanor by the trier of fact.

{30} Nothing in the record of this case demonstrates that the use of two-way video was necessary to further an important public policy as required by *Craig*. The district court did not conduct an evidentiary hearing or enter any findings on the issue. Because the required findings were not made, we hold that the admission of remote testimony violated Defendant's right to confrontation. Inconvenience to the witness is not sufficient reason to dispense with this constitutional right. *Schwartz*, 2014-NMCA-066, ¶ 7.

{31} The State does not argue that the *Craig* standard was met but instead asserts that there was no confrontation violation because the forensic analyst was unavailable to present live testimony and Defendant was able to cross-examine her through the audiovisual Skype connection. *See Crawford*, 541 U.S. at 53-54 (allowing testimonial statements to be admitted under the Confrontation Clause when the witness is unavailable and the defendant has had a prior opportunity to cross-examine). Assuming for the sake of argument that *Crawford* can be applied to analyze the admissibility of testimony given at trial over live video as if the statements were made out of court, the requirements of unavailability and cross-examination must still be met.

{32} An out-of-state witness is not generally considered unavailable for the purpose of the admission of out-of-court statements unless the proponent of that witness's testimony has complied with the Uniform Act. *See State v. Martinez*, 1984-NMCA-106, ¶¶ 10-11, 102 N.M. 94, 691 P.2d 887 (holding, pre-*Crawford*, that although "[o]ur prior cases have insisted on strict compliance with the Uniform Act before an out-of-state witness may be declared unavailable," a prosecutor's untimely and unsuccessful use of the Uniform Act was excusable when the witness had responded to three prior subpoenas and the state reasonably expected him to respond to a fourth in the same manner). After *Crawford*, the State must still comply with the Uniform Act, and it failed to do so in this case despite knowing weeks in advance of trial that the witness might not willingly attend. Accordingly, we conclude that the State has failed to establish the legal unavailability of the witness, and we need not determine whether cross-examination over Skype is sufficient to fulfill *Crawford*'s requirements. Under current United States Supreme Court Confrontation Clause jurisprudence, Defendant's Sixth Amendment right to confrontation was violated by the admission of the video testimony.

4. The violation of Defendant's confrontation rights was not harmless error

{33} "Improperly admitted evidence is not grounds for a new trial unless the error is determined to be harmful." *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110. When an error is constitutional, it is harmless only if the challenger can prove there is no reasonable possibility that the error affected the verdict. *Id.* ¶ 36. We must reverse a conviction if the erroneously

admitted evidence might have contributed to it. *Id.* ¶ 40.

{34} The State argues that the admission of this two-way video testimony was harmless error because another forensic analyst was present in court and properly testified to her preparation of a report comparing the DNA profiles developed by the absent forensic analyst. But the existence of other evidence to support the verdict does not cure a constitutional error when there is a reasonable possibility that the erroneously admitted evidence influenced the jury's verdict. *See id.* ¶¶ 40, 43 (stating that the existence of other evidence to support a conviction may be considered to understand the role that erroneously admitted evidence played in the trial but may not be the "focus of the harmless error analysis"). "The Court's focus is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *State v. Ortega*, 2014-NMSC-017, ¶ 20, 327 P.3d 1076 (internal quotation marks and citation omitted). The expert witness who testified via Skype was the only APD forensic scientist analyst who had actually performed measurements on the DNA samples in this case. Her involvement in the case was significant, and she testified to the results of the measurements she performed. The DNA profiles were offered as the sole evidence that implicated Defendant in this crime. We conclude that there is no reasonable possibility the testimony of the absent forensic analyst did not influence the verdict and accordingly that the error was not harmless.

{35} Although an error may be prejudicial with respect to one conviction and harmless with respect to another, *Tollardo*, 2012-NMSC-008, ¶ 44, we need not separately assess the effect of the error on each conviction in this case because the erroneously admitted DNA evidence was all that implicated Defendant in any crime. We reverse both of Defendant's convictions.

C. Retrial Is Allowed Only If Sufficient Evidence Supported Defendant's Convictions

{36} Although the violation of Defendant's right to confrontation requires us to reverse his convictions, we still must address the sufficiency of the evidence to determine whether retrial would be barred on double jeopardy grounds. *State v. Cabezuela*, 2011-NMSC-041, ¶ 47, 150 N.M. 654, 265 P.3d 705. On remand, Defendant is entitled to an acquittal on a charge if the evidence presented at trial was insufficient to support his conviction. *State v. Consaul*, 2014-NMSC-030, ¶ 41, 332 P.3d 850.

{37} In determining the sufficiency of the evidence, we review the evidence "in the light most favorable to the State, resolving all conflicts and making all permissible inferences in favor of the jury's verdict." *Id.* ¶ 42 (internal quotation marks and citation omitted). Viewed in this manner, substantial evidence must exist that would allow a rational trier of fact to find that each element of the crime has been established beyond a reasonable doubt. *Id.*

1. Sufficient evidence supports Defendant's first-degree deliberate intent murder conviction

{38} To prove first-degree deliberate murder, the State was required to prove that Defendant killed Ashford with the deliberate intention to take away her life. *See* NMSA 1978, § 30-2-1(A)(1) (1994) ("Murder in the first degree is the killing of one human being by another . . . by any kind of willful, deliberate and premeditated killing."); UJI 14-201 NMRA ("The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action" and requires a "calculated judgment" to kill, although it "may be arrived at in a short period of time."). Defendant argues that the jury verdict was inherently speculative because the DNA evidence did not adequately prove that Defendant was the killer and because some hallmarks of deliberate intent, such as motive or careful planning, were missing.

{39} There was sufficient evidence to allow a trier of fact to reasonably infer that it was Defendant who killed Ashford. Physical evidence containing a full DNA profile matching Defendant was found on Ashford's body in semen on her thigh and under the fingernails of her right hand, and also on the paver stone presumed to be the murder weapon. The jury was informed that unidentified DNA was also present and was alerted in closing arguments to consider the possibility that another person or other people could have been involved.

{40} Additionally, the State presented substantial evidence at trial to raise a reasonable inference of deliberate intent. This Court previously concluded there was sufficient evidence for a rational jury to infer deliberate intent under factual circumstances similar to those here based on evidence of a prolonged struggle and the large number of the victim's wounds. *See State v. Duran*, 2006-NMSC-035, ¶¶ 9, 11, 140 N.M. 94, 140 P.3d 515; *see also State v. Flores*, 2010-NMSC-002, ¶ 22, 147 N.M. 542, 226 P.3d 641 (concluding that there was sufficient evidence of deliberate intent where the defendant stabbed the victim with a screwdriver "so many times that it evidenced an effort at overkill").

{41} Defendant concedes that a large number of wounds, such as those sustained by Ashford, can indicate deliberation. The fact that the number of wounds could instead indicate impulsivity, as Defendant argues, does not mean that the jury was required to interpret them that way or, when combined with the evidence of dragging the incapacitated Ashford followed by further assault, that deliberation and impulsivity are equally possible so as to have required the jury to speculate. *See State v. Vigil*, 2010-NMSC-003, ¶ 20, 147 N.M. 537, 226 P.3d 636 (reversing a conviction because the "chain of inferences" supporting the verdict amounted to no more than "guess or conjecture" and stating that the jury may not speculate to reach the conclusions necessary to the verdict). There was sufficient evidence for a rational trier of fact to conclude that Defendant was the killer and that the killing was deliberate.

2. There was insufficient evidence to support Defendant's kidnapping conviction

{42} To support a kidnapping conviction under New Mexico law, the State must prove an "unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent . . . to inflict death, physical injury or a sexual offense." NMSA 1978, § 30-4-1(A)(4) (2003); *see also* UJI 14-403 NMRA. The State based its case for kidnapping on evidence showing that Ashford was initially assaulted in the small parking lot, then dragged to the edge of the lot behind a trash can where she was struck again at least once and where she was later found. Blood was found in two places within the parking lot, and there were drag marks showing her body had been moved. The State also relied on this evidence to support the charge of deliberate murder and informed the jury in closing arguments that it should consider the evidence in establishing both charges.

{43} New Mexico's kidnapping statute is broadly worded and often encompasses conduct that occurs during the commission of another crime. *See State v. Trujillo*,

2012-NMCA-112, ¶¶ 23-29, 289 P.3d 238 (discussing the history of kidnapping statutes and the types of conduct intended for punishment). We give effect to the plain meaning of a statute only when that will "not render the statute's application absurd, unreasonable, or unjust." *State v. Rowell*, 1995-NMSC-079, ¶ 8, 121 N.M. 111, 908 P.2d 1379 (internal quotation marks and citation omitted). "[V]irtually every assault, sexual assault, robbery, and murder involves a slight degree of confinement or movement." *Trujillo*, 2012-NMCA-112, ¶ 23 (internal quotation marks and citation omitted). To allow a kidnapping conviction to be based upon this incidental conduct can give rise to serious injustice by increasing punishment so as to render it disproportionate to culpability. *See id.* ¶ 24. The Legislature did not intend to punish as kidnapping conduct that is "merely incidental to another crime." *Id.* ¶ 39. Where no evidence establishes a kidnapping separate from that of acts predictably involved in another crime, the conviction cannot be sustained. *See id.* ¶¶ 39, 41.

{44} Any restraint here occurred during the commission of one continuous attack that ended in murder. This is in contrast to our cases upholding convictions for both kidnapping and murder, where separate evidence proved each crime. *See, e.g.*, *State v. Saiz*, 2008-NMSC-048, ¶ 33, 144 N.M. 663, 191 P.3d 521 (upholding convictions for both murder and kidnapping where the initial motive to restrain the victim was to commit a sexual assault, and the murder took place after the assault), *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36 & n.1, 146 N.M. 357, 210 P.3d 783; *State v. Jacobs*, 2000-NMSC-026, ¶¶ 24-25, 129 N.M. 448, 10 P.3d 127 (upholding convictions for both murder and kidnapping where the evidence showed either a kidnapping by deception prior to the murder, based on the defendant's false pretenses causing the teenage victim to associate with him, or a kidnapping by separate restraint for the purpose of sexual assault or during the victim's hundred-yard walk to her death). The evidence here indicates that the events all took place along one side of a small parking lot. The drag marks appear to extend less than ten feet, within the span of one parking space. The State asserts that this act of moving Ashford was distinct from her murder but fails to describe any separate restraint that would result in a kidnapping prior to the murder. The movement across a short distance within one small isolated parking lot did not constitute a separate crime from the murder that was already in progress. We conclude that on remand, Defendant may not be retried for kidnapping because insufficient evidence supported his kidnapping conviction.

D. Judges Must Adhere to the Code of Judicial Conduct and Avoid Any Appearance of Impropriety When Using Electronic Social Media

{45} Defendant argues that social media postings by the district court judge demonstrate judicial bias. During the pendency of the trial, the district court judge posted to his election campaign Facebook page discussions of his role in the case and his opinion of its outcome. Although we need not decide this issue because we reverse on confrontation grounds, we take this opportunity to discuss our concerns over the use of social media by members of our judiciary.

{46} "An independent, fair, and impartial judiciary is indispensable to our system of justice." Rule 21-001(A) NMRA. Accordingly, judges must adhere to the Code of Judicial Conduct, Rules 21-100 to -406 NMRA, at all times. A judge "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens." Rule 21-102 n.2. Judges must avoid not only actual impropriety but also its appearance, and judges must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Rule 21-102.

{47} These limitations apply with equal force to virtual actions and online comments and must be kept in mind if and when a judge decides to participate in electronic social media. *See* Rule 21-001(B) ("Judges and judicial candidates are also encouraged to pay extra attention to issues surrounding emerging technology, including those regarding social media, and are urged to exercise extreme caution in its use so as not to violate the Code."); New Mexico Supreme Court Advisory Committee on the Code of Judicial Conduct, Advisory Opinion Concerning Social Media, ¶ 4 (Feb. 15, 2016) ("[T]he Code . . . addresses conduct pertaining to social media use in the context of its broader rules. . . . Simply put, a judge may not communicate on a social media site in a manner that the judge could not otherwise communicate.").

{48} Social media use has led to numerous allegations of misconduct by participants in our legal system. *See, e.g.*, *United States v. Bowen*, 969 F. Supp. 2d 546, 625-27 (E.D. La. 2013) (granting the defendants' motion for a new trial on the basis of prosecutorial misconduct in posting online comments under anonymous pseudonyms that portrayed the defendants in a negative light and created "an online 'carnival atmosphere' . . . wherein justice was distorted and perverted in ways that are directly and strictly prohibited"); *Chace v. Loisel*, 170 So. 3d 802, 804 (Fla. Dist. Ct. App. 2014) (quashing an order denying a motion to disqualify a trial judge because the party's failure to respond to the judge's Facebook "friend" request created a reasonable fear of offending the judge and not receiving a fair and impartial trial); *State v. Smith*, 418 S.W.3d 38, 42, 48-49 (Tenn. 2013) (requiring an evidentiary hearing to determine whether a new trial was necessary on the basis of juror misconduct after a juror sent Facebook messages to one of the State's witnesses during trial).

{49} While we make no bright-line ban prohibiting judicial use of social media, we caution that "friending," online postings, and other activity can easily be misconstrued and create an appearance of impropriety. Online comments are public comments, and a connection via an online social network is a visible relationship, regardless of the strength of the personal connection. *See Domville v. State*, 103 So. 3d 184, 185-86 (Fla. Dist. Ct. App. 2012) (quashing an order denying disqualification of a trial judge based on a Facebook friendship with the prosecutor because the public social networking relationship was sufficient to create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial); *but see Youkers v. State*, 400 S.W.3d 200, 204-07, 213 (Tex. App. 2013) (affirming the denial of a motion for a new trial based on a Facebook friend connection between the trial judge and the victim's father because no evidence showed that the relationship would influence the judge and lead to bias or impartiality in the case and because the judge had placed all actual Facebook communications in the record and cautioned the father not to communicate with him further regarding the case).

{50} We recognize the utility of an online presence in judicial election campaigns, but we agree with the American Bar Association in recommending that these campaign sites be established and maintained by campaign committees, not by the judicial candidate personally. *See*

ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) (discussing *Judge's Use of Electronic Social Networking Media*). We clarify that a judge who is a candidate should post no personal messages on the pages of these campaign sites other than a statement regarding qualifications, should allow no posting of public comments, and should engage in no dialogue, especially regarding any pending matters that could either be interpreted as ex parte communications or give the appearance of impropriety.

{51} Judges should make use of privacy settings to protect their online presence but should also consider any statement posted online to be a public statement and take care to limit such actions accordingly. *See State v. Madden*, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, *8 (non-precedential) (Tenn. Crim. App. March 11, 2014, appeal denied September 18, 2014) ("[J]udges will perhaps best be served by ignoring any false sense of security created by so-called 'privacy settings' and understanding that, in today's world, posting information to Facebook is the very definition of making it public."). A judge's online "friendships," just like a judge's real-life friendships, must be treated with a great deal of care. The use of electronic social media also may present some unfamiliar concerns, such as the inability to retrieve or truly delete any message once posted, the public perception that "friendships" exist between people who are not actually acquainted, and the ease with which communications may be reproduced and widely disseminated to those other than their intended recipients. *See United States v. Fumo*, 655 F.3d 288, 305-06 (3d Cir. 2011) (affirming the denial of a motion for a new trial because there was no evidence of substantial prejudice to the defendant resulting from a juror's Facebook and Twitter comments during trial that were followed and rebroadcast by the media without the juror's knowledge). A judge must understand the requirements of the Code of Judicial Conduct and how the Code may be implicated in the technological characteristics of social media in order to participate responsibly in social networking. Members of the judiciary must at all times remain conscious of their ethical obligations.

III. CONCLUSION

{52} Because Defendant's confrontation rights were violated, his convictions must be reversed. The evidence was sufficient to support a conviction of first-degree murder but insufficient to support a conviction of first-degree kidnapping. We therefore remand to the district court for entry of a judgment of acquittal on the kidnapping charge and retrial on the charge of first-degree murder.

{53} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice
JUDITH K. NAKAMURA, Justice, not participating

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-025

No. S-1-SC-34418 (filed June 30, 2016)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ERIC MARQUEZ,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY
DOUGLAS DRIGGERS, District Judge

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Opinion

Petra Jimenez Maes, Justice

{1} In this case we again address whether shooting at or from a motor vehicle can serve as a predicate for felony murder. We recognize that the collateral-felony rule has generated confusion and hope to clarify its application in this opinion. Following trial, the jury found Defendant Eric Marquez guilty of first-degree felony murder contrary to NMSA 1978, Section 30-2-1(A)(2) (1994), and shooting from a motor vehicle causing great bodily harm contrary to NMSA 1978, Section 30-3-8(B) (1993). The underlying felony supporting Defendant's felony murder conviction was the felony of shooting from a motor vehicle. To avoid double jeopardy concerns, the district court vacated Defendant's conviction of shooting from a motor vehicle. The district court sentenced Defendant to a term of life imprisonment followed by a minimum period of five years of parole supervision. In his direct appeal, Defendant claims that: (1) shooting at a motor vehicle cannot serve as a predicate felony in the context of a felony murder conviction; (2) the court erred in precluding evidence of drive-by shootings at Defendant's home before 2010; (3) the jury instructions on felony murder and self-defense failed to instruct on the essential elements that Defendant did not act in self-defense or with sufficient provocation; and (4) admission of the Medical Investigator's testimony violated Defendant's confrontation rights. **{2}** We hold that the crime of shooting at or from a motor vehicle may not serve as the predicate felony in support of a felony murder charge and vacate Defendant's felony murder conviction. We reject Defendant's second, third, and fourth claims. We remand to the district court for entry of an amended judgment reinstating his conviction for shooting from a motor vehicle.

I. FACTS AND PROCEDURAL HISTORY

{3} On March 10, 2011, J.T. Melendrez, with his girlfriend Angel Ortega in the passenger seat of his car, drove to a gas pump at a local convenience store and parked his car. While Melendrez carried a gun on some occasions, he left the weapon in the car at Ortega's urging. Melendrez got out of his car and walked toward the store. Suddenly, Defendant drove into the convenience store parking lot, yelling from his truck. Defendant shot the unarmed Melendrez once from inside his vehicle and twice after exiting his vehicle, while yelling "[t]hat's what you fucking get. You shouldn't have fucking went past my house, stupid bitch."

{4} Ortega ran to Defendant and confronted him. She told Defendant that "it wasn't [Melendrez's] fault" because Melendrez had just been picking up Ortega. Defendant said "[t]hat's what he fucking gets for passing by my house." Defendant then got in his car and drove away. As he drove toward his home, Defendant called 911 to report what he had done.

{5} Las Cruces Police Department Agent Gabriel Arenibas was working that evening and was directed to Defendant's home by dispatch. When Arenibas arrived at Defendant's address, Defendant was outside and talking on his cellular telephone. Defendant got down on the ground as soon as he saw Arenibas. Defendant was "emotional," but Arenibas was able to detain him. Other officers responded and Arenibas walked Defendant to the back seat of a marked patrol car. Defendant told Arenibas that he had "messed up his life to protect his family."

{6} Detective Mark Meyers, also of the Las Cruces Police Department, was directed to respond to the scene of the shooting. But while he was on his way he learned that Defendant had been apprehended, and Meyers instead went to the police station to meet with Defendant. Defendant waived his *Miranda* rights and agreed to speak with Detective Meyers. Defendant admitted to shooting Melendrez.

{7} Defendant told police that he had been eating with his wife at a Subway earlier that evening. While at the Subway, Defendant received a call from a neighbor who said that Melendrez was driving around Defendant's home. Defendant claimed to have been worried because he believed that Melendrez had been involved in drive-by shootings at Defendant's home in the past. Defendant thus wanted to go home and check on his property.

{8} Defendant said that while he was on his way home he saw Melendrez's truck at a convenience store. Defendant explained that he decided to stop and tell Melendrez to leave his family and his home alone. Defendant claimed that before he got out of his own car Melendrez "made a move" as if to pull a gun from his waistband. And from inside of his own car, Defendant responded by shooting Melendrez with a shotgun. Defendant then got out of his car and shot Melendrez again. Defendant acknowledged that he could have simply driven past the convenience store or driven away without shooting Melendrez. But, Defendant explained, he did not do that because he wanted to tell Melendrez to leave him alone.

{9} Chief Medical Investigator Dr. Ross Zumwalt assisted in the autopsy of Melendrez's body. Melendrez had sustained one gunshot wound to his chest and one to his abdomen. Dr. Zumwalt determined

that these two gunshot wounds caused Melendrez's death, and that the manner of death was homicide.

{10} The jury convicted Defendant of first-degree felony murder contrary to Section 30-2-1(A)(2), and shooting at or from a motor vehicle causing great bodily harm contrary to Section 30-3-8(B). To avoid double jeopardy concerns, the district court vacated Defendant's conviction of shooting from a motor vehicle. The district court sentenced Defendant to a term of life imprisonment followed by a minimum period of five years of parole supervision. Defendant appealed directly to this Court. N.M. Const. art. VI, § 2 ("Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court."). Rule 12-102(A)(1) NMRA. In his direct appeal, Defendant claims that: (1) shooting at a motor vehicle cannot serve as a predicate felony in the context of a felony murder conviction; (2) the court erred in precluding evidence of drive-by shootings at Defendant's home before 2010; (3) the jury instructions on felony murder and self-defense failed to instruct on the essential elements that Defendant did not act in self-defense or with sufficient provocation; and (4) admission of the medical investigator's testimony violated Defendant's confrontation rights.

II. DISCUSSION

A. Shooting from a motor vehicle was improperly used as a predicate for felony murder in this case

1. Introduction and standard of review

{11} The jury found Defendant guilty of first-degree felony murder and shooting from a motor vehicle causing great bodily harm. Defendant argues that the Legislature did not intend to make shooting at or from a motor vehicle a predicate felony for purposes of felony murder and that we should thus reverse his conviction of felony murder. More specifically, Defendant contends that shooting at or from a motor vehicle is in essence a crime of assault or battery and is not independent of or collateral to a murder committed during the course of the shooting. In response, the State argues that shooting at or from a vehicle should uniformly be treated as a collateral felony because, unlike aggravated battery, it is "a crime which itself carries a high degree of risk to people other than the murder victim."

{12} Defendant's arguments raise questions of law, which we review de novo. *State v. Rowell*, 1995-NMSC-079, ¶ 8, 121 N.M. 111, 908 P.2d 1379. The fundamental principle of any attempt at statutory interpretation is to further the legislative intent and purposes underlying the statute. *See Sec. Escrow Corp. v. State Taxation & Revenue Dep't*, 1988-NMCA-068, ¶ 6, 107 N.M. 540, 760 P.2d 1306. "In construing a statute, our charge is to determine and give effect to the Legislature's intent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135.

2. New Mexico's felony murder rule

{13} There are three types of first-degree murder in New Mexico: (1) willful and deliberate killings; (2) killings committed "in the commission of or attempt to commit any felony," so-called felony murder; and (3) killings committed by an act greatly dangerous to the lives of others so as to indicate a depraved mind. Section 30-2-1(A). To obtain a conviction of felony murder, the prosecution must prove beyond a reasonable doubt that the defendant committed or attempted to commit a felony, which was either a first-degree felony or was committed under circumstances or in a manner dangerous to human life, that the defendant caused the death of the victim during the commission or attempted commission of the felony, and that the defendant intended to kill or knew that his or her acts created a strong probability of death or great bodily harm. *See* UJI 14-202 NMRA.

{14} This Court has examined the felony murder doctrine on numerous occasions, and we have repeatedly emphasized that the Legislature intended to limit the application of this crime. *See Campos v. Bravo*, 2007-NMSC-021, ¶ 9, 141 N.M. 801, 161 P.3d 846; *State v. Campos*, 1996-NMSC-043, ¶ 22, 122 N.M. 148, 921 P.2d 1266; *State v. Ortega*, 1991-NMSC-084, ¶¶ 14-15, 112 N.M. 554, 817 P.2d 1196, *abrogated on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1; *State v. Harrison*, 1977-NMSC-038, ¶¶ 12-14, 90 N.M. 439, 564 P.2d 1321, *superseded by rule on other grounds by Tafoya v. Baca*, 1985-NMSC-067, ¶ 17, 103 N.M. 56, 702 P.2d 1001. Among the many limitations we have placed on which felonies may serve as the predicate to a felony murder conviction, the one that has generated the most confusion is the collateral-felony rule. This rule requires that the predicate felony "be independent of or collateral to the homicide." *Harrison*, 1977-NMSC-038, ¶ 9. We have also held that "the predicate felony cannot be a lesser-included offense of second-degree murder." *Campos*, 1996-NMSC-043, ¶ 19.

{15} "The collateral-felony doctrine derived from our concern that the prosecution may be able to elevate improperly the vast majority of second-degree murders to first-degree murders by charging the underlying assaultive act as a predicate felony for felony murder." *Bravo*, 2007-NMSC-021, ¶ 10 (internal quotation marks and citation omitted). Thus,

> the purpose of the collateral-felony limitation to the felony-murder doctrine is to further the legislative intent of holding certain second-degree murders to be more culpable when effected during the commission of a felony—thereby elevating them to first-degree murders—while maintaining the important distinction between the classes of second- and first-degree murders.

Campos, 1996-NMSC-043, ¶ 22.

{16} As a result, not all felonies can serve as a predicate for felony murder. For one thing, some felonies are not inherently dangerous to human life or are not committed in a dangerous manner. For another, all or virtually all murders include the commission of some underlying felony in the nature of an assault or battery. *See Bravo*, 2007-NMSC-021, ¶ 12. The theory of felony murder is that a defendant shall be presumed to have the requisite culpability and mental state for first-degree murder due to the fact that the killing occurred during the dangerous enterprise of committing a felony. *See Harrison*, 1977-NMSC-038, ¶ 9.

{17} In order to explain the purpose of the collateral-felony rule, we begin with the relationship between second-degree murder and the crime of battery, which is the prototypical lesser-included offense of murder that fails to meet the collateral-felony requirement. *See Bravo*, 2007-NMSC-021, ¶ 12. When an individual unlawfully touches or applies force to the person of another in a rude or insolent manner, the individual commits the crime of battery. NMSA 1978, § 30-3-4 (1963). The level of the offense ranges from a petty misdemeanor to a third-degree felony depending on the offender's mental state, the degree of harm inflicted, and the instrumentality used to commit the battery. *See* § 30-3-4; NMSA 1978, § 30-3-5 (1969). A battery committed with an intent to injure that results in painful temporary disfigurement

or loss of function of a member or organ is a misdemeanor. *See* § 30-3-4; NMSA 1978, § 30-3-5 (1969). When there is an intent to injure and the battery results in great bodily harm, involves a deadly weapon, or is committed in a manner that could result in great bodily harm, the crime is a third-degree felony. Section 30-3-5(A), (C).

{18} If a battery results in death, the crime would remain a third-degree felony unless the offender acted with an intent to kill or knowledge of a serious likelihood of death or great bodily harm, in which case the crime is second-degree murder. *See State v. Garcia*, 1992-NMSC-048, ¶ 20, 114 N.M. 269, 837 P.2d 862; *see also State v. Varela*, 1999-NMSC-045, ¶ 14, 128 N.M. 454, 993 P.2d 1280 (concluding that the statutory definition of great bodily harm includes death). Although second-degree murder and aggravated battery may differ in resulting harm or mens rea, or both, the offender's underlying intention to injure the victim is common to both. The crime of aggravated battery does not require a felonious purpose other than injuring the victim and thus cannot be an independent felony for purposes of felony murder. The difference between aggravated battery and second-degree murder is thus a difference of degree, not of kind, which is why aggravated battery is a lesser-included offense of second-degree murder. "[I]t is impossible to commit second degree murder without committing some form of both aggravated assault and aggravated battery." *Campos*, 1996-NMSC-043, ¶ 23.

{19} Our case law requires us to "look, *not to the nature of the act*, but rather to whether the legislature intended that a particular felony should be able to serve as a predicate to felony murder." *Bravo*, 2007-NMSC-021, ¶ 14 (internal quotation marks and citation omitted). For purposes of the collateral-felony rule, legislative intent is better reflected in an assessment of felonious purpose. When a crime's objective is to injure or kill, the crime cannot be said to be independent of a murder committed during the course of that crime. It is this aspect of a predicate felony, together with its inherent dangerousness and the presence of a second-degree murder mens rea, that elevates the homicide to first-degree murder. We emphasize, however, that this assessment of a predicate felony's purpose is principally abstract in nature and is based largely on the Legislature's definition of the crime. It is not the kind of factual assessment of purpose formerly used in California that we expressly rejected in *Campos*, 1996-NMSC-043, ¶¶ 12, 18-19.

{20} In *Campos*, even though we determined that the defendant's conduct underlying his conviction of criminal sexual penetration (CSP) and felony murder was "unitary," *id.* ¶ 48, we held that CSP was properly used as a predicate for felony murder because CSP is not a lesser-included offense of second-degree murder, *id.* ¶ 25. CSP under NMSA 1978, Section 30-9-11 (2009) requires "engaging in [a] specified act[] or some form of penetration of the genital or anal openings of another" without any mens rea that is similar to the mens rea required for second-degree murder. *Campos,* 1996-NMSC-043, ¶ 25. The felonious purpose of CSP—other than to injure the victim—can be described as the "imposition of sexual activity on those who are not willing participants in fact or in law." *See State v. Stevens*, 2014-NMSC-011, ¶¶ 26, 29, 38, 323 P.3d 901. The legislative intent underlying CSP is the protection of people from unlawful intrusions into enumerated areas of the body. *See State v. Pierce*, 1990-NMSC-049, ¶ 14, 110 N.M. 76, 792 P.2d 408 (recognizing that the legislative intent underlying CSP of a minor is the protection from unlawful intrusions into enumerated areas of the body). The legislative rationale for enumerating areas of the body is the likelihood that "greater pain, embarrassment, psychological trauma, or humiliation may result from contact with intimate body parts as compared to contact with other parts of the body." *Id.* ¶ 15. Unlawful contact with other areas of the body is generally punishable under other statutes. *Id.* ¶ 16.

{21} As this Court explained in *Campos*:

> [I]n those situations in which there is more than one statutory definition of the requisite dangerous felony, a question may arise regarding which of the alternative statutory definitions is applicable for purposes of collateral-felony analysis. . . . In such a situation, the correct inquiry is whether it is possible to commit second degree murder without committing *some form* of the dangerous felony.

1996-NMSC-043, ¶ 23. Because it is possible to commit second-degree murder without committing some form of CSP, CSP can serve as a predicate felony. *Id.* ¶ 25.

{22} Another example of a dangerous felony that has a felonious purpose independent from the purpose of injuring a person is aggravated burglary. In *Bravo*, 2007-NMSC-021, ¶ 15, we held that aggravated burglary could serve as a predicate felony for a felony-murder conviction reasoning that aggravated burglary required the unauthorized entry of a structure, and the intent to commit a felony therein, elements which are not required for second-degree murder. *See id.* Further, it did not matter that the intent of the defendant in Bravo to commit a murderous battery was the basis for the commission of the predicate felony of aggravated burglary because it is possible to commit aggravated burglary with a felonious purpose other than physical injury to the victim. *Id.* Similarly, we held in *State v. Duffy* that robbery could serve as a predicate felony for felony murder because "the theft of anything of value from the person of another" is an independent felonious purpose apart from assaulting or battering the victim. 1998-NMSC-014, ¶ 25, 126 N.M. 132, 967 P.2d 807 (internal quotation marks and citation omitted), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 & n.6, 275 P.3d 110.

{23} In the present case, viewed from this independent-purpose-based perspective, shooting at or from a motor vehicle is "an elevated form of aggravated battery," *State v. Tafoya*, 2012-NMSC-030, ¶ 27, 285 P.3d 604, and thus cannot be used as a predicate for felony murder, *see Campos*, 1996-NMSC-043, ¶ 23. Shooting from a motor vehicle "consists of willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another." Section 30-3-8(B). "'Reckless disregard' requires that Defendant's conduct created a substantial and foreseeable risk and that Defendant disregarded such risk and was wholly indifferent to the consequences of his conduct and the welfare and safety of others." *State v. Mireles*, 2004-NMCA-100, ¶ 38, 136 N.M. 337, 98 P.3d 727 (citing UJI 14-344 NMRA); *see also* UJI 14-1704 NMRA. However, shooting from a motor vehicle must nevertheless still be committed with reckless disregard for another person's safety. Section 30-3-8(B). Thus, at its core, Section 30-3-8 is one of a group of statutes that proscribe assault and battery. Much like battery or assault is enhanced when committed with a deadly weapon, *see* NMSA 1978, §§ 30-3-2(A) (1963) & 30-3-5(C), the act is a greater crime still when committed with both a deadly weapon and a vehicle. In both situations, the Legislature determined that the crime

is more serious and a greater threat to human life, not because of any purpose or objective other than the commission of a battery, but because of the use of a dangerous instrumentality. And just as aggravated battery with a deadly weapon cannot be a collateral felony for purposes of felony murder, the crime of shooting at or from a motor vehicle likewise lacks an independent felonious purpose from that required under second-degree murder.

{24} Accordingly, a dangerous felony may only serve as a predicate to felony murder when the elements of any form of the predicate felony—looked at in the abstract—require a felonious purpose independent from the purpose of endangering the physical health of the victim. *See Campos*, 1996-NMSC-043, ¶ 23 ("For example, it is impossible to commit second degree murder without committing 'some form' of both aggravated assault and aggravated battery. Thus, both of those offenses would always be deemed to be non-collateral even though, under some statutory definitions, aggravated battery and aggravated assault include one or more statutory elements that are not elements of second degree murder."). In other words, there must be a felonious purpose that is independent from the purpose of endangering the physical health of the victim before the dangerous felony can be used to elevate a second-degree murder to a first-degree murder. Our responsibility is to make certain that, consistent with legislative intent, first-degree murder is reserved only for the most reprehensible murders that are deserving of the most serious punishment under New Mexico law. *See Tafoya*, 2012-NMSC-030, ¶ 38.

{25} Here, Defendant's underlying felony—a form of aggravated battery—did not have a felonious purpose independent from the purpose of endangering the physical health of the victim because shooting from a motor vehicle must be accomplished with reckless disregard for the safety of a person. Defendant's shooting from the motor vehicle directly resulted in the victim's death. And by itself, Defendant's use of a motor vehicle to commit the killing does not automatically elevate his crime of second-degree murder to first-degree murder. Otherwise, the manner and method of killing would be essentially self-enhancing. Using a vehicle to kill another, without more, is no different from killing another with a deadly weapon; in both cases, the instrumentality of choice facilitates the killing, but in neither case can the underlying felony—whether shooting from a motor vehicle contrary to Section 30-3-8 or aggravated battery with a deadly weapon contrary to Section 30-3-5(C)—be reasonably described as inherently independent of the murder.

B. The district court correctly denied Defendant's request to introduce evidence about drive-by shootings that occurred before 2010

{26} Before trial, Defendant filed a motion asking that the State be required to produce "crime scene photographs and other items," relating to investigations into "gang disturbances and violence initiated by members of the East-Side gang toward the Marquez family." Specifically, Defendant sought documents from investigations into incidents occurring on August 12, 2005, October 3, 2008, September 19, 2009, and January 1, 2010. Defendant alleged that the police had photographs and in some cases other physical evidence that was relevant to "confirm the history of East-Side gang shootings directed" at Defendant's home. Defendant also claimed to have evidence that Melendrez had threatened Defendant at least twice. The State filed a motion objecting to the release of photographs and other evidence as irrelevant and inadmissible, and argued that none of the items sought connected Melendrez to any of the incidents at Defendant's house. The State asked that the court preclude any evidence or testimony relating to these prior incidents.

{27} Apparently following a hearing, the court granted Defendant's request, in part. Specifically, while the court denied disclosure of evidence produced or recovered in the August 2005 investigation, the court ordered disclosure of the photographs and other evidence relating to the later incidents. The State then filed a motion in limine seeking to preclude Defendant from relying on evidence from the 2008, 2009, and 2010 incidents. The State argued that the probative value of such evidence was substantially outweighed by the unfair prejudice and that the evidence would confuse and mislead the jury. In support of its argument, the State observed that Melendrez was not mentioned in any of the drive-by shootings at Defendant's house and that even the most recent of the incidents documented in these reports had taken place over a year before Defendant killed Melendrez.

{28} The district court issued a written decision again ordering the disclosure of the photographs and other evidence relating to the later incidents and again denying Defendant's motion with respect to the earliest incident. The State filed an amended motion in limine that same day. In that motion, the State noted that it had complied with the court's production order but again asked the court to preclude use of that evidence at trial. The State argued that the evidence was not relevant because Melendrez was not mentioned in any of the reports. The State also sought preclusion of any of the victim's prior bad acts under Rule 11-404(A) NMRA. The State specifically referenced a charge Melendrez had pending at the time he was killed, as well as exclusion of defense witnesses, as irrelevant.

{29} Defendant filed his own motion in limine a few days later. In it, Defendant detailed several past incidents that he argued were relevant to his claim of self-defense. Defendant described: (1) a complaint filed by Defendant's brother Omar on January 15, 2006, about a drive-by shooting at 5010 Ortega Road, before Defendant lived there; (2) an additional complaint filed by Omar about a drive-by shooting on August 24, 2006, also before Defendant lived there; (3) a report made by Defendant's cousin Junie Talamantes about a drive-by shooting on October 3, 2008; (4) a report made by Defendant's girlfriend Meiley Estupinon concerning a drive-by shooting on September 19, 2009 ; (5) a report by Defendant about a drive-by shooting on January 1, 2010; (6) a January 11, 2011, incident in which Melendrez allegedly assaulted a person named Hector Andrade with a firearm; and (7) a report allegedly made by Arturo Chaves that he saw Melendrez drive by and shoot at Defendant's residence on March 10, 2011, about thirty minutes before Defendant killed Melendrez. Defendant claimed that each of these incidents was relevant to show his state of mind at the time he killed Melendrez and to show that Defendant reasonably believed that Melendrez was armed when he was shot and killed by Defendant.

{30} The court heard argument on the motions on the first day of trial. Defendant again explained what had happened at these incidents and argued that they were all relevant to his claim of self-defense. Defendant claimed that he knew about the drive-by shootings that occurred at the home before he had moved in. Defendant argued that the drive-by shootings were relevant to his state of mind when he confronted Melendrez on March 10, 2011, because he and his family had endured the

shootings for so long that Defendant was fearful for himself and his family.

{31} The district court ruled that evidence concerning drive-by shootings that had occurred before January 1, 2010, would be excluded. The court found that shootings before 2010 were "too remote in time" and that the evidence of drive-by shootings after 2010 provided a sufficient basis for Defendant to present his self-defense claim.

{32} On appeal to this Court, Defendant argues that the exclusion of this evidence was reversible error. Defendant argues that the evidence was admissible under Rule 11-405(B) NMRA as an element of his self-defense claim—the element of fear of immediate harm. Defendant claims that evidence of a victim's prior violent conduct can be admitted to show a defendant's fear of the victim, and that he had a right to "formulate a strategy to defend the charges brought by the State." Defendant also argues that the New Mexico Rules of Evidence call for the liberal admission of evidence tending to support a criminal defense.

{33} "In general, we review a trial court's admission or exclusion of evidence for abuse of discretion. An abuse of discretion arises when the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case." *State v. Armendariz*, 2006-NMSC-036, ¶ 6, 140 N.M. 182, 141 P.3d 526 (citation omitted), *overruled on other grounds by State v. Swick*, 2012-NMSC-018, ¶ 31, 279 P.3d 747.

> When a defendant is claiming self-defense, his or her apprehension of the victim is an essential element of his or her claim. Therefore, under Rule 11-405(B), evidence of specific instances of the victim's prior violent conduct of which the defendant was aware may be admitted to show the defendant's fear of the victim.

Armendariz, 2006-NMSC-036, ¶ 17.

{34} In *Armendariz*, this Court held that Rule 11-405(B) allows evidence of specific instances when the evidence is relevant to an essential element of a charge, claim, or defense. 2006-NMSC-036, ¶ 17. Because a defendant's fear of the victim is an essential element of a self-defense claim, Rule 11-405(B) allows a defendant to establish that element by presenting "evidence of specific instances of the victim's prior violent conduct of which the defendant was aware . . . ." *See* 2006-NMSC-036, ¶ 17. This evidence may not be presented simply to establish the victim's purportedly violent character, which is not an element of self-defense. *Id.* Indeed, such evidence is merely "circumstantial evidence that tends to show that the victim acted in conformity with his or her character on a particular occasion." *Id.* "Thus, under Rule 11-405(B) NMRA, only reputation or opinion evidence" is admissible to show that the victim was the first aggressor. *Armendariz*, 2006-NMSC-036, ¶ 17. Evidence of specific instances of conduct is not admissible for that purpose. *Id.*

{35} The excluded evidence consisted of photographs and witnesses who would testify about the four incidents reported by people other than Defendant. According to Defendant's proffer, none of the people who reported drive-by shootings identified Melendrez as the perpetrator. Indeed, the closest these events came to implicating Melendrez was a rumor that Melendrez's gang was intending a drive-by shooting on the weekend of one incident, and Defendant's brother, Omar, hearing someone yell the name of the gang immediately after or during another shooting. Defendant failed to proffer any evidence that Melendrez was the person who committed or even prompted the drive-by shootings. Even if the purpose of the excluded evidence was to establish an element of Defendant's self-defense claim, the district court properly excluded the evidence because Defendant failed to establish that the events were specific instances of Melendrez's conduct as opposed to the conduct of someone else and Defendant therefore failed to prove the relevance of this evidence to Defendant's apprehension of Melendrez. *See* Rule 11-104(B) NMRA ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."). As a result, the evidence was not admissible as specific instances of Melendrez's conduct.

{36} In explaining its decision to exclude the incidents that took place before 2010, the district court observed that Defendant was allowed to present ample testimony about Melendrez's earlier violent conduct to enable him to present his self-defense claim. The district court permitted Defendant to present evidence of drive-by shootings at his home that occurred on January 1, 2010, in April of 2010, and on another unspecified date in 2010. The court allowed testimony about circumstances in which Melendrez purportedly harassed Defendant and his family. One witness testified on Defendant's behalf that Melendrez had once driven up to Defendant and said that he was going to kill Defendant. The district court additionally permitted Defendant to present testimony that a neighbor saw Melendrez drive by Defendant's home and shoot at it about thirty minutes before Defendant killed Melendrez, even though there was no evidence that Defendant knew about that incident before he killed Melendrez.

{37} In addition to the district court's generous admission of Defendant's requested evidence, each of these supposed incidents appeared in the self-defense instruction Defendant tendered. Further, Defendant argued that these incidents caused him to live in fear of more drive-by shootings at his home. This fear, in turn, caused Defendant to "reasonabl[y]" believe that Melendrez was reaching for a gun in the convenience store parking lot, and shooting Melendrez was therefore an act of self-defense. On this record, we simply cannot say that Defendant was denied the opportunity to establish his purported fear of immediate harm from Melendrez given the use of these specific examples of Melendrez's violent conduct.

{38} Accordingly, the district court did not abuse its discretion in excluding some of the specific instances of Melendrez's purported violent conduct. These incidents were remote in time from Defendant's killing of Melendrez, the excluded evidence established at most the impermissible inference that Melendrez had a character trait for violence, and Defendant failed to show that these specific instances of conduct were perpetrated by Melendrez.

C. Defendant's confrontation rights were not violated

{39} Chief Medical Investigator Dr. Ross Zumwalt assisted in the autopsy of Melendrez's body. Dr. Zumwalt worked with and supervised Dr. John Burns, a trainee in forensic pathology, in conducting the autopsy. Dr. Zumwalt may have left during part of the autopsy, but he specifically recalled being present for at least part of the procedure and he recalled examining Melendrez's wounds. In addition to analyzing the wounds, Dr. Zumwalt considered the trajectories of the bullets, and he personally arrived at his own conclusions about both the wounds and their trajectories. At the autopsy, Dr. Zumwalt reviewed Dr. Burns's conclusions and signed the autopsy report.

{40} At trial, the defense moved to strike Dr. Zumwalt's testimony because Defendant was unable to confront Dr. Burns. The

district court denied the motion, stating that precedent supported Dr. Zumwalt's testimony where he was present and supervising during the autopsy and where he had personal knowledge of how the autopsy was conducted.

{41} "We generally review Confrontation Clause claims de novo." *State v. Cabezuela*, 2011-NMSC-041, ¶ 49, 150 N.M. 654, 265 P.3d 705. Under the Confrontation Clause, "an out-of-court statement that is both testimonial and offered to prove the truth of the matter asserted may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *State v. Navarette*, 2013-NMSC-003, ¶ 7, 294 P.3d 435, *cert. denied*, ____ U.S. ____, 134 S. Ct. 64 (2013). In *Cabezuela*, this Court held that the testimony of a supervising pathologist regarding an autopsy performed by a forensic pathology fellow did not violate the Confrontation Clause where the record indicated the supervising pathologist "had personal knowledge of and participated in making the autopsy report findings by virtue of her own independent participation in the microscopic exam, examination of the body and the injuries, and examination of all the photographs." 2011-NMSC-041, ¶¶ 48-52 (distinguishing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, ____ U.S. ____, 131 S. Ct. 2705 (2011)); *see also State v. Gonzales*, 2012-NMCA-034, ¶ 26, 274 P.3d 151 ("After *Cabezuela*, we know that a pathologist who participated in an autopsy can testify to his or her opinion, including opinions utilizing another participating doctor's notes."); *Marshall v. People*, 2013 CO 51, ¶ 19, 309 P.3d 943 ("Other courts that have considered this question have found that supervisor testimony satisfies the Confrontation Clause when the supervisor prepares or signs the report.").

{42} Here, the record indicates that Dr. Zumwalt had personal knowledge of and participated in the autopsy and preparation of the autopsy findings. He reviewed and signed the autopsy report. The Confrontation Clause creates no barrier to Dr. Zumwalt testifying about his own observations from his examination of the body, the wounds, and the bullet trajectories. Under *Cabezuela,* there was no violation of the Confrontation Clause. 2011-NMSC-041, ¶¶ 48-52.

D. Defendant's remaining claims

{43} At trial, the parties discussed the proposed jury instructions extensively. The State proffered a full version of the instructions while Defendant submitted his own, revised version of the self-defense instruction, which the court accepted. Defendant raised no objection to the State's proffered instruction on felony murder, and he did not submit his own felony-murder instruction.

{44} The district court instructed the jury that Defendant killed Melendrez in self-defense if

> 1. There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of Julian Melendrez, threatening to kill defendant, engaging in violent and intimidating acts against the defendant, and making a movement toward the defendant that created a belief in defendant's mind that Julian Melendrez was reaching for a gun to shoot defendant; and
> 2. The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed Julian Melendrez because of that fear; and
> 3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The court further instructed the jury that "[t]he burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. If you have a reasonable doubt as to whether the defendant acted in self-defense you must find the defendant not guilty." The felony-murder jury instructions did not contain an element of unlawfulness; that is, the instructions did not duplicate the language that the State must disprove self-defense beyond a reasonable doubt.

{45} Defendant argues that, even though the jury was instructed on self-defense in a separate instruction of his own authorship, the district court erroneously failed to include a lack of self-defense as an element of felony-murder. Conceding that he failed to preserve the issue, Defendant argues that the district court's omission of self-defense in the felony-murder instruction constitutes fundamental error.

{46} Because Defendant did not object to the jury instructions as given or offer his own instructions, we review for fundamental error. *State v. Cunningham*, 2000-NMSC-009, ¶¶ 8, 11, 128 N.M. 711, 998 P.2d 176. In a review for fundamental error, we first determine whether an error occurred. *State v. Silva*, 2008-NMSC-051, ¶ 11, 144 N.M. 815, 192 P.3d 1192, *holding modified on other grounds by State v. Guerra,* 2012-NMSC-027, ¶¶ 12-15, 284 P.3d 1076. If an error occurred, we determine whether the error was fundamental; we employ the fundamental error exception "very guardedly," and apply it "only under extraordinary circumstances to prevent the miscarriage of justice." *Silva*, 2008-NMSC-051, ¶ 13 (internal quotation marks and citations omitted).

> Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.

Cunningham, 2000-NMSC-009, ¶ 13 (internal quotation marks and citation omitted).

{47} This Court has outlined special concerns in reviewing for fundamental error in the context of jury instructions. Indeed,

> [w]here a man's fundamental rights have been violated, while he may be precluded by the terms of the statute or the rules of appellate procedure from insisting in this court upon relief from the same, this court has the power, in its discretion, to relieve him and to see that injustice is not done.

Id. ¶ 12 (internal quotation marks and citation omitted). "In applying the fundamental error analysis to deficient jury instructions, we are required to reverse when the misinstruction leaves us with no way of knowing whether the conviction was or was not based on the lack of the essential element." *State v. Montoya*, 2013-NMSC-020, ¶ 14, 306 P.3d 426 (internal quotation marks and citation omitted).

{48} The uniform jury instruction for felony murder lists the essential elements of the crime. *See* UJI 14-202. Self-defense is not included. *See id.* But the self-defense instruction use notes provide that, "[i]f this instruction is given, add to the essential elements instruction for the offense charged, 'The defendant did not act in self defense.'" Use Note 1, UJI 14-5171 NMRA. In *Cunningham*, the defendant claimed that the deliberate-intent murder instruction was fundamentally flawed because the district court had failed to include "unlawfulness" in the instruction. 2000-NMSC-009, ¶ 8 (internal quotation marks and citation omitted). "In order to prove unlawfulness,

the State must disprove the defendant's self-defense claim beyond a reasonable doubt." *State v. Benally*, 2001-NMSC-033, ¶ 10, 131 N.M. 258, 34 P.3d 1134. The defendant in *Cunningham* did not preserve the issue for review, and this Court reviewed his claim for fundamental error. *See* 2000-NMSC-009, ¶ 8. We held there that fundamental error did not occur because the jury would not have been confused or misdirected where a separate and proper self-defense instruction was provided to the jury. *Id.* ¶ 14. This Court went on to hold that the separate and accurate self-defense instruction cured the error of not including the element of unlawfulness in the deliberate-intent murder instruction where "a reasonable juror would understand that an acquittal based on self-defense is inconsistent with a guilty verdict on first-degree deliberate-intent murder." *Id.* ¶¶ 17, 22. The Court was "convinced that the element of unlawfulness was decided by the jury when they contemplated the separate self-defense instruction." *Id.* ¶ 23. We held that "it would be improper for this Court to exercise its inherent power in this case when it is unlikely that the interests of substantial justice would be furthered." *Id.*

{49} Here, Defendant claimed self-defense, and the district court used the self-defense instruction. As a result, the jury should also have been instructed that self-defense was an essential element of felony murder. It was fundamental error to omit this element. The error, however, is the same as the one that was before us in *Cunningham*. *Id.* ¶¶ 7-8. Because Defendant did not object to the instructions as given or offer his own instructions, *Cunningham* makes it plain that the separate, properly submitted self-defense instruction cured any error. *Id.* ¶¶ 17, 22-23. The jury could not have reached its verdict under the instructions given without finding beyond a reasonable doubt that Defendant did not act in self-defense. *See State v. Barber*, 2004-NMSC-019, ¶ 29, 135 N.M. 621, 92 P.3d 633 ("Error is not fundamental when the jury could not have reached its verdict without also finding the element omitted from the instructions."); *see also State v. Smith*, 2001-NMSC-004, ¶ 40, 130 N.M. 117, 19 P.3d 254 ("Juries are presumed to have followed the written instructions."). Accordingly, even though the district court erred by not including the essential element of self-defense in the felony-murder jury instruction, the separate properly submitted self-defense instruction cured the error.

{50} Ordinarily, in a case such as this one, we would remand for the purpose of having the district court vacate Defendant's felony murder conviction and enter a conviction of second-degree murder. *See Tafoya*, 2012-NMSC-030, ¶ 34. However, because of the errors committed in the felony-murder jury instruction, we instead remand for the purpose of vacating the felony-murder conviction and reinstatement of the shooting from a motor vehicle conviction.

{51} Defendant also argues that there was ample evidence to support a finding that he acted with sufficient provocation such as to reduce felony murder to voluntary manslaughter under a theory of imperfect self-defense. Because we are vacating Defendant's first-degree felony-murder conviction, we do not reach the issue of whether the district court erred by not including the elements of legally-adequate provocation in the felony-murder jury instruction.

III. CONCLUSION

{52} We hold that the crime of shooting at or from a motor vehicle cannot serve as the predicate felony in a felony-murder conviction. We reject Defendant's remaining claims of error. We remand to the district court with instructions to enter an amended judgment and sentence vacating Defendant's first-degree felony-murder conviction and reinstating his conviction of shooting from a motor vehicle.

{53} IT IS SO ORDERED.
PETRA JIMENEZ MAES, Justice

WE CONCUR:
CHARLES DANIELS, Chief Justice
BARBARA VIGIL, Justice
EDWARD L. CHÁVEZ, Justice, specially concurring
JUDITH K. NAKAMURA, Justice, dissenting

CHÁVEZ, Justice (specially concurring).

{54} This case is the first time since the enactment of NMSA 1978, Section 30-3-8(B) (1993) that a defendant has questioned whether the felony shooting at or from a motor vehicle can support a felony-murder conviction without violating the collateral-felony doctrine. I agree with the majority opinion that this felony cannot serve as the predicate felony for felony murder without violating the collateral-felony doctrine, a doctrine that this Court first described in 1977. *See State v. Harrison*, 1977-NMSC-038, ¶ 9, 90 N.M. 439, 564 P.2d 1321, *superseded by rule on other grounds by Tafoya v. Baca*, 1985-NMSC-067, ¶ 17, 103 N.M. 56, 702 P.2d 1001. Therefore, a prosecutor who wants to pursue a first-degree murder conviction for a death resulting from a drive-by shooting or shooting into a dwelling may charge the accused with depraved mind murder[1] pursuant to NMSA 1978, Section 30-2-1(A)(3) (1994). This charge has been available to prosecutors since before the 1987 enactment of Section 30-3-8. *See generally State v. McCrary*, 1984-NMSC-005, 100 N.M. 671, 675 P.2d 120 (concluding that depraved mind murder was upheld when the defendant shot numerous times from a truck into several tractor-trailers and cabs and killed one person, even though the defendant did not know that a person was in the tractor-trailer). Proving depraved mind murder does not require proof that the defendant intended to kill. *See* Wayne R. LeFave, *Criminal Law* § 14.4, at 779 (5th ed. 2010). Proof that a defendant killed someone by engaging in "outrageously reckless conduct . . . with ill will, hatred, spite, or evil intent [and with] total indifference for the value of human life" is proof that the defendant acted with a depraved mind. UJI 14-203 NMRA. This Court has recently noted on more than one occasion that drive-by shootings provide a clear example of the type of gravity and depravity required for a depraved mind murder conviction. *State v. Dowling*, 2011-NMSC-016, ¶¶ 2-3, 8-11, 150 N.M. 110, 257 P.3d 930; *State v. Reed*, 2005-NMSC-031, ¶ 31, 138 N.M. 365, 120 P.3d 447. It does not matter that the defendant intended to kill a specific person, but instead killed someone else who was in the line of fire. *See State v. Sena*, 1983-NMSC-005, ¶ 9, 99 N.M. 272, 657 P.2d 128.

{55} I also agree with Justice Nakamura that having the Legislature "[e]numerat[e] the felonies that may serve as predicate felonies for felony murder will clarify matters greatly." Dissenting op. ¶ 72. However, even if the Legislature were not to accept this invitation, in my view, the majority opinion does add clarity to how courts should apply the collateral-felony doctrine.

{56} In *State v. Campos*, this Court stated that it

> is impossible to commit second degree murder without committing some form of both aggravated assault and aggravated

[1]If the evidence supports the charge, a prosecutor may also charge an accused with premeditated murder under Section 30-2-1(A).

> battery. Thus, both of those offenses would always be deemed to be non-collateral even though, under some statutory definitions, aggravated battery and aggravated assault include one or more statutory elements that are not elements of second degree murder.

1996-NMSC-043, ¶ 23, 122 N.M. 148, 921 P.2d 1266. The Legislature categorizes the crimes listed in Chapter 30, Article 3 of the Criminal Code as assault and battery crimes, which includes the crime of shooting at or from a motor vehicle. All of the dangerous felonies that this Court has held support a felony-murder conviction without violating the collateral-felony doctrine, with one notable exception, are crimes not found in Chapter 30, Article 3. *See* majority op. ¶¶ 20-23 (listing as examples felony murder cases involving criminal sexual penetration, NMSA 1978, § 30-9-11 (2009); aggravated burglary, NMSA 1978, § 30-6-4 (1989); and robbery, NMSA 1978, § 30-16-2 (1973) as appropriate predicate felonies).

{57} The one notable exception is the crime of willfully shooting at a dwelling.[2] *See State v. Varela*, 1999-NMSC-045, ¶ 21, 128 N.M. 454, 993 P.2d 1280; *see also* § 30-3-8(A). In *Varela* several shots were fired into a mobile home; the bullet struck the owner as he slept, ultimately resulting in his death. 1999-NMSC-045, ¶ 2. The *Varela* Court held that shooting at a dwelling may serve as a predicate felony without violating the collateral-felony doctrine because Section 30-3-8 prohibits any shooting at a dwelling and not

> every instance of shooting at a dwelling which results in death is automatically felony murder. If a defendant shoots into a dwelling, believing it to be abandoned, and kills an occupant, then he or she would be guilty of the felony [shooting at a dwelling], but would not necessarily be guilty of felony murder. In such a fact pattern, a jury might find the requisite mens rea for second degree murder absent, precluding a conviction for felony murder.

1999-NMSC-045, ¶¶ 13, 18, 21. The requisite mens rea for second-degree murder requires the defendant to "know that his or her acts create a strong probability of death or great bodily harm," and therefore an accidental killing would not satisfy the mens rea for second degree murder. *Id.* ¶ 18. Because the felony of shooting at a dwelling does not have a mens rea similar to the mens rea for second-degree murder, it can be used as a predicate felony for felony-murder purposes. *Id*.

{58} The crime of shooting at a dwelling is complete once a person willfully shoots into a dwelling, whether occupied or not. Since its enactment, the crime of shooting at a dwelling has never required that the dwelling be occupied. In its original version Section 30-3-8 read, in relevant part: "[s]hooting at [an] inhabited dwelling . . . consists of willfully discharging a firearm at an inhabited dwelling house . . . . As used in this section, 'inhabited' means currently being used for dwelling purposes, whether occupied or not." *Id.* (1987). In 1993 the Legislature simply removed "inhabited" from the statute, making it a crime to willfully shoot at a dwelling—a place where a person lives.

{59} By contrast, when the Legislature enacted the crime of shooting at or from a motor vehicle in 1993, it included an element not required for shooting at a dwelling or occupied building. Section 30-3-8(B) provides that "[s]hooting at or from a motor vehicle consists of willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another." *Id.* (1993). The crime of "shooting at a dwelling" does not require that the shooter discharge the firearm with reckless disregard for another person. To find Defendant guilty of the second-degree felony of shooting from a motor vehicle, the jury had to find that he willfully shot a firearm from a motor vehicle with reckless disregard for another person and caused great bodily harm to the victim. *See* UJI 14-344 NMRA. To find that Defendant acted in reckless disregard, the jury had to find that he "knew that his conduct created a substantial and foreseeable risk, that he disregarded that risk and that he was wholly indifferent to the consequences of his conduct and the welfare and safety of others." *See* UJI 14-1704 NMRA (as modified).

{60} In my opinion, the additional element sufficiently distinguishes shooting at or from a motor vehicle from the crime of shooting at a dwelling for purposes of the collateral-felony doctrine. When one willfully discharges a firearm with reckless disregard for another person, the circumstances known to the shooter are such that the shooter knows that his or her act of willfully shooting—not driving or riding in a motor vehicle—is what creates a strong probability of death or great bodily harm. Thus, I conclude that like a form of aggravated battery or aggravated assault (i.e., assault while wearing a mask contrary to NMSA 1978, Section 30-3-2(B) (1963)), the crime of shooting from a motor vehicle cannot be used as a collateral felony, although it includes a statutory element—the motor vehicle—that is not an element of second-degree murder.

{61} Although I respect both the majority and the dissenting opinions in this case, I am persuaded that the majority opinion is consistent with the collateral-felony doctrine and its purposes. I therefore concur with the majority opinion.

EDWARD L. CHÁVEZ, Justice

NAKAMURA, Justice (dissenting).

{62} Shooting at or from a motor vehicle, a violation of NMSA 1978, Section 30-3-8(B) (1993), is a collateral felony and may serve as a predicate felony for felony murder. Defendant's felony-murder conviction should be affirmed. Because I disagree with the central holding of the majority's opinion, I do not join or offer any comments as to the other conclusions reached by the majority opinion.

{63} The majority opinion reaches the conclusion that shooting at or from a motor vehicle is *not* a collateral felony by departing from settled law without justification. Consequently, greater confusion in an already difficult area of law is likely. But the true source of the confusion in this area of law lies with our felony-murder statute itself. This Court's attempts to make clear and precise that which is vague and inexact have not and are unlikely to provide the type of succinct guidance our bench and bar require as to the applicability of our felony-murder rule. As a majority of other states have done, our Legislature could elect to enumerate the felonies that may serve as predicate felonies and greatly help clarify this area of law. *See* John O'Herron, *Felony Murder without a Felony Limitation: Predicate Felonies and Practical Concerns in the States*, 46 No. 4 Crim. Law Bull., art. 4, 668 (2010) ("Thirty-five states have felony murder statutes that enumerate predicate felonies."); *see also State v. Willis*, 1982-NMCA-151, ¶ 8, 98 N.M. 771, 652 P.2d 1222 ("The power to define crimes and to establish criminal penalties is a legislative function."); *cf. People v. Farley*, 210 P.3d 361, 411 (Cal. 2009) (observing

[2] *State v. Varela*, 1999-NMSC-045, ¶ 21, 128 N.M. 454, 993 P.2d 1280 did not address shooting at an occupied building.

that the policy concerns animating the Legislature to enumerate a particular felony offense as a predicate felony for first-degree felony murder "remain within the Legislature's domain," and acknowledging the judiciary's limited authority to narrow or modify the plain language of a validly enacted criminal statute).

I. THIS COURT'S COLLATERAL-FELONY JURISPRUDENCE COMPELS THE CONCLUSION THAT SHOOTING AT OR FROM A MOTOR VEHICLE IS A COLLATERAL FELONY

{64} New Mexico's felony-murder statute prohibits the killing of one human being by another "in the commission of or attempt to commit *any felony* . . . ." NMSA 1978, § 30-2-1(A)(2) (1994) (emphasis added). Yet it is not true in New Mexico that "any felony" may serve as a predicate felony for felony murder. *See generally State v. Yarborough*, 1996-NMSC-068, ¶ 11, 122 N.M. 596, 930 P.2d 131 (observing that a strict reading of the "any felony" language of Section 30-2-1(A)(2) is inappropriate, and stating that "[w]e look beyond the literal word of the statute to the common-law concept most likely intended by the legislature to be embodied in the statute"). Through the development of an elaborate body of case law, this Court has turned New Mexico's "broad felony-murder statute into one of the most narrow felony-murder rules in the country." O'Herron, *supra*, at 679. The collateral-felony rule is but one of the limitations we have placed on our felony-murder rule. The majority opinion seeks to clarify the purpose and application of this doctrine, but only makes matters more obscure. The contention that our collateral-felony rule *derived* from concern that the vast majority of second-degree murders might be improperly elevated to first-degree murders, Maj. Op. ¶ 15, does not correctly explain the origins of the collateral-felony rule. Additionally, the majority opinion's explanation of the rule's purpose is incomplete. *See id.* ¶ 17.

{65} The collateral-felony rule "is more commonly referred to as the merger doctrine because the predicate felony and the homicide are said to merge." *State v. Campos*, 1996-NMSC-043, ¶ 8 n.1, 122 N.M. 148, 921 P.2d 1266; *see also Roary v. State*, 867 A.2d 1095, 1103 (Md. 2005) (stating that the merger doctrine is also referred to as the collateral-felony doctrine); *State v. Williams*, 25 S.W.3d 101, 113 (Mo. Ct. App. 2000) (same). This Court elected not to use the phrase "merger doctrine," however, but embraced the phrase "collateral-felony rule" instead to avoid any possible confusion that might arise from duplicative terminology usage. *See, e.g.*, *State v. Pierce*, 1990-NMSC-049, ¶ 46, 110 N.M. 76, 792 P.2d 408 (observing that, in the double jeopardy context, "[t]he *rule of merger* precludes an individual's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted.") (emphasis added).

{66} The merger doctrine is not widely accepted, but has been adopted in jurisdictions, like New Mexico, where the Legislature has not expressly enumerated the felonies capable of supporting a felony-murder conviction. *State v. Godsey*, 60 S.W.3d 759, 774-75 (Tenn. 2001). The doctrine is a principle for discerning legislative intent. *Id.* at 774. It is a judicially-created mechanism for assessing whether the Legislature intended to permit a particular felony to serve as a predicate felony for felony murder. *State v. Duffy*, 1998-NMSC-014, ¶ 23, 126 N.M. 132, 967 P.2d 807, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. The doctrine's purpose becomes clearer still when the function of the doctrine in application is considered.

{67} The merger doctrine prevents "the felony-murder rule from being improperly expanded to encompass nearly all killings, rather than just killings occurring in the course of an independent felony." 1 Paul H. Robinson, *Criminal Law Defenses* § 103(a) at 496 (1984). The doctrine "restricts acceptable predicate felonies by treating certain felonies as inseparable from the homicides to which they give rise. The paradigm case is the killing that takes place in the course of an assault." Claire Finkelstein, *Merger and Felony Murder*, *in* Defining Crimes: Essays on the Special Part of the Criminal Law, 219 (R.A. Duff & Stuart Green eds., 2005). Because the vast majority of homicides are predicated on an initial felonious assault, "every felonious assault ending in death automatically would be elevated to murder in the event a felonious assault could serve as the predicate felony for purposes of the felony-murder doctrine." *People v. Hansen*, 885 P.2d 1022, 1028 (Cal. 1994), *overruled by People v. Sarun Chun*, 203 P.3d 425 (2009). Absent the merger limitation, two serious problems arise. First, "application of the felony-murder doctrine would allow for conviction of the defendant for murder without the prosecution having to prove the existence of malice." *Campos*, 1996-NMSC-043, ¶ 10. Such a result is inconsistent with basic principles of Anglo-American criminal law. *See generally People v. Aaron*, 299 N.W.2d 304, 317 (Mich. 1980) (criticizing the felony-murder rule on grounds that it "completely ignores the concept of determination of guilt on the basis of individual misconduct . . . [and] erodes the relation between criminal liability and moral culpability." (internal quotation marks and citations omitted)). Second, the felony-murder rule "would eliminate the mens-rea requirement for murder in most homicide cases and circumvent the legislative gradation system for classes of homicides." *Campos*, 1996-NMSC-043, ¶ 10. It is fair to infer that no Legislature would intend its own criminal penalty scheme to be circumvented, and avoiding this outcome is one of the primary policy rationales cited to justify the existence and adoption of the merger doctrine. *See generally Roary*, 867 A.2d at 1103-05 (discussing the conceptual justifications underlying the merger doctrine).

{68} While there is agreement about the underlying purposes of the merger doctrine, courts that have adopted it are divided on how it is to be applied. As one treatise notes, "[t]he difficulty arising from the merger doctrine lies in determining which underlying felonies should merge." 1 Robinson, *supra* at 498. In *Campos*, we noted three distinct methods utilized in varying jurisdictions: the independent felonious purpose test; the same act test; and deference to legislative intent. 1996-NMSC-043, ¶¶ 11-14. We rejected all three approaches because "New Mexico has a distinct version of the felony-murder doctrine, which calls for a different formulation of the" merger doctrine. *Id.* ¶ 16. Our distinct form of felony murder is an outgrowth of this Court's holding in *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196, *abrogated on other grounds as recognized by Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

{69} This Court's decision in *Ortega* was a significant turning point in our felony-murder jurisprudence. *Ortega* held that the prosecution must demonstrate "that the defendant *intended* to kill (or was knowingly heedless that death might result from his conduct)" to secure a felony-murder conviction. *Id.* ¶ 25. The significance of this determination, with respect to our continued adherence to the merger doctrine, has been largely overlooked. Requiring, as *Ortega* does, the prosecution to

prove the defendant acted with the mens rea commensurate with second-degree murder to secure a felony-murder conviction remedied the central ills the merger doctrine (as traditionally conceived) was adopted to cure. After *Ortega*, there is no concern a defendant can be convicted of murder without the State proving malice. *See Campos*, 1996-NMSC-043, ¶ 17. And *Ortega* largely foreclosed the possibility that the felony-murder doctrine might frustrate our Legislature's scheme of graduated penalties for the different classes of homicides. *See Campos*, 1996-NMSC-043, ¶ 17 ("Our felony-murder rule only serves to raise second-degree murder to first-degree murder when the murder is committed in the course of a dangerous felony."). Having significantly restricted the sweep of our felony-murder rule in *Ortega*, this Court in *Campos* realized that the merger doctrine served only a limited function after *Ortega*. The *Campos* Court explained that "the appropriate limitation imposed by the collateral-felony doctrine [*i.e.*, the merger doctrine] in New Mexico is simply that *the predicate felony cannot be a lesser included offense of second-degree murder*." 1996-NMSC-043, ¶ 19 (emphasis added).

{70} To determine if a particular predicate felony is a lesser-included offense of second-degree murder, we apply the strict-elements test. *Id.* ¶ 22. We did not select this test arbitrarily; rather, we embraced the strict-elements test because we determined that it is a reliable tool "for inferring whether the legislature intended to authorize separate application of each criminal statute." *Id.* ¶ 20 (internal quotation marks and citation omitted). In addition, the strict-elements test is most sensible in the wake of *Ortega* because the felony-murder doctrine applies only where the state can "prove the elements of second degree murder as well as an independent felony." *State v. Varela*, 1999-NMSC-045, ¶ 20, 128 N.M. 454, 993 P.2d 1280; *see also State v. McGruder*, 1997-NMSC-023, ¶ 16, 123 N.M. 302, 940 P.2d 150 (concluding that the strict-elements test is the appropriate analytical tool to determine whether a particular felony may serve as a collateral felony), *abrogated on other grounds by State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891. We have expressly rejected invitations to utilize other means to discern legislative intent in this area. *Varela*, 1999-NMSC-045, ¶ 19.

{71} Under the strict-elements test, an offense is "a lesser-included offense of another only if the statutory elements of the lesser offense are a sub-set of the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense." *Campos*, 1996-NMSC-043, ¶ 20 (internal quotation marks and citation omitted). A slightly clearer articulation of the strict-elements test appears in *Duffy*, 1998-NMSC-014, ¶ 24. In *Duffy*, we explained that, under the strict elements test,

> an offense is deemed to be a lesser-included offense of another only if all of the statutory elements of the lesser offense are completely embodied within the statutory elements of the greater offense such that it would be impossible ever to commit the greater offense without also committing the lesser offense.

Id. (internal quotation marks and citation omitted). When applying the strict-elements test, we do not consider the facts of a particular case but look to the elements of the offense in the abstract. *Varela*, 1999-NMSC-045, ¶ 17.

{72} The majority opinion complicates matters by stating that the collateral-felony rule requires that the predicate felony be independent of the homicide *and* then by noting that this Court has held that the predicate felony cannot be a lesser-included offense of second-degree murder. Maj. Op. ¶ 14. This suggests that there is some analytical distinction between these two propositions. But there is not. This Court has already made clear that a collateral felony is just an offense that is not a lesser-included offense of second-degree murder. *Campos*, 1996-NMSC-043, ¶ 19.

{73} In *Varela*, we considered whether shooting at a dwelling in violation of Section 30-3-8(A) is a collateral felony. 1999-NMSC-045, ¶¶ 15-21. We observed that "[t]he crime of shooting at a dwelling requires willfully shooting at a dwelling, which is not an element of second degree murder." *Id.* ¶ 18. Accordingly, we concluded that "shooting at a dwelling is not a lesser included offense of second degree murder." *Id.* This straight-forward analysis applies with equal force to Section 30-3-8(B) and these principles have a clear and easy application in this case.

{74} "Shooting at or from a motor vehicle consists of willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another." Section 30-3-8(B). Just as shooting at a dwelling is not an element of second-degree murder, *Varela*, 1999-NMSC-045, ¶ 18, shooting at or from a motor vehicle is also not an element of second-degree murder. *See* NMSA 1978, § 30-2-1(B). Accordingly, Section 30-3-8(B) is a collateral felony and may serve as a predicate felony for felony murder. This conclusion is supported by our collateral-felony case law. *See Campos v. Bravo*, 2007-NMSC-021, ¶ 15, 141 N.M. 801, 161 P.3d 846 (concluding that aggravated burglary is a collateral felony because two elements of the offense—(1) the unauthorized entry of a structure, and (2) the intent to commit a felony therein—are not elements of second-degree murder); *Duffy*, 1998-NMSC-014, ¶ 25 (concluding that robbery is a collateral felony because the elements of the offense—theft of anything of value from the person of another by use or threatened use of violence—are not elements of second-degree murder); *Campos*, 1996-NMSC-043, ¶ 25 (concluding that first-degree criminal sexual penetration is a collateral felony because the elements of the offense—some form of penetration of the genital or anal openings of another—are not elements of second-degree murder).

II. THE MAJORITY OPINION DEPARTS FROM SETTLED LAW WITHOUT JUSTIFICATION AND ADOPTS AN UNWORKABLE STANDARD FOR OUR COLLATERAL-FELONY RULE

{75} The majority opinion abandons our previous approach to the collateral-felony rule and states that "a dangerous felony may only serve as a predicate to felony murder when the elements of any form of the predicate felony—looked at in the abstract—require a felonious purpose independent from the purpose of endangering the physical health of the victim." Maj. Op. ¶ 24. The majority opinion clarifies that "there must be a felonious purpose that is independent from the purpose of endangering the physical health of the victim before the dangerous felony can be used to elevate a second-degree murder to first-degree murder." *Id.* Upon what grounds does the majority opinion base this new development in our collateral-felony jurisprudence? The majority opinion explains that "[f]or purposes of the collateral-felony rule, legislative intent is better reflected in an assessment of felonious purpose. When a crime's objective is to injure or kill, the

crime cannot be said to be independent of a murder committed during the course of that crime." *Id.* ¶ 19. But this is entirely inconsistent with *Campos* where this Court determined that the strict elements test most accurately reflects legislative intent for purposes of determining whether a felony is collateral. Why the majority adopts this new formulation and abandons our existing collateral-felony jurisprudence is unclear. No reason is expressly stated or readily discernible. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 33, 125 N.M. 721, 965 P.2d 305 (stating that the principle of stare decisis does not require this Court to always follow precedent nor preclude us from overruling precedent, but it does require that we provide justification when we depart from precedent).

{76} Whether or how the majority opinion's new approach remains tethered to the underlying purpose of the merger doctrine—to determine legislative intent and further that intent—is also unclear. The majority opinion's new formulation of our collateral-felony rule utilizes terminology associated with and rooted in the independent felonious purpose test. Under this test, courts focus on the defendant's underlying purpose and hold that the predicate felony and homicide merge unless the predicate felony was committed with an independent felonious purpose from the killing. *See* Finkelstein, *supra* at 223; *see also People v. Burton*, 491 P.2d 793, 801 (Cal. 1971) ("[T]here is a very significant difference between deaths resulting from assaults with a deadly weapon, where the purpose of the conduct was the very assault which resulted in death, and deaths resulting from conduct for an *independent felonious purpose*, such as robbery or rape . . . ."), *disapproved of on other grounds by People v. Lessie*, 223 P.3d 3 (2010). This Court expressly rejected the independent felonious purpose test in *Campos* because the test was developed in jurisdictions where accidental homicides can result in felony murder charges, and the test necessarily permits such charges in its application. We thus deemed the test incompatible with our unique approach to felony murder. *Campos*, 1996-NMSC-043, ¶¶ 15, 18 (rejecting the independent felonious purpose test, and other related tests, because an accidental killing cannot constitute second degree murder and, therefore, would not implicate New Mexico's unique felony murder statute). Even ignoring this fact, commentators have persuasively shown that the independent felonious purpose test is analytically unsound. *See* Finkelstein, *supra* at 224 ("The independent felonious purpose test is not even compelling as applied to assault. A defendant who intends to harm his victim by beating him up very likely does not have the purpose of inflicting sufficient harm on him to kill him. And if this is so, then how can this test maintain that the felonious purpose in this case—which involves wounding—is not independent of the homicide . . . .").

{77} If the majority opinion's intention is to rectify the confusion our collateral-felony rule has generated, *see* Maj. Op. ¶¶ 1, 14, it is doubtful that the adoption of a body of law we previously rejected as incompatible with our unique felony-murder jurisprudence is likely to achieve this end. And if any doubt exists that the majority opinion's new approach to the collateral-felony rule is likely to cast our felony-murder jurisprudence into disarray, we need look no further than our existing precedent to dispel that doubt.

{78} The majority opinion attempts to illustrate how its new approach to the collateral-felony rule functions by examining several felony offenses we have previously determined to be collateral. Maj. Op. ¶¶ 21-23. In *Campos*, this Court concluded that first-degree criminal sexual penetration (CSP), NMSA 1978, § 30-9-11 (2009), is a collateral offense and, thus, may serve as a predicate felony for felony murder. *Campos*, 1996-NMSC-043, ¶ 25. The majority opinion's new approach leads to the conclusion that CSP is *not* collateral and cannot serve as a predicate offense, despite the majority opinion's assertion to the contrary.

{79} While the majority opinion claims that unauthorized carnal knowledge or the imposition of sexual activity upon those who are not willing participants in sexual activity are the purportedly independent felonious purposes of CSP, Maj. Op. ¶ 20, this analysis is doubtful at best. To suggest that unauthorized carnal knowledge or the imposition of unwanted sexual activity upon another is not somehow inextricably associated with an intent to injure another does not withstand scrutiny. Such conduct is undoubtedly injurious and can only be carried out with an intent to harm. The majority opinion perhaps recognizes this and states that CSP is a collateral offense because it is possible to commit second-degree murder without committing some form of CSP. *Id.* ¶ 21. But this is the traditional collateral-felony analysis (*i.e.*, the strict-elements test) which the majority opinion abandons. The majority opinion's new approach to our collateral-felony doctrine is unworkable and likely to only further confuse this already difficult area of law.

III. CONCLUSION

{80} A violation of Section 30-3-8(B) is a collateral felony and may serve as a predicate felony for felony murder. The majority opinion avoids this conclusion by fundamentally altering our collateral-felony jurisprudence. Confusion and uncertainty are the likely outcomes of the majority's opinion. As this dissent lacks the force of law, clarity in this area of law must come from our Legislature. Enumerating the felonies that may serve as predicate felonies for felony murder will clarify matters greatly.

{81} For the forgoing reasons, I respectfully dissent.

JUDITH K. NAKAMURA, Justice

From the New Mexico Supreme Court

Opinion Number: 2016-NMSC-026

No. S-1-SC-34866 (filed June 30, 2016)

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
v.
JOANN YAZZIE,
Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
KAREN L. TOWNSEND, District Judge

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Opinion

Charles W. Daniels, Chief Justice

{1} The New Mexico Mandatory Financial Responsibility Act (MFRA), NMSA 1978, §§ 66-5-201 to -239 (1978, as amended through 2015), prohibits operation of a motor vehicle without liability insurance or other proof of financial responsibility and requires that proof of compliance be reported to the Motor Vehicle Division (MVD) of the New Mexico Taxation and Revenue Department (the Department) and kept with the vehicle. *See* § 66-5-205(A)-(B); 66-5-205.1(A)-(B). An MVD database that law enforcement officers can access from their onboard computers reports a compliance status of "active" or "suspended" or "unknown," based on MVD record information on liability insurance for each individual registered motor vehicle.

{2} In this case, where the evidentiary record demonstrates that close to ninety percent of vehicles reflecting an "unknown" compliance status in MVD records are in fact uninsured in violation of the law, we hold that an officer who learns that the MVD records for a particular vehicle indicate an "unknown" compliance status has constitutionally reasonable suspicion to stop the vehicle and investigate further. We reverse the contrary opinion of the Court of Appeals.

I. BACKGROUND

A. The Mandatory Financial Responsibility Act

{3} Under the MFRA,

> No person shall drive an uninsured motor vehicle, or a motor vehicle for which evidence of financial responsibility as was affirmed to the department is not currently valid, upon the streets or highways of New Mexico unless the person is specifically exempted from the provisions of the [MFRA].

Section 66-5-205(B). Violation of the MFRA is a misdemeanor offense. Section 66-5-205(E).

{4} The Legislature instituted the MFRA out of an awareness "that motor vehicle accidents in New Mexico can result in catastrophic financial hardship" and with the purpose of ensuring that motor vehicle operators "have the ability to respond in damages to accidents" occurring on New Mexico roadways. Section 66-5-201.1. The MFRA further provides that the Department shall neither issue nor renew the registration for an uninsured vehicle and that it shall suspend an existing registration if evidence reflects that insurance has not been maintained. *See* § 66-5-206.

{5} In 2001, the New Mexico Legislature amended the MFRA to enhance identification of uninsured vehicles. *See* H.B.847, 45th Leg., Reg. Sess. (N.M. 2001); § 66-5-205.1(D), (F). Among the resulting statutory provisions, the Legislature directed the Department to promulgate rules requiring insurance carriers to submit monthly reports of terminated insurance policies for the Department to keep in its files on the corresponding vehicles. Section 66-5-205.1(D). In response, the Department began operating the insurance identification database at issue in this case.

B. Facts and Proceedings

{6} While on routine patrol in San Juan County, New Mexico State Police Officer James Rempe entered the license plate number of the vehicle Defendant Joann Yazzie was driving into his patrol car's mobile data terminal (MDT). The MDT remotely accesses records maintained by the MVD regarding the compliance status of vehicles registered in New Mexico. The query returned a result indicating that the compliance status of the vehicle was "unknown." Upon receiving the report of "unknown" compliance status, Officer Rempe activated his emergency lights and pulled over Defendant's vehicle to investigate further. The "unknown" query return was the only basis for the traffic stop. Based on further information the officer acquired as a result of the stop, Defendant was arrested and charged in magistrate court with driving while under the influence of alcohol and failure to maintain insurance.

{7} Defendant filed a motion to suppress all evidence obtained during the course of the stop, arguing that the officer lacked reasonable suspicion to initiate the stop and thereby violated her right to be secure against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. The magistrate court denied the motion, and Defendant conditionally pleaded guilty to a violation of NMSA 1978, Section 66-8-102 (2010) for driving while under the influence of intoxicating liquor or drugs, second offense, reserving the right to appeal the denial of the motion to suppress.

{8} On appeal to the district court, Defendant renewed her motion to suppress. At an initial motions hearing, the State offered a witness from the MVD to provide explanatory testimony about the meaning of an MVD designation of "unknown" compliance status and about "circumstances"

in which "insurance would be valid [or] not valid." The district court observed,

> I think the State's looking for this expert based on my previous decisions that insurance unknown just doesn't cut it to me. I think it needs to be more, and I think the State's following my previous directive that if they don't have more, I'm going to be suppressing these stops.

{9} Accordingly the State called Walter Martinez, Bureau Chief for the MVD Insurance Tracking and Compliance Program, to testify at the subsequent suppression hearings. Martinez testified that the database Officer Rempe accessed is maintained by a third-party vendor that receives information from insurance carriers and matches it with vehicle registration information provided by the MVD. The MVD receives nightly updates, which are in turn immediately sent to other agencies, including the Department of Public Safety.

{10} An officer requesting insurance information from the system pertaining to a particular vehicle receives one of three possible responses through the MDT: "active" or "suspended" or "unknown." When entry of vehicle information triggers an "unknown" compliance status, "it is highly likely" that there is no insurance. Martinez testified that the MVD tracking process reflects that this likelihood of no insurance is ninety percent or greater.

{11} Martinez testified that when the MVD learns a vehicle is uninsured, it notifies the owner and allows a total of ninety-five days for the owner to produce evidence of financial responsibility before suspending the registration of that vehicle. During this interim period following notice to the owner, the MVD classifies the compliance status of the vehicle as "unknown." Martinez further testified about an MVD report of statistics on uninsured-status vehicles, compiling data from the 118,477 vehicles categorized as "unknown" between October 5, 2011, and February 13, 2012. Of the total number of vehicles of "unknown" compliance status, only eleven percent actually turned out to have had the required insurance when classified as "unknown," ten percent had lapsed insurance coverage that was later reinstated. The registrations of the remaining eighty percent were ultimately suspended for failure to bring the vehicles into compliance with the law. Martinez testified that although the precise numbers fluctuate, the percentages in the four-month sample period were generally reflective of the population of vehicles the MVD monitors for any given period.

{12} The district court found that the investigatory stop was constitutionally valid and denied Defendant's motion to suppress, concluding that at the time Officer Rempe initiated the stop it was reasonable for him to suspect that Defendant was in violation of the MFRA, given the high likelihood that a vehicle with a reported "unknown" compliance status is uninsured.

{13} The Court of Appeals reversed, holding that an MDT report that Defendant's insurance status was "unknown" did not, without more support, provide reasonable suspicion to justify a traffic stop and that MVD statistics correlating "unknown" compliance status with being uninsured could not "serve as a proxy" for the officer's own personal knowledge at the time he conducted the stop, absent evidence he personally knew of the statistical correlation. *State v. Yazzie*, 2014-NMCA-108, ¶¶ 1, 10, 336 P.3d 984. The Court of Appeals accordingly reversed the district court's denial of Defendant's motion to suppress. *Id.* ¶¶ 15, 17.

{14} We granted the State's petition for writ of certiorari to consider whether a vehicle traffic stop based only on information from an MVD records inquiry reflecting an "unknown" compliance status for the particular vehicle is supported by reasonable suspicion.

II. STANDARD OF REVIEW

{15} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Ketelson*, 2011-NMSC-023, ¶ 9, 150 N.M. 137, 257 P.3d 957. First, we "look for substantial evidence to support the trial court's factual finding, with deference to the district court's review of the testimony and other evidence presented." *State v. Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435, 250 P.3d 861; *see also Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 24, 122 N.M. 173, 922 P.2d 555 ("'Substantial evidence' is evidence that a reasonable mind would regard as adequate to support a conclusion." (citation omitted)). "We then review the application of the law to those facts, making a de novo determination of the constitutional reasonableness of the search or seizure." *State v. Sewell*, 2009-NMSC-033, ¶ 12, 146 N.M. 428, 211 P.3d 885.

{16} In this case, the district court included findings of fact in its order denying Defendant's motion to suppress. The parties neither dispute the central facts of this case nor assert that the district court's findings were made in error. Accordingly, we accept the district court's factual findings and address whether Officer Rempe's actions were objectively reasonable and particularized as a matter of law. *See Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 13, 147 N.M. 157, 218 P.3d 75 ("When there are no challenges to the district court's factual findings, we accept those findings as conclusive.").

III. DISCUSSION

{17} "[T]he United States and the New Mexico Constitutions provide overlapping protections against unreasonable searches and seizures." *State v. Rowell*, 2008-NMSC-041, ¶ 12, 144 N.M. 371, 188 P.3d 95; *see* U.S. Const. amend. IV; N.M. Const. art. II, § 10. Under the interstitial approach adopted by this Court in *State v. Gomez*, we ask "first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined." 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. Accordingly, we first address whether Officer Rempe's traffic stop complied with requirements of the United States Constitution.

A. The Traffic Stop Was Supported by Reasonable Suspicion Under the Fourth Amendment to the United States Constitution

{18} The Fourth Amendment to the United States Constitution "prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). While a full custodial arrest must be based on probable cause to believe a crime has been committed, *see Terry*, 392 U.S. at 24-26, an investigatory stop is grounded on the lesser standard of reasonable suspicion, *Alabama v. White*, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.").

{19} The overarching inquiry for all intrusions on personal liberty under the Fourth Amendment is reasonableness under the particular circumstances, "which

involves two questions: whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *State v. Neal*, 2007-NMSC-043, ¶ 18, 142 N.M. 176, 164 P.3d 57 (internal quotation marks and citation omitted).

{20} A traffic stop is justified at its inception if it is supported by reasonable suspicion that a law has been violated. *See State v. Jason L.*, 2000-NMSC-018, ¶¶ 14, 20, 129 N.M. 119, 2 P.3d 856. An officer's reasonable suspicion must be "a particularized suspicion, based on all the circumstances[,] that a particular individual, the one detained, is breaking, or has broken, the law." *State v. Garcia*, 2009-NMSC-046, ¶ 43, 147 N.M. 134, 217 P.3d 1032 (alteration in original) (internal quotation marks and citation omitted). In determining whether an officer's suspicion was reasonable, we employ an objective assessment of the officer's actions. *See State v. Hubble*, 2009-NMSC-014, ¶ 8, 146 N.M. 70, 206 P.3d 579. "The purpose of requiring objectively reasonable suspicion based on the circumstances is to prevent and invalidate police conduct based on hunches, which are, by definition, subjective." *State v. Ochoa*, 2009-NMCA-002, ¶ 25, 146 N.M. 32, 206 P.3d 143 (internal quotation marks and citation omitted). Accordingly, "[t]he subjective belief of the officer does not in itself affect the validity of the stop." *Hubble*, 2009-NMSC-014, ¶ 8 (internal quotation marks and citation omitted).

1. The investigatory stop was objectively reasonable

{21} Defendant understandably does not argue that a stop based solely on an MVD database report of a "suspended" compliance status would have been invalid given the statutory requirement to maintain evidence of insurance or financial responsibility. *See State v. Candelaria*, 2011-NMCA-001, ¶¶ 1, 16, 149 N.M. 125, 245 P.3d 69 (holding that officers had reasonable suspicion to conduct a vehicle stop where official license and registration records reflected that the vehicle was registered to a driver with a revoked license). Conversely, a return of "active" without any other indicia of wrongdoing would necessarily fail to provide the individualized reasonable suspicion necessary to support a lawful stop. The critical inquiry before us rests on the response Officer Rempe received from the MVD database because an "unknown" compliance status is factually and legally less determinative than compliance statuses of "active" or "suspended."

{22} The law necessarily tolerates some risk of investigatory intrusion on a person's freedom of movement where ambiguous circumstances could reasonably be construed as involving either lawful or unlawful activity. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (relying on precedent and noting that even where "conduct justifying the stop was ambiguous and susceptible of an innocent explanation[,] . . . officers could detain the individuals to resolve the ambiguity"). "[R]easonable suspicion . . . need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277. Reasonableness of a particular seizure instead "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

{23} In *Prouse*, the United States Supreme Court employed this balancing test and held that discretionary license and registration spot checks of automobiles constituted an unreasonable search and seizure under the Fourth Amendment. *See* 440 U.S. at 663. The Court found that the marginal contribution to highway safety through such discretionary stops did not outweigh the intrusion on individuals' Fourth Amendment interests. *See id.* at 660. The Court's concern centered on the lack of "an appropriate factual basis for suspicion directed at a particular automobile" or the absence of "some other substantial and objective standard or rule" for discerning which vehicle to stop out of the general pool of vehicles on the roadways. *Id.* at 661. The case before us does not represent the "kind of standardless and unconstrained discretion" that concerned the United States Supreme Court in *Prouse*. *See id.*

{24} "Reasonable suspicion depends on the reliability and content of the information possessed by the officers." *State v. Robbs*, 2006-NMCA-061, ¶ 13, 139 N.M. 569, 136 P.3d 570. Information an officer accesses from a government database is objective in that it is not subject to the officer's bias, but it must also be reliable. *See United States v. Esquivel-Rios*, 725 F.3d 1231, 1236 (10th Cir. 2013). In the context of informants, for example, the United States Supreme Court has emphasized that when "a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion . . . ." *White*, 496 U.S. at 330.

{25} This is not a case where an officer made a stop solely on the basis that he had no information indicating whether Defendant was operating a vehicle in compliance with the law. Officer Rempe stopped the vehicle based on a report from the MVD records for the vehicle, which under New Mexico law must be maintained for every registered vehicle, that did not show compliance with the law and instead reflected an "unknown" compliance status for the vehicle.

{26} Other jurisdictions have addressed analogous traffic stops based on suspected noncompliance with financial responsibility laws where, unlike this case, the appellate record contained no evidence of the statistical significance of an "unknown" compliance status report. *See, e.g.*, *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1206, 1209 (10th Cir. 2007) (concluding that a database report of vehicle insurance status "not found" was sufficient to establish reasonable suspicion to initiate a traffic stop in the absence of a showing of unreliability of the database); *State v. Dixson*, 633 S.E.2d 636, 639 (Ga. Ct. App. 2006) (holding that a stop was not based on reasonable suspicion where there were "no facts in the record indicating that a return of 'unknown' ma[de] it any more likely that a vehicle [was] uninsured rather than fully insured"); *Gonzalez-Gilando v. State*, 306 S.W.3d 893, 897 (Tex. App. 2010) (declining to find reasonable suspicion without "evidence developing the source of the information comprising the database, explaining what was meant when insurance information was unavailable, explaining why such information would be unavailable, illustrating the accuracy of the database, establishing the timeliness of the information within the database, . . . and the like").

{27} Under the approach of any of those jurisdictions, reasonable suspicion supported the stop in this case. Not only did the defense present no evidence of unreliability of the MVD database, as in *Cortez-Galaviz*, but the State developed the evidence, which *Dixson* and *Gonzales-Galindo* called out as lacking, to demonstrate that reliance on the New Mexico MVD database report of an "unknown" compliance status provided a reasonable basis for suspecting that Defendant's vehicle was probably uninsured, as reflected in the findings of the district court.

{28} In the absence of any evidence in a particular case that the records cannot be reasonably relied on, we conclude that New Mexico's comprehensive statutory and regulatory scheme to maintain and

make available to law enforcement up-to-date records of financial responsibility compliance justifies an officer's investigatory stop on the basis of a determination that MVD records reflect an "unknown" compliance status. We therefore agree with the approach taken by the Tenth Circuit in *Cortez-Galaviz* and would not place the burden on the State to call witnesses in each case to establish the significance of the "unknown" compliance status. Like the court in *Cortez-Galaviz*, we leave the door open to proof in a future case that contemporaneous realities have materially changed the reasonableness of using the MVD report for a traffic stop. *See* 495 F.3d at 1211 (basing the holding on the record before the court "without expressing views on what [it] might conclude if and when presented with a different record").

{29} We also reject the Defendant's argument that each individual officer making an investigatory stop on the basis of an MVD report of "unknown" compliance status must establish individual knowledge of the probabilities that status might reflect. That requirement would result in a chaotic and uneven application of the law and would make the outcomes of factually identical traffic stops vary in accordance with what each particular officer may have learned or remembered about MVD internal practices.

{30} It was objectively reasonable for Officer Rempe to suspect Defendant was operating an uninsured vehicle in violation of the law when the database indicated the compliance status was unknown to the MVD. If Officer Rempe's suspicion was particularized, the stop for further investigation "to verify or quell that suspicion" was constitutionally justified. *Sewell*, 2009-NMSC-033, ¶ 13.

2. The officer's reasonable suspicion was particularized to Defendant

{31} Not only must an officer have an objective basis for suspecting that criminal activity is afoot, but the suspicion must also be particularized to the individual who is stopped. *United States v. Cortez*, 449 U.S. 411, 417 (1981). "If a police officer lacks individualized suspicion, the government's interest in crime prevention will not outweigh the intrusion into the individual's privacy and the detention violates the Fourth Amendment." *City of Roswell v. Hudson*, 2007-NMCA-034, ¶ 18, 141 N.M. 261, 154 P.3d 76 (internal quotation marks and citation omitted).

{32} Defendant argues that the statistical data Martinez provided to explain the MVD's designation of "unknown" compliance fails to support particularized suspicion that Defendant, out of the group of operators of the vehicles that have an "unknown" compliance status, was breaking the law. Relying on *State v. Jones*, 1992-NMCA-064, ¶ 14, 114 N.M. 147, 835 P.2d 863, Defendant contends that "[s]tatistical information regarding a group does not give reasonable suspicion to stop a specific member of that group." The Court of Appeals similarly admonished against relying on general statistical probabilities to objectively support particularized suspicion. *See Yazzie*, 2014-NMCA-108, ¶ 16.

{33} Reasonable suspicion engages probabilities. *See New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) ("[T]he requirement of reasonable suspicion is not a requirement of absolute certainty: sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." (internal quotation marks and citation omitted)). This does not endorse using general statistical probabilities or group characteristics to establish reasonable suspicion for a stop. New Mexico courts have consistently concluded that "[g]uilt by association and generalized suspicions are insufficient" to create reasonable suspicion for a search or seizure. *State v. Prince*, 2004-NMCA-127, ¶ 17, 136 N.M. 521, 101 P.3d 332; *see also State v. Gage R.*, 2010-NMCA-104, ¶ 19, 149 N.M. 14, 243 P.3d 453 (recognizing that "the Fourth Amendment demands more than a generalized probability" and concluding that "the search of a group of students gathering at the 'smoker's corner,' without reason to suspect that any particular student is in possession of contraband, is not constitutionally sound").

{34} For example, in *Jones* the Court of Appeals held that mere association with a known gang member and presence in an area known for gang activity, without more, was insufficient to support reasonable suspicion that the particular defendant was engaged in criminal conduct. *See* 1992-NMCA-064, ¶ 15. In *Jones*, officers stopped and searched the defendant because he was dressed in gang attire and walking on a street in an area of known gang activity with an avowed gang member. *Id.* ¶¶ 3-4. The Court of Appeals concluded that "the officers' initial stop of defendant was illegal," reasoning that the officers "had only generalized suspicions that a gang member, not specifically defendant, had committed a litany of crimes . . . [, but] they had nothing connecting this individual defendant to a particular crime or crimes, except the likelihood that he was a gang member." *Id.* ¶¶ 14-15.

{35} The record before us does not represent the "sweeping and indiscriminate" law enforcement actions that concerned the Court of Appeals in those cases. *See Gage R.*, 2010-NMCA-104, ¶ 19. Here, Officer Rempe had individualized, particularized suspicion that Defendant did not have insurance on her specific vehicle based on the MVD file report of an "unknown" compliance status for that vehicle. Officer Rempe entered the license plate number of the car Defendant was driving into his MDT, which was linked to the MVD database. The MVD database associated the specific license plate number entered with information on the vehicle registered under that plate number. This information included whether the vehicle was properly insured in compliance with the law. Upon receiving information that the compliance status of the particular vehicle was unknown to the MVD, it was reasonable for Officer Rempe to suspect that, unlike other cars on the roadway, Defendant did not have the requisite proof of financial responsibility for the vehicle she was driving.

{36} Under the circumstances presented here, Officer Rempe was justified in his objective and particularized belief that the MVD database maintained for the purpose of ensuring compliance with the MFRA contained no information reflecting that the vehicle Defendant was driving was insured. Officer Rempe then had reason "to pluck this needle from the haystack of cars on the road for investigation of a possible insurance violation." *Cortez-Galaviz*, 495 F.3d at 1206. Accordingly, Officer Rempe's investigatory stop complied with the requirements of the Fourth Amendment to the United States Constitution.

B. The Traffic Stop Was Supported by Reasonable Suspicion Under Article II, Section 10 of the New Mexico Constitution

{37} Having determined that the district court did not err in denying the suppression motion under Fourth Amendment standards, we now address Defendant's rights under the New Mexico Constitution. The State contends that Defendant failed to preserve her state constitutional claim. We need not address that matter because we conclude that the result under the New Mexico Constitution is the same as under the United States Constitution.

{38} The controlling provision here is Article II, Section 10, which provides,

"The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." Although we have interpreted Article II, Section 10 to provide broader protections against unreasonable search and seizure than the Fourth Amendment in some contexts, *see Leyva*, 2011-NMSC-009, ¶ 3, we have never interpreted the New Mexico Constitution to require more than a reasonable suspicion that the law is being or has been broken to conduct a temporary, investigatory traffic stop, *see, e.g.*, *Garcia*, 2009-NMSC-046, ¶ 43 ("Investigatory detention is permissible when there is a reasonable and articulable suspicion that the law is being or has been broken." (internal quotation marks and citation omitted)). We have defined and applied the reasonable suspicion standard in the same way when conducting both Fourth Amendment and Article II, Section 10 analyses. *See, e.g.*, *Garcia*, 2009-NMSC-046, ¶ 43 (defining reasonable suspicion in a state constitutional analysis as a "particularized suspicion, based on all the circumstances[,] that a particular individual, the one detained, is breaking, or has broken the law" (alteration in original) (quoting *Jason L.*, 2000-NMSC-018, ¶¶ 19-20 (analyzing reasonable suspicion under the Fourth Amendment))).

{39} Accordingly, we apply the same reasonable suspicion analysis to the investigatory stop here under Article II, Section 10 as we did under the Fourth Amendment, and we hold that under the circumstances the traffic stop did not violate the New Mexico Constitution.

IV. CONCLUSION

{40} Because the MVD status report of an "unknown" compliance with statutory requirements for motor vehicle liability insurance provided reasonable suspicion that the particular vehicle Defendant was driving was uninsured in violation of the law, the investigatory stop was justified under both the United States and New Mexico Constitutions. We reverse the contrary opinion of the Court of Appeals and affirm the district court order denying Defendant's motion to suppress.

{41} IT IS SO ORDERED.

CHARLES W. DANIELS, Chief Justice

WE CONCUR:
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
BARBARA J. VIGIL, Justice
JUDITH K. NAKAMURA, Justice

A Message to New Mexico Attorneys *from Don Letherer*

I have retired from Letherer Insurance Consultants, (LIC) and my son, Brian Letherer, President of LIC, has assumed responsibilities for LIC's Lawyers Professionals Liability insurance program representing some 24 insurance companies. LIC and predecessors have served New Mexico attorneys since 1980. Brian now has four years of experience and has become very knowledgeable in the field of lawyers malpractice insurance. Brian can help solve the insurance problems attorneys encounter in an ever-changing legal environment.

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