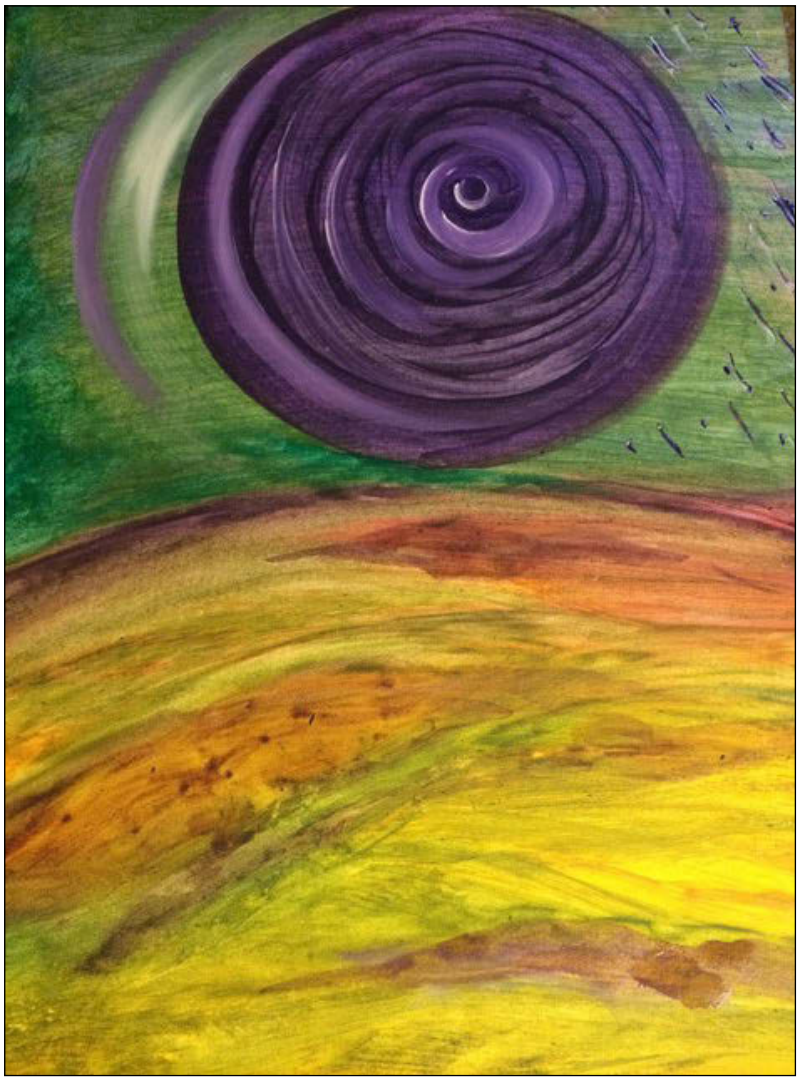
BAR BULLETIN

Official Publication of the State Bar of New Mexico

August 30, 2017 • Volume 56, No. 35



Peace in the Desert, by Barbara L. Chapman (see page 3) www.chapman-art.com

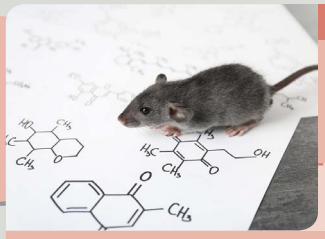
Inside This Issue

CLE Planner

Head back to school

with the Center for Legal Education!

Aug. 31



Featured CLE

The Law and Bioethics of Using Animals in Research

6.2 G

Thursday, Aug. 31, 2017 • 9 a.m.–4:30 p.m.
State Bar Center, Albuquerque

$99 Non-member not seeking CLE credit
$249 Co-sponsoring section members, government and legal services attorneys, and Paralegal Division members
$279 Standard and Webcast Fee
A $20 late fee will be assessed for walk-in registrations (applies to live attendance only). Registration and payment must be received in advance to avoid the fee.

Co-sponsor: Animal Law Section

This CLE will address the complex and often controversial regulatory framework that governs the use of animals in biomedical research and toxicity testing. The class will also explore the bioethics of using animals in research as well as reviewing litigation and policy developments in this quickly evolving field.

Earn CLE credits from your desk!

New CLE viewing format: Webinars from the Center for Legal Education
Webinars are available online only via your computer, laptop, iPad or mobile device with internet capabilities.
Webinars are considered live programs and attendees will receive live CLE credits after attending.

Joining the Webinar: Registration closes the morning of the program; registration and payment must be received prior to 10 a.m. MST. Pre-registrants will receive their access link by email one day in advance.

Sept. 13

What Notorious Characters Teach About Confidentiality

1.0 EP
WEBINAR

Wednesday, Sept. 13 • Noon – 1 p.m.
Online only course

$65 Registration Fee

Learn how the confidentiality rules work by looking at them from a different perspective. See how serial killers help illustrate the inner workings of the rules and also how Wall Street actually helped shape the rules about confidentiality and privilege. Join the "CLE Performer," Stuart Teicher, Esq., as he explains how a bunch of notorious characters actually contributed to the creation of our current rule on confidentiality.

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

State Bar of New Mexico
Center for Legal Education

STATE BAR of NEW MEXICO

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The *Bar Bulletin* (ISSN 1062-6611) is published weekly by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

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address@nmbar.org • www.nmbar.org

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8
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12
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12
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12
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14
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14
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14
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6
Divorce Options Workshop
6–8 p.m., State Bar Center, Albuquerque, 505-797-6003

8
Civil Legal Clinic
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

20
Common Legal Issues for Senior Citizens Workshop
10–11:15 a.m., Bonine Dallas Senior Center, Farmington, 1-800-876-6657

20
Family Law Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

27
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

October

4
Civil Legal Clinic
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

About Cover Image and Artist: The inspiration for Chapman's work is derived from the movement initiated by life's changes and challenges. The use of acrylic paint, chalk and oil pastels allow for the flow of spirit to emerge and unfold. Volunteering with homeless youth reinforces her drive to express the beauty, grace and courage that can be found in each day.

Notices

Court News

New Mexico Supreme Court Compilation Commission

Coming Soon—*Criminal and Traffic Law Manual*

The New Mexico Compilation Commission announces the official *2017 New Mexico Criminal and Traffic Law Manual®*. Exclusive to this official version are the section numbers of new or amended statutes extracted from the official New Mexico Statutes Annotated 1978®, a Table of Sections affected by 2017 legislation, and a Chapter 30, NMSA 1978 Table of Chargeable Criminal Offenses. Pertinent official NMRA excerpts from the Rules of Criminal Procedure, Evidence, and court-approved forms are included. Order yours at 505-827-4821 or 866-240-6550. Private practitioners, $31; Government, $29.

New Mexico Court of Appeals

Applicants for Judicial Vacancy

Six applications were received in the Judicial Selection Office as of 5 p.m., Aug. 16, for the Judicial Vacancy in the New Mexico Court of Appeals due to the retirement of James J. Wechsler effective July 31. The New Mexico Court of Appeals Judicial District Judicial Nominating Commission met on Aug. 25, at the Supreme Court Building in Santa Fe to evaluate the applicants. The Commission meeting was open to the public. The names of the applicants in alphabetical order are: **Jennifer Attrep**, **Daniel Jose Gallegos Jr.**, **Lauren Keefe**, **Emil J. Kiehne**, **Kerry Kiernan** and **Edward W. Shepherd**.

First Judicial District Court

Notice of Division II Pro Tem Assignment

The First Judicial District, Division II announces that Sarah M. Singleton has been appointed by the Chief Justice as judge pro tem for cases assigned to Division II. The assignment will last from Judge Singleton's retirement until a new judge takes office or Nov. 29, 2017, whichever comes first. During this time, Judge Singleton will continue to review proposed orders and motions that are submitted and will generally preside over Division II. Continue to send motion packages, proposed orders and correspondence concerning Division II cases to sfeddiv2proposedtxt@nmcourts.gov. The Division II telephone number will remain 505-455-8160.

Professionalism Tip

With respect to the courts and other tribunals:

I will be respectful toward and candid with the court.

Second Judicial District Court

Exhibit Destruction Notice

Pursuant to 1.21.2.617 Functional Records Retention and Disposition Schedules-Exhibits), the Second Judicial District Court will destroy Domestic (DM/DV) exhibits filed with the Court for cases for the years of 1993 to the end of 2012, 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 Sept. 29. Parties with cases with exhibits should verify exhibit information with the Special Services Division, at 505-841-6717 from 10 a.m.-2 p.m., Monday through 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.

Seventh Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court retention and disposition schedule, 1.21.2.617, the Seventh Judicial District Court, Catron County, Socorro County, Sierra County, and Torrance County will destroy exhibits filed with the Court; all unmarked exhibits, oversized poster boards/maps, diagrams and miscellaneous items; the Domestic (DM/DV) cases for the years of 1987 to the end of 2015; the Civil (CV/PB) cases for the years of 1997 to the end of 2015; the Sequestered exhibits (SQ/PQ/JQ/SI/SA) cases for the years of 1992 to the end of 2015; including but not limited to cases which have been consolidated. Counsel for parties are advised that exhibits may be retrieved through Setp. 22. For more information or to claim exhibits, contact Jason Jones, court executive officer, at 575-835-0050. 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.

U.S. District Court, District of New Mexico

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of part-time U.S. Magistrate Judge B. Paul Briones is due to expire on March 20, 2018. 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 four-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 Sept. 5.

State Bar News

Attorney Support Groups

- Sept. 11, 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#.
- Sept. 18, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the third Monday of the month.)
- Oct. 2, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month. Group will not meet in September due to the Labor Day holiday.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert, 505-242-6845.

Business Law Section

2017 Business Lawyer of the Year

The Business Law Section has opened nominations for its annual Business Lawyer of the Year Award, to be presented on Nov. 15 after the Section's Business Law Institute CLE. Nominees should demonstrate professionalism and integrity, superior legal service, exemplary service to the Section or to business law in general, and service to the public. Self-nominations are welcome. A complete description of the award and selection criteria are available at www.nmbar.org/BusinessLaw. The deadline for nominations is Oct. 2. Send nominations to Breanna Henley at bhenley@nmbar.org. Recent recipients include David Buchholz, Leonard Sanchez, John Salazar, Dylan O'Reilly and Susan McCormack.

Entrepreneurs in Community Lawyering

Fall Incubator Boot Camp Open to Solo Practitioners

The Entrepreneurs in Community Lawyering program, the State Bar's new legal incubator program, will host its third Boot Camp Oct. 17-20 at the State Bar Center. The Boot Camp is a condensed and intense introduction to the basics of setting up and managing a solo law practice. It also offers a learning opportunity for new lawyers not in ECL, who are starting or considering starting a solo practice. The Boot Camp covers a wide range of business topics and practice management issues. The State Bar invites up to 10 members to join ECL's participating attorneys for the October 2017 Boot Camp, on a first-come, first-served basis. CLE credit is not offered but materials will be provided to each participant. View the curriculum at www.nmbar.org/ECL. For more information or to enroll contact Stormy Ralstin at 505-797-6053 or Ruth Pregenzer at 505-797-6077.

Paralegal Division

Half-Day Mixed Bag CLE—Open to Paralegals and Attorneys

The Paralegal Division presents a "Half-Day Mixed Bag" CLE program (3.0 G), from 9 a.m.–noon, Sept. 23, at the State Bar Center. The CLE is open to paralegals and attorneys. The cost is $35 for Paralegal Division members, $50 for non-member paralegals and $55 for attorneys. Topics include Pre-Adjudication Animal Welfare (P.A.W.) Court, third party sexual harassment and the attorney/paralegal relationship. Contact Christina Babcock at cbabcock1@cnm.edu.

RFP for Audit and Tax Services

Deadline: Sept. 1

The State Bar of New Mexico and New Mexico State Bar Foundation are seeking proposals from qualified CPA firms to provide financial statement audit and tax preparation services for the two organizations. The term sought is an annual engagement starting with the fiscal year ended Dec. 31, 2017, with up to five annual renewal options (FY 2018—2022). The complete request for proposal can be found on the State Bar's website at www.nmbar.org by selecting the "Financial Information" option from the "About Us" menu. The deadline for submission of proposals is 4 p.m. MDST, Friday, Sept. 1, 2017.

Solo and Small Firm Section

Fall Speaker Series Line-up

The Solo and Small Firm Section will again sponsor monthly luncheon presentations on unique law-related subjects and this fall's schedule opens with Joel Jacobsen, Journal Business Outlook columnist and retired assistant attorney general, will present on current legal-business topics in New Mexico and (inter)nationally on Sept. 12. Following Jacobsen's presentation, Mark Rudd, former UNM associate professor and social activist, will speak about political movements over the last fifty years and the effects (if any) on American and international law on Oct. 17. On Nov. 21, the newly appointed U.S. Attorney will identify special issues that he or she will emphasize his or her tenure. And on Jan. 16, Nancy Hollander, internationally-respected defense attorney, will address constitutional developments in criminal law under the last four presidents, including Guantanamo and terrorism issues. 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

Veterans Legal Clinic Seeks Volunteers

The Veterans Legal Clinic seeks volunteer attorneys to provide brief legal advice (15-20 minutes) to Veterans in the areas of family law, consumer rights, bankruptcy, landlord/tenant, and employment during its first legal clinic of 2017 on Jan. 10 from 8:30-11 a.m. The only remaining clinic date 2017 is Sept. 12 from 8:30-11 a.m. For more information or to volunteer contact Keith Mier at KCM@sutinfirm.com.

UNM

Law Library Hours

Through Dec. 16

Building & Circulation	
Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.
Reference	
Monday–Friday	9 a.m.–6 p.m.
Holiday Closures	
Sept. 4 (Labor Day)	
Nov. 24–25 (Thanksgiving)	

Other Bars

Albuquerque Bar Association

September Luncheon and CLE

The Albuquerque Bar Association will host its monthly luncheon and CLE on Sept. 12 at the Hyatt Regency Albuquerque, 330 Tijeras Ave. NW, 87102. Richard Painter, of University of Minnesota Law School and vice-chairman of Citizens for Responsibility and Ethics will deliver the keynote address sponsored by the Thornburg Foundation. The luncheon will be noon–1 p.m. (arrive at 11:30 a.m. for networking). Afterwards, there will be a CLE program Marcos Gonzalez "Helping Lawyers Do What They Do Best" (1.0 EP) from 1:15–3:15 p.m.

Albuquerque Lawyers' Club

New Luncheon Speaker Season Kicks off with Judge Nan Nash

The Albuquerque Lawyers' Club, the oldest lawyers group in Albuquerque, an-

nounces the beginning of its 2017-2018 season. The Club meets for nine lunch sessions, which feature compelling speakers addressing issues important to the law, New Mexico culture and issues of the day. Past speakers have included Sam Donaldson, Mayor Richard Berry, best-selling author Lee Maynard, and Captain David Iglesias. Membership dues for the year are $250 and include all nine lunches. The lunch meetings are held at Seasons Restaurant on the first Wednesday of each month, at noon, September through May. Non-members are also welcome to our lunches. The cost for each lunch for non-members is $30 in advance or $35 on the day of. The first meeting will be held on Sept. 6 and will feature Judge Nan Nash, chief judge of the Second Judicial District Court. Judge Nash will discuss the court's recent role in advancing justice through system reform and reflect on this role when its efforts may run counter to the public's perception of justice. Judge Nash will be introduced by Chief Judge Linda Vanzi of the New Mexico Court of Appeals. For more information, contact Yasmin Dennig at ydennig@Sandia.gov.

New Mexico Defense Lawyers Association

2017 Award Winners

The New Mexico Defense Lawyers Association is pleased to announce that W. Mark Mowery has been selected as the 2017 Outstanding Civil Defense Lawyer of the Year and Justin D. Goodman as the 2017 Young Lawyer of the Year. The awards will be presented at the NMDLA Annual Meeting Awards Luncheon on Sept. 29 at the Hotel Chaco, Albuquerque. For reservation information, see www.nmdla.org or call 505-797-6021.

Oliver Seth American Inn of Court

2017 Meeting Season

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

Other News

New Mexico Workers' Compensation Administration

New Judge Reassignment

Effective Aug. 28, all pending and administratively closed cases before the New Mexico Workers' Compensation Administration previously assigned to Judge David Skinner will be reassigned to newly appointed Judge Tony Couture. Parties who have not yet exercised their right to challenge or excuse will have 10 days from Aug. 28 to challenge or excuse Judge Couture pursuant to N.M.A.C. Rule 11.4.4.13. Questions about case assignments should be directed to WCA Clerk of the Court Heather Jordan at 505-841-6028.

Legal Education

August

31 **The Law and Bioethics of Using Animals in Research**
6.2 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

September

8 **Practical Succession Planning for Lawyers**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Fit to Practice: Substance Abuse Prevention, Overcoming Depression and Physical Fitness for Ethical Well-Being**
1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **2016 Mock Meeting of the Ethics Advisory Committee**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Add a Little Fiction to Your Legal Writing (2016)**
2.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

8 **Techniques to Avoid and Resolve Deadlocks in Closely Held Companies**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Ethical Implications of Section 327 of the Bankruptcy Code**
1.0 EP
Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

13 **What Notorious Characters Teach About Confidentiality**
1.0 EP
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

14 **Complying with the Disciplinary Board Rule 17-204**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **Best and Worst Practices Including Ethical Dilemmas in Mediation (2016)**
3.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

14 **The Ethics of Representing Two Parties in a Transaction**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **28th Annual Appellate Practice Institute**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

18 **New Mexico Conference on the Link Between Animal Abuse and Human Violence**
11.7 G
Live Seminar, Albuquerque
Positive Links
www.thelinknm.com

18 **Ethical Considerations in Foreclosures**
1.0 EP
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

19 **How to Make Your Client's Estate Plan Survive Bankruptcy**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

20 **Concealed Weapons and Self-Defense**
1.0 G
Live Seminar, Albuquerque
Davis Miles McGuire Gardner
www.davismiles.com

21 **Controversial Issues Facing the Legal Profession (2016)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

September

21 **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

21 **Guardianship in New Mexico/The Kinship Guardianship Act (2016)**
5.5 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Structured Settlements in Claims Negotiations**
1.0 G
Live Seminar, Albuquerque
National Structured Settlements Trade Association
202-289-4004

22 **2017 Tax Sympmosium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

23 **How Jurors View Mistakes and Conflicts**
1.5 EP
Live Seminar, Santa Fe
Attorneys Liability Assurance Society
www.alas.com

23 **Half-Day Mixed Bag CLE**
3.0 G
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State Bar of New Mexico Paralegal Division
505-203-9057

28 **32nd Annual Bankruptcy Year in Review (2017)**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Transgender Law and Advocacy (2016)**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

28 **Ethics for Government Attorneys**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **PLSI 50th Anniversary CLE: Evolution of Indian Laws and Indian Lawyers**
4.5 G, 2.0 EP
Live Seminar, Isleta
American Indian Law Center
www.ailc-inc.org

29 **Professional Liability Insurance: What You Need to Know (2015)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Deposition Practice in Federal Cases (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Ethically Managing Your Law Practice (2016 Ethicspalooza)**
1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

October

2 **Uncovering and Navigating Blind Spots Before They Become Land Mines**
2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Bankruptcy Law: The New Chapter 13 Plan**
3.1 G
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Lawyers' Duties of Fairness and Honesty (Fair or Foul 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **2016 Administrative Law Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

4 **Deposition Practice in Federal Practice (2016)**
2.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

5 **2017 Health Law Symposium**
6.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **2017 Employment and Labor Law Insititute**
5.0 G, 1.0 EP
Live Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

6 **Ethics, Disqualification and Sanctions in Litigation**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

9 **Basic Practical Regulatory Training for the Electric Industry**
27.0 G
Live Seminar, Albuquerque
Center for Public Utilities NMSU
business.nmsu.edu

Opinions

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

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

Effective August 18, 2017

PUBLISHED OPINIONS

A-1-CA-35219	J Molinar v. L Reetz	Reverse/Remand	08/17/2017

UNPUBLISHED OPINIONS

A-1-CA-35238	State v. R Helt	Affirm	08/17/2017
A-1-CA-35733	J De Grimaldi v. L Eaton	Affirm	08/17/2017
A-1-CA-35786	M Thorne v. NMIMT	Affirm	08/17/2017
A-1-CA-35973	P Tays v. S Tays	Dismiss	08/17/2017
A-1-CA-36083	Y Mattison v. J Mattison	Affirm/Reverse/Remand	08/17/2017
A-1-CA-36200	State v. L Realivasquez	Affirm	08/17/2017
A-1-CA-36207	State v. J Wood	Reverse	08/17/2017
A-1-CA-36217	State v. A Montoya	Affirm	08/17/2017
A-1-CA-36287	State v. F Marabal	Affirm	08/17/2017

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

Clerk's Certificate of Admission

On August 8, 2017:
Michael R. Bebeau
17001 Melba Lane
Lutz, FL 33549
813-601-8403
michaelbebeau@gmail.com

On August 8, 2017:
Yolanda U. Silverio
U.S. Bankruptcy Court,
Eastern District of California
501 I Street, Suite 3-200
Sacramento, CA 95814
916-930-4538
916-930-4555 (fax)
yolanda_vo@caed.uscourts.gov

Clerk's Certificate of Change to Inactive Status

Effective August 6, 2017:
Darcy S. Bushnell
2017 Alvarado Drive NE
Albuquerque, NM 87110
505-379-5335
bushnell@law.unm.edu

Effective August 1, 2017:
Jeffrey W. Loubet
The Loubet Law Firm, LLC
4900 Lang Avenue NE,
Suite 202
Albuquerque, NM 87109
505-856-3399

Effective July 31, 2017:
Hal Simmons
7200 Vista del Arroyo NE
Albuquerque, NM 87109
505-884-7489

Effective July 30, 2017:
Merry Peterson Stubblefield
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Clerk's Certificate of Correction

A clerk's certificate of admission dated July 27, 2017, contained a typographical error in the e-mail address for **Brent L. Moss**. The correct e-mail address is as follows:
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Clerk's Certificate of Indefinite Suspension from Membership in the State Bar of New Mexico

Effective **August 2, 2017**, the following attorney is **INDEFINITELY SUSPENDED** from the State Bar of New Mexico for a period of not less than eighteen (18) months pursuant to Rule 17-206(A)(3) NMRA:
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Dated Aug. 8, 2017

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Dated Aug. 22, 2017

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective August 23, 2017

Pending Proposed Rule Changes Open for Comment:

There are no proposed rule changes currently open for comment.

Recently Approved Rule Changes Since Release of 2017 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-079	Public inspection and sealing of court records	03/31/2017
1-131	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
Rules of Civil Procedure for the Magistrate Courts		
2-112	Public inspection and sealing of court records	03/31/2017
Rules of Civil Procedure for the Metropolitan Courts		
3-112	Public inspection and sealing of court records	03/31/2017
Civil Forms		
4-940	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017
4-941	Petition to restore right to possess or receive a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the District Courts		
5-106	Peremptory challenge to a district judge; recusal; procedure for exercising	07/01/2017
5-123	Public inspection and sealing of court records	03/31/2017
5-204	Amendment or dismissal of complaint, information andindictment	07/01/2017
5-401	Pretrial release	07/01/2017
5-401.1	Property bond; unpaid surety	07/01/2017
5-401.2	Surety bonds; justification of compensated sureties	07/01/2017
5-402	Release; during trial, pending sentence, motion for new trial and appeal	07/01/2017
5-403	Revocation or modification of release orders	07/01/2017
5-405	Appeal from orders regarding release or detention	07/01/2017
5-406	Bonds; exoneration; forfeiture	07/01/2017
5-408	Pretrial release by designee	07/01/2017
5-409	Pretrial detention	07/01/2017
5-615	Notice of federal restriction on right to receive or possess a firearm or ammunition	03/31/2017
Rules of Criminal Procedure for the Magistrate Courts		
6-114	Public inspection and sealing of court records	03/31/2017
6-207	Bench warrants	04/17/2017
6.207.1	Payment of fines, fees, and costs	04/17/2017
6-401	Pretrial release	07/01/2017
6-401.1	Property bond; unpaid surety	07/01/2017
6-401.2	Surety bonds; justification of compensated sureties	07/01/2017
6-403	Revocation or modification of release orders	07/01/2017
6-406	Bonds; exoneration; forfeiture	07/01/2017
6-408	Pretrial release by designee	07/01/2017
6-409	Pretrial detention	07/01/2017
6-506	Time of commencement of trial	07/01/2017
6-703	Appeal	07/01/2017
Rules of Criminal Procedure for the Metropolitan Courts		
7-113	Public inspection and sealing of court records	03/31/2017
7-207	Bench warrants	04/17/2017
7-207.1	Payment of fines, fees, and costs	04/17/2017
7-401	Pretrial release	07/01/2017
7-401.1	Property bond; unpaid surety	07/01/2017
7-401.2	Surety bonds; justification of compensated sureties	07/01/2017
7-403	Revocation or modification of release orders	07/01/2017
7-406	Bonds; exoneration; forfeiture	07/01/2017
7-408	Pretrial release by designee	07/01/2017
7-409	Pretrial detention	07/01/2017
7-506	Time of commencement of trial	07/01/2017
7-703	Appeal	07/01/2017

Rules of Procedure for the Municipal Courts

8-112	Public inspection and sealing of court records	03/31/2017
8-206	Bench warrants	04/17/2017
8-206.1	Payment of fines, fees, and costs	04/17/2017
8-401	Pretrial release	07/01/2017
8-401.1	Property bond; unpaid surety	07/01/2017
8-401.2	Surety bonds; justification of compensated sureties	07/01/2017
8-403	Revocation or modification of release orders	07/01/2017
8-406	Bonds; exoneration; forfeiture	07/01/2017
8-408	Pretrial release by designee	07/01/2017
8-506	Time of commencement of trial	07/01/2017
8-703	Appeal	07/01/2017

Criminal Forms

9-301A	Pretrial release financial affidavit	07/01/2017
9-302	Order for release on recognizance by designee	07/01/2017
9-303	Order setting conditions of release	07/01/2017
9-303A	Withdrawn	07/01/2017
9-307	Notice of forfeiture and hearing	07/01/2017
9-308	Order setting aside bond forfeiture	07/01/2017
9-309	Judgment of default on bond	07/01/2017
9-310	Withdrawn	07/01/2017
9-515	Notice of federal restriction on right to possess or receive a firearm or ammunition	03/31/2017

Children's Court Rules and Forms

10-166	Public inspection and sealing of court records	03/31/2017

Rules of Appellate Procedure

12-204	Expedited appeals from orders regarding release or detention entered prior to a judgment of conviction	07/01/2017
12-205	Release pending appeal in criminal matters	07/01/2017
12-307.2	Electronic service and filing of papers	07/01/2017*
12-307.2	Electronic service and filing of papers	08/21/2017*
12-314	Public inspection and sealing of court records	03/31/2017

*The rule adopted effective July 1, 2017, implemented mandatory electronic filing for cases in the Supreme Court. The rule adopted effective August 21,2017, implements mandatory electronic filing in the Court of Appeals.

Rules Governing Admission to the Bar

15-104	Application	08/04/2017
15-105	Application fees	08/04/2017
15-301.1	Public employee limited license	08/01/2017
15-301.2	Legal services provider limited law license	08/01/2017

Rules of Professional Conduct

16-102	Scope of representation and allocation of authority between client and lawyer	08/01/2017

Disciplinary Rules

17-202	Registration of attorneys	07/01/2017
17-301	Applicability of rules; application of Rules of Civil Procedure and Rules of Appellate Procedure; service.	07/01/2017

Rules Governing Review of Judicial Standards Commission Proceedings

27-104	Filing and service	07/01/2017

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: 2017-NMSC-022

No. S-1-SC-34252 (filed June 19, 2017)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JUAN RIVAS,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
MARK SANCHEZ, District Judge

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Albuquerque, New Mexico
for Appellee

Opinion

Petra Jimenez Maes, Justice

{1} In this case we examine the circumstances under which detectives may question a juvenile defendant in the absence of and without notification of a court-appointed attorney or court-appointed guardian ad litem. Juan Rivas's (Defendant) convictions arose from his killing of eighty-three-year-old Clara Alvarez as she slept in her bed on July 29, 2011. Defendant was fifteen years old at the time. The State filed a petition alleging several delinquent acts under the New Mexico Children's Code (Children's Code) and added an allegation that Defendant was a serious youthful offender under the Children's Code, given his charge of first-degree murder. Evidence presented at trial included two statements Defendant had made to detectives. Defendant made the first statement prior to the filing of the petition, and the second after the filing and after a detention hearing was held and guardian and counsel were appointed. Based on the evidence presented, a jury convicted Defendant of first-degree murder, aggravated burglary, tampering with evidence, and unlawful taking of a motor vehicle. Defendant was then sentenced to life imprisonment. Defendant appeals directly to this Court, as mandated by the New Mexico Constitution and our Rules of Appellate Procedure. *See* N.M. Const. art. VI, § 2; Rule 12-102(A)(1) NMRA. We affirm Defendant's convictions and sentence.

I. FACTS AND PROCEDURAL HISTORY

{2} In the early morning hours of July 29, 2011, Defendant, fifteen years old at the time, snuck into Clara Alvarez's backyard along with his thirteen-year-old friend E.S. Alvarez was eighty-three years old and lived alone. Defendant and E.S. remained in Alvarez's backyard for about an hour. As they remained, Defendant searched for an entry point into the house, fashioned a weapon out of a stick, and dispatched E.S. to his grandmother's house to get scissors. E.S. left for his grandmother's house but did not return to Alvarez's house that day.

{3} Defendant eventually broke into the house alone. He walked through the house, entered Alvarez's bedroom, and stabbed her multiple times with his stick and a knife from her kitchen as she slept in her bed. After determining Alvarez was dead, he drove away from the house in her car. Defendant returned to the house multiple times over the next two days, enlisting his younger brother, B.R., and other friends to assist with disposal of Alvarez's body.

{4} Just after midnight on August 1, responding to a welfare check request, police officers entered Alvarez's home and found her body in the bedroom, wrapped in a mattress pad and telephone cord. The officers secured the house and called for investigation by a detective unit. Investigators later recovered a left palm print on Alvarez's washing machine, which returned a match for Defendant's print.

{5} Later that day, Sergeant Shane Blevins drove to Defendant's house, hoping to question him. As Blevins drove in the vicinity of the house, he passed a woman and a young man on foot. When he arrived at the house, he observed a vehicle matching the description of the vehicle taken from Alvarez's house. Blevins then returned to the people he had passed on the street, identified himself as a police officer, and asked the young man his name. The young man replied by giving the name B.R. and explained the woman with him was his mother. Blevins told them he was looking for Juan Rivas. On further questioning, Mrs. Rivas and the young man agreed to accompany Blevins in his police cruiser to the police station to answer additional questions. With the two in tow, Blevins drove back to Defendant's house briefly to drop off the Rivases' dog, and they arrived just as two other individuals were arriving. The two individuals identified themselves as Juan Rivas Sr. (Mr. Rivas) and B.R. Based on those revelations, Blevins soon learned the young man who had previously identified himself as B.R. was actually Juan Rivas Jr.—Defendant in this case. Officers then drove Defendant and his parents to the station for questioning.

{6} Defendant arrived at the station at around 9:30 p.m. that evening, and officers placed him in an interview room.[1] Detective Nathan Eubank entered the room and introduced himself, and Defendant did the same. Eubank asked Defendant for his date of birth; Defendant responded by asking, "Why?" Eubank explained he was investigating a murder and needed to establish some preliminary information before they could talk about it. "All right," Defendant replied.

1 [1]The interview was recorded and introduced at trial as State's Exhibit 235.

{7} Eubank then explained he would read Defendant certain rights he was granted as a juvenile, and Defendant asked, "Why a juvenile, though?" Eubank explained the State was "very particular" about Defendant's rights because he was a juvenile, under eighteen years of age. Defendant acknowledged the explanation, and Eubank added that Defendant should say something if he failed to understand any of the rights read. Defendant replied, "Yes, sir." Eubank reiterated that he was investigating a murder and then read Defendant an explanation of various rights, verbatim, from a New Mexico juvenile advice of rights form.

{8} Once finished, Eubank asked if Defendant had understood it all, and Defendant hesitated, wondering about "the last one." Eubank explained again that Defendant had the right to have an attorney present as Eubank asked questions, that Defendant was not required to speak with Eubank at all, and that if he did speak, he had the right to stop speaking at any time. On hearing that, Defendant asked, "Oh, so I just stop talking to you?" Eubank replied, "Yeah, you just say, 'I don't want to talk anymore.' " Defendant suggested he understood, responding, "All right, then, man." Eubank asked Defendant to print and sign his name on the advice of rights form, which would signify "that he understood all of that," and Defendant did so.

{9} Eubank then showed Defendant text at the bottom of the advice of rights form, asked him to read it, and asked him to indicate by marking where specified whether he was willing to speak with Eubank. Defendant read the text aloud, which inquires of individuals being questioned: "[a]fter being advised of your rights and with those rights in mind, do you wish to voluntarily give up those rights and talk to me now?" Defendant responded affirmatively and indicated his affirmation by marking "yes" as specified on the form. After Defendant had signed and marked the form, Eubank noted that with the legal "mumbo jumbo" out of the way, they could discuss the matters Eubank was investigating.

{10} Defendant explained he had chosen Alvarez's house to burglarize because he "liked her car." He had "just got angry" that night, he noted, and it had gotten out of hand. He and E.S. had been together in Alvarez's backyard, but eventually he had "socked out" E.S., causing him to leave. Defendant had ripped open a window screen to gain entry to the house, he explained, and he had then walked from the laundry room to Alvarez's bedroom. He had, he noted, taken a "stick" from Alvarez's backyard into the bedroom. Eubank asked if Alvarez had looked at Defendant at that point; Defendant responded that she "didn't have a chance" and that he "was just laughing" as he stabbed her repeatedly with the stick. Defendant acknowledged he had taken a knife from Alvarez's kitchen and had stabbed her with that as well. He left the stick, he noted, in Alvarez's bedroom. He maintained throughout the interview that he had acted alone in breaking into Alvarez's house and killing her.

{11} Eubank then asked where Defendant had stabbed Alvarez. "I don't know," Defendant responded, "I was just going at her"; he added he could feel "happy" only after he "got out" all of his anger. That accomplished, he noted, he had taken rosaries, jewelry, and money from Alvarez's house. He then burned his clothes, washed and disposed of his shoes, and told his mother the police would find him. As Defendant described the jewelry he had taken from Alvarez's house, Eubank asked Defendant if earlier he had been wearing a ring that belonged to Alvarez. Defendant responded that he had been and asked Eubank if he wanted it. Defendant briefly searched his pockets, located the ring, and handed it to Eubank, confirming he had taken it from Alvarez's house. Defendant acknowledged he had done some very "serious" things. Eubank asked Defendant if he had any remorse—to which Defendant responded, "Nah."

{12} On August 2, 2011, the State filed a delinquency petition in children's court, alleging Defendant had committed first-degree murder, aggravated burglary, tampering with evidence, and unlawful taking of a motor vehicle. The same day, the State added a motion to join Juan Rivas Sr. as a party to the petition. Defendant was held in a juvenile detention facility.

{13} Defendant appeared in children's court on August 3 for a detention hearing, as prescribed by statute. At that hearing—Defendant's first appearance in court in the proceeding—the district judge advised Defendant he had various rights, including a right to representation by an attorney at all stages of the proceedings. The district judge then appointed a public defender for Defendant, and the public defender shortly thereafter entered a not guilty plea on Defendant's behalf. Based on information Mr. Rivas might have knowledge regarding the incidents of that evening and might have interests diverging from Defendant's, an assigned juvenile probation officer recommended a guardian ad litem be appointed to represent Defendant's best interests. Based on that recommendation, the court appointed Defendant a guardian ad litem but made no other specific findings supporting the appointment. The court's written order specified only that "[t]he child has no parent, guardian or custodian appearing on behalf of the child, or his/her interests are in conflict with those of the child."

{14} The State also filed on August 3 a notice of intent to seek an adult sentence, alleging that Defendant was a serious youthful offender. The children's court ordered the case set for a preliminary hearing before the district court.

{15} The district court held the preliminary hearing a few months later, on November 17, 2011. After finding probable cause on each of the charges, the judge bound Defendant over for trial in district court on each of the four counts. Defendant was arraigned in district court on December 19, 2011.

{16} In the interim, as Defendant awaited his preliminary hearing in district court, Mr. Rivas called Eubank on August 5 and left a message indicating Defendant had an urgent desire to speak with Eubank. On August 6, Eubank and his colleague, Detective Conger, visited with Defendant at the juvenile detention center, where he was being held. Eubank explained Defendant's father had left word with the detectives that Defendant hoped to speak with them, and asked if that was true. Defendant responded affirmatively.

{17} Much as he had a few days prior when they first met, Eubank read Defendant the script verbatim from the standard juvenile advice of rights form and asked Defendant to indicate where appropriate on the form if he wished to speak with the detectives. And again, Defendant indicated he would indeed speak with them.

{18} At this meeting, however, Defendant gave an account different from the one he had given a few days earlier. Defendant maintained that E.S. had actually participated in killing Alvarez and that it had been E.S.'s plan all along. Moreover, Defendant added, E.S. had revealed he was following directions from a person named "Scooby." Scooby was apparently "big and connected," Defendant explained, and had numerous tattoos. Defendant acknowledged in this account that he had stabbed Alvarez, but he reported E.S. had retrieved and actually used the knives from the

kitchen. It was also E.S.'s idea, Defendant added, to take the money and jewelry from the house. E.S. had advised Defendant to take the blame, Defendant insisted, and had promised to "help" should Defendant be caught.

{19} Defendant's case was set for trial in December 2012. On December 6, 2012, just two business days before trial was scheduled to begin, Defendant's counsel moved to suppress the second statement Defendant had made to the detectives. Eubank had made no effort to contact Defendant's counsel prior to the second interview, counsel noted, and thus he contended the interview had violated Defendant's federal and state constitutional rights to counsel, as well as his statutory right to counsel provided by the Children's Code. Defendant's counsel made reference to the statement Defendant gave in his second interview as Defendant's "second" statement, and he explained a failure to move to suppress this second statement would render him "doubly ineffective." Defendant's counsel made no motion of any kind, however, with respect to the first statement.

{20} The State advanced two arguments in response. The motion was untimely under Rule 5-601 NMRA, the State noted, and its appearance on the eve of what promised to be a lengthy trial was highly prejudicial. And regardless of the timeliness of the motion, the State added, no right had been violated because Defendant had knowingly, voluntarily, and intelligently waived his rights prior to giving the statement.

{21} The district court heard argument on Defendant's motion on the day of jury selection—the opening day of trial. The court reviewed an audio recording of a phone call between Eubank and Mr. Rivas, a recording of Defendant's second interview with the detectives, and the standard advice of rights and waiver form Defendant had read and signed in the course of both the August 1 and August 6 interviews. After hearing arguments from the parties, the court noted the motion was untimely and should be denied on that ground alone. But even on the merits, the court explained, the record revealed Defendant had desired to speak with the detectives, he had been adequately advised regarding his rights, and he had understood and answered questions appropriately in the interview. Those factors, the district court concluded, indicated Defendant had known he had a right to an attorney and he had knowingly and voluntarily waived the right. The district court thus denied the motion and took up the trial as scheduled.

{22} The State presented a comprehensive case at trial, including numerous witnesses and at least two hundred exhibits, which included recordings of Defendant's two separate interviews with the detectives. Defendant was eventually convicted of all four counts—first-degree murder, aggravated burglary, tampering with evidence, and unlawful taking of a motor vehicle—and sentenced to a term of life imprisonment. Defendant appealed directly to this Court, contending (1) his various trial counsel were ineffective for failing to move to suppress statements he made in his August 1 interview, and (2) the district court erred in denying suppression of statements he made in his August 6 interview. *See* 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).

II. STANDARDS OF REVIEW

A. Ineffective Assistance of Counsel

{23} We review claims of ineffective assistance de novo. *State v. Crocco*, 2014-NMSC-016, ¶ 11, 327 P.3d 1068. A defendant seeking to establish ineffective assistance must show both deficient performance of counsel and prejudice caused by the deficient performance. *State v. Tafoya*, 2012-NMSC-030, ¶ 59, 285 P.3d 604; *State v. Jacobs*, 2000-NMSC-026, ¶ 48, 129 N.M. 448, 10 P.3d 127. In evaluating performance, we aim to avoid the distorting effects of hindsight, and if counsel's conduct may be characterized as a component of a plausible or rational strategy or tactic, we presume counsel's performance was within the bounds of acceptable representation. *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517. Typically, we prefer that ineffective assistance claims be brought in collateral proceedings so that defendants may adequately develop a record of counsel's conduct. *State v. Astorga*, 2015-NMSC-007, ¶ 17, 343 P.3d 1245. When a defendant establishes a prima facie case of ineffective assistance on direct appeal, however, we may remand the claim to the trial court for an evidentiary hearing and a ruling. *Arrendondo*, 2012-NMSC-013, ¶ 38.

B. Suppression Based on a Claim of Ineffective Waiver

{24} When reviewing a district court's denial of a motion to suppress inculpatory statements, we defer to the district court's factual findings "unless they are clearly erroneous, and [we] view the evidence in the light most favorable to the district court's ruling." *State v. Gutierrez*, 2011-NMSC-024, ¶ 7, 150 N.M. 232, 258 P.3d 1024 (internal quotation marks and citation omitted). We review de novo, however, the legal question of whether valid waiver has been made. *Id.*

III. DISCUSSION

{25} On appeal, Defendant contends the various counsel he was appointed during his proceeding below were as a group ineffective for failing to move to suppress statements he made in his August 1 interview with Eubank prior to the State's filing of the delinquency petition. Those statements, Defendant insists, were elicited in violation of his statutory and constitutional rights to counsel, and the circumstances surrounding the interview rendered any waiver he gave invalid. Defendant adds, as a second contention, that the district court erred in denying suppression of the statements he made in his post-delinquency petition during the August 6 interview with the detectives; they too, Defendant contends, were elicited in violation of applicable rights to counsel, and any waiver he may have given was again invalid. The State responds by arguing Defendant's motion to suppress the August 6 statements was untimely, and regardless, Defendant gave valid waivers in both instances. The timeline of events is significant for purposes of analyzing Defendant's claims.

A. The August 1 Interview and Defendant's Claim of Ineffective Assistance

{26} At the time of Defendant's August 1 interview with Eubank, he was fifteen years old, and the State had not yet filed its petition alleging delinquency. Given those facts, our prior cases make clear that specific provisions of the Children's Code must guide our examination of Defendant's statements. *State v. Martinez*, 1999-NMSC-018, ¶¶ 17-18, 127 N.M. 207, 979 P.2d 718 (concluding Children's Code provisions applied to juvenile questioned by police prior to filing of delinquency petition); *see generally* NMSA 1978, § 32A-2-14 (2009).

{27} Application of the Children's Code provisions may be consequential because the provisions grant juveniles protections against self-incrimination above and beyond those provided by the Fifth Amendment to the United States Constitution and Article II, Section 15 of the New Mexico Constitution. *See, e.g.*, *State*

v. DeAngelo M., 2015-NMSC-033, ¶ 6, 360 P.3d 1151. The federal and state constitutional provisions provide protections against self-incrimination and require, at a minimum, that before any individual may be subjected to custodial interrogation, the individual must be made aware of various rights the courts have established to aid in protecting the right to be free from self-incrimination. *See, e.g.*, *Martinez*, 1999-NMSC-018, ¶ 13; *see generally Miranda v. Arizona*, 384 U.S. 436, 479 (1966). Moreover, the cases explain, prior to questioning and later using any statements or admissions gleaned from these scenarios, investigators and officers must obtain from the individual a knowing, intelligent, and voluntary waiver of those established rights. *Miranda*, 384 U.S. at 479; *Martinez*, 1999-NMSC-018, ¶ 13.

{28} The Children's Code provisions bolster those protections against self-incrimination in various ways for children. Statements made by young children, for example, are without exception inadmissible at trial, regardless of any waiver made; statements made by children thirteen and fourteen years old are presumptively inadmissible, regardless of any waiver made; and for children fifteen and older, any waiver of rights is subject to specific statutory inquiry before it may be found knowingly, intelligently, and voluntarily made. Section 32A-2-14(E)-(F). In addition, though the constitutional protections recognized in *Miranda* apply generally only in situations featuring custodial interrogation, the Children's Code protections apply more broadly—in any scenario after a child has been subject to formal charges, in any scenario in which a child is subject to an investigative detention, and perhaps in any scenario at all in which a child is "suspected of being a delinquent child." Section 32A-2-14(C); *see State v. Javier M.*, 2001-NMSC-030, ¶ 38, 131 N.M. 1, 33 P.3d 1; *id.* ¶ 50 (Minzner, J., specially concurring) ("[T]he Legislature . . . intended to grant a further statutory right to a child who is alleged or suspected of being a delinquent child . . . ." (internal quotation marks and citation omitted)).

{29} The parties have no quarrel regarding application of these expanded protections to Defendant's August 1 interview with Eubank. Instead, they dispute whether Defendant validly waived his right against self-incrimination, even given application of the expanded protections and the specific statutory considerations guiding our analysis. Defendant's claim of ineffective assistance here turns on the validity of the waiver given in the August 1 interview. If the waiver was valid, Defendant's proffered ground for potential suppression below recedes along with his narrow claim of ineffective assistance.

{30} Our cases examining the federal and state constitutional right to be free from self-incrimination have set forth several general principles guiding the evaluation of whether waiver has been knowingly, intelligently, and voluntarily, and thus validly, made. We require that the waiver be made by " 'free and deliberate choice' " and absent " 'intimidation, coercion, or deception[.]' " *Martinez*, 1999-NMSC-018, ¶ 14; (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). The waiver, moreover, must have been made with "full awareness" of the nature of the right abandoned, and "full awareness" of "the consequences of the decision to abandon it." *Id.* (internal quotation marks and citation omitted). In making those determinations, courts must consider "the totality of the circumstances and the particular facts," must consider "the mental and physical condition, background, experience, and conduct of the accused," and must consider "the conduct of the police[.]" *Martinez*, 1999-NMSC-018, ¶ 14 (internal quotation marks and citation omitted). And courts must entertain, we have explained, "every reasonable presumption against waiver." *Id.* (alteration in original) (internal quotation marks and citation omitted).

{31} For waivers made by juveniles, the Children's Code further sharpens the focus of the analysis. *See* § 32A-2-14(E). Section 32A-2-14(E) directs courts to consider various factors in making validity determinations for juveniles. Those factors include the child's age and education; custodial status; the manner in which the rights have been advised; the length and circumstances of questioning; the condition of the quarters in which questioning occurs; the time of day and treatment of the child during questioning; the mental and physical condition of the child at the time of questioning; and whether the child had the counsel of an attorney, friend, or relative at the time of questioning. *Id.* Consideration of these factors refines for juvenile waivers the more generally-applicable totality-of-the-circumstances inquiry, and emphasizes "some of the circumstances that may be particularly relevant for a juvenile, such as the presence of a relative or friend." *Martinez*, 1999-NMSC-018, ¶ 18.

{32} Examination of those considerations here is instructive. Defendant was fifteen at the time of the interview. The record does not reveal his educational level, but at the same time, nothing in the record indicates he lacked "sufficient intelligence to understand" his rights or the repercussions of waiving those rights. *Gutierrez*, 2011-NMSC-024, ¶ 14 (internal quotation marks and citation omitted). New Mexico case law has made clear that children of similar age, even those suffering from "conditions and disorders" significantly affecting their cognitive abilities, may nonetheless be capable of understanding their rights and the consequences of waiver. *State v. Setser*, 1997-NMSC-004, ¶ 14, 122 N.M. 794, 932 P.2d 484; *see also Gutierrez*, 2011-NMSC-024, ¶¶ 14-15 (internal quotation marks and citation omitted); *cf. State v. Jonathan M.*, 1990-NMSC-046, ¶ 8, 109 N.M. 789, 791 P.2d 64 (comparing older children with children "under age fifteen" and concluding "a child over age fifteen is unlikely to make an involuntary statement in a noncustodial, noncoercive atmosphere or after receiving *Miranda* warnings").

{33} Neither age nor any other factor, however, is to be viewed in isolation—both the statute and our case law mandate consideration of all relevant circumstances. Defendant had no prior record. The interview here occurred at 9:30 in the evening at the Hobbs police station. He had been accompanied to the station by his parents and had been made to wait just a few minutes before the interview began. Just one officer—Eubank—conducted the questioning, and his conversational tone was cordial, even chummy. Very little information was exchanged before he began advising Defendant regarding his rights. The advisement itself took two forms: Eubank read aloud from a standard advice of rights form, and then Defendant was given an opportunity to read, and read aloud from, the form before signing and indicating a desire to speak. Defendant asked relevant follow-up questions, suggesting he understood the meaning of the language used. While the interview lasted about an hour, at no time did Eubank's demeanor, or Defendant's demeanor, change such that problematic inferences might arise regarding Defendant's treatment. The record does reveal that Defendant did not speak to any attorney, friend, or relative at any time during the interview. And finally, no evidence suggests he suffered from any impairment of mental or physical

condition that might give us pause in the analysis.

{34} We have found juvenile waivers intelligently, knowingly, and voluntarily made in similar scenarios and have emphasized the absence of coercive or manipulative circumstances. In *Martinez*, for example, where an interview occurred at the same hour in the evening, as in this case, and lasted for about an hour, the record revealed no evidence of mental or physical impairment; a standard *Miranda* script was read; and the defendant answered questions clearly and without resistance and never requested consultation with counsel, relative, or friend, we found a valid waiver—even in the absence of the signed waiver Defendant produced here. *Martinez*, 1999-NMSC-018, ¶¶ 22-23. And in *Gutierrez*, we found that a primarily Spanish-speaking juvenile with some cognitive impairment may validly waive his rights, given a demonstration of English fluency sufficient to understand those rights, an established familiarity with the juvenile justice system, and a record of immediate and detailed narrative responses relevant to the questions asked by the interviewer—again in the absence of a signed waiver form, and again in the absence of consultation with friend, relative, or counsel. 2011-NMSC-024, ¶¶ 15-17.

{35} Based on our constitutional case law, our statutory provisions, and a consideration of the totality of the circumstances here—including Defendant's age, the form of advisement, his explicit written waiver, his appropriate responses, and the absence of countervailing factors—we cannot conclude Defendant lacked full awareness of the rights abandoned here, nor can we conclude he lacked full awareness of the consequences of abandoning those rights. And nothing in the record suggests the presence of intimidation, deception, or coercion, or a lack of free and deliberate choice; thus none of those factors affect the validity analysis here. Accordingly, Defendant knowingly, intelligently, and voluntarily waived his rights in the August 1 interview. And because the record would not have supported a motion to suppress statements made in that interview on the basis of invalid waiver, Defendant has not made a prima facie case of ineffective assistance. *See, e.g.*, *Crocco*, 2014-NMSC-016, ¶ 24. As we have often explained, however, "[i]f facts beyond those" in this record may establish a claim of ineffective assistance, nothing precludes Defendant from asserting the claim and addressing the facts in a collateral proceeding. *Id.*

B. The August 6 Interview and Defendant's Claim of Right to Counsel

{36} With respect to suppression of statements Defendant made in his August 6 interview, the State points out as a preliminary matter that Defendant's motion came on the very eve of trial—clearly untimely under both the version of Rule 5-212(C) NMRA then in effect, which required the filing of suppression motions "within twenty (20) days of the entry of a plea," and the current version of the rule, which requires filing "no less than sixty (60) days prior to trial." Rule 5-212(C) (2012); Rule 5-212(C) (2013). The version then in effect, as it does now, gave the district court the ability to waive that requirement for good cause shown, but the court declined to find good cause here. Rule 5-212(C) (2012); Rule 5-212(C) (2013).

{37} Despite concluding Defendant's motion was untimely, however, the district court offered an alternative ruling on the merits, after having heard from both parties on the merits. In similar circumstances, various appellate tribunals have been willing to review not just the trial court's ruling on timeliness but the merits themselves, reasoning that when the trial court rules on the merits of an untimely suppression motion, the court has also implicitly found cause to grant relief from forfeiture of the right to seek suppression. *See, e.g.*, *United States v. Scott*, 705 F.3d 410, 416 (9th Cir. 2012). Other appellate courts have added the government may forfeit its untimeliness claim where it responds on the merits on appeal, as it has done here. *See, e.g.*, *United States v. Scalzo*, 764 F.3d 739, 743-44 (7th Cir. 2014). Given the airing of the merits arguments from both sides below and on appeal, given the district court's denial on the merits, and given the nature of this claim, we conclude the suppression issue has been adequately presented for our review. *See* Rule 12-321(A) NMRA (requiring that "a ruling or decision by the trial court was fairly invoked" for preservation purposes).

{38} The basic dispute between the parties resembles the dispute regarding the August 1 interview: Defendant again contends the August 6 interview violated his right to counsel, while the State contends he again validly waived that right after an adequate advisory and his resulting signature on the waiver form. As the parties recognize, however, the August 6 interview, coming as it did after the State filed its petition and after Defendant had been appointed counsel, calls for a separate analysis.

{39} Once the adversary judicial process has been initiated as it was with the August 2 filing of the petition here, the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution guarantee defendants the right to have counsel present at all critical stages of criminal proceedings. *See, e.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *State v. Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247. Any interrogation by the state once proceedings have begun, regardless of a defendant's custodial status, constitutes a critical stage for purposes of the Sixth Amendment analysis, and thus the parties do not dispute attachment of the Sixth Amendment right in this case. *See Montejo*, 556 U.S. at 786. The Sixth Amendment right may be waived much like the Fifth Amendment right against self-incrimination at issue in the August 1 interview, as long as the relinquishment is voluntary, knowing, and intelligent, and a defendant may often validly waive this Sixth Amendment right after receiving only the warnings prescribed by *Miranda*, which has its source in the Fifth Amendment. *See Montejo*, 556 U.S. at 786-87; *cf. Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988) ("[B]ecause the Sixth Amendment's protection of the attorney-client relationship . . . extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, . . . there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." (internal quotation marks and citation omitted)).

{40} The Sixth Amendment right to counsel and its New Mexico counterpart, however, differ from the Fifth Amendment right against self-incrimination at stake in the August 1 interview in various ways. The Sixth Amendment right is narrower in at least one sense—it is offense-specific, unlike *Miranda*'s Fifth Amendment right against self-incrimination—and is thus of no help with respect to questioning regarding matters not yet subject to adversarial proceedings. *See McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991). In many other ways, however, Sixth Amendment protection may be understood as broader than the Fifth Amendment protection. The Sixth Amendment right, the Supreme Court has explained, is integral to the protection of fundamental rights of criminal defendants and ensures fairness throughout the criminal proceeding. *Massiah v.*

United States, 377 U.S. 201, 205 (1964). In advancing those goals, the Sixth Amendment guarantees defendants the right to rely on counsel as intermediary between themselves and the State—not just at trial, but from the time of initiation of criminal proceedings onward, " 'when consultation, thorough-going investigation and preparation [are] vitally important' " for purposes of promoting fundamental fairness. *Massiah*, 377 U.S. at 205 (alteration in original) (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)); *see also Maine v. Moulton*, 474 U.S. 159, 172 n.9, 176 (1985).

{41} Cases examining early attachment of the right have recognized that even pretrial proceedings may be momentous; they may "well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967). Highlighting that proposition, we have previously observed the risk not only of unwise waiver by the uncounseled defendant, but the even " 'more significant risk of inaccurate, sometimes false, and inevitably incomplete' " accounts of events in question. *In re Howes*, 1997-NMSC-024, ¶ 28, 123 N.M. 311, 940 P.2d 159 (quoting *People v. Hobson*, 348 N.E.2d 894, 899 (N.Y. 1976)). The right to counsel has thus long protected "the unaided layman" at any "critical confrontations with his adversary," *United States v. Gouveia*, 467 U.S. 180, 189 (1984), and in any situation in which the defendant may need the "guiding hand of counsel" to resist the coercive powers of the prosecutorial process. *Powell v. Alabama*, 287 U.S. 45, 57, 69 (1932) (describing the post-arraignment period as "perhaps the most critical period of the proceedings"). Counsel is crucial, the Supreme Court has explained, at any point a defendant is immersed in the complexity of the criminal legal environment—at any point the "intricacies" of criminal law constrain his ability to defend himself. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 207 (2008) (internal quotation marks and citation omitted). The Sixth Amendment right, in other words, aims to level the playing field; it contemplates counsel as both strategist and shepherd at each stage to promote the goals of fairness and integrity throughout the proceeding. *See United States v. Ash*, 413 U.S. 300, 309 (1973) (explaining purpose of counsel is to "minimize imbalance in the adversary system").

{42} Counsel's leveling function is all the more critical for children. Children lack maturity and well-developed senses of responsibility; absence of either may result in impulsive action or decision. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005). Lags in neurological and psychosocial development related to reasoning, risk-taking, and impulse control render children less competent than adults in various ways that may be relevant in a criminal proceeding—as just one illustration, diminished perception, decision-making, and judgment may make them more suggestible and susceptible to any number of outside influences. *Id.*; *see also Miller v. Alabama*, 567 U.S. 460, __, 132 S. Ct. 2455, 2464 (2012) ; *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").

{43} These lags gain special prominence for children in settings involving interrogation, regardless of whether the interrogation occurs before or after criminal proceedings have been initiated. The pressure of interrogation, the Supreme Court has recognized, is "so immense," that it may "induce a frighteningly high percentage of people to confess to crimes they never committed." *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (internal quotation marks and citations omitted). The risk "is all the more troubling" and "all the more acute," the *J.D.B.* Court added, when the subject of interrogation is a child. *Id.*; *see also Haley v. Ohio*, 332 U.S. 596, 599 (1948) ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."). Lack of experience, perspective, and judgment, in other words, often leave children without the ability to "recognize and avoid" various choices detrimental to them, and those choices may frequently arise in interrogation, just as they may at any stage of a criminal proceeding. *See J.D.B.*, 564 U.S. at 272. That a child will experience police questioning in many ways distinct from an adult is a "commonsense reality." *Id.* at 265. Children, then, have a unique need for the guidance of counsel every step of the way and a unique need for "specific consideration" of whether they might appropriately waive that guidance. *In re Gault*, 387 U.S. 1, 42 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (recognizing a juvenile "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"). And an open question remains in the federal case law as to whether these defining characteristics of youth might require various "additional procedural safeguards" so as to satisfy the child's federal constitutional rights. *See J.D.B.*, 564 U.S. at 269-70, 270 n.4.

{44} Recognizing these principles, numerous other jurisdictions have established, by statutory scheme, special protections for children subject to police questioning, both before and after attachment of the Sixth Amendment right. Some require that a parent or guardian be present at questioning, or before a child may validly waive the right to counsel. *See, e.g.*, Conn. Gen. Stat. Ann. § 46b-137(a) (West 2012) (statements of a child under sixteen inadmissible unless made in the presence of a parent or guardian who has been advised of the child's rights); Miss. Code Ann. § 43-21-303(3) (West 1980) (police must extend invitation to parent or guardian to be present for child's interrogation). Others require the presence of parent or counsel. *See, e.g.*, Ind. Code Ann. § 31-32-5-1(3) (West 1997); N.D. Cent. Code Ann. § 27-20-26(1) (West 2012); *cf.* Colo. Rev. Stat. Ann. § 19-2-511(1) (West 1999). Still others direct that waiver can be made *only* with the assistance of counsel. Tex. Fam. Code Ann. § 51.09(1) (West 1997); W. Va. Code Ann. § 49-4-701(l) (West 2016).

{45} Other appellate decisions have established similarly heightened protections in both the Fifth and Sixth Amendment counsel contexts. Some have required the presence of a parent before a valid waiver may be made. *See, e.g.*, *In re Steven William T.*, 499 S.E.2d 876, 884 (W. Va. 1997); *see also In re K.W.B.*, 500 S.W.2d 275, 283 (Mo. Ct. App. 1973); *In re Aaron D.*, 290 N.Y.S.2d 935, 937-38 (N.Y. App. Div. 1968). Others have recognized the presence or encouragement of a parent may often weigh against the validity of waiver—for any number of reasons, including lack of comprehension or competence, and the significant risk of conflict. *See, e.g.*, *In re A.S.*, 999 A.2d 1136, 1150, 1150 n.6 (N.J. 2010); *Steven William T.*, 499 S.E.2d at 886 (reversing lower court's juvenile transfer order based in part on custodian's "adverse interests"); *see also Commonwealth v. Philip S.*, 611 N.E.2d 226, 231 (Mass. 1993) (observing adult may "lack[] capacity to appreciate the juvenile's situation and to give advice"). Many, recognizing those risks, have suggested "meaningful consultation" with an attorney or a disinterested parent or adult should ordinarily be a prerequisite to finding valid waiver in these scenarios. *See, e.g.*, *In re B.M.B.*, 955 P.2d 1302, 1310, 1311,

1312-13 (Kan. 1998) (internal quotation marks and citations omitted); *Commonwealth v. MacNeill*, 502 N.E.2d 938, 942 (Mass. 1987). Moreover, other courts have observed, the Sixth Amendment right may attach automatically for juveniles—it need not be explicitly invoked by an unknowing child, given the critical constitutional protection it is intended to provide in leveling an inherently unbalanced playing field. *See, e.g.*, *In re Darryl P.*, 63 A.3d 1142, 1190-91 (Md. Ct. Spec. App. 2013). And of course, other courts, highlighting the oft-intertwined guarantees of due process, protection against self-incrimination, and effective assistance of counsel have concluded a defendant may *never* waive the right to counsel in the absence of counsel; the right is "indelible," regardless whether exercised by adult or child. *See People v. Grice*, 794 N.E.2d 9, 10 (N.Y. 2003).

{46} As noted, our Legislature, clearly cognizant of the ways in which children experience the adversarial process differently, has also established special protections for juveniles in our Children's Code. A buffer, for example, between child and investigator already exists at the charging stage: officers must refer any allegations of delinquency to a juvenile probation office, which makes its own inquiry and recommendation to the children's court as to whether a delinquency petition is appropriate. *See, e.g.*, NMSA 1978, § 32A-2-7(A) (2005). Upon filing a petition, moreover, the children's court must appoint counsel if the child has not already retained an attorney and, at any point in the proceeding, may in addition appoint a guardian to advocate for the child's best interests, which are not often coextensive with the family's interests or even the child's legal interests. *See* § 32A-2-14(H), (J), (K). The Children's Code provisions also require that the court advise both the child and any parent, guardian, or custodian that counsel will represent the child at all stages of the proceeding, evincing an intent to provide both the child and any interested parties with the information that the child is entitled to rely on counsel as intermediary in every adversarial encounter along the way. Section 32A-2-14(H).

{47} While the Sixth Amendment right must often be explicitly asserted before it offers its protection in the context of police questioning, both the case law examining the juvenile experience in adversarial settings and our statutory provisions suggest the explicit invocation requirement is both inappropriate and unworkable for children. *Compare Darryl P.*, 63 A.3d at 1190 ("The prophylactic right to counsel only comes into existence when it is unambiguously invoked . . . . [T]he constitutional right to counsel, by contrast, comes into existence automatically, whether invoked or not . . . ."); *with State v. Desnoyers*, 2002-NMSC-031, ¶ 18, 132 N.M. 756, 55 P.3d 968 (concluding adult defendant had not asserted Sixth Amendment right based on failure to make an affirmative request at time of questioning), *abrogated on other grounds by State v. Collier*, 2013-NMSC-015, ¶¶ 12, 14, 301 P.3d 370. The sequence of events here illustrates just a part of the problem with the invocation requirement. Defendant, having been appointed counsel a few days prior, was then held in detention until the August 6 interview and had, apparently, no contact with counsel in that intervening period. Officers then approached Defendant based on contact from his father, asked if he was receptive to questioning, and then read him the same standard-form *Miranda* script—advising him he had a right to an attorney and the right to have one appointed—they had read him five days earlier. But clearly the circumstances were different on August 6, and the case law suggests the likelihood was exceedingly low that Defendant understood the significance of the information he had just received and that he could reconcile that information with the fact that he had already been appointed both an attorney and a guardian. *See, e.g.*, *Montejo*, 556 U.S. at 813 n.8 (Stevens, J., dissenting) (noting high likelihood of confusion in this scenario for "vulnerable defendants," including juveniles); *cf. In re Edwin S.*, 977 N.Y.S.2d 601, 603 (N.Y. Fam. Ct. 2013) (examining scenario where language of *Miranda* warning "can only serve to confuse [the] detainee with respect to the timing of his/her right to an attorney").

{48} Ethics rules and decades of departmental training suggest that the better practice for the officers here would have been to refrain from approaching Defendant once counsel was appointed, regardless of Defendant's age; his juvenile status compounded the constitutional risks. *See, e.g.*, Rule 16-402 NMRA; *Montejo*, 556 U.S. at 793 ("If a State *wishes* to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so." (emphasis in original)); *State v. Forbush*, 2011 WI 25, ¶ 54, 796 N.W.2d 741 (plurality opinion) (noting "it's incumbent on" investigating officers to inquire about an attorney before questioning "when it's been advised to the DA's Office that there is an attorney" (internal quotation marks omitted)); ABA Model Rules of Professional Conduct, Rule 4.2 at 117 (2016); *accord Gallegos*, 370 U.S. at 54 (explaining a juvenile "would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself"); *cf.* Federal Bureau of Investigation, Legal Handbook for FBI Special Agents § 7-4.1(7) at 95-96 (2003) (directing that "no interview of the accused may take place . . . unless . . . the accused's counsel is present," an additional waiver is obtained, or certain extenuating circumstances exist).

{49} That Defendant had also been appointed a guardian here both magnified and intensified the problem. The guardian, of course, had been appointed to stand in the place of Defendant's parents and had been appointed based largely on a potential conflict of interest between Defendant and Mr. Rivas. *See* § 32A-2-14(J). The question of why the investigators felt entitled to rely on Mr. Rivas's initiation of contact on Defendant's behalf under these circumstances has gone unaddressed by the parties, but the Children's Code provisions suggest that reliance was misplaced. *Id.*

{50} The defining characteristics of youth recognized by those cases and the attendant risks, coupled with the various legislative directives of our Children's Code provisions, compel us to conclude that children are different and must be treated differently for purposes of the Sixth Amendment counsel analysis. Accordingly, the juvenile Sixth Amendment right to counsel is absolute and indelible; once the right has attached, it may not be waived outside the presence of counsel. *See, e.g.*, *Grice*, 794 N.E.2d at 10 ("[I]nterrogation is prohibited unless the right is waived in the presence of counsel."); *see also Darryl P.*, 63 A.3d at 1191 ("The constitutional right against uncounseled interrogation is significantly broader than the prophylactic right against uncounseled self-incrimination."); *cf. State v. Lawson*, 297 P.3d 1164, 1173 (Kan. 2013) ("[A]fter the statutory right to counsel has attached, the defendant's uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court.").

{51} The district court thus need not have

engaged in the statutory waiver inquiry as it did here. Instead, once the record had established the Sixth Amendment right had attached and Defendant was questioned without counsel present, the district court had no alternative but to suppress Defendant's statements in their entirety. Accordingly, the district court erred in denying Defendant's motion to suppress the statements made in the August 6 interview.

C. The Effect of the Error

{52} The conclusion of error does not end the inquiry here, however, because as the State rightly points out, the improper admission need not be grounds for a new trial unless the error was harmful to Defendant. For a non-structural, constitutional error as has been established here, the State bears the burden of proving beyond a reasonable doubt that the error was harmless to the outcome. *See, e.g.*, *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110. A critical inquiry in the determination of whether a given error is harmless is the question of whether the error "was likely to have affected the jury's verdict." *Id.* ¶ 42. We examine all the circumstances surrounding the error; examine the importance to the prosecution's case of the erroneously admitted evidence, and ask, among other things, whether the erroneously admitted evidence was cumulative or introduced new facts. *Id.* ¶ 43. In the end, we must satisfy ourselves that the " 'guilty verdict actually rendered in *this* trial was surely unattributable to the error,' " *id.* ¶ 44 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)), or alternatively, that there was no "reasonable possibility" the error contributed to Defendant's conviction. *Tollardo*, 2012-NMSC-008, ¶ 57.

{53} The effect of admission of the August 6 statements here was exceedingly minimal. The State's theory at trial emphasized Defendant's willful and deliberate activity and posited that he had acted largely alone—in much the same way he had explained in his earlier August 1 interview with Eubank. Defendant's August 6 statements contradicted that account, suggesting his will may have been overborne by, and he may have acted in concert with, others directing the conduct. Defendant's presentation at trial was much more closely aligned with the account he gave on August 6, and it is unclear how, based on the rest of the record, his presentation might have changed in the absence of the August 6 statements. The error here, in other words, was likely not cumulative, but may have constituted a rare case of introduction of facts favorable to *Defendant*. But based on the convictions, it appears the jury found Defendant's August 1 version of events more credible than his August 6 version; and in the absence of the August 6 version, the record does not reveal much else of significance with which Defendant might have undermined the August 1 account.

{54} Accordingly, based on the record, there was no reasonable possibility the admission of the August 6 statements contributed to Defendant's convictions, and therefore the district court's erroneous admission of the statements was harmless.

IV. CONCLUSION

{55} Defendant has not established a prima facie case that his counsel was ineffective for failing to move to suppress statements Defendant made in his August 1 interview with Eubank. The district court erred, however, in admitting statements from Defendant's August 6 interview—at that point, Defendant's Sixth Amendment right to counsel had attached, and because he was a juvenile, the right could not have been validly waived in the absence of counsel. But that error was harmless because there was no reasonable possibility the admission contributed to Defendant's convictions. We affirm Defendant's convictions and sentence.

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

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

NAKAMURA, Justice
(specially concurring).

{57} I concur with the overall result reached by the majority; Defendant's convictions should be affirmed. I do not, however, join in all portions of the majority opinion. This case can be resolved on narrower grounds and, thus, should be. *See Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 775 P.2d 709 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so. We have repeatedly declined to decide constitutional questions unless necessary to the disposition of the case."); *Baca v. N.M. Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 12, 132 N.M. 282, 47 P.3d 441 (noting that courts exercise judicial restraint by deciding cases on the narrowest possible grounds and avoid reaching unnecessary constitutional issues); *see also Harmon v. Brucker*, 355 U.S. 579, 581 (1958) ("In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' nonconstitutional claim . . . ."); *United States v. Allen*, 406 F.3d 940, 946 (8th Cir. 2005) ("When we are confronted with several possible grounds for deciding a case, any of which would lead to the same result, we choose the narrowest ground in order to avoid unnecessary adjudication of constitutional issues."); *Bellville v. Town of Northboro*, 375 F.3d 25, 30 (1st Cir. 2004) ("Normally, we endeavor to avoid deciding constitutional issues and attempt to decide cases on the narrowest grounds possible."); *Korioth v. Brisco*, 523 F.2d 1271, 1275 (5th Cir. 1975) ("Cases are to be decided on the narrowest legal grounds available . . . .").

{58} The district court denied Defendant's motion to suppress because it was untimely. This determination is a complete and sufficient basis for denying the motion. *See State v. Vialpando*, 1979-NMCA-083, ¶ 6, 93 N.M. 289, 599 P.2d 1086 (failing to file a motion to suppress within the time frame required by our rules of criminal procedure provides sufficient grounds to deny the motion); *State v. Helker*, 1975-NMCA-141, ¶ 7, 88 N.M. 650, 545 P.2d 1028 ("[W]e hold that rules of criminal procedure can put a time limitation on the exercise of a constitutionally protected right."); *see also City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 28, 285 P.3d 637 ("Rule 5-212(C) requires that motions to suppress be filed before trial and that the district courts must adjudicate suppression issues before trial, absent good cause."). The district court's untimeliness ruling was an appropriate application of the law to the facts. *See State v. Gutierrez*, 2005-NMCA-015, ¶ 9, 136 N.M. 779, 105 P.3d 332 ("The denial of a motion to suppress requires us to determine if the law was correctly applied to the facts.").

{59} The former version of Rule 5-212(C) NMRA (2012) , applicable here, provides as follows: "A motion to suppress shall be made within twenty (20) days after the entry of a plea, unless, upon good cause shown, the trial court waives the time requirement of this rule." Defendant entered a not guilty plea in district court on December 19, 2011. *Maj. Op.* ¶¶ 13, 15. Defendant filed his motion to suppress 353 days later, on December 6, 2012, only

four days before trial. *Maj. Op.* ¶ 19. Defendant did not comply with the time for filing requirement. Even under the present iteration of the rule, Defendant's motion was significantly late. *See* Rule 5-212(C) NMRA ("A motion to suppress shall be filed no less than sixty (60) days prior to trial, unless, upon good cause shown, the trial court waives the time requirement."). **{60}** The district court did not find that good cause existed to excuse the untimely filing. As the ensuing discussion shows, this ruling was not an abuse of discretion. *See State v. Smallwood*, 2007-NMSC-005, ¶ 12, 141 N.M. 178, 152 P.3d 821 (explaining that the Court would review the district court's determination of whether a party had shown good cause to waive a time requirement under another rule for abuse of discretion).

{61} At the hearing on Defendant's suppression motion—which occurred on the opening day of trial—defense counsel conceded that there was no good explanation for why he and Defendant's previously appointed attorneys failed to comply with the time for filing requirement of Rule 5-212(C). The State rightly protested that this explanation was patently insufficient, emphasized that Defendant knew of the existence of the potential Sixth Amendment violation by at least the date of the preliminary hearing on November 17, 2011, and suggested that it was plausible Defendant purposefully delayed filing the suppression motion for strategic purposes. The State's arguments are persuasive.

{62} The record does in fact reflect that Defendant knew of the suppression issue as early as the preliminary hearing. At that hearing, Defendant established that Detective Eubank had some awareness that counsel had been appointed to represent Defendant by the time of the second interview on August 6, 2011, but, despite this awareness, Detective Eubank did not attempt to ascertain the identity of appointed counsel or to contact that individual before interviewing Defendant on August 6, 2011. We can only guess why Defendant did not file his motion to suppress at or around the time of the preliminary hearing and why he waited over a year to file it. It is clear, however, that clients are bound by the acts of their attorneys. *See State v. Serros*, 2016-NMSC-008, ¶ 46, 366 P.3d 1121 ("[A]ctions of defense counsel ordinarily are attributable to the defendant.").

{63} Our Rules of Criminal Procedure are intended to promote basic fairness in the administration of justice. *See* Rule 5-101(B) NMRA ("These rules . . . shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."). Waiting until the eve of trial to file a significant suppression motion implicating difficult questions of constitutional law is not, by any measure, "fair." The State had only a few short days to respond to Defendant's motion, and foisting difficult legal questions on an adversary on the very eve of trial bears all the marks of improper gamesmanship. It is impossible, of course, to say whether defense counsel was engaged in such conduct here. The point is simply that the Rules of Criminal Procedure exist to eliminate the possibility for gamesmanship and ensure an even playing field, and it is essential that the parties comply with them. Moreover, district courts must ensure parties comply with our Rules of Criminal Procedure and impose meaningful consequences when the rules are not followed so as to promote the efficient and effective administration of justice. *Cf. State v. Le Mier*, 2017-NMSC-017, ¶ 18, ___ P.3d ___. ("[T]rial courts shoulder the significant and important responsibility of ensuring the efficient administration of justice in the matters over which they preside, and it is our obligation to support them in fulfilling this responsibility.").

{64} In his briefing to this Court, Defendant's appellate counsel contends that the untimely filing was the product of ineffective assistance of counsel and that this deficiency constitutes the good cause necessary to excuse the untimely filing. I cannot agree for the following two reasons. **{65}** First, the statements elicited from Defendant at the second interview tended to exonerate Defendant and shift primary responsibility for the killing to others. *Maj. Op.* ¶ 52. Thus, it is unclear whether a competent attorney would want the statements suppressed, and it is equally unclear whether defense counsel's failure to move to suppress the statements even constitutes ineffective assistance of counsel. *See generally State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289 (alteration in original) ("Trial counsel is generally presumed to have provided adequate assistance. An error only occurs if representation [falls] below an objective standard of reasonableness. If any claimed error can be justified as a trial tactic or strategy, then the error will not be unreasonable." (internal quotation marks and citations omitted)). Second, to accept the contention that attorney incompetence constitutes good cause to excuse a defendant from complying with the time for filing requirement of Rule 5-212(C) would effectively nullify the requirement rendering it nothing more than a meaningless aspiration. "I just couldn't do it" is not an acceptable excuse for missing a filing deadline and the district court did not commit error or abuse its discretion in rejecting this explanation as good cause.

{66} The district court's decision to deny Defendant's suppression motion because it was not timely filed should be affirmed. This conclusion should end the analysis in Section III B of the majority opinion. The harmless error analysis in Section III C, while correct, is unnecessary. I concur that Defendant's convictions should be affirmed.

JUDITH K. NAKAMURA,
Chief Justice

From the New Mexico Supreme Court

Opinion Number: 2017-NMSC-023

No. S-1-SC-34662 (filed June 30, 201)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CARLOS CARRILLO,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BRETT R. LOVELESS, District Judge

ROBERT E. TANGORA
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Opinion

Barbara J. Vigil, Justice

{1} This is a capital appeal from the Second Judicial District Court following Defendant Carlos Carrillo's convictions of the murders of Christopher Kinney (Kinney) and Lyndsey Frost (Frost), tampering with evidence, and breaking and entering. Defendant appeals his convictions, arguing that: (1) the district court erred in allowing lay witnesses to testify to cell phone-related evidence with respect to the murder convictions, which, in Defendant's view, required a qualified expert; (2) there was insufficient evidence to support Defendant's convictions of murder, tampering with evidence, and breaking and entering; (3) the State committed prosecutorial misconduct when it repeatedly attempted to admit statements that the district court had ruled inadmissible prior to trial; and (4) cumulative error renders the guilty verdict unreliable. While we agree with Defendant with respect to the first issue, in part, we find that it was harmless error. We affirm Defendant's convictions.

I. BACKGROUND

{2} At around 8:00 a.m. on December 4, 2011, Albuquerque Police Department (APD) officers were dispatched to Tiguex Park in the Old Town area of Albuquerque. There, an APD officer spoke with a witness who had called 911 after noticing a blue Chevy Silverado pickup truck parked on the street with a man slumped over the driver's seat.

{3} After consulting with the witness, an APD officer approached the truck, which had the driver's side window rolled down, and saw a man, later identified as Kinney, in the driver's seat with what appeared to be a gunshot wound behind his left ear. The APD officer also noticed a woman in the passenger seat who was later identified as Kinney's girlfriend, Frost. Both were unconscious and unresponsive.

{4} As part of their investigation, the APD officers canvassed the neighborhood and asked nearby residents whether they had heard or seen anything. Some neighbors reported hearing cars driving down the street and a loud noise sometime between midnight and 4:00 a.m. Physical evidence collected from the crime scene included a red cell phone belonging to Kinney, seven shell casings, and two projectiles. Four additional projectiles were recovered during the autopsy of Frost.

{5} Based on the injuries to the victims and the trajectory of the bullets, the APD officers concluded that the shooter was standing at the driver's side of the truck and shot through the open window or possibly with the gun held inside the truck, since some of the ejected shell casings were found inside the vehicle. The APD officers also concluded that the victims did not have an opportunity to defend themselves as there was no evidence of a struggle, and Kinney's injury was from a shot fired at very close range. Frost had injuries that went through her hands and the top of her head, indicating that she was trying to protect herself by covering her head with her hands, and likely had her head down during the shooting. These conclusions regarding the victims' injuries were supported by the information provided by Dr. Ross Zumwalt from the Office of the Medical Investigator after the autopsies of the victims.

{6} Later that morning, the APD officers responded to a call that a male suspect was attempting to break into a car parked at the Golden Pride Restaurant on Old Coors and Central. The witness who called 911 reported that it looked like the suspect was using the butt of a gun to break the window of the car. The suspect then fled on foot.

{7} While en route to the restaurant, an APD officer made contact with a person who fit the description of the suspect. Shortly after, another APD officer arrived and assisted in arresting the suspect, who identified himself as Carlos Carrillo. Defendant told the APD officers that the car belonged to his girlfriend, Shantell Montoya (Montoya), who was at work at the restaurant, and that he broke the car window with his hands to retrieve his cell phone from inside the vehicle. The APD officers did not notice any injuries on Defendant's hands, and did not find a firearm on Defendant or along his possible routes from the restaurant parking lot to the intersection where he was arrested. Defendant did have $413 in cash, a cell phone, a bottle of cologne, and a plastic bag containing a brown substance, which Defendant admitted was heroin but which he claimed did not belong to him.

{8} The APD officers discovered that Defendant's cell phone number was saved in Kinney's cell phone under the name "Los" (presumably short for "Carlos"). There were multiple text messages on Kinney's cell phone that were sent to "Los" in the early morning hours of December 4, 2011. These text messages included:

> 2:28 a.m. - "This is f[***]ed up, bro[.] no joke[. W]hy you doing me like this?"
>
> 3:31 a.m. - "Dude[,] are you [f***]ing kidding me[? I] trusted you[. I] waited forever[. L]et me know what the [f***]ing deal is[. I] can[']t believe you[. You're] just as bad as [JJ,] but at least we got some [s***] from him[. T]his is [f***]ing bull[s***. I] seriously can[']t believe you[.]"

After retrieving Defendant's cell phone number from Kinney's cell phone, the APD officers obtained Defendant's cell phone records. The cell phone records showed that between 11:34 p.m. on December 3, 2011 and 4:03 a.m. on December 4, 2011, there were seventy-five cell phone calls from Kinney to Defendant and eight from Defendant to Kinney. Based on the text messages and calls, Detective Hollie Anderson believed that there was a disagreement and a possible confrontation between Kinney and Defendant.

{9} Detective Anderson interviewed Defendant in the early morning hours of December 5, 2011. Defendant initially told Detective Anderson that he went to bed around 1:00 a.m. or 2:00 a.m. on the night of December 3 into December 4, and stayed home the entire day of December 4. When Detective Anderson asked how he could have been arrested if he stayed home all day, Defendant explained that Montoya picked him up and took him to the restaurant where she worked. Initially, Defendant said that he and his girlfriend were pulled over and that the APD officers found drugs on his side of the car, so he was arrested. In response to further questioning, however, Defendant changed his story and explained that he was walking away from the restaurant when an APD officer stopped him in response to a 911 caller reporting that he had tried to break into Montoya's car. He said that the APD officers found the heroin at that time, but he was not sure where they found it.

{10} Detective Anderson asked Defendant whether he knew either Kinney or Frost. Defendant claimed that he did not know anyone by those names. However, when Detective Anderson showed him a picture of Kinney, he responded that he and Kinney had gotten high together and that he sometimes helped Kinney "score" drugs. Defendant alleged that Kinney had tried to call him to get drugs the night before he was arrested. Defendant said that he was not able to find drugs for Kinney that night, and that since Kinney eventually stopped calling, he assumed that Kinney had found some drugs on his own. Detective Anderson told Defendant that Kinney and Frost had been found murdered that morning. Defendant denied knowing about the murders.

{11} On December 20, 2011, Defendant was charged by grand jury indictment with two counts of first-degree murder (willful and deliberate), two counts of first-degree felony murder, two counts of shooting at or from a motor vehicle causing great bodily harm, tampering with evidence, possession of a firearm by a felon, auto burglary, and possession of a controlled substance (heroin). During November 2013, Defendant was tried on all charges except the felon in possession of a firearm charge, which was severed.

{12} The pretrial scheduling order mandated that the parties produce and exchange final witness lists no later than ten days prior to the first day of trial. The State provided a final witness list in accordance with the pretrial scheduling order, but it did not identify any expert witnesses. Defendant filed a motion in limine to restrict Abraham Cabrera (Cabrera) and Amy Tan (Tan) from testifying because they lacked personal knowledge, their testimony was irrelevant, and neither one was disclosed as an expert witness. *See* Rule 11-602 NMRA (A lay witness "may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); Rule 11-401 NMRA (Evidence is relevant if it tends to make a fact in issue "more or less probable" and "the fact is of consequence in determining the action."); *and* Rule 11-702 NMRA ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.").

{13} At the hearing on the motion in limine, Defendant argued that he anticipated Cabrera and Tan's testimony would interpret cell phone-related records, which he believed required a qualified expert. The district court did not rule on the motion in limine, but instead took it under advisement and told the parties it would decide the motion during trial based on the foundation laid and the exhibits offered.

{14} Both Cabrera and Tan testified at trial. Cabrera explained that as an employee in Cricket's legal compliance division, his job was to "pull the raw data for telephone calls for Cricket [C]ommunications and format it so law enforcement can read the records." The State introduced two exhibits through Cabrera: a call detail report record for Defendant's cell phone number listing all incoming and outgoing calls made between November 18, 2011 and December 5, 2011 (call detail report record), and a cell tower report listing all Albuquerque cell towers and the longitude and latitude coordinates for each cell tower (cell tower report). After Cabrera briefly explained what each exhibit was, Defendant objected, explaining that the State had not "established that . . . Cabrera [was] anything other than the custodian of records" and that it appeared that the State was beginning to ask Cabrera "to interpret the meaning of the records." Defendant contended that such testimony was "technical" and had to be introduced "through an expert witness and not through a lay witness." The State responded that Cabrera was only going to testify that the cell tower report "shows the locations of the cell towers around town," about which Cabrera had personal knowledge "[f]rom the records." The district court sustained the objection, instructing the State to lay a foundation, and explained that if Cabrera could testify about the contents of the records "based on his experience," the testimony would be allowed.

{15} The State then elicited testimony from Cabrera establishing that he had seen the cell tower reports before and knew how to read them. He explained that the records give the latitude and longitude for each cell tower, and that it did not take any scientific expertise to map the location of the cell tower from those coordinates because a simple Google search "will map it for you." Cabrera then described how a cell phone connects with a cell tower when a wireless customer places a cell phone call. Cabrera explained that each cell tower provides a signal to three separate sectors, each covering 120 degrees of the area around the cell tower, which might provide a general indication of where a cell phone is located when it connects to the cell tower. Cabrera testified that a cell phone will connect to the cell tower with the strongest signal and that the radius of a cell tower's range depends on the terrain and other factors, but the range is generally about one mile in an urban area like Albuquerque. Defense counsel did not object again during Cabrera's testimony, and only asked two questions on cross examination: whether Cabrera knew about the accuracy of the longitude and latitude data provided for the cell towers, and whether there was any way to determine the distance between a cell phone and the cell tower to which it connects. Cabrera explained that the cell tower coordinates were pulled from engineer reports, which he did not produce himself. He also testified that there is no way to determine how far a cell phone is

from a cell tower when it connects to place a call.

{16} The State's second witness, Tan, was an employee of Rocky Mountain Information Network. Tan's job was to create visual depictions of information provided by law enforcement agencies. Tan compiled information from Defendant's cell phone records onto a map that showed the location of the cell towers used for each call using software called "Tracing Trips." Tan created a second map that showed the cell tower and the sector to which each call connected. Tan also created a timeline of incoming and outgoing calls between Defendant's and Kinney's cell phones. Tan did not testify about Defendant's location based on the maps she created. However, the maps showed that the cell signal from Defendant's cell phone was received and recorded by cell towers near the Downtown and Old Town areas of Albuquerque around the time that the APD officers believed Kinney and Frost were killed. Defense counsel did not object at any point during Tan's testimony.

{17} The jury found Defendant guilty of: one count of first-degree murder (willful and deliberate) for the death of Kinney; one count of second-degree murder for the death of Frost; two counts of first-degree felony murder; two counts of shooting at or from a motor vehicle causing great bodily harm; one count of tampering with evidence; one count of breaking and entering; and one count of possession of heroin. After sentencing, the district court entered its judgment, sentence, and commitment. With respect to Kinney's murder, the district court merged the convictions for first-degree murder and felony murder and vacated the conviction for shooting at a motor vehicle on double jeopardy grounds. With respect to the killing of Frost, the district court merged the convictions for second-degree murder and shooting at a motor vehicle with the felony murder conviction. Accordingly, the district court sentenced Defendant to two life sentences, one for each first-degree murder conviction, plus an additional twelve and a half years, including two habitual offender enhancements on the remaining convictions for tampering with evidence, breaking and entering, and possession of heroin.

{18} We address each of Defendant's challenges to his convictions below.

II. DISCUSSION

A. Admission of Cell Phone-Related Testimony

{19} Defendant argues that the district court should not have permitted the State to admit cell phone-related testimony because the State did not qualify Cabrera and Tan as experts. Defendant argues further that the district court erred by admitting the testimony because it entailed specialized knowledge and, thus, a qualified expert witness was necessary. The State responds that the district court did not abuse its discretion in admitting lay testimony by Cabrera and Tan because their cell phone-related testimony did not involve any scientific, technical, or otherwise specialized knowledge.

1. Preservation

{20} As a preliminary matter, we must determine whether the issue was preserved when Defendant filed a motion in limine and objected to Cabrera's testimony at trial. "In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Walters*, 2007-NMSC-050, ¶ 18, 142 N.M. 644, 168 P.3d 1068 (internal quotation marks and citations omitted); *see* Rule 11-103(A)(1)(a)-(b) NMRA ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . if the ruling admits evidence, the party, on the record . . . timely objects or moves to strike, and . . . states the specific ground, unless it was apparent from the context[.]"). "[I]t is the responsibility of counsel at trial to elicit a definitive ruling on an objection from the court." *State v. Lucero*, 1993-NMSC-064, ¶ 11, 116 N.M. 450, 863 P.2d 1071.

{21} Defendant initially objected to the admission of Cabrera and Tan's testimony by filing a motion in limine. The district court did not rule on the motion in limine, but took it under advisement. Then, at trial, Defendant objected to Cabrera's testimony on the basis that it required a qualified expert. The district court sustained Defendant's objection and ordered the State to lay a foundation for Cabrera's "personal knowledge or his experience." Defendant properly preserved the issue with respect to Cabrera's testimony because the objection was made in a timely fashion, the nature of the objection was clear, and the district court issued a ruling upon the objection.

{22} The challenge to Tan's testimony, however, was not preserved. While Defendant asserted a specific objection to Cabrera's trial testimony, and thus preserved the issue, Defendant failed to object to Tan's testimony at trial. As a result, Defendant's objection to Tan's testimony rested solely on the motion in limine, a general objection, on which the district court judge did not rule.

{23} The motion in limine did not apprise either the opposing party or the district court to any specific alleged error in Tan's actual trial testimony. *See State v. Leyva*, 2011-NMSC-009, ¶ 36, 149 N.M. 435, 250 P.3d 861 (concluding that "[w]e require parties to assert the legal principle upon which their claims are based and to develop the facts in the trial court primarily for two reasons: (1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector." (internal quotation marks and citation omitted)). As the Court of Appeals stated in *Kysar v. BP American Production Co.*, 2012-NMCA-036, ¶ 23, 273 P.3d 867, "[a] motion in limine is merely a preliminary determination by a district court regarding the admissibility of evidence. . . . [M]otions in limine are interlocutory orders which are subject to reconsideration by the district court during the trial." (Citations omitted). The Court of Appeals continued that "[i]t is often impossible to make definitive evidentiary rulings prior to trial because admissibility will depend on the state of the evidence at the time of the ruling. As the trial unfolds, . . . it [may be] proper for the district court to revisit, and modify or reverse its prior ruling." *Id.* (internal quotation marks and citation omitted). "[M]otions in limine seeking advance rulings on the admissibility of evidence are fraught with problems because they are necessarily based upon an alleged set of facts rather than the actual testimony which the trial court would have before it at trial in order to make its ruling." *Id.* (alteration in original) (citations omitted). By their very nature, motions in limine do not sufficiently preserve an issue because the rulings on them are subject to change, depending on the nature of the relevant evidence at trial. Thus, Defendant failed to preserve his objection to Tan's testimony.

{24} We review the admission of an unpreserved claim only if the admission of the challenged evidence is plain error and it affects a substantial right. Rule 11-103(E). To constitute plain error, it must give rise to "an injustice that creates grave doubts concerning the validity of the verdict." *State v. Begay*, 1998-NMSC-029, ¶ 21, 125 N.M. 541, 964 P.2d 102 (internal

quotation marks and citation omitted). The admission of Tan's testimony does not rise to a level that creates a grave doubt as to the validity of the verdict. For these reasons, we do not find plain error that would compel us to review the admissibility of Tan's testimony.

2. Admissibility of Cabrera's testimony

{25} The central issue before us is whether Cabrera should have been qualified as an expert to testify regarding cell phone-related evidence. While cell phone-related testimony is increasingly common evidence in trials, *see generally* Aaron Blank, *The Limitations and Admissibility of Using Historical Cellular Site Data To Track the Location of a Cellular Phone*, 18 Rich. J. L. & Tech. 3 (2011); Alexandra Wells, Ping! The Admissibility of Cellular Records To Track Criminal Defendants, 33 St. Louis U. Pub. L. Rev. 487 (2014), the parameters of its admission are a matter of first impression in New Mexico.

{26} "[T]he threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal." *State v. Torres*, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20. "[T]he admission of expert testimony or other scientific evidence is . . . within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion." *State v. Alberico*, 1993-NMSC-047, ¶ 58, 116 N.M. 156, 861 P.2d 192.

{27} We consider Cabrera's trial testimony to fall within two distinct categories. The first category of Cabrera's testimony includes his testimony regarding the contents of two cell phone-related records, namely a call detail report record and a cell tower report listing the location of all cell towers in the city of Albuquerque. The second category includes testimony pertaining to how cell towers operate. We address each in turn.

{28} The State argues that the first category of cell phone-related testimony does not require a qualified expert. Many other jurisdictions have addressed this issue and concluded that information in a cell detail report or map showing the location of cell towers does not require a qualified expert. *See, e.g.*, *Collins v. State*, 172 So. 3d 724, 743 (Miss. 2015) (en banc) (The Mississippi Supreme Court held that testimony that simply describes the information in a call detail report record or "informs the jury as to the location of cell . . . towers" is properly lay testimony when it is based upon the personal observations of the witness.); *State v. Blurton*, 484 S.W.3d 758, 771-72 (Mo. 2016) (en banc) (The Missouri Supreme Court held that a lay witness may testify as to the location of different cell towers "pinged" by the defendant's cell phone throughout the night so long as the State did not try to pinpoint the precise location of the defendant's "cell phone in relation to the cell tower to which [the defendant's] cell phone was connected at the time the calls were made[.]"); *Burnside v. State*, 352 P.3d 627, 636 (Nev. 2015) (en banc) (The Supreme Court of Nevada held that "a map showing the locations of the cell phone sites that handled calls from the cell phones registered to [the defendants] during the time period relevant to the murder," which also included the time of each call and testimony which merely described the locations of cell towers, was not expert testimony.).

{29} In the instant case, we take a different approach. The first category of Cabrera's testimony was not opinion testimony. Rather, Cabrera's testimony regarding the call detail report record and the cell tower report was testimony about the contents and meaning of business records for which he was qualified as a custodian. Under Rule 11-803(6) NMRA, a record of an act, event, condition, opinion, or diagnosis is not excluded by the hearsay rule if:

> (a) the record was made at or near the time by—or from information transmitted by—someone with knowledge,
>
> (b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,
>
> (c) making the record was a regular practice of that activity, and
>
> (d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 11-902(11) or (12) NMRA or with a statute permitting certification.

As a result, neither Rule 11-701 NMRA nor Rule 11-702 needed to be satisfied.

{30} The State laid an adequate evidentiary foundation for Cabrera, the records custodian, to testify to the contents of the business records. Rule 11-803(6). Cabrera testified that the data in the call detail report record was captured by a computer at or near the time of occurrence of a matter set forth in the cell phone records. He further testified that the raw data, documents, and records were created and kept in the usual course of regular business activity. The defense counsel declined to object.

{31} With regard to the admissibility of the business records, under the right-for-any-reason doctrine, we uphold the district court's decision that the contents of the business records were properly admitted as business records. *State v. Vargas*, 2008-NMSC-019, ¶ 8, 143 N.M. 692, 181 P.3d 684 ("Under the right for any reason doctrine, we may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below." (internal quotation marks and citation omitted)). Because Cabrera testified to the contents and meaning of business records for which he was a custodian under Rule 11-803(6), the testimony was admissible.

{32} In addition, the district court could have taken judicial notice of the cell tower report because it included the latitude and longitude of all cell towers in the city of Albuquerque. The latitude and longitude points on a globe or valid map are a proper subject of judicial notice. Rule 11-201(B)(2) NMRA ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned . . . ."); *see also Trujillo v. Dimas*, 1956-NMSC-043, ¶ 42, 61 N.M. 235, 297 P.2d 1060 (holding that the district court could take judicial notice of the location of a county and the location of the New Mexico Principal Meridian in an action involving the validity of tax sales); *Carlsbad Broad. Corp. v. Bureau of Revenue*, 1947-NMSC-047, ¶ 8, 51 N.M. 360, 184 P.2d 434 (taking notice that "Texas state lines are about 70 miles east and 30 miles south of Carlsbad," New Mexico); *United States v. Piggie*, 622 F.2d 486, 488 (10th Cir. 1980) ("Geography has long been peculiarly susceptible to judicial notice for the obvious reason that geographic locations are facts which are not generally controversial . . . ."); *Rozelle v. Barnard*, 1963-NMSC-101, ¶ 2, 72 N.M. 182, 382 P.2d 180 ("This court, since early territorial days, has expressed the view that courts will take judicial notice of matters of common and general knowledge.").

{33} Had the State limited Cabrera's testimony to just the call detail report record

and the cell tower report, we would find no error. However, Cabrera proceeded to testify about how cell towers operate and interact with cell signals to locate the general origin of a cell phone call. This second category of testimony requires the "scientific, technical, or other specialized knowledge" to assist "the trier of fact to understand the evidence or determine a fact in issue." Rule 11-702. "This Court has discerned three prerequisites in Rule 11-702 for the admission of expert testimony: (1) experts must be qualified; (2) their testimony must assist the trier of fact; and (3) their testimony must be limited to the area of scientific, technical, or other specialized knowledge in which they are qualified." *See Torres*, 1999-NMSC-010, ¶ 23.

{34} In essence, a cell phone functions as a two-way radio that continually transmits and collects signals from cell towers throughout a cell network. *United States v. Hill*, 818 F.3d 289, 295 (7th Cir. 2016); *see* Blank, *supra*, at **5-6. Each cell tower covers a geographic area, and the connection between the cell phone and the cell tower can be influenced by a number of factors, including "[t]he number of antennas operating on the cell [tower], the height of the antennas, topography of the surrounding land, and obstructions (both natural and man-made)." Blank, *supra*, at *5. When a call is made, the cell phone typically connects to the cell tower with the strongest signal. *Id.* at *6. However, cell towers often overlap in coverage so that a single cell phone call might simultaneously connect to more than one tower. *Id.* Although the vicinity of the cell phone user is a substantial factor in determining the cell tower with which the cell phone connects, the geography, topography, angle and number of antennas on the cell tower sites, and characteristics of the specific phone impact the analysis. *Id.* at *7.

{35} In our view, understanding how cell towers operate requires a duly qualified expert to explain the technical nature of the many variables that influence how cell tower signals connect with cell phones. Rule 11-702. To conclude otherwise would subvert the reliability requirements of our rules of evidence. *See Torres*, 1999-NMSC-010, ¶ 42 (noting that without the proper foundation establishing the knowledge, skill, experience, training, or education of the witness, the reliability of this type of testimony is undermined). Qualifying an expert ensures that the testimony "will help the trier of fact to understand the evidence or to determine a fact in issue," Rule 11-702, rather than "confus[e] the issues [or] mislead[] the jury." Rule 11-403 NMRA.

{36} Cabrera's testimony regarding how cell towers operate required a technical analysis of the many factors that influence the strength of cell signals and the towers' connection with cell phones in order to ascertain the general location of Defendant's phone at a particular point in time. The State failed to establish that Cabrera had the specialized knowledge and experience to reliably explain how the cell tower operated in determining the general location of Defendant's cell phone. This type of cell phone-related information is highly technical and requires specialized knowledge of a qualified expert under Rule 11-702.

{37} Other jurisdictions have also determined that explaining how cell towers record and receive signals is clearly within the realm of expert testimony. *United States v. Yeley-Davis*, 632 F.3d 673, 684 (10th Cir. 2011); *see also Hill*, 818 F.3d at 296 (concluding that "statements about how cell . . . towers operate . . . fit[] easily into the category of expert testimony"). Courts have explicitly held that pinpointing a cell phone in relation to a cell tower involves "specialized knowledge not readily accessible to any ordinary person." *Yeley-Davis*, 632 F.3d at 684. The Nevada Supreme Court determined that testimony explaining that cell signals usually transmit from the nearest cell tower, except when the site is too busy or there is an obstruction, was expert testimony. *Burnside*, 352 P.3d at 636-37. Similarly, the Missouri Court of Appeals concluded that expert testimony is required to locate "the area in which [the defendant's cell] phone must have been to have connected to a particular cell site—i.e., to proffer testimony actually probative of whether [the defendant] was in one area rather than the other—required analysis of many variables that influence cell site signal strength." *State v. Patton*, 419 S.W.3d 125, 132 (Mo. Ct. App. 2013).

{38} It is incumbent upon the district court, as gatekeeper, to ensure the reliability of the testimony presented to the jury. We therefore conclude that Cabrera should have been identified and properly qualified as an expert before testifying about how cell towers interact with cell signals to identify the location of a cell phone call because this information required specialized knowledge. Therefore, because the State did not identify Cabrera as a qualified expert, the district court did not assess the evidentiary reliability of his testimony. As a result, the district court erred in admitting this testimony at trial.

{39} "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 (citations omitted). "We now analyze whether this evidentiary error was merely harmless, in which case we could overlook it, or prejudicial, requiring reversal." *State v. Leyba*, 2012-NMSC-037, ¶ 23, 289 P.3d 1215.

{40} "[W]e apply the non-constitutional error standard for harmless error" because admitting the cell tower evidence was an evidentiary error. *Id.* ¶ 24; *see also State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110. While a constitutional error requires only a reasonable possibility of prejudice for reversal, "[a] non-constitutional error requires reversal when there is a 'reasonable *probability* that misconduct contributed to the [defendant's] conviction.' " *Leyba*, 2012-NMSC-037, ¶ 24 (second alteration in original) (emphasis added) (quoting *Tollardo*, 2012-NMSC-008, ¶ 31). To determine "the probable effect of an evidentiary error," we assess all of the circumstances surrounding the error. *Leyba*, 2012-NMSC-037, ¶ 24 (internal quotation marks and citation omitted). In doing so, "[w]e examine the error itself, including the source of the error and the emphasis placed on the error at trial." *Id.* "To put the error in context, we often look at the other, non-objectionable evidence of guilt . . . to evaluate what role the error played at trial." *Id.* We conduct this analysis on a case-by-case basis. *Id.*

{41} Although the State used Cabrera's testimony to discredit Defendant's statements to the APD about his location on the night of the murders, Tan's testimony, to which there was no objection, summarized the information contained within the call detail report record and the cell tower report produced by Cabrera to show the longitude and latitude of cell phone towers on a map. Under the non-constitutional standard for harmless error, we conclude that it was harmless error in admitting Cabrera's testimony regarding how cell towers operate because the call detail report record and the cell tower report which were used to create the maps were properly admitted. Additionally, the calls between Defendant and Kinney are inculpatory, as are the location of the towers when these calls were placed. It is also harmless error

with respect to Defendant's convictions for tampering with evidence and breaking and entering because Cabrera's testimony did not relate to Defendant's convictions for conduct occurring at a different time and location. As a result, Defendant failed to establish that there is a reasonable probability that the jury would have had a reasonable doubt concerning his guilt as a result.

B. Sufficiency of the Evidence

{42} Defendant argues that there was insufficient evidence to support his convictions. "In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Garcia*, 1992-NMSC-048, ¶ 26, 114 N.M. 269, 837 P.2d 862 (alteration in original) (internal quotation marks and citation omitted).

1. Defendant's convictions for first-degree murder

{43} Defendant's arguments concerning the sufficiency of the evidence to support his convictions for the crimes committed at Tiguex Park are based on what he views as the State's failure to prove identity; that is, that Defendant was the person who committed the murders. Defendant does not argue that there was insufficient evidence to prove the other elements of the crime.

{44} Accordingly, we review the evidence to determine whether a rational jury could find that Defendant perpetrated the murders. The cell phone records show that Defendant and Kinney were in contact on the night of the murders. As the State points out, the text messages from Kinney to Defendant show that Kinney was upset with Defendant, which could support an inference of a conflict between the two. The map prepared by Tan shows that Defendant's cell phone "pinged" a cell tower in the Old Town area around 4:00 a.m., the approximate time when the murders were believed to have occurred. Additionally, because we consider even erroneously admitted evidence, *see Post*, 1989-NMCA-090, ¶ 24, we note that the jury could have inferred that Defendant was in the area at that time based on Cabrera's testimony about how a cell phone connects to the cell tower with the strongest signal. Further, a witness reported seeing Defendant with a firearm only a few hours later in the parking lot of the restaurant where Montoya worked. And, although Defendant told Detective Anderson that he stayed home all night and fell asleep by 1:00 a.m. or 2:00 a.m., his phone records show that he made and answered cell phone calls to and from Kinney and others much later than 2:00 a.m. *See State v. Flores*, 2010-NMSC-002, ¶ 23, 147 N.M. 542, 226 P.3d 641 ("[E]vidence of . . . an attempt to deceive the police may prove consciousness of guilt." (internal quotation marks and citations omitted)). This evidence provides a sufficient basis upon which a jury could find that Defendant was the person who committed the murders.

2. Defendant's convictions for tampering with evidence and breaking and entering

{45} Defendant argues under *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982 and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1, that there was insufficient evidence to support his convictions for tampering with evidence and breaking and entering.

{46} To find Defendant guilty of tampering with evidence, the jury must have found beyond a reasonable doubt that (1) "[t]he defendant hid a firearm," and that (2) "[b]y doing so, the defendant intended to prevent the apprehension, prosecution or conviction of Carlos Carrillo." *See* UJI 14-2241 NMRA. At trial, a witness testified that she was "[a]bsolutely positive" she saw a gun in Defendant's hand when he broke into the car at Golden Pride. Defendant then fled on foot, and when police stopped him soon thereafter, he did not have a gun. Though Defendant told police that he used his hands to break the window, the jury could logically infer that he had a gun, which he disposed of on the way from Golden Pride, and then lied about it to the police. Further, because he had been seen committing a crime (breaking into the car), the jury could reasonably infer that Defendant hid the gun to prevent apprehension, prosecution, or conviction of that crime.

{47} We note that *State v. Silva* requires that evidence showing that a defendant had a gun and used that gun to commit a crime, combined with a showing that the gun was then removed from the scene and never recovered, is insufficient to show that the defendant had the intent required by NMSA 1978, § 30-22-5(A) (2003). 2008-NMSC-051, ¶¶ 17-19, 144 N.M. 815, 192 P.3d 1192, *holding modified by State v. Guerra*, 2012-NMSC-027, ¶¶ 12-16, 284 P.3d 1076. The *Silva* Court held that the State must provide either direct evidence of a specific intent to tamper or evidence of an overt act from which the jury could infer that intent. 2008-NMSC-051, ¶ 18. Here, the State's case is supported by a witness's testimony that she saw Defendant with a gun after the murders were committed, that Defendant left the scene and was found shortly thereafter with no gun, and that Defendant lied about using his hand to break the window. This evidence distinguishes this case from those in which the jury was "effectively asked . . . to speculate that an overt act of . . . hiding [the murder weapon] had taken place, *based solely on the fact that such evidence was never found*." *Id.* ¶ 19 (alteration and second omission in original) (emphasis added) (internal quotation marks and citation omitted). There was sufficient evidence to support Defendant's conviction for tampering with evidence.

{48} Defendant also contends that there was insufficient evidence to support his conviction for breaking and entering because he entered to retrieve his own property from the vehicle. To find Defendant guilty of breaking and entering, the jury was required to find: (1) "[t]he defendant entered a 2006 Chevrolet 4-door belonging to Shantell Montoya without permission" and (2) "[t]he entry was obtained by the breaking of the vehicle window." *See* UJI 14-1410 NMRA. As the committee commentary to UJI 14-1410 explains, "New Mexico's breaking and entering statute . . . requires no intent to commit a crime upon entering, only the breaking and entering need be shown." Therefore, it is immaterial that Defendant was breaking in to retrieve his own property. A witness from Golden Pride testified that she saw him break the car window and rummage around inside the car. Further, Montoya testified that she was mad at him for breaking into her car, supporting the inference that he did not have permission. Thus, there was sufficient evidence to support the conviction for breaking and entering.

C. Alleged Prosecutorial Misconduct

{49} Defendant argues under *Franklin* and *Boyer* that "the State's repeated attempts to admit into evidence the statements by Mario Chavez and . . . Montoya was prosecutorial misconduct." The State responds that although defense counsel

objected at various points to the testimony of witnesses Mario Chavez (Chavez) and Montoya, the relief requested at trial was a limiting instruction, which is granted. Thus, the State argues, there was no basis for Defendant's prosecutorial misconduct claim because the limiting instruction cured any potential prejudice resulting from the alleged misconduct. Further, the State argues, Defendant failed to preserve his claim of prosecutorial misconduct, and, thus, it is not properly before the Court. We agree with the State.

{50} "When an issue of prosecutorial misconduct is preserved by a timely objection at trial, we review the district court's ruling for abuse of discretion." *State v. Paiz*, 2006-NMCA-144, ¶ 53, 140 N.M. 815, 149 P.3d 579. However, "[i]f no objection was raised, our review is limited to fundamental error." *Id*. "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (internal quotation marks and citations omitted).

{51} Importantly, Defendant made no claim of prosecutorial misconduct at trial. As a result, the issue was not preserved. Therefore, our review is limited to fundamental error.

{52} Defendant claims that the State introduced evidence in disregard of a district court order excluding the testimony of Chavez and Montoya. However, the pages to which Defendant cites in referring to a motion in limine to exclude such evidence are actually a notice of a trial status conference and a pretrial scheduling order. In fact, there is no motion in limine to exclude the testimony of Chavez or Montoya anywhere in the record. Thus, the State did not attempt to admit any evidence which had been previously excluded by the district court, and therefore, there was no prosecutorial misconduct. As the State points out, at the close of trial, defense counsel requested, and the jury received, a limiting instruction as to the scope of the evidence. *See State v. Trevino*, 1991-NMCA-085, ¶ 20, 113 N.M. 804, 833 P.2d 1170 ("Defendant may not complain on appeal when the specific relief requested was granted."). We conclude that there was no prosecutorial misconduct and no error upon which to grant relief.

D. Cumulative Error

{53} Finally, Defendant argues that the cumulative errors alleged render the verdict inherently unreliable."The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so serious in the aggregate that they cumulatively deprive the defendant of a fair trial." *State v. Ortega*, 2014-NMSC-017, ¶ 53, 327 P.3d 1076 (internal quotation marks and citation omitted). "The doctrine of cumulative error is to be strictly applied, and . . . cannot [be] invoke[d] if the record as a whole demonstrates that [the defendant] received a fair trial." *State v. Samora*, 2013-NMSC-038, ¶ 28, 307 P.3d 328 (alterations and omission in original) (internal quotation marks and citation omitted). Because we find only one error at trial, an error which was harmless, we reject Defendant's cumulative error claim, and thus, the doctrine of cumulative error does not entitle Defendant to further relief. We therefore affirm his convictions.

III. CONCLUSION

{54} For the foregoing reasons, we affirm Defendant's convictions.

{55} IT IS SO ORDERED.

BARBARA J. VIGIL, Justice

WE CONCUR:
JUDITH K. NAKAMURA,
Chief Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CHARLES W. DANIELS, Justice

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