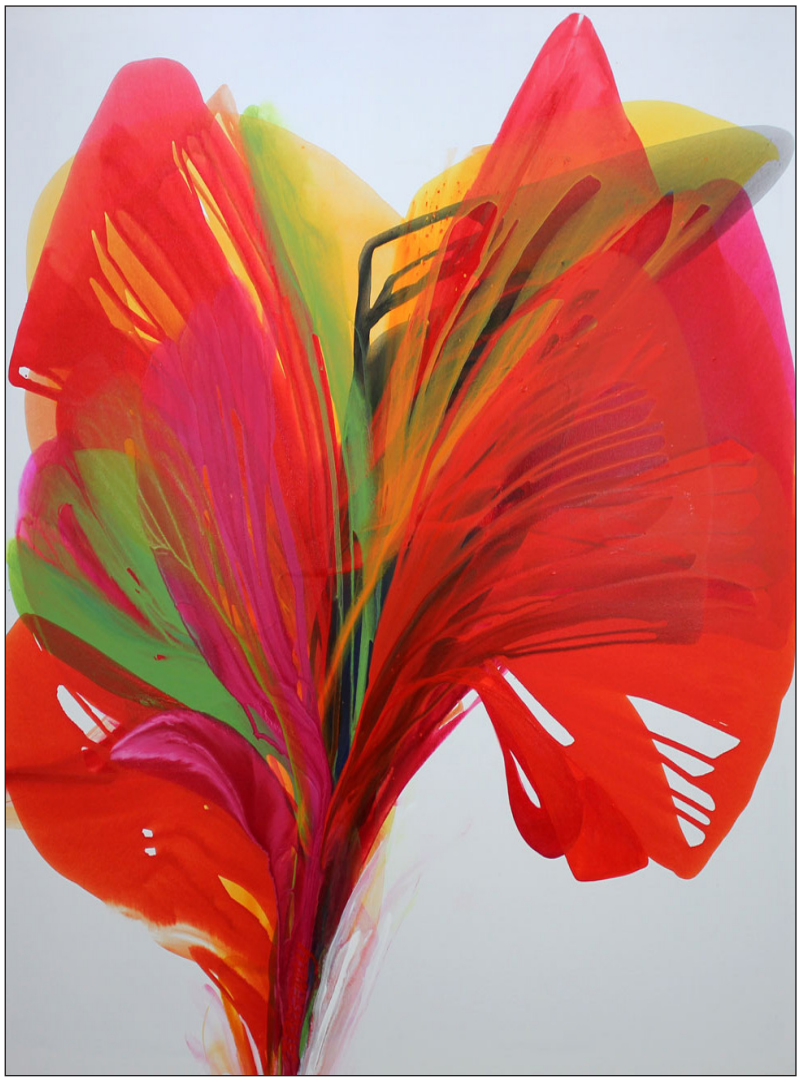
Official Publication of the State Bar of New Mexico

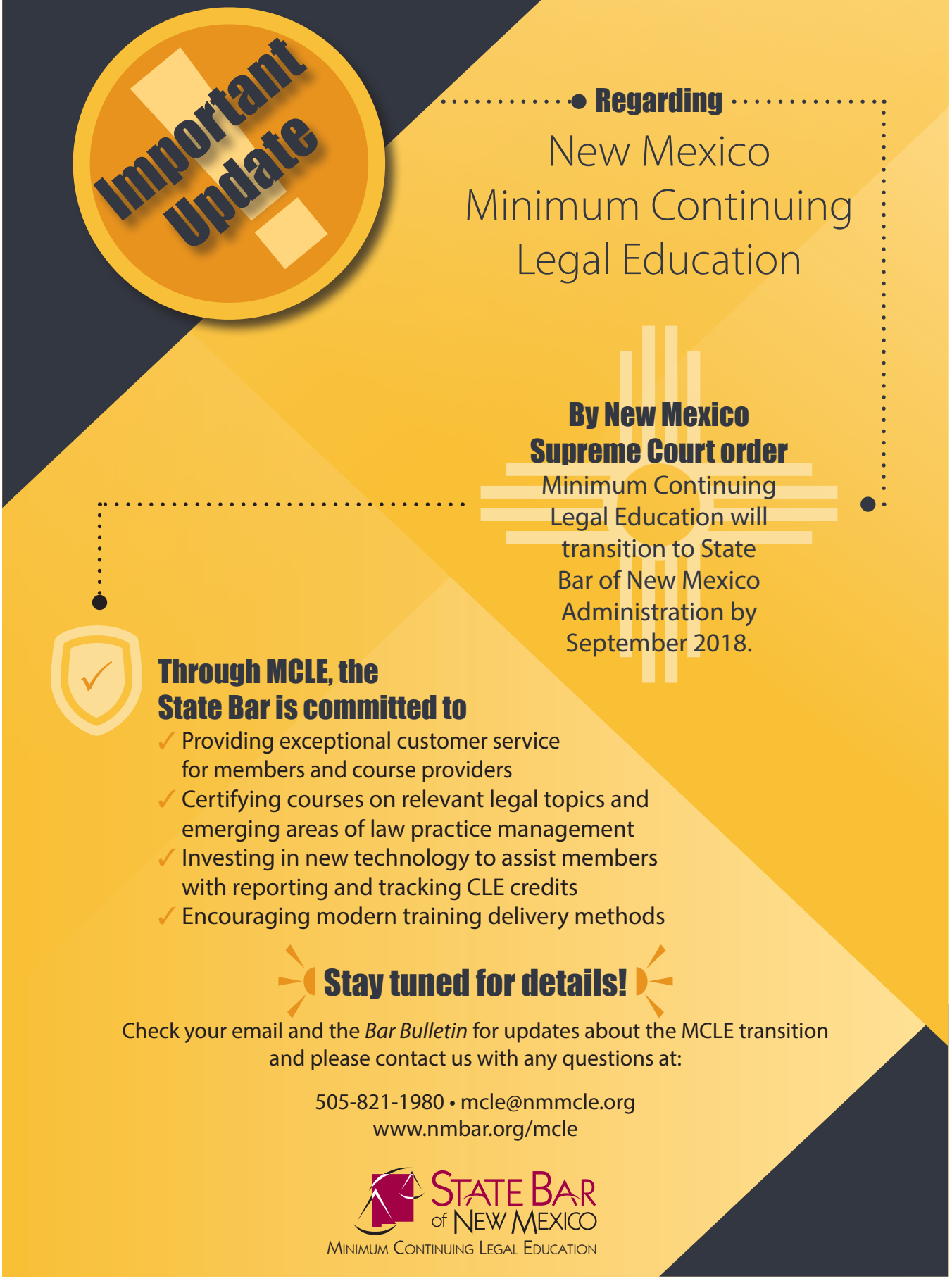
# Bar Bulletin

July 4, 2018 • Volume 57, No. 27



*A Little More Red,* by Bette Ridgeway Ridgewaystudio.com

## Inside This Issue


Important Update
Regarding
New Mexico Minimum Continuing Legal Education
By New Mexico Supreme Court order
Minimum Continuing Legal Education will transition to State Bar of New Mexico Administration by September 2018.
Through MCLE, the State Bar is committed to
✓ Providing exceptional customer service for members and course providers
✓ Certifying courses on relevant legal topics and emerging areas of law practice management
✓ Investing in new technology to assist members with reporting and tracking CLE credits
✓ Encouraging modern training delivery methods
Stay tuned for details!
Check your email and the Bar Bulletin for updates about the MCLE transition and please contact us with any questions at:
505-821-1980 • mcle@nmmcle.org
www.nmbar.org/mcle
State Bar of New Mexico
Minimum Continuing Legal Education

STATE BAR of NEW MEXICO

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**10**
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Noon, teleconference

**11**
**Animal Law Section Board**
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**11**
**Employment and Labor Law Section Board**
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**11**
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**12**
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**12**
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4 p.m., State Bar Center

## Workshops and Legal Clinics

### July

**6**
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10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

**11**
**Divorce Options Workshop**
6–8 p.m., State Bar Center, Albuquerque, 505-797-6022

**13**
**Civil Legal Clinic**
10 a.m.–1 p.m., Bernalillo County Metropolitan Court, Albuquerque, 505-841-9817

**18**
**Family Law Clinic**
10 a.m.–1 p.m., Second Judicial District Court, Albuquerque, 1-877-266-9861

**18**
**Common Legal Issues for Senior Citizens Workshop Presentation**
10–11:15 a.m., Clayton Senior Citizens Center, Clayton, 1-800-876-6657

**19**
**Common Legal Issues for Senior Citizens Workshop Presentation**
10–11:15 a.m., Raton Senior Center, Raton, 1-800-876-6657

**About Cover Image and Artist**: In her four decade career Bette Ridgeway has exhibited her work globally with more than 80 museums, universities and galleries, including Palais Royale, Paris and Embassy of Madagascar. Multiple prestigious awards include Top 60 Contemporary Masters, Leonardo DaVinci Prize and Oxford University Alumni Prize at Chianciano Art Museum, Tuscany, Italy. Mayo Clinic and Federal Reserve Bank are amongst Ridgeway's permanent public placements, in addition to countless important private collections. Many books and publications have featured her work, among them: *International Contemporary Masters and 100 Famous Contemporary Artists*. Ridgeway has also penned several books about her art and process.

# Notices

## Court News

### First Judicial District Court

#### Notice to Attorneys and Public

Effective June 11, a mass reassignment of all closed guardianship and conservatorship cases previously assigned to any judge in the First Judicial District Court occurred pursuant to NMSC Rule 23-109, the Chief Judge Rule. The First Judicial District Court will review all guardianship and conservatorship cases to determine whether the case is "active" and requires ongoing monitoring by the newly assigned judge. 1251 cases will be assigned to each Civil Division judge for review. Division I, Hon. Francis Mathew 1251 cases, from Judge Joe Cruz Castellano Jr., Judge Timothy L. Garcia, Judge Jennifer L. Attrep, Judge James A. Hall, Judge Steve Herrera, Judge Art Encinias and Judge Roger L. Copple. Division II, Hon. Gregory Shaffer 1251 cases from Judge Daniel A. Sanchez, Judge Sheri Raphaelson, Judge Stephen Pfeffer, Judge Petra Jimenez Maes, Judge Bruce Kaufman and Judge Steve Herrera. Division III, Hon. Raymond Ortiz 1251 cases from Judge Patricio M. Serna, Judge Tony Scarborough and Judge Daniel A. Sanchez. Division VI, Hon. David Thomson 1251 cases from Judge Barbara J. Vigil, Judge Michael E. Vigil, Judge Carol Vigil, Judge Sarah M. Singleton, Judge Patricio M. Serna and Judge Tony Scarborough. Parties who have not previously exercised their right to challenge or excuse will have ten (10) days from July 11, to challenge or excuse the newly assigned judge pursuant to Rule 1-088.1.

### Second Judicial District Court

#### Destruction of Tapes

In accordance with 1.17.230 NMAC, Section 1.17.230.502, taped proceedings on domestic matters cases in the range of cases filed in 1977 through 1988 will be destroyed. To review a comprehensive list of case numbers and party names, or attorneys who have cases with proceedings on tape and wish to have duplicates made, should verify tape information with the Special Services Division 505-841-6717 from 8 a.m.-5 p.m. Monday-Friday. Aforementioned tapes will be destroyed after September 1, 2018.

## *Professionalism Tip*

**With respect to opposing parties and their counsel:**

I will not serve motions and pleadings that will unfairly limit the other party's opportunity to respond.

### Fifth Judicial District Court
### Governor Susana Martinez

#### Appoints Michael Stone

Gov. Susana Martinez has appointed Michael H. Stone to fill the judgeship vacancy in Lea County, Division VII. Effective June 13, a mass reassignment of cases occurred pursuant to NMSC Rule 1-088.1. Judge Michael H. Stone was assigned all cases previously assigned to Judge Gary L. Clingman and/or Division VII of Lea County. Pursuant to Supreme Court Rule 1-088.1, parties who have not yet exercised a peremptory excusal will have 10 days from July 5, to excuse Judge Michael H. Stone.

### Sixth Judicial District Court

#### Judicial Notice of Resignation

The Sixth Judicial District Court announces the resignation of the Hon. Timothy L. Aldrich effective Aug. 10. A Judicial Nominating Commission will be convened in Silver City, New Mexico in August/September to interview applicants for the vacancy. Further information on the application process can be found on the Judicial Selection website (http://lawschool.unm.edu/judsel/index.php). Updates regarding the vacancy and the news release will be posted soon.

## State Bar News

### Appellate Practice Section

#### Luncheon with Judge Gallegos

Join the Appellate Practice Section for a brown bag lunch at noon, July 13, at the State Bar Center with guest Judge Daniel Gallegos of the New Mexico Court of Appeals. The lunch is informal and is intended to create an opportunity for appellate practitioners to learn more about the work of the Court. Those attending are encouraged to bring their own "brown bag" lunch. R.S.V.P. to Carmela Starace at cstarace@icloud.com.

### Children's Law Section

#### Tools to Stabilize and Protect Immigrant Clients

Come learn about tools to stabilize and protect immigrant clients and their families who are at risk of deportation during a noon knowledge presentation on July 13, in the Chama Room at Juvenile Court. Jessica Martin will introduce attendees to a holistic approach to serving clients who are immigrants which involves screening for basic forms of immigration relief and educating clients on their rights in the event of contact with or apprehension by Immigration and Customs Enforcement. Guests are invited to bring their own brown-bag lunch.

### Committee on Women and the Legal Profession

#### Professional Clothing Closet

Does your closet need cleaning? The Committee on Women sponsors a professional clothing closet, which provides professional attire to State Bar Members, law students, paralegals, and clients free of charge. The Committee graciously accepts gently used, dry cleaned and dark colored professional attire. All clothing should be court room and interview appropriate. Visit www.nmbar.org/CommitteeOnWomen > Initiatives > Professional Clothing Closet for donation locations and for information about visiting the closet.

### Legal Resource for the Elderly Program

#### Three Upcoming Legal Workshops

The State Bar of New Mexico's Legal Resources for the Elderly Program (LREP) is offering three free legal workshops in Clayton July 18, 10 a.m.-1 p.m., at Clayton Senior Citizens Center, Raton July 19, 10 a.m.-1 p.m., at Raton Senior Center and Roswell July 26, 10 a.m.-1 p.m., at Chaves County Joy Center. Call LREP at 800-876-6657 for more information.

## Legal Services and Programs Committee

### Committee Appointments

The Legal Services and Programs Committee seeks statewide members for appointment to the Committee. The Committee meets approximately five times year (in-person and by teleconference) and coordinates the annual New Mexico high school student Breaking Good Video Contest, administers Equal Justice Conference attendance stipends and organizes and staffs a tech legal fair in coordination with the Bernalillo County Metro Court Civil Legal Clinic held on the second Friday of each month in order to provide free legal advice to residents across the state. Committee membership is open to attorneys, legal service provider staff, paralegals, and law student members. Visit https://form.jotform.com/sbnm/CommitteeAppointments to express interest in serving on the LSAP Committee.

## New Mexico Judges and Lawyers Assistance Program

### Attorney Support Groups

- July 9, 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 available. Dial 1-866-640-4044 and enter code 7976003#.
- July 16, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- August 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)

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

### Committee Meeting

The New Mexico Judges and Lawyers Assistance Program will be having its next quarterly committee meeting on Thursday, July 12, 3-5 p.m. at the State Bar Center. The first hour of the meeting will be current business and getting ready for the State Bar Annual Conference. The second hour of the meeting, 4-5 p.m., will be a Thank You! to current members and a Connection! for those currently being monitored or anybody needing support. If you are in any way, shape or form connected to or curious about the NMJLAP, join us in the lobby and patio of the State Bar for a Mocktail happy hour with delicious food and drinks from 4-5 p.m., Thursday, July 12. If you are struggling with life and not sure where to turn for a listening and supportive body, join us and meet people in your profession that have been there and are happy to connect with you. For questions, call Pam Moore at 505-797-6003 office or 505-228-1948 mobile.

## Young Lawyers Division

### Homeless Legal Clinics in Albuquerque and Santa Fe

The Homeless Legal Clinic is open in Albuquerque from 9-11 a.m. (orientation at 8:30 a.m.), on the third Thursday of each month, at Albuquerque Healthcare for the Homeless, located at 1220 First Street NW and in Santa Fe from 10 a.m.-noon each Tuesday, at the St. Elizabeth Shelter, located at 804 Alarid Street in Santa Fe. Volunteer attorneys are needed to staff the clinics, serve as an "information referral resource" and join the pro bono referral list. For those staffing the clinic or providing other services, a trained attorney will assist you until you feel comfortable by yourself. Even if you are a new lawyer, you will be surprised at how much you have to offer these clients and how your help can make such a major difference in their lives. Visit www.nmbar.org/HLC to volunteer. Direct questions to YLD Region 2 Director Kaitlyn Luck at luck.kaitlyn@gmail.com.

### Santa Fe Wills for Heroes

The YLD seeks volunteer attorneys and non-attorneys for a Wills for Heroes event for Santa Fe first-responders from 9 a.m.-12:30 p.m., July 21, at the Santa Fe County District Attorney's Office located at 327 Sandoval St. #2 in Santa Fe. Volunteers should arrive at 8:30 a.m. for breakfast and orientation. Attorneys will provide free wills, healthcare and financial powers of attorney and advanced medical directives for first responders. Paralegal and law student volunteers are needed to serve at witnesses and notaries. Visit www.nmbar.org/WillsForHeroes to volunteer.


## 2018 Annual Meeting

### Resolutions and Motions

Resolutions and motions will be heard at 1 p.m., Aug. 9, at the opening of the State Bar of New Mexico 2018 Annual Meeting at the Hyatt Regency Tamaya Resort & Spa, Santa Ana Pueblo. To be presented for consideration, resolutions or motions must be submitted in writing by July 9 to Executive Director Richard Spinello, PO Box 92860, Albuquerque, NM 87199; fax to 505-828-3765; or email rspinello@nmbar.org.

## UNM School of Law

### Law Library Hours

**Summer 2018 Hours**
**May 12-Aug. 19**

*Building and 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. |

## Other Bars

### New Mexico Defense Lawyers Association

### Save the Date - Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17, at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Registration will be available online at nmdla.org in July. For more information contact nmdefense@nmdla.org.

### Nominations for NMDLA Annual Awards

The New Mexico Defense Lawyers Association is now accepting nominations for the 2018 NMDLA Outstanding Civil Defense Lawyer and the 2018 NMDLA Young Lawyer of the Year awards. Nomination forms are available on line at www.nmdla.org or by contacting NMDLA at nmdefense@nmdla.org. Deadline for nominations is July 27. The awards will be presented at the NMDLA Annual Meeting Luncheon on September 28th, at the Hotel Andaluz, in Downtown Albuquerque.

## Albuquerque Bar Association

### Membership Luncheon

The Albuquerque Bar Association will be holding its July Luncheon on July 10, from noon-1 p.m. at the Hyatt Regency Albuquerque 330 Tijeras NW, Albuquerque, NM, 87102. This Lunch will feature a forum of the major party candidates for the 1st Congressional District. The Lunch is $30.00 for members of the Albuquerque Bar Association and $40.00 for non-members. There is a $5.00 charge for walk-ups and day-of registration. To register please contact the Albuquerque Bar Association's interim executive director Deborah Chavez at dchavez@vancechavez.com or 505-842-6626 or send a check to:
Albuquerque Bar Association PO Box 40, Albuquerque NM 87103

## First Judicial District Bar Association

### Lawyer Well-Being CLE

Join us for a seminar on July 13, from 1-4:45 p.m., to learn skills for lawyer well-being, resilience, and better professionalism while earning 3.5 Ethics CLEs (approval pending). Presenter and attorney Hallie N. Love, national speaker on lawyer well-being topics, is both a licensed and certified positive psychology instructor with the Whole Being Institute (founded by former Harvard professor Dr. Tal Ben- Shahar), a therapist certified by the International Association of Yoga Therapists, an Integrative Restoration (iRest®) mindfulness instructor, and co-author of *Yoga for Lawyers – Mind-Body Techniques to Feel Better All the Time,* published by the ABA. Part I of the seminar will focus on interactive exercises using a synthesis of leading-edge neuroscience and mindfulness techniques, and will also include a mind-body trial preparation strategy attorneys can teach their clients and witnesses to help them be anxiety-resistant. Part II will include interactive Positive Psychology exercises to build overall well-being proven to increase resilience and optimism, meaning and purpose, better work-life balance, and overall life satisfaction. The seminar will be hosted at the Walther Bennett Mayo Honeycutt P.C. firm in Santa Fe. Cost is only $50 for First Judicial District Bar Association members and $60 for non-members until July 6, when the cost increases to $60 for members and $70 for non-members. Because there is limited space, contact Michele Catanach michelec@wbmhlaw.com with your name and bar number to reserve your place.

## American Bar Association

### Conquering Adversity and the Imposter Syndrome

The ABA Commission on Lawyer Assistance Programs presents a free CLE webinar, "The Solo/Small Firm Challenge: Conquering Adversity and the Imposter Syndrome" at 1 p.m. ET on July 16. Imposter syndrome, or the feeling of phoniness in people who believe they are not intelligent, capable or creative despite evidence of high achievement, creates a perfect storm of insecurity, anxiety and stress. Lawyers, especially those in solo practices or small firms, can become paralyzed by these thoughts. This program will discuss what imposter syndrome is, how it can affect competence and judgment as a lawyer and strategies for beginning to overcome it. Register now at ambar.org/impostersyndrome.

# Legal Education

## July

**6** **Baskets and Escrow in Business Transactions**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**10** **Selection and Preparation of Expert Witnesses in Litigation**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**11** **Protecting Subtenant Clients in Leasing**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**17** **Roadmap of VC and Angel, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**18** **Disaster Planning and Network Security for a Law Firm**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

**18** **Roadmap of VC and Angel, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**19** **Ethics for Business Lawyers**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**20** **Changing Minds Inside and Out of the Courtroom**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

**20** **2018 Family and Medical Leave Update**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**20** **Trial Know-How! (The Rush to Judgement) 2017 Trial Practice Section Annual Institute**
4.0 G, 2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**20** **The Duty to Consult with Tribal Governments: Law, Practice and Best Practices (2017)**
2.3 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

**20** **Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics (2017)**
3.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**24** **8 Mistakes Experienced Contract Drafters Usually Make**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

**24** **Due Diligence in Commercial Real Estate Transaction**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**25** **Estate and Gift Tax Audits**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**26** **Mediating with a Party with a Mental Illness/Disability**
2.0 EP
Live Seminar/ Teleseminar
Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**27** **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**27** **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**27** **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**31** **Lawyer Ethics and Disputes with Clients**
1.0 EP
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

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# Women's Bar Association Celebrates *Excellence and Advocacy*

*By Evann Kleinschmidt*


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On May 10, the New Mexico Women's Bar Association honored three women and one law firm for extraordinary contributions to the causes of women in the legal profession. Judge Sharon Walton received the 2018 Henrietta Pettijohn Award for her lifetime of work supporting women in the legal field. The award is named after Henrietta Hume Pettijohn Buck who, in 1892, became the first woman admitted to the New Mexico bar. Judge Walton was appointed to the Metropolitan Court in 1999 and has been involved in various professional organizations and is active in the New Mexico community.

Sarita Nair received the Exemplary Service Award for her outstanding service in the public sector and her achievements that serve as an example to all women. Nair was recently appointed chief administrative officer by Albuquerque Mayor Tim Keller.

Emma O'Sullivan received the Outstanding Young Attorney Award for her commitment to underserved populations through her work at the Santa Fe Dreamers' Project. She graduated from the UNM School of Law in 2012.

The law firm of Little Gilman-Tepper & Batley, PA, was awarded the 2018 Supporting Women in the Law Award for a long history of inclusivity for a welcoming and accommodating culture for women equally committed to family and their careers.

The Women's Bar Association's mission is to provide resources to empower women in the legal profession. Learn more at www.nmwba.org.

For more photos of the event,
visit **www.nmbar.org/photos.**

*1. Judge M. Monica Zamora (right) presented the Pettijohn Award to Judge Sharon Walton (left); 2. Sarita Nair (right) with her mother; 3. Women's Bar Association Board of Directors; 4. Members of the Little Gilman-Tepper & Batley, PA law firm present at the ceremony: Kelsy Montoya (paralegal), Sheryl Saavedra (attorney), Lauren Riley (law clerk), Jan Gilman-Tepper (attorney), Donna Baslee (attorney) and Randy Powers, Jr. (attorney); 5. Emma O'Sullivan with her family; 6. Chief Judge Edward Benavidez, Judge Linda Rogers, Camille Baca, Diana Palacios, Judge Sharon D. Walton, Robert Padilla, Judge Maria Dominguez, Libbye Alvarado*

The Rodey Law Firm has achieved top ranking in *Chambers* USA–America's Leading Lawyers for Business-2018. Rodey received Chambers' highest ranking in the following areas of law: Corporate/Commercial; Labor & Employment; Litigation: General Commercial; and Real Estate. Chambers bases its rankings on technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence, commitment, and other qualities most valued by the client. Chambers honored these Rodey lawyers with its highest designation of "Leaders in Their Field" based on their experience and expertise:

**Mark K. Adams** - Environment, Natural Resources & Regulated Industries; Water Law
**Rick Beitler** - Litigation: Medical Malpractice & Insurance Defense
**Perry E. Bendicksen III** – Corporate/Commercial
**David P. Buchholtz** – Corporate/Commercial
**David W. Bunting** – Litigation: General Commercial
**Jeffrey Croasdell** – Litigation: General Commercial
**Nelson Franse** - Litigation: General Commercial; Medical Malpractice & Insurance Defense
**Catherine T. Goldberg** - Real Estate
**Scott D. Gordon** - Labor & Employment
**Alan Hall** - Corporate/Commercial
**Bruce Hall** - Litigation: General Commercial
**Justin A. Horwitz** - Corporate/Commercial
**Jeffrey L. Lowry** – Labor & Employment
**Donald B. Monnheimer** - Corporate/Commercial
**Sunny J. Nixon** - Environment, Natural Resources & Regulated Industries: Water Law
**Theresa W. Parrish** - Labor & Employment
**Debora E. Ramirez** – Real Estate
**John P. Salazar** - Real Estate
**Andrew G. Schultz** - Litigation: General Commercial
**Tracy Sprouls** - Corporate/Commercial: Tax
**Thomas L. Stahl** - Labor & Employment
**Aaron C. Viets** – Labor & Employment
**Charles J. Vigil** – Labor & Employment

The New Mexico Judicial Performance Evaluation Commission (NMJPEC) has appointed **Nate Gentry**, an Albuquerque attorney who is completing his final term in the New Mexico State Legislature this year, as its newest member.

Gentry was first elected to the New Mexico Legislature in 2010, was elected Republican Whip in 2012, Majority Floor Leader in 2014, and Republican Floor Leader in 2016.

Gentry earned his Bachelor of Arts degree from Rhodes College in Memphis, Tennessee, and a Juris Doctor from the University of New Mexico School of Law. He is currently in private practice in Albuquerque.

## August

**1** **Charitable Giving Planning in Trusts and Estates, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**2** **Charitable Giving Planning in Trusts and Estates, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**7** **Defending Against IRS Collection Activity, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**8** **Defending Against IRS Collection Activity, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**9-11** **2018 Annual Meeting**
12 G, with Possible 7.5 EP
Live Seminar, Hyatt Regency Tamaya Resort and Spa
Center for Legal Education of NMSBF
www.nmbar.org

**14** **Joint Ventures Agreements in Business, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**15** **Joint Ventures Agreements in Business, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

**15** **Discover Hidden and Undocumented Google Search Secrets**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

**17** **Practice Management Skills for Success (2018)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**17** **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

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

**21** **Trust and Estate Update: Recent Statutory Changes that are Overlooked and Underutilized**
1.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

**21** **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 1**
1.0 G
Teleseminar
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# Opinions

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

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

**Effective June 22, 2018**

**PUBLISHED OPINIONS**

| | | | |
|---|---|---|---|
| A-1-CA-35910 | G. Rodriguez v. Ford Motor Company | Affirm | 06/19/2018 |
| A-1-CA-34986 | State v. J Blea | Affirm | 06/21/2018 |

**UNPUBLISHED OPINIONS**

| | | | |
|---|---|---|---|
| A-1-CA-35615 | State v. D Rodriguez | Affirm | 06/18/2018 |
| A-1-CA-36415 | State v. L Medrano | Affirm | 06/18/2018 |
| A-1-CA-37042 | State v. S Aguilar | Affirm | 06/18/2018 |
| A-1-CA-36640 | State v. E Mayfield | Affirm | 06/19/2018 |
| A-1-CA-35265 | State v. C Jones | Affirm | 06/20/2018 |
| A-1-CA-36205 | In Re Estate of M Ortiz | Reverse/Remand | 06/20/2018 |
| A-1-CA-36505 | State v. O Oropeza | Affirm | 06/20/2018 |
| A-1-CA-36811 | P Erwin v. Maintenance Services | Affirm | 06/20/2018 |
| A-1-CA-36853 | Bank of New York v. M McDonald | Affirm | 06/20/2018 |
| A-1-CA-34380 | State v. D Stogden | Affirm/Reverse/Remand | 06/21/2018 |
| A-1-CA-35561 | City of Santa Fe v. M Lopez | Reverse | 06/21/2018 |
| A-1-CA-35658 | C Sedillo v. NM Racing | Affirm | 06/21/2018 |

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

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From the Clerk of the New Mexico Supreme Court

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# Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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**Effective July 4, 2018**

## Pending Proposed Rule Changes Open for Comment:

**Comment Deadline**

*There are no proposed rule changes currently open for comment.*

## Recently Approved Rule Changes Since Release of 2018 NMRA:

**Effective Date**

**Rules of Civil Procedure for the District Courts**

| | | |
|---|---|---|
| 1-003.2 | Commencement of action; guardianship and conservatorship information sheet | 07/01/2018 |
| 1-079 | Public inspection and sealing of court records | 07/01/2018 |
| 1-079.1 | Public inspection and sealing of court records; guardianship and conservatorship proceedings | 07/01/2018 |
| 1-088.1 | Peremptory excusal of a district judge; recusal; procedure for exercising | 03/01/2018 |
| 1-104 | Courtroom closure | 07/01/2018 |
| 1-140 | Guardianship and conservatorship proceedings; mandatory use forms | 07/01/2018 |
| 1-141 | Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records | 07/01/2018 |

**Civil Forms**

| | | |
|---|---|---|
| 4-992 | Guardianship and conservatorship information sheet; petition | 07/01/2018 |
| 4-993 | Order identifying persons entitled to notice and access to court records | 07/01/2018 |
| 4-994 | Order to secure or waive bond | 07/01/2018 |
| 4-995 | Conservator's notice of bonding | 07/01/2018 |
| 4-995.1 | Corporate surety statement | 07/01/2018 |
| 4-996 | Guardian's report | 07/01/2018 |
| 4-997 | Conservator's inventory | 07/01/2018 |
| 4-998 | Conservator's report | 07/01/2018 |

**Rules of Criminal Procedure for the District Courts**

| | | |
|---|---|---|
| 5-302A | Grand jury proceedings | 04/23/2018 |

**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.**

Certiorari Denied, April 10, 2018, No. S-1-SC-36926

From the New Mexico Court of Appeals

**Opinion Number: 2018-NMCA-033**

No. A-1-CA-34082 (filed February 14, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JASON GWYNNE,
Defendant-Appellant

**APPEAL FROM THE DISTRICT COURT OF LEA COUNTY**
Mark T. Sanchez, District Judge

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Santa Fe, New Mexico
CHARLES J. GUTIERREZ,
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Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR,
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KIMBERLY CHAVEZ COOK,
Assistant Appellate Defender
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for Appellant

## Opinion

## J. Miles Hanisee, Judge

**{1}** Defendant Jason Gwynne was convicted by a jury of two counts (Counts 2 and 3) of manufacturing child pornography, a second degree felony, and one count (Count 1) of possession of child pornography, a fourth degree felony. He was sentenced to nineteen-and-one-half years in prison—nine years for each of the manufacturing counts, and eighteen months for possession—less time served. Defendant raises numerous issues on appeal, which we summarize as follows: (1) his conviction for possession must be vacated to avoid violation of his right to be free from double jeopardy; (2) multiple evidentiary errors deprived him of a fair trial; (3) his convictions for manufacturing child pornography are unconstitutional because the Legislature lacks a rational basis for criminalizing his particular alleged conduct (recording a sex act with a consenting sixteen-year-old girl) where the same conduct with an eighteen-year-old would not be a crime; and (4) there was insufficient evidence to support his convictions. We disagree with Defendant and affirm his convictions and sentence.

**BACKGROUND**

**{2}** In January 2013 Defendant, at the time thirty-five years old, was living in a one-bedroom trailer with his then-sixteen-year-old stepdaughter (Stepdaughter), whose mother had passed away in September 2012. Defendant allowed a sixteen-year-old friend (Friend) of Stepdaughter who had run away from home to stay with them. Stepdaughter slept on the pullout couch in the living room, while Defendant and Friend slept in the only bedroom. One night, Stepdaughter observed what she believed was Friend performing oral sex on Defendant in the trailer's bedroom and, after confronting Friend, reported the incident to an adult and later spoke with law enforcement. Stepdaughter reported to law enforcement that Friend and Defendant were "having a sexual affair" and that she had seen "naked pictures of unknown girls [of unknown age] on Defendant's cell phone."

**{3}** Law enforcement conducted a search of Defendant's residence, seized Defendant's phone, and downloaded three videos depicting Friend engaged in sexual acts. Defendant was initially charged with one count of sexual exploitation of children (possession) contrary to NMSA 1978, Section 30-6A-3(A) (2007, amended 2016).[1] After law enforcement officers further investigated the matter and obtained evidence indicating that Defendant was the male participant in what the officers believed were self-recorded videos where Defendant was engaged in sexual acts with Friend, Defendant was additionally charged with two counts of sexual exploitation of children (manufacturing) in violation of Section 30-6A-3(D).[2] Defendant denied both having a sexual relationship with Friend and that he was the male participant in the video. At trial, the central issue to be decided was the identity of the male participant in the videos.

**{4}** The State's first witness was Stepdaughter, whose testimony primarily established (1) when and why Friend had come to live with Stepdaughter and Defendant, (2) where Friend slept in the trailer, and (3) what prompted Stepdaughter to make a report concerning Friend and Defendant to authorities. Additionally, after the district court denied Defendant's motion in limine to exclude testimony by Stepdaughter regarding her observation of a prior sexual encounter between Defendant and Friend, Stepdaughter was allowed to testify that she once observed Friend performing oral sex on Defendant in the bedroom of the trailer.

[1]For purposes of this opinion, the 2007 version of this statute will be referenced.

[2]Defendant was not charged with any crime based on the underlying act of engaging in sexual intercourse with Friend because Friend was over sixteen years old, which is the age of consent in New Mexico. *See* NMSA 1978, § 30-9-11(G)(1) (2009) (providing that it is a fourth degree felony to sexually penetrate "a child thirteen *to sixteen* years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child" (emphasis added)); *State v. Samora*, 2016-NMSC-031, ¶ 30, 387 P.3d 230 (stating that "at age sixteen the alleged victim had passed the age of consent"). However, for purposes of the Sexual Exploitation of Children Act, NMSA 1978, §§ 30-6A-1 to -4 (1984, as amended through 2016), a "child" is considered to be anyone "under eighteen years of age." Section 30-6A-3.

**{5}** The State next called Friend, who testified that she was the female in the videos and that Defendant was the male. Friend admitted that she had previously stated that the male in the video was someone other than Defendant, but at trial she testified that her prior statement was a lie. Friend stated that she was aware that the video was being made and that Defendant was the person taking the video using his own cellular phone.

**{6}** Deputy Victor Hernandez of the Lea County Sheriff's Department described the investigation that followed Stepdaughter's report. He testified that when he went to Defendant's home to investigate and questioned Defendant, Defendant denied having sexual intercourse with Friend and told Deputy Hernandez that Friend slept on the couch. Deputy Hernandez's testimony also laid the foundation for the admission of State's Exhibit 1—the videos downloaded from Defendant's phone, which Deputy Hernandez seized during his investigation.

**{7}** Detective Mark Munro of the Hobbs, New Mexico Police Department testified regarding the videos themselves and how he came to suspect that Defendant was both the male participant in the videos and the person who manufactured the videos. He explained that "the angle and the manner [in] which [the video] was recorded was consistent with a participant recording the video." He testified that while only the face of the female in the videos was "readily apparent," the abdomen and genitals of the male participant were visible and contained what Detective Munro described as "a consistent abnormality to the abdomen, . . . some sort of a scar or possibly a tattoo" in each of the videos. He then explained that as part of his investigation he reviewed photographs of Defendant's unclothed torso that were taken by Deputy Hernandez and watched the videos again, comparing the images in the video of the male participant's abdominal area to the photographs of Defendant. Because Friend, who initially told law enforcement that Defendant was the male in the videos, changed her story and identified another person as the male participant, Detective Munro also personally examined and photographed the torso of the other suspect in order to compare it to the videos. Detective Munro explained that he "freeze frame[d] and pull[ed] . . . screenshot[s]" from the videos in order to be able to compare the images in the videos with the photographs of Defendant and the other suspect. Based on his comparison of the videos—including the screenshot images—and the photographs, Detective Munro believed that the photograph of Defendant was "consistent" with the person that he saw in the video and that the other suspect was not the person in the video.

**{8}** The district court admitted, and the State published to the jury, the videos in their entirety, the photographs of Defendant's and the other suspect's respective torsos, and the screenshot images taken from the three videos showing the male participant's abdominal area. The jury found Defendant guilty on all counts, and Defendant appealed.

## DISCUSSION

### I. Defendant's Convictions for Manufacturing and Possession of Child Pornography Do Not Violate His Right to Be Free From Double Jeopardy Under the Facts of This Case

**{9}** "The constitutional prohibition against double jeopardy protects against both successive prosecutions and multiple punishments for the same offense." *State v. Contreras*, 2007-NMCA-045, ¶ 19, 141 N.M. 434, 156 P.3d 725 (internal quotation marks and citation omitted). There are two types of "multiple punishments" cases: (1) "double[]description" cases, in which the defendant is charged with violations of multiple statutes or statutory subsections that may or may not be deemed the same offense for double jeopardy purposes; and (2) "unit of prosecution" cases, in which a defendant is charged with multiple violations of the same statute based on a single course of conduct. *State v. DeGraff*, 2006-NMSC-011, ¶ 25, 139 N.M. 211, 131 P.3d 61; *see State v. Franco*, 2005-NMSC-013, ¶ 14, 137 N.M. 447, 112 P.3d 1104 (observing that the courts "treat statutes written in the alternative as separate statutes" for double jeopardy purposes). This is a "double description" case because Defendant challenges his convictions under two different subsections of Section 30-6A-3: Subsection (A) (possession) and Subsection (D) (manufacturing).[3] *See Franco*, 2005-NMSC-013, ¶ 14.

**{10}** In "double description" cases, we apply the two-part test set forth in *Swafford v. State*, 1991-NMSC-043, ¶ 9, 112 N.M. 3, 810 P.2d 1223. We "first examine whether the defendant's conduct was unitary, meaning that the same criminal conduct is the basis for both charges." *Contreras*, 2007-NMCA-045, ¶ 20 (internal quotation marks and citation omitted). "If the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy violation." *Id.* (internal quotation marks and citation omitted). "If the conduct is unitary, however, then the second part of the analysis is to determine if the Legislature intended to punish the offenses separately." *State v. Silvas*, 2015-NMSC-006, ¶ 9, 343 P.3d 616.

**{11}** Defendant argues that the conduct underlying the manufacturing and possession of child pornography charges "was clearly unitary[.]" The State argues it was not. We agree with the State.

**{12}** "In analyzing whether a defendant's conduct is unitary, we look to whether [the] defendant's acts have sufficient indicia of distinctness." *Contreras*, 2007-NMCA-045, ¶ 21 (internal quotation marks and citation omitted). "In our consideration of whether conduct is unitary, we have looked for an identifiable point at which one of the charged crimes had been completed and the other not yet committed." *DeGraff*, 2006-NMSC-011, ¶ 27. "[W]e will not find that a defendant's conduct is unitary where the defendant completes one of the charged crimes before committing the other." *Contreras*, 2007-NMCA-045, ¶ 21. We also "consider such factors as proximity in time and space, similarities, the sequencing of the acts, intervening events, and the defendant's goals for and mental state during each act." *State v. Vance*, 2009-NMCA-024, ¶ 13, 145 N.M. 706, 204 P.3d 31. Importantly, "the question of whether a defendant's conduct is unitary is not limited by the [s]tate's legal theory, but rather depends on the elements of the charged offenses and the facts presented at trial." *Contreras*, 2007-NMCA-045, ¶ 21 (internal quotation marks and citation omitted). Thus,

[3]While Defendant was convicted of two separate manufacturing counts under Section 30-6A-3(D)—one for each of two videos containing child pornography that the jury concluded Defendant manufactured—he does not challenge those convictions as violating the Double Jeopardy Clause under our "unit of prosecution" cases. He only challenges his conviction under Section 30-6A-3(A) for possession of child pornography as being duplicative of one of the two manufacturing counts.

"[t]he proper analytical framework is whether the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses." *Franco*, 2005-NMSC-013, ¶ 7 (internal quotation marks and citation omitted). "We therefore first review the elements of the charged offenses and then consider whether the [s]tate presented sufficient facts at trial in order to support the elements of both crimes." *Vance*, 2009-NMCA-024, ¶ 13.

**{13}** Here, the jury was given three different jury instructions—one for each of the manufacturing charges, and one for the possession charge—containing the elements the State had to prove in order for Defendant to be convicted of Counts 1-3. On the first manufacturing charge (Count 2), the jury was instructed that the essential elements it had to find included that Defendant (1) manufactured (2) child pornography (3) *on or about January 26, 2013*. On the second manufacturing charge (Count 3), the jury was instructed that it had to find that Defendant (1) manufactured (2) child pornography (3) *on or about January 18, 2013*. And on the possession charge (Count 1), the jury was instructed that it had to find Defendant (1) had child pornography (2) in his possession (3) *on or about January 28, 2013*. On their faces, these instructions required the State to prove different elements—and thus different facts—based on the charges stemming from acts on three different dates: manufacturing on January 18, manufacturing on January 26, and possession on January 28.[4] Notably, Defendant does not contend that the jury relied on the same evidence to convict Defendant of possession and manufacturing, nor, as we next explain, would such a contention be availing. *Cf. id.* ¶ 14. We turn to the evidence presented at trial. *See id.* ¶ 15.

**{14}** As to the manufacturing counts, Friend testified that Defendant was the person who recorded (i.e., manufactured) the videos and that the videos show her—a "child" under Section 30-6A-3(D)—and Defendant having sex (i.e., the videos were of child pornography). Detective Munro testified regarding the videos recovered from Defendant's phone that (1) the video titled "video 005"—which formed the basis for Count 2—had a "creation date" of January 26, 2013; and (2) the video titled "video 006"—which formed the basis for Count 3—had a "creation date" of January 18, 2013. This evidence alone was sufficient to support each of the distinct elements contained in Counts 2 and 3.

**{15}** Regarding the possession charge—which was based not on any particular video but rather on what the State describes as Defendant's "possession of a collection of child pornography"[5]—the State presented altogether different evidence to establish the elements of possession than that used to support the manufacturing charges. Deputy Hernandez testified that he executed a search warrant at Defendant's home on January 28, 2013, during which he seized Defendant's phone. He further testified that three videos were downloaded from the phone, meaning that it could be reasonably inferred that the videos existed on the phone—and thus were in Defendant's possession—on or about January 28 when the phone was seized from Defendant. Detective Munro, in addition to testifying that the videos had been created at an earlier point in time (i.e., on January 18 and 26, 2013), testified that two of the videos—those titled "us" and "video005"—had been "duplicated," meaning that a second copy of each video had been saved on the phone. Furthermore, all of the videos that were downloaded from the phone seized on January 28, 2013, were published to the jury; those videos showed Friend engaged in a prohibited sexual act (to wit, sexual intercourse). *See* § 30-6A-2(A)(1) (defining "prohibited sexual act" as including, among other acts, "sexual intercourse").

**{16}** From this, the jury could independently infer that Defendant completed a separate act—possession of child pornography—that was sufficiently distinct from the previously completed acts of manufacturing because the acts of manufacturing and possession were separated not only in time but also by the intervening event of the duplication of the videos. *See Vance*, 2009-NMCA-024, ¶¶ 13, 17; *Contreras*, 2007-NMCA-045, ¶¶ 19, 22-23 (rejecting a double jeopardy challenge to convictions for possessing and trafficking cocaine where the state had "provided the jury with sufficient factual bases for finding that [the d]efendant possessed the cocaine both before and after he sold some if it[,]" and holding that the conduct supporting possession and trafficking was not unitary). Ignoring the evidence of duplication—which implies a later action by Defendant taken in order to continue to possess the copied videos—Defendant argues that he "took no additional steps to commit the crime of possession; the cell phone stored the recording automatically." But that is not what the evidence presented at trial indicates. Moreover, as in *Contreras*, we conclude that "it is extremely unlikely that the jury based its verdict on a theory that [the d]efendant only possessed" the videos at the time he manufactured them. 2007-NMCA-045, ¶ 23. Rather, the evidence established that Defendant continued to possess the videos after he had completed the act of manufacturing them and that the State's basis for charging Defendant with possession was separate and independent from the bases for charging him with manufacturing.

**{17}** We hold that Defendant's separate acts of manufacturing and possessing child pornography were not unitary under the facts of this case because there was distinct evidence from which "the jury reasonably could have inferred independent factual bases for the charged offenses." *Vance*, 2009-NMCA-024, ¶ 17 (internal quotation marks and citation omitted). Thus, Defendant's convictions do not violate his right to be free from double jeopardy.

**II. Evidentiary Errors**

**{18}** Defendant argues that multiple evidentiary errors deprived him of a fair trial. Specifically, he contends that the district court erred in admitting: (1) Stepdaughter's testimony that she had witnessed a prior sexual encounter between Defendant and Friend; (2) Detective Munro's opinion testimony—including his comparison of photographs of Defendant's torso with screenshot images from the videos—regarding his belief that Defendant was the

[4]We note that Defendant's double jeopardy argument relies on an outdated criminal information—the third amended criminal information filed in January 2014 rather than the *corrected* third amended criminal information filed in May 2014—that did not contain these distinct dates but instead identified January 28, 2013, as the date on which all alleged prohibited conduct occurred.

[5]The State originally relied on the video titled "us" to form the basis for the possession charge. However, the final criminal information filed prior to trial removed the specific reference to video "us" from the possession count and based the charge on Defendant's knowing and intentional possession of "any visual or print medium depicting" child pornography.

male participant in the videos; and (3) Deputy Hernandez's statements indicating there was another "victim" in the case. We address each of Defendant's claimed evidentiary errors in turn and conclude that even assuming error occurred, it was harmless, not cumulative, and does not require reversal.

**A. Stepdaughter's Testimony Regarding Defendant's and Friend's Prior Sexual Encounter**

**{19}** Defendant filed a motion in limine seeking to exclude Stepdaughter's testimony "concerning what she perceived as sexual activity between [D]efendant and [Friend]" on a prior occasion. The district court denied the motion, and Stepdaughter was allowed to testify as follows. On one occasion, Stepdaughter saw Friend "moving up and down" in the bedroom around ten o'clock at night and that Defendant, who was also in the bedroom, had his pajama pants pulled down "more than they should've been." Based on that observation, she confronted Friend about whether Friend was having a sexual relationship with Defendant. Stepdaughter thereafter reported to an adult her "concerns about [Friend] . . . and things going on at [the] house" and spoke with law enforcement a few days after making her initial report.

**{20}** Defendant argues that under Rule 11-404(B) NMRA, Stepdaughter's testimony about a prior sexual contact between Friend and Defendant should not have been admitted because it was offered for the prohibited purpose of showing that because Defendant "had relations with [Friend] on one day, he was more likely to act in conformity on the day the video was made[,]" and because its probative value was outweighed by its prejudicial effect. *See State v. Dietrich*, 2009-NMCA-031, ¶ 40, 145 N.M. 733, 204 P.3d 748 (explaining that appellate courts "consider two paramount factors in deciding whether the district court abused its discretion in admitting [Rule 11-404(B)] evidence: whether the [s]tate made a sufficient showing that the evidence would serve a legitimate purpose other than to show character . . . and whether the probative value was substantially outweighed by the danger of unfair prejudice or other factors" (internal quotation marks and citation omitted)). The State argues that the testimony was "properly admitted for purposes of establishing Defendant's identity and opportunity to film a sexual act with [Friend.]"

**{21}** While the State is correct that proving "identity" is a proper purpose for which otherwise inadmissible Rule 11-404(B) evidence may be admitted, it is the proponent's burden "to cogently inform the court—whether the trial court or a court on appeal—the rationale for admitting the evidence to prove something other than propensity. In other words, more is required to sustain a ruling admitting other-acts evidence than the incantation of the illustrative exceptions contained in the Rule." *State v. Gallegos*, 2007-NMSC-007, ¶ 25, 141 N.M. 185, 152 P.3d 828 (alteration, internal quotation marks, and citation omitted). We are not convinced that the State has met its burden, particularly given that "[t]he identity exception to Rule 11-404(B) may be invoked when identity is at issue *and when the similarity of the other* [*act*] *demonstrates a unique or distinct pattern easily attributable to one person*." *State v. Peters*, 1997-NMCA-084, ¶ 14, 123 N.M. 667, 944 P.2d 896 (emphasis added) (alteration, internal quotation marks, and citation omitted). The State, without pointing to anything in Stepdaughter's testimony that demonstrates a unique or distinct pattern that would be easily attributable to Defendant, merely argues that "because Defendant and [Friend] were engaged in a sexual relationship at the time the videos were manufactured and the videos depict[] sexual acts between [Friend] and a male, it becomes more likely that Defendant is the male in the video." Additionally, the State fails to establish that "opportunity" was even a fact in issue, meaning that it could not have served as the basis for the admission of the testimony. *See Gallegos*, 2007-NMSC-007, ¶¶ 33-35 (rejecting "opportunity" as a basis for admitting Rule 11-404(B) evidence where the undisputed facts established that the defendant had an opportunity to commit the charged acts).

**{22}** However, even assuming, without deciding, that the district court's admission of Stepdaughter's testimony was contrary to Rule 11-404(B), we conclude that such error was harmless. *See State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110 (explaining that even if evidence is improperly admitted, such error "is not grounds for a new trial unless the error is determined to be harmful"); *State v. Griscom*, 1984-NMCA-059, ¶¶ 16-18, 101 N.M. 377, 683 P.2d 59 (proceeding to a harmless error analysis without first resolving the primary evidentiary challenge). That is because after evaluating "all of the circumstances surrounding the error"—including "the importance of the erroneously admitted evidence in the prosecution's case"—as well as "evidence of [Defendant's] guilt separate from the error[,]" we conclude that there is not a "reasonable probability the error affected that verdict." *Tollardo*, 2012-NMSC-008, ¶¶ 36, 43 (alteration, emphasis, internal quotation marks, and citation omitted).

**{23}** The primary evidence supporting Defendant's convictions for manufacturing of child pornography came from (1) Friend's testimony that Defendant was the male participant in the videos and that he was the person recording the videos of the two of them having sexual intercourse, and (2) the videos themselves and the photographs of Defendant's torso showing a distinct scar, which were admitted at trial and shown to the jury over no objection. The primary evidence supporting Defendant's conviction for possession of child pornography came from (1) Deputy Hernandez's testimony regarding seizing Defendant's phone, which contained the videos, from Defendant's residence on January 28, 2012, and (2) the videos themselves, which contained child pornography. From the State's closing argument, it is clear that the State attributed little, if any, importance to Stepdaughter's challenged testimony. On numerous occasions, the State emphasized the aforementioned unchallenged pieces of evidence as being what supported the charges against Defendant. On only one occasion did the State, in passing, refer to Stepdaughter's statement that Stepdaughter once saw "something going on in the bedroom." In fact, it was defense counsel who, during closing, repeatedly reminded the jury of the evidence he sought to exclude when he first stated, "[Stepdaughter] is so outraged because she sees a head bobbing up and down that she feels compelled to report it[,]" and later reiterated, "[Stepdaughter] said the reason she was outraged is because she could see a fully-dressed young lady with her head going up and down, and that's the reason [Stepdaughter] was propelled out into reporting this."

**{24}** In the context of all of the evidence presented at trial, we cannot say that there is a reasonable probability that Stepdaughter's testimony describing her observation of a sexual encounter between Friend and Defendant contributed to any of Defendant's convictions. *See id.* ¶ 46 (explaining that "because an error may be prejudicial with respect to one conviction, but harmless with respect to another, courts must separately assess the effect the error

may have had on each of the defendant's convictions"). We thus hold that any error that occurred in admitting Stepdaughter's testimony was harmless and does not support reversal.

**B. Detective Munro's and Deputy Hernandez's Testimony**

**{25}** Defendant alleges three evidentiary errors related to the testimony of Detective Munro and Deputy Hernandez. First, Defendant contends that the district court erred in allowing Detective Munro to engage in "image-to-image comparison" and "digital manipulation" of the photographs of Defendant's torso and the screenshot images that Detective Munro made from the videos without first qualifying Detective Munro as an expert. Next, Defendant alternatively argues that Detective Munro's testimony—if deemed lay opinion—was inadmissible because it was not "helpful to a factual issue in dispute." Finally, regarding Deputy Hernandez's testimony, Defendant argues that Deputy Hernandez's "repeated references to a 'second victim' result[ed] in undue prejudice." Because the parties dispute whether certain of these challenges were preserved, we begin by identifying the applicable standard of review.

**{26}** Defendant concedes that he failed to preserve his challenge to Deputy Hernandez's testimony, as well as his challenge to the admission of Detective Munro's testimony adjusting the screenshot images and comparing those images to the photograph of Defendant's torso as lay opinion. Absent preservation, we only review for plain error. *See State v. Bregar*, 2017-NMCA-028, ¶ 28, 390 P.3d 212, *cert. denied*, ___-NMCERT-___ (No. S-1-SC-36258, Feb. 7, 2017) ("If an appellant fails to object to the admission of evidence below, on appeal we will only review for plain error[.]"). With regard to the admission of alleged improper expert testimony by Detective Munro, while not clear, Defendant appears to suggest that he preserved his challenge to the admission of that testimony; however, his failure to comply with the requirements of Rule 12-318(A)(4) NMRA renders his argument waived. Rule 12-318(A)(4) requires that as to each argument made on appeal, the appellant's brief in chief "shall contain a statement of the applicable standard of review . . . and a statement explaining how the issue was preserved in the court below, with citations to authorities, record proper, transcript of proceedings, or exhibits relied on." Defendant neither explains how the issue was preserved nor argues that we should apply an abuse of discretion standard. *See Bregar*, 2017-NMCA-028, ¶ 28 (explaining that "if an evidentiary issue is preserved by objection, we review the district court's decision to admit or exclude for an abuse of discretion"). Moreover, Defendant does nothing more than describe three instances during trial when defense counsel objected during Detective Munro's testimony. Critically, Defendant wholly fails to establish that the grounds for those objections—one of which Defendant concedes was, in fact, "inaudible"—are the same that provide the basis for his challenges on appeal. Thus, we do not consider his appellate arguments to be properly preserved. *See State v. Baca*, 1997-NMSC-045, ¶ 13, 124 N.M. 55, 946 P.2d 1066, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36, 146 N.M. 357, 210 P.3d 783 ("An objection that does not state the grounds for the objection preserves no issue for appeal."); *Bregar*, 2017-NMCA-028, ¶ 29 ("[F]or an objection to preserve an issue for appeal, it must appear that the appellant fairly invoked a ruling of the district court on the same grounds argued in the appellate court." (alterations, internal quotation marks, and citation omitted)); *State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 (stating that "this Court has no duty to review an argument that is not adequately developed"). We therefore review Defendant's challenges to Detective Munro's testimony for plain error. *See Bregar*, 2017-NMCA-028, ¶ 28.

**Plain Error**

**{27}** "Plain error is an exception to the general rule that parties must raise timely objection to improprieties at trial, and therefore it is to be used sparingly." *State v. Dylan J.*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44 (internal quotation marks and citation omitted). "Under the plain error rule, there must be (1) error, that is (2) plain, and (3) that affects substantial rights." *State v. Hill*, 2008-NMCA-117, ¶ 21, 144 N.M. 775, 192 P.3d 770 (internal quotation marks and citation omitted). "We apply the rule only in evidentiary matters and only if we have grave doubts about the validity of the verdict, due to an error that infects the fairness or integrity of the judicial proceeding." *Dylan J.*, 2009-NMCA-027, ¶ 15 (internal quotation marks and citation omitted). Appellate courts do not "use the plain error rule to review the validity of the admission of [erroneously admitted] testimony." *State v. Contreras*, 1995-NMSC-056, ¶ 24, 120 N.M. 486, 903 P.2d 228. "We must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* ¶ 23 (internal quotation marks and citation omitted). "In determining whether there has been plain error, we must examine the alleged errors in the context of the testimony as a whole." *Dylan J.*, 2009-NMCA-027, ¶ 15 (omission, internal quotation marks, and citation omitted).

**Detective Munro's Testimony**

**{28}** Detective Munro's primary purpose at trial was to explain how, as a result of his investigation, he concluded that Defendant was the male participant in the videos. Detective Munro did so by first describing the personal observations he made from watching the videos. He testified that while only the face of the female in the videos was "readily apparent," the abdomen and genitals of the male participant were visible and contained what Detective Munro described as a "consistent abnormality to the abdomen, . . . some sort of scar or possibly a tattoo" in each of the videos. He then explained that he reviewed photographs of Defendant's unclothed torso that were taken by a fellow investigating officer and watched the videos again, comparing the images in the video of the male participant's abdominal area to the photographs of Defendant. The State published the photographs taken of Defendant's abdominal area, which, Detective Munro testified, showed a "vertical scar that goes above and below the belly button" that was similar to what Detective Munro observed on the videos. At that point in Detective Munro's testimony, the State published Exhibit 1—containing the three videos—to the jury and asked that Detective Munro be allowed to play the videos for the jury. One by one, the jury was shown each of the three videos. After each video was played, Detective Munro explained that he made screenshots—also described as "freeze frames"—from the video, displayed the screenshot, then pointed to the area on the screenshot showing the same "indentation" or "abnormality" that Detective Munro had pointed out to the jury in the photographs of Defendant. While publishing the screenshot images to the jury, Detective Munro noted that the images as projected in the courtroom were "a little dark" and offered to "lighten [the] image if it could assist." As he was making the in-court adjustments to the laptop display settings, Detective Munro explained that "without altering the actual intent of it, I

can adjust the brightness level and increase the contrast."

**{29}** Defendant describes these adjustments as "digital manipulation" and "digital alteration." Citing a Connecticut case, *State v. Swinton*, 847 A.2d 921, 934-38 (Conn. 2004), he contends that "digital alteration of digital images is . . . the province of expert testimony" and thus that Detective Munro's reliance on "specialized knowledge" in "comparing [Defendant's] torso photos to the video[s]" was only admissible if he was first qualified as an expert. Defendant's argument is unavailing for two reasons: first, because *Swinton* is distinguishable; and second, because Defendant misconstrues the nature of Detective Munro's testimony.

**{30}** In *Swinton*, the defendant challenged the adequacy of the foundation for admitting what he contended was "computer generated evidence"—specifically, photographs of a bite mark that had been digitally enhanced using a computer software program. *Id.* at 934-36. The state argued that the photographs were not "computer generated evidence" but were "mere 'reproductions' " and thus governed by a different foundational standard that only required the testifying witness to be able to verify that the photograph is "a fair and accurate representation of what it depicts." *Id.* at 936-37. The court described the issue as being one that involved a question of "the difference between *presenting* evidence and *creating* evidence." *Id.* at 938. It agreed with the defendant that the photographs admitted were "computer generated"—i.e., "created"—and not mere photographic reproductions and thus were subject to different foundational requirements. *Id.* at 936, 938, 942-43. However, after applying the proper test as announced in that case, the court concluded that the state had laid a proper foundation to admit the evidence. *Id.* at 943-45.

**{31}** Here, Defendant attempts to liken Detective Munro's in-court adjustments to the laptop's display setting (for the purpose of improving the visibility of the image being projected to the jury) to the software-altered, i.e., computer-generated, photographs in *Swinton*. According to Defendant, Detective Munro's testimony included the presentation of "altered photographs," but that is simply not what the record indicates. The record is clear (1) that Detective Munro's screenshots were nothing more than "freeze frames," i.e., images depicting single frames from the video akin to pausing the video at a particular moment, and (2) that Detective Munro did nothing more than alter the "brightness" setting on the laptop to control the outward projection of the image. Unlike in *Swinton*, where the witness's testimony included an in-court demonstration of how he used special software to manipulate the bite-mark photograph, *id.* at 935, i.e., there was no doubt that the photographs themselves were altered before being presented to the jury, here, there is no evidence that any of the images presented to the jury had been modified in any way. As noted previously, Detective Munro even stated that the in-court adjustments he was making were done "without altering the actual intent." We have little difficulty concluding that the screenshots and Detective Munro's testimony were simply a means of *presenting* evidence to the jury rather than the creation of new evidence that would necessitate qualification as expert opinion. *Cf. id.* at 938. As such, they did not constitute expert testimony, and we hold that there was no error in not qualifying Detective Munro as an expert.

**{32}** Defendant next argues that Detective Munro's testimony identifying Defendant as the male in the videos was improper lay opinion because "the jury could watch the video[s] for itself," meaning that Detective Munro's testimony was not "helpful to [determining] a factual issue in dispute"—i.e., the identity of the male participant—as required by Rule 11-701 NMRA. *See* Rule 11-701(B) (providing that "testimony in the form of an opinion is limited to one that is . . . helpful . . . to determining a fact in issue"). This Court recently rejected a similar argument in *State v. Sweat*, 2017-NMCA-069, ¶¶ 20-24, 404 P.3d 20, *cert. denied*, ____-NMCERT-___ (No. S-1-SC-36574, Aug. 16, 2017).

**{33}** In *Sweat*, the issue was whether a detective was properly allowed to testify to his opinion of the identity of the person shown in a surveillance video, which had been admitted into evidence and was available for the jury to view. *Id.* ¶¶ 8, 21. The defendant argued that "the surveillance video speaks for itself" and that allowing the detective to offer his opinion "invaded the province of the jury" by not "allowing the jury to view the surveillance video and draw its own conclusion." *Id.* ¶ 21 (internal quotation marks omitted). This Court concluded otherwise, adopting for purposes of analysis the five-factor approach "deemed relevant to a determination of whether a lay witness is more likely than the jury to identify the defendant correctly" that was articulated in *People v. Thompson*, 2016 IL 118667, ¶ 41, 49 N.E.3d 393. *Sweat*, 2017-NMCA-069, ¶ 22 (internal quotation marks and citation omitted). Relevant to the *Sweat* Court's analysis was, among others, the fifth factor: "the degree of clarity of the surveillance recording and the quality and completeness of the subject's depiction in the recording." *Id.* ¶¶ 22, 24 (internal quotation marks and citation omitted). In *Sweat*, this Court considered that the defendant "himself describe[d] the quality of the surveillance video as 'grainy' and 'of poor quality' " in reaching its conclusion that the detective's testimony regarding the identity of the person in the surveillance video was admissible because it was helpful to the jury.[6] *Id.* ¶ 24. Likewise, here, Defendant describes the videos in question as "dark and grainy" and asserts that "scarring or other details in the video are *not* clear . . . when viewed on a computer monitor." Thus, we conclude that Detective Munro's testimony was admissible under Rule 11-701 because it would have been "helpful . . . to determining a fact in issue[,]" i.e., the identity of the male participant in the videos. *Id.* ¶ 22 (internal quotation marks and citation omitted). Because we hold that it was not error to admit Detective Munro's testimony, our review of Defendant's challenge on that basis ends here. *See Hill*, 2008-NMCA-117, ¶ 21 ("Under the plain error rule, there must be (1) error, that is (2) plain, and (3) that affects substantial rights." (internal quotation marks and citation omitted)).

**Deputy Hernandez's Testimony**

**{34}** As with our plain-error review of Detective Munro's testimony, we begin by examining the complained-of portion of Deputy Hernandez's testimony as a whole. *See Dylan J.*, 2009-NMCA-027, ¶ 15.

[6]While the *Sweat* Court also considered the presence of other factors, it stated that "[t]he existence of even one of the[] factors indicates that there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury[,]" i.e., that the witness's testimony is admissible under Rule 11-701 because it is helpful to the jury. *Id.* ¶ 22.

**{35}** During Deputy Hernandez's testimony, the State moved to admit into evidence Exhibit 1, the CD containing the videos downloaded from Defendant's phone. Defense counsel objected, arguing that the State had not laid a sufficient foundation for the admission of the CD because it had not been established whether Deputy Hernandez was the "police officer [that created the CD] or not." During defense counsel's ensuing voir dire of Deputy Hernandez, defense counsel elicited from Deputy Hernandez that the videos were taken off the cell phone using Cellebrite,[7] and that Deputy Hernandez was not the person who downloaded the videos onto the CD. Based on this, defense counsel again objected to the CD's admission, arguing that the State had not established chain of custody. Even after the State established that Deputy Hernandez was present when the CD was created, took possession of the CD after it was created, and could confirm that the data on the CD was identical to that on the cell phone, defense counsel continued to object to the CD's admission.

**{36}** Defense counsel was allowed to continue his voir dire, during which he questioned Deputy Hernandez about the serial numbers of the seized cell phones that Deputy Hernandez had recorded on the search warrant inventory. Defense counsel then questioned Deputy Hernandez about information contained on the Cellebrite-generated report, which contained numbers identifying each of the cell phones that had been seized, and attempted to show that the serial numbers documented in the search warrant inventory did not match the numbers contained in the Cellebrite report. Deputy Hernandez, after comparing the documents, confirmed that the numbers on the two documents did not match. Defense counsel, seizing upon what he perceived as a fatal discrepancy, then challenged Deputy Hernandez to explain how the court could admit "evidence of a cell phone that wasn't seized." Deputy Hernandez responded by pointing out to defense counsel that the Cellebrite report in question "has nothing to do with [Friend]" but rather contained the name of a different person, whom Deputy Hernandez referred to as "also a victim."

**{37}** Upon hearing Deputy Hernandez refer to another "victim," the district court immediately called a bench conference, asked counsel if the current line of questioning should occur outside the presence of the jury, and excused the jury. The district court, attempting to clarify matters, asked counsel if the discrepancy in the numbers was attributable to there being separate evidence related to another victim. The prosecutor answered "no" and explained that the numbers did not match because the Cellebrite report contained the phones' model numbers, not serial numbers. After a short recess, defense counsel indicated he had no further voir dire and agreed to allow the State to proceed with its direct examination of Deputy Hernandez. The State then laid a foundation for the admission of and again moved to admit Exhibit 1, which the district court then admitted over no objection.

**{38}** In light of the context of Deputy Hernandez's testimony, we conclude that it was not plain error to admit Deputy Hernandez's passing mention of another "victim." As Defendant himself describes it, what he complains of is "essentially a spontaneous statement"—one that the record indicates Deputy Hernandez inadvertently made as he explained counsel's misinterpretation of documents on which the State relied for the admission of key evidence. While it may have been error to allow Deputy Hernandez to testify as he did, and while such error could be deemed plain as evidenced by the district court's immediate reaction to the testimony, we are unconvinced that admission of the testimony "constituted an injustice that creates grave doubts concerning the validity of the verdict." *Hill*, 2008-NMCA-117, ¶ 21 (internal quotation marks and citation omitted). That is to say, the error did not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings[,]" i.e., the substantial rights of Defendant. *State v. Paiz*, 1999-NMCA-104, ¶ 28, 127 N.M. 776, 987 P.2d 1163 (internal quotation marks and citation omitted); *cf. id.* ¶¶ 26-29 (reversing the defendant's conviction because this Court concluded that all three elements of the plain error test—"(1) error, that is (2) plain, and (3) that affects substantial rights"—were present in that case). As such, we hold that the admission of Deputy Hernandez's testimony was not plain error.

**{39}** As a final matter regarding Defendant's challenge to Deputy Hernandez's testimony, we briefly address Defendant's claim of ineffective assistance of counsel that he appends to this argument. Defendant argues that "eliciting this [other 'victim'] evidence during an unnecessary voir dire [of Deputy Hernandez] without then seeking a mistrial or at least a curative instruction constituted ineffective assistance of counsel." We disagree.

**{40}** "To establish ineffective assistance of counsel, a defendant must show: (1) 'counsel's performance was deficient,' and (2) 'the deficient performance prejudiced the defense.' " *State v. Paredez*, 2004-NMSC-036, ¶ 13, 136 N.M. 533, 101 P.3d 799 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Without passing on Defendant's arguments regarding the deficient-performance prong, we conclude that Defendant has not met his burden of establishing a prima facie case for ineffective assistance of counsel based on his failure to explain how any alleged deficiency in trial counsel's performance prejudiced him. Defendant does nothing more than quote the standard for establishing prejudice[8], then states, "As argued above, [Deputy Hernandez's references to a second victim] was of an inherently prejudicial nature and implicated prior acts of a similar nature to those charged, carrying an obvious prejudicial impact." But "mere evidentiary prejudice is not enough." *State v. Roybal*, 2002-NMSC-027, ¶ 25, 132 N.M. 657, 54 P.3d 61. Because Defendant does nothing more than point to evidentiary prejudice and fails to explain how any deficiency in trial counsel's performance "represent[s] so serious a failure of the adversarial process that it undermines judicial confidence in the accuracy and reliability of the

[7]Later testimony from Detective Munro clarified that Cellebrite is a "forensic evidence recovery device" that (1) allows for the removal of information from a cell phone onto a CD, USB, or other storage device, (2) prevents the cell phone and information contained thereon from "being manipulated in any way" during the removal/copying process, and (3) generates a report and a CD on which the evidence can be reviewed without risk of manipulating the cell phone.

[8]"[I]n order to satisfy the prejudice prong, it is necessary to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[.]" *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 28, 130 N.M. 179, 21 P.3d 1032 (internal quotation marks and citation omitted).

outcome[,]" *id.*, we decline to further consider Defendant's argument. *See State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments).

**C. Cumulative Error**

**{41}** Defendant contends that "[i]f this Court finds error in any two of the above issues, cumulative error supports reversal." Defendant is incorrect. The mere fact that more than one error may have occurred is insufficient, alone, to require reversal. The doctrine of cumulative error "requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d 937. "The doctrine cannot be invoked if . . . the record as a whole demonstrates that a defendant received a fair trial[.]" *Id.* Importantly, "a fair trial is not necessarily a perfect one[.]" *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728. Even given the purported imperfections in Defendant's trial—i.e., failing to correct the admission of Deputy Hernandez's testimony regarding another "victim" and allowing Stepdaughter to testify to observing a prior sexual encounter between Defendant and Friend—we conclude that the record as a whole demonstrates that Defendant received a fair trial.

**III. The Constitutionality of Section 30-6A-3(D) as Applied in This Case**

**{42}** Defendant contends that "contrary to constitutional guarantees of equal protection and substantive due process, there is no rational basis for punishing [Defendant] with second-degree manufacture and fourth-degree possession for recording a sex act to which the minor participant legally consented." Defendant's equal protection challenge fails because he has not established that he is being treated differently than similarly situated individuals. *See Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 10, 138 N.M. 331, 120 P.3d 413 ("The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly."). Those who challenge the constitutionality of a statute "must first prove that they are similarly situated to another group but are treated dissimilarly. In other words, [they] must prove that they should be treated equally with another group but they are not because of a legislative classification." *Id.* ¶ 8. A statute that "does not create two separate classifications subject to different treatment" cannot be said to violate equal protection. *Montez v. J & B Radiator, Inc.*, 1989-NMCA-060, ¶¶ 12, 14-15, 108 N.M. 752, 779 P.2d 129.

**{43}** Defendant is in a class of persons that includes (1) adults who have (2) recorded consensual, non-criminal sexual acts (3) involving a minor participant. Defendant compares himself to "[a] person who records the same exact legal [sexual] activity with a consenting eighteen-year-old." Defendant emphasizes the fact that the underlying act Defendant recorded—sexual intercourse between a thirty-five-year-old and a sixteen-year-old—is not criminal. However, he ignores the purpose of and harm addressed by the Sexual Exploitation of Children Act, which defines "prohibited sexual act" as including, among other acts, "sexual intercourse" regardless of whether the act was, itself, legal. Section 30-6A-2(A). As our Supreme Court explained in *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, "The purpose of the Act is to protect children from the harm to the child that flows from trespasses against the child's dignity when treated as a sexual object." *Id.* ¶ 17 (internal quotation marks and citation omitted). Thus, even if the act recorded is legal, the act of recording the act is what the Legislature elected to criminalize based on the harm that occurs when "the child's actions are reduced to a recording which could haunt the child in future years[.]" *Id.* (internal quotation marks and citation omitted).

**{44}** Defendant's comparison, in addition, is not a proper one because a person who records consensual sex between two adults is not similarly situated to a person who records consensual sex between an adult and a minor; such individuals occupy entirely different classes. *Cf. Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (rejecting an equal protection challenge to a state law that treats differently tobacco advertisements on billboards and those in newspapers, magazines, or periodicals, and explaining that "the state has power to legislate with respect to persons in certain situations and not with respect to those in a different one"); *Carney v. Okla. Dep't of Pub. Safety*, 875 F.3d 1347, 1353 (10th Cir. 2017) (explaining that a convicted "aggravated sex offender" had failed to make an equal protection claim where he contended that he was "not similarly situated to ordinary sex offenders" and "ha[d] not shown that he [was] being treated differently than other aggravated sex offenders"); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 53-54 (10th Cir. 2013) (explaining that the Equal Protection Clause "simply keeps governmental decision[]makers from treating differently persons *who are in all relevant respects alike*" and rejecting an equal protection challenge where the plaintiffs failed to establish that their prohibited activity—which the court described as "different in kind and scale"—was similar to permitted activity (internal quotation marks and citation omitted)). Because Defendant cites no authority and develops no argument to support his contention that he is, in the first instance, similarly situated to his proffered comparator, we decline to consider further his equal protection challenge. *See Guerra*, 2012-NMSC-014, ¶ 21; *State v. Murillo*, 2015-NMCA-046, ¶ 17, 347 P.3d 284 (refusing to consider the defendant's equal protection argument where the defendant failed to address how the challenged statute treated differently groups that were similarly situated).

**{45}** Defendant—who dedicates the majority of his discussion on this issue to arguing that the Legislature lacks a rational basis for treating differently adults who record sex acts depicting minors than those who record sex acts depicting adults—similarly fails to provide any principled analysis to support his claim of a substantive due process violation. He does nothing more than (1) refer to general principles of law without explaining how they apply to the facts of this case and (2) rely on the irrelevant claim that Defendant "had *no* intent to disseminate the video" to support his assertion that "it shocks the conscience to punish [Defendant] with [nineteen-and-one-half-years] in prison." We decline to construct Defendant's argument on his behalf, *see Murillo*, 2015-NMSC-046, ¶ 17, and hold that Defendant has failed to establish either an equal protection or a substantive due process violation.

**{46}** As a final matter, we offer as an observation that Defendant's challenge is more properly directed to the attention of the Legislature than the courts. What Defendant essentially—though obliquely—asks us to do is that which we are constitutionally prohibited from doing: encroach on the power of the Legislature by questioning the wisdom of its enactments, particularly when Defendant has failed to establish that the challenged enactment is constitutionally infirm. *See*

*State v. Thompson*, 1953-NMSC-072, ¶¶ 11-12, 57 N.M. 459, 260 P.2d 370 ("The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power. . . . It is no part of the duty of the courts to inquire into the wisdom, the policy, or the justness of an act of the [L]egislature." (internal quotation marks and citation omitted)); *State v. Torres*, 2012-NMCA-026, ¶ 33, 272 P.3d 689 (explaining that under the doctrine of separation of powers, "one branch of the state government may not exercise powers and duties belonging to another" (internal quotation marks and citation omitted)).

**{47}** Our Legislature has, by enacting Section 30-6A-3, established as the policy of this state that it is a crime to record sexual activity where at least one of the depicted participants is a minor, regardless of whether the underlying activity depicted is non-criminal. Defendant contends that the fact that Friend could consent to the underlying act—i.e., legally engage in sexual intercourse with Defendant—but is disallowed under the law from consenting to a recording of that act is irrational. Yet it is the Legislature's prerogative to do exactly that: declare and define what acts are criminal. *See State v. Lassiter*, 2016-NMCA-078, ¶ 12, 382 P.3d 918, *cert. denied*, ___-NMCERT-___ (No. S-1-SC-36012, Aug. 18, 2016) ("It is the Legislature's exclusive responsibility to define crimes, not the judiciary's."); *State v. Bryant*, 1982-NMCA-178, ¶ 14, 99 N.M. 149, 655 P.2d 161 ("The decision as to which acts shall be declared criminal offenses is entirely a legislative function."). And to the extent Defendant challenges not only the very criminalization of the conduct at issue but also the degree to which the Legislature has elected to punish the conduct, such a challenge is equally afield of this Court's powers. *See State v. Frawley*, 2007-NMSC-057, ¶ 6, 143 N.M. 7, 172 P.3d 144 ("No point of law has longer been established in New Mexico than the rule that the prescription of the mode of punishment is pre-eminently a rightful subject of legislation." (alterations, internal quotation marks, and citation omitted)). Even were this Court to agree with Defendant that the length of his sentence is disproportionate to the offense committed given the particular facts of this case,[9] Defendant has failed to offer any basis on which we could properly—i.e., within the limits of our constitutional authority—consider this issue. "The question of whether the punishment for a given crime is too severe and disproportionate to the offense is for the [L]egislature to determine." *State v. Peters*, 1967-NMSC-171, ¶ 10, 78 N.M. 224, 430 P.2d 382 (internal quotation marks and citation omitted). Thus we leave it for the Legislature to address whether someone—like Defendant—who records a legal sexual act with a consenting minor should be subject to the sentence Defendant received in this case.[10]

**IV. Sufficiency of the Evidence**

**{48}** Defendant argues that the State failed to present sufficient evidence to sustain his convictions. We disagree.

**{49}** "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Cabezuela*, 2015-NMSC-016, ¶ 14, 350 P.3d 1145 (internal quotation marks and citation omitted). Our review involves a two-step process in which we first "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. We then "evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable doubt." *State v. Garcia*, 2016-NMSC-034, ¶ 24, 384 P.3d 1076. We disregard all evidence and inferences that support a different result. *See State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. Our appellate courts "will not invade the jury's province as fact-finder by second-guessing the jury's decision concerning the credibility of witnesses, reweighing the evidence, or substituting its judgment for that of the jury." *State v. Garcia*, 2011-NMSC-003, ¶ 5, 149 N.M. 185, 246 P.3d 1057 (alterations, internal quotation marks, and citation omitted).

**{50}** Contrary to these well-established rules, Defendant's entire sufficiency challenge is premised on reweighing the evidence, attacking the credibility of witnesses, and relying on evidence and inferences that would support a different result. As such and because we have previously reviewed at length the evidence that was presented in this case that supports Defendant's convictions for both manufacturing and possession of child pornography, we see no need to rehash that evidence here. We hold that sufficient evidence supports each of Defendant's convictions.

**CONCLUSION**

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

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

**J. MILES HANISEE, Judge**

**WE CONCUR:**

**MICHAEL E. VIGIL, Judge**

**JULIE J. VARGAS, Judge**

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[9]Notably, even the district court initially expressed concern about the State's recommendation of nineteen-and-a-half years, asking the State how the court could reconcile such a sentence with the ten-year sentence it had just imposed in a different case on a defendant who had killed a person. However, apparently persuaded by the State's argument regarding the distinctions between the two cases and likely owing to the fact that defense counsel neither argued that there were mitigating factors the court should consider nor asked the court to run the sentences concurrently, the district court acted within its discretion and sentenced Defendant in accordance with the State's recommendation.

[10]We note that the Legislature, in fact, very recently amended the Criminal Sentencing Act in order to *increase* the penalties for those who are convicted of manufacturing, distributing, and/or possessing child pornography. *Compare* Section 31-18-15 (2007), *with* Section 31-18-15 (2016)]. Under the amended act, someone convicted of the charges against Defendant in this case would face a term of imprisonment of up to thirty-four years: twelve years for each of the manufacturing counts and ten years for possession. *See* § 31-18-15(A)(6), (12).

Certiorari Denied, April 26, 2018, No. S-1-SC-36974

From the New Mexico Court of Appeals

**Opinion Number: 2018-NMCA-034**

No. A-1-CA-35528 (filed March 9, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
NEHEMIAH G.,
Child-Appellee

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
John J. Romero, District Judge

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for Appellee

## Opinion

## Stephen G. French, Judge

**{1}** During the night of January 18-19, 2013, when he was fifteen years old, Defendant Nehemiah G. (Child) killed his father, mother, and three younger siblings. He was indicted on five counts of first-degree murder and three counts of intentional child abuse resulting in the death of a child under age twelve. In October 2015, Child pleaded guilty to two counts of second-degree murder and, as charged, three counts of intentional child abuse resulting in death. Pursuant to NMSA 1978, Section 32A-2-20 (2009), the district court conducted an amenability hearing over the course of seven days in January and February 2016. At the conclusion of the hearing, the court found that "the State failed to prove by clear and convincing evidence that [Child] is not amenable to treatment or rehabilitation as a child in available facilities," and accordingly committed him to the custody of the New Mexico Children, Youth and Families Department (CYFD) until his twenty-first birthday (occurring March 20, 2018). The State has appealed the amenability determination. Because we determine that the district court abused its discretion by (1) insufficiently considering and failing to make proper findings regarding each of the seven statutory factors upon which the amenability determination rests, (2) misinterpreting precedent to conclude that the first four statutory factors related to the commission of the crime were of lesser or no applicability to that ultimate determination, and (3) arbitrarily disregarding uncontradicted expert testimony that indicated Child would not be rehabilitated by his twenty-first birthday, we reverse and vacate the district court's amenability determination, and remand for rehearing.

**BACKGROUND**

**{2}** We begin by summarizing the testimony given at the hearing concerning the circumstances of Child's personal life, including his maturity, his situation at home, his social and emotional health, and the facts concerning the commission of the crimes. At the time of the killings, Child lived in a house in Bernalillo County with his parents, Greg G. (Greg) and Sarah G. (Sarah), his nine-year-old brother, Z.G., and his two younger sisters, five-year-old J.G. and two-year-old A.G. The family was involved with and frequently attended church together at Calvary Chapel in Albuquerque, New Mexico. Child met his girlfriend, twelve-year-old A.W., at Calvary Chapel. He played in the church band, and his hobbies included skateboarding and video games, namely a World War II game called "Call of Duty." Child had always been home schooled. His mother taught him, but Child said that his studies had also been largely "self-directed" because his mother was too busy. Child said he planned to get a GED and to join the military when he turned eighteen. He claimed that he had used marijuana every few weeks since he was about twelve years old, which he got from his friends at church.

**{3}** Child described his mother as generally quiet, but she yelled at him at home. He said that she was always upset with him and his siblings, constantly angry or depressed, and she rarely smiled. Child said that she was verbally abusive to him nearly every day and had told him that she regretted his birth and wished she could stone him to death. Child also said that when she was especially mad, about once each month, she hit the children with a belt.

**{4}** Child's father, Greg, grew up Catholic but later became involved with gangs. He renewed his faith after spending time in jail, became a Christian pastor, and held a ministry at the Metropolitan Detention Center in Albuquerque, New Mexico. Greg purportedly told Child that before re-converting to Christianity and while he was part of a gang, he was in and out of jail a few times and had last been arrested for a drive-by shooting. Greg worked at Calvary Chapel for a period of time, but lost his job there in 2012. The family had financial difficulties, and Greg began working the night shift at the Rescue Mission. Child said that he and his father occasionally shot guns together. Greg was worried about intruders attacking the family when he worked the night shift, so he kept guns at the house for purposes of protecting the family and gave Child orders to stay up and patrol the property at night. Greg was hard on Child and Child recalled that when he was twelve years old he lost consciousness after being in a fight with his father.

**{5}** The morning of January 18, 2013, Child communicated to his girlfriend his thoughts about committing the crimes and said that he wanted to see her despite his parents preventing him from doing so. Sarah yelled at Child frequently that day and he felt irritated. He said he played "Call of Duty" for a couple of hours in the late afternoon, but he spent from 5:00 p.m. to 10:00 p.m. in his mother's room with her.

Child said that around 11:50 that evening, he had become increasingly angry and he decided that he would proceed with a plan to kill his mother, who by then had fallen asleep with Z.G. in her bedroom. Child retrieved a gun from the closet in her bedroom and shot her in the head two times. Child said that he shot her from about fifteen feet away and that he expected to kill her when he shot. Z.G. went to get tissues to clean up his mother's blood. When Z.G. returned, Child said to him "you're next" and shot Z.G. once in the head. Child claimed that he never liked Z.G. and that Z.G. had once threatened to kill him. Child then proceeded down the hall to find his sisters, who were crying, and shot both of them. Child said that he was certain they were dead after he shot them. Child recalled thinking that his father was a larger person and that he would need a more powerful gun to kill his father when he returned home from working a night shift. He retrieved his father's AR-15 rifle, shot his sister's lifeless body once more to see how loud the gun sounded, and went downstairs to wait for his father to return. Child waited in the bathroom for several hours until he heard his father walk by the door. When his father arrived, Child stepped out and shot him four times in the back, then walked closer to his father's body and shot him in the head.

**{6}** Both before and after the killings, between 11:20 p.m. on January 18, 2013 and 9:20 p.m. on January 19, 2013, Child and his girlfriend, A.W., exchanged text messages regarding a plan to kill their respective parents. Child also texted A.W. a picture of his mother and brother after he killed them, and much later, after having waited several hours for his father to return before killing him, Child told A.W. that he had killed him, too. They then arranged to meet at Calvary Chapel.

**{7}** Child was arrested on January 20, 2013. As stated, he was indicted on five counts of first-degree murder and three counts of intentional child abuse resulting in the death of a child under twelve years of age. Nearly three years later, Child pleaded guilty to two counts of second-degree murder, contrary to NMSA 1978, Section 30-2-1(A)(1) (1994), for the deaths of his mother and father, and three counts of intentional child abuse resulting in the death of a child under twelve years of age, contrary to NMSA 1978, Section 30-6-1(D) (2009), for the deaths of his brother and two sisters. The district court subsequently found that the State had failed to establish that Child was not amenable to treatment or rehabilitation, and entered a judgment committing Child "to the custody of [CYFD] to be confined until he reaches the age of twenty-one (21) unless sooner discharged." Child was nineteen years old at the time of disposition, and therefore his juvenile sanction amounted to confinement for a duration of approximately two years. The State appeals from the amenability finding which allowed the imposition of juvenile sanctions rather than an adult sentence.

**DISCUSSION**

**{8}** This appeal presents two issues: (1) Does the State have the right to appeal the amenability finding, and (2) Did the district court abuse its discretion in making that finding? We conclude that the State has the right to appeal from the amenability order, and that the district court abused its discretion by making the amenability finding.

**A. The State Has a Statutory Right to Appeal**

**{9}** As an initial matter we address whether this Court has jurisdiction over the State's appeal from the determination of the district court on Child's amenability to treatment in juvenile facilities. The State argues that it has both a statutory and constitutional right to appeal under NMSA 1978, Section 32A-1-17 (1999), NMSA 1978, Section 39-3-2 (1966), and Article VI, Section 2 of the New Mexico Constitution.

**{10}** We first examine the State's statutory arguments. Section 32A-1-17(A) of the Children's Code, NMSA 1978, §§ 32A-1-1 to -25-5 (1993, as amended through 2015), provides that "[a]ny party may appeal from a judgment of the court to the court of appeals in the manner provided by law." Neither party disputes that the district court's ruling resulted in a final judgment for purposes of appeal, and we agree that the judgment is final because all issues of law and fact have been determined and the case has been disposed of by the district court to the fullest extent possible. *See Zuni Indian Tribe v. McKinley Cty. Bd. of Cty. Comm'rs*, 2013-NMCA-041, ¶ 16, 300 P.3d 133. There is also no question that the State is a party to the case, so whether the State has a right to appeal turns on whether its appeal is "in the manner provided by law." Section 32A-1-17(A).

**{11}** The State argues that Section 32A-1-17(A) itself creates a right to appeal, and that it appealed "in the manner provided by law" because it followed Rule 12-201 NMRA, Rule 12-202 NMRA and Rule 12-208 NMRA. Our previous cases, however, have not interpreted Section 32A-1-17 as creating a right to appeal from Children's Code proceedings, and have instead interpreted it as requiring us to look to other statutes or to the New Mexico Constitution to determine whether an appeal is authorized. For example, in *In re Doe*, 1973-NMCA-141, 85 N.M. 691, 516 P.2d 201, we considered the predecessor statute to Section 32A-1-17, which also provided that appeals could be taken "in the matter provided by law[,]" and concluded that it required us to determine whether the appeal in that case was "authorized by law." *In re Doe*, 1973-NMCA-141, ¶ 3. We then held that another statute authorized the appeal. *Id.* ¶¶ 4-5. Both we and our Supreme Court have reached similar conclusions in other cases. *See State v. Jade G.*, 2007-NMSC-010, ¶¶ 1, 9-14, 141 N.M. 284, 154 P.3d 659 (allowing appeal by the state from a suppression order in a Children's Code case under NMSA 1978, Section 39-3-3(B)(2) (1972)); *In re Christobal V.*, 2002-NMCA-077, ¶¶ 1, 8, 132 N.M. 474, 50 P.3d 569 (holding that the State had the right to appeal from a delinquency proceeding because it was an "aggrieved party" under Article VI, Section 2 of the New Mexico Constitution). Accordingly, we hold that Section 32A-1-17 does not create a right to appeal. A right to appeal, if it exists, must be based on some other statute, or on the state constitution.

**{12}** The State also argues that delinquency proceedings are considered civil rather than criminal proceedings and, therefore, it may appeal from the children's court's order under Section 39-3-2. Section 39-3-2 governs civil appeals from district court, and provides that any party aggrieved may appeal "from the entry of any final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights[.]"

**{13}** The State cites no case which applies Section 39-3-2 to a juvenile delinquency proceeding, and we are not aware of any that do. Although we have applied NMSA 1978, Section 39-3-4 (1999), the statute authorizing interlocutory appeals from civil and special statutory proceedings, to delinquency proceedings, we did so because delinquency proceedings are special statutory proceedings, not on the ground that they are civil proceedings. *See In re Doe*, 1973-NMCA-141, ¶¶ 3-5

(holding that the predecessor statute to Section 39-3-4 authorized interlocutory appeal from juvenile proceeding that was itself statutorily authorized by the Delinquency Act). Our holding in *In re Doe* is consistent with a long line of opinions from our Supreme Court describing juvenile delinquency proceedings as special statutory proceedings (which are also known as "special proceedings"). *Cf. State v. Florez*, 1931-NMSC-068, ¶ 4, 36 N.M. 80, 8 P.2d 786 (recognizing that a proceeding sentencing minors who pleaded guilty to larceny was a statutory and special proceeding); *In re Santillanes*, 1943-NMSC-011, ¶ 20, 47 N.M. 140, 138 P.2d 503 ("That the juvenile delinquency act deals with special cases and sets up special proceedings, we do not doubt."); *State v. Acuna*, 1967-NMSC-090, ¶ 9, 78 N.M. 119, 428 P.2d 658 (acknowledging holding of *Florez* that juvenile proceedings are 'special statutory proceedings' as opposed to criminal proceedings) (citation omitted); *State v. Jones*, 2010-NMSC-012, ¶ 13, 148 N.M. 1, 229 P.3d 474 (stating that an amenability hearing is a "special proceeding").

**{14}** Because proceedings under the Children's Code are special statutory proceedings, we hold that the State has a right to appeal under NMSA 1978, Section 39-3-7 (1966), which provides that any aggrieved party may appeal "the entry of any final judgment or decision, . . . or any final order after entry of judgment which affects substantial rights, in any special statutory proceeding in the district court[.]" *See also* NMSA 1978, § 32A-1-5 (1993) (establishing the children's court as a division of the district court). Though neither party discussed the applicability of Section 39-3-7 to this case, their failure to bring it to our attention does not bar us from considering it, because the issue involves this Court's appellate jurisdiction. *See State v. Morris*, 1961-NMSC-120, ¶ 2, 69 N.M. 89, 364 P.2d 348 ("The fact that the jurisdictional question is not raised by the parties is of no consequence."); *William K. Warren Found. v. Barnes*, 1960-NMSC-069, ¶¶ 7-8, 67 N.M. 187, 354 P.2d 126 (noting that jurisdiction cannot be conferred by the parties through waiver or consent).

**{15}** Having concluded that Section 39-3-7 is the appropriate statute to apply to the present case, we must determine whether the State is an "aggrieved" party. See § 39-3-7 (stating that "any party aggrieved may appeal" from a final judgment in a special statutory proceeding in district court). "An 'aggrieved party' means a party whose interests are adversely affected." *Christobal V.*, 2002-NMCA-077, ¶ 8 (citation omitted). "The [s]tate is aggrieved by a disposition contrary to law[.]" *Id.; cf. State v. Aguilar*, 1981-NMSC-027, ¶¶ 5-7, 95 N.M. 578, 624 P.2d 520 (agreeing that the state was an "aggrieved party" "where it alleges a disposition contrary to law in a criminal proceeding" and also noting that the state has a "strong interest in the enforcement of its statutes"). As set forth more fully below, we find that the district court's disposition of this case was "contrary to law" because it failed to make the findings required under Section 32A-2-20(C), misinterpreted our Supreme Court's precedent, and its decision to arbitrarily disregard unanimous expert testimony "adversely affected" the State's "strong interest in the enforcement of its statutes." *Aguilar*, 1981-NMSC-027, ¶¶ 5-7; *Christobal V.*, 2002-NMCA-077, ¶ 8. Accordingly, we conclude that the State has a right to appeal the district court's amenability determination under Section 39-3-7.

**{16}** Having held that the State has a right to appeal because this proceeding is a special statutory proceeding, we need not discuss the State's argument that it has a constitutional right to appeal. *See Allen v. LeMaster*, 2012-NMSC-001, ¶ 28, 267 P.3d 806 ("It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." (internal quotation marks omitted)).

**B. Abuse of Discretion**

**{17}** We turn to the substance of the State's appeal, whether the district court abused its discretion in finding that the State had failed to prove that Child was not amenable to treatment. We begin by discussing the Delinquency Act, NMSA 1978, §§ 32A-2-1 to -33 (1993, as amended through 2016), with some specificity, because our analysis hinges on the district court's application of the Act's provisions to the testimony taken during Child's amenability hearing. We then review in detail the testimony presented at the amenability hearing and the district court's decision. Finally, we explain our conclusion that the district court abused its discretion.

**1. Governing Law**

**{18}** Section 32A-2-3(C), (H), and (J) of the Delinquency Act, establishes three classes of juvenile offenders, the last two of which are relevant to Child: delinquent offenders, serious youthful offenders, and youthful offenders. *see State v. Gonzales*, 2001-NMCA-025, ¶ 16, 130 N.M. 341, 24 P.3d 776 (explaining that "the Legislature created three 'classes' of juvenile offenders: serious youthful offenders, youthful offenders, and delinquent offenders"), *overruled on other grounds by State v. Rudy B.*, 2009-NMCA-104, 147 N.M. 45, 216 P.3d 810. The categories have important consequences because a child's placement in one of them determines the potential post-adjudication consequences that the child will face. *Jones*, 2010-NMSC-012, ¶ 10. This categorization "reflect[s] the rehabilitative purpose of the Delinquency Act, coupled with the realization that some juvenile offenders cannot be rehabilitated given the limited resources and jurisdiction of the juvenile justice system." *Gonzales*, 2001-NMCA-025, ¶ 16. Serious youthful offenders, children fifteen to eighteen years old charged with committing first-degree murder, "are excluded from the jurisdiction of the children's court unless found guilty of a lesser offense." *Id*; Section 32A-2-3(H). Serious youthful offenders are, therefore, tried and sentenced as adults in district court. *See* § 32A-2-6(A); *Jones*, 2010-NMSC-012, ¶ 11 ("Once charged with first-degree murder, a serious youthful offender is no longer a juvenile within the meaning of the Delinquency Act, and therefore is no longer entitled to its protections. As a result, serious youthful offenders are . . . automatically sentenced as adults if convicted.") (citation omitted); *see also Gonzales*, 2001-NMCA-025, ¶ 16 (explaining that "the Legislature has determined that serious youthful offenders cannot be rehabilitated using existing resources in the time available" given "the age of these offenders and the seriousness of the offense, including the requisite intent").

**{19}** Based on the indictment, Child was initially classified as a serious youthful offender, and therefore if convicted would have been automatically subject to adult sentencing. However, because Child pleaded guilty to second-degree murder and intentional child abuse resulting in the death of a child under twelve years of age, he is classified as a youthful offender. Youthful offenders are children fourteen to eighteen years old who are adjudicated guilty of at least one of twelve enumerated felonies, including second-degree murder as provided in Section 30-2-1 and child abuse resulting in death as provided in Section 30-6-1. *See* § 32A-2-3(J)(1)(a), (m). Youthful offenders "potentially face either juvenile or adult sanctions, depend-

ing on the outcome of a special proceeding after adjudication known as an amenability hearing." *Jones*, 2010-NMSC-012, ¶ 13.

**{20}** At the amenability hearing, the parties may present evidence regarding, and the district court "shall consider" the following factors:

> (1) the seriousness of the offense;
>
> (2) whether the . . . offense was committed in an aggressive, violent, premeditated or willful manner;
>
> (3) whether a firearm was used to commit the . . . offense;
>
> (4) whether the . . . offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;
>
> (5) the maturity of the child as determined by consideration of the child's home, environmental situation, social and emotional health, pattern of living, brain development, trauma history, and disability;
>
> (6) the record and previous history of the child;
>
> (7) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available; and
>
> (8) any other relevant factor, provided that factor is stated on the record.

Section 32A-2-20(C).

**{21}** To "consider[,]" the court must "think about this evidence with a degree of care and caution." *State v. Doe*, 1979-NMCA-122, ¶ 13, 93 N.M. 481, 601 P.2d 451. Further, our Supreme Court has held that the district court also must make "findings" regarding each of the factors. *See State v. Sosa*, 1997-NMSC-032, ¶ 8, 123 N.M. 564, 943 P.2d 1017. Based on its consideration of and findings regarding these factors, *see id.*, the court in its discretion, *see* § 32A-2-20(A), may impose an adult sentence only if it makes the following findings:

> (1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and
>
> (2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders.

Section 32A-2-20(B). If the court does not make these findings, then it must impose juvenile sanctions.

**{22}** The Delinquency Act reflects the unique status of children who commit delinquent acts and our Legislature's hesitation to impose punitive measures that potentially leave children incarcerated as adults. *See* § 32A-2-2 (listing the purposes of the Delinquency Act, including "to remove from children committing delinquent acts the adult consequences of criminal behavior"); *see also Jones*, 2010-NMSC-012, ¶ 32 (interpreting the legislative history of the Delinquency Act "as evidence of an evolving concern that children be treated as children so long as they can benefit from . . . treatment and rehabilitation"). Through the provisions of the Delinquency Act, "the Legislature no longer allows a child to be sentenced as an adult without the court first finding that the child is not amenable to treatment." *Id.* ¶ 33. Non-criminal treatment is the rule and adult criminal treatment the exception because "unlike the adult criminal justice system, with its focus on punishment and deterrence, the juvenile justice system reflects a policy favoring the rehabilitation and treatment of children." *Id.* ¶ 35 (internal quotation marks and citation omitted). Juvenile justice rests on the understanding that some youthful offenders are not "irredeemably depraved." *Graham v. Florida*, 560 U.S. 48, 72-73 (2010), *as modified* (July 6, 2010); *see id.* (deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible, but incorrigibility is inconsistent with youth.). This goal is to be pursued as long as it is "consistent with the protection of the public interest." Section 32A-2-2(A).

**{23}** The standard of proof for the two amenability findings articulated in Section 32A-2-20(B) reflects these policies and objectives underpinning juvenile justice. The standard is clear and convincing evidence, "a heightened standard of proof" just short of the highest standard, beyond a reasonable doubt. *Gonzales*, 2001-NMCA-025, ¶ 62. "For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *State ex rel. Children, Youth & Families Dep't v. Michelle B.*, 2001-NMCA-071, ¶ 12, 130 N.M. 781, 32 P.3d 790 (internal quotation marks and citation omitted). Despite the fact that the amenability determination is fraught with uncertainties and predictions, *see State v. Rudy B.*, 2010-NMSC-045, ¶ 38, 149 N.M. 22, 243 P.3d 726 ("[T]he fallibility and lack of precision inherent in the amenability determination render certainties virtually beyond reach in most situations."(internal quotation marks and citation omitted)), this Court has been wary of "[a]bandoning the goal of rehabilitation" too easily "through the mechanism of a too-low standard of proof." *Gonzales*, 2001-NMCA-025, ¶ 62.

**{24}** The Delinquency Act and the factors required by the amenability determination present evidentiary hurdles for the State as described above, but also impose challenges for the district court. CYFD and the district court lose authority to retain in custody a youthful offender sentenced as a juvenile beyond his or her twenty-first birthday. *See* § 32A-2-19(B)(1)(c); *Rudy B.*, 2010-NMSC-045, ¶ 18; *State v. Ira*, 2002-NMCA-037, ¶ 27, 132 N.M. 8, 43 P.3d 359. Section 32A-2-20(B) thus requires the district court to carefully balance the individual and societal interests at stake and to determine whether the delinquent child can be reintegrated into public life by the time he or she turns twenty-one. Indeed, the court's limited jurisdiction over children sentenced as juveniles can be "simply inadequate when the juvenile offender is extremely dangerous and in need of intensive treatment that, if there is any hope of rehabilitation, must extend well beyond the time that our current statutory scheme gives our courts to rehabilitate juvenile offenders." *Ira*, 2002-NMCA-037, ¶ 25; *see also Sosa*, 1997-NMSC-032, ¶ 10 (noting that "the brief period of treatment available to [the defendant] was insufficient to accomplish rehabilitation and protection of the public").

**{25}** The district court can be placed in a classic dilemma: impose juvenile sanctions, in which case the child will be released upon turning twenty-one years of age although rehabilitation and treatment may be incomplete and although the child may pose some risk to society; or impose an adult sentence, which may result in lengthy incarceration depriving the youthful offender of decades of freedom, but which eliminates the risk to society with certainty. *Ira*, 2002-NMSC-037, ¶ 47 (Bosson, J., specially concurring); *see id.* (describing the difficulty as a Hobson's choice that leaves the court with "essentially . . . no choice but to protect society at the expense of the child"). If the judge sen-

tences the youthful offender as a juvenile, the offender "go[es] free at age twenty-one, regardless of whether or not he proved to be truly amenable to rehabilitation." *Id.*

**2. The Amenability Hearing**

**{26}** Child's amenability hearing spanned seven days. The State and Child called numerous witnesses to testify, including some who knew the family from their attendance at Calvary Chapel, some who worked with Child during his stay at Sequoyah Adolescent Treatment Center, and others qualified as experts who testified specifically about Child's amenability to treatment by the age of twenty-one.

**{27}** Dr. Neel Madan, a clinical radiologist and neuroradiologist who reviewed scans of Child's brain, discussed the likelihood that the images revealed traumatic brain injury. Dr. Madan could not come to a conclusion about whether Child was malnourished or suffered a traumatic brain injury. He testified the images revealed no signs of bruising, scarring, or micro hemorrhaging in the brain. Dr. William Orrison, Child's neuroradiologist, testified that Child's brain scan evaluations returned findings that were abnormal and consistent with trauma. Dr. Orrison answered affirmatively when asked if Child's brain would be fully developed by his mid-twenties if he received the proper treatment and education.

**{28}** Detectives from the Bernalillo County Sheriff's Office testified about their involvement with the investigation of the crimes. One discussed the photos that Child had taken of his deceased family members, which Child kept on his iPod. Another interviewed Child during the investigation the day after the crimes, describing him as a responsive, average teenager. Child was calm, he changed his story once, cried when he discussed his mother, and was cooperative. Child told the detective that he was tired because he had not gotten any sleep the night before. Another detective described the discovery of the bodies in the house. There was also testimony about the discovery of the guns, which Child had put in Greg's car after the killings, and the ammunition found around the house. Dr. Clarissa Krinsky, who helped perform the autopsies on the five bodies, noted, among other things, that Sarah was likely shot from a distance of not more than one to two feet, that Z.G.'s gunshot wound was "rapidly fatal," and that Greg's injuries were consistent with those caused by a high power rifle.

**{29}** The district court next heard testimony about Child's presence at church from members who interacted with Child and his family. One witness described the family as "very disciplined" and "very respectful." He said Child did not often initiate conversation but was engaged when spoken to, and that he had never seen Child bully or pick fights with anyone. Vince Harrison, the safety director at Calvary Chapel, said that Greg was a "typical father" who was always with his family.

**{30}** The district court then heard testimony from employees and therapists at Sequoyah Adolescent Treatment Center, where Child had resided since May 2014. Rick Morrison performed Child's initial screening upon his entry into the facility. Morrison explained that Child's academic performance had improved, that Child had to work really hard, and that he would occasionally become frustrated with spelling and writing. His progress was normal and he learned at the "appropriate pace." Another employee said Child had days when he was sad and crying. This employee stated that on one occasion Child nearly got into a fight, but he has since been working on his coping skills. He further testified that Child shows "a lot of respect" for the employees, he does what is asked of him without complaining, and he is "a role model." A teacher at Sequoyah said Child has a strong interest in history, specifically Roman history and World War II. He described Child's progress in the classroom, noting that "he's more willing to hear opinions that he doesn't necessarily agree with and at least consider them." However, the teacher expressed concern that Child is "looking for a key to power," and remains fascinated by people with absolute power and control.

**{31}** Cheryl Aiken, Child's therapist at Sequoyah, also testified about his behavior at the facility. She said Child had problems with tolerance and racism and issues with people that he perceived to be different from him, and that he learned it from his parents, whom he said were prejudiced. Child has, however, learned and uses coping skills to manage his emotions, which she said is part of handling the trauma Child underwent given the alleged physical aggression and abuse by his father and mother. When asked to assess Child's progress, Aiken said he has "done very well" after twenty months of treatment at Sequoyah, and the medications he was taking for depression and hallucinations were helpful. Aiken said that Child has been in treatment and "he's made progress, so that . . . in itself shows that he's treatable." She described Child as "treatable" because he has made progress academically and has not been involved in any altercations, and explained that he has been able to manage his emotions. She said he is polite, has worked through his emotional issues, talked about and takes responsibility for what happened, and is, therefore, treatable. The average stay at the facility is between four and six months, but Aiken noted that Child has been there for twenty months because "he still needs treatment." When asked about the safety and risks associated with Child, Aiken stated: "I don't think we've talked about him stopping treatment right now . . . [he] certainly needs more work and hopefully that's addressed."

**{32}** Several experts testified specifically about Child's amenability to treatment by the time he reaches the age of twenty-one. Dr. Mohandie, called by the State, said that Child could not be treated by the time he reached the age of twenty-one. After stating that treating Child would "take a long time," Dr. Mohandie was asked whether it was possible or realistic to expect to treat Child in the two years remaining before his twenty-first birthday, to which he plainly replied: "No."

**{33}** Child called Dr. Manlove, who testified, "I can't say how he's going to be doing in two years[.]" To the extent Dr. Manlove expressed that Child was generally amenable to treatment, he did not say that Child would be treated or otherwise rehabilitated by age twenty-one, the time of his release from custody. Dr. Manlove, when asked specifically, "Is [Child] amenable to treatment?" replied, "He's definitely amenable to treatment from my perspective." However, Dr. Manlove emphasized that he "really strongly believe[d] that the trajectory should be extended as long as possible." On cross-examination, Dr. Manlove said that "we'd have a good feel for how he was doing by the time he was somewhere in his mid-20s range," and that he should be reassessed then.

**{34}** Dr. Fields, whom the district court appointed and Child called to testify stated, "Even though, statistically, his chances of reoffending in a violent way are very small, it's still partly based upon what he did, which . . . was absolutely horrific." He said, "I recommended a minimum of five years, and the reason I picked that was that [at] the end of five years, he would be twenty-three years old and brain development is completed by then." Dr.

Fields based his recommendation partly on the development of Child' brain and its faculties and partly on "the work" that he believed Child needed to do. "It is just a start and there is more to be done and I don't think it can be finished by the time he is twenty-one." Dr. Fields repeated his conclusion that the risk to the public, if Child remained in a structured treatment program for a while, would be very low. As long as Child "stays under the thumb of the court" when he transitions into the community, Child "will not pose a threat to the community." Dr. Fields also concluded that Child should not "be sentenced as a juvenile, do something for two and a half years, and cut him loose the day he turns twenty-one. That doesn't seem appropriate to me."

**{35}** Dr. Fields repeated his recommendation later on, recommending that Child be treated for "a minimum period of five additional years." He and defense counsel discussed the development of a child's frontal lobes, which are not fully formed until the age of twenty-three or the age of twenty-six. Dr. Fields was indeterminate about the exact age at which the frontal lobes are fully formed: "I wouldn't be surprised that in some cases it would take longer and in some cases it would probably take shorter" because "there's nothing magic about a particular age." Dr. Fields repeated, "there's no measure that you can do now and say . . . [Child] will have fully formed executive functioning and fully formed frontal lobes at the age of twenty-one and a half or the age of twenty-four[.]" He said Child needed to be reassessed at age twenty-three by treatment professionals and probation officers. Counsel then asked Dr. Fields: "This fully developed [frontal lobe issue,] . . . it wavers by person. It can happen earlier than [age] twenty-three. Do you have any belief that would happen?" Dr. Fields replied, "I would seriously doubt that anything under five years would suffice to produce the kinds of changes that I think [Child] needs to undergo before being deemed appropriate to release from court supervision[.]" He continued, "I'm not talking about frontal lobes now, I'm just talking about. . . *if we just look at what he did* and what are, at least as I delineated them and as I see them, the psychological makeup he has and problems he has, I just don't see that sooner than that is going to suffice to produce the kinds of changes that I think need to happen."

**{36}** Finally, the court heard testimony from Dr. George Davis, a psychiatrist employed by CYFD and called by Child. Dr. Davis did not testify about whether Child would be rehabilitated by the age of twenty-one. He testified about Youth Diagnostic Center's (YDC) capacity to address Child's needs, concluding that it could in fact meet his needs. He was asked if there is anything YDC could do to help Child when he reaches the age of twenty-one to ensure he reintegrated into society appropriately. Dr. Davis discussed the availability of the support offered, including discharge planners, a medical planner who arranges psychiatric and other similar appointments depending on the offender's needs, and transition coordinators who are involved in other aspects of reintegration, such as employment and education opportunities. Dr. Davis described the cut-off at age twenty-one as "not ideal because . . . it's just like a drop off," which is why YDC makes an effort to have delinquent offenders enter a reintegration center with enough time to set up community contacts for the offender, participate in school programs, and find employment.

**3. The Amenability Decision**

**{37}** After all the witnesses had testified, the district court over the course of nearly two hours orally summarized—but did not make findings about—most of the testimony. The court did not summarize the detectives' testimony, commenting instead that it "focused quite frankly on the crime . . . I'm not going over that testimony."

**{38}** The district court then read aloud Sections 32A-2-20(B)(1) and (2). Observing that there had been no evidence presented regarding the Section 32A-2-20(B)(2) finding, that Child was eligible for commitment to an institution for children with developmental disabilities or mental disorders, the court stated that it "finds accordingly" but noted that the question under Section 32A-2-20(B)(1) remained: whether "the child is not amenable to treatment or rehabilitation as a child in available facilities[.]"

**{39}** The district court then stated that "the focus of the hearings has been on all the [Section 32A-2-20(C)] factors," but specifically identified the fifth, sixth and seventh factors. It stressed that an amenability hearing is an evidentiary hearing to determine if the child is *not* amenable to treatment, and observed that the burden is on the State to make that showing by clear and convincing evidence. Citing *Rudy B.*, and while acknowledging that "you can't really focus on the child without talking about the offenses committed," the district court stated that our New Mexico Supreme Court, reminds us that "the focus of amenability hearings and the focus of the findings is on the child, not on the particular offense committed." The district court continued:

> The overriding question is can [Child] be rehabilitated or treated sufficiently to protect society's interest by the time he reaches the age of twenty-one? The Supreme Court again reminds us that the inquiry is not offense-specific. . . . Based on the evidence that I've summarized, the testimony specifically from Dr. Manlove, to a lesser degree, to a greater degree the testimony from Dr. Fields, and from Dr. Davis along with the testimony of those who have worked very closely with [Child] at least since May of 2014 are that he is amenable to treatment. . . . The question is, and . . . the elephant in the room [is], what happens when he turns twenty-one? To quote Ms. Pato, "we don't know." We do know that Dr. Fields has waffled on his magic age [of] twenty-three by saying there is no magic age, has also stated that for some youth that development occurs earlier and for some youth it occurs later. Dr. Mohandie, by his own admission, his task was to determine whether [Child] was insane. His venturing off into other diagnoses, which his approach and the repudiation of others leaves me with "I don't know" from, I mean, there's no clear and convincing evidence presented that Dr. Mohandie is accurate or inaccurate. In conclusion, the court finds that [Child], based on the testimony presented, has not been found to be not amenable to treatment in available juvenile facilities.

**{40}** The district court signed an amenability order prepared by Child, stating:

[T]his court being sufficiently informed, FINDS:

1. The State failed to prove by clear and convincing evidence

that [Child] is not amenable to treatment or rehabilitation as a child in available facilities, and

2. [Child] is not eligible for commitment to an institution for children with developmental disabilities or mental disorders.

IT IS THEREFORE ORDERED that [Child] will be subject to a juvenile disposition[.]

**4. Analysis**

**{41}** The State argues that the district court abused its discretion by failing to consider and make findings on the first four statutory factors, namely, the seriousness of the offense; whether it was committed in an aggressive, violent, premeditated, or willful manner; whether a firearm was used; and whether it resulted in personal injury. Section 32A-2-20(C)(1)-(4). The State also argues that failing to find Child not amenable to treatment constitutes an abuse of discretion because "the evidence was uncontradicted that [Child] required continued treatment until at least the age of [twenty-three]."

**{42}** We review the amenability determination for an abuse of discretion. *Sosa*, 1997-NMSC-032, ¶ 12. This Court "will find an abuse of discretion when the [district] court's decision is clearly against the logic and effect of the facts and circumstances of the case." *Id.* ¶ 7 (internal quotation marks and citation omitted). Additionally, "a trial court abuses its discretion when it exercises its discretion based on a misunderstanding of the law." *State v. Vigil*, 2014-NMCA-096, ¶ 20, 336 P.3d 380.

**{43}** Based on its discourse at the conclusion of the amenability hearing and the order issued afterwards, we conclude that the district court abused its discretion for three reasons: (1) the district court failed to consider and make findings on all of the statutorily required factors of Section 32A-2-20(C); (2) it based its findings in the amenability order on a misapprehension of the meaning and import of *Rudy B.*; and (3) it misunderstood, and then arbitrarily disregarded, the uncontradicted testimony of the experts who testified specifically about Child's prospects for rehabilitation by the age of twenty-one.

**i. The District Court Abused its Discretion by Failing to Consider and Make Findings on All of the Statutory Factors of Section 32A-2-20(C).**

**{44}** The district court summarized the testimony at the end of the amenability hearing. It also acknowledged that several detectives spoke about the circumstances of the crime and the deaths of the family members, and noted the testimony of Dr. Krinsky, the medical examiner whose testimony laid the foundation for introducing various exhibits, including autopsy reports and photographs. The district court expressly refused to consider the testimony of the detectives and the medical examiner, stating that it "focus[ed] quite frankly on the crime" and concluding "I'm not going over that testimony."

**{45}** The mere recitation of testimony concerning the statutory factors and the explicit refusal to consider testimony concerning the first four factors constitutes an abuse of discretion. Summarizing the evidence is not sufficient. *Cf. Mosley v. Magnolia Petroleum Co.*, 1941-NMSC-028, ¶ 10, 45 N.M. 230, 114 P.2d 740 (canceling a finding of fact that was simply a statement regarding the testimony of witnesses); *State ex rel. Hughes v. City of Albuquerque*, 1991-NMCA-138, ¶¶ 14-16, 113 N.M. 209, 824 P.2d 349 (in light of *Mosley*, examining administrative agency's decision to determine if agency merely recited witness testimony); *Adams v. Bd. of Review of Indus. Comm'n*, 821 P.2d 1, 6 (Utah Ct. App. 1991) (determining that, while tribunal's written decision "contain[ed] an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact"; findings of fact must state what "in fact occurred, not merely what the contradictory evidence indicates might have occurred"). It does not equate to making findings, *see Sosa*, 1997-NMSC-032, ¶ 8, or even to considering, i.e., weighing and balancing, the statutory factors. *See Doe*, 1979-NMCA-122, ¶ 13. Importantly, "none of those factors, standing alone, is dispositive. The [district] court *must consider each of them* . . . in determining whether the child is amenable to treatment or rehabilitation." *Jones*, 2010-NMSC-012, ¶ 41 (emphasis added).

**{46}** Furthermore, four of the enumerated factors require consideration of the facts and circumstances surrounding the commission of the crimes, where consideration means "to think about [the] evidence with a degree of care and caution." *Doe*, 1979-NMCA-122, ¶ 13; *see* § 32A-2-20(C)(1)-(4) (requiring consideration of the seriousness of the offense, whether it was committed in an aggressive, violent, premeditated, or willful manner, whether a firearm was used, and whether the offense was committed against persons or property). The district court's refusal to consider, or even review and summarize the testimony about the crimes as it did the testimony concerning the other statutory factors, constitutes an abuse of discretion.

**{47}** In addition, after reading the factors aloud, the court stated that "the focus of the hearings has been on all of the factors and, *very importantly*," emphasizing the seventh factor, (C)(7) of Section 32A-2-20, "the prospect for adequate protection of the public and the likelihood of reasonable rehabilitation of [Child.]" To the extent that the district court perceived one of the factors to be more important or deserving of greater weight to the exclusion of the first four enumerated factors, it abused its discretion by failing to properly consider each one of them. In *Gonzales*, upon appeal of a district court finding that the defendant was not amenable to treatment and therefore subject to an adult sentence, the defendant argued that the court had erred by using the seven factors to control, rather than guide, its finding. *See* 2001-NMCA-025, ¶ 45. We held that on the contrary the district court "was required to consider and balance these factors in making its finding[,]" and that "contrary to [the d]efendant's assertion that factor (C)(7) [of Section 32A-2-20] is the only factor relevant to determining a child's amenability to treatment, *we believe that every factor provides important information about the child and the child's prospects for rehabilitation*." *Gonzales*, 2001-NMCA-025, ¶ 45 (emphasis added); *see also Sosa*, 1997-NMSC-032, ¶ 11 (explaining that the district court considered the evidence in support of the defendant's amenability, but determined that it was outweighed by evidence relevant to the other statutory factors that weighed in favor of finding that the defendant was not amenable to treatment).

**{48}** Our Supreme Court's approach in *Sosa* to the appropriate weighing of each of the Section 32A-2-20(C) factors contrasts with that taken by the district court in this case. In finding the defendant not amenable to treatment, the district court in *Sosa* "[a]s required by statute," weighed all of the factors, including the first four. 1997-NMSC-032, ¶ 10. The court specifically discussed each factor and its effect on the determination: "[t]he serious nature of [the defendant's] offense, which resulted in the death of a young man, weighed in favor of sentencing [the defendant] as an adult[,] . . . [t]he premeditated and violent nature of the shooting also weighed in favor of sentencing [the defendant] as an adult"; and, "[t]he offense was against a person and resulted in a fatal personal injury, also

lending support to an adult sentence." *Id.* Our Supreme Court affirmed the district court's finding of non-amenability "[i]n light of the judge's methodical documentation of his consideration of the evidence as applied to the requisite statutory factors," and concluded that "the district court made a reasoned and justified determination that [the defendant] should be sentenced as an adult." *Id.* ¶ 12; *see id.* (holding that the court must make findings on the seven statutory factors in Section 32A-2-20(C)).

**{49}** In the absence of any similar documentation, we must review the district court's decision in this case for an abuse of discretion based only on the single-page order finding the State had failed to prove by clear and convincing evidence that Child was not amenable to treatment and on the oral discussion of the testimony at the end of the amenability hearing in which the district court stated that it need not review the testimony concerning the commission of the crimes. While the district court's duty to explain how it weighed and balanced the statutory factors is important in every case, it is especially important in a case like this one, where several statutory factors focus directly on the commission of five "horrific" killings with two firearms, all of which weighed against an amenability determination, and because three experts (discussed more fully below) agreed that Child could not be rehabilitated by the age of twenty-one sufficient to protect the public, which also weighed against an amenability determination. To make a determination that the State had not established that Child was not amenable to treatment, the district court needed to identify the specific evidence, through methodical documentation, that supported its decision and explain how and why that evidence outweighed the numerous factors that supported a finding that Child is not amenable to treatment. Thus, we conclude that the district court abused its discretion by failing to consider and make findings on any of the statutory factors. Next, we turn to the apparent reason the district court did not consider each of the statutory factors.

**ii. The District Court Based Its Findings in the Amenability Order on a Misapprehension of the Meaning of *Rudy B.***

**{50}** In disregarding the first four Section 32A-2-20(C) factors, the district court relied upon *Rudy B.*, which it took to stand for the proposition that an amenability determination focuses on the child, not on the particular offense committed by the child. The district court expressed its understanding of the meaning of *Rudy B.* three times: (1) our New Mexico Supreme Court reminds us that "the focus of the amenability hearings and the focus of the findings is on the child, not on the particular offense committed"; (2) "[our] Supreme Court in *Rudy B.* tells us that the focus of the findings set out in [Section] 32A-2-20 must be on the child, not on the particular offense committed"; and (3) "[our] Supreme Court again reminds us that the inquiry is not offense-specific, and it cautions that the fallibility and lack of precision inherent in the amenability determination renders certainties virtually beyond . . . reach in most situations." Having understood *Rudy B.* to mean that the amenability determination depends on characteristics specific to the offender that do not concern the crime, the district court gave much less weight, if any at all, to the first four statutory factors because they concern the facts surrounding the commission of the crimes.

**{51}** The district court misunderstood the meaning of *Rudy B.*, and therefore its applicability to this case, thereby abusing its discretion. *Vigil*, 2014-NMCA-096, ¶ 20; *see id.* ("[A] trial court abuses its discretion when it exercises its discretion based on a misunderstanding of the law."). In *Rudy B.*, the defendant appealed an order finding him not amenable to treatment and sentencing him as an adult, arguing that the Sixth Amendment afforded him the right to have a jury make the findings on the amenability determination. *Rudy B.*, 2010-NMSC-045, ¶ 2. In discussing this issue, our Supreme Court stated that the findings required by Section 32A-2-20(B) "are not offense-specific[,]" and "the focus of the findings at issue is on the *child*, not on the particular offense committed." *Rudy B.*, 2010-NMSC-045, ¶ 34.

**{52}** The court did not, however, pronounce the offense-specific factors of Section 32A-2-20(C) as inferior, or less important, or somehow deserving of lesser weight when determining whether the individual child is amenable to treatment. Immediately following these statements, the court explained that "the particular circumstances of the child's offense may have some bearing on this decision" because "some of the factors that the judge *must weigh* under Section 32A-2-20(C) are offense specific," for example, whether the offense was committed in an aggressive, violent, premeditated, or willful manner. *Rudy B.*, 2010-NMSC-045, ¶ 35 (emphasis added) (internal quotation marks and emphasis omitted).

**{53}** Moreover, in *Rudy B.*, the court had to examine the nature of the factors provided in Section 32A-2-20(C) and distinguish those relating to the offense from those relating to the character of the offender, because it had to determine whether a judge or a jury is entitled to make the findings required by Section 32A-2-20(B), and typically, juries make factual findings surrounding the particular circumstances of the offense. In other words, the distinction between offense-specific and offender-specific factors was drawn in *Rudy B.*, because it was relevant to the legal question presented—which is unrelated to the question presented in this appeal. That is, it was drawn for purposes of elucidating the nature of the amenability inquiry so as to examine the extent to which it presented tasks that are historically and traditionally reserved for the jury and not the judge. The court did not conclude that the offense-specific factors bear less weight and importance in determining whether or not an offender is in fact amenable to treatment; it concluded only that the offense-specific factors are part of a broader inquiry about the defendant's amenability to treatment, and that larger inquiry is not "a task traditionally performed by juries." *Rudy B.,* 2010-NMSC-045, ¶ 36. Rather than conclude that the offense-specific factors are to be given less weight when determining whether a defendant is amenable to treatment—as the district court here understood it to mean—the court simply suggested that the offense-specific factors be submitted to the jury during trial through special interrogatories. *Id.*

**{54}** The Delinquency Act creates no rigid delineation between offense-specific and offender-specific factors. It is not possible to evaluate whether the offender is amenable to treatment without evaluating the facts of the crimes that the offender committed, because the offender's conduct in the past is relevant to whether the offender poses a risk of danger to the public. For example, considering whether the offender committed the crimes in a violent, aggressive, or premeditated manner, as required by Section 32A-2-20(C)(2), necessarily entails examination of the offender's persona. The district court itself acknowledged that the distinction is blurred: "you can't really focus on the child without talking about the offenses committed." This Court previously has commented on the inseparability of the factors, explaining that the four factors that focus on the commission of the crime are to be considered insofar as they pertain to the defendant's likelihood of rehabilitation: "The determination of a child's prospects for rehabilitation is a complicated and difficult question that requires consideration of a child's environment, age, maturity, past behavior, and predictions of future be-

havior as well as *specifics of the offense as they relate to the prospects of rehabilitation*." *See Gonzales*, 2001-NMCA-025, ¶ 26 (emphasis added).

**{55}** In sum, we conclude that the district court misapprehended the meaning of *Rudy B.*, and therefore failed to consider and make findings on each of the enumerated factors of Section 32A-2-20(C), resulting in an abuse of discretion.

**iii. The District Court Abused Its Discretion by Disregarding the Unanimous Testimony That Child Would Not Be Rehabilitated by Age Twenty-One.**

**{56}** Consistent with the general rule, *see State v. Alberico*, 1993-NMSC-047, ¶¶ 36-37, 116 N.M. 156, 861 P.2d 192, a district court conducting an amenability hearing may disregard expert testimony. *See, e.g.*, *Gonzales*, 2001-NMCA-025, ¶ 40 ("We recognize that the fact[-]finder is entitled to disregard evidence presented by either party and to disregard the testimony of experts[.]" (citation omitted)); *see also In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 14, 121 N.M. 562, 915 P.2d 318 ("It is well settled in New Mexico that a fact finder may disregard the opinions of experts.").

**{57}** Importantly, however, the district court is not free to arbitrarily disregard expert testimony, and instead must have some rational basis for doing so. "[T]he testimony of a witness, whether interested or disinterested, cannot *arbitrarily* be disregarded by the trier of the facts[.]" *Medler v. Henry*, 1940-NMSC-028, ¶ 20, 44 N.M. 275, 101 P.2d 398 (emphasis added); *see id.* (noting that the trier of facts does not arbitrarily disregard witness testimony, even testimony that is not directly contradicted, if the witness is impeached, the testimony is equivocal or improbable, there are suspicious circumstances concerning the transaction testified to, or "legitimate inferences may be drawn from the facts and circumstances of the case that contradict or cast reasonable doubt upon the truth or accuracy of the oral testimony"). *Accord*, *Corley v. Corley*, 1979-NMSC-040, ¶ 6, 92 N.M. 716, 594 P.2d 1172; *Alto Vill. Servs. Corp. v. N.M. Pub. Serv. Comm'n*, 1978-NMSC-085, ¶14, 92 N.M. 323, 587 P.2d 1334; *Estate of Scott v. New*, No. A-1-CA-34566, mem. op. ¶ 4 (N.M. Ct. App. Sept. 17, 2015) (non-precedential) (referring to the '*Medler* rule').

**{58}** In *Doe*, we applied the "*Medler* rule" in the context of an amenability hearing. *See Doe*, 1979-NMCA-122, ¶ 13. There, the state charged a child whose gun discharged during a deer hunt, killing another person in the hunting party, with murder. *Id.* ¶ 1. Under the predecessor statute to the Delinquency Act, the district court, sitting as the children's court, was authorized to transfer the case to the district court so that the child could be tried as an adult. *Id.* Before the court could order the transfer, it had to consider, similar to Section 32A-2-20(B), "whether the child is amenable to treatment or rehabilitation as a child through available facilities." *Doe*, 1979-NMCA-122, ¶ 8 (alteration and internal quotation marks omitted); *see also* § 32A-2-20(A)(4). The district court ordered the transfer and the child appealed, arguing that the court abused its discretion in ordering the transfer given that the evidence of his amenability was uncontradicted. *Doe*, 1979-NMCA-122, ¶ 8. This Court observed that the direct evidence that the child was amenable to treatment or rehabilitation—the testimony of his high school principal and a diagnostic evaluation—was uncontradicted, and that no other substantial evidence in the record called amenability into question. *Id.* ¶¶ 9-12. On this basis, and relying on *Medler*, the *Doe* court determined that the district court had abused its discretion in disregarding the uncontradicted evidence of amenability. *Id.* ¶ 13.

**{59}** *Gonzales* and *In re Ernesto M., Jr.* illustrate application of the same principle in the context of an amenability hearing under current law. In *Gonzales*, the defendant challenged the district court's determination that he was not amenable to treatment as a juvenile, arguing among other grounds that the court ignored uncontradicted expert testimony that he was amenable to treatment. 2001-NMCA-025, ¶ 41. This Court rejected the argument and affirmed, but only after noting the district court's basis for disregarding the expert testimony: the experts' opinions were not unqualified, their opinions were formed without full knowledge of the defendant's history, and while one expert "felt that [the defendant] was amenable to treatment, . . . everything else she said indicated that she really had serious doubts." *Id.* ¶¶ 43-44.

**{60}** This Court undertook a similar analysis in *In re Ernesto M., Jr.* While again acknowledging that the district court was entitled to disregard the experts' testimony that the defendant was amenable to treatment, we observed that the district court properly might have found the victim's description of the violent crime in question—"that [the c]hild initiated the attack and took pleasure in humiliating and torturing [the v]ictim"—more persuasive than the experts' opinions. 1996-NMCA-039, ¶ 14. In addition, one of the two amenability experts had conceded a lack of certainty about the amenability determination. *Id.* ¶ 15. This evidence supported the district court's decision not to accept the experts' opinions that generally favored amenability and its determination that the defendant should be sentenced as an adult. *Id.*

**{61}** Here, three expert witnesses—Drs. Mohandie (the State's expert), Manlove (Child's expert) and Fields (the district court's expert)—testified unanimously that Child was not amenable to rehabilitation by age twenty-one. No other direct evidence was presented regarding the subject of amenability by age twenty-one: Dr. Davis did not address the subject, and Ms. Aiken said that he is "treatable" but that he still needs more treatment. She did not state an opinion about his rehabilitation by age twenty-one.

**{62}** In its concluding remarks, the district court articulated, as its *sole* ground for disregarding all of the experts' opinions, that Dr. Fields had "waffled": "We do know that Dr. Fields has waffled on his magic age [of] twenty-three by saying there is no magic age, has also stated that for some youth that development occurs earlier[.]" In fact, however, the record reflects that Dr. Fields did not equivocate on his opinion that Child could not be rehabilitated by age twenty-one such that the interests of the public would be protected. Dr. Fields acknowledged that development of the frontal lobe, the part of the brain that controls impulsiveness, may or may not be complete by age twenty-one. But Dr. Fields made clear that the indefinite timing of frontal lobe development did not affect his opinion that Child would not be rehabilitated by age twenty-one. On the contrary, *after* making his comment about the uncertain timing of frontal lobe development, Dr. Fields reiterated his firm belief that, because at least another five years of therapy would be necessary to work through Child's other psychological issues, Child would not be sufficiently treated or rehabilitated by age twenty-one to protect society's interests:

> I would seriously doubt that anything under five years would suffice to produce the kinds of changes that I think he needs to undergo before being deemed appropriate to release from . . . court supervision, or probation supervision. *Regardless, I'm not talking about frontal lobes now.* I'm just talking about, you know, . . . *if we just look at what he did and . . . the psychologi-*

> *cal makeup he has and problems he has, . . . I just don't see that sooner than that is going to suffice to produce . . . the kinds of changes that I think need to happen.*

The district court's "waffling" comment thus reflects a basic misunderstanding of Dr. Fields' testimony. A court's exercise of discretion "must be consistent with the evidence." *Schuermann v. Schuermann*, 1980-NMSC-027, ¶ 8, 94 N.M. 81, 607 P.2d 619. Because its articulated basis for disregarding the unanimous expert testimony regarding amenability is unsupported by the record, the district court abused its discretion.

**{63}** *State v. Trujillo*, 2009-NMCA-128, 147 N.M. 334, 222 P.3d 1040, stands for the proposition that unanimous expert witness testimony regarding amenability may be rejected if it is outweighed by non-expert evidence bearing on the seven Section 32A-2-20(C) factors. In *Trujillo*, we observed:

> This case essentially sets expert opinion against facts and inference drawn by the court from facts surrounding the crime and [the d]efendant's prior criminal history. It is the fact[-]finder's prerogative to weigh the evidence and to judge the credibility of the witnesses. The court was free to disregard expert opinion. It appears to us that the court adequately and appropriately addressed all concerns.

2009-NMCA-128, ¶ 18 (internal quotation marks and citations omitted). *See also Sosa*, 1997-NMSC-032, ¶¶ 10-11 (noting that the district court weighed statutory factors in determining the child should be sentenced as an adult).

**{64}** Here, however, we simply do not know what, if any, conclusions the district court may or may not have reached regarding any of the evidence other than the expert witnesses' opinions on the question of Child's amenability to treatment and rehabilitation by the time he reaches age twenty-one. While non-expert testimony was presented that in theory might support an inference of amenability, the State vigorously contested the validity and significance of that evidence. The court did not explain what testimony the court found credible or not credible, and did not make any findings or provide other explanation of what material information it gleaned from the testimony that it deemed credible. *See Mosley*, 1941-NMSC-028, ¶ 10; *Adams*, 821 P.2d at 1, 6. Instead, our insight into the court's reasoning is limited to its statement that it would not consider the evidence regarding the first four Section 32A-2-20(C) factors and its misstatement of Dr. Fields' testimony as grounds for disregarding the experts' unanimous view that Child could not be rehabilitated or treated by age twenty-one. We therefore must reverse the district court's amenability determination. "Findings of fact which are not . . . supported [by substantial evidence] cannot be sustained on appeal, and a judgment based on such findings is itself without support." *Vehn v. Bergman*, 1953-NMSC-037, ¶ 22, 57 N.M. 351, 258 P.2d 734; *accord*, *Harrison v. Animas Valley Auto & Truck Repair*, 1987-NMCA-017, ¶ 19, 105 N.M. 425, 733 P.2d 873 ("A judgment cannot be upheld on appeal unless the conclusion upon which it rests finds support in one or more findings of fact".), *rev'd on other grounds*, 1988-NMSC-055, 107 N.M. 373, 758 P.2d 787. We also will not simply affirm on a "right for any reason rationale." *Atherton v. Gopin*, 2015-NMCA-003, ¶ 37, 340 P.3d 630. This Court may not do so where it would require us to "assume the role of the district court and delve into fact-dependent inquiries." *State v. Randy J.*, 2011-NMCA-105, ¶ 28, 150 N.M. 683, 265 P.3d 734.

**{65}** We emphasize that our role as a reviewing court is limited. "The question for this Court is not what it would . . . [decide] based on the testimony presented below[.]" *Trujillo*, 2009-NMCA-128, ¶ 19. "We do not reweigh the evidence and will not substitute our judgment for that of the [district] court." *Gonzales*, 2001-NMCA-025, ¶ 40. Therefore, we will not undertake an independent review and evaluation of the evidence bearing on the Section 32A-2-20(C) factors. Instead we will remand this matter to the district court to reconsider the evidence and make another amenability determination in accordance with this opinion, including considering and making findings regarding all of the Section 32A-2-20(C) factors.

**5. Procedural Ramifications on Remand**

**{66}** Given the imminent approach of Child's twenty-first birthday (occurring March 20, 2018), we briefly address several issues relating to the consequences of our ruling. First, under the Delinquency Act, when a child reaches age twenty-one, CYFD loses authority to retain him or her in custody. See § 32A-2-19(B)(1), § 32A-2-20(F). Thus, as a practical matter Child could not be returned to CYFD for further treatment and rehabilitation following the district court's completion of another amenability hearing, even assuming the court were to make the same determination as it did in 2016.

**{67}** Second, notwithstanding CYFD's loss of authority, on remand the district court will retain jurisdiction over Child during the pendency of the second amenability proceeding, including any appeal. The district court, as children's court, possesses jurisdiction over adults for offenses they committed as juveniles. *See* NMSA 1978, § 32A-1-8(A) (2009) (providing that the children's court has "exclusive original jurisdiction of all proceedings under the Children's Code in which a person is eighteen years of age or older and was a child at the time the alleged act in question was committed"). Further, the State through its district attorney retains continuing jurisdiction to prosecute the case. *See* NMSA 1978, § 32A-1-6(A), (B), (F) (2005).

**{68}** Third, as a result of our reversal and remand of the 2016 disposition, Child's status before the district court is as if Child "had not yet been sentenced[.]" *See United States v. Rayford*, 552 Fed. App'x 856, 859 (10th Cir. 2014). That is, he is a youthful offender pending adult sentencing or juvenile disposition. Any determination of detention pending disposition will be made in accordance with Section 32A-2-11, Section 32A-2-12, and Section 32A-2-13.

**{69}** Fourth, on remand the parties may present evidence regarding the progress of Child's treatment and rehabilitation since entry of the 2016 disposition. *See Jones*, 2010-NMSC-012, ¶ 56; *see also State v. Doe*, 1983-NMCA-015, ¶ 23, 99 N.M. 460, 659 P2d 912 (stating that "the evidence to be considered may be that existing at the time of the latest transfer hearing, in addition to that produced at the earlier hearing"). Thus, the question the district court effectively must decide is whether Child, now twenty-one years old, *has been* "rehabilitated or treated sufficiently to protect society's interests[.]" *Rudy B.*, 2010-NMSC-045, ¶ 36.

**CONCLUSION**

**{70}** We reverse and vacate the district court's order on amenability, and remand to the district court to reconsider the evidence and make another amenability determination in accordance with this opinion, including considering and making findings on the record regarding all of the Section 32A-2-20(C) factors.

**{71} IT IS SO ORDERED.**
**STEPHEN G. FRENCH, Judge**

**WE CONCUR:**
**HENRY M. BOHNHOFF, Judge**
**EMIL J. KIEHNE, Judge**

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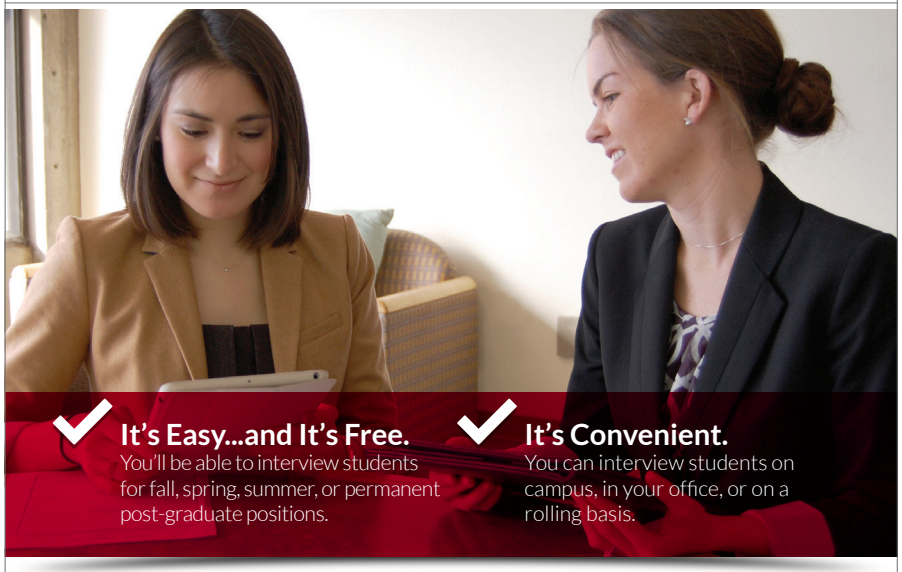

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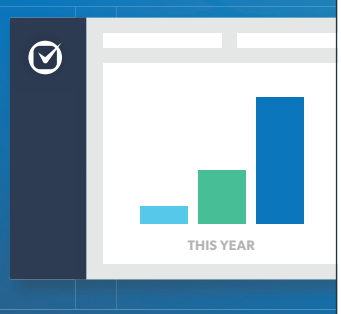


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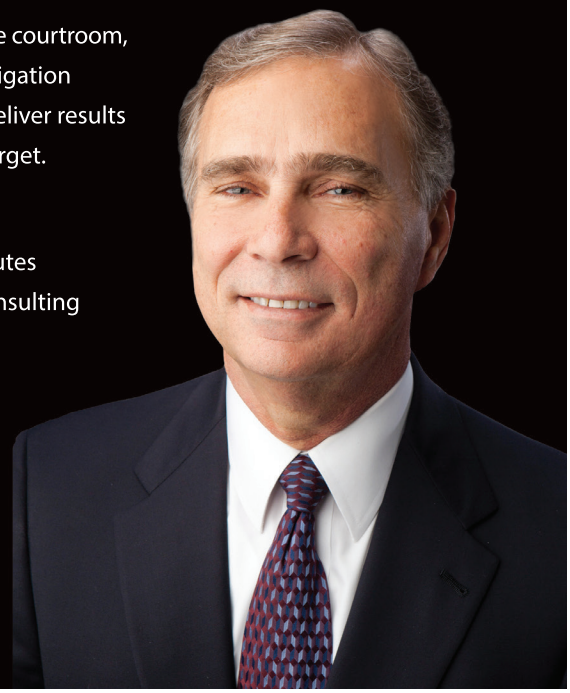

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Sandia Laboratory Federal Credit Union has an opening for a Compliance Analyst. This position requires a candidate who can communicate effectively and is diligent, detail-oriented, and discrete, with significant experience interpreting and applying regulations. If you enjoy research and synthesizing information to make decisions, this might be a good position for you. SLFCU offers competitive compensation, a great work environment and a generous benefit package. You may learn more about this position and about our organization, and submit an employment application, at www.slfcu.org/Join (Careers). EOE

**Mid to Senior-Level Attorney–**
Civil litigation department of AV Rated firm. Licensed and in good standing in New Mexico with three plus years of experience in litigation (civil litigation preferred). Experience in handling pretrial discovery, motion practice, depositions, trial preparation, and trial. Civil defense focus; knowledge of insurance law also an asset. We are looking for a candidate with strong writing skills, attention to detail and sound judgment, who is motivated and able to assist and support busy litigation team in large and complex litigation cases and trial. The right candidate will have an increasing opportunity and desire for greater responsibility with the ability to work as part of a team reporting to senior partners. Please submit resume, writing sample and transcripts to palvarez@rmjfirm.com.

**Full-time Law Clerk**
United States District Court, District of New Mexico, Albuquerque, Full-time Law Clerk, assigned to Judge Browning, $61,425 to $73,623 DOQ. See full announcement and application instructions at www.nmd.uscourts.gov. Successful applicants subject to FBI & fingerprint checks. EEO employer.

**Legal Assistant**
Established civil litigation law firm in the Journal Center area is looking for a full-time legal assistant. Must have previous legal experience, be familiar with local court rules and procedures, and be proficient in Odyssey and CM/ECF e-filing. Duties include proof reading pleadings and correspondence, drafting supporting pleadings, and providing support for multiple attorneys. Knowledge of Word, Outlook, and editing documents with Adobe Pro or eCopy software is preferred. Send resume and salary requirements to jyazza@guebertlaw.com .

**Assistant County Attorney Position**
Sandoval County is seeking applications from licensed New Mexico attorneys for its Assistant County Attorney position. Minimum qualifications include four years of experience in the practice of law including litigation and appellate experience and the coordination of multiple issues relevant to areas assigned; municipal/local government experience preferred. Litigation experience highly desirable. Salary based on qualifications and experience. For detailed job description, full requirements, and application procedure visit http://www.sandovalcountynm.gov/departments/human-resources/employment/

**Staff Attorney**
Western Environmental Law Center (WELC), a nonprofit public interest environmental law firm with a 25-year legacy of success, seeks a dynamic, public interest-focused attorney with at least two years of litigation experience to join our team. This full-time position will be located in our Taos, New Mexico office and will be filled as soon as possible, with an ideal start date of September 2018. To apply, please email the following as PDF attachments to jobs@westernlaw.org: (1) cover letter addressed to Erik Schlenker-Goodrich, Executive Director; (2) resume; and (3) minimum of three references. No phone calls or in-person visits please. For details and complete application instructions, visit https://westernlaw.org/job-announcement-staff-attorney.

**Nurse Paralegal**
The law firm of Butt Thornton & Baehr PC has an opening for an experienced Nurse Paralegal (5+ years). Excellent organization, computer and word processing skills required. Must have the ability to work independently. Generous benefit package. Salary DOE.Please send letter of interest and resume to, Gale Johnson, gejohnson@btblaw.com

**Paralegal**
Need experienced litigation paralegal for full time position with litigation firm. Must have experience filing court pleadings electronically, and helping with discovery and trial prep. Must be able to multitask. Fluency in Spanish a plus. Send resume w/ references via email to smwarren@nmconsumerwarriors.com.

**Litigation Paralegal**
Litigation paralegal needed for Albuquerque plaintiff's law firm, McGinn, Montoya, Love & Curry PA. Medical malpractice experience preferred but not required. Must be able to work in a busy, fast-paced litigation practice. 3-5 years relevant experience required. Experience obtaining & organizing medical records, compiling and reviewing records, and strong skills in Adobe PDF and Microsoft Office Suite a plus. The right candidate needs strong writing, communication and organization skills. Excellent benefit package included. Salary commensurate with experience. Spanish speaking helpful. Please send a resume and writing sample to MCMLAdmin@mcginnlaw.com

**Seeking Legal Secretary/Paralegal**
A highly valued member of our staff is retiring and we need to fill her position! The Davidson Law Firm is a small, established firm in Corrales with a very busy practice. Our team needs a legal secretary/paralegal, with at least 5 years' experience in civil litigation, to work on water law and medical malpractice matters. We are looking for a professional and friendly person who enjoys a direct and hands-on working relationship with attorneys and clients. Competitive compensation provided. Those needing a flex/part time positon will be considered. Please email a resume and cover letter with salary requirements to corralesfirm@gmail.com. All inquiries will be kept strictly confidential.

**Divorce Paralegal – Incredible Opportunity w/ New Mexico Legal Group**
New Mexico Legal Group, a cutting edge divorce and family law practice is looking for one more paralegal to join our team.
Why is this an incredible opportunity? You will be involved in building the very culture and policies that you want to work under. We are offer great pay, health insurance, automatic 3% to your 401(k), vacation and generous PTO. And we deliver the highest quality representation to our clients. But most importantly, we have FUN! Obviously (we hope it's obvious), we are looking for candidates with significant substantive experience in divorce and family law. People who like drama free environments, who communicate well with clients, and who actually enjoy this type of work will move directly to the front of the line. Interested candidates should send a resume and cover letter explaining why you are perfect for this position to DCrum@NewMexicoLegalGroup.com.com The cover letter is the most important thing you will send, so be creative and let us know who you really are. We look forward to hearing from you!

## Positions Wanted

### Experienced Paralegal Seeks Part-Time Employment In Santa Fe

Highly experienced (20+ years) and recommended paralegal wishes part-time or contract employment in Santa Fe only. For resume and references, please e-mail santafeparalegal@aol.com.

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Board certified orthopedic surgeon available for case review, opinions, exams. Rates quoted per case. Owen C DeWitt, MD, odewitt@alumni.rice.edu

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### Office For Rent

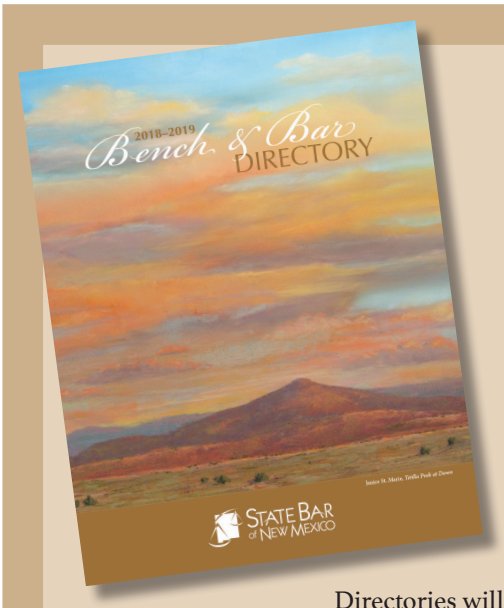
820 Second Street NW, office for rent, two blocks from courthouses, all amenities including copier, fax, telephone system, conference room, high-speed internet, phone service, receptionist, call Ramona at 243-7170

### Office For Rent

Office for rent in established firm. New and beautiful NE Heights office near La Cueva High School. Available May 1. Please contact Tal Young at (505) 247-0007.

### Downtown Office For Sale/Lease

Three (3) Blocks from the courthouse in revitalizing downtown near Mountain Road. Great visibility and exposure on 5th Street. Excellent office space boasting off street parking. Surrounded by law offices the property is a natural fit for the legal or other service professionals. Approximately 1230 square feet with two offices/bedrooms, one full bath, full kitchen, refinished hardwood floors, reception/living area with fireplace and conference/dining area. Property features CFA, 150sf basement and a single detached garage. Run your practice from here! Sale price is $265,000. Lease option and owner financing offered. Contact Joe Olmi @ 505-620-8864.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