Official Publication of the State Bar of New Mexico

Bar Bulletin

July 11, 2018 • Volume 57, No. 28

Summer Solace, by Carla Forrest

Inside This Issue

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12
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13
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18
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18
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19
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25
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6–9 p.m., State Bar Center, Albuquerque, 505-797-6094

About Cover Image and Artist: New Mexico Artist Carla Forrest provides an exciting vision of the Southwest through her spectral luminescent works, inspired by direct observation of nature and life. Forrest's pieces have tiles of color and incised lines one might expect from a palette knife painting, but reveal an even more complex painting.

Notices

Court News

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.

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.

Professionalism Tip

With respect to opposing parties and their counsel:

In the preparation of documents and in negotiations, I will concentrate on substance and content.

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 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#.
- Aug. 6, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (Group meets the first Monday of the month.)
- Aug. 13, 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#.

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 have 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 sup-

portive 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

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.

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 Sept. 28, at the Hotel Andaluz, in downtown Albuquerque.

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.

N.M. Chapter of the Federal Bar Association

CLE at the Movies

The Chapter presents its annual CLE at the Movies program on Fri. July 13, at 1p.m. (registration starts at 12:30 p.m.). Screen "Dream: An American Story", followed by a panel discussion of the legal issues that arise from undocumented status and Deferred Action for Childhood Arrivals (DACA). The panel, consisting of David Urias, Luisa Mabel Arellanes Serrano, and Cristina Chávez, will be moderated by Veronica C. Gonzales-Zamora. The event will be held at the State Bar Center 5121 Masthead NE Albq, NM 87109. Approval for up to 2.5 General CLE credits is pending. Cost is $30 for FBA members, $40 for non-members, and free for law student

members. Those attending are encouraged to pre-register at https://goo.gl/forms/vnSDAU0VFI62WW6U2 and pre-pay at https://www.paypal.me/nmfedbar.

Senior Lawyers Division

Volunteers Needed for Civil Legal Clinic

The Senior Lawyers Division will sponsor the Second Judicial District Court Civil Legal Clinic from 10 a.m.- 1 p.m. on Aug. 1. Volunteers are needed to give brief, free legal advice during the clinic to community members in need. Cases are screened by New Mexico Legal Aid in advance of client consultations and will consist of general civil questions, except for family and immigration law. Attorneys are expected to issue spot and use other attorneys as resources. Bill Burgett at burgettlaw@yahoo.com by July 27 to volunteer. The Clinic will take place in the 3rd floor conference room at the Court, located at 400 Lomas NW in Albuquerque.

Other News

Center for Civic Values

Albuquerque High School Seeks Mock Trial Attorney Coach

The Albuquerque High School is looking for an attorney coach for its Gene Franchini High School Mock Trial Team. Contact Kristen Leeds at mocktrial@civicvalues.org to express interest. To learn more about Mock Trial, visit www.civicvalues.org.

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

State Bar of New Mexico
Children's Law Section

16th Annual Art Contest

The pieces that make up our LIVES.

Save the Date for the Art Contest Reception! Oct. 24 at the South Broadway Cultural Center

Through the years, the Children's Law Section Art Contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. This year's theme is designed to encourage youth from around the state who have come into contact with the juvenile justice system to think about how they will make contributions to the world during their lifetime. Using materials funded by the Section's generous donors, contestants will decorate flip flops to demonstrate their idea.

How can I help? Support the Children's Law Section Art Contest by way of a donation that will enable contest organizers to purchase supplies, display artwork, provide prizes to contestants and host a reception for the participants and their families. Art supplies and contest prize donations are also welcome.

To make a tax deductible donation, visit **www.nmbar.org/ChildrensLaw** or make a check out to the New Mexico State Bar Foundation and note "Children's Law Section Art Contest Fund" in the memo line. Please mail checks to:

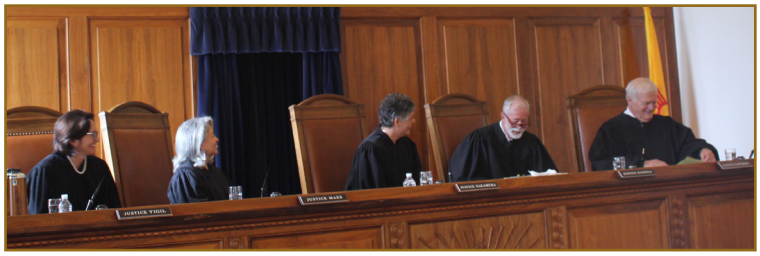
State Bar of New Mexico
Attn: Breanna Henley
PO Box 92860
Albuquerque, NM 87199

For more information contact
Alison Pauk at alison.pauk@lopdnm.us.

Welcome, Colleague

Formal Investiture Ceremony Held for Justice Gary L. Clingman

By Evann Kleinschmidt



The sitting Justices welcome their new colleague to the bench.

On June 15, a formal investiture ceremony was held for Justice Gary L. Clingman at the Supreme Court courtroom in Santa Fe. Chief Justice Judith K. Nakamura administered the oath of office. The Justice's son, Patrick Clingman, held the bible during the ceremony.

After taking the oath, Justice Clingman recognized those that have inspired him and supported him throughout his life and career, including his father. He recalled the advice his father gave to him when he first became a judge: treat everyone, rich or poor, the same. He said he remembers that advice every morning when he puts on his robe and pledged to continue to do so as a justice of the Supreme Court of New Mexico.

Justice Clingman served on the Fifth Judicial District Court in Lea County from 1997 until his appointment to the state's highest court. He was chief judge from 2006-2013.

The Justice will be the 19th person to fill the Hanna Seat on the Court which is named after the first justice to hold that seat, Richard H. Hanna. Justice Clingman is the 67th person to serve on the Court since statehood.

Legal Education

July

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
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27 **Litigation and Argument Writing in the Smartphone Age (2017)**
5.0 G, 1.0 EP
Live Replay, Albuquerque
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27 **Bankruptcy Fundamentals for the Non-Bankruptcy Attorney (2018)**
3.0 G
Live Replay, Albuquerque
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27 **Attorney vs. Judicial Discipline (2017)**
2.0 EP
Live Replay, Albuquerque
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Teleseminar
Center for Legal Education of NMSBF
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August

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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**
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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
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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)**
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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
Center for Legal Education of NMSBF
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22 **Technology: Time, Task, Document and Email Management**
1.0 G
Live Webinar
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22 **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Advanced Google Search for Lawyers**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

28 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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29 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Exclusive Rights (and Revenue) You Get With Music**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **2017 Real Property Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **New Mexico Liquor Law for 2017 and Beyond**
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Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Risky Business: Avoiding Discrimination When Completing the Form I-9 or E-Verify Process**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

31 **The Ethical Issues Representing a Band-Using the Beatles**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

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5 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

6 **Choice of Entity for Nonprofits & Obtaining Tax Exempt Status, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

11 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

12 **Planning with Single Member, LLCs, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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13 **How to Practice Series: Civil Litigation, Pt II – Taking and Defending Depositions**
4.5 G, 2.0 EP
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

19 **Income and Fiduciary Tax Issues for Estate Planners, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
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20 **Income and Fiduciary Tax Issues for Estate Planners, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

25 **2018 Sexual Harassment Update**
1.0 G
Teleseminar
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Listings in the Bar Bulletin *CLE Calendar are derived from course provider submissions. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to notices@nmbar.org. Include course title, credits, location, course provider and registration instructions.*

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 29, 2018

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A-1-CA-36718	K Kruskal v. P Sprunt	Affirm	06/25/2018
A-1-CA-36779	State v. T Wolf	Affirm	06/26/2018
A-1-CA-36904	CYFD v. Leticia S	Affirm	06/26/2018
A-1-CA-34794	State v. A Martinez	Affirm	06/27/2018
A-1-CA-37088	CYFD v. Amanda J	Affirm	06/27/2018
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A-1-CA-35565	State v. N Bravo	Reverse/Remand	06/29/2018

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

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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

CLERK'S CERTIFICATE NAME AND ADDRESS CHANGE

As of June 15, 2018:
Randy Boyer
F/K/A Randy Patrick Boyer
788 Tramway Place, NE,
Suite A
Albuquerque, NM 87122
571-272-7113
randy.boyer@uspto.gov

CLERK'S CERTIFICATE OF CORRECTION

Dated June 1, 2018:
Hooman Hedayati
251 14th Street, SE
#B
Washington, DC 20003
210-601-7231
hoomanhedayati21
@gmail.com

CLERK'S CERTIFICATE OF ADMISSION

On June 19, 2018:
Gabrielle Susanne Johnson
New Mexico Legal Aid, Inc.
600 E. Montana,
Suite D
Las Cruces, New Mexico
88001
575-541-4800
505-227-8712 (fax)
gabriellej@nmlegalaid.org

On June 26, 2018:
Bruce A. Koehler
Mounce, Green, Myers, Safi,
Paxson & Galatzan
PO Box 1977
100 N. Stanton,
Suite 1000 (79901)
El Paso, TX 79999
915-532-2000
915-541-1548 (fax)
koehler@mgmsg.com

On June 19, 2018:
Chikezie Canice Ogbuehi
State of Utah, Division of
Purchasing
3150 State Office Building
Salt Lake City, Utah 84114
801-538-3151
cogbuehi@utah.gov

On June 26, 2018:
Melanie S. Reyes
Flowers Davis, PLLC
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As of November 3, 2017, **Paul Livingston** will be shown on the Roll of Attorneys as deceased.

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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

The Ad Hoc Committee on Rules for Mental Health Proceedings has recommended amendments to Rules 5-123, 5-602, 6-302, 6-501, 6-507, 7-302, 7-501, 7-507, 8-302, 8-501, and 8-507 NMRA and Form 9-404 NMRA, and the adoption of new Rules 5-602.1, 5-602,2, 5-602.3, 6-507.1, and 8-507.1 NMRA and new Forms 9-404A and 9-514 NMRA. The proposed new and amended rules and forms are posted to the Supreme Court's website as Proposals 2018-029 and 2018-030, and may be found at https://supremecourt.nmcourts.gov/open-for-comment.aspx. Due to the length of the proposal, the full text is not being published in the Bar Bulletin.

The new and amended rules and forms fall into two categories. The first category consists of new and amended rules and forms that, if approved, would govern competency proceedings in the district, magistrate, and municipal courts. Rules 5-602, 5-602.1, 6-507, 6-507.1, 8-507, and 8-507.1 and Forms 9-404A and 9-514 were first published for comment in 2016 and are being republished for comment with significant revisions. New Rules 5-602.2 and 5-602.3 are being published for comment for the first time and would govern proceedings after a finding of incompetency. Similarly, amended Rule 5-123 is being published for comment for the first time and would more clearly define the court records in competency proceedings that must be sealed automatically without motion or order of the court.

The second category of rules and forms published in this proposal consists of amendments to the Rules for the Metropolitan, Magistrate, and Municipal Courts that refer to a defendant's ability to enter a *plea* of "not guilty by reason of insanity." *See* Rules 6-302, 6-501, 7-302, 7-501, 7-507, 8-302, & 8-501; Form 9-404. The amendments are necessary because "not guilty by reason of insanity" has not been a valid plea since at least 1974. *See* Rule 5-303 NMRA committee commentary ("Paragraph D of this rule, by eliminating the plea of not guilty by reason of insanity, introduced a change in New Mexico procedure."). Rather, the defendant's "insanity at the time of commission of an offense" may be raised as a *defense* "at the arraignment or within twenty (20) days thereafter." Rule 5-602(A) NMRA. Rules 6-302, 6-501, 7-302, 7-501, 7-507, 8-302, and 8-501 and Form 9-404 are thus being published for comment with amendments to bring them into conformance with the law. The amended rules also include stylistic and other changes that are intended to make the rules consistent with one another.

If you would like to comment on the proposed amendments before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
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Your comments must be received by the Clerk on or before Aug. 1, 2018, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

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

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-027
No. S-1-SC-35657 (filed March 9, 2018)

JOEL IRA,
Petitioner,
v.
JAMES JANECKA, Warden,
Lea County Correctional Facility,
Hobbs, New Mexico,
Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Jerry H. Ritter, Jr., District Judge

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Opinion

Edward L. Chávez, Justice

{1} During the last thirteen years the Supreme Court of the United States, relying on neuroscientific evidence of adolescent behavior, issued three opinions declaring that certain sentences imposed on juvenile offenders violate the Eighth Amendment prohibition of cruel and unusual punishment. *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the imposition of the death penalty for a crime committed by a juvenile); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that no juvenile could be sentenced to life without the possibility of parole for a nonhomicide offense); *Miller v. Alabama*, 567 U.S. 460 (2012) (striking down a statute that required courts to sentence a juvenile convicted of murder to life without parole). These cases created a special category under the Eighth Amendment for juvenile offenders whose culpability is mitigated by adolescence and immaturity. The cases recognize that a juvenile is more likely to be rehabilitated than an adult and therefore should receive a meaningful opportunity to obtain release by demonstrating maturity and rehabilitation. In *Montgomery v. Louisiana*, ___ U.S. ___, ___, 136 S.Ct. 718, 736-37 (2016), the Supreme Court endorsed the principles in *Roper*, *Graham*, and *Miller* and held that *Miller* applies retroactively because it announced a substantive rule of constitutional law.

{2} Nearly twenty years ago, Petitioner, Joel Ira, was sentenced as a juvenile to 91½ years in the New Mexico Department of Corrections after he pled no contest to several counts of criminal sexual penetration and intimidation of a witness—crimes which he committed when he was fourteen and fifteen years old. Under the relevant Earned Meritorious Deduction Act (EMDA), NMSA 1978, § 33-2-34(A) (1988, amended 2015),[1] Ira can be eligible for parole when he has served one-half of his sentence—approximately 46 years—if he maintains good behavior while incarcerated. He will be approximately 62 years old when he can first be eligible for parole. **{3}** Ira petitioned for a writ of habeas corpus to make the central argument that his sentence is equivalent to a life sentence without parole and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article II, Section 13 of the New Mexico Constitution. He relies on *Roper* and its progeny for his argument. Whether the rationale of these cases, and in particular *Graham*, should be applied to a term-of-years sentence for the commission of multiple crimes is the preliminary question we must answer. If *Graham* applies, we must next consider whether Ira's long consecutive sentence effectively deprives him of a meaningful opportunity to obtain release by demonstrating his maturity and rehabilitation, thereby violating the prohibition of cruel and unusual punishment.

{4} Other courts are split on whether to apply *Graham* when a juvenile receives a a multiple term-of-years sentence for the commission of multiple crimes. We conclude that *Graham* applies when a multiple term-of-years sentence will in all likelihood keep a juvenile in prison for the rest of his or her life because the juvenile is deprived of a meaningful opportunity to obtain release by demonstrating his or her maturity and rehabilitation. In this case, Ira can be eligible for a parole hearing when he is 62 years old if he demonstrates good behavior under the EMDA. Therefore, based on the record before us, we conclude that Ira has a meaningful opportunity to obtain release by demonstrating his maturity and rehabilitation before the Parole Board. We find the remaining issues raised in the petition to be without merit and therefore deny the petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

{5} The underlying conduct for which Ira pled no contest is discussed extensively in *State v. Ira*, 2002-NMCA-037, 132 N.M.

[1]Under the EMDA that applied when Ira was sentenced in 1997, an inmate "confined in the penitentiary of New Mexico . . . may be awarded a meritorious deduction of thirty days per month upon recommendation of the classification committee and approval of the warden . . . ." NMSA 1978, § 33-2-34(A) (1988). This statute effectively provides for a fifty percent reduction in an inmate's sentence if the inmate merits that reduction through good behavior while in confinement

8, 43 P.3d 359. Ira pled no contest to ten counts of criminal sexual penetration, one count of aggravated battery (great bodily harm), one count of aggravated battery against a household member, and one count of intimidation of a witness. *Id.* ¶¶ 2, 4. Ira committed these crimes when he was fourteen and fifteen years old. *Id.* ¶ 2. The victim of Ira's criminal sexual penetration and intimidation of a witness offenses was his stepsister, who was six years younger than Ira. *Id.*

{6} The district court had the discretion to invoke an adult sentence or a juvenile disposition. NMSA 1978, § 32A-2-20(A) (1996, amended 2009). The district court invoked an adult sentence because the court found that Ira was "not amenable to treatment or rehabilitation as a child in available facilities," and Ira was "not eligible for commitment to an institution for the developmentally disabled or mentally disordered." Section 32A-2-20(B)(1)-(2). The district court made these findings persuaded by the seriousness of the crimes and the effect on the young victim. The district court also noted that although Ira's lifestyle "was not one to be envied," the experts testified that Ira was "devoid of conscience and devoid of empathy for other human beings." The district court ultimately sentenced Ira to 91½ years in the custody of the New Mexico Department of Corrections.

{7} The Court of Appeals affirmed, holding that his sentence was not cruel and unusual punishment. *Ira*, 2002-NMCA-037, ¶ 1. The Court compared the gravity of Ira's offense against the severity of his sentence to determine whether the punishment was grossly disproportionate to the offense. *Id.* ¶ 19. It considered the severity of Ira's conduct, the toll of that conduct on his victim, and his lack of remorse and likelihood of committing similar acts in the future. *Id.* In light of these facts, the Court of Appeals decided his sentence was not "grossly disproportionate as to shock the general conscience or violate principles of fundamental fairness." *Id.* It acknowledged that "the decision to sentence a child as an adult is an extreme sanction that cannot be undertaken lightly." *Id.* ¶ 20. Yet, it emphasized that "the imposition of a lengthy, adult sentence on a juvenile does not, in itself, amount to cruel and unusual punishment." *Id.*

{8} In his special concurrence, Chief Judge Bosson expressed concern over the length of Ira's sentence. Since the earliest Ira can be eligible for a parole hearing is after serving 45 years of his sentence, Chief Judge Bosson noted, "[f]or one so young, this is effectively a life sentence. One who goes into prison a teenager and comes out a man at the age of retirement has forfeited most of his life." *Id.* ¶ 45 (Bosson, C.J., specially concurring).

{9} Chief Judge Bosson also observed the irony of the sentence when compared with the underlying offenses for which Ira pled no contest, explaining that

> [i]f [Ira] had eventually killed his victim, perhaps to protect himself from prosecution for his other crimes, he could have received a life sentence as an adult, but would have become eligible for parole after a "mere" thirty years. Thus, although [he] commits crimes which, however gruesome, are less than first degree murder, he receives a sentence that is effectively fifty percent longer.

Id. ¶ 46.

{10} Ira filed a writ of habeas corpus in the district court that sentenced him pursuant to Rule 5-802 NMRA. In it he argued that (1) his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment and Article II, Section 13 of the New Mexico Constitution; (2) the trial court erred in failing to set aside his plea agreement; and (3) he was denied effective assistance of counsel. The district court denied his petition. We granted certiorari pursuant to Rule 12-501 NMRA.

II. DISCUSSION

A. The Eighth Amendment Forbids a Term-of-Years Sentence That Deprives a Juvenile of a Meaningful Opportunity to Obtain Release

{11} Ira's argument that his 91½-year sentence is cruel and unusual punishment in violation of the Eighth Amendment and Section II, Article 13 of the New Mexico Constitution is a question of constitutional law, which we review de novo. *See State v. DeGraff*, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61. We do not address the prohibition of cruel and unusual punishment under Section II, Article 13 because we conclude that the Eighth Amendment affords the necessary protection in this case. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (holding that when an asserted right is protected under the United States Constitution, the claim under the New Mexico Constitution is not reached).

{12} The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The United States Supreme Court looks beyond a historical interpretation of cruel and unusual punishment and instead looks to "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). The Court emphasizes that "[e]mbodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham*, 560 U.S. at 59 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The Eighth Amendment "does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime." *Graham*, 560 U.S. at 59-60 (internal quotation marks and citation omitted). Some punishments are so grossly disproportionate that the Court has imposed "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of the penalty." *Miller*, 567 U.S. at 470.

{13} The Supreme Court has imposed several categorical bans on juvenile sentencing. In *Roper*, the Court held that the Eighth Amendment bars the death penalty for an offender who committed his or her offense before the age of eighteen. 543 U.S. at 568. In *Graham*,[2] the Court held that the Eighth Amendment prohibits juvenile offenders from being sentenced to life without the possibility of parole for a nonhomicide offense. 560 U.S. at 74. In *Miller*, the Court held that the Eighth Amendment prohibits a State from imposing a mandatory sentence of life without parole for juvenile offenders. 567 U.S. at 470.

[2]Graham was arrested and plead guilty to armed burglary with assault or battery and attempted armed robbery. *Id.* at 53-54. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. *Id.* at 54. While still on probation, Graham participated in a successful home invasion and robbery, an attempted robbery, and a high speed police chase. *Id.* at 54-55.

{14} The first issue we address is whether the analysis of juvenile sentencing in *Roper*, *Graham*, and *Miller* should be applied to multiple term-of-years sentences. Some jurisdictions have held that these cases do not reach multiple term-of-years sentences for multiple non-homicide crimes. *See State v. Kasic*, 265 P.3d 410, 411, 415-16 (Ariz. Ct. App. 2011) (holding that "*Graham* does not categorically bar the sentence[] imposed" on a juvenile offender convicted of "thirty-two felonies arising from six arsons and one attempted arson committed over a one-year period beginning when he was seventeen years of age"); *State v. Brown*, 118 So. 3d 332, 341 (La. 2013) (observing that *Graham* did not include any "analysis of sentences for multiple convictions and provide[d] no guidance on how to handle such sentences"); *Vasquez v. Commw.*, 781 S.E.2d 920, 925 (Va. 2016) (holding that *Graham* is not implicated for "multiple term-of-years sentences imposed on multiple crimes that, by virtue of the accumulation, exceed[] the criminal defendant's life expectancy"); *Lucero v. People*, 2017 CO 49, ¶ 19 ("Multiple sentences imposed for multiple offenses do not become a sentence of life without parole, even though they may result in a lengthy term of incarceration.").

{15} Other jurisdictions reject the narrow interpretation espoused by these aforementioned courts, largely concluding that such a narrow interpretation is inconsistent with *Graham*'s requirement that a juvenile be given a meaningful opportunity for release based on the juvenile's demonstrated maturity and rehabilitation. In *Henry v. State*, 175 So. 3d 675, 676 (Fla. 2015), the Florida Supreme Court considered whether *Graham* governed a juvenile offender's challenge to his 90-year aggregate sentence for his convictions of sexual battery while possessing a weapon, robbery, kidnapping, carjacking, burglary, and possession of marijuana. The *Henry* court applied *Graham* to the sentence reasoning that "the *Graham* Court had no intention of limiting its new categorical rule to sentences denominated under the exclusive term 'life in prison.'" *Id.* at 680. The Court emphasized that the differences noted in *Graham* between a juvenile and an adult, which called into question the constitutionality of a life-without-parole sentence, provide an equally compelling reason to question the constitutionality of lengthy term-of-years sentences. *Id.* And just as the *Graham* Court held that life-without-parole sentences are not justified by penological theories, 560 U.S. at 71-75, the *Henry* court held that lengthy term-of-years sentences are not justified by the penological theory of rehabilitation, which provides the "only . . . valid constitutional basis for sentencing juvenile nonhomicide offenders." 175 So. 3d at 679, 680.

{16} Other jurisdictions applying *Graham* to term-of-years sentences offer different rationales for doing so. *See State v. Boston*, 363 P.3d 453, 457 (Nev. 2015) (permitting courts to sentence a juvenile non-homicide offender "undermine[s] the [Supreme] Court's goal of 'prohibit[ing] States from making the judgment at the outset that those offenders never will be fit to reenter society'") (third alteration in original) (quoting *Graham*, 560 U.S. at 75); *State v. Zuber*, 152 A.3d 197, 211 (N.J. 2017) (reasoning that there is no practical difference between a juvenile who receives life without parole and a juvenile who receives "multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life"); *Budder v. Addison*, 851 F.3d 1047, 1053 n.4 (10th Cir. 2017) (interpreting *Graham* to include "*any* sentence that would deny a juvenile nonhomicide offender a realistic opportunity to obtain release, regardless of the label a state places on that sentence").

{17} Some jurisdictions have applied *Graham* when the sentence may provide for release before the juvenile's death but forecloses the opportunity for the juvenile to have a meaningful life outside of prison. *See State v. Moore*, 2016-Ohio-8288, 76 N.E.3d 1127, *cert. denied*, *Ohio v. Moore*, ___ U.S. ___, ___, 138 S. Ct. 62 (2017) (determining that a sentence that allows juvenile offenders to "breathe their last breaths" outside the prison walls is not the "meaningful opportunity" envisioned by the *Graham* Court). The Supreme Court of Connecticut articulated the same concern:

> A juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left. A juvenile offender's release when he is in his late sixties comes at an age when the law presumes that he no longer has productive employment prospects.
>
> * * *
>
> The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

Casiano v. Comm'r of Corr., 115 A.3d 1031, 1046, 1047 (Conn. 2015).

{18} Some courts have held that the Eighth Amendment only requires courts to consider the constitutionality of each individual sentence as opposed to the cumulative impact of consecutive sentences, *see e.g. Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001). Other courts disagree particularly when the consecutive sentences involve juvenile offenders. *See Moore*, 2016-Ohio-8288, ¶ 73 ("Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a juvenile who committed the one offense or several offenses and who has diminished moral culpability."); *Budder v. Addison*, 851 F.3d 1047, 1058 (10th Cir. 2017), *cert. denied sub nom. Byrd v. Budder*, ___ U.S. ___, ___, 138 S. Ct. 475 (2017) ("Just as [states] may not sentence juvenile nonhomicide offenders to 100 years instead of 'life,' they may not take a single offense and slice it into multiple sub offenses in order to avoid *Graham*'s rule that juvenile offenders who do not commit homicide may not be sentenced to life without the possibility of parole."). The United States Supreme Court has not endorsed either view. *See State v. Buchhold,* 2007 SD 15, ¶ 30, 727 N.W.2d 816 (2007) (stating that the Supreme Court has not "provided a clear answer to [the] question" of whether the Eight Amendment proportionality review should be "confined to the sentences imposed for each individual conviction or whether it extends to the consecutive sentencing scheme."). *O'Neil v. State of Vermont*, 144 U.S. 323, 331 (1892), does not indicate anything about the Supreme Court's view on the matter. The language quoted by the dissent in this case at paragraph 53 from *O'Neil* is not a holding of the Supreme Court but is only a quote from the lower

court's opinion that the Supreme Court included for context. *O'Neil*, 144 U.S. at 331. We are persuaded by the Supreme Court's rationale in *Roper*, *Graham*, and *Miller* that the cumulative impact of consecutive sentences on a juvenile is required by the Eighth Amendment.

{19} The dissent would also limit the scope of *Graham* on the grounds that there is a significant distinction between life without parole sentences and term-of-years sentences. Diss. Op. ¶ 44. The only difference our cases have recognized is that a life sentence, unlike a term of years, lacks a discernable maximum and minimum term of imprisonment. *State v. Juan*, 2010-NMSC-041, ¶ 40, 148 N.M. 747, 242 P.3d 314. Although there is a distinction, the distinction is immaterial to an Eighth Amendment analysis under *Graham*. The *Graham* Court explained what makes a life without parole sentence severe enough to warrant the imposition of additional safeguards is the fact that the sentence "alters the offender's life by a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69. Similarly, a term-of-years sentence that exceeds the juvenile's life expectancy "means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the juvenile], he will remain in prison for the rest of his days." *Id.* at 70 (internal quotation marks and citation omitted). The *Graham* Court recognized that in some cases "there will be negligible difference between life without parole and other sentences of imprisonment," citing the hypothetical of a 65-year-old who is sentenced to a lengthy term-of-years sentence without eligibility for parole as an example of a sentence that would be the functional equivalent of life without parole sentence. *Id.* at 70-71.

{20} We conclude that the analysis contained within *Roper* and its progeny should be applied to a multiple term-of-years sentence. Taken together, *Roper*, *Graham*, and *Miller* reveal the following three themes regarding the constitutionality of juvenile sentencing.

{21} First, juveniles' developmental immaturity makes them less culpable than adults because juveniles have an "underdeveloped sense of responsibility," and an inability "to appreciate risks and consequences," meaning juveniles' violations are likely to be a product of "transient rashness" rather than "evidence of irretrievabl[e] deprav[ity]." *Miller*, 567 U.S. at 471, 472, 477 (alterations in original) (internal quotation marks and citation omitted).

{22} Second, juveniles have a greater potential to reform than do adult criminals which makes it essential that they have a meaningful opportunity to obtain release based on demonstrated maturity and reform. *Graham*, 560 U.S. at 75. Although the Eighth Amendment does not require a state to release juveniles during their natural lives, it prohibits states from making the judgment at the outset that juveniles will never be fit to reenter society. *Id.* The *Miller* Court emphasized that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." 567 U.S. at 473. The *Graham* Court underscored that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 560 U.S. at 73 (citing *Roper*, 543 U.S. at 572).

{23} Third, no penological theory—retribution, deterrence, incapacitation, and rehabilitation—justifies imposing a sentence of life without parole on a juvenile convicted of a non-homicide crime because juveniles are less culpable and more amenable to reformation. *Graham*, 560 U.S. at 71-75.

{24} With respect to retribution, the *Graham* Court explained that "[s]ociety is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense." 550 U.S. at 71. "The heart of the retribution rationale," the Court reassured, focuses on "a criminal sentence [that] must be directly related to the personal culpability of the criminal offender." *Id.* (internal quotation marks and citation omitted). But in the case of juvenile offenders, the "case for retribution is not as strong . . . as with an adult," and "becomes even weaker with respect to a juvenile who did not commit homicide." *Id.* (internal quotation marks and citation omitted). Thus, retribution is not proportional if the state imposes life without parole on the less culpable juvenile nonhomicide offender. *Id.* at 71-72.

{25} Deterrence was similarly insufficient to justify a life without parole sentence on a juvenile. The *Graham* Court emphasized that "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Id.* at 72. (internal quotation marks and citation omitted) (omission in original). A juvenile's "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (omission in original)). As a result, juveniles are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72. Although a life without parole sentence may deter some juvenile offenders, "any limited deterrent effect provided by life without parole is not enough to justify the sentence." *Id.*

{26} Incapacitation also does not justify a life-without-parole sentence because a sentencing court would have to decide that a "juvenile offender forever will be a danger to society." *Id.* However, a sentencing court is not equipped to make such a judgment because, as the *Graham* Court explained, even expert psychologists encounter difficulty distinguishing between a crime that reflects on a juvenile's transient immaturity and a crime that reflects on a juvenile's irreparable corruption. *See id.* at 73.

{27} Rehabilitation does not support a life-without-parole sentence because it "forswears altogether the rehabilitative ideal." *Id.* at 74. The sentence reflects "an irrevocable judgment about [the juvenile offender's] value and place in society," a judgment that is inconsistent with a juvenile nonhomicide offender's "capacity for change and limited moral culpability." *Id.*

{28} Just as the *Graham* Court found no penological theory that justified the imposition of a life without parole sentence on a juvenile nonhomicide offender, we find no penological theory that supports a term-of-years sentence that in all likelihood will keep the juvenile in prison for the rest of his or her life without a meaningful opportunity to obtain release.

{29} What the *Graham* Court explained in establishing a bright-line rule prohibiting life without parole for a nonhomicide juvenile offender is that although "[a s]tate is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. The Court made clear that "[t]he Eighth Amendment does not foreclose

the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life." *Id.* At the same time, the Eighth Amendment "does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*

> **{30}** In this case, the district court sentenced Ira to an adult prison, stating:
>
> Ordinarily, the young age of the defendant would tend to influence a judge toward leniency, based upon the inference that the crimes were motivated in part by youthful impulsiveness and immaturity, and that converting a large amount of incarceration to probation will allow the youth to show that the lesson has been learned and he can now benefit rather than attack society. That analysis does not apply here, first because of the inability to convert first degree felony incarceration to probation . . . and, second, because Joel Ira is not the typical young defendant. The evidence shows that he is almost certain to be the same threat to society upon his release as he is today because humanity has not developed a way to implant a conscience once the period for its natural growth has passed.
>
> * * *
>
> This Court would like to fashion a sentence that will guarantee, or even offer hope, that Joel Ira can be released after a period of time as a rehabilitated person, able to be a valuable part of, rather than a threat to, his community. There is no such sentence.
>
> This Court would like to fashion a sentence that will assure Joel Ira's victims that he will not be a serious threat to them if released before he reaches an advanced age. There is not such sentence.
>
> This Court must then fall back upon a sentence that will protect society from a man without a conscience until such time as his physical ability to cause harm is less than the likelihood that he would attempt it. To assure that result, in consideration of the crowded conditions of our prisons and the ability of the Department of Corrections to grant credit of up to half of an adult sentence in order to relieve overcrowding, the Court must impose twice what it intends to be the effective term of incarceration.

{31} The district court relied on "the most experienced and qualified experts in the field of juvenile corrections and psychotherapy" at the time. These experts informed the court that Ira "is a child devoid of conscience and devoid of empathy for other human beings . . . . " The court further explained that

> [t]he experts say that each human being must develop these tools at a young age, for personalities become fixed before the teenage years and it is very hard, if not impossible to implant a conscience in a sixteen year old where none existed before. These experts looked, in this case, for evidence of remorse or empathy that would provide the slightest glimmer of hope that Joel Ira could defy the odds and become rehabilitated, and they found none . . . . The experts told this Court that New Mexico simply does not have a program that offers even a slight hope of protecting the public if Joel Ira were released from custody.

{32} The court's sentiment that no hope existed for Ira to be rehabilitated because personalities become fixed before teenage years is of questionable neuroscientific validity since *Roper* and its progeny. There is no evidence in the record to assist this Court in determining whether indeed the experts' opinions were invalid and unreliable. The *Miller* Court assumed that juveniles as a category are immature, impetuous, and generally have a diminished capacity to avoid negative environmental influences and peer pressures. 567 U.S. at 471, 476. It held that these characteristics weigh in favor of mitigation, making the need for life sentences without parole uncommon. *Id.* at 479.

{33} The *Miller* Court recognized that some youths, despite their status as adolescents, may be different from the norm, and therefore declined to consider whether the Eighth Amendment requires a categorical ban on life without parole for juveniles. *Id.* Stated differently, the Supreme Court recognizes the need for individualized sentencing. Thus, the juvenile's attorney will introduce mitigating evidence, perhaps through a forensic mental health expert, that the juvenile conforms to developmental norms, which should dissuade the district court from imposing a sentence that in all likelihood will condemn the juvenile to prison for the rest of his or her life without a meaningful opportunity to obtain release. The prosecution will introduce evidence that the juvenile is not the norm and therefore the crime was not the product of transient developmental influences, but instead the evidence makes the juvenile that rare juvenile whose crime reflects irreparable corruption. *See id.* at 479-80.

B. Ira's Term-of-Years Sentence is Constitutional Because it Does Not Deprive Him of a Meaningful Opportunity to Obtain Release

{34} Ira does not contest the evidence introduced against him during his sentencing or habeas corpus hearing. Instead he seeks a declaration that his sentence is categorically unconstitutional because it is the functional equivalent of a life sentence without the possibility of parole. Based on the record before us, we cannot agree with this contention.

{35} In this case the district court arguably found that Ira is that rare juvenile who is irreparably corrupt. Regardless, the sentence imposed on Ira does not deprive him of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Presuming that he demonstrates his good behavior, he will be parole eligible when he is approximately 62 years old. Had Ira been sentenced to 91½ years without the opportunity to reduce his sentence with good behavior, our analysis would be different. But, with demonstrated good behavior, Ira will have the opportunity to make his case before a parole board.

{36} The New Mexico Legislature enacted the Parole Board Act "to create a professional parole board." NMSA 1978, § 31-21-23 (1999). This Act provides parole board members with extensive powers and duties in exercising their authority to grant or deny parole. *See* NMSA 1978, § 31-21-25(B)(1), (2), (3) (2001) (providing that the parole board has the power to "conduct . . . investigations, examinations, interviews, hearings, and other proceedings . . .;" and to "summon witnesses, books, papers, reports, documents or tangible things and administer oaths as may be necessary for the effectual discharge of the duties of the board"). With respect to determining an inmate's eligibility for

parole, NMSA 1978, Section 31-21-10(A)(2)(2009) requires the parole board to consider all pertinent information concerning the inmate, including:

> (a) the circumstances of the offense;
> (b) mitigating and aggravating circumstances;
> (c) whether a deadly weapon was used in the commission of the offense;
> (d) whether the inmate is a habitual offender;
> (e) the [presentence and prerelease] reports filed under [NMSA 1978, Section 31-21-9 (1972)]; and
> (f) the reports of such physical and mental examinations as have been made while in an institution[.]

Section 31-21-10(A)(2).

{37} The parole board will be tasked with performing these duties during Ira's hearing to determine whether parole is in the best interest of society and whether Ira is able and willing to fulfill the obligations of a law-abiding citizen. *See* NMSA 1978, § 31-21-10(A)(3), (4) (2007). If he is granted parole, he will remain under the supervision of the parole board, possibly for the remainder of his life. *See* § 31-21-10.1(A)(2) (providing that a person convicted of first-degree criminal sexual penetration shall serve a period of parole up to the person's natural life).

{38} Certainly the fact that Ira will serve almost 46 years before he is given an opportunity to obtain release is the outer limit of what is constitutionally acceptable. *See People v. Contreras*, 2018 WL 1042252, at *9-10, ___ P.3d ___ (Cal. 2018) (citing cases holding that 50-year-long sentences are the functional equivalent of life without parole, and citing legislation enacted in the wake of *Graham* requiring parole as soon as 15 years but no later than 40 years after the start of the juvenile's sentence). The New Mexico Legislature is at liberty to enact legislation providing juveniles sentenced to lengthy term-of-years sentences with a shorter period of time to become eligible for a parole eligibility hearing. At the time of Ira's sentencing, a defendant sentenced to life imprisonment in a New Mexico institution would have been eligible for parole after serving a thirty-year sentence. *See* § 31-21-10(A)(1997). Whether the time frame in Section 31-21-10(A) or a shorter time frame is required by the Eighth Amendment to give juveniles a meaningful opportunity to obtain release presents an important question that we cannot answer based on the evidentiary record before us. Some studies conclude that a juvenile's brain does not fully develop until early adult years. *See* Brief for the Am. Psychol. Ass'n, Am. Psychiatric Ass'n et al. as Amici Curiae Supporting Petitioners, at 27, *Graham*, 560 U.S. 48 (No. 08-7412) ("[T]he part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence, consistent with the demonstrated behavioral and psychosocial immaturity of juveniles."). Perhaps evaluating the juvenile's maturity and rehabilitation once the juvenile's brain has presumably developed is the time frame required by the Eighth Amendment, but *Roper* and its progeny are of no assistance to us, nor is the record in this case.

{39} Other jurisdictions, in the wake of *Graham,* have amended their parole eligibility time frames for juveniles. Nevada enacted such a statute in 2015 providing a juvenile offender with a parole eligibility hearing after serving fifteen years of incarceration if the juvenile was convicted of an offense that did not result in the death of a victim. *See* Nev. A.B. 267 (codified as N.R.S. 213.12135) (2015); Remarks by James Dold, Minutes of Nev. Assemb. Comm. on Jud. 7 (Mar. 27, 2015) ("In response to [*Roper*, *Graham*, and *Miller*] and the emerging juvenile brain and behavioral developmental science, several states across the country have begun to eliminate life without parole sentences for kids and create more age-appropriate and fair sentencing standards that are in line with A.B. 267."). Washington requires juvenile offenders to serve twenty years in confinement before petitioning for parole eligibility. *See* Wash. Rev. Code § 9.94A.730(1) (2015); *see also* La. Rev. Stat. § 15:574.4(D)(1)(A) (2017) (requiring juvenile offenders serving life imprisonment to serve at least twenty-five years before parole eligibility). California provides for parole eligibility after a juvenile offender serves fifteen years if the juvenile was younger than twenty-five years old when the juvenile committed the offense for which the juvenile received the longest sentence. *See* Cal. Penal Code § 3051(b)(1) (2018). The California legislature enacted this statute after the California Supreme Court interpreted *Graham* to apply to a juvenile nonhomicide offender sentenced to a term of 110 years to life. *See People v. Caballero*, 145 Cal. Rptr. 3d 286, 288 (2012). Although we consider Ira's opportunity to obtain release when he is 62 years old constitutionally meaningful, albeit the outer limit, we do not intend to discourage the legislature from adopting a shorter time period as have many other jurisdictions.

C. Ira's Remaining Claims Lack Merit

{40} Ira alleges a number of procedural errors at the district court. First, he asserts that his waiver of a preliminary hearing should not have been honored because preliminary hearings for children should not be allowed to be waived. At the time of the proceedings against Ira, Rule 10-222 NMRA governed the circumstances under which an alleged youthful offender was afforded a preliminary hearing. When Ira entered his plea, Rule 10-222 was silent about whether a child could waive a preliminary hearing. *See* Rule 10-222 NMRA (1995); *but see* N.M. Const. art. II, § 14 (recognizing that a person being held on a criminal information for a "capital, felonious, or infamous crime" may waive the right to a preliminary examination). Rule 10-222 was amended while Ira's case was pending to explicitly permit such a waiver, and this right remains available today under Rule 10-213 NMRA. *See* Rule 10-222(B) (1999) ("[A] preliminary examination will be conducted unless the case is presented to a grand jury or the child waives the right to a preliminary hearing or grand jury."); Rule 10-213(B)(1) (2014). Accordingly, we find this argument to be without merit. Second, Ira contends that he did not have a separate amenability hearing. This issue is without merit because Ira did have both an amenability hearing and a separate sentencing hearing. Third, Ira contends that he did not receive a report from the Children, Youth and Families Department (CYFD) prior to the amenability hearing required by NMSA 1978, Section 32A-2-17(A)(3) (1995, amended 2009). This issue is without merit because the children's court attorney who prosecuted the case testified that a report was prepared, although it may not have been introduced into evidence. In addition, a CYFD juvenile probation officer testified during the amenability hearing and strongly urged the children's court judge to impose adult sanctions. Fourth, Ira asserts that once the court decided to impose an adult sanction he was entitled to a predisposition report from the adult probation and parole division of the Department of Corrections as required by

Section 32A-2-17(A)(3)(b). The State concedes this point but contends that Ira was not prejudiced because expert witnesses testified that no rehabilitation programs in the adult prison system were available to treat Ira. We agree with the State that Ira has not shown prejudice. *See State v. Jose S.*, 2007-NMCA-146, ¶ 20, 142 N.M. 829, 171 P.3d 768 (holding that a child must show prejudice from the court's failure to follow the statutory requirements).

{41} The fifth issue raised by Ira requires more elaboration. Ira asserts that the district court erred in failing to set aside his plea agreement because neither he, his attorney, the prosecutor nor the judge understood the sentence that could be imposed on Ira and therefore the judge initially imposed an illegal sentence on Ira. Ira argued this issue before the district court and on appeal before the Court of Appeals. *See Ira*, 2002-NMCA-037, ¶¶ 11, 35, 36. In a memorandum opinion, the Court of Appeals reversed his sentence because the district court erred in imposing adult sanctions for the five counts of criminal sexual penetration Ira committed when he was fourteen years old. *See State v. Joel I.*, No. 18,915, mem. op. at 3, 5 (N.M. Ct. App. Oct. 1, 1998) (non-precedential). At the time Ira was fourteen years old, the New Mexico Children's Code provided that a child between fifteen and eighteen years old is a "youthful offender" subject to adult sanctions when the child is charged with at least one of ten enumerated offenses, including aggravated battery and criminal sexual penetration. *See* NMSA 1978, § 32A-2-3(I)(1)(d), (g) (1995, amended 1996). Because Ira was only fourteen years old when he committed five counts of criminal sexual penetration, the district court could not impose adult sanctions with respect to those five counts. After the Court of Appeals reversed Ira's sentence, the district court resentenced him as an adult for the remaining five counts of criminal sexual penetration committed when Ira was fifteen years old, which Ira is currently serving. The Court of Appeals also rejected the arguments that the district court should have allowed Ira to withdraw his plea because of the sentencing error and the alleged ineffective assistance of counsel. Ira has had a full and fair opportunity to argue the merits of these issues and we therefore exercise our discretion to give preclusive effect to these issues. *See Duncan v. Kerby*, 1993-NMSC-011, ¶ 6, 115 N.M. 344, 851 P.2d 466 (concluding that an appellate court may exercise discretion in giving preclusive effect to an ineffective assistance of counsel claim rejected on direct appeal and subsequently raised in a habeas corpus proceeding).

III. CONCLUSION

{42} For the foregoing reasons, we affirm the district court's denial of Ira's habeas corpus petition.

{43} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Justice

WE CONCUR:

CHARLES W. DANIELS, Justice

BARBARA J. VIGIL, Justice

JUDITH K. NAKAMURA, Chief Justice (dissent in part and concur in part)

PETRA JIMENEZ MAES, Justice (joining in dissent and concurrence)

NAKAMURA, Chief Justice (concurring in part, dissenting in part).

{44} The categorical rule announced in *Graham* precluding states from imposing a sentence of life without parole upon juveniles convicted of a nonhomicide offense does not extend to Joel Ira. Ira perpetrated multiple nonhomicide offenses over a lengthy period of time and was sentenced to multiple term-of-years sentences to be served consecutively. *Ira*, 2002-NMCA-037, ¶ 14. There is a meaningful distinction between juveniles sentenced to life without parole for the commission of a single offense and juveniles sentenced to multiple consecutive sentences for a series of offenses committed over a period of time. This is amply illustrated by comparing Ira's case to *Commonwealth v. Donovan*, 662 N.E.2d 692 (Mass. 1996), a Massachusetts case involving a defendant who was sentenced as a juvenile to life without the possibility of parole for a single criminal act and who was paroled in the wake of *Graham* and *Miller*. Although Donovan was convicted of a homicide offense, the comparison is still apt: Donovan committed one offense, Ira committed multiple offenses. As will become clear, this critical difference between Donovan's and Ira's cases should inform our reading of *Graham*.

{45} Joseph Donovan was seventeen years old on the night of September 18, 1992. Joseph Donovan, The Commonwealth of Massachusetts Executive Office of Public Safety, Parole Board Decision (Aug. 7, 2014) at 1-2.[3] As Donovan and two companions walked down the street in Cambridge, Massachusetts, they encountered two men. *Donovan*, 662 N.E.2d at 694. The men were Norwegian citizens studying at the Massachusetts Institute of Technology, *id.*, a fact that assuredly contributed to the significant media attention dedicated to the events which unfolded during the chance encounter. One of the two men "bumped into" Donovan and Donovan demanded an apology. *Id.* at 695. No apology was given and Donovan punched one of the men in the face, knocking him to the ground. *Id.* One of Donovan's companions then stabbed and killed the man Donovan had punched. *Id.* Donovan testified that he did not know his companion had a knife, *id.* at 695 n.3, and did not see the stabbing. *Id.* at 695. Testimony was offered that Donovan stole the stabbed man's wallet and that one of Donovan's companions stole the other man's wallet before Donovan and his companions fled from the scene. *Id.* Donovan denied participating in the robbery, but was convicted of felony murder and sentenced to life imprisonment without parole. Parole Board Decision at 1-2.

{46} Donovan was one of the first juvenile offenders in Massachusetts considered for parole in the wake of the line of cases that include *Graham* and *Miller* and which recognize that juvenile offenders are constitutionally different from adults for purposes of sentencing. *See Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 276–77 (Mass. 2013) (discussing *Roper*, *Graham*, and *Miller* and concluding that the Massachusetts statute imposing life without the possibility of parole on juvenile offenders who commit first-degree murder is unconstitutional and holding that these juvenile offenders must be considered for parole eligibility); Parole Board Decision at 3. The parole board determined that Donovan "did not commit, intend, encourage, or foresee the stabbing that caused the victim's death." Parole Board Decision at 7. A forensic psychologist testified at the parole hearing that "Donovan was impulsive, immature, and directionless as a young person but

[3]The Commonwealth of Massachusetts Executive Office of Public Safety Parole Board's Decision, Joseph Donovan is available electronically at http://www.mass.gov/eopss/docs/pb/lifer-decisions/2014/donovan-joseph-8-7-14-paroled.pdf (last visited February 27, 2018).

that did not result in an early onset of violence in childhood or early teenage years." Parole Board Decision at 6. The psychologist was persuaded that Donovan has "no history of major conduct problems" and attributed Donovan's conduct on the night of September 18, 1992 to a lack of impulse control and a vulnerability to peer pressure. Parole Board Decision at 6. Donovan's parole application was granted. Parole Board Decision at 1.

{47} When Ira was fourteen to fifteen years old, he repeatedly raped his younger stepsister. *Ira*, 2002-NMCA-037, ¶ 6. The rapes occurred over a two-year period when she was eight to nine years old. *Id.* ¶ 5. In the course of the many rapes, Ira penetrated her mouth, vagina, and anus. *Id.* ¶ 6. These penetrations caused her such pain that she would scream into a pillow. *Id.* After one forcible sodomy where she screamed from the pain, Ira's penis was covered in blood from an anal tear. At other times, she nearly vomited. *Id.* Ira urinated and ejaculated into her mouth and forced her to swallow. *Id.* He frequently threatened to kill her if she alerted anyone about the rapes and one time choked her to unconsciousness. *Id.* He used subtle hand gestures—drumming or tapping his fingers on the arm of his chair—to signal to her that she would soon be raped again. *Id.*

{48} Ira was charged with ten counts of first-degree criminal sexual penetration and various other counts. *Id.* ¶ 2. He pleaded no contest to all of the charges except one. *Id.* ¶ 4. At sentencing, the testimony indicated that Ira did not feel remorseful about his conduct, refused to take responsibility for his actions, and believed that "he did not do anything wrong." *Id.* ¶¶ 8, 10. A mental health expert testified that Ira has "a severe conduct disorder, with tendencies towards violent sexual behavior and domination, that would require intensive, secured, long-term treatment." *Id.* ¶ 10.

{49} I offer these contrasting cases to highlight the fact that there are meaningful and self-evident distinctions between a juvenile offender like Donovan and a juvenile offender like Ira. Most critically, Donovan did not engage in repeated, violent attacks against others. He committed one violent act, which experts attributed to impulsiveness and immaturity. Ira, on the other hand, perpetrated repeated, horrific crimes over two years which experts attributed to a significant conduct disorder that manifests as a propensity for sexually violent behavior. Our understanding of the rule articulated in *Graham* should acknowledge that there are significant differences between single act and multiple act juvenile offenders. There is an abundance of legal support for the conclusion that this difference is legally salient.

{50} First, the text of *Graham* itself compels the conclusion that the rule articulated in *Graham* does not extend to Ira. In *Graham*, the Supreme Court made clear that the categorical rule announced applies only to "juvenile offenders sentenced to *life without parole* solely for a nonhomicide offense." 560 U.S. at 63 (emphasis added); *id.* at 74 ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*." (emphasis added)). The Court emphasized that a sentence of "life without parole" is unique. *See id.* at 69 ("[L]ife without parole is the second most severe penalty permitted by law. It is true that a death sentence is unique in its severity and irrevocability, yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences." (internal quotation marks and citations omitted)). Ira was not sentenced to life without parole; he was sentenced to five consecutive adult sentences of CSP I and one consecutive adult sentence of intimidation of a witness. *Ira*, 2002-NMCA-037, ¶ 14. Because Ira was not sentenced to life without parole, the categorical rule in *Graham* is inapplicable to him. This conclusion is not based on a constrained or overly formalistic reading of *Graham*.

{51} Justice Alito made clear in his dissenting opinion in *Graham* that "[n]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole." 560 U.S. at 124 (Alito, J., dissenting). Justice Thomas pointed out, in his dissenting opinion in *Graham*, that the majority did not count juveniles "sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment)[,]" when surveying the number of juvenile offenders serving life without parole sentences in the United States—that survey revealed that there were 123 juvenile offenders serving life without parole nationwide. *Id.* at 113 n.11 (Thomas, J., dissenting). The number of juveniles with multiple, lengthy, term-of-years sentences would likely number in the thousands, and Justice Thomas's observation that these offenders were not considered by the majority in their survey strongly suggests that the majority did not intend to bring this class of juvenile offenders within the ambit of the categorical rule articulated in *Graham*.

{52} Second, a lengthy, aggregate, consecutive, term-of-years sentence for multiple offenses is not the functional equivalent of life imprisonment for a single crime. An aggregate, consecutive, term-of-years sentence for multiple offenses is just that: it is an aggregate punishment for multiple offenses. Our case law already acknowledges this important distinction. *See State v. Juan*, 2010-NMSC-041, ¶ 40, 148 N.M. 747, 242 P.3d 314 ("Life sentences have always been understood to be different from a sentence for a term of years." (alteration, internal quotation marks and citation omitted)).

{53} Third, "it is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001). Moreover, and as the Supreme Court recognized long ago, "[i]t would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life." *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892). The preceding quoted passage from *O'Neil* is dictum, but the validity of the logic underpinning the quote is persuasive and this logic has indeed persuaded courts to reject "Eighth Amendment challenge[s] to consecutive sentences." *State v. Ali*, 895 N.W.2d 237, 245 (Minn. 2017).

{54} Fourth, "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006) (en banc). "This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." *Id.* "[A] separate [Eighth Amendment] proportionality review must be completed for each sentence imposed consecutively, rather than considering the cumulative total of such consecutive sentences. [This is b]ecause each sentence is a separate punishment for a separate offense[.]" *Lucero*, 2017 CO 49, ¶ 23 (second alteration in original); *accord*

Hawkins v. Hargett, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) ("The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes.").

{55} Fifth, "it is constitutionally permissible to punish a person who commits two, three, four or even more crimes (including murder) more severely than a person who commits a single crime." *Ali*, 895 N.W.2d at 243. Under New Mexico law, "[a] sentencing judge has discretion in determining whether sentences are to run consecutively or concurrently." *State v. Deats*, 1971-NMCA-089, ¶ 24, 82 N.M. 711, 487 P.2d 139. The sentencing judge's "discretion in this area will not be interfered with unless he has violated one of the sentencing statutes." *Id.* This Court has observed that "the imposition of separate sentences to run consecutively is lawful and violates no federally protected right." *State v. Padilla*, 1973-NMSC-049, ¶ 14, 85 N.M. 140, 509 P.2d 1335. Moreover, this Court has recognized that "imposition of multiple valid sentences to run consecutively does not, as such, constitute cruel and unusual punishment as contemplated by the Eighth Amendment to the Constitution of the United States." *Id.* ¶ 15.

{56} Sixth and finally, there are strong penological rationales to justify application of consecutive sentencing upon juveniles who commit multiple nonhomicide offenses. *Contra Graham*, 560 U.S. at 71 ("With respect to *life without parole* for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate . . . provides an adequate justification." (emphasis added) (citation omitted)). "The offender who commits two armed robberies should, all other things being equal, serve more time than the offender who commits one robbery. Concurrent sentences frustrate this objective, and consecutive sentences thus should be the rule in a just deserts model." Harvey S. Perlman and Carol G. Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 Va. L. Rev. 1175, 1220 (1979). As to deterrence, commentators have observed that "consecutive sentences are appropriate where a defendant has committed a series of heinous crimes so as not to provide a multiple offense discount which would not reflect the seriousness of a defendant's conduct." Baldwin's Oh. Prac. Crim. L. § 118:16 *Consecutive sentences* (3d ed.) (internal quotation marks and citation omitted).

{57} *Graham* is the law; juveniles convicted of a nonhomicide offense cannot be sentenced to life imprisonment without parole. 575 U.S. at 74. But this proposition does not answer the issue here: whether *Graham* extends to defendants like Ira who have committed many crimes over a period of time and who have been sentenced to multiple, consecutive, lengthy, term-of-years sentences. Policy concerns that are all but self-evident from comparison of Donovan's and Ira's cases as well as abundant, established law convinces me that the categorical rule articulated in *Graham* does not extend to Ira. Because the majority reaches the opposite conclusion, Maj. op. ¶ 4, I dissent. I concur, however, with the majority's conclusion that Ira has a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation as he will be eligible for a parole hearing at age sixty-two. Maj. op. ¶ 35. I also concur with the majority's ultimate conclusion that Ira's petition for habeas corpus should be denied. Maj. op. ¶ 42.

JUDITH K. NAKAMURA, Chief Justice

I CONCUR:
PETRA JIMENEZ MAES, Justice

From the New Mexico Supreme Court

Opinion Number: 2018-NMSC-028
No. S-1-SC-35864 (filed April 12, 2018)

STATE OF NEW MEXICO,
Plaintiff-Respondent,
v.
JOHN RADOSEVICH,
Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Louis E. DePauli Jr., District Judge

BENNETT J. BAUR,
Chief Public Defender
MARY BARKET,
Assistant Appellate Defender
Santa Fe, New Mexico
for Petitioner

HECTOR H. BALDERAS,
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Opinion

Charles W. Daniels, Justice

{1} The New Mexico tampering with evidence criminal statute, NMSA 1978, § 30-22-5 (2003), makes it a crime to hide or alter evidence of a crime. *See* § 30-22-5(A). The statutory penalty classifications vary from a petty misdemeanor to a third-degree felony, depending on "the highest crime for which tampering with evidence is committed." Section 30-22-5(B)(1)-(4). The penalty classification is a fourth-degree felony under Section 30-22-5(B)(2) "if the highest crime for which tampering with evidence is committed is a third degree felony or a fourth degree felony" and is a petty misdemeanor under Section 30-22-5(B)(3) "if the highest crime for which tampering with evidence is committed is a misdemeanor or a petty misdemeanor" but is a fourth-degree felony under Section 30-22-5(B)(4) "if the highest crime for which tampering with evidence is committed is indeterminate."

{2} In this case, we hold that to impose a greater penalty for commission of tampering pursuant to Subsection (B)(4), where the evidence does not establish the underlying offense, than for commission of tampering pursuant to Subsection (B)(3), where the evidence establishes an underlying misdemeanor offense, is both a denial of due process of law and a violation of an accused's right to have a jury determine guilt beyond a reasonable doubt on every element that may establish the range of permissible penalties. We therefore hold that the offense of tampering where the level of the underlying crime cannot be determined beyond a reasonable doubt is punishable at the lowest penalty classification for tampering. We also hold that the highest crime for which tampering with evidence of a probation violation is committed is the highest crime for which the defendant is on probation, rather than an indeterminate crime. We overrule *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, and *State v. Alvarado*, 2012-NMCA-089, ___ P.3d ___ (A-1-CA-31465, July 18, 2012), and all other cases to the extent they may have relied on *Jackson*.

I. BACKGROUND

{3} Just after midnight on September 8, 2012, Defendant's neighbor called 911 to report that Defendant was yelling obscenities and throwing objects into his yard. After calling the police, the neighbor walked outside his house to investigate. Defendant met the neighbor in the alleyway between their homes and, following a verbal exchange, Defendant threatened to stab the neighbor with "a little steak knife." Moments later an officer arrived at the scene, and Defendant threw the knife away and returned to his house. An officer subsequently recovered the knife.

{4} The State charged Defendant with assault with intent to commit murder, NMSA 1978, Section 30-3-3 (1977), a third-degree felony, and tampering with evidence pursuant to Section 30-22-5(B)(2), a fourth-degree felony. The district court judge directed a verdict in Defendant's favor on the assault with intent to murder charge and then, over Defendant's objection, instructed the jury on an uncharged crime, assault with a deadly weapon. Defendant was convicted of both assault with a deadly weapon under NMSA 1978, Section 30-3-2(A) (1963), a fourth-degree felony, and tampering with evidence as charged under Section 30-22-5(B)(2), also identified as a fourth-degree felony, although the tampering jury instruction did not identify an underlying offense. Defendant appealed both convictions to the Court of Appeals.

{5} For reasons that are not pertinent to the issues before us, the Court of Appeals reversed Defendant's conviction of assault with a deadly weapon and held that the charge could not be retried, a decision that the State has not asked us to review. *See State v. Radosevich*, 2016-NMCA-060, ¶¶ 5, 12, 38, 376 P.3d 871, *cert. granted*, 2016-NMCERT-___ (S-1-SC-35864, July 1, 2016).

{6} The Court of Appeals also addressed Defendant's argument that because his tampering conviction was "tied to his conviction for aggravated assault with a deadly weapon, he should be retried for tampering or permitted to challenge the degree of his conviction," based on his contention that the offense for which tampering could have been committed was a misdemeanor, making the tampering offense a petty misdemeanor under Section 30-22-5(B)(3). *Radosevich*, 2016-NMCA-060, ¶ 26. But rather than remanding for a new trial on the tampering charge, the Court of Appeals held that, because the tampering jury instruction at trial "did not tie tampering to any identified crime," *id.* ¶ 29, "Defendant's conviction for tampering with evidence is relative to an indeterminate crime and should be amended accordingly, not retried, as the State conceded." *Id.* ¶ 5. The court remanded to the district court to simply amend Defendant's judgment and sentence to impose a felony tampering conviction under the tampering statute's indeterminate crime provision, Section 30-22-5(B)(4). *Radosevich*, 2016-NMCA-060, ¶¶ 32, 38.

{7} We granted certiorari to consider Defendant's challenges to the Court of Appeals ruling with respect to his tam-

pering conviction. Defendant argues that interpreting the indeterminate crime provision of the tampering statute to permit conviction of a fourth-degree felony where a jury was not required to find whether the underlying offense was a misdemeanor or a felony violates the constitutional requirement that a jury must find the State has proved all the elements of a crime beyond a reasonable doubt in order to support a conviction and sentence.

II. DISCUSSION

A. Standard of Review

{8} "We review questions of statutory and constitutional interpretation de novo." *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232. When interpreting statutory language, "[o]ur primary goal is to ascertain and give effect to the intent of the Legislature." *State v. Nick R.*, 2009-NMSC-050, ¶ 11, 147 N.M. 182, 218 P.3d 868. But "[w]e have repeatedly cautioned that despite the 'beguiling simplicity' of parsing the words on the face of a statute, we must take care to avoid adoption of a construction that would render the statute's application absurd or unreasonable or lead to injustice or contradiction." *State v. Strauch*, 2015-NMSC-009, ¶ 13, 345 P.3d 317 (citation omitted). And we must be guided by the "well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions." *Schuster v. N.M. Dep't of Taxation & Revenue, Motor Vehicle Div.*, 2012-NMSC-025, ¶ 18, 283 P.3d 288 (internal quotation marks and citation omitted).

B. The New Mexico Tampering Statute

{9} In 2003 the New Mexico Legislature amended the tampering with evidence statute, which historically had defined a single tampering offense with a single fourth-degree felony punishment, to incorporate a tiered offense and sentencing scheme correlating the punishment for the tampering conduct with the level of the underlying crime to which the evidence related. *See State v. DeGraff*, 2006-NMSC-011, ¶ 34, 139 N.M. 211, 131 P.3d 61. The amended statute provides,

> A. Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.
>
> B. Whoever commits tampering with evidence shall be punished as follows:
>
> (1) if the highest crime for which tampering with evidence is committed is a capital or first degree felony or a second degree felony, the person committing tampering with evidence is guilty of a third degree felony;
>
> (2) if the highest crime for which tampering with evidence is committed is a third degree felony or a fourth degree felony, the person committing tampering with evidence is guilty of a fourth degree felony;
>
> (3) if the highest crime for which tampering with evidence is committed is a misdemeanor or a petty misdemeanor, the person committing tampering with evidence is guilty of a petty misdemeanor; and
>
> (4) if the highest crime for which tampering with evidence is committed is indeterminate, the person committing tampering with evidence is guilty of a fourth degree felony.

Section 30-22-5.

{10} The tampering statute punishes those who try to frustrate the criminal justice system by obstructing access to evidence of a crime. *See Jackson*, 2010-NMSC-032, ¶ 10 ("Tampering with evidence is uniquely offensive under the criminal code because when one acts intentionally to destroy, change, hide, place or fabricate physical evidence, that person seeks to deprive the criminal justice system of information.").

{11} This Court first interpreted the indeterminate crime provision of the amended tampering statute in *Jackson*. *See id.* ¶¶ 20-31. The defendant in *Jackson* falsified a probation-supervision urine test and was charged with tampering with evidence under the indeterminate crime provision in Section 30-22-5(B)(4). *Jackson*, 2010-NMSC-032, ¶¶ 3-4. The defendant argued that because all subsections of the tampering statute require that tampering relate to a specific crime and because a probation violation is not itself a defined crime in the criminal code, he could not be charged with or convicted of tampering with evidence. *Id.* ¶ 4.

{12} We held in *Jackson* that a defendant could be convicted and punished for commission of a fourth-degree felony under the indeterminate crime provision "where no underlying crime could be identified." *Id.* ¶ 21. We reasoned that Subsection (A) of the tampering statute "sets forth the elements of the offense" of tampering and Subsection (B) contains "levels of punishment" instead of elements of separate levels of crimes. *Jackson*, 2010-NMSC-032, ¶¶ 8, 20.

{13} Our ruling in *Jackson* was focused on the statutory interpretation issue presented by the parties, whether a person could be convicted of tampering with evidence in order to avoid detection of a probation violation that did not constitute a new crime. *Id.* ¶ 4. The parties in *Jackson* did not raise and we did not consider whether punishing a person for a fourth-degree felony in circumstances where it was unclear whether the person had committed misdemeanor or felony tampering would violate the person's constitutional rights to due process and trial by jury. We now do so.

C. The Tampering Statute Cannot Constitutionally Be Interpreted to Impose Greater Penalties for Tampering When the Underlying Crimes Are Unknown Than for Tampering When the Crimes Are Known

{14} Principles of constitutional due process guarantee the "right not to be convicted of a crime unless the state has proven the defendant's guilt beyond a reasonable doubt." *State v. Brown*, 1996-NMSC-073, ¶ 31, 122 N.M. 724, 931 P.2d 69 (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970)). As the United States Supreme Court recognized in *Winship*, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

{15} In cases where the accused has a right to a jury trial, those due process protections mean that the defendant is entitled to a jury determination that the evidence establishes "beyond a reasonable doubt" that the defendant "is guilty of every element of the crime." *Apprendi v. New Jersey*, 530 U.S. 466, 477, 490 (2000) (internal quotation marks and citation omitted) (holding that a legislature may not constitutionally "remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed").

{16} In *Cunningham v. California*, 549 U.S. 270, 274 (2007), the Court applied

these principles in striking down a California sentencing law that gave a trial judge and not the jury the authority to enhance a sentence by finding additional facts beyond those found by the convicting jury. Following *Cunningham*, this Court found unconstitutional New Mexico's similar statutes that allowed courts to use facts not found by a jury to increase a defendant's sentence range. *State v. Frawley*, 2007-NMSC-057, ¶ 1, 143 N.M. 7, 172 P.3d 144, *superseded by statute*, NMSA 1978, § 31-18-15.1 (as amended 2009); *see also State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901 ("[T]he Sixth Amendment right to trial by jury guarantees that all facts essential to a defendant's sentence must be determined by a jury, whether or not a judge or panel of judges might think those facts were proved in a particular case.").

{17} The United States Supreme Court has provided further guidance in assessing the constitutionality of statutes that, like the New Mexico tampering statute as interpreted by *Jackson*, 2010-NMSC-032, ¶¶ 8, 21, arguably define a criminal offense with basic elements a jury must find and also provide a separate list of sentencing factors that change the level of permissible punishment if additional facts are shown. In *Jones v. United States*, 526 U.S. 227, 229-30 (1999), the Court considered the federal carjacking statute, 18 U.S.C. § 2119 (1988), which provided in relevant part that a person possessing a firearm who takes a motor vehicle from another by force and violence or by intimidation shall "(1) be . . . imprisoned not more than 15 years . . . , (2) if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . , and (3) if death results, be . . . imprisoned for any number of years up to life . . . ."

{18} The Supreme Court held that in order to avoid constitutional infirmity the federal statute had to be construed as establishing three separate offenses with "distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones*, 526 U.S. at 252.

{19} In *Alleyne v. United States*, 570 U.S. 99, 103-04 (2013), the Supreme Court considered a federal statute, 18 U.S.C. § 924(c)(1)(A) (2006), that punished a convicted defendant at three different levels for using or carrying a firearm in connection with a crime of violence. If the defendant simply used or carried a firearm, the mandatory minimum sentence was five years; if the firearm was brandished, the mandatory minimum sentence was seven years; and if the firearm was discharged, the mandatory minimum sentence was ten years. The Court rejected the argument that the statute could constitutionally be separated into a basic offense with separate sentencing factors that did not have to be charged and proved by constitutional standards, basing its rejection on *Apprendi*'s holding that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 103 (citing *Apprendi*, 530 U.S. at 482-83 & n.10).

{20} The New Mexico Court of Appeals has noted the apparent tension between the constitutional principles in United States Supreme Court precedents and our holding in *Jackson*. *See, e.g.*, *State v. Herrera*, 2014-NMCA-007, ¶¶ 14 & n.1, 17, 315 P.3d 343 (recognizing the conflict between *Jackson* and *Apprendi* but declining to reach the issue because the defendant had not preserved it); *Alvarado*, 2012-NMCA-089, ¶¶ 14, 16 (trying to accommodate both *Apprendi* and *Jackson* by holding that a specific underlying crime is an element of the tampering offense for Sections 30-22-5(B)(1)-(3) but that a jury need not determine the underlying crime when a defendant is charged under the indeterminate provisions of Section 30-22-5(B)(4)). In *Alvarado*, the Court of Appeals held that if a jury does not make a finding "that the defendant tampered with evidence related to a capital, first, or second degree felony, . . . the court is limited to sentencing a defendant under the 'indeterminate crime' provision" of Section 30-22-5(B)(4). *Alvarado*, 2012-NMCA-089, ¶ 14. *Alvarado* held that the *Apprendi* line of cases precludes imposition of the enhanced third-degree felony penalty in Section 30-22-5(B)(1) for tampering in the absence of a jury finding that the tampering related to evidence of a first- or second-degree felony. *Alvarado*, 2012-NMCA-089, ¶¶ 14, 16. But the Court of Appeals did not consider the *Apprendi* issue inherent in permitting a defendant to be punished for anything above the lowest level of an offense, specifically the petty misdemeanor provisions of Section 30-22-5(B)(3), if the jury does not find the tampering was committed in connection with an offense that would justify an enhanced punishment beyond the basic levels prescribed in that section.

{21} Although *Jackson* did not address the constitutional issues we are called upon to address here, it did construe the tampering statute in a way that we must now reconsider, particularly in light of the possibility that our construction may result in violation of constitutional mandates. We do not overturn precedent lightly, but where our analysis "convincingly demonstrates that a past decision is wrong, the Court has not hesitated to overrule even recent precedent." *State v. Pieri*, 2009-NMSC-019, ¶ 21, 146 N.M. 155, 207 P.3d 1132 (internal quotation marks and citation omitted) (reviewing factors that may be relevant to overrruling precedent). As the United States Supreme Court has recognized, the presence of a constitutional concern is particularly significant. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision. This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." (internal quotation marks and citation omitted)). We undertake our review with those principles in mind.

{22} The case before us exemplifies the confusion that has been created by *Jackson*. The jury instruction defining the essential elements of the tampering offense did not require the jury to determine the crime or crimes for which tampering was committed, but simply provided,

> INSTRUCTION NO. 8
>
> For you to find the defendant guilty of tampering with evidence as charged in Count 2, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant hid or placed a knife;
> 2. By doing so, the defendant intended to prevent the apprehension, prosecution or conviction of defendant;
> 3. This happened in New Mexico on or about the 8th day of September, 2012.

Despite the lack of a jury finding on the level of the offense in this case, the district court entered an order accepting the jury verdict that recited in part that Defendant was found guilty of tampering with evidence, "a fourth degree felony, contrary to Section 30-22-5(A) & (B)(2), N.M.S.A. 1978." And the district court subsequently entered a final judgment sentencing Defendant for the felony offense in that section.

{23} The Court of Appeals rejected Defendant's argument that Defendant's felony tampering conviction should be vacated and the charge remanded for retrial for consideration of his theory that the tampering related to a misdemeanor offense. *See Radosevich*, 2016-NMCA-060, ¶ 26. The Court stated that because "the offense to which Defendant's tampering was related failed for insufficient evidence," and because on appeal the Court "reverse[d] its replacement by another offense and bar[red] retrial on that new replacement offense . . . , the underlying offense for which Defendant might have tampered [was] effectively rendered to be an unidentified, indeterminate crime." *Id.* ¶ 31. The Court accordingly denied Defendant's request for retrial and directed the district court to amend the judgment and sentence on remand to reflect that Defendant was convicted of the felony offense of tampering with evidence of an indeterminate crime under Section 30-22-5(B)(4) instead of for the felony offense of tampering with evidence of a third- or fourth-degree felony under Section 30-22-5(B)(2). *See Radosevich*, 2016-NMCA-060, ¶ 38.

{24} As this case demonstrates, the constitutionally unacceptable result of *Jackson*'s interpretation of the tampering statute is that if the state charges and proves that a defendant tampered with evidence to impede investigation or prosecution of a misdemeanor, the defendant can be punished only for the basic petty-misdemeanor crime of tampering. But under the same facts, if the state chooses not to identify an underlying crime in its charging document or fails at trial to prove the level of any underlying crime, the defendant can be convicted and sentenced for the fourth-degree felony of indeterminate tampering.

{25} We are guided by our experience in *Frawley* where we had initially issued a November 2005 dispositional order upholding against constitutional challenge a New Mexico sentencing statute, NMSA 1978, § 31-18-15.1(A) (1993), that permitted a judge to alter upward or downward the presumptive penalty range for felony offenses if the judge, and not a jury, found the existence of aggravating or mitigating factors. *See Frawley*, 2007-NMSC-057, ¶¶ 4-5. In February 2007 the United States Supreme Court in *Frawley v. New Mexico*, 549 U.S. 1191, 1191 (2007), vacated our 2005 judgment and remanded the case to us "for further consideration in light of *Cunningham*," 549 U.S. at 281, which held that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." Our October 2007 final opinion in *Frawley* held that the statute was unconstitutional based on our recognition that "the Sixth Amendment is violated *any time* a defendant is sentenced above what is authorized *solely* by the jury's verdict." *Frawley*, 2007-NMSC-057, ¶ 23.

{26} The result in this case cannot be justified by an argument that the accused has the burden of proving to a jury that he committed the lesser misdemeanor offense in order to avoid being convicted and sentenced at the felony level of tampering with the evidence of an indeterminate offense. *Mullaney*, 421 U.S. at 703, rejected long ago a burden-shifting approach that would permit a defendant to receive a greater sentence where it is unclear whether the less punishable or the more punishable level of an offense was committed.

{27} We hold that Section 30-22-5(B)(4) cannot be constitutionally applied to impose greater punishment for commission of tampering where the underlying crime is indeterminate than the punishment prescribed under Section 30-22-5(B)(3) where the underlying crime is a misdemeanor or petty misdemeanor. The remaining question we must resolve is what, if any, application of the indeterminate crime provision may be permitted. In *Frawley*, we determined that we could not reinterpret the sentencing statute in that case to save it from being struck down as unconstitutional. *See* 2007-NMSC-057, ¶¶ 30-33. But we also recognized that our law requires that if we can sever the invalid part of a statute while giving force and effect to the legislative purpose in the valid portion, we should do so. *See id.* ¶ 30. We conclude we can give effect to the intent of the indeterminate offense provisions in the New Mexico criminal tampering statute while severing its invalid enhanced felony penalties.

{28} It is clear to us from the statute's comprehensive coverage that the legislative intent was to make unlawful all efforts to avoid responsibility for criminal conduct by tampering with evidence that could be relevant to a person's being held responsible for commission of any crime. The recurring wording of the statute, including in the indeterminate crime provision, makes it clear that the offense is dependent on a finding of tampering with evidence in an attempt to evade responsibility for some kind of criminal conduct. *See, e.g.*, Section 30-22-5(B)(4) (providing penalties "if the highest crime for which tampering with evidence is committed is indeterminate"). The Legislature attempted in Subsections (B)(1)-(3) to cover all classifications of crimes in New Mexico statutes. But as we recognized in *Jackson*, the very nature of tampering with evidence may mean that the only evidence with which to prove the nature of the underlying crime has been destroyed. *See Jackson*, 2010-NMSC-032, ¶ 17. In some of the cases we reviewed, *see, e.g.*, *id.* ¶¶ 16-17, the defendants were held culpable under tampering statutes despite the fact that they had destroyed the evidence that could have proved the exact nature and level of their crimes. *See Phillips v. State*, 530 S.E.2d 1, 2 (Ga. Ct. App. 2000) (upholding a tampering conviction despite the defendant's acquittal of drug possession, where the only evidence remaining of the defendant's possession was a piece of a plastic bag covered with cocaine residue police found after dismantling the defendant's garbage disposal unit); *People v. Smith*, 786 N.E.2d 1121, 1122-23 (Ill. App. Ct. 2003) (upholding a tampering conviction where the defendant had swallowed and destroyed a quantity of a white substance suspected to be crack cocaine while police were conducting an investigatory stop of the vehicle in which she was riding); *State v. Mendez*, 785 A.2d 945, 954 (N.J. Super. Ct. App. Div. 2001) (upholding a tampering conviction where the defendant had tossed, and the police were unable to recover, a bag containing an unknown quantity of an unknown white, powdery substance out the window of a car being chased by police).

{29} These cases illustrate the wisdom of the Legislature's intent to provide sanctions for situations in which it is clear a defendant tampered with evidence of a crime to such an extent that an underlying crime could not be successfully prosecuted. Although we hold that the statute's provision of enhanced felony penalties where a jury cannot or does not find the level of the underlying offense, and thereby the level of the tampering crime cannot be constitutionally imposed, we also hold that the indeterminate tampering offense in Section 30-22-5(B)(4) can be insulated from invalidity by limiting its penalties to those prescribed in the statute for the lowest level of tampering, which are currently the petty misdemeanor penalties of Section 30-22-5(B)(3).

{30} The jury in this case found Defen-

dant guilty of tampering but did not find a level of the underlying offense. Because the evidence was sufficient to support a tampering conviction, we affirm his tampering conviction. But because the jury made no finding beyond reasonable doubt of the level of the underlying crime, the district court on remand should amend the judgment and sentence to reflect a conviction and sentence for indeterminate offense tampering and resentence Defendant pursuant to the basic tampering penalties in Section 30-22-5(B)(3).

{31} *Jackson*'s interpretation of the indeterminate provisions of the criminal evidence tampering statute failed to take into account controlling principles of constitutional law. *Jackson* also incorrectly interpreted the statute to provide that tampering with evidence of probation violations can be prosecuted only as an indeterminate level of tampering. That reading is inconsistent with the legislative intent to tie the level of the tampering crime to the seriousness of the crime for which the defendant was trying to avoid punishment. In all probation cases, there is clearly a level of crime for which tampering with evidence is committed, the lawful consequences of which the defendant is trying to avoid by hiding or destroying probation violation evidence. It is the easily ascertainable offense of conviction for which the defendant is on probation. In cases of multiple offenses of conviction for which the defendant is on probation, the statute provides explicit guidance that the level of the tampering crime is determined by "the highest crime for which tampering with evidence is committed." *See* Section 30-22-5(B).

{32} We will also refer this issue to our Criminal Uniform Jury Instructions Committee with directions to revise our jury instructions to reflect our holdings, whether by the use of amended elements instructions or, perhaps more appropriately, by special interrogatories to establish the highest level of underlying crime found by the jury to have been proved beyond a reasonable doubt.

{33} In his certiorari petition, Defendant had included an evidentiary issue regarding the admission of evidence of allegedly prejudicial statements he made to the victim. Upon further consideration, we determine that issue to be insubstantial and, to the extent our grant of certiorari encompassed that issue, we quash certiorari as improvidently granted.

III. CONCLUSION

{34} We hold that a conviction pursuant to the indeterminate offense provisions in Section 30-22-5(B)(4) of the evidence tampering statute cannot result in punishment more severe than is prescribed in Section 30-22-5(B)(3) for the lowest level of tampering. We also hold that the highest crime for which tampering with evidence of a probation violation is committed is the highest crime for which the defendant is on probation, rather than an indeterminate crime. We overrule *Jackson*, 2010-NMSC-032, and its progeny. We reverse the judgments of the Court of Appeals and the district court, and we remand to the district court with directions to amend the judgment and sentence to reflect Defendant's conviction of indeterminate offense tampering under Section 30-22-5(B)(4) and his resentencing pursuant to Section 30-22-5(B)(3).

{35} IT IS SO ORDERED.
CHARLES W. DANIELS, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice
BARBARA J. VIGIL, Justice
EDWARD L. CHÁVEZ, Justice, retired, sitting by designation

Certiorari Granted, April 30, 2018, No. S-1-SC-36966

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-035

No. A-1-CA-34272 (filed March 5, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RONALD WIDMER,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Stan Whitaker, District Judge

HECTOR H. BALDERAS,
Attorney General
Santa Fe, New Mexico
JOHN KLOSS,
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

BENNETT J. BAUR,
Chief Public Defender
C. DAVID HENDERSON,
Appellate Defender
Santa Fe, New Mexico
for Appellant

Opinion

Michael E. Vigil, Judge

{1} The district court denied Defendant Ronald Widmer's motion to suppress on grounds that inculpatory statements he made without the benefit of *Miranda* warnings were admissible under the police officer safety exception to *Miranda*. We disagree and reverse.

BACKGROUND

{2} Defendant was found guilty by a jury on one count of possession of a controlled substance (methamphetamine), contrary to NMSA 1978, Section 30-31-23 (2011). Defendant's conviction stemmed from the detention and search of his person that occurred during an Albuquerque, New Mexico Police Department (APD) investigation into whether a moped in Defendant's possession was stolen.

{3} Defendant filed a pre-trial motion to suppress statements he made, together with any drugs and paraphernalia seized from his person by the APD officers. Because Defendant's motion was untimely, the district court decided to address the merits of Defendant's motion during the trial, and together with any related constitutional issues as they arose while the evidence at trial was being presented.

{4} APD Officers Frank Baca and "Speedy" Apodaca, as well as APD forensic scientist Manuel Gomez testified. In addition, Defendant provided limited testimony outside of the presence of the jury. APD dispatch received an anonymous tip reporting two individuals in a Walgreens parking lot were trying to start a moped that appeared to have been tampered with, and Officers Baca and Apodaca were dispatched to investigate. Upon arriving at the Walgreens at around 11:00 p.m., Officer Apodaca testified that he approached Defendant and his companion, Lydia Alvarez, who were standing around a moped meeting the tip's description, and asked what was going on and what were they doing. Defendant and Ms. Alvarez, according to Officer Apodaca, cooperated with the officers and explained that their moped was having mechanical issues due to a low battery. Although Defendant told the officers that he owned the moped, Officer Apodaca said they continued to investigate because there was damage to the moped's ignition, which indicated that it may have been stolen.

{5} Officer Apodaca located a VIN number on the moped and ran that information through the National Criminal Information Center (NCIC)—a database through which police run checks on potential stolen vehicles, firearm inquiries, and warrant checks. At the same time, Officer Baca collected and ran the personal information of Defendant and Ms. Alvarez through NCIC and learned that Defendant had a possible active felony arrest warrant.

{6} As soon as the officers learned of the possible arrest warrant, within only minutes of arriving at Walgreens, and before receiving confirmation from dispatch that the arrest warrant was in fact active, Officer Apodaca detained Defendant, placed him in handcuffs, and directed him to sit near the sidewalk.

{7} While Defendant was being handcuffed, Officer Apodaca searched Defendant's person. During the search and without reading Defendant his *Miranda* rights, Officer Apodaca asked Defendant "Is there anything else on you that I should know about?"—which both officers testified is a routine question asked of individuals being patted down to ensure police safety. In response to Officer Apodaca's question, Officer Baca testified over defense counsel's objection (which was overruled) that Defendant admitted to having some methamphetamine in a red pill container hanging from his belt loop. As a result, Officer Apodaca seized a pill container which contained a white powdery substance from Defendant's belt loop. Shortly thereafter, APD dispatch confirmed that the arrest warrant for Defendant was outstanding and Defendant was placed in Officer Apodaca's squad car and removed from the scene.

{8} The district court gave two explanations for its ruling admitting Defendant's statement into evidence. The district court ruled that Defendant's questioning was permissible as incident to a lawful arrest under the police safety exception to *Miranda*. In a subsequent statement, the district court further explained that it refused to "get into the artfulness or lack of artfulness" of Officer Apodaca's question to Defendant.

The jury was instructed that:

> Evidence has been admitted concerning a statement allegedly made by [D]efendant. Before you consider such statement for any purpose, you must determine that the statement was given voluntarily. In determining whether a statement was voluntarily given, you should consider if it was

freely made and not induced by promise or threat.

{9} Officer Apodaca further testified that during the investigation at Walgreens he and Officer Baca also spoke with Ms. Alvarez. As a result of this interaction, Officer Apodaca testified that he seized a small baggie containing a white powdery substance from Ms. Alvarez, which Officer Baca had noticed was underneath Ms. Alvarez's leg where she sat on the sidewalk. Believing that all of the white powder seized from Defendant and Ms. Alvarez was methamphetamine, Officer Apodaca combined the contents of the pill container from Defendant's belt with the contents in the baggie seized from Ms. Alvarez into one bag before tagging it into evidence.

{10} Mr. Gomez, who was qualified as an expert in forensic science and analysis of controlled substances, testified that a single sample of the contents of the bag containing the mixed white powders seized from Defendant and Ms. Alvarez was tested for controlled substances. This sample tested positive for methamphetamine.

{11} The jury returned a general verdict of guilty, and Defendant appeals.

DISCUSSION

I. Standard of Review

{12} Appellate review of a motion to suppress under *Miranda* presents a mixed question of law and fact. *State v. Olivas*, 2011-NMCA-030, ¶ 8, 149 N.M. 498, 252 P.3d 722. We defer to the district court's findings of fact, if they are supported by substantial evidence, and apply de novo review to the application of the law to those facts. *State v. Nieto*, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442. "Whether a defendant was subject to a custodial interrogation and whether a defendant's statements are voluntarily given are legal determinations that we review de novo." *Olivas*, 2011-NMCA-030, ¶ 8; *see Nieto*, 2000-NMSC-031, ¶ 19 (utilizing de novo review to determine whether a defendant was subject to custodial interrogation); *State v. Cooper*, 1997-NMSC-058, ¶¶ 25-28, 124 N.M. 277, 949 P.2d 660 (applying de novo review to determine if a confession was voluntary). Likewise, we review a district court's conclusion of law that the police officer safety exception to *Miranda* applies under a de novo standard of review. *See United States v. Newton*, 369 F.3d 659, 669 (2d Cir. 2004) (applying a de novo standard of review to the district court's legal conclusion regarding the applicability of the public safety exception to *Miranda*); *United States v. Lackey*, 334 F.3d 1224, 1226 (10th Cir. 2003) ("Whether [the] facts support an exception to the *Miranda* requirement is a question of law.").

II. Analysis

{13} On appeal, Defendant argues that Officer Apodaca's question to Defendant: "Is there anything on your person that I should know about?"—which prompted Defendant to state that he had some methamphetamine—was custodial interrogation in violation of his rights under the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant also contends Officer Apodaca's question does not qualify under the police officer safety exception to *Miranda*. We agree with both contentions.

A. Custodial Interrogation Under Miranda

{14} The Fifth Amendment to the United States Constitution provides that "[n]o person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. Based on this protection, the United States Supreme Court established in *Miranda* that the government may not use statements, whether exculpatory or inculpatory, stemming from "custodial interrogation" of a suspect, unless effective procedural safeguards have been followed to secure the suspect's privilege against self-incrimination. 384 U.S. at 444 (holding that prior to investigatory questioning, a suspect "must be warned that he has [the] right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney"). *Miranda* warnings are required when a suspect has been: (1) placed in custody, and then (2) subject to interrogation. *Id.*; *State v. Vasquez*, 2010-NMCA-041, ¶ 26, 148 N.M. 202, 232 P.3d 438. When a defendant is subject to custodial interrogation without *Miranda* warnings, any responses made to police during the course of the custodial interrogation are presumed compelled and must be excluded from evidence. *Oregon v. Elstad*, 470 U.S. 298, 317 (1985).

{15} Therefore, we must determine if Officer Apodaca's question to Defendant concerning whether he had anything on him that Officer Apodaca should know about constituted "custodial interrogation." We consider the questions of whether Defendant was placed in custody and then subject to interrogation in turn.

{16} To determine whether a suspect was placed in custody for purposes of *Miranda*, appellate courts engage in an objective inquiry under which the ultimate issue is whether a suspect was either formally placed under arrest or subject to restraint from freedom of movement to the degree normally associated with a formal arrest. *See State v. Wilson*, 2007-NMCA-111, ¶ 14, 142 N.M. 737, 169 P.3d 1184; *see also State v. Munoz*, 1998-NMSC-048, ¶ 41, 126 N.M. 535, 972 P.2d 847; *Yarborough v. Alvarado*, 541 U.S. 652, 653 (2004). Because the inquiry into *Miranda* custody is an objective one, the subjective beliefs of the suspect and police officer concerning whether the suspect was in custody are immaterial. *See Wilson*, 2007-NMCA-111, ¶ 41. As a result, "[t]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Yarborough*, 541 U.S. at 653 (internal quotation marks and citation omitted); *see Wilson*, 2007-NMCA-111, ¶ 35 (holding that a suspect was in *Miranda* custody when the police handcuffed and placed him in a police vehicle); *see also New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (holding that a suspect was in *Miranda* custody when he was handcuffed and surrounded by police officers, even though he had not yet been told he was under arrest); *United States v. Smith*, 3 F.3d 1088, 1097-98 (7th Cir. 1993) (holding that a suspect was in *Miranda* custody when the suspect was frisked, placed in handcuffs, and told to sit in a specific place).

{17} Defendant was in custody for purposes of *Miranda* at the time of the questioning that led to his admission to possessing methamphetamine. Almost immediately upon arriving at Walgreens and learning of a possible active arrest warrant for Defendant, Officer Apodaca detained Defendant and placed him in handcuffs. Officer Apodaca proceeded to frisk Defendant and directed him to sit down on the sidewalk. Although Officer Baca testified at trial that APD officers are not permitted to formally place a suspect under arrest until potential warrants have been confirmed by dispatch, Officer Apodaca testified that at the time Defendant was placed in handcuffs "he was arrested for the warrant." However, whether Defendant's detention constituted an investigatory stop, a de facto arrest, or formal arrest is immaterial because a suspect need not be under formal arrest to be in "custody" under *Miranda*. Rather *Miranda* custody only requires restraint from movement to the degree normally associated with an arrest, as the courts in *Wilson*, *Quarles*, and *Smith* concluded. In those cases, the

courts determined suspects were in *Miranda* custody when they were handcuffed, frisked, questioned, and ordered to sit in a particular area—even if not explicitly told they were under arrest—because the suspects' movement was restrained to the degree normally associated with an arrest. Here, Defendant's freedom of movement was similarly restrained when he was handcuffed, frisked, questioned, and ordered to sit on the sidewalk by Officer Apodaca. The circumstances indicate that a reasonable person in Defendant's position would have understood himself to be in custody.

{18} Having determined that Defendant was placed in "custody" by Officer Apodaca for purposes of *Miranda*, we turn to whether Officer Apodaca's questioning of Defendant constituted "interrogation," under *Miranda*.

{19} "Interrogation" under *Miranda* certainly encompasses express questions from police to obtain an incriminating response. But, it is not limited to such express questions. "Interrogation" also includes "any words or actions," according to the United States Supreme Court, "that the police should know are reasonably likely to elicit an incriminating response[.]" *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), (quoted in *State v. Ybarra*, 1990-NMSC-109, ¶ 11, 111 N.M. 234, 804 P.2d 1053). In this regard, because *Miranda* is designed to provide a suspect in custody with additional protection against "coercive police practices, without regard to objective proof of the underlying intent of the police[,]" the focus is primarily on the suspect's perception. *Rhode Island*, 446 U.S. at 301. "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation" regardless of the police officer's actual intent. *Id.*

{20} *State v. Spotted Elk*, 34 P.3d 906 (Wash. Ct. App. 2001) is illustrative. In *Spotted Elk*, a police officer saw a person he knew to be a drug user, and after confirming his suspicion that she had outstanding arrest warrants, arrested her. *Id.* at 908. Because he knew the defendant was a drug user, the officer was concerned that she might have weapons, needles, or drugs on her person, and he asked, before handcuffing and searching her incident to arrest, "Do you have anything on your person I need to be concerned about?" *Id.* Usually, but not this time, the officer's practice was to immediately explain, "[w]eapons, needles or anything that can poke me, stick me, of any kind?" *Id.* In response to the officer's question, the defendant removed a plastic container from her shirt pocket and told the officer that it was heroin which belonged to a friend. *Id.* The Washington Court of Appeals concluded that given the broad nature of the officer's question (which lacked his usual explanation that he was looking for weapons, needles, or items that could poke or stick him), "he should have known his query was reasonably likely to elicit an incriminating response." *Id.* at 909. The court therefore concluded that the defendant was subjected to an interrogation under *Miranda*. *Spotted Elk*, 34 P.3d at 909.

{21} We find *Spotted Elk* persuasive and adopt its reasoning. Here, Defendant was confronted by two armed police officers, handcuffed, searched, and then ordered to sit on the sidewalk. After Defendant was handcuffed and while Officer Apodaca was in the process of searching Defendant, Officer Apodaca asked Defendant "Is there anything on you that I should know about?" This was a broad, unlimited question with no explanation that Officer Apodaca was asking only about items which could jeopardize his safety. From Defendant's perception, the "question" was tantamount to a demand by Officer Apodaca that Defendant disclose to him whether anything illegal was on Defendant's person. *See State v. Hermosillo*, 2014-NMCA-102, ¶ 11, 336 P.3d 446 ("In determining whether a person is being interrogated, we consider whether the officer's questioning is reasonably likely to elicit an incriminating response or has that effect."). An armed police officer who has just handcuffed a person and is in the process of searching that person who asks whether there is anything on his person the officer "should" know about, should know that the police officer's question is likely to elicit an incriminating response. We therefore conclude that Defendant was subjected to interrogation under *Miranda*.

{22} Because Defendant was subjected to custodial interrogation under *Miranda*, Defendant was entitled to being advised of his constitutional rights. It is undisputed that Defendant was *Mirandized* after the inculpatory statements were elicited from him by Officer Apodaca. As a result, unless the circumstances of Officer Apodaca's questioning of Defendant warrant application of an exception to *Miranda*, the district court erred in admitting Defendant's statement to Officer Apodaca that he had some methamphetamine. We proceed by considering the state's argument and district court's ruling that an exception to *Miranda* applies in this case.

B. The Police Officer Safety Exception to *Miranda*

{23} In *Quarles*, the United States Supreme Court established a "narrow exception to the *Miranda* rule[,]" which allows arresting officers to ask a defendant "questions necessary to secure their own safety or the safety of the public." *Quarles*, 467 U.S. at 658-59 (1984). In *Quarles*, a woman reported that she had been raped at gunpoint and provided a description of her attacker. *Id.* at 651-52. When the officers entered a nearby supermarket and saw a man fitting the description provided by the woman, he fled. *Id.* at 652. Following a short pursuit, the officers caught him, frisked him, and discovered that he was wearing an empty shoulder holster. *Id.* After handcuffing the suspect and before advising him of his *Miranda* rights, the officers asked the suspect where the gun was. *Quarles*, 467 U.S. at 652. He nodded towards some empty cartons and answered, "the gun is over there." *Id.* (internal quotation marks omitted). The Court reversed suppression of the defendant's statement and the firearm, holding that under circumstances where a question is "reasonably prompted by a concern for the public safety" or the safety of the arresting officers, *Miranda* warnings are not required. *Quarles*, 467 U.S. at 656, 658. The Court cautioned that under this "narrow exception," each case "will be circumscribed by the exigency which justifies it." *Id.* at 658.

{24} In *State v. Trangucci*, 1990-NMCA-009, ¶¶ 6-13, 110 N.M. 385, 796 P.2d 606, this Court applied *Quarles*. In *Trangucci*, the defendant forced himself into the victim's apartment, and after the victim refused the defendant's repeated demands for money, the defendant shot the victim in the face and ran. 1990-NMCA-009, ¶ 3. The police learned early the next morning that the defendant was at a certain motel and went there to arrest him. *Id.* ¶ 4. After entering the room with their weapons drawn, the officers observed a man lying on one of the beds with his back towards the door, and then found the defendant hiding underneath a dresser table with his hands hidden under his chest. *Id.* ¶ 5. After lifting the dresser and while lifting the defendant to his feet, one of the officers conducted a quick pat down of the defendant's front area and asked, "Where is the gun?" *Id.* Defendant, who was not

yet handcuffed, immediately answered that the officer was not going to find the gun because he had ditched it. *Id*. Defendant was then given his *Miranda* warnings. *Trangucci*, 1990-NMCA-009, ¶ 5. On appeal, the defendant argued that the district court erred in denying his motion to suppress his statement regarding the gun. *Id*. ¶ 6. This Court observed that "[t]he standard for application of the public safety exception to *Miranda* warnings" under *Quarles* is "a reasonable determination of an objective, immediate threat to the safety of the public [or the police]." *Trangucci*, 1990-NMCA-009, ¶ 10. Because substantial evidence supported the district court's finding "that the situation had not stabilized or been secured for everybody's safety" when the defendant was questioned, this Court held that the district court properly denied the defendant's motion to suppress under the police and/or public safety exception to *Miranda*. *Trangucci*, 1990-NMCA-009, ¶ 13.

{25} *Quarles* and *Trangucci* teach that a narrow exception to *Miranda* exists when there is an objective, immediate threat to police officer safety and police ask questions that are necessary to secure their own safety. In each case the exception "will be circumscribed by the exigency which justifies it." *Quarles*, 467 U.S. at 658. Previously decided cases, similar to the one before us here, give us additional guidance.

{26} In *Spotted Elk*, discussed above, after concluding that the police officer's question, "Do you have anything on your person I need to be concerned about?" was custodial interrogation under *Miranda*, the Washington Court of Appeals proceeded to consider whether the police officer safety exception applied. *Spotted Elk*, 34 P.3d at 908, 910. The court concluded it did not for two reasons: (1) "the officer's broad and apparently unqualified question was not related solely to his own safety"; and (2) "no sense of urgency attended the arrest." *Id*. at 910.

{27} In *State v. Crook*, 785 S.E.2d 771 (N.C. Ct. App. 2016), a police officer was at a motel investigating whether the defendant and another suspect were in possession of a stolen vehicle, and received confirmation that the suspect had an outstanding warrant for his arrest. *Id*. at 773-74. After a backup officer arrived, the officers went to the room to arrest the suspect, where a wrestling match ensued when the defendant interfered with the suspect's arrest. *Id* at 774. A police officer handcuffed the defendant, ordered him to sit on the ground, and during his pat-down of the defendant found scales in the defendant's pocket. *Id*. After retrieving the scales, the officer asked him whether "he [had] anything else on him" and the defendant answered, "I have weed in the room." *Id*. The court rejected the state's argument that the public safety exception to *Miranda* applied because there was no threat to the public safety which outweighed the need to protect the defendant's right against self-incrimination. *Crook*, 785 S.E.2d at 777-78. Specifically, the court noted, the defendant posed no threat to the police or public safety because he was not suspected of carrying a gun or weapon and was handcuffed, sitting on the ground when he was questioned. *Id*. at 778. The court therefore held that the defendant's motion to suppress his statement, "I have weed in the room[,]" should have been granted. *Id*. at 781.

{28} In *United States v. Castaneda*, 196 F.Supp.3d 1065 (D. Ariz. 2016), police officers approached the defendant because he violated a traffic law while riding his bicycle and because he appeared to be tryng to elude the officers. *Id*. at 1068. After it was discovered that the defendant had an outstanding misdemeanor warrant for failure to appear on a shoplifting charge, the defendant was handcuffed and arrested. *Id*. The officers also decided to retrieve the defendant's bicycle, which was ninety feet away and next to a storage shed. *Id*. One of the officers asked the defendant "if there was anything on the bicycle that he needed to know about." *Id*. One of the officers then heard the defendant say something about a joint and while taking the defendant to the patrol car, one of the other officers heard the defendant mumble that "he found something in the alley," that he thought it was a "rifle or something," and that it had "wood and screws." *Id*. The officers then found a sawed-off shotgun in a backpack attached to the handlebars of the bicycle. *Id*. at 1068-69. The defendant was indicted for being a felon in possession of a firearm in violation of federal law. *Id*. at 1069. The court rejected the government's argument that the defendant's statements at the scene of his arrest were not subject to suppression under the police officer safety exception to *Miranda*. *Castaneda*, 196 F.Supp.3d at 1072-74. First, the court noted that there were no facts about the defendant, his conduct, or his arrest that gave rise to a potential threat or "a pressing need to ensure police and/or public safety." *Id*. at 1072-73. In addition, the court concluded that the nature of the question itself was "vague and investigative" because asking if there is "anything" the officer needs to know about "invites" a response "to list specific items of evidence or other incriminating information just as much as it addresses officer or public safety[.]" *Id*. at 1073. Such a question, the court held, "as opposed to a question strictly intended to resolve an officer's objectively reasonable immediate safety concerns cannot be excused by the *Quarles* exception." *Id*. at 1074.

{29} We hold that under the facts of this case, Defendant's response to Officer Apodaca's question, "Is there anything else on you that I should know about" must be suppressed. This was a custodial interrogation without *Miranda* warnings, and the "narrow exception" recognized in *Quarles* does not apply. The officers expressed no concern of any kind that anything at the scene or Defendant's conduct posed a danger to their safety. In fact, Defendant was cooperative and handcuffed before the pat down. If Officer Apodaca was concerned that Defendant might have something on his person which would endanger Officer Apodaca while he conducted Defendant's pat down, he did not say so. In addition, there is nothing in the record to show the reason for such a concern, if such a concern potentially existed. Similar to *Castaneda*, the broad, undifferentiated question, "Is there anything else on you I need to know about?" was not focused on protecting officer safety. 196 F.Supp.3d at 1073-74. As we have already observed, the question not only invited Defendant to disclose whether he had contraband of any kind on his person, dangerous or not, the officer expected Defendant to cooperate and answer the question. By continuing to cooperate with the officer, Defendant's only options were to give an answer that was dishonest or to incriminate himself. We require Defendant to do neither under these circumstances.

{30} We emphasize that our holding does not prohibit a police officer from asking a focused question that is necessary to ensure the safety of the officer when there is an objective, immediate threat to the safety of the officer. However, this is not such a case. We therefore determine that the district court erred in admitting Defendant's statement that he had some methamphetamine in a red pill container hanging from his belt loop, together with the methamphetamine discovered as a result of Defendant's statement. *See State v. Greene*, 1977-NMSC-111, ¶¶ 31-32,

91 N.M. 207, 572 P.2d 935 (agreeing that "courts must be willing to bar the physical fruits of inadmissible statements and confessions, as well as the confessions themselves" under the "fruit of the poisonous tree" doctrine (internal quotation marks and citation omitted)).

C. Harmless Error

{31} Perhaps anticipating our conclusion, the State argues that even if *Miranda* was violated, admitting Defendant's statement into evidence was harmless error. We disagree.

{32} At issue here is the violation of Defendant's constitutional rights under *Miranda*. *See Wilson*, 2007-NMCA-111, ¶¶ 35-36 (stating that federal constitutional rights arise from a *Miranda* violation). An appellate court may not conclude that a constitutional error is harmless unless the state carries its burden of demonstrating that the error is harmless beyond a reasonable doubt. *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110. That is to say, the State must demonstrate that there is "no reasonable possibility" that the constitutional error affected the verdict. *State v. Barr*, 2009-NMSC-024, ¶ 53, 146 N.M. 301, 210 P.3d 198 (emphasis omitted), *overrruled on other grounds by Tollardo*, 2012-NMSC-008, ¶ 37.

{33} With the denial of Defendant's motion to suppress, the defense strategy relied on other lapel videos recorded by the officers to challenge the State's claim that the white powdery substance presented at trial was not seized from Defendant. Defense counsel argued that the methamphetamine presented at trial had actually been seized from Defendant's companion, Ms. Alvarez. In support of the defense, Defendant's attorney wanted to admit edited clips from Officer Apodaca's lapel cam video. However, because defense counsel had not yet edited the videos, and to avoid a delay in the trial to allow counsel to redact the videos, the district court ruled that to support the defense, defense counsel would be required to admit the full videos from Officer Apodaca and Baca's lapel cams, including the audio. On one of the videos, after the methamphetamine was seized from Defendant, one of the officers asked Ms. Alvarez if she had any methamphetamine, to which she responded, "What are you talking about?" As the officer was answering, "[t]he meth that's on [Defendant,]" Defendant told Ms. Alvarez, "[t]he meth that's on me baby."

{34} The State makes two arguments of harmless error on appeal that it did not make to the district court. First, relying on *State v. Fekete*, 1995-NMSC-049, ¶¶ 45-46, 120 N.M. 290, 901 P.2d 708, the State contends that Defendant's statement to Ms. Alvarez, "[t]he meth that's on me baby[,]" was admissible as a volunteered statement, even assuming there was a prior *Miranda* violation. Second, the State argues that there was no error because the methamphetamine on Defendant would have been lawfully seized anyway incident to his lawful arrest under the arrest warrant. *See State v. Paul T.*, 1999-NMSC-037, ¶ 11, 128 N.M. 360, 993 P.2d 74 ("Under the Fourth Amendment, the police may lawfully conduct a full, warrantless search of the arrestee's person without his or her permission."). The State's waiver arguments are not persuasive.

{35} *Fekete* is of no assistance to the State. In *Fekete*, the defendant had shot and killed a man on the street, and went back to his motel room for the night. 1995-NMSC-049, ¶¶ 8-9. Three statements made by the defendant were considered on appeal. Based on their investigation, police officers went to the defendant's motel the next day and asked if he would come to the police station and be questioned. *Id.* ¶ 11. The defendant responded that he had shot a man the night before and asked if they wanted the gun, pointed out where it was, and handed the officers extra ammunition he was carrying. *Id.* On the way to the police station, the defendant repeated twice again that he had shot a man the night before. *Id.* At the police station, the defendant signed a written waiver of his *Miranda* rights and gave a full confession. *Id.* Our Supreme Court held the defendant's first statements at the motel room were not the product of a custodial interrogation and were properly admitted into evidence. *Id.* ¶ 42. Our Supreme Court then assumed that the defendant was in custody on the way to the police station, and concluded that all of his statements, except one, were spontaneous and not in response to any questions by the police. And, the one question asked was,

"[W]hich one[?]" in response to the defendant's question about whether the man had lived. *Id.* ¶ 45. As to this question, our Supreme Court concluded, the error, if any, was harmless, because the defendant only repeated his earlier statements at the motel. *Id.* ¶ 46. Finally, our Supreme Court held that because the defendant made a valid voluntary, knowing, and intelligent waiver of his *Miranda* rights before giving the full confession at the police station, any error in admitting defendant's two prior statements was harmless. *Id.* ¶¶ 46, 49-51. In contrast to *Fekete*, Defendant's statement to Ms. Alvarez was simply the product of his prior *un-Mirandized* confession to Officer Apodaca that he had methamphetamine on his person. This statement and the powder taken from Defendant were subject to suppression under the fruit of the poisonous tree doctrine. *See Greene*, 1977-NMSC-111, ¶¶ 31-32. We do not further consider *Fekete*.

{36} Significantly, the State overlooks the fact that Defendant's purported "voluntary" statement was admitted into evidence only because the district court denied Defendant's motion to suppress. Defendant was left with relying on lapel cam videos which would otherwise have been suppressed to support his defense that the methamphetamine came from Ms. Alvarez. Moreover, the district court mandated that the entire videos be given to the jury. Under these circumstances, there was no waiver. *See State v. Zamarripa*, 2009-NMSC-001, ¶ 50, 145 N.M. 402, 199 P.3d 846 ("An objection is not waived where, after it is overruled, the objecting party agrees to the introduction of statements similarly objectionable and relies on them to make its case."). *See Saynor v. Sholer*, 1967-NMSC-063, ¶ 6, 77 N.M. 579, 425 P.2d 743 ("The court having already overruled the proper [hearsay] objection . . . counsel was placed in the rather unenviable position of having to make the best of a bad situation [by relying on hearsay]. This was not a waiver[.]" (internal quotation marks and citations omitted)).

{37} The State's inevitable discovery argument also fails. As set forth above, the suspected methamphetamine seized from Defendant was combined with suspected methamphetamine seized from Ms. Alvarez into one bag at the scene by Officer Apodaca. It is therefore unknown what, specifically, was tested positive for methamphetamine by Mr. Gomez. Because of its erroneous suppression ruling, the district court never developed a record for this Court to review regarding the inevitable discovery doctrine or the officer's contamination of the seized evidence. We apply the right for any reason doctrine only if doing so "is not unfair to the appellant." *State v. Gallegos*, 2007-NMSC-007, ¶ 26, 141 N.M. 185, 152 P.3d 828; *Beggs v. City of Portales*, 2013-NMCA-068, ¶ 32, 305 P.3d 75 ("It is within this Court's discretion to affirm the district court under the 'right for any reason' doctrine, but we

will not exercise such discretion if it would result in unfairness to the appellant."). Under the circumstances, it is unfair to apply the doctrine here, and we decline to do so.

{38} Finally, in our determination of whether the error in admitting Defendant's statement into evidence was harmless beyond a reasonable doubt, we note that no better evidence was available to the State besides Defendant's statement—his confession—that Defendant had methamphetamine on his person, and knew it was methamphetamine. Our Supreme Court has recognized that the impact of a confession is virtually impossible for a jury to ignore:

> Confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so. A full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. The risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

State v. Alvarez-Lopez, 2004-NMSC-030, ¶ 34, 136 N.M. 309, 98 P.3d 699 (alterations and omissions omitted) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). *See United States v. Leon-Delfis*, 203 F.3d 103, 112 (1st Cir. 2000) ("Confessions are by nature highly probative and likely to be at the center of the jury's attention.").

{39} We reject the State's arguments of harmless error and we are otherwise unable to conclude beyond a reasonable doubt that the admission of Defendant's statement into evidence, in violation of *Miranda,* was harmless.

CONCLUSION

{40} We reverse Defendant's conviction and remand to the district court for a new trial. In light of our holding, we do not address Defendant's remaining arguments.

{41} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge

I CONCUR:
TIMOTHY L. GARCIA, Judge Pro Tempore
J. MILES HANISEE, Judge (dissenting)

HANISEE, Judge (dissenting).

{42} When a defendant is legally arrested—as is the case when an NCIC search undertaken by law enforcement officers reveals the existence of an outstanding felony arrest warrant—our precedent uniformly, plainly and consistently permits a contemporaneous search incident to arrest. It matters not that supplemental confirmation of the warrant's accuracy by APD dispatch was ongoing when Defendant was handcuffed, searched, and seated upon a curb during the remainder of the officers' on-scene investigation. Stated more simply, a legal arrest commands the constitutionality of a search incident thereto. As such, the methamphetamine found in the pill container, attached to Defendant's belt, is admissible against him at trial. Also, I would hold Defendant's constitutional rights not to have been violated when he was asked, without being first notified of his right to remain silent, whether he possessed anything on his person that officers "should know about" because such an inquiry is justified by the limited *Miranda*-excepted need to secure officer safety. Therefore, Defendant's ensuing statement notifying officers of the presence of the methamphetamine on his person is also admissible against him. I respectfully dissent.

{43} First, we have held that outstanding arrest warrants permit arrests. *See State v. Grijalva*, 1973-NMCA-061, ¶ 12, 85 N.M. 127, 509 P.2d 894 (holding that possession of an arrest warrant is not essential to the legality of an arrest based thereon when the validity of the arrest warrant is not challenged). Despite the Majority's characterization of the warrant at issue to be a "possible active felony arrest warrant[,]" Majority Op. ¶ 5, our appellate courts have never held—nor should either hold—that arrest upon an NCIC-reported felony arrest warrant may only follow some secondary confirmation that the warrant is accurate or remains active. While ensuring the accuracy of known arrest warrants is laudable, it is not a constitutional mandate. I would make plain today that the initial discovery of an outstanding felony arrest warrant by use of a nationally-relied-upon database permitted Defendant's arrest.

{44} Next, searches incident to arrests are as entrenched as any exception to the otherwise applicable warrant requirement that serves generally, but not always, as the constitutional prequel to police looking for things in private places such as pill boxes attached to belt loops. *State v. Paananen*, 2015-NMSC-031, ¶ 29, 357 P.3d 958 ("One of the most firmly established exceptions to the warrant requirement is the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested." (internal quotation marks and citation omitted)); *State v. Weidner*, 2007-NMCA-063, ¶ 23, 141 N.M. 582, 158 P.3d 1025 (stating that the search incident to arrest exception requires the state to prove "that the search occurs as a contemporaneous incident to the lawful arrest of the defendant and is confined to the area within the defendant's immediate control" (internal quotation marks and citation omitted)). Coupled with Defendant's legal arrest, the accompanying search of his person and pockets corrects the Majority's conclusion that the methamphetamine Defendant possessed cannot be used against him at trial.

{45} The more constitutionally intriguing issue, one I suggest our Supreme Court take up, is the propriety of the un-*Mirandized* question asked of Defendant just before the constitutionally compliant search incident to his arrest. While the Majority's disallowance of the wording employed by the arresting officer finds some support in other jurisdictions, *see* Majority Op. ¶¶ 20, 27-28, I would hold differently. *Quarles* held that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." 467 U.S. at 657. In appropriate circumstances, *Quarles* has been interpreted to allow questions such as that asked here. *See United States v. Newsome*, 475 F.3d 1221, 1225 (11th Cir. 2007) (finding no problem with the officer's broadly phrased question, "Is there anything or anyone in the room that I should know about?" (internal quotation marks omitted)); *United States v. Luker*, 395 F.3d 830, 832 (8th Cir. 2005) (upholding the propriety of an officer's question regarding the presence of anything in a defendant's vehicle "that shouldn't be there or that [officers] should know about"); *United States v. Gorrell*, 360 F. Supp.2d 48, 53 (D.D.C. 2004) (upholding constitutionality of officer question, asked when placing the defendant under arrest, regarding whether there was anything "she should know about[?]"). It is my view that here, given that officers had received a report and confirmed the possibility that Defendant and a person with him were engaged in criminal

activity, and had learned from NCIC of the existing felony arrest warrant for Defendant, that the question asked of Defendant was constitutionally proper. I also note the question was asked in conjunction with the searching officer donning gloves as one precaution against the possibility of sharp objects such as needles. It seems to me that the instant circumstance fits neatly within the exception to the *Miranda* requirement drawn by *Quarles* and applied by the cases interpreting it. As such, Defendant's responsive statement, like the methamphetamine found in the search itself, is admissible against him at trial.

{46} The Majority's holding fails to reiterate the well-established constitutional propriety of the straightforward search incident to arrest that resulted in the seizure of methamphetamine from Defendant. More regrettably, it unnecessarily reduces the day-to-day safety of law enforcement officers by disallowing one simple, safety-geared inquiry of defendants that are possibly armed, possibly in possession of hazardous paraphernalia associated with drug use, or that otherwise may pose some unknown yet avoidable threat to officers. I view *Quarles* to permit officers to seek such limited assurance without first providing *Miranda* warnings. I would affirm the district court's denial of Defendant's motion to suppress.

J. MILES HANISEE, Judge

Certiorari Granted, May 21, 2018, No. S-1-SC-36995

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-036

No. A-1-CA-35186 (filed March 19, 2018)

PRINCETON PLACE,
Petitioner-Appellant,
v.
NEW MEXICO HUMAN SERVICES DEPARTMENT,
MEDICAL ASSISTANCE DIVISION,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Sarah M. Singleton, District Judge

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Opinion

Michael E. Vigil, Judge

{1} The district court upheld the decision of the Director of the New Mexico Human Services Department, Medical Assistance Division (HSD/MAD) to recoup Medicaid payments made to Princeton Place (Princeton), a nursing home located in Albuquerque, New Mexico. The claim was that Princeton was not entitled to Medicaid payments for services provided to a resident, J.F., because Princeton did not comply with New Mexico Department of Health (DOH) nursing home preadmission screening regulations before it admitted J.F. On appeal, Princeton contends the administrative record demonstrates that it complied with the applicable preadmission regulations. We agree and reverse.

BACKGROUND

A. The Federal and New Mexico Nursing Home Preadmission Screening Statutory and Regulatory Framework

{2} In 1987, Congress passed the Nursing Home Reform Act (NHRA). *See* Pub. L. No. 100-203, §§ 4201-06, 101 Stat. 1330 (1987) (codified at 42 U.S.C. § 1396r (2012)). The purpose of the NHRA "is to prevent the placement of individuals with [mental illness] or [mental retardation, e.g., intellectual disability][1] in a nursing facility unless their medical needs clearly indicate that they require the level of care provided by a nursing facility." Medicare and Medicaid Programs; Preadmission Screening and Annual Resident Review (PASARR), 57 Fed. Reg. 56,450, 56,451 (Nov. 30, 1992). To achieve this purpose, the NHRA requires that each state receiving federal Medicaid funding establish a program to screen all individuals seeking admission to a nursing home for mental illness and intellectual disability prior to admission. 42 U.S.C. § 1396a(a)(28)(D)(I) (2012); 42 U.S.C. § 1396r(e)(7) (A)-(B); 42 C.F.R. § 483.104 (2012); 42 C.F.R. § 483.106(a)(1) (2012). This screening is known as the "PASARR" process. *See* 42 C.F.R. § 483.100 (2012).

{3} Medicaid states are eligible to receive Federal Financial Participation (FFP) at a rate of seventy-five percent to reimburse nursing homes for services provided to Medicaid-eligible individuals determined, in accordance with the PASARR process, to need nursing home care. *See* 42 U.S.C. § 1396b (2012); 42 C.F.R. § 483.122(a) (2012); 57 Fed. Reg. at 56,451, 56,481. To qualify for Medicaid reimbursement, a nursing home is required to enter into a Medicaid Provider Participation Agreement (MPPA) with the state, under which the nursing home agrees to follow all state and federal Medicaid statutes and regulations, including PASARR requirements.

{4} Pursuant to the federal PASARR regulations, Medicaid states are required to establish a two-level preadmission screening process for nursing home applicants. *See* 42 C.F.R. § 483.128(a) (2012). At Level I, states "must identify all individuals who are suspected of having" mental illness or intellectual disability as defined by the federal regulations. *Id.*; *see* 42 C.F.R. § 483.102(a)-(b) (2012) (defining mental illness and intellectual disability for purposes of PASARR). States may delegate the authority to conduct Level I screens to nursing homes operating under an MPPA. *See* 57 Fed. Reg. at 56,460. However, when individuals are identified as suspected of having mental illness or intellectual disability at Level I, they must be referred back to the states' PASARR programs for Level II screening. *See* 42 C.F.R. § 483.106(e)(1)-(3). At Level II, states are required to evaluate and determine whether nursing home services or other specialized services are actually needed for identified nursing home applicants. 42 C.F.R. § 483.128(a). The Level II evaluations and determinations are thereafter provided to the applicants and admitting nursing homes. 42 C.F.R. § 483.128(i)(l). And where nursing home services are deemed appropriate for a particular applicant, the admitting nursing home may admit the applicant. 42 C.F.R. § 483.116(a) (2012).

[1]The terms "mental retardation" and "intellectual disability" are used interchangeably in the federal and New Mexico nursing home and Medicaid statutes and regulations. We follow suit and likewise do so in this opinion.

{5} In New Mexico, the State's PASARR program is housed within the DOH Developmental Disabilities Division. The State's PASARR program is responsible for ensuring that preadmission screening of all nursing home applicants is completed prior to any applicant's admission to a nursing home. When all PASARR requirements have been satisfied and an applicant has been admitted to a nursing home, HSD/MAD is responsible for processing the nursing home's claims for Medicaid reimbursement. HSD/MAD is also responsible for seeking recoupment of Medicaid funds that have been paid to nursing homes when the PASARR requirements have not been satisfied.

B. Princeton's Preadmission Screening of J.F. and HSD/MAD's Proposed Medicaid Recoupment Action

{6} In June 2011, J.F. underwent a Level I PASARR screening for admission to Princeton, which at the time was operating under an MPPA with the State of New Mexico. J.F. was born with spina bifida, a congenital condition of the central nervous system that affects the development of the spinal cord and brain. At the time that he applied for admission to Princeton, J.F.'s condition had deteriorated to the point that he required assistance with his activities of daily living including eating, toileting, bathing, dressing, and ambulation.

{7} Princeton's admission coordinator and licensed practical nurse, Vivian Richer, conducted J.F.'s Level I PASARR screen. As part of the screen, Ms. Richer completed a form provided to Princeton by DOH titled "New Mexico PASRR Screening Document"[2] (the PASARR Form). Ms. Richer relied on J.F.'s medical history, physical examination, and past admission orders in conducting her Level I PASARR screen of J.F. and in completing the PASARR Form.

{8} Section A of the PASARR Form titled "Client Data" asks for general personal information about a nursing home applicant, including whether she or he has any physical or mental diagnoses. Ms. Richer stated that under Section A, J.F. suffered from spina bifida, dystonia, and urinary tract infection.

{9} The heading for Section D of the PASARR Form states that "IF ANY ONE of the items to this section is 'Yes,' the person MUST BE REFERRED TO PASRR." Under Section D are Questions 4 and 5. Question 4 asks "[i]s there any indication of mental retardation?" Finding no indication of mental retardation in J.F.'s medical records, Ms. Richer checked "No" to question 4.

{10} Question 5 asks "[i]s there any indication of developmental disability (a severe, chronic disability that manifested before age 22)?" The instructions on the PASARR Form addressing Question 5 state that "[a]ny severe, chronic disability (except mental illness) that occurred before age 22 may indicate a developmental disability. Examples include: cerebral palsy, spina bifida, quadriplegia before age 22, a seizure disorder that started before age 22 or a severe head injury that occurred before age 22." Concluding that Question 5 was aimed at screening for developmental disability "as it relates to mental retardation," and finding no indication in J.F.'s medical records of this form of disability, Ms. Richer checked "No" to Question 5.

{11} Ms. Richer additionally found no indication in J.F.'s medical records of mental illness. Based on the lack of indication of either mental illness or mental retardation in his medical records, Ms. Richer did not refer J.F.'s Level I screen to DOH for a Level II evaluation. J.F. was admitted to Princeton and received nursing home care funded through Medicaid over the next two years.

{12} On July 19, 2013, for reasons that are not clear in the record, another Level I PASARR screen was completed for J.F. by a staff member at the University of New Mexico Hospital (UNMH). The UNMH staff member indicated on the PASARR Form that she completed that J.F. had a diagnosis of spina bifida and was suspected of having mental illness. The UNMH staff member also checked "Yes" to Question 5. Based on this positive Level I screen, UNMH referred J.F.'s screen to DOH. After consulting with Princeton, however, UNMH submitted a revised Level I PASARR screen to DOH with all items, including Question 5, checked "No." DOH responded to UNMH by requesting that it submit a second revised Level I PASARR screen for J.F. with Question 5 checked "Yes" based on J.F.'s diagnosis of spina bifida. UNMH therefore submitted a second revised Level I PASARR screen to DOH reflecting the requested change.

{13} Based on the information it received from UNMH, DOH conducted a Level II PASARR evaluation of J.F.'s condition and determined that J.F.'s needs met the criteria for nursing home level care and that no specialized services were warranted under the circumstances. DOH informed Princeton and J.F. of this determination on July 22 and 23, 2013, respectively.

{14} DOH also told Princeton on July 23, 2013, that in light of his spina bifida diagnosis, J.F.'s Level I screen should have been referred to DOH for a Level II evaluation when it was originally performed by Ms. Richer in June 2011. DOH contended that Princeton's preadmission screening of J.F. was incomplete and out of compliance with its PASARR regulations.

{15} DOH also communicated to HSD/MAD on the same day that Princeton had been out of compliance with its PASARR regulations between the date of J.F.'s admission to Princeton on June 28, 2011, and the date of the DOH's Level II PASARR determination on July 22, 2013. DOH concluded in its communication to HSD/MAD that Princeton should therefore be required to forfeit the FFP it received to pay for J.F.'s care while it was out of compliance with HSD/MAD PASARR regulations.

{16} On May 13, 2014, HSD/MAD sent a notification of noncompliance to Princeton. The notification stated that Princeton had been out of compliance with 8.312.2.18(B), (C) NMAC for "failure to complete [the] PASRR process for [J.F.] for the dates of 06/28/2011 to 07/22/2013." Because "Failure of a Medicaid Certified Nursing Facility to follow the PASRR regulations requires loss of funding from admission until the PASRR process is complete," the notice stated that based on DOH "audit findings" HSD/MAD "has calculated an overpayment to Princeton Place in the amount of $158,178.25." As a result, the notice demanded that "Princeton Place must submit [to HSD/MAD] payment in full for the deficiencies identified," in the amount of $158,178.25.

{17} Princeton responded to HSD/MAD's notification of noncompliance. Princeton asserted that it had "timely and appropriately completed a pre-admission Level I PASRR screen [of J.F.] in accordance with federal requirements," and had concluded that J.F. "did not meet [the] criteria for a Level II PASRR screen during the time period . . . at issue[.]" Princeton therefore requested that HSD/MAD either "revise, rescind or otherwise withdraw its"

[2]Although New Mexico uses the abbreviation "PASRR" in its nursing home preadmission screening regulations, procedures, and forms as opposed to "PASARR" as used in the federal statutory and regulatory framework, all references to the New Mexico framework hereinafter will use the abbreviation "PASARR" for purposes of consistency.

notification of noncompliance or "provide Princeton Place with a hearing date at which it may present evidence and legal arguments to challenge the recoupment identified" in the notification of noncompliance.

{18} A hearing before the HSD Fair Hearings Bureau was held to address Princeton's challenge to HSD/MAD's proposed Medicaid recoupment. Testifying at the hearing for HSD/MAD were the staff manager for the DOH PASARR Program, Leslie Swisher, and bureau chief for the HSD/MAD Program Policy and Integrity Bureau, Robert Stevens. Testifying for Princeton were Ms. Richer and forensic and clinical psychologist, Dr. Anne Rose. The Administrative Law Judge (ALJ), David Bruce Nava, found and concluded that, "[p]ursuant to NMAC 8.312.2.18, Princeton had a duty imposed by regulation to report [J.F.s] condition to the DOH, and they breached this duty. HSD has suffered damages as a result, because they are required to reimburse the federal government for the federal portion of the funds paid out to Princeton for the time period that the proper screening procedures were not in place."

{19} ALJ Nava also denied Princeton's request for his recusal from the case, which stemmed from his disclosure to the parties that as an assistant general counsel to HSD, he may have been asked to proofread the boilerplate MPPA to which all Medicaid providers, including Princeton, are a party. ALJ Nava reasoned that he gave no legal advice to HSD/MAD concerning the drafting of the agreement, that he had no personal stake in Princeton's case, and that the substance of HSD/MAD's boilerplate MPPA was not at issue in Princeton's case.

{20} Based on ALJ Nava's findings of fact and conclusions of law, the Director upheld HSD/MAD's proposed recoupment against Princeton. Princeton appealed the Director's decision to the district court, pursuant to NMSA 1978, Section 39-3-1.1(C) (1999) ("Unless standing is further limited by a specific statute, a person aggrieved by a[n agency's] final decision may appeal the decision to [the] district court by filing in district court a notice of appeal within thirty days of the date of filing of the final decision."), and Rule 1-074 NMRA (governing the procedure for administrative appeals to the district courts).

{21} Princeton argued before the district court that the Director erred in upholding HSD/MAD's proposed Medicaid recoupment on grounds that: (1) HSD/MAD failed to meet its burden of proving by a preponderance of the evidence that Princeton violated any State or federal PASARR regulation; (2) HSD/MAD's notification of noncompliance references "audit findings," but HSD/MAD never conducted an audit; and (3) ALJ Nava failed to recuse himself after disclosing a conflict of interest. The district court thereafter issued its Rule 1-074 decision affirming the Director's proposed Medicaid recoupment against Princeton. The district court reasoned that Princeton incorrectly performed the 2011 Level I PASARR screen of J.F., that ALJ Nava was not required to recuse himself from the case where Princeton's MPPA was not at issue in the case, and that although no formal audit was conducted in the case, this fact did not require reversal where HSD/MAD received its information concerning the dates of Princeton's alleged noncompliance directly from DOH.

{22} Princeton moved for rehearing, arguing that the district court had overlooked or misapprehended its standard of review under Rule 1-074(R). Princeton also argued that the district court overlooked or misapprehended the definition of a "related condition" under the federal PASARR regulations. Disagreeing with Princeton that it overlooked or misapprehended anything in regard to the administrative standard of review or PASARR definitions and standards, the district court denied Princeton's motion for rehearing.

{23} Princeton filed a petition for a writ of certiorari with this Court to review the decision of the district court, which we granted. Pursuant to the order of the district court, HSD/MAD's proposed recoupment has been stayed during the pendency of Princeton's appeal.

DISCUSSION

{24} Princeton's central argument on appeal is that it completed the Level I PASARR screening of J.F. in compliance with all State and federal PASARR regulations. The amicus, New Mexico Health Care Association/New Mexico Center for Assisted Living (the Amicus), also develops an additional and related argument that HSD/MAD "cannot enforce, as if it were a properly promulgated [r]ule, language contained only in instructions appended to" the PASARR Form. As a result, the Amicus submits that while HSD/MAD may enforce the substance of the New Mexico PASARR regulations, "it cannot treat as a violation of that [r]ule a failure to comply with [the] instructions that are merely appended to" the PASARR Form.

{25} Princeton raises two additional corollary issues on appeal. First, that the district court erred in affirming the Director's determination that ALJ Nava was not required to recuse himself from Princeton's case under the circumstances. Second, that HSD/MAD failed to substantiate its claim that it conducted an audit in conjunction with its action for Medicaid recoupment from Princeton. However, because we conclude that the outcome of whether Princeton complied with all applicable PASARR regulations in its performance of J.F.'s preadmission screening is dispositive, our analysis is limited to discussion of this issue.

A. Standard of Review

{26} In reviewing an agency decision, this Court applies the same standard of review applicable to the district court under Rule 1-074(R), *Hyden v. N.M. Human Servs. Dep't*, 2000-NMCA-107, ¶ 3, 130 N.M. 19, 16 P.3d 444, "while at the same time determining whether the district court erred in the first appeal." *City of Albuquerque v. AFSCME Council 18 ex rel. Puccini*, 2011-NMCA-021, ¶ 8, 149 N.M. 379, 249 P.3d 510 (internal quotation marks and citation omitted). Rule 1-074(R) provides that administrative decisions are reviewed to determine:

(1) whether the agency acted fraudulently, arbitrarily, or capriciously;

(2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

See also § 39-3-1.1(D). Because Princeton challenges the Director's decision, Princeton bears the burden of establishing that the decision falls within one of the grounds for reversal. *See Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 9, 120 N.M. 579, 904 P.2d 28.

B. Analysis

{27} Administrative decisions are not in accordance with the law "if the agency unreasonably or unlawfully misinterprets or misapplies the law." *Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, ¶ 10, 150 N.M. 694, 265 P.3d 745 (alteration, internal quotation marks, and citation omitted). In determining whether an administrative decision is not in accordance with law, issues of statutory and regulatory interpretation are reviewed

de novo using the same rules courts use to interpret statutes. *See Town of Taos v. Wisdom*, 2017-NMCA-066, ¶ 6, 403 P.3d 713; *Perez v. N.M. Dep't of Workforce Sols.*, 2015-NMCA-008, ¶ 9, 345 P.3d 330. While the appellate courts will accord some deference to an agency's interpretation of law, this Court "may always substitute its interpretation of the law for that of the agency's because it is the function of the courts to interpret the law." *Perez*, 2015-NMCA-008, ¶ 9 (internal quotation marks and citation omitted); *see also Carter v. N.M. Human Servs. Dep't*, 2009-NMCA-063, ¶ 8, 146 N.M. 422, 211 P.3d 219.

{28} We begin by addressing the issue raised by the Amicus concerning whether the PASARR Form and instructions constitute rules, such that the failure to follow them constitutes a violation of law. Pursuant to the New Mexico Administrative Procedures Act, "[p]rior to the adoption, amendment or repeal of any rule," an agency shall: (1) "publish notice of its proposed action in the manner specified by law, or as will reasonably give public notice to interested persons"; (2) "notify any person specified by law, and, in addition, any person or group filing [a] written request," of the time and place of any public hearing on the matter, an adequate description of the substance of the proposed action, and of any additional matter required by law concerning the statutory authority of the proposed rule; and (3) "afford all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and examine witnesses, unless otherwise provided by law." NMSA 1978, § 12-8-4(A)(1)-(3) (1969)

{29} Additionally, under the State Rules Act, in order to have any "efficacy, validity or enforceability," a rule must be submitted by the promulgating agency to the state records administrator for publication. *See Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 42, 93 N.M. 546, 603 P.2d 285; *see also* NMSA 1978, § 12-8-5(A) (1969) ("Each agency shall file each rule, amendment or repeal thereof, adopted by it, including all [existing] rules . . . according to the State Rules Act[.]"); NMSA 1978, § 14-4-3(A), (B) (2017) ("Each agency promulgating any rule shall place the rule in the format and style required by rule of the state records administrator and shall deliver the rule to the state records administrator . . . [who] shall maintain a copy of the rule as a permanent record open to public inspection during office hours, on the website of the records center, published in a timely manner in the New Mexico register and compiled into the New Mexico Administrative Code.").

{30} Relying on the United States Supreme Court case *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 95-101 (1995), HSD/MAD argues that the PASARR Form and instructions were intended to "interpret" the existing New Mexico PASARR statutes and regulations and "designed to assist lay people who might have difficulty figuring out if a condition is 'closely related to intellectual disability[.]' " HSD/MAD therefore contends that the PASARR Form and instructions were not required to be "subject[ed] to full-blown rule promulgation" in order to be effective. *See id.* at 99-100 (stating "[i]nterpretive rules" aimed at advising the public of an agency's construction of the statutes and regulations that it administers, which are consistent with existing federal regulations, "do not require notice and comment" pursuant to the federal Administrative Procedures Act).

{31} Assuming without deciding that *Shalala* applies in the context of administrative procedure and rulemaking in New Mexico, HSD/MAD overlooks that the United States Supreme Court in *Shalala* also held that interpretive rules not promulgated in accordance with the federal Administrative Procedures Act "do not have the force and effect of law and are not accorded that weight in the adjudicatory process[.]" *Id.* at 99. As a result, even under the case law cited by HSD/MAD, the interpretive rules contained in the PASARR Form and instructions do not have the force and effect of law and cannot serve as the basis for a HSD/MAD enforcement action. This conclusion is consistent with our Supreme Court's precedent in *Bokum Resources Corp.*, which held that rules not promulgated, pursuant to the New Mexico Administrative Procedures Act and State Rules Act lack "efficacy, validity or enforceability" as law. *See Bokum Res. Corp.*, 1979-NMSC-090, ¶ 42. It follows that because it is undisputed that the PASARR Form and instructions were not promulgated, pursuant to the New Mexico Administrative Procedures Act and State Rules Act, errors in completing the PASARR Form that do not otherwise violate properly promulgated PASARR rules or statutes, as the Amicus contends, "cannot be deemed violations of law" and cannot serve as the basis for the proposed Medicaid recoupment action against Princeton. Therefore, insofar as the Director and district court's decisions upholding the proposed Medicaid recoupment from Princeton relied upon the finding that Ms. Richer incorrectly checked "No" to Question 5 on the PASARR Form, this determination was not a violation of law.

{32} However, even accepting HSD/MAD's claim that an incorrect answer to a question on the PASARR Form could serve as the basis for a regulatory violation and Medicaid recoupment action, Ms. Richer did not violate the law in her performance of J.F.'s 2011 Level I PASARR screening. Prefaced by the heading stating that if answered "Yes," an individual "must be referred" to DOH for Level II PASARR screening, Question 5 on the PASARR Form asks whether a nursing home applicant presents "any indication of developmental disability (a severe, chronic disability that manifested before age 22)?" The instructions to Question 5 further provide that "[a]ny severe, chronic disability (except mental illness) that occurred before age 22 *may* indicate a developmental disability. Examples include: cerebral palsy, *spina bifida*, quadriplegia before age 22, a seizure disorder that started before age 22 or a severe head injury that occurred before age 22." (Emphasis added.)

{33} Giving the word "may" in the instructions to Question 5 its ordinary meaning, the PASARR Form and instructions do not mandate a referral for Level II screening of all individuals with a diagnosis of spina bifida. *See Thriftway Mktg. Corp. v. State*, 1992-NMCA-092, ¶¶ 9-10, 114 N.M. 578, 844 P.2d 828 ("[A] fundamental rule of statutory construction states that in interpreting statutes, the words 'shall' and 'may' should not be used interchangeably but should be given their ordinary meaning."); *see also* NMSA 1978, § 12-2A-4(A)-(B) (1997) (stating that the word "shall" indicates a "duty, obligation, requirement or condition precedent[,]" while the word "may" expresses "a power, authority, privilege or right"). Rather, we think that it is clear that the instruction to Question 5 allows those performing Level I PASARR screening of nursing home applicants to consider whether an individual who presents with a "severe, chronic disability," like spina bifida, shows any indication of developmental disability. *Cf. Thriftway Mktg. Corp.*, 1992-NMCA-092, ¶ 10 (holding that the statute providing the director of the alcohol and gaming division "may" approve or disapprove the issuance or transfer liquor licenses under certain

circumstances was intended to "invest the director with discretion as to whether to give final approval" for such issuances and transfers).

{34} In performing the Level I PASARR screening of J.F., Ms. Richer relied on J.F.'s medical history, physical examination, and past admission orders. Based on her analysis of J.F.'s medical records, Ms. Richer found no indication of developmental disability "as it relates to mental retardation" despite his diagnosis of spina bifida. Ms. Richer additionally found no indication in J.F.'s medical records of mental illness. Without indication of either mental illness or mental retardation in his medical records, there can be no dispute that Ms. Richer correctly concluded that it was unnecessary to refer J.F. to DOH for Level II screening. Further, Ms. Richer's conclusion was consistent with and furthered the central objective of the NHRA and federal PASARR regulations of "prevent[ing] the placement of individuals with" mental illness or mental retardation "in a nursing facility unless their medical needs clearly indicate that they require the level of care provided by a nursing facility." 57 Fed. Reg. at 56,451. We therefore conclude that the Director and district court erred in determining that Princeton improperly performed or otherwise failed to complete J.F.'s 2011 PASARR screening in violation of the law.

{35} Although not essential to our conclusion, we find Princeton's argument that Question 5 on the PASARR Form and its instructions are inconsistent with federal PASARR regulations to be persuasive. Princeton argues, and we agree, that Question 5 and its instruction, which appear to be aimed at screening for "related condition[s]" to intellectual disability by asking if there is "any indication of developmental disability (a severe, chronic disability that manifested before age 22) [,]" omits an essential element of the federal PASARR definition of a "related condition." In particular, Question 5 and its instruction fail to include the requirement under 42 C.F.R. § 435.1010 (2012) that to constitute a "related condition," a condition must "result[] in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and require[] treatment or services similar to those required for these persons." As a result, insofar as this element is not included in Question 5 or its instruction, the PASARR Form is inconsistent with federal law resulting in regulatory uncertainty in New Mexico and potential conflict with federal PASARR standards.

{36} Finally, it is important to emphasize that this case arose not from HSD/MAD's discovery that a patient had been mistreated or wrongfully admitted to Princeton. In fact, there is no dispute that Princeton was a proper placement for J.F. and that while residing at Princeton, J.F. received proper treatment. Rather, this is a case that arises from a failure by the State, by and through DOH and HSD/MAD, to follow its own regulations. *See Narvaez v. N.M. Dep't of Workforce Sols.*, 2013-NMCA-079, ¶ 15, 306 P.3d 513 ("An administrative agency is bound by its own regulations."). As conceded by counsel for HSD/MAD at oral argument before the district court, the conflict presented in this case arises as a result of PASARR being overseen by DOH and the payment of Medicaid funds being overseen by HSD/MAD. "They aren't yoked departments[,]" counsel explained, "and sometimes the right hand doesn't know what the left hand is doing." As a result, when a Medicaid claim is submitted to a HSD/MAD managed care organization from a Medicaid provider for a patient that is otherwise eligible for Medicaid, the managed care organization apparently may pay the claim without knowledge of whether DOH has gone through the PASARR process. And it is not until DOH eventually learns that a PASARR mistake has been made and reports it to HSD/MAD that HSD/MAD backtracks to determine whether an overpayment has been made.

CONCLUSION

{37} The order of the district court upholding HSD/MAD's Medicaid recoupment action against Princeton is reversed. This matter is remanded to the district court for further action consistent with this opinion.

{38} IT IS SO ORDERED.
MICHAEL E. VIGIL, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
M. MONICA ZAMORA, Judge

Classified

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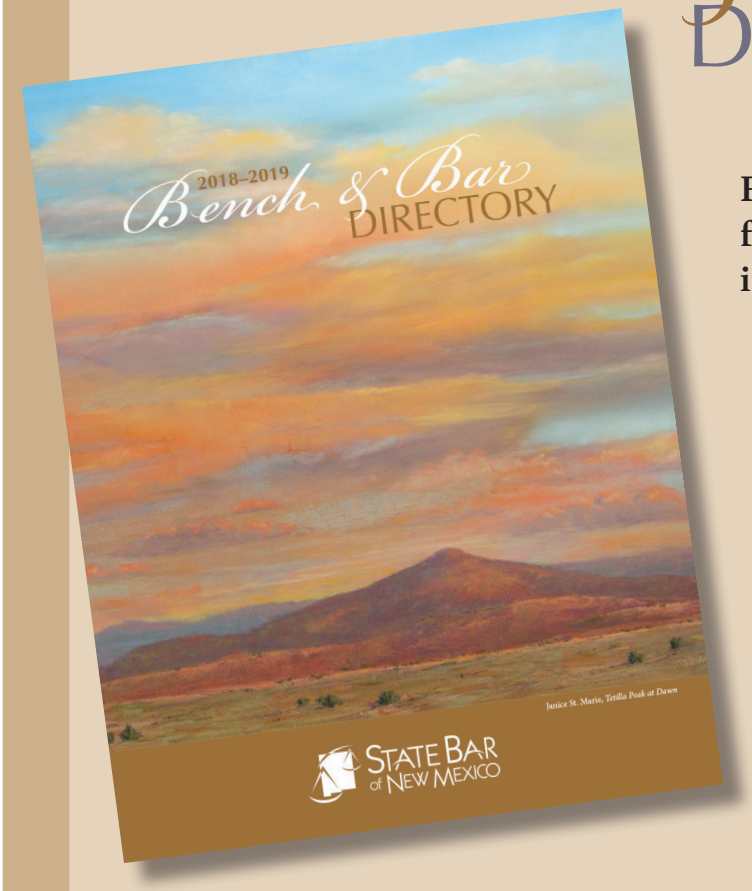

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