

# BAR BULLETIN

December 19, 2018 • Volume 57, No. 51



*Visit to Truches*, by Richard Prather (see page 3)

InArt Gallery, Santa Fe

## Inside This Issue

Notices .....	4
Hearsay/In Memoriam .....	8
A Letter from the Justices of the Supreme Court of New Mexico .....	11
Clerk Certificates .....	17

### From the New Mexico Court of Appeals

2018-NMCA-074, A-1-CA-35290: State v. Serna .....	21
2018-NMCA-075, A-1-CA-35500: State v. Flores .....	26



**WE WANT TO**

*thank you!*

The Center for Legal Education, New Mexico State Bar Foundation and State Bar are extremely grateful for the following members' contributions in making the first year of our How to Practice Series a success. These members have spent an incredible amount of volunteer time planning the curriculum and/or speaking.

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Margaret Graham  
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Hon. Alan Malott  
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December 19, 2018 • Volume 57, No. 51

## Table of Contents

Notices .....	4
Hearsay/In Memoriam .....	8
Calendar of Continuing Legal Education .....	14
Court of Appeals Opinions List .....	16
Clerk Certificates .....	17
<b>From the New Mexico Court of Appeals</b>	
2018-NMCA-074, A-1-CA-35290: State v. Serna .....	21
2018-NMCA-075, A-1-CA-35500: State v. Flores .....	26
Advertising .....	31

## Meetings

### December

21

#### Family Law Section Board

9 a.m., teleconference

## Workshops and Legal Clinics

### December

19

#### Family Law Clinic

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

### January

2

#### Civil Legal Clinic

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

4

#### Civil Legal Clinic

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

11

#### Civil Legal Clinic

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

**About Cover Image and Artist:** Richard Prather creates atmospheric landscapes. The challenge to capture the subtle nuances of shadow and light drives his pursuit in painting the canyons and mountains of the Southwest. Prather is largely self-taught having started painting in the late 70s while in college. In addition to more than 30 years of studying and painting on his own, he credits the many workshops from some of the very best plein air artists working today with having the largest impact on the quality of his work. Prather is a signature member of the Oil Painters of America, The Plein Air Painters of New Mexico and the Outdoor Painters Society. After a career as a life scientist the Environmental Protection Agency, Prather and his wife Sharla moved to Placitas where they currently reside with their two dogs Belle and Louie. To view more of his work, visit [www.richardprather.com](http://www.richardprather.com).



# Notices

## COURT NEWS

### New Mexico Supreme Court New Mexico Supreme Court Retirement Reception

Join the New Mexico Supreme Court reception in honor of the outstanding judicial careers of

The Hon. Petra Jimenez Maes

The Hon. Charles W. Daniels

The Hon. Gary L. Clingman

Beginning at 4-6 p.m. on Dec. 20, at the Supreme Court Law Library, 237 Don Gaspar Avenue, Santa Fe, join the New Mexico Supreme Court in extending well wishes and appreciation to all three judges upon their impending retirements from the New Mexico State Judiciary.

### Notice of Revised Alimony Guideline Worksheet

The Supreme Court has approved the recommendation of the Domestic Relations Rules Committee and its Statewide Alimony Guidelines Subcommittee to revise the Alimony Guideline Worksheet for use beginning Jan. 1, 2019, in light of upcoming changes to the federal tax law treatment of alimony payments under the Tax Cut and Jobs Act of 2017. The Court's Order, revised Alimony Guideline Worksheet and report of the Statewide Alimony Guidelines Subcommittee are available on the Court's website at <https://nmcourts.gov/>.

### First Judicial District Court Notice to Family Law Attorneys

The First Judicial District Court will hold open-court sessions to review and approve marital settlement agreements and to enter final decrees during the month of December due to the request by parties and attorneys to finalize pending divorce actions before Jan. 1, 2019. Judge LaMar and Judge Sanchez-Gagne's courts will be open from 8:30-9:30 a.m. to review documents on the following dates: Dec. 20, 21, 24, 26, 27, 28 and 31, 2018. If there is a snow delay, the court will be available from 10:30-11:30 a.m. on the same dates.

### Second Judicial District Court Announcement of Civil Vacancy

The Second Judicial District Court announces the retirement of the Hon. Judge Nan Nash effective, Jan. 1, 2019. This judicial vacancy will be for Division XVII (civil), inquires regarding specific details

## Professionalism Tip

**With respect to parties, lawyers, jurors, and witnesses:**

I will be punctual in convening all hearings, meetings and conferences.

for the judicial vacancy should be direct to the Chief Judge or the administrator of the court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the position, may be obtained from the Judicial Selection website: <http://lawschool.unm.edu/judsel/application.php>, or by email by contacting Beverly Akin at 505 -277-4700. The deadline for applications has been set for Jan. 7, 2019, at 5 p.m. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet at 9 a.m. on Jan. 24, 2019, at the Second Judicial District Court located at 400 Lomas Blvd NW, Room 338, Albuquerque, to evaluate the applicants for this position. The committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

### Announcement of Criminal Vacancy

Due to the Nov. 6 elections, one vacancy on the Second Judicial District Court will exist as of Jan. 1, 2019, to fill the seats of Judge Briana Zamora; this judicial vacancy will be for the Division VI (criminal). Inquiries regarding specific details for this judicial vacancy should be directed to the Chief Judge or the Administrator of the court. Dean Sergio Pareja of the UNM School of Law, designated by the New Mexico Constitution to chair the District Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications, as well as information related to qualifications for the

position, may be obtained from the Judicial Selection website: <http://lawschool.unm.edu/judsel/application.php>, or by email by contacting Beverly Akin at 505- 277-4700. The deadline for applications has been set for Jan. 8, 2019 at 5 p.m. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Committee will meet at 9 a.m. on Jan. 25, 2019, at the Second Judicial District Court located at 400 Lomas Blvd NW, Room 338, Albuquerque, to evaluate the applicants for this position. The committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

### Notice to Attorneys

Pursuant to the Constitution of the State of N.M., Judge Benjamin Chavez, Division XIX, will be transferring from the Criminal Court to the Civil Court. Effective Jan. 2, 2019, Judge Chavez will be assigned cases previously assigned to Judge Alan Malott, Division XV. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from Dec. 26, to excuse Judge Benjamin Chavez.

### Notice to Attorneys

Effective immediately all proposed orders, etc. for e-filing in civil cases previously assigned to Retired Judge Alan Malott, Division XV need to be emailed to [albddiv19proposedtxt@nmcourts.gov](mailto:albddiv19proposedtxt@nmcourts.gov) instead of [albddiv15proposedtxt@nmcourts.gov](mailto:albddiv15proposedtxt@nmcourts.gov) because Judge Benjamin Chavez, Division XIX has transferred from criminal bench to the civil bench and is assigned cases previously assigned to Judge Alan Malott, Division XV.

### Third Judicial District Court Mass Reassignment

Effective Dec. 28, a mass reassignment of all Division VIII cases previously assigned to Judge Jeanne H. Quintero will occur pursuant to NMSC Rule 23-109 Judge Grace B.



Duran has been elected to fill the vacancy in Division VIII. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 28, to challenge or excuse Judge Grace Duran pursuant to Rule 1-088.1.

### **Destruction of Exhibits**

Pursuant to 1.21 .2.617 NMAC (New Mexico Administrative Code), the Third Judicial District Court will destroy exhibits filed with the Court in civil, domestic, criminal, and probate cases for the years of 1980-2017, including but not limited to cases which have been consolidated. cases on appeal are excluded. Parties are advised that exhibits may be retrieved beginning Nov. 26-Dec. 31. Should you have cases with exhibits, verify exhibit information with the Clerk's Office at 523-8200 from 8 a.m.-4 p.m., Mon.-Fri. plaintiff/petitioner's exhibits will be released to counsel for the plaintiff(s)/petitioner(s) and defendant/respondent's exhibits will be released to counsel of record for defendants(s)/respondent(s). All exhibits will be released in their entirety. exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

### **New Mexico Sixth Judicial District Court Announcement of Vacancy**

A vacancy on the Sixth Judicial District Court will exist as of Jan. 2, 2019 due to the retirement of The Hon. Judge J.C. Robinson effective Jan. 1, 2019. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Sergio Pareja, chair of the Sixth Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: <http://lawschool.unm.edu/judsel/application.php>, or emailed to applicant by contacting the Judicial Selection Office at 505-277-4700. The deadline for applications has been set for Jan. 15, 2019 at 5 p.m. Applications received after that time will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Sixth Judicial District Court Judicial Nominating Commission will convene on Jan. 29, 2019 at 9 am at the Grant County Courthouse 201 N. Cooper

Street, Main Courtroom, 2nd Floor, Silver City. The commission meeting is open to the public and anyone who wishes to be heard about any of the candidates will have an opportunity to be heard.

### **Tenth Judicial District Court Destruction of Exhibits**

Exhibits in criminal cases for years 2005-2015 may be retrieved on Jan. 25, 2019. For more information contact Tenth Judicial District Court of County of Quay at 575-461-2764.

### **STATE BAR NEWS Cannabis Law Section Board of Directors Meeting Open to Membership**

On Aug. 9, the Board of Bar Commissioners approved a membership petition to form a State Bar of New Mexico Cannabis Law Section. The Section's Board of Directors will meet from 9-10 a.m., Dec. 20, at the State Bar Center and the general State Bar membership is invited to attend, share ideas and enroll in the Section. Please R.S.V.P. to Breanna Henley [bhenley@nmbar.org](mailto:bhenley@nmbar.org). Visit [www.nmbar.org/sections](http://www.nmbar.org/sections) to join the Section.

### **Minimum Continuing Legal Education**

#### **Compliance Deadline Approaching**

Dec. 31 is the last day to complete 2018 Minimum Continuing Legal Education requirements. Jan. 31, 2019, is the last day to submit 2018 credits without penalty. For a list of upcoming MCLE approved courses, visit [www.nmbar.org/MCLE](http://www.nmbar.org/MCLE). Contact MCLE with questions at 505-821-1980 or [mcle@nmbar.org](mailto:mcle@nmbar.org).

### **New Mexico Judges and Lawyers Assistance Program Attorney Support Groups**

- Jan. 7, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (The group normally meets the first Monday of the month.)
- Jan. 14, 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#.
- Jan 21, 19, 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#.

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

### **UNM SCHOOL OF LAW Law Library**

#### **Fall 2018 Hours**

Mon., Aug. 20– Sat., Dec. 15

#### *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.
Saturday & Sunday	No reference

### **OTHER BARS**

#### **Alaska Bar Association**

#### **CLE by the Sea in Honolulu, Hawaii**

Join Alaska Bar Association members along with 16 other bar association members as they attend continuing legal education programs, network at optional excursions, and enjoy the warm weather at a beautiful location. The 2019 CLE by the Sea is scheduled for Feb. 10-15, 2019, at the Prince Waikiki – Honolulu Luxury Hotel. This program is accredited for 12 total CLE credits (4.0 G, 8.0 EP) by New Mexico Minimum Continuing Legal Education. For more information, call 907-272-7469 or email Mary DeSpain, CLE director at [mary@alaskabar.org](mailto:mary@alaskabar.org), or visit <https://alaskabar.org/cle-mcle/cle-by-the-sea/>.

### **Albuquerque Lawyers Club Monthly Lunch Meeting**

The Albuquerque Lawyers Club invites members of the legal community to a Meet and Greet lunch meeting, featuring the new members of the NM Court of Appeals. Judge Miles Hanisee will be introducing Judges Kristina Borgadus, Megan Duffy, Jacqueline R. Medina and Briana H. Zamora. The lunch meeting will be held at noon on Jan. 9, 2019, at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. The cost is free to members/\$30 non-members. For more information email [ydennig@Sandia.gov](mailto:ydennig@Sandia.gov).



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The New Mexico Client Protection Fund Commission  
Thanks the following attorneys, each of whom  
recently completed six years of exemplary service  
on the Commission

Frank Chavez

Jason Marks (chair 2015 and 2016)

Travis Steele (chair 2017)

All three volunteered many hours each year  
investigating, analyzing and making recommendations  
concerning allegations of attorney dishonesty  
causing monetary losses to clients.



THANK

*You*

The State Bar of New Mexico would like to express its  
appreciation and gratitude to the following attorneys that participate in the  
**DIVORCE OPTIONS WORKSHOP**. Thank you for your professionalism,  
time and service to the community in New Mexico.

---

Gretchen Mary Walther

Tiffany Oliver Leigh

Linda Helen Bennett

Maria Montoya-Chavez

Martha Kaser





**George "Dave" Giddens** has been awarded the 2019 AV Preeminent™ ranking by Martindale-Hubbell, a company that provides background information on lawyers and law firms in the U.S. Giddens has earned this ranking for more than 10 years.



**Andrew G. Schultz**, an attorney with the Rodey Law Firm, has been named Attorney of the Year by the Albuquerque Bar Association. Schultz was recognized for his significant contributions to the practice of law, as well as his professionalism, integrity, superior legal service and service to the public. Schultz is the head of Rodey's Complex and Commercial Litigation practice group. He has a special interest in class action and civil rights litigation along with other

complex procedural and appellate work. Schultz is an adjunct professor and frequent lecturer at the University of New Mexico School of Law.



The judges of the Bernalillo County Metropolitan Court have elected a new chief judge, **Hon. Sandra Engel**, to head the state's busiest court. Judge Engel will succeed Judge Edward L. Benavidez who has served as chief judge of the court since 2017. Judge Engel's term will begin on Jan. 1, 2019. In addition to hearing his or her regular docket, the chief judge oversees administrative matters of the court including: the budget, policies, security, building maintenance and personnel matters.



**Pilar Vaile** (UNM School of Law Class of 2000) has been conferred memberships into the National Academy of Arbitrators this past October, upon completion of a rigorous application and peer review process. Vaile has been serving as a labor neutral since 2004, and as a private arbitrator since 2010; she now resides in Yuma, Colo.



Judge Engel has selected the **Hon. Yvette K. Gonzales** to preside over the Criminal Division of the court, and the **Hon. Frank A. Sedillo** will continue to serve as the presiding judge of the court's civil division.

**Paul Bardacke** and **Ben Allison** have been selected by their peers for inclusion in the 25th Edition of *Best Lawyers in America*. Paul Bardacke is recognized for bet-the-company litigation, commercial litigation, mediation and alternative dispute resolution. Ben Allison is recognized for commercial litigation, art law, copyright law and land use and zoning litigation.



**Beckham Angelo Rivera** has been selected as a participant in the State Bar's incubator program, Entrepreneurs in Community Lawyering. He is a family lawyer and estate planner based in Albuquerque. A graduate from Western Michigan University, he has worked with many organizations in Washington D.C., Detroit, Tampa, and New York to ensure equality and access to justice for marginalized communities. Rivera now uses his experience to assist his clients with

the delicate issues surrounding domestic and estate law. If you would like to speak with Rivera about legal concerns, he may be reached by phone at 505-750-3685 or visit Sunshine Legal's website at [www.sunshinelegalnewmexico.com](http://www.sunshinelegalnewmexico.com).

Modrall Sperling has been recognized as a leading law firm in New Mexico, and awarded the "highly recommended" designation by Benchmark Litigation for the 11 consecutive year. The following of the firm's lawyers were named Future or State Litigation Stars in the 2019 edition:

**Jennifer Anderson**  
**Martha Brown**  
**Timothy Fields**  
**Timothy Holm**  
**Tiffany Roach Martin**  
**Megan Muirhead**  
**Lynn Slade**  
**Alex Walker**

The following attorneys were named to the 40 & Under Hot List:  
**Anna Indahl**

**Nathan Nieman**  
**Tiffany Roach Martin**

And for the seventh consecutive year, **Jennifer Anderson** has been selected as one of the *Top 250 Women in Litigation in the United States*. She is one of only two New Mexicans to make the list.

# In Memoriam

www.nmbar.org



**Francisco Mario Ortiz** died on Sept. 11, at age 67. He was a U.S. Marine Corps veteran and studied Political Science at UNM. He was twice elected ASUNM President and earned the Lena Clauve Outstanding Senior Award. Ortiz graduated from UNM Law School. He began his career at the state and federal public defenders offices in Albuquerque and Las Cruces, practiced criminal defense and family law privately for many years, dedicating his practice to helping

underprivileged clients, and recently worked for the State of N.M. Ortiz's colleagues and friends will remember his jokes as well as his compassion and integrity in the courtroom.

**James (Jim) M. Durrett, Jr.** died Nov. 8. He was born in Tucumcari, on Feb. 19, 1935 to James and Dorothy Durrett. Durrett's father was an FBI agent and moved every 2-3 years in Texas and N.M. The family lived in Dallas, San Antonio, El Paso, Hobbs, Carlsbad and Indianapolis before returning permanently to N.M. Durrett attended Highland High School in Albuquerque where he played football and played harmonica in a cowboy band called the Rio Arriba Boys. He loved to talk about the State Champion football team and loved to tell stories about his teammates, especially future NFL Hall of Fame member Tommy McDonald. When he learned McDonald had been selected for the Hall of Fame, he would brag that "McDonald would never have even made it to college ball if Durrett had not been blocking for him". Durrett attended the University of New Mexico, and was a member of the Sigma Chi Fraternity. He graduated with a Bachelor's Degree in Business Administration in 1957, then attended UNM Law School. He started law school in a class of 53 students and graduated with 10 of that class in 1960 (along with four transfers). He was admitted to practice Aug. 11, 1960. After law school he moved to Farmington temporarily to live with his parents as he waited to go into the Army. He worked in the oilfield as a swamper on a truck for one day before receiving a call from Farmington attorney Marvin Baggett to come and work for him in his law firm for the same pay - \$1 per hour. He worked for Marvin and Bill Baggett for almost a year before his active duty orders came and he went into the active military as part of the Army Reserves. After he finished active duty he got a commission as a First Lieutenant in the U.S. Army Reserves, where he spent about eight years. Durrett served as New Mexico Oil Conservation General Counsel from 1962-1966. He often carpooled with future Supreme Court Justice Mary Walters. He partnered with Jerry Rhodes and Orville McCallister in the law firm of Rhodes, McCallister and Durrett in Albuquerque from 1966 until the mid-1970s. One of the few law clerks that the firm hired was Charles Daniels who would go on to be the Chief Justice of the New Mexico Supreme Court. After the firm dissolved he worked as solo practitioner until 1983. Durrett served as assistant university counsel for UNM from 1983-1986 before returning to private practice. In 1990, Durrett moved back to Farmington and served as county attorney for San Juan County from 1990-2015. Durrett is survived by his wife of 57 years, Norma, his daughter Denise Durrett and his son James M. Durrett III. Durrett was a man of integrity and wisdom and he will be missed.

**Beverly L. Graham**, age 60, succumbed to pneumonia on Oct. 27 at St. Vincent Hospital in Santa Fe. Graham was an only child and was preceded in death by her long-time partner, Steve, in Oct. 2014; her father, Thomas Glen Graham; and mother Raynell Beavers Graham. She was a Navy brat who was privileged to travel overseas and witness history in the making. Her family moved to Belen in 1971, where she excelled in school and in making lifelong friends, all of whom are devastated by her loss. Graham graduated from the University of Texas, Arlington in 1980 and South Texas College of Law in Houston in 1984. She taught law courses at Navarro College in Corsicana, Texas. She served as an attorney in Texas for several years before moving to Chama to take care of her ailing mother when her father passed suddenly. After her mother died, Graham stayed in Chama and practiced law. Every case she took on was handled with care and discretion, and she joked many times about being paid for her work on her clients' behalf with chickens or non-working vehicles or whatever people had. Graham was recognized for her dedication and pro-bono work by the Supreme Court Access to Justice Commission in 2016. She was always so kind and generous with both her advice and her time and we will miss her wonderful presence and loyal friendship. Graham leaves behind her beloved dogs, Jazzy and Mangus, her family in Texas and New Mexico including Austin, Rio Rancho, and Chama and a host of friends all over the U.S. and overseas. We will miss her wit, her love, and her intelligence; she was an extraordinary person with a big heart. We hope her reunion with her parents and Steve was joyous and look forward to seeing her again someday in paradise.

**Rudolph Russell Rager** passed away on Oct. 20. Survivors include his wife, Sharon, his children, Sean Rager, Kurt Rager, Quita Trembly, Elani Rager, Valari Shanks and Jordan Rager, as well as his sister, Ruth McLees.

**J. Penrod Toles**, a 70 plus year Roswell resident, businessman, former state senator and community leader, died peacefully at his home Jan. 13, 2017. He was born Oct. 19, 1929 in Happy, Swisher County, Texas to John E. Toles and Audie Penrod Toles who predeceased him. He was also predeceased by his three sisters Charlotte Toles, Christine Toles Elliott and Marybeth Toles Mangum. In 1943, Toles came to Roswell from Lubbock, Texas, to attend New Mexico Military Institute. This event proved to be the beginning of a lifetime of service and devotion to NMMI by Toles. He received his high school diploma, junior college degree, senior college Bachelor of Science degree and an Army Reserve Commission from NMMI. Toles also attended Washington and Lee University School of Law, in Lexington, Virginia, receiving a LLB/JD degree. Toles served five years in the U.S. Army Reserve from 1950-1955, including two years' active duty as a 1st Lieutenant in the 66th Tank Battalion, 2nd Armored Division, U.S. Army of Occupation, Germany. In 1954, Toles married Sally Saunders who survives him. She is the daughter of the late Col. and Mrs. H.P. Saunders, Jr. Col. Saunders was the Commandant of New Mexico Military Institute while Toles was a cadet. Toles is also survived by three sons: Perry Saunders Toles (and wife Sherri) of Roswell, Tyler Penrod Toles of Albuquerque, John Harwood Toles

of Denver, and by three grandchildren: Joshua, Jordan and Shelby. Toles practiced law in Roswell for several years before forming The Toles Company, a family business involving oil and gas production, commercial real estate, and farm and ranch properties. He was active in state government, serving in the New Mexico Senate from 1960-1966. Toles was State Chairman of the Democratic Party of New Mexico from 1968-1970. Toles served in various capacities for state, community and church endeavors. He was a fundraiser and builder, chairing the building committees for the construction of three major projects in Roswell: The Roswell Family YMCA, the First United Methodist Church and the Working Mother's Day Nursery. Toles served as board president of the Roswell Public Library; chairman of the Roswell Industrial Development Corporation; member of the First National Bank of Roswell Board of Directors; and N.M. chairman of the YMCA Youth and Government Program. Their public endeavors and charitable services caused Toles and Mrs. Toles to be the first couple honored as "Citizens of the Year" by the Roswell Board of Realtors. Toles was an active member of the First United Methodist Church of Roswell, where he led an adult Sunday school class for 50 years. He served on the Pastor-Parish Committee of the church, and was a Trustee of the New Mexico Conference Methodist Foundation, Inc. Of the many organizations that Toles served, none received more attention than New Mexico Military Institute. Over a 70 year period of close association Toles served as national president of the NMMI Alumni Association, President of the NMMI Board of Regents, and President of the NMMI Foundation, Inc. NMMI honored him as a Distinguished Alumnus in the Hall of Fame and dedicated the "J. Penrod Toles Learning Center" in his honor in 1985.

**Matthew Urrea**, 51, of Scottsdale, Ariz., passed away in Arizona on Nov. 20. Urrea was born in Albuquerque, to Francisco and Alberta Urrea on Feb. 17, 1967. He went to high school at Sandia High in Albuquerque before attending the University of New Mexico. After passing the New Mexico Bar Exam upon graduating from the UNM Law School, Urrea went on to receive his post-graduate degree, the LL.M. in Taxation Law, at New York University. Urrea was a practicing tax attorney and passionate entrepreneur. He was a partner at Schlenker & Urrea in Albuquerque for more than 20 years before heading his own law firm with offices in both Albuquerque and Scottsdale. He launched the growing walk-in Wills business with locations in New Mexico, Florida, and the soon-to-open Arizona location. Urrea was the president of the UNM chapter of the Sigma Chi Fraternity and met his wife of 26 years, Annabel Lee Urrea at a mixer in 1987. Urrea and Annabel married on Dec. 30, 1992 in Phoenix and made their home in Albuquerque for 17 years before moving to Arizona. Urrea is survived by their four beautiful children, Urrea Jr., Maria Pilar, Oliver, and Phoebe, all of Scottsdale, Ariz. He is survived by his parents Cisco and Alberta Urrea of Albuquerque; as well as by his six siblings, Francisco III; Tessa; Tina; Thomas; Richard; Daniel of Albuquerque. He is also survived by countless nephews, nieces and extended family. Urrea was a loving, devoted husband and father who took great pride in his family; still always referred to as "Daddy" by his adoring children. Known to "shred the guitar", Urrea was a gifted classical guitar player, and collector of guitars, who also loved a great game of golf, and reading. He had a history of excellence in track and field as well as golf in his youth.

**Robin Marie Webb** passed away on Aug. 19, after a couple of years of failing health. Webb was born on April 3, 1964, in Arlington, Va., to John and Joanne Webb. Eventually her family moved to Leavenworth, Kan., where she was the delight of her grandparents. She graduated from Kansas University with a BA in Communication, Kansas University School of Law and from American University with a Master in International Human Rights Law. She worked for the Department of Veterans Affairs the Tennessee Human Rights Commission and was admitted to practice before the U.S. Supreme Court. She started a private practice in which she helped veterans obtain the benefits to which they were entitled. She met Chris Griffin, a Nashville native, and they lived in Nashville for almost 18 years. Webb's greatest delight was being with family especially with her cousins and their children. Halloween was always an adventure. She is survived by Chris, her father, John Webb and stepmother, Madeline Webb, her mother, Joanne Piezonki.





## *Supreme Court of New Mexico*

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JUSTICES  
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CHARLES W. DANIELS  
BARBARA J. VIGIL  
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December 19, 2018

### **An Open Letter to the New Mexico Bench and Bar from the Justices of the Supreme Court of New Mexico**

On December 31, 2018, Senior Justice Petra Jimenez Maes, Justice Charles W. Daniels, and Justice Gary L. Clingman will retire from the New Mexico Supreme Court. The departure of three justices, at the same time, marks an exceptional moment in the Court's history and this letter is a modest gesture of our deep appreciation for their service, their contributions, and their friendship.

Born and raised in Albuquerque, Senior Justice Petra Jimenez Maes received her juris doctorate from the University of New Mexico School of Law in 1973 and began her legal career first in private practice and then as an attorney for Northern New Mexico Legal Services. She was appointed to the First Judicial District Court in 1981 embarking on a judicial career that would span thirty-seven years and make her one of the longest serving jurists in the state's history.

Senior Justice Maes has been a trailblazer. As a district court judge she earned a reputation as a staunch advocate for New Mexico's children and families. As a Supreme Court Justice she has continued to work tirelessly to improve children's court processes and ensure equal access to justice for all New Mexicans. As the driving force behind the Judiciary's technology efforts, Justice Maes has been instrumental to the implementation of a statewide unified case management system which streamlined case processing, improved service to the public, and forever changed how our courts do business. Her tenure on the Court reflects a record of numerous "firsts." She was the nation's first Hispanic woman to serve as

Chief Justice, the first woman to serve two terms as Chief Justice of the New Mexico Supreme Court, and the senior member of the Court's first female majority. Her accomplishments and distinguished awards are many, matched only by her unwavering devotion to her four children and five delightful grandchildren. While the departure of Justice Maes is alone a transformative event for the Court, the loss of her wisdom and expertise will be compounded by the simultaneous departure of her long-time colleague, Justice Daniels.

Before joining the Court in 2007, Justice Charles Daniels was a gifted and successful trial lawyer in a number of high profile cases including litigation resulting from the notorious 1980 prison riots. In addition to his private practice, he also served as an adjunct professor at the University of New Mexico's School of Law where his students included several of his future colleagues, including Petra Jimenez Maes.

While on the Court, Justice Daniels was elected to two terms as Chief Justice. During his first term, Justice Daniels skillfully led the Judiciary through the aftermath of the 2008 recession, keeping our courts open and our employees on the job. He continued that effort during his second term, stepping down early so that he could devote even more of his time and talent to the implementation of what has been described as the most significant change in New Mexico criminal law and practice since statehood, bail reform. His authorship in *State v. Brown*, 2014-NMSC-038, and the subsequent opinions he has authored since the voters amended the bail provisions in Article II, Section 13 of the New Mexico Constitution in 2016, will continue to provide the framework for New Mexico's bail reform efforts and are illustrative of Justice Daniel's thorough, thoughtful, and scholarly approach to the law. Justice Daniels' substantial time on the Court demonstrates how much can be accomplished by someone devoted to hard work and the rule of law.

Like his departing colleagues, Justice Gary Clingman will leave the Court at the end of the year with a long history of accomplishments in service of the New Mexico Judiciary. Justice Clingman graduated from Texas Tech University School of law in 1984. He began his legal career in 1985 with the Maddox Law Firm in Hobbs, New Mexico where he quickly gained recognition as a well-respected trial lawyer. He was appointed to the Fifth Judicial District Court in 1997 presiding over criminal,

civil, and children's court cases and was chosen by his colleagues to serve as Chief Judge in 2006, a position held until 2013. He joined the Court in April 2018.

During his tenure with the Judiciary, Justice Clingman has worked diligently and effectively to improve the administration of justice in New Mexico. He has served on the Judicial Reengineering Committee, worked to improve language access, and was instrumental in developing the Workforce Investment Plan, a comprehensive compensation plan for all judicial employees. Those fortunate enough to appear before or work with Justice Clingman know him to be polite, thoughtful and respectful, characteristics he has helped to instill in others by co-creating a training and orientation program for new district court judges. To date, sixty-four district court judges have benefited from the program.

The collective contributions of our departing colleagues to the New Mexico legal system cannot be overstated, and their combined experience and leadership will be missed. We are grateful for their friendship, their collegiality, and the example of excellence they leave for those of us who will follow in their footsteps.

Sincerely,



Judith Nakamura  
Chief Justice



Barbara J. Vigil  
Justice



# Legal Education

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## December

- |    |  |    |   |    |  |
|----|--|----|---|----|--|
| 20 | <b>Gain the Edge!® Negotiation Strategies for Lawyers</b><br>5.0 G, 1.0 EP<br>Webcast/Live Seminar, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                         | 27 | <b>Find it Fast and Free (and Ethically) with Google, Fastcase 7, and Social Media Sites</b><br>4.0 G, 2.0 EP<br>Webcast/Live Seminar, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                       | 28 | <b>Children's Code: Delinquency Rules, Procedures and the Child's Best Interest</b><br>1.5 G, 1.0 EP<br>Webcast/Live Seminar, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a> |
| 21 | <b>Ethics, Satisfied Clients &amp; Successful Representations</b><br>1.0 G<br>Teleseminar<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>   | 28 | <b>How to Practice Series: Demystifying Civil Litigation Pt 1 (2018)</b><br>6.0 G<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>  | 28 | <b>Moving Your Practice Into the Cloud-Benefits, Drawbacks and Ethical Issues</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                               |
| 21 | <b>Recent Developments in New Mexico Natural Resource Law</b><br>5.2 G, 1.0 EP<br>Webcast/Live Seminar, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                     | 28 | <b>Fall Elder Law Institute: Navigating Changes to the Adult Guardianship and Conservatorship Statutes and Rules (2018)</b><br>5.5 G, 1.0 EP<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a> | 29 | <b>Networking Professionally and Ethically</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>  |
| 21 | <b>Bad Review? Bad Response? Bad Idea! –Ethically Managing Your Online Reputation</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                         | 28 | <b>Immigration Law: U-Visa Training (2018)</b><br>1.0 G, 0.5 EP<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>  | 30 | <b>The Ethics of Delegation</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>   |
| 24 | <b>Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                                    | 28 | <b>Immigration Law: Assisting Human Trafficking Survivors (2018)</b><br>2.0 G<br>Live Replay, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>  | 31 | <b>The Ethics of Social Media Research</b><br>1.0 EP<br>Live Webinar<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>  |
| 26 | <b>What Drug Dealers and Celebrities Teach Lawyers about Professional Responsibility</b><br>3.0 EP<br>Webcast/Live Seminar, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a> | 28 | <b>Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b><br>1.0 EP<br>Webcast/Live Seminar, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                                      |    |  |
| 26 | <b>The Fear Factor: How Good Lawyers Get Into Ethical Trouble</b><br>3.0 EP<br>Webcast/Live Seminar, Albuquerque<br>Center for Legal Education of NMSBF<br><a href="http://www.nmbar.org">www.nmbar.org</a>                        |    |   |    |  |

## January 2019

- |  |  |   |
|--|--|---|
| <p><b>18 Trial Know-How! Presentation and Expertise (2018)</b><br/>5.2 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>                                 | <p><b>18 Criminal Rules Hot Topics (2018)</b><br/>2.5 G, 0.5 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>          | <p><b>25 The Fear Factor: How Good Lawyers Get Into Ethical Trouble (2018)</b><br/>3.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |
| <p><b>18 What Drug Dealers and Celebrities Teach Lawyers about Professional Responsibility (2018)</b><br/>3.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> | <p><b>25 2018 Business Law Institute</b><br/>5.0 G, 1.0 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p>               |   |
|  | <p><b>25 Pretrial Practice in Federal Court (2018)</b><br/>2.5 G, 0.5 EP<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/><a href="http://www.nmbar.org">www.nmbar.org</a></p> |   |

## February 2019

- 10-15 CLE by the Sea in Honolulu, Hawaii**  
4.0 G, 8.0 EP  
Live Seminar  
Alaska Bar Association  
[alaskabar.org/cle-mcle/cle-by-the-sea/](http://alaskabar.org/cle-mcle/cle-by-the-sea/)
- 22 Regional Seminar: Voir Dire**  
20.0 G  
Live Seminar, Santa Fe  
Trial Lawyer College

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to [notices@nmbar.org](mailto:notices@nmbar.org). Include course title, credits, location/course type, course provider and registration instructions.

# Opinions

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

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Mark Reynolds, Chief Clerk New Mexico Court of Appeals  
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**Effective December 7, 2018**

## **PUBLISHED OPINIONS**

A-1-CA-35908	W Espinoza v. City of Albuquerque	Reverse	12/05/2018
A-1-CA-36131	Dept Game & Fish v. T Rawlings	Affirm	12/07/2018

## **UNPUBLISHED OPINIONS**

A-1-CA-35627	State v. J Rodriguez	Reverse/Remand	12/03/2018
A-1-CA-36271	W Grandi v. F Grandi	Affirm	12/03/2018
A-1-CA-36388	State v. G Bunton	Affirm	12/03/2018
A-1-CA-37310	C Daye v. Gladino Inc.	Reverse/Remand	12/03/2018
A-1-CA-37077	CYFD v. Tabitha P.	Affirm	12/04/2018
A-1-CA-35220	State v. H Batista-Carrasco	Affirm	12/06/2018
A-1-CA-35569	Z Nauman v. D Mather	Affirm	12/06/2018

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

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



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From the Clerk of the New Mexico Supreme Court

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**CLERK'S CERTIFICATE  
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**CLERK'S CERTIFICATE  
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**CLERK'S CERTIFICATE  
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**CLERK'S CERTIFICATE  
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From the New Mexico Court of Appeals

**Opinion Number: 2018-NMCA-074**

No. A-1-CA-35290 (filed September 13, 2018)

STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
ERNEST SERNA,  
Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

Briana H. Zamora, District Judge

HECTOR H. BALDERAS,  
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MAHA KHOURY,  
ASSISTANT ATTORNEY GENERAL  
Santa Fe, New Mexico  
for Appellee

BENNETT J. BAUR,  
CHIEF PUBLIC DEFENDER  
KATHLEEN T. BALDRIDGE,  
ASSISTANT APPELLATE DEFENDER  
Santa Fe, New Mexico  
for Appellant

**Opinion**

**Daniel J. Gallegos, Judge**

{1} Defendant Ernest Serna was arrested and charged with an open count of murder (firearm enhancement), contrary to NMSA 1978, Section 30-2-1(A)(1) (1994), and NMSA 1978, Section 31-18-16 (1993); tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (2003); and aggravated stalking, contrary to NMSA 1978, Section 30-3A-3.1 (1997). While he was in police custody, Defendant made several potentially incriminating statements to the arresting deputy. In district court, Defendant filed a motion to suppress the statements, arguing that he was not adequately apprised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court found that the *Miranda* warnings were adequate and denied Defendant's motion. Subsequently, Defendant entered into a conditional plea and disposition agreement (plea agreement) in which he pled no contest to second degree murder (firearm enhancement), contrary to Section 30-2-1(B) and Section 31-18-16, tampering with evidence, and aggravated stalking. In the plea agreement, Defendant specifically reserved for appeal the issue of the adequacy of the *Miranda* warnings.

For the reasons that follow, we conclude that the *Miranda* warnings given to Defendant by the arresting deputy did not sufficiently convey Defendant's full rights under *Miranda*. We therefore reverse the district court's order denying Defendant's suppression motion.

**BACKGROUND**

{2} The State alleges that Defendant and Alicia Quintana (Victim) went to a restaurant together and subsequently engaged in a verbal altercation in the restaurant's parking lot. After the verbal altercation, Defendant and Victim returned to the restaurant to pay their bill and then left the establishment. Several minutes later, gunshots were heard and a pickup truck was seen quickly fleeing the parking lot. Victim was found bleeding in the parking lot and was later pronounced dead.

{3} Defendant was apprehended a few days later by Sandoval County Deputy Sheriff Sal Tortorici. Defendant was placed in the back of Deputy Tortorici's patrol vehicle and the two engaged in casual conversation for several minutes while Deputy Tortorici had his lapel camera turned on. The lapel video shows that after approximately six and a half minutes, Deputy Tortorici recited Defendant's *Miranda* rights from memory and without the use of a department-issued card. Specifically, Deputy Tortorici gave Defendant the fol-

lowing *Miranda* warning (first *Miranda* warning):

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney during any and all questionings. If you can't afford an attorney, one will be provided for you.

Deputy Tortorici did not immediately begin to question Defendant about the crime. Rather, Defendant and Deputy Tortorici continued to engage in conversation during which time Defendant made several statements about contemplating turning himself in to law enforcement. Deputy Tortorici then asked Defendant about the weapon, presumably the one allegedly used in the killing of Victim. Defendant responded by stating that he did not know what he did with the weapon and that he threw it out of his vehicle "somewhere."

{4} Deputy Tortorici proceeded to drive Defendant to the police station for further questioning. According to an additional video recorded by Deputy Tortorici's lapel camera, Defendant was read the following *Miranda* warning (second *Miranda* warning) from a department-issued card:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and you have the right to have him present with you while being questioned. If you cannot afford a lawyer, one will be appointed to you before any questionings. If you decide at any time you want to exercise these rights and not answer any questions, you may do so.

Deputy Tortorici then began to interrogate Defendant about what had happened outside the restaurant with Victim. Defendant immediately asked if he was being recorded and what it would take to get an attorney. Defendant expressed that he was previously unaware he could have an attorney and that he may not have been listening to the first *Miranda* warning. Defendant then stated he "want[ed] to be left alone." After Defendant and Deputy Tortorici engaged in a bit more conversation, in which Defendant either refused to answer or gave ambiguous responses to Deputy Tortorici's questions, the lapel video ends.

{5} Defendant was charged with an open count of murder (firearm enhancement),

tampering with evidence, and aggravated stalking. Subsequently, on August 17, 2015, Defendant filed a motion to suppress the statements made to Deputy Tortorici, arguing exclusively that the first *Miranda* warning given by Deputy Tortorici was inadequate. At the suppression hearing, the parties stipulated to the language used by Deputy Tortorici in the first *Miranda* warning. The district court denied the motion to suppress and found the first *Miranda* warning adequate. Notwithstanding the fact that the adequacy of the *Miranda* warning was the only issue addressed in Defendant's motion and during the suppression hearing, the district court also found that Defendant had waived his rights under *Miranda*. In response to the district court's order, Defendant filed a motion in limine seeking an additional order on the waiver issue. The district court then issued a letter requesting supplemental briefing as to whether Defendant waived his *Miranda* rights. The waiver issue was briefed by both sides and a second hearing was scheduled. At the hearing, a copy of the lapel videos was given to the district court and admitted into evidence<sup>1</sup>.

{6} The district court never entered an additional or amended order on the waiver issue. Instead, shortly after the second hearing, Defendant entered into a plea agreement in which he pled no contest to second degree murder (firearm enhancement), tampering with evidence, and aggravated stalking. The plea agreement stated that "Defendant may appeal only the issue of whether the arresting [s]heriff's [d]eputy gave an insufficient *Miranda* warning to . . . Defendant as raised in . . . Defendant's brief filed August 17, 2015." The district court's judgment and sentence order similarly stated that "Defendant may appeal the *Miranda* warning issue as raised in briefs filed 8/17/15."

#### DISCUSSION

{7} On appeal, Defendant makes two arguments stemming from the district court's denial of his suppression motion. First, Defendant argues that the first *Miranda* warning given to him was inadequate. Specifically, Defendant asserts that the warning did not adequately convey his right to have counsel appointed and present prior to questioning. Second,

Defendant argues that even if the warning was adequate, the district court erred in finding that he waived his rights under *Miranda*.

{8} In turn, the State contends that the warning was adequate and that the waiver issue was not preserved below or reserved for appeal in the plea agreement. Additionally, the State argues for the first time on appeal that some of the statements made by Defendant to Deputy Tortorici were volunteered.

#### I. Standard of Review

{9} In reviewing the district court's denial of a defendant's motion to suppress, the factual determinations are subject to a substantial evidence standard of review, but the application of the law to the facts is subject to de novo review. *State v. Nieto*, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442. We view the district court's factual determinations "in the manner most favorable to the prevailing party." *State v. Lopez*, 2000-NMCA-069, ¶ 4, 129 N.M. 352, 8 P.3d 154.

#### II. Adequacy of the *Miranda* Warnings

{10} At issue here is the Fifth Amendment right against self-incrimination. The Fifth Amendment states that no person shall "be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The Fifth Amendment right against self-incrimination is applicable to the State of New Mexico through the Fourteenth Amendment. *See State v. Filemon V.*, 2018-NMSC-011, ¶ 18, 412 P.3d 1089.

{11} This privilege against self-incrimination is available outside of court proceedings, including situations where a person is being questioned by law enforcement. *See Miranda*, 384 U.S. at 467 (holding that the Fifth Amendment privilege is available during in-custody interrogation of persons suspected or accused of a crime). A person is subject to custodial interrogation when law enforcement initiates questioning after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. *Id.* at 444.

{12} "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safe-

guards effective to secure the privilege against self-incrimination." *Id.* In order for a statement to be admissible, *Miranda* requires that prior to questioning, law enforcement must warn the person of the right to remain silent, that any statement he or she makes may be used as evidence against them, and that he or she "has a right to the presence of an attorney, either retained or appointed." *Id.* These warnings must be clearly conveyed to the individual held for interrogation and are an absolute prerequisite before the interrogation can begin. *Id.* at 471-72. "Only through such a warning is there ascertainable assurance that the accused was aware of" his or her *Miranda* rights. *Id.* at 472.

{13} Our focus in this case is on Deputy Tortorici's explication of Defendant's right to counsel. The right to counsel warning from *Miranda* requires that a person subject to custodial interrogation by law enforcement be apprised that they have a "right to the presence of an attorney[.]" *Id.* at 444. In this case, Deputy Tortorici warned Defendant that he had a "right to an attorney during any and all questionings." Deputy Tortorici also warned Defendant, "If you can't afford an attorney, one will be provided for you." Defendant argues that Deputy Tortorici's warnings were inadequate because they did not apprise him of his right to appointed counsel prior to questioning. In response, the State contends that there is no requirement that a *Miranda* warning explicitly inform the suspect of a right to an attorney prior to questioning. Further, the State asserts that Defendant was in fact informed of the right to have an attorney prior to answering questions, and that this is all that is required under *Miranda*.

{14} To the extent the State asserts that there is no requirement that a suspect be given the *Miranda* warnings verbatim, we agree. *See California v. Prysock*, 453 U.S. 355, 359-60 (1981) (stating that *Miranda* does not require a "talismanic incantation" of the warnings, but rather only the fully effective equivalent of such warnings). "The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of

<sup>1</sup>Defendant did not designate the transcript of this hearing as part of the record on appeal. We make this determination based on our own review of the record. The record indicates that the CD containing the lapel videos was admitted into evidence at the second hearing. This is the same CD this Court received as a supplemental exhibit

his rights.” *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir. 1967). “[I]t is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning.” *Id.*

{15} In making this determination, the form of a *Miranda* warning is of little consequence as we look to see if the substance of what is required by *Miranda* is communicated to the suspect. *See Prysock*, 453 U.S. at 359 (“[The United States Supreme] Court has never indicated that the ‘rigidity’ of *Miranda* extends to the precise formulation of the warnings given a criminal defendant.”); *State v. Briggs*, 1970-NMCA-062, ¶ 4, 81 N.M. 581, 469 P.2d 730 (“The warnings required by *Miranda* . . . deal with substance, not form.”); *see also People of Territory of Guam v. Snaer*, 758 F.2d 1341, 1343 (9th Cir. 1985) (“If a defendant has been told the substance of his constitutional rights, it is not fatal if irrelevant words or words with no independent substance are omitted.” (internal quotation marks and citation omitted)). *Miranda* warnings need not be examined “as if construing a will or defining the terms of an easement.” *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

{16} “The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.” *Duckworth*, 492 U.S. at 203 (alterations, internal quotation marks, and citation omitted). In taking this somewhat flexible and common sense approach, the United States Supreme Court has attempted to balance the individual right against compelled self-incrimination with the necessities encountered every day by law enforcement. *See Miranda*, 384 U.S. at 481 (“This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties.”).

{17} Our analysis of the adequacy of Deputy Tortorici’s *Miranda* warnings thus turns on two primary questions: (1) does *Miranda* require that a person subject to custodial interrogation be warned of that person’s right to have counsel present prior to questioning; and (2) if so, was this right reasonably conveyed by the warnings given by Deputy Tortorici?

#### **A. *Miranda* Warnings Must Convey the Right to the Presence of Counsel Prior to Questioning**

{18} It is clear from both *Miranda* and subsequent decisions by the United States Supreme Court that there is a right to have

and consult with counsel prior to questioning. *See Miranda*, 384 U.S. at 470 (“Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.”); *see also Duckworth*, 492 U.S. at 203 (noting that the warnings at issue, including the defendant’s right to speak to an attorney before and during questioning satisfied all the requirements of *Miranda*); *Florida v. Powell*, 559 U.S. 50, 62 (2010) (holding that, combined together, the warnings given to the defendant “reasonably conveyed” that he had a right to have an attorney present “at all times[.]” including both prior to and during police questioning). This right must be conveyed as part of the *Miranda* warnings. *See Prysock*, 453 U.S. at 361 (stating that the full right to counsel under *Miranda* that must be conveyed includes the “right to have a lawyer present prior to and during interrogation”).

{19} We address the State’s two points of disagreement with this proposition. The State’s first point is that this Court, our Supreme Court, and the United States Supreme Court have all upheld on numerous occasions warnings that simply apprised the suspect of a right to the presence of counsel, which is a verbatim recitation of what *Miranda* noted was required. *See Miranda*, 384 U.S. at 444. While this may be true, such a warning contains no limitation on the right to counsel. That is, one can reasonably infer from an advisement referring to the right to the presence of counsel that the right applies both before and during interrogation. The fact that courts have affirmed the use of the term “presence of counsel” does not mean that a suspect need not be advised of his right to counsel prior to questioning, as the State contends, but rather that such language adequately conveys that right. However, because this particular language is not at issue in this case, the State’s point is unavailing.

{20} The State’s second point, made in reliance on *Powell*, is that the full right to counsel encompasses only a right to counsel prior to *answering* any questions, as opposed to prior to *questioning*. Specifically, the State points out that the defendant in *Powell* was advised of his right to consult with an attorney before answering any questions and asserts that such warning was held by the United States Supreme Court to be sufficient. *See Powell*,

559 U.S. at 62-63. We observe, however, that the warnings at issue in *Powell* were inverse to the warnings given here. That is, the defendant in *Powell* was explicitly warned of his right to have counsel prior to answering any questions, but the warnings omitted the right to counsel *during* questioning. *Id.* at 54. However, the defendant was also advised that he had a right to have counsel appointed *prior to questioning*. *Id.* Importantly, the Supreme Court did not examine the sufficiency of the warning with respect to the right to counsel prior to answering questions, but rather analyzed whether the warnings in their totality “reasonably conveyed” to the defendant that he had a right to have an attorney present “at all times[.]” including both prior to and during police questioning. *Id.* at 62. In concluding that the warnings in their totality satisfied *Miranda*, the Supreme Court relied on and reaffirmed its decisions in *Prysock* and *Duckworth*. *Powell*, 559 U.S. at 60-62. We can see nothing in *Powell* that would indicate that the Supreme Court intended to limit the right to counsel prior to questioning, as outlined in *Miranda*, *Prysock*, and *Duckworth*, so that it would become effective only after questioning began, as the State contends. Nor does the State’s contention survive scrutiny when compared to the language in *Miranda* stating that if a suspect “indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be *no questioning*.” *Miranda*, 384 U.S. at 444-45 (emphasis added). Therefore, we are not convinced by the State’s argument on this point.

{21} We conclude that *Miranda* requires that a person be warned, at least implicitly, that they have a right to counsel prior to questioning. *See, e.g., United States v. Loucious*, 847 F.3d 1146, 1151 (9th Cir. 2017) (“The *Miranda* warnings at issue . . . adequately conveyed notice of the right to consult with an attorney before questioning.”); *see also Snaer*, 758 F.2d at 1342 (“The Supreme Court in *Miranda*, . . . although making clear that one does have the right to consult with counsel before questioning, is ambiguous as to how explicitly the person must be *warned* of that right.” (citation omitted)); *State v. Nave*, 821 N.W.2d 723, 727 (Neb. 2012) (“[A]lthough the *Miranda* warnings did not expressly state that [the defendant] was entitled to appointed counsel before questioning, that information was obviously implied from the warnings which the police read to him.”).



### B. The *Miranda* Warning in This Case Did Not Reasonably Convey the Right to the Presence of Counsel Prior to Questioning

{22} We now look at whether Deputy Tortorici's warnings reasonably and sufficiently conveyed to Defendant his right to have an attorney present, including prior to questioning. See *Powell*, 559 U.S. at 62-63; *Filemon V.*, 2018-NMSC-011, ¶ 48 (“*Miranda* warnings must be given in a manner that is clearly sufficient to grant the suspect an awareness of the right so the suspect can make a knowing, intelligent and voluntary choice to speak.”). This requires us to view the warnings in their totality to determine if Defendant was apprised, either explicitly or implicitly, of the right to have counsel before as well as during questioning. See *Duckworth*, 492 U.S. at 205 (holding that the warnings read together “in their totality” can satisfy the requirements of *Miranda*).

{23} The warning given to Defendant indicated that he had a right to an attorney “during any and all questioning.” The use of the word “during” is pivotal. “During” is a preposition and is defined as “throughout the duration of.” *Merriam-Webster's Collegiate Dictionary* 388 (11th ed. 2005). A “preposition” is “a function word that typically combines with a noun phrase to form a phrase which usually expresses a modification or predication.” *Id.* at 981. Thus, “during” modifies the phrase “you have a right to an attorney” and restricts that right to the duration of any questioning by law enforcement. Even viewing this language in a manner extending the utmost latitude to the law enforcement officer—and bringing common sense to bear—we still cannot see how “during” could be understood to apply backwards to also mean prior or before.

{24} The State's reference to *Loucioux* in its answer brief only serves to underscore this determination. In *Loucioux*, like here, the defendant was warned that he had the right to the presence of an attorney during questioning. 847 F.3d at 1148. And also like here, the defendant was not explicitly warned that he had the right to the presence of an attorney prior to questioning. *Id.* However, he was advised that if he could not afford an attorney, one would be appointed “before questioning.” *Id.* The court held that the warnings, taken together, “adequately conveyed notice of the right to consult with an attorney prior to questioning.” *Id.* at 1151. In this case, where the balance of the warnings contain

no “before questioning” language—or any other language, for that matter—by which we could infer that the full right to counsel was adequately conveyed, there is simply no way to reasonably read the warnings given by Deputy Tortorici as conveying to Defendant that he had a right to an attorney prior to questioning.

{25} In sum, by implying that the right to counsel would be effective only during the interrogation, the warnings given by Deputy Tortorici to Defendant placed a misleading temporal limitation on the full right to counsel under *Miranda*. Cf. *Powell*, 559 U.S. at 74 n.8 (Stevens, J., dissenting) (expressing concern over *Miranda* warnings that use a misleading temporal limitation on the right to counsel). Therefore, we conclude that the warnings here did not reasonably convey Defendant's *Miranda* rights. In so concluding, we simply reaffirm the traditional *Miranda* requirement that a suspect be apprised of the full right to counsel without limitation. “There are substantial practical reasons for requiring that defendants be advised of their right to counsel during as well as before questioning.” *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984). Having counsel present prior to questioning allows counsel to better protect the rights of his or her client, particularly against self-incrimination. See *Miranda*, 384 U.S. at 480 (“An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning.”); *Snaer*, 758 F.2d at 1343 (“The right to consult with an attorney before questioning is significant because counsel can advise the client whether to exercise his right to remain completely silent, or, if he chooses to speak, which questions to answer or how to answer them.”).

{26} We would be remiss if we did not point out the contrast in language between the first *Miranda* warning, given from memory, and the second *Miranda* warning, given from a department-issued card. Not only does the second *Miranda* warning advise Defendant of his “right to talk to a lawyer and . . . the right to have him present with [him] while being questioned” but also that “[i]f [he] cannot afford a lawyer, one will be appointed to [him] before any questionings.” In delivering the first *Miranda* warning from memory, and not from his department-issued card, Deputy Tortorici risked that he would fail to adequately convey Defendant's rights, and

that is precisely what happened. While we again note that law enforcement officers are not required to recite the warnings from *Miranda* verbatim, “police can always be certain that *Miranda* has been satisfied if they simply read the defendant his rights from a prepared card[.]” *Loucioux*, 847 F.3d at 1151 (internal quotation marks and citation omitted). This assumes, of course, that the content of the prepared card reasonably conveys a suspect's *Miranda* rights.

{27} Because the first *Miranda* warning given to Defendant by Deputy Tortorici was inadequate, the district court erred in denying Defendant's motion to suppress. See *Filemon V.*, 2018-NMSC-011, ¶ 19 (reiterating “the notion that statements that would otherwise be considered voluntary must be excluded for failure to warn”).

### III. Waiver of Rights Under *Miranda*

{28} We turn next to Defendant's argument that the district court erred in finding that he had waived his rights after receiving adequate *Miranda* warnings. There is some question as to whether this argument was preserved for appeal and whether this issue was reserved for appeal in Defendant's plea agreement. See *State v. Winters*, 2015-NMCA-050, ¶ 18, 349 P.3d 524 (stating that a defendant must preserve an issue for appeal by receiving an adverse determination on a pretrial motion and must also reserve the issue for appeal by expressing intent to do so in the plea agreement). However, we need not decide these questions one way or the other. Instead, we observe that as a matter of law, the rights conferred by the *Miranda* warnings can only be waived after the full and adequate warnings have been given. *State v. Verdugo*, 2007-NMCA-095, ¶¶ 13, 17, 142 N.M. 267, 164 P.3d 966. Because we have concluded that the first *Miranda* warning was inadequate, Defendant could not have validly waived his rights.

### IV. Volunteered Statements

{29} The State argues in its answer brief—for the first time—that Defendant volunteered several statements throughout the course of his dialogue with Deputy Tortorici and that these statements should be deemed admissible regardless of the adequacy of the first *Miranda* warning. “Generally, an appellee has no duty to preserve issues for review and may advance any ground for affirmance on appeal.” *State v. Todisco*, 2000-NMCA-064, ¶ 11, 129 N.M. 310, 6 P.3d 1032. This Court will affirm a district court's decision under the right for any reason doctrine “so long as the circumstances do not make it unfair to



the appellant to affirm.” *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 18, 146 N.M. 256, 208 P.3d 901.

{30} The statements in question were made by Defendant to Deputy Tortorici between the first and second *Miranda* warnings while Defendant was in the back of the patrol unit. Although we have concluded that the first *Miranda* warning given to Defendant was inadequate, it is still possible that a person can volunteer admissible statements even without adequate *Miranda* warnings. See *Miranda*, 384 U.S. at 478 (“Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.”); *State v. Fekete*, 1995-NMSC-049, ¶ 43, 120 N.M. 290, 901 P.2d 708 (recognizing that “even when an accused is in custody, *Miranda* protections do not apply in those situations where he or she volunteers statements”). “Volunteered statements come within one of two categories: statements which the police did not attempt to elicit, and statements made during custodial interrogation that may be in response to police questioning but are unresponsive to the questions asked.” *Id.* ¶ 44. The second type of statement—one that is unresponsive to the questions asked—is one that “police officers cannot foresee because it is too far removed from the questions asked.” *Id.*

{31} The State enumerates several statements that it argues were volunteered and therefore admissible. The statements are that (1) Defendant asked if the police were “looking for [him]”; (2) Defendant stated he was “trying to figure out who to call to turn [him]self in” and to “tell [law enforcement] they can pick [him] up somewhere . . . because it’s a bad situation”; (3) Defendant “didn’t know what to do . . . just been sitting there for the last day, day

and a half”; and (4) “there’s no place else for me to go, where am I going to go? . . . you can’t hide forever.”

{32} Aside from listing these four statements and asserting that they were “volunteered and . . . admissible,” the State provides us with no analysis with respect to each. By making no further argument, the State leaves it to us to determine the voluntariness of each statement in context. To do so, we must determine whether each statement was the product of express questioning or its functional equivalent, see *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980), or whether each statement was somehow so unresponsive to the questions asked that Deputy Tortorici could not have foreseen them. Further, we would have to determine, in the context of the ongoing and several-minutes-long conversation that both preceded and followed the giving of the first *Miranda* warning, whether Defendant himself initiated the questioning or whether Deputy Tortorici initiated the conversation. See *State v. Ferrari* 1969-NMSC-146, ¶ 14, 80 N.M. 714, 460 P.2d 244 (stating that when a person initiates the questioning they are not subject to custodial interrogation by law enforcement in that moment and that *Miranda* “does not prohibit every inquiry in response to volunteered statements where the arresting officer does not initiate the conversation”); see also David M. Nissman & Ed Hagen, *Law of Confessions*, § 5:8 (2d ed. 2018) (“There is no interrogation, certainly, where the police response is simply a non-interrogatory answer to a question posed by the suspect.”). This we will not do.

{33} “To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties’ work for them.” *Elane Photography,*

*LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53. “This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation rather than the parties’ carefully considered arguments.” *Id.* Furthermore, it would be unfair for us to construct the State’s argument without the opportunity for Defendant to respond.

{34} Consequently, because addressing this undeveloped argument—raised for the first time on appeal—would be unfair to Defendant, we will not affirm on a right for any reason basis. See *Cordova*, 2009-NMSC-021, ¶ 18. Even though we are not deciding this issue, this does not preclude the State from raising on remand, or the district court from considering, whether any of Defendant’s statements were volunteered in such a manner that the *Miranda* protections did not apply.

#### CONCLUSION

{35} We conclude that the district court erred in denying Defendant’s motion to suppress the statements made to Deputy Tortorici between the first and second *Miranda* warnings because Defendant was not adequately apprised of his right to counsel. Therefore, we reverse and remand to the district court for further proceedings.

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

**DANIEL J. GALLEGOS, Judge**

**WE CONCUR:**

**M. MONICA ZAMORA, Judge**  
**HENRY M. BOHNHOFF, Judge**

From the New Mexico Court of Appeals

**Opinion Number: 2018-NMCA-075**

No. A-1-CA-35500 (filed September 17, 2018)

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MELISSA RAE FLORES,

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

Stan Whitaker, District Judge

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LATE DEFENDER

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for Appellant

## Opinion

### Vanzi, Chief Judge

{1} Defendant Melissa Rae Flores appeals her convictions for receiving or transferring a stolen vehicle and possession of burglary tools. She argues that the admission of a codefendant’s indictment and plea, along with inadmissible hearsay testimony, denied her a fair trial. Defendant also raises the issue of an erroneous jury instruction and challenges the sufficiency of the evidence to support each of her convictions. Because we conclude that the State used the codefendant’s plea agreement and indictment solely for the substantive purpose of proving the elements of receiving or transferring a stolen vehicle against Defendant thus violating her right to a fair trial and to due process under the Sixth and Fourteenth Amendments of the United States Constitution, we reverse and remand.

#### BACKGROUND

##### Facts Leading to the Charges Against Defendant and Codefendant Scott Veretto

{2} Bernalillo County Sheriff’s Department Detective Jerry Koppman was looking for Scott Veretto in August 2013.

Koppman had previously arrested Veretto for stealing motorcycles and confirmed on NCIC that Veretto was a wanted fugitive. When Koppman arrived at Veretto’s last known address, he saw Veretto leave the residence, get into a Mustang, and drive away. Koppman learned the Mustang was registered to Cameron Ezell, so Koppman went to Ezell’s house to speak to him. Ezell told Koppman that he had let Veretto use his car and that Veretto was staying with Defendant, who was Veretto’s girlfriend at the time. While at Ezell’s residence, Koppman saw a partially disassembled Nissan Murano parked in the backyard. The vehicle identification number (VIN) plate had been removed from the Murano’s dashboard, but Koppman found a label with the VIN on the inside of the driver’s side door. A National Crime Information Center (NCIC) check established that Defendant’s mother owned the vehicle.

{3} Koppman then went to Defendant’s mother’s home, where Defendant also lived, and located Defendant. There, he saw a different and fully assembled Nissan Murano. The VIN plate on the dashboard of the Murano “appeared to have been tampered with.” Defendant gave Koppman access to the inside of the Murano by crawling through the back of the car to unlock the car, and an NCIC search of the

VIN from the secondary label confirmed that the vehicle was not owned by Defendant or her mother, but had been reported as stolen. Also, when Defendant opened the Murano for Koppman to examine the secondary VIN, he saw “a little computer” in the back of the vehicle. Defendant explained that she used the computer “to reset her key in order to start the car” using written instructions that Veretto had given to her. Defendant’s mother thought that she held legal title to the fully assembled Murano as she had purchased a similar one from a dealership a few years earlier for Defendant to drive.

{4} Based on these facts, Defendant was charged with receiving or transferring a stolen vehicle, conspiracy to receive or transfer a stolen vehicle, possession of burglary tools, and two counts of harboring a felon. On the same date, the State charged Veretto with receiving or transferring a stolen vehicle, conspiracy to receive or transfer a stolen vehicle, possession of burglary tools, and other crimes related to vehicle theft. Veretto subsequently entered into a plea and disposition agreement in which he agreed to plead guilty to receiving or transferring a stolen 2007 white Nissan Murano and conspiracy to commit receiving or transferring a stolen 2007 white Nissan Murano, among other offenses. Defendant’s case proceeded to trial.

##### The State’s Motion in Limine

{5} Prior to trial, the State filed a motion in limine requesting, among other things, to introduce Veretto’s plea and disposition agreement in order to “prove elements of the crime against . . . Defendant[,] . . . [s]pecifically, . . . to prove knowledge on behalf of . . . Defendant that Scott Veretto had committed a felony or felonies, and that . . . Defendant had reason to believe that the automobile which is the subject of Counts 1 and 2 was stolen.” At a hearing on the motion, the State further explained that it was going to call Veretto to testify at trial and that it wanted to present Veretto’s plea agreement as evidence for two reasons: First, “to show . . . the amount of motor vehicle thefts that [Veretto] has committed[,]” which “goes to the knowledge element . . . that [Defendant] knew that [Veretto] had committed a felony” on “the harboring of the felon” count; and second, “to show, for the receiving . . . a stolen motor vehicle [count], . . . that she knew it was stolen” because she “presumably. . . got this motor vehicle from Mr. Veretto. . . . And conspiracy to commit. So that all goes

to showing that [Veretto] conspired with [Defendant], which is one of the charges [Defendant is] charged with[.]” The State further said that it intended to admit the plea agreement “as substantive evidence . . . to show the knowledge components on [Defendant’s] part.” Defense counsel responded that he was concerned about the way that the State was trying to use Veretto’s guilty plea. Although he acknowledged that the plea agreement could be used to impeach Veretto, defense counsel stated:

I’m still a little concerned about the fact that the State is seeming to argue that this is relevant because he was convicted of a crime. It doesn’t show that [Defendant] knew that [Veretto] committed a crime. The crime they’re talking about is receiving or transferring a stolen motor vehicle, and the element that he could have pled to was that [Veretto] should have known it was stolen. That doesn’t do anything to show [Defendant’s] knowledge.

The district court said that it had “no idea what the testimony is going to be” but that the plea agreement was “usable for purposes of impeachment by [defense counsel], and [the State] can impeach [Veretto] with it as well, if, in fact, his testimony is contrary to what they intend to present here today.” The court further stated that

in terms of whether it’ll actually be admitted, I don’t know. And whether that’s going to be enough to show the state of mind of [Defendant] here remains to be seen. So I guess it’s really hard for me to say, it’s a little premature to make a firm decision about it, until I know what the foundation is going to be for purposes of trying to get it admitted. . . . So . . . let’s hold that in abeyance until we hear some testimony.

As a final matter, the district court rejected Defendant’s argument that the use of the plea agreement was “more prejudicial than probative.”

#### **Use of Veretto’s Testimony and Plea Agreement at Trial**

{6} During its opening statement, the State told the jury that it would hear that Veretto “pled to being in receipt [or] possession of” the stolen Murano that was parked at Defendant’s house, that Veretto “also pled to conspiring to being in receipt of that car[.]” and that “those are the same

charges that [Defendant] is now charged with, being in possession of that stolen car[.]” Defense counsel did not object and, in the course of his opening, stated that Veretto “did enter into a plea agreement in his case; and, yes, he did agree to testify for the State and do whatever they asked him to.” He then elaborated, telling the jury that

a big part of the incentive was the number of charges he was facing, the fact that he was facing additional enhancements as a habitual offender, anywhere up to eight years for each conviction that he has; and the fact that he currently has a probation violation pending, and that that probation violation has not been resolved, but he could end up going to prison as a result of that probation violation. And his testimony here today is happening before that probation violation issue is resolved for him, one way or the other.

So you will hear evidence regarding the bias and motivations of . . . Veretto[.] {7} The State called Veretto to testify in its case in chief. Veretto initially refused to testify about anything in his plea agreement which he characterized as “lies.” As a result, the State moved to admit certified copies of Veretto’s indictment and plea agreement into evidence. Defense counsel objected, and the parties held a bench conference outside the presence of the jury. During the bench conference, defense counsel said,

I think the only problem we have is, we discussed this in the motion in limine, and there was a more-prejudicial-than-probative argument with regards to the same charges that were against [Defendant]—against [Veretto]. So . . . [w]e don’t want to waive any of the arguments we made in limine on this.

The district court responded, “I’m not sure why that would be—why [Veretto’s] testimony, based upon what he pled to in the indictment, is going to be prejudicial to [Defendant] . . . . The question is whether it’s more prejudicial than probative, and I’m finding it more probative than prejudicial. . . . They’ll be admitted, over your objection.”

{8} At the State’s direction, Veretto read portions of his indictment to the jury:

[I]n Bernalillo County, New Mexico, the above named defendant received or transferred

possession of a . . . motor vehicle that the defendant knew or had reason to believe had been stolen or unlawfully taken from . . . another person; to wit, a white 2007 Nissan Murano, belonging to [another person], contrary to [NMSA 1978, Section 30-16D-4 (2009)].

Veretto confirmed that the name of the defendant on the indictment was his. Veretto then read the following portion of his plea agreement to the jury: “Receiving/transferring a stolen vehicle or motor . . . vehicle, a fourth-degree felony offense occurring on or between May 4, 2013, and October 19, 2013, as charged in Count 4 of [the] indictment[.] . . . [T]he defendant agrees to plead guilty to these crimes.” Veretto further confirmed that the signature on the plea agreement was his. The plea and disposition agreement was admitted into evidence, and the State elicited no further testimony from Veretto.

{9} After the State put on its case in chief, defense counsel moved for directed verdict on all of the charges. As to the count of receiving a stolen vehicle, the State argued that sufficient evidence supported the charge because, in pertinent part, “we have the fact that Scott Veretto pled to receiving and transferring this stolen motor vehicle. And [Defendant] had a relationship with Scott Veretto. So a jury, in the light most favorable to the State, can make the inference . . . that because he knew it, she knew it[.]” The district court granted Defendant’s motion for directed verdict on the conspiracy count and one of the harboring a felon counts. It denied the motion as to the three remaining counts of receiving a stolen vehicle, possession of burglary tools, and harboring a felon. With regard to the count of being in possession of a stolen vehicle, the jury was instructed that the State had to prove beyond a reasonable doubt each of the following elements of the crime:

1. [D]efendant had possession of a white, 2007 Nissan Murano;
2. This vehicle had been stolen or unlawfully taken;
3. At the time [D]efendant had this vehicle in her possession she knew or had reason to know that this vehicle had been stolen or unlawfully taken;
4. This happened in New Mexico on or about the 4th day of May through the 19th day of October, 2013.



{10} Thereafter, using Veretto's plea agreement to establish Defendant's knowledge that the vehicle was stolen, the State argued during closing as follows:

And then what's the final piece of evidence . . . You have to show that [Defendant] knew it was stolen. . . . [Y]ou have the testimony of Scott Veretto. And you have in evidence his plea, and you have in evidence the indictment that identifies what he pled to. And he pled to receiving a stolen 2007 Nissan Murano.

. . . .

[Defendant] was aware, because her boyfriend was, . . . as you'll see in the plea and disposition agreement that will go back to the jury room with you, a car thief, who stole several cars. This was one of them, the 2007 white Murano.

{11} Neither the State nor defense counsel asked for—and the district court did not give—a limiting instruction informing the jurors that Veretto's plea agreement could not be used as substantive evidence of Defendant's guilt. The jury acquitted Defendant of the remaining harboring a felon count, but found her guilty of receiving a stolen vehicle and possession of burglary tools. This appeal followed.

## DISCUSSION

### Standard of Review

{12} Defendant contends that the State introduced and used Veretto's indictment and plea agreement at trial solely as substantive evidence to establish her guilt. The State counters that Defendant failed to preserve her claim for review and that she "acquiesced in admission, and even 'opened the door' to it." We agree with Defendant.

{13} To the extent that the district court overruled defense counsel's timely objections, we review those evidentiary rulings under an abuse of discretion standard. See *State v. Duran*, 2015-NMCA-015, ¶ 11, 343 P.3d 207. "But we review de novo a misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling." *Id.* (alterations, internal quotation marks, and citation omitted). And, when a defendant's federal constitutional rights have been violated, we review those violations under a harmless error standard. *State v. Gutierrez*, 2007-NMSC-033, ¶ 18, 142 N.M. 1, 162 P.3d 156. Error is not harmless "if there is a reasonable possibility that the evidence complained of might have contributed to

the conviction." *Id.* (internal quotation marks and citation omitted); see also *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (explaining that "reviewing courts should only conclude that a constitutional error is harmless when there is no reasonable possibility it affected the verdict[.]" as opposed to the "lower standard" of non-constitutional harmless error (alteration, internal quotation marks, and citations omitted)). In determining whether it is reasonably possible that the improper evidence contributed to the conviction, we evaluate "all of the circumstances surrounding the error[.]" which may include examining "the source of the error and the emphasis placed upon the error." *Tollardo*, 2012-NMSC-008, ¶ 43. Although other evidence of a defendant's guilt "can never be the singular focus[.]" it "may often be relevant" to help us understand, for example, "what role [the error] may have played in the trial proceedings[.]" *Id.* Thus, we may consider "the importance of the erroneously admitted evidence in the prosecution's case[.]" *Id.* (alteration, internal quotation marks, and citation omitted). The State has the burden on appeal to "establish[] beyond a reasonable doubt that the jury verdict was not tainted by the constitutional error." *Gutierrez*, 2007-NMSC-033, ¶ 18; see also *Tollardo*, 2012-NMSC-008, ¶ 36 ("[T]he reasonable possibility standard continues to resemble the reasonable doubt standard[.]" (internal quotation marks and citation omitted)).

### Use of a Codefendant's Guilty Plea

{14} "A codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt." *United States v. Woods*, 764 F.3d 1242, 1246 (10th Cir. 2014) (internal quotation marks and citation omitted); see also *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981) (per curiam) ("As a principle of general acceptance, the guilty plea or conviction of a codefendant may not be offered by the government and received over objection as substantive evidence of the guilt of those on trial."); *Clemmons v. State*, 720 A.2d 1170, 1173 (Md. 1998) (collecting cases from numerous jurisdictions that demonstrate this principle). There are at least two important purposes for this rule: First, "it curbs the jury's temptation to find guilt by association"; and second, "it helps to ensure the government must prove every element of an offense against the defendant; the government may not borrow proof from another person's conviction." *Woods*, 764 F.3d at 1246. "The rule is grounded in

notions of fundamental fairness and due process[.]" *Id.*; see also *Bisaccia v. Att'y Gen. of the State of N.J.*, 623 F.2d 307, 312-13 (3d Cir. 1980) (explaining that this rule is grounded "on concepts of constitutional fairness" and holding that violation of the rule "amount[s] to a denial of constitutional due process").

{15} Our Supreme Court first recognized this rule a century ago, and our appellate courts have continued to endorse it. See *State v. Martino*, 1918-NMSC-128, ¶ 2, 25 N.M. 47, 176 P. 815 (holding that the criminal information and guilty pleas of four men who unlawfully engaged in gambling upon the defendant's premises were not admissible to prove that the defendant knowingly permitted gambling on his premises); see also *State v. Jackson*, 1943-NMSC-049, ¶¶ 9, 10, 13, 47 N.M. 415, 143 P.2d 875 (holding that a codefendant's testimony that he pleaded guilty to receiving stolen money—the same charge that the defendant was faced with—was erroneously admitted and "likely . . . was extremely prejudicial"); *State v. Gilbert*, 1982-NMCA-081, ¶ 29, 98 N.M. 77, 644 P.2d 1066 (recognizing that a "co-defendant's guilty plea may not be admitted . . . when that evidence is offered solely to prove [the] defendant's guilt"). In *Jackson*, our Supreme Court reasoned that the codefendant's guilty plea "was sufficient to authorize the court to pronounce sentence upon [the codefendant], but it was not conclusive proof of the truth of the charge . . . , and particularly not admissible as to elements of the offense as against a person not a party to [that] proceeding." 1943-NMSC-049, ¶ 14 (emphasis added). Recognizing that "[a]ccused persons are sometimes motivated to plead guilty to a charge rather than go to trial in the hope of acquiring leniency or some other advantage," the Court suggested that the proper way for the prosecution to have used the codefendant as a witness in that case would have been to elicit testimony from the codefendant "that he knew" the money was "stolen when he received it[.]" *Id.*

{16} There are no recognized exceptions to the rule that a codefendant's guilty plea may not be used as substantive evidence to prove a defendant's guilt. See *United States v. Torres-Colon*, 790 F.3d 26, 31 (1st Cir. 2015) ("The government cites no case—and we can find none—in which the guilty plea of a codefendant was permissibly used in this substantive way."); *Woods*, 764 F.3d at 1246 n.1 ("Because substantive



evidence is evidence offered to help establish a fact in issue, as opposed to evidence directed to impeach or to support a witness's credibility, allowing plea evidence for any purpose other than credibility would require creating an exception to the general prohibition against using pleas as substantive evidence." (alteration, internal quotation marks, and citation omitted)). However, in certain narrow instances, a codefendant's guilty plea evidence may be used non-substantively. *United States v. Paterson*, 780 F.2d 883, 886 (10th Cir. 1986). Most commonly, guilty pleas may be used for the "purpose of aiding the jury in its assessment of the codefendant's credibility as a witness." *Woods*, 764 F.3d at 1246 (internal quotation marks and citation omitted); see also *Halbert*, 640 F.2d at 1004 ("Admissibility of the plea turns on the purpose for which it is offered. When that purpose is to further the jury's difficult task of evaluating credibility, it is relevant and admissible[.]"); *Tollardo*, 2012-NMSC-008, ¶ 20 ("A co-defendant's conviction . . . may be admissible when it is introduced to impeach that co-defendant if he or she testifies, rather than as substantive evidence of the defendant's guilt."). A guilty plea may also be mentioned at trial "where other co-defendants plead guilty during trial and are conspicuously absent" or "where opposing counsel has left the impression of unfairness which raises the issue or invites comment on the subject." *Paterson*, 780 F.2d at 886 (internal quotation marks and citation omitted). Anytime a codefendant's guilty plea is used in one of these permissible ways, it is "critical" that the trial court give the jury "cautionary instructions limiting the jury's use of the guilty plea . . . as evidence relating to [the witness's] credibility" and not as proof that the defendant met any of the elements of the offenses with which she is charged. *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983).

#### **Use of Codefendant's Guilty Plea Deprived Defendant of a Fair Trial**

{17} In this case, the district court initially declined to "make a firm decision" on whether Veretto's guilty plea would "actually be admitted," reserving its ruling for trial when it could "hear some testimony." Defense counsel acknowledged that evidence of Veretto's plea agreement could be admissible if it was used for impeachment purposes. However, the record demonstrates that the State did not use Veretto's plea for impeachment or other permissible reasons, nor does the State make any effort

to assert on appeal that it used the plea for any of these proper purposes. From its direct examination of Veretto, to its admission of Veretto's indictment and guilty plea agreement into evidence, the State used this evidence for the sole purpose of substantively proving the knowledge elements against Defendant. The State's opening and closing arguments further emphasized to the jury that it should use Veretto's guilty plea to find that Defendant knew or should have known that the vehicle was stolen. See *Torres-Colon*, 790 F.3d at 31 (stating that they have found no precedent that allows a prosecutor's "bald introduction of a witness's guilty plea concerning facts or events similar to that for which the defendant is on trial[.] suggesting to the trier of fact that the defendant should be found guilty merely because of the witness's guilty plea" (omission, internal quotation marks, and citation omitted)); *United States v. Miranda*, 593 F.2d 590, 593 (5th Cir. 1979) (concluding that the prosecutor "deprived the defendant of a fair trial by deliberately urging the jury on two occasions to use [the guilty plea] evidence for a prohibited purpose"). And if the State's behavior at trial leaves any doubt that it planned to use the guilty plea improperly as substantive evidence, the statements it made during the hearings on its motion in limine (that it intended to use the plea agreement as substantive evidence) and Defendant's directed verdict motion ("that because [Veretto] knew it, [Defendant] knew it") make its intentions unmistakably clear. See *Clemmons*, 720 A.2d at 1175 (finding error where it was "unmistakably clear that [the codefendant's] testimony regarding his conviction was offered, and was likely to be taken by the jury, as substantive evidence against [the defendant];" and concluding "that it was plainly inadmissible for that purpose, and that it was prejudicial"). For these reasons, we conclude that the State's use and the district court's admission of Veretto's guilty plea evidence in this case "amount[ed] to a denial of constitutional due process[.]" *Bisaccia*, 623 F.2d at 313, and "deprived . . . [D]efendant of a fair trial[.]" *Miranda*, 593 F.2d at 593.

#### **The Deprivation of Defendant's Constitutional Rights Is Not Harmless Error**

{18} We next consider whether this deprivation of Defendant's constitutional rights resulted in harmless error—in other words, whether "there is no reasonable possibility" that the error "affected the verdict." *Tollardo*, 2012-NMSC-008, ¶ 36 (internal

quotation marks and citation omitted); see also *Gutierrez*, 2007-NMSC-033, ¶ 18 (emphasizing that "in a proper harmless error analysis, the appellate court defers to the jury verdict *only* when the [s]tate has established beyond a reasonable doubt that the jury verdict was not tainted by the constitutional error." (internal quotation marks and citation omitted)). We conclude that the error was harmful for several reasons. First, "the source of the error" was not Defendant, but the State who repeatedly emphasized to the jury that Veretto's guilty plea evidence should be used to prove that Defendant was aware the car was stolen. See *Tollardo*, 2012-NMSC-008, ¶ 43. Second, Veretto's guilty plea was critical to the State's case because there was no other evidence—other than that she used a computer to start the car at the direction of her boyfriend, and the Murano's dashboard VIN showed evidence of tampering—to establish Defendant's knowledge that the vehicle had been stolen or unlawfully taken. See *id.* And third, the State did not meet its burden because it did not provide any analysis in this regard in its answer brief on appeal. See *Gutierrez*, 2007-NMSC-033, ¶ 18 ("The [s]tate has the burden of establishing that the constitutional error was harmless beyond a reasonable doubt." (internal quotation marks and citation omitted)). Under these circumstances, we cannot say that "there is no reasonable possibility" that the substantive use of Veretto's guilty plea "affected the verdict." *Tollardo*, 2012-NMSC-008, ¶ 36 (emphasis, internal quotation marks, and citation omitted). To the contrary, substantive use of the plea in this case appears to have been highly prejudicial and tempted the jury to find Defendant guilty by association. See *Woods*, 764 F.3d at 1246 (recognizing that the reason for prohibiting substantive use of a codefendant's guilty plea is to "curb[] the jury's temptation to find guilt by association"); *Miranda*, 593 F.2d at 594 ("[A] codefendant's guilty plea or conviction with respect to similar or identical charges . . . is extremely prejudicial."); see also *Jackson*, 1943-NMSC-049, ¶ 13 (concluding that the codefendant's guilty plea evidence was "likely . . . extremely prejudicial"); *Clemmons*, 720 A.2d at 1175 (concluding that "[i]t is unmistakably clear" that substantive use of the codefendant's guilty plea "was prejudicial").

{19} We are not persuaded by the State's arguments on appeal that our conclusion should be different. Contrary to the State's

assertions, Defendant preserved her claim and did not “open[] the door” to the State’s use of the plea as substantive evidence. Defense counsel objected to the evidence during the pre-trial hearing on the State’s motion in limine and during trial while Veretto was on the stand, arguing both times that admission of the plea would be prejudicial to Defendant and that Veretto’s plea did not “do anything to show [Defendant’s] knowledge.” Defense counsel’s discussion of the plea in his opening statement came in response to the State’s use of the plea in its opening statement, and defense counsel’s comments were confined to Veretto’s credibility—they did not comment or otherwise open the door to the State’s substantive use of Veretto’s plea. See, e.g., *Paterson*, 780 F.2d at 885-86 (noting that where defense counsel did not invite the error and where defense counsel’s objection to the error was overruled, his subsequent failure to object to the admitted evidence may have been the result of tactical considerations). Moreover, any use that defense counsel tried to make of the improper guilty plea evidence during Veretto’s cross-examination after the district court admitted the evidence over his objection does not waive his claim on appeal. See, e.g., *State v. Zamarripa*, 2009-NMSC-001, ¶ 50, 145 N.M. 402, 199 P.3d 846 (“There is no waiver where a defense attorney, his or her original objection rejected by the court, determines to ‘make the best of a bad situation’ and argues the improperly admitted evidence in the client’s favor.”).

{20} The State next argues that, because the district court decided that Veretto’s guilty plea testimony was more probative than prejudicial under Rule 11-403 NMRA, Rule 11-105 NMRA forecloses Defendant’s claim that Veretto’s guilty plea should not have been used because defense

counsel did not request a limiting instruction. We disagree. Rule 11-105 states, in pertinent part, “If the court admits evidence that is admissible . . . for a purpose—but not . . . [admissible] for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.” Under these circumstances, a defendant’s failure to request a limiting instruction “waive[s] any right to complain of the trial court’s alleged error[,]” except in extreme circumstances under the fundamental and plain error doctrines. *DeMatteo v. Simon*, 1991-NMCA-027, ¶ 3, 112 N.M. 112, 812 P.2d 361; see also *State v. Allen*, 2000-NMSC-002, ¶ 51, 128 N.M. 482, 994 P.2d 728 (reviewing for fundamental and plain error the admission of evidence that had both an admissible and an inadmissible purpose, where the defendant failed to ask for a limiting instruction). Rule 11-105 does not apply in this case because Veretto’s guilty plea evidence was not admitted for an admissible purpose. As demonstrated above, the State’s sole purpose for including this evidence was for the inadmissible purpose of using it as substantive proof for the knowledge element of the crimes that Defendant was accused of committing.

{21} Finally, the State contends that the rule against admitting a codefendant’s guilty plea into evidence does not apply where a defendant is able to confront the codefendant at trial and the evidence served a non-hearsay purpose. We are not persuaded. The authorities cited by the State in support of this contention were limited to evidentiary rules against hearsay and a defendant’s constitutional rights under the Confrontation Clause. Here, admission of Veretto’s guilty plea evidence for the sole purpose of using it as substantive proof against Defendant

implicated her constitutional rights to due process and a fair trial. None recognize an exception to the rule against the substantive use of guilty plea evidence nor have we found a case that does so. See *Torres-Colon*, 790 F.3d at 31; *Woods*, 764 F.3d at 1246 n.1.

#### **Possession of Burglary Tools**

{22} The reversal of Defendant’s conviction for receiving a stolen vehicle necessarily requires that her conviction for possession of burglary tools be reversed as well. The instructions given to the jury for possession of burglary tools required the State to prove beyond a reasonable doubt, among other elements, that Defendant intended to use the automobile computer “for the purpose of committing burglary[.]” Whether Defendant intended to use this computer for the purpose of burglarizing the stolen vehicle depended on whether she knew that the vehicle was stolen. Because the district court improperly admitted Veretto’s guilty plea evidence as substantive proof of Defendant’s knowledge that the vehicle was stolen, there is a reasonable possibility that the improper evidence might have also contributed to the conviction for possession of burglary tools and that this conviction was similarly “tainted by the constitutional error.” *Gutierrez*, 2007-NMSC-033, ¶ 18 (internal quotation marks and citation omitted).

#### **CONCLUSION**

{23} We reverse Defendant’s convictions for receiving a stolen vehicle and possession of burglary tools and remand this case for a new trial.

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

**LINDA M. VANZI, Chief Judge**

**WE CONCUR:**

**M. MONICA ZAMORA, Judge**

**JULIE J. VARGAS, Judge**

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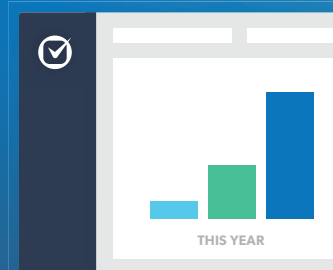
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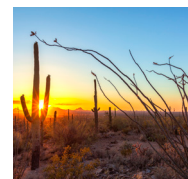
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### **Keller & Keller**

### **Pre-Litigation Attorney**

Keller & Keller is an award winning personal injury law firm located in Albuquerque. Seeking an attorney with 2+ years of experience to join our pre-litigation team. We are proud to offer an attractive compensation and benefits package, including a salary commensurate with experience, medical insurance, 401(k) retirement plan and paid time off. The Pre-Litigation Attorney will work directly with the Managing Attorney and 10-15 Pre-Litigation Case Managers on a daily basis. Responsibilities include: daily client contact; writing and editing demand letters; insurance coverage analysis for auto insurance policies; obtaining settlement authority; negotiating subrogation and lien reductions; handling minors' settlement approval actions; and, handling wrongful death estate actions. We are looking for a person with critical thinking skills and the ability to apply those skills in a fast-paced environment. Excellent interpersonal communication skills with clients and coworkers is a must. Prior management experience is a plus, but is not required. Additionally, the candidate must be able to apply their knowledge and skills to make decisions and take action on cases. Interested candidates should forward cover letter and resume to Zachary Farmer at [zfarmer@2keller.com](mailto:zfarmer@2keller.com). No phone calls, please. All inquiries will be confidential.

### **Personal Injury Law Attorneys**

Franklin D. Azar & Associates, P.C., a large and growing Colorado personal injury law firm, is seeking experienced Personal Injury Law attorneys to join its practice in Colorado. Qualified candidate will be able to demonstrate strong dedication to personal injury law and a passion for helping people; will possess strong organizational and writing skills; is energetic, hard-working, and a team-player. Complex litigation experience is preferred. Please submit your resume and cover letter to [malcolmo@fdazar.com](mailto:malcolmo@fdazar.com)



### Assistant City Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney to provide legal services to the City's Department of Municipal Development ("DMD"). The primary area of focus is construction law. The work includes, but is not limited to: contract drafting, analysis, and negotiations; regulatory law; procurement; general commercial transaction issues; intergovernmental agreements; dispute resolution; and civil litigation. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred and must be an active member of the State Bar of New Mexico, in good standing. Please submit resume and writing sample to attention of "Legal Department DMD Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or [amaragon@cabq.gov](mailto:amaragon@cabq.gov).

### Family Law Associate Attorney

The Law Office of Jill V. Johnson Vigil LLC., a Las Cruces based family law practice, is seeking to add an attorney to our team. Preferably applicants should have 2-3 years experience in family law. All applicants should be highly motivated, able to multi-task and manage a full caseload. The Law Office of Jill V. Johnson Vigil LLC. offers a comfortable and friendly work environment with benefits and competitive salary commensurate with your qualifications and experience. Applicants must be in good standing with NM Bar and willing to relocate to Las Cruces. Spanish speaking is preferred, but not required. If you are ready for the next step in your career, please send your cover letter, resume, writing sample, and three references via email to [careers@jvjlw.com](mailto:careers@jvjlw.com) before January 31, 2019. Please visit us online at [www.jvjlw.com](http://www.jvjlw.com).

### Full-time & Part-time Attorney

The offices of Lightning Legal Group, PC are seeking one full-time and one part-time attorney to represent clients at our Albuquerque and Santa Fe Offices. Candidates must be licensed in New Mexico and have 4 or more years' experience with Family Law and Civil Litigation. Additionally, ideal applicants will have the following skills: Strong client communication, organizational, problem solving, writing, research, computer and litigation experience; Ability to work in a vibrant growth orientated firm; Understand and integrate with the business protocols of a law firm; Ability to contemporaneously enter time in computer time-keeping system; Ability to work in a very laid-back atmosphere while maintaining the highest professional standards; Bilingual (Spanish & English) is valuable but not necessary. We are an equal opportunity employer and do not tolerate discrimination against anyone. All replies will be maintained as confidential. Please email references and resumes to [xc87505@gmail.com](mailto:xc87505@gmail.com).

### Attorney

Houser & Allison, APC, a Litigation Law Firm is looking to expand its New Mexico office. We are looking for attorneys with 3-6 years' experience in the New Mexico area, including financial practice experience. The ideal candidate must have strong writing, research and communication skills. The candidate must be a self-starter and able to work independently. Please send Resume to: [sclere@houser-law.com](mailto:sclere@houser-law.com)

### Oil & Gas Attorney

Established, and growing, Albuquerque boutique oil and gas law firm seeks a dedicated and hard-working attorney with 3 to 8 years' experience in oil and gas transactional, title, litigation and/or administrative practice work to join our talented, dedicated and congenial team. Please submit a letter of interest and resume to [nmoilgaslaw@cilawnm.com](mailto:nmoilgaslaw@cilawnm.com).

### Helpline Staff Attorney

The New Mexico State Bar Foundation seeks a helpline staff attorney for the Legal Resources for the Elderly Program (LREP). This position is for 30 hours/week and includes an excellent benefits package. Duties include providing legal information, legal advice and brief services related to civil matters to low-income New Mexican Seniors in accordance with the helpline policies and procedures. Additionally, the staff attorney will conduct legal workshops and clinics throughout NM (travel and overnight stays are required). The successful applicant must be able to work as part of a busy team in a fast-paced environment. Excellent customer service and computer skills are required. Bilingual in Spanish is a plus. Salary dependent on experience. Please email letter of interest and resume to [hr@nmbar.org](mailto:hr@nmbar.org), EOE.

### Attorney Supervisor

The Third Judicial District Court in Las Cruces is accepting applications for an At-Will, full-time Attorney Supervisor. Requirements include admission to the NM State Bar plus a minimum of five years experience in the practice of applicable law, of which two years must have been as a supervisor. Under administrative direction, as assigned by a judge or supervising attorney, review cases, analyze legal issues, perform legal research and writing, provide legal advice and make recommendations concerning the work of the Court. For a detailed job description, requirements and application/resume procedure please refer to <https://www.nmcourts.gov/careers.aspx> or contact Briggett Becerra, HR Administrator Senior at 575-528-8310. Deadline for submission is: December 21, 2018.

### Experienced Litigation Attorney

Do the words gritty, passionate, gets it done, or innovative describe you? Do you want to be a part of a team dedicated to excellent results? We strategically attack challenges and win! Machol & Johannes, LLC, is a World Class law firm operating in Colorado and 7 other states. We offer representation and customer service in the Collection and Creditor rights arenas. We are seeking an experienced Litigation Attorney licensed in NM who is interested in being part of a team with: leadership that truly listens; inspiration that brings out your best; culture that values you. Please contact Lorena.Wiant@mjfirm or visit us at [www.mjfirm.com](http://www.mjfirm.com) for more information or to submit a resume. We are looking forward to hearing from you!

### Second Judicial District Court

#### Contract Attorney

#### Residential Mortgage Foreclosure Settlement Facilitation Project

The Second Judicial District Court is accepting applications for Contract Attorneys for the Residential Mortgage Foreclosure Settlement Facilitation Project ("RMFSF"). RMFSF will operate under the direction of the Chief Judge and the Presiding Civil Judge. Attorney will conduct settlement facilitation conferences in residential foreclosures pending before the court between lenders and borrowers. Attorney is independent and impartial and shall be governed by the Rules of Professional Conduct, Mediation Procedures Act, NMSA 1978, § 44-7B-1 to 44-7B-6, and Mediation Ethics and Standards of Practice. Attorney will be responsible for memorializing settlement agreements and meeting with the designated supervising judge to receive case assignments and discuss RMFSF progress. Attorney agrees to twenty hours of work per week, which is anticipated to be a minimum of eleven settlement conferences per month, subject to adjustment for complex case assignments, maintain records for payment and reporting and statistical purposes as defined by the Court. Attorney will coordinate with assigned Court staff who provide administrative support to RMFSF. Qualifications: Must be a graduate of an ABA accredited law school; possess and maintain a license to practice law in the State of New Mexico; must have experience in settlement facilitation. Experience with residential mortgage foreclosure matters and loss mitigation is a plus. Compensation will be at a rate of \$50.00 per hour, inclusive of gross receipts tax. Send letter of interest, resume, proof of education and writing sample to the Second Judicial District Court, Court Administration, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Letters of interest without required material will be rejected. Letters must be received by court administration no later than 5:00 P.M. Friday, January 11, 2019. More information about the contract can be found on the SJDC's website: <http://www/2nddistrictcourtnm.com>.

## Chief Deputy District Attorney and Deputy District Attorney

Immediate opening for a Chief Deputy District Attorney and a Deputy District Attorney with the Sixth Judicial District Attorney's Office. Salary depends on experience, w/ benefits. Please send resume to Francesca Estevez, District Attorney, FMartinez-Estevez@da.state.nm.us Or call 575-388-1941.

## Associate Attorney

Dixon•Scholl•Carrillo•P.A is seeking an associate attorney with 3 or more years of experience to join them in their thriving civil litigation practice. We seek a candidate with excellent writing and oral advocacy skills and a strong academic background who is ready to be part of a hard-working team in a fun and friendly office. For consideration, please email a resume to lcarrillo@dsc-law.com or via U.S. mail to Lisa J. Carrillo, P.O. Box 94147, Albuquerque, New Mexico 87199-4147.

## Law Clerk At-Will

The NM Supreme Court is recruiting for a full-time, Law Clerk At-Will position in Santa Fe, New Mexico. SUMMARY OF POSITION: Under general supervision, work with justices on assigned cases, perform legal research, analysis, writing and editing. Salary: \$45,500-\$71,095. To apply, please go to: <https://www.nmcourts.gov/jobs.aspx>

## Divorce Paralegal – Incredible Opportunity w/ New Mexico Legal Group

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

## Paralegal

Litigation firm seeks experienced civil litigation legal assistant/paralegal with 3-5 years' experience. Strong Computer skills required including knowledge of Word, Excel, Outlook and Prolaw, E-filing, Tables, Abacus, Legal Solutions. Must be a self-starter with a willingness to work as a team player. Attendance, punctuality, attention to detail and organizational skills are a must. Excellent compensation and benefits. Please include salary requirements when applying. Experience with financial practice and foreclosure law is a plus. Please send Resume to: [sclere@houser-law.com](mailto:sclere@houser-law.com)

## Office Space

### Walking Distance to the Albuquerque Courthouses

Office space with parking and walking distance to the Albuquerque Courthouses available. Single offices or up to 3 offices available. Space includes access to 2 conference rooms, gated parking, a breakroom, shared receptionist and utilities. Please contact Antonia Roybal-Mack for more information at (505) 288-3500 or [Antonia@roybalmacklaw.com](mailto:Antonia@roybalmacklaw.com)

### Shared Uptown Office Space for Rent

Newly renovated executive offices for rent in shared professional office in Uptown area. Support staff work stations available if needed. Furnished options exist. Includes use of 3 conference rooms, reception services to greet guests and accept documents, copier, fax machine, kitchen/break room, utilities, janitorial services, exterior signage, and alarm service. Convenient access to I-40. Plenty of free parking. Starting from \$850/mo. Call Bryan at (505) 268-7000.

## Office Space—Santa Fe

Beautiful downtown office at 200 West De Vargas Street (located next to First Judicial Court Building). The property has its own private parking lot. Unit has brick floors, a kiva fireplace, vigas and plenty of natural light. 930 square feet. Contact Ryan Romero @ (505) 660-3274.

## 503 Slate NW

503 Slate NW, Affordable, two huge offices for rent, with secretarial area, located within one block of the courthouses. Rent includes parking, utilities, phones, fax, wireless internet, janitorial services. Both offices have large windows and natural lighting with views of the garden and access to a beautiful large conference room. Call 261-7226 for appointment.

## 500 Tijeras NW

One beautiful spacious downtown office available with reserved on-site tenant and client parking. Walking distance to court-houses. Two conference rooms, security, kitchen, gated patios and a receptionist to greet and take calls. Please email [estefany500tijerasllc@gmail.com](mailto:estefany500tijerasllc@gmail.com) or call 505-842-1905.

## Miscellaneous

### Want To Purchase

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

### Seeking Established Practice To Purchase

Las Cruces general civil practice focusing on real estate, business and family law seeks an established practice to purchase, take over from an attorney retiring or focusing on other areas. Please email: [lcmlaw@gmail.com](mailto:lcmlaw@gmail.com) with inquiries.

Official Publication of the State Bar of New Mexico

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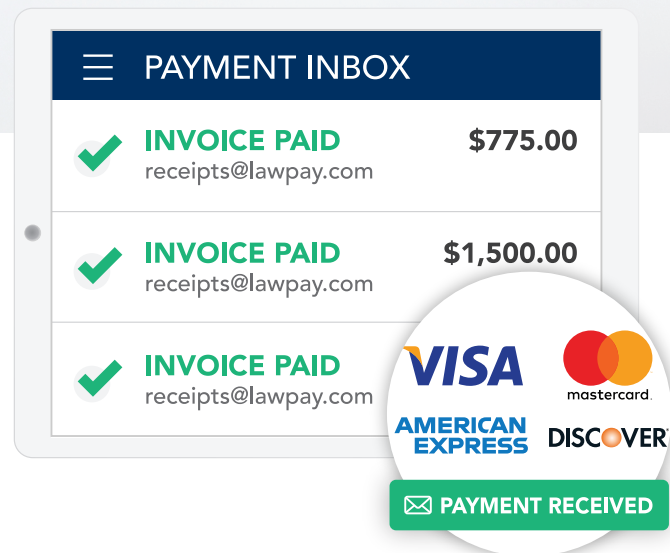
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