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Bar Bulletin

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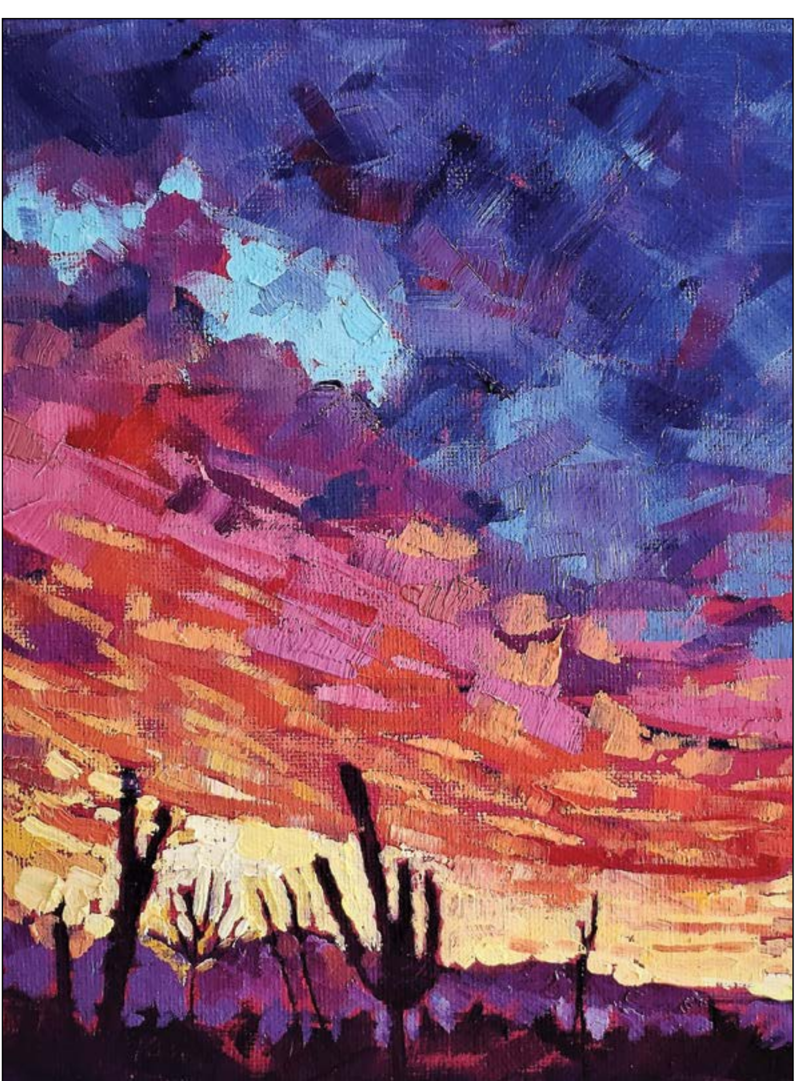

New Mexico Sky, by Bhavna Misra (see page 5) www.bhavnamisra.com

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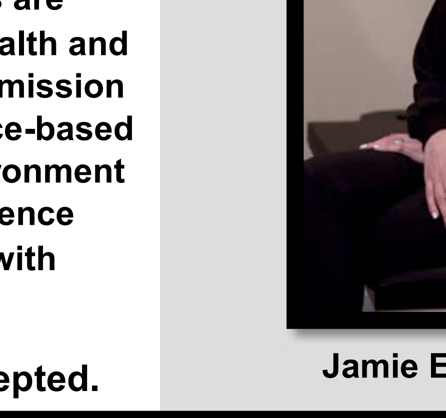

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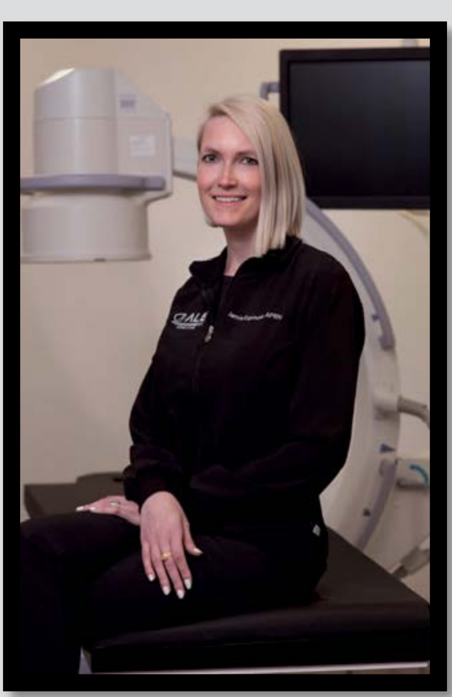

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Tina Muscarella Gooch represents clients in civil and complex commercial litigation, including employment, easement disputes, construction, cannabis, and constitutional law. In addition to handling general civil litigation matters in State and Federal Court, Tina also heads the Firm's cannabis practice group. In this capacity, she represents licensed medical cannabis growers, producers, and patients. She also works with vertically integrated cannabis entities and those hoping to become licensed under the new allowable cannabis licenses. She serves on the Board of the Cannabis Law Section of the State Bar of New Mexico and is a frequent presenter on cannabis and law issues.

Deborah E. Mann, chair of Sutin's health law group, has for more than 26 years represented New Mexico's health care providers on regulatory issues such as HIPAA, state and federal fraud and abuse laws, and laws prohibiting self-referrals, including Stark, the Anti-Kickback Statute, and the Eliminating Kickbacks in Recovery Act of 2018. She prepares and reviews contracts, leases, employment agreements, and professional service agreements and uses her experience in medical malpractice defense to provide advice regarding risk management. Deb also drafts legislation for progress in health law and testifies as an expert before legislative committees. *Best Lawyers* named her 2021 Albuquerque Health Care Lawyer of the Year.

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Moving On

Alan C. Torgerson

After more then 50 years in the legal profession I have decided to take the next step in my retirement. I will no longer be accepting new mediation cases after 2/22/22. Mediations already scheduled or in new cases will proceed as scheduled whether before or after 2/22/22. I will continue to serve as Special Master in the McClendon case and the Gold King Mine Release case. I will also continue to serve as a hearing officer for the Disciplinary Board and the New Mexico State Ethics Commission.

I have been blessed to have worked with many outstanding individuals throughout my career. I would like to take this occasion to thank all of the judges, lawyers, law clerks and staff that I have had the opportunity to work with over the years. Your contribution to my growth as an attorney and a person has been much appreciated. I would also like to give a shout out to all the attorneys I worked with as counsel for co-defendants and all the plaintiffs attorneys who I had the privilege of doing battle with over the years. Your advocacy, friendship and professionalism helped make me a better lawyer and a better judge. If you would like to share a memory or a story, I can always be reached at **alanctorgerson@yahoo.com**.

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Meetings

January

26
Intellectual Property Law Section
noon, J. Albright Law LLC

27
Elder Law Section
noon, virtual

27
Trial Practice Section
noon, virtual

28
Immigration Law Section
noon, virtual

February

1
Health Law Section
9 a.m., virtual

2
Employment and Labor Law Section
noon, virtual

3
Business Law Section
noon, virtual

4
Elder Law Section
noon, virtual

Workshops and Legal Clinics

January

27
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

February

3
Divorce Options Workshops
6-8 p.m., virtual

24
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

March

3
Divorce Options Workshops
6-8 p.m., virtual

24
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

April

7
Divorce Options Workshops
6-8 p.m., virtual

24
Consumer Debt/Bankruptcy Workshop
6-8 p.m., virtual

About Cover Image and Artist: Bhavna is an artist and tech enthusiast working out of her San Francisco Bay Area based studio. She makes meaningful art represented in portraits, wildlife, nature, and everything else. She specializes in creating custom artwork suitable for home and office. Oil has been her choice of medium for most of the recent works but she also uses pastels, acrylic and digital media. For more information, visit www.bhavnamisra.com.

Notices

Court News

New Mexico Supreme Court

Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at https://supremecourt.nmcourts.gov/. To view all New Mexico Rules Annotated, visit New Mexico OneSource at https://nmonesource.com/nmos/en/nav.do.

Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building hours: Monday-Friday 8 a.m.-5 p.m. Library Hours: Monday-Friday 8 a.m.-noon and 1-5 p.m. For more information call: 505-827-4850, email: libref@nmcourts.gov or visit https://lawlibrary.nmcourts.gov.

Third Judicial District Court

Announcement of Applicants

Three applications were received in the Judicial Selection Office as of Jan. 3 to fill the vacancy in the Third Judicial District Court which exists as of Jan. 1, due to the retirement of Hon. Marci Beyer effective Dec. 31, 2021. The Third Judicial District Court Judicial Nominating Commission convened on Jan. 19 to interview applicants for the position. The names of the applicants in alphabetical order are: **Robert Lara**, **Jeanne H. Quintero** and **Ramona J. Martinez-Salopek**. The Commission meeting was open to the public.

Bernalillo County Metropolitan Court

Reassignment of Cases

Effective Jan. 18, Judge Joshua J. Sánchez, Division IV, transfered from the Metropolitan Court Felony Division and to the misdemeanor criminal cases previously assigned to recently-retired Judge Henry A. Alaniz, Division XVII. Division XVII will be assigned felony cases previously assigned to Judge Sánchez, Division IV.

U.S. District Court, District of New Mexico

Public Notices Concerning Reappointments

The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of each magistrate judge to a new term (8-year terms for full-time and 4-year terms for part-time magistrate judges). The duties of a magistrate judge in this court include the following: (1) conducting most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conducting various pretrial matters and evidentiary proceedings on delegation from a district judge, and (4) trial and disposition of civil cases upon consent of the litigants. Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court. Comments may be submitted by email to MJMSP@nmcourt.fed.us. Questions or issues may be directed to Monique Apodaca, 575-528-1439. Comments must be received by Feb. 8.

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of full-time U.S. Magistrate Judge Carmen E. Garza is due to expire on Aug. 22.

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of Full-Time U.S. Magistrate Judge Kirtan Khalsa is due to expire on Sep. 7.

Reappointment of Incumbent U.S. Magistrate Judge

The current term of office of Part-Time U.S. Magistrate Judge Barbara Smith Evans is due to expire on Sep. 10.

New Mexico Secretary of State

Important Information For Notary Publics and Notarial Officers

In 2021, the State of New Mexico enacted the Revised Uniform Law on Notarial Acts, aka RULONA (Sections 14-14-A1 to 14-14A-32 NMSA 1978) which is effective Jan. 1, 2022. This change in law impacts every current and future commissioned notary public. RULONA makes a distinction between a notary public and a notarial officer. A notarial officer is not commissioned to perform a notarial act, but is authorized to perform a notarial act by certain authority, including individuals who are authorized to practice law in New Mexico, a New Mexico Judge, or New Mexico county clerk or deputy county clerk. A notarial officer authorized to practice law in New Mexico is authorized to practice notarial acts with no expiration but shall maintain an active license to practice law. The commission expiration date is December 31, 2021, for a notarial officer authorized to practice law in this state who was commissioned under the previous Uniform Law on Notarial Acts. All notarial officers will be required to get new official stamps to meet new legal requirements, keep a mandatory journal of notarial acts, and pass a training examination before being recommissioned. The new law also provides for notarial officers to apply with the Secretary of State to become authorized to perform remote online notarizations. Notarial officers are required to have an official stamp that follows statutory requirements that is on file with the Secretary of State before the notarial officer performs a notarial act. RULONA also provides that a judge of a court of this state, a court clerk or deputy court clerk of this state while performing a notarial act within the scope of the clerk's duties, and an individual licensed to practices law in this state are "notarial officers" and may perform notarial acts without applying to become a commissioned notary public. The Secretary of State's Office has additional information about the changes and new requirements on their website that all current or prospective notaries should review. That information can be found by going to www.sos.state.nm.us/ or by calling the Secretary of State's Office Business Services Division at 505-827-3600.

> ***Professionalism Tip***
>
> **With respect to my clients:**
>
> I will counsel my client that initiating or engaging in settlement discussions is consistent with zealous and effective representation.

State Bar News

License Renewal and MCLE Compliance–Due Feb. 1

State Bar of New Mexico licensing certifications and fees and Minimum Continuing Legal Education requirements are due Feb. 1, 2022. The Supreme Court of New Mexico recently revised the rules relating to attorney licensing and MCLE (see NMSC Order No. 21-8300-030). For more information, visit www.sbnm.org/compliance

To complete your licensing certifications and fees and verify your MCLE com-

pliance, visit www.sbnm.org and click "My Dashboard" in the top right corner. If you have not logged into our website recently, you will need to choose "Forgot Password." For questions about licensing and MCLE compliance, email mcle@sbnm.org or call 505-797-6054. For technical assistance accessing your account, email techsupport@sbnm.org or call 505-797-6018.

Access to Justice Fund Grant Commission

Two Vacancies Exist

The New Mexico Supreme Court will make two appointments for three-year terms to the State Bar of New Mexico ATJ Fund Grant Commission. The ATJ Fund Grant Commission solicits and reviews grant applications and awards grants to civil legal services organizations consistent with the State Plan for the Provision of Civil Legal Services to Low Income New Mexicans. To be eligible for appointment, applicants must not be affiliated with a civil legal service organization which would be eligible for grant funding from the ATJ Fund. Anyone interested in serving on the Commission should send a letter of interest and brief résumé by Feb. 1, to Stormy Ralstin at sralstin@sbnm.org.

Board of Bar Commissioners

Meeting Summary

The Board of Bar Commissioners of the State Bar of New Mexico met on Dec. 8, 2021. Action taken at the meeting follows:

- Approved the Oct. 7, 2021 meeting minutes;
- Adopted amendments to the State Bar Bylaws which were presented at the October meeting; and approved a recommendation of the Policy and Bylaws Committee and Special Committee on Sections to suspend lobbying by sections;
- Received information on the new rules regarding licensing and MCLE compliance outlined in NMSC Order No. 21-8300-30; amendments were made to the rules to streamline the deadlines and fee structure;
- Reviewed the internal committees of the board and combined a couple of the committees;
- Appointed Catherine Cameron and Simone M. Seiler for the Seventh and Thirteenth Judicial Districts by secret ballot to one-year terms; appointed Joseph F. Sawyer by acclamation to a one-year term; an election for the positions will be held with the next regular election of the Board in November;
- Appointed Mitchell Mender, Allison Block-Chavez and Liz Travis to the NM State Bar Foundation Board as the BBC Directors for three-year terms and reappointed Judge Carl Butkus as the non-BBC Director for a three-year term;
- Appointed Mick I. R. Gutierrez to the Client Protection Fund Commission for a three-year term;
- Reappointed David V. Jones and Twila B. Larkin to the Legal Specialization Commission for three-year terms;
- Discussed the BBC liaison appointments to the Supreme Court Boards and Committees, which will be finalized prior to the end of the year, and the Supreme Court will notify the chairs of the appointments;
- Approved a donation of $1,000 for the Teen Court of Lea County, Inc.;
- Held an executive session to discuss a personnel matter;
- Received a report on the Executive Committee, which met to review the agenda for the meeting, discuss internal committees of the Board, and discuss personal injury firms;
- Received a report on the Finance Committee, which included: 1) review and acceptance of the October 2021 financials; 2) received the 2022 Budget Disclosure and reported that no challenges were received to the Budget; 3) updated signers on the State Bar bank accounts; 4) approved a reimbursement from the State Bar to the Bar Foundation for the free CLE provided to members; 5) received a report on the 2022 licensing renewal; and 6) reviewed the Client Protection Fund, Access to Justice and Judges and Lawyers Assistance Program Third Quarter 2021 financials (for the Board's information only);
- Received a report on the Special Committee on Sections, which referred the section carryover policy to the Policy and Bylaws Committee to draft an amendment;
- Received a written report on the Special Committee on Diversity and Gender Recommendations; the State Bar's Equity in Justice Manager is the liaison between and will assist the two committees with the recommendations;
- Received a report on the Membership Survey Committee which will be sending a survey out to the membership next year;
- Received an update on the Public Law Section;
- Received an update on the Legal Specialization Commission;
- Received a report from the President-Elect, which included the following: the 2022 Board meeting dates as follows: Feb. 25, May 20-21 (Las Cruces, in conjunction with a board retreat and member district event), Aug. 11 (Tamaya, in conjunction with the Annual Meeting), Oct. 21, and Dec. 7 (Supreme Court); and update on the 2022 Annual Meeting;
- Received an update on the New Mexico State Bar Foundation;
- Received reports from the State Bar representatives, including the Senior Lawyers Division, Young Lawyers Division, Paralegal Division, commissioners districts, as well as the ABA House of Delegates representative; and
- Presented plaques to commissioners whose terms expire the end of the year, including: Ernestina R. Cruz, Judge Kevin Fitzwater, Constance Tatham, Elias Barela, Michael Eshleman, Jesus

— *Featured* —

Member Benefit

Defined Fitness offers State Bar members, their employees and immediate family members a discounted rate. Memberships include access to all five club locations, group fitness classes and free supervised child care. All locations offer aquatics complex, state-of-the-art equipment, and personal training services. Bring proof of State Bar membership to any Defined Fitness location to sign up. For more information, contact the corporate relations manager at 505-349-4444. www.definded.com

Lopez, Shasta Inman (YLD Chair), and Angela Minefee (Paralegal Liaison).

Note: The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Feb. 25 meeting.

New Mexico Judges and Lawyers Assistance Program

Defenders in Recovery

Defenders in Recovery meets every Wednesday night at 5:30 p.m. The first Wednesday of the month is an AA meeting and discussion. The second is an NA meeting and discussion. The third is a book study, including the AA Big Book, additional AA and NA literature including the Blue Book, Living Clean, 12x12 and more. The fourth Wednesday features a recovery speaker and monthly birthday celebration. These meetings are open to all who seek recovery. We are a group of defenders supporting each other, sharing in each other's recovery. We are an anonymous group and not affiliated with any agency or business. Anonymity is the foundation of all of our traditions. Who we see in this meeting, what we say in this meeting, stays in this meeting. For the meeting link, send an email to defendersinrecovey@gmail.com or call Jen at 575-288-7958.

Employee Assistance Program

NMJLAP contracts with The Solutions Group, The State Bar's EAP service, to bring you the following: FOUR FREE counseling sessions per issue, per year. This EAP service is designed to support you and your direct family members by offering free, confidential counseling services. Check out the MyStress Tools which is an online suite of stress management and resilience-building resources. Visit www.sbnm.org/EAP or call 866-254-3555. All resources are available to members, their families, and their staff. Every call is completely confidential and free.

Free Well-Being Webinars

The State Bar of New Mexico contracts with The Solutions Group to provide a free employee assistance program to members, their staff, and their families. Contact the solutions group for resources, education and free counseling. Each month in 2022, The Solutions Group will unveil a new webinar on a different topic. In January, focus on getting into the right frame of mind for the new year. Starting Jan. 18, check out "Reframing Your Way Through 2022" which teaches practical steps to use positive reframing strategies and guide your way through 2022. February's topic is honoring grief and loss. Starting Feb. 17, watch "Navigating Through Grief and Loss," covering ways to say goodbye as well as navigating the five stages of grief in a healthy way. View all webinars at www.solutionsbiz.com or call 866-254-3555.

Monday Night Attorney Support Group

The Monday Night Attorney Support Group meets at 5:30 p.m. on Mondays by Zoom. This group will be meeting every Monday night via Zoom. The intention of this support group is the sharing of anything you are feeling, trying to manage or struggling with. It is intended as a way to connect with colleagues, to know you are not in this alone and feel a sense of belonging. We laugh, we cry, we BE together. Email Pam Moore at pmoore@sbnm.org or Briggs Cheney at bcheney@dsc-law.com for the Zoom link.

NMJLAP Committee Meetings

The NMJLAP Committee will meet at 10 a.m. on April 2 and July 9. The NMJLAP Committee was originally developed to assist lawyers who experienced addiction and substance abuse problems that interfered with their personal lives or their ability to serve professionally in the legal field. The NMJLAP Committee has expanded their scope to include issues of depression, anxiety and other mental and emotional disorders for members of the legal community. This committee continues to be of service to the New Mexico Judges and Lawyers Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

UNM School of Law

Law Library Hours

Due to COVID-19, UNM School of Law is currently closed to the general public. The building remains open to students, faculty and staff, and limited in-person classes are in session. All other classes are being taught remotely. The law library is functioning under limited operations, and the facility is closed to the general public until further notice. Reference services are available remotely Monday through Friday, from 9 a.m.-6 p.m. via email at UNMLawLibref@gmail.com or voicemail at 505-277-0935. The Law Library's document delivery policy requires specific citation or document titles. Please visit our Library Guide outlining our Limited Operation Policies at: https://libguides.law.unm.edu/limitedops.

Women's Law Caucus

Nominations For The Annual Justice Mary Walters Award

The Women's Law Caucus organizes and hosts the annual Justice Mary Walters Award and Dinner. This award honors the pioneering spirit and legacy of Justice Mary Walters, the first female Justice of the New Mexico Supreme Court, by recognizing two women who represent Justice Walter's constant courage, strong ethics, leadership, and mentorship in the legal field. The Women's Law Caucus invites nominations. Submit the name of the nominee, a small blurb about why they should win the award, and a suggestion for who would introduce them if they win. Send nominations to johnstone@law.unm.edu by Feb. 28. The Justice Mary Walters Dinner and Award will be held on the evening of April 8.

Other News

Gene Franchini N.M. High School Mock Trial Competition

Judges Needed

The Gene Franchini New Mexico High School Mock Trial Competition needs judges. The qualifier competitions will be held Feb. 18–19 in Albuquerque and Las Cruces at the Bernalillo County Metropolitan Court in Albuquerque and the Third Judicial District Court in Las Cruces. Mock trial is an innovative, hands-on experience in the law for high school students of all ages and abilities. Every year hundreds of New Mexico teenagers and their teacher advisors and attorney coaches spend the better part of the school year researching, studying and preparing a hypothetical courtroom trial involving issues that are important and interesting to young people. Sign up at registration.civicvalues.org/mock-trial/registration/judge-volunteer-registration/ by Feb. 4. For more information, contact Kristen Leeds at the Center for Civic Values at 505-764-9417 or Kristen@civicvalues.org.

“What’s Next”
The New Mexico Well-Being Committee’s 2022 CAMPAIGN

From its inception in 2020, the New Mexico Well-Being Committee has maintained that it’s time for a culture change in the legal community; one that supports, encourages, and provides resources for its members’ well-being. But it’s not a one-size-fits-all; not at the individual lawyer level, nor at the community level. Indeed, there are many different sub-communities within the larger legal community, each with its own needs and perspectives on well-being. Thus, the Committee is pleased to announce its “What a Healthy Legal Community Looks Like” campaign. Starting next month, February, 2022, the Committee will air monthly podcasts and publish related articles featuring different “communities” within the larger legal community.

What “communities” are we talking about? At a minimum, solos and small firm practitioners, large firms, public defenders, district attorneys and other prosecutors, in-house counsel, lawyers for state agencies, judges, lawyers who are new to practice, lawyers who have practiced for decades, law students, paralegals and legal assistants. Undoubtedly there are others not listed here but from whom the Committee wants to hear. The plan is to showcase what each community is doing to create and promote well-being for its constituent members, and discover what additional resources and services might be pursued in the future.

We will be tapping into state and national legal community well-being sources in an effort to highlight the movers and shakers in this space. These are the firms, organizations, agencies and individuals that are changing the historical landscape of how the legal community performs or works. To be blunt, these are the legal communities that are choosing to pay attention to and take action to put in place guidelines, rules, policies, and recommendations that lead to a healthier work environment. Some of those actions might be mandatory regular vacation, reducing yearly billable hour limit, inviting families to company events, onsite physical exercise area, onsite therapist/counselor, encouraging away-from-desk lunch breaks, PM time limit on checking/responding to e-mails/texts, daily guided meditation resource, contact information for mental and behavioral health services/resources, a top-down regular conversation on the importance of taking care of oneself, and, most importantly….. leaders role modeling the behavior.

Yes, this is a tall order that will require us to redefine what it means to be a healthy, vibrant legal community. It will require that we make fundamental changes in the way we think about practicing law, in the way we actually practice law and in the way we prioritize our own well-being and the well-being of others while practicing. And it will require purposeful hard work. On the surface, it might appear easier to just leave things well enough alone; after all, haven’t we been doing things the same way for decades? Yes, and perhaps that is why 36% of lawyers qualify as problem drinkers[1], 28% report mild or higher depression symptoms, 23% report mild or higher stress symptoms, 19% report mild or higher anxiety symptoms and lawyers are ranked #8 in a top ten study of suicide by occupation. Turns out that “doing things the way we always have” results in a high probability that lawyering might be hazardous to your health. Again, it is time for a culture change.

As we embark on this overdue legal well-being culture change wave, we want to hear from you. What actions does your firm, organization, agency….basically, your work environment, currently have in place to take care of your mental, emotional and physical health? What improvements could be made? Maybe you feel your

work environment is a model for other state and national legal communities? Does your work organization/ firm have an identified Health and Wellness Director/ Leader? Does your work environment need one? In your legal community (i.e. SSF, law school, law firm, AG, DA, LOPD, etc.), do you know what other like state communities are doing to support their work force in the well-being area? Should you find out?

You know what is next….yes, we want to hear from you regarding these questions. Whether you are a five-star role model or "we have nothing in place, but are willing to learn", we want to hear from you. It is through connection and the sharing of information that we can and will be a healthier New Mexico legal community. It takes a few to start the conversation, but it takes a majority to force a shift, break down barriers, de-stigmatize, and cause change that is for the good of the whole. Would you like to write an article about your work environment? Would you like to have a discussion in a podcast? Please email us at well@sbnm.org.

As always, if you want more information, please visit www.sbnm.org/wellbeing. If you want to get involved or have questions, email us at well@sbnm.org. Regardless, we hope that each of you will join us in a commitment to well-being individually and as a community.

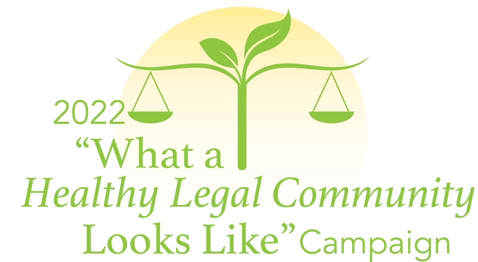
Authors:

WILLIAM D. SLEASE *("Bill") is the Professional Development Program Director for the State Bar of New Mexico. In addition to his duties at the State Bar, he serves as an adjunct professor at the University of New Mexico School of Law where he teaches 1L Lab, Ethics, and serves as a practice skills evaluator for the evidence-trial practice skills course. He formerly served as the Chief Disciplinary Counsel for the New Mexico Supreme Court Disciplinary Board. Prior to his work in the public service sector, he was in private practice with an emphasis in civil rights, employment and tort litigation.*

PAMELA MOORE, MA, LPCC, *the Program Director of the State Bar of New Mexico's Judges and Lawyers Assistance Program (NMJLAP), and a member of the NM Well-Being Committee.*

Endnotes

[1] National Task Force On Lawyer Well-Being Report, Aug. 14, 2017, Institute For Well-Being In Law, lawyerwellbeing.net.



Resources Shared by SBNM:

The Solutions Group

Employee Assistance Program: Free Service for Members!
Get help and support for yourself, your family and your employees.

FREE service offered by NMJLAP. Services include up to four FREE counseling sessions per issue per year for ANY mental health, addiction, relationship conflict, anxiety and/or depression issue. Counseling sessions are with a professionally licensed therapist. Other FREE services include management consultation, stress management education, critical incident stress debriefing, video counseling, and 24X7 call center. Providers are located throughout the state.

To access this service call 866-254-3555 and identify with NMJLAP.
All calls are CONFIDENTIAL.

State Bar *of* New Mexico
Judges and Lawyers
Assistance Program

The New Mexico Judges and Lawyers Assistance Program

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Legal Education

January

26 **Lawyer Ethics When Working with Paralegals**
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27 **Mandatory Succession Planning: It Has To Happen, But It Doesn't Have To Be That Difficult**
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28 **Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204**
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February

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Opinions

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

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

Effective December 31, 2021

PUBLISHED OPINIONS

A-1-CA-37870	State v. A Ontiveros	Reverse/Remand	12/20/2021
A-1-CA-38763	State v. D Wing	Affirm/Reverse/Remand	12/20/2021
A-1-CA-37734	State v. K Reed	Reverse/Remand	12/22/2021

UNPUBLISHED OPINIONS

A-1-CA-39380	State v. P Sisneros	Affirm	12/20/2021
A-1-CA-38199	S Griego v. Presbyterian Healthcare Serv.	Affirm	12/21/2021
A-1-CA-39635	State v. M Maney	Reverse/Remand	12/21/2021
A-1-CA-39844	State v. T Anaya	Affirm	12/21/2021
A-1-CA-40041	State v. M Dirickson	Affirm	12/21/2021
A-1-CA-39121	V Lopez v. NM Retiree Healthcare Authority	Affirm	12/22/2021
A-1-CA-39594	K Lyman v. G Lyman	Affirm	12/22/2021
A-1-CA-38601	State v. J Logan	Affirm	12/23/2021
A-1-CA-39314	B Curto v. L Deschamps	Affirm	12/30/2021
A-1-CA-39685	State v. D Garcia	Reverse/Remand	12/30/2021

Effective January 7, 2022

PUBLISHED OPINIONS

A-1-CA-38468	State v. F Lucero	Affirm	01/06/2022

UNPUBLISHED OPINIONS

A-1-CA-39654	State v. E Chino	Affirm	01/05/2022
A-1-CA-39518	J Lucero v. Board of Regents	Affirm	01/06/2022
A-1-CA-39593	In the Matter of Petition for Expungement for D Warren	Affirm	01/06/2022
A-1-CA-39679	State v. K Benton	Affirm/Reverse/Remand	01/06/2022
A-1-CA-39816	State v. T Gray	Affirm	01/06/2022
A-1-CA-39995	S Tellez v. M Dixon	Affirm	01/06/2022

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

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

From the New Mexico Supreme Court

Opinion Number: 2020-NMSC-015
No: S-1-SC-36839 (filed June 18, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ISMAEL ADAME and ANGELA ADAME,
Defendants-Appellants.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
JEFF F. MCELROY, District Judge

Released for Publication December 15, 2020.

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Opinion

Barbara J. Vigil, Justice.

{1} In this opinion we address whether, pursuant to Article II, Section 10 of the New Mexico Constitution, defendants Ismael and Angela Adame (the Adames) had a reasonable expectation of privacy in personal financial records maintained by their banks. We hold that Article II, Section 10 does not recognize a reasonable expectation of privacy in the Adames' banking records, which consist of five years of financial information voluntarily shared with their banks. Accordingly, we affirm the district court, which declined to suppress the bank records of the Adames on the basis of the New Mexico Constitution.

I. BACKGROUND

{2} The Adames are a married couple and business owners in Taos, New Mexico. Federal and state law enforcement suspected that the Adames were involved in drug trafficking. As part of the investigation into the Adames, a federal grand jury issued subpoenas for, and obtained, the Adames' personal banking records. A state grand jury later issued two subpoenas duces tecum for the Adames' records at two banks. These state subpoenas required that the banks produce for a five-year period the Adames' checking account records, savings account records, loan records, safe deposit box records, certificates of deposit, money market certificates, United States treasury notes, United States treasury bills, credit card records, purchases of bank checks, certified check records, letters of credit, and wire transfer records, among other financial records.

{3} Using the Adames' financial records, multiple-count indictments were issued against the Adames, whose cases were joined. Of the 106 charges filed against them, all but two were financial in nature.

{4} The Adames filed a motion to suppress the financial records obtained from their banks by federal subpoena.[1] The Adames argued that, unlike the Fourth Amendment to the United States Constitution, Article II, Section 10 of the New Mexico Constitution provides for a reasonable expectation of privacy in a person's financial records possessed by the person's bank, and, further, a warrant supported by probable cause is required to obtain and then admit such records at trial.

{5} The district court declined to conclude that the New Mexico Constitution provides greater protection than the Fourth Amendment for financial records maintained by banks in the absence of "clear authority from a higher court[.]" Specifically, the district court concluded that "the financial records obtained under proper [f]ederal process can be used . . . to find probable cause for a search warrant," and, because they were obtained legally, the records can be used at trial. Similarly, it concluded that "the financial records obtained by a New Mexico grand jury subpoena . . . can be used . . . as evidence at a trial[.]"

{6} The Adames moved the district court for an order allowing interlocutory appeal, which was granted. The Court of Appeals accepted the interlocutory appeal. The Court of Appeals then certified two questions to this Court, both of which we accepted: "(1) whether a person has a constitutional privacy interest in his or her financial records maintained by his or her financial institution under the New Mexico Constitution pursuant to Article II, Section 10; and (2) whether the State's use of federal and state grand jury subpoenas duces tecum in a state criminal proceeding is an unreasonable intrusion on that interest."[2]

---

[1]The federal grand jury subpoenas do not appear in the record. However, the Adames assert that the state subpoenaed the "same financial records" as were obtained pursuant to the federal subpoenas. The State does not assert otherwise. Accordingly, we assume for the purpose of our analysis that the records obtained through the federal subpoenas are the same as those demanded pursuant to the state subpoenas.

[2]Because we conclude that there is no constitutionally protected privacy interest under the first question presented, we need not determine whether the governmental intrusion on the privacy interest of the Adames was reasonable. Accordingly, we consider the second question presented no further.

II. DISCUSSION

A. Standard of Review

{7} This case presents a question of constitutional interpretation, which this Court reviews de novo. *State v. Ordunez*, 2012-NMSC-024, ¶ 6, 283 P.3d 282.

B. Article II, Section 10 Does Not Provide Greater Protection of Privacy Than the Fourth Amendment for the Adames' Bank Records, Which Consist of Five Years of Financial Information That Was Voluntarily Shared With Their Banks

{8} The question before this Court is whether the protections of Article II, Section 10 of the New Mexico Constitution extend to the Adames' bank records, which consist of five years of financial information voluntarily shared with their banks, and include checking account records, savings account records, loan records, safe deposit box records, certificates of deposit, money market certificates, United States treasury notes, United States treasury bills, credit card records, purchases of bank checks, certified check records, letters of credit, and wire transfer records, among other financial records.

{9} Article II, Section 10 guarantees that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures." This protection from governmental intrusion is conferred only when a person has a reasonable expectation of privacy in that which is searched or seized. *Cf. State v. Yazzie*, 2019-NMSC-008, ¶ 17, 437 P.3d 182 ("[Fourth Amendment] protection is only conferred when individuals have a reasonable expectation of privacy in the place to be searched or the thing to be seized." (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))). A person has such an expectation of privacy when, by his or her conduct, a person has exhibited an actual (subjective) expectation of privacy that society is prepared to recognize as reasonable. *State v. Crane*, 2014-NMSC-026, ¶ 18, 329 P.3d 689 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)); *see also Smith v. Maryland*, 442 U.S. 735, 740 (1979).

{10} The Adames contend that Article II, Section 10 provides greater privacy protection for their bank records than the Fourth Amendment. We analyze whether the New Mexico Constitution provides greater protection than an analogous provision of the federal constitution by applying the interstitial approach. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 19, 376 P.3d 836; *see also State v. Neal*, 2007-NMSC-043, ¶ 16, 142 N.M. 176, 164 P.3d 57 (stating that Article II, Section 10 and the Fourth Amendment are analogous constitutional provisions). Under the interstitial approach we address three questions: "(1) whether the right asserted by [the d]efendant is protected by the Fourth Amendment to the United States Constitution; (2) whether [the d]efendant preserved the state constitutional claim in the lower court; and (3) whether one of three established reasons exists to justify diverging from federal precedent." *Crane*, 2014-NMSC-026, ¶ 12.

1. The Fourth Amendment does not protect the Adames' personal bank records

{11} The United States Supreme Court recognizes a distinction under the Fourth Amendment between information "a person keeps to himself and what he shares with others." *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018). Under what has come to be known as the third-party doctrine, when a person voluntarily shares information with a third party, a person generally has no legitimate expectation of privacy in that information. *See id.* (describing the third-party doctrine). "As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Id.*

{12} The United States Supreme Court has held that a person has no legitimate expectation of privacy under the Fourth Amendment in bank records which consist of information voluntarily shared with third parties. *Id.* In *United States v. Miller*, the Government acquired several months of Miller's checks, deposit slips, and monthly statements from Miller's banks. 425 U.S. 435, 438 (1976). The United States Supreme Court held that Miller had no protected Fourth Amendment interest in those records. *Id.* at 444. First, the *Miller* Court reasoned that Miller could not assert "ownership" or "possession" of the documents, which were "business records of the banks." *Id.* at 440. Second, the "nature of those records confirmed Miller's limited expectation of privacy[.]" *Carpenter*, 138 S. Ct. at 2216. The checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the statements and deposit slips contained information "exposed to [bank] employees in the ordinary course of business." *Miller*, 425 U.S. at 442. The Supreme Court concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government," *id.* at 443, and held that "there was no intrusion into any area in which [Miller] had a protected Fourth Amendment interest," *id.* at 440. After recent examination by the United States Supreme Court, the application of *Miller* remains undisturbed, *see Carpenter*, 138 S. Ct. at 2220, and the Adames do not contend that Fourth Amendment protections apply to their records.

2. The Adames' state constitution claim was adequately preserved

{13} For a claim to be preserved, "it must appear that a ruling or decision by the trial court was fairly invoked." Rule 12-321(A) NMRA. This in turn requires "[a]ssertion of the legal principle and development of the facts." *State v. Gomez*, 1997-NMSC-006, ¶ 22, 122 N.M. 777, 932 P.2d 1. The Adames' motion to suppress the banking records in the district court was based solely on the argument that our state constitution protects an expectation of privacy in personal banking records. The district court based its denial of the claim on a considered determination that it could not find such protection in the New Mexico Constitution absent direction from New Mexico's appellate courts. No party contests the preservation of the state constitutional claim here, and we agree that the Adames' Article II, Section 10 claim was preserved.

3. The reasons to depart from federal precedent are inadequate

{14} Pursuant to our interstitial approach, we recognize three reasons to depart from established federal precedent: "(1) the federal analysis is flawed or undeveloped; (2) structural differences exist between federal and state government; or (3) distinctive state characteristics exist that would support the departure." *Crane*, 2014-NMSC-026, ¶ 15. Defendants argue both that the federal analysis is flawed and also that there are distinctive state characteristics that justify a departure from federal precedent.

a. The federal analysis is not flawed

{15} The Adames argue that the Fourth Amendment analysis of the United States Supreme Court in *Miller* is deeply flawed. The Adames state that the *Miller* Court should have "determined that an individual maintains a reasonable expectation of privacy in his or her financial records notwithstanding the fact [that such records are] held by a third party." To be sure, the Adames are not the first to criticize *Miller*.

{16} As the Adames point out, both the result in *Miller* and the third-party doctrine that animates it have been repeatedly questioned or criticized by scholars, some state courts, and by Justices on the United States Supreme Court. For example, Professor LaFave squarely criticizes *Miller* in his Fourth Amendment treatise, calling it "dead wrong," 1 Wayne R. LaFave, Search and Seizure § 2.7(c), at 970 (5th ed. 2012), and "lamentable," *id.* at 981, for its "substantial adverse impact upon values the Fourth Amendment seeks to preserve[,]" *id.* at 971 (internal quotation marks and citation omitted). Some scholars even com-

ment on the sheer volume of criticism. *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich L. Rev. 561, 563 n.5 (2009) ("A list of every article or book that has criticized the [third-party] doctrine would make this the world's longest law review footnote."); Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 Pepp. L. Rev 975, 976 (2007) (noting that the third-party doctrine "has been the target of sustained criticism"). Our Court of Appeals has also recognized scholarly criticism of *Miller*. *State v. McCall*, 1983-NMCA-109, ¶ 22, 101 N.M. 616, 686 P.2d 958, *rev'd on other grounds*, 1984-NMSC-007, ¶ 1, 101 N.M. 32, 677 P.2d 1068.

{17} Several state courts have departed from *Miller*, sometimes reaching a different result and sometimes criticizing the third-party principle itself. Pennsylvania, for example, recognizes a reasonable expectation of privacy in bank records under its constitution. *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) ("[U]nder . . . the Pennsylvania Constitution bank customers have a legitimate expectation of privacy in records pertaining to their affairs kept at the bank."); *see also, e.g.*, *State v. Thompson*, 810 P.2d 415, 418 (Utah 1991) (recognizing a right to privacy in bank records under the Utah Constitution); *but see, e.g.*, *State v. Schultz*, 850 P.2d 818, 834-35 (Kan. 1993) (declining to recognize a reasonable expectation of privacy in bank records under the Kansas Constitution). The Hawaii Supreme Court directly criticized the foundational reasoning of the third-party doctrine, in a case unrelated to banking records. *State v. Walton*, 324 P.3d 876, 906 (Haw. 2014) ("*Miller* . . . incorrectly rel[ies] on the principle that individuals who convey information to a third party have assumed the risk of that party disclosing the information to the government."); *see also Burrows v. Superior Court of San Bernadino Cty.*, 529 P.2d 590, 593 (Cal. 1974) (in bank) (stating, in a case decided prior to *Miller*, that "[i]t cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable"). We acknowledge that not all states view favorably the United States Supreme Court's application of the third-party principle to bank records.

{18} Justice Sotomayor directly questioned the continued viability of the third-party doctrine as a categorical rule in a 2012 concurrence. She wrote that the approach of the third-party doctrine is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring). Accordingly, she concluded that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." *Id.* Justice Sotomayor's analysis built on previous disapproval of the third-party doctrine as a rule by Justice Thurgood Marshall. *Id.* at 418 (citing Justice Marshall's dissent in *Smith*, 442 U.S. at 749); *see also Smith*, 442 U.S. at 748-49 (Marshall, J., dissenting) ("I remain convinced that constitutional protections are not abrogated *whenever* a person apprises another of facts valuable in criminal investigations[.] . . . Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes." (emphasis added)). In fact, deep concerns about the third-party doctrine extend all the way back to one of the roots of the doctrine, *Miller*, which states:

> [T]he totality of bank records provides a virtual current biography. While we are concerned in the present case only with bank statements, the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, savings, bonds, loan applications, loan guarantees, and all papers which the customer has supplied to the bank[.] . . . Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.

425 U.S. at 451-53 (Brennan, J., dissenting) (internal quotation marks and citation omitted). As demonstrated, the criticisms of *Miller* and the third-party doctrine are enduring.

{19} Despite the enduring and sometimes prescient criticisms, the principles animating the third-party doctrine remain viable. Only recently, in 2018, the United States Supreme Court re-examined the third-party doctrine in a groundbreaking Fourth Amendment case. *Carpenter*, 138 S. Ct. 2206; *see also* Alan Z. Rozenshtein, *Fourth Amendment Reasonableness After Carpenter*, 128 Yale L.J. Forum 943, 943 (2019) ("*Carpenter* . . . is one of this generation's most important Fourth Amendment opinions." (footnote omitted)). In *Carpenter*, the United States Supreme Court narrowed the scope of the third-party doctrine. Susan Freiwald & Stephen Wm. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 Harv. L. Rev. 205, 224 (2018). *Carpenter* held that there is a reasonable expectation of privacy in data from a cellphone-related technology where the data provided a detailed chronicle of the suspect's movements for seven days, even though the data was acquired from a third party that collected and kept the data for its own purposes. 138 S. Ct. at 2211-12, 2217 n.3, 2219-20. The *Carpenter* Court concluded that the third-party data was subject to Fourth Amendment protection and the government's acquisition of it was a search. 138 S. Ct. at 2223. *Carpenter* thus importantly established that the third-party doctrine is limited in scope: under certain circumstances Fourth Amendment protections apply to information voluntarily turned over to third parties. *See id.* at 2220, 2223; *id.* at 2247 (Alito, J., dissenting) (stating that it was "revolutionary" to allow a defendant to successfully raise a Fourth Amendment challenge to the search of a third party's property).

{20} But although the *Carpenter* Court narrowed the third-party doctrine in light of "new concerns wrought by digital technology," *id.* at 2222, it reiterated that the Fourth Amendment is inapplicable to "several months of canceled checks, deposit slips, and monthly statements," as held in *Miller*. *Carpenter*, 138 S. Ct. at 2216-17. The bank records in *Miller* were distinguishable from the "physical location information" revealed by the third-party data in *Carpenter*. *See id.* at 2223 (grounding Fourth Amendment protection for the third-party data obtained in *Carpenter* in the data's "deeply revealing nature[,] . . . its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection"). Not only did the *Carpenter* Court endorse the holding of *Miller*, it affirmed the principle that animates the third-party doctrine, stating that there is a "line between what a person keeps to himself and what he shares with others." *Carpenter*, at 138 S. Ct. at 2216.

{21} We agree with the United States Supreme Court that there is a constitutionally relevant difference between what is kept to oneself and what one chooses to share with others. *Id.* at 2216. Conventional bank records consisting of information shared with, and obtained from, third parties do not raise any "new concerns wrought by digital technology." *Id.* at 2222. Such

records are usually the business records of banks that are not owned or possessed by the suspect, are exposed in the ordinary course of business, and are not confidential communications but instead instruments or documents used in transactions. *See id.* at 2216. In sum, we conclude that the federal analysis articulated decades ago in *Miller* and recently narrowed in *Carpenter* is not flawed. Accordingly, we decline to depart from federal precedent on this basis. *See Gomez*, 1997-NMSC-006, ¶ 20 (stating that broader protection can be provided under the New Mexico Constitution where the federal analysis is unpersuasive because it is flawed).

b. Distinctive state characteristics do not support departure from federal jurisprudence

{22} The Adames argue that we should depart from the result in *Miller* with regard to their records "because of New Mexico's established tradition of providing strong privacy protection to its citizens under Article II, Section 10." Indeed, "New Mexico courts have long held that Article II, Section 10 provides greater protection of individual privacy than the Fourth Amendment." *Crane*, 2014-NMSC-026, ¶ 16; *see also State v. Garcia*, 2009-NMSC-046, ¶ 31, 147 N.M. 134, 217 P.3d 1032 ("Article II, Section 10 is calibrated slightly differently than the Fourth Amendment."); *Developments in the Law - The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1359-60 (1982) (stating that federal constitutional rights provide the minimum level of constitutional protection, and a state is justified to develop independent doctrine in an area where the state considers the federal doctrine inadequate).

{23} In addition to New Mexico's consistently strong preference for warrants, *Gomez*, 1997-NMSC-006, ¶ 36, our courts have recognized a number of specific circumstances that justify a departure from the Fourth Amendment. For example, New Mexico has provided greater protection to motorists detained at a border checkpoint. *See State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶¶ 1, 9, 12, 20, 130 N.M. 386, 25 P.3d 225 (holding that Article II, Section 10, unlike the Fourth Amendment, requires reasonable suspicion of criminal activity to justify a detention at a border checkpoint that extends beyond an inquiry into a motorist's citizenship and immigration status, and review of the motorist's documents). And has provided greater protection from police entry by force to execute a warrant. *See State v. Attaway*, 1994-NMSC-011, ¶¶ 14, 25, 117 N.M. 141, 870 P.2d 103 (holding that Article II, Section 10 "requires law enforcement personnel to knock and announce their authority when executing a warrant," although "[the United States] Supreme Court has not determined whether officers executing a search warrant must knock and announce prior to entry"). Also, we have provided greater protection against seizure, among other circumstances in which New Mexico has departed from federal search and seizure doctrine. *See Garcia*, 2009-NMSC-046, ¶¶ 15, 26, 35 (holding under Article II, Section 10 that an individual is seized when a reasonable person would not feel free to leave, departing from the federal test that required a person to "submit to a show of authority by law enforcement" (emphasis omitted)); *see also, e.g.*, *State v. Cordova*, 1989-NMSC-083, ¶¶ 1, 13, 17, 109 N.M. 211, 784 P.2d 30 (departing under Article II, Section 10 from the federal test for issuance of a warrant); *State v. Gutierrez*, 1993-NMSC-062, ¶¶ 1, 15 , 55, 55 n.10, 56, 116 N.M. 431, 863 P.2d 1052 (departing under Article II, Section 10 from the federal good faith exception for the exclusion of evidence obtained illegally).

{24} But none of those cases is much akin to this case-which involves the government's acquisition of a suspect's financial records from a third party-and accordingly do not control the result here. Perhaps in recognition of this, the Adames analogize most extensively to two New Mexico cases that recognized a reasonable right to privacy under Article II, Section 10 in one's trash. In *State v. Granville*, our Court of Appeals determined that Article II, Section 10 prohibits the warrantless search of an individual's sealed garbage bags placed in trash containers in an alley behind a residence. 2006-NMCA-098, ¶¶ 1, 3, 33, 140 N.M. 345, 142 P.3d 933. And in *Crane*, this Court extended the holding in *Granville* to garbage placed in opaque bags and left in a motel dumpster, "rather than being left in the motel room for disposal by the housekeeping staff." *Crane*, 2014-NMSC-026, ¶¶ 18, 20, 24.

{25} Both *Crane* and *Granville* emphasized that "when one seals garbage in an opaque container, one exhibits a reasonable expectation that the contents of the sealed, opaque container will remain private." *Crane*, 2014-NMSC-026, ¶ 22; *see also Granville*, 2006-NMCA-098, ¶ 27 ("There is a presumption that an expectation of privacy is reasonable when garbage is in a container that conceals the contents from plain view."). Among the fundamental reasons supporting the conclusion that an expectation of privacy in garbage is reasonable under Article II, Section 10 is that the information is concealed from view. *See Granville*, 2006-NMCA-098, ¶ 23 ("[T]he important issue [of the five] is whether the contents of one's garbage are concealed from plain view.").

{26} But unlike the trash in *Crane* and *Granville*, the information in bank records is visible to others, and known to be so; such information has been shared, not concealed. Checks, deposits, wire transfers, account statements, and the like are not "confidential communications" but, instead, "information exposed to bank employees in the ordinary course of business." *Carpenter*, 138 S. Ct. at 2216 (alteration, internal quotation marks, and citation omitted). In this important respect, bank records are different than trash placed out of view in opaque containers that are sealed or closed. In our view, individuals do not in general exhibit an actual (subjective) expectation of privacy in the financial information they expose to banking institutions and their employees. *See id.* at 2216, 2219 (stating that there is a reduced expectation of privacy in information voluntarily shared with third parties pursuant to the third-party doctrine). Accordingly, we do not find sufficient support from our trash cases to justify a reasonable expectation of privacy under Article II, Section 10 in conventional bank records containing information voluntarily shared with third parties. *See Crane*, 2014-NMSC-026, ¶ 18 (stating that an actual (subjective) expectation of privacy is requisite for a constitutionally cognizable reasonable expectation of privacy (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring))); *see also Morris*, 2016-NMSC-027, ¶ 19 ("Although we have the power to provide more liberty than is mandated by the United States Constitution when interpreting analogous provisions in our own constitution, the burden is on the party seeking relief under the state constitution to provide reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent." (alteration, emphasis, internal quotation marks, and citations omitted)).

{27} Even as we uphold the principle that there is a constitutional distinction "between what a person keeps to himself and what he shares with others," *Carpenter*, 138 S. Ct. at 2216, we recognize the limits of that principle. Shared information is not, of course, categorically unprotected under Article II, Section 10. *Cf. id.* at 2217 ("[T]he fact that . . . information is held by a third party does not by itself overcome the . . . claim to Fourth Amendment protection."). We emphasize that our decision is narrow. We express no view on more sophisticated bank records resulting from newer technologies that may reveal a person's "familial, political, professional, religious, and sexual associations" by, for example, creating a record of a person's whereabouts. *See id.* (internal quotation marks and citation omitted). Nor do we comment on an outsized collection of

financial information from banks that might span decades or even a lifetime. Like the *Carpenter* Court, we do not profess to have all the answers today about, in our case, the application of Article II, Section 10 to information voluntarily shared with third parties. *See id.* at 2220, 2220 n.4 (noting that the Court "d[id] not begin to claim all the answers" at that time about the application of the Fourth Amendment to certain third-party information and collection techniques). We conclude only that distinctive state characteristics do not support a reasonable expectation of privacy under Article II, Section 10 in the Adames' bank records, which consist of five years of financial information voluntarily shared with their banks.

III. CONCLUSION

{28} For the reasons stated, we hold that the Adames did not have a constitutionally protected interest pursuant to Article II, Section 10 in their banking records, which consist of five years of financial information voluntarily shared with their banks. The district court properly denied the motion to suppress as to those records.

{29} IT IS SO ORDERED.
BARBARA J. VIGIL, Justice

WE CONCUR:
JUDITH K. NAKAMURA, Chief Justice
PETRA JIMENEZ MAES, Justice, Retired Sitting by designation
GARY L. CLINGMAN, Justice, Retired Sitting by designation

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-050
No. A-1-CA-37917 (filed August 27, 2020)

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

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
WILLIAM G.W. SHOOBRIDGE, District Judge

Certiorari Denied, September 30, 2020, No. S-1-SC-38490.
Released for Publication November 24, 2020.

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Opinion

Jacqueline R. Medina, Judge.

{1} Defendant Juan Montelongo Esparza appeals his conviction for leaving the scene of an accident (no great bodily harm or death), in violation of NMSA 1978, Section 66-7-201(D) (1989). We hold that the district court committed fundamental error in failing to properly instruct the jury on Defendant's duty to remain at the scene of an accident and remand for retrial.

BACKGROUND

{2} On June 12, 2015, at approximately 3:40 p.m., a vehicle driven by Defendant collided with a vehicle driven by Freddy Marquez. Marquez was ejected from his vehicle and was severely injured. Marquez's girlfriend was also in the vehicle at the time of the accident, however, she sustained only minor injuries. Shortly after the collision several drivers stopped and unsuccessfully attempted to render aid to Marquez, who died shortly thereafter from his injuries. Based on witness testimony, emergency personnel arrived on the scene between fifteen and forty-five minutes after the collision.

{3} After the collision, a witness saw Defendant sitting in his vehicle talking on a cellphone but could not understand what Defendant was saying because Defendant was not speaking English. Defendant did not approach Marquez or his girlfriend at any time after the accident. At some point, Defendant got out of his car, began pacing back and forth, and then left the scene on foot. One witness estimated that Defendant left the scene between fifteen and twenty minutes after the accident, while another believed that Defendant left the scene forty-six minutes after the accident. In either case, Defendant left the scene before the first emergency responder arrived. When he left the accident scene, Defendant left behind his resident card which included his name, along with his vehicle registration and insurance card, in the glove compartment of his vehicle.

{4} Police located Defendant approximately two hours after the accident, four miles from the accident scene. Defendant had bloodshot, watery eyes and smelled strongly of alcohol. Defendant's blood alcohol content measured 0.04 grams per 100 milliliters of blood, approximately four hours after the accident. A forensic expert estimated that at the time of the collision Defendant had consumed the equivalent of four-and-a-half beers.

{5} The State charged Defendant with multiple crimes as a result of the accident, including homicide by vehicle (DWI), in violation of NMSA 1978, Section 66-8-101 (2004, amended 2016); leaving the scene of an accident involving personal injuries but not great bodily harm or death, in violation of Section 66-7-201(D); leaving the scene of an accident involving damage to a vehicle, in violation of NMSA 1978, Section 66-7-202 (1978); and failure to give information and render aid, in violation of NMSA 1978, Section 66-7-203 (1978). Following trial, a jury acquitted Defendant of homicide by vehicle (DWI) and failure to give information and render aid, but convicted Defendant of leaving the scene of an accident involving damage to a vehicle, in violation of Section 66-7-202, and leaving the scene of an accident involving personal injuries but not great bodily harm or death, in violation of Section 66-7-201(D). The district court sentenced Defendant to 364 days for violating Section 66-7-202(D) and vacated the lesser conviction for leaving the scene of an accident involving damage to a vehicle to avoid a double jeopardy violation. This appeal followed.

DISCUSSION

{6} Defendant raises two arguments on appeal. First, Defendant argues the district court committed fundamental error in instructing the jury. Second, Defendant contends there is insufficient evidence to support his conviction. We address each argument in turn.

Jury Instructions

{7} Defendant argues the district court fundamentally erred in failing to instruct the jury on the scope of his legal obligation to remain at the scene of the crime. "The propriety of the jury instructions given by the district court is a mixed question of law and fact requiring de novo review." *State v. Candelaria*, 2019-NMSC-004, ¶ 31, 434 P.3d 297. Defendant concedes he failed to preserve any error with respect to instructing the jury, thus we review only for fundamental error. *See* Rule 12-321(B)(2)(c) NMRA; *Candelaria*, 2019-NMSC-004, ¶ 31 (reviewing purported error in jury instructions for fundamental error because it was not raised at trial). "The doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Barber*, 2004-NMSC-019, ¶ 8, 135 N.M. 621, 92 P.3d 633. "[T]he general rule is that fundamental error occurs when the trial court fails to instruct the jury on an essential element." *State v. Lucero*, 2017-NMSC-008, ¶ 27, 389 P.3d 1039 (internal quotation marks and citation omitted). "We will only affirm a case in which the trial court failed to instruct the jury on an essential element when, under the facts adduced at trial, that omitted element was undisputed and indisputable, and no ratio-

nal jury could have concluded otherwise." *State v. Lopez*, 1996-NMSC-036, ¶ 13, 122 N.M. 63, 920 P.2d 1017 (internal quotation marks and citation omitted).

{8} The hit-and-run statute applicable to leaving the scene of an accident involving death or personal injuries—such as the tragic accident in this case—provides,

> "The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop the vehicle at the scene of the accident or as close thereto as possible, but shall then immediately return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 66-7-203[.]" Section 66-7-201(A). Section 66-7-203, in turn, provides,

The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving and shall upon request exhibit his driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

Depending on whether the accident resulted in "great bodily harm or death" and whether the driver "knowingly fail[ed] to stop or to comply with the requirements of Section 66-7-203[,]" the driver may be found guilty of a misdemeanor, a fourth degree felony, or a third degree felony. *See* § 66-7-201(B)-(D). Here, Defendant was convicted of a misdemeanor under Subsection (D) for "failing to stop or comply with the requirements of Section 66-7-203 . . . where the accident does not result in great bodily harm or death[.]"

{9} There is no Uniform Jury Instruction (UJI) for the crime of leaving the scene of an accident.[1] *See State v. Hertzog*, 2020-NMCA-031, ¶ 9, 464 P.3d 1090 ("[T]here are no uniform jury instructions for the crimes that Section 66-7-201 defines[.]"). Accordingly, the district court "was required to give an instruction that substantially follows the language of the statute in order to be deemed sufficient." *State v. Luna*, 2018-NMCA-025, ¶ 21, 458 P.3d 457 (alteration, internal quotation marks, and citation omitted), *cert. denied*, 2018-NMCERT-___ (No. S-1-SC-36896, Mar. 16, 2018). The court instructed the jury to find Defendant guilty if the State proved beyond a reasonable doubt that: (1) "[D]efendant operated a vehicle involved in an accident"; (2) "[t]he accident resulted in injury to Freddy Marquez"; and (3) "[D]efendant failed to immediately stop, return[,] and remain at the scene[.]"[2]

{10} Defendant argues the given jury instructions were fundamentally flawed because they did not instruct the jury that Defendant only had a duty to remain at the scene of the accident "until he has fulfilled the requirements of Section 66-7-203." Section 66-7-201(A). This temporal limitation on a driver's criminal liability for leaving the scene of an accident, Defendant argues, constituted an essential element that the jury was required to find beyond a reasonable doubt to convict him. We agree.

{11} While our appellate courts have previously dealt with appeals from convictions for leaving the scene of an accident involving death or personal injury under Section 66-7-201, it appears we have yet to definitively address whether the State must prove that a driver failed to comply with the requirements of Section 66-7-203 before leaving the scene of the accident. *See, e.g.*, *Hertzog*, 2020-NMCA-031, ¶ 10 (analyzing whether the failure to instruct jury on definition of "accident" constituted reversible error and whether sufficient evidence supported the defendant's conviction under Section 66-7-201); *State v. Montoya Guzman*, 2004-NMCA-097, ¶ 20 136 N.M. 253, 96 P.3d 1173 (analyzing whether sufficient evidence supported the defendant's conviction under Section 66-7-201). "In determining what is or is not an essential element of an offense, we begin with the language of the statute itself, seeking of course to give effect to the intent of the [L]egislature." *State v. Swick*, 2012-NMSC-018, ¶ 56, 279 P.3d 747 (internal quotation marks and citation omitted). We follow "the ordinary and plain meaning of the words of statute, unless this leads to an absurd or unreasonable result and unless the Legislature indicates a different interpretation is necessary." *Hertzog*, 2020-NMCA-031, ¶ 12 (alteration, internal quotation marks, and citation omitted). "[W]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *State v. Rivera*, 2004-NMSC-001, ¶ 10, 134 N.M. 768, 82 P.3d 939 (internal quotation marks and citation omitted).

{12} Defendant argues, and we agree, that the plain language of the last clause of Section 66-7-201 requiring a driver to "immediately return to and in every event . . . remain at the scene of the accident *until* he has fulfilled the requirements of Section 66-7-203" indicates that whether or not a driver complied with the requirements of Section 66-7-203 is an essential element when it is alleged that the driver unlawfully failed to remain at the scene of the accident. (Emphasis added.) By using the conjunction "until," the Legislature imposed a temporal limitation on a driver's obligations to remain at the scene of an accident and expressly conditioned criminal liability for leaving the scene on a driver's failure to first comply with the requirements of Section 66-7-203. *See Until, Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/until (last visited July 20, 2020) (defining "until" when used as a conjunction, as "up to the time that" and "up to such time as"). Thus, under the plain language of the statute, if the driver satisfies the requirements of Section 66-7-203 before leaving the scene of the accident, no criminal liability under Section 66-7-201 may be imposed. Conversely, the driver may be convicted of violating Section 66-7-201 if he fails to satisfy the requirements of Section 66-7-203 before leaving the scene.

{13} Given that a defendant is not required to remain at the scene of an accident under all circumstances—a requirement the instruction in this case directly suggests—it follows that the jury must be instructed on this element. Otherwise, a driver could be convicted of leaving the scene of an accident despite complying with Section 66-7-203 by giving his information, exhibiting his driver's license, and providing any reasonable aid to those injured in the accident. Such a result would undercut the Legislature's intent and run contrary to the purposes of our hit-and-run statutes, which are "to prohibit drivers from evading criminal or civil liability, to ensure people receive necessary aid or medical attention, and to deter drivers from thwarting or impeding investigations and avoiding liability for the harm

[1]In order to avoid confusion over how to properly instruct the jury in future cases, we encourage the UJI Criminal Committee to consider drafting instructions for the crimes proscribed by Section 66-7-201, as well as Section 66-7-202 (for accidents involving damage to vehicles).

[2]This instruction was identical to the instruction for Defendant's vacated conviction for leaving the scene of an accident involving damage to a vehicle—except for the second element, which provided, "The accident resulted in damage to a 2007 Cadillac Escalade[.]"

they cause by failing to stop or failing to comply with Section 66-7-203." *Hertzog*, 2020-NMCA-031, ¶ 16.

{14} Given the plain language of Section 66-7-201(A), we hold that a driver's failure to satisfy the requirements of Section 66-7-203 prior to leaving the scene is an essential element for a conviction of the crime of leaving the scene of an accident involving death or personal injuries. *See State v. Cabezuela*, 2011-NMSC-041, ¶ 38, 150 N.M. 654, 265 P.3d 705 ("The language of a statute determines the essential elements of an offense." (internal quotation marks and citation omitted)). The district court must instruct the jury to determine, among the other elements, whether the State proved beyond a reasonable doubt that, prior to leaving the scene of the accident, the driver failed to: (1) "give his name, address, and the [vehicle] registration number"; (2) exhibit his driver's license upon request to the "person struck or the driver or occupant of or person attending any vehicle collided with"; and (3) render "reasonable assistance" to any person injured in the accident. Section 66-7-203; *see Cabezuela*, 2011-NMSC-041, ¶ 39 ("It is the fundamental right of a criminal defendant to have the jury determine whether each element of the charged offense has been proved by the state beyond a reasonable doubt." (internal quotation marks and citation omitted)).

{15} The State argues that it was only required to prove that Defendant "simply failed to remain" at the scene and contends any other conclusion is contrary to *Guzman*, 2004-NMCA-097, because—according to the State—this Court "stated [in that case] that the prosecution is required to prove that the defendant 'failed to stop and/or failed to remain at the scene of the accident[.]' " *Id.* ¶ 20. We reject this argument. In *Guzman*, we reviewed the sufficiency of the evidence underlying a conviction for leaving the scene of an accident. In setting forth the elements for our sufficiency review, we stated,

> In order to convict [the d]efendant of [leaving the scene of an] accident[] involving death or personal injuries, the [s]tate was required to prove that [the d]efendant (1) operated a motor vehicle; (2) was involved in an accident which caused great bodily harm or death of the victim; (3) failed to stop and/or failed to remain at the scene of the accident; *and (4) failed to render reasonable aid to the victim*.

Id. ¶ 20 (emphasis added). Given the fourth element—which incorporates one of a driver's duties under Section 66-7-203—it is clear the state was required to prove more than simply that the defendant "failed to stop and/or failed to remain at the scene of the accident." *Guzman*, 2004-NMCA-097, ¶ 20. Additionally, the defendant in that case did not raise the argument that Defendant now raises (i.e., that the State is required to demonstrate that Defendant failed to comply with all of the requirements of Section 66-7-203 before leaving the scene of the accident)—most likely because the defendant did not stop at all. *See Guzman*, 2004-NMCA-097, ¶¶ 14, 20 (noting that the defendant only made a U-turn to investigate after hitting a pedestrian and left when she did not see anything). "The general rule is that cases are not authority for propositions not considered." *State v. Sanchez*, 2015-NMSC-018, ¶ 26, 350 P.3d 1169 (internal quotation marks and citation omitted); *see, e.g.*, *Dominguez v. State*, 2015-NMSC-014, ¶¶ 15-16, 348 P.3d 183 (declining to rely on a case for a proposition because the parties in that case did not appear to raise the argument now being considered). Accordingly, the State's reliance on *Guzman* is unavailing.

{16} The State also cites Section 66-7-201(D), the specific subsection Defendant was convicted of violating, for the proposition that "a person may be found guilty of leaving the scene of an accident if he simply failed to remain, even without failing to comply with the requirements of [Section] 66-7-203." Section 66-7-201(D) provides, in relevant part, "Any person failing to stop or comply with the requirements of Section 66-7-203 . . . where the accident does not result in great bodily harm or death is guilty of a misdemeanor[.]" The State does not explain exactly how Section 66-7-201(D) supports its position, but it appears that the State is arguing that the statute's use of the disjunctive "or"—which indicates that a defendant may be found guilty by simply failing to stop—made it unnecessary to instruct the jury on whether Defendant complied with Section 66-7-203. *See State v. Dunsmore*, 1995-NMCA-012, ¶ 5, 119 N.M. 431, 891 P.2d 572 ("The use of the disjunctive 'or' indicates that the statute may be violated by any of the enumerated methods.").

{17} We are unpersuaded by the State's logic. Reading Section 66-7-201(A) and (D) together makes clear that drivers have two distinct duties following an accident: (1) to "immediately stop the vehicle at the scene of the accident or as close thereto as possible" and (2) to "immediately return to" and "remain at the scene of the accident until he has fulfilled the requirements of Section 66-7-203[.]" Section 66-7-201(A); *see State v. Gurule*, 2011-NMCA-042, ¶ 12, 149 N.M. 599, 252 P.3d 823 ("[W]e read all provisions of a statute and all statutes in pari materia together in order to ascertain the legislative intent."). The failure to perform either of these duties is grounds for a violation; a driver may be convicted under Section 66-7-201(D) by failing to "immediately stop the vehicle at the scene of the accident or as close thereto as possible" *or* failing to "immediately return to" and "remain at the scene of the accident until he has fulfilled the requirements of Section 66-7-203." Section 66-7-201(A).

{18} It is undisputed that Defendant stopped his vehicle at the scene of the accident in this case. Consequently, in order to convict Defendant of violating Section 66-7-201(D), the State was required to prove that Defendant failed to "remain at the scene of the accident until he has fulfilled the requirements of Section 66-7-203[.]" Section 66-7-201(A). We, therefore, reject the State's argument that Defendant "could be found guilty of leaving the scene of an accident if he simply failed to remain." For the foregoing reasons, we hold that the district court erred in failing to instruct the jury to determine whether Defendant fulfilled the requirements of Section 66-7-203 before leaving the scene of the accident.

Fundamental Error

{19} Having found error in the jury instructions, we must now determine whether it was fundamental. As stated earlier, failure to instruct the jury on an essential element is generally fundamental error; we will only affirm in such cases "when, under the facts adduced at trial, that omitted element was undisputed and indisputable, and no rational jury could have concluded otherwise." *Lopez*, 1996-NMSC-036, ¶ 13 (internal quotation marks and citation omitted); *id.* (stating that "the question to be answered when an essential element has been omitted is whether there was any evidence or suggestion in the facts, however slight, that could have put the omitted element in issue" (alteration, internal quotation marks, and citation omitted)). Thus, "[i]f the evidence does not indisputably establish the missing element or elements, there exists fundamental error, and we must reverse." *Luna*, 2018-NMCA-025, ¶ 23; *see State v. Swick*, 2012-NMSC-018, ¶ 46, 279 P.3d 747 ("[F]undamental error occurs when, because an erroneous instruction was given, a court has no way of knowing whether the conviction was or was not based on the lack of the essential element.").

{20} For the following reasons, we conclude the omitted element of whether Defendant complied with Section 66-7-203's requirements was not "undisputed and indisputable," and therefore the error was fundamental. *Luna*, 2018-NMCA-025, ¶ 23 (internal quotation marks and citation omitted). First, Defendant testified that he left his resident card, vehicle registration, and insurance information in the glove compartment of his vehicle when

he walked away on foot from the scene of the accident.[3] Second, there was no evidence that Defendant failed to comply with any request to exhibit his driver's license to anyone at the scene. Third, although Defendant did not render any aid to Marquez, he testified that, as soon as he came to after the accident, others were already performing CPR on Marquez and he realized someone had already called 911.

{21} It is also noteworthy that the jury failed to convict Defendant of his standalone violation of Section 66-7-203 for failure to give information and render aid. In addressing this charge during closing argument, Defendant argued that although he did not give aid to Marquez, he was informed as soon as he came to that an ambulance was already on the way and people were performing CPR on Marquez. Given his lack of medical training, Defendant argued that it was unreasonable for him to have to inject himself into the attempts to save Marquez's life in order to avoid liability. He further argued that he did not fail his duty to give his information because he left his resident card and registration information in his car before he left on foot.

{22} For this count, the jury was instructed to find Defendant guilty if the State proved beyond a reasonable doubt that: (1) "[D]efendant operated a vehicle involved in an accident"; (2) "[t]he accident resulted in damage to a vehicle"; (3) "[D]efendant did not give his name, address and registration number of [his] vehicle"; and (4) "[D]efendant did not render assistance to any person injured or make arrangements for treatment[.]" As the first two elements were undisputed, it follows that the jury found the State's evidence lacking regarding Defendant's purported failure to "give his name, address and registration number of [his] vehicle" and/or "render assistance to any person injured or make arrangements for treatment." While not necessarily dispositive of our fundamental error analysis, this fact counsels in favor of finding fundamental error.[4]

{23} In light of the foregoing evidence and arguments, it does not appear that the missing essential element of whether Defendant complied with the requirements of Section 66-7-203 prior to leaving the scene was indisputably established. *See Lopez*, 1996-NMSC-036, ¶ 13. We must therefore reverse.

Sufficiency of the Evidence

{24} Despite concluding the failure to instruct the jury on Defendant's obligation to remain at the scene until he satisfied Section 66-7-203's requirements, we must nonetheless address Defendant's sufficiency argument to determine whether double jeopardy bars retrial. *See State v. Consaul*, 2014-NMSC-030, ¶ 41, 332 P.3d 850 ("To avoid any double jeopardy concerns, we review the evidence presented at the first trial to determine whether it was sufficient to warrant a second trial."). In reviewing the sufficiency of the evidence supporting a defendant's convictions, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Lente*, 2019-NMSC-020, ¶ 54, 453 P.3d 416 (internal quotation marks and citation omitted).

{25} Defendant concedes that the State presented sufficient evidence to convict him of leaving the scene of an accident involving death or personal injuries under the erroneous jury instructions. Defendant also acknowledges that our appellate courts generally review sufficiency claims against the erroneous jury instructions used at trial. *See State v. Dowling*, 2011-NMSC-016, ¶ 18, 150 N.M. 110, 257 P.3d 930 ("We review [the d]efendant's [sufficiency of the evidence] claim under the erroneous instruction provided to the jury at trial."); *State v. Akers*, 2010-NMCA-103, ¶ 32, 149 N.M. 53, 243 P.3d 757 ("In a case such as this one in which an erroneous instruction was apparently given, we nonetheless review the sufficiency of the evidence under the instructions as given."). Nonetheless, Defendant asks this Court to depart from established case law and measure the sufficiency of the evidence against the statutory elements of leaving the scene of an accident involving death or personal injuries.

{26} Even were we to agree with Defendant, our Supreme Court has determined that appellate courts review sufficiency claims "under the erroneous instruction provided to the jury at trial." *Dowling*, 2011-NMSC-016, ¶ 18. We must, therefore, reject Defendant's request to depart from precedent. *See State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 22, 135 N.M. 375, 89 P.3d 47 (reiterating principle that "the Court of Appeals is bound by Supreme Court precedent"). Given Defendant's concession, and given the evidence presented above, we conclude sufficient evidence supported Defendant's conviction and retrial is therefore permitted.

CONCLUSION

{27} For the foregoing reasons, we reverse and remand for a new trial.

{28} IT IS SO ORDERED.
JACQUELINE R. MEDINA, Judge

WE CONCUR:
J. MILES HANISEE, Chief Judge
KRISTINA BOGARDUS, Judge

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[3]As the State does not argue this was insufficient, as a matter of law, to satisfy Defendant's duty to "give his name, address and the registration number of the vehicle he [was] driving" Section 66-7-203, we assume, without deciding, a rational jury could have concluded Defendant's act of leaving these items at the scene fulfilled this duty.

[4]By the same token, we cannot say that the jury's decision not to convict Defendant of violating Section 66-7-203 necessarily means that it found that Defendant *did* satisfy its requirements—which Defendant asserts would bar retrial of Defendant's conviction under Section 66-7-201(D). The jury instructions did not require the jury to find that Defendant affirmatively satisfied all of Section 66-7-203's requirements in order to acquit him. Rather, the instructions required the State to prove that Defendant failed to satisfy each specified requirement under Section 66-7-203. Thus, it is possible the jury still found that Defendant failed to satisfy one or more of Section 66-7-203's requirements before leaving the scene, which would subject him to criminal liability under Section 66-7-201.

From the New Mexico Court of Appeals

Opinion Number: 2020-NMCA-051
No. A-1-CA-36032 (filed August 27, 2020)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LEO COSTILLO, JR.,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
KAREN L. TOWNSEND, District Judge

Released for Publication November 24, 2020.

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Opinion

J. Miles Hanisee, Chief Judge.

{1} The formal opinion previously filed in this matter on September 26, 2019, is hereby withdrawn, and this opinion is substituted therefor.[1]

{2} Defendant Leo Costillo, Jr., appeals from his convictions of twenty-one counts of criminal sexual penetration of a minor (CSPM), one count of attempt to commit CSPM, and one count of intimidation of a witness. Defendant argues that his convictions must be reversed because during trial, the State impermissibly commented on his prearrest silence in violation of his Fifth Amendment right to remain silent. Defendant also argues that due process and his right to be free from double jeopardy require the reversal of all but one of his convictions for CSPM and that his prosecution for intimidation of a witness was time-barred, requiring reversal of that conviction as well. We agree that the State's pervasive references to Defendant's invocation of his Fifth Amendment privilege, and the conclusion of guilt the State suggested be drawn therefrom, does not withstand constitutional scrutiny. We further agree that the State's prosecution of Defendant for intimidation of a witness was time-barred. We disagree, however, with Defendant that the State is barred from reprosecution under *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792. Finally, we decline to resolve Defendant's contention that his CSPM convictions violated his due process and double jeopardy rights, given his failure to challenge the nature of the criminal information on those grounds prior to trial. We nonetheless permit such a challenge on remand based upon our New Mexico Supreme Court's recent clarification of law in this area. We, therefore, reverse Defendant's convictions and remand for a new trial.

BACKGROUND

{3} During the summer of 2008, when R.S. was six years old, she lived with her grandmother and Defendant, her grandmother's husband. According to the criminal information filed by the State and R.S.'s testimony at trial, Defendant repeatedly raped R.S. from August 2008 until April 2009; threatened to hurt R.S. or her brother if she told anyone; and attempted but failed to rape R.S. in April 2013. R.S. first told her mother of the sexual abuse in 2015, and six months later, both reported it to police.

{4} Defendant was charged by criminal information with twenty-six counts of CSPM, which uniformly alleged identical instances of conduct occurring on or about the same date: August 15, 2008.[2] Defendant was also accused of a single count of intimidation of a witness. At trial, R.S., her mother, and San Juan County Sheriff's Deputy Detective Robert Tallman, the detective who conducted a voluntary, non-custodial interview of Defendant prior to any charges being filed, testified for the State. Defendant testified in his own defense, as did his wife and R.S.'s grandmother, Rosita Costillo. The jury returned guilty verdicts on all counts submitted to it. Defendant appeals. We reserve further discussion of the facts for our analysis.

DISCUSSION

I. The Prosecutor's Comments on and Use of Defendant's Invoked Silence Violated His Fifth Amendment Rights and Constituted Fundamental Error

{5} Defendant argues that the prosecutor's "direct and extensive comment on constitutionally protected silence" contributed to the "[e]xtreme and pervasive prosecutorial misconduct" that deprived him of a fair trial. Detective Tallman interviewed Defendant at the San Juan County Sheriff's office, and the clear implication of Detective Tallman's questioning, which Defendant quickly learned, was that Detective Tallman believed Defendant had sexually abused R.S. Despite the setting, and consistent with the non-custodial nature of the interview, Defendant declined to answer Detective Tallman's questions and asked several times to end the interview. Defendant contends that at his ensuing trial the prosecutor then impermissibly commented on Defendant's invocation of his Fifth Amendment right to remain silent during his voluntary, prearrest interview with Detective Tallman. Indeed, during trial, the prosecutor commented on

[1]This opinion has been modified on remand from our New Mexico Supreme Court, *see* No. S-1-SC-37981 (filed January 31, 2020), which instructed that this Court reconsider our original opinion in light of *State v. Lente*, 2019-NMSC-020, 453 P.3d 416, which was filed shortly after issuance of our original opinion in this case.

[2]Following the State's oral motion at trial to amend the information based on testimony that was presented at trial, there remained twenty-one counts of CSPM, one count of attempted CSPM (a lesser included offense of one count of CSPM), and one count of intimidation of a witness. The jury ultimately returned guilty verdicts on these remaining twenty-three counts.

Defendant's silence during every phase of the proceeding: in opening statement, during direct examination of Detective Tallman, while cross-examining Defendant, during his closing argument, and finally in rebuttal. Defendant, however, failed to make any objections to this evidence or argument.

{6} "[W]e review de novo the legal question whether the prosecutor improperly commented on [the d]efendant's silence." *State v. Foster*, 1998-NMCA-163, ¶ 8, 126 N.M. 177, 967 P.2d 852. "When a defendant fails to object at trial to comments made by the prosecution about his or her silence, we review only for fundamental error[.]" *State v. DeGraff*, 2006-NMSC-011, ¶ 21, 139 N.M. 211, 131 P.3d 61. "This review consists of two parts. We first determine whether any error occurred, i.e., whether the prosecutor commented on the defendant's protected silence. If such an error occurred, we then determine whether the error was fundamental." *Id.* Before we conduct our fundamental error analysis, however, we must answer two threshold questions—whether the State may use a defendant's prearrest silence as substantive proof of guilt when Defendant has invoked his right to remain silent, and whether Defendant did in fact invoke his right to remain silent in this case.

A. Prosecutors in New Mexico May Not Use a Defendant's Invoked Prearrest Silence as Substantive Evidence of Guilt

{7} The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. That "guarantee against testimonial compulsion . . . must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "It is the extortion of the information from the accused, the attempt to force him to disclose the contents of his own mind, that implicates the Self-Incrimination Clause." *Doe v. United States*, 487 U.S. 201, 211 (1988) (internal quotation marks and citations omitted). "There are four relevant time periods at which a defendant may either volunteer a statement or remain silent: before arrest; after arrest, but before the warnings required by *Miranda v. Arizona*, 384 U.S. 436, . . . (1966), have been given; after *Miranda* warnings have been given; and at trial." *DeGraff*, 2006-NMSC-011, ¶ 11.

{8} It remains axiomatic in American jurisprudence that a defendant's exercise of his right to remain silent at trial may not be used as a basis to convict him. *See id.* ¶ 12 ("The Fifth Amendment protects a defendant's decision not to testify at trial from prosecutorial comment."); *see also Griffin v. California*, 380 U.S. 609, 615 (1965) ("[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."). It is also well established that "due process guaranteed by the Fifth Amendment protects post-*Miranda* silence." *DeGraff*, 2006-NMSC-011, ¶ 12 (citing *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976)). The law is "less clear" regarding a prosecutor's ability to comment on a defendant's invocation of his or her right to remain silent post-arrest, pre-*Miranda*. *DeGraff*, 2006-NMSC-011, ¶ 13. Even more uncertain is whether there exists a constitutional limitation on a prosecutor's ability to comment on a defendant's prearrest and pre-*Miranda* silence, the circumstance present in this case.

{9} In *Jenkins v. Anderson*, the United States Supreme Court held that use of prearrest silence to impeach a criminal defendant's credibility does not violate the Fifth Amendment, but the Court expressly reserved the question of whether a defendant's prearrest silence can be used in circumstances other than impeachment. *See* 447 U.S. 231, 236 n.2, 239 (1980) ("Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment."). That question has remained open since *Jenkins*, as evinced by the division among lower courts considering whether the Constitution protects prearrest, pre-*Miranda* invocations of silence from substantive evidentiary use.[3]

{10} In 2013, the United States Supreme Court granted certiorari "to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief." *Salinas v. Texas*, 570 U.S. 178, 183 (2013). A plurality of the divided Court, however, determined that the defendant failed to invoke his right of silence and thus found it unnecessary to reach the question on which certiorari was granted. *See id.* Concurring in the judgment, Justice Thomas, joined by Justice Scalia, wrote that even had the defendant invoked the privilege, "the prosecutor's comments regarding [the defendant's] precustodial silence did not compel him to give self-incriminating testimony" and were, therefore, not improper comments on silence. *Id.* at 192 (Thomas & Scalia, JJ, concurring in judgment). The dissent, authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, concluded oppositely, reasoning that "the Fifth Amendment here prohibits the prosecution from commenting on [the defendant's] silence in response to police questioning." *Id.* at 193 (Breyer, Ginsburg, Sotomayor, & Kagan, JJ, dissenting). *Salinas*, therefore, left in place the differing federal circuit and state perspectives on the substantive viability of prearrest, pre-*Miranda* invoked silence.

[3] *See United States v. Okatan*, 728 F.3d 111, 116-17, 119-20 (2d Cir. 2013) (holding the prosecution was not permitted to use the driver's prearrest invocation or his subsequent silence as part of "its case in chief as substantive evidence of guilt"); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000) (holding the prosecution was barred from using the defendant's prearrest statement "as substantive evidence of guilt" because that would violate "the Fifth Amendment's privilege against self-incrimination"); *United States v. Burson*, 952 F.2d 1196, 1200-01 (10th Cir. 1991) (concluding the defendant's prearrest, pre-*Miranda* silence could not be substantively used by the prosecution at trial because "once a defendant invokes his right to remain silent, it is impermissible for the prosecution to refer to any Fifth Amendment rights which [the] defendant exercised"); *Coppola v. Powell*, 878 F.2d 1562, 1564, 1568 (1st Cir. 1989) (holding admission of a state trooper's testimony that the defendant stated prior to arrest that "he would not talk . . . without a lawyer" during the prosecution's case in chief violated the Fifth Amendment); *U.S. ex rel. Savory v. Lane*, 832 F.2d 1011, 1018-20 (7th Cir. 1987) (holding that the defendant's prearrest, pre-*Miranda* statement to officers that he did not want to speak to them was protected from use by the prosecution in its case in chief by the Fifth Amendment, but concluding it was harmless error); *but see United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) ("[W]e respectfully disagree with the First, Seventh and Tenth Circuits, which have all held that pre[]arrest silence comes within the proscription against commenting on a defendant's privilege against self-incrimination[.]"), *overruled on other grounds by United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (per curiam); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) ("The government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings."). State courts likewise are divided on the issue of whether the prosecution may introduce such evidence during its case in chief, with a significant number of states holding, on either federal or state constitutional grounds, that the state is barred from substantively using such prearrest expressions of silence. *See State v. Kulzer*, 2009 VT 79, ¶ 14, 186 Vt. 264, 979 A.2d 1031 (summarizing state court decisions).

{11} We agree with those courts that have concluded that a defendant's prearrest, pre-*Miranda* silence, once invoked, may not be admitted as substantive evidence of guilt by a prosecutor at trial. We, too, consider assertions of an individual's Fifth Amendment right of silence in the face of accusatory questioning by law enforcement to not be fodder for insinuations of guilt at trial. *See id.* at 195 ("[T]o allow comment on silence directly or indirectly can compel an individual to act as a witness against himself—very much what the Fifth Amendment forbids." (Breyer, J., dissenting) (internal quotation marks and citation omitted))); *Okatan*, 728 F.3d at 119 (answering in the negative "the question the Supreme Court left unanswered in *Salinas*: whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief" (internal quotation marks and citation omitted)). To hold otherwise validates—at the expense of the constitutional right holder—a classic "lose-lose" scenario, wherein the suspect either elects to answer police questions at the risk of self-incriminating disclosure or does not do so and the prosecution later uses the silence as evidence of guilt. In this context, the Constitution proscribes such an advantage to the state to the detriment of individuals within it.

{12} While Defendant was present at the interview voluntarily, he quickly realized even in the absence of *Miranda* warnings that anything he said could be "dangerous" to himself as an "injurious disclosure[.]" *See Hoffman*, 341 U.S. at 487. To conclude that the State may use Defendant's ensuing invocation of the Fifth Amendment as evidence of his guilt in its case in chief would, as explained by the Supreme Court in *Griffin*, render New Mexico courtrooms forums for little more than "an inquisitorial system of criminal justice" that imposes "a penalty . . . for exercising a constitutional privilege." 380 U.S. at 614 (internal quotation marks and citation omitted); *id.* at 615 (holding that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence [by not testifying at trial] or instructions by the court that such silence is evidence of guilt"). This we cannot abide. As did the analysis that underpinned *Griffin* and the dissent in *Salinas*, we decline to make one's prearrest assertion of the Fifth Amendment costly to a criminal defendant by allowing the State to infer guilt based thereon. We hold that prosecutors in New Mexico may not use a defendant's prearrest silence as substantive evidence of guilt when the defendant has invoked the Fifth Amendment privilege against self-incrimination.

B. Defendant Invoked His Right to Remain Silent

{13} We next turn briefly to the State's argument that Defendant failed to invoke his right to remain silent. If Defendant did not invoke his Fifth Amendment privilege, the prosecutor's comments on Defendant's silence were not constitutionally prohibited. *See DeGraff*, 2006-NMSC-011, ¶ 20 (recognizing "that silence is protected only if a right to remain silent is invoked"); *see also Salinas*, 570 U.S. at 191 ("Before [the defendant] could rely on the privilege against self-incrimination, he was required to invoke it."). "As a general rule, the constitutional privilege against self-incrimination is available only if it is invoked as the ground for refusing to speak." *State v. Gutierrez*, 1995-NMCA-018, ¶ 8, 119 N.M. 618, 894 P.2d 395. "If the witness desires the protection of the privilege, he must claim it[.]" *Id.* (alteration, internal quotation marks, and citation omitted). "It is agreed by all that a claim of the privilege does not require any special combination of words." *Quinn v. United States*, 349 U.S. 155, 162 (1955). "[N]o ritualistic formula is necessary in order to invoke the privilege." *Id.* at 164. "All that is necessary is an objection [to a question] stated in language that [the propounder of the question] may reasonably be expected to understand as an attempt to invoke the privilege." *Emspak v. United States*, 349 U.S. 190, 194 (1955).

{14} Here, the recording of Detective Tallman's interview of Defendant reflects that Defendant unequivocally informed Detective Tallman that he would not speak with him upon learning the topic Detective Tallman wished to discuss. When Detective Tallman invited Defendant to "start at the beginning and tell me about how that all started and how that happened[,]" referring to "some inappropriate things" that had gone on with R.S., Defendant immediately responded, "Let's stop there. Now that's the reason why I was asking what am I—am I in trouble for something because—this, this is gonna go to more evil stuff. Shouldn't I have an attorney here?" Defendant also repeatedly asked to stop the interview and indicated that he did not wish to continue speaking with Detective Tallman by asking, "So, can we stop for a while? I mean, step out of this, you know?" When Detective Tallman continued to question Defendant, Defendant interjected, not ten seconds later, "Can I go now? Can we set another time when we can talk?" Defendant ultimately demonstrated his intent not to speak with Detective Tallman, i.e., to exercise his right to remain silent, by answering affirmatively that he did not wish to speak further and by leaving the interview. *Cf. State v. King*, 2013-NMSC-014, ¶ 10, 300 P.3d 732 (holding that the defendant invoked his right to remain silent in a custodial interrogation when the defendant's invocation was not ambiguous). Based on the foregoing, we have little difficulty concluding that Defendant invoked his right to remain silent during his interview with Detective Tallman.

C. The Prosecutor Impermissibly Commented on Defendant's Silence

{15} We next consider whether—under existing precedent and the prohibition we announce today—the prosecutor's questions to Detective Tallman and Defendant and statements during the State's opening and closing remarks constituted improper commentary on Defendant's silence. In so doing, we consider "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the accused's exercise of his or her right to remain silent." *DeGraff*, 2006-NMSC-011, ¶ 8 (internal quotation marks and citation omitted).

{16} As stated already, the prosecutor directly exploited Defendant's refusal to answer Detective Tallman's questions throughout the proceedings. Twice during his opening statement, the prosecutor noted Defendant's failure to deny his involvement in R.S.'s sexual abuse during the interview with Detective Tallman, informing the jury that Defendant "d[idn]'t deny it once, not once," and a short time later, reminding them again that Defendant "[d]oesn't deny [the allegations] just once." During direct examination of Detective Tallman, the prosecutor introduced and played the forty-minute taped interview of Defendant in which he invoked his right to remain silent. Then when asked, "Did [Defendant] give any reasons why he would be falsely accused of such a heinous crime?" Detective Tallman responded, "Not one." And when cross-examining Defendant regarding his conversation with Detective Tallman, the prosecutor directly asked: "[W]hy didn't you profess your innocence just like you did to the jury?" Perhaps most illustrative of the prosecutor's mindset was his suggestion during closing argument that Defendant, if innocent, should have professed his innocence during the interview. The prosecutor suggested to the jury that they put themselves in the position of Defendant, arguing:

> When confronted . . . you're gonna wonder why these accusations are coming if you're really innocent. You're gonna be like, 'wow, that's really crazy that this little girl would even come up with these schemes.' But the first thing you'd want to do is profess your innocence. And you didn't get any of that.

The natural and necessary impact upon the

jury of each of the prosecutor's statements, especially taken together, was to prompt the jury to wonder what Defendant was hiding by invoking his right to remain silent. *See State v. Hennessy*, 1992-NMCA-069, ¶ 16, 114 N.M. 283, 837 P.2d 1366 (determining "whether the language of the prosecutor's questions on cross-examination and his comments in closing were such that the jury would naturally and necessarily have taken them to be comments on the exercise of the right to remain silent"), *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, ¶ 16, 116 N.M. 450, 863 P.2d 1071.

{17} Indeed, the prosecutor's theory of the case suggestively and unabashedly rested on the premise that Defendant's failure to proclaim his innocence in the face of R.S.'s accusations insinuates—if not commands—a conclusion of guilt. But as we hold today, a prosecutor's trial arsenal rightly excludes the fact of a defendant's invocation of silence for the straightforward reason that under the Fifth Amendment, no criminal defendant is compelled to say anything at all, much less profess his innocence, after he has invoked his right to remain silent. *Cf. In re Gault*, 387 U.S. 1, 47-48 (1967) ("The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. [I]t protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used." (omission, internal quotation marks, and citation omitted)). We conclude that the prosecutor's comments during his opening statement and closing argument, as well as the testimony he elicited from Detective Tallman and Defendant, proactively utilized Defendant's invocation of his right to remain silent as indicium of his guilt, and pursuant to our ruling today violated the Fifth Amendment.

D. The Prosecutor's Comments on Defendant's Silence Constituted Fundamental Error

{18} Having concluded that the prosecutor's comments on Defendant's silence were constitutionally improper, we next consider whether they rendered Defendant's trial fundamentally unfair such that a new trial is warranted despite Defendant's failure to object. *DeGraff*, 2006-NMSC-011, ¶ 21 ("[I]t is fundamentally unfair and a violation of due process to allow an individual's invocation of the right to remain silent to be used against him or her at trial." (internal quotation marks and citation omitted)). "Where counsel fails to object, the appellate court is limited to a fundamental error review." *State v. Sosa*, 2009-NMSC-056, ¶ 26, 147 N.M. 351, 223 P.3d 348. "[O]ur courts have been more likely to find reversible error when the prosecution's comment invades a distinct constitutional protection." *Id.* ¶ 27. "An error is fundamental if there is a reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *DeGraff*, 2006-NMSC-011, ¶ 21 (internal quotation marks and citation omitted). "[M]ore direct prosecutorial comments on a defendant's invocation of the right to remain silent are more likely to be fundamental error." *Id.* Only when the "evidence of guilt is overwhelming, such that the prosecutorial impropriety is insignificant by comparison, [may] a conclusion that the error is not fundamental . . . be warranted." *State v. Pacheco*, 2007-NMCA-140, ¶ 18, 142 N.M. 773, 170 P.3d 1011 (internal quotation marks omitted).

{19} Considered in sum, the prosecutor's comments on Defendant's silence during opening statement, direct examination of Detective Tallman, cross-examination of Defendant, and closing argument were cumulatively powerful. Indeed, the commentary was trial-spanning and suggestive of guilt. To reiterate, the State repeatedly invited the jury to infer Defendant's guilt from his invocation of his right to remain silent and his attendant failure to proclaim his innocence. It would be impossible to conclude in this instance that the prosecutor's comments on Defendant's silence were insignificant to the jury in its deliberation, particularly given the fact that the evidence of Defendant's guilt otherwise hinged largely on the testimony and credibility of R.S. *See id.* ¶ 18 ("[I]mproper prosecutorial . . . commentary on a defendant's exercise of the constitutional right to remain silent is frequently regarded as a significant factor, sufficiently prejudicial in nature to constitute fundamental error."). We conclude instead that the prosecutor's reliance upon Defendant's invoked silence, and the implication the prosecutor urged the jury to draw therefrom, were distinctly prejudicial and warrant a determination of fundamental error and require reversal of Defendant's convictions.[4]

E. Retrial Is Not Barred by Double Jeopardy Principles Under *Breit*

{20} Defendant further contends that the prosecutor's misconduct at trial was so extreme that retrial should be barred under double jeopardy principles. "The New Mexico Constitution, like its federal counterpart, protects any person from being 'twice put in jeopardy for the same offense.' " *Breit*, 1996-NMSC-067, ¶ 8 (quoting N.M. Const. art II, § 15); *see* U.S. Const. amend. V (providing that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb"). Generally, however, "the double jeopardy guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside." *United States v. DiFrancesco*, 449 U.S. 117, 131 (1980) (internal quotation marks and citation omitted). As the United States Supreme Court has explained, "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *Id.* (internal quotation marks and citation omitted).

{21} An exception to this rule exists, however, in extreme circumstances of prosecutorial misconduct, specifically when "a defendant is goaded by prosecutorial misconduct to move for a mistrial" or to seek "reversal on appeal" in a manner so extreme as to undermine "the defendant's interest in having the prosecution completed by the original tribunal before whom the trial was commenced." *Breit*, 1996-NMSC-067, ¶¶ 2, 14, 22. In *Breit*, our Supreme Court held:

> Retrial is barred under Article II, Section 15, of the New Mexico Constitution, [(1)] when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, [(2)] if the official knows that the conduct is improper and prejudicial, and [(3)] if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.

Breit, 1996-NMSC-067, ¶ 32. But the remedy of barring retrial on double jeopardy grounds "applies only in cases of the most severe prosecutorial transgressions." *State v. McClaugherty*, 2008-NMSC-044, ¶ 25,

[4]Defendant also contends that the prosecutor committed misconduct by "improperly introducing evidence of prior bad acts, then using it to argue propensity[.]" Defendant lodged no objection at trial, but argues that the prosecutor's conduct was a direct violation of Rule 11-404(B) NMRA, and thus constitutes per se fundamental error. Defendant has cited no authority for this bald proposition, we assume none exists, and we decline to further address his argument in this regard. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists[.]"); *see also* Rule 12-321(B)(2)(c) (permitting an appellate court, in its discretion, to review unpreserved issue for fundamental error); *State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate courts are under no obligation to review unclear or undeveloped arguments).

144 N.M. 483, 188 P.3d 1234 (internal quotation marks and citation omitted).

{22} We conclude that retrial is not barred based upon the prosecutor's trial conduct. Although under our holding today the State violated Defendant's Fifth Amendment rights, the prosecutor's reference to and use of Defendant's refusal to respond to police questions before he was arrested did not contravene then-established binding precedent. Indeed, the actions in question were those the United States Supreme Court sought to but did not resolve in *Salinas*. The record does not suggest, then, that the prosecutor knew his questions, comments, and argument were improper or in any way intended to provoke a mistrial, or that he acted in willful disregard of such under the second and third prongs of the *Breit* test. Indeed, Defendant never once objected to any of that which he now complains should bar his retrial. In contrast to *Breit*, where the prosecutor's misconduct was so "incessant[] and outrageous" that the district court judge's memorandum opinion outlining such was included as an appendix to the New Mexico Supreme Court's decision, here there is no such comparable record or evidence of knowing and willful misconduct by the prosecutor. *See Breit*, 1996-NMSC-067, ¶ 37. Rather, while we conclude today that the prosecutor's substantive use of the Defendant's silence is constitutionally impermissible and the prejudice associated therewith amounted to fundamental error, that conduct does not equate to the level of prosecutorial misconduct required to bar retrial under *Breit*. As such, retrial is not barred.

II. Defendant's Intimidation of a Witness Conviction Is Barred by the Statute of Limitations

{23} Defendant argues that his conviction for intimidation of a witness must be reversed because the statute of limitations barred the prosecution of that charge. We agree.

{24} Intimidation of a witness is a third-degree felony. NMSA 1978, § 30-24-3(C) (1997). The time limit for bringing charges for a third-degree felony is "five years from the time the crime was committed." NMSA 1978, § 30-1-8(B) (2009). Defendant's intimidation of R.S. occurred in August 2008, and Defendant was not charged or indicted until 2016, which exceeds the applicable statute of limitations.

{25} The State argues only that the statute of limitations for prosecuting Defendant for intimidation of a witness was tolled under NMSA 1978, Section 30-1-9.1 (1987). According to the State, Section 30-1-9.1 applies "when the victim of any offense is a child." It does not. Section 30-1-9.1 provides, "[t]he applicable time period for commencing prosecution pursuant to Section 30-1-8 . . . shall not commence to run for an alleged violation of [NMSA 1978,] Section 30-6-1 [(2009)], [NMSA 1978,] 30-9-11 [(2009),] or [NMSA 1978,] 30-9-13 [(2003)] until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first." By its plain language, Section 30-1-9.1 tolls the statute of limitations for prosecuting alleged violations of Sections 30-6-1 (abandonment or abuse of a child), 30-9-11 (criminal sexual penetration), and 30-9-13 (criminal sexual contact of a minor). It does not toll the statute of limitations for prosecuting an alleged violation of Section 30-24-3 (bribery or intimidation of a witness). Because Defendant's prosecution for intimidation of a witness exceeded the applicable limitations period of five years between when the crime was committed in August 2008 and when the information was filed in March 2016, Defendant's conviction on that charge is barred. *See State v. Kerby*, 2007-NMSC-014, ¶¶ 20, 27, 141 N.M. 413, 156 P.3d 704 (vacating the defendant's convictions that fell outside the applicable statute of limitations even though defense was not raised below because the defendant did not knowingly, intelligently, and voluntarily waive the defense).

III. Consideration of Defendant's Due Process and Double Jeopardy Challenges Shall Occur on Remand

{26} Defendant argues that all of his CSPM convictions except one violate his due process and double jeopardy rights and were not supported by sufficient evidence because the State pursued a course-of-conduct theory of prosecution based on factually indistinguishable incidents. We leave these challenges for consideration by the district court on remand.

{27} In its recent opinion in *Lente*, our New Mexico Supreme Court provided new guidance on evaluating due process, multiplicious double jeopardy, and sufficiency of the evidence challenges in "resident child molester" cases, a unique circumstance of abuse wherein "child victims in these cases are usually the sole witnesses of the crimes perpetrated and, because of their age and frequency of the sexual abuse to which they are subjected, cannot provide detailed accounts of the abuse but only general accounts of frequent sexual contact with the defendant." 2019-NMSC-020, ¶¶ 1-3. Under the *Lente* framework, courts first consider whether a defendant is charged with "carbon copy" counts, i.e., identically worded sex abuse charges that are in no way differentiated from one another, and thus, violate double jeopardy. *Id.* ¶¶ 13, 41-49 (explaining the "double jeopardy problems associated with unspecific, 'carbon copy' indictments").[5] Second, if the charging instrument passes constitutional muster, the trial evidence must then be sufficient to support multiple convictions. *Id.* ¶¶ 13, 68-70 (adopting three evidentiary requirements that must be met in order for an alleged victim's testimony to support multiple convictions in resident molester sex abuse cases).

{28} Importantly, however, *Lente* also explained that in order for a defendant to challenge an indictment or criminal information on appeal on the basis Defendant now does in this case, he must have "filed pretrial objections to the [charging instrument] or demanded any additional pretrial specification of the charges"—i.e., seeking a bill of particulars—*before* trial. *Id.* ¶ 16. A defendant who fails "to object to the indictment on notice or due process grounds" is "precluded from first [doing so] after trial[.]" *Id.* Such is the case here. In his briefing on appeal, Defendant does not indicate when or even if he pursued a challenge to or sought specification of the charges against him under principles of due process or notice. Moreover, the State contends he failed to do so, and our review of the record supplies no such instance where he did. Given this, we decline to resolve Defendant's due process and double jeopardy challenges to the criminal information, or further apply *Lente*.[6] Nonetheless, and particularly given the issuance of *Lente* following Defendant's first trial, Defendant and the State are free to pursue whatever course of action they consider to be warranted under *Lente* on remand, including issues related to the remaining charges contained within the criminal information.

CONCLUSION

{29} For the foregoing reasons, we reverse Defendant's convictions for twenty-one counts of CSPM, one count of attempt to commit CSPM, and one count of intimidation of a witness, and remand for a new trial on the CSPM and attempted CSPM charges.

{30} IT IS SO ORDERED.
J. MILES HANISEE, Chief Judge

WE CONCUR:
JENNIFER L. ATTREP, Judge
BRIANA H. ZAMORA, Judge

[5]Each count of alleged CSPM (originally twenty-six counts) contained in the criminal information uniformly stated: "on or about August 15, 2008, [Defendant] did unlawfully and intentionally cause a [minor] to engage in sexual intercourse, cunnilingus, fellatio, or anal intercourse or cause penetration, to any extent and with any object[.]"

[6]We decline to address Defendant's challenge to the sufficiency of the evidence in light of our ruling in this regard.

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EA

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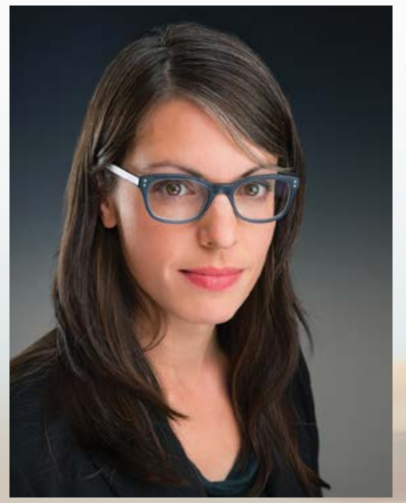

Montgomery & Andrews, P.A. is pleased to announce that **Jocelyn Barrett-Kapin** rejoined the firm as of counsel. Jocelyn previously worked at the firm as a litigation associate upon admission to the State Bar of New Mexico in 2012. In the interim, Ms. Barrett-Kapin practiced briefly in civil rights litigation and went on to co-manage a family business until returning to the law in 2019. Ms. Barrett-Kapin brings her litigation experience to the practice of administrative and regulatory law, concentrated in the areas of public utility regulation, natural resources, and water law. Ms. Barrett-Kapin lives in Santa Fe with her spouse and their wonderful three-year-old son.

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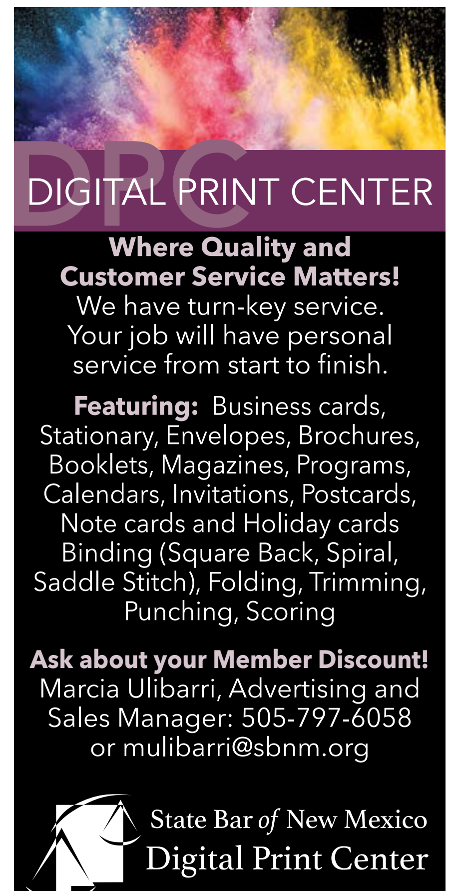

ALCARAZ LAW, P.A.

Alcaraz Law is proud to announce that

Marisela Chavez

has become a Partner of the firm.

Congratulations, Mari!

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We are pleased to announce

Jari L. Rubio

has joined the Firm as an Associate

Ms. Rubio earned her Bachelor of Arts degrees in Political Science and Psychology in 2018 from New Mexico State University and her Doctor of Jurisprudence in 2021 from University of New Mexico School of Law.

We welcome her to our practice.

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Positions

Lawyer Position
Guebert Gentile & Piazza P.C. seeks an attorney with up to five years' experience and the desire to work in tort and insurance litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert Gentile & Piazza P.C., P.O. Box 93880, Albuquerque, NM 87199-3880; advice1@guebertlaw.com. All replies are kept confidential. No telephone calls please.

Associate In-House Attorney
Pueblo of Laguna seeks applications for the position of Associate In-House Attorney to provide legal services for governmental offices and departments. Reply by February 17, 2022. Position details at: www.lagunapueblo-nsn.gov/elected-officials/secretarys-office/human-resources/employment/

City of Albuquerque – Contract Hearing Officer
The City of Albuquerque's Air Quality Program is seeking a qualified attorney to serve as a contract hearing officer for air quality related hearings, including petitions for rulemaking, permit appeals to the local Air Board and requests for public information hearings. This position is an independent contractor, and is not an employee of the City of Albuquerque. Applicant must be admitted to the practice of law by the New Mexico Supreme Court and be an active member of the Bar in good standing. A successful candidate will be an accomplished neutral facilitator, and have strong communication skills, knowledge of the Clean Air Act and air quality rules and regulations. Prior government hearing officer experience is preferred. Please submit a resume to the attention of "Air Quality Hearing Officer Application"; c/o Angela Aragon; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or amaragon@cabq.gov.

Senior Trial and Deputy District Attorneys
The 6th Judicial District Attorney's Office has an opening for a Senior Trial District Attorney and a Deputy District Attorney position in Silver City. Must have experience in criminal prosecution. Salary DOE. Send letter of interest, resume, and three current professional references to MRenteria@da.state.nm.us.

COA – Request for Letters of Interest
Notice is hereby given that the City of Albuquerque, Department of Finance and Administration, Risk Management Division calls for Proposals for RFLI of Workers' Compensation Legal Services. Interested parties may secure a copy of the Proposal Packet from the City of Albuquerque Risk Management Division, PO Box 470, Albuquerque, NM 87103, (505) 768-3080, or by accessing the City's website at https://www.cabq.gov/dfa/documents/request-for-letters-of-interest-workers-compensation-legal-services.pdf . Proposals submitted pursuant to this request will be accepted by the City on an ongoing basis until further notice in order to maintain a current listing of pre-qualified firms available to perform services for the City.

Litigation Attorney
Extremely busy Journal Center civil litigation firm is accepting resumes for an associate attorney with 5+ year's experience. Candidates should possess strong research and writing skills and a desire to represent injured parties. Practice areas include civil litigation/personal injury and tort matters. Litigation experience preferred, but not a deal breaker. Salary commensurate with experience. Please forward a letter of interest along with a Resume and writing sample to: paralegal3.bleuslaw@gmail.com.

Attorney – 3 years' Legal Experience
Butt Thornton & Baehr PC seeks an attorney with at least 3 years' legal experience who has an interest in Workers' Compensation law. BTB is in its 63rd year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest, resume, and writing samples to Ryan T. Sanders at rtsanders@btblaw.com.

Full-time and Part-time Attorney
Jay Goodman and Associates Law Firm, PC is seeking one full-time and one part-time attorney, licensed/good standing in NM with at least 3 years of experience in Family Law, Probate, Real Estate and Civil Litigation. If you are looking for meaningful professional opportunities that provide a healthy balance between your personal and work life, JGA is a great choice. If you are seeking an attorney position at a firm that is committed to your standard of living, and professional development, JGA can provide excellent upward mobile opportunities commensurate with your hopes and ideals. As we are committed to your health, safety, and security during the current health crisis, our offices are fully integrated with cloud based resources and remote access is available during the current Corona Virus Pandemic. Office space and conference facilities are also available at our Albuquerque and Santa Fe Offices. Our ideal candidate must be able to thrive in dynamic team based environment, be highly organized/reliable, possess good judgement/people/communication skills, and have consistent time management abilities. Compensation DOE. We are an equal opportunity employer and do not tolerate discrimination against anyone. All replies will be maintained as confidential. Please send cover letter, resume, and a references to: jay@jaygoodman.com. All replies will be kept confidential.

Litigation Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 37 states, is currently seeking an experienced litigation attorney for an immediate opening in its offices in Albuquerque and Santa Fe, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The position offers a significant signing bonus, 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume with cover letter indicating which office(s) you are interested in to Hamilton Hinton at hhinton@cordelllaw.com

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This position is continuous and will remain open until filled. Hearing Examiners provide independent recommended decisions, including findings of fact and conclusions of law, to the NMPRC Commissioners in adjudicated cases involving the regulation of public utilities, telecommunications carriers and motor carriers. They manage and organize complex, multi-discipline and multi-issue cases; preside over evidentiary hearings; and write recommended decisions, accomplished by reading and analyzing the evidence, and incorporating that evidence and analysis into a recommended decision similar to a court opinion. The ideal candidate will have experience practicing law in areas directly related to public utility regulation; experience as an administrative law judge or hearing officer; educational experience in areas directly related to public utility regulation, such as economics, accounting or engineering; and experience practicing law involving substantial research and writing. Minimum qualifications include a J.D. from an accredited school of law and five years of experience in the practice of law. Must be licensed as an attorney by the Supreme Court of New Mexico or qualified to apply for a limited practice license (Rules 15-301.1 and 15-301.2 NMRA). For more information on limited practice license please visit http://nmexam.org/limited-license/ . Substitutions may apply. To apply please visit www.spo.state.nm.us

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Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad and Hobbs offices. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney ($58,000 to $79,679). There is also an opening for a prosecutor with at least 2 years of Trial Experience for a HIDTA Attorney position in the Roswell office, with starting salary of ($ 70,000.00) Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

Multiple Associate Attorneys

Hinkle Shanor, LLP is seeking multiple associate attorneys to join its Santa Fe office in 2022! The Santa Fe office of Hinkle Shanor has a diverse practice portfolio that includes: medical malpractice defense litigation; complex litigation, including class action litigation; employment litigation; environmental law; energy, minerals, and natural resources; public utilities; product liability; transportation; and ski area defense. There are opportunities within the firm to work with each practice group. Ideal candidates will demonstrate strong academic achievement and polished writing skills. Substantial consideration will be given to candidates with prior litigation and trial experience. Interested candidates should submit a resume and cover letter identifying their practice interests. Highly competitive salary and benefits; all inquiries will be kept confidential. Please e-mail resumes and cover letters to gromero@hinklelawfirm.com.

City of Albuquerque – Contract Attorney

The City of Albuquerque, through the Albuquerque-Bernalillo County Air Quality Control Board ("Air Board"), is seeking a qualified attorney to contract with to provide legal representation and general legal services to the Air Board. This position is an independent contractor, and is not an employee of the City of Albuquerque. Applicant must be admitted to the practice of law by the New Mexico Supreme Court and be an active member of the Bar in good standing. A successful candidate will attend all Air Board meetings, have strong communication skills, knowledge of board governance and Robert's Rules of Order, The NM Open Meetings Act, and knowledge of environmental rules and regulations including the Clean Air Act. Prior experience with, or advising, board and commissions is preferred. Please submit a resume to the attention of "Air Board General Counsel Application"; c/o Angela Aragon; Executive Assistant; P.O. Box 2248, Albuquerque, NM 87103 or amaragon@cabq.gov.

Request For Proposal – Defense Legal Services

Pueblo of Laguna seeks proposal from any law firm or individual practicing attorney to provide legal services for adult criminal defense or representation of juveniles in delinquency proceedings when there is conflict of interest or unavailability of regular defender. Reply by February 17, 2022. RFP details at: www.lagunapueblo-nsn.gov/rfp_rfq.aspx

Assistant City Attorneys (Various Departments)

The City of Albuquerque Legal Department is hiring for various Assistant City Attorney positions. The Legal Department's team of attorneys provides a broad range of legal services to the City, as well as represent the City in legal proceedings before state, federal and administrative bodies. The legal services provided may include, but will not be limited to, legal research, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and negotiating contracts, litigating matters, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing and interpersonal skills are essential. Preferences include: Five (5)+ years' experience as licensed attorney; experience with government agencies, government compliance, real estate, contracts, and policy writing. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Current open positions include: Assistant City Attorney - APD Compliance; Assistant City Attorney – Employment/Labor. For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

8th Judicial District Attorney's Office Assistant Trial — Senior Trial

The 8th Judicial District Attorney Office is accepting applications for a full-time Assistant Trial Attorney/ Senior Trial Attorney in Taos, NM. Requirements: Assistant Trial Attorney: Attorney licensed to practice law in New Mexico plus a minimum of one (1) year relevant prosecution experience. Senior Trial Attorney: Attorney licensed to practice law in New Mexico plus a minimum of five (5) years relevant prosecution experience. Work performed: Incumbent will prosecute all cases, including high level and high profile cases. As experience allows, applicants should possess expertise in one or more areas of criminal prosecution; lead special prosecutions assigned by the District Attorney; supervises and mentors other attorneys and staff. Applicant may alternatively be a division/bureau head in a main or satellite office who handles cases as well as substantial administrative duties and tasks. Can act on behalf of the District Attorney as directed. Salary will be based upon experience, position applied for, and the current District Attorney Personnel and Compensation Plan. $55,000 to $70,000. Please submit resumes/letters of interest to Suzanne Valerio, District Office Manager by mail to 105 Albright Street Suite L, Taos, NM 87571 or by email to svalerio@da.state.nm.us no later than November 30, 2021

Eleventh Judicial District Attorney's Office, Div II

The Eleventh Judicial District Attorney's Office, Division II, Gallup, New Mexico is seeking qualified applicants for Trial Attorney. The Trial Attorney position requires advanced knowledge and experience in criminal prosecution, rules of evidence and rules of criminal procedure, trial skills, computer skills, ability to work effectively with other criminal justice agencies, ability to communicate effectively, ability to re-search/analyze information and situations. New Mexico State Bar license preferred. The McKinley County District Attorney's Office provides a supportive and collegial work environment. Salary is negotiable. Submit a letter of interest and resume to District Attorney Bernadine Martin, Office of the District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter to bmartin@da.state.nm.us. Position will remain opened until filled.

Associate Attorneys

Mynatt Martínez Springer P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking two associate attorneys to join our team. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, and government representation. Applicants with 0-5 years of experience will be considered for full-time employment. If it is the right fit, the firm will also consider applications for part-time employment from attorneys with more than 5 years of experience. Associates are a critical component of the firm's practice and are required to conduct legal research; provide legal analysis; advise clients; draft legal reviews, pleadings, and motions; propound and review pretrial discovery; and prepare for, attend, and participate in client meetings, depositions, administrative and judicial hearings, civil jury trials, and appeals. Successful candidates must have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. The firm will consider applicants who desire to work remotely. Offers of employment will include salary commensurate with experience and a generous benefits package. Please send your cover letter, resume, law school transcript, writing sample, and references to rd@mmslawpc.com.

Request For Proposal – Prosecutor Legal Services

Pueblo of Laguna seeks proposals from any law firm or individual practicing attorney to provide prosecutorial legal services for adult criminal or juvenile delinquency cases when there is conflict of interest or unavailability of regular prosecutor. Reply by February 17, 2022. RFP details at: www.lagunapueblo-nsn.gov/rfp_rfq.aspx

Associate Attorney

Immediate opportunity in downtown Albuquerque for an Associate Attorney. Practice area is Real Estate. Litigation and transactional experience are required. Experience with Home Owners Associations is a plus WordPerfect knowledge and experience is highly desirable. Send resume and writing sample to: Steven@BESt staffJobs.com

Chief Magistrate Judge - Ute Mountain Ute Court of Indian Offenses

The Bureau of Indian Affairs, Ute Mountain Ute Agency in beautiful Towaoc Colorado is seeking a Chief Magistrate Judge for the Ute Mountain Ute Court of Indian Offenses. The Magistrate con-tributes to the mission of this office by assisting in the administration of judicial services within the Southwest Region's Court of Indian Offenses. The Magistrate serves as an agent of the U.S. Government and is the official in charge of the Court of Indian Offenses of the Ute Mountain Ute Agency which services the Ute Mountain Ute Tribe. Prior experience as a judge is recommended, but not required. Indian preference will be given to qualified candidates. To be considered, please submit a cover letter, current resume with references and BIA Form 4432 (Indian Preference Form) to Eric.Rodriguez@bia.gov by 2/28/22.

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Looking for Part-Time Attorney to assist with various real-estate related projects. Approx. 20 hours a week. Potential for full-time position. At least 3 years' experience. Well established real estate firm with well-established client base. Independent Contractor. Malpractice Insurance Included. Rate $65/hour. Please send resume to astraussmartin@relanm.com

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Conklin, Woodcock & Ziegler, P.C. is seeking a full-time experienced attorney with at least three years litigation experience for an associate position with prospects of becoming a shareholder. We are a well-respected eight-attorney civil defense firm that practices in among other areas: labor and employment, construction, personal injury, medical malpractice, commercial litigation, civil rights, professional liability, insurance defense and insurance coverage. We are looking for a team player with a solid work record and a strong work ethic. Our firm is AV-rated by Martindale-Hubbell. Excellent pay and benefits. All replies will be kept confidential. Interested individuals should e-mail a letter of interest and resumes to: jobs@conklinfirm.com.

Contract Civil Legal Attorney

POSITION: Contract Civil Legal Attorney; PROGRAM: Peacekeepers, Espanola NM; STATUS: Contract/Part Time/Exempt; BENEFITS: No; RATE OF PAY: DOE; EDUCATION: Bachelor's Degree in Sociology, Social Work, Criminal Justice. EXPERIENCE: Three years in domestic violence, shelter or advocacy work. PREFERRED CERTIFICATES: None. Practice civil and family law with an emphasis on domestic violence orders of protection within the Eight Northern Pueblos. EIGHT NORTHERN INDIAN PUEBLOS COUNCIL, INC., 327 Eagle Drive, PO Box 969, Ohkay Owingeh, NM 87566; www.enipc.org (to access application) Submit applications to: Desiree Hall/HR Specialist, Desiree@enipc.org; 505-753-6998 (Fax); Or call 505-747-1593 ext. 110 for information

In-House Attorney

Pueblo of Laguna seeks applications for the position of In-House Attorney to provide legal services for governmental offices and departments. Reply by February 17, 2022. Position details at: www.lagunapueblo-nsn.gov/elected-officials/secretarys-office/human-resources/employment/

Associate General Counsel

This in-house counsel position in Albuquerque is responsible for providing legal knowledge, counsel, and advice in areas of major focus for Blue Cross and Blue Shield of New Mexico such as provider network, health care management, sales and marketing, and/or regulatory rate, form and compliance plan filings. With very limited supervision, the position will be responsible for various legal projects and issues which may include providing in-depth legal drafting, advice/counsel and support for negotiations and contracting with health care providers, utilization management activities, negotiations and contracting with insured and self-funded employer groups, and/or responses to, and appropriate res-olution of, regulator filing or other concerns. This position will contribute to strategic direction and will handle complex legal matters and large projects. Apply to https://bit.ly/2WpkWYG. JOB REQUIREMENTS: Juris Doctor degree from ABA-accredited law school; License to practice law in New Mexico or willing and able to become licensed soon after hire; At least 8 years' experience as an attorney-at-law; Excellent analytical, drafting, and problem-solving skills; Commitment to furnishing high quality and solutions-oriented legal services; Self-starter who thrives in fast-paced legal practice; Business and strategic acumen and commitment to business partnering; Clear and concise verbal and written communication skills; Interpersonal, negotiation, and diplomacy skills. PREFERRED JOB REQUIREMENTS: 3+ years' recent experience in health care law and/or health insurance law; Experience furnishing legal support for health insurer operations; Experience working with health insurance regulators.

Probation Officers

The United States Probation and Pretrial Services Office, District of New Mexico, is accepting applications for UNITED STATES PROBATION OFFICERS for the Albuquerque office. View announcement and application instructions at: http://www.nmpp.uscourts.gov/career-opportunities.

Legal Secretary

The City of Albuquerque Legal Department (Litigation Division) is seeking a Legal Secretary to assist assigned attorneys in performing a variety of legal secretarial/administrative duties, which include but are not limited to: preparing and reviewing legal documents; creating and maintaining case files; calendaring; provide information and assistance, within an area of assignment, to the general public, other departments and governmental agencies. Please apply at https://www.governmentjobs.com/careers/cabq.

Legal Assistant/Paralegal

Modrall Sperling has an excellent opportunity for a litigation legal assistant/paralegal. Although paralegal experience is preferred, we will consider entry-level candidates with strong academic records and work experience in related fields. Key Responsibilities: Organize case files; Draft and file legal documents; Review/index discovery documents; Prepare exhibits for depositions and trial; Conduct factual research; Assistant attorneys with administrative tasks. Basic Requirements: Previous experience as a paralegal, legal assistant, or legal secretary preferred but not required; Strong computer skills, including experience with Word, PDFs, Outlook, Excel, and calendaring applications; Experience with electronic discovery applications such as iPro preferred; Excellent word processing and proofreading skills; Strong organizational and document management skills. This position requires an individual who is self-motivated, detail-oriented, able to multi-task, works well in a team environment and is committed to learning. Modrall Sperling offers an outstanding compensation and benefits package. Please forward your resume to Susan Harris: susanh@modrall.com

Litigation Paralegal

The Law Offices of Erika E. Anderson is looking for an experienced litigation paralegal for a very busy and fast-paced firm of four (4) attorneys. The candidate must be highly motivated and well organized, pay close attention to detail, be willing to take on multiple responsibilities, and be highly skilled when it comes to both computer software and written communication. This is a wonderful opportunity to join an incredible team that works hard and is rewarded for hard work! The position offers a great working environment, competitive salary, and a generous benefits package including medical coverage, 401K, paid holidays, and over 2 weeks of paid time off. If interested, please send a resume to Brittany@eandersonlaw.com.

Paralegal

Established Albuquerque Family Law Firm seeks experienced paralegal with current working knowledge of domestic matters, state & local rules, filing procedures, trial preparation, calendaring & discovery. Must possess strong word processing skills and experience with Word, Excel, and Outlook. Salary DOE. Bachelor's degree or Associate degree with minimum of two years' experience in NM Family Law. Please send both a cover letter and resume to Letty@cortezhoskovec.com

Paralegal

The City of Albuquerque Legal Department is seeking a Paralegal to assist an assigned attorney or attorneys in performing substantive administrative legal work from time of inception through resolution and perform a variety of paralegal duties, including, but not limited to, performing legal research, managing legal documents, assisting in the preparation of matters for hearing or trial, preparing discovery, drafting pleadings, setting up and maintaining a calendar with deadlines, and other matters as assigned. Excellent organization skills and the ability to multitask are necessary. Must be a team player with the willingness and ability to share responsibilities or work independently. Starting salary is $21.31 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to $22.36 per hour. Competitive benefits provided and available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq.

Legal Resources for the Elderly Program (LREP) Intake Coordinator

The New Mexico State Bar Foundation Legal Resources for the Elderly Program (LREP) seeks a full-time Intake Coordinator to answer incoming calls, conduct and complete intakes, and establish case files in the LREP electronic case management system. This position also provides clerical assistance and support to other LREP staff as required. The successful applicant must have excellent communication, customer service, and organizational skills. Minimum high school diploma required. Generous benefits package. $15-$16 per hour, depending on experience and qualifications. To be considered, submit a cover letter and resume to HR@sbnm.org. Visit https://www.sbnm.org/About-Us/Career-Center/State-Bar-Jobs for full details and application instructions.

Legal Assistant/Paralegal

Rodey's Santa Fe office is accepting resumes for a legal assistant/paralegal position in Santa Fe. Candidate must have excellent organizational skills; demonstrate initiative, resourcefulness, and flexibility, be detail-oriented and able to work in a fast-paced, multi-task legal environment with ability to assess priorities. Responsible for calendaring all deadlines. Must have a high school diploma, or equivalent, and a minimum of three (3) years' experience as a legal assistant or paralegal in litigation, be proficient with Microsoft Office products and electronic filing and have excellent typing skills. Paralegal skills a plus. Firm offers comprehensive benefits package and competitive salary. Please send resume to jobs@rodey.com with "Legal Assistant – Santa Fe" in the subject line, or mail to Human Resources Manager, PO Box 1888, Albuquerque, NM 87103.

JSC Paralegal

State of NM Judicial Standards Commission located in Albuquerque seeks a JSC Paralegal, an classified, FLSA non-exempt, full-time position with benefits including PERA retirement. Pay Range II $19.616/hr-$31.876/hr DOE and budget availability Flexible work schedules available. Successful applicant will work closely with Executive Director, Commission attorneys, and support staff providing a full range of Paralegal functions, including but not limited to assisting in investigations, drafting pleadings, advanced legal research and writing, trial preparation, filing, manual and electronic recordkeeping, and other duties as assigned. Reliability, adherence to strict confidentiality, and exercise of discretion and good judgment are mandatory. Must adapt well to frequently changing priorities and periods of high stress. Must work independently and excel in a collaborative, small office environment. Fluency in Spanish is a desirable asset. No telephone calls, e-mails, faxes, or walk-ins accepted. See full job description and application instructions at https://humanresources.nmcourts.gov/home/career-opportunities/or on the Career Opportunities page of the Commission's website (nmjsc.org).

Office Space

Law Office for Lease

Purpose-built law office for lease. Modern office. 6 professional offices and 10 staff workstations. Stunning conference room, reception, kitchen. Fully furnished. Lots of file storage. Phones and copier available. 1011 Las Lomas Road NE, Albuquerque. Available immediately. Inquiries: admin@kienzlelaw.com.

Office For Rent

Santa Fe Offices Available April 1, 2022. Three bright offices in a conveniently located professional office building. The building has six offices, large reception area, kitchenette, and ample parking for clients and professionals. Three offices are currently rented by attorneys and staff. The rent includes alarm, utilities, and janitorial services. Based on office size, rent is $500-$600/office. Basement storage available. Call Donna 505-795-0077.

Miscellaneous

Want To Purchase

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

2022 *Bar Bulletin* Publishing and Submission Schedule

The *Bar Bulletin* publishes twice a month on the second and fourth Wednesday. Advertising submission deadlines are also on Wednesdays, three weeks prior to publishing by 4 pm.

Advertising will be accepted for publication in the *Bar Bulletin* in accordance with standards and ad rates set by publisher and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The publisher reserves the right to review and edit ads, to request that an ad be revised prior to publication or to reject any ad. **Cancellations must be received by 10 a.m. on Thursday, three weeks prior to publication.**

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email mulibarri@sbnm.org

The publication schedule can be found at **www.sbnm.org.**

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