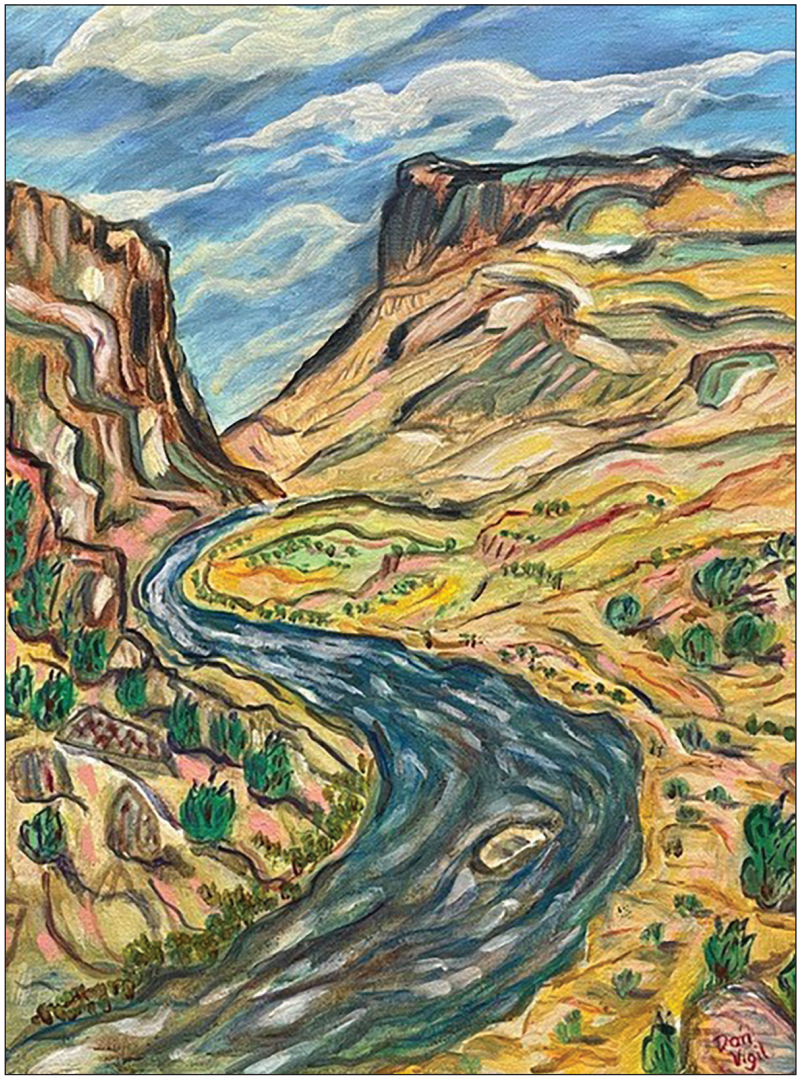
Official Publication of the State Bar of New Mexico

BAR BULLETIN

January 11, 2023 • Volume 62, No. 1



Imaginary River, by Donald D. Vigil (see page 3) paintingsbydonvigil.com

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—SPECIAL INSERT—
YLD In Brief

State Bar of New Mexico
Est. 1886

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

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Fax: 505-828-3765 • address@sbnm.org

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www.sbnm.org

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About Cover Image and Artist: Don Vigil has been an Albuquerque lawyer since 1978 and a painter even before that. He works in acrylic, oil and water color and his subjects are inspired by the lands of New Mexico, Colorado and Arizona. His style varies from impressionist to abstract and is loose and inviting.

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 Vacancy

A vacancy on the Third Judicial District Court exists as of Jan. 1 due to the retirement of the Honorable Judge Mary W. Rosner, Dec. 31, 2022. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the Administrator of the Court. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. Camille Carey, Chair of the Third Judicial District Court Judicial Nominating Commission, invites applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 28 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: https://lawschool.unm.edu/judsel/application.html, or emailed to you by contacting the Judicial Selection Office at akin@law.unm.edu. The deadline for applications has been set for Jan. 12 at 5 p.m. Applications received after that time will not be considered. The Third Judicial District Court Judicial Nominating Commission will meet beginning at 9 a.m. on Jan. 23 to interview applicants for the position at the Third Judicial District Court, located at 201 W. Picacho Ave, Las Cruces, N.M., to evaluate the applicants for this position. The Committee meeting is open to the public and members of the public who wish to be heard about any of the candidates will have an opportunity to be heard.

Thirteenth Judicial District Court

Notice of Mass Reassignment of Cases

Thirteenth Judicial District Court Chief Judge George P. Eichwald announced the mass reassignment of cases in Division IX, as a result of the 2022 General Election. Pursuant to 12-109 NMRA, Chief District Court Judge George P. Eichwald announced that, effective Jan. 3, all cases previously assigned to District Court Judge Karl W. Reifsteck will be reassigned to District Court Judge Allison P. Martinez. Pursuant to 1.088.1(C), parties who have not yet exercised a peremptory excusal will have 10 days from Jan. 25 to file their peremptory excusal.

U.S. District Court, District of New Mexico

Notice Concerning Reappointment of Incumbent Magistrate Judge

The current term of office of full-time United States Magistrate Judge Laura Fashing is due to expire on Aug. 31. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term. The duties of a magistrate judge in this court include the following: (1) presiding over most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) presiding over various pretrial matters and evidentiary proceedings on delegation from a district judge, (4) taking of felony pleas and (5) 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 usmjnewmexico@nmd.uscourts.gov. Questions or issues may be directed to Monique Apodaca, who can be reached at 575-528-1439. Comments must be received by Feb. 18.

Professionalism Tip

With respect to the courts and other tribunals:

In civil matters, I will stipulate to facts when there is no genuine dispute.

State Bar News

License Renewal and MCLE Compliance—Due Feb. 1, 2023

State Bar of New Mexico annual license renewal and Minimum Continuing Legal Education requirements are due Feb. 1, 2023. For more information, visit www.sbnm.org/compliance. To complete your annual license renewal and verify your MCLE compliance, visit www.sbnm.org and click "My Dashboard" in the top right corner. For questions about license renewal and MCLE compliance, email mcle@sbnm.org. For technical assistance accessing your account, email techsupport@sbnm.org.

New Mexico Lawyer Assistance Program

NM LAP Committee Meetings

The NM LAP Committee will meet at 4 p.m. on Jan. 12. The NM LAP 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 NM LAP 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 Lawyer Assistance Program and is a network of more than 30 New Mexico judges, attorneys and law students.

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.

The New Mexico Well-Being Committee

The N.M. Well-Being Committee was established in 2020 by the State Bar of New Mexico's Board of Bar Commissioners. The N.M. Well-Being Committee is a standing committee of key stakeholders that encompass different areas of the legal community and cover state-wide locations. All members have a well-being focus and concern with respect to the N.M. legal community. It is this committee's goal to examine and create initiatives centered on wellness.

New Mexico Medical Review Committee

Notice of Commissioner Vacancy

In accordance with Section 41-5-14 of the New Mexico Medical Malpractice Act, the State Bar of New Mexico is accepting applications for Chair of the State Bar Medical Malpractice Review Committee. This position will select available members of the Committee to serve on Medical Malpractice Review panels. Applicants must maintain membership with the State Bar of New Mexico. Members can send applications to kate.kennedy@sbnm.org.

UNM School of Law

Law Library Hours

The Law Library is happy to assist attorneys via chat, email, or in person by appointment from 8 a.m. - 8 p.m. Monday through Thursday and 8 a.m. - 6 p.m. on Fridays. Though the Library no longer has community computers for visitors to use, if you bring your own device when you visit, you will be able to access many of our online resources. For more information, please see lawlibrary.unm.edu.

Other News

The Center for Civic Values

Judges Needed for Gene Franchini New Mexico High School Mock Trial Competition

The Gene Franchini New Mexico High School Mock Trial Competition, open to any and all high school students, needs judges for its next event. The qualifier competitions will be held Feb. 17-18, 2023 at the Bernalillo County Metropolitan Court in Albuquerque and the Third Judicial District Court in Las Cruces. Those interested in attending the event may sign up at https://civicvalues.org/mock-trial/registration/judge-volunteer-registration/ by Feb. 4, 2023. Please email any questions to Kristen Leeds at Kristen@civicvalues.org or by phone at 505-764-9417.

Legal Education

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1.0 EP
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

12 **Spanish for Lawyers II**
20.0 G
Live Program
University of New Mexico School of Law
lawschool.unm.edu

13 **Reproductive Freedom Legal Summit 2023**
3.5 G, 1.0 EP
Live Program
American Civil Liberties Union of New Mexico
www.aclu-nm.org/

18 **REPLAY: Essential Law Firm Technology: The Best Of What's Out There**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

19 **REPLAY: Overview of Workers' Compensation Issues (2022)**
1.0 G
Webinar
Center for Legal Education of NMSBF
www.sbnm.org

20 **The Story of Amendment 4: A Journey Through Politics, Criminal Justice, and Narrative Change**
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Webinar
Center for Legal Education of NMSBF
www.sbnm.org

20 **Spring Basic Mediation**
30.0 G, 2.0 EP
Live Program
University of New Mexico School of Law
lawschool.unm.edu

24 **Succession Planning Rule 16-119**
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New Mexico Defense Lawyers Association
www.nmdla.org

25 **REPLAY: Law Practice Management For New Lawyers (2022)**
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Center for Legal Education of NMSBF
www.sbnm.org

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Center for Legal Education of NMSBF
www.sbnm.org

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Center for Legal Education of NMSBF
www.sbnm.org

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Center for Legal Education of NMSBF
www.sbnm.org

9 **Workers' Compensation: Settlement Outcomes**
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Center for Legal Education of NMSBF
www.sbnm.org

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10.0 G, 0.5 EP
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University of New Mexico School of Law
lawschool.unm.edu

17 **Preventing Nuclear Settlements**
1.0 G
Web Cast (Live Credits)
New Mexico Defense Lawyers Association
www.nmdla.org

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

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University of New Mexico School of Law
lawschool.unm.edu

21 **Poverty Law**
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University of New Mexico School of Law
lawschool.unm.edu

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14 **Family Mediation**
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Live Program
University of New Mexico School of Law
lawschool.unm.edu

A Message from State Bar President Carolyn Wolf

Dear Colleagues:

It has been a privilege and a delight to serve as President of the State Bar in 2022. We started the year unsure about the continuance of COVID restrictions, whether we could resume live meetings, CLE, or an annual meeting. Thankfully, we were able to meet in person in August for our annual meeting and to hold hybrid Board of Bar Commissioners meetings throughout the year.

In 1987, the Supreme Court adopted Rule 24-101 NMRA outlining the mission of the State Bar of New Mexico. I urge you to read this rule; it contains lofty, but essential guidance to all of us as State Bar members. The rule begins with "In order to aid the courts in improving the administration of justice," immediately setting the overall purpose of the State Bar to assist in the delivery of justice in New Mexico. This is followed by several more specific goals for the State Bar that guide the programs and projects of the State Bar. For example, the State Bar recently created an Equity in Justice program to meet the requirement that the State Bar "be cognizant of the needs of individual and minority members of the profession, including the full and equal participation of minorities and women in the State Bar of New Mexico and the profession at large." We are growing a Professional Development program, provide an ethics helpline that we hope will "foster and maintain high ideals of integrity, learning, competence, and public service." The State Bar hosted a Member Appreciation Day in October that included free CLE to also further this goal.

The Young Lawyers Division and the Senior Lawyers Division actively "improve the relations between the legal profession and the public" and "assist in the delivery of legal services to all in need of those services." The Young Lawyers Division facilitated Constitution Week, November 7 through 11, during which volunteer attorneys gave presentations on the United States Constitution to local fifth-grade students. The Young Lawyers helped organize a free legal services hotline for fire victims in the spring. Also in November, the State Bar hosted the annual Senior Lawyers Division In-Memoriam Ceremony, which recognized the members of the State Bar of New Mexico who passed away in 2022. At this event, the Senior Lawyers Division awarded three scholarships to third-year law students in memory of the State Bar members who have passed during the year. The scholarships are awarded based on essays submitted by the students. This year's topic was "Should US Supreme Court Justices be subject to the rules of Judicial Conduct for federal judges".

In addition, the State Bar Foundation launched the Modest Means Helpline in October as a tool for New Mexico residents of modest means and is an invaluable support mechanism for those in need of civil legal assistance and pro bono referral service.

In May, the Board of Bar Commissioners held a strategic planning retreat. Reminding ourselves of the mission given to us in Rule 24-101 NMRA, in particular the rule's directive that the State Bar should "promote and support the needs of all member," and using the results of the member survey taken in the spring, the BBC set goals to consider alternatives to one state-wide annual meeting, to provide new case summaries to our membership as decisions are issued by the appellate courts, and to develop other initiatives to provide better services to all of our members.

For more information about the strategic plan and to share your ideas and opinions on the work of the State Bar, please reach out to your district commissioners and to our 2023 officers, President Benjamin Sherman of Albuquerque, President-Elect Erin Atkins of Alamogordo, and Secretary-Treasurer Aja Brooks of Albuquerque.

I thank Ben, Erin and Past President Carla Martinez for their guidance and for their dedication to preserving and advancing the goals of the State Bar of New Mexico. Past President Martinez will be sorely missed for all that she accomplished as a BBC member and officer and for the special financial expertise she brought to the BBC as a CPA and attorney.

I also want to thank the outstanding staff of the State Bar, in particular our Executive Director Richard Spinello and our Board administrator, Kris Becker, and staff members Stormy Ralstin, David Powell, Pamela Moore, Bill Kramer, Celeste Valencia, Amanda Parker and Bill Slease. They are responsible for the success of all of the State Bar's endeavors.

Having had the opportunity to collaborate with New Mexico's judiciary and legal professionals, it has been humbling and rewarding to preside over such an important organization that will continue to do its best to provide services for its membership and to promote justice for all in our state. I hope that you will support Ben, Erin and Aja as they lead our State Bar into an era beyond the pandemic, I know that they hope to make significant strides on behalf of our members, and they see a prosperous future for our legal community. Thank you all and have a terrific 2023 and beyond.

Sincerely,

Carolyn Wolf
President, State Bar of New Mexico

ARTURO L. JARAMILLO

Summer Law Clerk Program

- ☑ **Does your firm, business, or organization want to be part of an ABA Awarded program? It's the only one of its kind in the country!**
- ☑ **Do you want to help ignite first year law student's passion in your field of law?**
- ☑ **Are you committed to promoting diversity and inclusion through the membership of the State Bar?**

If you answered yes to one or all of these questions, then participating in the Arturo Jaramillo Clerkship Program can help accomplish these goals! Arturo L. Jaramillo, the first Hispanic president of the State Bar of New Mexico, developed the Summer Law Clerk Program ("Program") in 1993 to offer first year law students of diverse backgrounds the opportunity to clerk in legal settings that provide a foundation for the students' law careers and to promote equal employment opportunities for persons who have historically been under-represented in the legal profession. The Program creates employment opportunities in medium and large law firms, state and local public agencies, and corporate law departments in New Mexico by providing a summer law clerk experience for motivated and deserving law students who meet the programs eligibility criteria.

To learn more, please contact the organizers of the event!

DENISE CHANEZ
dchanez@rodey.com

LEON HOWARD
lhoward@aclu-nm.org

State Bar *of* New Mexico
Committee on Diversity
in the Legal Profession

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-029
No: A-1-CA-38063 (filed December 1, 2021)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LUCIO GODINEZ, JR.,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
James W. Counts, District Judge

Certiorari Granted, April 22, 2022, No. S-1-SC-39151.
Released for Publication June 21, 2022.

Hector H. Balderas, Attorney General
Santa Fe, NM
John Kloss, Assistant
Attorney General
Albuquerque, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Mary Barket, Assistant Appellate
Defender
Santa Fe, NM

for Appellant

OPINION

IVES, Judge.

{1} Defendant Lucio Godinez, Jr. appeals the revocation of his probation, arguing in part that the district court violated his due process right to confront and cross-examine witnesses at the revocation hearing. The key precedent that guides us is *State v. Guthrie*, in which our Supreme Court recognized that a person who is accused of a probation violation has a due process right "to confront and cross-examine adverse witnesses []unless the hearing officer specifically finds good cause for not allowing confrontation[.]" 2011-NMSC-014, ¶ 12, 150 N.M. 84, 257 P.3d 904 (emphasis, internal quotation marks, and citation omitted). In *Guthrie*, the Court described general principles and specific factors that New Mexico courts should consider when determining whether "good cause" exists, and the Court considered those principles and factors in deciding that a probationer who was accused of failing to complete a treatment program did not have a due process right to confront his probation officer. *Id.* ¶¶ 45-49. Defining the inquiry as an assessment of "the necessity for, and utility of, confrontation with respect to the truth-finding process," the *Guthrie* Court made that determination in the context of "straightforward and routine charges—the simple, objective, and uncontroverted fact that probationer either did or did not successfully complete the program[.]" *Id.* ¶ 21 (internal quotation marks and citation omitted). Defendant's appeal requires us to apply *Guthrie* in a very different context—one our appellate courts have not previously addressed in a precedential opinion. Here, the State accused Defendant of violating his probation by committing a new crime, criminal sexual penetration of his daughter, and the district court determined that Defendant did not have a right to confront and cross-examine Daughter. Applying *Guthrie* to a set of facts not clearly contemplated by the governing framework that *Guthrie* created, we conclude, based on the record before us, that Defendant had a due process right to confront Daughter. Because the district court did not afford Defendant any opportunity to do so, we reverse and remand for any further proceedings that might be necessary, including a new revocation hearing if the State requests one.[1]

BACKGROUND

{2} In 2011, Defendant pleaded no contest to two counts of second-degree criminal sexual contact of a minor, contrary to NMSA 1978, Section 30-9-13(B) (2003). The district court entered judgment on Defendant's plea and sentenced Defendant to nine years' imprisonment for each count. The court made the two sentences consecutive and suspended all but two years of Defendant's eighteen-year sentence. The court also imposed a five-to-twenty-year probationary term to follow the two-year prison term. *See generally* NMSA 1978, § 31-20-5.2(A), (F)(3) (2003).

{3} Defendant completed his prison term in 2013. In 2018, the State sought to revoke Defendant's probation, alleging that Defendant violated its conditions by (1) omitting Daughter's autism diagnosis when he requested permission from his probation officer to have her stay with him and (2) committing criminal sexual penetration against Daughter.

{4} At the hearing on the State's petition to revoke Defendant's probation, the district court heard testimony from Defendant's probation officer, Daughter's mother, a sexual assault nurse examiner (SANE), a forensic safehouse interviewer, and a New Mexico State Police officer. Aside from noting the fact of Defendant's arrest on suspicion of violating the condition of his probation that he not commit any new crimes, the probation officer only testified to evidence of the allegation that Defendant violated his probation by failing to report Daughter's disability. Defendant denied that he had committed criminal sexual penetration against Daughter.

{5} Daughter did not testify. The State presented evidence that Daughter's condition was likely to regress if she had to testify in court about the alleged crime. The State's evidence consisted of witnesses' testimony about statements made by Daughter. The remainder of the State's evidence was testimony regarding witnesses' personal observations of Daughter's demeanor and physical condition after the alleged crime, as well as evidence of blood and the DNA of an unidentified male on some of Daughter's underwear.

[1] Because we reverse under Guthrie, we do not reach Defendant's argument that the district court erred by relying upon certain hearsay evidence in reaching its ultimate decision.

{6} Mother testified that Daughter, an adult who functioned at a first-grade level intellectually, had been visiting Defendant for what had been planned as a two-week stay. Near the end of those two weeks, Daughter did not call in the morning like she normally would. After Daughter did not answer Mother's call, Mother called Defendant who, after first saying he was too busy to put Daughter on the phone, did so after Mother demanded to speak with Daughter. When Defendant put Daughter on the phone, Daughter was "hysterical" and asked to be picked up.[2] Mother went to pick up Daughter and, when Defendant arrived at a meeting place with Daughter, Daughter was leaning against the window of Defendant's car and crying. Daughter hugged Mother while crying and did not say goodbye to Defendant, which was unusual. On their way home, Daughter said, "I'm tired; I'm tired," and she told Mother that she never wanted to return to Defendant's home. When they arrived home, Daughter hugged Mother's fiancé and again began to cry and went to sleep soon thereafter. According to Mother, over the next few days, Daughter acted unusually and appeared "distraught": Daughter at times followed Mother around the house and at other times sat idly on the couch rather than doing the things she would have normally done; cried "loudly" in the shower, where Mother would find her in the tub; woke in the night and screamed; hit the table; and asked, "Why? Why? Why, dad?" Mother asked Daughter if Defendant had done something to her, and Daughter pointed to "her behind" and asked to talk to the police. According to Mother, Daughter said that Defendant "hit her" and that "it" happened twice.

{7} Mother also testified that she observed blood on underwear in the suitcase Daughter had taken for her stay with Defendant. And the State elicited testimony from Mother indicating that the blood could not be attributable to Daughter's menstrual cycle because she had her period at the end of June, after her stay with Defendant, which was during the middle of the month. There was, however, conflicting testimony on this point: the SANE testified that Daughter stated at her examination that she had menstruated the previous Sunday, in the middle of the month. The police officer testified that on June 22, 2018, as much as one week after the alleged crime, he collected some of the clothing Daughter had taken for her stay with Defendant and brought it to the state crime lab. He testified that the crime lab found male DNA on the "inside crotch area" of Daughter's underwear but that the DNA had not been compared to that of any particular person. Although he testified that he had collected a DNA sample from Defendant, the results of a comparison to that sample were still pending at the time of the hearing, and the police officer read from the initial crime lab report that no comparison would be possible because of how little DNA had been found.

{8} The SANE testified that when she examined Daughter on Friday, June 22, she asked Daughter whether "the assault had occurred on Sunday," and Daughter nodded affirmatively. The SANE noted tears "throughout the exam" and that Daughter trembled during the anal portion of the examination. Although the SANE did not observe any injuries to Daughter's genital or anal areas, the SANE explained that skin in the vaginal and anal areas heals quickly. The SANE did observe bruising on Daughter's buttocks, thighs, and near her genitals; that her vagina was "red"; and a white vaginal discharge that, according to the SANE, could have had various causes. The SANE explained that she is trained not to opine on the age of a bruise, and, though she noted the differing coloration of Daughter's bruises, she did not testify to the severity of the bruising she observed. Although the SANE testified that she had seen similar bruising in earlier work she had done on cases involving criminal sexual contact, she explained that things other than sexual contact could have caused everything she observed at Daughter's examination.

{9} A forensic interviewer testified about Daughter's safehouse interview. The interviewer explained that she had to question Daughter as if she were interviewing a five- or six-year-old child. The interviewer testified that, during the interview, Daughter said that her "butt got hurt" "on the inside" as a result of two "spanking[s]" that occurred while neither she nor Defendant were wearing underwear and that, during these incidents, she was lying face down with Defendant behind her. The interviewer testified that she asked Daughter to identify, on a drawing of a nude male body, the body part Defendant had used to hurt her, and Daughter circled the penis. And she told the interviewer that she was still experiencing pain at the time of the interview, which occurred approximately one week after the alleged criminal sexual penetration.

{10} Defendant objected to the admission of Daughter's out-of-court statements through the forensic interviewer's testimony and the admission of DNA evidence through the police officer's testimony. The district court overruled the objections but did not make factual findings as to whether there was good cause to admit the challenged evidence without allowing Defendant to confront Daughter or the crime lab analyst who reported the DNA evidence. After the close of evidence, the district court cited, as corroboration for the unconfronted evidence, testimony of Mother regarding physical evidence and changes in Daughter's behavior. And the court concluded that the evidence established to a reasonable certainty that Defendant had violated a condition of his probation by committing a sex crime, citing, in addition to Mother's testimony, the police officer's testimony that the crime lab noted the presence of male DNA on some of Daughter's underwear and the SANE's testimony that Daughter presented with bruising at the SANE examination. However, the district court rejected the State's contention that Defendant also violated his probation by failing to report Daughter's disability.

{11} The district court revoked Defendant's probation and remanded him to the New Mexico Corrections Department for a period of just under eleven years, the remainder of the suspended portion of the sentence for his 2011 convictions. Defendant appeals.

DISCUSSION

{12} Defendant argues that the district court deprived him of due process by denying him, without good cause, an opportunity to confront Daughter and the crime lab analyst. Whether Defendant suffered a violation of his due process right to confrontation is a question of law that we review "de novo while deferring to the district court's factual findings."[3] *State v. Castillo*, 2012-NMCA-116, ¶ 9, 290 P.3d 727. For the reasons that follow, we agree with Defendant that there was not good cause to dispense with confrontation as to Daughter, and we therefore reverse without reaching Defendant's argument as to the crime lab analyst.

{13} "Because loss of probation is loss of only conditional liberty, 'the full panoply of rights due a defendant in a criminal trial [does] not apply.' " *Guthrie*, 2011-NMSC-014, ¶ 10 (alteration omitted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) (extending *Morrissey*—which concerned revocation of parole—to revocation of probation).

2 Defendant's girlfriend had been hospitalized the day before Mother called Daughter, and there was no dispute that Defendant was alone with Daughter between that time and the call.

However, defendants who face allegations that they have violated their probation have a due process right " 'to confront and cross-examine adverse witnesses []unless the hearing officer specifically finds good cause for not allowing confrontation[.]' " *Guthrie*, 2011-NMSC-014, ¶ 12 (emphasis omitted) (quoting *Gagnon*, 411 U.S. at 786). Hence, at a probation violation hearing, there is a "rebuttable presumption" that the probationer has a right to confront adverse witnesses. *State v. Wheeler*, No. S-1-SC-37709, dec. ¶ 17 (N.M. Sup. Ct. June 10, 2021) (non-precedential). *Guthrie* indicates that this presumption is especially strong, and thus more onerous to rebut, when, as in this case, the state seeks to revoke probation based on an unadjudicated charge that the probationer committed another crime. 2011-NMSC-014, ¶¶ 36, 38. The *Guthrie* Court stated that, where "the probationer is alleged to have committed a crime[] but has not been convicted," it "would be hard[-]pressed to envision a situation in which personal testimony and confrontation would not be required." *Id.* ¶ 38 (emphasis omitted); *see also Wheeler*, No. S-1-SC-37709, dec. ¶ 21.

{14} In analyzing whether due process requires confrontation or whether there is good cause to proceed without confrontation, a court should locate the particular evidentiary issue on a "spectrum or sliding scale with extremes at either end and much balancing and weighing of competing interests in between." *Guthrie*, 2011-NMSC-014, ¶ 40. The court must assess "the relative need for confrontation to protect the truth-finding process and the substantial reliability of the evidence," and "the stronger the probative value and reliability of the evidence, the less the need for confrontation." *Id.* ¶¶ 43-44. The focus should not be the reasons for the declarant's absence, *id.*, but instead "fundamental fairness, the touchstone of due process." *Id.* ¶ 25 (internal quotation marks and citation omitted). Where evidentiary issues fall on the spectrum depends "on a case-by-case analysis" of "the utility of confrontation." *Id.* ¶ 33.

{15} Our Supreme Court has explained that this analysis involves an indefinite number of factors, *id.* ¶¶ 34-41, and we glean five factors from *Guthrie* relevant to the analysis in this case: (1) whether the source of the challenged evidence is reliable and free of any motive to lie, *id.* ¶¶ 40-41; (2) the centrality of the challenged evidence to the ultimate conclusion about whether a probation violation occurred, *id.* ¶¶ 34, 37, 41; (3) whether the accused contests the fact that the challenged evidence would help prove, *id.* ¶¶ 35, 40-41; (4) the extent to which credibility determinations, perception, interpretation, inference, and judgment are required to decide the truth of the matter asserted by the declarant's statements, *id.* ¶¶ 37-41; and (5) whether the challenged evidence is substantially reliable, either because it is inherently reliable—e.g., hearsay admissible under a "proven exception[]" to the rule against hearsay, *id.* ¶ 36—or because it is sufficiently corroborated by other, reliable evidence. *Id.* ¶¶ 40-41.

{16} Applying these factors to Defendant's case,[4] we hold that there was not good cause to dispense with confrontation because the evidence presented at the hearing was not reliable enough to overcome the strong presumption that Defendant had a right to confront Daughter about the unadjudicated accusation that he had committed a new crime. As we will explain, Daughter's hearsay statements and thus her credibility were at the heart of this case. Those statements were neither inherently reliable nor sufficiently corroborated by other, reliable evidence, and cross-examination was therefore necessary to safeguard the truth-seeking process at the revocation hearing.

{17} Because we have no reason to doubt that the forensic interviewer testified accurately about what Daughter told her, *see id.* ¶¶ 40-41, we turn to the remaining factors, beginning with the critical role played by Daughter's hearsay statements to the interviewer. Those hearsay statements were central to the ultimate determination of whether Defendant violated his probation by committing a new crime. *See id.* ¶¶ 34, 37, 41. Indeed, those statements were the most probative evidence—and the *only* direct evidence—that Defendant had committed criminal sexual penetration as the State alleged. Moreover, the commission of a new crime was an affirmative fact that Defendant contested by denying that he had abused Daughter. *See id.* ¶¶ 35, 37, 40-41. Under these circumstances, discovering whether the State's allegation is true involves credibility determinations, perception, interpretation, inference, and judgment, and it was thus important to observe Daughter's demeanor. *See id.* ¶¶ 34, 37-41; *cf. State v. Lucero*, 1993-NMSC-064, ¶¶ 2, 22, 116 N.M. 450, 863 P.2d 1071 (stating that the credibility of a child who had accused the defendant of sexual abuse "was a pivotal issue" in a trial where "[t]he only witnesses to the alleged abuse were the defendant and the [alleged victim]"); *State v. Duran*, 2015-NMCA-015, ¶¶ 2-4, 25-26, 343 P.3d 207 (characterizing credibility as "the primary issue" in a trial where the alleged victim testified that the defendant had sexually abused her when she was a child but the defendant denied the accusation).

{18} Our analysis thus far having reinforced rather than rebutted the strong presumption in favor of confrontation, we turn to the final factor, reliability. We first address whether Daughter's statements are inherently reliable. *See Guthrie*, 2011-NMSC-014, ¶ 36. The State argues that they are because they would be admissible in a trial under Rule 11-803(4) NMRA, the exception to the rule against hearsay for statements made for medical diagnosis or treatment. *See Guthrie*, 2011-NMSC-014, ¶ 36 ("[H]earsay evidence may be inherently reliable if it conforms to proven exceptions to the hearsay rule."). We disagree. Because the forensic interviewer was not a medical provider, her testimony as to what Daughter told her would not be admissible under Rule 11-803(4).

[3] The State argues that we should not review Defendant's arguments, contending that (1) he did not preserve them because his objections at trial were on different grounds from those he makes on appeal; and (2) because he did not object to hearsay in the testimony of other witnesses, he "actively waived" his arguments on appeal. We disagree. Defendant invoked rulings on (1) whether admitting Daughter's statements through the forensic interviewer's testimony, without any opportunity to cross-examine Daughter, would be erroneous and (2) whether admitting the crime lab report through the police officer's testimony violated Defendant's right to confrontation. And, in arguing those objections, the parties narrowed the question before the district court to whether due process prohibited the court from admitting the challenged hearsay when Defendant would not have an opportunity to cross-examine either declarant. Nor did Defendant waive these issues. The State emphasizes the admission, without objection, of several statements Daughter purportedly made to Mother and the SANE, but the hearsay to which Defendant did object was not cumulative of that evidence. Cf. State v. La Madrid, 1997-NMCA-057, ¶¶ 16-17, 123 N.M. 463, 943 P.2d 110 (rejecting a claim that the district court had committed reversible error by admitting certain hearsay statements because the defendant had "acquiesce[d] in the admission of . . . the same statement[s]").

[4] Recognizing that, in Guthrie, our Supreme Court did not identify each factor that bears on the utility of confrontation in every case, we have considered whether any additional factors might bear on this case. Having identified none, we limit our analysis to the factors from Guthrie described in the text.

The testimony at issue here is unlike the testimony at issue in *State v. Mendez*, where our Supreme Court recognized that statements made to a SANE may sometimes be admissible as statements made for medical diagnosis or treatment because a SANE has "a *dual* role: the provision of medical care and the collection and preservation of evidence." 2010-NMSC-044, ¶¶ 41-43, 148 N.M. 761, 242 P.3d 328. But the witness here was not a SANE. She was a forensic interviewer whose testimony gives us no reason to conclude that she had any role other than collecting, preserving, and analyzing evidence; the record does not include any basis for concluding that a purpose of her examination was medical diagnosis or treatment. *Cf. Duran*, 2015-NMCA-015, ¶¶ 4-5 (recounting the testimony of a safehouse interviewer who explained that the goal of a forensic safehouse interview is to test the truth of an allegation that a child was a victim or witness to a crime). We therefore reject the State's argument that Daughter's statements to the forensic interviewer conform to a proven hearsay exception, and we see no other reason to conclude that her statements are inherently reliable.

{19} Because Daughter's hearsay statements are not inherently reliable, *Guthrie* permits us to conclude that her statements are substantially reliable only if they are sufficiently corroborated by other, reliable evidence. *See Guthrie*, 2011-NMSC-014, ¶¶ 40-41. Although the *Guthrie* Court did not explicitly describe how courts should determine whether corroborating evidence is powerful enough to obviate the need for confrontation, our Supreme Court took a case-specific approach to the good cause inquiry in *Guthrie*, and we therefore conclude that the corroboration determination hinges on the nature of the allegation and the facts of each case. The inquiry is not whether the corroborating evidence in the case would support a rational inference by the trial court judge that the accused is guilty but instead whether cross-examination of the declarant would assist the judge in deciding whether the accused is, in fact, guilty. *See id.* ¶ 43 (emphasizing that courts should focus "on the need for, and utility of, confrontation with respect to the truth-finding process . . . in light of the particular case at hand, including the specific charge pressed against the probationer"); *cf. Morrissey*, 408 U.S. at 483-84 (stating that revocation of parole should not occur without "an appropriate determination that the individual has in fact breached the conditions of parole" and explaining that the accused and society share an interest in such determinations resting on "accurate knowledge of the parolee's behavior"). Reading *Guthrie* holistically and focusing on the overarching principles that drove our Supreme Court's analysis, *see generally* 2011-NMSC-014, ¶ 43, we conclude that only unequivocal and reliable corroborating evidence will make the value of confrontation so minimal as to be unnecessary when, as in this case, the state makes a contested allegation that the probationer committed a new crime but there is no adjudication of guilt; the hearsay statements are central to the state's case but are not inherently reliable; and determining whether the statements are true entails a subjective judgment about the declarant's credibility. Under these circumstances, confrontation is essential to the truth-finding process unless corroborating evidence compellingly establishes that the crime occurred and that the probationer committed it.

{20} We conclude that the evidence in this case does not clear this high bar. Because the evidence offered to corroborate the declarant's statements is subject to conflicting interpretations, confrontation was necessary to increase the likelihood that the district court arrived at the truth. *Cf. California v. Green*, 399 U.S. 149, 158 (1970) (recognizing that cross-examination is "the greatest legal engine ever invented for the discovery of truth" (internal quotation marks and citation omitted)); *State v. Montoya*, 2014-NMSC-032, ¶ 39, 333 P.3d 935 ("For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony." (emphases, internal quotation marks, and citation omitted)). As corroboration for Daughter's hearsay statements, the district court cited Mother's testimony that Daughter's demeanor changed after visiting Defendant and that Mother observed blood on Daughter's underwear that was unlikely to have been due to menstruation.[5] The only other corroborating evidence was the police officer's testimony that there was male DNA on the underwear[6] and the SANE's testimony about her observations at Daughter's examination.[7]

[5] Our review is complicated somewhat by the fact that the district court made its factual findings regarding the admissibility of the challenged evidence after the close of evidence, at the same time that it announced its findings supporting its conclusion on the merits—that the evidence demonstrated to a reasonable certainty that Defendant had violated his probation by committing a sex crime against Daughter. Although the district court did not make any findings specific to whether the DNA evidence was admissible without cross-examination of the crime lab analyst, it found that the male DNA on Daughter's underwear likely was Defendant's. And the court found that the bruising observed at the SANE examination had some significance. As we understand the record, the district court made these findings to support its conclusion on the merits.

[6] In analyzing whether the other evidence sufficiently corroborated of the hearsay in the forensic interviewer's testimony, we assume without deciding that there was good cause to dispense with confrontation as to the crime lab analyst and that the findings of the crime lab were thus admissible through the testimony of the police officer.

[7] Various pieces of evidence have no impact our analysis. First, contrary to the State's argument, a recording of Daughter's unconfronted safehouse interview is not corroborating evidence, not least because it appears from the record that the district court did not view the recording, and the recording therefore could not have influenced the court's decision to dispense with confrontation. Cf. State v. Myers, 2008-NMCA-047, ¶¶ 6, 8, 10, 143 N.M. 710, 181 P.3d 702 (declining to incorporate certain video evidence into a review of the sufficiency of the evidence because the district court had not considered it in rendering its verdict), rev'd on other grounds, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105. In addition, the probation officer's testimony regarding Defendant's failure to report Daughter's disability has only de minimis corroborative value. The same is true of the testimony the State elicited from both Mother and the police officer seeking to demonstrate that Defendant had evinced a consciousness of guilt. Mother testified that another of her daughters told her that her son said that he was going to help Defendant "fix his finances" because Defendant would be going "somewhere." And the police officer recounted an interview he conducted of Defendant after Defendant had been jailed on suspicion of committing a probation violation. According to the police officer, Defendant said that, before his arrest, Mother had asked him why he had "hit" Daughter. Defendant denied abusing Daughter but told the police officer that, because of Mother's accusation and his criminal history, he expected that he might "be blamed." Because of the vagueness of Mother's testimony and the lack of evidence as to whether the statements regarding Defendant going "somewhere" were made before or after Defendant learned that he was being accused of abusing Daughter, we do not view that testimony as corroborating of the allegation that Defendant committed a sex crime against Daughter. And we do not view Defendant's statement to the police officer that he expected to "be blamed" as an admission or awareness of guilt when Defendant made the statement after his arrest, already charged with violating his probation in relation to Daughter's stay with him.

Although all of this evidence is consistent with the State's allegation, it is subject to conflicting interpretations and thus does not compellingly establish the truth of the allegation so as to render confrontation unnecessary. Mother's observations corroborate the accusation of criminal sexual penetration to some extent; they amount to circumstantial evidence that is consistent with the accusation. Nevertheless, everything Mother observed could have had an explanation other than sexual abuse. The behavior Mother observed in Daughter could have been a response to suffering criminal sexual penetration, or it could have been a manifestation of some other trauma. And the conflicting testimony about the timing of Daughter's menstruation renders ambiguous the import of the blood Mother observed. The DNA evidence also has some corroborative value. However, there was no evidence to support that the DNA evidence was indicative of sexual contact versus something like handling the underwear because the evidence did not establish what sort of bodily material transferred the DNA. In addition, the male DNA found on Daughter's underwear had not been and, according to the lab report, would not be matched with Defendant's DNA. Hence, the DNA found on Daughter's underwear may have been related to sexual contact or may not have been, and it may or may not have been Defendant's. Under these circumstances, the import of the DNA evidence is ambiguous. Similarly, although the SANE's testimony supports the inference that Daughter was sexually abused, it also allows for the interpretation that sexual abuse might not be the explanation for Daughter's physical condition at the SANE examination, which occurred as much as one week after the alleged crime. Because the corroborating evidence is subject to conflicting interpretations, we conclude that, even when viewed as a whole, it does not compellingly establish that Daughter's hearsay statements are reliable enough to render confrontation unnecessary.

{21} Finally, we address the State's argument that the need to protect Daughter from further emotional harm supports the conclusion that there was good cause for dispensing with confrontation. The State relies on *State v. Herrera*, in which the state, in a trial on charges of criminal sexual contact of a minor, introduced video depositions of the two victims in lieu of the victims' direct testimony. 2004-NMCA-015, ¶¶ 2-3, 7, 135 N.M. 79, 84 P.3d 696. *See generally* NMSA 1978, § 30-9-17 (1978); Rule 5-504 NMRA. Allowing the use of deposition testimony under such circumstances is meant to protect victims from "suffering unreasonable and unnecessary mental or emotional harm" while ensuring that defendants are "given an adequate opportunity to cross-examine" those victims. Rule 5-504(B). However, *Herrera* has no bearing on our analysis because here, unlike in *Herrera*, the State never sought to introduce deposition testimony to obviate the need for live testimony, and Defendant never had "an adequate opportunity to cross-examine" Daughter. Rule 5-504(B)(3). This case does not present the question of whether affording the accused an opportunity to confront a vulnerable alleged victim in a deposition, rather than during the revocation hearing itself, would satisfy due process under *Guthrie*.

{22} Instead, the question before us is whether it is consistent with due process to deny Defendant any opportunity whatsoever to confront Daughter because of her vulnerability. We recognize that the New Mexico Constitution protects Daughter's right to be treated with fairness and with respect for her dignity and privacy, *see* N.M. Const. art. II, § 24(A)(1), and that the risk that Daughter would suffer harm was likely the reason she did not testify. However, *Guthrie* requires us to focus less on why the declarant did not testify and more on "the need for, and utility of, confrontation with respect to the truth-finding process . . . in light of the particular case at hand, including the specific charge pressed against the probationer." 2011-NMSC-014, ¶ 43. Where "that need is significant," the declarant "must appear and be subject to confrontation, regardless of the reasons for his or her absence[,]" which are, "for the most part, irrelevant" to the analysis. *Id.* Whatever limited weight *Guthrie* permits us to give to Daughter's vulnerability, it is outweighed by the considerations our Supreme Court has identified as pertinent to the need for confrontation and the reliability of the evidence.

{23} Based on our application of *Guthrie* to this case, we conclude that no showing of good cause rebutted the strong presumption in favor of confrontation. In short, we cannot conclude, on the record before us, that this is the case our Supreme Court was "hard[-]pressed to envision"—one in which "personal testimony and confrontation [are not] required" to prove that the accused committed a new crime. *Id.* ¶ 38. We therefore hold that Defendant was denied due process when the district court relied on Daughter's hearsay statements to the forensic interviewer without affording Defendant any opportunity to confront Daughter.[8]

{24} We emphasize that our holding is narrow. We address only the question presented: whether the complete denial of Defendant's request for confrontation, which prevented the defense from conducting *any* cross-examination of Daughter, violated Defendant's right to due process. Accordingly, we offer no opinion about the type of confrontation or the scope of cross-examination that would satisfy due process under *Guthrie* while protecting Daughter's rights under Article II, Section 24 of the New Mexico Constitution. *See Gagnon*, 411 U.S. at 782 n.5 (explaining that states may develop "creative solutions to the practical difficulties" of ensuring due process in probation violation hearings); *Guthrie*, 2011-NMSC-014, ¶ 11 (recognizing that "due process is flexible and calls for such procedural protections as the particular situation demands" and that "not all situations calling for procedural safeguards call for the same kind of procedure" (emphasis, internal quotation marks, and citation omitted)); *cf. State v. Fairweather*, 1993-NMSC-065, ¶¶ 23-31, 116 N.M. 456, 863 P.2d 1077 (holding that the use of video recordings of depositions of child victims of sexual abuse in a criminal trial did not violate the defendant's Sixth Amendment right to confrontation, where defense counsel cross-examined the victims and the defendant viewed the depositions by television monitor in another room and was able to confer with counsel during the depositions); *State v. Smith*, 2001-NMSC-004, ¶ 23, 130 N.M. 117, 19 P.3d 254 (recognizing that, even in the context of a criminal trial, "the trial court has broad discretion to control the scope of cross-examination").

CONCLUSION

{25} We reverse the order revoking Defendant's probation and remand for any further proceedings that might be necessary, including a new revocation hearing if the State requests one.

{26} IT IS SO ORDERED.

ZACHARY A. IVES, Judge

WE CONCUR:

JACQUELINE R. MEDINA, Judge

SHAMMARA H. HENDERSON, Judge

[8] Because we hold that Defendant was denied his due process right to confront Daughter, we need not determine whether there was good cause to dispense with confrontation as to the crime lab analyst. Should the State request a new revocation hearing and seek to introduce hearsay like the crime lab report at issue in this appeal, we note that this Court has previously identified particular "minimum requirements" for the admission of that kind of evidence at a probation violation hearing. See generally State v. Sanchez, 2001-NMCA-060, ¶¶ 17-18, 130 N.M. 602, 28 P.3d 1143. And if Defendant raises the issue, the district court should analyze, consistent with Guthrie and this opinion, whether there is good cause for admitting the evidence without affording Defendant an opportunity to confront its author.

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-030
No: A-1-CA-38523 (filed January 31, 2022)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
CLAYTON THOMAS BENEDICT,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Brett Loveless District Judge

Certiorari Granted, April 22, 2022, No. S-1-SC-39240.
Released for Publication June 21, 2022.

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OPINION

YOHALEM, Judge.

{1} Defendant Clayton Thomas Benedict was charged by the State with second-degree murder and the lesser included offense of voluntary manslaughter. Defendant, an Uber driver, picked up two intoxicated passengers late afternoon on Saint Patrick's Day 2019. One of the passengers vomited in the backseat of Defendant's car. Minutes later, Defendant stopped along the shoulder of I-25 and told the passengers to get out of the car. An argument about paying a clean-up fee escalated into what Defendant saw as an attack sufficient to provoke him into fatally shooting James Porter (Victim), one of his passengers.

{2} The State appeals pursuant to NMSA 1978, Section 39-3-3(B)(1) (1972), from the district court's decision that there was no probable cause to bind Defendant over for trial on second-degree murder. The district court found probable cause solely on the lesser included offense of voluntary manslaughter. We agree with the State that the district court erred in failing to find probable cause to bind Defendant over for trial on second-degree murder and remand for amendment of the criminal information to include that charge.

BACKGROUND

{3} The State filed a criminal information charging Defendant with second-degree murder, pursuant to NMSA 1978, Section 30-2-1(B) (1994), and voluntary manslaughter, pursuant to NMSA 1978, Section 30-2-3(A) (1994). The case proceeded to a preliminary hearing, as required by Article II, Section 14 of the New Mexico Constitution when the State prosecutes a felony by criminal information, rather than by grand jury indictment. The procedures in the district court for a preliminary examination are set forth in Rule 5-302 NMRA.

{4} At the preliminary examination, the State introduced into evidence a video recording of an hour-long interview of Defendant by law enforcement on the night of the shooting. The entire record interview was played for the district court during the preliminary hearing. Defendant's interview was the only evidence of the events leading up to the shooting of Victim that night.

{5} Defendant testified that he picked up Victim and Victim's friend, Jonathan Reyes, from a local bar. Reyes was so drunk he was on the ground, and Victim was trying to get him on his feet. Once both passengers were in the vehicle, Defendant noticed Reyes looked "woozy," so he rolled down the window for him, and asked both Victim and Reyes to let him know if Reyes needed to vomit, so he could pull over. A minute or two later, as Defendant approached the entrance to I-25, Reyes vomited all over the back seat of Defendant's car.

{6} Defendant told his passengers that Uber would charge Victim (who had hailed the ride) a clean-up fee, which angered Victim. It was undisputed that it was Uber's policy to charge a clean-up fee when a passenger vomited in a driver's vehicle. When Reyes looked like he was about to vomit again, Defendant pulled over on the shoulder of the highway and asked both passengers to get out.

{7} Both passengers got out of the vehicle through the passenger's side back door, and Victim slammed the door behind him. Defendant opened the door, partially stepped out of the driver's seat, and told Victim not to slam his door. Victim began pulling off his hat, sunglasses, and necklaces throwing them on the ground, and started walking toward Defendant, moving from the passenger's side of the vehicle, around the tail end, toward the driver's door. Reyes told Victim it was "not worth it" and that they should just leave.

{8} Defendant told Victim to listen to his friend and advised both of them to go to the nearest stoplight, which was visible about a block away, sober up, and call another ride. Victim then pushed his friend aside and started moving toward Defendant again. Defendant pulled out a concealed handgun (which he was authorized to carry) stepped completely out of the driver's side of the vehicle, aimed the gun at Victim, and told Victim to "stop, back up, get away from me," and to "let me get in my car and leave." Victim stopped momentarily, but then began approaching Defendant again, yelling, "You want to fucking shoot me, then fucking shoot me, you fucking pussy." Defendant described backing up behind the driver's open door.

{9} Victim veered away, walking a couple of feet into the traffic lane, and waving his hands at passing vehicles. Defendant saw at least one truck swerve to avoid hitting Victim. Defendant indicated that while Victim was in the road, he thought that maybe he could get into his car, which was still running with the door open, and leave. Defendant reported feeling alarmed and confused by the fact that Victim had walked directly into traffic. Defendant was afraid that a car might veer to avoid hitting Victim and hit Defendant or his car, which remained on the shoulder, just out of the lane of traffic.

Defendant stated that all these thoughts rushed through his mind and he could not be sure exactly what he was thinking, but, in any event, he did not get back into his car and drive away. Instead, Defendant stood in front of his car, on the other side of the open driver's side door, still holding his gun.

{10} Victim then turned back toward the car. Victim was close to the driver's side open door and continued his approach. Victim said something like, "You are too fucking pussy to shoot me. I'll just run you over with your car." When Victim reached the open driver's door, he began to reach his head and hands into the vehicle. Without giving a verbal warning, Defendant fired his gun. Defendant told police he "focused in on the center of mass . . . through the window." Defendant shot Victim repeatedly, continuing to shoot until Victim stopped moving. The medical examiner testified Victim had been shot five times, three times in the back, once in the side, and once in the shoulder. When asked by the police what he thought would happen if he did not shoot Victim, Defendant said that he believed that Victim would have either run him over or would have driven straight into traffic and injured others.

{11} The State called the medical examiner and a crime scene investigator who testified that the physical evidence was consistent with Defendant's story.

{12} At the conclusion of the preliminary examination, the district court ruled that the State had failed to establish probable cause to believe that Defendant had committed second-degree murder. The district court found probable cause for the lesser included offense of voluntary manslaughter, concluding that because there were both verbal threats and actions by Victim, there was sufficient provocation for the fatal shooting. The district court asked the State to prepare a revised criminal information charging only voluntary manslaughter and entered a written order binding Defendant over for trial on voluntary manslaughter alone. The State appeals.

DISCUSSION

{13} Defendant argues, as a preliminary matter, that we lack jurisdiction to consider the State's appeal because the district court did not dismiss the charge of second-degree murder, but merely "diminished" it to voluntary manslaughter. The State contends that (1) in determining whether probable cause exists to bind over a defendant for trial, the district court must view all evidence presented at the preliminary hearing in the light most favorable to the State and draw all inferences in the State's favor; (2) whether there is sufficient provocation to reduce a charge of second-degree murder to voluntary manslaughter is exclusively within the province of the jury, and should not be the basis for a finding of no probable cause; (3) this Court should review the district court's application of the law of probable cause to the facts applying a de novo standard of review. We agree with the State as to the last point it makes on appeal: that the district court's application of the law to the facts should be reviewed by this Court de novo. We reject the deferential abuse of discretion or reasonable basis standard advocated by Defendant and by the dissent. Finally, reviewing the application of the law to the undisputed facts de novo, we reverse the district court's determination that there was no probable cause to bind Defendant over for trial on second-degree murder.

{14} We address each of the issues raised on appeal in turn, beginning with Defendant's threshold question of whether this Court has jurisdiction to consider this appeal.

I. This Court Has Jurisdiction to Consider This Appeal

{15} Defendant contends that we lack jurisdiction to consider the State's appeal under Section 39-3-3(B)(1), which allows the State to appeal to this Court "within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts[.]" Defendant argues that the district court did not "dismiss" the State's second-degree murder count, but rather merely "diminished" the count to the lesser included offense of voluntary manslaughter. We are not persuaded.

{16} When a jurisdictional issue is raised, this issue must be decided before this Court reviews the other issues on appeal. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300. "We review jurisdictional issues de novo." *State v. Lucero*, 2017-NMCA-079, ¶ 10, 406 P.3d 530.

{17} Defendant's claim that there was no appealable dismissal of the State's second-degree murder charge is based on the failure of the district court to issue an order expressly stating that the second-degree murder charge is dismissed. Instead of an order of dismissal, the district court directed the State to prepare an order, which the court entered, binding Defendant over for trial solely on the offense of voluntary manslaughter. The State's original criminal information had charged both second-degree murder and the lesser included offense of voluntary manslaughter as an alternative.

{18} In determining whether an order or judgment is final, we look at the substance and effect of the judgment or order, and not its form. *State v. Ahasteen*, 1998-NMCA-158, ¶ 10, 126 N.M. 238, 968 P.2d 328, *abrogated on other grounds by State v. Savedra*, 2010-NMSC-025, ¶ 9, 148 N.M. 301, 236 P.3d 20. The district court's order binding Defendant over only on the lesser included offense of voluntary manslaughter, when both second-degree murder and involuntary manslaughter were charged in the State's criminal information, was functionally equivalent to a dismissal of the second-degree murder charge. *See State v. McCrary*, 1982-NMCA-003, ¶ 26, 97 N.M. 306, 639 P.2d 593 (holding that where the bind-over order only included the lesser included offense, the state could not charge the defendant on the greater offense). We, therefore, are not persuaded that Defendant has shown that the district court failed to follow Rule 5-302(D)(1)'s injunction to "dismiss without prejudice all felony charges for which probable cause does not exist." *State v. Carlos A.*, 1996-NMCA-082, ¶ 8, 122 N.M. 241, 923 P.2d 608 ("[T]here is a presumption of correctness in the rulings or decisions of the trial court and the party claiming error must clearly show error.").

{19} Defendant also argues that we lack jurisdiction on appeal because the dismissal is without prejudice. Although Defendant is correct that the dismissal is without prejudice and allows the State to again present the matter to a grand jury or to refile its criminal information, Section 39-3-3(B)(1) clearly expresses the intent of our Legislature to allow the state to appeal, even though the order is not final. The appellate jurisdiction of this Court is determined by our Constitution and our Legislature. *See State v. Armijo*, 1994-NMCA-136, ¶ 7, 118 N.M. 802, 887 P.2d 1269. Unlike civil appeals, where a final order is required to appeal, the State is authorized in a criminal case to appeal any order dismissing one or more counts of a complaint, indictment or information, regardless of whether the dismissal is with prejudice or without. *See id.* ¶ 6 (holding that Section 39-3-3(B)(1) recognizes the state's constitutional right to appeal even though the matter is not final). We decline to hold differently in this case. We accordingly conclude that this Court has jurisdiction to decide this appeal.

II. The District Court at Preliminary Examination Serves as an Impartial Fact-Finder

{20} Having determined that we have jurisdiction over the State's appeal, we next address the State's argument that the court conducting the preliminary examination must "view all evidence and draw all inferences in favor of the prosecution." We disagree.

{21} Article II, Section 14 of the New Mexico Constitution requires that before a person "shall be held to answer for a capital, felonious or infamous crime," the prosecutor must either obtain an indictment by a grand jury or must file an

information, which then must be followed by a preliminary examination before a magistrate or judge: "No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination." [1] N.M. Const. art. II, § 14.

{22} The procedures required for a preliminary hearing in New Mexico do not command sole reliance on the evidence offered by the state. Rather, the rules of procedure adopted by our Supreme Court allow the defendant to subpoena and call witnesses on the defendant's behalf, Rule 5-302(B)(3); to cross-examine the state's witnesses, Rule 5-302(B)(4); and to raise objections based on the Rules of Evidence, Rule 5-302(B)(5). These provisions require the district court to hear both the state's evidence and the evidence submitted by the defendant and "determine probable cause from *all* the evidence." *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, ¶ 11, 72 N.M. 50, 380 P.2d 196.

{23} Drawing all inferences from the evidence in the state's favor would conflict with the defendant's right to present evidence and to have disputes of fact and questions of credibility resolved by an impartial judge. *See State v. Perez*, 2014-NMCA-023, ¶ 11, 318 P.3d 195 (criticizing a magistrate's failure at a preliminary hearing to apply "more rigorous evidentiary requirements and [to engage in] careful fact-finding" (alteration, internal quotation marks, and citation omitted)).

{24} We, therefore, reject the State's claim that the district court must draw all inferences from the evidence in favor of the State.

III. In a Preliminary Hearing, the District Court Must Determine Whether Probable Cause Exists as to Every Element of the Charged Crime

{25} The State next argues that the district court should not have considered the sufficiency of the provocation in determining whether there was probable cause to bind Defendant over for trial on second-degree murder. The State claims that, because it involves "a specific determination or finding," which is an element of the offense, only the jury can determine the sufficiency of the provocation.

{26} The cases relied on by the State on appeal address the question of whether the jury at trial should be instructed on the element of sufficient provocation. *See, e.g.*, *Sells v. State*, 1982-NMSC-125, ¶ 8, 98 N.M. 786, 653 P.2d 162. While the State is correct that the jury, rather than the judge, is responsible for determining at trial whether the defendant is guilty of each element of the charged crime beyond a reasonable doubt, these cases do not address the role of the judge in determining probable cause at a preliminary hearing, the matter at issue in this appeal.

{27} The State having presented no authority for its claim that it need not show probable cause to believe the accused committed each element of the crime charged, we do not address this issue further. *See State v. Casares*, 2014-NMCA-024, ¶ 18, 318 P.3d 200 ("We will not consider an issue if no authority is cited in support of the issue, because absent cited authority to support an argument, we assume no such authority exists.").

IV. Our Review of the Application of the Law of Probable Cause to the Facts Is De Novo

{28} We next turn to the standard of review applied by this Court to a lower court's decision applying the law of probable cause. The standard of review has not been previously addressed and is, therefore, an issue of first impression.

{29} The State argues that because a probable cause determination is a mixed question of law and fact, and because application of the probable cause standard requires the exercise of judgment about the values that animate legal principles, our review should be de novo. Defendant, in contrast, contends that our review should defer to the district court's decision and suggests either an abuse of discretion, or "substantial basis"[2] standard. We agree with the State that our review of the application of the law to the facts found by the district court should be de novo.

{30} Determining whether a prosecution is grounded in probable cause to believe that a crime was committed, and the defendant likely committed it, involves the weighing of important legal values: the state has a strong interest in enforcing its statutes and in being able to exercise its charging discretion in good faith, *State v. Heinsen*, 2005-NMSC-035, ¶ 10, 138 N.M. 441, 121 P.3d 1040, and the accused has a right to an independent evaluation of whether the state has met its burden of demonstrating that a prosecution is neither hasty nor ill-considered, but is supported by probable cause. *See State ex rel. Whitehead v. Vescovi-Dial*, 1997-NMCA-126, ¶¶ 5-6, 124 N.M. 375, 950 P.2d 818.

{31} In addition to requiring the weighing of competing values, a determination of probable cause is not susceptible to "bright-line, hard-and-fast rules." *State v. Evans*, 2009-NMSC-027, ¶ 11, 146 N.M. 319, 210 P.3d 216. The parameters of probable cause are developed on a case-by-case basis, each case requiring the court to weigh, under the totality of the unique circumstances of that case, whether the prosecution has established reasonable grounds to believe that the accused likely committed the crime charged. *See Hanagan*, 1963-NMSC-057, ¶ 11.

{32} The factors relied upon by our Supreme Court in *Williamson*, 2009-NMSC-039, ¶ 28, to support the adoption of a deferential standard of review for a magistrate's decision to issue a search warrant do not apply to the probable cause determination at preliminary hearing. The less demanding standard of review in *Williamson* was adopted in recognition of the often pressing demand for a quick decision on a warrant request in the lower court and to effectuate this state's strong preference in favor of the warrant process. *Id.* (noting that searches conducted pursuant to a search warrant are reviewed under a less demanding standard "because deference to the warrant process encourages police officers to procure a search warrant").

{33} Neither of these factors apply here. The decision as to probable cause to bind a defendant over for trial is made well after the arrest, the filing of the information, and the appointment of counsel, and follows an on-the-record evidentiary hearing. *See* Rules 5-302, 6-202, 7-202 (setting the procedures for a preliminary hearing in district court, magistrate court, and metropolitan court, respectively). Our review of the district court's determination of probable cause at a preliminary hearing is similar to review on appeal of a district court's pretrial determination of probable cause to conduct a warrantless search. That decision, like the decision reviewed here, is made after the fact, following full hearing by the district court.

[1] Initially, under Article II, Section 14 of the New Mexico Constitution, only magistrates could hold a preliminary examination. However, Article VI, Section 21 of the New Mexico Constitution, as amended in 1966, provides that "[d]istrict judges and other judges or magistrates designated by law may hold preliminary examinations in criminal cases." Preliminary examinations held by the magistrate or metropolitan court are governed by Rules 6-202 and 7-202 NMRA respectively, which are substantially identical to Rule 5-302.

[2] "Substantial basis" is the deferential standard of review, described as somewhere between substantial evidence and de novo review, adopted by our Supreme Court for review on appeal of a finding of probable cause to issue a search warrant. See State v. Williamson, 2009-NMSC-039, ¶ 30, 146 N.M. 488, 212 P.3d 376.

Our Supreme Court in *Williamson* approved the continued use of a de novo standard of review for the application of the law to the district court's findings of fact when reviewing a pretrial decision involving probable cause to conduct a warrantless search. 2009-NMSC-039, ¶ 27.

{34} We therefore conclude that a de novo standard should be applied to our review of the application of the law of probable cause to the district court's findings of fact, or to undisputed facts in the record.

V. The Application of the Law to the Undisputed Facts in This Case

{35} At a preliminary hearing, the state is required to establish only two components: (1) a crime has been committed; and (2) probable cause exists to believe the person charged committed it. *State v. Vallejos*, 1979-NMCA-089, ¶ 7, 93 N.M. 387, 600 P.2d 839. The district court at preliminary hearing is not deciding the case; it is merely deciding whether the case should be tried. "The test at a preliminary hearing is not whether guilt is established beyond a reasonable doubt, but whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused." *State v. Garcia*, 1968-NMSC-119, ¶ 6, 79 N.M. 367, 443 P.2d 860. Reasonable grounds are "more than suspicion but less than certainty." *State v. Goss*, 1991-NMCA-003, ¶ 17, 111 N.M. 530, 807 P.2d 228. "When ruling on probable cause, we deal only in the realm of reasonable probabilities, and look to the totality of the circumstances to determine if probable cause is present." *State v. Nyce*, 2006-NMSC-026, ¶ 10, 139 N.M. 647, 137 P.3d 587, *overruled on other grounds by Williamson*, 2009-NMSC-039, ¶ 29 & n.1. If probable cause is found, the defendant's guilt or innocence remains a question for a jury to decide following a criminal trial where the defendant is provided full due process. *See Garcia*, 1968-NMSC-119, ¶ 5 ("The preliminary hearing and the trial are separate and distinct.").

{36} With these principles in mind, we are asked to determine whether the district court erred in concluding that there is no probable cause to believe that Defendant committed the crime of second-degree murder. The elements of the crime of second-degree murder are (1) the defendant killed the victim; (2) the defendant knew that his acts created a strong probability of death or great bodily harm, and (3) there was not "sufficient provocation." *See* UJI 14-210 NMRA. " 'Sufficient provocation' can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." UJI 14-222 NMRA.

{37} Defendant argued below, and contends on appeal, that the district court correctly concluded that the evidence established that there was sufficient provocation, ruling out the charge of second-degree murder and requiring that Defendant be charged only with voluntary manslaughter. The State contends that the undisputed facts are sufficient to establish a reasonable basis to believe that Defendant likely committed second-degree murder, and that, therefore, the district court erred in dismissing the second-degree murder charge and binding Defendant over for trial only on voluntary manslaughter.

{38} The State points to undisputed evidence that it claims is sufficient to establish probable cause. It was undisputed that Defendant pointed a gun at the unarmed Victim early in the encounter, based on little provocation other than an argument about the charge for cleaning up the vomit in the back seat of Defendant's car. Defendant opened his car door to reprimand Victim for slamming the door and got out of his car to pull out his gun and point it at Victim, who was walking around the car from the rear passenger's side door at the time, and was unarmed. Defendant admitted that he briefly considered driving away when Victim wandered into traffic a few moments later, and that he failed to take advantage of the opportunity. Defendant kept his gun in his hand, lowering it, but never returning it to its holster, even when Victim turned away. It was only when Victim turned back toward the car and saw Defendant still with his gun in his hand that Victim threatened to run Defendant over, and started moving toward the open driver's side door of the car. And although Victim approached Defendant's car and began to reach inside, he had not yet stepped into the car and assumed control over it when Defendant, without a verbal warning, opened fire. Victim was just beginning to stoop with his head and hands reaching into the car when Defendant fired five shots into Victim's side and back through the open window of the driver's side door, killing him.

{39} We conclude that the district court failed to correctly apply the probable cause standard to these undisputed facts. This undisputed evidence supports *a reasonable belief* that an ordinary person of average disposition in Defendant's position would not have been provoked to the point of utilizing lethal force, but would instead have taken available opportunities to attain a position of safety from an unarmed man in no immediate position to pose a threat to Defendant's safety. The undisputed evidence also supports a *reasonable belief* that Victim acted in response to Defendant's drawing a gun early in the encounter. If so, Victim's subsequent response in attempting to threaten Defendant with his own car cannot be relied upon as sufficient provocation under the law. *See State v. Gaitan*, 2002-NMSC-007, ¶ 13, 131 N.M. 758, 42 P.3d 1207.

{40} The district court's decision that there was no probable cause to charge second-degree murder appears to be based on the district court's conclusion that the proof provided by the prosecution was not sufficient to convict Defendant of second-degree murder, but only sufficient to convict of voluntary manslaughter. As this Court held in *Vallejos*, however, a finding of no probable cause should not be based on the absence of proof sufficient to convict. *See* 1979-NMCA-089, ¶ 12. Where the evidence is sufficient to support *a reasonable belief* that Defendant committed the crime charged, conclusive proof of each element of the offense can await trial. The undisputed facts establish a triable issue as to whether an ordinary person of average disposition would have been sufficiently provoked to temporarily lose self-control. This decision should be made by a jury. The district court having found otherwise, we reverse.

CONCLUSION

{41} For these above reasons, we reverse the district court's dismissal of the State's information charging Defendant with second-degree murder. We remand to the district court for reinstatement of the second-degree murder charge.

{42} IT IS SO ORDERED.

JANE B. YOHALEM, Judge

I CONCUR:

J. MILES HANISEE, Chief Judge

GERALD E. BACA, Judge (dissenting in part).

BACA, Judge (dissenting in part).

{43} I respectfully dissent from the majority's conclusion that a de novo standard of review is the correct standard of review to be applied when an appellate court reviews a trial court's determination of probable cause at a preliminary hearing. The correct standard of review in that instance is abuse of discretion.

{44} I also respectfully dissent from the majority's conclusion that the district court's finding of no probable cause was incorrect. Instead, I would affirm the district court's finding that the State failed to establish probable cause as to the charge of second-degree murder.

{45} Before proceeding further, let's consider, for a moment, the requirement, purpose, and procedure of and for a preliminary hearing. A preliminary hearing is required by our Constitution when the filing of a complaint or information commences a criminal prosecution. N.M. Const. art. II, **14.**

This provision of our Constitution is to insure that no person is deprived of his liberty without due process of law. "Thus, a defendant cannot be held for trial unless a preliminary hearing has been held at which time the accused is informed of the crime charged against him and *a magistrate has determined that probable cause exists to hold him*." *State v. Coates*, 1985-NMSC-091, ¶ 7, 103 N.M. 353, 707 P.2d 1163 (emphasis added), *abrogated on other grounds*, *State v. Brule*, 1999-NMSC-026, ¶ 3, 127 N.M. 368, 981 P.2d 782.

{46} The preliminary hearing is a critical stage of the criminal prosecution. *State v. Vaughn*, 1964-NMSC-158, ¶ 3, 74 N.M. 365, 393 P.2d 711. The preliminary hearing can be held in a magistrate or district court. Rules 5-302, Rule 6-202. If the prosecution is commenced in the district court by information, the district judge is permitted to remand the case to the magistrate court for a preliminary hearing. Rule 5-302(E).

{47} The preliminary hearing "operates as a screening device to prevent hasty and unwise prosecutions and to save an innocent accused from the humiliation and anxiety of a public prosecution." *Whitehead*, 1997-NMCA-126, ¶ 6. "At the preliminary hearing, the state is *required* to establish, *to the satisfaction of the examining judge*, two components: (1) that a crime has been committed; and (2) probable cause exists to believe that the person charged committed it." *State v. White*, 2010-NMCA-043, ¶ 11, 148 N.M. 214, 232 P.3d 450 (emphases added) (citing *Vallejos*, 1979-NMCA-089, ¶ 7). If at the conclusion of the preliminary hearing, the court finds probable cause, the case, if in the magistrate court, is bound over for trial in the district court. Rule 6-202(D)(3). If, on the other hand, at the conclusion of the preliminary hearing, the court does not find probable cause, the charge is dismissed without prejudice and the defendant is discharged. Rule 6-202(D)(1).

{48} With this in mind, let's turn to the case before us to determine what should be the correct standard of review when an appellate court is asked to review the probable cause determination of a trial court at the conclusion of a preliminary hearing.

VI. A De Novo Standard of Review Is Incorrect

{49} The appropriate standard of review to apply in this case is an issue of first impression. Given the import of our decision, one would expect a complete and robust discussion and analysis of the issues leading to the majority's conclusion. Such is not the case. Based on an incomplete analysis of the issue, the majority concluded that a de novo standard of review is the appropriate standard of review in cases such as this. *See* Maj. Op. ¶¶ 28-34. I respectfully disagree and believe because the majority applied the incorrect standard of review, they also reached the wrong result.

{50} First, the majority compares a review of a lower court's determination of probable cause at preliminary hearing to a review of an appeal involving probable cause to conduct a warrantless search. Maj. Op. ¶ 33. The majority, with minimal analysis, concludes that the standard of review applied in the latter instance is the correct standard to be applied in this case. Maj. Op. ¶¶ 33-34. They state that this is the correct standard of review because the decision is made after the fact, following a full hearing. In support of their conclusion, the majority cites *Williamson*, 2009-NMSC-039, ¶ 27, stating:

> Our Supreme Court in *Williamson* approved the continued use of a de novo standard of review for the application of the law to the district court's findings of fact when reviewing a decision involving probable cause to conduct a warrantless search.
>
> We therefore conclude that a de novo standard should be applied to our review of the application of the law of probable cause to the district court's findings of fact, or to undisputed facts in the record.

Maj. Op. ¶¶ 33-34 (citation omitted).

{51} The majority's comparison of a review of a warrantless search to a preliminary hearing is misplaced. The two are wholly dissimilar, except that each deals with the existence/nonexistence of probable cause. The similarities end there. An example of the stark difference between the two is that warrantless searches include a presumption of unreasonableness. In contrast, preliminary hearings have no presumptions for or against a party or issue. *See State v. Rowell*, 2008-NMSC-041, ¶ 10, 144 N.M. 371, 188 P.3d 95 ("Warrantless seizures are presumed to be unreasonable and the [s]tate bears the burden of proving reasonableness." (internal quotation marks and citation omitted)); *c.f. Whitehead*, 1997-NMCA-126, ¶ 5 ("The primary purpose of the preliminary examination is to provide an *independent evaluation* of whether the state has met its burden of demonstrating probable cause." (emphasis added)).

{52} Second, the majority agrees with the State's argument that this Court should adopt a de novo standard of review because "provocation" in relation to second-degree murder is a mixed question of law and fact. In support of this proposition, the State relies upon *State v. Attaway*, 1994-NMSC-011, ¶ 6, 117 N.M. 141, 870 P.2d 103, and *State v. Salazar*, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996. These cases are easily distinguished and do not guide us in resolving the issues here. Yet, the majority seems to accept the State's argument without question.

{53} A review of these cases reveals that they do not support the majority's position. They are inapposite. In clarifying its holding in *Attaway*, our Supreme Court said that it "did not hold that all mixed questions of law and fact must be reviewed de novo. [It] simply held that, to determine the appropriate standard of review, the reviewing court must balance interests of judicial administration and public policy." *Williamson*, 2009-NMSC-039, ¶ 25. Specifically, concerning probable cause determinations, the Court said, "Accordingly, despite our broad language in *Attaway*, none of the principles articulated therein support the application of a de novo standard of review to an issuing court's determination of probable cause." *Williamson*, 2009-NMSC-039, ¶ 25. Thus, *Attaway* does not support a de novo review in this case.

{54} Salazar is even farther removed from the circumstances before us in this case. *Salazar* had nothing to do with a trial court's determination of probable cause. Rather, *Salazar* is a case in which the issue was the propriety of jury instructions. In *Salazar*, our Supreme Court held that where there is a question concerning the appropriateness of jury instructions, the standard of review was de novo. It said, "The propriety of jury instructions given or denied is a mixed question of law and fact. Mixed questions of law and fact are reviewed de novo." *Salazar*, 1997-NMSC-044, ¶ 49. Consequently, because *Salazar* discusses review of jury instructions, given or not given, an issue far different than the question before us in this case, *Salazar* does not provide any guidance in resolving the issues presented in this case.

{55} Third, the majority, relying upon *Williamson*, 2009-NMSC-039, ¶ 28, chose not to adopt a deferential standard of review in this instance stating that "the adoption of a deferential standard of review for a magistrate's decision to issue a search warrant [does] not apply to the probable cause determination at preliminary hearing," because the standard in *Williamson* was adopted "in recognition of the often pressing demand for a quick decision on a warrant request in the lower court and to effectuate the state's strong preference in favor of the warrant process." Maj. Op. ¶ 32.

{56} While I understand that the majority is seeking guidance from other procedures or situations like that before us, I do not agree that cases such as *Williamson* and the others cited by the majority are a sound basis for resolution of this case.

Much like *Attaway*, *Williamson* is a case involving the review of the legality of a search. But unlike *Attaway*, the review was as to the propriety of the issuance of search warrants and not a warrantless search. Here, too, and for the same reasons I articulated above as to *Attaway*, I find the majority's reliance on this case is misplaced.

{57} In fact, in *Williamson*, our Supreme Court rejected this Court's decision to apply a de novo standard of review to the issuance of a lower court's determination of probable cause in a search warrant. 2009-NMSC-039, ¶¶ 1, 18. In *Williamson*, the district court issued a search warrant based on probable cause that the defendant was shipping narcotics via mail. *Id.* ¶¶ 2-6. Before trial, the defendant moved to suppress the evidence gained from the search warrant because "the affidavit submitted in support of the first search warrant failed to set forth sufficient facts to establish probable cause." Id. ¶ 7. The district court granted the defendant's motion, and this Court affirmed that decision. Id. ¶¶ 7-8. The Supreme Court rejected this Court's application of a de novo standard of review and adopted the more deferential substantial basis standard of review. Id. ¶¶ 18, 29.

{58} Cases such as *Attaway* and *Williamson* involving challenges to searches, warrantless or via search warrant, are most often appeals from a district court's granting or denial of a motion to suppress. Notably, in those cases, the reviewing court gives deference to the prevailing party. "On appeal from the denial of a motion to suppress, we determine under de novo review whether the district court correctly applied the law to the facts." *State v. Garcia*, 2009-NMSC-046, ¶ 9, 147 N.M. 134, 217 P.3d 1032. Viewing the facts "in a manner most favorable to the prevailing party" and deferring to the district court's "findings of historical fact so long as they are supported by substantial evidence." *State v. Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). Where there are no findings of fact, we "indulge in all reasonable presumptions in support of the district court's ruling." *Id.* ¶ 11 (internal quotation marks and citation omitted). Absent a contrary indication in the record, "we presume the court believed all uncontradicted evidence." *Id.* Consequently, the majority's reliance upon cases reviewing warrantless searches and searches pursuant to a search warrant is misplaced as these cases support applying a deferential standard of review rather than a de novo standard of review.

{59} Lastly—and most importantly—I am concerned that the majority's opinion is contrary to the principles laid out by this Court in *White*, 2010-NMCA-043. In *White*, the state, following a preliminary hearing before a magistrate judge, who found that the state failed to establish probable cause for various felony offenses, filed identical charges in district court. *Id.* ¶ 1. The district court remanded the matter to the magistrate court for a preliminary hearing. Id. The same magistrate judge who originally heard the case was assigned the case. The state peremptorily excused that magistrate judge, and the case was assigned to another magistrate judge. *Id.* The case proceeded to preliminary hearing before the new magistrate judge. *Id.* The state presented the same evidence to the new magistrate judge at the second preliminary hearing as it had to the original magistrate judge. *Id.* However, unlike the original magistrate judge, the new magistrate judge found probable cause as to the charges and bound the case over to the district court for trial. *Id.* On appeal, this Court held that the state's obtaining a probable cause determination on the same evidence with two different lower court judges was improper. *Id.* ¶ 18. "The result of the procedure employed by the [s]tate was to allow one magistrate to overrule another magistrate on the issue of probable cause after a review of the same evidence. This is not proper." *Id.* ¶ 16.

{60} With *White* in mind, the majority's decision to review de novo a lower court's decision regarding the determination of probable cause at a preliminary hearing would have the practical effect of this Court playing the role of the second magistrate judge in *White*. Essentially, in this case, because the State is dissatisfied with the district court's decision, the State is asking this Court to review the same evidence previously ruled upon by a neutral and detached magistrate or district judge, which *White* held to be improper.[3] "It is axiomatic that a party may not do indirectly that which the law does not permit directly." *Id.*

{61} This Court recently held in *State v. Ayon*, 2022-NMCA-003, 503 P.3d 405 (No. A-1-CA-38812, July 27, 2021), that district courts do not have the authority to determine if "evidence was illegally obtained at a preliminary hearing." *Id.* ¶¶ **1, 17. In making that** holding, we highlighted the common purposes between grand jury proceedings and preliminary hearings. *Id.* ¶ 11. Notably, we stated, "**[d]**ifferent rules regarding the district court's authority to review illegally obtained evidence based solely on the choice of proceedings—grand jury proceedings as opposed to preliminary hearings—may encourage favoring one proceeding over another, undercutting efficient judicial administration and causing confusion." *Id.* The same reasoning applies to this case. Giving the State the option to appeal an unsuccessful preliminary hearing to this Court, and as the majority would have it—with a de novo nondeferential review, would be tantamount to encouraging "one proceeding over another, undercutting efficient judicial administration and causing confusion." *Id.* In summary, for the reasons stated above, I am unpersuaded that the correct standard of review is de novo.

VII. Abuse of Discretion Is the Correct Standard of Review

{62} The correct standard of review to be applied to the review of a court's probable cause determination at a preliminary hearing should be abuse of discretion.

{63} The majority failed to address Defendant's argument that our case law suggests that this Court has been deferential in the past and should continue to do so on this issue.

{64} In *Garcia*, after a successful preliminary hearing that charged the defendant with possession of marijuana, the defendant, on appeal, contended that the state failed to produce sufficient evidence that the substance involved was marijuana during the preliminary hearing. 1968-NMSC-119, ¶¶ 1-3. Although not stated outright, it appears our Supreme Court reviewed the appeal under a sufficiency of the evidence standard. *Id.* ¶ 7 ("The determinative question on appeal is whether the evidence offered at the preliminary hearing was sufficient to meet the above tests and to establish reasonable ground to satisfy the magistrate's judgment. In this case, we hold there was sufficient evidence." (citation omitted)). Our Supreme Court held that, for the purposes of the preliminary hearing, officer testimony that the substance was marijuana, absent any chemical testing, was sufficient to bind over the charge of possession of marijuana. *Id.*

{65} Although no standard of review was pronounced in *Vallejos*, this Court gave considerable deference to the magistrate's ruling at the preliminary hearing and, without analyzing the evidence, held that the evidence presented at the preliminary hearing was sufficient to bind the defendant over for murder. 1979-NMCA-089, ¶¶ 6-13.

[3] Bear in mind that although the State is crying "foul" here due to the finding of no probable cause by the district court, the prosecution of Defendant upon the charge of second-degree murder is not precluded. The State, if it chooses, could readily proceed against Defendant by grand jury indictment or represent the case to the metropolitan or district court at a preliminary hearing upon new and additional evidence. See State v. Chavez, 1979-NMCA-075, ¶ 20, 93 N.M. 270, 599 P.2d 1067; see also State v. Peavler, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d 1387; State v. Burk, 1971-NMCA-018, ¶¶ 2-3, 82 N.M. 466, 483 P.2d 940.

In *Vallejos*, after it was determined that the deceased was in the hospital for two weeks before he died, the defendant argued that the state failed to prove that the death resulted from the criminal agency and not from other natural causes. *Id.* **¶¶ 4, 6. There, we reasoned that "[t]he [s]**tate is only required to produce evidence sufficient to establish reasonable grounds for the [m]agistrate's exercise of judgment[,]" and concluded, "[t]he [m]agistrate had probable cause to believe [the] defendant committed the crime of murder." *Id.* **¶¶ 12-13.**

{66} My reading of *Vallejos* and *Garcia* convinces me that this Court has at the very least implicitly applied a deferential standard for preliminary hearing decisions and that we should continue to do so. The application of a deferential standard for reviewing a lower court's preliminary hearing decision seems to make the most sense, especially at this early stage of the prosecution. This is because even in cases such as the one before us, where the presiding judicial officer found no probable cause, the State could still proceed with the prosecution by grand jury indictment or by means of a second preliminary hearing upon new or additional evidence. *See White*, 2010-NMCA-043, ¶ 12. As well, this standard of review will safeguard against the State shopping for a forum that will agree with its view of the evidence despite a previous decision against it. Most importantly, this standard of review will ensure that the citizens of our state will only be held to answer for criminal charges that are supported by probable cause thereby "sav[ing] an innocent accused from the humiliation and anxiety of a public prosecution." *Whitehead*, 1997-NMCA-126, ¶ 6. Consistent with *Williamson* and *Attaway*, judicial administration and public policy weigh in favor of a deferential abuse of discretion standard of review. *See Williamson*, 2009-NMSC-039, ¶ 25 ("[T]he reviewing court must balance interests of judicial administration and public policy."). "It is not the function of [the] court to sit as a second preliminary hearing court to review the evidence of probable cause." *People v. Ayala*, 770 P.2d 1265, 1266 (Colo. 1989) (en banc). "When [the] court is asked to make a case-by-case review of the trial court's determination of the sufficiency of the evidence, the time expended by the court serves little purpose and is rarely productive of any precedential value." *Id.* (internal quotation marks and citation omitted).

{67} When reviewing a preliminary hearing decision from a lower court, we should apply an abuse of discretion standard similar to other jurisdictions. "It is well-settled that the standard to be observed in reviewing a magistrate's determination at preliminary examination is that the reviewing court should not disturb the determination of the magistrate unless a clear abuse of discretion is demonstrated." *People v. Doss*, 276 N.W.2d 9, 13 (Mich. 1979). "The magistrate's determination regarding the existence of probable cause shall not be disturbed upon review unless a clear abuse of discretion is demonstrated." *State v. Olsen*, 462 N.W.2d 474, 476 (S.D. 1990). To do otherwise would permit the State a second-look at the same evidence, without deferring to the trial courts who are in a better position to weigh the evidence.

{68} Therefore, the correct standard of review should be abuse of discretion.

VIII. The District Did Not Abuse Its Discretion

{69} I would affirm the district court's decision in this case.

{70} "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted).

{71} The State failed to argue that the district court abused its discretion. Instead, the State made three arguments on appeal. The State contends that (1) in determining whether probable cause exists to bind over a defendant for trial, the district court must view all evidence presented at the preliminary hearing in the light most favorable to the State and draw all inferences in the State's favor; (2) whether there is sufficient provocation to reduce a charge of second-degree murder to voluntary manslaughter is exclusively within the province of the jury, and should not be the basis for a finding of no probable cause; (3) this Court should review the district court's application of the law of probable cause to the facts applying a de novo standard of review.

{72} The majority rejected the State's first two contentions for some very sound reasons, and I agree with them. As to the third issue, I have to disagree with the majority's opinion for the reasons stated above.

{73} Therefore, without sufficient argument to the contrary, and upon reviewing the record, I find that the district court did not abuse its discretion in determining that the State failed to establish probable cause as to second-degree murder. I would therefore affirm.

GERALD E. BACA, Judge

State Bar *of* New Mexico
Young Lawyers Division

YLD *in brief*

WINTER 2022

The Official Newsletter of the
State Bar of New Mexico Young Lawyers Division

Jessica A. Perez

Message from the 2022 YLD Chair

So, another year comes to an end during a time where months seem to blend and fly by. The pandemic has altered the way many people operate in their day to day lives. The legal community and the Young Lawyer's Division are not an exception. Hearings are virtual, client meetings are over the phone, and some of us are still on some form of a working from home schedule. As we continue easing into 2023, the YLD Board is still committed to serving the community through support and programming for our members.

In 2022, the board focused a lot on what it meant to be practicing as a new attorney in this semi-post pandemic world. We've started having events in person once again and, for many new attorneys and law students alike, attending hearings or events outside of a computer screen is new. In addition, for our State, this year proved to be a rough one.

Many families are still being impacted by illness and death due to COVID-19. This year, our state saw tragedy with the Calf Canyon/Hermits Peak fire. In the face of these tragedies, we are reminded of why our public service programs are so important to us. Through Wills for Heroes, families can prepare for difficult moments, have peace of mind knowing a plan is in place and hopefully relieve a bit of the burden for their loved ones should anything happen. This year, board member Lauren Riley was instrumental in relief for New Mexico families by working with the American Bar Association YLD's Disaster Legal Services Program and the Federal Emergency Management Agency to provide immediate temporary legal assistance to disaster survivors.

I invite you all to continue following the YLD as we move forward. Volunteer with us when you have the time, join us at events when you're able and follow us on social media. Every year, within our Winter Edition of In Brief, program chairs provide an overview of what they accomplished this year. If you're interested in learning a little more about what we've accomplished this year, please have a look.

Finally, the board would like to thank our members who left at the end of 2022: Lindsay Cutler, Shasta Inman and Breanna Contreras. We enjoyed our time with you and hope to still see you around at events. Best wishes and have a happy holiday season!

— Jessica A. Perez, Chair

Damon Hudson

Lauren Riley

A Message from the Incoming Chair

Greetings and Happy New Year!

With the Young Lawyer's Division's 2022 year all wrapped up, we first wanted to take this opportunity to congratulate Board Member Lauren Riley on her award for Outstanding Young Lawyer of the Year. We are exceptionally proud of the work Lauren did in putting together the Disaster Legal Services hotline and in-person clinic to assist those impacted by the fires in New Mexico this year.

Additionally, the Board wanted to congratulate our outgoing chair, Jessica Perez, on her election to the Board of Bar Commissioners as the Commissioner for the 7th and 13th Judicial Districts. Jess will be a fantastic addition to the BBC and we look forward to seeing the great things she will do!

— Damon Hudson, Chair Elect

Program Updates

UNMSOL Mock Interviews

Every year, as part of the UNM School of Law mentorship program, the YLD hosts mock interviews on the law school campus. This event takes place on a Saturday with interview sessions in the morning as well as the afternoon. At this, the law students can bring with them resumes to be reviewed and they sit with a current young lawyer to practice their interview skills. All of this is done in scheduling alignment with the Arturo Jaramillo Clerkship Program to provide students with the best opportunity to succeed in their program interviews. This year, mock interviews shall take place in January at the law school. Signups for this went out to both students and volunteer attorneys in December.

If you are interested in this program or have any questions, please feel free to reach out to YLD Past Chair Jessica A. Perez at JPerez2@da.state.nm.us.

Mentorship Program

Mentorship to UNMSOL law students continues to be an integral part of the outreach that the Young Lawyers Division provides to the legal community. In early 2022, mentors from the 2021-2022 program assisted students in preparing for their Mock Interviews through YLD by reviewing resumes and assisting with the Mock Interview program, hosted by YLD.

We kicked off the fall 2022 semester with a group of over 70 attorney volunteers and 75 UNMSOL students signing up for the mentorship program. Over 65 mentors and mentees attended our back-to-school meet and greet. With finals and holidays ahead, mentors and mentees gathered for one last hoorah, with over 20 people in attendance! We truly appreciate the attorney volunteers that continue to make this important service possible. Thank you also to the Rodey Law Firm and Batley Family Law who both sponsored events this year, as well as Modrall Sperling who will be sponsoring our future spring event.

— Lauren Riley, 2022 Director at Large, Position 2

FEMA/ABA Disaster Legal Program

The Young Lawyers Division in partnership with the State Bar of New Mexico, FEMA and the ABA implemented a Disaster Legal Services Program hotline which provided free legal services to those affected by the Calf Canyon and Hermits Peak fires. Over 50 attorneys volunteered to assist with the calls received via the hotline to provide brief legal services. Additionally, more than 10 attorney volunteers and six UNMSOL Clinic students traveled to Las Vegas, NM to participate in the in-person legal clinic where assistance with FEMA applications, FEMA appeals, insurance questions and a myriad of additional issues was provided. More than 75 people were provided with free legal services through this program.

— Lauren Riley, 2022 Director at Large, Position 2

State Bar of New Mexico Annual Meeting

Last year, the New Mexico YLD was able to sponsor a couple of #Fit2Practice events at the 2022 State Bar of New Mexico Annual Meeting. Attendees interested in starting their day on the more active side were invited to enjoy an early morning nature trail walk at the Tamaya Resort and get some good stretches in during poolside yoga.

Following a long day of CLEs, attendees were then invited to join the YLD as they hosted a drag show. All State Bar members in attendance were able to watch performer and host Seliah DeLeon delight the crowd with her performances while also interviewing other performers about what drag means to them. With this being the first drag show performance to be hosted at the State Bar Annual Meeting, the YLD Board was delighted to learn that the event turned out to be one of the most, if not the most, well-attended YLD sponsored Annual Meeting events.

— Jessica A. Perez, 2022 Chair

SBNM is Hear Podcast

Be sure to check out episodes **3.4 Bridge the Gap Program: Overview of Your First Year of Practice** and **3.5 Bridge the Gap Program: Enhancing Your First Year of Practice** at www.sbnm.org/podcastlibrary, in which our own Lauren E. Riley interviews several Program Directors and General Counsel of the State Bar of New Mexico about the requirements in your first year of practice as well as the fun ways attorneys can get involved in the State Bar. Also, be sure to check out Season 3, Episode 12 of "What I Wish I Knew" where 2023 Chair Damon Hudson interviews Chief Justice Shannon Bacon.

Ask-a-Lawyer Call-in Program

Ask-A-Lawyer Call in Day

In April of last year, the Young Lawyers Division of the State Bar held "Ask-a-Lawyer" Law Day Call-In. Attorneys from all over New Mexico volunteered in person and over the phone to provide free legal advice. We had over 40 volunteer attorneys assisting with the program. Almost 200 people called in with legal issues including family law, landlord tenant, employment and various other areas of the law. The Young Lawyers Division of the State Bar would like to thank all our volunteers, we cannot do these programs without them. We look forward to hosting this event again in 2023.

— Damon J. Hudson, Chair-Elect

Wills For Heroes

The Young Lawyers Division organized four Wills for Heroes events this past year across the state of New Mexico. Last February, we hosted an event in Rio Rancho, drafting and executing wills, powers of attorney and healthcare directives for both the Rio Rancho Police and Bernalillo County Fire Departments. Last May, we organized an event in Las Cruces with the New Mexico State University Police Department. Next, we held an event at the Roswell Fire Department, providing estate planning documents to members of both the Roswell Fire Department and Police Department. The final event was last December in Albuquerque. This event supported members of Albuquerque Fire Rescue and was the biggest Wills for Heroes we have hosted since 2019. It was overall an incredibly successful year, with YLD providing over 100 wills, powers of attorney and healthcare directives to first responders and their spouses around the state.

We hope to see more attorney volunteers next year and are grateful to everyone who has volunteered with the program so far! We rely on volunteers in each city to make these events successful and are so appreciative of their hard work. We would also like to provide a special shout-out to the Paralegal Division for all their help throughout the year!

— Laura Unklesbay, 2022 Director at Large, Position 3

#Fit2Practice

From yoga to nature walks to the Duke City Pedaler, the YLD hosted a variety of Fit2Practice events in 2022!

In October, the YLD partnered with the Well Being Committee for a family fun run at Albuquerque Great Pumpkin Chase. We were especially excited to have some very promising future lawyers join in for the Kids K event! Special shout out to Maggie and Dominic who both took home first place in their age groups.

If you have an idea for a Fit2Practice event, please let the YLD know!

- Lindsay Cutler, 2022 Director at Large, Position 4

Veterans Clinic

The YLD continued to partner with the Veterans Justice Outreach Program to hold four Veteran's Legal Clinics in 2022. The first two clinics of the year were virtual, and we returned to holding the Veteran's Legal Clinic in person at the Veterans Memorial Park.

Through these clinics, veterans are able to meet one-on-one with experienced attorneys for consultations on a variety of legal issues. Thanks to partnerships with New Mexico's many civil legal services providers, volunteer attorneys and paralegals are often able to refers veterans to additional legal services. The YLD is grateful to the dedicated volunteer attorneys, paralegals and UNM Veteran Law Society, all of whom made this year's Clinic possible.

After two years of holding the Clinic virtually, it was great to see familiar faces return to Veterans Memorial Park. Please look out for future Veterans Clinics and consider volunteering in 2023!

— Lindsay Cutler, 2022 Director at Large, Position 4

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-031
No: A-1-CA-38830 (filed March 23, 2022)

STATE OF NEW MEXICO,
Plaintiff-Appellant,
v.
JAMES B. HENZ,
Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Brett R. Loveless District Judge

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Santa Fe, NM
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for Appellant

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for Appellee

OPINION

HANISEE, Chief Judge.

{1} The State appeals the district court's grant of Defendant James Henz's motion to suppress child pornography found in the search of his home, arguing that the district court erred in finding that the issued search warrant was not supported by probable cause. In this opinion, we examine for the first time the requisite level of description and verification necessary in an affidavit supporting the application for a search warrant for child pornography when the factual basis for the warrant are the reports of third-party electronic communication service providers (providers). We reverse.

BACKGROUND

{2} On August 5, 2019, Defendant was charged with one count of possession of a visual medium of sexual exploitation of children under eighteen years of age (possession of child pornography), contrary to NMSA 1978, Section 30-6A-3(A) (2016) (child pornography statute). The charge arose following two independent reports, one from Tumblr and one from Google, Inc., to the National Center for Missing and Exploited Children (NCMEC) that a user had posted child pornography onto both respective internet platforms.

{3} In the affidavit supporting Bernalillo County Sheriff's Department Detective Kyle Hartsock's request for a search warrant, Detective Hartsock included the following information about the reports sent to NCMEC by Tumblr and Google:

> On February 22 and 24, 2014[,] an internet [provider] called Tumblr sent two tips to NCMEC, who then sent [the information] to the [New Mexico Attorney General's (NMAG's) Office] on March 11, 2014, concerning a registered user of Tumblr who was involved in incidents of child pornography.
>
> Tumblr states that the user with moniker "allsoyummmy" utilize[d] the internet protocol [(IP)] address of 70.210.201.40 at the time of the incident. On [February 20, 2014,] that user posted approximately [six] images that contained explicit images of children in sexual acts or positions. The user also added the text "I trade pictures" and provided his email address and [messaging app] user name. The NMAG's office conducted a preliminary investigation into the user name and the email address that was posted[,] and identified a video of the user[,] as well as the name of James Hen[z] or James Medina with a date of birth [later identified to be that of Defendant's], as well as a Twitter profile indicating the user was in Albuquerque, New Mexico.
>
> Affiant received a second tip that came back to the same user. [The provider] Google . . . report[ed] that on July 7, 2014[,] the user killajamo505 uploaded child pornography images to [Google's] cloud service from IP address 107.4.45.176. Affiant went before a grand jury and asked for a subpoena to Comcast for IP address 107.4.45.176 on the date and time of the Google incident, asking for the subscriber information. Affiant did receive the information back from Comcast, which indicated that it is registered to Jeanette Medina. Comcast indicated that on the date in question the address was 6325 Sumac Dr SW, [in Albuquerque, New Mexico] but was disconnected on [August 4, 2014], and reconnected at 5715 Timberline Ave NW[, also in Albuquerque, New Mexico].

{4} Based on Detective Hartsock's affidavit, a search warrant for Defendant's residence was issued by a metropolitan court judge (the issuing court) in Bernalillo County, New Mexico. During the execution of the search warrant, law enforcement recovered multiple electronic devices containing forty images depicting child pornography. As well, Defendant told Detective Hartsock that he possessed child pornography, operated the usernames reported by Tumblr and Google, and "had a problem" with viewing child pornography.

{5} Defendant filed a motion to suppress evidence recovered during the search, arguing that the affidavit was insufficient to establish probable cause because it failed to contain either adequate descriptions of the images that purportedly constituted child pornography, or independent verification that such images violated New Mexico's child pornography statute. Following a hearing, the district court granted Defendant's motion to suppress. In its order, the district court characterized the tips from Tumblr and Google as "conclusory assertion[s]" that certain images contained child pornography, stating that such assertions "fail[ed] to provide the necessary descriptive detail to allow the issuing court to judge independently whether the images constituted 'child pornography' that would be prohibited under New Mexico law." The district court further found that the question of "[w]hether images described as 'child pornography' are prohibited under New Mexico law may include [an] analysis of several factors including camera angles, the acts depicted, the setting of the

image, etc." The district court stated that "[r]elying on a conclusion, whether from law enforcement or a third party, that an image constitutes 'child pornography' provides no information to the issuing court to evaluate the more subjective elements under New Mexico law[,]" and "[g]iven the subjectivity involved in determining whether materials constitute 'child pornography,' such that there is probable cause to believe the law is being or has been violated," an issuing court must "be provided with sufficient detailed information," which could "include the images themselves, sufficient factual details of the images, or other factual information from which the issuing court can evaluate the nature of the images or materials." Finding that the affidavit supporting the application for a search warrant did not explain the basis for Tumblr and Google to believe the images in question constituted child pornography as prohibited by New Mexico law, the district court found there to be an insufficient basis upon which to find probable cause and granted Defendant's motion to suppress. The State appeals.

DISCUSSION

{6} The State argues on appeal that the district court erred in reversing the issuing court's probable cause determination and granting Defendant's motion to suppress because the search warrant was supported by probable cause. More specifically, the State contends that Tumblr and Google are credible sources, the information contained in their tips was reliable, and Detective Hartsock's affidavit provided a substantial basis for the issuing court to have concluded that a search of Defendant's home would uncover evidence of child pornography. In response, Defendant argues that the affidavit failed to establish probable cause because it did not include any description of the relevant images from which an issuing court could conclude that a violation of the child pornography statute occurred or any indication that either law enforcement or the issuing court viewed the images to confirm they contained illegal content. Defendant also raises an additional argument that the children's court has exclusive jurisdiction of the case because Defendant was seventeen years old when law enforcement received the first tip from Tumblr. We address each issue in turn.

I. The Search Warrant Was Supported by Probable Cause

{7} In reviewing the district court's grant of Defendant's motion to suppress, "the reviewing court must determine whether the affidavit as a whole, and the reasonable inferences that may be drawn therefrom, provide a substantial basis for determining that there is probable cause to believe that a search will uncover evidence of wrongdoing." *State v. Williamson*, 2009-NMSC-039, ¶ 29, 146 N.M. 488, 212 P.3d 376. "[T]he substantial basis standard of review is more deferential than the de novo review applied to questions of law, but less deferential than the substantial evidence standard applied to questions of fact." *Id.* **¶ 30. Thus, "if the factual basis for the warrant is sufficiently detailed in the search warrant affidavit and the issuing court has found probable cause, the reviewing courts should not invalidate the warrant by interpreting the affidavit in a** hypertechnical, rather than a commonsense, manner." *Id.* (alteration, internal quotation marks, and citation omitted).

{8} "The constitutional validity of a search warrant, under the Fourth Amendment as well as Article II, Section 10 of the New Mexico Constitution, depends on whether the affidavit for a search warrant demonstrates that there is probable cause to believe that a crime is occurring or that seizable evidence of a crime exists at a particular location." *State v. Price*, 2020-NMSC-014, ¶ 14, 470 P.3d 265. A search warrant may be issued when "sufficient facts are presented in a sworn affidavit to enable the [issuing court] to make an informed, deliberate, and independent determination that probable cause exists." *State v. Gonzales*, 2003-NMCA-008, ¶ 11, 133 N.M. 158, 61 P.3d 867, *abrogated on other grounds by State v. Williamson*, 2009-NMSC-039, ¶ 29, 146 N.M. 488, 212 P.3d 376. The issuing court "must have sufficient facts upon which to conclude that there is a reasonable probability that evidence of a crime will be found in the place to be searched." *Id.* **¶ 12.** In making this determination, the issuing court must consider solely the information within the four corners of the affidavit submitted in support of a search warrant. *See Williamson*, 2009-NMSC-039, ¶ 31. "The degree of proof necessary to establish probable cause for the issuance of a search warrant is more than a suspicion or possibility but less than a certainty of proof." *State v. Vest*, 2011-NMCA-037, ¶ 7, 149 N.M. 548, 252 P.3d 772 (internal quotation marks and citation omitted). In reviewing an application for a search warrant, an issuing court may consider "[a]ll direct and circumstantial evidence alleged, as well as all reasonable inferences to be drawn from those allegations." *State v. Sabeerin*, 2014-NMCA-110, ¶ 13, 336 P.3d 990 (internal quotation marks and citation omitted). "Probable cause determinations . . . are not subject to bright line rules but rather are to be based on the assessment of various probabilities in a given factual context." *State v. Gurule*, 2013-NMSC-025, ¶ 14, 303 P.3d 838. "[T]he existence of probable cause is reviewed within the realm of probabilities rather than in the realm of certainty." *State v. Sanchez*, 2015-NMCA-084, ¶ 14, 355 P.3d 795 (internal quotation marks and citation omitted). This Court resolves "doubtful or marginal cases of probable cause . . . by giving preference to the warrant." *Gurule*, 2013-NMSC-025, ¶ 16.

{9} Where, as here, "a showing of probable cause depends in whole or in part on hearsay information, the affidavit must show," in addition to providing a sufficient substantive basis to allow the reviewing court to make an informed, deliberate, and independent determination that criminal activity has or is occurring, "a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." *State v. Haidle*, 2012-NMSC-033, ¶ 17, 285 P.3d 668 (internal quotation marks and citation omitted); *see also* Rule 5-211(E) NMRA (stating that probable cause "shall be based on substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished"). Under this test, we examine the informant's credibility, as well as the basis of the informant's knowledge to determine whether the method by which the information was gathered is reliable. *See Haidle*, 2012-NMSC-033, ¶¶ 19, 23. "First-hand observations by the informant" are a sufficiently reliable method of gathering the information. *State v. Barker*, 1992-NMCA-117, ¶ 5, 114 N.M. 589, 844 P.2d 839.

{10} There are, therefore, two main inquiries we undertake in our analysis of whether the search warrant in this case was supported by probable cause: (1) whether the affidavit provides a substantial basis for believing that Tumblr and Google are credible hearsay sources who gathered the information supporting their reports of illegal activity in a reliable manner; and (2) whether Detective Hartsock's affidavit provided a reasonable basis for the issuing court to conclude that a search of Defendant's home would uncover evidence of wrongdoing.

A. Tumblr and Google Functioned as Credible Hearsay Sources Who Gathered the Information Supporting Their Reports in a Reliable Fashion

{11} The State contends that both Tumblr and Google are inherently credible sources because federal law requires that they report actual knowledge of violations of federal child pornography laws. The State further asserts that the Tumblr and Google reports to NCMEC in this case, which arose from direct observation of materials posted by Defendant on their platforms, were premised upon information gathered in a reliable fashion. Defendant answers

that the federally mandated reporting obligations imposed upon providers like Tumblr and Google create an economic incentive for overly-inclusive reporting of images to NCMEC. Defendant further contends that because the federal reporting obligations require Tumblr and Google to report violations of federal—not New Mexico—child pornography laws, the providers' characterization of the reported images should not be relied upon to establish probable cause.

{12} As providers, Tumblr and Google's reports to NCMEC were compelled by 18 U.S.C. § 2258A(a)(1)(A), which requires that "[i]n order to reduce the proliferation of online child sexual exploitation and to prevent the online sexual exploitation of children," providers shall report apparent violations of federal child pornography laws to NCMEC "as soon as reasonably possible after obtaining actual knowledge" that such a violation occurred. *See also* 18 U.S.C. § 2258E(6) (defining "provider" as "an electronic communication service provider or remote computing service"). Under § 2258A(c)(1),(2), once NCMEC receives a provider's report of an apparent violation of federal child pornography laws, NCMEC "shall make available" such reports to any federal, state, or local law enforcement agency "involved in the investigation of child sexual exploitation."

{13} Although New Mexico courts have not previously examined either the credibility of providers or the reliability of the methods by which providers acquire reported information under relevant federal obligations, other jurisdictions have held that providers like Tumblr and Google are presumed to be reliable sources akin to identified citizen informants. For example, in *State v. Sisson*, the provider America Online (AOL) discovered and identified child pornography images and subsequently sent the images, along with the screenname of the individual who sent them, to law enforcement. 883 A.2d 868, 879-80 (Del. Super. Ct. 2005). The *Sisson* court explained that in sending the relevant images to law enforcement, AOL essentially functioned as "a citizen witness to a crime and, as such, [AOL was] presumed to be reliable." *Id.* at 880. "Accordingly, the [c]ourt [determined] that, under the circumstances, AOL was a reliable informant and no independent corroboration of the information provided by AOL was required." *Id.* The *Sisson* court went on to state:

> When information is supplied to law enforcement through a tip, the reliability of the so-called "tipster" determines how much corroboration, if any, is necessary to meet the probable cause standard for a search warrant to issue. . . . When the source of the tip is a named citizen informant, however, no corroboration is necessary to establish the reliability of the information. The information is presumed to be reliable because citizens have no reason to fabricate criminal activity; they are presumed to have no interest in the matter.

Id. at 879-80 (footnote omitted).

{14} This view of citizen informants is consistent with New Mexico law, as we have held that "a citizen[]informant[, even if anonymous,] is regarded as more reliable than a police informant or a crime-stoppers informant" when the citizen informant was an eyewitness to the reported illegal activity. *State v. Contreras*, 2003-NMCA-129, ¶¶ 10-12, 134 N.M. 503, 79 P.3d 1111. While Detective Hartsock's affidavit does not identify the individual Google and Tumblr employees who discovered and identified the images posted by Defendant, such omission does not undercut the logical inference that at least one individual employee viewed the images firsthand in order for the subsequent report to NCMEC to have been made. *See State v. Silverstein*, 2017 WI App 64, ¶ 19, 378 Wis. 2d 42, 902 N.W.2d 550 (explaining that even if the identity of the individual working for a provider who reported to NCMEC is unknown, Tumblr is more analogous to a citizen informant than an anonymous informant because Tumblr is "a named, traceable entity that is reporting a crime in furtherance of public safety[;] Tumblr gains nothing from making the tip[; and] Tumblr is under federal mandate to report suspected child abuse to NCMEC," an obligation which "itself heightens the reliability of the tip").

{15} Similarly, in *State v. Woldridge*, the Florida Court of Appeals determined that "AOL was in substantially the same position as a citizen informant, whose reliability can be presumed for purposes of the [issuing court]'s probable cause determination" where AOL discovered images of child pornography attached to an AOL subscriber's email, and AOL then forwarded the images "along with the subscriber's screen name to law enforcement through NCMEC." 958 So. 2d 455, 459-60 (Fla. Dist. Ct. App. 2007). Importantly, the *Woldridge* court emphasized the significance of the federal reporting mandate which compelled AOL's tip to NCMEC, stating that "the reliability of the tip from AOL can be presumed because federal law compelled AOL's report to NCMEC[,]" and clarified that while a corporation or provider will not always be found to function similarly to a citizen informant, "AOL's compliance with a federal law mandating that it report [the defendant]'s activities to NCMEC provides a presumption of reliability akin to that afforded a citizen informant." *Id.* at 458-59. Likewise, in *Adams v. State*, the Court of Criminal Appeals of Alabama held that "the tip from the [provider] was presumed reliable based on the mandatory federal reporting requirements[,]" and clarified that in forwarding relevant information to NCMEC, the provider acted "in a manner analogous to that of a citizen informant." 316 So. 3d 260, 265-66 (Ala. Crim. App. 2020) (internal quotation marks and citation omitted); *see also Manzione v. State*, 719 S.E.2d 533, 537 (Ga. Ct. App. 2011) (stating that when a provider "makes a report of criminal activity pursuant to its statutory reporting obligation [under federal law], it is the equivalent of one made from a law-abiding concerned citizen, and therefore is afforded a preferred status insofar as testing the credibility of the information" without independent verification (alteration, internal quotation marks, and citation omitted)).

{16} We agree with the above jurisdictions that have determined providers like Tumblr and Google to be credible sources who, by first-hand knowledge, gather their reported information regarding the transmission or receipt of child pornography in a reliable fashion, and adopt those jurisdictions' reasoning here. Defendant fails to present argument to the contrary, merely asserting that the federal reporting requirements create an economic incentive for providers, thus resulting in over-inclusive reporting.[1] Indeed, there is no indication that Tumblr and Google function differently than the providers in the above cited cases. That is, Tumblr and Google—under federal reporting requirements—convey information to NCMEC regarding the providers' respective knowledge of an identified user's transmission of images that presented apparent violations

[1] While Defendant identifies the financial penalties imposed for a provider's failure to comply with federal reporting requirements, he provides no evidence or authority to support the assertion that such penalties result in over-reporting by providers. Nor does Defendant provide any known circumstance of a false report driven by financial incentive. We therefore consider this argument to be speculative, as well as undeveloped, and decline to consider it further. See Corona v. Corona, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed."); see also Curry v. Great Nw. Ins. Co., 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists.").

of federal child pornography laws. Under our two-part framework for assessing the credibility and reliability of an affidavit's hearsay source, the affidavit presented (1) a substantial basis for believing Tumblr and Google; and (2) a substantial basis for concluding Tumblr and Google gathered the information of illegal activity in a reliable fashion, given the federal requirements compelling their respective reporting to NCMEC. Upon our own review of this issue, relying on the ample support from relevant persuasive authority and observing there to be a lack of supportive authority for Defendant's contention that Google and Tumblr were not credible reporting providers, we conclude that, as hearsay sources providing information to be used in an affidavit, Tumblr and Google functioned similarly to an identified citizen informant and are thus credible hearsay sources who gathered the information of illegal activity ultimately reported to NCMEC in a reliable fashion.

B. The Affidavit Provided Reasonable Grounds for the Issuing Court to Conclude That a Search of Defendant's Home Would Uncover Evidence of Wrongdoing

{17} The State argues that the district court erred in reversing the probable cause determination of the issuing court and granting Defendant's motion to suppress because Detective Hartsock's affidavit, and the reasonable inferences that could be drawn therefrom, provided reasonable grounds for the issuing court to conclude that a search of Defendant's home would uncover evidence of child pornography as proscribed by the New Mexico child pornography statute. Defendant answers that the affidavit failed to include either sufficient description of the posted images or verification that Detective Hartsock independently viewed the images in order to conclude that they violated our child pornography statute and that such flaws in the affidavit rendered it insufficient to support a determination of probable cause. Similarly, Defendant asserts that the issuing court should have independently viewed the images in making its probable cause determination. Defendant argues as well that because federal reporting requirements required Tumblr and Google to report violations of federal, not New Mexico, child pornography laws, the information reported to NCMEC is insufficient to establish probable cause under New Mexico law. We note that New Mexico courts have yet to squarely address the questions presented here, that is: in the context of reporting electronic transmission of child pornography, how much detail must be included in an affidavit—or, alternatively, how much independent verification of the averred information must occur—when the affidavit is premised upon information furnished by providers reporting under federal requirements. We therefore seek guidance from the many jurisdictions that have precedent on this issue.

{18} We first address whether Detective Hartsock's affidavit contained sufficient descriptions of the posted images, noting that, in general, "courts differ on the level of specificity required to describe the images to the issuing [court]." *People v. Rabes*, 258 P.3d 937, 940 (Colo. App. 2010); s*ee also United States v. Pavulak*, 700 F.3d 651, 661 (3d Cir. 2012) (holding that in order to allow an issuing court to independently evaluate whether images meet the legal definition of child pornography, "(1) the [issuing court] can personally view the images; (2) the search warrant affidavit can provide a sufficiently detailed description of the images; or (3) the search warrant application can provide some other facts that tie the images' contents to child pornography" (internal quotation marks and citation omitted)); *United States v. Lowe*, 516 F.3d 580, 586 (7th Cir. 2008) ("As a general matter, an issuing court does not need to look at the images described in an affidavit in order to determine whether there is probable cause to believe that they constitute child pornography. A detailed verbal description [of the images] is sufficient."); *United States v. Chrobak*, 289 F.3d 1043, 1045 (8th Cir. 2002) (providing that an affidavit's statement that images depicted "sexually explicit conduct involving children under the age of [sixteen]" provided substantial basis for concluding that a search would uncover evidence of wrongdoing because this language "is almost identical to the language of 18 U.S.C. § 2252"); *United States v. Smith*, 795 F.2d 841, 848 (9th Cir. 1986) (same). *But see State v. Nuss*, 781 N.W.2d 60, 67-68 (Neb. 2010) (providing that an affidavit's statements that files and images constituted "child pornography" and that the search would yield depictions of children "in a sexually explicit manner" were insufficient because it "does not use or even refer to the statutory definitions of sexually explicit conduct in describing the images" (internal quotation marks omitted)).

{19} As Defendant correctly argues, some courts have held that affidavits containing bare allegations that certain images constituted child pornography—without any additional detail about the images or why they violated relevant statutes—were inadequate to support probable cause determinations. *See United States v. Brunette*, 256 F.3d 14, 16, 17-19 (1st Cir. 2001) (holding that the affiant law enforcement agent's statement that an image depicted "a prepubescent boy lasciviously displaying his genitals" was insufficient to establish probable cause that the images were lascivious because the affidavit failed to "specify with any detail the basis for believing that th[e] images were pornographic" (internal quotation marks and citation omitted)); *see also Pavulak*, 700 F.3d at 661 (explaining that "[t]he label 'child pornography,' without more, does not present any facts from which the [issuing court] could discern a fair probability that what is depicted in the images meets the statutory definition of child pornography" (internal quotation marks omitted)). In *United States v. Miknevich*, the Third Circuit Court of Appeals criticized an affidavit that used language that was substantially the same as the affidavit at issue here because it provided no factual details regarding the substance of the images in question. 638 F.3d 178, 183 (3rd Cir. 2011) (evaluating an affidavit that described a movie as depicting "children, under the age of eighteen years old engaged in sexual acts and/or poses" (internal quotation marks omitted)). While the court held that this kind of "insufficiently detailed or conclusory description" of the images is not enough, it ultimately upheld the search warrant because it contained other information that the court deemed sufficient to permit a finding of probable cause by an issuing court—a highly descriptive file name and the file's SHA1 value. *Id.* at 183-84.

{20} In other instances, courts have been willing to accept descriptions akin to the language in the affidavit here. For example, in *United States v. Battershell*, the Ninth Circuit Court of Appeals considered an application for a warrant that described two images on the defendant's computer: one photo described as depicting "a young female (8-10 YOA) naked in a bathtub" and a second photo described as depicting a "young female having sexual intercourse with an adult male." 457 F.3d 1048, 1049 (9th Cir. 2006). The Ninth Circuit, tasked with determining whether the application for a warrant made a sufficient showing that the image depicted "sexually explicit conduct," began by noting that "[f]ederal law defines five categories of sexually explicit conduct with respect to child pornography." *Id.* at 1051 (footnote, internal quotation marks, and citation omitted). "The first four categories deal with specific conduct that is easy to identify and describe: (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; and (iv) sadistic or masochistic abuse." *Id.* (alteration, internal quotation marks, and citation omitted); *see* 18 U.S.C. § 2256(2)(A) (same)); *see also United States v. Jasorka*, 153 F.3d 58, 60 (2d Cir. 1998) (per curiam) (noting that the conduct involved in the first

four categories is "clearly defined and easily recognized"). The fifth category is the "lascivious exhibition of the genitals or pubic area of any person." *Jasorka*, 153 F.3d at 59. The *Battershell* court noted that this category "turns on the meaning of 'lascivious,' [and] is far more subjective and open to interpretation than the first four." 457 F.3d at 1051; *see also Brunette*, 256 F.3d at 18 ("[T]he identification of images that are lascivious will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer." (internal quotation marks and citation omitted)).

{21} The government conceded that the description of the first photo (i.e., "a young female (8-10 YOA) naked in a bathtub"), fell into the fifth category and that the officer's "terse description, absent an accompanying photograph, is insufficient to establish probable cause that the photograph lasciviously exhibited the genitals or pubic area because his conclusory statement is an inherently subjective analysis and it is unclear if the photograph exhibited the young female's genitals or pubic area." *Battershell*, 457 F.3d at 1051. As for the second photo, the court concluded that it fell within the first category described above and held that the affidavit describing a "young female having sexual intercourse with an adult male" was sufficient. *Id.* The court explained that an application need not contain elaborate descriptions of images allegedly depicting sexually explicit conduct—specifically sexual intercourse—with respect to child pornography "because any rational adult person can recognize sexually explicit conduct engaged in by children under the age of [sixteen] when he [or she] sees it." *Id.* at 1053 (alteration, internal quotation marks, and citation omitted). Instead, "the affiant need only be able to identify the specific, clearly defined acts listed in the statute, such as sexual intercourse or bestiality, and such conclusory statements are permissible to establish probable cause." *Id.* (alteration, internal quotation marks, and citation omitted); *see also Chrobak*, 289 F.3d at 1045 (stating unambiguously that "[t]here are very few pictures of actual children engaged in sexual acts that are not child pornography").

{22} Further, in *United States v. Simpson*, the Tenth Circuit upheld a probable cause determination premised upon an affidavit describing an FBI agent's online interaction with the defendant in which the agent "made a deal with the defendant to send [the agent] a computer diskette and thirty dollars through the mail in exchange for a video tape containing scenes of child pornography" in conversations which took place in conspicuously named chat rooms designated as "# sexpicshare # % % kidssexpics." 152 F.3d 1241, 1246 (10th Cir. 1998) (internal quotation marks and citation omitted). The Tenth Circuit stated that "while minimal, the information presented to the judge was sufficient for him to conclude that there was a fair probability that evidence of child pornography would be found." 152 F.3d at 1247.

{23} We agree with and adopt the approaches articulated by the Eighth, Ninth and Tenth Circuits regarding the level of detail required in an affidavit describing alleged images of child pornography. Indeed, that which constitutes child pornography varies precious little under New Mexico and federal law—and in American society, generally, as demonstrated by its universal illegality. Our child pornography statute contains nearly the same five categories of "prohibited sexual act[s]" as the federal statute at issue in *Battershell* and for the same reasons, we agree that the first four of these acts are easily recognized such that conclusory descriptions are sufficient. *See* 457 F.3d at 1051; *see also* NMSA 1978, § 30-6A-2(A) (2001) (defining "prohibited sexual act" as "(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadomasochistic abuse for the purpose of sexual stimulation; or (5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation"). The approaches adopted in these jurisdictions conform to our jurisprudence regarding probable cause, which is, we reiterate (1) premised upon considerations of reasonable inferences drawn from both direct and circumstantial evidence, *see Sabeerin*, 2014-NMCA-110, ¶ 13; (2) "reviewed within the realm of probabilities rather than in the realm of certainty[,]" *Sanchez*, 2015-NMCA-084, ¶ 14 (internal quotation marks and citation omitted); and (3) examined under the totality of the circumstances. *Price*, 2020-NMSC-014, ¶ 14. None of these principles require a rigid approach to evaluating the information presented in an affidavit. Rather, they call for a common sense review of the information contained in the affidavit. *State v. Donaldson*, 1983-NMCA-064, ¶ 13, 100 N.M. 111, 666 P.2d 1258 ("In determining probable cause, the court must interpret the affidavit in a common sense and realistic fashion and must not require technical requirements of elaborate specificity."); *see also United States v. Biglow*, 562 F.3d 1272, 1280 (10th Cir. 2009) ("[P]robable cause is a matter of probabilities and common sense conclusions, not certainties." (internal quotation marks and citation omitted)).

{24} Here, the Tumblr information as reported in the affidavit stated that an identified user "posted approximately [six] images that contained explicit images of children in sexual acts or positions." As in *Battershell*, where the image description of a "young female having sexual intercourse with an adult male" was sufficiently detailed to be identifiable as depicting "sexually explicit conduct" and "sexual intercourse[,]" 457 F.3d at 1051 (internal quotation marks and citation omitted), we conclude that the description of "sexual acts" is sufficiently detailed to be identifiable as depicting child pornography under either the New Mexico or federal definition thereof. Indeed, it is highly unlikely that an image described as depicting "[e]xplicit images of children in sexual acts" would fail to meet the requirements of our child pornography statute.[2] We, therefore, consider the description of the image in the Tumblr report to be sufficiently specific as to allow an issuing court to determine that there is a substantial basis to conclude that a search of Defendant's home would uncover evidence of wrongdoing. *See Williamson*, 2009-NMSC-039, ¶ 29; *see also Gurule*, 2013-NMSC-025, ¶ 16 (stating that appellate courts will resolve "doubtful or marginal cases of probable cause . . . by giving preference to the warrant"). We note that while the Google information as reported in the affidavit refers only to a user who uploaded "child pornography images" to Google's cloud service, taken together with the Tumblr report—which stated that the identified user "posted approximately [six] images that contained explicit images of children in sexual acts or positions"—we do not consider the Google report's dearth of descriptive information to be fatal to a finding of probable cause based on the affidavit as a whole. *See Miknevich*, 638 F.3d at 184 (explaining that while "[i]t remains the better practice for an applicant seeking a warrant based on images of alleged child pornography to . . . provide a description of the images sufficient to enable the [issuing court] to determine independently whether probable cause exists[,]" the lack of such description does not preclude a determination that probable cause exists if the application provides other facts and

[2] We emphasize that the "sexual acts" description is crucial in this case, given that "sexual positions" may not be considered sufficiently detailed in relation to our child pornography statute. See Battershell, 459 F.3d at 1051 (stating that a terse description of an image was insufficient to establish probable cause under the subjective fifth category prohibiting "lascivious exhibition of the genitals or pubic area" (internal quotation marks omitted)).

information that ties the images' contents to child pornography). Rather, the Google report and less detailed information contained therein served here to secondarily corroborate the more specific information provided by Tumblr, as would a second identified citizen informant providing substantially similar information of criminal activity as a first such informant.[3]

{25} We next address Defendant's contention that the issuing court or affiant law enforcement must view the relevant images directly.[4] In *United States v. Lowe*, the defendant made a similar argument, asserting that the descriptions of relevant images were subjective opinions by the reporting individual, which failed to meet the statutory definition of child pornography, and therefore the issuing court must have viewed the images, itself, in order to accurately determine whether probable cause existed. 516 F.3d 580, 586 (7th Cir. 2008). The *Lowe* court held that "[a]s a general matter, an issuing court does not need to look at the images described in an affidavit in order to determine whether there is probable cause to believe that they constitute child pornography" when a sufficiently detailed description exists within the affidavit. *Id.*

{26} The Ninth Circuit Court of Appeals has also held that while it is preferable that an affidavit include attachments of the actual images in question, the omission thereof is not fatal to the affidavit's ability to support a finding of probable cause. *See Battershell*, 457 F.3d at 1053 ("It would have been preferable if the affiant in this case had included copies of the photographs in the warrant application. But failing to include a photograph in a warrant application is not fatal to establishing probable cause. Indeed, a judge may properly issue a warrant based on factual descriptions of an image." (citations omitted)); *see also Smith*, 795 F.2d at 847 ("We are troubled by the fact that the government did not present and the [issuing court] did not see the photos in question before the warrant issued. Obviously, presentation of the photos with the affidavit would have been the ideal course, and the record contains no hint of why this was not done. Nevertheless, we do not find this omission fatal to the warrant in light of the affidavit taken as a whole."). This view is consistent with *New York v. P.J. Video, Inc.*, where the United States Supreme Court stated that it has "never held that a[n issuing court] must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure." 475 U.S. 868, 874 n.5 (1986).

{27} We agree with the Third, Seventh, and Ninth Circuits of the United States Court of Appeals that while it is a best practice to do so where possible, the issuing court need not independently view images alleged to depict child pornography in order to establish probable cause. A determination of probable cause is not based on *certainty*, but rather on *reasonable probability*. *See Sanchez*, 2015-NMCA-084, ¶ 14 ("[T]he existence of probable cause is reviewed within the realm of probabilities rather than in the realm of certainty." (internal quotation marks and citation omitted)); s*ee also Donaldson*, 1983-NMCA-064, ¶ 13 (explaining that a determination of probable cause "must not require technical requirements of elaborate specificity" to be contained within the affidavit). Indeed, "[w]e have never said that [law enforcement] must establish every link in the inferential chain that leads to probable cause. Rather, all that is required is that [law enforcement] make a showing that permits more than a suspicion or possibility but less than a certainty of proof." *Price*, 2020-NMSC-014, ¶ 18 (internal quotation marks and citation omitted).

{28} This principle—that a probable cause determination need not rely on certainty of any alleged wrongdoing—informs our analysis, as well, of Defendant's argument that the reported information was insufficient to establish probable cause because Tumblr and Google report violations of federal, and not New Mexico laws. Because probable cause is not based on certainty, *see id.*, the fact that Tumblr and Google report violations of federal, rather than New Mexico law, does not, in our view, compromise the appropriateness of the issuing court's determination that probable cause existed given that we do not require an affidavit to prove specific elements of a crime. Moreover, as to the merits of Defendant's argument in this regard, we agree with the State that the relevant definitions within federal and New Mexico child pornography laws are sufficiently similar such that a report of a violation of the applicable federal child pornography law would provide reasonable probability that the reported materials also violate our child pornography statute. Given the significant degree of substantive overlap between federal and New Mexico law on the subject—indeed, it is hard to even theoretically conjure an image that might violate one statute but not the other—it seems markedly improbable that a report of a violation of federal child pornography laws would not also, necessarily, implicate a violation of New Mexico child pornography laws. While useful to compare the parameters of the federal and state laws, it remains a bedrock principle that we do not require that an affidavit *proves* a violation in order to establish probable cause. Rather, we merely require that an affidavit "provide[s] a substantial basis for determining that there is probable cause to believe that a search will uncover evidence of wrongdoing." *Williamson*, 2009-NMSC-039, ¶ 29.

{29} Here, Detective Hartsock's affidavit presented the following: reports made by credible providers—reporting to NCMEC under federal requirements—that an individual posted images constituting child pornography on the providers' platforms; the identified usernames of the individual who posted the images; the associated email, birthdate, and physical address of the identified user; and the IP addresses from which the individual posted the images. We conclude that Detective Hartsock's affidavit, premised upon information furnished by the providers reporting under federal requirements, included sufficiently specific descriptions of the Tumblr images that would allow the issuing court to determine that a search of Defendant's home would uncover evidence of child pornography as proscribed by our child pornography statute, provided a substantial basis to support a finding of probable cause. Because an issuing court's "determination of probable cause must be upheld if the affidavit provides a substantial basis to support a finding of probable cause[,]" *id.*, we hold that issuance of the search warrant in this case was properly supported by probable cause and the district court erred in granting Defendant's motion to suppress.

II. The District Court Has Jurisdiction Over the Case

{30} Defendant raises the additional argument that the children's court has exclusive jurisdiction over this case, asserting that possession of child pornography is a continuing offense that, in this case, began when Defendant was a minor; therefore, jurisdiction rests only in children's court.

[3] We note that because the affidavit in this case contains two different providers' reports of alleged child pornography possession—the more detailed and descriptive Tumblr information and the less-descriptive Google information which benefits from the specificity of the Tumblr information—we do not address the issue of whether reporting an image identified by a provider merely as "child pornography," without further detail, and without other grounds supporting its identification as child pornography, would be adequate to support a probable cause determination.

[4] The record indicates that Tumblr sent the images as part of its report and the images were reviewed by the NMAG's Office, and presumably could have been provided with the warrant application.

Jurisdictional issues present "questions of law which are subject to de novo review." *State v. Chavarria*, 2009-NMSC-020, ¶ 11, 146 N.M. 251, 208 P.3d 896 (internal quotation marks and citation omitted).

{31} Defendant was seventeen years old when Tumblr and Google reported information to NCMEC. By August 20, 2014—when the search warrant was executed at Defendant's home and Defendant was charged by criminal information with possession of child pornography—Defendant was eighteen years old. Defendant was, therefore, undisputedly over the age of eighteen when he was found to be in possession of illegal images and charged accordingly. The criminal information set forth that "[o]n or about the 20th day of August, 2014, [Defendant] did knowingly and intentionally possess any visual or print medium depicting a prohibited sexual act or simulation thereof and [D]efendant knew or had reason to know that one or more of the participants was a child under the age of [eighteen] years, a fourth degree felony, contrary to Section 30-6A-3(A)." The State did not charge Defendant with committing any crime prior to his eighteenth birthday.

{32} Defendant states that the children's court "has exclusive original jurisdiction of all proceedings under the Children's Code in which a person is eighteen years of age or older and was a child at the time the alleged act in question was committed." NMSA 1978, § 32A-1-8(A) (2009).[5] But here Defendant was not charged with committing an act of possession of child pornography while he was a minor. Rather, he was charged with committing an act of possession of child pornography on August 20, 2014—the day his home was searched after he turned eighteen.[6] Based on the charge in this case, the State was tasked with proving that Defendant possessed child pornography then and no earlier. We are unpersuaded by Defendant's jurisdictional argument and hold that jurisdiction of this case properly rests in the district court.

CONCLUSION

{33} Having held that the search warrant was supported by probable cause, and that the district court erred in granting Defendant's motion to suppress, we reverse and remand for proceedings consistent with this opinion.

{34} IT IS SO ORDERED.

J. MILES HANISEE, Chief Judge

WE CONCUR:

MEGAN P. DUFFY, Judge

JANE B. YOHALEM, Judge

[5] Defendant additionally cites NMSA 1978, Section 32A-2-6(A) (1993), which provides that "[i]f it appears to a tribunal in a criminal matter that the defendant was under the age of eighteen years at the time the offense charged was alleged to have been committed and the offense charged is a delinquent act pursuant to the provisions of the Delinquency Act, the tribunal shall promptly transfer jurisdiction of the matter and the defendant to the [children's] court." Defendant further asserts that possession of child pornography is a delinquent act, citing NMSA 1978, Section 32A-2-3(A)(1)(k) (2009, amended 2019), which defines a "delinquent act" as "an act committed by a child that would be designated as a crime under the law if committed by an adult," including "an offense punishable as a felony." However, Section 32A-2-3(A)(1) defines offenses, pursuant only to municipal traffic codes or the Motor Vehicle Code. We, therefore, do not consider Defendant's reliance on these statutes to be relevant or persuasive.

[6] Defendant's briefing asserts that after receiving the Tumblr report, Detective Hartsock "decided to wait" to pursue charges after "realizing [Defendant] was a child." There is no indication in the record to support this assertion. See Chan v. Montoya, 2011-NMCA-072, ¶ 9, 150 N.M. 44, 256 P.3d 987 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence." (internal quotation marks and citation omitted)).

From the New Mexico Court of Appeals

Opinion Number: 2022-NMCA-032
No: A-1-CA-38317 (filed March 31, 2022)

VIGIL and VIGIL
Protestants-Appellants,
v.
NEW MEXICO TAXATION & REVENUE DEPARTMENT,
Respondent-Appellee

IN THE MATTER OF THE PROTESTTO ASSESSMENT ISSUED ON MARCH 14, 2018.

APPEAL FROM THE ADMINISTRATIVE HEARINGS OFFICE
Chris Romero, Hearing Officer

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OPINION

WRAY, Judge.

{1} Taxpayers Elauterio Vigil and Gabriel Vigil[1] appeal the assessments of taxes for tax years 2008, 2009, 2010, and 2011, arising from the operation of Prestige Towing & Recovery, Inc. (Prestige). The administrative hearing officer (Hearing Officer) determined that the ten-year statute of limitation applied to the assessments, based on a finding that Taxpayers filed fraudulent returns. *See* NMSA 1978, § 7-118(B) (2021).[2] The Hearing Officer additionally concluded that the New Mexico Taxation and Revenue Department (the Department) was not precluded from personally assessing taxes against Taxpayers for their operation of Prestige by the Department's earlier proceeding against a related, later-formed entity, Platinum Performance, LLC (Platinum).

{2} Taxpayers appeal. We reverse in part, and hold that (1) the seven-year limitation period applies to bar the Department from assessing gross receipts tax liability against Elauterio and Gabriel personally for 2008, 2009, and 2010; (2) estoppel principles do not preclude the Department from assessing Prestige's liability against Elauterio and Gabriel for 2011; and (3) contrary to Taxpayers' argument, the Hearing Officer properly assessed liability against Elauterio for his actions related to Prestige.

BACKGROUND

{3} In 1997, Gabriel decided to establish his own automotive technician business, Prestige. On October 24, 1997, Prestige received a certificate of incorporation from the state regulatory agency. Prestige's 1997 articles of incorporation identify Elauterio and Gabriel as directors and incorporators. Elauterio, Gabriel's father, provided significant financial support and helped to construct the building that housed Prestige.

{4} Prestige reported gross receipts taxes sporadically between January 2000 and December 2004. In 2007, Prestige submitted to the Public Regulation Commission (PRC) biennial reports for the years ending December 31, 2004, and December 31, 2006. On April 5, 2007, Prestige received notice from the PRC that the biennial reports required corrections. The parties dispute whether Prestige corrected the errors, but regardless, the PRC issued a certificate of cancellation of corporate status on August 7, 2007, which Prestige claims it did not receive.

{5} On September 21, 2011, the PRC issued a second certificate of incorporation to Prestige. The 2011 certificate of incorporation showed a different corporation number and listed only Gabriel as an incorporator and director. In 2011, Prestige began to file late corporate tax returns. Prestige filed a 2008 New Mexico income tax return for "Pass-Through Entities" (PTE return) on April 16, 2011. After that, Prestige filed the 2009 PTE return on April 24, 2012, the 2010 PTE return on April 12, 2012, and the 2011 PTE return on January 23, 2015. Between January 2008 and October 2011 Prestige did not report or remit any gross receipts to the State, but invoices established that Prestige charged the tax to its customers. Prestige began to file Combined Reporting System (CRS) returns in January 2011 and reported withholding taxes, but not gross receipts. Prestige filed no CRS returns for any other relevant period.

{6} The Department conducted an audit and on July 1, 2015, issued a notice of assessment for taxes owed by Prestige. On July 17, 2015, Gabriel and his wife, Lori, organized Platinum. Prestige sold its assets to Platinum, which notified Prestige's customers and immediately began operating at the same location, with the same phone number, and with most of the same employees. In 2016, the Department assessed Platinum as a successor in business to Prestige (Platinum Proceeding). After Platinum filed a formal protest of the assessment, a hearing officer (Platinum hearing officer) determined that Platinum was a successor in business to Prestige and that Platinum was liable for the full assessment of tax principal, but not penalties or interest. Platinum subsequently filed for bankruptcy. On January 18, 2019, the bankruptcy court entered a stipulated plan for reorganization, which included a payment plan for Platinum to pay to the Department the assessed and owed gross receipts tax.

{7} In March 2018, after the Platinum hearing officer's decision but before the Platinum bankruptcy stipulated plan, the Department issued two additional assessments against Gabriel and Elauterio, personally. The assessment notices explained that the Department did not recognize Prestige as a legal entity for the 2008 through 2011 assessment period, because the "business has failed to comply with the registration requirements of the Secretary of State for corporations." Taxpayers protested these assessments,

[1] Because of the common surname, we refer to individuals by their first names or as Taxpayers.
[2] The 2021 amendments to Section 7-1-18 do not impact the issues raised by this appeal, so we cite the current version of the statute.

which is the subject of this appeal. The Department argued in response that Taxpayers were personally liable because they continued to operate as a corporation after its cancellation, contrary to NMSA 1978, Section 53-18-9 (1967) (providing that "[a]ll persons who assume to act as a corporation without authority to do so are jointly and severally liable for all debts and liabilities incurred or arising as a result thereof"). The Hearing Officer agreed with the Department and denied Taxpayers' protest. Taxpayers appeal.

STANDARD OF REVIEW

{8} The Department's assessments of tax owing and demands for payment are presumed to be correct. NMSA 1978, § 7-1-17(C) (2007). The "taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary." *N.M. Tax'n & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 8, 336 P.3d 436 (internal quotation marks and citation omitted). If the taxpayer rebuts the presumption of correctness, "the burden shifts to the [d]epartment to demonstrate the correctness of the tax assessment." *Id.*

{9} This Court sets aside the decision of a hearing officer "only if we find [it] to be (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law." *Team Specialty Prods. v. N.M Tax'n & Revenue Dep't*, 2005-NMCA-020, ¶ 8, 137 N.M. 50, 107 P.3d 4 (internal quotation marks and citation omitted); *accord* NMSA 1978, § 7-1-25(C) (2015). To determine whether substantial evidence supports the Hearing Officer's decision, we view "the evidence in a light most favorable to the agency's decision." *See Casias Trucking*, 2014-NMCA-099, ¶ 19 (internal quotation marks and citation omitted). "The question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Id.* ¶ 20 (internal quotation marks and citation omitted). We review de novo questions of law and the application of the law to the facts. *TPL, Inc. v. N.M. Tax'n & Revenue Dep't*, 2003-NMSC-007, ¶ 10, 133 N.M. 447, 64 P.3d 474.

DISCUSSION

{10} Taxpayers make three arguments on appeal. Taxpayers first maintain that the Hearing Officer incorrectly applied a ten-year, rather than a seven-year statute of limitations to their failure to file gross receipts tax returns for 2008, 2009, and 2010. Relying on three forms of estoppel, Taxpayers next contend that the findings and arguments in the Platinum Proceeding estopped the Department from arguing in the present case that Prestige was not a corporation. Taxpayers last argue that Elauterio cannot be jointly and severally liable for the assessed taxes, because he did not participate in the operations and management of Prestige. We address each argument in turn.

I. The Seven-Year Statute of Limitation Bars the Assessments Prior to 2011

{11} The parties dispute which limitations period from Section 7-1-18 applies in this case. "We review de novo whether a particular statute of limitations applies." *Hess Corp. v. N.M. Tax'n & Revenue Dep't*, 2011-NMCA-043, ¶ 22, 149 N.M. 257, 252 P.3d 751 (internal quotation marks and citation omitted). To the extent Taxpayers contend insufficient evidence supports the Hearing Officer's findings relating to the limitations period, our review is for substantial evidence. *See Casias Trucking*, 2014-NMCA-099, ¶ 20.

{12} Generally, the limitation period for tax assessment is three years. Section 7-1-18(A). The limitation period is extended to ten years under Section 7-1-18(B) "[i]n case of a false or fraudulent return made by a taxpayer with intent to evade tax." To apply the ten-year limitation period set forth in Section 7-1-18(B), as the Hearing Officer did in this case, three requirements must be met: (1) a false or fraudulent return (2) made by the taxpayer (3) with intent to evade the tax. *See N.M. Tax'n & Revenue Dep't v. Bien Mur Indian Mkt. Ctr.*, 1989-NMSC-015, ¶ 6, 108 N.M. 228, 770 P.2d 873 (explaining that Section 7-1-18(B) "provides the [d]epartment may go back ten years from the end of the year in which the taxes were due when a taxpayer files a fraudulent return"). Alternatively, if a taxpayer fails "to complete and file any required return," the limitation period is "seven years from the end of the calendar year in which the tax was due." Section 7-1-18(C).

{13} The Hearing Officer applied the ten-year limitation period as provided in Section 7-1-18(B), based on his finding that Taxpayers filed false CRS returns with "intent to evade tax." Specifically, the Hearing Officer found that (1) Taxpayers filed no CRS returns for any relevant period other than January 2011 to October 2011; and (2) Taxpayer filed federal and PTE returns that reported gross receipts for the years 2008, 2009, and 2010, which showed that Taxpayers were aware they had earned gross receipts and had an obligation to report and pay gross receipts taxes.

{14} Taxpayers do not seek review of the evidence supporting the Hearing Officer's determination that they intended to evade the tax and argue only that the seven-year limitation period applied, because they did not file any gross receipts returns between 2008 and 2010. Our review is therefore limited to whether the evidence supported the Hearing Officer's finding that Taxpayers filed false and fraudulent returns. The Hearing Officer explicitly found, however, that Taxpayers filed CRS returns only for the period between January 2011 and October 2011 and no CRS returns were filed for 2008, 2009, or 2010. To the extent Taxpayers filed federal and PTE returns for the years 2008, 2009, and 2010,[3] which revealed "significant sums of gross receipts," those returns do not trigger the ten-year statute of limitations for 2008, 2009, and 2010. The evidence did not demonstrate that the filed federal and PTE returns were false or fraudulent. To the contrary, the Hearing Officer found that the federal and PTE returns reflected that gross receipts were earned and show a post-2011 understanding that CRS returns *should have been* filed for earlier years. The only false CRS returns were filed in 2011. No evidence demonstrates that the PTE returns filed for 2008, 2009, and 2010 were false or fraudulent. As a result, the ten-year limitation period for filing false or fraudulent returns does not apply to those years. *See Bien Mur*, 1989-NMSC-015, ¶ 6 (requiring, inter alia, that a false or fraudulent return be made by the taxpayer for the ten-year limitation period in Section 7-1-18(B) to apply). Instead, the seven-year limitation period found in Section 7-1-18(C), relating to the failure to file a return, applies and in the present case, bars the Department from assessing Taxpayers personally for the years 2008, 2009, and 2010.

{15} As Taxpayers acknowledge, the Department timely assessed the 2011 debt, and we therefore must further consider Taxpayers' remaining arguments as they relate to 2011.

II. The Department, in Its 2018 Assessments, Is Not Precluded on Estoppel Grounds From Personally Assessing Unpaid 2011 Gross Receipts Tax Against Taxpayers

{16} Taxpayers invoke three forms of estoppel to support their position that the Platinum Proceeding precludes the Department's March 2018 assessments. Taxpayers acknowledge that each form of estoppel has different elements, but they

[3] The parties dispute whether the filing of federal and PTE returns, as opposed to CRS returns, triggers the application of Section 7-1-18(B) and the ten-year limitation period in this case. Because the evidence does not demonstrate that the filed federal and PTE returns were false or fraudulent, we need not resolve this question.

argue that each doctrine precludes the personal assessments based on a single fact. Taxpayers contend that for Platinum to be liable as a successor in business to Prestige, there must have been an implicit finding by the Platinum hearing officer or a recognition by the Department in the Platinum Proceeding that Prestige was a corporation for the relevant years. Taxpayers maintain that as a result of such an implicit finding or recognition, the Department should be estopped from arguing in the present proceeding that Taxpayers were personally liable based on the revocation of Prestige's corporate status between 2007 and 2011.

{17} We observe that "[g]enerally, principles of equitable estoppel will only be applied against the state when a statute so provides or when right and justice demand it." *Bien Mur*, 1989-NMSC-015, ¶ 9 (internal quotation marks and citation omitted). "[I]n cases involving assessment and collection of taxes, the state will be held estopped only rarely." *Id.* We conclude that the Department is not precluded from assessing personal liability under these circumstances and address each asserted form of estoppel separately.[4]

A. Collateral Estoppel

{18} We first consider Taxpayers' collateral estoppel argument. A party seeking to apply collateral estoppel must first establish four elements:

> (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

Shovelin v. Cent. N.M. Elec. Co-op., Inc., 1993-NMSC-015, ¶ 10, 115 N.M. 293, 850 P.2d 996. Taxpayers contend that Prestige's corporate status was actually litigated and necessarily determined in the Platinum Proceeding. To evaluate Taxpayers' contention, we consider the purpose and nature of the Platinum Proceeding.

{19} In the Platinum Proceeding, the issue to be decided was whether Platinum was "liable under the assessment as a successor in business to [Prestige]." Taxpayers argue that "the existence of Prestige as a corporation had to be fully litigated in order for the Department to pursue the tax liability against Platinum and for the [Platinum] hearing officer to make a final ruling regarding the liability of Platinum." The Platinum hearing officer, however, did not need to determine that Prestige was a corporation in order to decide whether Platinum was a successor in business to Prestige's gross receipts tax liability. We explain.

{20} The Legislature has declared: "For the privilege of engaging in business, an excise tax equal to five and one-eighth percent of gross receipts is imposed on any person engaging in business in New Mexico." NMSA 1978, § 7-9-4(A) (2010). The term "person" includes

> an individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, limited liability partnership, joint venture, syndicate or other entity, including any gas, water or electric utility owned or operated by a county, municipality or other political subdivision of the state; or . . . a national, federal, state, Indian or other governmental unit or subdivision, or an agency, department or instrumentality of any of the foregoing[.]

NMSA 1978, § 7-9-3(N) (2021).[5] The Legislature has defined "engaging in business" without reference to corporate status or form but simply as "carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit." NMSA 1978, § 7-9-3.3 (2019).[6] If a business is transferred to a successor, "any tax from operating the business for which the former owner is liable remains due [and] the successor shall pay the amount due." NMSA 1978, § 7-1-63(A) (1997). The successor in business determination involves weighing a number of factors—none of which involve comparing the corporate forms of the initial and successor businesses. *See* 3.1.10.16(A) NMAC (outlining eight factors to determine successor in business status).

{21} The Platinum hearing officer did not need to decide whether Prestige was a corporation in order to determine whether Prestige had outstanding tax liability to which Platinum was a successor. Prestige would have been liable to remit gross receipts taxes for engaging in business, regardless of its corporate status—as an individual, a corporation, "or other entity." *See* § 7-9-4(A) (imposing gross receipts tax on any person engaging in business); § 7-9-3(N) (defining "person"); § 7-9-3.3 (defining "engaging in business"). As a result, if Platinum were a successor in business to Prestige, Prestige would also be liable for taxes that were due, even if Prestige were not an active corporation. *See* § 7-1-63(A). The Department was therefore not required to argue in the Platinum Proceeding, and the Platinum hearing officer was not required to determine, that Prestige was a "corporation" at the time the taxes were incurred in order to later assess Platinum for Prestige's tax liability.

{22} The limited record available from the Platinum Proceeding supports a conclusion that Prestige's corporate status was not litigated or decided. To determine whether Platinum was a successor in business to Prestige, the Platinum hearing officer appropriately focused on the 2015 transition between Prestige and Platinum. *See* 3.1.10.16(A) NMAC (outlining factors related to the transfer of business enterprises). The Platinum Proceeding findings do not refer to Prestige's corporate status between 2008 and 2011. While the Platinum hearing officer referred to Prestige as "the corporation," these references do not require application of estoppel in the absence of any other evidence that the matter was raised or litigated. *Cf. Keith v. ManorCare, Inc.*, 2009-NMCA-119, ¶ 39, 147 N.M. 209, 218 P.3d 1257 (refusing to apply judicial estoppel based on a party's colloquial references).

{23} Taxpayers have failed to demonstrate that the question of Prestige's corporate status was actually litigated and necessarily determined in the Platinum Proceeding. The Hearing Officer therefore correctly determined that the Department's 2018 assessments against Taxpayers were not precluded by collateral estoppel.

B. Corporation by Estoppel

{24} Taxpayers argue that "corporation by estoppel" precludes the Department from arguing in the present proceeding that Prestige was not a corporation between 2007 and 2011. Taxpayers point to *Timberline Equipment Co. v. Davenport*, 514 P.2d 1109, 1111-12 (Or. 1973) (en banc), to define the doctrine of "corporation by estoppel" as preventing "a party from denying corporate existence if that party has in the past recognized the entity's

[4] The Hearing Officer (1) expressed concerns that an administrative hearing officer might not have authority to apply estoppel principles, and (2) questioned whether the State could ever be estopped from assessing taxes. We do not address these issues because, assuming the equitable doctrines identified by Taxpayers are generally applicable in this context, none of them apply in this case.

[5] In 2021 and 2019, the Legislature amended Section 7-9-3 in a manner that does not impact the present analysis, so we cite the current version of the statute.

[6] In 2019, the Legislature amended Section 7-9-3.3 in a manner that does not impact the present analysis, so we cite the current version of the statute.

existence as a corporation even if the entity failed to incorporate or incorporated defectively." The New Mexico Supreme Court has similarly held that defendants who "dealt with" the plaintiffs as a corporation are "estopped to deny its legal existence." *Palatine Ins. Co. v. Santa Fe Mercantile Co.*, 1905-NMSC-026, ¶ 15, 13 N.M. 241, 82 P. 363.[7] While the traditional elements of equitable estoppel—reliance, misrepresentation, change of position—might not be required to establish corporation by estoppel, *see Timberline Equip. Co.*, 514 P.2d at 1111-12, the corporation by estoppel doctrine applies only "when it [would] be inequitable not to apply it." *Montoya v. Hubbell*, 1922-NMSC-054, ¶¶ 5-7, 28 N.M. 250, 210 P. 227; *see also* 8 Fletcher Cyc. Corp. § 3889 (2021) ("The corporation by estoppel doctrine rests upon equitable principles, and should only be applied when equity requires it.").

{25} In *Timberline Equipment Co.*, the Court explained that in order to properly apply the corporation by estoppel doctrine, "the cases must be classified according to who is being charged with estoppel." 514 P.2d at 1112. Specifically, "[w]hen a defendant seeks to escape liability to a corporation plaintiff by contending that the plaintiff is not a lawful corporate entity, courts readily apply the doctrine of corporation by estoppel." *Id.* Courts are "more reluctant" to apply the doctrine when individuals "seek to escape liability by contending that the debtor is a corporation, rather than the individual who purported to act as a corporation." *Id.* Taxpayers admittedly fall into the second category but nevertheless contend that because the Department treated Prestige as a corporation in the Platinum Proceeding in order to assess Prestige's tax liability against Platinum, the Department is now estopped from denying Prestige's corporate status to assess liability against Taxpayers. We disagree.

{26} Taxpayers acknowledge that the Department engaged in the Platinum Proceeding believing that Prestige had been a corporation. As explained in relation to collateral estoppel, the Department did not "deal with" Platinum or Prestige specifically as a corporation, but instead, as taxpayers. Taxpayers point to no particular conduct of the Department that demonstrates the Department dealt with Prestige or Platinum "on a corporate basis." *See Cranson v. Int'l Bus. Machs. Corp.*, 200 A.2d 33, 38 (Md. 1964) (describing the application of "the estoppel doctrine when there had been substantial dealings between them on a corporate basis"). In *Cranson*, the defendant relied on the plaintiff's corporate status and "relied on its credit" rather than on the credit of the individual defendant. *Id.* at 39. In this case, the Department did not rely on the corporate status or any corporate aspect of either Platinum or Prestige to assess taxes due or to argue that Platinum was a "successor in business." Taxpayers identify no particular aspect of the stipulated bankruptcy plan that relies on Prestige's corporate status.

{27} New Mexico courts have recognized that the principle of corporation by estoppel applies "only in the interest of justice, or when it will be inequitable not to apply it." *Montoya*, 1922-NMSC-054, ¶¶ 5-6 (estopping a corporate officer and director from denying "the proper organization of the corporation"). The Department's references to Prestige as a corporation in the Platinum Proceeding are unremarkable under the circumstances, and the Department did not rely on Prestige's status as a corporation to assess tax liability. *Cf. Keith*, 2009-NMCA-119, ¶¶ 39-41 (determining that a "casual reference" does not "rise to the level required to invoke judicial estoppel" unless the "use of the phrase in any way affected the resolution" of a successful motion). We therefore decline to apply corporation by estoppel to preclude the Department from assessing personal liability against Taxpayers for tax year 2011. *See Lopez v. State*, 1996-NMSC-071, ¶ 20, 122 N.M. 611, 930 P.2d 146 (observing that New Mexico courts are "reluctant to apply estoppel against the state and its agencies").

C. Judicial Estoppel

{28} Taxpayers additionally contend that the Department should be judicially estopped from arguing Prestige was not a valid corporation during the assessment period, because Taxpayers maintain that the Department took the position in the Platinum Proceeding that Prestige was a corporation to argue Platinum was a successor in business. "Judicial estoppel prevents a party who has successfully assumed a certain position in judicial proceedings from then assuming an inconsistent position, especially if doing so prejudices a party who had acquiesced in the former position." *Guzman v. Laguna Dev. Corp.*, 2009-NMCA-116, ¶ 12, 147 N.M. 244, 219 P.3d 12 (internal quotation marks and citation omitted). The record does not demonstrate that the Department assumed inconsistent positions between the Platinum Proceeding and in the present case.

{29} Taxpayers point to no evidence to establish that during the Platinum Proceeding, the Department "successfully argued" the position that Prestige was a valid corporation during the assessment period. *See Keith*, 2009-NMCA-119, ¶ 39. In *Keith*, the plaintiff argued that the defendant should be judicially estopped from contradicting language previously used in successful motions. *Id.* ¶¶ 38-40. This Court disagreed and explained that the plaintiff failed to demonstrate that the particular language used in the motions affected the outcome. *Id.* ¶ 40. Because the matter to be estopped "was not at issue in any of the motions or hearings" on which the plaintiff relied, and the defendant could therefore not have "successfully argued" that position, judicial estoppel did not apply. *Id.* Similarly, as we have discussed, Taxpayers have not shown that Prestige's corporate status was at issue in the Platinum Proceeding, the Department therefore did not successfully argue or assume a position on Prestige's corporate status, and judicial estoppel therefore does not apply.

{30} Further, the Department's positions in the Platinum Proceeding and in the present case are not inconsistent. The Department's position in the Platinum Proceeding was that Prestige owed gross receipts taxes and that Platinum, as a successor in business, was obligated to pay Prestige's liability. The Department's position in the present case is that pursuant to Section 53-18-9, Taxpayers are personally and jointly and severally liable for Prestige's liability—because they assumed to act as a corporation without authority to do so between 2008 and 2011. As discussed, Prestige could be liable for gross receipts tax even if it were not a valid corporation, and Platinum could be a successor in business and liable for the unpaid tax even if Prestige were not a valid corporation. Gabriel and Elauterio could also be personally—and jointly and severally—responsible for Prestige's tax liability because of their own actions. *See* § 53-18-9 (providing for joint and several liability for debts incurred as a result of acting as corporation without authority). The Department's assertions that both Platinum and Taxpayers are liable for Prestige's taxes are not inconsistent but instead, represent the separate application of Section 7-1-63 (successor in business assessments) and Section 53-18-9 (joint and several liability for unauthorized assumption of corporate powers).

{31} Under these circumstances, the Department "cannot be said to have been playing fast and loose" in the present case so as to warrant applying judicial estoppel. *See Keith*, 2009-NMCA-119, ¶ 40 (internal quotation marks and citation omitted); *id.* (holding that judicial estoppel did not apply, because employment status was not at issue in the hearings and motions cited);

[7] Taxpayers contend that the Hearing Officer erroneously concluded that Section 53-18-9 "eliminates the doctrine of corporation by estoppel." We address Taxpayers' arguments assuming the doctrine of corporation by estoppel remains viable in New Mexico.

see also Bien Mur, 1989-NMSC-015, ¶ 9 (applying estoppel against the state only rarely in the matter of tax assessment). Judicial estoppel is therefore inapplicable in the present case.

III. The Evidence Supports the Department's Personal Assessment Against Elauterio for Prestige's 2011 Tax Liability

{32} Taxpayers last challenge the Hearing Officer's conclusion that Elauterio is personally liable for gross receipts taxes owed by Prestige and contend that Elauterio did not participate in the operations of or manage Prestige. The Hearing Officer made a number of factual findings related to Elauterio's activities and subsequently concluded that Taxpayers, including Elauterio, were personally liable under Section 53-18-9. We affirm.

{33} Section 53-18-9 provides, "All persons who assume to act as a corporation without authority to do so are jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." Taxpayers argue this Court should adopt the definition of the Supreme Court of Oregon in *Timberline Equipment Co.* to construe the term "assume to act as a corporation," as set forth in Section 53-18-9. The *Timberline* court rejected an argument that a person's investment in a business would alone be sufficient to establish that the person assumed to act as a corporation and explained that the phrase "should be interpreted to include those persons who have an investment in the organization and who actively participate in the policy and operational decisions of the organization." *Id.* at 1113-14. We see no reason in the present case to specifically adopt the *Timberline* definition of "assume to act as a corporation" to construe that phrase in Section 53-18-9, considering that unlike in *Timberline*, the Hearing Officer did not rely on a financial investment alone. *See id.*

{34} The Hearing Officer found that, by his conduct, Elauterio held himself out as a corporation. Beginning in 1997, Elauterio contributed approximately $100,000 to Prestige. Elauterio was an initial director and incorporator, and he was president of Prestige when it incorporated in 1997. He remained a director and incorporator until 2011, when Prestige filed articles of incorporation for the second time. Between 2001 and 2006, Elauterio signed financing statements and purchased and registered vehicles for Prestige. Elauterio's credit was used by Prestige, Elauterio made payments for property and equipment, and he guaranteed loans. From Prestige's inception, Elauterio's course of conduct in relation to Prestige reasonably demonstrates that he assumed to act as a corporation.

{35} Elauterio continued to act as the corporation after Prestige's corporate status was cancelled.[8] For tax year 2008, Prestige reported loss distributions on a corporate tax return and distributed 80 percent of the loss to Elauterio and 20 percent of the loss to Gabriel. The 2008 tax document identifies Elauterio as a "shareholder/partner." The 2008 tax return was filed in April 2011, several months before the September 2011 incorporation date for the second Prestige. The 2008 tax return is relevant in two ways. First, Elauterio accepted the corporate loss for a tax year in which Prestige was not a corporation. Second, Elauterio acquiesced to the filing of the tax return in April 2011—a time when Prestige's corporate status remained cancelled. Throughout Prestige's existence, Elauterio additionally provided his professional services to help construct and maintain the approximately 10,000 square foot shop facility.

{36} Taxpayers essentially ask this Court to reweigh the evidence regarding Elauterio's involvement and draw the inferences favorable to them. This we will not do. *See Casias Trucking*, 2014-NMCA-099, ¶ 24 ("We do not place ourselves in the position of the fact finder and reweigh the evidence."). This Court has explained that Section 53-18-9 "provides that one who holds himself out as a corporation is personally liable for his acts if, in fact, there is no corporation." *Smith v. Halliburton Co.*, 1994-NMCA-055, ¶ 29, 118 N.M. 179, 879 P.2d 1198. Considering Elauterio's entire course of conduct, including acts that occurred during the period that Prestige was not a corporation, we affirm the Hearing Officer's determination that Elauterio was personally liable for Prestige's collectable tax debt.

CONCLUSION

{37} We hold that (1) the 2018 assessments are untimely for tax years 2008, 2009, and 2010; (2) the 2018 assessments for 2011 are not barred by any estoppel doctrine; and (3) the Hearing Officer appropriately found Elauterio personally liable for Prestige's 2011 gross receipts tax liability. We therefore remand the matter for recalculation of the personal liability of Gabriel and Elauterio for the gross receipts tax debt of Prestige for the tax year 2011.

{38} IT IS SO ORDERED.

KATHERINE A. WRAY, Judge

WE CONCUR:

JENNIFER L. ATTREP, Judge

JACQUELINE R. MEDINA, Judge

[8] Neither party argues that Elatuerio's knowledge about the cancellation of Prestige's corporate status is relevant under Section 53-18-9, and we therefore do not address the question.

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JGA is seeking an attorney, licensed/good standing in NM with at least 3 years of experience in Family Law, Probate, and Civil Litigation. Please send cover letter, resume, and 3 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 36 states, is currently seeking an experienced litigation attorney for an immediate opening in its office in Albuquerque, 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 firm offers 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 to Hamilton Hinton at hhinton@cordelllaw.com

Associate Attorney

Chapman Law, P.C. seeks a dynamic and ambitious associate attorney to assist with increasing litigation case load. Candidates should desire to take on a case load. Candidates should have one to five years civil defense experience and good research and writing skills, excellent oral speaking ability, and be a self-starter. Competitive salary and benefits offered. Send resume, references, writing sample and salary re-quirements to humanresources@chapmanlawnm.com.

Attorney II and Attorney III

Interesting work, good hours, great benefits. A less-adversarial-than-average practice. Nice weather, nice people, nice pace, great food. Las Cruces Child Support Enforcement Division is recruiting for Attorney II ($65,062 to $104,099) and Attorney III ($71,061 to $113,698) positions. Apply at www.spo.state.nm.us/work-for-new-mexico/.

Associate Attorney

Busy medical malpractice defense firm seeking a self-motivated and driven attorney. Must have strong, proficient research and writing skills. We provide career advancement training. We are open to candidates of all levels of experience. Full time and part time positions available. Pay de-pendent on experience. Position includes outstanding benefits package, including full health insurance premium paid, optional vision/dental packages, IRA matching, and much more. To apply, please provide your law school transcript, resume with references, salary requirements, and a writing sample to kbarnett@lady-justice.us.

Associate Litigation Attorney

Hinkle Shanor LLP is seeking an associate attorney to join their Albuquerque office in 2023! The Albuquerque office of Hinkle Shanor is heavily specialized in medical malpractice defense litigation. Ideal candidates will demonstrate strong academic achievement, polished writing skills, and have 2 or more years of experience. Substantial consideration will be given to candidates with prior medical malpractice litigation experience. Interested candidates should submit a resume and cover letter. Highly competitive salary and benefits. All inquiries will be kept confidential. Please email resumes and cover letters to Recruiting@hinklelawfirm.com.

Attorney Associate (FT At-Will) #00027612 Civil Court

The Second Judicial District Court is accepting applications for an At-Will Attorney Associate. This position will be assigned to the Civil Division. Summary of position: Under direction, will review cases, perform legal research, evaluation, analysis, writing and making recommendations concerning the work of the Court. Qualifications: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico. Must have three (3) years of experience in the practice of applicable law, or as a law clerk. Judicial clerkship experience is preferred. Target Pay: $45.442 hourly plus benefits. Send application or resume supplemental form with proof of education and writing sample to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Applications without copies of information re-quested will be rejected. Application and resume supplemental form may be obtained on the New Mexico Judicial Branch web page at www.nmcourts.gov. CLOSES: February 22, 2023 at 5:00 p.m.

Attorney Associate (FT-At Will) #10102478 Center For Self Help and Dispute Resolution Foreclosure Settlement Program

The Second Judicial District Court is accepting applications for a Full Time At Will Attorney Associate. This position will be assigned to the Foreclosure Settlement Program (FSP) and will operate under the direction of the Chief Judge, the Presiding Civil Judge, Managing Attorney, and upper level Court management. The Attorney Associate will facilitate settlement facilitation conferences between lenders and borrowers in residential foreclosure cases pending before the Court and will be responsible for conducting status conferences, settlement facilitations and reporting of statistical data to Court management. The majority of communication will take place via telephone and email, with occasional in-person or virtual settlement facilitations. The Attorney Associate is independent and impartial and shall be governed by the Rules of Professional Conduct, Mediation Procedures Act, NMSA 1978 §44-7B-1 to 44-7B-6, and Mediation Ethics and Standards of Practice. The Attorney Associate will coordinate with program administrative staff to support the FSP. Qualifications: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess and maintain a license to practice law in the State of New Mexico and have three (3) years of experience in the practice of applicable law, or as a law clerk. Experience in settlement facilitation/mediation and residential mortgage foreclosure matters and loss mitigation is strongly encouraged. Target Pay: $45.442 hourly, plus benefits. Send application or resume supplemental form with proof of education and writing sample to the Second Judicial District Court, Human Resource Office, P.O. Box 488 (400 Lomas Blvd. NW), Albuquerque, NM, 87102. Applications without copies of information requested will be rejected. Application and resume supplemental form may be obtained on the New Mexico Judicial Branch web page at www.nmcourts.gov. CLOSES: February 22, 2023 at 5:00 p.m.

Associate Attorney

Riley | Keller | ALDERETE | GONZALES, an AV-rated Albuquerque defense firm formed in 1982, seeks an associate attorney for an appellate/research writing position. We seek a person with appellate experience, an interest in legal writing and strong writing skills. The position is full-time with a virtual work setting and flexible schedule. We offer an excellent salary, benefits and pension package. Please submit a resume, references and writing samples to our Office Manager by fax, (505) 883-4362 or mvelasquez@rileynmlaw.com.

Request For Letters of Interest

Notice is hereby given that the City of Albuquerque Legal Department calls for Proposals for Request For Letters of Interest for legal services in the area of appellate law. Interested parties may secure a copy of the Proposal Packet, by accessing the City's website at https://www.cabq.gov/legal/documents/rfli-legal-services.pdf.

Associate Attorney

Do you want to work among colleagues, not cutthroats? Do you want to refine your case presentation skills? Do you want plenty of time in front of mediators and judges? Do you want to have the ability to work from home, from the office, or a combination of both? We specialize in workers' compensation defense, run a completely paperless office, and do a variety of district court work. We are a litigation focused firm looking for a newly licensed attorney or an attorney looking for a new challenge. If you think you are up to the task, submit a resume and cover letter to: jeffrey@hklfirm.com. Competitive salary and benefits.

Associate Attorney

Righi Fitch Law Group is a regional law firm that serves the legal needs of the insurance industry, construction industry, businesses and individuals throughout the states of Arizona, Colorado, New Mexico, Utah, & Hawaii. We are growing our team of motivated and skilled attorneys to be a part of our New Mexico office. Ideal candidates will have the following qualifications: 5 plus years experience in civil litigation; Experience handling and litigating complex bodily/personal injury and wrongful death cases; Experience handling construction defect cases a plus, not required; Experience taking both lay and expert depositions; Strong writing skills; Trial experience a plus, not required. Our law firm is dedicated to meeting all of our clients' needs. We are small enough to maintain personal relationships with our clients and offer cost-effective representation, yet we have the staff and resources to handle complex insurance defense, construction, business, and injury cases. Our office is committed to hiring and retaining a diverse workforce. We are proud to be an Equal Opportunity/Affirmative Action Employer, making decisions without regard to race, color, religion, creed, sex, sexual orientation, gender identity, marital status, national origin, age, veteran status, disability, or any other protected class. We offer a great office environment with remote flexibility, competitive salary and benefits package. For consideration please submit resume, writing sample and salary requirements to Leslie LeRoux, Director of Operations, at Righi Fitch Law Group – leslie@righilaw.com.

Entry Level Associate

Tucker Holmes, PC., a growing insurance defense firm in Colorado is seeking an entry level associate with 0-3 years experience. Qualified candidate must have strong research, analytic & writing skills. To learn more about our firm please visit our website at www.tucker-holmes.com. Starting salary depends on experience. Our firm offers a full benefit package & 401K plan. Please submit a cover letter, resume, writing sample, references & salary requirements to: mah@tucker-holmes.com

JSC Investigative Trial Counsel

State of NM Judicial Standards Commission located in Albuquerque seeks a JSC Investigative Trial Counsel, an FLSA exempt (not classified), at-will and full-time position with benefits including PERA retirement. NMJB Pay Range LL $31.273/hr-$62.546/hr, target salary ($31.273-$39.424) yearly DOE. Flexible work schedules available. Under general direction and review, the Investigative Trial Counsel assists in the investigation and prosecution of matters before the Commission involving the discipline, removal, or retirement, of New Mexico judges and may assist with oral and written arguments before the New Mexico Supreme Court. 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 (www.nmjsc.org).

Various Assistant City Attorney Positions

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 – EHD – Air Quality; Assistant City Attorney – Property & Finance For more information or to apply please go to www.cabq.gov/jobs. Please include a resume and writing sample with your application.

Program Specialist

The UNM School of Law seeks a half-time (.5 FTE) Program Specialist for the Border Justice Initiative (BJI). BJI is a grant-funded program educating law students to provide immigration law services to immigrants at the border, collaborating with medical and other non-profit providers. Duties include: providing/coordinating program administration, technical guidance, consultation, related support and day-to-day problem solving; coordinating volunteer and student employee participation; assisting budget tracking, preparation, and planning; some marketing/fund-raising duties i.e. writing social media and internet copy, sourcing photos, creating materials, drafting updates, and creating new content. Full time salary $40,643 to $60,000 DOE. For best consideration, apply by 1/17/2023 at UNM's employment website https://UNMJobs.unm.edu.

Administrative Assistant

The Clinical Law Program at the UNM School of Law is a law office where program faculty train law students in basic lawyering skills through the representation of clients. We are seeking an administrative assistant with excellent communication and interpersonal skills to join our law office as the front desk receptionist. The successful candidate will exhibit top-notch organizational skills and take pride in the quality of their work. Preferred Qualifications: Customer service experience; Knowledge of general office procedures; Ability to communication professionally; Punctuality and dependability; Experience with computer applications, Outlook and Microsoft Office; Knowledge of legal terminology; Experience handling confidential information; Ability to speak English and Spanish. See complete job posting at https://unm.csod.com/ux/ats/careersite/18/home/requisition/22960?c=unm

Paralegal for Busy Medmal Practice

Hinkle Shanor LLP is seeking an experienced paralegal to join their Albuquerque office in 2023! The Albuquerque office of Hinkle Shanor is heavily specialized in medical malpractice defense litigation. Ideal candidates will have 2-3 years of experience. Substantial consideration will be given to candidates with prior medical malpractice litigation paralegal experience. Interested candidates should submit a resume and cover letter. Highly competitive salary and benefits. All inquiries will be kept confidential. Please email resumes and cover letters to nanderson@hinklelawfirm.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 $24.68 per hour during an initial, proscribed probationary period. Upon successful completion of the proscribed probationary period, the salary will increase to $25.89 per hour. Competitive benefits provided and available on first day of employment. Please apply at https://www.governmentjobs.com/careers/cabq.

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 $21.382/hr-$42.763/hr, target salary $52,000 yearly 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).

Paralegal
AV Rated insurance defense firm needs full-time paralegal. Seeking individual with minimum of five years' experience as a paralegal in insurance defense. Excellent work environment, salary private pension, and full benefits. Please submit resume and references to Office Manager, 3880 Osuna Rd., NE, Albuquerque, NM 87109 or email to mvelasquez @rileynmlaw.com.

Legal Secretary
AV rated insurance defense firm seeks full-time legal assistant. Position requires a team player with strong word processing and organizational skills. Proficiency with Word, knowledge of court systems and superior clerical skills are required. Should be skilled, attentive to detail and accurate with a Minimum typing speed of 75 wpm. Excellent work environment, salary, private pension, and full benefits. Please submit resume to mvelasquez@rileynmlaw.com or mail to 3880 Osuna Rd. NE, Albuquerque, NM 87109

Office Space

All-Inclusive North Valley Office Suite
Locally owned and operated. Move-in ready suite ideal for a solo attorney. Conveniently located in the North Valley with easy access to I-25, Paseo Del Norte, and Montano. Visit our web-site www.sunvalleyabq.com for more details or call Jaclyn Armijo at 505-343-2016.

620 Roma NW
The building is located a few blocks from the federal, state and metropolitan courts. Monthly rent of $550 includes utilities (except phones), internet access, fax, copiers, front desk receptionist and janitorial service. You will have access to a law library, four conference rooms, a waiting area, off-street parking. Several office spaces are available. Call (505) 243 3751 for an appointment.

Miscellaneous

Want to Purchase
Want to Purchase minerals and other oil/gas interests. Send Details to: PO Box 13557, Denver, CO 80201

Contemplating Retiring
I am contemplating retiring from my collection practice. Interesting offers entertained. 505-898-6311/lpz@lzamzok.com

2023 *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 marcia.ulibarri@sbnm.org

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

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