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State Bar
2007 Annual Meeting
Early Registration Deadline
May 1
See page 8 for details

Special Insert:
Water Compact CLE

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Alliance Program: Guide to Member Benefits

For more information visit www.nmbar.org; or contact State Bar of New Mexico Membership Services, 5121 Masthead NE, Albuquerque, NM 87109
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Through the stated or implied endorsement of Alliance Program Participants, the State Bar of New Mexico assumes no liability for claims, losses, costs, damages, judgments or settlements including costs, expenses and attorneys fees arising from or in any manner relating to (1) any inaccurate representations made by the participant, (2) any breach of any warranty or any default in the performance of any of the covenants made by the participant, and (3) any negligent acts or omissions, whether inadvertent or intentional, and any willful misconduct by participant.
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Direct 505.797.6058
Cell 505.400.5469
mulibarri@nmbar.org
MAY 15th VIDEO REPLAYS - STATE BAR CENTER

Lawyer As Problem Solver:
2007 Professionalism
8:30 a.m.
1.0 Professionalism CLE Credit
☐ $49

Legal and Tax Advantages of Limited Liability Companies
9 a.m.
5.5 General and 1.0 Ethics CLE Credits
☐ $199

Prevention, Reporting & Representing Victims of Identity Theft
10 a.m.
2.7 General CLE Credit
☐ $109

Road and Access Law
12:30 p.m.
3.0 General CLE Credits
☐ $109

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours  INTERNET: www.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

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Authorized Signature ______________________

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Professionalism Tip

With respect to opposing parties and their counsel:
I will agree to reasonable requests for extensions of time or waivers of formalities when legitimate interests of my client will not be adversely affected.

Meetings

May

2 Employment and Labor Law Section
Board of Directors, noon, State Bar Center

7 Attorney Support Group,
5:30 p.m., First United Methodist Church

8 Criminal Law Section Board of Directors,
noon, State Bar Center

9 Children’s Law Section Board of Directors,
noon, Juvenile Justice Center

State Bar Workshops

May

15 Common Legal Issues Affecting Seniors,
10:30 a.m., Truth or Consequences Senior Center

17 Common Legal Issues Affecting Seniors
10:30 a.m., Corrales Senior Center, Corrales

23 Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

24 Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

Cover Artist: Michael Ligon Dickson was born in the Texas Panhandle and received his degree in architecture at Texas Tech University. He is senior principal and director of design at SMPC Architects in Albuquerque. As an artist, he has exhibited his paintings in numerous galleries in both Texas and New Mexico. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
Ninth Judicial District Court
Notice of Caseload Allocations
Pursuant to Administrative Order filed April 17 in the 9th District Court, Curry and Roosevelt Counties, New Mexico, the following caseload allocations have been established:

1. Judge David P. Reeb (Division V) will handle all civil matters plus the domestic violence docket in both Curry and Roosevelt Counties.
2. Judge Joe Parker (Division II) will handle all civil, criminal, juvenile and domestic matters, except CYFD, in Roosevelt County. He will move his chambers to the Roosevelt County Courthouse.
3. Judge Stephen K. Quinn (Division I) will continue as a criminal court judge in Curry County and will share the criminal docket with Judge Teddy L. Hartley (Division III).
4. Judge Robert S. Orlik (Division IV) will continue as family court district judge (including juveniles) for Curry County and will handle CYFD in Curry and Roosevelt Counties. The reallocation of caseloads shall become effective May 21. Judge Reeb will assume domestic violence responsibility after June 30.

Bernalillo County Metropolitan Court
Juror Appreciation Week
The Bernalillo County Metropolitan Court will celebrate Juror Appreciation Week, April 30–May 4, by providing breakfast and afternoon snacks all week. State Bar Executive Director Joe Conte and State Bar President Dennis Jontz will visit the court to thank jurors.

STATE BAR NEWS
Annual Meeting
According to its bylaws, the State Bar is required to hold an annual meeting of its members. As part of this year’s annual meeting, which will be held at the Inn of the Mountain Gods in Mescalero, the State Bar will conduct a CLE session on discussion topics from 3 to 4:45 p.m., July 12. Possible discussion topics include non-partisan judicial elections, reciprocity, tort reform and electronic filing. Members who have suggestions on other possible topics or who are interested in speaking to a specific topic or moderating a discussion, should contact Joe Conte, (505) 797-6099 or jconte@nmbar.org.

Attorney Support Group
The next Attorney Support Group meeting will be held at 5:30 p.m., May 7, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Bankruptcy Law Section
Eighth Annual Golf Outing
The State Bar Bankruptcy Law Section will host the eighth annual golf outing at 12:30 p.m., May 11, at the Four Hills Country Club, 911 Four Hills Rd. SE, Albuquerque. The cost of $65 includes a round of golf, a golf cart and hors d’oeuvres. A cash bar will also be available.

Destruction of Exhibits and Tapes
Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits or tapes filed with the court in criminal, civil, children’s court, domestic, incompetency/mental health, adoption and probate cases for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits and tapes can be retrieved by the dates shown below. Attorneys who have cases with exhibits, or who have cases with tapes and wish to have duplicates made, may verify exhibit or tape information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. These exhibits and tapes can be retrieved by the dates shown below. All exhibits will be released in their entirety. Exhibits and tapes not claimed by the allowed time will be considered abandoned and will be destroyed by Order of the Court.

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**Quality of Life Quote**
Be careful about reading health books; you may die of a misprint.

Mark Twain
Non-golfing section members are encouraged to attend the reception following the tournament at 5 p.m., also at the Four Hills Country Club. For more information or to register, contact Gerald Velarde, (505) 248-0500 or gvelarde@mac.com. Reservations must be made by May 7. Participants must provide their own golf clubs.

**Paralegal Division**

**Monthly Brown-Bag CLE for Attorneys and Paralegals**

The Paralegal Division invites members of the legal community to bring a lunch and attend *Witness Interviews*, presented by Private Investigator Mike Corwin. The program will be held from noon to 1 p.m., May 9, at the State Bar Center and offers 1.0 general CLE credit. Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys and $15 for paralegals and support staff. For more information, contact Cheryl Passalaqua, (505) 872-7469, or Evonne Sanchez, (505) 222-9356.

**Public Law Section**

**Public Lawyer Award**

The State Bar Public Law Section will present its annual Public Lawyer of the Year Award to Chief Deputy Attorney General Stuart M. Bluestone at 4 p.m., May 1, at the State Capitol Rotunda in Santa Fe. A reception will follow. This award is given to recognize the accomplishments of an attorney in the public sector, including significant length of service in government, excellence as an attorney, acting as a role model for other public lawyers and serving charitable institutions or nonprofit entities connected with the practice of law. Additionally, a recipient’s character and dedication to public law and public service furthers the integrity and repute of the legal profession. New Mexico Supreme Court Chief Justice Edward L. Chávez, State Bar President Dennis E. Jontz and Attorney General Gary K. King will speak at the event.

**Employment and Labor Law Section**

**Board Meetings Open to Section Members**

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings on the first Wednesday of each month. The next meeting will be held at noon, May 2, at the State Bar Center. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call S. Charles Archuleta, section chair, (505) 346-4646.

**Committee on Diversity in the Legal Profession**

**Reception and Third Study of Status of Minority Attorneys in New Mexico**

The State Bar’s Committee on Diversity in the Legal Profession will host a reception from 5 to 6:30 p.m., June 22, at the State Bar Center to commemorate the work of the committee and celebrate the beginning of the third study of minorities in the profession. The study will be a comprehensive look over the past three decades at bar passage rates, disciplinary matters, State Bar leadership, judicial selection and more. All members are welcome and encouraged to attend this important event. R.S.V.P. to (505) 797-6000 by June 8.

**National Association of Women Lawyers**

**Law Student Mentor Program**

The National Association of Women Lawyers has begun a new law student mentor program geared toward the social and professional advancement of female attorneys. The program matches attorney mentors and students from a variety of legal fields and geographic locations on a nationwide basis. Mentors may be any level of seniority and will be given guidance from NAWL on how to best help student protégées. NAWL anticipates completing the formal pairings in September 2007. Lawyers who join NAWL for the first time and sign up to become mentors will receive $20 off their first year dues. Law student membership to spend an hour with high school students on a new ABA/YLD program called *Choose Law: A Profession for All*. The program encourages diversity in our profession and, specifically, high school students of color to become attorneys. Attorney volunteers will spend one hour with a classroom of high school students to teach the importance of the legal profession and how law impacts many aspects of their lives. A video, written curriculum and Web site are available. Attorney volunteers will present the video and provide a meaningful discussion. For more information and to volunteer, contact Briana Zamora, bhzamora@btblaw.com, or Martha Chicoski, mchicoski@cabq.gov.

**Other Bars**

**N.M. Defense Lawyers Association**

**2007 Outstanding Civil Defense Lawyer Nominations**

Nominations are being accepted for the 2007 Outstanding Civil Defense Lawyer. The award will be presented at the 2007 DLA Annual Meeting on Oct. 18 in Albuquerque. This award is given to one or more attorneys who, over long and distinguished legal careers, have, by their ethical, personal, and professional conduct, exemplified for their fellow attorneys the epitome of professionalism and ability.

Letters of nomination should be sent to: NMDLA, PO Box 94116, Albuquerque, NM 87199; fax to (505) 858-2597; or e-mail nmdefense@nmdla.org

Deadline for submissions is May 31.
in NAWL is free and is open to both women and men. For more information, contact Dr. Stacie Strong, (312) 988-6186 or strongs@nawl.org.

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School of Law
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Building and Circulation
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Friday 8 a.m. to 6 p.m.
Saturday 9 a.m. to 6 p.m.
Sunday Noon to 11 p.m.
Reference
Monday–Friday 9 a.m. to 6 p.m.
Saturday Closed
Sunday Noon to 4 p.m.
Extended Exam Hours
Friday, May 4 8 a.m. to 10 p.m.
Saturday, May 5 8 a.m. to 10 p.m.
Phone: (505) 277-6236

Other News
Center for International Legal Studies
The Center for International Legal Studies, in cooperation with law faculties in Eastern Europe and the former republics of the Soviet Union, will offer short-term appointments to as many as 70 senior lawyers during spring 2008 and autumn 2008. A senior lawyer is defined as having at least 25 years of significant practice experience in the area in which he or she proposes to lecture.

The term of teaching may be from two to six weeks and the length of appointment and dates of teaching are subject to negotiation between the appointee and the host university.

The subject areas are not limited, but there is special interest in corporate and business law, intellectual property, litigation, arbitration and criminal procedure. The purpose of the seminars will be to introduce particular areas of common law legal systems to law students and junior faculty of the host university. Faculty appointments are not remunerated, and the appointee is responsible for travel expenses.

The host university will assist with lodging. A one-week orientation in Salzburg, Austria, is required prior to assumption of appointment.

Request an application by mail from the Center for International Legal Studies, PO Box 19, 5033 Salzburg, Austria; by fax to 43-662-835171 (Austria) or (509) 356-0077 (U.S.); or e-mail cils@cils.org. Application deadline is July 15.

Thirteenth Judicial District Attorney’s Office
Change of Address
The 13th Judicial District Attorney’s Office in Los Lunas (Valencia County) has moved to the Wells Fargo Bank Building, 101 South Main Street, Suite 201, Belen, New Mexico 87002. The mailing address is PO Box 1919, Los Lunas, NM 87031. The phone number is (505) 861-0311, and the fax number is (505) 861-7016.

N.M. Christian Legal Aid Information and Training Opportunities
New Mexico Christian Legal Aid announces a free information and training opportunity on May 4 for lawyers and law students who are either providing or are interested in providing help for the poor and homeless.

The training will be conducted from 11 a.m. to 5 p.m. at the State Bar Center. A free lunch will be provided at each session. Reservations are required. These nationally approved free training programs are offered only once or twice annually. Contact Jim Roach, (505) 243-4419, or roachlawfirm@yahoo.com, for further information or to R.S.V.P.
In the Supreme Court of the State of New Mexico

Proclamation

Law Day 2007

Law Day began 49 years ago with a proclamation from President Eisenhower. That first proclamation eloquently set forth the reasons why we, as a free people, celebrate our heritage of liberty under law.

President Eisenhower noted that it was “fitting that the people of this nation should remember with pride and vigilantly guard the great heritage of liberty, justice, and equality under law that our forefathers bequeathed to us.” Further, he said that it is “our moral and civic obligation as free [people] and as Americans to preserve and strengthen that great heritage.”

In celebrating Law Day this year, let us dedicate ourselves to the great values protected and preserved in our Constitution.

And, at the same time, let us recognize that democracy is not static, that we must always work to improve and perfect it. Let us seek to draw ever closer to the ideal cut in stone over the entrance to the United States Supreme Court: “Equal Justice Under Law.”

Let us resolve that Law Day be an opportunity for all of us, in government and the private sector, to examine our efforts to make equal justice a reality and to work together to reach that goal.

For more than 100 years, America’s charitable institutions and foundations, its lawyers and its courts, and countless others have worked to bring equal justice to as many people as possible.

Edward L. Chávez, Chief Justice
In the Supreme Court of the State of New Mexico

Proclamation
Juror Appreciation Week
April 30–May 4, 2007

WHEREAS, the right to a trial by jury is one of the core values of American citizenship;

WHEREAS, the obligation and privilege to serve as a juror are as fundamental to our democracy as the right to vote;

WHEREAS, our courts depend upon citizens to serve as jurors;

WHEREAS, service by citizens as jurors is indispensable to the judicial system;

WHEREAS, all citizens are encouraged to respond when summoned for jury service;

WHEREAS, a continuing and imperative goal for the courts, the State Bar, and the broader community is to ensure that jury selection and jury service are fair, effective, and not unduly burdensome on anyone; and

WHEREAS, one of the most significant actions a court system can take is to show appreciation for the jury system and for the tens of thousands of citizens who annually give their time and talents to serve on juries.

BE IT RESOLVED that the New Mexico State Courts are committed to the following goals:

• educating the public about jury duty and the importance of jury service;
• applauding the efforts of jurors who fulfill their civic duty;
• ensuring that the responsibility of jury service is shared fairly by supporting employees who are called upon to serve as jurors;
• ensuring that the responsibility of jury service is shared fairly among all citizens and that a fair cross section of the community is called for jury service including this state’s non-English speaking population;
• ensuring that all jurors are treated with respect and that their service is not unduly burdensome;
• providing jurors with tools that will assist their decision making; and
• continuing to improve the jury system by encouraging productive dialogue between jurors and court officials.

NOW, THEREFORE, I, Edward L. Chávez, Chief Justice of the New Mexico Supreme Court, do hereby recognize the week of April 30–May 4, 2007, as Juror Appreciation Week in New Mexico and encourage all state courts in New Mexico to support the celebration of this week.

DONE in Santa Fe, New Mexico, this 13th day of April, 2007.

Edward L. Chávez, Chief Justice
### Legal Education

#### May

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<td>New Mexico Collaborative Practice Symposium</td>
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**G = General**  **E = Ethics**  **P = Professionalism**  **VR = Video Replay**

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**WRITS OF CERTIORARI**

**As Updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk
New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective April 30, 2007**

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**Certiorari Granted and Submitted to the Court:**

(Submission = date of oral argument or briefs-only submission)

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**Petition for Writ of Certiorari Denied:**

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OPINIONS

AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS
Gina M. Maestas, Chief Clerk New Mexico Court of Appeals
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EFFECTIVE APRIL 20, 2007

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The Utton Center
Model Interstate Water Compact:

Why This Model is Useful Whether or Not Your River Has a Compact –
Advanced Management Principles for Interstate Rivers

9.7 General, 1.0 Ethics, and 1.0 Professionalism CLE Credits

Co-Sponsors:
The Utton Transboundary Resources Center, UNM School of Law,
State Bar of New Mexico Natural Resources, Energy & Environmental Section

Thursday, June 7 and Friday, June 8, 2007
State Bar Center
State Bar of New Mexico, Albuquerque
Thursday, June 7

8:30 a.m.  Introductory Remarks
Marilyn O'Leary, Director (outgoing),
The Utton Transboundary Resources Center, UNM School of Law
Sanford E. Gaines, Director (incoming),
The Utton Transboundary Resources Center, UNM School of Law

9:00 a.m.  The Model Compact
Development of Model; Advisory Committee Involvement
Marilyn C. O'Leary

Legal and Practical Foundations for Key Provisions
Jerome C. Muys, Attorney at Law, Washington, DC
George William Sherk, Colorado School of Mines, Golden, Colorado

10:00 a.m.  Break

10:15 a.m.  Legal and Practical Foundations for Key Provisions (continued)

12:00 p.m.  Questions and Discussion

12:30 p.m.  Lunch (provided at the State Bar Center)

1:30 p.m.  Principles of the Model Compact Applied
Case Study: The Spokane, An Uncompacted River

Facts and Overview
Rachael Paschal Osborn, Columbia Institute for Water Policy, Spokane, Washington

Discussion: Issues of Concern and Applicability of Model Compact by representatives of the two states, Washington and Idaho, and two tribes, Spokane Tribe of Indians and Coeur d'Alene Tribe, that comprise the basin.
David R. Tuthill, Jr., Interim Director, Idaho Department of Water Resources, Boise, Idaho
Shannon Work, Attorney at Law, Coeur d'Alene, Idaho
Brian Cleary, Attorney at Law, Cleary Law Group, Hayden, Idaho

3:30 p.m.  Break

3:45 p.m.  Principles of the Model Compact Applied to a River Already Subject to a Compact: Discussion of a recent experience on the Colorado River in the context of the 1922 Colorado River Compact, subsequent federal legislation, and the Supreme Court's decisions and decrees in Arizona v. California
Jerome C. Muys, Moderator
A Lower Basin State Perspective
James H. Davenport, Colorado River Commission of Nevada, Las Vegas, Nevada

An Upper Basin State Perspective
James S. Lochhead, Attorney at Law, Brownstein, Hyatt, Farber and Schreck, PC, Glenwood Springs, Colorado

The Federal Perspective

5:30 p.m. Adjourn

FRIDAY, JUNE 8

8:30 a.m. The Ethical Role of Politics in Compact Negotiations (1.0 E)
Do attorneys have an ethical obligation to avoid politicizing compact negotiations? Should demonstrated failure to negotiate in good faith on issues under approved compacts preclude litigation in the Supreme Court or justify imposing sanctions?

9:30 a.m. The Professionalism Role of Politics in Compact Negotiations (1.0 P)
Should there be a higher standard of professional behavior required of attorneys in compact negotiations and administration? The professionalism role of politics will be explored in the context of compact negotiations. George William Sherk, Moderator
Peter Sly, Mellon Fellow on Environmental Affairs, Colby College, Waterville, Maine
Steve Leitman, Senior Policy Analyst, Florida State University, Tallahassee, Florida
Ron Kaiser, Professor and Chair of Water Program, Texas A&M University, College Station, Texas

10:30 a.m. Break

10:45 a.m. Applying the Model Compact to Existing Compacts: How Flexible Is the Compact Clause?
Discussion of: (1) the extent to which states signatory to an interstate water compact may lawfully take actions not expressly authorized by the compact if such actions are in furtherance of the compact purposes and not in conflict with provisions of the compact, e.g., adjust compact water allocations or make new allocations of surplus water, engage in interstate water marketing or banking, exercise project approval and coordinate project operations, establish an advisory committee, establish and enforce water quality standards, and require compliance with mandatory mechanisms for conflict management and preclude litigation until such procedures are exhausted; (2) recent Supreme Court developments; and (3) who might have standing to challenge the validity of such actions.
Jerome C. Muys and George William Sherk
Panelists: Douglas Grant, Cord Foundation Professor of Law, University of Nevada, Las Vegas, Nevada
Kenneth Knox, Chief Deputy State Engineer, State of Colorado, Denver, Colorado
Maria O’Brien, Attorney at Law, Modrall Sperling, Albuquerque
Larry Morandi, Director of State Policy Research, National Conference of State Legislatures, Denver, Colorado

1:00 p.m. Adjourn

ABOUT THE UTTON CENTER
As the stresses on all natural resource uses increase, The Utton Transboundary Resources Center remains committed to promoting equitable and sustainable management and utilization of transboundary resources through impartial expertise, multi-disciplinary scholarship, and preventive diplomacy. By bringing together lawyers and scientists to support fact-based decision making for sustainable resource management, the center carries on in the tradition of Professor Albert E. Utton, a native New Mexican and Rhodes scholar, who established an international reputation by using multidisciplinary scholarship to address complex resource issues. The Utton Center, the natural resources center for the UNM School of Law in Albuquerque, New Mexico, works closely with the UNM Water Resources Program as well as with scholars and practitioners from across the U.S. and Mexico.
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IN THE MATTER OF THE ADOPTION OF NEW RULE 5-805 NMRA OF THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Rules of Criminal Procedure for the District Courts Committee to adopt new Rule 5-805 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that new Rule 5-805 NMRA of the Rules of Criminal Procedure for the District Courts hereby is ADOPTED;

IT IS FURTHER ORDERED that the adoption of new Rule 5-805 NMRA of the Rules of Criminal Procedure for District Courts shall be effective on and after June 1, 2007; and

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the adoption of new Rule 5-805 NMRA by publishing the same in the Bar Bulletin and NMRA.

DONE at Santa Fe, New Mexico, this 16th day of April, 2007.

Chief Justice Edward L. Chávez
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Richard C. Bosson

5-805. Probation; violations.

A. Violation of probation. At any time during probation if it appears that the probationer may have violated the conditions of probation:

   (1) the court may issue a warrant for the arrest of the probationer. If conditions of release are provided in the warrant, the probationer may be released on bond pending an adjudicatory hearing on the charges; or

   (2) the court or the probation office may issue a notice to appear before the court to answer a charge of violation of the conditions of probation.

B. Notice of arrest without warrant. If the probationer is arrested by the probation office without a warrant the probation office shall provide the district attorney with a written notice within one (1) day of the arrest. The notice shall contain a brief description of each alleged probation violation. A copy of the notice shall be given to the probationer and filed with the court.

C. Technical violation program. A judicial district may by local rule approved by the Supreme Court in the manner provided by Rule 5-102 NMRA, establish a program for sanctions for probationers who agree to automatic sanctions for a technical violation of the conditions of probation. Under the program a probationer may agree:

   (1) not to contest the alleged violation of probation;

   (2) to submit to sanctions in accordance with the local rule;

and

   (3) to waive the provisions of Paragraphs D through L of this rule.

For purposes of this rule, a “technical violation” means any violation that does not involve new criminal charges.

D. Conditions of release. If a probationer is arrested and not released on conditions of release, within five (5) days of the arrest of the probationer the sentencing judge or a judge designated by the sentencing judge shall review the notice of arrest or warrant and consider conditions of release pending adjudication of the probation violation. If no conditions for release are set, the probationer may file a motion to appear before the judge to consider conditions of release.

E. Filing of report. If there is a recommendation that probation be revoked, within five (5) days of the arrest of probationer the probation office shall submit a written violation or a summary report to the district attorney and the court describing the essential facts of each violation. A copy of the report shall be served on the probationer and the probationer’s attorney of record.

F. District attorney duty. Within five (5) days of receiving the probation violation or a summary report, the district attorney shall either file a motion to revoke probation setting forth each of the alleged violations or file a notice of intent not to prosecute the alleged violations.

G. Initial hearing. An initial hearing on a motion to revoke probation shall be commenced within thirty (30) days after the latest of the following events:

   (1) the date of the filing of a motion to revoke probation;

   (2) if the proceedings have been stayed to determine the competency of the probationer, the date an order is filed finding the probationer competent to participate in the revocation proceedings;

   (3) if an interlocutory or other appeal is filed, the date the mandate or order is filed in the district court disposing of the appeal; or

   (4) if the probationer is arrested or surrenders in another state, the date the probationer is returned to this state.

H. Adjudicatory hearing. The adjudicatory hearing shall commence no later than sixty (60) days after the initial hearing is conducted.

I. Discovery. The parties shall exchange witness lists and disclose proposed exhibits no less than ten (10) days after the initial hearing.

J. Waiver of time limits. The probationer may waive the time limits for commencement of the adjudicatory hearing.

K. Extensions of time. Extensions of time for commencement of a hearing on a motion to revoke probation may be granted in the manner provided by Rule 5-604 NMRA for extension of time for commencement of trial.

L. Dismissal. If an adjudicatory hearing on the alleged probation violation is not held within the time limits prescribed by this rule, the motion to revoke probation shall be dismissed with prejudice.

M. Applicability. Paragraphs E and F of this rule are not applicable to revocation of probation proceedings that are initiated by the district attorney without a prior recommendation of the probation office to revoke probation.
WHEREAS, this matter came on for consideration by the Court upon recommendation from the Board of Bar Examiners to approve amendments to Rule 15-105 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 15-105 of the Rules Governing Admission to the Bar hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 15-105 of the Rules Governing Admission to the Bar shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the Rule 15-105 of the Rules Governing Admission to the Bar by publishing the same in the Bar Bulletin and the NMRA.

DONE at Santa Fe, New Mexico, this 17th day of April, 2007.

Chief Justice Edward L. Chávez
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Richard C. Bosson

15-105. Application fees. 

A. Fees. Every applicant shall pay the fees as prescribed by the board from time to time. The following fees are fixed, until changed by the board:

(1) four hundred and fifty dollars ($450.00) for applicants whose graduation from law school is less than one (1) year prior to filing the application;

(2) a reduced fee of one hundred dollars ($100.00) for applicants who apply to repeat the examination; provided, however, that if the investigation report is dated more than fifteen (15) months prior to the date of application, an additional fee will be required to update the investigation report as provided in Rule 15-106 NMRA of these rules;

(3) reasonable additional costs to be determined by the Board of Bar Examiners, in connection with any investigations or hearings. Such costs shall include, but not be limited to, board attorney fees, court reporter fees, medical evaluations and any other fees for services to complete the investigation and hearing. Payment of such fees shall be a prerequisite for admission or for consideration of subsequent reapplications. In all cases, the applicant shall bear the applicant’s own costs associated with the application, investigation and hearing.

(4) eight hundred dollars ($800.00) for all other applicants;

(5) later filing fees shall be assessed as follows:

(a) fifty dollars ($50.00) if an application is filed within thirty (30) days of the filing deadline;

(b) one hundred dollars ($100.00) if an application is filed within sixty (60) days of the filing deadline;

(c) one hundred and fifty dollars ($150.00) if an application is filed within ninety (90) days of the filing deadline;

(d) two hundred dollars ($200.00) for applications filed ninety (90) days or more after the filing deadline; provided, however, that no new applications will be accepted after January 5th for the February exam or June 5th for the July exam.

B. Remittance of fees. All remittances for fees shall be made payable to: the New Mexico Board of Bar Examiners, and shall be deposited to an account designated as New Mexico Board of Bar Examiners general fund and shall be disbursed by order of the Board of Bar Examiners in carrying out the functions, duties and powers vested in said board. Application fees and costs are not refundable and will be applied toward the expenses of the board, including appropriate investigation by the National Conference of Bar Examiners.

C. Budget. The Board of Bar Examiners shall submit on or before January 1 of each year a proposed budget to the Supreme Court.

D. Audit. It shall likewise, on or before March 1 of each year, submit to the Supreme Court an accounting and audit of all funds received and disbursed during the prior calendar year. Such audit shall be performed by an auditor to be selected by the Supreme Court.

E. Compensation. Members of the Board of Bar Examiners shall receive mileage and per diem at the same rate as provided for public officials and employees of the state and any other compensation for service to the board as approved by the Court.
Following a jury trial, Defendant, Jesse Otto, was convicted of criminal sexual penetration of a minor (CSPM), contrary to NMSA 1978, § 30-9-11(C)(1) (1993, prior to 2003 amendment). He appealed. The Court of Appeals reversed and remanded for a new trial, holding that the trial court improperly permitted evidence of uncharged acts and of statements made by the victim to the victim’s mother. The Court also found that the admission of the evidence was more prejudicial than probative. The State appeals to this Court arguing that the Court of Appeals erred when it: (1) held that evidence of uncharged acts by Defendant was not admissible under Rule 11-404(B) NMRA and Rule 11-403 NMRA; (2) held that the trial court abused its discretion in admitting the victim’s statements to her mother; and (3) instructed the trial court to follow State v. Frawley, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580, regarding sentencing. We reverse and remand to the Court of Appeals to address Defendant’s argument regarding the enhancement of his sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 30, 2001, Defendant was indicted on one count of criminal sexual penetration on a child under 13 years of age, contrary to § 30-9-11(C)(1). The victim, Defendant’s step-daughter, testified by video deposition. The victim’s deposition was recorded on two video tapes. The first video related to the charged act, which occurred in Alamogordo, New Mexico, between September 1 and October 31, 2000, when the victim was six years old. The second video related to subsequent uncharged acts, which occurred in Colorado.

The day before trial, the court held a hearing to determine the admissibility of certain evidence. Defendant’s attorney argued that statements made by the victim to her mother and evidence of the uncharged acts in Colorado should not be admitted. He explained that the defense theory was that Defendant touched but did not penetrate the victim, and stated, “I will be submitting a lesser included offense jury instruction for criminal sexual contact of a minor, and that being so, well, we’re not really arguing mistake, what we are arguing [is] what exactly happened. I don’t really think it’s necessary for the Colorado stuff to come in and it’s highly prejudicial.” The State argued that when Defendant was interviewed after his arrest, his statements to the detective raised doubt as to whether Defendant knowingly engaged in the conduct, and that the second video containing victim’s testimony regarding the acts in Colorado should be admitted under Rule 11-404(B) NMRA to show intent and lack of mistake or accident.

After reviewing the arrest warrant affidavit, the police report containing Defendant’s statements to the police, and the tape-recorded interview of the victim’s mother, the court ruled that the statements by the victim to her mother would be allowed to show what the victim’s mother did in response to the statements and “so that the jury can have the complete picture as to how this all unfolded . . . .” The court stated that a limiting instruction would be given, upon request. The court then ruled that the evidence of the uncharged acts in Colorado would also be admitted, stating that the “testimony as to what went on in Colorado is part of this whole picture, that cannot be presented properly without all the pieces of the puzzle and all pieces of the picture . . . .” The court also found that the probative value of the evidence was not outweighed by unfair prejudice.

At trial, the jury viewed both video tapes containing the victim’s testimony. The other witnesses were the victim’s mother, the police officer who conducted the initial investigation, and the detective who interviewed Defendant after his arrest. The victim’s mother testified that one evening after they moved to Colorado she saw Defendant in bed with the victim and later questioned the victim. The victim’s mother testified that her daughter told her that “he comes in there just about every night mom,” and “he sticks his finger inside me and wiggles it around and it hurts mom and I don’t like it.” The court instructed the jury not to consider the victim’s statements to her mother for the truth of the statements, but for the limited purpose of explaining
what the mother did in response to the statements. The victim’s mother then testified that she confronted Defendant about what the victim had told her. Defendant started crying and said he was sorry.

[6] The detective who interviewed Defendant after his arrest testified that when he confronted Defendant about the allegation that Defendant had penetrated the victim’s vagina with one finger and then four fingers, Defendant stated he didn’t remember, but that he came “pretty damn close.” The prosecutor then asked the detective if Defendant explained how he got into that situation, and the detective replied, “[Defendant] stated that he was ready to finger her but he woke up but he didn’t think that he did.” The detective also testified that he questioned Defendant about telling the victim not to tell her mother about the incident. Defendant admitted taking the victim into another room and talking about it. The detective testified that “[Defendant] stated that he did take her into the toy room and stated that he figured it wasn’t serious enough to make a big deal about it . . . .” Additionally, the detective testified that when he asked Defendant why the victim would lie, referring to the allegations of penetration in the affidavit, Defendant stated that he did not believe that the victim would lie, and that he knew that she had told the truth. The defense called no witnesses. Defendant was convicted of criminal sexual penetration. He appealed.

[7] The Court of Appeals held that the “use of the uncharged Colorado acts as evidence of the charged Alamogordo acts in this context [was] contrary to Rule 11-404(B) NMRA.” State v. Otto, 2005-NMCA-047, ¶ 2, 137 N.M. 371, 111 P.3d 299. The Court held that the statements that the victim made to her mother regarding the uncharged acts were similarly inadmissible. Id. According to the Court, the State misinterpreted Defendant’s statement to the detective, and that what Defendant meant by this statement was that he did not commit the act of penetration, not that he was mistaken as to what acts he had committed. Id. ¶ 11. The Court stated that the State incorrectly sought the admission of the evidence of the uncharged acts in Colorado to show intent and absence of mistake or accident based upon this misinterpretation, and that whether Defendant did what he did accidentally or by mistake was “[n]ot in issue.” Id. ¶¶ 11, 16. Comparing Defendant’s case to State v. Ruiz, 2001-NMCA-097, 131 N.M. 241, 34 P.3d 630, the Court determined that the use of evidence of the uncharged acts amounted to “no more” than evidence of Defendant “acting in conformity with his propensity.” Otto, 2005-NMCA-047, ¶ 16. The Court also determined that the admission of the evidence was more prejudicial than probative. Id. Upon remand for a new trial, the Court instructed the trial court to follow Frawley, 2005-NMCA-017, in terms of sentencing if Defendant was convicted again. Otto, 2005-NMCA-047, ¶ 3.

[8] Judge Pickard dissented, finding that the evidence of the uncharged acts was admissible to show “intent, lack of accident, mistake, and knowledge of what Defendant was doing.” Id. ¶¶ 31-32. She stated that the majority violated the “cardinal rule of appellate procedure” that an appellate court “will affirm a trial court’s decision reaching a correct result, even though the reason offered to support the result is wrong,” and that the majority violated the “basic rule of criminal law” that courts “do not limit the State’s presentation of evidence to the narrow question of what a defendant has expressly put in issue.” Id. ¶ 29-30. The State appealed to this Court, and we granted certiorari.

II. DISCUSSION

A. The trial court did not abuse its discretion in admitting evidence of the uncharged acts under Rule 11-404(B)

[9] We review the trial court’s decision to admit evidence under Rule 11-404(B) for abuse of discretion. State v. Williams, 117 N.M. 551, 557, 874 P.2d 12, 18 (1994). “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 it as clearly untenable or not justified by reason.” State v. Woodward, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995) (citing State v. Apodaca, 118 N.M. 762, 770, 887 P.2d 756, 764 (1994)).

[10] “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” Rule 11-404(B). This list is not exhaustive and “evidence of other wrongs may be admissible on alternative relevant bases so long as it is not admitted to prove conformity with character.” State v. Martinez, 1999-NMSC-018, ¶ 27, 127 N.M. 207, 979 P.2d 718; see also State v. Jones, 120 N.M. 185, 188, 899 P.2d 1139, 1142 (Ct. App. 1995) (“New Mexico allows use of other bad acts for many reasons, including those not specifically listed in [Rule] 11-404(B).”). Before admitting evidence of “other crimes, wrongs or acts,” the trial court must find that the evidence is relevant to a material issue other than the defendant’s character or propensity to commit a crime, and must determine that the probative value of the evidence outweighs the risk of unfair prejudice, pursuant to Rule 11-403. See State v. Gaitan, 2002-NMSC-007, ¶ 26, 131 N.M. 758, 42 P.3d 1207.

[11] A potential inference of mistake or accident was created by Defendant’s statement to the detective that he “was ready to finger her but he woke up but he didn’t think he had.” Defendant also told the detective that the victim would not lie and that she had told the truth about what happened. We agree with the view expressed in the dissent to the Court of Appeals’ opinion that “[i]t appeared that Defendant was telling the police that what he did might have been done in his sleep without his conscious intent and whatever he did, he stopped it as soon as he awoke and realized what he was doing.” Otto, 2005-NMCA-047, ¶ 28 (Pickard, J., dissenting). Because this statement could have been interpreted by the jury as admitting to penetration, but doing so unconsciously, the prosecution had the right to introduce evidence to show that Defendant’s actions were intentional and not committed accidentally or by mistake. Defendant argues that because his defense theory at trial was that he committed sexual contact without penetration, not that he “mistakenly or without knowledge committed sexual acts,” the State’s purposes for presenting evidence of the uncharged Colorado acts to show intent and absence of mistake or accident were eliminated. He argues that he “put no evidence that he was half-asleep and did not know what he was doing.” The Court of Appeals agreed and stated that “despite the prosecution’s assertions, Defendant did not allege a mistake as to the character of his actions. At no point in the trial did Defendant deny having had contact with the child’s genitals.” Otto, 2005-NMCA-047, ¶ 16. However, it does not matter that Defendant’s statement was introduced into evidence by the State rather than Defendant. There is nothing in Rule 11-404(B) that requires evidence admitted under this rule be offered only to rebut evidence presented by the defense.

[12] The fact that the trial judge stated in
his ruling on Defendant’s motion to exclude the evidence that he was admitting it as “part of [the] whole picture,” in other words, to provide context, does not alter our view. Although context may be a proper purpose under Rule 11-404(B), see Jones, 120 N.M. at 188, 899 P.2d at 1142 (stating that the Court of Appeals has “approved the admission of other-bad acts evidence to show the context of other admissible evidence”), we do not address the issue of whether context was a proper purpose in this case, because we find that the evidence was properly admitted to show intent and absence of mistake or accident. See State v. Torres, 1999-NMSC-010, ¶ 22, 127 N.M. 20, 976 P.2d 20 (appellate court may affirm trial court’s admission of evidence on grounds not relied upon by trial court unless those grounds are based upon facts that defendant did not have a fair opportunity to address in the proceedings below).

The evidence was properly admitted to refute the inference of mistake or accident created by Defendant’s statement to the detective. Therefore, we find that the trial court did not abuse its discretion in admitting evidence of the uncharged acts in Colorado. Because we find that the evidence was properly admitted under Rule 11-404(B), we do not address the other arguments made by the State in support of reversal on this issue.

B. The trial court did not abuse its discretion in admitting evidence of the uncharged acts under Rule 11-403

The State also argues that the Court of Appeals erred in its determination that the evidence of the uncharged acts was not admissible under Rule 11-403. This rule states that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” Rule 11-403. “Because a determination of unfair prejudice is fact sensitive, ‘much leeway is given trial judges who must fairly weigh probative value against probable dangers.”’ Id. We review for abuse of discretion. See State v. Martinez, 1999-NMSC-018, ¶ 31, 127 N.M. 207, 979 P.2d 718 (“The trial court is vested with great discretion in applying Rule [11-403], and it will not be reversed absent abuse of that discretion.”) (internal quotation marks and citation omitted).

The trial court found that the probative value of this evidence was not outweighed by any unfair prejudice to Defendant. We agree. The evidence was highly probative to show lack of mistake or accident. Without the evidence of the uncharged acts, the jury was much more likely to believe that what happened in Alamogordo was a mistake or accident that only occurred because Defendant was asleep. There was no other evidence available to rebut this potential inference. See State v. Niewiadowski, 120 N.M. 361, 365, 901 P.2d 779, 783 (Ct. App. 1995) (availability of other means of proof is factor to consider in determining probative value).”

The purpose of [Rule] 11-403 is not to guard against any prejudice whatsoever, but only against the danger of unfair prejudice.” State v. Woodward, 121 N.M. 1, 6, 908 P.2d 231, 236 (1995) (citing 1 Kenneth S. Broun et al., McCormick on Evidence § 185, at 780 (John W. Strong ed., 4th ed. 1992))). Evidence is not unfairly prejudicial “simply because it inculpates the defendant.” Id. Rather, prejudice is considered unfair when it “goes only to character or propensity.” State v. Ruiz, 119 N.M. 515, 892 P.2d 962 (Ct. App. 1995) (emphasis added). In the present case, the evidence was properly admitted to show absence of mistake or accident—a “legitimate non-character use of the evidence.” State v. Jordan, 116 N.M. 76, 80, 860 P.2d 206, 210 (Ct. App. 1993). Given the probative value of the evidence for this purpose, we cannot say that the admission of the evidence was against the logic and effect of the facts and circumstances of the case, untenable, or not justified by reason. See Woodward, 121 N.M. at 4, 908 P.2d at 234. Therefore, the trial court did not abuse its discretion in admitting evidence of the uncharged acts under Rule 11-403.

C. The trial court did not abuse its discretion in admitting the victim’s statements to her mother

The State urges this Court to reverse the Court of Appeals in its determination that the trial court abused its discretion by admitting the victim’s statements to her mother. Defendant argued at the hearing for the motion in limine that the victim’s statements to her mother in Colorado describing what Defendant had done to her were hearsay and should not be admitted. The trial court denied the motion, ruling that the statements were admissible to show why the victim’s mother confronted Defendant in Colorado. At trial, the court instructed the jury to consider the statements “for the limited purpose only of explaining or supporting what the mother did in response or reaction to [the statements] and not for the purpose of establishing knowledge, belief, good faith, reasonableness, motive, effect on the hearer or reader, and many others.” (emphasis added) (internal quotation marks and citation omitted). The statements were offered for the legitimate purpose of explaining why the victim’s mother confronted Defendant in Colorado. The trial court’s admission of these statements was not “against the logic and effect of the facts and circumstances of the case,” or “clearly untenable or not justified by reason.” See Woodward, 121 N.M. at 4, 908 P.2d at 234 (discussing standard or review for trial court’s admission or exclusion of evidence). Therefore, we hold that the trial court did not abuse its discretion in admitting these statements.

Quoting State v. Alberts, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969), that “evidence must be consistent with a legitimate purpose and have some probative effect upon an issue in the case,” the dissent argues that the reason the victim’s mother confronted Defendant in Colorado has no probative effect upon the material issue in the case—whether Defendant committed CSPM in Alamogordo. In Alberts, a narcotics officer testified that during a briefing with local law enforcement officers, the officers named the defendant as a person engaged in illegal marijuana traffic. Id., 80 N.M. at 473, 457 P.2d at 992. The defendant objected on the grounds that the testimony was hearsay and prejudicial. Id. The trial court found that the statement was not offered for the truth of the matter asserted, but to establish the cause of the investigation and to show probable cause. Id. The Court of Appeals reversed, finding that the evidence “was clearly hearsay and clearly prejudicial.” Id., 80 N.M. at 474, 457 P.2d at 993. The Court stated that the testimony “was not consistent with any
legitimate purpose,” and “[t]he naming of [the] defendants as persons engaged in ‘illegal marijuana traffic,’ for the purpose of showing why [the officer] conducted an investigation, is not a legitimate reason for admitting this extremely prejudicial testimony.” Id.

{20} In the present case, the dissent makes the argument that, similar to Alberts, there was no legitimate reason for admitting the victim’s statements to her mother. However, Alberts is not dispositive for several reasons. First of all, this Court distinguished Alberts in State v. Stampley, 1999-NMSC-027, ¶¶ 38-39, 127 N.M. 426, 982 P.2d 477, by finding that although non-hearsay statements for the purpose of establishing the reason for a police investigation can be highly prejudicial, statements offered for other purposes, such as to explain police conduct, can be admissible “if relevant to a fact of consequence and not offered to prove the truth of the matter asserted.” In the present case, the trial court admitted the statements to show why the victim’s mother confronted Defendant, a legitimate non-hearsay purpose. Second, the dissent relies on Alberts to assert that the trial court’s purpose for admitting the evidence in the present case was “only legitimate if the purpose has any bearing on whether Defendant committed CSPM in Alamogordo.” However, the Alberts Court found that the reason for the investigation had no relevance to any issue in the case, Alberts, 80 N.M. at 475, 457 P.2d at 994, not that it had no relevance to the material issue in the case. In the present case, the reason that the victim’s mother confronted Defendant in Colorado was relevant as to why Defendant cried and apologized for an hour and a half when faced with the allegations that he had penetrated the victim almost every night. Although the confrontation itself may not have been probative as to whether Defendant committed the Alamogordo acts, the confrontation was probative as to whether Defendant penetrated the victim in Colorado because Defendant did not deny the allegations in the victim’s statements, but instead he responded by crying and apologizing. Finally, the Court in Alberts determined that the testimony was hearsay, and in this case we find that the testimony was not hearsay.

D. The Court of Appeals erroneously instructed the trial court regarding the enhancement of Defendant’s sentence

{21} The trial court enhanced defendant’s sentence by one-third. Defendant appealed, claiming that the trial court’s decision was not supported by sufficient evidence. The Court of Appeals did not rule on the sentencing issue, but instructed the trial court that “sentences may not be increased on the basis of aggravating circumstances unless those circumstances are found by the jury beyond a reasonable doubt,” based on State v. Frawley, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580. This Court overruled Frawley in State v. Lopez, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754. Thus, Lopez is controlling on the issue of sentence enhancement. Because we affirm Defendant’s convictions, the Court of Appeals must address the issue of whether there was sufficient evidence to support the trial court’s enhancement of Defendant’s sentence.

III. CONCLUSION

{22} We hold that the trial court did not abuse its discretion in admitting evidence of uncharged acts by Defendant and the victim’s statements to her mother. We also hold that the trial court did not abuse its discretion by ruling that the evidence of the uncharged acts was not more prejudicial than probative. Accordingly, we reverse and remand to the Court of Appeals to address Defendant’s argument regarding the enhancement of his sentence.

{23} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR:

PAMELA B. MINZNER, Justice

PATRICIO M. SERNA, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Chief Justice

(concurring in part and dissenting in part)

CHÁVEZ, Chief Justice (concurring in part and dissenting in part)

{24} I concur in Part II.A-B of the majority opinion because, through his equivocal statement to the police, Defendant, himself, injected the issue of mistake into the proceedings. However, I respectfully dissent from Part II.C of the majority opinion. After finding Defendant in bed with Victim in Colorado, Mother asked Victim if anything had happened. Victim told mother that Defendant had digitally penetrated her many times. Mother then confronted Defendant, and Defendant shamefully and sorrowfully admitted to these Colorado acts. This ultimately led to Mother contacting the police. The trial court concluded that Mother could testify as to what Victim told her “for the limited purpose only of explaining or supporting what the mother did in response or reaction to that and not for the truth of the child’s statements to the mother.” Although the trial court called this “an exception to the hearsay rule,” the trial court essentially ruled the statement to be non-hearsay. See Rule 11-801(C) NMRA (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”).

{25} The majority concludes that the trial court did not abuse its discretion in admitting this testimony because it was “offered for the legitimate purpose of explaining why the victim’s mother confronted Defendant in Colorado” and because a limiting instruction was given to the jury. Maj. Op. ¶¶ 17–18. The majority bases its conclusion on the recent statement in State v. Rosales, 2004-NMSC-022, ¶ 16, 136 N.M. 25, 94 P.3d 768, that “[e]xtrajudicial statements . . . may properly be received into evidence, not for the truth of the assertions therein contained, . . . but for such legitimate purposes as that of . . . effect on the hearer . . . .” This statement in Rosales, however, was a direct quote from State v. Alberts, 80 N.M. 472, 474–75, 457 P.2d 991, 993-94 (Ct. App. 1969), and Alberts shows why Mother’s statements should not have been admitted.

{26} In Alberts, a State Police Officer testified that local law enforcement officers told him that the defendants were involved in trafficking marijuana; the defendants objected on hearsay grounds. The trial court overruled the objection, stating that the statement was not offered for the truth of the matter, but “to establish the reason for investigation and to show probable cause.” Id. at 473. After reciting the above-stated rule the majority uses to support the admission of Mother’s testimony, the court in Alberts continued:

However, the evidence must be consistent with a legitimate purpose and have some proper probative effect upon an issue in the case. The objectionable testimony here was not consistent with any legitimate purpose. The naming of defendants as persons engaged in “illegal marijuana traffic,” for the purpose of showing why Officer Sedillo conducted an investigation, is not a legitimate reason for admitting this extremely prejudicial testimony. It could have had no probative effect upon any
issue in the case, other than the improper effect of persuading the jury as to the guilt of defendant. 

Id. at 475.

{27} Here, the same result is demanded. Why Mother confronted Defendant in Colorado about the Colorado acts has absolutely no probative value relating to the material issue in this case—i.e., whether Defendant committed CSPM in Alamogordo. The majority deems the use of the Victim’s statement to Mother to be for a “legitimate purpose.” Although using Victim’s statement to Mother about the Colorado acts to show why Mother confronted Defendant may have, as the trial court put it, been for a limited purpose, this purpose is only legitimate if the purpose has any bearing on whether Defendant committed CSPM in Alamogordo. Because I fail to see how the answer to the question of why Mother confronted Defendant about the Colorado acts has any relevancy as to whether Defendant committed the Alamogordo act, I would hold the admission of Victim’s statement to Mother to be error.

{28} Numerous cases in other jurisdictions have held such non-hearsay statements inadmissible on grounds of irrelevancy or because they were unfairly prejudicial in light of their limited probative value. See, e.g., United States v. Williams, 133 F.3d 1048, 1050-51 (7th Cir. 1998); United States v. Brown, 767 F.2d 1078, 1083-84 (4th Cir. 1985); Commonwealth v. Yates, 613 A.2d 542, 543-44 (Pa. 1992). Various treatises also recognize the fallacy of admitting a statement as non-hearsay under the guise of providing “background” or “context” to the proceedings. See, e.g., David F. Binder, Hearsay Handbook, § 2:10, at 2-40 (4th ed. 2001) (“In criminal cases the prosecution is fond of offering evidence of inculpatory out-of-court assertions as ‘background’ to explain why law enforcement agents decided to investigate a defendant. Such evidence is seldom relevant.”).

{29} Moreover, not only was it irrelevant why Mother confronted Defendant about Defendant’s acts in Colorado, the admission of Victim’s statement to Mother as non-hearsay was unfairly prejudicial to Defendant. Having found the Colorado acts admissible as Rule 11-404(B) evidence, the jury watched Victim testify on videotape that such acts occurred. Given the fact that Victim’s Rule 11-404(B) testimony about what happened in Colorado was only admitted because it was probative on the issue of mistake, any further evidence admitted on this issue greatly risked tipping the Rule 11-403 balance in favor of excluding the evidence. I believe that allowing Mother to testify that Victim told her about the Colorado acts tipped the scales because its true effect was to buttress Victim’s credibility by using a prior consistent statement. It is a cardinal rule that a witness’s credibility cannot be buttressed by admitting a prior consistent statement unless, among other things, the credibility of the witness has first been attacked. See Rule 11-801(D)(1)(b) NMRA; State v. Salazar, 1997-NMCA-044, ¶ 66, 123 N.M. 778, 945 P.2d 996; State v. Alaniz, 55 N.M. 312, 317, 232 P.2d 982, 984 (1951). I believe this rule holds particular force when dealing not with the substance of the charged crime, but with testimony regarding extrinsic acts admitted under Rule 11-404(B). Regardless of any limiting instruction, evidence offered in support of the veracity of the Rule 11-404(B) evidence should never have come in front of the jury in the first place. See Rule 11-105 NMRA (providing for a limiting instruction when evidence is admissible “for one purpose but not admissible . . . for another purpose”).

{30} For the foregoing reasons, I respectfully concur in part and dissent in part.

EDWARD L. CHÁVEZ,
Chief Justice
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-013

Topic Index:
Constitutional Law: Right to Confrontation; and Waiver of Rights
Criminal Procedure: Right to Confrontation
Evidence: Availability of Witness; and Hearsay Evidence

STATE OF NEW MEXICO,
Plaintiff-Petitioner,

versus

ANTHONY ROMERO,
Defendant-Respondent.
No. 29,690 (filed: March 15, 2007)

ORIGINAL PROCEEDING ON CERTIORARI
STEPHEN PFEFFER, District Judge

GARY K. KING
Attorney General
JOEL JACOBSEN
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for Petitioner

JOHN BIGELOW
Chief Public Defender
WILLIAM A. O’CONNELL
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for Respondent

OPINION

PAMELA B. MINZNER, JUSTICE

{1} The State appeals from an opinion by the Court of Appeals remanding a judgment and sentence following Defendant’s convictions of aggravated battery against a household member, contrary to NMSA 1978, § 30-3-16(C) (1995); aggravated assault against a household member with a deadly weapon, contrary to NMSA 1978, § 30-3-13 (A)(1) (1995); false imprisonment, contrary to NMSA 1978, § 30-4-3 (1963); and bribery or intimidation of a witness, contrary to NMSA 1978, § 30-24-3(A)(3) (1997). See State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, cert. granted, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120. After the trial, the United States Supreme Court issued its opinion in Crawford v. Washington, 541 U.S. 36 (2004). While this case was pending on appeal to this Court and during briefing, the United States Supreme Court issued its opinion in Davis v. Washington, 547 U.S. __, 126 S.Ct. 2266 (2006). We address three general issues: (1) whether two of the victim’s out-of-court statements were inadmissible, because they were testimonial under Davis and Crawford; (2) whether, even if inadmissible, their admission was harmless error; and (3) whether Defendant forfeited his right to object to the admission of those statements. See State v. Alvarez-Lopez, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699 (holding the doctrine of forfeiture by wrongdoing inapplicable when a witness had been deported during the period of time the defendant had been a fugitive). We affirm.

I. Background

{2} The facts underlying this appeal are stated clearly and thoroughly in the Court of Appeals’ Opinion. Romero, 2006-NMCA-045, ¶¶ 2-11. We do not restate them. We ought to emphasize, however, that Defendant was charged not only with domestic violence, which is the subject of this appeal, but also with the death of the victim, his wife. See State v. Romero, 2005-NMCA-060, 137 N.M. 456, 112 P.3d 1113, cert. granted, 2005-NMCERT-005, 137 N.M. 523, 113 P.3d 346, cert. quashed, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039 (Romero I). The domestic violence charges arose out of an incident that occurred in mid-October 2001; Defendant was charged with murder after the victim was found dead in his bed in late December 2001. Defendant was convicted of second-degree murder, but the Court of Appeals reversed his conviction, on the basis that he was entitled to but had not received instructions on nondeadly force self-defense and on involuntary manslaughter. Romero I, ¶¶ 22-23.

{3} In this appeal the Court of Appeals may have reasoned that if the doctrine of forfeiture by wrongdoing applied, the issues of whether testimonial evidence had been admitted erroneously under Davis and Crawford and, if so, whether the error was harmless would be moot. See Romero, 2006-NMCA-045, ¶ 45. For whatever reason, the Court of Appeals first addressed the doctrine of forfeiture by wrongdoing. In addressing the doctrine of forfeiture by wrongdoing, the Court appropriately indicated its concern that Alvarez-Lopez may have stated the doctrine too narrowly. Id. ¶ 37.

{4} We address the issues in the order Defendant briefed them. Defendant had the benefit of Davis by the time his answer brief was due, and Davis illuminates Crawford. Further, the preliminary questions ordinarily would seem to be whether Defendant has established an error at trial and, if so, whether that error is harmless. Therefore, we begin with a discussion of the evidentiary errors on which Defendant relied in arguing to this Court and the effect of Davis on the analysis of testimonial hearsay for purposes of the Confrontation Clause.

II. Discussion

{5} Davis consolidated two appeals, each arising from a state conviction. Each appeal presented the issue of when a victim’s out-of-court statements are subject to the Confrontation Clause of the Sixth Amendment. Each appeal stemmed from police investigation of a domestic dispute, and in each appeal, the declarant was unavailable at trial. Id. at __, 126 S.Ct. at 2270-73. The first case, Davis, involved the admissibility of questions posed to the victim by a 911 operator during an emergency call about a domestic dispute, while the second case, Hammon v. Indiana, involved the admissibility of the victim’s written statements in an affidavit given to a police officer after an alleged domestic dispute. Id. The Court held that the Davis 911 call was admissible but that admitting the Hammon affidavit would be a violation of the defendant’s Sixth Amendment rights. Id. at __, 126 S.Ct. at 2277-80.

{6} Davis further clarified the rule promulgated by Crawford, which held the Confrontation Clause bars the use of out-of-court statements made by witnesses that are testimonial, unless the witness is
unavailable, and the defendant had a prior opportunity to cross-examine, regardless of whether such statements are deemed reliable. *Davis*, 547 U.S. at __, 126 S.Ct. at 2273-74 (discussing the holding in *Crawford* concerning the phrase “testimonial statements”). In deciding *Crawford*, the Court deliberately chose not to adopt a comprehensive definition of “testimonial,” but stated:

The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 2 N. Webster, An American Dictionary of the English Language (1828). ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Ibid.* (alteration in original). An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

*Crawford*, 541 U.S. at 51.

As part of an ongoing discussion of the Confrontation Clause and its application to the admission of out-of-court witness statements, *Davis* explored and defined the meaning of testimonial hearsay, holding: Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at __, 126 S.Ct. 2273-74 (footnote omitted) (emphasis added). *Davis* confined its discussion of interrogation to situations involving law enforcement officers and their agents, concluding that actions of 911 operators, while not law enforcement officers themselves, qualified as actions of the police. *Id.* at __, 126 S.Ct. at 2274. The Court did not address further the scope of police interrogation, stating that “our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” *Id.* n.2.

The Court distinguished *Crawford*, which considered an interrogation by police officers of a witness hours after the event she described, from *Davis*, which considered an interrogation by a 911 operator during an ongoing emergency, based on the immediacy of the event. “[T]he nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past.” *Davis*, 547 U.S. at __, 126 S.Ct. at 2276. “[T]he difference in the level of formality between the two interviews is striking.” *Id.* at __, 126 S.Ct. at 2276-77.

On appeal to this Court, Defendant argues that when the Sexual Assault Nurse Examiner (SANE nurse) examined the victim, she was acting as a proxy for law enforcement officers and conducting a police interrogation. Defendant notes the victim’s visit was a result of her grand jury testimony and the help of a law enforcement officer working on the criminal case against Defendant. He argues the trial court erred in permitting the nurse to recite the victim’s statement as if the nurse had been the victim.

At trial, Officer Lewandowski testified about the victim’s appearance and demeanor and his initial interaction with her at the scene on October 13, 2001. *Romero*, 2006-NMCA-045, ¶ 5. The State played for the jury a taped interview of the victim, conducted the same afternoon as the incident. *Id.* ¶ 6. While the admissibility of the victim’s statements to the officer at the scene are not an issue on appeal to this Court, Defendant argues the taped interview was admitted as testimony in violation of his Sixth Amendment right to confrontation. He does not contend the officer’s testimony about the victim’s appearance and demeanor and his interaction with her on October 13 should have been excluded.

We address each evidentiary issue separately. Then we address the question of whether any error in admitting evidence was harmless. Finally, we address the question of whether the doctrine of forfeiture by wrongdoing is applicable.

**A. The SANE Nurse’s Testimony**

Defendant argues the statement given by the victim during the SANE interview was testimonial in three respects. First, the statement was the product of an investigation by authorities. Second, the victim subjectively knew her statement was testimonial in nature. See *Davis*, 547 U.S. at __, 126 S.Ct. at 2274 n.1 (“[E]ven when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”). He also reasons a reasonable person would have objectively understood it to be testimonial. “What is testimonial is in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Crawford*, 541 U.S. at 51 (internal citation omitted). Finally, as Defendant reasons in his answer brief, the statement was testimonial on its face because it was “clearly intended as a criminal accusation directed at Anthony Romero” and is a testimonial narrative supporting that accusation.

The State argues, on the other hand, that the victim’s statement to the SANE nurse was for the purposes of medical treatment and not sufficiently formal to qualify as “testimonial” or, in the alternative, that the “testimonial” portions should be redacted to accommodate *Davis*.

[T]rial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. *Id.* at __, 126 S.Ct. at 2277.

We need not decide whether an examination by a SANE nurse is analogous to a 911 call, within the meaning of the Confrontation Clause, because a SANE nurse examination is not typically “designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance.” *Id.* at __, 126 S.Ct. at 2276 (internal quotation marks omitted). On the facts in this record, Defendant’s arguments that the evidence was “testimonial” within the meaning of *Davis* have merit.

The victim’s narrative, read verbatim by the SANE nurse, includes two portions, that while relevant to medical treatment, accuse Defendant of specific criminal acts. For example, the narrative includes...
the following:

“That’s when he sexually assaulted me on the floor. He took off my pants and underwear and penetrated me.” I asked Jessica, and this is me asking Jessica, “I asked Jessica what she meant by penetrated me. Jessica replied, and this is her words, ‘penis in my vagina.’” End quote. Then Jessica continued, and this is in quotes, “I kept telling him no and to stop. I don’t remember after that.” End quote. I asked Jessica if Anthony was wearing a condom and she replied no.

Other portions of the statement also could be viewed as relevant to seeking medical treatment, but also accuse Defendant of specific criminal acts:

“Then he started to choke me. He put his hands around my neck and was on top of me. I was on the bed. I don’t remember what happened after that. I might have passed out . . . . He kissed me and told me to tell the police the marks on my neck were from rough sex.”

{16} In Davis, the jury did not hear the entire 911 call. The Court suggested that the questions posed to the victim by the 911 operator might have evolved into an interrogation and those answers should have been redacted or excluded, but that any error was harmless. Id. at __, 126 S.Ct. at 2277-78. The victim in Davis, however, was responding to individual, specific questions posed by the 911 operator. Id. Here, the victim was asked to tell the SANE nurse what happened, so the SANE nurse would know how to proceed. Her narrative identifies Defendant and accuses him of specific criminal acts. A different sort of redaction is necessary.

{17} Davis emphasized that the victim’s answers arose out of an ongoing emergency, while the Hammon statements arose out of an after-the-fact inquiry. Id. at __, 126 S.Ct. at 2276-79. In this appeal, the examination occurred several weeks after the assault and with the assistance and encouragement of Officer Lewandowski, who made the appointment. Under these circumstances, the portions of the victim’s narrative specifically accusing Defendant of sexual assault and other charges should have been excluded. The facts in this record are more analogous to the facts of Hammon than Davis.

{18} We agree with the State that redaction of portions of the narrative might have been appropriate, but the State has not identified portions of the narrative that might have been likely candidates for redaction. Under these circumstances, we affirm the Court of Appeals’ determination that the portion of the SANE nurse testimony that recited the victim’s narrative should have been excluded. No basis for redaction of that narrative has been identified.

B. Officer Lewandowski’s Testimony

{19} The officer testified at trial that when he encountered the victim at the scene on October 13, “she was upset, she was crying, she was shaking, she was continually crying.” This exact language does not appear in the officer’s police report. Instead, the report states, “I observed Ms. Romero with no shoes on her feet and crying for help. I observed redness and numerous cut marks on her neck. I observed Ms. Romero’s voice changing and she was struggling to talk and continually clearing her throat.” When Defendant attempted to impeach the officer on this issue, the officer testified the taped interview was part of his report, and the victim’s emotional state was evident during that interview. The Court of Appeals held the victim’s statements to the officer at the scene were not “testimonial” under Crawford. Romero, 2006-NMCA-045, ¶ 68.

{20} The State does not challenge that holding. The State does challenge the Court of Appeals’ failure to permit the officer to testify about his observations of the victim during the taped interview. In a sense, this challenge is similar to the challenge the Court of Appeals had with respect to the SANE nurse testimony.

{21} Crawford held that testimonial out-of-court statements are barred under the Confrontation Clause of the Sixth Amendment, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 68. Although Crawford declined to create a definitive list of statements that will always qualify as testimonial, the Court did say, “[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.” Id. at 52. Davis further developed the concept of testimonial, and said that when an interrogation, as part of an investigation, about potentially criminal past conduct is conducted, a declarant’s statements are “testimonial.” Davis, 547 U.S. at __, 126 S.Ct. at 2278. Davis further explained that the level of formality of the interrogation is a key factor in determining whether statements are “testimonial” within the meaning of Crawford. Id. Under Crawford and Davis, the victim’s taped, station-house interview was clearly “testimonial” for the purposes of the Sixth Amendment.

{22} The State acknowledges that the admission of the taped interview in its entirety was an error under Crawford. However, the State argues that the officer’s testimony about his subjective observations of the victim’s emotional state during the taped interview was not testimonial. Neither Crawford nor Davis address this argument. Nor did the Court of Appeals. The State contends that because the officer was available for cross-examination and because his testimony was based on firsthand observation, it was not hearsay and did not present a Crawford issue. We agree.

{23} Based on the Court of Appeals’ analysis and the holdings of Crawford and Davis, the taped interview of the victim was “testimonial” and should not have been played for the jury and admitted at trial. See Romero, 2006-NMCA-045, ¶ 52. The officer’s testimony regarding his observations of the victim during the taped interview was admissible under Crawford and Davis.

C. Harmless Error

{24} The discussion of harmless error is made more difficult by the fact that this case was tried before Crawford or Davis were decided. As a result, it seems very likely that objections were not made at trial that would have been made had either Crawford or Davis been available. Further, the case was briefed, in part, without the benefit of Davis. As a result, the written arguments on appeal probably differ from those the parties would have made with the benefit of Davis. In particular, we must decide what evidence we are entitled to consider in evaluating harmless error. In fairness to Defendant and in an effort to be consistent with comparable cases, we believe Defendant ought to be able to challenge not only the SANE nurse’s testimony but also the taped interview with Officer Lewandowski. We recognize that Defendant cross-examined the nurse on the information we have concluded should have been redacted. We also recognize that he did not object to the use of the victim’s grand jury testimony, which essentially duplicated the taped interview, because he wished to rely on the grand jury testimony for purposes of impeachment. Nevertheless, we are persuaded that Defendant ought to be able to rely on Crawford and Davis on appeal to this Court, notwithstanding trial choices made prior to the time those opinions were available and after his initial

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objections at trial were overruled. *State v. Lopez*, 2005-NMSC-036, ¶ 29, 138 N.M. 521, 123 P.3d 754 (“We apply new rulings in criminal cases to all cases on direct review.”); see *Romero*, 2006-NMCA-045, ¶¶ 13-16 (discussing State’s arguments that Defendant waived or failed to preserve his Confrontation Clause arguments).

{25} The Court of Appeals decided, under *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, that the inadmissible evidence corroborated and strengthened the State’s case and thus could not be viewed as harmless error. *Romero*, 2006-NMCA-045, ¶ 70. We have agreed with the Court of Appeals as to the exclusion of victim’s narrative from the SANE nurse’s testimony and also as to the taped interview of the victim by Officer Lewandowski. Because we have not been asked to review the Court of Appeals’ analysis of the victim’s grand jury testimony as inadmissible, nor its analysis of the victim’s statement to Officer Lewandowski at the scene as admissible, we do not address the merits of the Court of Appeals’ analysis.

{26} We are left with the Court of Appeals’ conclusion that the jury properly heard evidence of the victim’s statement at the scene, evidence of her appearance and demeanor at that time, and the testimony of other witnesses to past incidents of violence between Defendant and the victim. *Id.* ¶¶ 72-75. The jury should not have heard the victim’s grand jury testimony, the taped interview with Officer Lewandowski, or her narrative as testified to by the SANE nurse. The State had the burden to show there was no “‘reasonable possibility that the evidence complained of might have contributed to the conviction.’” *Johnson*, 2004-NMSC-029, ¶ 9 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). The State did not carry its burden.

{27} In the record of this appeal, there is sufficient evidence to support the conviction without the inadmissible evidence. Nevertheless, the victim’s grand jury testimony, her taped interview with Officer Lewandowski, and the narrative to which the SANE nurse testified provided a consistent coherent narrative that supplemented and thus corroborated or strengthened the State’s theory of what had happened. Had there been a single charge of battery or assault against a household member, our conclusion might be different, but we cannot say the inadmissible evidence did not contribute to the multiple charges of which Defendant was convicted. Thus, we conclude the Court of Appeals correctly held under *Crawford* and *Davis* that evidence that was admitted erroneously, and the error was not harmless. We next address the question of whether Defendant should be precluded from raising the error pursuant to the doctrine of forfeiture by wrongdoing.

D. Forfeiture by Wrongdoing

{28} The Court of Appeals noted that in *Alvarez-Lopez* we indicated that a defendant does not forfeit or waive his or her right to confront a witness against him unless he or she procured the witness’s absence with the intent to prevent that witness from appearing at trial. *Romero*, 2006-NMCA-045, ¶¶ 22-25 (discussing this Court’s opinion in *Alvarez-Lopez*, 2004-NMSC-030, ¶¶ 5, 7-10, 12-14). The Court of Appeals observed that we had relied on a federal rule of evidence that some courts have considered distinct from the requirements of the federal constitution. The Court of Appeals suggested that other jurisdictions have recognized a distinction between the requirements of a valid waiver of a right, which ordinarily is associated with intent, and forfeiture, which might require misconduct at a certain level. *Id.*, 2006-NMCA-045, ¶¶ 30-34. The Court of Appeals also noted that a rule of evidence might provide greater protection, as a matter of policy, than the constitutional right of confrontation mandates. *Id.* ¶ 36. These observations reflect case law we did not consider in deciding *Alvarez-Lopez*.

{29} Neither *Davis* nor *Crawford* addressed this issue, although *Crawford* referred to the doctrine as an equitable limitation on the right of confrontation. *Crawford*, 541 U.S. at 62. In *Davis*, furthermore, the United States Supreme Court said that

... when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal trial system. We reiterate what we said in *Crawford*: that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.” 541 U.S., at 62, 124 S.Ct. 1354 (citing *Reynolds*, 98 U.S., at 158-59).

That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation. *Davis*, 547 U.S. at __, 126 S.Ct. at 2280. This language in *Davis* seems consistent with an intent requirement, whether waiver or forfeiture provides the better analogy.

{30} There is case law to the effect that when a defendant has murdered a witness whose out-of-court statements the prosecution wishes to introduce at the defendant’s trial for the murder, that defendant will not be allowed to claim the constitutional right of confrontation, even if the prosecution cannot prove he or she killed to prevent the witness from testifying. See *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005); *State v. Meeks*, 88 P.3d 789 (Kan. 2004).

In this context, evidence that murder was committed to prevent the victim from testifying might be less strong than in more typical witness-tampering cases. It has been argued, as the State does in this appeal, that the doctrine of forfeiture by wrongdoing should be expanded beyond witness-tampering cases so that forfeiture applies “whenever a defendant’s wrongdoing caused a witness’s unavailability.” *Joshua Deahl*, Note, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 Mich. L. Rev. 599, 602 (2005). This argument views the rationale underlying the rule as estopping a defendant from complaining that he or she is unable to cross-examine a witness, when the defendant caused the inability. “‘It seems clear that causing one’s own inability to cross-examine is what lies at the heart of the forfeiture rule.’” *Id.* at 616. Yet even this argument is tempered by the view that “forfeiture should apply infrequently and only when there is strong evidence of its occurrence” and that we need “limitations that are designed to consistently achieve that end.” *Id.* at 615.

{31} The more traditional rationale reflects the view that such a defendant otherwise would be permitted to “benefit” from his or her wrongdoing. “[W]hen confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived. The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him.” *Meeks*, 88 P.3d at 794 (quoting *State v. Gettings*, 769 P.2d 25, 28 (Kan. 1989)). These opinions must be premised on the view that the federal rules of evidence do not limit, even if they help define, the forfeiture by
wrongdoing rule, nor do they determine the “constitutional right to confrontation.” *Alvarez-Lopez*, 2004-NMSC-030, ¶ 9. See generally Garcia-Meza, 403 F.3d at 370-71 (distinguishing the right secured by the Sixth Amendment and the protection of the rules of evidence). To the extent these opinions do not deal with typical witness-tampering cases, however, it may be that the intent requirement is unworkable. That would not be a reason to abandon it in cases where it helps provide a strong basis for finding waiver or forfeiture.

{[32]} Defendant has argued on appeal that the right of confrontation is not the sort of benefit to which the traditional rationale ought to be applied. Rather, confrontation is a vehicle for ensuring that the jury is exposed not only to the strength of the evidence but also to the weaknesses in that evidence. Defendant makes a compelling argument that we are being asked to balance a constitutional right against a somewhat vague and amorphous sense of what ought to be permitted. For example, the doctrine might be said to encompass premeditated murder within the scope of intentional wrongdoing but not vehicular homicide.

{[33]} Further, the same rationale seems to underlie the federal rule of evidence on which we relied in *Alvarez-Lopez*, making clear that the same rationale can support a narrow or a broad test or something between narrow and broad. We do not see any clear or easy distinction among degrees of homicide if the emphasis is on wrongdoing and believe that if the federal rules of evidence do not limit the doctrine, then a determination must be made on a case-by-case basis, with the risk of inconsistent results from different district courts and different appellate panels. Moreover, that determination ought to reflect the elements, even if constructive, of waiver or help identify conduct that merits the sort of condemnation associated with the concept of forfeiture.

{[34]} The stated rationale serves an important public policy of deterring intentional wrongdoing that threatens the strength of the process in which the constitutional right operates. Nevertheless, we believe the emphasis must be not only on wrongdoing but on intentional wrongdoing, from which an inference of waiver might be appropriate or in which an equitable conclusion of forfeiture is justified. Anything else appears to diminish the constitutional right *Crawford* and *Davis* have been developing with such care.

{[35]} We have reviewed many opinions from other jurisdictions that have addressed the doctrine of forfeiture by wrongdoing. We conclude that our opinion in *Alvarez-Lopez*, requiring proof of wrongdoing intended to prevent a witness from testifying before a defendant will be viewed as having forfeited the right of confrontation, is the majority rule. See, e.g., *United States v. Gray*, 405 F.3d 227 (4th Cir. 2005); *State v. Valencia*, 924 P.2d 497 (Ariz. Ct. App. 1996); *State v. Henry*, 820 A.2d 1076 (Conn. App. Ct. 2003); *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997); *State v. Hallum*, 606 N.W.2d 351 (Iowa 2000); *Commonwealth v. Edwards*, 830 N.E.2d 158 (Mass. 2005); *State v. Wright*, 701 N.W.2d 802 (Minn. 2005), vacated and remanded in light of *Davis*, __ U.S. __, 126 S.Ct. 2979 (2006); *People v. Geraci*, 649 N.E.2d 817 (N.Y. 1995); *Commonwealth v. Laich*, 777 A.2d 1057 (Pa. 2001); *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006); *Gonzalez v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006); *State v. Mechling*, 633 S.E.2d 311 (W. Va. 2006). See also *People v. Melchor*, 841 N.E.2d 420, 433 (Ill. App. Ct. 2005) (noting that except in situations in which the defendant is on trial for the murder of a witness whose testimony the prosecution wants to admit, a defendant’s intent or motive is relevant in determining whether the doctrine of forfeiture by wrongdoing applies). Further, we cannot say the distinction between waiver and forfeiture has proved helpful, although we agree that forfeiture is the preferred term. See *Hallum*, 606 N.W.2d at 354-55 (discussing the difference between the two terms).

{[36]} We note that in describing the doctrine of forfeiture by wrongdoing, *Davis* cited to *Edwards*, 830 N.E.2d at 172, an opinion of the Supreme Judicial Court of Massachusetts, which required the prosecution to prove the defendant acted in order to procure the witness’s unavailability in order to bar a defendant’s right to confront that witness. While there are arguments for change and opinions to the contrary, none of the arguments for change or opinions to the contrary provide satisfactory limitations on a doctrine that has the potential to emasculate the Confrontation Clause.

{[38]} We should make one other point. The Court of Appeals remanded, consistent with *Alvarez-Lopez*, for a factual determination by the trial court of Defendant’s intent. We doubt that there is sufficient evidence, even by a preponderance of the evidence standard, to support a finding of intent, but we will not overrule the Court of Appeals on this point. Neither party has suggested the Court of Appeals’ opinion erred in remanding for a pre-trial factual determination of intent, and it is possible there is evidence in the record to which we have not been directed that would support such a finding.

III. Conclusion

{[39]} In a sense, then, we are reversing Defendant’s convictions conditionally. The condition is that if, on remand, he is found to have procured the victim’s death with the intent to make her unavailable as a witness, he is not entitled to the benefit of the confrontation clause, and his convictions on the charges at issue in this appeal will stand. If, however, the trial court determines that there is insufficient evidence of his intent, he is entitled to a new trial on the charges at issue in this appeal, but the evidence the Court of Appeals concluded was inadmissible under *Crawford* and *Davis*, with one exception, may not be admitted. The exception is Officer Lewandowski’s testimony about the victim’s demeanor during the taped interview.

{[40]} IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice (concurring in part and dissenting in part)

BOSSON, Justice (concurring in part and dissenting in part).

{[41]} I am pleased to support most of this Opinion with the sole exception of Section II D, “Forfeiture by Wrongdoing,” from which I dissent.

{[42]} Assuming that Defendant Romero is found guilty of intentional homicide of his
deceased wife, in some form, I would hold that all the referenced statements of his wife may be used against him, notwithstanding the Confrontation Clause. Romero has forfeited his right to cross-examine his wife with respect to these statements by virtue of intentionally causing the very absence of his deceased wife of which he now complains. Whether Romero caused that absence with the specific intent to prevent his wife from testifying, or whether he caused that absence simply in a drunken rage, the effect is the same. The witness cannot speak for herself because she is dead at Romero’s hands. It seems a perversion of the Constitution and the Confrontation Clause to allow any defendant to profit so from his own misdeeds. Recent decisions from other jurisdictions express a similar reluctance to so narrowly construe the forfeiture doctrine in the wake of Crawford’s sweeping changes to the Confrontation Clause analysis. See, e.g., People v. Giles, P.3d , 2007 WL 635716, slip op. at 1, 8-9 (Cal. March 5, 2007); United States v. Martinez, F.3d , 2007 WL 489217, *4-5 (D.C. Cir. Feb. 16, 2007); State v. Jensen, N.W.2d , 2007 WL 543053, *13-16 (Wis. 2007). I am persuaded by the reasons discussed in these cases, as well as those in Justice Minzner’s able opinion, and as developed by Judge Pickard in the Court of Appeals below.

{43} I regret that we have lost an opportunity to clarify this Court’s recent opinion in Alvarez-Lopez, on which the majority appears to rely as a reason for requiring an intent not just to kill the witness, but to silence her as well. In my judgment, Alvarez-Lopez is a poor vehicle for this Court’s reticence. Alvarez-Lopez was not a murder case. The defendant absconded, and by the time he was brought to justice the incriminating witness had been deported. This Court appropriately held, in only a brief discussion, that Alvarez-Lopez had not caused the absence of the witness for purposes of the forfeiture rule. We could have stopped there. Nonetheless we continued, essentially in dicta, to add that according to the federal rule in question Alvarez-Lopez needed to show some specific intent to procure that absence in order to silence the witness, which of course was totally absent in that case. Even the State conceded the point. Rhetorically, the State also conceded in Alvarez-Lopez that such a specific intent was an essential element of the forfeiture doctrine, which of course is true if we look only at the federal rule, which is all the parties did in Alvarez-Lopez and which of course is NOT the position of the State in the matter before us. As a general proposition, cases do not usually serve as helpful authority for propositions, or in this case choices, neither argued nor discussed. See Fernandez v. Farmers Ins. Co. of Arizona, 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (“[C]ases are not authority for propositions not considered.” (internal quotation marks and quoted authority omitted)). I believe that norm should apply in this instance. At the very least, it should serve as a deterrent against undue reliance on that one opinion. I concede that one could go either way on how one interprets the forfeiture doctrine. Alvarez-Lopez should be used to frame the question, not decide it.

RICHARD C. BOSSON, Justice
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-014

Topic Index:
Criminal Law: Criminal Sexual Penetration; and Statute of Limitations
Evidence: Character Evidence

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
LESLEY KERBY,
Defendant-Respondent.
No. 29,336 (filed: March 16, 2007)

Consolidated with:
Docket No. 29,533
STATE OF NEW MEXICO,
Plaintiff-Respondent,
versus
LESLEY KERBY,
Defendant-Petitioner.

ORIGINAL PROCEEDINGS ON CERTIORARI
THOMAS J. HYNES, District Judge

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OPINION

PATRICIO M. SERNA, JUSTICE

1} Defendant, Leslie Kerby, was charged with thirteen counts of criminal sexual contact of a minor (“CSCM”) in violation of NMSA 1978, § 30-9-13(A)(1) (2001, prior to 2003 amendment). Only four of the thirteen counts were submitted to the jury, and the jury convicted Defendant on three counts. Defendant challenges his convictions on the basis that the statute of limitations barred the State from prosecuting him; that the trial judge improperly admitted evidence of a peephole between Defendant’s bedroom and Victim’s bathroom; and that Defendant’s right to a speedy trial was violated. The Court of Appeals concluded that the trial court erred in admitting the peephole evidence and that Defendant was presumptively prejudiced by the threemonth delay in commencing trial. State v. Kerby, 2005-NMCA-106, ¶¶ 1, 20, 44, 138 N.M. 232, 118 P.3d 740. The Court of Appeals remanded the speedy trial issue for further analysis and held that Defendant could also raise the statute of limitations issue at that time. Id. ¶¶ 41, 44.

2} In a separate appeal, the State raised issues regarding Defendant’s court-ordered treatment after serving his sentence. When Defendant neared the end of his sentence, he moved the trial judge to alter the terms of his treatment. Defendant sought to attend outpatient treatment, rather than an inpatient treatment facility as originally ordered, since attending an inpatient facility was an impossibility given the long waiting list. The trial judge entered a new order that substituted an outpatient treatment provider; however, the State appealed, arguing inter alia that the victim has a right to participate in this decision. The Court of Appeals agreed with the State, reversing the district court’s order and ordering reinstatement of the original sentence. State v. Kerby, No. 25,891, memorandum op. at 4 (Ct. App. Oct. 19, 2005). Defendant appealed to this Court. After granting Defendant’s Petition for a Writ of Certiorari, we consolidated the two cases.

3} We hold that the statute of limitations is a substantive right that may only be waived by a defendant after consultation with counsel, and only if the waiver is knowing, intelligent, and voluntary. The testimony at trial established that the four counts which the jury considered involved only events which were barred by the statute of limitations. See NMSA 1978, § 30-1-9.1 applicability note (1987). Defendant’s attorney admitted that he did not consult with Defendant about the statute of limitations because he failed to recognize the issue. For these reasons, Defendant would not have been convicted had the statute of limitations defense been raised before trial. Thus, we vacate Defendant’s convictions.

4} Because we find the statute of limitations issue dispositive in vacating Defendant’s convictions, we decline to address the issues Defendant raises regarding the speediness of his trial. Nor do we address the merits of the second appeal addressing the trial judge’s actions in substituting an outpatient treatment provider or the victim’s participation in that decision. We do, however, note that the Court of Appeals erred in holding that the peephole evidence was inadmissible propensity evidence under Rule 11-404(B) NMRA. Kerby, 2005-NMCA-106, ¶¶ 1, 20. We recently addressed the admissibility of other acts for non-propensity purposes, including intent, in State v. Otto, No. 29,158, slip op. (N.M. Feb. 23, 2007) and State v. Gallegos, 2007-NMSC-007.

1. FACTS

5} Inasmuch as we find the statute of limitations issue dispositive, we review only the facts relevant to that issue. Defendant lived with Victim and Victim’s mother from 1986 to 1988. During this time, Victim was six and seven years old. When Victim became an adult, she alleged that Defendant sexually abused her. On March 28, 2002, Defendant was charged by criminal information with thirteen counts of criminal sexual contact of a minor, a third degree felony. See § 30-9-13(A)(1).

6} At trial, Victim testified that she could recall four specific instances of touching. Victim also recalled four “clips,” as she called them, in which she could recall Defendant leaving her room, but in which she did not actually recall Defendant touching her, and approximately five more instances in which Victim “knew” Defendant touched her, but for which she had no specific memory.

7} Victim testified as follows with respect to the four specific instances of touching she
could recall. In the summer of 1986, Victim and her mother moved into a trailer with Defendant. In October 1986, they moved to a house with Defendant. Regarding the first instance of touching, Victim testified that Defendant rubbed her vulva a couple of months after Victim and her mother moved into the trailer (summer 1986), but before they moved to the house (fall 1986). Victim testified that the second time Defendant touched her was when he rubbed her buttocks while she was sleeping on the couch inside the trailer (summer 1986). Regarding the third instance, Victim testified that Defendant again rubbed her buttocks at the end of 1986, shortly after they moved to the house. Finally, the last specific recollection Victim had of Defendant inappropriately touching her was “a long time later” in the beginning of 1987.

83) Because Victim testified consistently that she could recall only four specific instances of Defendant touching her, the trial court dismissed nine of the thirteen counts at the close of the State’s case. At the same time, the criminal information was amended to allege incidents occurring between June 1, 1986, and December 31, 1987. Nevertheless, the trial court made very clear that it was sending to the jury only those four counts that were tied to Victim’s specific recollections, which occurred between summer 1986 and the beginning of 1987. The jury convicted Defendant on three of those four counts.

93) On appeal, Defendant challenged his convictions on the basis that the statute of limitations barred the State from prosecuting him; that the trial judge improperly admitted evidence of a peephole between Defendant’s bedroom and Victim’s bathroom; and that Defendant’s right to a speedy trial was violated. The Court of Appeals concluded that the trial judge erred in admitting the peephole evidence under Rule 11-404(B). Kerby, 2005-NMCA-106, ¶ 1, 20. In addition, the Court of Appeals rejected the trial judge’s finding that the case was a complex case for speedy trial purposes and found that the nineteen-month delay in commencing trial was presumptively prejudicial. Id. ¶ 44. The Court of Appeals remanded the speedy trial issue for further analysis. Id.

103) Defendant raised the statute of limitations defense for the first time on appeal. Id. ¶ 39. Defendant’s attorney admitted that he did not consult with Defendant about the statute of limitations because he failed to recognize the issue. Indeed, the Court of Appeals acknowledged that “[n]either defense counsel, the prosecutor, nor the district court appears to have recognized that the State was prohibited by Section 30-1-8 from prosecuting Defendant for touchings that occurred prior to June 19, 1987.” Id. The Court of Appeals did not analyze the statute of limitations defense but concluded that Defendant could raise it on remand. Id. ¶ 41.

II. STANDARD OF REVIEW

113) “When facts relevant to a statute of limitations issue are not in dispute, the standard of review is whether the district court correctly applied the law to the undisputed facts.” Haas Enters., Inc. v. Davis, 2003-NMCA-143, ¶ 9, 134 N.M. 675, 82 P.3d 42 (citing Inv. Co. of the Sw. v. Reese, 117 N.M. 655, 657, 875 P.2d 1086, 1088 (1994)). We review questions of law de novo. Id. We look at the trial proceedings to determine if the facts relevant to the statute of limitations were in dispute. Defendant did not dispute the factual time frame relevant to the statute of limitations at trial, but raised the legal issue for the first time on appeal. Kerby, 2005-NMCA-106, ¶ 39. Thus, we conclude that the relevant facts were not in dispute and, accordingly, review de novo Defendant’s statute of limitations defense.

III. THE STATUTE OF LIMITATIONS IS A SUBSTANTIVE RIGHT THAT CAN BE WAIVED ONLY BY A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER, AFTER CONSULTATION WITH COUNSEL

123) Defendant argues that the three counts for which he was convicted are barred by the statute of limitations. Defendant claims that the statute of limitations is “jurisdictional” and, thus, the district court was without jurisdiction to try and sentence him. The State, by contrast, argues that the statute of limitations is an “affirmative equitable defense” that can be “waived.” Defendant counters that, even if the statute of limitations can be waived, he did not knowingly waive the defense. Further, to the extent Defendant waived this defense, he argues that his counsel was ineffective in not raising the defense pre-trial.

133) In the civil litigation context, the statute of limitations defense is generally an affirmative defense that is lost if not properly pled. Rule 1-008(C) NMRA; see Wilson v. Denver, 1998-NMSC-016, ¶ 9, 125 N.M. 308, 961 P.2d 153 (citing Chavez v. Kitsch, 70 N.M. 439, 442-43, 374 P.2d 497, 499 (1962)); Butler v. Deutsche Morgan Grenfell, Inc., 2006-NMCA-084, ¶¶ 28-30, 140 N.M. 111, 140 P.3d 532. Civil statutes of limitations exist “to protect prospective defendants from the burden of defending against stale claims while providing an adequate period of time for a person of ordinary diligence to pursue lawful claims.” Garcia v. La Farge, 119 N.M. 532, 537, 893 P.2d 428, 433 (1995); see also Wood v. Carpenter, 101 U.S. 135, 139 (1879) (noting that civil statutes of limitations exist to give “security and stability to human affairs” and to “stimulate . . . activity and punish negligence”). However, “[t]he criminal limitations statute is only partially similar in form and purpose to its civil counterpart and is clearly different in its overall place and function in the law.” Alan L. Adlestein, Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial, 37 Wn. & Mary L. Rev. 199, 259 (1995). As the United States Supreme Court has recognized, criminal statutes of limitations are to be liberally construed in favor of a defendant because their purpose “is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions.” Toussie v. United States, 397 U.S. 112, 114 (1970).

143) Our rules likewise recognize the distinction between civil and criminal statutes of limitations. Indeed, there is no counterpart to Rule of Criminal Procedure 1-008(C) in our Rules of Criminal Procedure. While Rule 5-601(C)(1) NMRA provides that “defenses and objections based on defects in the initiation of the prosecution” must be raised before trial, our courts have never construed a statute of limitations defense as a “defect in the initiation of the prosecution.” Nor should they. Other jurisdictions recognize the difference in either their case law or rules. See, e.g., Conn. Super. Ct. R. § 41-8(1), (3) (providing that objections to a defect in the institution of the prosecution and a statute of limitations defense must be made prior to trial if capable of being determined); Maguire v. State, 453 So. 2d 438, 440 (Fla. Dist. Ct. App. 1984) (declining to construe a waiver of “all defects in the indictments” as a waiver of the statute of limitations); City of Cleveland v. Hirsch, 268 N.E.2d 600, 602 (Ohio Ct. App. 1971) (holding that a statute requiring a defendant to object to a defect in the indictment or information before trial was inapplicable to a statute of limitations claim).

153) Courts approach criminal statutes of limitations in one of three ways. First is the view that the statute of limitations is a jurisdictional limit on the subject matter of a court that cannot be waived or forfeited; second is the view that a defendant may “waive” the defense so long as he or she does so voluntarily, intelligently, and knowingly after consulting with counsel;
finally, some courts hold that the statute of limitations is a defense that is “forfeited” if not affirmatively raised in the trial court. See State v. Timoteo, 952 P.2d 865, 877 (Haw. 1997) (Ramil, J., dissenting); State v. Pearson, 858 S.W.2d 879, 886 (Tenn. 1993); Padie v. State, 594 P.2d 50, 55-57 (Alaska 1979). Historically, courts took the first approach, that is, that once the statute of limitations ran, a court lacked subject matter jurisdiction. Timoteo, 952 P.2d at 877 (Ramil, J., dissenting); see also People v. Verbrugge, 998 P.2d 43, 45-46 (Colo. Ct. App. 1999) (holding that, because the statute of limitations had run, the trial court had no jurisdiction to enter a conviction even though the defendant requested an instruction on the offense). Over time, however, courts have moved away from the jurisdictional view and toward deciding that a defendant may waive the defense if it is beneficial to him or her. See Timoteo, 952 P.2d at 877-78 (Ramil, J., dissenting); Adlestein, supra, at 291. This appears to be because the primary policy of a criminal statute of limitations, to protect the defendant, is not served by strict adherence to a jurisdictional approach. See id.

{16} The evolution of the law in California is illustrative. In People v. McGee, the California Supreme Court held that the statute of limitations limited a court’s subject matter jurisdiction and, thus, the issue could be raised at any time. 36 P.2d 378, 379-80 (Cal. 1934). Over sixty years later, the court abrogated the McGee rule in Cowan v. Superior Court, 926 P.2d 438 (Cal. 1996). In that case, the defendant pled guilty to the lesser offense of voluntary manslaughter after being charged with three counts of murder. Id. at 439. Realizing that the statute of limitations had run on voluntary manslaughter, the district attorney became concerned that the defendant might be able to rely on McGee to reverse his conviction after the other charges were dismissed. Id. at 439-40. He thus moved to set aside the plea. Id. at 439. In response, the defendant stated that he was willing to waive the statute of limitations. Id. The lower court, however, found that the statute of limitations was a “jurisdictional defect and the parties can never stipulate to jurisdiction,” and thus set aside the plea and reinstated the original charges. Id. Without specifically overruling the McGee jurisdictional rule, the court in Cowan held that a defendant may waive the statute of limitations when: (1) the waiver is knowing, intelligent, and voluntary; (2) the defendant has consulted with counsel, and the waiver is for the defendant’s benefit; and (3) the waiver does not handicap his or her defense or contravene any policies behind the statute of limitations. Id. at 440-41 (discussing Padie, 594 P.2d at 57).

{17} Three years later, in People v. Williams, the California Supreme Court was presented with an issue similar to the one we confront in the instant case: the defendant was charged with, and convicted of, a crime for which the statute of limitations had run. 981 P.2d 42, 43 (Cal. 1999). In Williams, the Attorney General argued that “because defendant did not assert the statute of limitations at trial, he has forfeited his right ever to do so, and that he must remain convicted of a felony and serve a prison sentence even if the prosecution is untimely and should have been dismissed.” Id. at 44. The court rejected this argument:

We now conclude that when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing.

Id. at 45; see also Pearson, 858 S.W.2d at 886-87 & n.8 (adopting the waiver approach and providing examples of why a defendant might wish to affirmatively waive the defense).

{18} Based on our review of the various approaches, we hereby adopt the waiver approach and hold that the statute of limitations is a substantive right that may only be waived by a defendant after consultation with counsel, and only if the waiver is knowing, intelligent, and voluntary.

{19} We reject the forfeiture rule for two fundamental reasons. We conclude that “the protection of the statute of limitations is too important to be unintentionally lost.” Timoteo, 952 P.2d at 878 (Ramil, J., dissenting). Besides the harsh policy of punishing defendants for failing to raise the statute of limitations in time, the forfeiture rule is also “an exercise in futility.” Williams, 981 P.2d at 45. As the Williams court explained: Defendants would usually gain indirectly by claiming ineffective assistance of counsel what a forfeiture rule would prevent them from gaining directly. A forfeiture rule would merely add a step to the litigation. Only those who admitted their guilt right away and did not request an attorney could never gain relief.

Id. If we adopted the forfeiture rule in the instant case, Defendant would have a compelling ineffective assistance of counsel claim because he would not have been convicted but for his attorney’s failure to raise the statute of limitations defense. In jurisdictions with a forfeiture rule, in numerous cases involving similar facts, courts have granted post-conviction relief outright on the basis of ineffective assistance of counsel or have remanded for an evidentiary hearing on the issue. See, e.g., United States v. Hansel, 70 F.3d 6, 8 (2d Cir. 1995) (per curiam); Byrd v. State, 754 So. 2d 191, 192 (Fla. Dist. Ct. App. 2000) (per curiam); People v. Gwinn, 627 N.E.2d 699, 701-02 (Ill. App. Ct. 1994); People v. Brocksmith, 604 N.E.2d 1059, 1065-66 (Ill. App. Ct. 1992); Commonwealth v. Barrett, 641 N.E.2d 1302, 1306, 1308 (Mass. 1994); State v. Wiemer, 533 N.W.2d 122, 133-34 (Neb. Ct. App. 1995). Thus, if we adopted the forfeiture rule, we would expend judicial (and executive) resources addressing Defendant’s ineffective assistance of counsel claim and ultimately delay the inevitable vacating of Defendant’s convictions.

IV. WE VACATE DEFENDANT’S CONVICTIONS BECAUSE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS STATUTE OF LIMITATIONS DEFENSE AFTER CONSULTING WITH COUNSEL

{20} Having adopted the waiver approach to the statute of limitations, we hold that Defendant did not knowingly, intelligently, and voluntarily waive this defense after consulting with his counsel. To the contrary, Defendant’s counsel candidly admitted in his briefing and oral argument that he simply did not think of the defense. We, therefore, vacate Defendant’s convictions because, as discussed below, it is clear from the record that had the defense been utilized, Defendant would not have been convicted.

{21} Defendant was initially charged by information with thirteen counts of criminal sexual contact of a minor, a third degree felony, on March 28, 2002. See §
Id Kerby

clear that the three crimes for which Defendant
acted a tolling provision which provides
that matter, were the ones tied to Victim’s
allegedly rubbed her vulva, to
fied that the first instance of touching, when
Defendant allegedly rubbed her vulva, oc-
curred a couple of months after Victim and
her mother moved into Defendant’s trailer
(summer 1986), but before they moved to
a house with Defendant (fall 1986). Victim
testified that the second time Defendant
touched her was when he rubbed her but-
tocks, while she was sleeping on the couch
inside the trailer, thus in the summer of
1986. Regarding the third instance, Victim
stated that Defendant again rubbed her but-
tocks at the end of 1986, shortly after they
moved to the house. Finally, the last spe-
cific recollection Victim had of Defendant
inappropriately touching her was “about
a month or so later,” in the beginning of
1987. It is, therefore, clear from the record
that, according to Victim’s testimony, the
last time Defendant touched her was before
the critical date of June 19, 1987. Defen-
dant was acquitted of the charge related
to the touching of Victim’s vulva, but was
convicted of the three charges related to
the touching of Victim’s buttocks. Since
these three instances happened before the
statute of limitations date of June 19,
1987, the statute of limitations ran five
years after they occurred, and Defendant
would not have been convicted had the
statute of limitations defense been raised
before trial.

22] Victim testified consistently that she
could only recall four specific instances of
touching. Because of this, the trial court
dismissed nine of the thirteen counts at
the close of the State’s case. While the criminal
information was amended at that time to
allege incidents occurring between June
1, 1986, and December 31, 1987, the trial
court was very clear that the only counts
go to the jury were the ones tied to
Victim’s specific recollection.

23] We note that Victim also testified with
respect to four “clips” and five instances in
which she “knew” Defendant had touched
her, but of which she had no specific rec-
collection, continuing into late 1987. How-
ever, the judge appropriately dismissed the
related counts at the close of the State’s
case-in-chief. The only instances of touch-
ing the jury considered, thus the only ones
that matter, were the ones tied to Victim’s
specific recollections. Therefore, we do not
consider the timing of these other incidents
in our statute of limitations analysis.

24] For clarity, we describe those four
specific instances again here. Victim testi-
fied that the first instance of touching, when
Defendant allegedly rubbed her vulva, oc-
curred in a couple of months after Victim and
her mother moved into Defendant’s trailer
(summer 1986), but before they moved to
a house with Defendant (fall 1986). Victim
testified that the second time Defendant
touched her was when he rubbed her but-
tocks, while she was sleeping on the couch
inside the trailer, thus in the summer of
1986. Regarding the third instance, Victim
stated that Defendant again rubbed her but-
tocks at the end of 1986, shortly after they
moved to the house. Finally, the last spe-
cific recollection Victim had of Defendant
inappropriately touching her was “about
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dant was acquitted of the charge related
to the touching of Victim’s vulva, but was
convicted of the three charges related to
the touching of Victim’s buttocks. Since
these three instances happened before the
statute of limitations date of June 19,
1987, the statute of limitations ran five
years after they occurred, and Defendant
would not have been convicted had the
statute of limitations defense been raised.
Because Defendant did not waive the
statute of limitations defense and because
Defendant would not have been convicted
had the issue been raised, we hereby vacate
Defendant’s convictions.

V. THE PEEPHOLE EVIDENCE
WAS ADMISSIBLE TO SHOW
INTENT UNDER RULE 11-404(B)

25] Although we find the statute of
limitations issue dispositive in vacating
Defendant’s convictions, we are compelled
to address briefly the admissibility of the
peephole evidence under Rule 11-404(B).
Rule 11-404(B) provides: “Evidence of
other crimes, wrongs or acts is not ad-
missible to prove the character of a person
in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.” We recently analyzed this rule in Otto and held that evidence of other acts is admissible under Rule 11-404(B) if relevant to a material issue other than the Defendant’s character or propensity to commit a crime. No. 29,158, slip. op. (N.M. Feb. 23, 2007); see also Gallegos, 2007-NMSC-007, ¶¶ 27-36.

26] In the instant case, the trial court al-
allowed evidence that Defendant constructed
a peephole which allowed him to peer into
Victim’s bathroom while Defendant hid in a
cubbyhole adjacent to the master bedroom,
to rebut evidence that Defendant innocently
touched Victim’s buttocks. Kerby, 2005-
NMCA-106, ¶¶ 9-15. Defendant injected
the issue of intent by calling his mother to
testify that Defendant told her the touch was
merely a fatherly pat on the bottom. The
Court of Appeals reversed, holding that
the peephole evidence amounted to
propensity evidence and was thus inad-
missible under Rule 11-404(B). Id. ¶¶
20-28. We disagree. A requisite element
of the charged crime of CSCM is that
the defendant’s touch was “unlawful.” State
v. Pierce, 110 N.M. 76, 792 P.2d 408, 415
(1990). “Unlawfulness” may be proven by
showing defendant’s behavior was “done . . .
to arouse or gratify sexual desire,” State
v. Osborne, 111 N.M. 654, 661, 808 P.2d 624,
was not admitted to prove “that sexual
attraction to young female children was a
trait of Defendant’s character,” as the Court
of Appeals erroneously held. Kerby, 2005-
NMCA-106, ¶ 28. The peephole evidence
was admitted to show that when Defendant
touched Victim’s buttocks he did so with
a sexual intent. As the Court of Appeals
noted, Defendant’s state of mind was “the
crucial issue in the case.” Id. ¶ 33. Thus,
evidence of the peephole is precisely the
type of non-propensity evidence that Rule
11-404(B) allows. Unless corrected, the
Court of Appeals opinion in the instant case
would continue as good law with respect to
the peephole evidence issue and could well
misguide future trial courts.

VI. CONCLUSION

27] We hold that the statute of limita-
tions is a substantive right that may only
be waived by a defendant, after consulta-
tion with counsel, and only if the waiver is
knowing, intelligent, and voluntary.
Defendant did not knowingly, intelligently,
and voluntarily waive his statute of limita-
tions defense after consulting with counsel.
Because it is clear that he would not have
been convicted had the statute of limita-
tions defense been raised, we hereby vacate
Defendant’s convictions.

28] IT IS SO ORDERED.
PATRICIO M. SERRA,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PAMELA B. MINZNER, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
From the New Mexico Supreme Court

Opinion Number: 2007-NMSC-015

Topic Index:
Civil Procedure: Certification
Insurance: Coverage; Insurance, General; Motor Vehicle Insurance; Primary, Secondary or Other Coverage; and Uninsured or Underinsured Motorist

CHRISTINA BORADIANSKY,
Plaintiff,
versus
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant.
No. 30,031 (filed: March 26, 2007)

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
BRUCE D. BLACK, United States District Judge

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for Defendant

OPINION

PAMELA B. MINZNER, JUSTICE

1) Plaintiff Christina Boradiansky filed a civil action against Defendant State Farm Mutual Automobile Insurance in the First Judicial District Court on December 22, 2005, alleging causes of action arising out of a car accident in Santa Fe, New Mexico. State Farm removed the matter to the United States District Court for the District of New Mexico on January 20, 2006. Both Plaintiff and Defendant filed dispositive motions in the federal district court. Based on those motions, United States District Judge Black certified two questions to this Court pursuant to NMSA 1978, § 39-7-4 (1997), and Rule 12-607 NMRA. They are:

(1) Whether Defendant’s insurance policy provision, excluding all government-owned vehicles from the definition of an “uninsured motor vehicle,” is unenforceable because it violates public policy as established by New Mexico’s Uninsured Motorist Act, NMSA 1978, § 66-5-301 (1983);

(2) Whether an insured carrying uninsured-motorist coverage is “legally entitled to recover” damages exceeding the limits established by the New Mexico Tort Claims Act, NMSA 1978, § 41-4-19 (2004), when the insured is injured by a government employee driving a government-owned vehicle and makes a claim against her insurer for damages that exceed those limits.

2) We conclude that the exclusion of all government-owned vehicles from the definition of an “uninsured motor vehicle” is unenforceable because it violates the public policy illustrated within New Mexico’s Uninsured Motorist Act. Further, we conclude Plaintiff is legally entitled to recover damages in this case within the meaning of Section 66-5-301, notwithstanding the limitations imposed by the Tort Claims Act on recovery against the State. We therefore answer both questions in the affirmative.

I.

3) On November 5, 2000, Plaintiff was severely injured in a motor vehicle accident when a Sandoval County Sheriff’s deputy ran a red light, while driving a government vehicle, and broad sided her vehicle. At the time of the accident, Plaintiff carried uninsured/underinsured motorist coverage of $500,000 as a part of her motor vehicle policy and an additional $2,000,000 under her umbrella policy. Plaintiff settled her claim against the governmental defendant for less than the cap under the Tort Claims Act, and she requested additional payments from Defendant in excess of the limits imposed by the Act. See § 41-4-19.

4) Defendant denied coverage. Defendant argues, as it did in federal district court, that Plaintiff’s policies contained an express exclusion; the policies provided that an “uninsured motor vehicle” does not include a vehicle “owned by a government or any of its political subdivisions or agencies” and, in addition, the New Mexico Tort Claims Act does not allow a plaintiff to recover any amount of damages greater than the limits set forth in the statute. Therefore, Defendant reasons, Plaintiff was not “legally entitled to recover” damages greater than those limits, and she should not recover under the Uninsured Motorist Act. See § 66-5-301 (providing that uninsured motorist coverage is offered “for the protection of persons insured . . . who are legally entitled to recover damages from owners or operators of uninsured motor vehicles”) (emphasis added). Plaintiff contends that the government-owned vehicle exclusion is unenforceable because it violates public policy. Further, she argues that the phrase “legally entitled to recover” simply means that she must establish fault on behalf of the other driver.

II.

5) These are questions of first impression in New Mexico and are reviewed de novo. “Appellate courts review questions of law de novo,” Hasse Contracting Co. v. KBK Fin., Inc., 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641. The initial inquiry in this case is whether the Uninsured Motorist Act permits State Farm to exclude coverage for government-owned vehicles under its policy.

A.

6) Over the years, our courts have considered various exclusions listed in insurance policies. See Gov’t Employees Ins. Co. v. Welch, 2004-NMSC-014, 135 N.M. 452, 90 P.3d 471 (family exclusions of liability and uninsured motorists from umbrella coverage); State Farm Mut. Auto. Ins. Co. v. Ballard, 2002-NMSC-030, 132 N.M. 696, 54 P.3d 537 (family exclusion step down provision); Phoenix Indem. Ins. Co. v. Pulis, 2000-NMSC-023, 129 N.M.
of uninsured motor vehicle owned by him); Demir v. Farmers Tex. Co., 1997-NMCA-100, 124 N.M. 36, 946 P.2d 240 (household exclusion under liability coverage); SandovaI v. Valdez, 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978) (one year limitation of time provision for claiming of uninsured motorist coverage).

Throughout, our courts have invalidated exclusions that they determined were in conflict with the underlying purpose of the Uninsured Motorist Act.

(7) Our rationale has varied, or seems to have varied, perhaps because we were considering in some cases whether applying New Mexico law was appropriate because the law of the place where the contract was formed was contrary to New Mexico public policy, see, e.g., Ballard, 2002-NMSC-030, ¶ 18, or whether the rights of a class-one insured were at issue. See Phoenix, 2000-NMSC-023, ¶ 18. We have referred several times to the exclusion of a discrete group as improper. See Welch, 2004-NMSC-014, ¶ 8; Ballard, 2002-NMSC-030, ¶ 13. We have been clearest about limitations on the rights of a class-one insured to recover. See Phoenix, 2000-NMSC-023, ¶ 26; Martinez, 1997-NMCA-100, ¶ 18. We have identified on occasion what we described as a gap in coverage the Legislature did not intend. See Phoenix, 2000-NMSC-023, ¶ 20; Found. Reserve, 109 N.M. at 535, 787 P.2d at 454; Chavez, 87 N.M. at 330, 533 P.2d at 103. We have struggled with the difference between valid contractual limitations on an insured’s right to recover, see Hartford Ins. Co. v. Cline, 2006-NMSC-033, ¶ 15, 140 N.M. 16, 139 P.3d 176, and those that are clearly inconsistent with the Legislature’s intent in enacting the Uninsured Motorist Act. See SandovaI, 91 N.M. at 708, 580 P.2d at 134.

(8) This Court in Chavez took the opportunity to discuss the legislative intent and purpose behind the Uninsured Motorist Act. In Chavez, State Farm argued that in ascertaining the object of uninsured motorist statute, the court need look no further than the text of the statute. 87 N.M. at 328, 533 P.2d at 101. We noted that “the legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance.” Id. at 329, 533 P.2d at 102 (quoting Bartlett v. Nationwide Mut. Ins. Co., 294 N.E.2d 665, 666 (1973)). Our cases suggest the text of the statute has not proved as easy to apply in some circumstances as others.

(9) Because this Court has cautioned on several occasions against reading the Uninsured Motorist Act to create unintended gaps in coverage, we believe seeking to avoid such gaps is an appropriate rationale on which we may rely in resolving the certified questions before this Court. “[T]he Legislature did not intend to allow the creation of a gap in coverage which is contrary to the purpose of the statute.” Id. at 330, 533 P.2d at 103. Reading the Uninsured Motorist Act to allow an exclusion of certain vehicles creates the type of impermissible gap the Legislature sought to avoid. We also have said “it is not the intent of the statute to limit coverage for an insured to a particular location or a particular vehicle.” Id. The main focus behind the Uninsured Motorist Act was to allow for coverage to be provided for innocent motorists injured through the fault of uninsured or underinsured motorists in New Mexico. It seems counterintuitive to suggest that the Legislature intended to create a gap in coverage by permitting a contractual exclusion of government-owned vehicles from uninsured or underinsured motorist claims. It also seems inconsistent with our concern for excluding coverage for discrete groups. If coverage is intended to be broad, then the exclusion of discrete groups of defendants seems as anomalous as discrete groups of plaintiffs.

(10) A majority of the other states that have dealt with government-owned vehicle exclusions have found them contrary to the purpose of uninsured motorist coverage statutes. Cropper v. State Farm Mut. Auto. Ins. Co., 671 A.2d 423, 426-27 (Del. Super. Ct. 1995). “Once uninsured motorist coverage is purchased, the insurance consumer is entitled to secure the full extent of the benefit which the law requires to be offered. Attempts by insurers to reduce this benefit by exclusion clauses are repugnant to the public policy of protecting persons injured in automobile accidents.” Id. at 426 (internal citation omitted). “While insures may exclude or limit liability coverage so long as public policy is not violated, provisions attempting to limit coverage required by statute are void.” Borjas v. State Farm Mut. Auto. Ins., 33 P.3d 1265, 1270 (Colo. Ct. App. 2001); see also Hillhouse v. Farmers Ins. Co., 595 P.2d 1102, 1103 (Kan. 1979) (holding that uninsured motorist coverage is mandated, and attempts to “dilute or limit statutorily mandated coverage” consistently have been held void or invalid); Gabriel v. Minn. Mut. Fire & Cas., 306 N.W.2d 73, 76 (N.D. 1993) (holding that exclusion of underinsured motorist coverage for accidents involving government vehicles is invalid as contrary to law); Rueschemeyer v. Liberty Mut. Ins. Co., 673 A.2d 448, 451 (R.I. 1996) (holding that “the government-owned vehicle exclusion contained in the policy at issue is void as a matter of law and as a matter of public policy”). The weight of this authority is impressive. Based on our own cases and the weight of authority elsewhere, we answer the first certified question affirmatively.

B.

(11) Since the enactment of the Uninsured Motorist Act, our courts have had some time to address the issues presented by the phrase “legally entitled to recover.” See, e.g., State Farm Mut. Auto. Ins. Co. v. Ovit, 117 N.M. 547, 549-50, 873 P.2d 979, 981-82 (1994); Wood v. Millers Nat’l Ins. Co., 96 N.M. 525, 528-29, 652 P.2d 1163, 1166-67 (1981); Demir, 2006-NMSC-091 ¶ 6-7; State Farm Mut. Auto. Ins. Co. v. Luebbers, 2005-NMCA-112, ¶ 10-28, 138 N.M. 289, 119 P.3d 169, cert. quashed, 2006-NMCT-10, 140 N.M. 675, 146 P.3d 810; State Farm Mut. Auto. Ins. Co. v. Maidment, 107 N.M. 568, 572-74, 761 P.2d 446, 450-53 (Ct. App. 1988). In the abstract, the phrase seems potentially circular. That is, it may mean only that a court of competent jurisdiction has determined the plaintiff has a right to recover. Alternatively, it may mean that there is no statutory or other legal barrier to recovery.

(12) Our courts have not been consistent or clear in defining the standard. In Wood, this Court held “that the phrase [legally entitled to recover] merely requires that the determination of liability be made by legal means.” 96 N.M. at 529, 632 P.2d at 1167. In Maidment, the Court of Appeals addressed the issue of “whether an insured [could] recover punitive damages from his insurer when the uninsured motorist dies

...
before an award is made.” 107 N.M. at 569, 761 P.2d at 447. The Court of Appeals held that the insured could not recover because the claim expired with the uninsured tortfeasor. Id. at 572-74, 761 P.2d at 450-52. In Ovitz, this Court addressed the issue of whether New Mexico residents could recover uninsured motorist benefits for an accident that occurred in Hawaii. The Court concluded that the insurer was not obligated to pay uninsured motorist benefits because, under Hawaiian law, the plaintiffs were not injured by an uninsured motorist; the owner of the automobile that injured the insured was self-insured and met the minimum coverage amounts under both New Mexico and Hawaiian law. Ovitz, 117 N.M. at 549, 873 P.2d at 981. Further, the plaintiffs were not “legally entitled to collect” noneconomic damages because of Hawaii’s no-fault insurance statute. Id. at 550, 873 P.2d at 982.

\{13\} Defendant suggested in oral argument that we need not look to the law of other jurisdictions because our own cases controlled the result in this case. We are not persuaded. The phrase “legally entitled to recover” seems something of a chameleon, varying with the facts and procedural context in which the need to define the phrase arises. Under these circumstances, we think cases from other jurisdictions, particularly when they are as uniform in result as they seem to be on the issues in this appeal, are helpful.

\{14\} Many jurisdictions have held that the phrase “legally entitled” means “the injuries must result from the negligent conduct of an uninsured motorist.” 1 Alan I. Widiss & Jeffery E. Thomas, Uninsured and Underinsured Motorist Insurance § 7.2, at 363 (3d. ed. 2005). However, if the court determines that the insured is not legally entitled to recover, notwithstanding the negligence of the motorist, typically he or she is precluded from uninsured motorist benefits. Id. at 367. Defendant contends that Plaintiff cannot recover the damages she seeks because the Tort Claims Act, which caps recovery from governmental defendants, precludes her from being legally entitled to recover. Plaintiff claims she is legally entitled to recover damages because the sheriff’s deputy pled guilty in municipal court, and there has never been a dispute over who was at fault. Defendant claims that the text of the Tort Claims Act resolves the issue; the Act provides that Plaintiff is not “legally entitled to recover” damages beyond that contained in the Tort Claims Act.

\{15\} However, it seems unlikely to us that the Legislature intended to prevent an insured’s access to insurance proceeds from uninsured or underinsured motorist coverage when the amount available under the Tort Claims Act cannot compensate fully for the injury. The purpose behind the Tort Claims Act is stated in the language itself.

The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act and in accordance with the principles established in that act.

NMSA 1978, § 41-4-2 (1976) (internal citation omitted).

\{16\} The Tort Claims Act seeks not only to protect the government, but to insure that there will be some recovery for those injured by negligent government employees. In this case, the Uninsured Motorist Act must be read in conjunction with the Tort Claims Act. The Legislature did not intend for the government and government employees to have absolute protection when someone is injured by their negligence. Further, it seems that the purpose of the Uninsured Motorist Act is much like the purpose of the Tort Claims Act, that is, to provide compensation to the injured party. In this case, by virtue of the Tort Claims Act, the government is underinsured with respect to the injuries sustained by Plaintiff. However, the Legislature has provided a “fix” through the Uninsured Motorist Act in motor vehicle accidents where the negligent party is not adequately insured. If the Legislature had intended limitations, we think the Legislature would have been explicit. Construing Chavez, the Court of Appeals in Sandoval stated “the only limitations under the New Mexico Uninsured Motorist Act shall be those specifically set out in the act itself.” 91 N.M. at 708, 580 P.2d at 134.

\{17\} That general statement may be another way of expressing the view that the Legislature did not intend gaps in coverage that were inconsistent with the purposes of the Act. Chavez, 87 N.M. at 330, 533 P.2d at 103. The only limitations contained in the Act are that the motorist be uninsured or underinsured and the party suing be legally entitled to recover damages. See § 66-5-301(A). We think Defendant is arguing Plaintiff must be entitled to recover unlimited damages under the Tort Claims Act. We disagree. We think she is in no different situation than if the tortfeasor had been covered inadequately under a commercial policy.

\{18\} This case is similar to Borjas and West American Insurance Co. v. Popa, 723 A.2d 1 (Md. 1998). In Borjas, the plaintiff was injured in an automobile accident with a police officer. Plaintiff initially tried to sue the police officer and his employer, but the case was dismissed because the defendants were immune from suit under the Colorado Governmental Immunity Act (CGIA), 33 P.3d at 1266. The plaintiff then brought suit against her insurer under the uninsured motorist provisions of her policy. Id. at 1266-67. The plaintiff claimed that the exclusion in the insurance policy violated public policy. Id. at 1267. Borjas held that the purpose behind the uninsured motorist statute was “to ensure that individuals injured in an accident will be compensated for their losses even if the other motorist is uninsured.” Id. Because immunity from suit would result in the same conclusion as would an injury caused by an uninsured motorist, the court concluded that the legal responsibility had the same effect in both situations. Id. at 1268. The court held that the uninsured motorist statute provides for drivers to purchase coverage in order to protect themselves, not only from an uninsured motorist, but also those protected under the CGIA. Id. The court perceived no inconsistencies between the policies of the two statutes and the interests protected. Id.

\{19\} In Popa, the plaintiffs’ son was killed when his vehicle was struck by a Maryland State Police officer. 723 A.2d at 2. The insurer claimed the plaintiffs were not entitled to uninsured/underinsured motorist benefits because they were not “legally entitled to recover” any amount beyond the $50,000 cap of the Maryland Tort Claims Act. Id. at 5. The court noted it had previously held “that ‘legally entitled to recover’ in the
uninsured motorist provisions of the policy meant only that the insured establish fault on the part of the uninsured or underinsured motorist and establish the amount of his or her damages.” Id. at 7; see Reese v. State Farm Mut. Auto. Ins. Co., 403 A.2d 1229, 1233 (Md. 1979). The court concluded the plaintiffs were entitled to recover the uninsured motorist coverage offset by the amount received from the governmental defendant under the Tort Claims Act. Popa, 723 A.2d at 11.

{20} The facts in our case correspond. Plaintiff in this case was injured by a police officer protected by the Tort Claims Act, which limited her recovery against New Mexico. Like Borjas and Popa, which both found that immunity was not a bar to the right to “legally recover” in those cases, we conclude the cap in the Tort Claims Act is not a bar to Plaintiff’s right to legally recover within the meaning of Section 66-5-301. We perceive no inconsistencies between the policies of the two statutes and the interests protected. We therefore answer the second certified question in the affirmative.

III.

{21} We conclude Plaintiff is entitled to recover uninsured motorist benefits. Our answers to the questions certified to this Court are as follows: (1) on the first question, we conclude that the government-owned vehicle exclusion violates the public policy of New Mexico because it creates an unintended gap in coverage; and (2) on the second question, we conclude Plaintiff is “legally entitled to recover” underinsured motorist damages beyond the limits established by the Tort Claims Act because the cap applies to recovery against the State. Thus, we answer both questions in the affirmative.

{22} IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PETRA JIMÉNEZ MAES, Justice

RICHARD C. BOSSON, Justice

RODERICK T. KENNEDY, Judge (sitting by designation)
charged with possession of crack cocaine, tampering with evidence, and possession of drug paraphernalia.

{4} Within one minute of Detective Potter’s cocaine purchase, the remaining two vehicles and observed a group of eight people gathered in front of a building at the far end of the parking lot from where the drug transaction had occurred. In addition to this group standing outside, there were two cars with a total of four people in them in the immediate vicinity of the group. Detective Soto, the officer who ultimately arrested Defendant, testified that as he approached he could see a subject who fit Detective Potter’s description of Clark among the group. Defendant was also in this group, though not immediately next to Clark. The officers did not observe any interaction between Defendant and Clark as they approached.

{5} As the detectives got out of their cars, the group began to scatter. Clark attempted to run but was quickly overtaken and placed under arrest. Defendant also split off from the group, in the opposite direction from Clark, in what Detective Soto described as a “slow run.” This caught Detective Soto’s attention, and he pursued Defendant with his gun drawn yelling for Defendant to stop. Defendant did not stop immediately and Detective Soto continued following him telling him to get down on the ground. Detective Soto told Defendant to stop three or four times before Defendant responded by stopping in front of a vehicle parked in the lot. When Defendant stopped, he went to his knees and threw something underneath the car. Detective Soto placed Defendant in handcuffs and looked under the car to see what Defendant had thrown. He found a broken glass crack pipe, a lighter, and a small piece of what was later identified as crack cocaine. Detective Soto testified that, as he turned back around to face Defendant, he noticed that Defendant “had his finger in his coin pocket” and was attempting to remove something, at which point Detective Soto reached into Defendant’s pocket and retrieved a second rock of crack cocaine. Defendant was formally arrested and

{6} Defendant filed a motion to suppress evidence, claiming that Officer Soto lacked reasonable suspicion when he pursued and seized Defendant. The district court entered an order granting Defendant’s motion and the State appealed. Reversing the district court’s order, the Court of Appeals first held that Defendant had not abandoned the evidence because Officer Soto had seized Defendant prior to Defendant throwing the drugs and paraphernalia under the car. See State v. Harbison, 2006-NMCA-016, ¶¶ 14-15, 139 N.M. 59, 128 P.3d 487. Next, the Court of Appeals held that Officer Soto had reasonable suspicion when he seized Defendant based on Defendant’s presence in a group with a person who had just completed a drug transaction combined with Defendant’s flight upon the arrival of the police. Id. ¶ 27.

{7} We granted certiorari in part based on Defendant’s arguments that the opinion of the Court of Appeals is inconsistent with New Mexico case law. See NMSA 1978, § 34-5-14(B)(1), (2) (1972); Rule 12-502(C)(4)(a), (b) NMRA. Upon review, we are persuaded that this appeal presents issues of first impression and that the Court of Appeals’ opinion appropriately applied federal constitutional law.

**STANDARD OF REVIEW**

{8} “The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party.” State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (quoted authority omitted). In conducting our review, “we observe the distinction between factual determinations which are subject to a substantial evidence standard of review and application of law to the facts[,] which is subject to de novo review.” State v. Nieto, 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442 (alteration in original) (quoted authority omitted). Determinations of reasonable suspicion are reviewed de novo. See Jason L., 2000-NMSC-018, ¶ 19.

{9} Defendant makes no argument on appeal that the New Mexico Constitution affords him greater protection than that afforded under the United States Constitution. Therefore, our analysis proceeds under the Fourth Amendment of the United States Constitution and is governed by federal constitutional law as set forth by the United States Supreme Court. See State v. Walters, 1997-NMCA-013, ¶ 9, 123 N.M. 88, 934 P.2d 282 (recognizing when defendant fails to present argument that state constitution provides greater protection than federal constitution, we assume protection is the same under both).

**SEIZURE**

{10} In determining whether Defendant was seized in violation of the Fourth Amendment, our first inquiry is at what moment Defendant was seized: when Detective Soto pursued Defendant ordering him to stop, or when Defendant in fact stopped? The point at which the seizure occurs is pivotal because it determines the point in time the police must have reasonable suspicion to conduct an investigatory stop. See Hodari D., 499 U.S. at 623-24. More particularly, if Defendant was not seized at the time he discarded the contraband, then the evidence would be considered abandoned and Fourth Amendment protections would not apply. We also note and subsequently discuss the question of whether the police had a basis for an investigatory stop at the time they arrived on the scene. We do so to address the issue of whether Defendant’s flight might have been unlawfully provoked and thus not an appropriate part of a reasonable suspicion analysis under Wardlow. {11} Under Terry, a seizure occurs “whenever a police officer accosts an individual and restrains his freedom to walk away.” 392 U.S. at 16. Our courts have held that a restraint on a person’s freedom, within the meaning of Terry, can result either from the application of physical force or by a showing of authority. Jason L., 2000-NMSC-018, ¶ 15 (citing State v. Lopez, 109 N.M. 169, 170, 783 P.2d 479, 480 (Ct. App. 1989)). In making our determination, “we consider all of the circumstances surrounding the incident in order to determine whether a reasonable person would have believed that he [or she] was not free to leave.” Id. (alteration in original) (quoted authority omitted). In Jason L. we identified examples of circumstances that might indicate a seizure in a given incident. Such circumstances include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” Id. ¶ 16 (quoting Lopez, 109 N.M. at 170, 783 P.2d at 480).

{12} Three of these four examples were present in the instant case in the parking lot when the police arrived. Thus, there is no question of a show of authority at the time the detectives drew their weapons and
gave orders for people to stop moving. If Defendant had immediately submitted to this show of authority, then he would have been seized at that time and we would apply a reasonable suspicion analysis as of that time. However, Defendant did not immediately submit to Detective Soto’s show of authority; instead, he fled when the officers arrived and continued to move away from Detective Soto at a “slow run.”

Pursuing Defendant with his gun drawn, Detective Soto had to repeat his command for Defendant to stop three or four times before Defendant finally dropped to his knees behind the car where he threw the drugs and paraphernalia.

Therefore, our initial question is whether a person like Defendant who does not submit to a show of authority is considered seized within the meaning of the Fourth Amendment at the time police authority is first shown, requiring reasonable suspicion at that moment. The United States Supreme Court has answered this question in the negative. See Hodari D., 499 U.S. at 626. In Hodari D., Hodari was standing on a street curb in a high crime area when he noticed an unmarked police cruiser approaching. Id. at 622-23. Hodari fled and the officers in the cruiser gave chase. Id. at 623. As he ran, Hodari discarded what was later determined to be a rock of crack cocaine. Id. The issue before the United States Supreme Court was whether a person who flees in the face of a “show of authority” by an officer is considered seized at the moment of flight under the Fourth Amendment. Id. at 624-25. The Court held that a seizure based on a show of authority, as opposed to physical force, requires “submission to the assertion of authority.” Id. at 626; see also State v. Rector, 2005-NMCA-014, ¶ 6, 136 N.M. 788, 105 P.3d 341 (“[A] seizure ‘requires either physical force . . . or, where that is absent, submission to the assertion of authority.’” (quoting Hodari D., 499 U.S. at 626)). Therefore, Hodari was not yet seized, and no reasonable suspicion was required, at the time he abandoned the contraband during flight. See Hodari D., 499 U.S. at 624 n.1 (relying on State’s concession that the officer did not have the reasonable suspicion to justify stopping Hodari, but suggesting that it is arguably against common sense to say that “[i]t is unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police”).

Hodari D. dictates that under the Fourth Amendment no seizure of Defendant occurred until he yielded to Officer Soto’s commands to stop. Thus, we analyze reasonable suspicion at the moment of the actual seizure, when Defendant stopped and submitted to Officer Soto, not earlier at the parking lot when the police approached and ordered everyone not to move. We agree with the district court and the Court of Appeals that at the time Defendant threw the evidence under the car he had already stopped in response to the show of authority and was under police seizure. Because Defendant had not abandoned the evidence before he was seized, Fourth Amendment protections apply to the evidence. We therefore determine whether, at the time of seizure, the officer had reasonable suspicion to conduct an investigatory stop of Defendant.

**Reasonable Suspicion**

A reasonable suspicion is a “particularized suspicion, based on all the circumstances” that the individual being detained is breaking or has broken the law. Jason L., 2000-NMSC-018, ¶ 20. “A reasonable suspicion of criminal activity can arise from wholly lawful conduct.” State v. Urioste, 2002-NMSC-023, ¶ 10, 132 N.M. 592, 52 P.3d 964 (quoted authority omitted). However, reasonable suspicion may not be based on “[i]nsufficiently supported and inarticulate hunches.” Jason L., 2000-NMSC-018, ¶ 20 (quoting State v. Cobbs, 103 N.M. 623, 626, 711 P.2d 900, 903 (Ct. App. 1985)). “In determining whether reasonable suspicion exists in a particular case, ‘the relevant inquiry is whether particular conduct is “innocent” or “guilty,” but the degree of suspicion that attaches to particular types of noncriminal acts.’” Urioste, 2002-NMSC-023, ¶ 10 (quoting United States v. Sokolow, 490 U.S. 1, 10 (1989)).

Because Defendant was not seized until he submitted to the detective’s show of authority after he had fled, we must decide whether Defendant’s flight upon the arrival of the detectives becomes a part of the totality of the circumstances to be considered in determining reasonable suspicion. We agree with the Court of Appeals that we have before us an issue of first impression in New Mexico. Further, because Defendant did not ask the Court of Appeals to apply a different standard under Article II, Section 10 of the New Mexico Constitution, the Court of Appeals correctly turned to the United States Supreme Court’s holding in Wardlow to decide this case under the Fourth Amendment.

In Wardlow, two officers, who were...
driving in a four-car caravan in an area known for heavy narcotics trafficking, noticed Wardlow standing next to a building and holding an opaque bag. 528 U.S. at 121-22. Wardlow looked in the officers’ direction and then fled. Id. at 122. The officers pursued Wardlow, overtook him, and detained him. A protective patdown frisk yielded a loaded .38 caliber pistol which led to Wardlow’s arrest and conviction.

operations. He described how a multiple person drug trafficking operation works.

briefly and investigate his potential role in reasonable suspicion to detain Defendant on that basis for finding that the officers had reasonable suspicion that the officers had reasonable suspicion that Defendant was in the area of a planned narcotics sale. Defendant fled. Given Defendant’s proximity to the crime scene combined with the officers’ need to maintain the status quo pending a brief investigation, and especially given the lack of record evidence that the police acted unlawfully to provoke Defendant’s flight so as to justify his seizure, we conclude, by applying Wardlow, that the police had reasonable suspicion to pursue Defendant and subject him to a brief investigatory stop. See generally 2 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, Criminal Procedure § 3.8(b) (1999) (indicating that a brief investigatory stop is appropriate not only to prevent crime but also to help detect it and suggesting that, in the immediate aftermath of a crime, an officer may be entitled to freeze a situation for a short time to make inquiry and determine to the suspect a police intent to seize him, is not subject to Fourth Amendment limits. Surely it does not follow that such provocative activity may be deemed to provide the reasonable suspicion the police will need once they catch up with the suspect and take control of him.

4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.5(f), at 530-31 (2004) (footnote omitted); see also Thomas, 759 N.E.2d at 905 (agreeing that its holding was not to be construed as giving “a license to conduct investigatory stops in every case where a citizen ignores, or fails to heed, a baseless police order or show of authority”).

{18} Analyzed under the Wardlow standard, this case presents a strong factual basis for finding that the officers had a reasonable suspicion to detain Defendant briefly and investigate his potential role in a multiple person drug sale. Defendant was not simply present in a high-crime area; he was standing in a group of eight to ten people with an individual known to have just completed a drug sale. Then, when several officers arrived at the scene, he hurried away in the opposite direction. Defendant’s flight under these circumstances, taken together with Detective Soto’s testimony that he was familiar with multiple-person drug sales, is clearly reasonable suspicion under Wardlow to permit Detective Soto to pursue Defendant and subject him to a brief investigatory stop.

{19} We recognize that the Wardlow analysis ultimately turns on whether the Defendant’s flight was provoked or unprovoked. Id. at 124 (stating reasonable suspicion founded on the defendant’s presence in high crime area combined with “unprovoked flight upon noticing the police”). The lack of provocation is critical.

We agree with the position of the Eleventh Circuit Court of Appeals in United States v. Franklin, 323 F.3d 1298 (11th Cir. 2003), acknowledging that “officers can approach an individual into fleeing, and then assert his flight as a justification for pursuing and stopping him.”; People v. Thomas, 759 N.E.2d 899, 905 (Ill. 2001) (upholding denial of suppression motion despite officer’s lack of reasonable suspicion at the time of attempted seizure because the officer “did not act without reason or for the sole purpose of provoking the defendant’s flight”). Thus, if police action at the moment of an attempted seizure is illegal and taken for the purpose of provoking flight, then flight in response to that action, being unlawfully provoked, may not be factored into the reasonable suspicion equation. To hold otherwise would create great opportunities for police mischief in the gullying between Wardlow and... Hodari D. Hodari D. says that police pursuit, even when it makes apparent

4 Officer Soto had been involved in narcotics investigations prior to this incident and was familiar with multiple person drug trafficking operations. He described how a multiple person drug trafficking operation works.

[I]n the past dealings it’s been my experience that dealers will oftentimes have somebody hold it for them, or they will have lookouts. Or I have seen it where dealers stashed the narcotics in one place. They make the deal and send somebody else to get it and come back. They hold the money. They don’t hold the drugs themselves, so there is numerous situations where it’s more than one person dealing on the street. Based on his experience, Officer Soto testified that he felt the need to briefly detain persons believed to be associated with the operation for investigative purposes and for officer safety.

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possible perpetrators).

**JASON L. IS NOT INCONSISTENT WITH WARDLOW**

{21} Defendant relies on *Jason L.* to come up with a different result. *Jason L.* is the preeminent New Mexico authority applying the Fourth Amendment to determine what types of police conduct constitute a show of authority that, in the absence of flight, will effect a seizure. In that case, the defendant Jason L. and his friend Filimon M. were approached at night on an empty street by armed officers whom they knew had been observing them prior to the encounter. *Jason L.*, 2000-NMSC-018, ¶ 17. The officers demanded that the boys approach, inquired whether they had weapons, frisked Filimon M. and found a gun, and then frisked Jason L. and found another gun. *Id.* The defendant was charged with unlawful possession of a handgun and moved to suppress evidence. *Id.* The State argued that Jason L. was not seized until the police actually frisked him. *Id.* This Court held that Jason L. was seized prior to the search and that the officers lacked individualized suspicion at that point in time. *Id.* ¶¶ 19-21.

{22} In his petition for certiorari to this Court, Defendant claims that the Court of Appeals dispensed with *Jason L.*’s requirement of an “individualized, particularized suspicion” by following *Wardlow*’s approach, which suggested that determinations of reasonable suspicion must be based on “commonsense judgments and inferences about human behavior.” *Wardlow*, 528 U.S. at 125. However, this comment in *Wardlow* followed the Supreme Court’s observation that “[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” *Id.* at 124. Thus, the Court’s comment came in the specific factual context of that case—a factual context that was not present in *Jason L.*

{23} We find nothing in *Jason L.* that is inconsistent with *Wardlow*. *Jason L.* presented a straightforward analysis under *Terry*, and did not involve flight upon arrival of an officer. See *Jason L.*, 2000-NMSC-018, ¶¶ 14, 16. Had the defendant in *Jason L.* run from the officers as they approached, then our analysis in that opinion would have been governed by *Wardlow*. Instead, the central issue in *Jason L.* was whether the defendant was seized when the police were speaking with him or not until they actually frisked him. In *Jason L.*, we concluded that because the officers demanded the boys approach, did not tell the boys they were free to leave, and used aggressive language or tone of voice indicating that compliance with their request was compulsory, the defendant would not have felt free to leave and was seized within the meaning of the Fourth Amendment prior to being frisked. *Id.* ¶ 19. On the other hand, *Wardlow* was not concerned with whether the defendant felt free to leave—both *Wardlow* and Defendant here *did* leave. *Wardlow* simply holds that unprovoked flight, when combined with presence in a high-crime area, provides the individualized reasonable suspicion to justify a *Terry* stop. *Wardlow*, 528 U.S. at 124-25.

{24} As discussed above, the officers here had reasonable suspicion under *Wardlow* to subject Defendant to an investigatory stop. The stop being valid, the ensuing seizure of drugs and paraphernalia was supported by the Fourth Amendment.

**INTERSTITIAL ANALYSIS**

{25} Defendant argues strenuously to this Court that the Court of Appeals should have conducted an interstitial analysis in accordance with *State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1, to determine whether the New Mexico Constitution affords greater protection to Defendant than the United States Constitution. Defendant contends that the Court of Appeals erred in “*sua sponte*” applying a federal analysis and adopting the position of the United States Supreme Court in *Wardlow* without conducting such an interstitial analysis. We granted certiorari on that basis only to find out that the issue had not been briefed to the Court of Appeals and was therefore abandoned.

{26} Without a state constitutional argument presented to the Court of Appeals, either in briefing or at oral argument, that Court was not required to conduct its own interstitial analysis. See *City of Santa Fe v. Komis*, 114 N.M. 659, 665, 845 P.2d 753, 759 (1992) (stating that the Court would not review issues not briefed on appeal); *Gomez v. Bernalillo County Clerk’s Office*, 118 N.M. 449, 455, 882 P.2d 40, 46 (Ct. App. 1994) (same). Nor did the Court of Appeals, absent a state constitutional argument before it, need to inquire about preservation in the trial court. The Court of Appeals properly analyzed this case under the Fourth Amendment and the relevant, binding United States Supreme Court precedent. See *Jason L.*, 2000-NMSC-018, ¶ 9 (reviewing claim only under Fourth amendment when defendant did not argue on appeal that the New Mexico Constitution afforded him greater protection than the United States Constitution); *Walters*, 1997-NMCA-013, ¶ 9 (limiting analysis to the Fourth Amendment when defendant advanced no separate analysis under the New Mexico Constitution nor argued that the state constitution affords greater protection).

**CONCLUSION**

{27} We affirm the opinion of the Court of Appeals reversing the district court’s suppression of evidence and remand for further proceedings.

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

RICHARD C. BOSSON,
Justice

WE CONCUR:
EDWARD L. CHÁVEZ, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
PETRA JIMENEZ MAES, Justice
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10:15 a.m. Break
10:30 a.m. The Court’s Ethical Dilemma (1.0 E)
11:30 a.m. Family Law Update
Hon. James Loughren
12:30 p.m. Lunch (provided at the State Bar Center)

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