IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. S-1-SC-40965**

SHAUN LEFLEUR,

Defendant-Appellant.

STATE OF NEW MEXICO'S ANSWER BRIEF

On Appeal from the Twelfth Judicial District Court
Otero County, New Mexico
The Honorable John P. Sugg, District Judge

RAÚL TORREZ
Attorney General

CHRISTA STREET
Assistant Solicitor General

Attorneys for Appellee
201 Third St. NW, Suite 300
Albuquerque, NM 87102
(505) 974-5889

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INTRODUCTION

Defendant forced his wife, Nancy, to kneel in front of him.[1] Then, Defendant shot her in the back of the head multiple times.[2] Defendant wrapped Nancy's body in a tarp and buried her in a shallow grave on private land near Oliver Lee Memorial State Park. Defendant fled to Texas and several weeks passed. Paranoid that park rangers would find the burial site, Defendant returned to New Mexico to camp alongside his "little rock garden" that he placed atop his wife's corpse.

The jury convicted Defendant of first degree murder and tampering with evidence. On appeal, Defendant alleges that admitting the depositions of two *unavailable* witnesses at trial violated his right to confront the witnesses against him. Defendant's Confrontation Clause argument fails because it relies on Defendant's factual omissions. Before trial, the parties agreed to depose Donald Pledger and Delbert Barrett in accordance with Rule 5-503 NMRA owing to their itinerant lifestyle and housing insecurity. The State submitted a transport order to the district court to ensure Defendant could be present for the depositions; however, Defendant told the district court that he did *not want to be present* at the depositions. The district

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[1] ***See* 5-21-25 CD 8:36:35-59**.

[2] The OMI forensic pathologist who conducted Nancy's autopsy testified that Nancy's manner of death was a homicide and that the cause of death was "gunshot wounds to the head." **[5-20-25 CD 10:33:50-10:34:10]** Two projectiles were recovered from Nancy's fractured skull. **[*Id.* 10: 38:14-16; 11:04:38-48]**

court explained to Defendant that he had a Sixth Amendment right to be physically present. After a colloquy with Defendant to ensure he was making a knowing, intelligent, and voluntary waiver of his right to face-to-face confrontation, the district court accepted Defendant's waiver.

Defendant's claim that the State cannot "satisfy Rule 11-804" NMRA fails. The district court found the two witnesses deposed by the State and defense counsel—who *cross-examined* both witnesses—were unavailable under Rule 11-804(A)(5)(a) NMRA. The district court similarly found that the two depositions were admissible as former testimony under Rule 11-804(B)(1). Defendant's argument that non-child-victim depositions are inadmissible at trial fails because it overlooks both binding precedent and the hearsay exception contained in the New Mexico Rules of Evidence. Defendant's claim that he was "convicted *by deposition*" **[BIC 1 (emphasis in original)]** is incorrect. The State introduced overwhelming evidence proving Defendant murdered his wife and buried her on remote private land to evade apprehension.

FACTS AND PROCEDURAL BACKGROUND

On April 21, 2024, Joseph Echavarria walked into a police station and told Sargeant Hooper that "he knew where a body had been buried." **[5-20-25 CD 9:10:18-30]** Joseph knew "the general vicinity" of the burial site was near Oliver Lee Memorial State Park, where various individuals experiencing housing insecurity

resided. **[*Id.* 9:11:00-07; 9:11:40-51; *see also* 5-22-25 CD 2:51:46-2:52:19]** Sargeant Hooper, Officer Marrujo, and Joseph found the abandoned "campsite" on private property where Defendant had previously camped earlier in the spring.[3] **[*Id.* 9:13:30-35]**

As the three men searched the area, Officer Marrujo "looked over to [his] right, and [saw] twigs and brushes and branches… that didn't really look natural." **[5-21-25 CD 10:42:25-38]** Officer Marrujo and Jospeh started removing "the branch pile," and then the *rocks underneath the branches*. **[*Id.* 10:43:30-45; 5-20-25 CD 9:15:30-9:16:20]** Officer Marrujo "wasn't really sure what he was looking at" when he started digging. **[5-21-25 10:52:50-55]** Officer Marrujo soon found the tarp wrapped around Nancy's body and smelled a "heavy odor" of "decomposition." **[*Id.* 10:53:39-10:54:15; *see also* 9:33:10-20; *see also* 5-20-25 CD 9:15:30-9:16:20; *see also* St. Ex. 29 4:00-6:02 (Officer Marrujo's body camera footage)]**

The State charged Defendant with first degree murder and tampering with evidence. **[1 RP 23 (Criminal Complaint), 1 RP 76 (Stipulated Order Severing**

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[3] *See also* St. Ex. 1 (In response to a trespassing call, Officer Preston Woods spoke to Defendant at that campsite on April 4, 2024, to inform Defendant he was camping on private property. Officer Woods' body camera footage shows Defendant's tent was adjacent to the burial site where police discovered Nancy's body two weeks later.); *see also* 5-21-25 CD 2:15:36-2:16:28 (Officer Marrujo testified he found Nancy's body below the tree at Defendant's campsite visible in State's Exhibit 1).

the Felon in Possession Charge "to avoid prejudice accruing to [Defendant.]")] Defendant agreed to speak to police after being advised of his *Miranda* rights. **[5-22-25 CD 9:24:50-9:25:22]** Defendant insisted that "[Nancy's] not a missing person." **[St. Ex. 38 00:11-16]** Nancy's wallet was in Defendant's car. **[*Id.* 1:17]** Defendant conveniently asserted Nancy "has an M.O. of just *disappearing*, jumping out of the car, leaving everything in the car." **[*Id.* 1:10-1:39]** Police asked Defendant how Nancy could, as Defendant suggested, run away to a different state without access to her wallet. **[*Id.*]** Defendant responded with one word: "P****." **[*Id.*]**

Defendant attempted to assure police that "there's nothing to investigate." **[*Id.* 11:35-40]** When police responded that Nancy was buried "beneath a tarp," Defendant vociferated "You're full of s***!" **[*Id.* 11:54-12:36]** Defendant later said, "She's dead. And you say somebody shot her. Execution?... From behind the head? From behind?" **[*Id.* 18:37-19:01]** After police confirmed Nancy was shot multiple times, Defendant asked "She didn't do it herself?" **[*Id.*, *see also id.* 14:41-56]** Defendant was reminded that Nancy could not have committed suicide by shooting herself in the back of the head multiple times. **[*Id.*]** Crucially, police divulged *only* that Nancy was shot "*in the head*" prior to Defendant "asking" if Nancy was shot "from *behind*" or "*execution*" style. **[*Id.* 14:41-56, 18:37-19:01]**

The magnitude of Defendant's brutality toward Nancy was revealed at trial. The night of February 26, 2024, Defendant called his friend Donald, who was

temporarily living at a campsite near Defendant's campsite. **[5-21-25 CD 8:32:10-8:33:06; *see also* 3:32:28-3:35:00 (Officer Marrujo's testimony about the cellphone records establishing Defendant called Donald twice on the night of February 26, 2024)]** Donald heard Defendant "arguing" with Nancy as Defendant told him, "This is what I deal with day in and day out." **[*Id.*]** Defendant told Donald, "Let me let you go," then hung up the phone. **[*Id.*]** About 15 minutes later, Defendant called back and said, "I just killed Nancy." **[*Id.* 8:33:06-18]** Donald did not believe Defendant, so he drove over to Defendant's campsite. **[*Id.* 8:33:44-55; 8:34:20]** Donald saw Nancy on the ground with "blood coming out of her head." **[*Id.* 8:34:20-8:36:25]** Defendant told Donald, "Don't throw up on me." **[*Id.*]** Then, Defendant turned to Nancy's body and screamed, "Why did you make me do this? Why did you make me do this? Why did you make do this?" **[*Id.*]** "Before [Donald] left, [Defendant] got a tarp off the tent [and] rolled [Nancy] up in it." **[*Id.* 8:37:50-8:38:00]** Defendant told Donald that he would call him in the morning. **[*Id.* 8:38:45-55]** Donald "prayed to God that that [Defendant] didn't call" because he was scared. **[*Id.*; *see also id.* 8:39:25-36; 8:40:25-35]**

Defendant drove himself and Donald to the closest Walmart the next morning. **[*Id.* 8:41:00-842:33]** Defendant parked his car, then asked Donald, "I'm not feeling well, will you get me some whiskey and a shovel?" **[*Id.*]** Defendant handed him a "wad of money." **[*Id.*]** Donald bought the shovel and the whiskey. **[*Id.*]** The State

presented corroborating evidence. **[*Id.* 1:41:25-37, 1:53:35-43 (Testimony identifying Defendant and Donald on the Walmart surveillance footage); *see also* St. Ex. 14 (Walmart surveillance footage of Donald purchasing the shovel and the whiskey); *see also* St. Ex. 13 (Surveillance footage of Defendant); *see also* St. Ex. 16 00:10-22 (Donald and Defendant exiting Walmart); *see also* St. Ex. 17 (Donald and Defendant entering the Walmart pharmacy)]** Defendant later texted Donald that "his little rock garden [was] done." **[5-21-25 CD 8:53:30-8:54:05]**

Donald subsequently left the area with his partner, Delbert, and the two "went into hiding." **[10:14:18-30; *see also* 8:17:30-8:18:30, 8:49:30-49 (Donald discussed their "transient" lifestyle living in their "5th wheel trailer" moving from RV Parks, BLM land, and truck stops, between Las Cruces, Alamogordo, Ruidoso, Roswell, and Tularosa.)]** Eventually, Donald told Delbert what happened the night of Nancy's murder. **[*Id.* 8:51:12-8:52:11]** Delbert then spoke to Joseph regarding what he had just learned about Nancy's murder and told Joseph, "You know what to do with this information." **[*Id.* 10:14:33-47]** At trial, Joseph testified that in January 2024, Defendant texted him and asked to buy a gun. **[5-19-25 CD 4:31:50-4:33:08; 4:34:00-20]** The text message from Defendant to Joseph read, "Hey do you have a 22 long pistol or 9mm that you want to sell?" **[St. Ex. 3]**

The State presented evidence regarding Defendant's efforts to distance himself from his crimes. Defendant's internet search history established that less than a week before Nancy's murder, Defendant searched "Mexico" and "Chihuahua." **[*See* St. Ex. 53a, 53b]** After the homicide, Defendant left New Mexico and travelled to Texas. **[*See* 5-22-25 CD 1:38:20-34]** While in Texas, Defendant texted Donald and said, "I need to know if the sheriff's department's been back out there and that'll tell me what's going on you know and if they're looking for me or if they're looking for a ghost." **[St. Ex. 43 (Text messages between Donald and Defendant from March 2024)]** Defendant also asked Donald if he had seen any park rangers in the area. **[*Id.*]** Defendant texted Donald, "Really that place needs to be cleaned up and get that s*** away from there and what I was going to do is tie a chain [to a car] and drag that table down [the] road and try to *get rid of* that [road][4] and just [discourage] people from driving down there if you know what I mean." **[5-22-25 CD 1:56:07-44]** Crucially, Defendant wrote in a separate text message, "I was just trying to give it enough time to let s*** cool down and I was actually going to go right back to the same spot which I may do I think that would be wise[.]" **[St. Ex. 43]**

[4] Although the original text message states, "…try to get rid of that Rose and just encourage people…[,]" Defendant testified that "Rose" and "encourage" were "typos," and he meant to say "road" and "discourage." **[5-22-25 CD 1:56:40-56]**

In contrast to Defendant's police interview where he cruelly suggested that Nancy "ran away" and there was "nothing to investigate" **[*See* St. Ex. 38 1:10-39]**, the State presented evidence that in the two-month timeframe after Nancy's murder and *before* Defendant's arrest, Defendant discussed his wife's death in the presence of two individuals who testified at trial: Officer Woods and Michael Hunt.

Officer Woods testified to his encounter with Defendant, which occurred before Joseph told police about the burial site. On April 4, 2024, Officer Woods responded to a trespassing call. **[5-20-25 CD 2:28:10-26]** Officer Woods drove out to *private land* near Oliver Lee Memorial State Park. **[*Id.* 2:29:10]** Once he spotted Defendant's campsite, Officer Woods parked his patrol unit on the *dirt road* and walked towards Defendant's tent. **[*Id.* 2:31:40-2:32:18; *see also* St. Ex. 43 (Defendant's text message from March 2024 that he wanted to "try to get rid" of a road.)]** It took Officer Woods about "two [to] three minutes" to reach Defendant's campsite on foot. **[*Id.* 2:49:10-15]** Once Officer Woods arrived, he stopped to "assess if [he] was going to be dealing with more than one individual." **[*Id.* 2:33:30-40]** Officer Woods heard Defendant, who was on the phone, say "My wife *passed away here* about three weeks ago." **[St. Ex. 22; 5-20-25 CD 2:32:20-28; 2:56:20-2:58:10]**

Officer Woods announced himself and told Defendant that the property belonged to the French brothers. Defendant told Officer Woods the land "is owned

by the French brothers, *my brother*." **[St. Ex. 1 1:56-2:00]** Defendant told Officer Woods that his name was "Richard Colvin." **[*Id.* 02:40-45; 03:42-52]** Officer Woods traipsed back to his patrol unit to verify the information and subsequently discovered that "there was no record found for that name and date of birth." **[5-20-25 CD 2:47:30-40]** By the time Officer Woods realized there was "no record," Defendant was "long gone down the dirt road." **[*Id.* 2:49:10-50]** At trial, James French, the property owner, testified Defendant is not his brother and that he had never seen Defendant before. **[*Id.* 3:07:05-25]**

Importantly, Michael Hunt, who lived near Defendant's campsite, spoke to Defendant prior to Defendant's arrest. **[5-22-25 CD 2:51:46-2:52:19; 2:52:50-2:53:30]** Michael testified at trial that "[Defendant] told [him] his *wife had committed suicide*." **[*Id.*]** The jury convicted Defendant of first degree murder and tampering with evidence. **[3 RP 624-626]**

ARGUMENT

I. The Admission of the Deposition Testimony of Donald Pledger and Delbert Barrett at Trial Did Not Violate Defendant's Right to Confrontation Because Defendant Waived His Right to Face to Face Confrontation, and Defense Counsel Cross-Examined Both Witnesses.

A. The Legal Framework and the Standard of Review.

"Whether out-of-court statements are admissible under the Confrontation Clause is a question of law, subject to de novo review." *State v. Tsosie*, 2022-NMSC-

017, ¶ 23 (internal citation omitted). The Confrontation Clause analysis is the "the threshold consideration for admissibility[.]" *Tsosie*, 2022-NMSC-017, ¶ 22. The admissibility of a statement that accords with a defendant's Sixth Amendment right remains subject to the New Mexico Rules of Evidence, "including hearsay" rules and exceptions. *Id.*

Thus, responding to Defendant's allegations is a two-step inquiry. First, were Defendant's rights under the Confrontation Clause violated? The answer is no; Defendant waived his right to face-to-face confrontation and defense counsel cross-examined both witnesses under oath at their depositions. Second, did the district court's admission of the deposition testimony of two unavailable witnesses comport with binding precedent and the New Mexico Rules of Evidence? The answer is yes; the district court properly found that the testimony of the two unavailable witnesses was admissible under the "former testimony" exception to the rule against hearsay.

B. The Governing Law on the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him." U.S. Const. amend. VI. This "procedural guarantee applies to…state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). The Confrontation Clause applies to "witnesses against the accused, those who bear testimony." *Id.* at 51 (internal citation omitted).

"Testimony" is defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* "The Sixth Amendment prohibits the introduction of testimonial statements by a nontestifying witness, *unless* the witness is *unavailabl*e to testify, and the defendant had a *prior opportunity for cross-examination*." *Tsosie*, 2022-NMSC-017, ¶ 24 (citing *Crawford*, 541 U.S. at 61) (emphasis added). The Confrontation Clause "is a procedural rather than a substantive guarantee." *Crawford*, 541 U.S. at 61.

The Confrontation Clause embodies two essential protections: the right to cross-examine adverse witnesses and "face to face" confrontation. *Id.* at 57. "The most important element of the right to confrontation is the right of cross-examination." *State v. Sanders*, 1994-NMSC-043, ¶ 22, 117 N.M. 452. Whereas the Confrontation Clause "reflects a *preference* for face-to-face confrontation at trial, [it is] a preference that must occasionally give way to considerations of public policy and the necessities of the case." *Maryland v. Craig*, 497 U.S. 836 at 849 (1990) (internal citations omitted) (emphasis in original). New Mexico law similarly recognizes that "the physical presence aspect of the confrontation right cannot be absolute and without exception because if it was, the Confrontation Clause 'would prohibit the admission of any accusatory hearsay statement made by an absent declarant.'" *State v. Berry*, 2025-NMCA-009, ¶ 9 (quoting *Craig*, 497 U.S. at 849). Requiring physical presence without exception "would abrogate virtually every

hearsay exception, a result long *rejected as unintended and too extreme*." *Id.* (internal citation omitted) (emphasis added).

C. Defendant Waived His Right to Face to Face Confrontation of Donald Pledger and Delbert Barrett with the Understanding that their Depositions Could Be Used Against Him at Trial if They Became Unavailable.

Defendant's recitation of the pretrial procedural history omits dispositive context. **[*See* BIC 1-35]** Defendant claims that the admission of the deposition testimony at trial violated his constitutional rights. **[*See* BIC 12-13, 25, 28]** This allegation overlooks the fact that Defendant waived his right to face-to-face confrontation for their depositions.

The State submitted a proposed transport order to the district court to allow Defendant to attend the depositions in person. **[1 RP 102, 3 RP 634]** "Not knowing why the parties were conducting depositions, the [district court] set the matter for judicial inquiry on July 29, 2024." **[3 RP 364]** The parties agreed to depose Donald and Delbert because "both men were experiencing housing insecurity. [They] lived together in a 5th wheel trailer and [had] a transient lifestyle staying at various campgrounds, RV parks, and Walmart parking lots." **[3 RP 634]** Defense counsel informed the district court that Defendant was (1) aware of his right to be physically present at the depositions and (2) waived his right to appear at the depositions. **[7-29-24 CD 1:37:10-1:38:15]** "After a colloquy with Defendant to ensure he was

making a knowing, intelligent, and voluntary waiver of his right to have face-to-face confrontation with the witnesses during the depositions, the [district court] accepted [Defendant's] waiver and permitted the depositions to be held in [Defendant's] absence." **[3 RP 635, *see also* 7-29-24 CD 1:39:04-1:40:30]** Defendant confirmed that he understood the depositions *could be admitted at trial* if the witnesses were unavailable at trial. **[*Id.* 1:38:15-1:39:04; 1:40:13-30; *see also* 3 RP 635]**

Depositions are a discovery mechanism under the New Mexico Rules of Criminal Procedure. *See generally* Rule 5-503 NMRA. As was the case here, a "deposition may be taken pursuant to this rule [] upon agreement of the parties[.]" Rule 5-503(B)(1); **[7-29-24 CD 1:34:50-1:35:06; 1:37:10]**. The deposition must be recorded. Rule 5-503(F). Notably, Rule 5-503 does *not* require a criminal defendant to be present at the deposition. Rather, "[t]he *officer* taking the deposition *must be physically present* with the witness." Rule 5-503(E)(6) The examination and cross-examination of a deposition witness may proceed as permitted at trial under the New Mexico Rules of Evidence. Rule 5-503(F). Like a trial, the witness is placed under oath. *Id.*

Donald and Delbert were placed under oath at their depositions. **[Rule 5-503(F); 5-21-25 CD 8:16:00-8:17:18; 10:01:05-10:02:06]** Defense counsel cross-examined both witnesses at their depositions **[*Id.* 9:01:20-9:28:35 (Cross-examination of Donald Pledger); (10:15:10-10:27:05) Cross-examination of**

Delbert Barrett] The jury observed the deposition cross-examination of both witnesses. **[*Id.*]** The right of cross-examination is "the *most important* element of the right of confrontation[.]" *Sanders*, 1994-NMSC-043, ¶ 22 (emphasis added).

Defendant implies that he would have taken a different "approach to cross-examination in the depositions[.]" **[*See* BIC 3]** This assertion is neither here nor there, as the Confrontation Clause provides for the *procedural right* of cross-examination. *Crawford*, 541 U.S. at 61; *Tsosie*, 2022-NMSC-017, ¶ 24. Defense counsel cross-examined both witnesses under oath, which safeguarded Defendant's procedural right to cross-examination under the Confrontation Clause. The procedural guarantee of cross-examination does *not* encompass Defendant's appellate contentions aimed at his attorney's strategic decisions regarding how he conducted the cross-examination. **[*See* BIC 3]** The Confrontation Clause "*merely* guarantees *an opportunity* for effective cross-examination; it does not guarantee that the defense may cross-examine a witness in whatever way, and to whatever extent, the defense might wish." *State v. Veleta*, 2023-NMSC-024, ¶ 9 (internal citation omitted) (emphasis added).

This Court has long recognized that "even constitutional rights [] may be waived." *Hovey v. State*, 1986-NMSC-069, ¶ 17, 104 N.M. 667. Because Defendant does not mention his knowing, intelligent, and voluntary waiver of face to face confrontation for the depositions **[*See* AB 1-35]**, Defendant necessarily does *not*

allege that the district court's colloquy was defective in any way. *See Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70 (noting that this Court does not consider undeveloped arguments). Thus, Defendant's rights under the Confrontation Clause were not violated because Defendant (1) waived his right to be physically present at the depositions with the knowledge that the deposition testimony could be admitted at trial if the witnesses became unavailable and (2) defense counsel cross-examined both witnesses during the depositions. **[*See* 3 RP 646 (The district court's finding that "admission of the video deposition testimony, which was conducted with the witnesses while there were under oath and subject to cross-examination, will not violate [Defendant's] confrontation rights under the Sixth Amendment.")]**

II. The District Court Properly Found that Donald Pledger and Delbert Barrrett Were Unavailable Pursuant to Rule 11-804(A)(5)(a) NMRA.

A. The Standard of Review and Legal Framework to Establish a Declarant's Unavailability.

Having established that Defendant's right to confrontation was not violated because (1) Defendant waived his right to be physically present at the depositions and (2) defense counsel cross-examined the witnesses, the next step is to analyze the admissibility of the depositions of Donald and Delbert at trial under Rule 11-804(A)(5)(a) and Rule 11-804(B)(1) NMRA. *Tsosie*, 2022-NMSC-017, ¶ 22, *see also* Rule 5-613(B) NMRA ("The Rules of Evidence, so far as they are applicable

and not in conflict with these rules, shall apply to and govern the trial of criminal cases").

Hearsay is a statement that (1) the declarant does not make while testifying at the current trial, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Rule 11-801(C) NMRA. "Hearsay is not admissible *except as provided by these rules* or by other rules adopted by the Supreme Court[.]" Rule 11-802 NMRA (emphasis added). One exception to the rule against hearsay is when the declarant is *unavailable* as a witness. *See* Rule 11-804. A declarant is deemed "unavailable" as a witness in "situations in which the declarant… is absent from the trial or hearing and the statement's proponent has not been able, *by process or other reasonable means*, to procure the declarant's attendance, in the case of a hearsay exception under Rule 11-804(B)(1)[.] " Rule 11-804(A)(5)(a) (emphasis added). In discussing witness unavailability **[*See generally* BIC 29-32]**, Defendant mentions "[t]he burden of showing necessity and exceptional circumstances[.]" **[BIC 31]** This is not the correct standard for *determining unavailability*. *See* Rule 11-804(A)(5)(a). Defendant ostensibly concedes the proper analysis for evaluating witness unavailability is contained in Rule 11-804(A). **[*See* BIC 31]**

"[W]hether there was an adequate showing of unavailability….involves both determining what efforts were made to obtain the presence of the witness, a factual question that is reviewed under *substantial evidence principles affording discretion*

to the trial court, and whether those efforts are sufficient under the constitution, a legal question that is reviewed de novo." *State v. Lopez*, 1996-NMCA-101, ¶ 13, 122 N.M. 459 (emphasis added). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *Martin v. State*, 2025-NMSC-044, ¶ 8 (internal citation omitted).

B. The District Court's Findings.

Before trial, the State presented three witnesses who testified to their efforts to locate Donald and Delbert. **[5-19-25 CD 8:19:57-9:08:38]** After considering the State's efforts, the district court ruled "both witnesses are unavailable under Rule 11-804(A)(5)(a)[.]" **[3 RP 642]** The district court's detailed order described the "actions by the State" constituting "good-faith, reasonable efforts to secure the attendance of the witnesses." **[3 RP 641; *see generally* 3 RP 633-646 (Order Denying Defendant's Motion in Limine to Prohibit the State From Using Deposition Testimony)]**

The Director of Investigations searched numerous RV parks in the Roswell and Ruidoso area looking for Donald and Delbert's 5th wheel camper. **[3 RP 637]** Special Agent Lewandowski searched RV parks in Alamogordo and Tularosa, as well as the campsite in Oliver Lee Memorial State Park. **[3 RP 638]** Agent Lewandowski "searched both men's names on a law enforcement database known as TLO to locate potential addresses for them." **[*Id.*]** All of the addresses in the TLO

predated Delbert's last known address. **[*Id.*]** Delbert is a registered sex offender, and "his last registered address was with the Doña Ana County Sheriff's Office (DASO) listing a shelter in [Las Cruces] as his place of residence." **[3 RP 635]** "Knowing [Delbert] was not living at the shelter address he provided to DASO when registering as a sex offender, the State searched RV parks, campgrounds, truck stops, and similar locations in Chaves, Lincoln, Otero, and Doña Ana Counties." **[3 RP 641]** Officer Marrujo searched truck stops and RV parks in the Las Cruces area. **[3 RP 639]** He also searched the camping areas in Oliver Lee Memorial State Park. **[*Id.*]** The district court noted Officer Marrujo "attempted to contact the witnesses by phone. Previously, both witnesses were responsive to [his] calls, but now neither witness was returning his calls." **[3 RP 638]** Officer Marrujo reached out to Joseph, who "advised he had no contact with the witnesses, and that [Donald's phone] was no longer in service." **[*Id.*]** The State obtained material witness warrants for the witnesses under Rule 5-404 NMRA. **[3 RP 639]** These cumulative efforts by law enforcement satisfy the requirement of Rule 11-804(A)(5)(a). The district court's ruling that the witnesses were unavailable was based on law enforcement's diligent efforts to secure the attendance of the witnesses at trial. **[*See* 3 RP 637-642]**

Although Defendant complains that law enforcement did not attempt to locate Donald and Delbert in Texas **[*See* BIC 7, 8, 30]**, the district court found "there [was] *no credible information* to believe the witnesses [were] in the State of Texas." **[3 RP**

642 (emphasis added)] Furthermore, Defendant ostensibly conceded during closing argument that Donald was unavailable. Defense counsel said, "[Donald's] not believable, he's not truthful. I'm talking about the man whose been *running from* law enforcement for eight months *despite their attempts to get hold of him*. **[5-22-25 CD 4:43:24-34]** Defense counsel later reiterated that "he disappears when the police are looking for him." **[*Id.* 5:03:03-09]** "Disappear[ing]" and "running from law enforcement" certainly substantiates a witness as unavailable under Rules of Evidence. *See* Rule 11-804(A)(5)(a).

III. The District Court Properly Found that the Depositions of Donald Pledger and Delbert Barrett Were Admissible Under Rule 11-804(B)(1).

A. The Standard of Review.

The admission of evidence, such as a videotaped deposition, "is within the sound discretion of the trial court and the trial court's determination will not be disturbed in the absence of an abuse of that discretion." *State v. Haskins*, 2008-NMCA-086, ¶ 26, 144 N.M. 287, *see also State v. Lopez*, 2011-NMSC-035, ¶ 4, 150 N.M. 179 ("[This Court] review[s] the admission of evidence pursuant to an exception or an exclusion to the hearsay rule for an abuse of discretion"). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438

(internal citation omitted). This Court will not find an abuse of discretion unless the ruling of the district court was "clearly untenable or not justified by reason." *Id.*

B. The Former Testimony Exception to the Rule Against Hearsay.

Rule 11-804(B)(1) outlines the "former testimony" exception to the rule against hearsay: "Testimony that (a)[5] was given as a witness at a trial, hearing, or *lawful deposition*, whether given during the current proceeding or a different one; and (b) is now offered against a party who had… an *opportunity and similar motive to develop it* by cross-, or redirect examination" is "*not* excluded by the rule against hearsay *if the declarant is unavailable as a witness*[.]" Rule 11-804(B)(1)(emphasis added). "Whether a party had an opportunity and similar motive to develop testimony" is evaluated on a case-by-case basis. *Lopez*, 2011-NMSC-035, ¶ 6.

C. The District Court Properly Found Defendant Had the Opportunity and Similar Motive to Develop Testimony.

The district court determined "[s]ince [Defendant] had a full *opportunity* to cross-examine the witnesses during the video deposition, and he had the *same motive* during the depositions as he would at trial, the video depositions meet the

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[5] Defendant does not "challenge… the taking of the depositions." **[BIC 13; *see also* 3 RP 642 (Defendant acknowledged that the video depositions were testimony that was given by the witnesses at a lawful deposition.)]** Thus, the State satisfies the first factor for admissibility of deposition testimony of an unavailable witness under Rule 11-804(B)(1)(a).

requirements of former testimony under Rule 11-804(B)(1)." **[3 RP 645 (emphasis added)]**

This Court's discussion in *Lopez*, 2011-NMSC-035, ¶¶ 6-9, regarding a party's motive to develop testimony is instructive. In *Lopez*, the defendant was charged with first degree murder and first degree CSP. *Id.* ¶ 1. At the defendant's preliminary hearing, a crucial witness testified under oath about the events that occurred the night the victim was murdered. *Id.* ¶ 3. Before trial, the district court found that witness was unavailable and permitted the State to introduce his preliminary hearing testimony under Rules 11-804(A)(5) and (B)(1). *Lopez*, 2011-NMSC-035, ¶ 3. At the preliminary hearing, the defendant questioned the witness about what he saw the night the victim died. *Id.* ¶ 8. This Court noted that the defendant's motive for cross-examining the witness at the preliminary hearing was "to show that [the defendant] did not rape and murder [the victim]." *Id.* This Court reasoned that the defendant's motive at trial, which was to demonstrate that he was not guilty of rape and murder, was the same as his motive at the preliminary hearing. *Id.* ¶ 9. This Court concluded that the district court did not abuse its discretion in admitting the preliminary hearing testimony at trial because the defendant had an opportunity and similar motive to cross-examine the witness "at the preliminary as he did at trial." *Id.*

From the inception of this case to closing arguments, Defendant's primary defense theory remained unchanged. Defendant entered a plea of not guilty. **[1 RP 20]** At trial, Defendant intended to demonstrate to the jury he did not commit the crime of first degree murder and tampering with evidence. Accordingly, the district court noted "Defendant had the same motive during the cross examination during the video depositions as he would at trial. Specifically, [Defendant] would want to discredit the witnesses or create doubt about their veracity especially as it relates to Donald Pledger who alleged [Defendant] confessed to killing the alleged victim[.]" **[3 RP 637]** This Court should find that Defendant had an opportunity and similar motive to cross-examine the witnesses at the deposition as he did at trial, and rule that the district court did not abuse its discretion in admitting the deposition testimony of two unavailable witnesses under Rule 11-804(B)(1).

Defendant's reliance on *State v. Garcia*, A-1-CA-32753, mem. op. (N.M. Ct. App. Apr. 29, 2015) (nonprecedential) is misplaced. **[*See* BIC 33, *see also* 3 RP 643-645]** The district court properly observed that the facts in *Garcia* are readily distinguishable from the facts of this case. **[3 RP 644]**. In *Garcia*, A-1-CA-32753, ¶ 2, the defendant was charged with abuse of a resident (physical or great psychological harm) at an assisted living facility. The resident alleged the defendant (an employee at the facility) started punching him and tore his pants. *Id.* Owing to the resident's frail health, the parties stipulated to the taking of a deposition, which

was admitted at trial. *Id.* The jury convicted the defendant. *Id.* ¶ 1. Seven months after the defendant's conviction, the defendant sought a new trial "on grounds that the [assisted living facility] had discovered the missing pants…and an internal investigation report… concluding that [the defendant] had not abused the resident." *Id.* ¶ 3. Importantly, the pants worn by the resident "showed no signs of alteration, ripping, or tearing[.]" *Id.* The district court granted Defendant's motion for a new trial. *Id.* The State sought to introduce the resident's deposition at the second trial because the resident had passed away. *Id.* ¶ 4. The district court excluded the deposition. *Id.* The Court of Appeals upheld the district court's order and noted that the evidence, i.e., the pants, were "discovered[] in a condition that tended to contradict the [resident's] testimony and thereby exculpate [the defendant]." *Id.* ¶ 9.

In this case, the district court rejected Defendant's reliance on *Garcia*, noting that "[t]he newly discovered [evidence] in *Garcia* was indisputably exculpatory." **[*Id.*]** The district court explained:

> Unlike the pants at issue in *Garcia*, the importance of the alleged phone call was always apparent as [Donald] alleged [Defendant] called him and confessed to killing his wife. That the phone records indicate the phone calls between [Defendant] and [Donald] occurred on the evening of February 26, [2024][6] instead of February 25, 2024 as alleged by [Donald] *would not change*

[6] Although the district court's order states February 26, 2025, **[3 RP 645]** the correct date is February 26, 2024. The entirety of the district court's order reflects the district court's understanding that the crime occurred in 2024, not 2025. **[*Id.* 633-645]**

> *the motive* of [Defendant] during his cross examination of [Donald] during the deposition. The *motive would still be* to show [Donald] was not a credible witness, and [Defendant's] alleged confession never occurred. **[3 RP 645 (emphasis added)]**

Without citing the record, Defendant claims that "new and highly material disclosures rendered the deposition cross examination ineffective as a constitutional matter and defeated [Defendant's] opportunity and similar motive to develop the prior testimony by cross-examination." **[BIC 12]** Defendant does not elucidate how the post-deposition "material disclosures" impacted Defendant's opportunity to develop prior testimony. **[BIC 12, *see also* BIC 28 (Defendant did not identify the evidence Defendant received after the deposition, nor did he cite to the record to substantiate the allegation.)]** This Court is reticent to consider undeveloped arguments that do not cite the record. *Elane Photography*, 2013-NMSC-040, ¶ 70; *see also Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451 ("It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence"); *see also* Rule12-318(A)(4) NMRA. If Defendant's allegations are predicated on the phone records that were disclosed after the deposition, the district court noted "[w]hether the phone records contradict [Donald's] testimony is a disputed fact between the parties and one that the jury will ultimately need to decide. However, the records *do show* that [Defendant and Donald] spoke on the phone around the time of the alleged crime." **[3 RP 636 (emphasis added)]**

D. Reading the Rules of Evidence and the Rules of Criminal Procedure In Pari Materia Proves that the District Court Properly Admitted the Deposition Testimony.

Judicial "review of the plain language of a rule in order to ascertain the intent of [this Court] is also guided by [the] review of rules in pari materia. Thus, [this Court is] to read all the provisions of a rule *together with other rules relating to the same matter*[.]" *State v. Ayon*, 2022-NMCA-003, ¶ 12 (internal citations omitted) (emphasis added). This Court recently reiterated "*all* discovery rules [] are liberally construed to effectuate their underlying purpose… The *purpose of discovery* in a criminal case, indeed the purpose of a trial itself, is to ascertain the truth." *State v. Garcia*, 2025-NMSC-030, ¶ 36 (internal citation omitted) (emphasis added). Accordingly, the Rules of Criminal Procedure "shall be construed to secure *simplicity* in procedure[.]" Rule 5-101(B) NMRA (emphasis added).

The Rules of Criminal Procedure expressly incorporate the Rules of Evidence. Rule 5-613(B) NMRA ("The Rules of Evidence, so far as they are applicable and not in conflict with these rules, shall *apply to* and *govern the trial* of criminal cases") (emphasis added). Rule 5-503 is a discovery mechanism. Rule 11-804(B)(1) delineates the two-factor test for the admissibility of former testimony (e.g., lawful depositions *taken in accordance with* Rule 5-503) at trial if the declarant is unavailable as a witness. *See* Rule 11-804(B)(1)(a) (enumerating "lawful deposition" as an example of "former testimony"). Rule 11-804(B)(1) states:

(B) **The exceptions**. The following are *not excluded* by the rule against hearsay *if the declarant is unavailable* as a witness:
(1) **Former testimony**. Testimony that
(a) was given as a *witness* at a trial, hearing, or *lawful deposition*, whether given during the current proceeding or a different one; and
(b) is now offered against a party who had… an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
Id. (emphasis added).

Put simply, the Rules of Criminal procedure allow for the taking of depositions, and the Rules of Evidence, which govern how a criminal trial is conducted, permit the admission of deposition testimony under the "former testimony" exception to the rule against hearsay when a witness is unavailable at trial. That is precisely what occurred in this case. The State deposed two witnesses in accordance with Rule 5-503. The district court correctly followed the plain language of the Rules of Evidence because testimony that was given at a lawful deposition is admissible in a criminal trial under the plain meaning of Rule 11-804(B)(1).

Defendant wonders "what are criminal depositions (of non-child-victim deponents) *for*, if not use at trial in lieu of live testimony?" **[BIC 19 (emphasis in original)]** Defendant refused to answer his own question: "[T]he actual answer—'there really isn't one'— is in fact a good explanatory fit[.]" **[*Id.*]** Defendant's claim that "there really isn't [an answer]" **[BIC 19]** ignores the plain language of the Rules of Evidence and the Rules of Criminal Procedure, which together permit the

introduction of former testimony—including depositions—at trial in carefully delineated circumstances.

Defendant's theory that "non-child-victim depositions cannot be admitted… at trial" **[BIC 13]** is incorrect because it directly conflicts with the plain language of the Rules of Evidence. *See, e.g.*, Rule 11-804(B)(1) (explaining the circumstances wherein former testimony—including depositions—is admissible at trial if the declarant is unavailable as a witness). Defendant's reliance on *State v. Berry*, 1974-NMCA-018, 86 N.M. 138, is correspondingly ineffective. **[*See Id.* 13-15, 21-23]** Defendant cites *Berry* to question whether Rule 11-804(B)(1) "is, on its own, enough to warrant admission of a deposition… if that rule's requirements are met." **[BIC 21]** According to Defendant, "[the] answer is no. The *Berry* court squarely held that 'the Rules of Criminal Procedure… contain the ***only authority*** for the use of depositions in criminal proceedings.'" **[BIC 21 (Emphasis in BIC)]** Defendant's selective reading of *Berry* omits critical context. The trial in *Berry* was held on February 20, 1973. *Berry*, 1974-NMCA-018, ¶ 5. The Rules of Evidence *did not exist* on February 20, 1973. *Ammerman v. Hubbard Broadcasting, Inc.*, 1976-NMSC-031, ¶ 5, 89 N.M. 307. The Rules of Evidence became *effective* July 1, 1973, for all cases *filed on* or *after* that date. *Id.*

This Court should decline Defendant's encouragement for reliance on *Berry*, a case wherein the (nonexistent) Rules of Evidence were inapplicable at trial, as it would be inherently antithetical to the current Rules of Criminal Procedure. *See* Rule 5-613(B), *see also id.* comm. cmt. ("This rule was amended effective July 1, 1973, upon the adoption of the Rules of Evidence).

Defendant mistakenly claims that a 2000 amendment to the Rules of Criminal Procedure "returned New Mexico… to the same status that this Court described in [1963]." **[BIC 18]** In essence, Defendant claims that because Rule 5-503 is silent as to when a deposition can be admitted at trial, that non-child-victim depositions should not be admitted at trial. Defendant's claim fails because the Rules of Evidence—which govern criminal trial proceedings in accordance with Rule 5-613(B)—expressly permit lawful depositions to be admitted at trial. *See* Rule 11-804(B)(1). This Court should reject Defendant's implicit request to ignore (1) binding precedent, (2) the *current* Rules of Criminal Procedure, and (3) the Rules of Evidence. "[R]eturn[ing] New Mexico" to the legal landscape of 1963 would be contrary to reason.

First, if this Court were to return this State to its 1963 jurisprudence, that would require this Court to turn a blind eye to *Crawford* and its progeny, an

untenable result. This Court adheres to and interprets the precedent of the United States Supreme Court. *State v. Lizzol*, 2007-NMSC-024, ¶ 7, 141 N.M. 705.

Second, Defendant's fixation on a repealed rule of criminal procedure is unpersuasive. **[*See* BIC 15-16, 18 (Discussing Rule 5-503(N) NMRA (1992)]** The Rules of Criminal Procedure state, "*These* rules govern the procedure in the district courts of New Mexico in all criminal proceedings." Rule 5-101(A) NMRA (emphasis added). Accordingly, the district followed the rules of procedure that are *currently in effect*. **[*See, e.g.*, 3 RP 633-646]** This Court should not partake in Defendant's reliance on the New Mexico Rules of Civil Procedure. **[*See* BIC 16, 20, 22-24, 35]** Upon this Court's adoption of the Rules of Criminal Procedure in 1972, this Court "provided in part that any rules of civil procedure governing criminal proceedings are hereby repealed." *Allen v. Lemaster*, 2012-NMSC-001, ¶ 14. Defendant's reliance on Florida's Rules of Criminal Procedure **[*See* BIC 15, 20-21]** is similarly unavailing. *See State v. Griego*, A-1-CA-41064, mem. op. ¶ 21 (N.M. Ct. App. Apr. 7, 2025) (rejecting the defendant's Rule 5-503 claim where his argument "relied almost exclusively on Florida case law and Florida rules of criminal procedure").

Third, the Rules of Evidence did not exist during the 1963 legal framework that Defendant relies on. This Court adopted the New Mexico Rules of Evidence by

order on April 26, 1973. *Ammerman*, 1976-NMSC-031, ¶ 5. Given the indispensability of the Rules of Evidence in our modern criminal law jurisprudence, this Court should reject Defendant's claim that New Mexico has "returned… to the same status" this Court described in 1963. **[*See* BIC 18]** In sum, the district court did not abuse its discretion in admitting the lawful depositions of two unavailable witnesses under Rule 11-804(B)(1).

CONCLUSION

The State respectfully requests that this Court affirm Defendant's convictions for first degree murder and tampering with evidence.

Respectfully submitted,

RAÚL TORREZ
Attorney General

/s/ Christa Street
Christa Street
Assistant Solicitor General
201 Third St. NW, Suite 300
Albuquerque, New Mexico 87102
(505) 974-5889

CERTIFICATE OF SERVICE

I certify that, on March 2, 2026, I filed a true and correct copy of the foregoing Answer Brief electronically through the Tyler Host E File and Serve System, which caused opposing counsel to be served by electronic means.

/s/ Christa Street

Assistant Solicitor General