IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

SHAUN LEFLEUR,

Defendant-Appellant.

No. S-1-SC-40965
Direct Appeal from the
Twelfth Judicial District Court
No. D-1215-CR-2024-00133
The Honorable John P. Sugg

DEFENDANT-APPELLANT'S BRIEF IN CHIEF

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Oral Argument Is Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Unenacted Legislation

New Mexico Appellate Cases

Other Cases

Secondary Sources

INTRODUCTION

Defendant-Appellant Shaun LeFleur was convicted *by deposition* of the first-degree murder of his wife, with the two most important witnesses against him—Donald Pledger and Delbert Barrett—absent from the trial entirely, their prior testimony instead played for the jury by video, over the strenuous objections of the defense. To that end, two normally important and contested procedural bars to a successful appeal are clearly satisfied here, as the issues in this appeal were plainly preserved and ruled upon below, and the testimony in question was so vitally important to the case that there is no serious argument for harmless error.

SUMMARY OF PROCEEDINGS

This case arises out of the early 2024 death of Mr. LeFleur's wife, Nancy LeFleur. **[RP 1]** The investigation began in April of that year when a friend of Donald Pledger and Delbert Barrett, a gay couple who lived in their 'fifth-wheel' RV[1] in Oliver Lee State Park roughly 15 miles south of Alamogordo, cold-contacted New Mexico State Police to tell them that Mr. Pledger had information about a murder. **[RP 321-22]** After making the unwanted (from Mr. Pledger's perspective)

[1] This is basically just an RV towed by a separate (detachable) truck—rather than having the vehicle and the living compartment fully integrated into a single unit—using a special horseshoe-shaped coupling device carried in the bed of the towing truck (called a 'fifth-wheel coupling'), rather than a standard tow hitch/ball. *See*, *e.g.*, Fifth-Wheel Coupling, Wikipedia.com, https://en.wikipedia.org/wiki/Fifth-wheel_coupling (last visited Jan. 5, 2026); Rule 11-201(D) ("The court may take judicial notice at any stage of the proceeding."). They are not rare, but they are somewhat distinctive looking.

introduction to police, Mr. Pledger eventually disclosed that he had gone to the campsite-living quarters of a friend of his, Mr. LeFleur, one Sunday night in February and seen Mr. LeFleur digging a shallow grave for his wife, whom Mr. Pledger observed to be "deceased with blood on her face." **[RP 322]** Mr. Pledger told police that Mr. LeFleur kept asking Ms. LeFleur's body "why did you make me do this?," and that he confessed to Mr. Pledger that he had put Ms. LeFleur on her knees and shot her repeatedly. **[RP 322]** Mr. Pledger openly acknowledged that Mr. LeFleur made no threats against him at that time, but that he nonetheless did not do anything to report his observations. **[RP 328]**

Messrs. Pledger and Barrett are not homeless, but have been called at various times in this case housing insecure, drifters, or itinerant campers; as a result, the State and the defense agreed to take their depositions in advance of trial—with the defense nonetheless making crystal clear on the record that the introduction of those depositions at trial would be inappropriate. **[RP 105]** ("[W]e have agreed to depose two potential witnesses who are housing insecure so we preserve the testimony we don't agree that it will take the place of in court testimony . . . ."). The depositions were taken August 5, 2024, **[RP 515]**, which was not even at the one-fourth mark, temporally,[2] between the May 7, 2024 indictment, **[RP 1]**, and the May 19, 2025

[2] The depositions were taken 90 days after the indictment, and the case tried 377 days post-indictment.

first day of trial. Defense counsel later described his approach to cross-examination in the depositions as follows:

> [I]f you alienate the witness and if you impeach them and if you try to ask them very, very tough questions, they'll bundle up and not give you additional information, which is appropriate in a trial setting in front of a jury because you want their behavior to argue to the jury. But in a deposition setting, [a major purpose is discovery, and] . . . [t]here's no judge and no jury to make decisions [on objections and credibility]. And the witness is not typically subject to very difficult questions, especially impeachment evidence, which if we know that they're saying something that is wrong or inaccurate, typically Defense does not then impeach them.

[5-16-25 FTR 4:32] As such, the depositions were generally inquisitory in substance and tone, with defense counsel rarely directly confronting or challenging the witness, much like civil discovery depositions. **[RP 550-86]**

In the leadup to trial, the State repeatedly (at least five times) disclosed Messrs. Pledger and Barrett with an address of "C/O Office of the District Attorney, Alamogordo, NM 88310." **[RP 12, 131, 189, 234, 276, 305 & 427]** *Contra* Rule 5-501(A)(5) NMRA ("[T]he state shall disclose or make available to the defendant . . . a written list of the names and addresses of all witnesses . . . ."). Finally, roughly a month before trial, the State filed a notice indicating its intent to use the two men's depositions in lieu of live testimony at trial. **[RP 278]**

Also after the depositions and in the leadup to trial, the District Court found that "the State provided the defense team with a significant amount of discovery that

was not available at the time of the video depositions. Most significantly, the State has now disclosed phone records for Mr. Pledger that might contradict some of his testimony." **[RP 636]** The phone records in question showed that Mr. Pledger's phone was off entirely during the days surrounding the alleged murder, and cell site location data showed that he "was at the site of the alleged murder for a significantly longer period of time than Mr. Pledger [] claimed" to police and in his deposition. **[RP 637]**

The State was open about the fact—to such an extent that Mr. LeFleur genuinely does not expect to see a harmless-error argument advanced on appeal—that "Donald Pledger[and] Delbert Barrett . . . [we]re crucial in the State's case. . . . [They] have vital information that relate[s] to the charges of murder . . . and are material witnesses." **[RP 324, 330, 336, 373, 379 & 385]** In its attempt to prove up the two men's unavailability as witnesses, the State called two of its in-house investigators, E.J. Fouratt and William Lewandrowski, and a New Mexico State Police Officer named Eric Marrujo.

Mr. Fouratt, after forgetting the first name of one of the two men he had been looking for, **[5-19-25 FTR 8:22:25-37]**, testified that he had confined his search to RV parks in Roswell and, on a single occasion, Ruidoso Downs, **[5-19-25 FTR 8:27:24-37 & 8:28:03-04** (Q. "Anywhere else?" A. "No.")**]** No reason was given for the focus on Roswell except for the fact that Mr. Fouratt "currently live[s] in

Roswell, . . . [and so] took it upon [him]self to go look at many of the RV parks in Roswell." **[5-19-25 FTR 8:21:42-51]** While Mr. Fouratt initially claimed that his office (actually just Mr. Lewandrowski and himself) had spent a month trying to find the two men, it quickly became obvious that this did not refer to anything close to a month of full-time, or even significant, work. For example, Mr. Fouratt never in this whole period had a photograph of either of the men he was looking for, **[5-19-25 FTR 8:28:30-58]**, but instead looked exclusively for the men's fifth-wheel RV and pickup truck, of which he did have photographs, **[5-19-25 FTR 8:24:04-09]**.

Mr. Fouratt initially suggested he spent a day (April 21, 2025) driving through "six or seven" RV parks in Roswell, **[5-19-25 FTR 8:24:43-45]**, before acknowledging that the parks in Roswell are small and "it takes [a] very short time to drive through and look." **[5-19-25 FTR 8:25:40-45]** When asked if he had looked anywhere in Las Cruces, Mr. Fouratt said that he "d[id]n't have any firsthand knowledge, but [] was told that that was covered by the state police." **[5-19-25 FTR 8:27:41-53]** Mr. Fouratt's entire direct examination lasted under eight minutes. **[5-19-25 FTR 8:20:41-8:28:12]**

On cross-examination, it was revealed that the State knew that Mr. Barrett was a registered sex offender but made no attempt to contact his probation officer or run a CLEAR (commercial database) search for him. **[5-19-25 FTR 8:29:32-48]** When asked what searches for addresses or personal information he had personally done,

Mr. Fouratt acknowledged that he had not done any. **[5-19-25 FTR 8:29:51-30:09]** And, when pressed even slightly for an actual inventory of his time, Mr. Fouratt acknowledged that he had driven through some RV parks on one day and *by* some others on one other day, and that was it:

> Q. You testified that for the Roswell ones, you said you searched all of them on April 21st and then again some of them on May 8th, is that correct?
>
> A: No, May 8th was when I was in Ruidoso Downs—
>
> Q. Okay, so one day there and one day—
>
> A. —searching those. Correct.
>
> Q. Okay. So just—
>
> A. But I travel through Ruidoso daily and Ruidoso Downs daily and many of those I can see from the highway.
>
> Q. Okay, but you didn't actually go in.
>
> A. I have not gone in every day, no.
>
> . . . .
>
> Q. So in terms of your efforts to go and actually search at the parks you did May 8th in Ruidoso Downs on Monday and then you did April 21st at Roswell?
>
> A. Correct.

[5-19-25 FTR 8:30:20-31:12] Finally, Mr. Fouratt acknowledged that he knew the men were from Texas and that their vehicles were registered in Texas, but that he had not taken any efforts whatsoever, direct or indirect, to ascertain whether the men were back home in Texas. **[5-19-25 FTR 8:31:16-34** (Q. "But you didn't make any efforts in Texas." A. "No, sir.")]. Strangely, Mr. Fouratt did not bring subpoenas with him on his supposedly intensive search, so, even if he had found the men, he "would've had to have somebody come serve them because I did not have [subpoenas] with me." **[5-19-25 FTR 8:33:11-25** ("[W]e were looking for them to serve them with subpoenas, at a minimum." Q. "So did you have those subpoenas . . . ?" A. "No, I would've had to have somebody come serve them because I did not have them with me.").**]**

The State's second witness, Mr. Lewandrowski, was similar. He used law-enforcement databases to look up a number of phone numbers associated with Mr. Pledger, finding one that had a voicemail message verifying that it was Mr. Pledger's phone, but Mr. Pledger never called Mr. Lewandrowski back, and Mr. Lewandrowski made no moves to pull cell site location data for the phone. **[5-19-25 FTR 8:36:24-37:07]** In terms of physical search, he "went driving around the Alamogordo area, the area between Alamogordo and Tularosa, the Tularosa area, out in the desert," and "even went all the way back to Oliver Lee [where the two had

been staying for a long time prior to and during the events forming the basis for this case] to see maybe if they were camped out there." **[5-19-25 FTR 8:37:42-56]**

Like Mr. Fouratt, Mr. Lewandrowski had made absolutely no attempt to look for the two witnesses in Texas, and when asked "if [he] could tell [us] a little bit about how it was that law enforcement was trying to track down Donald and Delbert in Texas," Mr. Lewandrowski did not know, stating that he was "not a hundred percent sure on that one," and having nothing further to add. **[5-19-25 FTR 8:40:12-26]** (As a result—and this is obviously important to this appeal—there is no evidence that any efforts were made to find Messrs. Pledger and Barrett in Texas.) He acknowledged, however, that when he ran TLO and CLEAR on the two men for various addresses affiliated with them, "they were all primarily in Texas." **[5-19-25 FTR 8:40:04-11 & 8:41:06-22** (Q. "Did you follow up with any of those Texas addresses, either yourself or did you instruct another law enforcement agency to follow and to see if you can locate them there?" A. "I did not." Q. "Did you make any efforts at all in Texas apart from these two addresses?" A. "I didn't.") **& 8:42:11-25]**

Mr. Lewandrowski "tried to search him through the sex offender registry, but [he] d[id]n't know if [he] was doing it properly, because nothing was coming up for [him]." **[5-19-25 FTR 8:43:30-38]** Finally, he "tried contacting Deputy Gifford with the Dona Anay County Sheriff's Office" to run additional searches—she is with

her department's "intel unit" and has more investigatory resources at her disposal—and coordinate a plan for searching Las Cruces, but Deputy Gifford never called him back. **[5-19-25 FTR 8:43:47-44:32]** When asked if he "contacted any associates of" the two men or "tr[ied] to find their families or anyone else," Mr. Lewandrowski answered plainly, "No." **[5-19-25 FTR 8:46:26-43]**

Ofc. Murillo, the State's final witness, was the one who had located the two men a year earlier to serve them with their deposition subpoenas, "out of pure luck, [] just happen[ing] to drive up to a rest area [where] they were off of I-10" in the Las Cruces area. **[5-19-25 FTR 8:51:28-52:03]** Ofc. Murillo was the only one to attempt to utilize the fact that Mr. Barrett was a sex offender, contacting his supervising officer but then pursuing almost no follow-up, let alone follow-through:

> Q. So your testimony today was that they don't, in Doña Ana, they don't require any sort of monthly check-in or they don't require a monthly phone call, so what are the responsibilities, then? Did he have to contact him at all?
>
> A. So that's from what he told me. Like I said, I don't know how often they have to check in, but he told me that they're not required to answer their phone and show up at a moment's notice. So that's what he explained to me.
>
> Q. Okay. Well, did you ask him what his check-in schedule is or when his next appointment was?
>
> A. I believe, from what I remember, I want to say it was like every six months, it was something, I can't remember what exactly he told me.

Q. Okay. Have six months elapsed since this conversation, do you remember?

A. Yes.

Q. Okay. So you didn't get a date, though, for him when he was supposed to check in from the officer?

A. If I did, I don't remember it.

. . . .

Q. Okay. And even though you received a date, you did not follow up on that date with the officer?

A. I don't know if I received an actual date. It was more of like a timeframe, but no, I didn't.

Q. Did you follow up with this officer around the timeframe?

A. No.

. . . .

Q. Did you ask [the supervising officer] if [Mr. Barrett] showed up for his check-in, the six month or whatever timeframe?

A. I don't remember.

Q. Okay. Did you try doing any sort of cell phone research, like a GPS monitoring or anything to find out if their cell phones were located somewhere?

A. No.

[5-19-25 FTR 9:00:35-9:03:17]

The District Court ultimately allowed the deposition testimony. **[RP 633-646]** While it acknowledged that the Mr. LeFleur's counsel "may have approached his cross-examination differently than he would have with the records," the District Court reasoned that, fundamentally, he had the same "motive" with and without the information, because, either way, he would want to "discredit the witnesses or create doubt about their veracity." **[RP 637]** The fact that Mr. LeFleur did not have any extrinsic evidence to support such an impeachment (or even guide counsel as to the right questions to ask) was, in the view of the District Court, immaterial.

Mr. LeFleur was convicted of first-degree murder at trial, and this appeal follows.

ARGUMENT

Mr. LeFleur's conviction by deposition was flatly inconsistent with the Rules of Criminal Procedure and Evidence and the Confrontation Clauses of the United States and New Mexico constitutions. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. First, under a plain reading of the Rules of Criminal Procedure and state statutes, there is simply no basis to use a deposition, in lieu of live testimony, against a criminal defendant, except in narrow, well-defined circumstances not applicable here. Second, admission of deposition testimony at trial violates a criminal defendant's confrontation rights under both the state and federal constitutions unless the State can satisfy the requirements of *Crawford*, which it failed to do here. Third, even if the use of deposition testimony at trial passes muster constitutionally and procedurally, the State failed to show "necessity" and "exceptional circumstances"—and indeed could not even meet the notably lower standard for admissibility under Rule 11-804, because the witnesses were not shown to be "unavailable" and new and highly material disclosures rendered the deposition cross-examination ineffective as a constitutional matter and defeated Mr. LeFleur's "opportunity and similar motive to develop [the prior testimony] by . . . cross-[]examination." Rule 11-804(B)(1)(b).

If this case only required the Court to decide the propriety of a district court's decision to permit or deny the taking of a deposition, it would be a discovery ruling

subject to abuse-of-discretion review. *See, e.g., State v. Layne*, 2008-NMCA-103, ¶ 6, 144 N.M. 574, 189 P.3d 707 (analyzing Rule 5-503 NMRA). In this case, however, as in *State v. Berry*, the challenge is not to "the taking of depositions" but to their subsequent use at trial. 1974-NMCA-018, ¶ 3, 86 N.M. 138, 520 P.2d 558. "The admissibility of evidence as an exception to the hearsay rule is separate from the objection based on confrontation grounds," *State v. Henderson*, 2006-NMCA-059, ¶ 8, 139 N.M. 595, 136 P.3d 1005; in the past, this Court has first considered the application of the Rules of Evidence and, only if those Rules were satisfied, turned next to the constitutional issue under a *de novo* standard, *see State v. Lopez*, 2011-NMSC-035, ¶¶ 4, 10, 150 N.M. 179, 258 P.3d 458.

I. Under the Rules of Criminal Procedure, non-child-victim depositions cannot be admitted against a defendant in lieu of testimony at trial.

At common law, parties in criminal cases had no right to take depositions. *See State v. Berry*, 1974-NMCA-018, ¶ 10, 86 N.M. 138, 520 P.2d 558 (citing *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, ¶ 7, 72 N.M. 50, 380 P.2d 196). For decades, New Mexico courts were "without jurisdiction to permit" depositions in those cases because no rule or statute authorized an exception to the common-law prohibition. *Armijo*, 1963-NMSC-057, ¶¶ 7-9. That first changed with the 1973 adoption of Rule 29 of the New Mexico Rules of Criminal Procedure. *See* NMSA 1953, § 41-23-29 (Supp. 1973).

In the 1970s, Rule 29 set out the circumstances in which depositions could be taken. It also described the (even narrower) circumstances in which they could be admitted at trial "as though the witness were then present and testifying":

> (1) If the witness is dead;
>
> (2) If the witness is unable to attend to testify because of illness or infirmity;
>
> (3) If the party offering the deposition has been unable to procure the attendance of the witness by subpoena;
>
> (4) If the witness is out of the state, his presence cannot be secured by subpoena or other lawful means, and his absence was not procured by the party offering the deposition; and
>
> (5) To contradict or impeach the witness.

Berry, 1974-NMCA-018, ¶ 4 (quoting NMSA 1953, § 41-23-29(n) (Supp. 1973)). Compliance with these rules determined admissibility because § 41-23-29(n) "is the only authority for the use of depositions in criminal proceedings. The trial court had no authority, apart from the rule, to allow the deposition to be used at trial." *Id.* ¶ 11; *see also State v. Cordova*, 1983-NMCA-144, ¶ 12, 100 N.M. 643, 674 P.2d 533 ("The taking and use of depositions must be authorized under Rule 29 and used in compliance with the rule. Because the use of depositions constitutes an exception to the right of confrontation, strict compliance with Rule 29 is required.").

Rule 29 eventually developed into Rule 5-503 NMRA. The newer rule "was derived from Rule 1.220(f) of the Florida Rules of Criminal Procedure." Rule 5-503 NMRA cmte. cmt. (1992). Like Rule 29, Rule 5-503 contained a provision for the "[u]se of depositions" in criminal trials. *Compare* 1953, § 41-23-29(n), *with* Rule 5-503(N) NMRA (1992). It allowed depositions to be admitted only if: "(1) the witness is unavailable, as unavailability is defined in Paragraph A of Rule 11-804 of the Rules of Evidence; (2) the witness gives testimony at the trial or hearing inconsistent with the witnesses' deposition; or (3) it is otherwise admissible under the Rules of Evidence." *Id.* As with the prior version of the rule, Rule 5-503 drew a distinction between "the *taking* of the deposition of any person other than the defendant," Rule 5-503(B) (1992) (emphasis added), and "*[u]se* of depositions" as evidence at trial, *id.* at (N) (emphasis added); *see also Berry*, 1974-NMCA-018, ¶ 3 ("Subdivision (a) provides for the taking of depositions. No issue is raised concerning the taking of the deposition. Subdivision (n) states when a deposition may be used."). Admissibility continued to be solely governed by Paragraph N. *Cf. id.* ¶ 11 ("Subdivision (n) of that rule is the only authority for the use of depositions in criminal proceedings.").

Paragraph N "has not been a part of Rule 5-503 since 2000," when the rule was amended to remove all references to the depositions' use at trial. *State v. Foster*, 2003-NMCA-099, ¶ 17, 134 N.M. 224, 75 P.3d 824; *see also* Rule 5-503 NMRA

(2000). According to the annotations, the 2000 amendment that eliminated this paragraph was "made to track District Court Civil Rule 1-030 NMRA," the civil rule governing depositions as a discovery device. *See* Rule 1-030 NMRA. The Rules of Civil Procedure contain a separate rule outlining when such depositions can be used at trial: Rule 1-032 NMRA (2005). Like Rule 1-030, then, Rule 5-503 in its current form does not purport to explain when (or if) depositions may be admitted at trial. In the Rules of Criminal Procedure, the rule that specifies standards for depositions' "[u]se at trial" is Rule 5-504 NMRA (2025).

Rule 5-504(B) does allow the State to admit deposition testimony against a defendant in lieu of live testimony, but it does so only under extremely limited circumstances: the defendant must be charged with criminal sexual penetration or criminal sexual contact with a child under sixteen, the child must be "unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm," the deposition must have been "presided over by a district judge" with the defendant present and represented by counsel, and the defendant must have had "an adequate opportunity to cross-examine the child." The depositions must be videotaped and are otherwise subject to the Rules of Evidence. *See* Rule 5-504(C). This exception to the disfavored admission of deposition testimony in criminal trials (which was prohibited for most of the State's history, *see Armijo*, 1963-NMSC-057, ¶¶ 7-9) has statutory grounds, which explicitly allow depositions to "be viewed and

heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim." NMSA 1978, § 30-9-17(A) (2008). The Legislature has in fact adopted an entire statutory scheme[3] to balance the confrontation rights of criminal defendants with the rights of "child witnesses." *See* NMSA 1978, § 38-6A-1 *et seq*. The Uniform Child Witness Protective Measures Act requires the State to satisfy a high burden of proof before it may use a videotaped deposition in lieu of testimony "in an open forum in the presence and full view of the finder of fact" and "face-to-face with the defendant." NMSA 1978, § 38-6A-5(A) (2012). The defendant may challenge that showing at a hearing, and the district court must enter a detailed order specifying its findings, conclusions, and the logistical conditions that apply to the ruling. *See* NMSA 1978, § 38-6A-4, -7 (2012).

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[3] While this Court's *Ammerman* doctrine is sometimes cavalierly described as rendering unconstitutional all attempts by the Legislature to enact rules of judicial procedure, the doctrine is significantly more complicated than that, particularly when the Legislature's purpose is not merely to affect judicial functions but to advance interests outside of the courtroom, *see*, *e.g.*, *Sw. Cmty. Health Servs. v. Smith*, 1988-NMSC-035, 107 N.M. 196, 755 P.2d 40 (effectively modifying, rather than striking down, the judicial-admissibility provisions of the Review Organization Immunity Act, NMSA 1978, §§ 41-9-1 to -7 (ROIA), noting that "[w]hich branch must yield to the other depends upon the circumstances of each individual case[, and a]n exercise of judicial discretion is called upon in the balancing of those interests"), and it is furthermore understood that legislative statutes affecting judicial procedure remain operative until expressly struck down, *see* Rule 1-091 NMRA ("All statutes relating to pleading, practice and procedure in judicial proceedings . . . enacted by any session of the legislature relating to said subjects, or any of them except as any of said statutes heretofore may have been or hereafter may be amended or vacated by order of this court, shall remain and be in effect and have full force and operation as rules of court."), perhaps exclusively by this Court, *see* N.M. Const. art. VI, § 3 (granting the Supreme Court alone "superintending control over all inferior courts").

There is no equivalent statute or rule providing for other witnesses to testify by deposition in lieu of live, face-to-face testimony at trial. Some legislative efforts to expand § 30-9-17's reach to witnesses other than children alleged to be victims of a sex crime have been unsuccessful. *See* H.B. 347 (N.M. 2005 Reg. Sess.) (titled "Electronic Depositions in Certain Cases"); H.B. 355 (N.M. 2007 Reg. Sess.) (titled "Electronic Recording of Certain Depositions"); *see also* H.B. 347 Fiscal Impact Report at 2 (Mar. 15, 2005) (noting the bill was opposed on the grounds that the protection "need not be afforded to other witnesses or adult victims and may run afoul of the constitutional right to confront witnesses."). The strict limits of the exception underscore that, in criminal cases, the use of deposition testimony carries serious implications for a defendant's right of confrontation, so "[c]ircumstances permitting the use of depositions at trial must be exceptional." *Cordova*, 1983-NMCA-144, ¶ 12.

In summary, when the 2000 amendment removed Paragraph N of 5-503, it returned New Mexico—except for in cases of child victims, as outlined above—to the same status that this Court described in *Armijo*.[4] 1963-NMSC-057, ¶¶ 7-9. To address the obvious question—'so then what are criminal depositions (of non-child-

[4] To state the obvious, the elaborate procedures attendant to child-deponents are not designed to apply *on top of* (some kind of extra-textual/common-law) 'normal' procedures applicable to other witnesses: absolutely everything in the legislative record, as well as common sense, indicates that these rules were designed to make things easier for, and more favorable to, child victims—not to single them out for harsher treatment.

victim deponents) *for*, if not use at trial in lieu of live testimony?'—there are several perfectly adequate answers. It should first be noted that all that is necessary here is a 'perfectly adequate' explanation, not a great one: criminal depositions are in fact barely ever used. So this is a bit like asking what the irreplaceably unique practical value of the Rule 1-031 deposition by written questions is: they are barely ever taken, so the actual answer—'there really isn't one'—is in fact a good explanatory fit for the real-world usage.

Despite their limited usefulness, non-child-victim criminal depositions are not a complete legal nullity (*i.e.*, completely duplicative of pretrial interviews in their usefulness, despite being much harder to get in the first place). First, if a deposition is taken and the deponent later testifies inconsistently at trial, the prior deposition testimony can, under Rule 11-801(D)(1)(a), be admitted for the truth of the matter, and not just for impeachment (as is the case with pretrial interviews). *See* Rule 11-801(D)(1)(a) ("A statement that meets the following conditions is not hearsay: . . . The declarant testifies and is subject to cross-examination about a prior statement, and the statement [ ] is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]"). As a practical matter, this means that if a key witness, whose testimony on a point is necessary to get the State's case above the sufficiency

threshold, testifies inconsistently with his pretrial testimony, the prior taking of a deposition rather than a pretrial interview could save the State's case from a JNOV.

Second, by virtue of being under oath, a deposition yields marginally better discovery than a pretrial interview at which a witness can technically lie with impunity. That difference will not be compelling for the vast majority of witnesses—most people are either going to tell the truth in either a deposition and an interview, or lie in both—but in some cases it might be. So maybe the non-child-victim deposition is principally a discovery tool. While this is at odds with most jurisdictions' (including the federal courts') conceptualization of the criminal deposition, there is one major exception, and it happens to be the state after which New Mexico has modeled its criminal-deposition rules from the very beginning: Florida. The Florida deposition rule is a mechanism for "discovery depositions," not a replacement for trial cross-examination. *See, e.g.*, Howard Dimmig, *Deposition Reform: Is the Cure Worse Than the Problem?*, 71 Fla. B.J. 52, 52 (Aug. 1997). As in New Mexico, "Florida's criminal deposition rules mirror its civil deposition rules." Chesa Boudin & Eric S. Fish, *Towards Pretrial Criminal Adjudication*, 66 B.C.L. Rev. 1135, 1181 (2025); *see also* Rule 5-503 NMRA (2000) (noting, in the annotations, that the amendment in 2000 was intended "to track District Court Civil Rule 1-030 NMRA"). The Florida Supreme Court has held that discovery depositions are "not designed as an opportunity to engage in adversarial

testing of the evidence against the defendant, nor is the rule customarily used for the purpose of cross examination. Instead, the rule is used to learn what the testimony will be and attempt to limit it or to uncover other evidence and witnesses." *Blanton v. State*, 978 So. 2d 149, 154-55 (Fla. 2008) (citing *State v. Lopez*, 974 So. 2d 340 (Fla. 2008)). Even though the defense counsel in *Blanton* did depose the witness before trial, the Florida Supreme Court disagreed that it was just "an opportunity squandered," writing that "[a] defendant cannot be 'expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the taking of the deposition.' This is especially true if the defendant is 'unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements.'" *Id.* at 154-56 (quoting *State v. Basiliere*, 353 So.2d 820, 824-25 (Fla.1977)).

Finally, there exists the question whether Rule 11-804(B)(1), the former-testimony exception to the hearsay rule, is, on its own, enough to warrant admission of a deposition—as it is with, say, preliminary-hearing testimony—if that rule's requirements are met. The answer is no. The *Berry* court squarely held that "the Rule[s] of Criminal Procedure . . . [contain t]he ***only authority*** for the use of depositions in criminal proceedings." 1974-NMCA-018, ¶ 11 (emphasis added). While that holding is old (some would say seminal), Rule 804(B)(1) of the New Mexico Rules of Evidence existed back then the same as it does now, *see, e.g., State*

v. Mann, 1975-NMCA-045, ¶¶ 8-22, 87 N.M. 427, 535 P.2d 70, and *it* was not held to be the sole authority permitting the introduction of deposition testimony in lieu of live testimony at trial; the *Mann* court even doubled down on the statement that "there must be strict compliance with Rule 29(n)," in the face of an argument for admission under Rule 804, *id.* ¶ 16. And in *McGuinness v. State*, 1979-NMSC-006, 92 N.M. 441, 589 P.2d 1032, this Court held that, where a witness who had earlier been deposed asserted the privilege against self-incrimination at trial, he was unavailable within the meaning of Rule 11-804, and "the deposition would not be excluded because of the hearsay rule. However, the fact that the deposition was not to be excluded as hearsay does not authorize its admission if it is excludable on other grounds. We find the deposition was excludable because of N.M.R. Crim. P. 29," which only allow[ed] "for the use of a deposition at trial 'if the party offering the deposition has been unable to procure the attendance of the witness by subpoena.'" *Id.* ¶¶ 12-13 (brackets omitted).

Even in the civil context, it is ultimately Rule 1-032, not 11-804(B)(1), that analytically dominates admissibility of depositions: it incorporates by reference "the Rules of Evidence applied as though the witness were then present and testifying," but then sets its own standards for when the deposition can be treated as live trial testimony in the first place—and some of these standards are duplicative of Rule 11-804(B)(1), *see* Rule 1-032(A)(3) (unavailability), some are lower/easier for the

proponent to satisfy, *see* Rule 1-032(A)(2) (allowing adverse officer and 30(B)(6) depositions to be used even if the witness is available), and some are higher/harder for the proponent to satisfy, *see* Rule 1-032(D) (outlining objections to depositions that do not affect admissibility under Rule 11-804(B)(1)). One looking to textually reconcile the dominant relationship that Rule 1-032 has to Rule 11-804(B)(1) might consider that compliance with Rule 1-032 is part of what is meant when Rule 11-804 specifies that the prior testimony must come from a "*lawful* deposition."[5] Rule 11-804(B)(1)(a) (emphasis added).

It would be very strange indeed to conclude that a general rule of evidence (applicable to both civil and criminal cases) that is dominated by a Rule of Civil Procedure in civil cases becomes dominant in criminal cases—where it is well known that the Confrontation Clause places extensive limitations on statements not subject to in-court cross-examination. It is contrary to the core holdings of *Berry* and *Mann*. And it would produce clearly wrong results; for example, Rule 11-804(B)(1)(a) allows the use of depositions taken "during the current proceeding or a different one," but would anyone seriously argue that a bottom-of-the-caption

[5] Another conceptualization might be that, while Rule 11-804(B)(1) addresses the hearsay problems with depositions, there are just *sui generis* barriers to the use of depositions, in addition to the obvious hearsay problem, that must be independently overcome. Analogically, a lawyer's arguments and statements in motions briefing meet all of the requirements of a statement by party opponent under Rule 11-801(D)(2), but they are not typically admissible at trial, because they (like depositions) are not just any statements; they are a tool of the legal process whose functioning would be impaired by freewheeling admission.

defendant in a civil case, perhaps represented jointly with his *respondeat superior*-liable employer, should lose the right to one day confront any of the witnesses against him in a later criminal prosecution, just because those same witnesses were deposed in the earlier civil action?

This is not just a hypothetical; it was the holding in *State v. Cordova*, in which the Court of Appeals barred a criminal *defendant* from using the past civil deposition of the victim's wife at trial:

> The taking and use of depositions must be authorized under Rule 29 and used in compliance with the rule. Because the use of depositions constitutes an exception to the right of confrontation, strict compliance with Rule 29 is required. Circumstances permitting the use of depositions at trial must be exceptional.
>
> The deposition in question was taken for another proceeding. Under the facts of this case we hold that the trial court correctly ruled that the civil deposition of Mr. Valdez could not be used when his wife was being cross-examined.

1983-NMCA-144, ¶¶ 12-13 (citation omitted).

The district court had no authority to allow Mr. LeFleur to be convicted by the deposition testimony of two absent witnesses. *See id.* That is true even if, "[a]s a result of [the witnesses'] unavailability, the deposition would not be excluded because of the hearsay rule," because "the fact that the deposition was not to be excluded as hearsay does not authorize its admission if it is excludable on other grounds." *McGuinness*, 1979-NMSC-006, ¶¶ 9, 13 (excluding deposition testimony

even though the witness had invoked his right against self-incrimination, making him "unavailable" within the meaning of Rule of Evidence 804).

II. Admitting the witnesses' depositions at trial violated Mr. LeFleur's right to confront the witnesses against him.

"The Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution guarantee a criminal defendant the right to confront adverse witnesses." *State v. Thomas*, 2016-NMSC-024, ¶ 1, 376 P.3d 184; *see also* N.M. Const. art. II, § 14. Under federal law, "an out-of-court statement that is both testimonial and offered to prove the truth of the matter asserted may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *State v. Navarette*, 2013-NMSC-003, ¶ 7, 294 P.3d 435. In *Crawford v. Washington*, the United States Supreme Court described depositions as part of a "core class of 'testimonial' statements." 541 U.S. 36, 51-52 (2004); *see also State v. Gurule*, 2013-NMSC-025, ¶ 35, 303 P.3d 838 (citing this definition). "The use of deposition testimony in criminal cases is highly disfavored, mainly because its use tends to diminish a defendant's Sixth Amendment confrontation rights." 22A C.J.S. *Criminal Procedure & Rights of Accused* § 375 (2025 update).

"The confrontation clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *State v. Schwartz*, 2014-NMCA-

066, ¶ 6, 327 P.3d 1108 (alterations omitted) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)). To avoid this requirement, the State must demonstrate "the necessity of the substitute procedure to further an important state interest," and the district court "must hear evidence and make a case-specific determination of necessity as it pertains to the particular witness." *Thomas*, 2016-NMSC-024, ¶ 27. As examples, in two pre-*Crawford* cases, the Court of Appeals and this Court allowed testimony by deposition by children who had been victims of sex crimes, concluding that "[t]here exists a strong public policy, as evidenced by Section 30-9-17 and by Rule 29.1, to protect child victims of sexual crimes from the further trauma of in-court testimony. This public policy concern must be considered together with the rights of the accused. The statute and the court procedural rule seek to strike a balance between these competing interests." *State v. Vigil*, 1985-NMCA-103, ¶ 10, 103 N.M. 583, 711 P.2d 28 (citations omitted); *see also State v. Fairweather*, 1993-NMSC-065, ¶ 25, 116 N.M. 456, 863 P.2d 1077 (quoting *Vigil*).

In *State v. Thomas*, by contrast, this Court held that remote video testimony—even by live, two-way video—could not replace "a physical, face-to-face confrontation" unless "the court has made a factual finding of necessity to further an important public policy and has ensured the presence of other confrontation elements concerning the witness testimony including administration of the oath, the opportunity for cross-examination, and the allowance for observation of witness

demeanor by the trier of fact." 2016-NMSC-024, ¶ 29; *see also id.* ¶ 30 ("Inconvenience to the witness is not sufficient reason to dispense with this constitutional right."). The district court did not make findings of necessity and public policy considerations in this case. **[RP 639-646]**

Because deposition testimony is indisputably testimonial, *see Crawford*, 541 at 51-52, the Court should consider whether both declarants were "unavailable" and whether Mr. LeFleur "had a prior opportunity to cross-examine" both of them in light of the evidence he later received. *Cf. Navarette*, 2013-NMSC-003, ¶ 7. First, "unavailability" for confrontation purposes may not be simply interchangeable with the standard for admissibility under Rule 11-804. *See, e.g., Crawford*, 541 U.S. at 42 (rejecting the holding in *Ohio v. Roberts*, 448 U.S. 56 (1980) that "fall[ing] within a 'firmly rooted hearsay exception'" satisfies the requirements of the Confrontation Clause). The Supreme Court has long held that "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (stating, where the State failed to make a meaningful attempt to transfer an inmate incarcerated hundreds of miles away for trial, "The right of confrontation may not be dispensed with so lightly."). If the State did not make a good-faith effort to secure the witness for trial, that person is not "actually unavailable"—even if the defendant did have a prior opportunity to

cross-examine the witness. *Id.* at 725-26. In this case, where the defense uncontestedly did not gain relevant knowledge about the witnesses' testimony until *after* the depositions, his opportunity to conduct an adequate cross-examination was that much more diminished.

"The central purpose of the Confrontation Clause, to ensure the reliability of evidence, is served by the combined effect of physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Thomas*, 2016-NMSC-024, ¶ 23 (cleaned up). The Confrontation Clause thus sought "to prevent depositions or *ex-parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). The Court should conclude that the admission of two depositions in lieu of live testimony violated Mr. LeFleur's confrontation rights under the circumstances presented here.

III. Even if depositions are admissible against a criminal defendant at trial, the State failed to meet its burden to show "necessity" and "exceptional circumstances," and cannot even satisfy Rule 11-804.

When Rule 29(n) remained in place, this Court held: "While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional. The necessity must be clearly established, and the burden of showing that necessity is on the prosecution." *McGuinness*, 1979-NMSC-006, ¶ 6 (citations omitted); *see also Cordova*, 1983-NMCA-144, ¶ 12 ("Circumstances permitting the use of depositions at trial must be exceptional."). In this case, even if a non-statutory, non-rule basis for admitting depositions can be assumed, the State must still prove more than routine difficulties in locating witnesses; it must prove it is not "*possible* to obtain [the witnesses'] attendance by proper process." *McGuinness*, 1979-NMSC-006, ¶ 6 (emphasis added, quotations omitted); *see also Allen v. LeMaster*, 2012-NMSC-001, ¶ 23, 267 P.3d 806 (citing the 1992 committee commentary to Rule 5-503). That high burden was not satisfied here.

The Court of Appeals opinion in *State v. Mann* provides an example of effort that cannot satisfy the State's burden on this issue. In that case, the district attorney sought to introduce prior testimony of a witness at trial, claiming that the State had "attempted to serve [a] subpoena upon" the witness, but "[w]e received information today—or the day before yesterday, rather, that he is in the State of Montana." 1975-NMCA-045, ¶ 11, 87 N.M. 427, 535 P.2d 70. The Court of Appeals held that the

State had failed to prove "unavailability": "The district attorney's statements are no more than bare recitals unsupported by factual elaboration." *Id.* ¶ 13. The Court noted: "The subpoena is not a matter of record. The issuance and attempt to serve the subpoena, as well as the time and place of the attempted service are not a matter of record.... In short, the record contains no evidence as to the circumstances of the State's alleged attempt and inability to subpoena the witness. Speculation, conjecture or surmise by an appellate court is sheer imprudence when a person's freedom is at stake." *Id.* ¶¶ 19-20.

The State failed to prove the "necessity" of using deposition testimony for two different witnesses at Mr. LeFleur's trial. Most of the evidence it provided was that its investigators had driven through or past RV parks in New Mexico. **[5-19-25 FTR 8:21:42-51, 8:27:24-37, 8:28:03-04]; [5-19-25 FTR 8:37:42-56]**. They conceded that they "didn't make any efforts in Texas," despite knowing both witnesses were from there, had "primarily" resided there, and had a Texas vehicle registration, **[5-19-25 FTR 8:31:16-34, 8:40:04-26, 8:41:06-22]**; they never tried to contact the witnesses' associates or family members, **[5-19-25 FTR 8:46:26-43]**; they failed to locate even the witness who was a registered sex offender, **[5-19-25 FTR 8:29:32-48]**; and Mr. Fouratt testified that he never actually obtained a subpoena during the period he claimed to be searching for the witnesses, **[5-19-25 FTR 8:33:11-25]**. The evidence did not rise to the "exceptional" level required for admitting one deposition

in lieu of face-to-face testimony, much less excuse the presence of *two* crucial witnesses.

The burden of showing "necessity" and "exceptional circumstances" is clearly higher than that required by the Rules of Evidence, but the State's efforts do not satisfy even the "reasonableness" requirements of Rule 11-804(A)(5). To satisfy that hearsay exception—the only exception at issue in this case, for either witness—the test is first whether the witness is "absent" and "the statement's proponent has not been able, by process or other reasonable means, to procure" his attendance. Rule 11-804(A)(5) NMRA. "In determining reasonableness, the trial court should balance the efforts undertaken by the State with the likely utility of cross-examination under the facts of the case." *State v. Lopez*, 1996-NMCA-101, ¶ 25, 122 N.M. 459, 926 P.2d 784. That is, the more important a witness, the greater the effort the State should undertake to ensure that witness will be present for trial. *See id.* In *State v. Stalter*, the Court of Appeals upheld the district court's conclusion that the defendant had failed to show a witness was "unavailable" under Rule 11-804 because, even though the defendant hired an investigator who was unable to find the witness, the defense "did not check other potential addresses, schools, welfare offices, or talk to neighbors," and never asked the witness' spouse. 2023-NMCA-054, ¶¶ 32-33, 534 P.3d 989. Cases that have questioned whether Rule 11-804(A)(5) allowed deposition testimony at trial "have required

strict compliance with all reasonable means to procure attendance by process, including use of the Uniform Act, before a witness may be declared unavailable under Rule 804(a)(5), or his deposition admitted under Rule 29(n)(4)." *State v. Vialpando*, 1979-NMCA-083, ¶ 17, 93 N.M. 289, 599 P.2d 1086. For example, serving a Texas resident with a New Mexico subpoena knowing that a "subpoena issued in New Mexico and served in Texas had no legal effect" was not sufficient to show unavailability in *State v. Waits*, 1978-NMCA-116, ¶ 5, 92 N.M. 275, 587 P.2d 53; *see also Madrid v. Scholes*, 1976-NMCA-007, ¶¶ 2, 6, 89 N.M. 15, 546 P.2d 863 (sending subpoenas to two witnesses was insufficient to show the proponent "was unable to procure [their] attendance"); *State v. Barela*, 1974-NMCA-016, ¶¶ 7-8, 86 N.M. 104, 519 P.2d 1185 (holding witnesses were not unavailable when the State failed to subpoena them out of concern they "would be annoyed"). "The burden is upon the State to prove the unavailability of its witness." *State v. Ewing*, 1982-NMSC-003, ¶ 17, 97 N.M. 235, 638 P.2d 1080.

After proving unavailability, the State must also show that the deposition testimony "is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Rule 11-804(B)(1)(b) NMRA. As noted above, the State cannot satisfy this requirement, either, because the defense had no opportunity or similar motive to develop the witnesses' testimony at the early stage of discovery in which those depositions

occurred, nor was there the same opportunity for confrontation by the defendant. *See* 5 Wayne R. LaFave, et al., *Criminal Procedure* § 20.2(e) (4th ed. 2025) (noting that defendants are often absent from discovery depositions, and "[t]he absence of the defendant, in particular, may lead to precluding the prosecution's subsequent use of a deposition at trial under the 'prior testimony' exception should the deposed witness later become unavailable to testify."). In *State v. Baca*, this Court held that a party had "very different" motives for examining a witness at the grand jury stage because, at the time of that testimony, the attorneys did not yet have medical reports that later called her story into question. *See* 1997-NMSC-045, ¶ 25, 124 N.M. 55, 946 P.2d 1066, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783. Until those records were obtained, the examining attorney would have had "no reason to question [her] veracity or to probe her claim." *Id.* ¶ 26. The Court of Appeals in 2015 similarly held that the district court properly excluded a videotaped deposition because the defendant had no opportunity to cross-examine the witness on evidence discovered afterward. *See State v. Garcia*, 2015 WL 2329028, ¶ 9 (N.M. Ct. App. Apr. 29, 2015) (non-precedential) ("As was the situation in *Baca*, we conclude that Defendant's motive in cross-examining Mr. Villegas at the deposition, and the development of the testimony elicited on cross-examination, would be strategically distinct following the discovery of the new evidence.").

New Mexico courts have expressed concern that "dispensing with any necessity or unavailability requirement would allow prosecutors to distort the search for the truth as a matter of tactical advantage, such as by substituting a high-performance witness to the declarant's statement for a low-performance declarant." *Lopez*, 1996-NMCA-101, ¶ 19. The same concern is triggered when a taped, curated deposition of a troublesome witness can simply replace his trial testimony at the State's convenience, without a showing of necessity or exceptional circumstances. *See, e.g., Barela*, 1974-NMCA-016, ¶ 8 ("If the State's position were upheld, a defendant could be tried by deposition and not by testimony of witnesses."). Admissibility under the hearsay rules is thus likely necessary but not sufficient to satisfy a defendant's rights. *See McGuinness*, 1979-NMSC-006, ¶¶ 12-13; *but see State v. Henderson*, 2006-NMCA-059, ¶ 19, 139 N.M. 595, 136 P.3d 1005 (speculating that the Rules of Evidence may afford "greater protection" than the constitution). At the least, the State must prove *both* that the witnesses were each unavailable and that the defense's opportunity for cross-examination was adequate, or the depositions should not be admitted. *See, e.g.,* 28 Am. Jur. 2d *Proof of Facts* § 1 (2025 update) (observing that evidence will likely be inadmissible if there was no prior opportunity for cross-examination, irrespective of witness availability).

Two witnesses' absence from trial does not automatically create the "exceptional circumstances" that have always been required to admit deposition

testimony, even under the Rules of Civil Procedure. *See, e.g., State v. Bobbin*, 1985-NMCA-089, ¶ 13, 103 N.M. 375, 707 P.2d 1185 (finding no such exceptional circumstances where the party unreasonably delayed seeking the deposition). "Because the use of depositions constitutes an exception to the right of confrontation," it has never been a matter of routine or convenience to admit evidence of that kind against a criminal defendant. *Cordova*, 1983-NMCA-144, ¶ 12. In this case, where the State did not meet the requirements of the Rules of Evidence, the Confrontation Clause, or the Rules of Civil Procedure, it cannot show necessity.

CONCLUSION

"[A] criminal prosecution, with its potentially severe consequences, should be a search for the truth. That search should be characterized in our adversary process by the parties' presentation of their best evidence so that a jury will have available as much information as possible to decide the case in the correct manner." *State v. Lopez*, 1996-NMCA-101, ¶ 18, 122 N.M. 459, 464, 926 P.2d 784, 789. The Court should vacate all convictions of Defendant-Appellant Shaun LeFleur and remand this case for further proceedings consistent with its opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2026, I submitted the foregoing Brief in Chief electronically via the Court's Odyssey filing system, and when doing so I selected the option for automated electronic service of the certified document, which will, on the date that the clerk's office formally accepts the document for filing, cause a certified copy of the document to be served via email upon all counsel of record.

HARRISON & HART, LLC

By: */s/ Carter B. Harrison IV*
Carter B. Harrison IV