



**IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

No.

IN THE MATTER OF HON. JAMES T. MARTIN
Third Judicial District Court

S-1-SC-39746

INQUIRY CONCERNING HON. JAMES T. MARTIN
Inquiry No. 2021-089

FILED UNDER SEAL
PURSUANT TO 27-104(B) NMRA

**PETITION TO ACCEPT STIPULATION AGREEMENT
AND CONSENT TO DISCIPLINE**

JUDICIAL STANDARDS COMMISSION
6200 Uptown Blvd., NE, Suite 340
Albuquerque, NM 87110-4159
Telephone: (505) 222-9353

PHYLLIS A. DOMINGUEZ
Executive Director & General Counsel

KARA JOHNSON
Investigative Trial Counsel

Counsel for Petitioner

BRIGGS F. CHENEY

DIXON SCHOLL CARRILLO, P.A.
6700 Jefferson St. NE, Suite B,
Albuquerque, NM 87109

Counsel for Respondent

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No.

IN THE MATTER OF HON. JAMES T. MARTIN
Third Judicial District Court

INQUIRY CONCERNING HON. JAMES T. MARTIN
Inquiry No. 2021-089

FILED UNDER SEAL
PURSUANT TO 27-104(B) NMRA

PETITION TO ACCEPT STIPULATION AGREEMENT
AND CONSENT TO DISCIPLINE

The Judicial Standards Commission of the State of New Mexico (“Commission”), through the undersigned counsel, hereby petitions the Supreme Court for an order approving the attached *Stipulation Agreement and Consent to Discipline (“Stipulation”)*, attached hereto as **Exhibit 1**, in which Hon. James T. Martin, (“Respondent”) consents to discipline from the Supreme Court in lieu of further disciplinary proceedings as outlined in the attached *Stipulation*. Respondent is represented by Briggs Cheney, Esq. The Commission recommends the Court approve the agreement, impose the

stipulated discipline against the Respondent and unseal the file in this matter pursuant to Rule 27-104(B) NMRA.

If the Court approves the *Stipulation Agreement and Consent to Discipline*, Respondent requests this matter remain under seal and this Court delay publication of the Public Censure until the criminal proceeding and all appeals in Cause Number D-307-CR-2018-00203 are final. The Commission opposes this request pursuant to Judicial Standards Commission Rule 12. In making this request, Respondent makes clear that Respondent's agreement to the *Stipulation Agreement and Consent to Discipline* is not conditioned on the Court's granting of the request for continued sealing of this matter and if the Court denies his request, Respondent respects that decision. Respondent may file a motion with the Supreme Court confirming his request which is understood the Commission would oppose.

The Commission believes this stipulation agreement best serves the interests of justice and the integrity of the New Mexico Judiciary, and as further grounds for this petition states:

1. The Commission invokes its jurisdiction pursuant to the Commission's power to recommend the discipline of judges, and the Supreme Court's power to discipline judges under the New Mexico

Constitution Article VI, Section 32; the Court's power of superintending control under the New Mexico Constitution Article VI Section 3; and Rule 36 of the Judicial Standards Commission's Rules.

2. This matter is currently pending before the Commission pursuant to a *Notice of Formal Proceedings* issued to Respondent on July 20, 2022 in Inquiry No. 2021-089 (See **Exhibit A to Exhibit 1**). Respondent's response to the *Notice of Formal Proceedings* was filed on August 09, 2022 (See **Exhibit B to Exhibit 1**).

3. The Commission issued a *Notice of Investigation* to Respondent on December 20, 2021 (See **Exhibit 2**) and Respondent's response to the *Notice of Investigation* was filed on January 10, 2022 (See **Exhibit 3**).

4. Pursuant to Commission's Rule 19, NMRA 2020, and following the Commission's receipt and review of Respondent's written response to the *Notice of Investigation*, the Commission invited Respondent to participate in an informal confidential conference with the Commission on June 6, 2022 by Zoom video conferencing. The conference afforded Respondent an opportunity to discuss and explain his response to the *Notice of Investigation* in person and provided the Commission an opportunity to ask Respondent

questions and further discuss the pending allegations and Respondent's response to assist in determining the appropriate course of action.

5. After full consideration of Respondent's written response and the information he provided verbally at the informal confidential conference, the Commission issued a *Notice of Formal Proceedings* to Respondent and set the matter for a hearing on the merits.

6. The Commission entered into a *Stipulation* with Respondent on January 20, 2023 (See **Exhibit 1**). The *Stipulation* was based upon the facts Respondent admitted and Respondent's consent to the imposition of discipline by the Supreme Court as follows:

Public Censure: Respondent agrees and consents to receive a public ensure from the Supreme Court, which shall be published in the New Mexico *Bar Bulletin*.

7. Respondent denies committing willful misconduct in office; however, he agrees and stipulates that the Commission, looking at the facts, evidence and totality of the circumstances, could find willful misconduct in office and violations of the Code of Judicial Conduct as outlined in the *Stipulation* and paragraph 8 of this *Petition*, which provides sufficient basis for the New Mexico Supreme Court to impose discipline pursuant to Article VI, Section 32 of the New Mexico Constitution.

8. Respondent admitted that his conduct violated Rules 21-101, 21-102, 21-103, 21-202, 21-204(B), 21-206 and 21-210 of the Code of Judicial Conduct.

9. The Commission shall close Inquiry No. 2021-089 upon an Order from the Supreme Court granting the stipulated discipline and upon the issuance of the public censure.

10. The attached *Stipulation* is enforceable by the Commission before the Supreme Court.

11. The Commission requests an order unsealing all documents filed with the Supreme Court in this matter pursuant to Rule 27-104(B) NMRA.

12. The Commission opposes a stay or any delay in this matter pending the outcome of a collateral matter in accordance with Judicial Standards Commission Rule 12.

12. It is in the best interests of justice and integrity of the New Mexico judiciary that the Supreme Court grant this petition.

WHEREFORE, the Commission respectfully requests this Court issue an order granting the Commission's petition, approving the *Stipulation Agreement and Consent to Discipline* and impose the discipline set forth in the

Stipulation. The Commission also requests that the Court's order unseal all documents filed in the Supreme Court in this case pursuant to Rule 27-104(B) NMRA.

Respectfully submitted,

JUDICIAL STANDARDS COMMISSION

Kara Johnson

PHYLLIS A. DOMINGUEZ
Executive Director & General Counsel

KARA JOHNSON
Investigative Trial Counsel

6200 Uptown Blvd., NE, Suite 340
Albuquerque, NM 87110-4159
Telephone: (505) 222-9353

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served upon Respondent via the Supreme Court's Electronic Filing and Service System and served via email on this 24th day of January, 2023 to the Respondent as follows:

James T. Martin
c/o Briggs Cheney
bcheney@DSC-law.com

Kara Johnson

KARA JOHNSON

JAN 24 2023

**BEFORE THE JUDICIAL STANDARDS COMMISSION
STATE OF NEW MEXICO****NM JUDICIAL
STANDARDS COMMISSION**

INQUIRY CONCERNING HON. JAMES T. MARTIN
Third Judicial District Court

Inquiry No. 2021-089

STIPULATION AGREEMENT AND CONSENT TO DISCIPLINE

THIS MATTER is currently pending before the Judicial Standards Commission ("Commission") pursuant to a *Notice of Formal Proceedings* issued to Hon. James T. Martin ("Respondent") on July 20, 2022, in Inquiry No. 2021-089 (*See Exhibit A*). Respondent provided his response to the *Notice of Formal Proceedings* on August 9, 2022 (*See Exhibit B*).

Prior to the issuing a *Notice of Formal Proceedings*, and pursuant to Commission Rule 19 NMRA 2020 and following the Commission's receipt and review of Respondent's written response to a *Notice of Investigation*, the Commission invited Respondent to participate in an informal confidential conference with the Commission on June 6, 2022, by Zoom video conferencing. The conference afforded Respondent an opportunity to discuss and explain his response to the *Notice of Investigation* in person and provided the Commission an opportunity to ask Respondent questions about the pending allegations and Respondent's response to assist in determining the appropriate course of action.

After full consideration of Respondent's written response and the information he provided verbally at the informal conference, the Commission issued a *Notice of Formal Proceedings* to Respondent and set the matter for a hearing on the merits.

**Investigative Trial
Counsel
Exhibit #1**

In consideration of the foregoing, this *Stipulation Agreement and Consent to Discipline* ("*Stipulation*") is entered into by and between the Commission and Respondent through his counsel Briggs Cheney, Esq. The parties hereby enter into the following *Stipulation*:

1. The Commission has jurisdiction over Respondent and the above-captioned and numbered matter pursuant to Article VI, Section 32 of the Constitution of the State of New Mexico; NMSA 1978, Sections 34-10-1 through 34-10-4; and Judicial Standards Commission Rules.
2. Respondent admits the following:
 - A. On or about July 26, 2021, during a telephone conversation with Assistant District Attorney Samuel Rosten ("Mr. Rosten"), and after reviewing the proposed jury instructions filed in the court's electronic filing system in Cause Number D-307-CR-2018-00203, a case in which Judge Martin's daughter was the alleged victim, Judge Martin advised Mr. Rosten to use the term "brandished a firearm" in his jury instructions rather than asking the jury to find the Defendant "pointed a firearm" at the alleged victim, Judge Martin's daughter.
 - B. On or about July 27, 2021, after the verdict in Cause Number D-307-CR-2018-00203, Judge Martin engaged in a conversation with Mr. Rosten and his co-counsel Assistant District Attorney Spencer Willson (Mr. Willson) after they were informed that Judge Martin and his daughter wanted to speak to them. Both Mr. Rosten and Mr. Willson left the courtroom to speak with Judge Martin and his daughter in a room down the hall from the courtroom. Before Mr. Rosten and Mr. Willson arrived, the Respondent and family had been advised that the defendant had been remanded to custody, but once Mr. Rosten and Mr. Willson arrived, Respondent did admonish Messrs. Rosten and Willson, "Good thing he was remanded, otherwise I would have told you to go back in there and try again."
 - C. On or about July 26-27, 2021 during the trial in cause number D-307-CR-2018-00203, Judge Martin allowed his daughter, the alleged victim and witness in the case, to use his chambers while waiting for her opportunity to testify.
3. Respondent admits he violated the following Rules of the Code of Judicial Conduct: 21-101, 21-102, 21-103, 21-204(B), 21-206 and 21-210 NMRA.

4. Respondent denies committing willful misconduct in office; however, he agrees and stipulates that the Commission, looking at the facts, evidence and totality of the circumstances, could find willful misconduct in office and violations of the Code of Judicial conduct under the rules enumerated in paragraph 3 of this stipulation, which provides sufficient basis for the New Mexico Supreme Court to impose discipline pursuant to Article VI, Section 32 of the New Mexico Constitution.

5. Respondent consents to imposition of the following discipline by the Supreme Court:

Public Censure – Respondent shall receive a public censure from the Supreme Court, which shall be published in the New Mexico *Bar Bulletin*.

6. The Commission will file **under seal** with the New Mexico Supreme Court, pursuant to JSC Rules 34(A) and 36(E), a *Petition to Accept Stipulation Agreement and Consent to Discipline* (“*Petition*”), attaching a copy of this executed *Stipulation*.

7. Upon execution of this *Stipulation*, acceptance by the Supreme Court, and issuance of a public censure the Commission will close the matter pending against the Respondent before the Commission (Inquiry No. 2021-089).

8. Upon granting the *Petition*, and pursuant to Supreme Court Rules, Respondent acknowledges that this matter will be unsealed at the Supreme Court.

9. This *Stipulation* is specifically enforceable by the Commission before the Supreme Court.

10. Respondent acknowledges that upon execution of this *Stipulation*, Respondent gives up any and all motions, defenses, objections, or requests that the Respondent has made or raised, or could assert hereafter in or concerning the Judicial Standards Commission proceedings.

11. The provisions of this *Stipulation* are material to the Commission's deliberations and ultimate acceptance of it.

12. This document is not enforceable unless fully executed by all parties.

13. The Commission and Respondent shall take all actions necessary to carry out and fulfill the terms and conditions of this *Stipulation*.

14. **Non-Compliance and Breach:** If Respondent violates any terms or provisions of this executed *Stipulation*, Respondent agrees that all facts alleged in the *Notice of Formal Proceedings* issued in Inquiry 2021-089 shall be deemed admitted by the Respondent, will be used against Respondent in future proceedings before the Commission and the Supreme Court, may constitute obstruction of Commission business and contempt.

15. Respondent shall not make any misrepresentations to the media concerning this Inquiry, the facts and circumstances of Respondent's *Stipulation*, or the Commission's proceedings.

16. The terms and conditions contained in this stipulation are mutually acceptable to and agreed upon by all parties.

17. All parties have read and understand this *Stipulation*, have had the opportunity to discuss it with and be advised by legal counsel, and hereby freely and voluntarily enter into this *Stipulation* free of any threats, and free of any promises not contained herein.

RESPONDENT'S REVIEW AND APPROVAL

I have read and understand this *Stipulation*. I have had the opportunity to discuss this matter and my rights with my attorney. I understand that by entering into this *Stipulation*, I will be giving up my rights to a formal hearing on the merits and to confront, cross-examine and compel the attendance of witnesses regarding these issues.

I know, understand, and agree that the provisions of this *Stipulation* are material to the Commission's deliberations and ultimate acceptance of it. I understand and agree that by entering into this stipulation I am admitting that the conduct described herein is fact and that such conduct taken individually or together may constitute willful misconduct. I also admit the Supreme Court has sufficient basis to impose discipline based on the admitted facts outlined above. I also fully understand and agree that if I violate any terms of this agreement the Commission shall re-initiate the matter pending before the Court and/or the Commission at the time this *Stipulation* was executed.

I understand and agree that my attorney is speaking for me, and on my behalf in this proceeding, and that anything my attorney says or does in this proceeding can and should be attributable to me. In the event my attorney says or does anything during the course of this proceeding that I do not agree with, I know, understand and agree that I have an affirmative duty to make my disagreement with my attorney's words or conduct known. If I do not make my disagreement known, then I know, understand, and agree that I am accepting my attorney's words and conduct in this proceeding as my own.




HON. JAMES T. MARTIN
Respondent

Dated: 1-17-23

COUNSEL FOR RESPONDENT'S REVIEW AND APPROVAL

I have reviewed this *Stipulation* with my client. I have advised my client of his constitutional rights and possible defenses, and hereby accept and approve my client's entry into this *Stipulation*.



BRIGGS CHENEY, ESQ.
Counsel for Respondent

Dated: 1/20/2023

INVESTIGATIVE TRIAL COUNSEL'S REVIEW AND APPROVAL

I have reviewed this *Stipulation* and find that it is appropriate and in the best interest of justice. I hereby recommend that the Judicial Standards Commission accept and approve this *Stipulation*.

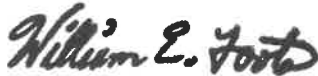


CHANCE A. GAUTHIER, ESQ.
Investigative Trial Counsel

Dated: 1-20-2023

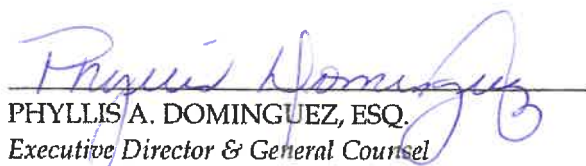
JUDICIAL STANDARDS COMMISSION'S REVIEW & APPROVAL

The Commission has reviewed this *Stipulation* and finds that it is in the best interest of justice and hereby accepts and approves this *Stipulation*.



WILLIAM E. FOOTE, PH.D.
Chair

Dated: 1-24-23



PHYLLIS A. DOMINGUEZ, ESQ.
Executive Director & General Counsel

Dated: 01/24/23

**BEFORE THE JUDICIAL STANDARDS COMMISSION
OF THE STATE OF NEW MEXICO**

FILED

INQUIRY CONCERNING HON. JAMES T. MARTIN
Third Judicial District Court
Inquiry No. 2021-089

JUL 20 2022

**NM JUDICIAL
STANDARDS COMMISSION**

NOTICE OF FORMAL PROCEEDINGS

TO: Hon. James T. Martin
Third Judicial District Court
201 W. Picacho Ave.
Las Cruces, NM 88005

YOU ARE HEREBY NOTIFIED that the Judicial Standards Commission, in accordance with its jurisdiction under Article VI, Section 32 of the New Mexico Constitution and pursuant to Judicial Standards Commission Rule 15, has instituted formal proceedings on the charges set forth below.

COUNT 1

On or about July 26, 2021, during a telephone conversation with Assistant District Attorney Samuel Rosten ("Rosten"), after having listened to the proposed jury instructions in Cause Number D-307-CR-2018-00203, a case in which your daughter was the alleged victim, you advised Rosten to use the term "brandished a firearm" in his jury instructions rather than asking the jury to find the Defendant "pointed a firearm" at the alleged victim, your daughter.

Such conduct violates the Code of Judicial Conduct Rules 21-101, 21-102, 21-103, 21-204(B), 21-206, 21-209 and 21-210 NMRA 2021 and constitutes willful misconduct in office.

COUNT 2

On or about July 26, 2021 you engaged in an *ex parte* communication with Assistant District Attorney Rosten regarding Cause Number D-307-CR-2018-00203, a criminal case in which your daughter was an alleged victim of an assault and for which Rosten was the prosecuting attorney. After the first day of trial, your daughter emailed Rosten requesting he contact her. Rosten contacted your daughter via telephone that same evening and your daughter handed you the telephone and you initiated and engaged in an *ex parte* phone

Exhibit A

conversation with Rosten.

Such conduct violates the Code of Judicial Conduct Rules 21-101, 21-102, 21-103, 21-204(B), 21-206, 21-209 and 21-210 NMRA 2021 and constitutes willful misconduct in office.

COUNT 3

On or about July 27, 2021, after the verdict in Cause Number D-307-CR-2018-00203, you engaged in a conversation with Rosten and his co-counsel Assistant District Attorney Spencer Willson (Willson) when a bailiff informed Rosten that you wanted to speak to him. Both Rosten and Willson left the courtroom to speak with you in a room down the hall from the courtroom. Once the attorneys arrived, you started to admonish Rosten for not requesting the Defendant be remanded into custody following the verdict. Had the Defendant not been remanded by the sitting judge, you told Rosten words to the effect that you would have demanded attorney Rosten go back into the court and tell the sitting judge that he (Rosten) had a change of position and wanted the Defendant remanded.

Such conduct violates the Code of Judicial Conduct Rules 21-101, 21-102, 21-103, 21-204(B), 21-206, and 21-209 NMRA 2021 and constitutes willful misconduct in office.

COUNT 4

On or about July 26–27, 2021 during the trial in cause number D-307-CR-2018-00203, you allowed your daughter, the alleged victim and witness in the case, to use your chambers while waiting for her opportunity to testify.

Such conduct violates the Code of Judicial Conduct Rules 21-101, 21-102, 21-103, and 21-204(B) NMRA 2021 and constitutes willful misconduct in office.

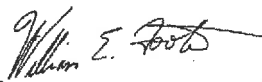
PLEASE BE ADVISED that in accordance with Rule 16 of the Judicial Standards Commission Rules, **you shall file a written answer to this notice within twenty-one (21) days of its service upon**

you. Your answer shall be filed with the Commission electronically (call for filing e-mail address) or by mail sent to:

*Judicial Standards Commission
6200 Uptown Blvd. NE, Suite 340
Albuquerque, New Mexico 87110-4159*

Article VI, Section 32 of the New Mexico Constitution provides that all papers filed with and proceedings before the Judicial Standards Commission are confidential, except that any record filed by the Commission in the New Mexico Supreme Court continues its privilege but, upon its filing, loses its confidential character, and a writing which was privileged prior to filing with the Commission, or its masters does not lose its privilege by the filing.

JUDICIAL STANDARDS COMMISSION

BY: 
William E. Foote, Ph.D, Chair
6200 Uptown Blvd. NE, Suite 340
Albuquerque, NM 87110-4159
(505) 222-9353

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July 2022 a true copy of the foregoing was sent as follows:

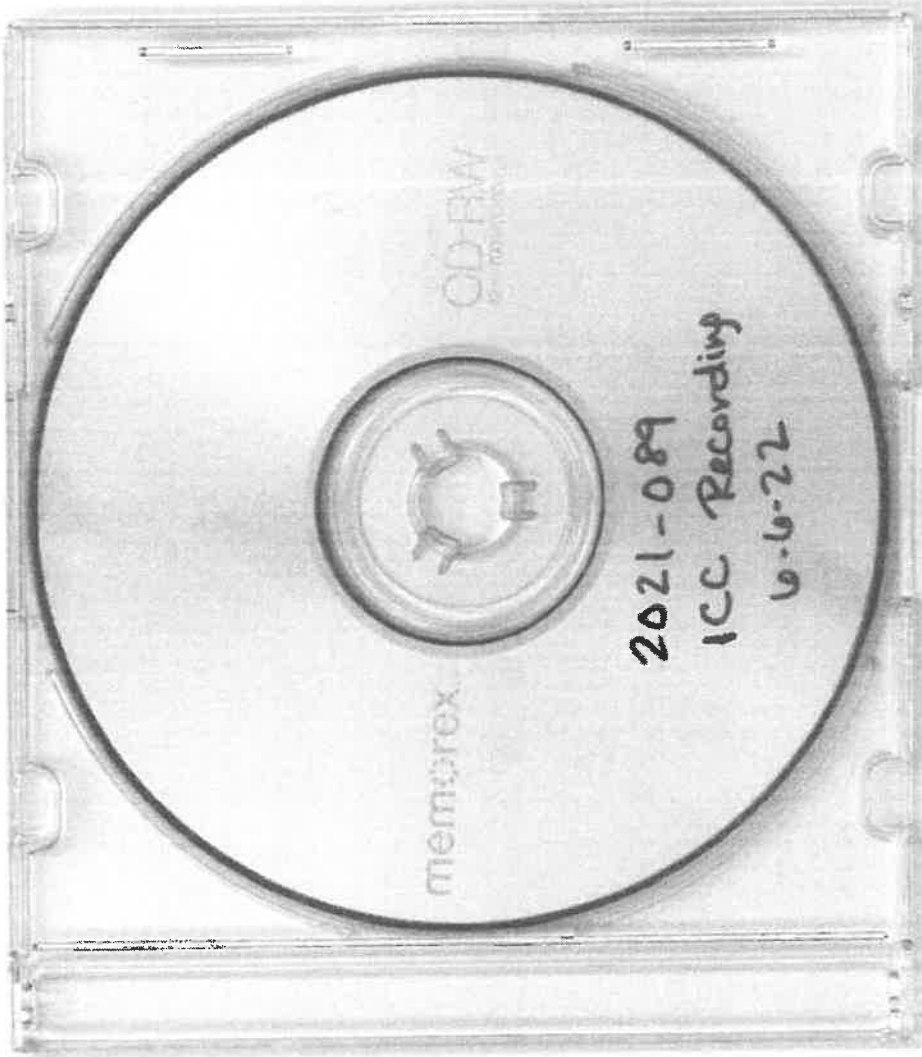
USPS VIA CERTIFIED RETURN RECEIPT

RESPONDENT

Hon. James T. Martin
c/o Briggs Cheney
Dixon Scholl Carrillo PA
P.O. Box 94147
Albuquerque, NM 87199-4147
bcheney@dsc-law.com

JUDICIAL STANDARDS COMMISSION





memorex

CD-RW

2021-089
ICC Recording
6-6-22

JUDICIAL STANDARDS COMMISSION
FOR THE STATE OF NEW MEXICO

INQUIRY CONCERNING A JUDGE
JSC Inquiry No. 2021-089

IN THE MATTER
HON. E. JAMES T. MARTIN

FILED

AUG 09 2022

lg
**NM JUDICIAL
STANDARDS COMMISSION**

RESPONSE TO NOTICE OF FORMAL CHARGES

Respondent, Judge James T. Martin, responds to the Commission's *Notice of Formal Charges* as follows:

COUNT 1

In response to Count I, Respondent only listened to his daughter's trial testimony via the Third Judicial District Court's public electronic link and did not listen to any other parts of the trial. Respondent's daughter testified in the first day of the two-day trial. Based on his daughter's examination and questions raised in the Respondent's mind from that examination, Respondent reviewed the prosecution's proposed jury instructions which had been filed of record prior to the start of trial, and specifically Criminal UJI 14-305. In a phone conversation after the first day of the trial, Respondent admits discussing Criminal UJI 14-305 with Assistant District Attorney Samuel Rosten ("Rosten") and suggesting that he consider using the term "brandished a firearm" in Criminal UJI 14-305 rather than "pointed a firearm." Respondent denies he 'advised Rosten to use the term "brandished a firearm.'"

Exhibit B

Respondent disagrees, and thus denies, that the alleged conduct violated the cited provisions of the Judicial Code of Conduct Rules. Respondent specifically denies that his actions were willful.

COUNT 2

Respondent admits as alleged in Count 2 that on July 26, 2021, after the first day of trial in the underlying criminal case that Respondent had a phone conversation with Mr. Rosten. Respondent further admits this conversation was in conjunction with Respondent's daughter's e-mail. Respondent's daughter understood that that Mr. Rosten wanted to talk to her to discuss the day's events and Respondent's daughter had sent Mr. Rosten an e-mail letting him know she was available to talk. Respondent disagrees and denies that he initiated the call or that the call was an "*ex parte* phone conversation with Rosten."

Respondent disagrees, and thus denies, that the alleged conduct violated the cited provisions of the Judicial Code of Conduct Rules. Respondent specifically denies that his actions were willful.

COUNT 3

Respondent admits that on July 27, 2021, after the verdict was returned in the underlying criminal case, Respondent did have a conversation with Rosten and his co-counsel as alleged in Count 3. Respondent does not believe he initiated a post-verdict meeting with the prosecutors, but Respondent is clear, and denies, that he

asked his staff (bailiff) to contact Mr. Rosten about meeting with Respondent. As explained in the Informal Conference, Respondent can only speculate this meeting was requested by the Victim's Advocate. Respondent believes there was discussion about how the trial had gone, what would happen and next, and that the defendant had been taken into custody. As to the remaining allegations in Count 3, Respondent has insufficient knowledge or information, at this time, to either admit or deny those allegations, and on that ground, denies the same.

Respondent disagrees, and thus denies, that the alleged conduct violated the cited provisions of the Judicial Code of Conduct Rules. Respondent specifically denies that his actions were willful.

COUNT 4

Respondent admits the factual allegations of Count 4, but disagrees, and thus denies, that the alleged conduct violated the cited provisions of the Judicial Code of Conduct Rules. Respondent specifically denies that his actions were willful.

DEFENSES

1. At no time material to circumstances surrounding or relevant to the Formal Charges was the Respondent acting or serving in a judicial role or capacity and at all times was acting as a father to the victim of a crime.

2. Respondent asserts that the complained of conduct does not violate the Code of Judicial Conduct.

3. Respondent asserts that the complaining witness statement alleges that the conversations regarding the jury instructions did not improperly influence the prosecutor's independent decision to modify the jury instructions.

4. Respondent asserts that the conversations between the Respondent, the victim's father, and the Assistant District Attorney prosecuting the criminal case does not constitute an *ex parte* communication.

5. Respondent asserts because the jury trial, in this matter, was held during the COVID-19 Pandemic and under the restrictive rules established by the New Mexico Supreme Court limiting public access to the courthouse, the actions of Respondent to allow his daughter, the victim in the criminal case, to use his chambers, does not violate the Code of Judicial Conduct.

WHEREFORE, for all the reasons stated herein, Respondent, the Honorable James T. Martin, requests:

A. The Judicial Standards Commission dismiss these proceedings in accordance with Rule 33 of the Judicial Standards Commission; or

B. In the alternative, enter into a non-disciplinary disposition in accordance with Rule 35 of the Judicial Standards Commission; and

C. For any other or further relief, at law or in equity, to which this Commission deems Respondent to be justly entitled.

Respectfully Submitted:



Briggs Cheney
Dixon•Scholl•Carrillo•P.A.
Attorney for Honorable James T. Martin
P.O. Box 94147
Albuquerque, N.M. 87199-4147
Phone: (505) 244-3890
Fax: (505) 244-3889
bcheney@dsc-law.com

I hereby certify that a copy of the foregoing pleading was filed and served via the Judicial Standards e-mail filing system, forfilingnmisc@nmisc.org, this 9th day of August, 2022.



Briggs Cheney



**STATE OF NEW MEXICO
JUDICIAL STANDARDS COMMISSION**

6200 UPTOWN BOULEVARD NE, SUITE 320
ALBUQUERQUE, NEW MEXICO 87110-4159
(505) 222-9353 • WWW.NMJSC.ORG

RANDALL D. ROYBAL
Executive Director & General Counsel

PHYLLIS A. DOMINGUEZ
Deputy Director

CHANCE A. GAUTHIER
Investigative Trial Counsel

December 20, 2021

CONFIDENTIAL

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Hon. James T. Martin
Third Judicial District Court
201 W. Picacho Ave.
Las Cruces, NM 88005

FILED

Re: Inquiry No. 2021-089; Notice of Investigation

DEC 20 2021 

Dear Judge Martin:

**NM JUDICIAL
STANDARDS COMMISSION**

You are hereby notified the above-referenced matter came before the Judicial Standards Commission on a verified, third-party complaint; a complaint docketed by the Commission's General Counsel; or upon the Commission's own motion. As part of an investigation pursuant to Rules 15(B) and (C) of the Judicial Standards Commission Rules (NMRA 2020), the Commission requires that you provide a written explanation as to the matter discussed below.

It has been alleged that:

On or about July 26, 2021 you engaged in an *ex parte* communication with Assistant District Attorney Samuel Rosten regarding Cause Number D-307-CR-2018-00203, a criminal case in which your daughter was a victim of an assault and for which Samuel Rosten was the prosecuting attorney. After the first day of trial, your daughter emailed attorney Rosten requesting he contact her. Attorney Rosten contacted your daughter that same evening and your daughter handed you the telephone and you initiated and engaged in an *ex parte* phone conversation meant to influence attorney Rosten's legal strategy.

On or about July 26, 2021, during an *ex parte* telephone conversation with attorney Samuel Rosten you used your prestige of office to influence attorney Rosten's trial strategy when you directed attorney Rosten to use the term "brandished a firearm" in his jury instructions rather than asking the jury to find the Defendant "pointed a firearm" at the victim, your daughter.

On or about July 26–27, 2021 during the trial in cause number D-307-CR-2018-00203, you allowed your daughter, a victim in the case, to use your chambers


**Investigative Trial
Counsel**
Exhibit #2

while waiting for her opportunity to testify. Such conduct may have the appearance of impropriety.

On or about July 27, 2021, after the verdict in Cause Number D-307-CR-2018-00203, you engaged in an *ex parte* conversation with attorney Rosten and his co-counsel attorney Spencer Willson. After the verdict came in, you had a bailiff direct attorney Rosten to come speak with you. Both attorney Rosten and attorney Willson left the courtroom and went to speak with you in a room down the hall from the courtroom. Once the prosecuting attorneys arrived, you immediately admonished attorney Rosten for not requesting the Defendant be remanded into custody following the verdict. Had the Defendant not been remanded by the sitting judge, you told attorney Rosten that would have demanded attorney Rosten go back into the court and tell the sitting judge that he had a change of position.

Please provide the Commission with an explanation for your actions and the factual and legal bases for such conduct. Your response to this notice must be submitted in writing and must include an explanation and disclosure of all pertinent facts, along with any relevant documents or materials you wish the Commission to consider regarding the matter outlined herein. Pursuant to Rule 16(B) of the Judicial Standards Commission Rules (NMRA 2020), the Commission must receive your response within twenty-one (21) days of your receipt of this notice.

Sincerely yours,


Joyce E. Bustos
Chair

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing was mailed on the 20th day of December 2021, by certified mail, return receipt requested to:

Hon. James T. Martin
Third Judicial District Court
201 W. Picacho Ave.
Las Cruces, NM 88005



JAMES T. MARTIN
1702 Westwind Road
Las Cruces, New Mexico 88007
(575) 523-8292 Office
(575) 640-4904 Cellular

FILED
JAN 10 2022
NM JUDICIAL
STANDARDS COMMISSION

January 7, 2022

Sent via U.S. Mail (Certified/Return Receipt Requested)
#7021 1970 0001 7033 0654

Joyce E. Bustos, Chair
State of New Mexico
Judicial Standards Commission
6200 Uptown Boulevard NE, Suite 320
Albuquerque, New Mexico 87110-4159

Re: Inquiry No. 2021-089; Notice of Investigation

Dear Chair Bustos,

Pursuant to the Notice of Investigation and Rule 16(B) of the Judicial Standards Commission Rules, please consider this my written response to the Notice of Investigation.

On January 14, 2018, my daughter, Karina Martin, was assaulted by Robert Burnham with a loaded AR-15 assault rifle. I vividly recall receiving a frantic telephone call from my daughter, explaining to me, that a man she knew as "Beto" had threatened her with a loaded rifle. I will never forget the fear in her voice as she explained to me how she thought she could have been killed.

Over the weeks that followed, I learned that my daughter had accompanied an acquaintance to a local restaurant, to meet Mr. Burnham. During this meeting, the acquaintance got angry at Mr. Burnham and the argument spilled into the parking lot. In the parking lot, my daughter became involved by cussing at Mr. Burnham. At that point, Mr. Burnham went to his Jeep and pulled out an AR-15 assault rifle. In my daughter's presence Mr. Burnham racked the AR-15 and loaded a round into the chamber. He then pointed it at my daughter and said, "What do you have to say now, Bitch?" My daughter then got back into her car and began crying, at which point Mr. Burnham left the parking lot.

Other witnesses in the restaurant, including an off duty police officer, saw the events unfold and dialed 911. A short time later, police officers stopped Mr. Burnham's Jeep and placed him under arrest for assaulting my daughter. A subsequent search of his Jeep located the AR-15 with a loaded 30 round magazine including one round in the chamber. Photographs of the AR-15 taken at the scene also showed that the safety was disengaged. Consequently, I fully realized how close my

**Investigative Trial
Counsel
Exhibit #3**

daughter came to losing her life.

In the weeks and months that followed, I noticed a change in behavior with my daughter. She had grown up around firearms. We were both avid hunters and I took the time to teach my daughter about firearm safety. She knew that you never point a weapon at something you do not intend to destroy. This experience with Mr. Burnham forever changed my daughter's relationship with firearms, with hunting and with me. I also noticed that my daughter became withdrawn, depressed and anxious. Without explanation, she would become hysterical, would breakdown in tears and even lost her job as a result of Mr. Burnham's violent assault.

My daughter began seeing a counselor and now almost four years later she is doing better. She has left the State of New Mexico and is working. In my opinion, the trial and conviction brought closure to this chapter of her life. However, not everything has returned to normal. She still will not handle any firearms and does not wish to go hunting with me. Unfortunately, I believe I have changed as well.

After the assault, the District Attorney filed a Criminal Complaint against Mr. Burnham. The District Attorney also sought pre-trial detention based upon Mr. Burnham's violent behavior. After the matter was presented to the Grand Jury for Indictment, all of the judges in the District, including myself, recused from the case. The New Mexico Supreme Court appointed the Honorable Steven Blankenship, from the Twelfth Judicial District, to preside over the matter.

Over the next three and a half years, the case was reassigned to multiple Assistant District Attorneys. Some of the Assistant District Attorneys were seasoned and more experienced; others were less experienced. The only way my daughter could get any information from the District Attorney's Office was to constantly reach out to them by calling and emailing the Victim's Advocate. The District Attorney's Office rarely informed my daughter about the status of the case, upcoming hearings or any other matters.

On May 8, 2019, Mr. Burnham plead guilty to Count I of the Grand Jury Indictment in exchange for the District Attorney's Office not seeking the firearms enhancement, which carries a mandatory minimum sentence of twelve months. Prior to sentencing, Mr. Burnham successfully moved to withdraw his guilty plea and retained new counsel. The trial was vacated and reset three times either at the request at the District Attorney's Office or defense counsel. There were also delays due to the COVID-19 pandemic. The trial was finally held July 26 and July 27, 2021.

The Notice of Investigation asserts that on July 26 I used the prestige of my office to improperly influence Assistant District Attorney Samuel Rosten regarding this case. By way of explanation, the jury instructions submitted by the District Attorney Office on July 23, 2021 incorrectly claimed that the State had to prove that Mr. Burnham "pointed a deadly weapon at Karina Martin." However, as a former prosecutor, I knew that this was an incorrect statement of the law because the Indictment in this case alleged that Mr. Burnham assaulted my daughter and all that is required to constitute an assault is that the Defendant had to brandish a deadly weapon and then as a result of that brandishing, the victim was in fear of a battery. *See* U.J.I. 14-305 NMRA. Because I knew that Mr. Rosten would be calling my daughter to discuss the events of the day I asked to speak with him when

she was done.

When Mr. Rosten called, I did speak to him and raised questions about with the jury instructions. I pointed out the mistake to Mr. Rosten and told him I that believed that there was a case on point that an assault occurs by brandishing a weapon and does not require actual use of the deadly weapon. I did not tell Mr. Rosten to change the instruction, but rather I offered a suggested change in light of the law. Mr. Rosten agreed with my analysis and even suggested that a defendant could brandish a knife and there was no requirement that it actually be pointed in order to place a victim of fear of bodily injury. Mr. Rosten told me that he would consult with his co-counsel and proceed as they saw appropriate. Subsequently, Mr. Rosten submitted amended jury instructions with a correct statement of the law and Judge Blankenship modified it further and submitted it to the jury for its consideration. At no time did I have any contact with Judge Blankenship or his staff.

The Notice of Investigation asserts that I engaged in a *ex-parte* communication with the Assistant District Attorney. I would point out that because I was not the assigned judge and the matter was not assigned to any judge in the courthouse, I do not believe this conversation was *ex-parte*. Furthermore, I believe that because this case involved a serious violent felony, my daughter and I, both, have rights under the New Mexico Constitution's Victims Bill of Rights to "confer with the prosecution." *See* New Mexico Constitution Art. II, Sec. 24; *See* also NMSA § 31-26-4 "Victim's Rights."

With respect to the second allegation in the Notice of Investigation, that I allowed my daughter to use my Chambers during the course of trial; that is correct. However, by way of explanation, I would point out that the trial occurred under COVID-19 restrictions. The public waiting area for witnesses and victims was not readily available. Furthermore, the Victim's Advocate, Suzanna Sandoval, with the District Attorney's Office, recommended, that she wait in my office away from the courtrooms. Because my office is not near any courtroom and is in fact on the other side of the courthouse in a secure area, I don't believe anyone would have known who she was or where she was going when she came or went from my office.

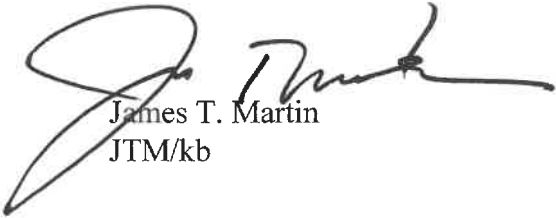
With respect to the third allegation in the Notice of Investigation, regarding my conversations with Mr. Rosten after the trial, again, I reinforce that I do not believe this was an *ex-parte* communication as discussed previously. I do dispute the second claim in the allegation that I had a bailiff direct Mr. Rosten to speak with me, rather, I recall that it was the Victim's Advocate that said Mr. Rosten wanted to speak to us after the verdict and that she sent a text message to Mr. Rosten telling him we were in the waiting room. I do not recall the exact substance of the conversation that I had with Mr. Rosten but I do recall asking if the Defendant had been remanded into custody in light of the one year mandatory minimum sentence. Judge Blankenship did remand Mr. Burnham into custody after the verdict but prior to my conversation with Mr. Rosten.

On August 11, 2021, counsel for Mr. Burnham filed a Motion for New Trial setting forth many of the allegations contained in the Notice of Investigation. Judge Blankenship denied the Motion for New Trial by written Order on August 12, 2021. On August 12, 2021, Mr. Burnham was sentenced to a period of 18-months enhanced by one year for the firearm with one year, six months suspended to be followed by one year parole and one year, six months supervised probation. Attached to this

letter is a copy of the Indictment, the proposed jury instructions at issue, the Motion for New Trial, the Order Denying the Motion for New Trial and my daughter's Victim Impact Statement.

If you need any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Martin", with a large, sweeping initial "J" and a horizontal line extending to the right.

James T. Martin
JTM/kb

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT

FILED
2018 FEB 22 PM 1:34
CLERK OF DISTRICT COURT
DOÑA ANA COUNTY, N.M.

STATE OF NEW MEXICO,

Plaintiff,

vs.

ROBERT BURNHAM,

Defendant.

No. D-307-CR-20180 203
Judge
Douglas R. Driggers

GRAND JURY INDICTMENT

THE GRAND JURY CHARGES:

Aggravated Assault (Deadly Weapon), (0056), on or about January 14, 2018, in Doña Ana County, the above-named defendant did assault or strike at Karina Martin, with an AR-15, a deadly weapon, a fourth degree felony, contrary to NMSA 1978, §30-3-2(A) (1963).

The name of the witness upon whose testimony this Indictment is based is Detective Ricardo Porras.

I hereby certify that the foregoing instrument is a True Bill.



FOREPERSON

DATE: 02/22/2018

APPROVED BY:



Daniel H. Sewell
Deputy District Attorney
845 N. Motel Blvd., 2nd Floor
Las Cruces, NM 88007
575-524-6370

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT

FILED
3rd JUDICIAL DISTRICT COURT
Dona Ana County
7/23/2021 11:44 AM
DAVID S. BORUNDA
CLERK OF THE COURT
Robert Segura

STATE OF NEW MEXICO,

Plaintiff,

vs.

ROBERT BURNHAM,

Defendant.

No. D-307-CR-201800203
Judge Steven Blankinship

CERTIFICATE OF DISCLOSURE OF INFORMATION

I hereby certify that all information required to be produced pursuant to NMRA 1986, Rule 5-501, has been produced.

I acknowledge that I have a continuing duty to disclose any additional information to which the Defendant is entitled under Rule 5-501.



Samuel Rosten
Assistant District Attorney
845 N. Motel Blvd., 2nd Floor
Las Cruces, NM 88007
575-524-6370

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered to opposing counsel, Jose R. Coronado, a true and correct copy of the foregoing on this 23rd day of July, 2021.



Samuel Rosten
Assistant District Attorney

For you to find the defendant guilty of aggravated assault by use of a deadly weapon, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant pointed a deadly weapon at Karina Martin;
2. The defendant's conduct caused Karina Martin to believe the defendant was about to intrude on her bodily integrity or personal safety by touching or applying force to her in a rude, insolent or angry manner;
3. A reasonable person in the same circumstances as Karina Martin would have had the same belief;
4. The defendant used a firearm.
5. This happened in New Mexico on or about the 14th day of January, 2018.

Plaintiff's Requested Instruction No. _____

U.J.I. Criminal No. Or Citation No. 14-305

Given: _____

Refused: _____

Withdrawn: _____

Given as Amended: _____

Judge: _____

STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO,

Plaintiff,

vs.

ROBERT BURNHAM,

Defendant.

No. D-307-CR-201800203
Judge Steven Blankinship

PLAINTIFF'S REQUESTED INSTRUCTIONS

COMES NOW the State of New Mexico, by and through its Assistant District Attorney, Samuel Rosten, and submits the attached Jury Instructions as being the applicable instructions in the above-numbered and -styled cause.



Samuel Rosten
Assistant District Attorney
845 N. Motel Blvd., 2nd Floor
Las Cruces, NM 88007
575-524-6370

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered to opposing counsel, Jose R. Coronado, a true and correct copy of the foregoing Jury Instructions on this 23rd day of July, 2021.



Samuel Rosten
Assistant District Attorney

mk 2018-0191

For you to find the defendant guilty of aggravated assault by use of a deadly weapon, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant brandished and/or pointed a deadly weapon at Karina Martin ~~in a threatening manner;~~
2. The defendant's conduct caused Karina Martin to believe the defendant was about to intrude on her bodily integrity or personal safety by touching or applying force to her in a rude, insolent or angry manner;
3. A reasonable person in the same circumstances as Karina Martin would have had the same belief;
4. The defendant used a firearm.
5. This happened in New Mexico on or about the 14th day of January, 2018.

Plaintiff's Requested Instruction No. 3

U.J.I. Criminal No. Or Citation No. 14-305

Given: _____

Refused: _____

Withdrawn: _____

Given as Amended: _____

Judge: *[Signature]*

**STATE OF NEW EXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT COURT**

FILED
3rd JUDICIAL DISTRICT COURT
Dona Ana County
8/11/2021 3:20 PM
DAVID S. BORUNDA
CLERK OF THE COURT
Lane Sheram

**STATE OF NEW MEXICO,
Plaintiff,**

v.

**D-307-CR-2018-203
JUDGE: Steven E. Blankinship**

**ROBERT BURNHAM,
Defendant.**

MOTION FOR NEW TRIAL

COMES NOW defendant ROBERT BURNHAM, through his attorney Jose R. Coronado, and moves this court for a new trial pursuant to Rule 5-614(A) & (C) of the Rules of Criminal Procedure for the District Courts. As grounds, counsel states as follows:

1. On July 27, 2021, Mr. Burnham's case proceeded to jury trial on one count of aggravated assault deadly weapon.
2. On July 28, 2021, the jury returned a verdict of guilty.
3. On July 27, 2021, the state submitted its proposed jury instructions to the court.
4. In the state's proposed jury instructions, it stated that Mr. Burnham "pointed a deadly weapon" at Karina Martin, the victim. This remained the state's position throughout the litigation and did not change until just before the final jury instructions were given to the jury.
5. In jury instruction no. 3, defining the elements of aggravated assault, the state amended its proposed jury instruction to state Mr. Burnham "brandished and/or pointed a deadly weapon" at Karina Martin, the victim.
6. When the court and the parties initially discussed the proposed jury instructions on the morning of the 27th of July and again on the 28th of July, the state submitted its proposed instruction with the language "pointed a deadly weapon at". This language was based upon the state's theory of the case and the testimony of Ms. Martin and other state witnesses.

7. When the jury instructions were reviewed a final time, the state for the first time advised the court that it intended to amend jury instruction no. 3 to include the word “brandished.” The defense objected, stating that throughout the proceedings the state had always alleged that the aggravated assault was based upon Mr. Burnham pointing the firearm at Ms. Martin. The defense also reminded the court that throughout the proceedings Ms. Martin stated that her fear of harm was based on Mr. Burnham pointing the rifle at her. That is what she testified to before the jury.

8. The court permitted the state to include the word “brandished” over defense counsel’s objection.

9. On August 10, 2021, counsel learned that the on the evening after the first day of jury trial Ms. Martin emailed Assistant District Attorney Samuel Roston and told him she wanted to speak to him. Mr. Roston was at home. Mr. Roston responded to the email by telephoning Ms. Martin. When Ms. Martin responded to the call, she said, “someone wants to talk to you,” then she handed the telephone to her father, Honorable James T. Martin, District Court Judge. Judge Martin told Mr. Roston to modify instruction no. 3 to include the word “brandished.” Judge Martin told Mr. Roston that there was a children’s court case that would support the use of “brandished” in the instruction.

10. Mr. Roston did not intend to include the word “brandished” in jury instruction no. 3 but did so only after Judge Martin suggested he do so.

11. The jury convicted Mr. Burnham. It is unknown whether the jury would have convicted Mr. Burnham without the addition of the word “brandished.” Ms. Martin never testified that her fear was caused by Mr. Burnham brandishing a firearm. She testified under oath that her fear was caused by Mr. Burnham pointing the rifle at her. None of the state’s witnesses testified to brandishment; all witnesses testified that Mr. Burnham pointed the rifle at Ms. Martin.

12. The state’s video evidence did not show Mr. Burnham point a rifle at Ms. Martin. At best, that evidence showed that Mr. Burnham removed something from the front seat of his Jeep; testimony

established that what he removed was an AR-15 rifle. But the video evidence did not support that he pointed the rifle at Ms. Martin.

13. The jury could have concluded that Mr. Burnham did not point the rifle at Ms. Martin. If it did, and if jury instruction no. 3 had not contained the word “brandished” the jury could have returned a verdict of not guilty or could have arrived at no verdict. But because Judge Martin interfered in the case, the jury could have focused on the word brandished to arrive at a guilty verdict.

14. Rule 5-614(A) permits this court to grant a new trial in the interests of justice. Counsel calls upon that subsection as the basis for this court granting this motion.

15. Rule 5-614(C) permits this court to grant a new trial based upon newly discovered evidence. Counsel calls upon that subsection as the basis for this court granting this motion. *See also, State v. Volpato*, 1985 NMSC 017.

16. This motion is filed promptly before the passage of time, and is filed within 24 hours of counsel learning about the above-stated events. Counsel is still investigating the events referred to above but files this motion at this time in order not to delay bringing the matter to the court as promptly as possible.

17. Counsel will request an evidentiary hearing on this motion.

18. The state is opposed to this motion.

Respectfully submitted,

/s/ Jose R. Coronado

JOSE R. CORONADO
NM State Bar No. 2847
Attorney for Robert Burnham
125 W. Griggs Avenue
Las Cruces, NM 88001
(575) 525-2517 - Tel.
(575) 525-2518 - Fax
jose@coronadolawlc.com

CERTIFICATE OF SERVICE

I certify that a copy of this Motion For New Trial, was filed through the Third Judicial District Court's Odyssey File & Serve System, which caused a copy to be served upon: Assistant District Attorney Samuel Rosten, Office of the Third Judicial District Attorney, 845 N. Motel Blvd., 2nd Floor, Suite D, Las Cruces, NM 88007, SRosten@da.state.nm.us, this 11th day of August, 2021.

/s/ Jose R. Coronado _____

JOSE R. CORONADO

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,
Plaintiff,

vs.

No. D-307-CR-2018-00203
Division I

ROBERT BURNHAM,
Defendant.

ORDER DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL

THIS MATTER having come before the Court *sua sponte* on the Defendant's *Motion for New Trial* filed on August 11, 2021. This matter had previously proceeded to a two-day jury trial on July 26, 2021 wherein the Defendant was found guilty of the charge as set forth in the Grand Jury Indictment. The jury also entered a special verdict wherein they found beyond a reasonable doubt that a firearm was used in the commission of aggravated assault by use of a deadly weapon.

The Jury and the Court heard sworn testimony at trial from: Karina Martin, Garrett Madrid, Officer Jason Hayes of the Las Cruces Police Department, Officer Joshua Nanez of the Las Cruces Police Department, Sgt. Richard Porras of the Las Cruces Police Department, Norm Detlaff of the City of Las Cruces, Andy Rodriguez, Jose Avila, and Robert Burnham ("Defendant").

The State's Exhibits 1 (photograph of jeep passenger side), 2 (photograph of front of jeep), 5 (photograph of firearm inside of jeep), 6 (photograph of firearm inside of jeep), 7 (photograph of side of firearm), 8 (photograph of firearm safety and the fire setting), 9 (photograph of the top of the magazine), 10 (photograph of loaded chamber), 11 (photograph of ammunition and magazine), 13 (surveillance video 1), and 14 (surveillance video 2) were admitted at trial.

The Court's findings and conclusions of law appear below. Headings are for the convenience of the reader and do not modify any numbered finding or conclusion.

The Court having reviewed the *Motion* and the court record as well as admitted trial exhibits, the applicable law, and being otherwise fully advised in the premises, hereby **FINDS AND CONCLUDES:**

I. PROCEDURAL HISTORY

1. On January 16, 2018, a Criminal Complaint and Statement of Facts in Support of Complaint were filed in the Dona Ana County Magistrate Court. See M-14-FR-2018-00046. The allegations include reference that the Defendant used a firearm, an AR-15 assault style rifle, in the commission of a felony.
2. On February 22, 2018, a Grand Jury Indictment was filed charging the Defendant with Aggravated Assault (Deadly Weapon), a fourth degree felony, contrary to NMSA 1978, Section 30-3-2(A). The alleged victim is Karina Martin.
3. On October 1, 2020 the State filed a Notice of Intent to Impose Firearm Enhancement pursuant to NMSA 1978, Section 31-18-16.
4. On July 23, 2021, prior to the start of the trial, the State submitted their Requested [Jury] Instructions pursuant to the Court's March 30, 2021 Order Setting Deadlines.
5. On July 26, 2021 a two-day jury trial commenced in this matter.
6. On July 27, 2021, the jury found the Defendant guilty of Aggravated Assault by Use of a Deadly Weapon as charged in Count 1; and, a special verdict was entered finding that a firearm was used in the commission of Count 1.
7. On August 11, 2021, the Defendant filed a *Motion for New Trial*.

II. STANDARD OF REVIEW

A. Motion for New Trial

1. The Defendant's *Motion for New Trial* was brought pursuant to Rule 5-614 NMRA.

2. Rule 5-614 NMRA provides:

- A. **Motion.** When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.
- B. **Evidence on motion.** When a motion for new trial calls for a decision on any question of fact, the court may consider evidence on such motion by affidavit or otherwise.
- C. **Time for making motion for new trial.** A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two (2) years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within ten (10) days after verdict or finding of guilty or within such further time as the court may fix during the ten (10) day period.
- D. **Procedure; hearing.** When the defendant has been found guilty by a jury or by the court, a motion for new trial may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. Such motion may be in writing and filed with the clerk. Such motion, written or oral, shall fully set forth the grounds upon which it is based.
- E. **Waiver.** Failure to make a motion for a new trial shall not constitute a waiver of any error which has been properly brought to the attention of the court.

- 3. “In criminal cases, there are two primary categories of new trial motions with different time requirements and different review standards. One is a motion for new trial based on newly discovered evidence, which may be filed within two years after the trial under Rule 5-614(C) and which is specifically governed by a particular set of standards under our case law. . . .” *State v. Aguilar*, 2019-NMSC-017, ¶ 25 (citing *See State v. Volpato*, 1985-NMSC-017, ¶ 7) (setting out particularized requirements) (internal citation omitted).
- 4. “The other category is far broader, authorizing a trial court to grant a new trial “on any other grounds” within the narrow time constraints of the rule. Rule 5-614(C). The

governing standard is whether the trial judge determines a new trial is required “in the interest of justice,” as articulated in Rule 5-614(A) NMRA. This term has a history of interpretation in the federal courts, where Rule 33(a) of the Federal Rules of Criminal Procedure authorized granting a new trial “in the interest of justice” long before the 1972 adoption of the New Mexico Rules of Criminal Procedure. *See, e.g., United States v. Smith*, 331 U.S. 469, 472, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947) (observing that the “rule is declaratory of the power to grant a new trial ‘in the interest of justice’ instead of for reasons catalogued as they might have been”). *Aguilar*, 2019-NMSC-017 at ¶ 26.

5. The Defendant’s *Motion for New Trial* is based, in part, on both Rule 5-614 (A) and (C) NMRA. Essentially, the Defendant points to two alleged errors: (1) providing a jury instruction on the elements of Aggravated Assault with a Deadly weapon that used the term “brandished” was in error and not supported by the evidence and, alternatively, (2) if not in error, that somehow the prosecutor’s request to use the term “brandished” was improperly influenced by the victim’s father who is a district court judge.
6. As far as the claim is made pursuant to Rule 5-614(A) NMRA (“interests of justice”), such a motion is required to be filed within ten (10) days of the verdict. *See* Rule 5-614(C) NMRA.
7. The verdict was entered on July 27, 2021.
8. Rule 5-104(A)(2) NMRA provides:
 - (2) Period stated in days or a longer unit; ten (10) days or less. When the period is stated in days but the number of days is ten (10) days or less
 - (a) exclude the day of the event that triggers the period;

(b) exclude intermediate Saturdays, Sundays, and legal holidays;
and

(c) include the last day of the period, but if the last day is a Saturday,
Sunday, or legal holiday, the period continues to run until the end of
the next day that is not a Saturday, Sunday, or legal holiday.

9. As such, the ten (10) day time period includes July 28 (Day 1), July 29, (Day 2), July 30 (Day 3), August 2 (Day 4), August 3 (Day 5), August 4 (Day 6), August 5 (Day 7), August 6 (Day 8), August 9 (Day 9), and August 10 (Day 10).
10. The claim pursuant to the “interests of justice” assertion was not filed “within” ten (10) days as therefore, the August 11, 2021 filing is untimely pursuant to Rule 5-614(C) NMRA and should be denied as untimely. Alternatively, this claim also fails on the merits as more fully set forth *infra*.
11. The Defendant’s claim regarding newly discovered evidence, however, is timely filed as provided in Rule 5-614 NMRA.
12. “The general rule is that motions for a new trial are not favored and will only be granted upon a showing of a clear abuse by the trial court.” *State v. Stephens*, 1982-NMSC-128, ¶ 7, (citing *State v. Ramirez*, 1968-NMSC-148; *State v. Fuentes*, 1960-NMSC-035).
13. The trial court’s exercise of discretion in denying or granting a motion for a new trial will not be disturbed unless there is a manifest abuse of discretion. *Aguilar*, 2019-NMSC-017; *see also Fuentes*, 1960-NMSC-035 at ¶ 6 (“The discretion of a trial court is not to be lightly interfered with as to the granting of a motion for new trial.”); *State v. Smith*, 1986-NMSC-038, ¶ 17, 104 N.M. 329, 721 P.2d 397, overruled on other grounds by *Gallegos v. Citizens Ins. Agency*, 1989-NMSC-055, ¶ 28, (“[T]he function of passing on motions for new trial

belongs naturally and peculiarly to the trial court.”); *State v. Moreland*, 2008--NMSC--038, ¶ 9 (An appellate court “will not disturb a trial court's exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion.”); *State v. Garcia*, 2005-NMSC-038, ¶ 7 (“[W]e will not disturb a trial court's exercise of discretion in denying or granting a motion for a new trial unless there is a manifest abuse of discretion.”); *State v. Rojo*, 1999-NMSC-001, ¶ 41 (“We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.”).

14. For the reasons discussed below, the Court rejects each of the Defendant’s claimed errors and denies the *Motion for New Trial*.

III. Use of the Term “Brandished”

15. The Jury Instruction No. 3, which was provided to the jury in this matter reads:

For you to find the defendant guilty of aggravated assault by use of a deadly weapon, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant *brandished and/or* pointed a deadly weapon at Karina Martin;
2. The defendant’s conduct caused Karina Martin to believe the defendant was about to intrude on her bodily integrity or personal safety by touching or applying force to her in a rude, insolent or angry manner;
3. A reasonable person in the same circumstances as Karina Martin would have had the same belief;
4. The defendant used a firearm.

5. This happened in New Mexico on or about the 14 day of January, 2018.

(Emphasis added)

16. The language complained of by the Defendant is the inclusion of “brandished and/or” and argues that the evidence would only support that the Defendant “pointed” the deadly weapon at Karina Martin.

17. The Court disagrees.

18. The record demonstrates that the Defendant had previously been noticed that the State would be pursuing and, implicitly, arguing that a firearm had been brandished in this matter.

See the Notice of Intent to Impose Firearm Enhancement filed on October 1, 2020.

19. NMSA 1978, Section 31-18-16 provides:

A. When a separate finding of fact by the court or jury *shows that a firearm was brandished in the commission of a noncapital felony*, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by three years, except that when the offender is a serious youthful offender or a youthful offender, the sentence imposed by this subsection may be increased by one year.

B. For a second or subsequent noncapital felony in which a firearm is brandished, the basic sentence of imprisonment prescribed in Section 31-18-15 NMSA 1978 shall be increased by five years, except that when the offender is a serious youthful offender or a youthful offender, the sentence imposed by this subsection may be increased by three years.

C. If the case is tried before a jury and if a prima facie case has been established *showing that a firearm was brandished in the commission of the offense*, the court shall submit the issue to the jury by special interrogatory. If the case is tried by the court and if a prima facie case has been established showing that a firearm was brandished in the commission of the offense, the court shall decide the issue and shall make a separate finding of fact thereon.

D. As used in this section, *“brandished” means displaying or making a firearm known to another person while the firearm is present on the person of the offending party with intent to intimidate or injure a person.*

(Emphasis added).

20. The evidence at trial clearly demonstrates that the Defendant displayed or made a firearm known to Karina Martin while the firearm was present on the Defendant's person with the intent to intimidate Karina Martin. *See* NMSA 1978, § 31-18-6(D).
21. The fact that the government initially tendered jury instructions, prior to the start of trial, that did not use the term "brandished" is not fatal or determinative of this issue.
22. Instructions, including those related to the elements of an offense, may also change to conform to the evidence.
23. "The court may at any time prior to a verdict cause the complaint, indictment or information to be amended in respect to any such defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Rule 5-204(A) NMRA; *see also* Rule 5-204(C).
24. The substantial rights of the Defendant were not prejudiced.
25. In deciding whether an instruction is proper, the trial court must not weigh the evidence, but must simply determine whether such evidence exists. *State v. Romero*, 1998-NMCA-057, ¶ 28.
26. Here, the evidence, essentially, can be surmised as following: a verbal altercation occurred between the Defendant and Karina Martin which included the use of foul and rude language between the two of them (*see, e.g.*, testimony of Karina Martin on July 26, 2021 between 2:01:06 PM and 2:01:57 PM); the Defendant went to his vehicle where he obtained an AR-15 rifle, loaded a magazine, chambered a round, turned the safety off, and pointed the rifle at Karina Martin while stating, "what are you going to do about it bitch" (*see, e.g.*, testimony of Karina Martin on July 26, 2021 between 2:01:57 PM and 2:04:52 PM). This

conduct by the Defendant caused Karina Martin to be placed in fear for her (*see, e.g.*, testimony of Karina Martin on July 26, 2021 between 2:04:52 PM and 2:06:21 PM).

27. The evidence supports that the Defendant brandished a firearm.
28. The conduct related to the firearm enhancement (brandishing) statute and the aggravated assault with a deadly weapon statute often arise out of the same facts. *See, e.g., State v. Baroz*, 2017-NMSC-030 (in discussing Double Jeopardy).
29. The use of the action, brandishing, is a proper insertion for a UJI 14-305 NMRA instruction.
30. UJI 14-305 NMRA provides:

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____]1, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (describe unlawful act, threat or menacing conduct);
2. The defendant's conduct caused _____ (name of victim) to believe the defendant was about to intrude on _____'s (name of victim) bodily integrity or personal safety by touching or applying force to _____ (name of victim) in a rude, insolent or angry manner2;
3. A reasonable person in the same circumstances as _____ (name of victim) would have had the same belief;
4. The defendant used a [_____]3 [deadly weapon. The defendant used a _____ (name of object). A _____ (name of object) is a deadly weapon

only if you find that a _____ (name of object), when used as a weapon, could cause death or great bodily harm⁴];

5. This happened in New Mexico on or about the _____ day of _____, _____.

30. Jury Instruction No. 3, as given, was proper.

IV. Allegations Related to Karina Martin's Father

31. A motion for new trial "shall fully set forth the grounds upon which it is based." Rule 5-614(D) NMRA.

32. "To justify a new trial on grounds of newly discovered evidence the newly discovered evidence must satisfy all of the following requirements: (1) it will probably change the result if a new trial is granted, (2) it must have been discovered since the trial, (3) it could not have been discovered before the trial by the exercise of due diligence, (4) it must be material, (5) it must not be merely cumulative, and (6) it must not be merely impeaching or contradictory. *State v. Moreland*, 2007-NMCA-047, ¶ 26, 141 N.M. 549, 157 P.3d 728 (quoting *State v. Volpato*, 1985-NMSC-017, ¶7, 102 N.M. 383, 696 P.2d 471) (internal quotation marks omitted).

33. The Defendant has the burden of proving the evidence met all six requirements. *See, e.g., State v. Desnoyers*, 2002-NMSC-031, 132 N.M. 756, 55 P.3d 968, abrogated by *State v. Rivas*, 2017-NMSC-022, 398 P.3d 299.

34. The Defendant alleges in the *Motion for New Trial* that on the evening after the first day of the jury trial, Assistant District Attorney Samuel Roston spoke to the victim's father, a district court judge, whom told Mr. Roston to use the word "brandished" for the elements instruction. (*Motion for New Trial*, ¶ 9).

36. Assuming for the sake of argument that this is true, defense counsel suggests that (i) this is the type of newly discovered evidence contemplated by Rule 5-614(C) NMRA that would warrant a new trial and/or (ii) that it is the type of conduct that would, in the interests of justice, demand a new trial pursuant to Rule 5-614(A) NMRA.
37. The Defendant fails to provide legal support for either position.
38. Where a party cites no authority to support an argument, the Court will assume no such authority exists. *See, e.g., In re Adoption of Doe*, 1984-NMSC-024, ¶ 2.
39. This is not newly discovered evidence as contemplate by Rule 5-614(C) NMRA. Further, even if it were newly discovered evidence, the Defendant has failed to meet his burden under *Moreland* and his arguments with respect to this claim are without merit.
40. A new trial is not required in the interest of justice. *See* Rule 5-614(A) NMRA.
41. The Defendant received a fair trial and the claimed errors are without merit.
42. The *Motion for New Trial* is not well-taken and should be summarily denied.

IT IS HEREBY ORDERED that the Defendant's *Motion for New Trial* is hereby **DENIED**.

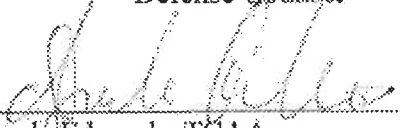

STEVEN E. BLANKINSHIP
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 12, 2021, a true and correct copy of the foregoing was served by Odyssey and through first-class mail on the following parties:

Samuel C. Rosten
Third Judicial District Attorney's Office

Jose R. Coronado
Defense Counsel


Amanda Edwards, TCAA

IN THE DISTRICT COURT
COUNTY OF DONA ANA
STATE OF NEW MEXICO

FILED
3rd JUDICIAL DISTRICT COURT
Dona Ana County
8/10/2021 2:38 PM
DAVID S. BORUNDA
CLERK OF THE COURT
Deanna Gomez

STATE OF NEW MEXICO,

Plaintiff,

vs.

ROBERT BURNHAM,

Defendant.

No. CR-2018-203
Judge Steven Blankenship

STATE'S SENTENCING MEMORANDUM

The State of New Mexico recommends that the Court require Defendant to serve a total term of 30 months in prison, and further states as follows.

1. The jury found Defendant guilty of aggravated battery by use of a deadly weapon, a fourth degree felony, in violation of NMSA 1978, Section 30-3-2(A) (1963). The basic sentence for a fourth degree felony is 18 months in prison. NMSA § 31-18-15(A)(13) (2019).

2. The jury found that a firearm was used in the commission of the offense. Thus, the one-year firearm enhancement applies under NMSA 1978, Section 31-18-16(A) (1993, amended 2020). The enhancement shall be the first sentence to be served. Section 31-18-16(A). It shall not be suspended or deferred. *Id.*

3. The victim Karina Martin will testify at the sentencing hearing. She will testify about Defendant's harm to her, including the emotional trauma she experienced since Defendant brandished and pointed a rifle at her.

4. She provided the attached statement. (Exhibit A). She recounted that Defendant pointed a loaded weapon at her. (*Id.*). He had the safety off. (*Id.*). Because she had experience with responsible use of firearms, she knew that you don't point a weapon at something unless you intend to kill it. She feared for her life, experienced long-term trauma, and lost pleasure in using firearms. At a gun show in April 2018, she broke down after seeing someone handle an AR-15. She prepared a statement reflecting why there should be a just punishment for Defendant's brazen offense. She requested the maximum time in prison for him. (*Id.*).

5. This Court has broad sentencing discretion. *State v. Lavone*, 2011-NMCA-084, ¶ 9, 150 N.M. 473. It "must consider many factors when it makes a sentencing determination, and the court is given broad discretion to fashion a sentence appropriate to the offense and the offender." *Id.* (internal quotation marks omitted). Generally, "all sentences of imprisonment, whether measured by an extended term or not,

have as their goals punishment and deterrence.” *State v. Quintana*, 2019-NMCA-030, ¶ 17 (internal quotation marks omitted), *affirmed by* 2021-NMSC-013, 485 P.3d 215.

6. By considering all relevant factors to impose a just punishment, this Court should determine that a 30-month sentence is appropriate for Defendant. *See Lavone*, 2011-NMCA-084, ¶ 9. One relevant factor is the harm to Ms. Martin. Defendant’s actions caused her to fear for her life. (Exhibit A). He inflicted emotional trauma that continued to this day. (*Id.*). Moreover, this Court should consider her request for the maximum punishment. (*Id.*).

7. Another factor is the seriousness of the offense. A 30-month sentence will reflect the gravity of Defendant’s actions. He grabbed a semi-automatic rifle, loaded it, charged it, brandished it, had its safety turned off, and pointed it at Ms. Martin. In the middle of the night, he wanted to terrorize her because of a personal disagreement.

8. The sentence will also serve to deter Mr. Burnham from committing more crimes during his sentence and after it. *See Quintana*, 2019-NMCA-030, ¶ 17. The Court should promote general deterrence by showing other people that Defendant’s crime is serious. *See id.* Finally,

Defendant has shown no remorse, and the State does not expect him to show any at sentencing. This factor weighs in favor of the maximum punishment.

WHEREFORE, the State requests that the Court impose the one-year firearm enhancement, impose a consecutive sentence of 18 months for the offense, refuse to suspend the sentences, and order that Defendant serve five years of probation and two years of parole.

Respectfully submitted,



Samuel Rosten
Assistant District Attorney
District Attorney's Office
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Second Floor, Suite D
Las Cruces, NM 88007
575-524-6370

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing to Joe Coronado.



Samuel Rosten
Assistant District Attorney

EXHIBIT A

Victim Impact Statement

The events of January 14th, 2018 will forever be a part of who I am, an event that has changed how I view a lot of things, but especially guns. I grew up in a household where gun safety and gun knowledge were paramount. From a young age I understood what it meant to raise a weapon and the level of commitment it required. You don't load a weapon unless you intend to fire it, and you understand that the animal on the other side of that barrel will die. On January 14th, 2018, I was that animal. I know that you never point a weapon at something you do not intend to destroy. I also know that you do not take a gun off of safety until you are ready to fire. The AR-15 that Mr. Burnham had pointed at me that night was loaded, and the safety was off. I understood what it meant to raise and load a weapon, and I was scared for my life.

Although the events of that night lasted only minutes, they impact me to this day. I find it difficult to write this, feeling as though the case is closed and Mr. Burnham has been delivered his justice with a guilty verdict from a jury. However, I know that it's not because on Thursday, August 12th, Your Honor will sentence him for his crime. Briefly, I will tell you some of the most impactful moments after January 14th, 2018.

The night of the event, I was taken to the police station and gave my statement of accounts. My parents expected me to be hysterical, afraid, scarred. But instead, I felt numb that night. It was not until a few days later, when I went to work at the same hotel the Mr. Burnham was staying at during the weekend of the incident, that I felt any emotion at all. I had to tell my boss about what happened, so that they could black-list Mr. Burnham from staying at the hotel again. I can remember telling my manager what happened and being okay, then WHAM, I broke. Every emotion, every feeling of helplessness, of being scared, of having my life flash before my eyes hit me at work, of all places. I had to call my mom to come and calm me down, I was in hysterics and could not fight the fear that coursed through me. Eventually, I did calm down and realized that this was my brain finally reacting to a situation that could have ended my life, but thankfully did not. This episode affected my work performance and my coworkers had to see me like that.

A few months later, in April, I was at a gun show in Midland, Texas and I had another episode, this one more profound than the last. Our family frequents gun shows, I knew all of the vendors around us very well, and felt safe there. A man across the aisle from us picked up an AR style rifle, shouldered it and pointed it toward the ceiling to check the scope. Consciously, I knew I was not in danger, the weapon was not loaded, and it wasn't even pointed toward me or anyone else. But, what happened in that moment subconsciously took me back to January 14th, and I collapsed, shaking in fear. I could feel myself go white, an instinctual fear coursing through me that left me an emotional mess. "How could I even feel this way?," I thought, I wasn't in danger, I had no reason to be like this, but I was wrong. I was affected, impacted, recounting the split-second terror of being a victim of a violent crime. I still do not look at guns the same way after that day, I stopped going to as many gun shows and I no longer felt comfortable being in front of or even behind a gun. I decided to go to counselling to address this, and spent 10 months

going to weekly, then to semi-monthly sessions to address my PTSD. It helped, I'm not scared when I see a gun anymore, but I still do not see them the same way, or have pleasure when I go hunting or shooting with my father. Guns are not the same for me, and they never will be.

My passion and the happiness I felt while bonding with my father over guns is gone, I will never feel the same way again and that is so sad. I've lost something that can never be replaced, a bond with guns that had been cultivated from a young age. I still respect them, but I think I will always fear them in some way.

Your Honor, please take these events into consideration when sentencing Mr. Burnham. I do not think that he is a bad man, but I also do not think that he is someone who ever understood or respected guns. I don't think he understood what it meant to raise or load a weapon, something that he will never be able to legally do again. That is what I care about, I care about taking responsibility and understanding what it means to raise and load a weapon, what the consequences are when you threaten the life of another, even if you do not intend to kill them. Mr. Burnham needs to take responsibility for the events of January 14th, 2018 and the only way that will happen is by going to prison for the maximum amount of time, so that he can finally reflect on this event and take ownership of using a gun against another. Thank you for listening.

Respectfully,

A handwritten signature in cursive script that reads "Karina Martin". The signature is written in black ink and is positioned above the typed name.

Karina Martin

August 10, 2021