

1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: September 13, 2018

4 **NO. A-1-CA-35290**

5 **STATE OF NEW MEXICO,**

6           Plaintiff-Appellee,

7 v.

8 **ERNEST SERNA,**

9           Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 **Briana H. Zamora, District Judge**

12 Hector H. Balderas, Attorney General

13 Maha Khoury, Assistant Attorney General

14 Santa Fe, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender

17 Kathleen T. Baldrige, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellant

1 **OPINION**

2 **GALLEGOS, Judge.**

3 {1} Defendant Ernest Serna was arrested and charged with an open count of murder  
4 (firearm enhancement), contrary to NMSA 1978, Section 30-2-1(A)(1) (1994), and  
5 NMSA 1978, Section 31-18-16 (1993); tampering with evidence, contrary to NMSA  
6 1978, Section 30-22-5 (2003); and aggravated stalking, contrary to NMSA 1978,  
7 Section 30-3A-3.1 (1997). While he was in police custody, Defendant made several  
8 potentially incriminating statements to the arresting deputy. In district court,  
9 Defendant filed a motion to suppress the statements, arguing that he was not  
10 adequately apprised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The  
11 district court found that the *Miranda* warnings were adequate and denied Defendant's  
12 motion. Subsequently, Defendant entered into a conditional plea and disposition  
13 agreement (plea agreement) in which he pled no contest to second degree murder  
14 (firearm enhancement), contrary to Section 30-2-1(B) and Section 31-18-16,  
15 tampering with evidence, and aggravated stalking. In the plea agreement, Defendant  
16 specifically reserved for appeal the issue of the adequacy of the *Miranda* warnings.  
17 For the reasons that follow, we conclude that the *Miranda* warnings given to  
18 Defendant by the arresting deputy did not sufficiently convey Defendant's full rights

1 under *Miranda*. We therefore reverse the district court's order denying Defendant's  
2 suppression motion.

### 3 **BACKGROUND**

4 {2} The State alleges that Defendant and Alicia Quintana (Victim) went to a  
5 restaurant together and subsequently engaged in a verbal altercation in the  
6 restaurant's parking lot. After the verbal altercation, Defendant and Victim returned  
7 to the restaurant to pay their bill and then left the establishment. Several minutes later,  
8 gunshots were heard and a pickup truck was seen quickly fleeing the parking lot.  
9 Victim was found bleeding in the parking lot and was later pronounced dead.

10 {3} Defendant was apprehended a few days later by Sandoval County Deputy  
11 Sheriff Sal Tortorici. Defendant was placed in the back of Deputy Tortorici's patrol  
12 vehicle and the two engaged in casual conversation for several minutes while Deputy  
13 Tortorici had his lapel camera turned on. The lapel video shows that after  
14 approximately six and a half minutes, Deputy Tortorici recited Defendant's *Miranda*  
15 rights from memory and without the use of a department-issued card. Specifically,  
16 Deputy Tortorici gave Defendant the following *Miranda* warning (first *Miranda*  
17 warning):

18 You have the right to remain silent. Anything you say can and will be  
19 used against you in a court of law. You have the right to an attorney  
20 during any and all questionings. If you can't afford an attorney, one will  
21 be provided for you.

1 Deputy Tortorici did not immediately begin to question Defendant about the crime.  
2 Rather, Defendant and Deputy Tortorici continued to engage in conversation during  
3 which time Defendant made several statements about contemplating turning himself  
4 in to law enforcement. Deputy Tortorici then asked Defendant about the weapon,  
5 presumably the one allegedly used in the killing of Victim. Defendant responded by  
6 stating that he did not know what he did with the weapon and that he threw it out of  
7 his vehicle “somewhere.”

8 {4} Deputy Tortorici proceeded to drive Defendant to the police station for further  
9 questioning. According to an additional video recorded by Deputy Tortorici’s lapel  
10 camera, Defendant was read the following *Miranda* warning (second *Miranda*  
11 warning) from a department-issued card:

12       You have the right to remain silent. Anything you say can and will be  
13       used against you in a court of law. You have the right to talk to a lawyer  
14       and you have the right to have him present with you while being  
15       questioned. If you cannot afford a lawyer, one will be appointed to you  
16       before any questionings. If you decide at any time you want to exercise  
17       these rights and not answer any questions, you may do so.

18 Deputy Tortorici then began to interrogate Defendant about what had happened  
19 outside the restaurant with Victim. Defendant immediately asked if he was being  
20 recorded and what it would take to get an attorney. Defendant expressed that he was  
21 previously unaware he could have an attorney and that he may not have been listening  
22 to the first *Miranda* warning. Defendant then stated he “want[ed] to be left alone.”

1 After Defendant and Deputy Tortorici engaged in a bit more conversation, in which  
2 Defendant either refused to answer or gave ambiguous responses to Deputy  
3 Tortorici's questions, the lapel video ends.

4 {5} Defendant was charged with an open count of murder (firearm enhancement),  
5 tampering with evidence, and aggravated stalking. Subsequently, on August 17, 2015,  
6 Defendant filed a motion to suppress the statements made to Deputy Tortorici,  
7 arguing exclusively that the first *Miranda* warning given by Deputy Tortorici was  
8 inadequate. At the suppression hearing, the parties stipulated to the language used by  
9 Deputy Tortorici in the first *Miranda* warning. The district court denied the motion  
10 to suppress and found the first *Miranda* warning adequate. Notwithstanding the fact  
11 that the adequacy of the *Miranda* warning was the only issue addressed in  
12 Defendant's motion and during the suppression hearing, the district court also found  
13 that Defendant had waived his rights under *Miranda*. In response to the district  
14 court's order, Defendant filed a motion in limine seeking an additional order on the  
15 waiver issue. The district court then issued a letter requesting supplemental briefing  
16 as to whether Defendant waived his *Miranda* rights. The waiver issue was briefed by  
17 both sides and a second hearing was scheduled. At the hearing, a copy of the lapel  
18 videos was given to the district court and admitted into evidence<sup>1</sup>.

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19 <sup>1</sup>Defendant did not designate the transcript of this hearing as part of the record  
20 on appeal. We make this determination based on our own review of the record. The

1 {6} The district court never entered an additional or amended order on the waiver  
2 issue. Instead, shortly after the second hearing, Defendant entered into a plea  
3 agreement in which he pled no contest to second degree murder (firearm  
4 enhancement), tampering with evidence, and aggravated stalking. The plea agreement  
5 stated that “Defendant may appeal only the issue of whether the arresting [s]heriff’s  
6 [d]eputy gave an insufficient *Miranda* warning to . . . Defendant as raised  
7 in . . . Defendant’s brief filed August 17, 2015.” The district court’s judgment and  
8 sentence order similarly stated that “Defendant may appeal the *Miranda* warning  
9 issue as raised in briefs filed 8/17/15.”

## 10 **DISCUSSION**

11 {7} On appeal, Defendant makes two arguments stemming from the district court’s  
12 denial of his suppression motion. First, Defendant argues that the first *Miranda*  
13 warning given to him was inadequate. Specifically, Defendant asserts that the  
14 warning did not adequately convey his right to have counsel appointed and present  
15 prior to questioning. Second, Defendant argues that even if the warning was adequate,  
16 the district court erred in finding that he waived his rights under *Miranda*.

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17 record indicates that the CD containing the lapel videos was admitted into evidence  
18 at the second hearing. This is the same CD this Court received as a supplemental  
19 exhibit.

1 {8} In turn, the State contends that the warning was adequate and that the waiver  
2 issue was not preserved below or reserved for appeal in the plea agreement.  
3 Additionally, the State argues for the first time on appeal that some of the statements  
4 made by Defendant to Deputy Tortorici were volunteered.

### 5 **I. Standard of Review**

6 {9} In reviewing the district court’s denial of a defendant’s motion to suppress, the  
7 factual determinations are subject to a substantial evidence standard of review, but  
8 the application of the law to the facts is subject to de novo review. *State v. Nieto*,  
9 2000-NMSC-031, ¶ 19, 129 N.M. 688, 12 P.3d 442. We view the district court’s  
10 factual determinations “in the manner most favorable to the prevailing party.” *State*  
11 *v. Lopez*, 2000-NMCA-069, ¶ 4, 129 N.M. 352, 8 P.3d 154.

### 12 **II. Adequacy of the *Miranda* Warnings**

13 {10} At issue here is the Fifth Amendment right against self-incrimination. The Fifth  
14 Amendment states that no person shall “be compelled in any criminal case to be a  
15 witness against himself[.]” U.S. Const. amend. V. The Fifth Amendment right against  
16 self-incrimination is applicable to the State of New Mexico through the Fourteenth  
17 Amendment. *See State v. Filemon V.*, 2018-NMSC-011, ¶ 18, 412 P.3d 1089.

18 {11} This privilege against self-incrimination is available outside of court  
19 proceedings, including situations where a person is being questioned by law

1 enforcement. *See Miranda*, 384 U.S. at 467 (holding that the Fifth Amendment  
2 privilege is available during in-custody interrogation of persons suspected or accused  
3 of a crime). A person is subject to custodial interrogation when law enforcement  
4 initiates questioning after a person has been taken into custody or otherwise deprived  
5 of his or her freedom of action in any significant way. *Id.* at 444.

6 {12} “[T]he prosecution may not use statements, whether exculpatory or inculpatory,  
7 stemming from custodial interrogation of the defendant unless it demonstrates the use  
8 of procedural safeguards effective to secure the privilege against self-incrimination.”

9 *Id.* In order for a statement to be admissible, *Miranda* requires that prior to  
10 questioning, law enforcement must warn the person of the right to remain silent, that  
11 any statement he or she makes may be used as evidence against them, and that he or  
12 she “has a right to the presence of an attorney, either retained or appointed.” *Id.* These  
13 warnings must be clearly conveyed to the individual held for interrogation and are an  
14 absolute prerequisite before the interrogation can begin. *Id.* at 471-72. “Only through  
15 such a warning is there ascertainable assurance that the accused was aware of” his or  
16 her *Miranda* rights. *Id.* at 472.

17 {13} Our focus in this case is on Deputy Tortorici’s explication of Defendant’s right  
18 to counsel. The right to counsel warning from *Miranda* requires that a person subject  
19 to custodial interrogation by law enforcement be apprised that they have a “right to

1 the presence of an attorney[.]” *Id.* at 444. In this case, Deputy Tortorici warned  
2 Defendant that he had a “right to an attorney during any and all questionings.”  
3 Deputy Tortorici also warned Defendant, “If you can’t afford an attorney, one will be  
4 provided for you.” Defendant argues that Deputy Tortorici’s warnings were  
5 inadequate because they did not apprise him of his right to appointed counsel *prior*  
6 to questioning. In response, the State contends that there is no requirement that a  
7 *Miranda* warning explicitly inform the suspect of a right to an attorney prior to  
8 questioning. Further, the State asserts that Defendant was in fact informed of the right  
9 to have an attorney prior to *answering* questions, and that this is all that is required  
10 under *Miranda*.

11 {14} To the extent the State asserts that there is no requirement that a suspect be  
12 given the *Miranda* warnings verbatim, we agree. *See California v. Prysock*, 453 U.S.  
13 355, 359-60 (1981) (stating that *Miranda* does not require a “talismanic incantation”  
14 of the warnings, but rather only the fully effective equivalent of such warnings). “The  
15 crucial test is whether the words in the context used, considering the age, background  
16 and intelligence of the individual being interrogated, impart a clear, understandable  
17 warning of all of his rights.” *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir.  
18 1967). “[I]t is for the court to objectively determine whether in the circumstances of  
19 the case the words used were sufficient to convey the required warning.” *Id.*

1 {15} In making this determination, the form of a *Miranda* warning is of little  
2 consequence as we look to see if the substance of what is required by *Miranda* is  
3 communicated to the suspect. *See Prysock*, 453 U.S. at 359 (“[The United States  
4 Supreme] Court has never indicated that the ‘rigidity’ of *Miranda* extends to the  
5 precise formulation of the warnings given a criminal defendant.”); *State v. Briggs*,  
6 1970-NMCA-062, ¶ 4, 81 N.M. 581, 469 P.2d 730 (“The warnings required by  
7 *Miranda* . . . deal with substance, not form.”); *see also People of Territory of Guam*  
8 *v. Snaer*, 758 F.2d 1341, 1343 (9th Cir. 1985) (“If a defendant has been told the  
9 substance of his constitutional rights, it is not fatal if irrelevant words or words with  
10 no independent substance are omitted.” (internal quotation marks and citation  
11 omitted)). *Miranda* warnings need not be examined “as if construing a will or  
12 defining the terms of an easement.” *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989).

13 {16} “The inquiry is simply whether the warnings reasonably convey to a suspect  
14 his rights as required by *Miranda*.” *Duckworth*, 492 U.S. at 203 (alterations, internal  
15 quotation marks, and citation omitted). In taking this somewhat flexible and common  
16 sense approach, the United States Supreme Court has attempted to balance the  
17 individual right against compelled self-incrimination with the necessities encountered  
18 every day by law enforcement. *See Miranda*, 384 U.S. at 481 (“This Court, while

1 protecting individual rights, has always given ample latitude to law enforcement  
2 agencies in the legitimate exercise of their duties.”).

3 {17} Our analysis of the adequacy of Deputy Tortorici’s *Miranda* warnings thus  
4 turns on two primary questions: (1) does *Miranda* require that a person subject to  
5 custodial interrogation be warned of that person’s right to have counsel present prior  
6 to questioning; and (2) if so, was this right reasonably conveyed by the warnings  
7 given by Deputy Tortorici?

8 **A. *Miranda* Warnings Must Convey the Right to the Presence of Counsel**  
9 **Prior to Questioning**

10 {18} It is clear from both *Miranda* and subsequent decisions by the United States  
11 Supreme Court that there is a right to have and consult with counsel prior to  
12 questioning. *See Miranda*, 384 U.S. at 470 (“Thus, the need for counsel to protect the  
13 Fifth Amendment privilege comprehends not merely a right to consult with counsel  
14 prior to questioning, but also to have counsel present during any questioning if the  
15 defendant so desires.”); *see also Duckworth*, 492 U.S. at 203 (noting that the  
16 warnings at issue, including the defendant’s right to speak to an attorney before and  
17 during questioning satisfied all the requirements of *Miranda*); *Florida v. Powell*, 559  
18 U.S. 50, 62 (2010) (holding that, combined together, the warnings given to the  
19 defendant “reasonably conveyed” that he had a right to have an attorney present “at  
20 all times[,]” including both prior to and during police questioning). This right must

1 be conveyed as part of the *Miranda* warnings. *See Prysock*, 453 U.S. at 361 (stating  
2 that the full right to counsel under *Miranda* that must be conveyed includes the “right  
3 to have a lawyer present prior to and during interrogation”).

4 {19} We address the State’s two points of disagreement with this proposition. The  
5 State’s first point is that this Court, our Supreme Court, and the United States  
6 Supreme Court have all upheld on numerous occasions warnings that simply apprised  
7 the suspect of a right to the presence of counsel, which is a verbatim recitation of  
8 what *Miranda* noted was required. *See Miranda*, 394 U.S. at 444. While this may be  
9 true, such a warning contains no limitation on the right to counsel. That is, one can  
10 reasonably infer from an advisement referring to the right to the presence of counsel  
11 that the right applies both before and during interrogation. The fact that courts have  
12 affirmed the use of the term “presence of counsel” does not mean that a suspect need  
13 not be advised of his right to counsel prior to questioning, as the State contends, but  
14 rather that such language adequately conveys that right. However, because this  
15 particular language is not at issue in this case, the State’s point is unavailing.

16 {20} The State’s second point, made in reliance on *Powell*, is that the full right to  
17 counsel encompasses only a right to counsel prior to *answering* any questions, as  
18 opposed to prior to *questioning*. Specifically, the State points out that the defendant  
19 in *Powell* was advised of his right to consult with an attorney before answering any

1 questions and asserts that such warning was held by the United States Supreme Court  
2 to be sufficient. *See Powell*, 559 U.S. at 62-63. We observe, however, that the  
3 warnings at issue in *Powell* were inverse to the warnings given here. That is, the  
4 defendant in *Powell* was explicitly warned of his right to have counsel prior to  
5 answering any questions, but the warnings omitted the right to counsel *during*  
6 questioning. *Id.* at 54. However, the defendant was also advised that he had a right  
7 to have counsel appointed *prior to questioning*. *Id.* Importantly, the Supreme Court  
8 did not examine the sufficiency of the warning with respect to the right to counsel  
9 prior to answering questions, but rather analyzed whether the warnings in their  
10 totality “reasonably conveyed” to the defendant that he had a right to have an attorney  
11 present “at all times[,]” including both prior to and during police questioning. *Id.* at  
12 62. In concluding that the warnings in their totality satisfied *Miranda*, the Supreme  
13 Court relied on and reaffirmed its decisions in *Prysock* and *Duckworth*. *Powell*, 559  
14 U.S. at 60-62. We can see nothing in *Powell* that would indicate that the Supreme  
15 Court intended to limit the right to counsel prior to questioning, as outlined in  
16 *Miranda*, *Prysock*, and *Duckworth*, so that it would become effective only after  
17 questioning began, as the State contends. Nor does the State’s contention survive  
18 scrutiny when compared to the language in *Miranda* stating that if a suspect  
19 “indicates in any manner and at any stage of the process that he wishes to consult

1 with an attorney before speaking there can be *no questioning*.” *Miranda*, 384 U.S. at  
2 444-45 (emphasis added). Therefore, we are not convinced by the State’s argument  
3 on this point.

4 {21} We conclude that *Miranda* requires that a person be warned, at least implicitly,  
5 that they have a right to counsel prior to questioning. *See, e.g., United States v.*  
6 *Loucioux*, 847 F.3d 1146, 1151 (9th Cir. 2017) (“The *Miranda* warnings at issue . . .  
7 adequately conveyed notice of the right to consult with an attorney before  
8 questioning.”); *see also Snaer*, 758 F.2d at 1342 (“The Supreme Court in  
9 *Miranda*, . . . although making clear that one does have the right to consult with  
10 counsel before questioning, is ambiguous as to how explicitly the person must be  
11 warned of that right.” (citation omitted)); *State v. Nave*, 821 N.W.2d 723, 727 (Neb.  
12 2012) (“[A]lthough the *Miranda* warnings did not expressly state that [the defendant]  
13 was entitled to appointed counsel before questioning, that information was obviously  
14 implied from the warnings which the police read to him.”).

15 **B. The *Miranda* Warning in This Case Did Not Reasonably Convey the Right**  
16 **to the Presence of Counsel Prior to Questioning**

17 {22} We now look at whether Deputy Tortorici’s warnings reasonably and  
18 sufficiently conveyed to Defendant his right to have an attorney present, including  
19 prior to questioning. *See Powell*, 559 U.S. at 62-63; *Filemon V.*, 2018-NMSC-011,  
20 ¶ 48 (“*Miranda* warnings must be given in a manner that is clearly sufficient to grant

1 the suspect an awareness of the right so the suspect can make a knowing, intelligent  
2 and voluntary choice to speak.”). This requires us to view the warnings in their  
3 totality to determine if Defendant was apprised, either explicitly or implicitly, of the  
4 right to have counsel before as well as during questioning. *See Duckworth*, 492 U.S.  
5 at 205 (holding that the warnings read together “in their totality” can satisfy the  
6 requirements of *Miranda*).

7 {23} The warning given to Defendant indicated that he had a right to an attorney  
8 “during any and all questioning.” The use of the word “during” is pivotal. “During”  
9 is a preposition and is defined as “throughout the duration of.” *Merriam-Webster’s*  
10 *Collegiate Dictionary* 388 (11th ed. 2005). A “preposition” is “a function word that  
11 typically combines with a noun phrase to form a phrase which usually expresses a  
12 modification or predication.” *Id.* at 981. Thus, “during” modifies the phrase “you  
13 have a right to an attorney” and restricts that right to the duration of any questioning  
14 by law enforcement. Even viewing this language in a manner extending the utmost  
15 latitude to the law enforcement officer—and bringing common sense to bear—we still  
16 cannot see how “during” could be understood to apply backwards to also mean prior  
17 or before.

18 {24} The State’s reference to *Loucioux* in its answer brief only serves to underscore  
19 this determination. In *Loucioux*, like here, the defendant was warned that he had the

1 right to the presence of an attorney during questioning. 847 F.3d at 1148. And also  
2 like here, the defendant was not explicitly warned that he had the right to the presence  
3 of an attorney prior to questioning. *Id.* However, he was advised that if he could not  
4 afford an attorney, one would be appointed “before questioning.” *Id.* The court held  
5 that the warnings, taken together, “adequately conveyed notice of the right to consult  
6 with an attorney prior to questioning.” *Id.* at 1151. In this case, where the balance of  
7 the warnings contain no “before questioning” language—or any other language, for  
8 that matter—by which we could infer that the full right to counsel was adequately  
9 conveyed, there is simply no way to reasonably read the warnings given by Deputy  
10 Tortorici as conveying to Defendant that he had a right to an attorney prior to  
11 questioning.

12 {25} In sum, by implying that the right to counsel would be effective only during the  
13 interrogation, the warnings given by Deputy Tortorici to Defendant placed a  
14 misleading temporal limitation on the full right to counsel under *Miranda*. *Cf. Powell*,  
15 559 U.S. at 74 n.8 (Stevens, J., dissenting) (expressing concern over *Miranda*  
16 warnings that use a misleading temporal limitation on the right to counsel). Therefore,  
17 we conclude that the warnings here did not reasonably convey Defendant’s *Miranda*  
18 rights. In so concluding, we simply reaffirm the traditional *Miranda* requirement that  
19 a suspect be apprised of the full right to counsel without limitation. “There are

1 substantial practical reasons for requiring that defendants be advised of their right to  
2 counsel during as well as before questioning.” *United States v. Noti*, 731 F.2d 610,  
3 615 (9th Cir. 1984). Having counsel present prior to questioning allows counsel to  
4 better protect the rights of his or her client, particularly against self-incrimination. *See*  
5 *Miranda*, 384 U.S. at 480 (“An attorney may advise his client not to talk to police  
6 until he has had an opportunity to investigate the case, or he may wish to be present  
7 with his client during any police questioning.”); *Snaer*, 758 F.2d at 1343 (“The right  
8 to consult with an attorney *before* questioning is significant because counsel can  
9 advise the client whether to exercise his right to remain completely silent, or, if he  
10 chooses to speak, which questions to answer or how to answer them.”).

11 {26} We would be remiss if we did not point out the contrast in language between  
12 the first *Miranda* warning, given from memory, and the second *Miranda* warning,  
13 given from a department-issued card. Not only does the second *Miranda* warning  
14 advise Defendant of his “right to talk to a lawyer and . . . the right to have him present  
15 with [him] while being questioned” but also that “[i]f [he] cannot afford a lawyer, one  
16 will be appointed to [him] before any questionings.” In delivering the first *Miranda*  
17 warning from memory, and not from his department-issued card, Deputy Tortorici  
18 risked that he would fail to adequately convey Defendant’s rights, and that is  
19 precisely what happened. While we again note that law enforcement officers are not

1 required to recite the warnings from *Miranda* verbatim, “police can always be certain  
2 that *Miranda* has been satisfied if they simply read the defendant his rights from a  
3 prepared card[.]” *Louciuous*, 847 F.3d at 1151 (internal quotation marks and citation  
4 omitted). This assumes, of course, that the content of the prepared card reasonably  
5 conveys a suspect’s *Miranda* rights.

6 {27} Because the first *Miranda* warning given to Defendant by Deputy Tortorici was  
7 inadequate, the district court erred in denying Defendant’s motion to suppress. *See*  
8 *Filemon V.*, 2018-NMSC-011, ¶ 19 (reiterating “the notion that statements that would  
9 otherwise be considered voluntary must be excluded for failure to warn”).

### 10 **III. Waiver of Rights Under *Miranda***

11 {28} We turn next to Defendant’s argument that the district court erred in finding  
12 that he had waived his rights after receiving adequate *Miranda* warnings. There is  
13 some question as to whether this argument was preserved for appeal and whether this  
14 issue was reserved for appeal in Defendant’s plea agreement. *See State v. Winters*,  
15 2015-NMCA-050, ¶ 18, 349 P.3d 524 (stating that a defendant must preserve an issue  
16 for appeal by receiving an adverse determination on a pretrial motion and must also  
17 reserve the issue for appeal by expressing intent to do so in the plea agreement).  
18 However, we need not decide these questions one way or the other. Instead, we  
19 observe that as a matter of law, the rights conferred by the *Miranda* warnings can

1 only be waived after the full and adequate warnings have been given. *State v.*  
2 *Verdugo*, 2007-NMCA-095, ¶¶ 13, 17, 142 N.M. 267, 164 P.3d 966. Because we  
3 have concluded that the first *Miranda* warning was inadequate, Defendant could not  
4 have validly waived his rights.

#### 5 **IV. Volunteered Statements**

6 {29} The State argues in its answer brief—for the first time—that Defendant  
7 volunteered several statements throughout the course of his dialogue with Deputy  
8 Tortorici and that these statements should be deemed admissible regardless of the  
9 adequacy of the first *Miranda* warning. “Generally, an appellee has no duty to  
10 preserve issues for review and may advance any ground for affirmance on appeal.”  
11 *State v. Todisco*, 2000-NMCA-064, ¶ 11, 129 N.M. 310, 6 P.3d 1032. This Court will  
12 affirm a district court’s decision under the right for any reason doctrine “so long as  
13 the circumstances do not make it unfair to the appellant to affirm.” *Cordova v. World*  
14 *Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 18, 146 N.M. 256, 208 P.3d 901.

15 {30} The statements in question were made by Defendant to Deputy Tortorici  
16 between the first and second *Miranda* warnings while Defendant was in the back of  
17 the patrol unit. Although we have concluded that the first *Miranda* warning given to  
18 Defendant was inadequate, it is still possible that a person can volunteer admissible  
19 statements even without adequate *Miranda* warnings. *See Miranda*, 384 U.S. at 478

1 (“Volunteered statements of any kind are not barred by the Fifth Amendment and  
2 their admissibility is not affected by our holding today.”); *State v. Fekete*, 1995-  
3 NMSC-049, ¶ 43, 120 N.M. 290, 901 P.2d 708 (recognizing that “even when an  
4 accused is in custody, *Miranda* protections do not apply in those situations where he  
5 or she volunteers statements”). “Volunteered statements come within one of two  
6 categories: statements which the police did not attempt to elicit, and statements made  
7 during custodial interrogation that may be in response to police questioning but are  
8 unresponsive to the questions asked.” *Id.* ¶ 44. The second type of statement—one  
9 that is unresponsive to the questions asked—is one that “police officers cannot  
10 foresee because it is too far removed from the questions asked.” *Id.*

11 {31} The State enumerates several statements that it argues were volunteered and  
12 therefore admissible. The statements are that (1) Defendant asked if the police were  
13 “looking for [him]”; (2) Defendant stated he was “trying to figure out who to call to  
14 turn [him]self in” and to “tell [law enforcement] they can pick [him] up  
15 somewhere . . . because it’s a bad situation”; (3) Defendant “didn’t know what to do  
16 . . . just been sitting there for the last day, day and a half”; and (4) “there’s no place  
17 else for me to go, where am I going to go? . . . you can’t hide forever.”

18 {32} Aside from listing these four statements and asserting that they were  
19 “volunteered and . . . admissible,” the State provides us with no analysis with respect

1 to each. By making no further argument, the State leaves it to us to determine the  
2 voluntariness of each statement in context. To do so, we must determine whether each  
3 statement was the product of express questioning or its functional equivalent, *see*  
4 *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980), or whether each statement was  
5 somehow so unresponsive to the questions asked that Deputy Tortorici could not have  
6 foreseen them. Further, we would have to determine, in the context of the ongoing  
7 and several-minutes-long conversation that both preceded and followed the giving of  
8 the first *Miranda* warning, whether Defendant himself initiated the questioning or  
9 whether Deputy Tortorici initiated the conversation. *See State v. Ferrari* 1969-  
10 NMSC-146, ¶ 14, 80 N.M. 714, 460 P.2d 244 (stating that when a person initiates the  
11 questioning they are not subject to custodial interrogation by law enforcement in that  
12 moment and that *Miranda* “does not prohibit every inquiry in response to volunteered  
13 statements where the arresting officer does not initiate the conversation”); *see also*  
14 David M. Nissman & Ed Hagen, *Law of Confessions*, § 5:8 (2d ed. 2018) (“There is  
15 no interrogation, certainly, where the police response is simply a non-interrogatory  
16 answer to a question posed by the suspect.”). This we will not do.

17 {33} “To rule on an inadequately briefed issue, this Court would have to develop the  
18 arguments itself, effectively performing the parties’ work for them.” *Elane*  
19 *Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53. “This creates a

1 strain on judicial resources and a substantial risk of error. It is of no benefit either to  
2 the parties or to future litigants for this Court to promulgate case law based on our  
3 own speculation rather than the parties' carefully considered arguments." *Id.*  
4 Furthermore, it would be unfair for us to construct the State's argument without the  
5 opportunity for Defendant to respond.

6 {34} Consequently, because addressing this undeveloped argument—raised for the  
7 first time on appeal—would be unfair to Defendant, we will not affirm on a right for  
8 any reason basis. *See Cordova*, 2009-NMSC-021, ¶ 18. Even though we are not  
9 deciding this issue, this does not preclude the State from raising on remand, or the  
10 district court from considering, whether any of Defendant's statements were  
11 volunteered in such a manner that the *Miranda* protections did not apply.

## 12 **CONCLUSION**

13 {35} We conclude that the district court erred in denying Defendant's motion to  
14 suppress the statements made to Deputy Tortorici between the first and second  
15 *Miranda* warnings because Defendant was not adequately apprised of his right to  
16 counsel. Therefore, we reverse and remand to the district court for further  
17 proceedings.

1 {36} **IT IS SO ORDERED.**

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**DANIEL J. GALLEGOS, Judge**

4 **WE CONCUR:**

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6 **M. MONICA ZAMORA, Judge**

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8 **HENRY M. BOHNHOFF, Judge**