Legal Education Calendar

Writs of Certiorari

Clerk Certificates

2005-NMCA-078: State v. Mark Montoya

2005-NMCA-079: State of New Mexico, ex rel., Patricia A. Madrid, and New Mexico State Game Commission v. UU Bar Ranch Limited Partnership Management Services, LTD.

2005-NMCA-080: State v. Mark Reyes

2005-NMCA-081: State v. Mario Sanchez

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2005 New Mexico Criminal and Traffic Law Manual™ available soon!

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Equal Access to Justice Campaign
Silent Auction

Auction Items Needed!

The Equal Access to Justice Campaign is a program that helps New Mexico families and individuals get the civil legal service help they need. Funds raised are used to make justice work for those who need it but cannot afford it - to give everyone a fighting chance.

To raise funds, Equal Access to Justice is holding a Silent Auction during the State Bar’s Annual Meeting in Ruidoso on September 23 at the Ruidoso Convention Center.

As a contributor to our silent auction, you and/or your organization will be promoted throughout the State Bar’s three-day Annual Meeting, in the event program, and in the State Bar’s weekly Bar Bulletin. Your donation is tax deductible.

We are looking for items such as:
- beauty/spa services
- sporting goods
- theatre and entertainment
- artwork
- food and wine
- travel
- jewelry
- clothes
- home decorating items
- or anything you think would be of interest.

Anything you can do will be greatly appreciated!

If you would like to donate an item or have a lead for us to contact, please contact Joe Conte at 797-6099, or jconte@nmbar.org.
20
Legislative Process: A 2005 Update
Wednesday, July 20, 2005 • State Bar Center, Albuquerque
Lunch: Noon • CLE: 12:45 p.m. • 2.4 General CLE Credits

Presenters: Cisco McSorley, Esq., Chair, New Mexico Senate Judiciary Committee and Al Park, Esq., New Mexico House Judiciary Committee
Join us for an informative update on legislative issues before members of the New Mexico House and Senate Judiciary Committees. The speakers will discuss recent legislative developments that will be affecting New Mexico practitioners.
☐ Standard Fee $59

21
Current Developments in Handling Discrimination Charges at the EEOC and the NM Human Rights Division
Thursday, July 21, 2005 • 2 - 4:30 p.m.
State Bar Center, Albuquerque • 2.7 General CLE Credits

Co-Sponsor: Employment and Labor Law Section

Presenters: Loretta Medina, Esq. and Francie Cordova
EEOC attorney Loretta Medina and HRD Director Francie Cordova will discuss recent developments in handling discrimination charges in New Mexico, tips for responding to charges and recent activities in their agencies. Recent amendments to the New Mexico Human Rights Act become effective July 1, 2005. Come find out how these changes will be implemented, how they affect the EEOC and HRD work-share agreement and how they could affect your client’s interests.
☐ Standard Fee $69

27
2005 Professionalism
Lawyers Concerned for Lawyers Substance Abuse and Addiction Issues in the New Mexico Legal Community
Video Replay • Wednesday, July 27, 2005
10 a.m. • Noon • State Bar Center
2.0 Professionalism CLE Credits

The 2005 Commission on Professionalism course, LAWYERS CONCERNED FOR LAWYERS: Substance Abuse and Addiction Issues in the New Mexico Legal Community, focuses on the serious issue of addiction and substance abuse. Over 15 million Americans suffer from the disease of alcoholism — roughly 10 percent of the general population. The percentage of professional men and women, including lawyers and judges who are chemically dependent, appears to be even higher with estimates as high as 15 to 20 percent for attorneys.

The 2005 Commission on Professionalism program features justices of the New Mexico Supreme Court and members of the State Bar’s Lawyers Assistance Committee in an informative and broad look at substance abuse. Participants also receive a perspective from the UNM School of Law and the Disciplinary Board. The program gives participants the tools necessary to help identify abuse and addiction problems, address confidentiality issues, provide resources for how to handle such situations and offer guidance to those who may be suffering through an illness.
☐ Standard Fee $59

FOUR WAYS TO REGISTER

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

Name
NM Bar #
Street
City/State/Zip

Phone Fax
Email

Program Title
Program Date
Program Location
Program Cost
☐ Purchase Order (Must be attached to be registered)
☐ Check enclosed $_________
Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card #
Exp. Date
Authorized Signature

4 Bar Bulletin - July 18, 2005 - Volume 44, No. 28
**Professionalism Tip**

With respect to the public and to other persons involved in the legal system:

I will be mindful of my commitment to the public good.
NOTICES

COURT NEWS

Supreme Court
Law Library Hours

The New Mexico Supreme Court Law Library is now open during the following hours:
Mon. – Fri. 8 a.m. to 5:30 p.m.
Sat. 10 a.m. to 3 p.m.

Commission on Access to Justice
Vacancy

One attorney vacancy exists on the Commission on Access to Justice. Attorneys interested in volunteering their time on this committee may send a letter of interest or resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters and resumes is Aug. 8.

Compilation Commission
Request for Proposals for Attorney Services

Pursuant to Sections 13-1-111 through -119.1 NMSA 1978, the New Mexico Compilation Commission and its Advisory Committee request competitive sealed proposals for an attorney to provide legal drafting and research services. The duties of the Compilation Commission and the Advisory Committee are set forth in the NMSA 1978. A copy of the Request for Proposals may be obtained from:

New Mexico Compilation Commission
Kathleen Jo Gibson, Secretary
PO Box 848
Santa Fe, NM 87504-0848

Competitive Sealed Proposals must be received on or before 5 p.m., July 20.

Judicial Performance Evaluation Commission
Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., July 22 at the Farmington Public Library, 2101 Farmington Ave. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

MCLE Board
Vacancy

One attorney vacancy exists on the MCLE Board due to the resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest or a resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters and resumes is Aug. 8.

NM Board of Legal Specialization
Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

Appellate Practice
Edward R. Ricco

First Judicial District Court
Criminal Bench and Bar Brownbag

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, July 19 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court’s Criminal Divisions.

Second Judicial District Court
Domestic Destruction of Exhibits: Settlement Week 2005

The Second Judicial District Court’s 17th Annual Settlement Week is scheduled for Oct. 17 to Oct. 21. The deadline for requesting a referral of a civil or domestic relations case to Settlement Week 2005 is July 29. For complete details regarding referral requests, refer to LR2-602, Section C, of the Second Judicial District Court’s Local Rules governing the Settlement Facilitation Program. Blank request forms may be picked up in the civil clerk’s office, domestic relations clerk’s office or court alternatives. When using a settlement week request form, include names, addresses and phone numbers of all parties and attorneys (especially Pro Se parties) involved and any other individuals requiring notice of the settlement facilitation. For more information contact the court alternatives office, (505) 841-7412.

Eleventh Judicial District Court
Judicial Nominations

The judicial nominating commission for the Eleventh Judicial District Court has recommended three finalists for a new state district judgeship in Gallup. The names will go to Gov. Bill Richardson for the final selection. The finalists are:

R. David Pederson
Bob Aragon
Douglas Decker
The new judgeship was created by the 2005 Legislature.

Thirteenth Judicial District Court
Sandoval County Court
Operations Moving

The new Sandoval County Courthouse is now ready for occupancy. In order to accommodate moving the Bernalillo clerk's office, the Thirteenth Judicial District Court there will be closed for moving July 21 and July 22. The court will reopen on July 25 at its new location. The new address is:

Thirteenth Judicial District Court
1500 Idalia Road, Building A
Bernalillo, NM 87004.

All current phone numbers will stay the same, but the court asks that attorneys be patient with communications as the new phone and computer systems come on line. For more information call Theresa Valencia, chief clerk, (505) 867-2376.

U.S. District Court for the District of New Mexico
Revised Criminal Justice Act (CJA)

Effective July 1, 2005, the U.S. District Court for the District of New Mexico revised its CJA Information Manual and amended its Attorney Information Manual. Also, a new Federal Bar Attorney Admission Form and processing information are now available. Visit the U.S. District Court Web site at www.nmcourt.fed.us to review copies of these documents in their entirety.

STATE BAR NEWS
Annual Meeting
Resolutions and Motions

The 2005 Annual Meeting of the State Bar of New Mexico will be held at noon, Sept. 23, at the Ruidoso Convention Center in Ruidoso. Resolutions and motions to be considered must be submitted in writing and received in the office of Joe Conte, executive director, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., Aug. 23.

Appellate Practice Section
Annual Meeting

The annual meeting of the Appellate Practice Section will take place at 1 p.m., Aug. 19 at the State Bar Center. It will be held in conjunction with the 16th Annual Appellate Practice Institute, which will be held that day at the State Bar Center from 8:20 a.m. to 4:30 p.m. All members of the section and other interested persons are invited to attend and to participate.

Lawyers Assistance Committee
Wanted: Lawyers in Recovery in Las Cruces

The Lawyers Assistance Committee is looking for attorneys in recovery in Las Cruces who are willing to make 12-Step calls. Attorneys who are able to help should call Bill Stratvert, (505) 242-6845.

Legal Career Center
Legal Administrators Luncheon

Join State Bar Membership Services and the Legal Career Center for lunch from noon to 1 p.m., July 20 at the State Bar Center. The Legal Career Center has added a new recruiting tool to its Web site and would like an opportunity to introduce it over a delicious lunch – as well as get feedback on how it can enhance the service to best meet the legal community’s needs. Not only is the Legal Career Center picking up the check, but it’s also providing a coupon for a free online job listing including résumé database access for members to use as the need arises. Attendees can expect:

· Delicious lunch by one of the top caterers in Albuquerque
· 15-minute overview of the services offered with the NMBar Career Center
· Q&A session on the services the legal community would like to see added to the Career Center
· Free 30-day online job listing including résumé database access for those attending

Legal administrators can take a pre-tour of the Career Center by going to www.nmbar.org and clicking on the “Career Center” button at the bottom of the home page. Attendees should R.S.V.P. to Richard Hackett at rhackett2@qwest.net, (800) 659-5589.

Membership Services
Becoming a Rainmaker Seminar

The State Bar and the Legal Career Center have teamed together to host Stephen Fairley, international best-selling author and marketing coach, as the presenter for a marketing seminar from 6 to 8 p.m., July 20 at the State Bar Center. The seminar, “Becoming a Rainmaker,” will focus on sales and marketing techniques to grow attorneys’ practices. To register and for complete information, visit the Rainmaker link on the State Bar’s Web site at www.nmbar.org or call the Legal Career Center at (800) 659-5589.

Paralegal Division
NM Paralegal Day

Gov. Bill Richardson has declared Aug. 26 as Paralegal Day in New Mexico. That date marks the 10th anniversary of the organizational meeting of the Paralegal Division of the State Bar of New Mexico. The Paralegal Division, formerly known as the Legal Assistants Division, was created by the New Mexico Supreme Court to serve the needs of paralegals throughout the state with the following specific goals: to encourage a high order of ethical and professional attainment; to further education among its members; to carry out programs within the State Bar; and to establish good fellowship among division members, the State Bar of New Mexico and the members of the legal community. The Division will honor its founders, current members and the legal community with a reception at the Albuquerque Museum from 2 to 5 p.m., Aug. 27. For more information about the Paralegal Division or the paralegal profession in New Mexico, visit its Web site at www.nmbar.org.

Pro Hac Vice

The New Mexico Supreme Court has established a new rule for practice by non-admitted lawyers before state courts (Pro Hac Vice). The new Rule 24-106 NMRA, is effective for cases filed on or after Jan. 20, 2005. Attorneys authorized to practice law before the highest court of record in any state or territory wishing to enter an appearance, either in person or on court papers, in a New Mexico civil case should consult the new rule. This rule requires non-admitted lawyers to file a registration certificate with the State Bar of New Mexico, file an affidavit with the court and pay a non-refundable fee of $250. Fees collected under this rule will be used to support legal services for the poor. For more information on the rule, a copy of the registration certificate and sample affidavit, go to www.nmbar.org. For questions about compliance with the rule, please contact Richard Spinello, Esq., Director of Public and Legal Services, State Bar of New Mexico, (505) 797-6050, (800) 876-6227, or rspinello@nmbar.org.
Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. There are special discounted rates for HNBA members as well as those who sign up for the early bird rate now until Aug. 31. Job fair employers may also register online at the HNBA Web site for the job fair. The registration fee for job employers includes day passes for two interviewers, prominent listing in the convention program book and one full day of interviews with one of the highest caliber talent pools in the United States. The HNBA is a non-profit, national association that represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, law students and legal professionals throughout the United States and Puerto Rico. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

National Association of Counsel for Children 28th National Children’s Law Conference
This summer, the National Association of Counsel for Children will hold its annual national child advocacy training Aug. 25 to 28 at the Hollywood Renaissance Hotel in Los Angeles. Each year in America, over one million children suffer abuse and neglect. These are serious incidents of beatings, sexual assault, and the kind of neglect that results in serious health problems. NACC members serve as child advocates for these children and guide them through the difficult legal process that determines their fate. The NACC is a nonprofit agency that provides the professional training and technical assistance the child advocates need to do their work. For more information, contact NACC at (888) 828-6222 or visit its Web site at www.naccchildlaw.org.

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www.nmbar.org
## JULY

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     Gallup  
     New Mexico Coalition of Sexual Assault Programs  
     7.2 G  
     (505) 661-7345 |
| 19   | Closely Held Business Planning: Opportunities and Challenges  
     Teleconference  
     Cannon Financial Institute  
     1.8 G  
     (800) 775-7654  
     www.cannonfinancial.com |
| 19   | Effective Law Office Advertising, Technology Applications and Business Planning  
     VR - State Bar Center, Albuquerque  
     Center for Legal Education of NMSBF  
     3.9 G, 1.3 E, 2.0 P  
     (505) 797-6020  
     www.nmbar.org |
| 19   | Equal Justice: Investigating and Prosecuting Crimes Against Individuals with Disabilities  
     Farmington  
     New Mexico Coalition of Sexual Assault Programs  
     7.2 G  
     (505) 661-7345 |
| 19   | Major Issues in Mediation  
     Teleconference  
     TRT, Inc.  
     2.4 G  
     (800) 672-6253  
     www.trtcle.com |
| 20   | Developments in Class Action Lawsuits  
     Teleseminar  
     Center for Legal Education of NMSBF  
     1.2 G  
     (505) 797-6020  
     www.nmbar.org |
| 20   | Legislative Process: A 2005 Update  
     State Bar Center, Albuquerque  
     Center for Legal Education of NMSBF  
     2.4 G  
     (505) 797-6020  
     www.nmbar.org |
| 20   | Supreme Court Term in Review  
     Roswell  
     Paralegal Division of NM  
     1.0 G  
     (505) 622-6510 |
| 20   | They Took My Stuff! How Do I Get it Back?  
     Teleconference  
     TRT, Inc.  
     2.4 G  
     (800) 672-6253  
     www.trtcle.com |
| 21   | Advanced Workers Compensation  
     Albuquerque  
     Sterling Education Services  
     7.4 G, 1.2 E  
     (715) 855-0495  
     www.sterlingeducation.com |
| 21   | Current Developments in Handling Discrimination Charges at the EEOC and the New Mexico Human Rights Division  
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     Employment and Labor Law Section and Center for Legal Education of SBNM  
     2.7 G  
     (505) 797-6020  
     www.nmbar.org |
| 21   | Personal Injury Case Evaluation and Intake - Make Your Accountant and Malpractice Insurer Happy  
     Teleconference  
     TRT, Inc.  
     2.4 G  
     (800) 672-6253  
     www.trtcle.com |
| 22   | Common Sense Ethics - Histories and Mysteries  
     Teleconference  
     TRT, Inc.  
     2.4 E  
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     www.trtcle.com |
| 25   | Mental Health Professional and Family Court  
     Albuquerque  
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     7.2 G  
     (715) 836-9900  
     www.meds-pdn.com |
| 25   | What Puts Government Lawyers in a Class by Themselves  
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     www.trtcle.com |
| 26   | Coping with Sexual Predators Within the Profession  
     Teleconference  
     TRT, Inc.  
     2.4 E  
     (800) 672-6253  
     www.trtcle.com |
| 26   | The Basics of Real Estate Transactions from Negotiation to Closing  
     VR - State Bar Center, Albuquerque  
     Center for Legal Education of NMSBF  
     5.6 G, 1.0 E  
     (505) 797-6020  
     www.nmbar.org |
| 27   | 2005 Professionalism: Lawyers Concerned for Lawyers  
     VR - State Bar Center, Albuquerque  
     Center for Legal Education of NMSBF  
     2.0 P  
     (505) 797-6020  
     www.nmbar.org |
| 27   | Internal Investigations Certificate Program  
     Albuquerque  
     Council on Education in Management  
     19.8 G  
     (800) 942-4494  
     www.counciloned.com |
**WRITS OF CERTIORARI**

**AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT**

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

**EFFECTIVE JULY 15, 2005**

### Petitions for Writ of Certiorari Filed and Pending:

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**Petition for Writ of Certiorari Denied:**
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FROM THE NEW MEXICO SUPREME COURT

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OPINION

LYNN PICKARD, JUDGE

{1} The important issue in this case is whether this Court’s holding in State v. Morales, 2002-NMCA-016, ¶¶ 5-11, 131 N.M. 530, 39 P.3d 747, that trial courts may designate certain offenses as serious violent ones, limiting defendants’ opportunity for good time credit, without running afoul of defendants’ jury trial rights, survives recent United States Supreme Court cases further refining the opinion in Apprendi v. New Jersey, 530 U.S. 466 (2000). We hold that it does survive recent Supreme Court decisions, although for different reasons. Finding the other issues raised by Defendant to be without merit, we affirm his convictions and sentence.

BACKGROUND

{2} Defendant was convicted of vehicular homicide committed while driving while intoxicated (DWI) and child abuse. He raises five issues on appeal: (1) whether the evidence was sufficient to convict him of vehicular homicide because there was insufficient evidence that he was impaired at the time of driving; (2) whether there was sufficient evidence to allow the trial court to designate the offense as a serious violent offense pursuant to the Earned Meritorious Deduction Act, NMSA 1978, § 33-2-34 (2004) (EMDA); (3) whether the EMDA’s allowing the trial court to find the facts that underlie the serious violent offense designation for offenses listed in Section 33-2-34(L)(4)(n) violates Defendant’s constitutional rights under Apprendi; (4) whether the trial court abused its discretion in refusing to change the venue; and (5) whether the trial court abused its discretion in admitting evidence that a blood test showed alcohol in Defendant’s blood when the trial court denied admission of the amount of alcohol because the test was taken more than four hours after Defendant was driving. We state the facts in our discussion of the particular issues.

Sufficiency of the Evidence of Impairment

{3} The standard of review for sufficiency of the evidence has been often stated. We must determine whether a rational jury could have found each essential element of the crimes charged to be established beyond a reasonable doubt, when viewing the evidence in the light most favorable to the State and indulging all inferences in favor of the verdict. State v. Carrasco, 1997-NMSC-047, ¶¶ 10-11, 124 N.M. 64, 946 P.2d 1075. This Court does not consider the “merit of evidence that may have supported a verdict to the contrary.” State v. Kersey, 120 N.M. 517, 520, 903 P.2d 828, 831 (1995) (internal quotation marks and citation omitted). When a defendant argues that the evidence and inferences present two equally reasonable hypotheses, one consistent with guilt and another consistent with innocence, our answer is that by its verdict, the jury has necessarily found the hypothesis of guilt more reasonable than the hypothesis of innocence. State v. Chandler, 119 N.M. 727, 732, 895 P.2d 249, 254 (Ct. App. 1995). Our Supreme Court has recently stated that the evidence is not to be reviewed with a divide-and-conquer mentality, State v. Graham, 2005-NMSC-004, ¶ 13, 124 N.M. __, __ P.3d __ [No. 28,286 (Mar. 1, 2005)], as though we were the finders of the facts. We do not reweigh the evidence or substitute our judgment for that of the jury. State v. Mora, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789.

{4} The evidence presented below was that Defendant was the driver of a pick-up truck in which a woman and two children were with him in the cab, which was designed to hold three people, and that none of the children were restrained with child restraints. They were driving after dark on a mesa, where the road was relatively straight, except where it turned near the accident. There were wild animals seen and killed on the winding road leading up to the mesa, but no such animals on the mesa itself. Defendant’s truck
went off the road at the turn; in the opinion of the investigating officers, Defendant failed to negotiate the turn, overcorrected, left the road, and rolled over. One of the children was ejected during the roll-over, and she died at the scene. There was a partially empty, fresh beer bottle lying on the ground along the path the truck took as it rolled over.

5) Defendant claimed that he swerved to avoid an animal, but there was testimony that there were no signs of braking and no animal tracks or other evidence of animals in the wet dirt in the vicinity. Defendant was evasive about the subject of drinking to police and passers-by who had stopped to give assistance. He smelled like alcohol, and at least one witness said that he had bloodshot eyes and slurred speech, and another witness said Defendant was leaning against the woman from the truck and rolling around in some fashion. He ultimately admitted to having had “one or two beers.” Defendant would not submit to a blood draw authorized by a warrant at first, adopting a fighting stance and telling the officers that they would “have to take [him] down.” Upon being threatened with taser guns, he eventually submitted to the blood test, and alcohol was present in his blood. This was four hours after the accident. An officer opined that Defendant’s conduct showed that he was driving while intoxicated.

6) Based on the evidence of impairment demonstrated to the people who saw Defendant right after the accident, his evasiveness about his drinking and his initial refusal to submit to the warrant ordering the blood test, the evidence contradicting his claim about swerving to avoid an animal, the alcohol in his blood four hours after the accident, and the officers’ opinions, a rational jury could easily have found beyond a reasonable doubt that Defendant was impaired by alcohol, and his impairment made him less able to exercise the clear judgment and steady hand necessary to handle a vehicle safely. See UJI 14-243 NMRA. The evidence was more than sufficient to support the verdict of homicide by vehicle.

Sufficiency of Evidence of Serious Violent Offense

7) In Morales, 2002-NMCA-016, ¶¶ 12-16, in addition to finding the statute constitutional, we also construed the statute and explained the sort of findings that a trial court must make to designate the offenses listed in Section 33-2-34(L)(4)(n) as serious violent ones such that defendants would be limited to four days per month of good time credit, instead of the thirty days per month otherwise available. We held that a court must find that the offenses were “committed in a physically violent manner either with an intent to do serious harm or with recklessness in the face of knowledge that one’s acts are reasonably likely to result in serious harm.” Id. ¶ 16. In fact, we gave an example of the offense at issue here and explained the ways in which it could be viewed as a serious violent offense or not:

Likewise, homicide by vehicle always results in death, but it can be committed by one who had only one drink but is thereby less able to drive safely, or it can be committed by one who intentionally and habitually gets drunk to the point of being several times over the legal limit, knowing that he or she must drive in a crowded area and is in no shape to do so, but does so nevertheless.

Id. ¶ 15. In this case, after emphasizing Defendant’s prior convictions, the trial court stated:

And I am also prepared to find that based on the priors, not based on the age of the victim, although I know that is a very emotional component of this case, that this does qualify as being a serious violent offense; and I’ll make the finding that over the course of the period of 15 years your history shows that you have not brought what appears to be a drinking problem under control[], that except for what I believe is one court ordered time, you really have not availed yourself of treatment to bring the problem under control, and this has made you a danger to others who are out on the road. And it’s this danger that ultimately resulted in the death of Santana Sanchez. I am going to recognize that this differs from the Morales case to that extent, and falls somewhere within that spectrum I talked about, how those DWIs have been considered in that case.

That will be the finding.

As the trial court recognized, this case falls somewhere in between the two extremes described in Morales, and the question we must answer is whether the trial court could have found that it crossed over the line into being a serious violent offense.

8) Subsequent cases have established that the trial court need not express its findings in the Morales language as long as the findings are consistent with the Morales standard. State v. Cooley, 2003-NMCA-149, ¶¶ 18-19, 134 N.M. 717, 82 P.3d 84. And in State v. Wildgrube, 2003-NMCA-108, ¶¶ 34-38, 134 N.M. 262, 75 P.3d 862, we affirmed a serious violent offense designation in circumstances that cannot be meaningfully distinguished from those in the case at bar. In Wildgrube, a substantial record of alcohol-related offenses, including four arrests resulting in two convictions for DWI, satisfied the standard of knowledge. Id. ¶ 37. The defendant’s behavior of continuing to drink and drive on the occasion in question while looking away from the road to do something else satisfied the standard of recklessness. Id. ¶ 37-38. We reviewed the trial court’s actions in designating the offense as a serious violent one for abuse of discretion. Id. ¶ 34. A trial court will abuse its discretion when its decision is not supported by substantial evidence. Brooks v. Northwest Corp., 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39.

9) We, therefore, review the facts and circumstances before the trial court. In this case, the showing at sentencing was of a defendant who had a fifteen-year history of DWI arrests (five) and convictions (three), more than the defendant in Wildgrube, and for which Defendant had served seven, thirty, and ninety days. Letters from Defendant’s family noted that nothing had worked to keep Defendant from drinking. The trial court knew about the excluded evidence of Defendant’s blood alcohol concentration (BAC), which was .10 approximately four hours after the accident. The trial court stated that Defendant’s long history of a drinking problem, with him having done nothing to bring it under control, made him a danger to others that ultimately resulted in a death.

10) Under these circumstances, we believe that the Morales standard is met. Defendant raises no issue concerning the physical violence aspect of the Morales standard. The knowledge aspect is shown by the long, prior history of a drinking problem. The recklessness is exhibited by Defendant’s continuing to drive drunk after several prior encounters with the law and doing so in a
particularly heedless manner – with two children in the car, at least one of whom was not restrained sufficiently to keep her from being ejected and killed. There was no abuse of discretion in this case because the facts supported the designation of the offense as a serious violent one.

Survival of Morales

{11} The Apprendi doctrine states, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” State v. Wilson, 2001-NMCA-032, ¶ 12, 130 N.M. 319, 24 P.3d 351 (internal quotation marks and citation omitted). We held in Morales that this doctrine did not apply to the question of whether a defendant would be entitled to earn four days or thirty days of credit per month under the discretionary subsection of the EMDA. The majority decision in Morales was grounded in part on the rationale of Wilson, which has since been shown to have been erroneous. See Blakely v. Washington, 124 S. Ct. 2531 (2004); State v. Frawley, 2005-NMCA-017, 137 N.M. 18, 106 P.3d 580, cert. granted, 2005-NMCERT-002, _ N.M. __, __ P.3d ___. Thus, this rationale for the result in Morales has not survived.

{12} However, there was a separate concurrence in Morales, 2002-NMCA-016, ¶¶ 21-25 (Bustamante, J., specially concurring), written by the same judge who dissented in Wilson, 2001-NMCA-032, ¶¶ 45-59 (Bustamante, J., concurring in part and dissenting in part). This separate opinion agreed with the result in Morales on the basis that the EMDA has a similar effect on defendants’ sentences as the mandatory minimum scheme that was upheld by the Supreme Court in McMillan v. Pennsylvania, 477 U.S. 79 (1986), which was not called into doubt by Apprendi, 530 U.S. at 487 n.13.

{13} For the reasons stated in that separate concurrence, which has not been called into doubt by subsequent cases, the Morales holding, that a judge is permitted to make the finding of serious violent offense triggering the limitation of earned credit to four days, does survive. Apprendi itself acknowledged that it did not overrule McMillan and “limit[ed] its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict – a limitation identified in the McMillan opinion itself.” Apprendi, 530 U.S. at 487 n.13. Blakely also pointed out that McMillan “involved a sentencing scheme that imposed a statutory minimum if a judge found a particular fact” and the Court therein “specifically noted that the statute does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense.” Blakely, 124 S. Ct. at 2538 (internal quotation marks and citation omitted) (alteration in original). Finally, the Court in United States v. Booker, 125 S. Ct. 738, 746-47, 749, 752, 756 (2005), repeatedly emphasized that it is sentences beyond the “statutory maximum” or “maximum sentence[s]” imposed by the judge not based solely on the facts found by the jury or admitted by the defendant with which the Apprendi doctrine is concerned (internal quotation marks and citation omitted).

{14} In this case, the effect of the EMDA is not to change anything with regard to any maximum sentence. Defendant’s sentence for his fourth DWI offense that resulted in a death was twelve years – six years for the underlying crime and two years added for his fourth DWI offense pursuant to NMSA 1978, § 66-8-101(C) and (D); § 31-18-15(A)(5) (1999). This was the basic sentence without any aggravating factors. See § 66-8-101(C) and (D); § 31-18-15.

{15} What changed by virtue of the EMDA was the amount of time that Defendant could earn as a credit on his sentence by participating in programs while incarcerated. The amount of good time it was possible to earn was changed from thirty days per month to four days per month. See § 33-2-34(A)(1), (2). If the “practical net effect of the EMDA is to impose a mandatory increased minimum sentence,” we continue to believe that the “EMDA and Pennsylvania statutes [at issue in McMillan] are not precisely the same, but their effect is substantively identical.” Morales, 2002-NMCA-016, ¶ 24 (Bustamante, J., specially concurring). Neither Apprendi nor subsequent cases have cast any doubt on the McMillan rationale, and they continue to be limited to sentence beyond the statutory maximum, which is not at issue in this case. Accordingly, we hold that the factors that the EMDA allows the judge to find in order to limit credit under Section 33-2-34(L)(4)(n) do not have to be found by the jury beyond a reasonable doubt.

Change of Venue

{16} Defendant contends that the trial court abused its discretion in refusing to change the venue after Defendant made a showing of extensive pretrial publicity that included media reports on his BAC results that were excluded from evidence by the trial court. However, the trial court conducted extensive individual voir dire and struck many members of the venire. Moreover, Defendant does not show that there was any problem with any of the jurors seated for his trial, and he does not contend that he was denied his right to a fair and impartial jury.

{17} As in State v. Barrera, 2001-NMSC-014, ¶¶ 14, 18, 130 N.M. 227, 22 P.3d 1177, the question here is whether the trial court abused its discretion in failing to change venue, not whether Defendant presented enough evidence that the trial court would have been within its discretion to change venue. As in Barrera, because Defendant’s showing was of the latter variety and because the trial court took care to seat a fair and impartial jury, we cannot say that discretion was abused. See id. ¶ 18.

Admission of Blood Alcohol Evidence

{18} As previously indicated, the trial court excluded evidence of Defendant’s BAC of .10, but allowed evidence that Defendant had alcohol in his blood. The basis of the trial court’s decision was the pretrial presentation of testimony by an expert who said that the BAC score only indicated Defendant’s BAC at the time of the test, four hours after the accident, and that while retrograde extrapolation could determine his BAC at the time of the accident, there was too much room for error. Accordingly, the trial court excluded the BAC score, finding that it would be unduly prejudicial, but allowed the State to inform the jury that Defendant did have alcohol in his blood when tested because such evidence was relevant, and when combined with the other evidence in the case, it provided corroborative evidence of impairment.

{19} Defendant contends that the trial court abused its discretion in this ruling because the absence of relation-back testimony ap-
plies equally to the presence of alcohol and the exact amount thereof. We disagree.

{20} Defendant relies on State v. Baldwin, 2001-NMCA-063, ¶ 8, 130 N.M. 705, 30 P.3d 394, but Baldwin does not go as far as Defendant suggests. Baldwin was concerned with a prosecution for driving with a particular BAC, id. ¶ 7, and the evidence was that the defendant’s BAC was precisely at that particular level two hours after the accident, id. ¶ 4. Baldwin was not a case involving the admission or exclusion of evidence, but it was instead a case about whether the evidence was sufficient to convict the defendant of the specific crime charged. Id. ¶¶ 23-24.

{21} In this case, in contrast, at issue is whether certain evidence ought to be excluded. The basis of the trial court’s pretrial ruling was not that the evidence of the .10 BAC had no bearing on the issues in the case; instead, it was that with the jury’s common knowledge of .08 being the legal limit and without evidence of how the .10 related back to the time of driving, the evidence would be unduly prejudicial. However, the evidence of alcohol in Defendant’s system four hours after the accident provided some evidence of alcohol in his system at the time of the accident inasmuch as there was no testimony of drinking after the accident. Evidence does not have to conclusively prove a proposition to be relevant. It is enough that the evidence have some tendency to make a fact in issue more or less probable than it would be without the evidence. See Rule 11-401 NMRA.

{22} The fact that the trial court excluded evidence of the actual result of the test on Rule 11-403 NMRA grounds did not mandate that evidence of the presence of alcohol was also too prejudicial. The admission or exclusion of evidence is reviewed for abuse of discretion. State v. Brown, 1998-NMSC-037, ¶ 32, 126 N.M. 338, 969 P.2d 313. The essence of a discretionary ruling is that it be not illogical, not unreasonable, and not contrary to facts and circumstances before the trial court. See Bursum v. Bursum, 2004-NMCA-133, ¶ 25, 136 N.M. 584, 102 P.3d 651 (“An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.” (internal quotation marks and citation omitted)). In this case, not only can we not say that the trial court abused its discretion, but it appears to us that the trial court exercised a sound discretion and one, indeed, that was favorable to Defendant.

CONCLUSION

{23} We affirm Defendant’s convictions and sentence.

{24} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

MICHAEL E. VIGIL, Judge
OPINION

IRA ROBINSON, JUDGE

{1} The Court has decided to revise the opinion filed on March 8, 2005. Therefore, the opinion is hereby withdrawn and the following opinion is substituted. The Motion for Rehearing filed on March 23, 2005, by Defendant UU Bar Ranch Limited Partnership, is hereby denied.

{2} In this appeal, we are called upon to determine who is the rightful titleholder to a road that provides access to the Whites Peak area of state trust lands in Colfax County. The State of New Mexico and the New Mexico State Game Commission (collectively referred to as Plaintiff) appeal the district court’s judgment quieting title in favor of UU Bar Ranch Limited Partnership (Defendant). For the reasons that follow, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

{3} The real property at issue in this case is a 2.6 mile stretch of dirt road (the Road) that lies completely within the exterior boundaries of Defendant’s ranch. Prior to statehood, the Territory of New Mexico owned the Road as part of the system of territorial public roads, and the Road was recognized as part of El Camino Real and the Mountain Branch of the Santa Fe Trail. When New Mexico became a state in 1912, all of the Territory’s real property interests, including the Road, were transferred to the State of New Mexico pursuant to our state constitution. The Road came to be designated on most maps as a part of State Highway 21, which was a north/south route from Cimarron south through Rayado to Ocate. The Road itself enjoyed continuous use by hunters during the hunting season, and occasional use by others, for access to state trust lands until 1997.

{4} On October 24, 1985, as part of an effort to reduce the number of unmaintained roads that were part of the state highway system, the State Highway Department executed a declaration of vacation and abandonment for a 4.7 mile segment of State Highway 21. Contemporaneously with the abandonment of the 4.7 mile portion of Highway 21, the Highway Department executed a quitclaim deed that Plaintiff argued conveyed the Road to the Game Commission. Ultimately, the district court found that the 4.7 mile abandoned segment of Highway 21 included the Road, but that the quitclaim deed did not include the Road.

{5} At trial, and now on appeal, the parties expend significant effort arguing about whether the Highway Department’s abandonment of the Road was conditioned on a successful administrative transfer of the Road by quitclaim deed to the Game Commission, so that access to the Whites Peak area would remain open to the public. In addition, even assuming that the Highway Department intended to administratively transfer the Road to the Game Commission, the parties vigorously dispute whether the evidence established that the description in the quitclaim deed included the Road. As we will discuss later in this opinion, we need not decide whether the district court correctly concluded that the quitclaim deed did not convey the Road to the Game Commission. Regardless of the effect or intent of the deed, between 1985 and 1997, neither the Game Commission, nor the Game and Fish Department, acting as the Game Commission’s agent, asserted any ownership of, control over, or interest in the Road.

{6} In the summer of 1997, Defendant began to investigate whether it was the exclusive owner of the Road. In September and October of 1997, the Game and Fish Department, with the participation of representatives from the Highway Department and Attorney General’s Office, investigated whether the Game Commission was the owner of the Road. On October 17, 1997, and November 15, 1997, the Game and Fish Department and the Governor issued respective letters disclaiming any ownership interest by the Game Commission in the Road, concluding instead that the Road was abandoned and privately owned. In a subsequent letter dated November 21, 1997, the Secretary of the State Highway Department also wrote that the Road was abandoned. Upon the completion of its investigation in the fall of 1997, Defendant concluded that it was the exclusive owner of the Road and, therefore, built and locked a gate at the northern...
terminus of the Road. Since the fall of 1997, Defendant has had exclusive possession of the Road.

7] In response to Defendant’s actions, the Attorney General filed a petition on behalf of the State of New Mexico seeking declaratory and injunctive relief. Because the district court ruled that the Attorney General lacked standing in her own right to pursue injunctive relief, the Attorney General’s Office filed an amended complaint naming the State of New Mexico and the Game Commission as Plaintiffs. The amended complaint no longer sought injunctive relief, but instead sought to quiet title to the Road. Defendant’s answer asserted a number of affirmative defenses, including lack of standing, estoppel, waiver, laches, and abandonment. Defendant also asserted counterclaims for its own declaratory relief and damages for inverse condemnation.

[8] Because the Attorney General filed the amended complaint without joining the Highway Department, Defendant reasserted a motion to dismiss for lack of standing. However, because Plaintiff was no longer seeking injunctive relief, but simply were trying to establish title to the Road, the district court denied the motion believing that Plaintiff did have standing to proceed. Nevertheless, the district court ultimately ruled against Plaintiff and quieted title to the Road in Defendant.

9] In quieting title to the Road in Defendant, the district court concluded that the Highway Department had abandoned the Road. The district court further concluded that the disputed quitclaim deed did not convey title to the Road to the Game Commission. Accordingly, as a result of the abandonment of the Road, the district court ruled that fee simple title to the Road reverted to Defendant through its predecessor in interest, who owned the abutting land at the time the Road was purportedly abandoned. The district court also ruled that waiver, acquiescence, equitable estoppel, and laches precluded Plaintiff from asserting any claim to the Road. The district court subsequently awarded Defendant its costs. In these consolidated appeals, Plaintiff challenge the district court’s quiet title judgment and award of costs.

DISCUSSION

[10] As we explain below, the district court erred in concluding that the Road was abandoned in accordance with New Mexico law. Therefore, without a legally effective abandonment of the Road, the district court’s conclusion that the Road reverted to Defendant cannot stand because title remains with the State. And because we conclude that Defendant has no basis for asserting title to the Road, we also conclude that the district court erred in ruling that Plaintiff were equitably barred from asserting a claim to the Road. Finally, we need not decide whether the disputed quitclaim deed was an effective transfer of title to the Road from the Highway Department to the Game Commission because, without a legally-effective abandonment, title remains with the Highway Department who is free to convey, or reconvey, title as it sees fit.

STANDARD OF REVIEW

[11] To the extent that this appeal requires us to review the sufficiency of the evidence to support the district court’s quiet title judgment, we view the evidence in the light most favorable to the district court’s findings, indulge all reasonable inferences in support of the district court’s decision, and disregard all evidence to the contrary. See Martinez v. Martinez, 1997-NMCA-096, ¶ 10, 123 N.M. 816, 945 P.2d 1034. To the extent that our review of the district court’s quiet title judgment requires us to interpret a statute, that is a question of law that we review de novo. See Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066; see also Cooper v. Chevron U.S.A., Inc., 2002-NMCA-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 (“The meaning of language used in a statute is a question of law that we review de novo.”).

A. The Road was not legally abandoned

[12] Plaintiff argue that the district court erred in ruling that the Highway Department legally abandoned the Road when it executed a formal declaration of vacation and abandonment of the Road on October 24, 1985. Plaintiff does not dispute that the Highway Department wanted to relinquish its own control over the Road. However, as noted above, the parties disagree about whether the Highway Department’s attempted abandonment of the Road was conditioned on an administrative transfer of the Road to the Game Commission that would ensure continued public access to the Whites Peak area via the Road. But we need not decide whether the district court correctly resolved that dispute because, regardless of the Highway Department’s intent, we agree with Plaintiff that the attempted abandonment was legally ineffective under the relevant statutory law governing the procedures for abandoning public roads in New Mexico.

[13] Plaintiff generally assert that the purported abandonment was not undertaken in accordance with the relevant statutes and specifically argue that (1) the purported abandonment was not approved by the State Board of Finance as required by statute, (2) the purported abandonment was not approved by the State Highway Commission, (3) Defendant was barred by the statute of limitations from using the purported abandonment as a means for claiming title to the Road, (4) the purported abandonment would violate the anti-donation clause of our state constitution, and (5) the purported abandonment is barred by the doctrine of estoppel by deed. We find Plaintiff’s argument regarding the need for Board of Finance approval dispositive and, therefore, need not address their other anti-abandonment arguments.

[14] At the time that the Highway Department sought to abandon the Road, NMSA 1978, § 13-6-2(A) (1984) provided that:

Any state agency or local public body is empowered to sell or otherwise dispose of real or personal property belonging to the state agency or local public body. No sale or disposition of real or personal property having a current resale value of more than two thousand five hundred dollars ($2,500) shall be made by any state agency or local public body unless the sale or disposition has been approved by the state board of finance.

[15] Initially, we note that there was no argument below, nor in the briefs on appeal, that Section 13-6-2 is inapplicable because the resale value of the real property comprising the Road would be less than $2,500. See State v. Thomson, 79 N.M. 748, 749-50, 449 P.2d 656, 657-58 (1969) (declining to affirm quiet title on a basis that was not argued below or in briefs on appeal); see also Meiboom v. Watson, 2000-NMCA-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (noting that an appellate court will not affirm the trial court on a fact-dependent ground that was not decided by the trial court). However, Defendant’s motion for rehearing nonetheless asserts that we should affirm on this basis because it would not be unfair to Plaintiff to do so. See id. (recognizing that an appellate court may affirm on a ground not relied upon by the trial court if it would not be unfair to the appellant to do so). In particular, Defendant maintains that it
would not be unfair to affirm on this basis because it was Plaintiff’s burden to prove a value over $2,500. Defendant also alleges there was evidence in the record from which this Court could infer that the value of the Road was less than $2,500. We are unpersuaded by both of Defendant’s contentions.

First, we reject Defendant’s contention that it was Plaintiff’s burden to prove the value of the Road was more than $2,500. Plaintiff’s complaint sought to quiet title in the Game Commission based on the quit claim deed regardless of whether the Road was simultaneously abandoned. In contrast, Defendant’s counterclaim for quiet title relied on invalidating the deed and establishing an otherwise valid abandonment of the Road. Therefore, we believe the burden was on Defendant, not Plaintiff, to prove a valid abandonment.

Second, even assuming that it otherwise would not be unfair to Plaintiff to affirm if the value of the Road was less than $2,500, we disagree with Defendant’s contention that there is enough evidence in the record to establish that the value of the Road was in fact less than $2,500. Defendant suggests that we could infer a value less than $2,500 because there was evidence that Defendant’s ranch was worth about $131 per acre. Defendant believes it would be appropriate to simply multiply the acreage of the Road by $131 to arrive at a value less than $2,500. However, to do so would require us to infer that the land encompassing the Road was comparable to the adjacent land encompassing the ranch. However, as the protracted battle over title to the Road demonstrates, there is every reason to believe that the intrinsic value of the Road is higher than the ranch land, especially given that the Road is critical to access to state trust lands.

In short, Plaintiff did not have the opportunity to demonstrate that the value of the Road was not comparable to the value of the ranch land, and any finding to that effect would, in all likelihood, require credibility determinations and inferences that should have been made by the district court in the first instance and were not. As such, we are loathe to affirm the district court on grounds not considered by that court because it would be unfair to Plaintiff to do so. Accordingly, we conclude that Section 13-6-2 does apply under the circumstances of this case.

Moreover, it is undisputed that the Highway Department did not obtain Board of Finance approval for the abandonment of the Road. Therefore, we hold that the lack of Board of Finance approval invalidated the attempted abandonment of the Road. See N.M. Dept. of Health v. Compton, 2000-NMCA-078, ¶ 11, 129 N.M. 474, 10 P.3d 153 (recognizing that “when the language of a statute is clear and unambiguous, it must be given effect by the courts”) and in general “‘use of the word “shall” . . . imposes a mandatory requirement’”) (quoting Redman v. Bd. of Regents, 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct. App. 1984)); see also NMSA 1978, § 12-2A-4(A) (1997) (“‘Shall’ and ‘must’ express a duty, obligation, requirement or condition precedent.”).

Defendant asserts that Board of Finance approval was not required for a number of reasons. First, Defendant suggests that because NMSA 1978, § 67-2-6 (1975) specifically authorizes the abandonment of state highways its procedures should override the procedural requirements in Section 13-6-2 for the general sale or disposition of state property. See generally State ex rel. Schwartz v. Sanchez, 1997-NMSC-021, ¶ 8, 123 N.M. 165, 936 P.2d 334 (recognizing the principle of statutory interpretation that favors the application of the more specific statute over the more general statute). However, the general/specific rule of statutory construction is only applicable when the two statutes are in conflict. See generally Citizens for Incorporation, Inc. v. Bd. of County Comm’rs, 115 N.M. 710, 716, 858 P.2d 86, 92 (Ct. App. 1993) (holding that the general/specific rule of statutory construction “applies only when the statutory provisions are conflicting”); State ex rel. Stratton v. Gurley Motor Co., 105 N.M. 803, 805, 737 P.2d 1180, 1182 (Ct. App. 1987) (holding that “[i]n order for a specific statute to prevail over the general, there must exist conflicting statutory provisions . . . such that a necessary repugnancy cannot possibly be harmonized”). For the reasons that follow, we conclude that the statutes can be harmonized with each other, and that the general/specific rule of statutory construction does not aid Defendant. Section 67-2-6 provides that:

Property or property rights acquired by purchase or condemnation by the state or any commission, department, bureau, agency or political subdivision of the state for public road, street or highway purposes shall not revert until such property or property rights are vacated or abandoned by formal written declaration of vacation or abandonment which has been duly declared by the state or any commission, department, institution, bureau, agency or political subdivision of the state in whom the property or property right has vested. The right to abandon and vacate shall exist regardless of whether the public road, street or highway was created by the legislature or otherwise.

While it is true that Section 67-2-6 does specifically address the abandonment and vacation of public roads, the statute simply requires a “duly declared” written abandonment. The statute is silent regarding what constitutes a “duly declared” abandonment. In fact, it is not entirely clear whether the procedure for abandonment contained in Section 67-2-6 is applicable in this case since the Road was not acquired through purchase or condemnation. In short, although Section 67-2-6 does give the State the right to abandon or vacate a public road, the statute is less than clear on the procedure to be used.

Given the ambiguity in Section 67-2-6, we cannot say that Section 67-2-6 should be applied to the exclusion of Section 13-6-2. Instead, we conclude that both statutes must be construed and applied together to give effect to legislative intent. See Quantum Corp. v. State Taxation & Revenue Dep’t, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848 (recognizing that a statute whose construction is in question should “be read in connection with other statutes concerning the same subject matter”); see also Key v. Chrysler Motors Corp., 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996) (“In interpreting statutes, we seek to give effect to the Legislature’s intent, and in determining intent we look to the language used and consider the statute’s history and background.”). Accordingly, Board of Finance approval was required to effectuate the abandonment of the Road.

Defendant relies on Walker v. Coleman, 540 So. 2d 983 (La. Ct. App. 1989) as support for its general/specific argument. In Walker, a state agency attempted to sell an unused public road pursuant to a statute that generally allowed the state agency to sell public property. Id. at 984. The court invalidated the sale because the statute specifically addressing the disposition of abandoned roads only provided for reversion of such roads to the contiguous land owners. Id. at 986. We find Walker distinguishable from this case because, as discussed above, Section 67-2-6 and Section 13-6-2 complement, rather than conflict with one another, unlike the statutes at issue in Walker.

Defendant also contends that Section 13-6-2 is inapplicable because the abandonment of a public road is not a “disposition”
within the meaning of the statute. Defendant suggests that a “disposition” is only the “act of transferring something to another’s care or possession.” BLACK’S LAW DICTIONARY 484 (7th ed. 1999). Under that definition, Defendant maintains that an abandonment does not constitute a disposition because the government’s interest in the Road is simply extinguished and nothing is transferred. We disagree with this view of Section 13-6-2 for two reasons. First, we believe that a “disposition” does encompass an abandonment under a plain reading of the statute. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 654 (3rd ed. 1971) (defining “disposition” to include relinquishing or ridding oneself of control). Disposition is equated with surrender or abandonment elsewhere in the law. See Reeves v. Jenkins, 439 P.2d 941, 945 (Okla. 1968) (stating that “[a] bankruptcy receiver ordinarily has no power to surrender, abandon, or make some other disposition of property”); see also Regents of the Univ. of N.M. v. N.M. Fed’n of Teachers, 1998-NMSC-020, ¶ 27, 125 N.M. 401, 962 P.2d 1236 (recognizing that the plain language of a statute is the primary indicator of legislative intent). Second, Defendant cannot simply ignore the fact that if the Road were truly abandoned, title to the Road would revert to another, which we assume, without deciding, would be Defendant as the abutting landowner. Thus, even under Defendant’s restrictive interpretation of the term “disposition,” an abandonment would have the effect of transferring possession of the Road to another. Accordingly, we reject Defendant’s contention that Section 13-6-2 is inapplicable to abandonments.

{25} Finally, Defendant points to evidence in the record that, since at least 1980, the Highway Department had not sought Board of Finance approval in connection with any of its state highway abandonments. Defendant also notes that the Highway Department’s 1982 abandonment guide does not list Board of Finance approval as one of the steps in the abandonment checklist, and the Highway Department would only seek Board of Finance approval for the abandonment of state highways that were originally created through the purchase of a right-of-way. In short, since there was evidence indicating that the Highway Department believed it did not need Board of Finance approval to abandon state highways, Defendant argues we should defer to the Highway Department’s interpretation of the statute it is charged with administering. See Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶ 30, 125 N.M. 786, 965 P.2d 370 (recognizing that courts will generally defer to an agency’s interpretation of an ambiguous statute or regulation that it is charged with administering if it implicates the agency’s expertise).

{26} Furthermore, “‘it is the function of the courts to interpret the law,’ and courts are in no way bound by the agency’s legal interpretation.” Chavez v. Mountain States Constructors, 1996-NMSC-070, ¶ 21, 122 N.M. 579, 592 P.2d 971 (quoting Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)). And given our conclusion that the legislature intended to require Board of Finance approval at the time that the Highway Department attempted to abandon the Road, we are not persuaded that we should defer to a purported agency interpretation that would be contrary to legislative intent. See High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 6, 126 N.M. 413, 970 P.2d 599 (declining to defer to an agency interpretation of an ordinance that was contrary to legislative intent).

{27} For all of the foregoing reasons, we therefore hold that the lack of Board of Finance approval prevented the Highway Department from executing a legally valid abandonment of the Road. And without the abandonment of the Road, even the district court acknowledged that the Road could not revert to Defendant, or its predecessor in interest, because title to the Road remained with the State regardless of which state agency was responsible for managing and maintaining the Road.

{28} We recognize that Defendant believes Plaintiff lacked standing to pursue a quiet title action that would declare title to the Road in the Highway Department. However, the amended complaint only sought to quiet title in the Game Commission and the Game Commission is a party to this action. We agree with the district court’s conclusion that Plaintiff therefore had standing to proceed. We need not decide whether standing would exist in this case to quiet title in the name of the Highway Department because that is not the relief Plaintiff requested. We do note, however, that no one has disputed that title to the Road was held by the Highway Department prior to the failed abandonment. Presumably, then, title would remain with the Highway Department unless Defendant could show that it could establish title to the Road through some other means than reversion by abandonment.

B. Defendant Cannot Establish Title Based on Waiver, Laches, and Estoppel

{29} Having concluded that the district court erred in quieting title in favor of Defendant in light of the ineffective abandonment of the Road, we turn now to Defendant’s claims based on waiver, laches, and estoppel. Defendant maintains that by failing to negate the letters from the Game and Fish Department and the Governor, the Game Commission’s actions amount to a waiver by acquiescence of the right to claim title to the Road. Since the purported abandonment of the Road is an ineffective means for Defendant to claim title to the Road through reversion, Defendant’s waiver by acquiescence claim is an apparent attempt to secure title through alternate means. However, New Mexico case law specifically “hold[s] that title to state land cannot be obtained pursuant to the doctrine of acquiescence.” Stone v. Rhodes, 107 N.M. 96, 99, 752 P.2d 1112, 1115 (Ct. App. 1988); see also Deaton v. Gutierrez, 2004-NMCA-043, ¶ 16, 135 N.M. 423, 89 P.3d 672. Similarly, Defendant’s affirmative defense of laches cannot be used as a means for establishing title to the Road. Id., ¶¶ 24-25 (rejecting an attempt to establish title through the affirmative defense of laches where the defendant failed to establish a right to title through adverse possession, acquiescence, or deed). Furthermore, it is well settled that a claimant must rely on the strength of its own title and not claimed weaknesses of his adversary when seeking to quiet title. See Tres Ladrones, Inc. v. Fitch, 1999-NMCA-076, ¶ 15, 127 N.M. 437, 982 P.2d 488; Martinez, 1997-NMCA-096, ¶ 12; Union Land & Grazing Co. v. Arce, 21 N.M. 115, 152 P. 1143 (1915).

{30} To the extent that Defendant also attempts to establish title through a claim of equitable estoppel, we question whether title could be established through such means for the same reason that other affirmative defenses are an inappropriate means for establishing title. Specifically, Defendant’s estoppel argument is premised on the same governmental statements and inaction that formed the basis for the waiver by acquiescence claim rejected above. We fail to see how Defendant can establish title through an otherwise improper means simply by changing the name of the claim. Moreover, estoppel generally cannot be premised on the opinions, or advice of government officials, that are contrary to law. See Rainaldi v. Pub. Employees Ret. Bd., 115 N.M. 650, 658, 857 P.2d 761, 769 (1993) (noting that courts have refused to allow estoppel against the state when the use of estoppel is based on the advice of a government official that
contradicts a statute or would permit an act that is contrary to law). Although Defendant characterizes the disclaimers of interest in the Road by the Game and Fish Department and Governor as statements of fact, abandonment of the Road was a matter of opinion dependent on a legal interpretation of what was required by New Mexico statutes to abandon a public highway. As set forth above, the statutory requirements for abandoning the Road were not met, and Defendant cannot circumvent those statutory requirements by relying on ostensible assurances to the contrary by government officials.

C. Defendant’s Costs

{31} Given our reversal of the district court’s judgment quieting title in favor of Defendant, we also reverse the district court’s award of costs to Defendant and remand for reconsideration of the question of costs.

CONCLUSION

{32} Because the district court erred in quieting title to the Road in Defendant on the basis of the Highway Department’s ineffective abandonment of the Road, we reverse the district court’s quiet title judgment. And since Defendant cannot otherwise establish title through waiver by acquiescence, laches, or estoppel, we need not decide whether the quitclaim deed from the Highway Department to the Game Commission was an effective conveyance of title, since title remains with the State in any event. See Srader v. Verant, 1998-NMSC-025, ¶ 40, 125 N.M. 521, 964 P.2d 82 (providing that the appellate court generally will not decide academic or moot questions); see also In re Will of Coe, 113 N.M. 355, 362, 826 P.2d 576, 583 (Ct. App. 1992) (noting that the function of quiet title decree is not to confer title, but merely to confirm pre-existing title).

{33} We note additionally that the record indicates that the Highway Department may have executed a second quitclaim deed in an apparent attempt to correct any deficiencies in the first quitclaim deed. We express no opinion on the effect of that deed, but simply note that as the apparent current titleholder to the Road, the Highway Department would remain free to convey, or reconvey, the Road to whomever it chooses.

{34} In light of our disposition, we need not address the remainder of the arguments raised by the parties on appeal. Because the district court apparently did not resolve the balance of Defendant’s counterclaims in light of its decision to quiet title to the Road in Defendant, we leave it to the sound discretion of the district court to dispose of Defendant’s outstanding counterclaims to the extent necessary.

{35} IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
MICHAEL E. VIGIL, Judge
OPINION
MICHAEL D. BUSTAMANTE,
CHIEF JUDGE

{1} Defendant Mark Reyes appeals from the district court’s decision that he is not competent to proceed as his own counsel, and that he did not knowingly and intelligently waive his right to counsel. Based on the following, we reverse the district court’s decision.

FACTUAL AND PROCEDURAL BACKGROUND

{2} On June 5, 2000, the State filed a criminal information charging Defendant with attempted first-degree murder, retaliation against a witness, receipt, transportation, or possession of a firearm by a felon, and tampering with evidence. Richard Gallagher, a public defender, was appointed to represent Defendant and entered his appearance on June 6, 2000. Defendant immediately wrote a letter to the district court requesting that he be allowed to represent himself in his trial and that Gallagher be removed as his counsel. Defendant stated that Gallagher did not represent him properly in Defendant’s previous trial, and that he had shown himself again to be misrepresenting Defendant by not allowing his witnesses to speak in court. Gallagher then filed a motion to substitute counsel or in the alternative to allow Defendant to proceed pro se.

{3} Hearings on Defendant’s motion to represent himself were scheduled and rescheduled, and the matter was brought up at a pre-trial conference. However, the matter was not resolved for various reasons, and the district court did not conduct a hearing on Defendant’s complaints, even when Gallagher alerted the district court to Defendant’s dissatisfaction with counsel and his wish to represent himself. After a hearing in early September where the district court praised Gallagher for his perseverance in continuing to represent Defendant, there was no further discussion regarding Gallagher’s representation. Defendant was represented by Gallagher at his jury trial and was found guilty of attempted first-degree murder and receipt, transportation, or possession of a firearm by a felon.

{4} After the judgment and sentence was entered, Defendant wrote another letter to the district court requesting court transcripts and noting that his motion to dismiss Gallagher was never ruled upon by the district court. Defendant appealed his convictions for attempted first-degree murder and felon in possession of a firearm, contending that the district court erred in failing to conduct a hearing concerning his interest and ability to represent himself or replace Gallagher at trial pursuant to Faretta v. California, 422 U.S. 806, 835 (1975). In a memorandum opinion, we held that the district court violated Defendant’s Sixth Amendment right to counsel by failing to conduct a Faretta hearing to determine whether Defendant knowingly, intelligently, and voluntarily waived his right to counsel. Defendant’s case was remanded to the district court for a Faretta hearing.

{5} The district court held a Faretta hearing on October 31, 2003. At the hearing, Defendant was questioned by his defense counsel at that time, Jesse Cosby (Cosby), the prosecutor, and the district judge. Among other things, Defendant expressed his unwavering desire to proceed pro se even if it was potentially detrimental to his defense. Counsel and the district judge discussed with Defendant the rules of proceeding pro se and Defendant’s familiarity with the trial setting and some court procedure, and they explored Defendant’s criminal history. Defendant requested standby counsel, and stated that Cosby would be acceptable. The district court determined, however, that under factors set forth in Faretta, Defendant was not competent to represent himself or conduct himself in conformity with the rules of evidence and courtroom procedures. The district court concluded that “Defendant’s waiver of counsel, while voluntary, is not knowing and intelligent, and therefore inadequate.” This appeal followed.

DISCUSSION

Standard of Review

{6} Our Supreme Court has stated that whether a defendant made a valid knowing, intelligent, and voluntary waiver of his constitutional rights “‘is a question of law which we review de novo.’” State v. Martinez, 1999-NMSC-018, ¶ 15, 127 N.M. 207, 979 P.2d 718 (quoting United States v. Toro-Pelaez, 107 F.3d 819, 826 (10th Cir. 1997)); State v. Padilla, 2002-NMSC-016, ¶ 18, 132 N.M. 247, 46 P.3d 1247; State v. Plouse, 2003-NMCA-048, ¶ 21, 133 N.M. 495, 64 P.3d 522 (stating that we review de novo whether the district court violated a defendant’s right to counsel by failing to adequately determine whether his decision to waive counsel and represent himself was made voluntarily, knowingly, and intelligently).

STATE OF NEW MEXICO, Plaintiff-Appellee, versusMARK REYES, Defendant-Appellant.

OPINION

Defendant-Appellant. No. 24,739 (filed May 3, 2005)

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY

ALVIN F. JONES, District Judge

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ALVIN F. JONES, District Judge

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-080

CERTIORARI NOT APPLIED FOR
The Right to Self-Representation

{7} Faretta states that “[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must ‘knowingly and intelligently’ forgo those relinquished benefits.” Faretta, 422 U.S. at 835 (holding that the Sixth Amendment accords a criminal defendant the right to proceed without counsel when he or she voluntarily and intelligently waives his or her right to counsel and elects to proceed pro se). In so holding, Faretta also states that a defendant must be made aware of the risks that go along with self-representation. Id. at 832, 835. Our Supreme Court followed Faretta in State v. Chapman, 104 N.M. 324, 327, 721 P.2d 392, 395 (1986), by recognizing that a defendant must be “accorded the right of self-representation when he or she is able to make a knowing and intelligent waiver of counsel.” Therefore, “[i]n a case where a defendant wishes to represent himself, the district court must determine if the defendant is making a ‘knowing and intelligent’ waiver of counsel and understands fully the dangers of self-representation.” State v. Rotibi, 117 N.M. 108, 110, 869 P.2d 296, 298 (Ct. App. 1994) (quoting State v. Castillo, 110 N.M. 54, 57, 791 P.2d 808, 811 (Ct. App. 1990)); see also Chapman, 104 N.M. at 327, 721 P.2d at 395 (stating that in a case where a defendant wishes to represent himself, the trial court must determine if he is making a knowing and intelligent waiver of counsel and fully understands the potential pitfalls of self-representation); State v. Lewis, 104 N.M. 218, 220, 719 P.2d 445, 447 (Ct. App. 1986).

{8} A “knowing and intelligent” waiver of the right to counsel requires a showing that “a defendant who elects to conduct his own defense has some sense of the magnitude of the undertaking and the hazards inherent in self-representation.” Castillo, 110 N.M. at 57, 791 P.2d at 811; see also United States v. Padilla, 819 F.2d 952, 956 (10th Cir. 1987) (stating that the task of assessing the defendant’s understanding and risks of self-representation initially falls on the trial court, which “must bear in mind the strong presumption against waiver”). While, “[t]here are no fixed guidelines to determine whether a defendant has ‘knowingly and intelligently’ waived the right to counsel,” we have created certain instructions for the district courts to follow at a Faretta hearing. Rotibi, 117 N.M. at 110, 869 P.2d at 298.

{9} To determine whether a defendant is making a voluntary, knowing, and intelligent waiver, “the court must inform itself regarding a defendant’s competency, understanding, background, education, training, experience, conduct and ability to observe the court’s procedures and protocol.” Chapman, 104 N.M. at 327, 721 P.2d at 395; Castillo, 110 N.M. at 57, 791 P.2d at 811 (citing authority for the proposition that an intelligent waiver of the right to counsel turns not only on the state of the record but on the circumstances of the case, and the trial court must consider the “defendant’s age and education, previous experience with criminal trials, and representation by counsel before trial”). Further, in Castillo, we determined that the trial court must: (1) make “[a] showing on the record . . . that a defendant . . . has some sense of the magnitude of the undertaking and the hazards inherent in self-representation”; (2) “insure that [a] defendant has been informed of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses or mitigating factors that might be available to the defendant”; and (3) “admonish [a defendant] that [those who proceed pro se] will be expected to follow the rules of evidence and courtroom procedures.” Id. at 57, 791 P.2d at 811; see Rotibi, 117 N.M. at 111, 869 P.2d at 299; see also Sanchez v. Mondragon, 858 F.2d 1462, 1467 (10th Cir. 1988) (stating that assuming a defendant voluntarily chooses self-representation, the trial court must ensure that the defendant has been informed of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses or mitigating factors that might be available to the defendant, and it must also admonish the defendant that he or she will be expected to follow the rules of evidence and courtroom procedure); see generally Von Moltke v. Gillies, 332 U.S. 708 (1948).

{10} The district court should take special care to advise the defendant as to the ramifications of proceeding pro se. In ascertaining whether a defendant is aware of the potential pitfalls of self-representation, appellate courts have suggested that defendants should be informed of at least the following:

(1) that presenting a defense is not a simple matter of telling one’s story, but requires adherence to various technical rules governing the conduct of a trial; (2) that a lawyer has substantial experience and training in trial procedure and that the prosecution will be represented by an experienced attorney; (3) that a person unfamiliar with legal procedures may allow the prosecutor an advantage by failing to make objections to inadmissible evidence, may not make effective use of such rights as the voir dire of jurors, and may make tactical decisions that produce unintended consequences; (4) that there may be possible defenses and other rights of which counsel would be aware and if those are not timely asserted, they may be lost permanently; (5) that a defendant proceeding pro se will not be allowed to complain on appeal about the competency of his representation; and (6) that the effectiveness of his defense may well be diminished by his dual role as attorney and accused.

3 Wayne R. LaFave et al., Criminal Procedure § 11.5(c), at 574-75 (2d ed. 1999) (internal quotation marks and footnotes omitted).

{11} In Godinez v. Moran, 509 U.S. 389, 400 (1993), the Supreme Court noted that “the defendant’s technical legal knowledge is not relevant to the determination whether he is competent to waive his right to counsel, and . . . although the defendant may conduct his own defense ultimately to his own detriment, his choice must be honored” (internal quotation marks and citations omitted).

“The one certain guideline is that the defendant is not required to have the competency and skill of an attorney to proceed pro se.” Rotibi, 117 N.M. at 110-111, 869 P.2d at 298-99; see Faretta, 422 U.S. at 836 (“[Defendant’s] technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.”). Faretta holds only that a defendant choosing self-representation must do so “competently and intelligently.” Id. at 835. The Supreme Court stated that a defendant’s “technical legal knowledge” is “not relevant” to the determination whether he is competent to waive his right to counsel. Id. at 836. Thus, while “[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by
their own unskilled efforts,” a criminal defendant’s ability to represent himself has no bearing upon his competence to choose self-representation. *Id.* at 834.

12 The Supreme Court in *Faretta* held that “[i]n forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense.” *Id.* at 836. We have similarly held that “[w]here a defendant has timely voiced such request [to represent him or herself pro se] and a waiver of court-appointed counsel is knowingly and intelligently undertaken, counsel may not thereafter be forced upon an appellant.” *Lewis*, 104 N.M. at 221, 719 P.2d at 448.  

**Defendant Voluntarily, Knowingly, and Intelligently Waived His Right to Counsel at the Faretta Hearing**

13 “The question of whether Defendant’s waiver of counsel was knowing and intelligent is contingent on the facts and circumstances of the case.” *Plouse*, 2003-NMCA-048, ¶ 27. We conclude in accordance with our case law that Defendant voluntarily, knowingly, and intelligently waived his right to counsel. In this case, the *Faretta* hearing included all of the *Castillo* requirements. Defendant testified that he is thirty-years-old. He stated that he dropped out of high school in the eleventh grade and earned his GED in 1996 while he was incarcerated, and that he had no problems with the English language. He stated that he has had previous experience with the criminal justice system since he was a teenager in that he had been charged with previous felonies and knew what occurred during a jury trial. He was aware of and understood the charges against him and the extent of punishments and possible range of sentences and enhancements, should he be found guilty of the charges.

14 Defendant clearly acknowledged the negative aspects of self-representation. This was discussed at the hearing and Defendant had discussed the matter with his appointed counsel, Cosby, prior to the hearing. Defendant clearly stated that he understood the dangers of self-representation. He acknowledged that there are a lot of procedures, obstacles, and limitations that he will not be able to overcome because he is not an attorney and he is incarcerated. He stated that he knew he needed to educate himself about the rules of evidence. Defendant acknowledged that he is subjecting himself to losing this case just because I’m representing myself, but I do have an understanding of general court procedure and I pretty much understand that I’m going to be limited in a lot of things in handling my case and that I’m responsible for my own defense and preparation of all my paperworks [sic] and that’s regardless of my situation in county jail.

15 Defendant recognized that there is a problem of testifying and also being his own attorney and that if he proceeded pro se, he would not take the stand. He also was aware of the difficulty in arguing a case and remaining neutral by acknowledging that there was a potential problem with neutrality of evidence and that he would be subject to sanctions if he does not follow court decorum. He was aware of the risk involved in comporting with rules of the district court and that he would be subject to sanctions, including contempt of court, if he failed to conduct himself properly. Cosby admonished Defendant that the prosecutor could take advantage of him because of his lack of understanding and experience with the rules of evidence. Defendant stated that he understood that he would “take that risk” and be responsible for familiarizing himself with court rules and procedures. He knew he would have to make his own record for appeal in order to preserve issues and that by receiving a new trial he would waive his right to appeal his convictions from his first trial in which Gallagher represented him.

16 Defendant testified that he was never adjudicated mentally incompetent. He was evaluated three times at the Las Vegas Medical Center forensic unit for mental competency to stand trial, and he was always determined competent to stand trial. Defendant stated he was not evaluated for competency in this case. Defendant stated that he was not taking any medication at the time and had no physical impairment or mental restrictions. Defendant stated that he had never ceased in requesting to proceed pro se.

17 The prosecutor asked Defendant if he knew the difference between leading and non-leading questions and the difference between relevant and irrelevant questions. Defendant indicated that he had researched best evidence and hearsay rules, that he “understand[s] everything that is written in the books,” and that while he lacked access to legal materials due to his incarceration, he had the rules on evidence, search and seizure, and general discovery and had some understanding of this material. Finally, Defendant indicated his willingness to accept standby-counsel should the district court determine that it would be appropriate.

18 Defendant’s *Faretta* hearing reveals that in this case, Defendant was clearly advised of the possible hazards and disadvantages of self-representation. He understood the ramifications of proceeding pro se, and he was aware of the charges and possible punishments. Defendant demonstrated that he had a rudimentary understanding of courtroom procedure, the rules of evidence, and rules of the court. He expressed a willingness to comply with court decorum. Defendant’s request to represent himself was unequivocal, unwavering, coherent, and calm.

19 As such, the district court erred in determining that Defendant did not knowingly, and intelligently waive his right to counsel. We have stated that:

once it has been determined that the waiver of counsel was “knowingly and intelligently” made by a defendant, . . . the court had no alternative but to allow Defendant to proceed on his own. To add an additional test of competency to conduct the trial would effectively take away the right to reject counsel and proceed pro se. Other than defendants trained in the law, few would possess the skills to conduct an effective defense. This is the reason defendants wishing to represent themselves are given the *Castillo* warnings. We note that the trial court has the option of terminating self-representation when a defendant deliberately engages in serious and obstructive misconduct. Further, the court has the right to appoint standby counsel to aid the accused at such time as the accused requests help or to be available to represent the accused if termination of self-representation is necessary. *Rotibi*, 117 N.M. at 111, 869 P.2d at 298.

20 As stated above, the fact that Defendant is not an attorney nor has the training or skills of an attorney, should not prevent De-
Defendant from representing himself. Defendant was given the Castillo warnings, and the district court conducted a detailed hearing on the issue. While the district court determined that Defendant “at best [has] the superficial understanding” of legal proceedings, according to law, this is not sufficient to prevent Defendant from proceeding pro se even if it is at his own peril.

{21} In this case, Defendant’s request to proceed pro se was clear and unequivocal throughout the proceedings. See LaFave, supra § 11.5(d) at 581. LaFave notes that “[o]nce a clear and unequivocal request is made, Faretta suggests only three possible grounds for denying that request.” LaFave, supra at 582-83. First, Faretta stressed that the request in that case was made “well before the date of trial.” Faretta, 442 U.S. at 807; LaFave, supra. Here, Defendant made his request before trial began. Second, Faretta noted that “the trial judge may terminate self-representation by a defendant who . . . engages in serious and obstructionist misconduct.” Faretta, 442 U.S. at 834 n.46; LaFave, supra at 583. In this case, Defendant was not misbehaving, and was not disruptive in the course of seeking to obtain self-representation, and was agreeable to going along with the district court’s rulings. Third, LaFave states that by requiring a valid waiver of counsel as a prerequisite for self-representation, Faretta recognized the authority of a trial court to refuse to permit self-representation when, despite its efforts to explain the consequences of waiver, a defendant is unable to reach the level of appreciation needed for a knowing and intelligent waiver. LaFave, supra at 584. Faretta also makes clear, however, “that a defendant does not need legal expertise nor unusual intelligence to meet its standard of awareness of the dangers and disadvantages of self-representation.” LaFave, supra.

{22} Our review of the record and proceedings below reveals that the district court erred when in deciding that Defendant was not competent to represent himself, and that Defendant’s decision to waive counsel, while voluntary, was not knowing and intelligent. Cf. Plouse, 2003-NMCA-048, ¶¶ 20-31 (providing a detailed analysis of the record which supported the district court’s determination that the defendant’s waiver of counsel was knowing and intelligent); Rotibi, 117 N.M. at 110-11, 869 P.2d at 298-99.

CONCLUSION

{23} We remand this case to the district court for a new trial, at which time Defendant may proceed pro se with standby counsel per his request at the Faretta hearing.

{24} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

WE CONCUR:
IRA ROBINSON, Judge
RODERICK T. KENNEDY, Judge
OPINION

CElia FoY CaSTILLO, Judge

[1] Mario Sanchez (Defendant) appeals the denial of his motion to suppress the crack cocaine seized from his pocket by an Albuquerque police officer. Defendant challenges the legality of the investigatory detention and subsequent pat down; he also contends that under the New Mexico Constitution, exigent circumstances were necessary for the legal seizure of the crack cocaine without a warrant. We conclude that Defendant’s arguments are without merit, and we affirm.

I. FACTS AND BACKGROUND

[2] Defendant was indicted on one count of trafficking cocaine by possession with intent to distribute. After the district court denied Defendant’s motion to suppress, he pled no contest, reserving for appeal the issue of whether the search and seizure violated his constitutional rights. At the hearing on the suppression motion, the parties stipulated to the facts contained in a pretrial interview with Officer Eric Brown. We detail the general facts below.

[3] Around 2:30 a.m. on September 15, 2001, police officers were dispatched to a “fight/party/disturbance” at a residence on Eucharist Street in Albuquerque. Officer Brown was one of the responding officers. He was aware that another officer at the scene had stopped a car with a driver who had been stabbed at the party by an unknown assailant. The victim was not cooperating and would not reveal who stabbed him. Officer Brown found the house littered with empty beer cans, bottles, marijuana pipes, and liquor; he saw broken glass and knocked-over furniture. He also saw blood and numerous weapons on the ground, as well as broken windows at the residence and in the cars located at the address. Officer Brown estimated at least fifty people fled the scene upon the arrival of the police. The officers performed a protective sweep of the residence and placed fifteen to twenty individuals from the residence on the curb in front of the residence. Several altercations occurred between the police and those detained in front of the house. According to Officer Brown, many of these people appeared to be drunk or high on drugs; they were yelling and screaming at the officers and wanted revenge. The detainees sometimes got up and tried to walk away, and some took fighting stances. All of this led Officer Brown to believe that his safety was threatened.

[4] He was one of several officers who swept the house and the backyard, where they proceeded to a shed at the back of the property. There were three people hiding inside the shed. Although Defendant initially refused to exit the shed when ordered to do so, he eventually came out. Once the individuals had exited the shed, Officer Brown patted them down. Based on statements concerning his training and extensive experience, Officer Brown described the basis for his immediate belief that a baseball-sized lump was bundled crack cocaine, which he seized from Defendant’s pocket. Defendant was indicted and convicted after entering a no-contest plea. This appeal followed.

II. STANDARD OF REVIEW

[5] In this case, we have a mixed question of fact and law. We view the facts in the light most favorable to the State, as the prevailing party, and defer to the district court’s findings of fact supported by substantial evidence. State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964. We review de novo the trial court’s application of the law to those facts. State v. Ochoa, 2004-NMSC-023, ¶ 5, 135 N.M. 781, 93 P.3d 1286.

A. Preservation

[6] In Defendant’s plea agreement, he reserved “the right to appeal the [c]ourt’s denial of his suppression motion argued in this case.” Defendant’s motion to suppress does not cite to the state constitution, except in a general manner and in relation to his arrest. At the suppression hearing, Defendant made three arguments: (1) there was no individualized, particularized suspicion for the investigatory detention; (2) there was no individualized, particularized suspicion for the pat down; and (3) there were no exigent circumstances allowing Officer Brown to remove the contents of Defendant’s pocket without a warrant. As to his first two points, Defendant does not argue that the New Mexico Constitution should be interpreted differently from the United States Constitution. The State agrees that the lawfulness of Defendant’s detention and weapons frisk under the Fourth Amendment was preserved. Thus, we analyze the validity of the investigatory detention and pat down under the Fourth Amendment.

[7] The State argues that Defendant never challenged the seizure of the crack cocaine under the Fourth Amendment and, further, that Defendant did not preserve any argument that the seizure was invalid under the state constitution, as required under State v. Gomez, 1997-NMSC-006, ¶¶ 20, 22, 122 N.M. 777, 932 P.2d 1 (requiring that a defendant set forth the basis on which any alleged violation of
a right under the state constitution is based). We agree with the State that Defendant did not argue that his rights were violated under the federal constitution when the crack cocaine was removed from his pocket. As to the state constitution, however, Defendant appears to have preserved his argument. At the suppression hearing, Defendant took the position that New Mexico has not yet adopted the plain feel exception to the warrant requirement, as enunciated in Minnesota v. Dickerson, 508 U.S. 366, 375 (1993) (holding that an officer may legally seize a concealed object during a pat down if the identity of the object as illegal contraband is “immediately apparent” to the officer). But he did not rely on New Mexico’s not having adopted the plain feel doctrine, nor did he argue for or against its adoption. Defendant’s contention was simply that in this case, the New Mexico Constitution requires proof of “exigent circumstances before . . . seizure without a warrant.”

On appeal, Defendant cites to Dickerson and assumes that New Mexico has adopted the doctrine. See State v. Pierce, 2003-NMCA-117, ¶ 22, 134 N.M. 388, 77 P.3d 292 (observing that New Mexico has not formally adopted the plain feel doctrine). But see State v. Paul T., 1999-NMSC-037, ¶ 27, 128 N.M. 360, 993 P.2d 74 (recognizing the existence of the plain feel doctrine but stating that the matter was not preserved below). Consequently, Defendant does not assert that the material was removed from his pocket in violation of the Fourth Amendment to the United States Constitution. However, Defendant contends that his rights under Article II, Section 10, of the New Mexico Constitution were violated because the State did not show that there were exigent circumstances to justify the seizure of the pocket contents. Defendant’s argument that the state constitution requires exigent circumstances was preserved. Accordingly, we do not address the plain feel doctrine, and we limit our analysis of the removal of the crack cocaine to Defendant’s contention that under the New Mexico Constitution, Officer Brown needed to demonstrate exigent circumstances.

B. Detention and Pat Down

Defendant agrees that it was reasonable for the police to think a crime had been committed on the property where the shed was located. As to the pat down, however, Defendant contends that Officer Brown had no reasonable individualized suspicion that Defendant had committed a crime and that the stop and detention were therefore not justified. We begin with the legality of the stop.

The State’s first argument is that no constitutional protections are involved in this case because Defendant was free to go. We disagree with the State’s characterization of the encounter. A seizure occurs by either the “use of physical force” by an officer “or submission by the individual” to an officer’s assertion of authority. United States v. Harris, 313 F.3d 1228, 1234 (10th Cir. 2002). When “a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” Terry v. Ohio, 392 U.S. 1, 16 (1968). In determining whether a reasonable person would have felt free to leave, we review all of the circumstances surrounding the encounter and focus on the following three factors: “(1) the conduct of the police, (2) the person of the individual citizen, and (3) the physical surroundings of the encounter.” State v. Jason L., 2000-NMSC-018, ¶ 15, 129 N.M. 119, 2 P.3d 856 (internal quotation marks and citation omitted). Defendant was discovered in the shed with two other persons. Officer Brown was accompanied by other police officers. All occupants of the shed were ordered out. The other occupants exited. At first, Defendant refused to come out of the shed; he then followed suit and complied with the order. In reviewing the three factors as applied to the facts in this case, we conclude that a reasonable person would not feel free to leave under the circumstances of this case. Thus, we continue our analysis.

Police may make an investigatory stop in circumstances that do not rise to the level of probable cause for an arrest if the officers have a reasonable suspicion that the law has been or is being violated. Terry, 392 U.S. at 21-22; State v. Flores, 1996-NMCA-059, ¶ 7, 122 N.M. 84, 920 P.2d 1038. The State must provide specific and articulable facts that, together with the rational inferences from those facts, reasonably warrant the intrusion. See Jason L., 2000-NMSC-018, ¶ 21. There is no doubt that the Eucharist Street residence was a crime scene and that at least one violent crime had been committed. One person had been stabbed, and neither the perpetrator nor the weapon had been located at the time Officer Brown discovered Defendant in the shed. Defendant argues that since nothing pointed to his having done the stabbing, he should not have been detained. As found by the trial court, “[i]t was reasonable and proper [for the police] to investigate the people located at the crime scene[, and] failure to do so would likely cause the investigation to be deficient and negligent on the part of the officers.” The trial court also found that Defendant was hiding in the immediate vicinity of the crime and was reluctant to comply with the officers’ request to come out of his hiding place. We agree with the trial court’s assessment of the situation. Officer Brown’s detention of Defendant by requesting him to exit the shed for questioning was warranted under the circumstances.

We now turn to the legality of the pat down. Our direction is found in Pierce:

Police may initiate a protective patdown search for weapons if they have specific and articulable facts which they contend support their assessment of danger. The search must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. A Terry search may not be expanded without probable cause into a search for evidence of a crime. If a protective search goes beyond that which is necessary to determine whether weapons are present, the fruits of the search are suppressed.

Defendant was hiding in the shed, and once his presence was discovered, he did not immediately exit the shed, as ordered by the police. While we agree with the trial court’s assessment that Defendant’s failure to exit the shed created a reasonable inference that Defendant harbored a consciousness of guilt regarding the crime that was being investigated, we do not rely on this conclusion for our holding. We look to the entire situation. The officers were faced with a chaotic situation: numerous participants had fled the scene, and those detained were acting in an aggressive manner. The premises resembled a battle scene—with blood, broken windows, and weapons lying around. Inside the house, the officers had observed empty beer cans, bottles, marijuana pipes, liquor, knocked-over furniture, blood, and broken glass. Officer Brown was aware that a stabbing had occurred and that neither the weapon nor the perpetrator had been located. In assessing the reasonableness of the necessity for the pat down, we defer to Officer Brown’s good judgment. See Gomez, 1997-NMSC-006, ¶ 40 (stating that we defer to the officer’s good judgment in evaluating the existence of exigent circumstances).

According to Defendant, there was no justification for the pat down before questioning because there was really no safety concern. In Defendant’s view, it would have been impossible for him to have drawn a weapon from concealment before being overwhelmed.
by the officers. We disagree with Defendant’s evaluation of the situation. An officer does not need to wait until he sees “the glint of steel before he can act to protect his safety.” *State v. Cobbs*, 103 N.M. 623, 630, 711 P.2d 900, 907 (Ct. App. 1985) (internal quotation marks and citation omitted).

{15} Under the circumstances of this case, we agree with Officer Brown’s conclusion that a pat down search was necessary for his own protection, as well as for the protection of the other officers and other people in the area. Therefore, we hold that Officer Brown was justified in conducting a pat down of Defendant’s person.

C. Removal of Pocket Contents

{16} Because Defendant does not argue a violation of his Fourth Amendment rights, we need not address the validity of the seizure under *Dickerson*. Nor do we get to the question of whether New Mexico should adopt the plain feel exception to the warrant requirement, since Defendant does not make this argument. Consequently, we limit our review to Defendant’s contention that the removal of illegal contraband from his pocket during pat down should only be allowed if Officer Brown can demonstrate that exigent circumstances required the removal. Defendant relies on *Gomez*, 1997-NMSC-006, ¶¶ 33-40, and *Campos v. State*, 117 N.M. 155, 158-59, 870 P.2d 117, 120-21 (1994). In *Gomez*, our Supreme Court departed from established federal precedent in interpreting the Fourth Amendment and held that under the New Mexico Constitution, Article II, Section 10, there are no “automatic” exigent circumstances justifying the warrantless search of an automobile. *Gomez*, 1997-NMSC-006, ¶¶ 44, 46. Consequently, the existence of exigent circumstances is evaluated on a case-by-case basis, and only where an officer has reasonably determined that exigent circumstances exist will a warrantless search of an automobile be held valid. *Id.* ¶ 40. *Campos* deals with warrantless arrests. In that case, our Supreme Court held that in order to justify a warrantless arrest, “the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant.” 117 N.M. at 159, 870 P.2d at 121. If an officer observes the person committing a felony, however, exigency will be presumed. *Id.*

{17} In arguing that *Gomez* applies to the facts of this case, Defendant has overlooked the different values that constitutional provisions like the Fourth Amendment and Article II, Section 10, are designed to protect. The search aspect of these provisions protects expectations of privacy, while the seizure aspect protects notions of possession, at least insofar as it applies to objects. *State v. Foreman*, 97 N.M. 583, 585, 642 P.2d 186, 188 (Ct. App. 1982).

{18} The *Gomez* court was dealing with people’s interest in privacy. The requirement of exigent circumstances, in addition to probable cause, gives a heightened level of protection to the privacy interest. Because the value of privacy is so important in New Mexico, this was entirely appropriate. But in this case, the privacy threshold has already been lawfully breached. We have held that the detention and pat down were lawful, and Defendant does not challenge Officer Brown’s immediate identification of the cocaine. Since the privacy threshold was breached, the remaining value that Article II, Section 10, would protect is Defendant’s interest in possessing his cocaine. But we have held in *Foreman* that Defendant has no such interest. 97 N.M. at 585, 642 P.2d at 188. Under these circumstances, there would be no point to giving a heightened level of protection to Defendant’s privacy interest because he has no interest. See *Ochoa*, 2004-NMSC-023, ¶ 8 (allowing warrantless seizure of incriminating evidence observed in plain view during the course of a protective pat down); *State v. Ferguson*, 106 N.M. 357, 358, 743 P.2d 113, 114 (1987) (holding that warrantless seizure of contraband from an incarcerated defendant was proper). Had the evidence in Defendant’s pocket not been contraband and instead been lawful objects suspected of being connected with a crime, a different result might obtain. However, we need not decide that question in this case. It is enough to hold that once Officer Brown knew Defendant had rocks of cocaine in his pocket, there was no need for exigent circumstances to allow their seizure without a warrant.

III. CONCLUSION

{19} We affirm the trial court’s denial of Defendant’s motion to suppress.

{20} IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:
IRA ROBINSON, Judge
RODERICK T. KENNEDY, Judge
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Yale trained forensic psychiatrist, board certified. Available for consultation, psychiatric evaluations, expert witness testimony and record review. Experienced in both criminal and civil matters. Call Dr. Kelly at (505) 463-1228.

OFFICE SPACE

Three Offices Available

Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

North Valley Casita-Style Office Space

Quick access to downtown. Charming sole proprietor space in intimate compound setting. Over 800 SF: office, reception area, storage & copies space. For lease or sale. Only a few spaces available. Red Sky Realty owner/broker 247-3424 (office), 235-7667 (cell).

Downtown

Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $350 per month. Call Orlivle, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Uptown Square Office Building

Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. 3747SF. Buildouts include reception counter/desk and separate kitchen area. Competitive Rates. Available Soon! Call Ron Nelson or John Whisenant 883-9662.

Across from the Courthouse

Share beautiful offices in Bank of America Building with two established family law practitioners. $676 per month, 30 months remaining on lease. Secretarial space, conference room, all amenities. Call Martha at 842-0662.

For Rent: North Valley Offices or Entire Building

Newly renovated office suites, shared conference room, reception area, kitchen, waiting area, security system. 5 minutes from Courthouses. Rent all or part (2500”). 1901 Candelaria NW (near Rio Grande Blvd., NW) Kathleen or Adam: 459-4528.

BUSINESS OPPORTUNITIES

Taos - Solo General Practice for Sale

Well established solo practice with an 8 year track record for sale. Practice has included real estate, commercial work, civil litigation, minor criminal matters, probate and estate planning. The sale includes: excellent advertising in Names & Numbers and US West, telephone numbers, client files and list, office equipment, forms files, and great lease on office location right on main street. If interested please call (505) 737-5468 or send inquiries to D. Todd Lazar, Attorney-At-Law, P.C., P.O. Box 3228, Taos, New Mexico 87571.

POTPOURRI

American Limousine


Seeking Information

Seeking information on the estate plan or Last Will and Testament of Ollie Frank Turpen, a/k/a Frank Turpen. Please contact William J. Lock, 5732 Osuna Road NE, Albuquerque, NM 87109 or call 880-2100.

Art Gallery Invite

James Rawley invites you to a show of his paintings in his gallery at 1014 Central SW on August 5, 2005 at 5:00 p.m. Please come!
“This program showed me specific strategies that are easy to implement. I had no idea marketing could be so easy.”

Elisabeth Kovac, NYC

“This program provided a crucial first step in educating me on how to start growing my law practice.”

Brian Stapleton, NYC

“Your presentation was great! I felt feeling excited about my practice because I felt, for the first time, I could successfully market it.”

Alicia Gieck, IL

These are just a few of the comments this program and speaker received during the sold out “Becoming a Rainmaker” seminars held recently in New York City, Chicago, New Jersey, and Los Angeles. Now, through the State Bar of New Mexico, it’s available to New Mexico lawyers as well.

Becoming A Rainmaker
Sales and Marketing Techniques
to Grow Your Practice

State Bar of New Mexico
Wednesday, July 20, from 6 p.m. to 8 p.m.
State Bar of New Mexico Professional Development Center,
5121 Masthead NE, Albuquerque

Presenter: Stephen Fairley, M.A., RCC

Fairley is an international best-selling author and was recently named “America’s Top Marketing Coach” by Coachville, the world’s largest coaching association. His specialty is helping professional service firms rapidly increase revenues and find new clients fast. His information-packed seminar includes:

* The seven ways to find more clients and which ones work best for solo practitioners and small firms
* How to apply the five key steps to becoming a rainmaker
* The five major roles every firm must fill in order to succeed
* How to avoid the top four marketing mistakes attorneys make
* Why 90 percent of advertising doesn’t work
* A 90-day personal action plan
* A six-step process for developing a 12-month strategic marketing plan
* And much more!

You cannot afford
to miss this program

To register and for complete information, click the Rainmaker link at www.nmbar.org
or call the Legal Career Center at 1-800-659-5589.

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