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Special Insert:
Daniels-Head Professional Liability Insurance

www.nmbar.org
Law Line 4 is a monthly call-in service aimed to assist the New Mexico public by answering questions from residents from across the state, held at the KOB studios in Albuquerque. The KOB LawLine 4 Call-In is regularly scheduled for the third Wednesday of each month. The hours are 5:00 p.m. until 7:00 p.m. Please note that the November 12 date is the second Wednesday of the month, also, there will be no sessions in January or December.

PLEASE CONSIDER SIGNING UP NOW SO YOU CAN CALENDAR YOUR PARTICIPATION. This is a tentative commitment: someone will call you 10 days to 2 weeks in advance of each scheduled date to confirm the date, time and your continued ability to participate.

NAME:____________________________________ PHONE:____________________________________
I have some questions. Please call me at: ______________________________________

(Check the box after the DATES AND TIMES you want to sign up for)

☐ July 16 5:00 – 7:00 p.m.  ☐ October 15 5:00 – 7:00 p.m.
☐ August 20 5:00 – 7:00 p.m.  ☐ November 12 5:00 – 7:00 p.m.
☐ September 17 5:00 – 7:00 p.m.

I have an attorney associate/ friend/ acquaintance that might be interested in participating.
NAME:____________________________________ PHONE:____________________________________
☐ You may use my name as a reference.  ☐ DO NOT use my name as a reference.

If you have any questions, please call Jorge at 797-6067. Email: jjimenez@nmbar.org
Fax sign up form to the attention of Jorge at 505.797.6074

Please list your current area(s) of law: ______________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
Dear Colleagues,

The 2008 State Bar of New Mexico Annual Meeting is fast approaching! As your president this year, I’ve spent a lot of time talking about important topics in our profession and outreach to our membership. Our annual meeting is the premier opportunity to gather and provide perspective/discussion on issues facing our profession. We also have in store for you a quality program with outstanding speakers, CLE sessions, social events, family activities and the opportunity to visit with colleagues from across the state and country.

The theme for our meeting will be “From Crisis to Courthouse.” As attorneys, we have a professional duty to be ready to counsel our clients and community when tragedy strikes. To assist us in understanding and being prepared for such events, our keynote speaker, Ken Feinberg, offers amazing insight into the 9/11 attacks and the ensuing Victim Compensation Fund. Our plenary speaker, Donna Beegle, offers a moving and inspiring talk on poverty in our nation. Our CLE programs will then provide practical information for your everyday business and surely offer something for everyone.

We have terrific entertainment lined up for Friday. Equal Access to Justice will host a live auction. Mike Rayburn will wow us with his comic and musical genius right after the President’s Reception and the annual State Bar Awards. Named Best Solo Artist 2007 by American Entertainment Magazine, Mike is sure to please. On Saturday, we will head to the air-conditioned Chase Field for a special Arizona Diamondbacks game against the Los Angeles Dodgers. How can you go wrong with a trip to the “ole ball park”? Finally, don’t forget that we are staying at the AAA Five Diamond Fairmont Scottsdale Princess Resort that has five pools (including the “Sonoran Splash”), the Willow Stream Spa, complimentary Kids’ Club, an outstanding TPC golf course, tennis, and incredible convention facilities—all for a low rate of $149 per night! Be sure to reserve your room (1-800-441-1414) as soon as possible because only a limited number are now available.

I am only touching on a few of the highlights for our annual meeting this year. Please review the insert in the April 7 Bar Bulletin or visit our State Bar Web site at www.nmbar.org in order to register today!

On behalf of the Board of Bar Commissioners, we are looking forward to seeing you in Scottsdale from July 17–20. I hope to see you there!

Sincerely,
Craig A. Orraj
Quarterly 12-page supplement to the Bar Bulletin
Advertising Available

Please contact
Marcia C. Ulibarri, Account Executive
505.797.6058 mulibarri@nmbar.org
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Professionalism Tip
With respect to opposing parties and their counsel:
I will consult with opposing counsel before scheduling depositions and meetings or before rescheduling hearings.

Meetings

June
23
Senior Lawyers Division Board of Directors, 4:30 p.m., State Bar Center

24 Real Property, Trust and Estate Section Board of Directors, 4 p.m., via teleconference

25 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 13th floor conference room

July
1 Elder Law Section Board of Directors, noon, State Bar Center

2 Employment and Labor Law Section Board of Directors, noon, State Bar Center

3 Board of Editors, 7:30 a.m., State Bar Center

State Bar Workshops

June
25 Consumer/Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

26 Consumer/Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

July
23 Consumer/Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

24 Consumer/Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

August
21 Consumer/Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

27 Consumer/Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

Cover Artist: The works of Denise Kunz reveal her passion for the art of flamenco. Her use of brilliant color demonstrates her growing understanding of this art form and resonates in her images rendered in acrylic on wood panel or canvas, revealing the raw incendiary emotion of flamenco. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court to provide 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 regular meeting will be from 8 a.m. to 5 p.m., June 27, at the State Bar Center, Albuquerque.

Newly-appointed Bernalillo County Metropolitan Court Judge Maria I. Dominguez will begin hearing criminal cases in Division VI on June 26 in Courtroom 640. She replaces Wayne Griego, who was removed from the bench. Judge Dominguez will be working a Monday through Friday rotation at the Court. She can be reached at (505) 841-8289. The fax number for Division VI is (505) 222-4806. Call Trial Court Administrative Assistant Jennifer Otero or Christy Burrows at (505) 841-8106 for additional information.

The Appellate Practice Section will hold its annual membership meeting at 12:45 p.m., Aug. 15, in conjunction with the 19th Annual Appellate Practice Institute. Details on the CLE may be found in the May 19 Bar Bulletin, CLE At-a-Glance. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199. To place an item on the agenda, contact Chair Jonathan Sperber, jonathan.sperber@state.nm.us.

The Attorney Support Group offers two meeting opportunities:
- Afternoon meeting, 5:30 p.m., July 7 (meets regularly on the first Monday of the month);
- Morning meeting, 7:30 a.m., July 21 (meets regularly on the third Monday of the month).

Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

Over 200 children are competing in the sixth annual Children’s Law Section Art Contest. Each artist was asked to design and decorate a tee-shirt with this year’s theme, “Looking Forward, Looking Back.” The artists are children who are improving their lives through court-ordered programs in Bernalillo, Santa Fe, Valencia, Sandoval, Cibola and San Juan counties. The contest provides the children with a positive opportunity to express their struggles, look toward the future, and celebrate artistic effort. Each year the Children’s Law Section sponsors the contest with the generous help of community donations. Members of the New Mexico Art Therapy Association help organize the event as well as instruct and assist the children in creating their entries.

A panel of judges who are professional artists themselves will select the winners. The awards will be announced at an exhibition to be held from 3 to 5:30 p.m., Nov. 7, at the Juvenile Justice Center, Conference Rooms A and B, 5100 Second Street NW, Albuquerque. For more information, contact Beth Collard (505) 259-7387 or beth.childrenslaw@gmail.com

Equal Access to Justice needs high-end items donated to raise funds for civil legal services for New Mexico’s poor. To donate to the auction,
contact Kate Mulqueen, (505) 797-6064, or kmulqueen@nmbar.org. Suggested items include art, jewelry, vacation home rentals, spa packages, hotel packages, air tickets, vintage wine, or creative gift packages.

Indian Law Section Board Vacancy

A vacancy exists on the Indian Law Section board. The position will be filled by appointment and the member will serve until the end of the year. Should the appointee wish to serve the remainder of the 2007–2009 term, he or she may run in the 2008 election that will be held in the fall.

Board members are expected to attend (in person or via teleconference) bi-monthly one-hour meetings, participate in committee activities, and recruit new members to fulfill the purpose of the section.

Section members interested in filling the vacancy should submit a short statement of interest to Georgene Louis, georgenelouis@yahoo.com, by 5 p.m. July 9. A resume may also be included. The appointment will be made prior to the July 25 section meeting. Direct questions to Georgene Louis.

Senior Lawyers Division Annual Meeting

The Senior Lawyers Division will hold its annual meeting at 4:30 p.m., July 18, during the 2008 Annual Meeting of the State Bar of New Mexico at the Fairmont Scottsdale Princess in Scottsdale, Arizona. Suggested agenda items should be sent to Chair Terrence Revo, terrence.revo@revolaw.com or (505) 293-8888.

Technology Committee Adobe Acrobat 8 for Lawyers

The Technology Committee will hold a free workshop from 5 to 6 p.m., July 24, at the State Bar Center, Albuquerque. The workshop will demonstrate the ways in which Adobe Acrobat Professional Version 8 can assist with crucial functions necessary to prepare for and receive in discovery as well as convert exhibits and other documents into files suitable for the U.S. District Court for the District of New Mexico’s CM/ECF electronic filing system. For a more detailed description, visit www.nmbar.org. Paralegals, attorneys and support staff are all invited to attend. Class is limited to 11 attendees. Reservations should be made by July 23 with Tony Horvat, thorvat@nmbar.org or (505) 797-6033.

Young Lawyers Division Annual Meeting

The Young Lawyers Division will hold its annual meeting from 10 a.m. to noon, July 19, during the 2008 Annual Meeting of the State Bar of New Mexico at the Fairmont Scottsdale Princess in Scottsdale, Arizona. Agenda items should be sent to Chair Brent Moore, brent.moore@state.nm.us.

OTHER BARS Albuquerque Bar Association

John Cooney Roast

The Albuquerque Bar Association invites the legal community to an evening of laughter, merriment, and irreverence as they roast John Cooney of Modrall Sperling Roehl Harris & Sisk PA. The event will take place at 6 p.m., Aug. 8, at the Hotel Albuquerque at Old Town, 800 Rio Grande Blvd. NW, Albuquerque. By reservation only: $75 Individual, $750 reserved table of ten, includes program recognition. The deadline for reservations is Aug. 5.

Membership Luncheon

The Albuquerque Bar Association’s Membership Luncheon will be held at 11:45 a.m., July 1, at the Hyatt Regency Hotel, 330 Tijeras NW, Albuquerque. The luncheon speaker is Richard C. Minzner. “Dick Minzner’s Legislative Analysis” will provide an update of the current legislative session. Lunch: $25 members/$35 non-members with reservation, $5 additional at door. Register for lunch by noon June 26.

N.M. Defense Lawyers Association

The DLA Board proudly announces the selection of the 2008 Civil Defense Lawyer of the Year and the DLA Young Lawyer Award. The legal community is invited to the DLA Annual Meeting on Oct. 9 at the Marriott Pyramid, Albuquerque, to congratulate the awardees.

2008 Civil Defense Lawyer of the Year
Al Green
Butt Thornton & Baehr
2008 DLA Young Lawyer of the Year
Jessica Hernandez
Rodey Law Firm

UNM School of Law Summer Library Hours

Building and Circulation

Monday—Thursday 8 a.m.—9 p.m.
Friday 8 a.m.—6 p.m.
Saturday 9 a.m.—6 p.m.
Sunday Noon—9 p.m.

Reference

Monday—Friday 9 a.m.—6 p.m.
Saturday Closed
Sunday Noon—4 p.m.
Independence Day, July 4 Closed

OTHER NEWS

N.M. Guardianship Association Annual Membership Meeting

The membership meeting of the N.M. Guardianship Association will be from noon to 3 p.m., June 27, at the UNM Continuing Education Conference Center, 1634 University Blvd. NE, Albuquerque. The newly appointed board membership meeting will follow from 3 to 4 p.m. This year’s meeting will cover actions taken last year, the priority agenda for workgroups, and nominations and election of board members. For further information, contact Ling Faith-Heuertz, (505) 883-4630 or lfaithheuertz@arcnm.org.
Thanks to the generosity and caring of the individuals listed below, Equal Access to Justice raised $253,000 in the 2007-08 Campaign to help the work of New Mexico Legal Aid, Law Access New Mexico, DNA-People’s Legal Services and the New Mexico Center on Law and Poverty. Whether you have been supporting EAJ over the years or are new to this donor list, the EAJ Board of Directors honors and thanks you for meeting your professional responsibility.

**Champions of Justice $10,000–$15,000**

- Miller Stratvert PA
- Modrall Sperling Roehl Harris & Sisk PA
- Rodey Dickason Sloan Akin & Robb PA
- State Bar of New Mexico Foundation

**Defenders of Justice $1,000–$9,000**

- Paul Abrams
- Anonymous Employees of Miller Stratvert PA through United Way of Central New Mexico
- Anonymous Employees of Sutin Thayer & Browne PC through United Way of Central New Mexico
- John and Polly Arango
- Atkinson & Thal
- Gary Brownell
- Brownstein, Hyatt, Farber & Schreck
- Butt Thornton & Baehr, PC
- Center for Civic Values
- Stephen Durkovich
- Freedman, Boyd, Hollander & Goldberg
- Geer Wissel & Levy
- Gilkey & Stephenson, PA
- Haft Foundation
- Hinkle Hensley Shanor & Martin, LLP
- Jones Sneed Wertheim & Wentworth
- Keleher & McLeod
- William R. Keleher
- Twila and Michael Larkin
- Luebben Johnson & Barnhouse
- Mason & Issacson
- Mary and Bernie Metzgar
- Richard Minzner
- Moody & Warner
- Andy and Liz Montgomery
- Mary Montgomery & Dale Anderson
- Montgomery & Andrews, PA
- Oliver Seth Inns of Court
- Thomas Olson
- Paralegal Division of the State Bar of New Mexico
- Charles Peifer
- Judge Lynn Pickard
- Roberta Cooper Ramo
- John Robb
- Rothstein Donatelli Hughes
- Dahlstrom Shoenberg & Bienvenu LLP
- Sanchez Mower & Desiderio
- Sheehan Sheehan & Stelzner, PA
- Sarah Singleton
- Matthew Slater and Faith Roessell
- Sutin, Thayer & Browne, PC
- Judge Alan Torgerson
- White Koch Kelly & McCarthy

**Advocates of Justice $400–$999**

- Barbara Albin
- Anonymous-Miller Stratvert PA
- Philip Armour
- Michael Armstrong
- Association of Fundraising Professionals-New Mexico Chapter
- MaryAnn Baker-Randall
- Daniel Behles
- Lori Bencoe
- Jon Boller
- Brian Branch
- David Buchholtz
- Edward Chavez
- Michael Condon
- Coppler & Mannick PC
- Bruce Cottrell
- Elizabeth Cunningham
- Russell Elliott
- Farmington Bar in Memory of

- Chris Booth
- Fin Line Firm
- First Judicial District
- Gene Franchini
- Vickie Gabin
- Phillip Gaddy
- Gene Gallegos
- Gallegos Law Firm
- John Greacen
- Margaret Jeffers
- Thomas Keleher
- LND Films
- Robert Levy and Susan Conway
- Long Pound & Komer
- Patricia McDonald
- Judith Ann Moore
- Kate Mulqueen and Joel Widman
- Myers & Oliver
- Narvaez Law Firm PA
- Noeding & Jarrett

- Lisa and Mark Ortega
- Peacock Myers PC
- Ruth Pregenzer
- Rose Provan
- Charles Purcell
- Edward Ricco
- Dennis Richard
- Conrad Rocha
- Louis Rose
- Michael Rosenberg
- Rubin Katz Law Firm
- Rugge Rosales & Associates PC
- Janet Santillanes
- Sawtelle Wirth & Biedscheid
- Serra Garrity
- Ronald Segel
- Kimball Udall
- Vogel Campbell & Blueher PC
- Wendy York
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Michael Vigil
Laurie Vogel
John Walker
Mary Walta
Richard Weiner
Lawrence Wells
Patricia Wendel
Jane Wishner
Kathleen Wright
Janet Yazzie
Ruth Yodaiken

Equal Access to Justice and you, our donors, share a common vision: legal help to be available to all New Mexicans, regardless of income.

We look forward to our future growth together as we continue to make our common vision a reality.

Thank you for making a difference in your profession.
LEGAL EDUCATION

JUNE

30 Am I My Bar’s Keeper?
Teleconference
TRT
1.0 E, 1.0 P
1-800-672-6253
www.trtcle.com

JULY

1 2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
Video Replay
Center for Legal Education of NMSBF
1.0 P
(505) 797-6020
www.nmbarcle.org

1 Basics of Real Estate Transactions (2005)
Video Replay
Center for Legal Education of NMSBF
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G = General   E = Ethics
P = Professionalism   VR = Video Replay
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**August**

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### 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 Fe, NM 87504-0848 • (505) 827-4860

**Effective June 23, 2008**

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County’s response due 6/30/08 by extn

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<td>30,956</td>
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**WRITS OF CERTIORARI**

**CERTIORARI GRANTED AND SUBMITTED TO THE COURT:**

<table>
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<th>Number</th>
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<tr>
<td>NO. 30,272</td>
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<td>Peters Corp. v. N.M. Banquest Investors Corp.</td>
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<td>Fiser v. Dell</td>
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<td>Pincheira v. Allstate Insurance Company</td>
<td>(COA 26,044)</td>
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**Certiorari Granted and Submitted to the Court:**

(Submission = date of oral argument or briefs-only submission)

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<td>(COA 26,887)</td>
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<td>Cordova v. World Finance</td>
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<td>State v. Bettencourt</td>
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**Petition for Writ of Certiorari Denied:**

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<td>NO. 31,109</td>
<td>State v. Molina</td>
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**Writ of Certiorari Quashed:**

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<td>NO. 30,986</td>
<td>Snyder v. Sain</td>
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</table>
## Published Opinions

No. 28204  12th Jud Dist Otero CR-04-540, STATE v J COLMENERO (affirm)       6/10/2008
No. 28222  12th Jud Dist Lincoln CV-05-361, W HANSON v E POWELL (affirm) 6/10/2008
No. 28321  2nd Jud Dist Bernalillo LR-06-114, STATE v L ESKEETS (affirm) 6/10/2008
No. 28349  7th Jud Dist Soccoro CR-06-181, STATE v L SCHWARTZ (dismiss) 6/10/2008
No. 26572  3rd Jud Dist Dona Ana CR-04-1236, STATE v J CARRERA (affirm) 6/12/2008
No. 28216  5th Jud Dist Lea LR-06-007, STATE v C WARREN (affirm) 6/12/2008
No. 28293  4th Jud Dist Mora CV-07-38, E MASCARENAS v J MASCARENAS (reverse) 6/12/2008
No. 28355  2nd Jud Dist Bernalillo JQ-07-80, CYFD v JACQUELINE C (affirm) 6/12/2008
No. 28434  12th Jud Dist Otero CV-06-357, S SMITH v J DUCKETT (affirm) 6/12/2008

## Unpublished Opinions

Slip Opinions for Published Opinions may be read on the Court’s Web site:
Clerk Certificates
From the New Mexico Supreme Court

Clerk’s Certificate of Name, Address, and/or Telephone Changes

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All attorneys must be listed to be considered as Insureds. Of Counsel attorneys need not be listed unless individual coverage is desired. If you are a sole practitioner, please list yourself. Attach sheet if additional attorneys are to be listed.

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<th>Attorney Name</th>
<th>D/C*</th>
<th>Social Security Number</th>
<th>Years in Practice</th>
<th>Date Joined Firm #</th>
<th>Prior Acts Exclusion Date #</th>
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* Designation Codes (D/C)  
O=Officers, Directors or Shareholders of the corporation who are licensed as lawyers  
P=Partners of Partnership  
E=Employed Lawyers (must be employee of applicant)  
S=Sole Proprietor  
PT=Part-time Lawyer (must work less than 26 hours per week in the private practice of law solely on behalf of the applicant firm)

**Current Insurance**  
(Complete this Section or Send copy of your Current Declaration Page)

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OPINION

EDWARD L. CHÁVEZ, CHIEF JUSTICE

[1] Following a lawful traffic stop of Defendant James Bomboy, a police officer saw in Defendant’s car, in plain view, a clear crystal substance that the officer immediately recognized as an illegal substance. After arresting Defendant, the officer reached into Defendant’s automobile and retrieved the substance, which was confirmed to be methamphetamine. The issue in this case is whether an officer can seize such evidence from an automobile without a warrant.

[2] The Court of Appeals affirmed the trial court’s suppression of the evidence in this case, relying primarily on State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1; State v. Garcia, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72; and State v. Jones, 2002-NMCA-019, 131 N.M. 586, 40 P.3d 1030. As urged by the Court of Appeals in its opinion, we take this opportunity to revisit these cases, and we hold that the seizure of contraband observed in plain view inside the automobile, by an officer who observed it during a lawful traffic stop, is justified by the exigent circumstances exception to the warrant requirement and by Gomez. This is because the contraband is in plain view not only to the officer, but also to the public at large, and therefore, if it is left alone, it can easily be tampered with or destroyed. To the extent that these cases are interpreted to hold otherwise, they are modified.

I. BACKGROUND

[3] Defendant was charged with possession of methamphetamine with intent to distribute after officers seized methamphetamine from his automobile. Defendant was also charged with possession of drug paraphernalia, failure to have an operating license plate lamp, and driving on a suspended or revoked license. Defendant was initially stopped by Officers Postlewait and Briseno for a traffic violation. After approaching Defendant’s automobile, Officer Briseno noticed a plastic baggie in the gap between the two front seats. The plastic baggie contained several smaller plastic baggies that contained a “clear crystal substance” that Officer Briseno immediately recognized as contraband. Officer Briseno then advised Officer Postlewait to arrest Defendant. After he arrested Defendant, Officer Postlewait retrieved the plastic baggie, which contained methamphetamine, from inside the vehicle.

[4] Defendant moved to suppress the methamphetamine. The district court, relying on Gomez and Jones, granted his motion because the warrantless search was done without Defendant’s consent or a showing of exigent circumstances. On appeal, the Court of Appeals affirmed the district court, but questioned whether this Court should revisit Garcia and Gomez. State v. Bomboy, 2007-NMCA-081, ¶ 16, 141 N.M. 853, 161 P.3d 898. We granted the State’s petition for a writ of certiorari and reverse. 2007-NMCERT-006, 142 N.M. 16, 162 P.3d 171.

II. DISCUSSION

[5] Article II, Section 10 of the New Mexico Constitution gives broader protection to individuals in the area of automobile searches than is provided by the Fourth Amendment of the United States Constitution. Garcia, 2005-NMSC-017, ¶¶ 26, 29. The Fourth Amendment allows a warrantless search of an automobile and of closed containers found within an automobile when there is probable cause to believe that contraband is contained therein. United States v. Ross, 456 U.S. 798, 825 (1982). New Mexico has rejected this bright line exception to the warrant requirement and requires “a particularized showing of exigent circumstances” in order to conduct a warrantless search of an automobile and its contents. Gomez, 1997-NMSC-006, ¶ 39.

[6] In Gomez, we recognized that “in most cases involving vehicles there will be exigent circumstances justifying a warrantless search.” Id. ¶ 44. We nonetheless chose to stay from federal precedent. Id. ¶ 34. In rejecting the federal bright-line rule, we emphasized our preference for warrants and recognized the endless variation in facts and circumstances that might make a search of an automobile either reasonable or unreasonable. Id. ¶¶ 36, 45. Our purpose was to keep intact the fact-specific nature of reasonableness determinations under search and seizure principles.

[7] In Gomez, an officer searched the defendant’s automobile after seeing marijuana, a brass pipe, and a pair of hemostats,
items commonly used for smoking marijuana, scattered on the console, seat, and floorboard. Id. ¶ 6. During the search the officer retrieved a fanny pack, unzipped it, and found perforated tabs of white paper inside it, which from experience he believed to contain LSD. Id. The defendant was charged with possession of LSD. Id. ¶ 1.

At trial he moved to suppress the evidence obtained from the warrantless search of his vehicle. Id. We upheld the warrantless search of the closed container at issue, concluding that the officer had probable cause to believe the automobile contained contraband and that exigent circumstances existed because the officer was concerned about destruction of the evidence by the crowd that had gathered at the scene. Id. ¶ 41. Under these circumstances, we found that the officer’s conduct was reasonable. Id. ¶ 43.

The specific issue before us in Gomez was the suppression of the LSD found in the closed container, a zipped fanny pack. Although the marijuana and other drug paraphernalia inside the automobile gave rise to probable cause to search the automobile, we did not determine whether the officer’s seizure of those items, in plain view, would have been unconstitutional under Article II, Section 10 of the New Mexico Constitution. However, in the case at hand, we are called upon to make such a determination. After applying the factsensitive reasonableness inquiry sanctioned by Gomez, we conclude that it is not unreasonable for an officer to seize an item from an automobile that is in plain view and that the officer has probable cause to believe is evidence of a crime.

The reasonableness of such a seizure is supported by the underpinnings of Article II, Section 10 of both the New Mexico Constitution and the Fourth Amendment of the United States Constitution. These provisions guarantee that people will not be subjected to unreasonable searches and seizures. The search aspect protects expectations of privacy, while the seizure aspect protects notions of possession. State v. Sanchez, 2005-NMCA-081, ¶ 17, 137 N.M. 759, 114 P.3d 1075. In this case, we are dealing with Defendant’s privacy interest in the interior of his automobile and his possessory interest in the methamphetamine seized from his automobile.

Determining whether a search is an intrusion on a legitimate expectation of privacy requires two considerations. State v. Warsaw, 1998-NMCA-044, ¶ 14, 125 N.M. 8, 956 P.2d 139. First, we consider “whether the individual’s conduct demonstrated a subjective expectation of privacy.” Id. Second, we consider “whether society recognizes the individual’s expectation of privacy as reasonable.” Id. In this case, Officer Briseno saw methamphetamine through the passenger window of Defendant’s car, situated between the two front seats. In placing the methamphetamine in such a highly visible area, we fail to see how Defendant could have had a subjective expectation of privacy. Even if Defendant did expect privacy in this area, society would not recognize such an expectation as reasonable given its conspicuous nature.

Therefore, Officer Postlewait reaching into the car is not considered an infringement on a legitimate expectation of privacy. Likewise, there can be no infringement on Defendant’s possessory interest in the methamphetamine because an individual does not have a lawful right to possess such contraband. See State v. Foreman, 97 N.M. 583, 585, 642 P.2d 186, 188 (Ct. App. 1982). As a result, the search and seizure of the methamphetamine in this case was reasonable.

We realize that, under certain circumstances, there exist heightened privacy interests. For example, if the methamphetamine in this case had been clearly visible through the window of a residence instead of an automobile, the rationale above would be ineffective because there is a heightened expectation of privacy in one’s home. State v. Ryon, 2005-NMSC-005, ¶ 23, 137 N.M. 174, 108 P.3d 1032; see also State v. Valdez, 111 N.M. 438, 441, 806 P.2d 578, 581 (Ct. App. 1990) (holding that officers’ observation of marijuana plants from outside a residence’s greenhouse did not authorize their warrantless entry into the greenhouse and seizure of the plants, absent some exception to the warrant requirement).

This heightened expectation of privacy does not apply with equal force to automobiles. State v. Rufino, 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980). However, in Jones, the Court of Appeals interpreted our decision in Gomez as equating the privacy interest in an automobile with the privacy interest in a home. 2002-NMCA-019, ¶¶ 13, 14. We disagree with this interpretation. The Court of Appeals read our opinion in Gomez too broadly. In Gomez, while we recognized greater protections under the New Mexico Constitution for automobile searches, we did not expressly equate an automobile with a home for search and seizure purposes. Without such a heightened privacy interest, the seizure of methamphetamine from an automobile, left in plain view, is not unreasonable.

The approach taken by the Court today is also consistent with the exigent circumstances exception to the warrant requirement. Exigent circumstances are defined as “an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.” Gomez, 1997-NMSC-006, ¶ 39 (internal quotation marks and quoted authority omitted). In the case at hand, there was an automobile on a roadway with evidence of a crime in plain view, not only to the officer but to the public as a whole. Such evidence, if left alone, could easily be tampered with or destroyed. Given these circumstances, we do not find it unreasonable for the officer to immediately secure the methamphetamine.

We do recognize, however, that the approach taken today may appear to be inconsistent with language in the post-Gomez cases of Jones and Garcia, and we take this opportunity to clarify any discrepancies. First, in Jones, after shining a flashlight inside the defendant’s automobile, an officer saw a hypodermic needle protruding from underneath a towel. 2002-NMCA-019, ¶ 5. After arresting the defendant, the officer reached into the automobile and seized the syringe and a paper package that was not in plain view from outside the automobile. Id. It was later determined that the contents of the package contained cocaine. Id. ¶ 6.

The defendant was charged with possession of cocaine and drug paraphernalia. Id. ¶ 17. The Court held “under Gomez that before evidence in an automobile may be seized, a warrant is required to enter the automobile unless the State can satisfy its burden to show that exigent circumstances existed justifying the warrantless entry or another applicable exception to the warrant requirement applies.” Id. ¶ 17. As discussed earlier, the Court reached this conclusion by relying on an incorrect interpretation of Gomez that equated the privacy interests in a home with the privacy interests in an automobile. From this perspective, the Court constrained future reasonableness determinations and instead adopted a blanket rule
precluding warrantless seizures of items seen in plain view in automobiles, regardless of the circumstances. Such a blanket rule conflicts with the spirit of Gomez, which encourages fact-specific inquiries in this area.

{16} In the second case, Garcia, the officer seized from the defendant’s automobile a gun that was in plain view inside the automobile and an open beer bottle, which was not visible from the outside of the automobile, but which was seen after the officer entered the automobile to retrieve the gun. 2005-NMSC-017, ¶ 4. The defendant was charged with being a felon in possession of a firearm and possessing an alcoholic beverage in an open container in a vehicle. Id. ¶ 5. We upheld the warrantless seizure of these items because there was a particularized showing of exigent circumstances. Specifically, we concluded that the defendant’s aggressive behavior necessitated the seizure of the gun in order to secure the scene. Id. ¶¶ 31-32. We prefaced our discussion regarding exigent circumstances justifying the seizure of the gun in plain view with the statement that “even with an object in plain view, an officer may not enter the car and seize the object, without either consent, a warrant, or exigent circumstances.” Id. ¶ 29. This language was unnecessary to the holding because there was a clear showing of exigent circumstances.

{17} Under the New Mexico Constitution, we continue to provide greater protection regarding automobile searches than that provided under the United States Constitution. Absent exigent circumstances or some other exception to the warrant requirement, an officer may not search an automobile without a warrant. However, if following a lawful stop on a roadway, an item in an automobile is in plain view and the officer has probable cause to believe the item is evidence of a crime, the officer may seize the item. Under these circumstances, we find that it is not only reasonable for the officer to do so, but that such action is also consistent with the exigent circumstances exception to the warrant requirement.

{18} In applying the principles established in Gomez to the present case, we conclude that the officer was allowed to seize the methamphetamine from Defendant’s vehicle. Officer Briseno saw, in plain view, the plastic baggie containing methamphetamine in Defendant’s car after stopping Defendant for a traffic violation. Officer Briseno had probable cause to believe that the plastic baggie contained evidence of a crime because he immediately recognized the baggie’s contents as contraband. Defendant was placed under arrest and the baggie was seized from his vehicle. The officer could not be assured that the contraband would not be removed or tampered with if it was not immediately secured. Under these circumstances, we find that it was lawful for the officer to seize the methamphetamine. Therefore, the evidence should not have been suppressed.

III. CONCLUSION

{19} For the foregoing reasons, the Court of Appeals and the district court are reversed.

{20} IT IS SO ORDERED.

EDWARD L. CHÁVEZ, Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
Defendant Cecil Boyett appeals from his conviction for the first degree murder of Deborah Rhodes (Victim), contrary to NMSA 1978, Section 30-2-1(A) (1963, as amended through 1994). He alleges that the jury erred in refusing to instruct the jury on his theory of the case and in denying his motion for a new trial. We discern no error and affirm Defendant’s conviction.

I. BACKGROUND

[2] Defendant and Victim had a rancorous history. The enmity that each harbored for the other apparently had its roots in a romantic interest that both had in Renate Wilder (Wilder).

[3] Wilder and Victim were childhood friends who eventually moved in together and started an intimate relationship. Although their romance ended, the two remained close friends, living and working together. Wilder later met Defendant, and the two became romantically involved. Wilder eventually supplanted Victim’s presence in her life with that of Defendant. She fired Victim from her bar and gave Victim’s former job to Defendant. She ousted Victim from her home with the help of a restraining order and invited Defendant to move in. At one point, Victim discovered the entwined couple near the hot tub behind Wilder’s house. Enraged, Victim retrieved a gun from the house and used it to threaten the couple. Disdain developed between Defendant and Victim, and Victim only occasionally returned to Wilder’s home after she was forced out.

[4] Following a protracted courtship, Wilder and Defendant planned to marry on February 6, 2004. A few days prior to her wedding, Wilder absconded from the home that she shared with Defendant. She spent that time with Victim and did not tell Defendant where she was or what she was doing. Wondering as to her whereabouts, Defendant engaged in a variety of activities aimed at locating her but was unsuccessful in his attempts; he rightfully suspected that she was with Victim although he was unable, at that time, to confirm his suspicions.

[5] On the afternoon of February 5, 2004, Wilder departed Victim’s company to return to her own home but had a car accident along the way. The accident occurred near Victim’s residence and, for a variety of reasons, Victim offered to claim responsibility for it. Wilder accepted and departed the scene on foot, walking back to the house that she shared with Defendant. Shortly after Wilder returned to the house, Victim arrived. Victim’s visit concluded when Defendant shot her in the head with a .357 revolver from approximately four feet away, but the events leading to that end were disputed at trial.

[6] The State successfully argued to the jury that Defendant hated Victim, was furious with her for having kept Wilder away without telling him about it, and shot her that afternoon to put an end to her meddling in the couple’s affairs. The State theorized that Victim went to the house to return Wilder’s keys and makeup bag, which she had forgotten in the wrecked car. The State argued that before Victim could accomplish that goal, Defendant opened the front door, shouted at her to leave the property, and then immediately shot her.

[7] Defendant’s version of events was quite different. He claimed that Victim came to the house that day intent on killing him to prevent his impending marriage to Wilder. Defendant testified that he heard a loud banging at the front door, grabbed the gun that he kept nearby, and opened the door only to find a furious Victim on the doorstep. Defendant said that he shouted at Victim, telling her to get off his property, but in the process of trying to run her off, he observed her draw the gun that he knew she routinely carried. In fear for his life, Defendant raised his revolver and shot Victim. Defendant asserted that if he had not shot her, she would have fired her gun and fatally wounded him.

[8] Defendant had two theories of the case. First, he argued that he was not guilty because he acted lawfully in shooting Victim, either in self defense, defense of another, or defense of habitation. Second, he argued that he was not guilty because he was unable to form the specific intent necessary to commit first degree murder. To establish his theory that he lacked specific intent, Defendant filed a Notice of Incapacity to Form Specific Intent (Notice) with the trial court. Although his Notice listed three expert witnesses who could have testified in support of the defense, Defendant did not produce an expert witness at trial. The expert that Defendant expected to testify regarding his specific intent, Dr. Lori Martinez, withdrew on the eve of her scheduled testimony after receiving police reports and other records from the State. Defendant did not offer testimony from the other experts listed in his Notice, nor did he seek a continuance to procure such testimony.
{9} Defendant requested that the jury be instructed on both theories. The trial court concluded that the jury instruction related to defense of habitation, UJI 14-5170 NMRA, did not apply in this case because Defendant did not shoot Victim inside his home. The trial court denied Defendant’s instruction on inability to form specific intent, UJI 14-5110 NMRA, because it required expert testimony and none had been provided. Based on the instructions that it was given, the jury convicted Defendant of first degree murder.

{10} After the verdict, Defendant filed a motion for a new trial. He alleged that he was surprised by Dr. Martinez’s withdrawal and was unable to replace her when she refused to testify. Defendant also contended that the State had intimidated Dr. Martinez by providing her with the previously unseen reports and statements. Defendant argued that he was “without the ability to obtain another expert to testify to [the specific intent] matter,” and thus he should be granted a new trial in which he could offer such expert testimony. The trial court denied Defendant’s motion for a new trial and sentenced him to life in prison.

{11} Defendant is now before this Court on direct appeal. See N.M. Const. art. VI, § 2. (“Appeals from a judgment of the district court imposing a sentence of... life imprisonment shall be taken directly to the supreme court.”); accord Rule 12-102(A) (1) NMRA. He challenges the trial court’s refusal to instruct the jury on defense of habitation and inability to form specific intent, as well as its denial of his motion for a new trial. Concluding that the trial court made the proper ruling on those issues, we affirm Defendant’s conviction. We write to clarify the law governing defense of habitation and to elucidate the evidentiary requirement for a jury instruction on inability to form specific intent.

II. DEFENDANT WAS NOT ENTITLED TO THE REQUESTED JURY INSTRUCTIONS

A. Standard of Review

{12} “The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo.” State v. Gaines, 2001-NMSC-036, ¶ 4, 131 N.M. 347, 36 P.3d 438. A defendant is entitled to an instruction on his or her theory of the case if evidence has been presented that is “sufficient to allow reasonable minds to differ as to all elements of the offense.” State v. Gonzales, 2007-NMSC-059, ¶ 19, 143 N.M. 25, 172 P.3d 162. “When considering a defendant’s requested instructions, we view the evidence in the light most favorable to the giving of the requested instruction[s].” State v. Contreras, 2007-NMCA-119, ¶ 8, 142 N.M. 518, 167 P.3d 966 (alteration in original) (quoted authority omitted). Failure to instruct the jury on a defendant’s theory of the case is reversible error only if the evidence at trial supported giving the instruction. See State v. Gardner, 85 N.M. 104, 107, 509 P.2d 871, 874 (1973) (“The court need not instruct if there is absence of such evidence.”).

{13} We address Defendant’s claim to each of the requested instructions in turn.

B. Defense of Habitation

{14} The trial court denied the defense of habitation instruction based on its conclusion that the defense applies to only those situations in which an intruder is killed within the home. Picking up the torch lit by the trial court, the State now argues that the defense should be limited to situations in which a person forcibly enters a home and is killed while intruding therein. By that argument, the State seeks our endorsement of a bright line rule that would require an intruder to cross the threshold before an occupant’s use of force to repel that entry could be justified by defense of habitation. Despite the State’s contention, we are unwilling to draw such a bright line.

{15} Defense of habitation has long been recognized in New Mexico. See, e.g., State v. Bailey, 27 N.M. 145, 162-63, 198 P. 529, 534 (1921). It gives a person the right to use lethal force against an intruder when such force is necessary to prevent the commission of a felony in his or her home. Id. at 162, 198 P. at 534; see also UJI 14-5170. The defense is grounded in the theory that “[t]he home is one of the most important institutions of the state, and has ever been regarded as a place where a person has a right to stand his [or her] ground and repel, force by force, to the extent necessary for its protection.” State v. Couch, 52 N.M. 127, 134, 193 P.2d 405, 409 (1946) (quoted authority omitted). Ultimately, in every purported defense of habitation, the use of deadly force is justified only if the defendant reasonably believed that the commission of a felony in his or her home was immediately at hand and that it was necessary to kill the intruder to prevent that occurrence. Id. at 133-34, 193 P.2d at 409; see also UJI 14-5170.

{16} This Court has refused to extend the defense to situations in which the victim was fleeing from the defendant, Gonzales, 2007-NMSC-059, ¶ 22, as well as situations in which the victim had lawfully entered the defendant’s home, see State v. Abeyta, 120 N.M. 233, 244, 901 P.2d 164, 175 (1995) (abrogated on other grounds by State v. Campos, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266). But our courts have never held that entry into the defendant’s home is a prerequisite for the defense. On the contrary, the seminal New Mexico case on defense of habitation was clear that, in certain circumstances, it may justify an occupant’s use of lethal force against an intruder who is outside the home. Bailey, 27 N.M. at 162, 198 P. at 534.

{17} In addition to providing a defense for the killing of an intruder already inside the defendant’s home, Bailey explained that defense of habitation justifies killing an intruder who is assaulting the defendant’s home with the intent of reaching its occupants and committing a felony against them. Id. Protecting a defendant’s right to prevent forced entry necessitates that the defense apply when an intruder is outside the home but endeavoring to enter it. See id. This interpretation of defense of habitation is supported by Couch, where the defendant fired a shotgun from within his home at an intruder who was outside, pelting the home with rocks. 52 N.M. at 130, 193 P.2d at 406. Prior to the night of the shooting, the defendant’s home had repeatedly been broken into, which caused him and his wife to “suffer intensely from apprehension of violence at the hands of the unknown intruder.” Id. at 130, 139, 193 P.2d at 406, 412. When the later assault on their home occurred, both the defendant and his wife believed that the attackers were the same people who had previously broken in. Id. at 139, 193 P.2d at 412. This Court concluded that, even though the victim was killed outside the home, the defendant was entitled to an instruction on defense of habitation because he could reasonably have believed that the person attacking it intended to enter and commit violence against the occupants. See id. at 140, 145, 193 P.2d at 412-13, 416.

{18} The proposition that defense of habitation allows one to kill to prevent an intruder’s forced entry is well supported by the law in other jurisdictions and treatises on the subject. See, e.g., People v. Curtis, 37 Cal. Rptr. 2d 304, 318 (Ct. App. 1994) (“Defense of habitation applies where the defendant uses reasonable force to exclude someone he or she reasonably believes is trespassing in, or about to trespass in, his
or her home." (emphasis added)); State v. Avery, 120 S.W.3d 196, 204 (Mo. 2003) (en banc) (“[D]efense of premises . . . authorizes protective acts to be taken . . . at the time when and place where the intruder is seeking to cross the protective barrier of the house.” (emphasis added) (quoted authority omitted)); State v. Blue, 565 S.E.2d 133, 139 (N.C. 2002) (“[U]nder the defense of habitation, the defendant’s use of force . . . would be justified to prevent the victim’s entry . . . .” (emphasis added)); State v. Rye, 651 S.E.2d 321, 323 (S.C. 2007) (“[T]he defense of habitation provides that where one attempts to force himself into another’s dwelling, the law permits an owner to use reasonable force to expel the trespasser.” (emphasis added)); see also 40 C.J.S. Homicide § 164 (2006) (“People may defend their dwellings against those who endeavor by violence to enter them and who appear to intend violence to persons inside . . . .” (emphasis added)); 2 Wharton’s Criminal Law § 164. Assuming that Defendant did not qualify for a defense of habitation instruction because, among other things, no evidence had been presented that the victim “entered[ed] the house in order to commit a felony involving violence.” 120 N.M. at 244, 901 P.2d at 175. Those authorities show that the term “felony” in the defense of habitation context is properly limited to those felonies involving violence. In other words, the felony that the defendant acted to prevent must have been one that would have resulted in violence against the occupants were it not prevented; in the event of any other felony, a defense of habitation instruction would be unwarranted. See Bailey, 27 N.M. at 162-63, 198 P. at 534 (“[I]t is not true that a [person] may kill another in his [or her] house when under the same circumstances of danger, or apparent danger, to person or property, he [or she] would not be justified in killing outside [the house].”); see also Pellegrino, 577 N.W.2d at 596 (“[P]eople may defend their dwellings against those who endeavor by violence to enter them and who appear to intend violence to persons inside.”).

{19} Based on our precedent and the authorities cited above, we cannot accept the position that defense of habitation requires an intruder to cross the threshold of the defendant’s home. Instead, we emphasize that a person has a right to defend his or her residence not only when an intruder is already inside the home, but also when an intruder is outside the home and attempting to enter to commit a violent felony. Bailey, 27 N.M. at 162, 198 P. at 534.

{20} We recognize that “[t]he term felony in former times carried a connotation of greater threat than” it does today. State v. Pellegrino, 577 N.W.2d 590, 596 (S.D. 1998). “In the common law, the rule developed that use of lethal force to prevent a felony was only justified if the felony was a forcible and atrocious crime.” Id. (quoted authority omitted). Felonies are no longer constrained to forcible and atrocious crimes, and were we not to update Bailey’s “felony” language, defense of habitation may apply to situations in which an intruder attempts to force entry into a home with the purpose of committing a non-violent felony, such as bribing a public official therein. See NMSA 1978, § 30-24-1 (1963) (bribing a public official is a third degree felony). Seeking to avoid such absurdity, we turn to our prior decisions to determine the meaning of “felony” as it is used in the defense of habitation context.

{21} As noted above, the defendant in Couch was entitled to an instruction on defense of habitation because he could have reasonably believed that the people who were attacking his home intended violence against its occupants. See 52 N.M. at 140, 193 P.2d at 412-13. Later, in Abeyta, this Court held that the defendant did not qualify for a defense of habitation instruction because, among other things, no evidence had been presented that the victim “entered[ed] the house in order to commit a felony involving violence.” 120 N.M. at 244, 901 P.2d at 175. Those authorities show that the term “felony” in the defense of habitation context is properly limited to those felonies involving violence. In other words, the felony that the defendant acted to prevent must have been one that would have resulted in violence against the occupants were it not prevented; in the event of any other felony, a defense of habitation instruction would be unwarranted. See Bailey, 27 N.M. at 162-63, 198 P. at 534 (“[I]t is not true that a [person] may kill another in his [or her] house when under the same circumstances of danger, or apparent danger, to person or property, he [or she] would not be justified in killing outside [the house].”); see also Pellegrino, 577 N.W.2d at 596 (“[P]eople may defend their dwellings against those who endeavor by violence to enter them and who appear to intend violence to persons inside.”).

{22} Because defense of habitation is not restricted to instances in which the victim is killed inside the defendant’s home, the trial court in this case erred when it excluded the instruction on that ground. Defendant would have been entitled to an instruction on the defense if some evidence reasonably tended to show that he killed Victim to prevent her from forcing entry into his home and committing a violent felony once inside. Thus, the question we must now answer is whether, when viewed in the light most favorable to giving the instruction, the evidence supports that theory. We decide that it does not.

{23} Defendant asserts that the following evidence is enough to support his theory that he had a reasonable belief that killing Victim was necessary to prevent a felony from occurring within his home: (1) Victim hated Defendant; (2) she knocked on the door to Defendant’s home; (3) she had threatened him with a gun in the past; (4) she was furious that the couple was to be married the next day; and (5) she always carried a loaded gun. Absent from that evidence is any demonstration that Victim was “endeavor[ing] by violence to enter” his home or that she “intend[ed] violence to persons inside.” 40 C.J.S. Homicide § 164. Assuming that Defendant reasonably believed that Victim intended to commit a felony in his home, defense of habitation would have justified his actions only if he could show that Victim was attempting to force entry to his home. For example, if the evidence showed that Victim was trying to break through Defendant’s front door at the time he killed her, defense of habitation would apply. However, under the facts of this case, there is no evidence reasonably tending to support the theory that Victim was attempting to force entry at the time Defendant killed her. After knocking on the door, Victim had retreated some four feet from it and was waiting for it to open. No evidence shows that, at the time she was killed, Victim was attempting to gain entry to Defendant’s home with the intent to commit a violent felony therein.

{24} Defendant’s argument seems to assert that he should have received the instruction because he could have reasonably believed that Victim was going to shoot him and then enter his home to continue the shooting. While that theory justifies the instructions that Defendant received on self defense, see UJI 14-5171 NMRA, and defense of another, see UJI 14-5172 NMRA, it does not give rise to an instruction on defense of habitation because it does not allege any attempted forced entry on Victim’s part.

{25} Because there is no evidence to support the theory that Defendant killed Victim in defense of his habitation, refusing the instruction was not in error. Although the trial court erred in its reasons for denying the instruction, the end result of its ruling was correct, and thus we affirm. See Meiboom v. Watson, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (“[E]ven if the district court offered erroneous rationale for its decision, it will be affirmed if right for any reason.”).

C. Inability to Form Specific Intent

{26} At trial, Defendant theorized that the organic brain damage he suffered years earlier caused him some mental disease or disorder that made him incapable of forming the requisite intent for first degree murder. He did not offer expert witness testimony to support his theory, and, based on the absence of such testimony, the trial court refused to instruct the jury on that theory. Defendant now challenges that ruling, alleging that the instruction does not require expert testimony, and therefore that the trial
court erred in denying the instruction.

{27} The defense of inability to form specific intent allows a defendant to avoid culpability for willful and deliberate murder whenever he or she was unable to form the specific intent required to commit the crime. See State v. Padilla, 66 N.M. 289, 295, 347 P.2d 312, 316 (1959); see also UJI 14-5110. The defense requires “evidence of the condition of the mind of the accused at the time of the crime, together with the surrounding circumstances, . . . to prove that the situation was such that” the defendant was unable to form specific intent, and thus lacked “any deliberate or premeditated design.” Padilla, 66 N.M. at 295, 347 P.2d at 316 (emphasis and quoted authority omitted). It applies in two situations: (1) when the defendant was intoxicated from the use of alcohol or drugs and (2) when the defendant suffered from a mental disease or disorder. Id.; see also UJI 14-5110. It is the latter that concerns us in this case.

{28} This Court has previously recognized that expert testimony is not required when the alleged cause of the defendant’s inability to form specific intent is within the realm of common knowledge and experience. See State v. Privett, 104 N.M. 79, 82, 717 P.2d 55, 58 (1986) (holding that expert testimony is not required for jury to understand how defendant’s intoxication may have interfered with his ability to form specific intent because “lay [persons] are capable of assessing the effects of intoxication as a matter within their common knowledge and experience”). Our Court of Appeals has explained that to establish an inability to form specific intent defense, the “defendant ha[s] the burden of introducing at least some competent evidence to support his [or her] claim” and “even the opinion testimony of nonexperts [can] provide the necessary competent evidence.” State v. Najar, 104 N.M. 540, 543, 724 P.2d 249, 252 (Ct. App. 1986). Thus, Defendant is correct insofar as he argues that the inability to form specific intent instruction does not require expert testimony, per se. However, Defendant errs by contending that nonexpert testimony will always suffice. When understanding the purported cause of a defendant’s inability to form specific intent goes beyond common knowledge and experience and requires scientific or specialized knowledge, lay witnesses are not qualified to testify and expert testimony is required.1

{29} In this case, Defendant argued that his organic brain damage caused his inability to form specific intent. In many cases, such a connection between a defendant’s medical condition and its effect on his or her ability to form specific intent will have to be established by expert testimony because the question often involves complicated medical issues that are beyond the realm of common knowledge and experience. The trial court viewed this case as one in which expert testimony was necessary to link Defendant’s injury to his inability to form the requisite intent, and Defendant has not persuaded us that the trial court was wrong in that conclusion.

{30} Although Defendant contends that his prior nursing experience qualified him as an expert capable of testifying about the cause of his inability to form specific intent, Defendant was never qualified as an expert at trial, and, regardless of whether he could have been so qualified, his testimony about his injury did not establish its effect on his capacity to form specific intent. When an inability to form specific intent defense is based on a mental disease or disorder, an instruction “is proper only when there is evidence that reasonably tends to show that the defendant’s claimed mental disease or disorder rendered the defendant incapable of forming specific intent at the time of the offense.” State v. Balderama, 2004-NMSC-008, ¶ 38, 135 N.M. 329, 88 P.3d 845. The only evidence that Defendant presented linking his organic brain damage to his inability to form specific intent was his own testimony regarding his injury. Defendant testified in detail about a head injury that he had suffered; that he had organic brain damage; that he had problems with amnesia; that he underwent various therapies to recover from his brain injury; that he had been on several different medications; and that his friends sometimes thought he “was out in left field.” Neither Defendant nor any other witness testified about how those facts showed that he was unable to form the requisite intent at the time of the offense, and thus the evidence did not reasonably tend to show that Defendant was unable to form specific intent at the time of the murder. Therefore, we hold that the trial court properly refused to instruct the jury on inability to form specific intent.

III. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR A NEW TRIAL

{31} Finally, Defendant argues that the trial court erred in refusing to grant him a new trial so that he could present expert witness testimony regarding his inability to form a specific intent defense. We review for abuse of discretion. State v. Chavez, 98 N.M. 682, 684, 652 P.2d 232, 234 (1982).

{32} Defendant argues that the absence of expert testimony concerning his inability to form specific intent resulted in prejudicial error, and thus he is entitled to a new trial. In so doing, he relies heavily on Balderama, in which the trial court excluded expert witness testimony regarding the defendant’s ability to form specific intent. 2004-NMSC-008, ¶ 18. This Court held that excluding the evidence constituted reversible error. Id. ¶ 2. Analogizing his case to Balderama, Defendant claims in his reply brief that “[t]he only difference between the cases is the reason why the expert could not testify.” Defendant’s reliance Balderama misses the mark. In Balderama, the trial court excluded the expert testimony. Id. In the instant case, Defendant’s expert witness refused to testify on her own accord, and Defendant did not mitigate the loss by subpoenaing her or moving for a continuance to secure a replacement expert.

{33} The facts of this case more closely resemble those in State v. Torres, in which this Court granted the defendant a new trial because one of his witnesses failed to testify. 1999-NMSC-010, ¶¶ 1, 6, 9, 127 N.M. 20, 976 P.2d 20. In Torres, when the defendant’s witness did not appear despite having been subpoenaed, he moved for a continuance. Id. ¶ 6. The trial court denied that continuance, which this Court held to be reversible error. Id. ¶ 9. The distinguishing factor between the instant case and Torres is that the defendant in Torres moved for a continuance due to the witness’s absence, whereas here Defendant simply proceeded

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1We note that this aspect of our case law has been adopted into New Mexico’s Rules of Evidence by the 2006 amendment to Rule 11-701 NMRA, which had not occurred at the time of Defendant’s trial. At that time, the rule was changed to explicitly prevent lay witnesses from offering opinion testimony that is “based on scientific, technical or other specialized knowledge within the scope of [the rule governing testimony by experts].” Rule 11-701(C).
with trial. After Dr. Martinez refused to testify, Defendant never subpoenaed her or any other expert to testify about his inability to form specific intent, nor did he move for a continuance to secure such testimony. {34} The record shows that Defendant was on notice that Dr. Martinez might change her opinion in light of the material that the State planned to provide her and that she would not “testify on limited information.” Dr. Martinez also advised the parties that it would be wise to obtain another expert’s opinion about Defendant’s inability to form specific intent, and Defendant had named two other experts on his pretrial Notice that he could have called to testify on the matter. Once he became aware that Dr. Martinez would not testify, Defendant could have moved for a continuance to secure testimony from another expert and Torres would have supported that motion. See id. ¶ 9. However, Defendant chose not to do so.

{35} Furthermore, during the hearing on his motion for a new trial, Defendant merely speculated that he could have found an expert willing to testify about his inability to form specific intent. He did not submit a written diagnosis or evaluation supporting his inability to form specific intent claim, nor did he offer an expert’s testimony or affidavit to that effect. Ultimately, as the State points out, Defendant presented no expert testimony to support his inability to form specific intent claim because he did not pursue the options available to him by which he could have obtained such testimony. And, equally important, Defendant has never demonstrated that, with sufficient time, he could have presented an expert to testify about his diminished capacity. Therefore, we are left to speculate about any prejudice to Defendant caused by his counsel’s decision not to request a continuance.

{36} We conclude that the trial court did not abuse its discretion in denying the motion for a new trial, and we will not disturb its ruling.

IV. CONCLUSION

{37} Based on the foregoing analysis, we affirm Defendant’s conviction.

{38} IT IS SO ORDERED.

PATRICIO M. Serna, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

RICHARD C. BOSSON, Justice

RICHARD E. RANSOM (Pro Tem)
the motion was addressed on the first day of children’s court. It became apparent when the motion was appropriately denied by the motion to suppress and did not request or prejudicially delay the filing of the violation of the Fourth Amendment. Because there was no evidentiary hearing but instead sought a nighttime search produced a small caliber handgun and a spent shell casing.

OPINION

JONATHAN B. SUTIN, CHIEF JUDGE

[1] Two days before trial, Child filed a motion to suppress evidence obtained pursuant to a search warrant that did not contain a written authorization for a nighttime search of Child’s home. Child sought no evidentiary hearing but instead sought a ruling based solely on the absence of the magistrate judge’s signed authorization for a nighttime search on the warrant.

[2] In a narrow holding, we determine that the motion was appropriately denied by the children’s court. It became apparent when the motion was addressed on the first day of trial, after the jury was picked, that the State wanted the magistrate judge to testify. The State represented that the magistrate judge would testify that he knew the warrant was obtained from a gunshot wound to his head. Linda M., Child’s mother (Mother), told the officers that Victim shot himself. Mother, Child, and all of the others present at the scene were taken to the police station for questioning. Only police and medical personnel remained at the scene. Based on the statements taken at the police station, the children’s court found that Child had shot Victim.

[3] Just after 10:00 p.m. police responded to a call of a shooting at the residence of Katrina G. (Child), then thirteen years old. Police went inside the house, where they observed Child holding a blood-soaked towel to the head of Victim, Adrian U., also thirteen years old. The officers also observed a small caliber firearm, a spent casing, and blood in plain view on the living room floor near Child and Victim. Medical personnel took Victim to the hospital, where he died the next morning from a gunshot wound to his head. Linda M., Child’s mother (Mother), told the officers that Victim shot himself. Mother, Child, and all of the others present at the scene were taken to the police station for questioning. Only police and medical personnel remained at the scene. Based on the statements taken at the police station, the children’s court found that Child had shot Victim.

[4] In connection with the investigation and as the questioning progressed that night, Sergeant Romero prepared a search warrant affidavit and went to the residence of a magistrate judge to obtain a warrant to search Child’s residence. The magistrate judge signed the warrant at his home at approximately 1:50 a.m. The warrant, which appears, for the most part, to be in

the form approved by our Supreme Court, see Rule 9-214 NMRA, stated: “YOU ARE HEREBY COMMANDED to search forthwith the person or place in the Affidavit between the hours of 6:00 a.m. and 10:00 p.m., unless I have specifically authorized a nighttime search.” Below the magistrate judge’s signature, the warrant stated: “AUTHORIZATION FOR NIGHTTIME SEARCH” followed by “I further find that reasonable cause has been shown for nighttime execution of this Warrant. I authorize execution of this Warrant at any time of the day or night for the following[,”]” At this point the page ends, as shown. There is no second page to the warrant, and the magistrate judge’s signature does not appear under or specifically related to the nighttime authorization.

[5] The police executed the warrant starting at approximately 2:00 a.m. While the search warrant was executed, Child and her mother were still at the police station. The home had been under constant police surveillance from the time Victim had been removed by medical personnel and those present had been taken for questioning. The search produced a small caliber handgun and a spent shell casing.

[6] Child became the subject of a children’s court case in which the State sought to have her adjudicated a delinquent child based on involuntary manslaughter. The petition was filed on January 18, 2005. Child was in detention at the time the petition was filed. As required under law, the time limit for commencing the adjudicatory hearing was therefore February 17, 2005. See Rule 10-226(A) NMRA. The adjudicatory hearing was set to commence on February 16, 2005. Child filed a motion on February 10, 2005, to disqualify the office of the district attorney for conflict of interest. Based on that motion, the State obtained an extension of time until April 19, 2005, to allow time to appoint a special prosecutor. This was the maximum extension that could be obtained from the children’s court. See Rule 10-226(D). A further extension, through June 3, 2005, was obtained from the Supreme Court. See Rule 10-226(E). The adjudicatory hearing was then set for May 25, 2005.

[7] Early on, Child was given adequate opportunity to present a motion to suppress evidence. Child in fact took that opportunity, but the motion Child presented, that was timely, was not based on whether the search was unconstitutional as the result of an invalid warrant. It was not until May 23, 2005, two days before the date set for
commencement of the adjudicatory hearing, that Child filed her motion to suppress the evidence seized in the home on the ground that the search was unconstitutional because the warrant did not expressly authorize a nighttime search.

[8] The parties and the court discussed the motion to suppress during the adjudicatory hearing on May 25. In the discussion, it became clear that the State believed that it had been prejudiced by the late filing of the motion. The State argued that the magistrate judge knew that the search would be conducted immediately that night, and that he implicitly authorized a nighttime search and would have signed the nighttime authorization had he been asked to do so, and that the magistrate judge’s testimony was required on the issue. The court expressed its view that the State was prejudiced by the late filing of the motion to suppress.

[9] Based on the State’s argument, the court determined that an evidentiary hearing was necessary, unless Child agreed to accept what the State was representing in regard to the magistrate judge’s intentions. The court noted that Child was required to request an evidentiary hearing if she wanted one. The court was clearly concerned about Child’s counsel’s failure to timely move to suppress on the issue of the warrant. The court also expressed concerns that a jury was already picked and that jeopardy had attached, and stated too that Child’s counsel had put the prosecution in a predicament by raising the issue so late. See In re Ruben O., 120 N.M. 160, 163, 899 P.2d 603, 606 (Ct. App. 1995) (indicating that the time limits for holding adjudicatory hearings are jurisdictional).

The court orally ruled that the motion was untimely under Rule 5-212 NMRA and Rule 10-103.1 NMRA. At no time during the discussion of the motion to suppress did Child request an evidentiary hearing or agree to have the motion heard based on the State’s representations as to what the magistrate intended. The court entered an order denying the motion to suppress on the ground it was untimely under Rule 5-601 NMRA and Rule 10-103.1. We will discuss Rules 5-212, 5-601, and 10-103.1 shortly.

[10] The court concluded that Child committed involuntary manslaughter, after which the children’s court adjudicated her a delinquent child. Child appealed that adjudication to this Court. While the appeal was pending on this Court’s summary calendar, we remanded for an evidentiary hearing and findings of fact relating to various issues. In particular, we asked the district court to address:

[T]he historical facts surrounding the apparent inability of the [children’s] court either to accommodate Child’s motion to suppress, or to evaluate the validity of the nighttime search upon Child’s repeated objections at trial, as well as for the purpose of obtaining written findings on the historical facts which bear upon the viability of the various legal theories surrounding the propriety of the nighttime search, and the effect of any violation of the applicable rules and Child’s constitutional rights on the admissibility of the evidence obtained in the course of the search.

[11] On remand, after conducting an evidentiary hearing, the children’s court entered findings of fact and conclusions of law relating to the issuance of the warrant, as well as the timeliness of the motion to suppress. Specifically, the court entered the following finding in regard to the motion to suppress:

On Monday, May 23, 2005, counsel for the Child filed two Motions in Limine, one of which was a motion to suppress all evidence seized pursuant to the warrant for the lack of nighttime search authorization. This motion was filed on this date despite the fact that counsel for the [C]hild had been provided with a copy of the search warrant that did not specifically authorize a nighttime search in discovery shortly after counsel for the [C]hild’s entry of appearance. Counsel for the [C]hild knew, or at the very least, should have known about this issue yet he either deliberately waited until the last minute to file this motion or was inadequately prepared.

The court also entered a finding of fact that “[t]he [c]ourt was not able to hear the Child’s [m]otion and reset the adjudicatory hearing within the time limits imposed by the Supreme Court in its order granting an extension of time to commence the adjudicatory hearing.” Further, the court entered findings in accord with its prior oral ruling on May 25, 2005, that the motion to suppress was untimely pursuant to Rules 5-212 and 10-103.1. The court also entered the following conclusions of law pertinent to the timeliness issue:

6. The [c]hildren’s [c]ourt could not adequately evaluate the validity of the nighttime search based on the evidence presented at trial, because different testimony, witnesses and evidence was required to decide the Child’s motion than was presented at trial. A separate evidentiary hearing was necessary to resolve the Child’s motion.

7. The Child’s [m]otion to [s]uppress was untimely filed. Notwithstanding the timeliness issue, a determination of the legality of the search was not necessary for the jury’s determination of whether the [C]hild had committed the delinquent act of involuntary manslaughter.

[12] On appeal, Child argues that she did not lose the right to object to the admission of evidence on Fourth Amendment grounds by failing to file a timely pre-adjudicatory motion to suppress, citing as authority State v. Doe, 93 N.M. 143, 145, 597 P.2d 1183, 1185 (Ct. App. 1979). She also argues that the court erred in concluding that the nighttime search was valid. The State counters that we should affirm the court’s denial of the motion to suppress because the motion was untimely based on Rule 10-103.1(A). The State also argues that there was no illegal search justifying suppression.

[13] Although Child sought a grant of her motion as a matter of law based solely on the absence of the required magistrate judge authorization on the warrant for a nighttime search, it became evident to the children’s court that an evidentiary hearing was required in order for it to decide the motion. Child did not, in our view, have a constitutional right, under the circumstances, to a hearing on the motion based solely on the documentary evidence of the warrant with no evidentiary hearing to obtain the testimony of the magistrate judge. Thus, for the reasons that follow, we hold that the court did not err in denying Child’s motion to suppress and affirm the children’s court adjudication that Child committed the delinquent act of involuntary manslaughter.

DISCUSSION

The Rules Relating to Motions

[14] We first set out the pertinent rules and case law on the issue of the timeliness of the motion to suppress. The applicable children’s court rule is Rule 10-103.1(A). This rule addresses “[a]ll motions, except
motions made during trial, or as may be permitted by the court.‖ Rule 10-103.1(A). The rule states that “[a]ll pre-adjudicatory motions shall be filed at least ten (10) days prior to any adjudicatory hearing except by leave of court." Id.

 Turning to the Rules of Criminal Procedure, Rule 5-601(B) permits a defendant to raise “[a]ny . . . objection or request” before trial by motion “which is capable of determination without a trial on the merits.” Rule 5-601(C) requires certain objections to be raised before trial, but objections to evidence are not included. Rule 5-601(D), however, pertains to “[a]ll motions, unless otherwise provided by these rules or unless otherwise ordered by the court,” and requires that the motion “shall be made at the arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.” Rule 5-601(E) states that “[i]f an evidentiary hearing is required, the motion shall be accompanied by a separate written request for an evidentiary hearing[.]”

 The Motion to Suppress, Though Perhaps Timely, Was Nevertheless Properly Denied

 A. The Rules Require an Evidentiary Hearing if it is Necessary

 It seems clear that, as a general rule, under the children’s court rules and the Rules of Criminal Procedure, a motion to suppress evidence is not required to be made before trial and may be made at trial. This is the intent, if not the holding, in Doe, in which this Court held that “failure to file a pre-adjudicatory motion to suppress the evidence did not deny [the child] the right to object to the admission of the evidence at trial.” 93 N.M. at 145, 597 P.2d at 1185. We see nothing in Rule 10-103.1(A) that requires us to conclude that a motion to suppress must always be filed before trial. We conclude that Rules 5-601 and 5-212 are consistent and, read together, like Rule 10-103.1(A), do not require us to conclude that a motion to suppress must always be filed before trial. We note that the Committee Commentary to Rule 5-601 states that “[Subsection] C of this rule does not include motions to suppress evidence as a matter which must be raised prior to trial.” In addition, the Committee Commentary to Rule 5-212 states that “[t]he New Mexico Rules of Criminal Procedure do not require a motion objecting to illegally seized evidence prior to trial. . . . If a pretrial motion to suppress is made under this rule, it must be filed within twenty (20) days after the entry of a plea.” This, however, does not resolve the question of whether the children’s court erred in denying Child’s motion to suppress.

 In State v. Urban, 108 N.M. 744, 779 P.2d 121 (Ct. App. 1989), this Court analyzed whether a pretrial motion to dismiss an indictment on Sixth Amendment speedy trial and Fourteenth Amendment due process grounds was timely, and also whether, if timely, was nevertheless appropriately denied by the district court. Id. at 745, 779 P.2d at 122. We concluded that the motion was timely because the defendant’s motion raised objections that were directed to the initiation of the prosecution and therefore did not have to be raised within the time limits of Rule 5-601(D). See Urban, 108 N.M. at 746-47, 779 P.2d at 123-24. However, we interpreted Rule 5-601(E) to apply to all motions for which an evidentiary hearing is required, including the motion filed by the defendant. Urban, 108 N.M. at 747, 779 P.2d at 124.

 In Urban, on the morning of trial the defendant orally requested further hearing of his claims during argument on his motion to dismiss. Id. at 745-46, 779 P.2d at 122-23. The court denied his request. Id. at 746, 779 P.2d at 123. Because the defendant “failed to make an adequate showing that an evidentiary hearing was necessary” as required under Rule 5-601(E), we held that the district court did not err in denying the motion. See Urban, 108 N.M. at 747, 748-49, 779 P.2d at 124, 125-26.

 We explained in Urban that Subsection (E) “establishes an orderly procedure for resolving issues that need to be resolved prior to trial but for which an evidentiary hearing is appropriate.” Id. at 747, 779 P.2d at 124. The rule contemplates that the party who files the motion requests a hearing, and the court then determines whether an evidentiary hearing is necessary. Id. Thus, the trial court is to determine “initially whether an evidentiary hearing is required.” Id. Although, in Urban, we indicated that the court was entitled to deny the motion if the movant failed to show the need for such a hearing, we think that the analysis in Urban may be applied to uphold the children’s court’s denial of Child’s motion under the circumstances in the present case.

 Here, as we have indicated, Child moved to suppress two days before trial, leaving no time for an evidentiary hearing before or during trial. Child did not request an evidentiary hearing and may not have wanted one, since Child sought a determination from the court as a matter of law that the warrant was invalid because it did not bear the nighttime search signature authorization of the magistrate judge. But it became apparent to the court from the State’s argument about the need for the magistrate judge’s testimony that an evidentiary hearing was not only appropriate but would be required. The lack of time or opportunity for an evidentiary hearing before and during trial existed because of the deadline to hold the adjudicatory hearing and because of Child’s long delay in asserting the motion to suppress. Under these circumstances, we cannot agree with Child that she had a constitutional right to have her motion decided without an evidentiary hearing or despite the time predication of the court caused by Child. See State v. Aragon, 89 N.M. 91, 95, 547 P.2d 574, 578 (Ct. App. 1976) (holding that the defendant’s failure to file a timely motion to suppress with resulting prejudice to the State entitled the State to a mistrial because “it would be contrary to the ends of public justice to carry the first trial to a final verdict”), overruled on other grounds, State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

 We note that in State v. Alberico, 116 N.M. 178, 180 n.1, 861 P.2d 219, 221 n.1 (Ct. App. 1991), rev’d on other grounds, 116 N.M. 156, 861 P.2d 192, we suggested that a court might have options to keep a motion to suppress alive even in circumstances similar to those in the present case. In Alberico, we suggested that a court might declare a mistrial, or might allow the trial to proceed to verdict and, if the defendant is convicted, “conduct a hearing to determine whether the evidence was inadmissible and a new trial therefore required.” Id. As to the mistrial route, we indicated that this procedure “risks a later determination that the declaration of mistrial, particularly if made over objection by [the] defendant, was unnecessary and therefore later retrial is barred by double jeopardy principles.” Id. By noting Alberico, we do not intend to indicate that the footnote discussion of alternatives sets any particular precedent in New Mexico law. However, even were
we to assume that the Alberico discussion was applicable to the present case, we will not address whether the children’s court might or should have considered alternatives such as those suggested in Alberico, for two reasons. First, Child did not raise Alberico, request an evidentiary hearing, ask for a continuance of the trial, or discuss any specific alternative. Second, Child did not argue in the children’s court that the court sua sponte was required to look for alternatives beyond determining whether the evidentiary hearing could take place during the trial. Nor does Child argue this on appeal.

B. An Evidentiary Hearing Was Needed

23 Rule 5-211(B) NMRA states: Contents. A search warrant shall be executed by a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer, an Indian tribal or pueblo law enforcement officer or a civil officer of the United States authorized to enforce or assist in enforcing any federal law. The warrant shall contain or have attached the sworn written statement of facts showing probable cause for its issuance and the name of any person whose sworn written statement has been taken in support of the warrant. A search warrant shall direct that it be served between the hours of 6:00 a.m. and 10:00 p.m., according to local time, unless the issuing judge, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time.

An obvious purpose of this rule is to assure that a nighttime search occurs only upon the exercise of a neutral, detached magistrate judge’s independent evaluation and discretion as to whether reasonable cause exists for the search. See State v. Hausler, 101 N.M. 143, 144, 679 P.2d 811, 812 (1984) (“The Court of Appeals in Dalrymple properly held that, absent language in the warrant authorizing a nighttime search, it was impossible to determine whether the magistrate exercised the discretion vested in him to allow a nighttime search.”); State v. Garcia, 2002-NMCA-050, ¶ 15, 132 N.M. 180, 45 P.3d 900 (holding the failure to establish reasonable cause for issuance of a nighttime search warrant pursuant to Rule 6-208(B) NMRA made the search unreasonable and therefore unconstitutional); State v. Dalrymple, 80 N.M. 492, 494, 458 P.2d 96, 98 (Ct. App. 1969) (holding under a statute materially analogous to Rule 5-211(B) that “whether a search may be made at any time . . . is clearly a matter to be determined by the issuing magistrate . . . judge and evidenced by the language of the warrant which is issued”). Nighttime search authorization for search of a residence is required so that a neutral magistrate judge can assess the need for the search weighed against the fear and security concerns generated by a nighttime search. See Garcia, 2002-NMCA-050, ¶ 11 (citing authority indicating that nighttime searches are disfavored because of threat to privacy, violation of the sanctity of the home, and endangerment to police and those asleep in the home). Thus, the procedure codified by Rule 5-211(B) is “of such constitutional import that failure to strictly comply with [it] requires suppression of the evidence obtained.” State v. Malloy, 2001-NMCA-067, ¶ 9, 131 N.M. 222, 34 P.3d 611.

24 Nothing in our jurisprudence, however, precludes in all cases the after-the-fact testimony of a magistrate judge to support the reasonableness of a nighttime search by showing that the judge actually performed the required scrutiny and evaluation and authorized the nighttime search although the warrant itself failed to expressly show the authorization. We see no reason to adopt such a bright-line preclusive rule. The present case is a good example why we should not do so. We think it best to approach the issue on a case-by-case basis.

25 In this case, a neutral magistrate judge approved the nighttime search, as evidenced by his testimony obtained after our remand to the children’s court. According to a factual finding of the court:

[The magistrate judge] specifically remember[ed] asking Sergeant Romero when the warrant was going to be executed and he was told that officers were waiting at the residence for the judge to approve the warrant so they could search the residence. [The magistrate judge] expected and anticipated the warrant was going to be executed between the hours of 10:00 p.m. and 6:00 a.m. since this is when he was contacted for authorization for the search.

The court concluded that:

The Search Warrant signed in this case by [the magistrate judge] lawfully authorized a nighttime search despite the fact [he] did not specifically authorize a nighttime search. Irrespective of the [j]udge’s signature not appearing on the signature line explicitly authorizing a nighttime search, the [j]udge implicitly authorized the search to begin during the nighttime hours. None of the factors normally associated with the policies against execution of a nighttime warrant were present in this case.

26 Additionally, the warrant affidavit stated facts sufficient to make a nighttime search constitutionally reasonable, as well as probable cause for the search generally. The warrant affidavit stated that a shooting had occurred, police responded to the residence, and the officers who first arrived saw Victim with a serious injury to his head. It stated that the officers were originally told that Victim shot himself, but were later told that Child accidentally shot Victim. The affidavit further stated that the juveniles present at the residence were at the police department waiting for further investigation, to include the owner of the residence, Mother. It also listed the evidence that the sergeant and other officers had seen when they first arrived at the residence, including the handgun, the shell casing, and blood on the floor. These statements established probable cause for the search and reasonable cause for a nighttime search.

27 Furthermore, given that the shooting incident occurred at night, that the police were called at night to assist and investigate, and that none of the occupants were present at the time of the search, we see no basis on which to hold that the immediate nighttime search was unreasonable. There existed no issues of privacy expectation, security, or danger. See Garcia, 2002-NMCA-050, ¶ 11 (discussing the concerns of the great threat to privacy, the violation of the sanctity of the home, the endangerment to police and slumbering citizens as reasons disfavoring nighttime searches). As this Court stated in Garcia, [T]he nighttime search . . . was conducted upon people who were observed to be active in the nighttime. It was based on probable and reasonable cause that had just recently been developed, again in the nighttime. It bears emphasis that this is not a case in which the police developed probable cause during business hours and then waited until nighttime, when they
believe people will be asleep, to execute the warrant. The intrusiveness of the nighttime search . . . is considerably lessened because of these circumstances, making the showing of necessity sufficient under constitutional scrutiny. *Id.* ¶ 19. Under the circumstances here, we cannot see how delaying the search of the residence for four hours, from 2:00 a.m. to 6:00 a.m., would have been any more constitutionally reasonable than searching the residence immediately as was done. Finally, none of the constitutional policies against a nighttime search are implicated here. The nighttime search did not “encroach upon either the special privacy interests or the public safety concerns that underlie the nighttime search prohibition.”

*Id.* ¶ 16 (internal quotation marks and citation omitted).

{28} Based on the foregoing analyses, in our view the children’s court was not required to grant Child’s motion to suppress based solely on the face of the warrant. It was reasonable for the court to determine that an evidentiary hearing was needed to adjudicate the suppression issue.

CONCLUSION

{29} We affirm. The children’s court properly denied Child’s motion to suppress. As indicated by the evidence obtained at the evidentiary hearing later held after remand from this Court, an evidentiary hearing was necessary to decide Child’s motion to suppress. However, Child’s motion to suppress was filed too late for a pretrial or in-trial adjudication. Moreover, Child did not request the court to follow any procedure pursuant to which an evidentiary hearing could be held, nor did Child even request an evidentiary hearing. We see no constitutional or other basis on which to hold that the children’s court erred in denying Child’s motion to suppress. We therefore affirm the court’s adjudication that Child committed the delinquent act of involuntary manslaughter.

{30} IT IS SO ORDERED.

JONATHAN B. SUTIN,
Chief Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
MICHAEL E. VIGIL, Judge
OPINION

JONATHAN B. SUTIN, CHIEF JUDGE

{1} This appeal presents the question whether a Colorado conviction for driving while ability impaired (DWAI) can be used to enhance a defendant’s sentence for driving while under the influence of intoxicating liquor or drugs (DWI) under NMSA 1978, § 66-8-102 (2005) (amended 2007). Defendant Darel L. Lewis challenges his conviction for felony DWI based on a fourth offense, claiming that he has only two prior convictions. See § 66-8-102(G) (providing that an offender is guilty of a fourth degree felony upon a fourth conviction for DWI). Defendant argues that the Colorado offense of DWAI cannot be used for sentencing purposes under Section 66-8-102 because (1) it occurred outside New Mexico, and (2) DWAI is not equivalent to a New Mexico DWI. We hold that Section 66-8-102 requires that equivalent out-of-state convictions be used to enhance a defendant’s sentence for repeated DWI convictions. We also hold that Defendant’s Colorado conviction for DWAI is equivalent to a New Mexico DWI conviction. We therefore affirm.

BACKGROUND

{2} The State charged Defendant with DWI (fourth or subsequent offense), aggravated battery, and false imprisonment. Defendant pleaded guilty in the alternative to felony or misdemeanor DWI and no contest to false imprisonment. The district court accepted the plea. In its amended judgment, the district court noted that, pursuant to no contest pleas accepted by the court, Defendant was convicted of DWI, a fourth degree felony, and false imprisonment. During sentencing, the State informed the district court that Defendant had three prior DWIs. Defendant conceded that he had two prior DWI convictions, but argued that his Colorado conviction for DWAI could not be used to enhance his sentence under Section 66-8-102. The district court disagreed and found that Defendant had three prior DWI convictions, two in municipal court in New Mexico and one in Colorado. The information in the record concerning the Colorado conviction is that Defendant was convicted on September 9, 1994, in Cause No. 93-001944, for an offense in La Plata County, Colorado, occurring on or about November 22, 1993. The district court sentenced Defendant to eighteen months as provided for by statute for his fourth conviction. See § 66-8-102(G) (providing that “[u]pon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony and . . . shall be sentenced to a term of imprisonment of eighteen months, six months of which shall not be suspended, deferred or taken under advisement”).

{3} On appeal, Defendant challenges the district court’s use of his Colorado DWAI conviction in determining that his present DWI conviction is his fourth within the meaning of Section 66-8-102(G), contending that this is his third conviction under Section 66-8-102(F), which carries a punishment of no more than 364 days, constituting a misdemeanor.

DISCUSSION

{4} Defendant raises two issues on appeal: (1) whether Section 66-8-102 permits the use of DWI convictions from other states in determining the number of a defendant’s prior DWI convictions, and (2) whether Defendant’s Colorado conviction for DWAI constitutes an equivalent DWI conviction under Section 66-8-102.

The District Court Did Not Err in Sentencing Defendant to Felony DWI When One of His Prior Convictions Was a Conviction for DWAI in the State of Colorado

{5} Defendant first contends that the Colorado offense of DWAI cannot be used to enhance his DWI penalty under Section 66-8-102 because it is an out-of-state conviction. In response, the State argues that the language and history of Section 66-8-102 clearly demonstrate that the Legislature intended that DWI convictions from other states be used to determine the appropriate punishment for a violation of the statute.

Standard of Review and Canons of Construction

{6} The interpretation of a statute is a question of law we review de novo. State v. Smith, 2004-NMSC-032, ¶ 8, 136 N.M. 372, 98 P.3d 1022. The primary aim of statutory construction is to “give effect to the intent of the Legislature.” Id. (internal quotation marks and citation omitted). “We begin by looking at the language of the statute itself.” Id. ¶ 9. When “the meaning of a statute is truly clear—not vague, uncertain, ambiguous, or otherwise doubtful—it is of course the responsibility of the judiciary to apply the statute as written.” State ex rel. Helman v. Gallegos, 117 N.M. 346, 352, 871 P.2d 1352, 1358 (1994).

{7} In the event there is any doubt as to the meaning of the words of a statute, we also consider the statute’s history and background. See id. at 353, 871 P.2d at 1359 (noting that a statute’s history and background may help clarify an ambiguity). We construe a statute in the context of its history and legislative objectives, reading statutes in pari materia to ascertain legislative intent. See State v. Cleve, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980

[8] Finally, New Mexico courts apply a rule of strict interpretation of penal statutes. State v. Nelson, 1996-NMCA-012, ¶ 7, 121 N.M. 301, 910 P.2d 935. Statutes defining criminal conduct, and providing for additional or enhanced penalties for criminal conduct, “are strictly construed and any doubts regarding construction of criminal statutes are resolved in favor of lenity.” Id. “If it is not clear that the legislature intended an enhanced sentence, no enhancement will be applied.” Id. (alteration omitted) (internal quotation marks and citation omitted). However, even with respect to the rule of lenity, the language of penal statutes must be given a reasonable construction. Id.

Section 66-8-102

[9] In Section 66-8-102, the Legislature clearly expressed its intent to increase penalties for the crime of DWI based on the number of times an offender has been convicted of DWI. See State v. Hernandez, 2001-NMCA-057, ¶¶ 23-26, 130 N.M. 698, 30 P.3d 387 (noting that DWI sentencing is tied to recurrence of the offense). “[R]epetition of offense is accounted for by increasing the basic punishment per numbered conviction.” Id. ¶ 30. Misdemeanor penalties steadily increase for the first, second, and third convictions, while punishment at the felony level similarly increases for the fourth through seventh convictions. See § 66-8-102(E)-(J). The penalty provisions of Section 66-8-102 were “intended to enhance the sentence for repeat offenders rather than to create a new offense with discrete elements.” State v. Anaya, 1997-NMSC-010, ¶ 18, 123 N.M. 14, 933 P.2d 223.

[10] The specific penalty provision at issue in this appeal is Section 66-8-102(G). Section 66-8-102(G) provides that “[u]pon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony.” In another subsection under Section 66-8-102, the Legislature further provides:

A conviction pursuant to a municipal or county ordinance in New Mexico or a law of any other jurisdiction, territory or possession of the United States or of a tribe, when that ordinance or law is equivalent to New Mexico law for driving while under the influence of intoxicating liquor or drugs, and prescribes penalties for driving while under the influence of intoxicating liquor or drugs, shall be deemed to be a conviction pursuant to this section for purposes of determining whether a conviction is a second or subsequent conviction.

§ 66-8-102(Q).

[11] Based on the plain language, we agree with the State that the meaning of the statute is clear. Subsection (G) provides that an offender is guilty of a fourth degree felony upon a fourth conviction pursuant to Section 66-8-102. Subsection (Q) expressly establishes which prior convictions are to be used in determining the appropriate penalty level. Under Subsection (Q), a DWI-equivalent conviction from another state shall constitute a DWI conviction under Section 66-8-102 in determining whether the current conviction in New Mexico is a second or subsequent conviction, as long as the out-of-state conviction is based on a law that is equivalent to Section 66-8-102 and prescribes penalties for DWI. Thus, when a defendant has three prior convictions, a defendant must be sentenced for a fourth DWI conviction pursuant to 66-8-102(G), even though not all of the convictions occurred in New Mexico. Subsection (Q) requires a sentencing court to give effect to a defendant’s out-of-state convictions. Because the statute is clear, it should be applied as written.

[12] Despite the express language in Subsection (Q) relating to out-of-state convictions, Defendant contends that the Legislature has never clearly indicated its intent to include convictions from other jurisdictions for the purposes of criminal enhancement pursuant to Section 66-8-102. To support this argument, Defendant points to the language in Subsection (G) which states “pursuant to this section.” Defendant argues that by using the phrase “pursuant to this section” without elaboration, the Legislature did not expressly provide for the use of out-of-state convictions for enhancement purposes. Rather, in Defendant’s view, the Legislature limited prior convictions that could be considered to those obtained pursuant to Section 66-8-102, in other words, convictions obtained in New Mexico.

[13] Defendant argues that this issue is still controlled by Nelson. In Nelson, this Court determined that language similar to “pursuant to this section” in a previous version of Section 66-8-102(G) did not clearly indicate legislative intent to count prior convictions from other states. See Nelson, 1996-NMCA-102, ¶ 18 (holding that the term “under this section” did not include out-of-state convictions). Even though Section 66-8-102 has been amended since Nelson, Defendant contends that the Legislature has never changed the language discussed in Nelson in any substantive way. In making this argument, Defendant also relies on an analysis contained in an unpublished federal court decision relating to the continued validity of Nelson. See Manzanares v. Romero, No. CIV-05-1105 JH/KBM, slip op. (D.N.M. Feb. 3, 2006).

[14] We reject Defendant’s reliance on Nelson. Although we perceive little room for doubt concerning the Legislature’s intent given the plain language of Section 66-8-102, the history of the statute makes clear that the Legislature intended to require out-of-state convictions to be counted as prior convictions. In Nelson, this Court examined a version of Section 66-8-102 that was enacted in 1993. See Nelson, 1996-NMCA-012, ¶ 1; 1993 N.M. Laws ch. 66, § 7. Similar to the present Subsection (G), the statute in effect at the time of Nelson provided that an offender was guilty of a fourth degree felony “[u]pon a fourth or subsequent conviction under this section.” Nelson, 1996-NMCA-012, ¶ 4 (internal quotation marks and citation omitted). At the time, Section 66-8-102 limited its definition of prior convictions that could be used for sentence enhancement to those under municipal or county ordinances. See 1993 N.M. Laws ch. 66, § 7. In the absence of a definition in Section 66-8-102 that included out-of-state convictions as prior convictions, the State argued in Nelson that a definition of a “subsequent offender” in another part of the Motor Vehicle Code could be used to support a legislative intent to count out-of-state convictions as prior convictions. See 1996-NMCA-012, ¶ 11. Under that definition, a “subsequent offender” included first offenders who were again adjudicated guilty of DWI under municipal ordinance or state or federal law. See id.

[15] In Nelson, we rejected the State’s argument. Id. We determined that the reference to “subsequent offender,” which was not found in Section 66-8-102, was limited to license revocation proceedings. Nelson, 1996-NMCA-012, ¶ 14. Thus, we were not persuaded that the use of the term “subsequent offenders” in relation to administrative proceedings indicated a
legislative intent that the criminal enhancement provisions of Section 66-8-102 should include out-of-state convictions. Nelson, 1996-NMCA-012, ¶ 14. In reaching this conclusion, we noted that “[i]t would have been a simple matter for the [L]egislature to change the language in Section 66-8-102(G) from ‘under this section’ to ‘under any state law, federal law, or municipal ordinance’ when it amended the statutes . . . , but it did not.” Id. Because we were not certain that the Legislature intended that convictions in other jurisdictions be treated as an offense under Section 66-8-102, we determined that the plain meaning of “under this section” was limited to convictions under Section 66-8-102 and did not include out-of-state convictions. Nelson, 1996-NMCA-012, ¶ 14, 18. Accordingly, we held that the statute in effect at the time Nelson was decided only allowed valid prior DWI convictions obtained in New Mexico courts to be considered for purposes of criminal enhancement penalties. Id. ¶ 18.

{16} In light of subsequent statutory amendments, we conclude that a completely different legislative intent is clear today. Following our decision in Nelson, the Legislature amended Section 66-8-102 in an act titled in part, “Authorizing the Use of Convictions from Other Jurisdictions for Driving While Under the Influence of Intoxicating Liquor or Drugs as Prior Convictions.” 1997 N.M. Laws ch. 43, § 1. That new version of the statute included Subsection (J), which provided that:

[a] conviction under a municipal or county ordinance in New Mexico or a law of any other jurisdiction, territory or possession of the United States which is equivalent to New Mexico law for driving under the influence of intoxicating liquor or drugs, prescribing penalties for driving while under the influence of intoxicating liquor or drugs shall be deemed to be a conviction under this section for purposes of determining whether a conviction is a second or subsequent conviction.

Id. In 2002 the Legislature enumerated the 1997 Subsection (J) as (M), and changed “under this section” to “pursuant to this section.” 2002 N.M. Laws ch. 82, § 1. In 2003 the Legislature further amended this subsection to include convictions pursuant to the jurisdiction of tribes. 2003 N.M. Laws ch. 164, § 10. Although the Legislature has subsequently amended the statute, the subsection defining prior convictions remains a part of Section 66-8-102, currently codified as Subsection (Q). See § 66-8-102(Q).

{17} Despite the addition of a subsection defining convictions from other jurisdictions as prior convictions, Defendant urges us to adopt the reasoning of a federal magistrate judge that found Nelson remained valid. See Manzanares, No. CIV-05-1105 JH/KBM at 10. Based on Manzanares, Defendant continues to argue that the Legislature’s only change to the key language at issue in Nelson was to change the words “under this section” to “pursuant to this section” in reference to the Section 66-8-102(G) enhancement. Defendant contends that the statute still states, pursuant to our interpretation in Nelson, that only convictions obtained in New Mexico courts may be used as priors in determining the number of DWI convictions a defendant has under Section 66-8-102 for purposes of criminal punishment. Defendant argues that if the Legislature had intended to include convictions from other jurisdictions, it would have inserted that language into Subsection 66-8-102(G) when it amended the statute after Nelson. Because the Legislature did not make that change to Subsection (G), Defendant asserts that the Legislature took no action to add the language necessary to each of the criminal penalty enhancements now at Subsections (F)-(J) to make prior out-of-state convictions applicable to those sections. Thus, Defendant contends that the enhancement portion of New Mexico’s DWI statute does not apply to the felony enhancement aspect of the conviction but simply to administrative aspects of punishment. In Defendant’s view, the federal court in Manzanares correctly found that Nelson has not been abrogated.

{18} Defendant has not provided us with the full pertinent record of the Manzanares case. The State indicates that there were proceedings that could cast doubt on the validity of the magistrate judge’s recommended resolution in that case, including, among other things, the fact that the recommended resolutions and the court’s acceptance of it was interlocutory, and the fact that the case was ultimately dismissed for lack of prosecution. We see no reliable basis on which to agree with or to give any weight to any analysis in Manzanares.

{19} Further, we cannot accept Defendant’s construction of Section 66-8-102. Defendant would have us completely ignore the Legislature’s decision after Nelson to add a subsection to our DWI statute defining prior convictions to include out-of-state DWI convictions. See 1997 N.M. Laws ch. 43, § 1; § 66-8-102(Q). Although the Legislature did not amend Subsection (G) in the manner discussed in Nelson, it clearly expressed its intention to broaden the definition of prior convictions starting with the title of the act it passed in 1997 (“Authorizing the Use of Convictions from Other Jurisdictions for Driving While Under the Influence of Intoxicating Liquor or Drugs as Prior Convictions”). See Smith, 2004-NMSC-032, ¶ 14 (noting that a statute’s title may be used to construe legislative intent). In addition, Subsection (Q) states that equivalent convictions in another jurisdiction, territory, or possession of the United States or of a tribe shall be considered “pursuant to this section.” See § 66-8-102(Q). Reading Subsections (F)-(J) and (Q) together, the only logical conclusion is that the Legislature intended Subsection (Q) to apply to all the penalty provisions in Section 66-8-102. See Smith, 2004-NMSC-032, ¶ 10 (stating that if several sections of a statute are involved, we will read them together so that all parts are given effect); see also 2A Norman J. Singer, Statutes and Statutory Construction § 46:05, at 165 (6th ed., rev. 2000) (“[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.”).

{20} We remain persuaded that by amending Section 66-8-102 to include what is now Subsection (Q), and by including the phrase “pursuant to this section” in both subsections, the Legislature clearly indicated its intent to include out-of-state convictions as prior convictions for enhancement purposes. Further, we reject Defendant’s argument that Nelson remains valid because the Legislature and this Court have not explicitly overruled it. Contrary to Defendant’s assertions, the Legislature clearly abrogated our holding in Nelson by expressly providing a subsection that defined out-of-state convictions as prior convictions under Section 66-8-102. See 1997 N.M. Laws ch. 43, § 1; § 66-8-102(Q). Thus, Defendant has been on notice since 1997 that his prior out-of-state DWI conviction would count for sentence enhancement in New Mexico.

{21} Finally, Defendant wrongly asserts that this Court and the Legislature “have spoken with [our] silent acquiescence in the logic of the Nelson holding.” This Court has once cited Nelson for the rule that courts should apply the plain meaning of a statute when it is clear. See State v.
will compare Colo. Rev. Stat. § 42-4-1301 with New Mexico's Section 66-8-102 throughout this discussion.

Defendant's Colorado Conviction for DWAI Is Equivalent to DWI in New Mexico

Having concluded that a valid out-of-state conviction must be considered a prior conviction, we now address whether Defendant's Colorado conviction for DWAI is an equivalent offense to the New Mexico crime of DWI for the purpose of sentencing Defendant as a repeat offender pursuant to Section 66-8-102.

Defendant argues that it was impermissible to use his Colorado conviction to enhance his crime to a felony because it does not satisfy the equivalency requirements of Section 66-8-102(Q). Relying on Commonwealth v. Bolden, 532 A.2d 1172, 1175-76 (Pa. Super. Ct. 1987), Defendant argues that, in determining whether two statutes are equivalent, the fundamental inquiry is into the elements of the offense.

For the purpose of this equivalency discussion, we note that the parties rely on the current version of Colorado's DWAI statute, Colo. Rev. Stat. § 42-4-1301(1)(a), which defines DWAI as consuming sufficient alcohol or drugs that affect the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle. According to Defendant, the New Mexico statute is identical to the Colorado statute, and thus is an equivalent offense.

In Colorado, it is a misdemeanor to drive a vehicle while under the influence of alcohol or drugs, while impaired by alcohol or drugs. Colo. Rev. Stat. § 42-4-1301(1)(a), (b). Colorado law defines "driving under the influence" (DUI) as consuming sufficient alcohol or drugs to affect the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle. According to Defendant, the New Mexico statute is identical to the Colorado statute, and thus is an equivalent offense.

Defendant argues that the New Mexico statute is not equivalent to Colorado's DWAI statute because the New Mexico statute contains a different element not present in the Colorado statute. According to Defendant, the New Mexico statute requires a person to have a BAC of 0.08 or more, whereas Colorado's statute contains presumptions that exist under Colorado law constitute a different element not present in the New Mexico statute.

In addition to defining DWAI as prohibiting impairment to the slightest degree, the Colorado statute in effect at the time Defendant committed his offense provided that the amount of alcohol in a defendant's blood or breath "shall give rise" to certain presumptions. See Colo. Rev. Stat. § 42-4-1202(2). The statute provided that a BAC in excess of 0.05 but less than 0.10 "shall give rise to the presumption that the..."
defendant’s ability to operate a vehicle was impaired.” Colo. Rev. Stat. § 42-4-1202(2) (b). The statute further provided in the same subsection that these presumptions “shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or whether or not his ability to operate a vehicle was impaired by the consumption of alcohol.” Colo. Rev. Stat. § 42-4-1202(2) (d).

[32] In Barnes v. People, 735 P.2d 869, 872-73 (Colo. 1987) (en banc), the Colorado Supreme Court construed the presumptions in the Colorado DUI statute as creating permissive inferences, despite the use of the phrase “shall be presumed.” The Colorado statute was at some point amended to provide that a BAC in excess of 0.05 but less than 0.08 gives rise to a “permissible inference” of impairment. Colo. Rev. Stat. § 42-4-1301(6)(a)(I). The statute also provides that the inferences concerning a defendant’s BAC shall not be construed as limiting the consideration of other evidence, and that evidence of a defendant’s BAC is not conclusive evidence of impairment. See Colo. Rev. Stat. § 42-4-1301(6)(b). Thus, a factfinder is not required to look solely to a defendant’s BAC to find a defendant guilty of DWAI.

[33] Similarly, Section 66-8-102(A) proscribes driving “under the influence.” Blood or breath alcohol is not an element of the crime. As in Colorado, per se DWI is a separate crime. See Colo. Rev. Stat. § 42-4-1301(2)(a); § 66-8-102(C)(1). Thus, evidence of blood or breath alcohol is not necessary in proving DWAI in Colorado, nor is it necessary to prove DWI in New Mexico under Section 66-8-102(A). Under New Mexico law, a BAC of 0.05 but less than 0.08 does not give rise to a presumption that a person was or was not under the influence of intoxicating liquor. NMSA 1978, § 66-8-110(B)(2)(a) (2003) (amended 2007). However, “the amount of alcohol in the person’s blood or breath may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor[.]” § 66-8-110(B)(2)(b); § 66-8-110(A) (providing that the results of blood or breath alcohol tests may be introduced into evidence). Thus, in both states, a BAC of more than 0.05 and less than 0.08 may be used as evidence of being under the influence of intoxicating liquor. Accordingly, a defendant’s BAC is an evidentiary means of proving impairment, but it is not necessarily an element of the crime.

[34] Under these circumstances, we disagree with Defendant’s contention that the existence of presumptions in the Colorado statute at the time of Defendant’s DWAI requires us to find that the statutes are not equivalent. Contrary to Defendant’s assertion, DWAI is not a per se crime based on an alcohol percentage in a defendant’s blood or breath. It is instead a crime defined by the element of impairment.

[35] We note that other courts comparing DWAI statutes with DWI statutes have focused on the degree of impairment in determining whether statutes are equivalent. In People v. Crane, 48 Cal. Rptr. 3d 334, 338 (Ct. App. 2006), for example, a California appellate court determined that Colorado’s DWAI statute could not be used for sentence enhancement. See id. The court in Crane specifically recognized that California did not apply the slightest degree standard, but required impairment to an appreciable degree. Id. Thus, the elements of the offenses were different.

[36] For similar reasons, the Montana Supreme Court reached the same conclusion in State v. McNally, 2002 MT 160, ¶¶ 21-23, 310 Mont. 396, ¶¶ 21-23, 50 P.3d 1080, ¶ 21-23. In McNally, the court acknowledged that a person cannot be convicted for driving while under the influence in Montana if the person’s ability is impaired to the slightest degree. See id. ¶ 22. Because Colorado’s DWAI law allows a person to be convicted under a lower standard than that required under Montana’s DUI statute, the court held that a defendant’s prior convictions in Colorado did not constitute convictions for a violation of a similar statute in Montana. Id. ¶ 23; accord Commonwealth v. Shaw, 744 A.2d 739, 744-45 (Pa. 2000) (holding that the New York offense of DWAI, which required impairment to any degree, does not constitute an equivalent offense to the Pennsylvania offense of DUI for purposes of sentence enhancement because Pennsylvania requires substantial impairment).

[37] In contrast to California, Montana, and Pennsylvania, the New Mexico Legislature has defined driving under the influence more broadly. In other states that also define driving under the influence more broadly, courts have found that DWAI statutes can be used as prior convictions for sentencing repeat offenders. See, e.g., McAdam v. State, 648 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 1995) (holding that a Colorado conviction for DWAI was a similar alcohol-related offense to Florida’s, even if it is based on a BAC greater than 0.05 and less than 0.10); Marciniak v. State, 911 P.2d 1197, 1198 (Neve. 1996) (per curiam) (holding that the Michigan offense of driving while visibly impaired is the same or similar conduct as DUI in Nevada); State v. Parisi, 519 S.E.2d 531, 534 (N.C. Ct. App. 1999) (holding that the New York offense of DWAI was substantially equivalent to North Carolina’s offense of driving while under the influence of an impairing substance because both statutes required a defendant to be impaired to the extent that the driver’s ability to operate a vehicle is diminished even though the definitions of impairment were not identical and the statutes did not mirror one another); State v. Ducheneaux, 2007 SD 78, ¶ 4, 738 N.W.2d 54, 54 (holding that the elements of Colorado’s DWAI statute and South Dakota’s DUI statute were substantially similar because both required impairment to the slightest degree); cf. United States v. Walling, 974 F.2d 140, 142 (10th Cir. 1992) (holding that a Colorado DWAI conviction is clearly a similar offense to DWI or DUI for the purpose of the federal sentencing guidelines). In reaching this conclusion, some courts have expressly recognized that different levels of and the existence of evidentiary presumptions were not reasons for determining that the DWAI statutes were not equivalent. See, e.g., McAdam, 648 So. 2d at 1245; Ducheneaux, 2007 SD 78, ¶ 5. Nor did it matter that DWAI is a lesser included offense of DUI in Colorado. See Ducheneaux, 2007 SD 78, ¶ 5. Because the elements were substantially similar, the DWAI conviction could be considered a prior offense. Id. ¶ 4.

[38] Defendant asserts that we should not rely on cases that have upheld the use of various DWAI offenses as prior convictions, and argues that the courts in these states either did not engage in an equivalency analysis or used a lesser standard of “substantially similar” or “substantially equivalent.” To the extent that Defendant argues that a DWAI statute must be identical to a DWI statute to be equivalent, we disagree. As the cases we have cited indicate, the critical factor for a court to determine is whether the elements are equivalent. In particular, the focus must be on the degree of impairment prohibited by the statute. See Parisi, 519 S.E.2d at 534.

[39] Defendant, in effect, asserts that the test for equivalency must be even broader than an inquiry into the elements.
Defendant argues that an equivalency test must take into consideration whether the conduct for which Defendant was convicted in another state would be prohibited under our law. Pointing once again to the permissible inferences allowed under Colorado law, Defendant contends that a defendant in Colorado can be convicted based on a presumption arising at a BAC of 0.051, while a defendant in New Mexico is not subject to the same presumption. Thus, in Defendant’s view, because the Colorado statute punishes conduct that would not necessarily be a crime in New Mexico, the potential exists for enhancement based on facts that could result in an acquittal in New Mexico.

For several reasons, we are not persuaded by Defendant’s argument. First, we note that our statute only requires that a statute from another jurisdiction be equivalent and prescribe penalties. See § 66-8-102(Q). For the proposition that an equivalency test must take into consideration whether the conduct for which a defendant was convicted would be prohibited in New Mexico, Defendant again relies on Crane, 48 Cal. Rptr. 3d at 338-39. In California, however, certain statutes expressly provide that an out-of-state conviction can be used for enhancement only if the crime would have been a violation of the California DUI law if the crime had been committed in California. Id. at 336-37. Our Legislature did not impose the same test by requiring that conduct in another jurisdiction violate Section 66-8-102 or that the laws be identical. Instead, Subsection (Q) requires the use of an out-of-state conviction if the other state’s law is equivalent to New Mexico law. We agree with the State that by allowing for enhancement based on equivalent out-of-state convictions, the Legislature intended to include a broader range of foreign offenses as prior offenses.

Moreover, Defendant has given us no reason to doubt whether his DWAI conviction from Colorado would be a crime under New Mexico law if committed in New Mexico. While Defendant argues that he could have been convicted in Colorado on facts that would not result in a conviction under New Mexico law, such as having a 0.051 BAC, we find this suggestion completely speculative. Defendant does not challenge his actual conviction in Colorado on grounds that it was based on a certain BAC without other evidence of impairment. Defendant does not argue that he would not have been convicted in New Mexico for the same conduct for which he was convicted in Colorado. Nothing in the record indicates otherwise. While Colorado may have different evidentiary standards with respect to whether a person is impaired, the elements are the same, which if proven in New Mexico would justify a conviction for the offense of DWI.

In reaching this conclusion, we recognize that Defendant believes the burden should be on the State to ensure that the conduct underlying his Colorado conviction would meet all the elements of the New Mexico offense. To support this argument, Defendant quotes the following from Crane:

If the statutory definition of the crime in the foreign jurisdiction contains all of the necessary elements to meet the California definition, the inquiry ends. If the statutory definition of the crime in the foreign jurisdiction does not contain the necessary elements of the California offense, the court may consider evidence found within the record of the foreign conviction in determining whether the underlying conduct would have constituted a qualifying offense if committed in California, so long as the use of such evidence is not precluded by rules of evidence or other statutory limitation. Where the record presented at trial does not competently disclose the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law.

In relying on this passage from Crane, Defendant overlooks the fact that the appellate court in Crane found that the Colorado DWAI statute punished the slightest degree of impairment, while the California statute required impairment to an appreciable degree. Id. at 338. In contrast, we have concluded that the elements of the Colorado DWAI statute are the same as Section 66-8-102(A) in that both require impairment to the slightest degree. We therefore have no reason to look beyond the fact of the conviction. See Crane, 48 Cal. Rptr. 3d at 339 (stating that if the statutory definitions of the crime in the other jurisdiction contain all of the necessary elements, then the inquiry ends).

Both statutes at issue here require impairment to the slightest degree. Thus, the Colorado offense of DWAI is equivalent to the New Mexico offense of DWI under Section 66-8-102(A). We therefore hold that the district court properly enhanced Defendant’s DWI conviction based in part on a prior Colorado conviction.

CONCLUSION

We affirm Defendant’s conviction for felony DWI based on his fourth offense.

IT IS SO ORDERED.

JONATHAN B. SUTIN,
Chief Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
IRA ROBINSON, Judge
Certiorari Denied, No. 30,998, April 3, 2008

From the New Mexico Court of Appeals

Opinion Number: 2008-NMCA-071

ANDREW MARTINEZ,
Petitioner-Appellant,
versus
HONORABLE RICHARD C. CHAVEZ,
Respondent-Appellee.
No. 26,935 (filed: February 26, 2008)

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
SAM B. SANCHEZ, District Judge

JOHN BIGELOW
Chief Public Defender
KARL ERICH MARTELL
Assistant Appellate Defender
Santa Fe, New Mexico

RENEE BARELA GUITERREZ
Taos, New Mexico
for Appellee

JEFFREY ALAN SHANNON
SHANNON LAW OFFICE
Taos, New Mexico
for Appellant

OPINION

A. JOSEPH ALARID, JUDGE

[1] This case comes to us by order of remand from our Supreme Court. The Supreme Court issued a per curiam opinion holding that this Court “incorrectly classified” this case as “seeking review of a district court habeas corpus proceeding.” See Martinez v. Chavez, 2008-NMSC-___, ¶ 16, N.M. __, P.3d __ [No. 30,194(N.M. Sup. Ct. Dec. 5, 2007)]. The Supreme Court reversed our transfer order and remanded to us for further consideration.

In this opinion, we briefly discuss our criteria for deciding when a case should be transferred to the Supreme Court. As for the merits of Defendant’s arguments on appeal, we affirm.

BACKGROUND

[2] Defendant was arrested on January 21, 2006, for Driving While Intoxicated (DWI) and selling or giving alcohol to minors. On January 25, 2006, Defendant signed a Waiver of Appointed Attorney (Waiver) and was found guilty of the charges. Defendant was sentenced to 179 days in jail with 177 days suspended. Defendant was also given six months probation, and ordered to fulfill other obligations in connection with his convictions.

On April 13, 2006, Defendant filed with the district court a “Verified Petition for Writ of Superintending Control or Writ of Supervisory Control and Petition for Writ of Prohibition and for Writ of Mandamus” (Petition). Since Defendant had been convicted and sentenced on January 25, the filing of his Petition was outside the fifteen-day time limit for appeal to the district court provided by NMSA 1978, § 35-15-1(B) (1969). At the time the Petition was filed, Defendant had served the two days in jail that were not suspended, but was still serving his probation.

[4] In the Petition, Defendant argued that he was never advised about the right to counsel; the right against self-incrimination; the right to confront, cross-examine or compel the attendance of witnesses; or the right to appeal. Defendant claimed that, prior to the entry of the convictions, he had not read the Waiver and the Waiver had not been read or explained to him. Therefore, Defendant argued, the convictions were not entered based on a knowing, intelligent, or voluntary waiver of rights. Defendant asked the district court to prohibit the municipal court judge from “carrying out the sentence imposed” and to order the municipal court judge to vacate his convictions. The district court found that the Waiver was defective on its face, and Defendant did not make a knowing, intelligent and voluntary waiver of his right to counsel. The district court found that the convictions were not valid and should be vacated. Finally, the district court ordered that the matter be reset for trial in the municipal court at which Defendant would be represented by counsel.

[5] Defendant appealed to this Court. In his docketing statement, Defendant raised issues regarding the proceedings in the district court. In addition, Defendant argued that the charges against him should have been dismissed with prejudice, and that he cannot be retried on the charges because he had served his jail sentence and retrial would violate his double jeopardy rights.

We issued a calendar notice proposing to affirm the district court’s decision. We did not address Defendant’s claims with respect to the proceedings in the district court because Defendant received the relief he sought—vacation of his convictions. As for Defendant’s double jeopardy claims, the calendar notice relied on County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990), for the proposition that when convictions are vacated based on an error in the trial proceedings, as opposed to evidentiary insufficiency, double jeopardy does not bar retrial of the defendant. Id. 109 N.M. at 740-44, 790 P.2d 1021-25.

In response to our calendar notice, we received a memorandum in opposition. Defendant raised an issue regarding the finality of the judgment appealed, and also argued again that the actions of the municipal judge and prosecutor were so egregious that his convictions should be dismissed with prejudice. Because we decided to transfer the case to the Supreme Court, we did not address the arguments in the memorandum in opposition. In our transfer order, we explained that we viewed Defendant’s Petition as a collateral attack on his convictions and the sentence he had partially served. The Supreme Court subsequently returned the case to us based on its determination that we had incorrectly classified it as an appeal from a habeas corpus proceeding. See Martinez, 2008-NMSC-___, ¶ 16.

DISCUSSION

Habeas Corpus and This Case

[7] Generally, where a final conviction is being attacked in a collateral proceeding, it is considered a habeas corpus proceeding. See Rule 5-802 NMRA. Habeas corpus protects an individual’s basic right of
freedom from illegal restraint. See Caristo v. Sullivan, 112 N.M. 623, 628, 818 P.2d 401, 406 (1991). Our Supreme Court has recognized that almost all post-conviction requests for relief are, in substance, petitions for habeas corpus relief, with the only exceptions being motions for new trial or for modification of a sentence. State v. Cummings, 2007-NMSC-048, ¶ 21, 142 N.M. 656, 168 P.3d 1080 (explaining that “Rule 5-802 trumps Section 31-11-6 to the extent that statute is construed as providing a remedy identical to that which can be obtained by writ of habeas corpus” and that the only two situations that are not preempted by Rule 5-802 and should be categorized as other forms of post-conviction relief are those involving motions for new trial or to modify a sentence).

[8] In this case, based on the substance of Defendant’s Petition, he was not seeking a new trial or a modification of his sentence. Despite the title of Defendant’s Petition, the substance of the Petition filed in the district court was that the convictions could not stand because the Waiver was not signed voluntarily, and therefore, Defendant’s constitutional right to counsel was violated. We read Defendant’s Petition as claiming that the sentence imposed for his convictions was in violation of the constitution of the United States, or of the constitution or laws of New Mexico or was otherwise subject to collateral attack. Rule 5-802 NMRA. Our Supreme Court has determined, however, that the particular circumstances in this case are not to be categorized as habeas corpus proceedings. Therefore, as directed by the Supreme Court, we will resolve this case, although we are uncertain how the district court proceeding in this case should be categorized. In future cases, however, as the Supreme Court has directed, we will continue to examine the substance of the pleadings filed below to determine whether the request for post-conviction relief asks for a remedy that is in the nature of habeas corpus. As the Supreme Court decided in Cummings, review of district court decisions made in such actions is appropriately in the Supreme Court by way of a petition for writ of certiorari, rather than by appeal to this Court. 2007-NMSC-048, ¶¶ 9, 15.

Merits

[9] Defendant argues, pursuant to State v. Franklin, 78 N.M. 127, 129, 428 P.2d 982, 984 (1967), and State v. Boyer, 103 N.M. 655, 658-59, 712 P.2d 1, 4-5 (Ct. App. 1985), that the finality of the decision of the district court “may be debatable.” As explained by Defendant, an order remanding a case to a lower court is ordinarily considered to be non-final for purposes of appeal because the case has not ended. See State v. Abasteen, 1998-NMCA-158, ¶ 11, 126 N.M. 238, 968 P.2d 328. However, under the doctrine of “practical finality,” we will review an order of remand if the issue(s) on appeal would not, as a practical matter, otherwise be able to be reviewed. Id. ¶ 12. In this case, Defendant’s primary arguments are that his convictions should have been vacated with prejudice so that he would not be subject to retrial on the same charges, and that retrial would violate his right to be free from double jeopardy. The district court determined that Defendant’s convictions would be vacated but that he must be retried on the charges. Defendant must be allowed to appeal that decision now, in order to protect his right to be free from double jeopardy. See State v. Apodaca, 1997-NMCA-051, ¶¶ 15-17, 123 N.M. 372, 940 P.2d 478 (discussing double jeopardy protections and the inability to protect a defendant from being forced to undergo a second trial for the same offense once the second trial has taken place). Under the doctrine of “practical finality,” therefore, the district court’s decision in this case is final for purposes of appeal.

[10] Defendant contends that he should not be retried because the actions of the municipal court judge and the prosecutor were so egregious that the charges should instead be dismissed with prejudice as a sanction. As our Supreme Court held in State v. Breit, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792, retrial is barred under the double jeopardy clause when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and . . . the official knows that the conduct is improper and prejudicial, and . . . the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.

Id. ¶ 32. In Breit, the prosecutor engaged in misconduct from his opening statement to the motion for new trial after the case had ended. Id. ¶¶ 41-44. The prosecutor engaged in relentless attempts to inflame the jury with irrelevant comments, impermissible allegations, exaggerated claims, improper argument, use of sarcasm and scorn and belligerent remarks to opposing counsel, implied threats to opposing counsel, eye-rolling and sneering, accusations of perjury and fabrication, comments on the veracity of witnesses, and other highly prejudicial verbal and non-verbal behaviors. Id.

[11] The “egregious” conduct referred to by Defendant in this case is that the municipal judge routinely had defendants sign waivers of counsel regardless of whether counsel was actually available. Unlike the situation in Breit, the conduct of the municipal judge and the prosecutor in this case was not so unfairly prejudicial as to warrant dismissal of the charges. Although Defendant also alleges that misconduct occurred in the district court, the district court granted Defendant the relief that he requested. Therefore, to the extent that the assertions of misconduct in the district court amounted to error, Defendant did not suffer any prejudice.

[12] We affirm the district court’s decision to vacate Defendant’s convictions and remand the case to the municipal court for a new trial.

[13] IT IS SO ORDERED.
A. JOSEPH ALARID, Judge
WE CONCUR:
MICHAE LD D. BUSTAMANTE, Judge
CYNTHIA A. FRY, Judge
The Bassett family (Bassetts) appeal the trial court’s order granting summary judgment in a legal malpractice claim against Sheehan, Sheehan & Stelzner, P.A. (Sheehan). Because we conclude that the Bassetts’ claim presented no genuine issue of material fact, we affirm.

I. BACKGROUND

(2) In 1984, the Bassetts sold a parcel of real estate to a buyer, William Turner (Turner). Clifford Atkinson (Atkinson) drafted the conveyance documents. Fourteen years later, Turner sued the Bassetts and claimed that he had retained the water rights appurtenant to the land because the deed did not properly sever them. The Bassetts employed Sheehan to defend the suit, and the Bassetts ultimately prevailed at the Supreme Court of New Mexico in Turner v. Bassett, 2005-NMSC-009, 137 N.M. 381, 111 P.3d 701.

(3) Soon after the victory, the Bassetts filed suit against Sheehan and Atkinson for legal malpractice. The Bassetts first alleged that Atkinson’s preparation of the conveyance documents fell below the standard of care because the documents did not expressly exclude a transfer of water rights and, further, that Atkinson failed to warn the Bassetts that the documents should contain such an exclusion. Second, the Bassetts claimed that Sheehan incorrectly advised them of the applicable statute of limitations on their claim against Atkinson. He filed a motion to dismiss on August 30, 2005, and argued that the Bassetts’ claim against him was barred because the statute of limitations had run two years prior to the filing of the complaint. The trial court granted Atkinson’s motion, and he is no longer a party to this suit.

(4) Sheehan filed a motion for summary judgment and argued that “[i]f . . . Atkinson did not commit any legal error in the way he drafted the deed, as the statute then provided and as the Supreme Court . . . confirmed [in Turner], then it follows that he could not have been negligent [for] breached any duty to his client.” According to Sheehan, if Atkinson were not liable for negligence, then the Bassetts could not pursue their malpractice claim against Sheehan because the allegedly incorrect advice about the statute of limitations would have caused the Bassetts no harm. The trial court agreed with Sheehan and entered summary judgment in Sheehan’s favor. The Bassetts appeal the order to this Court.

II. DISCUSSION

(5) We review the trial court’s order granting summary judgment de novo. See Barbeau v. Hoppenrath, 2001-NMCA-077, ¶ 6, 131 N.M. 124, 33 P.3d 675. “Summary judgment is proper when the material facts are undisputed and the only remaining issues are questions of law.” Bird v. State Farm Mut. Auto. Ins. Co., 2007-NMCA-088, ¶ 7, 142 N.M. 346, 165 P.3d 343, cert. denied, 2007-NMCERT-007, 142 N.M. 329, 165 P.3d 326. “A defendant seeking summary judgment . . . bears the initial burden of negating at least one of the essential elements upon which the plaintiff’s claims are grounded.” S. Farm Bureau Cas. Co. v. Hiner, 2005-NMCA-104, ¶ 9, 138 N.M. 154, 117 P.3d 960 (internal quotation marks and citation omitted). “Once such a showing is made, the burden shifts to the plaintiff to come forward with admissible evidence to establish each required element of the claim.” Id.

(6) The Bassetts essentially argue that Sheehan provided no evidence to negate the elements of legal malpractice and that, instead, the trial court and Sheehan relied solely on the Turner decision to conclude that there was no question of fact as to duty or breach of duty. Sheehan counters that the Bassetts failed to rebut Sheehan’s prima facie case by producing evidence of a genuine issue of material fact that supported the claim against Atkinson. We agree with Sheehan and consider (1) whether Sheehan made a prima facie case for summary judgment and (2) whether in response to Sheehan’s motion, the Bassetts came forward with evidence to support the elements of their claim.

A. Sheehan’s Prima Facie Case

(7) The elements of legal malpractice are (1) the employment of the defendant attorney, (2) the defendant attorney’s neglect of a reasonable duty, and (3) a loss to the plaintiff proximately caused by the defense attorney’s neglect. Akutagawa v. Laflin, Pick & Heer, P.A., 2005-NMCA-132, ¶ 11, 138 N.M. 774, 126 P.3d 1138. Because only the second element is at issue in the present case, we limit our analysis to Atkinson’s duty to the Bassetts and whether that duty was breached.

1. Duty

(8) The Bassetts argue that the trial court erroneously determined that Atkinson owed no duty of care in this case. Whether or not a person has a duty is a question of law. Lessard v. Coronado Paint & Decorating Ctr., Inc., 2007-NMCA-122, ¶ 27, 142 N.M. 583, 168 P.3d 155, cert. quashed, 2008-NMCERT-002, __ N.M. __, __ P.3d __. An attorney’s duty to a client is “to
exercise the degree of knowledge or skill ordinarily possessed by others in his or her profession similarly situated.” Resolution Trust Corp. v. Barnhart, 116 N.M. 384, 388, 862 P.2d 1243, 1247 (Ct. App. 1993).

According to the Bassetts, Atkinson’s duty of care required him “to include an appropriate exclusion of water rights in the conveyance or to warn the client about the possible consequences if the exclusion was not included.” The Bassetts conflate the possible consequences if the exclusion were to be ignored with the appropriate exclusion of water rights in the conveyance. Appropriately excluding water rights is an obligation of care required him “to include an express exclusion of water rights from the conveyance documents.” 2005-NMSC-009, ¶ 25. The Bassetts argue that this language does not specifically hold that Atkinson did not breach his duty, and they are correct. In Turner, however, the claim against the Bassetts was based on the contention that the deed, as drafted by Atkinson, conveyed water rights that the Bassetts did not intend to convey. Id. ¶¶ 6-7. The Supreme Court concluded that the deed did not convey the water rights to Turner. Id. ¶ 25-28. “[T]he conveyor of title to the land who has acquired a permit need not express in the conveyance documents that which is already presumed as a matter of law: the land passes without water.” Id. ¶ 24. We therefore conclude that the deed prepared by Atkinson was legally sufficient to convey the property without water rights. This leads us to the issue of breach of duty.

In determining whether an attorney has breached a duty, this Court has considered the facts of the underlying dispute in order to determine whether an attorney’s failure to act could have been negligent. In Selby v. Roggow, 1999-NMCA-044, 126 N.M. 766, 975 P.2d 379, the plaintiffs contended that the defendants “committed malpractice by failing to raise several compulsory counterclaims which, if filed, would have resulted in [the] plaintiffs prevailing in the foreclosure action.” Id. ¶ 3. The trial court granted summary judgment. Id. After considerable analysis, id. ¶¶ 12-20, this Court determined that “a counterclaim based upon [the plaintiffs’] theory[,] even if it had been filed, would have failed.” Id. ¶ 21. As a result, the Selby Court held that the plaintiffs raised no issues of material fact, id. ¶ 4, and that the “[d]efendants’ failure to raise such a counterclaim . . . as a matter of law did not constitute legal malpractice.” Id. ¶ 21; cf. Meiboom v. Carmondy, 2003-NMCA-145, 177 N.M. 699, 82 P.3d 66 (“We decide only that . . . there are genuine issues of material fact concerning whether [the] plaintiffs might have prevailed in the underlying case[,]”) . Under the facts of the present case, Turner established that a claim against the Bassetts could not survive summary judgment if the claim were based on Atkinson’s failure to include the reservation language in the deeds. See 2005-NMSC-009, ¶¶ 1, 24. Consequently, we conclude that Sheehan’s prima facie case successfully negated the element of breach of duty. The Bassetts were therefore required to rebut Sheehan’s case; accordingly, we review the evidence provided by the Bassetts.

B. The Bassetts’ Evidence

{12} In response to Sheehan’s prima facie case, the Bassetts rely on a number of cases from other jurisdictions for the proposition that “despite an advantageous final result in a matter, an attorney will not be immune from responsibility for the costs and damages resulting from mistakes made and departures from the standard of care.” After reviewing these cases, we consider them to be distinguishable from the present dispute.

{13} In Sindell v. Gibson, Dunn & Crutcher, 63 Cal. Rptr. 2d 594 (Ct. App. 1997), the defendant attorneys negligently failed to obtain a necessary consent from the client’s wife. Id. at 596. The California Court of Appeal pointed out that “when the defendants failed to obtain that consent, their negligence made possible litigation asserting a community property interest which could not have otherwise been raised.” Id. at 601. The Court thus held that the client could properly claim the attorney fees resulting from the litigation as damages that flowed from the attorneys’ negligence. Id. at 602. Similarly, Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead, 417 S.E.2d 29 (Ga. Ct. App. 1992), held that a trial judge improperly granted summary judgment because even though the plaintiffs suffered no actual judgment against them because of the attorneys’ legal advice, the plaintiffs provided evidence that they suffered damages as a result of the defendant attorneys’ allegedly negligent advice. Id. at 33. Both Sindell and Rogers focus on whether the plaintiffs suffered damages as a result of negligent advice and do not consider the question of breach.

In Sindell, there was no question about the attorneys’ negligence in the affair; the court assumed the attorneys’ negligence. See 63 Cal. Rptr. 2d at 598. The trial court in Rogers granted summary judgment based on a failure of the plaintiffs to show damages resulting from the legal advice. 417 S.E.2d at 32. There is no discussion in Rogers regarding breach of duty. In the present case, Sheehan does not argue that the Bassetts incurred no expense. Instead, Sheehan contends that the Bassetts did not provide any evidence to establish that Atkinson was negligent. Sindell and Rogers do not provide direction on that issue.

{14} In John B. Gunn Law Corp. v. Maynard, 235 Cal. Rptr. 180 (Ct. App. 1987), the trial court refused a jury instruction on
causation tendered by the plaintiff. Id. at 183. The California Court of Appeal reversed and held that the client was entitled to a jury instruction based on her theory of causation. Id. at 184. Maynard stands for the proposition that a jury should be instructed on conflicting theories of causation, id., and does not address breach of duty.

15 Mieras v. DeBona, 550 N.W.2d 202 (Mich. 1996), is equally unhelpful. That court held that an attorney drafting a will owes a duty of care to the third-party beneficiaries of the will. Id. at 214-15. While we agree that attorneys owe a duty of care to their clients, any duty to third parties is not an issue in the present case.

16 First Interstate Bank of Denver v. Berenbaum, 872 P.2d 1297 (Colo. Ct. App. 1993), appears to address the Bassetts’ contentions directly, but it does not advance the Bassetts’ position. In Berenbaum, the Colorado Court of Appeals identified that Colorado attorneys owe their clients a duty to anticipate “reasonably foreseeable risks.” Id. at 1300. Then the court explained that “[i]f language included within a document because of the acts or omissions of an attorney results in litigation, even if the language is ultimately construed in favor of the client, the question remains whether reasonably prudent attorneys should have foreseen that the likely result of its inclusion would be litigation.” Id.

We reject this proposition for two reasons. First, in New Mexico, “a mere error of judgment or mistake in point of law that has not been settled by the highest court of law and upon which reasonable lawyers may differ, will not subject an attorney to liability.” First Nat’l Bank of Clovis v. Diane, Inc., 102 N.M. 548, 552, 698 P.2d 5, 9 (Ct. App. 1985). Second, after Sheehan made a prima facie case and negated the element of breach, the Bassetts came forward with no admissible evidence to show that Atkinson’s drafting resulted in a foreseeable risk of litigation. Therefore, we do not consider Berenbaum to be instructive.

17 In Sizemore v. Swift, 719 P.2d 500 (Or. Ct. App. 1986), the Court of Appeals of Oregon determined that because there was a question of fact about the reasonableness of the attorneys’ conduct, a trial court improperly granted summary judgment in a legal malpractice case. Id. at 504. The attorneys drafted a trust, which was later the subject of litigation. Id. at 501-02. The client was successful in the litigation but then brought suit against the drafting attorneys. Id. The client provided evidence, in the form of an affidavit, that the trust created by the attorneys was “not reasonable under Oregon practice.” Id. at 504. The court noted that “[i]f the fact of litigation does not in itself prove negligence, so ultimate success in the litigation does not in itself disprove it.” Id. (citation omitted).

18 In the present case, the Bassetts provided no evidence to establish the element of breach after the burden shifted from Sheehan. Where the Sizemore plaintiff provided an affidavit regarding the standard of care in Oregon, id., the Bassetts responded to Sheehan’s motion with dictum from Turner and citations to several cases from out-of-state jurisdictions. The Bassetts did not provide affidavits or expert testimony about the reasonableness of Atkinson’s actions at the time the deeds were drawn.

Instead, the Bassetts pointed to statements made by Sheehan before the Turner opinion was issued, when Sheehan examined the feasibility of a claim against Atkinson for the Bassetts. This deposition testimony does not establish that at the time Atkinson drew the deeds, an attorney exercising reasonable care would have included the express severance language in the deeds. The Bassetts provided no evidence tending to show a breach of duty by Atkinson, and they provided no additional facts that would forestall summary judgment.

19 It is well established that “[i]f the facts are not in dispute, but only the legal effect of the facts is presented for determination, then summary judgment may properly be granted.” Koenig v. Perez, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986). The facts in the present case are not in dispute. There is no question that Atkinson prepared the deed and that the deed did not include language that would have expressly severed the water rights from the property. Turner determined the legal effect of these undisputed facts. The Bassetts did not raise additional facts. We therefore hold that there are no material facts in dispute and that summary judgment was properly granted for Sheehan. See Wood v. Cunningham, 2006-NMCA-139, ¶ 6, 140 N.M. 699, 147 P.3d 1132.

III. CONCLUSION

20 We affirm the trial court.

21 IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

IRA ROBINSON, Judge
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