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McGUINNESS v. STATE: LIMITING THE USE OF DEPOSITIONS AT TRIAL

INTRODUCTION

New Mexico courts have traditionally restricted the use of depositions in criminal proceedings unless expressly authorized by statute.[1] Rule 29(n) of the New Mexico Rules of Criminal Procedure is the sole statutory authority for admitting depositions at trial.[2] The judiciary has construed Rule 29(n) to allow admission of the depositions of witnesses who are dead[3] or absent from the jurisdiction[4] when there has been a prior opportunity for cross-examination.[5] In *McGuinness v. State*,[6] however, the New Mexico Supreme Court narrowly interpreted the rule to exclude the deposition of a witness who asserts a privilege against self-incrimination.[7]

The *McGuinness* decision hinges on the court's interpretation of what constitutes "non-attendance" or "unavailability" of a witness. Rule 804 of the New Mexico Rules of Evidence defines "unavailability" to include absences based on testimonial privilege.[8] The court

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1. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974); State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).
2. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974); State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974); N.M.R. Crim. P 29(n) (1978), which states:

> (n) *Use of Depositions.* At the trial, or at any hearing, any part or all of a deposition, *so far as admissible under the rules of evidence* applied as though the witness were then present and testifying, may be used:
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> (1) if the witness is dead;
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> (2) if the witness is unable to attend to testify because of illness or infirmity;
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> (3) if the party offering the deposition has been *unable to procure the attendance of the witness by subpoena;*
>
> (4) if the witness is out of the state, his presence cannot be secured by subpoena or other lawful means and his absence was not procured by the party offering the deposition; and
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> (5) to contradict or impeach the witness.
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> If only part of a deposition is offered in evidence by a party, any adverse party may require him to offer any other part or parts.

3. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), *aff'd*, 86 N.M. 31, 519 P.2d 127 (1973).
4. State v. DeSantos, 91 N.M. 428, 575 P.2d 612 (Ct. App. 1978).
5. *Id.* at 432, 575 P.2d at 616; State v. Tijerina, 84 N.M. at 437, 504 P.2d at 647.
6. 92 N.M. 441, 589 P.2d 1032 (1979).
7. *Id.*
8. N.M.R. Evid. 804 (1978), which states:

rejected this definition and, without explanation, found that a valid testimonial privilege did not make a witness "absent" under Rule 29(n).[9]

This casenote discusses the possible rationale underlying *McGuinness*[10] and a way to circumvent the decision with a creative legal fiction.[11]

CASE HISTORY

The defendant in *McGuinness* was convicted of second-degree murder.[12] The prosecution's chief eyewitness was deposed prior to trial at the state's request. The defendant and his counsel were present at the deposition and cross-examined the witness. The defense was unable to ascertain the name of a second eyewitness at the time of the deposition and could not cross-examine the deponent about the eyewitness.[13]

The deponent asserted his fifth amendment privilege against self-incrimination at trial. He refused to testify because he would have perjured himself by making statements inconsistent with his prior sworn testimony.[14] His deposition was admitted into evidence over

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(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant:

(1) is *exempted by ruling of the judge on the ground of privilege* from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(Emphasis added).

9. 92 N.M. at 443, 589 P.2d at 1035.

10. *See* text accompanying notes 34-60 *infra.*

11. *See* text accompanying notes 68-74 *infra.*

12. 92 N.M. at 441, 589 P.2d at 1032.

13. *Id.* at 442, 589 P.2d at 1033. Although the Defense did not know the name of the second eyewitness, it did know of his existence. The defense could cross-examine the deponent about the presence of a second person, but could not compare conflicts in the testimony of the two witnesses. The second witness testified at trial and was fully cross-examined. Appellee's Answer Brief at 18, McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

14. 92 N.M. at 442, 589 P.2d at 1033. Subsequent to the deposition, the deponent called the defendant's attorney and made statements which directly conflicted with his prior testimony. These statements were ruled inadmissible at trial. *Id.*

the defendant's objection. The court of appeals upheld the admission of the deposition, finding that the witness' assertion of his privilege against self-incrimination made him "unavailable" within the meaning of Rule 29(n).[15] The New Mexico Supreme Court reversed that decision and remanded the case for a new trial.[16]

THE CONSTITUTIONAL RIGHT TO CONFRONTATION

The sixth amendment to the United States Constitution grants a defendant the right to confront those persons testifying against him.[17] This right was made applicable to the states by the fourteenth amendment[18] and is incorporated into the New Mexico Constitution.[19]

The United States Supreme Court has held that the right to confrontation only grants a defendant the right to cross-examine a witness.[20] The desire to have a witness physically present in the courtroom is an ancillary right not essential to the constitutional guarantee.[21] In *California v. Green*,[22] the Court held that the admission of testimony from a preliminary hearing did not violate the confrontation clause when the defendant had had a previous opportunity to cross-examine the witness and the witness was unavailable at trial.[23]

New Mexico has followed the Supreme Court's interpretation of

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15. *Id.*

16. *Id.* at 444, 589 P.2d at 1035. On remand the defendant was convicted again. This decision was appealed on August 23, 1979 on other grounds.

17. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. For the historical development of this right, see Comment, *Confrontation: A Trial Right?*—United States v. Singleton, 1973 Utah L. Rev. 839, 840.

18. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

U.S. Const. amend. XIV. *See also* Douglas v. Alabama, 380 U.S. 415 (1965); Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965).

19. The New Mexico Constitution states, "In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him . . . ." N.M. Const. art. 2, § 14 (1978).

20. California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965). *See also* Comment, *Confrontation: A Trial Right?*—United States v. Singleton, 1973 Utah L. Rev. 839.

21. California v. Green, 399 U.S. 149, 165-68 (1970).

22. 399 U.S. 149 (1970).

23. *Id.* at 165-68.

the right to confrontation. In *State v. Lunn,*[24] the court of appeals found the right to confrontation does not necessarily include the right to have the witness present at trial. The only definite requirement of the right is that an opposing party be allowed an adequate opportunity to cross-examine the witness.[25] Since a witness' presence is not constitutionally required in New Mexico, the courts have upheld the admission of testimony given at preliminary hearings,[26] previous trials[27] and depositions.[28]

A three-part test for admissibility of prior statements was established by the court of appeals in *State v. Tijerina.*[29] The court stated:

> If the accepted requirements of the [1] administration of the oath, [2] adequate opportunity to cross-examine on substantially the same issue, and [3] present unavailability of the witness, are satisfied then the character of the tribunal . . . and the form of the proceedings are immaterial, and the former testimony should be received.[30]

All properly executed depositions meet the first two requirements of the *Tijerina* test.[31] Depositions in a criminal action are required to be given under oath[32] and opposing counsel is given the opportunity to cross-examine the deponent.[33] The admissibility of depositions therefore depends upon an interpretation of what constitutes "unavailability" of a witness.

THE McGUINNESS DEPOSITION

The deposition admitted at the *McGuinness* trial met the first two requirements of the standard established in *Tijerina.* The witness was

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24. 82 N.M. 526, 484 P.2d 368 (Ct. App. 1971).

25. *Id.* at 528, 484 P.2d at 370. *See also* Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969); State v. Jackson, 30 N.M. 309, 233 P. 49 (1924).

26. State v. Jackson, 30 N.M. 309, 233 P. 49 (1924). *See also* State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), *aff'd,* 86 N.M. 31, 519 P.2d 127 (1977). *Cf.* Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969).

27. State v. Riddel, 38 N.M. 550, 37 P.2d 802 (1934). *Cf.* State v. Halsey, 34 N.M. 223, 279 P. 945 (1929).

28. State v. DeSantos, 91 N.M. 428, 575 P.2d 612 (Ct. App. 1978).

29. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), *aff'd,* 86 N.M. 31, 519 P.2d 127 (1977).

30. *Id.* at 437, 504 P.2d at 647. *Tijerina* relies on King v. State Indus. Accident Comm'n, 211 Or. 40, 309 P.2d 159 (1957) which quotes C. McCormick, Handbook on the Law of Evidence §235 (1954).

31. N.M.R. Crim. P. 29(f) & (h).

32. N.M.R. Crim. P. 29(f).

33. N.M.R. Crim. P. 29(h).

deposed under oath[34] and the defense had an opportunity to cross-examine him.[35] The defense attorney knew that a second eyewitness had been present at the homicide but could not ascertain that person's identity at the time of the deposition.[36] Thus, the deponent could not be questioned about any inconsistencies between his story and that of the second witness. The supreme court ignored the question of whether there had been an opportunity for full cross-examination under the facts of the case and focused exclusively on Rule 29(n).[37]

Depositions are admitted into evidence solely under Rule 29(n). There is no common law authority for admitting depositions in criminal proceedings.[38] In *State v. Berry*[39] and *State v. Barela*,[40] the court of appeals indicated that a deposition must fall within the scope of Rule 29(n) or be excluded under the common law.[41]

Rule 29(n) was patterned after Federal Rule of Criminal Procedure 15(e)[42] and was adopted by the New Mexico Supreme Court on July 1, 1972.[43] It provided that depositions should be used "so far as otherwise admissible under the rules of evidence" when a witness is ill, dead, absent from the jurisdiction or when "the party offering the deposition has been unable to procure the attendance of the witness by subpoena."[44]

Rule 29(n) does not define what constitutes inability to procure the attendance of a witness. Federal Rule 15(e) was amended in 1975 to clarify those situations in which a witness would be deemed absent.[45] It now allows the use of depositions at trial "if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence . . . ."[46] Rule 804(a) defines "[u]navailability as a witness" to include situations in which the declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement . . . ."[47]

34. N.M.R. Crim. P. 29(f).
35. N.M.R. Crim. P. 29(h); Appellee's Answer Brief at 17.
36. *See* note 13 *supra*.
37. 92 N.M. at 442-44, 589 P.2d at 1033-35.
38. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974); State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).
39. 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).
40. 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).
41. *Id.*; State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).
42. Fed. R. Crim. P. 15, amend. n.(e) (1975).
43. N.M.R. Crim. P. 29(n).
44. Fed. R. Crim. P. 15, amend. n.(e) (1975). Depositions can also be admitted for impeachment purposes under the rule. *See* text of the rule, note 2 *supra*.
45. Fed. R. Crim. P. 15, amend. n.(e) (1975).
46. Fed. R. Crim. P. 15(e).
47. Fed. R. Evid. 804(a)(1).

Rule 804(a) of the New Mexico Rules of Evidence is virtually identical to Federal Rule of Evidence 804(a).[48] The definition of unavailability contained in both the federal and state rule has been confirmed by the New Mexico judiciary in *State v. Self*.[49] The court in *Self* held "where . . . the court has ruled that a witness is exempted from testifying concerning a statement made by him, then that person is unavailable within the meaning of Rules of Evidence 804(a)(1) . . . ."[50]

Despite the clear indication that "unavailability of a witness" includes absence through testimonial privilege, the supreme court held the admission of the deposition in the *McGuinness* case was improper.[51] Since the 1975 amendment to Federal Rule 15(e) has not been adopted in Rule 29(n), the court refused to accept the definition of "unavailability" contained in the Federal Rules of Evidence.[52] Instead, the court narrowly defined being "unable to procure the attendance of the witness by subpoena"[53] as being unable to secure the physical presence of the witness in the courtroom.[54] Therefore, if a witness appeared in court to claim a testimonial privilege, his deposition could not be admitted because he had physically attended the trial.[55]

The court failed to note that, even without the adoption of the federal amendment, Rule 29(n) refers directly to the rules of evidence.[56] The categories of "absence" listed in Rule 29 have been held "comparable" to those in Rule of Evidence 804(a).[57] Rule 804 provides the operative definition for unavailability of a witness.[58] The court has inexplicably changed this definition when it is applied to the admission of depositions at trial.[59]

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48. N.M.R. Evid. 804.

49. 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

50. *Id.* at 40, 536 P.2d at 1096.

51. 92 N.M. at 443, 589 P.2d at 1035.

52. *Id.* at 444, 589 P.2d at 1032. The defendant argued that failure to adopt the 1975 amendments to Federal Rule 15(e) reflected judicial intent to exclude the depositions of privileged witnesses. Defendant-Appellant's Brief-in-Chief at 17-20. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

53. N.M.R. Crim. P. 29(n)(3).

54. 92 N.M. 441, 443, 589 P.2d 1032, 1034-35.

55. *Id.* at 443, 589 P.2d at 1034.

56. N.M.R. Crim. P. 29(n). *See* italicized portions of the rule, note 2 *supra.*

57. State v. Mann, 87 N.M. 427, 430, 535 P.2d 70, 73 (Ct. App. 1975). *See also* Madrid v. Scholes, 89 N.M. 15, 546 P.2d 863 (Ct. App. 1976), *cert. denied,* 89 N.M. 206, 549 P.2d 284 (1976).

58. N.M.R. Evid. 804(a). *See* text of the rule, note 8 *supra.*

59. 92 N.M. at 444, 589 P.2d at 1035. Instead of explaining its distinction in the definitions of unavailability, the court glosses over its decision by stating, "the fact that the deposition was not to be excluded as hearsay [under Rule 804(a)(1)] does not authorize its

The court did not explain the difference between a witness' failure to testify because of a privilege and his failure to testify because of the remaining Rule 29(n) situations (death, insanity, illness and absence from the jurisdiction).[60] The only practical distinction between these situations is that a testimonial privilege may be considered a matter of choice rather than an unavoidable circumstance. This distinction does not recognize that a witness is more likely to feign illness or depart the jurisdiction to avoid testifying than to convince a court to allow a false assertion of privilege.[61]

This reasoning has led Missouri courts to admit the depositions of witnesses who validly assert a testimonial privilege at trial.[62] In *State v. Yates*,[63] the Missouri Supreme Court permitted the introduction of a witness' deposition after she claimed her privilege against self-incrimination at trial. The court stated:

> When [the witness] invoked the privilege against self-incrimination at the trial she made herself as unavailable as if she were dead or gone out of the state .... [A] necessity arises for the admission of [her] previously given testimony from a secondary source, in order that defendant may be accorded a fair trial.[64]

The *McGuinness* decision distinguished this case because the defendant in *Yates*, and not the state, sought to introduce a deposition.[65] This distinction is nonsensical. Rule 29(n) makes no distinction between a defendant and the prosecution for purposes of admitting depositions.[66] Nor have the Missouri courts based their decisions on the identity of the party seeking to admit a deposition.[67]

California courts may have provided a circuitous fiction to avoid

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admission if it is excludable on other grounds." *Id. Cf.* People v. Leach, 15 Cal.3d 419, 541 P.2d 296, 124 Cal. Rptr. 752 (1975), *cert. denied*, 424 U.S. 926 (1976); People v. Smith, 13 Cal. App. 3d 897, 91 Cal. Rptr. 786 (1970); Annot., 43 A.L.R.3d 1413 (1972).

60. N.M.R. Crim. P. 29(n). *See* text of the rule, note 2 *supra*. *See also* Hayward v. Barron, 38 N.H. 366 (1859), in which the court finds that a party should not be denied his right to have a witness present because it is his "misfortune" to be excused to avoid self-incrimination.

61. *See generally* State v. Yates, 442 S.W.2d 21 (Mo. 1969).

62. *Id.;* Sutter v. Easterly, 189 S.W.2d 284 (Mo. 1945).

63. 442 S.W.2d 21 (Mo. 1969).

64. *Id.* at 28.

65. 92 N.M. at 443, 589 P.2d at 1034. This distinction may allow future New Mexico defendants to introduce the depositions of privileged witnesses, while prohibiting the same action by the prosecutor.

66. N.M.R. Crim. P. 29(n). *See* text of the rule, note 2 *supra*.

67. *See* Sutter v. Easterly, 189 S.W.2d 284 (Mo. 1945), where the Missouri Supreme Court admitted the affidavit of a *plaintiff* in a suit in equity after he asserted his privilege against self-incrimination.

this type of limitation on Rule 29(n). Admissibility of depositions in California trials was restricted in *People v. Lawrence,*[68] a decision similar to *McGuinness.* In *Lawrence,* the California Court of Appeals upheld the exclusion of a witness' testimony which was given at two previous trials after the witness asserted his privilege against self-incrimination.[69] The court excluded the prior testimony because "[the witness'] failure to testify stemmed merely from the exercise of his legal right to assert his privilege against self-incrimination, not because of death, insanity, absence from the jurisdiction or lack of anybody's ability to find him."[70]

In 1975 the California Supreme Court circumvented the *Lawrence* decision to admit into evidence a testimonial transcript of the prosecution's chief witness from a preliminary hearing.[71] The witness in *People v. Rojas*[72] was granted immunity and could not claim a privilege against self-incrimination. He nevertheless refused to testify because he feared for his personal safety.[73] Although the witness was present in the courtroom, the innovative court admitted his deposition under Rule 29(n) because the witness' mental condition kept him from testifying.[74]

The *Rojas* decision can be extended to allow admission of the depositions of privileged witnesses. Instead of claiming a fifth amendment privilege, a witness can refuse to testify out of *fear* of incriminating himself. Fear generated by the threat of prison is as real a deterrent as is the fear of bodily harm. Since the "fear" of incrimination is a mental condition rather than a testimonial privilege, the deposition of the frightened witness can be admitted under the Rule 29(n) provision for absence due to a psychological illness.[75]

CONCLUSION

The *McGuinness* decision has irrationally altered the definition of unavailability as applied to the admission of depositions. The result excludes the deposition of a privileged witness even though that witness is prevented from testifying to the same extent as a witness who is absent from the jurisdiction, mentally or physically ill or deceased.

68. 168 Cal. App. 2d 510, 336 P.2d 189 (1959).
69. *Id.* at ____, 336 P.2d at 194.
70. *Id.*
71. People v. Rojas, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975). *Cf.* Sheehan v. State, 223 N.W. 2d 600 (Wis. 1974).
72. 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).
73. *Id.* at 547, 542 P.2d at 233, 125 Cal. Rptr. at 361.
74. *Id.* at 549-50, 542 P.2d at 235, 125 Cal. Rptr. at 363.
75. N.M.R. Crim. P. 29(n)(2). *See* text of the rule, note 2 *supra.*

The prosecution in *McGuinness* was relying on the testimony of the eyewitness to prove its case against the defendant.[76] The state could have easily determined in advance whether the witness was dead, absent from the jurisdiction or mentally or physically ill. It may *not* have known the witness would assert a testimonial privilege on the stand. A prosecutor or defense attorney faced with a "surprise" assertion of privilege by a key witness can only buttress its case by admitting the deposition of the privileged witness. Since the deposition must have been taken under oath and the opportunity for cross-examination must have been provided, the admission of the deposition would not violate the defendant's constitutional right to confrontation.[77]

A witness who asserts a valid privilege is unavailable to testify. His testimony cannot be elicited by subpoena. Despite this fact, the New Mexico Supreme Court has refused to include the testimonial privilege in the definition of "unavailability." The court's failure to admit the depositions of privileged witnesses may result in the creation of a legal fiction.

Instead of admitting that a witness is asserting a testimonial privilege, attorneys seeking to admit depositions may be forced into the subversion of claiming that a witness is refusing to testify because he *fears* self-incrimination. Since fear is a mental condition, it falls into another of the Rule 29(n) categories and the deposition can be admitted into evidence. Through the *McGuinness* decision, the judiciary has once again deferred to the hallowed judicial principle that legal fiction is better than truth.

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76. 92 N.M. at 442, 589 P.2d at 1032-33.
77. *See* text accompanying notes 17-33 *supra.*