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Letter in Response to Marvell, The New Mexico Court of Appeals Summary Calendar: An Evaluation

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LETTER IN RESPONSE TO MARVELL, "THE NEW MEXICO COURT OF APPEALS SUMMARY CALENDAR: AN EVALUATION"

Dear Editors:

We are writing in response to *The New Mexico Court of Appeals Summary Calendar: An Evaluation*¹ by Thomas B. Marvell, Esq., which appeared in the previous issue of the *New Mexico Law Review*. We disagree with the author's conclusions that the summary calendar reduces delay and provides for just results for criminal defendants. Furthermore, we are particularly concerned that the summary calendar violates the rights of indigent criminal defendants to effective assistance of counsel and to equal protection.

Defendants with sufficient funds can purchase transcripts or tapes of their trials for use when preparing their docketing statements and memoranda in opposition to the court's proposed summary dispositions. Criminal defendants who have been granted free process on appeal are essentially denied access to the transcripts or tapes by the operation of the summary calendar system. Under the rules, lawyers for the indigent defendants have access to transcripts or tapes only after the court orders the filing of them—in other words, when the case goes off the summary calendar. Therefore, the people who are primarily harmed by this procedure are indigent criminal defendants. Their lawyers must write docketing statements from memory without the benefit of a transcript or tapes.

Additionally, the lawyer handling the appeal for an indigent defendant is frequently not the lawyer who tried the case. As a result, the appellate lawyer may be unaware of important issues which are present in the trial record. One of the most glaring problems this creates is the inability of the appellate lawyer to evaluate possible ineffective assistance of counsel claims. Although trial counsel may recognize errors the court made during trial, trial counsel may not recognize their own errors. Absent a transcript or the tapes, appellate counsel is precluded from evaluating errors trial counsel made which may have denied the defendant a fair trial. This is true because the appellate counsel is wholly dependent on what he or she learns from the trial counsel.

Moreover, the summary process is wasteful because sometimes appellate counsel argue issues which, if they had access to the transcripts or tapes, they would realize had not been properly preserved below. Often, the memoranda in opposition to a proposed summary disposition become lengthy briefs which must be discarded once the court places the appeal on the general calendar and counsel reviews the record and discovers the issue was not preserved below.

1. 22 N.M.L. REV. 501 (1992).

Another aspect of the wastefulness of this process is that the parties write numerous memoranda rather than one complete brief based upon a full review of the record below. In most cases, this causes longer delay than the traditional system which it is intended to improve. During this unnecessary delay, indigent defendants who cannot afford appeal bond may be languishing in prison.

The summary process also forces appellate counsel to raise issues which may not be meritorious because if these issues are not raised during the summary process, they will not be preserved. If counsel had a complete record to review, counsel could make a reasoned judgement of which issues to urge on appeal. Finally, even meritorious issues are not always adequately preserved because of lack of access to the facts.

Time and space limitations prevent a thorough analysis of the problems associated with the summary calendar. Mr. Marvell's conclusion that the system is efficient is incorrect, and he does not address the effect of the summary calendar on an indigent criminal defendant's constitutional rights to effective assistance of counsel, equal protection and a fair trial. For indigent criminal defendants, the summary calendar is neither fair nor fast.

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Dated: September 18, 1992