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CRIMINAL LAW

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I. HOMICIDE

Homcide cases during the Survey year dealt with a variety of issues. The majority of the issues arose in the context of jury instructions which were challenged as improperly given, or which were alleged to have been improperly refused.

A. Instructions

1) Self-defense

In *State v. Martinez*[1] the supreme court held that the trial court properly refused to give an instruction on self-defense. The defendant was convicted of felony murder, armed robbery with a firearm, and larceny over $2,500. The trial court refused the defendant's requested instruction on self-defense. On appeal, the defendant argued that a self-defense instruction should have been given because evidence was introduced showing that there had been a struggle at the scene of the homicide, that he had multiple wounds on his head and legs, and that his hand was severely wounded.[2]

The supreme court noted that self-defense is applicable only when there is an appearance of immediate danger of death or great bodily harm which would put the reasonable person in fear of his safety.[3] The court set out the requirements for evidence sufficient to warrant a self-defense instruction: "To warrant an instruction on self-defense the evidence must be sufficient to raise a reasonable doubt in the minds of the jury as to whether or not a defendant accused of homicide did act in self-defense."[4] Based on this standard, and the peculiar facts of *Martinez,* the court said that there could be no reasonable doubt that the defendant's actions were not self-defense.

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1. 95 N.M. 421, 622 P.2d 1041 (1981).

2. *Id.* at 423, 622 P.2d at 1043. The defendant argued that his hand wound would have greatly diminished his grip. *Id.* Apparently, he wished for the court to infer that it would therefore be less likely for him to have been a willing aggressor.

3. *See* N.M. Stat. Ann. § 30-2-7 (1978); N.M. U.J.I. Crim. 41.41.

4. 95 N.M. at 423, 622 P.2d at 1043, citing State v. Cochran, 78 N.M. 292, 430 P.2d 863 (1967).

The facts of *Martinez* raise the unique question whether mere evidence of a struggle will give rise to a self-defense instruction. The medical investigator in *Martinez* testified that the victim's scalp contained too many lacerations to count; the nose was distorted and pushed to the side; a wire had been wrapped around the victim's neck; there were "defensive" wounds on the victim's forearms; and there was a penetrating bullet wound on the left arm and chest.[5] The medical investigator further testified that the victim was alive at the time he was shot, and that death resulted from hemorrhaging of the brain caused by blows to the head.

The court stated that, by itself, circumstantial evidence of a struggle is not evidence to show a reaction to an appearance of the danger of death or great bodily harm sufficient enough to warrant a self-defense instruction.[6] *Martinez* should not be read to mean that evidence of a struggle or wounds on the accused, which are consistent with a claim of self-defense, would not raise a "reasonable doubt" as to the accused's claim. Instead, it should be read merely for the proposition that evidence of a fight will not warrant a self-defense instruction if the evidence from the fight does not support the instruction at all.

The court noted that the wounds which the accused received were consistent with the state's contention that the victim was struggling to ward off the defendant's attack, but did not support the defendant's claim of self-defense. The court looked to the nature and extent of the victim's wounds and decided that the injuries caused by the defendant were not consistent with a theory of self-defense. The court held that because there was no showing of a reasonable fear of death or severe injury, and because the wounds on the defendant and the victim belied the defendant's claim of self-defense, the trial court properly refused to give the tendered self-defense instruction.[7]

In another case dealing with self-defense, *State v. Montano,*[8] the court of appeals, using the same standard applied in *Martinez,* held that the evidence did warrant an instruction of self-defense, and reversed the trial court. Serna, the victim, and a friend had spent most of the day drinking. In the early evening, they went to the defendant's home and, against her wishes, drank late into the night. Serna became hostile. When the defendant refused to cook dinner for him, he knocked a hole in the bathroom wall. Later, Serna's friend agreed to leave and to take Serna with him. When Serna

5. 95 N.M. at 423, 622 P.2d at 1043.
6. *Id.*
7. *Id.*
8. 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

learned that they were to go, he became angry and cursed the defendant. He looked at her threateningly and rose from his chair. The defendant grabbed a gun[9] and backed up to the sink. The gun discharged and Serna was killed.

The trial court refused the defendant's requested self-defense instruction. The court of appeals held that under the circumstances, the jury could have found that Montano acted reasonably, and that she was put in fear of death or great bodily harm immediately before she shot Serna.[10] Therefore, a self-defense instruction was proper.

2) Felony Murder

In *State v. Wall*[11] the court dealt with two challenges made in response to jury instructions. The defendant (Wall) was charged with felony murder. The charge stemmed from a killing during a robbery. The first challenge was to the causation instruction given at trial.[12] The defendant alleged that the jury instruction on causation did not establish the causal link between the death and the felony as is required by *State v. Harrison.*[13] The court decided that the contention was without merit, because *Harrison* held only that Uniform Jury Instruction—Criminal 2.04 was inadequate to explain causation

9. The defendant had become frightened earlier in the evening when she heard noises outside. Fearing that Serna and his friend were too drunk to defend her, she got the gun to protect herself and forgot to put it away. *Id.* at 234, 620 P.2d at 888.

10. The state argued that a request for an instruction on the law of self-defense was inconsistent with the defendant's assertion that the gun accidentally discharged. The court noted that, while the claims were inconsistent, evidence had been introduced which suggested the gun was intentionally fired. The court held that because evidence was introduced which supported the claim, the instruction was proper, even though the evidence was offered by the state. 95 N.M. at 236, 620 P.2d at 890.

11. 94 N.M. 169, 608 P.2d 145 (1980).

12. The trial court gave both U.J.I. Crim. 2.04 and 2.50. N.M. U.J.I. Crim. 2.04 provides:

> For you to find the defendant guilty of felony murder, which is first degree murder [as charged in Count . . .], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1) The defendant [committed] [or] [attempted to commit] the crime of [name of felony];
>
> 2) During [the commission of] [or] [the attempt to commit] the crime of [name of felony], the defendant caused the death of [name of victim]. . . .

N.M. U.J.I. 2.50 provides:

> For you to find the defendant guilty of [name of crime], the state must prove to your satisfaction beyond a reasonable doubt that the act of the defendant caused the death of [name of victim].
>
> The cause of death is an act which, in a natural and continuous chain of events, produces the death and without which the death would not have occurred. [There may be more than one cause of death. If the acts of two or more persons contribute to cause death, each such act is a cause of death.]

13. 90 N.M. 439, 564 P.2d 1321 (1977).

when given alone. In *Wall*, Uniform Jury Instruction 2.04 was given, but it was augmented by Uniform Jury Instruction 2.50. The court held that the use of the two together met the *Harrison* requirement.[14]

The second challenge in *Wall* stemmed from the use of a jury instruction to answer a question presented by the jury. Throughout the trial, the prosecutor had used the theory that Wall personally committed the felony. During deliberations, the jury asked whether "a witness to, or a party to," a robbery is equally guilty of the crime of robbery as is the person who committed the robbery.[15] Over Wall's objection, the trial judge responded by providing the jury with Uniform Jury Instruction—Criminal 28.32, which states that an accessory to a felony can be found guilty of felony murder, even though he did not actually commit the felony. Wall argued that the trial court's use of the jury instruction was error because it introduced a new theory of liability, and he could not be found guilty on a theory of murder which was not part of the prosecutor's case.

Relying on *State v. Blea,*[16] Wall argued that additional jury instructions should be limited to offenses within the indictment, because the indictment is the only means by which the defendant can learn of the charges against which he must defend. The court agreed, but concluded that the additional instruction did not go beyond the indictment because the legislature and the courts have abolished the distinction between a principal and an accessory.[17] The court stated that putting Wall on notice that he could be convicted as a principal put him on notice that he could be convicted as an accessory.[18] The court held that the trial court did not abuse its discretion by giving the additional instruction.

3) Voluntary Manslaughter

Eight cases decided during the survey period involved murder convictions in which the defendant claimed he was improperly denied an instruction on voluntary manslaughter. In three cases the appellate courts decided that the evidence required a manslaughter in-

14. 94 N.M. at 172, 608 P.2d at 148.

15. *Id.* at 171, 608 P.2d at 147.

16. 84 N.M. 595, 506 P.2d 339 (Ct. App. 1973). *Blea* held that the purpose of an indictment is to give the accused notice of the charges against him so that he may prepare a defense. A defendant therefore, could not be tried for an offense not in the indictment, because he would not be able to prepare an adequate defense. Preventing the defendant from preparing a defense would deprive him of his right to a fair trial. *Id.* at 598, 506 P.2d at 342.

17. 94 N.M. at 171, 608 P.2d at 147.

18. *Id.* at 171-72, 608 P.2d at 147-48.

struction.[19] In the other five cases the convictions were affirmed.[20]

New Mexico law defines manslaughter generally as "the unlawful killing of a human without malice."[21] Voluntary manslaughter is manslaughter "committed upon a sudden quarrel or in the heat of passion."[22] Heat of passion has been construed to include provocation and emotions other than those which are usually associated with "passion." The New Mexico courts have included fear within the scope of "heat and passion."

In *State v. Garcia*[23] the court found no support for the defendant's assertion that the evidence indicated heat of passion, and thus required a voluntary manslaughter instruction. During the course of an altercation, Garcia pulled out a gun and the victim began running away. Garcia pointed the gun in the air, then at the victim. Garcia crouched, hesitated, and fired. Garcia admitted that he had accom-

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19. Two of those cases were State v. Maestas, 95 N.M. 335, 622 P.2d 240 (1981) and State v. Benavidez, 94 N.M. 706, 616 P.2d 419 (1980). The last of the three, State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980), is discussed in detail in the section on self-defense instructions, *supra* at text accompanying notes 8 through 10. The defendant claimed that the facts which would support an instruction on self-defense would also warrant an instruction on voluntary manslaughter. The court of appeals agreed and the conviction was reversed. It would seem, both as a practical and a theoretical matter, that whenever a defendant is entitled to a self-defense instruction, an instruction on voluntary manslaughter is also warranted. If there are facts which may have caused the defendant to believe his life or well-being were in danger, this circumstance would be adequate to sustain a voluntary manslaughter instruction.

20. In one of those five cases, State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981), the court held that an instruction on voluntary manslaughter was not warranted. The facts of the case are discussed in the text accompanying notes 1 through 7 *supra*.

21. N.M. Stat. Ann. §30-2-3 (1978):

> Manslaughter is the unlawful killing of a human being without malice.
>
> A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion. Whoever commits voluntary manslaughter is guilty of a third degree felony.
>
> B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.
>
> Whoever commits involuntary manslaughter is guilty of a fourth degree felony.

This definition of manslaughter is made difficult to understand in light of recent changes in the law of homicide. The New Mexico legislature redefined murder in 1980 to exclude the term "malice." *Compare* N.M. Stat. Ann. §30-2-1 (1978) (murder defined in terms of malice) *with* N.M. Stat. Ann. §30-2-1 (Cum. Supp. 1981) (murder defined without reference to malice). In 1980, the legislature also repealed N.M. Stat. Ann. §30-2-2, which defined malice.

The change in the law of murder makes the current statutory definition of manslaughter obsolete, because it uses a term which is foreign to the law of homicide in New Mexico. Only by reference to the earlier statute can meaning be given to the still-effective definition of manslaughter.

22. N.M. Stat. Ann. §30-2-3(A) (1978).

23. 95 N.M. 260, 620 P.2d 1285 (1980).

plished his purpose of warning or scaring the victim before he fired the fatal shot.

The court stated that the evidence, taken in the light most favorable to the defendant, showed that he was the aggressor in an altercation which led to the fatal shooting.[24] The court held that there was no evidence of provocation which would affect the defendant's state of mind. The court did not directly address the issue of lack of intent to actually shoot the decedent. Instead, the court translated the question to one of whether the defendant had sufficient time to develop deliberate intent. The court noted that "deliberate intent," as required by the murder statute, does not require a long thought process, but may be arrived at in a "short" period of time.[25]

Evidence will be found sufficient to support a voluntary manslaughter conviction if the evidence, from whatever source and taken in the light most favorable to the defendant, supports a finding of sufficient provocation to the defendant.[26] This is true even where the state is the source of the evidence of provocation. Thus, in *State v. Maestas*[27] the New Mexico Supreme Court held that a voluntary manslaughter instruction was improperly refused, even though the only evidence before the court was the evidence of the state's witnesses.[28] The state's evidence showed that an argument took place between the defendant and the victim outside a bar. Later, the defendant was sitting in his car. The victim, who was intoxicated, left the bar and approached the car. The victim either staggered or lunged toward the car and leaned in the car window. The defendant then shot the victim. After the shooting, a knife was found near the victim's body. It was identified as similar to a knife owned by the victim. The defendant was convicted of first degree murder and second degree murder with use of a firearm, and appealed. The supreme court concluded that the evidence presented at trial was sufficient to warrant a voluntary manslaughter instruction.[29] The court did not state its reason for that conclusion. Apparently, the court considered that the evidence supported the inferences that the defendant believed that the victim intended to attack him, feared the attack, and killed as a result of the fear provoked by the victim's conduct.

In cases involving provocation as a result of the defendant's fear, the court may look to the prior relationships between the victim and

24. *Id.* at 261, 620 P.2d at 1286.
25. *Id.* at 262, 620 P.2d at 1287.
26. *State v. Maestas,* 95 N.M. 335, 622 P.2d 240 (1981).
27. *Id.*
28. The defense did not produce or present any evidence at all. *Id.* at 336, 622 P.2d at 241.
29. *Id.* at 337, 622 P.2d at 242.

the defendant to determine whether the defendant was actually put in fear of his life or safety. In *State v. Benavidez,*[30] evidence was presented that the victim had once stolen a television set belonging to the defendant and had assaulted the defendant's son in the past. Additional evidence showed that the victim had threatened to kill both the defendant and his son on the afternoon of the shooting and that the victim, while highly intoxicated, had come to the defendant's home on the day of the shooting and had argued with the defendant. During the course of the argument, the victim made a gesture which could have been an attempt to strike or move for a weapon.[31] The supreme court held that the evidence met the standard of provocation sufficient to sustain a conviction of voluntary manslaughter.[32]

The court noted that the relationship between the parties before the shooting was relevant to whether fear was a motivating factor. The court did not say expressly why these prior events were relevant to its finding that fear was a motivating factor. The victim's assault on the defendant's son and the threat to the defendant and his son were apparently factors which helped sustain a finding that the defendant had a reasonable belief that the victim was a present danger to the defendant's safety.

In *State v. Farris,*[33] however, the court did not look to the past relationship of the parties in deciding whether, under the facts of the case, the defendant had been sufficiently provoked. In *Farris,* the victim was killed by her husband of twenty years. Prior to the kill-

30. 94 N.M. 706, 616 P.2d 419 (1980).

31. "The gesture was variously characterized as a raised fist, a swing, a punch, an attempt to strike and a move for a weapon." *Id.* at 707, 616 P.2d at 420. New Mexico case law is not clear as to whether a gesture indicating an intent merely to strike would support a finding of provocation which would justify a killing. The provocation would have to be measured in the context of all the circumstances. The *Benavidez* court did not reach that question, however, because the evidence showed that the gesture could have been interpreted as a move for a weapon.

32. The state presented an argument that the failure to instruct on voluntary manslaughter, if error, was harmless. The state argued that the jury was instructed first to determine whether the defendant was guilty of first-degree murder, and only if they decided he was not, were they to proceed to the lesser included offenses. *See* N.M. U.J.I. Crim. 2.40. The state argued that because the jury found the defendant guilty of first degree murder, the jury would never have discussed voluntary manslaughter.

The court rejected the state's argument, noting that a defendant is entitled to have his theory of the case submitted to the jury. The court agreed that the jury is supposed to address the murder charge first, but found that the jury's deliberations, nevertheless, could be affected by knowing what choices they have. Assuming there was evidence of provocation, the jury was not given the choice of finding that the defendant committed voluntary manslaughter. "To argue that a finding by the jury that the defendant acted with deliberate intention precludes any possibility that they could have found sufficient provocation begs the question. The jury was simply not given the choice." 94 N.M. at 708, 616 P.2d at 421.

33. 95 N.M. 96, 619 P.2d 541 (1980).

ing, the couple had been separated several times because the wife had allegedly been seeing other men. During the final separation, the victim's current boyfriend and his brother had threatened the defendant twice. The defendant bought a gun to protect himself.

On the morning of the shooting, the defendant met with his wife. A quarrel developed and the victim "poked [the defendant] in the chest and told him to leave her boyfriend alone, that the boyfriend could come into the house anytime he wanted."[34] What then happened is unclear. The defendant testified merely that he "lost his head" and shot the victim.[35]

The court did not look to the relationship during the twenty-year marriage, or to the threats by the boyfriend and the brother. The court cited *Benavidez,* but held that the circumstances *most* relevant to provocation are those within the *res gestae* of the killing.[36] It is not clear whether *Farris* is a retreat from the *Benavidez* approach, which looked to the prior relations between the parties, or whether the court merely decided that the prior relations between the parties in *Farris* did not add up to sufficient provocation to warrant a voluntary manslaughter instruction.

The cases can best be reconciled by the making of a distinction between the kind of passion involved. In *Benavidez,* the prior relationships included assault and death threats, both of which can produce fear. In *Farris* the past relationships were not necessarily of the type which would produce fear. Rather, they were a derivative of "lost love."

This distinction is supported by other cases involving provocation of emotions other than fear. In *State v. Lujan,*[37] the defendant killed his ex-wife and her male friend. On the evening of the killing, the defendant was "taunted" by his ex-wife.[38] One hour later, the defendant returned to the place where he had last seen his ex-wife, and shot and killed her. Almost an hour after the first shooting, the defendant went to the home of his ex-wife's friend and shot him.

The defendant claimed that a build-up of stress due to his wife's infidelity, a divorce, and worries about his children contributed to his emotional outburst on the evening of the killing.[39] The defendant requested an instruction of voluntary manslaughter, but the request

34. *Id.*
35. *Id.*
36. *Id.* at 97, 619 P.2d at 542.
37. 94 N.M. 232, 608 P.2d 1114 (1980).
38. *Id.* at 233, 608 P.2d at 1115.
39. *Id.* The trial court excluded evidence which tended to show a build-up of stress.

was denied. The jury convicted the defendant of first degree murder of both the ex-wife and the friend.[40]

On appeal, the court implicitly rejected the defendant's contention that a gradual build-up of emotional distress could justify or mitigate a killing. The court noted that the only evidence of actual provocation before the killing was the victim's "taunting" of the defendant. Noting that the court has before held that words alone cannot be sufficient provocation to reduce a murder charge to voluntary manslaughter,[41] the court upheld the trial court's refusal to grant the instruction.

Another Survey case, *State v. Robinson,*[42] addressed a similar situation. The defendant was convicted of the murders of Tim Walker and Christine Hitchcock. The evidence showed that the defendant and Christine had dated on and off for about a year. The defendant did not know Walker, nor did he know that Christine and Walker had started dating shortly before the killings.[43]

A high-speed chase took place between Walker's car and a car similar to that of the defendant. The two cars stopped in front of Walker's home. Walker went to the driver's side of the other car and leaned down as though to talk to someone. A witness saw Walker fall to the ground. Medical testimony revealed that Walker was dealt a non-fatal shot in the chest. The defendant turned his car around, came back, and stopped. The defendant got out of the car and shot Walker in the head at close range.[44] The opinion does not discuss the details of Christine's death.[45]

The defendant introduced no evidence of provocation. He argued instead that he did not commit the homicides. The only evidence of provocation was that the defendant and Christine had had a boyfriend-girlfriend relationship. The court stated that such evidence may have supported "an inference of a smoldering desire within the defendant to avenge Christine dating another male by doing away

40. *Id.* at 232, 608 P.2d at 1114.

41. *See* State v. Trujillo, 27 N.M. 594, 203 P. 846 (1921).

42. 94 N.M. 693, 616 P.2d 406 (1980).

43. *Id.* at 700, 616 P.2d at 413.

44. *Id.* at 696, 616 P.2d at 409.

45. It does discuss, in the context of an evidentiary question, an event on the day of her death. The defendant fired a rifle into the air when Christine refused to get into his car with him. The question before the court was whether a friend of Christine would be allowed to retell the story of the incident as she heard it from Christine. The court held that it was hearsay, but it was admissible as an "excited utterance" exception to the hearsay rule. *Id.* at 697, 616 P.2d at 410. For an in-depth discussion of this issue in the *Robinson* case, *see* Norwood, *Evidence,* 12 N.M. L. Rev. 379 (1982).

with both of them, but it would not support an inference of 'a sudden quarrel.' "[46] Therefore, the court rejected the argument that the facts could, as a matter of law, give rise to such provocation which is "adequate and proper to negate the presumption of malice."[47] The court held that the instruction on voluntary manslaughter was properly refused because there was insufficient evidence of provocation to warrant such an instruction.

4) Diminished Responsibility Defense and Insanity

The fourth Survey case dealing with jury instructions was *State v. Lujan.*[48] The defendant was convicted of the murder of his former wife and an acquaintance. The defendant appealed, alleging that the trial court erred in failing to give two requested instructions. The trial court refused to instruct the jury on a diminished responsibility defense, and refused to instruct on the consequences of a verdict of not guilty by reason of insanity. The supreme court held that the instructions were properly refused.[49]

In *Lujan,* the defendant was taunted by his ex-wife. An hour later he returned to the place he had last seen her, and shot and killed her. Almost an hour later, the defendant appeared at the home of a longtime acquaintance, and shot and killed him. Lujan later surrendered to the police. Testimony was introduced at trial that Lujan was suffering from frontal cortical atrophy and therefore had difficulty in controlling his emotions. Conflicting evidence was admitted on whether Lujan could control himself or his emotions on the night of the crime.[50] The defense theory was that the defendant's mental condition, coupled with a buildup of stress over a period of time,[51] resulted in his inability to stop himself from killing.[52]

Lujan claimed that the trial court erred in not instructing the jury on diminished capacity. The Uniform Jury Instruction on insanity includes an optional sentence which states: "[e]ven if you find beyond a reasonable doubt that the defendant was sane, you must still determine if he had the ability to form the deliberate intention to take away the life of another."[53] The use notes to the instruction

46. 94 N.M. at 701, 616 P.2d at 414.
47. *Id.*
48. 94 N.M. 232, 608 P.2d 1114 (1980).
49. *Id.* at 234, 608 P.2d at 1116.
50. *Id.* at 233, 608 P.2d at 1115.
51. The buildup of stress was said to be caused by the discovery of his wife's infidelity, a divorce, and worries about his children. *Id.*
52. *Id.*
53. N.M. U.J.I. Crim. 41.00:

Evidence has been presented concerning the defendant's sanity. In determin-

provide that the optional sentence should be used when the defendant is charged with willful and deliberate murder and the evidence will support a finding of inability to form intent.[54] The court in *Lujan* relied on a distinction between being able to control one's emotions, and being able to formulate a deliberate plan.[55] The court stated that the record contained evidence that the defendant was able to form a deliberate intent,[56] and held that the instruction on diminished capacity was properly refused. The court further noted that there was no evidence that Lujan was not able to form a deliberate intent.

The court in *Lujan* also held that the trial court's refusal to instruct the jury on the consequences of a verdict of not guilty by reason of insanity was proper.[57] Relying on *State v. Chambers,*[58] the court noted that the consequences of a verdict are not a relevant consideration for the jury, and that the jury need only "patiently and dispassionately weigh the evidence and arrive at a verdict in accordance with the law as given to them by the court."[59]

B. Other Issues

Other homicide cases decided during the survey year dealt with a variety of issues. Those issues included double jeopardy and venue.

1. Double Jeopardy

In *State v. Martinez,*[60] the court held that the imposition by the trial court of consecutive sentences for felony murder, armed rob-

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ing whether or not the defendant was sane, you may consider all the evidence including

[. . .]

A person is insane if, as a result of a mental disease, he

[. . .]

If you determine that the defendant committed the act charged but you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity. [*Even if you find beyond a reasonable doubt that the defendant was sane, you must still determine if he had the ability to form deliberate intention to take away the life of another*]. . . .

(emphasis added).

54. Use note 3 to N.M. U.J.I. Crim. 41.00.

55. 94 N.M. at 234, 608 P.2d at 1116.

56. *Id.* at 233, 608 P.2d at 1115.

57. *Id.* at 234, 608 P.2d at 1116.

58. 84 N.M. 309, 502 P.2d 999 (1972). In *Chambers* the defendant was charged with murdering his wife. He defended on the ground of insanity and was refused a requested instruction which would have apprised the jury as to the result of a "not guilty by reason of insanity" verdict. The supreme court held that the instruction was properly refused because it would have put an irrelevant issue before the jury. The court also noted that the refusal was in accord with those jurisdictions which express a majority view on the issue.

59. 94 N.M. 234, 608 P.2d at 1116.

60. 95 N.M. 421, 622 P.2d 1041 (1981).

bery, and larceny over $2,500 did not violate the constitutional prohibition against double jeopardy.[61] At issue in *Martinez* was whether the offenses were separate and distinct, or whether they merged into the same offense. The court held them to be separate offenses, relying on *State v. Stephens,*[62] an earlier New Mexico case. *State v. Stephens* stands for the proposition that armed robbery and felony murder need not be merged, because they are different offenses. Martinez acknowledged that under the *Stephens* rule the offenses would not be merged, but urged the court to reconsider the *Stephens* rule in light of *Whalen v. United States.*[63] In *Whalen,* the Supreme Court held that charges of rape and felony murder merged. Martinez argued that the case was analogous to his case, and that *Stephens* should be overruled.[64] The New Mexico Supreme Court declined to revise the ruling in *Stephens.* The court reasoned that *Whalen* did not reach the double jeopardy issue. Instead, it dealt with the interpretation of federal statutory law. The court stated that *Whalen* indicates that federal courts cannot impose consecutive sentences, unless specifically authorized to do so by Congress.[65] Because there was no statutory authorization for the imposition of consecutive sentences, the federal court wrongly imposed the sentence, and the Supreme Court reversed.[66] The *Martinez* court noted that, in New Mexico, both statute and case law have defined felony murder and armed robbery as separate offenses, even though they may arise out of the same transaction. Imposing consecutive sentences on the defendant, therefore, was not error.[67]

2. Venue

Two homicide cases during the Survey year dealt with venue. In *State v. Martinez*[68] and in *State v. Robinson*[69] the supreme court affirmed the trial court's denial of motions for a change of venue.[70]

61. *Id.* at 425, 622 P.2d at 1045.
62. 93 N.M. 458, 601 P.2d 428 (1979).
63. 445 U.S. 684 (1980).
64. *See* 95 N.M. at 424, 622 P.2d at 1044.
65. *See* 445 U.S. at 689.
66. *Id.* at 690.
67. 95 N.M. at 425, 622 P.2d at 1045.
68. 95 N.M. 445, 623 P.2d 565 (1981).
69. 94 N.M. 693, 616 P.2d 406 (1980).
70. At least one other case dealing with venue was decided during the Survey year: Marsh v. State, 95 N.M. 224, 620 P.2d 878 (1980). The defendants in *Marsh* were indicted by the Valencia County grand jury for the possession of over one hundred pounds of marijuana with intent to distribute and with conspiracy to commit a felony. After a hearing, the trial judge granted the defendants' motion to dismiss on the basis that jurisdiction and venue were not proper in Valencia County.

The State alleged that defendant Marsh had flown over Valencia County in a small plane

The basic scenario was the same in both cases. The defendants alleged that they could not receive a fair trial in the local courts, and presented affidavits and witnesses to that effect.

In *State v. Robinson,* the trial court twice postponed its decision of the defendant's motion for a change of venue. The trial court conducted the initial screening process of 123 venire persons by dividing the panel into groups of twelve. The court excluded, *sua sponte,* any prospective juror who had formed an opinion as to the innocence or guilt of the defendant. These exclusions were made without any further inquiry as to the basis or strength of that opinion.[71]

On appeal, the defendant challenged the trial court's denial of his motion for change of venue. The defendant did not claim that the trial court improperly failed to exclude those people who did manifest a prejudice. The defendant claimed that the responses of jurors on voir dire were not reliable and that their assurances were insufficient to protect the defendant's right to a fair trial.[72] Implicit in the defendant's argument is a claim that the trial court improperly considered voir dire responses in ruling on the change of venue motion.

The court of appeals upheld the trial court's denial of the motion for change of venue, citing *State v. Sierra.*[73] *Sierra* held that where a trial court did not make a final ruling on a motion for change of venue until after voir dire, the voir dire could be used as evidence by the trial court in reaching its decision as to the change of venue motion. The court in *Robinson* noted that such a decision will not be disturbed by the appellate court unless the defendant can demonstrate an abuse of discretion. The court implied that because the

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burdened with 479 pounds of marijuana. Marsh met with defendant Bass in McKinley County and unloaded the marijuana there. The plane never set down in Valencia County. On appeal the supreme court held that the Valencia district court had both jurisdiction and venue. The supreme court, however, issued a writ of superintending control mandating that the case be transferred to McKinley County.

The court held that the state is vested with jurisdiction for offenses committed in the airspace over New Mexico unless the federal government has preempted such regulation. The court found that there was no preemption in this case, and the courts of New Mexico therefore had jurisdiction to hear the case.

On the issue of venue, the court noted that the sixth amendment to the United States Constitution provides that trial shall be had "by an impartial jury of the State and district wherein the crime shall have been committed." The court noted that venue would properly lie only if the offense of possession and conspiracy was committed in Valencia. The court held that the offense of possession was a continuing offense, and that it was committed in any county through which the defendant traveled. The court also held that the conspiracy was committed in Valencia, because the defendant committed an "overt act" within Valencia County merely by passing through the county's airspace. 95 N.M. at 226, 620 P.2d at 880.

71. 94 N.M. at 695, 616 P.2d at 408.

72. *Id.*

73. 90 N.M. 680, 568 P.2d 206 (Ct. App. 1977), *cert. denied,* 91 N.M. 4, 569 P.2d 414 (1977).

defendant did not argue that the trial court abused its discretion, the claim was rejected.

State v. Martinez[74] involved N.M. Stat. Ann. §§21-5-3 to -4 (1958 Comp.), the predecessor of the current statute.[75] The issue was whether the statute made it mandatory for the court to grant a

74. 95 N.M. 445, 623 P.2d 565 (1981). *Martinez* also dealt with a second question. The second issue was whether the admission into evidence of a video-taped deposition of one of the state's witnesses constituted error. 95 N.M. at 448-49, 623 P.2d at 568-69. The defendant alleged that the use of the video tape denied him his right to confront witnesses against him and that the state failed to meet the requirements of the Rules of Criminal Procedure which require it to obtain an order allowing a deposition to be taken by other than stenographic means. *See* N.M. R. Crim. P. 29(e)(3). The court held the contentions to be without merit.

The court first addressed the constitutional claim. Acknowledging that the constitution provides that an accused has the right to face his accuser, the court noted that the right should be interpreted in light of the law as it existed at the time it was adopted. The court relied on Mattox v. United States, 156 U.S. 237 (1895) to show that there are exceptions to the general rule that one must be available for cross-examination at trial:

> [T]o prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

156 U.S. at 242-43. The court said that *Mattox* stands for the proposition that the general rule of allowing for cross-examination at trial must sometimes give way to considerations of public policy and the necessities of the case. Quoting Douglas v. Alabama, 380 U.S. 415 (1965), the court noted that "cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." 95 N.M. at 448, 623 P.2d at 568. The *Martinez* court concluded that there were sufficient reasons of "public policy" to justify the use of the taped deposition in the case: the deponent had died, and he was the only eyewitness to the crime. 95 N.M. at 448, 623 P.2d at 568. The court further noted that there was sufficient opportunity for cross-examination at the time of the deposition so that its introduction did not run counter to the confrontation clause. *Id.* at 449, 623 P.2d at 569. Though the court did not mention it, the use of a video-taped deposition might be even more likely to insure that defendant's rights than would a stenographic deposition, because the jury has the opportunity to observe the witness's demeanor.

The defendant's second argument as to the videotaped deposition was that it was taken without obtaining an order allowing the deposition to be taken by other than stenographic means. The court considered that the sole question was whether the non-compliance with a technical rule prejudiced the defendant. *Id.* at 449, 623 P.2d at 569. The defendant relied on McGuinnes v. State, 92 N.M. 441, 589 P.2d 1032 (1979), State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974) and State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974), for the proposition that the rule dealing with use of depositions must be strictly construed. The court agreed with the defendant's interpretation of the cases cited, but distinguished them by noting that in none of those cases was there a sufficient showing that the deponents were outside or absent from the jurisdiction, and that they could not be obtained by legal process. 95 N.M. at 449, 623 P.2d at 569. In *Martinez,* the deponent had died several months before the trial.

The court held that the provisions of Rule 29 are to insure that the use of inordinate means of recording depositions will provide an accurate and trustworthy record. The court held that the defendant was not prejudiced, because there was no showing that the record was not accurate and trustworthy. *Id.*

75. 95 N.M. at 447, 623 P.2d at 567. The murder took place in 1973. Proceedings were begun in 1977, before the 1978 statutory revisions.

change of venue motion, or whether the trial court was vested with discretion. Without analysis, the court decided that the particular statute involved was §21-5-4, which vested the trial court with discretion. The court held that because there was no demonstration that the denial was an abuse of the court's discretion, the denial of the motion would not be reversed.[76]

II. THEFT OFFENSES

The appellate courts of New Mexico and the Tenth Circuit considered a number of cases related to theft during the Survey year. The courts interpreted several statutes, but primarily dealt with jury instructions.

A. Larceny

In *State v. Lopez (Lopez I)*[77] and *Lopez v. State (Lopez II),*[78] both New Mexico appellate courts considered the trial court's failure to include the element of "consent" in an instruction on larceny.[79] The defendant was convicted of larceny and appealed. The defendant contended that taking another's property "without consent" is an essential element of larceny. Lack of consent was not included in the instructions given to the jury.[80] The defendant argued that this omission was reversible error.

In *Lopez I,* the New Mexico Court of Appeals concluded that the instruction was erroneous for two reasons. First, the instruction did not include "without consent of owner." Second, it did not state that the taking was "felonious."[81] The court of appeals, however, affirmed the trial court's giving the instruction, subject to review by the New Mexico Supreme Court.[82]

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76. 95 N.M. at 448, 623 P.2d at 568.

77. 94 N.M. 349, 610 P.2d 753 (Ct. App. 1980) *(Lopez I).*

78. 94 N.M. 341, 610 P.2d 745 (1980) *(Lopez II).*

79. The statute reads: "Larceny consists of the stealing of anything of value which belongs to another." N.M. Stat. Ann. §30-16-1 (Cum. Supp. 1981).

80. The instruction given was N.M. U.J.I. Crim. 16.00:

> For you to find the defendant guilty of larceny [as charged in Count . . .], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant took and carried away [describe property], belonging to another, [which had a market value over $ . . .];
>
> 2. At the time he took this property, the defendant intended to permanently deprive the owner of it;
>
> 3. This happened in New Mexico on or about the . . . day of . . . 19 . . .

81. 94 N.M. at 352, 610 P.2d at 756.

82. This case was apparently certified to the supreme court by the court of appeals under N.M. Stat. Ann. §34-5-14(C) (1978) and Rules of Appellate Procedure for Criminal Cases, Rule 406.

In *Lopez II,* the New Mexico Supreme Court also affirmed the trial court, but for different reasons. The court stated that the committee commentary after Uniform Jury Instruction—Criminal 16.00 (the instruction given at trial) equated the intent to deprive the owner of property with a taking without consent. The court noted that Instruction 16.00 was given in conjunction with Uniform Jury Instruction—Criminal 1.50,[83] which is the general criminal intent instruction. The court quoted from the committee commentary from Instruction 16.00: "The committee believed that the element of trespassory taking was covered by this instruction together with the instruction on general criminal intent, Instruction 1.50."[84] The court then set out Instruction 1.50, and noted that that instruction is to be given for every crime except first and second degree murder. Without further comment, the court held that "U.J.I. Crim. 16.00 and U.J.I. Crim. 1.50, given together, correctly state the law applicable to larceny."[85]

This holding does not take into account the different statutory definitions for theft in New Mexico. Some of the New Mexico theft statutes require a specific intent;[86] in others, no specific intent is required.[87] It is not clear from the *Lopez II* opinion whether Uniform

83. N.M. U.J.I. Crim. 1.50:

> In addition to the other elements of [identify crime or crimes] the state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime, even though he may not know that his act is unlawful. Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him.]

For an in-depth analysis of instruction 1.50, *see Romero, New Mexico Mens Rea Doctrines and the Uniform Criminal Jury Instructions,* 8 N.M. L. Rev. 127 (1978).

84. 94 N.M. at 342, 610 P.2d at 746 (emphasis by the court is deleted).

85. *Id.*

86. *See, e.g.,* N.M. Stat. Ann. § 30-16-3 (1978): "Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure . . . with the *intent to commit any felony or theft* therein." (emphasis added), and its corresponding instruction, N.M. U.J.I. Crim. 16.20, which provides: "[T]he state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime: 1. The defendant entered . . . without authorization or permission; 2. When the defendant entered . . . he *intended to commit" [a felony or theft therein]*" . . . (emphasis added). The committee commentary to the instruction does not contain a reference to U.J.I. 1.50.

87. *See, e.g.,* the robbery statute, N.M. Stat. Ann. § 30-16-2 (1978): Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use of or threatened use of force or violence" and its corresponding instruction, N.M. U.J.I. Crim. 16.10:

> 1) The defendant took and carried away . . . from . . . , or from his immediate control *intending to permanently deprive* . . . of the property; . . .
>
> 2) The defendant took the . . . by [force or violence] [or] [threatened force or violence]; . . . (emphasis added).

Unlike U.J.I. 16.00, this instruction's commentary does not include a reference to U.J.I. 1.50.

Jury Instruction—Criminal 1.50, when given in conjunction with any of the theft instructions besides larceny, will sufficiently state the law applicable to those crimes.

B. Robbery

In *United States v. Lewis,*[88] the Tenth Circuit Court of Appeals considered the intent requirement of the federal bank robbery statute.[89] In *Lewis,* the defendant was an alcoholic who had previously been in federal prison. The evidence indicated that Lewis was unable to cope with life outside prison. He decided to rob a bank so that he would be returned to prison. Lewis discussed his plans with a local detective, an FBI agent, and various others. Lewis carried out his plans, and was apprehended in the foyer of the bank. At trial, Lewis tendered an instruction which, if given, would have required that Lewis have the specific intent to steal.[90] The trial court refused the instruction. Instead, the court instructed the jury that upen entering the bank, Lewis must have had "the specific intent to commit in the bank a felony affecting the bank. . . ."[91] Lewis was convicted of a violation of 18 U.S.C. §2113(a), the federal bank robbery statute, and was sentenced to ten years in prison.

Lewis appealed, attacking the intent instruction given at trial. Lewis argued that his intent to commit the robbery in order to be caught and put back in prison was not an intent to permanently separate the bank from its money. Therefore, he did not have the specific intent required by the Bank Robbery Act, and the instruction given at trial was wrong. The Tenth Circuit Court of Appeals disagreed.[92]

Cf. N.M. Stat. Ann. §30-16-14, which has no instruction and no requirement of intent.

Larceny and robbery are generally considered to be specific intent crimes because of the statutory language. An argument can be made that all theft offenses are specific intent crimes, because they all include intent to permanently deprive.

88. 628 F.2d 1276 (10th Cir. 1980).

89. 18 U.S.C. §2113(a) (1976) reads, in pertinent part:

> Whoever *enters or attempts to enter any bank,* credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union or as a savings and loan association, *with intent to commit* in such bank . . . *any felony* affecting such bank, credit union or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(emphasis added).

90. This is a curious development, considering that Lewis's plan was to rob a bank.

91. 628 F.2d at 1278.

92. The court distinguished the first paragraph of §2113(a), which does not require felonious intent:

> (a) Whoever, *by force and violence,* or by *intimidation,* takes or attempts to take, from the person or presence of another any property or money or any other things of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .

18 U.S.C. §2113(a) (1976). The court noted that the offense is so "unamibguously dangerous

The court noted that the Bank Robbery Act merely required specific intent to commit a *felony within the bank.* Defendant's motives for forming that intent were irrelevant. Therefore, the instruction was appropriate as given at trial.

Lewis also argued that he was entitled to a necessity defense.[93] The court refused to give an instruction on the necessity defense. The appellate court found this proper, pointing out that the defense could only be available in case of "absolute and uncontrollable necessity; . . . established beyond a reasonable doubt."[94] The court stated that "necessity" does not arise from a choice of several courses of action. The court noted that there were several options other than bank robbery available to Lewis, and held that the necessity defense was, therefore, not available to him.

C. Burglary

The two burglary cases decided during the Survey year also involved jury instructions. In *State v. Ruiz,*[95] the defendant requested an instruction on criminal trespass as a lesser offense necessarily included within burglary. The instruction apparently identified trespass as either entering or remaining on the property of the victim. The trial court refused the instruction because there was no evidence of malicious intent, which is required for criminal trespass. The defendant appealed, challenging the trial court's refusal of the instruction. The court of appeals noted that the trial court did not err in refusing the requested instruction "because it was not a correct statement of the law."[96] The court considered the words "remaining on" in the instruction to be wrong because a person can commit a burglary without remaining on the property.[97] Because the case was

to others that the requisite mental intent is necessarily implicit in that description." 628 F.2d at 1279, quoting United States v. De Leo, 422 F.2d 487, 491 (1st Cir. 1970), *cert. denied,* 397 U.S. 1037 (1970). In *De Leo,* the court specifically noted that paragraph 2 of §2113(a) and paragraph (b) of the statute required felonious intent, but that the other paragraphs of §2113 did not. The *De Leo* court stated that it was immaterial, because of the danger, to require felonious intent to steal under §2113(a): "the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." 422 F.2d at 491.

93. 628 F.2d at 1279.

94. *Id.* The reason for this strict rule is the possibility of fraud should a looser rule be applied. It would be difficult for the "beyond a reasonable doubt" standard to be met, however, if the defendant cannot put on psychological witnesses. In *Lewis,* the court refused to allow the defendant's psychologist witness to answer a hypothetical question concerning the defendant's belief that the robbery was the only way Lewis could prevent inevitable harm to himself and others. The opinion gives no reason why the psychologist was not permitted to answer the question.

95. 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

96. *Id.* at 778, 617 P.2d at 167.

97. It is curious that when the criminal trespass statute reads "entering *or* remaining," *see* note 77 *infra,* that an instruction which contains that language is not a correct statement of the law.

to be remanded for a new trial on other grounds, the court of appeals then set out to discuss the elements of criminal trespass as a lesser offense necessarily included within burglary.

The court stated the general rule that the question of whether a lesser offense is included in the greater is answered by deciding whether the greater offense can be committed without also committing the lesser. The court then compared the burglary statute[98] and the criminal trespass statute[99] to see whether criminal trespass, based only on entry, is a lesser included offense of burglary of a dwelling house. The court concluded that it was. The analysis fell into three parts.

1) Unauthorized/Unlawful

The court noted that burglary of a dwelling house requires "unauthorized entry." The criminal trespass statute requires "unlawful entry with knowledge that consent is denied or withdrawn."[100] The court reasoned that an unlawful entry is an entry not authorized by law,[101] and concluded that the "unauthorized entry" required for burglary includes the knowledge that there is no consent to enter, which is required for criminal trespass. Therefore, as far as criminal trespass as a lesser included offense of burglary is concerned, "unauthorized entry" is the same as "unlawful entry."

2) Dwelling House/Land

The burglary statute forbids entry of a dwelling, while the criminal trespass statute forbids entry of the lands of another.[102] The *Ruiz* court rejected the state's argument that burglary of a dwelling could be committed without entering the lands of another. The court reasoned that "lands" in the criminal trespass statute included buildings and fixtures, and decided that when one enters another's dwelling house, he has also entered another's lands.[103]

3) Intent

The burglary statute requires an entry with intent to commit a fel-

98. N.M. Stat. Ann. §30-16-3 (1978): "Burglary consists of the unauthorized entry of any . . . dwelling or other structure, moveable or immoveable, with the intent to commit any felony or theft therein."

99. N.M. Stat. Ann. §30-14-1(A) (Cum. Supp. 1980): "Criminal trespass consists of unlawfully, and with malicious intent, entering or remaining on the lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof."

100. *Id.*

101. 94 N.M. at 779, 617 P.2d at 168.

102. *See* notes 98 and 99 *supra.*

103. The court specifically excluded vehicles, watercraft and aircraft from this analysis. 94 N.M. at 779, 617 P.2d at 168.

ony therein. The criminal trespass statute requires malicious intent. The court stated that in this context, malicious intent means hatred or ill will.[104] "Ill will imports a wish to vex, annoy, or injure another person or an intent to do a wrongful act."[105] The court then equated "intent to commit a felony or theft" in the burglary statute with "ill will" (malicious intent) required in the criminal trespass statute.[106]

In light of those three considerations, the court concluded that criminal trespass is a necessarily included lesser offense in burglary of a dwelling house. One cannot commit burglary of a dwelling house without committing criminal trespass as well.

A second case decided during the Survey year was *State v. Brewster*.[107] The court of appeals again considered the trial court's refusal to give the defendant's requested criminal trespass instruction. The trial court refused the instruction in *Brewster* on the ground that if the defendant had no intent to steal, there could be no malicious intent to support a theory of criminal trespass.

Without much discussion, the court of appeals cited *State v. Ruiz*[108] and held that the trial court erred in refusing the instruction, "because there was evidence that the malicious intent necessary to support criminal trespass was defendant's intention to commit the wrongful act of searching the papers contained in the residence without permission or legal justification for doing so."[109]

After *Ruiz* and *Brewster*, the law in New Mexico is clear that criminal trespass is a lesser offense necessarily included within burglary of a dwelling. Thus, any time a burglary instruction is given in the context of a dwelling house, a criminal trespass instruction must also be given.

D. Stolen Property

Two cases during the Survey period dealt with stolen property. The first, a federal case, is actually a federal jurisdiction case. The authors felt, however, that the case should be included.[110] The second, a state case, concerned the sufficiency of the evidence to estab-

104. *Id.*

105. *Id.*

106. This reasoning underlies the court of appeals' disagreement with the trial court's finding that there was no evidence of malicious intent in *Ruiz*. The court of appeals stated that evidence of intent to commit a felony was also evidence of malicious intent.

107. 94 N.M. 783, 617 P.2d 172 (Ct. App. 1980).

108. 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980). *See* text accompanying notes 73-82 *supra*.

109. *Id.* at 783, 617 P.2d at 172.

110. The main reason for including the case was that it would not be reported in any other Survey issue article. Another reason was the court's treatment of the interstate element in the case.

lish the element of knowledge in a charge of receiving stolen property in New Mexico.

1) Federal jurisdiction

In *United States v. O'Connor,*[111] the defendant was charged with aiding and abetting interstate transportation of stolen goods[112] and with conspiracy to transport stolen property in interstate commerce.[113] O'Connor was a "finder"—a person who puts a buyer and a seller together for a fee. One of his deals involved his efforts to sell uranium oxide, U-308 (yellowcake). A prospective buyer became suspicious and notified the Federal Bureau of Investigation. The FBI was present at the sale and seized the barrels of yellowcake, which had been stolen in New Mexico by Lucero, one of the sellers.

In a second transaction, O'Connor agreed to find a buyer for more of Lucero's New Mexico yellowcake. O'Connor contacted Marko (who turned out to be an FBI undercover agent). Through Marko, O'Connor arranged a sale with an FBI agent. The parties met in New Mexico. Final payment was to be made after the uranium was assayed in El Paso, Texas. The sellers were arrested in El Paso.

O'Connor was convicted of both aiding and abetting and conspiracy. On appeal, O'Connor challenged the jurisdiction of the federal court. He argued that the interstate element of his offenses was manufactured by the FBI. O'Connor relied on *United States v. Archer*[114] for the proposition that Congress did not intend to grant federal jurisdiction over cases in which "federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present."[115] The Tenth Circuit Court of Appeals distinguished *Archer,* saying that that case dealt with "virtual entrapment."[116] The court found that the federal agents in O'Connor did not solicit the theft of the yellowcake. Nor, said the court, was the interstate activity an "incidental aspect" of the transaction.[117] Rather, the assaying of the ore in El Paso[118] was an "integral . . .

111. 635 F.2d 814 (10th Cir. 1980).
112. 18 U.S.C. §2314 (1976) and 18 U.S.C. §2 (1976).
113. 18 U.S.C. §371 (1976).
114. 486 F.2d 670 (2d Cir. 1973).
115. 635 F.2d at 817, quoting United States v. Archer, 486 F.2d at 682.
116. 635 F.2d at 817.
117. *Id.* at 818. *Cf.* United States v. Archer, *supra* note 114, where interstate telephone calls were too "casual and incidental" to allow federal jurisdiction in the case.
118. The court noted that there was substantial evidence that the yellowcake was to be delivered, as well as assayed, in El Paso.

aspect of the transaction."[119] The court agreed with the defendant's argument that in grounding federal jurisdiction on an interstate nexus, the courts must avoid "alter[ing] sensitive federal-state relationships through usurpation of state control over local matters,"[120] but found that danger not present in O'Connor. The court held that jurisdiction was properly asserted by the trial court, because federal agents did not entrap the defendant, and because the interstate element was an integral part of the transaction.

2) Knowledge in Receiving Stolen Property

In *State v. Olloway,*[121] the New Mexico Court of Appeals, pursuant to the New Mexico statute, considered the sufficiency of the evidence needed to establish the element of "knowledge" in a charge of receiving stolen property.[122] At trial, eight state witnesses testified that certain of their possessions, including television sets, stereos, and casette tape players, had been stolen. Police officers testified that these goods were seized in the defendant's apartment. The police, however, were unable to testify with certainty that the defendant knew that the goods were stolen. The defendant was convicted, and he appealed. The defendant challenged his conviction, apparently on the ground that the "knowledge" element was not supported by sufficient evidence to warrant a conviction. Possession of the goods was not disputed.[123]

In New Mexico, mere possession of stolen property is not sufficient to warrant a conviction on a charge of receiving stolen property.[124] Knowledge that the goods are stolen, however, can be established through circumstantial evidence.[125] Possession of stolen property, if not satisfactorily explained,[126] is a "circumstance to be

119. 635 F.2d at 818.

120. *Id.*, quoting Rewis v. United States, 401 U.S. 808, 812 (1971).

121. 95 N.M. 167, 619 P.2d 843 (Ct. App. 1980), *cert. denied,* Oct. 6, 1980.

122. N.M. Stat. Ann. §30-16-11(A) (1978): "A. Receiving stolen property means intentionally to receive, retain or dispose of stolen property *knowing it has been stolen* or believing it has been stolen, unless the property is received, retained or disposed of with intent to restore it to the owner." (emphasis added).

123. The court of appeals seemingly had no strong feelings about this case. It first proposed summary affirmance and the defendant objected. The court then proposed summary reversal and the state objected. 95 N.M. at 168, 619 P.2d at 844.

124. *See* State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App. 1974), *cert. denied,* 86 N.M. 593, 526 P.2d 187 (1974).

125. State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), *cert. denied,* 81 N.M. 140, 464 P.2d 559 (1970), *cert. denied,* 398 U.S. 904 (1970).

126. Defendants may be tempted to argue that this requirement raises fifth amendment problems. Possession must be "satisfactorily explained" or circumstantial evidence may be used to prove knowledge that the property was stolen. This might require the defendant to decide whether to take the stand and explain, or forfeit his explanation, should he decide to ex-

taken into consideration with all of the other facts and circumstances in the case. . . ."[127] For example, in *State v. Elam,*[128] the defendant was convicted of receiving books stolen from the University of New Mexico Zimmerman Library. The jury considered, among other things, the defendant's aliases, his possession of an embosser which would obliterate the university seals in the books, and the five different stories the defendant told about the acquisition of the books. The court in *Elam* found these circumstances to be sufficient to sustain the conviction.

The court in *Olloway* decided that possession, coupled with the sheer numbers of items stolen on various dates, and the fact that some of the items were duplicates, could lead "a rational trier of fact . . . [to find a] defendant guilty beyond a reasonable doubt with regard to each essential element (possession and knowledge) of receiving stolen property."[129] The court affirmed the conviction.

Olloway suggests that a wide variety of circumstances will be considered sufficient to prove the element of knowledge that property is stolen. The jury can consider evidence of the defendant's suspicious conduct, as in *Elam,* and such things as the number and duplication of the items, as in *Olloway.* It is arguable that the burden on the prosecutor is lightened when he has such a wide scope of evidence to present.

E. Fraud

The New Mexico Court of Appeals considered two cases involving fraud and related issues during the survey period. The first, *State v. Ellenberger,*[130] was one of several cases arising out of the basketball scandal at the University of New Mexico. The court held that a university basketball coach is not a public official, and is not, therefore,

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ercise his right not to take the stand. In New Mexico, however, it has been held that similar decisions are tactical decisions and do not violate the defendant's fifth amendment rights. *See, e.g.,* State v. DeSantos, 91 N.M. 428, 575 P.2d 612 (Ct. App. 1978) (decision to testify at first trial did not bar use of his testimony at second trial); State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975) (in applying alibi rule, trial court did not violate defendant's privilege against self-incrimination); State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), *cert. denied,* 81 N.M. 140, 464 P.2d 559 (1970), *cert. denied,* 398 U.S. 904 (1970) (trial court's refusal to suppress evidence of prior convictions after defendant decided to take the stand to explain away the possession of the stolen goods was not error).

127. 95 N.M. at 168, 619 P.2d at 844, quoting State v. Follis, 67 N.M. 223, 223, 354 P.2d 521, 521-22 (1960). In *Follis,* there was a total lack of circumstantial evidence to show the requisite knowledge. Therefore, the conviction was reversed.

128. 86 N.M. 595, 526 P.2d 189 (Ct. App. 1974).

129. 95 N.M. at 168-69, 619 P.2d at 844-45.

130. 20 N.M. St. B. Bull. 109 (Dec. 9, 1980), *rev'd,* 20 N.M. St. B. Bull. 606, 629 P.2d 1216 (1981).

within the ambit of the false voucher statute. The second case, *State v. Stettheimer,*[131] involved a real estate transaction. The defendant's conviction was upheld.

In *State v. Ellenberger,* the University of New Mexico head basketball coach was charged with ten counts of fraud under the New Mexico criminal fraud statute[132] and 12 counts of making or permitting false public vouchers contrary to §30-23-3 of the New Mexico criminal laws.[133] The trial court dismissed all counts brought under §30-23-3, because that statute only applied to public officials, and a university basketball coach is a public employee, not a public official. The state appealed the dismissal. The court of appeals agreed with the trial court. The court of appeals construed §30-23-3 to exclude basketball coaches and affirmed the dismissal of the charges.

The court of appeals looked at the history of the statute and noted that the current article containing the statute in question is entitled "Misconduct by Officials."[134] The court noted that the predecessor to the current statute had been applicable to "any person" who made a false voucher,[135] but that §30-23-3 eliminated the "any person" language from the law. The current statute, therefore, is more limited and only applies to officials.

The court of appeals then considered the meaning of the word "officials" to determine if a basketball coach came within the purview of the statute. The court noted that all the other pertinent sections of Article 23 of the New Mexico Code referred to *both* public officers and public employees.[136] The court noted that New Mexico

131. 94 N.M. 149, 607 P.2d 1167 (Ct. App. 1980).

132. N.M. Stat. Ann. §30-16-6 (Cum. Supp. 1981).

133. N.M. Stat. Ann. §30-23-3 (1978). The statute reads:

> Making or permitting false public voucher consists of knowingly, intentionally or willfully making, causing to be made or permitting to be made, a false material statement or forged signature upon any public voucher, or invoice supporting a public voucher, with intent that the voucher or invoice shall be relied upon for the expenditure of public money.
>
> Whoever commits making or permitting false public voucher is guilty of a fourth degree felony.

134. 20 N.M. St. B. Bull. at 110. *See* State v. Thurman, 88 N.M. 31, 536 P.2d 1087 (Ct. App. 1975), *cert. denied,* 88 N.M. 29, 536 P.2d 1085 (1975) which held that §30-23-3 applies only to public officials.

135. *See* Pollack v. Montoya, 55 N.M. 390, 234 P.2d 336 (1951), where the court held that the appointed Chief of the Division of Liquor Control (now Alcoholic Beverage Control) was a public "officer." *See also* State v. Quinn, 35 N.M. 62, 290 P. 786 (1930), where the court held that an equipment engineer for the State Highway Department was not a state "officer" within the meaning of the bribery statute, N.M. Stat. Ann. §35-2802 (Comp. 1929).

136. *See, e.g.,* N.M. Stat. Ann. §30-23-1 (1978): "Demanding illegal fees consists of any *public official or public employee* knowingly asking or accepting anything of value greater than that fixed or allowed by law. . . ." (emphasis added); N.M. Stat. Ann. §30-23-2 pro-

makes a distinction between public officers and public employees, and concluded that the absence of a reference to public employees in §30-23-3 precluded application of that statute to public employees.[137] Because Ellenberger was a public employee and not a public official, the court of appeals held that the trial court properly dismissed the charges under §30-23-3.

In an opinion handed down after the Survey period, the New Mexico Supreme Court reversed the court of appeals. The supreme court held that the statute was unambiguous in its application to both public employees and public officials. Therefore, the court of appeals' analysis of legislative intent was unnecessary. The court found that Ellenberger was properly charged under the statute.[138]

The supreme court then turned to the question of whether the counts against Ellenberger brought under this statute should be merged with the fraud counts which arose out of the same criminal acts. The court held that this issue was prematurely before it, because the case was on interlocutory appeal, and there had been, as yet, no convictions.[139]

In *State v. Stettheimer*,[140] the court of appeals considered the sufficiency of the evidence concerning fraud and attempted fraud. The court also looked at a challenge to the failure of the trial court to give a requested instruction. The two counts of Stettheimer's convictions were based on discrete sets of facts. The court affirmed the convictions.

The defendant, a real estate agent, entered a contract with Ms. Melear which authorized the defendant to sell Melear's house. The property was appraised and listed for sale at $11,400. Mr. Mendez offered to trade some apartments for Ms. Melear's house. Defendant and Mendez closed that transaction, for $14,000. The next day, defendant telephoned Ms. Melear and offered to buy her house for $10,200. The defendant did not tell Melear of the deal with Mendez

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vides that "[n]othing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to *public officials or public employees* . . ." (emphasis added); N.M. Stat. Ann. §30-23-5 (1978): "Unlawful speculation in claims against the state consists of any *public official or public employee* directly or indirectly buying, selling, . . ." (emphasis added); N.M. Stat. Ann. §30-23-6(A): "*Any public official or public employee* receiving anything of value . . ." (emphasis added); N.M. Stat. Ann. §30-23-7: ". . . a *public officer or public employee* convicted of a violation . . ." (emphasis added).

137. The statute also is silent with respect to public officials. As the court noted, however, the title of the article is "Misconduct by Officials."

138. 20 N.M. St. B. Bull. 606, 608 (May 21, 1981), 629 P.2d 1216, 1218 (1981).

139. *Id.*

140. 94 N.M. 149, 607 P.2d 1167 (Ct. App. 1980).

for $14,000. Under these facts, the defendant was convicted of fraud.

On appeal, the defendant argued that the state failed to prove all the elements of fraud.[141] Specifically, the defendant argued that his mere silence concerning the $14,000 transaction did not amount to "misrepresentation" in the criminal context. The court distinguished the cases relied upon by the defendant to support his proposition,[142] and noted that the modern trend is that silence may form the basis for criminal misrepresentation "where the defendant has a legal duty to speak or where such silence is calculated to deceive."[143] The court said that the broad definition of the required criminal conduct in the New Mexico criminal fraud statute[144] followed the modern trend.

With little additional discussion, the court referred to the defendant's fiduciary duty, and stated that there was substantial evidence that the misrepresentation was both material and relied upon by Ms. Melear. The conviction was affirmed. After *Stettheimer,* it appears that silence, especially the silence of a fiduciary, can form the basis of a criminal action for fraud in New Mexico.

F. Attempted Fraud

The attempted fraud charge against Stettheimer was based on property contracts. The defendant and sellers signed two contracts for the sale of the same piece of property. The first was for $16,000 (the negotiated sale price). The second, for $20,300, was drafted with the intent to defraud the bank. The defendant applied to a bank

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141. The instruction given at trial read:

> For you to find the defendant guilty of fraud as charged in Count I, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant, by any words or conduct, misrepresented a fact to Robbi Melear, intending to deceive or cheat Robbie Melear;
>
> 2. Because of the misrepresentation and Robbie Melear's reliance on it, defendant obtained the *sum of $2,960.00;*
>
> 3. This *sum of money* belonged to someone other than Defendant; . . . .

See 94 N.M. at 151, 607 P.2d at 1169 (emphasis added by the court).

Among other things, the defendant contended that the instruction specified money, and he received no money, but a house. Therefore, the instruction reading "the sum of $2,960.00" was the wrong instruction. The court noted that the instruction need not be exact. The factual inconsistency of calling the fraudulently acquired increased value "money" and not property, was considered to be irrelevant by the court.

142. Those cases were People v. Baker, 96 N.Y.. 340 (1884); Rogers v. People, 161 Colo. 317, 422 P.2d 377 (1966); McCorkle v. State, 170 Ark. 105, 278 S.W. 965 (1926).

143. 94 N.M. at 152, 607 P.2d at 1170.

144. N.M. Stat. Ann. §30-16-6 (Cum. Supp. 1981): "Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations."

for financing, using the fraudulent $20,300 contract. The defendant was to receive a loan commitment of $16,240 (80% financing). The loan was not completed because of title problems. The defendant was convicted of attempted fraud.[145]

On appeal, the defendant challenged his conviction with three arguments. First, the defendant argued that acquiring borrowed money is not criminal fraud. The court of appeals dealt with the defendant's first argument summarily: "The fraudulent obtainment of a loan may be the basis for a conviction of criminal fraud."[146]

The defendant's second contention was that in determining the degree of the offense, the court must look to the value of the credit rather than the amount of money involved in the loan. Because no evidence had been introduced as to the value of the loan, there was no evidence that the defendant had attempted a felony. The court characterized the defendant's second argument as a "clever game of semantics."[147] The court pointed out that the statute mandates that the property has to be worth over $2,500 in order for there to be a felony.[148] The defendant sought to acquire fraudulently an additional $3,440 from the bank, the court reasoned, and therefore he had attempted the felony of fraud. According to the court, the means of acquisition were irrelevant, so long as the acquisition was the result of fraudulent conduct, practices, or representations.

The defendant further asserted that his actions were mere preparation, and not an overt act in furtherance of committing a crime, so he had not really attempted to commit a felony. The court dealt somewhat more fully with this argument. The court noted that an action amounts to more than a preparation when there has been "some overt act" in furtherance of execution of the crime.[149] Furthermore, the act must "amount to the commencement of the consumation [of the crime]."[150] Even slight acts in furtherance of the intent to com-

145. N.M. Stat. Ann. §30-28-1 (1978): "Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect is commission."

146. 94 N.M. at 153, 607 P.2d at 1171. *Cf.* State v. Thoreen, 91 N.M. 624, 578 P.2d 325 (Ct. App. 1978), *cert. denied,* 91 N.M. 610, 577 P.2d 1256 (1978); State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App. 1978), *cert. denied,* 92 N.M. 180, 585 P.2d 324 (1978). Both *Thoreen* and *Schifani* were cited by the court in *Stettheimer.*

147. 94 N.M. at 153, 604 P.2d at 1171.

148. N.M. Stat. Ann. §30-16-6 (Cum. Supp. 1981). There can also be a fraud of a lower degree committed with a taking or misappropriation of property worth over $100 but less than $2,500. *Id.*

149. 94 N.M. at 144-45, 607 P.2d at 1171-72, quoting State v. Lopez, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), *cert. denied,* 81 N.M. 140, 464 P.2d 559 (1970). *See* State v. Trejo, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972), which affirms the language in *Lopez.*

150. 94 N.M. at 154, 607 P.2d at 1172.

mit the crime will constitute an attempt. The court stated that "[t]o present an offer to the bank, which constituted an element of the attempted crime (fraudulent misrepresentation), and then accept a loan commitment based on the fraudulent document is a 'subsequent step in a direct movement toward the commission of the offense.' "[151] The court, therefore, affirmed the conviction of attempted fraud.[152]

G. Forgery

In *State v. Smith,*[153] the New Mexico Court of Appeals construed the New Mexico forgery statute,[154] holding that alteration of signed bearer paper is forgery. In *Smith,* Higgins purchased auto parts from Henderson-Baker Imports in Las Cruces and paid for the parts with a check. Higgins left the payee's name blank on the check. Henderson-Baker Imports was then burglarized. Subsequently, the defendant presented the check to Mr. Land in payment for goods. Land wrote the name of his business in the payee blank, and required the defendant to put her name and telephone number on the back of the check. The defendant wrote a fictitious name and number. The defendant was convicted of forgery and appealed.

The defendant argued that the check was bearer paper and was negotiated by delivery alone. Therefore, the fictitious name and number was not a material alteration, which is an element of forgery.[155] The court agreed that the check was indeed bearer paper and was negotiable to all the world by delivery, although the payor had intended it to be payable only to Henderson-Baker Imports. Citing an Arizona case,[156] the court said that the filling in of the payee

151. *Id.*

152. The defendant's argument that one of his instructions was improperly refused was also rejected. The court held that U.J.I. Crim. 28.10 was correctly given without the defendant's requested addition, which read: "[y]ou are instructed that preparation to commit a crime not followed by an overt act done toward its commission does not constitute an attempt." The court reasoned that the instruction given at trial sufficiently stated the law, and the defendant's requested instruction was repetitious.

153. 95 N.M. 432, 622 P.2d 1052 (Ct. App. 1981).

154. N.M. Stat. Ann. §30-16-10 (1978): Forgery consists of: A. Falsely making or altering any signature to, or any part of, any writing purported to have any legal efficacy with intent to injure or defraud; . . ."

155. *Id.* The court equated "altering" as prohibited by the statute with a "material alteration."

156. The court cited State v. Rovin, 21 Ariz. App. 260, 518 P.2d 579 (1974). The *Rovin* opinion stated: "[a]lteration of a document without authority to do so may constitute forgery and such alteration may consist of insertion of matter in the document after it has been signed." 21 Ariz. App. at 262, 518 P.2d at 580. The court in *Smith,* however, did not analyze the case in terms of alteration without authorization, or in terms of insertion of new matter after signature.

blank constituted a material alteration.[157] The court then reasoned that Land was the agent of the defendant when he wrote the name of his business on the check. Therefore, the defendant, through her agent, had altered a writing purporting to have legal efficacy with an intent to defraud. The court held that the defendant's acts constituted the crime of forgery under the New Mexico statute and affirmed the conviction.

The result reached by the court in *Smith* may be correct, but the reasoning is incomplete. The court did not discuss how the filling in of a different payee than the one intended by the payor was forgery. Certainly, Smith did not "make" the check, as is prohibited by the statute. Nor did she alter either the signature on the check or any part of the writing which was already on the check. Although the court implied, with its quotation from the Arizona case,[158] that insertion of matter in the document after it has been signed can be an "alteration" within the meaning of the New Mexico statute, the court did not specifically say so. It would have been helpful if the court had completed its analysis specifically to include that "alteration" can be insertion of new words in a blank space after the document has been signed.

III. OTHER CRIMES

A. Criminal Sexual Penetration

During the Survey year, New Mexico appellate courts handed down two decisions concerning the crime of criminal sexual penetration (CSP). In *State v. Larson*[159] the New Mexico Supreme Court upheld the relatively new criminal sexual penetration statutes[160] against a challenge of unconstitutional vagueness. *State v. Garcia*[161] discussed the difficult question of psychological examination of a rape victim, and granted a new trial because no examination was made.

In *Larson,* the defendant was charged with coercing his fifteen-year-old sister-in-law and his thirteen-year-old stepdaughter into

157. The court stated that the filling in of the payee blank restricted the negotiability of the check by restricting it to a single payee. 95 N.M. at 433, 622 P.2d at 1053.

158. *See* note 132 *supra.*

159. 94 N.M. 795, 617 P.2d 1310 (1980).

160. N.M. Stat. Ann. §30-9-1 to -16 (1978 & Cum. Supp. 1981). These statutes represent a major change from earlier New Mexico laws prohibiting the less well-defined crime of rape. *See* N.M. Stat. Ann. §40A-9-1 to -19 (1953).

161. 94 N.M. 583, 613 P.2d 725 (Ct. App. 1980), *cert. denied,* 95 N.M. 299, 621 P.2d 516 (1980).

performing sexual acts with him. He was convicted under N.M. Stat. Ann. §30-9-11 (1978), which reads:

> Criminal sexual penetration is the unlawful and intentional causing of a person, other than one's spouse, to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse, or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

Larson argued that the statute is unconstitutionally vague because it fails to define the word "unlawful." The defendant claimed that this failure made it impossible to know if a sexual act was lawful or unlawful penetration. Therefore, the statute might be inconsistently and arbitrarily enforced.[162]

The court rejected these arguments for two reasons. First, the court said that the statute must be read in its entirety.[163] The subsections of §30-9-11 define first, second, and third degree CSP, and include in those definitions a requirement of force or coercion. A person of ordinary intelligence,[164] therefore, would be on notice of what was meant by the term "unlawful."[165] The second point made by the court was that a statute is not susceptible to a vagueness attack merely because a hypothetical case might be created where applicability of the statute might be questionable.[166]

The indictment in *State v. Garcia*[167] charged ten sexual offenses. The defendant was convicted of five. Before trial, the defendant moved for an order requiring the complaining witness to submit to a psychological examination. The motion was denied, and the defendant argued on appeal that the denial was reversible error. The New Mexico Court of Appeals agreed, and remanded the case for a new trial.

The *Garcia* decision may be so tied to its particular facts that it sheds no light on the difficult question of psychological examination of the complaining witness in a rape case. The court in *Garcia* made an attempt to emphasize the narrowness of its holding. In *Garcia,* the state relied on "mental anguish" as part of the personal injury which raised the crime from third to second degree CSP. The state,

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162. 94 N.M. at 796, 617 P.2d at 1311.

163. *Id.*

164. *See* State v. Najera, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).

165. The court also pointed out that the word "unlawful" has been defined in New Mexico as "without excuse or justification." *See* Territory v. Gonzales, 14 N.M. 31, 89 P. 250 (1907).

166. *See* United States v. Harriss, 347 U.S. 612 (1954), which deals with both issues.

167. 94 N.M. 583, 613 P.2d 725 (Ct. App. 1980), *cert. denied,* 95 N.M. 299, 621 P.2d 516 (1980).

therefore, established the relevancy of the psychological state of the complaining witness, and discovery with regard to that element of its case was also relevant.

Once psychiatric testimony has been admitted at all, however, it will be difficult to prevent its use for purposes which are irrelevant or prejudicial. A psychiatric examination might require an exploration of the prior sex life of the complaining witness, for example, or might touch upon his or her mental condition before the alleged crime, which would lead to an argument on the issue of consent. *Garcia* may serve as a warning to the state not to rely on "mental anguish" as a personal injury in CSP cases. If the state does so rely, it may open the door to unwanted psychiatric examination.[168]

B. Battery and Assault

The New Mexico courts decided two cases during the Survey year involving battery or assault against a peace officer. *State v. Rhea*[169] discussed the question whether a conviction of battery on a peace officer[170] was precluded by the existence of a more specific statute covering the offense. *State v. Andazola*[171] rejected a challenge of unconstitutional vagueness which was directed at the statute which prohibits resisting or obstructing an officer.[172]

In *State v. Rhea,*[173] the defendant was convicted of battery upon a peace officer[174] for hitting a jailer. The court of appeals summarily reversed on two grounds. The first ground was that the specific crime of assault by a prisoner[175] covered the case. Where both a gen-

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168. This holding may give rise to an interesting question concerning the privacy right of a victim in a CSP case. The victim may not wish to undergo a psychiatric examination. Under *Garcia,* however, the victim may be forced to, if the state has made an allegation of "mental anguish" an important part of its case. Forcing a victim to submit to such testing may violate constitutional privacy interests. As a practical matter, such a case may never arise. It is difficult to imagine that a district attorney will inflict an unwanted ordeal on the complaining witness, merely to raise the CSP charge from a fourth to a third degree felony.

Testimony about prior sexual conduct is generally excluded by Rule 412 of the Federal Rules of Evidence, in an effort to prevent courtroom harassment and humiliation of the rape victim. For an extensive discussion of the question, *see* Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility,* 49 U. Colo. L. Rev. 185 (1978).

169. 94 N.M. 168, 608 P.2d 144 (1980).

170. N.M. Stat. Ann. §30-22-24 (1978).

171. 95 N.M. 430, 622 P.2d 1050 (1981).

172. N.M. Stat. Ann. §30-22-1(B) (Cum. Supp. 1981).

173. 94 N.M. 168, 608 P.2d 144 (1980).

174. N.M. Stat. Ann. §30-22-24(A) (1978) defines battery upon a peace officer as: "[T]he unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner."

175. N.M. Stat. Ann. §30-22-17 (1978) defines assault by a prisoner as intentionally:

A. placing an officer or employee of any penal institution, reformatory, jail

eral and a specific statute condemn the same acts, it is error to prosecute under the general statute.[176] The second ground for summary reversal was that, in the opinion of the court of appeals, a jailer is not a "peace officer." The New Mexico Supreme Court granted certiorari and reversed the court of appeals.

The supreme court held that the summary reversal procedure was inappropriate, because factual determinations were necessary before it could be decided which of the two statutes better fitted the case. The court further held that the two statutes did not stand in the relation of general to specific.[177] The supreme court quoted the statutory definition of "peace officer"[178] and pointed out that all that was required for a person to come under that definition was a duty vested by law "to maintain public order."[179]

In *State v. Andazola,* defendant allegedly used a large dog in an assault on peace officers. The officers were called by Andazola's girlfriend, who appeared to have been injured in the course of an argument with Andazola. Rather than talk to the police when they arrived, Andazola walked over to stand beside a large, vicious dog. He then unhitched the dog and went inside the girlfriend's trailer. The girlfriend screamed for help and the officers summoned other officers. Sometime thereafter, the dog was shot by the police. The

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or prison farm or ranch, or a visitor therein, in apprehension of an immediate battery likely to cause death or bodily harm;

B. causing or attempting to cause great bodily harm to an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein; or

C. confining or restraining an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, with intent to use such person as a hostage.

176. *See* State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct. App. 1970).

177. The court did not detail precisely how the crimes differ. It merely quoted the language of each statute (*see* notes 174, 175 *supra*). The court emphasized "great bodily harm"; this may indicate that the court saw the crime of assault by a prisoner as more serious than that of battery on a police officer.

178. N.M. Stat. Ann. §30-1-2(C) (1978): "[A]ny public official or *public officer vested by law with a duty to maintain public order* or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes; . . ." (emphasis added by the court).

In one other survey year case, peace officer status was important. City of Alamogordo v. Ohlrich, 95 N.M. 725, 625 P.2d 1242 (Ct. App. 1981), concerned a disorderly conduct conviction where defendant had made abusive and insulting remarks to a police officer. The definition of disorderly conduct involved a "present danger of violence" and a likelihood of provoking "an immediate violent reaction in an average person. . . ." Section 6-2-8 of the codified ordinances of Alamogordo. The court of appeals held that a peace officer is not an "average person" for purposes of the ordinance. It is part of the duty vested by law in a peace officer that he use restraint in dealing with the public.

179. 94 N.M. at 169, 608 P.2d at 145. Other jurisdictions have also arrived at the conclusion that a jailer is a police officer. *See* Schalk v. Dep't of Admin., 42 Cal. App. 2d 624, 117 Cal. Rptr. 92 (1974); Kimball v. County of Santa Clara, 24 Cal. App. 3d 780, 101 Cal. Rptr. 353 (1972); State v. Grant, 102 N.J. Super. 164, 245 A.2d 528 (1968).

defendant was arrested and accused of aggravated assault on a peace officer.[180] He was convicted of the lesser offense of resisting or obstructing an officer.[181] Defendant appealed, arguing that the statute under which he was convicted is unconstitutionally vague, both on its face and as applied to his case.

The court of appeals quickly disposed of the argument that the statute is vague on its face. The court stated that the "clear simple language"[182] of the statute puts all persons of common intelligence on notice of when they would be exposed to criminal sanctions.

The contention that the statute was vague as applied to the defendant was based on a reading of the jury's verdict. The defendant argued that the failure to convict on the greater crime of assault meant that the jury had decided that he was not using the dog as a weapon. As the court of appeals pointed out, it is difficult to understand how that argument constitutes a claim of vagueness. In any event, the court refused to base its own opinion of the case on speculation about the decision-making processes of the jury. The court stated that it is mere conjecture what the jury may have believed, and it would be intolerable if the jury's verdict could be looked behind for purposes of appeal.

C. Contributing to the Delinquency of a Minor

In *State v. Cuevas,*[183] the New Mexico Supreme Court reversed a court of appeals decision construing the statute which prohibits contributing to the delinquency of a minor.[184] Cuevas, a high school teacher, was invited to a party given by some of his minor students. There was liquor at the party and Cuevas demonstrated how tequila is drunk with salt and lemon. Cuevas was convicted of contributing and sentenced to three consecutive one-to-five-year terms in the state penitentiary. He was convicted under a general statute which makes it a felony to contribute to the delinquency of a minor.[185] Cuevas appealed, claiming that it was error to convict under a general statute,

180. N.M. Stat. Ann. §30-22-22(A)(1) (1978).
181. N.M. Stat. Ann. §30-22-1 (Cum. Supp. 1981).
182. 95 N.M. at 431, 622 P.2d at 1051.
183. 94 N.M. 792, 617 P.2d 1307 (1980).
184. N.M. Stat. Ann. §30-6-3 (1978).
185. This statute provides:

> Contributing to delinquency of minor consists of any person committing any act, or omitting the performance of any duty, which act or omission causes, or tends to cause or encourage the delinquency of any person under the age of eighteen years.
>
> Whoever commits contributing to delinquency of minor is guilty of a fourth degree felony.

Id.

where a more specific statute existed which made it a violation of the Liquor Control Act to encourage a minor to drink.[186] The court of appeals agreed and reversed the conviction.[187] The supreme court granted certiorari and reversed the court of appeals.

As in *State v. Rhea,* discussed above,[188] the disagreement between the court of appeals and the supreme court in *Cuevas* turned on whether the two statutes actually stood in the relationship of general to specific. The court of appeals concluded that the two statutes stood in such a relationship, based on the purposes of the two statutes. According to the court of appeals, the purpose in both is to protect the minor.[189] Therefore, the court reasoned, one is merely a more specific form of the other.

The supreme court rejected the court of appeals' approach and held that the crime of contributing to the delinquency of a minor is separate and distinct from the violation of the Liquor Control Act. The court reasoned that to hold otherwise would be to repeal the contributing statute, because it would be rare for there to be no statute prohibiting the act which allegedly contributed to the delinquency of the minor. The supreme court disagreed that the purpose of the two statutes is the same. According to that court, the purpose of the contributing statute is to protect children from harmful adult behavior.[190] The court stated that the purpose behind the liquor laws has a different emphasis, although the two may overlap to some extent.[191]

The supreme court went on to address an issue which was not discussed by the court of appeals—that of merger. Cuevas had been convicted of three separate counts of contributing, all based on the

186. N.M. Stat. Ann. §60-10-16(A)(4) (1978) (current version at N.M. Stat. Ann. §60-7B-1.1 (Repl. Pamp. 1981):

> A. It is a violation of the Liquor Control Act . . . for any club, retailer, dispenser or any other person, except a parent or guardian or adult spouse of any minor, or adult person into whose custody any court has committed the minor for the time, outside of the actual, visible, personal presence of the minor's parent, guardian or adult spouse or the adult person into whose custody any court has committed the minor for the time, to do any of the following acts:
>
> . . .
>
> (4) to aid or assist a minor to buy, procure or be served with alcoholic liquor.

187. State v. Cuevas, 19 N.M. St. B. Bull. 350 (Ct. App. Apr. 17, 1980).

188. *See* text accompanying notes 145 through 155, *supra.*

189. In State v. Favela, 91 N.M. 476, 576 P.2d 282 (1978), the court held that the purpose of the contributing statute is to protect children from harmful adult behavior. The purpose of the liquor laws, as set out in N.M. Stat. Ann. §60-3A-2 (1978) is more general: "[A]lcoholic beverages shall be licensed, regulated, and controlled so as to protect the public health, safety and morals of every community in the state; . . ."

190. See note 189 *supra.*

191. 94 N.M. at 794, 617 P.2d at 1309. The court did not say what the different emphasis was.

same acts. The court found that the three convictions were both arbitrary and excessive. The court concluded that it was an arbitrary decision to convict Cuevas of only three counts when at least twenty minors attended the party. Additionally, the possibility of 15 years in the penitentiary made the three counts seem excessive. The court affirmed one conviction and remanded the other two convictions for dismissal.[192]

D. Confinements and Escapes

Three cases were decided during the Survey period which involved escapes from prison or the harboring of a fugitive. *State v. Martin*[193] held that an escape from the Chavez County Jail, where the defendant was being held pending arraignment for an offense committed in the state penitentiary, could give rise to charges of "escape from the penitentiary."[194] *State v. Ellis*[195] held that the defendant had the burden of showing that his confinement was unlawful in order to raise unlawfulness as a defense. Finally, *State v. Rogers*[196] held that the statute prohibiting acts "in aid of" a fugitive from justice was not unconstitutionally vague.

In *Martin,* the defendant was convicted of conspiracy, assault by a prisoner, false imprisonment of a jailer, and escape from the penitentiary. The court of appeals considered the first and last of these convictions on appeal. On the conspiracy charge, the defendant argued that the indictment failed to give him notice of the felony which was the subject of the alleged conspiracy. The court rejected this argument on two grounds. First, the court said the other counts of the indictment which charged felonies were sufficient to give notice of the felonies in question. Second, the defendant had failed to request a specification of the felonies underlying the conspiracy charge. Therefore, he waived any claim that he did not know what the claims were.

The defendant in *Martin* had been in the penitentiary until he was

192. The supreme court originally published the *Cuevas* opinion on June 24, 1980. On September 30, 1980, the court withdrew the June 24 opinion and substituted an opinion which is substantially the same. The only difference is that the second opinion mentions and rejects Cuevas' claim that the statute was unconstitutionally vague.

193. 94 N.M. 251, 609 P.2d 333 (Ct. App. 1980), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980).

194. N.M. Stat. Ann. §40A-22-9(B) (1953) (current version at N.M. Stat. Ann. §30-22-9(B) (1978)).

195. 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980), *cert. denied,* 95 N.M. 426, 622 P.2d 1046 (1981).

196. 94 N.M. 527, 612 P.2d 1338 (Ct. App. 1980), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980).

arrested for a narcotics offense and booked into the Chaves County Jail until arraignment. The court order which provided for his transfer also provided that Martin would return to the penitentiary after arraignment. Martin participated in an escape from the Chaves County Jail. He was convicted of escape under Section 30A-22-9(B), which reads:

> Escape from the penitentiary consists of any person who shall have been lawfully committed to the penitentiary:
>
> A. Escaping or attempting to escape from such penitentiary; or
>
> B. escaping or attempting to escape from any other lawful place of custody or confinement although not within the confines of the penitentiary.
>
> Whoever commits escape from penitentiary is guilty of a second degree felony.[197]

On the charge of "escape from the penitentiary," the defendant argued that he was not under the control of the penitentiary when he escaped. Therefore, he should be subject to the lesser charge of escaping from jail. The supreme court held that, although there was a change in the location of his physical confinement, defendant's lawful custody or confinement was in the penitentiary.[198] The special facts in *Martin* indicated to the court that physical confinement in the county jail was in fact a penitentiary confinement.[199]

State v. Ellis[200] raised a question of evidentiary burdens. Ellis contended that the crime of "escape from the penitentiary"[201] carried a necessary element that the confinement was lawful. The state made a prima facie case that the defendant's incarceration was lawful. On appeal, Ellis collaterally attacked the lawfulness of his commitment. The court of appeals held that this attack was improper and could only have been raised in the trial court below. The court analogized the case to an habitual offender proceeding, where the defendant must come forward, after he is arrested, with evidence of the invalidity of a prior conviction.[202] Similarly, after the state in *Ellis* had made a prima facie showing of a lawful commitment, the defendant

197. N.M. Stat. Ann. §40A-22-9(B) (1953) (currently N.M. Stat. Ann. §30-22-9(B) (1978)).

198. 94 N.M. at 254, 609 P.2d at 336.

199. *Id.*

200. 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980), *cert. denied,* 95 N.M. 426, 622 P.2d 1046 (1981).

201. *See* text accompanying notes 174 through 176 *supra.*

202. In support of this proposition the court cited State v. Wildenstein, 91 N.M. 550, 577 P.2d 448 (Ct. App. 1978), State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978), and State v. Lujan, 90 N.M. 778, 568 P.2d 614 (Ct. App. 1977).

had the burden of coming forward with factual evidence to refute that showing.

In *State v. Rogers,*[203] the New Mexico Court of Appeals upheld a statute against a challenge of unconstitutional vagueness. Rogers falsely confessed to a killing which had been committed by a friend of his. He made the confession for the purpose of effecting his friend's release from prison. Rogers was convicted of harboring a felon. The statute under which Rogers was convicted reads:

> Harboring or aiding a felon consists of any person . . . who knowingly conceals any offender or gives such offender *any other aid,* knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment.[204]

Rogers argued that the phrase "any other aid" was too vague to give him notice that the statute would apply to the giving of false testimony. He further contended that he should have been prosecuted under either a New Mexico statute or an Albuquerque ordinance which specifically prohibits false testimony.[205] The court dealt with the first of Rogers' contentions in a laconic fashion, merely asserting that "[o]ne with common intelligence should have no difficulty understanding that knowingly confessing falsely to a crime, for the purpose of permitting an arrested felon to be released and thus escape 'trial, conviction or punishment,' is giving aid of a nature precisely proscribed by the statute."[206]

The court answered the defendant's second contention by focusing on the purpose of the harboring statute.[207] Neither of the enactments suggested by Rogers as more appropriate[208] emphasized the crucial element of the crime of harboring a felon. The harboring statute, the court said, is not concerned with a more serious crime than the mere making of a false statement. Instead, it is concerned with the intent to render assistance to a fugitive. According to the court, it is this intent which merits the greater penalty of the harboring statute.

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203. 94 N.M. 527, 612 P.2d 1338 (1980), *cert. denied,* 94 N.M. 675, 615 P.2d 992 (1980).
204. N.M. Stat. Ann. §30-22-4 (1978) (emphasis added by the court).
205. N.M. Stat. Ann. §30-39-1 (1978); Alb. Ordinance 96-1973, §2-16.
206. 94 N.M. at 529, 612 P.2d at 1340.
207. *Id.*
208. Those enactments are N.M. Stat. Ann. §30-39-1 (1978) and Albuquerque Ordinance 96-1973, §2-16, which provide that false reporting to a law enforcement agency or officer is a misdemeanor.

E. Drug Cases

Two important cases were decided during the Survey year in the area of controlled substances. *State v. Smith*[209] discussed the difficult problem of whether the doctrine of merger should apply where different drugs were possessed by the defendant in the same transaction, and the state prosecuted for separate offenses. In *State v. Carr,*[210] Judge Hernandez of the court of appeals carefully and exhaustively considered the complicated issue of how the Controlled Substances Act (CSA)[211] applies to physicians.

In *Smith,* the defendant was convicted of four counts of trafficking in narcotic drugs. The drugs were part of a single sale. The only distinction between the counts of the indictment was that each count concerned a different drug. The court of appeals found error in the trial court's failure to merge the four counts. In a thoughtful opinion by Justice Sosa, the supreme court reversed the court of appeals and reinstated the convictions.

The court explored New Mexico law on the "same evidence" test[212] and the "included offense" test.[213] Had the court found either the same evidence would give rise to several convictions or one offense was necessarily included in the other, the trial court would have held that all but one count was barred by double jeopardy.[214] Absent such a finding, the court could not decide that merger was mandated.

The important factors in the *Smith* decision were considerations of policy. The court said that question of policy in cases of merger override any purely mechanical test. The tests themselves, in fact, are simply reflections of the policies of judicial economy and effi-

209. 94 N.M. 379, 610 P.2d 1208 (1980).

210. 20 N.M. St. B. Bull. 457 (Ct. App. Feb. 19, 1981).

211. N.M. Stat. Ann. §30-31-1 to 30-31-40 (Repl. Pamp. 1980 & Supp. 1981).

212. The "same evidence test" was set out in State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975). The question to consider under that test is whether the same facts offered in support of one offense would sustain a conviction of the other. If they would, the courts are merged.

213. The "one offense" test was set out in State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App. 1977), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977). Under this test, the court must consider whether one offense necessarily involved the other, and whether the elements of the two are the same. If the answer to these questions is affirmative, the counts merge.

214. The fifth amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This provision, and its counterpart in the New Mexico Constitution, art. 2, § 15, is referred to as the double jeopardy clause.

The double jeopardy provision prohibits a person from being tried twice for the same offense. In defininig "same offense," New Mexico courts have held that if the same evidence which would support a conviction of one offense would necessarily convict that person of another offense, the two offenses are, for the purposes of the double jeopardy clause, the same offense. Consequently, prosecution of a defendant can be had under only one of the statutes. *See* notes 212-213, *supra.*

ciency. The policies in *Smith* argued against merger. The court noted that if a dealer in illegal drugs knew that he could traffic in different drugs without multiple prosecutions, he would be free to keep a selection of drugs on hand. This might lead to larger sales, easier access to more drugs, and a greater possibility of mixing incompatible drugs. The court held, therefore, that policy and public interest militated against the merger of the four counts into one.

The second important controlled substances case, *State v. Carr,* occasioned a careful examination of the CSA. The defendant was a physician who wrote prescriptions for Niki Jones. Jones obtained the drugs, sold them, and returned part of the proceeds to Carr. Carr was convicted of 42 violations of the CSA. The jury found him guilty of trafficking, distributing, and intentionally acquiring and possessing certain controlled substances. The court of appeals, in a lengthy opinion, upheld the convictions.

The defendant made several arguments on appeal. He argued that a physician writing a prescription is dispensing, rather than distributing, drugs, and is therefore immune from prosecution. He supported this argument by contending that the legislature had set up a "different parallel system" of regulation for those permitted by law to conduct transactions in controlled substances.[215]

The court rejected this argument on three grounds. First, the court said that the overall scheme of the CSA indicates that persons such as the defendant should come within its ambit. The law does not make an exception for persons registered to conduct transactions in controlled substances. The law says, instead, that its sanctions will apply to *any person*[216] found guilty of trafficking. Further, the court noted that the federal law, after which the CSA is modeled, has been construed to include registered persons.[217]

The second reason that the court rejected the defendant's argument was that the so-called "parallel system of regulation" concerned technical violations, with less severe penalties than the more general provisions of the CSA.[218] The court thought it unlikely that the legislature could have intended for a registrant to get off more lightly than a non-registered person who committed a similar offense.

Finally, the court rejected the defendant's argument because it would lead to an absurdity. Under the "parallel system" that the

215. *See* N.M. Stat. Ann. § 30-31-12 to -19 (Repl. Pamp. 1980).

216. N.M. Stat. Ann. § 30-31-20(B) (Repl. Pamp. 1980) (emphasis supplied by the court).

217. *See* United States v. Moore, 423 U.S. 122 (1975).

218. *Compare, e.g.,* N.M. Stat. Ann. § 30-31-14 (1978) which provides that a registrant's license shall be revoked if he or she distributes controlled substances, *with* N.M. Stat. Ann. § 30-31-20 (1978), which provides that the distribution of controlled substances is a felony.

defendant urged, a physician could avoid prosecution for trafficking entirely by writing a prescription. According to the court, the seriousness of the crme made it unlikely that the legislature intended for sanctions to be so easily avoidable.

The defendant next argued that a physician's handing out of drugs could not be what the legislature meant by "trafficking," because physicians must have some leeway in handing out sample medications for legitimate medical purposes. The court acceded to this argument, but found that the CSA can allow dispensing by a physician *only* for legitimate medical purposes.[219] The court indicated that the legitimacy of the purpose is determined by the physician's intent. Activity which exceeded these legitimate purposes would be distributing rather than dispensing, and therefore subject to prosecution.

The *Carr* decision substantially clarifies New Mexico law with regard to the criminal liability of a physician dispensing drugs. The court held that physicians do not stand in any privileged position, but can be held criminally liable for trafficking in controlled substances to the same extent as can lay persons.

F. Perjury

The perjury trial of Emilio Naranjo was examined by both the court of appeals and the supreme court during the Survey year. Both courts reversed his conviction, but they did so on slightly different grounds.

Naranjo was the county sheriff for Rio Arriba County. He testified at the trial of Moses Morales concerning Morales' alleged possession of marijuana. Morales was acquitted. Naranjo was indicted for perjury[220] and convicted. He appealed and the court of appeals reversed.[221] In *State v. Naranjo,* the supreme court granted certiorari, then affirmed in part and reversed in part.[222]

Two criminal law questions were raised by the case. First, the courts discussed the sufficiency and specificity of the indictment. Both courts found the indictment to be insufficient. Second, the requirements of proof in a perjury case were examined in the context of a claim that there was no substantial evidence to support the con-

219. The court quoted the strong language of the seventh circuit: "When . . . a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled substances, his conduct should be treated like that of any street-corner pill-pusher." United States v. Green, 511 F.2d 1062, 1067 (7th Cir. 1975); *See* United States v. Fellman, 549 F.2d 181 (10th Cir. 1977).

220. N.M. Stat. Ann. § 30-25-1 (1978).

221. State v. Naranjo, 94 N.M. 413, 611 P.2d 1107 (1979).

222. 94 N.M. 407, 611 P.2d 1101 (1980).

viction. Both courts acceded to the claim of insufficient evidence, but with different emphasis.

The defendant first argued that the indictment was insufficient to charge the defendant with perjury. The court of appeals agreed that the indictment should have been dismissed. The court found that the statement alleged to be false was in fact true.[223]

Judge Walters, in a special concurrence, pointed out that the first of these questions was improperly decided. It is not the province of the court of appeals to determine questions of fact. Judge Walters would have also concluded that the indictment should have been dismissed. She argued that the allegations of falsity were not sufficiently specific to give Naranjo notice of what he was required to defend against.[224] The supreme court agreed with Judge Walters on this issue.[225]

The second criminal law question raised by the *Naranjo* case was whether the evidence was sufficient to support the conviction. The court of appeals agreed with the defendant that the evidence was insufficient, focusing its attention on two separate issues. First, the state's entire case hung on the uncorroborated testimony of one witness. The rule in New Mexico is that the testimony of an uncorroborated witness is not sufficient evidence to support a conviction of perjury.[226] Second, the essential elements of the crime were simply not addressed by the proof adduced at trial. For example, the state presented no evidence that the defendant had knowledge that his statement was false. Without evidence of this, the crime of perjury was not proved.[227] The court of appeals emphasized that the requirements of proof in a perjury case are extremely strict, and every presumption will be in the defendant's favor.[228] The court decided that the state failed to overcome the presumption that the defendant was telling the truth.

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223. As the supreme court pointed out, the poorly drawn indictment made it impossible to determine which statements were relevant to the perjury charge.

224. *See* N.M. Rules Crim. P. 5(d). *See also* Territory v. Lockhard, 9 N.M. 523, 45 P. 1106 (1896).

225. Naranjo v. State, 94 N.M. at 411, 611 P.2d at 1105.

226. In Territory v. Williams, 9 N.M. 400, 54 P.2d 232 (1898), the court said:

> This evidence alone, and uncorroborated, is not such proof as the law requires in trials for perjury; it is one oath against another; and if the citizens of this territory can be convicted of perjury and sent to the penitentiary for a term of years, and their characters ruined for life by oath against oath, as in this case, then the best citizens may well shun the courts as a traveler would quicksand.

9 N.M. at 402, 54 P. at 232. *See also* State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App. 1972).

227. State v. Olson, 92 Wash.2d 134, 594 P.2d 1337 (1979); State v. Wash.2d 134, 594 P.2d 1337 (1979); State v. Wallis, 50 Wash.2d 350, 311 P.2d 659 (1957).

228. Richardson v. State, 45 Ohio App. 46, 186 N.E. 510 (1933).

The supreme court agreed that there was not sufficient evidence to sustain a guilty verdict. The supreme court opinion, however, did not dwell upon the special requirements of proof in a perjury case. The court merely pointed out that no testimony indicated that the defendant's statement was false. It was possible to infer the falsity of the statement, but the court decided that the state had certainly not proved its case beyond a reasonable doubt.