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Criminal Procedure

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CRIMINAL PROCEDURE

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INTRODUCTION

The New Mexico courts considered a variety of criminal cases during the Survey year. These cases fall into no easy categories, and are generally divided here according to those provisions of the United States Constitution that they construe. Cases involving grand jury questions and the Habitual Offender Act are treated separately.

I. THE FOURTH AMENDMENT

A. Probable Cause

The confidential informant is a major source of police information leading to arrests and searches. In New Mexico a new source of such information is achieving currency. That source is the anonymous informant produced by Crimestoppers Programs. Several questions regarding the use of confidential and anonymous informants and the disclosure of their identities came before New Mexico courts during the Survey year. The courts also considered second-hand sources of probable cause and re-evaluated the scope of review of probable cause on the appellate level.

1. Confidential Informants

One New Mexico case dealt with the procedure for the disclosure of the identity of a confidential informant. It is settled that hearsay information provided by confidential informants may form the basis for a finding of probable cause to arrest or search.[1] The basic test for gauging the validity of such tips was set forth some years ago in *Aguilar v. Texas.*[2]

> [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the nar-

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1. Jones v. United States, 362 U.S. 257 (1960) (*Jones* was overruled in United States v. Salvucci, 448 U.S. 8 (1980), to the extent that *Jones* gave automatic standing to those objecting to a search which discovered evidence used against them); *see also* Draper v. United States, 358 U.S. 307 (1959).

2. 378 U.S. 108 (1964).

> cotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable."[3]

In *Spinelli v. United States*[4] The Court further explained *Aguilar*. Where one or both of the two prongs of the *Aguilar* test were not met, sufficient independent corroboration by the police of information in the tip could satisfy the test.

The two-pronged *Aguilar* test was applied by the New Mexico Court of Appeals in *State v. Ramirez*.[5] The important contribution of the *Ramirez* decision, however, is its elaboration of the procedure for dealing with the always delicate question of disclosure of the identity of a confidential informant.[6] Generally, under Rule 510 of the New Mexico Rules of Evidence the state need not disclose the identity of a confidential informant.[7] *Ramirez* makes it clear that a regulatory exception to that "privilege" is triggered when a defendant who seeks disclosure of the identity of a confidential informant makes a preliminary showing that "the informant would be helpful or necessary to the defense."[8] In *Ramirez* the defense made such a showing with its claim that the informant was present during the narcotics transaction and could provide information relevant to a defense of entrapment.[9] The court held that the defendant had made the requisite showing, and was therefore entitled to an *in camera* hearing during which the judge, through testimony or affidavits, could determine whether the informant's testimony would indeed be helpful. In *Ramirez*, the trial court first granted and then denied such a hearing. The court of appeals ruled the denial to be erron-

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3. *Id.* at 114.

4. 393 U.S. 410 (1969).

5. 95 N.M. 202, 619 P.2d 1246 (Ct. App. 1980). The court there upheld a search warrant based on an informant's tip because the affidavit: (1) indicated that the informant personally observed the drugs which were sought on the person who was searched pursuant to the warrant—meeting the first part of the *Aguilar* test, and (2) stated that the informant had provided information in the past which had resulted in four arrests and convictions on controlled substance charges, which met the second prong. The affiant/officer had also done a significant amount of corroboration of the information provided by the informant and of other suspicious activity on the part of defendant and his accomplice.

6. N.M. R. Evid. 510(a). "The . . . state . . . has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law . . . ."

7. *Id. See also,* McCray v. Illinois, 386 U.S. 300 (1967).

8. 95 N.M. at 204, 619 P.2d at 1248. N.M. R. Evid. 510(c)(2) states: "If it appears . . . that an informer will be able to give testimony that is relevant and helpful to the defense of an accused, . . . the judge shall give the state . . . an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply the testimony."

9. 95 N.M. at 205, 619 P.2d at 1249.

eous, but also concluded that dismissal, the relief required by Rule 510,[10] was inappropriate because the state had demonstrated that after reasonable efforts it had been unable to locate the informant.[11]

Thus the court in *Ramirez* specified the sequence of steps to be followed where defendant seeks the identity of a confidential informant. Though Rule 510 contains the basic procedure, the court goes beyond the plain language of Rule 510 to explicate the kind of defense showing required to obtain an *in camera* hearing and to recognize a new "unavailability" type of exception to the drastic relief mandated by Rule 510.

2. Anonymous Informants—Crimestoppers' Tips

Increasingly, police are using "Crimestoppers" informants as sources for probable cause to search or arrest. Often these informants supply their tips to the police anonymously over the telephone.[12] In two cases during the Survey year, New Mexico's appellate courts considered search warrant affidavits based substantially on information provided anonymously through Crimestoppers programs.

Before the New Mexico Supreme Court's decision in *State v. Jones*[13] it was open to question in New Mexico whether anonymous "Crimestoppers" informants would be reviewed under the *Aguilar/Spinelli* standards developed for application to confidential informants.[14] It has been argued that anonymous informants should be considered inherently less reliable than ordinary police informants.[15] The ordinary confidential informant is at least known to

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10. N.M. R. Evid. 510(c)(2):
> If the judge finds that there is reasonable probability that the informer can give the testimony [that is relevant and helpful to the defense], and the state . . . elects not to disclose his identity, the judge on motion of the defendant [or on his own motion] in a criminal case shall dismiss the charges to which the testimony would relate.

11. 95 N.M. at 205, 619 P.2d at 1249.

12. The informants are paid through a number system which maintains the informants' anonymity.

13. 96 N.M. 14, 627 P.2d 409 (1981).

14. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

15. Though no cases appear to have enunciated standards for dealing with crimestoppers informants, several jurisdictions have considered anonymous informants and their credibility. Several points can be induced from those cases. First, information from an anonymous tipster fails to meet the "credibility" of the informant prong of *Aguilar*. Second, the courts do not treat anonymous informants as citizen informants whose tips are inherently credible. Third, some courts allow information from an anonymous source to go to a showing of reasonable suspicion, but not probable cause. Finally, those one or two courts that have found probable cause based solely on tips from anonymous informants have had before them substantial independent corroboration by the authorities of detailed information from the tipsters. *See* Henighan v. United States, 433 A.2d 1059 (App. D.C. 1981); Hetland v. State, 387 So.2d 963

the police and is currying favor with them. He can be brought to task if his information is faulty. The anonymous informant, on the other hand, is known to no one, not even the police, and thus is unaccountable for incorrect information.

Without directly treating this issue, the supreme court in *State v. Jones*[16] indicated that the anonymous informant would be subjected to ordinary application of the *Aguilar/Spinelli* test. In *Jones,* a police officer who was manning the phones of the Crimestoppers program received a call from an anonymous informant. The caller stated that he had been in Jones' apartment within the last twelve hours and Jones had shown him narcotics and bragged that they had been obtained by burglarizing several pharmacies in the Albuquerque area. Jones had stated that he had gained entry to two pharmacies through the roof and one pharmacy through the window.

The caller further described Jones, his apartment, and his car and stated that Jones had said that he transported narcotics in his car. Officers checked the department records which revealed that three recent unsolved burglaries of Albuquerque pharmacies had been committed with a *modus operandi* as described by the citizen informant. The *modus operandi* of the burglaries had not been publicly revealed by the police.

The police undertook surveillance of Jones' apartment. Jones was observed by police officers emerging from that apartment and getting into the car described by the informant. Jones matched the informant's description. The officers arrested him and searched his person. They found what they believed to be controlled substances.[17]

Applying the United States Supreme Court's formula in *Spinelli,* the court in *Jones* found that the independent corroboration by the police of the informant's description of the *modus operandi* (which had not been made public) was sufficient to demonstrate the informant's credibility. The court so held despite the absence of any other indication of why the police believed that their anonymous Crimestopper's informant was credible.

State v. Brown[18] was remanded by the supreme court to the court of appeals for reconsideration in light of the supreme court's opin-

(Fla. 1980). (Both cases based a finding of reasonable suspicion on information provided by anonymous informants.) State v. Sieler, 95 Wash. 2d 43, 621 P.2d 1272 (1980) (insufficient corroboration of an anonymous tip to justify a stop); State v. Hasenbank, 425 A.2d 1330 (Me. 1981) (corroborated tip from anonymous informant justifies stop and frisk).

16. 96 N.M. 14, 627 P.2d 409 (1981).

17. *Id.* at 15, 627 P.2d at 410.

18. 96 N.M. 10, 626 P.2d 1312 (Ct. App. 1981). For an in-depth analysis of State v. Jones and State v. Brown, *see* Note, *Search & Seizure—Search Warrants—Probable Cause—Reliability of Confidential & Anonymous Informants—State v. Brown,* 12 N.M. L. Rev. 517.

ion in *Jones*. The court of appeals maintained its prior decision that the warrants were invalid, and distinguished *Jones*.

The *Brown* affidavits contained three separate tips. The first was from a confidential informant who was found in possession of a tennis racket stolen in the burglary under investigation. This tip indicated that the informant had "learned that this burglary had been committed by Marvin and Melvin Brown, and that the confidential informant was concerned for his safety, and a member in good standing of the community with no arrest record." The police then received an anonymous Crimestoppers tip that the Browns had supplied socks, similar to those stolen in the burglary, to a cheerleading team. Finally, a second Crimestoppers tip informed that the Browns had been seen selling tennis equipment and had a large supply of stolen equipment in their rear bedroom.

The *Brown* court held that tips from the confidential informant and the first anonymous informant met neither prong of the *Aguilar* test. The tips provided no "substantial basis for believing the source of the hearsay to be credible [nor] for believing that there is a factual basis for the information furnished."[19] Informant tip number three may have spoken from personal observation and thus satisfied the second prong of the *Aguilar* test, but there was nothing in that tip to support the informant's credibility. The court distinguished *Jones* by noting the total absence of any corroboration of a unique "M.O."

The court of appeals concluded by stating that even the aggregate of all three tips did not add up to a showing of probable cause. Citing *Spinelli,* the court said "that an aggregate of discrete bits of information, each of which is defective, does not add up to the establishment of probable cause."[20]

The *Brown* decision appears to overstate the reach of *Spinelli* and to ignore the earlier United States Supreme Court decision in *Jones v. United States.*[21] *Spinelli* says only that limited amounts of otherwise innocent information, even if corroborated by the police, do not provide sufficient detail or corroboration to convert an affidavit which is otherwise insufficient under *Aguilar* into one which demonstrates probable cause.[22] In *Jones v. United States,* the United States Supreme Court upheld the warrant before it, finding that there was a substantial basis for crediting the hearsay information provided in the affidavit by the confidential informant. The Court observed that the informant's story was corroborated by "other

19. *See* N.M. R. Crim. P. 17(f).
20. 96 N.M. at 13, 626 P.2d at 1315.
21. 362 U.S. 257 (1960).
22. 393 U.S. at 418-19.

sources."[23] These "sources" were other tips from other confidential informants which by themselves would not have supported a finding of probable cause.[24] A similar situation was present in *Brown*. Consequently, it appears that the last portion of *Brown* might bear reconsideration.

3. Second-hand Sources of Information

In *State v. Martinez,*[25] a case of first impression in New Mexico, the New Mexico Supreme Court considered the issue of second-hand sources of information. Often in making arrests or searches, particularly in exigent circumstances, police officers must rely for descriptions and other information upon second-hand sources of information, such as radio dispatchers. The United States Supreme Court, in *Whiteley v. Warden,*[26] held that officers are not required to check out the dispatcher's source of information and the reliability of that source.

In *Martinez,* the court relied on *Whiteley v. Warden,* and held that effective law enforcement requires that a police officer called upon by a dispatcher or other officer to execute an arrest or search is entitled to assume that the officer requesting the aid has probable cause to justify the intrusion. Quoting from *Whiteley,* the state supreme court observed that where such probable cause is absent at the source, an otherwise illegal intrusion "cannot be insulated from challenge by the decision of the investigating officer to rely on fellow officers . . ." to make the arrest or search.[27]

4. Scope of Appellate Review of Probable Cause

In *State v. Martinez,*[28] the supreme court also reconsidered its long-standing rule on the scope of review by an appellate court of a finding of probable cause to arrest or search. *Martinez* overruled *State v. Deltenre,*[29] and *Rodriguez v. State,*[30] which had held that the facts to be examined on appeal are only those facts elicited at the hearing on the motion to suppress. The court stated that an appellate court "may determine if probable cause did or did not exist by an examination of all the record surrounding an arrest or search and sei-

23. 362 U.S. at 271.
24. *See also,* United States v. Harris, 403 U.S. 573, 576 (1971).
25. 94 N.M. 436, 612 P.2d 228 (1980), *cert. denied,* 449 U.S. 959 (1980).
26. 401 U.S. 560 (1971).
27. 94 N.M. at 438, 612 P.2d at 230.
28. 94 N.M. 436, 612 P.2d 228 (1980), *cert. denied,* 449 U.S. 959 (1980).
29. 77 N.M. 497, 424 P.2d 782 (1966), *cert. denied,* 386 U.S. 976 (1967).
30. 91 N.M. 700, 580 P.2d 126 (1978).

zure."[31] An appellate court may now consider not only the record of the hearing on the motion to suppress, but also the record of trial and presumably that of any evidentiary hearing before the trial court. The court noted that the new rule would enable appellate courts "to truly and fully determine the legality or illegality of an arrest or search . . . ."[32]

In *State v. Padilla,*[33] the court of appeals substantially extended the *Martinez* rule on scope of review. The court in *Padilla* considered the admissibility of a second statement by the defendant after a first confession had been improperly induced by references to leniency. Under *State v. Austin,*[34] after a first statement has been suppressed, the burden is upon the state to show that the second statement was voluntary. In *Padilla,* three questions directed by the police to the defendant in the course of taking the second statement referred to his first statement. The *Padilla* court, reviewing the record on the motion to suppress under *Martinez,* found that references to the first statement which were contained in the second statement showed connection with, rather than separation from, the first statement. The court said that ordinarily, such a connection would require suppression of the second statement as tainted by the first.[35] Citing *Martinez,*[36] the *Padilla* court nevertheless sustained the admission of the second statement into evidence, despite the state's burden to prove no taint.[37]

The court indicated that it must consider the entire record including the record of the defendant's trial, not just the record of the suppression hearing when dealing with a suppression question. The court stated that it was the defendant's burden as appellant to furnish a sufficient record on the issues raised on appeal, and that as an appellate court it was bound to resolve all inferences in favor of the trial court's ruling. The defendant's docketing statement indicated that he took the stand and testified on his own behalf. A transcript of that testimony was not included in the record on appeal. The court of appeals concluded that it was bound to assume that the trial court's ruling was correct.

In *Padilla* the court appears to have inferred from the absence of a record of defendant's trial testimony, that such testimony contained

31. 94 N.M. at 439, 612 P.2d at 231.
32. *Id.*
33. 95 N.M. 86, 619 P.2d 190 (Ct. App. 1980).
34. 91 N.M. 586, 577 P.2d 894 (Ct. App. 1978).
35. 95 N.M. at 87, 619 P.2d at 191.
36. State v. Martinez, 94 N.M. 436, 612 P.2d 228 (1980), *cert. denied,* 449 U.S. 959 (1980). *See* text accompanying notes 27-30 *supra.*
37. 95 N.M. at 88, 619 P.2d at 192.

evidence adverse to his claim on the motion to suppress. The implications of *State v. Padilla* for defendants appealing from the denial of a motion to suppress are substantial. In order to protect themselves from this type of negative inference they must include in the record on appeal transcripts of all testimony which might conceivably bear on the motion to suppress. Such a requirement seems an unnecessary and expensive extension of *State v. Martinez*.

B. The Warrant Requirement

The New Mexico courts considered the warrant requirement in several cases during the Survey period. Generally a warrant is required before a search can be made. The warrant must be based upon probable cause, and probable cause must be determined by a " 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' "[38] Several exceptions to the warrant requirement have developed through the years. Some of these exceptions were discussed in New Mexico in the past year.

1. The Automobile Exception and Container Searches

The "automobile exception" to the warrant requirement developed in *Carroll v. United States*[39] and *Chambers v. Maroney*.[40] Under the automobile exception, vehicles legitimately stopped on the highway may be searched without a warrant where they are stopped if there is probable cause to search. These vehicles also may be searched later at the station if probable cause still exists.[41] The theory underlying this exception is that while "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears,"[42] automobiles generally possess an inherent mobility,[43] and one has a lesser expectation of privacy in a motor vehicle.[44]

The United States Supreme Court in *Arkansas v. Sanders*[45] and *Chadwick v. United States*[46] and the New Mexico courts have held that the *Carroll/Chambers* rationale is not applicable to searches of

38. Spinelli v. United States, 393 U.S. 410, 415 (1969), *quoting* Johnson v. United States, 333 U.S. 10, 14 (1948).
39. 267 U.S. 132 (1925).
40. 399 U.S. 42 (1970).
41. *Id.* at 52.
42. Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971).
43. Chambers v. Maroney, 399 U.S. 42, 50 (1970).
44. United States. v. Chadwick, 433 U.S. 1 (1977); South Dakota v. Opperman, 428 U.S. 364 (1976).
45. 422 U.S. 753 (1979).
46. 433 U.S. 1 (1977).

some containers, such as luggage.[47] The courts have reasoned that such containers are surrounded by greater expectations of privacy and are inherently easier to secure than are automobiles. Consequently, absent particular exigency, searches of luggage and containers must be made pursuant to a warrant.

During the Survey year the New Mexico appellate courts continued to confront the task of applying the *Chadwick/Sanders* analysis to containers other than luggage. In *State v. White,*[48] the court of appeals affirmed the trial court's suppression of marijuana seized in a warrantless search of cardboard boxes and bags found in the trunk of a car stopped by the border patrol at a checkpoint. The court emphasized that "whether a warrant is required to search a container which has been seized depends upon the facts concerning the container."[49] In this case the court stressed that "the boxes were closed and at least partially sealed by tape . . . . [T]he bags were of solid material, not 'mesh' . . . . The bags were closed and tied at the top."[50] In light of these facts, the court of appeals held that "the trial court could properly rule that there was a reasonable expectation of privacy in these items. A warrant was required to search these items."[51]

The second "container case" decided during the Survey year was *State v. Capps.*[52] In *Capps,* several large, very dark trash bags and a brown grocery bag were in the trunk of a car which was detained by police. The tops of the trash bags were rolled and taped shut. The grocery sack had the top rolled but was not sealed. The trial court admitted the evidence seized from the containers. The court of appeals, however, saw no basic difference between the facts before it and those in *White* and found *White* to be controlling. The court reversed the trial court and required a warrant to search.

Capps may conflict with, and indeed overrule *sub silentio,* the 1979 decision of the court of appeals in *State v. Smith.*[53] The *Smith* court sustained the trial court's finding that no warrant was required

47. Robbins v. California, 69 L.Ed. 2d 744 (1981); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. at 13. State v. Walker, 93 N.M. 769, 605 P.2d 1168 (Ct. App. 1980). *But see,* New York v. Belton, 69 L.Ed. 2d 768 (1981) (where auto occupant is arrested in or near that auto, the entire passenger compartment of the vehicle including any closed containers therein may be searched incident to that arrest).

48. 94 N.M. 687, 615 P.2d 1004 (Ct. App. 1980).

49. *Id.* at 688, 615 P.2d at 1005.

50. *Id.* at 689, 615 P.2d at 1006.

51. *Id.*

52. 20 N.M. St. B. Bull. 15 (April 9, 1981), *cert. denied,* 94 N.M. 674, 615 P.2d 911 (1981). [Ed. note: After this article was written, the supreme court decided to hear the case and reversed the court of appeals. 21 N.M. St. B. Bull. 219 (Jan. 27, 1982).]

53. 94 N.M. 379, 610 P.2d 1208 (1980).

to search a tan plastic garbage bag found behind the passenger seat of a car. The drugs found in *Smith* were contained in small plastic bags within the large garbage bag and could not be seen.

Shortly after *Capps* was decided, the United States Supreme Court decided *Robbins v. California*,[54] which made it evident that *Capps* represents a proper view of the law on container searches, and that *State v. Smith* is no longer good law. In *Robbins* the Court found no distinction between containers used to transport personal effects such as suitcases or footlockers, and "flimsier containers" such as plastic bags.[55] It held that unless a closed container is such that its contents are exposed to plain view, those contents are wholly protected by the fourth amendment under *Chadwick* and *Sanders*.[56]

2. Exigent Circumstances

In *State v. Perea*[57] the court of appeals applied the broad "exigent circumstances" exception to the warrant requirement to a case involving "evanescent" evidence.[58] While defendant was at the hospital his hands were wiped with a cotton swab soaked in nitric acid solution to test for the presence of gunfire residue. A warrant is usually required for such a search absent exigent circumstances. Though there was probable cause, no warrant was in fact obtained. The trial court upheld the intrusion. The court sustained the warrantless search on the ground that the intrusion was minimal, and that the hospital procedure to cleanse patients brought to the emergency room immediately created the necessary exigency to dispense with the warrant requirement. The court cited to *Cupp v. Murphy*[59] in which the United States Supreme Court held that where probable cause obtained, the police were justified "in subjecting [defendant] to the very limited search [taking scrapings from his fingernails] necessary to preserve highly evanescent evidence [blood]. . . ."[60]

54. 69 L.Ed. 2d 744 (1981). On October 13, 1981, the United States Supreme Court granted review in United States v. Ross, 50 U.S.L.W. 3265. *Ross* involves the warrantless search of a paper bag found in the trunk of a vehicle during a lawful search thereof. The court ordered the parties to address the question whether it should reconsider *Robbins*. *See* 30 Crim. L. Rep. 1005. *Robbins* is particularly vulnerable. The opinion of the court was signed by only three justices. Its author, Justice Stewart, is no longer on the Court. Moreover, it is difficult to see a principled and meaningful basis for distinction between *Robbins* and New York v. Belton, 69 L.Ed. 2d 768 (1981).

55. 69 L.Ed. 2d at 750–751.

56. *Id.*

57. 95 N.M. 777, 626 P.2d 851 (Ct. App. 1981), *cert. denied*, 96 N.M. 17, 627 P.2d 412 (1981).

58. *See* Cupp v. Murphy, 412 U.S. 291 (1973); Schmerber v. California, 384 U.S. 757 (1966).

59. 412 U.S. 291 (1973).

60. *Id.* at 296.

Perea seems to be a legitimate application of the *Cupp v. Murphy* analysis because the chemical substances on the defendant's skin might have been washed away under the hospital procedure if the officers had taken the time to seek a warrant.

3. State Action

State v. Perea[61] also contains a briefly-discussed, but interesting question regarding the warrant requirement—state action. In *Perea,* defendant was hospitalized after his arrest. The emergency room nurse, as was her custom when she believed a crime was involved, took his shirt. She later turned it over to the police. The court of appeals held that there was no fourth amendment violation because there was no govenmental intrusion.

The court did not discuss any evidence of prior arrangement between the nurse and police. The evidence that such seizures were routine in cases of suspected criminal involvement indicates, however, that the nurse or the emergency room staff as a whole may have been acting as agents of the police in taking the shirt. In cases of such an agency relationship most courts have found sufficient state action to trigger fourth amendment protections.[62]

An even more interesting "state action" case with potentially broad implications is *State v. Ryder.*[63] In *Ryder* a tribal police officer, Rocha, who was not cross-commissioned as a state police officer, stopped the non-Indian defendant, Pressing, for going through a stop sign within the Mescalero Apache Reservation. Rocha realized that because he was not a state police officer he could not issue a citation for violation of a state traffic law.[64] Rocha then called Officer Chino, who was a commissioned New Mexico peace officer. Rocha detained[65] Pressing during the ten minutes it took Chino to arrive. During that detention Rocha obtained information which gave him probable cause to believe that Pressing's vehicle contained marijuana. Based on that information, searches were made which yielded over 100 pounds of marijuana. Defendants successfully moved to suppress the marijuana on the ground that because

61. 95 N.M. 777, 626 P.2d 851 (1981), *cert. denied,* 96 N.M. 17, 627 P.2d 412 (1981).

62. *See, e.g.,* State v. Coburn, 165 Mont. 488, 530 P.2d 442 (1974) (state action found where suppressed marijuana seized by store manager after manager consulted with police prior to seizure); Stapleton v. Superior Court of Los Angeles County, 73 Cal. Rptr. 575, 447 P.2d 967 (1968) (participation in planning by police was government action when private agent seized credit card).

63. 20 N.M. St. B. Bull. 383 (Ct. App. April 2, 1981), *cert. granted.*

64. *See* N.M. Stat. Ann. §§66-8-124 & -125 (1978); 66-1-4(49) (Cum. Supp. 1981); and 29-1-11 (Cum. Supp. 1981).

65. *See* text accompanying note 119 *infra.*

Rocha had no authority to detain the defendant, the detention was illegal and the marijuana was the fruit of that illegality.[66] The court of appeals reversed the trial court. As an alternative ground [67] for its reversal it held that there was no constitutional violation in the detention because there was no governmental action.[68]

The court reasoned that by stripping Rocha of any police authority in this case, defendant's argument converted the Indian officer into a private citizen. This deprived his conduct of the requisite "governmental participation to invoke the constitutional protection against an unreasonable search."[69]

Had Rocha been acting in a private capacity, the most analogous cases would be those involving searches by off-duty police officers. "Generally, the courts have responded that such a search is private if the off-duty officer was at the time acting as a private individual rather than as a policeman."[70]

Officer Rocha, however, was not off-duty when he stopped Pressing's vehicle. He was on-duty. Rocha was not acting in his private capacity (*e.g.*, acting as a parent, friend, or neighbor). He was acting solely as a police officer. Indeed the court of appeals itself concluded that the presence of Rocha as a uniformed officer in an official police car was enough to constitute a stop for fourth amendment purposes.[71] Officer Rocha was in the uniform of a tribal police officer. In that capacity he stopped defendant's vehicle for a violation of tribal law. He subsequently detained defendant for arrest on a violation of state law. Under those facts, it is difficult to see how the

66. 20 N.M. St. B. Bull. at 384.

67. *See* text accompanying note 119 *infra*.

68. 20 N.M. St. B. Bull. at 386.

69. *Id.*

70. W. LaFave, Search & Seizure, A Treatise on the Fourth Amendment 113 (1978), citing to People v. Wachter, 58 Cal. 3d 911, 130 Cal. Rptr. 279 (1976) (off-duty deputy sheriff went fishing with friend, friend then went to home of acquaintance to show deputy a barn with distinctive features, deputy while on property saw marijuana growing; held, private search); People v. Topp, 40 Cal. 3d 372, 114 Cal. Rptr. 856 (1974) (off-duty police officer accompanied friend to friend's home which friend shared with another, remained in living room while friend searched bedroom of other occupant and found drugs; held, "there was no state action involved and the evidence was properly admissible"); State v. Roccasecca, 130 N.J. Super. 585, 328 A.2d 35 (1974) (off-duty police lieutenant employed part-time as security consultant at factory searched for evidence of gambling there; held, this is a police search, as there was "no evidence that the investigation of lottery activities came within the scope of his employment" at the factory); State. v. Schlabach, 25 Or. App. 525, 549 P.2d 1283 (1976) (deputy sheriff went on neighbor's property to retrieve horse, discovered marijuana; case remanded because trial judge failed to determine if deputy was acting in his official capacity at the time); Moore v. State, 562 S.W.2d 484 (Tex. Crim. 1978) (neighbor of off-duty officer asked him to search van parked in front of her house; held, a police search, as "an officer is for many purposes on duty 24 hours a day.").

71. *See* text accompanying notes 119 and 120 *infra*.

court could characterize his actions except as those of an agent of the state.[72]

The decision in *Ryder* is unprecedented.[73] Courts have generally held that searches by persons less cloaked with the mantle of police authority than officer Rocha constitute state action. For instance, searches by private persons acting as agents for the police,[74] and searches by nonpolice public employees have been held to be state action.[75]

There are two additional difficulties with the state action analysis in *Ryder*. First, the defendant's claim was not a constitutional one, but was statutory. The state action analysis was therefore inappropriate.[76] Second, the court's reasoning could lead to unacceptable results. For example, out-of-uniform officers could make traffic arrests beyond their authority under N.M. Stat. Ann. §66-8-124 (1978)[77] and violate a suspect's fourth amendment rights with impunity.

C. *Consent Searches*

During the survey year New Mexico courts either reaffirmed or clarified several significant points regarding the validity of consent searches. In *State v. White,*[78] the court of appeals simply reaffirmed its previously established deference to the trial court in its findings of fact as to whether the defendant validly consented.[79]

The question of whether motivation or intent of a consenting party has some bearing on the validity of that person's consent[80] typically arises where an estranged or alienated spouse consents to

72. No officer acts within his authority when he acts unconstitutionally. No one would argue, however, that such unconstitutional conduct reduces the offending officer to the status of private citizen, thus rendering his conduct beyond the pale of the constitution.

73. *See generally,* W. LaFave, Search & Seizure—A Treatise on the Fourth Amendment 110-45 (1978) for a thorough discussion of the state action requirement under the fourth amendment. There is no mention therein of any case similar in its material facts to *Ryder.*

74. *See, e.g.,* Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); Commonwealth v. Dembo, 451 Pa. 1, 301 A.2d 689 (1973); People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505 (1955); People v. Fierro, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (1965).

75. *See, e.g.,* State v. Baccino, 282 A.2d 869 (Del. Super. 1971).

76. 20 N.M. St. B. Bull. at 384-85.

77. N.M. Stat. Ann. §66-8-124 (1978): "No person shall be arrested for violating the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor except by a full-time, salaried peace officer who, at the time of arrest, is wearing a uniform clearly indicating his official status."

78. 94 N.M. 687, 615 P.2d 1004 (Ct. App. 1980).

79. *See* State v. Austin, 91 N.M. 793, 581 P.2d 1288 (Ct. App. 1978); State. v. Ruud, 90 N.M. 647, 567 P.2d 496 (Ct. App. 1977).

80. *See, e.g.,* United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970). *But see* Commonwealth v. Martin, 358 Mass. 282, 264 N.E.2d 366 (1970).

the search of premises shared with the defendant. In some jurisdictions, courts have held that motivation does bear on validity of the consent. In *State v. Larson,*[81] the issue was presented to the New Mexico Supreme Court in classic fashion. Defendant's wife took her two daughters to the police to report that her husband had engaged in sexual activity with the two children. She wanted the defendant arrested and signed a written consent to search their mutual residence. The trial court denied defendant's motion to suppress. Chief Justice Sosa, writing for the supreme court, upheld the validity of the consent, noting that the critical question was whether the wife had "common authority over the premises with the defendant. . . ."[82] The opinion in *Larson* apparently means that the motivation or intent of the consenting party has no bearing on the validity of the search in New Mexico.[83]

A type of search activity closely related to that of consent searches is that of search as a condition of probation. In *State v. Gardner,*[84] the New Mexico Court of Appeals dealt thoroughly with this question. In *Gardner,* the defendant was on probation from a conviction for possession of cocaine. One of the conditions of his probation was that he submit to a search of his car, person, or residence anytime upon request of his probation officer. Defendant was suspected by the police of involvement in a theft from a shop in Taos. His probation officer, together with police officers, went to his residence. After defendant was informed of his condition of probation, he opened the trunk of his car in which were found some of the stolen items.

On appeal, defendant made two claims. He first claimed that the evidence should be suppressed because the search was conducted by the probation officer in violation of probation department regulations which forbade probation officers from conducting warrantless searches.[85] His second claim was that the search was unreasonable, and therefore violative of his fourth amendment rights.

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81. 94 N.M. 795, 617 P.2d 1310 (1980).

82. *Id.* at 797, 617 P.2d at 1312; *see* United States v. Matlock, 415 U.S. 164 (1974); State v. Madrid, 91 N.M. 375, 574 P.2d 594 (Ct. App. 1978), *cert. denied,* 91 N.M. 491, 576 P.2d 297 (1978).

83. 94 N.M. at 797, 617 P.2d at 1312. The supreme court did not explain this conclusion in *Larson. But see* United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970) (where the court suggests that spousal antagonism would preclude "acting in harmony with the marital relationship from which her joint right of ownership or control is derived"). *Cf.* Commonwealth v. Martin, 358 Mass. 282, 264 N.E.2d 366 (1970) ("while they are both living in the premises the equal opportunity does not lapse and revive with the lapse and revival of amicable relations between the spouses").

84. 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

85. *Id.* at 173, 619 P.2d at 849.

On the first point, the court agreed with the defendant's characterization of the department regulation. The court noted, however, that New Mexico courts had no duty to enforce that regulation because compliance with the regulation was not mandated by any federal or state constitutional or statutory law.[86] The court found that, under the circumstances, the specific condition of probation imposed on the defendant overrode regulatory provisions directing probation officers to abstain from searches of probationers.[87]

The court went on to rule on the constitutionality of this search as a condition of probation. Citing *United States v. Consuelo-Gonzalez,*[88] the court recognized that "a probationer's rights concerning searches are more limited than the rights of a person not on probation."[89] The court noted that such limitations must be reasonable. "Reasonableness" is measured by whether the condition is "reasonably related to his rehabilitation."[90] In this regard, the *Gardner* court observed that "[a] condition of probation which requires a prior narcotics offender to submit to a search is reasonably related to the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses."[91] The court held, therefore, that the probation search requirement was constitutional.

The court imposed two further requirements which must be met before a search as a condition of probation would be constitutional. First, such a search must be reasonable as to time and manner,[92] and second, the search must be within the "scope of the probationary process."[93] The court, quoting *Consuelo-Gonzalez,* found that although the probation officer was accompanied by police officials who were primarily concerned with the new criminal offense and not with the defendant's probation, "a proper visitation by a probation officer does not cease to be so because he is accompanied by a law enforcement official."[94] The court also observed that the condition imposed upon the defendant did not require submission to search upon the request of the police officers. The condition required him

86. *See* United States v. Caceres, 440 U.S. 741 (1979); United States v. Payner, 447 U.S. 727 (1980).

87. 95 N.M. at 174, 619 P.2d at 850.

88. 521 F.2d 259 (9th Cir. 1975).

89. 95 N.M. at 174, 619 P.2d at 850.

90. N.M. Stat. Ann. §31-20-6(E) (1978).

91. 95 N.M. at 174, 619 P.2d at 850.

92. *Id.*

93. In other words, the search must not be a subterfuge for a criminal investigation by the police. *Id.* at 175, 619 P.2d at 851.

94. *Id.*

to submit to search only upon the request of his probation officer.[95] In *Gardner,* the court concluded that these conditions were satisfied, and reversed the trial court's order suppressing the evidence.

The court in *Gardner* apparently required that a search as condition of probation not be a "subterfuge for police investigation." At the same time, the court seemed to presume absence of subterfuge even in circumstances where the police were clearly motivated by a desire to investigate a wholly new crime. After *Gardner,* defendants will have difficulty demonstrating subterfuge.

D. Inventory Searches

In *State v. Ruffino,*[96] the supreme court of New Mexico recognized the validity of inventory searches in New Mexico and set out requirements for a valid inventory search. First, the vehicle to be inventoried must be in police control and custody based on some legal ground, and there must be some nexus between the arrest and the reason for the impounding. Second, the inventory must be made pursuant to established police regulations. Third, such searches must further one of two purposes: either the protection of the owner's property, or protection of the police from false claims or potential danger. Finally if during an inventory search evidence or other seizable items are discovered, a search warrant should be obtained before the evidence is seized.[97]

The United States Supreme Court, in *South Dakota v. Opperman,*[98] upheld inventory searches as valid under the fourth amendment and itself set out a series of requirements for the validity of such searches. The standards set forth in *Ruffino* differ somewhat from those in *Opperman.* The differences in some instances limit the scope of inventory searches in New Mexico. In others the differences broaden that scope as compared to the standard set out in *Opperman.*

In several respects the requirements set out in *Ruffino* parallel those in *Opperman.* First, *Opperman* similarly requires that the vehicle be impounded pursuant to lawful authority.[99] *Oppperman* also indicated that the inventory must be conducted pursuant to established police regulations.[100] Finally, *Opperman* made it clear

95. *Id.*
96. 94 N.M. 500, 612 P.2d 1311 (1980).
97. *Id.* at 502, 612 P.2d at 1313.
98. 428 U.S. 364 (1976).
99. *Id.* at 369.
100. *Id.* at 370.

that, just as with any other type of search, the scope of an inventory search must be reasonable. Reasonableness is defined in light of the major purposes of the inventory exception.[101]

In other respects, the *Ruffino* opinion differs from *Opperman.* The court in *Ruffino* stated that "there must be some nexus between the arrest and the reason for the impounding."[102] In *Opperman* there was no arrest of the defendant because the vehicle was impounded for being illegally parked in a tow-away zone. It seems clear that under *Opperman,* at least, there need be no such nexus. Furthermore, *Ruffino* suggests that a warrant should be obtained before evidence observed during an inventory is seized.[103] No such requirement is mentioned in *Opperman* where marijuana observed was immediately seized.[104] In each of the two foregoing respects, *Ruffino* appears to impose more restrictions on police use of inventory searches than does *Opperman.*

On the other hand, *Ruffino* either ignores precautions indicated in *Opperman* or extends the application of that case in two instances. First, *Opperman* suggests that an inventory search would be improper where less intrusive alternatives existed. The Supreme Court emphasized that in *Opperman* "[t]he owner . . . was not present to make other arrangements for the safekeeping of his belongings."[105] There is no similar discussion in *Ruffino.* Second, in *Ruffino* the court concluded that it was properly within the scope of an inventory search to open and search the trunk of the defendant's vehicle: "[t]o forbid entry into trunks as part of an inventory search would frustrate the very purpose of the inventory since the trunk is a likely place for valuables to be stored."[106] The need for the police to protect themelves from liability for objects in their custody would arguably justify the inventory of a trunk because it is a "likely place for valuables to be stored."[107] The protection of the owner's property, however, would not ordinarily call for the inventory of a

101. *Id.* at 375.
102. 94 N.M. at 502, 612 P.2d at 1313.
103. *Id.*
104. 428 U.S. at 366.
105. *Id.* at 375.
106. 94 N.M. at 502, 612 P.2d at 1313.
107. It may be that these differences in the requirements articulated by the two courts simply reflect the different fact settings in which the two cases arose. In *Ruffino,* of course, there was an arrest, and the defendant was in custody and thus unavailable to make other arrangements for his vehicle. In *Opperman* there was no arrest, and because the defendant was at large, he might have made other arrangements.

locked trunk because a locked trunk is reasonably invulnerable to theft or vandalism.[108]

After *Ruffino,* defense counsel may argue that inventory searches in New Mexico must meet a test which combines the elements emphasized in *Ruffino* with those identified in *Opperman* but not noted in *Ruffino.* It remains to be seen in subsequent litigation whether this combination of the two cases was the supreme court's intent in *Ruffino.*

E. Stops

The United States Supreme Court in *Terry v. Ohio*[109] and subsequent decisions[110] has carved out a distinct area of police activity which is governed by the fourth amendment, but is subject to less stringent controls than the full-scale arrest or search. One such lesser intrusion is the "stop"—typically a brief detention for some legitimate law enforcement purpose. "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons."[111] A stop occurs when an officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen. . . ."[112] An officer does not need probable cause to justify the stop, but rather the lesser showing of "reasonable suspicion."[113]

In two decisions during the survey year the New Mexico appellate courts dealt with the intriguing question of what constitutes a "stop" in New Mexico. In *State v. Montoya*[114] a motel burglary was reported in which a set of speakers and a wallet were taken. The manager described two suspects "as about 5'8", Spanish males in their teens with bushy hair and medium build." Officer White suspected one of the Montoyas. The victim's wallet was found two days later within a few blocks of the Montoyas' residence. Two officers went to the defendant's house and found him sitting in his car parked beside the house. The officers were in an unmarked car and in plain clothes. They approached defendant's car, and as they were

108. *But see,* Cady v. Dombrowski, 413 U.S. 433 (1973), in which the court upheld the warrantless search of the trunk of an auto incident to the caretaking function of the local police to protect community safety. The police in *Cady* "were under the impression" that the incapacitated driver, a Chicago police officer, was required to carry his service revolver at all times. The police had reason to believe the revolver might be in defendant's car, which had been towed to an unprotected garage, and might be vulnerable to vandals.

109. 392 U.S. 1 (1968).

110. *See, e.g.,* Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

111. Terry v. Ohio, 392 U.S. at 19.

112. *Id.*

113. United States v. Brignoni-Ponce, 422 U.S. at 882.

114. 94 N.M. 542, 612 P.2d 1353 (Ct. App. 1980).

identifying themelves as police officers, one of the officers saw a stereo speaker which matched the description of one of the speakers reported stolen.

The court of appeals agreed with the trial court that the officers had no "articulable facts to focus suspicion on this defendant." The court found "there is no showing that the officers exercised any physical force or show of authority, or restrained the defendant prior to the time they observed the contraband in plain view in the rear of the automobile."[115] The court, therefore, held that there was no fourth amendment intrusion. The court distinguished *State v. Ray,*[116] and *State v. Galvan,*[117] in that those two decisions involved "an investigatory intrusion into a sphere in which the defendant could maintain a reasonable expectation of privacy. In *Galvan* there was a stopping of the automobile; in *Ray,* an opening of the door of a parked pickup and a searching of its pasesengers."[118] The *Montoya* court concluded that no showing of reasonable suspicion was required in that case because there was no such intrusion.

In *Ray* and *Galvan,* the courts suggested that officers needed a reasonable suspicion based on articulable facts in order to even "approach" a suspect. *Montoya* clarified the language in *Ray* and *Galvan* which seemed to go well beyond the apparent requirements of *Terry* and its progeny. The court of appeals further refined the concept of what constitutes a stop of restraint of an individual in *State v. Ryder.*[119] In *Ryder* a tribal police officer, after stopping the defendant for a traffic violation, asked the defendant to wait in his pickup while he called another BIA officer who was a commissioned New Mexico peace officer. The defendant waited for about ten minutes until the second officer's arrival. There was no order by the officer to wait, and the officer and the defendant were in their separate cars most of the time. The court, however, concluded that the trial court "correctly determined that the presence of a uniformed officer, in an official police car, was sufficient to induce defendants to wait for the arrival of [the other officer]."[120] On these facts, the presence of the uniformed officer in the official police car was enough to constitute a stop.[121]

115. *Id.* at 553-44, 612 P.3d at 1354-55.
116. 91 N.M. 67, 570 P.2d 605 (Ct. App. 1977).
117. 90 N.M. 129, 560 P.2d 550 (Ct. App. 1977).
118. State v. Montoya, 94 N.M. at 544, 612 P.2d at 1355.
119. 20 N.M. St. B. Bull. at 385.
120. *Id.*
121. *Id.* In *Ryder* the court of appeals also decided the legality of the detention of non-Indian defendants by a BIA officer who was not cross-commissioned as a New Mexico peace officer. The detention in *Ryder* lasted some ten minutes after the BIA officer had stopped de-

Generally, the stops which have been considered justifiable upon a showing of reasonable suspicion have been stops for questioning concerning some criminal or regulatory violation. In *State v. Hernandez*[122] the court of appeals dealt with a somewhat different category of police activity—the detention of individuals connected with an incident which has not yet been determined to involve any criminal conduct at all.

In *Hernandez,* the officer was told that a person fitting the defendant's description was reported to have been drinking and to have left with a one-year old child from a residence at which he had earlier caused trouble. The officer knew the defendant. When the officer reached the scene he recognized defendant, who was sitting in a car. The officer told the defendant to wait while he found out what was happening. The defendant tried to leave. The officer reached in and turned off the ignition. An altercation began between defendant and the officer which ultimately involved several other police officers.

Defendant was convicted of battery upon a police officer and appealed. The defendant argued that detention by a police officer is allowable only when there is reasonable suspicion of crime committed or about to be committed or when exigent circumstances permit a brief stop to ask only identity and a few questions.[123] The court of appeals rejected that argument and upheld the officer's limited authority to detain the defendant.

Recognition of such a limited police authority to stop comports with the United States Supreme Court decisions.[124] Application of

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fendants' vehicle for a stop sign violation and detained it until a fellow officer who was cross-commissioned could arrive.

The court of appeals held that Oliphant v. Susquamish Indian Tribe, 435 U.S. 191 (1978), does not prevent a BIA officer from stopping or arresting non-Indian defendants. *Oliphant* refers only to the jurisdiction of tribal courts. Indeed, the United States Supreme Court opinion at least tacitly acknowledges that such an arrest may be made so long as Indian authorities "promptly deliver up any non-Indian offender, rather than try to punish him themelves."

In the state court's view, the BIA officer had authority under the tribal code to stop defendant and issue a tribal citation even if under New Mexico law an arrest for a state traffic violation could only be made by a uniformed full-time peace officer. It was reasonable for the officer who had authority to make the stop for a stop sign violation to detain the defendants for approximately ten minutes under either of two circumtances: the officer might have detained the defendants in order to arrest them on the tribal code violations and detain them for delivery to state officials as directed in *Oliphant;* it would also have been reasonable for the officer to detain the defendants so that Officer Chino, the cross-commissioned officer, could arrest them on state charges.

A simpler solution for tribal law enforcement agencies would be simply to cross-commission all Indian police officers in order to avoid the problems presented in *Ryder.* The *Ryder* decision seems to make clear that even if a tribal officer is not cross-commissioned, he may stop to detain and arrest non-Indians at least for the purpose of turning them over to state authorities.

122. 95 N.M. 125, 619 P.2d 570 (Ct. App. 1980).

123. *Id.* at 126, 619 P.2d at 571.

124. *See* note 110 *supra.*

the Supreme Court's "balancing test"[125] to the somewhat different type of police activity involved in *Hernandez* reinforces the conclusion that the intrusion would be justified upon a showing similar to the *Terry*-mandate reasonable suspicion that the detainee is involved in the activity or disturbance which the officer is investigating and that such activity as reported with reasonable reliability[126] to the officer may involve criminal conduct, or the potential therefor.

F. Frisks

In *State v. Harrison,*[127] police officers obtained a warrant to search a motel room and its occupant, Dionel Tenorio, for a pen gun. The officers entered the room after knocking and found Tenorio lying on the bed with the defendant sitting on the edge of the bed. When the defendant saw the officers she ran to the bathroom, but was grabbed before she could reach the toilet. Because she was female, defendant was told to pat down her pockets. The officers could see that there was something in the pockets, but did not know what. At trial one officer testified that he did not believe that the bulge in defendant's pocket was a pen gun, but that he thought it might have been some other type of weapon. During the search of the defendant, one of the officers opened her purse and found the pen gun inside. The search of defendant's person, nevertheless, continued.[128] Defendant was ordered to empty her two pants pockets and revealed a tightly packed object which contained pills and heroin. The defendant was convicted of possession of heroin. On appeal, the court considered the validity of the search.

The court referred to *State v. Blea,*[129] where the supreme court had held that "a search for weapons is proper even though the officers are without a reasonable belief that the person is armed and presently dangerous, so long as the person fits a class of people who are 'often armed and often will attempt to leave the scene, using their

125. In the cases cited in note 110 *supra,* the Supreme Court identified a distinct area of police activity and balanced that state interest against the level of intrusion into individual privacy interests in order to determine the appropriate fourth amendment protections. In *Hernandez* the state interest in effective law enforcement would seem to give an officer the authority briefly to freeze the scene of an incident to which he has been called where he has a reasonable suspicion that a crime may have been committed, may be in process, or may be about to be comitted. The countervailing impact on an individual's privacy is limited, and indeed, is essentially the same as that in a stop. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

126. *See* Adams v. Williams, 407 U.S. 143 (1972).

127. 95 N.M. 383, 622 P.2d 288 (Ct. App. 1980).

128. *Id.* at 384, 622 P.2d at 289.

129. 92 N.M. 269, 587 P.2d 47 (Ct. App. 1978), *cert. denied,* 92 N.M. 260, 586 P.2d 1089 (1978), *cert. denied,* 441 U.S. 908 (1979).

vehicle for a "fast get away."[130] Even prior to the court of appeals decision in *Harrison, Blea* had been substantially undercut by the United States Supreme Court's decision in *Ybarra v. Illinois.*[131]

In *Ybarra,* the Court stated "the 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief of suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place."[132] In *Harrison* the court recognized this development, overruled the trial court and held that the frisk of the defendant was unlawful.[133] After *Harrison,* reasonable suspicion to justify a frisk in New Mexico must be particularized as to the person to be frisked. The mere fact that an individual fits into a general class of people is not, after *Ybarra* and *Harrison,* sufficient to justify a frisk of that individual.[134] Thus, in *Harrison,* the court of appeals is moving in a direction consistent with that of the United States Supreme Court in limiting the scope of *Terry*-type stops and frisks.[135] *Blea* would therefore seem no longer to be good law.

G. *Fruit of The Poisonous Tree And Reasonable Expectation of Privacy*

In *State v. Barry,*[136] the court of appeals dealt with two interesting concepts related to the fourth amendment right to be free from unreasonable searches and seizures:[137] The concept of reasonable expectation of privacy, and the "inevitable discovery" exception of the fruit of the poisonous tree doctrine.[138]

In *Barry,* narcotics officers were tailing Marion, with whom they had arranged through an undercover informant to buy marijuana. The officers watched Marion drive to one of two residences, one of which was the defendant's, to pick up the marijuana. The officers were unable to get close enough to determine which of the residences Marion entered for fear of alerting him. After Marion's departure from the residence, he was arrested and, among other things, the

130. 95 N.M. at 385, 622 P.2d at 290.

131. 444 U.S. 85 (1979).

132. *Id.* at 94.

133. 95 N.M. at 386, 622 P.2d at 291.

134. In *Harrison,* the court further held that even assuming that the officers had a reasonable belief that the defendant was armed "there was no testimony that showed that they reasonably believed that she was also presently dangerous. . . . The mere fact that she was present while a search warrant was being executed is not sufficient." 95 N.M. at 386, 622 P.2d at 291.

135. *See also* Dunaway v. New York, 442 U.S. 200 (1979).

136. 94 N.M. 788, 617 P.2d 873 (Ct. App. 1980).

137. U.S. Const. amend. IV; N.M. Const. art. 2, § 10.

138. State v. Williams, 285 N.W.2d 248 (Iowa 1979).

officers seized from him an electronic garage door opener. The officers returned to the location of the two residences and through independent investigation developed probable cause to believe that marijuana was contained in the defendant's residence. As they were approaching the defendant's residence, one officer pressed the garage door opener, and the garage door of defendant's residence opened. As it was opening, the officer pressed the opener again, and the garage door closed immediately. During the two to three seconds that the garage door was open, the officers saw large amounts of marijuana inside the garage. Using this and other information, the officers obtained a search warrant. Pursuant to the warrant the officers seized the marijuana.[139] Defendant claimed that the opening of the door constituted an illegal search and that the warrant and subsequent search were thereby tainted by the initial illegality. The trial court refused to suppress the marijuana.

The court of appeals affirmed the defendant's conviction on two grounds. The court first decided that the defendant had no reasonable expectation of privacy in his garage under the circumstances in this case, and second, that the marijuana would have been inevitably discovered and therefore was not proof of any initial illegality.

In reaching the first conclusion, the court reasoned that possession by Marion of Barry's garage door opener destroyed any contention by Barry, under the circumstances, that his expectation of privacy was justifiable.

> [W]hen one choses to dilute his exclusive possession of any part of the premises by granting access to another, he loses the expectation of privacy he would otherwise enjoy, because he then subjects his privacy to the comings and goings of another, and to anyone else who might accompany his co-possessor or pass within viewing range of the exposed area.[140]

This analysis would seem appropriate only if it led to the conclusion that Marion, to whom defendant had loaned the garage door opener, could validly consent to the police opening or searching the garage. There is no indication in *Barry* that Marion consented to a search of the garage.

Consent to search the property or premises of another may be given by one who "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[141] No court has suggested, however, that such a relation-

139. 94 N.M. at 789-790, 617 P.2d at 874-875.
140. *Id.* at 791, 617 P.2d at 876.
141. United States v. Matlock, 415 U.S. 164, 171 (1974).

ship wipes out all reasonable expectations of privacy as to any and all persons.

The court in *Barry* went much farther, however, and concluded that by handing over the garage door opener to Marion, defendant lost any justifiable expectation of privacy in the garage, and essentially stripped himself of any fourth amendment protections as to his garage. The court of appeals relied on cases which turn on the plain view doctrine that one can forsake any legitimate expectation of privacy in premises or objects where one's conduct is not calculated to preserve that privacy.[142] In *Barry,* however, the defendant took reasonable measures to preserve the privacy of his garage from public view and from the view of the police by closing the garage. The defendant's giving the garage door opener to Marion should have reduced or eliminated his expectation of privacy only as to Marion.

The second basis for the court of appeals' affirmance of the conviction in *Barry* was that the marijuana seized from the garage would have inevitably been discovered by the police. With this conclusion the court adopted for the first time in New Mexico the so-called "inevitable discovery" exception to the fruit of the poisonous tree doctrine.[143] Under the inevitable discovery doctrine, suppression is not required even though evidence would otherwise be considered the fruit of an initial illegality if two conditions are satisfied: "(1) that the police have not acted in bad faith to hasten the discovery of the questioned evidence, and (2) that there is proof the evidence would have been found without the impermissible act, and how that discovery would have occurred."[144] In *Barry* the court accepted the facts that the officers had probable cause to obtain a search warrant without having viewed the marijuana, and that the evidence indicated that the officers' purpose in opening the garage door was to identify positively the residence from which they knew marijuana had been transferred.

The court concluded that there was nothing in the record that could support an inference of bad faith. In the court's view, the

142. The cases relied upon by the court for this proposition are Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976). These cases are distinguishable from the facts in *Barry.*

143. *See* note 131, *supra.*

144. 94 N.M. at 790, 617 P.2d at 875; *see also,* United States v. Crews, 445 U.S. 463 (1980) (where the Supreme Court, while purporting not to pass on its validity, may have implicitly sanctioned the inevitable discovery rule); Brewer v. Williams, 430 U.S. 387, 406-7, n. 12 (1977) (where the Supreme Court in dictum suggests that on retrial evidence which it held to have been obtained in violation of Massiah v. United States, 377 U.S. 201 (1964) "might well be admissible on the theory that the body would have been discovered in any event. . . .").

second condition of the inevitable discovery rule was also satisfied. The officers had probable cause independent of the viewing of the marijuana. They could have obtained a search warrant in any event, and in executing the search warrant would have inevitably discovered the marijuana.[145]

Commentators have argued that the inevitable discovery rule substantially undermines the deterrent effect of the exclusionary rule by encouraging police to shortcut more painstaking investigative techniques in favor of illegal activity.[146] The concept of inevitable discovery may be so vague that it enables courts to invoke the exception in situations where the discovery would have occurred only by the most circuitous and unusual routes.[147] The application of the inevitable discovery rule in the context of the *Barry* case is unusual. Ordinarily, the inevitable discovery in question is assumed to be a discovery which would have been made by some means independent of those which are challenged as illegal by the defendant.[148] In this case, the inevitable discovery upon which the court focused was by means of a search pursuant to the very search warrant challenged by the defendant.

The impact of judicial recognition of the inevitable discovery rule in New Mexico remains to be seen. The hope is that the court will soon give more precise guidelines for application of the defense.

II. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

A. Miranda Warnings

1. Custodial Interrogation

Two decisions by the court of appeals during the Survey year underscored the conflict that exists in New Mexico over when *Miranda*[149] warnings must be given. In *Miranda* itself the United States Supreme Court held that the prophylactic admonitions must be given whenever a suspect is subjected to "custodial interroga-

145. State v. Barry, 94 N.M. at 790, 617 P.2d at 875.

146. Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules,* 74 Colum. L. Rev. 88, 89 (1974).

147. Comment, *Fruit of the Poisonous Tree: Recent Developments As Viewed Through its Exceptions,* 31 U. Miami L. Rev. 615, 627 (1977). *See also,* United States v. Alvarez-Porras, 643 F.2d 54, 63-64 (2d Cir. 1981) where the second circit refused to adopt the inevitable discovery exception. The court found that the exception was doubly flawed. First, it encourages speculation about whether police might eventually have developed a lawful basis for discovery of the particular evidence. Second, the exception promotes conjecture about what police might have done, or conceivably could have done to obtain the evidence lawfully.

148. *See, e.g.,* State v. Williams, *supra* note 131.

149. Miranda v. Arizona, 384 U.S. 436 (1966).

tion."[150] By that phrase the Court meant anytime the defendant is interrogated while in police custody at the station house or while otherwise significantly deprived of his liberty.[151] In *State v. Bramlett,*[152] officers responded to a call regarding a one-car accident. They recognized the car as one usually driven by the defendant, and found him not far from the accident scene. One officer stopped Bramlett and asked him whether he had been driving and if he had been in an accident. Bramlett answered "no" to both questions. The officer testified that at that point he would have "persuaded the defendant to stay had he tried to walk away."[153] The officer then asked him to get into the patrol car which the defendant did. The two men returned to the the scene of the accident.

The court of appeals suppressed the defendant's responses to the two questions, holding that the defendant should have been given his *Miranda* warnings prior to being asked those questions by the police. *Bramlett,* when viewed together with a prior decision of the court of appeals, *State v. Wheeler,*[154] indicates that in New Mexico, a defendant is entitled to his *Miranda* warnings whenever he is in any way detained by the police and suspicion is focused upon him.[155]

The *Wheeler/Bramlett* approach is a rather strict application of *Miranda.* The *Miranda* warnings are designed as a protection for a suspect's fifth amendment privilege against *compelled* self-incrimination.[156] Therefore, *Miranda* itself emphasizes the inherently coercive atmosphere of a custodial interrogation in a police-dominated situation. Most appellate courts recognize this by holding that *Miranda* warnings are not required in *Terry*-type stop situations such as that which occurred in *Bramlett.*[157]

A more conservative view of the circumstances under which *Miranda* warnings are required is typified by the court of appeals decision in *State v. Montano.*[158] In *Montano,* the defendant made her first statement to the police when they arrived at her home to investigate a homicide she had reported. There were apparently a

150. *Id.* at 444.
151. *Id.*
152. 94 N.M. 263, 609 P.2d 345 (1980).
153. *Id.* at 265, 609 P.2d at 347.
154. 92 N.M. 116, 583 P.2d 480 (Ct. App. 1978).
155. "[W]hen a investigation has focused on the accused he is entitled to the *Miranda* safeguards." *Id.* at 117, 583 P.2d at 481.
156. 384 U.S. at 461.
157. *See, e.g.,* United States v. Gallagher, 430 F.2d 1222 (7th Cir. 1970); Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968); People v. Rodney, 21 N.Y.2d 1, 233 N.E.2d 255 (1967); Kamisar, LaFave & Israel, Modern Criminal Procedure 624 (5th ed. 1980).
158. 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

number of officers at her home and some of them suspected a criminal homicide from the beginning. The court of appeals held that the questioning in *Montano* fell into the category of "general on-the-scene questioning" which is not considered custodial under *Miranda*.[159] Therefore, the court concluded that *Miranda* warnings were not required prior to that questioning.

Defendant's second statement to the police was taken at the station house where she had gone at the request of the police at approximately 4:00 a.m. After that questioning she returned home. The court, noting that all questioning done at the police station is not custodial,[160] held that the defendant was not in custody or deprived of her freedom of action in any significant way, and that it was therefore not necessary for the police to give the defendant *Miranda* warnings prior to the questioning at the station. The decision in *Montano* is consistent with *State v. Harge*.[161] In *Harge,* the court held that *Miranda* warnings need not be given prior to questioning at the station house under circumstances similar to those in *Montano*.[162] The court went on to note that "*Miranda* warnings need not be given simply because questioning takes place in the station house, or because the questioned person is one whom the police suspect."[163] The police need not give the warnings to everyone whom they question. *Miranda* warnings are required only where there is such a restriction on a person's freedom as to render him "in custody and subject to a coercive environment."[164]

The four cases appear to be inconsistent. *Wheeler* and *Bramlett* can be distinguished from *Harge* and *Montano* however, on their facts. In *Wheeler* and *Bramlett,* courts found that the defendants were not free to leave, which was not the case in *Harge* and *Montano*. Nevertheless, the two lines of cases represent different approaches to the question of when *Miranda* warnings are required. *Harge* and *Montano* represent perhaps the more orthodox view that there must be a deprivation of freedom of action in a significant way so as to create the coercive atmosphere necessary to trigger the fifth amendment privilege against compelled self-incrimination.

159. Miranda v. Arizona, 384 U.S. at 477; State v. Montano, 95 N.M. at 237, 620 P.2d at 891.

160. *See,* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

161. 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979).

162. 94 N.M. at 15, 606 P.2d at 1109. In *Harge,* the deputy testified that he could not remember whether the defendant went to the police station of his own accord or at the request of the police. The court stated that "at the time of the statement defendant was not taken into custody. . . ." *Id.*

163. *Id.*

164. *Id.*

2. Waiver

In two cases decided during the Survey period the courts dealt with the question of waiver of *Miranda* rights; *i.e.*, the waiver of the right to remain silent and the waiver of the right to counsel. In *State v. Showalter,*[165] the defendant requested counsel, but his request was ignored by the police who continued to interrogate him for about an hour and a half. The trial court suppressed the statements and on the state's appeal, the court of appeals affirmed the suppression. The court observed that in *Miranda,* the Supreme Court had outlined the procedure to be followed when an individual invokes his right to counsel: "If [a suspect in custody] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states he wants an attorney, the interrogation must cease until an attorney is present."[166]

Showalter presents the interesting question of what is the test for waiver when a suspect has initially invoked his right to counsel, and the state claims that he subsequently waived that right. The New Mexico Supreme Court had decided in *State v. Greene*[167] that a defendant may, after an initial invocation of his right to counsel, waive that right without having previously seen counsel. However, under *Greene* the state must shoulder a heavy burden to prove that the defendant knowingly and intelligently waived his right to counsel.

When *Greene* was decided, the Supreme Court of the United States had not yet set down its rules on the question of subsequent waiver after initial invocation of the right to counsel. In *Michigan v. Mosley*[168] the Supreme Court had expressly reserved that question, noting that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney.

This last term the United States Supreme Court faced the question squarely and set out precise guidelines. In *Edwards v. Arizona,*[169] the Supreme Court held

> that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to fur-

165. 94 N.M 663, 615 P.2d 278 (Ct. App. 1980).
166. 94 N.M. at 664, 615 P.2d at 279; *see also,* Michigan v. Mosley, 423 U.S. 96, 101 (1979).
167. 91 N.M. 207, 572 P.2d 935 (1977).
168. 423 U.S. 96, 104 (1975).
169. 49 U.S.L.W. 4496 (May 19, 1981).

> ther police initiated custodial interrogation even if he has been advised of his rights. . . . An accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.[170]

Showalter, being a clear case of police abuse of the rights pronounced in *Miranda,* is perfectly consistent with the United States Supreme Court's decision in *Edwards.*

In *State v. Trujillo,*[171] the state supreme court, for the first time since *Greene,* faced the question of the validity of a waiver of *Miranda* rights subsequent to an initial invocation of the right to counsel. In *Trujillo,* the defendant was advised of his *Miranda* rights at the station. He indicated that he did not wish to discuss any of the events about the murder and he refused to waive his right to counsel. The interrogating officer went on to ask a series of "background questions."[172] During this questioning, the officer asked where the defendant had been on the night the victim was killed. The defendant's reply was admitted in evidence although its use was limited to impeachment of the defendant's testimony.[173]

In this pre-*Edwards v. Arizona* decision the state supreme court inquired whether the defendant "knowingly, intelligently, and voluntarily waived his *Miranda* rights"[174] and found such a waiver. Under the precise guidelines elaborated in *Edwards,*[175] however, it would seem that Trujillo's statement would now have to be sup-

170. 49 U.S.L.W. at 4498.

171. 95 N.M. 535, 624 P.2d 44 (1981). For a more detailed analysis of this case, *see* Note, *Custodial Interrogation in New Mexico: State v. Trujillo,* 12 N.M. L. Rev. 577 (1982).

172. 95 N.M. at 540, 624 P.2d at 49.

173. *Id.* at 541, 624 P.2d at 50. As the *Trujillo* court noted, any error would have been "harmless error" under the rule in Chapman v. California, 486 U.S. 18 (1967). Althogh the evidence allegedly taken from Trujillo in violation of *Miranda* was used only for purposes of impeachment, the court did not invoke the rule set out in Oregon v. Haas, 420 U.S. 174 (1975) and Harris v. New York, 401 U.S. 222 (1971). In those cases, the United States Supreme Court held that statements taken in violation of *Miranda* are admissible for purposes of impeaching the defendant's testimony at trial. An application of that rule would have enabled the New Mexico Supreme Court to dispose of this issue in *Trujillo* with dispatch. It is possible that by its failure to invoke the *Harris/Haas* exception to *Miranda,* and indeed by failing even to mention either of the cases, the state supreme court signaled its disapproval of that exception to the rule of exclusion for violations of *Miranda.*

Other states which have rejected Oregon v. Haas and Harris v. New York on state constitutional grounds include California, People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); Pennsylvania, Commonswealth v. Tuplett, 462 Pa. 244, 341 A.2d 62 (1975); and Hawaii, State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971).

174. 95 N.M. at 540, 624 P.2d at 49.

175. Edwards v. Arizona, 49 U.S.L.W. 4496 (May 19, 1981).

pressed. Counsel was not made available to Trujillo before the "background" interrogation was taken. The accused himself did not initiate the further communication exchange or conversation with the police. Rather it was the police who initiated the continuation of the "background" questioning.[176] The New Mexico Supreme Court may wish to reconsider both *Greene* and *Trujillo* in light of the *Edwards* decision.

Further on the question of waiver, in *State v. Bramlett,*[177] the court of appeals held that under the facts and circumstances of that case, the defendant, who was highly intoxicated, could not have "knowingly and voluntarily" waived his *Miranda* rights. Despite the arresting officers' testimony that they believed Bramlett knew and understood the *Miranda* warnings that had been read to him, the court of appeals focused on the officer's description of his condition at the time of the statements: "staggering, slurred speech, difficulty in walking, strong alcoholic smell—and the intoxication test level of .23."[178] Moreover the court observed that the officers kept him in jail "for his own protection" because they thought he was too intoxicated to be released.[179] N.M. Stat. Ann. §43-2-22(a) (1978) permits such detention of an intoxicated person. "Intoxicated person" is defined as one "whose mental and physical functioning is so substantially impaired . . . that he has become . . . unable to care for his own safety."[180] Under these circumstances, the court of appeals held that Bramlett was too intoxicated to knowingly and voluntarily waive his *Miranda* rights.[181]

Bramlett is, no doubt, an extreme case, particularly in light of the police decision to detain the defendant in protective custody. The state should, however, take note of the risk involved in taking statements from a highly intoxicated suspect.

B. Mental Competence To Give A Voluntary Statement

An issue related to but distinct from *Miranda* which arises when the state seeks to admit statements by the defendant is that of the

176. The police practice of proceeding to ask "background questions" after a defendant has invoked his right to remain silent or his right to counsel under *Miranda* is troublesome. Even though a defendant like Trujillo might well have waived his rights under *Miranda* as to "background" information, it is unlikely that the defendant intended to waive those rights as to questions so closely relating to the criminal incident as his whereabouts on the night of the murder.

177. 94 N.M. 263, 609 P.2d 345 (Ct. App. 1980).

178. 94 N.M. at 268, 609 P.2d at 350.

179. *Id.*

180. N.M. Stat. Ann. §43-2-17(a) (1978).

181. 94 N.M. at 268, 609 P.2d at 350.

voluntariness of the statement.[182] Competency to give a statement is an aspect of voluntariness.[183] In *State v. Ruiz,*[184] the court held that the question of competency is not covered by the Uniform Jury Instructions.[185] Therefore, where there is evidence to indicate that defendant's mental competence to give a statement is in doubt, a separate intruction on competence must be given. The court in *Ruiz* recommended that the instruction use the language set forth in *State v. Manus:* "[T]he defendant must have had sufficient mental capacity at the time he made the statement, to be conscious of the physical acts performed by him to retain them in his memory and to state them with reasonable accuracy."[186]

C. Comment On Defendant's Post-Arrest Silence

Courts in New Mexico generally prohibit the state from commenting on a defendant's post-arrest silence.[187] This prohibition on comment is designed to protect another element of the defendant's fifth amendment privilege against compelled self-incrimination: the right to remain silent in the face of police interrogation. In *State v. Romero,*[188] the court outlined the law on comment on post-arrest silence as it stands in New Mexico today with its major exceptions. In *Romero,* the defendant took the stand on his own behalf and presented an alibi defense. On direct he was asked:

> Q: If you committed these crimes would you plead guilty today?
> A: Yes, sir, I would.

On cross-examination, the following questioning occurred:

> Q: When you were questioned by Detective Johnnie Brown on the warrant for these eight different counts, why didn't you

182. *See* Mincey v. Arizona, 437 U.S. 385 (1978).
183. State v. Manus, 93 N.M. 95, 101, 597 P.2d 280, 286 (1979).
184. 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).
185. N.M. U.J.I. Crim. 40.40 (N.M. Stat. Ann. 1978) provides:
Evidence has been admitted concerning a statement allegedly made by the defendant. Before you consider such statement for any purpose, you must determine that the statement was given voluntarily. In determining whether a statement was voluntarily given, you should consider if it was freely made and not induced by promise or threat.
186. State v. Manus, 93 N.M. at 101, 597 P.2d at 286.
187. In State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975) the court held that if defendant's silence lacks significant probative value, any reference to defendant's silence has an intolerable prejudicial impact and is plain error requiring reversal even though raised for first time on appeal.
188. 94 N.M. 300, 609 P.2d 1256 (Ct. App. 1980).

explain to her what had really happened and what the mistakes were?
A: I had nothing to say for my own protection.
Q: At the preliminary hearing, did you take the stand and testify to explain the mistakes?
Defense Counsel: Your Honor, I object.
The Court: Sustained.
Q: When is the first time you have told the story that you have just told today?
A: Right now to you.[189]

The court of appeals stated the rule that "it is clear that the prosecution may not use the defendant's silence at the time of his arrest to impeach an exculpatory story which the defendant presents at trial. The reason is that the silence is insoluably ambiguous."[190] "Direct comment" on post-arrest silence never has significant probative value when used to impeach an exculpatory story presented at trial. Such comment is plain error and reversal is required even though the issue is raised for the first time on appeal.[191] Two exceptions to the plain error rule have been recognized by the New Mexico courts. In *State v. Baca*[192] the court distinguished between those comments directly attributable to questioning of the defendant by the prosecutor and those comments incorporated within the testimony of a witness and held that the latter would not be plain error, and therefore would be reviewable when a timely objection was made. The second exception was set out by the United States Supreme Court in *Doyle v. Ohio.*[193] In *Doyle,* the court stated that post-arrest silence could be used by the state to impeach a defendant who claims to have told the police an exculpatory story at the time of his arrest.

As the court in *Romero* noted, however,

> post-arrest silence could be used by the prosecution to contradict the defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.[194]

In *Romero,* the court found that neither the *Baca* nor the *Doyle* ex-

189. *Id.* at 300-301, 609 P.2d at 1256-1257.
190. *Id.* at 301-302, 609 P.2d at 1257-1258.
191. *Id.* at 301, 609 P.2d at 1257.
192. 89 N.M. 204, 549 P.2d 282 (1976).
193. 426 U.S. 610, 619, n.11 (1976).
194. 94 N.M. at 302, 609 P.2d at 1257.

ception to the plain error rule applied on the facts, and therefore the prosecutor's comment constituted a reversible error.

State v. McGee[195] presents an example of a set of facts where the court found as a matter of law that there had been no impermissible comment by the prosecution on defendant's post-arrest silence. In *McGee,* after questioning the defendant about his arrest and arraignment, the district attorney asked the general question, "did you tell anyone about [your feeling that the police had the wrong man]?"[196] After the defendant replied that he had told Kurt Lohbeck, a reporter, the prosecutor asked, "did you tell anyone else?"[197] Because the question was general and defendant's answer did not direct the jury's attention to his silence upon arrest but rather to his calling a local newsman, the court found that the question "did not amount to a comment on defendant's silence at the time of his arrest."[198] Therefore reversal was not required.

D. Comment On Defendant's Failure To Testify

In two decisions handed down on succeeding days during the survey year, the state supreme court elaborated on the constitutional prohibition against prosecutorial comment on defendant's failure to testify. In *Gonzales v. State*[199] the state had argued that its comment was if anything, "indirect comment" on the accused's failure to testify at trial and therefore was not reversible error.[200] The court concluded that the prosecution's comment was reversible error. It was "direct comment" on the defendant's failure to testify, whatever may have been the district attorney's intention in making the comments, because "his choice of words do not exclude a reasonable interpretation that he was making a direct comment on Gonzales' failure to testify."[201]

In *State v. Ruffino,*[202] the supreme court clarified two major

195. 95 N.M. 317, 621 P.2d 1129 (Ct. App. 1980).
196. *Id.* at 319, 621 P.2d at 1131.
197. *Id.*
198. *Id.*
199. 94 N.M. 495, 612 P.2d 1306 (1980).
200. The comment was:

> And did you hear one word from the defense, one word of denial that he beat him with this 2 x 4. Not one word of denial. . . . What was his justification for doing to Byron what he did? He didn't tell you, the defense didn't tell you what the reason was. He didn't give you any justification. He didn't deny that he hit him with a 2 x 4 and he didn't tell you why.

Id. at 495, 612 P.2d at 1306.
201. *Id.*
202. 94 N.M. 500, 612 P.2d 1311 (1980).

limitations on defense claims of reversible error on the grounds of comment on defendant's failure to testify. First, the court made it clear that such comment does not constitute "plain error."[203] Therefore, where no objection is made by the defense at trial, the issue of comment on defendant's failure to testify cannot be raised on appeal for the first time. Further limiting the availability of this constitutional claim, the court repeated the rule that "[t]he prosecutor can refer to the defendant's failure to testify if the door is opened by the defense. . . ."[204]

These cases may lead to anomolous results. Comment on post-arrest silence, under *Romero,* is considered "plain error" under New Mexico Rule of Evidence 103(d) and can be raised for the first time on appeal.[205] On the other hand, comment on the defendant's failure to testify at trial, is not considered plain error and must be preserved by timely objection at trial in order to be raised on appeal.

The rights affected by comment on post-arrest silence and failure to take the stand are identical. Both types of comment violate the fifth amendment privilege against self-incrimination. In *State v. Marquez*[206] the court of appeals cited several definitions of "plain error": "grave errors which affect substantial rights of the accused;" "errors that result in a clear miscarriage of justice;" errors that "are obvious or . . . otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[207] If a defendant's right to no comment on post-arrest silence is "substantial," the right to no comment on failure to testify must be as well. If it is a "clear miscarriage of justice" for the prosecutor to comment on post-arrest silence, the state's comment on the even more basic right to refuse to take the stand must be an even more grievous error. Certainly prosecutorial comment on defendant's failure to testify is at least as obvious an error as is comment on post-arrest silence.

III. GRAND JURY

The 1978 amendments to the grand jury statutes have substantially changed grand jury practices in New Mexico.[208] During the

203. *Id.* at 503, 612 P.2d 1314 (1980).
204. *Id.*
205. *See also,* State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).
206. 87 N.M. 57, 529 P.2d 283 (Ct. App. 1974), *cert. denied,* 87 N.M. 47, 529 P.2d 273 (1974).
207. *Id.* at 61, 529 P.2d at 287, *quoting* United States v. Campbell, 419 F.2d 1144, 1145 (5th Cir. 1969).
208. N.M. Stat. Ann. §§31-6-1 to -14 (Cum. Supp. 1981).

Survey period, the New Mexico courts decided a number of cases which interpreted that statutory scheme and enforced its provisions.

A. Notice Requirement

The court in *Rogers v. State*[209] thoroughly outlined the requirements of notice to the target witness set out in N.M. Stat. Ann. §31-6-11(B) (1978), as well as the procedures for challenging adequacy of notice. After *Rogers* the rules for compliance with the target notice requirement and for challenges to be raised for noncompliance are quite clear.

Under *Rogers,* any challenge to the adequacy of notice to the target witness under Section 31-6-11(B) must be raised by the defendant before trial.[210] Once the issue is raised by the defense, the prosecution then has the burden of persuading the trial court that the notice was adequate. Notice is mandatory and it is the responsibility of the district attorney attending the grand jury to provide that notice absent the existence of one of the statutory exceptions.[211]

The court in *Rogers* provided specific instructions regarding the timing of notice to the target witness. Notice must be received "in sufficient time to exercise the right to testify."[212] The 36-hour notice required for all subpoenaed witnesses under N.M. Stat. Ann. §31-6-12(A) (1978) was interpreted by the court to be required for all target witnesses, even if not subpoenaed, unless a judge specifically approves a shorter period.[213]

The opinion in *Rogers* further elaborated on the test for proper notice in terms of the content of the notice itself. The language of the notice must be such that a nonlawyer would reasonably understand that he was a target of a grand jury investigation.[214]

Any method for sending notice is acceptable, whether written or oral, so long as it complies with the statutory intent that the target be given an opportunity to testify, and so long as the prosecutor exer-

209. 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

210. The court also noted that in *Rogers* the defendant "desired to testify and would have if given an opportunity to do so." The court does not say that this is an essential element of a claim of inadequate notice, but a prudent defense attorney would want to plead and prove the foregoing in a motion to dismiss the indictment for failure to provide notice to the target witness. *Id.* at 222, 608 P.2d at 534.

211. N.M. Stat. Ann. §31-6-11(B) (Cum. Supp. 1981) states: "The target shall be notified of his target status and be given an opportunity to testify, if he desires to do so, *unless* the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person." (emphasis added).

212. 94 N.M. at 221, 608 P.2d at 533.

213. *Id.*

214. *Id.*

cises reasonable diligence in giving notice. Specifically, though notice to counsel may be sufficient, it is not sufficient to send notice to the public defender if, as in the *Rogers* case, the district attorney should have known that the defendant had private attorneys.[215]

If the district attorney wishes to send notice to an incarcerated defendant at the jail, there will be no presumption of delivery without evidence of the jail's mail system. In any event, there will be no presumption of timely delivery. Thus the careful district attorney will establish some sort of certification of affidavit system indicating not only delivery but the specific time of delivery.

B. Evidence

An interesting dichotomy has arisen in New Mexico law on the question of the type of evidence to be presented before the grand jury. In *Maldonado v. State,*[216] the state supreme court held that N.M. Stat. Ann. §31-6-11(A) (Cum. Supp. 1980), which requires that the grand jury receive only evidence which is admissible at trial, is "directory" only, and is not subject to enforcement by the courts. The court further held that the introduction of inadmissible evidence before the grand jury does not violate due process unless the trial itself is rendered unfair. This holding reaffirms the court's long-standing position.[217]

Shortly before *Maldonado* was decided, the court of appeals in *State v. Herrera,*[218] affirmed the trial court's dismissal of an indictment on the ground that the prosecutor had failed to present exculpatory evidence known to him. The court in *Herrera* found that the prosecutor's omission constituted a denial of due process to the defendant.

It is difficult to understand how the prosecutorial error before the grand jury in *Herrera* could constitute a denial of due process under the *Maldonado* test, which requires that the trial itself be rendered unfair. Certainly the omission of exculpatory evidence at the grand jury can be remedied by the trial court's admission of such evidence at trial, just as hearsay evidence can be excluded at trial. That action by the trial court would preclude any transfer of the unfairness to the trial.

It was suggested that *Maldonado* may have overruled *Herrera sub*

215. *Id.* at 221-222, 608 P.2d at 533-534.

216. 93 N.M. 670, 604 P.2d 363 (1979). For a more detailed analysis of this case, *see* Note, *Criminal Procedure—Grand Jury—Inadmissible Evidence—Due Process: Maldonado v. State,* 11 N.M. L. Rev. 451 (1981).

217. The New Mexico courts have long been considered to be without the power to review the sufficiency, legality, or competency of the evidence presented to the grand jury. *See* State v. Chance, 29 N.M. 34, 221 P. 183 (1923).

218. 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979).

silentio.[219] This view was expressly rejected by the court of appeals in *State v. Lampman,*[220] decided during the Survey year. In *Lampman,* the court of appeals found a denial of due process where a prosecutor had refused to allow a grand jury witness to testify to an inconsistent statement by the officer at the scene of the accident. The court found that the prosecutor had knowingly withheld exculpatory evidence from the grand jury. The court, therefore, held that the defendant had been denied due process. It rejected the state's reliance on *Maldonado* and stated: "*Maldonado* did not overrule *Herrera.* . . ."[221]

In *State v. Sanchez,*[222] the court cited to N.M. Stat. Ann. §31-6-11(B) (Cum. Supp. 1980),[223] relied on *State v. Herrera,*[224] and again found a denial of due process. In *Sanchez* the prosecutor, because he thought the exculpatory evidence was untrue, refused to provide the jury with the confession of a co-defendant which contained exculpatory statements concerning the defendant. The court held that the prosecutor's "belief that Lucero was lying was not determinative."[225] The sole question was whether the evidence "tended to negate guilt." If so, its omission required dismissal of the indictment.[226]

It is difficult to square the due process analysis in the *Herrera, Lampman, Gonzales,* and *Sanchez* line of cases with the due process analysis pronounced by the state supreme court in *Maldonado.* It is unclear how the failure to present exculpatory evidence to the grand jury in and of itself taints the fairness of the trial. It is even less clear why an indictment should be dismissed after a trial in which the defendant was convicted, presumably in the face of the exculpatory evidence. If the exculpatory evidence did not prevent a conviction under beyond a reasonable doubt standards,[227] it is illogical to reverse a conviction and order the dismissal of an indictment because that same evidence was not presented to the grand jury operating under a probable cause standard.[228]

The *Maldonado* rule may not justify the result in *Herrera, Lamp-*

219. Hartz, *Criminal Law and Procedure,* 11 N.M. L. Rev. 85 (1981).

220. 95 N.M. 279, 620 P.2d 1304 (Ct. App. 1980) [Editor's note: *Lampman, Herrera,* and other exculpatory evidence/grand jury cases were overruled in Buzbee v. Donnelly, 634 P.2d (1981)].

221. 95 N.M. at 280, 620 P.2d at 1305.

222. 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980).

223. 95 N.M. at 28, 618 P.2d at 372.

224. 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979).

225. 95 N.M. at 28, 618 P.2d at 372.

226. *Id.*

227. The reasonable doubt standard is required in criminal cases as a matter of due process. Mullaney v. Wilbur, 421 U.S. 684 (1975), *In re* Winship, 397 U.S. 358 (1970).

228. N.M. Stat. Ann. §31-6-10 (Cum. Supp. 1981).

man, and *Sanchez.* Other policy considerations, however, may support those results. It is the function of the grand juries to find "probable cause" to hold the defendant for trial. In other procedures where probable cause is to be determined, hearsay is admissible.[229] There is no reason, then, why such evidence should not be admissible before the grand jury or why its introduction before the grand jury should constitute a denial of due process.

On the other hand, the prosecutor has an obligation to conduct the grand jury in a fair and impartial manner, particularly as the grand jury proceeding is usually conducted *ex parte.* The introduction of exculpatory evidence known to the prosecutor would be a way of ensuring such fairness.

IV. HABITUAL OFFENDERS

A. Double Jeopardy

A person convicted of a non-capital felony in New Mexico who has one or more prior felony convictions is subject to the New Mexico Habitual Offender Act.[230] The act mandates from one to eight years' enhancement of sentence without possibility of suspension or deferral. This provision has led to much litigation and has been attacked on a double jeopardy theory.[231] In four cases decided last year[232] the New Mexico Supreme Court reaffirmed the position set out in *State v. Linam,*[233] that because a habitual offender proceeding only involves sentencing and not trial of any crime, double jeopardy does not attach in such a proceeding. Indeed, in *State v. Garcia*[234] and *State v. Archibeque,*[235] the court concluded that double jeopardy did not apply even where the habitual offender proceeding did not commence until a substantial time after the defendants were convicted and sentenced on the underlying offense and had begun serving that sentence.[236] Thus, the position on the double jeopardy im-

229. *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103 (1975); Aguilar v. Texas, 378 U.S. 108 (1964); N.M. R. Evid. 804(b) and notes thereto.

230. N.M. Stat. Ann. §31-18-17 (1978). The enhancement varies depending on the number of prior convictions. One prior offense leads to a one-year enhancement; two priors, four years; and three or more priors, eight years.

231. *See* annotations to N.M. Stat. Ann. §31-18-17 (1978).

232. State v. Archibeque, 95 N.M. 411, 622 P.2d 1031 (1981); State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980); State v. James, 94 N.M. 604, 614 P.2d 16 (1980); and State v. Valenzuela, 94 N.M. 340, 610 P.2d 744 (1980).

233. 93 N.M. 307, 600 P.2d 253 (1979).

234. 95 N.M. 246, 620 P.2d 1271 (1980).

235. 95 N.M. 411, 622 P.2d 1031 (1980).

236. State v. Garcia, 95 N.M. at 251, 620 P.2d at 1276; State v. Archibeque, 95 N.M. at 411, 622 P.2d at 1031. *But see* Bullington v. Missouri, 49 U.S.L.W. 4481 (May 4, 1981) where the Supreme Court held that the death penalty cannot be imposed at a second sentencing pro-

plications of habitual offender proceedings is now firmly established in New Mexico.[237]

B. *Burdens of Proof*

The court in *State v. Garcia* went beyond the double jeopardy question to explain the shifting burdens of proof in challenges to the validity of prior convictions leading to habitual offender proceedings.

> The state has the burden of proof in making a prima facie case that a defendant has been convicted of a prior felony. If the defendant raises the defense that the prior convictions are invalid, the defendant has the burden of producing evidence demonstrating their invalidity. If no evidence is produced, . . . then this defense is not a matter to be decided. But if such evidence had been produced, then the state would have had the burden of persuasion as to the validity of the prior convictions. . . . The absence of a record of a guilty plea proceeding does not establish the invalidity of the guilty plea but only that the transcript of that proceeding is unavailable.[238]

In *Garcia* and in *State v. James,* the court suggested two bases on which a defendant might successfully challenge the validity of a

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ceeding after retrial of defendant where the jury in the first sentencing hearing had fixed the penalty at life, the only alternative to capital punishment.

Bullington is distinguishable in at least one respect from these New Mexico decisions. In the New Mexico cases, defendants have argued that the prior jeopardy which precluded a defined habitual offender hearing attached at the trial itself. State v. Garcia, 95 N.M. at 248, 620 P.2d at 1273; State v. Archibeque, 95 N.M. at 411, 622 P.2d at 1031. On the other hand, Bullington's claim was that jeopardy attached after the first sentencing hearing vis-a-vis any record of such proceeding. 49 U.S.L.W. at 4483.

The United States Supreme Court's decision emphasizes, however, the trial-like process in Missouri's capital-sentencing proceeding. That process is similar to trial because of the requirement that the state prove its case for the death penalty beyond a reasonable doubt, and the limit of two choices (similar to the guilty/not guilty choice presented to juries in criminal trials) available to the Missouri jury. Bullington v. Missouri, 49 U.S.L.W. at 4483. In several respects these characteristics are shared by our habitual offender proceedings which require a "mini-trial" where the state must prove the prior convictions beyond a reasonable doubt. Moreover, the jury is similarly limited to one of two decisions—finding the prior offense or not.

Thus, *Bullington* does not threaten the validity of the foregoing New Mexico cases, but does indicate the potentially significant limitation to our court's position that double jeopardy does not apply to habitual offender proceedings. *Bullington* suggests that the merits of an argument that a prior habitual offender hearing favorable to defendant would preclude a subsequent proceeding where both sought to enhance the penalty for the same basic conviction.

237. Moreover, New Mexico's rule derives some support from United States v. DiFrancesco, 449 U.S. 117 (1980), in which the United States Supreme Court found no double jeopardy problem in a state's appeal solely from the sentence imposed upon the defendant.

238. State v. Garcia, 95 N.M. at 248, 620 P.2d at 1273, *quoting* rulings from State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App. 1978), *cert. quashed,* 92 N.M. 532, 591 P.2d 286 (1979).

prior conviction.[239] In *Garcia,* the defendant claimed that his prior convictions arose from guilty pleas which were not intelligently or voluntarily made. The supreme court indicated in *Garcia* that such a claim, if proven, would invalidate a prior conviction for habitual offender purposes.[240] In *James,* the defendant claimed that his prior conviction was invalid because it had been obtained in part through the admission of evidence which was constitutionally inadmissible. Although the court rejected the defendant's claim because it had previously decided the question of the conviction,[241] the court seemed to indicate it would otherwise consider such a claim of constitutional invalidity of a prior conviction.[242]

C. Delay—Due Process

In *State v. Hirsch,*[243] the defendant invoked a constitutional claim of denial of due process to challenge a five-month delay in filing a supplemental information seeking to enhance his sentence as a habitual offender.[244] The defendant asserted a denial of due process because the pendency of the habitual offender proceeding had rendered his first parole hearing meaningless. The pendency of the habitual offender proceeding also caused the postponement of a second parole hearing until a date actually later than that which would have been set if he had been initially sentenced as a habitual offender. The court rejected the due process contention. In doing so, the court contrasted the defendant's case to due process claims arising from pretrial delay. The court noted that in pre-trial delay cases the constitutional malady arises from prejudice to the defendant's ability to get a fair trial. No such claim was made in the instant case. Rather the alleged prejudice was to defendant's right within the parole process. The court concluded that the appropriate remedy for the defendant was within that parole process.[245]

The court's position makes a great deal of sense. The appropriate remedy for the defendant in light of his claimed prejudice would be to advance the parole hearing date to that which would have applied

239. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980); State v. James, 94 N.M. 604, 614 P.2d 16 (1980).

240. 95 N.M. at 251, 620 P.2d at 1275: "If a guilty plea is induced by promises by the State, the bargain must be enforced or some other appropriate relief should be granted."

241. State v. James (I), 76 N.M. 376, 415 P.2d 350 (1966). Note that neither the defendant in *James* nor the defendant in *Garcia* was successful in his challenge.

242. State v. James, 94 N.M. at 605, 614 P.2d at 17.

243. 95 N.M. 169, 619 P.2d 845 (Ct. App. 1980).

244. Defendant was convicted on the underlying offense on May 2, 1979, and sentenced on May 29, 1979. The supplemental information was filed October 4, 1979. *Id.*

245. 95 N.M. at 170, 619 P.2d at 846.

if his habitual offender conviction had come down in May 1979, at the time of his original conviction. A due process challenge to the habitual offender proceeding should only arise where delay in bringing the proceeding results in prejudice to defendant's ability to defend himself in that very proceeding.[246]

D. Time of Commission

In *State v. Linam,*[247] the state supreme court held that: "the use of the words 'upon conviction of such second felony' or 'third felony' as used in the [Habitual Offender Act] must be held to mean felonies committed subsequent to the dates of the convictions relied on to effect an increase of the penalty."[248] This is because of the deterrent purpose of the Habitual Offender Act—"the increased penalty is held *in terrorem* over the criminal for the purpose of effecting his reformation and preventing further and subsequent offenses by him."[249] In *State v. Valenzuela,*[250] and *State v. Wise,*[251] the supreme court reaffirmed its holding in *Linam.*

Linam focused on the sequence of conviction and commission between the underlying offense and one or more prior offenses. *Wise,* on the other hand, held that the trial court's instructions were erroneous because, while the instructions "required the jury to consider the consecutive order of *convictions* [of nine different alleged prior offenses],[252] [t]he jury [was] not charged with considering whether each subsequent crime was *committed* after the previous conviction."[253]

Thus, *Wise* indicates that where a defendant is charged under the Act with more than one prior offense, the *conviction* of each prior offense must precede the *commission* of each subsequent prior offense. This rule is unnecessarily burdensome. The deterrent purpose of the Habitual Offender Act is sufficiently well served by the *Linam* requirement that commission of the underlying offense need

246. U.S. v. Marion, 404 U.S. 307 (1971); United States v. Kubrick, 444 U.S. 111 (1979). *See also,* State v. Polsky, 82 N.M. 393, 482 P.2d 257 (1971); State v. Adams, 80 N.M. 426, 457 P.2d 223 (1969).

247. 93 N.M. 307, 600 P.2d 253 (1979).

248. *Id.* at 309, 600 P.2d at 255.

249. *Id.*

250. 94 N.M. 340, 610 P.2d 744 (1980).

251. 95 N.M. 265, 620 P.2d 1290 (1981).

252. The dates of convictions stated in each count were: Count 1, June, 1943; Count 2, August 28, 1944; Count 3, February 3, 1950; Count 4, February 3, 1950; Count 5, June 11, 1953; Count 6, May 6, 1963; Count 7, May 6, 1963; Count 8, February 7, 1973; Count 9, May 18, 1977.

253. State v. Wise, 95 N.M. at 266, 620 P.2d at 1291.

follow conviction of any prior offense used for enhancement. *Wise,* thus, is an unnecessary imposition on the prosecution.

E. Prior Federal Convictions as Basis

A different question regarding the Habitual Offender Act arose in two cases, *State v. James,*[254] and *State v. Montoya.*[255] Both cases involved prior federal convictions. In both cases, the state supreme court discussed the circumstances under which a non-New Mexico felony conviction constitutes a felony under the laws. Each case applied a standard different from that enunciated in a previous New Mexico decision.[256]

In *James,* the prior convictions were for bank robbery and conspiracy to commit bank robbery. The court held that because the record in the prior conviction showed that the trial court had found "appellant had entered the bank with the intent to commit larceny,"[257] his presence was unauthorized and therefore met the requisite elements of New Mexico's burglary statute.[258]

In *Montoya,* the prior federal conviction was for illegal purchase of heroin. The court observed that the dictionary definition of the word "purchase" necessarily includes the actual or constructive "possession" of heroin, and actual or constructive possession of heroin is a felony under the laws of New Mexico.[259] The court held that the Habitual Offender Act was therefore properly applied.

In *State v. Garduno,*[260] the court had held that a prior federal drug conviction could be used to increase defendant's penalty for his subsequent state conviction because "the federal offense was substantially the same as the state offense."[261] After *James* and *Montoya,* the question of whether a non-New Mexico felony conviction may be used to enhance the penalty under the Habitual Offender Act may be decided by applying any of three standards. The first standard is that enunciated in *Garduno:* where the statutory elements of the two offenses are identical, the prior federal conviction may be used to enhance the penalty. The second standard is that of *Montoya:* where the dictionary definition of the elements of the federal

254. 94 N.M. 604, 614 P.2d 16 (1980).
255. 94 N.M. 704, 616 P.2d 417 (1980).
256. State v. Garduno, 93 N.M. 335, 600 P.2d 281 (1979).
257. 94 N.M. at 605, 614 P.2d at 17.
258. The burglary statute reads: "Burglary consists of the unauthorized entry of any . . . dwelling or other structure, . . . with the intent to commit any felony or theft therein." N.M. Stat. Ann. §30-16-3 (1978).
259. State v. Montoya, 94 N.M. at 706, 616 P.2d at 419.
260. 93 N.M. 335, 600 P.2d 281 (1979).
261. *Id.* at 336, 600 P.2d at 282.

offense necessarily include those of a state offense, the federal offense can be used as a prior offense for purposes of the Habitual Offender Act. Finally, from *James,* there is yet another standard: where the evidence presented on a not necessarily identical element of one offense would prove an element of another, the federal conviction can be used to invoke the Habitual Offender Act.

F. Discretion

In *State v. Russell,*[262] the court of appeals held that the Habitual Offender Act only precludes suspension or deferment of the one-year sentence imposed by that section and does not preclude deferment or suspension of the basic sentence.[263] Thus even in a habitual offender case the trial court maintains its discretion to suspend or to defer the basic sentence imposed on the underlying offense.

V. TRIAL BY JURY

In several cases decided during the Survey year, the appellate courts of New Mexico dealt with a variety of questions involving the jury trial process. The courts considered questions involving challenges, instructions, communication with jurors, and the right to a jury trial on appeal.

A. Jury Selection

In three cases the courts considered the process of jury selection. In *State v. Crespin,*[264] the defendant claimed constitutional error because the state had exercised a peremptory challenge against the only black member of the jury venire. The court of appeals found there was insufficient evidence of racial discrimination in the prosecution's exercise of its peremptory. The court also recognized a rebuttable presumption that peremptory challenges are exercised for proper (*i.e.,* non-racial) reasons. The court, however, adopted a more liberal standard of proof to rebut that presumption than had been adopted by the United States Supreme Court in *Swain v. Alabama.*[265]

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262. 94 N.M. 544, 612 P.2d 1355 (Ct. App. 1980).

263. *Id.* at 545, 612 P.2d at 1356. N.M. Stat. Ann. §31-18-17(B) (1978) states that the basic sentence of a habitual offender "shall be increased by one year, and the sentence imposed by *this* subsection shall not be suspended or deferred." (emphasis supplied by the court.)

264. 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).

265. 380 U.S. 202 (1965). In *Swain,* the court held that "[t]he presumption is not overcome . . . by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." *Id.* at 222.

In *Swain* the Supreme Court stated:

> [I]t is permissible to insulate from inquiry the removal of Negroes from a par-

Essentially *Swain* requires that the defendant base his claim of racial discrimination in the exercise of peremptory challenges on a factual base which is broader than that presented by his case alone.[266] The *Crespin* court observed that more recent cases and scholarly commentary suggested that the *Swain* test may be too limited. The court concluded that "certain fact situations may arise where the defendant can overcome the presumption based entirely upon the facts of his own case."[267] In sum, the New Mexico court held that improper use of peremptory challenges can be shown in two ways: 1) "by presenting facts beyond the instant case" or 2) "where the absolute number of challenges in the one case raises the inference of systematic acts by the prosecutor."[268]

Perhaps the most significant aspect of the *Crespin* case is that the court of appeals based its adoption of the more liberal test not upon the equal protection clause of the United States Constitution,[269] but solely upon Article II, Section 14 of the New Mexico Constitution.[270] Thus, for the first time, a New Mexico appellate court has expressly held that a provision of the New Mexico Constitution provides a separate and greater protection for the people of New Mexico than

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> ticular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances . . . is responsible for the removal of Negroes who have been selected as qualified jurors and who have survived challenges for cause . . . it would appear that the purposes of the peremptory challenge are being perverted.

380 U.S. at 223-24.

266. *See also* United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977); Morgan v. United States, 564 F.2d 803 (8th Cir. 1977).

267. 94 N.M. at 487, 612 P.2d at 717. The court of appeals was concerned that the limited rule of *Swain* "would provide no protection to the first defendant who suffers such discrimination but, because he is the first, he cannot show enough 'instances' to establish a pattern of prosecutorial abuse." The court also felt that "such a limited rule provides a right that seldom, if ever, results in a remedy . . . because of an inability to present the information necessary to support the claim. In the normal case, counsel would have no prior notice that the issue might become relevant." *Id.*

268. *Id.* at 488, 612 P.2d at 718. The court also helpfully set out examples of two cases in which courts of other jurisdictions have upheld claims of racial discrimination in the exercise of peremptory challenges under the second test adopted in Crespin; *see* People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (where the prosecutor peremptorily challenged at least seven black jurors); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979) *cert. denied,* 444 U.S. 881 (1980) (where the prosecutor peremptorily challenged twelve of thirteen qualified black jurors).

269. U.S. Const. amend. XIV, § 1.

270. "In all criminal prosecutions the accused shall have the right . . . [to a] speedy public trial by an impartial jury. . . ." N.M. Const. art. 2 § 14.

an identically worded provision of the United States Constitution.[271]

A separate question regarding jury selection arose in *State v. Martinez.*[272] The defendant appealed from the trial court's denial of his challenge of two jurors for cause. The state supreme court rejected his claim, noting that the trial court has a great deal of discretion in accepting challenges to jurors for cause. The court announced three prerequisites for a valid challenge to that discretion: 1) the defendant must show manifest error or clear abuse of discretion in the trial court's failure to dismiss the jurors; 2) the defendant must allege that he would have used the peremptories used on the jurors challenged for cause to excuse an equal number of other jurors; and 3) the defendant must allege that the impartiality of the jury panel was affected by leaving the challenged jurors on the panel. If the last showing is not made, the court indicated that any error would be harmless.[273]

Finally, in *State v. Rodriguez,*[274] the defendant claimed the denial of a fair trial because a juror did not disclose information that might bear on his ability to make a fair and impartial decision.[275] The court rejected the defendant's claim, and set out a two-pronged showing to be required of defendants who assert such a claim. First, the defen-

271. 94 N.M. at 488, 612 P.2d at 718. Other state courts have similarly interpreted their state constitutions. *See, e.g.,* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974). The New Mexico Supreme Court may have signaled a more expansive view of *Miranda* and of the exclusionary rule in State v. Trujillo, 95 N.M. 535, 624 P.2d 44 (1981). There is some jurisprudence in New Mexico to support the *Crespin* court's overt adoption of the independent state constitutional ground. In State v. Wilson, 92 N.M. 54, 582 P.2d 826 (Ct. App. 1978), the court of appeals held that New Mexico's Implied Consent Statute provided greater protection than the fourth amendment to the United States Constitution. In State v. Slayton, 90 N.M. 447, 564 P.2d 1329 (Ct. App. 1977) the court of appeals invoked New Mexico's due process clause and ignored the federal constitutional provision. In State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966) the state supreme court observed that having found an arrest valid under the fourth amendment, it was bound to test the validity of the arrest under New Mexico constitutional standards. But State v. Rogers, 90 N.M. 604, 556 P.2d 1142 (1977) is to the contrary. There the court found the double jeopardy clause in New Mexico's constitution identical to that in the federal constitution, and concluded that the clauses should be interpreted identically. As noted in the text accompanying notes 96–108 *supra,* the supreme court in State v. Ruffino has provided the additional protection of a warrant requirement before items found in the course of an inventory search may be seized. By no means does the court in *Ruffino* suggest an independent state constitutional ground for such added protection.

272. 95 N.M. 445, 623 P.2d 565 (1981).

273. *Id.* at 450, 623 P.2d at 570.

274. 94 N.M. 801, 617 P.2d 1316 (1980).

275. The defendant claimed that a juror had not fully disclosed the fact that he knew a relative of a victim. 94 N.M. at 801, 617 P.2d at 1316.

dant must show that the juror knew more than he actually disclosed. Second, the defendant must show that the juror failed properly to perform his duties to the prejudice of the defendant.[276]

B. Communications with Jurors

During the Survey year, the New Mexico courts decided two cases involving external communications with jurors during trial. In the first case, *State v. Perez,*[277] the supreme court upheld the trial court's refusal to poll the jury members after they had been discharged concerning their knowledge and opinion of newspaper articles regarding the case. The court found no abuse of discretion where the defendant had made no showing that any juror had read the article, and the request to poll the jury was not made until after the jurors were discharged. The article was not part of the record on appeal. The supreme court, therefore, was unable to review it independently.

State v. Perea,[278] involved a classic case of improper communication with and among jurors. In *Perea,* a newspaper with a headline and lengthy pro-prosecution article about the case was found in the jury room while the jury was absent. Thereafter, the bailiff told the jury: 1) that a defense attorney had "elatedly commented that defendant had won his case because of the jury's exposure to the newspaper;" and 2) he didn't know what would happen to him for allowing the newspaper into the jury room. The juror who brought the newspaper into the room admitted her mistake, apologized, and indicated that she hoped it would "not cause a mistrial or undue acquittal or whatever it's called."[279] That same juror had stated to other jurors that she did not want an acquittal.

The jurors, when questioned by the judge, asserted their continued impartiality. The court of appeals reversed the defendant's conviction, however, because the communications had thoroughly contaminated the atmosphere of the jury. The deliberations of the jury, the court stated, should be totally free of such "outside mischiefs."[280]

In *State v. Rickerson,*[281] the court of appeals ruled once again on an allegation of a "shotgun instruction." In *Rickerson,* the court held that trial court inquiry into the numerical division of the jury, though not to be encouraged, is not in and of itself, reversible error.

276. State v. Rodriguez, 94 N.M. at 802, 617 P.2d at 1317. It was this second element of the test that was not met in *Rodriguez.*

277. 95 N.M. 262, 620 P.2d 1287 (1980).

278. 95 N.M. 777, 626 P.2d 851 (Ct. App. 1981).

279. 95 N.M. at 779, 626 P.2d at 853.

280. 95 N.M. at 780, 626 P.2d at 852.

281. 95 N.M. 666, 625 P.2d 1183 (Ct. App. 1981).

Such inquiry will only result in reversal where it is shown to have had a coercive effect on the jury.

The court expanded on the meaning of "coercive effect" with illustrations of the types of factors to be considered in determining the presence of coercion:

> a) whether any additional instruction or instructions, especially a shotgun instruction were given; b) whether the court failed to caution a jury not to surrender honest convictions, thus pressuring holdout jurors to conform; and c) whether the court established time limits on further deliberations with a threat of a mistrial.[282]

C. *Right to Jury Trial on Appeal*

In *State v. Haar,*[283] the court of appeals found no right to a jury trial on appeal *de novo* from magistrate court. The court cited *Baldwin v. New York*[284] for the proposition that where sentence cannot be enhanced no jury trial is required.[285] The court noted that the statutory provision governing appeals from magistrate court, is silent as to the right of the court to enhance the penalty and that the history of the statute indicates that the legislature intended that there be no such right.[286] The court concluded that there was no constitutional requirement of the trial by jury on appeal *de novo* from magistrate court.[287] The court found that because the language of the statute governing appeals from municipal court, does expressly provide for the imposition of "the same, a greater, or a lesser penalty as that imposed in the municipal court," a right to trial by jury is constitutionally required on appeals from municipal court.[288]

A 1981 amendment to N.M. Stat. Ann. §35-13-2 added language indicating that, on affirmance of a magistrate court judgment, "the district court shall enter judgment imposing the same, a greater or a lesser penalty as that imposed in the magistrate court. . . ."[289] Thus *Haar* is no longer good law with regard to appeals from

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282. *Id.* at 667, 625 P.2d at 1184.

283. 94 N.M. 539, 612 P.2d 1350 (Ct. App. 1980).

284. 399 U.S. 66 (1970).

285. A jury trial, however, is otherwise required where more than a six-month's imprisonment is authorized. Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

286. 94 N.M. at 541, 612 P.2d at 1352.

287. State v. Haar, 94 N.M. at 540, 612 P.2d at 1351.

288. It should be noted that the language of the statute regarding appeals from metropolitan court is the same as that of the magistrate court statute interpreted in *Haar.* N.M. Stat. Ann. §34-8A-6 (1979). It would seem therefore, that on appeals *de novo* from metropolitan court there is also no right to enhance the penalty, and consequently no right to trial by jury.

289. N.M. Stat. Ann. §35-13-2 (Supp. 1981).

magistrate court. The provision on appeals from metropolitan court, however, remains unchanged.[290]

VI. STATE'S RIGHT TO APPEAL

In *State v. Santillanes,*[291] the court of appeals held that the state has the right to appeal the decision of the trial court, on enhancement. The trial court sustained a motion to strike enhancement of sentence with prejudice. The trial court had sentenced petitioner and he had begun to serve his sentence. In allowing the appeal, the court of appeals interpreted the New Mexico Constitution[292] and a New Mexico statute.[293]

The defendant had argued that the state's right of appeal was limited to those situations expressly set out in N.M. Stat. Ann. § 39-3-3(B). The court of appeals conceded that the predecessors of the present statute provided that the state should *only* be allowed an appeal under the circumstances indicated in the statute. However, the word "only" has been omitted in recent enactments of § 39-3-3(B).

Rejecting dictum to the contrary in *State v. Gunzelman,*[294] the court noted that the New Mexico constitutional provision grants an "absolute right to one appeal" to any aggrieved party.[295] Section 39-3-3(B) "merely recognizes the state's constitutional right to appeal and identifies circumstances permitting ordinary and interlocutory appeals."[296] An appeal was thus permitted in *Santillanes* and the enhancement was struck.

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290. *See* note 288 *supra.*

291. 20 N.M. St. B. Bull. 163 (Feb. 5, 1981), *rev'd on other grounds,* 20 N.M. St. B. Bull. 712, 632 P.2d 354 (1981).

292. N.M. Const. art. 6, § 2:

> Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as may be provided by law; *provided that an aggrieved party shall have an absolute right to one appeal.* (emphasis added).

293. N.M. Stat. Ann. § 39-3-3(B) (1978) provides:

> In any criminal proceeding in district court an appeal may be taken by the state . . . (1) within thirty days from a decision, judgment or order dismissing a complaint, indictment or information as to any one or more counts; (2) within ten days from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property. . . .

294. 85 N.M. 295, 512 P.2d 55 (1973).

295. *See* note 292 *supra.* As the court of appeals observed, the state is obviously a party to every criminal proceeding, and is aggrieved when it claims a disposition against it by the court was contrary to law. 20 N.M. St. B. Bull. at 165.

296. *Id.* at 165. The United States Supreme Court for the first time made clear that the government may in certain instances appeal on the issue of sentence without violating the double jeopardy clause. In United States v. DiFrancesco, 449 U.S. 117 (1981) the court by a

VII. PSYCHIATRIC EXAMINATION OF A RAPE VICTIM

In two decisions during the Survey year, the court of appeals defined the extent of the trial court's discretion to order psychiatric examinations of rape victims. In *State v. Romero,*[297] the court of appeals upheld the refusal to order such an examination because it "would have unnecessarily invaded the victim's right to privacy."[298] The court held that

> while court-ordered psychiatric examination of the prosecuting witness in a sex crime may occasionally be proper, such an order may not issue unless it is shown that the probative value of the evidence reasonably likely to be obtained from the examination outweighs the prejudicial effect of such evidence and the prosecutrix' right of privacy.[299]

In *Romero* the court found that the probative value of the evidence in question was small because the victim's psychological condition was shown by other evidence and there was no attempt by the state to present any further evidence in rebuttal. Therefore refusal of the order was proper.[300]

In *State v. Garcia,*[301] the court of appeals found an example of a proper court-ordered psychiatric examination of the rape victim. In *Garcia,* defendant was convicted of four counts of criminal sexual

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five-four decision, upheld a provision of the Organized Crime Control Act of 1970 that gives the government the right to appeal from sentence imposed on a "dangerous special offender." The Court reasoned that sentencing does not possess the qualities of constitutional finality that attach to acquittal. Nor, in the Court's view, do the considerations underlying the double jeopardy clause, *i.e.* prevention of the anxiety, embarrassment, and expense to which the government subjects a defendant when it repeatedly tries to convict, have any real significance during appeal of sentence.

297. 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

298. *Id.* at 26, 606 P.2d at 1120.

299. *Id.* at 27, 606 P.2d at 1121.

300. *Id.* The court relied on its interpretation of several regulatory and statutory provisions. Rule 29 of the New Mexico Rules of Criminal Procedure gives a defendant the right of access to material which has a bearing on the offense charged or a defense thereto "unless otherwise limited by order of the court." Rule 31 of the New Mexico Rules of Criminal Procedure which provides that the court can "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden. . . ." Such an order may indicate that a deposition may not be taken. N.M. Stat. Ann. § 30-9-16 (1978) "severely limits the opportunity of a defendant charged with sexual offenses to impeach the prosecutrix testimony by presenting evidence as to her prior sexual behavior." The *Romero* court stated that the enactment of § 30-9-16 demonstrates that it is "strong public policy in this state to prevent unwarranted intrusions into the private affairs of the victims of sex crimes." 94 N.M. at 27, 606 P.2d at 1121. Psychiatric examination such as that requested in *Romero* presents a profoundly intrusive probing of the victim's psyche insofar as it examines the victim's past sexual behavior. The court concluded that such an examination was therefore within the terms of § 30-9-16.

301. 94 N.M. 583, 613 P.2d 725 (Ct. App. 1980).

penetration in the second degree.[302] Because of the state's indication in its statement of facts that the "personal injury" relied on by the state was "mental anguish," the defendant moved for a psychological examination of the victim. The trial court ruled that it could not order the examination requested. To the court of appeals, that determination indicated a failure on the part of the trial court properly to exercise its discretion. The trial court has authority to order an examination for mental anguish. Under New Mexico Rules of Criminal Procedure 29(B) a defendant need not show necessity for such discovery, but simply that the matter is "relevant" to the offense charged.[303] The court of appeals sought to emphasize the narrowness of its holding. The court limited the holding to situations involving "defendant's effort to have the complaining witness examined for 'mental anguish' when the state was relying on mental anguish as the 'personal injury' which raised the criminal sexual penetration from a third degree to a second degree felony."[304] In so doing, the court distinguished *Romero,*[305] which involved "an effort to obtain an examination directed to the mental condition of the complaining witness prior to the activities on which the charges against defendant were based."[306]

VIII. DEFENDANT'S PRESENCE AT TRIAL

In three decisions during the Survey period, the New Mexico courts clarified the defendant's right to be present during various stages of his criminal trial, as well as the extent of his right to be absent therefrom. In *State v. Garcia,*[307] the trial court denied defendant's request to be present with his attorney during jury selection. The state supreme court held that such refusal was error because the defendant had a right to be present when the challenges were made to the jurors.[308] The defendant's right to be present at every stage of trial is grounded in the sixth amendment and applied to the states via

302. *Id.* The second degree offense charged require penetration "by the use of force or coercion which results in personal injury to the victim." N.M. Stat. Ann. §30-9-11(B)(2) (1978).

303. New Mexico Rule of Criminal Procedure 29(B) provides that: "Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused. . . ."

304. State v. Garcia, 94 N.M. at 585, 613 P.2d at 727.

305. *See* note 297 *supra.*

306. State v. Garcia, 94 N.M. at 585, 613 P.2d at 727. The court also noted that the issue in *Garcia* did "not involve an effort to obtain information concerning the prior sex life of the complaining witness." *Id. See* State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978).

307. 95 N.M. 246, 620 P.2d 1271 (1980).

308. *Id.* at 249, 620 P.2d 1274. *See* N.M. R. Crim. P. Rule 47A: "Defendant shall be present . . . at every stage of trial."

the fourteenth amendment.[309] Challenges to the jury array have been recognized as an essential to fair trial as far back as *Lewis v. United States.*[310] Although such right may be waived,[311] the court found no waiver in *Garcia* because defendant had objected to his exclusion.

In *State v. McClure,*[312] the trial court received a question from the jury after it had begun deliberating. After consulting with attorneys for both parties, the court responded with a written note. Defendant claimed that a presumption of prejudice arose because of his absence during both discussion of the question and when the answer was sent to and received by the jury. He was sleeping in the hallway at the two critical times. The court of appeals agreed with the defendant. If a communication to the jury is not made in open court, the defendant must be present when a written response to the jury is sent.[313] In *McClure* the defendant was not present at that time and therefore a presumption of prejudice arose.[314] The court of appeals found that the state had not overcome that presumption because it failed to show that the communication did not affect the verdict.[315]

The supreme court held in *State v. Larson*[316] that while defendant has a right to be present at critical stages of his trial, his "right" to be absent from trial is subject to the sound discretion of the trial court. In *Larson,* the court found no error in the trial court's denial of the defendant's request to waive his presence before the jury when he was under medication and his demeanor could have had a negative impact on the jury. The court noted that Rule 47 of the New Mexico Rules of Criminal Procedure does not vest an absolute right of absence in the defendant.[317] On the contrary, the judge usually can and should compel the presence of defendant at trial. In unusual circumstances and for good cause shown the court can permit absence. Because the record in *Larson* indicated careful consideration of defendant's request and insufficient cause to justify the absence, the court found that the trial court had acted within the bounds of its discretion.[318]

309. U.S. Const. amend. VI; U.S. Const. amend. XIV § 1.

310. 146 U.S. 370 (1892).

311. N.M. R. Crim. P. Rule 47B; *see* Pointer v. Texas, 380 U.S. 400 (1965).

312. 94 N.M. 440, 612 P.2d 232 (Ct. App. 1980).

313. State v. Saavedra, 93 N.M. 242, 599 P.2d 395 (Ct. App. 1979).

314. *See* State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979); State v. Brugger, 84 N.M. 135, 500 P.2d 420 (Ct. App. 1972), cited in State v. McClure, 94 N.M. 440, 612 P.2d 232 (Ct. App. 1980).

315. 94 N.M. at 442, 612 P.2d at 234.

316. 94 N.M. 795, 617 P.2d 1310 (1980).

317. The court relied on interpretations of Fed. R. Crim. P. 43, which is identical to N.M. R. Crim. P. 47. 95 N.M. at 797, 617 P.2d at 1312.

318. 94 N.M. at 797, 617 P.2d at 1312.

IX. PROBATION REVOCATION

In *State v. Sanchez,*[319] the court of appeals held that the probation revocation process is not subject to speedy trial constitutional provisions, because probation revocation is not part of the criminal trial. The court reaffirmed that the probation revocation process is subject to due process protections, where unreasonable delay occurs between knowledge of a probation violation and notice to or arrest of the probationer.[320]

There are, according to *Sanchez,* three requirements for a valid claim of due process violation. First, defendant must make a showing of inordinate delay. Second, the delay must have caused him some prejudice or oppressive detriment and third, the delay must not have been brought about by his own fault or lack of diligence.[321] Without indicating the length of the delay which was experienced in the instant case, the court found no denial of due process in *Sanchez* because no claim of prejudice was made. Delay alone does not constitute a sufficient showing.[322]

The court's conclusion that due process is the appropriate constitutional protection governing probation revocation proceedings is consistent with the United States Supreme Court's views as expressed in *Morrissey v. Brewer*[323] and *Gagnon v. Scarpelli.*[324] The test for determination of denial of due process arising from delay in bringing probation revocation hearings is similar, however, to that announced by the United States Supreme Court in dealing with pre- and post-indictment delay problems.[325]

In *State v. Ayala,*[326] the trial court assessed jury costs and bailiff's costs as conditions of probation. The defendant appealed, claiming that assessment of such costs was not authorized. The court of

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319. 94 N.M. 521, 612 P.2d 1332 (Ct. App. 1980).

320. *Id.* at 524, 612 P.2d at 1335. The court relied on State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970), which held that a defendant whose probation is subject to revocation "is entitled to an evidentiary hearing on the reasonableness of a delay between the issuance and execution of a warrant for defendant's arrest."

321. State v. Sanchez, 94 N.M. at 524, 612 P.2d at 1335.

322. The court in *Sanchez* disapproved State v. Chavez, 94 N.M. 102, 607 P.2d 640 (Ct. App. 1979), where a denial of due process was found after a delay of five months after the magistrate conviction. In *Sanchez,* the court also held that the defendant had waived any defect in service of notice of the probation revocation hearing by the fact of entry of appearance on his behalf by counsel. *Id.*

323. 408 U.S. 471 (1972).

324. 411 U.S. 778 (1973).

325. In Barker v. Wingo, 407 U.S. 514 (1972), for example, the factors considered included (1) the length of delay, (2) the reason for the delay, (3) whether and when defendant asserted his right, and (4) the existence of any actual prejudice to defendant.

326. 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

appeals agreed. Under the New Mexico probation statute, costs may be authorized as a condition of probation if they are "the actual costs of . . . probation service not exeeceding $200 (two hundred dollars) annually in one or several intallments."[327] The court of appeals concluded that "probation service" did not include jury and bailiff costs. A court may only impose conditions of probation authorized by law. Conditions not so authorized are void.[328] Further, assessment of jury and bailiff costs does not reasonably relate to rehabilitation relevant to the offense for which probation was granted.[329]

Assessable costs under *Ayala* may include actual costs of supervision and processing within the probation system. It is not clear whether the cost of a pre-sentence report might be borne by the defendant as a condition of probation. Such costs lie somewhere between the costs of trial such as jury and bailiff's costs, and costs incurred by the probation department during actual service of probation.

327. *Id.* at 465, 623 P.2d 585, citing State v. Holland, 91 N.M. 386, 574 P.2d 605 (Ct. App. 1978), with approval.

328. N.M. Stat. Ann. §31-20-6 (1978).

329. State v. Ayala, 95 N.M. at 466, 623 P.2d at 586. N.M. Stat. Ann. §31-20-6 was amended in 1981 to require the payment of up to $1020 in actual costs of probation service. N.M. Stat. Ann. §31-20-6 (Repl. Pamp. 1981).