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CRIMINAL LAW AND PROCEDURE

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I. DOUBLE JEOPARDY

Double jeopardy was an issue in more than a dozen cases before the appellate courts last year. It appeared in three contexts: (1) after declaration of a mistrial; (2) after a proceeding in which jeopardy had not yet "attached"; and (3) in determining whether the defendant could be sentenced for both of two separate offenses.

A. After Declaration of a Mistrial.

Although the double jeopardy clause of the fifth amendment[1] generally prevents subjecting a defendant to two trials for the same offense, it is well settled that a defendant can be retried if a conviction is reversed on appeal.[2] Similarly, the defendant ordinarily can be subjected to a second trial after a mistrial is declared, either upon the motion of the defendant or because "there is manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated."[3] In *State v. Day,*[4] *State v. Dunn,*[5] *State v. Quintana,*[6] and *State v. Mestas,*[7] however, the courts considered whether a defendant could be retried after a mistrial is declared because of prosecutorial misconduct or error. This issue is now settled in New Mexico, In *Day,* the supreme court held that retrial is permissible after a mistrial[8] caused by prosecutorial misconduct unless "the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or sub-

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1. U.S. Const. amend. V states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

2. One exception is when the conviction is reversed because there was insufficient evidence to establish proof beyond a reasonable doubt. Burks v. United States, 437 U.S. 1 (1978).

3. United States v. Perez, 9 Wheat 579, 580 (1824).

4. ___N.M. ___, 617 P.2d 142, *cert. denied,* 49 U.S.L.W. 3248 (Oct. 7, 1980).

5. 93 N.M. 239, 599 P.2d 392 (Ct. App.), *cert. denied,* 92 N.M. 675, 593 P.2d 1078 (1979).

6. 93 N.M. 644, 603 P.2d 1101 (Ct. App. 1979).

7. 93 N.M. 765, 605 P.2d 1164 (Ct. App. 1980).

8. Or, as in *Day,* after a reversal on appeal because of prosecutorial misconduct that should have led to declaration of a mistrial.

jecting the defendant to the harassment and inconvenience of successive trials."[9] Although the *Day* court stated that "[n]o clearly defined rule on this issue before us has been announced and applied in this state,"[10] essentially the same rule had been stated in the three earlier court of appeals cases.[11]

This rule appears to be that expressed by the United States Supreme Court.[12] The rationale for the rule is straightforward. If the prosecutor's conduct is designed to violate the intent of the double jeopardy clause, then a retrial should be prohibited. A prosecutor facing a likely acquittal should not be able to give the state a second chance at a conviction by engaging in egregious conduct with the intent that the judge declare a mistrial. On the other hand, the double jeopardy clause is not intended to prevent the prosecutor from doing his utmost (even if he acts ill-advisedly and improperly) to ensure the defendant's conviction. The court in *Day* stated that when the prosecutor's misconduct is sufficiently improper, although not motivated by a desire to precipitate a mistrial, the appropriate remedy is a mistrial and disciplinary action against the prosecutor. In the court's view the public should not suffer the consequences of the freeing of a guilty individual solely because of a prosecutor's misconduct.[13]

The difficulty in applying the doctrine expressed in *Day* and its precursors lies in determining the motivation of the prosecutor. One factor to consider is the egregiousness of the prosecutor's error, for if his conduct was so improper that he should have known that a mistrial would result, his motive was probably not to secure a conviction. A second, and perhaps more telling, factor is the judge's own view of whether the case was going badly for the prosecution.[14]

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9. ___N.M. at ___, 617 P.2d at 146.

10. *Id.*

11. An unclear pronouncement of this principle in *Quintana* was corrected in the *Mestas* opinion.

12. Lee v. United States, 432 U.S. 23, 32-33 (1977); Divans v. California, 434 U.S. 1303 (1977) (opinion in chambers); United States v. Dinitz, 424 U.S. 600, 611 (1976).

13. This argument would have more force if prosecutorial incompetence were not the cause of numerous criminals going free and if disciplinary action were a more realistic threat under current New Mexico practice.

14. This consideration was noted specifically in *Mestas* where the trial court, in ruling that an improper question was not asked in bad faith with the intention of provoking a mistrial, said: "She had everything to lose from that [question], nothing to gain. She had a very favorable jury." 93 N.M. at 768, 605 P.2d at 1167. There is some authority to the effect that retrial is barred whenever the prosecutor knowingly has engaged in misconduct. *See* United States v. Martin, 561 F.2d 135 (8th Cir. 1977); United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). In practice there may be little difference between the two standards. If the prosecutor "knows" his act is improper, he presumably knows it probably will provoke a mistrial.

B. Attachment of Jeopardy.

Six cases involved the question of whether jeopardy had "attached." The concept of "attachment" of jeopardy is a convenient tool for determining whether one has been subjected to double jeopardy. In a jury case, jeopardy attaches when the jury is empaneled and sworn.[15] In a non-jury proceeding, jeopardy attaches when the judge is first presented with evidence at the trial.[16] Proceedings before the attachment of jeopardy are irrelevant as far as the double jeopardy clause is concerned. For example, if an indictment is dismissed on a pretrial motion, no jeopardy attaches, and the defendant can be reindicted and tried for the same offense.

Two cases decided by the court of appeals show the range of matters which can be covered by the notion of attachment. In *State v. Romero,*[17] there clearly was no double jeopardy problem. The defendant had been indicted twice for the same offense, but one of the indictments was dismissed before he was tried on the second. Both indictments were legally sufficient. The court ruled that jeopardy had not attached before the one indictment was dismissed, so there could have been no double jeopardy. The ruling is sound under double jeopardy doctrine, but it is also supported by policy considerations. A contrary result would make it difficult for a grand jury, after deliberating further or obtaining more evidence, to issue a superseding indictment clarifying, extending, or reducing the charges against one already indicted.

In *State v. Mares,*[18] the concept of attachment was taken to its logical extreme in allowing a trial of the defendant even after the district judge had taken evidence and ruled that the defendant was "not guilty." The unusual circumstance in *Mares* was that the "not guilty" ruling had been rendered prior to trial. The defendant, a former sheriff's deputy, had been charged with aggravated battery. The defendant moved that the charge be dismissed because the defendant at all times had been "in the lawful discharge" of his duties as a peace officer and "therefore, as a matter of law, the acts constituting the factual basis for the indictment therein were lawful and the prosecution . . . [could] not lie."[19] After holding an evidentiary hearing over the objections of the prosecutor, the court issued its "not guilty" ruling and

15. Christ v. Bretz, 437 U.S. 28 (1978).
16. Serfass v. United States, 420 U.S. 377 (1975).
17. 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).
18. 92 N.M. 687, 594 P.2d 347 (Ct. App.), *cert. denied,* 92 N.M. 675, 593 P.2d 1078 (1979).
19. *Id.* at 688, 594 P.2d at 348.

dismissed the indictment. The court of appeals held that the trial court had acted improperly in hearing the evidence before the trial as well as in not allowing the jury to decide the issue. The defendant argued that even if the trial court's ruling was improper, a verdict of "not guilty" cannot be reviewed on appeal. Nevertheless, the court of appeals held that jeopardy had not attached because the dismissal occurred prior to trial.[20] The district judge had no authority to make a pre-trial determination regarding defendant's guilt or innocence. Therefore, the matter should be treated like any other improper dismissal of an indictment—the indictment could be reinstated and the defendant put on trial.

The court's lack of authority to rule was the basis of decision in two other double jeopardy cases. In *State v. Montoya,*[21] a delinquency petition containing four counts had been filed against the defendant in children's court. After a mistrial, three allegations were dismissed with prejudice and the State filed a *nolle prosequi* with respect to the fourth. The defendant was then indicted in district court on the first three charges. His motion to dismiss the indictment because it subjected him to double jeopardy was granted by the trial court, but reversed on appeal. The defendant conceded that the children's court lacked subject matter jurisdiction over the first three offenses so that its actions with respect to them could not bar a later prosecution. The court of appeals went one step further and ruled that the children's court also lacked jurisdiction over the fourth charge, involuntary manslaughter. The court of appeals held that the vehicular homicide statute, rather than the involuntary manslaughter statute, applied and that the children's court lacked jurisdiction to proceed under the inapplicable statute. Because the children's court had lacked jurisdiction over all four allegations, the children's court proceeding could not bar the indictment regardless of whether the offenses charged were the same.[22]

The final case dealing with lack of authority, *State v. James,*[23] is the most difficult. The defendant was charged in district court with vehicular homicide. He claimed that the prosecution was barred because he had been prosecuted for lesser included offenses in municipal court. The supreme court provided two alternative grounds for denying this claim. First, the defendant was not subjected to jeopardy

20. The court specifically relied on United States v. Sanford, 429 U.S. 14 (1976) and Serfass v. United States, 420 U.S. 377 (1975).

21. 93 N.M. 346, 600 P.2d 292 (Ct. App.), *cert. denied,* 92 N.M. 532, 591 P.2d 286 (1979).

22. As an alternative holding, the court also ruled that none of the three offenses charged in the indictment were the "same" as the involuntary manslaughter charge in children's court for double jeopardy purposes.

23. 93 N.M. 605, 603 P.2d 715 (1979).

in the municipal court because he neither pled guilty nor was tried. The dispute with respect to this ground was purely a factual one. Second, the municipal court had no jurisdiction to try the charge of vehicular homicide and, therefore, no proceeding in municipal court could bar a district court prosecution for that offense.

To rule against the defendant, the supreme court had to distinguish the United States Supreme Court decision in *Waller v. Florida*.[24] *Waller* held that a state court and a municipal court are arms of the same sovereignty, so the defendant may not be subjected to trial by both for the same offense.[25] But the *James* court held that a municipal court proceeding could not bar prosecution of a greater offense over which the municipal court had no jurisdiction. The court found no conflict with *Waller*, stating:

> The *Waller* decision stands for the proposition that two courts within a state—district and municipal—cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to this rule . . . . [Waller, 397 U.S. at 395, n. 6.] In *Ashe v. Swenson*, . . . Mr. Justice Brennan specified and elaborated upon several of these exceptions in his concurring opinion. He stated: "Another exception would be necessary if no single court had jurisdiction of all the alleged crimes."[26]

But the only "exception" stated in the *Waller* footnote cited in *James* was that the defendant could be prosecuted in state court for "offenses not embraced within the charges against him in the municipal court"[27]—an exception which would also apply to successive prosecutions in the same court. The statement is hardly support for the *James* result. Similarly, Mr. Justice Brennan's footnote was quoted out of context.[28]

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24. 397 U.S. 387 (1970).

25. The ruling distinguished the state-municipality relationship from that between federal and state governments. A state may prosecute an individual for the same offense for which he was prosecuted in federal court or vice versa because the two jurisdictions are considered separate sovereignties. The double jeopardy clause bars only repeated prosecution by the same sovereignty. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

26. 93 N.M. at 607, 603 P.2d at 717.

27. 397 U.S. at 395, n. 6.

28. His footnote was stating an exception to his rule, not adopted by the Court, which would require all offenses arising out of a single transaction to be prosecuted at one trial. In other words, he would permit an exception to his rule to allow a municipal court to prosecute for driving without a license and a state court to prosecute for reckless driving even when both charges arise from the same transaction. In addition, the *James* interpretation of Mr. Justice Brennan's footnote is inconsistent with his categorical assertion in Robinson v. Neil, 409 U.S. 505, 511 (1973), that the exception did not apply to a case when the defendant had been convicted of assault and battery in city court and assault with intent to commit murder in state court (almost certainly a matter beyond the municipal court's jurisdiction).

More importantly, *James* is inconsistent with the rationale of *Waller* that prosecutions by state and municipal authorities are prosecutions by the same sovereign. An offense and a lesser included offense are the same for double jeopardy purposes.[29] Thus, the *James* exception would allow one sovereign to prosecute an individual twice for the "same" offense if the municipal court charge was a lesser offense included in a greater offense (over which it had no jurisdiction) charged in district court. If *Waller* itself left any doubt that this result is prohibited, that doubt was removed in *United States v. Wheeler,*[30] where the Court said: "[A] single sovereign [cannot] impose multiple punishment for a single offense merely by the expedient of establishing multiple political subdivisions with the power to punish crimes."[31] *James* should be reconsidered by the New Mexico Supreme Court at the next opportunity.[32]

Finally, in *State v. Rogers*[33] and *State v. Valenzuela,*[34] the courts held that jeopardy does not attach in a post-conviction jury trial for sentencing an habitual offender.[35] Although an individual cannot be retried on a criminal charge if the conviction is reversed for the prosecution's failure to present sufficient evidence to establish guilt beyond a reasonable doubt,[36] the courts in both *Rogers* and *Valenzuela* remanded for new habitual offender proceedings after holding that the prior proceeding had not established that the defendant was a habitual offender as charged. If the supreme court really means that jeopardy does not attach at an habitual offender trial, presumably an "acquittal" in such a proceeding could be appealed by the state. Both decisions followed *State v. Linam,*[37] and *Rogers* cited the same case authority relied on in *Linam.*[38] Those cases, however, ap-

29. Brown v. Ohio, 432 U.S. 161 (1977). The Court held that offenses arising from the same act or transaction are the same unless "each . . . requires proof of a fact which the other does not." *Id.* at 166.

30. 435 U.S. 313 (1978).

31. *Id.* at 321.

32. *See* Benard v. State, 481 S.W.2d 427 (Tex. Crim. App. 1972).

33. 93 N.M. 519, 602 P.2d 616 (1979).

34. 94 N.M. 285, 609 P.2d 1241 (Ct. App. 1979), *aff'd,* 94 N.M. 340, 610 P.2d 744 (1980).

35. N.M. Stat. Ann. § 31-18-20 (Supp. 1980).

36. Burks v. United States, 437 U.S. 1 (1978).

37. 93 N.M. 307, 600 P.2d 253, *cert. denied,* 444 U.S. 846 (1979).

38. Grugger v. Burke, 334 U.S. 728 (1948); Davis v. Bennett, 400 F.2d 279 (8th Cir. 1968); and Pearson v. State, 521 S.W.2d 225 (Tenn. 1975). A decision post-dating these cases, United States v. DiFrancesco, 101 S. Ct. 426 (1980), upholding the government's right to appeal a sentence under 18 U.S.C. § 3576 (1976), may appear to add support. But much of the language in *DiFrancesco* suggests that a new *trial* for sentencing would be subject to the double jeopardy clause. *Id.* at 432-33, 437, 439. ("This limited appeal does not involve a retrial . . . § 3576 does not subject a defendant to a second trial. . . . The appellate court . . . is empowered to correct only a legal error.")

pear to say only that a habitual offender prosecution does not subject the defendant to multiple jeopardy for the prior offenses which are the predicates of the habitual offender prosecution. What is needed is an analysis of whether an habitual offender proceeding is one to which the principles of double jeopardy apply. The United States Supreme Court recently stated: "[T]he risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.' "[39] By this standard, the criminal punishment imposed by an habitual offender proceeding would seem to be subject to the constraints of the double jeopardy clause. It is significant that the burden of proof in such proceedings is to establish guilt beyond a reasonable doubt,[40] the burden applied only in criminal cases. The issue deserves more than the brief paragraph provided in the opinions thus far.

C. Multiple Sentencing.

One recurring issue in double jeopardy litigation is whether two offenses are sufficiently related that punishment for both, even after a consolidated trial, is prohibited. In *State v. Manus,*[41] the defendant claimed that double jeopardy prohibited his receiving consecutive sentences for first degree murder, attempted first degree murder, and aggravated assault. Manus argued that because all three charges arose out of the same episode, the "same transaction" test prohibited consecutive sentences. The supreme court, however, followed its earlier decision in *State v. Tanton*[42] and applied the "same evidence" test, ruling that the three convictions required proof of different elements and that different evidence was admitted to prove those elements. Because the charges related to three different victims, the result in *Manus* clearly seems correct under double jeopardy principles.

The related doctrine of merger, however, may have provided a slightly better prospect for relief. The court may order "merger" of two offenses when the offenses are not identical for double jeopardy purposes if public policy or legislative intent precludes multiple punishment.[43] Thus, Manus could have contended on policy grounds

39. Breed v. Jones, 421 U.S. 519, 529 (1975).

40. State v. Dawson, 91 N.M. 70, 72, 570 P.2d 608, 610 (Ct. App. 1977); N.M. U.J.I. Crim. 39.01.

41. 93 N.M. 95, 597 P.2d 280 (1979).

42. 88 N.M. 333, 540 P.2d 813 (1975).

43. *Compare* State v. Boeglin, 90 N.M. 93, 559 P.2d 1220 (Ct. App. 1977) (only one larceny, although six pistols taken) *and* State v. Cuevas, 19 N.M. St. B. Bull. 960 (October 16, 1980) (only one conviction for contributing to delinquency of three minors at same party) *with* State v. Smith, 94 N.M. 379, 610 P.2d 1208 (1980) (four consecutive sentences allowed for trafficking in four different drugs at the same time).

that he should be subjected to punishment on only the first degree murder charge, with the other offenses being merged into it. But there is little to recommend this argument under the facts of the case.

In a later case, however, the court's treatment of both double jeopardy and merger was less satisfactory. In *State v. Stephens,*[44] the court upheld the imposition of consecutive sentences for felony murder and the underlying felony (armed robbery). Referring to both double jeopardy and the merger doctrine, the court found that neither offense "necessarily involves" the other and the two offenses are not the "same offense" under the "same evidence" test because either crime could be committed without committing the other. This conclusion was reached, "even though it [was] necessary to prove the underlying felony in order to convict the defendant of first degree murder."[45]

The court's analysis fails on two counts. First, if the two crimes are not the "same offense," the defendant could be *tried* successively for felony murder and the underlying felony. The United States Supreme Court, however, has unanimously ruled in identical circumstances (armed robbery and felony murder) that successive prosecutions are a violation of the double jeopardy clause.[46]

Second, even if the Constitution in itself does not bar consecutive sentences, the United States Supreme Court in *Whalen v. United States,*[47] in overturning consecutive sentences for felony murder and the underlying felony, said "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so."[48] Thus, the *Stephens* court should have determined whether there is legislative authority for multiple sentences in the felony murder context. New Mexico law is not controlled by the decision in *Whalen* that the District of Columbia statutes do not permit consecutive sentences for felony murder and the underlying felony. *Whalen* suggests, however, that more analysis is needed of this issue, rather than the formalistic argument of *Stephens* and its unamplified conclusion that "[c]onsecutive sentences are proper in a case such as the one at bar."[49] A future case may provide an opportunity for discussion of public policy issues

44. 93 N.M. 458, 601 P.2d 428 (1979).

45. *Id.* at 463, 601 P.2d at 433.

46. Harris v. Oklahoma, 433 U.S. 682 (1977).

47. 100 S. Ct. 1432 (1980). The Court did not decide whether the double jeopardy clause permits consecutive sentences for two offenses which must be tried together. Four justices, however, joined in opinions stating that so long as Congress authorized consecutive sentences, the double jeopardy clause would not be violated.

48. *Id.* at 1436.

49. 93 N.M. at 463, 601 P.2d at 433.

and the rule adopted in *Whalen* that "doubt must be resolved in favor of lenity."[50]

Finally, in *State v. Leyba*,[51] the court considered a statute restricting multiple sentencing. The defendant had been indicted for shoplifting and conspiracy. The shoplifting statute specifically prohibits charging a defendant "with a separate or additional offense arising out of the same transaction"[52] upon which the shoplifting charge is based. The district court accordingly dismissed the conspiracy charge, but the court of appeals reversed. The court pointed out that conspiracy is a crime of agreement, which requires no overt act, and "[t]he overt act which constitutes the object of the conspiracy is no part of the crime of conspiracy."[53] This statement would be appropriate in double jeopardy analysis. The issue in *Leyba*, however, was the meaning of the statute, not the requirements of the constitution. To conclude, as the court of appeals did, that "[t]he alleged conspiracy did not arise from the same transaction as led to the charge of shoplifting,"[54] is to suggest that the legislature intended to enact a very technical statutory provision that virtually dupliated the double jeopardy clauses of the state and federal constitutions. In this regard it is noteworthy that the only authority cited by *Leyba* for the meaning of "same transaction" was a double jeopardy decision.

II. HARMLESS ERROR

The doctrine of harmless error provides that a conviction will not be overturned despite error in the criminal proceeding if the defendant would have been convicted notwithstanding the error. An equivalent doctrine applies in civil proceedings, but because the burden on the prosecution in a criminal case is to prove guilt *beyond a reasonable doubt*, it is much more difficult to contend that an error would not have changed the result in a criminal trial.

This is not to say that the doctrine has no role. For example, it

50. 100 S. Ct. at 1439. The New Mexico Supreme Court had that opportunity in *State v. Martinez*, 20 N.M. St. B. Bull. 238 (Feb. 26, 1981), when it considered *Whalen* in the context of consecutive sentences for armed robbery and felony murder. But it misread *Whalen* as saying that merger was required because, unlike the situation in *Martinez*, "the two offenses in the case required proof of the same facts." 20 N.M. St. B. Bull. at 241. On the contrary, merger was required in *Whalen* because proof of the underlying felony was "a necessary element of proof of the felony murder." 100 S. Ct. at 1439. This was exactly the situation in *Martinez*. Moreover, the *Martinez* court never reached the difficult double jeopardy issue raised by Harris v. Oklahoma, 433 U.S. 682 (1977), which the *Whalen* court avoided by finding merger.

51. 93 N.M. 366, 600 P.2d 312 (Ct. App. 1979).

52. N.M. Stat. Ann. § 30-16-20 (1978).

53. 93 N.M. at 367, 600 P.2d at 313.

54. *Id.*

would be difficult to criticize its application in *State v. Manus.*[55] In that case the supreme court found that shotgun shells seized in a murder investigation were the product of an unlawful search. Because the issue at trial was the defendant's intent, not who had fired the shotgun, one would be hard put to say that introduction of the shotgun shells as evidence influenced the verdict.

A. Jury Instructions and Communications with the Jury.

The New Mexico courts have been reluctant to find that improper jury instructions and improper communications with the jury constitute harmless error. The courts generally have presumed prejudice in these cases, particularly when instructions have failed to conform to the uniform jury instructions for criminal cases. In *State v. Sanders,*[56] the prosecution introduced evidence of two incidents of alleged child abuse that occurred prior to the abuse incident which formed the basis of the charge. The only purpose for which the evidence was admissible was to establish that the incident in question was not an accident. Despite defendant's request, the trial court did not give a requested Uniform Jury Instruction (U.J.I.),[57] limiting the jury's consideration of the prior incidents to "absence of accident." Holding that "upon a showing of the slightest evidence of prejudice, the error [will] be reversible error"[58] when a U.J.I. instruction is not given, and pointing out that the defendant's credibility was a crucial issue in the case, the court of appeals found a sufficient showing of prejudice to reverse. Yet one should be skeptical that such limiting instructions have any real effect on the jury.

In *State v. Griffin,*[59] the issue was whether Griffin, who was being tried as an habitual offender, was the same person as a Kenneth Smitherman, who had been convicted of felonies in another state. The court's instructions on the elements of the charge referred to the defendant as "Kenneth Griffin a/k/a Kenneth Smitherman." The court of appeals reversed because the instruction "had the effect of preempting the jury's function of determining the issue of identity,"[60] although again one wonders whether the language of the instruction could have influenced the jury in its determination of identity.[61]

55. 93 N.M. 95, 597 P.2d 280 (1979).
56. 93 N.M. 450, 601 P.2d 83 (Ct. App. 1979).
57. N.M.U.J.I. Crim. 40.28.
58. 93 N.M. at 451, 601 P.2d at 84.
59. 94 N.M. 5, 606 P.2d 543 (Ct. App. 1980).
60. *Id.* at ___, 606 P.2d at 544. The result in this case has been greatly limited by State v. Muniz, 20 N.M. St. B. Bull. 2231 (Jan. 29, 1981).
61. In State v. Poore, 19 N.M. St. B. Bull. 529 (Ct. App. July 19, 1979), the court of

The New Mexico courts also have looked with a jaundiced eye at any communication of the judge with the jury that is not made in open court and in the presence of the defendant and his counsel. Last year saw two reversals on this ground. In *State v. McCarter,*[62] the trial court sent what the supreme court considered to be a "shotgun" instruction[63] in a note to the jury after a proceeding at which defense counsel, but not defendant, was present. In *State v. Stephens,*[64] the judge in a murder case sent a note to the jury answering its question about the stage of the moon on the date of the alleged offense, despite defense counsel's compelling objection that the jury also would need other information about conditions of visibility. The *substance* of the communications in both cases undoubtedly involved substantial and influential error, but the language of the two opinions emphasized the prosecutor's heavy burden of establishing harmless error when the *procedural* requirement is not met.

> It is highly improper for the trial court to have any communication with the jury except in open court and in the presence of the accused and his counsel. When such communication takes place, a presumption of prejudice arises. . . . The State has the burden of affirmatively showing that the defendant was not prejudiced by the communication between the court and the jury.
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> Further, the record fails to show substantial evidence to the effect that the communication did not affect the verdict. The burden of establishing this fact resting with the state, and the state failing to meet this burden, the presumption of prejudicial error must prevail.[65]

This particularly strict standard for reviewing incorrect instructions or improper communications with the jury can be justified because there is little excuse for that type of error. Reversal may be appropriate as a matter of superintending control over the lower courts even in the absence of significant prejudice to the accused.[66]

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appeals held that failure to give a uniform jury instruction was harmless error since the substance of the omitted instruction was covered by other instructions. But this result was reversed by the supreme court. State v. Poore, 94 N.M. 172, 608 P.2d 148 (1980).

62. 93 N.M. 708, 604 P.2d 1242 (1980).

63. A shotgun instruction is one that puts excessive pressure on a dissenting juror to join with the majority in its verdict. *Id.* at 710-11, 604 P.2d at 1244-45.

64. 93 N.M. 458, 601 P.2d 428 (1979).

65. State v. Stephens, 93 N.M. at 460-61, 601 P.2d at 430-31, *quoted in* State v. McCarter, 93 N.M. at 711, 604 P.2d at 1245.

66. In State v. Saavedra, 93 N.M. 242, 599 P.2d 395 (Ct. App. 1979), where the judge communicated with the jury by handwritten note, but the conviction was not reversed because the note correctly stated the law and the defendant had waived any objection to the procedure used.

B. "Bad Character" Evidence.

Predicting the effects of evidence on a jury is a task beset with uncertainty.[67] One type of inadmissible evidence that is unlikely to be "harmless," however, is that which could lead the jury to conclude that the defendant is probably guilty or that his case is unworthy of consideration because he is a "bad person." Several appellate decisions last year dealt with this type of evidence.[68]

Casaus v. State[69] reversed the court of appeals' decision and held that it was not harmless error to admit into evidence a prior conviction of the defendant. Although a recent prior conviction may be used to impeach the defendant's credibility if he testifies, the conviction used in *Casaus* was too remote in time to be admissible for that purpose.[70] Given the probable impact on the jury of evidence of the defendant's prior conviction, the supreme court held that, when such evidence is admitted improperly, the error is prejudicial except in special circumstances.[71]

The court of appeals found that the admission of "bad character" evidence was not harmless error in two cases. In *State v. Gonzales,*[72] evidence was admitted that the defendant's brother and another person assaulted a principal prosecution witness, but no evidence was produced directly tying the defendant to the beating.[73] The conviction was reversed. In *State v. Bartlett,*[74] a murder trial, the court of appeals found reversible error where the prosecutor repeatedly referred in his questioning of defendant to a prior arrest "for trying to kill your father with a knife,"[75] when the prosecution's evidence showed that there was no arrest for that offense. The court of appeals ruled that the trial judge's attempt to cure the error with an instruction to the jury could not be effective under the circumstances.

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67. A Jury Research Project Study now being conducted at the University of New Mexico by Dr. Gale Sutton-Barbere, Ph.D. is apparently the first systematic research concerning the impact upon juries of improperly admitted evidence.

68. State v. Sanders, 93 N.M. 450, 601 P.2d 83 (Ct. App. 1979), discussed at notes 56-58 *supra,* also involved evidence that could be misused by the jury as evidence of bad character.

69. 94 N.M. 58, 607 P.2d 596 (1980).

70. N.M.R. Evid. 609(a)(1). Basically, the rule restricts admissibility to those prior convictions from the preceding ten years.

71. The court also reversed the court of appeals' ruling that the improper admission into evidence of a gun taken from the defendant when he was arrested was harmless error. 94 N.M. at 59, 607 P.2d at 597.

72. 93 N.M. 445, 601 P.2d 78 (Ct. App. 1979).

73. If the state had proved that the defendant had been responsible for the beating, the evidence could have been offered to show an attempt to suppress evidence or testimony, which is admissible to prove consciousness of guilt.

74. 19 N.M. St. B. Bull. 231 (Ct. App. March 13, 1980).

75. *Id.* at 232.

In four cases, however, the court of appeals found the admission of "bad character" evidence to be harmless error. In *State v. Castro,*[76] the defendant was convicted of manslaughter of his former wife. The court ruled that, although admission of testimony that the defendant had been dismissed from employment for harassing three women was improper, it was harmless error in light of the defendant's seventeen page sworn confession. Perhaps the confession covered every item that could possibly have prejudiced the jury against the defendant, but any type of "bad character" testimony is bound to have some effect on a jury, particularly when the issue at trial is the defendant's intent.

In *State v. Mills,*[77] the court of appeals agreed that in the prosecution of the defendant for aggravated battery it was improper to have introduced evidence that the defendant's wife lived at a drug rehabilitation center "because of some unidentified 'problems.' "[78] The court, however, dismissed defendant's arguments that this evidence would reflect prejudicially on the defendant. The conclusion is debatable since one could expect some jurors to think that a person whose wife is associated with the drug culture is less deserving of concern and is more likely to commit an offense than others are.[79]

A more questionable case is *State v. Gutierrez.*[80] The evidence against the defendant consisted of a robbery victim's eye witness identification, corroborated by his selection of defendant's photograph from police mug books. The prosecutor's repeated references to "mug books" focused the jury's attention on the defendant's prior involvement with the police, and could have had a decided effect on the jury, particularly since the state needed to rely exclusively on the veracity of one individual. Although the court invoked the rule that it could find harmless error only when "evidence of defendant's guilt [is] so overwhelmingly persuasive that under no reasonable probability could the exhibits have induced the jury's finding of guilt,"[81] it found the error to be harmless. At least the court said it would reverse if the error were repeated in the future.

The most disturbing of the opinions in this area is *State v. Vialpando,*[82] although the result is defensible. A witness, in response to

76. 92 N.M. 585, 592 P.2d 185 (Ct. App. 1979).
77. 94 N.M. 17, 606 P.2d 1111 (Ct. App. 1980).
78. *Id.* at ___, 606 P.2d at 1115.
79. Also in *Mills* the court found harmless error in some jurors having seen the defendant in handcuffs under escort. This result was correct because the jury already was informed through admissible evidence that the defendant was currently in prison.
80. 93 N.M. 232, 599 P.2d 385 (Ct. App. 1979).
81. *Id.* at 235, 599 P.2d at 388.
82. 93 N.M. 289, 599 P.2d 1086 (Ct. App. 1979).

questioning from the judge, unexpectedly volunteered information that he had first met the defendant at the state penitentiary. The trial court offered to instruct the jury that the defendant had not been an inmate at the time, but the defendant refused the instruction. Given the circumstances of the case, such an instruction may have effectively eliminated the prejudicial impact of the witness' statement. The defendant's decision to oppose the instruction should not aid him in obtaining a reversal of his conviction. The court's language in attempting to buttress its conclusion with a harmless error argument, however, was unfortunate. The court, citing *Gutierrez*,[83] wrote,

> [R]eceipt of inadmissible evidence is not reversible error when other evidence of defendant's guilt is so persuasive that under no reasonable probability could the improper evidence have induced the jury's verdict. *The converse of that principle is the necessity of finding that there was no reasonable probability of a guilty verdict without the inadmissible evidence.*[84]

The second sentence, if it means what it appears to say, not only is incorrect as a matter of logic,[85] but also is contrary to the principles of the harmless error doctrine. The sentence seems to say that the erroneous admission of evidence will cause reversal of a conviction only if it would have been unreasonable to convict without the evidence. In other words, to establish reversible error, it is necessary to show that a directed verdict of acquittal would be required if the inadmissible evidence were not considered.[86] The best that can be said

83. State v. Gutierrez, 93 N.M. 232, 599 P.2d 385 (Ct. App. 1979).

84. 93 N.M. at 297, 599 P.2d at 1094 (emphasis added).

85. The converse would be: "Error in the admission of evidence is reversible if there was a reasonable probability of a not guilty verdict without the inadmissible evidence."

86. One would also hope that the language in the sentence was merely an oversight. But similar disturbing language appears with respect to a second issue in the case, which concerned the amendment of the indictment. Before the jury was instructed, the state was permitted to change its allegation from (1) causing the victim to engage in sexual intercourse by use of force and coercion *and* in the commission of other felonies to (2) causing the victim to engage in sexual intercourse by use of force and coercion *or* by the commission of other felonies. The amendment, in the absence of any showing of prejudice to the defendant in the preparation of his case, would seem proper. But the court went one step further than necessary by contending that the defendant would have been convicted under the original indictment in any case. "[W]hether the indictment was amended or not, defendant suffered no detriment," wrote the court, since "there is no substantial evidence whatever that all of the crimes charged, and all of the elements of each crime, were not proved." 93 N.M. at 299, 599 P.2d at 1096. The court appears to be saying: "We think all of the elements of the crime were proved, so what does it matter if the jury was not instructed properly on those elements." This statement is contrary to the law in New Mexico in that failure to instruct properly on the elements of an offense is reversible error even if the defendant failed to object to the instructions. State v. Rhea, 93 N.M. 478, 601 P.2d 448 (Ct. App. 1979); State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969).

for the language of *Vialpando* is that it is ill-considered dictum. It reflects a rather offhand approach to harmless error and a general tendency of the court of appeals to apply the doctrine both when it is unnecessary (because affirmance is proper on other grounds) and in inappropriate circumstances. A doctrine that upholds criminal convictions, despite error at trial, should not be a favorite of the law and must be applied with the greatest circumspection. Refusal to find harmless error will rarely set the guilty free; it requires only a new trial.

C. "Bruton" Error.

In *State v. Richter*,[87] the error was a violation of the United States Supreme Court's ruling in *Bruton v. United States.*[88] *Bruton* held that a non-testifying co-defendant's confession implicating the defendant is not admissible at a joint trial of the two defendants, even when the trial court instructs the jury that the confession is admissible against only the co-defendant.[89] *Richter,* however, held that the error was harmless because the defendant's own confession, which established all the elements of the offense, was also admitted at the trial. It is appealing to view virtually any error as harmless when the defendant confesses, and the result in *Richter* is supported by several decisions cited in the opinion.[90] In addition, several weeks after the *Richter* decision the United States Supreme Court affirmed a conviction under similar circumstances in *Parker v. Randolph.*[91] But as Mr. Justice Blackmun's concurrence in that case convincingly argues, whether there is harmless error will depend on more than just whether the defendant confessed.[92] The confessions must be examined closely to see where they do and do not overlap and what effect the differences may have on the defense raised by the accused. *Richter* may be a sound result, but the opinion omits the underlying analysis essential for a proper determination of the issue.

87. 93 N.M. 55, 596 P.2d 268 (Ct. App. 1979).

88. 391 U.S. 123 (1968).

89. *Bruton* held that a jury, despite the limiting instruction, could not be expected to ignore the co-defendant's accusation against the defendant, and the use of such hearsay would, therefore, violate the sixth amendment right of the defendant to confront his accusers. *Id.* at 126.

90. Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971); United States v. Mancusi, 404 F.2d 296 (2d Cir. 1968).

91. 442 U.S. 62 (1979). Of the eight Justices participating in Parker v. Randolph, four found that under the circumstances of the case—including a confession by the defendant himself—a limiting instruction to the jury sufficed and there was no error. (The *Richter* opinion does not indicate whether the jury was instructed to consider the confession only on the issue of the confessing co-defendant's guilt.) Mr. Justice Blackmun concurred on the ground that the error was harmless, and three dissenters thought the error was not harmless.

92. *Id.* at 79-80 (Blackmun, J., concurring).

III. DECISIONS INVOLVING THE GRAND JURY

The grand jury, and the way it conducts its business, is a matter of growing public concern. In New Mexico issues relating to the grand jury are appearing more frequently before the courts. The results, however, are not wholly satisfactory. The rationale underlying the decision is not explored in the opinions, thereby making prediction of future results uncertain.

A. Evidence Before the Grand Jury.

The chief recurring issue recently has been the propriety of the evidence presented or not presented to the grand jury. There were six appellate decisions in this area during the year. In *Maldonado v. State,*[93] the sole supreme court case, the defendant sought reversal of his conviction on the ground that inadmissible evidence had been presented to the grand jury which returned an indictment against him. The court followed its fifty-six year old precedent, *State v. Chance,*[94] and affirmed the conviction on the ground that the courts would not review such a claim.

In both cases the defendants, Chance and Maldonado, relied on the New Mexico statute[95] which states: "All evidence [before the grand jury] must be such as would be legally admissible upon trial."[96] The *Chance* court held that the statute was merely "directory" and "for the guidance of the grand jury."[97] It was persuaded by the traditional secrecy of grand jury proceedings and the doctrine that a court cannot review the grand jury's actions with respect to the evidence presented to that body without "clear statutory authority." It feared that a contrary result would permit every person indicted to compel a hearing at which he or she could ascertain what had been presented to the grand jury, "thus injecting into our judicial system a new and highly objectionable procedure."[98]

The *Maldonado* court noted that the legislature had never taken the opportunity to amend the statute to make its terms mandatory rather than directory,[99] thereby implying a legislative intent that the courts are not to enforce the statute. Regardless of the soundness of the *Chance* decision, it had received the imprimatur of legislative silence.

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93. 93 N.M. 670, 604 P.2d 363 (1979).
94. 29 N.M. 34, 221 P. 183 (1923).
95. Now N.M. Stat. Ann. § 31-6-11(A) (Supp. 1980).
96. *Maldonado* also raised a due process argument, discussed below.
97. 29 N.M. at 39, 221 P. at 185.
98. *Id.*
99. 93 N.M. at 671, 604 P.2d at 364.

The court in *Maldonado*, however, went beyond mere statutory interpretation. It also embraced the *Chance* result on policy grounds. These grounds apparently were intended not only to buttress the court's ruling with respect to the statute, but also to justify the second holding of the court: that due process did not require it to review the prosecutor's presentation of inadmissible evidence to the grand jury. These policies were expressed as follows: "We merely recognize, as do the majority of jurisdictions, that there are compelling reasons for the courts not to go behind an indictment to inquire into the evidence considered by a grand jury. These reasons include the need for both judicial economy and the secrecy of grand jury proceedings."[100] Unfortunately, these two reasons[101] were not explored in greater depth. The need for secrecy of grand jury proceedings is hardly the concern that it was twenty years ago.[102] In New Mexico the defendant ordinarily is entitled to receive from the state, within ten days after arraignment, a list of the witnesses the state intends to call at trial and all of their prior statements, including grand jury testimony.[103] In some cases defendants obtain complete grand jury transcripts. In *Maldonado* the defendant was able to cite the specific instances of the presentation of allegedly inadmissible evidence to the grand jury; so apparently nothing secret was presented to the *Maldonado* court. Moreover, the reasons for secrecy previously expressed by the New Mexico Supreme Court[104] ordinarily would not apply

100. *Id.*

101. One policy ground supporting *Chance* was ignored by the court: the statute is unwise if interpreted literally. Hearsay that would be inadmissible at trial is perfectly appropriate before a grand jury in a variety of circumstances. For example, in ordinary cases it is justifiable to avoid the expense of calling tangential supporting witnesses or experts such as a chemist identifying a dangerous drug. In investigatory grand jury work, hearsay is not only appropriate, it is often necessary or virtually unavoidable; hearsay can be an essential source of leads. Moreoever, whether the hearsay would be admissible at trial may often be indeterminable when it is offered to the grand jury because admissibility may depend on unforeseeable events such as whether the declarant becomes a defendant.

102. In Dennis v. United States, 384 U.S. 855 (1966), the United States Supreme Court first held that the prior grand jury testimony of a witness at trial should have been disclosed to the defendant for inspection in preparation for cross examination of the witness. Since 1970 such discovery has been allowed with respect to every government witness in federal court. 18 U.S.C. § 3500(e)(3) (1976).

103. N.M.R. Crim. P. 27(a)(5).

104. The reasons for [keeping grand jury sessions secret include] . . . promoting freedom in the disclosure of crime; preventing coercion of grand jurors through outside influences and intimidation, thus allowing a freedom of deliberation and expressions of opinion which would otherwise be impossible; prohibiting [sic] the safety and anonimity [sic] of witnesses, thus encouraging the greatest possible latitude in their voluntary testimony; preventing forewarning to those whose criminal conduct has been uncovered; and protecting the good names of persons considered by the grand jury but not indicted.

Baird v. State, 90 N.M. 667, 669, 568 P.2d 193, 195 (1977).

when disclosure comes after the indictment and apprehension of the defendant.

"Judicial economy" may be a more compelling policy reason, but it is not defined in the opinion. On its face it would seem to refer to conservation of judicial resources, the avoidance of duplicative effort, as when the same issue is presented repeatedly to the court.[105] In *Maldonado,* however, the challenge to the grand jury proceeding was raised after conviction, so that "judicial economy" in this case would mean a total elimination of *any* judicial review of the issue.

"Judicial economy" may refer, however, to the notion that it is wasteful and dilatory for the courts to review the propriety of evidence presented to the grand jury because the trial jury will weigh only the *admissible* evidence. This rationale was expressed by the Hawaii Supreme Court in *State v. Bell:*[106]

> [T]he grand jury phase is devoted only to a preliminary determination of whether criminal proceedings should be instituted against any person. The full trial phase—with its attendant evidentiary and procedural restrictions—still remains the actual adjudicatory stage of the guilt or innocence of the accused. . . . "[T]he greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence." . . . The ex parte nature of the grand jury is based upon "an abiding confidence in the jury trial system. . . ."[107]

Regardless of the rationale behind *Maldonado,* there is substantial United States Supreme Court authority supporting the proposition that defects in the presentation of evidence to the grand jury do not raise issues of due process. In *Frisbie v. Collins,* the Court wrote that "due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him

105. This could be a description of one of the policy arguments of the United States Supreme Court in United States v. Calandra, 414 U.S. 338 (1974), which held that motions to suppress unlawfully seized evidence will not be heard at the grand jury stage of a proceeding. The Court said that suppressing evidence at the grand jury stage, rather than awaiting indictment, would retard investigations without advancing the purpose of the exclusionary rule—the deterrence of unlawful searches.

106. 60 Hawaii 241, 589 P.2d 517 (1978) (failure to present exculpatory evidence to grand jury does not violate due process unless evidence is "clearly exculpatory").

107. *Id.* at ___, 589 P.2d at 520-21. This policy reason is also suggested in Costello v. United States, 350 U.S. 359 (1956), which held that a review of the evidence presented to the grand jury to determine if it was insufficient or improper (a) is not required by the fifth amendment provision that all felonies be prosecuted only after a grand jury indictment and (b) would not be instituted by the Court under its supervisory powers. The Court wrote that the result of a rule requiring such review: "would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Id.* at 363. Further, the rule "would result in interminable delay but add nothing to the assurance of a fair trial." *Id.* at 364.

and after a fair trial in accordance with constitutional procedural safeguards."[108] Also, in *Costello v. United States,* the Court held that "an indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."[109] Although it might be argued that a grand jury becomes biased if it is not presented with exculpatory evidence or if it is presented with inadmissible evidence, the bias referred to in *Costello* is apparently bias, such as racial prejudice, which exists at the outset of the investigation.[110]

Thus, the only occasion on which the presentation of evidence to the grand jury might raise a due process issue is when that presentation somehow infects the trial itself. In *Maldonado* the court rejected the defendant's claim that due process was violated by the prosecutor's presentation of inadmissible evidence to the grand jury because, in the court's view, Maldonado was not denied a fair trial.

To summarize the result in *Maldonado:*

1) The statute requiring that the grand jury receive only evidence admissible at trial is "directory" only and does not require (or permit) judicial supervision;

2) Due process is not violated by the use of improper evidence before the grand jury unless the trial itself is rendered unfair.

The bottom line of the holding is that neither the statute nor due process requires that a trial be delayed or a conviction after a fair trial be overturned because of questions raised about the evidence presented to the grand jury.

Maldonado does not hold, however, that no remedies are available for abuse of the grand jury. *Maldonado* states that the statutory directives are to be obeyed. At least four possible checks on grand jury abuse could be imposed. First, an indictment may require a trial without justifying custody. The United States Supreme Court has held that any information filed by the government is enough to initi-

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108. 342 U.S. 519, 522 (1952) (the defendant unsuccessfully claimed that he was denied due process because he was unlawfully abducted from one state to bring him to trial in another).

109. 350 U.S. 359, 363 (1956) (footnote omitted) (indictment based entirely on hearsay will not be quashed). This proposition was recently affirmed in Gerstein v. Pugh, 420 U.S. 103, 118-19 (1975), which held that a conviction will not be overturned on the ground that the *information* filed in the case was not founded on probable cause. Although the defendant's arguments in *Costello* and *Gerstein* were not explicitly predicated on due process, it would be remarkable if the results were rejected on that ground. Beck v. Washington, 369 U.S. 541, 546 (1962), suggested that due process required no more than *Costello.*

110. The case cited by the Court on the "unbiased" requirement was Pierre v. Louisiana, 306 U.S. 354 (1939), in which an indictment was overturned because blacks were excluded from the grand jury. This case and similar cases decided recently rest on equal protection grounds. *E.g.,* Castaneda v. Partida, 430 U.S. 482 (1977).

ate a trial, but that the defendant cannot be held in custody without a judicial determination of probable cause to support the information.[111] Similarly, if significant prosecutorial abuse occurs in presenting evidence to a grand jury, the fourth amendment or due process may require that a defendant be freed pending trial.

Second, one who has suffered the stigma and expense arising from an indictment procured through prosecutorial abuse of the grand jury could bring a civil action against the prosecutor involved. The fact that civil suits have proved ineffective in deterring or remedying unlawful searches may be largely the result of victims' being perceived as criminals, especially where the search uncovered contraband or other evidence of crime. When an indictment is obtained by government misconduct, however, the victim is likely to be acquitted in the criminal trial and would make a more attractive civil plaintiff than would a victim of the unlawful search.[112]

Bar disciplinary action, despite its present deficiencies in New Mexico, is a third remedy which must be considered. Even a warning could have an important educational effect.

Finally, and most important of all, the courts can exercise their inherent powers to oversee grand jury proceedings to curb abuses.[113] In determining whether to quash an indictment or apply other sanctions the court, under this overseeing power can weigh such factors as:

1. Repetition of a violation criticized in the past;[114]
2. Delay of the trial;
3. Egregiousness of the violation; and
4. Violation of grand jury secrecy.

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111. Gerstein v. Pugh, 420 U.S. 103, 109 n.10 (1975).

112. The New Mexico Tort Claims Act would appear to allow for this cause of action. *See* N.M. Stat. Ann. § 41-4-4(B) (1978). But the common law has provided immunity to prosecutors. Imbler v. Pachtman, 424 U.S. 429 (1976); Restatement (Second) of Torts § 656 (1977).

113. United States v. Chanen, 549 F.2d 1306, 1309 (9th Cir. 1977); United States v. Basurto, 497 F.2d 781, 793-94 (9th Cir. 1974) (Hufstedler, J., concurring) (appropriate ground for dismissing indictment because of knowing use of perjured testimony is exercise of supervisory power, not due process); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) (after repeated admonitions in earlier decisions against excessive use of hearsay before grand jury, court reverses conviction for such excessive use); United States v. Mackey, 405 F. Supp. 854 (E.D.N.Y. 1975); 1 C. Wright, Federal Practice and Procedure: Criminal § 101, at 151 (1969).

"Supervisory powers" may be a better descriptive term than "overseeing power," but it is important to distinguish between this power over grand juries and the New Mexico Supreme Court's constitutionally derived power of "superintending control over all inferior courts." This constitutional provision by its terms would not apply to supervisory control over grand juries. N.M. Const. art. 6, § 3; State v. Gunzelman, 85 N.M. 295, 299, 512 P.2d 55, 59 (1973).

114. *See* United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

This power also could be applied to provide perhaps the most effective means of preventing abuse, requiring the state's prosecutors to take a relatively brief ethics course shortly after beginning duty.

The exercise of this inherent overseeing power was not an issue in *Maldonado,* and in any case the facts did not justify its application. The allegedly inadmissible evidence involved was not crucial to the case and no egregious conduct by the prosecutor was apparent. A consideration of this inherent power, though, provides a useful framework in which to analyze the year's court of appeals decisions involving questions of the propriety of evidence before the grand jury. Since none of the cases involved an allegation of denial of a fair trial, under *Maldonado* an exercise of the court's inherent power to oversee grand jury proceedings would be the only appropriate basis for review.

Of the five court of appeals cases, none posed problems of grand jury secrecy and two involved only simple factual inquiry unlikely to lead to complex litigation. In these two cases, therefore, exercise of the court's inherent power would be justified by any substantial claim of abuse.

In the first case, *State v. Poore,*[115] the defendant challenged the grand jury indictment on the basis that an essential witness before the grand jury had not been sworn. The trial court heard testimony from both the witness and the grand jury foreman that the witness was sworn and ruled that the indictment was proper. The court of appeals affirmed. Without referring to *Chance*[116] (although unsworn testimony would be "inadmissible evidence"), the court held that the trial court's inquiry did not violate the rule imposing grand jury secrecy. It did not state, however, what the remedy, if any, would be if unsworn testimony had been taken, and it did not consider whether the trial court's inquiry was appropriate. Considered in the framework of the application of the court's power of oversight, the issues are straightforward. As noted in *Poore,* no rationale for secrecy would require the court to refrain from hearing whether a witness was sworn or to prohibit either the witness or the foreman from testifying on this issue. Also, a proceeding on such a simple issue is unlikely to cause substantial delay.[117] There being no strong reason against ruling on this issue, the exercise of this power is appropriate even if the use of unsworn testimony were not an egregious error.

115. 18 N.M. St. B. Bull. 530 (Ct. App.), *rev'd on other grounds,* 94 N.M. 172, 608 P.2d 148 (1980).

116. 29 N.M. 34, 221 P. 183 (1923).

117. A hearing by the trial court would be brief, and because the likelihood of any reversal of the trial court's finding is slim, the long delays that might result from a reversal on appeal would not occur.

A similar analysis applies to *State v. Stevens.*[118] The indictment against Stevens was quashed by the district court because the prosecutor presented testimony concerning a statement made by Stevens even though the trial court had earlier suppressed the statement in another proceeding against him. The court of appeals held that the district court had no right to review the admissibility of the evidence in the second grand jury proceeding. The decision is consistent with the language in *Chance* and its progeny, on which the court of appeals relied.[119] But if Stevens had raised the possibility of the exercise of overseeing power, a contrary result would have been appropriate. Clearly, no secrecy issue is involved in this second use of the defendant's confession. Nor can any sound argument based on judicial economy be made. A determination of whether the evidence before the grand jury is admissible would require no lengthy delay, since the issue of admissibility would have been resolved in the prior proceeding.[120] Thus, if the court in *Stevens* had decided that the use of an unlawfully obtained confession by the grand jury was a significant abuse, use of the court's inherent oversight power would have been fully justified.

In three other cases, however, the court of appeals allowed the defendant to raise issues which could create long delays in the prosecutorial process. In *State v. Saiz,*[121] the court of appeals ruled that the prosecutor acted properly in explaining to the grand jury why a certain matter was referred back to it. Although the result in *Saiz* is correct, the court's decision creates the possibility of lengthy delays in the future if the prosecutor's comments to the grand jury become a matter of judicial concern, particularly at the pre-trial stage. In *Saiz* the appeal was not heard until after trial because the trial court had denied the defendant's motion; but one can foresee trial courts weighing relatively complex facts involving the propriety of the prosecutor's remarks, quashing the indictment, and being reversed on appeal, thereby greatly delaying trial. Given this risk of delay and the absence of any due process interests of the defendant, the court should exercise its overseeing power only in those circumstances

118. 93 N.M. 434, 601 P.2d 67 (Ct. App. 1979).

119. *Id.* at 435-36, 601 P.2d at 68-69.

120. It is noteworthy that the United States Supreme Court in its opinion in United States v. Calandra, 414 U.S. 338, 352 n. 8 (1974), did not disavow the result in Silverthrone Lumber Co. v. United States, 251 U.S. 385 (1920), which quashed a grand jury subpoena for records that a court had previously ordered returned to the defendnat because they had been seized unlawfully. One factor upon which *Calandra* distinguished *Silverthrone* was that there had been a prior judicial determination of illegality of the seizure in the latter case.

121. 92 N.M. 776, 595 P.2d 414 (Ct. App. 1979).

where intentional, grossly improper remarks constitute a substantial factor in the grand jury's decision to indict. In lesser cases, remedies other than quashing an indictment would suffice.

Two other cases, *State v. Herrera*[122] and *State v. Harge*,[123] involved the court's review of the prosecutor's failure to present certain "exculpatory" evidence to the grand jury. In *Herrera* the court of appeals upheld the dismissal of an indictment because the prosecutor had not presented exculpatory evidence within his knowledge to the grand jury. In *Harge* the court of appeals reversed the trial court for dismissing an indictment on the ground that the prosecutor neither complied with a grand jury request to produce a witness nor notified the defense of the request. The court held that the prosecutor had not refused a request or withheld exculpatory evidence and said that the law does not "require that a defendant be allowed to present his case. Instead, [it] only require[s] the prosecutor to present exculpatory evidence if he has knowledge of it and to withhold it would deny defendant a fair trial."[124]

Although *Herrera* and *Harge* were decided on due process grounds,[125] that approach contradicts the language in the *Maldonado*[126] opinion (which postdated *Herrera* and *Harge*) that a due process claim arising from grand jury proceedings must be founded on a claim of denial of a fair trial. Not only is it unclear how the misconduct alleged in *Herrera* and *Harge* could lead to an unfair trial, but *Herrera* and *Harge* were decided before the trial itself, making a determination of its fairness difficult indeed. In both *Herrera* and *Harge* the defendants had learned before trial that evidence was withheld from the grand jury, so that the evidence could not be termed *"withheld . . . at trial,"*[127] an express requirement of the *Maldonado* test for determining when withholding exculpatory evidence violates due process.

What, then, if the court in *Herrera* and *Harge* had considered exercising its power of oversight over the grand jury? The problem with

122. 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979).

123. 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979).

124. *Id.* at ___, 606 P.2d at 1108.

125. A New Mexico statute states that "when [the grand jury] has reason to believe that other competent evidence is available that may explain away or disprove a charge or accusation or that would make an indictment unjustified, then, it should order the evidence produced," N.M. Stat. Ann. § 31-6-11(B) (Supp. 1980); but the *Harge* court held, following *Chance*, that the statutory language is merely directory. Since the language appears in the same statutory section as does the language held to be directory in *Chance* and its progeny, the holding of the court of appeals is proper as a matter of statutory interpretation.

126. 93 N.M. 670, 672, 604 P.2d 363, 365 (1979).

127. *Id.* (emphasis in the original).

reviewing whether exculpatory evidence has been presented to the grand jury is illustrated by *Harge,* in which a lengthy delay resulted from consideration of the issue. Perhaps in *Herrera* justice was done, but the defendant probably could have cleared his name more quickly through acquittal at trial (presumably the outcome if the exculpatory evidence withheld was so significant) than by taking the appellate route. The chief virtue of judicial review of issues such as the withholding of exculpatory evidence from the grand jury is the deterrence of future misconduct. Remedies such as disciplinary proceedings may be more effective and less disruptive to the judicial process than dismissal of the indictment in most cases of alleged improper presentation of evidence to the grand jury. Only the most egregious conduct, such as intentionally using perjured testimony[128] or withholding a confession by a third party, should justify quashing an indictment.[129]

B. Other Matters Relating to the Grand Jury.

Three other cases did not directly involve review of the propriety of grand jury action, but raised some of the same issues discussed above and may have implications for grand jury proceedings.

In *State v. Chavez,*[130] the grand jury had issued a no-bill, but the district attorney proceeded by information. After a preliminary hearing, the trial court dismissed the information on the ground that all the evidence presented by the district attorney at the hearing had been in his possession at the time of the grand jury investigation. The court of appeals, finding no constitutional, common law, or statutory authority preventing the district attorney from filing an information in these circumstances, ruled that the trial could proceed if the district court found probable cause at the preliminary hearing.

The *Chavez* opinion is of particular interest because of a statute passed in 1979 which states that "[a]fter a grand jury acts on the merits of evidence presented to it and returns a no-bill, the same matter shall not be presented again to that jury or another grand jury on the same evidence."[131] The statute will have little impact on the criminal justice system if the district attorney can circumvent it merely by filing an information. The most important issue to be decided is whether the courts have authority to enforce the statute; if

128. State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977) (decided on due process grounds).

129. This is apparently the standard in Hawaii. State v. Bell, 60 Hawaii 241, 589 P.2d 517 (1978).

130. 93 N.M. 270, 599 P.2d 1067 (Ct. App. 1979).

131. N.M. Stat. Ann. § 31-6-11.1 (Supp. 1980).

they do, frequent litigation may result.[132] *Chance* and *Maldonado* suggest that the statute is merely directory. If the legislature wanted the matter to be reviewable in court, presumably it would have said so explicitly, given its assumed knowledge of the rulings of *Chance* and its progeny. In addition, the policy against delaying the prosecution is particularly strong with respect to judicial review of this issue, because it may be difficult to determine what constitutes "the same matter" or "the same evidence." Moreover, once the court is presented with an indictment by the second grand jury, what substantial interest is served by quashing an indictment if there is no defect in the second grand jury proceeding? Absent an intent to harass, the indictment itself would not seem unfair.

In re Investigation No. 2 of the Governor's Organized Crime Prevention Commission,[133] involved a witness who failed to appear in response to a subpoena duces tecum from the Commission. After a hearing, the district court issued an order enforcing the subpoena. When the witness appeared before the Commission, he refused to turn over subpoenaed records on the ground that they were protected under the fifth amendment privilege against self-incrimination. In seeking a contempt order against the witness, the Commission argued that the witness had waived the privilege by not raising it at the district court proceeding. The district court found the witness to be in contempt, but the supreme court reversed. Although certain facts regarding waiver peculiar to the case apparently influenced the court's decision, the precedential value of the ruling lies in its treatment of when a fifth amendment claim regarding documents should be raised. The court, without doing so explicitly, appeared to adopt the arguments of the Civil Liberties Union's Amicus Brief, which it summarized in its opinion:

> [T]he evaluation of a claim of privilege before the witness appears under oath and refuses to answer a specific question is inefficient and awkward because the district court is not familiar with the subject matter and the scope of the Commission's inquiry; . . . the court cannot intelligently assess the validity of the witness' claim of privilege because it cannot compare a specific question or demand with a specific, allegedly incriminatory answer or document. . . .[134]

This argument would have more force if the issue of whether a document is privileged under the fifth amendment ordinarily involved de-

132. One may wonder, however, about the likelihood of a district attorney presenting identical evidence to a second grand jury.

133. 93 N.M. 525, 602 P.2d 622 (1979). The author assisted in the preparation of the Commission's brief.

134. *Id.* at 526-27, 602 P.2d at 623-24.

termining whether the document was itself incriminatory. Generally, however, the issue is whether the document is of a type for which the individual can claim a privilege.[135] More importantly, there is no requirement that the witness be asked any questions, except perhaps those relating to authentication, at the proceeding at which the subpoenaed records are to be produced. Thus, inefficiency is likely to lie not in asking the district court to make a judgment without a complete record, but in allowing delay of the resolution of the fifth amendment question until the witness' second appearance before the court.[136] If applied to grand juries, this decision could prove harmful. Because grand juries have very short lifetimes—six months in New Mexico[137]—any delays in obtaining records can create serious difficulties. Perhaps, however, *In re Investigation No. 2* has a more limited scope. It may allow a claim of privilege with respect to documents to be raised after court-ordered enforcement of a subpoena duces tecum only when the witness had good reason not to raise the privilege at the court hearing. The court said that the witness in this case could not have known of the incriminatory aspects of certain documents until he heard specific questions which were asked at the Commission hearing. If the decision is so limited, investigators can avoid its result by demanding production of all subpoenaed records before asking specific questions, which is the better, customary procedure in any event.

The issue in *State v. Davis*[138] was whether a defendant prosecuted by information was entitled to obtain a defense witness' testimony given before a grand jury that had not investigated the case brought against the defendant. The court ruled that "[u]nless the witness testified before the grand jury about the matter being tried, defendant is not entitled to the grand jury transcript."[139] The court's ruling is consistent with the reasons for grand jury secrecy. When the grand jury testimony relates to a matter other than the one for which the defendant is on trial, there is a substantial possibility that harm will result from release of the testimony because it relates either to an ongoing investigation, which could be prejudiced by premature disclo-

135. For example, corporate and partnership records are not privileged under the self-incrimination clause of the fifth amendment. Bellis v. United States, 417 U.S. 85 (1974).

136. For example, in the *In re Investigation No. 2* case, the Commission, after having already obtained a court order at an adversary proceeding requiring the witness to turn over the documents, would have to go back to court a second time, after the witness had appeared before the Commission. The Commission ultimately could obtain any records to which it was entitled, but the delay could be substantial and harmful to the investigation.

137. N.M. Stat. Ann. § 31-6-1 (1978).

138. 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

139. *Id.* at 574, 591 P.2d at 1171.

sure, or to scandalous matters that were not found worthy of indictment by the grand jury. In addition, such testimony probably would be useful only for collateral impeachment of a witness, which is generally improper cross-examination. The slight possibility of advantage to the defendant cannot outweigh the legitimate reasons for grand jury secrecy.

IV. SENTENCING

A. Sentencing Alternatives.

Three decisions dealt with the sentencing alternatives available to the trial court. In *State v. Aragon,*[140] the defendant appealed the revocation of his probation. The district court had deferred a three-year sentence, placed him on probation and imposed a $2,000 fine. The court of appeals reversed the revocation because the trial court cannot both defer a sentence and impose a fine, which is in itself a sentence. Once the defendant paid the fine, his sentence was executed and the deferral of the prison sentence became void, thereby ending the probationary period before he was charged with violating the terms of probation. Because imposition of a fine and suspension of a sentence of imprisonment may be a useful sentencing tool, this decision deserves the attention of the legislature.

In *State v. Pendley,*[141] the defendant had been sentenced under the firearm enhancement statute,[142] which increases the minimum and maximum terms of imprisonment for a felony by five years if a firearm is used in the commission of the felony. The statute forbids *suspending* the first year of a first offender's sentence. The trial court decided that it also had no authority to *defer* imposition of the sentence,[143] but the court of appeals reversed. Although deferral of sentencing appears to undercut the statute's purpose, the court of appeals relied on the fact that the statute specifically prohibited both *deferral* and *suspension* for second offenders while prohibiting only *suspension* for first offenders. Thus, the failure to prohibit *deferral*

140. 93 N.M. 132, 597 P.2d 317 (Ct. App. 1979).

141. 92 N.M. 658, 593 P.2d 755 (Ct. App. 1979).

142. N.M. Stat. Ann. § 31-18-4 (1978) (current version at N.M. Stat. Ann. § 31-18-16 (Supp. 1980)).

143. The chief differences between deferring imposition of sentence and suspending a sentence that is imposed are: (1) once the period of *deferral* expires without revocation by the court, the charges are dismissed, whereas one who successfully completes the period during which the sentence is *suspended* still has a criminal conviction on his or her record; and (2) if the deferral is revoked, the judge can impose any sentence permissible under the applicable statute, but if suspension of a sentence is revoked, the court can impose no greater penalty than the sentence whose imposition was suspended. N.M. Stat. Ann. § § 31-20-1 to -12 (1978).

for first offenders would appear to have been intentional. This seems to be an appropriate construction of the statute, but the legislative intent is difficult to fathom.[144]

In *State v. Nolan*,[145] the trial court imposed consecutive sentences for armed robbery, burglary, and contempt, and added a probationary period of three years to run after service of the three consecutive sentences.[146] The court of appeals voided the probationary part of defendant's sentence because the statutory authority for probation[147] does not provide for probation unless a sentence is suspended or deferred.

B. Probation Revocation.

The two most striking decisions regarding sentencing concerned revocation of probation. In *State v. Chavez*,[148] the probation revocation hearing was conducted seven months after the defendant's arrest on a charge of violating the terms of his probation. The revocation was overturned on appeal on the ground that the seven-month delay after his arrest was unreasonable, even though the defendant had been in custody for only the first ten days. The court suggested that due process required this result, but it focused on the statutory language, which says that, after a probationer is arrested, "[t]he court shall *then* hold a hearing, which may be informal, on the violation charged."[149] The court of appeals interpreted "then" to mean "promptly or within a reasonably short period of time after an alleged violation or after an arrest for a violation."[150] This ruling creates the odd result of imposing a more stringent test for "speedy revocation" of the probation of a non-incarcerated defendant than for "speedy trial."[151] A more flexible approach, defining "then" as "the next step" rather than as "immediately," would have been helpful and would not have distorted the statutory language. The court's rigid logic forced a result that may often be contrary to a probationer's own interest. In the future, the State will need to seek a hearing immediately after

144. In the 1977 legislature, section 31-18-4 was repealed. The current law, N.M. Stat. Ann. § 31-18-16 (Supp. 1980), prohibits suspension and deferral.

145. 93 N.M. 472, 601 P.2d 442 (Ct. App. 1979).

146. The sentence would have a similar effect to that of the special parole term imposed under federal law in drug offenses. 21 U.S.C. § 841 (Supp. III 1979).

147. N.M. Stat. Ann. § 31-20-5 (1978).

148. 94 N.M. 102, 607 P.2d 640 (Ct. App. 1979).

149. N.M. Stat. Ann. § 31-21-15(B) (1978) (emphasis added).

150. 94 N.M. at ____, 607 P.2d at 643.

151. To determine whether there has been denial of a speedy trial, the court must weigh (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 (1972); State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977).

the arrest rather than delaying the hearing to give the defendant time to straighten himself out.[152]

State v. Montoya[153] held that a probationer is entitled to an opportunity to explain an alleged violation of probation, even if he admits the violation or was convicted in a criminal trial of committing offenses on which the allegation of violation of probation is based. After the defendnat admitted to the court in his "hearing" that he had consumed alcohol in violation of his probation requirements, the trial court ruled that there was no need to hear anything further and revoked the probation. But the court of appeals, relying on United States Supreme Court precedent,[154] held that the defendant has a right to explain his violation and any mitigating circumstances. The court also held that a new hearing would be required even though, subsequent to the original "hearing," the defendant had been convicted of two criminal offenses alleged in the original motion to revoke probation. The court of appeals refused to presume that the trial court would revoke probation based on the convictions. The ruling may require a futile gesture, but holding a hearing would not impose a great burden.

C. Hearing Required at Sentencing.

State v. Vialpando[155] upheld the action of the trial court in conducting a sentencing hearing immediately after trial without requiring a presentence report. The judge had an unusual amount of information about the defendant. Not only had he read expert reports on the defendant's competency to stand trial, but also he had previously sentenced the defendant, with the assistance of a presentence report, on another charge for which he was still serving time. Nevertheless, the court of appeals' opinion is less than convincing. With respect to the defendant's claim that "it was unfair to defendant to expect his counsel to proceed immediately after 'a lengthy trial' to present to the court an argument or evidence concerning sentencing, and to deny defendant the hearing before sentencing that he automatically is afforded when a presentence report is ordered,"[156] the court of appeals stated only that the argument was "patently vacuous."[157]

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152. *But see* State v. Sanchez, 94 N.M. ____, 612 P.2d 1332 (Ct. App.), *cert. denied*, ____N.M. ____, 615 P.2d 992 (1980) (reaching a result contrary to *Chavez*).

153. 93 N.M. 84, 596 P.2d 527 (Ct. App. 1979).

154. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471, 488 (1972).

155. 93 N.M. 289, 599 P.2d 1086 (Ct. App. 1979).

156. *Id.* at 300, 599 P.2d at 1097.

157. *Id.*

The court's reasoning is unclear. One would think that any defense counsel would want an opportunity to collect his thoughts, evidence, and arguments over a period of time before arguing sentencing before the court. Also, there is some merit in the defendant's argument that his conduct during fourteen months of incarceration subsequent to commission of the offense might be relevant to sentencing. What is most questionable, however, is the court of appeal's statement that "the trial court recited cogent, compelling reasons for declining to seek a presentence investigation before entering sentencing against the defendant."[158] Although the trial judge explained why he felt sufficiently informed about the defendant to proceed to sentencing immediately, he gave no "cogent" or "compelling" reason why the sentencing proceeding could not be deferred. Public protection was not an issue because the defendant was already incarcerated, and updating the prior presentence report would not have unduly burdened the state's probation officers.

D. Habitual Offenders.

Three decisions involved New Mexico habitual offender statutes. *State v. Garduno*[159] dealt with enhanced punishment for second offenders of the Controlled Substances Act.[160] The Act, which makes it unlawful for any person "to intentionally traffic,"[161] provides a sentence of up to life imprisonment "for the second and subsequent offenses."[162] Garduno had a prior federal drug conviction, but he contended that a federal offense could not be used to increase the penalty for his state conviction. The supreme court, noting that the enhancement provision did not specifically require that the prior offense have been prosecuted under the state statute, ruled that Garduno could be sentenced as a second offender since the elements of the federal statute under which he had been convicted were identical to those of the state trafficking statute.

State v. Rogers[163] and *State v. Valenzuela*[164] both held that if a defendant is charged as a second, third, or fourth offender under the Habitual Offender Statute,[165] each felony in the sequence must have been *committed* after the defendant was *convicted* for the prior

158. *Id.* at 301, 599 P.2d at 1098.
159. 93 N.M. 335, 600 P.2d 281 (1979).
160. N.M. Stat. Ann. § § 30-31-1 to -40 (Repl. 1980).
161. *Id.* § 30-31-20(B).
162. *Id.* § 30-31-20(B)(2).
163. 93 N.M. 519, 602 P.2d 616 (1979).
164. 94 N.M. 285, 609 P.2d 1241 (Ct. App. 1979).
165. N.M. Stat. Ann. § 31-18-5 (1978) (current version at N.M. Stat. Ann. § 31-18-17 (Supp. 1980)).

offense. This resolution of the issue was not new, since the same interpretation was given to the statute in *State v. Linam.*[166]

V. SEARCH AND SEIZURE

The lawfulness of a search or seizure is often the dispositive issue in a criminal case. The importance of this issue is reflected in the number of appeals last year in which it was raised.

A. The Warrant Requirement.

In general, a search is lawful only if a court has issued a search warrant founded on probable cause.[167] The exceptions to this requirement, however, are a matter of continuing litigation.

1. Search of "Containers."

One "container" that has raised continual controversy in the law of search and seizure is the automobile. It is well established that officers having probable cause to search an automobile that they have stopped may search the vehicle without first obtaining a warrant.[168] The warrant requirement is waived because of the exigent circumstance that an automobile is highly mobile and therefore could disappear while the officers seek a warrant.[169] A warrant also is not required if the officers delay the search until after they have taken the passengers into custody and impounded the vehicle.[170]

The automobile exception, however, does not justify warrantless searches of automobiles in all circumstances. In *State v. Luna,*[171] the New Mexico Supreme Court denied the validity of a warrantless search of an impounded vehicle because the officers had not had probable cause to search the car for evidence of murder and burglary when it was stopped. They did not obtain such probable cause until the car had been impounded, and by that time no "exigent circumstances" justified a warrantless search.[172]

166. 93 N.M. 307, 600 P.2d 253, *cert. denied,* 420 U.S. 250 (1979).

167. U.S. Const. amend. IV.

168. Carroll v. United States, 267 U.S. 132 (1925).

169. In recent years the United States Supreme Court also has justified the automobile exception on the basis that one does not expect as much privacy in an automobile as in a home. *See, e.g.,* Arkansas v. Sanders, 442 U.S. 753, 761 (1979).

170. Chambers v. Maroney, 399 U.S. 42 (1970).

171. 93 N.M. 773, 606 P.2d 183 (1980).

172. At the time that the car was stopped, the officers had probable cause to search the car for evidence of three other offenses, including possession of marijuana. Therefore, under Chambers v. Maroney, 399 U.S. 42 (1970), a stationhouse search for such evidence would have been unlawful. But the *Luna* court rejected the argument that the search actually conducted was valid, apparently on the inexplicable ground that the scope of the actual search would be different from the scope of the allowable search. Ordinarily, an officer's conduct is not unlawful simply because his subjective justification for his conduct was incorrect. State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980) (officer gave wrong ground for arrest).

Warrants also may be required before certain contents of an automobile may be searched. In *State v. Walker,*[173] the court of appeals followed *Arkansas v. Sanders,*[174] recently decided by the United States Supreme Court, and held that a suitcase seized from an automobile by the police could not be searched without a warrant. In *Sanders* the United States Supreme Court held that once law enforcement officers seize an item such as a suitcase, whether from an automobile or elsewhere, there is no reason to conduct an immediate search rather than to maintain the item in their custody until a warrant can be obtained.

On the other hand, in *State v. Smith,*[175] the court of appeals held that no warrant was required to search a plastic bag "commonly used to wrap or contain drug packets,"[176] which was seized from an automobile. Relying on language in *Sanders*[177] that a lawfully seized container may be searched without a warrant if the contents can be inferred from the outward appearance of the container, the court of appeals rather questionably stated that in drug cases a plastic bag is such a container. The record in *Smith* may establish that the nature of the bag indicated its contents, but the opinion does not discuss the facts in sufficient detail to justify that conclusion.[178]

A car's trunk appears to be sufficiently analogous to luggage that it, too, would not be subject to search without a warrant. But in *State v. Sandoval*[179] the court upheld a trunk search at an immigration checkpoint by border patrol agents who smelled marijuana. In applying the automobile exception, the court of appeals did not distinguish the trunk from the rest of the car. The decision predated *Sanders,* but was not contradicted by it. The Supreme Court in *Sanders* stated that generally all "integral parts" of the automobile (specifically including the trunk and glove compartment) may be searched without a warrant.[180] The Court suggested that the distinction between an integral part and removable luggage is based on the difficulty of securely impounding the vehicle.[181] The whole vehicle would need to

173. 93 N.M. 769, 605 P.2d 1168 (Ct. App. 1980).

174. 442 U.S. 753 (1979).

175. 19 N.M. St. B. Bull. 37, 38 (Ct. App. Jan. 17, 1980), *rev'd on other grounds,* 94 N.M. 379, 610 P.2d 1208 (1980).

176. 19 N.M. St. B. Bull. at 38.

177. 442 U.S. at 764-65.

178. A more recent New Mexico appellate case on searching packages is State v. White, ___ N.M. ___, 615 P.2d 1004 (Ct. App. 1980) (boxes and bag could not be searched without a warrant).

179. 92 N.M. 476, 590 P.2d 175 (Ct. App. 1979).

180. 442 U.S. at 763.

181. *Id.* at 765-66, n. 14 (the same basis for the distinction was noted in United States v. Chadwick, 433 U.S. 1, 13 n. 7 (1977)).

be impounded while a warrant was obtained to search an integral part of it, which is not the case with an item of luggage.

Cases involving non-automobile searches also reflect the requirement that a container cannot be searched without a warrant absent exigent circumstances. *State v. Manus*[182] held that a clothing pocket is entitled to the protection of the warrant requirement. The defendant had been taken to a hospital emergency room for treatment after a shooting incident in which he killed a police officer. His clothing was taken by hospital staff. A police officer asked for the clothing as possible evidence and another officer, noting a weight in the pants, looked through the pants and found four shotgun shells. The New Mexico Supreme Court ruled that no exigent circumstances justified proceeding without a warrant, because the clothing was in the exclusive control of the officers when the search was conducted.

In *State v. Moore,*[183] however, the court of appeals found exigent circumstances permitting a warrantless intrusion. While searching a home for a burglary suspect, a police officer saw what looked like a gun butt protruding from a mattress. When he lifted the mattress, he found three rifle cases. The defendant argued on appeal that the officer could not open the closed cases without a warrant. The court of appeals upheld the search as a proper exercise of protective action by the officer. The victim of the burglary had told the officer that some rifles were missing. The court reasoned that the officer was examining the rifles to determine whether he had custody of the stolen rifles so he could be sure none were available to be used by the defendant against the officers.[184]

2. Search Incident to Arrest.

Although no exigent circumstances justified the warrantless search of the defendant's clothing in *State v. Manus,*[185] the search might be upheld as a "search incident to arrest." Law enforcement officers may search without a warrant "for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained."[186] Such warrantless searches are not un-

182. 93 N.M. 95, 597 P.2d 280 (1979).

183. 92 N.M. 663, 593 P.2d 760 (Ct. App. 1979).

184. The court might also have noted that the contents of the gun cases were inferrable from the shape of the container. *Arkansas v. Sanders,* decided after *Moore,* specifically cited a gun case as an example of a container for which there can be no reasonable expectation of privacy because its contents are inferrable from its outward appearance. 442 U.S. at 764-65, n. 13.

185. 93 N.M. 95, 597 P.2d 280 (1979).

186. United States v. Edwards, 415 U.S. 800, 802-03 (1974).

limited in scope.[187] But the *Manus* decision may have been too restrictive in rejecting the contention that the search could be upheld as incident to an arrest. *Manus* relied on the general rule prohibiting the search of an arrestee's personal effects if the items are in the exclusive control of officers.[188] The court failed to note, however, that the rule does not apply to personal effects which are "immediately associated with the person of the arrestee."[189] For example, *United States v. Edwards*[190] upheld a warrantless seizure of an arrestee's clothing the morning after the arrestee was incarcerated. Since in *Manus* the clothing was property "immediately associated" with the arrestee's person, the search-incident-to-arrest doctrine was not inapplicable simply because the item was in the exclusive control of the law enforcement agents. Although there may be other reasons why the search-incident-to-arrest exception would not apply to the *Manus* facts,[191] the court's reasoning does not adequately distinguish *Edwards*.

In another search-incident-to-arrest decision, the court also apparently imposed requirements not established by the United States Supreme Court. In *State v. Luna*,[192] the defendant had been arrested for a traffic offense. After he was taken into custody, he was recognized and questioned about a murder:

> The police at that time seized the tennis shoes defendant was wearing, which appeared to match the footprint found next to the Taylor purse. It is claimed that the warrantless seizure of the shoes was unreasonable. We disagree. It was reasonable for the officers to believe

187. For example, a search incident to an arrest cannot extend throughout the residence where the arrestee is apprehended, but is limited to the area within his immediate control. Chimel v. California, 395 U.S. 752 (1969).

188. The court, quoting Rodriguez v. State, 91 N.M. 700, 705, 580 P.2d 126, 131 (1978), said: "Where officers have within their exclusive control personal effects belonging to the arrestee, a warrantless search of these items is illegal." 93 N.M. at 104, 597 P.2d at 280.

189. United States v. Chadwick, 433 U.S. 1, 15 (1977). The full quotation reads:

> Once law enforcement officers have reduced luggage or other personal property *not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, search of that property is no longer an incident of the arrest.

(Court's emphasis deleted, author's emphasis added.) By analogy with Chambers v. Maroney, 399 U.S. 42 (1970), the arrestee's clothing can be searched without a warrant at the moment of arrest, so there should be no objection to a later warrantless search of the same items. Rodriguez v. State, 91 N.M. 700, 580 P.2d 126 (1978), involved a sleeping bag, so the personal effects exception to the general prohibition did not apply.

190. 415 U.S. 800 (1974).

191. The circumstances of Manus' hospitalization and of the removal of his clothing are not detailed in the opinion.

192. 93 N.M. 773, 606 P.2d 183 (1980).

> that the shoes were possible evidence of a crime, because the defendant had been implicated in other burglaries, and the police already knew of the footprint found near the Taylor purse. The intrusion was justified.[193]

The court apparently upheld the seizure as one incident to an arrest, but it appeared to require that a search and seizure in such circumstances also satisfy some sort of "reasonableness" test based on grounds to believe that the items seized were possible evidence. The United States Supreme Court, however, has not imposed such a requirement.[194]

The *Manus* and *Luna* opinions may arise from a decision of the New Mexico Supreme Court to impose a more stringent test on searches incident to arrest than has the United States Supreme Court. Although a state supreme court must follow the decisions of the United States Supreme Court when interpreting the fourth and fourteenth amendments of the United States Constitution, the New Mexico Constitution has its own search and seizure provision.[195] The New Mexico Supreme Court, therefore, may interpret the state's Constitution as prohibiting searches that are otherwise permissible under the United States Constitution. The New Mexico courts in the past, however, consistently have followed the constitutional rulings of the United States Supreme Court on search and seizure issues. It is significant that the rulings in *Manus* and *Luna* say nothing about the court's adopting a standard different from that of the United States Supreme Court. In fact, both decisions rely on United States Supreme Court authority on the search and seizure issue. The problem is that other such authority was not considered.

3. "Plain View."

Three of the year's cases dealt with the "plain view" doctrine which, with certain exceptions discussed below, permits an officer to seize items in plain view if he has a right to be in the position from which he obtains the view. A typical application of the doctrine is

193. *Id.* at 778, 606 P.2d at 188.

194. *See* United States v. Robinson, 414 U.S. 218 (1973), where the Court upheld an officer's search of a cigarette pack in the pocket of an individual arrested for driving without a license.

195. N.M. Const. art. 2, § 10 states:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized nor without a written showing of probable cause, supported by oath or affirmation.

State v. Doe.[196] A police officer followed a juvenile into his driveway after observing him speeding in a residential area. The juvenile left his car without closing the door. While the officer, standing two feet from the automobile, was checking to see if the youth had a driver's license, he saw some marijuana cigarettes on top of the car's console. The court ruled that the evidence was lawfully seized because it was in plain view.

Despite the apparent simplicity of the doctrine, its application may be difficult and surprising. In *State v. Turkal,*[197] officers were conducting a search pursuant to a warrant for marijuana and nude photographs. They came upon some tape recordings which they also seized. Evidence at the scene (for example, a tape recorder and microphone were hooked up under defendant's bed) suggested that the recordings may have been evidence of a crime, but the supreme court ruled that the seizure of the tape decks was unlawful because the warrant authorized the seizure only of items particularly described in it. Although the officers were lawfully executing their task when they came upon the tapes, the court in *Turkal* did not apply the plain view doctrine because the *contents* of the tapes were not in plain view. Under *Turkal,* a plain view seizure is justified only if the incriminating nature of the object is "immediately apparent" (as with a sawed off shotgun, for example). If the object must be examined ("searched") further to determine its incriminating nature, then it is not considered to be in plain view.[198]

State v. Luna[199] presented a tantalizing set of facts as far as the plain view doctrine is concerned. An officer conducting a lawful warrantless search of an automobile observed two stereo speakers, but had no idea of their significance. Because the speakers' incriminating nature was not immediately apparent, no seizure would have been permitted at that time. The warrantless seizure of the speakers, conducted after the officers learned that the speakers were stolen was held unlawful because the view of the speakers on the second search was *planned. Luna,* following the plurality opinion in *Coolidge v. New Hampshire,*[200] said the plain view doctrine requires that any

196. 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

197. 93 N.M. 248, 599 P.2d 1045 (1979).

198. Other courts have expressed this requirement, most notably the United States Supreme Court plurality in Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See also* United States v. Berenguer, 562 F.2d 206, 210-11 (2nd Cir. 1977) (search of contents of wallet illegal even though wallet was in plain view). *Turkal's* facts are very similar to those in the seizure of pornographic films described in the concurring opinion of Mr. Justice Stewart in Stanley v. Georgia, 394 U.S. 557, 571 (1969), which was cited favorably by *Coolidge v. New Hampshire* and expressly followed in *Turkal.*

199. 93 N.M. 773, 606 P.2d 183 (1980).

200. 403 U.S. 443 (1971).

seizure under that exception to the warrant requirement be "inadvertent."[201] The rationale for this condition is that there is no justification for officers not to obtain a warrant for evidence they expect to find.

4. Statutes.

Even when officers obtain a warrant satisfying all constitutional requirements, the legislature may forbid the search. In *State v. Steele*,[202] a valid sarch warrant was obtained to conduct a blood-alcohol test on the defendant. There was no constitutional issue. Section 66-8-111 of the New Mexico statutes, however, provides that "[i]f a person under arrest refuses upon request of a law enforcement officer to submit to chemical tests designated by the law enforcement agency as provided in [the Act], none shall be administered."[203] The court of appeals held that the search was invalid because it was conducted without the consent of the defendant, and the evidence obtained in the search was suppressed. Of course, the result in such a case can be altered by legislative enactment.

The legislature also may "forbid" a specific procedure for seizing evidence simply by failing to approve that procedure. In *Sanchez v. Attorney General*,[204] the attorney general obtained a court order requiring a suspect to provide handwriting exemplars. The suspect had not been arrested or indicted, so no criminal case had been initiated against him. The court of appeals found no constitutional prohibition against the order, but it also found no authorization for it in state law. Because the district courts do not have unlimited power, such a procedure for issuing an order would be proper only if a statute specifically provided for it or the practice was "known to the common law and equity practice of England prior to 1776. . . ."[205] Finding no historical precedent, the court of appeals ruled the order invalid. Such an order could be obtained, however, once the suspect was charged formally with the offense for which the exemplars were sought; examplars also could be obtained through a grand jury subpoena.[206] The attorney general's investigation, therefore, need not be stymied.

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201. 93 N.M. at 779, 606 P.2d 440 (Ct. App. 1979).

202. 93 N.M. 470, 601 P.2d 440 (Ct. App. 1979).

203. N.M. Stat. Ann. § 66-8-111 (1978).

204. 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

205. 93 N.M. at 214, 598 P.2d at 1174. Article 6, section 13 of the New Mexico Constitution provides that the district courts have "original jurisdiction." The language quoted is the *Sanchez* court's description of those matters encompassed by original jurisdiction.

206. The opinion did not suggest why the attorney general had not proceeded via a grand jury.

B. Procedure for Challenging a Search.

Two decisions during the year involved procedural requirements for raising search and seizure issues. In *State v. Doe,*[207] the court of appeals allowed a juvenile to move to suppress evidence at trial despite a children's court rule of procedure stating that all pre-adjudicatory motions "shall be filed" within twenty days of the filing of the petition alleging delinquency.[208] The court held that the rule merely provided an alternative means for a defendant to move to suppress evidence, and that the objection to the evidence may be raised at trial.[209] The court indicated that requiring a motion to suppress to be made within the pre-trial time limits would be a "finicky procedural requirement."[210] The *Doe* court, however, did not consider the potential disruptions resulting from hearing a motion during the trial and the prejudice to the prosecution resulting from such a procedure. The prosecution can appeal from an adverse decision at a pretrial hearing of a motion to suppress, but if the evidence is not suppressed until trial, the prosecution may have no means to prevent an unappealable acquittal.[211]

State v. Cervantes[212] involved a challenge to the veracity of a search warrant affidavit. The court adopted the procedures set out by the United States Supreme Court in *Franks v. Delaware.*[213] Under *Franks,* a hearing attacking the veracity of an affidavit is required only if the defendant provides an offer of proof supporting allegations of deliberate falsehood or reckless disregard of the truth by government agents. The defendant should furnish affidavits or other reliable statements to support his attack or explain satisfactorily why they are unavailable. As a result of these requirements, hearings on the veracity of affidavits will be uncommon in New Mexico courts.

C. Probable Cause.

In general, an arrest or search must be predicated on "probable cause." Officers have "probable cause" to arrest when "the facts and

207. 93 N.M. 143, 597 P.2d 1183 (Ct. App. 1979).

208. N.M. Child. Ct. R. 14.

209. The result is inconsistent with State v. Vialpando, 93 N.M. 289, 293, 599 P.2d 1086, 1090 (1979), which said that a trial motion to suppress a line-up identification was untimely because New Mexico Rule of Criminal Procedure 18(c) requires motions to suppress to be filed within twenty days of the entry of a plea.

210. 93 N.M. at 148, 597 P.2d at 1188.

211. The New Mexico statute allowing appeals by the state of suppression orders does not explicitly bar an appeal during the trial. N.M. Stat. Ann. § 39-3-3(B)(2) (1978). The federal statute, however, does bar such appeals. 18 U.S.C. § 3731 (1976). Moreover, there may be a constitutional problem with mid-trial review.

212. 92 N.M. 643, 593 P.2d 478 (Ct. App. 1979).

213. 438 U.S. 154 (1978).

circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense."[214] The test seems straightforward, but it can be difficult to determine whether specific facts justify a finding of probable cause.

One area in which the United States Supreme Court has provided guidance is in the use of informants to establish probable cause. The Supreme Court has held that information obtained from an informant may be used to establish probable cause when the officer's affidavit establishes (1) the underlying observations from which the informant could draw his or her conclusions, and (2) that the informant is reliable.[215] New Mexico appellate courts considered the second requirement in two decisions during the year.

In *State v. Cervantes,*[216] the sole fact establishing the informant's credibility was that in the prior week he had given information resulting in the recovery of stolen property. It is probably impossible to find a principle which could determine precisely where to draw the line as to how much prior accurate information should be required to establish the reliability of an informant. Significantly, the court drew the line at the least possible amount: one prior piece of accurate information made the informant "reliable."

The court of appeals' approval of such use of informant information, however, may apply only in reviewing warrants and not in reviewing warrantless searches and seizures. Although the court of appeals before it had the same information concerning the informant's reliability as did the judge issuing the warrant, the court emphasized that it was only reviewing the decision of the issuing judge, that his determination should be paid great deference, and that it could not "say that the issuing judge's common-sense view . . . was erroneous as a matter of law."[217] This ruling reflects the view of the United States Supreme Court that warrants are to be encouraged and that in close cases the fact that a warrant was issued may tip the scales in favor of finding probable cause.[218]

An issue in *State v. Turkal*[219] was the veracity of a young female informant who stated that the defendant had furnished illegal drugs

214. Beck v. Ohio, 379 U.S. 89, 91 (1964).
215. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).
216. 92 N.M. 643, 593 P.2d 478 (Ct. App. 1979).
217. *Id.* at 647, 593 P.2d at 482.
218. United States v. Ventresca, 380 U.S. 102 (1965).
219. 93 N.M. 248, 599 P.2d 1045 (1979).

to juveniles and had taken nude pictures of young girls. The court found that her veracity was established by the substantial corroboration in the affidavit of her allegation of drug distribution. The court did not discuss an additional factor supporting the veracity of the informant. According to the affidavit, the informant was simply a "concerned juvenile citizen."[220] Questions of credibility that arise when an informant is involved personally in the criminal activity, therefore, did not arise.

Several other appellate decisions concerning the meaning of probable cause are so dependent on their facts that they have little precedential value. Language in two opinions should be mentioned, however. In *State v. Moore*,[221] the defendant had rented a house located approximately one block from his landlord. The landlord's house was burglarized and a witness described to police officers a man he had seen at the front door of the landlord's house early in the evening of the burglary. The landlord told officers that the description met that of the defendant and later pointed out the defendant to officers. The issue before the court was whether officers had probable cause to arrest the defendant for the burglary. The opinion stated that "there was probable cause to arrest Moore for the burglary on the basis of the two identifications that [the victim/landlord] made to [the police officer]."[222] This abbreviated statement may be intended to encompass all the various facts of the case indicating the defendant's guilt to the officers prior to the defendant's arrest.[223] But, standing alone it suggests that there is probable cause to arrest someone for burglary of his landlord's house simply because he is seen at the front door of the house on the evening of the burglary. This language of *Moore* could be misused to justify or encourage[224] unlawful police action.

In *Sanchez v. Attorney General*,[225] discussed earlier, the attorney general, investigating false Medicaid claims from the drug store Sanchez owned, had obtained a court order compelling Sanchez to provide handwriting exemplars. The court of appeals found no authority for the district court's order requiring the exemplars. In one section of the opinion the court rejected the theory that the order was the equivalent of a search warrant. After explicitly withholding a ruling on whether the affidavit established probable cause, the court merely

220. *Id.* at 250, 599 P.2d at 1047.

221. 92 N.M. 663, 593 P.2d 760 (Ct. App. 1979).

222. *Id.* at 666, 593 P.2d at 763.

223. The facts included various attempts by the defendant to conceal his identity and evade police officers.

224. This might occur if the decision is used in training or advising law enforcement officers.

225. 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

said that the order and affidavit did not satisfy the requirements of Rule of Criminal Procedure 17[226] of the purposes of a search warrant authorized by the rule, the one applicable to the facts of the case would be one authorizing searches for evidence which "would be material evidence in a criminal prosecution."[227] The court said that this purpose was not satisfied: "This comparison is desired because the investigator does not know whether Sanchez is involved in the false claim. The affidavit contains nothing indicating Sanchez' handwriting exemplars 'would' be in evidence."[228] Since the court stated that it was not considering the issue of probable cause, the result apparently would have been the same even if the affidavit had established probable cause to believe that Sanchez participated in the fraud and signed a document used to perpetrate it. The above language also would seem to prohibit issuing a search warrant for a suspect's shoe so that the police may compare it with footprints found at the scene of the crime. Despite having probable cause to believe that the shoe would fit the footprint, officers would not "know" it and, therefore, would want the shoe for purposes of *comparison.* Perhaps, however, the court is merely being technical in requiring that an applicant for a warrant specifically state that there is probable cause to believe the item to be compared *will be* evidence. Such a recitation would force the applicant and the issuing judge to focus on the probable cause requirement that must be met before a warrant can issue. Without this focus, the requirements for a warrant could be confused with the lesser standard for a subpoena. This lesser standard permits acquisition of, for example, a handwriting exemplar if the exemplar would merely be "relevant," even if there is no probable cause to believe the witness wrote the writing in question.[229]

VI. MISCELLANEOUS

A. Notice.

The notice required by due process was the key issue in three cases decided during the year.

In *In re Klecan,*[230] the supreme court overturned a contempt citation against an attorney. The court held that summary punishment for contempt for courtroom misconduct may not be imposed and enforced unless it is clear on the record that the contemnor was given a

226. N.M.R. Crim. P. 17(a).
227. *Id.*
228. 93 N.M. at 212, 598 P.2d at 1172.
229. *In re* Investigation No. 2 of the Governor's Organized Crime Prevention Commission, 91 N.M. 516, 577 P.2d 414 (1978).
230. 93 N.M. 637, 603 P.2d 1094 (1979).

specific warning by the judge, an opportunity to explain, and a hearing. Only in the case of "flagrant contemptuous conduct,"[231] where, for example, there is a violent disruption of the proceedings or blatant disrespect for the judge, can punishment be imposed without those prerequisites.

In *Roybal v. Martinez,*[232] a contempt citation for violation of a court order was overturned because the defendant had not been served personally with the Order to Show Cause.[233] The unusual aspect of the case was that the defendant appeared at the hearing on the Order to Show Cause and two weeks earlier had filed an affidavit in which he responded to the Order. The appellate court, however, accepted the defendant's contention that service had not been consummated[234] and held that the defendant had not waived his objection concerning lack of service by making a special appearance at the hearing for the purpose of raising that very objection.

In *City of Albuquerque v. Juarez,*[235] the defendant was convicted for driving while his driver's license was suspended. He claimed that the prosecution failed to show that he had actual knowledge of the suspension. The notice of suspension had been sent to the defendant by certified mail but was returned to the sender unclaimed. The court of appeals held that it was not necessary to prove that the licensee had actual knowledge of the suspension, but reversed the conviction, holding that the prosecution needed to show that either the defendant had acknowledged receipt of the notice or that he voluntarily had avoided receiving it.[236]

B. Ineffective Assistance of Counsel.

The constitutional right of an accused to the assistance of coun-

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231. *Id.* at 639, 603 P.2d at 1096.

232. 92 N.M. 630, 593 P.2d 71 (Ct. App. 1979).

233. Because a criminal contempt proceeding is independent of the proceeding in which the order was issued, it must be initiated by personal service on the defendant. State v. Armijo, 38 N.M. 280, 31 P.2d 703 (1934); Lindsey v. Martinez, 90 N.M. 737, 568 P.2d 263 (Ct. App. 1977).

234. The defendant testified that his affidavit was in response to newspaper articles rather than to the court documents which were not served on him.

235. 93 N.M. 188, 598 P.2d 650 (Ct. App. 1979).

236. The court said:

> The City did not establish either of these notice attempts, nor was there any evidence that the defendant had moved over ten days before the notice was sent [N.M. Stat. Ann. § 66-5-22 (1978) requires a licensee to notify the Motor Vehicle Division within ten days of a change of address] or that he refused to claim the letter. Lacking such proof, the prosecution must show other good faith and accepted methods of notifying a driver that his license has been suspended.

Id. at 191, 598 P.2d at 653.

sel[237] also requires that the assistance be effective. The claim of ineffective assistance, though regularly made, is rarely upheld. Typical treatment of the issue is found in *State v. Mills.*[238] The court of appeals answered the defendant's claim summarily by stating: "His claim basically goes to trial strategy which does not establish such a claim. The record fully supports the trial court's ruling that defendant's representation was 'highly competent' in a case where the evidence 'was overwhelming as to the guilt of this defendant.' "[239]

State v. Luna[240] was the only case providing some relief to the defendant on such a claim. The court remanded the case to district court to determine whether trial counsel's representation of defendant on a conspiracy charge had been effective. The charge had named three co-conspirators. Before defendant's trial, one pled guilty to other charges and the conspiracy charge against him was dropped. The other two were acquitted of the conspiracy charge by a jury. The dismissal and the two acquittals took place well before defendant's trial. Apparently, the court of appeals believed that the defendant's counsel had an obligation to take some steps predicated on the prior acquittals and the dismissal: "Although defendant might properly have been charged as combining with [the defendant against whom the charge was dismissed], he was tried on the charge of a four-man conspiracy. His trial counsel did nothing to attack or limit that charge by motion or otherwise."[241] The court of appeals, by citing a case involving the doctrine of collateral estoppel,[242] may have been suggesting that the defendant could have benefitted under that doctrine from the acquittals of the alleged co-conspirators. But the United States Supreme Court has recently, in a unanimous decision, rejected the doctrine of nonmutual collateral estoppel in criminal cases (the estoppel being "nonmutual" because the defendant seeking to raise the estoppel was not a party to the prior trial).[243] Nevertheless, there is authority that one cannot be convicted of conspiracy if all alleged co-conspirators are acquitted,[244] so Luna may

237. U.S. Const. amend. VI.

238. 94 N.M. 17, 606 P.2d 1111 (Ct. App. 1980).

239. *Id.* at ____, 606 P.2d at 1114. Other cases denying claims of ineffective assistance of counsel were State v. Gutierrez, 93 N.M. 232, 599 P.2d 385 (Ct. App. 1979), and State v. Urioste, 93 N.M. 504, 601 P.2d 737 (Ct. App. 1979).

240. 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

241. *Id.* at 686, 594 P.2d at 346.

242. State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973).

243. Standefer v. United States, 100 S. Ct. 1999 (1980) (conviction of aiders and abettors).

244. State v. Gilmore, 47 N.M. 59, 134 P.2d 541 (1943) (dictum); *contra* Gardner v. State, 286 Md. 520, 408 A.2d 1317 (1979); People v. Berkowitz, 50 N.Y.2d 333, 428 N.Y.S.2d 927 (Ct. App. 1980); Development, *Criminal Conspiracy*, 72 Harv. L. Rev. 920, 974 (1959).

have had grounds for a pretrial motion modifying the indictment.[245]

The peculiarity of the *Luna* decision is that instead of addressing the merits of the contention that the indictment was improper and needed modification, the court remanded for a hearing on whether the trial attorney's failure to raise the issue constituted ineffective assistance of counsl. Yet, the trial court can hardly rule on whether the assistance of original counsel was effective until it decides whether modification of the indictment was proper. There is nothing "ineffective" in failing to raise an objection that will be overruled. The court of appeals rightly could be concerned that the defendant, a minor participant in the offense, was convicted of a conspiracy when the three other alleged co-conspirators "got off." It strains the doctrine of ineffective assistance of counsel, however, to require a hearing on that issue when the court failed to point to specific instances of deficient conduct of trial counsel that could harm his client.[246]

C. Confession Cases.

Three cases raised the issue of admissibility of confessions. *State v. Adams*[247] apparently affirmed the rule that a confession is inadmissible if it is induced by an express or implied promise of leniency, but the supreme court held that there was substantial evidence supporting the trial court's ruling that no such promise was made.

In *State v. Poller*,[248] the issue was whether a voluntary statement was the fruit of a prior statement obtained in violation of the *Miranda* rules.[249] The defendant approached the first officer to arrive at the scene of a killing and told him that the victim had stolen money from her and that she had shot him. Next, without being given any *Miranda* warnings, she was taken into custody in an officer's patrol car and questioned about the shooting. She repeated her first statement. She was then placed in the vehicle of another officer, who did advise her of her *Miranda* rights. Although she said that she did not wish to waive her right to remain silent and did not wish to talk, she volunteered further information about the shooting. The court of appeals, recognizing that the state had to prove that the third statement was not the product of the unlawfully obtained second statement, ruled that the state had met its burden.

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245. The dismissal of the conspiracy charge against the fourth alleged co-conspirator would not benefit Luna. State v. Verdugo, 79 N.M. 765, 449 P.2d 781 (1969).

246. *See* Cuyler v. Sullivan, 100 S. Ct. 1708, 1719 (1980) (must show "an actual lapse in representation," even when attorney had potential conflict of interest).

247. 92 N.M. 669, 593 P.2d 1072 (1979).

248. 93 N.M. 257, 599 P.2d 1054 (Ct. App. 1979).

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

State v. Day[250] is the most interesting of the three cases involving confessions, particularly in light of a subsequent United States Supreme Court decision.[251] The defendant, after being advised of his *Miranda* rights and declining to sign a written waiver, remarked that "[T]his is all hogwash."[252] The officer, believing the remark referred to the advice of rights, asked the defendant what "hogwash" meant. The defendant then gave an incriminatory statement concerning his actions. The court gave two alternative grounds for finding the statement of the defendant admissible. First, it held that the defendant had waived his right to remain silent because his answer came after he was advised of his rights and was aware of them. This argument is questionable since the defendant's refusal to sign a written waiver strongly, if not explicitly, indicates that the defendant did not wish to be interrogated. Under these circumstances, the officer should not have interrogated the defendant.[253]

The court's second reason for admitting the statement hits closer to the mark. The court stated that the defendant's answer was not responsive to the question, was not the result of in-custody questioning, and was volunteered. Although the court may be faulted for its failure to explain either the relevance of the defendant's unresponsiveness or its criteria for determining whether a statement was the result of in-custody questioning or was volunteered, the decision appears to focus on the elements of the situation which were held critical in *Rhode Island v. Innis,*[254] a United States Supreme Court case decided two months later. In *Innis* the United States Supreme Court held that "interrogation" refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custoday) that the police should know are reasonably likely to elicit an incriminatory response from the suspect."[255] Under this standard the officer was not "interrogating" Day when he asked the meaning of "hogwash." Day's answer may have been responsive in his mind, but it was not the type of answer the officer reasonably expected to elicit, so there was no "in-custody *interrogation.*" In *Innis* the officers did not directly ask the defendant any questions, but the principle of that case would seem to support the *Day* result.

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250. ___N.M. ___, 617 P.2d 142 (1980), *cert. denied,* 49 U.S.L.W. 3248 (Oct. 7, 1980).

251. Rhode Island v. Innis, 100 S. Ct. 1682 (1980).

252. *Id.* at ___, 617 P.2d at 148.

253. *See* Michigan v. Mosley, 423 U.S. 96, 102 (1975) (once a person has invoked his right to silence, interrogation cannot be resumed after only a "momentary respite").

254. 100 S. Ct. 1682 (1980).

255. *Id.* at 1689.

D. Competency.

The two chief decisions on the issue of competency were procedural ones. In *State v. Luna,*[256] the court held that a defendant who raises the issue of insanity is not entitled to a bifurcated trial. In a bifurcated trial, sanity is determined at a proceeding separate from the proceeding in which it is decided whether the defendant committed the alleged acts. The defendant argued that to establish insanity it was necessary to introduce "evidence of prior acts and self-incriminating statements made to psychologists and psychiatrists,"[257] and that a limiting instruction could not prevent the jury from considering that evidence when deciding whether defendant committed the alleged acts. The court held that due process did not require such a bifurcation. It ruled that the issues should be decided in one proceeding until Rule 40 of the Rules for Criminal Procedure for the District Courts, which establishes the order of trial, is altered. Although certain types of bifurcation procedures may raise due process problems, those problems are surmountable[258] and the force of the defendant's argument in *Luna* suggests that an amendment to the rule should be considered.[259]

The other procedural case was *State v. Sena.*[260] *Sena* held that the issue of the defendant's competency to stand trial or to be sentenced can be raised at any time. The court ruled that the trial judge should have conducted a hearing on those competency issues upon the defendant's request following a post-trial diagnostic evaluation. The State argued that a new trial was unjustified because evidence of incompetence could have been discovered before trial by the exercise of due diligence.[261] The court of appeals said that if the defendant had been incompetent, he could hardly have waived his rights on the issue.

Sena also held that the judge, without a jury, should conduct the

256. 93 N.M. 773, 606 P.2d 183 (1980).

257. *Id.* at 779, 606 P.2d at 189.

258. For example, it would be violative of due process to forbid psychiatric testimony relevant to intent at the first proceeding and then forbid a decision on any issue but insanity at the first proceeding and then forbid a decision on any issue but insanity at the second stage. *See* State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970). The subtleties of the issues involved would require too long a discussion for this article. For a good discussion *see* Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword,* 66 Nw. U.L. Rev. 327 (1971).

259. The Committee Commentary to Rule 40 does not indicate that it considered the possibility of bifurcation when an insanity defense is raised.

260. 92 N.M. 676, 594 P.2d 336 (Ct. App. 1979).

261. The requirement sought by the state is imposed in the ordinary case of a motion for a new trial based on newly discovered evidence. State v. Lucero, 90 N.M. 342, 344, 563 P.2d 605, 607 (Ct. App. 1977).

post-trial hearing on competency, at which the defendant has the burden of persuasion by a preponderance of the evidence. The chief obstacle to this result was *State v. Chavez*,[262] which had held unconstitutional a New Mexico statute and rule of procedure requiring the court, without a jury, to decide the issue of competency to stand trial. *Chavez* was based on a state constitutional provision guaranteeing the right to a jury trial as it existed at the time of statehood[263] and on an 1855-56 statute, which was in effect until 1967 and provided for a jury trial of the competency issue.[264] But *Sena*, trying to reconcile *Chavez* with the supreme court's recently issued Rule of Criminal Procedure 35(b), which provides for the judge to determine competency in circumstances like those in *Sena*, noted the ambiguity of the 1855-56 statute and distinguished earlier decisions as not involving post-trial motions. The court held that a jury trial is not constitutionally required on the issues of (1) competency to stand trial, if the issue is not raised until the sentencing hearing, and (2) competency to be sentenced.

E. Venue.

Section 30-1-14 of the New Mexico statutes provides that the trial of a crime can be held "in any county in which a material element of the crime was committed."[265] Two appellate decisions during the year considered the issue of where venue lies for certain offenses.

In *State v. Smith*,[266] the defendant was tried for murder in Bernalillo County even though the bodies of the victims were discovered in Torrance County and the crime was allegedly committed in Torrance County. The court held, however, that there was substantial evidence that the defendant formed the intent to kill in Bernalillo County.

In *State v. Marsh*,[267] the defendants were charged in Valencia County with possession of marijuana with intent to distribute it and conspiracy. The State alleged that one defendant flew a plane over Valencia County to a location in McKinley County where the plane landed to unload the marijuana. There was no evidence that the assistants on the ground had been in Valencia County or that the pilot had landed in Valencia County.

On the charge of possession of marijuana with intent to distribute, the court of appeals held that venue existed in any county in which

262. 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).
263. N.M. Const. art. 2, § 12.
264. N.M. Stat. Ann. § 41-13-3 (1953) (repealed 1967).
265. *Id.* § 30-1-14 (1978).
266. 92 N.M. 533, 591 P.2d 664 (1979).
267. 19 N.M. St. B. Bull. 182 (Ct. App. Feb. 28, 1980).

the pilot traveled with the marijuana because two elements of the crime, possession and intent to distribute, existed in that county. Furthermore, because an aider or abettor can be tried in any county where the principal can be tried, those waiting on the ground in McKinley County to help the pilot could also be tried in Valencia County.

The court reached a different result on the conspiracy charge. It said that venue was proper only in the county in which the conspiracy was entered into and, perhaps, where an overt act took place in furtherance of the conspiracy.[268] There was no evidence to support the first ground for venue. As for the second ground, the court, without deciding whether to follow the widely accepted rule that an overt act can be the basis for venue, said that the only act alleged to have occurred in Valencia County was flying over that county, which was not an overt act in the county. Therefore, venue would not lie in Valencia County.

The second ruling in *Marsh* is questionable for two reasons. First, why isn't flying over a county an overt act of the conspiracy? The flight was the key element of the conspiracy. The case relied upon by the court offers little support; rather, it relied on a case suggesting that *Marsh* was decided incorrectly.[269] Secondly, if, as *Marsh* held, venue for the offense of possession with intent to distribute lay in Valencia County because the pilot had the requisite intent while flying over the county, then venue should be proper for the conspiracy charge. Intent to distribute is a material element of the conspiracy;[270] so the same intent that provides venue for the substantive crime would also provide venue for the conspiracy charge.[271]

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268. *Id.* at 184.

269. The case cited by *Marsh*, United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974), held that landing a plane and making a phone call in the judicial district were enough to establish venue, but it did not say that such acts were *required*. The case relied upon by *Barnard* ruled that *driving through* the district was sufficient to establish venue for a conspiracy to smuggle drugs. United States v. Trenary, 473 F.2d 680 (9th Cir. 1973). On appeal, the New Mexico Supreme Court reversed and held that the transportation of marijuana through the county was an overt act; but it exercised its superintending power over inferior courts to require trial in McKinley County. Marsh v. State, 20 N.M. St. B. Bull. 13 (Dec. 5, 1980).

270. N.M.U.J.I. Crim. 28.20 gives as the second element of the offense of conspiracy: "2. The defendant and the other person intended to commit [the felony which the defendant allegedly conspired to commit]." In other words, a material element of the conspiracy charge is that the defendant have the intent to commit the felony which is the object of the conspiracy.

271. The conspiracy charged in *Marsh* was a conspiracy to distribute drugs, rather than a conspiracy to possess with intent to distribute. The court did not suggest that while the pilot was flying over Valencia county he had no intent to commit the offense of distribution. The court found that there was an allegation that the pilot had the requisite intent for possession with intent to distribute, and an element of that offense is that the defendant "intended to transfer" the controlled substance. N.M.U.J.I. Crim. 36.03.

F. Elements of Substantive Offenses.

Several decisions last year defined the elements of criminal offenses. Two dealt with forgery,[272] two with fraud,[273] and one each with embezzlement,[274] unlawful transfer of a motor vehicle,[275] criminal sexual penetration,[276] assault on a peace officer,[277] extortion,[278] and enhancement of a sentence for use of a firearm.[279]

272. In State v. Cook, 93 N.M. 91, 596 P.2d 860 (Ct. App. 1979), the defendant, using a name he had assumed for several years, opened a checking account with a deposit of $50 and then wrote checks totaling more than $6,000 on the account. The court reversed the conviction for forgery on the ground that forgery is not committed when "the check purports to be the very act of the person issuing it and not the act of another person." *Id.* at 92, 596 P.2d at 861. In State v. Saavedra, 93 N.M. 242, 599 P.2d 395 (Ct. App. 1979), the court held that to commit the crime of forgery it is not necessary for the defendant actually to have signed the forged signature on the check. The defendant need only "make up" the check (such as by filling in the name of the payee) as long as he has the requisite knowledge and intent.

273. In State v. Martinez, 18 N.M. St. B. Bull. 720 (Ct. App. 1979), the court held that in determining the degree of a fraud the relevant amount is not the financial injury to the victim, but the amount of money obtained by the defendant as a result of the fraud. Thus, one is guilty of the offense of committing fraud in excess of $2,500 if the victim pays the defendant $2,501, even though the victim's loss is significantly less because the value of the property obtained from the defendant by the victim might be $2,000. In State v. Hamilton, 19 N.M. St. B. Bull. 185 (Ct. App. Feb. 28, 1980), the court reiterated the New Mexico rule that reliance by the victim is an element of the offense of fraud. But it added that it is no defense to the charge that the victim's reliance was negligent.

274. In State v. Stahl, 93 N.M. 62, 596 P.2d 275 (Ct. App. 1979), the court held that a store clerk in charge of the store during the evening could not be convicted of embezzling money from a drop-box at the store because he was not "entrusted" with the contents. He had no keys to the drop-box and had no permission or authority to take any money out of it. If he took money from the drop-box, he would have to be charged with larceny rather than embezzlement.

275. The issue in State v. Montano, 93 N.M. 436, 601 P.2d 69 (Ct. App. 1979), was the meaning of "pass title" in the statute making it unlawful to transfer possession of a vehicle with intent to pass title when the person knows or has reason to know that the vehicle has been stolen or unlawfully taken. N.M. Stat. Ann. § 66-3-505 (1978). The defendant argued that because the vehicle was stolen he had no title to pass. The court of appeals, however, held that the statute is violated if the defendant intended to pass whatever form of title he had, and possession may constitute that form of title.

276. In State v. Urioste, 93 N.M. 504, 601 P.2d 737 (Ct. App. 1979), the court conconsidered the meaning of "aided or abetted" in the definition of the crime of sexual penetration in the second degree. The offense is committed when criminal sexual penetration is perpetrated "by the use of force or coercion when the perpetrator is aided or abetted by one or more persons." N.M. Stat. Ann. § 30-9-11 (1978). The defendant argued that aiding and abetting were to be construed in their technical legal sense and that it was therefore necessary for the prosecution to prove the requisite criminal intent of the aiders and abettors. But the court, citing the commentary to the Uniform Jury Instructions, held that the intent of the aiders and abettors was not an element of the crime and it was sufficient to instruct the jury that the defendant "acted with the help or encouragement of one or more persons." The court took a common sense approach and assumed that the drafters of the statute were not using language in a legally sophisticated sense.

277. State v. Rhea, 93 N.M. 478, 601 P.2d 448 (Ct. App. 1979), held that assault on a peace officer requires the peace officer to be performing his duties. Failure to instruct on that element was reversible error, even in the absence of an objection at trial by defendant.

278. In State v. Barber, 93 N.M. 782, 606 P.2d 192 (Ct. App. 1979), the court held that

the threat necessary for commission of the crime of extortion can be communicated through acts as well as through words. The court found that defendant's prior attack on the victim and his ranting and raving at the victim constituted sufficient communication of a threat.

279. In State v. Chouinard, 93 N.M. 634, 603 P.2d 744 (Ct. App. 1979), the court held that the statute, which increases the sentence for the commission of a felony if the defendant "used" a firearm in the felony, does not encompass simple possession of the firearm during the commission of the felony.