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# Criminal Procedure

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# CRIMINAL PROCEDURE

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## I. INTRODUCTION***

The New Mexico courts considered a variety of criminal procedure cases during the Survey year. These cases fall into no easy categories. In the first section of this article, the cases are generally divided according to those provisions of the United States Constitution they construe. The second portion of the article discusses various areas of criminal procedure including sentencing, prosecutorial conduct, juries, plea bargains, and destruction of evidence. The authors have chosen to discuss the most significant criminal procedure cases—about two thirds of the relevant cases decided by the New Mexico Supreme Court and the Court of Appeals during the Survey year.

## II. FOURTH AMENDMENT

### *A. Probable Cause*

#### 1. Confidential Informants

In *State v. Baca,*[1] the New Mexico Supreme Court analyzed an affidavit for a search warrant containing, inter alia, hearsay information from two confidential sources. The court found that the affidavit did not meet the established *Aguilar/Spinelli* standards for probable cause.[2] Although the court found the informant sufficiently credible, it rejected the affidavit because it contained insufficient factual basis for the information supplied by the informant. The affidavit merely stated the informant's own conclusions about the defendant and his activities without any supporting

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***Mr. Jiles discusses sections II–IV, and Professor Stelzner discusses the remaining sections.

1. 97 N.M. 379, 640 P.2d 485 (1982).

2. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). In *Aguilar,* the Supreme Court said that in order for a tip from a confidential informant to be considered valid for purposes of a search warrant based on probable cause, it must (1) describe some of the underlying circumstances showing how the informant knew what he claimed to know; and (2) give some reasons why the affiant believes the informant is credible. 378 U.S. at 114. In *Spinelli,* the Court explained that a deficiency in the first part of the *Aguilar* test could be overcome by a sufficiently detailed description from the informant that is corroborated by police investigation. 393 U.S. at 416.

data.[3] The supreme court relied on *State v. Duran*[4] and N.M. R. Crim. P. 17(f)[5] for the New Mexico statement of the *Aguilar/Spinelli* test.

This holding follows *United States v. Ventresca,*[6] in which the United States Supreme Court stated that probable cause may not be made out by "affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based."[7] The *Baca* case should stand as a reminder to law enforcement officers and magistrates alike that mere conclusory statements in search warrants will not be sustained at the appellate level.

2. Second Hand Sources of Information

In *State v. Martinez,*[8] the New Mexico Supreme Court held that a law enforcement officer who makes an arrest or search at the request of another officer or at the call of a dispatcher may justifiably assume that the one making the request had probable cause for the intrusion. In this Survey year, the New Mexico Court of Appeals applied this rule to out-of-state law enforcement sources of probable cause. In *State v. Powell,*[9] a New Mexico magistrate was presented with an affidavit for a search warrant which recited details of narcotics offenses committed by defendants in Texas. The affidavit did not specifically state why the information should be considered reliable but it did say that the information came from narcotics agents for the Texas Department of Public Safety.[10] Relying on *Martinez* and *United States v. Ventresca,*[11] the court of appeals found that the magistrate could reasonably rely on the information supplied by the Texas agents. In *Ventresca,* however, unlike the situation in *Powell,* the affiant had personal knowledge of the events he described as well as

3. The informant said that he had "first hand personal knowledge" about the kind of automobile the defendant had access to, that the defendant was "known by the informant to be involved in narcotics transactions," and that he had "personal knowledge" that the defendant often carried a weapon similar to that used in the crime. 97 N.M. at 381, 640 P.2d at 487.

4. 90 N.M. 741, 568 P.2d 267 (Ct. App. 1977). "It is of vital importance that the *reliable* confidential informant or affiant describe the criminal activity in sufficient detail so that the magistrate has something substantial to rely on and not a casual rumor circulating in the underworld." *Id.* at 743, 568 P.2d at 269 (emphasis by the court).

5. N.M. R. Crim. P. 17(f) states that the probable cause necessary for a search warrant "shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished."

6. 380 U.S. 102 (1965).

7. *Id.* at 108–109.

8. 94 N.M. 436, 612 P.2d 228, *cert. denied,* 449 U.S. 959 (1980).

9. 96 N.M. 569, 632 P.2d 1207 (Ct. App. 1981).

10. *Id.* at 570, 632 P.2d at 1208.

11. 380 U.S. 102 (1965) (observations of fellow officers of the government engaged in common investigation are a reliable basis for a warrant applied for by one of their number).

information from other officers.[12] In *Powell*, the affiant recited no facts from personal observation. The *Powell* court did not justify this reliance only on the basis of the fact that the information came from law enforcement officers. The court also specifically noted that the State of Texas itself has issued arrest warrants for these same defendants based on this information.

The decision may pose a problem for some future defendants. When the probable cause for their arrest[13] or search warrant is drawn from an out-of-state police officer it may be uneconomical and ineffective for the defendant to challenge the affidavit. He may find it practically impossible to question the credibility of the ultimate source of the information. The *Powell* opinion is silent on how the Texas authorities received their information. While the New Mexico magistrate may rely on the Texas magistrate's findings that the original source was believable, the defendant may have no way of reaching that ultimate source.

In addition, there were no exigent circumstances presented in *Powell*. With the communications facilities now available to law enforcement personnel, there does not appear to be any reason why the New Mexico officers could not have easily acquired a copy of the underlying circumstances relied upon by the Texas authorities in the initial determination of probable cause. If left unrefined, the *Powell* decision will permit Las Cruces police officers and magistrates to rely on second-level probable cause determinations if the source were an El Paso police source while a Farmington magistrate could not place the same reliance on information received from Las Cruces. One can wonder why this exception is needed at all.

### *B. Warrant Requirement Exceptions*

#### 1. Automobile Exception/Container Search

> [T]he law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided.[14]

Although Mr. Justice Powell wrote this in reference to the United States Supreme Court, much the same could be said about the New Mexico appellate courts' approaches to the problem. Indeed, New Mexico not

12. *Id.* at 103.

13. The opinion does not specifically say that this rule applies to arrest warrants as well, but the *Martinez* opinion, upon which the court of appeals relied, stated: "an *arrest* or search warrant must be supported by affidavit, when based upon information from an informant, setting forth facts showing the reliability of the informant and probable cause." 94 N.M. at 440, 612 P.2d at 232 (emphasis added).

14. Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring in the judgment).

only reflects the federal inconsistency, it also fosters its own. This became apparent in this Survey year in the New Mexico Supreme Court's reversal of the previous year's court of appeals decision in *State v. Capps*.[15]

In *Capps*, an Artesia police officer made a valid stop[16] of a car in which the defendant was a passenger. While he was questioning the driver about the ownership of the car, the officer smelled the odor of raw marijuana. The driver then gave his consent for the officer to look into the trunk. The officer discovered nine dark green plastic trash bags inside the trunk.[17] The officer poked a hole in one of the green bags and found that it contained a portion of the more than eighty pounds[18] of marijuana found in the trunk. The police took the bags to the evidence locker and impounded the car.[19]

The court of appeals had found that the defendant had a reasonable expectation of privacy in these containers and held that a search warrant was required.[20] The supreme court majority disagreed. It said that this was not a container case at all[21] but was "within the extents of the automobile exception."[22] In a lengthy dissent, Justice Sosa noted that the United States Supreme Court held in *Robbins v. California*,[23] on almost identical facts, that such a search was not authorized by the so called "automobile exception."[24] In the *Robbins* plurality opinion, the Court held that the police may not search a closed container unless the container's shape or appearance clearly reveals its contents.[25]

"Automobile exception" is the unfortunately misleading label assigned to one of the exceptions[26] to the fourth amendment warrant requirement.

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15. 20 N.M. St. B. Bull. 399 (Ct. App. Apr. 9, 1981), *rev'd*, 97 N.M. 453, 641 P.2d 484 (1982). For a discussion of the court of appeals decision, see Stelzner, *Criminal Procedure, Survey of New Mexico Law: 1980–81*, 12 N.M.L. Rev. 271, 279–80 (1982).

16. This stop was the subject of an interlocutory appeal of the trial court's denial of a motion to suppress. The court of appeals' memorandum opinion upheld the validity of the stop. *See* 20 N.M. St. B. Bull. at 400.

17. Each green bag contained marijuana that was triple wrapped and taped in opaque bags and sealed shut. *Id.* at 401.

18. The supreme court said that it was approximately eighty-eight pounds, 97 N.M. at 454 n.1, 641 P.2d at 485 n.2; the court of appeals said eighty-four, 20 N.M. St. B. Bull. at 401.

19. It is necessary to read three accounts for the best understanding of the facts: the majority's, 97 N.M. at 454, 641 P.2d at 485; the dissent's (Sosa, J., dissenting), *Id.* at 458, 641 P.2d at 490; and the court of appeal's, 20 N.M. St. B. Bull. at 400.

20. 20 N.M. St. B. Bull. at 400. The court relied on State v. White, 94 N.M. 687, 615 P.2d 1004 (Ct. App. 1980) (warrant required for search of contents of sealed boxes and bags stored in trunk of automobile).

21. 97 N.M. at 457, 641 P.2d at 488.

22. *Id.* at 458, 641 P.2d at 489.

23. 453 U.S. 420 (1981).

24. *Id.* at 424 (Stewart, J., plurality opinion).

25. *Id.* at 427.

26. Some of the others are: search incident to lawful arrest, Chimel v. California, 395 U.S. 752 (1969); hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968); plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1971); and consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

The automobile is only accidently associated with this exception,[27] and perhaps the better designation would be the "*Carroll* Doctrine," after the case of *Carroll v. United States*.[28] The doctrine is a two-part test which must be met to establish that a search of a constitutionally protected area is valid: (1) there must be probable cause to believe that there is evidence of a crime in the place to be searched; and (2) there is an exigency that the evidence will disappear because it is located in a place that is mobile.[29]

In *Capps*, the supreme court found that the aroma of marijuana was sufficient probable cause for the officer to search the automobile.[30] The court found the second part of the test was met and relied on *United States v. Milhollan*.[31] In *Milhollan*, the Third Circuit held that "the justification for the search must arise suddenly and unexpectedly."[32] The New Mexico court reasoned that, because the officer was not looking for marijuana when he stopped the car, the unexpected smell of marijuana and the mobility of the automobile supplied all the exigency that was necessary.[33]

The court apparently did not view *Capps* as a container case because the officer was looking for marijuana, not a specific container.[34] This appears to be a departure from the usual way of analyzing these cases. The majority stated that "[i]f there is probable cause to search for a particular item, the officer can search every container and location within the permitted area where that item could be located."[35]

The supreme court distinguished *Capps* from *Robbins* in one paragraph.

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27. As noted by the majority in the supreme court *Capps* opinion, for an excellent exposition of this exception, see Moylan, *The Automobile Exception: What it is and What it is Not—A Rationale in Search of a Clearer Label*, 27 Mercer L. Rev. 987 (1976).

28. 267 U.S. 132 (1925); *Carroll* is further explained in United States v. Chadwick, 433 U.S. 1 (1977).

29. 267 U.S. at 149, 153.

30. 97 N.M. at 454, 641 P.2d at 485.

31. 599 F.2d 518 (3d Cir.), *cert. denied*, 444 U.S. 909 (1979).

32. 599 F.2d at 526. *Milhollan* was decided three months before Arkansas v. Sanders, 442 U.S. 753 (1979), and two years before *Robbins* (see *infra* note 39 for a discussion of *Sanders*). In *Milhollan*, the circuit court justified the search of a satchel within an automobile by relying on two cases, Chambers v. Maroney, 399 U.S. 42 (1970) (not a container case), and another Third Circuit case, United States v. Vento, 533 F.2d 838 (3d Cir. 1976). The *Milhollan* court's statement that the justification for the search must arise suddenly and unexpectedly came from *Vento*. The *Vento* court was not re-defining "exigency" to simply mean "a sudden and unexpected discovery." It was instead specifying the exigency surrounding the search of that particular automobile. In *Vento*, the exigency was that confederates of the arrestee were nearby and might easily have removed the evidence. Furthermore, the police in *Vento* had probable cause to search a specific paper bag which was later placed in the automobile. *Id.* at 865–67. In *Milhollan* (and in *Capps* as well), the court only mentioned the "sudden and unexpected" character of the discovery of the suspect containers, not the existence of any identifiable exigency. 599 F.2d at 526.

33. 97 N.M. at 456, 641 P.2d at 487. The majority failed to point out in its rationale that the mobility of the automobile had been diminished by the fact that, at the time of the search, the suspects were under arrest and the officer had possession of the keys. *Id.* at 459, 641 P.2d at 490.

34. *Id.* at 457, 641 P.2d at 488.

35. *Id.* at 458, 641 P.2d at 489.

Under *Robbins*, once the police have seized a container, the likelihood of its mobility is significantly reduced; the exigency thus disappears. The *Capps* opinion stated, "The officer here never seized the plastic bags. While the bags were in the car, he tore a hole in them."[36]

The dissent argued that:

> The majority tells all police officers that they can rummage through all containers located in an automobile undergoing a lawful warrantless search, so long as they do not "seize" the containers. The rationale of the majority is that the automobile is "mobile." This is wrong. The only question is whether the officer should have taken the bags along with the defendants to the police station and then should have obtained a warrant to search the bags, rather than immediately searching the bags without a warrant.[37]

Justice Sosa answered this question in the affirmative,[38] citing *Robbins* and *Arkansas v. Sanders*[39] as authority.

The majority, however, was apparently anticipating a change in the United States Supreme Court's handling of these cases.[40] If this is true, the court guessed correctly. In *United States v. Ross*[41] the United States Supreme Court overruled *Robbins*[42] and some of the reasoning in *Sanders*[43] and declared an unequivocal rule that police and courts could more easily follow. The Court succinctly stated the rule:

> We hold that the scope of warrantless searches authorized by that exception [the *Carroll* Doctrine] is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.[44]

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36. *Id.* This statement is, of course, incorrect. *See supra* text accompanying note 19.

37. *Id.* at 462, 641 P.2d at 493 (Sosa, J., dissenting).

38. *Id.*

39. 442 U.S. 753 (1979) (containers which are found in a vehicle that is being subjected to a lawful warrantless search may be searched only upon a showing of genuine exigent circumstances). The *Sanders* court noted that:

> [t]here are essentially two reasons for the distinction between automobiles and other private property. First, as the court repeatedly has recognized, the inherent mobility of automobiles often makes it impracticable to obtain a warrant. . . . In addition, the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property.

*Id.* at 761.

40. The majority noted that the United States Supreme Court had directed the parties in United States v. Ross, ___ U.S. ___, 102 S.Ct. 2157 (1982), to address the question whether the Court should reconsider *Robbins*. 97 N.M. at 458 n.6, 641 P.2d at 489 n.6.

41. ___ U.S. ___, 102 S.Ct. 2157 (1982).

42. *Id.* at ___, 102 S.Ct. at 2172.

43. *Id.*

44. *Id.* Compare the *Capps* rule *supra* in text accompanying note 35.

The holdings of *Capps* and *Ross* are substantially the same but the reasoning differs. The *Ross* court seemed to find that this new rule lay dormant in *Carroll* all along.[45] It did not see this as a change in the law as much as a realization of it. The *Capps* court, however, sought to redefine "exigency" in order to justify the use of the *Carroll* Doctrine. Practitioners may find that this rule will, indeed, make it easier to deal on a day-to-day basis with the automobile/container cases because of the certainty of the rule. Thus, the divergent reasonings may be less important than the resulting common rule.

2. Border Searches

Searches of persons entering the United States and of the items they bring with them have traditionally occupied a unique place in search and seizure analysis.[46] Courts view these searches as being something apart from the searches that must fulfill the probable cause and warrant requirements of the fourth amendment.[47] They are "reasonable" simply by virtue of the fact that the persons and items searched have entered the country[48] and that, as a sovereign, the United States has the authority to protect its territorial integrity.[49] They differ from "plain view" and "exigent circumstances" searches because probable cause is not a required basis for the reasonableness of the search.[50]

While the sovereign has the authority to conduct searches in seeking out violations of its customs[51] and immigration[52] laws, it need not restrict its police activities to the immediate border itself. The United States Supreme Court has recognized a limited extension to the concept of border searches by permitting searches at the functional equivalent of the border (e.g. international airports).[53]

During the Survey year the New Mexico Court of Appeals recognized a more recent development in border search analysis, the "extended border search." In *State v. Gonzales,*[54] the court discussed the propriety of a search that uncovered a cache of marijuana. Border Patrol agents had reason to believe that the defendant had illegally entered New Mexico on foot from Mexico carrying a suspiciously large backpack. The agents did not observe him actually crossing the border but did see him leaving

45. *Id.* at ___, 102 S.Ct. at 2169–70.
46. United States v. Ramsey, 431 U.S. 606, 619 (1977) (brief history of the unique significance of the border search analysis).
47. *Id.*
48. Carroll v. United States, 267 U.S. 132, 154 (1925).
49. Torres v. Puerto Rico, 442 U.S. 465, 472–73 (1979).
50. United States v. Ramsey, 431 U.S. at 619.
51. 19 U.S.C. § 482 (1976).
52. 8 U.S.C. § 1357(a)(3)(c) (1976).
53. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).
54. 97 N.M. 182, 637 P.2d 1237 (Ct. App.), *cert. denied,* 97 N.M. 242, 638 P.2d 1087 (1981).

a well-established illicit entry trail. Just minutes before, they had electronically detected someone moving on the same trail. The defendant then placed his over-sized backpack into the trunk of an automobile. The agents then detained the defendant and called in a customs agent who searched the trunk and discovered marijuana.

The court of appeals rejected the defendant's claim that fourth amendment analysis should apply to the search.[55] Instead, it found the "border search" exception to be more appropriate in light of the facts of the case. The court held that the place of the search[56] was not the functional equivalent of the border; instead the court applied the extended border concept.

Under the "functional equivalent analysis" the border is, in a sense, brought to the place of the search,[57] as when an international flight lands at an international airport. The concept of the extended border is similar but the factual setting is not so clear-cut. In an extended border situation, there is no similar certainty that the person actually crossed the border. Instead, inferences are drawn from known facts and a decision is made as to whether a border exception applies at all. As the *Gonzales* court put it, "[a] border crossing is a critical fact"[58] in the analysis. If it appears that a suspect did not cross an international border, there can be no border exception.

Because the United States Supreme Court has not ruled on the extended border concept, the New Mexico Court of Appeals looked to the circuit courts for guidance.[59] The court found that the Fifth Circuit enunciated the standard for proper extended border searches in *United States v. Richards*.[60] That standard is: (1) it must be established by a preponderance of the evidence that a border crossing has occurred;[61] (2) it must be established with reasonable certainty that when searched, the person or

55. 97 N.M. at 185, 637 P.2d at 1240. The court recognized that if fourth amendment analysis had been applied, the discovered evidence should have been suppressed. For authority the court cited Arkansas v. Sanders, 442 U.S. 753 (1979), and State v. White, 94 N.M. 687, 615 P.2d 1004 (Ct. App. 1980).

56. The search took place in the parking lot of a tavern, approximately two miles from the border. 97 N.M. at 184–85, 637 P.2d at 1239–40.

57. United States v. Brennan, 538 F.2d 711, 715 (5th Cir. 1976).

58. 97 N.M. at 187, 637 P.2d at 1242.

59. *Id.* at 186–88, 637 P.2d at 1241–43. The court relied on United States v. Richards, 638 F.2d 765 (5th Cir. 1981); United States v. Jacobson, 647 F.2d 990 (9th Cir. 1981); Unitd States v. Driscoll, 632 F.2d 737 (9th Cir. 1980); United States v. Moore, 638 F.2d 1171 (9th Cir. 1980); and United States v. Bilir, 592 F.2d 735 (4th Cir. 1979).

60. 638 F.2d 765 (5th Cir. 1981).

61. 97 N.M. at 188, 637 P.2d at 1243. In adopting the preponderance burden, the *Gonzales* court expressly declined to use the standards of "reasonable suspicion," United States v. Bilir, 592 F.2d 735 (4th Cir. 1979); "firm belief," United States v. Driscoll, 632 F.2d 737 (9th Cir. 1980); and "reasonable certainty," United States v. Jacobson, 647 F.2d 990 (9th Cir. 1981).

thing was in the same condition it was in when the border was crossed;[62] and (3) before the search, the government agents must have had reasonable suspicion supported by articulatable facts that the person or thing searched was involved in illegal activity, such as smuggling contraband.[63] In applying this test to the facts in *Gonzales,* the court found the extended border search exception appropriate and upheld the propriety of the search.[64]

The effect of this decision may well be that there will be more and more searches of individuals at increasing distances from the border,[65] while the district courts attempt to apply the elements of this test and the different evidentary standards for each part of the test. The appellate courts' next job in the area of extended border searches will be to give helpful standards for how far the extended border extends.

### *C. Standing*

The fourth amendment right to be free from unreasonable search and seizure is a personal right[66] that cannot be asserted vicariously.[67] The current standard[68] used by the courts and set forth by the Supreme Court in *United States v. Salvucci,*[69] is that the person asserting the right must have had "a legitimate expectation of privacy in the area searched."[70] This expectation is legitimate if two requirements are fulfilled: "first that a person [has] exhibited an actual (subjective) expectation of privacy, and

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62. The *Gonzales* court applied the "reasonable certainty" standard of *Richards* to the unchanged position of the person or thing searched. It then adopted the *Driscoll* court's definition of "reasonable certainty" as "a higher standard than probable cause, but less than proof beyond a reasonable doubt." 97 N.M. at 187, 637 P.2d at 1242. In *Driscoll,* however, the court was applying that standard to establish the fact of a border crossing, not the unchanged condition. 632 F.2d at 739.

63. 97 N.M. at 187, 637 P.2d at 1242.

64. *Id.* at 187, 637 P.2d at 1243.

65. The trial courts may find little guidance from authority in this area. In the following cases the searches were all upheld: United States v. Bilir, 592 F.2d 735 (4th Cir. 1979) (three to four miles from the border); United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978) (254 miles from the border, 20 hours after entry); United States v. Martinez, 481 F.2d 214 (5th Cir. 1973), *cert. denied,* 415 U.S. 931 (1974) (150 miles from the border, 142 hours after entry); United States v. Majourau, 474 F.2d 766 (9th Cir. 1973) (80 to 90 miles from the border); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970) (105 miles from the border). The Immigration and Naturalization Service considers 100 air miles to be a reasonable distance from the border for purposes of activities of its agents. 8 C.F.R. § 287.1(a)(2) (1981).

66. This principle was established in Alderman v. United States, 394 U.S. 165, 174 (1969), and recognized in New Mexico in State v. Ellis, 88 N.M. 90, 92, 537 P.2d 698, 700 (Ct. App. 1975).

67. Rakas v. Illinois, 439 U.S. 128, 134 (1978); State v. Torres, 81 N.M. 521, 527, 469 P.2d 166, 172 (Ct. App. 1970).

68. In an early decision the United States Supreme Court had established the more lenient standard that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress." Jones v. United States, 362 U.S. 257, 267 (1960); *see also* Goldman v. United States, 316 U.S. 129, 134–36 (1942); Olmstead v. United States, 277 U.S. 438, 457, 464, 466 (1928).

69. 448 U.S. 83 (1980).

70. *Id.* at 92.

second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[71]

In *State v. Waggoner,*[72] the New Mexico Court of Appeals added one more to the line of New Mexico cases[73] using an expectation of privacy standard. In *Waggoner,* the defendants, with their pockets stuffed with stolen money, asked a stranger to drive them to the bus station. On the way to the station, an officer legitimately stopped the car, arrested, and then searched the defendants. The officer then searched the car without either the driver's or the defendants' consent. Upon searching the automobile, the officer found more money in the back seat behind a cushion. The trial court denied the motion to suppress[74] the evidence of the money found in the car and held that the defendants had no standing.[75]

The New Mexico Court of Appeals affirmed that finding because the defendants did not have a legitimate expectation of privacy in the back seat of the driver's car. The *Waggoner* court reinforced the rule that one who challenges the legitimacy of a search has a heavy burden in proving he had a legitimate expectation of privacy in the place searched. This ruling is consistent with the strictures of conventional search and seizure standards. *Waggoner* leaves unclear, however, what evidence a defendant must produce in order to show standing when he is a passenger in an automobile owned by another person.

### *D. Warrantless Arrest*

In *State v. Devigne,*[76] the defendant sought to suppress a confession made after the police arrested him without a warrant in his own home. Two weeks after obtaining probable cause to arrest, Albuquerque police detectives entered the Devignes' home during daylight hours. They arrested him for a series of residential burglaries. The record showed no exigent circumstances and was silent on the defendant's consent for the

71. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

72. 97 N.M. 73, 636 P.2d 892 (Ct. App. 1981).

73. State v. Barry, 94 N.M. 788, 791, 617 P.2d 873, 876 (Ct. App. 1980) (a person has no legitimate expectation of privacy in premises when he voluntarily grants free access to the premises to a third party); State v. Chort, 91 N.M. 584, 585, 577 P.2d 892, 893 (Ct. App. 1978) (garden enclosed by five foot solid wall provides actual expectation of privacy); State v. Aragon, 89 N.M. 91, 94, 547 P.2d 574, 577 (Ct. App. 1974) (open area around curtilage not location to which a person has a legitimate expectation of privacy); State v. Torres, 81 N.M. 521, 527, 469 P.2d 166, 172 (Ct. App. 1970) (one does not have a privacy interest in the contents of a third party's automobile parked on one's home property).

74. Defendants' argument for suppression was essentially that even though Rakas v. Illinois, 439 U.S. 128 (1978), was in fact the law of the land, the old "legitimate presence" argument should still prevail because the court of appeals had not explicitly adopted *Rakas* yet. Record at 54, State v. Waggoner (on file at the University of New Mexico School of Law).

75. 97 N.M. at 74, 636 P.2d at 893.

76. 96 N.M. 561, 632 P.2d 1199 (Ct. App. 1981).

police to enter his home. A detective admitted that they "probably could have" obtained a warrant because "[w]e had ample probable cause."[77]

The defendant moved to suppress two inculpatory statements and a written confession.[78] The trial court denied this motion and Devigne was subsequently convicted on stipulated facts and on the confession.[79] On appeal from the conviction, Devigne argued that the statements should have been suppressed because they were the fruit of an illegal warrantless arrest.[80]

In *Payton v. New York*,[81] and *Steagald v. United States*,[82] the United States Supreme Court held that the fourth amendment prohibits the police from making a warrantless and non-consensual entry into a suspect's home in order to make a routine felony arrest.[83] *Devigne* reminded lower courts that *Payton* and *Steagald* are the law in New Mexico. The court stated that "the existence of probable cause does not validate the warrantless arrest of a person in that person's residence absent consent to enter or exigent circumstances"[84] and remanded for a finding on consent.

## III. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

### *A. Custodial Interrogation*

In a pair of cases from the court of appeals, the New Mexico interpretation of what constitutes custodial interrogation within the meaning of *Miranda*[85] was to some extent clarified.[86] In *State v. Gonzales*,[87] the issue was whether the interrogation was "custodial," and in *State v. Edwards*,[88] the issue was whether the custodial exchange was "interrogation."

In *Gonzales*, a sheriff's deputy was investigating the theft of a nail gun. While the deputy was conducting general on-the-scene questioning, the defendant, Gonzales, agreed to accompany him to trace another suspect. While Gonzales assisted the deputy, he made two statements which

77. *Id.* at 563, 632 P.2d at 1201.

78. At the trial level the defendant argued (1) that he was not properly advised of his right to remain silent; (2) that he did not waive his right to remain silent; and (3) that his statements were involuntary. These were not the grounds raised on appeal. *Id.* at 562, 632 P.2d at 1200.

79. *Id.*

80. *Id.*

81. 445 U.S. 573 (1980).

82. 451 U.S. 204 (1981).

83. *Payton*, 445 U.S. at 576; *Steagald*, 451 U.S. at 1211–12.

84. 96 N.M. at 563, 632 P.2d at 1201.

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

86. For a discussion of conflicting approaches to New Mexico law in this area, see Stelzner, *Criminal Procedure, Survey of New Mexico Law: 1980–81*, 12 N.M.L. Rev. 271, 295 (1982).

87. 96 N.M. 556, 632 P.2d 1194 (Ct. App. 1981).

88. 97 N.M. 141, 637 P.2d 572 (Ct. App. 1981).

the trial court later refused to suppress. The first was an inculpatory declaration Gonzales made to the other suspect when the suspect was located. The second was Gonzales' answer, "No," to the deputy's question about whether he had driven the other suspect to town. The deputy arrested Gonzales after this second statement.

The trial court declined to suppress the first statement because it was not made to a police officer and admitted the second statement because neither it nor the first was the result of custodial interrogation. The court of appeals affirmed both the holding and the reasoning of the trial court. The court referred to *State v. Harge*[89] which required *Miranda* warnings only when "there is such a restriction on a person's freedom as to render him 'in custody' and subject to a coercive environment."[90] The court also relied on *State v. Montano*[91] for the proposition that, "[g]eneral on-the-scene questioning or other general questioning of citizens in the fact finding process is not considered custodial."[92] Therefore *Miranda* warnings were not required. The court of appeals' decision and its reliance on *Harge* and *Montano* should provide the practitioner with a clearer definition of custody.[93]

In *Edwards,* custody was not at issue because officers had already arrested the defendant, Edwards, and were escorting him to the detention center. A third officer then drove up and directed a question to one of the officers. Edwards responded with an incriminating answer.[94] The defendant moved to suppress this statement, claiming a violation of his *Miranda* rights under the fifth amendment.

The court of appeals questioned whether this exchange had been interrogation at all. The court held that it was not because there was no evidence that (1) the officer knew or should have known his question would have resulted in an incriminating statement by the defendant; and (2) the defendant himself perceived that he was being interrogated. The court explicitly followed the test set up by the United States Supreme

89. 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979).

90. *Id.* at 15, 606 P.2d at 1109.

91. 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

92. *Id.* at 237, 620 P.2d at 891.

93. *Gonzales* leaves unresolved, however, an apparent inconsistency in the New Mexico treatment of custodial interrogation problems. It is still not clear how significantly police must restrain a person's freedom before he is entitled to be advised of his *Miranda* rights. For a discussion of this inconsistency in New Mexico law, see Stelzner, *Criminal Procedure, Survey of New Mexico Law: 1980-81,* 12 N.M.L. Rev. 271, 279 (1982).

94. The officer asked, "Is he the one?" and the defendant replied, "I didn't shoot anybody but five or six times and if that wasn't enough I would have shot him five or six more." 97 N.M. at 143, 637 P.2d at 574.

Court in *Rhode Island v. Innis*,[95] in which the Supreme Court attempted to clarify when the *Miranda* safeguards came into play. The court of appeals' interpretation of the *Innis* test in *Edwards* appears to be consistent with the Supreme Court's ruling in that case.

### *B. Conversations Between Arrestees*

In *State v. Lucero*,[96] a police officer secretly seized a conversation among three arrestees and used it to encourage further incriminating statements. After the officer had arrested the suspects for commercial burglary, given them their *Miranda* warnings, and placed them in his patrol car, the officer secretly turned on a tape recorder on the front seat and left the men alone. When he returned to the car he told the men, "[y]ou might want to listen to this tape," and played it back for them.[97] The suspects initiated a conversation[98] with the officer and made additional incriminating statements. After the defendant, Lucero, arrived at the detention center, he gave a written inculpatory statement. The officer later erased the tape.

Lucero sought to suppress the oral and written statements, contending that the surreptitious seizure of his conversation in the patrol car was an impermissible invasion of his fourth amendment right to be free from unreasonable seizure. The court of appeals rejected this argument because, "[w]hen they sat in [the] patrol car, these suspects had no reasonable expectation of privacy. Thus, Lucero's oral statement was not the 'fruit' of an unlawful seizure of evidence."[99] The court cited a Florida case, *Brown v. State*,[100] which had almost identical facts. The *Brown* court reasoned that just as a prisoner in jail has no reasonable expectation of privacy, neither does an arrestee confined in a police vehicle.

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95. 446 U.S. 291 (1980).

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of police (other than normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

*Id.* at 300–01.

96. 96 N.M. 126, 628 P.2d 696 (Ct. App. 1981).

97. *Id.* at 127, 628 P.2d at 697.

98. Although it was not critical in *Lucero*, in cases decided after Edwards v. Arizona, 451 U.S. 477 (1981), it becomes important whether it is the suspect or the police who initiates a conversation after the suspect has chosen to exercise his right to be silent following his *Miranda* warnings. According to *Edwards*, "an accused . . . having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *Id.* at 484–85.

99. 96 N.M. at 128, 628 P.2d at 698.

100. 349 So. 2d 1196 (Fla. Dist. Ct. App. 1977).

Although this was considered a "seizure" for fourth amendment purposes, the defendant raised a fifth amendment challenge—that of voluntariness.[101] As the court said, "[t]he question then is whether the officer exerted 'an improper influence' when he played the recorded conversation back to Lucero."[102] According to the court, the sequence of events involved a lawful fourth amendment seizure of a conversation followed by an uncoerced spontaneous statement.[103]

## IV. SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The New Mexico Supreme Court decision in *State v. Orona*[104] changed the previous New Mexico standard for determining whether a defendant's sixth amendment right to effective assistance of counsel has been protected. Orona's claim was that because his attorney stated he did not want to represent him, the attorney did not render adequate representation.[105] The supreme court did not agree that this rose to the level of ineffective assistance of counsel and rejected the claim.[106] Since 1967, the established standard was the "sham and mockery" test that had been set out in *State v. Moser:*[107] there is a denial of effective assistance of counsel only where the trial, considered as a whole, was a mockery of justice, a sham, or a farce. The court in *Orona* expressly rejected the sham and mockery test and adopted the "reasonably competent defense attorney" standard set forth by the Tenth Circuit in *Dyer v. Crise.*[108]

The *Dyer* court noted that, although most courts in the Tenth Circuit had said they were using the sham and mockery test, they had actually been applying a stricter standard. The real test used by most courts was the "reasonably competent" test: "[t]he Sixth Amendment demands that defense counsel exercise the skill, judgment, and diligence of a reasonably competent defense attorney."[109] Therefore, the *Dyer* court's formal adop-

101. Lucero had argued that by playing back the tape, the officer had improperly influenced him into giving the statement. This, he claimed, was a violation of his fifth amendment right to remain silent. "To be admissible, a confession must be free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Brady v. United States, 397 U.S. 742, 753 (1970).

102. 96 N.M. at 128, 628 P.2d at 698 (citing Brady v. United States, 397 U.S. 742, 753 (1970), for the rule that, to be admissible, the statement must be free of threats, promises, or violence).

103. 96 N.M. at 128, 628 P.2d at 698.

104. 97 N.M. 232, 638 P.2d 1077 (1982).

105. *Id.* at 234, 638 P.2d at 1079.

106. *Id.*

107. 78 N.M. 212, 430 P.2d 106 (1967).

108. 613 F.2d 275 (10th Cir.), *cert. denied,* 445 U.S. 945 (1980).

109. 613 F.2d at 278.

tion of the new rule was not a change in standard, but rather a recognition of the change which had already taken place.[110]

In *Orona,* the New Mexico Supreme Court reviewed recent New Mexico cases and found that, for all practical purposes, New Mexico courts had also already adopted this stricter measure.[111] The court overruled earlier cases insofar as they had applied the sham and mockery standard.[112]

## V. SENTENCING

In *State v. Mabry,*[113] the trial court convicted the defendant of first-degree murder and sentenced him to life imprisonment, the mandatory sentence prescribed for this crime by statute.[114] The defendant challenged his sentence on the grounds that its mandatory nature violated the doctrine of separation of powers, and that as applied to him, the sentence was cruel and unusual because he would not receive adequate treatment in the state penitentiary for his serious mental and psychological problems. Mabry based his separation of powers claim on two contentions. Mabry claimed first that at common law the judiciary possessed the inherent power to suspend a sentence; his second claim was that the inherent power was an integral part of the judicial function which the legislature could not abrogate under the constitutional mandate of separation of powers.[115]

The New Mexico Supreme Court rejected the separation of powers claim on two grounds. First, the vast majority of jurisdictions which have considered the question have rejected a defendant's premise that courts have the inherent power to suspend sentences.[116] The court observed that in *In re Lujan,*[117] the only New Mexico case in which the court considered the judiciary's inherent power to suspend sentences, the supreme court had concluded that a court was without power to suspend a sentence absent statutory authorization.[118] The *Mabry* court stated: "Even assuming, arguendo, that our courts would have possessed such a power at common law, that power has long been defined and delimited by statute in New Mexico."[119] Second, the supreme court rejected Mabry's separation of powers claim because it was "solely within the province of the

110. *Id.*

111. 97 N.M. at 233–34, 638 P.2d at 1078–79.

112. Practitioners should be aware that earlier New Mexico cases may have stated they were following the "sham and mockery" test while actually applying a more stringent standard to the facts. *See, e.g.,* State v. Trivitt, 89 N.M. 162, 168, 548 P.2d 442, 448 (1976).

113. 96 N.M. 317, 630 P.2d 269 (1981).

114. N.M. Stat. Ann. § 31-18-3(A) (1978), *repealed by* 1977 N.M. Laws. ch. 216, § 17.

115. N.M. Const. art. III, § 1.

116. Annot., 73 A.L.R.3d 474 (1976). 96 N.M. at 320, 630 P.2d at 272.

117. 18 N.M. 310, 137 P. 587 (1913).

118. 96 N.M. at 320, 630 P.2d at 272.

119. *Id.*

Legislature to establish penalties for criminal behavior."[120] A "necessary incident" of that legislative power was the right to "regulate or restrict the circumstances in which courts may suspend sentences in order to ensure the efficacy of those criminal penalties."[121] Thus, according to the *Mabry* court, whatever the wisdom of mandatory sentencing statutes with their concomitant removal of judicial discretion in sentencing, the role of the courts is to defer to that legislative judgment absent a clear showing of a constitutional violation.

The state supreme court also rejected Mabry's cruel and unusual punishment argument because he had failed to "prove the factual assertions of the premise" that he would not receive adequate treatment at the penitentiary.[122] The court also noted that Mabry had not directed the court to any authority for his proposition that even with sufficient factual proof, his cruel and unusual punishment claim would be valid.[123] With this decision, the state supreme court may have laid to rest the constitutional challenges of mandatory sentencing schemes. The only recourse for opponents of mandatory sentencing would seem to be with the legislature.

In *State v. Sanchez*,[124] the court of appeals dealt with two of the issues raised previously in *Mabry*. In *Sanchez*, the state appealed from the trial court's imposition of a ten-to-fifty year sentence for the defendant's second conviction of trafficking in heroin; the statutory penalty for such a second conviction was imprisonment for life.[125] The defendant's prior heroin conviction was in 1960, and his current conviction involved the sale of 1.43 grams of material which contained only .1% heroin. Because of the remoteness of the defendant's prior conviction and the infinitesimal amount of heroin involved, the trial court had found that a life sentence would be cruel and unusual.

120. *Id.* at 321, 630 P.2d at 273; *see also* State v. Archibeque, 95 N.M. 411, 622 P.2d 1031 (1981); State v. Holland, 91 N.M. 386, 574 P.2d 605 (Ct. App. 1978).

121. 96 N.M. at 321, 630 P.2d at 273.

122. *Id.* at 322, 630 P.2d at 274.

123. *Id.* There is, however, authority for the proposition that an inmate of a prison has a constitutional right to adequate medical care. *See* Bell v. Wolfish, 441 U.S. 520, 529 n.11 (1979). That principle would seem to support the claim in *Mabry* that a person with an unusual and serious psychological problem could not be incarcerated if appropriate care and treatment were not available at the institution.

124. 21 N.M. St. B. Bull. 342 (Ct. App. Nov. 17, 1981), *cert. granted.*

125. The statute in effect at the time of the defendant's conviction was N.M. Stat. Ann. § 30-31-20(B)(2) (1978), which provided that "anyone found guilty of a second trafficking offense is 'guilty of a felony and shall be punished by a fine . . . or by imprisonment for life, or both.' " 21 N.M. St. B. Bull. at 343. The statute was subsequently amended, and the new statute, N.M. Stat. Ann. § 30-31-20(B)(2) (Repl. Pamp. 1980), provides: "(B) Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally traffic. Any person who violates this subsection is: . . . (2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978." N.M. Stat. Ann. § 31-18-15 (Repl. Pamp. 1981) provides for sentencing of noncapital felonies.

The New Mexico Court of Appeals primarily relied on *Rummel v. Estelle*.[126] In *Rummel*, The United States Supreme Court upheld the imposition of a mandatory life sentence upon a habitual offender for his third conviction of a nonviolent theft offense involving a relatively small amount of money. In essence, the *Rummel* decision dictated substantial deference to legislative judgment in assigning term of year sentences, including life sentences, as penalties for felony offenses. In addition, the New Mexico Court of Appeals invoked the decision in *Terrebonne v. Blackburn*.[127] In *Terrebonne*, the Fifth Circuit Court of Appeals upheld a life sentence for a first offense of distributing heroin on the theory that "[t]he state could reasonably treat heroin distribution as a serious crime equivalent to crimes of violence."[128] The New Mexico Court of Appeals also cited *State v. Archibeque*,[129] in which the state supreme court upheld a life sentence for a defendant charged as a habitual offender with four prior felony convictions. The *Archibeque* opinion stated: "[T]he judiciary should not impose its own views concerning the appropriate punishment for crimes."[130] Ultimately, and quite properly under *Rummel*, the *Sanchez* court concluded that the remoteness of the prior conviction and the small amount of heroin involved in the transaction were outweighed by the state's "strong and substantial interest in deterring and punishing those who traffic in heroin."[131] Although both the *Sanchez* decision and the earlier *Archibeque* decision appear to be completely consistent with the substantial deference to the legislature rationale articulated in *Rummel v. Estelle*, it should be noted that the *Rummel* court was sharply divided and that other courts have not been quite so deferential to the legislature in considering term of years punishments.[132] It should also be noted that the state supreme court granted certiorari in *Sanchez* and, at the time this article was written, had not yet issued its opinion.

In *State v. Augustus*,[133] the defendant raised a cruel and unusual punishment challenge to his jail sentence, on the ground that he would be unable to receive needed medical attention under the terms of this sentence. The trial court sentenced the defendant to jail after a plea agreement. Prior to his sentencing, the defendant had undergone open heart surgery. His physician had written to the court, stating that the defendant was under a great deal of stress that could complicate his medical situation, that he needed close follow-up and medical treatment, and therefore it

126. 445 U.S. 263 (1980).
127. 646 F.2d 997 (5th Cir. 1981).
128. *Id.* at 1002.
129. 95 N.M. 411, 622 P.2d 1031 (1981).
130. *Id.* at 412, 622 P.2d at 1032.
131. 21 N.M. St. B. Bull. at 344.
132. *See, e.g., In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
133. 97 N.M. 100, 637 P.2d 50 (Ct. App. 1981).

was preferable that the defendant live in El Paso where treatment was more readily available. In sentencing the defendant to a 90-day term in the county jail, the trial court provided that the defendant could be released on his own recognizance to visit his doctor, if a local physician determined it necessary.[134]

In considering the defendant's challenge, the court of appeals first noted that it construed the cruel and unusual punishment provisions of the United States Constitution and the New Mexico Constitution identically.[135] The court rejected the defendant's cruel and unusual punishment claim, finding that the standard set out by the United States Supreme Court in *Estelle v. Gamble*[136] was not met. *Gamble,* as the court of appeals observed, held that there must be a "deliberate indifference to serious medical needs" for a cruel and unusual punishment claim to arise.[137] Because of the explicit provision made in the trial court's sentence for medical care for the defendant and because in the court of appeals' view, the physician's preferences and advice fell short of establishing serious medical needs, the court of appeals held that the *Estelle* standard was not met in the *Augustus* case.

It seems clear, however, after *Estelle v. Gamble, Mabry,* and *Augustus,* that a third rubric of cruel and unusual punishment violations now exists in New Mexico. Traditionally, courts viewed the cruel and unusual punishment clause as proscribing two types of practice: first, punishment such as torture, which was literally cruel and unusual; and, second, punishment such as the death penalty in rape cases, which was disproportionate to the offense.[138] The more recently recognized third category goes less to the nature of the sentence itself than to the manner in which the sentence is imposed, effectively opening the conditions of imprisonment or sentence to challenge on constitutional grounds. *Estelle, Mabry,* and *Augustus* established that one claim of cruel and unusual conditions of imprisonment may be based on a lack of needed medical or psychiatric care.

In *State v. Stout,*[139] the state supreme court dealt with the constitutional implications of enhancement statutes. In *Stout,* the trial court convicted the defendant of robbery with a firearm and sentenced him to a term of not less than fifteen nor more than fifty-five years. Approximately eight months later, after the defendant had begun serving the sentence, the district attorney filed a supplementary information alleging a prior con-

134. *Id.* at 101, 637 P.2d at 51.
135. *Id.* at 100, 637 P.2d at 50. *See* U.S. Const. amend. VIII; N.M. Const. art. II, § 13.
136. 429 U.S. 97 (1976).
137. 97 N.M. at 101, 637 P.2d at 51.
138. *See* Coker v. Georgia, 433 U.S. 584 (1977).
139. 96 N.M. 29, 627 P.2d 871 (1981).

viction of armed robbery and seeking an enhanced sentence of life imprisonment in accordance with N.M. Stat. Ann. § 30-16-2 (1978).[140] After trial on the supplemental information, the court sentenced the defendant to life imprisonment.

The defendant raised two constitutional challenges to his enhancement proceeding. First, he claimed that the filing of the notification of enhancement after his conviction denied him due process. Second, the defendant urged that the initiation of the enhancement proceeding eight months after he had begun his sentence constituted a violation of his right not to be placed in double jeopardy. The state supreme court rejected both challenges. The *Stout* court relied primarily on the United States Supreme Court's decision in *Oyler v. Bowles,*[141] in which the Court held that the state need not give the defendant notice before trial that enhancement may be sought after conviction. In the view of the *Stout* court, *State v. Rhodes*[142] established the basic due process protections in enhancement proceedings. *Rhodes* only required that before the court could impose an enhanced penalty, a pleading be filed by the state in order to give the defendant notice and opportunity to be heard. Thus, in *Stout,* the state supreme court found that the prosecution had complied with the dictates of *Rhodes* because it had filed a pleading, its supplemental information, prior to seeking the enhanced penalty.[143]

As to Stout's double jeopardy claims, the supreme court noted that "in some case[s] it could violate the defendant's rights to wait a substantial period of time before enhancement is sought"; but the court simply reaffirmed a holding it has reached on a number of occasions—that "validly increasing a sentence under our habitual offender act is not double jeopardy."[144] The court concluded that the fact that the defendant was not sentenced under New Mexico's habitual offender statute[145] made no material difference. The enhancement statute at issue in *Stout* is essentially

140. *Id.* at 31, 627 P.2d at 873.

141. 368 U.S. 448 (1962).

142. 76 N.M. 177, 181, 413 P.2d 214, 217 (1966).

143. 96 N.M. at 31–32, 627 P.2d at 873–74. In State v. Santillanes, 96 N.M. 477, 632 P.2d 354 (1981), the state supreme court considered *Stout* to be dispositive. In *Santillanes,* the defendant contended that the enhancement proceeding brought under N.M. Stat. Ann. § 30-31-20(B) (Repl. Pamp. 1980), which provides for an enhanced sentence for second and subsequent convictions of trafficking in controlled substances, must be brought before the defendant has begun serving his sentence on the most recent convictions. *Stout,* though dealing with a different enhancement statute, was clearly directly on point, and the New Mexico Supreme Court held that the state may file enhancement charges after a defendant has begun serving his sentence on his most recent conviction. For further discussion of *Santillanes,* see Hollander, *Criminal Law, ante* at 333.

144. 96 N.M. at 32, 627 P.2d at 874; *see* State v. James, 94 N.M. 604, 614 P.2d 16 (1980); State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), *cert. denied,* 84 N.M. 271, 502 P.2d 296 (1972).

145. N.M. Stat. Ann. § 31-18-17 (Repl. Pamp. 1981).

the same in procedure and purpose as New Mexico's habitual offender statutes.[146]

In *State v. Hernandez*,[147] the New Mexico Court of Appeals dealt with two questions related to sentencing: whether the court has the power to impose a sentence after deferral, and under what circumstances the state can waive probation violations. Hernandez pled guilty to two counts of burglary. The court deferred his sentence and ordered that he serve 90 days in the county jail with work release and certain restitution provisions. The defendant obtained employment and was released from jail during the day in order to work. He was subsequently laid off and shortly thereafter his probation officer advised him to return to the jail. He did not return and within two weeks a bench warrant was issued for his arrest. The warrant was never served. Local police arrested the defendant on a separate matter three and one-half months later.[148]

The court revoked the defendant's deferred sentence and imposed a sentence of not less than one nor more than five years. The court then suspended that sentence and placed the defendant on probation for thirty-six months. As a condition of that probation he was to serve nine months in jail. The defendant challenged the thirty-six months' probation and the nine months' jail time on the ground that both exceeded the provisions in his original sentence. The court of appeals rejected the defendant's claim. The court agreed that imposition of a suspended sentence was indeed limited to the balance of the sentence imposed but suspended, but it distinguished between a deferred and a suspended sentence.[149] In *Hernandez,* the court had deferred the sentence. Thus, it had not imposed a sentence. Under those circumstances, once a probation violation had been established, the trial court had authority to impose any sentence which might have been imposed originally. As to Hernandez's claim that the state had waived his probation violation because of the delay in his arrest,[150] the court concluded that it would be permissible to infer from the evidence that the defendant's whereabouts could have been known with reasonable diligence. Nevertheless, the court found that the delay in the *Hernandez* case was not unreasonable. It reasoned that in order to be unreasonable, delay must not only be lengthy but must also have some adverse effect upon the defendant. From the record in *Hernandez,* it appeared to the court that the defendant did not claim that he was prej-

146. 96 N.M. at 32, 627 P.2d at 874.

147. 97 N.M. 28, 636 P.2d 299 (Ct. App. 1981).

148. *Id.* at 29, 636 P.2d at 300.

149. *Id.* at 31, 636 P.2d at 302.

150. The standard for state waiver of a probation violation was set forth in State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970): "If there has been unreasonable delay in the issuance and execution of a warrant against a probation violator whose whereabouts is known or could be known with reasonable diligence, and the violator's return is possible, the probation authorities, as a matter of law . . . have waived defendant's violations." *Id.* at 450, 468 P.2d at 421.

udiced by the delay in any way. Therefore, "the trial court could properly consider the three-and-one-half month delay not to be unreasonable."[151]

By imposing this requirement of a showing of prejudice, the court appeared to be following the model of due process analysis for claims of pre-indictment[152] or pre-arraignment[153] delay which require the same showing. The parallels seem appropriate, and suggest that the kind of prejudice which could be relevant would include prolonged pre-hearing detention, the pressures and anxieties of continued exposure to the potential of probation revocation, and, most important, the unavailability of witnesses or loss of memory by witnesses.[154]

In *State v. Gonzales,*[155] the court of appeals articulated the legal standards for determining the maximum length of probation in a particular case. In the *Gonzales* case, the maximum probation period which the court could have imposed was eighteen months. The trial court sentenced the defendant to a term of eighteen months in the penitentiary, to be followed by one year of parole. The court then suspended all but ninety days of the defendant's sentence. The defendant challenged the length of the probationary period because it exceeded the eighteen month maximum period of incarceration for the offense.

The specific issue presented in *Gonzales* concerned the definition of the maximum term which the court could have imposed on Gonzales: "The total period of suspension shall not exceed the maximum length of . . . imprisonment which could have been imposed."[156] The state argued that the period of parole was part of the maximum sentence which could have been imposed. The court of appeals rejected this argument and held that "[t]he parole term is not to be utilized in determining the maximum length of probation under a suspended sentence,"[157] because it is served after completion of any actual imprisonment.[158] Furthermore, statutes which authorize additional imprisonment, such as for aggravating circumstances,[159] or for use of a firearm,[160] or for a prior felony conviction,[161]

151. 97 N.M. at 30, 636 P.2d at 301.

152. *See* United States v. Lovasco, 431 U.S. 783 (1977).

153. *See* State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), *cert. denied,* 86 N.M. 5, 518 P.2d 1209 (1974).

154. *See, e.g.,* Barker v. Wingo, 407 U.S. 514 (1972).

155. 96 N.M. 556, 632 P.2d 1194 (Ct. App. 1981).

156. N.M. Stat. Ann. § 31-20-7(B) (Repl. Pamp. 1981). The statute provides in full: "When the court has suspended the execution of a sentence, in whole or in part, the total period of suspension shall not exceed the maximum length of the term of imprisonment which could have been imposed by sentence against the defendant for the crime of which he was convicted."

157. 96 N.M. at 557, 632 P.2d at 1195.

158. N.M. Stat. Ann. § 31-18-15(C) (Repl. Pamp. 1981).

159. N.M. Stat. Ann. § 31-18-15.1 (Repl. Pamp. 1981).

160. N.M. Stat. Ann. § 31-18-16 (Repl. Pamp. 1981).

161. N.M. Stat. Ann. § 31-18-17 (Repl. Pamp. 1981).

are only applicable where the facts triggering those provisions are on the record.[162]

In *State v. Gibson*,[163] the defendant entered into a plea and disposition agreement. Under the agreement, the defendant pled guilty to simple robbery and the court deferred his sentence for four years while it placed him on probation. One specific condition of his probation was that he not live in Luna County without express official permission. The defendant claimed that this banishment was an improper condition of probation for constitutional and public policy reasons.[164] While the court of appeals did not actually hold that a trial court lacks authority to banish a defendant, even with the defendant's agreement, the court assumed absence of such authority. The court, however, rejected the defendant's suggested remedy for the unauthorized condition, which would have been to simply delete that condition and to maintain the balance of the agreement. The court of appeals observed that "[i]f a plea agreement is not followed in all its parts, the entire agreement is rejected."[165] The *Gibson* decision appears designed to preserve the integrity of plea agreements that are the result of a total bargaining package, which cannot be modified in one of its items without affecting the whole package.

## VI. PROSECUTORIAL MISCONDUCT

In *State v. Stevens*,[166] the New Mexico Supreme Court rendered an important and controversial decision with respect to pretrial prosecutorial vindictiveness. The question presented in *Stevens* was whether the third of a series of successively more serious indictments violated the defendant's right to due process.

In *Stevens*, the defendant was initially indicted for aggravated assault and voluntary manslaughter or, in the alternative, involuntary manslaughter with a firearm enhancement. The defendant moved to suppress certain evidence. While the first indictment was pending, the prosecution filed a second indictment charging the defendant with second-degree murder with a firearm enhancement. After the district attorney filed a *nolle prosequi* in the first set of charges, the trial court granted the defendant's motion to suppress. The court subsequently granted a motion to quash the second indictment because the prosecution had filed that indictment while the first was still pending. Thereafter the prosecutor obtained a

162. In State v. Crespin, 96 N.M. 640, 633 P.2d 1238 (Ct. App. 1981), the court of appeals on a related question held that a court is not empowered to extend probation time after imposing a sentence previously suspended. The court based this rule on the proposition established in State v. Castillo, 94 N.M. 352, 610 P.2d 756 (Ct. App. 1980), that a trial court lacks authority to increase a penalty once the penalty has been imposed.

163. 96 N.M. 742, 634 P.2d 1294 (Ct. App. 1981).

164. *Id.* at 743, 634 P.2d at 1295.

165. *Id.*

166. 96 N.M. 627, 633 P.2d 1225 (1981).

third indictment on an open charge of murder. The defendant was conficted of second-degree murder on this third indictment. On appeal, the court of appeals reversed the defendant's conviction, holding that a presumption of vindictiveness arose when the prosecutor sought an enhanced indictment after the defendant had exercised a procedural right—filing the motion to suppress.[167]

The state supreme court reversed and affirmed the conviction. The court held that while a violation of due process could occur under the circumstances presented in the case, there was as a matter of law in New Mexico no presumption of prosecutorial vindictiveness. The court distinguished the United States Supreme Court's decisions in *North Carolina v. Pierce*[168] and *Blackledge v. Perry*.[169] The court reasoned that allegations of pretrial prosecutorial vindictiveness implicated a substantially different balance of interests than the claims of post-appeal pretrial vindictiveness raised in *Pierce* and *Perry*.[170] The state supreme court considered the United States Supreme Court decision in *Bordenkircher v. Hayes*[171] to be more on point. *Bordenkircher* held that in the course of plea negotiations, a prosecutor may, consistent with due process, threaten to enhance the charges against a defendant unless he accepts a plea offer.[172]

The *Stevens* holding is contrary to the majority of cases being decided by the federal circuit courts.[173] Nevertheless, the New Mexico Supreme Court, noting that "the U.S. Supreme Court has never applied the vin-

167. 96 N.M. 753, 756, 635 P.2d 308, 311 (Ct. App. 1981).

168. 395 U.S. 711 (1969).

169. 417 U.S. 21 (1974).

170. 96 N.M. at 630–31, 633 P.2d at 1228–29. In *North Carolina v. Pierce*, the Supreme Court held that the record must reflect the reasons for a heavier sentence imposed by the same judge after a second conviction resulting from a successful appeal of the original conviction. The Court reasoned that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. . . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725.

In *Perry*, the United States Supreme Court extended these concerns to actions by the prosecutor. The Court found that the prosecutor's conduct in reindicting a defendant on a more serious felony charge after he exercised a statutory right to a de novo appeal from his misdemeanor conviction, violated due process because of the improper deterrent effect of a defendant's apprehension of retaliation. 417 U.S. at 28.

171. 434 U.S. 357 (1978).

172. In *Bordenkircher*, the prosecutor openly admitted that he acted vindictively in obtaining a subsequent indictment which added a more serious habitual offender enhancement after the defendant had refused to plea bargain on the original indictment. The United States Supreme Court reasoned that the defendant's due process rights were not impaired because an increase in charges was a part of the give and take of plea bargaining and contained no "element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363.

173. *See, e.g.*, United States v. Goodwin, 637 F.2d 250 (4th Cir. 1981); United States v. Andrews, 633 F.2d 449 (6th Cir. 1980); United States v. Griffin, 617 F.2d 1342 (9th Cir. 1980); United States v. Groves, 571 F.2d 450 (9th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292 (5th Cir.), *cert. denied*, 434 U.S. 1049 (1977); James v. Rodriguez, 553 F.2d 59 (10th Cir.), *cert. denied sub nom.*, Malley v. James, 434 U.S. 889 (1977).

dictiveness notion to a prosecutor's actions in the pretrial and trial stages of a criminal case,"[174] viewed *Bordenkircher* as departing from, or at least restricting, *Pierce* and *Perry*. The court thought that there would be "serious problems in applying a *Pierce/Perry* presumption of vindictiveness at the pretrial stage."[175]

The court observed that issues of prosecutorial vindictiveness require a reconciliation of two conflicting rules of law. On the one hand, "prosecutors have and need broad discretion to file charges where there is probable cause that someone has broken the law."[176] On the other hand, "vindictive conduct by persons with the awesome power of prosecutors . . . is unacceptable and requires control."[177] The *Stevens* court considered the first consideration to be more weighty where the allegations of prosecutorial vindictiveness arose during the pretrial period.

It is precisely at the pretrial stage, however, where so many procedural rights of defendants may be chilled, and thus, where the concerns underlying the *Pierce* and *Perry* decisions and the decisions of the federal circuit courts cited above become most critical. Furthermore, the state supreme court's reliance on the *Bordenkircher's* limiting impact upon *Pierce* and *Perry* ignored the fact that the rationale in *Bordenkircher* relied heavily on the "give and take"[178] of plea bargaining. Such "give and take" is obviously inappropriate with regard to the exercise of procedural rights.

In *State v. Payne*,[179] the court of appeals held that prosecutorial misconduct in closing argument required reversal of the defendant's conviction and remand of the case. In *Payne*, the prosecutor attempted on at least three different occasions during trial to improperly interject the defendant's character into evidence. The trial court permitted the prosecutor to say that the state was not allowed to point out that, despite the fact that the defendant could introduce testimony as to the violent propensities of the victim, the state was not allowed to introduce similar

174. 96 N.M. at 629, 633 P.2d at 1227.

175. *Id.* at 630, 633 P.2d at 1228. The state supreme court stated five concerns underlying its decision: (1) "At the pretrial stage the prosecutor has not gone through the effort of a trial and therefore has less at stake and less motive to act vindictively." (2) "[M]any actions taken by a prosecutor prior to conviction might appear vindictive yet are required by our system of criminal justice." (3) "Imposition of a pretrial presumption of vindictiveness would interfere with proper prosecutorial discretion." (4) "If a prosecutor acts vindictively before trial, the defendant still retains the protection of a jury trial." (5) "[T]he indictments in the present case were obtained through a grand jury, which traditionally has afforded some protection against improper prosecutorial activity." *Id.* at 630–31, 633 P.2d at 1228–29.

176. *Id.* at 629, 633 P.2d at 1227 (quoting United States v. Andrews, 633 F.2d 449, 453 (6th Cir. 1980)).

177. 96 N.M. at 629, 633 P.2d at 1227 (quoting United States v. Andrews, 633 F.2d 449, 453 (6th Cir. 1980)).

178. 434 U.S. at 363.

179. 96 N.M. 347, 630 P.2d 299 (Ct. App. 1981).

evidence with regard to the defendant.[180] The court of appeals unanimously agreed that the prosecutor's conduct was improper in two respects. First, he had usurped the sole responsibility of the judge in instructing the jury as to the law in a given case.[181] Second, the prosecutor had suggested that the inadmissible evidence was indeed available but had been kept from the jury because of a technical rule of evidence:

> The essence of the prosecutor's argument was that the prosecution was not allowed to present evidence of the defendant's character, of how the defendant beat someone up, but the defense was allowed to introduce evidence of the victim's character. The impropriety of this argument is patent; it suggested that defendant did beat up people and was a bad character; it, in effect, admitted there was no such evidence, and suggested that the jury would have heard such evidence, if the prosecution had been "allowed to do it."[182]

## VII. GRAND JURY

*Buzbee v. Donnelly*[183] may have been the most significant criminal procedure decision of the Survey period. In *Buzbee*, the state charged the defendants with ten counts of first-degree murder arising out of events which occurred during the New Mexico State Penitentiary riot in February 1980. The defendants moved to dismiss the indictments claiming that the prosecutors knowingly withheld exculpatory evidence from the grand jury in violation of section 31-6-11(B).[184] The defendants noted that the prosecution withheld three types of exculpatory evidence: (1) statements of the defendants in which they denied involvement in any killings; (2) prior statements of grand jury witnesses and other potential witnesses which were inconsistent with testimony presented to the grand jury; and (3) promises made to the grand jury witnesses that if they gave statements, they would not be returned to the penitentiary or to any satellite facilities.[185]

The New Mexico Supreme Court, with Justice Sosa and court of ap-

180. The pertinent portions of the prosecutor's closing were as follows:

> We are not allowed to go into the defendant's history and present, "On this date she beat somebody up, etc.," down the line and say and therefore she acted in conformity therewith. And its [sic] obvious why we aren't allowed to do it. . . . But they are allowed to do that to the victim and it's called the prosecutor mercy rule. They are allowed to go into the character of the victim and unless they open up the defendant's character by having her take the stand and say something to the effect of "I'm a peaceful person," I can't touch it. So let's just let that issue stand right there, all right?

*Id.* at 351, 630 P.2d at 303.

181. *Id.* at 352, 630 P.2d at 304.

182. *Id.* at 351–52, 630 P.2d at 303–304.

183. 96 N.M. 692, 634 P.2d 1244 (1981).

184. N.M. Stat. Ann. § 31-6-11(B) (Cum. Supp. 1982).

185. 96 N.M. at 695, 634 P.2d at 1247.

peals' Judge Wood dissenting, rejected the defendants' contention. The court first observed that the responsibilities of the grand jury include "both the determination of whether there is probable cause that a person committed a crime and the protection of citizens from the arbitrary and oppressive acts of the government."[186] Second, the court stated that this dual function of the grand jury was possible because the government maintains the grand jury as an "independent agency from both the Executive and Judicial Departments."[187] Finally, the court noted that the grand jury function of finding probable cause was only "in the nature of an enquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to enquire . . . whether there be sufficient cause to call upon the party to answer it."[188] In essence, the court endorsed the deferential attitude toward the grand jury which the United States Supreme Court set forth in *Costello v. United States*.[189]

In *Buzbee* the court had the task of construing the language of the New Mexico grand jury statutes, which required that "the prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target where he is aware of such evidence."[190] In its analysis, the court pointed out that the language of the statute required that "all evidence must be such as would be legally admissible upon trial."[191] The court found that that requirement precluded the prosecutor from presenting the defendants' declarations of innocence, despite the fact that such declarations directly negated the defendants' guilt. The court concluded that such statements would be "inadmissible as hearsay, except under certain situations that are not pertinent."[192] The court held that while prior statements of grand jury witnesses and others might be inconsistent with statements presented to the grand jury, they did not constitute evidence

186. *Id.* at 696, 634 P.2d at 1248.

187. *Id.* at 695, 634 P.2d at 1247.

188. *Id.* at 695, 634 P.2d at 1247.

189. 350 U.S. 359 (1956). In *Costello*, the Supreme Court upheld an indictment, based solely on hearsay evidence, against a claim of denial of due process. The Court reasoned that, first, there would be a great delay in grand jury proceedings if the Court held otherwise, and, second, a contrary decision would permit a defendant to insist on a kind of preliminary trial to determine the confidentiality and adequacy of the evidence before the grand jury. The *Costello* court observed that, "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits." *Id.* at 363.

190. N.M. Stat. Ann. § 31-6-11(B) (Cum. Supp. 1980). This section had been amended prior to the decision in *Buzbee*, but the provision controlling *Buzbee* was the 1980 version. The present statute is N.M. Stat. Ann. § 31-6-11 (Cum. Supp. 1982) and it still requires the prosecutor to present exculpatory evidence.

191. N.M. Stat. Ann. § 31-6-11(A) (Cum. Supp. 1980). The 1981 legislature amended section (A) of the provision, eliminating the requirement that evidence be legally admissible upon trial and adding the following clause: "The sufficiency or competency of the evidence upon which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury." N.M. Stat. Ann. § 31-6-11(A) (Cum. Supp. 1982).

192. 96 N.M. at 699, 634 P.2d at 1251.

*directly* negating guilt.[193] The *Buzbee* court concluded that the legislature intended the term "evidence *directly* negating guilt" to mean direct, not circumstantial, evidence.[194] Because all of the withheld evidence in *Buzbee*, other than the self-serving statements of the defendants, was circumstantial, the evidence was not appropriate for submission to the grand jury under section 31-6-11(B).[195]

Having disposed of the issues presented by the defendants on statutory grounds, the majority in *Buzbee* nevertheless felt constrained to deal in dictum with related due process considerations. In this regard, the court noted that the United States Supreme Court has "repeatedly shaped its holding so as to prevent litigious interference with grand jury proceedings."[196] The *Buzbee* majority reasoned that the danger that such judicial deference "will result in the erosion of the power and effectiveness of the grand jury, by allowing the prosecutor to mislead it . . ." was ad-

193. *Id.* at 699–700, 634 P.2d at 1251–52. The withheld information included:

1. A witness, who did not testify before the grand jury, did not identify a defendant in his statement as being one of those implicated.
2. A witness identified a defendant in testifying before the grand jury but had not identified the same defendant in his prior statement.
3. A witness, who did not testify before the grand jury, said in a statement that the way a murder was carried out was different than what was described by other witnesses before the grand jury.
4. A witness, who testified before the grand jury, named other persons as participants but not the defendant.
5. A witness whose grand jury testimony implicated a defendant had given a previous statement in which he was confused as to the identity of the defendant.
6. Statements that the killers were masked.
7. Statements that a defendant was present for a while at a killing, but the witness did not see the defendant participate in the killing.
8. A witness, who testified before the grand jury, but changed his mind or made a mistake as to the identity of the perpetrator in his prior statement.

*Id.*

194. *Id.* at 700, 634 P.2d at 1252.

195. N.M. Stat. Ann. § 31-6-11 (Cum. Supp. 1980). In so ruling, the state supreme court specifically overruled the court of appeals' decisions in a line of cases which commenced with State v. Herrera, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979). These cases include: State v. Gonzales, 95 N.M. 636, 624 P.2d 1033 (Ct. App. 1981); State v. Lampman, 95 N.M. 279, 620 P.2d 1304 (Ct. App. 1980); State v. Sanchez, 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980); State v. Harge, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979). It should be noted that in most of these decisions the court of appeals dismissed the indictment based on due process analysis and not on a construction of the New Mexico statute requiring introduction of exculpatory evidence. In its subsequent due process analysis, the majority in *Buzbee* did not really address the constitutional reasoning set forth by the court of appeals.

196. 96 N.M. at 702, 634 P.2d at 1254. The *Buzbee* court observed that, in deference to the grand jury, the United States Supreme Court has held on several occasions that "indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits." *Id.* at 697, 634 P.2d at 1249 (citing Costello v. United States, 350 U.S. 359, 363 (1956)). The Supreme Court has also refused to extend the exclusionary rule to grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974).

dressed by prohibiting the prosecutor from engaging in "fundamentally unfair tactics."[197]

The state supreme court appeared to reject application of the *Brady-Agurs* test[198] to grand jury proceedings, although it has been accepted by some circuit courts.[199] The court suggested that this test was inappropriate for grand jury proceedings.[200] It reasoned that there is no need to impose a due process requirement that the prosecutor divulge exculpatory evidence to the grand jury where such evidence must be divulged to the defendant before he is tried.[201]

Ultimately the state supreme court reaffirmed its ruling in *State v. Chance*,[202] that an indictment duly returned into court and regular on its face cannot be challenged with respect to the kind and degree of evidence.[203] The court left unclear the precise standard for a dismissal of the grand jury indictment due to a denial of due process. It suggested, but did not decide, that such dismissal would be appropriate only in the face of "flagrant prosecutorial misconduct."[204] In addition, the court

197. 96 N.M. at 703–704, 634 P.2d at 1255–56. Such tactics would include: "(1) the prosecution obtaining an indictment on the basis of evidence known to be prejudicial; and (2) prosecution leading the Grand Jury to believe it has received eye-witness, rather than hearsay testimony." *Id.*

198. 96 N.M. at 704–705, 634 P.2d at 1256–57. In Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976), the United States Supreme Court held that the prosecution has a pretrial duty to divulge certain exculpatory evidence to an indicted defendant under certain circumstances, including where there has been a "pretrial request for specific evidence" if that evidence "might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104. Where a general request, or no request has been made, the test is whether the omitted evidence created a reasonable doubt as to the defendant's guilt that did not otherwise exist. *Id.* at 112.

199. *See, e.g.*, Galtieri v. Wainright, 582 F.2d 348 (5th Cir. 1978).

200. 96 N.M. at 704–705, 634 P.2d at 1256–57. To begin with, "[t]he materiality and quantum of evidence to show probable cause, justifying the return of an indictment, is far less than is necessary at trial to prove a defendant's guilt beyond a reasonable doubt. An indictment is only a formal accusation of guilt." *Id.* Second, and perhaps most important, the very existence of the *Brady-Agurs* requirement of pretrial prosecutorial disclosure of exculpatory evidence ensures that the defendant's right to a fair trial guaranteed by due process will be adequately protected. *Id.* at 705–706, 634 P.2d at 1257–58. *See supra* note 198 for a discussion of the *Brady-Agurs* requirement.

201. *See* Maldonado v. State, 93 N.M. 670, 604 P.2d 363 (1979). In *Maldonado*, the New Mexico Supreme Court held that it did not constitute a denial of due process to introduce inadmissible evidence before the grand jury. For further discussion of *Maldonado*, see Note, *Criminal Procedure—Grand Jury—Inadmissible Evidence, Due Process. Maldonado v. State, 93 N.M. 670, 604 P.2d 363 (1979)*, 11 N.M.L. Rev. 451 (1981).

202. 29 N.M. 34, 221 P. 183 (1923).

203. 96 N.M. at 706, 634 P.2d at 1258 (citing State v. Chance, 29 N.M. at 34, 221 P. at 183). The *Buzbee* majority held that:

> opening up indictments for challenge would halt the orderly process of investigations, would cause extended litigation on unimportnt issues and would frustrate the public's interest in the fair and expeditious administration of the criminal laws. It would be an intrusion into the separate provinces of the constitutionally independent offices of the grand jury and the prosecutor. In any event, the claimed misconduct would be cured at trial.

96 N.M. at 706, 634 P.2d at 1258.

204. 96 N.M. at 707, 634 P.2d at 1259.

suggested, but did not decide, that it would not approve the application of the *Brady-Agurs* test to grand jury proceedings.

Thus, the entire due process analysis in *Buzbee* leaves the state of the law unclear. In addition, at least a portion of the court's statutory analysis would seem to be no longer applicable under the 1981 amendments to the statutes.[205] Furthermore, the state supreme court's interpretation of the language of the statute that "the *prosecuting attorney* assisting the grand jury *shall present evidence that directly negates the guilt of the target* where he is aware of such evidence"[206] seems rather restrictive in light of the prior decisions of the court of appeals,[207] precedent from other jurisdictions,[208] and the court's concession that "[o]ur statutes in the past have been very favorable to targets of an investigation as compared to some other jurisdictions."[209] Because the legislature did not choose to specify that direct or circumstantial evidence was required, it would seem that a more appropriate interpretation of the statutory language would be along the lines suggested by the *Buzbee* dissent: "[w]hether evidence is exculpatory is to be determined by objectively examining the withheld evidence and determining whether, in itself, the withheld evidence indicates that a defendant is not guilty of the crime charged."[210]

The court's reluctance to intervene in grand jury proceedings would seem to be more appropriate in instances such as those presented in *Costello v. United States* and *Maldonado v. State*,[211] where the defendant was objecting to evidence presented to the grand jury and claimed that such evidence was inadmissible. In such situations, as well as those where the defendant is seeking either to suppress or exclude evidence presented to the grand jury,[212] societal interests other than those directly implicating the grand jury and the efficacy of its proceedings are involved. Where the defendant claims, however, that evidence directly negating his guilt has been withheld from the grand jury by the prosecutor, the grand jury's independence from the prosecutor is directly implicated, as is the basic

205. *See supra* notes 190–91. Insofar as the *Buzbee* decision was based on the court's interpretation of the "legally admissible upon trial" language of the prior statute, that analysis would seem no longer applicable in light of the elimination of that language from the statute in the 1981 amendments. It seems that the amended statute would require that the "self-serving" statements of the defendants in *Buzbee* be presented to the grand jury.

206. 96 N.M. at 698, 634 P.2d at 1250 (emphasis by the court).

207. *See supra* note 195.

208. *See, e.g.*, Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975).

209. 96 N.M. at 699, 634 P.2d at 1251.

210. *Id.* at 708, 634 P.2d at 1260 (Sosa, J., dissenting).

211. Costello v. United States, 350 U.S. 359 (1956); Maldonado v. State, 93 N.M. 670, 604 P.2d 363 (1979).

212. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974); United States v. Blue, 384 U.S. 251 (1966).

truth-seeking function of the grand jury. Under such circumstances, only the courts can protect the grand jury from the prosecutor's encroachments, and intervention would seem more appropriate. Finally, it seems clear that when defense counsel represents a client who is the target of a grand jury investigation, he should request in writing that the prosecutor introduce any exculpatory evidence to the grand jury. First, such a request assures that the prosecution cannot claim that it did not "know" of the existence of such evidence. Second, it might also lessen the defendant's burden in raising a due process challenge to the grand jury proceedings, in light of the fact that the *Buzbee* court did not clearly reject the application of the *Brady-Agurs* test to grand jury proceedings.

## VIII. PLEAS AND PLEA BARGAINS

In *State v. Lucero*,[213] the court of appeals dealt with a case in which the defendant had pled guilty to commercial burglary. Sometime thereafter, the state filed a supplementary information claiming that the defendant was an habitual offender with two prior felony convictions. The defendant moved to dismiss the supplementary information or in the alternative, to be permitted to withdraw his guilty plea to the burglary charge. The defendant contended that the prosecutor had agreed not to charge him as an habitual offender in exchange for the guilty plea. There was no written plea and disposition agreement which recorded the alleged agreement.

The defendant's counsel testified that she had discussed the plea agreement with the prosecutor. She stated that he had agreed not to charge the habitual offender offense, but on the condition that the plea agreement not be mentioned to the trial judge because of the district attorney's office policy not to admit agreements to forego habitual offender charges on the record. On the basis of this discussion, defense counsel testified that she had advised the defendant that the court would probably impose a sentence on the burglary offense but that the state would initiate no habitual offense proceedings against him.[214] The defendant testified that the main reason for his decision to plead guilty was his understanding that the prosecutor would not charge him with being an habitual criminal. The district attorney testified that he did not recall any plea negotiation with defense counsel. Indeed, he was certain that he had not agreed not to charge the defendant with being an habitual criminal because he had no authority to make such a deal.[215]

The trial court denied the motion to dismiss because it was not con-

213. 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).
214. *Id.* at 348, 639 P.2d at 1202.
215. *Id.*

vinced that a plea agreement had been reached. The court further denied the motion to withdraw the guilty plea on its finding that there was no evidence that the defendant had relied upon his counsel's representations that the prosecutor would not bring any habitual offender charge.

The court of appeals held that in the absence of any written agreement or disclosure of the plea agreement in open court as required under Rule 21,[216] the trial court, as the trier of fact, could quite properly choose "to disbelieve the presentation made by defendant and to accept the testimony produced by the State."[217] The court of appeals expressed its concern with regard to the defendant's allegations of the district attorney's policy of plea bargaining on habitual charges as long as no written record of the bargain was made. The court condemned secret plea agreements as not only impermissible under the rules of criminal procedure but also "cowardly and unreliable."[218] The court admonished trial courts on the importance of the second sentence of Rule 21, which provides that the court "*shall also* inquire . . . whether the defendant's willingness to plead . . . results from prior discussions between the attorney for the government and the defendant or his attorney."[219] Because of the trial court's failure to fully comply with this provision of Rule 21, the defendant's reply to the trial court that his plea was voluntary "does not conclusively determine that no promises had been made."[220] The court noted, "[h]ad the trial court made the required second inquiry of all participants in this case . . . defendant would have been completely foreclosed from later asserting that the prosecutor had made unkept promises."[221]Thus, based on the record of the *Lucero* case, the court of appeals found that the state had failed to carry its burden of showing that the defendant's guilty plea resulted from a knowing and intelligent waiver. The court strongly suggested, however, that strict adherence to the requirements of Rule 21 might have enabled the state to carry its burden of persuasion.

Finally, the court concluded that the evidence did not support the trial court's finding that there was no evidence that the defendant had relied upon his attorney's representation with regard to the plea bargain. On the contrary, the defendant had testified that the main reason he agreed to plead guilty was because his attorney had informed him of the terms of the specific plea bargain; in addition, there was other evidence corroborating the defendant's version of the story.

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216. N.M. R. Crim. P. 21 (Cum. Supp. 1982).
217. 97 N.M. at 348, 639 P.2d at 1202.
218. *Id.*
219. *Id.* at 349, 639 P.2d at 1203 (emphasis by the court) (citing N.M. R. Crim. P. 21 (Cum. Supp. 1982)).
220. 97 N.M. at 350, 639 P.2d at 1204.
221. *Id.*

In light of this finding of reliance, the court found that the defendant had received ineffective assistance of counsel. Specifically, the court observed that "competent defense counsel would not have permitted evasion of criminal rules that were intended, at least in part, for the protection of the defendant, nor would they have engaged in conduct suspiciously harmful to their clients and adroitly deceptive to the court."[222] Consequently, the court of appeals reversed the trial court and instructed it to set aside the convictions and sentences in the commercial burglary and habitual offender proceedings and to allow withdrawal of the defendant's guilty plea.

This decision reflects an appropriately principled view of the policy underlying Rule 21. However, the court of appeals ignored the district attorney's statutory obligation to make charges under all habitual offender statues.[223] In light of that statutory mandate (which flies in the face of actual practice),[224] it is highly unlikely that the district attorney is going to be able to state publicly in a plea and disposition agreement that he is violating his statutory obligation to charge the habitual offense.

## IX. TRIAL BY JURY.

In *State v. Lopez*,[225] the court of appeals considered whether the method of selecting names for the jury wheel violated the sixth amendment by depriving the defendants, who were members of the La Raza Unida party, of a fair cross section of the community. The court viewed the defendants' contention as having two bases: (1) the absence from the jury wheel of names of La Raza Unida members and (2) the absence from the jury wheel of names of persons registered to vote who did not vote in the general election.[226]

The selection of a petit jury from a representative cross section of the community is an essential component of the sixth amendment right to a

222. *Id.* at 351, 639 P.2d at 1205.

223. N.M. Stat. Ann. § 31-18-19 (Repl. Pamp. 1981).

224. Prosecutors often use the potential of the habitual charge in plea bargaining in New Mexico.

225. 96 N.M. 456, 631 P.2d 1324 (Ct. App. 1981). During the Survey year, the supreme court also considered a trial by jury issue. In State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981), the court dealt with the often recurring question of the appropriate conduct for a judge when a jury is unable to agree on a verdict. For further discussion of this case, see Note, *Jury—Trial Judge's Inquiry into Numerical Division of Jury: State v. Rickerson*, 13 N.M.L. Rev. 205 (1983).

226. 96 N.M. at 458, 631 P.2d at 1326. Defendants did not claim that the New Mexico statutory procedure was not followed. Indeed, in this case, the statutorily prescribed procedure was clearly followed. The clerk of the court testified that she randomly selected 35% of the names appearing in the poll books for each voting division in the last election pursuant to N.M. Stat. Ann. § 38-5-3 (1978); that those names were placed in the jury wheel as required by N.M. Stat. Ann. § 38-5-4 (1978); and that the names of the jury panel were taken from that jury wheel. The poll books, of course, contain only the names of those who voted in the particular election. Thus, as a result of the statutorily prescribed jury selection procedure, if no member of the La Raza Unida party voted in the last general election, then none could be included in the jury wheel.

jury trial.[227] The court in *Lopez* set out the standard for establishing a prima facie violation of the fair cross section requirement:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process.[228]

The court of appeals applied this standard to the defendants' first claim of a constitutional violation resulting from the exclusion of La Raza Unida members. The court found that while the defendants had shown that members of La Raza Unida were excluded, the exclusion did not appear to be of La Raza Unida members as a group. In the view of the court, the procedure excluded persons who did not vote although they were registered to vote. Consequently, the court found that the defendants' first claim failed because there was no showing that the state had excluded La Raza Unida members because they were members of that party.[229]

The court may have given rather short shrift to the defendants' claim with regard to the exclusion of La Raza Unida members. In *Castaneda v. Partida*,[230] the United States Supreme Court established an equal protection test for exclusion of Hispanics from the grand jury which, as the *Lopez* court noted, is essentially the same as the sixth amendment standard.[231] In *Castaneda*, however, the state had not excluded the members of the class (Hispanics or Mexican Americans) because they were members of that particular ethnic group. Instead, the exclusion was due to the method of selection of the grand jury venire, which was based on being a qualified voter.[232] This method had resulted indirectly in a systematic exclusion of Mexican Americans from the grand jury. Thus it would seem that the court of appeals may have erred in *Lopez*. *Castaneda* suggests that the inquiry should not be whether the selection process excludes members of a discreet group because they are members of that group, but rather whether the process by its operation systematically excludes members of a particular class. With that inquiry, the defendants may have

227. Taylor v. Louisiana, 419 U.S. 522 (1975). In Duren v. Missouri, 439 U.S. 357 (1979), the Supreme Court held that an automatic exemption upon request for women, who constituted 54% of the adult population in the county, amounted to a systematic exclusion of women because resultant jury venires averaged less than 15% female.

228. 96 N.M. at 459, 631 P.2d at 1327 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

229. 96 N.M. at 459, 631 P.2d at 1327.

230. 430 U.S. 482 (1977).

231. 96 N.M. at 459, 631 P.2d at 1327. *See supra* note 227 and accompanying text.

232. 430 U.S. at 485.

been able to prevail on their claim if they could have demonstrated that La Raza Unida members did not vote in the last general election.[233]

After rejecting the defendants claim as to the exclusion of La Raza Unida members, the *Lopez* court went on to consider the second base of their claim: that the state violated the sixth amendment because it excluded from the jury wheel the names of persons who were registered to vote but who did not vote. On this claim the court identified the issue as whether such persons are "a distinct group in the community."[234] The court of appeals adopted the three-pronged test for determining what constitutes a distinct group set out in *United States v. Test*.[235] The *Lopez* court found that the defendants had offered no proof that registered voters who did not vote were a "distinctive" or "cognizable" group. Therefore, the court held that the second part of the defendants' jury selection claim was without merit.

## X. DESTRUCTION OF EVIDENCE

In *State v. Duran*,[236] the defendant moved to dismiss or to suppress fingerprint evidence prior to his trial in which he was convicted of second-degree murder. He argued that the officers investigating the case had improperly destroyed a Coke can from which a fingerprint matching Duran's was lifted. The issue presented to the state supreme court was whether the destruction of the can constituted the improper suppression of material evidence. The Coke can had been found in a trash receptacle at the scene of the crime. Once the fingerprint was lifted off, the can was returned to the trash receptacle. At that time the police neither knew to whom the prints belonged nor did they suspect Duran.

The applicable test to determine whether there had been an improper suppression of material evidence was set out by the New Mexico Court of Appeals in *State v. Lovato*.[237] *Lovato* held that reversal of a defendant's conviction was required if "(1) the State either intentionally deprived the defendant of evidence, or, by inadvertance, breached a duty to preserve the evidence; (2) the suppressed evidence was material to the guilt or innocence of the accused; and (3) the defendant was prejudiced by the

233. La Raza Unida members might not have voted because no party members were candidates.

234. 96 N.M. at 459, 631 P.2d at 1327.

235. 550 F.2d 577 (10th Cir. 1976). A distinct group has the following characteristics: "(1) the presence of some quality or attribute which 'defines and limits' the group; (2) a cohesiveness of 'attitudes or ideas or experience' which distinguishes the group from the general social milieu; and (3) a 'community of interest' which may not be represented by other segments of society." *Id.* at 591.

236. 96 N.M. 364, 630 P.2d 763 (1981).

237. 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980).

improper suppression of the evidence."[238] Applying this test to the facts in *Duran,* the state supreme court held that the destruction of the Coke can did not require reversal of the defendant's conviction. The court set out two reasons for its conclusion. First, the court noted that evidence is material under the *Lovato* test if it is "material to the guilt or innocence of the accused."[239] The court concluded that "none of the testimony indicated that the can was of any further use to either the prosecution or defense after the fingerprint had been lifted from it. Duran's own expert testified that the possibility of obtaining a second lifting of the fingerprint from the can was 'not very probable.' "[240] Secondly, the court observed that the only object which had any real evidentiary value, the fingerprint itself, "was preserved by the State and available to defense counsel for testing and analysis."[241] The court noted that simple common sense compelled its conclusion in *Duran.* In the court's view, the defendant's claims would mean that:

> all objects from which fingerprints are obtained should be preserved as evidence. If a fingerprint was obtained from a wall then that portion of the wall should be cut out and preserved. . . . The tons of objects collected, say in Bernalillo County, would soon fill the Courthouse and City Hall and demand the construction of more storage space.[242]

It would seem that the supreme court's decision was proper based on the facts in *Duran,* given the testimony of the defendant's own expert witness. In some cases, however, additional prints could be obtained from certain objects. In such cases it would not be necessary to, as the court suggested, "cut out" portions of walls. Some portable objects could be held for a reasonable period of time by the police to enable the defense to inspect them. If the objects were not portable, the police could take *reasonable* steps to preserve any fingerprints for a *reasonable* period of time. In some cases, at least, the suppression of objects from which fingerprints have been obtained could be material and their suppression prejudicial to the defendant.

## XI. COMPETENCY TO STAND TRIAL

In *State v. Nelson,*[243] the supreme court decided whether a defendant has a right to have his competence determined by a jury as opposed to

238. 96 N.M. at 365, 630 P.2d at 764 (citing State v. Lovato, 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980)).

239. 96 N.M. at 365, 630 P.2d at 764. *See also* State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961); Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975).

240. 96 N.M. at 365, 630 P.2d at 764.

241. *Id.* at 365, 630 P.2d at 764.

242. *Id.* at 366, 630 P.2d at 765.

243. 96 N.M. 654, 634 P.2d 676 (1981).

a judge, for purposes of an habitual offender proceeding. In *Nelson,* a hearing was held on the defendant's competency on the first day of the habitual offender proceeding. There was conflicting evidence as to Nelson's competency, but the most recent evidence presented orally characterized him as incompetent. Nevertheless, the court determined that Nelson was competent for purposes of the proceeding. The trial court refused to permit a jury determination of the issue. On review, the supreme court considered two specific issues: (1) whether Rule 35(b)[244] was applicable to habitual offender proceedings, and (2) whether the constitution required a jury determination of competence in habitual offender proceedings.

The court then discussed three characteristics of the habitual offender proceeding. The court noted that a defendant charged as an habitual offender must respond to the charge stating whether he is the same person as indicated in the information. If that becomes a factual issue, a jury is impaneled to make the relevant inquiry. Second, in the view of the supreme court, the habitual offender statute does not create a new offense

244. N.M. R. Crim. P. 35(b) (Cum. Supp. 1982) provides:

(b) Determination of competency to stand trial.

(1) How raised. The issue of the defendant's competency to stand trial may be raised by motion, or upon the court's own motion, at any stage of the proceedings.

(2) Determination. The issue of the defendant's competency to stand trial shall be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as [to] the defendant's competency to stand trial.

(i) If a reasonable doubt as to the defendant's competency to stand trial is raised prior to trial, the court, without a jury, may determine the issue of competency to stand trial; or, in its discretion, may submit the issue of competency to stand trial to a jury, other than the trial jury.

(ii) If the issue of the defendant's competency to stand trial is raised during trial, the trial jury shall be instructed on the issue. If, however, the defendant has been previously found by a jury to be competent to stand trial, the issue of the defendant's competency to stand trial shall be submitted to the trial jury only if the court finds that there is evidence which was not previously submitted to a jury which raises a reasonable doubt as to the defendant's competency to stand trial.

(3) Proceedings on finding of incompetency. If a defendant is found incompetent to stand trial:

(i) further proceedings in the criminal cae shall be stayed until the defendant becomes competent to stand trial;

(ii) the court, where appropriate, may order treatment to enable the defendant to attain competency to stand trial;

(iii) the court may review and amend the conditions of release pursuant to Rule 22 of these rules.

(4) Mistrial. If the finding of incompetency is made during the trial, the court shall declare a mistrial.

but merely provides a proceeding for enhancing sentences.[245] In its third point, however, the court conceded that an habitual offender charge is serious and that the potential for prejudice is so great that several characteristics of a trial, such as the right to counsel, the right to a jury, and the rules of evidence, are imposed to protect the defendant.[246] Indeed, the habitual offender proceeding statute itself states that a defendant has a "right to be *tried* as to the truth."[247]

Under Rule 35(b)(2), there is a right to a jury determination only where reasonable doubt of the defendant's competence to stand trial exists and if the issue is raised during trial. When the issue is raised post-trial, there is no right to a jury determination.[248] In the view of the supreme court, Rule 35 indicates a restrictive approach to the right to trial by jury in competency proceedings. Thus the court concluded that:

> the right to have a jury determination of competency attaches only where competency to stand trial is at issue and when a reasonable doubt is raised after the trial has begun but before it has ended. In all other instances, the judge has discretion to make the determination himself or to submit the issue to a non-trial jury. . . . Questions as to sentencing competency are always decided by a court alone regardless of when the question is raised.[249]

The court further held that the constitutional requirements for jury determination of competency are coextensive with Rule 35. Specifically, the court stated that "the constitutional right to a jury determination of trial competency should be limited to the specific right recognized in Rule 35."[250] The court reasoned that although a habitual offender proceeding has many of the characteristics of a trial, it is not a trial in the constitutional sense for purposes of making a determination as to competency.[251]

245. 96 N.M. at 655, 634 P.2d at 677. *See* N.M. Stat. Ann. § 31-18-17 (Repl. Pamp. 1981).

246. 96 N.M. at 655, 634 P.2d at 677.

247. N.M. Stat. Ann. § 31-18-20(A)(2) (Repl. Pamp. 1981) (emphasis added).

248. 96 N.M. at 656, 634 P.2d at 678. State v. Sena, 92 N.M. 676, 594 P.2d 336 (Ct. App. 1979).

249. 96 N.M. at 657, 634 P.2d at 679.

250. *Id.* at 657, 634 P.2d at 679.

251. This conclusion is consistent with and probably required by prior decisions of the supreme court in which the court held that an habitual offender proceeding was not a trial for double jeopardy purposes. *See, e.g.*, Hernandez v. State, 96 N.M. 585, 633 P.2d 693 (1981); State v. James, 94 N.M. 604, 614 P.2d 16 (1980).