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Criminal Procedure and Evidence

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CRIMINAL PROCEDURE AND EVIDENCE

I. INTRODUCTION

This criminal procedure and evidence survey covers cases appearing in the New Mexico Bar Bulletin between July 1, 1990 and August 1, 1991. Parts II and III are arranged to follow the order of the events in a criminal proceeding. Part IV covers recent New Mexico cases concerning the rules of evidence and standards of review.

II. SEARCHES, SEIZURES, AND *MIRANDA* WARNINGS

A. Searches Conducted Pursuant to a Warrant

1. Search Warrants

The fourth amendment of the United States Constitution protects "persons, houses, paper, and effects, against unreasonable searches and seizures," and requires that search warrants be "supported by Oath or affirmation, and particularly describ[e] the place to be searched, and the persons or things to be seized."[1] The New Mexico Constitution also guarantees against unreasonable searches and seizures.[2]

The New Mexico Supreme Court Rules provide that "[a] warrant shall issue only on a sworn written statement of the facts showing probable cause for issuing the warrant."[3] During the survey period, New Mexico appellate courts considered the existence of probable cause in search warrants based on affidavits containing hearsay testimony provided by informants.[4] In judging the sufficiency of hearsay testimony as a basis for an affidavit, New Mexico employs a two-part test.[5] First, a court must determine whether the affidavit contains sufficient facts indicating the basis for the affiant's knowledge.[6] Second, a court must determine

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1. U.S. CONST. amend IV.
2. N.M. CONST. art. II, § 10, provides that:
   The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.
3. N.M. R. CRIM. P. 5-211(A).
4. State v. Hernandez, 111 N.M. 226, 804 P.2d 417 (Ct. App. 1990); State v. Wisdom, 110 N.M. 772, 800 P.2d 206 (Ct. App.), *cert. denied*, 110 N.M. 749, 779 P.2d 1121 (1990).
5. The New Mexico test for sufficiency of facts contained in an affidavit is more stringent than the federal test. For a more detailed discussion of the differences in the two tests, see Survey, *Criminal Procedure*, 21 N.M.L. REV. 624 (1991).
6. State v. Cordova, 109 N.M. 211, 213, 784 P.2d 30, 32 (1989).

whether the affidavit sets forth sufficient facts indicating the veracity of the informant.[7] This test is codified in Supreme Court Rule 5-211(E).[8]

In *State v. Wisdom*,[9] the defendant was charged with possession of controlled substances, receiving stolen property, and possession of firearms by a felon.[10] Wisdom moved to suppress evidence obtained in searches conducted pursuant to several search warrants.[11] The same affidavit was submitted to support each warrant,[12] and was based in part on hearsay provided by unnamed informants.[13] The district court found the affidavits insufficient to meet the requirements of Rule 5-211(E) and the evidence was suppressed.[14] The state appealed.[15]

In reversing the district court's finding, the New Mexico Court of Appeals first considered whether the affidavits established the basis of the informant's knowledge.[16] The court rejected Wisdom's paragraph-by-paragraph analysis of the affidavits and instead read them as a whole and gave them a nontechnical construction.[17] The court agreed with the state that, when read as a whole, the affidavits clearly indicated that the informant was basing his information on personal knowledge.[18] The court then held that the veracity of the informants was also established by the affidavits.[19] The assertion that the informants had been reliable on at least three other occasions, taken with the rest of the affidavits' information, was sufficient for the court to conclude that an issuing magistrate could infer the credibility of the informants.[20]

In *State v. Hernandez*,[21] an affidavit in support of a search warrant stated that "witnesses observed" Hernandez in the vicinity of a burglary.[22] The affidavit also stated that police investigating the crime scene concluded

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7. *Id.*

8. N.M. R. CRIM. P. 5-211(E). This rule provides that:

> As used in this rule, "probable cause" 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. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

See also N.M. R. CRIM. P. 6-208(F), 7-208(E), 8-207(F).

9. 110 N.M. 772, 800 P.2d 206 (Ct. App.), *cert. denied*, 110 N.M. 749, 779 P.2d 1121 (1990).

10. *Id.* at 773, 800 P.2d at 207.

11. *Id.*

12. *Id.* at 775, 800 P.2d at 209.

13. *Id.* at 773, 800 P.2d at 207.

14. *Id.* at 776, 800 P.2d at 210.

15. *Id.* at 773, 800 P.2d at 207.

16. *Id.* at 776, 800 P.2d at 210.

17. *Id.* (citing State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973)).

18. *Id.*

19. *Id.* at 777, 800 P.2d at 211.

20. *Id.* at 776-77, 800 P.2d at 210-11. The court rejected Wisdom's argument that the affidavit was insufficient to establish credibility in that it did not specify the number of informants nor when or to whom the information was given. *Id.* at 777, 800 P.2d at 211.

21. 111 N.M. 226, 804 P.2d 417 (Ct. App. 1990).

22. *Id.* at 227, 804 P.2d at 418.

that the perpetrator had cut himself, and his blood and several dropped stolen items created a trail toward Hernandez's residence.[23] The affidavit further asserted that police observed a fresh cut on Hernandez's hand.[24] A search warrant was issued, and the trial court denied Hernandez's motion to quash the warrant and suppress the evidence found pursuant to it.[25]

On appeal, Hernandez argued that the affidavit was insufficient to establish probable cause.[26] The state contended that the affidavit established that the witnesses were "citizen-informers," and that as such their credibility should be presumed.[27] The court of appeals did not have to reach the issue of presumption of credibility. Instead, the court concluded that the status of the witnesses could not be determined because the information was not at all corroborated.[28] Consequently, the court held that "it is virtually impossible to find the hearsay reliable."[29] The court further held that the trail of stolen items, the bloodstains at the scene, and the cut observed on Hernandez' hand were insufficient by themselves to establish probable cause for the warrant.[30]

Taken together, *Wisdom* and *Hernandez* both expand and hinder a magistrate's discretion in issuing search warrants. Under *Wisdom*, a magistrate may infer the reliability of an informant even though the basis for that inference is not laid out in detail in the affidavit. Under *Hernandez*, however, the establishment of an informant's credibility requires that an affidavit at least provide some sort of corroboration of the given information.

2. Wiretaps

In addition to searches of persons' physical property, New Mexico allows an "interference with communications" exception to privacy that includes interference with telephone communications.[31] The issuance of an order for such an interference, or "wiretap," must be based on probable cause that the wiretap will obtain evidence of the commission of certain crimes.[32] Every wiretap order "shall contain a provision that

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 228, 804 P.2d at 419 (citations omitted).
28. *Id.* at 229, 804 P.2d at 420. The information might have been sufficiently corroborated had the affidavit disclosed the witnesses identities, observation, or discussions with the police. *Id.*
29. *Id.*
30. *Id.*
31. N.M. STAT. ANN. § 30-12-1 (Repl. Pamp. 1984). The entirety of the New Mexico wiretap statute is found in N.M. STAT. ANN. sections 30-12-1 to -11.
32. New Mexico Statutes Annotated section 30-12-2 states that:

> An ex parte order for wiretapping, eavesdropping or the interception of any wire or oral communication may be issued by any judge of a district court upon application of the attorney general or a district attorney, stating that there is probable cause

the authorization to intercept . . . shall be conducted in such a way as to minimize the interception under this act and shall terminate upon attainment of the authorized objective . . . ."[33] Any aggrieved person may move to suppress the contents of any wiretap on the grounds that "the interception was not made in conformity with the order of authorization or approval."[34]

In *State v. Manes*,[35] the court of appeals considered as a matter of first impression, the issue of the propriety of minimization during a wiretap.[36] An order was issued for the police to tap the home telephone of Manes, who was suspected of drug trafficking.[37] The order required that the intercepted communications be minimized, that a weekly report be submitted describing the police officers' efforts at minimization, and that a list of innocent callers be supplied to the court.[38] The officers' minimization process consisted of listening to a call for up to a minute to determine if it was incriminating, and if it was not the interception would cease for one to two minutes.[39] This process would then continue until the call was finished.[40] The police testified that they could not be certain that a call from any specific person would be innocent, and no list of innocent callers was provided to the court.[41] An incriminating conversation led to Manes's arrest and conviction.[42] Manes argued on appeal that the police had failed to minimize the tapped phone calls of his wife, mother, and children.[43]

Noting that the New Mexico and federal wiretap statutes are substantially similar, the court of appeals looked to federal minimization cases for guidance.[44] In so doing, the court held that to prevail Manes had to show a pattern, rather than merely isolated examples, of interception of innocent calls.[45] The court then concluded that the minimization

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to believe that:

A. evidence may be obtained of the commission of:

(1) the crime of murder, kidnapping, extortion, robbery, trafficking or distribution of controlled substances or bribery of a witness;

(2) the crime of burglary, aggravated burglary, criminal sexual penetration, arson, mayhem, receiving stolen property or commercial gambling, if punishable by imprisonment for more than one year; or

(3) an organized criminal conspiracy to commit any of the aforementioned crimes; or

B. the communication, conversation or discussion is itself an element of any of the above specified crimes.

33. N.M. STAT. ANN. § 30-12-6 (Repl. Pamp. 1984).

34. *Id.* § 30-12-8(B)(2).

35. 112 N.M. 161, 812 P.2d 1309 (Ct. App.), *cert. denied*, 112 N.M. 77, 811 P.2d 575; *cert. denied*, 112 S. Ct. 381 (1991).

36. *Id.* at 165, 812 P.2d at 1313.

37. *Id.* at 163, 812 P.2d at 1311.

38. *Id.* at 164, 812 P.2d at 1312.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 165, 812 P.2d at 1313.

45. *Id.*

procedures followed by the police were properly conducted.[46] The court further held that other factors, such as the wiretap's short life span, the possibility of Manes being involved in a widespread conspiracy, the use of coded language in the intercepted calls, and the close judicial supervision of the operation,[47] showed "that the minimization was reasonable under the totality of the circumstances."[48]

Manes is an important case because it establishes the police practices necessary to constitute valid wiretap minimization. In practical terms, this decision should be helpful to prosecutors using wiretap evidence because it allows for a measure of flexibility in wiretap operations, as shown by the court's forgiveness of "officer oversight" that technically violated the wiretap order.[49] Moreover, by looking for guidance from and deciding consistently with federal interpretations of similar statutes, the court of appeals has placed New Mexico in the federal mainstream on the issue of minimization.[50]

B. Warrantless Searches

Situations often arise that compel the police to make searches without warrants. Such warrantless searches "are per se unreasonable unless they fall within certain well-defined exceptions to the warrant requirement."[51] The survey period saw New Mexico appellate courts consider many of the search warrant exceptions.

1. Inventory

Police inventory searches, which are reasonable if they are made for the protection of the owner's property or to protect police from false crimes or potential danger, are recognized in New Mexico as an exception to warrantless searches.[52] In *State v. Boswell*,[53] Boswell was arrested in a grocery store for shoplifting.[54] Boswell produced identification for the police from his wallet and then accidentally left the wallet on a cabinet in the store.[55] He was then taken to the police station for booking, at which time it was realized the wallet had been left behind.[56] Although

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46. *Id.* at 166-67, 812 at 1314-15.

47. The court found that "the extent of judicial supervision was extensive enough to render the officers' oversight regarding developing and presenting a formal list of names or telephone numbers of innocent parties to the judge, as mentioned in the wiretap order, inconsequential." *Id.* Thus, the wiretap operation was reasonable even though it admittedly "was not made in conformity with the order of authorization or approval." N.M. STAT. ANN. § 30-12-8(B)(3).

48. *Manes*, 112 N.M. at 167, 812 P.2d at 1315.

49. *Id.*

50. This is especially true in light of the fact that certiorari was denied in this case by both the New Mexico and the United States Supreme Courts. State v. Manes, 112 N.M. 77, 812 P.2d 1309 (Ct. App.), *cert. denied*, 112 N.M. 77, 811 P.2d 575; *cert. denied*, 112 S. Ct. 381 (1991).

51. State v. Crenshaw, 105 N.M. 329, 332, 732 P.2d 431, 434 (Ct. App. 1986).

52. State v. Ruffino, 94 N.M. 500, 612 P.2d 1311 (1980).

53. 111 N.M. 240, 804 P.2d 1059 (1991) [hereinafter *Boswell II*].

54. *Id.* at 241, 804 P.2d at 1060.

55. *Id.*

56. *Id.*

Boswell told the arresting officer a friend would get the wallet for him, the officer went back to the store to retrieve it.[57] The officer found the wallet, searched it at the store, and discovered drugs in it.[58] The officer testified that he retrieved the wallet so that it would not be lost, and searched it pursuant to police procedure.[59] As a result of this search, a blotter of LSD was discovered and Boswell was convicted of drug possession with intent to distribute.[60]

The court of appeals reversed Boswell's conviction,[61] holding that the search did not fall under the inventory exception because the wallet "was not part of the effects on his person at the time of the booking."[62] The court further held that there was no "reasonable nexus" to prompt the officer to retrieve the wallet because "[t]here was no evidence the police officer suspected that evidence of shoplifting was concealed" in it.[63]

The New Mexico Supreme Court reversed the court of appeals and upheld the conviction.[64] The supreme court held that inventory searches are lawful if police have control of the searched object, if the inventory is made pursuant to police procedure, and if the search is reasonable.[65] The court then focused on whether the police controlled the wallet, "i.e., was there a reasonable nexus between Boswell's arrest and the seizure of the wallet?"[66] In its analysis, the court found that "[t]he state interests justifying an inventory constitute an independent basis for the reasonableness of the search."[67] Thus, the court held that an "incident to arrest theory" is not needed for inventory searches.[68]

In addition, the court concluded that "[p]robable cause is not required to justify an inventory search."[69] Instead, the "reasonable nexus" between the arrest and the seizure of the wallet was found in "the need to safeguard defendant's property from loss and to protect the police from liability and charges of negligence."[70] The court reasoned that this was not a case where the wallet would have been safe if left at the store or where it could have been immediately placed by Boswell in secure custody.[71] Consequently, the court held that the governmental interests for

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57. *Id.*
58. *Id.*
59. *Id.* at 242 n.1, 804 P.2d 1061 n.1.
60. *Id.* at 241, 804 P.2d at 1060.
61. State v. Boswell, 110 N.M. 190, 793 P.2d 1343 (Ct. App. 1989) [hereinafter *Boswell I*].
62. *Id.* at 193, 793 P.2d at 1346.
63. *Id.*
64. *Boswell II*, 111 N.M. at 245, 804 P.2d at 1064.
65. *Id.* at 241, 804 P.2d at 1060.
66. *Id.* at 242, 804 P.2d at 1061.
67. *Id.* at 243, 804 P.2d at 1062. In reaching this conclusion, the court relied on Illinois v. Lafayette, which held that "[t]o determine whether the search . . . was unreasonable we must 'balanc[e] its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" Illinois v. Lafayette, 462 U.S. 640, 645 (1983) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)); *see Boswell II*, 111 N.M. at 243 n.3, 804 P.2d at 1062 n.3.
68. *Boswell II*, 111 N.M. at 244, 804 P.2d at 1063.
69. *Id.* at 243, 804 P.2d at 1062.
70. *Id.* at 244, 804 P.2d at 1063.
71. *Id.*

inventory searches justified the officer's unauthorized search and seizure of the wallet.[72]

The decision in *Boswell II* could be very helpful to future police inventory searches. Previously, New Mexico inventory search cases only involved impounded vehicles, which had been held to have a reduced expectation of privacy due to their inherent mobility.[73] With *Boswell II*, however, the inventory exception has been extended to a defendant's personal effects, even if those effects are not on or near the defendant. As long as there is the need for the police to protect the defendant's property and to protect themselves from negligence actions, there exists the "reasonable nexus" needed to justify such a search and seizure.

2. Exigent Circumstances and Plain View

New Mexico recognizes an exigent circumstances exception to the search warrant requirement.[74] An exigent circumstance is defined in part as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property . . . ."[75] New Mexico also allows for warrantless seizures of items in plain view of police officers if, among other factors, "the officers are lawfully in the position from which they observe the evidence."[76]

In *State v. Calloway*,[77] the fire department responded to a fire at Calloway's residence.[78] A fire official, investigating the cause of the fire, saw handguns, laboratory glassware, and chemicals.[79] The official called in a police impact officer, who in turn called in a police chemist to determine how to handle the chemicals.[80] The impact officer was told that the scene was not safe, and he subsequently seized the chemicals, the drug lab paraphernalia, the handguns, and a briefcase.[81] Calloway's motion to suppress this evidence was denied by the trial court, and he was convicted of drug trafficking.[82]

On appeal, Calloway argued that there were no exigent circumstances justifying the officer's search because by the time he arrived the fire was out and a search for the origin of the fire had already been completed.[83] Calloway further argued that because the officer's intrusion was invalid,

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72. *Id.*

73. *Ruffino*, 94 N.M. at 502, 612 P.2d at 1313; *see also* State v. Williams, 97 N.M. 634, 642 P.2d 1093, *cert. denied*, 495 U.S. 845 (1982).

74. State v. Copeland, 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct. App.), *cert. denied*, 104 N.M. 702, 726 P.2d 856 (1986).

75. *Id.*

76. State v. Luna, 93 N.M. 773, 779, 606 P.2d 183, 188 (1980). In addition, the evidence must be discovered inadvertently, and the incriminating nature of the evidence must be immediately apparent. *Id.*

77. 111 N.M. 47, 801 P.2d 117 (Ct. App.), *cert. denied*, 111 N.M. 77, 801 P.2d 659 (1990).

78. *Id.* at 48, 801 P.2d at 118.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 49, 801 P.2d at 119.

the seizure of the evidence did not fall under the plain view doctrine.[84]

In affirming the conviction, the court of appeals held that the presence of the hazardous chemicals constituted the exigent circumstance for the warrantless entry into Calloway's residence.[85] The court then held that because the entry was valid, the plain view doctrine applied to the chemicals, paraphernalia, and handguns, and that the briefcase was properly seized and searched to determine if it also contained hazardous materials.[86] Additionally, the court concluded that the officer's statements that he entered the residence to investigate a drug lab were irrelevant because "objective conditions rather than an officer's subjective intentions determine whether exigent circumstances exist."[87]

3. Consent

New Mexico also recognizes the voluntary signing of a consent to search form as validating evidence obtained in a warrantless search.[88] In *State v. Munoz*,[89] police learned from witnesses at the scene of a burglary that persons leaving the scene with stolen property had entered a residential address.[90] When officers arrived at the address, Ms. Duran informed them that she was the resident.[91] The residence was in fact a duplex with a common interior door.[92] After an initial refusal, Ms. Duran ultimately signed a consent to search form.[93] As a result of this search, the police found and arrested Munoz, who was hiding in an attic with several stolen items.[94]

The trial court denied Munoz's motion to suppress the evidence obtained in the search, holding that he had no expectation of privacy in the premises and therefore had no standing to challenge the search.[95] On appeal, Munoz argued that he was the sublessee of the other half of the duplex and that as such he did have a privacy interest in the residence that required the police to obtain his consent before they could conduct their search.[96] As evidence for this Munoz pointed to the fact that Ms. Duran testified at trial that she sublet the duplex to him.[97]

In rejecting Munoz's argument, the court of appeals found that substantial evidence supported the trial court's finding that Munoz had no reasonable privacy expectation in the duplex.[98] The court noted that police

84. *Id.* at 50, 801 P.2d at 120.
85. *Id.*
86. *Id.* at 50-51, 801 P.2d at 120-21.
87. *Id.* at 50, 801 P.2d at 120.
88. State v. Cohen, 103 N.M. 558, 711 P.2d 3 (1985), *cert. denied*, 476 U.S. 1158 (1986).
89. 111 N.M. 118, 802 P.2d 23 (Ct. App.), *cert. denied*, 111 N.M. 136, 802 P.2d 645 (1990).
90. *Id.* at 119, 802 P.2d at 24.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 120, 802 P.2d at 25.
96. *Id.* at 119, 802 P.2d at 24.
97. *Id.* at 120, 802 P.2d at 25.
98. *Id.*

testified that Ms. Duran told them at the scene that the other side of the duplex was vacant, that this statement was reinforced by the fact that the interior door was open upon their search, and that Munoz had told police that he lived in another city.[99] The court held that, when confronted with conflicting evidence, the trial court was allowed to believe police testimony over that of Ms. Duran or Munoz.[100]

In *State v. Bedolla*,[101] police received an anonymous tip that persons in a purple Nissan truck with California license plates were dealing drugs out of a motel room.[102] While the police were staking out the motel, three people in a purple Nissan truck pulled up, went into a motel room, came out, and drove away.[103] After following the truck for a quarter mile, the police stopped the truck.[104] At this time, the police had observed no criminal activity either at the motel or in the truck.[105] Bedolla, one of the men in the truck, was questioned by Officer Lara.[106] Lara told Bedolla he was investigating the tip, that he would need a warrant to search the motel room, and that he felt he had enough probable cause to obtain that warrant.[107] Bedolla and the police went back to the motel, he was read his *Miranda* rights, he signed a consent to search form, and the room was then searched.[108] Drugs were found pursuant to the search and Bedolla was convicted for possession with intent to distribute cocaine.[109]

Bedolla appealed, contending that his consent and the evidence obtained therefrom should have been suppressed because the police illegally stopped his truck.[110] The state argued that New Mexico follows the rule that "a voluntary consent can validate what might otherwise be an illegal search and seizure," and that consequently the validity of the stop was irrelevant.[111]

In reversing the conviction, the court of appeals first found the initial stop of the truck to be invalid.[112] The court reasoned that the sole impetus for the stop was the information given by the anonymous tip, and this "did not meet the threshold requirements for an investigatory stop . . . ."[113]

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99. *Id.*
100. *Id.*
101. 111 N.M. 448, 806 P.2d 588 (Ct. App.), *cert. denied* 111 N.M. 416, 806 P.2d 65 (1991).
102. *Id.* at 449, 806 P.2d at 589.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 449-50, 806 P.2d at 589-90.
109. *Id.* at 449, 806 P.2d at 589.
110. *Id.* at 450, 806 P.2d at 590.
111. *Id.* The state arrived at this "rule" by quoting dicta from State v. Cohen, 103 N.M. 558, 563, 711 P.2d 3, 8 (1985), *cert. denied*, 476 U.S. 1158 (1986), and by citing State v. Hadley, 108 N.M. 255, 771 P.2d 188 (Ct. App. 1989), which appears to follow the dicta literally. *Bedolla*, 111 N.M. at 453, 806 P.2d at 593.
112. *Bedolla*, 111 N.M. at 450, 806 P.2d at 590.
113. *Id.* at 451, 806 P.2d at 591. The court distinguished the stop in this case from situations in which investigative detentions are properly made, such as if done to protect officers and others, if done on the basis of more articulable facts, or if done pursuant to eyewitness information that accurately predicts future behavior. *Id.* at 450-53, 806 P.2d at 590-93.

The court then held a voluntary consent alone does not always purge the taint of prior police illegalities.[114] Contrary holdings in *State v. Hadley*[115] and *State v. Zelinske*[116] were expressly overruled.[117] The court interpreted the supreme court's decision in *State v. Cohen*[118] to require the consideration of "whether a voluntary consent to search obtained after an illegal stop is an exploitation of the prior illegality *and* whether the prior illegality affects the voluntariness of consent."[119] The court held that the rule upon which the state relied allowed only for the possibility, rather than the rigid necessity, of a voluntary consent removing the taint of an illegal detention.[120]

The court then specifically held that because the illegal act of stopping the truck in this case was not sufficiently removed from the consent, and that because the truck was stopped solely to investigate the anonymous tip, even an assumedly voluntary consent would not purge the taint of the illegal act.[121] The court concluded, therefore, that Bedolla's motion to suppress the drug evidence should have been granted.[122] As the illegal act was an exploitation of the prior illegality, the issue of voluntariness of consent was not reached.[123]

Bedolla's importance lies in the court of appeals' interpretation of the dicta in *State v. Cohen* that "a voluntary consent can validate what might otherwise be an illegal search and seizure."[124] Rather than agreeing with the state's contention that a voluntary consent *must* act as a cure-all for police improprieties, the court read the *Cohen* dicta to mean that a voluntary consent that is *sufficiently attenuated from* illegal police activities *may* validate a subsequent search and seizure.

4. Protective Sweep

The United States Supreme Court recently added "protective sweep" to the list of exceptions to the search warrant requirement.[125] The Court held that:

> [t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts

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114. *Id.* at 455, 806 P.2d at 595.
115. 108 N.M. 255, 771 P.2d 188 (Ct. App. 1989).
116. 108 N.M. 784, 779 P.2d 791 (Ct. App. 1989).
117. *Bedolla*, 111 N.M. at 455, 806 P.2d at 595.
118. 103 N.M. 558, 563, 711 P.2d 3, 8 (1985), *cert. denied*, 476 U.S. 1158 (1986). Dicta from *Cohen* was relied upon by the state in its argument that a voluntary consent necessarily purges the taint of a prior illegality. *Bedolla*, 111 N.M. at 453, 806 P.2d at 593.
119. *Bedolla*, 111 N.M. at 455, 806 P.2d at 595 (emphasis in original).
120. *Id.* at 453, 806 P.2d at 593.
121. *Id.* at 456, 806 P.2d at 596.
122. *Id.*
123. *Id.* The court did note, however, that with regard to this issue the state has "a much heavier burden to satisfy than when proving consent to search after a legitimate stop." *Id.*
124. *Cohen*, 103 N.M. at 563, 711 P.2d at 8.
125. Maryland v. Buie, 494 U.S. 325 (1990).

> that the area to be swept harbors an individual posing a danger to those on the arrest scene.[126]

The Court found justification for protective sweeps in "the threat posed by the arrestee, . . . or more properly by unseen third parties in the house."[127]

In *State v. Lara*,[128] the New Mexico Court of Appeals had occasion to acknowledge this newest search warrant exception. An argument took place at Lara's home between Lara and three friends.[129] The argument turned violent, two of the friends were somehow cut after altercations with Lara, and all three friends fled the house.[130] The three met up with and told their story to nearby police officers, who then proceeded to Lara's house.[131] The officers placed Lara under arrest and conducted a protective sweep of the premises.[132] Lara appealed his conviction for aggravated battery, contesting, in part, the legality of the protective sweep.[133] The court of appeals held that the protective sweep was valid because of the violent nature of the crime and because the officers did not know if there were any other people in the house.[134]

5. Roadblock

The detention of motor vehicles and the questioning of drivers pursuant to a police or border patrol roadblock constitutes a fourth amendment seizure.[135] In New Mexico, however, a roadblock may be constitutionally permissible if it is reasonable.[136] To be reasonable, New Mexico courts require that a roadblock have adequate preparatory supervision, that motorists be treated uniformly, that the roadblock be safe, that the location be reasonable, that the official nature of the roadblock be immediately apparent, that the length and nature of the roadblock be minimized, and that the roadblock receive advance publicity.[137]

In *State v. Bolton*,[138] Bolton and Gill were stopped at a roadblock where police were checking for licenses, registrations, and proofs of

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126. *Id.* at 337.
127. *Id.* at 336 (citing Chimel v. California, 395 U.S. 752 (1969)).
128. 110 N.M. 507, 797 P.2d 296 (Ct. App.), *cert. denied*, 110 N.M. 330, 795 P.2d 1022 (1990).
129. *Id.* at 510, 797 P.2d at 299.
130. *Id.* at 510-11, 797 P.2d at 299-300.
131. *Id.* at 511, 797 P.2d at 300.
132. *Id.*; *see also* State v. Valdez, 111 N.M. 438, 806 P.2d 578, (Ct. App. 1990), *cert denied*, 111 N.M. 316, 805 P.2d 85 (1991). In *Valdez*, the court of appeals held that a search did not fall within the protective sweep exception because it occurred *before* the defendant was placed under arrest, and was thus not conducted "incident to a lawful arrest." *Id.* at 440, 806 P.2d at 580.
133. *Lara*, 110 N.M. at 510, 797 P.2d at 299.
134. *Id.* at 514, 797 P.2d at 303.
135. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (police sobriety checkpoint); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976) (border patrol checkpoint).
136. City of Las Cruces v. Betancourt, 105 N.M. 655, 735 P.2d 1161 (Ct. App. 1987) (sobriety roadblock); State v. Valencia Olaya, 105 N.M. 690, 736 P.2d 495 (Ct. App.) (roadblock to check license, title, and insurance documents), *cert. denied*, 105 N.M. 689, 736 P.2d 494 (1987).
137. *Betancourt*, 105 N.M. at 658-59, 735 P.2d at 1164-65.
138. 111 N.M. 28, 801 P.2d 98 (Ct. App.); *cert. denied*, 111 N.M. 16, 801 P.2d 86 (1990).

insurance.[139] At the time of "primary" inspection, to which almost all noncommercial vehicles were subject, Gill gave statements about the truck's ownership that were inconsistent with its registration.[140] This prompted a more thorough "secondary" inspection on the side of the road.[141] Police Officer Newman then obtained consent to search the truck, and soon thereafter discovered that the gas tank contained cocaine.[142] Border Patrol personnel participated in the roadblock, and one of those agents assisted in the search.[143]

Bolton and Gill appealed their convictions for drug trafficking, arguing in part that the roadblock was not valid because it was pretextual.[144] In affirming the convictions, the court of appeals held that the trial court properly rejected Bolton and Gill's argument that the stated purpose of the roadblock was a pretext.[145] Specifically, the defendants contended that the roadblock's actual purpose was to check for drugs and illegal aliens and not to check driving documents.[146] The court found that the involvement of Border Patrol agents in the roadblock was probative, but not determinative, of "whether the sole, or even the chief, purpose of setting up the roadblock was an illegitimate one."[147] The court then concluded that the district court was entitled to believe police testimony as to their motives for conducting the roadblock, and that sufficient evidence was presented to reject Bolton and Gill's pretext theory.[148]

The *Bolton* decision could be important in the future because the court recognized pretext as a potential abuse of the power to conduct roadblocks, noting that the guidelines for determining the legitimacy of a roadblock "include the reasonableness of the time, place, and duration of the roadblock, which bear on the effectiveness of the roadblock to serve its proper purpose."[149] The court also assumed that there are but a limited number of reasons for the establishment of roadblocks.[150]

The validity of a roadblock detention was also at issue in *State v. Goss*.[151] Donal and Johnny Goss were stopped by a police roadblock checking for driver's licenses, vehicle registrations, and proofs of insurance.[152] Johnny supplied the inspecting police officer, Officer Frisk, with a license and registration.[153] Frisk then noticed a smell of marijuana

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139. *Id.* at 31, 801 P.2d at 101.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 33, 801 P.2d at 103.
145. *Id.* at 37, 801 P.2d at 107.
146. *Id.* at 33, 801 P.2d at 103.
147. *Id.* at 36, 801 P.2d at 106.
148. *Id.* at 37, 801 P.2d at 107.
149. *Id.* at 34, 801 P.2d at 104.
150. *Id.* The court cited the checking of vehicle and document registration and sobriety as legitimate uses of roadblocks.
151. 111 N.M. 530, 807 P.2d 228 (Ct. App.), *cert. denied*, 111 N.M. 416, 806 P.2d 65 (1991).
152. *Id.* at 531, 807 P.2d at 229.
153. *Id.*

coming from, and observed a raised wooden platform in, the camper shell of the Gosses' truck.[154] Frisk testified that he secondarily detained the Gosses, at which time he obtained oral permission to look under the platform.[155] Frisk further testified that the marijuana smell became intense and that he found several packages under the platform.[156] Frisk placed the Gosses under arrest and subsequently obtained consent to search the truck.[157] Both men were convicted of unlawful distribution of marijuana.[158]

The Gosses appealed those convictions, arguing that the secondary detention and subsequent search of their truck was invalid because they were detained even after they had produced the driving documentation that was the aim of the roadblock.[159] They also argued that evidence at trial contradicted the plausibility of Officer Frisk's testimony.[160] The court of appeals affirmed the convictions.[161] The court held that Officer Frisk's smelling of marijuana coming from the truck constituted probable cause for the secondary detention.[162] The court further held that, even though the evidence could have been interpreted differently, the trial court was entitled to credit Officer Frisk's testimony.[163]

Secondary detention at a roadblock was again at issue in *State v. Estrada*.[164] Estrada and a passenger were asked about their citizenship status at a Border Patrol checkpoint.[165] Both produced valid immigration documentation and neither exhibited suspicious behavior.[166] The questioning agent noticed that the spare tire on the car was out of place, and as a consequence directed the vehicle to a secondary detention area.[167] A search of the car was conducted pursuant to this detention and drugs were discovered in the drive shaft.[168] Estrada was convicted of possession of drugs with intent to distribute.[169]

On appeal, the court of appeals considered whether the agent was required to have a reasonable suspicion of wrongdoing for the secondary detention and, if so, whether there was reasonable suspicion in this case.[170] The court concluded that while reasonable suspicion is not needed "to divert motorists to secondary [areas] for the initial brief questioning and

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154. *Id.* at 531, 807 P.2d at 229.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 532, 807 P.2d at 230.
159. *Id.* at 533, 807 P.2d at 231.
160. *Id.* at 534, 807 P.2d at 232.
161. *Id.* at 530, 807 P.2d at 228.
162. *Id.* at 534, 807 P.2d at 232.
163. *Id.*
164. 111 N.M. 798, 810 P.2d 817 (Ct. App. 1991).
165. *Id.* at 798, 810 P.2d at 817.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 799, 810 P.2d at 818.

inspection,"[171] reasonable suspicion is required in secondary detentions that involve more than routine questioning and inspection.[172] The court then held that the abnormality of Estrada's spare tire by itself did not amount to reasonable suspicion for the secondary detention in this case.[173] Consequently, the court reversed Estrada's conviction.[174]

The survey period's roadblock cases affirmed more convictions than they reversed. Nevertheless, these cases appear to restrain the expansion of roadblock searches and seizures. In its decisions, the New Mexico Court of Appeals recognized pretext as a possible abuse of the roadblock power of the police;[175] it implied that the legitimate uses of roadblocks are limited;[176] and it held that an automotive abnormality that was not in and of itself illegal did not create the reasonable suspicion needed for a secondary detention.[177]

6. Automobile Stops

Police may make an investigatory stop of a vehicle if they have a reasonable belief that such a detention is appropriate.[178] Police may also search a detained vehicle if there is probable cause to do so.[179] In *State v. Apodaca*,[180] Officer Conticelli stopped Apodaca for a safety belt violation after observing his shoulder harness dangling from the ceiling.[181] After receiving suspicious and conflicting information about Apodaca's car, Officer Conticelli asked for, and was given, permission to search the trunk.[182] The officer smelled marijuana coming from a suitcase, and a search of the suitcase confirmed his suspicions.[183]

Apodaca was convicted of possession with intent to distribute marijuana.[184] Apodaca appealed his conviction, arguing that the reasonable suspicion did not exist for the initial stop, that the stop was pretextual, that the stop was unduly prolonged, and that the search of the suitcase was unjustified.[185]

In upholding the conviction, the court of appeals concluded that a dangling shoulder harness constituted reasonable suspicion for a seat-belt stop, and that sufficient evidence was presented to allow the trial court to determine that the stop was not pretextual.[186] The court also held

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171. *Id.* at 800, 810 P.2d 817 (citing United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).
172. *Id.*
173. *Id.* at 802, 810 P.2d at 821.
174. *Id.*
175. State v. Bolton, 111 N.M. 28, 34, 801 P.2d 98, 104 (Ct. App.), *cert. denied*, 111 N.M. 16, 801 P.2d 86 (1990).
176. *Id.*
177. State v. Estrada, 111 N.M. 798, 802, 810 P.2d 817, 821 (Ct. App. 1991).
178. State v. Barton, 92 N.M. 118, 120, 584 P.2d 165, 167 (Ct. App. 1978).
179. *Id.*; *see also*, Chambers v. Maroney, 399 U.S. 42 (1970).
180. 112 N.M. 302, 814 P.2d 1030 (Ct. App.), *cert. denied* 112 N.M. 220, 813 P.2d 1018 (1991).
181. *Id.* at 303, 814 P.2d at 1031.
182. *Id.* at 304-05, 814 P.2d at 1032-33.
183. *Id.* at 303, 814 P.2d at 1031.
184. *Id.*
185. *Id.* at 303-05, 814 P.2d at 1031-33.
186. *Id.*

that, regardless of the officer's subjective suspicions about Apodaca, the inconsistent statements and suspicious behavior of Apodaca created an objective justification for the post-stop detention.[187]

In addressing whether the warrantless suitcase search was valid, the court held that probable cause was first needed to search the entire vehicle.[188] The court then followed the decision in *United States v. Ross*,[189] in which the United States Supreme Court held that probable cause to search a vehicle justifies the search of all of the contents of the vehicle that might conceal the object sought.[190] The court also overruled *State v. White*[191] and *State v. Walker*[192] to the extent that they conflict with *Ross*.[193] The court finally concluded that Apodaca's consent to search the trunk and the officer's subsequent detection of drugs in one container constituted probable cause to search the whole car, and, therefore, that the warrantless search of the suitcase was justified.[194]

In *State v. Creech*,[195] conservation officer Hanson stopped a truck in his patrolling area after observing a man in the bed of the truck pointing a rifle toward oncoming traffic.[196] Officer Hanson then questioned the occupants of the car, including Creech.[197] After reporting the incident to the district attorney, it was discovered that Creech was a convicted felon.[198] Creech was prosecuted as a felon in possession of a firearm.[199] Creech attempted to suppress the information he gave to officer Hanson, arguing that Hanson had neither reasonable suspicion nor statutory authority to make the stop.[200] Officer Hanson testified that he made the stop out of concern for public safety and to gather hunting data.[201] The information was introduced into evidence, Creech was convicted and he appealed.[202]

In reversing the conviction, the court of appeals held that, although officer Hanson testified that he stopped all vehicles to collect hunting data, there existed no reasonable suspicion for these stops.[203] The court

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187. *Id.* at 304-05, 814 P.2d at 1032-33.
188. *Id.* at 305, 814 P.2d at 1033.
189. 456 U.S. 798 (1982).
190. *Id.* at 825.
191. 94 N.M. 687, 615 P.2d 1004 (Ct. App. 1980) (warrant required for search of boxes and bags in car), *overruled by*, State v. Apodaca, 112 N.M. 302, 814 P.2d 1030 (Ct. App. 1991).
192. 93 N.M. 769, 605 P.2d 1168 (Ct. App. 1980) (warrant required for search of suitcase in car), *overruled by*, State v. Apodaca, 112 N.M. 302, 814 P.2d 1030 (Ct. App. 1991).
193. *Apodaca*, 112 N.M. at 305-06, 814 P.2d at 1033-34.
194. *Id.*
195. 111 N.M. 490, 860 P.2d 1080 (Ct. App. 1991).
196. *Id.* at 491, 806 P.2d at 1081.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 494, 806 P.2d at 1084. The court noted that "[i]n some cases, statutory authority provides a constitutionally adequate substitute [to reasonable suspicion]." *Id.* The court also noted that "there was no evidence of department practice or regulation authorizing this customary practice," a consideration that had just recently been held to be a valid substitute for probable cause in State v. Boswell, 111 N.M. 240, 804 P.2d 1059 (1991) (pertinent to inventory searches). *Creech*, 111 N.M. at 494, 806 P.2d at 1084.

also held that an emergency situation did not exist to justify the stop because there was no evidence that other vehicles were on the road or that officer Hanson believed the passenger in the bed of the truck would intentionally or accidentally fire the rifle.[204]

7. Conclusion

The great majority of the survey period's warrantless search cases resulted in the affirmance of convictions. One possible reason for this outcome may be that the New Mexico appellate courts, either consciously or unconsciously, are adhering to the currently popular judicial philosophy of showing little sympathy for criminal defenses based on fourth amendment exclusion of evidence arguments. This philosophy has been aggressively promoted by the United States Supreme Court, which during the Burger and Rehnquist tenures "has generally been inhospitable toward both substantive fourth amendment claims and toward the exclusionary rule as a way to enforce those claims."[205] Chief Justice Rehnquist explained the reasoning behind the philosophy when he stated that:

> the so-called "exclusionary rule" created by this Court imposes a burden out of all proportion to the Fourth Amendment values which it seeks to advance by seriously impeding the efforts of the national, state, and local governments to apprehend and convict those who have violated their laws.[206]

This is not to say that the New Mexico appellate courts will mechanically follow in every instance the Supreme Court's erosion of fourth amendment defenses for criminal defendants.[207] However, in the current "tough on crime" atmosphere, appellate court judges, who are retained or rejected at general election,[208] may be somewhat hesitant to reverse the convictions of blatantly guilty defendants on fourth amendment technicalities.

C. *Miranda Warnings*

The fifth amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[209] The New Mexico Constitution also safeguards against

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204. *Creech*, 111 N.M. at 495, 806 P.2d at 1085.

205. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 148 (1989).

206. Robbins v. California, 453 U.S. 420, 437 (Rehnquist, J., dissenting) (1981).

207. For example, see State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989), in which the New Mexico Supreme Court rejected the United States Supreme Court's test for the sufficiency of a search warrant affidavit in favor of a more stringent standard. For a more detailed discussion of *Cordova*, see Survey, *Criminal Procedure*, 21 N.M. L. REV. 623 (1991).

208. N.M. CONST. art. VI, § 33(A) states that:

> Each justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge shall . . . be subject to retention or rejection on a non-partisan ballot.

209. U.S. CONST. amend. V.

self-incrimination in criminal contexts.[210] In *Miranda v. Arizona*[211] the United States Supreme Court held that statements made by a person during custodial interrogation may not be used to prosecute that person "unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[212] These procedural safeguards are now commonly referred to as a person's "*Miranda* rights."[213] The survey period saw New Mexico appellate courts deal with two *Miranda* cases.[214]

In *State v. Trangucci*,[215] the New Mexico Court of Appeals considered whether Trangucci's statements made in police custody fell under the "public safety" exception to the *Miranda* warnings.[216] Police, suspecting Trangucci of aggravated assault and battery with a firearm, entered Trangucci's motel room with sidearms drawn.[217] The police found Trangucci hiding under a desk, and as they were pulling him up officer Overman asked, "Where's the gun?"[218] Trangucci replied that he had gotten rid of it.[219] The police then read Trangucci his *Miranda* rights.[220]

Trangucci was convicted and he appealed, contending that the trial court erred in denying his motion to suppress his statements about the gun.[221] Specifically, Trangucci argued that the public safety exception to *Miranda* applied only to the safety of the general public and not to the safety of the police alone.[222] In rejecting this argument and affirming the conviction, the court stated that "[t]he Supreme Court has clearly included considerations of police safety within the purview of the public safety exception."[223] Consequently, the court held that the evidence supported the trial court's decision to deny Trangucci's motion to suppress, and the conviction was affirmed.[224]

In *State v. Ybarra*,[225] an altercation occurred in which Garcia injured Ybarra and in which Ybarra stabbed Garcia with a knife.[226] The police

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210. N.M. CONST. art. II, § 15 provides that "[n]o person shall be compelled to testify against himself in a criminal proceeding . . . ."

211. 384 U.S. 436 (1966).

212. *Id.* at 444.

213. These rights include the right to remain silent, the right to be informed that statements made may be used against the declarant, the right to an attorney, and the right to waive voluntarily the above rights. *Id.*

214. State v. Trangucci, 110 N.M. 385, 796 P.2d 606 (Ct. App.), *cert. denied*, 109 N.M. 631, 788 P.2d 931 (1990); State v. Ybarra, 111 N.M. 234, 804 P.2d 1053 (1990).

215. 110 N.M. 385, 796 P.2d 606 (Ct. App.), *cert. denied*, 109 N.M. 631, 788 P.2d 931 (1990).

216. *Id.* at 387, 796 P.2d at 608. The public safety exception was created in New York v. Quarles, 467 U.S. 649 (1984).

217. *Id.* at 386, 796 P.2d at 607.

218. *Id.* at 386-87, 796 P.2d at 607-08.

219. *Id.* at 387, 796 P.2d at 608.

220. *Id.*

221. *Id.* at 385, 796 P.2d at 606.

222. *Id.* at 387, 796 P.2d at 608.

223. *Id.* at 388, 796 P.2d at 609. In reaching this conclusion, the court looked at language in the *Quarles* opinion stating that officers can distinguish "between questions necessary to secure their own safety or the safety of the public . . . ." *Id.* at 387-88, 796 P.2d at 608-09 (quoting *Quarles*, 467 U.S. at 658-59).

224. *Id.* at 388, 796 P.2d at 609.

225. 111 N.M. 234, 804 P.2d 1053 (1990).

226. *Id.*

placed Ybarra under arrest at the police station and then took him to a hospital for treatment of his injuries.[227] Officers had not yet read Ybarra his *Miranda* rights.[228] During treatment, and in the presence of Officer Wright, Nurse Price asked Ybarra questions about the altercation, to which Ybarra gave several incriminating answers.[229]

At trial, Ybarra moved to suppress Nurse Price's statements about their conversation on the grounds that it was a custodial interrogation in violation of *Miranda* protections.[230] The state argued that because the police did not participate in the conversation, because the conversation was the product of Nurse Price's initiative, and because Nurse Price was not an agent of the police, no custodial interrogation took place and a need for a *Miranda* warning was thus obviated.[231] The motion was denied,[232] Ybarra was convicted of first degree murder, and he appealed.[233]

The supreme court reversed the conviction.[234] The court first discussed at length the definition of "custodial interrogation."[235] The court then held that the conversation constituted a custodial interrogation because "[a]lthough the police did not create [the compulsion inherent in custodial surroundings], they took advantage of it by subjecting Ybarra to circumstances which they knew or should have known were reasonably likely to elicit incriminating responses."[236]

Thus, the survey period saw a restriction of the *Miranda* safeguard with respect to its applicability before an officer's safety is assured. Conversely, the survey period saw an expansion of the protection the *Miranda* doctrine affords an arrestee in a situation in which there is no public danger.

III. DOUBLE JEOPARDY AND SENTENCE ENHANCEMENT

The guarantee against double jeopardy is found in the fifth amendment of the United States Constitution, which declares that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[237] Three protections flow from the double jeopardy guarantee of the fifth amendment: 1) protection against a second prosecution of the same offense after acquittal; 2) protection against a second prosecution

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227. *Id.* at 235, 804 P.2d at 1054.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. The trial court held that a custodial interrogation had taken place, but that a *Miranda* warning was not needed because it fell under the "rescue doctrine." On appeal, however, the state conceded that the rescue doctrine was inapplicable and continued to argue that there was no custodial interrogation. *Id.*
233. *Id.* at 234, 804 P.2d at 1053.
234. *Id.* at 238, 806 P.2d at 1057.
235. *Id.*
236. *Id.*
237. U.S. CONST. amend. V.

after conviction; and 3) protection against multiple punishments for the same offense.[238]

The New Mexico Constitution also provides protection against double jeopardy.[239] Additionally, two New Mexico statutes expand and define the double jeopardy rights guaranteed to its citizens.[240] In New Mexico, jeopardy attaches when the jury is empaneled in a criminal jury trial, and in a bench trial when the state presents some evidence.[241] Jeopardy attaching, however, does not always guarantee that retrial is barred.[242]

The most common double jeopardy issue the courts consider is whether a defendant has been twice put in jeopardy for the same offense, where one or more than one statute may be involved. In *Owens v. Abram*,[243] New Mexico adopted the test devised by the United States Supreme Court in *Blockburger v. United States*[244] for analyzing the "same offense" doctrine, in which the application of more than one statute could result in a violation of any of the three double jeopardy protections provided by the constitution. The test consists of comparing the statutory elements of the offenses to determine whether it is possible to violate one offense without violating the other.[245] Where it is possible to violate one offense without violating the other, double jeopardy protection for the "same offense" would not apply.[246] Thus, where violation of one offense is not possible without the other, the New Mexico Supreme Court has "merged" a conviction and sentence for a crime that was a lesser included offense

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238. North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (citations omitted).

239. N.M. CONST. art. II, § 15.

240. New Mexico Statutes Annotated section 30-1-10 states:

> No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees for the same crime and a new trial is granted the accused, he may not be tried for a crime or degree of the crime greater than the one of which he was originally convicted.

New Mexico Statutes Annotated section 30-31-27 (Repl. Pamp. 1989) states:

> If a violation of the Controlled Substances Act is a violation of a federal law, the law of another state or the ordinance of a municipality, a conviction or acquittal under federal law, the law of another state or the ordinance of a municipality for the same act is a bar to prosecution.

241. State v. Eden, 108 N.M. 737, 743, 779 P.2d 114, 120 (Ct. App. 1989) (citing State v. James, 93 N.M. 605, 603 P.2d 715 (1979)).

242. For example, retrial is barred unless a "manifest necessity" exists in declaring a mistrial. United States v. Perez, 22 U.S. (9 Wheat.) 578, 580 (1824); State v. Saavedra, 108 N.M. 38, 41, 766 P.2d 298, 301 (1988). In New Mexico retrial is also permitted if an appellate court finds the trial court based its conviction on erroneously admitted evidence, State v. Post, 109 N.M. 177, 783 P.2d 487 (Ct. App. 1989), or an appellate court finds the trial court based its dismissal on erroneously excluded evidence as opposed to insufficient evidence. County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990).

243. 58 N.M. 682, 274 P.2d 630 (1954), *cert. denied*, 348 U.S. 917 (1955), *overruled by*, State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973).

244. 284 U.S. 299 (1932).

245. Grady v. Corbin, 495 U.S. 508 (1990).

246. *Id.* at 510. This Court also stated that if under a Blockburger analysis, double jeopardy is *not* barred, additional scrutiny must be given. If the prosecution must prove conduct that constitutes an offense for which the defendant has already been prosecuted, the double jeopardy clause bars subsequent prosecution. *Id.* at 519-21.

of a greater charge.[247] More recently, however, in *State v. McGuire*,[248] the New Mexico Supreme Court may have shifted its emphasis from "same offense" to "same conduct."[249]

New Mexico has treated the "same offense" doctrine by applying the prohibition of multiple punishments to single acts as opposed to single offenses.[250] New Mexico also looks to the number of victims to define the number of separate offenses.[251] Finally, New Mexico uses public policy concerns to define legislative intent.[252]

The following section examines cases that raised double jeopardy claims during the current survey period.[253]

A. Adjudicated Innocence

In spite of constitutional and statutory protection, retrial is not barred in all circumstances. As stated previously, double jeopardy does not bar retrial when a "manifest necessity" to declare a mistrial exists.[254] Also, double jeopardy does not bar retrial when the trial court bases a defendant's conviction on evidence that was erroneously admitted.[255]

In *State v. Archuleta*[256] the state appealed the lower court's dismissal with prejudice of indictments against the defendants. The defendants were charged with embezzlement or larceny over $250.00[257] and conspiracy[258] to commit either embezzlement or larceny.[259] The state called Mr. Gulley to testify regarding the retail value of the items at issue.[260] Defense counsel objected to Gulley's testimony because he was present in an out-of-court interview with a state witness who had testified previously.[261] The district court found that defendants were prejudiced under Rule of Evidence 11-615, which excludes all witnesses from the trial proceedings so they cannot hear the testimony of other witnesses.[262] The state subsequently attempted

247. State v. Pierce, 110 N.M. 76, 86-87, 792 P.2d 408, 418-19 (1990).

248. 110 N.M. 304, 795 P.2d 996 (1990).

249. For a more in-depth discussion of the *McGuire* analysis, see Survey, *Criminal Procedure*, 21 N.M.L. REV. 623, 670-73 (1991).

250. State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990).

251. State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989).

252. State v. Martinez, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989). This court analogized three counts of assisting escape to a previous case where public policy precluded four counts of drug trafficking from merging into one count. *Id.* at 39, 781 P.2d at 311.

253. *See* Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991); Herron v. State, 111 N.M. 357, 805 P.2d 624 (1991); State v. Mares, 112 N.M. 193, 812 P.2d 1341 (Ct. App. 1991); State v. Archuleta, 112 N.M. 55, 811 P.2d 88 (Ct. App. 1991); State v. Bachicha, 111 N.M. 601, 808 P.2d 51 (Ct. App. 1991).

254. *See supra* note 242 and accompanying text.

255. *See supra* note 242 and accompanying text.

256. 112 N.M. 55, 811 P.2d 88 (Ct. App.), *cert. denied*, 112 N.M. 21, 810 P.2d 1241 (1991).

257. *See* N.M. STAT. ANN. 1978 § 30-16-8 (Cum. Supp. 1992) (embezzlement); N.M. STAT. ANN. 1978 § 30-16-1 (Cum. Supp. 1992) (larceny); N.M. STAT. ANN. 1978 § 30-1-13 (Repl. Pamp. 1984) (accessory).

258. *See* N.M. STAT. ANN. 1978 § 30-28-2 (Repl. Pamp. 1984) (conspiracy).

259. *Archuleta*, 112 N.M. at 56, 811 P.2d at 89.

260. *Id.* at 57, 811 P.2d at 90.

261. *Id.*

262. *Id.*

to establish retail value through the introduction of price tags shown in a photograph.[263] The court dismissed all counts of the indictment due to insufficiency of evidence.[264]

The state argued that the district court abused its discretion in making this determination.[265] The New Mexico Court of Appeals concluded, however, that the state did not have a right of appeal in this case.[266]

As a basis for applying a double jeopardy analysis, the court of appeals said that because the district court began to hear evidence, the defendant had already been placed in jeopardy once.[267] Although New Mexico courts have held that attachment does not guarantee a bar to retrial, the core meaning of the double jeopardy clause is that a judgment of acquittal may not be appealed.[268]

In this instance, the district court's dismissal amounted to a determination of the defendants' innocence, i.e., an acquittal. The court held that "[a] judgment of acquittal, whether based on a jury verdict of not guilty *or on a ruling by the court that the evidence is insufficient to convict*, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."[269] The court concluded that any dismissal, whether appropriate or not, which "amounts to a determination of a defendant's innocence" is equivalent to adjudicated innocence and bars the state from appealing.[270]

The court analogized an erroneous dismissal to an erroneous acquittal.[271] Applying the analogy to this case, the court followed prior case law pertaining to erroneous acquittals, therefore broadening the scope of double jeopardy protection.[272] This ruling regarding adjudicated innocence as a bar to retrial, however, narrows an exception to double jeopardy protection, where an appellate court finds the trial court has erroneously excluded evidence as opposed to finding insufficient evidence.[273]

Finally, the court found that because the district court's dismissal "was not strictly necessary," the result is comparable to "a declaration of a mistrial for reasons other than manifest necessity, and defendants cannot be made to submit to another trial."[274] Although it seems that this additional justification for barring retrial is superfluous, it appears that a dismissal that is not "strictly necessary" may constitute "adjudicated

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263. *Id.* These photos were later excluded from evidence, because they had not been disclosed to defendant. *Id.*

264. *Id.* at 57-58, 811 P.2d at 90-91.

265. *Id.* at 59, 811 P.2d at 91.

266. *Id.*

267. *Id.* (citing United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977)).

268. *Id.*

269. *Id.* at 58, 811 P.2d at 90 (quoting United States v. Scott, 437 U.S. 82, 91 (1978)) (emphasis added).

270. *Id.*

271. *Id.*

272. *Id.*

273. *See supra* note 242 and accompanying text.

274. *Archuleta*, 112 N.M. at 59, 811 P.2d at 92.

innocence" analogous to an acquittal. This result would bar retrial under New Mexico's previously established double jeopardy protection.

B. Multiple Convictions/Punishments in the Same Trial

One situation in which a court must determine whether a defendant has been put in jeopardy twice for the same offense is when he or she is subject to multiple convictions or is given multiple punishments in the same trial. In this situation, the double jeopardy guarantee may prevent the court from "prescribing greater punishment than the legislature intended."[275]

In New Mexico, if the legislature has not explicitly expressed a desire for multiple punishments in a single prosecution, the *Blockburger* test[276] requiring statutory analysis has been applied to determine whether more than one offense exists for purposes of multiple punishments.[277] This statutory analysis should also determine whether or not the greater offense includes all the elements of the lesser offense.[278] However, where there is clear legislative intent for multiple punishments, merger of two offenses may be precluded.[279] New Mexico has shifted its emphasis from same offense to same act,[280] and multiple victims may result in multiple offenses.[281]

In *State v. Bachicha*,[282] the defendant argued that the trial court erred by not merging each of his convictions of aggravated assault upon three victims with his convictions of false imprisonment with a firearm. The defendant claimed it was a single transaction.[283] As the result of a domestic dispute, the defendant held a gun on his wife, his brother-in-law, and his sister-in-law.[284] When the defendant's wife attempted to escape, he caught her and forced her to the floor.[285] The defendant also shot his sister-in-law.[286]

The New Mexico Court of Appeals held that, under the facts of this case, "the jury could properly convict defendant of the offense of false imprisonment upon his wife, sister-in-law, and brother-in-law, and the separate offenses of aggravated assault with a firearm upon the same victims, because there was separate evidence of multiple aggravated as-

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275. Grady v. Corbin, 495 U.S. 508, 517 (1990).
276. *See supra* notes 243-44 and accompanying text.
277. Owens v. Abrams, 58 N.M. 682, 274 P.2d 630 (1954), *cert. denied*, 348 U.S. 917 (1955).
278. State v. Pierce, 110 N.M. 76, 87, 792 P.2d 408, 419 (1990).
279. State v. McGuire, 110 N.M. 304, 309, 795 P.2d 996, 1001 (1990) (holding that "substantial evidence" was present independently to convict the defendant of two charges having different requisite intents).
280. State v. Pierce, 110 N.M. 76, 85-86, 792 P.2d 408, 417-18 (1990).
281. State v. Moore, 109 N.M. 119, 127-28, 782 P.2d 91, 99-100 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989).
282. 111 N.M. 601, 808 P.2d 51 (Ct. App.), *cert. denied*, 111 N.M. 529, 807 P.2d 227 (1991).
283. *Id.* at 603, 808 P.2d at 53.
284. *Id.* at 602, 808 P.2d at 52.
285. *Id.*
286. *Id.*

saults upon each victim."[287] The court referred to specific acts of directing and redirecting the rifle at each of the victims.[288]

Furthermore, the court stated that "[m]erger does not occur when different evidence is required to prove the two offenses."[289] A finding of aggravated assault requires proof that a person having criminal intent, threatened or engaged in menacing conduct with a deadly weapon toward a victim, causing the victim to believe he or she was about to be in danger of receiving an immediate battery.[290] False imprisonment requires proof that a person restrained or confined the victim against his or her will, where the person knew he had no authority to restrain or confine the victim.[291] In this instance, the defendant's acts of assault constituted in part the method used to restrain and confine the victim.[292] However, merger of the two offenses was precluded because there was evidence of separate, multiple acts of aggravated assault committed independently from those of false imprisonment and against multiple victims.[293]

The New Mexico Court of Appeals applied a fact-based analysis to the preclusion of merger. Additionally, an indirect application of the *Blockburger* test[294] was evident by the inclusion of the statutory elements of both offenses. The court failed, however, to consider legislative intent with respect to these two offenses. Concern regarding the court's application of a fact-based analysis that ignored the prior reasoning of the New Mexico Supreme Court is expressed in Judge Hartz's concurring opinion.[295] Both the fact-based analysis and the legislative intent analysis of *Blockburger*, however, would achieve the same result in this instance.

Herron v. State[296] involved a defendant's appeal of a conviction for nineteen of twenty-one counts of second degree criminal sexual penetration. The victim rode with three men to one of the defendant's homes where two of the men sexually assaulted her.[297]

The court of appeals upheld the conviction.[298] The supreme court granted review to determine whether the convictions are contrary to the double jeopardy clauses of the New Mexico and United States Constitutions.[299] The supreme court affirmed five of the nineteen convictions and sentences

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287. *Id.*
288. *Id.* at 604, 808 P.2d at 54.
289. *Id.* at 603, 808 P.2d at 53 (citing State v. Muise, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985)).
290. N.M. STAT. ANN. § 30-3-2 (Repl. Pamp. 1984); Sells v. State. 98 N.M. 786, 653 P.2d 162 (1982); State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979); State v. Cruz, 86 N.M. 455, 525 P.2d 382 (Ct. App. 1974).
291. N.M. STAT. ANN. § 30-4-3 (Repl. Pamp. 1984); State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969).
292. *Bachicha*, 111 N.M. at 604-05, 808 P.2d at 54-55.
293. *Id.*
294. *See supra* notes 243-44 and accompanying text.
295. *Id.* at 606, 808 P.2d at 56 (Hartz, J., concurring).
296. 111 N.M. 357, 805 P.2d 624 (1991).
297. *Id.* at 38, 805 P.2d at 325.
298. *Id.*
299. *Id.*

for criminal sexual penetration.[300] The case was remanded to the trial court to vacate fourteen convictions and sentences and to resentence accordingly.[301]

The court reasoned that without a clear statutory command that each re-penetration constituted a distinct offense, the court could not say that the New Mexico Legislature intended multiple punishments.[302] The court held that "separate penetrations can occur within sufficient temporal proximity to raise doubt whether the legislature intended separate punishments for those acts which could equally be inspired by a single criminal intent bent on a single assaultive episode."[303] Where there is doubt the court indicated reliance on the rule of lenity.[304]

The instant case follows the line of reasoning previously described in *State v. Pierce*.[305] In *Pierce* the supreme court merged fourteen separate counts of child abuse into two, because it found that the legislature did not intend for a defendant to be subject to multiple punishments for a single act of child abuse.[306] The court held that multiple convictions are allowed where there is evidence showing that an abusive act is interrupted and then another act is commenced;[307] and also that each act must be accompanied by the requisite unlawful conduct.[308] As in *Pierce*, the state in *Herron* did not establish that each act was distinct from the others.

Herron is distinguishable from *Pierce*, however, because the notion of completeness regarding the act of sexual penetration is not pertinent to acts of child abuse.[309] The supreme court concluded that the notion of completion served to distinguish between an attempt and a completed crime, not between two completed crimes. Therefore, this court goes beyond *Pierce* to clarify and eliminate potential confusion in determining legislative intent.

Finally, in *State v. Mares*[310] the defendant sought merger of kidnapping and criminal sexual penetration counts and also merger of four counts of battery. In this case, the victim met the defendant in a bar.[311] They left the bar together in order to obtain some marijuana.[312] After giving another couple a ride home, the defendant and victim stopped at a park

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300. *Herron*, 111 N.M. at 363, 805 P.2d at 330.

301. *Id.*

302. *Id.* at 360-61, 805 P.2d at 327-28; *see also* N.M. STAT. ANN. § 30-9-11 (Repl. Pamp. 1984).

303. *Herron*, 111 N.M. at 360, 805 P.2d at 327.

304. *Id.* at 361, 805 P.2d at 328 (citing Bell v. United States, 349 U.S. 81, 83-84 (1955)). "The Court explained the rule 'means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.'"

305. 110 N.M. 76, 792 P.2d 408 (1990).

306. *Id.*

307. *Id.* at 85, 792 P.2d at 417-18.

308. *Id.*

309. *See* People v. Harrison, 48 Cal. 3d 321, 329, 768 P.2d 1078, 1082, 256 Cal. Rptr. 401, 405 (citing CAL. PENAL CODE § 289 (West 1988)) ("a violation of section 289 is 'complete' the instant 'slight' 'penetration' of the proscribed nature occurs").

310. 112 N.M. 193, 812 P.2d 1341 (Ct. App. 1991).

311. *Id.* at 195, 812 P.2d at 1343.

312. *Id.*

to use the restrooms.[313] Subsequently, the defendant made "advances" towards the victim.[314] The victim attempted to repel the defendant's efforts, but the defendant became angry and began to choke the victim.[315] A struggle ensued in which the defendant hit the victim with his fists.[316] When the victim attempted to escape, the defendant caught her and choked and hit her.[317] The defendant also attempted to rape her.[318] He penetrated the victim vaginally.[319] Subsequently, the victim escaped.[320]

The defendant sought merger of the kidnapping and criminal sexual penetration counts and also merger of the four counts of battery.[321] Applying a fact-based analysis, the court of appeals upheld the separate convictions of kidnapping and criminal sexual penetration, because the facts necessary to prove both crimes are different.[322] The court also remanded the case to the trial court with instructions to vacate all but one of the battery convictions and sentences, and to resentence the defendant on one count only.[323]

The *Mares* court's analysis reflected its decision in *Herron v. State*.[324] In *Herron*, the court held that the criminal sexual penetration statute did not separately punish each penetration during a continuous attack, unless proof of distinctive acts regarding each penetration existed.[325] The court in *Mares* applied the *Herron* analysis to multiple counts of batteries, but found the record inadequate to establish distinctive acts for purposes of multiple offenses.[326] In these three cases, it appears that both the New Mexico Court of Appeals and the New Mexico Supreme Court have shifted to a fact-based analysis combined with an indirect statutory construction analysis to determine legislative intent regarding multiple punishment.

In a highly-publicized case, *Swafford v. State*,[327] the supreme court found no double jeopardy bar to separate convictions and punishments for incest and criminal sexual penetration and assault with intent to commit rape and criminal sexual penetration.[328] The victim was the defendant's half-sister.[329] While visiting the defendant and his family, both

313. *Id.*
314. *Id.*
315. *Id.* at 196, 812 P.2d at 1344.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 198, 812 P.2d at 1346.
322. *Id.*
323. *Id.* at 201-2, 812 P.2d at 1349-50.
324. 111 N.M. 357, 805 P.2d 624 (1991).
325. *Id.* Various factors which help determine whether acts are distinct include the time between acts, the location of the victim at the time of each act, the existence of and intervening event, distinctions in the commission of the acts, the defendant's intent, and the number of victims. *Id.* at 359, 805 P.2d at 626.
326. *Mares*, 112 N.M. at 199, 812 P.2d at 1347.
327. 112 N.M. 3, 810 P.2d 1223 (1991).
328. *Id.* at 11-12, 810 P.2d at 1231-32.
329. *Id.* at 6, 810 P.2d at 1226.

the victim and the defendant spent the evening at home drinking.[330] The victim went to bed and was awakened by the defendant, who was pulling a rope he had tied around her wrist.[331] The defendant responded violently to the victim's attempts to repel his attack.[332] The defendant tied the victim's arms and legs to the bed.[333] The defendant was charged with criminal sexual penetration with a candle and his penis.[334] He was sentenced to terms of four years each for third degree sexual penetration, incest, and aggravated assault plus two years for false imprisonment.[335] The defendant claimed a violation of double jeopardy protection against multiple punishments for the same offense because the acts arose out of the same act of sexual intercourse and each offense necessarily includes the other and must merge for sentencing.[336]

The supreme court clearly distinguished between those cases in which the defendant has been charged with multiple violations of a single statute based on a single course of conduct, and cases in which the defendant is charged with violations of multiple statutes.[337] In both cases, whether legislative intent exists to authorize multiple punishments is the relevant inquiry.[338]

After reviewing and classifying the various tests previously applied in New Mexico,[339] the *Swafford* court adopted a two-part test to determine legislative intent to punish.[340] The first part of the test inquires whether or not the conduct underlying the offense violates both statutes.[341] If the conduct is determined to violate both statutes, then the second part of the test applies.[342] If the conduct is separate and distinct, however, then the inquiry ends.[343] This part of the test necessarily involves a close examination of the facts.

The second prong of the test focuses on the statutes to determine whether the legislature intended to create separately punishable offenses.[344] "Absent a clear expression of legislative intent, a court first must apply the *Blockburger* test to the elements of each statute."[345] A finding that

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330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 7, 810 P.2d at 1227.
337. *Id.*
338. *Id.*
339. *Id.* at 11-12, 810 P.2d at 1231-32. The previously applied tests in New Mexico have included: 1) the "same evidence test"; 2) the "necessarily involved" test; and 3) the "necessarily included" test. *Id.* All three of these tests are variations involving an examination of statutory elements. A fourth test, first set forth in State v. DeMary, 99 N.M. 177, 655 P.2d 1021 (1982), allows the accused to a "lesser offense" instruction based on the evidence obtained at trial and the elements of the lesser offense. *Swafford*, 112 N.M. at 12, 810 P.2d at 1232.
340. *Swafford*, 112 N.M. at 13, 810 P.2d at 1233.
341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* For a discussion of the *Blockburger* test, see *supra* notes 243-44 and accompanying text.

the elements of the statutes are not subsumed within the other is not conclusive, but it creates a presumption that the statutes punish distinct offenses.[346] This presumption may be overcome by other traditional means of determining legislative intent, including an identification of social evils sought to be addressed and the quantum of punishment available for each offense.[347]

In this case, the court found no double jeopardy bar to both convictions and consecutive sentences for incest and criminal sexual penetration.[348] In applying the first part of the test, the court found that the conduct underlying both offenses violated both statutes.[349] Additionally, upon applying the second part of the analysis, there was a strong indication of legislative intent to punish each offense separately.[350] The statutes indicate separate elements and also achieve different policy objectives.[351] The court also held that separate convictions and punishments for assault with intent to commit rape and criminal sexual penetration are appropriate in this case.[352] Applying a fact-based analysis, the court found evidence of distinctive rather than unitary acts. According to that finding, the court did not need to apply the second prong of the test to conclude that the convictions and sentences were proper.[353]

Thus, *Swafford* provides New Mexico with an expanded test that is inclusive of previously applied tests pertaining to multiple punishments under the same offense doctrine. This test incorporates a fact-based analysis, a statutory construction analysis, and traditional legislative intent analyses through a simple two-step process. Additionally, it allows for consideration of social policy to influence the determination of whether or not multiple conviction or punishment is proper.

C. *Sentence Enhancement*

Sentence enhancement also falls within the fifth amendment protection provided by the double jeopardy clause against multiple punishments for the same offense.[354] New Mexico asserts the same double jeopardy guarantee as the federal Constitution under its own state constitution.[355] Additionally, two pertinent New Mexico statutes provide objective standards and guidelines for enhancing basic sentences due to aggravating circumstances.[356] Other relevant statutes include the Criminal Sentencing

346. *Id.*
347. *Id.*
348. *Id.*
349. *See id.* at 14, 810 P.2d at 1234.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. U.S. CONST. amend. V.
355. N.M. CONST. art. II, § 15.
356. N.M. STAT. ANN. § 31-18-15.1 *Alteration of basic sentence; mitigating or aggravating circumstances; procedure*; N.M. STAT. ANN. § 31-20A-5 *Aggravating circumstances.*

Act, which incorporates the habitual-offender statute.[357] Under that statute[358] enhancement depends on the number of the defendant's prior felony convictions.[359]

New Mexico has asserted this same constitutional protection in holding that a state's attempt to enhance an individual's sentence under a habitual offender statute after initial sentencing may constitute a double jeopardy violation.[360] Sentence enhancement may also violate double jeopardy standards if it is not "within objectively reasonable expectations of finality."[361] Accordingly, a sentence may not be enhanced after the sentence has been served.

New Mexico has also held that sentence enhancement is impermissible when the same facts used to convict a defendant are also used to enhance the defendant's sentence under the habitual offender statute.[362] The double jeopardy clause also prohibits double use of the same felony.[363] The following section examines seven cases that raised double jeopardy claims pertaining to sentence enhancement during the current survey period.[364] Six of these cases involve this second type of sentence enhancement.

1. Enhancement and Prior Convictions

In *State v. Castrillo*,[365] the New Mexico Court of Appeals held that the enhancement provisions of Castrillo's sentence were invalid. Castrillo had acknowledged that he was a felon and that he had been in possession of a firearm.[366] Castrillo was convicted of being a felon in possession of a firearm.[367] His sentence was enhanced as a habitual offender.[368] Castrillo contended that the use of the same prior felony to prove both the crime of felon in possession of a firearm and his status as a habitual offender violated the prohibition of double jeopardy.[369] The state conceded that the sentence was improper.[370] The court concluded, therefore, that

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357. N.M. STAT. ANN. 1978, § 31-18-13(A) (Repl. Pamp. 1987) states: "all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the Criminal Sentencing Act . . . ." *Id.*

358. *Id.* § 31-18-17.

359. State v. Peppers, 110 N.M. 393, 400, 796 P.2d 614, 621 (1990).

360. March v. State, 109 N.M. 110, 782 P.2d 82 (1989).

361. *Id.*

362. *Peppers*, 110 N.M. at 400, 796 P.2d at 621.

363. State v. Haddenham, 110 N.M. 149, 793 P.2d 279, *cert. denied*, 110 N.M. 72, 792 P.2d 48 (1990).

364. State v. Castrillo, 112 N.M. 766, 819 P.2d 1324 (1991); State v. Calvillo, 112 N.M. 140, 811 P.2d 794 (Ct. App. 1991); State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991); Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991); State v. Reneau, 111 N.M. 217, 804 P.2d 408 (Ct. App. 1990); State v. Smith, 110 N.M. 534, 797 P.2d 984 (Ct. App. 1990); State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

365. 112 N.M. 766, 819 P.2d 132 (1991).

366. *Id.* at 769, 819 P.2d 1327.

367. *Id.*

368. *Id.*

369. *Id.* at 767, 819 P.2d 1325.

370. *Id.*

the enhancement provision of the defendant's sentence was invalid.[371] The case was remanded for resentencing.[372]

In *Swafford v. State*,[373] the defendant contended that enhancement cannot be based on an element—in this case the victim's blood relationship to defendant—that was required to convict the defendant of incest in the same trial.[374] The court agreed, because use of the same statutory element for conviction *and* enhancement is "repetitive of the punishment the legislature has established for the crime"[375] and in violation of a New Mexico statute.[376]

Two other cases from this survey period upheld the defendant's convictions and enhanced sentences. The defendant's convictions were affirmed in *State v. Peppers*.[377] On October 24, 1988, Peppers pleaded no contest to a charge of failure to appear for sentencing on a conviction of vehicular homicide.[378] The next day the state filed supplemental criminal information and alleged that Peppers was a habitual offender.[379] On October 26, 1988, Peppers admitted to being an habitual offender.[380] On November 1, the court filed the judgment and sentence, plus an enhanced sentence of eight years under the habitual offender statute.[381] Subsequently, Peppers filed a motion to withdraw his plea.[382] One of the issues Peppers raised on appeal was whether the vehicular-homicide conviction could be used to enhance his failure-to-appear sentence.[383]

The court of appeals found that the two acts of vehicular homicide and failure to appear constituted two separate acts, contrary to defendant's suggestion otherwise.[384] The court stated that the two acts are not contemporaneous and "the state did not have to prove vehicular homicide as an element of the failure to appear."[385] The court further reasoned that although previous New Mexico law[386] derives from an assumption about legislative intent, such as if a previous felony is considered to determine the punishment, the legislature does not intend that the same previous felony can also be used to establish that defendant was a habitual offender.[387] In its reasoning the court distinguished this case from previous

371. *Id.*
372. *Id.*; *see also* State v. Reneau, 111 N.M. 217, 804 P.2d 408 (Ct. App. 1990) (holding it impermissible to sentence defendant as habitual offender when same facts were relied on to convict him of felon in possession of a firearm).
373. 112 N.M. 3, 810 P.2d 1223 (1991).
374. *Id.* at 16, 810 P.2d 1236.
375. *Id.*
376. *See* N.M. STAT. ANN. § 31-18-15.1 (Repl. Pamp. 1990).
377. 110 N.M. 393, 394, 796 P.2d 614, 615 (Ct. App. 1990).
378. *Id.* at 703
379. *Id.* at 394-95, 796 P.2d 615-16.
380. *Id.* at 394, 796 P.2d 615.
381. *Id.*
382. *Id.*
383. *Id.* at 394, 796 P.2d 615.
384. *Id.*
385. *Id.* at 400, 796 P.2d 621.
386. State v. Haddenham, 110 N.M. 149, 763 P.2d 279 (Ct. App. 1990); State v. Keith, 102 N.M. 462, 697 P.2d 145 (Ct. App. 1985).
387. *Peppers*, 110 N.M. at 400-01, 796 P.2d at 621-22.

New Mexico cases.[388] Here, "the same facts are not used both to prove the offense and to enhance the punishment."[389] Conviction of the offense being tried is necessary for purposes of the habitual offender statute, but not to prove failure-to-appear.[390]

Similarly, in *State v. Calvillo*[391] the court of appeals regarded Calvillo's prior convictions as separate. On October 27, 1986, Calvillo was convicted of burglary and battery on a peace officer.[392] The crimes were disposed of at the same time even though they were committed on different dates.[393] On December 5, 1990, Calvillo was convicted of the crime of felon in possession of a firearm.[394] At the trial, the parties stipulated to Calvillo's previous burglary conviction.[395] Following the felon in possession of a firearm conviction, the state filed supplemental information.[396] The trial court dismissed the information based on its interpretation of *State v. Haddenham*.[397] The state appealed the trial court's decision.[398]

In this case the New Mexico Court of Appeals found no "double use" problems analogous to *Haddendam*, because here the question was whether the judgment may be "split" such that one conviction may be used to enhance under the habitual offender statute, while the other may be used to prove the underlying felony for the felon in possession charge.[399] Although both the habitual offender and felon in possession of a firearm statutes have the common purpose of deterrence for the commission of subsequent crimes, the felon in possession of a firearm statute serves an additional purpose.[400] This statute also protects society by prohibiting the possession of firearms by felons.[401] Given this additional policy consideration, the court saw no problem with splitting the convictions to serve separate purposes.[402]

One final case regarding an enhanced sentence, *State v. Watchman*,[403] involved aggravating a defendant's felony conviction. The conviction was based upon his prior uncounseled "driving while intoxicated" ("DWI") convictions obtained in the Navajo Tribal Court and in the Gallup Municipal Court. On October 15, 1988, Watchman was involved in a

388. *Id.* at 401, 796 P.2d at 622.
389. *Id.*
390. *Id.*
391. 112 N.M. 140, 811 P.2d 794 (Ct. App. 1991).
392. *Id.* at 141, 811 P.2d 795.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.* (citing State v. Haddenham, 110 N.M. 149, 793 P.2d 279 (Ct. App. 1990)). The court held that a trial court could not sentence a defendant as a habitual offender when the same felony was relied upon to convict him of being a felon in possession of a firearm. *Id.*
398. *Id.*
399. *Id.*
400. *Id.* at 612.
401. *Id.*
402. *Id.*
403. 111 N.M. 727, 809 P.2d 641 (Ct. App.), *cert. denied*, 111 N.M. 529, 807 P.2d 227 (1991).

head-on collision, which resulted in the death of two people.[404] Watchman pleaded guilty to two counts of vehicular homicide.[405] The trial court requested a presentence report.[406] The report indicated prior convictions in tribal court and the Gallup Municipal Court for DWI.[407] Watchman moved to exclude this evidence, but the trial court denied the motion.[408] The trial court found that Watchman's basic sentence should be enhanced by an additional year because of aggravating circumstances.[409]

The New Mexico Court of Appeals held that the trial court erred in aggravating Watchman's felony conviction based upon his prior uncounseled DWI convictions.[410] The court explained that it is improper to sentence a defendant as a second offender, enhancing the penalty imposed, when the defendant's prior conviction was obtained without benefit of counsel.[411]

Regarding the use of prior convictions for purposes of sentence enhancement, it seems that the court has not diverted from its prior reasoning. Simply stated, New Mexico courts are willing to allow sentence enhancement only where no "double use" is evident.

2. Enhancement and Guilty Plea

In *State v. Smith*,[412] the New Mexico Court of Appeals reversed the defendant's sentence, including enhancement, and remanded for further proceedings contingent upon the defendant's decision to withdraw his guilty plea. Smith pleaded guilty to robbery.[413] At the sentencing hearing Smith's sentence was enhanced pursuant to section 31-18-16.1(A)(2) of the Criminal Sentencing Act, over his objection.[414] Smith claimed he was entitled to notice of the state's intent to seek enhancement and that, upon remand, only the basic sentence should be entered.[415]

The court reasoned that although there was no plea agreement between Smith and the state, a sufficient remedy would allow Smith to be returned to his earlier position, since there was no evidence of Smith's reliance on his plea.[416] Furthermore, now that Smith had received notice, it would be appropriate to remand for a sentencing hearing.[417] Finally, the court stated that double jeopardy did not preclude a new trial on the enhancement issue.[418]

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404. *Id.* at 729, 809 P.2d at 643.
405. *Id.*
406. *Id.*
407. *Id.* at 729-30, 809 P.2d at 643-44.
408. *Id.* at 730, 809 P.2d at 644.
409. *Id.*
410. *Id.* at 733, 809 P.2d at 647.
411. *Id.* (following State v. Ulibarri, 96 N.M. 511, 632 P.2d 746 (Ct. App. 1981)).
412. 110 N.M. 534, 797 P.2d 984 (Ct. Ap. 1990).
413. *Id.* at 535, 797 P.2d 985.
414. *Id.*
415. *Id.*
416. *Id.* at 535-36, 797 P.2d at 985-86.
417. *Id.*
418. *Id.* at 536-37, 797 P.2d at 986-87 (citing State v. Linam, 93 N.M. 307, 600 P.2d 253, *cert. denied*, 444 U.S. 846 (1979)).

IV. EVIDENCE

The New Mexico Supreme Court and the New Mexico Court of Appeals have addressed several hearsay issues during the survey year. The courts examined the constitutional right to confront a witness in the context of admitting out-of-court statements,[419] evaluated the scope of the excited utterance doctrine,[420] and addressed the admissibility of out-of-court statements that are recanted at trial.[421] The courts also examined relevancy issues surrounding the admissibility of prior convictions,[422] witness credibility,[423] and the admissibility of insurance in a criminal case.[424] Finally, the courts examined the abuse of discretion doctrine,[425] and sufficiency of evidence questions.[426]

A. Hearsay Cases

1. Constitutional Right to Confront a Witness

The right to confront a witness arises from the sixth amendment of the United States Constitution and a similar provision of the New Mexico Constitution.[427] These provisions simply state that a defendant has a right "to be confronted with the witnesses against him."[428] The United States Supreme Court has construed this to mean, generally, that the right to confront a witness is satisfied where the declarant of the statement is subject to cross examination at any stage of the proceedings.[429] In *Ohio v. Roberts*,[430] the Supreme Court held that a two-step analysis must be applied before a statement can be admitted without contravening a defendant's rights under the confrontation clause.[431] First, there must be

419. State v. Hoeffel, 112 N.M. 358, 815 P.2d 654 (Ct. App.), *cert. denied*, 112 N.M. 279, 814 P.2d 457 (1991); State v. Sanchez, 112 N.M. 59, 811 P.2d 92 (Ct. App. 1991); State v. Pacheco, 110 N.M. 599, 798 P.2d 200 (Ct. App.), *cert. denied*, 110 N.M. 533, 797 P.2d 983 (1990).

420. State v. Mares, 112 N.M. 193, 812 P.2d 1341 (Ct. App.), *cert. denied*, 112 N.M. 235, 814 P.2d 103 (1991).

421. State v. Vigil, 110 N.M. 254, 794 P.2d 728 (1990).

422. State v. Reneau, 111 N.M. 217, 804 P.2d 408 (Ct. App. 1990); State v. Duncan, 111 N.M. 354, 805 P.2d 621 (1991); State v. Baca, 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990), *cert. denied*, 111 N.M. 164, 803 P.2d 253 (1991).

423. State v. Reynolds, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990), *cert. denied*, 111 N.M. 164, 803 P.2d 253 (1991); State v, Finchum, 111 N.M. 716, 809 P.2d 630 (1991); State v. Flanagan, 111 N.M. 93, 801 P.2d 675 (Ct. App. 1990), *cert. denied*, 111 N.M. 77, 801 P.2d 659 (1990).

424. *Flanagan*, 111 N.M. at 93, 801 P.2d at 675.

425. State v. Mathis, 111 N.M. 687, 808 P.2d 972 (Ct. App.), *rev'd*, 112 N.M. 744, 819 P.2d 1302 (1991); Montoya v. Super Save Warehouse Foods, 111 N.M. 212, 804 P.2d 403 (1991); Scoggins v. State, 111 N.M. 122, 802 P.2d 631 (1990).

426. State v. Muniz, 110 N.M. 799, 800 P.2d 734 (Ct. App. 1990), *cert. denied*, 110 N.M. 749, 799 P.2d 1121 (1990); State v. Rubio, 110 N.M. 605, 798 P.2d 206 (Ct. App. 1990), *cert. denied*, 110 N.M. 641, 798 P.2d 591 (1990).

427. U.S. CONST. amend. VI; N.M. CONST. art. II, § 14.

428. U.S. CONST. amend. VI; N.M. CONST. art. II, § 14.

429. California v. Green, 399 U.S. 149 (1970). (confrontation concerns satisfied by cross-examination of declarant at preliminary hearing).

430. 448 U.S. 56 (1980).

431. *Id.*

a showing that the declarant is unavailable at trial.[432] Second, there must be sufficient indicia of reliability to the statement.[433]

The New Mexico Court of Appeals recently examined the meaning of the "indicia of reliability" prong of the test. In *State v. Pacheco*,[434] defendants Pacheco and Baca picked up two women who were walking home from a bar in Espanola.[435] The women were a mother and daughter.[436] The four of them returned to the home of the two women.[437] Pacheco and Baca allegedly tied one woman in the living room and forced the other woman to engage in sexual intercourse.[438] The defendants then forced her to leave with them and they drove to Ojo Caliente to take Pacheco home.[439] On the drive back, Baca allegedly forced intercourse on the woman again before they returned to Espanola.[440]

Pacheco was charged with false imprisonment and kidnapping.[441] Baca was charged with false imprisonment, kidnapping, and criminal sexual penetration.[442] Pacheco did not testify at the trial.[443] Baca testified that the woman voluntarily accompanied him on the drive and voluntarily engaged in intercourse.[444] During the trial, the court admitted an out-of-court statement by Michael Campos.[445] Campos was a friend of Baca and had stated that Baca told him he had "partied" with the woman on the night the alleged crimes took place.[446] The trial court admitted this statement under "other" hearsay exceptions.[447]

The court of appeals held that the statement was improperly admitted because it lacked sufficient reliability to satisfy confrontation concerns.[448] The court looked at whether this out-of-court statement was admissible by applying a trustworthiness test.[449] The court held that the statement by Campos was not admissible because it lacked "any circumstantial guarantee of trustworthiness."[450] The court indicated there would not have been a hearsay problem if Campos had testified at the trial.[451] The court identified four dangers of hearsay evidence to be considered in determining trustworthiness of a statement.[452] They are ambiguity, lack

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432. *Id.* at 65.
433. *Id.* at 65-66.
434. 110 N.M. 599, 789 P.2d 200 (Ct. App. 1990).
435. *Id.* at 600, 798 P.2d at 201.
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.* at 600-01, 798 P.2d at 201-02.
445. *Id.* at 601, 798 P.2d at 202.
446. *Id.*
447. *See* N.M. R. EVID. 11-804(B)(6).
448. *Pacheco*, 110 N.M. at 603, 798 P.2d at 204.
449. *Id.*
450. *Id.*
451. *Id.* at 601, 798 P.2d at 202.
452. *Id.* at 603, 798 P.2d at 204.

of candor, faulty memory, and misperception.[453] In applying these standards, the court found dangers of ambiguity, lack of candor, and faulty memory, and thus found the statement inadmissible.[454] The importance of this case is the ruling by the court that hearsay exceptions must be narrowly construed in criminal cases because of confrontation concerns.

The court of appeals also examined the trustworthiness of an out-of-court statement by a co-defendant in a burglary case. In *State v. Sanchez*,[455] Sanchez was charged with burglary and conspiracy.[456] The evidence against Sanchez was based on a taped interview with co-defendant Chacon that linked Sanchez to the crimes.[457] Chacon was declared unavailable as a witness because he said he did not recall the taped interview due to drug use.[458]

The court of appeals held the admission of this statement was proper because there was other corroborative evidence, and the trial court properly found indicia of trustworthiness sufficient to overcome concerns of the defendant being able to confront a witness.[459] Instead of applying the "four dangers" test of *Pacheco*, the court looked to the totality of the circumstances in determining the trustworthiness of the statement.[460] The court employed the same confrontation clause analysis used by the United States Supreme Court in *Idaho v. Wright*.[461] The court examined whether there was other corroborative evidence, whether the statement attempted to shift blame, whether the statement was against the penal interest of the declarant, and whether the declarant was offered leniency in exchange for the statement.[462] Applying this totality of the circumstances test, the court held that the statement was not made in exchange for leniency, was not made to shift blame, and was against the penal interest of the declarant.[463] Based on these factors and the existence of other corroborative evidence, the court held that the statement was properly admitted.[464] In this case, the statement was by a co-defendant, which prompted the court to apply a slightly different trustworthiness test from the test applied in the earlier *Pacheco* ruling.

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453. State v. Taylor, 103 N.M. 189, 197, 704 P.2d 443, 451 (Ct. App. 1985).
454. *Pacheco*, 110 N.M. at 603, 798 P.2d at 204.
455. 112 N.M. 59, 811 P.2d 92 (Ct. App. 1991).
456. *Id.* at 60, 811 P.2d at 94.
457. *Id.*
458. *Id.*
459. *Id.* at 65, 811 P.2d at 98. The court also noted that this statement could have been admitted under the prior inconsistent statements exception to hearsay at N.M. R. EVID. 11-801(D)(1)(a).
460. *Sanchez*, 112 N.M. at 65, 811 P.2d at 98.
461. 497 U.S. 805 (1990). The confrontation clause analysis as set forth by the Supreme Court in this case looked at the totality of the circumstances and declined to apply a mechanical test. *See* State v. Earnest, 106 N.M. 411, 744 P.2d 539 (1987), *cert. denied*, 484 U.S. 924 (1987) (where the New Mexico Supreme Court held that admission of a confession by a co-defendant did not violate the confrontation clause because it had sufficient indicia of reliability because the co-defendant was not offered leniency in exchange for the statement, the statement was against the declarant's penal interest, the statement did not attempt to shift blame, and there was other evidence to corroborate the statement).
462. *Sanchez*, 112 N.M. at 65, 815 P.2d at 98.
463. *Id.*
464. *Id.*

In *State v. Hoeffel*,[465] Hoeffel claimed a violation of his right to confront a witness when the court refused to allow the result in a prior civil case, which discharged him from liability, to be introduced in a criminal case of embezzlement. Hoeffel was charged with embezzling furniture from his landlady.[466] Prior to the criminal proceeding, Hoeffel had filed a civil claim against his landlady, claiming she had improperly seized his personal belongings.[467] The landlady counterclaimed that Hoeffel improperly removed furniture from his rental unit.[468] The judge presiding over the civil action issued an opinion letter stating he believed the landlady's counterclaim of improper removal of furniture by Hoeffel was without merit.[469] This opinion letter was what Hoeffel sought to introduce in the subsequent criminal trial for embezzlement.[470] The trial court did not allow the opinion letter into evidence.[471] Nonetheless, Hoeffel was allowed to ask the landlady about it during cross examination.[472] Hoeffel argued his ability to confront the landlady as a witness was limited because the court did not allow him to introduce the opinion letter into evidence.[473]

The court of appeals stated that the New Mexico courts only allow the introduction of prior judgments in two situations and that the opinion letter failed to fall into either case.[474] The court of appeals held there was no confrontation clause problem because Hoeffel was allowed to cross-examine the landlady with respect to the existence of the civil suit.[475] Thus, the court of appeals has indicated that it is unwilling to broaden the exceptions for admissibility of prior proceedings. This case reiterates that the court of appeals narrowly construes exceptions to hearsay rules when confrontation concerns exist.

2. Statement Recanted at Trial

There are two basic reasons for the hearsay exception for prior inconsistent statements which effectually give such statements substantive effect.[476] First, because it is proper for the jury to consider such statements

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465. 112 N.M. 358, 815 P.2d 654 (Ct. App.), *cert. denied*, 112 N.M. 279, 814 P.2d 457 (1991).
466. *Id.* at 359, 815 P.2d at 655.
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. *See* N.M. R. EVID. 11-803(V), (W). Provision "V" allows for admission of a judgment of a previous felony conviction to prove any fact essential to sustain the judgment, not including judgments against persons other than the accused when offered by the state in a criminal prosecution for a purpose other than impeachment. Provision "W" allows for admission of a judgment as to proof of matters of personal, family, or general history or boundaries when essential to the judgment when such matters would be provable by evidence of reputation. Furthermore, although the court treated the opinion letter as a prior judgment, it is unclear whether an opinion letter should be considered a judgment within the meaning of the rules.
475. *Hoeffel*, 112 N.M. at 361, 811 P.2d at 657.
476. *Maestas*, 92 N.M. at 144, 584 P.2d at 191.

for impeachment purposes, the jury may also consider the trustworthiness of the prior statement versus the trustworthiness of the testimony at trial.[477] Second, statements which are made closer in time to the event may be more trustworthy than testimony at trial because a declarant has not been influenced by outside pressures.[478]

State v. Vigil[479] was a trial for first degree murder. Vigil shot and killed her husband, claiming the gun had gone off accidentally as the result of a struggle.[480] The trial court found that the gun was intentionally discharged.[481] The trial court admitted an out-of-court statement of a witness who said the defendant had admitted to shooting her husband because she was upset at having discovered he had molested her daughter.[482] This statement was recanted by the witness and she refused to attribute the statement to the defendant at the trial.[483] The trial court admitted this statement that was recanted during the trial under the prior inconsistent statement exception to hearsay.[484] Vigil was convicted of the first degree murder of her husband.[485]

She appealed the conviction, claiming, *inter alia*, that the trial court erred in admitting a prior extrajudicial statement recanted by the declarant at trial.[486] The court of appeals allowed the statement.[487] The court of appeals held the statement was clearly admissible under the prior inconsistent statement exception to hearsay, and although the trial court could have refused to admit the statement because of prejudicial effect, it is clearly within the discretion of the trial court to weigh the probative value of a statement against prejudicial effect.[488] The conviction was affirmed.[489] This case reinforces that broad latitude is afforded to the trial courts in considering whether to admit prior inconsistent statements.

B. Relevancy

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[490] New Mexico courts have interpreted relevant evidence to be

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477. *Id.*
478. *Id.*
479. 110 N.M. 254, 794 P.2d 728 (1990).
480. *Id.* at 256, 794 P.2d at 730.
481. *Id.*
482. *Id.* at 258, 794 P.2d at 732.
483. *Vigil*, 110 N.M. at 258, 794 P.2d at 732.
484. N.M. R. EVID. 11-801(D)(1)(a). This rule states that a statement is not hearsay if a declarant testifies at trial, is subject to cross examination, and the statement offered is inconsistent with the declarant's testimony. The court noted the statement would have been admissible as an admission under N.M. R. EVID. 11-801(D)(2).
485. *Vigil*, 110 N.M. at 254, 794 P.2d at 728.
486. *Id.* at 258, 794 P.2d at 732.
487. *Id.*
488. *See* State v. Davis, 97 N.M. 130, 637 P.2d 561 (1981).
489. *Vigil*, 110 N.M. at 259, 794 P.2d at 733.
490. N.M. R. EVID. 11-401.

evidence that tends to establish a material proposition,[491] is offered to prove an issue and sheds light on that issue,[492] and naturally and logically tends to establish a fact in issue.[493]

1. Prior Convictions: Character Evidence

Where character is an element of the crime, it is admissible under the general provisions of the relevant evidence rule.[494] Generally, character evidence is not admissible to prove conduct;[495] however, evidence of other crimes, wrongs or acts is admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[496] This list, however, is not exclusive.[497] New Mexico courts have been cautious when ascertaining whether character is an element of a crime because of the potential impact on the outcome of the criminal proceeding.

In *State v. Reneau*,[498] Reneau was tried for voluntary manslaughter in the shooting death of her husband.[499] There was a history of abuse to Reneau by her husband.[500] Reneau was staying at her mother's home.[501] Her husband went to the house and threatened Reneau and her mother several times on the day he was shot.[502] He had earlier slashed the tires on her car and also threatened to cut her.[503] After this threat, Reneau pointed a gun at her husband.[504] He laughed, reminding her that the last time she had pointed a gun at him he severely beat her with a lead pipe.[505] Reneau then shot her husband.[506] She was convicted.[507]

The New Mexico Court of Appeals reversed the conviction and remanded the trial because evidence of Reneau's prior acts of violence were improperly admitted.[508] The court held that the character of the defendant is not an element of self-defense so character evidence was not admissible under the other crimes, wrongs, or acts exception to the

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491. State v. Romero, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).
492. State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), *cert. denied*, 80 N.M. 33, 450 P.2d 633 (1969).
493. Wright v. Brem, 81 N.M. 410, 467 P.2d 736 (Ct. App. 1970).
494. N.M. R. EVID. 11-402; *see* State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979); *see also* Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981) (where the court held that this rule does not bar character evidence when character is an element of the crime).
495. N.M. R. EVID. 11-404(A).
496. N.M. R. EVID. 11-404(B).
497. State v. Lara, 109 N.M. 294, 784 P.2d 1037 (Ct. App. 1989).
498. 111 N.M. 217, 804 P.2d 408 (Ct. App. 1990).
499. *Id.* at 218, 804 P.2d at 409.
500. *Id.*
501. *Id.*
502. *Id.*
503. *Id.*
504. *Id.*
505. *Id.*
506. *Id.*
507. *Id.*
508. *Id.* at 219, 804 P.2d at 410.

character evidence rule.[509] The court reasoned that the inquiry into self-defense examines the reasonableness of defendant's fear of imminent danger, which is a question for the jury.[510]

This case clarifies the New Mexico law with regard to whether character evidence is an element of self-defense. Because the court of appeals has held that character evidence is not an essential element of self-defense, evidence of other crimes, wrongs, or acts may not be introduced as relevant in a self-defense inquiry. Such evidence may only be used to rebut good character when the defendant puts her character in issue.[511]

Similarly, in *State v. Duncan*,[512] the New Mexico Supreme Court discussed whether the character of the coercer is an element in the defense of duress.[513] Duncan had met the victim, Polly, and her husband through a prison fellowship program while he was incarcerated at the Los Lunas Correctional Facility.[514] Duncan stayed with them after he was released from prison and maintained contact after he moved into his own place.[515] Duncan had an acquaintance named Wiggington that he knew from prison.[516] Polly had let Duncan store some of Wiggington's personal things at her house.[517] Wiggington went to retrieve his personal effects after he ascertained that Polly's husband would be out of town.[518]

On the night of August 5th, about a week after Wiggington was released, he met Duncan after work, pulled out a knife, and told him he was going to kill Polly.[519] Wiggington told Duncan to telephone Polly.[520] She picked them up at the supermarket and brought them to her home.[521] Duncan testified that he went along with it because he was afraid that Wiggington would kill Polly otherwise.[522] Once they arrived at Polly's home, Wiggington pulled out his knife and told her he was going to rape and rob her.[523] He proceeded to rape her then attempted to suffocate her with a pillow.[524] Wiggington instructed Duncan to suffocate an exchange student staying with Polly who had been kept hostage during the

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509. *See* N.M. R. EVID. 11-404(B). This rule states that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. The case law interpreting this rule indicates that the rule does not bar character evidence when character is an essential element of a crime. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

510. *Reneau*, 111 N.M. at 219, 804 P.2d at 410.

511. N.M. R. EVID. 11-404(A)(1).

512. 111 N.M. 354, 805 P.2d 621 (1991).

513. *Id.* at 355, 805 P.2d at 622. The supreme court opinion refers to the court of appeals' case for a statement of the facts and issues on appeal. The court of appeals' case is State v. Duncan, 30 N.M. BAR BULL. 258 (Ct. App. Apr. 4, 1991).

514. State v. Duncan, 30 N.M. BAR BULL. 258.

515. *Id.* at 259.

516. *Id.*

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.*

523. *Id.*

524. *Id.*

night.[525] Duncan refused to do this and finally persuaded Wiggington to leave the women alone.[526]

At the trial, Duncan claimed the defense of duress because he was afraid Wiggington would kill Polly if he did not cooperate.[527] The trial court excluded evidence regrading the character of Wiggington.[528] Duncan was convicted of aggravated burglary, kidnapping, false imprisonment, armed robbery, criminal sexual penetration, and unlawfully taking of a motor vehicle.[529]

The court of appeals remanded and held that the character of the coercer is an element of the defense of duress.[530] The question was certified by the supreme court.[531] The supreme court held that the character of the coercer is not an element of the defense of duress.[532] The supreme court agreed with the court of appeals that the evidence of character had been improperly excluded.[533] The supreme court reasoned that the character evidence should have been admitted because it went to Duncan's state of mind and was therefore relevant.[534] In this case, the supreme court dispelled a controversy regarding character evidence by definitively holding that character of the coercer is not an element of the defense of duress.

State v. Baca[535] involved the admissibility of prior acts. Baca and his father, the co-defendant in this case, knocked on the door of the victims' apartment in the early hours of the morning, claiming to be looking for someone.[536] Baca and his father were both armed and they forced their way into the apartment and stole money from the victims.[537] Baca was convicted of armed robbery, aggravated burglary, and conspiracy to commit armed robbery.[538]

On appeal, Baca argued that the trial court's admission of police testimony regarding pursuit of him on an allegedly stolen motorcycle was not admissible under the prior bad acts rule.[539] The court of appeals held that an officer's testimony regarding the prior acts of a defendant was admissible.[540] The court of appeals found the officer's testimony was admissible because it was a police mistake and therefore the taint of a prior bad act was not present in the testimony and could not have

525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.* at 260.
529. *Id.* at 258.
530. *Id.* at 263.
531. State v. Duncan, 111 N.M. 354, 355, 805 P.2d 621, 622 (1991).
532. *Id.*
533. *Id.*
534. *Id.* at 357, 805 P.2d at 624.
535. 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990), *cert. denied*, 111 N.M. 164, 803 P.2d 253 (1991).
536. *Id.* at 272, 804 P.2d at 1091.
537. *Id.*
538. *Id.*
539. *Id.* at 277, 804 P.2d at 1096. The prior bad acts rule is found at N.M. R. EVID. 11-404(B).
540. *Id.*

prejudiced the defendant.[541] The court rejected Baca's argument that evidence of an uncharged crime is inadmissible.[542] Baca relied on *State v. Beachum*,[543] which held that evidence of other crimes, wrongs, or acts can only be admitted if it is relevant to an issue other than character and its prejudicial effect is outweighed by its probative value.[544] The court of appeals found the *Beachum* precedent to be "inapposite" because it characterized the officer's testimony as regarding a "police mistake" rather than as regarding a prior bad act.[545] Thus, the court of appeals implicitly broadened the prior acts exception by allowing the uncharged incident to be admitted, while at the same time expressly stating that the incident was not a prior bad act.

2. Prior Convictions: Credibility of a Witness

Evidence of a prior conviction is admissible to impeach the credibility of a witness.[546] The conviction must have been for a crime punishable by death or imprisonment in excess of one year or have involved dishonesty or a false statement.[547] Evidence of crimes more than ten years old is generally not admissible.[548] The purpose of questioning a witness as to prior convictions is to cast doubt on the credibility of a witness.[549]

The court of appeals examined the scope of the prior convictions rule in *State v. Reynolds*.[550] Reynolds was convicted of burglary.[551] Reynolds claimed he was denied a fair trial for several reasons, one of which was the prosecutor's attempt to inform the jury of felony convictions which were over ten years old.[552] During cross examination, Reynolds referred to his "habitual" status.[553] The prosecutor asked what he meant and Reynolds answered it meant he had been in trouble more than once.[554] Reynolds was referring to convictions for crimes over ten years old.[555] Generally, crimes over ten years old are not admissible to impeach the credibility of a witness under the prior convictions rule.[556] The defense moved for a mistrial, which the trial court denied.[557]

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541. *Id.*
542. *Id.*
543. 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).
544. *Id.* at 567, 632 P.2d at 1205.
545. *Baca*, 111 N.M. at 277, 804 P.2d at 1096.
546. N.M. R. EVID. 11-609; *see also* State v. Mares, 112 N.M. 193, 812 P.2d 1341 (Ct. App. 1991).
547. N.M. R. EVID. 11-609.
548. *Id.*
549. *See* State v. Coca, 80 N.M. 95, 451 P.2d 999 (Ct. App. 1969); Sierra Blanca Sales Co., Inc. v. Newco Indus., 84 N.M. 524, 505 P.2d 867 (Ct. App.), *cert. denied* 84 N.M. 512, 505 P.2d 855 (1972).
550. 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990).
551. *Id.* at 264, 804 P.2d at 1083.
552. *Id.* at 267, 804 P.2d at 1086.
553. *Id.*
554. *Id.*
555. *Id.*
556. N.M. R. EVID. 11-609(B).
557. *Reynolds*, 111 N.M. at 267, 804 P.2d at 1086.

The court of appeals ruled it was within the discretion of the trial court to deny the motion for a mistrial.[558] The court of appeals noted that the defense failed to move for the prosecutor to be admonished, which is one possible remedy.[559] The court held there was no error because the defendant mentioned the topic himself and therefore could not claim prejudice.[560] The court reasoned that defense counsel should have objected earlier and not let the defendant answer the prosecutor's question about the meaning of habitual.[561] The court held that although evidence of crimes more than ten years old is generally not admissible to impeach the character of a witness, it is not error to admit such crimes if the witness is responsible for bringing attention to the prior convictions, there is a lack of due diligence on the part of the attorney to correct the situation, and the trial court finds no prejudice.[562] Because Reynolds's attorney failed to object, the court of appeals allowed deviation from the prior convictions rule which prohibits the use of convictions more than ten years old to impeach the credibility of a witness.

In another case, *State v. Finchum*,[563] the New Mexico Supreme Court held that it was not error to admit a statement to a doctor by a defendant that he had killed someone.[564] Finchum was accused of first degree murder, tampering with evidence, and aggravated burglary.[565] Finchum and the victim were acquainted.[566] Finchum and the victim had an argument over whether Finchum should take the drugs the victim offered him.[567] Finchum allegedly said the victim treated him disrespectfully and he wanted to get even.[568] After the body was discovered, Finchum allegedly told several people he had killed the victim.[569] At the trial, the prosecutor was allowed to introduce a statement Finchum had made to his doctor that he had killed someone.[570] Finchum argued his statement to the doctor was extrinsic evidence and not admissible.[571] The trial court allowed the statement.[572] Finchum was convicted by a jury.[573]

The supreme court affirmed the convictions and held Finchum's statement to the doctor admissible because it was not admitted for the truth

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558. *Id.* at 268, 804 P.2d at 1087.
559. *Id.*
560. *Id.* at 267, 804 P.2d at 1086; *see also* State v. Garcia, 80 N.M. 466, 457 P.2d 985 (1969).
561. *Reynolds*, 111 N.M. at 267, 804 P.2d at 1086. The court reiterated the precept that the defense has a duty to object at the earliest time, citing State v. Fish, 102 N.M. 775, 782, 701 P.2d 374, 381 (Ct. App. 1985).
562. *Reynolds*, 111 N.M. at 268, 804 P.2d at 1087.
563. 111 N.M. 716, 809 P.2d 630 (1991).
564. *Id.* at 719, 809 P.2d at 633.
565. *Id.* at 716, 809 P.2d at 630.
566. *Id.* at 717, 809 P.2d at 631.
567. *Id.*
568. *Id.*
569. *Id.*
570. *Id.*
571. *Id.*
572. *Id.*
573. *Id.*

of the matter asserted, but went to the credibility of the witness.[574] The court said this statement was admissible because it was used to impeach Finchum's statement that he had never told anyone he had killed someone.[575] The court did not expressly state as much, but implied that this statement was allowable as a prior inconsistent statement to impeach the declarant.[576]

3. Relevancy of Insurance Coverage and Opinion Testimony Revisited

Generally, evidence of insurance coverage is not admissible in an action for negligence because it is immaterial and prejudicial.[577] It may be admissible when it is highly relevant to an issue in the lawsuit.[578] Evidence of insurance may also be admissible for purposes other than proving negligence, such as proof of ownership.[579] Trial courts have a great deal of discretion in applying this rule and only an abuse of discretion with prejudicial results can be held error.[580]

In *State v. Flanagan*,[581] the trial court held it was not error to admit evidence of insurance in a criminal case.[582] Flanagan was charged with vehicular homicide.[583] Flanagan was driving his vehicle when it accelerated suddenly and hit a truck, causing the truck to roll.[584] The driver of the truck died.[585] There was conflicting evidence regarding the speed at which Flanagan's vehicle was traveling.[586] He was convicted of homicide by vehicle.[587]

Flanagan raised two issues regarding admissibility of evidence on appeal. First, he argued unfair prejudice from the admission of insurance evidence.[588] The court of appeals reasoned that even though mention of insurance coverage is usually prejudicial in a civil case, there was little chance of prejudice from insurance evidence in a criminal case.[589] The court indicated that even if the evidence was improper, the defense should have asked for the jury to be admonished.[590] Second, Flanagan argued

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574. *Id.*
575. *Id.*
576. *See* N.M. R. EVID. 11-801(D)(1)(a).
577. Mac Tyres v. Vigil, 92 N.M. 446, 589 P.2d 1037 (1979); Cardoza v. Town of Silver City, 96 N.M. 130, 628 P.2d 1126 (Ct. App.), *cert. denied*, 96 N.M. 116, 628 P.2d 686 (1981).
578. *Mac Tyres*, 92 N.M. at 448, 589 P.2d at 1039.
579. N.M. R. EVID. 11-411.
580. *Mac Tyres*, 92 N.M. at 448, 589 P.2d at 1039; *see also* Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985).
581. 111 N.M. 93, 801 P.2d 675 (Ct. App. 1990).
582. *Id.* at 98, 801 P.2d at 680.
583. *Id.* at 94, 801 P.2d at 676.
584. *Id.* at 95, 801 P.2d at 677.
585. *Id.*
586. *Id.*
587. *Id.* at 94, 801 P.2d at 676.
588. *Id.* at 95, 801 P.2d at 677.
589. *Id.* at 96, 801 P.2d at 678.
590. *Id.* at 95, 801 P.2d at 677. The court adopted the same standard for criminal cases as the one used in civil cases, stating that prejudicial effects are cured by prompt admonishment. *See* Chavez v. Chenoweth, 89 N.M. 423, 533 P.2d 703 (Ct. App. 1976).

that testimony by a witness that a different witness may have been incorrect was improperly admitted.[591] The court of appeals discussed witness credibility and noted that the rule allows the credibility of a witness to be attacked or supported in the form of an opinion.[592] While the court said it was improper for a witness to testify that another witness was "mistaken," it was permissible for the prosecutor to attempt to clear discrepancies in testimony by asking a witness to explain inconsistencies.[593] Thus, the court of appeals disallowed testimony by a witness that another witness was "mistaken," yet allowed the implication to be made.

C. *Abuse of Discretion*

Abuse of discretion is often claimed by parties on appeal; however, the standard to be applied is vague and an abuse of discretion claim must be considered in light of the particular circumstances of each claim.[594] The New Mexico Court of Appeals has articulated the abuse of discretion standard to be "a ruling clearly against the logic and effect of the facts and circumstances before the court."[595]

The court of appeals addressed an abuse of discretion claim where a trial court dismissed a case when the state failed to comply with discovery. In *State v. Mathis*,[596] the defendants were charged with trafficking controlled substances based on information supplied by an informant who had transacted the drug deals with defendants.[597] The state was ordered to produce certain documents regarding the informant.[598] The state obtained a writ of prohibition from the supreme court staying some of the discovery orders.[599] The trial court then ordered the state to show cause why it had failed to comply with the discovery orders that were not stayed.[600]

At a hearing upon the defendant's motion to dismiss for failure to comply with discovery, the trial court granted the motion because it found undue delay and prejudice caused by the state's failure to comply with discovery.[601] The state appealed the dismissal of the case.[602]

The court of appeals, for the first time, addressed the issue of whether or under what circumstances criminal charges may be dismissed for failure to comply with a discovery order.[603] The court held that dismissal was

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591. *Flanagan*, 111 N.M. at 95, 801 P.2d at 677.
592. *Id.* at 96-97, 801 P.2d at 679-80 (citing N.M. R. EVID. 11-608, which discusses evidence of character and conduct of witnesses).
593. *Id.* at 97, 801 P.2d at 679.
594. *See generally* State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).
595. State v. Lucero, 98 N.M. 311, 314, 648 P.2d 350, 353 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).
596. 111 N.M. 687, 808 P.2d 972 (Ct. App.), *rev'd*, 112 N.M. 744, 819 P.2d 1302 (1991).
597. *Id.* at 689, 808 P.2d at 974.
598. *Id.*
599. *Id.* at 690, 808 P. 2d at 975.
600. *Id.*
601. *Id.*
602. *Id.* at 691, 808 P.2d at 976.
603. *Id.* at 694, 808 P.2d at 979.

too severe of a sanction.[604] The court of appeals reasoned that the conduct of the state was not to be considered unreasonable delay in light of the writ of prohibition by the supreme court.[605] The court also reasoned that the state had complied with the discovery to the best of its ability.[606] The court stated that dismissal of a case for failure to comply with discovery is a severe sanction and that a trial court should impose the least severe sanction available.[607]

The New Mexico Supreme Court granted a writ of certiorari in this case.[608] The supreme court held that the court of appeals erroneously determined that the state could further challenge the discovery orders following the writ of prohibition.[609] The supreme court also found that the trial court was within its discretion when it dismissed the case because of the state's failure to comply with discovery.[610] The supreme court discussed the "prosecutorial team" concept, which requires various agencies to cooperate in good faith with criminal prosecutions.[611] The supreme court reasoned that allowing agencies to challenge discovery orders on jurisdictional grounds would hinder the discovery purpose of bringing forth the true facts.[612]

Montoya v. Super Save Warehouse Foods[613] was a non-criminal case also dealing with an abuse of discretion claim. In *Montoya* the supreme court upheld the jury verdict for Montoya and held it was neither an abuse of discretion nor reversible error to allow an undisclosed witness to testify.[614] The court distinguished this case from *Khalsa v. Khalsa*.[615] In *Khalsa*, the court of appeals held it was error to allow an undisclosed witness to testify because the witness was an expert and knowledge of the expert testimony was crucial to prepare an effective cross-examination.[616] The instant case was distinguished by the *Montoya* court because the undisclosed witness in *Montoya* was a rebuttal witness and testimony by rebuttal witnesses was within the discretion of the trial court.[617]

In *Scoggins v. State*,[618] the supreme court found it was not an abuse of discretion for the trial court to dismiss a case when the state lost its evidence. Scoggins was charged with possession with intent to distribute

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604. *Id.*
605. *Id.* at 693, 808 P.2d at 978.
606. *Id.*
607. *Id.* at 694, 808 P.2d at 979 (citing United States v. Euceda-Hernandez, 768 F.2d 1307 (11th Cir. 1985)).
608. Mathis v. State, 112 N.M. 744, 819 P.2d 1302 (1991).
609. *Id.* at 746, 819 P.2d at 1304.
610. *Id.* at 747, 819 P.2d at 1305.
611. *Id.* at 746, 819 P.2d 1304 (citing State v. Wisniewski, 103 N.M. 430, 435, 780 P.2d 1031, 1036 (1985)).
612. *Id.* at 747, 819 P.2d at 1305.
613. 111 N.M. 212, 804 P.2d 403 (1991).
614. *Id.* at 215, 804 P.2d at 406.
615. 107 N.M. 31, 751 P.2d 715 (Ct. App.), *cert. denied*, 107 N.M. 16, 751 P.2d 700 (1988).
616. *Id.* at 33-35, 751 P.2d at 716-18.
617. *Montoya*, 111 N.M. at 215, 804 P.2d at 406.
618. 111 N.M. 122, 802 P.2d 631 (1990).

methamphetamine and possession of controlled substances.[619] Evidence of drug paraphernalia, latent fingerprints of the defendant, and lab equipment were lost by the police department and the case was dismissed.[620]

The state appealed to the court of appeals and the dismissal was reversed.[621] Scoggins then appealed to the supreme court.[622] The supreme court reversed the court of appeals and sustained the original decision of the trial court.[623] The supreme court reversed the holding of the court of appeals that dismissal of a case is only appropriate where there is gross negligence on the part of the state.[624] The court of appeals held that the proper course of action would be suppression of the lost evidence or admission with full disclosure of the loss and its relevance.[625] The supreme court disagreed. It held that the exclusion of evidence is within the discretion of the trial court after considering the materiality and possible prejudicial effect of the evidence.[626] This holding has the effect of emphasizing the broad discretion given to trial courts in determining evidentiary issues. This case may lead to further debate regarding the appropriateness of a dismissal sanction where evidence is lost in a criminal case.

D. Sufficiency of the Evidence

The standard for determining whether there is evidence sufficient to support a verdict in New Mexico is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every essential element.[627] In drug cases, proof of possession may be established by evidence of the conduct and actions of the defendant along with circumstantial evidence.[628] Constructive possession exists when a defendant has knowledge and control over the presence of drugs.[629] In the event that a defendant is not in exclusive control of the premises, an inference of constructive possession

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619. *Id.*
620. *Id.*
621. *Id.* at 123, 802 P.2d at 632.
622. *Id.* at 122, 802 P.2d at 631.
623. *Id.*
624. *Id.* The court of appeals relied on State v. Doe, 92 N.M. 354, 588 P.2d 680 (Ct. App. 1978), which held that dismissal is only appropriate when there is gross negligence and mere negligence is not enough to compel dismissal. *Scoggins*, 111 N.M. at 122, 802 P.2d at 631.
625. *Scoggins*, 111 N.M. at 123, 802 P.2d at 632. The court of appeals had relied on State v. Chouinard, 96 N.M. 658, 634 P.2d 680 (1981), where New Mexico followed the standard set by the second circuit that sanctions should only be imposed against the government when there is bad faith and that sanctions are not appropriate when evidence is lost out of mere negligence.
626. *Scoggins*, 111 N.M. at 124, 802 P.2d at 633 (citing State v. Chouinard, 96 N.M. 658, 662-63, 634 P.2d 680, 684-85 (1981)). Justice Baca dissented from the majority holding. He asserted that dismissal is only proper where there is bad faith on the part of the prosector and the defendant asserts that prejudice will result if the parties proceed to trial. *Id.* at 124-25, 802 P.2d at 633-34 (Baca, J., dissenting).
627. State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988).
628. State v. Donaldson, 100 N.M. 111, 119, 666 P.2d 1258, 1226 (Ct. App. 1983).
629. State v. Montoya, 85 N.M. 126, 127, 509 P.2d 893, 894 (Ct. App. 1973).

can only be drawn if there are other incriminating circumstances.[630] There were two important sufficiency of the evidence cases decided during this survey period.

In *State v. Muniz*,[631] the court of appeals re-examined the issue of constructive possession in light of the ruling in *State v. Brietag*.[632] In *Muniz*, the police obtained a search warrant for the residence where they believed Muniz resided.[633] In the bedroom, they found marijuana along with letters addressed to the defendant at the searched address.[634] There was no other evidence of any personal items belonging to Muniz.[635] Muniz was convicted of possession of marijuana.[636]

Muniz argued that *Brietag* required the state to account for all of the contents of the bedroom in order to establish that a defendant is in exclusive control.[637] The court of appeals limited the application of *Brietag* by saying it indicated that silence concerning other contents of a room where some of defendant's belongings are found along with drugs could not defeat an inference of possession.[638] This decision indicates that constructive possession may be found with very slight evidence of a defendant's dominion and control.

In *State v. Rubio*,[639] the court of appeals broadened the types of circumstantial evidence that may be used to demonstrate drug possession, adopting the practices of various jurisdictions.[640] In this case, the police obtained a wire tap on the telephone of Jerry Askew.[641] Police intercepted conversations between Askew and Rubio.[642] There was no mention of drugs in these conversations, however. Askew and Rubio arranged to meet after each conversation.[643] Officers observed Askew and Rubio together but did not see drugs or money exchanged.[644] Askew was arrested and named Rubio as a drug customer in a plea agreement.[645]

Rubio was convicted for possession of cocaine based on Askew's testimony and other circumstantial evidence.[646] The evidence presented

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630. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977); State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

631. 110 N.M. 799, 800 P.2d 734 (Ct. App.), *cert. denied*, 110 N.M. 749, 799 P.2d 1121 (1990).

632. 108 N.M. 368, 772 P.2d 898 (Ct. App. 1989). In *Brietag*, the court of appeals held that there was insufficient evidence to establish constructive possession where the defendant leased a home but was absent from the premises and the personal belongings of several people were found in the bedroom where drugs were found. *Id.* at 371, 772 P.2d at 901. The court found insufficient evidence because there were no facts indicating the defendant exercised dominion and control over the drugs. *Id.* at 372, 772 P.2d at 902.

633. *Muniz*, 110 N.M. at 800, 800 P.2d at 735.

634. *Id.* at 800-01, 800 P.2d at 735-36.

635. *Id.* at 801, 800 P.2d at 736.

636. *Id.* at 799, 800 P.2d at 734.

637. *Id.* at 800-01, 800 P.2d at 735-36.

638. *Id.* at 801, 800 P. 2d at 736.

639. 110 N.M. 605, 798 P.2d 206 (1990), *cert. denied*, 110 N.M. 641, 798 P.2d 591 (1990).

640. *Id.* The court discussed the practices of the Fourth, Fifth, and Eleventh Circuits.

641. *Id.* at 607, 798 P.2d at 208.

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.*

646. *Id.* at 605, 798 P.2d at 206.

was the price of the substance, the secretive nature of the transaction between Askew and Rubio, and Askew's previous success in selling the substance.[647] Rubio claimed this was insufficient evidence to support his conviction.[648]

The New Mexico Court of Appeals discussed the various types of circumstantial evidence it generally allows in determining whether a substance is cocaine or not.[649] The court listed the appearance and packing of a substance, the price of a substance, the manner of use of a substance, and the effect of a substance on the user as admissible to show a substance is cocaine.[650] The court of appeals further noted that some jurisdictions allow the secretive nature of a transaction and a seller's previous success in selling a substance as cocaine to be considered as circumstantial evidence.[651] The court of appeals adopted these standards in this case.[652] The court of appeals also adopted as admissible circumstantial evidence the lay testimony of a drug dealer that what he sold was cocaine.[653] In adopting these standards from other jurisdictions, the court of appeals broadened the type of evidence that may used to obtain drug convictions in New Mexico.

E. Conclusion

During this survey year, the New Mexico Supreme Court and the Court of Appeals made several significant evidentiary rulings. First, the court of appeals examined hearsay questions in light of confrontation concerns.[654] The court of appeals also reiterated that excited utterance exceptions to hearsay are not limited according to when they were made.[655]

Second, the supreme court and court of appeals examined issues of character evidence and held that character evidence is not an element of self-defense[656] and character of the coercer is not an element of the defense of duress.[657] The court of appeals also broadened the prior bad

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647. *Id.* at 608, 798 P.2d at 209.
648. *Id.* at 607, 798 P.2d at 208.
649. *Id.* at 608, 798 P.2d at 209.
650. *Id.*
651. *Id.* Here, the court noted the practice of the fifth circuit which recognizes as circumstantial evidence a seller's previous success in selling a substance as cocaine (citing United States v. Eakes, 783 F.2d 499 (5th Cir. 1986), *cert. denied*, 477 U.S. 906 (1986)). The court also noted the practice of the fourth circuit in allowing the secretive nature of a transaction to be introduced as circumstantial evidence (citing United States v. Dolan, 544 F.2d 1219 (4th. Cir. 1976)).
652. *Rubio*, 110 N.M. at 608, 798 P.2d at 209.
653. *Id.* The court notes the practice of the eleventh circuit in allowing testimony of a person with prior experience in the drug trade (i.e., a prior user, seller, or law enforcement officer) to testify as to the identity of a controlled substance (citing United States v. Harrell, 737 F.2d 971, (11th Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)).
654. State v. Pacheco, 110 N.M. 599, 798 P.2d 200 (Ct. App. 1990); State v. Sanchez, 112 N.M. 59, 811 P.2d 92 (Ct. App. 1991); State v. Hoeffel, 112 N.M. 358, 815 P.2d 654 (Ct. App. 1991), *cert. denied*, 112 N.M. 279, 814 P.2d 457 (1991).
655. State v. Mares, 112 N.M. 193, 812 P.2d 1341 (Ct. App. 1991).
656. State v. Reneau, 111 N.M. 217, 804 P.2d 408 (Ct. App. 1990).
657. State v. Duncan, 111 N.M. 354, 805 P.2d 621 (1991).

acts exception by allowing an uncharged incident to be admitted as a prior bad act.[658]

Third, the court of appeals examined the admissibility of prior convictions and held that crimes over ten years old are admissible if the defendant mentions them himself, the attorney does not object, and no prejudice is found.[659]

Fourth, the court of appeals held the prohibition against admitting evidence of insurance does not apply in a criminal case because there is no danger of prejudice.[660] The court of appeals also held that a witness may not testify that another witness is mistaken but may make such an implication.[661]

Fifth, the supreme court examined the abuse of discretion doctrine and held that dismissal may be appropriate in a criminal case where evidence is lost.[662] The supreme court also held it was proper for a lower court to allow an undisclosed rebuttal witness to testify.[663]

Finally, the court of appeals broadened the scope of evidence that may be used to obtain drug convictions.[664]

STANLEY N. HARRIS
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658. State v. Baca, 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990), *cert. denied*, 111 N.M. 164, 803 P.2d 253 (1991).

659. State v. Reynolds, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990), *cert. denied*, 111 N.M. 164, 803 P.2d 253 (1991).

660. State v. Flanagan, 111 N.M. 93, 801 P.2d 675 (Ct. App. 1990).

661. *Id.*

662. Scoggins v. State, 111 N.M. 122, 802 P.2d 631 (1990).

663. Montoya v. Super Save Warehouse Foods, 111 N.M. 212, 804 P.2d 403 (1991).

664. State v. Muniz, 110 N.M. 799, 800 P.2d 734 (Ct. App. 1990), *cert. denied*, 110 N.M. 749, 799 P.2d 1121 (1990); State v. Rubio, 110 N.M. 605, 798 P.2d 206, (Ct. App. 1990), *cert. denied*, 110 N.M. 641, 798 P.2d 591 (1990).