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CRIMINAL LAW

I. INTRODUCTION

During the survey period, from August 1, 1989 to July 31, 1990, New Mexico appellate courts used common rules of statutory construction to decide several criminal cases. Part II of this article analyzes six of these cases and divides them into two categories: the definition of terms, and the interpretation of essential elements of a given offense. Part II.A. discusses: (1) whether a soft drink vending machine is a structure for purposes of the New Mexico burglary statute;[1] (2) whether the motor vehicle code considers a snowmobile a vehicle;[2] and (3) whether a criminal sentence includes the defendant's time served.[3] Part II.B. examines: (1) whether escape is a continuing offense;[4] (2) whether a criminal solicitation is perpetrated when no communication is perfected;[5] and (3) whether a defendant committed forgery, rather than attempted forgery, when the intended victim refused to accept the forged instrument.[6]

Part III of this article looks at five cases arising out of DWI citations. The first two cases follow the evolution of the interpretation of the Fresh Pursuit Act by the New Mexico Supreme Court.[7] The third case discusses whether the warrant requirement in the Implied Consent Act applies to blood-alcohol tests taken for medical purposes.[8] The fourth case discusses a minor's right to a jury trial.[9] Finally, the fifth case discusses whether a district court has discretion to impound a vehicle driven by a drunk driver.[10]

II. STATUTORY INTERPRETATION OF TERMS AND ELEMENTS

During the survey year, New Mexico appellate courts defined terms and elements of various crimes within New Mexico's criminal statutes. These cases can be divided into two categories. In one category of cases, the appellate courts provided definitions for particular words within a statute. In another category of cases, the courts performed statutory construction.

A. Particular Terms Within Criminal Statutes Defined

The New Mexico Court of Appeals recently examined the definitions of terms found in burglary,[11] motor vehicle,[12] and sentencing[13] statutes.

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1. *See infra* notes 14-27 and accompanying text.
2. *See infra* notes 28-43 and accompanying text.
3. *See infra* notes 44-60 and accompanying text.
4. *See infra* notes 64-81 and accompanying text.
5. *See infra* notes 82-107 and accompanying text.
6. *See infra* notes 108-40 and accompanying text.
7. *See infra* notes 145-71 and accompanying text.
8. *See infra* notes 172-87 and accompanying text.
9. *See infra* notes 188-208 and accompanying text.
10. *See infra* notes 209-21 and accompanying text.
11. *See infra* notes 14-27 and accompanying text.
12. *See infra* notes 28-43 and accompanying text.
13. *See infra* notes 44-60 and accompanying text.

1. Definition of "Structure"

Burglary is "the unauthorized entry of any vehicle, watercraft, aircraft, dwelling *or other structure*, movable or immovable, with the intent to commit any felony or theft therein."[14] In *State v. Bybee*,[15] the court of appeals interpreted the word "structure" as it is used in the burglary statute.

The authorities charged Bybee with three counts of burglary of soft drink vending machines located outside a store.[16] Bybee entered into a plea agreement with the prosecution in which Bybee pled *nolo contendere* to one count of burglary and the prosecution dismissed the remaining two counts of burglary.[17] Bybee, however, specifically reserved the right to appeal the trial court's denial of his motion to dismiss the burglary charges.[18]

On appeal, Bybee raised the issue of whether the definition of "structure" as used in the burglary statute includes soft drink vending machines.[19] The court of appeals determined that the legislature did not intend for the term "structure" to include all spaces within constructed items.[20] Thus, the court refused to allow the term "structure" to include soft drink vending machines located outside a store. Accordingly, the court reversed the trial court's denial of the defendant's motion to dismiss the burglary charges.[21]

The court of appeals based its decision on two principles. First, the court examined legislative intent. The court noted that the burglary statute expands the common law offense of burglary by including structures other than dwellings within the statute's reach.[22] The court refused, however, to expand the reach of the burglary statute to include unlawful entry into soft drink vending machines located outside a building or other structure. The court concluded that the legislature's modification of common law burglary did not contemplate that a vending machine alone could be a structure.[23]

The second principle the court relied on in making its decision was the rule of construction that criminal statutes must be construed strictly against the state.[24] Strict construction of criminal statutes prevents the courts from enlarging or amending statutes.[25] Only the legislature may include specific objects or places under the proscription of the burglary

14. N.M. STAT. ANN. § 30-16-3 (Repl. Pamp. 1984) (emphasis added).
15. 109 N.M. 44, 781 P.2d 316 (Ct. App. 1989).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 46, 781 P.2d at 318.
21. *Id.* at 44, 781 P.2d at 316.
22. *Id.* at 45, 781 P.2d at 317.
23. *Id.* at 46, 781 P.2d at 318.
24. *Id.* at 45, 781 P.2d at 317.
25. *Id.* at 47, 781 P.2d at 319; *see also* Varos v. Union Oil Co. of Cal., 101 N.M. 713, 715, 688 P.2d 31, 33 (Ct. App. 1984).

statute.[26] Therefore, if vending machines outside a building or structure are to fall within the bounds of the burglary statute, the legislature must amend the statute.[27]

2. Definition of "Motor Vehicle"

In *State v. Eden*,[28] the court of appeals interpreted the term "motor vehicle" in the Motor Vehicle Code by examining legislative intent and applying principles of statutory construction. Eden was driving a snowmobile on a forest road in the Jemez Mountains when he hit a trailer hitched to a pickup truck.[29] The impact sent the snowmobile flying.[30] When the snowmobile landed, it hit a cross-country skier.[31] The accident seriously injured and disfigured the skier.[32]

At trial, the jury found Eden guilty of one count of causing great bodily harm with a motor vehicle and one count of reckless operation of a snowmobile.[33] On appeal, in attacking the jury's conviction on the count of great bodily harm with a motor vehicle, Eden argued that a snowmobile is not a motor vehicle within the meaning of the Motor Vehicle Code because a snowmobile may not be legally operated on a New Mexico highway.[34] The court of appeals agreed with Eden and reversed Eden's conviction for the crime of causing great bodily injury with a motor vehicle.[35]

In reversing Eden's conviction of causing great bodily harm with a motor vehicle, the court pointed out that the crime is part of the Motor Vehicle Code.[36] The court then examined the Motor Vehicle Code's

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26. *Ruiz*, 109 N.M. at 47, 781 P.2d at 319.

27. *Id.* In rejecting the notion that the term "structure" included soft drink vending machines located outside a building, the court noted that the power to define crimes is a legislative function and penal statutes must be strictly construed. *Id.* at 46, 781 P.2d at 318. The court then applied the rule that "[d]oubts about the construction of a criminal statute are resolved in favor of the rule of lenity." *Id.* (citing State v. Keith, 102 N.M. 462, 697 P.2d 145 (Ct. App.), *cert. denied*, 102 N.M. 492, 697 P.2d 492 (1985)).

28. 108 N.M. 737, 779 P.2d 114 (Ct. App.), *cert. denied*, 108 N.M. 681, 777 P.2d 1325 (1989).

29. *Id.* at 738, 779 P.2d at 115.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* The prosecution introduced evidence and testimony at trial indicating that Eden was driving the snowmobile while intoxicated. *Id.* at 739, 779 P.2d at 116. Eden contended that the trial court improperly admitted the results of the breath alcohol test given to him on the day of the accident shortly after he was arrested. *Id.* at 742, 779 P.2d at 119. The court of appeals affirmed the trial court's admission of the breath test results as evidence of reckless operation of a snowmobile. *Id.* at 743, 779 P.2d at 120 (citing State v. Watkins, 104 N.M. 561, 724 P.2d 769 (Ct. App.), *cert. denied*, 104 N.M. 632, 725 P.2d 832 (1986)).

34. *Id.* at 738-39, 779 P.2d at 115-16. Snowmobiles are primarily used for off-road recreational purposes. *See* N.M. STAT. ANN. §§ 66-9-1 to -13 (Repl. Pamp. 1987); Vandolsen v. Constructors, Inc., 101 N.M. 109, 114, 678 P.2d 1184, 1189 (Ct. App.), *cert. denied*, 101 N.M. 77, 687 P.2d 705 (1984).

35. *Eden*, 108 N.M. at 739, 779 P.2d at 116. The court affirmed Eden's conviction on the count of reckless driving of a snowmobile. *Id.*

36. *Id.* The crime of causing great bodily injury with a motor vehicle is the injuring of a human being in the unlawful operation of a motor vehicle. N.M. STAT. ANN. § 66-8-101(B) (Repl. Pamp. 1987).

definitions of "motor vehicle"[37] and "vehicle"[38] and considered these definitions in light of the legislature's intent in imposing criminal liability for causing great bodily injury with a motor vehicle.[39] Because the definition of "vehicle" limits vehicles to devices used *upon a highway*, the court concluded that the legislature intended to define a "device typically and lawfully used upon a highway to transport persons and property."[40]

The court next addressed the relationship between snowmobiles and highway operation. Snowmobiles are not a part of the Motor Vehicle Code because snowmobiles are governed by the Snowmobile Act.[41] Under the Snowmobile Act, a snowmobile may not be operated on any limited access highway or freeway at any time.[42] The court concluded that the legislature's choice of language in the Motor Vehicle Code, together with the enactment of the Snowmobile Act, evidenced a legislative intent that a snowmobile not be considered a motor vehicle for the purpose of fulfilling the elements of the felony crime of causing great bodily harm with a motor vehicle.[43]

3. Definition of "Sentence"

In *State v. Ruiz*,[44] the court of appeals examined the intent of the legislature and applied principles of statutory construction to the Sentencing Statute.[45] Ruiz was convicted of battery on a peace officer and resisting arrest.[46] The district court later found that Ruiz was a habitual offender.[47] After suspensions and enhancements,[48] the district court sentenced Ruiz to one year in prison, but granted Ruiz credit for two days of presentence confinement.[49] The court ordered that Ruiz's sentence be served in the Chaves County Detention Center, a county jail.[50] The state appealed the sentence, contending

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37. "'[M]otor vehicle' means every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from batteries or from overhead trolley wires, but not operated upon rails." N.M. STAT. ANN. § 66-1-4(B)(39) (Repl. Pamp. 1989); *see also* N.M. STAT. ANN. § 66-9-9 (Repl. Pamp. 1987).

38. "'[V]ehicle' means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, including any frame, chassis or body of any vehicle or motor vehicle, except devices moved by human power or used exclusively upon stationary rails or tracks." N.M. STAT. ANN. § 66-1-4(B)(74) (Repl. Pamp. 1989).

39. *Eden*, 108 N.M. at 739, 779 P.2d at 116.

40. *Id.*

41. *Id.* at 740, 779 P.2d at 117.

42. *Id.*

43. *Id.* at 741, 779 P.2d at 118. The prosecution was limited to the Snowmobile Act's provision for a petty misdemeanor when a snowmobile has been operated recklessly. *Id.* at 740-41, 779 P.2d at 117-18. Thus, in defining a term within a statute, the court again opted for a rule of lenity because the court excluded snowmobiles from the operation of the Motor Vehicle Code.

44. 109 N.M. 437, 786 P.2d 51 (Ct. App. 1989), *cert. denied*, 109 N.M. 436, 786 P.2d 50, *cert. denied*, 109 N.M. 419, 785 P.2d 1038 (1990).

45. N.M. STAT. ANN. § 31-20-2 (Repl. Pamp. 1990).

46. *Ruiz*, 109 N.M. at 437, 786 P.2d at 51.

47. *Id.*

48. Ruiz's initial sentence was eighteen months for the battery and six months for resisting arrest. *Id.* The court suspended these sentences. *Id.* The court, however, was required under the habitual offender statute to enhance the sentence for the battery by one year. *Id.*

49. *Id.*

50. *Id.*

that the district court did not have the authority to order Ruiz's sentence to be served in a county jail because the sentence was for one year.[51] Ruiz contended that his sentence was for only 363 days.[52]

The parties' dispute concerning the length of Ruiz's sentence was significant because, under the New Mexico Sentencing Guidelines, the district court must sentence a defendant to a corrections facility, not a county jail, if the defendant is sentenced to imprisonment for a term of one or more years.[53] The court of appeals construed the Sentencing Statute according to its plain meaning, holding that Ruiz's sentence was the one-year term imposed by the judgment of the district court, not the 363 days remaining to be served after the judge credited the sentence with the two days of presentence confinement.[54]

The court's decision was based, first, on the district court's judgment, which read "the *sentence* . . . is suspended *except* for *one (1) year*. . . ."[55] Second, the court looked at the statutory scheme. The terminology of the statutory provisions regarding time credit does not suggest that credit for presentence confinement *alters* a sentence.[56] Rather, the statute authorizing time credit states that "[a] person . . . shall, upon conviction . . . be *given credit* for the period spent in presentence confinement *against any sentence*. . . ."[57] Thus, this language suggested to the court that a sentence remains unaltered by presentence confinement credit.[58] In Ruiz's case, the trial court sentenced him to one year. The court of appeals held that the part of the court's judgment and sentence directing that Ruiz serve his sentence in a county jail was contrary to the law.[59] The court of appeals remanded the case to the district court for entry of an amended sentence.[60]

B. Statutory Elements of Crimes

New Mexico appellate courts examined the statutory elements of the crimes of assisting escape,[61] criminal solicitation,[62] and forgery[63] during the survey period.

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51. *Id.* at 438, 786 P.2d at 52.

52. *Id.* Ruiz calculated his sentence by subtracting the two days of presentence confinement from 365 days (one year).

53. *Id.*

54. *Id.* Ruiz argued that the Sentencing Guidelines were ambiguous and thus the court of appeals should apply the rule of lenity when construing the Sentencing Guidelines. *Id.* (citation omitted). The court of appeals determined that the Sentencing Guidelines could be construed according to their plain meaning and thus were not ambiguous. *Id.* Therefore, in this situation the rule of lenity did not apply.

55. *Id.* (emphasis added).

56. *Id.*; *see also* N.M. STAT. ANN. § 31-20-12 (Repl. Pamp. 1990).

57. *Ruiz*, 109 N.M. at 438, 786 P.2d at 52 (quoting N.M. STAT. ANN. § 31-20-12 (Repl. Pamp. 1987)) (emphasis added).

58. *Id.* The court compared the presentence confinement language to the language in the habitual offender statute. The court noted that the habitual offender statute specifically states that the *sentence* is to be changed. The presentence confinement statute, however, states that the offender shall be given credit; it does not alter the length of the sentence. *Id.*

59. *Id.* at 439, 786 P.2d at 53.

60. *Id.*

61. *See infra* notes 64-81 and accompanying text.

62. *See infra* notes 82-107 and accompanying text.

63. *See infra* notes 108-40 and accompanying text.

1. Assisting Escape

On July 4, 1987, Jimmy Kinslow, William Wayne Gilbert, and David B. Gallegos escaped from the New Mexico State Penitentiary.[64] Three weeks after the escape, Gallegos contacted his brother-in-law, Christopher Martinez.[65] At the request of Gallegos, Martinez travelled to Santa Fe, picked up the three escapees, and drove them to Albuquerque.[66] Martinez continued to assist the three escapees for several days by giving them food and driving them to various motels in Albuquerque.[67] After a few days, Kinslow took Martinez's car without notice and left the other escapees in Albuquerque.[68] Soon thereafter, Martinez borrowed a car and drove Gilbert and Gallegos to California.[69] Eventually, the California authorities arrested Martinez and each of the three escapees.[70]

Martinez was charged with two counts of harboring and aiding a felon and three counts of assisting escape.[71] A jury found Martinez guilty of the three counts of assisting escape.[72] Martinez appealed his conviction for assisting escape on the ground that he had no involvement in the actual escape from the penitentiary.[73]

According to New Mexico's Uniform Jury Instructions, the elements of the crime of assisting escape are: (1) a prisoner was in custody or confinement; (2) a prisoner escaped; (3) the defendant aided the escape of the prisoner; and (4) the event occurred in New Mexico.[74] The issue the court faced was whether a charge of assisting escape is proper against a person who assists an inmate after the inmate has broken out of confinement, but while the inmate is still hiding from law enforcement authorities.[75]

The court of appeals' decision hinged on whether the offense of escape is a continuing offense.[76] If escape ends at the prison door, or when a prisoner successfully eludes immediate pursuit or reaches temporary sanctuary, then the crime of assisting escape cannot apply to a person who

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64. State v. Martinez, 109 N.M. 34, 35, 781 P.2d 306, 307 (Ct. App. 1989).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* At the end of the trial, the trial court directed a verdict in favor of Martinez on two counts of harboring or aiding a felon. *Id.*
73. *Id.*
74. N.M. UNIF. JURY INSTRUCTIONS - CRIM. 14-2224. Assisting escape consists of:

A. intentionally aiding any person confined or held in lawful custody or confinement to escape; or

B. any officer, jailer or other employee, intentionally permitting any prisoner in his custody to escape.

Whoever commits the crime of assisting escape is guilty of a third degree felony. N.M. STAT. ANN. § 30-22-11 (Repl. Pamp. 1984).

75. *Martinez*, 109 N.M. at 36, 781 P.2d at 308.
76. *Id.* at 37, 781 P.2d at 309. Escape as a continuing offense means that escape commences when an inmate flees from lawful custody or confinement and continues until the inmate is apprehended or surrenders. *Id.*

later aids an escapee.[77] If the crime of escape continues for so long as the escapee voluntarily remains at large, however, then the crime of assisting escape is also for so long as the escapee remains at large.

In *State v. Martinez*, the court of appeals held that New Mexico's escape statute constitutes a continuing offense.[78] In reaching its decision, the court considered the plain language of the escape statute,[79] the seriousness of escape, and the clear legislative purpose of deterring escape as support for the court's conclusion that escape constitutes a continuing offense.[80] Once the court supported its holding that escape is a continuing offense in New Mexico, the court easily found that an individual who intentionally helps a person avoid recapture, when he knows the person he is helping has escaped from lawful custody, may properly be charged with the offense of assisting escape.[81]

2. Criminal Solicitation

James Cotton was arrested and charged with multiple counts of criminal sexual penetration of a minor and criminal sexual contact with his fourteen-year-old stepdaughter.[82] While awaiting trial in jail, Cotton told two other inmates that he wished to persuade his stepdaughter not to testify against him.[83] Cotton also wrote several letters to his wife in Indiana in which he discussed his strategy for his defense of the criminal charges against him.[84] In particular, on September 23, 1987, Cotton wrote a letter to his wife requesting her to persuade his stepdaughter not to testify at his trial.[85] He gave this letter to his cell mate for mailing.[86] The cell

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77. *Id.* at 36, 781 P.2d at 308.
78. *Id.* at 37, 781 P.2d at 309.
79. The text of the escape statute provides:
> Escape from a penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:
> A. escaping or attempting to escape from such penitentiary; or
> B. escaping or attempting to escape from any other lawful place of custody or confinement although not actually within the confines of the penitentiary.

N.M. STAT. ANN. § 30-22-9 (Supp. 1990).
80. *Martinez*, 109 N.M. at 37-38, 781 P.2d at 309-10. The court also supported its decision by pointing out that the commentary to New Mexico's jury instruction for duress as a defense in an escape case provides that the defendant must make a good faith effort to *surrender* or *return to custody* as soon as the claimed duress has lost its coercive force. *Id.* at 37, 781 P.2d at 309. The commentary to N.M. UNIF. JURY INSTRUCTIONS-CRIM. 14-2224 cites a United States Supreme Court decision, United States v. Bailey, 444 U.S. 394 (1980), in which the Supreme Court states that escape from federal custody is a continuing offense. The New Mexico Court of Appeals determined that this citation to United States v. Bailey must be an indication that escape is a continuing offense in New Mexico. *Martinez*, 109 N.M. at 37, 781 P.2d at 309.
81. *Martinez*, 109 N.M. at 37, 781 P.2d at 309. The court dismissed Martinez's argument that the appropriate charge for the crime he committed was harboring or aiding a felon. *Id.* at 37-38, 781 P.2d at 309-10.
82. State v. Cotton, 109 N.M. 769, 770, 790 P.2d 1050, 1051 (Ct. App. 1990).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

mate, however, gave this letter to law enforcement authorities.[87] Thus, no one mailed the original letter to Cotton's wife.

Similarly, between September 24 and 26, 1987, Cotton wrote another letter to his wife.[88] In this letter Cotton again urged his wife to talk the stepdaughter out of testifying against him.[89] Cotton was released on bail on September 28, 1987, but the authorities arrested him twenty-four hours later on charges of criminal solicitation[90] and conspiracy.[91] At the time of the rearrest, law enforcement officers found the second letter in Cotton's car.[92]

A jury convicted Cotton on two counts of criminal solicitation.[93] Cotton appealed his conviction.[94] On appeal, Cotton contended that the record lacked sufficient evidence to support the charges of criminal solicitation because Cotton's wife never received the letters.[95] Thus, the question presented to the court of appeals was whether the record contained proper evidence sufficient to establish beyond a reasonable doubt each element of criminal solicitation.[96] The court of appeals held that evidence of criminal solicitation is not sufficient when the intended solicitation is not in fact communicated.[97] The offense of solicitation is incomplete in cases where the solicitation is not communicated.[98]

In reaching its decision, the court of appeals noted that the criminal solicitation statute in New Mexico adopts, in part, the Model Penal Code definition of the crime of solicitation.[99] The court of appeals relied on the New Mexico Legislature's failure to enact the portion of the Model Penal Code making *uncommunicated* solicitations a crime.[100] The court

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87. *Id.*
88. *Id.*
89. *Id.*
90. The criminal solicitation statute states:

> Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation, if with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

N.M. STAT. ANN. § 30-28-3(A) (Repl. Pamp. 1984).
91. *Cotton*, 109 N.M. at 770, 790 P.2d at 1051.
92. *Id.* Cotton did not mail the second letter before his release on bail. *Id.*
93. *Id.* at 770-71, 790 P.2d at 1051-52. The court directed a verdict in favor of Cotton on the conspiracy charge. *Id.* at 771, 790 P.2d at 1052.
94. *Id.* at 770, 790 P.2d at 1051.
95. *Id.* at 771, 790 P.2d at 1052. The fact that these two letters were never mailed was not in dispute at Cotton's trial on charges of criminal solicitation. *Id.*
96. *Id.* The elements of solicitation are:

> 1. The defendant intended that another person commit [name of felony];
> 2. The defendant [solicited] [commanded] [requested] [induced] [employed] the other person to commit the crime;
> 3. This happened in New Mexico on or about the ____day of ____, 19____.

N.M. UNIF. JURY INSTRUCTIONS - CRIM. 14-2817.
97. *Cotton*, 109 N.M. at 774, 790 P.2d at 1055.
98. *Id.*
99. *Id.* at 771-72, 790 P.2d at 1052-53.
100. *Id.* at 772, 790 P.2d at 1053.

of appeals determined that the legislature's omission of that portion of the Model Penal Code's definition indicated an implicit legislative determination that the offense of solicitation requires some form of actual communication between the defendant and either an intermediary or the person intended to be solicited concerning the subject matter of the solicitation.[101]

In addition, the court explained the statute's language "or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony."[102] The court did not read the statute so broadly that an attempt to commit criminal solicitation in fact constitutes criminal solicitation.[103] Rather, the court noted that a charge of attempted criminal solicitation might be appropriate where the intended solicitation is not communicated to an intermediary or a solicitee.[104] The crime of solicitation does not include attempted solicitation because solicitation and attempt have distinct elements.[105] Attempt requires proof of an intent to commit an offense, plus proof of an act in furtherance of the offense.[106] Solicitation, however, is complete whether or not overt steps are ever taken toward completing the offense being solicited.[107]

3. Forgery

New Mexico courts have construed the forgery statute[108] on several occasions in the past. In *State v. Tooke*,[109] the court of appeals interpreted "issuing" or "transferring" a forged writing to include the voluntary transfer of such a writing to someone who acquires a legal interest in the forged writing.[110] Under the facts of *State v. Tooke*, Tooke delivered a forged check to an "okayer," who called a check verification service before approving the check.[111] The court concluded that transfer of the check to the "okayer" did not pass a legal interest.[112] Therefore, Tooke could not properly be charged with forgery, but he could be charged and convicted of attempted forgery.[113]

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101. *Id.*
102. *Id.* at 773-74, 790 P.2d at 1054-55.
103. *Id.* at 773, 790 P.2d at 1054.
104. *Id.* at 774, 790 P.2d at 1055.
105. *Id.*
106. *Id.* at 773-74, 790 P.2d at 1054-55.
107. *Id.* at 774, 790 P.2d at 1055.
108. Forgery consists of:

> A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or
> B. knowingly issuing or transferring a forged writing with intent to injure or defraud.
>
> Whoever commits forgery is guilty of a third degree felony.

N.M. STAT. ANN. § 30-16-10 (Repl. Pamp. 1984).
109. 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970), *overruled*, State v. Ruffins, 109 N.M. 688, 789 P.2d 616 (1990).
110. *Id.* at 619, 471 P.2d at 189.
111. *Id.* at 618, 471 P.2d at 188.
112. *Id.*
113. *Id.*

Seven years later, the court of appeals decided *State v. Linam*,[114] in which the facts were similar to those of *State v. Tooke*. Linam handed a forged check to a bank teller to be cashed.[115] The teller took the check to her supervisor.[116] After Linam's conviction for forgery, he contended on appeal that the evidence only supported a conviction for attempted forgery because the facts in his case were not distinguishable from the facts in *State v. Tooke*.[117] The court of appeals held that, in Linam's case, an interest passed to the teller because the teller had immediate authority to cash the check.[118] Thus, Linam could properly be convicted of forgery.[119]

The supreme court resolved the debate over forgery versus attempted forgery in *State v. Ruffins*.[120] On December 18, 1986, Martha Ruffins stole Pauline Halley's purse.[121] Halley reported the incident to the police.[122] The next day, Ruffins attempted to use a check from Halley's checkbook to pay for gas and food at a truck stop.[123] The two-party check was made payable to Ruffins and signed "Mrs. Pauline Halley."[124] The cashier refused to accept the check.[125]

Ruffins was charged with forgery and larceny.[126] At trial, the jury convicted Ruffins of the forgery charge.[127] Ruffins appealed the forgery conviction to the court of appeals. Ruffins contended that her acts constituted only attempted forgery and that the state's failure to produce the forged check prevented a conviction for forgery.[128] The New Mexico Court of Appeals certified the case to the New Mexico Supreme Court for a determination of the requirements of the crime of forgery.[129]

The supreme court first listed three methods of accomplishing forgery: (1) falsely making or altering a writing purporting to have legal efficacy; (2) physically delivering a forged writing; or (3) passing an interest in a forged writing.[130] In *Ruffins*, the court examined the relationship between the last two methods of committing forgery.[131]

Physical delivery alone is enough to constitute the transfer of a forged instrument.[132] No requirement exists that an interest in the instrument

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114. 90 N.M. 729, 568 P.2d 255 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977), *overruled*, State v. Ruffins, 109 N.M. 688, 789 P.2d 616 (1990).
115. *Id.* at 730, 568 P.2d at 256.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. 109 N.M. 668, 789 P.2d 616 (1990).
121. *Id.* at 669, 789 P.2d at 617.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* Presumably, Ruffins took the check with her when she left the truck stop. *Id.*
126. *Id.*
127. *Id.* The jury acquitted Ruffins of the larceny charge. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 670, 789 P.2d at 618.
131. *Id.*
132. *Id.*

pass if there is physical delivery of the forged instrument.[133] A defendant issues a forged writing when he knowingly physically delivers the false instrument, offers the false instrument, or otherwise makes the false instrument available for action.[134] A defendant transfers a forged writing when he knowingly conveys an interest in the false instrument.[135] These definitions served as the basis for the court's overruling of *State v. Tooke*[136] and *State v. Linam*.[137]

Finally, the court concluded that acceptance of a forged instrument is not an element of the crime of forgery.[138] Acceptance is not necessary because, even if an individual refuses to accept a forged instrument, the forger nevertheless offered the instrument as a genuine instrument.[139] Thus, the court upheld Ruffins' conviction for forgery.[140]

III. STATUTORY CONSTRUCTION IN DWI CASES

During the survey period, New Mexico appellate courts addressed several cases involving drunk drivers. These cases raised issues requiring the courts to interpret the Fresh Pursuit Act[141] and the Implied Consent Act.[142] The courts also addressed when a minor has the right to a jury trial[143] and whether the trial court is required to impound vehicles involved in DWI's.[144]

A. Fresh Pursuit

The New Mexico Supreme Court interpreted the Fresh Pursuit Act[145] ("FPA") twice during the survey period.[146] The FPA permits a police officer to continue his pursuit of a suspect outside of the officer's jurisdiction if the suspect has allegedly committed a misdemeanor in the

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133. *Id.* The court of appeals' earlier opinions incorrectly required a passing of an interest in addition to physical delivery. *Id.* at 670-71, 789 P.2d at 618-19.

134. *Id.* at 671, 789 P.2d at 619.

135. *Id.*

136. 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970), *overruled*, State v. Ruffins, 109 N.M. 688, 789 P.2d 616 (1990); see *supra* notes 109-13 and accompanying text.

137. 90 N.M. 729, 568 P.2d 255 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977), *overruled*, State v. Ruffins, 109 N.M. 688, 789 P.2d 616 (1990); *see supra* notes 114-19 and accompanying text.

138. *Ruffins*, 109 N.M. at 671, 789 P.2d at 619. The court overruled State v. Lopez, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), *cert. denied*, 81 N.M. 140, 464 P.2d 559 (1970), to the extent that *State v. Lopez* suggested that acceptance is a necessary element of the crime of forgery. *Ruffins*, 109 N.M. at 671, 789 P.2d at 619.

139. *Ruffins*, 109 N.M. at 671, 789 P.2d at 619.

140. *Id.* Because Ruffins' actions fulfilled the requirements for the completed crime of forgery, she was not entitled to a jury instruction for attempted forgery. *Id.*

141. See *infra* notes 145-71 and accompanying text.

142. See *infra* notes 172-87 and accompanying text.

143. See *infra* notes 188-208 and accompanying text.

144. See *infra* notes 209-21 and accompanying text.

145. N.M. STAT. ANN. §§ 31-2-1 to -8 (Repl. Pamp. 1984).

146. *See* County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990); Incorporated County of Los Alamos v. Johnson, 108 N.M. 633, 776 P.2d 1252 (1989).

presence of the pursuing officer.[147] Early in the survey period, the supreme court failed to explicitly define "misdemeanor" in the FPA to include petty misdemeanors.[148] Ten months later, the court explicitly extended the term "misdemeanor" in the FPA to include "petty misdemeanors."[149]

The facts and the questions presented to the supreme court in *Incorporated County of Los Alamos v. Johnson*[150] and *County of Los Alamos v. Tapia*[151] were remarkably similar.[152] In both *Tapia* and *Johnson*, a police officer observed a person driving a car in an erratic manner.[153] The police officer in each case began his pursuit in Los Alamos County.[154] Neither driver stopped his vehicle until he entered Santa Fe County.[155] Each driver was arrested, charged, and convicted by the Los Alamos Municipal Court of driving while intoxicated ("DWI").[156] Tapia's case differed from Johnson's case in one respect. The trial court in *Tapia* found that the police officer who stopped Tapia did not have reasonable grounds to believe that Tapia was intoxicated.[157] Instead, the police officer in *Tapia* had only a reasonable suspicion to stop Tapia for running a stop sign and operating his motor vehicle with an inoperative tail light.[158] In *Johnson*, the police officer observed Johnson driving in an erratic manner, which constituted reasonable grounds for the officer to believe Johnson was intoxicated.[159] Thus, the *Tapia* court had to determine whether the FPA applied to a person whom the police officer suspected of running a stop sign and driving with an inoperative tail light.[160] The *Johnson* court, conversely, had to determine whether the FPA applied to fresh pursuit of a suspected drunk driver.[161]

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147. N.M. STAT. ANN. § 31-2-8 (Repl. Pamp. 1984). Section 31-2-8 states:

> A. Any county sheriff or municipal police officer who leaves his jurisdictional boundary while in fresh pursuit of a misdemeanant whom he would otherwise have authority to arrest shall have the authority to arrest that misdemeanant anywhere within this state and return him to the jurisdiction in which the fresh pursuit began without further judicial process.
>
> B. For purposes of this section, "fresh pursuit of a misdemeanant" means the pursuit of a person who has committed a misdemeanor in the presence of the pursuing officer. Fresh pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

148. *Johnson*, 108 N.M. at 634-35, 776 P.2d at 1253-54. *But see id.* at 635, 776 P.2d at 1254 (Baca, J., specially concurring).

149. *Tapia*, 109 N.M. at 745, 790 P.2d at 1026.

150. 108 N.M. 633, 776 P.2d 1252 (1989).

151. 109 N.M. 736, 790 P.2d 1017 (1990).

152. *Compare id.* at 737-38, 790 P.2d at 1018-19 *with Johnson*, 108 N.M. at 634-35, 776 P.2d at 1253-54.

153. *Tapia*, 109 N.M. at 737-38, 790 P.2d at 1018-19; *Johnson*, 108 N.M. at 633, 776 P.2d at 1252.

154. *Tapia*, 109 N.M. at 737-38, 790 P.2d at 1018-19; *Johnson*, 108 N.M. at 633, 776 P.2d at 1252.

155. *Tapia*, 109 N.M. at 737-38, 790 P.2d at 1018-19; *Johnson*, 108 N.M. at 633, 776 P.2d at 1252.

156. *Tapia*, 109 N.M. at 738, 790 P.2d at 1019; *Johnson*, 108 N.M. at 633, 776 P.2d at 1252.

157. *Tapia*, 109 N.M. at 745, 790 P.2d at 1026.

158. *Id.*

159. *Johnson*, 108 N.M. at 633, 776 P.2d at 1252.

160. *Tapia*, 109 N.M. at 745, 790 P.2d at 1026.

161. *Id.*

The alleged offenses in *Tapia* and *Johnson* were materially different because a person convicted of DWI for the first time is a petty misdemeanant, a person convicted of subsequent DWI's is a misdemeanant,[162] and a person convicted of running a stop sign and driving with an inoperative tail light is always a petty misdemeanant.[163] Therefore, the police officer chasing Johnson had no way of knowing whether Johnson had violated a misdemeanor or petty misdemeanor statute.[164]

Although the *Johnson* court rejected Johnson's reading of the FPA to exclude petty misdemeanors, the court found that the FPA authorized the police officer to pursue Johnson into Santa Fe County.[165] Yet, the *Johnson* court did not explicitly find that the term "misdemeanor" included petty misdemeanors.[166] Rather, the court interpreted the FPA to allow extraterritorial arrests when a police officer has no way of knowing whether the suspect allegedly violated a misdemeanor or petty misdemeanor statute.[167]

Justice Baca wrote a specially concurring opinion in *Johnson* in which he stated he would not have simply found an exception to the FPA for situations falling within the facts of *Johnson*. Instead, Justice Baca would have defined "the generic term 'misdemeanor'" to include petty misdemeanors for purposes of the FPA.[168] Justice Ransom joined Justice Baca's special concurrence. Ten months later, when the supreme court heard *Tapia*, Justices Baca and Ransom convinced Chief Justice Sosa of their position.[169] In *Tapia*, the supreme court adopted Baca's definition of misdemeanor and found that the arrest outside of the officer's jurisdiction for running a stop sign and driving with an inoperative tail light was valid.[170] Thus, currently, a county sheriff or municipal police officer may chase a suspected petty misdemeanant outside of the officer's jurisdiction if the pursuit began within the boundaries of the officer's jurisdiction.[171]

B. Implied Consent

The court of appeals heard a DWI case in which the issue was whether the Implied Consent Act[172] governs the administration of a blood-alcohol

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162. *Johnson*, 108 N.M. at 635, 776 P.2d at 1254.
163. *Tapia*, 109 N.M. at 745, 790 P.2d at 1026.
164. *Johnson*, 108 N.M. at 635, 776 P.2d at 1254.
165. *Id.*
166. *Id.* at 633, 776 P.2d at 1252; *see also Tapia*, 109 N.M. at 745, 790 P.2d at 1026.
167. *Johnson*, 108 N.M. at 633, 776 P.2d at 1252.
168. *See id.* at 635, 776 P.2d at 1254 (Baca, J., specially concurring).
169. *See Tapia*, 109 N.M. at 745, 790 P.2d at 1026. It is interesting to note that in *Johnson*, Chief Justice Sosa's dissenting opinion adopted Judge Alarid's court of appeals opinion that construed section 31-2-8 of the FPA as prohibiting fresh pursuit for petty misdemeanors, *Johnson*, 108 N.M. at 636, 776 P.2d at 1255 (Sosa, C.J., dissenting), yet Chief Justice Sosa concurred with the majority in *Tapia*, which explicitly stated that the FPA allows extraterritorial arrests of suspected petty misdemeanants. *Tapia*, 109 N.M. at 745, 790 P.2d at 1026.
170. *Tapia*, 109 N.M. at 745, 790 P.2d at 1026.
171. *Id.*
172. N.M. STAT. ANN. §§ 66-8-105 to -112 (Repl. Pamp. 1987).

test when the test is administered solely for medical reasons.[173] The Implied Consent Act states that any person who drives a motor vehicle in New Mexico automatically consents to a breath or a blood test to determine whether that person has been driving while under the influence of drugs or alcohol.[174] The Implied Consent Act, however, also provides that if a person is arrested for suspicion of DWI and refuses to submit to a blood test, a police officer must obtain a search warrant before compelling the suspect to submit to the test.[175]

In *State v. Johnston*,[176] Johnston was taken to an emergency room with head injuries sustained in a traffic accident.[177] An emergency room physician noticed the odor of alcohol emanating from Johnston and ordered that a blood-alcohol test be performed by the hospital laboratory as part of Johnston's treatment.[178] The hospital staff took the blood sample solely for medical purposes and drew the blood before the defendant's arrest.[179] Subsequently, at the request of law enforcement officials, a hospital employee took another blood sample.[180]

At trial, the district court suppressed the results of the test ordered by law enforcement officials.[181] The state then attempted to introduce the results of the first blood test as proof of defendant's intoxication at the time of the accident.[182] The trial court also suppressed the results of the first blood test because the court believed that admitting the results would circumvent the Implied Consent Act.[183]

On appeal, the court of appeals held that the trial court erroneously suppressed the results of the hospital's blood test.[184] Following the lead of several other states' courts, the court of appeals explained that implied consent statutes normally do not apply to blood tests taken strictly for medical reasons.[185] The court then concluded that the New Mexico Implied Consent Act's scheme was similar to that of other states' Implied Consent Acts in that New Mexico's Act only requires that a search warrant be

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173. *See* State v. Johnston, 108 N.M. 778, 779 P.2d 556 (Ct. App.), *cert. denied*, 108 N.M. 771, 779 P.2d 549 (1989).

174. N.M. STAT. ANN. § 66-8-107(A) (Repl. Pamp. 1987).

175. N.M. STAT. ANN. § 66-8-111(A) (Repl. Pamp. 1987).

176. 108 N.M. 778, 779 P.2d 556 (Ct. App.), *cert. denied*, 108 N.M. 771, 779 P.2d 549 (1989).

177. *Id.* at 779, 779 P.2d at 557.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* The trial court found that Johnston refused to submit to a second blood test. Notwithstanding Johnston's refusal, the police officer ordered that the hospital take another blood sample. Because the court did not issue a search warrant authorizing the second blood test, the trial court suppressed the results of that test. Record at 110-11.

182. *Johnston*, 108 N.M. at 779, 779 P.2d at 557.

183. *Id.* Section 66-8-111(A) of the Implied Consent Act provides that "[i]f a person under arrest for [DWI] refuses upon request of a law enforcement officer to submit to chemical tests designated by [the Implied Consent Act], none shall be administered except when a municipal judge, magistrate, or district judge issues a search warrant authorizing chemical tests as provided . . . ." The district court judge reasoned that allowing the results of the first blood test into evidence would effectively render meaningless a defendant's right to refuse a blood test. Record at 117, 124.

184. *Johnston*, 108 N.M. at 780-81, 779 P.2d at 558-59.

185. *Id.* at 780, 779 P.2d at 558.

obtained for blood tests taken at the direction of law enforcement officials.[186] Because the medically administered blood test did not violate the Implied Consent Act, the court reversed the trial court's order suppressing the results of the first test performed by the hospital's laboratory.[187]

C. *Right to a Jury Trial for a Minor Charged with DWI*

The United States and New Mexico Constitutions guarantee a jury trial for criminal proceedings.[188] In federal juvenile proceedings, the right to a jury trial is not constitutionally required.[189] The New Mexico Constitution, however, secures the right to a jury trial in all cases that, at the time of the state constitution's adoption, required a jury trial.[190] When New Mexico adopted its constitution, juveniles were treated the same as adults for the purposes of determining whether a jury trial was in order.[191] Further, the New Mexico Children's Code presently provides that a juvenile is entitled to a jury trial when an adult is so entitled under the same circumstances.[192] In 1977, the court of appeals interpreted the Children's Code as providing a minor defendant the right to a jury trial when the offense, if committed by an adult, would be triable in district court.[193]

In light of this background, the court of appeals had to decide whether a minor charged with two petty misdemeanors was entitled to a jury

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186. *Id.*

187. *Id.* at 780-81, 779 P.2d at 558-59.

188. U.S. CONST. amend. VI.; N.M. CONST. art. II, § 12.

189. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); State v. Doe, 90 N.M. 776, 568 P.2d 612 (Ct. App. 1977). The *Doe* court explained that although neither the sixth nor the seventh amendment of the United States Constitution requires that a juvenile be given a jury trial whenever an adult would be so entitled, "states may require stricter constitutional standards" as New Mexico has after its enactment of the Children's Code. *Id.* at 777, 568 P.2d at 613 (citations omitted).

190. N.M. CONST. art. II, § 12. The constitution states that "[t]he right of trial by jury *as it has heretofore existed* shall be secured to all and remain inviolate." *Id.* (emphasis added); *see* Guiterrez v. Gober, 43 N.M. 146, 148, 87 P.2d 437, 438 (1939) (the "as it has heretofore existed" clause refers to the right to a jury trial "as it existed in the territory of New Mexico at the time immediately preceding the adoption of the [New Mexico] Constitution").

191. *See* Peyton v. Nord, 78 N.M. 717, 723, 437 P.2d 716, 722 (1968); *Doe*, 90 N.M. at 777, 568 P.2d at 613.

192. N.M. STAT. ANN. § 32-1-31(A) (Repl. Pamp. 1989). The statute provides in pertinent part that "[a] jury trial on the issues of alleged delinquent acts may be demanded by the child . . . when the offense alleged would be triable by jury if committed by an adult. . . ." *Id.* But, even adults are not entitled to a jury trial under all circumstances. For example, an adult tried in metropolitan court for an offense which carries a penalty that does not exceed 90 days imprisonment is entitled to a bench trial only. N.M. STAT. ANN. § 34-8A-5(B)(1) (Repl. Pamp. 1990).

193. *Doe*, 90 N.M. at 777, 568 P.2d at 613. In *Doe*, the minor defendant was charged with receiving stolen property. *Id.* Had an adult committed that offense, the magistrate court would have had jurisdiction. *Id.* All cases tried in magistrate court, except for contempt of the magistrate court, are triable by a jury. N.M. STAT. ANN. § 35-8-1 (Repl. Pamp. 1988); *see also* N.M. STAT. ANN. § 36-10-1 (1953, 2d Repl. Vol. 6, 1972, Supp. 1975) (also true for magistrate court proceedings when the court of appeals decided *Doe*). Thus, if the court had held that a juvenile was entitled to a jury trial whenever an adult would be entitled to a jury trial in *magistrate court*, juveniles would *always* be entitled to a jury trial. The *Doe* court rejected this reading of the Children's Code because such a holding would render the phrase "when the offense alleged would be triable by jury if committed by an adult . . ." superfluous. *Doe*, 90 N.M. at 777, 568 P.2d at 613.

trial. In *State v. Benjamin C.*,[194] a minor defendant was charged with DWI and with allowing himself to be served alcohol.[195] The defendant requested a jury trial in a timely manner.[196] The trial court determined the minor defendant had no right to a jury trial.[197] The defendant appealed after the judge convicted him of the two crimes.[198]

The state, and apparently the trial court, relied on the court of appeals' earlier holding in *State v. Doe*[199] that a juvenile is entitled to a jury trial when the state alleges that the juvenile committed a district court offense.[200] The *Doe* court restricted a juvenile's jury trial right to district court offenses. The court reasoned that if the statutory provision mandating a jury trial for juveniles "when the offense alleged would be triable by jury if committed by an adult" was interpreted to mean magistrate court offenses, then juveniles would be entitled to a jury trial in all cases.[201] Because the juvenile defendant in *Benjamin C.* was charged with two petty misdemeanors, neither of which were by definition "district court offenses," the trial court denied the defendant's motion for a jury trial.[202]

On appeal, the *Benjamin C.* court explained that the state's analysis was faulty because the state failed to focus on the "totality of the offenses charged against the child."[203] The court applied the procedure the supreme court adopted in *Vallejos v. Barnhart*[204] concerning adults charged with multiple offenses.[205] In *Vallejos*, the supreme court determined that adult defendants were entitled to a jury trial when the *aggregate* penalty for all offenses charged exceeded six months.[206] The aggregate penalty for the two offenses charged against Benjamin C. exceeded six months.[207] Thus, the court concluded that the minor in this case was entitled to a jury trial.[208]

D. Judicial Discretion to Impound Vehicles Implicated in DWI Cases

In another DWI-related case, the court of appeals decided whether the statute that imposes penalties for DWI offenders mandates that state

194. 109 N.M. 67, 781 P.2d 795 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989).
195. *Id.* at 70, 781 P.2d at 798; *see also* N.M. STAT. ANN. §§ 60-8-102 (Supp. 1988), 60-7B-1(B), -1.1 (Repl. Pamp. 1987).
196. *Benjamin C.*, 109 N.M. at 68, 781 P.2d at 796.
197. *Id.*
198. *Id.*
199. 90 N.M. 776, 568 P.2d 612 (Ct. App. 1977).
200. *See Benjamin C.*, 109 N.M. at 70-71, 781 P.2d at 798-99.
201. *Doe*, 90 N.M. at 777, 568 P.2d at 613; *see supra* note 193.
202. *Benjamin C.*, 109 N.M. at 70, 781 P.2d at 798.
203. *Id.*
204. 102 N.M. 438, 697 P.2d 121 (1985).
205. *Benjamin C.*, 109 N.M. at 70-71, 781 P.2d at 798-99.
206. *Vallejos*, 102 N.M. at 438, 697 P.2d at 121. Under New Mexico law, a criminal defendant may request a jury trial when "the penalty exceeds ninety days' [sic] but does not exceed six months imprisonment." A criminal defendant is entitled to a jury trial, absent acceptable waiver, when "the penalty exceeds six months' imprisonment." N.M. STAT. ANN. § 34-8A-5(B)(2) to -5(B)(3) (Repl. Pamp. 1990). Additionally, in State v. (Jesus) Sanchez, 109 N.M. 428, 429, 786 P.2d 42, 43 (1990), the supreme court held that an "objective measure of the combined, maximum statutory penalties [rather than a] subjective measure of the actual penalty threatened at the commencement of trial" should be used to determine whether a defendant is entitled to a jury trial.
207. *Benjamin C.*, 109 N.M. at 71, 781 P.2d at 799.
208. *Id.*

trial courts impound a second-time DWI offender's automobile.[209] In *State v. Barber*,[210] the defendant pled guilty to a second offense of DWI.[211] The defendant owned the car he was driving when he was stopped, and he still owned it when he pled guilty to the offense.[212] Although the state proved all of the statutory elements required before an automobile can be impounded, the magistrate court denied the state's motion to impound the defendant's car.[213] The district court dismissed the state's original appeal of the motion to impound;[214] the state then appealed the district court's dismissal of its appeal.[215] The state contended that the impoundment was mandatory if all the statutory elements were proven.[216]

On appeal, the court of appeals began its analysis by looking at the wording of the statute.[217] The court first acknowledged that the use of the word "shall" in a statute generally designates mandatory action.[218] The court then compared the statutory section concerning the impounding of a vehicle to the statutory section imposing imprisonment upon conviction of DWI. The court noted that the legislature passed both sections concurrently.[219] The court then noted that the legislature included language in the imprisonment section which *clearly precluded judicial intervention* in imprisonment, but did not include any such language in the impoundment section.[220] Because such "mandatory" language was not present in the impoundment section, the court concluded that the legislature did

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209. *See* N.M. STAT. ANN. § 66-8-102(I) (Supp. 1990). The statute provides:

> I. In addition to any other penalties imposed by this section, if a person is convicted for the second time under this section, the motor vehicle he was driving at the time of the offense, if the convicted person was an owner of the motor vehicle at the time of the offense, *shall* be impounded or immobilized by an immobilization device at the convicted person's expense for thirty days. . . .

Id. (emphasis added).

210. 108 N.M. 709, 778 P.2d 456 (Ct. App.), *cert. denied*, 108 N.M. 713, 778 P.2d 911 (1989).

211. *Id.* at 710, 778 P.2d at 457.

212. *Id.*

213. *Id.*

214. The district court found that the state had no right to appeal the magistrate's decision. The court based its finding on: (1) double jeopardy grounds; (2) N.M. STAT. ANN. § 35-13-1, which only gives a criminal *defendant* (not the prosecution) the right to appeal a magistrate's findings to the district court; and (3) the belief that section 66-8-102(I) was discretionary.

215. *Barber*, 108 N.M. at 710, 778 P.2d at 457.

216. *Id.*

217. *Id.* at 711, 778 P.2d at 458.

218. *Id.*

219. *Id.*

220. *Id. Compare* N.M. STAT. ANN. § 66-8-102(I) (Supp. 1988) *with* § 66-8-102(E)(1), (E)(2). N.M. STAT. ANN. § 66-8-102(E) states in pertinent part:

> Notwithstanding any provision of law to the contrary for suspension or deferment of execution of a sentence:
>
> (1) upon a second or third conviction occurring within five years of a prior conviction, each offender shall be sentenced to a jail term of not less than forty-eight consecutive hours which *shall not be suspended or deferred or taken under advisement*; and
>
> (2) upon a fourth or subsequent conviction, each offender shall be sentenced to a jail term of not less than six months which *shall not be suspended or deferred or taken under advisement*.

(Emphasis added.) The language that prevents a court from suspending or deferring a sentence in these cases is not in the impoundment section of the statute.

not intend to remove judicial discretion in the case of vehicle impoundment after a second DWI conviction.[221] In other words, because the statute does not make impoundment mandatory, courts have discretion with respect to the impoundment of vehicles used to commit DWI.

IV. CONCLUSION

This survey has discussed the relevant legal issues and judicial interpretations of criminal statutes in New Mexico for the survey period commencing in August 1989 and culminating in July 1990. After extensive review, the authors have provided a synopsis of the pertinent cases that have affected criminal law in New Mexico. This survey has provided those cases in a framework that is helpful to legal practitioners, law students and lay persons.

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221. *Barber*, 108 N.M. at 711, 778 P.2d at 458.