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Criminal Procedure

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CRIMINAL PROCEDURE

I. INTRODUCTION

This criminal procedure survey covers cases appearing in the New Mexico Bar Bulletin between August 1, 1989 and June 30, 1990. The survey article is organized to follow the sequence of events in a criminal proceeding. More specifically, this survey article addresses: (1) fourth amendment suppression issues; (2) speedy trial; (3) assistance of counsel; and (4) double jeopardy.

II. FOURTH AMENDMENT — SEARCHES AND SEIZURES

The fourth amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures."[1] As a preliminary matter, a court must determine whether the questioned search and seizure was the result of government conduct. The fourth amendment applies to unreasonable searches and seizures by federal and state governments and does not regulate conduct between individual citizens.[2] If government conduct exists, the court must then examine whether the individual has a reasonable expectation of privacy in the place(s) searched or the item(s) seized.[3] If a reasonable expectation of privacy exists, then fourth amendment protection is implicated.[4]

The court is faced with one of two situations if a fourth amendment right exists: (1) searches conducted with warrants; and (2) searches con-

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1. U.S. CONST. amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. The fourth amendment applies to the states under the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

The New Mexico provision sets forth:

> 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.

N.M. CONST. art. II, § 10.

2. *See, e.g.*, State v. Johnston, 108 N.M. 778, 779 P.2d 556 (Ct. App.), *cert. denied*, 108 N.M. 771, 779 P.2d 549 (1989). In State v. Johnston, Johnston argued that a blood sample taken by a hospital as part of his treatment could not be used against him in a criminal prosecution. The court of appeals rejected Johnston's argument because the blood test was not taken by or at the request of the state, and private blood tests taken solely at the request of a physician do not implicate the fourth amendment. *Id.* at 780, 779 P.2d at 558 (citing State v. Richerson, 87 N.M. 437, 440, 535 P.2d 644, 647 (Ct. App.), *cert. denied*, 87 N.M. 450, 535 P.2d 657 (1975)).

3. If the person does not have a reasonable expectation of privacy, then there is no fourth amendment protection and the analysis ends. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967) (citations omitted).

4. *Katz* further held that what a person seeks to preserve as private may be constitutionally protected, even in an area accessible to the public. *Id.* at 351-52.

ducted without warrants. In cases where a search warrant was obtained, the central issue involves the validity of the warrant. Two survey cases involved the validity of a search warrant.[5] Each of these cases involved the issuance of a search warrant based on hearsay by an informant.

In those instances where a search warrant is invalid, or where no search warrant was obtained, the fourth amendment analysis still considers whether the search and seizure falls into one of the many exceptions to the search warrant requirement.[6] During the survey period, four exceptions to the search warrant requirement were addressed by New Mexico appellate courts.[7]

A. Search Warrants

The issuance of a valid search warrant requires that the issuance of the warrant be based on probable cause.[8] Moreover, the warrant must be issued by a "neutral and detached magistrate."[9] In the cases considered by the New Mexico appellate courts, the issue centered around whether hearsay information obtained from informants gave probable cause for the issuance of a search warrant. The United States Supreme Court has faced this problem on a number of occasions, and thus has developed the test to be applied under the fourth amendment by the federal courts, which is set forth in *Illinois v. Gates*.[10] States, however, have a choice between following the federal standard or applying their own state constitutional standard.[11] During the survey period, New Mexico made its choice.[12]

1. The Federal Standard

The federal standard involved a trilogy of cases.[13] The first test developed under the federal standard involved two cases.[14] *Aguilar v. Texas*[15]

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5. State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989); State v. Therrien, 110 N.M. 261, 794 P.2d 735 (Ct. App. 1990).

6. "Generally, a warrantless search is per se unreasonable, unless it falls within an exception to the search warrant requirement." State v. Corneau, 109 N.M. 81, 89, 781 P.2d 1159, 1167 (Ct. App. 1989) (citing State v. Crenshaw, 105 N.M. 329, 732 P.2d 431 (Ct. App. 1986)).

7. New Mexico appellate courts adressed: the automobile exception (State v. Pena, 108 N.M. 760, 779 P.2d 538 (1989)); the canine exception (State v. Villanueva, 110 N.M. 359, 796 P.2d 252 (Ct. App.), *cert. denied*, 110 N.M. 260, 794 P.2d 734 (1990)); the plain view doctrine (State v. Lopez, 109 N.M. 169, 783 P.2d 479 (Ct. App.), *cert. quashed*, 109 N.M. 131, 782 P.2d 384 (1989); State v. Zelinske, 108 N.M. 784, 779 P.2d 971 (Ct. App. 1989)); and the inevitable discovery doctrine (State v. Corneau, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989)). Other exceptions to the warrant requirement include exigent circumstances, searches incident to arrest, inventory searches, consent, and hot pursuit. *See* State v. Crenshaw, 105 N.M. 329, 333, 732 P.2d 431, 435 (Ct. App. 1986).

8. Nathanson v. United States, 290 U.S. 41, 47 (1933).

9. Johnson v. United States, 333 U.S. 10, 14 (1948).

10. 462 U.S. 213 (1983).

11. N.M. R. CRIM. P. 17(f) (1953 & Supp. 1975); *see also* Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), *cert. denied*, 431 U.S. 924 (1977).

12. State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989).

13. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969); Illinois v. Gates, 462 U.S. 213 (1983).

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

15. 378 U.S. 108 (1964).

set forth the standard under which search warrants could be issued based on the knowledge of an informer. *Aguilar* held that an affidavit may be based on hearsay information, provided that the magistrate is informed of "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'"[16] This initial requirement has been referred to as the "adequacy of the informant's basis of knowledge"[17] prong of the *Aguilar-Spinelli* test.

In addition, *Spinelli v. United States*[18] held that if the magistrate is not furnished with information stating how the information was gathered, the tip must "describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor. . . ."[19] This second requirement has been referred to as the "veracity of the informant"[20] prong of the *Aguilar-Spinelli* test.

After the decision in *Spinelli*, the question of the issuance of a search warrant based on the hearsay evidence of an informant was settled. In 1983, however, the United States Supreme Court rejected the *Aguilar-Spinelli* test and announced a new standard in *Illinois v. Gates*.[21] *Gates* modified the two-part requirement to a mere "totality of the circumstances" test.[22] Under the current federal standard, the two-pronged *Aguilar-Spinelli* test has been abandoned in favor of a less definite standard where the magistrate merely examines the "totality of the circumstances" to determine if probable cause exists for the issuance of a search warrant.[23]

In adopting the totality of the circumstances test, the Court stated that it was "far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip."[24] The Court believed that the *Aguilar-Spinelli* test was too inflexible and technical.[25] The totality of the circumstances test, on the other hand, was flexible and able to take into account many of the events of everyday life.[26]

2. The New Mexico Standard

Despite the federal modification leading to the adoption of the totality of the circumstances test, the New Mexico Supreme Court decided, in

16. *Id.* at 114 (footnote omitted).
17. State v. Therrien, 110 N.M. 261, 262, 794 P.2d 735, 736 (Ct. App. 1990).
18. 393 U.S. 410 (1969).
19. *Id.* at 416.
20. *Therrien*, 110 N.M. at 262, 794 P.2d at 736.
21. 462 U.S. 213, 244-45 (1983).
22. *Id.* at 230.
23. *Id.*
24. *Id.* (footnote omitted).
25. *Id.*
26. *Id.*

State v. Cordova,[27] to continue to follow the *Aguilar-Spinelli* test first adopted by New Mexico in 1975.[28] If states were required to apply the same standards as the federal courts, no debate would exist. The federal standard, however, serves only as a bare minimum. States are free to impose higher standards in search and seizure cases than mandated under the United States Constitution.[29] When a state chooses to give greater protection than that given in the federal constitution, it is usually accomplished by interpreting greater protection under a state's constitution or statutes.

In *Cordova*, the police received a tip from an informant that Cordova was selling heroin out of a private residence.[30] The informant stated that Cordova was driving a red Chrysler Cordova with Texas plates. The informant also gave the address of the residence.[31] Additionally, the informant gave the police a description of Cordova and stated that several heroin users had been observed at the house.[32] Police drove by the residence and verified the physical description given by the informant.[33] An affidavit was prepared by the police, and the magistrate issued a search warrant.[34] Cordova was arrested and convicted of possession of heroin after the trial court denied a motion to suppress.[35]

Cordova appealed on the issue of whether sufficient probable cause existed for the magistrate to issue the search warrant.[36] The court of appeals applied the *Aguilar-Spinelli* test that is codified in rule 5-211(E),[37] and reversed the trial court because the affadavit on which the warrant was based was inadequate.[38] The supreme court granted certiorari and upheld the court of appeals, finding that the entire affidavit was comprised of hearsay information and "stated no more than . . . innocent facts."[39]

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27. 109 N.M. 211, 784 P.2d 30 (1989).

28. N.M. R. CRIM. P. 17(f) (1953 & Supp. 1975); *see also* Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), *cert. denied*, 431 U.S. 924 (1977).

29. "Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." Cooper v. California, 386 U.S. 58, 62 (1967).

30. 109 N.M. at 212, 784 P.2d at 31.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

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

> 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.

Id.; *see also* N.M. R. CRIM. P. 7-208(E), 8-208(F); *Cordova*, 109 N.M. at 214 & n.4, 784 P.2d at 33 & n.4.

38. *Cordova*, 109 N.M. at 212, 784 P.2d at 31.

39. *Id.* at 218, 784 P.2d at 37.

These facts, either separately or as a whole, did not suggest illegal activity.[40]

Although Cordova's appeal was based on *both* the federal and state constitutions, the court based its decision on the New Mexico Constitution and court rules. The court did find the federal precedent informative.[41] The court noted that although it did not consider *Illinois v. Gates* and the cases cited therein to be controlling, this line of cases was considered in making its decision.[42]

In retaining the *Aguilar-Spinelli* test, the supreme court held that the principles of the New Mexico Constitution were better served by this test.[43] Despite this fact, the court stated that if, in the future, the *Illinois v. Gates* test better serves the principles of the New Mexico Constitution, it will be adopted. The supreme court found that the United States Supreme Court adopted the *Illinois v. Gates* test because the lower courts were applying the *Aguilar-Spinelli* test "in too rigid and technical a fashion."[44]

In *State v. Therrien*,[45] an affidavit was issued based upon information supplied by an unidentified informant. The police received a crime stopper's call stating that Therrien was growing marijuana. The informant also provided the police with Therrien's location.[46] Police drove by the address and saw a house with a small shed, a car, and a pickup truck.[47] The caller also told police that the marijuana would be harvested and moved before the next day.[48] This anonymous telephone information was put into an affidavit.[49] Based on this affidavit, the magistrate issued a search warrant.[50]

Therrien was arrested and convicted of possession of more that eight ounces of marijuana.[51] Therrien appealed from his conviction on the grounds that the affidavit was insufficient for the issuance of the search warrant.[52] The New Mexico Court of Appeals relied on *State v. Cordova*[53] and applied the two-prong *Aguilar-Spinelli* test. In *Therrien*, the court of appeals held that the search warrant was based on an affidavit that did not pass the veracity prong of the test.[54]

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40. *Id.* (citing *Spinelli*, 393 U.S. at 416).
41. *Id.* at 212 n.1, 784 P.2d at 31 n.1.
42. *Id.*
43. *Id.* at 217, 784 P.2d at 36 (citations omitted).
44. *Id.* at 216, 784 P.2d at 35.
45. 110 N.M. 261, 794 P.2d 735 (Ct. App. 1990).
46. *Id.* at 262, 794 P.2d at 736. "Crime stoppers" may give police tips as to illegal activities without having to identify themselves. Further, if the tip leads to favorable results, the caller receives a cash award. *Id.* at 264, 794 P.2d at 738.
47. *Id.* at 262, 794 P.2d at 736. The location and vehicles matched the description given by the caller. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 261, 794 P.2d at 735.
52. *Id.*
53. 109 N.M. 211, 784 P.2d 30 (1989); *see supra* notes 27-44 and accompanying text.
54. 110 N.M. at 263, 794 P.2d at 737.

To pass the veracity prong of the *Aguilar-Spinelli* test, information by unidentified informants must include information corroborating the tip.[55] The fact that a crime stopper informant would receive a financial reward, in and of itself, is not sufficient to fulfill the veracity prong of the test.[56] Further, information supplied by unknown informants must be accepted with greater caution than information received from a known informant because the basis of the unknown informant's knowledge is unknown and cannot be ascertained.[57] Finally, it is impossible to determine whether a crime stopper's information is based upon personal knowledge or rumor.[58] As a result, the information in the crime stopper's call was insufficient to pass the veracity-prong of the *Aguilar-Spinelli* test.

B. Warrantless Searches and Seizures

Often, circumstances require police to make a search without a warrant. When making a warrantless search, probable cause must exist for the search to be valid. The United States Supreme Court has held that the probable cause requirement cannot be less for a warrantless search than that required for the issuance of a valid search warrant.[59]

Further, warrantless searches are assumed to be invalid.[60] As held in *State v. Pena*,[61] "it has long been the rule that warrantless searches are *per se* unreasonable under the fourth amendment of the United States Constitution."[62] Nevertheless, exceptions to this rule exist. During the survey period, New Mexico courts had ample opportunity to examine several of the exceptions to the search warrant requirement.[63]

1. Consent to Search

In *State v. Zelinske*,[64] the court of appeals addressed whether police had probable cause to arrest Zelinske and seize the automobile he was driving without a warrant. In this case, the police stopped Zelinske at a valid roadblock.[65] Zelinske produced a valid driver's license along with

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55. *Id.* at 262, 794 P.2d at 736.
56. *Id.* at 264, 794 P.2d at 738.
57. *Id.*
58. *Id.*
59. Wong Sun v. United States, 371 U.S. 471, 479 (1963).
60. State v. Pena, 108 N.M. 760, 761, 779 P.2d 538, 539 (1989). As a result, the burden of proof will be on the state to show that the warrantless search was reasonable and fell within one of the exceptions to the search warrant requirement.
61. *Id.* at 761, 779 P.2d at 539.
62. 108 N.M. 760, 779 P.2d 538 (1989); *see infra* notes 94-103 and accompanying text.
63. The New Mexico appellate courts addressed: the automobile exception (State v. Pena, 108 N.M. 760, 779 P.2d 538 (1989)); the canine exception (State v. Villanueva, 110 N.M. 359, 796 P.2d 252 (Ct. App.), *cert. denied*, 110 N.M. 260, 794 P.2d 734 (1990)); the plain view doctrine (State v. Lopez, 109 N.M. 169, 783 P.2d 479 (1989); State v. Zelinske, 108 N.M. 784, 779 P.2d 971 (Ct. App. 1989)); consent to search (State v. Zelinske, 108 N.M. 784, 779 P.2d 971 (Ct. App. 1989)); and the inevitable discovery doctrine (State v. Corneau, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989)).
64. 108 N.M. 784, 779 P.2d 971 (Ct. App. 1989).
65. *Id.* at 785, 779 P.2d at 972.

the rental agreement for the car.[66] The police requested permission to search the car after detecting a deodorizing agent.[67] Zelinske gave the police permission to search the car.[68] As police searched the trunk of the car, they saw a heavily-taped box in a garment bag.[69] The officer touched the box.[70] At this point, Zelinske withdrew his consent to the search, placed the box back into the garment bag, and closed the trunk of the car.[71] The police seized Zelinske and the car.[72] Zelinske was arrested, the officer swore out an affidavit, and a search warrant was issued.[73] The police found cocaine in the taped box. Zelinske was charged with attempted possession with intent to distribute cocaine.[74]

The trial court denied Zelinske's motion to suppress the evidence. Zelinske then entered a plea of no contest.[75] Zelinske appealed from the order denying his motion to suppress.[76] On appeal, Zelinske argued that there were no grounds for the issuance of the search warrant.[77] The incriminating evidence was found only after the defendant had withdrawn his consent to the search. The court of appeals conceded the legality of the initial stop and focused on the "crucial" issue of whether probable cause existed at the moment Zelinske withdrew his consent.[78]

It is well established that a search warrant must be based on the information that is known by the police *at the time the search warrant is sought*.[79] The court found that by withdrawing his consent to the search, Zelinske exhibited the required expectation of privacy to invoke his fourth amendment rights.[80] As a result, probable cause had to be based on the information that was known by police at the time consent was withdrawn by Zelinske.[81] The officers knew of the presence of the deodorizer and the taped cardboard box at the time consent was withdrawn by Zelinske.[82] The court of appeals held that this was not enough. "The use of neither a deodorizer nor a taped cardboard box, however, can be considered unusual or even uniquely suited to use in the transportation of narcotics."[83]

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66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 784, 779 P.2d at 971.
75. *Id.* at 784-85, 779 P.2d 971-72.
76. *Id.*
77. *Id.* at 785, 779 P.2d at 972.
78. *Id.* at 785-86, 779 P.2d at 972-73.
79. *Id.* at 786, 779 P.2d at 973.
80. *Id.*
81. *Id.* (citing State v. Blea, 88 N.M. 538, 543 P.2d 831 (Ct. App.), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1975)).
82. *Id.*
83. *Id.* at 787, 779 P.2d at 974 (citing State v. Galvan, 90 N.M. 129, 560 P.2d 550 (Ct. App. 1977)); *see also* Spinelli v. United States, 393 U.S. 410 (1969).

Finally, the state contended that the presence of the deodorizer and the heavily-taped box, coupled with Zelinske's withdrawal of consent to the search, gave the police probable cause for the warrantless seizure. The court of appeals rejected this argument and held that the withdrawal of consent could not be used by police to conduct a warrantless search.[84]

Judge Alarid found justification for the court's decision. If the refusal or withdrawal of consent to a search gave probable cause for a search, then police would be able to conduct the search no matter what response was given once they requested permission to search someone suspected of unlawful conduct.[85] Moreover, if the person consented to the search, police would be allowed to conduct the search.[86] But, if the person did not consent to the search, police would still be allowed to conduct the search because probable cause would then exist for the issuance of a search warrant.[87] Therefore, police would be allowed to conduct a search whether consent was obtained or not.[88] The court of appeals found that this result conflicted with the probable cause requirement of the fourth amendment.[89]

2. Automobile Exception

The mobility of automobiles presents unique problems under the fourth amendment. If an officer was required to obtain a search warrant prior to searching a car, the opportunity would usually be lost because the car would be moved before the officer could return with the warrant.[90] As a result, the courts have permitted warrantless searches of automobiles since the early part of this century.[91] The courts have continued to make exceptions to the search warrant requirement for automobiles because the opportunity to search it is soon lost.[92] All that is required for a valid search of an automobile without a warrant is that the police have probable cause for the search.[93]

The automobile exception to the search warrant requirement arises when police officers have probable cause to believe that contraband is present in a stopped car on the side of the road or at a roadblock.[94] In *State v. Pena*, police stopped Pena's car at a roadblock.[95] At the request of the police, Pena allowed the car's ashtray to be searched.[96]

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84. *Id.* at 788, 779 P.2d at 975. Probable cause requirements for warrantless searches are at least as stringent as those to obtain a valid search warrant. Wong Sun v. United States, 371 U.S. 471, 479 (1963).
85. *Zelinski*, 108 N.M. at 788, 779 P.2d at 975.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. Chambers v. Maroney, 399 U.S. 42, 51 n.9 (1970).
91. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925).
92. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970).
93. *Id.* at 49; *see also* State v. Barton, 92 N.M. 118, 120, 584 P.2d 165, 167 (Ct. App. 1978).
94. State v. Pena, 108 N.M. 760, 761, 779 P.2d 538, 539 (1989).
95. *Id.* at 760, 779 P.2d at 538.
96. *Id.*

Police found an alligator roach clip in the ashtray.[97] The residue on the roach clip tested positive for marijuana in a field test performed at the location where the police had stopped Pena.[98]

Because the roach clip contained marijuana residue, the police made a warrantless search of Pena's car over his objection.[99] As a result of the search of the car and a pat-down search of Pena, police found a significant amount of cocaine and cash, as well as drug paraphernalia.[100] The trial court denied Pena's motion to suppress the evidence found as a result of the warrantless search by police.[101] After a bench trial, Pena was convicted of trafficking cocaine with the intent to distribute and possession of drug paraphernalia.[102]

Prior to this case, New Mexico appellate courts had not faced this issue. The New Mexico Court of Appeals reversed Pena's convictions[103] based on *People v. Franklin*.[104] In *Franklin*, the police arrested Franklin, after conducting a warrantless search, based on the observation of a roach clip on a key ring.[105] A charred residue was present on the roach clip, but police found no narcotics on the end of the roach clip.[106] *Franklin* held that the observation by police of a roach clip with charred residue containing no narcotic materials was not sufficient to establish the probable cause required to search the automobile without a warrant.[107]

The New Mexico Supreme Court granted certiorari to determine whether the discovery of a roach clip and marijuana residue alone gave police probable cause to search Pena's car.[108] In reversing the court of appeals, the supreme court found that probable cause for a warrantless search existed under the automobile exception.[109]

In general, the automobile exception, which allows the search of a car, arises when police have probable cause to believe there is contraband in a vehicle stopped on the road.[110] The court held that the narcotic material found on the roach clip tied it to an illegal use and resulted in the required probable cause to support the warrantless search.[111] The fact that the roach clip in Pena's case contained narcotic material on it distinguished the warrantless search from the search conducted in *People v. Franklin*.

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97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* An inventory of the car revealed 26 one-gram packets of cocaine. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 761, 779 P.2d at 539.
104. 46 A.D.2d 189, 362 N.Y.S.2d 34 (1974).
105. *Id.*
106. *Id.* at 190, 362 N.Y.S.2d at 35.
107. *Id.*
108. *Pena*, 108 N.M. at 760, 779 P.2d at 538.
109. *Id.* at 761, 779 P.2d at 539. It should be noted that the majority consisted of three justices, with one additional justice writing a concurring opinion and the final justice adopting the opinion of the majority of the court of appeals as his dissent.
110. *Id.* (citing United States v. Lopez, 777 F.2d 543, 550 (10th Cir. 1985)).
111. *Id.*

Once contraband, such as marijuana, is legally observed within a car, police have probable cause to believe that other contraband may be in the car.[112] As a result, police may search the car under the automobile exception to the search warrant requirement.[113] Thus, the police validly searched Pena's car and the trial court properly admitted the evidence.

3. Canine Sniff Searches

Canine sniff searches of luggage at airports and bus stations have been held permissible under the fourth amendment by the United States Supreme Court.[114] In upholding the use of trained dogs to detect narcotics in a traveler's luggage, the Court has found that the sniff only indicates the presence or absence of narcotics.[115] No other information as to the contents of the person's luggage is revealed.[116] As a result, the Court has determined that the use of trained dogs does not constitute a search under the fourth amendment.[117]

Only one New Mexico case, *State v. Sandoval*,[118] has addressed whether detection of the odor of narcotics provides sufficient probable cause to conduct a search. *Sandoval* involved a case of human detection of narcotic odors. In *Sandoval*, agents smelled raw marijuana in a car they had stopped at a citizenship checkpoint.[119] The agents recovered five plastic bags containing ten pounds of marijuana.[120] The defendants were convicted of possession of marijuana with the intent to distribute and of conspiring to possess marijuana with the intent to distribute.[121] Defendants appealed, asserting, *inter alia*, that the search was invalid because the agents did not have probable cause, and the agents were not qualified to detect the odor of marijuana.[122]

In *Sandoval*, the court found that the odor of marijuana was sufficient to give probable cause for a search of the car.[123] Further, an agent's testimony that he smelled raw marijuana was sufficient to establish that the agent was familiar with the odor.[124]

In *State v. Villanueva*,[125] the court considered whether detection of an odor by a trained dog at a border checkpoint constituted an illegal search. *Villanueva* presented an issue of first impression in New Mexico. In this

112. *Id.* at 762, 779 P.2d at 540.
113. *Id.* at 761, 779 P.2d at 539.
114. United States v. Place, 462 U.S. 696, 707 (1983).
115. *Id.*
116. *Id.*
117. *Id.*
118. 92 N.M. 476, 590 P.2d 175 (Ct. App. 1979).
119. *Id.* at 477, 590 P.2d at 176.
120. *Id.* at 479, 590 P.2d at 178.
121. *Id.* at 477, 590 P.2d at 176.
122. *Id.* at 477-78, 590 P.2d at 176-77.
123. *Id.* at 478, 590 P.2d at 177.
124. *Id.*
125. 110 N.M. 359, 796 P.2d 252 (Ct. App.), *cert. denied*, 110 N.M. 260, 794 P.2d 734 (1990).

case, the border patrol[126] stopped a commercial bus from El Paso, Texas containing Villanueva and several other passengers.[127] After checking the citizenship of the passengers, the border patrol agents obtained permission from the driver to open the luggage compartments.[128] Narcotic detection dogs reacted positively to two suitcases.[129] The driver indicated that these two suitcases and one other suitcase belonged to Villanueva.[130]

After Villaneuva denied having any luggage on the bus, the agents asked him to go inside the checkpoint office for further questioning.[131] Inside, Villanueva again denied having any luggage on the bus.[132] The agents asked Villanueva to empty his pockets and take off his shoes.[133] The agents found baggage claim receipts for the three pieces of luggage in Villanueva's right shoe.[134]

The agents summoned the state police, who gave Villanueva his *Miranda* rights.[135] The agents opened the suitcases without a warrant, and police found approximately forty pounds of marijuana.[136] Villanueva claimed that the use of the trained drug detection dogs by the agents violated his fourth amendment rights and constituted an illegal search.[137]

Villanueva filed a motion to suppress the evidence obtained as a result of and following the canine search.[138] The trial court admitted the marijuana found in the suitcases, but ordered that the baggage claim tickets and the oral statements made by Villanueva be suppressed.[139] Both the state and Villanueva filed for an interlocutory appeal from the trial court order.[140]

The court of appeals affirmed the trial court and adopted the United States Supreme Court's holding in *United States v. Place*,[141] finding that the canine search did not result in an illegal search. Although *Villanueva* expands the use of odors to establish probable cause to include those

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126. New Mexico, as one of the states that borders a foreign country, maintains permanent checkpoints at its borders.

> [T]he Border Patrol [may] maintain permanent checkpoints at or near intersections of important roads leading away from the border at which a vehicle would be stopped for brief questioning of its occupants "even though there is no reason to believe that a particular vehicle contains illegal aliens."

United States v. Villamonte-Marquez, 462 U.S. 579, 587 (1983) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976)).

127. *Villanueva*, 110 N.M. at 360, 796 P.2d at 253.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 361, 796 P.2d at 254.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 360, 796 P.2d at 253. The state appealed only as to the suppression of the baggage claim tickets. *Id.* at 361, 796 P.2d at 254.
141. 462 U.S. 696 (1983).

detected by trained dogs in public places,[142] the use of this holding in future cases is limited. The court was careful to stress that its holding was limited to searches conducted at border patrol checkpoints, luggage in a common area, and when the owner is at some distance from the luggage.[143] The court reserved expanding its holding beyond the facts in this case until such a case is properly presented to it.[144]

4. Plain View Doctrine

The requirements of a valid search and seizure under the plain view doctrine were set forth by the United States Supreme Court in *Coolidge v. New Hampshire*.[145] The *Coolidge* decision held[146] that valid searches and seizures under the plain view doctrine require that: (1) the item be in plain view; (2) the police be lawfully in the position to observe the item; (3) the incriminating nature of the item be immediately apparent; and (4) the item have been inadvertently discovered.[147] As of June 1990, forty-six states had adopted the requirements set forth in *Coolidge*.[148] New Mexico adopted these requirements in *State v. Luna*.[149]

The New Mexico Court of Appeals dealt with two cases involving the plain view doctrine during the survey period.[150] In *State v. Lopez*,[151] the defendant, Lopez, was parked in a pickup on a dead-end street with a passenger, Sanchez, in his vehicle.[152] A van pulled up and parked approximately one car length away from the pickup.[153] Four police officers got out of the van and approached the pickup.[154] While standing next to the pickup, one of the officers went to the passenger side of the pickup and noticed contraband inside on the seat of the pickup.[155] The issue raised in this case was whether the conduct of the police officers

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142. *Villaneuva*, 110 N.M. at 362, 796 P.2d at 255.
143. *Id.*
144. *Id.*
145. 403 U.S. 443 (1971).
146. The Supreme Court has since stated that "Justice Stewart's analysis of the 'plain view' doctrine did not command a majority and a plurality of the Court has since made clear that the discussion [of Coolidge v. New Hampshsire] is 'not a binding precedent.'" Horton v. California, 496 U.S. 128, ____, 110 S. Ct. 2301, 2307 (1990) (quoting Texas v. Brown, 460 U.S. 730, 737 (1983)).
147. State v. Luna, 93 N.M. 773, 779, 606 P.2d 183, 189 (1980).
148. Horton v. California, 496 U.S. 128, ____, 110 S. Ct. 2301, 2312 (1990) (Brennan, J., dissenting).
149. *Luna*, 93 N.M. at 779, 606 P.2d at 189.
150. *See* State v. Lopez, 109 N.M. 169, 783 P.2d 479 (Ct. App.), *cert. quashed*, 109 N.M. 131, 782 P.2d 384 (1989); State v. Zelinske, 108 N.M. 784, 779 P.2d 971 (Ct. App. 1989). In *Zelinske*, the court of appeals rejected the argument that a box that was heavily taped could be seized under the plain view doctrine because its contents were not known to be contraband. Unless the container itself is contraband, when the contents are unknown, the plain view exception to the search warrant requirement does not apply. *Id.* at 787, 779 P.2d at 974.
151. 109 N.M. 169, 783 P.2d 479 (Ct. App), *cert. quashed*, 109 N.M. 131, 782 P.2d 384 (1989).
152. *Id.* at 171, 783 P.2d at 481.
153. *Id.*
154. *Id.*
155. *Id.*

was such that Lopez would believe that he was being restrained by the police prior to the discovery of the contraband in plain view.

The trial court found that Lopez had been illegally seized by police and that, as a result, the police were not legally in a position to observe the contraband in the car.[156] As a result, the trial court suppressed the contraband discovered by the police.[157] In affirming the trial court, the court of appeals found that based on the facts of this case, the trial court could have found that Lopez believed that he was not free to leave.[158] An officer may question a citizen so long as the officer does not restrain the citizen without consent.[159] The court of appeals found that the trial court could correctly find that the officers illegally restrained Lopez without his consent.

An important point is that, as with all cases since *State v. Luna*, the requirements set forth in *Coolidge v. New Hampshire* were not questioned by New Mexico courts.[160] On June 5, 1990, the United States Supreme Court decided *Horton v. California*.[161] In its decision, the court rejected the inadvertency requirement stated in *Coolidge*, and kept all the other requirements for a valid plain view doctrine search and seizure.[162] In so doing, the Court stated that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[163] Thus, the United States Supreme Court requires only that (1) the item be in plain view, (2) the police be lawfully in the position to observe the item, and (3) the incriminating nature of the item be immediately apparent.[164]

State v. Lopez was decided after *Horton v. California*, and did not present a proper forum for deciding New Mexico's response to *Horton*. Basically, New Mexico may follow the decision in *Horton* and delete the inadvertency requirement as previously required,[165] or it may retain the additional requirement by relying on state constitutional law.[166] This will be a future challenge for New Mexico courts.

5. "Fruits of the Poisonous Tree" Doctrine

The "fruits of the poisonous tree" doctrine can be traced back to *Silverthorne Lumber Co. v. United States*.[167] In *Silverthorne*, the Court

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156. *Id.* at 170, 783 P.2d at 480.
157. *Id.*
158. *Id.* at 172, 783 P.2d at 482.
159. *Id.*
160. 403 U.S. 443 (1971). The *Zelinske* court also did not question the requirements set forth in *Coolidge*.
161. 496 U.S. 128, 110 S. Ct. 2301 (1990).
162. *Id.* at ____, 110 S. Ct. at 2308-09.
163. *Id.*
164. *Id.* at ____, 110 S. Ct. at 2308.
165. *See* State v. Luna, 53 N.M. 773, 606 P.2d 183 (1980).
166. As noted *supra*, State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989), retained the *Aguilar-Spinelli* test and rejected the *Illinois v. Gates* test. For a discussion of State v. Cordova, see notes 27-44 and accompanying text.
167. 251 U.S. 385 (1920).

invalidated a subpoena issued based on information obtained from an illegal search.[168] Since the *Silverthorne* decision, a series of cases were decided that evolved into the "fruits of the poisonous tree" doctrine. The underlying purpose of this doctrine is to prevent the use of evidence illegally obtained by police.[169] The goal of the doctrine is to deter police from making illegal searches.[170]

a. Inevitable Discovery Doctrine

Since its introduction, courts have also recognized the need to allow some very important exceptions to the fruit of the poisonous tree doctrine. One exception to the doctrine is the inevitable discovery exception. Under the inevitable discovery exception, if the evidence that was illegally obtained would have been discovered in a legal manner anyway, the evidence is admissible.[171] The rationale for the inevitable discovery doctrine is grounded in the idea of deterrence. When misconduct on the part of police results in evidence that would not otherwise have been obtained, that evidence must be suppressed.[172] But, if the misconduct on the part of police only results in evidence that would have been obtained lawfully anyway, the police should not be penalized.[173]

In *State v. Barry*,[174] the New Mexico Court of Appeals held that, for the inevitable discovery exception to apply, the prosecution must prove that the police acted in good faith when the illegal search and seizure was made and the evidence would have inevitably been discovered using legal means.[175] In 1984, the United States Supreme Court decided *Nix v. Williams*,[176] which "apparently removed the good faith requirement."[177] For the first time since *Nix*, a New Mexico court was given the opportunity to re-examine its good faith requirement when it decided *State v. Corneau*.

In *Corneau*,[178] the police made three warrantless searches of Corneau's apartment after his arrest for criminal sexual penetration and false imprisonment. Corneau moved to suppress the evidence obtained as a result of the second and third warrantless searches.[179] The court of appeals found that the second and third searches made by the police could not be justified under the exigent circumstances exception to the warrant requirement.[180]

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168. *Id.* at 392.
169. Wong Sun v. United States, 371 U.S. 471, 485 (1963).
170. Nix v. Williams, 467 U.S. 431, 442-43 (1984).
171. *Id.* at 448.
172. *Id.* at 442-43.
173. United States v. Silvestri, 787 F.2d 736, 740 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988).
174. 94 N.M. 788, 617 P.2d 873 (Ct. App. 1980).
175. *Id.* at 790, 617 P.2d at 875.
176. 467 U.S. 431 (1984).
177. State v. Corneau, 109 N.M. 81, 90, 781 P.2d 1159, 1168 (Ct. App. 1989).
178. 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989).
179. *Id.* at 89, 781 P.2d at 1167.
180. *Id.* at 89-90, 781 P.2d at 1167-68.

In affirming the court's admission of the evidence seized during the second and third warrantless searches, the court of appeals applied the inevitable discovery exception.[181] The court held that since the victim informed the police of the existence and location of the evidence, probable cause existed for a search warrant (which was later obtained) and the evidence would have inevitably been discovered.[182]

Next, the court examined the good faith requirement it had previously announced in *State v. Barry*. Corneau's only claim of bad faith was that the search was based on the district attorney's judgment and not a neutral magistrate's judgment.[183] The court did not find that this represented bad faith on the part of the officers.[184] Thus, the evidence seized by the police during the second and third warrantless searches was held admissible.[185]

Ultimately, the court declined to rule on the good faith requirement. While the court recognized that a law enforcement officer's conduct may involve actual bad faith in some cases, there was no bad faith in this case. With this in mind, the court left the question of the good faith test required under *State v. Barry*, and removed in *Nix v. Williams*, for decision when properly brought before the court.[186] Although the issue remains undecided, some indication of the court's stance may be inferred from the fact that the court declined to follow several other jurisdictions that require the police possess and pursue lawful means prior to the illegal conduct.[187] The court, however, reiterated the fact-specific nature of these cases and declined to answer the important issue of the validity of the *State v. Barry* decision.[188]

b. Limits of the "Fruits of the Poisonous Tree" Doctrine

A second limitation to the fruits of the poisonous tree doctrine is that not all evidence illegally obtained by the police must be excluded.[189] The Supreme Court's decision in *Wong Sun v. United States* makes the fruits of the poisonous tree doctrine a balancing test instead of a "but for" test.[190] A court must balance the interests of society in convicting the wrongdoer with the deterrent function served by the fruits of the poisonous tree doctrine.[191]

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181. *Id.* at 90, 781 P.2d at 1168.
182. *Id.*
183. *Id.* at 91, 781 P.2d at 1169. Prior to the second warrantless entry, as required under departmental policy, the police telephoned an assistant district attorney. The assistant district attorney gave police permission to make the warrantless entry. *Id.* at 85, 781 P.2d at 1163.
184. *Id.* at 91, 781 P.2d at 1169.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* Corneau did not raise this issue on appeal; therefore, it was not considered by the court.
189. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).
190. Brown v. Illinois, 422 U.S. 590, 603-04 (1975).
191. *Id.* at 608-09 (Powell, J., concurring).

In the highly publicized case of *State v. Chamberlain*,[192] the court of appeals was presented with an illegal search issue. Officers Carrillo and Messimer responded to a call at the Chamberlain residence. The call had been made by a prostitute who had locked herself in the bathroom after Chamberlain battered her.[193] When Carrillo and Messimer arrived, Chamberlain was at home alone.[194] Chamberlain invited the officers to take a look around the house.[195]

At this point, Carrillo activated a portable tape recorder on his gun belt.[196] The officers found a woman's comb on a bed and began to question Chamberlain about it.[197] Chamberlain refused to answer any questions and requested that the officers leave.[198] The officers refused to leave.[199] A gun battle between Chamberlain and the officers followed, resulting in Carrillo's death.[200]

Chamberlain moved to suppress the tape recording from the point in time when he requested the officers to leave. Chamberlain based this motion on his assertion that the search from that point forward was illegal because he had withdrawn his consent.[201]

In affirming the trial court's admission of the evidence, the court of appeals skirted the issue of whether the search was illegal.[202] The court focused on the admissibility of a crime committed on a police officer, rather than the legality of the search.[203] When framed in this manner, the court refused to suppress the evidence, for "'[a]pplication of the exclusionary rule in such a fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved . . . .'"[204] This result would be "manifestly unacceptable."[205] The rationale for this decision is that an alleged victim of an illegal search should seek protection through the court system by the exclusion of any evidence illegally obtained by police, not through the assault and murder of the officers.

III. SIXTH AMENDMENT — SPEEDY TRIAL AND INEFFECTIVE ASSISTANCE OF COUNSEL

The sixth amendment to the United States Constitution sets forth in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy

192. 109 N.M. 173, 783 P.2d 483 (Ct. App.), *cert. denied*, 109 N.M. 154, 782 P.2d 1351 (1989).
193. *Id.* at 174, 783 P.2d at 484.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 175, 783 P.2d at 485.
203. *Id.* (citations omitted).
204. *Id.* (quoting State v. Miller, 282 N.C. 633, 641, 194 S.E.2d 353, 358 (1973)).
205. *Id.*

the right to a speedy and public trial . . . and . . . have the Assistance of Counsel for his defense."[206] During the current survey period, New Mexico courts ruled on both speedy trial issues and claims of ineffective assistance of counsel.

A. Right to Speedy Trial

The right to a speedy trial is guaranteed by the sixth amendment of the United States Constitution and made applicable to the states through the fourteenth amendment.[207] The right can also be asserted under state speedy trial statutes.[208] The exclusive remedy for a violation of the defendant's sixth amendment right to a speedy trial is dismissal.[209]

The United States Supreme Court first articulated the defendant's interest in safeguarding a speedy trial right in *United States v. Ewell*.[210] The Supreme Court provided its most extensive treatment of the sixth amendment speedy trial right in *Barker v. Wingo*.[211] In *Barker*, the Court applied a four factor balancing test to determine whether the defendant's speedy trial right had been violated.[212] The *Barker* factors are the length of delay, the reason for delay, the assertion of the right to a speedy trial, and the prejudice to defendant resulting from the delay.[213] These factors are weighed against one another, and no single factor by itself is determinative to finding a speedy trial violation.[214] On appeal, courts must review the facts of the case and independently balance the *Barker* factors.[215]

New Mexico courts gave express recognition to the *Barker* test and began applying it in *State v. Harvey*.[216] New Mexico courts also analyzed speedy trial claims under the state's speedy trial statute.[217]

1. Right to Speedy Trial — Constitutional Claims

Beginning with *Harvey*, New Mexico courts have applied the four factors set forth in *Barker* to determine whether a defendant's consti-

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206. U.S. CONST. amend. VI.

207. Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

208. The New Mexico speedy trial statute can be found at N.M. R. CRIM. P. 5-604(B).

209. Strunk v. United States, 412 U.S. 434, 440 (1973). "In light of the policies which underlie the right to a speedy trial, dismissal must remain . . . 'the only possible remedy.'" *Id.* (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)).

210. 383 U.S. 116 (1966). The sixth amendment guarantee "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *Id.* at 120; *see infra* notes 218-346 and accompanying text.

211. 407 U.S. 514 (1972).

212. *Id.* at 530.

213. *Id.*

214. *Id.* at 533. The *Barker* Court found that "these factors have no talismanic qualities; courts must . . . engage in a difficult and sensitive balancing process." *Id.*

215. State v. Grissom, 106 N.M. 555, 561, 746 P.2d 661, 667 (Ct. App. 1987) (citing United States v. Loud Hawk, 474 U.S. 302 (1986)).

216. 85 N.M. 214, 216, 510 P.2d 1085, 1087 (Ct. App. 1973).

217. *See* N.M. R. CRIM. P. 5-604(B).

tutional right to a speedy trial has been violated.[218] During the current survey period, New Mexico courts used three cases to clarify and redefine the application of the *Barker* test to constitutionally-based speedy trial claims.[219]

In *Zurla v. State*,[220] the New Mexico Supreme Court emphasized the relative importance of the first three *Barker* factors and clarified which party bears the burden of proof regarding the fourth factor, prejudice to the defendant. Zurla was arrested for shoplifting on December 14, 1985, while on parole for a prior conviction.[221] He was released the following day after posting a $2,500 bond.[222] In late January, Zurla's parole was revoked, in part, because of the pending charges against him.[223] Due to his parole violation, Zurla was incarcerated from January 27, 1986, to May 22, 1987.[224] There was a seventeen-month lapse between Zurla's arrest and his trial date.[225] Upon returning to prison, Zurla filed a *pro se* motion to have his trial set within six months.[226] Zurla was in the custody of the Department of Corrections for most of the seventeen-month delay due to his parole violation.[227]

Despite Zurla's motion for a speedy trial, the district attorney's office failed to inquire into his whereabouts.[228] A simple phone call to the Department of Corrections' Central Records Office could have located Zurla.[229] The district attorney's office failed to make this phone call.[230] Subsequently, on July 9, 1987, Zurla moved to dismiss the shoplifting charges, claiming that his speedy trial right had been violated.[231]

The district court denied Zurla's motion to dismiss and Zurla was convicted of shoplifting.[232] The court of appeals affirmed.[233] On appeal, the supreme court reversed the court of appeals and held that the seventeen-month delay violated Zurla's speedy trial right.[234] Upon independent review of the court of appeal's decision, the supreme court held that the court of appeals assigned too little weight to the first three *Barker*

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218. When a defendant asserts the right to a speedy trial, he is required to prove each element except the reason for delay. State v. Tartaglia, 108 N.M. 411, 416, 773 P.2d 356, 361 (Ct. App.), *cert. denied*, 108 N.M. 318, 772 P.2d 352 (1989), *overruled in part*, Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990).

219. Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990); State v. Tartaglia, 109 N.M. 801, 791 P.2d 76 (Ct. App. 1990); Work v. State, 111 N.M. 145, 803 P.2d 234 (1990).

220. 109 N.M. 640, 789 P.2d 588 (1990).

221. *Id.* at 641, 789 P.2d at 589.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 645, 789 P.2d at 593.

228. *Id.* at 641, 789 P.2d at 589.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 641-42, 789 P.2d at 589-90.

233. *Id.* at 641, 789 P.2d at 589.

234. *Id.* at 648, 789 P.2d at 596.

factors.[235] The court also held that the court of appeals erred in concluding that the state had prevailed on the prejudice factor.[236] The court addressed each of the four *Barker* factors in turn.

a. Length of Delay

The first factor, the length of delay, is regarded as a "triggering mechanism."[237] Unless the length of delay is presumptively prejudicial, there is no reason to analyze the remaining three factors in the balancing test.[238] Whether the length of delay in a particular case acts to trigger inquiry into the remaining *Barker* factors depends on the specific circumstances of the case.[239]

In *Zurla*, the New Mexico Supreme Court agreed with the court of appeals and held that the seventeen-month delay between Zurla's arrest and trial date was "presumptively prejudicial."[240] The presumption of prejudice prompted inquiry into the remaining three *Barker* factors.[241] The court concluded that the court of appeals had weighed the seventeen-month delay too lightly in Zurla's favor.[242] The court reasoned that the shoplifting charges against Zurla constituted a relatively simple case.[243] The seventeen-month period of incarceration was viewed as unacceptably long in the context of a relatively simple crime.

b. Reason for Delay

The court then addressed the state's reason for the delay. *Barker* drew distinctions between intentional state delay tactics, state negligence resulting in delay, and valid reasons for delay.[244] Any attempt by the state intentionally to hinder the defense effort through the use of delay tactics was weighed *heavily* against the state.[245] Negligent reasons for delay, such as overcrowded courts, constitute a more neutral reason and weigh *less heavily* against the state.[246] Valid reasons for delay, such as missing witnesses, serve to *justify* delay.[247]

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235. *Id.* at 642, 789 P.2d at 590.
236. *Id.*
237. *Barker*, 407 U.S. at 530.
238. *Id.*
239. *Id.* at 530-31.
240. *Zurla*, 109 N.M. at 642, 789 P.2d at 590.
241. *Id.* (citing State v. Grissom, 106 N.M. 555, 561-62, 746 P.2d 661, 667-68 (Ct. App. 1987); State v. Kilpatrick, 104 N.M. 441, 444, 722 P.2d 692, 695 (Ct. App.), *cert. denied*, 104 N.M. 378, 721 P.2d 1309 (1986)).
242. *Id.* The court of appeals had found that although the three factors of length of delay, reason for delay, and defendant's assertion of the right weighed in his favor, they did not weigh *heavily* in his favor. *Id.*
243. *Id.* The supreme court noted that the length of delay "[which] can be tolerated for an ordinary street crime is considerably less than for a serious . . . charge." *Id.* (quoting *Barker*, 407 U.S. at 531).
244. *Barker*, 407 U.S. at 531.
245. *Id.*
246. *Id.*
247. *Id.*

The court of appeals found the state was merely negligent in failing to locate Zurla and did not weigh this factor heavily against the state.[248] Presumably, the court of appeals followed the Supreme Court in *Barker*, which considered negligent delay a "neutral reason" to be weighed "less heavily" against the state.[249] By contrast, the New Mexico Supreme Court held that merely labeling the state's reason as "negligent delay" does not automatically fix the weight to be given to this factor.[250]

In this case, the supreme court found that the state demonstrated "bureaucratic indifference" by failing to inquire into Zurla's whereabouts despite notice that he was housed in the state's own corrections facility.[251] Such "bureaucratic indifference" was held to weigh more heavily against the state than simple case overload.[252] The state's indifference is particularly apparent considering that Zurla timely asserted his speedy trial right.[253] Thus, the New Mexico Supreme Court recognizes a new category of state-caused delay called "bureaucratic indifference," which establishes a middle ground between intentional state delay tactics and negligent state delay.

What distinguishes "bureaucratic indifference" from negligence is not completely clear from *Zurla*. Perhaps "bureaucratic indifference" simply indicates that the state was grossly negligent in failing to bring the defendant to trial. The decision in *Zurla* does demonstrate that the court will carefully scrutinize the state's reason for delay and weigh this factor heavily against the state if the conduct of the state exhibits indifference to the defendant's speedy trial right.

c. Assertion of the Right

Next, the supreme court considered what weight to give to Zurla's assertion of his speedy trial right.[254] The court of appeals weighed this factor in Zurla's favor, but not heavily.[255] The supreme court disagreed with the court of appeals and weighed this factor heavily in Zurla's favor, noting that "the assertion of the right is entitled to strong evidentiary weight in deciding whether a speedy trial violation has taken place."[256] The early assertion of the right is entitled to this weight because

248. *Zurla*, 109 N.M. at 643, 789 P.2d at 591.

249. *Id.*

250. *Id.* (citing Graves v. United States, 490 A.2d 1086, 1092 (D.C. 1984) (en banc), *cert. denied*, 474 U.S. 1064, *overruled in part on other grounds sub nom.* Sell v. United States, 525 A.2d 1017 (D.C. 1987); Taylor v. State, 429 So. 2d 1172, 1174 (Ala. Crim. App.) *cert. denied*, 464 U.S. 950 (1983)).

251. *Id.* at 643-44, 789 P.2d at 591-92. The court also believed that the state demonstrated "indifference" by not inquiring into Zurla's whereabouts in light of Zurla's timely assertion of his speedy trial right and because of the uncomplicated nature of the charges against him. *Id.* at 643, 789 P.2d at 591.

252. *Id.* at 644, 789 P.2d at 592.

253. *Id.* (citing Commonwealth v. Lutoff, 14 Mass. App. Ct. 434, 440 N.E.2d 52 (1982)).

254. *Id.*

255. *Id.* at 642, 789 P.2d at 590. "[T]he court of appeals incorrectly weighed the first three Barker v. Wingo factors too lightly in favor of the defendant . . . ." *Id.*

256. *Id.* at 644, 789 P.2d at 592. (citing *Barker*, 407 U.S. at 531-32).

it "indicates the defendant's desire to have the charges resolved rather than gambling that the passage of time will operate to hinder prosecution."[257] A timely assertion of the speedy trial right, while not absolutely necessary, will be weighed heavily in the defendant's favor.

d. Prejudice to the Defendant

The court then examined the final factor of prejudice to the defendant. *Barker* recognizes three distinct types of prejudice intended to be prevented by securing a speedy trial.[258] The speedy trial right seeks to prevent oppressive pretrial incarceration, the anxiety and concern of the accused, and the possibility of impairment to the defense.[259] The court of appeals held that Zurla failed to show any elements of prejudice resulting from the seventeen-month delay.[260] Although the New Mexico Supreme Court found the prejudice to Zurla was slight, it reversed and found that Zurla had suffered oppressive pretrial incarceration and impairment to his defense.[261]

The issue of oppressive pretrial incarceration involved the question of whether Zurla had lost the possibility of serving concurrent sentences.[262] The court of appeals, relying on *State v. Tarango* [263] and *State v. Powers*,[264] held that Zurla suffered no prejudice from the loss of the possibility of serving concurrent sentences.[265] According to the court of appeals, Zurla had no *right* to serve concurrent sentences because the loss of the *possibility* of serving concurrent sentences did not amount to prejudice.[266] The supreme court, however, relied upon *Smith v. Hooey*[267] and held that "loss of the possibility of serving concurrent sentences constitutes an aspect of prejudice."[268] Thus, the supreme court expressly overruled *Tarango* and *Powers* to the extent that they disagree with *Smith v. Hooey*.[269]

The supreme court then considered whether Zurla suffered impairment to his defense. Zurla claimed prejudice to his defense because two key defense witnesses had left New Mexico following his arrest and could not be located.[270]

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257. *Id.*
258. 407 U.S. at 532.
259. *Zurla*, 109 N.M. at 644, 789 P.2d at 592 (citing *Barker*, 407 U.S. at 532).
260. *Id.*
261. *Id.* at 645, 789 P.2d at 593.
262. *Id.*
263. 105 N.M. 592, 734 P.2d 1275 (Ct. App.), *cert. denied*, 105 N.M. 521, 734 P.2d 761 (1987). The *Tarango* court held that "the possibility of serving a sentence concurrently is not a right and cannot be construed as actual prejudice." *Id.* at 598, 734 P.2d at 1281 (citing State v. Powers, 97 N.M. 32, 636 P.2d 303 (Ct. App. 1981)).
264. 97 N.M. 32, 636 P.2d 303 (Ct. App. 1981) (holding that the possibility of serving concurrent sentences is only a possibility, not a right, and does not result in actual prejudice).
265. *Zurla*, 109 N.M. at 645, 789 P.2d at 593.
266. *Id.*
267. 393 U.S. 374 (1969).
268. *Zurla*, 109 N.M. at 645, 789 P.2d at 593.
269. *Id.*
270. *Id.* at 641, 789 P.2d at 589.

The court of appeals held that Zurla bore the burden of proving prejudice and failed to establish prejudice.[271] The court of appeals relied on *State v. Tartaglia*,[272] which held that the defendant must present specific proof of prejudice and may not simply rely on the presumption of prejudice arising from the length of delay.[273] *Tartaglia*, which is based on *Barker* and *United States v. Loud Hawk*,[274] holds that the presumption of prejudice is a mere triggering mechanism which does not carry forward to establish the actual prejudice necessary to prevail on the fourth prong of the *Barker* analysis.[275]

The supreme court disagreed with the reasoning of *Tartaglia* and held that if the defendant establishes presumptively prejudicial delay, the burden of persuasion then shifts to the state to establish that no speedy trial violation occurred.[276] The court expressly overruled *Tartaglia* "[t]o the extent it suggests the state does not have this burden."[277] Thus, *Zurla* departs from *Barker* and *Loud Hawk* by deciding that the presumption of prejudice which triggers initial inquiry into the four *Barker* factors now *carries forward* to become a presumption of prejudice with respect to the prejudice prong of the *Barker* analysis. The state will now have the burden of persuasion to demonstrate that a speedy trial violation has not taken place, once a presumption of prejudice is raised.[278] By contrast, *Barker* and *Loud Hawk* refused to allow the initial presumption of prejudice to carry forward to the prejudice prong of the *Barker* analysis because the presumption was a mere triggering mechanism. Prior to *Zurla*, the defendant was required to "present specific corroboration of his contention of prejudice."[279] Now, the state must overcome the initial presumption of prejudice by persuading the court that the defendant was not prejudiced by the delay.

When analyzing whether Zurla's defense was impaired, the court considered the actions of the defendant and the state. Zurla failed to show whether he had attempted to locate the missing witnesses and failed to demonstrate a causal relationship between the delay and the loss of the witnesses' testimony. The state did not show how the evidence controverted the presumption of prejudice as applied to the loss of this testimony.[280]

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271. *Id.* at 645, 789 P.2d at 593.

272. 108 N.M. 411, 773 P.2d 356 (Ct. App.), *cert. denied*, 108 N.M. 318, 772 P.2d 352 (1989), *overruled in part*, Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990).

273. *Id.* at 415, 773 P.2d at 360. The "presumption of prejudice" referred to is the presumption that arises under the first *Barker* factor, as a result of the length of delay. *Id.* This presumption merely acts to trigger analysis into the remaining three *Barker* factors and "does not function to summarily answer the separate factor of prejudice to a defendant." *Id.*

274. 474 U.S. 302 (1986). In *Loud Hawk*, the court held that the "possibility of prejudice is not sufficient to support respondents' position that their speedy trial rights were violated." *Id.* at 315.

275. *Tartaglia*, 108 N.M at 415, 773 P.2d at 360 (citing *Barker*, 407 U.S. at 530; *Loud Hawk*, 474 U.S. 302).

276. *Zurla*, 109 N.M. at 646, 789 P.2d at 594.

277. *Id.*

278. *Id.*

279. *Tartaglia*, 108 N.M. at 416, 773 P.2d at 361 (citing State v. Grissom, 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987)).

280. *Zurla*, 109 N.M. at 647-48, 789 P.2d at 595-96.

When the evidence was viewed as a whole, the court held that the state did not meet its burden of persuasion to demonstrate that Zurla's defense had not been impaired.[281]

2. *State v. Tartaglia* — Refinements of *Zurla v. State*

On appeal after remand, following the decision in *Zurla*, the court of appeals reconsidered *State v. Tartaglia*.[282] In the second *Tartaglia* appeal, the court of appeals further refined speedy trial analysis.

Tartaglia was indicted for possession of drugs and drug paraphernalia on March 12, 1985, while incarcerated for a parole violation.[283] Tartaglia was sent a notice of the indictment. When Tartaglia failed to appear, a bench warrant was issued for his arrest.[284] Neither Tartaglia nor prison officials were aware of the outstanding bench warrant when Tartaglia was released.[285] Tartaglia was subsequently arrested on February 26, 1987, and he posted bond the following day.[286] A formal arraignment took place on March 6, 1987.[287] On the basis of the two-year delay between his indictment and arraignment, Tartaglia filed a motion to dismiss claiming a violation of his right to a speedy trial.[288]

On second appeal, the New Mexico Court of Appeals held that despite an absence of prejudice, Tartaglia's speedy trial right had been violated because the first three *Barker* factors weighed heavily in his favor.[289] While recognizing "the prejudice factor focuses most directly on the goals of the speedy trial clause,"[290] the court emphasized that actual prejudice is not required to justify dismissal if the length of delay, the reason for delay and the assertion of the right all weigh substantially in the defendant's favor.[291] Thus, the court abrogated the necessity of actual prejudice within the *Barker* analytical framework. A defendant can now prevail on a speedy trial claim in the absence of actual prejudice.

3. *Work v. State* — Further Refinements of *Zurla v. State*

Finally, in *Work v. State*,[292] the New Mexico Supreme Court further explained its application of the *Barker* factors and its holding in *Zurla*.

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281. *Id.* at 648, 789 P.2d at 596. Justice Baca dissented from the majority opinion in *Zurla*, adopting the memorandum opinion from the court of appeals as his dissent. *Id.* at 649, 789 P.2d at 597.

282. 109 N.M. 801, 791 P.2d 76 (Ct. App. 1990).

283. *Tartaglia*, 108 N.M. at 413, 773 P.2d at 358.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Tartaglia*, 109 N.M. 801, 803, 791 P.2d 76, 78 (1990). The court agreed with the defendant's claim that "the relevant time period was twenty-four months from defendant's indictment until his arrest and arraignment." *Id.* at 802-03, 791 P.2d at 77-78. The court weighed the two-year delay in "a relatively simple drug case" fairly heavily against the state. *Id.* at 803, 791 P.2d at 78. The court found the reason for delay to be "bureaucratic indifference" and also weighed this factor heavily against the state. *Id.* The court also found that the defendant had "timely asserted his [speedy trial] right by filing a motion to dismiss shortly after his arrest on the indictment." *Id.*

290. *Id.* at 803, 791 P.2d at 78 (citing United States v. Henry, 615 F.2d 1223 (9th Cir. 1980)).

291. *Id.*

292. 111 N.M. 145, 803 P.2d 234 (1990), *cert. denied*, 111 S. Ct. 1413 (1991).

The court addressed all four *Barker* factors and held that John Work's right to a speedy trial had been violated.

Work was arrested and charged with criminal solicitation on April 24, 1986.[293] On September 22, 1986, the charges were dismissed without prejudice pending a grand jury hearing.[294] On December 17, 1987, the grand jury indicted Work on four counts of criminal solicitation and one count of aggravated battery.[295] A trial was scheduled for August 22, 1988.[296] On July 11, 1988, Work moved to dismiss the charges on speedy trial grounds.[297] The trial court granted the motion after a hearing and dismissed Work's indictment with prejudice.[298]

On appeal, the New Mexico Court of Appeals reversed the decision of the trial court.[299] The court found the length of the delay and the assertion of the speedy trial right to be in Work's favor.[300] The court, however, decided that the reasons for delay favored the state and that Work "had the 'burden of proof' to show prejudice."[301] The court determined that Work had failed to make such a showing. After balancing the four *Barker* factors, the court of appeals held that Work's speedy trial right had not been violated.[302]

The New Mexico Supreme Court reversed the court of appeals, holding that Work's right to a speedy trial had been violated.[303] In making this decision, the supreme court reiterated its application of the four *Barker* factors and discussed, in relevant part, the length of delay, the reason for the delay, the assertion of the speedy trial right, and prejudice to the defendant.[304]

a. Length of Delay

The court of appeals held that any pre-indictment delay following dismissal of the magistrate court charges should not be included as part of the length of delay.[305] The court of appeals found the remaining

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293. *Id.* at 146, 803 P.2d at 235.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.* The court placed primary emphasis on the conclusion that Work "had not established prejudice from the delay, as contemplated by the fourth *Barker* factor." *Id.*
303. *Id.*
304. *Id.* at 146-47, 803 P.2d at 235-36. Regarding the assertion of the right by the defendant, the supreme court agreed with the court of appeals and held that the defendant's timely assertion of his speedy trial right weighed in his favor. *Id.* at 147, 803 P.2d at 236. However, Justice Wilson's dissenting opinion points out that Work's assertion of his speedy trial right was seriously undermined by his substantial contributions to the pre-trial delay period and his apparent attempts to avoid trial. *See id.* at 152, 803 P.2d at 241 (Wilson, J., dissenting).
305. *Id.* at 147, 803 P.2d at 236. In analyzing the length of delay, the trial court considered the "entire [twenty-eight month] time period from [Work's] arrest on April 24, 1986, to the date of the hearing on the motion to dismiss the indictment, August 18, 1988." *Id.* This time period included

thirteen months to be the relevant time period and presumptively prejudicial.[306] The majority of the supreme court agreed with the court of appeals, thus triggering inquiry into the remaining three *Barker* factors.[307] The supreme court declined to consider whether pre-indictment delay should be considered as an aspect of the total length of delay.[308]

b. Reason for Delay

In determining the weight to be given to the reason for the delay, the supreme court noted that Work was responsible for several periods of delay that constituted the total length of delay.[309] Despite Work's substantial contribution to the delay, the supreme court held that the reason for delay was neutral, or at most, "somewhat in favor of the state."[310] The supreme court held that the state had violated Work's right to a speedy trial despite the fact that Work himself caused delays in the trial process.

It is paradoxical that a defendant can contribute significantly to pre-trial delay and eventually prevail against the state by claiming a state violation of his speedy trial right.[311] The New Mexico Supreme Court has weakened the "reason for delay" factor by allowing the defendant to cause pre-trial delay and then prevail on a speedy trial claim. Arguably, this decision may provide incentives for a defendant to contribute to pre-trial delay in order to build and establish delay time that is pre-

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a fifteen-month delay period "between [the] magistrate court dismissal and [the] grand jury indictment." *Id.* The majority and the court of appeals did not include the fifteen-month preindictment period as part of the delay period because there were "no charges pending" against Work during the fifteen months and there were "no restraints on his liberty." *Id.*

306. *Id.*

307. *Id.* Justice Wilson, dissenting from the majority, did not regard the thirteen-month delay as sufficiently lengthy to be presumptively prejudicial. *Id.* at 151, 803 P.d at 240 (Wilson, J., dissenting). Justice Wilson would consider the thirteen-month delay to be a sequence of two proceedings, consisting of five and eight months respectively. *Id.* Because there was no presumption of prejudice arising from the thirteen-month period, Justice Wilson would not have considered the remaining three *Barker* factors. *Id.*

308. *Id.* at 147, 803 P.2d at 236. By declining to decide whether preindictment delay should be counted as part of the length of delay, the court ignored the opportunity to decide a hotly contested issue. The trial court held that the fifteen month preindictment period was part of the total length of delay. *Id.* at 146, 803 P.2d at 235. Similarily, Justice Ransom held the preindictment period to be part of the length of delay. *Id.* at 150, 803 P.2d at 239 (Ransom, J., specially concurring).

309. *Id.* at 147, 803 P.2d at 236. Work was responsible for a period of delay occurring before the original charges were dismissed on September 22, 1986, and following the grand jury indictment on December 17, 1987. *Id.* at 146, 803 P.2d at 235.

310. *Id.* at 147, 803 P.2d at 236. Work substantially contributed to pre-trial delay. *Id.* at 152, 803 P.2d at 241 (Wilson, J., dissenting). He "twice waived the time limits for preliminary hearings and on three occasions obtained additional time in which to file pretrial motions while he sought [superintending writs] from [the] court." *Id.*

311. Justice Wilson, dissenting, commented on the majority's decision to allow Work to contribute to the pre-trial delay and eventually prevail on speedy trial grounds. *Id.* (Wilson, J., dissenting). Wilson regarded Work's contribution to pre-trial delay as undermining his assertion of the speedy trial right. *Id.* He noted that Work "substantially contributed to the delay of both the first and second proceedings." *Id.* Furthermore, "the defendant's complaint of delay, filed approximately five weeks prior to the scheduled trial, was not calculated to put the state on notice that the defendant wanted a speedy trial . . . ." *Id.* Justice Wilson perceived Work as attempting "to escape the consequences of trial altogether." *Id.*

sumptively prejudicial.[312] Thus, New Mexico allows a defendant to contribute to his own pre-trial delay and then successfully claim that the state has violated his speedy trial right.

c. Prejudice to Defendant

The decision in *Work* clearly reemphasizes the holding in *Zurla* on prejudice to the defendant. Further, *Work* highlights the situations in which the presumption of prejudice to the defendant is accorded great weight as opposed to when the presumption is entitled to minimal weight.

The court of appeals held that Work, not the state, had the burden of proving that the delay had been prejudicial and that Work had not met this burden.[313] In reversing the court of appeals, the supreme court reemphasized that the original presumption of prejudice, used to trigger inquiry into the remaining three *Barker* factors, "carries forward" and shifts the burden to the state to establish on balance that no speedy trial violation has occurred.[314] Thus, because the state failed to rebut the presumption of prejudice, this factor was found to weigh in Work's favor.[315] *Work* clearly follows *Zurla* and establishes that the presumption of prejudice arising from a given length of delay carries forward into the analysis of the fourth factor.[316]

The court clarified that, in some instances, the presumption of prejudice will be accorded great weight. *Work* re-enforces the court of appeals' decision in *Tartaglia* by holding that under some circumstances the delay may be so long that it is "well-nigh conclusive" of prejudice so that proof of actual prejudice becomes unnecessary.[317] The presumption of prejudice may by itself be enough to tip the balance of the fourth factor in favor of the accused in cases where the accused has been subjected to long periods of pre-trial delay or has prevailed on the first three *Barker* factors.[318]

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312. The decision that a defendant can contribute to his own pre-trial delay and still prevail against the state on a speedy trial claim may be a manifestation of the court's adamant contention that the *Barker* test is a balancing process, with no single factor being determinative. *Zurla*, 109 N.M. at 642, 789 P.2d at 590 (citing *Barker*, 407 U.S. at 533).

313. *Work*, 111 N.M. at 147, 803 P.2d at 236. In formulating this holding, the court of appeals relied on State v. Tartaglia, 108 N.M. 411, 773 P.2d 356 (Ct. App.), *cert. denied*, 108 N.M. 318, 772 P.2d 352 (1989). *Id.* However, Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990), overruled *Tartaglia*'s holding to the extent that the state had no burden of persuasion to rebut the defendant's presumption of prejudice. *Work*, 111 N.M. at 147, 803 P.2d at 236 (citing *Zurla*, 109 N.M. at 646, 789 P.2d at 594).

314. *Work*, 111 N.M. at 147, 803 P.2d at 236.

315. *Id.* at 148, 803 P.2d at 237.

316. *Id.* at 147, 803 P.2d at 236. Justice Wilson asserts in his dissenting opinion that "*Zurla* misapplied *Barker*" by holding that the presumption of prejudice arising from the first factor "carries forward" to become part of the fourth factor. *Id.* at 152, 803 P.2d at 241 (Wilson, J., dissenting). Justice Wilson contended that requiring the state to bear the burden of persuasion to rebut a presumption of prejudice forces the state to "positively prove a negative." *Id.* at 153, 803 P.2d at 242.

317. *Id.* at 148, 803 P.2d at 237 (citing United States v. Avalos, 541 F.2d 1100, 1116 (5th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977)).

318. *Id.* When the first three *Barker* factors weigh heavily in favor of the accused, then "prejudice

The characterization of the presumption of prejudice was taken one step further. The state is entitled to rebut any presumption of prejudice, and has the burden of doing so.[319] In *Work*, the supreme court held the state can fulfill its burden by establishing valid reasons for the delay or an untimely assertion of the right and acquiesence by the defendant to the delay, and by showing the accused was not actually prejudiced by the delay.[320] These alternatives amount to no more than rebutting the last three *Barker* factors. The irony is that a case in which the presumption of prejudice is given great weight will invariably be a case where the first three *Barker* factors weigh heavily in the defendant's favor.[321] Therefore, it would seem nearly impossible for the state to rebut factors that already weigh against it. The court, however, allows some flexibility by finding that these alternatives are "not all-inclusive."[322]

Nevertheless, in some instances, the presumption of prejudice may be designated little or no weight.[323] First, the presumption will carry less weight when the defendant makes no attempt to demonstrate actual prejudice resulting from the delay.[324] Second, the court implied that the presumption will carry less weight when the length of delay, the reason for the delay, and the assertion of the speedy trial right do not weigh in favor of the defendant.[325] As a result, a defendant increases the chances of prevailing on a speedy trial claim if actual prejudice can be demonstrated, especially if the other factors in the analysis do not weigh in the defendant's favor.[326] Work successfully demonstrated actual prejudice, unrebutted by the state, and ultimately prevailed in his claim. Work proved potential impairment to his defense by first illustrating the "weak-

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becomes totally irrelevant." *Id.* (citing *Avalos*, 541 F.2d 1100). Thus, even in the absence of actual prejudice, the accused is able to prevail if the length of delay is presumptively prejudicial, the reason for the delay is weighed heavily against the state, and the accused has timely asserted his right.

319. *Id.*

320. *Id.* at 147, 803 P.2d at 236 (citing Barker v. Wingo, 407 U.S. 514 (1972)).

321. *Id.* at 148, 803 P.2d at 237 (citing *Avalos*, 541 F.2d at 1116).

322. *Id.* at 147 n.1, 803 P.2d at 236 n.1. Other reasons offered by the state, other than rebutting the last three *Barker* factors, may be acceptable in countering the presumption of prejudice. *Id.* The court did not indicate what these circumstances might be.

323. *Id.* at 148, 803 P.2d at 237 (citing *Zurla*, 109 N.M. at 646, 789 P.2d at 594; State v. Holtslander, 102 Idaho 306, 313, 629 P.2d 702, 709 (1981)).

324. *Id.*

325. *Id.* If neither party presents evidence on prejudice, the presumption of prejudice "may have greater or lesser significance in the balancing process depending on the length of the delay and the weights assigned to the other factors." *Id.*

326. The defendant may offer evidence "to corroborate the presumption [of prejudice]." *Id.* *Work* underscores the necessity to demonstrate actual prejudice. Work reinforced the initial presumption of prejudice by showing actual prejudice to his case resulting from the pre-trial delay. *See id.* Work arguably had weaknesses in his speedy trial claim. While the thirteen-month delay was presumptively prejudicial and Work timely asserted his right to a speedy trial, he also substantially contributed to the delay. *Id.* at 152, 803 P.2d at 241 (Wilson, J., dissenting). Thus, the reason for delay was found to be "somewhat in favor of the state." *Id.* at 147, 803 P.2d at 236. As noted earlier, the presumption of prejudice carries less weight when the first three *Barker* factors do not favor the defendant. Because Work only prevailed on two *Barker* factors, the presumption of prejudice might not have tipped the fourth *Barker* factor in his favor absent the showing of actual prejudice.

ness of a witness' memory" and secondly, by establishing that the "first degree murder charges . . . caused him humiliation and embarrassment[327] and affected his reputation . . . ."[328]

4. Right to Speedy Trial — Claims Raised Under the Six-Month Rule

The United States Supreme Court has found "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[329] The court, however, did declare that states may define reasonable time periods "consistent with constitutional standards," within which a criminal trial must begin.[330] New Mexico's six-month rule[331] sets forth specific conditions which trigger the running of the six-month time period within which a defendant's criminal proceeding must commence.

State v. Sanchez[332] reaffirms that any one of the seven enumerated events in New Mexico Rule of Criminal Procedure 5-604 acts to "suspend the proceeding" at the district court level, rather than to toll the six-month period.[333] Sanchez was arraigned on a charge of first-degree murder on July 8, 1987.[334] The state subsequently received an extension of time from the supreme court, set to expire on February 5, 1988.[335] In January, the first-degree murder charge was negotiated to a plea of guilty to voluntary manslaughter.[336] The hearing to enter the plea was scheduled for March 15, 1988.[337] The trial court rejected the plea agreement when the victim's family opposed such an agreement.[338] The trial commenced on September 6, 1988, and Sanchez was convicted of first-degree murder.[339]

In appealing his conviction, Sanchez contended that his trial took place in violation of the New Mexico speedy trial statute because the proceedings

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327. *Id.* at 148, 803 P.2d at 237. The court of appeals found that "humiliation and embarrassment" could generally be categorized "under the rubric of 'anxiety and concern of the accused.'" *Id.* Although the court of appeals held that "anxiety and concern of the accused" did not entail stress exceeding that attending most criminal prosecutions, the New Mexico Supreme Court held that "the existence of such anxiety and concern is . . . a sub-factor to be considered in" the assessment of prejudice. *Id.*

328. *Id.* Justice Ransom wrote a specially concurring opinion in which he found the "presumption of prejudice entitled to little weight when consideration is limited to the thirteen-month delay consisting of five months during which charges were pending in the magistrate court and eight months following the indictment." *Id.* at 149, 803 P.2d at 238 (Ransom, J., specially concurring). Nonetheless, Justice Ransom concurred in the result because he concluded that the fifteen-month preindictment delay should be included as part of the delay period, making the total delay period twenty-eight months. *Id.* at 150, 803 P.2d at 239. The presumption of prejudice is weighed more heavily against the state for a twenty-eight month delay. *Id.*

329. *Barker*, 407 U.S. at 523.

330. *Id.*

331. N.M. R. CRIM. P. 5-604(B).

332. 109 N.M. 313, 785 P.2d 224 (1989).

333. *Id.* at 316-17, 785 P.2d at 227-28; *see* N.M. R. CRIM. P. 5-604.

334. *Sanchez*, 109 N.M. at 316, 785 P.2d at 227.

335. *Id.* The state was granted an extension of time pursuant to N.M. R. CRIM. P. 5-604(C).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 314, 785 P.2d at 225.

commenced more than six months after his arraignment.[340] The supreme court found that the act of negotiating the plea "suspend[ed] the proceedings."[341] By negotiating the plea Sanchez impliedly consented to extend the date for trial beyond the February 5 deadline and to six months past March 15, the date the plea was ruled upon.[342]

Furthermore, the court discussed the effect of this circumstance on the six-month rule.[343] The court asserted that the six-month rule does not simply recommence after interruption.[344] Rather, the six-month period does not apply when one of the circumstances contemplated by the statute is in effect.[345] When the circumstance ceases to be in effect, a new six-month period begins.[346]

B. Ineffective Assistance of Counsel

The sixth amendment of the Constitution of the United States sets forth that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[347] The Supreme Court has long held that the right to counsel means the right to effective assistance of counsel.[348] The purpose behind the right to effective counsel is to guarantee the accused a fair trial in the adversarial system.[349] Thus, the right to effective assistance of counsel is grounded in "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[350] If the performance of the accused's counsel causes the process to lose its character as an adversarial proceeding, the constitutional right is violated.[351]

The following section examines five cases which addressed ineffective assistance claims during the current survey period.[352] In these cases, the

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340. *Id.* at 315, 785 P.2d at 226.

341. *Id.* at 316-17, 785 P.2d at 227-28 (quoting State v. Mendoza, 108 N.M. 446, 449, 774 P.2d 440, 443 (1989)).

342. *Id.* at 316, 785 P.2d at 227. The court agreed with the state's argument, which asserted that the pivotal date for assessing a violation of the six month rule was March 15, the date the plea was rejected. *Id.* This decision is consistent with N.M. R. CRIM. P. 5-604, which allows the "trial of a criminal case [to] . . . commence six . . . months after . . . the date the court allows . . . the rejection of a plea. . . ." N.M. R. CRIM. P. 5-604(B).

343. *Sanchez*, 109 N.M. at 316, 785 P.2d at 227.

344. *Id.*

345. *Id.*

346. *Id.*

347. U.S. CONST. amend. VI.

348. United States v. Cronic, 466 U.S. 648, 654 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). This proposition is suggested by the text of the sixth amendment. *Id.* "The Amendment requires not merely the provision of counsel to the accused, but 'Assistance' at trial," which is to be "for his defence." *Id.* If the accused receives no actual assistance, then his constitutional right is deemed to be violated. *Id.*

349. *Id.* at 656-57.

350. *Id.* at 656. "When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred." *Id.*

351. *Id.* at 656-57.

352. State v. Crislip, 109 N.M. 351, 785 P.2d 262 (Ct. App.), *cert. denied*, 109 N.M. 262, 784 P.2d 1005 (1989); State v. Newman, 109 N.M. 263, 784 P.2d 1006 (Ct. App.), *cert. denied*, 109

court announced the applicable standard with respect to ineffective assistance of counsel claims.

The New Mexico Court of Appeals applied the *Strickland*[353] standards to claims of counsel ineffectiveness during trial. Furthermore, the court addressed whether multiple representation of co-defendants led to ineffectiveness. Finally, during the survey period, the court considered whether denial of a defense-requested motion for continuance rendered the defense attorney unprepared and ineffective. The survey cases provide a unique factual contrast because counsel was held ineffective in some cases and effective in others.

1. Application of the *Strickland* Standards — Counsel Found Ineffective

In *Strickland v. Washington*,[354] the United States Supreme Court set forth a two-part test for determining whether the accused's sixth amendment right to counsel has been violated by deficient counsel performance. *Strickland* requires the defendant to demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.[355] To determine whether counsel's performance was deficient, the court decides whether the performance was that of a reasonably competent attorney in light of the surrounding circumstances.[356] The second requirement, proof of prejudice, requires the defendant to show a reasonable probability that, *but for* counsel's unprofessional errors, the result of the proceeding would have been different.[357] Finally, the reviewing court must be "highly deferential" and presume that counsel has rendered adequate assistance.[358]

In *State v. Crislip*,[359] the New Mexico Court of Appeals applied the *Strickland* standard to Crislip's ineffective assistance claim. Defendant Patrice Crislip was accused of child abuse resulting in the death of her child.[360] Crislip's fourteen-month-old son died after being hospitalized with multiple fractures to the skull.[361] Both Crislip and her husband,

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N.M. 262, 784 P.2d 1005 (1989); State v. Stenz, 109 N.M. 536, 787 P.2d 455 (Ct. App.), *cert. denied*, 109 N.M. 562, 787 P.2d 842 (1990); State v. Santillanes, 109 N.M. 781, 790 P.2d 1062 (Ct. App. 1990); State v. Brazeal, 109 N.M. 752, 790 P.2d 1033 (Ct. App.), *cert. denied*, 109 N.M. 631, 788 P.2d 931 (1990).

353. These standards were enunciated in the United States Supreme Court case of Strickland v. Washington, 466 U.S. 668 (1984). For an explanation of these factors, see *infra* notes 354-58 and accompanying text.

354. 466 U.S. 668 (1984).

355. *Id.* at 687.

356. *Id.* According to *Strickland*, "[t]he court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690.

357. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

358. *Id.* at 689.

359. 109 N.M. 351, 785 P.2d 262 (Ct. App.), *cert. denied*, 109 N.M. 262, 784 P.2d 1005 (1989).

360. *Id.* at 353, 785 P.2d at 264.

361. *Id.*

Robert Crislip, were charged with child abuse resulting in death.[362] Patrice and Robert were tried separately and were assigned separate counsel because each implicated the other in the death of their son.[363] Patrice was tried and convicted.[364] On appeal, Patrice alleged that her right to effective assistance of counsel had been denied.[365]

The New Mexico Court of Appeals reviewed several alleged instances of attorney incompetence which had occurred prior to or during Patrice Crislip's trial. In determining whether counsel had been ineffective, the court applied the two-part *Strickland* test to determine whether Crislip's attorney had performed below the standard of a reasonably competent attorney and whether her defense had been prejudiced.[366] The court specifically addressed three alleged acts of incompetence.

The first alleged act of incompetence occurred on direct examination where Patrice denied abusing her child.[367] During cross-examination, the prosecutor made repeated references to an out-of-court statement made by Robert Crislip that he saw Patrice beating their child several days before the child was hospitalized with fatal injuries.[368]

The prosecutor brought this statement before the jury to attack the credibility of Patrice regarding a claimed memory loss reported to have happened the day she allegedly beat her child.[369] This "blackout claim" was never made a part of Patrice's defense during trial.[370] Patrice's counsel failed to object to the use of this out-of-court statement.[371] Furthermore, Crislip's attorney failed to take any protective action whatsoever.[372] The court, *sua sponte*, gave a limiting instruction on this evidence.[373] Furthermore, after conviction the court questioned the defense counsel's failure to object.[374]

At issue was whether Crislip's attorney was incompetent by not taking protective measures regarding the use of Robert's out-of-court statement. The court first noted that out-of-court statements made by a codefendant are "presumptively unreliable" and "less credible than ordinary hearsay"

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362. *Id.*
363. *Id.*
364. *Id.* Robert Crislip, originally scheduled to be tried before defendant, disappeared prior to trial and was still missing at the time Crislip was tried. *Id.*
365. *Id.*
366. *Id.* at 353-57, 785 P.2d at 264-68. The court recognized that the standard for deciding whether counsel was ineffective is "whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent attorney." *Id.* at 353, 785 P.2d at 264 (citing State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982); State v. Dean, 105 N.M. 5, 727 P.2d 944 (Ct. App.), *cert. denied*, 104 N.M. 702, 726 P.2d 856 (1986)).
367. *Id.* at 354, 785 P.2d at 265.
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* With regard to the prosecution's use of the out-of-court statement of Robert Crislip, "[d]efense counsel did not move to suppress [the] statement, did not object, did not move to strike the state's reference to the statement, did not move for a mistrial, and did not even seek a limiting instruction." *Id.*
373. *Id.*
374. *Id.*

because codefendants are motivated by self interest—they are willing to implicate another to avoid incrimination.[375] Thus, the statement would have been inadmissable as violating Crislip's confrontation rights, had Patrice's attorney made a timely objection.[376]

The state argued that Robert's statement was not introduced as substantive evidence, but rather was admissible to impeach Crislip's claim of memory loss during the day the incident allegedly happened.[377] Patrice, however, never raised a blackout defense during trial.[378] Accordingly, there was no legitimate purpose for the prosecution to introduce Robert's statement because it was not admissible to impeach any of Patrice's trial testimony.[379] The court of appeals held that Robert's statement was inadmissible, and defense counsel should have objected to it.[380]

The court then addressed whether Patrice had been prejudiced by the admission of her husband's statement. The court found that there was no evidence that Patrice had ever beaten her child, except for Robert's out-of-court statement.[381] Moreover, the state had not established a legitimate purpose for introducing Robert's statement.[382] Furthermore, the evidence would likely have been stricken had defense counsel correctly moved for exclusion.[383] The court utilized the *Strickland* standard to determine if there was a "reasonable probability" that, absent the failure of Crislip's attorney to take protective action regarding Robert Crislip's damaging statement, the fact-finder would have had reasonable doubts about Crislip's guilt.[384] Under this standard, the court held that the statement was highly prejudicial to Crislip's case.[385]

The second alleged act of incompetence was counsel's failure to oppose the state's use of psychiatric testimony.[386] Prior to trial, the district court ordered a psychological evaluation of Patrice pursuant to her attorney's motion.[387] Patrice's attorney allowed the state access to the evaluation report before he himself looked at it.[388] Included in the report was a defense witness list indicating that the defense might call a neuro-psychiatrist to testify.[389] As a result, the state was able to call Dr. Daugherty, the psychiatrist who had performed Patrice's evaluation, as its witness.[390]

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375. *Id.* at 355, 785 P.2d at 266. The court also noted that Crislip and her husband were being tried separately "precisely because [their] defenses were antagonistic." *Id.*
376. *Id.*
377. *Id.*
378. *Id.* at 356, 785 P.2d at 267.
379. *Id.*
380. *Id.* at 355-56, 785 P.2d at 266-67.
381. *Id.* at 356, 785 P.2d at 267.
382. *Id.*
383. *Id.*
384. *Id.* at 354, 785 P.2d at 265 (citing *Strickland*, 466 U.S. at 695).
385. *Id.* at 356, 785 P.2d at 267.
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.* Crislip's counsel did not subpoena Dr. Daugherty. *Id.*

During the trial, Dr. Daugherty testified extensively for the state on her evaluation of Patrice and the possible reasons why she might have experienced blackouts and memory loss.[391] As noted previously, however, Patrice never evoked a memory loss or blackout defense during trial.[392] Evidence about blackouts and memory loss was introduced by the prosecution and tended to put Patrice's mental stability at issue.[393] The court concluded that the prosecution improperly commented on Patrice's character because she had not placed her character at issue by raising a memory loss defense.[394] In spite of this, Crislip's attorney failed to object.[395] The court held that Crislip's attorney had acted incompetently by not objecting to Dr. Daugherty's testimony, but held that the testimony was not prejudicial.[396] Despite a holding that Dr. Daugherty's testimony was not prejudicial in and of itself, the court went on to hold that the failure to object to the testimony "was cumulatively an aspect of ineffective assistance of counsel."[397]

The court of appeals then addressed whether Crislip's counsel had been ineffective in preparing for trial.[398] Crislip argued that her attorney had not properly investigated the case while preparing for trial and had not developed any trial tactics.[399] While the court emphasized that the strategy of trial counsel should not be second-guessed on appeal, it also expressed serious concerns about the defense attorney's preparation for trial.[400] Thus, the court considered the failure of Crislip's attorney to adequately prepare for trial as an aspect of cumulative ineffectiveness.[401]

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391. *Id.* The court stated that:

> On direct examination, Dr. Daugherty testified that the purpose of her evaluation was to determine the physical cause for blackouts and memory lapses defendant reported experiencing. She testified that defendant had reported occasionally experiencing blackouts, usually for a few seconds or minutes, including a memory loss for the entire day of March 24th. She also testified there was no evidence of brain damage in defendant, but although the blackouts were not due to brain damage, they could have other causes such as trauma or stress.

Id. The testimony that Crislip had no evidence of brain damage was likely used to attack Crislip's credibility and character by implying that the blackout stories were fabricated.

392. *Id.*

393. *Id.* at 356-57, 785 P.2d at 267-68.

394. *Id.* at 357, 785 P.2d at 268.

395. *Id.*

396. *Id.*

397. *Id.* (citing State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct.App. 1985)). In *Talley*, the New Mexico Court of Appeals held that multiple acts of attorney incompetence, while perhaps not prejudicial in and of themselves, combined to become cumulative aspects of ineffective assistance of counsel. *See Talley*, 103 N.M. at 37, 702 P.2d at 357. This doctrine of cumulative attorney error bestows an advantage upon defendants who can conceivably show many small, unprejudicial errors which collectively add up to counsel ineffectiveness.

398. *Crislip*, 109 N.M. at 357, 785 P.2d at 268.

399. *Id.* The only apparent trial tactic relied upon by Crislip's attorney was to hope that Robert Crislip would be convicted prior to Crislip's trial, thereby giving her a basis for leniency. *Id.*

400. *Id.*

401. The court of appeals did not expressly state whether it considered the way in which Crislip's attorney prepared for trial as an aspect of cumulative error. It appears that it did so, however, because the court mentioned counsel's "failure to interview key witnesses prior to trial" in the conclusion of the case, when discussing the combined errors that deprived Crislip of a fair trial. *Id.* at 357-58, 785 P.2d at 268-69.

The court held that, overall, Patrice's attorney had "failed to measure up to the standard required of a reasonably competent attorney."[402] Although recognizing that Patrice was not entitled to an error-free trial, the court nonetheless found that the combined effect of multiple instances of ineffective assistance prejudiced Patrice and denied her a fair trial.[403]

2. Alternatives for Determining Ineffectiveness

Judge Hartz concurred in the result in *Crislip*, but stated in his concurring opinion that he would have reversed because of plain error rather than ineffective assistance of counsel.[404] In addition to the plain error doctrine, Judge Hartz suggested two additional ways to dispose of ineffective assistance claims.

Judge Hartz contended that when a defendant claims counsel ineffectiveness the case should either be remanded to the trial court for a hearing on the issue or the defendant should be required to seek post-conviction remedies under the New Mexico habeas corpus statute.[405] Judge Hartz believed that appellate courts could only speculate when trying to determine an attorney's trial tactics.[406] Because such determinations are without a formal record from a hearing, they are inefficient and prone to error.[407] According to Judge Hartz, a hearing or habeas corpus proceeding would allow the attorney to explain fully his conduct and permit the court to make an intelligent evaluation of whether "'counsel's acts or omissions were within the range of reasonable competence."'[408] Ac-

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402. *Id.* at 357, 785 P.2d at 268 (citing State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982); State v. Taylor, 107 N.M. 66, 752 P.2d 781 (1988)).

403. *Id.* at 358, 785 P.2d at 269. The case was reversed and remanded to the trial court. *Id.*

404. *Id.* (Hartz, J., specially concurring). The plain error doctrine allows evidentiary matters to be reviewed on appeal "despite failure of trial counsel to bring them to the attention of the trial court." *Id.* at 359, 785 P.2d at 270 (citing State v. Wall, 94 N.M. 169, 608 P.2d 145 (1980); State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975); State v. Sanchez, 86 N.M. 713, 526 P.2d 1306 (Ct. App. 1974)). Judge Hartz pointed out that: "'Plain error' has been characterized in various ways such as 'grave errors which seriously affect substantial rights of the accused,' 'errors that result in a clear miscarriage of justice,' errors that 'are obvious . . .' [or errors which] seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting United States v. Campbell, 419 F.2d 1144 (5th Cir. 1969)).

405. *Id.* at 358, 785 P.2d at 269. The habeas corpus remedy is a remedy to be sought after exhausting all other remedies available to the defendant. *See* N.M. R. CRIM. P. 5-802(B)(3). The rule

> governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint for a determination that such custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such a sentence; that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.

Id. 5-802(A).

406. *Crislip*, 109 N.M. at 358, 785 P.2d at 269.

407. *Id.*

408. *Id.* at 359, 785 P.2d at 270 (quoting People v. Pope, 152 Cal. Rptr. 732, 740, 590 P.2d 859, 867 (1979)).

cordingly, Judge Hartz presumably favors the judicial deference enunciated in *Strickland*.[409]

Hartz's concurring opinion leaves open the possibility that the New Mexico Court of Appeals may prefer remand or post-conviction remedies when substantial claims of ineffective assistance are raised in future cases.[410] *State v. Stenz*[411] substantiates this trend. In *Stenz*, the court of appeals held that Stenz's attorney was not incompetent for failing to make a motion to suppress evidence where no basis existed in the record to support the motion.[412]

In dicta, the court discussed Judge Hartz's concurring opinion in *Crislip*. The court agreed that substantial claims of counsel ineffectiveness should be remanded to the trial court for a hearing or remedied through a habeas corpus proceeding.[413] The court further asserted that because a habeas corpus proceeding allows the defendant to establish a record of counsel ineffectiveness, "remands would be appropriate only in . . . limited situations."[414] Thus, habeas corpus proceedings may provide the remedy for future counsel ineffectiveness claims except for certain limited situations in which remand would be appropriate.

3. No Sixth Amendment Violation — Counsel Effective

In *State v. Newman*,[415] the New Mexico Court of Appeals addressed another claim that defense counsel was ineffective during trial. Newman was tried and convicted of criminal sexual contact with a child under the age of thirteen.[416] At the beginning of the trial, Newman's attorney objected to a state's expert witness being allowed to testify.[417] Counsel objected to the witness's qualifications as an expert counselor, therapist, and psychologist.[418] The trial court sustained the motion in part and held that the expert witness would not be allowed to give an opinion about whether she believed the child was telling the truth about the claimed sexual contact.[419] During trial the expert proceeded to testify, without solicitation from the state, that she believed the child was truthful regarding the alleged sexual contact with Newman.[420] Newman's attorney

409. *See supra* notes 353-58 and accompanying text.
410. *See Crislip*, 109 N.M. at 358, 785 P.2d at 269 (Hartz, J., specially concurring).
411. 109 N.M. 536, 787 P.2d 455 (Ct. App.), *cert. denied*, 109 N.M. 562, 787 P.2d 842 (1990).
412. *Id.* at 538, 787 P.2d at 457.
413. *Id.* at 539, 787 P.2d at 458; *see Crislip*, 109 N.M. at 358, 785 P.2d at 269 (Hartz, J., specially concurring).
414. *Stenz*, 109 N.M. at 539, 787 P.2d at 458. The court gave an example of situations in which remand would be appropriate, "such as when the trial record establishes a prima facie case of ineffective assistance of counsel, but the state has not had an opportunity to present evidence to rebut that prima facie case." *Id.*
415. 109 N.M. 263, 784 P.2d 1006 (Ct. App. 1989).
416. *Id.* at 264, 784 P.2d at 1007.
417. *Id.* at 265, 784 P.2d at 1008.
418. *Id.*
419. *Id.* The trial court did rule that "the witness could state her opinion concerning whether the child's behavior was consistent with that of a sexually abused child." *Id.*
420. *Id.* at 267, 784 P.2d at 1010.

promptly requested a cautionary instruction, and the trial court instructed the jury to dismiss the witness's testimony regarding her opinion as to the truthfulness of the child's allegations.[421]

On appeal, Newman asserted that his attorney failed to perform as a reasonably competent attorney[422] because counsel sought a cautionary instruction rather than a mistrial.[423] The court noted that the decision of Newman's attorney to ask for a cautionary instruction, rather than for a mistrial, was a choice of trial tactics.[424] The court further recognized that an appellate court is not free to second guess the trial tactics of a trial attorney.[425] Hence, the court held that trial counsel's decision to ask for a cautionary instruction, rather than move for a mistrial, failed to demonstrate either incompetence or prejudice to Newman's defense.[426]

The basic distinction between effective and ineffective counsel is clearly illustrated by comparing the decisions in *Crislip* and *Newman*. Crislip's defense counsel clearly allowed damaging and improper hearsay testimony to be heard by the jury with no protective action taken on Crislip's behalf.[427] As a result, ineffectiveness and resulting prejudice were clearly shown.[428] In contrast, Newman's defense counsel responded quickly to improper witness testimony.[429] The requested protective action was left to the discretion of the trial counsel—not to be second guessed by the appellate court. The request for a limiting instruction in *Newman* was held to be a reasonable decision, although alternatives existed. Counsel's decision was not found unreasonable, ineffective or prejudicial simply because one option was pursued instead of another.

C. *Multiple Representation and Conflicts of Interest*

The United States Supreme Court has held that a defendant's right to effective assistance of counsel can be violated where one attorney represents codefendants.[430] Moreover, when joint representation occurs for defendants having conflicts of interest, a specific showing of prejudice is not required.[431] One attorney representing codefendants, however, does not violate constitutional guarantees of effective assistance of counsel *per*

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421. *Id.*

422. *Id.* at 267-68, 784 P.2d at 1010-11; *see* State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982); State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985).

423. *Newman*, 109 N.M. at 267-68, 784 P.2d at 1010-11.

424. *Id.* at 268, 784 P.2d at 1011.

425. *Id.* (citing State v. Dean, 105 N.M. 5, 727 P.2d 944 (Ct. App.), *cert. denied*, 104 N.M. 702, 726 P.2d 856 (1986)).

426. *Id.* In addition to requesting a cautionary instruction, Newman's attorney provided a vigorous defense throughout the trial. *Id.*

427. *Crislip*, 109 N.M. at 356-58, 785 P.2d at 267-69.

428. *Id.* at 358, 785 P.2d at 269.

429. *Newman*, 109 N.M. at 268, 784 P.2d at 1011.

430. Holloway v. Arkansas, 435 U.S. 475, 481 (1978) (citing Glasser v. United States, 315 U.S. 60, 70 (1942)). "[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Glasser*, 315 U.S. at 70.

431. *Holloway*, 435 U.S. at 489.

se.[432] New Mexico courts previously addressed conflicts of interest in *State v. Aguilar*[433] and *State v. Robinson*.[434]

In New Mexico, conflicts of interest must be "actual" and not merely a possibility.[435] The test for determining actual conflicts of interest is whether "counsel 'actively represented conflicting interests' that adversely affected his performance."[436]

In *State v. Santillanes*,[437] the New Mexico Court of Appeals addressed the issue of whether defendant Santillanes was denied effective assistance of counsel when his counsel also represented Santillanes' brother on charges stemming from the same incident. Santillanes and his brother became involved in a fight with several persons.[438] As a result, three persons were wounded.[439] Both Santillanes and his brother were arrested.[440] Santillanes was charged with shooting one victim, and his brother was charged with stabbing two victims.[441] Both men retained the same defense counsel.[442] Defendant was tried and convicted of aggravated battery with a deadly weapon.[443]

At a motion hearing for a new trial, Santillanes' attorney stated that, after trial, Santillanes' brother admitted to committing the crime of which Santillanes had just been convicted.[444] Santillanes asserted that defense counsel had not allowed him to testify during trial on his own behalf.[445] Defense counsel admitted that he purposely avoided calling Santillanes as a witness in order to protect Santillanes' brother.[446] In addition, two witnesses testified at the motion hearing that Santillanes' brother had admitted to firing the shot.[447]

The court held that Santillanes was denied his right to effective assistance of counsel because his attorney had a conflict of interest in representing both Santillanes and his codefendant brother for charges emanating from the same incident.[448] The court stated that Santillanes' attorney had a duty to avoid such conflicts of interest.[449] Furthermore, in a case where there is a conflict of interest, prejudice to the defense is presumed.[450]

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432. *Id.* at 482. The Court points out that a "'common defense often gives strength against a common attack.'" *Id.* at 482-83 (quoting *Glasser*, 315 U.S. at 92).
433. 87 N.M. 503, 536 P.2d 263 (Ct. App. 1975).
434. 99 N.M. 674, 662 P.2d 1341, *cert denied*, 464 U.S. 851 (1983).
435. State v. Santillanes, 109 N.M. 781, 790 P.2d 1062 (Ct. App. 1990).
436. *Id.* at 783, 790 P.2d at 1064.
437. *Id.*
438. *Id.* at 782, 790 P.2d at 1063.
439. *Id.*
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.* at 783, 790 P.2d at 1064.
445. *Id.*
446. *Id.*
447. *Id.*
448. *Id.* at 782, 790 P.2d at 1063.
449. *Id.* at 783, 790 P.2d at 1064 (citing State v. Talley, 103 N.M. 33, 702 P.2d 353 (Ct. App. 1985)).
450. *Id.* (citing State v. Aguilar, 87 N.M. 503, 536 P.2d 263 (Ct. App. 1975)). The court mentioned

The court noted that trial counsel had to abandon a strategy that could have absolved Santillanes in an attempt to exonerate Santillanes' brother.[451] Thus, the court held that an actual conflict of interest existed and Santillanes was entitled to a new trial.[452]

D. *Motions for Continuance and Ineffective Assistance of Counsel Claims*

In *State v. Brazeal*,[453] the court addressed the issue of whether the denial of a motion for continuance creates the presumption that the defendant suffered prejudice from ineffective assistance of counsel.[454] In this case, a public defender was appointed to represent Brazeal on February 23, 1989, following a mistrial.[455] The day before trial, defense counsel informed the court that additional investigation time was needed and, therefore, he could not render effective assistance of counsel.[456] Defense counsel then moved for a continuance on the day of the trial, but the motion was denied.[457] On appeal, Brazeal claimed ineffective assistance of counsel for several reasons, one of which was the denial of the continuance.[458]

The court noted that "the trial judge has broad discretion in ruling on a motion for continuance."[459] Furthermore, only the most egregious circumstances would support a presumption of ineffectiveness arising from the denial of a continuance.[460] The court then held that, "except in exceptional circumstances, [the court should] not ignore the actual conduct of the trial and presume that the defendant has suffered prejudice from ineffective assistance of counsel due to the failure of the trial judge to grant a continuance."[461]

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that "there must be an actual conflict of interest and not just a possibility of a conflict." *Id.* (citing State v. Robinson, 99 N.M. 674, 662 P.2d 1341, *cert. denied*, 464 U.S. 851 (1983)). The court mentioned that the "test for determining the existence of an actual conflict is whether counsel 'actively represented conflicting interests' that adversely affected his performance." *Id.* (citing *Robinson*, 99 N.M. at 679, 662 P.2d at 1346).

451. *Id.*

452. *Id.* at 785, 790 P.2d at 1066.

453. 109 N.M. 752, 790 P.2d 1033 (Ct. App. 1990).

454. *Id.* at 755, 790 P.2d at 1036.

455. *Id.* at 754, 790 P.2d at 1035.

456. *Id.* at 755, 790 P.2d at 1036.

457. *Id.*

458. *Id.* A denial of continuance often precludes the defense attorney from preparing fully and properly. The court recognized that "[b]oth New Mexico and the United States Supreme Courts have treated the claim of an improper denial of a continuance as a claim of ineffective assistance of counsel." *Id.* (citing State v. Taylor, 107 N.M. 66, 752 P.2d 781 (1988); United States v. Cronic, 466 U.S. 648 (1984)).

459. *Id.* at 756, 790 P.2d at 1037.

460. *Id.* (citing Powell v. Alabama, 287 U.S. 45 (1932); United States v. Cronic, 466 U.S. 648 (1984)). It appears that it would be difficult to demonstrate egregious circumstances to support a presumption of ineffectiveness. "A presumption of ineffectiveness arising from refusal to grant a continuance is justified in a very limited class of cases." *Id.*

461. *Id.* "[A]ppellate courts will not presume denial of effective assistance of counsel because of the trial judge's refusal to grant a continuance unless, under the circumstances, 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" *Id.* (citing *Cronic*, 466 U.S. at 659-60).

Because no presumption of prejudice existed, Brazeal had to establish ineffective assistance of counsel based on his attorney's conduct at trial.[462] The court found no proof of prejudice and held that Brazeal was not denied effective assistance of counsel.[463] The court based this holding on the determination that the outcome of the trial would likely have been the same even if the continuance had been granted.[464]

IV. DOUBLE JEOPARDY

A. Introduction

The fifth amendment of the United States Constitution provides that no person may be put in jeopardy of life or limb for the same offense twice.[465] In its interpretation of the double jeopardy clause, the United States Supreme Court has found that double jeopardy protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[466] During the survey period, New Mexico courts only dealt with double jeopardy protection with respect to multiple punishments for the same offense.[467]

The Supreme Court has stated that the federal double jeopardy clause applies to state prosecutions through the fourteenth amendment.[468] Additionally, New Mexico protects its citizens from being twice put in jeopardy for the same offense under its constitution[469] and by statute.[470] The New Mexico constitutional provision has been interpreted to afford the identical protection provided by the federal constitutional amendment.[471] The statutory protection against double jeopardy, however, further defines New Mexico citizens' rights.[472]

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462. *Id.* at 757, 790 P.2d at 1038. The court first considered the prejudice element, rather than first considering whether defense counsel's performance was deficient. *Id.* at 758, 790 P.2d at 1039. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . , that course should be followed." *Id.* (quoting *Strickland*, 466 U.S. at 697).

463. *Id.*

464. *Id.*

465. U.S. CONST. amend. V.

466. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

467. State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990); State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990); State v. Corneau, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989); State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App. 1989); State v. Martinez, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

468. Benton v. Maryland, 395 U.S. 784, 794 (1969).

469. N.M. CONST. art. II, § 15.

470. N.M. STAT. ANN. § 30-1-10 (Repl. Pamp. 1984). The statute provides:

> 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 of 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.

Id.

471. State v. Rogers, 90 N.M. 604, 605-06, 566 P.2d 1142, 1143-44, *aff'd in part, rev'd in part*, 90 N.M. 604, 566 P.2d 1142 (1977).

472. *See* N.M. STAT. ANN. § 30-1-10 (Repl. Pamp. 1984).

A complete double jeopardy analysis requires a thorough understanding of several complicated concepts. The first concept that will be discussed concerns when jeopardy attaches for an offense.[473] Because the double jeopardy clause prohibits a person from being twice put in jeopardy for the same offense, a court must decide when the defendant is first put in jeopardy. Of course, a determination that jeopardy has attached for a given offense does not necessarily bar retrial under all circumstances.[474] Thus, the next concept discussed concerns some of the situations in which jeopardy attached but retrial was not barred.[475]

Another concept that leads to much confusion concerns whether the defendant has previously been put in jeopardy for the offense with which he is currently charged. This concept often requires an inquiry into whether two separate statutory offenses are the "same offense" as the term is used in the fifth amendment or any applicable corresponding state constitutional provision.[476] New Mexico courts clarified several of these concepts during the survey period.[477]

B. When Jeopardy Attaches

When faced with a double jeopardy challenge, the first question that a court must often answer is: has this defendant already been put in jeopardy, *i.e.*, has jeopardy attached for the given offense? For the purpose of determining when jeopardy attaches, the Supreme Court has distinguished between criminal jury trials and criminal bench trials. In a criminal jury trial, jeopardy attaches when the jury is impaneled and sworn.[478] In a criminal bench trial, jeopardy attaches when evidence is first heard.[479]

In New Mexico, jeopardy attaches just as it does under federal double jeopardy law. Jeopardy attaches under state law when the jury is impaneled in a criminal jury trial,[480] and in a bench trial when the state presents some evidence.[481]

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473. *See infra* notes 478-81 and accompanying text.

474. The most common example of a permissible retrial occurs following an appellate order for a remand. Although a new trial may be granted to the defendant, the second trial is a continuation of the first for double jeopardy purposes. Ball v. United States, 163 U.S. 662 (1896).

475. *See infra* notes 482-532 and accompanying text.

476. *See infra* notes 532-621 and accompanying text.

477. *See* State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990); State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990); County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990); Callaway v. State, 109 N.M. 416, 785 P.2d 1035, *cert. denied*, 110 S. Ct. 2603 (1990); March v. State, 109 N.M. 110, 782 P.2d 82 (1989); State v. Haddenham, 110 N.M. 149, 793 P.2d 279, *cert. denied*, 110 N.M. 72, 792 P.2d 49 (1990); State v. Post, 109 N.M. 177, 783 P.2d 487 (Ct. App. 1989); State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989); State v. Martinez, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989); State v. Barber, 108 N.M. 709, 778 P.2d 456 (Ct. App.), *cert. denied*, 108 N.M. 713, 778 P.2d 911 (1989); State v. Eden, 108 N.M. 737, 743, 779 P.2d 114, 120 (Ct. App.), *cert. denied*, 108 N.M. 681, 777 P.2d 1325 (1989).

478. Crist v. Bretz, 437 U.S. 28 (1978).

479. Serfass v. United States, 420 U.S. 377 (1975).

480. State v. Eden, 108 N.M. 737, 743, 779 P.2d 114, 120 (Ct. App.), *cert. denied*, 108 N.M. 713, 778 P.2d 1325 (1989) (citing State v. James, 93 N.M. 605, 603 P.2d 715 (1979)).

481. *Id.*

C. *When Double Jeopardy Does Not Bar Retrial*

Even after jeopardy has attached, retrial is not barred under all circumstances. During the survey period, New Mexico courts considered three situations in which defendants contended that double jeopardy barred retrial after the trial court made a procedural error.[482] In one case, the trial court declared a mistrial.[483] In another case, the defendant's conviction was supported by what appellate review later deemed inadmissible evidence.[484] In yet a third case, the defendant's dismissal was based on erroneously excluded evidence.[485] As the appellate courts pointed out, the double jeopardy clause may bar retrial when the trial court declares a mistrial, but double jeopardy does not bar retrial when the trial court errs in its determination of the admissibility of evidence.

1. Mistrials

Although jeopardy has attached, judicial declaration of a mistrial over the defendant's objection may not bar retrial.[486] The Supreme Court has determined that if the defendant objects to a mistrial, retrial is barred once jeopardy attaches unless there existed a "manifest necessity" to declare the mistrial.[487]

The Court defined manifest necessity as a "high degree" of necessity.[488] Mistrials are manifestly necessary when a procedural error prevents the trial from going forward.[489] Additionally, declaring a mistrial is manifestly necessary when there is a hung jury[490] or consecutive illnesses of the participants in a criminal proceeding.[491] Apparently, the state is entitled to a "second shot" at a case after a mistrial has been declared when, due to the circumstances of a given case, a fair trial is not possible.

Within the last year, the New Mexico Supreme Court reviewed double jeopardy's impact on mistrials with respect to manifest necessity. In *Callaway v. State*,[492] the trial court *sua sponte* declared a mistrial. Defense counsel asked a legitimate question but received an unresponsive answer; had the answer been solicited, it would have violated a court order.[493] The trial court judge declared a mistrial over defense counsel's objection.[494]

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482. County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990); Callaway v. State, 109 N.M. 416, 785 P.2d 1035, *cert. denied*, 110 S. Ct. 2603 (1990); State v. Post, 109 N.M. 177, 783 P.2d 487 (Ct. App. 1989).

483. *See Callaway*, 109 N.M. at 416, 785 P.2d at 1035.

484. *See Post*, 109 N.M. at 178, 783 P.2d at 488.

485. *See Tapia*, 109 N.M. at 737, 790 P.2d at 1018.

486. *See* State v. Saavedra, 108 N.M. 38, 41, 766 P.2d 298, 301 (1989).

487. United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); *Saavedra*, 108 N.M. at 41, 766 P.2d at 301.

488. Arizona v. Washington, 434 U.S. 497, 506 (1978).

489. *See, e.g.*, Lovato v. New Mexico, 242 U.S. 199 (1916); Thompson v. United States, 155 U.S. 271 (1894).

490. *Perez*, 22 U.S. (9 Wheat.) at 579.

491. *Saavedra*, 108 N.M. at 41, 766 P.2d at 301.

492. 109 N.M. 416, 785 P.2d 1035 (1990).

493. *Id.* at 418, 785 P.2d at 1037.

494. *Id.*

Additionally, the prosecution had not requested a mistrial at that time.[495]

The supreme court found that the trial court acted out of anger and did not explore other alternatives prior to declaring a mistrial.[496] The *Callaway* court employed the rule set out by the West Virginia Supreme Court in *Porter v. Ferguson*.[497] The *Porter* court stated that "when the trial court acts irrationally, irresponsibly or precipitately in response to a prosecutor's motion for a mistrial, such action will not be condoned, and double jeopardy will bar a retrial of the accused for the same offense."[498] The *Callaway* court then stated that *Porter*'s rule should apply "even more forcefully when the trial court sua sponte orders a mistrial."[499] The court concluded that because the mistrial was not manifestly necessary, the double jeopardy clause barred retrial.[500] Thus, in New Mexico the state may not be entitled to a "second shot" at a case when a trial court judge *sua sponte* declares a mistrial.[501]

2. Convictions Supported by Erroneously Admitted Evidence

The United States Supreme Court has determined that the double jeopardy clause does not bar retrial if the trial court based defendant's conviction on evidence later deemed inadmissible.[502] In *Lockhart v. Nelson*, the trial court, during Johnny Lee Nelson's sentencing hearing, allowed the prosecution to admit evidence that the United States District Court of the Eastern District of Arkansas later deemed inadmissible.[503] The district court then found that double jeopardy barred the state from resentencing Nelson.[504]

The Supreme Court accepted the appellate court's finding that evidence was erroneously admitted and thus the remaining evidence was insufficient to support enhancing Nelson's sentence under Arkansas' habitual offender statute.[505] The Court still decided, however, that the double jeopardy clause did not bar retrial.[506] The *Lockhart* Court based its reasoning on the decision that it was permitted to look at all the evidence presented, not just the admissible evidence.[507]

In *State v. Post*,[508] the New Mexico Court of Appeals adopted the United States Supreme Court's reasoning in *Lockhart*.[509] The trial court

495. *Id.*
496. *Id.*
497. 324 S.E.2d 397 (W. Va. 1984).
498. *Callaway*, 109 N.M. at 417, 785 P.2d at 1036 (quoting *Porter*, 324 S.E.2d at 401).
499. *Id.*
500. *Id.* at 417-18, 785 P.2d at 1036-37.
501. *See id.* at 416, 785 P.2d at 1035.
502. Lockhart v. Nelson, 488 U.S. 33 (1988).
503. *Id.* at 37.
504. *Id.*
505. *Id.* at 40 n.7.
506. *Id.* at 42.
507. *Id.* at 41-42.
508. 109 N.M. 177, 783 P.2d 487 (Ct. App. 1989).
509. *Id.* at 181, 783 P.2d at 491; *see also Lockhart*, 488 U.S. at 33.

in *Post* admitted evidence the court of appeals later deemed inadmissible.[510] The court of appeals then held, citing *Lockhart*, that retrial is permissible after an appellate court finds the trial court erroneously admitted evidence, even if the remaining evidence would not support a conviction.[511] The *Post* court reasoned that if retrial was not allowed, the state would have to "overtry" its cases in order to ensure that, even if some of the admitted evidence was later excluded, there would still be sufficient evidence to support a conviction.[512] Although the *Post* court allowed a retrial, it left open the question of whether the state could replace the excluded evidence with new evidence during the second trial.[513]

3. Dismissals Based on Erroneously Excluded Evidence

Later in the survey period, the New Mexico Supreme Court more clearly explained when double jeopardy prohibits a trial after a district court has dismissed a criminal case. In *County of Los Alamos v. Tapia*,[514] the supreme court distinguished between dismissals based on evidentiary insufficiency and dismissals based on erroneously excluded evidence.[515] In *Tapia*, a police officer in Los Alamos County observed the defendant running a stop sign.[516] After the officer began to pursue defendant with emergency flashers on, defendant drove over the county line into Santa Fe County.[517] Defendant was arrested for driving while intoxicated.[518] The trial judge found the arrest was illegal and excluded the fruits of the arrest, including the results of the field sobriety test.[519] The charges were therefore dismissed.[520] The county appealed the dismissal.[521] The court of appeals affirmed the dismissal on double jeopardy grounds.[522]

The supreme court held that double jeopardy did not bar further prosecution because the trial court's dismissal was based on erroneously excluded evidence and not on insufficient evidence.[523] The *Tapia* court explained that the "incorrect receipt or rejection of evidence"[524] is trial error and evidentiary insufficiency is the "failure of the prosecution to offer sufficient evidence to satisfy the trier of fact beyond a reasonable doubt."[525] The court therefore found that double jeopardy does not preclude retrial when the defendant proves the trial court erroneously admitted evidence.[526]

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510. *Post*, 109 N.M. at 178, 783 P.2d at 488.
511. *Id.* at 181, 783 P.2d at 491.
512. *Id.*
513. *Id.*
514. 109 N.M. 736, 790 P.2d 1017 (1990).
515. *Id.* at 740, 790 P.2d at 1021 (quoting Burks v. United States, 437 U.S. 1, 15 (1978)).
516. *Id.* at 737-38, 790 P.2d at 1018-19.
517. *Id.* at 738, 790 P.2d at 1019.
518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.*
523. *Id.* at 744, 790 P.2d at 1025.
524. *Id.* at 740, 790 P.2d at 1021 (quoting Burks v. United States, 437 U.S. 1, 15 (1978)).
525. *Id.*
526. *Id.*

The *Tapia* court then supported its decision by relying on the trial court's failure to render a judgment of acquittal.[527] The court first distinguished between an acquittal, which it defined as a resolution of some of the factual issues in the defendant's favor, and a termination of a trial in defendant's favor.[528] It then concluded that because the trial court dismissed the case on "trial error" grounds and did not enter a judgment of acquittal, the double jeopardy clause did not bar retrial.[529]

The cases in this section show that double jeopardy does not protect a defendant against retrial when a trial judge makes an error in judgment. In such situations, appellate courts balance the fair administration of justice against the defendant's fifth amendment rights.[530] When a court erroneously includes or excludes evidence, even the defendant may have an interest in a retrial in order to have the matter fairly decided once and for all.[531] In such cases, the balance tips in favor of a final determination of the defendant's guilt or innocence via a new trial. But, the balance tips in favor of barring retrial when the trial court acts out of anger, rather than when it makes a simple error in judgment, and *sua sponte* declares a mistrial when it was not manifestly necessary as exemplified by *State v. Post.*

D. "Same Offense" Doctrine

The main double jeopardy issue courts confront is whether the government has put a defendant in jeopardy twice for the same offense. The same offense doctrine comes into play in two distinct situations. The first situation occurs when a defendant has been given multiple punishments for the same offense during a single trial. The second situation occurs when a defendant faces two trials for one offense.

The Supreme Court has developed a test for courts to determine whether two statutory offenses are the same for double jeopardy purposes. The first prong of the test, which is used in the analysis of both single trial and multiple trial situations, determines whether the legislature intended multiple punishments in a given case, and whether the two offenses are the same for double jeopardy purposes.[532] The second prong of the test, which need only be used in the case of a subsequent prosecution, shifts the court's focus from statutory construction to the defendant's conduct by prohibiting a second trial based on previously tried conduct.[533]

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527. *Id.* at 741, 790 P.2d at 1022.

528. *Id.* at 741, 742, 790 P.2d at 1022, 1023.

529. *Id.* at 743-44, 790 P.2d at 1024-25.

530. *See* Lockhart v. Nelson, 488 U.S. 33 (1988); *see also Tapia*, 109 N.M. at 741-42, 790 P.2d at 1022-23.

531. *See Lockhart*, 488 U.S. at 42. Apparently, Johnny Lee Nelson's "opportunity to 'obtai[n] a fair readjudication of his guilt free from error'" weighed heavily in the state's favor. *Id.* (quoting Burks v. United States, 437 U.S. 1, 15 (1978)). According to Justice Rehnquist, a defendant may have an interest in a retrial rather than a dismissal, thus this balancing test may start out tipped in the state's favor. *Id.*

532. Blockburger v. United States, 284 U.S. 299 (1932).

533. Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084 (1990).

During the survey period, New Mexico courts were only confronted with cases in which defendants contended they were challenging multiple punishments in a single prosecution.[534] In these cases, our state courts decided whether New Mexico's double jeopardy clause precludes multiple punishment: (1) when legislative intent dictates imposing multiple punishments for several illegal acts perpetrated against a single victim; (2) when legislative intent dictates imposing multiple punishments for several illegal acts perpetrated against multiple victims; and (3) when public policy, rather than clear legislative intent, may impose multiple punishments upon a defendant. Before turning to the recent New Mexico cases dealing with the "same offense" doctrine, an understanding of the United States Supreme Court's treatment of federal "same offense" jurisprudence is in order.

1. The First Prong: *Blockburger v. United States* and Legislative Intent

The Supreme Court developed a test to determine whether two offenses are the same for double jeopardy purposes in *Blockburger v. United States*.[535] The Court stated "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[536] The Supreme Court interpreted *Blockburger* as mandating a comparison of the statutory elements of the two given offenses to determine whether it is possible to violate one offense without violating the other.[537] If it is possible to violate only one of the offenses, then the two offenses are not the "same offense" for double jeopardy purposes.[538]

Statutory analysis under *Blockburger* does not require that two crimes be exactly the same in order to be considered the same offense for double jeopardy purposes. If one crime includes all of the elements of another crime, punishment for the *lesser included offense* precludes prosecution of the greater offense via the double jeopardy clause.[539] The *Blockburger* Court therefore provided a test which focuses on the statutory elements of two crimes to determine whether, for the purposes of double jeopardy analysis, the two crimes are the same offense and thus merge.[540]

2. The Second Prong: *Grady v. Corbin*—Multiple Trials and the Shift in Focus to Conduct

The United States Supreme Court has recently determined that merely comparing the statutory elements of the given offenses, as the *Blockburger*

534. For a discussion of some recent New Mexico cases dealing with double jeopardy's impact on multiple prosecutions, see Survey, *Criminal Procedure*, 20 N.M.L. Rev. 285, 309-10 (Spring 1990).

535. 284 U.S. 299 (1932).

536. *Id.* at 304 (citations omitted).

537. Grady v. Corbin, 495 U.S. 508, ____, 110 S. Ct. 2084, 2090-91 (1990).

538. *Id.*

539. *See, e.g., id.* at ____, 110 S. Ct. at 2090.

540. *See id.*

test does, may be insufficient in some circumstances.[541] In *Grady v. Corbin*,[542] the defendant, Thomas Corbin, caused an automobile accident in which the driver of the car he hit died. The metropolitan court judge, unaware of the death, accepted Corbin's guilty plea to two misdemeanor traffic violations.[543] Later, the state indicted Corbin for vehicular manslaughter.[544] The Supreme Court, in affirming the New York Court of Appeals, barred the state from further prosecuting Corbin on double jeopardy grounds.[545] The *Grady* Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will *prove conduct* that constitutes an offense for which the defendant has already been prosecuted."[546]

The Court explained that the *Blockburger* test is only the first step in modern double jeopardy analysis.[547] If the *Blockburger* test bars a subsequent prosecution, the analysis ends.[548] But when the criminal statutes the state relies upon survive *Blockburger*'s scrutiny, and the prosecution must "prove conduct that constitutes an offense for which the defendant has already been prosecuted," double jeopardy still bars a subsequent prosecution.[549]

The Court reasoned that multiple prosecutions raise more concerns than do other situations under which double jeopardy is a consideration.[550] Although single prosecutions, as well as multiple prosecutions, may subject a defendant to enhanced sentencing, only multiple prosecutions give the state an opportunity to practice its case and therefore increase the risk of an erroneous conviction.[551] Because multiple trials subject defendants to greater risks than do single trials, double jeopardy must afford greater protection to defendants under the threat of multiple trials.[552] The Court has therefore increased double jeopardy's protection by forbidding any court from twice trying a defendant for the same conduct, rather than simply for the same offense.

The Supreme Court has produced a two-prong test for purposes of a "same offense" analysis. First, a court must determine if the legislature *clearly* intended multiple punishments under the given statutes.[553] If the

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541. Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084 (1990); *see also* Brown v. Ohio, 432 U.S. 161, 166-67 n.6 (1977).

542. 495 U.S. 508, 110 S. Ct. 2084 (1990).

543. *Id.* at ____, 110 S. Ct. at 2088.

544. *Id.* at ____, 110 S. Ct. at 2089. The indictment charged Corbin with reckless manslaughter, second-degree vehicular manslaughter, criminally negligent homicide, third-degree reckless assault, and driving while intoxicated. *Id.*

545. *Id.* at ____, 110 S. Ct. at 2089-90.

546. *Id.* at ____, 110 S. Ct at 2087 (emphasis added).

547. *Id.* at ____, 110 S. Ct at 2090, 2093.

548. *Id.* at ____, 110 S. Ct. at 2090 (citation omitted).

549. *Id.* at ____, 110 S. Ct at 2093 (footnote omitted).

550. *Id.* at ____, 110 S. Ct at 2091.

551. *Id.* at ____, 110 S. Ct at 2091-92; *see* Ashe v. Swenson, 397 U.S. 436 (1970).

552. *Grady*, 495 U.S. at ____, 110 S. Ct. at 2091-92.

553. *See* Whalen v. United States, 445 U.S. 684, 691-92 (1980). A court is to begin with the

legislature clearly intended to impose multiple punishments using the two statutes, double jeopardy does not bar multiple punishments and the court's job is done.[554] Absent a finding of clear legislative intent, the court must use *Blockburger* as a test of statutory construction to determine whether it is possible to violate only one of the statutes.[555] If it is not possible to commit one crime without committing the other, double jeopardy precludes multiple punishments and, again, the court's job is done.[556] Finally, in the case of subsequent prosecutions, the court must determine whether the prosecution will necessarily prove conduct for which the defendant has already been tried.[557] If the prosecution will prove the same conduct twice, double jeopardy bars the subsequent prosecution.[558]

3. New Mexico's Treatment of the "Same Offense" Doctrine

The New Mexico Supreme Court implicitly adopted the *Blockburger* test in *Owens v. Abram*.[559] More recently, the court has clarified double jeopardy analysis stating that "merger precludes an individual's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted."[560] Further, the court of appeals has stated that a comparison of the statutory elements of each offense is necessary in cases of subsequent prosecutions and in cases of multiple punishments in a single prosecution.[561]

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assumption that the legislature did not intend to punish the same offense under two statutes. *Id.* Simply finding that two statutes could punish the same act is not enough. *See* Brown v. Ohio, 432 U.S. 161 (1977). But where a legislature enacts a separate criminal statute that explicitly imposes an additional punishment for enhanced criminal activity, the double jeopardy clause does not preclude a court from imposing both sentences upon a defendant whose single act violates both statutes. *See* Missouri v. Hunter, 459 U.S. 359 (1983). For example, multiple punishments were not precluded when a defendant violated Missouri's first degree robbery statute and its armed criminal action statute because the Missouri Legislature clearly intended to impose multiple punishments upon convicted felons who used weapons. *See id.* The *Hunter* Court quoted the relevant statute:

> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is *also* guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. *The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law* committed by, with or through the use, assistance, or aid of a dangerous or deadly weapon. . . .

Id. at 362 (quoting Mo. Rev. Stat. § 559.225 (Supp. 1976) (emphasis added)).

554. *Hunter*, 459 U.S. at 368-69.

555. *See Grady*, 495 U.S. at ____, 110 S. Ct. at 2090-91.

556. *See id.*

557. *Id.* at ____, 110 S. Ct. at 2093.

558. *Id.*

559. 58 N.M. 682, 274 P.2d 630 (1954), *cert. denied*, 348 U.S. 917 (1955). The *Owens* court did not cite *Blockburger*, but instead relied on *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943), State v. Jacoby, 25 N.M. 224, 180 P. 462 (1919), and Bartlett v. United States, 166 F.2d 928 (10th Cir. 1948) for its double jeopardy analysis.

560. State v. Pierce, 110 N.M. 76, 86, 792 P.2d 408, 418 (1990) (citation omitted).

561. State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989). Under New Mexico law, one crime is a lesser included offense of another if the elements of the greater offense include all of the elements of the lesser offense. State v. Wynne, 108 N.M. 134, 138, 767 P.2d 373, 377 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989) (citation omitted).

a. When Legislative Intent Dictated Imposing Multiple Punishments for Several Illegal Acts Perpetrated Against a Single Victim

In its first double jeopardy case after *Grady*, the New Mexico Supreme Court determined whether a jury could have found separate facts to support multiple convictions in a single prosecution without violating the defendant's double jeopardy rights. In *State v. McGuire*,[562] the court affirmed defendant's convictions of first-degree murder, first-degree kidnapping, and second-degree criminal sexual penetration ("CSP").[563] The defendant's main contention on appeal was that the state's use of defendant's same acts to support a conviction of CSP and kidnapping violated his double jeopardy rights.[564]

The court first explained that, barring a clear legislative intent to the contrary, the imposition of multiple punishments violates double jeopardy.[565] The court then searched for an indication of legislative intent within the CSP and kidnapping statutes.[566] The court reasoned the legislature clearly intended for a defendant to be punished for both CSP and kidnapping, if found guilty of both offenses, because the legislature wrote two statutes, each imposing a separate punishment for a single act of rape.[567] Recognizing that the state's reliance on "identical facts" to support both convictions would be troublesome, the court found the trial court did not violate the defendant's double jeopardy rights because the jury could have relied on separate facts to infer that the defendant had the requisite intent for both CSP and kidnapping.[568]

The problem with the court's analysis is that the *McGuire* rule completely undermines the *Blockburger* test. The court recognized that two offenses merge for double jeopardy purposes "if the defendant could not have committed the greater offense without also committing the lesser."[569] The court pointed out, however, that in New Mexico, "[g]iven the statutory definitions, it is possible that nearly every act of [CSP]

562. 110 N.M. 304, 795 P.2d 996 (1990). This was the culmination of a highly publicized case in New Mexico. The incident began when defendant, Travis McGuire, kidnapped Jena Marie Repp in Albuquerque on December 6, 1985. *Id.* at 306, 795 P.2d at 998.

563. *Id.* at 309, 795 P.2d at 1001. The court also reversed and remanded the case for a new sentencing hearing. *Id.* at 314, 795 P.2d at 1006.

564. *Id.* at 307, 795 P.2d at 999.

565. *Id.* at 308, 795 P.2d at 1000. (citing State v. (Christopher) Pierce, 110 N.M. 76, 792 P.2d 408 (1990); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1582 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 3237 (1990)); *see also* Whalen v. United States, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring).

566. *McGuire*, 110 N.M. at 308, 795 P.2d at 1000.

567. *Id.* at 309-10, 795 P.2d at 1001-02. As defined in New Mexico, kidnapping requires that the victim be "held to service against [her] will." N.M. STAT. ANN. § 30-4-1 (Repl. Pamp. 1984). This "service" can include holding for sexual purposes. State v. Hutchinson, 99 N.M. 616, 624, 661 P.2d 1315, 1323 (1984). Additionally, New Mexico does not require a kidnapping to include transportation of the victim, contrary to the common law. *McGuire*, 110 N.M. at 308, 795 P.2d at 1000. Thus, most rapes will also be kidnappings. *Id.*

568. *McGuire*, 110 N.M. at 308-09, 795 P.2d at 1000-01. In order to be convicted of kidnapping, the state must prove that the defendant had the specific intent to restrain the victim. A conviction of CSP, on the other hand, need only be supported by general intent. *See id.* at 309, 795 P.2d at 1001.

569. *Id.* at 309, 795 P.2d at 1001 (citing State v. DeMary, 99 N.M. 177, 655 P.2d 1021 (1982)).

also will constitute the act of kidnapping."[570] Instead of concluding that CSP and kidnapping merged, the court found that the statutory schemes of CSP and kidnapping constituted clear legislative intent to impose multiple punishments upon someone convicted of second-degree CSP.[571] Applying the *McGuire* rule completely precludes the merger of any two offenses.

The court continued its double jeopardy analysis by determining whether CSP was a lesser included offense of kidnapping.[572] The court looked at the given elements of each crime but disregarded its earlier finding that "nearly every act of [CSP] also will constitute the act of kidnapping."[573] Instead, the court again relied on the fact that CSP and kidnapping have different requisite intents.[574] Finding that "substantial evidence" was present to independently convict the defendant of each charge, the court affirmed McGuire's convictions.[575]

The second portion of the court's analysis is superfluous. The court had already decided that the legislature clearly intended that multiple punishments be imposed when a defendant is convicted of second-degree CSP and kidnapping.[576] There is no double jeopardy problem if the legislature clearly intended to impose multiple punishments.[577] Once the court found clear legislative intent to impose multiple punishments upon CSP and kidnapping convictions, its analysis should have ended.

The opinion goes on to further convolute double jeopardy law. The court, in concluding that double jeopardy did not preclude multiple punishments imposed upon this defendant, reasoned that each conviction was based on independent "substantial evidence."[578] The court then cited *Grady v. Corbin*[579] to explain that the United States Supreme Court considers the "critical inquiry [to] involve[] the *conduct* to be proven, *not the evidence used to prove it.*"[580] By upholding McGuire's convictions because each was based on independent evidence, and then citing a Supreme Court decision that requires an analysis of *conduct* rather than evidence, the court has contradicted its own analysis.

Although the supreme court explained that the legislature intended multiple punishments for a person convicted of kidnapping and CSP in *McGuire*, the court also gave an example of when the legislature did not intend to impose multiple punishments upon a person who committed

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570. *Id.* at 308, 795 P.2d at 1000.
571. *Id.* at 308-09, 795 P.2d at 1000-01.
572. *Id.* at 309, 795 P.2d at 1001.
573. *Id.* at 308, 795 P.2d at 1000.
574. *Id.* at 308-09, 795 P.2d at 1000-01.
575. *Id.* at 309, 795 P.2d at 1001.
576. *Id.* at 310, 795 P.2d at 1002.
577. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); *see also* Whalen v. United States, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring).
578. *McGuire*, 110 N.M. at 309, 795 P.2d at 1001.
579. 495 U.S. 508, 110 S. Ct. 2084 (1990).
580. *McGuire*, 110 N.M. at 310-11, 795 P.2d at 1002-03 (emphasis added) (citing *Grady*, 495 U.S. 508, 110 S. Ct. 2084).

several acts of child abuse. In *State v. Pierce*[581] the defendant was convicted of fourteen counts of child abuse resulting in death or great bodily harm.[582] There was one victim in all of these offenses. All injuries were inflicted during three separate episodes.[583] The state alleged a separate count of child abuse for each injury inflicted.[584]

The underlying problem with the *Pierce* case is obvious: the state's charging scheme eventually led to a double jeopardy violation. Although a defendant can be charged with offenses that eventually merge, entry of multiple sentences after conviction is what violates the double jeopardy clause.[585] The fourteen counts of child abuse merged into two separate counts because the legislature did not intend, in the wording of the child abuse statutes, for a defendant to be subject to multiple punishments for a single act of child abuse.[586] The court found that Pierce only committed two acts of abuse and thus vacated twelve of Pierce's convictions and sentences for child abuse.[587]

The *Pierce* court, quoting the United States Supreme Court in *Whalen v. United States*,[588] as it did in *State v. Ellenberger*,[589] found that the double jeopardy clause only bars multiple punishments for the same offense if the legislature did not intend a person convicted of multiple offenses to be subject to multiple punishment.[590] The court interpreted what evidence was necessary to support a conviction under the statute criminalizing child abuse resulting in death or great bodily harm and fourth degree child abuse.[591] The court held that multiple convictions are allowed "only when each conviction is supported by evidence indicating that: (1) a single abusive act or a continuous series of abusive acts was interrupted and then another act or series was commenced, and (2) each separate act or series of acts was accompanied by the requisite unlawful conduct."[592] The court then found the state did not show that each injury was the result of an independent, interrupted act.[593] Accordingly, the court held that the double jeopardy clause barred multiple punishments

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581. 110 N.M. 76, 792 P.2d 408 (1990).

582. *Id.* at 78, 792 P.2d at 410. Pierce was also convicted of first-degree murder, three counts of first-degree criminal sexual penetration of a minor, one count of third-degree criminal sexual contact of a minor, and two counts of fourth-degree child abuse. *Id.*; *see* N.M. STAT. ANN. §§ 30-2-1, 30-9-11(A)(1), -13(A), and 30-6-1 (Repl. Pamp. 1984).

583. *Pierce*, 110 N.M. at 78, 792 P.2d at 410.

584. *Id.* at 79, 792 P.2d at 411.

585. *Id.* at 86-87, 792 P.2d at 418-19. The court went on to find that entry of multiple sentences is prohibited even where the sentences are to run concurrently. *Id.* at 87, 792 P.2d at 419.

586. *Id.* at 84-85, 792 P.2d at 416-17.

587. *Id.* at 87, 792 P.2d at 419.

588. 445 U.S. 684 (1980). "The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended." *Id.* at 697 (Blackmun, J., concurring) (emphasis in original) (citation omitted).

589. 96 N.M. 287, 629 P.2d 1216 (1981).

590. *Pierce*, 110 N.M. at 84-85, 792 P.2d at 416-17.

591. *Id.*; *see* N.M. STAT. ANN. § 30-6-1 (Repl. Pamp. 1984).

592. *Pierce*, 110 N.M. at 86, 792 P.2d at 418 (emphasis omitted).

593. *Id.*

for the multiple injuries inflicted in this case and thus merged several of the injuries into single acts of abuse.[594]

The most significant portion of the opinion may be within the first few sentences of the court's analysis. The court interpreted the double jeopardy clause as prohibiting multiple punishments for a single act rather than only for a single offense.[595] The *Pierce* court stated that, "[b]oth the fifth amendment to the United States Constitution and article II, section 15 of the New Mexico Constitution preclude the imposition of multiple punishments for *one act or offense*."[596] By expanding the definition of the word "offense," as used in the double jeopardy clause, to include acts, the court may be reflecting the United States Supreme Court's shift in emphasis in its double jeopardy analysis from the "same offense" to the "same conduct."[597]

b. When Legislative Intent Dictated Imposing Multiple Punishments for Several Illegal Acts Perpetrated Against Multiple Victims

The New Mexico Court of Appeals in *State v. Moore*[598] defined separate offenses by the number of victims and the number of acts.[599] In *Moore*, the defendant, in the course of robbing the two victims' home, bound both victims.[600] The defendant was convicted of two counts of armed robbery and two counts of false imprisonment.[601]

First, the court looked at the statutory elements of armed robbery and false imprisonment and found that the two offenses did not merge.[602] The court's analysis of the two distinct offenses was consistent with *Blockburger*. Next, the court determined that because there were two victims, the defendant committed four offenses: two offenses of armed robbery and two offenses of false imprisonment.[603] The court reasoned that because four separate criminal acts were committed, the double jeopardy clause did not preclude multiple punishments for two counts of each offense.[604]

The *Moore* decision is consistent with the analysis followed by the *Pierce* court. In its double jeopardy analysis, the *Moore* court first used a "*Blockburger*-type" test to guide it through the necessary statutory construction.[605] The *Moore* court then determined the number of criminal

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594. *Id.* at 87, 792 P.2d at 419.
595. *Id.* at 85, 792 P.2d at 417.
596. *Id.* (emphasis added).
597. *Cf.* Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084 (1990); *see also supra* text accompanying notes 541-58.
598. 109 N.M. 119, 782 P.2d 91 (Ct. App. 1989).
599. *Id.* at 127-28, 782 P.2d at 99-100.
600. *Id.* at 122, 782 P.2d at 94.
601. *Id.* at 123, 782 P.2d at 95. Defendant was also convicted of one count of aggravated burglary. *Id.*; *see also* N.M. STAT. ANN. §§ 30-16-4, -2, 30-4-3 (Repl. Pamp. 1984), 31-18-16 (Repl. Pamp. 1990).
602. *Moore*, 109 N.M. at 127, 782 P.2d at 99.
603. *Id.* at 128, 782 P.2d at 100.
604. *Id.* at 127, 782 P.2d at 99.
605. *Id.*

acts perpetrated by the defendant, as did the *Pierce* court.[606] Each court then allowed only one punishment to be imposed for each unlawful act.[607]

c. When Public Policy, Rather Than Clear Legislative Intent, May Impose Multiple Punishments Upon a Defendant

The court of appeals in *State v. Martinez*[608] determined legislative intent by looking at public policy when it considered whether multiple punishments for a single act were permissible.[609] The defendant in *Martinez* was convicted of three counts of assisting the escape of inmates.[610] Martinez helped three escapees remain hidden from authorities by driving them from Santa Fe to Albuquerque and later driving two of them to Garden Grove, California.[611] In his appeal, Martinez contended the three counts of assisting escape constituted the same offense for double jeopardy purposes.[612]

The *Martinez* court began its inquiry by analogizing the facts in *State v. Smith*[613] with the facts before it.[614] In *Smith*, law enforcement officials confiscated four separate types of illegal drugs.[615] The *Smith* court found that because its defendant was in possession of four different kinds of drugs, in separate bags, the "same evidence rule does not bar prosecution on each of the drug counts" and neither public policy nor legislative intent indicate a desire to allow the four counts of drug trafficking to merge.[616]

The *Martinez* court therefore decided that four separate bags of drugs was substantially similar to aiding the escape of three inmates in two ways.[617] First, the *Martinez* court found similar public policies behind criminalizing drug trafficking and assisting escape.[618] The court concluded that because public policy precluded four counts of drug trafficking from merging into one count, the same public policy would not allow three counts of assisting escape to merge.[619] Second, the *Martinez* court decided that if four counts of drug trafficking did not merge under the same evidence rule, neither did three counts of assisting escape.[620] But the *Smith* decision is distinct because it explained that double jeopardy did

606. *Id.* at 128, 782 P.2d at 100; *Pierce*, 110 N.M. at 85, 792 P.2d at 417.
607. *Moore*, 109 N.M. at 128, 782 P.2d at 100; *Pierce*, 110 N.M. at 86-87, 792 P.2d at 418-19.
608. 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).
609. *Id.* at 38-39, 781 P.2d at 310-11.
610. *Id.* at 34, 781 P.2d at 306; *see also* N.M. STAT. ANN. § 30-22-11 (Repl. Pamp. 1984).
611. *Martinez*, 109 N.M. at 35, 781 P.2d at 307.
612. *Id.* at 38, 781 P.2d at 310.
613. 94 N.M. 379, 610 P.2d 1208 (1980).
614. *Martinez*, 109 N.M. at 39, 781 P.2d at 311.
615. *Smith*, 94 N.M. at 380, 610 P.2d at 1209.
616. *Id.* at 381, 610 P.2d at 1210. Many analysts of double jeopardy equate the *Blockburger* test with a "same evidence" test. *See* Grady v. Corbin, 495 U.S. 508, ____ n.12, 110 S. Ct. 2084, 2093 n.12 (1990).
617. *Martinez*, 109 N.M. at 39, 781 P.2d at 311.
618. *Id.*
619. *Id.*
620. *Id.*

not require merger of the drug charges because each bag of drugs could be used as separate evidence.[621] The defendant's act of driving the escapees in *Martinez* could not be separated, however, and the same evidence to convict Martinez of one count of assisting escape would have to be used to convict him of the other counts.

The *Martinez* court therefore failed to follow standard double jeopardy law in two ways. First, it added an element of public policy to double jeopardy analysis where none belongs. Second, the court of appeals misapplied the *Smith* holding and upheld multiple punishments for a single act that resulted in multiple offenses by disregarding the *Blockburger* same evidence test.

E. The Jurisdictional Exception

Even if a person is convicted of a lesser included offense, a "jurisdictional exception" may allow a subsequent prosecution for a greater offense.[622] If the trial court lacked the jurisdiction to try the defendant for the greater offense at the time of the trial for the lesser included offense, the jurisdictional exception allows a subsequent prosecution for the greater offense in a court that has jurisdiction.[623]

The jurisdictional exception may no longer be valid in New Mexico. The supreme court adopted the jurisdictional exception in *State v. Goodson*.[624] Although the United States Supreme Court has impliedly rejected the jurisdictional exception several times,[625] New Mexico courts have not read any of those cases as doing so.[626] In *Salaz v. Tansy*,[627] the United States District Court overruled the jurisdictional exception in New Mexico.[628]

F. Additional Sentencing Concerns

Double jeopardy violations often arise when a state attempts to enhance an inmate's sentence under a habitual offender statute after initial sentencing.[629] New Mexico courts have stated that where retrial for sentence correction does not normally violate double jeopardy,[630] sentence enhancement may violate double jeopardy standards if it is not "within objectively reasonable expectations of finality."[631]

In *March v. State*,[632] the supreme court stated that a sentence may be enhanced after the defendant begins serving the time, but not after he

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621. *Id.*
622. Diaz v. United States, 223 U.S. 442, 449 (1912).
623. *Id.*
624. 54 N.M. 184, 188, 217 P.2d 262, 264 (1950).
625. *See, e.g.*, Waller v. Florida, 397 U.S. 387 (1970).
626. *See* Salaz v. Tansy, 730 F. Supp. 369 (D.N.M. 1989).
627. *Id.*
628. *Id.*
629. *See, e.g.*, March v. State, 109 N.M. 110, 782 P.2d 82 (1989).
630. State v. Barber, 108 N.M. 709, 711, 778 P.2d 456, 458 (Ct. App. 1989).
631. *March*, 109 N.M. at 111, 782 P.2d at 83.
632. 109 N.M. 110, 782 P.2d 82 (1989).

has been discharged from custody.[633] In *March*, the state attempted to enhance a defendant's sentence after the sentence had already been served.[634] The *March* court stated that "[s]entencing may violate concepts of double jeopardy if not within objectively reasonable expectations of finality."[635] The court reasoned that not only does a court lose jurisdiction to enhance after a defendant is released,[636] but the reasonable person could infer that he had completed his sentence upon release.[637] March finished serving his sentence before the state filed its petition to enhance his sentence, so the supreme court reversed the court of appeals.[638]

The court of appeals encountered another example of impermissible sentence enhancement in *State v. Haddenham*.[639] The *Haddenham* court held that double jeopardy prohibits sentencing a defendant as a habitual offender using the same facts relied upon to convict the defendant of the underlying offense of felon in possession of a firearm.[640]

The prosecution in *Haddenham* used the same prior convictions in order to enhance the defendants' sentences under the habitual offender statute and to prove that each defendant was a felon for purposes of the felon in possession of a firearm statute.[641] The court reasoned that because the legislature did not specifically intend to permit "double use" of the same felony, the double jeopardy clause prohibited multiple punishments under those two statutes.[642]

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633. *Id.* at 112, 782 P.2d at 84.
634. *Id.*
635. *Id.* at 111, 782 P.2d at 83.
636. *Id.* at 112, 782 P.2d at 84.
637. *Id.* at 111, 782 P.2d at 83.
638. *Id.* at 112, 782 P.2d at 84. Consider whether the state would have violated March's "objectively reasonable expectation of finality" had the state filed its petition for enhancement before March was released, but the court still decided to enhance his sentence after his release. *Id.* at 111, 782 P.2d at 83. The court of appeals answered affirmatively in State v. Gaddy, 110 N.M. 120, 792 P.2d 1163 (Ct. App. 1990).
639. 110 N.M. 149, 793 P.2d 279, *cert. denied*, 110 N.M. 72, 792 P.2d 49 (1990). The court of appeals consolidated *Haddenham* with *State v. Benton*.
640. *Id.* at 154, 793 P.2d at 284.
641. *Id.* at 151, 793 P.2d at 281; *see also* N.M. STAT. ANN. §§ 30-7-16 (Repl. Pamp. 1984), 31-18-17 (Repl. Pamp. 1990).
642. *Haddenham*, 110 N.M. at 153-54, 793 P.2d at 283-84; *see* Whalen v. United States, 445 U.S. 684 (1980); State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990).