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Criminal Procedure

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CRIMINAL PROCEDURE

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I. INTRODUCTION

The New Mexico courts dealt with a number of criminal procedure issues during the Survey year. Most cases simply reiterated established law and applied it to a new set of facts. In several cases, however, the courts explored new areas and changed the law significantly. Several cases decided by the United States Supreme Court that may have a pronounced effect on future New Mexico decisions also are discussed.

The cases decided fall into no easy categories. The first half of this article deals with cases construing the United States Constitution; the cases are divided by the section of the Constitution with which they deal. The second half of the article deals with non-constitutional aspects of criminal procedure.

II. FOURTH AMENDMENT

A. Probable Cause to Issue a Search Warrant

Decisions by the appellate courts of New Mexico during the Survey year have not radically altered the requirements of previous cases.[1] The decisions suggest, however, that the courts will be much more liberal in finding that a magistrate's grant of a search warrant was proper than they have been in the past. This new deference seems to be spawned by a distaste for the exclusionary rule itself.[2]

In *State v. Snedeker*,[3] the New Mexico Supreme Court found that a search warrant issued to search the home of the former President of Western New Mexico University (WNMU) was valid. A search pursuant to the warrant led to the discovery of some 12,000 rounds of ammunition, as well as a great deal of paraphernalia for a variety of different weapons. Based on this and other evidence, the grand jury indicted Snedeker on

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1. A recent decision by the United States Supreme Court may, however, have radically changed the law. The Court in Illinois v. Gates, 103 S. Ct. 2317 (1983) abandoned the *Aguilar/Spinelli* rule for determining probable cause. *See infra* notes 19-23 and accompanying text.

2. The exclusionary rule simply requires that any evidence obtained in violation of the defendant's constitutional rights may not be introduced into evidence against him. Weeks v. United States, 232 U.S. 383 (1914). *See also* Mapp v. Ohio, 367 U.S. 643 (1961).

3. 99 N.M. 286, 657 P.2d 613 (1982).

twenty-two counts of making false public vouchers.[4] The trial court decided that the affidavit upon which the warrant was issued did not show probable cause and suppressed the evidence.[5] The state appealed and the court of appeals affirmed the suppression. The New Mexico Supreme Court granted certiorari and reversed the courts below.

The Supreme Court's opinion described the case at some length. It noted that the investigating officer found that a great deal of ammunition was being purchased by WNMU, ostensibly for use by campus security. His investigation showed, however, that campus security had never requested nor received the ammunition, and further, that it did not even have weapons capable of using some of the ammunition. The investigating officer also charged that Snedeker personally had received the ammunition, but no basis was given to substantiate that charge. Nonetheless, the court held that the magistrate could fairly infer such a finding.

In finding that this information showed probable cause to believe that Snedeker had used university monies to purchase goods for himself, the court did not create new or unusual law. It did, however, explicitly recognize that a magistrate need not rely solely on the information in the affidavit, but that he might also make reasonable inferences from the information given. The court cited several cases defining inferences, and noted that inferences might properly be drawn from circumstantial evidence.[6] The court also observed that the officer had obtained purchase orders and warrants.[7] Based on this information, the court concluded that the magistrate could infer that the officer had read the documents and had gleaned from them the name of the person who had signed the receipts for the delivery of the property.[8]

The court's analysis that a magistrate can draw an inference is correct, but the particular inference made in this case is troublesome. Purchase orders and warrants are simply authorizations to pay money for certain goods. Authorizing payment is inherent in the very nature of the job of a university president. The fact that Snedeker authorized such payments is a far step from a conclusion that he personally received delivery. The

4. Snedeker apparently used University funds to purchase the seized evidence. The ammunition was ordered by and delivered to Snedeker over a three-year period, 1977-1980. *Id.* at 287, 657 P.2d at 614.

5. *Id.* at 288, 657 P.2d at 615. Additional evidence against Snedeker was found during a second search. The warrant for the latter search was obtained as a result of observations made during the first search. Under the "fruit of the poisoned tree" doctrine, the second search could be found valid only if the first search was proper. *See* Wong Sun v. United States, 371 U.S. 471 (1963). The trial court accordingly suppressed the evidence from the later search.

6. *See* Bendorf v. Volkswagenwerk Aktiengeselischaft, 90 N.M. 414, 564 P.2d 619 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977); Gray v. E.J. Longyear Co., 78 N.M. 161, 429 P.2d 359 (1967).

7. 99 N.M. at 291, 657 P.2d at 618.

8. *Id.*

court held, however, that the magistrate could infer that the officer had found the president's signature on the receipts for delivery[9] because the officer had obtained warrants "along with supporting documents for the purchase[s]."[10]

The court's reason for finding a permissable inference in *Snedeker,* and the real import of the case, is the obvious distaste the court expressed for the exclusionary rule.[11] Citing *Stone v. Powell,*[12] the court noted that the exclusionary rule is not a personal constitutional right, but a judicially created remedy to safeguard fourth amendment rights through the rule's deterrent effect.[13] Quoting from *Powell,* the court stated that the policies of the rule are not absolute but "must be evaluated in light of competing policies."[14] The court in *Snedeker* obviously found that, on balance, Snedeker's rights should succumb to those of the public.

The import of *Snedeker,* therefore, is that the court will stretch to validate a search that discloses evidence of guilt whenever it can. Relying on *Powell,* the court found that an oft stated purpose of the rule, that of preserving judicial integrity,[15] no longer was to be considered. As to the second purpose of the rule, that of deterring illegal police practices, the court made it clear that it thought that such a purpose was based on "speculations and unsubstantiated assumptions,"[16] which should bow to the more concrete concepts underlying the punishment of the guilty.[17]

The court of appeals applied the teachings of *Snedeker* in *State v. Lopez*[18] to uphold the validity of a search warrant issued in connection with a fatal hit and run collision. The information available to the court

9. *Id.* at 291, 657 P.2d 618.

10. *Id.* at 287, 657 P.2d at 614.

11. The court explained the purpose and social cost of the exclusionary rule at length, obviously finding that the costs usually outweighed the benefits. *Id.* at 288-89, 657 P.2d 615-16.

12. 428 U.S. 465 (1976).

13. *Snedeker,* 99 N.M. at 289, 657 P.2d at 616. The Court in *Powell* had reviewed, at length, the ostensible purposes of the rule. Two principle reasons always have justified the rule: first, it would deter abuses of the police power; and second, use of "tainted" evidence in trials would make the courts accomplices in the violation of the Constitution. *See* McNabb v. United States, 318 U.S. 332 (1943). The Court in *Powell,* however, stated that the concept of "preserving the integrity of the judicial process . . . has limited force as a justification for the exclusion of highly probative evidence." *Powell,* 428 U.S. at 485 (footnote omitted).

14. 99 N.M. at 289, 657 P.2d at 616.

15. *See supra* note 14.

16. 99 N.M. at 289, 657 P.2d at 616 (quoting Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C. J., concurring)).

17. This position is best explained by referring to the language of the court itself:

> To hold that this search warrant is invalid would be to compound the toll that is being taken on society and on the integrity of the courts by an absolutist application of the exclusionary rule. Some of our judges have quite obviously been intimidated by the supposed constitutional mandates and have applied loose logic and rubber-stamp reactions when any small item appeared to be wrong.

99 N.M. at 292, 657 P.2d at 619.

18. 99 N.M. 791, 664 P.2d 989 (Ct. App. 1982).

at the time it issued the warrant indicated that Frank Taylor, the investigating officer, responded to a hit and run accident involving a motorcycle. On the way to the scene, a blue pick-up truck ran him off the road. Taylor later found debris from the vehicle that struck the motorcycle, including a headlamp, at the scene of the accident. Other information included an examination of the decedent and the motorcycle that revealed chips of blue paint from the striking vehicle, and the statement of a bartender describing two men who had been in his bar near the scene of the accident until thirty minutes before the collision and who left driving a blue pick-up truck. "Crime Stoppers" also received information that corroborated the bartender's statement. The caller gave the full name of one of the men, and "Ray" for the second.

Based on this information, Taylor checked with local police in Deming. They told him a Raymond Lopez fit the physical description of one of the men, and that he owned a blue truck. Taylor went to Lopez's home; no one was there, but Taylor saw a tailgate from a blue Chevrolet truck leaning against the garage door. Taylor peered through a crack in the door and saw a truck parked in the garage. Based on this information, the magistrate issued a search warrant for Lopez's garage.

On appeal, the court upheld the warrant, finding that though the affidavit did not describe direct evidence of criminal activity, the circumstances did show probable cause to believe the evidence of a crime could be found. The court rejected an attack on the "Crime Stopper's" tip, noting that despite the fact that the credibility of the tip and of the informant were not set out in the affidavit, the information was corroborated by information from the Deming police and by Taylor's observation. From that information, the magistrate could infer the credibility of the informant and his tip.

The supreme court's decisions in *Snedeker* and *Lopez* show a trend towards upholding search warrants. This trend, however, will be curbed by the specific limits imposed by the court of appeals' application of the *Aguilar/Spinelli* test in *Lopez*. In *Illinois v. Gates*,[19] however, the United States Supreme Court abandoned the *Aguilar/Spinelli* test, allowing an even more lax review of the issuance of search warrants.

The defendants in *Gates* were indicted for the possession of marijuana, which police officers found in their automobile and in their home pursuant to a search warrant. The police received an anonymous letter accusing the defendants of dealing in drugs. It stated that they traded in drugs by having one defendant drive from Chicago to Florida, leaving the car to be loaded with drugs. The other defendant would then fly to Florida and

19. 103 S. Ct. 2317 (1983). Though the United States Supreme Court has abandoned the *Aguilar/Spinelli* test, New Mexico is still bound by its dictates. *See* N.M. R. Crim. P. 16.

drive the drug-laden car back to Chicago. The letter further stated the specific date of the next Florida trip.

The police verified the tip by finding that the parties named in the letter did live at the address stated in the letter; that one of the defendants flew from Chicago to Florida on or about the date specified in the letter, checked into a room registered in the name of the other defendant, and, the next morning, left with an unidentified woman in a car with Illinois plates, driving towards Chicago.[20] Based on the above facts, a magistrate issued a search warrant for the defendants' house and automobile.

The state court ordered that marijuana found pursuant to the search warrant should be excluded from trial.[21] It based its decision on the fact that the letter alone could not support a probable cause determination. In this regard the United States Supreme Court agreed. Further, the state court held that the corroboration offered by the police did not meet the two-pronged test of *Aguilar/Spinelli*. In *Gates*, the Supreme Court held otherwise.

The Court in *Gates* agreed that the considerations embodied in the Illinois court's interpretation of *Aguilar/Spinelli* were "highly relevant." The Court noted, however, that they should not be viewed as separate, rigid, or dispositive. The Court instead held that a "totality of the circumstances" analysis should be employed. Under such an analysis, the magistrate could make a "balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip. . . ."[22]

The Court offered a variety of justifications for this analysis, including the argument that it more fairly allowed a magistrate free access to all relevant information, and would be easier to apply. The Court also found that such a test would help compensate for the fact that affidavits are drawn by non-lawyers, would encourage officers to apply for warrants instead of engaging in warrantless searches (and thereby increase the illusion of lawfulness), and would facilitate the police's function of protecting the public.[23]

B. Exception to the Warrant Requirement

Although a warrant generally is required before police can search a person or his property, the courts have carved a number of exceptions into this rule. In five cases decided during the Survey year, the court of appeals found the requirements for at least one of the exceptions, the

20. The license plates on the Mercury were registered as belonging to an American Motors car owned by the defendants. *Gates*, 103 S. Ct. at 2326.

21. *Id.*

22. *Id.* at 2330.

23. *Id.* at 2331.

"plain view" doctrine, to be satisfied. In *State v. Powell,*[24] the first of these cases, the court explained the nature and application of that doctrine.

In *Powell,* a police officer who suspected that the driver was drunk stopped a truck in which the defendant was a passenger.[25] The driver stepped out of the truck and approached the officer. The officer smelled no odor of alcohol and thought the driver's movements normal. This satisfied the officer that the driver was not intoxicated.[26] The officer then walked to the truck and looked in it.[27] He noted two passengers in the truck, and, in a crevice in the ceiling, a baggie that "contained a green leafy substance." He asked the defendant to hand it to him. The officer satisfied himself that the substance was marijuana and placed all three under arrest. As he radioed for assistance, he saw the defendant throw something away. A search found the defendant had thrown away bags of cocaine. The officer subsequently charged the defendant with possession with intent to distribute.

The trial court ruled the officer obtained the cocaine as the result of a warrantless and unjustified search into the truck, and suppressed both the cocaine and the marijuana. On appeal, the state argued that the marijuana was in the "plain view" of the officer and hence he did not require a warrant to search the truck. The court of appeals agreed and reversed. In reaching its conclusion, the court noted that "plain view" has two meanings in fourth amendment cases. The first and most common meaning, inapplicable in *Powell,* refers to items seen by an officer who is legally in a place from which he can see the goods pursuant to a search warrant or another exception to the warrant requirement.[28] The Supreme Court has placed limits on the material that may be seized as a result of this type of a "plain view" search. In order to be seizable, the goods must not only have been seen from a vantage point where the officer had a lawful right to be, but the viewing must have been inadvertent.[29] This

24. 99 N.M. 381, 658 P.2d 456 (Ct. App. 1983).

25. The officer had observed the truck weaving across the center line of the road and almost off the pavement on the right. The trial court made no ruling as to the validity of the stop, but, as the court of appeals noted, the only evidence showed the stop was valid. *Id.* at 382, 658 P.2d at 457.

26. *Id.* at 383, 658 P.2d at 458.

27. The officer testified that he did so because he knew there were passengers in the truck and he wanted to ensure his own safety. The trial court did not accept this explanation, noting that he had better ways to protect himself. The court of appeals held that it could not rule that the trial court's view of this evidence was erroneous. *Id.* at 383, 658 P.2d at 458.

28. *Id.* at 384, 658 P.2d at 459 (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971); and State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980)).

29. Coolidge v. New Hampshire, 403 U.S. 443, 468-72 (1971). The Court in *Coolidge* had a third requirement, that the items seized "clearly" be evidence of a crime. It was not involved in *Powell* because that requirement deals with seizure and not search. This requirement, however, was recently modified in Texas v. Brown, 51 U.S.L.W. 4361 (U.S. April 19, 1983). The Court in *Brown* held the third requirement to be too strict; that items were properly seized if the officer had probable cause to believe they were connected with criminal activity. *Id.*

requirement is designed to prevent officers from circumventing the law by entering the property of another on one basis, so it may effect a search for specific items.

The second meaning of "plain view" deals with goods that can be seen by an officer who is lawfully where he is, not because of an exigency or warrant, but simply because any person would have a right to be there. The distinction between the two meanings is subtle yet important: in the first there is a "search" because the goods are somewhere that has an expectation of privacy; in the second there is no such expectation and hence no "search."[30] The police are not limited by the "inadvertency" rule of the first type of "plain view," because there is no search; they are free to look for any evidence that is in open view.

The court held that the observations of the officer in *Powell* fell within this second definition. Even though the purpose of the valid stop was completed, the officer still could look into the truck without his viewing constituting a search for fourth amendment purposes. Relying on *Coolidge v. New Hampshire,*[31] the court held that the single concern was whether the officer had a "legitimate reason for being present." Having found the truck was stopped lawfully, the court found that the officer lawfully could look into it and see what was exposed to open view.[32]

The second and third cases dealing with the "plain view" doctrine, *State v. Williams*[33] and *State v. Foreman,*[34] dealt with inventory searches. The defendant in *Williams* was arrested during the commission of an armed robbery. The police searched him and found a set of car keys. The keys fit a car in the parking lot of the store he was robbing; the police searched the car and found evidence that later was used against him. In *Foreman,* the defendant's truck was stopped by the police and the defendant arrested on an outstanding warrant. The truck then was searched and, in a closed shoe box, the police found cocaine, paraphernalia, and a gun. In both cases, the court allowed the findings into evidence on the theory that they were the product of a valid inventory search and hence in "plain view."

30. Quoting from 1 W. Lafave, Search and Seizure, § 2.2, pp. 242-43 (1978), the court in *Powell* noted the first meaning is deserving of a different name, as the items are not really in plain view. An item truly found in plain view:

> has been left in an 'open field' or similar nonprotected area. . . . In [such an instance] there has been no search at all because of the plain view character of the situation, and this means that the observation is lawful without the necessity of establishing either pre-existing probable cause or the existence of a search warrant or one of the traditional exceptions to the warrant requirement.

99 N.M. at 384, 658 P.2d at 459.

31. 403 U.S. 433 (1971).

32. 99 N.M. at 385, 658 P.2d at 460. *See also* Cook v. Commonwealth, 216 Va. 71, 216 S.E.2d 48 (1975).

33. 97 N.M. 634, 642 P.2d 1093 (1982).

34. 97 N.M. 583, 642 P.2d 186 (Ct. App.), *cert. quashed,* 98 N.M. 51, 644 P.2d 1040 (1982).

The decisions in *Foreman* and *Williams* raise two concerns regarding inventory searches. The first is the propriety of an inventory search under the circumstances; the second is the failure to obtain a warrant after discovery of the evidence, but prior to seizing it.

The United States Supreme Court has long held that an inventory search executed in conformance with established procedures is valid when the vehicle is lawfully impounded.[35] The purpose of the inventory is to protect the owner of the car so as to make his valuables secure, to protect the municipality and its officers from claims of lost or stolen goods, and to protect the public from vandals who might find a firearm or drugs.[36] The goals are laudable. It is important to note, however, that there is no Supreme Court authority granting an across-the-board right to inventory vehicles.

In *South Dakota v. Opperman,*[37] the Supreme Court agreed that police had the right to inventory impounded vehicles. It did not grant that right for non-impounded vehicles, nor did the court extend that right to cases where the owner of the car is at hand. The dissent in *Opperman* strongly argued, and the majority did not disagree, that in such a case the owner of the car should be able to dictate what would happen to his property. The courts in *Foreman* and *Williams* assumed that the inventory search was valid, and the evidence therefore was in "plain view." This assumption, however, completely disregards the language employed by the United States Supreme Court in Opperman.

Foreman raises a further question concerning the proper extent of an inventory search. The court in *Foreman* distinguished *State v. Ruffino,*[38] in which the New Mexico Supreme Court held that when evidence is discovered during an inventory search, "a search warrant should normally be obtained prior to seizing the evidence."[39] The court in *Foreman* held this language to be inapplicable to the facts before it because this case involved contraband and not mere "evidence."[40] The court held *Ruffino* did not alter the "plain view" doctrine, and that under *Coolidge,* the goods were seizable.[41] This analysis by the court completely fails to address the more important aspect of the seizure that was raised by

35. South Dakota v. Opperman, 428 U.S. 364 (1976).

36. *See* State v. Ruffino, 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980).

37. 428 U.S. 364 (1976).

38. 94 N.M. 500, 612 P.2d 1311 (1980).

39. *Id.* at 502, 612 P.2d at 1313.

40. 97 N.M. at 584, 642 P.2d at 187. The court also intimated that because the quoted language only noted that a warrant "should" be obtained, the supreme court might not have been stating a rule of constitutional dimension, but was "simply expressing a preference. . . ." *Id.* at 585, 642 P.2d at 188. The court did not have to rule on this distinction because of the court's ultimate holding.

41. Although the court did not expressly refer to *Coolidge,* the fact that the evidence was patently illegal made it "clearly evidence of a crime." *See supra* note 29.

counsel: assuming the police were justified in performing an inventory search, a second issue is whether they had the right to open a closed container.

The Supreme Court has never held that an inventory search justified excursions into closed containers. Though the Court in *United States v. Ross*[42] did hold that an automobile search based on probable cause authorized a search into any container that might contain the sought after evidence, the Court authorized that further search only to the extent that the search was supported by probable cause. An inventory search, however, is not based on probable cause. The police, not seeking evidence of a crime or contraband, should accord the container the higher protection of privacy it was granted in *Robbins v. California*.[43] As none of the reasons justifying an inventory search justify intrusion into the container, the court in *Foreman* should have excluded the evidence.

The final two cases dealing with the "plain view" doctrine involved a challenge that the officer was not lawfully present at the viewing. These claims stem from the United States Supreme Court's holding in *Payton v. New York*[44] that arrest is a form of seizure, and that it was "unreasonable" to effect a routine felony arrest in the defendant's home absent a warrant.

The defendant in *State v. Pool*[45] was apparently an unwanted guest of a motel in Eunice, New Mexico.[46] The owner of the motel, with an officer present, knocked on the motel door. The defendant opened the door, saw the police officer, and closed the door. The officer believed he smelled marijuana burning, so he opened the door and went in. The officer found an alligator clip with a "burned substance" in its teeth. The trial court convicted the defendant for possession of narcotic paraphernalia[47] after it refused to suppress the items found in the hotel room. On appeal, the court held the exigencies of the moment justified the entry, and that the entry was supported by probable cause.

Quoting at length from *State v. Sanchez*,[48] the court held that *Payton* applied only to routine arrests and was not applicable where exigencies

42. 456 U.S. 798 (1982).
43. 453 U.S. 420 (1981).
44. 445 U.S. 573 (1980).
45. 98 N.M. 704, 652 P.2d 254 (1982).
46. The officer in *Pool* was summoned by the owner/ manager of the motel to remove a trespasser. The room indicated by the owner was occupied by the defendant and the trespasser. *Id.* at 705, 652 P.2d at 255. The court held at the outset that the rules applying to police authority to enter a private home were applicable to the entry into the motel room. *Id.* at 706, 652 P.2d at 256. *See also* United States v. Anthon, 648 F.2d 669 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).
47. A later related search disclosed a small amount of marijuana. It was discovered pursuant to the officer's return to the motel room at the defendant's request.
48. 88 N.M. 402, 540 P.2d 1291 (1975).

would make a delay for a search warrant fruitless. The court held that the officer had probable cause based upon the smell of marijuana.[49] It also found the officer reasonably could have expected the defendant to destroy the evidence after seeing the police, and that the officer was justified in acting swiftly and without a warrant.

The final case dealt with an entry into defendant's home for the explicit purpose of arresting him on a charge of rape. The court in *State v. Chavez*[50] again rejected a claim under *Payton,* holding instead that the nature of the crime itself gave the police reason to believe that the suspect might seek to flee and justified a warrantless entry into his home.[51] The court held that because the police were lawfully present, evidence of the crime that was visible as they effected the arrest was in "plain view."[52]

III. FIFTH AMENDMENT

"[N]or shall [any person] be compelled in any criminal case to be a witness against himself. . . ."[53]

Not only does the fifth amendment protect against requiring self-incrimination, it also protects against drawing inferences based on the exercise of this right. In three cases decided during the Survey year, the New Mexico Court of Appeals dealt with allegations that this allied right had been trammeled by comments made by counsel for the state or by a witness for the state.

The first of these cases, *State v. Mirabal,*[54] involved a comment by a witness during a trial for robbery. The arresting officer was testifying about the circumstances surrounding the defendant's arrest. The officer identified the defendant as one of the persons he arrested, and volunteered that he "read them their *Miranda* Warnings, . . . (and) asked them if they had anything to say about it. They refused."[55] The defendant objected to this reference to the exercise of his right against self-incrimination,

49. 98 N.M. at 706, 652 P.2d at 256. *See also* State v. Sandoval, 92 N.M. 476, 590 P.2d 175 (Ct. App. 1979).

50. 98 N.M. 61, 644 P.2d 1050 (Ct. App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982).

51. The defendant in the case was charged with, and convicted of, rape. The victim was forced into the defendant's truck and taken to his home. While there he beat and tortured her, and committed three acts of criminal sexual penetration in the first degree. About five hours after her abduction, she escaped while the defendant dozed.

The court held the warrantless arrest was justified based on these facts. The victim was able to identify the defendant, his home, and his truck. Once he realized she had escaped, it was probable that he would try to flee to avoid punishment. *Id.* at 63-64, 644 P.2d at 1052-53.

52. During the brief search for the defendant in his home, the police saw a number of items eventually used as evidence, including bloody sheets, towels, newspapers, and the victim's shoes. *Id.* at 62, 644 P.2d at 1051.

53. U.S. Const. amend. V.

54. 98 N.M. 130, 645 P.2d 1386 (Ct. App. 1982).

55. *Id.* at 132, 645 P.2d at 1388.

and moved for a mistrial. The trial court denied the motion but did offer a curative instruction.[56]

On appeal the defendant urged that the comment was plain error and required reversal. He relied on *State v. Lara*,[57] where the court held that "[i]f the defendant's silence lacks significant probative value, the reference to silence has an intolerable prejudicial impact requiring reversal."[58] Under this analysis the comment would warrant reversal. *Lara*, however, involved a comment made in direct response to a question about the defendant's silence, and in *State v. Baca*,[59] the supreme court limited *Lara* to its particular facts.

Under the *Baca* analysis a mistrial is mandated only when the prosecutor "is directly responsible for the improper comment. . . ."[60] The *Baca* court rejected any rule that automatically required a mistrial if counsel commented on the defendant's silence, holding instead that plain error occurs only when the state intentionally solicits such evidence. The reference in *Mirabal* was not at the prosecutor's insistence, and therefore, the court held the comment was not plain error and that it was cured by the judge's instruction.

Two cases involved a comment by the prosecutor made during the course of the prosecutor's closing argument. In *State v. Martinez*,[61] the sole comment claimed as error was the prosecutor's remark that there had been no contradictory testimony as to what had happened. Relying on *State v. Aguirie*[62] and *State v. Montoya*,[63] the court quickly disposed of the claim of unfair comment by holding that the comment did not implicate the defendant's fifth amendment right because such a comment did not improperly refer to plaintiff's failure to testify.

The court addressed a more troublesome comment in *State v. Ramirez*.[64] The prosecutor's closing argument in that case directly referred to defendant's silence:

> Nowhere during this period of time does this defendant come forward and most of all, nowhere does he come forward and produce the gun that can acquit him or maybe show he didn't fire the fatal shot.[65]

Relying on the language from both *Lara* and *Baca*, the court held that Ramirez' fifth amendment right had been violated because the prosecutor

56. *Id.*
57. 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).
58. *Id.* at 235, 539 P.2d at 625 (citing United States v. Hale, 422 U.S. 171 (1975)).
59. 89 N.M. 204, 549 P.2d 282 (1976).
60. *Id.* at 205, 549 P.2d at 283.
61. 98 N.M. 27, 644 P.2d 541 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).
62. 84 N.M. 376, 503 P.2d 1154 (1972).
63. 91 N.M. 752, 580 P.2d 973 (Ct. App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978).
64. 98 N.M. 268, 648 P.2d 307 (1982).
65. *Id.* at 267, 648 P.2d at 308.

was "directly responsible" for the comment on the accused's silence. The court rejected the state's argument that the defendant waived any error when no timely objection was offered, holding instead that the direct reference constituted plain error that could be raised for the first time on appeal.[66]

IV. SIXTH AMENDMENT

The sixth amendment affords a defendant many protections related to and including the right to a jury trial.[67] A number of cases decided during the Survey year dealt with issues that touched on these rights.

A. The Right to a Trial by an Impartial Jury

1. Discovery.

The right to a meaningful trial necessarily carries with it the right to know not only the nature of the charges, but also the specific evidence that will be used. In two cases, the New Mexico courts explored the rules that deal with the state's obligation to make its evidence known.

In *State v. Tomlinson*,[68] the defendant appealed his conviction of several felonies, on the grounds that the state had violated his sixth amendment rights by not providing him with a list of witnesses that it would call until just before trial. The court of appeals rejected the defendant's arguments, holding that sanctions for violations of disclosure rules were within the lower court's discretion. The court found that the evidence was not necessarily prejudicial because it was neither technical nor cumulative, holding instead that the defendant had the burden to establish prejudice.[69] The court further noted that the exclusion of evidence was a most severe remedy, and reversal would not be appropriate for its refusal. The defendant instead should have sought a lesser remedy.

The second case dealing with discovery in the context of the sixth amendment was *State v. Sandoval*.[70] The defendant argued that the state

66. *Id.*

67. U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

68. 98 N.M. 337, 648 P.2d 795 (Ct. App.), *rev'd on other grounds*, 98 N.M. 213, 647 P.2d 415 (1982).

69. Defendant rested his argument on State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), *cert. denied*, 86 N.M. 656, 526 P.2d 798 (1974).

70. 99 N.M. 173, 655 P.2d 1017 (1982).

violated Rule 27 of the New Mexico Rules of Criminal Procedure[71] by failing to notify the defense of two inconsistent statements made by one of the state's witnesses. The defendant further argued that this violation prejudiced the case.[72] The court employed a four-part analysis to determine whether the allegations warranted a reversal. First, the court questioned whether the state had either breached some duty it owed to the defendant or intentionally deprived the defendant of evidence; second, it considered the materiality of the evidence; next, it asked whether the defendant had been prejudiced; and finally, it examined whether the trial court cured the state's failure to disclose evidence.[73]

The court dealt quickly with the first two inquiries, finding the state clearly had a duty to disclose and that the earlier statements were indeed material. The third inquiry was one of constitutional analysis. The standard employed by the court was whether the omitted evidence would have created a reasonable doubt that would not otherwise exist.[74] The court then reviewed the witness's earlier statement and concluded that although he had said the defendant was not present when the beating of the victim began, Sandoval later joined the group that was doing the beating. Although this testimony might suggest that Sandoval did not take part in all aspects of the murder, it does not create a reasonable doubt that he was not involved. The court also held that the state's failure to disclose the inconsistent statements did not prejudice the defendant and hence did not mandate reversal. The court found this conclusion

71. Rule 27, in relevant part, provides:

> a) INFORMATION SUBJECT TO DISCLOSURE
>
> [W]ithin ten days after arraignment . . . the state shall disclose or make available to the defendant:
>
> (6) EXCULPATORY EVIDENCE.
>
> Any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

72. The facts in *Sandoval* are a bit confusing: Sandoval was charged with beating a fellow inmate to death. Fuentes, the witness, had been sexually abused by Sandoval on a number of occasions. The defense made a conscious decision to not try to impeach Fuentes on this ground, feeling instead that evidence on the sexual abuse would prejudice a jury against Sandoval.

The defense later learned, however, that one of the earlier statements made by Fuentes was that Sandoval was sexually abusing Fuentes when the killing began. The defense argued that had it known this, the entire strategy of the trial would have changed. 99 N.M. at 174, 655 P.2d at 1018.

73. The first three prongs of this test came from State v. Lovato, 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980). It did not deal with the fourth inquiry because it involved evidence that had been destroyed and hence never introduced.

74. 99 N.M. at 175, 655 P.2d at 1019 (citing United States v. Agurs, 427 U.S. 97 (1976)). The court in *Agurs* held only that when a defendant makes a general request for information, the prosecutor is under a constitutional obligation only to disclose evidence that would create a reasonable doubt. 427 U.S. at 113. The court in *Sandoval* held that Rule 27 requires no more than the general request in *Agurs* and hence the same standard should apply. 99 N.M. at 175, 655 P.2d at 1019. This analysis leaves open the question whether a stricter analysis will be the appropriate guide in determining prejudice if a more specific request for evidence is made.

supported by its analysis of the fourth prong, noting that once the state disclosed this evidence, the trial court granted the defense a continuance to evaluate the statements.

2. The Role of the Jury

Three cases decided during the Survey year dealt with the role that jurors play in making determinations in criminal trials. In *State v. Ennis*[75] and *State v. Vallejos,*[76] the court of appeals addressed the issue of what use a jury could make of the fact that a defendant had not called witnesses to testify in his behalf.

In *Vallejos,* the defendant testified that he could not have committed the crime because he was drinking with friends at the time. During closing argument, the prosecutor commented on the fact that the defendant had not called his friends to corroborate his story. The defendant argued that the effect of this comment was to imply that the defense had the burden of proving the accused's innocence, and thus improperly shifted the burden of proof to the defendant.

The court of appeals disagreed, and sustained the trial court's ruling. The court held that because the judge had instructed the jury that the burden of proof properly rested with the state, the prosecutor's comment did not modify the court's instruction. Further, the court noted that although the inference sought by the prosecutor, that the defendant did not call witnesses because their testimony would be unfavorable, might or might not be proper, it was an inference that could be urged by either side and thus was a "mere matter of argument."[77] Based on this premise, the court concluded that the jury could properly estimate the value of such arguments.

The court clarified this analysis in *State v. Ennis.*[78] The prosecutor there made a remark similar to that made in *Vallejos,* noting that Ennis had not called the person who could clear him. The defendant objected on the grounds that New Mexico law permits an inference that testimony of witnesses not called would be unfavorable only if it was within the power of the party to produce the witness.[79] The only evidence presented by either side regarding the witness in question was the defendant's claim that he did not know where the witness could be found. Ennis argued that because the uncontroverted evidence showed the witness was not within his power to produce, the prosecutor's inference was improper.

75. 99 N.M. 117, 654 P.2d 570 (Ct. App.), *cert. denied,* 99 N.M. 148, 655 P.2d 160 (1982).
76. 98 N.M. 798, 653 P.2d 174 (Ct. App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982).
77. 98 N.M. at 801, 653 P.2d at 177.
78. 99 N.M. 117, 654 P.2d 570 (Ct. App.), *cert. denied,* 99 N.M. 148, 655 P.2d 160 (1982).
79. 99 N.M. at 120, 654 P.2d at 573. *See* State v. Soliz, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969); 2 J. Wigmore, Evidence §§ 285-88 (Chadbourn Rev. 1979).

The court rejected the argument, agreeing only that a jury instruction regarding inferences would be improper under the circumstances. Relying on *Vallejos,* the court reasoned that "it is for the jury to properly estimate the value of the attorneys' argument[s],"[80] and therefore, counsel still could present their arguments to the jury in an effective manner.

A third case dealing with the role of the jury dealt with the issue whether the judge or the jury properly should make a determination. In *State v. Gallegos,*[81] the defendant appealed his conviction of perjury, arguing that the judge had interfered with the accused's right to have a jury trial. One of the elements of perjury is the making of a "material" statement. In *Gallegos,* the trial court took it upon itself to decide whether the particular statement was material. The court of appeals relied on the "overwhelming weight of authority" and agreed that the decision properly rested with the court.[82]

B. The Right to a Speedy Trial

In *State v. Tollardo,*[83] the defendant claimed that the magistrate court lost jurisdiction over her when it failed to hold a preliminary hearing within twenty days after her initial appearance. Citing Rule 15(d) of the New Mexico Magistrate Rules of Criminal Procedure,[84] the defendant argued the requirement that the preliminary hearing "shall" be held within that time was mandatory.

The court of appeals noted that "shall" is normally interpreted by the courts to be a mandatory word, but held that such an interpretation in this case would be inconsistent with Rule 3(b). Rule 3(b) gives a magistrate authority to enlarge the time for any action save the time of commencement of trial or the time for taking an appeal. The court held the magistrate properly exercised his discretion in this case[85] and, because the defendant failed to show any prejudice as a result of the delay, the court remanded for reinstatement of the charges.

80. 99 N.M. at 120, 654 P.2d at 573. The court in *Ennis* agreed with the defendant that the inference sought by the state was invalid, but found that because it was only argument, the defendant was not prejudiced by it. He was free to point out the invalidity of the argument.

81. 98 N.M 31, 644 P.2d 545 (Ct. App.), *cert. denied,* 99 N.M. 148, 655 P.2d 160 (1982).

82. Every jurisdiction except New York and Massachusetts has found that the decision is properly made by the court. *See* cases cited at 98 N.M. at 32, 644 P.2d at 546.

83. 99 N.M. 115, 654 P.2d 568 (Ct. App.), *cert. denied,* 99 N.M. 148, 655 P.2d 160 (1982).

84. Rule 15(d) provides:

> A preliminary hearing shall be held within a reasonable time but in any event not later than ten days following the initial appearance if the defendant is in custody and no later than twenty days if he is not in custody. Failure to comply with the time limits set forth in this paragraph shall not affect the validity of any indictment for the same criminal offense.

85. The hearing was rescheduled by the magistrate so that he would be free to attend a judicial conference. The court of appeals found this constituted good cause. 99 N.M. at 117, 654 P.2d at 570.

In *State v. Santillanes,*[86] the defendant appealed his conviction as a habitual criminal on the ground that the delay in bringing him to trial violated his right to a speedy trial. The defendant pled nolo contendre to a charge of larceny in October of 1978. In return for his plea, the prosecutor agreed not to file a habitual criminal proceeding against him, based on several conditions.[87] In July 1981, the defendant was charged with a crime that violated the agreement. The day after he was convicted of the charge, he also was convicted of being an habitual criminal.

The defendant argued that the delay of thirty-two months violated his rights to a speedy trial and due process and was presumptively prejudicial. The court rejected his claim, however, and held that the period prior to filing a charge is not to be considered in determining whether there has been a violation of the right to a speedy trial.[88] The time before that date was unimportant.

C. The Right to Assistance of Counsel

The sixth amendment guarantee of the right to counsel carries with it the right to have counsel present at all critical stages of a prosecution, including custodial interrogation.[89] This right was involved in *State v. Dominguez.*[90] The police suspected the defendant in *Dominguez* of having shot at a vehicle. While still in the custody of the County Sheriff, Dominguez contacted a law firm and engaged it to represent him in the matter. The law firm contacted the state police and advised them that he had counsel. The sheriff's department then transported the defendant to the state police, and they in turn read the defendant his rights as required by *Miranda v. Arizona.*[91] The defendant informed the police that he would make no statement until he had met with his counsel. Approximately three-and-a-half hours later the same officer who had been with Dominguez earlier asked the defendant to make a statement.[92] Dominguez

86. 98 N.M. 448, 649 P.2d 516 (Ct. App. 1982).

87. The agreement provided that the state could file the habitual proceedings if the defendant violated any condition of release or committed any other crime. The court accepted his plea and sentenced him to two years of unsupervised probation. *Id.* at 450, 649 P.2d at 518.

88. *Id.* (citing State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977); N.M. R. Crim. P. 37).

89. The protection against self-incrimination during investigation extends only to "custodial interrogation"; questions or other conduct designed to solicit an incriminating response from a person subject to control by the police. Note that the protections afforded by the sixth amendment are quite similar to those granted by the fifth amendment. The sixth amendment grants the right to counsel before being subjected to the criminal process; the fifth amendment grants the right to remain silent even after counsel has been retained. Many of the cases construing fifth amendment rights have been found controlling in sixth amendment cases. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966).

90. 97 N.M. 592, 642 P.2d 195 (Ct. App.), *cert. quashed,* 98 N.M. 51, 644 P.2d 1040 (1982).

91. 384 U.S. 436 (1966).

92. The officer involved was not only the same officer whom the defendant earlier told he would not speak without his counsel present, but was also the same officer that Dominguez' counsel spoke with when he called the state police. 97 N.M. at 593, 642 P.2d at 196.

complied, offering a written statement that implicated him. Dominguez later claimed that this statement was in violation of his right to have counsel.

Relying on *Miranda v. Arizona*[93] and *State v. Word*,[94] the court of appeals held that once a defendant indicates that he wishes to consult an attorney before speaking, there can be no questioning. The officer's request that Dominguez "make a statement" was "likely to evoke an incriminating response,"[95] and was thus custodial interrogation. Having decided that the statement was the product of interrogation, the court turned to the state's claim that the defendant had waived his right to counsel. The apparent basis for the state's argument was the combination of the lapse of time, the innocuous nature of the investigating officer's question, the defendant's familiarity with his rights, and the fact that the statement was given voluntarily.[96]

The court rejected this "totality of the circumstances" approach, and created an absolute rule. Relying on *Edwards v. Arizona*,[97] the court held that showing that a statement was made voluntarily does not address the question of whether the defendant waived his right to counsel. The court held that once a defendant has expressed his desire to have counsel present, the police must cease custodial interrogation. Only if the defendant himself initiates further communication may the police press the issue at all. In *Dominguez*, the court found there was no waiver because the police gained the damaging evidence as a result of custodial interrogation initiated by the police after a request for counsel.

V. EIGHTH AMENDMENT

In *State v. Garcia*,[98] the New Mexico Supreme Court upheld the constitutionality of the New Mexico Capital Felony Sentencing Act.[99] In finding the Act permissable, the court almost summarily relied on United States Supreme Court precedent to uphold the act. The court first cited to *Gregg v. Georgia*[100] and *State v. Rondeau*[101] for the proposition that the death penalty is not per se cruel and unusual. The court then noted that this particular statute is constitutional because it is modeled after statutes that have withstood the scrutiny of the United States Supreme Court.[102]

93. 384 U.S. 436 (1966).
94. 80 N.M. 377, 456 P.2d 210 (Ct. App. 1969).
95. 97 N.M. at 593, 642 P.2d at 196.
96. *Id.* at 594, 642 P.2d at 197.
97. 451 U.S. 477 (1981).
98. 99 N.M. 771, 664 P.2d 969, *cert. denied*, 103 S. Ct. 2464 (1983).
99. N.M. Stat. Ann. §§ 31-20A-1 to 31-20A-6 (Repl. Pamp. 1981).
100. 428 U.S. 153 (1976).
101. 89 N.M. 408, 553 P.2d 688 (1976).
102. 99 N.M. at 777, 664 P.2d at 975. *See* Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

The only serious consideration the court gave to the attack on the statute was in passing on the claim that the jury instructions would serve only to confuse the jury and leave them unapprised as to how they should decide whether to impose the death penalty.[103] Under the Act, a jury can impose the death penalty only if it finds, beyond a reasonable doubt, that one or more of the specific aggravating circumstances charged had occurred.[104] Once a jury so finds, it must then balance the aggravating circumstances against the mitigating circumstances,[105] and decide whether a life sentence or the death penalty shall be imposed. The court found the jury instructions to be clear enough to withstand constitutional scrutiny.

The final point addressed by the court concerned whether the sentence imposed in *Garcia* was "excessive and/or disproportionate" in comparison to that of Garcia's co-defendant.[106] Garcia relied on the Act, which provides that the death penalty should not be imposed if the sentence would be excessive or disproportionate relative to the penalty imposed in similar cases, considering both the crime and the defendant.[107] The court rejected Garcia's claim, noting that Garcia started the fight and "intentionally and unmercifully" stabbed the guard in the back while he was being held by the other defendant. The court held that the conduct of the two defendants was different enough to warrant different treatment.

In reaching this result, the court set forth guidelines by which it would decide similar claims in the future. In deciding whether a sentence of death is excessive or disproportionate, the court will review as follows:

1. We will review this issue only when raised on appeal.
2. In our review, we will consider only New Mexico cases in which a defendant has been convicted of capital murder under the SAME AGGRAVATING CIRCUMSTANCE(S).
3. Only those New Mexico cases in which a defendant was convicted under the same aggravating circumstance(s) and then received EITHER the death penalty OR life imprisonment and whose con-

103. Although the court reviewed the jury instructions and found "no fault" with them, it further noted that the objections could not be raised on appeal because the defendant had not objected to them at trial. The court specifically noted that just because the penalty of death could be imposed, submission of an erroneous jury instruction did not become fundamental error. 99 N.M. at 779, 664 P.2d at 977.

104. The aggravating circumstances upon which a death penalty can be based are limited to those set out in the statute. N.M. Stat. Ann. § 31-20A-3 (Repl. Pamp. 1981).

105. Unlike aggravating circumstances, mitigating factors are not defined or limited by statute. The court rejected the defendant's claim that mitigating circumstances must be specified in a clear and objective standard, finding that a judge or jury should be able to take in an unlimited variety of considerations in deciding to spare one's life. 99 N.M. at 778-79, 664 P.2d at 978-79.

106. Garcia's co-defendant, Jesse Trujillo, had been involved in the scuffle that cost the lives of a prison guard and a fellow inmate. 99 N.M. at 779, 664 P.2d at 979.

107. *See supra* note 105.

viction and sentence have been upheld previously by this Court, will be considered appropriate for comparison.

4. We will review the record and compare the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate.[108]

VI. SENTENCING

A number of cases decided during the Survey year dealt with issues involving sentences. Only a few, however, significantly affected the law, so many will be treated briefly or only cited for the reader's reference.

A. Allocutus

The defendant in *Tomlinson v. State*,[109] convicted of three counts of kidnapping and one count of robbery, appealed from his sentence on the ground that he had not had a chance to speak before the court passed sentence. Relying on a statute providing for a sentencing hearing,[110] the New Mexico Supreme Court held that such a hearing was mandatory and that it impliedly granted the defendant a right to speak. The court reasoned that the Legislature was aware of this right and intended to include it.[111]

B. Plea Bargain Agreements

The defendant in *State v. Sykes*[112] entered into a plea and disposition agreement with the state in which defendant pled guilty to burglary and larceny and agreed to waive extradition proceedings on charges in Nevada.[113] In turn, the court imposed the agreed upon sentence: two concurrent three-year terms followed by a two-year probation. The defendant still had to face the Nevada charges; therefore, the plea agreement also provided that the sentence imposed in New Mexico would run concur-

108. 99 N.M. at 780, 664 P.2d at 980. The court examined early United States cases at some length to justify this standard of review. *Id.* The reader is recommended to the case for a detailed background because an abstract of the case can never fully describe its subject. *Id.*

109. 98 N.M. 213, 647 P.2d 415 (1982).

110. N.M. Stat. Ann. § 31-18-15.1 (Repl. Pamp. 1981). The statute itself does not provide for the right to be heard, but only for consideration of aggravating and mitigating circumstances. Both the trial court and the court of appeals found substantial compliance with the statute because the court had listened to all the evidence and was familiar with mitigating evidence. 98 N.M. at 214, 647 P.2d at 416.

111. The court reasoned that any other result would be in derogation of common law because the right of *allocutus* was so favored at common law. *Id.* at 214-15, 647 P.2d at 416-17.

As to the right of *allocutus* generally, note that the court rejected the state's argument that it was harmless error in this case. Although the court did not expressly so hold, it implied the doctrine of harmless error would never be applicable where *allocutus* has been denied. *Id.*

112. 98 N.M. 458, 649 P.2d 761 (Ct. App. 1982).

113. *Id.* at 459, 649 P.2d at 763.

rently with any "time to be served as a result of conviction in Nevada."[114]

When the defendant surrendered himself to Nevada authorities, he pled guilty pursuant to another plea bargain agreement. The Nevada court sentenced the defendant to one year in prison, but suspended the sentence and placed him on three years' probation in Nevada. The New Mexico court, realizing that no prison time would be imposed in Nevada, had the defendant returned and imprisoned. The defendant appealed, arguing that the state violated the plea bargain.

The court of appeals agreed, holding that the state could not change the sentence. The agreement must be upheld or rejected as an entire unit. New Mexico could not now seek to rescind the agreement to the further detriment of the defendant because the defendant already had relied on the agreement by pleading guilty and voluntarily submitting to charges in Nevada. The court further held that although the result of the agreement was not what the state expected, it nonetheless had to accept it. The state had promised the defendant that three years of service to New Mexico would be concurrent with three years of service to Nevada. If Nevada chose to order probation instead of incarceration, that decision bound New Mexico as well.

A second case dealing with abiding by plea bargains showed the flip side of the coin. In *State v. Bazan,*[115] the court held a defendant could not appeal a conviction based on a plea bargain.[116] The defendant pled guilty to driving while intoxicated, second offense, as part of a plea agreement. The court imposed a six-month sentence and the defendant appealed to district court, seeking a trial de novo.

The court held the defendant had waived his right to appeal. Relying on *Baird v. State,*[117] the court held that the clause in the agreement that waived the defendant's right to appeal was valid.[118] The court also held

114. *Id.*

115. 97 N.M. 531, 641 P.2d 1078 (Ct. App.), *cert. denied,* 98 N.M. 50, 644 P.2d 1039 (1982).

116. *Bazan* actually dealt with an appeal from the conviction, not just the sentence. It has been included in this section for purpose of clarity.

117. 90 N.M. 667, 568 P.2d 193 (1977).

118. Two pertinent provisions of the agreement in *Bazan* were set out by the court at length:

> Unless this plea is rejected or withdrawn, that the defendant hereby gives up any and all motions, defenses, objections or requests which he has made or raised, or could assert hereafter, to be the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement. . . .
>
> . . .
>
> . . . I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading (guilty) (no contest) I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein[.]

97 N.M. at 532, 641 P.2d at 1079.

that because the defendant did not attempt to withdraw his plea or to allege error in the agreement, he was bound by its provisions.

C. Restitution

Section 31-17-1 of New Mexico Statutes Annotated[119] provides that a court may require a person convicted of a crime to make restitution to the victims of the crime of which he was convicted. Several cases decided during the Survey year defined both the extent of court-ordered restitution and the procedures involved in its application.

In *State v. Lack*,[120] the defendant appealed from an order of restitution. The court's analysis of this claim provides some insight into the procedures the court must follow in imposing such a sentence. It first noted that a court could require restitution as a condition of parole or probation. The defendant's failure to comply with a lawful order of restitution in that situation would then constitute a violation of probation or parole.

In ordering restitution, the court must require the defendant, in cooperation with his parole or probation officer, to prepare a plan of restitution, including the specific amount to be paid to each victim as well as a schedule of payment. The court in *Lack* held that this procedure is necessary in order to satisfy requirements of due process; to give the defendant notice of the amount of restitution claimed, the opportunity to dispute the amount, and to question his ability to pay.[121] Final order to pay, however, must be made by the court and not by the parole or probation officer. A report by such officer, however, would aid the court in making this determination.

A full evidentiary hearing is not required in making a final determination. The court in *Lack* specifically noted that the rules of evidence did not apply, and further, that the amount of restitution need not be proven by a preponderance of the evidence.[122] The court did state, however, that the defendant had the right to be sentenced on the basis of accurate information. If a defendant disputes any information in the report, therefore, he may question its accuracy at a sentencing hearing.[123]

119. N.M. Stat. Ann. § 31-17-1 (Repl. Pamp. 1981).

120. 98 N.M. 500, 650 P.2d 22 (Ct. App.), *cert. denied*, 98 N.M. 478, 649 P.2d 1391 (1982).

121. *Id.* at 509, 649 P.2d at 31. Although the defendant in *Lack* was not afforded the procedure required by the statute, the court refused to reverse on that ground because he failed to present that issue on appeal. The court apparently applied a harmless error rule of sorts, for it reviewed the facts justifying the amount and the defendant's ability to pay. Further, the court noted that he had access to a pre-sentence report that apprised him of the amounts claimed and also noted that the court gave him the opportunity to dispute the amounts ordered. *Id.*

122. 98 N.M. at 506, 650 P.2d at 26.

123. *Id.* Note that an order of restitution is mandatory when a sentence is either deferred or suspended, but may be imposed even if the full sentence is imposed. *See* State v. Ennis, 99 N.M. 117, 654 P.2d 570 (Ct. App.), *cert. denied*, 99 N.M. 148, 655 P.2d 160 (1982); State v. Gross, 98 N.M. 309, 648 P.2d 348 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

VII. RULES OF PROCEDURE

Appealing from a conviction of three felony counts, the defendant in *State v. Casteneda*[124] argued that a new trial should be ordered because the state's witness committed perjury. To establish his claim the defendant pointed to inconsistencies between the witness's testimony and that of other witnesses. The court of appeals rejected his plea on two grounds.

First, the court noted that an order for a new trial was inappropriate because the defendant failed to bring the claim before the trial court. Relying on Rule 308 of the New Mexico Rules of Appellate Procedure,[125] the court held the failure to alert the trial court in a timely manner as to the claim of perjury waived the right to appeal on that ground. Second, the court held that the defendant failed to establish a right to a new trial. The defendant had established only inconsistencies. To warrant a new trial, a defendant must establish perjury of a material fact by evidence that is so "clear and convincing . . . as to leave no reasonable doubt that perjury was committed."[126]

State v. Chavez[127] concerned the propriety of a new trial granted by the court on its own motion. After the defendant was convicted on two counts of first-degree murder, one count of aggravated battery, and one count of carrying a firearm in a licensed liquor establishment, the court, sua sponte, ordered a new trial.[128] On appeal the state argued[129] that Rule 45 of the New Mexico Rules of Criminal Procedure does allow such an order, but instead requires that an order granting a new trial must be accompanied by a written or oral statement setting forth the reasons for the new trial. The supreme court held that the trial court's reference to the interests of justice referred to the standard relied on, but not the grounds for the order. Finding the mandates of Rule 45 were not met, the court remanded the case for action consistent with Rule 45.

Although new trials are permitted under Rule 45, a judgment n.o.v.

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124. 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

125. N.M. R. Crim. App. P. 308. *See also* State v. Hogervorst, 90 N.M. 580, 566 P.2d 828 (Ct. App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977).

126. 97 N.M. at 678, 642 P.2d at 1137.

127. 98 N.M. 682, 652 P.2d 232 (1982).

128. The trial court did not make it clear why it was granting the new trial. It noted that the evidence was conflicting and held that, "in the interest of justice," a new trial would be granted pursuant to N.M. R. Crim. P. 45.

The state argued that the new trial was improper because it was granted because a juror later impeached the verdict. The supreme court agreed that it is improper to allow a jury to impeach its verdict (*see* N.M. R. Evid. 606(b)), but held the court did not grant the new trial on that ground, but solely on the basis of Rule 45(a). 98 N.M. at 683-84, 652 P.2d at 233-34.

129. A second issue in the case was whether the state had the right to appeal. The defendant argued that the state was not an aggrieved party within the meaning of article VI, section 2 of the New Mexico Constitution. This section limits appeals to be taken only by an aggrieved party. The supreme court held the state was an aggrieved party, noting the state's interest in upholding a lawful jury verdict. 98 N.M. at 683, 582 P.2d at 233.

is not a tool available to a trial judge in a criminal case. The defendant in *State v. Davis*,[130] convicted of larceny, moved for and received a judgment of acquittal, notwithstanding the verdict. The state appealed, arguing that such a judgment was not proper.

The court of appeals agreed with the state. It noted that a judgment n.o.v. is permitted by the Rules of Civil Procedure, but is not mentioned in the Criminal Rules.[131] The court reasoned that Rule 40(e)[132] requires the court to determine the sufficiency of the state's evidence at the close of its case. The defendant moved for a directed verdict at the close of the state's case and after the defense rested. The trial court took both motions under advisement. The appellate court, however, noted that the rules do not provide for taking such motions under advisement. The court held it must be deemed to have denied the motion because it could not take the motion under advisement and it did not grant the motion. The court further noted that Rule 46 requires a court to enter a judgment of guilty if the defendant is so found.[133] The court held this placed a mandatory duty on the trial judge. The case was remanded with instructions to reinstate the jury verdict because the trial court did not fulfill its duty.[134]

The defendants in *State v. Stephens*[135] were convicted of the first-degree murder of a fellow inmate. Seven months after their conviction, Michael Price executed a warrant confessing that he alone had killed the decedent and that the defendants had nothing to do with the crime.[136] Based on the affidavit and other evidence,[137] the defendants moved for a new trial. The court denied the defendant's motion, and the judgment was upheld on appeal when the supreme court found the evidence to be merely cumulative. The legal footwork involved in getting to the supreme court's finding is extremely questionable, however, and serves only to undermine the court's credibility.

130. 97 N.M. 745, 643 P.2d 614 (Ct. App.), *cert. denied*, 98 N.M. 478, 649 P.2d 1391 (1982).

131. 97 N.M. at 747, 643 P.2d at 616. *See* N.M. R. Civ. P. 50(b).

132. N.M. R. Crim. P. 40(e).

133. 97 N.M. at 748, 643 P.2d at 617. *See* N.M. R. Crim. P. 46.

134. 97 N.M. at 748, 643 P.2d at 617. Relying on United States v. Jenkins, 420 U.S. 358 (1975), and United States v. Wilson, 420 U.S. 332 (1975), the court held such an order did not offend the prohibition against double jeopardy, as the defendant would not be subject to another trial. 98 N.M. at 747-48, 643 P.2d at 616-17.

135. 99 N.M. 32, 653 P.2d 863 (1982).

136. Price had been indicted for the murder as a co-defendant of the parties in *Stephens*. After trial of the three had begun, Price was severed as a defendant and granted a separate trial. Before his trial began, he pled guilty to a reduced charge of voluntary manslaughter. *Id.* at 34, 653 P.2d at 865.

137. The other evidence included promises the state had made to the state's witnesses in exchange for their testimony and evidence that a guard had seen the defendants leave the vicinity of the murder with no blood stains, which would be inconsistent with the state's case. As to both bits of evidence, the court held the defendant could have discovered it prior to trial. *Id.* at 36-38, 653 P.2d at 867-69.

The defendants argued that under *State v. Chavez,*[138] a new trial must be ordered. The defendant in *Chavez* was granted a new trial when, after the trial, another person confessed to the crime and when two other eyewitnesses said the defendant had not committed the crime. The court rejected the argument based on *Chavez*. It held that *Chavez* not only had a later confession, but two witnesses to corroborate it. The court, however, misread *Chavez:* neither of the two witnesses indentified the man who confessed; both men simply said the defendant did not commit the crime. This is not corroboration, but merely information that makes it more likely that the confession could be true. It therefore should go only to the weight of the new evidence.

Citing *State v. Valdez,*[139] the court stated:

> We have held that even if another person was prepared to testify, or had confessed that he, and not another, had committed a crime for which another was convicted, that would not be newly discovered evidence since such person could add nothing to testimony defendant could have given at trial.[140]

This statement is not what *Valdez* held. *Valdez* did not hold that the confession of another could not add anything that could not have been brought up at the first trial. It only held in that particular case, any evidence relied on for a new trial had been available at the earlier trial.

The case of *Stephens* is markedly different from *Valdez*. In *Valdez* the defendant knew of the confession before his trial, therefore, it was not *new* evidence. The confession in *Stephens* came to light seven months after trial. The evidence presented in *Stephens* was new evidence; it was evidence not available at the earlier trial. The court's argument that Price's confession "is merely cumulative of the alibi defense" used by the defendants is without merit. Under such an analysis, any evidence tending to prove the defendant not guilty would only be cumulative of his claim that he did not commit the crime.

The court in *Stephens* correctly noted that the standard to be applied in motions for new trials is that the new evidence must "probably produce a new result if a new trial is to be granted."[141] After concluding that the confession was not new evidence, the court further stated that the defendants had failed to convince the trial court that a different result would obtain on retrial. The ruling presents an interesting issue because Price's confession, if believed, probably would cause a different verdict. The question, then, is whether a judge may consider the witnesses' credibility.

138. 87 N.M. 38, 528 P.2d 897 (Ct. App. 1974).
139. 95 N.M. 70, 618 P.2d 1234 (1980).
140. *Stephens,* 99 N.M. at 37, 653 P.2d at 868.
141. *Id.* (citing State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981)).

The court's decision in *Stephens* implies an affirmative answer. In distinguishing earlier cases, the court noted that "Price's confession stands by itself as a rank assertion of criminal involvement . . . without the benefit of corroboration."[142] If the court did not hold that such a confession, as a matter of law, is not believable, it at least allowed the trial court to find it unbelievable.[143]

142. The confession in *Stephens* was corroborated by the two defendants. 99 N.M. at 37, 653 P.2d at 868. Additionally, the testimony of the guard, though not admissible at a later trial, does buttress the reliability of Price's confession. Finally, the fact that the state promised its witnesses favored treatment for charges pending against them should show the weakness in the state's case. Where various factors in a case show the attenuated nature in a case, the court has been willing to grant a new trial in the past. *See* State v. Chavez, 87 N.M. 38, 528 P.2d 897 (Ct. App. 1974); State v. Fuentes, 67 N.M. 31, 351 P.2d 209 (1960).

143. The New Mexico courts have never before decided whether the reliability of the evidence could be considered. In several cases, however, the courts have reversed a denial of a new trial without inquiring into whether the new evidence was believable. *See, e.g.*, State v. Chavez, 87 N.M. 38, 528 P.2d 897 (Ct. App. 1974). In *Chavez*, the dissenting judge specifically noted that the lower court could not deny a new trial simply because he did not believe the new evidence. While some evidence might be held incredible as a matter of law, a trial court should not deny a new trial simply because it finds the evidence unbelievable. If the evidence could be believed, the defendant should be granted a new trial. *Id.* at 40, 528 P.2d at 899 (Hendley, J., dissenting).