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CRIMINAL LAW

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INTRODUCTION

During the survey period, the appellate courts of New Mexico issued opinions in several significant cases interpreting the requisite elements of a variety of criminal offenses under New Mexico statutes. The courts clarified the actus reus elements of possession of burglary tools, commercial gambling, child abuse, habitual offenders, and unlawful practice of law; clarified the mental state requirements for criminal trespass, tax fraud, and criminal contempt; considered the appropriate bases and procedures for revocations of bail and probation; and decided issues involving the appropriate standard of appellate review, agreements not to prosecute, and criminal court jurisdiction.

I. CLARIFICATION AND INTERPRETATION OF ACTUS REUS ELEMENTS

A. *Possession of Burglary Tools*

In *State v. Jennings*,[1] the court of appeals interpreted the element of the offense of possession of burglary tools which requires the possession of a "device or instrumentality . . . commonly used for the commission of burglary. . . ."[2] In *Jennings*, the court held that where there is evidence allowing a reasonable inference that tools possessed by defendants were "actually used as burlgary tools," evidence that such tools are "commonly used" as burglary tools is unnecessary.[3]

In *Jennings*, police officers first observed two men inside a closed gas station and then outside attempting to scale the building.[4] The officers then heard a metallic banging in an area where a stairway led to the basement.[5] The two men were arrested as they entered a van.[6] The officers

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1. 102 N.M. 89, 691 P.2d 882 (Ct. App. 1984).

2. N.M. Stat. Ann. § 30-16-5 (Repl. Pamp. 1984): "Possession of burglary tools consists of having in the person's possession a device or instrumentality designed or commonly used for the commission of burglary and under circumstances evincing an intent to use the same in the commission of burglary."

3. 102 N.M. at 92, 691 P.2d at 885.

4. *Id.* at 90, 691 P.2d at 883.

5. *Id.* at 91, 691 P.2d at 884.

6. *Id.*

frisked the two men and found a long-bladed screwdriver and a small flashlight.[7] The officers testified that they had observed fresh marks, seemingly from a screwdriver, at the lock of the bathroom door of the station.[8] In addition, a padlock had been forcibly removed from the basement door of the station.[9] The defendant claimed that the state had put on no evidence that flashlights and screwdrivers are commonly used burglary tools.[10]

The court, relying on *State v. Candelaria*[11] and *State v. Blea*,[12] two "deadly weapons" cases, read the "commonly used" language out of the statute. There was little support in *Candelaria* and *Blea* for the court's conclusion. While the court's decision to uphold the judgment of the trial court was probably correct, the decision could have been based on a less drastic rationale which would not have required a rewriting of the statute. The court could simply have concluded that, based on the evidence and on common experience, a jury might reasonably have concluded, even in the absence of direct testimony by police officers, that screwdrivers and flashlights are indeed commonly used in burglaries. In excising the "commonly used" requirement from the statute, the court eliminated an important limiting element in an offense requiring little actus reus in the first place. *Jennings* raises a risk of criminalizing conduct which in ordinary circumstances would be innocent.

However, *Jennings* suggests an interpretation of the offense which prosecutors should note carefully. The rationale of the decision suggests that where there is no evidence of "actual use" of a tool in a burglary, the prosecutor must put on evidence such as the testimony of an experienced police officer in the burglary unit that the particular tools involved in an offense are "commonly used" as burglary tools. This could present pitfalls for the prosecutor.

B. Commercial Gambling

In an interesting and intricately reasoned decision in *State v. Owens*,[13] the court of appeals held that the commercial gambling statute[14] requires more than one act of accepting or making a bet, but that commercial gambling need not be for profit.

The defendant was convicted of twelve counts of commercial gam-

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. 97 N.M. 64, 636 P.2d 883 (Ct. App. 1981).
12. 100 N.M. 237, 668 P.2d 1114 (Ct. App. 1983).
13. 23 N.M. St. B. Bull. 1226 (Ct. App. 1984).
14. N.M. Stat. Ann. § 30-19-3(B) (Repl. Pamp. 1984): "Commercial gambling consists of . . . B. receiving, recording or forwarding bets or offers to bet. . . ."

bling.[15] The state's evidence at trial consisted primarily of a series of tape recordings of telephone conversations between the defendant and a man named Newman.[16] An expert in commercial gambling testified that the conversations between the defendant and Newman indicated that twelve bets had been placed on football games for a total of $26,500.00.[17]

The court of appeals observed that the commercial gambling statute is designed to proscribe the activities of bookmakers.[18] Thus, proof of commercial gambling requires more than one bet or offer to bet, although one act of betting is sufficient for conviction of social gambling.[19] There is no need, however, for the prosecution to prove a profit motive in order to obtain a conviction of commercial gambling.[20] Finally, the court rejected the trial court's interpretation of the commercial gambling statute and held that the distinction between social and commercial gambling does not depend on whether the bet is offered or accepted.[21]

In sum, the court of appeals clarified in *Owens* the distinction between social and commercial gambling. The difference hinges on whether the prosecution can prove multiple instances of the taking or receiving of bets.[22]

C. Child Abuse

In *State v. Leal*,[23] the court of appeals reaffirmed the doctrine of *Smith v. State*[24] that where a defendant is convicted on a theory which has no evidentiary support and based on instructions which should not have been given, the conviction must be reversed—and in many instances the defendant discharged—even though the defendant could have been convicted of a greater offense on a different theory.[25]

In *Leal*, the defendant was convicted of "permitting a child to be . . . tortured, cruelly confined, or cruelly punished" in violation of N.M. Stat. Ann. § 30-6-1(C)(2) (Repl. Pamp. 1984).[26] The state adduced substantial evidence at trial that the defendant herself had caused the abuse; however, the record did not contain evidence from which a reasonable inference could be drawn that another person caused the abuse, and that the de-

15. *Owens*, 23 N.M. St. B. Bull. at 1227.
16. *Id.*
17. *Id.*
18. *Id.* at 1229.
19. *Id.*
20. *Id.* Though it may accord with the *statutory* language to impose no requirement of profit motive for "commercial"gambling, it may outrage the *English* language.
21. *Id.*
22. *Id.*
23. 23 N.M. St. B. Bull. 1021 (Ct. App. 1984).
24. 89 N.M. 770, 558 P.2d 39 (1976).
25. *Leal*, 23 N.M. St. B. Bull. at 1022.
26. N.M. Stat. Ann. § 30-6-1(C)(2) (Repl. Pamp. 1984).

fendant "permitted" it.[27] As the court observed, one does not "permit" oneself to do an act.[28] Because there was not substantial evidence to support the conviction for permitting child abuse, the court ordered the conviction reversed and the defendant discharged.[29] In essence, the defendant was acquitted on the only charge presented, i.e., "permitting" the child to be abused. Therefore, under the double jeopardy clause, the defendant could not be tried a second time for that offense.[30]

In the *Leal* opinion, however, it is not clear that the defendant could not have been tried on the theory that she "caused" the child to be abused. *Leal* serves as a reminder to the courts and prosecutors in cases where different crimes are lumped together in one offense, under one heading, to be careful to instruct the jury and charge the defendant on a theory which is consistent with the facts of the case.

D. Habitual Offenders

In *State v. Burk*,[31] the court of appeals considered whether a proceeding in another state in which the defendant pleads guilty, but where adjudication of guilt is deferred during the pendency of probation, constitutes a "conviction" for purposes of the New Mexico Habitual Offender Act.[32] The court held that since the state of Texas had deferred not only the defendant's sentence but also the adjudication of his guilt, there was no "conviction" as required under the Habitual Offender Act. Thus, the proceeding in Texas could not be used in New Mexico to enhance the defendant's sentence.[33] Even though New Mexico and federal law consider a guilty plea sufficient for enhancement, under Texas law there was no conviction and without a conviction there could be no enhancement.[34] Thus, while the definition of "felony" for purposes of the Habitual Offender Act depends on New Mexico law (i.e., whether the offense was punishable by imprisonment for more than one year or would have been otherwise classified as a felony in New Mexico), the definition of "conviction" depends on the procedural rules and the substantive law of the state in which the alleged "conviction" took place.

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27. *Id.*
28. *Id.*
29. *Id.*
30. *See* Burks v. United States, 437 U.S. 1 (1979).
31. 101 N.M. 263, 680 P.2d 980 (Ct. App. 1984).
32. N.M. Stat. Ann. § 31-18-17(A)(2)(a) (Cum. Supp. 1985): "A. For purposes of this section, 'prior felony conviction' means . . . (2) any prior felony for which the person was convicted other than an offense triable by court martial if: (a) the conviction was rendered by a court of another state. . . ."
33. 101 N.M. at 265, 680 P.2d at 982.
34. *Id.*

E. Unlawful Practice of Law

In *State v. Edwards*,[35] the court of appeals interpreted the statute prohibiting the practice of law without a license.[36] The court confronted the question whether the filing of five different pleadings on different dates but in the same action constituted one continuing violation of the statute or five separate violations. The defendant had been convicted in the district court of five counts of practicing law without a license.[37] The court of appeals held that the defendant's multiple activities on behalf of a single client in a single cause of action constituted one continuing offense.[38]

At the outset the court determined that the defendant was not barred from raising the issue on appeal for the first time, because his claim was one that amounted to a defense of double jeopardy which could be claimed for the first time on appeal.[39] The court reasoned that if the legislature, in enacting the criminal statute, had not intended to authorize separate convictions and sentences for the filing of each pleading in a single action, then the sentence in this case would constitute multiple punishments for a single offense, thus violating the double jeopardy clause.[40] The court concluded that the legislative intent of protecting the unwary and uninformed public from injury at the hands of persons unskilled or unlearned in the law would be fulfilled if the defendant in this case were found liable for only one act of unauthorized practice of law.[41] Additionally, the court observed that if the filing of each pleading in a single cause of action constituted a separate criminal offense, then every act within the context of unlawful representation would be a separate offense (e.g., phoning the client, talking with opposing counsel, etc.).[42]

In *Edwards*, the court of appeals used a reasoned analysis of the legislative intent and the policy underlying the statute to arrive at a reasonable interpretation of the scope of the offense. In essence, the court concluded that, given the scope of the unlawful practice statute, all separate acts within representation of a single client in a single action merge into one offense.

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35. 102 N.M. 413, 696 P.2d 1006 (Ct. App. 1984).

36. N.M. Stat. Ann. § 36-2-28 (Repl. Pamp. 1984): "If any person shall, without having become duly licensed to practice, or whose licenses to practice shall have expired either by disbarment, failure to pay his license fee or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of an offense under this act. . . ."

37. 102 N.M. at 414, 696 P.2d at 1007.

38. *Id.*

39. *Id.* at 415, 696 P.2d at 1008.

40. *Id.*

41. *Id.* at 417, 696 P.2d at 1010.

42. *Id.* at 416, 696 P.2d at 1009.

II. INTERPRETATION AND CLARIFICATION OF MENTAL STATE REQUIREMENTS

A. Criminal Trespass

In *State v. McCormack*,[43] the court of appeals interpreted the criminal intent requirement for conviction of the offense of criminal trespass, and, in doing so, reviewed concepts of general criminal intent and mistake of law. The court held that criminal trespass is a general intent crime in New Mexico and, therefore, the defense of mistake of law is not available on that charge.[44]

In preparation for a demonstration at the Waste Isolation Pilot Plant (WIPP) site near Carlsbad, the Department of Energy placed "no trespassing" signs and a sawhorse barricade on the road to the fenced workyard.[45] This barricade was within the WIPP site but extended some 800 feet beyond the permanently fenced workyard.[46] The court found that there was ample evidence that the demonstrators were warned not to cross the barricade on pain of arrest for trespass.[47] The defendant, a reporter, heard those warnings.[48] When some demonstrators crossed the barricade, the defendant followed off to one side taking photographs.[49] He was arrested well beyond the barricades.[50]

The defendant admitted on appeal that he had heard loudspeaker warnings to the crowd but claimed that he did not have the requisite intent to commit criminal trespass because he did not believe the warnings applied to the press.[51] The court treated McCormack's claim as a defense of mistake of law, i.e., he claimed that he did not know he was violating the law.[52] The court noted an amendment in the legislative session of 1981 removing the "malicious intent" requirement from the statute, and concluded that criminal trespass is a general criminal intent crime.[53] Therefore, knowledge that one is violating the law is not an element of the offense and thus a defense of mistake of law is unavailing.[54] A general

43. 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984).
44. *Id.* at 352, 682 P.2d at 745.
45. *Id.* at 351, 682 P.2d at 744.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 352, 682 P.2d at 745.
53. *Id.* at 351-52, 682 P.2d at 744-45.
54. *Id.* at 352, 682 P.2d at 745.

intent crime requires only that the defendant deliberately do an act which the law declares to be a crime.[55]

Assuming mistake of law to be the basis of the defendant's claim, the court's reasoning is correct. However, the offense of criminal trespass also requires that the defendant enter or remain without authorization or permission "*knowing* that consent to enter had been denied or withdrawn. . . ."[56] Arguably, the defendant's claim was simply that he did not know that consent to enter had been denied to or withdrawn from the press. This would constitute a mistake of fact defense, rendering the court's treatment of his appeal incorrect. If the state produced insufficient evidence to support a jury finding that the defendant "knew" that consent to enter had been denied or withdrawn, then the defendant's appeal might have had merit.

B. Tax Fraud

In *State v. Sparks*,[57] the court of appeals considered the sufficiency of the evidence introduced at trial that the defendant willfully made or subscribed a fraudulent tax return in violation of N.M. Stat. Ann. § 7-1-73(A) (Repl. Pamp. 1983). The defendant was in the business of purchasing tax returns from taxpayers and preparing the returns.[58] In 1981, he purchased returns from Frederick Thompson with the agreement that the defendant would pay Thompson cash and take any refund paid by the state.[59] The return filled out and signed by the defendant listed Thompson as having five dependent children.[60] Thompson testified that the defendant never asked him whether he had any dependents and that he did not in fact have five children and did not recognize the names of the "children" on the return.[61] The court concluded that there was substantial evidence for a jury verdict that the defendant had willfully made a return under penalty of perjury which he did not believe to be true and correct

55. *Id.* The Uniform Jury Instruction on general criminal intent states:

> [T]he state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime, [even though he may not know that his act is unlawful].

N.M. U.J.I. Crim. 1.50.

56. N.M. Stat. Ann. § 30-14-1 (Repl. Pamp. 1984) (emphasis added).
57. 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985).
58. *Id.* at 319, 694 P.2d at 1384.
59. *Id.*
60. *Id.* at 320, 694 P.2d at 1385.
61. *Id.* at 319-20, 694 P.2d at 1384-85.

in every material matter.[62] Further, the court equated the willful conduct requirement of §7-1-73(A)[63] with general criminal intent as defined in U.J.I. Crim. 1.50.[64]

The court also ruled on the appropriate sentencing upon conviction of a violation of N.M. Stat. Ann. §7-1-73(A) (Repl. Pamp. 1983).[65] This issue arose because that section, while defining an offense, is not contained in the criminal code.[66] Subsection B of §7-1-73 states that anyone found guilty of a violation of the statute "is guilty of a felony and upon conviction thereof, shall be fined not more than five thousand dollars ($5,000.00) or imprisoned not less than six months nor more than three years or both together with costs of prosecution." Reading the statute literally, the trial court had sentenced the defendant to a minimum of six months and a maximum of three years in prison.[67] However, the court of appeals, applying N.M. Stat. Ann. §31-18-13(b) (1978), held that "[w]henever a defendant is convicted of a crime under . . . a statute not contained in the Criminal Code, which specifies the penalty to be imposed on conviction, the court shall set as a definite term of imprisonment the minimum term prescribed by such statute. . . ."[68] Thus, the court of appeals held that the district court erred in its sentencing and should have imposed the minimum six months sentence for each count on which the defendant was convicted.[69]

C. Criminal Contempt

In *In re Michael Stout* (*State v. McGhee*),[70] the court of appeals considered the mental state requirement and sufficiency of the evidence upon the mental state requirement of criminal contempt. Attorney Stout was convicted of indirect criminal contempt for failing to appear at a sentencing proceeding.[71] The uncontradicted evidence was that Stout was

62. *Id.* at 320, 694 P.2d at 1385.

63. "Any individual or person who: A. willfully makes and subscribes any return, statement or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . is guilty of a felony. . . ."

64. "A person acts intentionally when he purposely does an act which the law declares to be a crime, [even though he may not know that his act is unlawful]. Whether the defendant acted intentionally may be inferred from all the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him]."

The Use Note to UJI Crim. 1.50 states that the bracketed portions of the instruction should be used "only if applicable."

65. *Sparks*, 102 N.M. at 325-26, 694 P.2d at 1389-90.

66. *Id.* at 325, 694 P.2d at 1389.

67. *Id.* at 326, 694 P.2d at 1390.

68. *Id.* at 325, 694 P.2d at 1389.

79. *Id.* at 326, 694 P.2d at 1390.

70. 102 N.M. 159, 692 P.2d 545 (Ct. App. 1984).

71. *Id.* at 160, 692 P.2d at 546.

required to be in another courtroom in another city at the time of the scheduled sentencing and had arranged with a colleague in the Office of the Public Defender to represent the client at sentencing.[72] However, when the sentencing judge called the client's case, the replacement attorney announced that he was not prepared and moved for a continuance.[73] Subsequently, a hearing of sorts was held in the judge's chambers, where Stout was given a chance to and did explain his absence and the measures he had taken to provide representation at the sentencing.[74] Nevertheless, Stout was convicted of criminal contempt by the judge.

The court of appeals held that the offense of criminal contempt requires a criminal state of mind, specifically a conscious attempt to violate a court order.[75] The court observed that "[i]nability without fault to comply with the court's order is a defense to a contempt charge."[76] The court found that because Stout had been in another court at the same time and had arranged for substitute counsel and prepared substitute counsel for the hearing, he had shown that he had no intent to violate the court's order requiring his presence at the sentencing.[77] Consequently, the court of appeals reversed the trial court and instructed it to discharge Stout.[78]

In light of the rule in New Mexico that indirect contempt may be tried by a judge who is the subject of the alleged contemptuous act, it is particularly important that the court of appeals in *Stout* required a showing of criminal intent for a conviction of criminal contempt. This requirement not only increases the culpability required for a conviction, but also provides some basis for a distinction between criminal and civil contempt.

III. REVOCATION OF PROBATION AND BAIL

A. No Contest Plea as Basis for Probation Revocation

In *State v. Baca*,[79] following the defendant's conviction in metropolitan court for DWI-second and possession of less than one ounce of marijuana, the court suspended his sentence and placed him on probation.[80] One condition of his probation was that he not be convicted subsequently of any alcohol-related offense.[81] Approximately six weeks after conviction, the defendant was arrested for DWI and entered a plea of no contest.[82]

72. *Id.*
73. *Id.*
74. *Id.* at 160-61, 692 P.2d at 546-47.
75. *Id.* at 162, 692 P.2d at 547.
76. *Id.*
77. *Id.*
78. *Id.*
79. 101 N.M. 415, 683 P.2d 970 (Ct. App. 1984).
80. *Id.* at 416, 683 P.2d at 971.
81. *Id.*
82. *Id.*

On the basis of the no contest plea, the state moved to revoke the defendant's probation, and the metro court granted the motion.[83] The district court upheld the revocation on appeal.[84]

The issue presented to the court of appeals was whether a conviction based on a no contest plea can be used as the sole basis of a probation revocation.[85] The court held that a plea of no contest is not the full equivalent of a plea of guilty and, therefore, cannot be used as the sole basis of a probation revocation.[86]

In the court's view, no contest pleas are indeed a tacit admission of guilt; however, they are such an admission solely for purposes of the cases in which they are entered.[87] In *Piassick v. United States*,[88] the Fifth Circuit held that, though *nolo contendere* means "I do not contest it" and clearly denotes an admission of guilt, the admission operates only in the case in which it is entered.[89] The court of appeals observed further that a trial court has the discretion to refuse a no contest plea.[90] Fundamentally, the court considered that the public policy to promote plea bargaining would be undermined if no contest pleas could be used as the sole basis for probation revocations.[91]

B. Time to Commence Probation Revocation Proceedings

In the second case involving probation revocations, *State v. Chavez*,[92] the court of appeals was presented with two issues: "(1) whether the revocation of the defendant's suspended sentence was barred for failure to commence revocation proceedings within a reasonable time; and (2) whether the revocation proceedings were premature pending a final decision on the defendant's appeal in federal court."[93] The court affirmed the probation revocation, finding for the state on both issues.

The defendant's first contention was that the five-month delay in the

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 417, 683 P.2d at 972.
87. *Id.*
88. 253 F.2d 658 (5th Cir. 1958).
89. *Id.* at 661. N.M. R. Crim. P. 21(g)(6) provides:

> Inadmissibility of Plea Discussions. Evidence of . . . a plea of no contest . . . or an offer to plead . . . no contest . . . to the crime charged or any other crime, or of statements made in connection with . . . the foregoing [plea] or [offer], is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The court in *Baca* held that Rule 21(g)(6) applies to proceedings in metropolitan, as well as in district court. 101 N.M. at 417, 683 P.2d 972.

90. *Baca*, 101 N.M. at 418, 683 P.2d at 973.
91. *Id.*
92. 102 N.M. 279, 694 P.2d 927 (Ct. App. 1985).
93. *Id.* at 280-81, 694 P.2d at 928-29.

initiation of the probation revocation proceedings was unreasonable and prejudicial.[94] The court reasoned that although there are no specific mandatory time limits imposed by rule or statute in New Mexico, revocation proceedings must be held within a reasonable time after authorities become aware of an alleged probation violation or after the probationer is arrested.[95] Aside from this reasonable time restriction, prosecutors may initiate probation revocation proceedings before or after a probationer's trial on related charges.[96]

The court found that regulatory and constitutional speedy trial protections are not applicable to probation revocation proceedings. However, it ruled that delay in the institution and prosecution of probation revocation proceedings—coupled with a showing of prejudice to the probationer—may constitute a denial of due process.[97]

The court elaborated the factors to be considered in determining whether a probation revocation hearing has been brought within a reasonable time. These factors are the length of the delay, the reasons for the delay, and the prejudice, if any, to the defendant resulting from the delay.[98] Additionally, the court observed that the defendant's failure to request an earlier hearing or his contribution to the delay may also be considered.[99] These factors are quite similar to those considered in determining a constitutional deprivation of speedy trial rights.[100] In *Chavez*, the court held that the delay by state authorities in initiating the defendant's probation revocation proceedings until after the trial in federal court on the charges that formed the basis of the alleged probation violation did not result in prejudice to the probationer.[101] In the court's view, the defendant failed to meet his burden of showing that he had demanded an earlier hearing or was unable to call necessary witnesses on his behalf or that any of the witnesses had problems remembering any critical events relevant to the revocation proceeding.[102]

The defendant's second contention was that the state acted prematurely in initiating his probation revocation proceedings prior to determination of his appeal from his federal court convictions.[103] The court held that, in New Mexico, a prosecutor may file his motion before or after appeal is final, just as he may move for probation revocation before or after trial

94. *Id.* at 281, 694 P.2d at 929.
95. *Id.*
96. *Id.*
97. *Id.* at 282, 694 P.2d at 930.
98. *Id.*
99. *Id.*
100. *See, e.g.*, Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967).
101. 102 N.M. at 282, 694 P.2d at 930.
102. *Id.*
103. *Id.*

on the charges underlying the motion.[104] In so holding, the court adopted the position of the majority of jurisdictions, including Arizona, Colorado, and the Second Circuit.[105]

C. *Appeal of Bail Revocation*

In the companion cases of *State v. David* and *State v. Munoz*,[106] the court of appeals considered the common issue as to the proper method of appealing denials or revocations of bail. In *David*, the defendant's bail was revoked because he had threatened to kill a witness.[107] In *Munoz*, the trial court had denied bail pursuant to article II, section 13, of the New Mexico Constitution, which permits the trial court to deny bail for sixty days when a defendant is accused of a felony and has previously been convicted of two or more felonies within the state which are unrelated to the alleged criminal transaction for which he is currently being charged.[108]

The two defendants took different routes to appeal their denials of bail. Munoz took direct appeal pursuant to Crim., Child Ct., Dom. Rel. and W/C App. Rule 202 (Repl. Pamp. 1983);[109] David appealed pursuant to New Mexico Rules of Criminal Procedure[110] and Crim. Child Ct., Dom. Rel. and W/C App. Rule 204.

The court of appeals noted that some confusion had arisen regarding the method of perfecting appeals from orders denying or revoking bail.[111] The confusion seems to have arisen because statutory and regulatory provisions cover review of conditions of release.[112] But obviously, as the court observed, no "conditions" were set in the *Munoz* and *David* cases.[113] There can be no conditions of release if there is no bond. Rule 204 of the Rules of Criminal Appellate Procedure provides for review of conditions of release.[114] Nevertheless, the court held that Rule 204 "provides the most appropriate means for appeal" in cases of denial or revocation of bail.[115] With respect to the *Munoz* case, the court reasoned that article

104. *Id.*

105. *See* Roberson v. State of Connecticut, 501 F.2d 305 (2d Cir. 1974); People v. Salazar, 568 P.2d 101 (Co. Ct. App. 1977), *cert. denied*, 434 U.S. 1039 (1978); *and* State v. Barnett, 540 P.2d 684 (Az. 1975) (en banc).

106. 102 N.M. 138, 692 P.2d 524 (Ct. App. 1984).

107. *Id.* at 140, 692 P.2d at 526.

108. *Id.* N.M. CONST. art. II, § 13 states: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

109. *David*, 102 N.M. at 141, 692 P.2d at 527.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

II, section 13, requires that appeals from orders denying bail shall be given preference over all other matters, and, in the court's view, Rule 204 provides "the most expeditious method" for giving preference.[116]

IV. OTHER CASES

A. *Appropriate Standard of Appellate Review*

In *State v. Chapman*,[117] the state supreme court considered the scope of appellate review of the jury's finding that the respondent was competent to stand trial. The court of appeals had determined that the state's evidence had failed to establish that the respondent could rationally consult with his attorney with a reasonable degree of understanding or that he could rationally perceive and comprehend the events in question.[118] Consequently, the court of appeals reversed the trial court's finding of competence.[119] The supreme court reversed the court of appeals, finding that it had substituted its judgment for that of the jury.[120] In so doing, the supreme court established a deferential scope of appellate review for findings of competency to stand trial.

In reaching this conclusion, the supreme court observed that the appropriate burden of proof in a competency proceeding is that the state be required to prove competence by a preponderance of the evidence.[121] The appropriate standard of appellate review, however, is the traditional one of "substantial evidence" or such relevant evidence as is acceptable to a reasonable mind.[122] The appellate court must not substitute its judgment for that of the jury, but must defer to the jury's finding as long as it is supported by substantial evidence.[123] Moreover, jurors are not bound by or required to accept the opinions of experts presented at the competency hearing.[124] In this case, despite the fact that the defendant twice previously had been found incompetent to stand trial, the court found that the record showed substantial evidence to support the jury verdict.[125]

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116. *Id.* at 143, 692 P.2d at 529.
117. 101 N.M. 478, 684 P.2d 1143 (1984).
118. *Id.* at 478, 684 P.2d at 1143.
119. *Id.*
120. *Id.* at 479, 684 P.2d at 1144.
121. *Id.*
122. *Id.*
123. *Id.* at 480, 684 P.2d at 1145.
124. *Id.* at 479, 684 P.2d at 1144.
125. *Id.* at 480, 684 P.2d at 1145. Justice Walters filed a dissenting opinion, claiming that substantial evidence of competence had not been presented to the jury. *Chapman*, 101 N.M. 478, 480, 684 P.2d 1143, 1145 (1984) (Walters, J., dissenting). Justice Walters observed that it was uncontradicted that the defendant's entire capability of communicating with his attorney centered upon his delusional perception of the surrounding facts and that, therefore, he could not assist his attorney in formulating a rational defense. *Id.*

B. Agreements Not to Prosecute

In *State v. John Doe,*[126] the court of appeals considered the question of the enforceability of an agreement not to prosecute. The court concluded that such an agreement can be enforced against the state if it has been duly consummated and complies with the requirements of due process.[127]

In *Doe,* the defendant had entered into an agreement drafted by his attorney that he was "to aid the state in the search and seizure of controlled substances which may lead to the arrest of individuals in possession of said substances . . . [F]or each three individuals [defendant] assists the state in the search and seizure process leading to the arrest of that individual, one charge . . . will be dismissed."[128] Based on the facts, the trial court found that the defendant had not complied with the agreement, and the court of appeals agreed.[129] Further, the court of appeals set forth the procedure to be followed by the trial court in considering the enforceability of such agreements. The trial court must examine the totality of the circumstances and the exact agreement of the parties and ascertain whether a refusal to comply with the agreement would deny the defendant of due process of law.[130] In this case, the court concluded that the state's refusal to comply with the agreement did not constitute a denial of due process.[131]

C. Jurisdiction: Prosecution by Private Counsel

Finally, in *State v. Baca,*[132] the court of appeals considered the question whether either the district court or the metropolitan court had jurisdiction to try a defendant who was prosecuted in metropolitan court by private counsel. The court of appeals held that neither court had jurisdiction over Baca's case.[133]

The *Baca* case arose out of a fight between a teacher and a former student.[134] The teacher filed a private complaint in metropolitan court alleging assault and battery.[135] Baca filed a cross-complaint against the teacher also alleging assault and battery.[136] The district attorney's office suggested mediation. When it became apparent that mediation would not

126. 23 N.M. St. B. Bull 1333 (Ct. App. 1984).
127. *Id.* at 1335.
128. *Id.* at 1334.
129. *Id.* at 1336.
130. *Id.*
131. *Id.*
132. 101 N.M. 716, 688 P.2d 34 (Ct. App. 1984).
133. *Id.* at 716, 688 P.2d at 34.
134. *Id.*
135. *Id.*
136. *Id.*

succeed, the district attorney's office withdrew from the case, claiming that the filing of the cross-complaint created a conflict of interest for the district attorney's office.[137] The district attorney's office also informed the public defender representing Baca that the filing of the cross-complaint changed the case to a civil action and that the public defender would also have to withdraw.[138] The district attorney's office indicated to the public defender that the matter would be reset on a civil calendar.[139] However, the case remained on the criminal docket and went to trial.[140]

At trial, the teacher was represented by private counsel, who prosecuted the case.[141] Baca appeared *pro se,* but shortly before trial a public defender was allowed to sit at Baca's table in order to assist him.[142] The metropolitan court dismissed Baca's cross-complaint and found him guilty of assault and battery.[143] After a trial *de novo,* the distict court also found him guilty of assault and battery.[144]

Baca contended both at the district court and before the court of appeals that the metropolitan court lacked jurisdiction to hear the case as a criminal matter and that this deprived the district court of jurisdiction to render a verdict after a trial *de novo.*[145] In a related argument, he contended that there was no evidence on the record that private counsel for the teacher had been appointed as an associate attorney for the district attorney, nor that any metropolitan court order had issued approving such an appointment.[146]

The court of appeals reasoned that the metropolitan court lacked criminal jurisdiction over the case, if in fact it was prosecuted by an attorney without authority.[147] N.M. Stat. Ann. §36-1-19 (Repl. Pamp. 1984) prohibits anyone other than the district attorney's office from representing the state in a criminal proceeding "except on order of the court and with the consent of those offices."[148] Thus, the court concluded, the issue of whether the teacher's attorney had authority to prosecute the case in

137. *Id.*
138. *Id.* at 717, 688 P.2d at 35.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id. See* N.M. Stat. Ann. § 36-1-19 (Repl. Pamp. 1984):

> [N]o one shall represent the state or any county thereof in any matter in which the state or county is interested except the attorney general, his legally appointed and qualified assistants or the district attorney or his legally appointed and qualified assistants, and such associate counsel as may appear on order of the court, with the consent of the attorney general or district attorney. . . .

metropolitan court depended on the existence of two facts: (1) that the district attorney's office had granted permission, and (2) that an order of the metropolitan court had issued approving the authority.[149] In this case, the court found that the record disclosed neither type of approval and therefore proper authority was not vested in private counsel to prosecute the case.[150] Absent this authority, the court concluded that the metropolitan court lacked criminal jurisdiction to proceed and therefore the district court also lacked jurisdiction to hear the case on the *de novo* appeal.[151] The court therefore vacated the judgment and sentence of the district court and remanded with instructions to dismiss the charges.[152]

149. *Baca*, 101 N.M. at 717, 688 P.2d at 35.

150. *Id.* at 718, 688 P.2d at 36.

151. *Id.* The district court's jurisdiction to hear a *de novo* appeal is limited by the jurisdiction of the metropolitan court from which the appeal originated. *See* State v. Lynch, 82 N.M. 532, 484 P.2d 374 (Ct. App. 1971).

152. *Baca*, 101 N.M. at 718, 688 P.2d at 36.