NEW MEXICO LAW REVIEW

Volume 16
Issue 1 *Winter 1986*

Winter 1986

Criminal Procedure

Stephen A. Slusher

CRIMINAL PROCEDURE

STEPHEN A. SLUSHER*

INTRODUCTION

No decision during this abbreviated survey period stands out as a significant change or advance in the law. At least one decision resolved a question with a substantial potential impact on the administration of justice.[1] Since the last survey issue, one case has been affirmed by the United States Supreme Court,[2] and the First Session of the Thirty-Seventh Legislature has effectively overruled a New Mexico Supreme Court decision relating to disqualification of judges.[3]

The approach New Mexico will take in significant Fourth Amendment areas remains unresolved. The exclusionary rule, in its application to

*Deputy District Attorney, Second Judicial District, State of New Mexico; B.A., St. John's College, 1974; J.D., University of New Mexico School of Law, 1977.

1. *See* State v. Sandoval, 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984), involving the right to counsel for persons arrested for driving while under the influence of intoxicating liquor, discussed *infra* notes 33–43 and accompanying text.

2. *See* Fugate v. New Mexico, 105 S.Ct. 1858 (1985), discussed *infra* notes 19–21 and accompanying text.

3. In State ex rel. Gesswein v. Galvan, 100 N.M. 769, 676 P.2d 1334 (1984), the court held N.M. Stat. Ann. § 38-3-9, providing for disqualification of district court judges, unconstitutional. The decision rested on the conclusion that the disqualification statute was procedural in nature, and thus under a separation of powers analysis was within the exclusive province of the supreme court. *See* Slusher, *Criminal Procedure, Survey of New Mexico Law: April 1, 1983–March 31, 1984,* 15 N.M.L. Rev. 263, 278 (1985) [hereinafter cited as Slusher, *Criminal Procedure*]. In apparent response, the legislature enacted Chapter 91, Laws 1985, which repealed N.M. Stat. Ann. § 38-3-9, and enacted a new § 38-3-9, which provides:

> A party to an action or proceeding, civil or criminal, including proceedings for indirect contempt arising out of oral or written publications, except actions or proceedings for constructive and other indirect contempt or direct contempt shall have the right to exercise a peremptory challenge to the district judge before whom the action or proceeding is to be tried and hear, whether he be the resident district judge or a district judge designated by the resident district judge, except by consent of the parties or their counsel. After the exercise of a peremptory challenge, that district judge shall proceed no further. Each party to an action or proceeding may excuse only one district judge pursuant to the provisions of this statute. In all actions brought under the Workmen's Compensation Act (N.M. STAT. ANN. §§ 52-1-1 to 52-1-69 (1978)), the employer and the insurance carrier of the employer shall be treated as one party when exercising a peremptory challenge to the judge under this statute. The rights created by this section are in addition to any arising under Article 6 of the constitution of New Mexico.

The act passed with an emergency clause, and was effective April 1, 1985. In response, the supreme court immediately promulgated amended Rules 34.1 and 34.2, R. Crim. P., relating to disqualification of judges and designation of judges, respectively. Rule 34.1 now provides that:

> (a) Definition of parties. Parties, as used in this rule, shall mean: a defendant, and

search warrants, has been effectively eviscerated as a matter of federal law.[4] New Mexico can follow suit or explore independent state grounds.[5] The *Aguilar-Spinelli* standard for determining the credibility of informants in search warrant affidavits was abandoned by the United States Supreme Court.[6] Our courts have not yet addressed the issue.

---

on behalf of the State, the District Attorney or the Attorney General. No Assistant District Attorney or Assistant Attorney General may file an election to excuse.
(b) Extent of excuse or challenge. No judge may be excused from hearing preliminary matters prior to trial. No party shall excuse more than one judge.
(c) Procedure for excusing a district judge. Except as provided in paragraph (d) of this rule, the statutory right to excuse the judge before whom the case is pending, or who may be assigned to preside over the trial, from presiding over the trial of the case may be exercised only by a party signing and filing an election to excuse with the clerk of the district court no later than ten days after arraignment or filing the waiver of arraignment. Within five days of filing the election to excuse the clerk of the court shall give written notice to each party.
(d) Procedure for remaining parties to exercise election to excuse. If a party has exercised the statutory right to excuse a judge, all other parties who have not exercised the statutory right to excuse a judge and who wish to excuse any other judge who could be assigned to preside over the trial, must within ten days of the clerk's written notice, file a provisional election to excuse with the clerk of the court naming the judge to be excused.
(e) Recusal. No district judge shall sit in any action in which his impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and shall recuse himself in any such action. Upon receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

Under the reasoning of *State ex rel. Gesswein v. Galvan* the new statute is as unconstitutional as was the former. It is equally clear that by the prompt adoption of implementing rules, as well as the tenor of discussions on the new statute during House and Senate Judiciary Committee hearings at which the author was present, that the Supreme Court is willing to live with the new statute. This is not the first time that an uneasy accommodation has been reached for problems engendered by the substantive/procedure law dichotomy. N.M. Const. art. III, § 1 expressly provides that:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

The catch, of course, is in ascertaining what powers properly belong to what department. The uncertain distinction between substantive and procedural law, with the legislature having responsibility for substantive law and the judiciary for procedural, illustrates the problems in properly separating powers.

4. United States v. Leon, 104 S.Ct. 3405 (1984); *see* Slusher, *Criminal Procedure, supra* note 3, at 265.

5. *Leon* has engendered not inconsiderable controversy. *See, e.g.*, Hartman and Bernstein, *To Leon, and Beyond*, Trial, January, 1984 at 50; LaFave, *"The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications*, 1984 U. Ill. L. Rev. 895. It can be anticipated that at least some states will apply a different standard under state constitutions. *Cf.* Williams, *The New Patrol for the Accused: State Constitutions as a Buffer Against Retrenchment*, 26 How. L. J. 1307 (1983). However, New Mexico has rarely, if ever, expressly rejected a United States Supreme Court position on independent state constitutional grounds.

6. Illinois v. Gates, 103 S.Ct. 2317 (1983). *See also* Slusher, *Criminal Procedure, supra* note 3, at 264.

I. THE FIFTH AMENDMENT

A. Miranda *Warnings*[7] *and Comment on Pre-Trial Silence*

It is said that hard cases make bad law.[8] In *State v. Martin*,[9] the Supreme Court held that the Fifth Amendment prohibited asking a defendant whether she had ever told family members about her version of the offense, at least where the possible conversations would have been after *Miranda* warnings were given. In *Martin*, the defendant was accused of murdering her husband and convicted of first degree murder, an offense carrying a mandatory life sentence. At trial, she admitted killing her husband, a fact she had evidently never divulged to police or her family, and claimed self defense.[10] At the time of arrest she was given *Miranda* warnings, but was not held in confinement for most of the pre-trial period.[11] The Court held that asking the defendant whether she had failed to tell family members about her version of the offense so that the prosecutor would be unable to learn of it from them was a violation of the defendant's rights under *Miranda*.[12]

The opinion is significant because of its substantial expansion of the Fifth Amendment *Miranda* doctrine. *Miranda* and its progeny have consistently been limited to use of statements stemming from custodial interrogation. New Mexico courts have clearly recognized that custodial interrogation requires interrogation by a law enforcement officer and an atmosphere in which the suspect has been deprived of his freedom in some significant way.[13] The court cited two United States Supreme Court cases for the proposition that impeachment by silence after giving of

7. Miranda v. Arizona, 384 U.S. 436 (1966), delineated the right of suspects to be advised of certain constitutional rights prior to custodial interrogation by law enforcement officers; absent compliance, any admission obtained is subject to suppression.

8. Justice Holmes, in a dissent to a case in excess of two hundred pages in length, actually said "[g]reat cases like hard cases make bad law." Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904). His definition of great, as "some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment," *Id.*, is perhaps not inapposite.

9. 101 N.M. 595, 686 P.2d 937 (1984). On remand in *Martin*, the defendant plead to voluntary manslaughter, and ended up serving less than two years incarceration. The case received significant publicity.

10. *Id.* at 599, 686 P.2d at 941.

11. *Id.* at 600, 686 P.2d at 942. The opinion is unclear as to the defendant's confinement status, but the court file clearly shows she was not in custody for virtually the entire pre-trial period.

12. *Id.* at 600, 686 P.2d at 942.

13. In State v. Swise, 100 N.M. 256, 669 P.2d 732 (1983), the court held that *Miranda* warnings were not required if the defendant is not in custody or deprived of his freedom in some significant way, even if the investigation has focused on the defendant; *accord*, State v. Harge, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979), holding that *Miranda* rights were not implicated where a suspect voluntarily goes to a sheriff's office and discusses a case in an atmosphere free of coercion. In State v. Archuleta, 82 N.M. 378, 482 P.2d 244 (Ct. App. 1970), *cert. denied* 82 N.M. 377, 482 P.2d 241 (1971), it was recognized that *Miranda* applies only to interrogations by law enforcement officers or agents, and not to interrogation by private parties such as insurance adjusters.

Miranda warnings was violative of the Fifth Amendment, yet each involved a comment on silence while the defendant was in a custodial situation, a clearly distinguishing factural circumstance.[14] It is clear that the decision could be predicated on evidentiary rather than consitutional grounds,[15] but the opinion is apparently based solely on constitutional grounds. The effect of expanding *Miranda* safeguards to clearly noncustodial circumstances involving persons not agents of the state is unclear.[16]

Martin was also cross-examined as to her statement on life insurance claim forms that decendent was "Shot by unknown assailants."[17] In holding cross-examination to be proper, the court found *Miranda* inapplicable, largely because "a defendant who voluntarily speaks after receiving Miranda warnings has not remained silent."[18]

14. United States v. Hale, 422 U.S. 171 (1975) and Doyle v. Ohio, 426 U.S. 610 (1976). In *Hale*, the issue involved the propriety of asking a defendant on cross-examination why he had not given the police his alibi when questioned by them shortly after his arrest. The Court expressly declined to reach the constitutional issue, but concluded that, under its general supervisory authority over lower federal courts, the probative value of the pretrial silence was outweighed by the prejudicial impact of admitting it into evidence. *Id.* at 173, 181.

In *Doyle*, the due process issue was reached as to state court prosecutions where a defendant was asked on cross-examination about post-arrest silence to law enforcement officers. In finding a due process violation, the court limited its ruling to post-*Miranda*, post-arrest silence in the face of interrogation in the presence of law enforcement officers. Indeed, the court noted, without ruling, that cross-examination on silence at a preliminary hearing or on general pretrial silence "present[s] different considerations from those implicated by cross examining . . . as to . . . silence after receiving *Miranda* warnings at the time of arrest." 426 U.S. at 616, n. 6.

15. The decision in *Hale*, *supra* note 13, was based on evidentiary grounds. Much of the discussion in *Martin*, *supra* note 8, concerns the inferentially limited probative value of the silence of defendant, an evidentiary point clearly not dependant on constitutional law. Nonetheless, the court clearly framed the issue as one of constitutional dimension. *Id.* at 599, 686 P.2d at 941.

16. *Martin* apparently eliminates cross-examination on silence in any post-*Miranda* situation. If silence becomes sacrosanct post-*Miranda*, without the necessity for state action in the situation in which the silence arises, it is difficult to understand how *Miranda* should be limited. The lack of apparent limitation extends *Miranda* past boundaries established by the Supreme Court. The Court has held that there is no constitutional violation in comment on pre-arrest silence in the absence of governmental action to induce the silence. Jenkins v. Anderson, 471 U.S. 231 (1980). It is difficult to reconcile *Jenkins* with *Martin*.

It may be that the confusion was engendered by the court's failure to focus on a key element, the effect of governmental action to inducing petitioner to remain silent to her own family members. If the giving of *Miranda* warnings in some way induced Martin to remain silent to all the world, and not just police officers, then the decision is explicable. Fundamental fairness precludes the granting of a right, such as the right to remain silent, followed by punishment, here impeachment by silence, for the exercise of that right. However, if giving *Miranda* warnings does not in fact inhibit conversation with family members, then the logical underpinnings of the decision are weak indeed. The majority opinion develops no reasons why the giving of *Miranda* warnings would have caused Mrs. Martin to not discuss the events surrounding her husband's death with her family members, and neither logic nor common sense suggest a rationale. It was noted that ". . . defendant is not under any compulsion to divulge information to family members," 101 N.M. at 600, 686 P.2d at 942, and that "emotional trauma limited defendant's ability to speak." *Id.* These considerations go to the evidentiary weight of the evidence, *see* note 13, *supra*, but not to the applicability of *Miranda* principles.

17. 101 N.M. at 598–99, 686 P.2d at 940–41.

18. *Id.* at 599, 686 P.2d at 941. Notwithstanding that, *Miranda* is not implicated absent custodial interrogation by law enforcement officers. *See, e.g., State v. Archuleta*, *supra* note 12. The majority

B. *Double Jeopardy*

As recently reported, *State v. Fugate* and its companions[19] upheld the jurisdictional exception to the double jeopardy clause. The United States Supreme Court, by an evenly divided vote in a one line per curiam opinion, upheld the New Mexico court.[20]

In *State v. Messier,*[21] the court of appeals concluded that a new trial was proper after the lower court had declared a mistrial due to the unavailability of a key prosecution witness. In *Messier,* the minor victim of an alleged criminal sexual penetration had her testimony taken by videotape in lieu of trial testimony.[22] After trial commenced and jeopardy attached, it was discovered that the videotape was inaudible, and that the child was unavailable to testify due to illness. In finding manifest necessity, the court held that the trial court properly exercised its discretion in declaring mistrial and specifically reserving the right to retry the dependant.[23] Of particular importance was the fact of the illness of the witness, and the steps the trial court took to avoid a mistrial, including a continuance to explore alternatives to a mistrial.[24]

II. THE SIXTH AMENDMENT

A. *The Right to Testify*

In *State v. Henry,*[25] the defendant claimed on appeal that he had been denied his right to testify on his own behalf. During opening statement,

opinion places reliance on Anderson v. Charles, 447 U.S. 404 (1980), which in a per curiam opinion held the obvious: that a defendant who gives police a statement may be cross-examined on the statement, as a prior inconsistent statement. The *Anderson* analysis is predicated upon the applicability of *Miranda* to the prior inconsistent statement. In *Martin,* Justice Riordan, in special concurrence, criticized the majority opinion for assuming that *Miranda* was implicated. *Id.* at 608, 686 P.2d at 950. The same unstated assumption was made in concluding *Miranda* applied to cross-examination on lack of communication with family members. The majority opinion would have been better served had the applicability of *Miranda* principles been more rigorously approached.

19. State v. Padilla, 101 N.M. 58, 678 P.2d 686 (1984), *reversing* 101 N.M. 78, 678 P.2d 706 (Ct. App. 1983) *and* State v. Fugate, 101 N.M. 82, 678 P.2d 710 (Ct. App. 1983); State v. Manzanares, 100 N.M. 621, 674 P.2d 511 (1983). The jurisdictional exception provides that if a court, such as a magistrate court, does not have jurisdiction to try the entire case, including related felony charges, jeopardy does not attach as to the charges for which the court lacks jurisdiction. *See* Slusher, *Criminal Procedure, supra* note 3, at 274.

20. 105 S.Ct. 1858 (1985). The tie vote, like others in the same period, was occasioned by the absence of Justice Powell. A tie vote in the United States Supreme Court results in affirmance of the case below, but the decision is of limited precedential value.

21. 101 N.M. 582, 686 P.2d 272 (Ct. App. 1984).

22. *Id.* at 583, 686 P.2d at 273. Videotaping the testimony of minor victims of certain offenses, for use at trial, is permitted under certain limited circumstances. Rule 29.1, R. Crim. P. In accordance with the rule, the trial court ruled that the child would be unable to testify without suffering harm.

23. The standard for appellate review is whether the trial court exercised its sound discretion in determining that there was a manifest necessity for the declaration of a mistrial. *Id.* at 584, 686 P.2d at 274.

24. Illness or injury to a participant or principle witness is a common ground for finding manifest necessity. *Id.* at 585, 686 P.2d at 275. The court was troubled by the prosecutor's apparent failure to discover the problem with the videotape prior to trial, but noted that "in this age of advanced technology, we are not prepared to say the prosecutor was derelict in failing to do so." *Id.*

25. 101 N.M. 277, 681 P.2d 62 (Ct. App. 1984).

an attorney for the defendant stated that defendant would testify.[26] At the close of the defendant's case-in-chief, the attorney announced that "'after discussion with his attorneys, the defendant has elected not to testify.'"[27] On appeal, the defendant claimed that his attorneys had contravened his instructions, thus violating his sixth amendment rights. The court of appeals affirmed the conviction.

The court recognized that the right of a defendant to testify is a fundamental privilege which is personal, and the ultimate decision is that of the defendant.[28] Defense counsel may advise the defendant, and indeed may have an obligation to do so;[29] however, general waiver principles apply to the constitutional right to testify;[30] and where a defendant is aware of his right to testify and acquiesces in his trial counsel's statement that he will not testify, he is deemed to have waived the right to testify.[31]

B. Right to Counsel

The right to counsel of a defendant accused of driving while under the influence of intoxicating liquor was the subject of *State v. Sandoval*.[32] Defendants had been arrested following an incriminating breath alcohol test. Neither had been advised of any right to an attorney at or subsequent to the time of arrest.[33] The court of appeals rejected their claim that a right to counsel attached upon an incriminating breath alcohol test result.

Under existing law, a person administered a breath alcohol test has a right to an independent chemical test at public expense,[34] but law enforcement officers are under no obligation to inform the suspect of the

26. *Id.* at 280, 681 P.2d at 65.

27. *Id.* at 281, 681 P.2d at 66.

28. *Id.* at 280, 681 P.2d at 65. *See* Faretta v. California, 422 U.S. 806 (1975).

29. Effective assistance of counsel standards, predicated on the sixth amendment, require defense counsel to candidly and fully advise defendant of his options and the probable outcome. The Defense Function Standards 5.1 and 5.2, *American Bar Association Standards for Criminal Justice* (2d ed. 1980), set forth the general standards, which presumably meet the minimal requirements of "skill, judgment, and diligence of a reasonably competent defense attorney." *See, e.g.*, Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (*en banc*), *cert. denied*, 445 U.S. 945 (1980).

30. 101 N.M. at 280, 681 P.2d at 65.

31. *Id.* at 281, 681 P.2d at 66. The general principle is well supported in case law form other jurisdictions. The court of appeals concluded that the trial court is not required to determine whether defendant had knowingly and intelligently waived the right. *Id.* at 281, 681 P.2d at 66. The problem is, however, that absent some record of the waiver, a defendant can raise a claim of ineffective assistance of counsel for not having been adequately advised by his attorney. That was an alternate theory of relief in *Henry*. The court of appeals dismissed the claim summarily. *Id.*

32. 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984). The statutory offense charged, commonly known as DWI, is codified in N.M. Stat. Ann. § 66-8-102 (1984 Cum. Supp.). Both defendants were charged with a second offense under subsection (E), which carried a significantly harsher penalty than a first offense.

33. *Id.* at 400, 683 P.2d at 517.

34. Under N.M. Stat. Ann. § 66-8-109 (B) and (E), part of the Implied Consent Act, a suspect who submits to a chemical test has the right to an independent chemical test, the cost of which is borne by the law enforcement agency involved.

right to the additional test.[35] Defendants based the claim on their need to be advised by counsel of the right to an independent test and whether such a test should be taken.[36] The court focused its sixth amendment analysis on both the adversary proceedings requirement and the critical stage requirement.[37]

The defendants claimed that the adversary proceedings had been commenced because the arresting officers had issued a citation and had completed the narrative portion of a criminal complaint either shortly before or after the incriminating breath alcohol test.[38] The court determined that since citations were not authorized by law for the offense involved, they were legal nullities.[39] In any event, the court drew a "bright line" between the authority invested in law enforcement officers and that invested in prosecutors, and held that the governmental commitment necessary to trigger adversary proceedings for sixth amendment purposes did not exist until the line was crossed.[40]

The court narrowly construed the critical stage requirement, and determined that there was no "one-sided confrontation" between the defendants and the state. Because the officers were required to allow the exercise of the right to an independent test, but were not required to advise the defendants of the right, the government was not in a position

35. *See* City of Farmington v. Joseph, 91 N.M. 414, 575 P.2d 104 (Ct. App. 1978); State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

36. It was recognized that "alcohol in the blood decomposes in a short period of time." *Id.* at 401, 683 P.2d at 518. Thus, if the right to an independent test is not exercised quickly, the opportunity is, as a practical matter, lost.

37. The sixth amendment right to counsel if generally recognized as having two requirements: (1) that the government have initiated adversary judicial criminal proceedings; and (2) that the accused be in a critical stage of the proceedings. Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967). There are prior cases, primarily involving custodial interrogation, where a sixth amendment right was addressed in situations not meeting the two requirements. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964). Most such cases have been construed as implicating fifth amendment privileges against self-incrimination which only collaterally involve a sixth amendment claim. *See, e.g.*, Kirby v. Illinois, *supra*.

38. 101 N.M. at 402, 683 P.2d at 519.

39. Citations are generally authorized by Metropolitan Court Rule 38(a), which allows a citation to commence a criminal aciton where "permitted by law." However, citations are authorized only for petty misdemeanors, N.M. Stat. Ann. § 31-1-6(A), and second offense DWI is not a petty misdemeanor. *Compare* N.M. Stat. Ann. §§ 30-1-6 and 66-8-102(E). Additionally, N.M. Stat. Ann. § 66-8-122, which requires that persons charged with DWI "be immediately taken before an available magistrate," obviously conflicts with any citation provision.

40. 101 N.M. at 402, 683 P.2d at 519. The court recognized that as a practical matter prosecution might follow arrest and issuance of citations in a "high percentage of cases," but the statistical correlation did not amount to "prosecutorial commtiment." The opinion also states that "[t]he legislature has not given peace officers the power to charge individuals with crimes," and cites N.M. Stat. Ann. §§ 29-1-1 to -12 in support of the proposition. *Id.* at 402, 683 P.2d at 519. The statement is inexplicable in light of the express provision in N.M. State Ann. § 29-1-1 that: "[I]t is also declared the duty of every such [peace] officer to diligently file a complaint or information, in the circumstances are such as to indicate to a reasonably prudent person that such action should be taken. . . ." Given that a prosecutor need not even appear in misdemeanor prosecutions in magistrate courts, N.M. Stat. Ann. § 36-1-20, it is hard to see how persons are charged if not by peace officers.

to abuse its power or potentially take advantage of the accused.[41] While the court was not unsympathetic to defendants' claims, it was held that no sixth amendment right to counsel existed.[42]

III. SENTENCING

A. *Increase in Penalty Following Appeal*

In *State v. Sisneros*,[43] the supreme court addressed the circumstances under which a defendant can receive a more severe sentence following reconviction after a successful appeal.[44] Defendant had initially plead guilty pursuant to a plea agreement in 1981. After a dispute developed over the terms of the agreement, defendant appealed. The court directed that he be allowed to withdraw his original guilty plea.[45] On remand, the defendant was retried before a different judge, convicted, and received a nine year sentence. The original sentence from which the defendant had successfully appealed was six years.

The issue before the court was whether there was adequate compliance with due process requirements under *North Carolina v. Pearce*.[46] In reviewing the record, the court found that the presumption of vindictiveness

41. There are obvious practical difficulties with expanding the right to counsel in this area. In Albuquerque alone, arrests for DWI approach 1,000 per month and most occur after regular working hours. An expansion of the right to counsel, coupled with the obligation to provide counsel for indigent defendants, would be costly, indeed.

42. Only one case ever appeared to hold that sixth amendment right to counsel existed at the breath alcohol test stage, and its history is instructive. In State v. Fitzsimmons, 93 Wash.2d 436, 610 P.2d 893, *vacated*, 449 U.S. 977, *aff'd on other grounds*, 94 Wash.2d 858, 620 P.2d 999 (1980), the lower court found a sixth amendment right to counsel for suspects submitting to a chemical test for alcohol. The United States Supreme Court vacated and remanded for a determination of whether the judgment was "based upon federal or state constitutional grounds, or both." On remand, the Washington Supreme Court determined that its decision relied primarily on state court rules.

43. 101 N.M. 679, 687 P.2d 736 (1984).

44. In two cases decided during the last survey year, New Mexico courts addressed these issues for the first time. *See* State v. Cordova, 100 N.M. 643, 674 P.2d 533 (Ct. App. 1983); *and* State v. Lopez, 99 N.M. 612, 661 P.2d 890 (Ct. App. 1983).

45. State v. Sisneros, 98 N.M. 201, 647 P.2d 403 (1982).

46. 395 U.S. 711 (1969). *Pearce* requires that a defendant be free to appeal without fear of retaliatory or vindictive punishment. As held in United States v. Goodwin, 457 U.S. 368 (1981), there is a presumption of vindictiveness any time there is an increased sentence, which may only be overcome by objective information in the record justifying the increased sentence.

There are exceptions to the presumption: the only one arguably applicable in New Mexico is based upon a two tier system in which a defendant is entitled to a trial de novo on appeal from an inferior court. In Colten v. Kentucky, 407 U.S. 104 (1972), it was held that a due process presumption of vindictiveness did not attach in such a scheme. New Mexico's scheme requires trials de novo in district court on appeals from judgments of metropolitan, magistrate and municipal courts. There is no statutory authority for district courts to increase sentences on appeal from metropolitan courts. State v. Haar, 100 N.M. 609, 673 P.2d 1342 (Ct. App. 1983). However, on appeals from magistrate court a district court has authority to impose a greater sentence, N.M. Stat. Ann. § 35-13-2 (Cum. Supp. 1984), as does a district court on appeal from municipal court. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977); N.M. Stat. Ann. § 35-15-8.

had been overcome and that there were adequate reasons to justify the increased sentence. The court's decision was based on several grounds: (1) The second sentence was imposed by a different judge;[47] (2) in contrast to the original sentence being the result of a plea bargain, the second sentence was imposed after trial, and the judge had full knowledge of the circumstances of the offense; (3) the actual sentence imposed was less than that recommended by probation authorities in their presentence report; and (4) based upon psychological reports submitted by the defendant on a motion to reconsider sentence, the trial court found that the defendant had no feelings of remorse for his conduct.[48]

B. Place of Incarceration

The proper place of incarceration for a defendant sentenced to more than one year on misdemeanor offenses was the issue in *State v. Musgrave*.[49] The defendant was convicted of aggravated battery, a misdemeanor, and simple battery, a petty misdemeanor. The sentences for the two offenses were consecutive, with defendant receiving a total sentence of one year and nine days.[50] He was sentenced to the custody of the corrections department, and claimed on appeal that the proper place of confinement was the county jail. The court of appeals disagreed. Under applicable statutes, a person sentenced to imprisonment for one year or more must be imprisoned in a facility designated by the corrections department.[51]

IV. SPEEDY TRIAL

A. Rule 37

In *State v. Romero*,[52] the court was faced with speedy trial issues engendered by the defendant being "lost" in the corrections system. The

47. The court recognized that imposition of the subsequent sentence by a different judge was not, of itself, sufficient to overcome a presumption of vindictiveness, but held that given that fact "the possibilities of vindictiveness are greatly reduced." 101 N.M. at 682, 687 P.2d at 739.

48. The objective information the court relied upon raised two distinct considerations supporting the increased sentence. First, the leniency traditionally accorded a defendant who enters a plea agreement is not necessarily applicable at resentencing after a trial. Second, a sentencing judge who conducts a trial has significantly more information about the offense and offender than does a judge who takes a guilty plea. *Id.* at 683–84, 687 P.2d at 740–41.

49. 102 N.M. 148, 692 P.2d 534 (Ct. App. 1984).

50. Defendant received a sentence of 364 days on the aggravated battery, and ten days on the simple battery. The total sentence of one year and nine days is reached by combining the consecutive sentences.

51. N.M. Stat. Ann. § 33-2-39 provides that: "Whenever any convict shall have been committed under several convicitons with separate sentences, they shall be construed as one continuous sentence for the full length of all the sentences combined." The provision was read in conjunction with N.M. Stat. Ann. § 31-20-2(A), which provides that: "Persons sentenced to imprisonment for a term of one year or more shall be imprisoned in a corrections facility designated by the corrections and criminal rehabilitation department [corrections department]. . . ."

52. 101 N.M. 661, 687 P.2d 96 (Ct. App. 1984).

defendant was arraigned in October 1982. He remained in the local jail until December, when he was transferred into the state corrections system on parole revocation charges on another matter. In December, after his transfer, a bench warrant was issued for his arrest based upon allegations that his whereabouts were "presently unknown to the State and the Defense" and that he had "made himself unavailable to his attorney. . . ."[53] While still in custody, defendant was ultimately located and rearrested in August 1983, and the matter proceeded to trial in January 1984.

The court of appeals rejected a speedy trial claim. Given the lack of assertion of the right by defendant and the lack of prejudice caused by the delay, the trial court did not err in denying the motion to dismiss.[54] However, the court did hold that under Rule 37,[55] defendant was entitled to dismissal of the indictment with prejudice. The defendant did not fail to comply with his conditions of release, because he had never been released from custody.[56] Defendant's trial was not commenced within the six month period, and he was entitled to discharge.[57]

In *State v. Sanchez*,[58] the issue was what constituted an arraignment for purposes of computing the time periods under Rule 37. The defendant was transferred from children's court to be tried as an adult. A criminal information was filed charging him with aggravated burglary and criminal

53. *Id.* at 664, 687 P.2d at 99.

54. At least four factors are to be considered in determining whether there is a due process denial of the right to speedy trial—length of delay, reason for the delay, defendant's assertion of the right to speedy trial and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 (1972). These four factors must be considered together with the relevant circumstances in a balancing test. *Id.* In *Romero*, defendant did not raise the speedy trial issue until September 1983. The claim of prejudice, based on the potential unavailability of an expert witness, was characterized as "no more than the possibility of prejudice," and thus too speculative to mandate a different result in the balancing test. 101 N.M. at 663, 687 P.2d at 98.

55. The version of Rule 37, R. Crim. P., then in effect provided that trial of a criminal case shall be commenced within six months after the latest of several enumerated events. The applicable events were: "(1) The date of arraignment, or waiver of arraignment, in the district court of any defendant; . . . The date of arrest of the defendant after conditions of release has been revoked for failure to appear as required[.]" Event 5 was amended by order dated November 17, 1982, to be effective for all cases filed on or after January 1, 1983, and now provides: "(5) The date of arrest of the defendant for failure to appear[.]" Given the rationale of the court's decision, it is not apparent that the amendment would have required a different result.

56. The conditions of release provided that defendant was not to leave Bernalillo County, which he did, albeit involuntarily and while in custody. The court of appeals concluded that the conditions of release never became applicable, because defendant was in custody at all pertinent times. 101 N.M. at 665, 687 P.2d at 100.

57. Rule 37 (d), R. Crim. P., provides for dismissal with prejudice if trial does not commence within the specified time. Under Rule 37 (b), time commenced running at arraignment, and no other intervening event started a new time period. The court rejected the prosecution's contention that defendant's unknown whereabouts was enough to toll the statute. Concluding that the defendant was available to the state since he was in state custody, the court found no evidence that the prosecutor could not have located the defendant had the prosecutor proceeded with reasonable diligence. 101 N.M. at 665, 687 P.2d at 100.

58. 101 N.M. 509, 684 P.2d 1174 (Ct. App.), *cert. denied* 101 N.M. 555, 685 P.2d 963 (1984).

sexual penetration, and he was arraigned on those charges in November 1982. In February 1983, a motion for a preliminary hearing was granted, and was held in April 1983. The defendant then waived his rearraignment set for May 25, 1983. In September 1983, the district court granted the defendant's motion to dismiss pursuant to Rule 37. The issue on appeal focused on which arraignment triggered the six month period under Rule 37.[59]

Defendant argued that the six month period commenced to run from his first arraignment in November 1982. In rejecting this argument, the court noted that a defendant has a right either to a preliminary hearing or a grand jury indictment.[60] Since there had been no preliminary hearing at the time of the first arraignment, that proceeding was effectively void and did not commence the operation of Rule 37.[61] Thus, Rule 37 commenced running in May 1983, when he waived arraignment, and the trial court's order dismissing the charges was erroneous.

B. Interstate Agreement on Detainers

In *State v. Aaron*,[62] the court of appeals considered the circumstances under which an extension of time within which to try a case was proper under the Interstate Agreement on Detainers.[63] While incarcerated in California, the defendant gave notice to the prosecutor and court of his demand for a timely disposition of the charges against him. Absent a continuance for good cause the Interstate Agreement on Detainers requires trial within 180 days of demand.[64] Based on the reasons presented for the continuance, the court of appeals affirmed the conviction.

---

59. *See supra* note 56.

60. N.M. Const. art. II, § 14. A defendant may waive the right to a probable cause determination. While not specifically addressed, the court evidently concluded that the defendant had not waived his right to a preliminary hearing by entering a plea at arraignment. *See, e.g.*, State v. Gallegos, 46 N.M. 387, 129 P.2d 634 (1942); *but see*, State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

61. The transfer hearing in children's court requires a finding of reasonable grounds to believe the child committed the act. N.M. Stat. Ann. §§ 32-1-29 and 30. However, since that is not technically a preliminary hearing under N.M. Const. art. II, § 14, a juvenile defendant is evidently entitled to two probable cause determinations.

62. 102 N.M. 187, 692 P.2d 1336 (Ct. App. 1984).

63. The Interstate Agreement on Detainers is a uniform law which has been adopted by at least forty-six states, the District of Columbia and the federal government. It is codified in New Mexico at N.M. Stat. Ann. § 31-5-12. It is designed to facilitate the disposition of criminal charges in one state when the accused is incarcerated in another.

64. Article 3(A) of the Interstate Agreement on Detainers provides, in pertinent part:

> . . . [the prisoner] shall be brought to trial within one hundred eighty days after he has caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice . . . , but for good cause shown in open court . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

If the prisoner is not brought to trial within the time period plus any extensions, the charges are to be dismissed with prejudice under Article 5(C) of the Agreement.

The defendant gave notice in May 1982, and was transferred to New Mexico in August. In November, within the original 180 days,[65] the state moved for a continuance. Later, within the continuance period, the state moved for a second continuance, which was also granted. The defendant was tried within the period provided for in the second continuance. The state showed that because of the appointment of the original judge to the supreme court, the unavailability of any other judge, and the delay in appointment of a successor judge, the continuances were necessary or reasonable under the provisions of the Interstate Agreement on Detainers.[66]

V. TRIAL BY JURY

A. Jury Selection

State v. Henry[67] also addressed the problems created by off-the-record discussions between the judge and prospective jurors during jury selection. During voir dire, defense counsel invited prospective jurors to speak to the judge privately if there were any matters which might affect their ability to serve.[68] Several jurors did and the judge communicated to counsel the substance of his conversations with the jurors. All the jurors who spoke to the judge were ultimately excused for cause. The defendant claimed error based upon the private conversations.[69]

The court of appeals held that since the defendant, through his counsel,

65. A prior case established that the continuance must be granted within the original 180 day period. State v. Shaw, 98 N.M. 580, 651 P.2d 115 (Ct. App. 1982).

66. The sequence of events was complicated. The original trial judge had been elected to the supreme court, but took office early to fill a vacancy on that court. His successor to the district court bench did not take office until January 14, 1983. The first continuance was based upon the vacancy, the lack of an assigned judge to handle cases for that division, and a full complement of cases by all other judges. During the period of the first continuance, there was a superseding indictment, which necessarily related back to the original demand. When the second continuance was granted, the new judge had not yet taken office.

Defendant also objected to the fact that no evidence was presented at either of the continuance hearings to establish cause. The court of appeals, citing State v. Beck, 97 N.M. 3112, 639 P.2d 599 (Ct. App. 1982), held that there is no requirement for evidence in order to make a showing of good cause and recognized that "[i]n established practice such a showing is often made by statement of counsel." 102 N.M. at 192, 692 P.2d at 1341. In addition, the defendant had failed to object to the manner of presentation of the grounds for good cause at the continuance hearings.

67. 101 N.M. 277, 681 P.2d 62 (Ct. App. 1984). The case was on remand from the supreme court, 101 N.M. 266, 681 P.2d 51, the court of appeals having been reversed on the issue of comment on the defendant's right not to testify. Another issue considered by the court of appeals, involving the defendant's right to testify, is discussed *supra* notes 26–32 and accompanying text.

68. 101 N.M. at 279, 681 P.2d at 64.

69. The defendant claimed that the conversations violated his constitutional right to a fair trial under the sixth and fourteenth amendments to the United States Constitution, and N.M. Const. Art. II, § 14. He also argued that the ex parte communications violated Rule 47 (a), R. Crim. P., which provides, in part, that a "defendant shall be present . . . at every stage of the trial including the impaneling of the jury. . . ."

had invited the jurors to communicate privately with the judge, he could not complain that they had done so on appeal.[70] However, the court did recognize that the defendant has a constitutional right to be present at every stage of the proceedings, including the procedures attendant to the impaneling of the jury.[71] It is thus clear that ex parte or off-the-record communications between a judge and prospective jurors may lead to reversible error.

B. Jury Selection in Capital Cases

In *State v. Finnell*,[72] the supreme court considered the propriety of a bifurcated scheme for jury selection in a capital case, where the jury was not voir dired on the death penalty until after the guilt phase of the trial.[73] The supreme court held that the procedure utilized was erroneous, and remanded the case for a sentencing proceeding before a new jury.[74]

70. As a general proposition, a party may not complain on appeal about evidence or procedures which they have urged in the court below. *See, e.g.*, State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979); State v. Padilla, 98 N.M. 349, 648 P.2d 807 (Ct. App.), *cert. denied* 98 N.M. 336, 648 P.2d 794 (1982).

71. 101 N.M. at 280, 681 P.2d at 65. The court noted that even if an error is of constitutional dimension, it does not require reversal if it is harmless beyond a reasonable doubt. The court emphasized the fact that all the jurors who privately communicated with the judge were ultimately excused.

72. 101 N.M. 732, 688 P.2d 769 (1984).

73. Under the Capital Felony Sentencing Act, N.M. Stat. Ann. §§ 31-20A-1 to -6, once the jury determines the guilt phase, the same jury then proceeds to hear evidence in the sentencing proceeding and delivers a sentence. Generally, a jury in a capital case is "death qualified" during initial voir dire. Witherspoon v. Illinois, 391 U.S. 510, (1968), requires that a juror cannot be excluded for cause unless the juror is: "[I]rrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceeding." 391 U.S. at 522. In *Finnell*, the defense and prosecution stipulated they would not conduct a death penalty voir dire or mention the death penalty until after the penalty phase was concluded. After a guilty verdict was returned, they conducted a voir dire of the actual jurors and alternates on the death penalty issues. As a result, six of the original jurors and six alternates were selected to hear the penalty phase. They returned a verdict of death.

This is the only reported case in New Mexico employing a bifurcated jury selection scheme. However, in other cases, failure to follow such a scheme has been advanced as error by defendants, a proposition rejected by the supreme court. State v. Simonson, 100 N.M. 297, 669 P.2d 1092 (1983); State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983); State v. Trujillo, 99 N.M. 251, 657 P.2d 107 (1982). Reasons advanced for rejecting the claim for a bifurcated selection process were: the impossibility of ascertaining the number of jurors who should be impaneled; the lack of guideline for selection of a jury by such a process; the need to voir dire jurors on whether they could convict a defendant knowing some other person could then impose the death penalty based upon that conviction; and the lack of standards for peremptory challenges at the penalty phase.

74. In addition to the other reasons advanced in earlier opinions, *supra* note 75, the court recognized that N.M. Stat. Ann. § 31-20A-1 (B) requires that sentencing be conducted before "the original trial jury." Under N.M. Stat. Ann. § 31-20A-4 (E), on remand, a new jury could be selected for the sentencing phase before which the guilt phase evidence would be admissible.