NEW MEXICO LAW REVIEW

Volume 15
Issue 2 *Spring 1985*

Spring 1985

Criminal Law

Nancy Hollander

Kari Converse

CRIMINAL LAW

NANCY HOLLANDER* and KARI CONVERSE**

I. SUBSTANTIVE STATUTORY CHANGES AFFECTING NEW MEXICO CRIMINAL LAWS

The 1984 New Mexico Legislature[1] made numerous substantive changes in the area of criminal law. It created several new crimes, increased the penalties for existing crimes, rewrote sentencing provisions for both adults and juveniles, and made significant changes affecting crimes, penalties, and administrative procedures relating to charges of driving while intoxicated.

A. New Crimes

The 1984 Legislature enacted a completely new section in the New Mexico criminal code entitled the Sexual Exploitation of Children Act.[2] This act makes it a fourth degree felony for anyone to distribute or to possess with the intent to distribute for profit any visual or print medium depicting certain prohibited sexual acts if one or more of the participants in the act is under sixteen years of age.[3] The sexual acts prohibited by the act include sexual intercourse, bestiality, masturbation, sadomasochistic abuse for the purpose of sexual stimulation, and lewd exhibition of the genitals.[4]

The new act also makes it a crime for anyone to permit a child under sixteen to engage in any of these prohibited sexual acts knowing or having a reason to know that the act may be recorded in a visual or print medium or performed publicly.[5] Both the sexual act and simulation of the sexual act are prohibited.[6] Anyone violating this section is guilty of a fourth degree felony unless the child involved is under thirteen, in which case the crime is a third degree felony.[7]

*J.D., University of New Mexico, 1978; Associate, Freedman, Boyd & Daniels, Albuquerque, New Mexico.

**Member, Class of 1985, University of New Mexico School of Law, Albuquerque, New Mexico.

1. 36th Legislature, 2nd Session, 1984.
2. N.M. Stat. Ann. §§ 30-6A-1 to -4 (Repl. Pamp. 1984).
3. *Id.* § 30-6A-3(A).
4. *Id.* § 30-6A-2(A).
5. *Id.* § 30-6A-3(B),(C).
6. *Id.* § 30-6A-3.
7. *Id.* § 30-6A-3(B).

If the child performs the sexual act for the violator's profit, the violator is guilty of a third degree felony, or in the case of a child under thirteen, a second degree felony.[8] Anyone who manufactures any visual or print medium depicting these prohibited sexual acts utilizing participants under sixteen years of age is guilty of a third degree felony.[9]

The act further makes it a crime to encourage or to promote children under the age of sixteen to engage in prostitution,[10] or to hire or offer to hire a child between the ages of thirteen and sixteen to engage in any prohibited sexual act.[11] A violation for these provisions is a third degree felony unless the child is under the age of thirteen, in which case the crime is a second degree felony.[12]

Parents or guardians who knowingly permit their children to engage in acts for the purpose of producing any visual or print medium depicting the prohibited sexual acts get off rather lightly under this scheme as the offense is a fourth degree felony.[13] New Mexico law requires that one be charged with the most specific crime.[14] If one can prove he is a parent or guardian of a child who allegedly engaged in one of the prohibited sexual acts and it was for the purpose of preserving the act on film or in print, he can argue that he must be charged under this section, limiting his exposure to a fourth degree felony.

B. Increased Penalties

The bill which contained the Sexual Exploitation of Children Act also increased the penalty for certain types of child abuse.[15] Abuse of a child that does not result in the child's death or great bodily harm to the child had been a fourth degree felony. It remains a fourth degree felony for the first offense, but is now a second degree felony for subsequent offenses.[16] If the abuse does result in the child's death or great bodily harm, the first offense is now a second degree felony and second and subsequent offenses are first degree felonies.[17]

8. *Id.* § 30-6A-3(C).
9. *Id.* § 30-6A-3(D).
10. *Id.* § 30-6A-4(A).
11. *Id.* § 30-6A-4(B).
12. *Id.* § 30-6A-4(A).
13. *Id.* § 30-6A-4(C).
14. "The courts in New Mexico have long adhered to the rule that where both a general and a specific statute condemn the same offense, the State must prosecute under the specific statute." State v. Reams, 98 N.M. 372, 375, 648 P.2d 1185, 1188 (Ct. App.), *rev'd on other grounds*, 98 N.M. 215, 647 P.2d 417 (1981).
15. *See* N.M. Stat. Ann. § 30-6-1 (Repl. Pamp. 1984).
16. *Id.* § 30-6-1(C).
17. *Id.* The legislature passed another bill, Senate Bill 139, which also amended § 30-6-1. This bill was inconsistent with the bill that was codified, House Bill 199. N.M. Stat. Ann. § 12-1-8 (1978) provides that if two or more acts are enacted during the same session of the legislature amending the same set of the New Mexico Statutes Annotated, the act last signed by the Governor shall be

C. Sentencing Changes

The legislature also amended section 31-19-1 to require that a defendant convicted of a misdemeanor be placed on either supervised or unsupervised probation for at least some portion of the period of any deferred or suspended sentence.[18] The prior formulation of the statute gave the sentencing judge the option of including probation with a deferred or suspended sentence. That option continues to apply to judges sentencing for felony convictions.[19] In addition, the legislature amended the statutes to extend the requirements relating to probation and the conditions of orders deferring or suspending sentences to magistrate and metropolitan courts.[20] Previously there was no clear authority for magistrate and metropolitan court judges to sentence a defendant to probation, although they have been doing so for a good many years.[21]

These amendments create a conflict between two sections of the statute.[22] One section provides that the magistrate, metropolitan, or district court shall order a defendant to be placed on probation "*if* the defendant is in need of supervision, guidance or direction that is feasible for the probation service to furnish."[23] This language conflicts with the section that requires probation for some portion of any suspended or deferred misdemeanor sentence, without any qualification.[24]

The legislature also provided for mandatory alcohol and drug abuse screening and treatment for juvenile offenders upon certain findings by the children's court.[25] Whenever that court finds that a child has violated any ordinance or statute proscribing driving while under the influence of intoxicating liquor or drugs, the court shall order the child to report to an alcohol or drug abuse bureau of the state for screening and, if necessary, for treatment. This referral is mandatory and does not require a hearing or finding on the issue of need for care and rehabilitation. After a child is discharged by the alcoholism or drug abuse bureau or completes a period of supervision, any petition for an offense based upon the same conduct must be dismissed with prejudice. This amendment contains a sunset clause and is in effect only through July 1, 1985.

---

presumed to be the law. Apparently, House Bill 199 was signed last, although the Governor signed both bills on the same day.

18. N.M. Stat. Ann. § 31-19-1 (Cum. Supp. 1984).

19. *Id.* § 31-20-5.

20. *Id.* §§ 31-20-5 to -6. *See also* Slusher, Criminal Procedure, 15 N.M. L. Rev. ___ (1985), in this issue.

21. *See* N.M. Institute of Public Law, Magistrate Bench Book (R. Cosgrove ed. 1975).

22. *Compare* N.M. Stat. Ann. § 31-20-5 (Cum. Supp. 1984) *with* N.M. Stat. Ann. § 31-19-1 (Cum. Supp. 1984).

23. N.M. Stat. Ann. § 31-20-5 (Cum. Supp. 1984) (emphasis added).

24. *See* N.M. Stat. Ann. § 31-19-1 (Cum. Supp. 1984). In practice, most judges include probation in all sentences and limit it to unsupervised probation where there is no genuine need for supervision or guidance.

D. Laws Involving Driving Offenses

The statutes involving driving while under the influence of alcohol or drugs (DWI) and the administrative procedures related to the driving offenses that might cause one to lose his driver's license underwent drastic rewriting during the 1984 session of the legislature. The results are a confusing set of statutes, the meaning of which will undoubtedly require court interpretation.

New Mexico law previously required that anyone convicted of three DWI offenses subsequent to July 1, 1955 could not be licensed until five years after the third conviction.[26] The section now contains the additional proviso that one must not have been subsequently convicted of DWI during the five-year period prior to his request for restoration of his license. This amendment fills a gap in the previous statute that allowed for the possibility that someone could be convicted of DWI three times and then, after five years had passed, apply for a license even though during that five-year period he had been convicted of DWI a fourth time.

Prior to the 1984 amendments, the statute also provided that a person would never be granted another New Mexico driver's license if he was convicted three times, lost his license for five years, had his license restored, and then was subsequently convicted of DWI.[27] This section now provides that one subsequent conviction after the five-year revocation results in an additional five-year revocation.[28]

The legislature also amended section 66-5-29, entitled "Mandatory Revocation of License by Division,"[29] to require the motor vehicle division to revoke the license of any driver adjudicated as a delinquent for certain driving offenses. Adjudication as a delinquent is not a conviction.[30] Prior to this amendment, section 66-5-29 applied only to convictions, not to juveniles who were adjudicated delinquents for the enumerated offenses.

The legislature also changed the section involving limitations on guilty pleas. If the blood alcohol level of the person charged contains at least .10% by weight of alcohol, that person is no longer allowed to plead guilty to any charge other than DWI.[31] The previous maximum blood alcohol level under this section was .15%. This change goes in conjunc-

25. N.M. Stat. Ann. § 32-1-31 (Cum. Supp. 1984).

26. N.M. Stat. Ann. § 66-5-5 (1978).

27. N.M. Stat. Ann. § 66-5-5(D) (Cum. Supp. 1983).

28. Under the statutory scheme, prior to 1984 it was quite routine to secure a limited license to drive to work. Even if one lost his license forever, he could still get to and from work. Under the new scheme there are no limited licenses for subsequent DWI offenders. N.M. Stat. Ann. § 66-5-35(A)(2) (Repl. Pamp. 1984).

29. *Id.* § 66-5-29.

30. N.M. Stat. Ann. § 32-1-33 (Repl. Pamp. 1981).

31. N.M. Stat. Ann. § 66-8-102.1 (Cum. Supp. 1984).

tion with section 66-8-110(C), which states that "if the blood of the person tested contains .10% or more by weight of alcohol, the arresting officer *shall* charge him with a violation of §66-8-102 N.M. Stat. Ann. (1978)."[32]

Perhaps the most far-reaching amendment, and the one likely to have devastating effects on persons who must drive to maintain their employment, is the one that provides for mandatory license revocation. A law enforcement officer must submit an affidavit stating that the officer upon probable cause arrested the person for DWI, that the person submitted to chemical testing, and that the results indicated .10% or more by weight of alcohol in the person's blood if eighteen years or older or .05% or more if less than eighteen years, or if the person refused to submit to a blood alcohol test, that he had been advised that failure to submit could result in revocation of his driving privilege.[33]

The time periods for the revocation are: ninety days if the person is eighteen years of age or older; six months if the person is less than eighteen years of age and has not previously had his license revoked pursuant to the provisions of the section; and, one year if the person is less than eighteen years of age and has previously had his license revoked pursuant to the provisions of the section or if the person refused to submit to a blood alcohol test. Furthermore, if a person is a resident of New Mexico or will become a resident within a year and does not have a license to operate a motor vehicle in this state, he shall not receive one for the period of time that his license would have been revoked had he been a licensed New Mexico driver.[34]

If a person loses his license under one of these conditions, he will immediately be issued a written notice of the revocation and of the right to a hearing. The officer will confiscate the license and issue a temporary license valid for thirty days (assuming the person has a valid license or permit to begin with). The affected person must request a hearing within ten days after the receipt of the notice of revocation; the hearing must be set for a date no later than thirty days after receipt of the notice and must be held in the county where the offense took place.[35] Essentially the same procedure follows whether the person refuses to submit to a test or submits to a test that could result in revocation.

At the hearing, the director must make certain findings pursuant to the statute. These findings are limited to the following issues:

1. Whether the law enforcement officer had reasonable grounds to

32. *Id.* §66-8-110(C).
33. *Id.* §66-8-111.
34. *Id.* §66-8-111(C).
35. *Id.* §66-8-112. If the results of the chemical test cannot be obtained immediately, the Motor Vehicle Department sends the notice of revocation.

believe that the person had been driving a motor vehicle within this state while under the influence of intoxicating liquor;

2. Whether the person was arrested;
3. Whether the hearing was held no later than thirty days after notice of revocation or no later than ninety days after notice of revocation if the hearing has been extended pursuant to subsection C of the section; and
4. Whether: (a) the person refused to submit to a test upon a request of the law enforcement officer after the law enforcement officer advised the motorist that the failure to submit to a test could result in revocation of the motorist's privilege to drive; or (b) the chemical tests were administered pursuant to the provisions of the Implied Consent Act;[36] and the test results indicated a blood alcohol content of .10% or more by weight if the person is eighteen years of age or older or a blood alcohol content of .05% or more by weight if the person is less than eighteen years of age.[37]

If the hearing is based on a refusal to take a chemical test, the officer must show that the offender failed to submit to the test upon request of the law enforcement officer after the officer advised him that his failure to submit could result in revocation of his license.[38]

The distinction in the statute between children and adults which assumes that children become impaired at .05% instead of .10% blood alcohol content will undoubtedly lead to litigation to test its constitutionality.[39] Further, the statute's heightened emphasis on controlling the drunk driver and the severity of the penalties, both criminal and administrative, will no doubt result in new, creative defenses. The state will find itself forced to prove the accuracy of its alcohol breath tests[40] and the accuracy of the presumptions upon which the chemical tests rely, including the conversion ratio from blood alcohol to breath alcohol[41] and the assumption that a test result showing .10% blood alcohol content

36. N.M. Stat. Ann. §§ 66-8-105 to -112 (1978).

37. N.M. Stat. Ann. § 66-8-112(E) (Cum. Supp. 1984).

38. *Id.*

39. As age has not been recognized as a suspect classification requiring strict judicial scrutiny, this statute must rationally further a legitimate state purpose or interest. Texas Woman's Univ. v. Chayklintaste, 530 S.W.2d 927 (Tex. 1975). In the criminal context, age classifications have been upheld regarding rape in Owens v. Wainwright, 698 F.2d 1111 (11th Cir. 1983), *cert. denied,* 104 S. Ct. 117 (1983); regarding curfew in Dillon v. Downes, 401 F. Supp. 1240 (W.D. Va. 1975); regarding license suspensions in State v. Damiano, 142 N.J. Super. 457, 361 A.2d 631 (1976); and regarding treatment of 17-year-old offenders as adults in Benavidez v. State, 655 S.W.2d 233 (Tex. Ct. App. 1983).

40. *See* N.M. Stat. Ann. § 24-1-22 (Supp. 1981), setting out the requirements for state approval of evidential breath tests.

41. The standard used is 1:2100. It is assumed that there is as much alcohol in one part blood as in 2100 parts of breath. *See The Constitutionality of Chemical Test Presumptions of Intoxication and Motor Vehicle Statutes,* 20 San Diego L. Rev. 301 (1983).

demonstrates that the suspect had a .10% blood alcohol level at the time he was driving.[42]

The driving privileges allowed New Mexico drivers upon suspension or revocation of their licenses have been severely limited.[43] Once a license is suspended or revoked following conviction or adjudication as a delinquent under any law, ordinance, or regulation relating to motor vehicles, "a person may apply to the director [of the motor vehicle division] for a license or permit to drive limited to use allowing him to engage in gainful employment."[44] This sounds promising but excludes almost everyone. If one refuses to take a blood alcohol test, he is not eligible to apply for a limited license.[45] Anyone previously convicted of DWI, likewise, is not eligible for a limited license.[46] The only persons convicted of DWI who can apply for limited licenses are first offenders. But a first offender will lose his license for only ninety days.[47] It appears, therefore, that very few persons convicted of DWI are eligible for a limited license.[48]

II. STATUTORY CONSTRUCTION

A. Abuse of a Peace Officer

State v. Wade[49] involved the interpretation of the meaning of the statutory phrase "abusing any . . . peace officer."[50] The New Mexico Supreme Court held that the word "abusing" applies to speech in addition to physical acts. This legislative prohibition of speech is permissible so long as the statute does not offend the first and fourteenth amendments to the United States Constitution.[51] The New Mexico court correctly found that the only "words" the legislature can prohibit without infringing upon the defendant's first amendment rights are "fighting words," as defined by the United States Supreme Court in *Chaplinsky v. New Hampshire*:[52]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and ob-

42. *See* N.M. Stat. Ann. § 66-8-102 (Cum. Supp. 1984). *See also Driving with 0.10% Blood Alcohol: Can the State Prove It?*, 16 U.S.F.L. Rev. 819 (1982).

43. N.M. Stat. Ann. § 66-5-35 (Repl. Pamp. 1984).

44. *Id.* § 66-5-29.

45. Under the old statute, one could refuse a blood alcohol test but plead guilty within 30 days as a first offender and keep his license. That section has been deleted.

46. N.M. Stat. Ann. § 66-5-35(A) (Repl. Pamp. 1984).

47. *Id.* § 66-8-111.

48. The Motor Vehicle Division does have authority to suspend or to revoke licenses in circumstances not related to DWI. This appears to remain unaffected by the new amendments. *See id.* § 66-5-30.

49. 100 N.M. 152, 667 P.2d 459 (Ct. App. 1983).

50. N.M. Stat. Ann. § 30-22-1(D).

51. *See* Gooding v. Wilson, 405 U.S. 518 (1972).

52. 315 U.S. 568 (1942).

> scene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or intend to incite an immediate breach of the peace.[53]

The *Wade* court held, therefore, that the "'abusing' speech in section 30-22-1(D) . . . covers only speech that can be called 'fighting' words."[54] The evidence showed that the defendant was upset at a police intrusion into a family argument. He screamed obscenities, waved his arms around, and yelled. "Screaming obscenities and yelling 'get the hell out of the house' do not amount to 'fighting' words, particularly when they are addressed to police officers, who are supposed to exercise restraint."[55] According to the court, any other interpretation of section 30-22-1(D) would render the section unconstitutional.[56] Having so stated, the court went on to find that the evidence was not sufficient to show that the defendant used fighting words. In other words, there was no evidence that the defendant intended to incite an immediate breach of the peace.[57]

The court compared its previous decision in *City of Alamogordo v. Orlich*,[58] where the court reversed a conviction for disorderly conduct under an Alamogordo ordinance after the defendant shouted at a policeman words which indicated that he believed the policeman to be an incestuous child of a female dog.[59] The court also relied on *State v. Doe*,[60] where the defendant's conduct of questioning the police in a loud voice as to why he had been stopped and clenching his fists was not deemed sufficient to establish the fighting words exception.

B. Escape

State v. Coleman[61] involved the construction of the statute prohibiting escape from jail.[62] Coleman had been lawfully committed to the Eddy County jail and placed on work release with a private roofing firm. One evening he failed to return to the jail from his employment. The defendant contended that leaving a job site while on a work release program did not come within the meaning of "escape from jail" under the statute. The court disagreed, finding that there were only two essential elements

53. *Id.* at 571-72.
54. 100 N.M. at 153, 667 P.2d at 460.
55. *Id.* at 155, 667 P.2d at 462.
56. *Id.* at 154, 667 P.2d at 461.
57. *See Chaplinsky*, 315 U.S. 568.
58. 95 N.M. 725, 625 P.2d 1242 (Ct. App. 1981); *see* Hollander, Criminal Law, 13 N.M.L. Rev. 323, 326-28 (1983).
59. 95 N.M. at 726, 625 P.2d at 1243.
60. 92 N.M. 109, 583 P.2d 473 (Ct. App.), *rev'd on other grounds*, 92 N.M. 100, 583 P.2d 464 (1978).
61. 101 N.M. 252, 680 P.2d 633 (Ct. App. 1984).
62. N.M. Stat. Ann. § 30-22-8 (Repl. Pamp. 1984).

that must be proved: that the defendant was committed to jail and that the defendant escaped from jail.[63] The court found it only reasonable to conclude that while on work release the defendant was still in jail for all intents and purposes. Thus, this case was no different than *State v. Gilman*,[64] where the defendant had escaped from the county fairgrounds while on a work detail. Although Gilman was under the direct supervision of a guard and Coleman was not, the court found the distinction neither persuasive nor relevant.

C. School Attendance

In *State v. Edgington*,[65] the court interpreted the statute requiring compulsory school attendance.[66] The district court had granted the defendant's motion to dismiss the indictment on the grounds that the statute violated the equal protection clause of the United States and the New Mexico Constitutions. The court of appeals disagreed. The court found that strict scrutiny was not required because education is not a fundamental right and, therefore, only a rational relation test was necessary.[67] This statute, therefore, did not violate the defendant's equal protection rights.[68]

D. Child Abuse

State v. Williams[69] involved an attack on the sufficiency of evidence on behalf of a woman convicted of child abuse on the grounds that it violated her right to due process. Her conviction was based on a section of the child abuse statute permitting guilt to be found on a standard of negligence:[70] that she negligently placed the child in a situation that could endanger his health. There was no evidence that the defendant had abused her child, only that she knew her husband had abused her child and that she had a duty to care for and protect her child from her husband.[71] The court found that her failure to seek help for her child was the proximate cause of the child's injuries.[72] The decision is disturbing because it stretches

63. *See* N.M. U.J.I. Crim. 22.21.

64. 97 N.M. 67, 636 P.2d 886 (Ct. App. 1981); *see* Hollander, *supra* note 58, at 325-26.

65. 99 N.M. 715, 663 P.2d 374 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983). *See* Note, *Compulsory School Attendance—Who Directs the Education of a Child:* State v. Edgington, 14 N.M.L. Rev. 453 (1984).

66. N.M. Stat. Ann. § 22-12-2 (Repl. Pamp. 1984).

67. 99 N.M. at 718, 663 P.2d at 377; *see* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, *reh'g denied*, 93 S. Ct. 1919 (1973); Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982); Denis J. O'Connell High School v. Virginia High School, 581 F.2d 81 (4th Cir.), *cert. denied*, 440 U.S. 936 (1978); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. Ct. App. 1983).

68. 99 N.M. at 719, 663 P.2d at 378.

69. 100 N.M. 322, 670 P.2d 122 (Ct. App.), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983).

70. N.M. Stat. Ann. § 30-6-1(C)(1).

71. 100 N.M. at 324, 670 P.2d at 124.

72. *Id.*

criminal liability beyond acceptable limits. It makes simple negligence the standard for criminal activity[73] and it fails to take into account the realities of a situation where a pregnant woman, herself the object of her husband's brutality, fails to take steps to stop him from injuring her child.[74]

E. Forfeiture

An intriguing case is *State v. Stevens*,[75] which involved an interpretation of the statute delineating items subject to forfeiture under the Controlled Substances Act.[76] The court focused on the grammatical construction of the statute: "All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale of property described in subsections A or B. . . ."[77] The question raised was whether the vehicle actually need be used for the purpose of transporting the controlled substance. This case involved the interpretation of the restrictive clause "for the purpose of sale." Based on the location of the commas, the court found that the clause "for the purpose of sale" restricted the phrase "or in any manner to facilitate transportation," but did not restrict the phrase "to transport." The car involved in *Stevens*, therefore, could be seized under this statute because it facilitated the transportation for the purpose of sale of property. It was not necessary that the car actually transport the drugs (which it obviously did not).[78]

F. Embezzlement

The supreme court held that numerous small embezzlements can sustain one third degree embezzlement conviction in *State v. Pedroncelli*.[79] Pedroncelli was secretary-treasurer of a union and over a period of six months, cashed twenty-two checks and made fourteen cash withdrawals totalling $16,571.00. She was charged with a third degree felony of embezzlement over $2,500 and found guilty.[80] The court of appeals reversed, saying "the evidence . . . prove[d] 36 separate acts of embezzlement of more

73. More than simple negligence is normally required for criminal culpability. People v. Warner Lambert Co., 434 N.Y.S.2d 159, 414 N.E.2d 660 (1980), *cert. denied*, 450 U.S. 1031 (1981); Commonwealth v. Tackett, 299 Ky. 731, 187 S.W.2d 297 (1945); Commonwealth v. Welansky, 55 N.E.2d 902 (Mass. 1944).

74. Although this statute was substantially amended during the 1984 session of the legislature, this particular section survived intact. The section was deleted by amendment but that amendment did not become law. *See* N.M. Stat. Ann. § 30-6-1 (Repl. Pamp. 1984). *See supra* note 17.

75. 100 N.M. 577, 673 P.2d 1310 (1983).

76. N.M. Stat. Ann. § 30-31-34 (Cum. Supp. 1984).

77. *Id.* § 30-31-34(D).

78. 100 N.M. at 579, 673 P.2d at 1312.

79. 100 N.M. 678, 675 P.2d 127 (1984).

80. *Id.* at 679, 675 P.2d at 128. *See* N.M. Stat. Ann. § 30-16-8 (Repl. Pamp. 1984).

than $100 but less than $2,500, all fourth degree felonies"[81] and remanded for entry of a judgment of guilty on one count of fourth degree embezzlement. The supreme court reversed the court of appeals, holding that successive conversions may constitute one crime of larceny if there is one single sustained criminal intent.[82]

The court approved the holding in *State v. Allen*,[83] that the issue of whether takings are part of a single criminal scheme or multiple offenses is a question for the jury to decide. "The factfinder may . . . evaluate the evidence to determine if one protracted intention accompanies the several takings or conversions that may be implicated within a single charge."[84]

The court also held that the single evidence test for double jeopardy would preclude the state from bringing separate fourth degree charges on each of the thirty-six separate acts of embezzlement in addition to the third degree charge.[85] The same evidence test is whether the facts offered in support of one offense would sustain a conviction of the other.[86] Therefore, the state apparently would be prevented from charging thirty-six fourth degree felonies or one third degree felony, but must charge one crime of embezzlement, either a third or a fourth degree felony. The court of appeals' reliance on *Sanchez v. State*,[87] was misplaced, because although *Sanchez* was an analogous factual situation, the reversal of the conviction in *Sanchez* was based upon the vagueness of the indictment, not on the single larceny doctrine.

G. Burglary

In *State v. Rodriguez*,[88] the state charged the defendant with burglary for reaching into the open uncovered bed of a pickup truck and taking a tool box.[89] The court of appeals held that reaching into the bed of a pickup truck constitutes "entry" within the meaning of burglary as defined in N.M. Stat. Ann. section 30-16-3 (Repl. Pamp. 1984).

Judge Bivins noted that most of the elements of common law burglary[90] have been eliminated, leaving only the elements of entry and intent.

81. 100 N.M. at 682, 675 P.2d at 131.
82. *Id.* at 680, 675 P.2d at 129.
83. 59 N.M. 139, 280 P.2d 298 (1955).
84. 100 N.M. at 681, 675 P.2d at 130.
85. *Id.*
86. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975); Owens v. Abram, 58 N.M. 682, 274 P.2d 630 (1954), *cert. denied*, 348 U.S. 917 (1955).
87. 97 N.M. 445, 640 P.2d 1325 (1982).
88. 101 N.M. 192, 679 P.2d 1290 (Ct. App. 1984).
89. *Id.* at 193, 679 P.2d at 1291.
90. Breaking, entering, a dwelling house, of another, at night, with the intent to commit a felony. *Id.*

Although the legislature has expanded the definition of burglary, "[t]he rationale underlying the expansion . . . remains somewhat unclear."[91]

The touchstone of burglary, distinguishing it from theft, has traditionally been the invasion of some zone of expected inviolability or privacy.[92] While "entry" has been construed to include merely inserting a hand or arm,[93] it is difficult to imagine the bed of a pickup truck as the sort of inviolate space that burglary statutes seek to protect.

Other jurisdictions have split on the identical question. In *People v. Romero*[94] the Colorado Supreme Court held that under Colorado law reaching into the back of a pickup truck constituted entry. On the other hand, in *Smith v. First Judicial District Court,*[95] the court held that reaching into the back of a pickup truck did not constitute burglary within the meaning of the Nevada statutes,[96] despite the statutory definition of "entry" as "the entrance of the offender, or the insertion of any part of his body."[97] Thus, under a technical definition of "entry," reaching into the bed of a pickup truck can constitute burglary. The better-reasoned decisions, however, consider this activity to be outside the intended reach of the burglary statutes.

In *State v. Jennings*[98] the court of appeals reworked the definition of possession of burglary tools[99] by eliminating the requirement that the tools be those commonly used as burglary tools. Jennings and a co-defendant were observed attempting to enter into a closed filling station. They were arrested. During the search pursuant to the arrest, officers found a screw driver in Jenning's possession and a flashlight in his co-defendant's possession. Both were convicted of, *inter alia,* possession of burglary tools. The defendants appealed their convictions based on the lack of proof of the common use of tools for burglary and lack of proof of intent to use the tools in the commission of the burglary. The court of appeals initially

91. *Id.* at 194, 679 P.2d at 1292.

92. "It is an offense against the security of habitation or occupancy, rather than against ownership or property." 3 Wharton's Criminal Law § 326 (14th ed. 1980). Under the Model Penal Code, "[t]he offense has thus been limited . . . to the invasion of premises under circumstances especially likely to terrorize the occupants . . . [and this] narrows the offense to reflect more appropriately the distinctive situation for which it was originally devised." Model Penal Code § 221.1, commentary at 67 (1980).

93. *See* Mirich v. State, 593 P.2d 590 (Wyo. 1979); People v. Failla, 414 P.2d 39, 51 Cal. Rptr. 103 (1966); State v. Maddox, 465 S.W.2d 607 (Mo. 1971).

94. 179 Colo. 159, 499 P.2d 604 (1972).

95. 75 Nev. 526, 347 P.2d 526 (1959).

96. Nev. Rev. Stat. § 205.060 (1983) states: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semi-trailer or house trailer, or railroad car, with the intent to commit grand or petit larceny, or any felony, is guilty of burglary."

97. Nev. Rev. Stat. § 193.010(8) (1983).

98. 102 N.M. 94, 691 P.2d 882 (Ct. App.), *cert. quashed,* 102 N.M. 88, 691 P.2d 881 (1984).

99. See N.M. Stat. Ann. § 30-16-5 (Repl. Pamp. 1984).

held that "the issue of whether items are commonly used for burglaries is a factual one to be decided by the jury,"[100] but concluded that "in view of evidence of *actual* use, evidence that flashlights and screw drivers are commonly used burglariously is unnecessary."[101] This holding appears to eliminate one element of the offense. N.M. Stat. Ann. section 30-16-5 defines the crime of possession of burglary tools as "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 commission of burglary." N.M. U.J.I. Crim. 16.23 instructs for this crime: "1. The defendant had in his possession (name tools or devices), which are designed for or commonly used in commission of a burglary."

Proof of common use was previously held to be a requirement for conviction in *State v. Najera,*[102] where the court of appeals held that

> [O]ne is exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or device is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary.[103]

In *Jennings,* the court instead analogized to two recent cases involving deadly weapons. In *State v. Candelaria,*[104] the court held that the use of a screwdriver constituted assault with a deadly weapon under a statute that reads: "Aggravated assault consists of . . . unlawfully assaulting or striking at another with a deadly weapon."[105] In *State v. Blea,*[106] an icepick in the defendant's possession constituted the element of carrying a deadly weapon within the meaning of an ordinance that defined "deadly weapon" as

> any firearm or any weapon which is capable of producing death or great bodily harm, including *but not restricted to,* any type of dagger, metalic knuckles, switchblade, ponyard, dirk knife, sword cane, sharp pointed cane or rod, slingshot, bludgeon, knumchucks, straight razor, or slapper.[107]

In these cases, convictions were justified by the lack of definition in *Candelaria* and the non-inclusive definition in *Blea.* "Common use," on the other hand, appears as part of the statute and part of the uniform jury

100. 102 N.M. at 96, 691 P.2d at 884.
101. *Id.* at 97, 691 P.2d at 885 (emphasis in original).
102. 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).
103. 89 N.M. at 523, 554 P.2d at 984.
104. 97 N.M. 64, 636 P.2d 883 (Ct. App. 1981).
105. N.M. Stat. Ann. § 30-1-12(B) (Repl. Pamp. 1984).
106. 100 N.M. 237, 668 P.2d 1114 (Ct. App. 1983).
107. Crim. Code of Albuquerque § 2-8(B) (1978) (emphasis added).

instruction. As a result of the holding in *Jennings,* the supreme court will need to clarify whether evidence of actual use can substitute for evidence of common use in a conviction for possession of burglary tools.

In *State v. Ross,*[108] the court of appeals decided that breaking and entering into a garage[109] is not necessarily a lesser included offense of burglary of a dwelling house.[110] Because the defendant requested a jury instruction on breaking and entering as a lesser included offense, however, he could not appeal his conviction on that charge.

Ross was indicted by a grand jury on burglary of a dwelling house. The evidence showed that he had been observed trying to enter a garage that was not attached to a house.[111] At trial, the court gave the defendant's requested instructions on, *inter alia,* breaking and entering.[112] Ross was found guilty of breaking and entering; he appealed the sufficiency of the evidence, the trial court's refusal to direct a verdict on burglary of a dwelling house, and the giving of the jury instruction on breaking and entering. The court of appeals held that the evidence was sufficient for a conviction of breaking and entering and that the acquittal on burglary of a dwelling house precluded a claim of error on the failure to direct a verdict.[113]

"A lesser included offense is one which is comprised of some, but not all, of the elements of a greater offense, and which does not have any element not included in the greater offense so that it is not possible to commit the greater offense without committing the lesser offense."[114] "Breaking" is no longer a part of the definition of burglary in New Mexico.[115] Therefore, under the facts of *Ross,* "breaking and entering was not a lesser included offense of the charge of burglary."[116] The court held that under some facts, such as entry by fraud, breaking and entering could still constitute a lesser included offense.[117] The "[d]efendant having urged the court to adopt an instruction upon the offense of breaking and entering [however] will not be heard on appeal to claim that . . . his conviction of breaking and entering was error."[118]

108. 100 N.M. 48, 665 P.2d 310 (Ct. App. 1983).
109. Breaking and entering is defined in N.M. Stat. Ann. § 30-14-8 (Repl. Pamp. 1984).
110. N.M. Stat. Ann. § 30-16-3(A) (Repl. Pamp. 1984).
111. 100 N.M. at 50, 665 P.2d at 312.
112. *Id.*
113. 100 N.M. at 50-51, 665 P.2d at 312-13.
114. *Id.* at 51, 665 P.2d at 313; State v. Barela, 95 N.M. 349, 622 P.2d 254 (Ct. App. 1980).
115. State v. Ortiz, 92 N.M. 166, 584 P.2d 1306, *cert. denied,* 92 N.M. 79, 582 P.2d 1292 (1978); State v. Tixier, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).
116. 100 N.M. at 51, 665 P.2d at 313.
117. *Id.*
118. *Id.*

H. Custodial Interference

In *State v. Whiting*,[119] the court held that a custodial parent may be subject to criminal sanctions for custodial interference.[120] *Whiting* involved a divorce decree in which the court awarded joint custody of two children to the mother, Nicolette Whiting, and itself; Whiting had physical custody, but the children remained wards of the court and in the court's legal custody. The court also ordered that the children not be removed from its jurisdiction without court order.[121] Whiting began preparations to move one child to London, England, and was charged with and convicted of custodial interference.[122] The court of appeals upheld the conviction based upon violation of the order not to remove the children from the jurisdiction:

> The court order in this case provided that the children were not to be removed from the jurisdiction without the court's permission. Consequently, defendant had no legal right to remove her child from the jurisdiction at the time and in the manner stated in the charging instruments, and violation of that order subjected her to the criminal sanctions of § 30-4-4(A).[123]

The majority of the opinion, however, was devoted to justifying the propriety of an order of joint custody in the mother and the court. The joint custody statute refers to "an order of the court awarding custody of a minor to *both parties*."[124] Yet the court found "nothing in the statute [that] indicates that the authority granted the district court in § 40-4-7(B)(4) to fashion a 'just and proper' custody order inhibits its authority to award joint custody to one parent, and retain joint custody in the court."[125] A court may make separate orders of physical and legal custody.[126] A court is a proper entity in which to vest custody because, for the purposes of the Children's Code, "'legal custody' means a legal status created by the order of the court . . . that vests in a person or agency . . . the right and duty to protect, train and discipline the child. . . ."[127] "'Person' means an individual or any other form of entity recognized by law,"[128] which would include a district court.

119. 100 N.M. 447, 671 P.2d 1158 (Ct. App. 1983).
120. *See* N.M. Stat. Ann. § 30-4-4 (Repl. Pamp. 1984).
121. 100 N.M. at 448, 671 P.2d at 1159.
122. *Id.*
123. *Id.* at 449, 671 P.2d at 1160.
124. N.M. Stat. Ann. § 40-4-9.1(C) (Repl. Pamp. 1983) (emphasis added).
125. 100 N.M. at 449, 671 P.2d at 1160.
126. N.M. Stat. Ann. § 40-4-9.1(C) (Repl. Pamp. 1983).
127. N.M. Stat. Ann. § 32-1-3(J) (Repl. Pamp. 1981).
128. *Id.* § 32-1-3(K).

While the title and no doubt the basic focus of the statute is to prevent kidnapping by the non-custodial parent, the functional language of the statute could render either parent liable. "Custodial interference consists of the taking from this state . . . a child . . . permanently or for a protracted period, knowing that he has no legal right to do so."[129] Interestingly, the court's opinion indicates that the acts that rendered Whiting liable were her preparations to remove one of the children, and not an actual removal.[130] Yet the conviction was on custodial interference, rather than on attempt to commit custodial interference.

III. STATUTORY CONSTRUCTION—JUVENILE LAW

The supreme court grappled with a section of the Children's Code[131] in *State v. Doe*.[132] The question raised was whether the children's court could transfer a child to the district court when there was evidence that the child *may* be amenable to treatment.[133] The statute in question in this case, section 32-1-30, must be distinguished from the general transfer statute, section 32-1-29. The general transfer statute requires that a child be transferred only if he is *not* amenable to treatment.[134] Section 32-1-30 operates "notwithstanding the provisions of Section 32-1-29, N.M. Stat. Ann. 1978," and specifically provides that a child can be transferred at fifteen years if the criminal act is murder or at sixteen years if the criminal act is assault with intent to commit a violent felony, kidnapping, aggravated battery, dangerous use of explosives, felony criminal sexual penetration, robbery, aggravated burglary, or aggravated arson.[135] If one of these specific felonies is involved, the court must *consider* whether the child is amenable to treatment or rehabilitation; the court need not find a lack of amenability. Thus, section 32-1-30, in conjunction with section 32-1-29, sets up a discretionary standard when certain felonies are at issue, and a required standard when other felonies are involved.

IV. CONSTITUTIONAL CONSTRUCTION

State v. Dees[136] involved the construction of a constitutional provision. Article II, section 6 of the New Mexico Constitution provides that "no

129. N.M. Stat. Ann. § 30-4-4 (1980).

130. 100 N.M. at 448, 671 P.2d at 1159.

131. N.M. Stat. Ann. §§ 32-1-1 to -53 (Repl. Pamp. 1981 and Cum. Supp. 1984).

132. 100 N.M. 649, 674 P.2d 1109 (1983). *See* Note, *The Transfer of a Child from Juvenile Court to Adult Court:* State v. Doe, 15 N.M.L. Rev. ___ (1985), in this issue.

133. *See* N.M. Stat. Ann. § 32-1-30 (Repl. Pamp. 1981).

134. N.M. Stat. Ann. § 32-1-29 (Repl. Pamp. 1981) is the general transfer statute permitting the court to transfer a matter if a child is over 16 years of age, the conduct is a felony, a hearing is held in conformity with the rules, there is proper notice, and the court finds *inter alia* that the child is not amenable to treatment.

135. N.M. Stat. Ann § 32-1-30 (Repl. Pamp. 1981).

136. 100 N.M. 252, 669 P.2d 261 (Ct. App. 1983).

law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons."[137] *Dees* raised the issue of whether the statute prohibiting the carrying of a firearm into a licensed liquor establishment[138] violated article II, section 6. The court held that it did not.[139]

Article II, section 6 of the New Mexico Constitution is a unique provision dissimilar to the second amendment to the United States Constitution, which provides that the right of the people to keep and to bear arms shall not be infringed.[140] The court found that the New Mexico constitutional provision is broader than the second amendment's provision because the second amendment is grounded on the notion of a civilian militia.[141] The New Mexico Constitution was amended in 1971 to add the language that citizens have the right to bear arms not only for security and defense but also for hunting and recreational purposes or other lawful purposes.[142] This amendment did not give one the absolute right to bear arms, but rather a right that must be weighed against the reasonable regulations of the state.[143] Analogizing this case to the issue of fighting words under the first amendment, the court held:

> [W]hen the legislature perceives that the carrying of a firearm may present a clear and present danger . . . if mixed with the opportunity for its bearer to succumb to the influence of intoxicating liquors, it serves a legitimate goal in a constitutionally approved manner when it regulates and limits an unfettered exercise of the citizen's right to bear arms.[144]

V. SPECIFIC INTENT

In *State v. Bejar,*[145] the court held that possession of heroin with intent to distribute includes the requirement that specific intent be proved beyond a reasonable doubt. This is not new law.[146] What is interesting about this case is that there was a very small amount of heroin present,[147] a factor which may be inconsistent with an intent to distribute. There were other

137. N.M. Const. art. II, § 6.
138. *See* N.M. Stat. Ann. § 30-7-3 (1978).
139. 100 N.M. at 255, 669 P.2d at 264.
140. *See* U.S. Const. amend II.
141. 100 N.M. at 253, 669 P.2d at 262.
142. *See* N.M. Const. art. II, § 6.
143. *Dees,* 100 N.M. at 255, 669 P.2d at 264 (citing United States v. Romero, 484 F.2d 1324, 1327 (10th Cir. 1973)).
144. 100 N.M. at 255, 669 P.2d at 264.
145. 101 N.M. 190, 679 P.2d 1288 (Ct. App.), *cert. denied,* 101 N.M. 189, 679 P.2d 1287 (1984).
146. *See id.* at 191, 679 P.2d at 1289.
147. *Id.*

factors, however, that were inconsistent with personal use: additional heroin had just been flushed down the toilet, and the defendant had three sets of scales used for weighing heroin, packages of balloons, cash, tin foil, and other items that were inconsistent with personal use.[148] The distinction between possession of a drug and possession with intent to distribute may depend, then, not on quantity (although that is one factor), but on the presence or absence of items tending to show that the defendant had been preparing to sell the drugs.

VI. DOUBLE JEOPARDY

The New Mexico courts considered three cases this year dealing with the jurisdictional exception to double jeopardy. The New Mexico Supreme Court continued to hold that double jeopardy does not apply where a lower court, not having jurisdiction to try the greater crime, renders a decision on a lesser included offense.[149] This exception to double jeopardy has been recognized previously by the New Mexico Supreme Court in *State v. James*[150] and *State v. Goodson,*[151] and by the United States Supreme Court in *Diaz v. United States*.[152] In *State v. Manzanares,*[153] the court of appeals reconsidered the jurisdictional exception in light of three United States Supreme Court cases: *Waller v. Florida,*[154] *Robinson v. Neil,*[155] and *Illinois v. Vitale*.[156]

In *Manzanares,* the defendant was involved in a traffic accident which resulted in a death. He was convicted of vehicular homicide in district court after pleading guilty to several lesser included offenses in magistrate court. The court of appeals reversed the vehicular homicide conviction, holding that the jurisdictional exception was no longer viable in light of *Waller, Robinson,* and *Vitale*. The New Mexico Supreme Court, however, reversed the court of appeals, holding that *James* and *Goodson* were still the law in the State of New Mexico.[157] The court distinguished *Vitale* on the basis that there was no showing that one court could not have heard both counts; it distinguished *Waller* on the basis that the question in that case was dual sovereignty between city and state, and not a jurisdictional exception.[158] The court held "reason and logic do not support a rule where

148. *Id.*
149. *See* State v. Manzanares, 100 N.M. 621, 674 P.2d 511 (1983).
150. 93 N.M. 605, 603 P.2d 715 (1979).
151. 54 N.M. 184, 217 P.2d 262 (1950).
152. 223 U.S. 442 (1912).
153. 100 N.M. 621, 674 P.2d 511 (1983).
154. 397 U.S. 387 (1970).
155. 409 U.S. 505 (1973).
156. 447 U.S. 410 (1980).
157. 100 N.M. at 622, 674 P.2d at 512.
158. *Id.* at 623, 674 P.2d at 513.

one guilty of a crime of homicide by vehicle may escape a possible sentence of three years imprisonment by the expedient of pleading guilty to a charge of DWI or reckless driving,"[159] but admitted that the situation "could be avoided by a modicum of cooperation between prosecutors."[160]

In *State v. Padilla*,[161] the defendant resisted an arrest executed by three officers. He pleaded guilty to the charge of resisting arrest in magistrate court; he then moved to dismiss a pending district court charge of felony battery on a police officer. The court of appeals rejected the state's argument that the defendant was being prosecuted in district court for kicking one officer and in magistrate court for resisting the other two, holding that the state could not break the offense into discrete parts.[162] It found that, under a factual analysis, the same facts would support a conviction of both crimes, or under a statutory analysis, the same definition applied to both crimes. Double jeopardy, therefore, did attach. The charges differed only in that battery of a police officer requires the resisting person to reach the point of touching the police officer. The court of appeals held that after *Diaz v. United States*[163] the jurisdictional exception was no longer a viable rationale,[164] but the supreme court reversed this decision.[165]

In *State v. Fugate*,[166] the defendant was involved in a three-car accident inflicting great bodily injury on an occupant of another car. He pleaded nolo contendere to DWI and careless driving in municipal court. The injured party ultimately died, and the defendant was then charged with vehicular homicide. The court of appeals held that the United States Supreme Court had unmistakably rejected the jurisdictional exception test and reversed the conviction. It held that because defendant could have been charged immediately with great bodily injury by vehicle, and because the charge of great bodily injury by vehicle was as serious as a death by vehicle charge, the "necessary facts" exception set out in *Brown v. Ohio*[167] did not apply. The New Mexico Supreme Court reversed the court of appeals, holding that the jurisdictional exception still did apply and, thus,

159. 100 N.M. at 624, 674 P.2d at 514.

160. *Id.*

161. 101 N.M. 78, 678 P.2d 706 (Ct. App. 1983), *rev'd*, 101 N.M. 58, 678 P.2d 686 (1984).

162. *Id.* at 80, 678 P.2d at 708.

163. 223 U.S. 442 (1912).

164. 101 N.M. at 81, 678 P.2d at 709.

165. 101 N.M. 58, 678 P.2d 686 (1984).

166. 101 N.M. 82, 678 P.2d 710 (Ct. App. 1983), *rev'd*, 101 N.M. 58, 678 P.2d 686 (1984), *aff'd by an equally divided court*, 53 U.S.L.W. 4408 (U.S. March 26, 1985) (No. 83-6663).

167. 432 U.S. 161 (1977). Although the double jeopardy clause prohibits successive prosecution and cumulative punishment for a greater and a lesser included offense, "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." *Id.* at 168 n.7.

it was not necessary to reach the necessary facts exception to double jeopardy.[168] The United States Supreme Court, by an equally divided court, recently affirmed the *Fugate* decision.[169]

Manzanares,[170] *State v. Tanton*,[171] and *State v. Tijerina*[172] recognized that the necessity of applying the jurisdictional exception to double jeopardy could be avoided by a modicum of cooperation between prosecutors. *Manzanares* rationalized, however, that "there does not seem to be a practical way to enforce this type of cooperation. It can only be encouraged by the courts."[173] *Tijerina* discussed the balancing of interests between prosecutorial cooperation and defendants' exposure to double jeopardy:

> It should not be inferred from this opinion that this court intends to encourage or approve piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems which threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly in mind and trying all charges together.[174]

New Mexico district courts are courts of general jurisdiction and have jurisdiction to hear the lesser-included offenses in any case.[175] The policy cited in *Tijerina* and followed by the court of appeals in *Manzanares*, *Padilla*, and *Fugate* appears to be a sound policy.

VII. JURY INSTRUCTIONS

A. *Statutory Exceptions*

In *State v. Roybal*,[176] a case involving the unlawful carrying of a firearm into a liquor establishment, the defendant contended that the exceptions contained in the statute constituted an essential element of the crime.[177] The jury instruction the court gave recited the statute but did not include the categories of persons specifically exempted from its grasp. The defendant argued that the failure to instruct the jury on this element was

168. 101 N.M. at 84, 678 P.2d at 712.
169. 53 U.S.L.W. 4408 (U.S. March 26, 1985) (No. 83-6663).
170. 100 N.M. 621, 674 P.2d 511 (1983).
171. 88 N.M. 333, 540 P.2d 813 (1975).
172. 86 N.M. 31, 519 P.2d 127 (1973).
173. 100 N.M. at 624, 674 P.2d at 514.
174. 86 N.M. at 36, 519 P.2d at 132; *see also Tanton*, 88 N.M. at 336, 540 P.2d at 816.
175. N.M. Const. art. VI, § 13.
176. 100 N.M. 155, 667 P.2d 462 (Ct. App. 1983).
177. *Id.* at 157, 667 P.2d at 464.

jurisdictional and, therefore, reversible error. Appellate counsel, unable to contact trial counsel, could not point to any evidence showing the applicability of the exceptions to the defendant. New Mexico Court of Appeals Chief Judge Walters held that "[i]t was never contemplated that appellate counsel would be permitted to speculate about facts in order to raise an issue that a transcript of the trial testimony 'might' develop or support,"[178] and that "the general rule is that a defendant must prove he is within an exception to a penal statute in order to take advantage of it."[179]

In support of her holding, Judge Walters cited a New Mexico statute and New Mexico jury instruction, both of which dealt with controlled substances.[180] That statute provides that the defendant has the burden of proving he is within an exception to the statute. The Committee Commentary to the Uniform Jury Instructions clarifies that

> [a]lthough the statute states that the burden of proof is on the defendant, such burden never shifts from the state in a criminal trial. The defendant has the burden of going forward with sufficient evidence to raise the issue of the exception or exemption, and then the state must disprove the existence or validity of such exception or exemption beyond a reasonable doubt.[181]

Judge Walters' holding that a defendant must prove the exception applies to him, therefore, would appear to be in error as a general proposition.

In the 1971 case of *State v. James*,[182] the court held that it was error to instruct the jury that defendant was presumed sane until disproved by a preponderance of the evidence: the defendant merely had to present evidence reasonably tending to support the fact of insanity to be entitled to a jury instruction on insanity.[183] This holding was cited in *State v. Wilson*,[184] which supported *James* while adding that the presumption of insanity remains throughout, and overruled *State v. Torres*,[185] which held that it was incorrect to place the burden of the defendant's sanity on the state.[186] Once the defendant raises the issue of the applicability of an exemption, exception, or defense with sufficient evidence to create a jury issue, the state has the burden of disproving its applicability, and the burden of proof never shifts.

178. *Id.*
179. *Id.*
180. *See* N.M. Stat. Ann. § 30-31-37 (Repl. Pamp. 1980) *and* N.M. U.J.I. Crim. 36.43.
181. Committee Commentary, U.J.I. Crim. 36.43.
182. 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).
183. *Id.* at 266, 490 P.2d at 1239 (citing State v. Martinez, 30 N.M. 178, 230 P.2d 379 (1924)).
184. 85 N.M. 552, 514 P.2d 603 (1973).
185. 82 N.M. 422, 483 P.2d 303 (1971).
186. *Id.* at 424, 483 P.2d at 305.

B. Depraved Mind

In *State v. McCrary,*[187] the supreme court dealt with the "depraved mind" definition of murder.[188] It held that a defendant must have subjective knowledge that (1) his conduct was very risky, and (2) under circumstances known to the defendant, he should have realized the high degree of risk.

In *McCrary,* the defendants attended a carnival and thought they had been cheated out of sixty-four dollars. As a means of revenge, they returned to the carnival with several rifles and a shotgun and shot at carnival tractor trailers and cabs. They claimed to have been aiming at the tires, although no bullets hit the tires, but many hit the cabs and trailers. One of these bullets entered the sleeping compartment of a cab and hit the victim in the head, killing her.

The defendants claimed that the subjective knowledge required was subjective knowledge that the victim was asleep in the cab. The court held that N.M. U.J.I. Crim. 2.05[189] requires that the "[d]efendants did not have to actually know that [the victim] DeGracia was in the sleeper compartment. Rather, sufficient subjective knowledge exists if the defendants' conduct was very risky, and under the circumstances known to defendants they should have realized this very high degree of risk."[190]

The court has consistently refused to elaborate on the definition of "depraved mind." Uniform Jury Instruction 2.05, listing essential elements of an act greatly dangerous to life, requires that:

> . . . 3. The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;
> 4. The defendant knew that his act was greatly dangerous to the lives of others.[191]

This jury instruction, however, does not define "depraved mind." The court held, in somewhat circular reasoning, that knowing one's act is greatly dangerous to the lives of others is the standard for proving the defendant's culpable knowledge for a depraved mind.[192] The previous year, in *State v. Sena,*[193] the court upheld a district court's refusal of a tendered jury instruction that would define "depraved mind" on the ground that "[t]he submitted instruction contained a particular limitation which

187. 100 N.M. 671, 675 P.2d 120 (1984).
188. The "depraved mind" definition of murder is murder based on acts greatly dangerous to the lives of others, indicating a depraved mind. N.M. Stat. Ann. § 30-2-1 (Repl. Pamp. 1984).
189. N.M. U.J.I. Crim. 2.05.
190. 100 N.M. at 673, 675 P.2d at 122 (emphasis in original).
191. N.M. U.J.I. Crim. 2.05.
192. 100 N.M. at 673, 675 P.2d at 122.
193. 99 N.M. 272, 657 P.2d 128 (1983).

does not accurately reflect state law."[194] *Sena* held that intent to kill just one person was not incompatible with a depraved mind, in response to the defendant's contention that an intent to kill one particular person would remove the act from this class.

Shortly after *McCrary,* the court again held in *State v. Chavez*[195] that N.M. U.J.I. Crim. 2.05 was not confusing and that it was error for the trial court to grant a new trial on that ground. In *Chavez,* instructions on premeditated murder and depraved mind murder were given.[196] The trial court granted a new trial, which the state appealed first to the court of appeals and then to the supreme court. The supreme court remanded, *inter alia,* for the trial court to set forth more fully its grounds for a new trial.[197] The trial court listed as a ground, jury "confusion [which] was compounded by Instructions No. 2 and No. 6 since there is no definition of 'depraved mind' making the distinction between the alternative theories difficult if not impossible to determine."[198] The state again appealed to the court of appeals, which affirmed, determining that "on retrial the trial court will have the opportunity to correct faulty or confusing instructions."[199] The supreme court leapt to defend the clarity of U.J.I. Crim. 2.05, holding that "[t]he court of appeals is to follow the jury instructions promulgated by the supreme court; they are not free to abolish uniform jury instructions approved by this court."[200] Thus, the trial court erred in finding that the jury instructions were confusing.[201]

C. Essential Elements

The New Mexico appellate courts decided three cases[202] this year that appear to halt a trend of willingness to reverse for errors in jury instructions, at least where the error does not concern an essential element of the crime upon which a defendant is convicted.[203]

In *State v. Doe,*[204] the supreme court held that the failure to give N.M. U.J.I. Crim. 1.50, the general criminal intent instruction, is not juris-

194. 99 N.M. at 274-75, 657 P.2d at 130-31.
195. 101 N.M. 136, 679 P.2d 804 (1984).
196. 101 N.M. at 137, 679 P.2d at 805.
197. 98 N.M. 682, 652 P.2d 232 (1982).
198. 101 N.M. at 137, 679 P.2d at 805.
199. *Id.* at 143, 679 P.2d at 811.
200. 101 N.M. at 139, 679 P.2d at 807 (citation omitted).
201. *Id.*
202. State v. Doe, 100 N.M. 481, 672 P.2d 654 (1983); State v. Southerland, 100 N.M. 591, 673 P.2d 1324 (Ct. App.), *cert. denied,* 100 N.M. 689, 675 P.2d 241 (1983); *and* State v. Jackson, 100 N.M. 487, 672 P.2d 660 (1983).
203. That trend was established in State v. Curlee, 98 N.M. 576, 651 P.2d 111 (Ct. App.), *cert. denied,* 98 N.M. 576, 651 P.2d 636 (1982), *and* State v. Otto, 98 N.M. 734, 652 P.2d 756 (Ct. App. 1982).
204. 100 N.M. 481, 672 P.2d 654 (1983).

dictional error that may be raised on appeal for the first time.[205] In *Doe*, the defendant was convicted of the delinquent act of second degree murder.[206] At trial, the defendant neither submitted U.J.I. Crim. 1.50, which the use note requires to be given, nor objected to the court's failure to give the instruction. On appeal, *Doe* claimed that general intent is an essential element and that the failure to give the instruction was jurisdictional error.[207] The court of appeals reversed the conviction based on the trial court's failure to give U.J.I. Crim. 1.50 on general criminal intent.[208] The supreme court reversed the court of appeals; it found that failure to give the instruction was not reversible error for two reasons. First, the court disapproved of the court of appeals' treatment of use notes:

> Both Doe and the court of appeals' opinion rely on *State v. Curlee* . . . and *State v. Otto* [citations omitted] for the proposition that failure to follow the Use Note for a Uniform Jury Instructions is jurisdictional error. . . .
>
> The failure to give a definitional jury instruction is not error. . . .
>
> The Court of Appeals in *Curlee* determined that because the Use Note to UJI Crim. 2.11 required that UJI Crim. 1.50 must be given, failure to give UJI Crim. 1.50 in an unaltered form was reversible error. Thereafter, the Court of Appeals in *Otto,* relied on *Curlee,* and held that the failure to give UJI Crim. 1.50 is jurisdictional and reversible error. . . . [Here], the Court of Appeals now goes further and holds that UJI Crim. 1.50 is jurisdictional because the Use Note says that it "must be given."
>
> [T]he jury instructions must be considered as a whole, and if the jury instructions substantially follow the language of the statute or use equivalent language, then they are sufficient. The language in a Use Note, like a definitional jury instruction, cannot elevate a jury instruction to the status of an *essential element*.[209]

Second, the supreme court determined that the 1980 amendment to N.M. Stat. Ann. § 30-2-1 eliminated the requirement of malice for murder[210]

205. *Id.* at 483, 672 P.2d at 656. Jurisdictional error is error so fundamental that the trial court is deprived of jurisdiction to enter a judgment on a matter; it may be raised for the first time on appeal. State v. Southerland, 100 N.M. 591, 673 P.2d 1324 (Ct. App.), *cert. denied,* 100 N.M. 689, 675 P.2d 241 (1983); State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969); State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

206. *See* N.M. Stat. Ann. § 30-2-1(B) (Repl. Pamp. 1984); N.M. Stat. Ann. § 32-1-3(O) (Repl. Pamp. 1981).

207. 100 N.M. at 483, 672 P.2d at 656.

208. *Id.*

209. *Id.* (emphasis in original).

210. 1980 N.M. Laws ch. 21, § 1 changed the definition of murder. 1963 N.M. Laws ch. 303, § 2-1 had defined murder as "the unlawful killing of one human being by another with malice aforethought, either express or implied, by any of the means with which death may be caused." 1980 N.M Laws ch. 21, § 1 amended the definition to read "the killing of one human being by another, without lawful justification or excuse, by any of the means with which death may be caused," and in addition repealed N.M. Stat. Ann. § 30-2-2 (1978), which defined malice.

and thus eliminated the need for a jury instruction on general criminal intent:

> [T]he Legislature . . . has eliminated the requirement that a defendant commit a second degree murder with "general criminal intent." Rather, both first and second degree murder now require the specific intent set forth in the statute. Second degree murder now occurs when "a person * * * kills another human being . . . [knowing] that such acts create a strong probability of death or great bodily harm. . . . There is no requirement for general criminal intent.[211]

This holding in *Doe* effectively overrules the use note to N.M. U.J.I. Crim. 1.50.

State v. Southerland[212] provides a good analysis of jurisdictional error in jury instructions. In *Southerland,* the court of appeals held that the giving of a jury instruction on second degree murder which differed from the uniform jury instruction[213] was not jurisdictional error when the defendant was found guilty of the greater crime of attempted first degree murder.

Southerland held up a convenience store; in the course of the robbery, he discharged a .38 pistol into the clerk's nose from a distance of twelve inches. The clerk survived, and Southerland was charged with armed robbery and attempted first degree murder. He was convicted on both charges. Southerland appealed two jury instructions. He appealed the refusal to give an instruction on aggravated assault as a lesser included offense. He also claimed the jury instruction that was given on the lesser included offense of attempted second degree murder, not objected to below, was jurisdictional error.[214]

The rationale of jurisdictional error is that "a court would lack jurisdiction to adjudicate guilt and sentence a defendant when it does not submit to the jury the essential ingredients of the only offense on which the conviction could rest."[215] The court of appeals reasoned that "it is difficult to see how the court lacked authority to proceed by making a mistake in an instruction on an offense for which [the defendant] was not convicted."[216] Jurisdictional error was previously found only where there was a complete failure to instruct on essential elements.[217] The court of appeals took notice of the recent trend to find jurisdictional error in the failure to give the correct jury instruction as well as the failure to give

211. 100 N.M. at 484, 672 P.2d at 657 (citations omitted).
212. 100 N.M. 591, 673 P.2d 1324 (Ct. App.), *cert. denied* 100 N.M. 689, 675 P.2d 241 (1983).
213. N.M. U.J.I. Crim. 2.10.
214. 100 N.M. at 593-94, 673 P.2d at 1326-27.
215. *Id.* at 594, 673 P.2d at 1327.
216. *Id.*
217. *See* State v. Cardona, 86 N.M. 373, 524 P.2d 989 (Ct. App.), *cert. denied,* 86 N.M. 372, 524 P.2d 988 (1974); State v. Puga, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

any instruction, but also foresaw the supreme court's treatment of the issue in *Doe*. The court, therefore, found as an alternate ground for affirmance that "error in an instruction on a lesser offense is harmless and non-prejudicial where defendant is convicted of the greater offense."[218]

Additionally, the court of appeals noted that the instruction the trial court gave was more favorable to the defendant than N.M. U.J.I. Crim. 2.10, because the trial court defined intent as "an intent to kill or do great bodily harm" rather than "knowledge that one's acts create a strong probability of death or great bodily harm."[219] Finally, the court of appeals found no ground for the defendant's requested instruction on aggravated assault. An instruction on a lesser offense should be given only when there is evidence that the lesser offense is the highest degree of the crime committed.[220] Here, the defendant discharged a large pistol directly into the clerk's face at close range. There was no evidence to indicate that the defendant intended anything less than murder.[221]

The decision in *Southerland* appears to be at odds with the decision in *State v. Jackson*,[222] where the supreme court considered an identical jury instruction and found the language constituted jurisdictional error. In *Jackson*, however, the defendant was convicted of second degree murder, the charge contained in the incorrect instruction. Jackson and the victim had fought in a restaurant, and Jackson fatally stabbed the victim.[223] He was charged with first degree murder, and at trial, the court gave an instruction on the lesser included offense of second degree murder.[224] The jury instruction for second degree murder was the same one given in *Southerland*, misdefining intent.[225] Jackson was found guilty of second degree murder, and he appealed the conviction based on error, *inter alia*, in the instruction on second degree murder.

218. 100 N.M. at 595, 673 P.2d at 1328; *see also* State v. Hamilton, 89 N.M. 746, 557 P.2d 1095 (1976); State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977); State v. Scott, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977). The court of appeals noted that State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982), *overruled on other grounds in* Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982), substantially overrules these cases, but distinguished *Reynolds* on two grounds. *Reynolds* involved a complete failure to instruct on a lesser included offense, not a misinstruction. Additionally, in *Reynolds*, a proper request for a jury instruction was made and refused. Southland made no such request.

219. *Id.* at 595, 673 P.2d at 1328.

220. State v. Martinez, 98 N.M. 17, 644 P.2d 531 (Ct. App. 1982); State v. Romero, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

221. 100 N.M. at 596, 673 P.2d at 1329.

222. 100 N.M. 487, 672 P.2d 660, *rev'g* 99 N.M. 478, 660 P.2d 120 (Ct. App. 1983).

223. *Id.* at 489, 672 P.2d at 662.

224. *Id.*

225. "[A]n intent to kill or do great bodily harm" rather than "knowledge that one's acts create a strong probability of death or great bodily harm." *Southerland*, 100 N.M. at 593, 673 P.2d at 1326.

The supreme court overturned Jackson's conviction and remanded the case for a new trial.[226] The supreme court held that the instruction given on second degree murder constituted fundamental error because the instruction failed to instruct the jury properly on the necessary elements of second degree murder.[227] In dissent, Justice Stowers objected to the manner in which the issue was presented to the court. The only question appealed was whether the trial court's refusal to instruct on voluntary manslaughter was error. The court of appeals raised the issue of the jury instruction in a dissent to the affirmance of the trial court's conviction, followed by the defendant's presentation of the question in his motion for rehearing.[228] The majority defended its consideration of the question, admitting that while normally a party cannot appeal a jury instruction not objected to below,[229] "there are exceptions. It is within the province of this court, in its discretion, to prevent injustice where a fundamental right of the accused has been violated."[230]

Jackson and *State v. Doe* were decided only one day apart. While the court's treatment of the two cases may seem disparate, the explanation may lie in the fact that the error in *Jackson,* even though possibly benefiting the defendant, was in the instruction setting out the elements of the charge upon which Jackson was convicted, while in *Doe,* the error was in an instruction which did not set out essential elements of the offense.

D. Self-Defense

In *State v. Chavez,*[231] the supreme court affirmed the trial court's refusal of the defendant's requested jury instruction on self-defense. In so doing, the court articulated an objective test for evaluating the defendant's uncorroborated claim of self-defense.[232] The court looked to the definition of felony murder as a death committed during the commission of a felony by activity "inherently or foreseeably dangerous to human life."[233] To the court, participation in such activity prevents the defendant from proving "that the killing resulted from fear, and that the defendant acted as

226. State v. Jackson, 100 N.M. 487, 672 P.2d 660, *rev'g* 99 N.M. 478, 660 P.2d 120 (Ct. App. 1983).

227. 100 N.M. at 489-90, 672 P.2d at 662-63.

228. 100 N.M. at 490, 672 P.2d at 663 (Stowers, J., dissenting).

229. *See* State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

230. 100 N.M. at 489, 672 P.2d at 662 (citing State v. Garcia, 46 N.M. 302, 128 P.2d 459 (1942); and State v. Garcia, 19 N.M. 414, 143 P.2d 1012, *reh'g granted,* 19 N.M. 420, 143 P. 1014 (1914)).

231. 99 N.M. 609, 661 P.2d 887 (1983).

232. The court noted that the only evidence to support defendant's claim of self-defense was the defendant's own testimony. While the court did not elaborate, it clearly attached significance to the lack of corroborating evidence. *See id.* 99 N.M. at 611, 661 P.2d at 889.

233. 99 N.M. at 611, 661 P.2d at 889; State v. Harrison, 90 N.M. 439, 442, 564 P.2d 1321, 1324 (1977).

a reasonable person would act under the circumstances."[234] The impression the court leaves is that no self-defense instruction is available to a defendant who caused death while committing a dangerous felony.

E. Defense of Property

In *State v. Trammel,*[235] the supreme court ruled that a jury instruction on defense of property was not available to a defendant who used force to resist the lawful termination of his electric service.[236] The court derived from a 1917 New Mexico Supreme Court case[237] the proposition that an individual may not use force to defend property where the attempt to dispossess is lawful.[238] The court did not articulate the significance of the defendant's intent; there is the possibility that a defendant would believe an attempt to dispossess to be unlawful. The court, therefore, left the ultimate question of intent, or the defendant's knowledge, for future courts to resolve.

F. Mental Illness

The court of appeals considered the use of the recently approved jury instructions regarding the defense of mental illness[239] in *State v. Page*[240] and concluded that N.M. U.J.I. Crim. 41.02,[241] determining mental illness, may be given in the absence of an insanity defense. Page was convicted of burglary[242] arising from a fight in his ex-wife's house. He claimed that back pain led him to take pain pills, and in addition, that he had been drinking and smoking marijuana during that day, all of which rendered him unable to form the requisite specific intent to commit burglary.[243] At trial, the defendant tendered U.J.I. Crim. 41.00 (defense of

234. 99 N.M. at 611, 661 P.2d at 889 (quoting State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980)).

235. 100 N.M. 479, 672 P.2d 652 (1983).

236. Trammel requested a jury instruction on defense of property based on N.M. U.J.I. Crim. 41.50.

237. State v. McCracken, 22 N.M. 588, 166 P. 1174 (1917).

238. 100 N.M. at 481, 672 P.2d at 654.

239. N.M. Stat. Ann. U.J.I. Crim. 41.00 to 41.03.

240. 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984).

241. N.M. U.J.I. Crim. 41.02 states:

> The defendant was mentally ill at the time of the commission of the crime if a substantial disorder of thought, mood, or behavior impaired his judgment at the time of the commission of the offense.
>
> If you find beyond a reasonable doubt that the defendant committed the act charged you may find him guilty but mentally ill at the time of the commission of the offense.

242. *See* N.M. Stat. Ann. § 30-16-3(A) (Repl. Pamp. 1984).

243. Under New Mexico law, burglary is a specific intent crime. State v. Elliott, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), *rev'd on other grounds,* 89 N.M. 305, 551 P.2d 1352 (1976); State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

insanity), U.J.I. Crim. 41.02 (determining mental illness),[244] and U.J.I. Crim. 41.11 (inability to form intent).[245] The court refused U.J.I. Crim. 41.00, defense of insanity, because the notice requirements of N.M. R. Crim. P. 35[246] had not been complied with,[247] but gave instructions on determining mental illness and ability to form intent.[248]

The court of appeals upheld the conviction and the trial court's use of the jury instructions. It noted that the defendant's only objection to the jury instructions below was to the refusal to submit U.J.I. Crim. 41.00. A defendant cannot appeal the use of a jury instruction that he submitted himself or to which he failed to object.[249] The trial court was also correct in giving U.J.I. Crim. 41.02 without allowing the defense of insanity or also giving U.J.I. Crim. 41.00 because this use is specifically approved by the uniform jury instruction committee.[250] Neither does the fact that the statute establishing the defense of "guilty but mentally ill"[251] specifies that the instruction on guilty but mentally ill should be given when a defendant has asserted the defense of insanity preclude its use in other appropriate contexts.[252]

VIII. DEFENSES

In two cases decided during the survey year, the courts considered the defenses of mistake and impossibility. In *State v. Gonzales*,[253] the case involving the defense of mistake, the court of appeals examined the factual context upon which the defense may be used. In *State v. Lopez*,[254] the case involving the defense of impossibility, the supreme court abolished the common law distinction between factual and legal impossibility in attempt crimes; in its place, the court adopted the more modern Model Penal Code approach, requiring the factfinder to determine the element of intent from the defendant's point of view.

244. Since the state did not tender U.J.I. Crim. 41.02, the court assumed that Page did (although the record did not indicate that he had). *See* 100 N.M. at 792, 676 P.2d at 1357.

245. 100 N.M. at 790, 676 P.2d at 1355.

246. "Notice of 'Not Guilty by Reason of Insanity at the Time of Commission of an Offense' must be given at the arraignment or within 20 days thereafter. . . ." N.M. R. Crim. P. 35(a)(1).

247. 100 N.M. at 790, 792, 676 P.2d at 1355, 1357.

248. *Id.*

249. 100 N.M. at 792, 676 P.2d at 1357.

250. "The committee believed that this instruction should also be given if the jury has been presented an instruction on inability to form a deliberate or specific intent to commit an offense." N.M. U.J.I. 41.02, Committee Commentary.

251. N.M. Stat. Ann. § 31-9-3 (Repl. Pamp. 1984).

252. 100 N.M. 791, 676 P.2d at 1356.

253. 99 N.M. 734, 663 P.2d 710 (Ct. App.), *cert. denied*, 99 N.M. 644, 622 P.2d 645, *cert. denied*, 104 S. Ct. 173 (1983).

254. 100 N.M. 291, 669 P.2d 1086 (1983).

A. Mistake

In *State v. Gonzales,*[255] the court of appeals decided to what facts the defense of mistake of fact may apply. Gonzales was the executive director of the Santa Fe Community Action Program ("the Program"). In October 1977, he and his wife attended a conference in Philadelphia. His wife was not a Program employee, but Gonzales paid for his wife's airfare to Philadelphia with Program funds. He was charged with embezzlement for expending state monies on his wife's airplane ticket.[256]

Gonzales raised the defense of mistake of fact, claiming that he believed that the Program actually owed him money. The trial court refused the defendant's jury instruction on mistake of fact. Judge Donnelly noted that mistake of fact applies when a "defendant entertained a belief of fact that, if true, would make his conduct lawful."[257] Gonzales did not claim that he believed that if he was owed the money, then he had lawful authority to use the money for payment of expenses of his wife in accompanying him to Philadelphia.[258] The factual question of whether he was owed money by the Program, therefore, did not affect the legality of using Program funds for the benefit of his wife.

B. Impossibility

In *State v. Lopez,*[259] the supreme court modified the common law doctrine of impossibility. Lopez had received $100 from an informant for a substance that Lopez falsely represented to be cocaine. Lopez was charged with attempt to traffic a controlled substance.[260] The supreme court rejected the common law distinction between factual and legal impossibility and held that a defendant's criminal intent (or lack thereof) controls. The court noted that "[t]he doctrine of impossibility abounds with confusion" because of the difficulty of determining whether a particular situation falls within the category of "legal impossibility" (the act, if completed, would not be criminal) or "factual impossibility" (it is impossible to complete the crime because of a physical or factual condition unknown to the defendant).[261] Adopting the Ninth Circuit's position in *United States v. Quijada,*[262] the court held the test to be one of the defendant's intent, or viewing the facts as the defendant supposes

255. 99 N.M. 734, 663 P.2d 710 (Ct. App.), *cert. denied,* 99 N.M. 644, 622 P.2d 645, *cert. denied,* 104 S. Ct. 173 (1983).
256. *See* N.M. Stat. Ann. § 30-16-8 (Repl. Pamp. 1984).
257. 99 N.M. at 736, 663 P.2d at 712.
258. *Id.* at 736-37, 663 P.2d at 712-13.
259. 100 N.M. 291, 669 P.2d 1086 (1983).
260. *See* N.M. Stat. Ann. § 30-31-20 (Repl. Pamp. 1980).
261. 100 N.M. at 292, 669 P.2d at 1087.
262. 588 F.2d 1253 (9th Cir. 1978).

them to be.[263] Either Lopez intended to sell cocaine and completed sufficient overt acts in furtherance thereof, constituting attempt to traffic in a controlled substance, or Lopez committed fraud by selling a substance he knew was not cocaine, but intended that the informant believe it to be cocaine.[264] The court did not discuss the possibility of fraud, apparently assuming the defendant thought the substance was cocaine. "When the objective is clearly criminal, impossibility is not a proper defense."[265]

263. 100 N.M. at 292-93, 669 P.2d at 1087-88.
264. *Id.* at 292, 669 P.2d at 1087.
265. *Id.* at 293, 669 P.2d at 1088.