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Criminal Procedure

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CRIMINAL PROCEDURE

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I. INTRODUCTION

During the survey year, New Mexico appellate courts issued numerous opinions affecting criminal procedure, though few cases broke new ground. The New Mexico Supreme Court continued an active role, reviewing and reversing the court of appeals on certiorari.[1] At least one survey case, involving disqualification of judges, has significant impact beyond the criminal field.[2]

II. THE FOURTH AMENDMENT

The fourth amendment remains a changing body of law, with a distinctly conservative bias present in the decisions of both the United States and New Mexico Supreme Courts. Absent egregious misconduct by the police, a search conducted pursuant to a search warrant is becoming unassailable.[3] While the major tenets of fourth amendment law as evolved over the past quarter century remain,[4] few new areas of protection are developing, and existing standards are being narrowed and focused.

A. Search Warrants

1. Nighttime Searches

In *State v. Hausler,*[5] the New Mexico Supreme Court considered what the affiant and issuing magistrate must do to authorize a search between the hours of 10:00 p.m. and 6:00 a.m. The supreme court, which reversed the court of appeals on the issue, held that the magistrate must both authorize the nighttime search and have reasonable cause, but the reasonable cause need not appear in the affidavit or warrant. In *Hausler,* the issuing magistrate had specifically stated in the warrant that it could be

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1. Of the 35 cases decided during the survey year discussed in this Article, 10 are supreme court decisions on certiorari to the court of appeals.

2. *See infra* notes 75-85 and accompanying text.

3. *See, e.g., infra* notes 5-14 and accompanying text.

4. The exclusionary rule, which has virtually been eliminated for searches conducted pursuant to a warrant even where probable cause is lacking, is an exception. *See infra* note 13 and accompanying text.

5. 101 N.M. 143, 679 P.2d 811 (1983).

served at any time. The supporting affidavit, however, contained only conclusory language to the effect that the property would be destroyed if not immediately seized. There were no facts in the affidavit to support the conclusion.

The court found the precise wording of Rule 17(b)[6] determinative because it did not specify where the reasonable cause need appear. Thus, the court held that reasonable cause for a nighttime search need not be included in the affidavit. Accordingly, the case was remanded for a determination of whether reasonable cause was presented to the magistrate at the time of issuing the warrant, even though not incorporated into the affidavit.

2. Probable Cause

Only one case actually dealt with the sufficiency of an affidavit, and it applied standards which have subsequently been altered or eliminated by the United States Supreme Court. In *State v. Donaldson,*[7] four pounds of cocaine were found in a house, and eighteen pounds were found in a vehicle. The search warrant for the house was challenged. The court of appeals utilized the two-pronged test of *Aguilar-Spinelli*[8] to substantiate the credibility of confidential informants, a test which has since been rejected by the United States Supreme Court.[9] Applying the standard of review set forth in *State v. Snedeker,*[10] the court determined that the affidavit did set forth sufficient probable cause.

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6. N.M. R. Crim. P. 17(b) (Repl. Pamp. 1980) provides in relevant part:

> A search warrant shall direct that it be served between the hours of 6:00 a.m. and 10:00 p.m., according to local time, unless the issuing judge, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time.

Prior to a 1980 amendment, the rule had provided that a nighttime search was proper only if the sworn written statement was positive that the property was in the place to be searched and there was probable cause to believe it would be moved or destroyed.

7. 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).

8. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). The two-pronged test derived from these cases focuses on (1) specifying the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's information.

9. *See* Illinois v. Gates, 103 S.Ct. 2317 (1983). In *Gates,* the Court adopted a "totality of the circumstances" test in determining the reliability of an unnamed informant. As Massachusetts v. Upton, 104 S.Ct. 2085 (1984), made clear, the two-pronged test derived from *Aguilar* and *Spinelli* has been abandoned in favor of the "totality of the circumstances" test. Because of the provisions of N.M. R. Crim. P. 16, which appear to incorporate the *Aguilar-Spinelli* standard into state law, the *Gates* decision is of questionable vitality in New Mexico practice.

10. 99 N.M. 286, 657 P.2d 613 (1982). *Snedeker* is generally cited for the proposition that great deference ought to be paid to the issuing magistrate's decision. The actual issue decided in *Snedeker* was that a magistrate need not rely solely on the information in an affidavit for a search warrant, but could draw reasonable inferences from that information. Particularly in light of the criticism of the exclusionary rule in *Snedeker, id.* at 289, 657 P.2d at 616, the opinion can be read as a challenge to the viability of the exclusionary rule, an issue recently addressed by the United States Supreme Court. *See infra* text accompanying notes 11-14.

The *Donaldson* decision predates *United States v. Leon,*[11] in which the United States Supreme Court rejected routine review by trial and appellate courts of the determination of probable cause by the issuing magistrate. In *Leon,* a confidential informant of "unproven reliability" gave basic information establishing probable cause. Although an extensive investigation obtained corroborating evidence, the evidence obtained was "as consistent with innocence as with guilt."[12] Motions to suppress were granted upon a determination that the affidavit was insufficient to establish probable cause. The government urged both the trial and appellate courts to adopt an exception to the exclusionary rule because the evidence had been seized in reasonable, good-faith reliance on a search warrant.

In *Leon,* the United States Supreme Court abandoned the rigid application of the exclusionary rule by adopting a "good faith" exception to the rule. When evidence is seized by officers acting in objective reasonable reliance on a search warrant and the search warrant is issued by a detached and neutral magistrate, the evidence may not be suppressed even if the affidavit is later determined to lack probable cause.[13] While New Mexico courts could continue to apply the pre-*Leon* standard under the state constitution and thus hold that exclusion of evidence is the proper remedy, the courts have rarely applied a higher state constitutional standard than that required under the parallel federal constitutional provision.[14] The next survey year should see New Mexico decide on the course to be followed.

3. Seizure Prior to Search

In *State v. Burdex,*[15] the court of appeals held that securing a dwelling prior to the issuance of a search warrant did not invalidate the search. Police went to the defendant's residence without a warrant and were refused consent to search by the defendant's wife. The police allowed the defendant's wife to change clothes, escorting her into the dwelling for that purpose, and then instructed her to leave. She was not allowed

11. 104 S. Ct. 3405 (1984).

12. *Id.* at 3438 (Brennan, J., dissenting).

13. The Court did identify situations in which exclusion would remain the appropriate remedy, including use of false information, use of information obtained in reckless disregard of the truth, situations where the issuing magistrate wholly abandons a judicial role, and reliance on an affidavit without particularized facts or even colorable probable cause. 104 S. Ct. at 3421-22. While the new rule was characterized as a good-faith "exception" for searches conducted pursuant to warrant, the exception appears to leave little room for the exclusionary rule.

14. N.M. Const. art. II, § 10 is at least coextensive with the fourth amendment; it provides:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

While New Mexico courts frequently cite to both relevant state and federal constitutional provisions, there is a dearth of cases applying a higher state standard.

15. 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

back into the dwelling until after an authorized search took place the next day. The defendant argued that the initial intrusion by the police was constitutionally invalid, and therefore that any evidence subsequently obtained should be suppressed.

Generally, the burden is on the state to sustain a warrantless search.[16] In *Burdex,* however, there was no evidence that the police conducted a search when they secured the residence or that the warrant was predicated upon observations made while securing the residence. The absence of evidence establishing a warrantless search led the court to find no fourth amendment violations, and hence no evidence to suppress.[17]

4. Aerial Surveillance

The problems engendered by aerial surveillance were considered in two cases, *State v. Bigler*[18] and *State v. Rogers.*[19] Both involved initial aerial surveillance, followed by a search. In *Bigler,* a police officer acting on a tip flew over the defendant's property and observed what he thought was marijuana growing among rows of corn. He then made the same observation on the ground from a county road and additionally smelled the odor of green marijuana. A warrant was obtained, and the search

16. *See, e.g.,* State v. Gonzales, 97 N.M. 182, 637 P.2d 1237 (Ct. App.), *cert. denied,* 97 N.M. 242, 638 P.2d 1087 (1981). In *Gonzales,* there was a warrantless search of a suitcase in the trunk of a vehicle parked by a nightclub near the Mexican border. The search was ultimately upheld under the "border search exception" to the fourth amendment, which was developed in United States v. Ramsey, 431 U.S. 606 (1977).

17. 100 N.M. at 203, 668 P.2d at 319. In Segura v. United States, 104 S. Ct. 3380 (1984), a case decided last term, the United States Supreme Court was presented with a similar issue. One defendant was arrested upon entering an apartment building. He was forcibly escorted to his apartment, which agents then entered and secured, arresting the other person residing there. Both lower courts had held the initial entry to be illegal, but that issue was not reviewed by the Supreme Court. No search occurred until the next day when a warrant was obtained.

The *Segura* decision distinguished a search from a seizure. While searches implicate privacy rights, seizures implicate possessory interests, requiring a lesser standard of protection. *Segura* involved a seizure. The Supreme Court thus held that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Id.* at 3389.

The Supreme Court applied a "but for" test in determining whether the evidence was the product of the illegal entry. The agents had obtained the warrant based upon facts known to them independent of the seizure. Since the illegal entry did not contribute to the discovery of the evidence obtained pursuant to the warrant, the test was not met. Therefore, exclusion of the evidence was not required because it was not "fruit of the poisonous tree." *See* United States v. Crews, 445 U.S. 463 (1980). The Court rejected an expansion of the "but for" test premised upon the discovery being possible because of the inability, by virtue of the seizure, of defendants or their friends to remove or to destroy the evidence. To at least five of the justices, that argument defied "both logic and common sense." 104 S. Ct. at 3392.

The New Mexico Court of Appeals decision in *Burdex,* while not as extensive an analysis, reached the same conclusion as *Segura.* Unlike *Segura,* however, there was no apparent determination of the legality of the initial entry.

18. 100 N.M. 515, 673 P.2d 140 (1983).

19. 100 N.M. 517, 673 P.2d 142 (1983).

yielded 5,680 pounds of marijuana plants. In *Rogers,* officers flew over the defendant's property in a helicopter, observing marijuana protruding from holes in the roof of a greenhouse. The initial observation was confirmed with the use of field glasses. Based upon these observations, a warrant was obtained.

The fourth amendment issues were framed in terms of the defendants' justifiable expectations of privacy and the appropriateness of the surveillance techniques. Both defendants resided in areas where air traffic was not uncommon. Based largely on that fact, the court concluded that neither defendant had a reasonable expectation of privacy, at least to the extent of visibility from the air.[20] On the issue of appropriateness of the surveillance techniques, the court had trouble with the facts in *Rogers* because the surveillance necessarily included a building within the defendant's curtilage. The court analyzed the nature of the overflight, including altitude, the reason for the overflight, and length and extent of the intrusion. In light of the fact that the officers were acting on a tip and had minimized the intrusion, however, the court concluded that the surveillance methods were not unreasonable.

B. Warrantless Searches

1. Plain View

In *State v. Krout,*[21] the New Mexico Supreme Court determined that an officer attempting to execute an arrest warrant can look anywhere that might reasonably produce the subject of the warrant. A police officer learned from two different sources where the subject of an arrest warrant was living. He went to the location and knocked on the door of the residence, but received no answer. The officer walked around the building and looked in a window, observing what appeared to be marijuana plants. The officer then went to a second building, a greenhouse. He found two doors to the greenhouse: one was padlocked from the outside, the other was wired shut. After knocking and receiving no response, he looked through a crack next to a door and observed several rows of plants which appeared to be marijuana.

Armed with this information, the officer obtained a search warrant and seized the marijuana. The owners of the property were charged with

20. In Oliver v. United States, 104 S. Ct. 1735 (1984), the Supreme Court held that there is no legitimate expectation of privacy in an open field, and thus no fourth amendment rights are implicated when officers, without a warrant, observe an open field. This is true even if "No Trespassing" signs are present. In *Bigler,* applying the open fields doctrine, even though the defendant had surrounded his field with six rows of corn, the defendant clearly had no legitimate expectation of privacy. The *Oliver* decision casts doubt on the validity of another New Mexico case, State v. Chort, 91 N.M. 584, 577 P.2d 892 (Ct. App. 1978), which held that a police officer riding a horse onto defendant's property so that he could look into a fenced area amounted to an unreasonable government intrusion.

21. 100 N.M. 661, 674 P.2d 1121 (1984).

marijuana-related offenses and moved to suppress the evidence.[22] The trial court suppressed the evidence after finding that the officer "did not have lawful authority sufficient to allow his view through the cracks of the greenhouse door."[23] The court of appeals affirmed, holding that because the officer had no reason to believe that the subject of the arrest warrant would be located other than at the residence, the officer was without authority to search.[24]

On certiorari, the New Mexico Supreme Court reversed, concluding that since the officer had reason to believe the subject was living on the premises, a large rural piece of property, the officer "had the right to enter the premises or any part that might *reasonably* produce the subject of the warrant."[25] Because the officer was lawfully on the premises,[26] his observation of the marijuana in plain view was proper.[27]

2. Joint Endeavor with a Private Investigator

In *State v. Cox*,[28] the defendant was charged with the arson of his own home to collect insurance. The trial court suppressed certain evidence

22. The subject of the initial arrest warrant was evidently not charged with the marijuana-related offenses.

23. 100 N.M. at 662, 674 P.2d at 1122.

24. *Id.*

25. *Id.* at 663, 674 P.2d at 1123 (emphasis in original). The court of appeals applied a subjective test, making the belief of the officer as to whether the subject was in the greenhouse or otherwise on the premises the determining factor. The supreme court applied an objective test, focusing on whether the search might reasonably produce the subject of the warrant.

26. It is not clear whether the premises were specified in the arrest warrant as the residence of the subject. From the New Mexico Supreme Court opinion, it appears that the officer learned of the possible residence after the warrant issued. Both that opinion and the unpublished court of appeals opinion cited Payton v. New York, 445 U.S. 573 (1980), for the proposition that an arrest warrant is sufficient authority to enter a dwelling in which the suspect lives if there is reason to believe the subject is there.

The court of appeals also mentioned Steagald v. United States, 451 U.S. 204 (1981), but did not develop the analysis. *Steagald* involved the search of a third person's residence by officers holding a valid arrest warrant for a subject and having reason to believe that the subject of the warrant was at the third person's residence. The United States Supreme Court held that a search warrant was required to search for a person named in an arrest warrant on the premises of a third person. In *Krout*, at best it appears that the officer only thought that the subject of the arrest warrant was living on the premises, and it is clear that third persons, the owners, were believed to reside there. The status of the subject as visitor, guest, or resident, was never established. Even if the subject was a guest, the entry would not have violated the subject's fourth amendment privacy rights. *See, e.g.*, United States v. Underwood, 717 F.2d 482 (9th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 1309 (1984).

If the subject of the arrest warrant was not a resident, or the premises were not specified in the arrest warrant, it is hard to see how the privacy rights of the owners were not violated under a *Steagald* analysis. The issue in *Steagald* was "whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their houses are searched without their consent and in the absence of exigent circumstances." 451 U.S. at 212. This issue was never reached in *Krout* and may not have been squarely before the court.

27. *See, e.g.*, Harris v. United States, 390 U.S. 234 (1968).

28. 100 N.M. 667, 674 P.2d 1127 (1983).

upon the motion of the defendant, and the state appealed. At issue was whether the evidence seized was taken as a result of government action or private action.

The fire was extinguished in the early morning hours of December 14, 1982. A cursory search and seizure of samples was conducted around noon that day by a police officer and fire fighters. The next day, a police officer put up a "Do Not Enter" sign on the house. On December 18, a private investigator, a police officer, and the fire chief went to the scene. They examined and seized a five-gallon can and samples of wood products. No warrant, either administrative or based upon probable cause, was ever obtained.

Following a United States Supreme Court decision,[29] the court of appeals concluded that a warrant was required if there was government action. The court held that government action is implicated when a law enforcement officer participates in a joint endeavor with a private investigator as part of an ongoing criminal investigation. Since the fire chief had cut the samples of wood, and the police officer had taken custody of them, it was clear government action was involved. Accordingly, the court affirmed the trial court's suppression of the evidence.

III. THE FIFTH AMENDMENT

The fifth amendment remains a relatively static body of law. *Miranda* and its progeny remain unchanged.[30] Only in the area of immunity is there any discernible evolution in the law.[31] That movement is, in large part, a result of creative application of grants of use and derivative use immunity by prosecutors.

A. Miranda Warnings

1. Custodial Interrogation

In *State v. Swise*,[32] the New Mexico Supreme Court considered whether *Miranda* warnings are required if a defendant is not in custody or deprived of freedom in some significant way. Police officers, investigating a death, had received information that the decedent had been seen several days prior to his death handcuffed and restrained by the defendant. They went to the defendant's place of business, advised him that they were police

29. Michigan v. Tyler, 436 U.S. 499 (1978). In *Tyler*, the Court held that entry to fight a fire requires no warrant and that, upon entry, officers may remain for a reasonable time to investigate the cause of the fire. If evidence of criminal conduct is discovered during the course of the administrative investigation, a warrant must be obtained. The decision was reaffirmed in Michigan v. Clifford, 104 S. Ct. 641 (1984).

30. Neither of the cases discussed in this Article involving *Miranda* rights represents an analytic departure from the original precepts behind the *Miranda* decision.

31. *See infra* text accompanying notes 39-56.

32. 100 N.M. 256, 669 P.2d 732 (1983).

officers, and that they were investigating a possible homicide. They spoke with defendant for no more than ten minutes. During this interview, the defendant was not placed under arrest or held in any type of restraint. Two subsequent statements were given, but played no part in the appeal.

The trial court suppressed the statements. It determined that the interview constituted a police interrogation because the investigation focused on the defendant, and as an objective matter, the defendant was not free to leave the premises. The court of appeals upheld the trial court's ruling, and the supreme court reversed.

The supreme court began its analysis by determining the factors which trigger the giving of *Miranda* warnings. It noted two views: the minority view requiring *Miranda* warnings when an investigation focuses on the individual as a suspect; and the majority view requiring *Miranda* warnings when the defendant is in custody or deprived of his freedom in some significant way.[33] The court adopted the majority view, and in an unusual occurrence, concluded that the trial court's factual findings were not supported by the evidence.[34] There was no evidence that the defendant was placed under any restraint during the questioning. Thus, the coercive atmosphere that *Miranda* protects against was simply not present. The order suppressing the statement, therefore, was reversed.

2. Waiver of the Right to Counsel

In *State v. Boeglin*[35] the court of appeals considered the standards necessary to establish a valid waiver of the right to counsel subsequent to invocation of the right to counsel. Phillip Boeglin was arrested for homicide following the discovery of a body on the morning of February 12, 1982. He received *Miranda* warnings, denied any knowledge of the homicide, and then requested an attorney. After his request, an officer remained with him in the interview room. The defendant and the officer engaged in "casual" conversation, though the homicide was apparently discussed and the officer asked the defendant to discuss the homicide. Some fifteen minutes after the invocation of his right to counsel, the interview started again; this interview was tape recorded.

33. In United States v. Oliver, 505 F.2d 301 (7th Cir. 1974), it was held that, in the context of an Internal Revenue Service investigation, "custody" existed when the investigation focused on the taxpayer, even in the absence of any actual restraints. *Oliver* was overruled in United States v. Fitzgerald, 545 F.2d 578 (7th Cir. 1976), and the approach was generally rejected in Beckwith v. United States, 425 U.S. 341 (1976).

34. As a general rule, an appellate court can only determine whether the evidence substantially supports the factual findings. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975). It is rare to find a case where the record does not support the findings of a trial court.

35. 100 N.M. 127, 666 P.2d 1274 (Ct. App.), *rev'd on other grounds*, 100 N.M. 740, 672 P.2d 643 (1983). During the survey year, Mr. Boeglin had several separate appeals giving rise to opinions by appellate courts. This case involves an interlocutory appeal from murder and related charges; his other appeals arose in the context of contempt convictions resulting from his refusal to testify against co-defendants. *See infra* notes 39-50 and accompanying text.

The defendant was specifically asked whether he would now talk to the police without an attorney. Upon receiving an affirmative response, the police questioned the defendant and obtained a statement from him explaining his whereabouts and denying any involvement in the homicide. The defendant was then booked into jail. During the booking process, the defendant was allowed to telephone a private attorney. The defendant spoke to a secretary in the attorney's office; a short time later he received a message, relayed by a jailer, that the attorney would represent the defendant for $10,000 "up front cash." The defendant indicated he could not afford that kind of money.

About an hour after learning that the private attorney wanted $10,000, the defendant asked a jailer to let him talk to the district attorney. The defendant was then taken to the district attorney's office, where he spoke with an investigator who had questioned him earlier. He was once again given his *Miranda* warnings, but indicated that he wanted to talk. He then gave a statement implicating himself in the homicide. He subsequently led officers to the location where the murder weapon and other evidence had been concealed. Later that evening, a fourth statement was obtained.

The trial court denied motions to suppress both the statements and the evidence. The court of appeals characterized the issue as whether the defendant, after invoking his right to counsel, had (1) knowingly, voluntarily and intelligently elected to waive his right, and (2) initiated the communications subsequent to the invocation of his right to counsel. The court held that both standards must be met to establish a valid confession subsequent to invocation of the right to counsel.[36]

The court of appeals concluded that the trial court had failed to make express findings on the issues of waiver by the defendant and of initiation of communications following the defendant's invocation of his right to counsel. According to the appellate court, the trial court's findings were conclusory and were, in part, contradictory.[37] The court of appeals emphasized that the burden was on the state and that there was a presumption against the waiver of a constitutional right.[38] Accordingly, the case was remanded for further findings by the trial court.

36. *Id.* at 132, 666 P.2d at 1279. The court relied on Edwards v. Arizona, 451 U.S. 477 (1981). *Edwards* held that, once an accused invokes his right to counsel, interrogation absent counsel is impermissible "unless the accused himself initiates further communication, exchanges or conversations with the police." *Id.* at 485. *Edwards* explicitly prohibits attempts by police to reinterrogate an accused who is in custody once he has asserted his right to counsel. *Id.* at 484-85.

37. 100 N.M. at 133, 666 P.2d at 1280. The trial court had found that "no evidence to be utilized in the case was taken." *Id.* at 130, 666 P.2d at 1277. In point of fact, a firearm and other evidence was recovered as a direct result of the defendant's statements. Further, the defendant actually led officers to the items.

38. *See* State v. Green, 92 N.M. 347, 588 P.2d 548 (1978); State v. Briggs, 81 N.M. 581, 469 P.2d 730 (Ct. App. 1970).

B. Immunity

Four separate opinions dealt with compelled testimony pursuant to a grant of immunity.[39] In two cases, *State v. Chavez*[40] and *State v. Boeglin*,[41] the court of appeals abandoned its previous decision in *State v. Urioste*[42] in favor of the United States Supreme Court decision in *Murphy v. Waterfront Commission*.[43] Both cases involved defendants held in contempt for failure to testify after being granted use immunity. The defendants had refused to testify on the grounds that they could face federal prosecution. In *State v. Urioste*, the court of appeals had reversed a contempt citation on the grounds that the witness had a valid fifth amendment privilege because of the possibility of federal prosecution.[44] In *Chavez* and *Boeglin*, the court of appeals quoted *Murphy*, holding that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law."[45] A witness given use immunity is protected from any use of his testimony, including use by another sovereign. Therefore, fear of federal prosecution resulting from

39. The most common grant of immunity is "use and derivative use" immunity, under which the government is precluded from using the testimony of the witness or any evidence derived, directly or indirectly, from that testimony, against the witness. *See* N.M. Stat. Ann. § 31-6-15 (Repl. Pamp. 1984); N.M. R. Crim. P. 58; N.M. R. Evid. 412. Use and derivative use immunity do not, however, preclude prosecution of the witness with the use of independently obtained evidence. Transactional immunity, which precludes prosecution of the witness for the conduct about which he testifies, is limited to obscure statutory provisions for rarely prosecuted offenses. All of the cases in this section involve use and derivative use immunity.

40. 100 N.M. 612, 673 P.2d 1345 (Ct. App. 1983).

41. 101 N.M. 567, 686 P.2d 257 (Ct. App. 1984).

42. 95 N.M. 712, 625 P.2d 1229 (Ct. App. 1980).

43. 378 U.S. 52 (1964).

44. 95 N.M. at 715-16, 625 P.2d at 1232-33. The *Urioste* decision was evidently premised on the notion that a federal court is not required to apply state rules of privilege. That may be true, but is irrelevant because fifth amendment rights, rather than rules of privilege, were involved.

45. *Chavez*, 100 N.M. at 615, 673 P.2d at 1348; *Boeglin*, 101 N.M. at 568, 686 P.2d at 258; *see Murphy*, 378 U.S. at 77-78. The contempt conviction in *Chavez* was reversed on other grounds. *See infra* text accompanying notes 119-123. In *Boeglin*, the court affirmed its decision applying *Murphy*, but reversed the conviction, holding that because the defendant had relied upon *Urioste*, he should be allowed an opportunity to answer the questions. *Murphy* applied the same fairness consideration, allowing the contemnors the opportunity to answer. *Murphy*, however, arose in the context of an inquiry into organized crime by a commission, which presumably still wanted the answers. Boeglin refused to answer questions in the course of a murder trial which presumably concluded without his testimony. Though fairness may dictate reversing the conviction, it was not apparent that any tribunal still wanted his testimony.

Boeglin had also argued that the state should be compelled to seal its file because it could not use evidence obtained directly or indirectly from the compelled testimony. *See supra* note 39; Kastigar v. United States, 406 U.S. 441 (1972). Thus, sealing the file would preserve the status of the state's knowledge at the time Boeglin's compelled testimony was given. While the court of appeals agreed that the burden of proof is on the government to prove that its evidence was derived from sources wholly independent of the compelled testimony, it declined to require sealing of the file. Sealing of a file or certifying evidence prior to the grant of immunity, however, makes the prosecutor's burden of proof that the evidence was independently obtained substantially easier. *See, e.g.*, Goldberg v. United States, 472 F.2d 513 (2nd Cir. 1973).

compelled statements made in a state court proceeding is not grounds for refusal to testify.

The next issue was whether a use immunity order immunized the defendant only for "truthful statements." In yet another *State v. Boeglin*[46] decision, the trial court had held the defendant in contempt following his refusal to testify after being given a grant of use immunity. The court of appeals reversed the conviction, holding that the immunity order was improper because it limited immunity to truthful statements. On certiorari, the New Mexico Supreme Court held that the limitation was proper. In reaching its decision, the supreme court reviewed both the obligations of a witness and the purpose of use immunity. Under Evidence Rule 603[47] a witness is required to take an oath or affirmation declaring he will "testify truthfully." That obligation applies to all witnesses, including those whose testimony is compelled.

The supreme court reasoned that a grant of use immunity must be conditioned on the witness testifying truthfully. The terms of both the immunity statute[48] and applicable evidence rule[49] permit prosecution for perjury committed while testifying pursuant to a grant of immunity. Because prosecution for perjury is permissible, it follows that a witness is entitled to immunity only for truthful testimony. Finally, the court noted that use immunity is coextensive with the fifth amendment privilege and that the privilege is intended to prevent a person from being compelled to tell the truth, not to permit the witness to lie.[50]

In the final "immunity" case, *State v. Cheadle*,[51] the supreme court concurred with an earlier court of appeals decision holding that a defendant has no authority to demand immunity for a witness. Cheadle was on trial for murder and related offenses. After resting his case, he moved to re-open because a defense witness had been located. The trial court

46. 100 N.M. 470, 672 P.2d 643 (1983). Upon affirmance of the conviction by the supreme court, the case was remanded to the court of appeals for disposition of the remaining issues. That court reversed. *See supra* text accompanying notes 41-45 (discussing *Boeglin*).

47. N.M. R. Evid. 603 provides: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

48. N.M. Stat. Ann. § 31-6-15 (Repl. Pamp. 1984).

49. N.M. R. Evid. 412 provides:

> Evidence compelled under an order requiring testimony or the production of a record, document or other object notwithstanding a privilege against self incrimination, or any information directly or indirectly derived from such evidence, may not be used against the person compelled to testify or produce in any criminal case, except a prosecution for perjury committed in the course of the testimony or in a contempt proceeding for failing to comply with the order.

50. In Kastigar v. United States, 406 U.S. 441 (1972), it was recognized that use and derivative use immunity is coextensive with the protection afforded by the fifth amendment. It has been held that false testimony, even if compelled by an immunity order, is not protected by the fifth amendment. *See* United States v. Tramunti, 500 F.2d 1334 (2nd Cir.), *cert. denied*, 419 U.S. 1079 (1974).

51. 101 N.M. 282, 681 P.2d 708 (1983).

concurred, but the witness, out of the presence of the jury, invoked his fifth amendment privilege and refused to answer any questions. The defense requested that the trial court, on its own initiative, grant the witness immunity and compel his testimony. The trial court refused.

The supreme court noted that neither the immunity statute nor the rule contemplates a grant of immunity for defense witnesses.[52] The rule itself is predicated upon a written application of the prosecuting attorney. Cheadle made an oral request, and thus did not comply with any portion of the rule. In any event, the court declined to extend immunity to defense witnesses.[53]

The defense had urged that under certain circumstances due process may require that the government afford immunity for a defense witness.[54] The supreme court rejected that approach and held that there is no authority to demand immunity for a witness by the defense. In so doing, the supreme court affirmed the earlier decision of the court of appeals in *State v. Sanchez*,[55] where the court of appeals concluded that a defendant cannot compel immunization of a witness.[56]

C. Double Jeopardy

In a triad of appeals raising the same issue, the New Mexico Supreme Court decided that the jurisdictional exception to the double jeopardy

52. *Id.* at 286, 681 P.2d at 712.

53. In its discussion of use immunity, the court either confused use immunity with transactional immunity, or else subtly eliminated use immunity. The court stated that the N.M. R. Crim. P. 58 immunity order "must also contain a specific condition that New Mexico will forego the prosecution of the person for criminal conduct about which he is questioned and testifies." 101 N.M. at 286, 681 P.2d at 712. That is, of course, the definition of transactional immunity. *See supra* note 39. A 1980 amendment to Rule 58 makes the rule applicable only to use and derivative use immunity, not to transactional immunity. The court cited Campos v. State, 91 N.M. 745, 580 P.2d 966 (1978), in support of its characterization of the contents of the order, but *Campos* was clearly a transactional immunity case; it did not involve use and derivative use immunity. It may well be that, because the court was discussing immunity generally, concepts inherent in the two different types of immunity were unintentionally intertwined.

54. The leading case in this context is Government of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980). This case suggests that a form of judicial immunity should be required if four circumstances are present: (1) a proper application; (2) the defense witness is available; (3) the testimony is clearly exculpatory and essential to the defendant's case; and (4) there is no strong government interest which countervails against a grant of immunity. While *Virgin Islands* has been widely commented upon, it has not been widely followed. *See* Comment, *Defense Witness Immunity and the Right to a Fair Trial*, 129 U. Pa. L. Rev. 377 (1980).

55. 98 N.M. 428, 649 P.2d 496 (Ct. App.), *cert. denied*, 98 N.M. 478, 649 P.2d 1391 (1982).

56. *Id.* Most other jurisdictions and federal courts have concluded that a defendant cannot compel immunization of a witness. *See* Annot., 4 A.L.R.4th 617 (1981). *But see* United States v. Lord, 711 F.2d 887 (9th Cir. 1983); People v. Owens, 97 A.D.2d 855, 469 N.Y.S.2d 249 (App. Div. 1984). The primary problem with a defendant compelling immunization is practical; it effectively precludes prosecution of the witness. The prosecutor has the burden of proving evidence against an immunized witness was independently obtained. *See supra* note 45. Meeting the burden can be difficult. Clever use of immunized witnesses by a defendant in a severed trial involving multiple defendants could preclude prosecution of all but the first defendant.

provision of the fifth amendment is still valid.[57] The jurisdictional exception provides that if a court, such as a magistrate court, does not have jurisdiction to try the entire case, jeopardy does not attach.[58] Under New Mexico law, a magistrate court does not have jurisdiction to try a felony.[59] Thus, the jurisdictional exception allows prosecution for felony offenses even though misdemeanors arising out of the same occurrence have resulted in convictions in inferior courts.[60]

In *State v. Manzanares*,[61] the defendant pled guilty in magistrate court to numerous traffic offenses, including reckless driving and driving while under the influence of an intoxicating liquor. He then raised a double jeopardy defense to his indictment for vehicular homicide in district court. On interlocutory appeal, the court of appeals reversed the denial of the motion to dismiss on double jeopardy grounds; that decision, in turn, was reversed by the New Mexico Supreme Court.

The court of appeals had reversed the denial on the premise that the jurisdictional exception had been abandoned by the United States Supreme Court.[62] The New Mexico Supreme Court rejected that argument, but it did allude to alternatives to the jurisdictional exception.[63] The court was clearly motivated by the "abuse which could result when a defendant pleads guilty to lesser offenses in a court without jurisdiction to hear a felony charge" if the jurisdictional exception were eliminated.[64] While

57. State v. Padilla, 101 N.M. 58, 678 P.2d 686 (1984), *cert. granted sub nom.* Fugate v. New Mexico, 105 S. Ct. 81 (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).

58. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

59. State v. Mann, 94 N.M. 276, 609 P.2d 723 (1980).

60. Presumably, collateral estoppel would preclude prosecution of felony charges after prosecution of included misdemeanors results in an acquittal in a lower court. *Cf.* Ashe v. Swenson, 397 U.S. 436 (1970); State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

61. 100 N.M. 621, 674 P.2d 511 (1983).

62. The court of appeals relied heavily on the argument that because the jurisdictional exception had not been applied by the United States Supreme Court since Diaz v. United States, 223 U.S. 442 (1912), it was no longer good law.

63. Indeed, in a case decided after *Manzanares*, the United States Supreme Court was presented with a similar issue. In Thigpen v. Roberts, 104 S. Ct. 2916 (1984), the defendant had been convicted of reckless driving, driving while intoxicated, and related offenses. He appealed and received a trial de novo, in a procedure similar to New Mexico's. The state then charged him with manslaughter, and he was duly convicted. The Court disposed of the case on the premise that the felony charge subsequent to the appeal established a presumption of unconstitutional prosecutorial vindictiveness under Blackledge v. Perry, 417 U.S. 21 (1974). The dissents in *Thigpen* addressed the double jeopardy issues, with Justice O'Connor advancing the argument that jeopardy should not attach in the first stage of a two-tier system providing for trial de novo on appeal. 104 S. Ct. at 2923 (O'Connor, J., dissenting).

64. 100 N.M. at 624, 674 P.2d at 514. This is a significant practical problem in a judicial scheme which provides for concurrent jurisdiction over some offenses by different courts. District courts, for example, as courts of general jurisdiction, have jurisdiction over misdemeanor offenses as well as felonies. The practical problems are further exacerbated by municipal courts, which allow prosecutions by the municipality rather than the state. The *Manzanares* opinion mentions a "modicum

the jurisdictional exception remains the law in New Mexico, it may be susceptible to challenge in the federal system.

IV. THE SIXTH AMENDMENT

A. *Effective Assistance of Counsel*

Two survey cases raised novel theories of ineffective assistance of counsel. In the first, *State v. White*,[65] the defendant argued that he was afflicted with ineffective assistance of counsel because his trial attorney was not admitted to practice in New Mexico. The defendant had retained an El Paso attorney, licensed in Texas but not New Mexico, to represent him on drug-related offenses. The Texas attorney associated with New Mexico counsel, who neither participated in the proceedings nor was excused from doing so.[66] No claim was directed to any specific conduct of the trial attorney. The argument was that representation by an attorney who was not licensed in New Mexico was ineffective *per se*.

The court of appeals examined two lines of cases involving unlicensed attorneys. The first determined that there is ineffective assistance when the purported attorney is not a lawyer or where the failure to obtain licensure is related to inability to pass a bar examination, want of moral character, or similar disabilities.[67] The second looked at the nature of the failure to obtain licensure and, by applying a due process analysis, determined whether the disability warranted relief.[68]

In concluding that there had been no violation of the defendant's sixth amendment right to effective assistance of counsel, the court of appeals declined to apply a *per se* ineffective assistance of counsel rule. Instead, it paid close attention to the facts of the case. The attorney in question was licensed in Texas and other states, had extensive trial experience, had retained local counsel, and had apparently committed no errors, tactical or otherwise. The court refused to find ineffective assistance of counsel in the absence of any showing of prejudice.

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of cooperation between prosecutors" as one possible solution. *Id.* While lack of cooperation may be a problem, a more common problem is the absence of any prosecutor in misdemeanor cases, particularly where the defendant is not represented by counsel. Often the defendant is the only player who knows what is happening, and it is not necessarily in his or her best interest to share the knowledge.

65. 101 N.M. 310, 681 P.2d 736 (Ct. App. 1984). *In re* Palafox, 100 N.M. 563, 673 P.2d 1296 (1983), is a companion case.

66. N.M. R. Crim. P. 53.1 provides that nonadmitted counsel must associate with admitted counsel and that admitted counsel, "unless excused by the court, must be present in person in all proceedings before the court." There was a violation of Rule 53.1, for which both counsel were held in contempt in the companion case, *In re* Palafox, 100 N.M. 563, 673 P.2d 1296 (1983).

67. *See* Solina v. United States, 709 F.2d 160 (2d Cir. 1983); People v. Felder, 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979). In *Solina*, the court specifically held that the sixth amendment required "licensed" counsel, but that technical defects in licensed status would not necessarily be a sixth amendment violation.

68. *See* Wilson v. People, 652 P.2d 595 (Colo. 1982).

In *State v. Hernandez*,[69] the New Mexico Supreme Court explored the limits of conflicts of interest. The defendant was represented by an attorney who, the day of trial, became a partner with the attorney who had represented a co-defendant in the same case. The co-defendant had pled and promised to testify against Hernandez. The trial court refused to allow the attorney to withdraw the morning of trial, and the court of appeals reversed on the grounds that a possible conflict existed and that it was not necessary to show actual prejudice.

On certiorari, the supreme court held that there must be an actual conflict of interest. In other words, counsel, or the firm with which counsel is associated, must actively represent conflicting interests.[70] The law partnership did not exist when the co-defendant entered into a plea agreement. Further, Hernandez was not represented by his trial attorney at the time the co-defendant pled. The court held that the conflict was too slight to permit a finding of active representation of conflicting interests.

B. Confrontation of Witnesses

In *State v. Worley*,[71] a prosecution witness refused to testify under a grant of immunity and was held in contempt.[72] On appeal, the defendant argued two issues: first, that he had been prejudiced by the inferences flowing from the failure of the witness to testify; and second, that he had been denied his right to confront witnesses.

During the defendant's trial, the prosecution called the same recalcitrant witness, a co-defendant, as a rebuttal witness and questioned him about inculpatory testimony he gave at his earlier trial. The prosecutor asked if the witness had made a particular answer to a question, reading the answer to the witness, but the witness refused to acknowledge making the statement. Given the strength of the state's case and the relative unimportance of the evidence elicited by reading statements from a prior trial, the court did not find prejudice.[73] The supreme court held that the

69. 100 N.M. 501, 672 P.2d 1132 (1983).

70. In State v. Robinson, 99 N.M. 674, 662 P.2d 1341 (1983) the court discussed the potential for a conflict of interest when two attorneys, who are associated, represent respectively a defendant and a co-defendant turned prosecution witness. Because the defendant in *Robinson* was not represented at the time the co-defendant entered into negotiations with the state, the court declined to find an actual conflict of interest and did not find actual prejudice.

71. 100 N.M. 720, 676 P.2d 247 (1984).

72. The recalcitrant witness was Carl Case, who had been earlier convicted of murder in the same case. His contempt for failure to testify is discussed *infra* notes 127-38 and accompanying text.

73. The court also noted that the statements used by the prosecutor derived from the testimony of the witness in open court in the witness' own trial, and thus "carried more of an indicia of reliability." 100 N.M. at 726, 676 P.2d at 253. While reliability may be a rationale for the right of confrontation, the right nonetheless is independently significant. It is not clear what importance is to be attached to the reliability of the challenged testimony.

admonitions and instructions given by the trial court were sufficient to cure any error caused by knowledge of the co-defendant's guilt.

On the confrontation issue, the court held that even if the limited testimony given by the witness was untested by cross-examination, it did not rise to the level of reversible error. Applying the standard devised in *Namet v. United States,*[74] the court determined that the failure of the witness to respond to defense questions did not, even inferentially, add new evidence. All that could be drawn from the witness's refusal to testify was cumulative of other evidence, and thus the failure of the witness to testify did not add "critical weight" to the evidence.

V. RIGHT TO DISQUALIFICATION OF A JUDGE

In a case with implications far beyond the criminal field, the New Mexico Supreme Court virtually eliminated the "right" to disqualify a district court judge. *State ex rel. Gesswein v. Galvan*[75] started when an assistant district attorney filed a "notice of peremptory disqualification" of Judge Joe H. Galvan in accordance with Rule 34.1 of the Rules of Criminal Procedure.[76] Judge Galvan denied effect to the state's purported disqualification, and the state responded by filing an original petition for a writ of prohibition with the supreme court.

The opinion itself framed two issues. The central issue was whether the statute involving a right to disqualification[77] created a substantive right or was procedural in nature. The second issue, though never really addressed, was whether either the statute or rule violated the state constitutional right to disqualify a judge.[78] With these issues in mind, the court

74. 373 U.S. 179 (1963).

75. 100 N.M. 769, 676 P.2d 1334 (1984).

76. The history of the procedure utilized to disqualify a judge is itself instructive. The disqualification statute, N.M. Stat. Ann. § 38-3-9 (1978), speaks of an affidavit by a party stating that the assigned judge cannot preside with impartiality. At least one case appeared to hold that the affidavit must be signed by a party and that any deviance from the proscribed form constituted grounds to set the affidavit aside. *See* Coca v. New Mexico Health & Social Servs. Dep't, 89 N.M. 558, 555 P.2d 381 (Ct. App.), *cert. denied,* 90 N.M. 8, 558 P.2d 620 (1976). Yet, in 1982, the supreme court adopted N.M. R. Crim. P. 34.1, creating a "notice of peremptory disqualification" which could be signed by an attorney, and which required only a statement that the party was electing to exercise his statutory right of disqualification. The rule was, in part, a response to the realization that affidavits of disqualification were routinely signed by litigants who were without any personal knowledge of the judge, but were following their counsel's strategic suggestions. The rule thus conformed practice to the reality of the situation.

77. N.M. Stat. Ann. § 38-3-9 (1978) provides, in pertinent part:

> Whenever a party to an action or proceeding, civil or criminal, . . . shall make and file an affidavit that the judge before whom the action or proceeding is to be tried and heard . . . cannot, according to the belief of the party making the affidavit, preside over the action or proceeding with impartiality, that judge shall proceed no further.

78. N.M. Const. art. VI, § 18, provides:

> No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or

reviewed the history of the disqualification statute in New Mexico and the variety of ways in which the right to disqualification has been characterized.

The right to a fair and impartial trial was of primary importance to the disqualification analysis. Having established the right to a fair and impartial tribunal as the substantive right, it was then easy to characterize disqualification as procedural on the basis that "substantive law creates, defines, or regulates rights while procedural law outlines the means for enforcing those rights and obtaining redress."[79] The problem facing the court, however, was that previous case law had established that the statutory right to disqualification was substantive.[80] The court examined the rationale of the earlier cases "in light of present day circumstances."[81] In holding the disqualification statute to be procedural in nature, the court concluded that it "can adopt a rule of procedure when the operation of the court is involved and the existing process has created a problem."[82] In its conclusion, the court retracted Rule 34.1.[83] The "ever increasing number of disqualifications" led the court to conclude that the statute and rule presented an "unreasonable burden on the system."[84] The statute

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consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest.

Nothing in the constitutional provision suggests how or why a disqualification statute or rule allowing disqualification on additional grounds would violate the constitutional provision, and thus render the statute or rule invalid or unenforceable. The opinion itself did not address the issue. It is hard to see how a constitutional provision setting minimum standards is violated by the adoption of statutes or rules setting higher standards. Indeed, it happens frequently. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966), *and* State v. Wilson, 92 N.M. 54, 582 P.2d 826 (Ct. App. 1978) (involving statutory implied consent laws imposing a higher standard than that constitutionally required).

79. 100 N.M. at 770, 676 P.2d at 1335.

80. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978), Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969), and State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933), can be read as recognizing a substantive, as opposed to procedural, right.

81. 100 N.M. at 771, 676 P.2d at 1336. It is one thing to hold that earlier cases were wrong. It is something entirely different to hold that statutory disqualification was a substantive right in 1933, but had devolved into a procedural right by 1984. The problem may be with the artificial nature of the substantive/procedural construct. As the court recognized, the difference between substantive law and procedural law "can be difficult to define." *Id.* at 772, 676 P.2d at 1337.

82. *Id.* at 772, 676 P.2d at 1337.

83. *See supra* note 76 (discussing N.M. R. Crim. P. 34.1). Because the writ was issued in a pending case, the court held it was prohibited from applying new rules to the case at bar. 100 N.M. at 773, 676 P.2d at 1338; *see* N.M. Const. art. IV, § 34. The petitioner won the battle, but presumably lost the war.

84. 100 N.M. at 773, 676 P.2d at 1338. Immediately following the retraction of Rule 34.1, the court adopted a new Rule 34.1, effective March 5, 1984. By the terms of the implementation order, it applies to all cases filed on or after the effective date. The rule essentially eliminates disqualification as of right by requiring that the affidavit of disqualification "state sufficient facts showing the bias, prejudice or interest of the judge being disqualified" and by requiring that counsel certify to the truth of the facts. The rule also allows the judge to determine the sufficiency of the factual allegations of bias, prejudice, or interest. This too is contrary to prior practice. *See* State *ex rel.* Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933). New Mexico thus joins the federal system and numerous states in allowing disqualification only in limited circumstances. *See, e.g.*, Comment, *Meeting the*

was thus presumably subject to modification by adoption of a superseding rule by the court.[85]

VI. SENTENCING

A. Aggravating Circumstances

The determinate sentencing law in New Mexico provides for increasing the basic sentence by up to one-third upon a finding by the court of "aggravating circumstances surrounding the offense or concerning the offender."[86] The constitutionality of this scheme was finally laid to rest in *State v. Segotta*.[87] David O. Mead and Lisa Jeanette Segotta were convicted in a joint trial of second degree murder, with Segotta additionally convicted of solicitation to commit murder. They pursued separate appeals, with separate decisions rendered by the court of appeals, but the cases were again consolidated by the New Mexico Supreme Court. The court of appeals held the aggravating sentence statute unconstitutional; the supreme court reversed the court of appeals.[88]

The court of appeals conducted an exhaustive analysis of the statute and the applicable constitutional standard. Focusing primarily upon a perceived lack of standards or guidelines for determining whether alteration of the basic sentence is appropriate, the court held that the statute was void for vagueness. The court appeared to reject a strict, mechanistic scheme limiting the trial court to specific exclusive criteria in determining whether aggravation is proper, while also holding that the legislature must give some definite guidelines.

The supreme court gave the arguments advanced by the court of appeals short shrift. Given the context of the entire sentencing scheme and the role of judicial discretion in sentencing, it held that the aggravation sentencing statute was not unconstitutionally vague. The court then enumerated a list of proper mitigating or aggravating circumstances, taking

Challenge: Rethinking Judicial Disqualification, 69 Calif. L. Rev. 1445 (1981); Report, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 Or. L. Rev. 311 (1969); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435 (1966). A similar rule of civil procedure, N.M. R. Civ. P. 88.1, was adopted at the same time as the new criminal rule. *But see infra* note 169.

85. The court's definition of "procedural" law as the means for enforcing substantive rights allows it to invoke its rule-making power at will. The definition also raises significant separation of powers issues beyond the scope of this Article.

86. N.M. Stat. Ann. § 31-18-15.1 (Repl. Pamp. 1981).

87. 100 N.M. 498, 672 P.2d 1129 (1983).

88. The court of appeals decisions were State v. Segotta, 100 N.M. 18, 665 P.2d 280 (Ct. App. 1983), and State v. Mead, 100 N.M. 27, 665 P.2d 289 (Ct. App. 1983). The supreme court noted that similar arguments had been previously rejected by the court of appeals in State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App.), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982), and that the court of appeals had failed to even consider its own decision in *Wilson*.

care to note that trial courts are not limited to the listed factors.[89]

The supreme court opinion left many questions unanswered. For example, the court of appeals had raised the issue of the standard for the burden of proof of aggravating circumstances. It also noted that issues of both the burden of persuasion and the burden of production were implicated.[90] The court of appeals further enunciated a laundry list of additional due process questions even though they were not raised by the defendant. These included whether the prosecutor must give advance notice of the specific aggravating circumstances intended to be offered, whether the defendant can confront and cross-examine witnesses at the sentencing hearing, and whether illegally obtained evidence can be considered at a sentencing hearing.

B. Increase in Penalty Following Appeal

For the first time, New Mexico appellate courts addressed issues involved in a trial court imposing a harsher sentence following a successful appeal. In *State v. Cordova*,[91] the defendant successfully appealed his conviction for aggravated battery, for which he received a three-year suspended sentence and two years of probation and was ordered to pay probation costs and $175.00 each month as restitution. After remand, he was again convicted. The trial judge imposed a sentence of three years incarceration followed by parole. The stated reason for change of the sentence was "due to defendant's failure to make restitution with the exception of one payment."[92]

The court of appeals considered the due process issue. Under *North Carolina v. Pearce*,[93] due process requires that a defendant should be free to appeal without fear of retaliatory or vindictive punishment. *Pearce* adopted a test requiring judges to state their reasons for imposing a more severe sentence after a new trial. Further, the reasons must be based upon events subsequent to the initial sentence.[94]

89. The court held that the factors a trial court may consider as mitigating or aggravating include: unusual aspects of the defendant's character; past conduct; age; health; any events surrounding the crime; a pattern of conduct indicating whether the defendant is a serious threat to society; and the possibility of rehabilitation. 100 N.M. at 501, 665 P.2d at 1132.

90. There is, as the court of appeals noted, a split among the federal circuits on the issue of whether the government or the defendant has the burden of going forward once a defendant challenges the accuracy of information in a presentence report. *Compare* United States v. Weston, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) (holding that it is unfair to place the burden of proving the falsity of a challenged presentence report information on the defendant), *with* United States v. Battaglia, 478 F.2d 854 (5th Cir. 1972) (reaching a contrary result).

91. 100 N.M. 643, 674 P.2d 533 (Ct. App. 1983).

92. *Id.* at 647, 674 P.2d at 537.

93. 395 U.S. 711 (1969).

94. Wasman v. United States, 104 S. Ct. 3217 (1984).

In its analysis, the court of appeals determined that the defendant had no obligation, other than moral, to pay restitution during the pendency of the appeal. Applying the *Pearce* test, the court held that failure to pay restitution where judgment was stayed pending appeal was not a proper "justifying circumstance" for increasing the initial sentence. Consequently, the case was remanded for sentencing in accordance with the original sentence.

In *State v. Lopez*,[95] the court of appeals held that the total sentence of incarceration was the test for vindictiveness and that no due process right was implicated where actual punishment had not increased. The defendant had initially appealed his sentences for two second offense armed robberies with second offense firearm enhancements and several other offenses.[96] Altogether, he had received a twenty-one year sentence. The court of appeals had found the decision to treat defendant as a second offender to be improper and remanded the case.

The trial court then resentenced the defendant, imposing a total of nineteen years imprisonment. Even though the total sentence of incarceration was less, a due process claim was raised because counts which had earlier been concurrent were now consecutive.[97] The court of appeals rejected the contention that changing counts from concurrent to consecutive was evidence of judicial vindictiveness. Instead, the court focused on the "actual effect of the new sentence as a whole on the total amount of punishment."[98] Applying this standard, the new sentence did not violate due process principles.

The final case in this area involved permissible sentences on appeal de novo from metropolitan court to district court. By statute, a defendant can appeal a conviction in metropolitan court and receive a new trial in district court.[99] The defendant in *State v. Haar*[100] did just that; he was

95. 99 N.M. 612, 661 P.2d 890 (Ct. App. 1983).

96. The initial appeal was unreported. Second offense armed robbery is a first degree felony, punishable by 18 years in prison, while first offense armed robbery is a second degree felony, punishable by nine years. N.M. Stat. Ann. § 30-16-2 (Repl. Pamp. 1984); N.M. Stat. Ann. § 31-18-15 (Repl. Pamp. 1981). A second or subsequent use of a firearm in the commission of a felony results in a mandatory three-year enhancement; first use results in a mandatory one-year enhancement. N.M. Stat. Ann. § 31-18-16 (Repl. Pamp. 1981).

97. The trial court ordered that the nine-year sentences for robbery be served consecutively, but that the one-year firearm enhancements on each count be served concurrently. The sentence was technically improper, because the firearm enhancement increases a sentence and is not severable. The effect of the sentence was either to run one of the enhancements concurrent to the basic sentence, rather than treating the sentence for each count as a unitary whole, or else to have the two sentences "overlap" by one year. *See, e.g.*, State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982). As the court of appeals noted, the defendant did not challenge the length or arrangement of his sentences.

98. 99 N.M. at 613, 661 P.2d at 891. *See also* United States v. Markus, 603 F.2d 409 (2nd. Cir. 1979).

99. N.M. Stat. Ann. § 34-8A-6 (Repl. Pamp. 1981).

100. 100 N.M. 609, 673 P.2d 1342 (Ct. App. 1983). Mr. Haar has almost single-handedly developed the law in the area of de novo appeals. In addition to this case, Mr. Haar was the defendant

rewarded with a net increase of thirty days on his jail sentence. The court of appeals held that since a district court does not have specific statutory authority to increase the sentence, it could not.[101] In an interesting twist, the state had argued on appeal that the initial sentence was void because it had included a probationary term as well as incarceration and the metropolitan court had no specific statutory authority to impose probation. The court rejected that argument, reasoning that the correctness of the metropolitan court sentence was not being reviewed and that only the propriety of the district court's increased sentence was at issue.[102]

C. Sentencing Procedures

In *State v. Diaz*,[103] the New Mexico Supreme Court established that a sentence is not final until formally entered. The defendant in *Diaz* was orally sentenced to a suspended sentence and probation. After sentencing, but prior to entry of the judgment, he was reported by a deputy sheriff to have made comments which were "disrespectful to the trial court."[104] At a motion to reconsider the sentence, the defendant received the same sentence, with the exception that no portion of it was suspended. The court of appeals reversed the imposition of the second sentence, holding that a sentence was final when orally pronounced and that double jeopardy precluded any increase of sentence.[105] In summarily reversing the decision, the supreme court held that an oral pronouncement of sentence by a judge in a criminal case is not a final judgment.[106]

In a case clearly calling for legislative action, *State v. Chavez*[107] held

in an earlier case, State v. Haar, 94 N.M. 539, 612 P.2d 1350 (Ct. App.), *cert. denied*, 449 U.S. 1063 (1980), which established the proposition that the district court on appeal de novo has only such jurisdiction as has been authorized by statute and cannot increase the sentence absent statutory authority. In a companion case to his earlier conviction, Haar v. Hanrahan, 708 F.2d 1547 (10th Cir. 1983), the court held that a defendant does not have a right to trial by jury on appeal de novo where the de novo court cannot impose a greater sentence than the initial court and a sentence of not over six months is involved.

101. The statute providing for trial de novo on appeal from metropolitan court, N.M. Stat. Ann. § 34-8A-6 (Repl. Pamp. 1981), is silent on the sentence on appeal. The case thus fell under the rule of the first *Haar* decision, 94 N.M. 539, 612 P.2d 1350. That case was decided prior to the establishment of the metropolitan court. In apparent response to the first *Haar* decision, the legislature amended the magistrate court appeal statute, N.M. Stat. Ann. § 35-13-2 (Cum. Supp. 1984), to allow an increase in sentence on appeal, but did not make the same change in the parallel metropolitan court statute.

102. The issue has presumably been rendered moot by the amendments to N.M. Stat. Ann. §§ 31-19-1, 31-20-5, and 31-20-6 (Cum. Supp. 1984), which specifically authorize magistrate and metropolitan courts to impose probation as a condition of suspending a sentence.

103. 100 N.M. 524, 673 P.2d 501 (1983).

104. *Id.*

105. *Id.* The double jeopardy argument was predicated, in part, on the fact that defendant had already completed a portion of his sentence by paying restitution prior to the resentencing hearing.

106. 100 N.M. at 526, 673 P.2d at 502. The double jeopardy objection was answered by reference to the record, which indicated that the checks which were issued for restitution were voided because of clerical errors. Thus, restitution was not actually paid at the time of resentencing.

107. 100 N.M. 750, 676 P.2d 827 (Ct. App. 1984).

that upon revocation of probation a court cannot impose additional conditions of probation. Relying heavily on a prior case,[108] the court held that under the applicable statute,[109] a court has only two options once a violation of probation is established: continue or revoke probation. This was true even if the defendant is willing to waive all double jeopardy protection and submit to the additional condition. As the court held, under the statute "trial courts continue to be deprived of the discretionary power to apply common sense solutions to probation violations."[110] The ball now appears to be in the legislature's court.

VII. NEW TRIAL STANDARD

Another case entitled *State v. Chavez*[111] addressed the issue of whether a trial court can weigh the evidence and the credibility of witnesses in determining whether to grant a new trial.[112] In the initial appeal of this case, the New Mexico Supreme Court set down general guidelines for granting a new trial and remanded the case for consideration in light of those guidelines.[113] On remand, the trial court again granted a new trial, and the appeal ensued.

Criminal Procedure Rule 45 allows a court to grant a new trial "if required in the interests of justice."[114] On remand after the initial appeal, the trial court made specific factual findings concerning the trial. These included findings that the convictions for first degree murder were against the overwhelming weight of the evidence, that there were significant and irreconcilable conflicts in the testimony of the witnesses, and that the instructions as given, which included both premeditated first degree murder and depraved mind first degree murder, were confusing to the jury. Based upon these findings, the trial court again granted a new trial, and the court of appeals again affirmed.

On certiorari, the New Mexico Supreme Court framed the question in terms of the role to be played by the trial judge. The decision of the court of appeals, in affirming the trial court, was characterized by the supreme court as permitting the trial judge to "sit in judgment of a criminal case as the proverbial *thirteenth juror.*"[115] The supreme court rejected this

108. State v. Crespin, 96 N.M. 640, 633 P.2d 1238 (Ct. App. 1981).

109. N.M. Stat. Ann. § 31-21-15(B) (Repl. Pamp. 1981).

110. 100 N.M. at 751, 676 P.2d at 828.

111. 101 N.M. 136, 679 P.2d 804 (1984) (*Chavez II*). The same case was involved in an earlier appeal involving the right to a new trial. *See* State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982) (*Chavez I*).

112. The procedure followed in a motion for a new trial is set forth in N.M. R. Crim. P. 45.

113. *Chavez I*, 98 N.M. at 684, 652 P.2d at 234 (1982). The court recognized that granting a new trial was discretionary, but required that the grounds upon which a new trial is sought or granted must be specified so that the decision can be reviewed for abuse of discretion and legal sufficiency.

114. N.M. R. Crim. P. 45.

115. 101 N.M. at 138, 679 P.2d at 806 (emphasis in original).

approach and specifically held that the trial court abused its discretion in weighing the evidence and the credibility of the witnesses.

On the issue of confusing instructions, the supreme court held that, because the instructions given were supreme court approved, the court of appeals had "no authority to set the instructions aside."[116] The supreme court also determined that the trial court's disagreement with "the required manner of instructing the jury is not an appropriate ground upon which a new trial may be granted, if those instructions are approved by this Court."[117] The supreme court thus disposed of the issue without ever addressing the merits.[118]

VIII. CONTEMPT

Characterizing contempt as either direct or indirect continues to puzzle both courts and practitioners. The distinction is critical because due process procedural requirements exist for indirect contempt.

A. Indirect Contempt

In yet another case entitled *State v. Chavez*,[119] the issue on appeal was whether summary disposition of contempt for refusal to testify before a grand jury was proper. The defendant refused to answer questions before a grand jury and persisted in his refusal even after being granted use immunity.[120] Finally, a district court judge ordered him to testify or "suffer the consequences." Upon his representation that he would not testify, the defendant was sentenced to sixty days' imprisonment. The court of appeals characterized the contempt as criminal.[121]

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116. *Id.* at 139, 679 P.2d at 807.

117. *Id.*

118. It is entirely arguable that the issue could be raised on direct appeal, and the court was simply holding that the issue was not an appropriate one for a Rule 45 motion. While *Chavez I* recognized that the standard for granting a new trial is whether the new trial is "in the interest of justice", it is unclear what that standard means in light of *Chavez II*.

A trial judge appears to have limited authority to grant a new trial, particularly on grounds related to the proof of the offense. *See* State v. Davis, 97 N.M. 745, 643 P.2d 614 (Ct. App. 1982) (establishing that a judge could not determine a motion for directed verdict after submission of the case to the jury). *Chavez II* seems to establish that a trial court has the same authority after a verdict as does an appellate court—if it is supported by substantial evidence, the verdict is unassailable. *See supra* note 34.

119. 100 N.M. 612, 673 P.2d 1345 (Ct. App. 1983).

120. The case was unusual. Chavez had been earlier charged with drug-related offenses. At his trial, he raised an alibi defense. At the close of the case, the prosecution dismissed the charges, and Chavez was thus discharged. The grand jury then commenced investigating possible perjury charges against one of the witnesses who had testified at the defendant's trial. *See supra* notes 39-45 and accompanying text.

121. Criminal contempt is intended as punishment; it is distinguished from civil contempt, which is intended to coerce the contemnor into a desired course of conduct. The distinction is largely pragmatic; a contemnor may purge himself of civil contempt by complying with the court order, but criminal contempt cannot be purged. Characterization of contempt as criminal or civil appears to have little bearing on whether the contempt is direct or indirect.

As a general rule, a judgment of direct contempt is supportable only if the defendant can be punished summarily.[122] The court of appeals held that summary punishment for a witness who refuses to testify before a grand jury is improper.[123] The lack of an open, serious threat to orderly procedure precludes the need for summary punishment. A grand jury is an ongoing body, as opposed to a trial jury, and therefore delay is not as critical. An order of contempt for failure to testify before a grand jury is thus indirect and cannot be treated summarily.

In *State v. Stout*,[124] the New Mexico Supreme Court reversed the *per se* rule, previously adopted in *Wollen v. State*,[125] requiring a new judge for a contempt where the judge is the accuser. *Stout* involved an indirect contempt, arising from an attorney's failure to appear at a sentencing hearing which had been rescheduled at his request. The judge before whom Stout was to have appeared initiated the contempt proceeding by ordering Stout to show cause why he should not be held in contempt and proceeded to hear the contempt. The case squarely fell within the *per se Wollen* rule.

The court advanced several arguments for modifying *Wollen*, including maintenance of judicial dignity and authority as well as waste of judicial resources. In place of the *per se* rule, the court adopted a rule holding that a judge is precluded from hearing a case only when the judge "has become so embroiled in the controversy that he cannot fairly and objectively hear the case, or when he or one of his staff will necessarily be a witness in the proceeding."[126]

B. "Direct" or "Summary" Contempt

In *State v. Case*,[127] the defendant was held in contempt for failure to answer questions during a trial. The defendant had been convicted of murder and criminal sexual penetration. Following his conviction, he was called as a witness in the trial of another person charged with related crimes. Case was granted use immunity, but refused to testify about certain

122. Numerous cases have elaborated the procedural requirements for an indirect contempt. *See, e.g.*, State v. Diamond, 94 N.M. 118, 607 P.2d 656 (Ct. App. 1980). The terminology used in characterizing contempts is not always precise. "Direct contempt" is frequently used to refer to contempts which may be punished summarily, though it appears that not all contemptuous acts which occur in the presence of the judge may be treated summarily. *See, e.g.*, Taylor v. Hayes, 418 U.S. 488 (1974).

123. 100 N.M. at 614, 673 P.2d at 1347. The court of appeals relied primarily on a United States Supreme Court case, Harris v. United States, 382 U.S. 162 (1965), which also held that summary punishment for refusal to testify before a grand jury was improper.

124. 100 N.M. 472, 672 P.2d 645 (1983).

125. 86 N.M. 1, 518 P.2d 960 (1974).

126. 100 N.M. at 475, 672 P.2d at 648. The rule adopted is the majority rule, best enunciated in Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

127. 100 N.M. 173, 667 P.2d 978 (Ct. App. 1983).

events relating to the homicide. The trial court then held Case in contempt ten separate times, based upon ten different questions, and sentenced him to one year for each contempt, with the sentence to be served consecutively.

The first issue on appeal concerned the appropriateness of summary adjudication of the contempt and the one-year sentences. Citing *United States v. Wilson*,[128] the court of appeals concluded that refusal to testify is a proper matter to be dealt with summarily. The number of contempts charged, however, was held improper. A witness can be held in contempt only once for refusing to testify about a subject of inquiry.[129] Thus all contempts necessarily merged into one. The court of appeals also reversed the one-year sentence, because a sentence in excess of six months cannot be imposed absent a jury trial or waiver of a jury trial.[130]

The second issue involved the contemnor's right to counsel. Case had been held in contempt on two questions prior to the arrival of his attorney. As a general proposition, any defendant who receives a jail sentence has a right to counsel.[131] The state urged that the general rule did not apply because of the special nature of summary contempt.[132] In holding that there is no right to counsel for summary contempt, the court considered the competing interests[133] and determined that the necessity for summary proceedings was of primary importance.[134]

The final issue involved the right to present defenses. In disposing of this issue, the court of appeals held that a contemnor does have a right

128. 421 U.S. 309 (1975).

129. Since all questions which Case refused to answer were characterized as directed to the homicide, the court reserved ruling on whether there could be more than one contempt if a witness refused to answer questions on "more than one subject of inquiry." 100 N.M. at 175, 661 P.2d at 980. The construct seems artificial, since "subject of inquiry" is a category with obvious elastic compass.

130. In Taylor v. Hayes, 418 U.S. 488 (1974), the Supreme Court recognized a sixth amendment right to trial by jury in contempt cases where the actual sentence imposed exceeded six months. The contempt situation is unique; in all other cases it is the potential sentence, rather than the actual sentence, which governs the right to trial by jury. *Cf.* Duncan v. Louisiana, 391 U.S. 145 (1968).

131. Argersinger v. Hamlin, 407 U.S. 25 (1972), established the proposition that a person cannot be imprisoned for any offense, including a petty misdemeanor, unless represented by counsel at his trial or unless the right to counsel is knowingly and intelligently waived.

132. The salient difference between a summary contempt and a criminal trial is the summary nature—there is literally no hearing in a summary contempt. Counsel thus could serve only a limited purpose.

133. The competing interests are the historical and constitutional right to assistance of counsel, on the one hand, and the need to control disruptive behavior and to compel witness cooperation and the limited value counsel can serve, on the other hand. As the court noted, however, other jurisdictions have split on the issue of which interest is primary. Saunders v. State, 319 So. 2d 118 (Fla. Dist. Ct. App. 1975), specifically held that *Argersinger* did not require counsel for direct contempt during the course of the trial, while Commonwealth v. Crawford, 466 Pa. 269, 352 A.2d 52 (1976), reached a contrary result.

134. The court recognized that if a jury trial is constitutionally required, then the right to counsel would attach, presumably because an actual trial would be held. 100 N.M. at 178, 667 P.2d at 983.

of allocution, the right to be heard, before sentence is imposed.[135] The court declined to recognize a right to present defenses. Case argued on appeal that he should have been allowed to present evidence of duress because he reasonably feared retaliation if he testified. Quoting from *Piemonte v. United States,*[136] the court stated that no person has a right to refuse to testify because of fear of reprisal.[137] The action was remanded for the state to elect whether to accept a maximum six-month sentence or to choose a jury trial, in which event the sentence could exceed six months.[138]

City of Bernalillo v. Aragon[139] involved an appeal from district court following that court's review, on appeal, of a summary contempt adjudication by a municipal court.[140] The first issue was whether the contemnor had a right to trial de novo on appeal to district court. As a general rule, a defendant has a right to a trial de novo on appeal from municipal court to district court.[141] The court of appeals held that a trial de novo was not required. The court's conclusion was premised in part upon the determination that no trial need be held for a summary contempt; therefore, allowing a trial on appeal would be senseless.

In addressing the merits, the court determined that the defendant's conduct warranted summary contempt. The defendant had argued that his conduct did not justify conviction as a matter of law. The affidavits of witnesses to the contemptuous conduct, which were part of the record, reflected that the defendant had uttered expletives and had otherwise engaged in inappropriate behavior. The court disposed of the argument in short order, holding that summary contempt was entirely proper to preserve order and decorum. The judgment was affirmed.

IX. GRAND JURY AND TRIAL PROCEDURE

A. *Grand Jury*

In *State v. Cruz,*[142] the defendant was served with notice of his status as a target of a grand jury investigation.[143] The defendant appeared at the

135. *Id. See* Taylor v. Hayes, 418 U.S. 488 (1974). *See generally* Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation,* 15 N.M.L. Rev. 41, 56-60 (1985) (discussing the right of allocution in New Mexico).

136. 367 U.S. 556 (1961).

137. 100 N.M. at 177, 667 P.2d at 982. *In re* Oliver, 333 U.S. 257 (1948), goes so far as to hold that there is no defense to summary contempt. A witness clearly has a right not to answer, however, when he retains a fifth amendment right against self-incrimination.

138. If a contemnor is allowed a trial by jury, it is unclear what maximum sentence may be imposed.

139. 100 N.M. 547, 673 P.2d 831 (Ct. App. 1983).

140. Municipal courts have authority to summarily punish contempts. N.M. R.P. Mun. Ct. 33(b).

141. N.M. R.P. Mun. Ct. 39.

142. 99 N.M. 690, 662 P.2d 1357 (1983).

143. The right to notice of status as a target of a grand jury investigation, and the accompanying right to testify, are both statutory. N.M. Stat. Ann. § 31-6-11(B) (Repl. Pamp. 1984).

courthouse on the day the grand jury was convened, unaccompanied by an attorney. The prosecutor presenting the case asked the defendant whether he wished to testify. The defendant equivocated and then indicated he wanted to testify after another witness. The prosecutor informed the defendant that the defendant could testify immediately or not at all. Finally, the prosecutor told the defendant he had ten seconds to decide and proceeded to count down, but the defendant still failed to decide. Some time later, the defendant informed the prosecutor he wanted to testify, but was told he could not. He was indicted, duly tried, and convicted; he appealed, urging error in the failure to allow him to testify. The court of appeals reversed his conviction, but on certiorari the supreme court affirmed the trial court.

The issues on appeal were the sufficiency of notice to the defendant and whether the prosecutor's conduct obstructed the defendant's right to testify.[144] Based upon prior decisions of the court of appeals, the supreme court held that four days notice was sufficient.[145] On the obstruction issue, the supreme court noted that a prosecutor has a duty "to protect both the public's interest and the rights of the accused."[146] Absent a finding that the prosecutor's conduct reflected an impermissible motive, the court declined to find error.

The most interesting aspect of the decision is Justice Riordan's concurring opinion. Recognizing that the right to testify is statutory and not constitutional,[147] Justice Riordan characterized the right as one which is not "substantial" within the meaning of Criminal Procedure Rule 7.[148] Therefore, any error is not subject to review. In so doing, the concurrence promotes the adoption of a rule that, absent some sort of extraordinary need for relief, an indictment is not open to question once a defendant has been convicted.[149] It is likely this argument will be raised in the future.

144. The defendant's right to notice and right to testify are statutory. *See* N.M. Stat. Ann. § 31-6-11(B) (Repl. Pamp. 1984).

145. 99 N.M. at 692, 662 P.2d at 1359. In Rogers v. State, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980), it was determined that 36 hours notice to a target was sufficient.

146. 99 N.M. at 692, 662 P.2d at 1357.

147. 99 N.M. at 692-93, 662 P.2d at 1359-60 (Riordan, J., concurring); *see supra* note 143.

148. N.M. R. Crim. P. 7 provides, in relevant part, that "[an] indictment . . . shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be . . . in any manner affected, because of any defect, error . . . or repugnancy therein which does not prejudice the substantial rights of the defendant upon the merits." In other words, indictments are invalid only if the substantial rights of the defendant are prejudiced upon the merits. The right to testify before the grand jury is not a substantial right. An indictment, therefore, is not to be deemed invalid where the right to testify before the grand jury is denied.

149. This rationale was enunciated by Justice Jackson in his dissent in Cassell v. Texas, 339 U.S. 282, 298 (1950). *See also* State v. Guse, 237 Or. 479, 392 P.2d 257 (1964); State v. Gortmaker, 60 Or. App. 723, 655 P.2d 575 (1982), *aff'd on other grounds*, 295 Or. 505, 668 P.2d 354 (1983). The position is bottomed on the premise that guilt having been unanimously established beyond a reasonable doubt by virtue of the conviction, any error in establishing probable cause is harmless beyond peradventure. Other than the obvious limitations it places on review and supervision of grand jury proceedings, the argument is compelling.

In a case on a related issue, *State v. Penner*,[150] the court of appeals held that a defendant must show "actual and substantial prejudice," beyond a mere showing that he wanted to testify, if he fails to receive adequate notice. The statute requires that "actual and substantial prejudice" be shown before the burden of proving diligence in notifying the target of his right to testify shifts to the prosecutor.[151] In this case, the defendant argued that the prejudice existed because he had not been able to testify due to lack of opportunity. The court of appeals held that the defendant's burden is to "establish that his missing testimony would have changed the vote of the grand jury on the issue of probable cause."[152] The defendant having failed to do so, there was no error.

B. Trial Procedure

1. Severance

In *State v. Foye*,[153] the defendant was charged with one count of attempted criminal sexual penetration and one count of criminal sexual penetration. There were different victims for the two offenses. The defendant argued that the counts should be severed because he wanted to testify on one count but not on the other. In affirming the trial court's denial of the severance motion, the court of appeals made clear two pertinent points.

First, the court specifically declined to follow the opinion in *Cross v. United States*,[154] a case cited in the committee commentary to the severance rule.[155] The court noted that *Cross* held that prejudice exists where an accused desires to testify on one of two joined offenses that are "clearly distinct in time, place and evidence."[156] Recognizing, however, that *Cross* has been limited,[157] the court of appeals determined that, because evidence of one offense might be admissible in the trial of the other, severance would not serve the purposes advanced by the *Cross* rule.[158]

150. 100 N.M. 377, 671 P.2d 38 (Ct. App. 1983).

151. N.M. Stat. Ann. § 31-6-11(B) (Repl. Pamp. 1984).

152. 100 N.M. at 379, 671 P.2d at 40. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981), is cited for the proposition. It is not clear that *Buzbee* addressed the issue of burden of proof. There being no case in which a defendant was held to have produced sufficient evidence to meet the burden, it is unclear what type and quantity of evidence is sufficient to show that the probable cause determination would have been changed. An argument can be made that, given *Buzbee* and its progeny (such as this case), New Mexico appellate courts have de facto adopted a rule under which grand jury indictments are virtually unassailable, particularly after conviction. *See supra* notes 147-49 and accompanying text.

153. 100 N.M. 385, 671 P.2d 46 (Ct. App. 1983).

154. 335 F.2d 987 (D.C. Cir. 1964).

155. N.M. R. Crim. P. 34.

156. 100 N.M. at 387, 671 P.2d at 48.

157. *Id.* at 388, 671 P.2d at 49; *see, e.g.*, Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968).

158. 100 N.M. at 388, 671 P.2d at 49; *see, e.g.*, N.M. R. Evid. 404(b) (providing that evidence of other crimes or wrongs may be admissible to show intent, plan, identity, or absence of mistake or accident).

Second, in discussing the cases following *Cross*, the court strongly intimated that failure to sever will not be held to be an error unless the defendant makes an actual showing of the nature of his testimony and reasons for not wishing to testify on some offenses. The objective is to allow the trial court to be satisfied that the claim of prejudice is genuine and to allow the trial court to weigh the competing interests of judicial economy against the defendant's interest in testifying.[159] Thus, in order to attempt severance, a defendant must reveal a substantial part of his trial strategy.

2. Prosecutorial Misconduct

The defendant in *State v. Diaz*[160] was charged with commercial burglary and larceny. His defense was based on lack of intent due to intoxication. During closing argument, primarily rebuttal, the prosecutor made numerous comments forming the basis of the appeal. First, the court of appeals specifically condemned the trial court's procedure in waiting to hear objections to closing argument until after the jury had retired to deliberate. By that time the court could not correct the error through issuance of a remedial instruction to the jury. Next, the court considered the basic faults of the prosecutor's argument, which fell into three broad categories: improper reference to the authority of the prosecutor; improper characterization of the defendant; and derogation of an appropriate defense.

Improper reference to the prosecutor's authority concerned the prosecutor's extensive remarks referring to his role as protector of the rights of the jury and other citizens. The court found these remarks to verge on the expression of a personal opinion on the part of the prosecutor as to the guilt of the defendant.[161] As to the prosecutor's improper characterization of the defendant, the error was palpable. The prosecutor had referred to the defendant as being a "yo-yo," "stupid," a "thief," and a "crook." On the issue of derogation of a proper defense, the prosecutor engaged in what amounted to a jury nullification argument.[162] The pros-

159. The test was developed in Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968). It has been followed in United States v. Outler, 659 F.2d 1306 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); United States v. Reicherter, 647 F.2d 397 (3rd Cir. 1981); and State v. Roberts, 62 Ohio St. 2d 170, 405 N.E.2d 247, *cert. denied* 449 U.S. 879 (1980).

160. 100 N.M. 210, 668 P.2d 326 (Ct. App. 1983).

161. The argument is that such comments, presumably because of reference to the role of the prosecutor as protector of truth and right, lead to the inference that the prosecutor would not be there unless the prosecutor believed the defendant to be guilty. Under N.M. Code of Professional Responsibility DR 7-106(C)(4), a lawyer cannot express a personal opinion as to the justness of a cause, though under DR 7-103(A) a prosecutor has an obligation not to prosecute unless personally satisfied of probable cause.

162. Jury nullification, a concept which has engendered not inconsiderable comment, is the notion that a jury may, in effect, nullify the instructions given by the court by applying a "higher" standard—moral, humanitarian, political, or religious. It is most often utilized in political trials. *See, e.g.*, Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex. L. Rev. 488 (1976).

ecutor argued that even if the jury believed the defendant could not form the requisite intent, acquittal of the defendant would "send a message to the community that would encourage similar crimes."[163] The court of appeals reversed the conviction, holding that the prosecutor's conduct amounted to cumulative error.

X. EXTRADITION

In two opinions rising out of the same extradition, several points of New Mexico law were clarified. In the first opinion, *State ex rel. Schiff v. Brennan,*[164] the New Mexico Supreme Court followed the majority rule holding that there is no right to bail after an arrest on a governor's extradition warrant. Once the governor has issued a warrant, the fugitive may contest it by a writ of habeas corpus, but he still must be remanded to custody even though the warrant will be contested.

In *Hopper v. State ex rel. Schiff,*[165] the New Mexico Supreme Court held that district courts cannot go behind charging documents to determine whether actions of a fugitive amount to criminal behavior in the demanding state. In *Hopper,* after the governor's warrant had issued, the fugitive sought a determination by writ of habeas corpus of whether the acts he was alleged to have committed were crimes under the law of the demanding state.[166] Based largely upon *Michigan v. Doran,*[167] the court held that, once the governor has granted extradition, all a court can do on habeas corpus is determine whether the extradition documents are facially valid, whether the petitioner has been charged with a crime by the demanding state, whether the petitioner is the person named in the request for extradition, and whether the petitioner is a fugitive. No other inquiries may be made.

The court recognized that state law sets out a procedure for the governor to follow in deciding whether to exercise discretion.[168] In situations where extradition may not be appropriate, however, only the governor may exercise discretion, not the courts.

163. 100 N.M. at 214, 668 P.2d at 330. If you accept the premise of the intoxication defense to specific intent crimes, the argument is actually illogical. It is difficult to both be encouraged to do an act and do the act without the intent to have done it.

164. 99 N.M. 641, 662 P.2d 642 (1983). This case was an extraordinary writ, filed in the supreme court. The companion case proceeded by regular appeal.

165. 101 N.M. 71, 678 P.2d 699 (1984).

166. The case apparently arose in the context of a property dispute with a former spouse.

167. 439 U.S. 282 (1978).

168. 101 N.M. at 73, 678 P.2d at 701. *See* N.M. Stat. Ann. § 31-4-4 (Repl. Pamp. 1984). The case was decided primarily on the constitutional extradition provisions, U.S. Const. art. IV, § 2, cl. 2, and the federal implementing statute, 18 U.S.C. § 3182 (1982).

XI. CONCLUSION

No single decision or area in criminal procedure this survey year significantly changed the law. In practical terms, the virtual elimination of judicial disqualification will have the most impact.[169] Most other decisions merely defined or clarified points of existing law.

The coming survey years should see how New Mexico applies recently announced United States Supreme Court decisions interpreting the fourth amendment. New Mexico courts still must decide whether they will hold to the *Aguilar-Spinelli* standard for informant search warrants or whether it will adopt "totality of the circumstances" as the appropriate test.[170] The continued vitality of the exclusionary rule is also questionable. With the virtual abandonment of the rule by the United States Supreme Court, New Mexico is free to decide its own course.[171] Time, and the right cases, will tell.

169. The longevity of State *ex rel.* Gesswein v. Galvan, 100 N.M. 769, 676 P.2d 1334, may be limited. As this Article goes to press, the legislature has passed a bill granting each party to civil or criminal action a single preemptory challenge to the presiding judge. The bill is awaiting action by the governor. While the new statute would not answer the procedural/substantive right dichotomy, it appears likely that the supreme court would reinstate disqualification if the new law is enacted. *See supra* text accompanying notes 75-85.

170. *See supra* text accompanying notes 8-9.

171. *See supra* text accompanying notes 11-14.