NEW MEXICO LAW REVIEW

Volume 20
Issue 2 *Spring 1990*

Spring 1990

Criminal Procedure

Janeet Kinniry

Will O'Connell

CRIMINAL PROCEDURE

I. INTRODUCTION

This criminal procedure survey covers cases appearing in the Bar Bulletin between January 1988 and July 1989. The article initially follows the order of a criminal proceeding, surveying cases that do not involve constitutional issues but relate to trial procedure and sentencing; the article then circles back and surveys cases analyzing particular constitutional provisions. The article concludes with a discussion of *State v. Clark*,[1] a case we found the most interesting of the survey period. *Clark* involves significant death penalty and eighth amendment issues.

II. PRETRIAL PROCEDURES

Defendants' challenges to pretrial procedures failed in the following noteworthy cases from the survey year. In balancing individual rights against the state's interest in prosecution, the court was reluctant to dismiss at the initial stages.

A. Grand Jury Practice

In *State v. Hewitt*,[2] the defendant unsuccessfully challenged the prosecution's conduct in grand jury proceedings. The function of the grand jury is to investigate and find probable cause, not to adjudicate; thus, the defendant cannot invoke the full range of due process rights available at trial.[3]

The role of the grand jury presents a natural tension between the determination of probable cause and the protection of citizens from abusive prosecution.[4] New Mexico courts prefer to resolve mistakes by trial on the merits rather than to interfere with the finding of probable cause.[5] "In general, only flagrant cases of deliberate prosecutorial misconduct resulting in demonstrable prejudice have resulted in dismissal of indictments."[6]

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1. 108 N.M. 288, 772 P.2d 322, *cert. denied*, 110 S. Ct. 291 (1989).

2. 108 N.M. 179, 769 P.2d 92 (Ct. App. 1988).

3. *In Re* Grand Jury Sandoval County, 106 N.M. 764, 768, 750 P.2d 464, 468 (Ct. App. 1988). One significant difference between trial and grand jury proceedings is the more lenient evidentiary standard allowed in grand jury investigations. Evidence presented to a grand jury is not reviewable absent a showing of bad faith on the part of the prosecuting attorney. *See* N.M. STAT. ANN. § 31-6-11 (1978).

4. Buzbee v. Donnelly, 96 N.M. 692, 696, 634 P.2d 1244, 1248 (1981). In *Buzbee*, the supreme court presented a complete exposition of the interplay between the common law and New Mexico's statutory law of grand jury proceedings. *Id.* at 695-98, 634 P.2d 1247-50.

5. "We hold that opening up indictments for challenge would halt the orderly progress of investigations, would cause extended litigation on unimportant issues and would frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.* at 706, 634 P.2d at 1258. The due process questions raised by prosecutorial discretion are problematic, as evidenced by the significant dissent in *Buzbee*. *Id.* at 707-12, 634 P.2d at 1259-64 (Sosa, J., and Wood, J., dissenting).

6. State v. Velasquez, 99 N.M. 109, 112, 654 P.2d 562, 565 (Ct. App. 1982).

Hewitt challenged the prosecutors' refusal to present exculpatory evidence to the grand jury. The court upheld the prosecution's wide discretion to determine whether exculpatory evidence must be admitted.[7] In *Hewitt*, the trial court had quashed the indictment, finding that the state had failed to present exculpatory evidence, or alternately, that the two assistant district attorneys had improperly influenced the grand jury.[8] The court of appeals reversed on the basis that there was no showing that the excluded evidence would have directly negated Hewitt's guilt or changed the grand jury's judgment on probable cause.[9]

While the grand jury was considering the evidence against him, Hewitt delivered a letter to the grand jury.[10] The letter stated that Hewitt had heard rumors he was being investigated and wished to present three evidentiary exhibits to prove his innocence: a transcript of a taped conversation between him and Benjamin, his accuser; a letter he (Hewitt) had drafted to the FBI; and the results of a polygraph test he had taken. These items did not accompany the letter. Upon hearing the letter, jury members questioned the district attorneys about whether Hewitt had been properly notified of the proceedings. One of the attorneys stated that Hewitt and his attorneys of record had been notified by regular mail of the proceedings. Responding to a jury member's comment that regular mail provided no assurance of receipt, the attorney indicated that if the defendant believed he had been prejudiced, he could raise the issue by motion. The attorney then advised the grand jury to determine whether to obtain the evidence Hewitt proposed. Deciding not to obtain further evidence, the grand jury returned the indictment.[11]

Reversing the trial court, the court of appeals found that only one item, the polygraph test, was admitted into evidence at the hearing on the motion to dismiss.[12] The polygraph test was not directly exculpatory because it concerned only one of the charges against Hewitt.[13] Further, the letter containing the results was hearsay, and no foundation for the admissibility of the test results was established because the polygraph examiner had not been properly qualified as an expert witness and the

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7. *Hewitt*, 108 N.M. at 183, 769 P.2d at 96. The burden of quashing an indictment is on the defendant. *Velasquez*, 99 N.M. at 112, 654 P.2d at 565. Evidence before the grand jury is not subject to review absent a showing of bad faith on the part of the prosecutor who assisted the grand jury. N.M. STAT. ANN. § 31-6-11(A) (Repl. Pamp. 1984). To quash an indictment based on the state's failure to present exculpatory evidence, the defendant must satisfy a three-pronged test. *Hewitt*, 108 N.M. at 182, 769 P.2d at 95. The defendant must first show that the prosecutor's acts or omissions were prejudicial. *Velasquez*, 99 N.M. at 112, 654 P.2d at 565 (citing *Buzbee*, 96 N.M. at 704, 634 P.2d 1255). Second, the excluded evidence must directly negate the defendant's guilt. *Buzbee*, 96 N.M. at 699, 634 P.2d at 1251. Third, the exculpatory evidence must be legally admissible. *Id.*

8. *Hewitt*, 108 N.M. at 180, 769 P.2d at 93.

9. *Id.* at 185, 769 P.2d at 98.

10. *Id.* at 181, 769 P.2d at 94.

11. *Id.* at 182, 769 P.2d at 95.

12. *Id.*

13. *Id.* at 183, 769 P.2d at 96.

accuracy of the tests had not been developed.[14] Thus, the court found no factual basis for the trial court's determination that the excluded evidence was directly exculpatory and admissible.[15]

The court further determined that the prosecutor's comments to the grand jury were not prejudicial because the defendant failed to establish that the prosecutors' answers to jurors' questions both changed the result and infringed upon the independent judgment of the grand jurors.[16] Generally, trial courts should dismiss only flagrant cases of deliberate prosecutorial misconduct resulting in demonstrable prejudice.[17] Demonstrable prejudice requires showing that the conduct infringed upon the independent judgment of the grand jurors and changed the result.[18] "Perjury, deceit, or malicious overreaching that subverts a grand jury proceeding constitutes conduct that infringes upon the independent judgment of the jurors."[19]

In his dissent, Judge Alarid criticized the majority for focusing solely on whether the evidence was exculpatory instead of fully considering whether the prosecutors violated their duty to act in a fair and impartial manner.[20] Judge Alarid also believed the prosecutors' statements "likely affected the independent judgment of the grand jury," and he would have upheld the trial court's implied finding that the result would have been different.[21]

Two other cases in the survey year presented challenges to grand jury proceedings: *In re Grand Jury Sandoval County*,[22] and *State v. Morton*.[23] In *In re Grand Jury*, the target of a grand jury investigation applied for a writ of mandamus to compel the district attorney to present certain evidence, to control the manner of the state's presentation, and to conduct voir dire examination of the grand jury members.[24] The court of appeals affirmed the district court's refusal to issue the writ. The court stated

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14. *Id.* The judge has discretion to allow evidence of a polygraph examination if the test was administered in accordance with the rules of evidence. SUP. CT. RULES ANN. 11-707(C) (Recomp. 1986).

15. *Hewitt*, 108 N.M. at 183-84, 769 P.2d at 96-97. The court noted that defendant failed to produce the alleged exculpatory evidence at the motion hearing. *Id.* at 184, 769 P.2d at 97.

16. *Id.* at 185, 769 P.2d at 98. The court stated there was testimony which constituted sufficient evidence of probable cause to indict on the count of larceny, the subject of the polygraph test. *Id.*

17. *See* United States v. Page, 808 F.2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987); State v. Velasquez, 99 N.M. 109, 112, 654 P.2d 562, 565 (1988)(both cases cited in *Hewitt*, 108 N.M. at 184, 769 P.2d at 97).

18. *Hewitt*, 108 N.M. at 184, 769 P.2d at 97 (citing *Velasquez*, 99 N.M. at 112, 654 P.2d at 565).

19. *Id.* Statements to the grand jury explaining law or procedure are proper unless they are incorrect or conflict with the grand jury's charge. *Id.* (citing State v. Ballinger, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), *rev'd on other grounds*, 100 N.M. 583, 673 P.2d 1316 (1984) and State v. Martinez, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982)).

20. *Id.* N.M. STAT. ANN. § 31-6-7 (1984) states, in part, "The prosecuting attorney shall conduct himself in a fair and impartial manner at all times when assisting the grand jury."

21. *Hewitt*, 108 N.M. at 185-86, 769 P.2d at 98-99 (Alarid, J., dissenting).

22. 106 N.M 764, 750 P.2d 464 (Ct. App. 1988).

23. 107 N.M. 478, 760 P.2d 170 (Ct. App. 1988).

24. 106 N.M. at 765, 750 P.2d at 465.

that a mandamus writ was inappropriate to control the district attorney in grand jury proceedings for two reasons: first, the petitioner had other remedies available, including motions to dismiss or to quash indictment or a writ of prohibition; second, mandamus could not properly compel a district attorney, who is given broad discretionary power.[25]

In *Morton*, the court of appeals considered whether an indictment must allege aggravating circumstances in order for the state to prosecute the defendant in a death penalty proceeding.[26] The court held that aggravating circumstances are not elements of the capital felony charged but are considerations for sentencing following conviction.[27] The indictment, therefore, was sufficient because it recited the crime as a capital felony and referred to the proper statute.[28] Because the defendant was charged with a capital felony, the defendant was on notice that the court would consider the aggravating circumstances listed in the capital felony sentencing provision.[29] The court attached a due process caveat, stating that the state may have to provide notice of intent to claim aggravating circumstances prior to trial if it intends to establish aggravating circumstances through evidence admitted at trial.[30]

B. Pre-Indictment Delay

In *State v. Lewis*,[31] the defendant moved to dismiss his indictment on the basis that he was denied due process because pre-indictment delay abrogated his fundamental right to a speedy trial.[32] When the trial court denied his motion, he pled guilty to the charges, conditioning his plea on the right to appeal the constitutional issue of speedy trial. The court of appeals affirmed his convictions.[33]

Lewis was arrested for selling amphetamines to undercover narcotics agents on two separate occasions. The state delayed making the arrest for nine months after the final sale in order to continue its undercover operation.[34]

Pre-indictment delay presents a due process question, rather than a speedy trial question, because the sixth amendment right to a speedy

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25. *Id.* at 766-67, 750 P.2d at 466-67. Mandamus writs may only be issued when no other timely and adequate remedy exists, and they may only be issued to mandate the performance of a ministerial, nondiscretionary duty. *Id.* at 766, 750 P.2d at 466 (citing, inter alia, N.M. STAT. ANN. § 44-2-5 (1978); *see also id.* § 44-2-4).

26. 107 N.M. at 479, 760 P.2d at 171.

27. *Id.* at 479-80, 760 P.2d at 171-72.

28. *Id.* at 480, 760 P.2d at 172.

29. *Id.* (citing N.M. STAT. ANN. § 31-20A-5 (Repl. Pamp. 1987) ("aggravating circumstances to be considered by the sentencing court or jury")).

30. *Id.* at 480-81, 760 P.2d 172-73. The state's filing of a notice of intent to claim aggravating circumstances was sufficient and did not circumvent the grand jury's duty to find probable cause. *Id.* at 481, 760 P.2d at 173. The grand jury found probable cause as to the underlying offense and need not have found probable cause as to aggravating circumstances. *Id.*

31. 107 N.M. 182, 754 P.2d 853 (Ct. App. 1988).

32. *Id.* at 183, 754 P.2d at 854.

33. *Id.*

34. *Id.*

trial applies only after the defendant has been indicted, arrested or accused.[35] The court of appeals rejected Lewis' due process claim, applying the standard established in *State v. Jojola*.[36]

Since *Jojola*, the courts have made clear that a defendant must show with substantial certainty that lost evidence would have been exculpatory.[37] *Lewis* does not change the analysis. [38] Lewis claimed that witnesses were unavailable at trial who would have testified he did not transfer any drugs.[39] The court dismissed this claim as a speculative assertion that a witness might be useful; the claim did not show actual prejudice.[40] The court stated that the identity of alibi witnesses was unclear and that the agents' testimony on the lack of witnesses, though uncertain, cast doubt on the extent of actual prejudice.[41]

Because the defendant did not successfully show actual prejudice, the court did not need to reach the reasonableness of the state's justification for the delay. The court did complete the analysis, however, holding in dictum that the state's desire to continue an ongoing undercover operation for almost nine months was a reasonable basis for delay.[42]

C. Speedy Trial: Six-Month Rule

The following cases during the survey year interpreted New Mexico's rule governing the right to a speedy trial: *State v. Mendoza*,[43] *State v.*

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35. *Id.* at 184, 754 P.2d at 855. For a discussion of sixth amendment speedy trial issues, see *infra* notes 324-46 and accompanying text.

36. 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976). In *Jojola*, the court of appeals applied the standards set forth in United States v. Marion, 404 U.S. 307 (1971). Due process is violated if pre-indictment delay causes substantial prejudice to a defendant, and the delay was an intentional device to gain tactical advantage over the accused. *Jojola*, 89 N.M. at 490, 553 P.2d at 1297. In *Jojola*, the court developed a two-step procedure for determining whether a defendant has been substantially prejudiced by pre-indictment delay. First, the defendant must show he has suffered *actual* prejudice by specifically establishing how his defense would have been more successful had the delay been shorter. *Id.* at 491, 553 P.2d at 1298. After the defendant shows actual prejudice, the court must weigh the actual prejudice against the state's reasons for the delay to determine whether there has been substantial prejudice. *Id.* at 490, 553 P.2d at 1297.

37. *Jojola* itself was a sodomy case delayed 7.5 months. The court rejected as insufficient the defendant's bald claim that he was prejudiced because he could not remember relevant events. 89 N.M. at 491, 553 P.2d at 1298.

In State v. Grissom, 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987), defendants charged with business fraud claimed a due process violation because of the state's 16 month delay. Defendants cited the death of an exculpatory witness. The court found no substantial prejudice because the trial court was willing to admit testimony given by the witness in relation to another charge prior to his death. *Id.* at 566, 746 P.2d at 672. Further, the court indicated that the successful prosecution of white collar crimes required greater tolerance for delay. *Id.* at 561, 746 P.2d at 667.

In State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978), defendant claimed a due process violation because the death of a witness hampered his defense of a larceny charge. The court found that defendant failed to present what the witness would have testified to and how the testimony would have exonerated him. When the defendant further complained that the state had established no reason for the one-year pre-indictment delay, the court indicated that unless there is actual prejudice, the court need not reach the issue of the state's reason for the delay. *Id.* at 758, 581 P.2d at 21.

38. 107 N.M. at 184, 754 P.2d at 855.

39. *Id.* at 185, 754 P.2d at 856.

40. *Id.*

41. *Id.*

42. *Id.* at 185-86, 754 P.2d at 856-57.

43. 108 N.M. 446, 774 P.2d 440 (1989).

Bishop,[44] and *State v. Lucero*.[45] Although the right to a speedy trial is grounded in the United States Constitution,[46] many states, including New Mexico, have enacted their own rules to enforce and supplement the constitutional right.[47] While the courts have traditionally distinguished between statutory and constitutional speedy trial challenges, the supreme court's two-tiered analysis in *Mendoza* indicates that constitutional rights are always implicated and must be examined.[48]

In *Mendoza*, the supreme court granted certiorari to consider whether the six-month rule recommences upon a finding of competency following a stay of proceedings to determine a defendant's competency to stand trial.[49] The court found these circumstances analogous to the rule permitting the six-month time period to recommence upon a finding of competency following a stay of proceedings for incompetency.[50] The supreme court held that because a stay to determine competency was essentially in the defendant's interest, the stay was chargeable to the

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44. 108 N.M. 105, 766 P.2d 1339 (Ct. App. 1988).

45. 108 N.M. 548, 775 P.2d 750 (Ct. App.), *cert. quashed*, 108 N.M. 582, 775 P.2d 1299 (1989).

46. U.S. CONST. amend. VI & XIV. New Mexico's constitution also guarantees the right to a speedy trial. N.M. CONST. art. II, § 14. For discussion of constitutional speedy trial challenges in the survey year, see *infra* notes 324-46 and accompanying text.

47. New Mexico's District Court Rule of Criminal Procedure 5-604(B) states:

> Time limits for commencement of trial. The trial of a criminal case or an habitual criminal proceeding shall be commenced six (6) months after whichever of the following events occurs latest:
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> (1) the date of arraignment, or waiver of arraignment, in the district court of any defendant;
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> (2) if the proceedings have been stayed on a finding of incompetency to stand trial, the date an order is filed finding the defendant competent to stand trial;
>
> (3) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed;
>
> (4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal;
>
> (5) the date of arrest of the defendant for failure to appear;
>
> (6) if the defendant has been placed in a preprosecution diversion program, the date of the filing with the clerk of the district court of a notice of termination of a preprosecution diversion program for failure to comply with the terms, conditions or requirements of such program;
>
> (7) the date the court allows the withdrawal of a plea or the rejection of a plea made pursuant to Paragraph's A to F of Rule 5-304.

SUP. CT. RULES ANN. 5-604(B) (Recomp. 1986). The Rules of Criminal Procedure for the Magistrate Courts, Metropolitan Court, and Magistrate Courts also specify that

> [a] charge . . . which is pending for six (6) months from the date of the arrest of the defendant or the filing of a complaint or citation against the defendant . . . without commencement of a trial . . . shall be dismissed without prejudice unless, after a hearing, the [court] finds that the defendant was responsible . . . .

Id. 6-506(B), 7-506(B), 8-506(B) (Repl. Pamp. 1988).

48. *Mendoza*, 108 N.M. at 449, 774 P.2d at 449. In his special concurrence in *Mendoza*, Justice Ransom argued that the court should avoid the common appellation of "speedy trial" for both the rule and the constitutional right and avoid "engrafting principles of constitutional analysis onto the operation of the rule." *Id.* at 444, 774 P.2d at 444.

49. *Id.* at 441, 774 P.2d at 441.

50. *Id.* at 443, 774 P.2d at 443. *See* SUP. CT. RULES ANN. 5-604(B)(2) and *supra* note 47. Defendant's counsel argued, and the trial court and the court of appeals agreed, that since the inquiry led to a finding that the defendant was competent, the six-month time period was not recommenced under the plain meaning of Rule 5-604(B)(2). *Mendoza*, 108 N.M. at 441, 774 P.2d at 441.

defendant, and the six-month time period recommenced after a finding of competency was entered.[51] The court declined to read its rule on incompetency stays in a literal manner.[52] Although no court rule specifically applied to the defendant's situation, the supreme court held that recommencement of the six-month period was "consistent with the intent of the rule, with the interests protected by it, and [was] appropriate in the present case."[53]

In the second tier of its analysis, the court examined the delay in terms of factors gleaned from cases brought under the sixth amendment speedy trial guarantee.[54] This tier demands consideration of the length of delay, reason for the delay, defendant's assertion of his right, and prejudice to the defendant.[55] The court found that the delay was to protect Mendoza's constitutional rights, that he acquiesed in the delay, that he only asserted his right after trial commenced, and, that no prejudice was revealed.[56] Thus, the court found no violation of Mendoza's right to a speedy trial.[57] As Justice Ransom objected in his special concurrence, the court has now effectively merged constitutional analysis with the speedy trial inquiry under its rules.[58]

In *Bishop*, the court clarified the definition of "month" for purposes of the rule governing the right to a speedy trial.[59] The court defined a month as a calendar month[60] and determined that the date the complaint is filed should not be included in computing the rule's period.[61]

The court in *Bishop* also analyzed when a defendant waives his right to rely upon the rule.[62] Bishop was charged in Bernalillo County with driving while intoxicated and failing to yield the right of way.[63] The case was set for trial seven times.[64] When the trial finally commenced seven months after the charges were filed, the court dismissed for failure to prosecute within the six-month time limit.[65] The court of appeals reversed.[66] During the seven months before trial, Bishop had been granted a thirty-

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51. *Id.* at 443, 774 P.2d at 443.

52. *Id.* at 443-44, 774 P.2d at 443-44. The court relied, in part, on the "common sense approach" developed by State v. Flores, 99 N.M. 44, 653 P.2d 875 (1982). *Flores* explicated what has become accepted as the established rule of construction for speedy trial questions. *Flores* held that the purpose of the rule was "to assure the prompt trial and disposition of criminal cases" and is not to be technically applied "to effect dismissals." *Id.* at 46, 653 P.2d at 877.

53. *Mendoza*, 108 N.M. at 442, 774 P.2d at 442.

54. *Id.* at 443, 774 P.2d at 443.

55. *Id.* For further explanation of the constitutional factors, see State v. Chacon, 103 N.M. 288, 289, 706 P.2d 152, 153 (1985).

56. *Mendoza*, 108 N.M. at 443-44, 774 P.2d at 443-44.

57. *Id.* at 444, 774 P.2d at 444.

58. *Id.*

59. 108 N.M. at 107, 766 P.2d at 1341.

60. *Id.*

61. *Id.* at 108, 766 P.2d at 1342.

62. *Id.* at 108-09, 766 P.2d at 1342-43.

63. *Id.* at 106, 766 P.2d at 1340.

64. *Id.*

65. *Id.* at 106, 766 P.2d at 1340. The court analyzed the issue under former Metropolitan Court Criminal Rule 55(b) which is identical to SUP. CT. RULES ANN. 7-506(B) (Repl. Pamp. 1988).

66. *Bishop*, 108 N.M. at 110, 766 P.2d at 1344.

five day continuance by the court.[67] His motion for a continuance included an express waiver of the six-month rule.[68] In appellate argument, however, Bishop stated that his waiver was limited to the continuance period, that tolling is not authorized under the rule, and that even though a continuance had been granted, the trial court had ample opportunity to commence trial within the statutory period.[69] Bishop argued that the rule should be strictly construed in his favor.[70]

The court of appeals disagreed, holding that the right to a speedy trial is a right relative to delays, and that if a defendant causes, contributes or consents to a delay, he may have waived his right.[71] The trial court must examine the reasons for all delays.[72] If the defendant caused any delay, the court has the discretion to exclude that period from the six-month limitation.[73] The court construed the motion for continuance as a limited waiver of the running of the time under the six-month rule for the period of the continuance.[74] The court stated, however, that a defense continuance does not automatically waive the running of the time.[75] In *Bishop*, the defense motion or continuance included a statement that "[d]efendant waives the six-month rule."[76]

In *Lucero*, the court of appeals affirmed the metropolitan court's dismissal of a criminal complaint for failure to prosecute within the six-month period mandated by Rule 7-506(B).[77] The state filed charges against the defendant on October 2, 1986 for driving while under the influence of alcohol and other offenses . When the arresting officer failed to appear for trial, the court dismissed the case without prejudice. On December 19, the state refiled charges and trial was set for March 11, 1987. The defendant obtained two continuances, and trial was once again set for May 21, 1987. This trial date was postponed, however, because of the absence of the trial judge. When all parties appeared for trial on July 9, the court dismissed the charges because six months had passed since the original filing date. The court of appeals affirmed the dismissal.[78]

The court of appeals held that the filing of a new complaint does not toll the operation of the rule if it alleges no new facts or charges.[79]

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67. *Id.* at 106, 766 P.2d at 1340.
68. *Id.*
69. *Id.* at 108, 766 P.2d at 1342.
70. *Id.*
71. *Id.* at 109, 766 P.2d at 1343.
72. *Id.*
73. *Id. See supra* note 47.
74. *Bishop*, 108 N.M. at 109, 766 P.2d at 1343. In his dissent, Judge Apodaca stated that the majority inappropriately confused waiver with the exception provision of the rule. *Id.* at 110, 766 P.2d at 1344.
75. *Id.* at 109, 766 P.2d at 1343. *See also Lucero*, 108 N.M. at 551, 775 P.2d at 753 ("[a]utomatic tolling of the six-month rule during a delay caused by defendant's conduct is not required") (citing *Bishop*).
76. 108 N.M. at 106, 766 P.2d at 1340.
77. 108 N.M. at 551, 775 P.2d at 753 (discussing SUP. CT. RULES ANN. 7-506(B) (Repl. Pamp. 1988); *see supra* note 47).
78. *Id.* at 549, 775 P.2d 751.
79. *Id.* at 551, 775 P.2d at 753.

Harmonizing its holding with *State v. Chacon*[80] and *State v. Benally*,[81] the court noted that those cases did not compel a finding that every dismissal by a court initiated the running of a second six-month period.[82] In *Lucero*, the court found that the charges in the second complaint were identical to those in the first, that no new facts or information formed the basis of the second complaint, and that the primary reason for refiling was the state's negligence in prosecuting the first complaint.[83]

Even without the six-month time period recommencing with the second complaint, the trial setting vacated by defendant's motion for continuance was within the original six-month period.[84] While the court had the power to toll the running of the six-month rule due to Lucero's continuances, it was within its discretion not to do so.[85] A court's decision to toll must be based on an analysis of all relevant factors.[86] Based upon the history of the case, the court of appeals could not find error as a matter of law and affirmed the lower court's decision.[87]

III. JURY SELECTION

A. Peremptory Challenges

In *State v. Goode*[88] and *State v. Jim*[89] the court of appeals examined the state's use of peremptory challenges. *Batson v. Kentucky*[90] provided the framework for analyzing whether the prosecution violates a defendant's right to equal protection by using peremptory challenges to exclude members of the defendant's race from the jury.[91]

The court of appeals in *Goode* stated the proper procedure for analyzing whether challeges were discriminatory and articulated circumstances that raise an inference of purposeful discrimination and criteria by which to

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80. 103 N.M. 288, 706 P.2d 152 (1985) (amended supplemental criminal information was sufficiently different from original to commence second six-month period).

81. 99 N.M. 415, 658 P.2d 1142 (Ct. App. 1983) (second six-month period commenced on filing of amended information).

82. *Lucero*, 108 N.M. at 551, 775 P.2d at 753.

83. *Id.* at 550, 775 P.2d at 752.

84. *Id.* at 551, 775 P.2d at 753.

85. *Id.* (citing *Bishop*, 108 N.M. at 106, 766 P.2d at 1340.)

86. *Id.* Under SUP. CT. RULES ANN. 7-506(B) (Repl. Pamp. 1988), "A metropolitan court must decide whether the defendant was responsible for the failure to hold trial in a timely fashion." *Id.*

87. *Lucero*, 108 N.M. at 551, 775 P.2d at 753.

88. 107 N.M. 298, 756 P.2d 578 (Ct. App. 1988).

89. 107 N.M. 779, 765 P.2d 195 (Ct. App.), *cert. denied*, 107 N.M. 720, 764 P.2d 49 (1988).

90. 476 U.S. 79 (1986).

91. New Mexico first applied the *Batson* criteria in State v. Sandoval, 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987). To raise the issue, a defendant must first make a prima facie showing that the state's challenges were exercised in a discriminatory manner. *Id.* at 698, 736 P.2d at 503. To establish a prima facie case, the defendant must show that he is a member of a cognizable racial group, that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire, and that these facts and other circumstances raise an inference that the prosecutor exercised his challenges to remove members of the panel on account of their race. *Id.* (quoting *Batson*, 476 U.S. at 96). Once the defendant has made the requisite showing, the burden shifts to the state to come forward with racially neutral explanations for its challenges. *Id.* at 700, 736 P.2d at 505.

examine prosecutors' justifications for challenges.[92] *Goode* involved unusual facts for an examination of discriminatory peremptory challenges because neither the trial judge, the prosecutor, nor the defense counsel realized that the excluded panel member was black until after the jury had been selected.[93] To establish a prima facie case of racially discriminatory use of peremptory challenges, a defendant must establish that he is a member of a cognizable racial group, that the prosecuter has used peremptory challenges to remove members of that group from the jury and that the circumstances raise an inference of racial discrimination.[94] In *Goode*, the court cited three circumstances that would raise an inference of discriminatory use: a showing that the defendant's race is substantially underrepresented on the jury; a showing that the case is susceptible to racial discrimination because the victim and defendant are of different races; and a showing that the state's challenges have excluded all members of the defendant's race.[95] In *Goode*, the court found that the prima facie burden had been met because the victim and defendant were from different races and the state's challenge excluded the only black panel member from the jury.[96]

The court determined that only after the prima facie case has been established should the state's racially neutral justifications be examined.[97] While the state's burden is not as strict as that imposed for removing a juror for cause, the state must give "clear and reasonably specific reasons that are related to the case to be tried."[98] The trial court then must examine the state's reasons to determine whether they are "genuine and reasonable."[99]

Several circumstances might indicate that a prosecutor's justifications are pretextual. The court identified the following circumstances: varying treatment of white and nonwhite panel members; desultory or inadequate voir dire of members of a defendant's race; justification unrelated to the specific case; and a past prosecutorial pattern of challenges against particular racial groups.[100] In addition, the court noted that assumptions by prosecutors that members of a specific race hold certain beliefs or will act in predictable ways are unconstitutional.[101]

Conversely, if the totality of circumstances indicates that the prosecution has carefully considered the merits of each panel member, the court will not find discriminatory use of a challenge.[102] In *Goode*, the court found

92. *Goode*, 107 N.M. at 301-03, 756 P.2d at 581-83.
93. *Id.* at 300, 756 P.2d at 580.
94. *Id.* at 301, 756 P.2d at 581.
95. *Id.*
96. *Id.*
97. *Id.* (adopting the approach taken in People v. Granillo, 197 Cal. App. 3d 110, 242 Cal. Rptr. 639 (1987)).
98. *Id.* at 301, 756 P.2d at 581.
99. *Id.* at 302, 756 P.2d at 582.
100. *Id.* at 302-03, 756 P.2d at 582-83.
101. *Id.* at 303, 756 P.2d at 583.
102. *Id.*

that the prosecutor's exclusion of the juror because she had previously served on a hung jury, combined with the fact that the prosecutor was ignorant of the panel member's race was sufficient.[103] The court cautioned trial courts, however, that *Goode* presented an unusual fact situation.[104] The prosecutor's assertion of ignorance of the race of a panel member should rarely be given substantial credence.[105]

The court again examined discriminatory use of peremptory challenges in *State v. Jim*.[106] In *Jim*, the court held that the defendant failed to establish a prima facie case because circumstances did not support an inference that the prosecutor excluded the panel member because she was Navajo.[107] The court indicated that the prima facie case was weak because both victim and defendant were Navajo, and there was no showing that Navajos were underrepresented on the jury.[108] The defendant argued that two Navajos were removed from the panel for cause, that the prosecution did not voir dire the excluded panel member, and that the presence of two Navajos on the jury did not automatically rule out discrimination.[109] The court held that the prosecutor's failure to question the prospective juror was relevant in evaluating the prosecutor's justifications but insufficient to establish the prima facie case.[110] Because the defendant did not establish the prima facie case, the court did not examine the prosecutor's justifications for the exclusion.[111]

B. Removal for Cause

The following cases, *State v. Jim*,[112] *State v. Sutphin*,[113] *State v. Espinosa*,[114] and *State v. Wiberg*,[115] demonstrate the appellate courts' strong support for a trial court's discretion to retain or dismiss jurors for cause. Absent clear abuse of discretion, an appellate court will not disturb the jury selection below.

In *Jim*, the defendant asserted that a juror was improperly excused for cause because of the juror's acquaintance with the defense counsel.[116] The defendant argued that no showing was made that the juror could

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103. *Id.* at 303-04, 756 P.2d at 583-84.
104. *Id.* at 304, 756 P.2d at 584.
105. *Id.*
106. 107 N.M. 779, 765 P.2d 195 (Ct. App. 1988).
107. *Id.* at 782, 765 P.2d at 198.
108. *Id.* at 781-82, 765 P.2d at 197-98. This case also indicates the importance of making a factual showing on the record that the excluded juror is a member of a cognizable race. Here, prosecution objected that other than her appearance, there was no actual showing that the excluded panel member was Navajo. *Id.* at 781, 765 P.2d at 197. The appeals court agreed in this case to assume she was Navajo; however, practitioners rely on such tolerance at their peril.
109. *Id.* at 782, 765 P.2d at 198. Defendant cited United States v. Clemons, 843 F.2d 741 (3d Cir. 1988), for this general proposition.
110. *Jim*, 107 N.M. at 782, 776 P.2d at 198.
111. *Id.*
112. 107 N.M. 779, 776 P.2d 195 (Ct. App.), *cert. denied*, 107 N.M. 720, 764 P.2d 491 (1988).
113. 107 N.M. 126, 753 P.2d 1314 (1988).
114. 107 N.M. 293, 756 P.2d 573 (1988).
115. 107 N.M. 152, 754 P.2d 529 (Ct. App.), *cert. denied*, 107 N.M. 106, 753 P.2d 352 (1988).
116. 107 N.M. at 782, 765 P.2d at 198.

not be fair and impartial.[117] The court stated that the standard of review was abuse of discretion. Here the trial court did not abuse its discretion; abuse of discretion occurs only when the court allows a biased juror to sit.[118] "Defendant has a legal right only to impartial jurors, not to impartial jurors of his choice."[119]

In *Sutphin*, the defendant challenged the removal of two prospective jurors who were opposed to the death penalty.[120] The state sought the death penalty against prisoner Sutphin for the murder of his cellmate.[121] The defendant was subsequently sentenced to life imprisonment.[122] The supreme court upheld the trial court's assessment of the jurors' ability to view the proceedings impartially and apply the law in accordance with the court's instruction.[123] The court based its decision on the standard established in *Wainwright v. Witt*[124] for determining when a prospective juror may be excluded for his views on capital punishment.

Espinosa and *Wiberg* illustrate that a defendant who challenges the court's role in jury selection must meet the heavy burden of proving abuse of discretion. Espinosa appealed the trial court's refusal to allow him to voir dire panel members about whether they would be prejudiced by his decision not to testify.[125] The trial court excluded this question on the basis that it inquired into an issue of law rather than fact.[126] In affirming, the court of appeals emphasized that the direction of voir dire is discretionary and will only be reversed upon a finding of abuse.[127]

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117. *Id.* at 783, 765 P.2d at 199.

118. *Id.* (quoting United States v. Puff, 211 F.2d 171, 184-85 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954)). The New Mexico Supreme Court's clear directive in Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987) may have prompted the court's caution in *Jim*. In *Fuson*, the supreme court granted the defendant a new trial because the trial court refused to remove a juror for cause who was acquainted with several witnesses. *Id.* at 633, 735 P.2d at 1139. After the court's refusal, the defense used a peremptory challenge to remove the offending juror. Because jurors were then chosen after defense had exhausted its peremptory challenges, the trial court's refusal impaired Fuson's right to a peremptory challenge. The court of appeals affirmed the trial court, relying upon Martinez v. State, 95 N.M. 445, 623 P.2d 565 (1981), for its holding that the defendant must prove prejudice. The supreme court, following the lead of federal courts, disagreed and overruled *Martinez*. The court held that every defendant has a right to an impartial jury, and "prejudice is presumed when the right of peremptory challenge is denied or impaired." *Fuson*, 105 N.M. at 634, 735 P.2d at 1140.

119. *Jim*, 107 N.M. at 783, 765 P.2d at 199.

120. 107 N.M. 126, 753 P.2d 314 (1988).

121. *Id.* at 129, 753 P.2d at 1317.

122. *Id.* The fact that Sutphin did not receive the death penalty does not moot the issue. The debate concerns whether a defendant is accorded a fair trial from an impartial, representative jury when only those citizens who unquestioningly accept capital punishment are selected.

123. *Id.* at 130, 753 P.2d at 1318. One juror stated he had considered the issue but "still couldn't vote for [the death penalty]." *Id.* at 129, 753 P.2d at 1317. The second juror stated she could consider the death penalty only in cases involving the death of a police officer. *Id.*

124. 469 U.S. 412 (1985). In *Wainwright*, the Court held that a prospective juror may be dismissed for cause when his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424. The Court adopted the more relaxed standard established by Adams v. Texas, 448 U.S. 38 (1980), and abandoned the necessity to prove an excluded juror's bias with "unmistakable clarity" as required by Witherspoon v. Illinois, 391 U.S. 510 (1968).

125. *Espinosa*, 107 N.M. at 296, 756 P.2d at 576.

126. *Id.*

127. *Id.*

Noting that the defense counsel agreed without objection to the court's direction, the court of appeals declined to find an abuse of discretion.[128]

Similarly, in *Wiberg*, the court held that the defendant did not sustain his burden of proving a potential juror's partiality.[129] Wiberg was convicted of driving under the influence of alcohol, vehicular homicide while driving under the influence of alcohol, reckless driving, and causing great bodily harm while driving under the influence of alcohol.[130] On appeal, he contended he was denied a fair trial because the court failed to strike a juror with very strong views against drinking.[131] When asked by defense counsel whether she could be impartial in judging the case, the juror indicated that she could.[132] The court of appeals affirmed. Because defense counsel did not pursue the inquiry after the juror said she could be impartial, defendant did not meet his burden in demonstrating partiality.[133]

IV. JUROR MISCONDUCT

In *State v. Sacoman*,[134] the defendant appealed his murder conviction partially on the basis of juror misconduct. Sacoman claimed, as an alibi defense, that he was working as a busboy at a hotel at the time of the murder. Work records indicated that he had not clocked out that day, and various witnesses offered conflicting testimony about Sacoman's presence at the work place and about the hotel's clock-out procedures.[135] One juror injected his personal experience as a busboy into the jury's deliberations; another juror injected a fabricated conversation she claimed to have had with a hotel payroll clerk.[136] This communication of specific knowledge was extraneous information and created a rebuttable presumption of prejudice.[137] However, because the jury had already unanimously decided that the defendant was at the scene of the murder and not at work by the time the extraneous information was introduced, the court of appeals held that "the trial court reasonably found presumption of prejudice was overcome."[138]

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128. *Id.*

129. 107 N.M. at 157, 754 P.2d at 534.

130. *Id.* at 153, 754 P.2d at 530.

131. *Id.* at 156, 754 P.2d at 533. The juror was a member of MADD (Mothers Against Drunk Driving) who stated she "hated" drinking and considered it a sin. *Id.*

132. *Id.*

133. *Id.* at 157, 754 P.2d at 534. The court also noted that it was the defense counsel who "rehabilitated" the prospective juror. *Id.*

134. 107 N.M. 588, 762 P.2d 250 (1988).

135. *Id.* at 589-90, 762 P.2d at 251-52.

136. *Id.* at 590, 762 P.2d at 252. Jury deliberations must concern only the factual record and not extraneous facts which have not been "screened through the judicial process." *Id.* at 591, 762 P.2d at 253 (quoting People v. Huntley, 87 A.D.2d 488, 492, 452 N.Y.S.2d 952, 955 (1982)).

137. *Id.* at 590-91, 754 P.2d at 252-53.

138. *Id.* at 592, 762 P.2d at 254. *See* State v. Zinn, 106 N.M. 544, 550, 746 P.2d 650, 656 (1987) (one method of rebutting prejudice is to show the improper communication occurred when the jury was already prepared to return a verdict). The court in *Sacoman* also noted the strength of the state's case. Not only did two codefendants who pled to lesser charges testify, but two other witnesses testified that defendant physically reenacted his role in the fatal shooting the following day. 107 N.M. at 592, 762 P.2d at 254.

Sacoman further claimed that the woman who fabricated the conversation and who then perjured herself at a hearing on the motion for a new trial was a biased and dishonest juror.[139] He claimed mistrial because she had prejudiced his right to a fair and impartial jury.[140] The court of appeals held that whether a juror should be disqualified is a question of fact and that the trial court's ruling would not be disturbed unless unreasonable.[141] The court found the trial court's assessment reasonable because the fellow jurors were unaffected by her statements and because she was "motivated only by her appraisal of the evidence heard at trial, and her desire for peer recognition."[142]

V. TRIAL PROCEDURE

In *State v. Archuleta*,[143] the defendant appealed his conviction after a bench trial for possession of marijuana, a lesser-included charge that the court considered sua sponte. The sole issue on appeal was whether, by waiving his right to jury trial, the defendant waived his right to decide whether to submit a lesser-included charge.[144]

The defendant waived his right to a jury trial on the charge of possession of marijuana with intent to distribute.[145] Neither the defense nor the prosecution requested a finding on the lesser charge of mere possession.[146] The defendant argued on appeal that *State v. Boeglin*[147] held that a defendant has the exclusive right to determine whether lesser offenses should be submitted to the factfinder and that right was not lost because he waived his right to a jury trial.[148] Disagreeing, the court stated that *Boeglin* merely held that a defendant has a right to an instruction for a lesser-included offense if the evidence supports it, not that he has the right to waive such an instruction.[149] The court held that at a bench

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139. *Sacoman*, 107 N.M. at 592, 762 P.2d at 254.
140. *Id.* at 593, 762 P.2d at 255.
141. *Id.*
142. *Id.*
143. 108 N.M. 397, 772 P.2d 1320 (Ct. App. 1989).
144. *Id.* at 398, 772 P.2d at 1321.
145. *Id.*
146. *Id.* Defendant had stipulated to having 1.4 ounces of marijuana at the time of his arrest. *Id.*
147. 105 N.M. 247, 731 P.2d 943 (1987).
148. *Archuleta*, 108 N.M. at 398, 772 P.2d. at 1321. In *Boeglin*, the court stated that a defendant has the duty to make strategic choices regarding submission of lesser-included offenses. 105 N.M. at 249, 731 P.2d at 945. In *Boeglin*, the trial court advised the defendant and his counsel that the defendant was entitled to submission of an instruction for second degree murder. *Id.* at 248-49, 731 P.2d at 944-45. Against the advice of counsel, Boeglin declined to submit the instruction and was convicted of first degree murder. *Id.* at 249, 731 P.2d at 945. On appeal, Boeglin argued that the trial court had a duty to submit sua sponte an instruction on a lesser offense, which was supported by the evidence, in order to assure the defendant a fair trial. *Id.* Disagreeing, the court of appeals responded that the decision to submit a lesser-included offense instruction is not a fundamental right that cannot be waived. *Id.* at 250, 731 P.2d at 946. The court held the defendant voluntarily waived his right to a lesser-included offense instruction and stated that the court was not required to give the second degree murder instruction sua sponte, regardless of whatever requests or objections are made by the prosecution or defense. *Id.* at 249, 252, 731 P.2d 945, 948.
149. *Archuleta*, 108 N.M. at 398, 772 P.2d at 1321.

trial, the court may consider lesser-included charges that neither the defense nor the prosecution have requested.[150] The court declined to allow the defendant to reconsider his waiver of jury trial since a defendant does not have the exclusive right to determine whether a lesser-included offense instruction will be submitted to the jury.[151] The factfinder may consider a lesser-included offense in both a bench or jury trial.[152] In the case of a bench trial, the court expressly held that the "lesser-included charge may be argued by either party, or may be considered sua sponte by the trial court."[153]

VI. SENTENCING

Four cases in the survey year, *Saavedra v. State*,[154] *State v. Morton*,[155] *Hayes v. State*,[156] and *Gillespie v. State*,[157] established important rules in sentencing.

In *Saavedra*, the court held that a presumption of vindictive sentencing is inapplicable in a case where the sentencer on remand is a different person than the one who entered the first sentence.[158] Saavedra was originally sentenced to life imprisonment plus twenty-one years, to run concurrently. On remand, the twenty-one year sentence was entered to run consecutively with the life sentence.[159] In *North Carolina v. Pearce*,[160] the United States Supreme Court held that due process requires that a defendant who has appealed must not be penalized by receiving a stricter sentence after the second trial. Such a practice would discourage defendants from exercising their constitutional rights.[161] The Court held that when the second sentence is more severe, a presumption of vindictiveness arises.[162] The state must then rebut the presumption by a showing that evidence uncovered only at the second trial justified the increase.[163]

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150. *Id.* (citing, inter alia, State v. Dyer, 671 P.2d 142 (Utah 1983) (trial court not precluded from considering lesser-included offense in bench trial where the defendant employs an "all or nothing" theory.))

151. *Id.* at 399-400, 772 P.2d at 1322-23 (citing State v. Edwards, 97 N.M. 141, 637 P.2d 572 (Ct. App.), *cert. denied*, 97 N.M. 621, 642 P.2d at 621 (1981)). In *Edwards*, the defendant was charged with second degree murder with the use of a firearm. 97 N.M. at 142, 637 P.2d at 573. The state sought a conviction of involuntary manslaughter by a negligent act, and the jury received an instruction on this lesser-included offense over the objection of defendant. *Id.* at 145, 637 P.2d at 576.

152. *Archuleta*, 108 N.M. at 400, 772 P.2d at 1323.

153. *Id.* at 399, 772 P.2d at 1322.

154. 108 N.M. 38, 766 P.2d 298 (1988). For a discussion of the double jeopardy issue involved in this case, see *infra* notes 277-88 and accompanying text.

155. 107 N.M. 478, 760 P.2d 170 (Ct. App. 1988). *Morton* is discussed *supra* notes 26-30 and accompanying text.

156. 106 N.M. 806, 751 P.2d 186 (1988).

157. 107 N.M. 455, 760 P.2d 147 (1988).

158. 108 N.M. at 44, 766 P.2d at 304.

159. *Id.* at 44, 766 P.2d at 303-04.

160. 395 U.S. 711, 725 (1969).

161. *Id.* at 724-25.

162. *Id.* at 726.

163. *Saavedra*, 108 N.M. at 44, 766 P.2d at 304 (citing Texas v. McCullough, 475 U.S. 134, 141-44 (1986)).

In *Saavedra*, the court expressly overruled *State v. Sisneros*[164] by holding that "the fact that the sentencers are different, as they are in this case, is sufficient grounds to make the presumption of vindictiveness inapplicable."[165] In *Sisneros*, the court held that the while the presence of different sentencers is relevant, it is not dispositive.[166] The court of appeals held that *Saavedra* was controlled by the Supreme Court's ruling in *Texas v. MuCullough*.[167] In *McCullough*, the court held that where two different sentencers were involved, no "increase" took place, but rather, two courts simply held differently, thus the presumption of vindictiveness was relieved.[168]

In *Hayes*, the supreme court decided an important jurisdictional issue, subsequently incorporated into the court's rule on sentence modification.[169] Hayes was convicted of second degree murder, and his conviction was affirmed by the court of appeals in December 1986.[170] As required by the rule, Hayes petitioned for modification of sentence within thirty days of affirmance.[171] After the defense attorney and the trial court exchanged communications, the motion was not heard until May 1987.[172] The trial court dismissed the motion on the basis that since more than 30 days had elapsed since affirmance of the conviction, the court was without jurisdiction to hear the motion.[173] Hayes argued that many federal circuits adhere to the "reasonable time rule," which allows courts discretion to modify sentences after thirty days.[174] Hayes also argued that even if the trial court properly dismissed the motion, he was denied due process because he had relied upon the court's original assurances that the motion would be heard.[175]

The supreme court determined that Rule 5-801 mandates that the *filing* of a motion to modify sentence is jurisdictional, so motions must be filed within thirty days.[176] The *disposition* of the motion, however, is discretionary and trial courts may hear motions after thirty days.[177] With

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164. 101 N.M. 679, 687 P.2d 736 (1984).
165. *Saavedra*, 108 N.M. at 44, 766 P.2d at 304.
166. 101 N.M. at 682, 687 P.2d at 739.
167. 475 U.S. 134 (1986).
168. *Saavedra*, 108 N.M. at 44, 766 P.2d at 304 (quoting *McCullough*, 475 U.S. at 140).
169. *See* SUP. CT. RULES ANN. 5-801 (Cum. Supp. 1989) (committee commentary) which states:

> The rule, as originally drafted, limited the period of time that district court [sic] could modify a sentence to a period of thirty (30) days after imposition of sentence. Rule 5-801 was revised in 1988 to comply with the Supreme Court's decision in Hayes v. State. . . .
>
> Under this rule, no modification of sentence can be considered by the trial court after the filing of notice of appeal. However, the trial court may modify the sentence within thirty (30) days after receipt of the mandate.

170. *Hayes*, 106 N.M. at 807, 751 P.2d at 187.
171. *Id.* at 807, 751 P.2d at 187.
172. *Id.*
173. *Id.*
174. *Id.* The court cited Gaertner v. United States, 763 F.2d 787, 790-91 (7th Cir.), *cert. denied*, 474 U.S. 1009 (1985), for a partial list of circuits that recognize the reasonable time rule.
175. *Hayes*, 106 N.M. at 807, 751 P.2d at 187.
176. *Id.* at 808, 751 P.2d at 188.
177. *Id.*

this ruling, the supreme court specifically overruled the relevant portions of *State v. Sykes*.[178] The court also decided in *Hayes* that if the trial court fails to rule within ninety days, the motion is denied as a matter of law.[179] The court also agreed that dismissal here would have been a clear due process violation, since Hayes had relied upon the assurances of the trial court that the motion would be heard.[180]

In *Gillespie*, the supreme court, relying on the statute that governs parole procedure and upon *Brock v. Sullivan*,[181] held that a parole period for felony conviction commences immediately after the sentence has been completed, and that it may run concurrently with a misdemeanor sentence.[182] The court in *Gillespie* overruled *State v. Smith*[183] to the extent that it was inconsistent with its holding.[184]

VII. POST-TRIAL

A. Pardons

In an unusual case, *State v. Mondragon*,[185] the court of appeals examined the limits of the governor's power to pardon.[186] Mondragon was

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178. 98 N.M. 458, 649 P.2d 761 (Ct. App. 1982). In *Sykes*, the court of appeals held that, except to correct an illegal sentence, all rulings must be made within 30 days. *Id.* at 460, 649 P.2d at 763.

179. 106 N.M. at 808, 751 P.2d at 188. SUP. CT. RULES ANN. 5-801(B) (Cum. Supp. 1989) provides in pertinent part:

> Modification of sentence. A motion to reduce a sentence may be filed within thirty (30) days after the sentence is imposed, or within thirty (30) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within thirty (30) days after entry of any order or judgment of the appellate court denying review of, or having the effect of upholding, a judgment of conviction. . . . The court shall determine the motion within ninety (90) days after the date it is filed or the motion is deemed to be denied.

The rule was also amended by adding present paragraph (A), which provides: "Correction of sentence - The court may correct any illegal sentence at any time pursuant to Rule 5-802 and may correct a sentence imposed in an illegal manner within the time provided by this rule for the reduction of sentence."

180. *Hayes*, 106 N.M. at 808, 751 P.2d at 188.

181. 105 N.M. 412, 733 P.2d 860 (1987).

182. 107 N.M. 456, 760 P.2d 148 (1988). In *Brock*, the court stated:

> In the absence of some fault on the part of the prisoner, a sentence cannot be divided into fragments so as to compel the prisoner to serve the sentence in installments. Because the legislature has deemed the parole period to be part of the sentence of a convicted person, a separation of each parole period from its connected period of imprisonment necessarily requires that the sentence be fragmented and served in installments. We are not persuaded that the legislature intended such a result when it enacted the Criminal Sentencing Act. . . .

105 N.M. at 414, 733 P.2d at 862 (citations omitted). N.M. STAT. ANN. § 31-21-10(C) (1987) reads in part: "An inmate who was convicted of a fourth degree felony and who has served the sentence of imprisonment imposed by the court . . . shall be required to undergo a one-year period of parole."

183. 102 N.M. 350, 695 P.2d 834 (Ct. App. 1985).

184. 107 N.M. at 456, 760 P.2d at 148. In *Smith*, the court of appeals held that "[w]hen any convict has been committed under several convictions with separate sentences, the sentences shall be construed as one continuous sentence for the full length of the combined sentences." 102 N.M. at 352, 695 P.2d at 836.

185. 107 N.M. 421, 759 P.2d 1003 (Ct. App.) *cert. denied*, 107 N.M. 267, 755 P.2d 605 (1988).

186. The New Mexico Constitution grants pardoning power to the governor. N.M. CONST. art.

convicted of fourteen offenses and appealed the enhanced sentence imposed during habitual offender proceedings on twelve counts that had been pardoned by the governor.[187] The court of appeals agreed with Mondragon and reversed the enhancement.[188]

In its memorandum in opposition to summary reversal, the state contended that the governor had no power to pardon habitual sentences, the governor had no power to pardon habitual offender status, and the pardon was premature.[189] The court of appeals rejected the state's arguments, holding that the habitual offender statutes do not limit the governor's power to pardon.[190] If the legislature desires to limit pardoning power, it must do so expressly.[191] The court stated that habitual offender statutes are highly punitive and must be construed strictly; the court would not interpret them as presenting implied limits on the governor's pardoning power.[192] The court noted that the intent of the habitual offender statutes was not frustrated in this instance.[193]

In its second argument, the state claimed that the governor only has power to pardon Mondragon's offenses, not his status as a habitual offender.[194] The court agreed and noted that its holding did not demand a retreat from the supreme court's ruling in *Shankle v. Woodruff*.[195] If Mondragon commits any further offenses, the pardoned offenses can be used to enhance sentence. The governor is not precluded, however, from pardoning any sentence, even that imposed as a result of habitual offender status.[196]

Finally, the state argued that the pardon was premature because Mondragon had not yet been determined a habitual offender.[197] The court

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V § 6. Mondragon was convicted and sentenced for 14 offenses. *Mondragon*, 107 N.M. at 422, 759 P.2d at 1004. The state filed for habitual offender enhancement, seeking an additional year for each offense. During pendency of a prior appeal, the governor pardoned 12 of the sentences and specifically pardoned the enhancements. *Id.* Notwithstanding the governor's pardon, the trial court sentenced Mondragon for an additional 14 years as a habitual offender.

187. *Mondragon*, 107 N.M. at 422, 759 P.2d at 1004.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 423, 759 P.2d at 1005. Habitual offender enhancements may run concurrently or consecutively. Thus, Mondragon's enhancement could have been one or fourteen years. Because sentence enhancements were not pardoned on two of the counts, the enhancement of at least one year was not disturbed.

194. *Id.*

195. 64 N.M. 88, 92-93, 324 P.2d 1017, 1020 (1958). Shankle was sentenced to life imprisonment for swindling in 1941. In 1949, he was granted full pardon by the governor. In 1952, he was again convicted on similar charges. Addressing the question for the first time, the supreme court held that pardon did not erase the underlying conviction, thus the pardoned offense could be used to enhance the sentence for a subsequent crime.

196. *Mondragon*, 107 N.M. at 423, 759 P.2d at 1005. The court noted that if the governor had not specifically pardoned Mondragon's habitual offender sentences, the state's question might be reached. Given the governor's unequivocal statement and his clear authority, however, no sentence for habitual offender could be enforced. *Id.* at 424, 759 P.2d at 1006.

197. *Id.* The state noted that the provision in the New Mexico Constitution that pardon is only allowed "after conviction" was a deliberate attempt to limit pardoning abuses that existed at common

disagreed, finding that Mondragon had been convicted of the underlying offenses. The determination of habitual offender status represented a finding and sentencing thereon, not a finding of guilt.[198]

B. Meritorious Deductions

Martinez v. State[199] laid to rest the possibility that those persons sentenced to life imprisonment might serve less than the mandatory thirty years by receiving meritorious deductions. By statute, an inmate sentenced to life imprisonment for a capital offense first becomes eligible for parole in thirty years.[200] Martinez contended that this statute denies capital felons equal protection by precluding the receipt of meritorious deductions as mandated by section 33-2-34.[201] The supreme court stated that even if the law were discriminatory, it would not be unconstitutional if rationally related to a legitimate governmental purpose.[202] The court then held that confining dangerous persons is a legitimate and rational basis for imprisoning capital felons for at least thirty years.[203]

VIII. CHILDRENS' CODE

During the survey year, New Mexico courts demonstrated their reluctance to expand upon legislative intent in construing juvenile law. The following two cases applied very strict statutory construction.

In *State v. Michael R.*,[204] the court of appeals clarified section 32-1-31(E) of the Childrens' Code. Under a former version of the law, before placing a child on probation, the court had to find both that the child had committed a delinquent act and that the child was in need of care and rehabilitation.[205] Under the current law, the court need only find

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law or in the federal system. The court suggested the following authorities for this historical proposition: In Re Anderson, 34 Cal. App. 2d 48, 92 P.2d 1020 (1939); Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1 (1976); Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977).

198. *Mondragon*, 107 N.M. at 424, 759 P.2d at 1006.

199. 108 N.M. 382, 772 P.2d 1305 (1989).

200. N.M. STAT. ANN. § 31-21-10 (A)(Repl. Pamp. 1987).

201. *Martinez*, 108 N.M. at 383, 772 P.2d at 1306. N.M. STAT. ANN. § 33-2-34 (1987) provides in part:

> Any inmate confined in the penitentiary of New Mexico or other institution designated by the corrections department for the confinement of adult criminal offenders may be awarded a deduction of not more than ten days' meritorious good time per month based upon good conduct upon recommendation of the classification committee and approval of the warden . . . .

202. *Martinez*, 108 N.M. at 383, 772 P.2d at 1306 (citing *McGinnis v. Royster*, 410 U.S. 263 (1973)).

203. *Id.* The court cited its own opinion in *State v. Clark*, 108 N.M. 288, 313, 772 P.2d 322, 349 (1989) for a full discussion of a felon's dangerousness in relation to the actual time he serves in prison.

204. 107 N.M. 794, 765 P.2d 767 (Ct. App.) *cert. denied*, 109 N.M. 748, 764 P.2d 879 (1988).

205. *Id.* at 795, 765 P.2d at 768.

that the child committed a delinquent act.[206] If the court does not find that the child is in need of care and rehabilitation, the court may still place the child on probation without a finding of need for care and rehabilitation.[207] The court may not, however, take the child into custody.[208]

In *State v. Taylor*,[209] the supreme court construed Childrens' Court Rule 10-223 and section 32-1-30(B) of the Childrens' Code. Rule 10-223 states that a transfer hearing shall be commenced within thirty days from filing of a motion to transfer if the child is in custody.[210] The court held that the hearing need only be commenced within the express time period, not completed.[211]

Section 32-1-30(B) provides that a district judge may impose conditions on the confinement of a child defendant.[212] Taylor argued that this statute affords the trial court discretion not to sentence a child convicted of a first degree capital felony to life imprisonment.[213] The court held, however, that this provision may allow the judge to alter the terms of confinement, but not the length of confinement. Where, as in Taylor's case, a sentence is mandatory, a judge has no discretion.[214]

IX. FOURTH AMENDMENT - SEARCHES AND SEIZURES

During the survey year, the court of appeals relaxed the standard for the particularity requirement for search warrants,[215] reexamined the stan-

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206. *Id.* at 796, 765 P.2d at 769. *Michael R.* was decided under a statute effective until July, 1989. The current law, N.M. STAT. ANN. § 32-1-31(E) (Repl. Pamp. 1989) is the same; in relevant part, it states:

> If the court finds on the basis of a valid admission of the allegations of the petition or on the basis of proof beyond a reasonable doubt based upon competent material and relevant evidence that the child committed the acts by reason of which he is alleged to be delinquent or in need of supervision, it may, in the absence of objection, proceed immediately to hear evidence on whether the child is in need of care or rehabilitation and file its finding. . . . If the court finds that a child alleged to be delinquent or in need of supervision is not in need of care or rehabilitation, it may dismiss the petition and order the child released from any detention or legal custody imposed in the proceedings. No child shall be placed in the custody of the youth authority after adjudication of his case without a finding of need for care and rehabilitation.

207. *Michael R.*, 107 N.M. at 796, 765 P.2d at 769.

208. *Id.*

209. 107 N.M. 66, 752 P.2d 781 (Ct. App. 1988) (construing SUP. CT. RULES ANN. 10-223 (Recomp. 1986) and N.M.STAT. ANN. § 32-1-30 (Repl. Pamp. 1986)).

210. SUP. CT. RULES ANN. 10-223 (Recomp. 1986).

211. *Taylor*, 107 N.M. at 69, 752 P.2d at 784.

212. N.M. STAT. ANN. § 32-1-30(B) (Repl. Pamp. 1989).

213. *Taylor*, 107 N.M. at 70, 752 P.2d at 785.

214. *Id.* at 71, 752 P.2d at 786.

215. *See* State v. Elam, 108 N.M. 268, 771 P.2d 597 (Ct. App.), *cert. denied*, 108 N.M. 273, 771 P.2d 981 (1989); State v. Jones, 107 N.M. 503, 760 P.2d 796 (Ct. App.), *cert. denied*, 109 S. Ct. 561 (1988). An original draft of the sections on the fourth, fifth, sixth, and fourteenth amendments was prepared by Victoria L. Jones.

dards for voluntary consent to search,[216] and modified the plain view exception to the warrant requirement.[217]

A. The Particularity Requirement

In *State v. Jones*,[218] the court of appeals reversed the district court's finding that a search warrant listing "invoices, inventory cards, checkbooks, bank records to include cancelled checks, and any other records that show items bought or sold in the operation of Chaveroo Supply Co." was a general search warrant in violation of the fourth amendment.[219] Jones was alleged to have received stolen goods in his oil field supply business.[220] The prosecution offered evidence, uncovered by the search, that Jones paid the seller of the stolen goods only eleven percent of their retail value.[221]

Relying on *Andresen v. Maryland*,[222] the court held that the restrictions of the fourth amendment's particularity requirement may be relaxed when an alleged criminal scheme is complex and involves a mass of documents used as a "shield" to cover incriminating evidence.[223] Where probable cause has been established, the description of the documents to be seized need only be "as specific as the circumstances and the nature of activity under investigation permit."[224]

The court further held that it would have been unreasonable to limit the warrant to documents from specific periods because of the circumstances and the complexity of the criminal scheme.[225] The court's substantial relaxation of the particularity requirement follows from the court's emphasis on the need to provide a "practical margin of flexibility" in cases of complex and carefully concealed criminal schemes.[226]

In *State v. Elam*,[227] the court relied on its decision in *Jones* to reject defendant's fourth amendment claim of an unconstitutional general

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216. *See* State v. Hadley, 108 N.M. 255, 771 P.2d 188 (Ct. App. 1989); State v. Anderson, 107 N.M. 165, 754 P.2d 542 (Ct. App. 1988).

217. *See* State v. Miles, 108 N.M. 556, 775 P.2d 758 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240 (1989).

218. 107 N.M. 503, 760 P.2d 796 (Ct. App.), *cert. denied*, 109 S. Ct. 561 (1988).

219. *Id.* at 504, 760 P.2d at 797. The warrant clause of the fourth amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV. *See generally* Stanford v. Texas, 379 U.S. 476 (1965) (through the fourteenth amendment, the fourth amendment prohibits states from using general warrants).

220. *Jones*, 107 N.M. at 504, 760 P.2d at 797.

221. *Id.*

222. 427 U.S. 463, 481 n.10 (1976).

223. *Jones*, 107 N.M. at 505, 760 P.2d at 798 (quoting Andresen v. Maryland, 427 U.S. 463, 481 n.10 (1976)).

224. *Id.* (quoting United States v. Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983)). In *Jones*, probable cause to search was based on a Chaveroo employee's description of Jone's scheme for concealing evidence of illegal purchases, on the employee's statement that Jones purchased stolen equipment on numerous occasions and on a "roustabout's" statement that he had sold stolen goods to Jones at a reduced price. *Id.* at 505, 760 P.2d at 798.

225. *Id.* The affiant's informant had been unable to estimate the number of purchases of stolen goods that had occurred over a seven-year period. *Id.*

226. *Id.* (quoting *Wuagneux*, 683 F.2d at 1349).

227. 108 N.M. 268, 771 P.2d 597 (Ct. App. 1989).

search.[228] Elam was convicted of running a fraudulent business from his home.[229] The police removed three truckloads of documents, pursuant to a warrant, to establish Elam's fraudulent activities.[230] Elam claimed the search warrant was "general" and sought both to quash the warrant and to suppress the evidence seized.[231] Elam attempted to distinguish *Jones*, arguing that it did not apply to searches of a home.[232] The court disagreed, citing federal cases holding that a home has no greater sanctity when used as a place of business than any other place of business.[233] The police had probable cause to believe that virtually all of the records of the business were evidence or instrumentalities of fraudulent activity.[234] Therefore, the warrant was specific enough to satisfy the particularity requirement.[235]

B. Consent

In *State v. Anderson*,[236] the trial court suppressed evidence discovered when an officer stopped the defendant for speeding, searched the trunk of his car, and found methamphetamine in plastic bags inside a "laundry" bag.[237] The court of appeals affirmed.[238] The state argued that the officer had probable cause to search because Anderson fit a drug courier profile taught in law enforcement classes: he was nervous, was travelling in an easterly direction, had a carry-bag in his car and no other visible luggage, slept in a rest area the previous night, and had a bucket of Kentucky Fried Chicken on the car seat next to him.[239] The court held that those facts described hundreds of innocent motorists travelling New Mexico highways every day and were therefore not sufficient to establish probable cause to search.[240]

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228. *Id.* at 269, 771 P.2d at 598. In *Elam*, the court of appeals quoted supreme court's quotation in *Jones* from *Andresen v. Maryland* describing the need for flexible application of the particularity requirement: "'the complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.'" *Id.* (quoting *Jones*, 107 N.M. at 505, 760 P.2d at 798 (quoting Andresen v. Maryland, 427 U.S. 463, 481 n.10).

229. *Id.* Elam invited victims to invest in contrived expeditions for historical artifacts and treasures through his business, New Mexico Museum Supply and Exploration Co. *Id.*

230. *Id.*

231. *Id.* The warrant was 35 pages long, with a three-page appendix, and its language was similar to that used in *Jones*: all "records, papers, documents or other tangible evidence, including but not limited to tax forms, records of income and expenses . . . cancelled checks, invoices, diaries, journals" etc. of the business were to be seized. *Id.*

232. *Id.*

233. *Id.* at 269-70, 771 P.2d at 598-99 (citing Lewis v. United States, 385 U.S. 206 (1966); United States v. Cerri, 753 F.2d 61 (7th Cir.), *cert. denied*, 472 U.S. 1017 (1985)).

234. The affidavit described a wide variety of fraudulent activities Elam carried out in his home. *Id.* at 270, 771 P.2d at 599.

235. *Id.* at 270, 771 P.2d at 599.

236. 107 N.M. 165, 754 P.2d 542 (Ct. App. 1988).

237. *Id.* at 166-67, 754 P.2d at 543-44.

238. *Id.* at 166, 754 P.2d at 543.

239. *Id.* at 169, 754 P.2d at 546.

240. *Id.*

The state also argued that the defendant had voluntarily consented to the search.[241] The court held, however, that the trial court's decision to suppress the results of the search was supported by substantial evidence.[242] The officer pulled Anderson over for driving two miles per hour over the speed limit.[243] After Anderson had given the officer all the information necessary to issue the speeding ticket, the officer asked Anderson if he could look in Anderson's trunk.[244] After Anderson assented and opened the trunk, the officer handled and opened an opaque white cloth bag he found in the trunk, discovering a substance the officer guessed to be cocaine.[245] The officer then arrested Anderson.[246]

After reviewing these facts, the court of appeals concluded that the trial court's decision to suppress the evidence necessarily included a finding that the officer unreasonably detained the defendant longer than necessary to issue the speeding ticket and that the resulting atmosphere was coercive.[247] Therefore, the totality of the circumstances supported a finding that Anderson's consent was not voluntary.[248] Moreover, the court held that substantial evidence also supported the trial court's finding that the defendant's consent was to search the trunk only and did not extend to the further search of items inside the trunk.[249]

The court of appeals also addressed the issue of voluntary consent in *State v. Hadley*.[250] Officers had gone to the Sagebrush Inn in Taos to investigate a Crimestoppers tip that Hadley was selling drugs and was possibly armed.[251] An officer who knew Hadley approached him, told him that he had received a tip that Hadley might be armed, and obtained Hadley's consent to a pat-down search.[252] The officer, having noticed bulges in Hadley's pockets, searched them and found a camera, a flashlight, and two baggies containing cocaine.[253]

The issue before the court was whether the trial court's finding that consent was voluntary was supported by sufficient evidence.[254] Hadley argued that his consent to the search was not voluntary because the

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241. *Id.* at 168, 754 P.2d at 545.

242. *Id.* Whether consent to a search is voluntary is a question of fact. *Id.* at 167, 754 P.2d at 544 (citing State v. Valencia Olaya, 105 N.M. 690, 736 P.2d 495 (Ct. App. 1987)). The court analyzed the facts to see whether in the light of the presumption disfavoring waiver of constitutional rights, and considering the totality of the circumstances, consent was "specific and unequivocal" and given in the absence of duress. *Id.* (citations omitted).

243. *Id.* at 166, 754 P.2d at 543.

244. *Id.* at 167, 754 P.2d at 544.

245. *Id.*

246. *Id.*

247. *Id.* at 168, 754 P.2d at 189.

248. *Id.* It was not any less coercive because of defendant's size or gender. *Id.*

249. *Id.*

250. 108 N.M. 255, 771 P.2d 188 (Ct. App. 1989).

251. *Id.* at 256, 771 P.2d at 189.

252. *Id.*

253. *Id.*

254. *Id.* at 257, 771 P.2d at 190. The court framed the issue as "not whether the consent was voluntary; [but] rather . . . whether the trial court could properly find consent to be voluntary." *Id.*

officer induced him to consent by supplying incomplete information about the tip he was acting on.[255]

The court rejected Hadley's claim because there was neither affirmative misrepresentation nor silence that could be equated with fraud by the officer[256] and because the trial court could have reasonably concluded that Hadley did not rely on the officer's failure to disclose when he consented.[257]

Hadley did not argue that the search of his pockets exceeded the scope of his consent to a pat-down search.[258] Nevertheless, in noteworthy dictum the court said that, under the circumstances, the search did not exceed the scope of consent.[259] The court reasoned that under the circumstances the officer's observation of bulges in Hadley's pockets supported a "particularized belief" that Hadley might have a weapon.[260] Thus, even if the officer lacked "objective articulable facts" on which to base his original stop and detention of Hadley, Hadley's subsequent consent to a pat-down conferred on the officer the right to make an additional intrusion into Hadley's pockets.[261] The court's analysis effectively grafts the principles of *Terry v. Ohio*[262] onto a search which, in the absence of consent, would have been illegal.[263]

C. Plain View Exception

In *State v. Miles*,[264] a case of first impression in New Mexico, the court of appeals held that an officer may investigate the contents of a legally seized container which is itself contraband when the officer is "virtually certain" the container contains more contraband. After the officer stopped Miles for speeding, he noticed a wooden box in plain

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255. *Id.* Hadley also argued that his consent was invalid because he was under the influence of a combination of alcohol and prescription drugs when he gave it. The court held that the trial court could reasonably find that the combination of medication and alcohol at the time of the consent did not render defendant's consent involuntary.

256. *Id.* at 258, 771 P.2d at 191 (citing United States v. Tweel, 550 F.2d 297 (5th Cir. 1977)).

257. *Id.* at 258, 771 P.2d at 191 (citing United States v. Turpin, 707 F.2d 332 (8th Cir. 1983)).

258. *Id.* at 256, 771 P.2d at 190.

259. *Id.*

260. *Id.*

261. *Id.* at 257, 771 P.2d at 190 (citing State v. Cobbs, 103 N.M. 623, 711 P.2d 900 (Ct. App. 1985)). In *Cobbs*, the court of appeals held that police may "conduct a protective search" or "frisk" a person stopped when the officer reasonably suspects the person has committed a violent or inherently dangerous crime, such as dealing in large quantities of narcotics, or a person stopped on suspicion of a non-violent offense where there are other articulable facts that the officer is in danger. 103 N.M. at 630, 711 P.2d at 907.

262. 392 U.S. 1 (1968). *Terry* allows an officer to make an investigative stop when the officer possesses specific and articulable facts which, taken together with "reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience," reasonably warrant the intrusion. *Id.* at 27. The Supreme Court also relaxed the warrant requirement in *Terry* to allow officers to conduct searches reasonably designed to discover weapons in order to protect thenselves from potential danger when they are face-to-face with suspects. *Id.* at 29-30.

263. The trial court had found that the officer's initial stop and detention were improper because they were not based on "objective, articulable facts." *Hadley*, 108 N.M. at 256-57, 771 P.2d at 189-90. Hadley's voluntary consent, however, vitiated the constitutional problems which arose from the illegal stop. *See id.* at 258, 771 P.2d at 191.

264. 108 N.M. 556, 775 P.2d 758 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240 (1989).

view on the passenger side of the floor of the vehicle.[265] The officer recognized the box as drug paraphenalia by its size and special markings.[266] After asking Miles and the other occupants of the vehicle whether any of them owned the box, and getting no response, the officer opened the box and discovered marijuana inside.[267]

Miles argued that the incriminating nature of the box siezed was not immediately apparent.[268] The court disagreed, stating that the box was obviously drug paraphernalia because of its size and markings.[269] Because it was in plain view, the officer could seize it without a warrant.[270] Further, given the nature of the box, the court found that defendant did not have a reasonable expectation of privacy in the box that would invoke fourth amendment protection of the search of the box's contents.[271] A person does not have a reasonable expectation of privacy in a container whose contents may be inferred from its outward appearance through transparency, distinctive configuration, or other factors.[272] However, the officer must be "virtually certain" that the container contains contraband.[273]

X. FIFTH AMENDMENT - DOUBLE JEOPARDY

During the survey period, the courts examined double jeopardy in the contexts of susequent prosecutions for the same offense[274] and multiple punishments for the same offense: merger[275] and sentence enhancement.[276]

A. Subsequent Prosecutions for the Same Offense

In *State v. Saavedra*,[277] the court of appeals considered whether the double jeopardy clause precludes the state from retrying a defendant after a trial court declares a mistrial for "manifest necessity" over the

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265. *Id.* at 557, 775 P.2d at 758.

266. *Id.* The box bore a dot on its side indicating the place to press so that a small pipe would pop out like a jack-in-the-box. *Id.*

267. *Id.*

268. *Id.* at 558, 775 P.2d at 760. Incriminating evidence may be seized under the plain view exception if the officer is legally in the position to view the evidence, if the officer discovers the evidence inadvertently, and if the incriminating nature of the evidence is immediately apparent. *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971); State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980)). A witness testified that boxes such as the one seized are non-incriminating "novelty items." *Id.* at 557, 775 P.2d at 759.

269. *Id.* at 558, 775 P.2d at 760.

270. *Id.* The officer was legally entitled to be in the position from which he saw the box. The defendant did not challenge the length of detention or probable cause to stop. *Id.*

271. *Id.* at 558-59, 775 P.2d at 760-61.

272. *Id.* at 559, 775 P.2d at 761 (citing Arkansas v. Sanders, 442 U.S. 753, 764-65 n.13 (1979)).

273. *Miles*, 108 N.M. at 559, 775 P.2d at 761 (citing Texas v. Brown, 460 U.S. 730, 751 (1983)(Stevens, J., concurring)). The virtual certainty standard is higher than probable cause. *See id.*

274. State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988); State v. Hamilton, 107 N.M. 186, 754 P.2d 857 (Ct. App.), *cert. denied*, 107 N.M. 132, 753 P.2d 1320 (1988).

275. State v. Gammil, 108 N.M. 208, 769 P.2d 1299 (Ct. App. 1989).

276. 107 N.M. 293, 756 P.2d 573 (1988).

277. 108 N.M. 38, 766 P.2d 298 (1988). For a discussion of the vindictive sentencing issue in this case, see *supra* notes 158-68 and accompanying text.

defendant's objection. Jeopardy attaches when the jury is sworn in for the defendant's first trial.[278] If the court grants a mistrial over the defendant's objection, the state may only retry the defendant if the mistrial was for reasons of "manifest necessity."[279]

At Saavedra's first trial on remand, Saavedra's attorney had come down with chicken pox, and substitute counsel was representing Saavedra.[280] The prosecutor was scheduled for necessary back surgery on a specific date, leaving a period of only three days for the trial.[281] The court was skeptical whether three days would be adequate;[282] moreover, the judge had promised both himself and his staff a vacation to begin the day defendant estimated trial could resume.[283]

The court of appeals held that the trial court did not abuse its discretion in granting the mistrial.[284] The trial court had considered the alternatives and had valid reasons to declare the mistrial.[285] Relying on cases from other jurisdictions,[286] the court of appeals also stated that "the extended illness of one of the participants in a criminal proceeding justifies the declaration of a mistrial for reasons of manifest necessity."[287] Thus, the court of appeals affirmed Saavedra's convictions.[288]

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278. *Id.* (citing Downum v. United States, 372 U.S. 734 (1963)).

279. *Id.* (citing United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977)). When a defendant has been acquitted, the double jeopardy bar against retrial is absolute. When a trial has been aborted before its conclusion, however, a defendant's right to be protected from double jeopardy must be weighed against the public interest in prosecution. Because the subordination of the defendant's constitutional right must not be "lightly undertaken," the prosecuter must "shoulder a heavy burden to justify the mistrial if the double jeopardy bar is to be avoided." *Id.* (citation omitted).

280. *Id.* at 40, 766 P.2d at 300.

281. *Id.*

282. *Id.* at 43, 766 P.2d at 303. "The judge noted, based on his experience, that when an attorney assures him that a matter will take three days to try, he finds it prudent to set aside six." *Id.*

283. *Id.* at 40, 766 P.2d at 300. The court of appeals stated, however, that vacation plans will never constitute manifest necessity and did not consider this reason. *Id.* at 42 n.2, 766 P.2d at 302 n.2.

284. *Id.* at 43, 766 P.2d at 303. The court noted that "although it may have been the better course" not to declare a mistrial, sufficient reason had been given by the trial court. *Id.*

The court's standard of review of a double jeopardy claim after mistrial will vary between strict scrutiny and abuse of discretion depending upon the reasons presented for mistrial. *Id.* at 42, 766 P.2d at 302 (citing Arizona v. Washington, 434 U.S. 497, 507-11 (1978)). Where the trial court bases its decision on scheduling problems, as it did in *Saavedra*, the court of appeals will not overrule unless there is "some clear indication that [the trial court] failed to engage in a 'scrupulous exercise of judicial discretion'." *Id.* at 43, 766 P.2d at 303 (quoting United States v. Jorn, 400 U.S. 470, 485 (1971)).

285. *Id.* at 43, 766 P.2d at 303. "The trial court was faced with an extremely complex rescheduling problem involving numerous witnesses, several from outside the state, and a prosecutor and defense attorney whose health problems might well have thwarted any solution short of a mistrial, or might have resulted in inadequate representation of either the State or the defendant." *Id.*

286. Loux v. United States, 389 F.2d 911 (9th Cir.) *cert. denied*, 393 U.S. 867 (1968); People v. Castro, 657 P.2d 932 (Colo. 1983); Glover v. United States, 301 A.2d 219, 222 (D.C. 1973); State v. Cole, 286 Or. 411, 595 P.2d 466, *cert. denied*, 444 U.S. 968 (1979); Commonwealth v. Thomas, 346 Pa. Super. 11, 498 A.2d 1345 (1985), *app. denied*, 514 Pa. 635, 522 A.2d 1105 (1987); State v. Mendoza, 101 Wis. 2d 659, 305 N.W.2d 166 (Ct. App. 1981).

287. *Saavedra*, 108 N.M. at 43, 766 P.2d at 303.

288. *Id.*

In *State v. Hamilton*,[289] the court of appeals reiterated that jeopardy cannot attach when a court does not have jurisdiction. The court held that an acquittal by a court without jurisdiction to try the defendant was void.[290] Therefore, jeopardy did not attach and defendant could not claim double jeopardy at his retrial for the same offense.[291]

In his first trial in magistrate court, the defendant had been convicted of one count of battery on a peace officer and acquitted of one count of aggravated assault on a peace officer.[292] On appeal, however, the court reversed Hamilton's conviction because he had been denied his right to counsel at the preliminary hearing.[293] On remand, the state recharged the defendant with the same charges as in the first trial.[294] At the close of the second trial, Hamilton requested a jury instruction on the offense of resisting, evading or obstructing a police officer, a lesser-included offense of aggravated assault on a police officer.[295] The defendant was convicted on two counts of the reduced offense.[296] Rejecting Hamilton's objection that retrial on the acquitted count was double jeopardy, the court of appeals held that denial of counsel deprived the magistrate court of jurisdiction to either acquit or convict.[297] The acquittal was therefore invalid, and the state could retry the defendant on all charges.[298]

B. Merger and Sentence Enhancement

In *State v. Gammil*,[299] the court of appeals vacated the defendant's sentence for aggravated assault, holding that the offense merged with the defendant's robbery conviction. Gammil was convicted in the trial court of robbery, aggravated battery, and conspiracy to commit robbery.[300] All the charges arose out of an attempted purse-snatching: the defendant grabbed the victim's purse and threw her to the ground in his attempt to wrest it from her.[301]

In *State v. Sandoval*,[302] the court of appeals established two tests to determine whether multiple punishments for the same charge subject a

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289. 107 N.M. 186, 754 P.2d 857 (Ct. App), *cert. denied*, 107 N.M. 132, 753 P.2d 1320 (1988).
290. *Id.* at 188, 744 P.2d at 859.
291. *Id.*
292. *Id.* at 187, 754 P.2d at 858.
293. *Id.* (citing State v. Hamilton, 104 N.M. 614, 725 P.2d 590 (Ct. App. 1986)).
294. *Hamilton*, 107 N.M. at 187, 754 P.2d at 858.
295. *Id.*
296. *Id.*; *see* N.M. STAT. ANN. § 30-22-1 (Repl. Pamp. 1984). Hamilton also argued on appeal that his conviction for resisting an officer was improper because it is not a lesser-included offense of either aggravated assault or battery on a peace officer. *Hamilton*, 107 N.M. at 188, 754 P.2d at 859. The court agreed but held that a conviction will not be reversed for an improper instruction when the defendant himself requested the instruction. *Id.* at 189, 754 P.2d at 860 (citing State v. Boeglin, 105 N.M. 247, 731 P.2d 943 (1987); State v. Padilla, 104 N.M. 23, 715 P.2d 471 (Ct. App. 1986)). For a discussion of *Boeglin*, see *supra* note 148.
297. *Hamilton*, 107 N.M. at 187-88, 754 P.2d at 858-59.
298. *Id.* at 188, 754 P.2d at 859.
299. 108 N.M. at 208, 210, 769 P.2d 1299, 1301 (Ct. App. 1989).
300. *Id.*at 208-09, 769 P.2d at 1299-1300.
301. *Id.* at 210, 769 P.2d at 1301.
302. 90 N.M. 260, 561 P.2d 1353 (Ct. App. 1977).

defendant to double jeopardy.[303] Under *Sandoval*, the court must determine whether one offense is a necessarily included lesser offense,[304] or whether the same evidence would sustain a conviction for either offense.[305] In *Gammil*, the court held that *State v. DeMary*[306] now requires courts to apply these tests in light of the particular facts and circumstances of each case.[307] Mechanical comparison of the elements of each offense is no longer sufficient. Vacating the sentence for aggravated battery, the court found that the defendant had "committed the robbery and aggravated battery by one act."[308] Because the aggravated battery offense, under the facts of the case, did not have any element not included in the robbery offense, and because the robbery could not have been committed without the commission of the lesser offense, the two offenses had merged.[309]

In *State v. Espinosa*,[310] the supreme court rejected the defendant's argument that he was subjected to double jeopardy by the imposition of two separate enhancements for the use of a firearm on two criminal counts.[311] Espinosa was convicted of kidnapping with a firearm, false imprisonment with a firearm, attempted armed robbery, and felony murder.[312] Relying upon *State v. Ellis*,[313] Espinosa argued that the trial court erred by imposing two firearm enhancements for two of the crimes, rather than only one for the entire series of crimes.[314] The supreme court held that both case law[315] and statutory

303. *Gammil*, 108 N.M. at 209, 769 P.2d at 1300 (citing *Sandoval*, 90 N.M. 260, 561 P.2d 1353).

304. *Id.* The court must compare the statutory elements of each crime to determine whether one is lesser-included. *Sandoval*, 90 N.M. at 262, 561 P.2d at 1355.

305. *Gammil*, 108 N.M. at 209, 769 P.2d at 1300. Under the same evidence test, if the evidence offered in support of one offense would support a conviction for the other offense, double jeopardy applies. *Id.*; *Sandoval*, 90 N.M. at 262, 561 P.2d at 1355.

306. 99 N.M. 177, 655 P.2d 1021 (1982).

307. *Id.* at 210, 769 P.2d at 1301.

308. *Id.* at 210, 769 P.2d at 1301. *Cf.* State v. Williams, 105 N.M. 214, 730 P.2d 1196 (Ct. App. 1986)(the court upheld as distinct two charges against the defendant for kidnapping by holding for services and assault with attempt to commit criminal sexual penetration as distinct, so that merger did not apply; State v. Ross, 104 N.M. 23, 715 P.2d 471 (Ct. App. 1986)(the court upheld multiple counts on the basis that the elements of general fraud were not necessarily involved in a charge of fraudulent securities practice).

In *Gammil*, the court stated that the remedy for cases involving merger is to vacate the sentence and not the conviction. 108 N.M. at 210, 769 P.2d at 1301.

309. *Gammil*, 108 N.M. at 210, 769 P.2d at 1301. As a practical matter, the robbery and the assault involved one continuous action, not to be confused with a "single transaction." The defense of a single criminal transaction has been discredited in New Mexico. *See* State v. Tanton, 88 N.M. 333, 336, 540 P.2d 813, 816 (1975). In *Sandoval*, the court rejected the argument that because the defendant had to shoot the victim to obtain her purse, only one criminal transaction had occurred. *Sandoval*, 90 N.M. at 263, 561 P.2d at 1356.

310. 107 N.M. 293, 756 P.2d 573 (1988).

311. *Id.* at 297-98, 756 P.2d at 577-78.

312. *Id.* at 294, 756 P.2d at 574.

313. 88 N.M. 90, 537 P.2d 698 (Ct. App. 1975). ("Where convictions on two or more counts in a single trial are based on a unified course of events, the convictions count as one under [the prior law] § 40A-29-3.1(C) 1953 (2d Repl. Vol. 6.").

314. *Espinosa*, 107 N.M. at 294, 297, 756 P.2d at 574, 577.

315. *Id.* at 297-98, 756 P.2d at 577-78 (quoting State v. Kendall, 90 N.M. 236, 244, 561 P.2d 935, 943 (Ct. App.), *rev'd in part on other grounds*, 90 N.M. 191, 561 P.2d 464 (1977)(rejecting the single criminal transaction test and holding "[i]f the statute punishes for 'use' of a firearm in committing a felony, the punishment is to be applied for each felony committed by using a firearm.")).

law[316] had changed since the court had decided *Ellis*.[317] In *Espinosa*, the supreme court overruled *Ellis* in so far as it conflicted with *State v. Kendall* and affirmed both enhancement sentences.[318]

XI. SIXTH AMENDMENT

During the survey period, the courts clarified sixth amendment speedy trial analysis,[319] examined the defendant's right to be present at trial[320] and during communications between judge and jury,[321] and focused on the interaction between the right to be present and the right to a fair, impartial, and unanimous jury.[322]

A. Right to Speedy Trial[323]

In *State v. Sanchez*,[324] the court of appeals clarified when a defendant's sixth amendment right to a speedy trial attaches. Sanchez was arrested, booked, and released without any restrictions on January 19, 1986.[325] He was not charged until nineteen months later, when he was indicted for trafficking by possession with intent to distribute controlled substances.[326] Sanchez moved to dismiss the indictment as a violation of his right to a speedy trial because of the nineteen-month delay between his arrest and his indictment, claiming that his sixth amendment right to a speedy trial was triggered by the arrest, not the indictment.[327]

The court held that arrest can only trigger a defendant's federal speedy trial right when there has been a formal indictment or information, or when there has been an arrest and holding to answer.[328] The court distinguished cases in which the defendant had suffered an "impairment of liberty" (such as a bond or other restriction) or lived under a "cloud of unresolved criminal charges."[329] Holding that without such restrictions,

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316. N.M. STAT. ANN. § 31-18-16 (Repl. Pamp. 1987), the current firearm enhancement statute, provides that a basic sentence may be enhanced by one year if the court or the jury finds that a firearm was used in the commission of a non-capital felony. For a second or subsequent non-capital felony, the basic sentence may be increased by three years. Neither of these enhancements may be suspended or deferred.

317. *Espinosa*, 107 N.M. at 297, 753 P.2d at 577.

318. *Id.* at 298, 756 P.2d at 578. *See supra* note 315.

319. State v. Sanchez, 108 N.M. 206, 769 P.2d 1297 (Ct. App.), *cert. denied*, 108 N.M. 197, 769 P.2d 731 (1989); State v. Tartaglia, 108 N.M. 411, 773 P.2d 356 (Ct. App.), *cert. denied*, 108 N.M. 318, 772 P.2d 352 (1989).

320. State v. Clements, 108 N.M. 13, 765 P.2d 1195 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988).

321. State v. Escamilla, 107 N.M. 510, 760 P.2d 1276 (1988).

322. *Id.*

323. For a discussion of other speedy trial issues, see *supra* notes 31-87 and accompanying text.

324. 108 N.M. 206, 769 P.2d 1297 (Ct. App.), *cert. denied*, 108 N.M. 197, 679 P.2d 731 (1989).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* (citing Ibarra v. Municipal Court, 162 Cal. App. 3d 853, 208 Cal. Rptr. 783 (1984)).

329. *Id.* (citing Kilpatrick v. State, 103 N.M. 52, 702 P.2d 997 (1985)).

defendant's speedy trial rights were not triggered by arrest, the court affirmed the convictions.[330]

In *State v. Tartaglia*,[331] the court of appeals addressed the burden of proof of the *Barker v. Wingo*[332] factors for the first time in New Mexico. Tartaglia was indicted for possession of heroin, valium, and drug paraphernalia on March 12, 1985 while he was incarcerated on unrelated charges.[333] The prosecution had sent a notice to his home address, then issued a bench warrant for his arrest. When Tartaglia was released in May 1985, neither he nor the prison authorities were aware of the outstanding warrant. He was finally arrested on February 26, 1987 and arraigned on March 6, 1987.[334]

When analyzing a speedy trial claim, the court must balance four factors: (1) length of delay; (2) reason for delay; (3) assertion of the right to speedy trial; and (4) prejudice to the defendant as a result of the delay.[335] In *Tartaglia*, the court held that it is the defendant's burden to prove all but the reason (i.e., the justification) for the delay.[336] Further, the defendant must show the prejudice to him as a result of the delay as an independent factor.[337]

The length of the delay is merely a triggering device which is "presumptively prejudicial" and serves as a screen by which meritless claims may be filtered out.[338] The court need not inquire into the other three *Barker* factors if the defendant does not establish the "presumptively prejudicial" delay.[339] Whether the delay is presumptively prejudicial is determined primarily by "the nature and complexity of the crime involved."[340]

The main issue in *Tartaglia* concerned the defendant's contention that the presumption of prejudice from the delay should carry over into the fourth and most critical of the *Barker* factors, the prejudice caused by the delay to the defendant's case.[341] While stating that the defendant

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330. *Sanchez*, 108 N.M. at 207, 769 P.2d at 1298. If the sixth amendment right is not triggered by the arrest, and there is a prejudicial delay between arrest and indictment, the defendant may claim a due process violation under the fourteenth amendment. *See* State v. Lewis, 107 N.M. 182, 754 P.2d 853 (Ct. App. 1988) and *supra* notes 31-42 and accompanying text.

331. 108 N.M. 411, 773 P.2d 356 (Ct. App.), *cert. denied*, 108 N.M. 318, 772 P.2d 352 (1989).

332. 407 U.S. 514 (1972). *Barker* is the leading case outlining the analysis of claims of constitutional speedy trial violations.

333. *Tartaglia*, 108 N.M. at 413, 773 P.2d at 358.

334. *Id.*

335. *Id.* at 414, 773 P.2d at 359 (citing *Barker*, 407 U.S. 514).

336. *Id.* at 414, 773 P.2d at 359. In State v. Zurla, 29 N.M. Bar Bull. 330, 333 (1990), the supreme court overruled *Tartaglia* to the extent that it suggests that the state does not have the burden of persuasion to show that defendant's speedy trial right has not been violated.

337. *Tartaglia*, 108 N.M. at 416, 773 P.2d at 361.

338. *Id.* at 415-16, 773 P.2d at 360-61.

339. *Id.* at 415, 773 P.2d at 360 (citing State v. Kilpatrick, 104 N.M. 441, 722 P.2d 692 (Ct. App. 1986)).

340. *Id.* at 414, 773 P.2d at 359 (citing *Kilpatrick*). Whether or not the defendant caused or contributed to the delay claimed to be prejudicial is a threshold consideration. State v. Tarango, 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987).

341. *Tartaglia*, 108 N.M. at 415, 773 P.2d at 360. The state conceded that the other factors weighed in the defendant's favor.

need not show "actual prejudice,"[342] the court insisted that the defendant must show "specific corroboration of his contention of prejudice," independent from the evidence of the length of the delay itself.[343] The presumption of prejudice because of a lengthy delay "does not function or summarily answer the separate factor of prejudice to a defendant."[344] After enunciating this principle, the court remanded to allow the defendant to attempt to show specific evidence of prejudice.[345] The court cautioned, however, that the defendant need only present some evidence; he does not have to actually prove prejudice.[346]

B. Right to be Present

In *State v. Clements*,[347] the court of appeals held that the defendant was denied his constitutional right to be present.[348] The defendant failed to appear during his trial in Roswell after he had gone to Albuquerque to bring back a witness. Defense counsel requested a continuance until the next day so that the defendant could be present. Before granting the continuance, however, the court ordered the defendant to turn himself in to the Bernalillo County Detention Center and wait there until he could be returned to Roswell. The court suggested that if the defendant complied, the court would consider continuing the trial.[349]

Although the defendant immediately turned himself in, the court did not grant the continuance. Instead, the court allowed the state's four rebuttal witnesses to testify and removed a juror.[350] Defense counsel preserved the error with continuing objections.[351]

The court of appeals first addressed the issue of whether the defendant had waived his right to be present. A defendant may waive this con-

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342. *Id.* at 416, 773 P.2d at 361. Actual prejudice is any circumstance which can be shown to have prevented the defendant's otherwise successful defense. *Id.* (citing State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978)); *see supra* notes 37-41 and accompanying text.

343. *Tartaglia*, 108 N.M. at 416, 773 P.2d at 361. The court argued that the defendant must put forth some evidence so that the state can knowledgeably rebut the defendant's claim of prejudice. *Id.* at 415, 773 P.2d at 360.

344. *Id.*

345. *Id.* at 417, 773 P.2d at 362. The court remanded rather than affirmed the conviction because it found that the defendant had reasonably relied on prior, yet ultimately distinguishable,case law. *Id.* (citing State v. Kilpatrick, 104 N.M. 441, 722 P.2d 692 (Ct. App. 1986); State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972)). Prejudice may be shown by oppressive pretrial incarceration, by defendant's anxiety and concern caused by the delay, and, most importantly, the impairment of the defense caused by the delay. *Id.* at 415, 773 P.2d at 360 (citing Barker v. Wingo, 407 U.S. 514, 532 (1972)).

346. *Id.*

347. 108 N.M. 13, 765 P.2d 1195 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988).

348. *Id.* at 17, 765 P.2d 1199. Under the confrontation clause, U.S. CONST. amend. VI, and the due process clause, amend. XIV, as embodied in SUP. CT. RULES ANN. 5-612(A) (Recomp. 1986) (N.M. R. Crim. P.), the defendant's presence is required "at every stage of trial."

349. *Clements*, 108 N.M. at 15, 765 P.2d at 1197.

350. *Id.* at 16, 765 P.2d at 1198. The prosecutor advised the court that two of the state's rebuttal witnesses might not be available if the trial was delayed. However, the prosecutor and the witnesses never made any attempt to confirm their plans or the time when they would be unavailable. *Id.*

351. *Id.*

stitutional right if he voluntarily absents himself from trial.[352] The court found that the defendant's absence was voluntary until he entered detention in Alabuquerque.[353] At that point, his absence became involuntary because he was told the trial would not be continued until he returned,[354] was and he no longer waived his right.[355]

The court then set forth a balancing test trial courts must use to determine whether or not to proceed with trial in the defendant's absence. The court must balance "defendant's right of confrontation, and the possible prejudice which may ensue from his absence, against the time, expense, and inconvenience occasioned by his absence."[356] The trial court's decision to proceed will not be reversed unless it is erroneous.[357] Even if the decision is erroneous, the state has the burden to prove beyond a reasonable doubt that "the denial of a defendant's guaranteed right of confrontation of witnesses against him, or his presence during jury selection . . . was harmless."[358] In this case, the defendant was not absent voluntarily, the trial court did not weigh all relevant factors, and the state had not offered to demonstrate beyond a reasonable doubt that it was harmless error to conduct the trial without the defendant.[359] Therefore, the court remanded for a new trial.[360]

C. Right to Fair and Impartial Jury and to a Unanimous Verdict of Twelve Jurors

In *State v. Escamilla*,[361] the supreme court reaffirmed that defendants have a fundamental right to a fair and impartial jury which includes the

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352. *Id.* at 17, 765 P.2d 1199. The right to be present is codified for the New Mexico District Courts in Criminal Procedure Rule 5-612. That rule states in part:

> A. Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impanelling of the jury and the return of the verdict and the imposition of any sentence, except as otherwise provided by this rule.
>
> B. Continued presence not required. The further progress of the trial, including the return of the verdict, shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present:
>
> (1) *voluntarily absents himself* after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or
>
> (2) engages in conduct which is such as to justify his being excluded from the courtroom.

SUP. CT. RULES ANN. 5-612 (Recomp. 1986)(emphasis added).

To clarify the meaning of the phrase "voluntarily absents himself," the court considered interpretations of Rule 43 of the Federal Rules of Criminal Procedure, which is the same as the New Mexico rule. *Clements*, 108 N.M. at 17, 765 P.2d at 1199. Generally, if a defendant is voluntarily absent, he has freely, knowingly, and intelligently waived his presence. *See* Hovey v. State, 104 N.M. 667, 670-71, 726 P.2d 344, 347-48 (1986).

353. *Clements*, 108 N.M. at 19, 765 P.2d at 1201.

354. *Id.*

355. *Id.* The state argued that the defendant's absence could not change from voluntary to involuntary regardless of the detention. The court avoided deciding this question by analyzing whether the defendant's rights were violated even if his absence were voluntary.

356. *Id.* at 19, 765 P.2d at 1201.

357. *Id.* A decision will be erroneous if the defendant reasonably could have been prejudiced by the absence. *Id.*

358. *Id.*

359. *Id.* The trial court, for example, did not consider whether it was proper for the two other rebuttal witnesses to testify. *Id.*

360. *Id.*

361. 107 N.M. 510, 760 P.2d 1276 (1988).

right to a unanimous verdict of twelve jurors.[362] The court also examined the defendant's right to be present during jury communications and the trial court's responsibility to record those communications.[363]

During jury deliberations at Escamilla's trial, the jurors told the bailiff, who told the judge, that one juror did not understand English. The judge responded that he knew the juror and the juror did, in fact, understand English. The judge did not conduct a hearing but simply instructed the jury to continue deliberating. Ultimately, the jurors translated for the non-English speaking juror.[364]

The defendant and his counsel were unaware of the problem.[365] However, counsel became aware before the jury reached its verdict that there was a juror who could not understand the deliberations.[366] After the jury rendered a verdict of guilty, the defendant moved for a mistrial. The trial court denied the motion.[367]

Because the defendant did not preserve the error, but a fundamental right was involved, the supreme court needed to decide whether the defendant waived the right, and if he did, whether fundamental error was involved.[368] The defendant had waived his right to a fair, impartial, and unanimous jury by "gambling on the verdict."[369] However, because the trial court also violated the defendant's right to be present during communications, and never made a record of those communications, the supreme court remanded.[370]

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362. *Id.* at 515, 516, 760 P.2d at 1281, 1282. In New Mexico these rights are grounded in the sixth amendment of the United States Constitution and in article 2, sections 12, 14, and 18, of the New Mexico Constitution. *See* Mares v. State, 83 N.M. 225, 226, 490 P.2d 667, 668 (1971); State v. Holloway, 106 N.M. 161, 164, 740 P.2d 711, 714 (Ct. App.), *cert. denied*, 106 N.M. 405, 744 P.2d 180 (1987); State v. Gallegos, 88 N.M. 487, 488-89, 542 P.2d 832, 833-34 (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1975).

363. *Escamilla*, 107 N.M. at 515-16, 760 P.2d at 1280-81. A defendant has the right to be present during communications with the jury pursuant to SUP. CT. RULES ANN. 5-610(D) (Recomp. 1986). Hovey v. State, 104 N.M. 667, 726 P.2d 344 (1986)(interpreting New Mexico Rule of Criminal Procedure 43(D), the predecessor to Rule 5-610(D)). Rule 610(D) states:

> Communications between the judge and the jury may be made in writing without recalling the jury after notice to the attorneys and an opportunity for objection. Unless requested by counsel for the defendant, communications not relating to issues of the case at trial may be made without recalling the defendant.

The committee commentary to the rule states that "[a]ll communications between the judge and the jury should be made a part of the record, whether made in the presence of defense counsel and defendant or not." Agreeing with the commentary, the *Escamilla* court held that the rule creates an independent duty by the trial court to create a record and make a ruling. *Escamilla*, 107 N.M. at 515, 516, 760 P.2d at 1281, 1282.

364. *Escamilla*, 107 N.M. at 518, 760 P.2d at 1279.

365. *Id.*

366. *Id.* at 515, 760 P.2d at 1281. Although the record showed that counsel knew during the time of deliberation about the non-English speaking juror, the record did not show that counsel knew about the communications with the judge. *Id.*

367. *Id.* at 518, 760 P.2d at 1279.

368. *Id.* at 515, 760 P.2d at 1281. Fundamental error cannot be waived. *Id.* (citing State v. Sanchez, 58 N.M. 77, 84, 265 P.2d 684, 688 (1954)).

369. *Id.* (citing State v. Costales, 37 N.M. 115, 19 P.2d 189 (1933)). In *Costales*, the court held "that the size of a juror's vocabulary, or the extent of his ability to understand English, are not proper subjects of inquiry after the verdict is rendered." 37 N.M. at 118, 19 P.2d at 191.

370. *Escamilla*, 107 N.M. at 515-16, 760 P.2d at 1281-82.

The court directed the trial court to certify the record as to the details of the communications and to hold a hearing for the state to attempt to rebut the presumption of prejudice which necessarily arose from the defendant's absence from the communications.[371] The supreme court also directed the trial court to determine at the hearing whether the defendant's right to a "jury of twelve" was violated.[372] However, even if the trial court found prejudice to the defendant from his absence, or from the jury irregularity, the court had discretion not to grant a new trial if the court found that there was no fundamental error *and* that the defendant had waived his rights.[373]

XII. FOURTEENTH AMENDMENT

In *Aguilar v. State*,[374] the supreme court addressed the issue of whether a confession was involuntary and therefore invalid under the fourteenth amendment's due process clause. The defendant had an IQ of approximately 70, and had recently been diagnosed a paranoid schizophrenic and treated at the New Mexico State Hospital.[375] He was arrested for the burglary of a hardware store. After reading the defendant his *Miranda* rights, the Chief of Police, who knew the defendant, encouraged him to confess to the burglary.[376]

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371. *Id.* at 516, 760 P.2d at 1282. *See Hovey*, 104 N.M. at 670, 726 P.2d at 347 ("[A] presumption of prejudice arises whenever such an improper communication occurs, and the State bears the burden of rebutting that presumption by making an affirmative showing on the record that the communication did not affect the jury's verdict.").

372. *Escamilla*, 107 N.M. at 516, 760 P.2d at 1282.

373. *Id.* A defendant can waive fundamental rights if the trial court ensures that the waiver was made "voluntarily, knowingly, and intelligently." *Hovey*, 104 N.M. at 670-71, 726 P.2d at 347-48. The mandate for the trial court, therefore, appeared to be to ascertain whether the defendant actually knew about the communcations and the non-English speaking juror and actually decided not to raise the issue.

By giving the trial court discretion to find fundamental error, even if the defendant had waived his rights, the supreme court was applying an expansive definition of fundamental error. The doctrine of fundamental error is applied only "under exceptional circumstances and solely to prevent a miscarriage of justice." State v. Tipton, 73 N.M. 24, 26, 385 P.2d 355, 357 (1963). Courts have often defined "miscarriage of justice" narrowly to mean the conviction of an obviously innocent defendant. *See* State v. Sanders, 54 N.M. 369, 379, 225 P.2d 150, 160 (1950); State v. Padilla, 104 N.M. 378, 721 P.2d 1309 (Ct. App.), *cert. denied*, 104 N.M. 378, 721 P.2d 1309 (1986). On the other hand, fundamental error also has been defined more broadly as an "error [that] goes to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942). Since the issues in *Escamilla* involved fundamental rights, not guilt or innocence, the court must have adopted the latter, broader definition. However, in State v. Clark, 108 N.M. 288, 772 P.2d 322, *cert. denied*, 110 S. Ct. 291 (1989), discussed in Part XIII *infra*, that broad definition was rejected. Justice Ransom, who authored the *Escamilla* decision, dissented in *Clark*. *Id.* at 313-17, 772 P.2d at 347-51.

374. 106 N.M. 798, 751 P.2d 178 (1988).

375. *Id.* at 799, 751 P.2d at 179.

376. *Id.* at 798-99, 751 P.2d at 178-79. Chief Barela implied to the defendant that the authorities would treat him better if he confessed, and that if he did not confess he might be charged with other unrelated crimes. The Chief also stated that the police had found Aguilar's fingerprints at the scene, even though these were never produced into evidence at the trial. *Id.* at 799, 751 P.2d at 179.

The trial court refused to suppress this confession on grounds of involuntariness, and the court of appeals affirmed. The supreme court reversed.[377] Reaffirming the "totality of the circumstances test,"[378] the court determined that the court of appeals in its independent review focused only on evidence that supported a finding of voluntariness.[379]

The supreme court relied on the three phase analytical framework established in *Culombe v. Connecticut*.[380] The first phase involves an examination of the totality of circumstances surrounding the confession. In the second phase, the court must infer how the accused reacted to those circumstances. Finally, the court must apply due process standards to their findings.[381] Due process requires that the confession must have been freely given and not induced by apparent promises or threats.[382] The state bears the burden of proving by preponderance of the evidence that the confession was voluntary.[383]

The court held that the "implied threats and promises, especially when knowingly made to a defendant with diminished mental capacity, rendered the confession involuntary as a matter of law."[384] The state failed to meet its burden of proving that under all the circumstances the confession was voluntary because the accused "unquestionably had difficulty in appreciating the meaning of the assurances given to him . . . and in distinguishing whether a deal had been made."[385]

XIII. EIGHTH AMENDMENT, CAPITAL SENTENCING, FUNDAMENTAL ERROR: *STATE V. CLARK*

A. Introduction

In *State v. Clark*,[386] the New Mexico Supreme Court affirmed a death sentence. Clark, who pled guilty to kidnapping and first degree murder,[387]

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377. *Id.* at 798, 751 P.2d at 178.

378. *Id.* at 799, 751 P.2d at 179 (citing State v. Tindle, 104 N.M. 195, 718 P.2d 705 (Ct. App. 1986); State v. Aguirre, 91 N.M. 672, 579 P.2d 798 (Ct. App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978)).

379. *Id.* at 799, 751 P.2d at 179.

380. *Id.* (citing Columbe v. Connecticut, 367 U.S. 568 (1961)).

381. *Id.* at 799-800, 751 P.2d at 179-80.

382. *Id.* at 800, 751 P.2d at 180 (citing *Tindle*, 104 N.M. at 198, 718 P.2d at 708).

383. *Id.*

384. *Id.*

385. *Id.* The court noted that as interrogators become more skilled in psychological persuasion, the mental condition of the defendant has become a significant factor in assessing voluntariness. *Id.* (citing Colorado v. Connelly, 479 U.S. 157 (1986)).

386. 108 N.M. 288, 772 P.2d 322, *cert. denied*, 110 S. Ct. 291 (1989).

The New Mexico Supreme Court substantially lessened *Clark*'s impact on New Mexico death sentencing hearings—without, however, expressly overruling *Clark*—in State v. Henderson, 29 N.M. Bar Bull. 342 (1990). *See infra* notes 398, 460, and 471.

387. *Clark*, 108 N.M. at 290, 772 P.2d at 324. Clark based his decision to plead guilty partly on representations by Governor Anaya that the governor would commute any death sentence imposed on Clark. *Id.* at 291, 772 P.2d at 325. The trial court accepted Clark's guilty plea but declined to conduct the sentencing hearing before Governor Anaya's term of office expired. *Id.* The trial court afterwards denied Clark's motion to withdraw his guilty plea. *Id.* at 292, 772 P.2d at 326.

argued that his rights were violated in several ways during his sentencing proceeding. The court recognized that the record was fraught with error but nevertheless refused to reverse Clark's death sentence because no error rose to the level of "fundamental error," rendering fatal Clark's failure to object to the errors at the time of the proceeding.

Clark argued that the trial court deprived the jury of mitigating information by refusing to pronounce sentence on his kidnapping conviction before the jury considered the penalty for his murder conviction.[388] He also argued that the jury was presented with prejudicial and irrelevant argument and testimony during the proceeding. This included emotional testimony from the victim's mother,[389] prosecutorial argument weighing the value of Clark's life against the victim's life,[390] testimony about the possible length[391] and expense[392] of Clark's incarceration, and prosecutorial comment on Clark's failure to testify.[393] Clark argued that even if none of these alleged errors warranted reversal standing alone, the accumulation of error deprived him of a fair trial.[394] Clark also challenged the validity of the statutory aggravating circumstance of "murder of a witness to a crime,"[395] and the admission of his criminal record to prove that the category applied to him.[396] Finally, Clark challenged the jury instructions given at the sentencing hearing, arguing that their description of the jury's role in analyzing aggravating and mitigating circumstances violated the eighth amendment.[397]

B. Order of Sentencing

The supreme court held that the potential period of confinement of a capital defendant is not a mitigating circumstance under the eighth amendment.[398] At the sentencing proceeding Clark had requested that the

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The supreme court held that the trial court did not abuse its discretion by denying the motion for withdrawal. The court reasoned that Clark made his guilty plea knowingly and voluntarily, that he did not assert his innocence, that he had assistance of counsel, and that he waited two and one-half months before seeking the withdrawal. *Id.* The supreme court held that Governor Anaya's representations did not affect the voluntariness of Clark's plea, noting that Clark told the trial court that he had made his decision to plead guilty before he learned of the possibility of a commutation. *Id.* The court also noted that Clark persisted in proffering the plea after the trial court informed him that it would not hold the sentencing hearing before Governor Anaya's term ended. *Id.* at 292-93, 772 P.2d at 326-27.

The court also held that absence of prejudice to the prosecution is not sufficient grounds to permit a plea of guilty to be withdrawn. *Id.* at 292, 772 P.2d at 326.

388. *Id.* at 293, 772 P.2d at 327. *See infra* notes 398-417 and accompanying text.

389. *Id.* at 298, 772 P.2d at 332. *See infra* notes 418-23 and accompanying text.

390. *Id.* at 299, 772 P.2d at 333. *See infra* notes 424-30 and accompanying text.

391. *Id. See infra* notes 436-42 and accompanying text.

392. *Id.* at 300, 772 P.2d at 334. *See infra* notes 443-48 and accompanying text.

393. *Id.* at 301, 772 P.2d at 335.

394. *Id.* at 311, 772 P.2d at 345. *See infra* notes 452-55 and accompanying text.

395. *Id.* at 304, 772 P.2d at 338. *See infra* notes 456-62 and accompanying text.

396. *Id.*

397. *Id.* at 306, 772 P.2d at 340. *See infra* notes 463-67 and accompanying text.

398. *Id.* at 294, 772 P.2d at 328. *But see* State v. Henderson, 29 N.M. Bar Bull. 342, 343-44 (1990). In *Henderson,* the court distinguished *Clark,* stating:

> In *Clark*, we held that it is not error for the trial court to refuse to impose sentence

judge sentence him for his kidnapping conviction before the jury considered his sentence for murder so that the jury might consider the term of imprisonment imposed as a "mitigating factor."[399] Clark argued that a long prison term would reduce his future dangerousness.[400]

The trial court ruled that it could not sentence Clark on the kidnapping charge before the jury's capital sentencing decision.[401] Instead, the trial court allowed defense counsel to inform the jury what options were open to the court under the Criminal Sentencing Act.[402] Clark argued on appeal that he had a constitutional right under *Lockett v. Ohio*[403] and *Skipper v. South Carolina*,[404] to have the jury informed of his kidnapping sentence in order to firmly fix the time when he might become eligible for parole.[405] He argued that the court's failure to impose the kidnapping sentence prior to the jury's death penalty decision unnecessarily enlarged the range of sentences potentially available and confused the jurors about the effect of their verdict.[406]

The supreme court rejected Clark's argument. The court declared that mitigating circumstances are facts about the defendant's character or

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> for the noncapital offenses before the the capital sentencing phase *if* the jury is instructed on the range of sentences available and if the jury is allowed to consider that range as a mitigating circumstance (always, at the defendant's request). We now hold that it *is* error to refuse an instruction . . . pertaining to the meaning of a life sentence. We further hold that the court should, if requested, either impose sentence on the collateral noncapital offenses or give the range of sentences on those offenses as in *Clark*.

See infra text accompanying note 460. *Id.* at 344 (emphasis in original).

Although the permissibility of the government raising the issue of pardon or parole has been widely discussed, *see* Annotation, *Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon*, 12 A.L.R.3d 832, §§ 3, 4 (1967 and Supp. Aug. 1989); Annotation, *Prejudicial Effect of Statement of Prosecutor as to Possibility of Pardon or Parole*, 16 A.L.R.3d 1137, §§ 3, 4 (1967), the question of whether a defendant in a capital sentencing proceeding may raise the term of future incarceration as a mitigating factor has received less attention. Two courts have recently addressed this issue. The Maryland Court of Appeals held that a state statute allowed the defendant to present evidence of the length of future incarceration even though the Maryland courts had held that such evidence is irrelevant to the consideration of future dangerousness. Doering v. State, 313 Md. 384, 545 A.2d 1281 (1988). The South Carolina Supreme Court stated in dictum that because a statute denying parole to convicted murderers implicated neither future dangerousness nor the defendant's character, it would be inadmissible in a capital sentencing hearing. State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), *cert. denied*, 109 S. Ct. 1559 (1989).

399. *Clark*, 108 N.M. at 293, 772 P.2d at 327.

400. *Id.* at 293, 772 P.2d at 327. Clark's exposure at the time of his capital hearing included a basic eighteen-year sentence for kidnapping. N.M. STAT. ANN. § 31-18-15.1 (Repl. Pamp. 1987). The trial court had discretion, after a hearing on mitigating or aggravating circumstances, to increase or decrease the basic sentence by as much as six years. *Id.* The trial court also had discretion to decide whether the sentence was to be served concurrently or consecutively with the twenty-four-year sentence imposed for Clark's previous conviction for kidnapping and sexual penetration of a minor. *Id.* § 31-18-21 Finally, the basic sentence was subject to a one-year enhancement for the use of a firearm and a one-year enhancement under the habitual offender statute. *Id.* §§ 31-18-16(A) and -17(B).

401. *Clark*, 108 N.M. at 293, 772 P.2d at 327.

402. *Id.*

403. 438 U.S. 586 (1978) (defendant must be allowed to present all mitigating evidence at death penalty proceeding).

404. 476 U.S. 1 (1986) (defendant's past good behavior in prison is relevant to the consideration of his future dangerousness and is therefore a "mitigating circumstance").

405. *Clark*, 108 N.M. at 294, 772 P.2d at 328.

406. *Id.* at 293, 772 P.2d at 327.

background, or circumstances of the particular offense, that may call for a penalty less than death.[407] The court interpreted *Skipper v. North Carolina* to mean that the evidence of the defendant's past good behavior in prison was admissible as character evidence, stating:

> It is the defendant's own conduct and background that is the source of mitigating evidence regarding his potential for future dangerous behavior that the jury must be allowed to consider. The sentencing prerogatives of the trial judge, or the possible length of a life sentence, simply have no relevance under eighth amendment standards as they have developed so far.[408]

Thus, the relevant distinction is whether or not the inhibition against future dangerousness arises from the character of the defendant.

The court noted that evidence of the judge's opinion on issues relevant to sentencing—here, Clark's degree of culpability for the kidnapping—might impermissibly prejudice the defendant.[409] The court stated that "[i]t is almost universally accepted that a trial judge should not express or otherwise indicate to the jury an opinion on whether a defendant is guilty of criminal charges."[410] Even in the present circumstance, where guilt was not at issue and Clark himself decided that the information was potentially mitigating, the court found the trial judge's decision to delay non-capital sentencing to be appropriate.[411]

Chief Justice Sosa and Justice Ransom dissented from the majority's holding. The chief justice stated that the eighth amendment requires that the court allow the sentencing body to consider as a mitigating factor "any aspect of a defendant's character or record."[412] The defendant's record would include any past sentence and any concurrent or consecutive sentence arising out of the case before the capital jury.[413] Chief Justice Sosa stated that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."[414] The chief justice would have found that the trial court committed fundamental error because it failed to give this information.[415]

Justice Ransom agreed with Chief Justice Sosa in a separate dissent. "I am firmly convinced that under eighth amendment jurisprudence the defendant was entitled to have the jury apprised of [non-capital sentencing]

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407. *Id.* at 294-95, 772 P.2d at 328-29 (citing California v. Brown, 479 U.S. 538, 541 (1987); *Skipper*, 476 U.S. at 4; Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); *Lockett*, 438 U.S. at 605).

408. *Id.* at 295, 772 P.2d at 329.

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* at 312, 772 P.2d at 346 (citing *Lockett*, 438 U.S. 586).

413. *Id.*

414. *Id.* at 313, 772 P.2d at 347 (quoting California v. Ramos, 463 U.S. 992, 1004 (1983)).

415. *Id.*

information."[416] Justice Ransom agreed with the chief justice that the length of incarceration may mitigate the aggravating circumstance of future dangerousness and act as an independent mitigating circumstance.[417]

C. Propriety of Testimony and Fundamental Error

Clark challenged the propriety of testimony by the victim's mother on eighth amendment grounds.[418] Clark argued that the mother's testimony was not relevant to his blameworthiness and created the possibility that the jury imposed the death sentence in an impermissibly arbitrary manner.[419] The supreme court held that the mother's testimony was relevant to the aggravating circumstance that Clark kidnapped her daughter before killing her.[420] The testimony was also directly related to the circumstances of the crime itself.[421] Finally, the court noted that the mother's testimony "contained none of the elements proscribed in *Booth v. Maryland*:[422] descriptions of the character and reputation of the victim; descriptions of the emotional impact of the crime upon the victim's family; and opinions of the victim's family characterizing the crime or the defendant."[423]

The court also denied that the government violated the *Booth* standards when the prosecution suggested in closing argument that the victim's life was worth at least Clark's life.[424] The United States Supreme Court held in *Booth* that a jury in a death sentencing proceeding may not consider the victim's personal characteristics.[425] Clark argued that the prosecution's argument impermissibly focused the jury's attention on the personal characteristics of his victim.[426] The supreme court, however, characterized

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416. *Id.* at 315, 772 P.2d at 349 (Ransom, J., dissenting) (citing *Lockett*, 438 U.S. at 604) (jury must be allowed to consider any circumstance of the offense that supports the imposition of a sentence less than death)).

417. *Id.* at 315-16, 772 P.2d at 349-50 (citing *Ramos*, 463 U.S. at 1003 (because capital jury is concerned that the defendant may be returned to society, information about parole is relevant to its decision whether to impose the death penalty); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) (evidence that defendant would not be dangerous if incarcerated must be considered potentially mitigating)).

418. *Id.* The victim's mother testified about the circumstances of her daughter's disappearance and about the efforts the mother and others made to find her. *Id.*

419. *Id.* (citing Booth v. Maryland, 482 U.S. 496 (1987) (evidence of the impact of the crime on the victim's family inadmissible)).

420. *Id.* at 299, 772 P.2d at 333 (citing N.M. STAT. ANN. § 31-20A-1(C) (1978) ("In the sentencing proceeding, all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances . . .")). The fact of the kidnapping permitted the inference that Clark killed the victim because she was a witness to a crime. *See id.* at 304, 772 P.2d at 338. Murder of a witness to a crime, in order to prevent the witness from reporting or testifying to the crime, is an aggravating circumstance permitting the imposition of the death sentence. N.M. STAT. ANN. § 31-20A-5 (1978).

421. *Clark*, 108 N.M. at 299, 772 P.2d at 333 ("[G]uilty pleas and stipulated facts are no substitute for the evidence of a crime to be considered by a jury.").

422. 482 U.S. 496, 502-03 (1987).

423. *Clark*, 108 N.M. at 299, 772 P.2d at 333.

424. *Id.* at 300, 772 P.2d at 334.

425. *Booth*, 482 U.S. at 504.

426. *Clark*, 108 N.M. at 298, 772 P.2d at 332 (citing *Booth*, 482 U.S. 496 (jury in death sentencing proceeding may not consider personal characteristic of the victim)).

the argument as a plea for retribution, an acceptable basis for imposing the death penalty and a permissible subject for prosecutorial argument.[427] The court noted, moreover, that innocence and defenselessness were the only characteristics brought to the jury's attention.[428] The court held these characteristics to be "generic to children" and not personal to the victim.[429] Choice of a class of victim, the court noted, is a circumstance of the crime that *Booth* does not bar the jury from hearing.[430]

Clark argued that several errors at his sentencing hearing required reversal in spite of the fact that he did not object to them at the hearing. The court held that Clark's failure to timely object constituted a waiver of each claim.[431] The court denied that the "greater degree of scrutiny" accorded capital appeals[432] required the court to relax the timely objection rule.[433] The court further denied that any of the errors that Clark alleged for the first time on appeal constituted "fundamental error."[434] Fundamental error warrants review regardless of whether the defendant timely objects.[435]

Clark argued that it was error for the government to present testimony and argument about the length of a life sentence and the possibility of parole.[436] The court, having already held that the possible length of time the defendant will spend in prison is immaterial to capital sentencing proceedings,[437] stated that it was error to place the issue of Clark's eligibility for parole before the jury.[438] The court held, however, that the error did not rise to the level of reversible fundamental error because the fundamental error doctrine does not apply when the defendant creates the error by his own actions,[439] and Clark had raised the issue of sentencing

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427. *Id.* at 300, 772 P.2d at 334 (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

428. *Id.*

429. *Id.*

430. *Id.* (citing *Booth*, 482 U.S. at 504-05 n.7).

431. *Id.* at 296, 772 P.2d at 330 (citing State v. Escamilla, 107 N.M. 510, 760 P.2d 1276 (1988)(claims of error involving even fundamental rights are subject to waiver) (discussed *supra* notes 361-73 and accompanying text); State v. Tafoya, 94 N.M. 762, 764, 617 P.2d 151, 153 (1980); State v. Ruffino, 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980); State v. Casteneda, 97 N.M. 670, 678, 648 P.2d 1129, 1137 (Ct. App. 1982) (failure to timely object bars review of the issue on appeal)).

432. *Id.* at 296-97, 772 P.2d at 330-31 (quoting State v. Compton, 104 N.M. 683, 688, 726 P.2d 837, 842, *cert. denied*, 479 U.S. 890 (1986)).

433. *Id.* at 297, 772 P.2d at 331 (citing State v. Cheadle, 101 N.M. 282, 287, 681 P.2d 708, 713 (1983), *cert. denied*, 466 U.S. 945 (1984)).

434. *See infra* notes 451-53 and accompanying text.

435. *Clark*, 108 N.M. at 296, 772 P.2d at 330 (citing State v. Compton, 104 N.M. 683, 687, 726 P.2d 837, 841, *cert. denied*, 479 U.S. 890 (1986); State v. Ramirez, 98 N.M. 268, 269, 648 P.2d 307, 308 (1982)).

436. *Id.* at 295, 772 P.2d at 329.

437. *See supra* notes 408 and accompanying text.

438. *Clark*, 108 N.M. at 297, 772 P.2d at 331. The vast majority of jurisdictions hold that the possibility of parole or pardon is admissible in capital sentencing proceedings. *See* Annotation, *Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon*, 12 A.L.R.3d 832, §§ 3, 4 (1967 and Supp. Aug. 1989); Annotation, *Prejudicial Effect of Statement of Prosecutor as to Possibility of Pardon or Parole*, 16 A.L.R.3d 1137, §§ 3, 4 (1967).

439. *Clark*, 108 N.M. at 298, 772 P.2d at 332 (citing State v. Padilla, 104 N.M. 446, 449-51, 722 P.2d 697, 700-02 (Ct. App.), *cert. denied*, 104 N.M. 378, 721 P.2d 1309 (1986)).

in his case-in-chief.[440] The court also noted that cross-examination is permitted on the subject matter of direct examination,[441] and that the government is generally entitled to respond to the defendant's argument.[442]

Clark also argued, and the court agreed, that it was error for the government to inquire into the cost of incarcerating Clark.[443] Clark's failure to object at trial waived the issue, however, and the court held that no fundamental error occurred.[444] Significantly, the court analogized the instant context—the evaluation of the degree of death-worthiness—with the usual fundamental error context of a trial of guilt or innocence.[445] One presently accepted standard for evaluating a claim of fundamental error is whether "the defendant's innocence appears indisputable or if the question of his guilt is so doubtful that it would shock the conscience to permit the conviction to stand."[446] The court held that the standard for a capital sentencing hearing—where the question of guilt is a foregone conclusion—is "whether there is a reasonable possibility that any error changed the outcome of the sentencing hearing."[447] The court held that the brevity of the government's improper argument kept it from being sufficiently prejudicial to warrant reversal.[448]

Clark argued that the government committed reversible error by commenting to the jury on Clark's failure to explain certain details of his crime. The court held that the government's actions were improper,[449] but refused to reverse the death sentence because there was no fundamental error.[450] The court concluded that there was "no probability that the

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440. *Id.* at 297, 772 P.2d at 331.

441. *Id.* at 298, 772 P.2d at 332 (citing SUP. CT. RULES ANN. 11-611 (Recomp. 1986)).

442. *Id.* (citing State v. Muise, 103 N.M. 382, 392, 707 P.2d 1192, 1202 (Ct. App.), *cert. denied*, 103 N.M. 287, 705 P.2d 1138 (1985)).

443. *Id.* at 300, 772 P.2d at 334.

444. *Id.*

445. *Id.* at 301, 772 P.2d at 335. For a criticism of this approach, see Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740 (1987).

446. *Clark*, 108 N.M. at 301, 772 P.2d at 335 (citing State v. Manlove, 79 N.M. 189, 441 P.2d 229 (Ct. App.), *cert. denied*, 79 N.M. 159, 441 P.2d 57 (1968)).

447. *Id.* (citing Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986) (The capital sentencing proceeding was not rendered "fundamentally unfair" by impermissible prosecutorial comments. The court analyzed the effect of the remarks under the "prejudice prong" of Strickland v. Washington, 466 U.S. 668, 693-94 (1984) (whether, but for the impermissible comment, the jury's sentence would have been different).).

448. *Id.* (citing *Tucker*, 802 F.2d at 1293; Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), *sentence vacated*, 478 U.S. 1016 (1986) (remanded for reconsideration in light of Rose v. Clark, 478 U.S. 570 (1986), *judgment reinstated*, 809 F.2d 700, *cert. denied*, 478 U.S. 1022 (1987)).

449. *Id.* at 302-03, 772 P.2d at 336-37 (citing Griffin v. California, 380 U.S. 609 (1965) (fifth amendment prohibits direct or indirect comments on the defendant's failure to testify)). The court adopted a new standard to evaluate allegedly improper prosecutorial comments, "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Id.* at 302, 772 P.2d at 336 (citing Hearn v. Mintzes, 708 F.2d 1072, 1076 (6th Cir. 1983); United States v. White, 444 F.2d 1274, 1278 (5th Cir.), *cert. denied*, 404 U.S. 949 (1971); Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955); McCracken v. State, 431 P.2d 513, 517 (Alaska 1967); State v. Lincoln, 3 Haw. App. 107, 125, 643 P.2d 807, 819 (1982); State v. Hunter, 29 Wash. App. 218, 220, 627 P.2d 1339, 1342 (1981)).

450. *Id.* at 303, 772 P.2d at 337.

error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them."[451]

The court again used the test of whether alleged error changed the outcome of the jury's decision in evaluating Clark's argument that even if none of the alleged individual errors rose to the level of fundamental error, the cumulative effect of the errors required reversal as accumulated fundamental error.[452] The court found that there was no reasonable probability that the errors claimed changed the result of the hearing.[453]

In dissent, Chief Justice Sosa noted that the various errors committed by the government presented the jury with "bewildering testimony" and left it with the apparent choice of having Clark executed or releasing him onto the streets.[454] Justice Ransom would have found that fundamental error arose during the proceeding:

> A substantial portion of Clark's death penalty hearing was devoted to evidence and arguments on the possibility of commutation or pardon, parole, the costs of incarceration, and legislative or judicial actions that could impact the sentence of life imprisonment. The majority opinion concedes this was inconsistent with the decision-making role that the legislature set out for the jury. It is clear to me that the jury had to be in complete and utter confusion over the choice they were to make, and I believe this constituted a miscarriage of justice in the sentencing proceeding. Any miscarriage of justice is fundamental error.[455]

D. Aggravating Circumstances—Murder of a Witness

Clark argued that the statutory "murder of a witness" aggravating circumstance[456] is overbroad if it includes cases where murder follows another crime against the same victim.[457]

The court considered the reasoning behind the provision and concluded that the aggravating circumstance of murder of a witness allows the jury to consider the motive for the murder. The court held that the class of murders is adequately narrowed for eighth amendment purposes when it

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451. *Id.* The court offered no authority for this statement, which echoes the language of Fahy v. Connecticut, 375 U.S. 85 (1963). *Fahy* set the standard for determining when federal constitutional error may be considered "harmless," and therefore not requiring reversal. *Id.* at 86-87. In Chapman v. California, the United States Supreme Court tightened up the *Fahy* test, holding that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967).

452. *Clark*, 108 N.M. at 311, 772 P.2d at 345.

453. *Id.* (citing State v. Hamilton, 89 N.M. 746, 751, 557 P.2d 1095, 1100 (1976)). *Hamilton* did not, however, address the issue of fundamental error in the present context of a death penalty hearing.

454. *Id.* at 313, 772 P.2d at 347 (Sosa, C.J., dissenting).

455. *Id.* at 314, 772 P.2d at 348 (Ransom, J., dissenting).

456. N.M. STAT. ANN. § 31-20A-5(G) (Repl. Pamp. 1987).

457. *Clark*, 108 N.M. at 304, 772 P.2d at 338 (citing Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); Godfrey v. Georgia, 446 U.S. 420 (1980)).

is limited to murders committed to avoid prosecution.[458] The court further held that the state's interest in preventing felons from killing their victims to avoid prosecution reasonably justifies a death sentence.[459]

The court rejected Clark's argument that the government "double counted" the fact that he kidnapped his victim before killing her, counting it both as the separate crime of kidnapping and as an aggravating circumstance to murder.[460] The court held that "[t]he requirement that the State prove beyond a reasonable doubt that the motive for the killing was the elimination of a potential witness sufficiently distinguishes a killing of this type from other killings committed during the commission of a kidnapping."[461] One consequence of the court's holding is that it rendered permissible the introduction by the government of evidence of Clark's prior conviction for kidnapping and criminal sexual penetration for the limited purpose of showing Clark's motive for the killing.[462]

E. Standards for the Jury

The court held that Clark was not prejudiced by the jury instructions given at the hearing,[463] noting that the eighth amendment does not require specific legal standards for balancing aggravating against mitigating circumstances.[464] Clark argued that the jury instructions required the jury to find unanimously that a statutory aggravating circumstance existed beyond a reasonable doubt before imposing the death penalty, but that the jury was not provided with a legal standard for weighing aggravating circumstances against mitigating circumstances.[465] Clark argued that the instructions discouraged the jury from fully considering nonstatutory mitigating factors.[466] The court rejected this argument, stating, "We adhere to the view that a specific written list of nonstatutory mitigating circumstances is not required where the instruction given indicates that the list of enumerated factors is not exclusive."[467]

F. Mills *Error*

In *Mills v. Maryland*,[468] the United States Supreme Court remanded for resentencing because a substantial probability existed that a juror

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458. *Id.* (citing Harich v. Wainwright, 813 F.2d 1082, 1103, *reh'g granted*, 828 F.2d 1497 (1987), *opinion on reh'g*, 844 F.2d 1464 (11th Cir. 1988) (sentence affirmed); Gray v. Lucas, 677 F.2d 1086, 1110 (5th Cir. 1982), *cert. denied*, 463 U.S. 1237 (1983)).

459. *Id.*

460. *Id.* at 305, 772 P.2d at 339. *But cf.* State v. Henderson, 29 N.M. Bar Bull. 342, 345 (1990) (where the crimes of kidnapping and rape are factually inseparable, jury may not consider aggravating circumstance of murder during the commission of a kidnapping).

461. *Clark*, 108 N.M. at 305, 772 P.2d at 339.

462. *Id.* at 304-05, 772 P.2d at 338-39.

463. SUP. CT. RULES ANN. 14-7028 and -7030 (Recomp. 1986) (N.M. U.J.I. Crim.).

464. *Clark*, 108 N.M. at 307, 772 P.2d at 341 (citing Franklin v. Lynaugh, 108 S. Ct. 2320 (1988); Zant v. Stephens, 462 U.S. at 876 n.13; State v. Cheadle, 101 N.M. 282, 287, 681 P.2d 708, 713 (1983), *cert. denied*, 466 U.S. 945 (1984)).

465. *Id.* Clark argued that this rendered his sentence unreliable. *Id.*

466. *Id.* at 306, 772 P.2d at 340.

467. *Id.* (citing People v. Free, 94 Ill. 2d 378, 69 Ill. Dec. 1, 447 N.E.2d 218, *cert. denied*, 464 U.S. 865 (1983); Bowers v. State, 306 Md. 120, 507 A.2d 1072, *cert. denied*, 479 U.S. 890 (1986); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)).

468. 486 U.S. 367 (1988).

could have thought he was precluded from considering any mitigating evidence unless all the jurors agreed that a particular circumstance existed.[469] Clark argued that the jury instruction given at his sentencing hearing violated the principles established in *Mills*.[470] The court disagreed.[471]

The court held that the dangers presented by the Maryland verdict form in *Mills* are not present in New Mexico. The Maryland form required the sentencing jury to make specific findings that a particular mitigating circumstance either existed or did not exist, and that this circumstance had been proven by a preponderance of the evidence.[472] Clark's jury was instructed that they must unanimously find beyond a reasonable doubt that the aggravating circumstances existed, and that any finding they reached regarding the appropriate sentence must be unanimous.[473] The jury instruction stated: "[i]f you find an aggravating circumstance, you must consider all mitigating circumstances. A mitigating circumstance is any conduct, circumstance or thing which would lead you to decide not to impose the death penalty."[474]

JANET KINNIRY
WILL O'CONNELL
BARBARA A. MANDEL, Ed.

469. *Id.* at 384.
470. *Clark*, 108 N.M. at 309-10, 772 P.2d at 343-44.
471. *Id.* at 310, 772 P.2d at 344. In State v. Henderson, the supreme court held that a death sentencing jury should be instructed that "it need not unanimously find the existence of a mitigating circumstance before considering it." 29 N.M. Bar Bull. 342, 347 (1990) (citing *Mills*, 486 U.S. 367). The court said, "We disapprove of any language in *Clark* to the contrary." *Id.*
472. *Clark*, 108 N.M. at 309, 772 P.2d at 343.
473. *Id.*
474. *Id.* (quoting SUP. CT. RULES ANN. 14-7029 (Recomp. 1986)).