NEW MEXICO LAW REVIEW

Volume 18
Issue 2 *Summer 1988*

Summer 1988

Criminal Procedure

Elliott Guttmann

CRIMINAL PROCEDURE

ELLIOTT GUTTMANN*

I. INTRODUCTION

This article reviews cases involving the fourth, fifth, and sixth amendments, and evaluates decisions applicable to the right to a speedy trial, the right to trial by jury, and sentencing.

II. THE FOURTH AMENDMENT[1]

In recent years the United States Supreme Court has handed down several significant decisions regarding the fourth amendment.[2] In New Mexico, the courts have tended to affirm or clarify existing case law rather than to establish a new direction or precedent. One result has been a paucity of cases containing significant fourth amendment issues before the New Mexico courts during the survey year.

A. Third Party Consent

One area where the courts provided assistance and clarification was third party consent. In *State v. Clark*,[3] the defendant's landlady gave consent for the police to search the defendant's premises and possessions.[4] Such consent would normally be insufficient to allow a search because of a person's expectation of privacy in his premises and possessions,[5] but the state also relied upon the theory of abandonment[6] to validate the search. If a person does not demonstrate a privacy expectation when he has abandoned his premises, he will not be protected by the fourth amendment against a warrantless search.[7] The court, after an extensive discussion of what factors constitute abandonment,[8] found that the

*Assistant District Attorney, Albuquerque, New Mexico.

1. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

2. United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Shepard, 468 U.S. 981 (1984).
3. 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).
4. *Id.* at 12, 727 P.2d at 951.
5. *Id. See* Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 360 (1967); State v. Donaldson, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).
6. *Clark*, 105 N.M. 12-13, 727 P.2d at 951-52.
7. *Id.*
8. *Id.* at 13-14, 727 P.2d at 952-53. Evidence offered by the state in support of abandonment included the fact that the landlady had heard that defendant was in jail, that defendant was behind in his rent, and that the landlady had made arrangements with defendant's sister to remove defendant's possessions. *Id.* The court noted that mere nonpayment of rent was not, in itself, evidence of abandonment nor was the fact of defendant's incarceration. *Id.* The court relied on the evidence that defendant had communicated to his sister his desire for the removal of his possessions. *Id.*

defendant had abandoned his premises and possessions and, therefore, did not qualify for the protections of the fourth amendment.[9]

In *State v. Hensel*,[10] also involving third party consent, the defendant's mother was the personal representative of an estate where a ranch was located.[11] She told police that her son had stolen her car, that the car probably was at the ranch and that her son probably would have left drugs at the ranch; the son was later to testify that his mother had given him the ranch and that he lived there on a sporadic basis.[12] Although the mother never lived at the ranch or used it in any way, she gave consent for a warrantless search of the ranch.[13] While searching the ranch, the police found illegal drugs.[14]

The trial court held that the mother was the owner of the ranch and, therefore, had authority to give consent.[15] The court of appeals disagreed; it held that more than mere ownership is required for third party consent.[16] The authority which justifies third party consent does not rest upon the law of property; rather, authority to consent rests on the mutual use of the property by persons generally having joint access or control of the property.[17] Although the court of appeals was primarily concerned with another issue, the right of confrontation, nevertheless it ordered a new hearing on the issue of third party consent to determine the lawfulness of defendant's occupancy of the ranch and his mother's authority to consent to a warrantless search of the ranch property.[18]

State v. Hensel, like *State v. Clark*, helps clarify third party consent in New Mexico. In both cases a third party owner gave consent to search premises occupied by another. In *Hensel*, where the mother gave consent to search the ranch, ownership alone was not sufficient for a valid search.[19] In *Clark*, however, the court made an exception where abandonment of the premises was shown.[20] The cases represent a fine tuning of the definitions of ownership and abandonment in the context of third party consent by an owner.

B. Search Warrant Affidavits

The United States Supreme Court has noted that a good faith exception to the exclusionary rule may exist.[21] The New Mexico Court of Appeals briefly discussed, but did not apply, the good faith exception in *State v. Crenshaw*.[22] The police officers in *Crenshaw* had gone on foot patrol in the Lincoln National Forest in search of marijuana.[23] They believed, incorrectly, that they were on

9. *Id.* at 14, 727 P.2d at 953.
10. 106 N.M. 8, 738 P.2d 126 (Ct. App. 1987).
11. *Id.* at 9, 738 P.2d at 127.
12. *Id.*
13. *Id.*
14. *Id.* at 8, 738 P.2d at 126.
15. *Id.* at 9, 738 P.2d at 127.
16. *Id.* at 10, 738 P.2d at 128.
17. *Id.*
18. *Id.* at 11, 738 P.2d at 129.
19. *Id.* at 10, 738 P.2d at 128.
20. *Clark*, 105 N.M. at 14, 727 P.2d at 953.
21. *See supra* note 2.
22. 105 N.M. 329, 732 P.2d 431 (Ct. App. 1986).
23. *Id.* at 330, 732 P.2d at 432.

national forest land when they discovered defendant's cabin and numerous marijuana plants; they were, in fact, on defendant's property.[24] They obtained a search warrant based upon their observations.[25]

Defendant was convicted of possession of marijuana with intent to distribute.[26] He argued on appeal that the initial search that formed the basis for probable cause to issue the warrant was illegal because the officers had intruded onto the curtilage of the cabin that defendant had leased.[27]

The State asked the court of appeals to uphold the trial court's admission of the evidence obtained in the search under the good faith exception to the exclusionary rule.[28] The United States Supreme Court leaves to the state courts' discretion whether to resolve a fourth amendment question before turning to the good faith issue or whether to consider immediately the issue of the officers' good faith.[29] The court chose to examine the fourth amendment violation first, and found that the search warrant was invalid based on the pre-warrant trespass onto defendant's curtilage.[30] It held that much of the evidence seized was inadmissible and remanded the case for a new trial.[31]

The court of appeals was reluctant to apply a good faith exception under the facts of this case. It feared that using the officers' good faith to overcome the initial trespass would serve to eliminate the exclusionary rule, which the court declined to do.[32] The court did not exclude the good faith exception in all cases, but in requiring an examination of the fourth amendment violation first, the court created a hurdle for those seeking its application.

The New Mexico courts will continue to evaluate search warrant affidavits and, if possible, to save warrants by excising those portions of them which contain material misrepresentations or tainted evidence. In *State v. Copeland*[33] and *State v. Doran*,[34] the court of appeals noted that when a search warrant is based partially on tainted evidence and partially on evidence obtained from independent sources, evidence seized pursuant to the warrant is sometimes admissible. Such evidence is admissible if the lawfully obtained information amounts to probable cause and if it would justify issuance of the warrant apart from the tainted information.[35] In these and similar cases in the future, the courts must still make the difficult judgment as to whether the remaining facts of the warrant are sufficient to save the warrant. This determination will have to be made on a case-by-case basis. In both *Copeland* and *Doran*, the court of appeals upheld the admission of non-tainted or independent evidence.[36]

24. *Id.* at 331, 732 P.2d at 433.
25. *Id.*
26. *Id.* at 334, 732 P.2d at 436.
27. *Id.*
28. *Id.*
29. *Id.* at 335, 732 P.2d at 437.
30. *Id.* at 334, 732 P.2d at 436.
31. *Id.* at 335, 732 P.2d at 437.
32. *Id.* at 334, 732 P.2d at 436.
33. 105 N.M. 27, 727 P.2d 1342 (Ct. App. 1986).
34. 105 N.M. 300, 731 P.2d 1344 (Ct. App. 1986).
35. *Copeland*, 105 N.M. at 32, 727 P.2d at 1347; *Doran*, 105 N.M. at 303, 731 P.2d at 1347.
36. *Copeland*, 105 N.M. at 33, 727 P.2d at 1348; *Doran*, 105 N.M. at 303-04, 731 P.2d at 1347-48.

C. Warrantless Arrest—Exigent Circumstances

If probable cause exists, exigent circumstances provide an exception to the rule requiring a warrant to arrest a person.[37] In *State v. Copeland,* officers went to a motel room following a hit-and-run accident and saw the defendant, a suspect in the accident, through a crack in the door.[38] The officers knew or believed that hit-and-run accidents usually are associated with driving while intoxicated (DWI) and were fearful that the evidence (alcohol in defendant's bloodstream) would dissipate.[39] The officers also believed that a search warrant would take approximately three hours to procure.[40] Therefore, the officers broke the chainlock, entered the room, arrested the defendant, and gave him breath alcohol tests.[41] The court upheld the warrantless arrest, noting that the alcohol in defendant's system was metabolizing as time passed and, therefore, the evidence would have been destroyed had a warrant been required.[42]

D. Right to Frisk

The court of appeals adopted a standard for deciding what circumstances justify a frisk by police officers in *State v. Cobbs.*[43] A police officer had received a dispatch to investigate a possible residential burglary in progress.[44] Once there, the officer apprehended the defendant and without asking any questions patted him down and found a syringe.[45] The trial court apparently disapproved of the officer's failure to question the defendant prior to the patdown and suppressed the evidence.[46]

The court of appeals reversed and upheld the validity of the search even though the officer had not made an inquiry prior to the patdown search.[47] More importantly, the court of appeals adopted a standard for determining an officer's right to frisk or conduct a protective search: that right is automatic whenever the suspect has been stopped upon the suspicion that he has committed, was committing, or was about to commit a type of crime for which an offender is likely to be armed.[48] Under the *Cobbs* standard, a frisk or patdown search of a burglary suspect is permissible even though the suspect does not behave in a threatening

37. *Copeland,* 105 N.M. at 31, 727 P.2d at 1346; *see* State v. Chavez, 98 N.M. 61, 644 P.2d 1050 (Ct. App. 1982).

38. *Copeland,* 105 N.M. at 29-30, 727 P.2d at 1344-45.

39. *Id.* at 30, 727 P.2d at 1345.

40. *Id.*

41. *Id.* The accident occurred about two and one-half hours prior to the police officers' entering the room. The defendant was taken to the police station and given three breath alcohol tests. They registered .19, .21, and .21.

42. *Copeland,* 105 N.M. at 31-32, 727 P.2d at 1346-47.

43. 103 N.M. 623, 711 P.2d 900 (Ct. App. 1985).

44. *Id.* at 625, 711 P.2d at 902.

45. *Id.*

46. *Id.* at 627, 711 P.2d at 902.

47. *Id.* at 627-28, 711 P.2d at 904-05. The court cited Justice Harlan's concurring opinion in Terry v. Ohio, 392 U.S. 1, 33 (1968): "there is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet."

48. *Cobbs,* 103 N.M. at 630, 711 P.2d at 907.

manner.[49] Other inherently dangerous crimes to which the *Cobbs* standard will apply include robbery, rape, assault with weapons, and dealing in large narcotics transactions.[50]

III. THE FIFTH AMENDMENT[51]

A. *Miranda Warnings*

The *Miranda*[52] decision, twenty years later, continues to be one of the most contested and debated decisions in criminal procedure. In *State v. Greyeyes*,[53] the court of appeals analyzed the *Miranda* warnings in the context of a routine traffic stop.[54] A police officer arrived at the scene of an accident and began general on-the-scene questioning.[55] The defendant, in response to the officer's questions, said he had been drinking all night.[56] These admissions were used against the defendant to obtain a driving while intoxicated conviction.[57]

On appeal, defendant argued that his statements should not have been admitted at trial because he was not given the *Miranda* warnings before questioning began.[58] The court of appeals noted that the right to *Miranda* warnings does not attach until an accused is in custody or is deprived of freedom in some significant way.[59] The court upheld the driving while intoxicated conviction and held that general on-the-scene questioning in the fact-finding process is not custodial and does not deprive the defendant of freedom in a significant way.[60] The fact that the police may have focused their investigation on the defendant, as happened here, does not necessarily raise the questioning to a level requiring *Miranda* warnings.[61]

In *State v. Tindle*,[62] the court of appeals provided guidance as to the type of

49. *Id.* Defendant relied heavily upon the ruling of the court of appeals in State v. Harrison, 95 N.M. 383, 622 P.2d 288 (Ct. App. 1980). The court of appeals in *Cobbs* held that to the extent that *Harrison* requires that an officer must not only have reasonable suspicion that a suspect is armed but also reasonable suspicion that a suspect is presently dangerous, it is not to be followed.

50. *Cobbs*, 103 N.M. at 630, 711 P.2d at 907.

51. The fifth amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

52. Miranda v. Arizona, 384 U.S. 436 (1966).

53. 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987).

54. *Id.*

55. *Id.* at 550, 734 P.2d at 790.

56. *Id.*

57. *Id.*

58. *Id.* at 551, 734 P.2d at 791.

59. *Id. See* State v. Swise, 100 N.M. 256, 669 P.2d 732 (1983).

60. *Greyeyes*, 105 N.M. at 551, 734 P.2d at 791.

61. *Id. See* State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968); State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980), *rev'd in part on other grounds*, Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

62. 104 N.M. 195, 718 P.2d 705 (Ct. App. 1986).

promises that would render a confession admissible or inadmissible.[63] In *Tindle* a police officer gave the defendant *Miranda* warnings while arresting him and made an implied promise that "it would be better" if the defendant confessed.[64] The trial court suppressed the defendant's confession and the State appealed.[65]

The appellate court distinguished between express promises and implied promises.[66] An express promise of leniency will render a confession involuntary as a matter of law.[67]An implied promise of leniency, on the other hand, is but one factor among many that the court must consider when it evaluates the totality of circumstances surrounding a confession.[68] In *Tindle*, the court of appeals felt that the trial court might have erroneously applied the standard for an express promise to the officer's implied promise.[69] The case was remanded to the trial court to ensure that its decision comported with the appellate court's analysis.[70]

B. Comment on Failure to Testify

A prosecutor's comments in *State v. Lopez*[71] were grounds for the court of appeals to order a new trial.[72] At the close of defendant's case, the trial court inquired whether the state intended to present rebuttal testimony.[73] The defendant initially intended to testify, but decided not to do so.[74] The prosecutor, in the presence and hearing of the jury, responded, "Yes sir, . . . having been told that . . . Mr. Colson was going to take the stand . . . it's going to take me about. . . ."[75] The court of appeals found that the prosecutor's comments violated the defendant's fifth amendment privilege against self-incrimination and that the comments constituted reversible error.[76] The fact that the prosecutor might have made a mistake or might have made his comments inadvertently did not lessen the prejudicial impact of the comments.[77]

The rule prohibiting comment on a defendant's failure to testify or his silence at time of arrest applies with equal force to a defendant's refusal to consent to a search.[78] In *Garcia v. State*,[79] the defendant refused to allow police officers to

63. *Id.*
64. *Id.* at 198, 718 P.2d at 708.
65. *Id.* at 196, 718 P.2d at 706.
66. *Id.* at 199, 718 P.2d at 709.
67. *Id. See* State v. Lindemuth, 56 N.M. 257, 243 P.2d 325 (1952); State v. Wickman, 39 N.M. 198, 43 P.2d 933 (1935).
68. *Tindle*, 104 N.M. at 199-200, 718 P.2d at 709-10.
69. *Id.* at 200, 718 P.2d at 710.
70. *Id.*
71. 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986).
72. *Id.* at 548, 734 P.2d at 788.
73. *Id.* at 544, 734 P.2d at 784.
74. *Id.* at 545, 734 P.2d at 785.
75. *Id.* at 544, 744 P.2d at 784.
76. *Id.* at 545, 744 P.2d at 785.
77. *Id.* The court cited State v. Frank, 92 N.M. 456, 589 P.2d 1047 (1979), which stated that "whatever the prosecutor's intentions might have been and even if spoken with the purest of motives, if in fact the comments related to the failure of the defendant to testify, they were prejudicial and required that the conviction be set aside." *See* Gonzales v. State, 94 N.M. 495, 612 P.2d 1306 (1980); State v. Dominguez, 91 N.M. 296, 573 P.2d 230 (Ct. App. 1977).
78. Garcia v. State, 103 N.M. 713, 712 P.2d 1375 (1986).
79. *Id.* at 714, 712 P.2d at 1376.

search his car. At trial, the prosecutor commented on the defendant's refusal to consent to the search.[80] The court of appeals upheld the conviction despite the prosecutor's comments, but the supreme court reversed.[81] A defendant has a right to refuse to consent to a warrantless search without such refusal later being used to imply his guilt.[82] This right, the supreme court noted, is analogous to the right to remain silent; refusal to permit a search is as ambiguous as invoking silence.[83]

C. *Double Jeopardy*

Defendants made numerous challenges on the basis of double jeopardy, but their convictions were upheld. In *State v. Price*,[84] the defendant was found guilty of attempted felony murder.[85] The court of appeals ruled that attempted felony murder was a non-existent crime, reversed defendant's conviction on that charge and remanded the case for a new trial.[86] Defendant asked the court to preclude the state, on remand, from charging him with attempt to commit first degree murder,[87] claiming that jeopardy attached because he had already gone to trial and been convicted.[88] The court of appeals, however, reasoned that the trial court lacked jurisdiction in the first trial since attempted felony murder is a non-existent charge.[89] The court concluded that if the trial court did not have jurisdiction there was no prior conviction so there could be no basis for a claim of double jeopardy.[90]

In *State v. Williams*,[91] the State obtained multiple convictions of criminal sexual contact on the theory that defendant committed one offense by touching the victim's breast, and another by touching her genital area.[92] The defendant claimed double jeopardy.[93] On appeal, however, the court of appeals found that the legislature intended to protect the victim from intrusions to each enumerated area.[94]

The defendant also claimed that double jeopardy applied because he had been convicted of similar crimes: kidnapping by holding for service and assault with intent to commit criminal sexual penetration.[95] The appellate court defined and distinguished the two crimes. According to the court, "to hold for services"

80. *Id.*
81. *Id.* at 713-14, 712 P.2d at 1375-76.
82. *Id.* at 714, 712 P.2d at 1376.
83. *Id.*
84. 104 N.M. 703, 726 P.2d 857 (Ct. App. 1986).
85. *Id.*
86. *Id.* at 706, 726 P.2d at 860.
87. *Id.* at 707, 726 P.2d at 861.
88. *Id.* at 706, 726 P.2d at 860.
89. *Id.*
90. *Id.*
91. 105 N.M. 214, 730 P.2d 1196 (Ct. App. 1986).
92. *Id.* at 216, 730 P.2d at 1198. N.M. STAT. ANN. §30-9-12 (Repl. Pamp. 1984): "Criminal sexual contact is intentionally touching or applying force without consent to the unclothed intimate parts of another who has reached his eighteenth birthday . . . for purposes of this section 'intimate parts' means the primary genital area, groin, buttocks, anus or breast."
93. *Williams*, 105 N.M. at 216, 730 P.2d at 1198.
94. *Id.* at 217, 730 P.2d at 1199.
95. *Id.* at 216, 730 P.2d at 1198.

includes sexual purposes which can be either criminal sexual penetration or criminal sexual contact.[96] In contrast, the crime of assault with intent to commit criminal sexual penetration is specifically defined only in terms of criminal sexual penetration.[97] At trial, in addition to evidence of a sexual assault, there was evidence from which the jury could infer that defendant restrained the victim with the intent of holding her for services, i.e., noncriminal sexual penetration purposes.[98]

The appellate court held that because different evidence underlay the two offenses of assault with intent to commit criminal sexual penetration and kidnapping by holding for service, no merger was required and no double jeopardy attached.[99] The court of appeals reached the same conclusion in *State v. Hernandez*[100] where it held that the defendant's conviction for trafficking and for conspiracy did not violate double jeopardy because these are separate offenses with separate evidentiary requirements.[101]

In *State v. Ross*,[102] the defendant was convicted of six counts of fraud and six counts of fraudulent securities practices.[103] He claimed that conviction for both offenses placed him in double jeopardy and subjected him to double punishment.[104] The court of appeals rejected the defendant's contention and held that the elements of general fraud are not necessarily involved in a charge of fraudulent securities practices.[105]

The issue of sentencing and double jeopardy was addressed in *State v. Rushing*.[106] The trial court orally gave the defendant a deferred sentence.[107] Before the court entered a written judgment and sentence, the state filed a motion to reconsider the sentence based upon the defendant's misrepresentations at sentencing.[108] The defendant argued that he had commenced serving his orally imposed sentence and that the trial court could not increase his sentence.[109] The trial court, however, granted the state's motion and gave a new sentence (incarceration).[110] The court of appeals upheld the new sentence, reasoning that the actions upon which the defendant relied created no reasonable expectation of finality.[111] Moreover, under the facts peculiar to this case, double jeopardy principles would not preclude vacating a deferred sentence that was obtained on the basis of the defendant's misrepresentations at the time of sentencing.[112]

96. *Id.* at 218, 730 P.2d at 1200.
97. *Id.*
98. *Id.*
99. *Id.*
100. 104 N.M. 268, 720 P.2d 303 (Ct. App. 1986).
101. *Id.* at 278, 720 P.2d at 313.
102. 104 N.M. 23, 715 P.2d 471 (Ct. App. 1986).
103. *Id.*
104. *Id.* at 24, 715 P.2d at 472.
105. *Id.* at 27, 715 P.2d at 475.
106. 103 N.M. 333, 706 P.2d 875 (Ct. App. 1985).
107. *Id.* at 334, 706 P.2d at 876.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 335, 706 P.2d at 877.
112. *Id.*

IV. THE SIXTH AMENDMENT[113]

A. Right to Counsel

Many cases appearing before the court in New Mexico came under the ambit of the sixth amendment. The court of appeals addressed the right to counsel in *State v. Hamilton*,[114] where the defendant was advised of his right to counsel and to have counsel appointed if he were indigent.[115] Defendant initially said he would retain private counsel.[116] At the preliminary hearing a month later, however, he informed the court that he could not afford counsel.[117] The trial court concluded that, by waiting to inform the court until the time of hearing, the defendant had waived his right to appointed counsel.[118] The court of appeals reversed,[119] holding that the trial court ignored the well-established principle that an accused is not required to request the assistance of counsel;[120] counsel must be provided whether or not the accused requests one.[121]

In *State v. Seward*,[122] the defendant was charged with an offense and was represented by a public defender with respect to that offense. While the defendant was in custody for that offense, the police questioned him on an unrelated offense.[123] The court of appeals held that statements the defendant made under this questioning were voluntary; using them against the defendant did not violate the fifth amendment privilege against self-incrimination.[124]

The court also analyzed defendant's sixth amendment right to counsel. At issue was whether defendant's statement should have been suppressed because the police failed to notify the public defender that defendant was in custody.[125] Defendant argued that the statement was obtained in violation of the Public Defender Act[126] and the Indigent Defense Act[127] and that the public defender should have been consulted prior to the statement.[128] The court of appeals held that neither act was applicable: (1) no right to counsel was triggered by the

113. The sixth amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. CONST. amend VI.

114. 104 N.M. 614, 725 P.2d 590 (Ct. App. 1986).
115. *Id.* at 615, 725 P.2d at 591.
116. *Id.*
117. *Id.*
118. *Id.* at 616, 725 P.2d at 592.
119. *Id.*
120. *Id. See* Carnley v. Cochran, 369 U.S. 506 (1962).
121. *Hamilton*, 104 N.M. at 616, 725 P.2d at 592. The case was remanded to the trial court with instructions to vacate the sentence and to provide a new preliminary hearing. *Id.* at 619, 725 P.2d at 595.
122. 104 N.M. 548, 724 P.2d 756 (Ct. App. 1986).
123. *Id.* at 553, 724 P.2d at 761.
124. *Id.* at 554, 724 P.2d at 762.
125. *Id.* at 552, 724 P.2d at 760.
126. N.M. STAT. ANN. §§31-15-1 to -12 (Repl. Pamp. 1984). Readers should note that statutes are now codified in (Repl. Pamp. 1987).
127. *Id.* §§31-16-1 to -10.
128. *Seward*, 104 N.M. at 552, 724 P.2d at 760.

Indigent Defense Act until defendant's first court appearance on a particular charge, and (2) the Public Defender Act did not confer blanket authorization for the public defender to meet with all indigents in custody.[129] Thus, a defendant in custody can be questioned on unrelated charges without violating the sixth amendment right to counsel.[130] To bolster this conclusion, the court of appeals cited the U.S. Supreme Court which had recently said: "To exclude evidence pertaining to charges as to which the sixth amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at the time, would unnecessarily frustrate the public's interest in the investigation of criminal activities."[131]

B. Right to Pro Se Representation

New Mexico courts continued to struggle with the question of when a defendant has properly asserted his right to represent himself or to request substitution of counsel. In *State v. Lewis*,[132] the defendant vacillated about whether he wanted to represent himself. The trial court assigned a court-appointed attorney;[133] on appeal, the defendant argued that he had been denied the right to represent himself.[134] The court of appeals held that the defendant's indecision could be considered a waiver of his right to self-representation.[135]

A defendant's request to represent himself was also made in *State v. Chapman*.[136] The trial court denied the request to appear pro se.[137] On appeal, the defendant argued that the denial was error because the court failed to make an inquiry into his abilities to make a valid waiver of counsel.[138] The court of appeals held that the denial was not error because the trial court had presided over a lengthy competency hearing and had sufficient information with which to make a proper determination of the defendant's abilities to waive counsel.[139]

C. Right to Substitution of Counsel

Related to the issue of the right to appear pro se is the right of an indigent to substitute counsel. A defendant does not have the right to dismiss arbitrarily a court-appointed counsel and request another counsel. In *State v. Lewis*,[140] the court of appeals held that the decision to appoint substitute counsel is discretionary; the court will not grant substitute counsel without a showing of good cause.[141] The court reached a similar conclusion in *State v. Hernandez*,[142] where

129. *Id.* at 553, 724 P.2d at 761. *See* State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).
130. *Seward*, 104 N.M. at 554, 724 P.2d at 762. *See* United States v. Masullo, 489 F.2d 217 (2nd Cir. 1973) (questioning violated neither sixth amendment nor professional ethics).
131. Maine v. Moulton, 474 U.S. 159 (1985).
132. 104 N.M. 677, 726 P.2d 354 (Ct. App. 1986).
133. *Id.* at 677-78, 726 P.2d at 354-55.
134. *Id.* at 682, 726 P.2d at 359.
135. *Id.*
136. 104 N.M. 324, 721 P.2d 392 (1986).
137. *Id.* at 327, 721 P.2d at 395.
138. *Id.*
139. *Id.* His conviction was reversed on other grounds.
140. 104 N.M. at 680, 726 P.2d at 357.
141. *Id.*
142. 104 N.M. 268, 720 P.2d 303 (Ct. App. 1986).

it said that it would not find abuse of discretion unless inadequate representation or prejudice to the defendant was shown.[143]

The court provided guidelines for the substitution of counsel in *State v. Lucero*.[144] In this instance defense counsel, more than the defendant, sought substitution of counsel.[145] The court measures a request such as this by the sixth amendment promise of effective assistance of counsel.[146] The trial court correctly found that defendant had not articulated a sound justification for replacement of counsel.[147] At the subsequent habitual offender proceeding, however, relations between defendant and his counsel had become somewhat strained and the trial court should have permitted withdrawal of counsel.[148] Counsel, mindful that he could have been held in contempt, informed the court he would not aid or represent defendant.[149] Counsel's statements should have alerted the court that defendant probably would not receive the performance of a reasonably competent defense attorney; because the trial court erred in refusing to appoint substitute counsel at the habitual offender proceeding, the court of appeals reversed the sentence and remanded for a new habitual offender hearing.[150]

D. Right to Confrontation

An important sixth amendment case involving the right of confrontation and videotape testimony was later vacated by the United States Supreme Court.[151] In *State v. Tafoya*,[152] videotaped depositions were taken of child abuse victims while the defendant was required to remain in a control booth. The defendant argued that the procedure violated not only his sixth amendment right to confront witnesses against him but also a state statute and rule of criminal procedure which required that depositions be taken in the presence of the defendant.[153]

The court of appeals reasoned that the general rule favoring face-to-face confrontation sometimes must give way to considerations of policy and necessity.[154] There was testimony that each child would suffer harm if required to testify face-to-face with the defendant.[155] The court of appeals liberally defined the term "presence"; the defendant was at hand, was within reach and, therefore, was present.[156] In addition, the defendant had the opportunity to cross-examine the

143. *Id.* at 272, 720 P.2d at 307; *see* State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977).
144. 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986).
145. *Id.* at 591, 725 P.2d at 270.
146. *Id.* at 593, 725 P.2d at 272.
147. *Id.* at 592, 725 P.2d at 271.
148. *Id.* at 594, 725 P.2d at 273.
149. *Id.*
150. *Id.*
151. In Coy v. Iowa, 108 S.Ct. 2810 (1988), the United States Supreme Court held that confrontation means face to face confrontation, and remanded because there was a screen between a child and defendant. Tafoya v. New Mexico was also remanded for further action consistent with Coy v. Iowa.
152. 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986).
153. N.M. STAT. ANN. §30-9-17 (Repl. Pamp. 1984) and N.M. R. CRIM. P. 29.1 (Repl. Pamp. 1985). The statute and the rule required the deposition to be taken "in the presence of defendant" or require defendant to be "present".
154. *Tafoya*, 105 N.M. at 120, 729 P.2d at 1374.
155. *Id.*
156. *Id.* at 119, 729 P.2d at 1373.

victims.[157] The court of appeals had ruled that his sixth amendment right to confront witnesses had been satisfied.[158]

In *State v. Hensel*,[159] the court of appeals discussed the right of confrontation in the context of a suppression hearing.[160] Ordinarily, the Rules of Evidence are inapplicable in suppression hearings.[161] Hensel's suppression hearing, however, involved not only a hearsay objection but also a sixth amendment confrontation claim.[162] The police officer testified that defendant's mother, who did not testify, had given permission to search property upon which the defendant was found with illegal drugs.[163] The court of appeals noted that while a defendant is not guaranteed the right to confront all out-of-court declarants in any suppression hearing, he does have the constitutional right to confront the key witnesses against him.[164] The mother's authority to consent to the search made her a key witness.[165] Defendant's conviction was reversed.[166] The significance of this decision is that a trial court must decide whether a witness is an important or key witness prior to permitting the admission of hearsay evidence against the defendant in a suppression hearing.

The court of appeals made a similar ruling regarding the right of confrontation in *State v. Austin*.[167] The facts in this two witness case are simple. The defendant worked as a clerk for Western Union in Hobbs, New Mexico.[168] When a customer asked to have money wired, defendant would record it in her daily log.[169] The main Western Union office in Kansas City, also recording transactions on its computer, discovered that the Hobbs office's bank balance was insufficient to cover the amount of money wired from that office.[170] The New Mexico employer made a comparison of defendant's daily logs with computer printouts from the Kansas City office and discovered transactions recorded on the printouts which were not on the defendant's logs.[171] At trial the printouts were admitted under the business records exception to the rule against hearsay.[172] Based upon the discrepancies between the daily logs and the printouts, defendant was convicted of twenty-two counts of embezzlement.[173]

The court of appeals noted that the admissibility of the printouts under the

157. *Id.* at 121, 729 P.2d at 1375.

158. *Id.* In Coy v. Iowa, 108 S.Ct. 2798 (1988), the United States Supreme Court held that confrontation means face to face confrontation, and remanded because there was a screen between a child and defendant. Tafoya v. New Mexico was also remanded for further action consistent with Coy v. Iowa.

159. 106 N.M. 8, 738 P.2d 126.

160. *Id.* at 10, 738 P.2d at 128.

161. *Id.*

162. *Id.*

163. *Id.* at 9, 738 P.2d at 127.

164. *Id.* at 10-11, 738 P.2d at 128-29.

165. *Id.* at 10, 738 P.2d at 128.

166. *Id.* at 11, 738 P.2d at 129.

167. 104 N.M. 573, 725 P.2d 252 (Ct. App. 1985).

168. *Id.* at 574.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 573-74, 725 P.2d at 252-53.

business records exception was not the only issue to consider.[174] Generally, well-established hearsay exceptions are presumptively reliable.[175] There are cases, however, where the out-of-court declarant, i.e., records, is a witness against the defendant, and while the evidence may be admissible under a hearsay exception, it may still offend the confrontation clause.[176]

Under the confrontation clause, the computer printouts should have been excluded.[177] The computerized records in this case differ in important ways from traditional business records.[178] There were only two witnesses at trial, the defendant and the victim, the New Mexico employer, and neither witness understood how the computer printouts were prepared.[179] Thus, although these printouts were the primary basis for convicting the defendant, she had no opportunity to cross-examine any witness concerning their accuracy.[180] The court of appeals found that the trial court erred in admitting the records.[181]

The court of appeals felt there was insufficient evidence to convict the defendant if the computerized printouts were excluded.[182] Therefore, the court remanded the case with instructions to discharge the defendant.[183]

In two cases during the survey period New Mexico appellate courts emphasized a defendant's right to be present at all stages of a criminal trial, a right which also derives from the confrontation clause.[184] In *State v. McDuffie*,[185] defense counsel participated in a suppression hearing after waiving presence of the defendant.[186] The court of appeals held that because the defendant was not aware of the waiver he could not have waived his presence voluntarily, knowingly, and intelligently.[187]

The New Mexico Supreme Court made a similar ruling in *Hovey v. State*.[188] The supreme court rejected the claim that defense counsel orally waived the defendant's right to be present during a communication between the court and the attorney.[189] The supreme court invalidated the waiver on the grounds that the trial court could not properly infer that the defendant voluntarily had waived his presence.[190] When counsel seeks a waiver, the trial court must exercise extra caution and circumspection to ascertain whether counsel is waiving the right or whether the defendant voluntarily was doing so through his attorney.[191]

174. N.M. R. EVID. 803(6) (Repl. Pamp. 1983).
175. *Austin*, 104 N.M. at 575, 725 P.2d at 254.
176. *Id.*
177. *Id.*
178. *Id.* at 576, 725 P.2d at 255.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *See* Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).
185. 106 N.M. 120, 739 P.2d 989 (Ct. App. 1987).
186. *Id.* at 121, 739 P.2d at 990.
187. *Id.* at 122, 739 P.2d at 991.
188. 104 N.M. 667, 726 P.2d 344 (1986).
189. *Id.* at 671, 726 P.2d at 348.
190. *Id.*
191. *McDuffie*, 106 N.M. at 122, 739 P.2d at 991.

V. RIGHT TO SPEEDY TRIAL

A. Right to Speedy Trial

In *State v. Kilpatrick*,[192] the court of appeals ruled that the defendant had been denied a right to a speedy trial.[193] The defendant was arrested, incarcerated briefly, and released after posting bond.[194] While on bond, the defendant remained subject to certain obligations and restrictions.[195] Eleven months passed between the defendant's arrest and indictment.[196] The court of appeals initially rejected defendant's claim of prejudicial delay.[197] The supreme court reversed and remanded the cause to the court of appeals with instructions to determine whether defendant had been prejudiced.[198]

The court of appeals then found that the delay of more than ten months was presumptively prejudicial, thereby compelling review of additional balancing factors.[199] Based upon the review of factors and guidelines, the court of appeals found that the defendant had been denied the right to a speedy trial.[200] The case established that a delay of ten months or more could in some cases require a finding of a presumption of prejudice.

In evaluating a defendant's claim of right to a speedy trial, the court will consider whether the defendant is responsible for the delay. In *State v. Tarango*,[201] the defendant left prison on furlough and failed to return.[202] The defendant was subsequently arrested and incarcerated in another state.[203] The defendant was returned to New Mexico and convicted of escape.[204] The defendant argued on appeal that he was denied his right to a speedy trial because he was not tried until twenty-five months after the criminal complaint for escape had been filed against him.[205] The court of appeals noted that since the defendant had been a fugitive and then imprisoned in another state, most of the delay was attributable to him.[206] The court, affirming defendant's conviction, also held that the state was not responsible for delay prior to the time it was notified of defendant's whereabouts.[207]

192. 104 N.M. 441, 722 P.2d 692 (Ct. App. 1986).
193. *Id.* at 446, 722 P.2d at 697.
194. *Id.* at 443, 722 P.2d at 694.
195. *Id.* at 445-46, 722 P.2d at 696-97.
196. *Id.* at 443, 722 P.2d at 694.
197. *Id.* at 442, 722 P.2d at 693.
198. *Id.* at 442-43, 722 P.2d at 693-94.
199. *Id.* at 444, 722 P.2d at 695. Once a presumption of prejudice exists, the balancing factors established in Barker v. Wingo, 407 U.S. 514 (1972) must be considered. These factors include: (1) length of delay; (2) reasons for delay; (3) assertion of right; and (4) prejudice to defendant. *See* United States v. McDonald, 456 U.S. 1 (1982); United States v. Marion, 404 U.S. 307 (1971).
200. *Kilpatrick*, 104 N.M. at 446, 722 P.2d at 697.
201. 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987).
202. *Id.* at 594, 734 P.2d at 1277.
203. *Id.*
204. *Id.*
205. *Id.* at 597, 734 P.2d at 1280.
206. *Id.* at 598, 734 P.2d at 1281.
207. *Id.*

B. Right to Continuance

The defendant was convicted of burglary in *March v. State*.[208] The supreme court found, however, that the trial court's denial of defendant's request for a continuance was an abuse of discretion.[209] One day prior to trial defense counsel moved for a continuance in order to obtain a forensic evaluation to determine whether the defendant had a viable defense of lack of capacity to form a specific intent.[210] When it denied the motion, the trial court violated due process by making a potential avenue of defense unavailable to the defendant.[211]

In *State v. Peterson*,[212] the trial court also denied defendant's request for a continuance, but this time the court of appeals affirmed.[213] The defendant, appearing pro se, requested a continuance to prepare for the trial.[214] The court of appeals felt that the defendant had had ample time to prepare and that any lack of preparedness was due to his own dilatoriness.[215] The trial court had met its dual responsibilities to provide for a fair trial and for an orderly and expeditious proceeding of litigation.[216]

VI. TRIAL BY JURY

A. Jury Selection

In several cases the court illustrated the importance of jury selection. Specifically, in two cases, *State v. Sandoval*[217] and *Fuson v. State*,[218] the court overruled previous decisions and granted new trials because the defendants were not given a fair and impartial jury. In *State v. Sandoval*, a Hispanic defendant appealed on grounds that the state improperly based its peremptory challenges on the race of the prospective jurors.[219] The prosecutor excused the only two Hispanic jurors who could have served on the jury, thus creating a Hispanic-free jury panel.[220]

Prior to *Sandoval*, a defendant seeking to show systematic exclusion of jurors based upon race was required to demonstrate a pattern of exclusion that extended beyond his own case.[221] In 1986, the United States Supreme Court modified this standard in *Batson v. Kentucky*.[222] Under the *Batson* standard, a defendant can establish a pattern of racial exclusion based solely on the facts of his case.[223]

208. 105 N.M. 453, 734 P.2d 231 (1987).
209. *Id.* at 454, 734 P.2d at 232.
210. *Id.* at 454-55, 734 P.2d at 232-33.
211. *Id.* at 456, 734 P.2d at 234.
212. 103 N.M. 638, 711 P.2d 915 (Ct. App. 1985).
213. *Id.* at 643, 711 P.2d at 920.
214. *Id.* at 641, 711 P.2d at 918.
215. *Id.* at 643, 711 P.2d at 920.
216. *Id.*
217. 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987).
218. 105 N.M. 632, 735 P.2d 1138 (1987).
219. 105 N.M. at 697, 736 P.2d at 502.
220. *Id.*
221. *Id.* at 698, 736 P.2d at 503. *See* Swain v. Alabama, 380 U.S. 202 (1965).
222. 476 U.S. 79 (1986).
223. *Sandoval*, 105 N.M. at 698, 736 P.2d at 503.

This standard makes it easier for a defendant to assert and prove prejudice since prejudice will be reviewed as it applies on a case-by-case basis. In *Sandoval*, New Mexico adopted the *Batson* standard, reversed the defendant's conviction, and remanded the case for a new trial.[224]

During voir dire in *Fuson v. State*, a prospective juror voiced his uncertainty about his ability to be a fair and impartial juror.[225] The defendant sought to excuse the person for cause; when the court denied the request, the defendant was forced to use all of his peremptory challenges before the court completed the venire.[226] The court of appeals affirmed the trial court's decision. In doing so, the court relied on *State v. Martinez*, where the supreme court stated that it would only find that a trial court's failure to dismiss a juror was reversible error if the complaining party could show that the jury which finally heard the case was biased or unfair.[227]

The case next went to the supreme court, which reversed the court of appeals and the trial court.[228] The court held that prejudice is presumed when, as here, a party is compelled to use peremptory challenges on persons who should have been excused for cause and the party exercises all of his peremptory challenges before the court completes the venire.[229] The court overruled its decision in *Martinez* to the extent that it failed to recognize a presumption of prejudice in this situation.[230]

B. Jury Selection—Swearing in of the Jury

In *State v. Apodaca*,[231] the court of appeals considered the permissible time for swearing in the jury. The state had already presented its opening statement and its first witness when the defendant moved for a mistrial because the jury had not been sworn.[232] The trial court denied the motion, gave the oath, and continued with the trial.[233] Because the oath addresses how the jury will arrive at a verdict and was administered before the jury began to deliberate, the court of appeals held that the trial court correctly refused to declare a mistrial.[234]

C. Right to Public Trial

The court of appeals discussed the right to a public trial, or, more precisely, the right to a closed trial, in *State v. Apodaca*.[235] In a criminal sexual penetration case, the prosecutor requested that the courtroom be closed to the public during the testimony of the child victim.[236] The prosecutor requested, however, that the

224. *Id.* at 700, 736 P.2d at 504. *See* United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987).
225. 105 N.M. at 633, 735 P.2d at 1139.
226. *Id.*
227. *Id. See* State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981).
228. *Fuson*, 105 N.M. at 634, 735 P.2d at 1140.
229. *Id.*
230. *Id.*
231. 105 N.M. 650, 735 P.2d 1156 (Ct. App. 1987).
232. *Id.* at 654, 735 P.2d at 1160.
233. *Id.*
234. *Id.* N.M.U.J.I. CRIM. 14-123 sets out the oath, which was "do you swear or affirm that you will arrive at a verdict according to the evidence and the law as contained in the instructions of the court?"
235. 105 N.M. 650, 735 P.2d 1156 (Ct. App. 1987).
236. *Id.* at 652, 735 P.2d at 1158.

court permit the victim's family to be present.[237] The defendant agreed to exclude the public on the condition that the court permit his family members to be present.[238] Over the defendant's objections, the court excluded all spectators, including the defendant's family.[239] The court permitted the victim's family to remain.[240] On appeal, the court of appeals noted that once the defendant agreed to exclude all spectators except his family and the victim's family, the trial court had the discretion to exclude everyone except the victim's family.[241]

D. Jury Instructions—Lesser Included Offenses

Jury instructions, as always, provided a fertile ground for appellate issues. One of the more notable cases was *State v. Boeglin*,[242] where the defendant was convicted of first degree murder. He had the opportunity, prior to submission of instructions to the jury, to submit an instruction on the lesser included offense of second degree murder.[243] The defendant waived this option.[244]

On appeal, the defendant urged the supreme court to rule that whenever the evidence in a first degree murder prosecution warrants the submission of a second degree murder instruction, the trial court should give the instruction sua sponte, regardless of the defendant's wishes.[245] The supreme court declined to formulate such a rule.[246] A defendant is free to make strategic choices, but once he makes them he generally is bound by them.[247]

In another first degree murder case, *State v. Omar-Muhammed*,[248] the defendant appealed his conviction of first degree depraved mind murder. A bystander was killed when the defendant drove through a roadblock at approximately 100 miles per hour.[249] In a case of first impression, the supreme court held that the trial court erred by refusing to instruct that vehicular homicide, committed while under the influence of drugs, was a lesser included offense of depraved mind murder.[250]

In *State v. Boeglin*, the supreme court indicated that a defendant is bound by his strategic choice if he or she declines an instruction which normally would be given. *State v. Omar-Muhammed* has the effect of expanding the requirement that a lesser included offense instruction be given, if the defendant requests it, in a first degree murder case.

E. Grand Jury Improprieties

In two cases the court of appeals refused to reverse or quash an indictment for alleged grand jury improprieties. In *State v. Apodaca*, the prosecutor, while

237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 654, 735 P.2d at 1160.
242. 105 N.M. 247, 731 P.2d 943 (1987).
243. *Id.* at 249, 731 P.2d at 945.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 251, 731 P.2d at 947. *See* Spaziano v. Florida, 468 U.S. 447 (1984).
248. 105 N.M. 788, 737 P.2d 1165 (1987).
249. *Id.* at 789, 737 P.2d at 1166.
250. *Id.* at 792, 737 P.2d at 1169.

conducting a grand jury, excused a regular grand juror and substituted an alternate.[251] The defendant argued that the alternate was not eligible to serve because the prosecutor, not the district judge, made the substitution, in violation of state statute.[252] The trial court rejected defendant's argument and the court of appeals affirmed.[253] The court distinguished between mandatory and directory statutory provisions and held that the statute governing grand jury selection is directory.[254] In addition, the court noted that there had been no actual prejudice to the defendant.[255]

In *State v. Laskay,*[256] the court of appeals affirmed the trial court's denial of defendant's motion to quash an indictment. The defendant alleged that because the grand jury foreman previously had worked as an assistant district attorney he was ineligible to serve as a grand juror.[257] The court of appeals noted that qualifications for grand jurors are fixed by statute.[258] The statute does not provide for challenges based on individual juror bias or for any cause other than lack of legal qualifications.[259]

One reason for the court of appeals' affirmance of the grand jury's decision may be an absence of actual prejudice to the defendant. In *Apodoca,* the court noted that the defendant had not shown that he had suffered actual prejudice; the court felt the prosecutor was attempting to be fair to the defendant.[260] In *Laskay,* the court gave a cautionary note: "there could be situations where grand jurors would be so prejudiced against a person that the jurors would be ineligible to serve. . . ."[261]

F. Basis for Mistrial

An important question arises in a jury trial when there is a motion for a mistrial following improper testimony. The court may resolve this issue by deciding

---

251. 105 N.M. at 652, 735 P.2d at 1158.

252. *Id.* at 652-53, 735 P.2d at 1158-59. N.M. STAT. Ann. §31-6-1 (1978) provides, in pertinent part: "The district judge shall summon and qualify as a panel for grand jury service such number of jurors as he deems necessary. . . . The district judge may discharge or excuse members of a grand jury and substitute alternate grand jurors as necessary." *Id.* Section 31-6-2 provides, in pertinent part: "The foreman, for good cause, may request the court to excuse or discharge individual grand jurors and to replace them with alternate grand jurors as necessary. . . ."

253. 105 N.M. at 653, 735 P.2d at 1159.

254. *Id.*

255. *Id.* "Statutory provisions which relate to the number of and qualifications of jurors, or which are designed to secure impartiality or freedom from unfair influences, are ordinarily deemed to be mandatory, while those which prescribe details as to the manner of selection or drawing are usually regarded as directory." *See* State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct. App. 1970) *cert. denied* 401 U.S. 941 (1971).

256. 103 N.M. 799, 715 P.2d 72 (Ct. App. 1986).

257. *Id.*

258. *Id.*

259. *Id.* at 800, 715 P.2d at 73. By statute, grounds for challenges to the validity of the grand jury are limited to: (1) that the grand jury was not legally constituted; (2) that an individual grand juror was not legally qualified to serve as a juror; and (3) that an individual grand juror was a witness against the person indicted. N.M. STAT. ANN. §§31-6-3.

260. 105 N.M. at 653, 735 P.2d at 1159.

261. 103 N.M. at 800, 715 P.2d at 73 (quoting State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979)).

whether the testimony was solicited. For example, in *State v. Nichols*,[262] on direct examination, a key witness for the State made the comment, unsolicited by the prosecutor, that defendant was acquainted with "inmates."[263] The trial court denied defendant's motion for mistrial and offered to give the jury a cautionary instruction, which defendant declined.[264] The supreme court upheld the trial court's decision.[265]

The supreme court reached a different result in *State v. Saavedra*[266] where the prosecutor asked the same question at trial and before the grand jury.[267] The witness gave the same answer each time.[268] On both occasions the prosecutor asked the state's key witness how long he had known the defendant and both times he answered, "since he got out of the penitentiary."[269] As in *Nichols*, this was an improper reference to a defendant's prior felony conviction.[270] Noting that the answer appeared to be solicited and presuming prosecutorial misconduct, the court remanded for a new trial.[271]

In *State v. Hernandez*,[272] the trial court directed a verdict on a conspiracy count but permitted the remaining counts to stand and go before the jury.[273] The defendant argued that a mistrial should have been granted because the prejudicial testimony concerning the conspiracy was now before the jury.[274] Defendant's argument was evaluated by the court of appeals. The court noted that if defendant's reasoning were adopted, a mistrial would have to be granted whenever a trial court decided that one or more charges should not go to the jury.[275] Because this would be very impractical, defendant's conviction was affirmed.[276]

VII. SENTENCING

A. Legality of a Sentence

In two cases the court of appeals served notice that a person's sentence is affected by whether it falls within the provisions of the Criminal Code, the Motor Vehicle Code, or the Worthless Checks Act. In *State v. Greyeyes*,[277] defendant had been sentenced as a repeat driving while intoxicated offender under the Motor Vehicle Code.[278] Under the Motor Vehicle Code, the trial court had the

262. 104 N.M. 74, 717 P.2d 50 (1986).
263. *Id.* at 75, 717 P.2d at 51.
264. *Id.*
265. *Id.*
266. 103 N.M. 282, 705 P.2d 1133 (1985).
267. *Id.* at 284, 705 P.2d at 1135.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 284-85, 705 P.2d at 1135-36.
272. 104 N.M. 97, 717 P.2d 73 (Ct. App. 1986).
273. *Id.* at 99, 717 P.2d at 75.
274. *Id.*
275. *Id.*
276. *Id.* at 101, 717 P.2d at 77.
277. 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987).
278. *Id.* at 552-53, 734 P.2d at 792-93.

discretion to give repeat offenders sentences of from ninety days to one year.[279] The trial court sentenced the defendant to one year.[280]

The court of appeals reversed and cited section 31-18-13 of the Criminal Code[281] which provided that whenever a defendant is convicted of a crime not contained in the Criminal Code, the trial court must set as a definite term of imprisonment the minimum term prescribed by the statute.[282] In 1978, the legislature enacted the Criminal Sentencing Act with the intent to replace indeterminate sentencing with determinate sentencing in both Criminal Code cases and cases not within the Criminal Code.[283] This is accomplished by requiring imposition of the minimum sentence for all cases. Accordingly, the trial court was only authorized to give a sentence of ninety days.

In *State v. Muzio*,[284] the defendant was convicted of issuing worthless checks. Under the Worthless Checks Act this offense had a prescribed penalty of one-to-three years in the penitentiary.[285] Although issuing worthless checks is a felony, the trial court erred in treating the offense as a fourth degree felony, which carries a presumptive sentence of eighteen months.[286] The sentence, based upon a statute not within the Criminal Code, should have been for one year only, which is the minimum term prescribed by the statute.[287]

B. Good Time Credit Applied to Pretrial Credit

In *State v. Aqui*,[288] the court addressed the issue of whether a defendant should be given good time credit for time spent in a county jail. New Mexico's statutory scheme draws a distinction between the treatment of prisoners detained prior to sentencing and those confined after sentencing.[289] Good time credit is authorized only for time served after sentencing.[290]

After being arrested, defendants were unable to make bail and had to spend the time between arrest and sentencing in jail.[291] Before their sentencing hearings, defendants filed motions for credit for good time spent in jail.[292] They argued

279. *Id.* Defendant was convicted of violating N.M. STAT. ANN. §66-8-102 (Cum. Supp. 1986) of the Motor Vehicle Code which provided that a conviction for a second or subsequent DWI is punishable by imprisonment for not less than ninety days nor more than one year. *See* N.M. STAT. ANN. §66-8-102(E).

280. 105 N.M. at 550-51, 734 P.2d at 790-91.

281. *Id.* at 553, 734 P.2d at 793. N.M. STAT. ANN. §31-18-13 (Repl. Pamp. 1981).

282. *Id.* N.M. STAT. ANN. §31-18-13(B) (Repl. Pamp. 1981) provides in pertinent part: "Whenever a defendant is convicted of a crime under . . . a statute not contained in the Criminal Code, which specifies the penalty to be imposed on conviction, the court must set as a definite term of imprisonment the minimum term prescribed by such statute. . . ."

283. 105 N.M. at 553, 734 P.2d at 793. N.M. STAT. ANN. §31-18-13 (Repl. Pamp. 1983) provides the method for establishing the applicable determinate sentence for offenses not contained in the Criminal Code.

284. 105 N.M. 352, 732 P.2d 879 (Ct. App. 1987).

285. *Id.* at 355, 732 P.2d at 882; N.M. STAT. ANN. §30-36-5(B).

286. 105 N.M. at 356, 732 P.2d at 883; N.M. STAT. ANN. §31-18-15(A)(4) provides that the basic sentence which may be imposed for a fourth degree felony is eighteen months.

287. 105 N.M. at 356, 732 P.2d at 883.

288. 104 N.M. 345, 721 P.2d 771 (1986).

289. *Id.* at 349, 721 P.2d at 775.

290. *Id.*

291. *Id.*

292. *Id.* at 347, 721 P.2d at 773.

that a person on bail prior to sentencing would be able to earn good time credit for the entire period of his or her incarceration.[293] Thus, such a person would serve a lesser sentence than a person who could not make bail who would be ineligible for good time credit until sentencing.[294]

The trial court denied defendants' motions, but the court of appeals reversed, holding that due process required the granting of good time credit for presentence detainees where it had been earned.[295] The supreme court, however, reversed the court of appeals and affirmed the trial court.[296] It held that New Mexico's statutory scheme did not offend equal protection nor due process of law.[297]

C. Restitution as a Condition of Sentencing

In *State v. Madril*,[298] the court of appeals held that a direct relationship between the criminal activities of a defendant and the damages suffered by the victim are a prerequisite to ordering restitution.[299] The defendant pled nolo contendere to possession of stolen property.[300] The property in defendant's possession was returned to the victim.[301] As a condition of probation, the trial court ordered the defendant to pay restitution for unrecovered property taken in the burglary.[302] The defendant had not been charged with, nor did she admit to, any elements of the burglary, however.[303] The court of appeals, finding no relationship between the defendant and the burglary, held that restitution was not authorized in these circumstances.[304]

The court of appeals again found restitution to be unauthorized in *State v. Dean*.[305] The defendant was convicted of trafficking in cocaine and was sentenced to incarceration followed by parole.[306] One condition of parole was that defendant make restitution to the State Police for monies used by an undercover State Police officer to purchase cocaine from the defendant.[307] The purpose of the statute authorizing restitution as a condition of parole is to make recovery possible to the victim.[308] The court held that the state was not a victim within the definition of the statute and, therefore, restitution was not authorized.[309]

---

293. *Id.* at 349, 721 P.2d at 775.
294. *Id.*
295. *Id.* at 346, 721 P.2d at 772.
296. *Id.*
297. *Id.* at 350-51, 721 P.2d at 776-77.
298. 105 N.M. 396, 733 P.2d 365 (Ct. App. 1987).
299. *Id.* at 397, 733 P.2d at 366.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at 398, 733 P.2d at 367.
305. 105 N.M. 5, 727 P.2d 944 (Ct. App. 1986).
306. *Id.* at 8, 727 P.2d at 947.
307. *Id.*
308. *Id.* at 9, 727 P.2d at 948; N.M. STAT. ANN. §31-17-1 (Repl. Pamp. 1987).
309. *Id.* N.M. STAT. ANN. §31-17-1(A)(1) defines a victim as "any person who has suffered actual damages as a result of the defendant's criminal activities." Actual damages are "damages which a victim could recover against the defendant in a civil action arising out of the same facts or events. . . ." N.M. STAT. ANN. §31-17-1(A)(2). The court concluded that, because the state is not a "victim", compensating the state does not further the purpose of victim restitution.

In *State v. Muzio*,[310] the court of appeals reviewed what effect a defendant's filing for, or discharge in, bankruptcy should have on an order of restitution. The court held that such a filing or discharge does not void a restitution order imposed as a condition of probation under a state criminal judgment.[311]

The court of appeals discussed a probationer's ability or inability to pay a fine in *State v. Parsons*.[312] The defendant failed to pay a fine as required by probation.[313] The trial court automatically revoked probation[314] once the violation was established.[315] The defendant had testified he was financially unable to make additional payments.[316] The court of appeals held that the trial court could revoke probation and sentence the defendant to imprisonment if he willfully refused to pay.[317] If the defendant could not pay despite bona fide efforts, the court must consider alternate methods of punishment.[318] Furthermore, the trial court must indicate in the record, or adopt findings of fact, which state whether defendant had the ability to pay and whether defendant's failure to pay was willful.[319] The court of appeals remanded the case to the trial court for entry of additional findings of fact and conclusions of law.[320]

D. Sentencing an Habitual Offender

The issue in *State v. Marquez*[321] and *State v. Davis*[322] was when can a conviction be used for habitual offender purposes. In *State v. Marquez*, the court held that a conviction resulting from a plea of nolo contendere may be used to enhance a defendant's sentence as an habitual offender.[323] The defendant argued that Evidence Rule 410 prohibits admission of a plea of nolo contendere in any civil or criminal proceeding against the person who made the plea.[324] The court noted that the fact that defendant pled nolo contendere was not being used against him; it was, rather, the fact that there was a conviction following that plea that was being used.[325]

In a similar challenge, in *State v. Davis*, the defendant was convicted of a felony and given a deferred sentence.[326] He subsequently was given additional years as an habitual offender.[327] The supreme court held that it was permissible

310. 105 N.M. at 355, 732 P.2d at 879.
311. *Id.*
312. 104 N.M. 123, 717 P.2d 99 (Ct. App. 1986).
313. *Id.* at 124-25, 717 P.2d at 100-01.
314. *Id.* at 125, 717 P.2d at 101. The fine was for $500. In addition, there were probation costs of $15.00 a month.
315. *Id.*
316. *Id.*
317. *Id.* at 126, 717 P.2d at 307.
318. *Id.*
319. *Id.* at 126-27, 717 P.2d at 102-03.
320. *Id.* at 127, 717 P.2d at 103.
321. 105 N.M. 269, 731 P.2d 965 (Ct. App. 1987).
322. 104 N.M. 229, 719 P.2d 807 (1986).
323. 105 N.M. at 272, 731 P.2d at 968.
324. *Id.* at 270, 731 P.2d at 966.
325. *Id.*
326. 104 N.M. at 229, 719 P.2d at 807.
327. *Id.*

to enhance a deferred sentence in a subsequent habitual offender proceeding.[328] The court noted that the Habitual Offender Act [329] provided for enhancement of the basic sentence for "any person *convicted* . . ." and that conviction, not the sentence imposed, is the polestar for analysis.[330]

E. The Habitual Offender and Consecutive Sentencing

The court of appeals considered the issue of consecutive enhancements for habitual offenders convicted of multiple offenses in *State v. Lucero*.[331] The defendant had been convicted of three fourth degree felonies for which his sentence totaled four and one-half years.[332] All three convictions were enhanced by eight years under the Habitual Offender Act, to run consecutively for an additional twenty-four years.[333] The court of appeals affirmed the sentence, which carried a total of twenty-eight and one-half years.[334] In doing so, the court observed that the length of a sentence is a legislative perogative which the court will not disturb without a compelling reason.[335]

F. The Parolee and Consecutive Sentencing

The New Mexico courts took a different approach to consecutive sentences in the area of parole. In *Brock v. Sullivan*,[336] the defendant was convicted of four fourth degree felonies and was sentenced to incarceration, where the sentences were to be served consecutively.[337] The Parole Board held that defendant must serve one year of parole for each offense; thus, the defendant was subject to four years of parole.[338]

The supreme court reversed the Parole Board.[339] The court held that in the case of consecutive sentencing, the parole of each offense commences immediately after the period of imprisonment for that offense.[340] The parole time runs concurrently with the running of any subsequent basic sentence then being served.[341]

G. Effective Date of Sentencing for Habitual Offender Purposes

In *State v. Castillo*,[342] the defendant pled guilty to a first offense.[343] He then committed a second offense before the court filed the Judgment and Sentence in

328. *Id.* at 230, 719 P.2d at 808.
329. N.M. STAT. ANN. §31-18-17 (Repl. Pamp. 1987).
330. *Id.*
331. 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986).
332. *Id.* at 594, 725 P.2d at 273.
333. *Id.*
334. *Id.*
335. *Id.*
336. 105 N.M. 412, 733 P.2d 860 (1987).
337. *Id.* at 413, 733 P.2d at 861.
338. *Id.* at 413-14, 733 P.2d at 861-62.
339. *Id.* at 415, 733 P.2d at 863.
340. *Id.* at 414-15, 733 P.2d at 862-63.
341. *Id.*
342. 105 N.M. 623, 735 P.2d 540 (Ct. App. 1987).
343. *Id.* at 624, 735 P.2d at 541.

the first case.[344] The defendant was convicted of the second offense.[345] The court subsequently took both offenses into account and tried and sentenced the defendant as an habitual offender.[346]

The defendant argued that the trial court erred in considering the first offense for habitual offender purposes because the guilty plea for that offense had not been reduced to writing when the subsequent offense occurred.[347] The court of appeals, however, could see no reason why a person who is given the opportunity to remain free pending sentencing, but who commits another crime prior to sentencing, should be protected from a law designed to deter the subsequent crime.[348] The appellate court, affirming the trial court, also noted that a plea of guilty constituted a legal conviction within the meaning of the habitual offender statute.[349]

H. Sentencing for Contempt of Court

In *State v. Pothier,*[350] the supreme court took a direct role in sentencing for contempt of court. There is no constitutional or statutory limit on a sentence of criminal contempt of court in New Mexico.[351] The only limit on such a sentence lies in the district court's discretion.[352] In *Pothier,* two co-defendants were given a life sentence for contempt following a jury trial.[353] The supreme court noted, after reviewing decisions in other jurisdictions, that no state has a statutory imprisonment for contempt of court of longer than one year.[354] Thus, the supreme court remanded for new sentencing.[355] Similarly, in *Case v. State,*[356] the supreme court found that a ten year sentence for one count of criminal contempt was excessive and was an abuse of discretion by the trial court.[357]

The court of appeals reversed another conviction for contempt which involved an excessive fine.[358] The trial judge found counsel in direct criminal contempt for counsel's behavior and for his refusal to answer questions the court put to him.[359] Because counsel's refusal to answer in the presence of the court constituted direct contempt, the court was able to impose a penalty in a summary proceeding.[360] The court imposed a fine of $10,000.[361] The court of appeals found

344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. 104 N.M. 363, 721 P.2d 1294 (1986).
351. *Id.* at 369, 721 P.2d at 1300.
352. *Id.*
353. *Id.* at 364, 721 P.2d at 1295. Defendants were convicted pursuant to N.M. STAT. ANN. §34-1-2 (Repl. Pamp. 1981), which authorizes the court "to punish contempts by reprimand, arrest, fine or imprisonment. . . ."
354. 104 N.M. at 370, 721 P.2d at 1301.
355. *Id.*
356. 103 N.M. 501, 709 P.2d 670 (1985).
357. *Id.* at 503, 709 P.2d at 672.
358. *In re* Summary Contempt Proceedings Against Michael Tom Cherryhomes, 103 N.M. 771, 714 P.2d 188 (Ct. App. 1985).
359. *Id.* at 774, 714 P.2d at 191.
360. *Id.*
361. *Id.*

that a fine in excess of $1,000 gave the defendant the right to a jury trial.[362] The court remanded the case, *In re Summary Contempt Proceedings against Michael Tom Cherryhomes*, for a trial by jury on the contempt issue.[363]

362. *Id. See* Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973), *rev'd in part on other grounds*, 103 N.M. 430, 708 P.2d 1031 (1985).

363. 103 N.M. at 775, 714 P.2d at 192.