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# Criminal Law

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# CRIMINAL LAW

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## I. INTRODUCTION

Few cases decided by New Mexico appellate courts during the Survey year are destined to become landmarks in New Mexico legal history. Most of the issues presented to the courts during this period dealt with the finer points of statutory construction, the wording of jury instructions, and the determination of which offenses were properly presented to the jury. If one can discern an overall pattern from these appellate decisions, it would be an expansion of the ranges of sentencing sanctions and criminal charges. The courts also continued to grapple with the issues resulting from the unfortunate morass created by past encounters with the "provocation" and "heat of passion" elements of voluntary manslaughter.[1]

## II. LESSER INCLUDED OFFENSES

The courts faced several cases this year relating to the propriety of the submission or refusal to submit lesser included offenses to the jury. Lesser included offenses often call into play both fairly complex legal analysis and careful evaluation of the evidence.[2] The case law in New Mexico allows an offense that has not been charged to be submitted to the jury if (1) there is evidence in the record to support a conviction of the charge and (2) the lesser offense is "necessarily included" in the greater offense that is charged.[3] An offense is considered to be necessarily included when the greater offense charged in the indictment cannot be committed without also commiting the lesser offense.[4]

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1. Although the entire history of the problem is beyond the scope of this Survey, an excellent analysis may be found in Professor Romero's recent article. Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M.L. Rev. 747 (1982).

2. *See* 15 A.L.R. 4th 118 (1982).

3. State v. Patterson, 90 N.M. 735, 568 P.2d 261 (Ct. App. 1977).

4. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977). The court held that simple battery was a necessarily included offense within the offense of battery on a peace officer, because both offenses involve persons, and a peace officer cannot be battered without his person being battered.

A good overview of how the courts treat lesser included offense issues is found in the court of appeals' opinion in *State v. Tomlinson*.[5] The defendant was convicted on three counts of kidnapping and one count of armed robbery. He appealed to the trial court's refusal to submit to the jury the lesser included offense of false imprisonment as an alternative to kidnapping.

The court of appeals reversed the trial court and reaffirmed the holding of *State v. Armijo*[6] that a kidnapping defendant is entitled to a false imprisonment instruction when there is evidence indicating his lack of intent to hold the victim to service.[7] In *Tomlinson*, the court found this evidence in the defendant's testimony that the co-defendant was the primary actor and that Tomlinson did not share the co-defendant's intent to hold the victims to service. Additionally, the court of appeals reasoned that the trial court erred in refusing to submit the instruction to the jury because the crime of false imprisonment was necessarily included in kidnapping, the crime charged in the indictment, and because there was evidence to support a finding of false imprisonment.[8]

A slightly more difficult analysis was required in *State v. DeMary*.[9] The defendant was indicted for, *inter alia*, aggravated battery on his wife as a result of an incident in which the prosecution contended the defendant attacked his wife with a butcher knife. Defendant was acquitted of the aggravated battery charge but was convicted of aggravated assault, an offense not charged in the original indictment. Defendant appealed the trial court's submission of that charge to the jury, arguing that it was not a proper lesser included offense.

The court of appeals agreed with the defendant: for an offense to be included within another offense, the lesser offense must be necessarily included within the offense charged.[10] The court relied upon *State v. Kraul*[11] for this proposition. *Kraul* held that "necessarily included" means the greater offense cannot be committed without also commiting the lesser offense. Based upon this rationale, the court held that assault is not

5. 98 N.M. 337, 648 P.2d 795 (Ct. App.), *rev'd on other grounds*, 98 N.M. 213, 647 P.2d 415 (1982).

6. 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977). In *Armijo*, the state argued that false imprisonment is not necessarily included in the charge of kidnapping because, although false imprisonment requires the victim to be held against his will, kidnapping by holding to service does not require that the victim be held against his will. The court of appeals rejected the state's strained reading of the statute.

7. Kidnapping still may be regarded as an aggravated form of false imprisonment. The defendant commits kidnapping when, in addition to the act of restraint, he intends to hold the victim in a condition of involuntary servitude. C. Torcia, Wharton's Criminal Law, § 210 (14th ed. 1979).

8. The court affirmed the armed robbery conviction.

9. 99 N.M. 177, 655 P.2d 1021 (1982).

10. *Id.* at 179, 655 P.2d at 1023.

11. 90 N.M. 314, 563 P.2d 108 (Ct. App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977).

necessarily included within battery because the greater offense of battery[12] could be committed without necessarily committing the lesser offense of assault.[13] In essence, what the court stated was that battery could be committed by striking a victim who was unaware that the attack was about to occur. Further, the court found that the assault instruction submitted to the jury, requiring the jury to find the victim believed she was about to be seriously injured or killed, included an element that was not *necessarily* included within battery. If the New Mexico definition of lesser included offenses were always strictly applied, the court of appeals' decision technically was correct.[14]

The New Mexico Supreme Court, however, reversed the court of appeals in a less technical and perhaps more result-oriented application of the lesser included offense doctrine. The supreme court held that the specific elements of each crime must be construed in light of the evidence in order to determine whether the lesser crime is included in the greater.[15] The supreme court reasoned that it was proper for the trial court to instruct the jury on aggravated assault because there was evidence in the record to support a finding that the victim feared the defendant's actions in what was actually a face to face encounter. The supreme court went beyond a strict analysis of the elements of the offenses and engaged in an examination of the particular circumstances of the case. The supreme court determined that under the particular circumstances in *DeMary,* aggravated assault was a necessarily included offense within aggravated battery and, reversing the court of appeals, reinstated the aggravated assault conviction.

The supreme court's resolution can be both praised and condemned. On the positive side, the decision achieves what could be considered a just result under the facts. It is clear from the record that the state could have charged the defendant with aggravated assault and the evidence in the record would have justified the jury's finding on that charge. The negative aspect of the court's opinion, however, is that in achieving rough justice in this case, the precedent created obscures the previously existing clear guidelines for application of the lesser included offense doctrine.

12. "The unlawful touching or application of force . . . with intent to injure." N.M. Stat. Ann. § 30-3-5 (1978).

13. The instruction in this case was based on N.M. Stat. Ann. § 30-3-1(B) (1978), proscribing conduct which causes the victim to fear a battery.

14. For example, in State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969), the court held that battery was an included offense within the offense of aggravated battery. Aggravated battery must be committed with an intent to injure, and battery must be done in a rude, insolent, or angry manner to constitute an offense. Although one can commit the greater offense without necessarily committing it in a rude, insolent, and angry manner, the court of appeals rejected this technical reading of the statute. *See* State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977).

15. 99 N.M. at 179, 655 P.2d at 1023 (1982).

Before *DeMary*, case law in New Mexico precluded looking to the evidence in determining whether an offense is necessarily included in a charged offense.[16] After *DeMary*, it is unclear how far beyond the statutory analysis the trial court must go in determining whether a lesser included offense should be submitted to the jury. The courts probably will be safe in relying on *DeMary* to the extent of treating aggravated assault as a necessarily included offense of aggravated battery, but to attempt to apply its unclear reasoning beyond that situation risks the creation of reversible error.

In *State v. Gonzales*,[17] the court of appeals also addressed the factual circumstances that might justify the submission of a simple battery instruction as a lesser included offense of battery upon a peace officer. Gonzales was convicted of battery on a police officer and appealed the trial court's refusal to instruct the jury on simple battery as a lesser included offense. An examination of the statutes involved makes it clear that one cannot commit the offense of battery on a peace officer without also committing simple battery.[18] Therefore, the court did not have to face the conceptual statutory construction problems involved in *DeMary* and *Tomlinson*. Instead, *Gonzales* required the court to address the other problem recurrent in lesser included offense situations, the factual determination of whether there was sufficient evidence in the record to justify submitting the lesser offense to the jury.[19]

The factual inquiry in *Gonzales* addressed the requirement that the officer be performing his duties in order to make the offense a battery

16. *See* State v. Alderete, 91 N.M. 373, 574 P.2d 592 (Ct. App.), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978) (indicating that attempted trafficking of heroin is not necessarily included in the offense of trafficking); State v. Patterson, 90 N.M. 735, 568 P.2d 261 (Ct. App. 1977) (holding that aggravated assault is not included in assault with intent to kill); and State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973) (holding that driving under the influence of intoxicants is not included in vehicular homicide).

17. 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

18. "Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner." N.M. Stat. Ann. § 30-3-4 (1978). "Battery upon a peace officer is the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner." N.M. Stat. Ann. § 30-22-24 (1978).

19. From a purely theoretical point of view, it could be argued that a crime determined to be a necessarily included offense under an analysis of the elements of the statutes always could be submitted without resort to the factual analysis exemplified by *Gonzales*. The state always has the burden of proving every element of the offense beyond a reasonable doubt, and because a verdict cannot be directed against the defendant on any single one of those elements, a jury is free to find against the prosecution on those elements that elevate an offense from the lesser included offense to the greater offense charged, notwithstanding the judge's view of the weight of the evidence or the absence of evidence to challenge the state's position on the differentiating elements. The courts, however, have not taken that approach. Instead, they require the defense to point to evidence that the judge believes would be sufficient to create a reasonable doubt in the minds of reasonable jurors on those differentiating elements which elevate the lesser offense to the greater. *Gonzales* is an example of that approach.

upon a peace officer.[20] The record in *Gonzales* contained evidence that an officer investigating a bar fight punched the defendant in the face. Although the officer claimed he struck the defendant first because he felt the defendant was about to strike him, the defendant's testimony was to the contrary. The court found that the defendant's testimony gave rise to an issue of the use of excessive force by the police officer and noted that excessive force is not part of the performance of the duties of the police officer.[21] The court concluded that the defendant was entitled to his requested instruction on simple battery as a lesser included offense because there was a factual issue as to whether the officer was performing his duties.[22]

## III. VOLUNTARY MANSLAUGHTER

The courts grappled this year, perhaps inevitably, with the legacy created by *State v. Trujillo*[23] and *Smith v. State*.[24] Those cases and their progeny[25] hold that it is error for a court to submit to the jury an instruction on voluntary manslaughter when the facts establish either first or second degree murder, but are not sufficient to support a finding beyond a reasonable doubt of the voluntary manslaughter elements of provocation, heat of passion, or sudden quarrel. The net result of this doctrine is that the elements of voluntary manslaughter intended to mitigate the offense

20. The statute requires that the officer be in the "lawful discharge of his duties," but the approved instruction on peace officer battery, N.M. U.J.I. Crim. 22.10, is the result of some statutory rewriting by the Jury Instruction Committee. The instruction does not require that the officer be in the "lawful discharge of his duties," but, on the theory that the issue of lawfulness is generally a question of law to be decided by the judge, requires only that the peace officer be performing his duties. State v. Rhea, 93 N.M. 478, 601 P.2d 448 (Ct. App. 1979), had previously approved this statutory modification in the jury instructions in *dictum*.

21. 97 N.M. at 609, 642 P.2d at 212 (Ct. App. 1982). The court's opinion indicates that when an officer uses excessive force, he or she is acting outside the scope of his or her duties and therefore is acting as any other citizen. The logical extension of this reasoning would extend the "defense of another" defense to a defendant who intervenes on behalf of a third person who is the victim of excessive police force. At the present, the court recognizes that a defendant has a limited right only if acting in self-defense against a police officer using excessive force. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977).

22. The court's opinion did not involve the issue of whether there is a right to use necessary force in resisting an unlawful arrest. Although New Mexico traditionally has held that a citizen does have such a right, *see, e.g.*, State v. Kuykendall, 37 N.M. 135, 19 P.2d 744 (1933), recent cases have cast some doubt on both the existence and scope of that right. *See* State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978) and State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), *cert. denied*, 90 N.M. 637, 567 P.2d 486 (1977). Both *Gonzales* and its predecessor, State v. Melendrez, 91 N.M. 259, 572 P.2d 1267 (Ct. App. 1977), clearly stand for the proposition, however, that one has a right to defend oneself against the use of excessive force in making an arrest.

23. 27 N.M. 594, 203 P. 846 (1921).

24. 89 N.M. 770, 558 P.2d 39 (1976).

25. *See, e.g*, State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981); State v. Aubrey, 91 N.M. 1, 569 P.2d 411 (1977); State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977); State v. Reed, 39 N.M. 44, 39 P.2d 1005 (1934); State v. Hunt, 30 N.M. 273, 231 P. 703 (1924).

from the premeditated or "cold blooded" homicide offenses have become affirmative requirements that the prosecution must prove in order to sustain a voluntary manslaughter conviction.

The most severe problems created by this doctrine arise when the defendant is being prosecuted for murder, and a lesser included offense instruction on voluntary manslaughter is either submitted or refused. If it is submitted and the defendant is found guilty of manslaughter the defendant may be set free by the appellate courts upon a determination that the record shows an intentional killing but does not contain sufficient evidence of provocation to sustain a finding beyond a reasonable doubt. On the other hand, if the defendant's request to have voluntary manslaughter instructions submitted to the jury is denied and he is convicted of a greater offense, the appellate court may reverse the conviction if it determines that there was evidence tending to support a finding of provocation.[26]

Not only does this result create a terrible dilemma for trial judges in their efforts to determine whether to submit a voluntary manslaughter instruction to the jury, but it leads to unfortunate consequences in the administration of criminal justice. One consequence is that most trial courts probably will refuse defendant's request to have a voluntary manslaughter instruction submitted to the jury. This refusal will save the appellate courts from having to choose to turn a murderer free in the event that a voluntary manslaughter instruction was submitted improperly. As a further consequence, however, the defendant and the criminal justice system may be burdened with an unnecessary appeal and retrial in the event that the appellate court later determines that the trial court should have submitted the instruction. Nonetheless, preventing a murderer from being released may be perceived by the trial court as the safest way to resolve the matter.

Another unfortunate consequence of treating the provocation element as an affirmative element of voluntary manslaughter, rather than a mitigating factor in homicide, is that it creates a gap in the coverage of the homicide statutory scheme. The gap arises in the situation where there is evidence sufficient to support a finding of either provocation or no provocation. This evidence may be enough to raise a reasonable doubt that defendant is guilty of murder, but it is not enough to sustain a conviction of voluntary manslaughter.

This year, the appellate courts were faced with appeals in which trial courts had both granted and denied the voluntary manslaughter instruction. In *State v. Martinez*,[27] the defendant relied on *State v. Smith* in his

26. *See, e.g.*, State v. Ulibarri, 67 N.M. 336, 355 P.2d 275 (1960).
27. 97 N.M. 540, 641 P.2d 1087 (1982).

claim that there was insufficient evidence of provocation to justify his conviction for voluntary manslaughter. Martinez was charged with murder in the shooting death of a state policeman. The court of appeals affirmed the conviction by finding sufficient evidence of provocation.

In reaching this result, the court was forced to distinguish the unfortunate precedent of *State v. Manus*.[28] *Manus* also involved a defendant who killed a police officer and was charged with murder. The defendant requested a voluntary manslaughter instruction on the grounds that the officer provoked the defendant's actions. The trial court denied the requested instructions, and the supreme court affirmed. The *Manus* court stated that as a matter of law, "[a]cts of a peace officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation."[29]

The *Martinez* court, faced with the combination of *Manus* and *Smith*, had to search the record to find evidence of unlawful conduct on the part of the officer sufficient to support a jury finding of provocation. The evidence relied upon by the court was testimony that there had been previous confrontations between defendant and the officer. The confrontations implicitly involved some unlawful conduct on the part of the officer. At the scene of the killing, the officer had dragged the defendant out of his truck and pushed him up against the truck after the defendant refused to get out voluntarily. The court, in a result-oriented opinion, affirmed the conviction stating there was sufficient evidence to support the conviction on voluntary manslaughter.

The supreme court addressed the issue of whether words could constitute provocation for voluntary manslaughter in *State v. Sells*.[30] Sells was convicted of second degree murder for the shooting of his wife. At trial, the jury was instructed on first and second degree murder and involuntary manslaughter, but the trial court denied the defendant's requested instruction on voluntary manslaughter. The court of appeals affirmed the conviction on the basis of the *Trujillo-Smith* line of authority, because it found insufficient evidence of provocation to justify submitting voluntary manslaughter to the jury. The court felt bound by the holding of the New Mexico Supreme Court in *State v. Farris*,[31] which presented a situation quite similar to that in *Sells*. In both cases, the defendants

28. 93 N.M. 95, 597 P.2d 280 (1979).

29. *Id.* at 100, 597 P.2d at 285. The *Manus* holding, requiring not only that the acts provoking the defendant be sufficient to provoke a reasonable person into acting emotionally but that they be "unlawful" acts in order to mitigate a murder offense to manslaughter, has been analyzed and soundly criticized in Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M.L. Rev. 747 (1982). The *Manus* decision is destined to lead to confusion and anomalous results in future decisions.

30. 98 N.M. 786, 653 P.2d 162 (Ct. App. 1982).

31. 95 N.M. 96, 619 P.2d 541 (1980).

shot their wives after their wives made statements concerning men with whom they were having affairs. *Farris* upheld the refusal of a trial judge to submit voluntary manslaughter to the jury on the court's belief that words can never be sufficient provocation.[32]

In *Sells,* however, the supreme court granted certiorari, reexamined its decision in *Farris,* and reversed the court of appeals. The court noted that a strict reading of *Farris* would never allow words to be the factual basis for manslaughter provocation. Although holding to the view that insulting words are never sufficient provocation,[33] the court adopted the long-repeated distinction that *informational* words, as distinguished from merely *insulting* words, may constitute adequate provocation.[34] The court noted that a sudden disclosure of an event that would provide adequate provocation may be the equivalent of the event presently occurring.[35] To the extent that *Farris* and other New Mexico cases indicated that informational words could not be sufficient provocation, the *Sells* opinion expressly overruled them.

The *Sells* court seemed to be moving away from mechanical and rigid formulae for determining what may or may not be sufficient provocation under the statute. If this is the direction in which the court is moving, it is a good move. Attempting to define in advance the specific fact situations that will or will not justify a jury in finding that the defendant was reasonably provoked robs the jury of its function as the fact finder and creates confusion and difficulty in future cases. Perhaps the same result will be reached by the court when the *Manus* decision is reconsidered in the future.

## IV. CRIMINAL INTENT

The consequences of labeling a crime a strict liability offense are exemplified in *State v. Lucero.*[36] The crime involved was child abuse. A number of cases, beginning with *State v. Lucero* (hereinafter *Lucero I*),[37] have held that the New Mexico child abuse statute[38] is a strict liability statute dispensing with the traditional element of criminal intent. *Lucero I* was based on the language of the statute that provided, "[a]buse of a child consists of a person *knowingly, intentionally or negligently,* and without justifiable cause, causing or permitting a child to be: (1) placed

32. *Id.* at 97, 619 P.2d at 542.

33. 98 N.M. at 787, 653 P.2d at 163 (1982).

34. W. LaFave & A. Scott, Criminal Law § 76 (1972).

35. Sells fatally shot his wife at about 5 a.m. Late the night before and up to the time of the shooting, they had been arguing about Mrs. Sells' boyfriend. Sells had learned that night for the first time of his wife's long-standing marital infidelity. 98 N.M. at 786-87, 653 P.2d at 162-63.

36. 98 N.M. 204, 647 P.2d 406 (1982).

37. 87 N.M. 242, 531 P.2d 1215 (Ct. App.), *cert. denied,* 87 N.M. 239, 531 P.2d 1212 (1975).

38. N.M. Stat. Ann. § 30-6-1 (Cum. Supp. 1983).

in a situation that may endanger the child's life or health; or (2) tortured, cruelly confined or cruelly punished. . . ."[39] *Lucero I* and subsequent cases have construed the statute to be a strict liability statute on the basis of the use of the word "negligently" in the statute.[40] For example, in *State v. Fuentes*,[41] the court of appeals upheld the trial court's refusal to give a mistake of fact instruction. The reasoning underlying the decision was that (a) mistake of fact is a defense when it negates the existence of the mental state essential to the crime charged, (b) defendant's mental state is not essential to the crime of child abuse, and (c) mistake of fact is not a defense to a charge of child abuse.[42]

This year, the court used similar reasoning to hold that duress is not a defense to the crime of child abuse. In *State v. Lucero* (hereinafter *Lucero II*),[43] the trial court ruled inadmissible the testimony of a psychologist stating that the defendant did not seek help for her abused child because she was afraid of her boyfriend, the person who committed the physical abuse. The court of appeals reversed the defendant's conviction because of the failure to allow the testimony relating to the duress defense, but the New Mexico Supreme Court reinstated the conviction. The reasoning of the supreme court was that (a) duress is "an act committed under compulsion, such as *apprehension* of serious and immediate bodily harm, is involuntary and, therefore, not criminal,"[44] (b) apprehension is a mental state, and (c) the child abuse statute imposes strict liability and punishment without regard to the mental state of the defendant.

The reasoning in the *Fuentes–Lucero II* line of cases is troubling. It appears that once the courts determine child abuse to be a strict liability crime, the language of the statute is no longer important, despite the fact that it was the language of the statute that originally justified this categorization. Both the statutory language and a jury instruction tracking it[45] submit to the jury the question of whether the defendant "knowingly, intentionally, or negligently" permitted a child to be endangered or abused. Two of these three terms clearly relate to intentional acts. If the jury is going to consider these elements of the offense as contained in a jury instruction, then it should also be permitted to consider the defenses of

39. *Id.* § 30-6-1(C) (1978) (emphasis added).

40. *See, e.g.*, State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975); State v. Fuentes, 91 N.M. 554, 577 P.2d 452 (Ct. App.), *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978); State v. Coe, 92 N.M. 320, 587 P.2d 973 (Ct. App.), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1978).

41. 91 N.M. 554, 577 P.2d 452 (Ct. App.), *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978).

42. *Fuentes* also indicated in *dictum* the court's view that refusal of a mistake of fact instruction might *never* be reversible error because the standard instructions on the requirement of criminal intent would seem to include the defense. *Id.* at 557, 577 P.2d at 455.

43. 98 N.M. 204, 647 P.2d 406 (1982).

44. *Id.* at 206, 647 P.2d at 408.

45. *See* State v. Robinson, 93 N.M. 340, 345, 600 P.2d 286, 291 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979); N.M. Stat. Ann. § 30-6-1 (1978).

duress and mistake of fact.[46] Moreover, it would seem that the statute does not eliminate completely an inquiry into the mental state of the defendant; it merely allows the jury to base a conviction on a finding of one of the three states of mind.

Strange results will continue from the problems created by *Lucero I,* in declaring the child abuse statute to be a strict liability offense, and by *Fuentes* and *Lucero II,* in removing the normal defenses that relate to the mental state of the defendant. One would assume, for example, that insanity would be determined to be unavailable as a defense in a case of child abuse based upon the same reasoning as provided in *Fuentes* and *Lucero II.*

Notwithstanding the New Mexico courts' interpretation of the child abuse statute, when the prosecution submits the case to the jury on knowingly and intentionally endangering or abusing a child, there is logically no reason why the defendant should not be entitled to present evidence and have the benefit of instructions on traditional defenses relating to those two states of mind.[47] In cases where the prosecution submits the negligence element to the jury, there is no reason the usual defenses to crimes involving criminal negligence should not be allowed.[48]

This term, the New Mexico Supreme Court faced once again the meaning of the term "depraved mind" in the first degree murder statute.[49] In *State v. Sena,*[50] the defendant was convicted of first degree murder based on a "depraved mind" theory. The defendant attempted to shoot and kill the doorman at a bar after an altercation. The defendant shot at the doorman several times, but instead killed an innocent bystander. The defendant's argument on appeal was that the evidence supported a verdict based on transferred intent to kill.[51] Defendant admitted that he specifically intended to kill the doorman. He claimed, however, that because the depraved mind theory "has been limited to reckless acts and disregard of human life in general as opposed to the deliberate intention to kill one

46. W. LaFave & A. Scott, Criminal Law § 28 (1972).

47. *Id.* at 201.

48. Although *Lucero I* held that simple, or tort, negligence was all that was required under the statute, there is nothing in the statute to indicate that the word "negligently" in a criminal statute means anything other than criminal negligence. N.M. Stat. Ann. § 30-6-1 (1978).

49. "Murder in the first degree is the killing of one human being by another without lawful justification or excuse . . . (3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life." N.M. Stat. Ann. § 30-2-1 (Cum. Supp. 1983).

50. 99 N.M. 272, 657 P.2d 128 (1983).

51. "Murder is the unlawful killing of one human being by another with malice aforethought, either express or implied . . . perpetrated . . . (5) from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being." N.M. Stat. Ann. § 30-2-1 (1978). The statute has now been amended to exclude a specific reference to the transferred intent theory, although it clearly will continue to be a basis for a first degree murder conviction. *Id.* (Cum. Supp. 1983).

particular person,"[52] his intent to kill the doorman removed him from the scope of the depraved mind statute.

The supreme court rejected the argument, and construed the depraved mind statutory language more broadly. The court held that "Sena's act, regardless of his specific intent to kill the doorman, was greatly dangerous to the lives of others and indicated a depraved mind without regard for human life."[53] The result is sensible and avoids a hypertechnical and unjust result.

## V. CONTROLLED SUBSTANCES

Prior to the enactment in 1972 of the Controlled Substances Act,[54] the criminal laws relating to controlled substances were found in several different parts of the statutes; one area was the Drug and Cosmetic Act.[55] The recent case of *State v. Reams*[56] addressed problems caused by overlapping coverage of these two acts. The defendants were charged with unlawful distribution of a controlled substance (quaalude) in violation of the Controlled Substances Act.[57] The state appealed the district court's dismissal of the charges; the court of appeals affirmed the dismissal and the supreme court reversed.

*Reams* presented a difficult issue because of the overlapping coverage of the two statutes. Both statutes purported to declare the possession or sale of quaalude to be a criminal offense. The Controlled Substances Act penalty provision[58] made the crime a third degree felony. The Drug and Cosmetic Act penalty, however, was a petty misdemeanor.[59] The case thus presented the recurring problem of determining which of two apparently applicable statutes controlled.[60] The law in New Mexico is that where two statutes treat the same subject matter, the more specific of the two statutes will be construed to prevail over the statute with the more general terms and broader scope.[61]

Although the foregoing principle is simple to state, it is often much

52. *See* State v. DeSantos, 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976).

53. 99 N.M. at 274, 657 P.2d at 130 (1982).

54. The Act has been codified at N.M. Stat. Ann. §§ 30-31-1 to 30-31-40 (Repl. Pamp. 1980).

55. Now codified as N.M. Stat. Ann. §§ 26-1-1 to 26-1-26 (1978).

56. 98 N.M. 372, 648 P.2d 1185 (Ct. App. 1981), *aff'd in part and rev'd in part*, 98 N.M. 215, 647 P.2d 417 (1982).

57. "Except as authorized by the Controlled Substances Act [30-31-1 to 30-31-40 NMSA 1978], it is unlawful for any person to intentionally distribute or possess with intent to distribute a controlled substance. . . ." N.M. Stat. Ann. § 30-31-22(A) (Repl. Pamp. 1980).

58. *Id.* § 30-31-22.

59. *Id.* § 26-1-26(B).

60. *See* State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966); State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936); State v. Alderete, 88 N.M. 150, 538 P.2d 422 (Ct. App. 1975).

61. State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936).

more difficult to apply. *Reams* exemplifies that difficulty. The majority of the court of appeals determined that because the Drug and Cosmetic Act was more specific in terms of its regulatory provisions applicable to methaqualone than the Controlled Substances Act, the former act applied.[62] On certiorari, the supreme court reversed and adopted by reference the dissenting opinion of Judge Wood. That opinion concluded that the Controlled Substances Act was both more comprehensive and more specific in dealing with the controlled substances falling within its coverage.[63] Moreover, Judge Wood specifically held that the Drug and Cosmetic Act applies only when the Controlled Substances Act does not apply.[64] It is clear, therefore, that a charge under the Controlled Substances Act cannot be dismissed on the ground that the Drug and Cosmetic Act covers the same offense.

## VI. CONSTITUTIONAL CHALLENGES

*State v. Norush*[65] addressed the meaning of the *ex post facto* prohibition under the New Mexico Constitution and case law. The defendants were convicted for escape from the penitentiary. At the time of the offenses, the supreme court in *Esquibel v. State*[66] had specifically held that the duress defense stated in New Mexico Uniform Jury Instruction—Criminal 41.20 was a defense to the charge of escape from the penitentiary.[67] By the time Norush was tried, however, the duress defense to a charge of escape from the penitentiary had been substantially limited by a modification of the uniform jury instruction.[68]

By its terms, the *ex post facto* clause of the New Mexico Constitution[69] applies only to state legislative enactment of *ex post facto* laws. The New Mexico courts, however, traditionally have held that the state constitutional prohibition on legislative enactments equally applies to judicial rulemaking.[70] The court of appeals in *Norush* concluded that the change

62. 98 N.M. at 376, 648 P.2d at 1189.

63. *Id.* at 378, 648 P.2d at 1191.

64. *Id.*

65. 97 N.M. 660, 642 P.2d 1119 (Ct. App.), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982).

66. 91 N.M. 498, 576 P.2d 1129 (1978).

67. "Evidence has been presented that the defendant was forced to . . . [describe acts of defendant] under threats. If the defendant feared great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty." Use Note 1 states: "For use when duress is a defense to any crime except homicide, [or] a crime requiring an intent to kill. . . ."

68. N.M. U.J.I. Crim. 41.20 and 41.22. The significant change is that the Use Note makes 41.20 inapplicable to escape from the penitentiary. N.M. U.J.I. Crim. 41.22 is a duress defense instruction specifically for escape from the penitentiary.

69. "No ex post facto law . . . shall be enacted by the legislature." N.M. Const. art. II, § 19.

70. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967); State v. DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct. App. 1977). For federal treatment of this issue, see Bouie v. City of Columbia, 378 U.S. 347 (1964) and Marks v. United States, 430 U.S. 188 (1977).

in the duress instruction deprived defendants of the duress defense available at the time of their escape and was prohibited as *ex post facto*.[71]

In reaching its result, the court of appeals addressed the state's argument that the court was powerless to hold the jury instruction mandated by the supreme court inapplicable. The order of the supreme court mandating the use of the new instruction provided that the change "shall apply to criminal cases filed in the district courts on or after July 1, 1980."[72] The court of appeals noted that the prosecution originally had filed the indictment in *Norush* in December of 1979, and then dismissed in August of 1980 because of irregularities in the grand jury proceedings. The exact same charge again was filed by information in October of 1980.

In a holding noteworthy for its potential application to future cases, the court of appeals held that the dismissal and refiling did not bring the case under the new rule that became effective after the original filing.[73] The court held that the state may not rely upon prosecutorial errors, whether by the grand jury or by the prosecutor assisting the grand jury, in attempting to take advantage of the change in the law. That reasoning would seem to apply with full force to cases involving the application of article IV, section 34 of the New Mexico Constitution, which provides "[n]o act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."[74] The courts have construed that provision to apply both to court rules[75] and to changes in the law (although not technically *ex post facto*) occurring after the case has been filed in a court.[76] Whether the courts will apply the *Norush* holding to future changes where a case is filed, dismissed because of some fault of the prosecution or grand jury, and then refiled after a change in procedure or evidence that may not rise to the level of an *ex post facto* law, is an open question.

In *State v. Sandoval*,[77] the defendant was convicted of prostitution and claimed on appeal that the prostitution statute[78] violated the equal rights amendment and equal protection clause of the New Mexico Constitution,[79] as well as the equal protection clause of the United States Constitution.[80]

71. The *Norush* court noted that it was immaterial whether the change be categorized as a procedural change or a change in substantive law, so long as the change operated to deny to the accused the defense available under the law in effect at the time of the commission of the offense. 97 N.M. at 662, 642 P.2d at 1121.

72. *Id.* at 664, 642 P.2d at 1123.

73. *Id.*

74. N.M. Const. art. IV, § 34.

75. State v. DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct. App. 1977).

76. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962); 1969 Op. Att'y Gen. No. 69-10.

77. 98 N.M. 417, 649 P.2d 485 (Ct. App. 1982).

78. N.M. Stat. Ann. § 30-9-2 (Cum. Supp. 1983).

79. "No person shall . . . be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18.

80. U.S. Const. amend. XIV, § 1.

The defendant argued that because the prostitution statute makes multiple offenses of the prostitute a misdemeanor, whereas the patron statute[81] makes multiple convictions a petty misdemeanor, the statutes discriminate against women. The court noted that both statutes were gender neutral on their face and conceivably could apply to both male and female prostitutes and patrons, allowing for the prosecution of either sex under either statute. The court also upheld the power of the Legislature to set different criminal penalties for different criminal activities.

If the *Sandoval* court meant that the defendant could not complain about different treatment of male and female patrons, there is no occasion to disagree with the statement. If, however, the court was addressing the defendant's argument that female prostitutes and male patrons are treated in a manner that violates equal protection or the equal rights amendment, the court's position is troublesome. The court's decision seems to imply that an independent ground for rejection of a selective enforcement argument is that the defendant is not charged under the statute which she claims is not enforced against the class of persons who benefit from the discriminatory selective enforcement scheme.[82]

## VII. MISCELLANEOUS STATUTORY CONSTRUCTIONS

In *State v. Martinez,*[83] the supreme court upheld a conviction of criminal sexual penetration in the second degree. The court decided the statutory requirement that the sexual penetration be perpetrated "in the commission of any other felony"[84] applies to the situation where a burglar commits a rape while on the premises. The defendant argued that because the crime of burglary technically is complete when there is an unauthorized entry with the requisite intent,[85] the burglary was completed once he entered the dwelling, and the rape which occurred after entry was not "in the commission" of the burglary. The court rejected the argument and held the statutory language should be applied in the same manner as identical language appearing in the felony murder statute.[86] The courts have interpreted the felony murder statute as meaning that if a homicide occurs within the *res gestae* of a felony, it is immaterial whether the homicide occurred before or after the actual commission of the felony,

81. N.M. Stat. Ann. § 30-9-3 (Cum. Supp. 1983).

82. The *Sandoval* court also held that the defendant had no standing to complain of unequal enforcement of the patronizing statute because she was not charged with or convicted of an offense under that statute. 98 N.M. at 419, 649 P.2d at 487.

83. 98 N.M. 27, 644 P.2d 541 (Ct. App. 1982).

84. N.M. Stat. Ann. § 30-9-11(B)(4) (1978).

85. State v. Madrid, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972); State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

86. 98 N.M. at 30, 644 P.2d at 544 (Ct. App. 1982).

so long as the two acts were part of one continuous event and closely connected in time, place, and causal connection.[87] The court's result, although not as capable of precise application as the technical position taken by the defendant, is a common sense application of the obvious legislative intent.

An analogous issue was presented in *State v. Luna*.[88] The defendant was convicted of aggravated burglary, which creates a more serious category of the crime of burglary when the defendant, "after entering, arms himself with a deadly weapon."[89] In *Luna*, the defendants burglarized a store and stole a number of unloaded rifles and pistols. They argued on appeal that they had not "armed" themselves simply by stealing unloaded weapons. The court held that it was immaterial whether the firearms were loaded or unloaded,[90] and took note of the fearful and hazardous situation created by the appearance of an apparently armed burglar.

Although it is not altogether clear from the opinion, the court appears to equate "arms" with "possesses"; the intention of the defendant to employ the firearm as a weapon may be immaterial.[91] The court observed that whether a defendant is in actual possession of a firearm within the contemplation of the statute or possesses the requisite criminal intent is still a matter for proof at the trial. This language leaves open the possibility of the defense that the firearm was not available for use as a weapon, even though technically it was in the possession of the defendant, similar to a firearm in a locked container. The opinion also may leave open the argument that the defendant did not intend to arm himself, but merely intended to steal the firearm as a part of the loot, although this latter interpretation seems highly unlikely in light of the earlier analysis.[92]

*State v. Willis*[93] raised the question of whether a viable fetus is a person under the New Mexico vehicular homicide statute.[94] The defendant was indicted and charged with vehicular homicide for the death of an unborn, viable fetus. The state appealed the district court's dismissal of the indictment, and the court of appeals upheld the dismissal, holding that a

87. *See, e.g.*, State v. Harrison, 90 N.M. 439, 564 P.2d 1321 (1977); State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971).

88. 99 N.M. 76, 653 P.2d 1222 (Ct. App. 1982).

89. N.M. Stat. Ann. § 30-16-4(B) (1978).

90. The court relied in part on N.M. Stat. Ann. § 30-1-12(B) (1978) which defines a "deadly weapon" to include "any firearm, whether loaded or unloaded."

91. 99 N.M. at 78, 653 P.2d at 1244 (1982).

92. Defendants moved to dismiss during the trial on the grounds that possession of unloaded firearms did not mean "armed" within the contemplation of the statute, and that the prosecution failed to prove their intention to use the weapons because the weapons were unloaded and part of the loot. They did not affirmatively argue a lack of intent to arm themselves. *Id.* at 77, 653 P.2d at 1223.

93. 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982).

94. N.M. Stat. Ann. § 66-8-101 (Cum. Supp. 1983).

fetus is not a person for purposes of the statute.[95] In arriving at this conclusion, the court relied on the recognized principle that any statutory ambiguity in a penal statute must be strictly construed against the state.[96]

The court observed that this was an issue of first impression in New Mexico and that all jurisdictions which had addressed the issue had held that the homicide statutes of their respective states did not apply to a viable fetus.[97] The court found this position to be in keeping with the common law position and the apparent legislative intent in New Mexico. From 1853 to 1963, the New Mexico homicide statute distinguished between killing a human being and killing a fetus. In 1963, the Legislature repealed the statute relating to the killing of an unborn infant child. The court correctly concluded that to include a fetus within the scope of the homicide statute would be both inconsistent with the legislative history and a violation of the *ex post facto* protections of the New Mexico Constitution.[98]

Spousal immunity under the New Mexico escape statute[99] was examined in *State v. Mobbley*.[100] Mobbley was charged with knowingly harboring or aiding a man named Needham, who was attempting to avoid arrest. Needham and Mobbley's husband were hiding in her house when police officers with felony warrants arrived at the house to look for the wanted men. Mobbley lied by telling the officers the two men were not at the premises. The police officers heard noises inside during the course of the conversation with Mobbley, and entered the house and arrested the two men.

The district court dismissed the charge stating Mobbley was exempt from punishment by the wording of the statute.[101] The prosecutor had stipulated that Mobbley could not have revealed the presence of Needham without also revealing the presence of her husband. The district court concluded that she could not be prosecuted under the statute and dismissed the information.

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95. 98 N.M. at 775, 652 P.2d at 1226 (Ct. App. 1982).

96. *See* State v. Ortiz, 78 N.M. 507, 433 P.2d 92 (Ct. App. 1967).

97. *See, e.g.*, Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), People v. Green, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); State v. Brown, 378 So. 2d 916 (La. 1979).

98. The court did not address the question of the extent to which the Legislature could impose criminal penalties for killing a fetus. The issues involved in such a statute obviously would be intertwined with the complex constitutional issues raised by abortion statutes. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

99. N.M. Stat. Ann. § 30-22-4 (1978).

100. 98 N.M. 557, 650 P.2d 841 (Ct. App. 1982).

101. "Harboring or aiding a felon consists of any person, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity, who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment." N.M. Stat. Ann. § 30-22-4 (1978).

The court of appeals reversed. The court looked to the common law and legislative history of the statutory exemption. The statute is an outgrowth of the common law of accessories after the fact,[102] and the exemption apparently is justified on the ground that it is unrealistic to expect persons to be deterred from giving aid to their close relatives.[103] The court emphasized, however, that Mobbley was not charged with harboring her husband, but was charged with harboring Needham. The court recognized that the defendant faced a dilemma. If she had answered truthfully, she would have revealed the presence of her husband. If she had lied, she would have incurred the risk of prosecution. Nevertheless, the court held that it would be improper for the courts to expand the exemption created by the statute. In *dictum,* the court observed that "at a trial a jury could properly determine . . . that defendant lacked the requisite statutory intent to aid Needham."[104]

In this type of situation, the proper inquiry is the intent of the defendant: if the intent was to aid both her husband and the accomplice, she can be punished for harboring the accomplice, but not for harboring her husband. On the other hand, if her intent in lying to the officers merely was to assist her husband, without concern for the consequences to the accomplice, the exemption apparently will apply. Although the court's holding makes the fact finder's task of determining the defendant's true intent more difficult, it probably is in keeping with the meaning of the statute.

## VIII. SENTENCING

The recent popularity of various enhancement schemes in the statutes has created a great deal of litigation. In *State v. Johnston,*[105] the court reaffirmed earlier interpretations[106] of the firearm enhancement statute.[107] The defendant was given four firearm enhancements on various sentences he received for offenses arising from two armed robberies. One of the related burglary sentences was enhanced because defendant was armed with a firearm when he entered the house. Defendant argued that he had not "used" the firearm, as required by the statute, but was merely carrying it. The court rejected the argument, citing the earlier case of *State v. Trujillo,*[108] which held that "use" includes the menacing display or striking

102. W. LaFave & A. Scott, Criminal Law § 66 (1972).

103. *Id.*

104. 98 N.M. at 558, 650 P.2d at 842 (Ct. App. 1982).

105. 98 N.M. 92, 645 P.2d 448 (Ct. App. 1982).

106. State v. Trujillo, 91 N.M. 641, 578 P.2d 342 (Ct. App.), *cert. denied,* 91 N.M. 751, 580 P.2d 972 (1978); State v. Gonzales, 95 N.M. 636, 624 P.2d 1033 (Ct. App.), *overruled on other grounds sub nom.* Buzbee v. Donnelly, 96 N.M. 692, 701, 634 P.2d 1244, 1253 (1981); State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), *modified,* 90 N.M. 191, 561 P.2d 464 (1977).

107. N.M. Stat. Ann. § 31-18-16 (1978).

108. 91 N.M. 641, 578 P.2d 342 (Ct. App.), *cert. denied,* 91 N.M. 751, 580 P.2d 972 (1978).

of a victim with the gun, regardless of whether the gun actually was used as a firearm.[109]

The court also rejected Johnston's argument that the aggravated degrees of the burglary and robbery crimes of which he was convicted were, in effect, already enhanced because they were committed with a deadly weapon. The *Johnston* court relied on its holding in *State v. Gonzales*[110] that the firearm enhancement could be added to the basic sentence of aggravated battery with a deadly weapon, even though the weapon provides both the basis for the firearm enhancement and the increased severity of the basic sentence.

Finally, the defendant argued unsuccessfully that the crimes actually were one continuing event, and that it was improper to impose four separate firearm enhancements for one continuous use of the firearm. The court again relied on an earlier case, *State v. Kendall,*[111] which upheld enhancing the sentences for all crimes committed with the use of a firearm. The *Johnston* opinion reflects the general approach of the New Mexico appellate courts to apply the enhancement statutes to their fullest extent.[112]

*State v. Reaves*[113] follows the same trend. Reaves was convicted of aggravated assault.[114] In addition, the jury found that he had used a firearm in the commission of the crime. His basic sentence of eighteen months[115] for aggravated assault was enhanced by one year pursuant to the firearm enhancement statute.[116] The defendant also was found to be an habitual offender and his sentence was further enhanced by another year in accordance with the provisions of the habitual offender statute.[117] The defendant argued on appeal that once the basic sentence is enhanced by the firearm provision, it is no longer a "basic" sentence capable of enhancement under the habitual offender statute.[118] The court held that the various sentencing enhancements serve different purposes and the statutory language indicates a legislative intent to apply them cumulatively.

109. Compare State v. Chouinard, 93 N.M. 634, 603 P.2d 744 (Ct. App. 1979) in which the court recognized a distinction between "use" and "possession," holding the enhancement inapplicable where a firearm was found to have been concealed on the person of the defendant after his arrest for distribution of cocaine. The court held that mere possession, without display or further use in the commission of the crime, was not "use" within the meaning of the statute.

110. 95 N.M. 636, 624 P.2d 1033 (Ct. App.), *overruled on other grounds sub nom.* Buzbee v. Donnelly, 96 N.M. 692, 701, 634 P.2d 1244, 1253 (1981).

111. 90 N.M. 236, 561 P.2d 935 (Ct. App.), *modified,* 90 N.M. 191, 561 P.2d 404 (1977).

112. Other courts have taken different approaches. *See, e.g.,* Busic v. United States, 446 U.S. 398 (1980) (if the defendant is charged under a statute which already authorizes enhancement the sentence may not be further enhanced by another enhancement provision).

113. 99 N.M. 73, 653 P.2d 904 (Ct. App. 1982).

114. The statute, N.M. Stat. Ann. § 30-3-2 (1978), elevates an assault from a petty misdemeanor to a felony when the assault is committed "with a deadly weapon."

115. *Id.* § 31-18-15 (Repl. Pamp. 1981).

116. *Id.* § 31-18-16(A).

117. *Id.* § 31-18-17(B).

118. *Id.* Section 31-18-17 provides that a convicted offender with one previous felony shall have "his basic sentence" increased by one year, without possibility of suspension or deferment.

A separate enhancement provision was involved in *State v. Wilson*.[119] As part of the new determinate sentencing scheme, the Legislature provided that the basic sentence could be increased by a factor of up to one-third if the court finds the existence of "aggravating circumstances."[120] The defendant was convicted of aggravated battery; the aggravating factor under the battery statute was the use of a gun. At sentencing, the trial court added one year to the basic sentence of three years, finding the use of the firearm to be the aggravating circumstance. The court of appeals reversed this sentence because the language of the statute specifically excludes the consideration of the use of a firearm as an aggravating circumstance. This subject is covered in the separate firearm enhancement statute.[121]

On remand, the trial court resentenced the defendant to the same term, this time finding aggravating circumstances in the deliberate and planned nature of the attack. Again the defendant appealed, claiming that the charge of aggravated battery includes the element of an intent to injure, and there were no aggravating circumstances beyond the elements of the offense that would justify an enhancement of the statute. The court of appeals this time upheld the sentence, distinguishing between an element of the crime and the circumstances surrounding the commission of the crime.[122] The court found the facts that the defendant lay in wait for the victim, that her actions were deliberate, and that defendant's statement to the victim just before she fired indicated an intent to inflict serious injury justified the finding of aggravating circumstances.[123]

The court in *Wilson* also rejected the defendant's double jeopardy argument that the circumstances were used twice to enhance her sentence; first to raise the aggravated battery from a misdemeanor to a felony and second to increase the sentence for aggravating circumstances. The court held there was no double jeopardy in considering the circumstances surrounding the felony when determining whether the basic sentence should be enhanced because there was only one offense involved: the felony of aggravated battery.[124]

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119. 97 N.M. 534, 641 P.2d 1081, *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982).

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

121. *Id.* § 31-18-16.

122. 97 N.M. at 538, 641 P.2d at 1085.

123. The court quoted the statement of the defendant in which she told the probation office the circumstances of the confrontation with the victim:

> I said, 'Did you get a good piece of ass tonight.' He said, 'No I didn't.' Then I said, 'Well I'm really sorry because it'll probably be your last.' Then I pulled my gun out and shot him.

*Id.* at 537, 641 P.2d at 1084.

124. A recent decision of the court of appeals, State v. Mead, 100 N.M. 27, 665 P.2d 289 (Ct. App. 1983), has held the "aggravating circumstances" enhancement unconstitutional for lack of guidelines. The supreme court has granted certiorari and at the time of this writing, the case had not been decided.

Finally, the court of appeals construed the victim restitution statute[125] in a manner that would provide for maximum use of the restitution policies[126] embodied in the statute. In *State v. Gross*,[127] the defendant was convicted of embezzlement. He was sentenced to the basic term of three years, with the mandatory two year parole term, and fined the maximum $5,000.[128] In addition, the court ordered the defendant to make full restitution to the victims. The defendant appealed the restitution order, arguing that it was not authorized under the victim restitution statute. That statute specifically states that "[i]f the trial court exercises either of the sentencing options under Section 31-20-6 NMSA 1978 [the suspension and deferment provisions], the court shall require as a condition of probation or parole" a plan of victim restitution.[129] The defendant argued that the victim restitution order was unauthorized because the trial court had imposed the penitentiary term and had not deferred or suspended any part of the sentence.

The court of appeals rejected the argument, construing the statute to reflect a legislative policy of requiring each violator to make restitution. One potential problem created by this result is that if restitution is required as a condition of the mandatory two year parole to be served after imprisonment for the maximum term allowed under the statute, the defendant could remain in prison for an additional two years beyond the maximum set by the statute because of his failure or refusal to make restitution.[130]

125. N.M. Stat. Ann. § 31-17-1 (Repl. Pamp. 1981).

126. "It is the policy of this state that restitution be made by each violator of the Criminal Code of New Mexico to the victims of his criminal activities. . . . This section shall be interpreted and administered to effectuate this policy. . . ." *Id.* § 31-17-1(A).

127. 98 N.M. 309, 648 P.2d 348 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982).

128. N.M. Stat. Ann. § 31-18-15(B)-(D) (Repl. Pamp. 1981).

129. *Id.* § 31-17-1(B).

130. The imprisonment of a defendant for his inability to make restitution, as opposed to his refusal, raises equal protection problems. It is a violation of equal protection to incarcerate a defendant for his inability to pay a fine. *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972).