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CRIMINAL LAW AND PROCEDURE

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I. INTRODUCTION

This abbreviated survey period yielded few cases which have significance beyond the defendants, their counsel and the extent of state prison overcrowding. The most important case, *Baca v. State*,[1] changed the rule on entrapment, placing New Mexico courts squarely and righteously in the path of "sting" operations which create crimes to obtain convictions. The period also saw the majority of the New Mexico Supreme Court begin to wrest the high ground from the court of appeals in enforcing the bill of rights and rooting out unfairness in the criminal justice process. Many of the cases in this survey, however, merely apply constitutional standards recently laid down by the United States Supreme Court.

II. THE FOURTH AMENDMENT—SEARCHES AND SEIZURES

A. Searches of High School Students

In *State v. Michael G.*,[2] the court of appeals, for the first time, applied the decision of the United States Supreme Court in *New Jersey v. T.L.O.*[3] A student at Carlsbad High told the swimming coach that another student, Michael G., had tried to sell him some marijuana.[4] Without identifying Michael G., the swimming coach notified two assistant principals.[5] The assistant principals went to the swimming pool and the swimming coach

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1. 106 N.M. 338, 742 P.2d 1043 (1987).

2. 106 N.M. 644, 748 P.2d 17 (1987).

3. 469 U.S. 325 (1985). In *T.L.O.*, the Court held that high school officials may search a student without a warrant, "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the laws or the rules of the school." *Id.* at 341-42. Probable cause is not required. *Id.*

4. 106 N.M. at 645, 748 P.2d at 18.

5. *Id.*

pointed out Michael G.[6] The assistant principals subsequently searched Michael G.'s locker and found two marijuana cigarettes.[7]

Michael G. was on probation at the time.[8] The state filed a motion to revoke his probation based on the discovery of the marijuana.[9] The trial court denied Michael G.'s motion to suppress the marijuana as the fruit of an unreasonable search and revoked his probation.[10] Michael G. appealed.[11]

The court of appeals first had to decide whether its decision in *Doe v. State*[12] had survived *T.L.O.* In *Doe*, the court had enumerated factors to be considered in deciding whether "reasonable suspicion" existed to justify a school search.[13] These were the child's age and history of disciplinary problems; the prevalence in the school of the problem at which the search was aimed; the need to make an immediate search; and the probative value and reliability of the information leading to the search.[14]

The court of appeals concluded that the United States Supreme Court's general "reasonable grounds" approach in *T.L.O.* indicated that the *Doe* factors could no longer be mechanically applied.[15] Still, the *Doe* factors would continue "to provide a useful guide in determining whether a school search was reasonable under the fourth amendment."[16]

Applying these standards, the court of appeals found that reasonable grounds existed to search Michael G.'s locker.[17] The court gave greatest weight to the credibility of the student's statement.[18] The court likened the student's statement to that of a disinterested citizen informant.[19] The court stated generally that a student's direct statement to a school official indicating personal knowledge of facts that would establish that another student is engaging in illegal conduct may provide reasonable grounds to search.[20] A statement which merely relays rumors or suspicions, however, will not do.[21]

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6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. 88 N.M. 347, 540 P.2d 827 (Ct. App. 1975).
13. *Id.* at 352, 540 P.2d at 832.
14. *Id.*
15. 106 N.M. at 647, 748 P.2d at 20.
16. *Id.*
17. *Id.*
18. *Id.*
19. *See* United States v. Gagnon, 635 F.2d 766 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981).
20. 106 N.M. at 647, 748 P.2d at 20.
21. *Id.*

B. Police Roadblocks

On March 5, 1987, the court of appeals announced two decisions involving police roadblocks. In *City of Las Cruces v. Betancourt*,[22] the court considered for the first time whether "police roadblocks set up for the purpose of detecting and apprehending drunk drivers" are permissible under the fourth amendment.[23]

On New Year's Eve of 1985 the City of Las Cruces set up a roadblock on a major downtown street to detect drunk drivers.[24] The police arrested Betancourt and another defendant as a result of the roadblock.[25] Both admitted they were driving drunk and both were convicted of DWI.[26] On appeal, they argued that the roadblock violated the fourth amendment prohibition against unreasonable seizures.[27]

The court of appeals stated that in deciding whether a roadblock is reasonable, it is necessary to "balance the gravity of the governmental interest or public concern served by the roadblock, the degree to which it advances these concerns and the severity of the interference with individual liberty, security, and privacy. . . ."[28] The court declared that the governmental interest in protecting the public from drunk drivers was so great that any reasonable attempt to remove drunk drivers from the road would be upheld, as long as motorists were not subjected "to arbitrary invasions solely at the unfettered discretion of officers in the field."[29]

The court then enumerated eight guidelines to be weighed in considering the reasonableness of a roadblock: (1) the role of supervisory personnel (high ranking officials should make the decision to set up the roadblock and should select the site and procedures); (2) restrictions on discretion of field officers (cars should not be stopped randomly but according to some mechanical system, such as every third car); (3) safety (approaching traffic should be warned of the roadblock); (4) reasonable location; (5) time of day and duration (late evening hours on a weekend may be reasonable, but not Monday morning during rush hour); (6) indicia of the official nature of the roadblock (scene should provide high visibility

22. 105 N.M. 655, 735 P.2d 1161 (Ct. App.), *cert. denied*, 105 N.M. 618, 735 P.2d 535 (1987).

23. 105 N.M. at 656, 735 P.2d at 1162. Three cases had previously considered roadblock checks of driver's licenses and vehicle registration. *See* State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977); State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975); State v. Ruud, 90 N.M. 647, 567 P.2d 496 (Ct. App. 1977).

24. 105 N.M. at 656, 735 P.2d at 1162.

25. *Id.* at 657, 735 P.2d at 1163.

26. *Id.*

27. *Id.*

28. *Id.* at 658, 735 P.2d at 1164.

29. *Id.* (citing Brown v. Texas, 443 U.S. 47 (1979)). *See also* Delaware v. Prouse, 440 U.S. 648 (1979); Annotation, *Validity of Routine Roadblocks by State or Local Police for Purpose of Discovery of Vehicular or Driving Violations*, 37 A.L.R.4th 10 (1985).

but minimize undue apprehension); (7) length and nature of detention; and (8) advance publicity (the roadblock should be publicized for its deterrent effect).[30] The court applied these guidelines to the facts of the case and found no fourth amendment violation.[31]

In a decision announced on the same day as *Betancourt*, another panel of the court of appeals applied the *Betancourt* guidelines. In *State v. Olaya*,[32] the defendant's detention at a police roadblock resulted in a full search of his car and eventually in his conviction for possession of cocaine.[33] On appeal, he challenged, among other things, the validity of his initial detention at the roadblock.[34]

At the instance of their immediate supervisor, two highway patrolmen set up a roadblock on I-40 about 20 miles from the Texas border.[35] The patrolmen chose the exact spot.[36] They stopped "all privately-owned, east-bound vehicles" to check licenses and registrations.[37] In accordance with their supervisor's instructions, they used reflectors, marked patrol cars, and a stop sign to alert motorists to the roadblock.[38]

Relying on *Delaware v. Prouse*,[39] Olaya complained of the absence of guidelines setting specific limits on "the unbridled discretion of the police officers."[40] Noting that such unbridled discretion in field officers creates the danger of pretextual stops, the court of appeals, nevertheless, validated the roadblock in this case.[41] The court stated that, apart from the absence of advance publicity, the roadblock "satisfied the intent" of each *Betancourt* guideline.[42]

The court of appeals did not discuss several ways in which the roadblock in *Olaya* did not comply with the *Betancourt* guidelines. Contrary to the first guideline,[43] the field officers themselves chose the site for the roadblock. Further, the court was not clear on who had decided that commercial vehicles would not be stopped.[44] The second *Betancourt* guideline

30. 105 N.M. at 658-59, 735 P.2d at 1164-65.

31. The court stressed that the city bore the burden of demonstrating the legality of the roadblock. *Id.* at 659, 735 P.2d at 1165.

32. 105 N.M. 690, 736 P.2d 495 (Ct. App.), *cert. denied*, 105 N.M. 689, 736 P.2d 494 (1987).

33. *Id.* at 691, 736 P.2d at 496.

34. *Id.* at 692, 736 P.2d at 497.

35. *Id.* at 691, 736 P.2d at 496.

36. *Id.*

37. *Id.*

38. *Id.*

39. 440 U.S. 648 (1979). In *Rouse*, the Supreme Court held that "persons in automobiles or public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." 440 U.S. at 663.

40. 105 N.M. at 693, 736 P.2d at 498.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 691, 736 P.2d at 496.

makes this the supervisor's decision.[45] If the field officers made both these decisions, then they retained significant, if not "unbridled," discretion. The court of appeals stressed, however, as it had done in *Betancourt*,[46] that "no one guideline is dispositive . . . ."[47] Substantial evidence had supported the trial court's finding that the field officers "did not have or exercise unbridled discretion . . . ."[48]

Betancourt and *Olaya* have established an analytical framework for considering the validity of roadblocks under the fourth amendment. Neither case, however, rigidly binds the lower courts to the eight guidelines. Courts are to be guided by the principle that the public must be protected both from the unfettered exercise of power by field officers and from drunk drivers. Finally, counsel should note that a trial court's conclusion that field officers were adequately controlled will be reviewed on appeal for "substantial evidence" only. [49]

III. NATURE OF THE CRIME

A. Requirement of Knowledge

In *Reese v. State*,[50] the supreme court overruled *Rutledge v. Fort*[51] and decided that conviction of the crime of assault or battery on a peace officer requires proof that the defendant knew the victim was a peace officer.[52] *Rutledge* had been based on the decision of the United States Supreme Court in *United States v. Feola*.[53] Courts and commentators had understood *Feola* to hold that the defendant's knowledge of the identity of the victim was neither necessary nor relevant in a prosecution for assault upon a federal officer.[54] However, the federal circuits and various states now understand *Feola* to say that conviction is improper when the defendant acts from a mistaken belief that he is threatened with an intentional tort by a private citizen.[55]

The supreme court in *Reese* did not make clear under what circumstances knowledge of the official identity of the victim is an essential

45. *Id.*
46. *Betancourt*, 105 N.M. at 658, 735 P.2d at 1164.
47. *Olaya*, 105 N.M. at 693, 736 P.2d at 498.
48. *Id.*
49. *Id.*
50. 106 N.M. 498, 745 P.2d 1146 (1987).
51. *See* Rutledge v. Fort, 104 N.M. 7, 715 P.2d 455 (1986). *Rutledge* and *Reese* were in fact the same case. For the rather tortured procedural history of the case, see the subsequent Reese v. State, 106 N.M. 505, 745 P.2d 1153 (1987).
52. The court based its conclusion on the requirements of due process and not on the language of the statutes. 106 N.M. at 499, 745 P.2d at 1147. *See* N.M. STAT. ANN. §§ 30-22-22 and -24 (Repl. Pamp. 1984 & Cum. Supp. 1987).
53. 420 U.S. 671 (1975).
54. *Reese*, 106 N.M. at 499, 745 P.2d at 1147.
55. *Id.* at 500, 745 P.2d at 1148.

element of the crime in New Mexico. The court appeared to state that such knowledge will always be required: "[W]e explicitly overrule our holding in *Rutledge* insofar as it holds that a defendant's knowledge as to the identity of the peace officer assaulted is not a necessary element of the crimes . . . ."[56] Elsewhere, however, the court appeared to limit the requirement to cases where the defendant mistakenly believes that he is being threatened by a private citizen.[57]

Basic criminal law principles of deterrence and retribution suggest that knowledge of the official status of the victim should be a required element of assault or battery upon a peace officer.[58] Defense counsel, however, cannot completely rely on the language quoted above that makes knowledge a "necessary element" of the statutory offense, but may have the burden of going forward with some evidence of mistaken identity before relying on the lack of proof on the issue.

B. Unauthorized Entry

In *State v. Sanchez*,[59] the court of appeals addressed the question of what constitutes an "unauthorized entry" within the meaning of the New Mexico burglary statutes.[60] Sanchez stole a purse from an office in Presbyterian Hospital in Albuquerque.[61] Landlee, the defendant in a consolidated case, was arrested in the loading dock area of A.P.K. Auto Parts, a retail store.[62] It was undisputed that Presbyterian and the auto parts store were open to the public.[63] The defendants were convicted of burglary because they entered into restricted areas of these public places.[64] The court of appeals affirmed the convictions, holding that where a building is only partly open to the public, a defendant may be convicted of burglary if he enters an area not open to the public with the intent to commit a crime.[65]

The trouble with the holding, as noted by Judge Apodaca in a concurring opinion,[66] is that to be convicted of burglary, a defendant must *know* his entry is unauthorized.[67] In the case of a building plainly open to the public

56. *Id.* at 499, 745 P.2d at 1147.

57. *Id.* at 500, 745 P.2d at 1148. Reese defended on the basis of just such a mistaken belief. *Id.* at 498-99, 745 P.2d at 1146-47. *Feola* requires scienter in these circumstances only. 420 U.S. at 686.

58. *See generally*, Note, *Criminal Law*, 17 N.M.L. REV. 433 (1987).

59. 105 N.M. 619, 735 P.2d 536 (Ct. App.), *cert. denied*, 105 N.M. 618, 735 P.2d 535 (1987).

60. N.M. STAT. ANN. §§ 30-16-3 to -4 (Repl. Pamp. 1984).

61. 105 N.M. at 620, 735 P.2d at 537.

62. *Id.* at 619-20, 735 P.2d at 536-37.

63. *Id.* at 620, 735 P.2d at 537.

64. *Id.* at 619-20, 735 P.2d at 536-37.

65. *Id.* at 621-22, 735 P.2d at 538-39.

66. *Id.* at 622-23, 735 P.2d at 539-40.

67. *Id.* at 622, 735 P.2d at 539 (citing State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980)).

to some extent, how is the jury to determine the limit of the public invitation?

Judge Apodaca suggested that juries should be instructed that the invitation extends to all areas "which by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances . . . would cause a reasonable person to believe that no permission to enter or remain is required."[68] This is the rule in at least three jurisdictions.[69] The opinion of the court did not discuss this sensible approach. This approach should be adopted because New Mexico's criminal uniform jury instructions are so spare and barren in places that they abdicate the judicial role to the fact finder.

C. The Degrees of Homicide

In *State v. Fero*,[70] the supreme court clarified the distinction between second degree murder and manslaughter. Fero was the principal of a high school.[71] To friends he appeared disturbed, even suicidal, the day before a scheduled evaluation with his superintendent, Hansen.[72] The two men had a history of conflict.[73] Fero claimed that at the evaluation, Hansen criticized him sharply, ridiculed him and then fired him.[74] Fero claimed that as he departed a gun fell out of his portfolio.[75] The next he knew, Hansen was on the floor with five bullet holes in him.[76]

The trial court instructed on both first degree murder and on second degree murder based on mental illness, but refused to instruct on manslaughter.[77] Fero was convicted of first degree murder.[78]

The supreme court held the instruction on second degree murder appropriate, because the jury could have believed that Fero was, in fact, out of control.[79] The trial court, however, properly refused the manslaughter instruction.[80] Manslaughter requires such provocation as would cause "an ordinary person of average disposition"[81] to lose control.[82]

68. 105 N.M. at 622, 735 P.2d at 539.
69. *See* OR. REV. STAT. § 164-205(4) (1971); People v. Bozeman, 624 P.2d 916 (Colo. Ct. App. 1980); State v. McGinnis, 622 S.W.2d 416 (Mo. Ct. App. 1981).
70. 105 N.M. 339, 732 P.2d 866 (1987).
71. *Id.* at 341, 732 P.2d at 868.
72. *Id.*
73. *Id.*
74. *Id.* at 342, 732 P.2d at 869.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 343, 732 P.2d at 870.
80. *Id.*
81. N.M. U.J.I. CRIM. 14-222 (Recomp. 1986).
82. *Id.*

Hansen's behavior was not sufficiently provocative.[83]

Hansen derided and ridiculed Fero.[84] Non-informational statements, however, including forms of derision and ridicule, do not constitute adequate provocation for manslaughter.[85] The ordinary person of average disposition is required to absorb such sticks and stones. Still, Hansen did not simply deride and ridicule Fero. He derisively *informed* Fero that Fero had been fired. Information can constitute adequate provocation.[86]

The supreme court held that Hansen's information could not supply provocation, however, because Hansen had "not just a legal right, but a public duty" to evaluate Fero's performance as principal.[87] The court had held previously that, in general, the exercise of a legal right cannot supply adequate provocation for manslaughter.[88] The supreme court left open the possibility that in some other case the performance of a public duty may be sufficiently "egregious" in manner so as to supply provocation.[89]

IV. SENTENCING

A. Crimes Outside the Criminal Code

On February 23, 1987, the court of appeals ruled in *State v. Greyeyes*,[90] that 90 days is both the minimum and the maximum jail sentence for a second or subsequent conviction of Driving While Intoxicated (DWI).[91] On the date of the court of appeals' decision, the DWI statute, not a part of the Criminal Code, made a second or subsequent conviction punishable "by imprisonment for not less than ninety days nor more than one year. . . ."[92] However, the Criminal Sentencing Act provides that crimes outside the Criminal Code shall be punished according to the minimum jail term prescribed in the statute.[93] Therefore, Greyeyes, convicted of a second or subsequent DWI, could be jailed for 90 days only.[94]

The court of appeals went out of its way to note that unambiguous statutes "must be read and given effect as . . . written by the legisla-

83. *E.g.*, State v. Castro, 92 N.M. 585, 592 P.2d 185 (Ct. App. 1979).

84. 105 N.M. at 343, 732 P.2d at 870.

85. *Id.* at 343-44, 732 P.2d at 870-71.

86. Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

87. 105 N.M. at 344, 732 P.2d at 871.

88. State v. Maners, 93 N.M. 95, 597 P.2d 280 (1979).

89. 105 N.M. at 344, 732 P.2d at 871. Presumably, this weighing of egregiousness would be left to the jury. If so, one could argue that it could have been left to the jury, and not to the judge, in this case.

90. 105 N.M. 549, 734 P.2d 789 (Ct. App.), *cert. denied*, 105 N.M. 521, 734 P.2d 761 (1987).

91. *Id.* at 553, 734 P.2d at 793.

92. N.M. STAT. ANN. § 66-8-102(E) (Cum. Supp. 1986).

93. N.M. STAT. ANN. § 31-18-13(B) (Repl. Pamp. 1981 & Repl. Pamp. 1987).

94. 105 N.M. at 552, 734 P.2d at 792. He had been given a one-year sentence by the trial court. *Id.* at 550, 734 P.2d at 790.

ture. . . ."[95] It is the legislature's work to set the penalties for the crimes.[96]

The New Mexico Legislature responded promptly. Effective April 7, 1987, the DWI statute was amended to add the words "notwithstanding the provisions of Section 31-18-13 N.M. Stat. Ann. 1978" to both paragraphs setting the penalties for DWI.[97] Therefore, despite the provisions of the Criminal Sentencing Act and despite *Greyeyes*, judges presumably once more have discretion to give 90 days to one year to second or subsequent DWI offenders.

B. Relationship Between Parole and Consecutive Underlying Sentences

In *Brock v. Sullivan*,[98] the supreme court considered how parole terms attached to consecutive underlying sentences should run. Brock was convicted of four fourth-degree felonies.[99] For each mandatory 18 month sentence, the trial court ordered a year's probation "after the service of the actual period of imprisonment. . . ."[100]

At the end of Brock's prison term, the Parole Board interpreted the trial court's order of parole to mean that Brock would now serve four consecutive parole terms of one year each.[101] In short, the Parole Board saw four "stacked" prison terms followed by four "stacked" paroles:

S1 S2 S3 S4 P1 P2 P3 P4

Brock disagreed with this interpretation, and so did the supreme court.[102] The Sentencing Act does not require "consecutive sentences to be completed prior to the commencement of the parole period for each basic sentence."[103] Rather, the legislature intended each parole period to run concurrently with any subsequent jail sentence:[104]

	P1	*P2*	*P3*	*P4*
S1	*S2*	*S3*	*S4*	

In the context of "stacked" underlying sentences, the parole period for each offense "commences immediately after the period of imprisonment for that offense. . . ."[105]

95. *Id.* at 553, 734 P.2d at 793 (citing Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957)).
96. *Id.*
97. N.M. STAT. ANN. § 68-8-102(D) and (E) (Repl. Pamp. 1987).
98. 105 N.M. 412, 733 P.2d 860 (1987).
99. *Id.* at 413, 733 P.2d at 861.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 414, 733 P.2d at 862 (citing N.M. STAT. ANN. § 32-18-15(C) (Repl. Pamp. 1981)).
104. 105 N.M. at 414, 733 P.2d at 862.
105. *Id.*

V. JURIES

In a case of first impression in New Mexico, the court of appeals in *State v. Holloway* considered whether a juror's attempt during a poll of the jury to qualify or change her vote "casts a cloud on the validity of the verdict. . . ."[106] After the foreman announced verdicts convicting Holloway of criminal sexual penetration and criminal sexual contact of a minor, the defense requested a poll of the jury.[107] Juror Carol Caldwell was asked, "Is this your verdict?"[108] This dialogue followed:

> Caldwell: Yes, can I qualify it? Can I just say . . . ?
> Court: Is this your verdict?
> Caldwell: Yes.[109]

Defense counsel did not object to the court's entry of the verdict.[110]

On appeal, the court of appeals stated that the sixth amendment guarantees a unanimous verdict at which each juror has freely arrived.[111] Fundamental justice requires a verdict "free from ambiguity."[112] The court of appeals held that it is the trial judge's duty to preserve the defendant's right to a voluntary and unanimous verdict.[113] Accordingly, the judge's poll must be more than a formality.[114] If a juror's response to the question, "Is this your verdict?" should alert the judge to uncertainty, the judge must "question further to give the juror full opportunity to indicate his present state of mind."[115]

The court of appeals agreed with the state's argument that the trial court has discretion concerning the manner in which the jury is polled.[116] Still, the trial judge must respond to a juror's reluctance to assent.[117] Here, juror Caldwell plainly had reservations. The trial judge abused his discretion in neither inquiring further nor directing the jury to continue deliberating.[118] Because the judge allowed ambiguity to remain, the verdict was not unanimous.[119]

Defense counsel should always request a jury poll. If ambiguities ap-

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106. 106 N.M. 161, 163, 740 P.2d 711, 713 (Ct. App. 1987).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 164, 740 P.2d at 714.
112. *Id.* (quoting Sanchez v. Martinez, 99 N.M. 66, 73, 653 P.2d 897, 904 (Ct. App. 1982)).
113. *Id.*
114. *Id.* at 165, 740 P.2d at 715.
115. *Id.* SCRA 1986, 5-611(E) provides that "[i]f upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations."
116. 106 N.M. at 165, 740 P.2d at 715.
117. *Id.*
118. *Id.* at 166, 740 P.2d at 716.
119. *Id.*

pear during such a poll, counsel will have to consider whether to pursue the ambiguities if the trial court fails to do so or to await an appeal to present the issue.

VI. CONFRONTATION CLAUSE[120]

During the survey period, the New Mexico Supreme Court reversed its 1985 decision in *State v. Earnest*,[121] on remand from the Supreme Court of the United States. In *Earnest I*, the court had held that the defendant was entitled to a new trial because the trial judge had admitted, against Earnest, the pretrial statement of Earnest's accomplice who did not take the stand at trial and thus could not be cross-examined concerning the statement.[122] In reversing the trial court, the supreme court had relied on decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals, all of which required some pretrial opportunity for "full and complete cross examination" before such a pretrial statement could be admitted.[123]

The state appealed *Earnest I* to the Supreme Court of the United States.[124] Before reviewing *Earnest I*, however, the Court issued its decision in *Lee v. Illinois*.[125] The facts in *Lee* were virtually identical to those in *Earnest I*. A co-defendant's confession was admitted as substantive evidence, even though the co-defendant could not be cross-examined.[126] The Supreme Court held that the incriminating confessions of accomplices are only *presumptively* unreliable and inadmissible.[127] Some confessions may bear sufficient "indicia and reliability" to overcome the presumption.[128] Having decided *Lee*, the Supreme Court vacated *Earnest I* and remanded for proceedings consistent with *Lee*.[129]

On remand,[130] the New Mexico Supreme Court presumed, no doubt correctly, that the United States Supreme Court intended that the state be given a chance to overcome the presumptive unreliability of the co-

120. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

121. 103 N.M. 95, 703 P.2d 872 (1985).

122. *Id.* at 98, 703 P.2d at 875.

123. 448 U.S. 56 (1980); United States v. Allen, 409 F.2d 611 (10th Cir. 1969).

124. New Mexico v. Earnest, 477 U.S. 648 (1986).

125. 476 U.S. 530 (1986).

126. *Id.*

127. *Id.*

128. In the more recent United States v. Owens, 108 S.Ct. 838 (1988), the Supreme Court held that neither the Confrontation Clause nor Federal Rule of Evidence 802 is violated by the admission of a prior, out-of-court statement of identification of a witness who is unable, because of memory loss, to explain the basis of the identification.

129. 477 U.S. at 677.

130. State v. Earnest, 106 N.M. 411, 744 P.2d 539 (1987) (*Earnest II*).

defendant's confession.[131] Since a pretrial opportunity to cross-examine the accomplice was no longer absolutely required, the New Mexico Supreme Court found in *Earnest II* sufficient "indicia of *reliability*" in the accomplice's statement to make it admissible:[132] the co-defendant was not offered leniency in exchange for the statement; the statement was against the co-defendant's penal interest; the statement did not shift responsibility to the defendant from the co-defendant; and independent evidence adduced at trial corroborated the co-defendant's statements.[133]

VII. ENTRAPMENT

In *Baca v. State*,[134] the supreme court issued its most important opinion of the survey period, deciding New Mexico's first "sting" case differently than many federal courts have done. Rejecting precedent, the court decided that the defense of entrapment may be established either by showing the defendant's lack of predisposition toward committing a crime, the sole test previously, or by showing that the police exceeded the standards of proper investigation.[135]

The police had been using Granger, an informant, in an undercover narcotics operation.[136] Granger introduced the defendant to undercover Officer Work, who masqueraded as Granger's friend.[137] Granger told Baca that he wanted to sell cocaine to Work, but owed Work money and was afraid of him, and so needed Baca's help.[138] Granger and Baca went to a trailer where Granger bought the cocaine.[139] Granger then gave it to Baca to "sell" to Work for him.[140] When Work paid Baca $130 for the cocaine by prearrangement with Granger, Baca was arrested.[141]

These facts showed that the police instigated at least one completely phony drug buy, being both buyer and seller. The defendant was a go-between. The trial court instructed the jury on entrapment, but the jury convicted.[142] On appeal, the defendant claimed that the facts established the defense of entrapment as a matter of law.[143]

Before *Baca*, the controlling New Mexico case was *State v. Fiechter*,[144]

131. *Id.* at 412, 744 P.2d at 540.
132. *Id.* There was no remand to the district court for a hearing.
133. *Id.*
134. 106 N.M. 338, 742 P.2d 1043 (1987).
135. *Id.* at 341, 742 P.2d at 1046.
136. *Id.* at 338, 742 P.2d at 1043.
137. *Id.* at 339, 742 P.2d at 1044.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 338, 742 P.2d at 1043.
143. *Id.*
144. 89 N.M. 74, 547 P.2d 557 (1976).

which held that "the key issue for the trier of fact where the defense of entrapment is asserted is the defendant's predisposition to commit the crime."[145] This is the so-called "subjective" approach to entrapment. The "objective" approach considers whether any police misconduct would have encouraged a person to engage in crime.[146]

The debate concerning the objective and subjective bases of entrapment dates to the decision of the United States Supreme Court in 1932 in *Sorrells v. United States*.[147] *Sorrells* held that the government may not argue that the accused is guilty of a crime which the government itself instigated,[148] but the Court added that the "predisposition and criminal designs of the defendant are relevant."[149] *Sherman v. United States*[150] followed *Sorrells*, again leaving open the question of the exact significance of predisposition.[151]

The leading case for the objective approach to entrapment is the Fifth Circuit decision in *United States v. Bueno*.[152] In *Bueno*, one police agent supplied the drug, while another persuaded the defendant to act as the go-between, handing the defendant the money to be passed to the first agent.[153] Citing *Sorrells*, the Fifth Circuit upheld the defense of entrapment, attributing the crime to "the creative activity of the government."[154]

The New Mexico Supreme Court found the facts of *Bueno* indistinguishable from those of *Baca*, and these facts presented "a perfect illustration of why something more than a subjective standard is needed to define entrapment."[155] The objective test of entrapment is necessary to deter the police from creating crime "for the sole purpose of prosecuting and punishing it."[156]

Practitioners should note that the supreme court emphasized that evidence *either* of lack of predisposition *or* of police misconduct may make

145. 106 N.M. at 339, 742 P.2d at 1044.

146. State v. Sainz, 84 N.M. 259, 261, 501 P.2d 1247, 1249 (Ct. App. 1972). *Fiechter* expressly overruled *Sainz*. *See Fiechter*, 89 N.M. at 77, 547 P.2d at 560.

147. 287 U.S. 435 (1932); *see generally*, Annotation, *Modern Status of the Law Concerning Entrapment to Commit Narcotics Offense*, 22 A.L.R. FED. 731, 733-36 (1975).

148. 287 U.S. at 452.

149. *Id.* at 451.

150. 356 U.S. 369 (1958).

151. In United States v. Russell, 411 U.S. 423 (1973), the Supreme Court went through the *Sorrells* "investigation" analysis, concluded there was no police misconduct, and held that the defendant's "predisposition" was . . . fatal to his claim of entrapment." 411 U.S. at 436. In *Baca*, the New Mexico Supreme Court stated that *Russell* merely "stands for the proposition that police misconduct is not the sole determinant in defining entrapment." 106 N.M. at 340, 742 P.2d at 1045.

152. 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973). Illinois, New Jersey, Mississippi and Michigan have previously followed *Bueno*. *See Baca*, 106 N.M. at 340, 742 P.2d at 1043.

153. 447 F.2d at 904-05.

154. *Id.* at 906.

155. 106 N.M. at 340, 742 P.2d at 1045.

156. *Id.* (quoting *Sorrells*, 287 U.S. at 444).

out a prima facie defense of entrapment.[157] Further, beyond the facts of *Baca* in any case in which the accused can show that the government initiated events for the sole purpose of creating crime, counsel should argue that the defense of entrapment has been established as a matter of law.[158]

VIII. CONCLUSION

During the survey period, the New Mexico appellate courts provided considerable practical guidance to the bar in such cases as *Betancourt/ Olaya*, *Greyeyes*, *Brock*, and *Holloway*. Conversely, the decisions in *Reese* and *Sanchez* may simply have muddied the waters. In the last analysis, *Baca* is the case of the survey period. The supreme court acted courageously and correctly in handing down *Baca* in spite of the ever-mounting anti-drug hysteria in this country.

157. 106 N.M. at 341, 742 P.2d at 1046. This holding is plainly contrary to *Fiechter*, despite the court's curious assertion that it is following *Fiechter*. *See id.* at 339, 742 P.2d at 1044.

158. Failing a directed verdict, defense counsel should consider special interrogatories asking the jury whether the police acted as buyer, seller, and instigator or otherwise tailored to the nature of the "sting" jury instruction. If the jury answers "yes," dismissal should follow. The current uniform jury instruction focuses solely on predisposition and is therefore no longer complete. *See* N.M. U.J.I. CRIM. 14-5160 (Recomp. 1986).