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CRIMINAL LAW

I. INTRODUCTION

During the survey period, from January 1988 to August 1989, the New Mexico Court of Appeals decided two cases clarifying the New Mexico Racketeering Act.[1] The court of appeals also examined and compared the statutory elements of fraud and the offenses created by the Worthless Check Act.[2] In addition, the court of appeals held that attempted trafficking by possession with intent to distribute constitutes a crime in New Mexico.[3] The court of appeals also discussed the quantum of evidence necessary to support the inference of "constructive possession" of contraband,[4] and examined the entrapment defense.[5] The New Mexico Supreme Court clarified the elements of the crime of holding or using an altered license plate.[6]

Also during the survey period, defendants raised several challenges to laws penalizing drunk driving and the procedure involved in arrest and prosecution of drunk drivers.[7] This article has treated these cases separately. The most interesting challenges implicated equal protection.[8]

II. RACKETEERING

During the survey period two significant cases involved the New Mexico Racketeering Act[9] ("the Act"), a piece of legislation greatly influenced

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1. State v. Hughes, 108 N.M. 143, 767 P.2d 382 (Ct. App.), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989); State v. Wynne, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989). *See infra* notes 16-54 and accompanying text.

2. State v. Higgins, 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988). *See infra* notes 67-80 and accompanying text.

3. State v. Curry, 107 N.M. 133, 753 P.2d 1321 (Ct. App.), *cert. denied*, 107 N.M. 132, 753 P.2d 1320 (1988). *See infra* notes 81-90 and accompanying text.

4. State v. Brietag, 108 N.M. 368, 772 P.2d 898 (Ct. App. 1989). *See infra* notes 91-103 and accompanying text.

5. State v. Rodriguez, 107 N.M. 611, 762 P.2d 898 (Ct. App.), *cert. denied*, 107 N.M. 546, 761 P.2d 424 (1988). *See infra* notes 104-22 and accompanying text.

6. Ortiz v. State, 106 N.M. 695, 749 P.2d 80 (1988). *See infra* notes 60-66 and accompanying text.

7. Incorporated County of Los Alamos v. Montoya, 108 N.M. 361, 772 P.2d 891 (Ct. App.), *cert. denied*, 108 N.M. 273, 771 P.2d 981 (1989); State v. Wyrostek, 108 N.M. 140, 767 P.2d 379 (Ct. App.), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989); State v. Wiberg, 107 N.M. 152, 754 P.2d 529 (Ct. App.), *cert. denied*, 107 N.M. 106, 753 P.2d 352 (1988); Meyer v. Jones, 106 N.M. 708, 749 P.2d 93 (1988). *See infra* notes 124-203 and accompanying text.

8. *Meyer*, 106 N.M. 708, 749 P.2d 93; *Montoya*, 108 N.M. 361, 772 P.2d 891. *See infra* notes 124-80 and accompanying text.

9. N.M. STAT. ANN. §§ 30-42-1 to -6 (Repl. Pamp. 1989). Cases decided during the survey period involving the Racketeering Act were State v. Hughes, 108 N.M. 143, 767 P.2d 382 (Ct. App.), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989); State v. Wynne, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989); and Maxwell v. Wilson, 108 N.M. 65, 766 P.2d 909 (1988). In *Maxwell*, a civil case not discussed below, the supreme court held that the existence of an "enterprise" standing alone will not sustain a suit for civil damages under the Racketeering Act. *Id.* at 67, 766 P.2d at 911. The Act provides civil remedies in § 30-42-6. The *Maxwell* court indicated that to avoid dismissal the civil plaintiff must allege one of the

by the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[10] The stated purpose of the New Mexico Racketeering Act is to "eliminate the infiltration and illegal acquisition of legitimate economic enterprise by racketeering practices and the use of legal and illegal enterprise to further criminal activities."[11] "Racketeering" means virtually any felonious act.[12] A "pattern of racketeering activity" means that the defendant has engaged in two or more incidents of racketeering, with a few exceptions, provided that the acts are done with the special intent of accomplishing the activities prohibited under the Act.[13] The prohibited activities are set out in section 30-42-4 of the Act and comprise, essentially, the use of "racketeering" to participate in an "enterprise."[14] An "enterprise" is any legal entity "or any group of individuals or group of individuals associated in fact though not a legal entity and includes illicit as well as licit entities."[15]

New Mexico courts followed the lead of the majority of the federal courts interpreting RICO by reading the Act broadly to allow prosecution of any but the most solitary and sporadic criminal activity. In *State v. Hughes*[16] and *State v. Wynne*,[17] the court of appeals considered appeals of convictions for conspiracy to racketeer by defendants who manufactured drugs for sale. The court rejected these defendants' challenges to the Act. The rejections were based in part on judicial interpretation of the federal racketeering act.

In *State v. Hughes*, the court of appeals held that the day-to-day operations of drug manufacturers may fall within the state racketeering act.[18] Hughes was convicted of trafficking in a controlled substance by manufacture, racketeering, and conspiracy to racketeer.[19] The facts supporting the racketeering charge were all instances of conduct related to Hughes' methamphetamine manufacturing operation.[20]

Hughes advanced several arguments attempting to show that his conduct did not fall within the Racketeering Act. He argued that because the government had not proved the existence of an association beyond that in existence to manufacture methamphetamine, the government had failed

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predicate criminal acts set out in section 30-42-3(A) of the Act. *Id.*

Prior to the survey period, the New Mexico courts have interpreted the Racketeering Act only once, in State v. Johnson, 105 N.M. 63, 728 P.2d 473 (Ct. App.), *cert. denied*, 481 U.S. 1051 (1987).

10. 18 U.S.C. §§ 1961-68 (1984); *See* State v. Johnson, 105 N.M. at 69, 728 P.2d at 479 (the New Mexico Racketeering Act is "patterned after" RICO).

11. N.M. STAT. ANN. § 30-42-2 (Repl. Pamp. 1989).

12. *See id.* § 30-42-3(A) (Repl. Pamp. 1989).

13. *See id.* § 30-42-3(D) (Repl. Pamp. 1989).

14. *See id.* § 30-42-4 (Repl. Pamp. 1989).

15. *Id.* § 30-42-3(C) (Repl. Pamp. 1989).

16. 108 N.M. 143, 767 P.2d 382 (Ct. App.), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989).

17. 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989).

18. *Hughes*, 108 N.M. at 150-51, 767 P.2d at 389-90.

19. *Id.* at 145, 767 P.2d at 384.

20. *Id.* at 147, 767 P.2d at 386.

to prove the existence of an "enterprise" as required by the Act.[21] He argued that even if the government had produced sufficient evidence to support the existence of an "enterprise," the government had failed to produce evidence independent of that used to support the existence of the underlying predicate offenses.[22] Finally, he challenged the trial court's finding that the use of stolen equipment in the drug manufacturing operation was an instance of the statutorily prohibited activity of "investment of proceeds."[23]

A. Definition of "Enterprise"

The trial court found that Hughes received stolen property and participated in the manufacture of methamphetamine.[24] The government argued that these activities comprised the predicate acts of racketeering activity and that they were performed with the intent of furthering a drug manufacturing "enterprise."[25] Hughes argued that in order to prove the existence of an "enterprise" the government must show the existence of an association above and beyond that necessary to perform the acts that are predicate to racketeering activity.[26] To bolster his argument, Hughes cited a series of Eighth Circuit Court of Appeals decisions interpreting the federal racketeering act (RICO).[27] The Eighth Circuit has interpreted the RICO requirement of an "enterprise" to mean more than simply an organization set up to commit only the predicate acts constituting the pattern of racketeering activity.[28]

The New Mexico court declined to follow the Eighth Circuit, noting that the New Mexico legislature intended the broader view taken by the majority of the federal courts that have interpreted the federal racketeering statute.[29] The legislature expressly defined "enterprise" to include both licit and illicit entities.[30] Furthermore, the New Mexico definition of "enterprise" includes *any* group of individuals and contains no limiting language.[31] Finally, the fact that the statute requires the finding of only

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21. *Id.*
22. *Id.* at 149-50, 767 P.2d at 388-89.
23. *Id.* at 146-47, 767 P.2d at 385-86.
24. *Id.* at 146, 767 P.2d at 385.
25. *See id.* at 146-49, 767 P.2d at 385-88.
26. *Id.* at 147, 767 P.2d at 386.
27. *Id.* The federal racketeering act is found at 18 U.S.C. §§ 1961-68 (1984).
28. *See* Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986); United States v. Bledsoe, 674 F.2d 647 (8th Cir.), *cert. denied sub nom.* Phillips v. United States, 459 U.S. 1040 (1982); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *see also* Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146 (D.N.J. 1983), *aff'd in part, rev'd in part*, 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).
29. *Hughes*, 108 N.M. at 149, 767 P.2d at 388 (citing United States v. Mazzei, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), *cert. denied sub nom.* Callanan v. United States, 475 U.S. 1098 (1986); United States v. Cagnina, 697 F.2d 915 (11th Cir.) *cert. denied*, 464 U.S. 856 (1983); United States v. Perholtz, 842 F.2d 343 (D.C. Cir.) *cert. denied sub nom.* Feldman v. United States, 109 S. Ct. 1164 (1989); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)).
30. *Hughes*, 108 N.M. at 149, 767 P.2d at 388 (citing N.M. STAT. ANN. § 30-42-2 (Repl. Pamp. 1989)).
31. *Id.* (citing N.M. STAT. ANN. § 30-42-3(C) (Repl. Pamp. 1989)) (emphasis added).

two predicate acts in order to trigger the penalty convinced the court that "highly organized and prolific criminal entities are not the only targets of the act."[32]

In *State v. Wynne*,[33] the court of appeals again faced an appeal of a conviction for conspiracy to commit racketeering arising from a drug manufacturing operation. The court of appeals affirmed the view stated in *Hughes*, without citing that case, holding that an "enterprise" may exist even when there is no evidence of an association above and beyond the acts which form the pattern of racketeering activity.[34]

B. Proof of "Enterprise"

In *Hughes*, the court also addressed the issue of whether the government's proof of the enterprise may overlap with proof of the pattern of racketeering activity.[35] The United States Supreme Court held in *United States v. Turkette*[36] that a conviction under RICO requires proof of both an enterprise and a pattern of racketeering activity. Some courts have interpreted this requirement to mean that the government must prove the existence of the enterprise without reference to the proof of the pattern of racketeering activity.[37] The court did not adopt this view in *Hughes*.[38]

The court stated that the government may prove an enterprise by showing that an association of persons possesses three qualities: a common purpose among the participants, organization, and continuity.[39] The court further stated that the relevant factors to be considered include the identity of the individuals, their knowledge of the relevant activities, the amount of planning required to carry out the predicate acts, the frequency of the acts, the time span between the acts, and the existence of an identifiable structure within the entity.[40]

The court stated that the government may rely on some or all of the same factors to prove the existence of an enterprise and a pattern of racketeering activity.[41] The court also stated that the proof of a pattern of racketeering activity does not necessarily prove the existence of an enterprise, but the inference may be drawn from proof of a pattern of racketeering activity in some cases.[42] The court held that in *Hughes* the jury could properly have inferred the existence of an enterprise:

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32. *Id.*

33. 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989).

34. *Id.* at 137, 767 P.2d at 376.

35. *Hughes*, 108 N.M. at 147-51, 767 P.2d at 386-90.

36. 452 U.S. 576, 583 (1981).

37. *E.g.*, United States v. Perholtz, 842 F.2d 343 (D.C. Cir.) *cert. denied sub nom.* Jackson v. United States, 109 S. Ct. 65 (1988); *but see* United States v. Riccobene, 709 F.2d 214 (3d Cir.), *cert. denied sub nom.* Cianeaglini v. United States, 464 U.S. 849 (1983); United States v. Griffin, 660 F.2d 996 (4th Cir. 1981), *cert. denied sub nom.* Garonzik v. United States, 454 U.S. 1156 (1982).

38. *Hughes*, 108 N.M. at 150, 767 P.2d at 389.

39. *Id.* (citing *Perholtz*, 842 F.2d 343).

40. *Id.*

41. *Id.*

42. *Id.*

> Here, the evidence demonstrated that the same four individuals were involved in the manufacturing process. They participated in the process at one- to two- week intervals, for a total of six or seven incidents of manufacturing methamphetamines. . . . [The operation required planning and special knowledge and "felt like" a business to at least one of the participants.] On these facts, we have no difficulty concluding that defendant was in the business of manufacturing and selling methamphetamines.[43]

C. Definition of "Proceeds"

Hughes was convicted of using the proceeds of racketeering activity in an enterprise contrary to section 30-42-4(A) of the Act.[44] The government argued that under the circumstances of the case stolen laboratory equipment, useful in manufacturing or distributing controlled substances, constituted "proceeds."[45] The court of appeals agreed that the evidence was sufficient to establish the "use or investment" of proceeds where the "proceeds" invested were stolen laboratory equipment rather than money. The court reasoned that since the statute refers to "use or investment," but does not explicitly limit its terms to money, the correct interpretation of "proceeds" is the broader one.[46]

D. Sentencing

Hughes argued that his conviction for the predicate offense of conspiracy to traffic merged with his conviction for conspiracy to racketeer.[47] The court declined, however, to consider whether the conviction for conspiracy to traffic was a lesser-included offense of Hughes' conviction for conspiracy to racketeer because Hughes had received concurrent sentences for the two convictions, thus obviating the double jeopardy issue.[48]

The court of appeals also examined the issue of merger in *State v. Wynne*.[49] The court found that Wynne's conviction for conspiracy to racketeer merged with her conviction for conspiracy to traffic by manufacture.[50] The court applied the rule, set out in *State v. DeMary*,[51] that whether an offense charged is an included offense of another offense charged must be determined in light of the facts of the particular case.[52]

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43. *Id.* at 150-51, 767 P.2d at 389-90.

44. *Id.* at 147, 767 P.2d at 386 (citing N.M. STAT. ANN. § 30-42-4(A) (Repl. Pamp. 1989)).

45. *Id.* Hughes conceded that there was evidence that proceeds of more than one act of drug manufacture were invested in later acts of manufacture. *Id.* Nevertheless, the jury instruction required the jury to find that the "proceeds" from the act of receiving stolen goods was invested in the "enterprise." *Id.*

46. *Id.*

47. *Id.* at 151, 767 P.2d at 390.

48. *Id.* (citing State v. Srader, 103 N.M. 205, 704 P.2d 459 (Ct. App. 1985)).

49. 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989).

50. *Id.* at 138, 767 P.2d at 377.

51. 99 N.M. 177, 655 P.2d 1021 (1982).

52. *Wynne*, 108 N.M. at 138, 767 P.2d at 377.

The trial court had instructed the jury that in order to prove Wynne guilty of conspiracy to racketeer, the government must have proved that she agreed to engage in an enterprise for the manufacture of methamphetamine as a pattern of racketeering activity.[53] In light of this instruction, the court held that the defendant's conviction for conspiracy to traffic by manufacture merged with her conviction for conspiracy to racketeer, and therefore the court ordered the sentence for conspiracy to traffic vacated.[54]

III. OTHER OFFENSES

During the survey period the New Mexico Supreme Court clarified the elements of the crime of holding or using an altered license plate.[55] The court of appeals examined the statutory elements of fraud and the offenses created by the Worthless Check Act and concluded that the statutes prohibit different offenses.[56] In addition, the court of appeals held that attempted trafficking by possession with intent to distribute constitutes a crime in New Mexico.[57] The court of appeals also discussed the quantum of evidence necessary to support the inference of "constructive possession" of contraband.[58] Finally, the court of appeals examined the entrapment defense for the first time since *Baca v. State*.[59]

A. Altered License Plate Jury Instruction

In *Ortiz v. State*[60] the supreme court reversed Ortiz' conviction for using an altered license plate[61] because the trial court failed to instruct the jury that in order to convict the jury must find that Ortiz knew that the plate was altered with fraudulent intent.[62] The court further held that the omission of the instruction was jurisdictional error, and therefore the error could be raised for the first time on appeal.[63]

The jury instruction given by the trial court read in part:

> For you to find the defendant guilty of holding or using an altered license plate . . . the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

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53. *Id.*

54. *Id.* In State v. Johnson the court of appeals held that cumulative sentences may be imposed for both racketeering and underlying predicate offenses. 105 N.M. 63, 70-71, 728 P.2d 473, 480-81 (Ct. App. 1986), *cert. denied*, 481 U.S. 1051 (1987). In *Wynne* the court distinguished *Johnson*, noting that *Wynne* involved conspiracy rather than the commission of substantive predicate offenses and that Wynne entered into only one agreement concerning the crimes charged. *Wynne*, 108 N.M. at 139, 767 P.2d at 378.

55. Ortiz v. State, 106 N.M. 695, 749 P.2d 80 (1988).

56. State v. Higgins, 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988).

57. State v. Curry, 107 N.M. 133, 753 P.2d 1321 (Ct. App.), *cert. denied*, 107 N.M. 132, 753 P.2d 1320 (1988).

58. State v. Brietag, 108 N.M. 368, 772 P.2d 898 (Ct. App. 1989).

59. State v. Rodriguez, 107 N.M. 611, 762 P.2d 898 (Ct. App.) *cert. denied*, 107 N.M. 546 (1988); Baca v. State, 106 N.M. 338, 742 P.2d 1043 (1987).

60. 106 N.M. 695, 749 P.2d 80 (1988).

61. N.M. STAT. ANN. § 66-8-3(D) (Repl. Pamp. 1987).

62. *Ortiz*, 106 N.M. at 696, 749 P.2d at 81.

63. *Id.* at 698, 749 P.2d at 83.

1. The defendant held or used a license plate which had been altered;
2. At the time he used or held the license plate, the defendant knew it had been altered. . . .[64]

The proffered instruction did not include the element that the defendant used the plate knowing that it had been altered with fraudulent intent.[65] The court held that since proof of every element is essential, it did not matter that Ortiz had not put his knowledge of the fraud at issue, nor that he did not object to the jury instructions at trial.[66]

B. Fraud and the Worthless Check Act

In *State v. Higgins*,[67] the court of appeals examined the statutory elements of fraud[68] and the offenses created by the Worthless Check Act ("the Act").[69] Higgins was convicted of defrauding two financial institutions by creating a "false balance" in each institution by setting up an account with non-existent funds and then writing bad checks on "starter checks" issued by the institution.[70] The court of appeals observed that in order to convict Higgins of fraud, the jury was required to find that Higgins obtained property from the financial institution, that the property belonged to someone other than Higgins, and that the property had a market value of over $2,500 in the case of the first count and $100 in the case of the second.[71]

The court struck down these two convictions, reasoning that there was no evidence that Higgins obtained anything of value from the financial institutions.[72] There was no evidence that the "starter checks" had any intrinsic value.[73] Furthermore, Higgins made no withdrawals from either financial institution, nor did he receive any credit from either institution.[74]

Higgins also argued that the Worthless Check Act deals with subject matter identical to that of the fraud statute and that therefore he should

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64. *Id.* at 697, 749 P.2d at 82.
65. *Id.*
66. *Id.* at 698, 749 P.2d at 83. Justice Stowers dissented. Stowers believed the jury instruction was sufficient, as did the government and the majority in the court of appeals. Because there is no legal way provided by statute or otherwise to alter a license plate, Stowers contended "that the very definition of alter, as used in a legal context presumes an intent to defraud." *Id.* (Stowers, J., dissenting).
67. 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988).
68. *See* 1979 N.M. Laws ch. 119, § 1 (codified at N.M. STAT. ANN. § 30-16-6 (Repl. Pamp. 1984); amended by 1987 N.M. Laws ch. 121, § 2 (codified at N.M. STAT ANN. § 30-16-6 (Cum. Supp. 1989).
69. The Worthless Check Act is contained in N.M. STAT. ANN. §§ 30-36-1 to -9 (Repl. Pamp. 1987).
70. *Higgins*, 107 N.M. at 619, 762 P.2d at 906.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

have been prosecuted only under the Act, as the more specific statute dealing with identical subject matter.[75]

In reaching its holding that the Act was not an exception to the fraud statute, the court examined the language of each statute and the elements of each crime to determine if the statutes require the same proof to convict and whether the statutes condemn the same offenses.[76] The court also considered the purposes and policies of the statutes.[77]

The court observed that while both crimes require a specific intent to defraud, only fraud requires a showing that the victim relied on the misrepresentation, proof that the property obtained belonged to someone other than the defendant, and proof of the market value of the property obtained by the defendant.[78] Conviction under the Act, but not conviction of fraud, requires a showing that the defendant knew he could not cover the check when he issued it, as well as proof of the value of the check—that is to say, the loss to the victim.[79] Finally, the court held that the legislative purpose of the fraud statute is to protect people from being defrauded of their property, whereas the purpose of the Worthless Check Act is to prevent mischief to commerce.[80]

C. Attempted Trafficking by Possession with Intent to Distribute

In *State v. Curry*,[81] the court of appeals held that attempted trafficking by possession with intent to distribute constitutes a crime in New Mexico. Curry's neighbor intercepted a Federal Express shipment addressed to Curry which contained a substantial amount of cocaine.[82] Curry tried several times to recover the package from the neighbor, but he never possessed the drugs.[83] The court held that the jury could infer an intent to distribute from the amount of the drugs the defendant sought to possess.[84] The jury could also infer an intent to possess from the actions of the defendant.[85] Thus the government met its burden of proving that

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75. *Id.* at 619-20, 762 P.2d at 906-07 (citing State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936) (when a general statute and a specific statute cover the same subject matter, in a criminal case the defendant must be tried under the specific statute)).

76. *Id.* at 620, 762 P.2d at 907 (citing State v. Rhea, 94 N.M. 168, 608 P.2d 144 (1980); City of Farmington v. Wilkins, 106 N.M. 188, 740 P.2d 1172 (Ct. App.), *cert. denied*, 106 N.M. 174, 740 P.2d 1158 (1987); State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975)).

77. *Id.* (citing State v. Cuevas, 94 N.M. 792, 617 P.2d 1307 (1980), *overruled on other grounds*, State v. Pitts, 103 N.M. 778, 714 P.2d 582 (1986)).

78. *Id.* at 621, 762 P.2d at 908.

79. *Id.*

80. *Id.*

81. 107 N.M. 133, 753 P.2d 1321 (Ct. App.), *cert. denied*, 107 N.M. 132, 753 P.2d 1320 (1988).

82. *Id.* The courier entrusted the package to the neighbor because Curry was not at home. *Id.* at 133, 753 P.2d at 1321. The courier left a delivery notice on Curry's door, which the neighbor removed when her young daughter discovered a white powder in the package. *Id.*

83. *Id.* at 134, 753 P.2d at 1322. The neighbor had turned the package over to the police. *Id.* Curry called Federal Express and learned that the package had been delivered to his neighbor, who then frustrated Curry's repeated importunings by denying that she had the package. *Id.*

84. *Id.* (citing State v. Donaldson, 100 N.M. 111, 666 P.2d 1258 (Ct. App.), *cert. denied*, 100 N.M. 53, 665 P.2d 809 (1983); State v. Quintana, 87 N.M. 414, 534 P.2d 1126 (Ct. App.), *cert. denied*, 423 U.S. 832 (1975)).

85. *Id.*

the defendant attempted to possess cocaine with the intent to distribute the drug.[86]

Curry argued that it was impossible to attempt to have an intent, but the court rejected this argument.[87] The court observed that the state supreme court has applied the general attempt statute[88] to the offense of trafficking cocaine by distribution.[89] The court concluded that "[s]ince defendant can intend to distribute a controlled substance without actually possessing the substance, we see no reason why the general attempt statute should not be applied to the offense of trafficking by possession with intent to distribute."[90]

D. "Constructive Possession" of Contraband

In *State v. Brietag*,[91] the court of appeals reversed a conviction for possession of contraband based on a theory of "constructive possession" because of insufficient evidence.

The police executed a search warrant for a house rented by Brietag.[92] Brietag was not present when the warrant was executed, and the evidence suggested that he had only visited the house sporadically.[93] Seven or eight persons were present in the house when the police searched it, and many people had access to the house.[94] The search revealed contraband in a bedroom which contained many personal items.[95] While some of these items belonged to Brietag, many others may not have belonged to him.[96]

The court held that the evidence was insufficient as a matter of law to support the inference that Brietag "constructively possessed" the contraband.[97] Constructive possession exists when the defendant has both knowledge of the presence of the contraband and control over it.[98] Where the defendant is not in exclusive possession of the premises—as in the instant case—the jury can only infer constructive possession from incriminating statements or other circumstances tending to support the inference.[99]

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86. *Id.*
87. *Id.*
88. N.M. STAT. ANN. § 30-28-1 (Repl. Pamp. 1984). The statute provides that an "[a]ttempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." *Id.*
89. *Curry*, 107 N.M. at 135, 753 P.2d at 1323 (citing State v. Lopez, 100 N.M. 291, 669 P.2d 1086 (1983) (defendant could attempt to distribute cocaine even when distribution was rendered impossible because the substance distributed was not, in fact, cocaine)).
90. *Id.*
91. 108 N.M. 368, 772 P.2d 898 (Ct. App. 1989).
92. *Id.*
93. *Id.* at 369, 772 P.2d at 899.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 372, 772 P.2d at 902.
98. *Id.* at 370, 772 P.2d at 900 (citing State v. Montoya, 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973)).
99. *Id.* (citing State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App. 1977); State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974)).

Because Brietag made no incriminating statements, the issue facing the court turned on the sufficiency of evidence of incriminating circumstances.[100] The contraband was found in close proximity not only to Brietag's personal belongings, but also to the belongings of several other people.[101] Because several people occupied the bedroom, there was no "rational connection between the location of the drugs and defendant's probable knowledge and control of them."[102]

The court characterized as "significant" the fact that Brietag was absent from the house when the search took place.[103] In otherwise similar circumstances, therefore, the court might allow the jury to infer constructive possession if the defendant were on the premises when the warrant was executed.

E. The Entrapment Defense

In *State v. Rodriguez*,[104] the court of appeals held that to claim entrapment the defendant cannot deny that the underlying act took place.[105] The defendant need not actually testify if other evidence supports entrapment.[106] However, the defense is not available to the defendant who denies committing the offense because its invocation necessarily involves the commission of at least some elements of the offense.[107]

At trial, Rodriguez initially declined to take the stand.[108] The government offered the testimony of police officers who had engaged the services of Rodriguez as a police informant.[109] The officers testified that they had instructed Rodriguez to help the police set up drug deals.[110] An undercover agent then testified that Rodriguez had sold him imitation controlled substances.[111] Rodriguez was unaware that the man was an undercover agent.[112]

The court of appeals held that this testimony, standing alone, was insufficient to allow a jury instruction on the defense of entrapment.[113]

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100. *Id.*

101. *Id.* The court noted that courts have allowed the inference of constructive possession where drugs were found in close proximity to the defendant's personal belongings (citing Gary v. State, 473 So. 2d 604 (Ala. Crim. App. 1985) and People v. Richardson, 139 Mich. App. 622, 362 N.W.2d 853 (1984)).

102. *Brietag*, 108 N.M. at 370-71, 772 P.2d at 900-01.

103. *Id.* at 371, 772 P.2d at 901.

104. 107 N.M. 611, 762 P.2d 898 (Ct. App.), *cert. denied*, 107 N.M. 546, 761 P.2d 424 (1988).

105. *Id.* at 616, 762 P.2d at 903 (citing United States v. Mabry, 809 F.2d 671 (10th Cir.), *cert. denied*, 484 U.S. 874 (1987); State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968)).

106. *Id.* (citing *Mabry*, 809 F.2d 671; State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968)). Evidence of entrapment requires showing either lack of predisposition to commit the crime charged or that the police "exceeded the proper standards of proper investigation." Baca v. State, 106 N.M. 338, 341, 742 P.2d 1043, 1046 (1987).

107. *Rodriguez*, 107 N.M. at 616, 762 P.2d at 903 (citing *Mabry*, 809 F.2d 671; *Garcia*, 79 N.M. 367, 443 P.2d 860).

108. *Id.* at 613, 762 P.2d at 900.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 616, 762 P.2d at 903.

There was no evidence that Rodriguez was subject to undue persuasion or enticement to commit the offenses charged.[114] The court relied on *State v. Fiechter*[115] and Uniform Jury Instruction (Criminal) 14-5160[116] for the proposition that "[e]ntrapment requires a showing that a law enforcement officer initiated a criminal act or used undue persuasion or enticement in order to induce the defendant to commit a crime and that, without such conduct, the defendant would not have committed the crime."[117]

Rodriguez argued that *Baca v. State*[118] controlled and that under the *Baca* holding he had been entrapped.[119] *Baca* expanded the defense of entrapment in New Mexico by providing that a defendant may assert the defense of entrapment by showing either lack of predisposition to commit the crime for which he is charged[120] or that the police exceeded the standards of proper investigation.[121] In the instant case, the court held that the facts were distinguishable from those of *Baca*—without saying how—and held that the instant case did not fall within the modified prospective application of *Baca*.[122] Thus, *Rodriguez* does not shed any light on how courts should proceed under the new *Baca* entrapment standard.

IV. DRIVING WHILE INTOXICATED (DWI) OR WHILE UNDER THE INFLUENCE (DUI)

During the survey period defendants raised several challenges to drunk driving laws and the procedure involved in arrest and prosecution of drunk drivers. This article has therefore grouped these cases together.[123]

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114. *Id.*

115. 89 N.M. 74, 547 P.2d 557 (1976).

116. The jury instruction provides:

> Evidence has been presented that the defendant was induced to commit the crime by law enforcement officers or their agents. For you to find the defendant guilty, the state must prove to your satisfaction beyond a reasonable doubt that the defendant was already willing to commit the crime and that the law enforcement officials or their agents merely gave him the opportunity.

SUP. CT. RULES ANN. 14-5160 (Recomp. 1986).

117. *Rodriguez*, 107 N.M. at 616, 762 P.2d at 903.

118. 106 N.M. 338, 742 P.2d 1043.

119. *Rodriguez*, 107 N.M. at 616, 762 P.2d at 903 (citing *Baca*, 106 N.M. at 339, 742 P.2d at 1044).

120. This is essentially the rule stated in *Fiechter*, 89 N.M. at 77, 547 P.2d at 560.

121. *Baca*, 106 N.M. at 339, 742 P.2d at 1044. For a full discussion of *Baca*, see Note, *New Mexico Expands the Entrapment Defense*: Baca v. State, 20 N.M.L. REV. 135 (1990).

122. *Rodriguez*, 107 N.M. at 616-17, 762 P.2d at 903-04.

123. Not covered in the text of this survey is State ex rel. Taxation and Motor Vehicle Dep't v. Van Ruiten, 107 N.M. 536, 760 P.2d 1302 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988), in which the court of appeals considered the propriety of a police investigatory stop of a vehicle prompted by an anonymous and uncorroborated tip. The stop led to the driver's refusal to take a blood-alcohol test and ultimately to the appealed-from administrative hearing in which defendant lost his driver's license. *Id.* at 537-38, 760 P.2d 1303-04. The court analyzed the case using traditional fourth amendment jurisprudence and upheld the stop and subsequent test. *Id.* at 538-39, 760 P.2d at 1304-05.

Two other DWI cases, State v. Lucero, 108 N.M. 548, 775 P.2d 750 (Ct. App.), *cert. denied*, 108 N.M. 433, 773 P.2d 1240 (1989), and State v. Bishop, 108 N.M. 105, 766 P.2d 1339 (Ct. App. 1988), interpreted the six-month speedy trial rule. For a discussion of *Lucero* and *Bishop*, see this issue, Survey of Criminal Procedure, notes 59-87 and accompanying text.

In *Meyer v. Jones*,[124] the supreme court rejected an equal protection challenge to the Bernalillo County Metropolitan Court practice of denying jury trials for first DWI offenses. In *Incorporated County of Los Alamos v. Montoya*,[125] the court of appeals rejected an equal protection challenge to a county DWI ordinance. The *Montoya* court also rejected an attack on the ordinance on the ground that the ordinance was inconsistent with the state DWI statute. In *State v. Wyrostek*,[126] the court of appeals interpreted the Implied Consent Act. The court of appeals also evaluated statutory limitations on blood-alcohol testing procedure in *State v. Wiberg*.[127]

A. Equal Protection and the Right to a Jury

In *Meyer v. Jones*,[128] the supreme court held that a statute requiring that certain offenses be tried by a judge in Bernalillo County Metropolitan Court does not deny defendants equal protection of the law. The statute does not violate equal protection even though the defendants would have a right to a jury trial if tried for the same offenses in magistrate courts elsewhere in the state.[129]

Meyer challenged his conviction for DWI during a mandatory bench trial in Bernalillo County.[130] Metropolitan court judges are statutorily required to try cases in which the penalty does not exceed ninety days imprisonment as bench trials.[131] Upon a petition for a writ of mandamus, the district court held that Meyer was denied equal protection of the law when the metropolitan court denied his request for a jury trial.[132]

In support of Meyer's equal protection claim, the district court pointed out that a metropolitan court is by statute a magistrate court for all purposes of state law and that the right to trial by jury exists in all magistrate court proceedings.[133] Because he was deprived of a jury in Bernalillo County, but would have had a jury trial elsewhere in the state, Meyer argued, and the district court agreed, that he was denied equal protection.[134]

The supreme court first noted that the distinction between serious and petty offenses in the right-to-a-jury-trial context turns on the length of

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124. 106 N.M. 708, 749 P.2d 93 (1988).
125. 108 N.M. 361, 772 P.2d 891 (Ct. App.), *cert. denied*, 108 N.M. 273, 771 P.2d 981 (1989).
126. 108 N.M. 140, 767 P.2d 379 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989).
127. 107 N.M. 152, 754 P.2d 529 (Ct. App.), *cert. denied*, 107 N.M. 106, 753 P.2d 352 (1988).
128. 106 N.M. 708, 749 P.2d 93.
129. *Id.* at 713, 749 P.2d at 98.
130. *Id.* at 709, 749 P.2d at 94.
131. N.M. STAT. ANN. § 34-8A-5(B)(1) (Repl. Pamp. 1981).
132. *Meyer*, 106 N.M. at 709, 749 P.2d at 94.
133. *See id.* (citing N.M. STAT. ANN. § 34-8A-2 (Repl. Pamp. 1981) (metropolitan court) and § 35-8-1 (Supp. 1988) (right to a jury trial)).
134. *See id.* at 709-10, 749 P.2d at 94-95.

imprisonment, not on the length of probation.[135] The court examined several United States Supreme Court cases and concluded that the penalty available to the trial judge in the instant case did not implicate the constitutional right to a jury trial.[136]

Turning to Meyer's state and federal equal protection claims, the supreme court noted that in New Mexico the standard for reviewing state equal protection claims is the same as that for reviewing federal claims.[137] The court therefore applied standards employed by the United States Supreme Court.[138] Because the case did not implicate the fundamental right to a jury trial[139] and did not involve a suspect classification,[140] the court held that it was only required to decide whether the statute had a rational basis.[141]

Although not bound by federal precedent in this matter,[142] the court found federal decisions regarding geographic distinctions "worthy of consideration" in scrutinizing the challenged statute for a rational basis.[143] The court observed that the United States Supreme Court has said that the equal protection clause protects "equality between persons as such, rather than between areas,"[144] and that, under the equal protection clause, "territorial uniformity is not a constitutional prerequisite."[145] The court further observed that "[a] body of United States Supreme Court cases supports the proposition that in matters concerning concentrations of population, a state government may enact in one part of the state 'substantive restrictions and variations in [criminal] procedure that would differ from those elsewhere in the state.'"[146] The court reasoned that as long as the legislation treats equally all people under similar circumstances within a given section of a state, the legislation does not violate the equal protection clause of the fourteenth amendment.[147]

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135. *Id.* at 710, 749 P.2d at 95. The statute under which the defendant was charged provided that the penalty for a first conviction for DWI is confinement of at least 30 but not more than 90 days, or a fine, or both. In addition, conviction may carry a probationary sentence exceeding ninety days but no more than three years if any part of the sentence or fine is suspended. N.M. STAT. ANN. § 66-8-102(D) (Repl. Pamp. 1987).

136. *Meyer*, 106 N.M. at 710, 749 P.2d at 95 (citing Frank v. United States, 395 U.S. 147, 151-52 (1969)).

137. *Id.*

138. *Id.* (citing Garcia v. Albuquerque Pub. Schools Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), *cert. quashed*, 95 N.M. 426, 622 P.2d 1046 (1981)).

139. *See supra* notes 133 and 134.

140. The *Meyer* court did not state the basis for this assertion. *See Meyer*, 106 N.M. at 711, 749 P.2d at 96. *Cf.* Inc. County of Los Alamos v. Montoya, 108 N.M. 361, 772 P.2d 891 (Ct. App.), *cert. denied*, 108 N.M. 273, 771 P.2d 981 (1989); *see infra* at notes 149-80 and accompanying text.

141. *Meyer*, 106 N.M. at 711, 749 P.2d at 96.

142. The district court's decision was based on N.M. CONST. art. II, § 18 as well as the federal equal protection clause. *Id.*

143. *Id.*

144. *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 427 (1961)).

145. *Id.* (citing *McGowan*, 366 U.S. at 427; Missouri v. Lewis, 101 U.S. 22 (1879)).

146. *Id.* at 712, 749 P.2d at 97 (quoting Salsburg v. Maryland, 346 U.S. 545, 553 (1954); and citing North v. Russell, 427 U.S. 328, 338-39 (1976) and Hayes v. Missouri, 120 U.S. 68 (1887)).

147. *Id.* (citing *North*, 427 U.S. at 338, and *Lewis*, 101 U.S. at 31).

The court concluded that the statute in question was supported by a rational legislative purpose:

> [W]e are persuaded that, because of the legislature's requirement that magistrate judges in metropolitan court be attorneys and magistrates elsewhere throughout the state need not meet that qualification, the disallowance of juries in metropolitan court is not arbitrary, unreasonable nor unrelated to a legitimate legislative purpose. All persons within Bernalillo County are treated equally, and the classification may be justified on grounds of judicial economy, as well as on the advanced judicial qualifications of the magistrates presiding over those cases.[148]

B. Equal Protection and Stricter County Ordinance

In *Incorporated County of Los Alamos v. Montoya*,[149] the court of appeals upheld several DWI convictions under a Los Alamos County municipal ordinance.[150] The court held that the ordinance, which required a minimum sentence more severe than that provided by the state DWI statute,[151] was constitutional.[152] The defendants had argued that they were denied equal protection of the law because they were punished more harshly under the county ordinance than they would have been under the state statute.[153]

The defendants claimed that the existence of two laws, the state statute and the county ordinance, penalizing the same conduct, allowed the charging authorities unconstitutional leeway to subject one person to a

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148. *Id.* at 713, 749 P.2d at 98.

149. 108 N.M. 361, 772 P.2d 891 (Ct. App.), *cert. denied*, 108 N.M. 273, 771 P.2d 981 (1989).

150. LOS ALAMOS COUNTY, N.M. CODE § 10.24.140(C) (1986). The ordinance requires first offenders whose blood alcohol level is greater than 0.15 % and who are convicted under the ordinance to serve a mandatory jail term of 72 hours. *Montoya*, 108 N.M. at 363, 772 P.2d at 893.

151. N.M. STAT. ANN. § 66-8-102 (Repl. Pamp. 1987) provides for fines or jail sentences which may be suspended or deferred for first offenders whose blood alcohol level is greater than 0.10 %.

152. 108 N.M. at 368, 772 P.2d at 898. In an additional holding not discussed below, the court rejected an argument that the municipal court lacked subject matter jurisdiction. While the state DWI statute gives concurrent jurisdiction to magistrate and district courts in cases brought under the statute, it also provides that "this section does not affect the authority of a municipality under a proper ordinance to prescribe penalties for driving while under the influence of intoxicating liquors or drugs." *Id.* at 364, 772 P.2d at 894 (quoting N.M. STAT. ANN. § 66-8-102(F) (Repl. Pamp. 1987)).

The court also rejected an argument that the municipal ordinance, which provides for mandatory jail sentences for first offenders, conflicted with the state statute, which grants the trial judge the discretion to defer the sentence on the condition that the driver attend a driver rehabilitation program. *Id.* at 365, 772 P.2d at 895. The court noted that the maximum penalty imposed under the ordinance does not exceed that prescribed under the statute. *Id.*

In determining that the county ordinance complemented the state law rather than conflicted with it, the court applied the tests enunciated in City of Hobbs v. Biswell, 81 N.M. 778, 473 P.2d 917 (Ct. App. 1970). *Montoya*, 108 N.M. at 365, 772 P.2d at 895. In *Montoya*, the court restated the tests as "whether the stricter requirements of the ordinance conflict with state law, and whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits." *Id.*

153. *See id.* at 365-67, 772 P.2d at 895-97.

greater punishment than another who committed an identical act.[154] The defendants based their argument on *State v. Chavez*.[155] In *Chavez* the New Mexico Supreme Court stated in dictum, "We no longer subscribe to [the] view which would permit the law enforcement authorities to subject one person to the possibility of a greater punishment than another who has committed an identical act."[156] To do so, according to the *Chavez* court, "would do violence to the equal protection clauses of our state and federal constitutions."[157]

The State argued that the United States Supreme Court overruled *Chavez* in *United States v. Batchelder*.[158] In *Batchelder*, the Supreme Court held that the federal equal protection clause does not forbid duplicative federal criminal statutes unless the defendant can show a discriminatory basis for prosecution under one rather than the other statute.[159] The court of appeals did not find *Batchelder* to be dispositive of *Montoya*.[160] *Batchelder* involved the application of overlapping statutes within the same jurisdiction.[161] The court stated that when, as in *Montoya*, different jurisdictions have enacted overlapping or identical legislation, the appropriate equal protection analysis is threefold: the court must determine 1) whether the challenged ordinance has a rational basis; 2) whether the challenged ordinance impermissibly punishes offenders more severely than they would be punished elsewhere in the state; and 3) whether defendants are denied equal protection where enforcement officers exercise discretion to charge under one or the other overlapping law.[162]

The court first held that the ordinance had a rational basis.[163] The court gave three reasons why the ordinance was not discriminatory on its face. First, the ordinance treated similarly all persons with blood-

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154. *Id.* at 365-66, 772 P.2d at 895-96.

155. 77 N.M. 79, 419 P.2d 456 (1966).

156. *Montoya*, 108 N.M. at 366, 772 P.2d at 896 (quoting *Chavez*, 77 N.M. at 82, 419 P.2d at 459).

157. *Id.* (quoting *Chavez*, 77 N.M. at 82, 419 P.2d at 459).

158. 422 U.S. 114, 123-25 (1979).

159. *Id.* at 125. In *Montoya*, the court noted that a majority of jurisdictions have followed *Batchelder*. 108 N.M. at 366, 772 P.2d at 896 (citing Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985); Crews v. State, 366 So. 2d 117 (Fla. Dist. Ct. App. 1979); State v. Pickering, 462 A.2d 1151 (Me. 1983); State v. Secrest, 331 N.W.2d 580 (S.D.), *dismissed by* 464 U.S. 802 (1983); State v. Cissell, 127 Wis. 2d 205, 378 N.W.2d 691 (1985), *cert. denied*, 475 U.S. 1126 (1986)). The court also noted that a minority of jurisdictions have not adopted the standard. 108 N.M. at 366, 772 P.2d at 896 (citing People v. Mumaugh, 644 P.2d 299 (Colo. 1982) (en banc); People v. Estrada, 198 Colo. 188, 601 P.2d 619 (1979) (en banc); State v. Jessup, 31 Wash. App. 304, 641 P.2d 1185 (1982)).

In *Montoya*, the court noted that City of Klamath Falls v. Winters, 289 Or. 757, 619 P.2d 217 (1980), overruled State v. Pirkey, 203 Or. 697, 281 P.2d 698 (1955). *Pirkey* was cited by the New Mexico Supreme Court in *Chavez*. *Montoya*, 108 N.M. at 366, 772 P.2d at 896.

160. *Montoya*, 108 N.M. at 366-67, 772 P.2d at 896-97. The court noted that it was compelled to follow the precedent of the New Mexico Supreme Court, regardless of whether a United States Supreme Court decision seemed to the contrary. *Id* at 366, 772 P.2d at 896 (citing State v. Manzanares, 100 N.M. 621, 674 P.2d 511 (1983), *cert. denied*, 471 U.S. 1057 (1985)).

161. *Id.* at 366-67, 772 P.2d at 896-97 (citing State v. Pickering, 462 A.2d 1151 (Me. 1983); *but see* State v. Cissell, 127 Wis. 2d 205, 378 N.W. 2d 691 (1985), *cert. denied*, 475 U.S. 1126 (1986)).

162. *Id.* at 367, 772 P.2d at 897.

163. *Id.*

alcohol levels of 0.15 percent or more.[164] Second, the legislature provided for mandatory jail time for a second DWI offense under the state statute.[165] And third, the class of intoxicated drivers is not a suspect class for equal protection purposes.[166]

The court then stated that "territorial uniformity is not a constitutional prerequisite."[167] Therefore, the defendants were not denied equal protection because they were punished more severely under the ordinance than they would have been elsewhere.[168] The court supplied no instance when a local ordinance would fail this second prong of the test for overlapping statutes.

Finally, the court examined the issue of whether the existence of overlapping laws improperly allowed the government discretion to charge defendants under either a harsh or a more lenient law.[169] The court first held that the defendants were not denied equal protection as a matter of federal constitutional law, because the defendants did not demonstrate that the government chose to prosecute them under the stricter statute for unconstitutional reasons.[170] Next, the court held that the defendants did not have standing to raise a state constitutional claim, because the record failed to demonstrate that the ordinance as applied against the defendants violated the defendants' constitutional rights.[171]

The defendants conceded that county law enforcement officers charge all offenders under the local ordinance rather than the state statute.[172] Although the officers have discretion whether to cite offenders into magistrate or municipal court, the two courts have concurrent jurisdiction over the ordinance.[173] Therefore there was no discrimination, and defendants had no standing to claim a *Chavez* violation because no state official exercised discretion whether to charge a defendant under the local ordinance or the state statute.[174]

After *Montoya*, it appears that if a defendant proves that he was subject to "the possibility of a greater punishment than another who has committed an identical act,"[175] the court of appeals would dismiss the charges under *Chavez*, provided that the defendant shows an actual exercise of discretion by a law enforcement officer.[176] Furthermore, the court noted in *Montoya* that the supreme court might not overrule *Chavez*

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164. *Id.* (citing Meyer v. Jones, 106 N.M. 708, 749 P.2d 93 (1988) (discussed at *supra* notes 128-47 and accompanying text)).
165. *Id.* (citing N.M. STAT. ANN. § 66-8-102(E) (Repl. Pamp. 1987)).
166. *Id.* (citing *Meyer*, 106 N.M. 708, 749 P.2d 93).
167. *Id.* (citing *Meyer*, 106 N.M. 708, 749 P.2d 93).
168. *Id.*
169. *Id.*
170. *Id.* (citing United States v. Batchelder, 442 U.S. 114 (1979)).
171. *Id.* (citing State v. Casteneda, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982)).
172. *Id.*
173. *Id.* (citing N.M. STAT. ANN. § 35-3-4(A) (Supp. 1988)).
174. *See id.* at 367, 772 P.2d at 897.
175. *Chavez*, 77 N.M. at 81, 419 P.2d at 458.
176. *See Montoya*, 108 N.M. at 367, 772 P.2d at 897.

even if it should reconsider that case in light of *Batchelder*.[177] The supreme court could conclude that *Batchelder* applies only to overlapping statutes, and not to identical statutes.[178] Second, and more important, the state's supreme court may interpret the equal protection clause of the New Mexico Constitution[179] to be broader than that of the United States Constitution.[180]

C. Implied Consent and the Arrest of an Unconscious Suspect

In *State v. Wyrostek*,[181] the court of appeals held that the Implied Consent Act[182] does not require that an unconscious suspect be formally arrested before being subjected to a blood-alcohol test. The government appealed from the trial court's suppression of the results of a blood-alcohol test performed on the defendant while the defendant was unconscious.[183] Wyrostek, who remained unconscious from the time the officer arrived at the scene of the accident until after the blood test was performed at a hospital, was not formally arrested until his arraignment.[184]

Section 66-8-107 mandates that motorists consent to a blood test "*if arrested* for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or any drug."[185]

The court of appeals reversed the trial court, holding that to read the statute literally and to require the arrest of an unconscious person would be to require a useless act.[186] Moreover, the court noted that in New Mexico a person is deemed to be arrested when his freedom of action is restricted by a police officer and he is subject to the control of the officer.[187] Since an unconscious person's freedom of action is already restricted, reasoned the court, it would be useless to require a formal arrest under such circumstances.[188]

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177. *See id.* at 366-67, 772 P.2d at 896-97.

178. *See id. See also* State v. Pickering, 462 A.2d 1151 (Me. 1983); *but see* State v. Cissell, 127 Wis. 2d 205, 378 N.W.2d 691 (1985), *cert. denied*, 475 U.S. 1126 (1986).

179. N.M. CONST. art. II, § 18.

180. *See* Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 469, 595 P.2d 592, 598, 156 Cal. Rptr. 14, 20-21 (1979); Madison v. Yunker, 589 P.2d 126, 129 (Mont. 1978). The courts have frequently analyzed both state and federal equal protection clauses when considering equal protection challenges. *See, e.g.*, Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 15-21, 485 P.2d 529, 538-42, 95 Cal. Rptr. 329, 338-42 (1971); State ex rel. Olson v. Maxwell, 259 N.W.2d 621, 627 (N.D. 1977); Hanson v. Hutt, 83 Wash. 2d 195, 199, 517 P.2d 599, 603 (1973). *But cf. Meyer*, 106 N.M. at 710, 749 P.2d at 95 and *supra* note 129 and accompanying text.

181. 108 N.M. 140, 767 P.2d 379 (Ct. App. 1988), *cert. denied*, 108 N.M. 115, 767 P.2d 354 (1989).

182. N.M. STAT. ANN. §§ 66-8-105 to -112 (Repl. Pamp. 1987).

183. *Id.*

184. *Id.* at 141, 767 P.2d at 380.

185. N.M. STAT. ANN. § 66-8-107 (Repl. Pamp. 1987) (emphasis added).

186. *Wyrostek*, 108 N.M. at 142, 767 P.2d at 381.

187. *Id.* (citing Boone v. State, 105 N.M. 223, 227, 731 P.2d 366, 370 (1986) (citing State v. Frazier, 88 N.M. 103, 105, 537 P.2d 711, 713 (Ct. App. 1975))).

188. *Id.*

Wyrostek argued that the arrest requirement forces the police to focus on probable cause prior to intruding on the suspect's body.[189] The court noted, however, that the Act has an independent, built-in probable cause requirement and held that this vitiated the defendant's argument.[190]

D. Blood-Alcohol Testing

In *State v. Wiberg*,[191] the court of appeals held that a nurse who performs a blood-alcohol test need not be employed by a physician or a hospital. Wiberg was convicted of driving while under the influence and vehicular homicide, great bodily harm by vehicle, and reckless driving, all while under the influence of alcohol.[192] He appealed the trial court's refusal to suppress the evidence of a blood-alcohol test performed on him by a licensed practical nurse employed by a temporary services agency under contract with the police to test blood.[193] Wiberg argued that the test as performed was illegal under the New Mexico statute.[194]

The relevant statutory language provides: "Only a physician, licensed professional or practical nurse or laboratory technician or technologist employed by a hospital or physician shall withdraw blood from any person in the performance of a blood-alcohol test."[195] Wiberg argued that this language describes two classes of persons and that the employment clause applies to all persons listed after the comma.[196] He argued further that read this way, the statute guarantees that nurses and technicians drawing samples will be adequately trained to perform the task reliably.[197] Finally, Wiberg argued that New Mexico case law required that the language of the statute be strictly construed because the purpose of the statute is penal.[198]

The court of appeals applied the "last antecedent doctrine"[199] and held that the employment clause applies to "technologist," but not to the more remote terms, thereby interpreting the statute so as to find no illegality under the facts.[200] The court reasoned that Wiberg's interpretation of the statute would thwart the "salutary and necessary" purposes of the legislature.[201] The court also noted that the legislature has already

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189. *Id.*

190. *Id.* (citing N.M. STAT. ANN. § 66-8-107(B) (Repl. Pamp. 1987)(a test of blood or breath shall be administered at the direction of an enforcement officer who has reasonable grounds for believing the person has been driving under the influence of alcohol or drugs)).

191. 107 N.M. 152, 754 P.2d 529 (Ct. App.), *cert. denied*, 107 N.M. 106, 753 P.2d 352 (1988).

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

193. *Id.*

194. *Id.* at 154, 754 P.2d at 531 (citing N.M. STAT. ANN. § 66-8-103 (Repl. Pamp. 1987)).

195. N.M. STAT. ANN. § 66-8-103 (Repl. Pamp. 1987).

196. *Wiberg*, 107 N.M. at 154, 754 P.2d at 531.

197. *Id.*

198. *Id.* at 156, 754 P.2d at 533 (citing State v. Garcia, 91 N.M. 664, 579 P.2d 790 (1978)).

199. *Id.* at 155, 754 P.2d at 532 (citing In re Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941)). The court restated the doctrine: "[R]elative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." *Id.*

200. *Id.*

201. *Id.*

provided schemes to assure that nurses are well trained.[202] Finally, the court observed that section 103 does not itself punish offenses against the state and is not a penal statute requiring strict construction.[203]

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202. *Id.* (citing N.M. STAT. ANN. §§ 61-3-13 to -14 (Repl. Pamp. 1986) (licensing requirements for professional nurses)).

203. *Id.* at 156, 754 P.2d at 533 (citing Dennison v. Tocker, 55 N.M. 184, 229 P.2d 285 (1951) (the purpose of a penal statute is to punish offenses against the state)).