Constitution
of the
State of New Mexico

ADOPTED JANUARY 21, 1911

PREAMBLE

We, the people of New Mexico, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a state government, do ordain and establish this constitution.

ARTICLE I
Name and Boundaries

The name of this state is New Mexico, and its boundaries are as follows:

Beginning at the point where the thirty-seventh parallel of north latitude intersects the one hundred and third meridian west from Greenwich; thence along said one hundred and third meridian to the thirty-second parallel of north latitude; thence along said thirty-second parallel to the Rio Grande, also known as the Rio Bravo del Norte, as it existed on the ninth day of September, one thousand eight hundred and fifty; thence, following the main channel of said river, as it existed on the ninth day of September, one thousand eight hundred and fifty, to the parallel of thirty-one degrees forty-seven minutes north latitude; thence west one hundred miles to a point; thence south to the parallel of thirty-one degrees twenty minutes north latitude; thence along said parallel of thirty-one degrees twenty minutes, to the thirty-second meridian of longitude west from Washington; thence along said thirty-second meridian to the thirty-seventh parallel of north latitude; thence along said thirty-seventh parallel to the point of beginning.

ARTICLE II
Bill of Rights

Section 1. [Supreme law of the land.]

The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.

ANNOTATIONS

Comparable provisions. — Utah Const., art. I, § 3.

Actions under contracts clause of United States constitution. — Actions against the state under the contracts clause are barred by sovereign immunity because the contract clause does not provide for claims for money damages. Manning v. New Mexico Energy, Minerals & Natural Res. Dep't, 2006-NMSC-027, 140 N.M. 528, 144 P.3d 87, aff'g in part, rev'g in part, 2004-NMCA-052, 135 N.M. 487, 90 P.3d 506, cert. denied, 549 U.S. 1051, 127 S. Ct. 663, 166 L. Ed. 2d 513 (2006).

Restitution of amounts discharged in bankruptcy. — The supremacy clause of the U.S. constitution does not preclude the district court from ordering the defendant to make restitution to the victims of his fraud of debts that had been discharged by the bankruptcy court. State v. Collins, 2007-NMCA-106, 142 N.M. 419, 166 P.3d 480, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

Judgment offending public policy of New Mexico. — The fact that a judgment entered by a foreign court could not have been entered by a New Mexico court, because it would have offended the public policy of New Mexico, will not permit the courts of New Mexico to deny it full faith and credit as required under U.S. Const., art. IV, § 1. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Law reviews. — For article, "Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights," see 25 N.M. L. Rev. 173 (1995).

For article, "The Federalism Revolution," see 31 N.M. L. Rev. 7 (2001).

For article, "Supreme Court Update," see 31 N.M. L. Rev. 31 (2001).

For article, "Developing the Eighth Amendment of Those 'Least Deserving' of Punishment: Statutory Mandatory Minimum for Non-Capital Offense Can Be 'Cruel and Unusual' When Imposed on Mentally Retarded Children", see 34 N.M. L. Rev. 35 (2004).

For article, "Overbreadth Outside the First Amendment", see 34 N.M. L. Rev. 53 (2004).

For note and comment, "Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs under Federal and New Mexico Law after *Zelman v. Simmons-Harris*", see 34 N.M. L. Rev. 193 (2004).

For note, "Did *Cooper v. Leatherman* Require State Appellate Courts to Apply a De Novo Standard of Review for Determining the Constitutional Excessiveness of Punitive Damages Claims? *Aken v. Plains Electric Generation & Transmission Cooperative, Inc.*", see 34 N.M. L. Rev. 405 (2004).

For note, "Adding Charges on Retrial: Double Jeopardy, Interstitialism and *State v. Lynch*", see 34 N.M. L. Rev. 539 (2004).

For note, "Complying with *Nunez*: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy after *State v. Esparza*", see 34 N.M. L. Rev. 561 (2004).

For article, "Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age", see 35 N.M. L. Rev. 81 (2005).

For article, "Criminal Justice and the 2003-2004 United States Court Term", see 35 N.M. L. Rev. 123 (2005).

For article, "Reflections on Fifteen Years of the *Teague v. Lane* Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness and the Perversity of the Court's Doctrine", see 35 N.M. L. Rev. 161 (2005).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 2, 70; 16A Am. Jur. 2d Constitutional Law § 440.

Implied cause of action for damages for violation of provisions of state constitutions, 75 A.L.R.5th 619.

Existence of pendent jurisdiction of federal court over state claim when joined with claim arising under laws, treaties, or Constitution of United States, 75 A.L.R. Fed. 600.

16 C.J.S. Constitutional Law § 3.

Sec. 2. [Popular sovereignty.]

All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.

ANNOTATIONS

Cross references. — *See* Kearny Bill of Rights, cl. 1 in Pamphlet 3.

Comparable provisions. — Montana Const., art. II, § 1.

Utah Const., art. I, § 2.

Wyoming Const., art. I, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law § 2; 16A Am. Jur. 2d Constitutional Law §§ 625 to 627.

16 C.J.S. Constitutional Law § 3; 16A C.J.S. Constitutional Law §§ 444 to 451; 29 C.J.S. Elections § 1.

Sec. 3. [Right of self-government.]

The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.

ANNOTATIONS

Comparable provisions. — Montana Const., art. II, § 2.

Conservancy districts. — Laws 1923, ch. 140, § 301 (repealed), creating conservancy districts, did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 4, 5, 14 to 17.

81A C.J.S. States §§ 16, 20 to 28.

Sec. 4. [Inherent rights.]

All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. I, § 1.

Iowa Const., art. I, § 1.

Montana Const., art. II, § 3.

Utah Const., art. I, § 1.

Supremacy of federal constitution. — This section's guarantee of the right of "seeking and obtaining safety" does not prevail over the state's duty under the extradition clause of Art. IV of the United States constitution, which has been long held to be mandatory on the states. New Mexico ex rel. Ortiz v. Reed, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998).

Rights described in this section are not absolute, but are subject to reasonable regulation. Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493 (Ct. App. 1984), aff'd in part and rev'd in part on other grounds, 102 N.M. 482, 697 P.2d 482 (1985).

Physician aid in dying is not a fundamental right protected under the inherent rights clause. — Where petitioners, two doctors and their patient, sought declaratory and injunctive relief to the effect that either 30-2-4 NMSA 1978, New Mexico's criminal statute prohibiting assisted suicide, did not apply to the conduct defined by petitioners as physician aid in dying, or even if the statute did apply to physician aid in dying, such an application would be unconstitutional, the petitioners failed to establish a fundamental or important right to aid in dying under N.M. Const., Art. II, § 4, because the inherent rights clause has never been interpreted to be the exclusive source for a fundamental or important constitutional right, and on its own has always been subject to reasonable regulation. Morris v. Brandenburg, 2016-NMSC-027, *aff'g* 2015-NMCA-100, 356 P.3d 564.

Aid in dying is not a fundamental liberty interest protected by the inherent-rights guarantee of N.M. Const., Art. II, § 4. — Where plaintiffs, two doctors and their terminally ill patient, sought a court declaration that they cannot be prosecuted under 30-2-4 NMSA 1978, alleging that the statute does not apply to aid in dying, and if it does, such application offends the inherent-rights guarantee afforded by N.M. Const., Art. II, § 4, the district court erred in permanently enjoining the state from enforcing 30-2-4 NMSA 1978, because aid in dying is not a fundamental liberty interest under the New Mexico constitution because such an interest is diametrically opposed to the express inalienable right to life and the fundamental constitutional protection sought by plaintiffs protects a very narrow class of citizens and does not uniformly apply to all New Mexicans; therefore, a mentally competent, terminally ill patient's interest in a physician's assistance in dying is not a fundamental liberty interest protected under the provision protecting inherent individual rights to life, liberty and happiness provided for in N.M. Const. Art. II, § 4. Morris v. Brandenberg, 2015-NMCA-100, cert. denied, 2015-NMCERT-008.

Deprivation of "happiness" not tort claim. — Vague references to "safety" or "happiness" in this section are not sufficient to state a claim under 41-4-12 NMSA 1978 (liability of law enforcement officers). Waiver of immunity based on such constitutional grounds would emasculate the immunity preserved in the Tort Claims Act. Blea v. City of Espanola, 117 N.M. 217, 870 P.2d 755 (Ct. App.); cert. denied, 117 N.M. 328, 871 P.2d 984 (1994).

Economic policy adopted by state. — A state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process clause so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. Rocky Mt. Whsle. Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643, appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

Laws 1937, ch. 44, § 2, Fair Trade Act (49-2-2, 1953 Comp., repealed), was unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety or general welfare insofar as

it concerned persons who were not parties to contracts provided for in Laws 1937, ch. 44, § 1 (49-2-1, 1953 Comp., now repealed). Skaggs Drug Ctr. v. Gen. Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

The right of association emanating from the first amendment is not absolute. Its exercise, as is the exercise of express first amendment rights, is subject to some regulation as to time and place. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214, 78 A.L.R. 3d 1101 (1975).

The right of association has never been held to apply to the right of one individual to associate with another, and certainly it has never been construed as an absolute right of association between a man and woman at any and all places and times. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214, 78 A.L.R. 3d 1101 (1975).

Right is not waiver of government tort immunity. — Assuming the right to intimate association is encompassed within N.M. Const., art. II, §§ 4 and 17, as a matter of law, the plaintiffs, who are children of the deceased killed by law enforcement officers, were unforeseeable as injured parties and defendant officers had no duty towards them. The plaintiffs' allegations of violations of their constitutional right to associate with their father and receive his love, guidance, and protection are not sufficient to waive immunity. Lucero v. Salazar, 117 N.M. 803, 877 P.2d 1106 (Ct. App.), cert. denied, 117 N.M. 802, 877 P.2d 1105 (1994).

Constitutional rights of teachers and students. — Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate; school officials do not possess absolute authority over their students, and among the activities to which schools are dedicated is personal communication among students, which is an important part of the educational process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214, 78 A.L.R. 3d 1101 (1975).

A regulation of the board of regents of the New Mexico state university which prohibited visitation by persons of the opposite sex in residence hall, or dormitory, bedrooms maintained by the regents on the university campus, except when moving into the residence halls and during annual homecoming celebrations, where the regents placed no restrictions on intervisitation between persons of the opposite sex in the lounges or lobbies of the residence halls, the student union building, library or other buildings, or at any other place on or off the campus, and no student was required to live in a residence hall, did not interfere appreciably, if at all, with the intercommunication important to the students of the university, the regulation was reasonable, served legitimate educational purposes and promoted the welfare of the students at the university. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214, 78 A.L.R. 3d 1101 (1975).

Although personal intercommunication among students at schools, including universities, is an important part of the educational process, it is not the only, or even the most important, part of that process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214, 78 A.L.R. 3d 1101 (1975).

Status of resident for divorce purposes. — The New Mexico legislature may constitutionally confer the status of resident for divorce purposes upon those continuously stationed within this state by reason of military assignment. Wilson v. Wilson, 58 N.M. 411, 272 P.2d 319 (1954).

Tort liability not found. — Although the language of this section is broader than that of the fourteenth amendment to the United States Constitution, the plaintiff can not support a liability action against a school board or its officers when the plaintiff's decedent, while interviewing for the job of security officer and attempting to complete a physical agility test, suffered a heart attack and subsequently died. Simple negligence in the performance of a law enforcement officer's duty does not amount to commission of a tort. Tafoya v. Bobroff, 865 F. Supp. 742 (D.N.M. 1994), aff'd, 74 F.3d 1250 (10th Cir. 1996).

Right to protect property. — The right to protect property being a specifically mentioned right, its presence in this section might provide the basis for additional protection against unreasonable searches and seizures. State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App.), cert. denied 112 N.M. 308, 815 P.2d 161 (1991), modified by State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Reclamation district contract. — A provision of a reclamation contract allowing a reclamation district to enter into a lawful contract with the United States for the improvement of the district and the increase of its water supply does not violate this section or art. II, § 18. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

Cause of action as property right. — Cause of action which Indian acquires when tort is committed against him is property which he may acquire or become invested with, particularly if tort is committed outside of reservation by a state citizen who is not an Indian; where Indian is killed as result of such tort, the cause of action survives. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Recovery of damages as property right. — Intermediate scrutiny should be applied to determine the constitutionality of the cap on damages in Subsection A(2) of 41-4-19 NMSA 1978 of the Tort Claims Act. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (S. Ct.1990), appeal after remand 119 N.M. 602, 893 P.2d 1006 (1995), overruled by 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Ordinance denying right to canvass. — Green River ordinance was held valid despite contention that it deprived photographer who employed solicitors to canvass residential areas of right to acquire and enjoy property. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941).

Unreasonable interference with others. — This section means that each person may seek his safety and happiness in any way he sees fit so long as he does not

unreasonably interfere with the safety and happiness of another. 1966 Op. Att'y Gen. No. 66-15.

Graduated income tax provisions are in no way related to or in conflict with the inherent rights provision in this section. Such income tax provisions do not prevent or deny a person's natural inherent and inalienable rights. 1968 Op. Att'y Gen. No. 68-09.

Law reviews. — For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 439 to 446, 552 to 573.

Civil Rights: constitutionality of civil rights ordinance, 93 A.L.R.2d 1028.

Validity of regulation by public-school authorities as to clothes or personal appearance of pupils, 58 A.L.R.5th 1.

Observation through binoculars as constituting unreasonable search, 59 A.L.R.5th 615.

16A C.J.S. Constitutional Law §§ 444 to 454; 16B C.J.S. Constitutional Law §§ 472 to 500; 16C C.J.S. Constitutional Law §§ 977 to 991.

Sec. 5. [Rights under Treaty of Guadalupe Hidalgo preserved.]

The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate.

ANNOTATIONS

Cross references. — For the Guadalupe Hidalgo treaty division in the Attorney General office, *see* 8-5-18 NMSA 1978.

This section does not protect the culturally bound use of personal property. N.M. Gamefowl Assn., Inc. v. State ex rel. King, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

This section does not protect the right to engage in cockfighting. N.M. Gamefowl Assn., Inc. v. State ex rel. King, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Law reviews. — For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

Sec. 6. [Right to bear arms.]

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms. (As amended November 2, 1971 and November 2, 1986.)

ANNOTATIONS

Cross references.— For the Concealed Handgun Carry Act, *see* 29-19-1 to 29-19-13 NMSA 1978.

Comparable provisions. — Idaho Const., art. I, § 11.

Montana Const., art. II, § 12.

Utah Const., art. I, § 6.

Wyoming Const., art. I, § 24.

The 1971 amendment, which was proposed by H.J.R. No. 5, § 1 (Laws 1971, p. 1378) and adopted at the special election held on November 2, 1971, with a vote of 55,349 for and 20,521 against, substituted "No law shall abridge the right of the citizen to keep and" for "The people have the right to," deleted "their" before "security and defense," and inserted "for lawful hunting and recreational use and for other lawful purposes."

The 1986 amendment, which was proposed by S.J.R. No. 10 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 179,716 for and 111,517 against, added the last sentence.

Reasonable regulation of right to bear arms. — A law which prohibits one from carrying a firearm into a liquor establishment is a reasonable regulation and not an infringement upon the right to bear arms, under either the federal or the state constitution. State v. Dees, 100 N.M. 252, 669 P.2d 261 (Ct. App. 1983) (decided prior to 1986 amendment, which added the last sentence).

Section 30-7-3 NMSA 1978, prohibiting unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages, is not an unconstitutional infringement upon the right to bear arms under the New Mexico constitution; regulation of the right to bear arms is not a deprivation of that right. State v. Lake, 1996-NMCA-055, 121 N.M. 794, 918 P.2d 380, cert. denied, 121 N.M. 676, 916 P.2d 1343 (1996).

Conviction for negligent weapon use constitutional. — Possession of firearms by intoxicated persons presents a clear danger to the public. The state constitution does not support a right to engage in this type of behavior. Therefore, the defendant's conviction for negligent use of a deadly weapon did not violate his right to bear arms under the state constitution, since there was evidence that he was intoxicated, he

pointed the gun at another person, and he appeared to be loading the gun. State v. Rivera, 115 N.M. 424, 853 P.2d 126 (Ct. App.), cert. denied, 115 N.M. 228, 849 P.2d 371 (1993).

Carrying of concealed weapons. — Constitution neither forbids nor grants the right to bear arms in a concealed manner. State ex rel. N.M. Voices for Children, Inc. v. Denko, 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458.

Ordinances prohibiting the carrying of concealed weapons have generally been held to be a proper exercise of police power and do not deprive citizens of the right to bear arms as their effect is only to regulate the right, however, as applied to arms, other than those concealed, an ordinance which purports to completely prohibit the right to bear arms is void. City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (Ct. App. 1971) (decided prior to 1986 amendment, which added the last sentence).

Carrying of loaded gun. — Under the state constitution of New Mexico a person can carry a loaded gun which is not concealed although there may be a local ordinance to the contrary. U.S. v. Romero, 484 F.2d 1324 (10th Cir. 1973) (decided prior to 1986 amendment, which added the last sentence).

It is lawful to carry a gun in a vehicle. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1293.

Seizure of gun does not have to be related to initial traffic stop when it is justified on safety grounds during a search incident to arrest. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-006, 135 N.M. 788, 85 P.3d 1293.

Tort by minor. — Parent who keeps loaded firearm in home and who is without knowledge that his minor child was indiscreet or reckless in handling firearms is not liable for tort committed by the minor. Lopez v. Chewiwie, 51 N.M. 421, 186 P.2d 512 (1947).

Constitutionality of statute making it unlawful to possess a switchblade knife. — Intermediate scrutiny should be applied to determine the constitutionality of 30-7-8 NMSA 1978, which prohibits the possession of switchblade knives; to survive a challenge under intermediate scrutiny, the government must show that the statute is substantially related to an important government purpose. State v. Murillo, 2015-NMCA-046.

Section 30-7-8 NMSA 1978, which prohibits the possession of switchblade knives is not an unconstitutional infringement upon the right to bear arms under the New Mexico constitution. Prohibiting the possession of switchblade knives serves an important governmental purpose, to protect the public from the surprise use of a dangerous weapon utilized in large part for unlawful activity, and prohibiting the possession of

switchblades is substantially related to this narrow, but important, purpose. State v. Murillo, 2015-NMCA-046.

Scope of restriction on regulation by municipalities and counties. — The language used in the last sentence of this section simply takes from municipalities and counties the authority they otherwise would have under their police powers to regulate matters which are incidents of right to bear arms. It does not, by its terms, restrict such regulation to the legislature, although the practical result of the prohibition is to allow firearm regulation only by the state and state agencies with the requisite statutory authority. 1990 Op. Att'y Gen. No. 90-07.

The last sentence of this section, prohibiting a municipality or county from regulating "in any way, an incident of the right to keep and bear arms," includes buying and selling firearms. 1990 Op. Att'y Gen. No. 90-07.

Law reviews. — For article, "The Right (?) to Keep and Bear Arms," see 27 N.M. L. Rev. 491 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms §§ 4, 5, 8, 27.

Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of state statutes restricting the right of aliens to bear arms, 28 A.L.R.4th 1096.

Fact that weapon was acquired for self-defense or to prevent its use against defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 39 A.L.R.4th 967.

Sufficiency of prior conviction to support prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 39 A.L.R.4th 983.

Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R.4th 931.

Validity, construction and application of state or local law prohibiting manufacture, possession, or transfer of "assault weapon," 29 A.L.R.5th 664.

Federal constitutional right to bear arms, 37 A.L.R. Fed. 696.

16 C.J.S. Constitutional Law § 148; 16B C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons §§ 2, 3, 8, 10.

Sec. 7. [Habeas corpus.]

The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion or invasion, the public safety requires it.

ANNOTATIONS

Cross references. — For supreme court's power to issue habeas corpus, *see* N.M. Const., art. VI, § 3.

For district court's power to issue habeas corpus, *see* N.M. Const., art. VI, § 13.

See Kearny Bill of Rights, cl. 9 in Pamphlet 3.

For statutory habeas corpus provisions generally, *see* 44-1-1 to 44-1-38 NMSA 1978.

Comparable provisions. — Idaho Const., art. I, § 5.

Iowa Const., art. I, § 13.

Utah Const., art. I, § 5.

Wyoming Const., art. I, § 17.

"Special proceeding" under 39-3-7 NMSA 1978. — A habeas corpus proceeding is not a special statutory proceeding as contemplated by Laws 1937, ch. 197 (39-3-7 NMSA 1978), which authorized appeals from final judgment of district court to supreme court. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Writ properly refused. — Where, prior to trial, defendant requested a writ of habeas corpus ad testificandum requiring the appearance of a witness who was then incarcerated, but witness would claim the fifth amendment upon the subject indicated, the court stated that it would be a useless gesture and refused the request. Murdock v. United States, 283 F.2d 585 (10th Cir. 1960), cert. denied, 366 U.S. 953, 81 S. Ct. 1910, 6 L. Ed. 2d 1246 (1961).

Law reviews. — For note, "Post-Conviction Relief After Release From Custody: A Federal Message and a New Mexico Remedy," see 9 Nat. Resources J. 85 (1969).

For article, "Habeas Corpus in New Mexico," see 11 N.M. L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Habeas Corpus §§ 1 to 7.

Whether habeas corpus is a civil or criminal remedy as affecting state's right to appeal from discharge, 10 A.L.R. 401, 30 A.L.R. 1322.

Appeal from conviction, right to, as affected by discharge on habeas corpus, 18 A.L.R. 873, 74 A.L.R. 638.

Habeas corpus to test constitutionality of ordinance under which a petitioner is held, 32 A.L.R. 1054.

Appeal from conviction, power to grant writ of habeas corpus pending, 52 A.L.R. 876.

Habeas corpus as remedy for delay in bringing accused to trial or to retrial after reversal, 58 A.L.R. 1512.

Federal court, discharge on habeas corpus in, from custody under process of state court for acts done under federal authority, 65 A.L.R. 733.

Statutory remedy as exclusive of remedy by habeas corpus otherwise available, 75 A.L.R. 567.

Liability for statutory penalty of judge, court administrative officer or other custodian of person, in connection with habeas corpus proceedings, 84 A.L.R. 807.

Assistance of counsel, relief in habeas corpus for violation of accused's rights to, 146 A.L.R. 369.

Conviction of offense other than that charged in indictment or information, habeas corpus as remedy, 154 A.L.R. 1135.

Mistreatment of prisoner lawfully in custody as ground for habeas corpus, 155 A.L.R. 145.

Former jeopardy as ground for habeas corpus, 8 A.L.R.2d 285.

Court's power and duty, pending determination of habeas corpus proceeding on merits, to admit petitioner to bail, 56 A.L.R.2d 668.

Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

When is a person in custody of governmental authorities for purpose of exercise of remedy of habeas corpus, 26 A.L.R.4th 455.

Propriety of federal court's considering state prisoner's petition under 28 USC § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

Review by federal civil courts of court-martial convictions, 95 A.L.R. Fed. 472.

39 C.J.S. Habeas Corpus §§ 2 to 5.

Sec. 8. [Freedom of elections.]

All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

ANNOTATIONS

Cross references. — For Election Code, *see* Chapter 1.

Comparable provisions. — Idaho Const., art. I, § 19.

Montana Const., art. II, § 13.

Utah Const., art. I, § 17.

Wyoming Const., art. I, § 27.

Vote is supreme right. — The supreme right guaranteed by state constitution is the right of a citizen to vote at public elections. State ex rel. Walker v. Bridges, 27 N.M. 169, 199 P. 370 (1921).

Restrictions that impair the right to candidacy are subject to rational basis review. — The right to candidacy and the right to vote are subject to differing levels of scrutiny. The right to candidacy is not fundamental, whereas the right to vote is fundamental. Restrictions that only impair the right to candidacy are subject to rational basis review. Restrictions on voters' rights can be subjected to heightened scrutiny. Laws limiting the field of candidates are unconstitutional when they burden an identifiable segment of voters, such as voters who share a particularized viewpoint, economic status, or associational preference, by limiting these voters' freedom of choice and association. Under rational basis review, a law need only be rationally related to a legitimate governmental purpose. Kane v. City of Albuquerque, 2015-NMSC-027.

Where the city of Albuquerque's charter and personnel rules prohibit employees of the city from being a candidate for, or from holding elective office of, the state of New Mexico or any of its political subdivisions, the charter and personnel rules do not violate the First Amendment to the United States Constitution because they do not impinge on voters' choice by limiting the field of potential candidates, nor do they impact an identifiable group of voters who share a common political affiliation, economic status, viewpoint, or membership in a protected class. Petitioner, a captain with the Albuquerque fire department (AFD), was free to retain her position in the AFD or hold elective office, and there was no legal provision precluding petitioner from making this choice. Kane v. City of Albuquerque, 2015-NMSC-027.

Where the city of Albuquerque's charter and personnel rules prohibit employees of the city from being a candidate for, or from holding elective office of, the state of New Mexico or any of its political subdivisions, the charter and personnel rules do not violate the First Amendment to the United States Constitution because they regulate conflicts of interest and limit the perception of partisan influence among its employees, and they are rationally related to the legitimate governmental purpose of promoting administrative proficiency and removing either actual or apparent partisan influence. Kane v. City of Albuquerque, 2015-NMSC-027.

Fundamental errors outside of Election Code trigger constitutional violation. — Election is only "free and equal" if the ballot allows the voter to choose between the lawful candidates for that office; therefore, ballot errors by county clerk that are outside the Election Code are violations of N.M. Const., art. II, § 8. Gunaji v. Macias, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008.

Standing. — While constestants in an election do not enjoy directly as political candidates the protection of N.M. Const., art. II, § 8, they have standing to assert the rights of those voters whose votes were incorrectly tabulated. Gunaji v. Macias, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008.

Remedy. — The remedy for ballot errors outside the Election Code but in violation of N.M. Const., art. II, § 8 is not a new election but rather to analogize from the Election Code, specifically 1-14-13 NMSA 1978, and reject the votes in the tainted precinct. Gunaji v. Macias, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008.

Write-in candidates in conservancy district elections. — Conservancy district board rule prohibiting write-in candidates for election to the board is invalid as contrary to the legislative intent expressed by 1-1-19 NMSA 1978, making the Election Code, Chapter 1 NMSA 1978, applicable to special district elections and to the constitutional mandate in this section of "free and open" elections. Gonzales v. Middle Rio Grande Conservancy Dist., 106 N.M. 426, 744 P.2d 554 (Ct. App. 1987).

Law reviews. — For note, "Why Gunaji v. Macias Matters to Candidates and Voters: Its Impact on New Mexico Election Law", see 33 N.M. L. Rev. 431 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections § 2 et seq.

Criminal responsibility of one cooperating in violation of election law which he is incapable of committing personally, 5 A.L.R. 786, 74 A.L.R. 1110, 131 A.L.R. 1322.

Constitutionality of corrupt practices acts, 69 A.L.R. 377.

Women's suffrage amendment to federal or state constitution as affecting preexisting constitutional or statutory provisions which limited rights or duties to legal or male voters, 71 A.L.R. 1332.

Propriety of test or question asked applicant for registration as voter other than formal questions relating to specific conditions of his right to registration, 76 A.L.R. 1238.

Constitutionality of statutes in relation to registration before voting at election or primary, 91 A.L.R. 349.

Purging voters' registration lists, remedy and procedure for, 96 A.L.R. 1035.

Nonregistration as affecting legality of votes cast by persons otherwise qualified, 101 A.L.R. 657.

Statutory provisions relating to form or manner in which election returns from voting districts or precincts are to be made, failure to comply with, 106 A.L.R. 398.

Failure of officers to give notice of election as a punishable offense, 134 A.L.R. 1257.

Excess or illegal ballots, treatment of, when it is not known for which side of a proposition they were cast, 155 A.L.R. 677.

Voting by persons in the military service, 155 A.L.R. 1459.

Conspiracy to prevent exercise of right respecting election as within federal statutes denouncing conspiracy, 162 A.L.R. 1373.

Official ballots or ballots conforming to requirements, failure to make available as affecting validity of election of public officer, 165 A.L.R. 1263.

Power of election officers to withdraw or change returns, 168 A.L.R. 855.

Military establishments, state voting rights of residents of, 34 A.L.R.2d 1193.

What constitutes "conviction" within constitutional or statutory provision disfranchising one convicted of crime, 36 A.L.R.2d 1238.

Validity of percentage of vote or similar requirements for participation by political parties in primary elections, 70 A.L.R.2d 1162.

Validity and effect of statutes exacting filing fees from candidates for public office, 89 A.L.R.2d 864.

Absentee Voters' Laws, validity of, 97 A.L.R.2d 218.

Effect of conviction under federal law, or law of another state or country on right to vote or hold public office, 39 A.L.R.3d 303.

Students: residence of students for voting purposes, 44 A.L.R.3d 797.

29 C.J.S. Elections § 6.

Sec. 9. [Military power subordinate; quartering of soldiers.]

The military shall always be in strict subordination to the civil power; no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.

ANNOTATIONS

Cross references. — For military affairs generally, *see* Chapter 9, Article 9 NMSA 1978.

Comparable provisions. — Idaho Const., art. I, § 12.

Iowa Const., art. I, § 14.

Utah Const., art. I, § 20.

Montana Const., art. II, § 32.

Wyoming Const., art. I, § 25.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Military and Civil Defense § 355.

6 C.J.S. Armed Services § 7.

Sec. 10. [Searches and seizures.]

The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

ANNOTATIONS

Cross references. — *See* Kearny Bill of Rights, cl. 11 in Pamphlet 3.

For issuance, contents, execution and return of arrest warrant in district court, *see* Rules 5-208 and 5-210 NMRA.

For issuance, contents, execution and return of search warrants in district court *see* Rule 5-211 NMRA.

For issuance, contents, execution and return of arrest warrant in magistrate court, *see* Rules 6-203 and 6-206 NMRA.

For issuance, contents, execution and return of search warrant in magistrate court, *see* Rule 6-208 NMRA.

For issuance, contents, execution and return of arrest warrant in metropolitan court, *see* Rules 7-204 and 7-206 NMRA.

For issuance, contents, execution and return of search warrant in metropolitan court, *see* Rule 7-208 NMRA.

For issuance, contents, execution and return of arrest warrant in municipal court, *see* Rule 8-205 NMRA.

For issuance, contents, execution and return of search warrant in municipal court *see* Rule 8-207 NMRA.

Comparable provisions. — Idaho Const., art. I, § 17.

Iowa Const., art. I, § 8.

Montana Const., art. II, § 11.

Utah Const., art. I, § 14.

Wyoming Const., art. I, § 4.

I. GENERAL CONSIDERATION.

A. IN GENERAL.

Exceptions to the warrant requirement. — In the absence of a search warrant, a search must find its justification in one of the exceptions to the warrant requirement, namely plain view, probable cause plus exigent circumstances, search incident to arrest, consent, inventory and hot pursuit. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

"Good faith" exception invalid. — Evidence obtained by virtue of an invalid search warrant is not admissible under the exclusionary rule's "good faith" exception as articulated by the United States supreme court in United States v. Leon, since the good-faith exception is incompatible with the guarantees of the New Mexico constitution that prohibit unreasonable searches and seizures and that mandate the issuance of search warrants only upon probable cause. State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993).

State and federal clauses compared. — The protections afforded under this section are more extensive than those under the fourth amendment of the United States constitution. In re Shon Daniel K., 1998-NMCA-069, 125 N.M. 219, 959 P.2d 553, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Preservation of constitutional argument. — To preserve a state constitutional argument pursuant to Article II, Section 10, the party need not cite specific cases in support of a constitutional principle, so long as the party asserted the principle recognized in the cases and has developed the facts adequately to give the opposing party an opportunity to respond and to give the court an opportunity to rule on the issue, because a plethora of precedent already interprets Article II, Section 10 more expansively than the Fourth Amendment. State v. Bell, 2015-NMCA-028, cert. denied, 2014-NMCERT-012.

In DWI trial, defendant's assertions that the officer that made the traffic stop lacked reasonable suspicion to conduct an investigation beyond the traffic infraction, together with defendant's argument that the facts known to the officer were insufficient to justify prolonging the traffic stop for purposes of a DWI investigation, were sufficient to alert the trial court to the constitutional issue and to trigger protections pursuant to Article II, Section 10 of the New Mexico Constitution, and therefore defendant's state constitutional argument was sufficiently preserved. State v. Bell, 2015-NMCA-028, cert. denied, 2014-NMCERT-012.

State constitutional claim not preserved. — Where defendant, who was a passenger in a vehicle that was involved in a crash, was arrested after defendant fled from the vehicle after the crash; defendant was handcuffed and arrested by a police officer who pursued defendant; after defendant was arrested, the officer saw defendant reach into his pocket and toss a piece of cardboard onto the ground; the cardboard contained methamphetamine; and in defendant's motion to suppress the evidence, defendant made only a broad statement about the New Mexico constitution providing greater protection than the United States constitution and did not refer to any particular constitutional provision or principle or provide reasons for interpreting any provision in the New Mexico constitution differently from its federal counterpart, defendant failed to preserve the argument that the New Mexico constitution provides more protection than the United States constitution to a passenger of a vehicle who decides to run after the vehicle is involved in a crash. State v. Maez, 2009-NMCA-108, 147 N.M. 91, 217 P.3d 104, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940, rev'g 2007-NMCA-006, 140 N.M. 864, 149 P.3d 961.

A claim that an investigatory vehicle stop violated this section was not preserved where the court of appeals decided the case under the fourth amendment to the federal constitution and did not adequately articulate an interstitial analysis, as required by New Mexico law to support an independent claim under the state constitution. State v. Vandenberg, 2003-NMSC-030, 134 N.M. 566, 81 P.3d 19, rev'g 2002-NMCA-066, 132 N.M. 354, 48 P.3d 92.

Not applicable to private intrusions. — The provisions of this section do not apply to intrusions by private persons. State v. Johnston, 108 N.M. 778, 779 P.2d 556 (Ct. App.), cert. denied, 108 N.M. 771, 779 P.2d 549 (1989).

Statutory provisions read in pari materia. — This section and statutory provisions relative to issuance of warrants and verification of information are to be considered in pari materia. State v. Trujillo, 33 N.M. 370, 266 P. 922 (1928).

The standard for a seizure under Article II, Section 10 of the New Mexico constitution is whether a reasonable person would feel free to leave. State v. Garcia, 2009-NMSC-046, 147 N.M. 134, 217 P.3d 1032, rev'g 2008-NMCA-044, 143 N.M. 765, 182 P.3d 146.

New Mexico standard of seizure. — Where a police officer, who was responding to a domestic call to remove a person from the callers' home, saw defendant walking across the street in the vicinity of the callers' home; the officer was not acquainted with the defendant and had no information that defendant was the person to whom the caller was referring; the officer stopped the officer's marked patrol vehicle in the intersection near defendant, shone a light on defendant and told defendant to stop; defendant did not stop; defendant appeared to be fumbling with something in his pocket, and the officer feared that defendant had a weapon; the officer pulled the officer's gun and ordered defendant to stop; the defendant did not stop and the officer sprayed defendant with pepper spray; and the officer saw something fall from defendant's pocket and the officer then tackled defendant, defendant was seized under the standard of Article II, Section 10 of the New Mexico constitution when the officer stopped his patrol car in the intersection, shone the light on defendant and told defendant to stop. State v. Garcia, 2009-NMSC-046, 147 N.M. 134, 217 P.3d 1032.

Search and seizure is constitutionally lawful under either of three instances: if conducted pursuant to a legal search warrant, by consent or incident to a lawful arrest. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

A search and seizure may be by consent, as an incident to a lawful arrest or pursuant to a legal search warrant. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

A search and seizure may be by consent as an incident to a lawful arrest or pursuant to a legal search warrant. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970).

Reasonableness is the touchstone of any search. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

If a search and seizure is reasonable, as that term is defined and understood, it will not violate the constitutional mandate, but reasonableness must be determined by the facts and circumstances of each case. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

The reasonableness of the search depends on the facts and circumstances of each case. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

Whether the search and seizure was reasonable must be determined on the basis of the facts of the case. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

The standard by which all search and seizure cases are to be determined is reasonableness. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975).

The reasonableness of each search and seizure is to be decided upon its own facts and circumstances in light of general standards. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Unreasonable search. — An unreasonable search and seizure cannot be made reasonable by what is discovered. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

United States Const., amend. IV, by its words, protects only against unreasonable searches and seizures, and what is reasonable depends upon the facts and circumstances of each case. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Probation revocation hearings. — The exclusionary rule of this section applies in probation revocation hearings. State v. Marquart, 1997-NMCA-090, 123 N.M. 809, 945 P.2d 1027, cert. denied, 123 N.M. 626, 944 P.2d 274 (1997).

Applicability to juvenile proceedings. — United States Const., amend. IV, has been expressly applied to juvenile proceedings in this state by former 32-1-27 NMSA 1978. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Where a search is sought to be justified on either of two grounds and the search is lawful under one of the asserted grounds, the search does not become unlawful because not sustainable under the other asserted ground. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

Plea of guilty. — Irregularities in connection with defendant's arrest and detention cannot be raised after the entry of a voluntary plea of guilty. State v. Marquez, 79 N.M. 6, 438 P.2d 890 (1968).

Distinction and instrumentalities. — Nothing in the language of the fourth amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime or contraband. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or

contraband. State v. Williamson, 78 N.M. 751, 438 P.2d 161 (1968), cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

No good faith exception to exclusionary rule. — There is no good faith exception to the exclusionary rule under this section. State v. Gutierrez, 112 N.M. 774, 819 P.2d 1332 (Ct. App. 1991), aff'd, 116 N.M. 431, 863 P.2d 1052 (1993).

Exclusionary rule not applicable. — Even if officers violated the rights of defendant and his family by entering their apartment without a warrant, the exclusionary rule does not foreclose the use of evidence obtained by the officers of defendant's actions attacking the officers within the apartment. State v. Traverson B., 2006-NMCA-146, 140 N.M. 783, 149 P.3d 99, cert. denied, 2006-NMCERT-011, 140 N.M. 845, 149 P.3d 942.

Serial number check of lawfully seized weapon. — Where police officer was legally in possession of a gun, running a search on the serial number was not an additional intrusion under the U.S. constitution because defendant no longer had a reasonable expectation of privacy in the weapon and the N.M. constitution does not provide him with more protection than does the U.S. constitution in connection with serial number checks of lawfully seized objects. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1293.

Remedies of persons aggrieved by unlawful search and seizure. — A person aggrieved by an unlawful search and seizure may move for the return of the property and to suppress the use of evidence so obtained on the ground that the property seized is not that described in the warrant. State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App. 1968), cert. denied, 80 N.M. 746, 461 P.2d 228 (1969), cert. denied, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970), overruled by State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973).

Denial of motion to suppress. — In viewing the facts to determine the propriety of denying a motion to suppress, controverted questions of fact will not be resolved, but the facts found by the trial court will be weighed against the standards of reasonableness. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Defendants were prejudiced by the unconstitutional denial of a hearing on their motion to suppress when the trial court refused to guarantee that none of the testimony elicited from them therein would be admitted at their subsequent trial; a defendant cannot be required to elect between a valid fourth amendment claim or, in legal effect, a waiver of his fifth amendment privilege against self-incrimination. State v. Volkman, 86 N.M. 529, 525 P.2d 889 (Ct. App. 1974), superceded by rule State v. Roybal, 115 N.M. 27, 846 P.2d 333 (1992).

Consideration of suppression issue following second appeal. — The law of the case doctrine leaves considerable discretion to appellate courts to interpret what,

precisely, the law of the case is; application of the doctrine is a matter of discretion and it is not an inflexible rule of jurisdiction. State v. Martinez, 2015-NMCA-013.

When the trial court's decision to suppress evidence obtained during an illegal search was affirmed by the court of appeals, the law of the case doctrine did not bar, on a motion for reconsideration, the district court from considering the state's motion that was based on a new argument and new authority. State v. Martinez, 2015-NMCA-013.

Police officers cannot just ask anyone for permission to search his effects. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975).

The facts to be examined on appeal are those facts elicited before the trial court on the hearing on the motion to suppress. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

B. STANDING TO CHALLENGE SEARCH AND SEIZURE.

Defendant was not the owner or a guest in a house where defendant was searched and seized. — Where police, who were looking for an intoxicated driver, found defendant's car, which matched the description of the car of the intoxicated driver, parked in front of a house; the police entered the house, found defendant sleeping on a couch, and administered field sobriety tests and a breath test which indicated that defendant was intoxicated; defendant was arrested for aggravated DWI; and defendant was not the owner of the house or a guest and did not have permission to be in the house, the police entry into the other person's house did not violate defendant's own reasonable expectation of privacy in the house and defendant did not have standing to suppress the evidence obtained as a result of defendant's warrantless arrest in the other person's house. State v. Crocco, 2014-NMSC-016, *rev'g* 2013-NMCA-033, 296 P.3d 1224.

Seizure of evidence related to pretextual stop of an automobile. — Where police officers, who were monitoring drug activity at a motel and who were under orders to stop every vehicle leaving the motel, followed a vehicle in which defendant's co-conspirator was a passenger looking for probable cause to stop the vehicle; the officers stopped the vehicle for failure to use a turn signal; the co-conspirator left the vehicle and went to a motel room; the co-conspirator returned to the vehicle with methamphetamine and told the officers that the co-conspirator had purchased the methamphetamine from defendant earlier in the day at defendant's motel room; no evidence was seized from the vehicle; and defendant had no possessory interest in the vehicle, was not riding in the vehicle, was not present at the scene of the stop, and played no role in the stop and seizure of the evidence from the co-conspirator, defendant did not have standing to argue a motion to suppress evidence that resulted from the pretextual stop of the vehicle. State v. Silvas, 2013-NMCA-093, cert. granted, 2013-NMCERT-009.

C. STATE ACTION.

Standing to challenge search and seizure. — Where an undercover police officer entered an apartment that defendant occupied to buy cocaine; after the officer completed the transaction, the officer signaled surveillance officers who entered the apartment and detained the occupants outside the apartment; the officer saw defendant trying to hide something in the top part of a closet; the officers found the drug buy-money in the crawl space above the closet; and defendant testified that he had been staying in the apartment for three weeks, slept in the apartment, used the kitchen and bathroom, kept clothes and hygiene items in a bedroom, and paid another person, who stayed in the apartment and paid the rent, $50 per week, defendant had an expectation of privacy in the apartment and in the drug buy-money and standing to seek suppression of the drug buy-money evidence. State v. Sublet, 2011-NMCA-075, 150 N.M. 378, 258 P.3d 1170.

Where police officers seized a digital camera pursuant to a search of defendant's home; defendant testified that defendant and the co-defendant had purchased the camera at a Wal-Mart for the two of them using a credit card and that defendant paid the co-defendant cash to cover the purchase; and the state's evidence showed that during the search, the officers found several credit cards that did not belong to the co-defendant, that one credit card, which belonged to a victim of identity theft, listed the co-defendant as the card holder, that the co-defendant had used the fraudulent credit card to purchase a memory stick for the camera at an Office Max store, and that the camera had been distributed by an Office Max store in Las Vegas, Nevada, the district court could conclude that the camera had been lawfully purchased and that defendant had standing to challenge the seizure of the camera. State v. Gurule, 2011-NMCA-063, 150 N.M. 49, 256 P.3d 992, rev'd, 2013-NMSC-025, 303 P.3d 838.

Purse. — Society recognizes a reasonable expectation of privacy in an individual's purse and defendant, who had not disclaimed or abandoned ownership of defendant's purse, had standing to challenge the search of the purse. State v. Bond, 2011-NMCA-036, 150 N.M. 451, 261 P.3d 599.

Motel room. — Defendant had standing to challenge a search as violative of the federal and state constitutions where defendant's testimony established that he had an actual and subjective expectation of privacy in a motel room. State v. Zamora, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517, cert. quashed, 2005-NMCERT-012.

Right of privacy must be invaded. — Constitutional provisions prohibiting unreasonable searches and seizures are personal rights, and they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. To have standing one must be the victim of the search in the sense that one's right of privacy was invaded. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Evidence must be an element of the offense. — Defendant had no standing to exclude evidence on grounds of unreasonable search where the evidence seized was not an essential element of any of the offenses with which defendant was charged, and

where defendant never claimed a connection with any of the seized evidence - either at the suppression hearing or at trial. State v. Ellis, 88 N.M. 90, 537 P.2d 698 (Ct. App. 1975), overruled on other grounds State v. Espinosa, 107 N.M. 293, 756 P.2d 573 (1988).

Where a U-Haul dealer stated that he was holding a van leased by defendant until paid what was owing and if defendant did not pay he was going to keep the contents of the van, and he was waiting for the money owing at the time of the inventory search, this recognition of defendant's right to the vehicle by the U-Haul representative was sufficient to give defendant standing to object to an inventory search and seizure. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

Possession of the evidence is required. — All that is necessary to give a defendant standing to challenge search and seizure is "possession" of the seized evidence which is itself an essential element of the offense with which the defendant is charged. State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973), overruled by State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (1974).

Owner of a house. — Arrestee's spouse, co-owner of home, present at time of husband's invalid arrest, had a reasonable expectation of privacy in the couple's home and was entitled to summary judgment on a claim under this section. Montes v. Gallegos, 812 F. Supp. 1165 (D.N.M. 1992).

Expectation of privacy of a visitor. — Since the defendant, by permission of the owner, was in the bedroom of a residence with the door closed, she had a reasonable expectation of privacy. State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App.), cert. denied, 119 N.M. 389, 890 P.2d 1321 (1995).

To establish his standing to challenge a search and seizure, a visitor must show subjectively, by his conduct, that he had an expectation of privacy, and objectively that his expectation was reasonable; defendant did not make any specific showing concerning his expectation of privacy where he was among a group of people in the living room in the presence of marijuana. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Evidence taken from a vehicle. — Where a car that was searched and from which evidence was seized did not belong to defendant nor did the record show that he claimed any possessory interest in the car, the fact that the car was parked on defendant's property when it was searched did not give defendant standing to challenge the search and seizure. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Argument that since defendant did not own but only rented a car that was searched, he did not have standing to question the validity of the application for the search warrant, where there was no question that defendant was one against whom the search was

directed, was without merit. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled by State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (1973).

Evidence taken from a vehicle. — Even though the defendant did not own the vehicle and was not an occupant at the time of the search, she had standing to challenge a search by virtue of her status as a permissive user who had an ongoing relationship with the owner through which she exerted control over both the vehicle and its contents. State v. Leyba, 1997-NMCA-023, 123 N.M. 159, 935 P.2d 1171.

Detention by a police service aide is state action. — Where defendant was detained and handcuffed by a police service aide pending the arrival of police officers to investigate defendant's involvement in a rear-end accident; the police service aide was employed by the police department as a non-commissioned officer to do some of the same work that a certified officer would do, including investigating traffic accidents and crime scenes; and the police service aide wore a uniform and drove a marked patrol car, the police service aide's actions were state actions because the police service aide was acting as the agent of the police department when the police service aide detained defendant. State v. Slayton, 2009-NMSC-054, 147 N.M. 340, 223 P.3d 337.

Probation search in aid of police investigation is unlawful. — The authority of probation officers to conduct searches and seizures upon probationers without a warrant may not be used as a proxy or surrogate for police investigations. When police participate in searches with probation officers, the courts must determine that the probation officers acted independently. The decisive inquiry is whether the probation officers acted with a probationary purpose. State v. Bolin, 2010-NMCA-066, 148 N.M. 489, 238 P.3d 363, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Where defendant was on probation; police officers wanted to execute a warrant on a third person in an ongoing narcotics investigation; the police officers had information that defendant and the third person had been seen together and speculated that the third person might be at defendant's home; the police officers asked defendant's probation officers to assist the police officers; the police officers and the probation officers went to defendant's home; defendant informed the police officers that the third person was not at defendant's home; defendant's physical appearance indicated to the police officers and the probation officers that defendant was using drugs; defendant admitted to taking drugs the previous evening; defendant tested positive to a drug test administered by the probation officers; the police officers held defendant in custody and interrogated defendant about the third person and about whether defendant had been dealing in drugs; the probation officers conducted a search of defendant's immediate area and found contraband items; the police officers then halted the search to obtain a search warrant; when the search warrant was approved, the police officers conducted a second search that revealed additional contraband; and the district court found that the only reason the police officers were at defendant's home was to find the third person, and the only reason the probation officers were at defendant's home was to aid the police investigation, the searches were not conducted for a probationary purpose, the police officers improperly used the probation officers to search defendant's home to

effectuate their narcotics investigation, and the district court properly suppressed all evidence produced after defendant informed the officers that the third person was not at defendant's home. State v. Bolin, 2010-NMCA-066, 148 N.M. 489, 238 P.3d 363, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

Indian tribal law. — Because there is nothing in either the Zuni constitution or the Zuni tribal law and order code which authorizes the Zuni tribal court to issue a search warrant, the evidence seized from a house on the Zuni reservation pursuant to such a warrant is inadmissible at trial in a New Mexico court, and the motion to suppress the evidence obtained during the search should have been granted. State v. Railey, 87 N.M. 275, 532 P.2d 204 (Ct. App. 1975).

Questioning by school official is state action. — Questioning of a 13-year-old student by his assistant principal in an empty classroom in the presence of a teacher is "state action," rendering U.S. Const., amend. IV, applicable through amend. XIV. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Agency test to determine state action. — To determine whether a private person is acting as an agent or instrumentality of the government in conducting a search, the court must determine both that the government knew of and acquiesced in the intrusive conduct, and that the party performing the search intended to assist law enforcement efforts. State v. Santiago, 2009-NMSC-045, 147 N.M. 76, 217 P.3d 89, rev'g 2008-NMCA-041, 143 N.M. 756, 182 P.3d 137.

Search by private security guards was not state action under the agency test. — Where defendant was involved in a verbal altercation at a shopping mall, private security guards that were employed by the mall responded to the fight and attempted to stop defendant as defendant was leaving the mall; a security guard stopped and handcuffed defendant; the security guards searched defendant and discovered a pill bottle containing baggies of white powder; after the security guards subdued and searched defendant, police officers arrived at the scene and took defendant into custody; the officers tested the white powder and confirmed that it was cocaine; the security guards were employed by a private security company and were not also police officers; the police were not present during or before and did not request or otherwise participate in the search, the evidence did not support a finding that the security guards were the agents of the government in conducting the search and the fourth amendment did not apply to the search. State v. Santiago, 2009-NMSC-045, 147 N.M. 76, 217 P.3d 89, rev'g 2008-NMCA-041, 143 N.M. 756, 182 P.3d 137.

II. UNREASONABLE SEARCHES AND SEIZURES.

A. IN GENERAL.

Parole search. — The fourth amendment does not prohibit parole searches that are based on reasonable suspicion of a parole violation. State v. Benavidez, 2010-NMCA-

035, 148 N.M. 190, 231 P.3d 1132, cert. denied, 2010-NMCERT-003, 148 N.M. 560, 240 P.3d 15.

Where defendant's parole officer observed defendant driving a car; a short time later, the parole officer went to defendant's house to conduct a routine visit; when the parole officer arrived at defendant's house, the parole officer saw the same car that defendant had been driving earlier; the parole officer knocked on the door and announced the parole officer's presence but received no response; the parole officer noticed curtains and blinds moving in the room that the parole officer knew to be defendant's room; the parole officer called for police backup and continued to knock and announce for twenty minutes; when the police arrived, the parole officer kicked in the door; the parole officer found defendant under a bed in defendant's room; defendant stated that defendant was hiding because defendant had missed a parole meeting; after defendant was taken outside the house, the parole officer continued to search the house; and the parole officer found methamphetamine in defendant's room, the search and seizure of the drug evidence did not violate defendant's fourth amendment rights because the parole officer had reasonable suspicion to believe that defendant had violated the conditions of defendant's parole, which required defendant to promptly respond to the parole officer's knock on the door, and because defendant's odd behavior reasonably led the parole officer to believe that defendant possessed contraband or had violated parole in some other way. State v. Benavidez, 2010-NMCA-035, 148 N.M. 190, 231 P.3d 1132, cert. denied, 2010-NMCERT-003, 148 N.M. 560, 240 P.3d 15.

Warrantless probation searches must be supported by reasonable suspicion as defined in New Mexico law to be an awareness of specific articulable facts, judged objectively, that would lead a reasonable person to believe criminal activity occurred or was occurring. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

The state constitution is not construed to require any higher degree of probability than reasonable suspicion as long as the suspected probation violation on which a warrantless search is based is reasonably related to the probationer's rehabilitation or to community service. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Warrantless search without seizure of evidence. — Where police officers, who were monitoring drug activity at a motel, stopped a vehicle in which defendant's co-conspirator was a passenger; the co-conspirator left the vehicle, entered a motel room, returned to the vehicle with methamphetamine, and told the officers that the co-conspirator had purchased the methamphetamine from defendant earlier in the day at defendant's motel room; and the officers forced their way into defendant's motel room without a search warrant while defendant was away from the room; no evidence was seized during the search of the motel room, defendant did not suffer any prejudice as a result of the warrantless search of the motel room and the district court did not err in denying defendant's motion to suppress evidence seized during the police investigation. State v. Silvas, 2013-NMCA-093, cert. granted, 2013-NMCERT-009.

Protective search was not necessary. — Where an undercover police officer entered an apartment that defendant occupied to buy cocaine; after the officer completed the transaction, the officer signaled surveillance officers who entered the apartment; the officer saw defendant trying to hide something in the top part of a closet; the undercover officer was the only officer who knew that defendant tried to stash something in the closet and the officer could not see what defendant was trying to stash; the occupants were handcuffed and detained outside the apartment; the officers reentered the apartment without a warrant to search the closet; the officers found a hole in the ceiling of the closet and the drug buy-money in the crawl space above the closet; there was no evidence that defendant had abandoned the drug buy-money; the drug buy-money was not in plain view; and because the occupants were detained outside the apartment, there was no exigency facing the officers or necessity to conduct a protective sweep, the search was unlawful. State v. Sublet, 2011-NMCA-075, 150 N.M. 378, 258 P.3d 1170.

Consensual encounter transformed into a criminal investigation. — Where a police officer observed defendant running though a back parking lot of a motel late at night; defendant did not have a shirt on and defendant's hand appeared to be bleeding; defendant walked past the officer's car; the officer drove around the motel and observed defendant running across the parking lot of a closed business; the officer stopped and questioned defendant; the officer asked defendant for identification to determine if defendant was involved in a domestic disturbance or fight at the motel; the officer asked dispatch to run a local check on defendant; when the officer asked defendant how defendant had cut defendant's hand, defendant responded the defendant's hand had been cut on a light bulb; the officer knew that people who smoke methamphetamine use light bulbs to ingest the drug; when dispatch reported that defendant had an outstanding warrant for his arrest, the officer placed defendant under arrest; the officer then searched defendant and found methamphetamine on defendant's person; and during the entire time up to defendant's arrest, the officer failed to inquire regarding defendant's physical or mental condition or to act in a way that indicated any concern for defendant's welfare, any consensual encounter that existed ceased and was transformed into a criminal investigation when the officer requested and obtained defendant's identification and the evidence should have been suppressed. State v. Montano, 2009-NMCA-130, 147 N.M. 379, 223 P.3d 376.

Search of garbage bags in a motel dumpster. — Article II, Section 10 of the New Mexico Constitution prohibits a warrantless search of garbage left for collection in a motel dumpster. State v. Crane, 2014-NMSC-026, *aff'g* 2011-NMCA-061,149 N.M. 674, 254 P.3d 117.

Where a guest at a motel reported that a stong chemical odor was coming from a particular room at a motel; the police officers who were dispatched to investigate the report observed an individual leave the motel room and discard a box in the motel's dumpster; while the officer was inspecting the box, the officer heard two more items being deposited in the dumpster; the officer retrieved the bags from the dumpster and noticed a strong chemical odor when the officer opened the bags; and the officer found

evidence of methamphetamine production inside the bags, defendant had a reasonable expectation that the contents of the garbage bags that were placed in the dumpster would remain private which required the police officer to obtain a warrant before searching the garbage bags. State v. Crane, 2014-NMSC-026, *aff'g* 2011-NMCA-061,149 N.M. 674, 254 P.3d 117.

Where police officers were investigating suspected methamphetamine production in a motel room; an occupant of the room left the room, walked to the dumpster, and threw something in the dumpster; the officers checked the dumpster and identified two garbage bags that emanated a strong chemical odor; and without obtaining a search warrant, the officers opened and searched the bags where they found items used to manufacture methamphetamine, defendant had a reasonable expectation of privacy in the motel room and the garbage discarded from it and the warrantless search of defendant's garbage was unreasonable under Article II, Section 10 of the New Mexico constitution. State v. Crane, 2011-NMCA-061, 149 N.M. 674, 254 P.3d 117, aff'd, 2014-NMSC-026.

Recordings of telephone calls from jail. — Where defendant made telephone calls from jail requesting that defendant's friends be present at defendant's trial ostensibly to influence the testimony of the state's witnesses; and when a call was placed at the jail, a digital message informed both parties to the call that the call may be recorded and monitored, the recording of the telephone calls did not violate the prohibition against unreasonable searches and seizures. State v. Johnson, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

Where the defendant received notice that his telephone calls from jail might be monitored or recorded before the defendant made the calls, the admission of a tape recording of the defendant's calls made in jail do not violate the defendant's right to be free from unreasonable searches. State v. Templeton, 2007-NMCA-108, 142 N.M. 369, 165 P.3d 1145.

Monitored telephone calls from jail. — The defendant's right to Miranda warnings was not implicated by the monitoring of his phone calls from jail because there was no evidence that he was compelled, coerced, or improperly influenced into making calls. State v. Coyazo, 1997-NMCA-029, 123 N.M. 200, 936 P.2d 882; cert. denied, 123 N.M. 168, 936 P.2d 351 (1997).

Rights not violated by monitoring telephone calls. — The monitoring of the defendant's phone calls from jail did not violate his attorney-client privilege, his privilege against self-incrimination, protections against unreasonable searches and seizure, or his right of privacy. State v. Coyazo, 1997-NMCA-029, 123 N.M. 200, 936 P.2d 882, cert. denied, 123 N.M. 168, 936 P.2d 337 (1997).

Search and seizure were reasonable. — Where police officers arrived at a third party's residence to execute a search warrant which contained a no-knock provision for officer safety based on an affidavit that the property contained drugs, guns and money

and that the occupant was not afraid to shoot if necessary; the officers encountered defendant who was leaving the adjacent property and entering the third party's property to return to defendant's vehicle; defendant was approximately twenty feet from the third party's house; the officers ordered defendant to the ground at gun point; defendant remained unsecured on the ground for approximately fifteen minutes while the officers executed the warrant; after searching the house, one of the officers placed handcuffs on defendant and noticed a knife in defendant's back pocket that was plainly visible; defendant gave the officer permission to search defendant for other knives; and during the search, the officer found methamphetamine on defendant, defendant's fourth amendment rights were not violated. State v. Winton, 2010-NMCA-020, 148 N.M. 75, 229 P.3d 1247, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Where the child was arrested and held in detention in Nevada pursuant to a New Mexico warrant for murder; the New Mexico police told the arresting Nevada officer that the child was suspected of wearing a white pair of shoes with a circle on the bottom at the time of the murder; the Nevada officer confirmed that the description matched the shoes the child was wearing; the child's shoes were seized when the child was booked into the detention center; and the standard detention facility's booking procedure required the taking of a detainee's clothes if they were determined to have evidentiary value, the shoes were admissible into evidence, because they were taken during a constitutional inventory search. State v. Gutierrez, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

Detention of visitor for investigation. — A visitor may be detained where there is a reasonable basis to believe that the visitor is connected to the premises or to criminal activity based on the totality of the circumstances; defendant's proximity to marijuana and drug paraphernalia in the living room gave officers a reasonable basis to believe that he had a connection to the presence of the marijuana and drug paraphernalia so as to reasonably detain him as part of the investigation. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Expansion of investigation. — Although the investigation did not originally involve drugs, officers could reasonably expand the scope of the investigation based on the reasonable suspicion of criminal activity. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Search by private parties. — When the state seeks to justify a search on the basis that it was merely repeating a search previously undertaken by private parties without state involvement, the question is whether the prior search actually took place as alleged. If it did, the defendant lacked a reasonable expectation of privacy. If not, the defendant's reasonable expectation of privacy remained intact and a subsequent search by law enforcement would not be reasonable unless a warrant was obtained or an exception to the warrant requirement was met. State v. Rivera, 2007-NMCA-104, 142 N.M. 427, 166 P.3d 488, rev'd, 2008-NMSC-056, 144 N.M. 836, 192 P.3d 1213.

Police search beyond the scope of a private search. — Under Article II, Section 10 of the New Mexico constitution, an officer may seize a package that has already been searched by a private party and turned over to the officer. Absent an exception to the warrant requirement, the officer may not exceed the scope of the private party search without a warrant. State v. Rivera, 2010-NMSC-046, 148 N.M. 659, 241 P.3d 1099, rev'g 2009-NMCA-049, 146 N.M. 194, 207 P.3d 1171.

Where a sealed package, which was shipped to defendant in Albuquerque on a commercial bus, was opened by an employee of the bus company in Denver; the package contained a tool box that held bundles wrapped in brown plastic; the employee called a DEA agent in Albuquerque who told the employee to reseal the package and ship it to Albuquerque; when the package arrived in Albuquerque, the agent and the bus station manager opened the package and found the opaque bundles in the tool box; the agent concluded, based on training and experience, that the agent had probable cause to believe that the bundles contained marijuana; and the agent cut into one of the bundles, the agent's action in opening a bundle exceeded the scope of the private search and without a warrant violated Article II, Section 10 of the New Mexico constitution. State v. Rivera, 2010-NMSC-046, 148 N.M. 659, 241 P.3d 1099, rev'g 2009-NMCA-049, 146 N.M. 194, 207 P.3d 1171.

If an individual's expectation of privacy is breached by a private actor, then subsequent investigation by the state is not an unreasonable search or seizure under the fourth amendment, so long as the investigation does not expand upon the scope of the original breach. State v. Rivera, 2009-NMCA-049, 146 N.M. 194, 207 P.3d 1171, rev'd, 2010-NMSC-046, 148 N.M. 659, 241 P.3d 1099.

Expectation of privacy was waived. — Where defendant took defendant's computer and hard drives to a coworker to install a software upgrade; defendant told the coworker that defendant had child pornography on one of the hard drives and asked the coworker to erase the memory; the coworker viewed the pornography and made the computer and the hard drives available to the police for viewing, defendant lost defendant's expectation of privacy by voluntarily relinquishing possession of the computer and hard drives to the coworker and asking the coworker to destroy the child pornography stored on the hard drive and the seizure and search of the computer and hard drives, without a warrant, was reasonable and lawful under the fourteenth amendment and under Article II, Section 10 of the New Mexico constitution. State v. Ballard, 2012-NMCA-043, 276 P.3d 976, rev'd, State v. Olsson, 2014-NMSC-012.

Patdown justified. — Where a 911 caller reported criminal activity involving the firing of weapons from two vehicles; the caller's address was across from the area where the activity was occurring; the caller described the vehicles and gave an address where one of the drivers lived; one of the investigating officers identified defendant as one of the drivers from the address the caller gave to the 911 operator; the officer had prior dealings with defendant and knew that defendant was aggressive and anti-police; the officers located a vehicle that matched the description of one of the vehicles in the area where the caller had stated the shooting occurred; the officers approached the vehicle

with weapons drawn; the officer recognized defendant as the passenger in the vehicle; and the officers ordered the driver and defendant to exit the vehicle and to keep their hands visible, the officers had a lawful basis on which to initiate their investigation and to conduct a protective patdown of defendant. State v. Johnson, 2010-NMCA-045, 148 N.M. 237, 233 P.3d 371.

Expansion of pat-down not justified. — Where a police officer was dispatched to investigate a domestic violence incident between defendant and defendant's live-in friend; when the officer approached defendant, defendant put defendant's hands into defendant's pockets and refused to remove defendant's hands; the officer conducted a pat-down search for weapons; defendant was cooperative and non-threatening during the search; the officer did not locate any weapons during the search; the officer felt a hard golf ball-size object in defendant's pants pocket; the officer did not believe that the object felt like a knife; the officer removed the object from defendant's pants pocket because the officer wanted to know what the object was; and the object was cocaine, the removal of the object from defendant's pants pocket exceeded the proper scope of the pat-down search for weapons. State v. Almanzar, 2012-NMCA-111, 288 P.3d 238, cert. granted, 2012-NMCERT-011, rev'd, 2014-NMSC-001.

Pat-down not justified. — Where the sole rationale offered for the search was police officer's testimony that he considers any person with whom he comes into contact to be an unknown threat, although this may be a prudent assumption, this assumption alone cannot justify a pat-down. State v. Boblick, 2004-NMCA-078, 135 N.M. 754, 93 P.3d 775, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

Where premises of disturbance resembled battle scene, numerous participants had fled scene, and those detained defendants acted aggressively, police officer's conclusion that pat down search of defendant was necessary for his own protection, as well as for the protection of the other officers and other people in the area, and the police officer was justified in conducting a pat down of defendant's person. State v. Sanchez, 2005-NMCA-081, 137 N.M. 759, 114 P.3d 1075, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229 .

Forcibly abandoned property. — Where defendant's abandonment of property was a direct result of an actual illegal police search, defendant did not act voluntarily in abandoning property, and the evidence must be suppressed. State v. Ingram, 1998-NMCA-177, 126 N.M. 426, 970 P.2d 1151, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Abandonment of duffel bag. — Where drug enforcement administration agents, who boarded a bus to investigate narcotics trafficking, had no information that there were any drugs on the bus or information that would lead them to suspect that any of its passengers were trafficking in drugs, defendant's failure to respond to the agents' questions to passengers about their baggage did not constitute an abandonment of defendant's privacy interest in his duffel bag and the warrantless search of the duffel

bag violated the defendant's fourth amendment rights. State v. McNeal, 2008-NMCA-004, 143 N.M. 239, 175 P.3d 333.

No expectation of privacy. — Where defendant knew others used his bedroom in a trailer, defendant gave permission to visitors to use other rooms in the trailer, the trailer was owned by defendant's employer and used for a base of operations for a bear study; the trailer was frequently unlocked and a number of people had keys, defendant made the trailer available to acquaintances for unlimited purposes, the central part of the trailer was used for work-related activities, work-related equipment and supplies were stored in defendant's bedroom, defendant encouraged a search of the trailer for sources of the illness of the victim who shared the trailer with defendant, and defendant did not protect his privacy rights, defendant did not have an actual, subjective expectation of privacy or a reasonable subjective expectation of privacy in the bedroom and common area of the trailer. State v. Ryan, 2006-NMCA-044, 139 N.M. 354, 132 P.3d 1040, cert. denied, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120, cert. denied, 549 U.S. 899, 127 S. Ct. 215, 166 L. Ed. 2d 172.

No seizure by use of pepper spray. — Where the defendant walked away and refused to comply with a police officer's repeated attempts to detain him; the defendant was fumbling with something in his pocket; the defendant failed to comply when the police officer drew his weapon and ordered the defendant to remove his hands from his pocket; the officer sprayed the defendant with pepper spray; the defendant continued to walk away and dropped a baggie of cocaine; the officer tackled the defendant and placed him in handcuffs, the defendant was not seized before he threw away the baggie of cocaine and he voluntarily abandoned the cocaine. State v. Garcia, 2008-NMCA-044, 143 N.M. 765, 182 P.3d 146, rev'd, 2009-NMSC-046, 147 N.M. 134, 217 P.3d 1032.

Detention was not a seizure. — Detectives were discharging a legitimate investigative function when they identified themselves to defendant and asked him about items he attempted to pawn, and under circumstances where they had reports that similar items had been stolen, defendant's answers were vague, and in identifying himself he had an extra social security card bearing a name other than defendant's, detectives' questioning, request for identification, and request that defendant go to the police station to check the items attempted to be pawned did not amount to an unreasonable seizure of defendant. Therefore, the detention of defendant from the initial question until he entered the police car did not bar the admission of the evidentiary items. State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

Seizure occurred when officer ordered occupants out of a vehicle. — Where two police officers approached a parked car in which defendant was a passenger to see what was going on; the officers became suspicious and concerned about their safety when they noticed the driver and defendant make abrupt movements; and instead of questioning the occupants, one officer ordered the driver to open the door of the car, defendant was seized by the police when the officer ordered the driver to open the door. State v. Murry, 2014-NMCA-021.

Arrest pursuant to outstanding warrant after seizure. — Where police officers seized the defendant without reasonable suspicion of criminal activity and then discovered that there was an outstanding warrant against the defendant, the arrest of the defendant pursuant to the warrant did not justify the detention of the defendant and the district court properly suppressed evidence obtained as a result of the defendant's detention. State v. Soto, 2008-NMCA-032, 143 N.M. 631, 179 P.3d 1239, cert. quashed, 2009-NMCERT-005, 146 N.M. 728, 24 P.3d 793.

Assistance to bail bondsman. — Absent a warrant or the existence of a recognized exception to the warrant requirement, merely accompanying a bail bondsman to apprehend a bonded accused does not automatically give police officers constitutional authority to enter private homes. State v. Gutierrez, 2008-NMCA-018, 143 N.M. 422, 176 P.3d 1154, cert. quashed, 2008-NMCERT-011, 145 N.M. 532, 202 P.3d 125.

Curfews. — Where a child was taken into custody for a curfew violation but not arrested, the fact that the ordinance mandated that the officer take the child into custody supplied the necessary justification for a pat-down search of his person; however, there were no grounds for an expanded protective search of his pockets. State v. Paul T., 1999-NMSC-037, 128 N.M. 360, 993 P.2d 74, rev'g 1997-NMCA-071, 123 N.M. 595, 943 P.2d 1048.

Presence of defendant during search. — The fact that defendant is not present when a search occurs does not make the search unreasonable. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Where search for one thing reveals another. — Where search is for one drug and a second drug is discovered, seizure of the second drug is lawful. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

Evidence discovered through legally seized camera. — Where a police officer seized a digital camera during a search of defendant's residence for child pornography; the officer had probable cause, based on the officer's training and experience, to believe that the camera contained child pornography; by searching the digital information in the camera, the officer discovered a witness to testify against defendant whose existence would not have known but for the search of the camera; and the district court erroneously determined that the seizure and search of the camera was not supported by probable cause and excluded the witness' testimony under the fruit of the poisonous tree doctrine, the district court erred in excluding the witness's testimony. State v. Gurule, 2013-NMSC-025, rev'g 2011-NMCA-063, 150 N.M. 49, 256 P.3d 992.

Exclusion of evidence discovered through illegally seized camera. — Where police officer's seized a digital camera during a legal search of defendant's residence for child pornography; the officers did not have probable cause to seize the camera; by searching the digital information in the camera, the officers discovered a witness to testify against defendant; and the officers would not have known about the witness but for the illegal search of the camera, the trial court did not err in suppressing the

testimony of the witness under the fruit of the poisonous tree doctrine. State v. Gurule, 2011-NMCA-063, 150 N.M. 49, 256 P.3d 992, rev'd, 2013-NMSC-025.

Open fields or lots. — This section uses the word "homes", while the federal constitution uses the word "houses". The difference in wording between the federal and state constitutions is some evidence that the state constitutional provision may be interpreted as extending to open fields, providing broader protection than the federal. State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App.), cert. denied, 112 N.M. 308, 815 P.2d 161 (1991), modified, State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Defendant did not demonstrate a reasonable expectation of privacy in marijuana plots located more than one hundred yards from his cabin, where he placed no signs declaring the property to be private property or declaring the land to be off-limits to trespassers and did not erect any substantial fences around the plots. State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App.), cert. denied, 112 N.M. 308, 815 P.2d 161 (1991), modified, State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Where heroin was found in the lot next to defendant's home and was on unoccupied property, the defendant had no reasonable expectation of privacy as to this location, and thus the constitutional prohibition against unreasonable searches and seizures did not apply. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled by State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Aerial surveillance. — Where defendant's property lies within two or three miles of a municipal airport, and crop dusters fly in the area at will, the defendant had no reasonable expectation of privacy in his field to the extent of visibility from the air, and the aerial surveillance of the property did not violate defendant's fourth amendment rights. State v. Bigler, 100 N.M. 515, 673 P.2d 140 (Ct. App.), cert. quashed, 100 N.M. 505, 672 P.2d 1136 (1983).

Visibility from the air. — A defendant does not have a justifiable expectation of privacy with respect to marijuana plants protruding through holes in his greenhouse roof, to the extent of their visibility from the air. State v. Rogers, 100 N.M. 517, 673 P.2d 142 (Ct. App.), cert. denied, 100 N.M. 439, 671 P.2d 1150 (1983).

Aerial surveillance. — The fourth amendment affords citizens no reasonable expectation of privacy from aerial surveillance conducted in a disciplined manner such as mere observation from navigable airspace of an area left open to public view with minimal impact on the ground. When aerial surveillance, however, creates a hazard or a physical disturbance on the ground or unreasonable interference with a resident's use of his property, such surveillance creates a physical invasion of privacy in violation of the fourth amendment and its prohibition against unreasonable searches and seizures. State v. Davis, 2015-NMSC-034, *rev'g in part*, *aff'g in part* 2014-NMCA-042, 321 P.3d 955.

Where state police conducted a comprehensive aerial surveillance of defendant's property and the surrounding area that allegedly discovered marijuana plants growing on defendant's property, evidence that the helicopter used in the surveillance swooped in low enough to cause panic among the residents, caused property damage on nearby properties, produced excessive noise and kicked up dust and debris, and in the process of providing aerial protection for the officers on the ground, increased the risk of actual physical intrusion, the aerial surveillance and the manner in which it was conducted transformed the surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into defendant's expectation of privacy and constituted an unwarranted search in violation of the fourth amendment. State v. Davis, 2015-NMSC-034, *rev'g in part*, *aff'g in part* 2014-NMCA-042, 321 P.3d 955.

Aerial surveillance under the New Mexico Constitution. — Aerial surveillance constitutes a search under Article II, Section 10 of the New Mexico Constitution if the government agents involved intend to obtain information from a target through aerial surveillance and if the information to be obtained through aerial surveillance could not otherwise be obtained without physical intrusion into the target's home or curtilage. If the surveillance constitutes a search, then the government agents must obtain a search warrant before conducting the surveillance, absent an exception to the warrant requirement. State v. Davis, 2014-NMCA-042, cert. granted, 2014-NMCERT-003.

Where the state police and national guard were seeking to locate marijuana plantations by aerial surveillance; a spotter in a helicopter alerted a ground team to the presence of a greenhouse and vegetation in defendant's backyard; the officers did not have a warrant to search defendant's property; the officers made contact with defendant and asked permission to search the residence; defendant voluntarily consented to the search; during the search, the officers found marijuana and drug paraphernalia; and the evidence indicating that defendant was growing marijuana in the greenhouse could not have been obtained without aerial surveillance unless the officers physically invaded the greenhouse, the search violated Article II, Section 10 of the New Mexico constitution because the helicopter surveillance constituted a search requiring probable cause and a warrant. State v. Davis, 2014-NMCA-042, cert. granted, 2014-NMCERT-003.

Suppression of marijuana evidence observed in shielded garden. State v. Chort, 91 N.M. 584, 577 P.2d 892 (Ct. App. 1978).

Administrative inspection of business premises. — A nonconsensual, warrantless administrative inspection of business premises can be made only when the enterprise sought to be inspected is engaged in a business pervasively regulated by state or federal government; the inspection will pose only a minimal threat to justifiable expectations of privacy; the warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent government interest; and the inspection is carefully limited as to time, place and scope. Where a publishing company was not engaged in a pervasively-regulated business, and the state agency, in the absence of consent, must obtain a search warrant based upon a preliminary finding of probable cause by a judicial officer. State ex rel. Environmental Imp. Agency v. Albuquerque

Publishing Co., 91 N.M. 125, 571 P.2d 117 (1977), cert. denied, 435 U.S. 956, 98 S. Ct. 1590, 55 L. Ed. 2d 808 (1978).

Where officers followed building owner into defendant's room after owner knocked on the door and was invited in, such entry is not constitutionally unreasonable even where defendant did not know of the presence of the officers when he gave the invitation to enter. State v. Chavez, 87 N.M. 180, 531 P.2d 603 (Ct. App. 1974), cert. denied, 87 N.M. 179, 531 P.2d 602 (1975), cert. denied, 422 U.S. 1011, 95 S. Ct. 2635, 45 L. Ed. 2d 675 (1975).

The rule excluding illegally obtained evidence does not apply to a school disciplinary proceeding. Scanlon v. Las Cruces Public Schools, 2007-NMCA-150, 143 N.M. 48, 172 P.3d 185.

Search by school officials was reasonable. — Search of a 13-year-old boy who was seen by a school official smoking a pipe on school property against school regulations was based upon cause to believe that the search was necessary in the aid of maintaining school discipline, and the trial court was accordingly correct in admitting into evidence the fruits of that search. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Searches by school officials. — School officials may conduct a search of a student's person if they have a reasonable suspicion that a crime is being or has been committed or they have reasonable cause to believe that the search is necessary in the aid of maintaining school discipline; among the factors to be considered in determining the sufficiency of cause to search a student are the child's age, history and record in the school, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay and the probative value and reliability of the information used as a justification for the search. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Something less than the strict standards to which police officers are held is appropriate given the facts and circumstances of school searches, since crime in the schools is reaching epidemic proportions, ordinary school discipline is essential if the educational function is to be performed, events calling for discipline are frequent and sometimes require immediate action, and the normal exceptions to the warrant requirement would have little application in the school situation. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

A student's voluntary, direct statement to a person in authority, indicating personal knowledge of facts which establish that another student is engaging in illegal conduct, may provide school authorities reasonable grounds to search the second student's locker. However, a student's mere relaying of rumors or suspicions about another student is not sufficient to provide reasonable grounds. State v. Michael G., 106 N.M. 644, 748 P.2d 17 (Ct. App.), cert. denied, 106 N.M. 627, 747 P.2d 922 (1987).

Individualized suspicion is required for search by school officials. — The search by school officials of a student is warranted only if the circumstances create an individualized suspicion that a particular rule of the school has been violated and that the search will serve to produce evidence of that violation. Some articulable facts that focus suspicion on a specific student must be demonstrated before any school search can be carried out. State v. Gage R., 2010-NMCA-104, 149 N.M. 14, 243 P.3d 453.

A student's mere association with or presence among suspected wrongdoers without more does not provide a sufficient basis for a search of the student by school official. State v. Gage R., 2010-NMCA-104, 149 N.M. 14, 243 P.3d 453.

Where a school security officer observed the child in a group of students in an area outside the school known as the "smoker's corner"; the officer saw some of the students smoking, but could not remember if the child was smoking; when the school bell rang, the students entered school property; the officer detained all of the students, including the child, patted them down and searched their backpacks for tobacco and tobacco products; during the search of the child, the officer found a lighter, a pipe and a knife in the child's backpack; school policy prohibited smoking, tobacco product, lighters, and cigarettes on school property; and the officer suspected that the child might have tobacco or tobacco products based on the child's presence at the "smoker's corner", the search of the child was not justified at its inception because the officer did not have an individualized and particularized suspicion that the child had violated school policy. State v. Gage R., 2010-NMCA-104,149 N.M. 14, 243 P.3d 453.

Where school officials did not suspect child of engaging in any criminal activity, did not smell marijuana on him and had no knowledge or information concerning any wrong-doing by child, other than being out of class without a pass, there was no logical connection between the search of the child for contraband and the suspected violation of being out of class without a pass, search of child and his jacket was not supported by reasonable suspicion and was not justified at its inception. State v. Pablo R., 2006-NMCA-072, 139 N.M. 744, 137 P.3d 1198, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

Informer's use of electronic device. — Where informer making purchases of heroin from defendants had an electronic device concealed on his person that transmitted sounds to a receiver in a police car and the sounds were recorded on tape, defendants' contention that the tapes were erroneously admitted as evidence, that they were victims of an illegal search and seizure, and that their privilege against self-incrimination was violated was without merit. The informer having testified as to the conversations, the tapes were admissible to corroborate the informer's testimony. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Search of defendant's purse was not reasonable. — Where police officers, who were looking for a stolen vehicle, stopped a vehicle in which defendant was a passenger; an officer handcuffed defendant, read Miranda rights to defendant, placed defendant in the police patrol unit, and asked defendant for identification; defendant

informed the officer that defendant's identification was in a wallet in defendant's purse in the stolen vehicle; the officer retrieved a brown purse which defendant identified as belonging to defendant; defendant informed the officer that a black pencil bag inside the purse did not belong to defendant; the officer removed the black bag from the purse and opened it to determine if it contained any owner identification; the black bag contained methamphetamine; and the state did not claim that the search of the purse was pursuant to a valid arrest, the officer unreasonably searched defendant's purse and seized its contents without consent. State v. Bond, 2011-NMCA-036, 150 N.M. 451, 261 P.3d 599.

Request to empty pockets. — After stopping a vehicle based on violations of the seat-belt law and before making an arrest, an officer violated the constitutionally permissible bounds of a pat-down search when he did not feel the outside of defendant's pocket but asked him to empty his pockets at a time when the defendant was not free to leave and in a manner that the officer admitted was directive. State v. Ingram, 1998-NMCA-177, 126 N.M. 426, 970 P.2d 1151, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Drug sniffing dog not inventory search. — Because the officers were not following a routine procedure established by police regulations, the use of drug sniffing dog cannot be justified under the inventory-search exception. State v. Ramzy, 116 N.M. 748, 867 P.2d 418 (Ct. App. 1993), cert. denied, 116 N.M. 801, 867 P.2d 1183 (1994).

Warrant cannot validate prior illegal search. — If a search which discovers evidence is unreasonable, then the subsequent seizure is the fruit of that illegal search and a search warrant cannot validate a prior illegal search. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Blood alcohol tests. — The doctrine of search and seizure is not applicable to a blood test made at the sole request of the surgeon, a private individual. State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Absent a valid warrant or consent by the defendant, an arrest prior to the taking of a blood alcohol test is an essential element in order to constitute a reasonable search and seizure. Admission into evidence of the results of a blood test which does not meet this standard is reversible error. State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Sex offender DNA testing and dental imprinting. — The provision of the Albuquerque Sex Offender Registration and Notification Act ordinance that requires sex offenders to submit to compulsory DNA testing and dental imprinting is an unreasonable governmental invasion into the individual's personal security or privacy and violates the fourth amendment guarantee against unreasonable searches and seizures. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Entry under defendant's trailer and severing of a sewer pipe before executing a search warrant for narcotics did not amount to an unconstitutional search under the

circumstances since testimony indicated that heroin is often disposed of by flushing and that upon a prior arrest of one defendant she attempted to dispose of heroin in this fashion. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Dog sniff of defendant's closed luggage in the common baggage compartment of a common carrier did not violate a reasonable expectation of privacy on the part of the defendant, and did not constitute a search within the meaning of this section. State v. Villanueva, 110 N.M. 359, 796 P.2d 252 (Ct. App.), cert. denied, 100 N.M. 260, 794 P.2d 734 (1990).

Nighttime searches. — Where defendant challenged the denial of his motion to suppress evidence from a nighttime search, since the search was conducted on people who were seen to be active in nighttime, and probable cause was developed in the nighttime, the search was constitutional. State v. Garcia, 2002-NMCA-050, 132 N.M. 180, 45 P.3d 900, cert. denied, 132 N.M. 193, 46 P.3d 100 (2002).

Statute requiring any person killing bovine to preserve its hide unmutilated for 30 days did not violate constitutional immunities from self-incrimination and unreasonable searches and seizures. State v. Walker, 34 N.M. 405, 281 P. 481 (1929).

Strip searches of prison visitors can be justified on basis of reasonable suspicion, but only if such searches are conducted as part of a prison procedure that informs visitors before being searched that they have the right to refuse to be searched, in which case they will be escorted off the prison grounds. State v. Garcia, 116 N.M. 87, 860 P.2d 217 (Ct. App. 1993).

B. EXIGENT CIRCUMSTANCES DOCTRINE.

A warrantless arrest supported by probable cause is reasonable if exigency exists. — The overarching inquiry in reviewing warrantless arrests is whether it was reasonable for the officer not to procure an arrest warrant; a warrantless arrest supported by probable cause is reasonable if some exigency existed that precluded the officer from securing a warrant. State v. Paananen, 2015-NMSC-031, *rev'g* 2014-NMCA-041.

Where defendant was detained after store personnel observed him shoplifting flashlights, defendant was frisked and his possessions and the stolen flashlights were displayed on a table to present to law enforcement; officers arrived at the scene and developed probable cause to arrest defendant based on their review of the store surveillance video-tape and the evidence of shoplifting displayed on the table before them. The officers arrested defendant without a warrant, pursuant to 30-16-23 NMSA 1978, and searched defendant's belongings incident to the arrest, finding hypodermic needles and heroin. The supreme court held that it was reasonable for the officers to make a warrantless arrest where they had probable cause, and when securing a warrant was not reasonably practical before responding to the scene, because the officers did not have the information supporting probable cause or the time to act on it

prior to arriving on scene, and that an on-the-scene arrest supported by probable cause supplied the requisite exigency. The subsequent search of defendant was therefore a lawful search incident to arrest. State v. Paananen, 2015-NMSC-031, *rev'g* 2014-NMCA-041.

Dissipation of alcohol is a factor that may create an exigent circumstance. — Although dissipation of alcohol does not per se justify a warrantless entry into a home, it is a factor to consider in analyzing the reasonableness of police action in effecting a warrantless arrest. State v. Nance, 2011-NMCA-048, 149 N.M. 644, 253 P.3d 934, cert. denied, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171.

Exigent circumstances justified warrantless arrest of defendant at defendant's home for DWI. — Where defendant's vehicle collided with the victim's vehicle in a parking lot; the victim detected that defendant had a strong odor of liquor; the victim, who was following defendant's vehicle, observed defendant drive out of the parking lot in front of oncoming traffic, pull out in front of traffic, speeding, and running stop signs; the victim followed defendant to defendant's home and waited for the police; defendant did not respond to the police officers knocking on defendant's front door for fifteen minutes; defendant subsequently blew a 0.29 and 0.27 on a breathalyzer test; the officers did not enter defendant's home or draw their weapons or search defendant's home; the evidence material to the DWI case was dissipating; and the police officers arrested defendant for DWI at defendant's home without a warrant, exigent circumstances justified the officer's actions. State v. Nance, 2011-NMCA-048, 149 N.M. 644, 253 P.3d 934, cert. denied, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171.

Exigent circumstances and search incident to arrest exceptions not applicable. — Where a police officer stopped the defendant for speeding in a school zone; the defendant was the only person in the vehicle; the officer lawfully seized marijuana in the defendant's possession, arrested the defendant, handcuffed the defendant and placed the defendant in the patrol vehicle; the defendant told the officer that there was a shotgun in the defendant's vehicle; the officer conducted an inventory of the defendant's vehicle pending impoundment of the vehicle and discovered the shotgun, a revolver and other weapons in the vehicle, the seizure of the shotgun and the revolver was not lawful under the exigent circumstances and search incident to arrest exceptions to the warrant requirement. State v. Rowell, 2007-NMCA-075, 141 N.M. 783, 161 P.3d 280, rev'd, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95.

Exigent circumstances. — The court will not assume that an individual is dangerous or inclined to harm an officer in the course of a routine traffic stop simply because a loaded weapon is present in the vehicle in order to justify entry into a vehicle to seize a weapon based on the exigent circumstances doctrine. State v. Rowell, 2007-NMCA-075, 141 N.M. 783, 161 P.3d 280, rev'd, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95.

For a finding of exigent circumstances, so as to justify a warrantless search, the following criteria must be met: (1) there must be a real possibility that evidence will be destroyed if law enforcement officers cannot enter the premises before they obtain a

search warrant; (2) the exigency must not be one improperly created by law enforcement officers; and (3) any intrusion by law enforcement officers should minimize the imposition on privacy and possessory interests protected by the fourth amendment and this section. State v. Wagoner, 1998-NMCA-124, 126 N.M. 9, 966 P.2d 176, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998), overruled by State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Weapon in a vehicle on school grounds. — The mere existence of a weapon in a vehicle belonging to a person at least nineteen years old on school grounds during school hours does not automatically create an inherent exigency justifying a warrantless search of the vehicle under the exigent circumstances exception or a presumption of immediate control under the search incident to arrest exception. State v. Rowell, 2007-NMCA-075, 141 N.M. 783, 161 P.3d 280, rev'd, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95.

Exigent circumstances are not required in connection with warrantless probation search supported by reasonable suspicion. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Where pat down search was lawful once police officer knew defendant had rocks of cocaine in his pocket, there was no need for exigent circumstances to allow their seizure without a warrant. State v. Sanchez, 2005-NMCA-081, 137 N.M. 759, 114 P.3d 1075, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229 .

The exigent circumstances exception means that if, prior to entry, a police officer in good faith believes that the person whose home is to be searched and/or the person inside to be arrested is fleeing or is attempting to destroy evidence, the police officer may enter without fulfilling the usual requirements. A good faith belief is meant reasonable belief, resting on a reasonable assessment of the facts available to the police officer prior to entry. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

The burden of showing the existence of exigent circumstances rests on the state. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

An exigent circumstance exists if, prior to entry, officers in good faith believe that the contraband, or other evidence, for which search is to be made is about to be destroyed, and the question of exigent circumstances is one of fact. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

A search for weapons in the absence of probable cause to arrest must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus, it

must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. State v. Washington, 82 N.M. 284, 480 P.2d 174 (Ct. App. 1971).

An officer armed with a search warrant prior to forcible entry must give notice of authority and purpose, and be denied admittance; this is a general standard, and noncompliance with this standard is justified if exigent circumstances exist. An exigent circumstance exists if, prior to entry, officers in good faith believe that the contraband, or other evidence, for which the search is to be made is about to be destroyed. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975), overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

The exigency of the circumstances, as with the probable cause required to make a search reasonable under the circumstances, depends on practical considerations. The circumstances must be evaluated from the point of view of a prudent, cautious and trained police officer. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975), overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Absent a search warrant or valid consent to enter, intrusion into a private residence by law officers must be supported by a showing, by a preponderance of the evidence, that the entry was justified by exigent circumstances; and whether exigent circumstances exist is within the fact finding function of the trial court. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App.), cert. denied, 100 N.M. 192, 668 P.2d 308 (1983).

An individual in a car with a weapon, by itself, does not create exigent circumstances. State v. Garcia, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72, aff'g in part and rev'g in part 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41.

Exigent circumstances to search meth labs. — Where officers possess particularized information suggesting that a meth lab is active, that knowledge is sufficient to support a determination that exigency exists due to the dangerous nature of meth production and the very real possibility of explosion or fire inherent in the meth production process. State v. Allen, 2011-NMCA-019, 149 N.M. 267, 247 P.3d 1152, cert. denied, 2011-NMCERT-001, 150 N.M. 559, 263 P.3d 901.

A statement to a police officer that an active meth lab is present in a home when made by a person who just exited the home provides the particularized information necessary to conclude that there are exigent circumstances justifying a warrantless entry into the home. State v. Allen, 2011-NMCA-019, 149 N.M. 267, 247 P.3d 1152, cert. denied, 2011-NMCERT-001, 150 N.M. 559, 263 P.3d 901.

Where an officer was questioning defendant and defendant’s relative outside a mobile home in connection with the theft of antifreeze from an auto parts store; the officer noticed a white powdery crystallized substance protruding from defendant’s pocket which the officer identified as methamphetamine; a third person emerged from the mobile home and asked to speak to the officer; and the third person told the officer that

there was a meth lab active in the house, exigent circumstances justified the warrantless search of the mobile home. State v. Allen, 2011-NMCA-019, 149 N.M. 267, 247 P.3d 1152, cert. denied, 2011-NMCERT-001.

Exigent circumstances not found. — In determining whether exigent circumstances exist, the test is whether under the objective test exigent circumstances were shown to exist at the time of injury and that the particular defendant presents a danger, may flee, or is destroying evidence; there was no evidence of the existence of exigent circumstances where although numerous individuals were present on the premises, at the time of execution of the search warrant nothing indicated that anyone threatened the officers or that they were placed in fear by persons either inside or outside the residence. State v. Williams, 114 N.M. 485, 840 P.2d 1251 (Ct. App. 1992).

The state failed to prove the existence of exigent circumstances justifying a warrantless search of an automobile where border agents conducted the search at a checkpoint thirty miles away from the location of the nearest magistrate, the magistrate was available at the time of the stop, there was a telephone at the checkpoint and a fax machine at the main border patrol office, and there were three border patrol agents on duty at the checkpoint at the time of the stop. State v. Gallegos, 2003-NMCA-079, 133 N.M. 838, 70 P.3d 1277, cert. quashed, 2005-NMCERT-012, 138 N.M. 773, 126 P.3d 1137.

Exigent circumstances did not exist. — Exigent circumstances justifying a warrantless search did not exist where defendant's car was parked outside the sheriff's office and the defendant and the two other occupants were in the sheriff's office under arrest. State v. Coleman, 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

Exigent circumstances do not exist where the only fact known to the police is the readily disposable nature of the contraband that is the object of the search. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Exigent circumstances found. — Where a police officer was dispatched to investigate a trash fire; the officer observed bottles of acetone in the burnt trash pile; the officer detected a strong chemical smell coming from the house near the trash fire; the officer heard someone walking in the house, and after the officer knocked on the door of the house, the officer heard someone running in the house; the officer entered the house and observed that the master bedroom was padlocked from the outside, and the chemical odor was especially strong near the door; the officer was concerned that someone was hiding in the room who would pose a risk to the police officers, destroy evidence, or turn the scene into a deadly situation; the officer broke the padlock, and when the officer opened the door, the officer was confronted with a strong chemical odor that pushed the officer back from the door and made another officer dizzy; and a meth lab expert entered the house prior to obtaining a search warrant to determine whether there was anything that would explode or start a fire, because the officer had particularized information suggesting that there might be someone hiding in the house

who could pose a threat or destroy evidence and a concern that the meth lab might explode or cause a fire, exigent circumstances justified the warrantless search of the house for the limited purpose of a safety and welfare check. State v. Brown, 2010-NMCA-079, 148 N.M. 888, 242 P.3d 455, cert. denied, 2010-NMCERT-007.

Where a police officer, who was responding to a report of a disturbance at a room in a motel, observed from outside the room, through a gap between the curtains, defendant using a lighter under a spoon attempting to heat up an unknown substance and then attempting to draw the substance into a syringe; the officer believed that defendant was preparing illegal drugs for injection; the officer obtained a key to the room; the officer was concerned that if the police did not enter the room immediately, the substance would be lost or destroyed; the officers entered the room and collected the spoon with the substance in it, a loaded syringe, and a bag as evidence; and field testing of the substance indicated that the substance was methamphetamine, the officers' entry was justified based on the destruction-of-evidence exigency. State v. Huettl, 2013-NMCA-038, 305 P.3d 956, cert. granted, 2013-NMCERT-003.

Where an officer saw methamphetamine in plain view in a vehicle occupied only by the defendant who was the driver; the drugs were within defendant's reach and immediate control; and the defendant was in control of the vehicle and able to drive away, the officer instantly had probable cause to believe that defendant was committing a crime and the seizure of the drugs was justified by exigent circumstances. State v. Weidner, 2007-NMCA-063, 141 N.M. 582, 158 P.3d 1025.

Where the officers received a report that the defendant had fired a firearm at others and some of the officers heard the shots, and the officers observed the defendant lying on a bed holding a firearm and were concerned about the safety of others in the area if the defendant were to begin shooting again, substantial evidence supported the trial court's finding of exigent circumstances justifying a warrantless seizure of the gun. State v. Calvillo, 110 N.M. 114, 792 P.2d 1157 (Ct. App.), cert. denied, 110 N.M. 72, 792 P.2d 49 (1990).

Where police officers armed with a search warrant had probable cause to believe and in good faith did believe that defendant was selling heroin from his home and that there was heroin therein, they had received information from an informant who had assisted in the investigation leading to the issuance of the warrant, that defendant kept a weapon in the house and that the officers would have to move rapidly or defendant would flush the heroin down the toilet, the officers were all experienced and knew from their experience that normally there is an attempt to get rid of heroin before police officers get into a house, and after knocking on the door and announcing that they were police officers, they could see people moving and hear the sound of voices coming from inside the house, one of which was yelling or screaming as if someone was calling to another for the purpose of getting attention, the circumstances justified the officers in entering after knocking and announcing that they were police officers without waiting to be invited or denied entry. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975), overruled

by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994), rev'g 88 N.M. 378, 540 P.2d 858 (1975).

Where, after plainclothes officer stated he was a police officer and showed his badge and gun, defendant disappeared from the door, turned out the lights and was heard running, exigent circumstances justified a forcible entry by the officer, since the officer, in good faith prior to entry, believed that defendant was fleeing. State v. Kenard, 88 N.M. 107, 537 P.2d 1003 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), cert. denied, 423 U.S. 1024, 96 S. Ct. 468, 46 L. Ed. 2d 398 (1975).

Where the presence of possibly hazardous chemicals provided the exigent circumstances necessary for a warrantless entry of defendant's residence, seizure of glassware and handguns was lawful because they were in plain view, and the exigencies of the situation permitted the opening of a briefcase without a warrant to search for other weapons or explosives. State v. Calloway, 111 N.M. 47, 801 P.2d 117 (Ct. App.), cert. denied, 111 N.M. 77, 801 P.2d 659 (1990).

Application to border searches. — The requirement of exigent circumstances under this section applied to federal border patrol agent's search of defendant's truck at a checkpoint in New Mexico where the state sought to introduce evidence resulting from that search in a New Mexico state court. State v. Snyder, 1998-NMCA-166, 126 N.M. 168, 967 P.2d 843, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Truck at border checkpoint presented exigent circumstance. — Border-patrol agents at checkpoint had an objectively reasonable basis for believing that exigent circumstances justified an immediate warrantless search of defendant's truck, and, therefore, marijuana seized pursuant to such search was not subject to the exclusionary rule. State v. Snyder, 1998-NMCA-166, 126 N.M. 168, 967 P.2d 843, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

No exigent circumstances. — Anhydrous ammonia leaking from the defendant’s garage did not, by itself, provide exigent circumstances to justify a warrantless entry into the defendant’s home that was located in a separate building thirty to forty feet away. State v. Moore, 2008-NMCA-056, 144 N.M. 14, 183 P.3d 158.

Attempt to flee. — Where defendant was suspected of a murder, and his attempt to move toward back of mobile home indicated an attempt to flee, officers' warrantless arrest on grounds of exigent circumstances was justified. State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807, overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Exigent circumstances exception applicable. — Where a police officer stopped the defendant for speeding in a school parking lot; the officer observed in plain sight a bag of marijuana in the defendant’s shirt pocket; the officer removed the defendant from the vehicle, handcuffed him, placed him under arrested, and secured him in the officer’s patrol car; the defendant admitted that he had a shotgun in his vehicle; and the officer

then searched the vehicle for weapons, the seizure of weapons from the defendant's vehicle was justified the exigent circumstances exception to the warrant requirement. State v. Rowell, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95, rev'g 2007-NMCA-075, 141 N.M. 783, 161 P.3d 280.

Exigent circumstances and arrest incident to arrest. — Where a police officer seized marijuana on defendant's person while defendant was behind the wheel of the vehicle, the marijuana was in plain view in the defendant's pocket, defendant could drive away with the marijuana, and the officer contemporaneously arrested the defendant for possession of drugs, the seizure of the marijuana was lawful based on the exigent circumstances and arrest incident to arrest exceptions to the warrant requirement. State v. Rowell, 2007-NMCA-075, 141 N.M. 783, 161 P.3d 280, rev'd, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95.

C. KNOCK AND ANNOUNCE DOCTRINE.

Knock and talk procedure. — A police officer, who is engaged in a "knock and talk" investigation, is not required, as a prerequisite to obtaining a valid consent to search a home, to advise the occupant that consent to the search may be withheld. State v. Flores, 2008-NMCA-074, 144 N.M. 217, 185 P.3d 1067, cert. denied, 2008-NMCERT-004, 144 N.M. 48, 183 P.3d 933.

Futility exception to the knock-and-announce rule. — Where the defendant opened the door of his apartment at the same time police officers were about to knock on the door, recognized the officers, and attempted to shut the door, the officers were justified in dispensing with the knock-and-announce rule, because compliance would have been futile. State v. Vargas, 2008-NMSC-019, 143 N.M. 692, 181 P.3d 684, rev'g 2007-NMCA-006, 140 N.M. 864, 149 P.3d 961.

Time sufficient to infer refusal of consent to enter. — Where police officers served a search warrant on the defendant's trailer; knocked on two doors; announced their identity and purpose approximately twenty times; and heard a person moving back and forth within the trailer, but never toward the door, the officer's wait of ten to twenty seconds before entering the trailer was a reasonable length of time for them to conclude that they were being denied admission and the search of the trailer was constitutional. State v. Hand, 2008-NMSC-014, 143 N.M. 530, 178 P. 3d 165.

Time sufficient to infer refusal of consent to enter. — Where the size of defendant's motel room was no larger than twelve feet by twelve feet; the bed was within three or four feet of the door; the officers knocked while announcing notice of their presence, identification of authority, and statement of lawful purpose for at least ten seconds before using a battering ram to forcibly enter the motel room; and there was no response from inside the room during the time the officers were knocking and announcing, the ten second interval was a reasonable length of time for the officers to conclude that they were being denied admittance and the officers did not violate the knock-and-announce rule prior to forcefully entering the motel room to serve a search

warrant. State v. Johnson, 2006-NMSC-049, 140 N.M. 653, 146 P.3d 298, aff'g in part and rev'g in part 2004-NMCA-064, 135 N.M. 615, 92 P.3d 61.

Knock-and-announce requirement inherent. — Article II, § 10 incorporates a knock-and-announce requirement. The requirement that officers executing a search warrant announce their identity and purpose and be denied admission is a critical component of a reasonable search under this section. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (Ct. App. 1994), aff'g 114 N.M. 83, 835 P.2d 81 (1992).

Exclusion of evidence for failure to knock-and-announce. — If an officer does not knock-and-announce prior to forcible entry and exigent circumstances are not present, the fruits of that search would be excluded as a violation of the general constitutional reasonableness requirement. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (Ct. App. 1994), aff'g 114 N.M. 83, 835 P.2d 81 (1992).

Factors to be considered in following the knock-and-announce rule. — An objectively reasonable officer should consider the time at which a search warrant is executed, the identity of the occupants likely to be within the dwelling at the time of the search, and the size of the dwelling to be searched in assessing whether a period of nonresponsiveness following a knock-and-announce signals constructive refusal. State v. Ulibarri, 2010-NMCA-084, 148 N.M. 576, 240 P.3d 1050, cert. denied, 2010-NMCERT-008.

Time insufficient to conclude refusal to answer knock on door. — Where defendant and others were the target of an investigation of drug trafficking; after defendant had been arrested, police officers executed a search warrant of defendant’s house at 10:00 p.m.; defendant shared the house with defendant’s elderly grandparent; the grandparent was not suspected of any wrongdoing; the lead officer knew that neither defendant nor any other individual targeted in the investigation was in the house and that only defendant and the grandparent lived in the house; the officers knocked and announced, waited ten to twelve seconds during which time they heard no response or any other noise in the house, and then forced entry into the house; and as the door swung inward, the door hit the grandparent who was walking toward the door, under the totality of the circumstances, the wait of ten to twelve seconds was not reasonable and the knock-and-announce rule was violated. State v. Ulibarri, 2010-NMCA-084, 148 N.M. 576, 240 P.3d 1050, cert. denied, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Because ten seconds is such a short interval of time to wait for a person to answer a door at 6:15 a.m. on a weekend morning, and because the officers heard no sounds suggesting that defendant was awake, either to answer the door or to destroy evidence, under these circumstances and in the absence of exigency, ten seconds was not a sufficient interval to conclude that defendant refused to answer the door. Therefore, the search was not constitutionally reasonable, and the results of the search should have been suppressed. State v. Johnson, 2004-NMCA-064, 135 N.M. 615, 92 P.3d 61, aff'd in part and rev'd in part, 2006-NMSC-049, 140 N.M. 653, 146 P.3d 298.

Danger to law enforcement exception to knock-and-announce. — There is a general exception to the rule of announcement based on an officer's objectively reasonable belief that full or partial compliance with the rule of announcement would increase the risk of danger to the officers effectuating the warrant. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (Ct. App. 1994), aff'g 114 N.M. 83, 835 P.2d 81 (1992).

The 10 to 15 second pause after knocking and announcing in this case was sufficient time for the officers to wait before executing their forcible entry into the house. The time interval, while extremely short for 6:00 a.m. on a Saturday morning, was sufficiently long given the highly specific indicia that the defendant posed a menace to police executing the warrant, since he was known to possess many weapons and had made threats against police. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (Ct. App. 1994), aff'g 114 N.M. 83, 835 P.2d 81 (1992).

Evidence that police officers had received previous information that the occupants of the residence had access to firearms amply supported the trial court's rejection of defendant's argument concerning their violation of the knock-and-announce rule. State v. Steinzig, 1999-NMCA-107, 127 N.M. 752, 987 P.2d 409, cert. denied, 128 N.M. 149, 990 P.2d 823.

Destruction of evidence exception to knock-and-announce. — If an officer has good reason to believe that evidence will be destroyed, that officer is justified in making an unannounced entry into a person's residence. "Good reason" will be defined by whether it was objectively reasonable for the officer to believe that evidence is being or will be destroyed based upon the particular circumstances surrounding the search. State v. Ortega, 117 N.M. 160, 870 P.2d 122 (1994), aff'g 114 N.M. 193, 836 P.2d 639 (Ct. App. 1992).

Futility exception to the knock and announce requirement. — If the police observe that a person has seen them as they approach a residence, then, unless the police have information at the time of entry that leads to a reasonable belief that the person who saw them knows both that they are officers and that they have authority to enter pursuant to a warrant, the futility exception does not apply to the knock-and-announce requirement. The fact that someone has simply seen the police does not generally provide a factual basis for a reasonable suspicion that the occupant knows that the officers have authority to enter pursuant to a warrant. State v. Jean-Paul, 2013-NMCA-032, 295 P.3d 1072.

Exigent circumstances exception to the knock and announce requirement. — The fact that the police observe that a person has seen them approach a residence and moves about the residence knowing that the police are outside, but not knowing that the police are there to execute a warrant, does not create the kind of exigent circumstances that excuse the knock-and-announce requirement based on a suspicion that evidence will be destroyed. State v. Jean-Paul, 2013-NMCA-032, 295 P.3d 1072.

If exigent circumstances do not excuse the knock-and-announce requirement, then under the New Mexico constitution, the assessment of how long officers must reasonably wait between knocking and announcing and a forcible entry is made by reference to the time that it would take someone to voluntarily respond or for the police to infer constructive refusal, not by the time that it would take for the occupants to engage in the behavior that the exigent circumstances exception seeks to prevent. State v. Jean-Paul, 2013-NMCA-032, 295 P.3d 1072.

The starting point of the waiting period of the knock and announce requirement is from the time that the first announcement of the police's presence and purpose to execute a search warrant has been completed. The time period cannot begin when the police start to knock or when they announce they are the police, because until the occupants are notified that the police are there to execute a search warrant, they have no reason to believe that they are required to either open the door or suffer a forcible entry. State v. Jean-Paul, 2013-NMCA-032, 295 P.3d 1072.

Two to five seconds wait did not satisfy the knock and announce requirement. — Where police officers, who were executing a search warrant at defendant's home, saw a person standing near the window, looking in the direction of the officers, and then moving from the window as the officers reached the door, and the officers knocked and announced their presence and authority pursuant to a search warrant, waited one to five seconds, and then forcibly entered the home using a battering ram, the one to five second wait was not justified by either the exigent circumstance exception or the futility exception to the knock-and-announce requirement because the one-to-five-second wait was too short to permit the occupants either to answer the door or from which to infer that they had refused to voluntarily admit the police and the entry violated Article II, Section 10 of the New Mexico constitution. State v. Jean-Paul, 2013-NMCA-032, 295 P.3d 1072.

Knock-and-announce rule violated. — Where police officers executed a search warrant at defendant's residence looking for drugs; there was no evidence of any exigency or that defendant presented a danger; and the belt tape recording of one officer indicated that the officers announced for eight seconds, never knocked and never waited to give defendant an opportunity to open the door and that after eight seconds, the officers battered the door down with a battering ram, the belt tape recording was substantial evidence that the officers violated the knock-and-announce rule and that the entry into defendant's residence was illegal. State v. Gonzales, 2010-NMCA-023, 147 N.M. 735, 228 P.3d 519.

The knock-and-announce rule applies to the execution of arrest warrants. State v. Vargas, 2008-NMSC-019, 143 N.M. 692, 181 P.3d 684, rev'g 2007-NMCA-006, 140 N.M. 864, 149 P.3d 961.

Time of use of battering ram to force entry excluded from time to infer refusal to enter. — When officers began hitting the door of defendant's motel room with a battering ram, they ceased "knocking" and began "entering" and the time during which

the officers hit the door with the battering ram must be excluded from the time the officers waited for consent to enter after they knocked and announced their identity and purpose under the knock-and-announce rule. State v. Johnson, 2006-NMSC-049, 140 N.M. 653, 146 P.3d 298, aff'g in part and rev'g in part, 2004-NMCA-064, 135 N.M. 615, 92 P.3d 61.

Destruction of evidence exception. — Where the affidavit for the search warrant established a good faith belief on the part of the officers that heroin was to be found on the premises; the officers knocked on the door, identified themselves as police officers, and announced their purpose, and while awaiting a response heard commotion within, the officers were justified in not delaying further. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

Search warrant does not abrogate knock-and-announce requirement and since officers, equipped with a valid warrant during the conduct of a drug raid, failed to give notice of their authority and purpose prior to entering a motel room with a pass key, evidence seized pursuant to this warrant was required to be suppressed. State v. Rogers, 116 N.M. 217, 861 P.2d 258 (Ct. App. 1993).

Ruse exception to the announcement rule. — For a ruse to be a reasonable and constitutional alternative to knocking and announcing, the state must demonstrate that, at the time of execution of the warrant, the police had a reasonable suspicion, based upon the particular circumstances of the case at hand, that exigent circumstances exist to believe that announcing would increase the risk of injury to the officers or increase the risk that evidence would be destroyed. State v. Reynaga, 2000-NMCA-053, 129 N.M. 257, 5 P.3d 579, cert. denied, 129 N.M. 208, 4 P.3d 36 (2000).

Procedure used prior to forcible entry. — In executing a search warrant or making an arrest on probable cause, an officer, prior to forcible entry, must give notice of authority and purpose and be denied admittance. Noncompliance with this standard is justified, however, if exigent circumstances exist, which may include good faith belief that the officers or someone within is in peril of bodily harm or that the person to be arrested is fleeing or attempting to destroy evidence. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

The general standard for executing a search is that prior to forcible entry, an officer must give notice of authority and purpose and be denied admittance, but noncompliance with the standard may be justified by exigent circumstances known to the officer beforehand, as, for example, when the officer, in good faith, believes that a person is attempting to destroy evidence. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

An officer, prior to forcible entry, must give notice of authority and purpose, and be denied admittance although noncompliance with this standard is justified if exigent circumstances exist, as, for example, when prior to entry officers in good faith believe that the person to be arrested is fleeing or attempting to destroy evidence. This rule

allows the police to act fast and without warning under exigent circumstances when to do otherwise might allow a guilty person to escape conviction, but at the same time, prevents unwarranted intrusion into private dwellings by overzealous police officers eager to execute a search. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend upon the circumstances of each case. However, simultaneous identification and entry is unreasonable and demands the suppression of evidence. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Where a police officer knocked on defendant's door and announced his authority in an audible manner, but did not wait for anyone to come to the door, nor did he state his purpose for being present, or request permission to enter and serve the warrant, he did not properly give notice of his authority and purpose. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

"Forcible entry". — Forcible entry is not restricted to breaking down a door or window; entry through a closed but unlocked door, absent consent, is a forcible entry, as is entry through an open door, absent consent. In essence, forcible entry refers to an unannounced intrusion. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

The phrase "refused admittance" has been generally interpreted not to mean an affirmative refusal, and an officer may justifiably conclude that he has been refused entry where after announcement he either becomes aware of activity by the occupants which is inconsistent with action deemed reasonably necessary to open the door, or where a reasonable interval of time has elapsed without any response by the occupants, although an entry made too soon after announcement precludes any opportunity by the occupant to refuse the officer admittance. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Where a police officer knocked loudly on the door, stated his identity as a police officer and that he had a search warrant, demanded entry and repeated this two or more times, waiting 30 to 60 seconds before breaking in, the officer could reasonably infer that he had been denied admittance. State v. Sanchez, 88 N.M. 378, 540 P.2d 858 (Ct. App.), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975), latter decision overruled by State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

D. COMMUNITY CARETAKER DOCTRINE.

Community caretaker exception embodies three distinct doctrines. — The community caretaker exception to the warrant requirement embodies three distinct doctrines: the emergency aid doctrine which applies specifically to warrantless intrusions into the home, the automobile impoundment and inventory doctrine, and the public servant doctrine which deals primarily with warrantless searches and seizures of automobiles; each doctrine involves separate types of intrusions involving distinct expectations of privacy, and each is analyzed by different standards. State v. Sheehan, 2015-NMCA-021, cert. denied, 2015-NMCERT-002.

Standards under the community caretaker doctrines. — The burden for justifying a warrantless entry into a private residence under the emergency aid doctrine is significantly higher than the standards under the other community caretaker doctrines because the expectation of privacy in the home is strongest and a warrantless entry into a home presents unique concerns; under the emergency aid doctrine, police may make a warrantless entry into a home if they have reasonable grounds to believe that there is an emergency at hand and that there is an immediate need for their assistance for the protection of life or property; under the public servant doctrine, a police officer may stop a vehicle for a specific, articulable safety concern, even in the absence of reasonable suspicion that a violation of law has occurred or is occurring. State v. Sheehan, 2015-NMCA-021, cert. denied, 2015-NMCERT-002.

Wrong community caretaker doctrine applied. — Where officer, while patrolling a state highway, noticed a vehicle parked on the shoulder of the road with the driver's side door open and interior lights on, and inside the vehicle were two people, one of which was a woman who appeared unconscious and in an unnatural position; at trial, officer sufficiently articulated a specific concern for the safety of the female passenger to permit him to detain the vehicle to alleviate his safety concern pursuant to the public servant doctrine; the trial court erred in granting a motion to suppress, concluding that the officer's concerns were not sufficient to meet the higher standard of the emergency assistance doctrine. State v. Sheehan, 2015-NMCA-021, cert. denied, 2015-NMCERT-002.

Emergency assistance doctrine. — Under the emergency assistance doctrine, an officer's warrantless entry into a home is justified if the state can establish that the police have reasonable grounds to believe that there is an emergency at hand and that there is an immediate need for their assistance for the protection of life or property, that the search is not primarily motivated by intent to arrest and seize evidence, and that there is some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. State v. Cordova, 2016-NMCA-019, cert. granted, 2015-NMCERT-008.

Where officers entered defendant's home without a warrant following a collision between defendant's vehicle and a motorcyclist, where the motorcyclist was killed and the driver and occupants of defendant's vehicle fled the scene, the state failed to establish that the officers had reasonable grounds to believe that defendant might have been injured to an extent requiring the officers' immediate entry and assistance where

there was no concrete evidence that defendant was the driver involved in the accident, and assuming the officers knew that defendant was the driver, they had no specific evidence that defendant was seriously injured and in need of immediate aid, such as blood in the vehicle, impacts to the windshield from the inside of the vehicle, or information from witnesses that the occupants of the vehicle appeared injured when they fled the scene, and the officers had no specific information that defendant was even at home when the officers made the warrantless entry of defendant's home, and there were no signs of injury, such as blood, noted on defendant's property. State v. Cordova, 2016-NMCA-019, cert. granted, 2015-NMCERT-008.

Community caretaker doctrine. — The test of legitimacy under the community caretaker doctrine is whether the officers' actions were objectively reasonable and in good faith. State v. Nemeth, 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936, overruled by State v. Ryan, 2005-NMSC-005, 137 N.M. 174, 108 P.3d 1032.

A response by law enforcement officers to a call seeking assistance in regard to a possible suicide inside a home can be characterized both as the rendering of emergency aid or assistance and the rendering of assistance out of a concern for a person's safety and welfare for purposes of application of the community caretaker exception to the fourth amendment warrant requirement. State v. Nemeth, 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936, overruled by State v. Ryan, 2005-NMSC-005, 137 N.M. 174, 108 P.3d 1032.

An officer who acts in the community caretaker capacity is still subject to state and federal constitutional constraints with respect to a weapons frisk because it is distinct from a welfare check. State v. Boblick, 2004-NMCA-078, 135 N.M. 754, 93 P.3d 775, cert. denied, 2004-NMCERT-006.

Officer was not acting as a community caretaker. — The search undertaken by the police officer was not a community caretaking encounter with defendant, consensual or otherwise, but rather, it was a search of his property while defendant was incapacitated. As police officer looked in the ER examination room, saw the clothes lying on the floor, and of his own volition entered the room, picked up the pants, and searched the pockets, the state did not present substantial evidence as to the reasonableness of police officer's belief that his aid and assistance was necessary, and police officer's search of defendant's clothes was done for the purpose of investigating possible criminal activity or obtaining incriminatory evidence, rather than pursuant to a community caretaking function. State v. Gutierrez, 2005-NMCA-015, 136 N.M. 779, 105 P.3d 332, cert. quashed, 2005-NMCERT-006, 137 N.M. 768, 115 P.3d 231.

E. PLAIN VIEW DOCTRINE.

Plain view doctrine. — It is not a search to observe that which occurs openly in a public place and which is fully disclosed to visual observation, and there is no seizure in disregard of any lawful right when officers retrieve and examine the packets which have been dropped in a public place. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

The constitutional prohibition is directed to unreasonable searches and seizures so that people may be secure in their persons, houses, papers and effects, and does not apply to items viewed in an open field. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled by State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Seizure of contraband observed in plain view. — The seizure of contraband observed in plain view inside an automobile, by an officer who observed it during a lawful traffic stop, is justified by the exigent circumstances exception to the warrant requirement, because the contraband is in plain view not only to the officer, but also to the public at large and therefore, if left alone, it can easily be tampered with or destroyed. State v. Bomboy, 2008-NMSC-029, 144 N.M. 151, 184 P.3d 1045, rev'g 2007-NMCA-081, 141 N.M. 853, 161 P.3d 898.

Plain view exception to the warrant requirement. — Under the plain view exception to the warrant requirement, items may be seized without a warrant if the police officer was lawfully positioned when the evidence was observed, and the incriminating nature of the evidence was immediately apparent, such that the officer had probable cause to believe that the article seized was evidence of a crime. The “immediately apparent” language requires that there be probable cause without the need for further search or an additional invasion of privacy and possessory interests. Probable cause exists when the facts and circumstances warrant a belief that the accused had committed an offense, or is committing an offense, and must be evaluated in relation to the circumstances as they would have appeared to a prudent, cautious and trained police officer. An officer must acquire information establishing probable cause to believe that an item is possessed unlawfully before seizing it. State v. Sanchez, 2015-NMCA-084.

Where police officer initiated a traffic stop after discovering that defendant’s vehicle registration had expired, the officer observed a clear, plastic bag on the floorboard of the vehicle containing capsules or pills, and where defendant attempted to conceal the bag on the floorboard by trying to slide it underneath the driver’s seat, the New Mexico court of appeals held that the existence of two pills contained within a small bag on the floorboard of the car was insufficient to convey evidence of criminality that would be apparent to the officer based upon mere observation, and defendant’s attempt to conceal the bag containing pills that may or may not have been lawfully possessed, without any testimony from the officer indicating suspicious circumstances or specific knowledge about defendant or the item seized, is not an act that supplied the officer with a suspicion that rose to the level of probable cause. State v. Sanchez, 2015-NMCA-084.

Plain view doctrine applied. — There is no seizure in the sense of the law when the officers examined the contents of a napkin after it had been dropped to the street. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (Ct. App. 1966).

Where police officer testified that when he knocked on the door and entered at the invitation of the defendant, he did so only for the purpose of talking to whoever was

present concerning blood found in a car parked outside, but where at that time he had been advised of the assault on the complaining witness in the case and when he saw the defendant and the bloody clothes, both on him and in the room, defendant was placed under arrest and the clothes were gathered up and taken to the police station along with defendant, there was no illegal search and seizure, and, accordingly, the clothing taken from defendant's room was admissible in the trial of the charges against him. State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (Ct. App. 1966).

A package thrown from a car as it stops is not procured through a search; neither is there a seizure, and the contents thereof are admissible evidence. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (Ct. App. 1966).

Where stolen rings and clothes were seen next to codefendant at the time he was discovered hiding in the closet, the items were in plain view, and there was no subsequent search. State v. Hansen, 87 N.M. 16, 528 P.2d 660 (Ct. App. 1974).

Where police officer saw a gun in plain view from outside a car as the driver was being given a traffic citation, the requirements of the plain view doctrine are met. However, under New Mexico constitution, even with gun in plain view, officer may not enter vehicle and seize gun without consent, warrant or exigent circumstances. State v. Garcia, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72, aff'g in part and rev'g in part, 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41.

Where heroin seized during a search pursuant to a warrant was physically located on property upon which there was an unoccupied house, and not within the curtilage as specified in the warrant, it was held that although the warrant did not authorize a search outside the curtilage, the can containing the heroin was viewed from a place the officer had a right to be under the warrant, and consequently, it was not discovered as a result of an illegal search. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled by State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Officer entitled to look into parked vehicle once investigatory stop completed. — Once the purpose of an investigatory stop is completed, an officer still has the right to look into a vehicle parked on a public road, and may then seize contraband which is in plain view. State v. Powell, 99 N.M. 381, 658 P.2d 456 (Ct. App.), cert. denied, 99 N.M. 358, 658 P.2d 433 (1983).

Plain view doctrine did not apply. — Where law enforcement officers who were executing a valid warrant authorizing the search of the defendant’s home for evidence of criminal sexual penetration observed parts of protected game animals in the defendant’s home and called in a conservation officer to determine whether the defendant was in violation of game and fish laws, the conservation officer’s entry into the defendant’s home to look for evidence of violations of game and fish laws and the conservation officer’s subsequent seizure of items of the defendant’s personal property was not a legitimate extension of the plain view observations of the officers executing

the search warrant because the incriminating nature of the animal parts would not be immediately apparent unless and until the investigating officer has probable cause that the animal parts are unaccompanied by proper documentation, the conservation officer's entry into the defendant's home was unlawful, and the items of personal property seized by the conservation officer were the fruits of an unlawful entry. State v. Moran, 2008-NMCA-160, 145 N.M. 297, 197 P.3d 1079.

The plain view doctrine does not apply to marijuana found in defendant's car, which marijuana was enclosed in a burlap-like sack, where neither of the police officers involved can testify that he was able to see inside the bag. State v. Coleman, 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

Where the marijuana seized was not in plain view until the officers ordered the defendants out of the car and proceeded to enter the car themselves, the plain view doctrine did not apply since in order for the plain view rule to be applicable, the officers must lawfully be in the position that enabled them to see what is allegedly in plain view. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Where contraband was discovered when officers opened a cedar chest, a metal pill box in a purse in an overnight case while searching for heroin, the "plain view" doctrine did not justify its seizure of the contraband. However, seizure of the contraband was permissible under the facts of the case because where permission has been given to search for a particular object, the ensuing search remains valid as long as its scope is consistent with an effort to locate that object and other evidence observed in the course of such a lawful search may also be seized. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

F. OTHER EXCEPTIONS.

A warrantless arrest supported by probable cause is reasonable if exigency exists. — The overarching inquiry in reviewing warrantless arrests is whether it was reasonable for the officer not to procure an arrest warrant; a warrantless arrest supported by probable cause is reasonable if some exigency existed that precluded the officer from securing a warrant. State v. Paananen, 2015-NMSC-031, *rev'g* 2014-NMCA-041.

Where defendant was detained after store personnel observed him shoplifting flashlights, defendant was frisked and his possessions and the stolen flashlights were displayed on a table to present to law enforcement; officers arrived at the scene and developed probable cause to arrest defendant based on their review of the store surveillance video-tape and the evidence of shoplifting displayed on the table before them. The officers arrested defendant without a warrant, pursuant to 30-16-23 NMSA 1978, and searched defendant's belongings incident to the arrest, finding hypodermic needles and heroin. The supreme court held that it was reasonable for the officers to make a warrantless arrest where they had probable cause, and when securing a warrant was not reasonably practical before responding to the scene, because the

officers did not have the information supporting probable cause or the time to act on it prior to arriving on scene, and that an on-the-scene arrest supported by probable cause supplied the requisite exigency. The subsequent search of defendant was therefore a lawful search incident to arrest. State v. Paananen, 2015-NMSC-031, *rev'g* 2014-NMCA-041.

Inevitable discovery doctrine did not apply. — Where the loss prevention personnel of a store observed defendant place flashlights under defendant's jacket and leave the store without paying for the them; defendant was detained in the loss prevention office; when the police officers arrived, they spoke with the loss prevention personnel and learned the facts leading up to defendant's detention; the officers entered the office and immediately handcuffed defendant and conducted a pat down search; the officers searched defendant's backpack and discovered hypodermic needles and heroin; defendant's warrantless arrest was illegal because the state failed to show exigent circumstances to support the arrest; and the state argued that the evidence would have been inevitably discovered in an inventory search, the evidence would not have been inevitably discovered because an inventory search would not have been independent of the illegal arrest. State v. Paananen, 2014-NMCA-041, cert. granted, 2014-NMCERT-003.

"Hot pursuit" doctrine. — Where shortly after an armed robbery an officer saw defendant, who fit the description of one of the robbers, enter a house and after about ten minutes the officers actually entered the house, the doctrine of "hot pursuit" applied and the entry by the officers was a valid intrusion. State v. Hansen, 87 N.M. 16, 528 P.2d 660 (Ct. App. 1974).

Search of wallet seized during arrest. — Where the defendant's wallet was seized incident to his lawful arrest, the inventory search exception justified the search of the defendant's wallet. State v. Saiz, 2008-NMSC-048, 144 N.M. 663, 191 P.3d 521, abrogated, State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783.

Inventory search exception. — For a constitutional, lawful inventory search, the police must have control or custody of the object of the search, the inventory must be carried out pursuant to established police regulations, and the search must be reasonable and conducted in good faith. To be a reasonable search, it must be made pursuant to an established procedure and further any one of the following three purposes: to protect the arrestee's property while it remains in police custody, to protect the police against claims or disputes over lost or stolen property, or to protect the police from potential danger. State v. Davis, 2016-NMCA-073, cert. granted, 2016-NMCERT-____.

Where patrol officer began to follow defendant, who was driving a motorcycle, on suspicion of driving with a revoked driver's license, and where defendant pulled into the driveway of his home, parked his motorcycle, took off his backpack and placed it on top of his car that was parked in his carport, and where the officer, after confirming that defendant was driving on a revoked license, arrested defendant, the warrantless search of defendant's backpack was not a lawful inventory search because a reasonable nexus

between the arrest and the seizure was absent because defendant did not have physical possession of the backpack at the time of his arrest and because it was seized at defendant's home, and the state failed to satisfy the requirement that the purported inventory search was made in accordance with police guidelines where the officer testified that the sheriff's department only inventoried items on the person of an arrestee at the time of the arrest, and, as noted, defendant did not have physical possession of the backpack when he was arrested. State v. Davis, 2016-NMCA-073, cert. granted, 2016-NMCERT-____.

Search not permissible under the plain-feel doctrine. — Where, during a lawful protective patdown of defendant for a weapon, the officer felt a hard object in defendant's jacket pocket; it was immediately apparent to the officer that the object was not a weapon; and the officer had to manipulate the object to determine that the object was a glass drug pipe, the officer went beyond the lawful parameters of a protective patdown and the seizure of the glass pipe was not permissible under the plain-feel doctrine. State v. Johnson, 2010-NMCA-045, 148 N.M. 237, 233 P.3d 371.

Inevitable discovery exception. — The inevitable discovery doctrine applies where evidence may have been seized illegally, but where an alternative legal means of discovery such as a routine police inventory search would inevitably have led to the same result. State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

For the doctrine to apply, the alternate source of evidence must be pending, but not yet realized. If the alternate source has been realized, and the evidence seized or "reseized" according to this alternate source, the inevitable discovery doctrine is no longer applicable. Instead, the admissibility of the evidence must be evaluated under the independent source doctrine. State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Independent source doctrine. — The independent source doctrine (an exception to the exclusionary rule where evidence is legally seized after an illegal search) is inapplicable to a search conducted pursuant to a warrant based partially on tainted information gathered during a prior illegal search. State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Sufficient attenuation of live witness testimony as exception to the exclusionary rule. — Witness testimony, though causally related to an illegal search, may become sufficiently attenuated from the illegality, considering whether the witness is willing to testify and whether the purpose served by excluding the witness testimony outweighs the cost of forever precluding the witness from testifying. State v. Martinez, 2015-NMCA-013.

Where defendant was charged with numerous sex offenses and drug offenses, and where the court of appeals affirmed the trial court's decision to suppress all physical evidence seized from the defendant's home and vehicle, all statements made by

defendant and the testimony of the victim; on motion for reconsideration following the first appeal, the court of appeals determined that it was appropriate for the trial court to consider the state's motion for reconsideration that was based on a new argument and new authority; the court of appeals held that live witness testimony, though causally related to an illegal search may become sufficiently attenuated from the illegality if the witness is willing to testify; the state, however, failed to present testimony in person, or by affidavit, to show the willingness of the witness to testify and therefore the district court properly denied the motion for reconsideration. State v. Martinez, 2015-NMCA-013.

Evidence obtained during second traffic stop need not be excluded where sufficient attenuation existed between two traffic stops. — Where police officers received information supporting an investigation into ownership of a van that defendant was towing after an initial unconstitutional stop of defendant's vehicle had ended, sufficient attenuation existed between the first and second stop of defendant's vehicle to purge any taint resulting from the illegal first stop, where there was a complete end to the first stop and a clear beginning to the subsequent stop, there existed an intervening circumstance between the two stops, and there was no showing of flagrant misconduct on the part of the law enforcement officers. State v. Monafo, 2016-NMCA-092, cert. denied, 2016-NMCERT-____.

New crime exception to the exclusionary rule is limited. — The purpose of the exclusionary rule is to deter police misconduct; when a defendant commits a new crime that endangers the safety of a police officer or endangers public safety following an improper detention, the need to protect law enforcement officers outweighs the deterrent to police misconduct provided by immunizing the defendant's actions from criminal liability, but the policy reasons for recognizing a new crime exception to the exclusionary rule do not exist when a non-violent, identity-related offense is committed in response to unconstitutional police conduct. State v. Tapia, 2015-NMCA-055, cert. granted, 2015-NMCERT-005.

Where defendant was a passenger in a vehicle that was stopped without reasonable suspicion, the police officer observed defendant committing a seatbelt violation and asked defendant for identification, and where defendant concealed his identity by giving the officer a false name and committed forgery by signing the citation issued by the officer in the false name defendant had given to the officer, the court of appeals held that the commission of a non-violent, identity-related offense in response to unconstitutional police conduct does not automatically purge the taint of the unlawful police conduct under federal law, and that suppression of the evidence of defendant's new crimes was appropriate because evidence of the new crimes flowed directly from observing an alleged seat belt violation during the unlawful seizure. State v. Tapia, 2015-NMCA-055, cert. granted, 2015-NMCERT-005.

Meaning of the phrase "at the scene". — The phrase "at the scene" as used in 31-1-7(A) NMSA 1978 must be read broadly to enable a police officer to make a warrantless arrest within a reasonable time and distance from when and where a domestic

disturbance occurred. State v. Almanzar, 2014-NMSC-001, rev'g 2012-NMCA-111, 288 P.3d 238.

Where defendant and the victim began quarreling in a parking lot; defendant kicked the victim; and the police arrested defendant for domestic violence at a store across the street from the parking lot within minutes after the victim called 911, defendant's warrantless arrest was lawful under 31-1-7(A) NMSA 1978 because the arrest was make in close proximity to when and where the incident occurred. State v. Almanzar, 2014-NMSC-001, rev'g 2012-NMCA-111, 288 P.3d 238.

Evidence from a warrantless arrest incident to domestic disturbance. — Where police officers responded to a domestic violence incident that had occurred in a parking lot between defendant and defendant's live-in friend; after the incident, defendant and defendant's friend had both left the parking lot and had gone to two separate locations away from the parking lot; the officers found defendant at a convenience store that was near the parking lot; and the officers conducted a pat-down search of defendant and discovered cocaine in defendant's pants pocket, the district court erred in holding that the evidence would have been inevitably discovered during a search incident to a legal arrest for misdemeanor domestic battery because an arrest could only have been effectuated at the parking lot where the domestic battery had occurred. State v. Almanzar, 2012-NMCA-111, 288 P.3d 238, cert. granted, 2012-NMCERT-011, rev'd, 2014-NMSC-001.

A protective search or sweep. — A protection search or sweep is only allowed incident to a lawful arrest; thus, since the officers entered and searched a bedroom before they arrested the defendant, the search and seizure could not be upheld as a protective sweep. State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App. 1994), cert. denied, 119 N.M. 389, 890 P.2d 1321 (1995).

Search of medicine cabinet cannot be upheld as a protective sweep, and motion to suppress the contents of the medicine cabinet and all the fruits of the search of the medicine cabinet should be granted. State v. Zamora, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517, cert. quashed, 2005-NMCERT-012, 138 N.M. 773, 126 P.3d 1137.

G. TRAFFIC STOPS.

Unknown liability insurance compliance status provides reasonable suspicion to make investigatory stop. — Where police officer, on routine patrol, entered the license plate number of the vehicle defendant was driving into the patrol car's mobile data terminal, which remotely accesses records maintained by the motor vehicle department regarding the insurance compliance status of vehicles registered in New Mexico, and where the query returned a result indicating that the compliance status of the vehicle was unknown, there was a reasonable basis for suspecting that defendant's vehicle was probably uninsured in violation of 66-5-205(B) NMSA 1978, and therefore the officer had reasonable suspicion to stop defendant's vehicle. State v. Yazzie, 2016-NMSC-026, *rev'g* 2014-NMCA-108, 336 P.3d 984.

Traffic stop based on the unknown insurance status of a vehicle. — Where defendant was driving a vehicle when a police officer entered the vehicle's license plate number into the mobile data terminal in the police car which informed the officer that defendant's vehicle insurance status was "unknown"; the officer then stopped defendant's vehicle; and the only basis for the stop was the information that the vehicle's insurance status was unknown, the stop was not constitutionally authorized because the information known to the officer did not provide any specific articulable facts to support a suspicion that defendant was committing a crime by driving an uninsured vehicle. State v. Yazzie, 2014-NMCA-108, cert. granted, 2014-NMCERT-010.

Traffic stop cannot be based on a probability. — Where defendant was driving a vehicle when a police officer entered the vehicle's license plate number into the mobile data terminal in the police car which informed the officer that defendant's vehicle insurance status was "unknown"; and based on the testimony of a witness from the motor vehicle division, the district court concluded that because there was an 80% to 90% chance that the owner of a vehicle with an unknown insurance status had not obtained insurance, its was reasonable for the officer to suspect that defendant did not have insurance, a strong correlation between "unknown" status and being uninsured was insufficient by itself to support a traffic stop because evidence must be particularized to the person who is stopped for a violation and those facts must be articulated, rather than based solely on probability. State v. Yazzie, 2014-NMCA-108, cert. granted, 2014-NMCERT-010.

Traffic stop must be based on reasonable suspicion or probable cause. — To conduct a constitutionally valid traffic stop, a police officer must have reasonable suspicion of criminal activity or probable cause that the traffic code has been violated; a reasonable suspicion is a particularized suspicion, based on all the circumstances that the person being detained is breaking or has broken the law. An appellate court will find reasonable suspicion if the officer is aware of specific articulable facts, together with rational inferences from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring. State v. Martinez, 2015-NMCA-051, cert. granted, 2015-NMCERT-005.

In DWI trial, where the police officer testified that he observed defendant approach an intersection with a four-way stop sign at a high rate of speed, slam on the brakes and come to a complete stop after passing the stop sign and entering the lane of traffic, and where the district court made an express finding after viewing the officer's dashboard camera video that defendant did not enter the intersection before coming to a complete stop, which was directly contrary to the officer's testimony, the state failed in its burden of showing that the officer had a reasonable suspicion to believe defendant's vehicle failed to stop at the point nearest the intersecting roadway before entering the intersection as required by 66-7-345(C) NMSA 1978. State v. Martinez, 2015-NMCA-051, cert. granted, 2015-NMCERT-005.

The totality of the circumstances supported the officers' reasonable suspicion of criminal activity. — In defendant's trial for possession of a controlled substance, law

enforcement officers had reasonable suspicion to make an investigatory stop of the vehicle in which defendant was a passenger, based on law enforcement's observations of the vehicle's presence at two locations at which people cooperating with the police purchased heroin, on the fact that the vehicle was registered to a resident of one of the locations, and on the fact that the vehicle followed a particular pattern known to the officers to be associated with heroin purchases from one of the locations. Under the totality of the circumstances, the information known to the officers provided an objective basis upon which the officers could reasonably suspect criminal activity and conduct a lawful investigatory stop. State v. Hernandez, 2016-NMCA-008, cert. denied, 2015-NMCERT-012.

Test for whether officer had reasonable suspicion to stop motor vehicle is objective; it is the evidence known to the officer that is important, not his view of the governing law. State v. Munoz, 1998-NMCA-140, 125 N.M. 765, 965 P.2d 349.

Stop for suspended driver's license. — Police officers, who are informed that the owner of a car observed under suspicious circumstances has a suspended driver's license, have reasonable suspicion to initiate a traffic stop. State v. Candelaria, 2011-NMCA-001, 149 N.M. 125, 245 P.3d 69, cert. denied, 2010-NMCERT-011, 150 N.M. 490, 262 P.3d 1143.

Where, as police officers pulled into a parking lot where a car and a pickup were parked, the vehicles sped away; the officers followed the car which they recognized from a previous investigation; a records search of the license plate on the car indicated that the car was owned by a person known to the officers; and a records search of the owner's driving record revealed that the driving privileges of the owner had been suspended, the officers had reasonable suspicion to initiate a traffic stop of the car. State v. Candelaria, 2011-NMCA-001, 149 N.M. 125, 245 P.3d 69, cert. denied, 2010-NMCERT-011, 150 N.M. 490, 262 P.3d 1143.

Expansion of the scope of a traffic stop. — As the circumstances of a lawful traffic stop develop, police officers may expand the investigation to answer any new reasonable and articulable suspicions that arise during the course of their lawful activity. State v. Candelaria, 2011-NMCA-001, 149 N.M. 125, 245 P.3d 69, cert. denied, 2010-NMCERT-011, 150 N.M. 490, 262 P.3d 1143.

Where police officers lawfully stopped defendant's car; defendant told the officers that defendant had been stopped by police earlier in the day with a firearm; the officers observed an empty handgun holster and a box of ammunition in the back seat of the car; defendant consented to a pat-down search for weapons; the officers also noticed the odor of marijuana coming from the car; defendant stated that defendant had smoked marijuana earlier in the day; and based on the odor of marijuana and defendant's statement, the officers requested permission to search the car and defendant consented to the search both verbally and in writing, the detention of defendant after the initial traffic stop was supported by reasonable suspicion. State v. Candelaria, 2011-NMCA-

001, 149 N.M. 125, 245 P.3d 69, cert. denied, 2010-NMCERT-011, 150 N.M. 490, 262 P.3d 1143.

Extension of traffic stop for field sobriety texts. — An officer may administer field sobriety tests if the officer has developed independent reasonable suspicion that would support the extension of the traffic stop to conduct the field sobriety tests. State v. Candace S., 2012-NMCA-030, 274 P.3d 774, cert. denied, 2012-NMCERT-002.

Illegal expansion of stop. — Where a police officer received complaints from a woman that her brother had been harassing her; the officer parked the officer's vehicle near the woman's house to be able to observe any additional problems; the officer observed a truck drive up and stop in front of the house and defendant go inside the house; when defendant came out of the house, the officer asked defendant why defendant was at the house, asked for defendant's identification, and ran a check on defendant and found nothing; the officer returned defendant's identification and advised defendant to leave and then immediately asked defendant if defendant had any drugs or weapons; defendant said no; the officer then asked if the officer could pat defendant down; defendant agreed; the officer placed defendant in a secure, spread-eagle position and patted defendant down; the officer asked defendant if the officer could remove what the officer felt in defendant's pocket; defendant agreed; the officer removed a bindle of drugs; and there was no indication that drug trafficking was occurring at the house, the officer was justified in making brief inquires to find out what defendant was doing in the house in connection with the officer's investigation of domestic violence at the house, the officer was not justified in asking further questions about drugs and weapons or in placing defendant in a secure, spread-eagle position and patting defendant down, the encounter did not become consensual after the officer told defendant that defendant was free to leave, and the illegal expansion of the stop tainted defendant's subsequent consent to search. State v. Figueroa, 2010-NMCA-048, 148 N.M. 811, 242 P.3d 378, cert. quashed, 2011-NMCERT-012, 291 P.3d 159.

Under the New Mexico constitution, a police officer cannot use a valid traffic stop as a pretext to pursue an investigation of another offense that is not supported by reasonable suspicion or probable cause. State v. Ochoa, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143, cert. quashed, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.

Pretextual traffic stop. — Where a narcotics agent was surveilling a residence for drug traffic; the agent saw an unfamilar vehicle that was driven by the defendant; the agent wanted to identify and question the defendant; when the defendant drove away from the residence, the agent saw that the defendant was not wearing a seatbelt; the agent asked a patrol officer to stop the vehicle; the patrol officer followed the defendant but could not determine whether or not the defendant was wearing a seatbelt; relying on the information provided by the agent, the patrol officer stopped the defendant, the stop for the seatbelt violation was a pretext for the investigation of the agent's unsupported hunch that the defendant was involved in drug activity and was not constitutionally reasonable under the New Mexico constitution. State v. Ochoa, 2009-NMCA-002, 146

N.M. 32, 206 P.3d 143, cert. quashed, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.

Traffic stop to execute a warrant for arrest. — The pretext rule of State v. Ochoa, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143 does not apply when a traffic stop occurs during a criminal investigation that does not involve a reasonable suspicion, but the sole reason for the stop is to execute an outstanding arrest warrant. State v. Peterson, 2014-NMCA-008, cert. denied, 2013-NMCERT-012.

Where law enforcement officers, who were investigating defendant for possible drug activity, discovered that defendant had an outstanding misdemeanor warrant; the officers stopped defendant's vehicle to execute the warrant; and after arresting defendant, the officers found heroin in defendant's pocket and crack cocaine in the vehicle, the decision to stop defendant in order to execute the arrest warrant was not an improper pretextual stop prohibited by the New Mexico constitution and State v. Ochoa, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143 because the officers did not need reasonable suspicion to stop defendant when they had a valid outstanding arrest warrant. State v. Peterson, 2013-NMCA-012, cert. denied, 2013-NMCERT-012.

Pretextual traffic stop was based on an unrelated motive that was supported by reasonable suspicion. — Where police officers conducted surveillance of a home based on reliable information from a confidential informant that the home was a stash house for marijuana and that a large quantity of marijuana would be delivered to the house; a pickup truck arrived at the house and the driver and a person from the house moved three boxes from the truck to the house; at the same time, the confidential informant informed the officers that based on conversations with the residents of the house, a large quantity of marijuana was currently stored at the residence; the officers saw defendant's spouse load one of the boxes into a vehicle and drive away; defendant's spouse was stopped for a vehicle violation and the stopping officer found packages of marijuana in the box; defendant later drove away from the house; the officers asked another officer to stop defendant's vehicle; defendant's vehicle was stopped for making two sudden lane changes without signaling; and the officer found packages of marijuana in two boxes in defendant's vehicle, the pretextual stop of defendant was valid, because the underlying motive to investigate defendant's involvement in drug activity was supported by reasonable suspicion. State v. Alderete, 2011-NMCA-055, 149 N.M. 799, 255 P.3d 377.

Reasonable suspicion to expand scope of stop. — Where a police officer stopped defendant for failure to stop at a stop sign; the officer detected the strong odor of "burnt marijuana" coming from the vehicle; and when the defendant exited the vehicle, the officer smelled "burnt marijuana" on defendant's person, the odor of marijuana emanating from the vehicle and on defendant's person provided objective, articulable facts that would lead a reasonable officer to suspect that defendant was driving under the influence and supported the expansion of the scope of the stop to investigate a possible DUI. State v. Randy J., 2011-NMCA-105, 150 N.M. 683, 265 P.3d 734, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Reasonable mistake of law. — An officer's reasonable mistake of law can support a finding of reasonable suspicion to conduct a lawful traffic stop under the fourth amendment. The fourth amendment, however, tolerates only reasonable mistakes, and those mistakes, whether of fact or of law, must be objectively reasonable. State v. Dopslaf, 2015-NMCA-098, cert. denied, 2015-NMCERT-008.

Where police officer stopped defendant's vehicle after observing defendant perform a U-turn across the middle of the street, believing that defendant had violated 66-7-319 NMSA 1978 (driving on divided highways) when he made the U-turn, it was objectively reasonable for the officer to believe that crossing over the painted median was a violation of 66-7-319 NMSA 1978, because it was objectively reasonable for the officer to believe that the painted median was constructed to impede vehicular traffic and designed to prohibit maneuvers such as defendant's U-turn, especially when 66-7-319 NMSA 1978 lacks definitive guidance as to what constitutes an intervening space or a clearly indicated divided section. Assuming without deciding that the officer was mistaken as to the law, the court of appeals determined that the officer had reasonable suspicion to make the traffic stop. State v. Dopslaf, 2015-NMCA-098, cert. denied, 2015-NMCERT-008.

Mistake of law. — Where a traffic stop was initiated based on the officer's mistaken understanding of law, the officer did not have reasonable suspicion or probable cause to stop the defendant's vehicle. State v. Anaya, 2008-NMCA-020, 143 N.M. 431, 176 P.3d 1163, cert. denied, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

Where defendant was stopped by police for making a left turn without ending up in the left most lane of the roadway defendant turned into, the traffic stop was without a reasonable basis in law, because Subsection B of 66-7-322 NMSA 1978 does not specify a particular lane that a driver who makes a left turn must end up in once the turn is completed and permits the driver discretion to choose a lane after completion of a turn. State v. Almeida, 2011-NMCA-050, 149 N.M. 651, 253 P.3d 941, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Probable cause not shown. — Where a police officer stopped a vehicle for a speeding violation; defendant was a passenger in the vehicle; while the officer was questioning the driver, defendant looked straight ahead, avoiding eye contact with the officer except for a single furtive glance at the officer; defendant's behavior caused the officer to suspect that narcotics or weapons were in the vehicle; after the officer issued a citation to the driver, the officer asked if there were any illegal drugs or weapons in the vehicle; defendant granted the officer permission to search the vehicle; and the officer found illegal narcotics in the vehicle which defendant admitted owning, defendant's behavior alone was insufficient to give rise to a reasonable suspicion of criminal activity, defendant was illegally detained when the stop was extended by the officer's questions concerning illegal drugs and weapons, and the illegal drugs were discovered as a result of the illegal detention. State v. Portillo, 2011-NMCA-079, 150 N.M. 187, 258 P.3d 466, cert. denied, 2011-NMCERT-006, 150 N.M. 764, 266 P.3d 633.

Where the police officer observed the defendant sitting in his vehicle in front of a house that was under drug investigation; a man who was a convicted felon was leaning into the vehicle talking to the defendant; when the defendant drove away from the house, the officer stopped the defendant for a cracked windshield; the defendant appeared nervous when he was stopped and wanted to leave; the defendant refused consent to search the vehicle; and the officer detained the defendant's vehicle for approximately ten minutes to await a drug dog to perform a perimeter sniff of the vehicle while permitting the defendant to leave the vehicle, the officer did not have reasonable suspicion to detain the vehicle beyond that necessary to issue a citation for the cracked windshield and evidence seized from the vehicle was inadmissible as the fruit of an illegal search and seizure. State v. Neal, 2007-NMSC-043, 142 N.M. 176, 164 P.3d 57.

Constitutionality of sobriety checkpoint. — A sobriety checkpoint is constitutionally permissible so long as it is reasonable within the meaning of the fourth amendment as measured by its substantial compliance with eight guidelines, which include the role of supervisory personnel, restrictions on discretion of field officers, safety, reasonable location, time and duration, indicia of official nature of the roadblock, length and nature of detention, and advance publicity. No one guideline is necessarily dispositive of the issue. State v. Swain, 2016-NMCA-024.

Where a New Mexico state police sergeant prepared a plan and supervised a DWI checkpoint in De Baca county and sent an e-mail to a radio station a month before the scheduled checkpoint with a request to publicize the roadblock, but did not request confirmation of the radio station's receipt of his e-mail, did not know whether the station received his e-mail, did not listen to the radio station to confirm the checkpoint was publicized, and did not seek publication in the county newspaper, the DWI checkpoint was constitutional where the evidence established that the checkpoint plan complied with all the established guidelines except the advance publicity factor; the lack of advance publicity, without more, is not sufficient to find that a DWI checkpoint constitutes an illegal seizure. The district court erred in determining that the state did not substantially comply with the DWI checkpoint factors, and erred in granting defendant's motion to suppress. State v. Swain, 2016-NMCA-024.

DWI checkpoint was constitutional. — Where a DWI checkpoint had been planned by the DWI unit supervisor for the Bernalillo county sheriff's office, approved by his lieutenant, where an approved tactical plan laid out the parameters of the checkpoint, including the placement of signs, cones, reflective tape, and emergency lighting at the checkpoint site, where the checkpoint location was selected on the basis of prior arrest statistics and on the successful deterrent effect of past checkpoints at the same location, and where testimony that the advance publicity factor was complied with, the trial court did not err in determining that the checkpoint was reasonable. State v. Hall, 2016-NMCA-080.

Roadblock was constitutional since the selection of the roadblock and procedures for conducting it were approved by police supervisory personnel; officers had no discretion as to which vehicles were stopped; pylons, special stop signs, room for safe stopping

distance and other safeguards were provided; the location was chosen because of the number of DWI-related accidents in the area; the roadblock was conducted between the hours of 12:00 a.m. and 3:00 a.m. on a Saturday morning; the officers wore uniforms and police cars with flashing lights were parked at the roadblock; the total detention time was no more than five minutes per vehicle; and the roadblock had been publicized in advance. State v. Madalena, 121 N.M. 63, 908 P.2d 756 (Ct. App. 1995).

Where the guidelines for the roadblock limited field officers to no more than two minutes of conversation with motorists, the officers were not permitted to ask questions unrelated to a driver's sobriety, and the supervising officer provided the guidelines to the officers at a briefing before the roadblock, the roadblock was constitutional. State v. Rivera, 2010-NMCA-109, 149 N.M. 406, 249 P.3d 944, aff'd in part, rev'd in part, 2012-NMSC-003, 268 P.3d 40.

Fourth amendment standard for questioning during a traffic stop. — Under the fourth amendment the reasonableness of a traffic stop is limited only by the time required to conduct a reasonable investigation into the initial justification for the stop. Questioning by an officer does not have to be reasonably related to the initial justification for the stop to be permissible. If the questioning measurably extends the detention, the officer must have a reasonable suspicion of criminal activity or concern for police safety to support further questioning or the encounter must have evolved into a consensual encounter. State v. Leyva, 2011-NMSC-009, 149 N.M. 435, 250 P.3d 861, overruling State v. Duran, 2005-NMSC-034, 138 N.M. 414, 120 P.3d 836.

New Mexico constitution standard for questioning during a traffic stop. — The New Mexico constitution provides greater protection against unreasonable searches and seizures than does the fourth amendment. The subject matter limitations set forth in State v. Duran, 2005-NMSC-034, 138 N.M. 414, 120 P.3d 836 is a valid test for the reasonableness of police questioning under Article II, Section 10. Under Article II, Section 10, the reasonableness of a traffic stop is limited only by the time required to conduct a reasonable investigation into the initial justification for the stop. All questions asked by an officer must be reasonably related to the initial justification for the stop. Unrelated questions are permissible only if they are supported by independent reasonable suspicion, if they are related to officer safety, or if the interaction has developed into a consensual encounter. State v. Leyva, 2011-NMSC-009, 149 N.M. 435, 250 P.3d 861.

Questioning defendant during a traffic stop was reasonable. — Where a police officer stopped defendant for speeding; before defendant stopped, the officer observed defendant lean over as if defendant were placing something under the passenger seat; the officer found that defendant's license was suspended; at the officer's direction, defendant arranged to have someone pick up defendant's vehicle; the officer did not observe any suspicious activity during the stop; the officer issued three citations to defendant; the officer then asked defendant if there were any weapons or drugs in the vehicle; defendant responded that there was marijuana in the vehicle; at the officer's request, defendant consented to a search of the vehicle; and the officer discovered

marijuana under the passenger seat and methamphetamine in the passenger compartment, the officer's questioning of defendant after the traffic investigation was completed did not violate defendant's rights under the fourth amendment because the questions were a de minimis extension of the detention and reasonable under the circumstances and did not violate defendant's rights under Article II, Section 10 or the New Mexico constitution because the officer had independent and articulable reasonable suspicion to expand the officer's questioning of defendant. State v. Leyva, 2011-NMSC-009, 149 N.M. 435, 250 P.3d 861.

Further questioning not permissible. — Where an officer stopped defendant's vehicle because of the lack of a license plate, the officer could lawfully ask for driver documentation, but an additional question whether defendant had any weapons in the car, and the officer's subsequent detention and search were not permissible. City of Albuquerque v. Haywood, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, overruled by State v. Leyva, 2011-NMSC-009, 149 N.M. 435, 250 P.3d 861.

Lack of reasonable suspicion to expand traffic stop. — Article II, Section 10 of the New Mexico Constitution requires a reasonable justification for the initial stop and that all questions asked during the stop be reasonably related to the reason for the stop or otherwise be supported by reasonable suspicion; inquiries unsupported by reasonable suspicion during a vehicle stop makes the continuing detention of the person illegal and any evidence discovered as a result of an illegal seizure must be suppressed. State v. Bell, 2015-NMCA-028, cert. denied, 2014-NMCERT-012.

Where a law enforcement officer stopped defendant for speeding, the officer's questions regarding weapons and dead bodies, asked for the sole purpose of trying to elicit truthful responses from defendant, improperly expanded the scope of the traffic stop because the non-traffic inquires were unsupported by reasonable suspicion; the district court properly determined that all evidence acquired after the improper questions were asked during the illegal detention should be suppressed. State v. Bell, 2015-NMCA-028, cert. denied, 2015-NMCERT-012.

Reasonable suspicion to detain. — Where a police officer stopped defendant's vehicle based on his suspicion that the passenger in the vehicle had forged a check, the officer had no suspicion that the defendant had committed or was committing an offense, and the officer found drugs and drug paraphernalia in the possession of the passenger, the officer had reasonable suspicion about the contents of the vehicle and authority to detain and question the defendant about the contents of the vehicle and then to ask for consent to search the vehicle. State v. Funderburg, 2008-NMSC-026, 144 N.M. 37, 183 P.3d 922, rev'g 2007-NMCA-021, 141 N.M. 139, 151 P.3d 911.

No reasonable suspicion to detain. — Where a police officer, who was parked in an alley, saw defendant pull into the alley and immediately back out; because the officer thought defendant's behavior was suspicious, the officer followed and stopped defendant, because the temporary registration tag on defendant's vehicle had expired; defendant had a passenger who was known to the officer to be a prostitute; the officer

asked defendant to exit the vehicle so that the officer could interview defendant about the prostitute; the officer did not have sufficient independent articulable and reasonable suspicion to expand the scope of the initial detention for the further inquiry regarding defendant's relationship with the prostitute. State v. Olson, 2011-NMCA-056, 150 N.M. 348, 258 P.3d 1140, rev'd, 2012-NMSC-035, 285 P.3d 1066.

Reasonable suspicion to expand the traffic stop. — Where the police officer was parked late at night in a marked police car in an alley where the officer had previously seen prostitutes at work; the officer saw defendant enter the alley, recognize the police vehicle, immediately back out of the alley, and drive away; the officer stopped defendant for driving with an expired registration; the driver avoided eye contact with the officer; the officer recognized the passenger in the vehicle as a known prostitute; and based on the passenger's clothing and makeup, the officer thought the passenger was currently working as a prostitute, the officer had reasonable suspicion to expand the traffic stop to investigate prostitution solicitation. State v. Olson, 2012-NMSC-035, 285 P.3d 1066, rev'g 2011-NMCA-056, 150 N.M. 348, 258 P.3d 1140.

Information supplied by confidential informant may support reasonable suspicion. — Detailed information, provided by a confidential informant and verified by officers, supported a reasonable suspicion of criminal activity, thereby justifying an investigatory stop of defendant's vehicle. State v. Skippings, 2014-NMCA-117.

Length of investigatory detention. — Temporal duration is neither the controlling nor the only factor to be considered in assessing the reasonableness of the extent of an investigatory detention. State v. Sewell, 2009-NMSC-033, 146 N.M. 428, 211 P.3d 885, rev'g, 2008-NMCA-027, 143 N.M. 485, 177 P.3d 536.

Where police officers lawfully stopped the defendant's car to investigate suspected drug trafficking; the officers failed to find drugs in the car; a passenger in the car appeared nervous and afraid and tried to indicate to the officers that the passenger was afraid of something that the officers needed to investigate; the officers separated the defendant and the passenger after the car search to talk to the passenger privately; the passenger told one officer that the passenger could not talk in front of the defendant and that the defendant was making a crack deal; the passenger told the officer that the passenger had the drugs; and the time that elapsed between the initial traffic stop and the discovery of the drugs was not more than ten minutes, the brief additional time to talk with the passenger was justified under the totality of the circumstances and was not an unreasonable extension of the roadside detention. State v. Sewell, 2009-NMSC-033, 146 N.M. 428, 211 P.3d 885, rev'g, 2008-NMCA-027, 143 N.M. 485, 177 P.3d 536.

Detention of vehicle based on reasonable suspicion was reasonable, where defendant's freedom of movement was not severely restricted, officers immediately requested assistance of drug dog when defendant refused consent to search, canine unit arrived within thirty-five to forty minutes after officers stopped the vehicle and tried to obtain consent to search, and off-duty officer on call with the drug dog lived approximately ten

miles from the stop. State v. Robbs, 2006-NMCA-061, 139 N.M. 569, 136 P.3d 570, cert. denied, 2006-NMCERT-005, 139 N.M. 568, 136 P.3d 569.

Investigatory detention as a de facto arrest. — Where officers lawfully stopped defendant's vehicle to investigate suspected drug trafficking, and where defendant was patted down, hand-cuffed and read Miranda warnings, the ten-minute detention did not transform the seizure from an investigatory detention into a de facto arrest when officers detained defendant no longer than necessary to verify or quell their suspicion of criminal activity. State v. Skippings, 2014-NMCA-117.

Establishment of DWI roadblock did not require warrant since the evils that a warrant is designed to prevent were addressed by the requirement that the decision to set up a roadblock be made by supervisory personnel and by restrictions on the discretion of field officers in conducting the roadblock. State v. Bates, 120 N.M. 457, 902 P.2d 1060 (Ct. App.), cert. denied, 120 N.M. 213, 900 P.2d 962 (1995).

Border patrol stops at international border checkpoints. — Article II, Section 10 does not afford greater protections than the federal constitution at an international border checkpoint because unlike motorists who are stopped at interior border checkpoints, all motorists stopped at international fixed checkpoints are known to be international travelers who are not entitled to the heightened privacy expectations enjoyed by domestic travelers. New Mexico constitutional law, therefore, does not depart from the federal border search doctrine, and thus U.S. customs and border protection officers may conduct routine searches, including referral to a secondary checkpoint, of persons and effects crossing the border even in the absence of individualized suspicion. State v. Sanchez, 2015-NMSC-018, *rev'g* No. 32,994, mem. op. (N.M. Ct. App. Nov. 6, 2013) (non-precedential).

Where defendant motorist was stopped by U.S. customs and border protection officers at an international border checkpoint, and where defendant produced valid documentation of her legal status as a permanent resident, the border protection officers did not violate defendant's state constitutional right to be free of unreasonable searches and seizures when defendant was referred to a secondary area to have her vehicle inspected, even though the border patrol officers did not suspect any criminal activity, because a citizen's state constitutional rights, and expectation of privacy, at a checkpoint located on the border are significantly less than inside the border, and the federal government's interest in preventing the entry of unwanted persons and effects is greater at the international border. State v. Sanchez, 2015-NMSC-018, *rev'g* No. 32,994, mem. op. (N.M. Ct. App. Nov. 6, 2013) (non-precedential).

Border patrol stops. — Under the New Mexico constitution, after a federal border patrol agent has asked about a motorist's citizenship and immigration status, and has reviewed the motorist's documents, any further detention requires reasonable suspicion of criminal activity. State v. Cardenas-Alvarez, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225, aff'g 2000-NMCA-009, 128 N.M. 570, 995 P.2d 492.

The misdemeanor arrest rule does not apply to investigatory traffic stops. State v. Ochoa, 2008-NMSC-023, 143 N.M. 749, 182 P.3d 130, rev'g 2006-NMCA-131, 140 N.M. 573, 144 P.3d 132, on remand, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143, cert. quashed, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.

An officer may reasonably rely on information from another officer that a crime has been or is being committed to justify an investigatory traffic stop. State v. Ochoa, 2008-NMSC-023, 143 N.M. 749, 182 P.3d 130, rev'g 2006-NMCA-131, 140 N.M. 573, 144 P.3d 132, on remand, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143, cert. quashed, 2009-NMCERT-011, 147 N.M. 464, 225 P.3d 794.

Pretextual traffic stop. — State v. Ochoa, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143 requires a determination whether the real reason for a traffic stop is supported by objective evidence of reasonable suspicion and holds that if the stop is supported by objective evidence of reasonable suspicion, the traffic stop is constitutional. State v. Gonzales, 2011-NMSC-012, 150 N.M. 74, 257 P.3d 894.

Where a confidential informant told a police officer that an individual with defendant's name would be transporting a large amount of methamphetamine; the informant gave the officer the name of the street on which the person lived; the officer set up a surveillance of defendant's residence, coordinated a traffic stop of defendant for a window tint violation, and arranged for a canine unit to be present at the time of the traffic stop; and the officer admitted that the traffic stop was a pretext for a drug investigation, the trial court was required to determine whether the real reason for the traffic stop was objectively supported by reasonable suspicion before the court could rule on defendant's motion to suppress methamphetamine evidence seized at the traffic stop. State v. Gonzales, 2011-NMSC-012, 150 N.M. 74, 257 P.3d 894.

H. AUTOMOBILE SEARCHES.

Warrantless search of automobile was justified by exigent circumstances. — Where police officers, who were dispatched to a drive-in in response to reports of an armed subject pointing a rifle at several people from the window of a vehicle, stopped defendant's vehicle and conducted a standard felony stop procedure; after defendant and two minors exited the vehicle and were restrained, the officers conducted a warrantless search of the vehicle; the officers found a rifle in the trunk of the vehicle; the officers were trained to check the trunk of a vehicle during a felony stop because the trunk could conceal a person; during the stop, a group of onlookers had gathered near the vehicle; and the officers had probable cause to believe that an assault with a deadly weapon had occurred and that a gun used in the commission of a crime was in a vehicle that was accessible to a group of people even if it was not accessible to defendant, exigent circumstances justified the warrantless search of the vehicle. State v. Leticia T., 2014-NMSC-020, *rev'g* 2012-NMCA-050, 278 P.3d 553.

Search of automobile pursuant to standard operating procedures. — Where an armed suspect was reported to have pointed a rifle from the passenger side window of

a vehicle at several persons standing in a parking lot; a police officer stopped a vehicle that matched the description of the vehicle; the officer decided to conduct a felony stop and called for backup; the child stepped out of the front passenger door of the vehicle; two other children were ordered out of the vehicle; based on the officer's training and standard operating procedures for felony stops, the officers conducted a warrantless search of the trunk and found a rifle; and the officers did not testify about any facts that led them to suspect that anyone was actually hiding in the truck of the vehicle, the search of the trunk was not justified by standard operating procedures or exigent circumstances or as a protective sweep. State v. Leticia T., 2012-NMCA-050, 278 P.3d 553, *rev'd*, 2014-NMSC-020.

A warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances, and a warrantless search is valid where the officer reasonably has determined that exigent circumstances exist. State v. Gomez, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Under N.M. Const., art. II, § 10, there are no "automatic" exigent circumstances justifying the warrantless search of an automobile; rather, a warrantless search of an automobile is valid only where the officer has reasonably determined that exigent circumstances exist. State v. Jones, 2002-NMCA-019, 131 N.M. 586, 40 P.3d 1030, cert. denied, 131 N.M. 619, 41 P.3d 345 (2002), abrogated, State v. Bombay, 2008-NMSC-029, 144 N.M. 151, 184 P.3d 1045.

Before evidence seen in plain view inside an automobile may be seized, a warrant is required to enter the automobile unless the state can satisfy its burden to show that exigent circumstances existed justifying the warrantless entry or that another applicable exception to the warrant requirement applies. State v. Jones, 2002-NMCA-019, 131 N.M. 586, 40 P.3d 1030, cert. denied, 131 N.M. 619, 41 P.3d 345 (2002), abrogated State v. Bombay, 2008-NMSC-029, 144 N.M. 151, 184 P.3d 1045.

The state must justify the warrantless search of an automobile incident to an arrest through articulated facts in the record showing a reasonable likelihood of either a potential danger or the concealment or destruction of evidence. State v. Pittman, 2006-NMCA-006, 139 N.M. 29, 127 P.3d 1116, cert. quashed, 2007-NMCERT-001, 141 N.M. 165, 152 P.3d 152.

Search was unlawful. — Article II, § 10 requires both probable cause and exigent circumstances for the warrantless search of an automobile. No exigent circumstances existed for a search of the trunk when the vehicle was in an impound lot, was to remain there for several days, and the lot had numerous security measures. State v. Warsaw, 1998-NMCA-044, 125 N.M. 8, 956 P.2d 139, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

The presence of a gun in defendant's locked car parked in the parking area of his grandmother's apartment complex, without more, did not create a danger to the public or exigent circumstances justifying a search of the car. State v. Pittman, 2006-NMCA-

006, 139 N.M. 29, 127 P.3d 1116, cert. quashed, 2007-NMCERT-001, 141 N.M. 165, 152 P.3d 152.

Search of vehicle was lawful. — Where police officers searched the car and seized the gun, not as evidence of a crime, but in a reasonable effort to secure the scene, under these facts, the officers were entitled to a reasonable, limited search of the car for weapons, even after the suspects had left the car. State v. Garcia, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72, aff'g in part and rev'g in part, 2004-NMCA-006, 135 N.M. 595, 92 P.3d 41.

Defendant's expectations of privacy, particularly to his vehicle parked outside the probation office, were necessarily reduced by his status and by the provisions in the probation order and intensive supervision program agreement regarding warrantless arrests and searches where he was under arrest and had undergone a patdown search that aroused suspicions and a key-lock match that caught him in a lie. Defendant's probation status, together with his prior convictions and the current probation violation for which he was arrested, the patdown discovery of a large sum of cash in small bills, and defendant's lie about how he arrived at the probation office were sufficient to give the officers a reasonable basis to search the vehicle for evidence of another violation of his probation conditions. State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. quashed, 2006-NMCERT-004, 139 N.M. 430, 134 P.3d 121.

Inventory search. — Where a police officer initiated a traffic stop after observing defendant towing a trailer that was missing a tail light and a license plate; the officer noticed that defendant was nervous and that defendant's responses were inconsistent; the officer discovered that defendant’s driver’s license had been revoked and arrested defendant; the officer conducted an inventory search of defendant’s vehicle; in the center console of the vehicle, the officer discovered a cell phone case containing a glass pipe wrapped in a napkin; the pipe contained a white powdery residue; and it was apparent to the officer that the pipe was used for the consumption of narcotics, the inventory search provided a valid basis for the warrantless entry of defendant’s vehicle and the subsequent seizure of the pipe was justified by the plain view doctrine. State v. Lopez, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361, cert. denied, 2009-NMCERT-010, 147 N.M. 452, 224 P.3d 1257.

Search of a moving object. — The courts have long recognized another exception to the requirement that searches and seizures be undertaken by officers only after obtaining a warrant, that is, the search of a moving object, particularly an automobile, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Following a valid investigatory stop, an officer was justified, on the basis of a reasonable suspicion that defendant had recently used a handgun to commit an aggravated assault, in conducting a protective search of the floor and adjacent area of defendant's

vehicle; however, a search of a small hole in the dashboard exceeded the scope of the search. State v. Arredondo, 1997-NMCA-081, 123 N.M. 628, 944 P.2d 276, overruled by State v. Steinzig, 1999-NMCA-107, 127 N.M. 752, 987 P.2d 409.

Vehicle trunk is protected place. — Entry into the trunk of a vehicle, even an open trunk, is an intrusion governed by the fourth and fourteenth amendments because, at least in New Mexico, persons have a reasonable expectation of freedom from intrusion in that area. State v. Ramzy, 116 N.M. 748, 867 P.2d 418 (Ct. App. 1993), cert. denied, 116 N.M. 801, 867 P.2d 1183 (1994).

An inventory search of an automobile in lawful custody of the police can be made and items in the trunk can be inventoried. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

An inventory search of an automobile does not violate U.S. Const., amend. IV, when that automobile is in the lawful custody of the police in a reasonable exercise of its caretaking function. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

Where the initial intrusion into a vehicle which is lawfully in police custody is justified, an inventory of the contents of closed containers is also justified. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

An inventory search is not constitutionally permissible absent a search warrant after police have relinquished possession, custody and control of a vehicle to a third party who has the legal right to possession, custody and control of the vehicle, and the trial court should have granted defendant's motion to suppress. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

Unreasonable search. — Where police officer engaged in exploratory rummaging in the automobile after receiving keys from defendant that were to be delivered to defendant's grandmother, the officer was not concerned about any danger defendant might pose; in fact, defendant posed no danger; the state did not demonstrate that the car would contain any evidence related to defendant's warrant for failure to appear and nothing in the record reflected any knowledge on the officer's part of defendant's felony record before the officer searched defendant's vehicle, the search cannot be characterized as reasonable under this section. State v. Pittman, 2006-NMCA-006, 139 N.M. 29, 127 P.3d 1116, cert. quashed, 2007-NMCERT-001, 141 N.M. 165, 152 P.3d 152.

Actions of officers. — Where, following an accident, defendant sought to preserve the contents of the trunk of his car as private, actions of officers in encouraging a narcotics dog to jump into the trunk and bending their heads into the trunk to view the object of the dog's alert, constituted an illegal search. State v. Warsaw, 1998-NMCA-044, 125 N.M. 8, 956 P.2d 139, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Leaving car unattended before search. — Where the officer went by a grocery store before returning to the car that was to be searched, and the officer's trip by the grocery store before returning to the car was part of a continuing series of events, the fact that the car was unattended for 10 minutes did not make the search unreasonable, but the fact that the car had been unattended might raise questions in connecting defendant with items found in the search. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

"Visual search" by the officer of car of defendant to search for weapons, wherein he saw a shaving kit, a pair of shoes and a prybar, was not unreasonable. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

I. LICENSE, REGISTRATION AND LICENSE PLATE CHECK.

An individual has no reasonable expectation of privacy in a vehicle license plate number or vehicle identification number and a police officer does not need reasonable suspicion to conduct a license plate check or a vehicle identification number search. State v. Herrera, 2010-NMCA-006, 147 N.M. 441, 224 P.3d 668, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

In conducting general license and registration checks under former 64-13-49, 1953 Comp. (similar to 66-5-16 NMSA 1978) and 66-3-13 NMSA 1978, the actions of the police must be in conformity with the constitutional requirements of the U.S. const., amend. 4; and when the detention permitted by the statute becomes a mere subterfuge or excuse for some other purpose which would not be lawful, the actions then become unreasonable and fail to meet the constitutional requirement. State v. Bloom, 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976), rev'd in part, 90 N.M. 192, 561 P.2d 465 (1977).

Request for driver's license. — Where a law enforcement officer, without preamble, requests a driver's license from the driver of a parked vehicle, the driver is not free to leave, the encounter is not consensual, and the detention must be justified by individualized reasonable suspicion. State v. Williams, 2006-NMCA-062, 139 N.M. 578, 136 P.3d 579, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

License plate check. — Where a law enforcement officer, who was informed that there was a potential incident with regard to defendant’s car, but who did not observe the incident, ran a check on the car’s license plate number; the license plate check showed that the plate did not match the car; the officer returned to the car with defendant to obtain the vehicle identification number; when defendant opened the door of the car, the officer observed a handgun inside the car; the vehicle identification number search revealed that there was no current valid registration for the car in New Mexico; defendant admitted that defendant was a convicted felon; the officer placed defendant under arrest; and during an inventory search of the car, the officer found cocaine and drug paraphernalia, the court erroneously held that the officer was required to have a reasonable suspicion to conduct the license plate check. State v. Herrera, 2010-NMCA-

006, 147 N.M. 441, 224 P.3d 668, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

General license and registration check. — Officer's activities in asking defendant, who was a passenger and owner of the vehicle, for identification, registration and insurance documentation, and in pursuing a computer warrants check based on the identification supplied by defendant, were constitutionally permissible and did not constitute valid grounds on which to suppress evidence seized in search of the vehicle after defendant's arrest. State v. Rubio, 2006-NMCA-067, 139 N.M. 612, 136 P.3d 1022, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

Where defendant's car was stopped during a general license and registration check, and after a police request, defendant opened the trunk, at which point the officer smelled marijuana, and subsequently the defendant opened a suitcase (also at the officer's request), it was held that the seizure of the marijuana residue found in the suitcase was not unlawfully accomplished. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (Ct. App. 1977), rev'g in part 90 N.M. 226, 561 P.2d 925 (1976).

J. IN CASES OF ARREST.

Lawful expansion of initial detention. — Where police officers were investigating an aggravated battery; the victim informed the police that the perpetrators were defendant and defendant’s friend, and that defendant drove a red Isuzu and identified the location of the battery; the officers went to the house; a red Isuzu was parked outside the house; the officers noticed the odor of burnt marijuana when the front door of the house was opened; the officers asked the occupants of the house, including defendant, if they had any weapons and patted them down; with the consent of a person who lived in the house the officers conducted a protective sweep of the house but did not see any drugs in plain view; defendant indicated that defendant owned the red Isuzu; the officers asked defendant if there were any drugs or weapons in the Isuzu and defendant indicated that there was a pry bar in the Isuzu; the officers asked defendant if they could retrieve the pry bar from the Isuzu as part of the aggravated assault investigation; defendant declined but offered to retrieve the pry bar; the officers noticed the odor of marijuana emanating from the Isuzu and called a canine unit; the canine alerted indicating the presence of drugs; the officers obtained a search warrant, searched the Isuzu, and found cocaine; prior to arriving at the house, the officers had been informed that defendant was dealing drugs in the neighborhood and that defendant’s friend had been seen carrying a handgun, the officers lawfully detained defendant in relation to the aggravated battery investigation and lawfully expanded the initial detention to a pat down of defendant and to await a search of the Isuzu for drugs. State v. Martinez, 2010-NMCA-051, 148 N.M. 262, 233 P.3d 791, cert. denied, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

An arrest made by a state actor in violation of a statute is not per se a violation of the fourth amendment to the United States constitution. State v. Slayton, 2009-NMSC-054, 147 N.M. 340, 223 P.3d 337.

Contemporaneous seizure of drugs and arrest. — Where an officer saw methamphetamine in plain view in a vehicle occupied by only the defendant who was the driver; the drugs were within defendant's reach and immediate control; the defendant was in control of the vehicle and able to drive away; and the officer first seized the drugs and then immediately arrested the defendant, the seizure and the arrest were contemporaneous, and the seizure was justified as a search incident to arrest. State v. Weidner, 2007-NMCA-063, 141 N.M. 582, 158 P.3d 1025.

Warrantless pat-down was reasonable and lawful as incident to the lawful arrest of defendant for a violation of a condition of the probation order and a condition of his intensive supervision program agreement. State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. quashed, 2006-NMCERT-004, 139 N.M. 430, 134 P.3d 121.

A search without a warrant is lawful when the search is incident to a lawful arrest. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

The right to search incident to a lawful arrest is deeply rooted in the law. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Right is exception to warrant requirement. — In the case of a lawful custodial arrest, a full search of the person is an exception to the warrant requirement. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Reason for right to search. — A police officer must have power to conduct an immediate search following an arrest in order to remove weapons and to prevent the suspect from destroying evidence. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Search incident to arrest is "reasonable". — In the case of a lawful custodial arrest, a full search of the person is a "reasonable" search. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

An arrest will not be validated by what it turns up. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Where evidence is not fruit of the arrest. — When it is clear that the trial court had jurisdiction of the defendant and of the cause, it makes no difference if defendant's presence was obtained through illegal arrest, when the evidence utilized at the trial was not a fruit of the arrest. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

Seizure of items incidental to unrelated offense. — Officers who search incidental to a lawful arrest may seize things incidental to another and wholly unrelated offense which may be uncovered by such a search. State v. Adams, 80 N.M. 426, 457 P.2d 223

(Ct. App. 1969); State v. Slicker, 79 N.M. 677, 448 P.2d 478 (1968); State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Although the checks seized from defendant were unrelated to the assault and battery charge, their seizure was not an unreasonable seizure violative of the constitutional prohibition because they were taken as an incident to the arrest on the assault and battery charge. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct. App. 1969).

Although certain evidentiary items were unrelated to car registration offense, with which defendant was charged, their seizure was not an unreasonable seizure violative of the constitutional prohibition where they were taken as an incident to the arrest for that offense. State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

Warrantless seizure of weapon. — Based on a police officer's reasonable safety concern, a warrantless seizure of a weapon within the area of immediate control of a person who is present during a custodial arrest does not violate the rights of the arrestee under the New Mexico constitution. State v. Gutierrez, 2004-NMCA-081, 136 N.M. 18, 94 P.3d 18, cert. denied, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1293.

Search of premises not prohibited. — A search and seizure is permissible when made contemporaneous with the arrest, and the constitution does not prohibit a search of the arrested person's premises for evidence related to the crime, under appropriate circumstances. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968).

Search delayed after arrest. — Where there was probable cause for the arrest and detention of the vehicle, and officers looked in the car approximately one-half hour after the defendants were taken into custody and the presence of one of the television sets was noted, the search was reasonably incident to the arrest. State v. Warner, 83 N.M. 642, 495 P.2d 1089 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

A search that occurred around two hours after the arrest when the evidence is sufficient to show that the police officers had reasonable or probable cause to search the automobile at the place of arrest was valid, because the authority to search continued to authorize a search at the police station shortly thereafter. The search was not remote; therefore, the evidence seized from the car was properly admitted. State v. Courtright, 83 N.M. 474, 493 P.2d 959 (Ct. App. 1972).

Examination of contents of briefcase. — Where taking into custody of briefcase and the examination of its contents constituted a seizure and search, and this seizure and search were incident to the lawful arrest of the defendant, they were also lawful. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968).

Nothing stated in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), compels, or even strongly suggests, that the taking of a briefcase and its contents, incident to a lawful arrest, constituted an unreasonable search and seizure contrary to

the guarantees of U.S. Const., amend. IV and XIV, and of this section. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968).

Search incident to arrest shown. — Where probable cause existed for child's arrest after examination of a cigarette containing marijuana was lawfully taken from the child's shirt pocket, the subsequent emptying of the child's pockets and the formal arrest were substantially contemporaneous events, the child having been deprived of freedom of movement prior to those two events, and the seizure of the lid of marijuana was thus incident to a lawful arrest. In re Doe, 89 N.M. 83, 547 P.2d 566 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Police officers were not required to obtain a search warrant prior to searching defendant's car for a gun in situation where police arrived on scene minutes after being called and told that a shooting was in progress, were directed by friends of alleged victim to defendant's car, arrested defendant and advised him of his rights, whereupon defendant stated that he didn't mean to shoot anyone and then told officers that the gun was under the front seat of the car. State v. Gurule, 84 N.M. 142, 500 P.2d 427 (Ct. App. 1972).

Search incident to arrest not shown. — Where the warrantless search of the car and seizure of marijuana seeds and marijuana were unlawful because consent was not given and the search was not pursuant to an arrest, there was no probable cause to warrant a search. State v. Brubaker, 85 N.M. 773, 517 P.2d 908 (Ct. App. 1973).

Where there was no arrest for any charge at the time of the search of defendant's car for beer, and defendant was not taken into custody for his driving violation, the search could not be justified by the search incident to arrest theory. The scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Where defendants placed their belongings on the table, and it was thus evident that they were not armed, search was at an end, and since defendants were not under arrest, a search and seizure incident to arrest was not involved, and, therefore, where the officers continued search, discovery of marijuana constituted an illegal search and seizure. State v. Washington, 82 N.M. 284, 480 P.2d 174 (Ct. App. 1971).

Bondsman arresting third party. — Neither the common-law nor statutory authority of a bondsman to make a warrantless arrest of his principal absolves a bondsman of criminal responsibility ensuing from the armed, unauthorized, and forcible entry into the residence of a third party. State v. Lopez, 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986), cert. denied, 479 U.S. 1092, 107 S. Ct. 1305, 94 L. Ed. 2d 160 (1987), cert. quashed, 105 N.M. 521, 734 P.2d 761, modified, State v. Baca, 114 N.M. 668, 845 P.2d 762.

Arrest for driving with suspended license.— Where defendant was stopped for driving with suspended license, there was no evidence that the suspension was DWI-related, and 66-8-122 and 66-8-123 NMSA 1978 required the officer to cite and release

defendant, defendant's custodial arrest for driving with a suspended license was unlawful, search of defendant after arrest was unlawful, and seizure of drug-related evidence was unreasonable and should have been suppressed. State v. Bricker, 2006-NMCA-052, 139 N.M. 513, 134 P.3d 800, cert. quashed, 2007-NMCERT-002, 141 N.M. 339, 154 P.3d 1239.

Seizure of drugs as incident to arrest for DWI. — Where defendant's vehicle was stopped after almost striking a police vehicle; the police officer smelled alcohol on defendant's breath, conducted field sobriety tests and placed defendant under arrest for DWI; during a search incident to the arrest, the officer found a dollar bill in defendant's pocket that was folded in a unique way which the officer recognized as packaging for cocaine; and the officer opened the dollar bill and discovered a white, powdery substance that was later confirmed to be cocaine, the seizure and search of the dollar bill was reasonable. State v. Armendariz-Nunez, 2012-NMCA-041, 276 P.3d 963, cert. denied, 2012-NMCERT-003.

Incident to arrest. — The state must prove the ability of the suspect to gain possession of a weapon to use against the officer or to gain possession of evidence and conceal or destroy it to justify seizure of a weapon as an incident to arrest. State v. Rowell, 2007-NMCA-075, 141 N.M. 783, 161 P.3d 280, rev'd, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95.

Search incident to arrest exception not applicable. — Where a police officer stopped the defendant for speeding in a school parking lot; the officer observed in plain sight a bag of marijuana in the defendant's shirt pocket; the officer removed the defendant from the vehicle, handcuffed him, placed him under arrested, and secured him in the officer's patrol car; the defendant admitted that he had a shotgun in his vehicle; and the officer then searched the vehicle for weapons, the seizure of weapons from the defendant's vehicle was not justified by the search incident to arrest exception to the warrant requirement. State v. Rowell, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95, rev'g 2007-NMCA-075, 141 N.M. 783, 161 P.3d 280.

Under-clothing search. — A search incident to arrest that involves an officer removing or looking under any part of an arrestee's clothing requires, at a minimum, particularized reasonable suspicion that the arrestee is concealing a weapon or evidence that is susceptible to destruction before arriving at the police station. State v. Williams, 2011-NMSC-026, 149 N.M. 729, 255 P.3d 307, rev'g 2010-NMCA-030, 148 N.M. 160, 231 P.3d 616.

Under-clothing search was reasonable. — Where defendant was stopped for a traffic violation; as the officer approached the vehicle, the officer saw defendant engage in acts that, based on the officer's experience, were consistent with concealing contraband or searching for a weapon; when defendant exited the vehicle, defendant's pants were unzipped and defendant's belt was unbuckled; defendant was placed under arrest on an outstanding felony warrant; with defendant standing between two officers and between two police cars parked bumper-to-bumper, the arresting officer patted defendant down,

shook the waistband of defendant's pants, pulled the waistband of defendant's pants and underpants outward, looked down and saw a plastic bag underneath defendant's underpants, and with a gloved hand reached down and removed the bag which contained illegal substances; and there was no evidence that any other person could see underneath defendant's clothing, the officer had particularized reasonable suspicion to conduct an under-clothing search and the seizure of the bag was reasonable under the fourth amendment. State v. Williams, 2011-NMSC-026, 149 N.M. 729, 255 P.3d 307, rev'g 2010-NMCA-030, 148 N.M. 160, 231 P.3d 616.

Reach-in search was unreasonable. — Where defendant was stopped for driving through a stop sign; the police officer observed defendant fumbling around in the car as the officer approached the defendant's car; the officer confirmed that defendant had an outstanding felony warrant; defendant was placed under arrest and handcuffed; the officer noticed that defendant's pants were unzipped and part of defendant's shirt was pulled through the zipper opening; the officer preformed a pat-down search of defendant which did not reveal anything that the officer believed was a weapon; the officer pulled the front of defendant's pants outward, looked down and observed and seized a plastic bag containing crack cocaine and heroin next to defendant's genitals; and the search was conducted between two police cars in broad daylight at rush hour on the side of a street, the search was unreasonable and violated defendant's right to be free from unreasonable searches and seizures. State v. Williams, 2010-NMCA-030, 148 N.M. 160, 231 P.3d 616, rev'd, 2011-NMSC-026, 149 N.M. 729, 255 P.3d 307.

III. WARRANT REQUIREMENTS.

A. IN GENERAL.

A blank or alias warrant is void. If name in warrant is not given, the warrant must contain the best description possible, sufficient to indicate clearly the person to be arrested. It should state his occupation, personal appearance, place of residence or other means of identifying him. 1959-60 Op. Att'y Gen. No. 60-145.

Search illegal if probable cause not in affidavit for warrant. — Search of premises was illegal where there was no probable cause to search premises for evidence of murder since there was no evidence presented in the affidavit from which a magistrate could properly infer that the place to be searched was defendant's residence. State v. Herrera, 102 N.M. 254, 694 P.2d 510 (1985), cert. denied, 471 U.S. 1103, 105 S. Ct. 2332, 85 L. Ed. 2d 848 (1985).

Where the only allegations of criminality in an affidavit for a search warrant were hearsay from persons who were not law-enforcement officers, the affidavit did not establish probable cause because it did not establish either (1) that the informants were truthful persons, (2) that the informants had particular motives to be truthful about their specific allegations, or (3) that the allegations of criminality had been sufficiently corroborated. State v. Therrien, 110 N.M. 261, 794 P.2d 735 (Ct. App. 1990), overruled in part on other grounds, State v. Barker, 114 N.M. 589, 844 P.2d 839 (1992).

The standards for the sufficiency of search warrants are: (1) only a probability of criminal conduct need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; (3) common sense should control; (4) great deference should be shown by courts to a magistrate's determination of probable cause. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

Application failing to state basis for statement. — Where application for search warrant gave no clue as to the basis for the statement that a packet of marijuana had been found in the car, it did not state probable cause and was constitutionally inadequate. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds by State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (1973).

Oral representations to the judge who issues the search warrant are insufficient, because this section requires a written showing of probable cause. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled by State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (1973).

Information in affidavit not stale. — Trial court erred in granting motion to suppress evidence seized in search pursuant to a warrant on the basis that the information in the affidavit for the warrant was stale where affidavit recited informant's month-old purchase of heroin, his past observations of heroin on the premises and his observations of sales from the premises during the month prior to issuance of the search warrant, and also gave statements of three reliable informants that defendant was a daily heroin user. State v. Garcia, 90 N.M. 577, 566 P.2d 426 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Affidavit held insufficient. — Affidavit did not establish a substantial basis for believing an informant's report was based on reliable information, where, although the informant reportedly stated that defendant had brought heroin into town and was selling it at the house in question, the affidavit was devoid of any indication of how the informant gathered this information. State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989).

Magistrate to be interposed between arresting force and citizen. — Before a warrant for arrest may be issued, the judicial officer issuing it must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant, so as to allow a relatively independent magistrate to be interposed between the arresting force, and the citizen, whose right not to be arrested without cause is guaranteed by U.S. Const., amend. IV. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

De novo review of probable cause. — An issuing court’s determination of probable cause to issue a search warrant should not be reviewed de novo, but, rather, must be upheld if the affidavit provides a substantial basis to support a finding of probable cause. State v. Williamson, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376, rev'g 2008-NMCA-096, 144 N.M. 522, 188 P.3d 1273.

Probable cause analysis. — Probable cause to believe a defendant committed a crime and probable cause to believe the home of the accused or another particular location will contain evidence of the crime does not follow ineluctably from an allegation of crime. The link between the two conclusions must be made on a case-by-case basis by the reviewing judge or magistrate who is asked to issue a search warrant. State v. Evans, 2009-NMSC-027, 146 N.M. 319, 210 P.3d 216.

No probable cause to expand search to defendant's residence. — Where police officers conducted surveillance of defendant's house in preparation for executing an arrest warrant on defendant and defendant's spouse; the officers did not see anyone enter or leave the house, other than defendant and defendant's spouse; the officers did not have any facts to suggest that anyone, other than defendant and defendant's spouse, was in the house; the officers found defendant and defendant's spouse sitting at a patio table in defendant's back yard about ten feet from an open sliding door to the house; and after defendant and defendant's spouse were arrested, the officers conducted a protective sweep of the house and found trash bags that smelled of marijuana; the officers obtained a search warrant based on the discovery of the trash bags and seized the trash bags, the search of the house was unwarranted because there was no evidence to support any specific safety concerns involving any other persons at the arrest scene and the search warrant was invalid because it was based upon evidence tainted by the illegal entry. State v. Eckard, 2012-NMCA-067, 281 P.3d 1248.

Standards for testing affidavits of probable cause. — Affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Informant information. — Information supplied by an informer, verified by police, was sufficient to constitute probable cause for issuance of a search warrant. State v. Mireles, 84 N.M. 146, 500 P.2d 431 (Ct. App. 1972).

Showing of probable cause is not limited to written statements. — A "showing" of probable cause required under Article II, Section 10 of the New Mexico constitution is not limited to a writing that the issuing judge sees rather than hears or ascertains by other means. Rather, the plain meaning of "showing" as used in Article II, Section 10 is a presentation or statement of facts or evidence that may be accomplished through visual, audible or other sensory means. State v. Boyse, 2013-NMSC-024, rev'g 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

A search warrant may be obtained by telephone. — Where a police officer, who was investigating cruelty to animals, prepared a detailed, type-written affidavit as part of an application for a search warrant of defendant's property; the officer contacted the on-call magistrate judge by telephone; over the telephone, the judge administered an oath to the officer who then read the written affidavit to the judge; the judge approved the search warrant over the telephone; and the officer noted the judge's approval on the

search warrant form and executed the search warrant, the search warrant was valid because the Article II, Section 10 of the New Mexico constitution allows for requesting and approving search warrants by telephone. State v. Boyse, 2013-NMSC-024, rev'g 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

Telephonic warrants are not permitted under the New Mexico constitution. — Article II, Section 10 of the New Mexico constitution requires that a sworn writing must be shown to and considered by the issuing court before a warrant issues. The requirement is not satisfied when an investigator makes a writing but does not show it to the judge. State v. Boyse, 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285, rev'd, 2013-NMSC-024.

Where an investigator prepared a typewritten affidavit for a search warrant; the investigator then spoke over the telephone with a judge; the judge administered an oath to the investigator; the investigator read the statement of facts in support of the search warrant to the judge; the judge orally approved the warrant; and the investigator signed the judge's name to the warrant, the warrant was invalid under Art. II, Section 10 of the New Mexico constitution. State v. Boyse, 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285, rev'd, 2013-NMSC-024.

Failure to return warrant. — Where the defendant received notice of a search warrant of the defendant's home and signed the inventories, the defendant was aware of what was seized and had a copy of the warrant, and the defendant did not assert a substantive problem with the execution of the warrant or the evidence seized under the warrant, the failure to return the warrant, to file the warrant with the court, or to have a judge or clerk sign the warrant was not fundamental error. State v. Dietrich, 2009-NMCA-031, 145 N.M. 733, 204 P.3d 748, cert. denied, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

Tainted information. — A judge may not validate illegal police conduct by issuing a warrant that is based on tainted information, even if the judge makes a notation that the warrant should have been issued without the tainted information. State v. Trudelle, 2007-NMCA-066, 142 N.M. 18, 162 P.3d 173, cert. quashed, 2008-NMCERT-002, 143 N.M. 667, 180 P.3d 674.

Tainted evidence. — Where police officers smelled a chemical odor that is associated with methamphetamine production as they approached defendants' home; one defendant had yellowed and scorched fingers that are typical of persons who cook methamphetamine; the officers did not observe any other persons in the house who may have posed a threat or destroyed evidence; the officers did not have any information about the presence of possible victims in the house; the officers did not have any information that the defendants had weapons or were prone to violence; the officers entered the defendants' home before deciding to obtain a search warrant and conducted a protective sweep of the house prior to arresting one defendant pursuant to an unrelated, outstanding warrant; the officers did not remain in the house while waiting for a search warrant to issue; the officers were not concerned about their safety and

allowed one defendant to reenter the house unaccompanied by an officer; the officers searched a detached garage based on one officer's observations from the home during the initial entry; and the officers were not entitled to enter the defendants' home under the protective sweep, exigent circumstances or community caretaker exceptions, the search warrant that was based on information obtained by the officers from the initial entry of the house was invalid. State v. Trudelle, 2007-NMCA-066, 142 N.M. 18, 162 P.3d 173, cert. quashed, 2008-NMCERT-002, 143 N.M. 667, 180 P.3d 674.

Affidavit failed to establish the veracity of a confidential informant. — Where a magistrate issued a search warrant of defendant's residence that was supported by an affidavit in which a police officer stated that within the past 48 hours an informant observed defendant handling marijuana at the residence; on several earlier occasions, the officer observed activity at defendant's residence that was consistent with drug trafficking; and the informant had cooperated with officers while under supervision to make at least two purchases of controlled substances; the affidavit did not indicate that the informant had provided reliable information in the past; and the officer's observations were not made in the same time period as that addressed by the informant, the affidavit did not sufficiently establish the informant's veracity and the observations by the officer of activity consistent with drug trafficking at defendant's residence did not sufficiently corroborate the informant's observations of drug activity to justify the issuance of a warrant. State v. Vest, 2011-NMCA-037, 149 N.M. 548, 252 P.3d 772, cert. quashed, 2012-NMCERT-004, 293 P.3d 887.

Liability for wrongful issuance and service of warrant. — Police officers and assistant district attorney were immune from liability for alleged wrongful issuance and service of a search warrant which was valid on its face in which court ordered police officers to search for child, take him into custody, keep him safely and make a return of the proceedings on the warrant. Torres v. Glasgow, 80 N.M. 412, 456 P.2d 886 (Ct. App. 1969).

Where warrantless arrest based upon communication from superiors. — When an officer has no warrant and arrests are based upon a communication from superiors, the officer or his superior must later be prepared to meet the twofold test of requiring that the source of the communication be credible, and the underlying circumstances which formed the basis of the communication be shown. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

Requirements for investigative demands under Antitrust Act. — Constitutional restrictions on government searches and seizures do not impose a requirement that civil investigative demands (CID) issue only upon a reasonable cause to believe that the Antitrust Act, Chapter 57, Article 1 NMSA 1978, has been or is being violated. The federal constitution requires only that for the issuance of an administrative subpoena the inquiry must be within the authority of the agency, the demand must not be too indefinite, and the information must be reasonably relevant to the purposes of the investigation; also, N.M. Const., art. II, § 10 does not require a "probability" showing that the federal constitution does not. Moreover, probable cause does not have the same

meaning in the context of administrative searches as it does in the context for searches for evidence of crimes. Wilson Corp. v. State ex rel. Udall, 1996-NMCA-049, 121 N.M. 677, 916 P.2d 1344, cert. denied, 121 N.M. 644, 916 P.2d 844, cert. denied, 519 U.S. 964, 117 S. Ct. 388, 136 L. Ed. 2d 304 (1996).

B. PROBABLE CAUSE FOR WARRANT.

Affidavit failed to establish the veracity and reliability of informants. — Where the victim, whose decomposed body was found in a remote area, was killed by violent blunt-force trauma to the head; the victim was a local transient and drug user who had a history of stealing from those who invited the victim into their homes; the search warrant affidavit that the police submitted to obtain a warrant to search defendant's property stated that the police had received tips from a confidential source and two concerned citizens that defendant had admitted to at least one person that defendant killed the victim for stealing and that defendant admitted to the killing prior to the discovery of the victim's body; the affidavit did not allege that the sources heard defendant's admission directly and did not indicate why the sources believed defendant's admission; the affidavit did not indicate that any of the sources had provided reliable information to police in the past or made the statements against their interest; the affidavit did not provide information to discount the possibility that the sources might have been involved in the killing or had a reason to fabricate the story; and the sources provided only the independently corroborated fact that the victim stole from defendant, the affidavit did not establish probable cause because it failed to provide any basis upon which the veracity of the sources or the reliability of their information could be determined. State v. Haidle, 2012-NMSC-033, 285 P.3d 668.

Non-hearsay allegations in affidavit failed to establish probable cause. — Where the victim, whose decomposed body was found in a remote area, was killed by violent blunt-force trauma to the head; the victim was a local transient and drug user who had a history of stealing from those who invited the victim into their homes; the search warrant affidavit that the police submitted to obtain a warrant to search defendant's property stated that defendant admitted that defendant had sex with the victim, that the victim's blood would be found in defendant's bathroom, that the victim stole from defendant, and that defendant owned a baseball bat for protection; and the affidavit stated that defendant's home was near the place where the victim's body was discovered, the affidavit did not establish probable cause. State v. Haidle, 2012-NMSC-033, 285 P.3d 668.

Probable cause for warrant. — Where a police officer stated in an affidavit for a search warrant of the defendant's home that a citizen-informer, who was named in the affidavit, who had lived with the defendant and who was a suspect in the investigation of the alleged burglary of the defendant's home, told the officer that when the informer was a minor, the defendant tried to rape the informer, that the defendant had sodomized the informer and that the defendant took sexually explicit pictures of the informer; that employees of state agencies corroborated accounts by the informer that the defendant engaged in inappropriate conduct with juvenile males; that the informer's girlfriend

alleged that the defendant intended to use drugs to facilitate sex with the informer; and where all persons to whom the police officer spoke were identified in the affidavit by name or position, the affidavit was supported by probable cause. State v. Dietrich, 2009-NMCA-031, 145 N.M. 733, 204 P.3d 748, cert. denied, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

Probability for issuance of warrant shown. — Where the affidavits presented to the magistrate indicated that the affiants personally inspected two cars rented previously by the defendants and found significant traces of marijuana, that the defendants lived together, spent large amounts of cash for purchases, had no visible means of support, rented numerous automobiles for trips and flew on airplanes during the period of surveillance, the magistrate could assure himself that the affidavits were not based on rumors or merely on the defendants' reputation; there was sufficient information for him to be satisfied that the circumstances by which the affiants came by their information demonstrated probability for the issuance of a search warrant. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

Where the application for search warrant clearly showed how the officer concluded that the specific item for which they were looking might be in a certain car and where it affirmatively showed that two sources of information spoke with personal knowledge, the application was sufficient, and the district judge who found that the affidavit showed probable cause and who issued the search warrant did not err in so doing. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Statements in the affidavit that the informant saw the defendant in possession of heroin and that the affiant knows the informant to be reliable because he has provided him with reliable information concerning narcotics violations in the past were sufficient to support the issuance of the search warrant. State v. Ramirez, 95 N.M. 202, 619 P.2d 1246 (Ct. App. 1980).

Probable cause found. — Where an affidavit for a search warrant alleged that the defendant brought a package into a UPS store; the defendant appeared to be nervous and did not know what was inside the package; when the store manager told the defendant that the package would have to be opened to ascertain its contents, the defendant stated that the package contained a book; although the defendant had mailed packages before, this was the first time the defendant appeared nervous and did not know what was in the package; after the defendant left, the store manager opened the package and discovered a clear plastic bag, which appeared to be vacuum sealed, containing a Crystal Light cylinder and a Ferrero candy box, both wrapped in duct tape; a narcotics detection dog sniffed the package, but failed to indicate a positive response to narcotics; and a law enforcement officer with eleven years of experience who was assigned to the narcotics task force division of the police department averred that often times narcotics are packaged in unusual containers, wrapped in duct tape and vacuum sealed to make the narcotics less detectable by narcotic detection dogs, the facts alleged in the affidavit were sufficient to explain the narcotic detection dog’s failure to

alert to the presence of narcotics and to support a reasonable inference that the package contained narcotics. State v. Williamson, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376, rev'g 2008-NMCA-096, 144 N.M. 522, 188 P.3d 1273.

Where an investigating officer's affidavit, when read as a whole, clearly indicated that the reports of informants were based on seeing stolen items at the locations indicated and on overhearing a conversation referring to a burglary, the information in the affidavit was sufficient to support the magistrate's issuance of the search warrant and necessarily his determination as to the informant's credibility. State v. Wisdom, 110 N.M. 772, 800 P.2d 206 (Ct. App. 1990), overruled by State v. Barker, 114 N.M. 589, 844 P.2d 839 (1992).

Probable cause to believe that the accused committed a crime and that the home of the accused contained evidence of the crime. — Where the murder victim's body was found wrapped in sheets and tied with electrical wire; the defendant's friend told police that the friend saw the defendant with the victim shortly before the victim died; during a consensual search of the defendant's bedroom, officers observed numerous electrical wires of different sizes and colors and two mattresses without linens or other bedding materials; the defendant's mother told the police that the defendant told conflicting stories about the defendant's activities the night the defendant borrowed the defendant's mother's van around the time the victim disappeared; a probation officer told the police that the probation officer overheard the defendant say to the defendant's friend that "I guess I am a murderer"; and the defendant's statements and the defendant's mother's statements placed the victim and the defendant at the defendant's residence on the night the victim died, the magistrate judge was justified in finding a probability that the defendant was involved in the victim's disappearance and death and that evidence of the murder would be found in the defendant's bedroom. State v. Evans, 2009-NMSC-027, 146 N.M. 319, 210 P.3d 216.

Mere suspicion of trained officers. — While events appropriately may be suspicious to an officer trained in the detection and interdiction of clandestine methamphetamine manufacturing, that suspicion does not necessarily equate to probable cause. Mere suspicion about ordinary, non-criminal activities, regardless of an officer's qualifications and experience, does not satisfy probable cause. However, ordinary, innocent facts alleged in an affidavit may be sufficient if, when viewed together with all the facts and circumstance, they make it reasonably probable that a crime is occurring in the place to be searched. State v. Nyce, 2006-NMSC-026, 139 N.M. 647, 137 P.3d 587.

Suspicious purchases. — Allegations in affidavit of police officers that defendant purchased four one ounce bottles of tincture of iodine, which was the entire stock of iodine on the store shelf, covered the iodine in her shopping cart, attempted to use the self-pay register and exhibited a hurried pace, and purchased a one pint bottle of hydrogen peroxide at a different store, did not give rise to probable cause that defendant was manufacturing methamphetamine. State v. Nyce, 2006-NMSC-026, 139 N.M. 647, 137 P.3d 587.

Nexus between purchase of drug ingredients and residential manufacturing of drugs. — When officers believe that controlled substances are being manufactured in a residence, there must be sufficient nexus in the affidavit for a search of drugs to occur in that home. The mere fact that defendant purchased and brought tincture of iodine, in a quantity that is inconsistent with personal use, and hydrogen peroxide, both of which are ingredients in the manufacture of methamphetamine, did not establish a sufficient nexus between the purchases and the officer's belief that methamphetamine was being manufactured at the home to support probable cause for the issuance of a search warrant of the house. State v. Nyce, 2006-NMSC-026, 139 N.M. 647, 137 P.3d 587.

Nexus between criminal activity at two different properties. — Where defendant's co-conspirator was arrested while driving a vehicle registered in the co-conspirator's name, but bearing the VIN of a different vehicle that had been reported stolen; based on information that the co-conspirator was engaged in criminal activity and surveillance of the co-conspirator's property, the police obtained a search warrant of the co-conspirator's property which confirmed the factual basis of the officer's search warrant affidavit and revealed several stolen vehicles and VIN-altered vehicles; the officer also received information that the co-conspirator did business at defendant's property; the officer obtained a search warrant of defendant's property based on an affidavit that contained all of the factual information used to establish probable cause to search the co-conspirator's property and the additional facts that the officer had observed the co-conspirator and several suspicious vehicles at defendant's property; and the affidavit also stated that the officer had learned that the conspirator was engaged in criminal activity at defendant's property, but was silent regarding the source and substance of the information, the affidavit did not provide sufficient probable cause to support the search warrant because the information attributable to defendant's property failed to show a nexus between the co-conspirator's criminal activity at the co-conspirator's property and defendant's property and the affidavit did not contain sufficient facts to permit the issuing judge to conclude that the information learned by the officer regarding criminal activity at defendant's property was credible or reliable. State v. Sabeerin, 2014-NMCA-110, cert. granted, 2014-NMCERT-010.

Statements of undisclosed informants. — Affidavit in support of search warrant, which was based primarily upon information provided by undisclosed informants but which failed to set out sufficient facts to determine the reliability of such informants, was insufficient to establish probable cause, and thus a search predicated on such warrant violated this section and the fourth amendment to the United States constitution. In re Shon Daniel K., 1998-NMCA-069, 125 N.M. 219, 959 P.2d 553, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Informant information. — Where affidavit for search warrant stated that informant had signed statement from person willing to testify in court which stated that that person had personal knowledge that heroin was kept inside a certain house and that he had received heroin from that place on approximately 10 different occasions, such was sufficient for judge to whom affidavit was presented to find probable cause for issuance of a search warrant. State v. Archuleta, 85 N.M. 146, 509 P.2d 1341 (Ct. App.), cert.

denied, 85 N.M. 145, 509 P.2d 1340 (1973), cert. denied, 414 U.S. 876, 94 S. Ct. 85, 38 L. Ed. 2d 121 (1973) overruled State v. Barker, 114 N.M. 589, 844 P.2d 839 (Ct. App. 1992).

Falsehoods and omissions in search warrant affidavit. — To suppress evidence based on alleged falsehoods and omissions in a search warrant affidavit, the defendant must show either deliberate falsehood or a reckless disregard for the truth as to a material fact; a merely material misrepresentation or omission is insufficient. State v. Garnenez, 2015-NMCA-022, cert. denied, 2015-NMCERT-001.

Where the affidavit to support a search warrant contained a false statement that defendant was under arrest, and where the officer testified that he used a standard form affidavit and did not remove the stock language that the defendant was under arrest, and that he did not intend to mislead the issuing judge by the mistaken inclusion of this language, the district court, being in the best position to resolve questions of fact and to evaluate the credibility of witnesses, did not err in upholding the search warrant following a finding that the misstatement was not deliberate or reckless. State v. Garnenez, 2015-NMCA-022, cert. denied, 2015-NMCERT-001.

C. DESCRIPTION OF ITEMS.

General warrant. — Where a search warrant did not describe with particularity the things to be searched or seized; and the affidavit for the search warrant stated that the law enforcement officer requested a search warrant to "examine the scene for any and all evidence which may lead investigators to the offender and or possible witnesses", the search warrant was invalid as an impermissible general warrant. State v. Sabeerin, 2014-NMCA-110, cert. granted, 2014-NMCERT-010.

Authority to seize computer hard drive. — A search warrant that authorized police to seize computers and computer diskettes containing child pornography is sufficient to authorize the police to seize the computer’s hard drive. State v. Hinahara, 2007-NMCA-116, 142 N.M. 475, 166 P.3d 1129, cert. denied, 2007-NMCERT-008.

Authority to search computer hard drive. — A search warrant that authorized police to search computers and computer diskettes containing child pornography is sufficient to authorize the police to search the computer’s hard drive and all files within the computer for illegal images and to seize any unlawful images within the computer. State v. Hinahara, 2007-NMCA-116, 142 N.M. 475, 166 P.3d 1129, cert. denied, 2007-NMCERT-008, 142 N.M. 435, 166 P.3d 1089.

Description of items to be seized. — Where defendant was charged with willfully discharging a firearm at a motor vehicle; pursuant to a search warrant, the police seized a pistol, ammunition and a cell phone, all of which were specifically listed in the warrant; defendant claimed that defendant was entitled to a blanket suppression of all evidence seized because the warrant authorized the police to search for "finger prints" and "photography of the residence and evidence", which did not satisfy the particularity

requirement of the fourth amendment; and the police did not seize any fingerprints or make photographs of any evidence not listed in the warrant, even if the authorization to search for "finger prints" and "photography of the residence and evidence" was overly broad, the lack of particularity did not entitle defendant to blanket suppression of all the evidence seized pursuant to the warrant. State v. Casares, 2014-NMCA-024, cert. denied, 2014-NMCERT-001.

Where a search warrant specified the seizure of controlled substances kept contrary to law the items to be searched for and seized were as precisely identified as the situation permitted considering the wide variety of drugs used by addicts, the words used in the warrant having a definite meaning in that they referred to certain and definite lists of drugs and their derivatives. Nothing was left to the discretion of the officers. Heroin is one of the drugs listed, and it was heroin that they seized. State v. Quintana, 87 N.M. 414, 534 P.2d 1126 (Ct. App. 1975), cert. denied, 88 N.M. 29, 536 P.2d 1084 (1975), cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

A description in a search warrant is sufficient if the officer can, with reasonable effort, ascertain and identify the place intended to be searched; the description, however, must be such that the officer is enabled to locate the place to be searched with certainty. It should identify the premises in such manner as to leave the officer no doubt and no discretion as to the premises to be searched. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled by State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App.), cert. denied, 80 N.M. 746, 461 P.2d 228 (1969), cert. denied, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970).

A search warrant was not overly broad where the items described therein to be searched and seized were described with sufficient particularity to be specifically related to the counterfeiting activity believed to be occurring at defendant's residence. State v. Steinzig, 1999-NMCA-107, 127 N.M. 752, 987 P.2d 409, cert. denied, 128 N.M. 149, 990 P.2d 823.

Sufficiency of the description of the place to be searched. — Where the address to be searched was listed on each page of the police officer’s affidavit; based on the officer’s interview of the victim at "the address", the narrative in the affidavit described numerous acts of sexual molestation of the victim by defendant that had occurred in defendant’s bedroom, stated that the victim and defendant resided in the same house, described the address in great detail, and described the evidence of the molestation that would be found at "the address", "the residence" and "the Trujillo home"; and the narrative did not explicitly state that "the residence" and the address were one and the same, that the address was the place where the events occurred, or that the address

was where the evidence would be found, a reviewing judge could reasonably infer that the residence described by the address was the same as the residence where the evidence would be found. State v. Trujillo, 2011-NMSC-040, 150 N.M. 721, 266 P.3d 1.

Where the search warrant described the place to be searched as "a residence" located at a specified address "along with surrounding curtilage" and described the residence in detail; when the police officers entered the residence, they noticed defendant exiting a detached guesthouse in the backyard of the residence; the officers found drugs in the guesthouse but not in the residence; when the officers obtained the search warrant, they did not know about the existence of the guesthouse; the guesthouse was located a few feet from the residence; the residence and the guesthouse were owned as a common unit and were surrounded by a wall; the guesthouse had separate utilities and was a self-sufficient residential structure; and defendant lived in the guesthouse and defendant's parent lived in the residence, the guesthouse was not part of the curtilage of the residence, but was being used as a separate residence by defendant and required independent probable cause for its search. State v. Hamilton, 2012-NMCA-115, 290 P.3d 271.

Where warrant contained two errors, in that the color of the residence was wrong, and the street number of the residence was wrong, but the warrant properly described the roof of the residence, located the house with specificity and stated that the residence was the only one in the immediate area which had a chicken coop containing pigeons (plainly visible from the road), the requirements of a sufficient description were met. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds by State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Warrant allowing a search of "all persons" was impermissibly broad. — Where the police had information that the owner of a theater hosted rave parties where drugs were sold and consumed and underage persons consumed alcohol; the theater was a public theater that anyone could enter; a police officer, who attended a rave party at the theater, observed underage people drinking alcohol and people smoking marijuana and taking ecstasy; other than identifying the owner of the theater and three persons by name, the officer gave no description of any of the people the officer observed; based on the officer's report, the police obtained a search warrant, which authorized a search of the owner and any persons in the theater; an officer searched defendant, but did not find any illegal drugs on defendant's person; when the officer searched defendant's purse, the officer found a container containing methamphetamine; and before the officer opened the purse, the officer had no particularized suspicion that the purse contained contraband, the purse had no odors, and after opening the purse, the officer saw no obvious evidence of contraband or anything suspicious, the "all persons" warrant impermissibly authorized a search of defendant's person because it was not supported by information establishing a particularized suspicion that defendant or "all persons" in the theater were involved in criminal activity or in possession of contraband, the search of defendant's purse was not supported by probable cause, and there was nothing to

suggest that the purse was connected to the theater or the illegal activity occurring at the theater. State v. Light, 2013-NMCA-075.

Probable cause existed to seize a camera pursuant to a search warrant. — Where a police officer, who was investigating the distribution of child pornography over the internet, discovered that a computer located at defendant's address contained child pornography; the officer's affidavit for a search warrant stated that a computer at defendants' address was being used to share child pornography and that based on the officer's training and experience, there is a high probability that online child predators possess collections of child pornography in various forms, making it necessary to seize computers and photographic equipment; the warrant authorized the officer to search for photographs of child pornography; and in the search of defendants' resident, the officer seized a digital camera that contained child pornography, the officer had probable cause to seize and search the digital camera because there was a sufficient nexus between the suspected crime of distributing child pornography over the internet and the digital camera where child pornography might be stored and the search warrant authorized the officer to search every container and location within defendants' residence in which the evidence could be stored, including the digital camera. State v. Gurule, 2013-NMSC-025, rev'g 2011-NMCA-063, 150 N.M. 49, 256 P.3d 992.

No probable cause to seize camera pursuant to search warrant. — Where a police officer was investigating the distribution of child pornography on an ultra-peer internet site; the officer obtained a search warrant of defendant's residence based on the officer's affidavit that the officer had reason to believe that someone using a computer in defendant's home was receiving, processing and distributing child pornography; nothing in the affidavit provided any evidence that anyone was taking pornographic photographs of children; during the search of defendant's residence the officers seized a digital camera, which the search warrant expressly authorized the officers to seize and search; there was no indication that the camera was being used for the storage of internet child pornography or for the independent manufacture of pornography; and months after the camera was seized, the officer performed a forensic analysis of the camera's digital information seized and discovered defendant engaging in sexual acts with a child, there was no probable cause to support the seizure of the camera. State v. Gurule, 2011-NMCA-063, 150 N.M. 29, 256 P.3d 992, rev'd, 2013-NMSC-025.

IV. PROBABLE CAUSE.

A. IN GENERAL.

Reasonable suspicion. — An investigatory detention requires individualized suspicion. Individualized suspicion requires the articulation of the suspicion in a manner that is particularized with regard to the individual who is stopped. State v. Patterson, 2006-NMCA-037, 139 N.M. 322, 131 P.3d 1286, cert. denied, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

Probable cause for arrest not necessary for investigation. — In appropriate circumstances and in an appropriate manner, a police officer may approach a person to investigate possibly criminal behavior even though the officer may not have probable cause for an arrest. To justify such an invasion of a citizen's personal security, the police officer must be able to specify facts which, together with rational inferences therefrom, reasonably warrant the intrusion. These facts are to be judged by an objective standard - would the facts available to the officer warrant a person of reasonable caution to believe the action taken was appropriate? State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975); State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled by State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

A police officer making a lawful stop of a motorist is not precluded from making reasonable inquiries concerning the purpose or purposes for the stop, nor is an inquiry by an officer automatically violative of the right of security of a motorist, because the officer lacks probable cause to secure a warrant, or even because he lacks reasonable grounds for suspecting the motorist to be guilty of a crime. There is nothing wrong with an officer asking for information or asking for permission to make a search. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975), rev'g in part, 88 N.M. 384, 540 P.2d 864 (Ct. App. 1975).

Public safety may be factor in investigatory stop of vehicle. — The exigency of the possible threat to public safety that a drunk driver poses, New Mexico's grave concern about the dangers of drunk drivers, and the minimal intrusion of a brief investigatory stop may tip the balance in favor of the stop. State v. Contreras, 2003-NMCA-129, 134 N.M. 503, 79 P.3d 1111, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975).

In determining whether search and seizure was unreasonable, the absence of probable cause for arrest is not determinative. The inquiry is the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The facts must be judged against an objective standard: Would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

Probable cause cannot be established or justified by what is revealed by the search. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Defective information cannot provide probable cause. — An aggregate of discrete bits of information, each defective, cannot add up to probable cause. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Reasonable suspicion based on report by citizen informant. — Where an officer had reasonable suspicion, based on a concerned citizen's report, that juveniles might have a gun or guns, and he reasonably subjected them to a limited search to protect his own safety, there was no violation of either the New Mexico or the United States constitution. State v. Jimmy R., 1997-NMCA-107, 124 N.M. 45, 946 P.2d 648, cert. denied, 123 N.M. 802, 945 P.2d 1020 (1997).

Reliability of citizen informant. – In New Mexico, a citizen-informant is regarded as more reliable than a police informant or a crime-stoppers informant, because citizens presumably have nothing to gain by fabrication. State v. Contreras, 2003-NMCA-129, 134 N.M. 503, 79 P.3d 1111, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Case-by-case examination of probable cause. — The existence of "probable cause," whether for issuance of a search warrant or warrant of arrest, or for arrest without a warrant, or for search and seizure without a warrant, involves a case-by-case examination of the facts, and no two cases are precisely alike. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Expansion of investigation. — Although the investigation did not originally involve drugs, officers could reasonably expand the scope of the investigation based on the reasonable suspicion of criminal activity. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

The burden is on the state to show the requisite probable cause to justify a warrantless arrest. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

There is no reason to equate reasonable cause with probable cause. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

The question of probable cause is one of law to be determined by the trial court by way of voir dire examination. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

It is for a neutral and detached judge to determine from the affidavit whether probable cause exists. A police officer is not vested with that authority. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Hearsay can establish probable cause. — That information was hearsay does not destroy its role in establishing probable cause. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

B. INVESTIGATORY STOP.

Reasonable suspicion based on mistake of law justified by violation a different law. — If an officer mistakenly believes that certain conduct violates one statute, but that conduct in fact violates a different statute, reasonable suspicion exists to stop the suspect despite the officer's mistake of law. State v. Moseley, 2014-NMCA-033, cert. denied, 2014-NMCERT-002.

Where defendant was driving at a speed of thirty-five miles per hour in an area that contained both residences and businesses; no speed limit signs were posted in the area; a police officer, who was under the mistaken belief that the applicable speed limit was twenty-five miles per hour, stopped defendant for speeding; and defendant was not driving erratically or improperly, despite the officer's mistaken belief as to the applicable speed limit, the officer had reasonable suspicion to stop defendant, because the applicable speed limit under 66-7-301(A)(2) NMSA 1978 was thirty miles per hour. State v. Moseley, 2014-NMCA-033, cert. denied, 2014-NMCERT-002.

Reasonable suspicion based on tip. — Where a tip was provided by an informant whose identity was known by officers, tip correctly predicted the future movement of defendant, and other significant facts provided in tip were collaborated by officers, the tip was sufficiently complete and reliable to provide reasonable suspicion for an investigatory stop regarding drugs. State v. Robbs, 2006-NMCA-061, 139 N.M. 569, 136 P.3d 570, cert. denied, 2006-NMCERT-005, 139 N.M. 568, 136 P.3d 569.

Reasonable suspicion based on tip and public safety considerations. — Under Fourth Amendment analysis, the New Mexico court of appeals held that moving vehicles with intoxicated drivers pose a serious threat of injury or death to innocent citizens, and that the minimal intrusiveness of an investigatory stop based on an anonymous tip is outweighed by the gravity of the public concern and the public interest served by the stop. State v. Lope, 2015-NMCA-011, cert. denied, 2014-NMCERT-010.

Where officer pursued and stopped truck after being informed by another driver of another vehicle that the driver of the truck was intoxicated, the New Mexico court of appeals determined, based on Fourth Amendment analysis, that the minimal intrusiveness of an investigatory stop based on an anonymous tip is justified where information provided by the tip such as a description and location of the vehicle was corroborated. State v. Lope, 2015-NMCA-011, cert. denied, 2014-NMCERT-010.

Stop for revoked driver's license. — Where a police officer ran the license plate of the vehicle defendant was driving through the motor vehicle department and determined that the driving privileges of the registered owner of the vehicle had been revoked; and the officer made no effort to determine, prior to stopping the vehicle, whether the driver

of the vehicle was the registered owner, the stop did not violate Article II, Section 10 of the New Mexico constitution because the officer had reasonable suspicion to stop defendant's vehicle. State v. Hicks, 2013-NMCA-056, 300 P.3d 1183, cert. denied, 2013-NMCERT-004.

Vehicle in unsafe condition may be stopped. — A motor vehicle with a cracked windshield, if in an unsafe condition, may be constitutionally stopped, because 66-3-801 NMSA 1978 makes it a crime to drive a vehicle that is in an unsafe condition. State v. Munoz, 1998-NMCA-140, 125 N.M. 765, 965 P.2d 349.

Warrantless stop for safety concern. — Since the officer testified that the reason he stopped the truck was a concern for the safety of the passengers on the back tailgate, even though when asked if the truck was violating any state, municipal, or federal law, the officer said that it was not. Under these facts, the detention of the truck and the request for the license of the driver, registration, and proof of insurance did not violate the fourth amendment requirement of reasonableness. State v. Reynolds, 119 N.M. 383, 890 P.2d 1315 (1995), rev'g 117 N.M. 23, 868 P.2d 668 (Ct. App. 1993).

Reasonable suspicion to detain. — Where a police officer stopped defendant's vehicle based on his suspicion that the passenger in the vehicle had forged a check; the officer had no suspicion that the defendant had committed or was committing an offense; and the officer found drugs and drug paraphernalia in the possession of the passenger, the officer had reasonable suspicion about the contents of the vehicle and authority to detain and question the defendant about the contents of the vehicle and then to ask for consent to search the vehicle. State v. Funderburg, 2008-NMSC-026, 144 N.M. 37, 183 P.3d 922, rev'g, 2007-NMCA-021, 141 N.M. 139, 151 P.3d 911.

No reasonable suspicion to seize defendant. — Where two police officers approached a parked car in which defendant was a passenger to see what was going on; the officers did not observe the occupants in the car doing anything illegal or violating any law and they had not received any reports or dispatches regarding suspicious or criminal activity in the area; the officers became suspicious and concerned about their safety when they noticed the driver and defendant make abrupt movements; and instead of questioning the occupants, one officer ordered the driver to open the door of the car; and defendant was seized by the police when the officer ordered the driver to open the door; the officers did not have reasonable suspicion to seize defendant. State v. Murry, 2014-NMCA-021.

Lack of reasonable individualized suspicion. — Where a police officer had a general suspicion arising from the fact that a car in which defendant was a passenger was parked for thirty minutes on a street late at night in a neighborhood where recent burglaries, but none that night, had occurred, the officer did not have a reasonable individualized suspicion that defendant was committing or had committed a crime that justified detaining defendant or demanding identification from defendant. City of Roswell v. Hudson, 2007-NMCA-034, 141 N.M. 261, 154 P.3d 76.

No individualized suspicion. — Where police officer stopped defendant, who was driving a vehicle at 2 a.m. with temporary dealer plates that are for use only when demonstrating a vehicle, and the officer knew that temporary dealer plates are often misused or stolen, the officer did not have a particularized reasonable suspicion that defendant may have been engaged in misuse of the temporary demonstration plate to justify a traffic stop. State v. Aguilar, 2007-NMCA-040, 141 N.M. 364, 155 P.3d 769, cert. denied, 2007-NMCERT-003, 141 N.M. 401, 156 P.3d 39.

No individualized reasonable suspicion to justify detention. — Where defendant's vehicle was legally parked on side of street, officer did not observe any illegal activity, but was suspicious because of the late hour and a person was leaning into a vehicle that was parked in front of a residence belonging to an individual with outstanding warrants, the detention of the defendant was not justified by individualized reasonable suspicion. State v. Williams, 2006-NMCA-062, 139 N.M. 579, 136 P.3d 579, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

Reasonable suspicion shown. — Where an off-duty police officer witnessed a vehicle straddling the lane-divider line, splitting traffic and hitting vehicles out of its way; the officer turned on the emergency lights and siren of the officer's unmarked police car; the vehicle came to a stop and the driver exited the vehicle and ran away; defendant exited the vehicle and ran in the opposite direction; the officer testified based on experience that in circumstances where the occupants of a vehicle flee after a crash, there is reason to believe that the occupants committed or were committing a crime or were subject to pending warrants; and defendant's behavior would not be considered by a reasonable layperson to be merely innocuous or innocent, the officer had reasonable suspicion to stop and detain defendant for purposes of investigating the incident. State v. Maez, 2009-NMCA-108,147 N.M. 91, 217 P.3d 104, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

Evading a DWI checkpoint. — Where police officers set up a DWI checkpoint at the top of a hill; cones, droplights and flashing emergency lights at the checkpoint were visible to the surrounding area indicating police activity to approaching motorists; the officers placed signs that alerted motorists to the upcoming checkpoint; one sign was placed in the median visible to motorists traveling toward the checkpoint; the checkpoint lights were visible from the sign in the median; at 2:00 a.m., an officer observed defendant approach the checkpoint, make a legal U-turn in front of the sign in the median and drive away in the opposite direction from the checkpoint; and the officer pursued and stopped defendant on the suspicion that defendant was driving while intoxicated, the officer could have reasonably believed that defendant was attempting to evade the checkpoint and the officer had reasonable suspicion to stop defendant. State v. Anaya, 2009-NMSC-043, 147 N.M. 100, 217 P.3d 586, rev'g 2008-NMCA-077, 144 N.M. 246, 185 P.3d 1096.

Probable cause not shown. — Where a 911 caller reported that someone pulled a gun and took the caller's money during a drug transaction in the vicinity of a school; the dispatcher relayed information to a police officer that there was an armed subject in the

area of the school; the officer had no other description of the person with the gun or a specific location where the incident occurred; the officer observed defendant and another person walking from the direction of the school toward the backdoor of a laundromat that was within two blocks of the location of the alleged drug transaction; defendant and the other person had their hands in the pockets of their jackets; when the officer yelled at defendant and the other person, defendant darted into the laundromat; defendant later came out of the laundromat; the officer directed defendant to take defendant's hands out of the pockets of defendant's jacket; and when the officer performed a pat down search of defendant, the officer discovered a revolver and a marijuana pipe in defendant's pocket, defendant was seized when the officer requested defendant to take defendant's hands out of defendant's pockets and the seizure was without an articulable, reasonable suspicion that defendant had engaged in criminal activity. State v. Eric K., 2010-NMCA-040, 148 N.M. 469, 237 P.3d 771.

Where the defendant was walking down a residential street while carrying a pair of pants; when police officers drove by, the defendant gave them a look of surprise; after the officers passed, the defendant moved out of the street onto the sidewalk; the defendant appeared nervous; as the officers approached and displayed their badges, the defendant lowered the arm upon which he was carrying the pants so that it was positioned next to his hip; and defendant took steps back, the defendant's actions were not enough to create reasonable suspicion to detain him and the search of the defendant that revealed a firearm was illegal. State v. Gutierrez, 2008-NMCA-015, 143 N.M. 522, 177 P.3d 1096, cert. quashed, 2009-NMCERT-001, 145 N.M. 657, 203 P.3d 872.

Where two officers who had stopped defendant's car for carelessly leaving the curb saw alcoholic beverages therein (not a crime in and of itself) and neither officer ever explained why either of them believed any of the three occupants (all of whom had reached their majority) were under 21 (so as to make possession of the alcohol illegal), the officers had no probable cause to search the car, since to justify such an invasion of a citizen's personal security, the police officer must be able to specify facts which, together with rational inferences therefrom, reasonably warrant the intrusion, and defendant's motion to suppress should have been granted as being conducted without a warrant and not pursuant to any exception to the warrant requirement. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Officers lacked sufficient detail to properly detain and search a vehicle based on the race and number of its occupants and the color of the car, since the car stopped included a six-year-old girl, was not travelling from the area of the disturbance, and nothing about the appearance or operation of the vehicle aroused the officer's suspicions or contributed to the justification for the stop. U.S. v. Jones, 998 F.2d 883 (10th Cir. 1993).

Valid investigatory stop. — Where defendant was driving southbound on a highway that consisted of two lanes in each direction with a median in between; police officers observed defendant's car cross over the dashed lines on the road, make a sudden left

turn from the far right lane into a driveway, without using a turn signal, and while making the turn, crossing over the other southbound lane, the median and both northbound lanes; the officers stopped defendant and issued a warning citation for failing to maintain defendant's lane contrary to 66-7-317(A) NMSA 1978 which defendant signed; the officers believed that defendant's driving was indicative of possible impairment; and defendant was ultimately arrested for DWI, under the totality of circumstances, after observing defendant's erratic driving, the officers lawfully stopped defendant, based on traffic offenses they observed, to investigate whether defendant was impaired and a danger on the road. State v. Salas, 2014-NMCA-043, cert. denied, 2014-NMCERT-003.

Even in the absence of probable cause, an informant's tip combined with the officers' investigation and independent knowledge gave rise to a reasonable suspicion to stop the defendant's vehicle, and the defendant's actions in response to the officers' lawful attempt to execute a protective search provided both the probable cause and exigent circumstances to justify a warrantless search. State v. Eskridge, 1997-NMCA-106, 124 N.M. 227, 947 P.2d 502.

Where driver did not have a valid registration for his car and the license plate did not match with his vehicle, it was reasonable for a police officer to open the driver's door of defendant's car to attempt to verify the primary vehicle identification number (VIN); thus, the officer's act of opening the door to look for a secondary VIN did not constitute an unreasonable search of the car without probable cause. State v. Romero, 2002-NMCA-064, 132 N.M. 364, 48 P.3d 102, cert. denied, 132 N.M. 397, 49 P.3d 76 (2002).

Under the totality of circumstances, an investigatory stop of a vehicle was reasonable where the facts allowed the inference that the anonymous caller was a reliable concerned motorist, the information given was detailed enough for the deputies to find the vehicle in question and confirm the description, and the caller was an apparent eyewitness to the defendant's erratic driving. State v. Contreras, 2003-NMCA-129, 134 N.M. 503, 79 P.3d 1111, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533 (2003).

A police officer who testified he had been working in narcotics for approximately four years, had made numerous arrests in the area, for the year prior to defendant's arrest had spent almost every day in the area, and was acquainted with many addicts and had discussed methods of carrying and hiding small quantities of narcotics, had reasonable grounds for belief that defendant, based on the officer's observance of his conduct, was in possession of heroin and therefore had probable cause for the detention, and search and seizure which disclosed the heroin. State v. Blea, 88 N.M. 538, 543 P.2d 831 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

An officer's observation of a car operating on a public street without lights provided a sufficient basis for him to stop it, whether or not he thought it might be the car he was looking for in connection with a drive-by shooting. State v. Vargas, 120 N.M. 416, 902 P.2d 571 (Ct. App.), cert. denied, 120 N.M. 213, 900 P.2d 962 (1995).

Valid investigatory detention. — Where an officer received a dispatch that a caller had reported a “parked DWI in the parking lot” of a restaurant, described the subject vehicle, gave a partial license plate number for the vehicle, reported that a male subject who smelled of alcohol had entered the restaurant, passed out in the bathroom for a period of time, left the restaurant and then got into a dark blue vehicle, and then drove the vehicle from one parking space to another, almost striking several other vehicles in the parking lot, and where the officer, upon arriving on the scene minutes after receiving the dispatch call, found a vehicle matching the caller’s description, the officer could reasonably infer that the car was the subject of the dispatch, and could reasonably suspect that the man described by the caller might be in the car and that he might have engaged in the criminal activity of driving while intoxicated; an investigatory detention and seizure of the car and its occupants was justified because the information provided by dispatch and the officer’s own corroborating observation identifying the subject car would lead a person of reasonable caution to suspect criminal activity involving the car and its occupants. State v. Simpson, 2016-NMCA-070, cert. denied, 2016-NMCERT-____.

Officer’s conduct in opening the door of a vehicle did not transform a lawful investigatory detention into a search requiring a warrant. — Where an officer received a dispatch that a caller had reported a "parked DWI in the parking lot" of a restaurant, described the subject vehicle, gave a partial license plate number for the vehicle, reported that a male subject who smelled of alcohol had entered the restaurant, passed out in the bathroom for a period of time, left the restaurant and then got into a dark blue vehicle, and then drove the vehicle from one parking space to another, almost striking several other vehicles in the parking lot, and where the officer, upon arriving on the scene minutes after receiving the dispatch call, found a matching vehicle, with very dark tinted windows preventing the officer from seeing inside the vehicle to determine what the occupants were doing, an investigatory detention and seizure of the car and its occupants was justified and the officer’s conduct in opening the door did not transform a lawful investigatory detention into a search requiring a warrant, because it was the safest way to make contact with the car’s occupants, and under the circumstances, it was reasonable for the officer to open the car door, enabling the officer to see both occupants and remain outside while conducting his investigation. State v. Simpson, 2016-NMCA-070, cert. denied, 2016-NMCERT-____.

C. SEARCHES.

Warrantless search not justified. — The circumstances did not justify a warrantless search of defendant's home, where the deputies had no reason to believe someone else was in the home or that the evidence was likely to be destroyed before a deputy could return with a warrant. State v. Wagoner, 1998-NMCA-124, 126 N.M. 9, 966 P.2d 176, cert. denied, 125 N.M. 654, 964 P.2d 818 (1998), overruled by State v. Wagoner, 2001-NMCA-014, 130 N.M. 274, 24 P.3d 306, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Reasonable belief that offense committed. — Probable cause for a warrantless search means a reasonable ground for belief of guilt and exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Reasonable suspicion. — Where police officers executed a search warrant at a home based on a tip that methamphetamine was for sale at the home; the warrant covered the home, curtilage and vehicles at the home; defendant, who was a visitor at the home, was on probation for an earlier conviction; the conditions of defendant's probation were that defendant would submit to warrantless searches of defendant's person, residence and vehicles at the direction of defendant's probation officer or any law enforcement officer; the officers tried to reach defendant's probation officer without success and then searched defendant's vehicle where the officers found drug paraphernalia which defendant admitted belonged to defendant; and the officers then searched defendant's purse inside the home where they discovered methamphetamine, the officers had reasonable suspicion that defendant was committing or had committed a crime and that defendant's vehicle or purse contained evidence of the crime sufficient to support a warrantless search. State v. Brusuelas, 2009-NMCA-111, 147 N.M. 233, 219 P.3d 1, cert. denied, 2009-NMCERT-009, 147 N.M. 421, 224 P.3d 648.

Where a police officer stopped the vehicle in which the defendant was a passenger for speeding; the officer noticed a heavy odor of air freshener, heavy perfume or after shave in the vehicle; the driver could not produce a driver's license; the driver was uncommonly nervous; the name of the registered owner of the vehicle did not match the name of the driver; the driver did not know the name of the registered owner of the vehicle or the person who had given him permission to use the vehicle; and the driver and the defendant gave the officer conflicting travel plans, the totality of the circumstances provided the officer an articulable and reasonable basis to inquire about drugs and justified his request for consent to search the vehicle. State v. Pacheco, 2008-NMCA-131, 145 N.M. 40, 193 P.3d 587.

Probable cause shown. — Officer's observation of tobacco and marijuana seeds at a location where child had been and of a commercial cigarette which had been twisted at the end in child's pocket provided probable cause for seizure of the cigarette. In re Doe, 89 N.M. 83, 547 P.2d 566 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Information regarding the sale by defendant of "dexedrine pills" from a suitcase at a truck stop, detailed information concerning the description of defendant, the fact that he would be armed, the fact that a lady would be traveling with him and recitation of the make and color of the tractor and the color of the trailer, considered together with the testimony concerning informant's reliability, furnished adequate basis for the trial court's finding of probable cause, and such finding, combined with exigent circumstances which existed due to fact that drugs were kept in a vehicle provided the required foundation for

the warrantless search of defendant's tractor and trailer. State v. One 1967 Peterbilt Tractor, 84 N.M. 652, 506 P.2d 1199 (1973).

While the underlying facts, if any, known by the officer regarding defendant's reputation as a safeman were not brought out, the officer had knowledge that a "peeled" safe had been found nearby after a neighbor thrice had complained of loud hammering noises, that defendant's car contained tools well suited to such work (which tools he could see through the car window), and that defendant's car was the only one moving in the area at 3:00 a.m. and these facts supplied probable cause for searching the car, without regard to defendant's reputation as a safeman. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Police officer's experience of vials as drug paraphernalia and knowledge of defendant's prior involvement with drugs established probable cause to seize vial in plain view in defendant's pants pocket as he was patting down defendant. State v. Ochoa, 2004-NMSC-023, 135 N.M. 781, 93 P.3d 1286.

D. ARREST.

Investigatory stop as invalid arrest. — Under the totality of the circumstances, the detention of the defendant in the locked patrol car over 45 minutes and probably longer prior to being arrested, presented a significant intrusion and resulted in a de facto arrest with no probable cause. State v. Werner, 117 N.M. 315, 871 P.2d 971 (1994), rev'g 115 N.M. 131, 848 P.2d 1 (Ct. App. 1992).

Fruit of the poisonous tree doctrine. — Where probable cause for an arrest warrant was founded on evidence that had been seized fifteen days earlier when police officers improperly entered defendant’s home, drug evidence discovered in the course of a search incident to defendant’s arrest on the warrant was the fruit of the poisonous tree and should have been suppressed. State v. Lujan, 2008-NMCA-003, 143 N.M. 233, 175 P.3d 327.

Unsigned warrant invalid. — Since the bench warrant upon which the defendant was arrested was not properly signed by the court, the warrant was invalid and evidence seized thereunder was suppressed. State v. Gurrola, 121 N.M. 34, 908 P.2d 264 (Ct. App. 1995).

Where physical possession of warrant not essential. — Physical possession of the arrest warrant is not essential to a lawful arrest when the validity of the warrant is not involved. State v. Grijalva, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1973).

Federal and state standards must be met. — Having found the arrest to be valid under the federal standards, the arrest without a warrant must still be tested by New Mexico standards. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Conviction not void for illegal arrest. — Where defendant was properly before the court under the information filed against him and his plea thereto, and there is no contention made that he did not receive a fair trial, or that the verdict of guilty upon which his conviction was entered was not supported by the evidence, his conviction was not thereby rendered void even where the warrant was unlawfully issued and his arrest illegal. State v. Halsell, 81 N.M. 239, 465 P.2d 518 (Ct. App. 1970).

A police officer may arrest without a warrant if the circumstances would warrant a reasonable person in believing that an offense had been committed by the person whom he then arrests. State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973).

An officer may legally arrest one whom he reasonably believes is committing a criminal offense in his presence. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

Officer arresting without warrant need not have actual knowledge that an offense is being committed in his presence; a bona fide belief on the part of the officer is sufficient. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967).

Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967); State v. Ramirez, 95 N.M. 202, 619 P.2d 1246 (Ct. App. 1980).

Where defendant had a strong smell of liquor on his breath immediately after accident, had a "half gone" bottle of wine in the car, and had been driving the car, circumstances warranted the arresting officer, as a reasonable person, to believe that defendant had been driving while intoxicated and provided a probable cause for defendant's arrest without a warrant. State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973).

Where police officer testified that he knew that the appellant "was on revocation" and that he stopped the appellant "to check his driving privileges," and where appellant did not testify, arresting officer was justified in making the arrest without a warrant for violation of 64-13-68, 1953 Comp., a misdemeanor committed in his presence. State v. Gutierrez, 76 N.M. 429, 415 P.2d 552 (1966).

Where the officer makes an arrest without any knowledge of the commission of a crime except from an informer whom he does not know to be reliable, the courts have consistently held there is no reasonable grounds for the arrest. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Investigatory stop made by police who were called to assist motel owner in evicting the defendant was unlawful since failure of defendant to pay rent did not constitute a criminal offense. Since there was no justified official intrusion upon the constitutionally

protected interest of defendant, her resistance did not provide probable cause for the arrest, and even though she fled from the officer, evidence recovered as a result thereof was tainted and properly suppressed. State v. Frazier, 88 N.M. 103, 537 P.2d 711 (Ct. App. 1975).

The legality of an arrest without a warrant depends upon whether the arrest was based upon probable cause. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Trial court's decision as to reasonableness of arrest will not be disturbed if facts found to make the arrest constitutionally reasonable are supported by substantial evidence. State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Same standard for arrest with or without warrant. — The probable cause standard for an arrest must be at least as stringently applied in the case of warrantless arrests as in the instance of an arrest with a warrant. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

Reasonable suspicion or exigent circumstances must exist. — In the absence of reasonable suspicion or exigent circumstances, even if some other reasonable ground may exist, an officer may not restrain a person in order to question him. State v. Burciaga, 116 N.M. 733, 866 P.2d 1200 (Ct. App. 1993).

No individualized reasonable suspicion. — Where police officers saw the defendant riding his bicycle near a secured area and decided to see where the defendant was headed; the officers pulled their patrol car up next to the defendant’s bicycle; the defendant stopped his bicycle; the officers began questioning the defendant about his activities, asked the defendant for his driver’s license and retained the license to run a warrant check, the seizure of the defendant was not justified by reasonable suspicion of criminal activity. State v. Soto, 2008-NMCA-032, 143 N.M. 631, 179 P.3d 1239, cert. quashed, 2009-NMCERT-005, 46 N.M. 728, 214 P.3d 793.

Probable cause for arrest shown. — Where an off-duty police officer witnessed a vehicle straddling the lane-divider line, splitting traffic and hitting vehicles out of its way; the officer turned on the emergency lights and siren of the officer’s unmarked police car; the vehicle came to a stop and the driver exited the vehicle and ran away; defendant exited the vehicle and ran in the opposite direction; the officer ran after defendant, yelled "Police, stop" several times; defendant refused to obey the officer’s command; after running further, defendant stopped; the officer brandished his gun and badge; the officer told defendant that the officer was a police officer and ordered defendant on the ground; defendant refused to obey the command, the officer had probable cause to arrest defendant for evading and resisting a police officer. State v. Maez, 2009-NMCA-108, 147 N.M. 91, 217 P.3d 104, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

Where arresting officer testified that he was contacted by car radio by a second officer and, after getting together with him, learned of the shooting, who the suspect was, that defendant was identified as the suspect by several persons present at the shooting, and that the suspect was on foot when he left the house where the shooting occurred, whereupon the officer drove up and down the streets checking for defendant, and, having no success, staked out the apartment of defendant, subsequent arrest and frisk search at defendant's apartment was based on probable cause. State v. Riggsbee, 85 N.M. 668, 515 P.2d 964 (1973).

Where appellant was arrested by drugstore owner who apprehended appellant outside his store in early morning, appellant was properly arrested without warrant on probable cause, and appellant was properly before the justice of the peace regardless of validity of final complaint of the store owner. State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967).

Police had probable cause to arrest and search defendant where police observed defendant engage in what appeared to be a drug transaction just prior to his arrest, police clocked the vehicle driven by defendant going approximately 50 miles an hour in a 35 mile-per-hour zone, and defendant, when asked for his driver's license, stated that he had none. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

The Philadelphia police were entitled to act on the Phoenix police department's telephone request and to assume that Phoenix had probable cause for making it, and since defendant did not contend that the Phoenix police lacked probable cause to arrest him for crimes committed in Arizona, defendant's arrest by the Philadelphia police was lawful, and the confession thereafter obtained from him was admissible. State v. Carter, 88 N.M. 435, 540 P.2d 1324 (Ct. App. 1975).

When the arresting officer saw a pistol in defendant's pocket, he thereby had all the probable cause needed to make an arrest, regardless of whether the weapon later was found to be unloaded. Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972), cert. denied, 410 U.S. 987, 93 S. Ct. 1518, 36 L. Ed. 2d 185 (1973).

No probable cause. — Where police officers set up a drug buy with a dealer; the dealer, the defendant and two other people drove to the designated meeting place; the dealer left the vehicle, entered the police vehicle and made a drug deal with the police agent; the defendant remained in the vehicle; the police were ordered to arrest all people in the vehicle; the defendant complied with police orders; prior to his arrest, the defendant had not made any furtive or sudden movements and he did not exhibit any nervousness or suspicious behavior, the officers did not have probable cause to arrest the defendant. State v. Morales, 2008-NMCA-102, 144 N.M. 537, 189 P.3d 670, cert. denied, 2008-NMCERT-006, 144 N.M. 380, 188 P.3d 104.

Warrantless arrest justified by probable cause and exigent circumstances. — Where the police located the defendant on the day after the defendant and the murder victim had been last seen together; the evidence pointed overwhelmingly to the

defendant's having assaulted the victim and having removed her body from the location of the assault; the defendant had been eluding detection and aggressively destroying and concealing evidence of the crime, the warrantless arrest of the defendant was supported by probable cause and exigent circumstances. State v. Saiz, 2008-NMSC-048, 144 N.M. 663, 191 P.3d 521; abrogated, State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783.

No reasonable suspicion. – In companion cases, defendants were illegally seized because findings of individualized suspicion that defendants were or had violated the law were not justified where in one case, the finding by an officer of drug paraphernalia in the possession of another occupant of the car in which defendant had been riding and an open container of beer in the car did not point to any facts particular to the defendant that would lead to individualized suspicion that defendant was violating a law and where in the other case, the officer stated that defendant acted nervous without an articulation of specific reasons of concern that defendant had knowledge of criminal activity on the part of the other occupants of the automobile in which defendant had been riding. State v. Patterson, 2006-NMCA-037, 139 N.M. 322, 131 P.3d 1286, cert. denied, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

The misdemeanor arrest rule does not apply to DWI investigations, and an investigating officer need not observe the offense in order to make a warrantless arrest. Instead, the warrantless arrest of one suspected of committing DWI is valid when supported by both probable cause and exigent circumstances. City of Santa Fe v. Martinez, 2010-NMSC-033, 148 N.M. 708, 242 P.3d 275.

Misdemeanor arrest rule does not apply to DWI investigations. — Where a shopping mall employee saw a person staggering around the mall parking lot attempting to unlock different vans; the person eventually unlocked the door to a van and drove away; the employee gave the police a description of the van and the van's license plate number; a police officer went to the van's registered owner's address and observed a van that matched the employee's description in the driveway; the van's engine was warm; the officer knocked at the front door of the residence; the officer observed defendant stagger past the doorway, strike defendant's head on the wall next to the door, and fall; defendant staggered to the door a second time, fell, and opened the door from a sitting position; defendant told the officer that defendant had been driving the van earlier; and defendant had a strong odor of alcohol in defendant's breath, slurred speech, blood-shot eyes, and was unsteady, defendant's arrest for DWI was valid. City of Santa Fe v. Martinez, 2010-NMSC-033, 148 N.M. 708, 242 P.3d 275.

Police-team concept. — The police-team concept will apply if there has been cooperate work between police officers. State v. Mitchell, 2010-NMCA-059, 148 N.M. 842, 242 P.3d 409, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Where the first police officer stopped defendant for a traffic violation; the first officer noticed an odor of alcohol coming from defendant and that defendant had bloodshot, watery eyes; defendant admitted to drinking; the first officer called a second officer to

complete the investigation; the first officer reported to the second officer what the first officer had observed; the second officer noticed an odor of alcohol coming from defendant's vehicle and that defendant had bloodshot watery eyes and slurred speech; and the second officer performed a field sobriety test and arrested defendant for DWI, the first officer's primary duty was to patrol the streets, not to perform DWI investigations, the two officer's investigations together constituted a cooperative effort that permitted the second officer to investigate the possibility of DWI and to support probable cause for the warrantless arrest of defendant for DWI. State v. Mitchell, 2010-NMCA-059,148 N.M. 842, 242 P.3d 409, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Probable cause that non-jailable offense has been committed does not automatically make an arrest reasonable under this section. State v. Rodarte, 2005-NMCA-141, 138 N.M. 668, 125 P.3d 647, cert. quashed, 2006-NMCERT-007, 140 N.M. 280, 142 P.3d 361.

Arrests for non-jailable offenses are unreasonable under this section in the absence of specific and articulable facts that warrant an arrest. State v. Rodarte, 2005-NMCA-141, 138 N.M. 668, 125 P.3d 647, cert. quashed, 2006-NMCERT-007, 140 N.M. 280, 142 P.3d 361.

Probable cause to extend traffic stop for field sobriety texts. — Where the officer observed defendant's erratic driving, smelled the odor of alcohol on defendant's person, and saw defendant sway as defendant walked to the back of defendant's vehicle, the officer had reasonable suspicion to administer field sobriety tests to defendant. State v. Candace S., 2012-NMCA-030, 274 P.3d 774, cert. denied, 2012-NMCERT-002.

Warrantless arrests in public. — Statutory provisions regarding warrants must be considered in para materia with this section. 30-31-30 B NMSA 1978 cannot establish conclusively that an arrest based on such authority comports with the constitutional protection afforded by this section. Warrantless arrests made under the authority of the statute may be presumed reasonable but that presumption may be rebutted under an interpretation of what is constitutional. Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994), *rev'g* 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991).

For a warrantless arrest to be reasonable, the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant. If an officer observes the person arrested committing a felony, exigency will be presumed. Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994), *rev'g* 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991).

A warrantless arrest supported by probable cause is reasonable if exigency exists. — The overarching inquiry in reviewing warrantless arrests is whether it was reasonable for the officer not to procure an arrest warrant; a warrantless arrest supported by probable cause is reasonable if some exigency existed that precluded the

officer from securing a warrant. State v. Paananen, 2015-NMSC-031, *rev'g* 2014-NMCA-041.

Where defendant was detained after store personnel observed him shoplifting flashlights, defendant was frisked and his possessions and the stolen flashlights were displayed on a table to present to law enforcement; officers arrived at the scene and developed probable cause to arrest defendant based on their review of the store surveillance video-tape and the evidence of shoplifting displayed on the table before them. The officers arrested defendant without a warrant, pursuant to 30-16-23 NMSA 1978, and searched defendant's belongings incident to the arrest, finding hypodermic needles and heroin. The supreme court held that it was reasonable for the officers to make a warrantless arrest where they had probable cause, and when securing a warrant was not reasonably practical before responding to the scene, because the officers did not have the information supporting probable cause or the time to act on it prior to arriving on scene, and that an on-the-scene arrest supported by probable cause supplied the requisite exigency. The subsequent search of defendant was therefore a lawful search incident to arrest. State v. Paananen, 2015-NMSC-031, *rev'g* 2014-NMCA-041.

Warrantless misdemeanor arrest requires probable cause and exigent circumstances. — For a warrantless misdemeanor arrest to be reasonable under Article II, Section 10 of the New Mexico constitution, the arrest must be based on both probable cause and exigent circumstances. The arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a misdemeanor and that some exigency existed that precluded the officer from securing a warrant. The necessity for both probable cause and exigent circumstances applies even if statutory authority for the arrest only requires probable cause. State v. Paananen, 2014-NMCA-041, cert. granted, 2014-NMCERT-003.

Where the loss prevention personnel of a store observed defendant place flashlights under defendant's jacket and leave the store without paying for the them; defendant was detained in the loss prevention office, but was not restrained in any way, and was told that the police had been called; when the police officers arrived, they spoke with the loss prevention personnel and learned the facts leading up to defendant's detention; when the officers entered the loss prevention office, they immediately handcuffed defendant; and defendant was compliant and cooperative when defendant first encountered the officers and presented no imminent threat to escape or destroy evidence, the warrantless arrest of defendant was not valid under the New Mexico constitution, because although the officers had probable cause to arrest defendant, the state failed to show any exigent circumstances to support the arrest. State v. Paananen, 2014-NMCA-041, cert. granted, 2014-NMCERT-003.

V. CONSENT TO SEARCH.

A. IN GENERAL.

Probation search by law enforcement officer. — Where police officers executed a search warrant at a home based on a tip that methamphetamine was for sale at the home; the warrant covered the home, curtilage and vehicles at the home; defendant, who was a visitor at the home, was on probation for an earlier conviction; the conditions of defendant's probation were that defendant would submit to warrantless searches of defendant's person, residence and vehicles at the direction of defendant's probation officer or any law enforcement officer; the officers tried to reach defendant's probation officer without success and then searched defendant's vehicle where the officers found drug paraphernalia which defendant admitted belonged to defendant; and the officers then searched defendant's purse inside the home where they discovered methamphetamine, the officers were authorized to conduct the searches of defendant's vehicle and purse by the conditions of defendant's probation. State v. Brusuelas, 2009-NMCA-111, 147 N.M. 233, 219 P.3d 1, cert. denied, 2009-NMCERT-009, 147 N.M. 421, 224 P.3d 648.

The scope of a consent search is limited and determined by the actual consent given. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

The search did not exceed defendant's consent where the defendant affirmatively volunteered to be searched and did not express any restriction to the search or protest the search of his pockets or his wallet. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Scope of consent. — The search did not exceed defendant's consent where the defendant affirmatively volunteered to be searched and did not express any restriction to the search or protest the search of his pockets or his wallet. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Where the owner of the vehicle gave an unrestricted consent to its search, it is established law in New Mexico that if officers, conducting a lawful search for property illegally possessed, discover other property illegally possessed, the latter may be seized also. State v. Warner, 83 N.M. 642, 495 P.2d 1089 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Suppression is required where officer impermissibly expands the scope of consent. — Where, during a traffic stop of defendant's vehicle in an investigation concerning the ownership of a van that defendant was towing, the officer made a specific request to see the receipt for a specific vehicle, and where defendant complied with that request by opening the receipt book to the relevant page, a reasonable person in that situation would have understood defendant's consent to have been limited to that specific page or document, and therefore it was not reasonable for the officer to assume that physical possession of the receipt book, which was given to facilitate a close inspection of the information on the receipt, allowed him to flip through the entire receipt book and examine the contents of all pages; defendant's consent was limited to the

receipt for the van, and the officer impermissibly expanded the scope of that consent. State v. Monafo, 2016-NMCA-092, cert. denied, 2016-NMCERT-____.

The question of the voluntariness of a consent is one of fact to be determined by the trial court from all the evidence adduced upon this issue; that court must weigh the evidence, determine its credibility or plausibility, determine the credibility of the witnesses, and decide whether the evidence was sufficient to clearly and positively, or clearly and convincingly, establish that the consent was voluntarily given. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977), rev'g in part 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976); State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975), rev'g in part 88 N.M. 384, 540 P.2d 864 (Ct. App. 1975).

The question of whether consent to a search has been given is a question of fact subject to the limitations of judicial review. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

The question of consent to search is to be determined by the court and is not an issue to be submitted to the jury. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Consent to the search must be freely and intelligently given, must be voluntary and not the product of duress or coercion, actual or implied. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970); State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966).

Where without force or threat, an officer stated that he intended to seek a search warrant and may have offered the opportunity to consent to a search before the warrant was obtained, and the defendant stated that he wished to be searched so that he could leave the premises, his consent was not obtained by duress where a warrant was ultimately issued. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Propriety of search eliminated by consent. — A consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Miranda warnings need not necessarily be given before there can be a valid consent to search. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Permission need not be initially volunteered to constitute consent. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

There is nothing wrong with an officer asking for information or asking for permission to make a search, and permission need not be initially volunteered to constitute consent. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977), rev'g in part 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976).

Consent is exception to requirements of warrant and probable cause. — The probable cause required to secure a warrant or to justify a warrantless search is not a prerequisite to a consent search or to a request for consent to search. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975), rev'g in part 88 N.M. 384, 540 P.2d 864 (Ct. App. 1975).

A search authorized by consent is an exception to the requirements of both a warrant and probable cause and is wholly valid. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977), rev'g in part 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976); State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975), rev'g in part 88 N.M. 384, 540 P.2d 864 (Ct. App. 1975).

Consent must be proven by clear and positive evidence. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970); State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966).

The burden of proving consent is on the state. State v. Bidegain, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970); State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969); State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966).

Acquiescence is not consent. — Where officer who applied for the search warrant for seized automobile interviewed defendant a short time prior to making the application, where officer testified that defendant had no objection to a search of the car because officer had told him that he was going to get a search warrant for it anyway, and where defendant then affirmatively consented to a search of the car, this consent did not justify the search since it was no more than acquiescence to a claim of lawful authority. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled by State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Validity of consent after evidence obtained unlawfully. — In order for evidence obtained after an illegality, but with the voluntary consent of the defendant, to be admissible, there must be a break in the causal chain from the illegality to the search. In deciding whether the consent is sufficiently attenuated from the fourth amendment violation, courts must consider the temporal proximity of the illegal act and the consent,

the presence or absence of intervening circumstances, and the purpose and flagrancy of the official misconduct. State v. Davis, 2015-NMSC-034, *rev'g in part*, *aff'g in part* 2014-NMCA-042, 321 P.3d 955.

Where state police consensually searched defendant's greenhouse and seized fourteen marijuana plants after conducting a comprehensive aerial surveillance of defendant's property and the surrounding area, evidence that the helicopter used in the surveillance swooped in low enough to cause panic among the residents, caused property damage on nearby properties, produced excessive noise and kicked up dust and debris, and in the process of providing aerial protection for the officers on the ground, increased the risk of actual physical intrusion, the aerial surveillance and the manner in which it was conducted transformed the surveillance from a lawful observation of an area left open to public view to an unconstitutional intrusion into defendant's expectation of privacy and constituted an unwarranted search in violation of the fourth amendment. Evidence that the officers' contact with defendant and the officer's subsequent request to search defendant's greenhouse were made in direct response to, and simultaneously with, the information provided by the helicopter spotter, information obtained as a result of the illegal helicopter search. There were no intervening circumstances between the aerial search and defendant's consent, and as a result, there was insufficient attenuation to purge defendant's consent of the taint resulting from the warrantless aerial search. State v. Davis, 2015-NMSC-034, *rev'g in part*, *aff'g in part* 2014-NMCA-042, 321 P.3d 955.

Consent to search was not sufficiently attenuated from illegal search. — Where the state police and national guard were seeking to locate marijuana plantations by aerial surveillance; a spotter in a helicopter alerted a ground team to the presence of a greenhouse and vegetation in defendant's backyard; the officers did not have a warrant to search defendant's property; the officers made contact with defendant and asked permission to search the residence; defendant voluntarily consented to the search; during the search, the officers found marijuana and drug paraphernalia; the search of defendant's property violated Article II, Section 10 of the New Mexico constitution because the helicopter surveillance of defendant's property constituted a search requiring probable cause and a warrant; and the officer who obtained defendant's consent entered defendant's property solely as a result of information obtained in the helicopter search and there were no intervening circumstances between the aerial search and defendant's consent, there was insufficient attenuation to purge defendant's consent of the taint of the unconstitutional aerial surveillance and evidence obtained through the search was inadmissible. State v. Davis, 2014-NMCA-042, cert. granted, 2014-NMCERT-003.

Consent to search was valid. — Where a helicopter pilot observed a possible marijuana plantation in defendant's yard; six police officers, armed with service weapons and government vehicles created a secure premise around defendant's property; while the other officers remained outside defendant's property, one officer approached defendant, identified the officer as an officer, stated that the helicopter had identified marijuana on defendant's property and asked defendant for permission to

search defendant's property; the officer told defendant several times that defendant was not required to provide consent, that the decision was up to defendant, that the officers would begin a search only if defendant consented to the search, that if defendant refused, the officer would secure the property and try to obtain a search warrant and that the other officers were present for safety; defendant did not object to or protest the request to search; defendant was not detained and was allowed to move about freely; the officer's and defendant's tone of voice were calm and normal; and defendant signed a consent form, there was substantial evidence that defendant voluntarily consented to the search. State v. Davis, 2013-NMSC-028, rev'g 2011-NMCA-102, 150 N.M. 611, 263 P.3d 953.

Consent invalid. — Where the spotter in a surveillance helicopter directed police to defendant's property to investigate whether vegetation in defendant's greenhouse and behind the house was marijuana; at least six armed police officers and five government vehicles entered defendant's property as the helicopter hovered overhead; the officers spread out across the property; an officer asked defendant to consent to a search of the property; the officer told defendant that the if defendant did not consent to the search, the police would secure the property and obtain a search warrant; and after hesitating, defendant gave the officer defendant's oral and written consent to search the property, because defendant thought that a refusal to consent to the search was futile and thought the police were already searching the property, defendant's consent was given under duress and coercive circumstances and was not voluntary. State v. Davis, 2011-NMCA-102, 150 N.M. 611, 263 P.3d 953, rev'd, 2013-NMSC-028.

Consent of minor to vehicle search. — A police officer need not advise a minor of the right to refuse to consent in order to obtain the valid consent of the minor to search the minor's vehicle. State v. Carlos A., 2012-NMCA-069, 284 P.3d 384, cert. denied, 2012-NMCERT-006.

Where the minor, who was seventeen years of age, was stopped by a police officer for a traffic violation; the officer smelled the odor of marijuana; the minor consented to the search of the minor's vehicle; the officer did not advise the minor and the minor did not know that the minor had a right to refuse to consent; the contact between the minor and the officer was low-key, polite, cooperative, and not hostile; the officer did not exert any unusual pressure on the minor; and the encounter lasted about ten minutes from the time of the stop to the end of the vehicle search, there was substantial evidence that the minor voluntarily consented to the search of the vehicle. State v. Carlos A., 2012-NMCA-069, 284 P.3d 384, cert. denied, 2012-NMCERT-006.

Consent shown. — Defendant's statement that he was going to open the trunk of his car when asked by the officer, even before the officer indicated that he would secure a search warrant, together with the evidence of the officer concerning his request to look into the trunk of the vehicle, could properly be construed as consent on this defendant's part to look into and make a search of the trunk. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977), rev'g in part 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976).

Evidence that during a routine check of driver's licenses and vehicle registrations, defendant was routinely stopped and that after defendant, who resided in Arizona, had produced an Arizona's driver's license issued to him and a Connecticut certificate of registration showing the vehicle to be registered in the name of another person, the officers unsuccessfully attempted a computer check to determine if the car was stolen, and then asked what was in the trunk of the vehicle, and if defendant minded if they looked in the trunk, to which defendant replied that he did not mind, got out of the vehicle and personally unlocked and opened the trunk, supported the trial court's finding that defendant voluntarily consented to the opening of the trunk. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975), rev'g in part 88 N.M. 384, 540 P.2d 864 (Ct. App. 1975).

B. CONSENT BY THIRD PARTY.

Consent by third party. — A third party cannot consent to a search of a part of the premises within defendant's exclusive use and control. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

While the original entry was with the permission of defendant's relative and homeowner, he could not validly consent to a search of the defendant's personal effects which were not exposed to open view. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

A defendant may object to a search consented to by another where the defendant has exclusive control over a part of the premises searched or over an effect on the premises which is itself capable of being searched. Enclosed spaces over which a nonconsenting party has a right to exclude others, whether rooms or effects, are protected. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

Common authority over work spaces. — Regional supervisor for defendant's employer, who had free access to employer's trailer that was used as a base of operations for a bear study, had common authority over the work spaces within the trailer and the crawlspace underneath it, could consent to a search of those areas of the trailer. State v. Ryan, 2006-NMCA-044, 139 N.M. 354, 132 P.3d 1040, cert. denied, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120, cert. denied, 549 U.S. 899, 127 S. Ct. 215, 166 L. Ed. 2d 172 (2006).

Where victim and defendant lived and worked in a trailer that was owned by their employer and used as a base of operations for a bear study, victim and defendant at times stayed together in defendant's bedroom, victim's access to defendant's bedroom was never restricted, and victim stored her equipment and business materials in defendant's bedroom and where victim and defendant both used a video camera in their bear research, victim sometimes entered defendant's bedroom to get the camera and videotapes, defendant had given victim authority to enter his bedroom to get and view the videotapes, videotapes that contained scenes of defendant committing the crime were not hidden, the victim had a sufficient relationship to defendant's bedroom to

consent to a search of the bedroom and victim had a sufficient relationship to the videotapes found in the bedroom to authorize police officers to view the videotapes. State v. Ryan, 2006-NMCA-044, 139 N.M. 354, 132 P.3d 1040, cert. denied, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120, cert. denied, 549 U.S. 899, 127 S. Ct. 215, 166 L. Ed. 2d 172 (2006).

Consent by spouse. — Where there is no showing that defendant's personal effects were taken from an area reserved to defendant's exclusive use, and the wife, as a joint possessor of the premises, consents to the taking of the personal effects, the consent is valid. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

Where there is no claim that the wife's consent to search resulted from fraud, coercion or threat by the police, the wife's consent under the facts was sufficient. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

The wife, as a joint possessor, may consent to a search in her own right and the items taken by her consent can be used in evidence against the other joint possessor. State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App. 1969).

When a spouse, who has common authority over premises and other community property within it, finds incriminating evidence and voluntarily delivers it to the police and consents to an examination of that evidence, neither the fourth amendment nor this section of the New Mexico constitution prohibits the admission of the evidence at trial. State v. Cline, 1998-NMCA-154, 126 N.M. 77, 966 P.2d 785, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998), cert. denied, 526 U.S. 1041, 119 S. Ct. 1338, 143 L. Ed. 2d 502 (1999).

Consent by parent. — Where trial court specifically found and properly ruled that permission to search house was voluntarily given by defendant's mother, and where defendants were single and living with their parents in their parents' home, it follows that the defendants' boots were seized as a result of a lawful search and were properly received in evidence, and mere irregularity as might appear on the consent form used by the officers was not deemed controlling. State v. Williamson, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

Consent by home owner. — A search after permission is given by one who has authority, such as the owner of a house, is valid. State v. Mosier, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971).

Even assuming defendant was living in mobile home, a fact that was in dispute, the home's owners and co-inhabitants could lawfully consent to search of the home. State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807, modified, State v. Gallegos, 2007-NMSC-007, 141 N.M. 185, 152 P.2d 828, overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110..

Consent by third party invalid. — Where the defendant was stopped because the vehicle he was driving had a cracked windshield; the defendant refused to consent to a search of the vehicle; the police officer did not have reasonable suspicion to detain the vehicle; the defendant's father, who owned the vehicle, arrived at the scene in response to a call from the defendant immediately following the police officer's detention of the vehicle; the father gave consent to search the vehicle, there was no attenuation between the illegal detention of the vehicle and the father's consent to the search and the father's consent was tainted and invalid to support the search of the vehicle. State v. Neal, 2007-NMSC-043, 142 N.M. 176, 164 P.3d 57.

Parent cannot consent for adult child. — Under the facts and circumstances of this case, a third party's status as a parent did not, without more, empower him to consent to a search of his 29-year-old son's room. State v. Diaz, 1996-NMCA-104, 122 N.M. 384, 925 P.2d 4.

State must show control. — To establish a third party's common authority to consent to a search, the state is required to show more than ownership of the house. The evidence had to demonstrate that the third party had "joint access or control for most purposes" over an area of "mutual use". State v. Diaz, 1996-NMCA-104, 122 N.M. 384, 925 P.2d 4.

No "apparent authority" exception. — When the state relies upon consent to justify a warrantless search of a residence, there is no "apparent authority" exception under the New Mexico constitution. State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App. 1994), cert. denied, 119 N.M. 389, 890 P.2d 1321 (1995).

The state is required to show actual authority of the third party for his consent to be valid; apparent authority is not sufficient. State v. Diaz, 1996-NMCA-104, 122 N.M. 384, 925 P.2d 4.

A deputy game warden may patrol privately owned land for the purpose of looking out for wild game interests upon such land. 1947-48 Op. Att'y Gen. No. 47-4974.

Search warrant for intoxicating liquor. — No statute authorizes issuance of search warrant for intoxicating liquor, and any such authority is to be found in this constitutional provision. 1933-34 Op. Att'y Gen. No. 34-737.

Law reviews. — For note, "The Investigatory Stop of Motor Vehicles in New Mexico," see 8 N.M. L. Rev. 223 (1978).

For note, "Search and Seizure: The Automobile Exception to the Fourth Amendment Warrant Requirement - A Further Exception to the Fourth: State v. Capps," see 14 N.M. L. Rev. 239 (1984).

For note, "Criminal Procedure - Search and Seizure - Expectations of Privacy in the Open Fields and an Evolving Fourth Amendment Standard of Legitimacy: Oliver v. United States," 16 N.M. L. Rev. 129 (1986).

For note, "Criminal Procedure - Search and Seizure of Person and Property: *State v. Lovato,* " see 23 N.M. L. Rev. 323 (1993).

For note, "New Mexico Requires Exigent Circumstances for Warrantless Public Arrests: *Campos v. State*," see 25 N.M. L. Rev. 315 (1995).

For article, "State Constitutional Interpretation and Methodology," see 28 N.M. L. Rev. 199 (1998).

For note, "Constitutional Law - The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure - *State v. Gomez*," see 28 N.M. L. Rev. 355 (1998).

For article, "New Mexico State Constitutional Law Comes of Age," see 28 N.M. L. Rev. 379 (1998).

For article, "*State v. Gomez* and the Continuing Conversation over New Mexico's State Constitutional Rights Jurisprudence," see 28 N.M. L. Rev. 387 (1998).

For note, "Police Searches on Public School Campuses in New Mexico," see 30 N.M. L. Rev. 141 (2000).

For article, "New Developments in Fourth, Fifth and Sixth Amendment Law," see 31 N.M. L. Rev. 175 (2001).

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For note, "Constitutional Law: State v. Nemeth - The Community Caretaker Exception to the Fourth Amendment," see 32 N.M. L. Rev. 291 (2002).

For note, "Search and Seizure Law: State v. Cardenas-Alvarez: The Jurisdictional Reach of State Constitutions - Applying State Search and Seizure Standards to Federal Agents," see 32 N.M. L. Rev. 531 (2002).

For article, "State v. Urioste: A Prosecutor's Dream and Defender's Nightmare", see 34 N.M. L. Rev. 517 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Searches and Seizures §§ 2 to 6.

Admissibility, in civil case, of evidence obtained by unlawful search and seizure, 5 A.L.R.3d 670.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 A.L.R.3d 473.

Validity of consent to search given by one in custody of officers, 9 A.L.R.3d 858.

Traffic violation: lawfulness of search of motor vehicle following arrest for traffic violation, 10 A.L.R.3d 314.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 A.L.R.3d 359.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

Sufficiency of description, in search warrant, of apartment or room to be searched in multiple-occupancy structure, 11 A.L.R.3d 1330.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search, 19 A.L.R.3d 727.

Plea of guilty as waiver of claim of unlawful search and seizure, 20 A.L.R.3d 724.

Private individual: admissibility, in criminal case, of evidence obtained by search by private individual, 36 A.L.R.3d 553.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 A.L.R.3d 385.

"Furtive" movement or gesture as justifying police search, 45 A.L.R.3d 581.

Observation through binoculars as constituting unreasonable search, 48 A.L.R.3d 1178.

Censorship and evidentiary use of unconvicted prisoner's mail, 52 A.L.R.3d 548.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 A.L.R.3d 172.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure, 77 A.L.R.3d 636.

Validity of requirement that, as a condition of probation, defendant submit to warrantless searches, 79 A.L.R.3d 1083.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child - state cases, 99 A.L.R.3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant, 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 1 A.L.R.4th 673.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property - state cases, 2 A.L.R.4th 1173.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse - state cases, 4 A.L.R.4th 196.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 4 A.L.R.4th 1050.

Odor of narcotics as providing probable cause for warrantless search, 5 A.L.R.4th 681.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A.L.R.4th 318.

Admissibility in criminal case of blood-alcohol test where blood was taken despite defendant's objection or refusal to submit to test, 14 A.L.R.4th 690.

Use, in attorney or physician disciplinary proceeding, of evidence obtained by wrongful police action, 20 A.L.R.4th 546.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

Disputation of truth of matters stated in affidavit in support of search warrant - modern cases, 24 A.L.R.4th 1266.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Employment of photographic equipment to record presence and nature of items as constituting unreasonable search, 27 A.L.R.4th 532.

Search and seizure: suppression of evidence found in automobile during routine check of vehicle identification number (VIN), 27 A.L.R.4th 549.

Reasonable expectation of privacy in contents of garbage or trash receptacle, 28 A.L.R.4th 1219.

Validity of searches conducted as condition of entering public premises - state cases, 28 A.L.R.4th 1250.

Lawfulness of warrantless search of purse or wallet of person arrested or suspected of crime, 29 A.L.R.4th 771.

Admissibility, in criminal case, of evidence discovered by warrantless search in connection with fire investigation - post-Tyler cases, 31 A.L.R.4th 194.

Propriety in state prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 32 A.L.R.4th 378.

Validity of routine roadblocks by state or local police for purpose of discovery of vehicular or driving violations, 37 A.L.R.4th 10.

Validity of, and admissibility of evidence discovered in, search authorized by judge over telephone, 38 A.L.R.4th 1145.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 A.L.R.4th 705.

Search and seizure: What constitutes abandonment of personal property within rule that search and seizure of abandoned property is not unreasonable - modern cases, 40 A.L.R.4th 381.

Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person's body, 41 A.L.R.4th 60.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, 44 A.L.R.4th 366.

Propriety of governmental eaves-dropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Officer's ruse to gain entry as affecting admissibility of plain-view evidence - modern cases, 47 A.L.R.4th 425.

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Propriety of state or local government health officer's warrantless search - post-Camara cases, 53 A.L.R.4th 1168.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

Search and seizure: reasonable expectation of privacy in public restroom, 74 A.L.R.4th 508.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 A.L.R.5th 52.

Prisoner's rights as to search and seizure under state law or constitution - post-Hudson cases, 14 A.L.R.5th 913.

State constitutional requirements as to exclusion of evidence unlawfully seized - post-*Leon* cases, 19 A.L.R.5th 470.

Search and seizure: lawfulness of demand for driver's license, vehicle registration, or proof of insurance pursuant to police stop to assist motorist, 19 A.L.R.5th 884.

Admissibility, in motor vehicle license suspension proceedings, of evidence obtained by unlawful search and seizure, 23 A.L.R.5th 108.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision, 31 A.L.R.5th 229.

Search and seizure of bank records pertaining to customer as violation of customer's rights under state law, 33 A.L.R.5th 453.

Propriety of stop and search by law enforcement officers based solely on drug profile, 37 A.L.R.5th 1.

Propriety of execution of search warrant at nighttime, 41 A.L.R.5th 171.

Sufficiency of description in warrant of person to be searched, 43 A.L.R.5th 1.

Application of "plain-feel" exception to warrant requirements-state cases, 50 A.L.R.5th 581.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child-state cases, 51 A.L.R.5th 425.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse-state cases, 55 A.L.R. 5th 125.

Observation through binoculars as constituting unreasonable search, 59 A.L.R.5th 615.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property - state cases, 61 A.L.R.5th 1.

Searches and seizures: Reasonable expectation of privacy in contents of garbage or trash receptacle, 62 A.L.R.5th 1.

Belief that burglary is in progress or has recently been committed as exigent circumstance justifying warrantless search of premises, 64 A.L.R.5th 637.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 65 A.L.R.5th 407.

Search and seizure: reasonable expectation of privacy in tent or campsite, 66 A.L.R.5th 373.

Validity of anticipatory search warrants - state cases, 67 A.L.R.5th 361.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 68 A.L.R.5th 343.

Civilian participation in execution of search warrant as affecting legality of search, 68 A.L.R.5th 549.

Effect of retroactive consent on legality of otherwise unlawful search and seizure, 76 A.L.R.5th 563.

Permissibility and sufficiency of warrantless use of thermal imager or Forward Looking Infra-Red Radar (F.L.I.R.), 78 A.L.R.5th 309.

Validity of police roadblocks or checkpoints for purpose of discovery of illegal narcotics violations, 82 A.L.R.5th 103.

Validity of search or seizure of computer, computer disk, or computer peripheral equipment, 84 A.L.R.5th 1.

What constitutes compliance with knock-and-announce rule in search of private premises - state cases, 85 A.L.R.5th 1.

Federal and state constitutions as protecting prison visitor against unreasonable searches and seizures, 85 A.L.R.5th 261.

Constitutionality of secret video surveillance, 91 A.L.R.5th 585.

Expectation of privacy in internet communications, 92 A.L.R.5th 15.

Error, in either search warrant or application for warrant, as to address of place to be searched as rendering warrant invalid, 103 A.L.R.5th 463.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 99 A.L.R.5th 557.

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale – state cases, 109 A.L.R.5th 99.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale – state cases, 111 A.L.R.5th 239.

When are facts relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance – state cases, 112 A.L.R.5th 429.

Validity of warrantless search of motor vehicle based on odor of marijuana — state cases, 114 A.L.R. 5th 173.

Validity of warrantless search based in whole or in part on odor of narcotics other than marijuana, or chemical related to manufacture of such narcotics, 115 A.L.R. 477.

When are facts relating to drug other than cocaine or marijuana so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of controlled substance — state cases 113 A.L.R. 5th 517.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of state constitutions, 117 A.L.R. 5th 407.

Validity of warrantless search of other than motor vehicle or occupant of motor vehicle based on odor of marijuana — state cases 122 A.L.R. 5th 439.

Validity of warrentless search of motor vehicle driver based on odor of marijuana — state cases, 123 A.L.R. 5th 179.

Validity of search conducted pursuant to parole warrant, 123 A.L.R. 5th 221.

Admissibility of ion scan evidence, 124 A.L.R. 5th 691.

Validity of warrantless search of motor vehicle passenger based on odor of marijuana, 1 A.L.R. 6th 371.

Application of Leon good faith exception to exclusionary rules where police fail to comply with knock and announce requirement during execution of search warrant, 2 A.L.R. 6th 169.

When are facts offered in support of search warrant for evidence of nondrug, nonsexual offense so untimely as to be stale — state cases, 6 A.L.R. 6th 533.

Narcotics and drugs: use of trained dogs to detect narcotics or drugs as unreasonable search in violation of fourth amendment, 31 A.L.R. Fed. 931.

Fourth amendment as protecting prisoner against unreasonable searches or seizures, 32 A.L.R. Fed. 601.

Construction and application of "national security" exception to fourth amendment search warrant requirement, 39 A.L.R. Fed. 646.

Authority of United States officials to conduct inspection or search of American registered vessel located outside territorial waters of United States, 40 A.L.R. Fed. 402.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's relative, 48 A.L.R. Fed. 131.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative, 49 A.L.R. Fed. 511.

Sufficiency of description of business records under fourth amendment requirement of particularity in federal warrant authorizing search and seizure, 53 A.L.R. Fed. 679.

Validity, under federal constitution, of search conducted as condition of entering public building, 53 A.L.R. Fed. 888.

Aerial observation or surveillance as violative of fourth amendment guaranty against unreasonable search and seizure, 56 A.L.R. Fed. 772.

Defense of good faith in action for damages against law enforcement official under 42 USC § 1983, providing for liability of person who, under color of law, subjects another to deprivation of rights, 61 A.L.R. Fed. 7

Propriety, under § 287(a)(1) of Immigration and Nationality Act (8 USCS § 1357(a)(1)), of warrantless interrogation of alien, or person believed to be alien, as to alien's right to be or to remain in United States, 63 A.L.R. Fed. 180.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force, 66 A.L.R. Fed. 119.

Admissibility of evidence obtained by unconstitutional search in proceedings under Occupational Safety and Health Act (29 USCS § 651 et seq.), 67 A.L.R. Fed. 724.

When do facts shown as probable cause for wiretap authorization under 18 USC § 2518(3) become "stale," 68 A.L.R. Fed. 953.

Propriety in federal prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 69 A.L.R. Fed. 522.

Use of electronic tracking device (beeper) to monitor location of object or substance other than vehicle or aircraft as constituting search violating Fourth Amendment, 70 A.L.R. Fed. 747.

Fourth amendment as prohibiting strip searches of arrestees or pretrial detainees, 78 A.L.R. Fed. 201.

Validity of warrantless search under extended border doctrine, 102 A.L.R. Fed. 269.

Warrantless detention of mail for investigative purposes as violative of fourth amendment, 115 A.L.R. Fed. 439.

Permissibility under Fourth Amendment of detention of motorist by police, following lawful stop for traffic offense, to investigate matters not related to offense, 118 A.L.R. Fed. 567.

When is consent voluntarily given so as to justify search conducted on basis of that consent - Supreme Court cases, 148 A.L.R. Fed. 271.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of Fourth Amendment, 150 A.L.R. Fed. 399.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor relative, 152 A.L.R. Fed. 475.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse, 160 A.L.R. Fed. 165.

Sufficiency of information provided by anonymous informant to provide probable cause for federal search warrant - cases decided after Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), 178 A.L.R. Fed. 487.

Validity of warrantless administrative inspection of business that is allegedly closely or pervasively regulated; cases decided since Colonnade Catering Corp. v. U.S., 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970), 182 A.L.R. Fed. 467.

When are facts offered in support of search warrant for evidence of federal nondrug offense so untimely as to be stale, 187 A.L.R. Fed. 415.

Validity of warrantless search of motor vehicle based on odor of marijuana — federal cases, 188 A.L.R. Fed. 487.

Validity of warrantless search of motor vehicle occupant based on odor of marijuana — federal cases, 192 A.L.R. Fed. 391.

Sufficiency of information provided by confidential informant, whose identity is known to police, to provide probable cause for federal search warrant where there was indication that informant provided reliable information to police in past — cases decided after Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 529 (1983), 196 A.L.R. Fed 1.

79 C.J.S. Searches and Seizures § 3 et seq.

Sec. 11. [Freedom of religion.]

Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.

ANNOTATIONS

Cross references. — For religious rights preserved under Treaty of Guadalupe Hidalgo, *see* N.M. Const., art. II, § 5.

For provision that religious belief not to abridge right of citizens to vote, hold office or sit upon juries, *see* N.M. Const., art. VII, § 3.

For prohibition against religious tests for admission to school and prohibition against requiring attendance at religious services, *see* N.M. Const., art. XII, § 9.

For provision relating to use of sacramental wines, *see* N.M. Const., art. XX, § 13.

For provisions requiring religious toleration and prohibiting polygamy, *see* N.M. Const., art. XXI, § 1.

See Kearny Bill of Rights, cl. 3 in Pamphlet 3.

For excusing student from school to participate in religious instruction, *see* 22-12-3 NMSA 1978.

For statutory provision prohibiting teaching of sectarian doctrine in public school, *see* 22-13-15 NMSA 1978.

For statutory provision requiring charter schools to be nonsectarian and nonreligious, *see* 22-8B-4 NMSA 1978.

For statutory provisions regarding posting of religious codes in schools, *see* Historic Codes Act, 22-15-15 NMSA 1978 et seq.

For statutory provisions that require the nonsectarian operation of state educational institutions, *see* 21-1-22 NMSA 1978.

For the New Mexico Religious Freedom Restoration Act, *see* 28-22-1 NMSA 1978.

For statutory provisions guaranteeing freedom of worship by Indians in state correctional institutions, *see* 33-10-4 NMSA 1978.

Comparable provisions. — Idaho Const., art. I, § 4.

Iowa Const., art. I, §§ 3, 4.

Montana Const., art. II, § 5.

Utah Const., art. I, § 4.

Wyoming Const., art. I, § 18.

Prohibiting commercial photography business from discriminating based on sexual orientation did not violate freedom of religion. — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, Chapter 28, Article 1 NMSA 1978; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds; and plaintiff claimed that the act compelled plaintiff to express a positive image and message about same-sex commitment ceremonies contrary to plaintiff's beliefs, the act did not violate plaintiff's first amendment free exercise rights because the act is a neutral law of general applicability that ensures that businesses that choose to operate as a public accommodation do not discriminate against protected classes of people, it does not target only religiously motivated discrimination. Elane Photography, LLC v. Willock, 2013-NMSC-040, aff'g 2012-NMCA-086, 284 P.3d 428, aff'd, 2013-NMSC-040, 309 P.3d 53.

Where plaintiff violated the Human Rights Act, Chapter 28, Article 1 NMSA 1978, by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of religion because the act forced plaintiff to photograph same-sex marriages in violation of plaintiff's owner's religious belief that marriage is the union of one man and one woman, the act did not violate plaintiff's freedom of religion because the act is directed at and applies generally to all citizens transacting business through public accommodations that deal with the public at large, any burden on religion or religious beliefs was incidental and uniformly applied to all citizens, and a rational basis existed to support the governmental interest in protecting specific classes of citizens from discrimination in public accommodations. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, cert. granted, 2012-NMCERT-008, 296 P.3d 491, aff'd, 2013-NMSC-040.

Sign ordinance held not to violate provision. — Where a sign ordinance does not limit what a religious organization may maintain on its signs, the ordinance does not abridge the free exercise of religious beliefs in violation of this provision. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Baccalaureate and commencement exercises. — The New Mexico constitutional provisions, statutes and decisions do not prohibit holding baccalaureate services and commencement exercises in a church building, where it is the only building in the community which could comfortably accommodate those present. Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952).

The appropriation of educational funds to private schools is unconstitutional. — N.M. Const., Art. XII, § 3 expressly prohibits the appropriation of public funds to sectarian, denominational or private schools. A public school under the control of the state can directly receive funds, while a private school not under the exclusive control of the state cannot receive either direct or indirect support. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Where petitioners filed a complaint for declaratory judgment against the secretary of the New Mexico public education department seeking a declaration that the state issuing instructional materials to students attending private schools is unconstitutional, the New Mexico supreme court held that the Instructional Material Law, §§ 22-15-1 through 22-15-14 NMSA 1978, in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions, and private schools as agents for the benefit of eligible students, violates N.M. Const., Art. XII, § 3, because the constitutional provision expressly restricts the use of public funds to other than sectarian schools and expressly prohibits the appropriation of educational funds to private schools. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Furnishing of instructional material to students attending private schools does not violate this section. — The Instructional Material Law, (22-15-1 through 22-15-14 NMSA 1978), in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions and private schools as agents for the benefit of eligible students, does not violate this section; this section serves the same goals as the establishment clause of the first amendment of the United States constitution, and the United States supreme court has made clear that textbook and instructional material programs that benefit all children, regardless of the school of their attendance, do not conflict with the establishment clause. Moses v. Skandera, 2015-NMCA-036, cert. granted, 2015-NMCERT-001.

Special use permit for parochial school not unreasonable restriction. — A municipal zoning ordinance requiring the issuance of a special use permit as a prerequisite to the operation of a parochial school does not impose an unreasonable restriction upon a church's free exercise of religion. City of Las Cruces v. Huerta, 102 N.M. 182, 692 P.2d 1331 (Ct. App. 1984), cert. denied, 102 N.M. 225, 693 P.2d 591 (1984).

Statute authorizing school board to implement daily moment of silence unconstitutional. — Former 22-5-4.1 NMSA 1978, which authorized local school boards to implement a daily moment of silence, and its implementation in a public school system, violated this section, in that it gave a preference by law to a particular mode of worship. Duffy ex rel. Duffy v. Las Cruces Pub. Sch., 557 F. Supp. 1013 (D.N.M. 1983).

Local prohibition on Sunday sale of alcohol. — Section 60-7A-1 NMSA 1978, regulating the sale of alcoholic beverages and allowing local option districts to prohibit Sunday sales, is a proper exercise of legislative power and does not violate equal protection of the laws under U.S. Const., amend. XIV, § 1 and N.M. Const., art. II, § 18, nor the prohibitions of the furtherance and establishment of religion clause of U.S. Const., amend. I and this section. Pruey v. Dep't of Alcoholic Beverage Control, 104 N.M. 10, 715 P.2d 458 (1986).

Wrongful decision to perform autopsy. — In an action for damages on the basis of a wrongful decision to perform an autopsy on decedent, causing emotional distress to family members because the body was not handled according to traditional Navajo religious beliefs, a count alleging interference with plaintiffs' free exercise of religion was dismissed since the state had given no consent to be sued and there was no express waiver for the state medical examiner under the Tort Claims Act. Begay v. State, 104 N.M. 483, 723 P.2d 252 (Ct. App. 1985), rev'd, Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306 (1986), cert. denied, 479 U.S. 1020, 107 S.Ct. 677, 93 L.Ed. 2d 727 (1986).

Taxation of fraternal benefit societies. — Fact that fraternal benefit societies meeting certain qualifications were exempted from former 2% privilege tax did not render the tax invalid as contravening the guarantees in respect to religious worship where members of any religious faith or order could organize an exempt society. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M. 1938), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Oaths by witnesses and jurors. — Defendant's contention that by requiring an oath by witnesses and jurors, the state "openly fostered religion," when made without any showing that the defendant was affected thereby, was at best a species of harmless error. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Church autonomy doctrine prevents civil legal entanglement between government and religious establishments by prohibiting courts from trying to resolve disputes related to ecclesiastical operations and protects free exercise of religion by limiting the possibility of civil interference in the working of religious institutions. Celnik v. Congregation B'Nai Israel, 2006-NMCA-039, 139 N.M. 252, 131 P.3d 102.

Church autonomy doctrine prohibits secular adjudication of certain claims brought against religious organizations by their employees. — District court properly dismissed suit for prima facie tort brought by a long-tenured rabbi against his congregation after he was terminated because application of the intrusive balancing test called for under the prima facie tort analysis would require the court to intervene into how the congregation treats and selects its ecclesiastical leaders contrary to the principles of the church autonomy doctrine. Celnik v. Congregation B'Nai Israel, 2006-NMCA-039, 139 N.M. 252, 131 P.3d 102.

Church autonomy doctrine applies only if judicial resolution of claims would violate the first amendment. The immunity afforded by the church autonomy doctrine is not triggered simply by the subject matter of the complaint. Galetti v. Reeve, 2014-NMCA-079.

Church autonomy doctrine did not prohibit secular adjudication of claims not rooted in religious beliefs. — Where plaintiff was employed as a principal and teacher at a religious school operated by the association; plaintiff sued the defendants for wrongful termination, asserting claims against the association for breach of contract and against the individual defendants for retaliatory discharge, violation of the New Mexico

Human Rights Act, intentional interference with contract, and defamation and for damages, plaintiff claims were not barred by the church autonomy doctrine because plaintiff's claims could be resolved without any religious entanglement. Galetti v. Reeve, 2014-NMCA-079.

School credit for bible study courses. — The legislature may not enact laws permitting the public schools in New Mexico to grant credit to pupils for bible study or other religious courses taught in a church Sunday school by nonaccredited ministers or other Sunday school teachers. 1967 Op. Att'y Gen. No. 67-48.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education may constitute a violation of the state establishment clause, if the schools involved are primarily sectarian. 1999 Op. Att'y Gen. No. 99-01.

Nuns teaching in public schools. — This section and N.M. Const., art. XII, § 9, prevent there being anything in the law to prohibit the payment of Sisters who are qualified and employed to teach in our public schools. 1939-40 Op. Att'y Gen. No. 39-3101.

Employment of chaplains at state penal institutions. — There is nothing unconstitutional in the employment of chaplains at a state penal institution for counseling purposes. There would be nothing unconstitutional in the chaplains being hired to render general counseling services to any inmate who should desire to avail himself of the same. 1957-58 Op. Att'y Gen. No. 57-103.

Law reviews. — For comment, "Compulsory School Attendance - Who Directs the Education of a Child? State v. Edgington," see 14 N.M. L. Rev. 453 (1984).

For annual survey of New Mexico property law, see 16 N.M. L. Rev. 59 (1986).

For article, "The Free Exercise Rights of Native Americans and the Prospects for a Conservative Jurisprudence Protecting the Rights of Minorities," see 23 N.M. L. Rev. 187 (1993).

For note, "Constitutional Law - New Mexico Federal Court Rejects Government's Attempt to Determine Membership Eligibility in a Religion: United States v. Boyll," see 23 N.M. L. Rev. 211 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 409, 464 to 495.

Releasing public school students from attendance for purpose of receiving religious instruction, 2 A.L.R.2d 1371.

Deed discriminating or imposing restrictions against persons on account of religion, 3 A.L.R.2d 466.

Restrictive covenants, conditions or agreements in respect of real property discriminating against persons on account of race, color or religion, 3 A.L.R.2d 466.

Compulsory education law: religious beliefs of parents as defense to prosecution for failure to comply with, 3 A.L.R.2d 1401.

Loud speakers: public regulation and prohibition of broadcasts in streets and other public places as infringement of religious freedom, 10 A.L.R.2d 627.

Chemical treatment of public water supply, statute, ordinance or other measure involving, as interference with religious freedom, 43 A.L.R.2d 453.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Zoning regulations as affecting churches, 74 A.L.R.2d 377, 62 A.L.R.3d 197.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Constitutionality of furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Jury service, religious belief as ground for exemption or excuse from, 2 A.L.R.3d 1392.

Compulsory medical care for adult, power of courts or other public agencies, in the absence of statutory authority, to order, 9 A.L.R.3d 1391.

Prisoners, provision of religious facilities for, 12 A.L.R.3d 1276.

Drugs: free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 A.L.R.3d 939.

Public property: erection, maintenance or display of religious structures or symbols on as violation of religious freedom, 36 A.L.R.3d 1256.

Adoption: religion as factor in adoption proceedings, 48 A.L.R.3d 383.

What constitutes "church," "religious use" or the like within zoning ordinance, 62 A.L.R.3d 197.

Validity, under establishment of religion clause of federal or state constitution, of making day of religious observance a legal holiday, 90 A.L.R.3d 728.

Regulation of astrology, clairvoyancy, fortune-telling, and the like, 91 A.L.R.3d 766.

Power of court or other public agency to order medical treatment for child over parental objections not based on religious grounds, 97 A.L.R.3d 421.

Validity, under federal and state establishment of religion provisions, of prohibition of sale of intoxicating liquors on specific religious holidays, 27 A.L.R.4th 1155.

Judicial review of termination of pastor's employment by local church or temple, 31 A.L.R.4th 851.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity, 38 A.L.R.4th 1219.

Liability of religious association for damages for intentionally tortious conduct in recruitment, indoctrination, or related activity, 40 A.L.R.4th 1062.

Validity of local or state denial of public school courses or activities to private or parochial school students, 43 A.L.R.4th 776.

Invasion of privacy by a clergyman, church, or religious group, 67 A.L.R.4th 1086.

Cause of action for clergy malpractice, 75 A.L.R.4th 750.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Power of court or other public agency to order medical treatment over parental religious objections for child whose life is not immediately endangered, 21 A.L.R.5th 248.

Free exercise of religion as applied to individual's objection to obtaining or disclosing social security number, 93 A.L.R.5th 1.

First Amendment challenges to the display of religious symbols on public property, 107 A.L.R.5th 1.

Effect of First Amendment on jurisdiction of National Labor Relations Board over labor disputes involving employer operated by religious entity, 63 A.L.R. Fed. 831.

Validity, construction, and application of provisions of § 702 of Civil Rights Act of 1964 (42 USCS § 2000e-1) exempting activities of religious organizations from operation of Title VII Equal Employment Opportunity provisions, 67 A.L.R. Fed. 874.

Constitutionality of teaching or suppressing teaching of Biblical creationism or Darwinian evolution theory in public schools, 102 A.L.R. Fed. 537.

Constitutionality of teaching or otherwise promoting secular humanism in public schools, 103 A.L.R. Fed. 538.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

What constitutes "hybrid rights" claim under *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 163 A.L.R. Fed. 493.

16A C.J.S. Constitutional Law §§ 513 to 538.

Sec. 12. [Trial by jury; less than unanimous verdicts in civil cases.]

The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate. In all cases triable in courts inferior to the district court the jury may consist of six. The legislature may provide that verdicts in civil cases may be rendered by less than a unanimous vote of the jury.

ANNOTATIONS

Cross references. — For right to impartial jury, *see* N.M. Const., art. II, § 14.

For provisions relating to grand jury, *see* N.M. Const., art. II, § 14.

For number of jurors in cases in probate court, *see* N.M. Const., art. VI, § 23.

See Kearny Bill of Rights, cl. 5 in Pamphlet 3.

For right to jury in metropolitan courts, *see* 34-8A-5 NMSA 1978.

For statutory provisions relating to drawing and empaneling juries, *see* 38-5-1 NMSA 1978 et seq.

For right to jury in probate court, *see* 45-1-306 NMSA 1978.

For jury trial in civil cases in district court, *see* Rule 1-038 NMRA.

For jury trial in criminal cases in district court, *see* Rule 5-605 NMRA.

For jury trial in civil cases in magistrate court, *see* Rule 2-602 NMRA.

For jury trial in criminal cases in magistrate court, *see* Rule 6-602 NMRA.

For jury trial in civil cases in metropolitan court, *see* Rule 3-602 NMRA.

For jury trial in criminal cases in metropolitan court, *see* Rule 7-602 NMRA.

Comparable provisions. — Idaho Const., art. I, § 7.

Iowa Const., art. I, § 9.

Montana Const., art. II, § 26.

Utah Const., art. I, § 10.

Wyoming Const., art. I, § 9.

I. GENERAL CONSIDERATION.

Cap on medical malpractice damages does not violate the right to trial by jury. — The cap on medical malpractice damages in 41-5-6 NMSA 1978 does not violate the right to trial by jury under Article II, Section 12 of the constitution of New Mexico. Salopek v. Friedman, 2013-NMCA-087.

Right to jury trial not denied. — Where defendant was tried without a jury in municipal court for DWI, third offense in violation of a municipal ordinance which provided that the maximum penalty for the charge was one hundred seventy-nine days imprisonment, the ordinance did not unconstitutionally limit defendant's right to a jury. City of Rio Rancho v. Mazzei, 2010-NMCA-054, 148 N.M. 553, 239 P.3d 149, cert. denied, 2010-NMCERT-005, 148 N.M. 575, 240 P.3d 1049.

Right to a jury trial under the federal constitution not implicated. — If a jury is instructed on the essential elements of the crime with which the defendant is charged, and the instruction requires the jury to find those elements beyond a reasonable doubt, the defendant has been accorded the procedure required to protect the presumption of innocence, so where defendant was charged with involuntary manslaughter, and where the jury instruction included all of the elements of the charged crime, but also included an additional element, the additional element did not become an essential element of the crime, and defendant's right to a jury trial under the federal constitution was not implicated. State v. Carpenter, 2016-NMCA-058.

A defendant has a right to a jury determination of the facts that would support enhancement of his sentence. State v. King, 2007-NMCA-130, 142 N.M. 699, 168 P.3d 1123, cert. quashed, 2007-NMCERT-011, 143 N.M. 157, 173 P.3d 764.

Presence of interpreter during jury deliberations. — Once an interpreter for non-English speaking jurors has been given the mandatory interpreters' oath to interpret testimony correctly, the interpreter is authorized to be in the jury room during jury deliberations to assist non-English speaking jurors and no presumption of prejudice arises. State v. Pacheco, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745, rev'g 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553 (Ct. App. 2005).

Where interpreter was present while jury deliberated defendant's guilt or innocence without the benefit of an oath or instruction to ensure that the interpreter neither participate in or interfere with the jury's deliberations, there is a presumption of prejudice. State v. Pacheco, 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553, rev'd, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

Interpreter's oath insufficient. — Where the trial court only required an interpreter to take an oath to faithfully and impartially translate the witness's testimony, this oath was insufficient to safeguard against interference, or the appearance of interference, with the jury's deliberations. State v. Pacheco, 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553, rev'd, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

Juror's inability to understand English. — It is a violation of this section and art. II, § 14, to allow one unqualified juror to serve in a criminal cause for the reason that any verdict rendered in such a situation would be less than unanimous; and a juror who does not possess a working knowledge of English is unable to serve, in the absence of an interpreter, because he cannot possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused. When the court learns in the midst of the jury's deliberations that one juror does not understand English very well, it should conduct a summary hearing to determine for itself the ability of the juror in question to understand English. State v. Gallegos, 88 N.M. 487, 542 P.2d 832 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

A case was remanded for the trial court to certify the record as to the details of any communications between the court and jury as to a jury member not understanding English, and to conduct an evidentiary hearing into whether the state could overcome a presumption of prejudice from the defendant's absence during these communications, and to determine whether the defendant was accorded his right to a jury of 12. Irrespective of the proper preservation of error by the defendant, it was the duty of the trial court to make a record and rule upon any possible miscarriage of justice that could have constituted fundamental error. State v. Escamilla, 107 N.M. 510, 760 P.2d 1276 (1988).

This section and art. II, § 14 compared. — The difference in the purposes of this section and art. II, § 14 is that this section guarantees a trial by jury and § 14 provides, among other things, that the trial shall be by an "impartial" jury. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

This section guarantees a trial by jury and art. II, § 14 provides, among other things, that the trial shall be by an "impartial" jury. By impartial jury is meant a jury where each and every one of the 12 members constituting the jury is totally free from any partiality whatsoever. "Impartial" is defined in Webster's New International Dictionary (2nd Ed.), as "not partial; not favoring one more than another; treating all alike; unbiased; equitable; fair; just." Accordingly, the jury which one charged with crime is guaranteed is one that does not favor one side more than another, treats all alike, is unbiased,

equitable, fair and just. If any juror does not have these qualities, the jury upon which he serves is thereby deprived of its quality of impartiality. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

Members of jury panel array under 21 years of age. — In a burglary trial, where the jury panel array may have included three jurors under the age of 21, but the members of the petit jury, none of whom were under 21, were selected and qualified according to statute, and defendant did not show that he suffered any prejudice, his motion to quash for lack of a fair and impartial jury was without merit. State v. Chavez, 86 N.M. 625, 526 P.2d 219 (Ct. App. 1974).

Procedure to be followed in securing right to jury. — The right to trial by jury as guaranteed by the constitution is to be distinguished from the procedure to be followed in securing the right. Reasonable regulatory provisions, although different in form and substance from those in effect at the adoption of the constitution, do not abridge, limit or modify the right which is to remain inviolate. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

The supreme court has power to regulate pleading, practice and procedure, and this power may be applied to regulate the procedure to be followed in securing the right to a jury trial, but it may not be used to prohibit entirely the right to jury trial which, under the constitution, is to remain inviolate. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Rule 38(d), N.M.R. Civ. P. (see now Rule 1-038D NMRA), does not contravene this section and is a reasonable procedural regulation. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

A constitutional guaranty of the right of trial by jury does not preclude the adoption of reasonable rules of court providing that a litigant shall not be entitled to a jury trial unless he makes demand within the time and in the manner specified by the rule. Carlile v. Continental Oil Co., 81 N.M. 484, 468 P.2d 885 (Ct. App. 1970).

Although right to trial by jury is guaranteed, one relying thereon must assert it in appropriate form. Knabel v. Escudero, 32 N.M. 311, 255 P. 633 (1927).

Once jury trial ordered, court not to withdraw. — Under Rule 1-039B NMRA once the parties consent to try an issue before a jury and the court orders a jury trial pursuant to the stipulation, the trial court cannot withdraw the legal issues from the jury on the ground that there are also equitable issues involved. Peay v. Ortega, 101 N.M. 564, 686 P.2d 254 (1984).

Shareholder's derivative suits. — If a shareholder's derivative suit raises legal claims or issues as to which the corporation is entitled to a jury trial, those claims or issues should be tried by a jury on demand. Scott v. Woods, 105 N.M. 177, 730 P.2d 480 (Ct. App. 1986), cert. quashed, 105 N.M. 26, 727 P.2d 1341 (1986).

Excusing prospective juror. — It is within the trial court's discretion as to whether a prospective juror should be excused, and the trial court's decision will not be disturbed unless there is a manifest error or a clear abuse of discretion. State v. Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), overruled by State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

Trial in federal courthouse. — Where the trial was before a jury of the county where crime was committed, and was presided over by the judge of the district in which the county is located, appellant was denied none of the rights guaranteed her by this section and N.M. Const., art. II, § 14, notwithstanding the trial was in a federal courthouse. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Determination of competency to stand trial. — Where defendant moved for a jury trial on the question of his competency, the trial court should have determined, after an evidentiary hearing, whether there was reasonable doubt as to defendant's competency, and if the trial court ruled there was reasonable doubt, the issue was for the jury to decide. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

In that class of cases where the right to a trial by jury existed prior to the constitution, it cannot be denied by the legislature. To the extent that 31-9-1 NMSA 1978 eliminates the right to a jury determination on the question of mental capacity to stand trial, it violates this section and is void. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Rule 35(b) (see now Rule 5-602 B NMRA) does more than regulate the procedure for securing a jury trial; and to the extent that it eliminates the right to a jury determination on the question of mental capacity to stand trial, it violates this section and is void. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Right of juvenile to jury trial. — At the time of the adoption of the state constitution, a juvenile could not have been imprisoned without a trial by jury. This being true, no change in terminology or procedure may be invoked whereby incarceration could be accomplished in a manner which involved denial of the right to jury trial. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Prior to the adoption of the state's first juvenile law in 1917, a minor charged with having committed a criminal offense was handled no differently than an adult. Under the provisions of this section, which reads in part, "the right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate," he would have been entitled to have his guilt determined by a jury before he could have been imprisoned. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

This section does not entitle a delinquent child to a jury trial in all instances. State v. Doe, 90 N.M. 776, 568 P.2d 612 (Ct. App. 1977).

The fact that the jury chooses not to believe defendant does not amount to a denial of a jury trial. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

Directed verdicts. — The all important consideration in determining whether to direct a verdict in a civil action is that a party has the constitutional right to have controverted questions of fact settled by the jury. Sanchez v. Gomez, 57 N.M. 383, 259 P.2d 346 (1953).

Where the evidence is controverted, even though, to the presiding judge, the possibility of a recovery by the plaintiff may appear remote and even though the court may be motivated in its action in directing the verdict by a sincere desire to spare the plaintiff from the further and additional expense which more prolonged proceedings may entail, the party aggrieved may not in such manner be deprived of a jury determination. Sanchez v. Gomez, 57 N.M. 383, 259 P.2d 346 (1953).

Order compelling arbitration was not unconstitutional on the ground that it deprived defendants of their right to a jury trial without a knowing or intentional waiver. The order was final, and defendants were required to file an appeal to pressure their right to a jury trial. Lyman v. Kern, 2000-NMCA-013, 128 N.M. 582, 995 P.2d 504, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

Compulsory arbitration is constitutional. — The procedures used in judicial tribunals need not be used in compulsory arbitration, so long as the arbitration procedures are sufficient to guarantee a fair proceeding. Therefore, the provisions of 22-10-17.1 NMSA 1978 (recompiled as 22-10A-28 NMSA 1978) mandating compulsory arbitration of the grievances of discharged school employees do not violate an employee's right of access to the courts, or right to jury trial; nor do these provisions unconstitutionally delegate power to a nonjudicial tribunal. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Quiet title action. — In suit to quiet title, where complaint alleges that defendants are in possession of land in question, are cultivating it and have fenced it, and answer sets up title, possession and right to possession in defendants, defendants have a constitutional right to trial by jury, and court is without jurisdiction to try case as a suit in equity. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906, 30 A.L.R. 92 (1921).

One charged with a misdemeanor not of the class triable to a justice of the peace is entitled to a jury trial. State v. Jackson, 78 N.M. 29, 427 P.2d 46 (Ct. App. 1967).

Selling liquor without a license. — At the time of the adoption of the constitution and immediately prior thereto, a person charged with selling alcoholic liquor without a license had the right to a trial by jury. State v. Jackson, 78 N.M. 29, 427 P.2d 46 (Ct. App. 1967).

Change of venue. — "Right to trial by jury" is in no respect impaired by statute authorizing change of venue, upon state's application, when fair trial cannot be had in county of original venue. State v. Holloway, 19 N.M. 528, 146 P. 1066 (1914).

Trial by jury. — Insureds' claim that a state's imposition of a mandatory arbitration clause in all title insurance policies was a violation of their state constitutional and seventh amendment right to a trial by jury was upheld. Lisanti v. Alamo Title Ins. of Tex., 2001-NMCA-100, 131 N.M. 334, 35 P.3d 989, aff'd in part, rev'd in part, 2002-NMSC-032, 132 N.M. 750, 55 P.3d 962 (2002).

II. WAIVER OF JURY.

Waiver of right to jury. — Accused in felony case may waive right to trial by jury. State v. Hernandez, 46 N.M. 134, 123 P.2d 387 (1942).

Although person accused of felony may consent to trial without jury, case may not be tried without jury over state's objection. State ex rel. Gutierrez v. First Judicial Dist. Court, 52 N.M. 28, 191 P.2d 334 (1948).

The right to a jury trial is a privilege which may be waived, and if a right to jury trial existed in a case where appellant was charged with giving alcoholic beverages to minors, appellant, by proceeding without demand or objection to trial before the court without a jury, waived the privilege granted by the constitution. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

In order to effect waiver of a jury in felony cases, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

By pleading guilty the defendant admits the acts well pleaded in the charge, waives all defenses other than that the indictment or information charges no offense, and waives the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty plea and right to remain silent. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

The safeguards required for waiver of a jury in felony cases has never been extended to misdemeanors. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

A defendant charged with a petty offense or a misdemeanor, represented by counsel, who proceeds without objection to trial before the court without a jury, thereby waives the privilege of a jury trial if one is granted in the particular petty offense by the constitution. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

The jury may be waived but, insofar as a juvenile is concerned, this should be permitted only when advised by counsel and it is amply clear that an understanding and intelligent

decision has been made. If a juvenile, after considering all the advantages and disadvantages attendant thereon, and having been advised by counsel, waives a trial by jury, then the benefits generally felt to attach through trial to the court would be his. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Remand was required for an evidentiary hearing concerning whether defendant voluntarily, knowingly, and intelligently waived his right to a jury trial at the time of denial of his counsel's request for a continuance because of illness. State v. Aragon, 1997-NMCA-087, 123 N.M. 803, 945 P.2d 1021, cert. denied, 123 N.M. 626, 944 P.2d 274 (1997).

Trial court's conclusion that defendant waived his right to a jury trial was supported by defendant's testimony that he understood his decision to proceed at a bench trial, that he made the decision after discussing his options with counsel, that he understood the choice before him, that he suffered no mental defect which would render his decision suspect, and that his counsel did not apply pressure or otherwise induce him into waiving his right. State v. Aragon, 1999-NMCA-060, 127 N.M. 393, 981 P.2d 1211, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999).

Child's right to waive jury trial. — A child may waive his or her right to a jury trial without the state's concurrence. In re Christopher K., 1999-NMCA-157, 128 N.M. 406, 993 P.2d 120.

Sentence enhancement. — Where the defendant was not informed of acts that would constitute sufficient evidence of aggravating circumstances when he entered into a plea agreement, the defendant’s waiver of his right to a jury trial in the plea agreement was not a voluntary and intelligent waiver of his right to a jury trial on the sentence enhancement factors. State v. King, 2007-NMCA-130, 142 N.M. 699, 168 P.3d 1123, cert. quashed, 2007-NMCERT-011, 143 N.M. 157, 173 P.3d 764.

In suit to deprive one of the possession of real estate, this section of the constitution grants a right to a jury trial to the one in possession. This right, however, can be waived by the defendant in possession affirmatively seeking to quiet title in himself. Griego v. Roybal, 79 N.M. 273, 442 P.2d 585 (1968).

III. CASES NOT TRIABLE BY JURY.

Eminent domain proceedings. — It was the purpose of the constitution framers to retain the right to trial by jury as it heretofore existed in the territory of New Mexico except in "special proceedings" unless express provision for jury trial was included therein. Eminent domain proceedings are "special proceedings." El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982), cert. denied, 98 N.M. 478, 649 P.2d 1391 (1982).

Criminal contempt is not triable by jury. State v. Magee Publishing Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924), overruled in part, State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965).

So long as the fine for criminal contempt which is, or may be, imposed is not more than $1,000, there is no federal constitutional right to jury trial as the crime is a petty offense. Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973).

Action by dissenting shareholder. — There is no statutory or constitutional right to a jury in a proceeding brought by a dissenting shareholder based on the right to an appraisal of the value of a dissenting shareholder's stock for stock valuation created by the legislature. Smith v. First Alamogordo Bancorp., Inc., 114 N.M. 340, 838 P.2d 494 (Ct. App. 1992), cert. denied, 114 N.M. 314, 838 P.2d 468 (1992).

No right to jury trial in paternity proceedings. — In a paternity proceeding the putative father is not entitled to a jury trial because such right did not exist at common law or by statute at the time the New Mexico constitution was adopted. State ex rel. Human Servs. Dep't v. Aguirre, 110 N.M. 528, 797 P.2d 317 (Ct. App. 1990).

No right to jury trial in parental-rights terminations. — There is no right to a trial by jury in parental rights termination proceedings. State ex rel. Children, Youth & Families Dep't v. T.J., 1997-NMCA-021, 123 N.M. 99, 934 P.2d 293, cert. denied, 122 N.M. 808, 932 P.2d 498 (1997).

Violation of city ordinances. — Violation of ordinance prohibiting use of vile and abusive language is a petty offense tried at common law summarily without a jury, and may be prosecuted before a police judge without a jury. Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939).

Prior convictions. — Defendant is not entitled to have a jury find the facts of his prior convictions beyond a reasonable doubt under this section. State v. Sandoval, 2004-NMCA-046, 135 N.M. 420, 89 P.3d 92, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Forcible entry and detainer action. — No right to trial by jury exists in forcible entry and detainer actions in absence of express statutory authority since action is a special statutory proceeding, summary in character. Reece v. Montano, 48 N.M. 1, 144 P.2d 461 (1943), superseded by statute, State v. James, 76 N.M. 416, 415 P.2d 543 (1966).

Injunctive actions. — In suit to enjoin defendant from practicing medicine as a public nuisance, he was not entitled to trial by jury. State ex rel. Marron v. Compere, 44 N.M. 414, 103 P.2d 273 (1940).

Mortgage foreclosure. — Parties in mortgage foreclosure suit cannot have jury trial upon issue of indebtedness. Young v. Vail, 29 N.M. 324, 222 P. 912, 34 A.L.R. 980

(1924), overruled by Evans Financial Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983).

Probate court appeals. — No party to a proceeding brought in probate court and appealed or removed to district court under statute is entitled to jury trial as a matter of right. In re Sheley's Estate, 35 N.M. 358, 298 P. 942 (1931).

Quiet title action. — Where in a quiet title action neither possession nor any other issue at law is in anywise involved, and the action is essentially one in equity rather than one in the nature of ejectment, or otherwise at law, jury trial is properly denied. Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942).

Remittitur. — Remission by plaintiff of part of verdict at suggestion of trial court, followed by judgment for sum remaining, does not deprive defendant of his constitutional right to have question of damages tried by jury. Henderson v. Dreyfus, 26 N.M. 541, 191 P. 442 (1919).

Rescission. — Purchaser of real estate did not have the right to trial by jury on a claim for equitable rescission under the federal Interstate Land Sales Full Disclosure Act or under the state constitution. Las Campanas Ltd. Partnership v. Pribble, 1997-NMCA-055, 123 N.M. 520, 943 P.2d 554.

Trial de novo. — There is no right to jury trial on appeal to district court from justice court conviction of unlawful liquor sales. City of Clovis v. Dendy, 35 N.M. 347, 297 P. 141 (1931).

On appeal from justice of peace, trial de novo in district court does not of itself contemplate that there be a jury trial, and district court is not bound by procedure and rules of justice court. Reece v. Montano, 48 N.M. 1, 144 P.2d 461 (1943), superseded by statute, State v. James, 76 N.M. 416, 415 P.2d 543 (1966).

Driving under influence of intoxicating liquor. — Where defendant was convicted by a jury in magistrate court of aggravated DWI, first offense, which carried a maximum sentence of incarceration of ninety days; defendant appealed to district court and filed a demand for a jury trial; the district court denied defendant’s request for a jury trial; and at a bench trial, the district court found defendant guilty of DWI, the district court did not violate defendant’s right to a jury trial under the sixth amendment of the United States Constitution or Article II, Section 12 of the New Mexico Constitution because the maximum period of imprisonment was less than six months and defendant could not overcome the presumption that the offense of DWI, first offense, was not a serious offense for purposes of the sixth amendment right to a jury trial. State v. Cannon, 2014-NMCA-058, cert. denied, 2014-NMCERT-006.

Denial of jury trial on charge of driving under the influence of intoxicating liquor as prohibited by state law is not unconstitutional, since maximum penalty of 90 days in jail

and $200 fine was not so severe as to remove it from the petty offense class. Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959).

The fact that a conviction under a municipal ordinance for drunken driving automatically sets in motion a proper exercise of the state police power has no connection with or relevance to the appellant's right to a jury trial. City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954).

Mandatory revocation of the driving license of any person convicted under former 64-13-59, 1953 Comp. (similar to 66-5-29 NMSA 1978) for a period of one year does not deny the right to trial by a jury in district court on appeal, in violation of this constitutional section or N.M. Const., art. II, § 14. City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954).

Phrase "as it has heretofore existed" refers to the right to jury trial as it existed in the territory of New Mexico immediately preceding adoption of the constitution. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957); Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939); Young v. Vail, 29 N.M. 324, 222 P. 912 (1924), 34 A.L.R. 980, overruled by Evans Financial Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983); State v. Holloway, 19 N.M. 528, 146 P. 1066, 1915F L.R.A. 922 (1914).

It was the purpose of the constitution framers to retain the right of trial by jury, as it theretofore existed in the territory of New Mexico, except in special proceedings, for which express provision was made in the same instrument. Seward v. Denver & R.G.R.R., 17 N.M. 557, 131 P. 980, 46 L.R.A. (n.s.) 242 (1913).

This section is to be applicable only to those cases to which this right was secure at the time of the enactment of the constitution. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

The law applicable at the adoption of the constitution in reference to right to trial by jury in prosecution by information was preserved by the language of the constitution. State v. Jackson, 78 N.M. 29, 427 P.2d 46 (Ct. App. 1967).

This section does not grant any right of trial by jury, but merely continues that which existed in the territory preceding adoption of the constitution. Guiterrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939).

The right to trial by jury which is guaranteed by the constitution refers to the right as it had existed and was enforced in the territory of New Mexico at the time of the adoption of the constitution and does not guarantee such right in all cases of alleged violations of criminal statutes. Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959).

The constitution continues the right to jury trial in that class of cases in which it existed either at common law or by statute at the time of adoption of the constitution. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

The constitution continues the right to jury trial in that class of cases in which it existed either at common law or by statute at the time of the adoption of the constitution and in that class of cases where the right to a trial by jury existed prior to the constitution, it cannot be denied by the legislature. State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957).

Multiple crimes arising from single incident. — In determining the constitutional right to jury trial of a defendant charged with more than one petty crime arising from a single incident, a court should consider the objective measure of the combined, maximum statutory penalties rather than the subjective measure of the actual penalty threatened at the commencement of trial. State v. Sanchez, 109 N.M. 428, 786 P.2d 42 (1990).

Rule against cumulating possible sentences is overruled. — The holding of State v. James, 76 N.M. 416, 415 P.2d 543 (1966) that potential sentences facing a defendant should not be cumulated in determining whether the defendant was entitled to a jury trial, but should be treated separately, is expressly overruled because the rationale supporting the concept of objective measures is more in line with the constitutional mandate for jury trials in cases in which the possible sentence exceeds six months, whether for a single offense or for multiple offenses arising from the same incident or transaction. State v. Sanchez, 109 N.M. 428, 786 P.2d 42 (1990).

Right to jury trial does not apply to juvenile amenability determinations. — A determination of amenability to treatment or rehabilitation of a youthful offender pursuant to Section 32A-2-20 NMSA 1978 is not within the scope of the rule of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000), and the sixth amendment's guarantee of a jury trial does not apply to amenability proceedings. State v. Rudy B., 2010-NMSC-045, 149 N.M. 22, 243 P.3d 726, rev'g 2009-NMCA-104, 147 N.M. 45, 216 P.3d 810.

Those misdemeanors triable in district court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of this section. 1963-64 Op. Att'y Gen. No. 64-37.

Trial by jury in the various state courts is not guaranteed by the federal constitution. United States Const., art. III and amend. VI concern defendants before federal courts only. Nor is this right extended by U.S. Const. amend. XIV, which is limited to the general requirement of due process, more particularly concerning the procedural and substantive requirements of notice and an opportunity to be heard. Within this the states may establish any system of criminal courts deemed desirable. The constitution of New Mexico granted no new rights so far as the question of a right to a jury trial is concerned. This section provides: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate." 1957-58 Op. Att'y Gen. No. 58-36.

This constitutional provision has been interpreted by the New Mexico supreme court to continue the right to jury trial in that class of cases where the right to a trial by jury existed prior to the constitution of New Mexico. 1963-64 Op. Att'y Gen. No. 64-37.

By this section, the right to trial by jury was guaranteed only to the extent that it existed prior to the adoption of the constitution. 1957-58 Op. Att'y Gen. No. 58-36.

This section requires a unanimous verdict in a criminal case. 1972 Op. Att'y Gen. No. 72-31.

Waiver of jury trial in criminal case requires consent of the state. 1953-54 Op. Att'y Gen. No. 53-5686.

No right of trial by jury exists in municipal court in "petty" or "minor" cases arising from the violation of city ordinances. 1963-64 Op. Att'y Gen. No. 64-37.

The case of City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954), specifically holds that the offense of driving while intoxicated is within the class denominated "petty" and as such is triable without a jury if the violation is that of a municipal ordinance. However, it should be pointed out that this case appears to be limited to municipal ordinances and is not concerned with the acts of the state legislature. 1957-58 Op. Att'y Gen. No. 58-38.

In a first offense case of driving while intoxicated, defendant is not entitled as a right to a jury trial in the district court for the reason that such an offense is deemed a "petty" offense in New Mexico pursuant to Gutierrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939) and City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954). 1957-58 Op. Att'y Gen. No. 58-36.

Driving while intoxicated violations of state statutes in district courts tested by the "petty" or "grave" standard do not give rise to the right of trial by jury. 1957-58 Op. Att'y Gen. No. 58-36.

In criminal cases over which a justice of the peace has jurisdiction, a defendant is entitled to a jury trial by a six-man jury, if demand is timely made (opinion rendered under former 36-12-3, 1953 Comp.). 1963-64 Op. Att'y Gen. No. 64-37.

Law reviews. — For comment, "Juries - New Trial - Discovery of Juror's Disqualification or False Answer on Voir Dire as Ground for New Trial," see 7 Nat. Resources J. 415 (1967).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M. L. Rev. 85 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

For annual survey of New Mexico Criminal Procedure, see 20 N.M. L. Rev. 285 (1990).

For note, "Civil Procedure and Constitutional Law: Changing New Mexico Remittitur Procedure to Protect the Appropriate Balance of Power Between Judge and Jury - *Allsup's Convenience Stores, Inc. v. North River Insurance Co.*," see 32 N.M. L. Rev. 277 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury § 3 et seq.

Removal of public officer, right to jury trial in proceedings for, 3 A.L.R. 232, 8 A.L.R. 1476.

Seizure of property alleged to be illegally used, right to jury trial, 17 A.L.R. 568, 50 A.L.R. 97.

Validity of statute allowing for separation of jury, 34 A.L.R. 1128, 79 A.L.R. 821, 21 A.L.R.2d 1088.

Right to consent to trial of criminal case before 12 jurors, 70 A.L.R. 279, 105 A.L.R. 1114.

Declaratory judgment action as infringement of right to jury trial, 87 A.L.R. 1209.

Right to jury trial in disbarment proceedings, 107 A.L.R. 692.

Appearance to demand jury trial as submission to jurisdiction, 111 A.L.R. 925.

Deficiency judgment, right to jury trial of issues as to, 112 A.L.R. 1492.

Right to jury trial in suit to remove cloud, quiet title or determine adverse claims, 117 A.L.R. 9

Interlocutory ruling of one judge on right to jury trial as binding on another judge in same case, 132 A.L.R. 68.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 A.L.R. 383.

Right to jury trial in action under Fair Labor Standards Act, 174 A.L.R. 421.

Insanity: constitutional right to jury trial in proceeding for adjudication of incompetency or insanity or for restoration, 33 A.L.R.2d 1145.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Arbitration statute as denial of jury trial, 55 A.L.R.2d 432.

Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

Substitution of judge: right to jury trial as violated by substitution in criminal case, 83 A.L.R.2d 1032.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 A.L.R.2d 1162.

Juvenile court delinquency proceedings, right to jury trial in, 100 A.L.R.2d 1241.

Eminent domain: how to obtain jury trial in eminent domain: waiver, 12 A.L.R.3d 7.

Intoxication: motor vehicles: right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Garnishment: issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Statute reducing number of jurors as violative of right to trial by jury, 47 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 958.

Right to jury trial on vacation of judgment, 75 A.L.R.3d 894.

Validity and efficacy of accused's waiver of unanimous verdict, 97 A.L.R.3d 1253.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

Waiver, after not guilty plea, of jury trial in felony case, 9 A.L.R.4th 695.

Validity of agreement, by stipulation or waiver in state civil case, to accept verdict by number or proportion of jurors less than that constitutionally permitted, 15 A.L.R.4th 213.

Right to jury trial in stockholder's derivative action, 32 A.L.R.4th 1111.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 A.L.R.4th 304.

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony, 46 A.L.R.4th 1047.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 A.L.R.4th 343.

Small claims: jury trial rights in, and on appeal from, small claims court proceeding, 70 A.L.R.4th 1119.

Validity, construction, and effect of statute limiting amount recoverable in dram shop action, 78 A.L.R.4th 542.

Right to jury trial in action under state civil rights law, 12 A.L.R.5th 508.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury - post- *Batson* state cases, 20 A.L.R.5th 398.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 A.L.R.5th 245.

Substitution of judge in state criminal trial, 45 A.L.R.5th 591.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 A.L.R.5th 631.

Right to jury trial in child neglect, child abuse, or termination of parental rights proceedings, 102 A.L.R.5th 227.

Complexity of civil action as affecting seventh amendment right to trial by jury, 54 A.L.R. Fed. 733.

Right to jury trial on issue of damages in copyright infringement actions under 17 U.S.C.A. § 504, 163 A.L.R. Fed. 467.

Sec. 13. [Bail; excessive fines; cruel and unusual punishment.]

All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in

which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied by the district court for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration, in the following instances:

A. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction or a common transaction with the case at bar;

B. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state. The period for incarceration without bail may be extended by any period of time by which trial is delayed by a motion for a continuance made by or on behalf of the defendant. An appeal from an order denying bail shall be given preference over all other matters. (As amended November 4, 1980 and November 8, 1988.)

ANNOTATIONS

Cross references. — *See* Kearny Bill of Rights, cls. 9 and 10 in Pamphlet 3.

For provisions relating to bail generally, *see* 31-3-1 NMSA 1978 et seq.

For provisions relating to bail, *see* Rule 5-401 NMRA.

For provisions relating to bail in magistrate court, *see* Rule 6-401 NMRA.

For provisions relating to bail in metropolitan court, *see* Rule 7-401 NMRA.

For provisions relating to bail in municipal court, *see* Rule 8-401 NMRA.

Comparable provisions in district court. — Idaho Const., art. I, § 6.

Iowa Const., art. I, §§ 12, 17.

Montana Const., art. II, §§ 21, 22.

Oregon Const., art. I, §§ 14, 16.

Utah Const., art. I, §§ 8, 9.

Wyoming Const., art. I, § 14.

The 1980 amendment, which was proposed by H.J.R No. 9 (Laws 1979) and adopted at the general election held on November 4, 1980, by a vote of 157,992 for and 88,033

against, provided for the denial of bail in certain instances; and after the first paragraph, added the second paragraph, including Subparagraphs A and B.

The 1988 amendment, which was proposed by H.J.R No. 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 278,909 for and 95,156 against, specified that the provisions for bail apply to defendants prior to conviction; and in the first paragraph, after "All persons shall", added "before conviction".

I. BAIL.

Constitutional right to bail. — All persons have a right to bail and although there is a presumption that all persons are bailable pending trial, the right to bail is not absolute under all circumstances; the trial court must give proper consideration to all of the factors in determining conditions of release set forth in the rules of criminal procedure and shall set the least restrictive of the bail options and release conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community. State v. Brown, 2014-NMSC-038.

Intent of section. — This provision is based upon the idea that a person accused of crime shall be admitted to bail until adjudged guilty by the court of last resort to him. However, this right is not absolute under all circumstances. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

Sentence to term. — Sentence of not less than 40 nor more than 90 years is not one of "imprisonment for life" within meaning of bail statute. Welch v. McDonald, 36 N.M. 23, 7 P.2d 292 (1931).

Presumption that "proof is evident or presumption great". — The charge of a capital offense raises a rebuttable presumption that the proof is evident and the presumption great that the defendant so charged committed the capital offense, and one so accused is not entitled to bail until that presumption is overcome. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

In habeas corpus to be admitted to bail, if proof of capital crime is plain and presumption great, the court will not weigh it as against other facts and circumstances apparently contradictory. Ex parte Wright, 34 N.M. 422, 283 P. 53 (1929).

The supreme court weighs the evidence in habeas corpus proceedings only to determine whether it would sustain a verdict of guilty. Proof of deliberation in killing must be evident or the presumption great to warrant denial of bail to one charged with murder in the first degree. Ex parte Simpson, 37 N.M. 453, 24 P.2d 291 (1933).

Sentence to imprisonment for life precludes bail pending appeal. Welch v. McDonald, 36 N.M. 23, 7 P.2d 292 (1931).

The imposition of a cash-only bond is constitutional. State v. Gutierrez, 2006-NMCA-090, 140 N.M. 157, 140 P.3d 1106, cert. denied, 2006-NMCERT-008, 140 N.M. 422, 143 P.3d 184.

Power to revoke bail. — Since the court had inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, it also had the right to do so before trial. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

The constitution gives to one accused of crime the right to personal liberty pending trial, except under certain circumstances. The supreme court has said that a suspended sentence gives a defendant his right of personal liberty and that due process requires a notice and hearing before such suspension can be revoked. Therefore, due process also requires notice and an opportunity to be heard before bond can be revoked and a defendant remanded to custody. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

Due process right to hearing on revocation of bail. — Where the state alleged that defendant violated the conditions of defendant's pretrial release by harassing the victim and by using drugs; the district court ordered defendant to submit to a urinalysis test; the pretrial services employee who administered the test reported to the court that defendant had tested positive for opiates; the district judge personally examined the test strip and agreed with findings of the pretrial services employee; based on that evidence, the district court found that defendant had violated the conditions of defendant's release and revoked bail and remanded defendant back into custody; the district court denied defendant's request for a full evidentiary hearing; defendant was denied any opportunity to examine witnesses, to present any evidence in opposition to the state's motion to revoke bail; to show any mitigating circumstances that might continue defendant's release from custody, or to defend against the revocation of bail; and the district court did not consider any alternatives to incarceration or whether additional conditions of release would adequately protect the community, the state's witnesses, and assure defendant's appearance at trial, defendant was denied defendant's procedural due process right to an adequate hearing prior to revocation of bail and remand into custody. State v. Segura, 2014-NMCA-037.

Post-conviction relief. — Conclusory claims that defendant was held under excessive bail are too vague to provide a basis for post-conviction relief. State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct. App. 1971).

Abuse of discretion by court in determining bail. — Where defendant is entitled to bond pending final determination of his conviction, the determination of what bail is proper to grant is particularly within the trial court's discretion but a demand for a corporate surety with a predetermined exclusion of all other collateral as surety is an abuse of discretion. State v. Lucero, 81 N.M. 578, 469 P.2d 727 (Ct. App. 1970).

An abuse of discretion occurs when the court exceeds the bounds of reason when setting bond with all the circumstances before it being considered. State v. Cebada, 84 N.M. 306, 502 P.2d 409 (Ct. App. 1972).

Where trial court determined that defendant was bailable, and found no facts indicating that defendant would likely commit new crimes, that defendant posed a danger to anyone, or that defendant was unlikely to appear if released, and trial court failed to give proper consideration to all of the factors in determining conditions of release set forth in Rule 5-401 NMRA, and trial court failed to set the least restrictive of the bail options and release conditions, it was an abuse of discretion to continue the imposition of bond. State v. Brown, 2014-NMSC-038.

II. CRUEL AND UNUSUAL PUNISHMENT.

Inadequate medical care. — Where plaintiff was an inmate of the state prison; plaintiff was placed in leg restraints; and plaintiff brought excessive force and inadequate medical care claims against the defendant who was the medical director of the prison, plaintiff's allegation that tissue scarring resulted because of a delay in medical treatment of approximately three and one-half hours, by itself, was insufficient to support a constitutional claim of cruel and unusual punishment amounting to inadequate medical care because plaintiff did not identify any substantial harm resulting from the delay in treatment. Griffin v. Penn, 2009-NMCA-066, 146 N.M. 610, 213 P.3d 514.

Waiver of right to appeal conviction and sentence. — Where the defendant, who was seventeen-years of age at the time of the murder, entered a guilty plea to murder in the first degree with a firearm, the plea and disposition agreement contained no agreements as to sentencing; the agreement stated that the maximum penalty for murder in the first degree as a youthful offender is life imprisonment and that the defendant expressly waived the right to appeal the conviction that results from the entry of the plea agreement; and the district court sentenced the defendant to life imprisonment, the defendant waived the defendant's right to challenge the constitutionality of the defendant's sentence on appeal, including the right to raise a cruel and unusual punishment claim. State v. Chavarria, 2009-NMSC-020, 146 N.M. 251, 208 P.3d 896.

Proportionality review of criminal sentence in a noncapital case to determine whether an enhanced sentence under the habitual offender statute violates the prohibition against cruel and unusual punishment is permissible, although reversal of a sentence on such grounds should be exceedingly rare. State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Cruel and unusual punishment generally. — Defendant's seven-and-one-half-year sentence for four counts of violating the Remote Financial Services Unit Act and a fifth count of theft of identity did not constitute cruel and unusual punishment. State v. Castillo, 2011-NMCA-046, 149 N.M. 536, 252 P.3d 760, cert. denied, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171.

Although habitual criminality is a status rather than an offense, where defendant was not convicted of being an habitual criminal but of the commission of a criminal act, he was appropriately punished for the commission of that crime by a substituted enhanced sentence as prescribed by statute and his punishment was not cruel and unusual punishment. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Ordinarily the term "cruel and unusual punishment" implies something inhuman and barbarous. State v. Peters, 78 N.M. 224, 430 P.2d 382 (1967).

The word "usual" does not appear to either enlarge or restrict the word "cruel," and refers to the nature of the punishment under consideration rather than to the infrequency of its imposition. State ex rel. Serna v. Hodges, 89 N.M. 351, 552 P.2d 787, overruled by State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

The fixing of penalties is a legislative function and what constitutes an adequate punishment is a matter for legislative judgment. The question of whether the punishment for a given crime is too severe and disproportionate to the offense is for the legislature to determine. McCutcheon v. Cox, 71 N.M. 274, 377 P.2d 683 (1962).

Some personal discomfort, occasioned by being jailed for a few hours awaiting preliminary examination, does not constitute a denial of due process or equal protection, nor can it be said to constitute cruel and unusual punishment. Christie v. Ninth Judicial Dist., 78 N.M. 469, 432 P.2d 825 (1967).

Cruel and unusual punishment implies a limitation upon the form and character of the punishment and is not a limitation upon the duration. State v. Matthews, 79 N.M. 767, 449 P.2d 783 (1969); State v. Peters, 78 N.M. 224, 430 P.2d 382 (1967).

Although excessively long sentences, as well as those that are inherently cruel, are objectionable under this section and U.S. Const., amend. VIII, consecutive sentences of life imprisonment for murder, life imprisonment for act of carnal knowledge, and not more than 20 years imprisonment for kidnapping, were not excessive under facts of case where defendant inflicted these crimes upon five-year-old child. State v. Padilla, 85 N.M. 140, 509 P.2d 1335 (1973).

Defendant's indeterminate sentence of not less than 10 nor more than 50 years was not cruel and unusual punishment. State v. Deats, 83 N.M. 154, 489 P.2d 662 (Ct. App. 1971).

The objects and purposes of the Indeterminate Sentence Act, which form the basis for fixing the maximum penalty of life imprisonment, in the court's opinion, clearly preclude a determination that cruel and unusual punishment results from the sentence. Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Defendant's argument that the application of 30-22-9 NMSA 1978 to escapees from the prison honor farm constituted cruel and unusual punishment because of the difference in facilities at the farm compared with the state penitentiary was without merit, since the prison honor farm was an integral part and parcel of the state penitentiary, and escape therefrom was an escape from the state penitentiary. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Confinement for eight months in county jail, at which time defendant pleaded guilty and for which time defendant has been given full credit against his properly imposed sentence, does not constitute cruel and unusual punishment. State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct. App. 1969).

Detention of child awaiting residential treatment is not cruel or unusual. State v. Wacey C., 2004-NMCA-029, 135 N.M. 186, 86 P.3d 611.

Sex offender registration. — Because the Albuquerque Sex Offender Registration and Notification Act ordinance is a regulatory scheme that is not punitive in intent or effect, the retroactive application of the ordinance does not violate the cruel and unusual punishment clause. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

New Mexico's Capital Felony Sentencing Act is constitutional. State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), overruled by State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783.

Life sentence for guilty but mentally ill murderer. — Imposition of a life sentence upon a murder defendant who was found guilty but mentally ill did not constitute cruel and inhuman punishment. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Cruel and unusual punishment provision inapplicable where defendant burned with acid. — The court committed error in relying upon the cruel and unusual punishment provision of this section to dismiss the information, where the defendant, while in the county jail prior to trial, had been doused with some type of acid and severely burned. State v. Smallwood, 94 N.M. 225, 608 P.2d 537 (Ct. App. 1980).

Habitual offender sentence of five-time shoplifting felon proper. — A sentence of eight years' imprisonment, imposed under the habitual offender statute against a defendant convicted for the fifth time on felony shoplifting charges, was not so disproportionate as to require reversal as cruel and unusual punishment under the New Mexico constitution, notwithstanding facts that three of the convictions were over 15 years old, and the latest charge was only $3 over the minimum threshold for felony shoplifting. State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Failure to provide medical care. — Although failure to provide needed medical care may constitute punishment that is inherently cruel, a prisoner is not entitled to every medical procedure of his or her private physician's choice. A sentence which does not exhibit a deliberate indifference to a defendant's medical needs is not inherently cruel. State v. Augustus, 97 N.M. 100, 637 P.2d 50 (Ct. App. 1981), cert. denied, 97 N.M. 621, 642 P.2d 607 (1981).

Incarceration of defendant with severe asthma was not cruel and unusual punishment since the prison provided custodial treatment, including arrangements for emergency medical care. State v. Arrington, 120 N.M. 54, 897 P.2d 241 (Ct. App. 1995), cert. denied, 119 N.M. 810, 896 P.2d 490 (1995).

Death penalty as cruel and unusual punishment. — The death penalty in and of itself does not amount to cruel and unusual punishment within the prohibition of U.S. Const., amend. VIII or this section, but former 40A-29-2, 1953 Comp., which did not permit the exercise of controlled discretion, but mandated a death sentence upon the conviction of a capital felony, was constitutionally defective. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

The death penalty is not cruel and unusual punishment per se within the prohibition of the eighth and fourteenth amendments of United States constitution or this section. State v. Garcia, 99 N.M. 771, 664 P.2d 969, cert. denied, 462 U.S. 1112, 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983); State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793; State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

Issue of cruel and unusual punishment not raised. — Defendant's claim that he was returned to New Mexico from Texas without extradition proceedings and without a waiver of extradition and that in being so returned he suffered cruel and unjust treatment is not a claim of cruelty in his punishment and does not raise an issue under this section of the constitution or U.S. Const., amend. VIII. State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968).

This section does not apply to fugitives held for rendition to a sister state. 1974 Op. Att'y Gen. No. 74-38.

Right of parolee to bail. — Looking at the basic purposes of bail, it is seen that the reasons therefor do not apply where a conviction has been had and that conviction is final. This, of course, is the situation of a parolee. There is no danger that an innocent person may suffer punishment. Guilt has been established. 1957-58 Op. Att'y Gen. No. 57-33.

A parolee who is being held in jail for investigation of parole violation is not entitled to make bond. 1957-58 Op. Att'y Gen. No. 57-33.

An out-of-state parolee who is under the parole board's supervision under the terms of the interstate compact is not eligible to make bond when held in jail for investigation of

parole violation or after he has been arrested and placed in jail pending clearance with the sending state. 1957-58 Op. Att'y Gen. No. 57-33.

Right of probationer to bail. — A probationer, arrested in a county other than the county which granted him probation, has a right to be admitted to bail in the county in which he is arrested. 1964 Op. Att'y Gen. No. 64-106.

After conviction, but pending a review of conviction, the right to bail depends upon whether or not a statute creates that right. 1957-58 Op. Att'y Gen. No. 57-33 (rendered prior to 1988 amendment, inserting "before conviction" in the first sentence).

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M. L. Rev. 247 (1974).

For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M. L. Rev. 269 (1981).

For article, "The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 12 N.M. L. Rev. 685 (1982).

For comment, "The Constitution Is Constitutional - A Reply to The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M. L. Rev. 145 (1983).

For article, "Disability Advocacy and the Death Penalty: The Road from Penry to Atkins", see 33 N.M. L. Rev. 173 (2003).

For article, "Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia," see 33 N.M. L. Rev. 183 (2003).

For article, "Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment", see 33 N.M. L. Rev. 207 (2003).

For article, "Atkins v. Virginia: A Psychiatric Can of Worms," see 33 N.M. L. Rev. 255 (2003).

For article, "What Atkins Could Mean for People with Mental Illness", see 33 N.M. L. Rev. 293 (2003).

For article, "'Life Is in Mirrors, Death Disappears': Giving Life to Atkins", see 33 N.M. L. Rev. 315 (2003).

For article, "Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins", see 33 N.M. L. Rev. 349 (2003).

For article, "Developing the Eight Amendment for Those 'Least Deserving' of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can be 'Cruel and Unusual' When Imposed on Mentally Retarded Offenders", see 34 N.M. L. Rev. 35 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance §§ 23 to 41, 63, 73 to 81; 21 Am. Jur. 2d Criminal Law §§ 614, 615, 625 to 631.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Bail jumping after conviction or failure to surrender or appear for sentencing, and the like, as contempt, 34 A.L.R.2d 1100.

Court's power and duty, pending determination of habeas corpus proceeding on merits to admit petitioner to bail, 56 A.L.R.2d 668.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Upon whom rests burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption great, 89 A.L.R.2d 355.

Right to apply cash bail to payment of fine, 42 A.L.R.5th 547.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment, 33 A.L.R.3d 335.

Prison conditions as amounting to cruel and unusual punishment, 51 A.L.R.3d 111.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to Juvenile Delinquency Act, 53 A.L.R.3d 848.

Sterilization of criminals or mental defectives as cruel and unusual punishment, 53 A.L.R.3d 960.

Capital punishment: effect of abolition of capital punishment on procedural rules governing crimes punishable by death - post-Furman decisions, 71 A.L.R.3d 453.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Sufficiency of access to legal research facilities afforded defendant confined in state prison or local jail, 23 A.L.R.4th 590.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

Propriety of imposing capital punishment on mentally retarded individuals, 20 A.L.R.5th 177.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment, 27 A.L.R. Fed. 110.

When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eight Amendment, 164 A.L.R. Fed. 591.

When does forfeiture of motor vehicle pursuant to federal statute violate excessive fines clause of Eighth Amendment, 169 A.L.R. Fed. 615.

When does forfeiture of real property violate excessive fines clause of Eighth Amendment - post-Austin cases, 168 A.L.R. Fed. 375.

Excessive fines clause of Eighth Amendment - supreme court cases, 172 A.L.R. Fed. 389.

8 C.J.S. Bail §§ 14 to 29, 66 to 72; 24 C.J.S. Criminal Law §§ 1593 to 1609.

Sec. 13. (Proposed.) [Bail; excessive fines; cruel and unusual punishment.] *(2016)*

All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.

ANNOTATIONS

Compiler's notes. *— Section 2 of S.J.R. No. 1 (Laws 2016, appearing on the November 8, 2016 general election ballot as* ***Constitutional Amendment 1****) provided that this proposed amendment shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.*

Sec. 14. [Indictment and information; grand juries; rights of accused.] (1993)

No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been

committed. (As amended November 4, 1924, effective January 1, 1925, November 4, 1980, and November 8, 1994.)

ANNOTATIONS

Cross references. — For right to jury trial, *see* N.M. Const., art. II, § 12.

For right to bail, *see* N.M. Const., art. II, § 13.

For prohibition against double jeopardy and self-incrimination, *see* N.M. Const., art. II, § 15.

For waiver of indictment, *see* N.M. Const., art. XX, § 20.

For the Kearny Bill of Rights, *see* cl. 6 in Pamphlet 3.

For duties of examining magistrate, *see* 31-3-1 to 31-3-9 NMSA 1978.

For grand juries generally, *see* 31-6-1 to 31-6-13 NMSA 1978.

For indictments and informations generally, *see* Rules 5-201 and 5-204 NMRA.

Comparable provisions. — Iowa Const., art. I, §§ 10, 11.

Montana Const., art. II, § 24.

Utah Const., art. I, §§ 12, 13.

Wyoming Const., art. I, §§ 10, 13.

1924 amendment. — The amendment to this section was proposed by H.J.R. 14 (Laws 1923, p. 351) and was adopted by the people at the general election November 4, 1924, by a vote of 28,420 for to 21,166 against. The amendment inserted "or information filed by a district attorney or attorney general or their deputies" in the first sentence of the first paragraph; added the second sentence of that paragraph; added the entire second paragraph; and added a fourth paragraph, which has been omitted by the compiler as executed, which read: "After the submission and approval by the electors of the state, the provisions hereof shall take effect on January 1, 1925."

The 1980 amendment which was proposed by S.J.R. No. 10 (Laws 1979) and adopted at the general election held on November 4, 1980, by a vote of 124,996 for and 108,056 against, substituted "the lesser of two hundred registered voters or five percent of the registered voters" for "seventy-five resident taxpayers" in the last sentence of the second paragraph.

The 1994 amendment, proposed by S.J.R. No. 5 (Laws 1993) and adopted at the general election held on November 8, 1994, by a vote of 203,496 for and 192,549 against, substituted "greater of two hundred registered voters or two percent of the registered voters" for "lesser of two hundred registered voters or five percent of the registered voters" near the end of the second paragraph.

I. GENERAL CONSIDERATION.

Selection of a grand jury must be under the control of the district court. — Where, after the orientation and swearing of the grand jurors, the district court transferred the process of selecting and excusing jurors to the district attorney's office without further apparent involvement by the district court; the list of grand jurors used by the district attorney's office contained notations that suggested that someone in the district attorney's office excused several grand jurors; and the district court found that there was no fraud or prejudice to defendant in the conduct of the grand jury proceeding and denied defendant's pretrial motion to quash the indictment, the district court should have quashed the indictment irrespective of whether any actual fraud or prejudice was established when the improper involvement of the district attorney in the excusal of grand jurors was brought to the attention of the district court. De Leon v. Hartley, 2014-NMSC-005.

Courts have inherent authority to insure that defendants are afforded their constitutional rights in criminal proceedings. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, rev'd, 2006-NMSC-023, 139 N.M. 466, 134 P.3d 753.

Review by writ of certiorari. — Where defendant alleged in his petition for a writ of certiorari that the state violated his rights as provided under the fifth, sixth, and fourteenth amendments to the United States constitution, and Article II, Section 14 of the New Mexico constitution, the state supreme court had jurisdiction to review defendant's case by writ of certiorari because it involved a significant question of law under the constitution of New Mexico or the United States. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

This section is self-executing and needs no further legislation to put it in force. State v. Rogers, 31 N.M. 485, 247 P. 828 (1926).

The term "criminal prosecution" as used in the constitution means the criminal "proceedings". Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789 (1969), overruled by State v. Lopez, 2013-NMSC-047.

A criminal prosecution is commenced when a criminal complaint is filed with a magistrate and a warrant issued thereon. Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789 (1969), overruled by State v. Lopez, 2013-NMSC-047.

Guilty but mentally ill verdicts constitutional. — New Mexico statutory provisions authorizing a verdict of guilty but mentally ill do not impinge upon a defendant's right to

a fair trial and do not violate the equal protection clauses of the United States and New Mexico constitutions. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Constitutional rights of juveniles. — When a juvenile is transferred to district court for criminal proceedings, all of the rights and safeguards in such cases required by law and the constitution of the United States and the constitution of New Mexico must be accorded him. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

Waiver of jury by juvenile. — The jury may be waived but, insofar as the juvenile is concerned, this should be permitted only when advised by counsel and it is amply clear that an understanding and intelligent decision has been made. If the juvenile, after considering all the advantages and disadvantages attendant thereon, and having been advised by counsel, waives a trial by jury, then the benefits generally felt to attach through trial to the court would be his. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Rights waived by plea of guilty. — A voluntary plea of guilty waives the right to preliminary hearing, right to counsel and the right to aid with defense, and defendant's claim that he was denied the use of a telephone is not ground for relief, absent some showing of prejudice. State v. Maimona, 80 N.M. 562, 458 P.2d 814 (Ct. App. 1969).

Prior procedural state court defects are waived by the voluntary entry of plea of guilty. Baez v. Rodriguez, 381 F.2d 35 (10th Cir. 1967).

Impartial judge. — It seems very unlikely that the New Mexico constitution makers displayed the solicitude for an impartial trial shown by this section, and at the same time intended to curtail power of legislature to provide means in furtherance of such end, by disqualification of judges believed by litigants to be partial. What would it avail accused to have trial by impartial jury, if proceedings were presided over by biased judge? State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Language that defendant understands. — Under this provision, defendant is entitled to have testimony interpreted to him in a language which he understands. While such right cannot be denied, it is incumbent upon defendant, in some appropriate manner, to call attention of trial court to fact that he does not understand the language in which testimony is given. State v. Cabodi, 18 N.M. 513, 138 P. 262 (1914).

Where instructions were translated into Spanish by court interpreter, who had to be corrected several times, and defendant's attorney assisted in the translation without making objection, defendant was not denied his constitutional rights. State v. Garcia, 43 N.M. 242, 89 P.2d 619 (1939).

Habeas corpus relief did not lie on claim that guilty plea was not intelligently made where record showed that defendant answered both by himself and through an interpreter to questions put by the judge to be sure that defendant knew what he was doing when he pleaded guilty. Orosco v. Cox, 359 F.2d 764 (10th Cir. 1966).

The existence of a language barrier is a circumstance probing both the totality of understanding premising the entry of plea and the adequacy of representation by counsel. Orosco v. Cox, 359 F.2d 764 (10th Cir. 1966).

Mandatory revocation of driving license. — Mandatory revocation by state authorities of the driving license of any person convicted under former 64-13-59, 1953 Comp. (similar to 66-5-29 NMSA 1978) for a period of one year does not deny the right to trial by a jury in district court on appeal, in violation of this section or N.M. Const., art. II, § 12. City of Tucumcari v. Briscoe, 58 N.M. 721, 275 P.2d 958 (1954).

Probation revocation proceeding. — The right of personal liberty is one of the highest rights of citizenship and this right cannot be taken from a defendant in a probation revocation proceeding without notice and an opportunity to be heard without invading his constitutional rights. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Cumulative irregularities. — Any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial must be reversed. State v. Martin, 101 N.M. 595, 686 P.2d 937 (1984); State v. Wilson, 109 N.M. 541, 787 P.2d 821 (1990).

Capital, felonious or infamous crime. — Contempt of court is not a capital, felonious or infamous crime. State v. Pothier, 104 N.M. 363, 721 P.2d 1294 (1986).

Writ of prohibition. — Where trial court is without jurisdiction to enter any judgment, prohibition will issue as a matter of right, but an alternative writ of prohibition should be discharged as having been improvidently issued where relator has been denied no privilege or right to which he is entitled. State ex rel. Prince v. Coors, 52 N.M. 189, 194 P.2d 678 (1948).

Rights not violated by monitoring telephone calls. — The monitoring of the defendant's phone calls from jail did not violate his attorney-client privilege, his privilege against self-incrimination, protections against unreasonable searches and seizure, or his right of privacy. State v. Coyazo, 1997-NMCA-029, 123 N.M. 200, 936 P.2d 882, cert. denied, 123 N.M. 168, 936 P.2d 337 (1997).

Combination of factors invading rights. — Failure to grant a continuance to allow defendant a reasonable time to prepare and present a defense, denial of his rights to subpoena witnesses and to have medical records produced, and granting the state's motion to suppress any evidence going to defendant's mental or physical condition, invaded defendant's constitutional rights to due process and a fair trial. March v. State, 105 N.M. 453, 734 P.2d 231 (1987).

Right to a public trial. — Whether general public may be excluded from trial is discretionary with trial court, and in determining whether discretion was abused the appellate court starts with the view that the interest of a defendant in having ordinary

spectators present during trial is not an absolute right but must be balanced against other interests which might justify excluding them. State v. Padilla, 91 N.M. 800, 581 P.2d 1295 (Ct. App. 1978).

Where disinterested persons were excluded from courtroom during rape victim's testimony, whereupon she controlled her emotions while testifying, there was no denial of a public trial, and the defendant's claim of actual prejudice, asserting that the absence of spectators lent credibility to the victim's testimony, was no more than speculation since the absence of spectators might just as well have lessened the impact of the testimony. State v. Padilla, 91 N.M. 800, 581 P.2d 1295 (Ct. App. 1978).

II. INDICTMENT AND INFORMATION.

Suppression of favorable evidence. — Where defendant, who was a gang member, shot and killed a member of another gang; the state called cooperating witnesses who were former gang members; defendant subpoenaed the witnesses' informant files to determine whether any consideration had been given to the witnesses for their cooperation as a basis for cross-examining the witnesses as to bias and motive to lie; the state produced a redacted file of one witness, asserted that files did not exist on the other witnesses, and that no witnesses were paid; at trial, it was discovered that one the witnesses struck a deal with the state to be released from jail in exchange for the witness' testimony; the information was disclosed to defendant; and defendant failed to establish that any evidence was suppressed, defendant's due process rights were not violated. State v. Turrietta, 2013-NMSC-036, aff'g 2011-NMCA-080, 150 N.M. 195, 258 P.3d 474.

Right to public trial was violated. — Where defendant, who was a gang member, shot and killed a member of another gang; the state requested that the courtroom be closed during the testimony of cooperating witnesses who were former gang members because the state believed that gang members would pack the courtroom and intimidate the witnesses so that they would not testify; the witnesses testified that they had experienced threats and violence prior to trial; the state never offered sufficient proof that the threats and violence were directly related to defendant's case or that a link existed between the threats and violence and the witnesses' ability or willingness to testify; although the witnesses named gang members who had threatened or intimidated them, the district court excluded more than thirty people from the courtroom, including members of defendant's family and friends, without knowing whether the excluded people were gang affiliated; the district court did not consider all alternatives to closure, such as increased security or the wait-and-see method; and the district court's justification for the closure, which was based on the danger to the witnesses and the fact that a gang etching had been found outside the courtroom door, failed to mention any specific threat or possibility of intimidation, defendant's right to a public trial was violated. State v. Turrietta, 2013-NMSC-036, rev'g 2011-NMCA-080, 150 N.M. 195, 258 P.3d 474.

Right to public trial was not violated. — Where defendant was involved in a gang-related shooting in which the victim was killed; the state called as witnesses four confidential informants who were current or former gang members; two of the informants had been threatened by members of defendant's gang; two of the informants had not been threatened; twice before trial, graffiti tagging had been found outside the court room; the graffiti tagging had been done by a member of defendant's gang who had threatened one of the informants; the trial court partially closed the trial to the public during the testimony of the two informants who had been threatened, but did not exclude the immediate family members of defendant and the victim, attorneys, staff members and the press; and the court room was open to the public during the testimony of the informants who had not been threatened, defendant's sixth amendment right to a public trial was not violated. State v. Turrietta, 2011-NMCA-080, 150 N.M. 195, 258 P.3d 474, rev'd, 2013-NMSC-036.

Courtroom closure violated sixth amendment. — Where defendant was charged with trafficking cocaine; the state called an undercover officer, who bought crack cocaine from defendant, to testify; the district court excluded all members of the public during the officer's testimony to protect the officer and the officer's undercover identity; the state did not provide any evidence regarding the identification of any persons whose presence during the officer's testimony may have imperiled ongoing investigations or threatened the officer's safety in those investigations; and the district court did not consider pursuing alternatives to closure or issue findings as to any specific threats to the officer's identify, safety or the viability of the officer's undercover operations, or the breath of reasonable alternatives to closure, the courtroom closure violated defendant's constitutional right to a public trial under the sixth amendment. State v. Hood, 2014-NMCA-034.

Right to public trial not violated where defendant consented to partial courtroom closure. — Defendant waived his right to a public trial when his attorney expressly stipulated to and encouraged the partial courtroom closure during a defense witness's testimony. State v. Hobbs, 2016-NMCA-006, cert. denied, 2015-NMCERT-012.

Familial relationship between defendant and district attorney. — Where defendant claimed that the district attorney was a third cousin of the defendant and that in Navajo culture, defendant and the district attorney had a clan relationship that made the district attorney culturally the grandfather of defendant, and the district attorney swore in an affidavit that although the district attorney was one-half Navajo, the district attorney was unaware of any clan relationship with defendant, that the district attorney had never had personal or direct contact with defendant until after the prosecution of defendant's case had begun, and that the district attorney had only recently discovered that the district attorney's grandmother was the sister of defendant's great-grandfather, the trial court did not abuse its discretion in determining that the familial relationship between the district attorney and defendant was insufficient to create a personal bias that warranted disqualification. State v. Juan, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

Language that defendant understands. — The word "charge" used in clause "to have the charge and testimony interpreted to him in a language that he understands" refers to the indictment or information, and not to instructions. State v. Cabodi, 18 N.M. 513, 138 P. 262 (1914).

Length of charging period. — Where, as often occurs in child sexual abuse cases, the indictment sets forth a lengthy charging period, the due process rights of the defendant are implicated and the court must consider multiple factors to determine the reasonableness of the state's efforts to narrow the time of the indictment and the potential prejudice to the defendant of the time frame chosen by the state. State v. Baldonado, 1998-NMCA-040, 124 N.M. 745, 955 P.2d 214.

Where indictment charged defendant with sexual abuse of a child, defendant was not prejudiced or denied due process by state's failure to reduce charging period from 16 months to a more definite four months because defendant could not have raised a viable alibi defense. State v. Ervin, 2002-NMCA-012, 131 N.M. 640, 41 P.3d 908, cert. denied, 131 N.M. 619, 41 P.3d 345 (2002).

Alteration of charge from a misdemeanor to a felony. — Absent some clerical error, where charges have been submitted by criminal information and where those charges were not included in the bind-over order for trial in district court, the defendant has not been afforded due process. State v. Rodriguez, 2009-NMCA-090, 146 N.M. 824, 215 P.3d 762, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Where the criminal complaint charged defendant with a misdemeanor count of possession of a controlled substance without a prescription; the magistrate judge bound defendant over for trial on the misdemeanor charge; the criminal information filed by the state in district court charged defendant with a felony count of possession of a dangerous drug without a prescription; in district court, defendant waived arraignment and entered a plea of not guilty to the felony count, defendant was deprived of due process because defendant was subjected to criminal prosecution without probable cause. State v. Rodriguez, 2009-NMCA-090, 146 N.M. 824, 215 P.3d 762, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Effect of amendment of information. — Defendant is not injured where amendment to information apprises him of facts he might have requested by bill of particulars. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Information must conform to the magistrate's bind-over order holding the accused to answer. State v. McCrary, 97 N.M. 306, 639 P.2d 593 (Ct. App. 1982).

Information may be amended to conform to bind-over order. — Where a magistrate held a preliminary hearing and orally announced that there was evidence to bind the defendant over for trial on three counts, but because of a clerical error the written bind-over order omitted two of the counts, the trial court may, upon motion, amend the

information originally drawn up to conform to the written bind-over order, to include all three courts. State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

Charge in complaint kindred to that in information. — Procedural due process was satisfied where crime charged in complaint in magistrate's court was kindred to that to which defendant was held to answer in district court after a preliminary examination which was otherwise adequate and where information was in substantial accord with magistrate's commitment. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Information need not correspond to arrest complaint. — Information may be framed according to facts developed at preliminary examination and need not correspond with complaint which served as basis for warrant on which accused was arrested, since it must be presumed that magistrate performed his duty fairly. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Waiver of right to probable cause hearing. — Entering a not guilty plea to a defective criminal information at arraignment does not itself constitute a waiver of defendant’s right to a probable cause hearing. State v. Rodriguez, 2009-NMCA-090, 146 N.M. 824, 215 P.3d 762, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Where the magistrate judge bound defendant over for trial on a misdemeanor count of possession of a controlled substance without a prescription; the criminal information filed by the state in district court charged defendant with a felony count of possession of a dangerous drug without a prescription; defendant waived arraignment and entered a plea of not guilty to the felony count in district court, defendant did not waive the right to a probable cause hearing on the felony charge. State v. Rodriguez, 2009-NMCA-090, 146 N.M. 824, 215 P.3d 762, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Jury instruction on an uncharged crime. — Where the district court submits an uncharged crime to the jury as a basis for conviction, it deprives a defendant of the defendant’s constitutional right to notice and the opportunity to prepare a defense, unless the crime is a lesser-included offense of the crime charged. State v. Davis, 2009-NMCA-067, 146 N.M. 550, 212 P.3d 438.

Where the defendant was charged with intentional child abuse; the defendant was not indicted for negligent child abuse and the state did not seek to amend the indictment to charge negligent child abuse; the trial court instructed the jury on both intentional and negligent child abuse; the jury found the defendant guilty of abuse of a child without specifying whether the jury found intentional or negligent child abuse; and negligent child abuse is not a lesser-included offense of intentional child abuse, the submission of the negligent child abuse instruction constituted fundamental error. State v. Davis, 2009-NMCA-067, 146 N.M. 550, 212 P.3d 438.

Prosecuting by information constitutional. — The provisions of this section, permitting the prosecution of a felony by information, does not violate either the fifth

amendment requirement of a grand jury indictment or the due process clause of the U.S. Const., amend. XIV. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct. App. 1967).

Simplified forms of information provided for by New Mexico statutes do not offend against the constitution. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

The purpose of an indictment or information is, first, to furnish an accused with such a description of the charge against him as will enable him to make his defense and to avail himself of his conviction or acquittal against a subsequent prosecution for the same offense; and second, that the court may be informed as to the facts alleged so it may determine whether the facts are sufficient to support a conviction, if one should be had. State v. Blea, 84 N.M. 595, 506 P.2d 339 (Ct. App. 1973).

A formal accusation is required to be filed before a person may be punished for a crime. Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954).

That a person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court cannot be questioned, as it is regarded as fundamental that the accused must be tried only for the offense charged in the information. State v. Villa, 85 N.M. 537, 514 P.2d 56 (Ct. App. 1973).

Purposes of transcript. — Original purpose of transcript of evidence was to inform district attorney and to enlighten judgment of grand jury in determining whether an indictment should be presented; it now serves additional purpose of enlightening district attorney and attorney general as to what, if any, information is to be filed. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Felony must be prosecuted by indictment or information. — A criminal complaint subscribed by a county sheriff and charging defendant with burglary and grand larceny was insufficient to invoke the jurisdiction of the court in that the crimes charged therein purport to be in each case a felony and such as can be prosecuted only upon indictment or presentment by a grand jury, or by an information filed by the district attorney, attorney general or their deputies, as required by this section. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Either indictment or information may be used. — District court has jurisdiction to try defendant who is proceeded against by criminal information filed by district attorney, even where defendant did not waive his right to be charged by grand jury indictment, because this section provides that district court proceedings may be based upon either method. State v. Vaughn, 82 N.M. 310, 481 P.2d 98 (1971), cert. denied, 403 U.S. 933, 91 S. Ct. 2262, 29 L. Ed. 2d 712 (1971).

Since the 1924 amendment to this section, defendant has had no right to be charged by a grand jury; rather he may be proceeded against by information. Flores v. State, 79 N.M. 420, 444 P.2d 605 (Ct. App. 1968).

Defendant who was charged by a criminal information was not entitled to be indicted by a grand jury because under this section, a defendant may be charged either by grand jury action or by a criminal information. State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968).

Under this section, a defendant may be proceeded against either by a grand jury indictment or by a criminal information. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

State may choose to proceed by indictment or information. — In the district court a prosecution proceeds either on the basis of indictment or information, and the choice is the state's. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Right not to be tried. — In the sense of a right not to be tried in the absence of a grand jury indictment, the right is satisfied by an indictment valid on its face and returned by a legally constituted grand jury. Once such an indictment is returned, there exists no right not to be tried in the sense relevant to the underlying rationale for the collateral order doctrine nor a right for immediate review pursuant to a writ of error or pursuant to N.M. Const., art VI, § 2. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

State may proceed by information after no-bill from grand jury. — Neither the N.M. Const. art. II, § 14, nor 31-6-11.1 NMSA 1978, limits the state's ability to proceed by information after a grand jury has returned a no-bill. State v. Isaac M., 2001-NMCA-088, 131 N.M. 235, 34 P.3d 624, cert. denied, 131 N.M. 221, 34 P.3d 610 (2001).

State's burden of proof in rebutting the presumption of inadmissibility in 32A-2-14F NMSA 1978. — To overcome the presumption of inadmissibility in 32A-2-14F NMSA 1978, the state must prove by clear and convincing evidence that at the time the thirteen or fourteen-year-old child made his or her statement to a person in a position of authority, the child had the maturity to understand his or her constitutional and statutory rights and the force of will to invoke such rights. In order to obtain the clear and convincing evidence needed to rebut the presumption of inadmissibility, the interrogator who is in a position of authority must first adequately advise the thirteen or fourteen-year-old child of his or her Miranda and statutory rights and then invite the child to explain, on the record, his or her actual comprehension and appreciation of each Miranda warning. State v. DeAngelo M., 2015-NMSC-033, *aff'g on other grounds* 2015-NMCA-019.

Where thirteen-year-old child, charged with murder, residential burglary, tampering with evidence, and larceny, was subjected to a custodial interrogation by three law enforcement officers, during which child made inculpatory statements regarding a burglary that connected child to a murder, the trial court erred in denying child's motion to suppress the statements where the officers failed to advise child of his Miranda and statutory rights in a clear and intelligible manner and where it was not clear from the

record that child fully comprehended and appreciated his constitutional and statutory rights. Moreover, the fact that child continued to answer questions after unambiguously asserting his right to remain silent provided additional evidence that child did not possess either the maturity to understand his rights or the force of will to assert those rights. The state did not meet its burden of rebutting the presumption of inadmissibility under 32A-2-14F NMSA 1978. State v. DeAngelo M., 2015-NMSC-033, *aff'g on other grounds* 2015-NMCA-019.

Due process does not require a bill of particulars. — In order to satisfy due process, the primary determination is whether the accused had enough information to adequately prepare his defense, and a bill of particulars or statement of facts is generally not required when the state maintains an open file policy. State v. DeAngelo M., 2015-NMCA-019, cert. granted, 2015-NMCERT-002.

Where child, charged with murder, burglary and other delinquent acts, was furnished with the state's witness list, had access to all material relevant to the state's case against him, and the delinquency petition stated with particularity each of the crimes charged, including relevant statutory provisions, the dates and locations of the alleged offenses as well as a list of the items alleged to have been stolen, the child had enough information to prepare his defense in accordance with due process and was not entitled to a bill of particulars. State v. DeAngelo M., 2015-NMCA-019, cert. granted, 2015-NMCERT-002.

Right to demand nature and cause of accusations. — Accused's right to demand nature and cause of accusation is expressly protected by bill of particulars. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

The New Mexico constitution does not require that an indictment recite all particulars of an offense. It says only that the accused shall have the right to "demand the nature and cause of the accusation." This can be done by a bill of particulars. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945); Ex parte Kelley, 57 N.M. 161, 256 P.2d 211 (1953).

Appellant was entitled "to demand the nature and cause of the accusation" against him under this section, and while that remedy was available by way of bill of particulars, he did not choose to make use of it. Consequently, any claimed error is waived. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961).

Although defendant has the right to demand the nature and cause of the accusations, in order to exercise this right defendant must pursue it, and where defendant never requests a hearing, the constitutional provision is waived. State v. Cebada, 84 N.M. 306, 502 P.2d 409 (Ct. App. 1972).

Where the defendant argues that he did not have official notice of the specific charge until the day of trial but his objection to proceeding to trial was pro forma only, he requested no continuance, he made no plea of surprise, he made no claim that he was not prepared for trial, nor did he assert prejudice, then his claim of error is without merit.

State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App. 1972), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

"Filing" required. — Neither the New Mexico constitution nor the rules of criminal procedure require that indictments be "returned in open court." Those provisions speak only in terms of "filing." State v. Ellis, 89 N.M. 194, 548 P.2d 1212 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Time of war or public danger. — When no war or state of public danger exists during the period in which the alleged felonious acts occurred, a military court would be wholly without jurisdiction to try members of the national guard for the felonies with which they were charged. Clearly then, the civil courts must have jurisdiction to try for alleged violations. State ex rel. Sage v. Montoya, 65 N.M. 416, 338 P.2d 1051 (1959).

Waiver of indictment. — Prior to the 1924 amendment to this section, and in the constitution, as adopted, the permissive use of an information was surrounded by so many safeguards as to render it unlikely that the framers could have contemplated the requirements of this section could be waived otherwise than by the proviso in N.M. Const., art. XX, § 20. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Compliance with the terms of this section that no person shall be held to answer for certain crimes unless on presentment of indictment or information is mandatory and may not be made the subject of waiver. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

"Criminal complaint" not sufficient. — Where a "criminal complaint" fails to meet the requirements of this section, it thereby denies the district court jurisdiction to accept the defendant's guilty plea and impose sentence upon him. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Information filed before magistrate's transcript. — An information for murder, filed six days before magistrate's transcript is filed, is not void for lack of jurisdiction, where defendant does not allege or offer to show that preliminary examination was not in fact held. State v. Parker, 34 N.M. 486, 285 P. 490 (1930).

Crimes not capital, felonious or infamous. — The constitution only requires capital, felonious or infamous crimes to be charged by indictment or information, and this provision of the New Mexico constitution is clear and unambiguous. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

Where the appellant is not charged with a capital, felonious or infamous crime, there is neither a constitutional nor statutory requirement that the appellant be charged by information or indictment. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968).

So long as the fine for criminal contempt which is, or may be, imposed is not more than $1,000, there is no federal constitutional right to jury trial as the crime is a petty offense,

nor need prosecution be by information. Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973).

The use of initials instead of words in a criminal complaint to identify the offense deprives defendant of due process of law. State v. Raley, 86 N.M. 190, 521 P.2d 1031 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Failure to allege value of embezzled property. — Although information should have alleged value, jurisdiction does not depend upon the value of the property embezzled; value merely denotes the grade of the offense. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (1958).

Allegation of ownership in larceny case. — Where alleged crime constituted both common-law larceny and statutory grand larceny, allegation that defendant "committed the crime of larceny" would be sufficient, since ownership was not "of the essence of the crime." State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Ownership need not be alleged in larceny cases where name given to offense by the common law or by statute is used in information. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Since ownership in a particular individual is not an element of larceny, a statute may dispense with allegation of ownership in information. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

Murder. — Information stating that defendant did "murder" a named person is sufficient apprisal of offense charged. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

Manslaughter. — Information charging manslaughter was sufficient to satisfy constitutional requirement where it was in the form provided by 41-6-41, 1953 Comp., now repealed, and it enumerated the section defining the offense and the section fixing the penalty. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961).

Failure to name rape victim. — An information is not fatally defective in failing to name the victim of the statutory rape charged. Ex parte Kelley, 57 N.M. 161, 256 P.2d 211 (1953).

Indictment sufficient though arrest delayed. — Reasonableness of the conduct of the police in a particular case is to be weighed against the possible prejudice to the defendant resulting from delay in arrest, and where defendant's arrest was postponed in the interest of effective police work, and was not unreasonably delayed after the general investigation was concluded, refusal of the trial court to dismiss the indictment was not error. State v. Baca, 82 N.M. 144, 477 P.2d 320 (Ct. App. 1970).

III. PRELIMINARY EXAMINATION.

Right of confrontation. — The right of confrontation guaranteed by the sixth amendment to the United States constitution and Article II, Section 14 of the constitution of New Mexico is a trial right that does not apply to probable cause determinations in preliminary examinations. State v. Lopez, 2013-NMSC-047, overruling Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789.

Right of confrontation did not apply at preliminary examination. — Where police officers found a bag containing a green leafy substance and a bag that contained a white powdery substance in defendant's vehicle during a search incident to defendant's arrest for driving with a suspended license; at defendant's preliminary examination, the magistrate court admitted a forensic laboratory report into evidence without an opportunity for the defense to personally cross-examine the laboratory analyst who prepared the report; and the report concluded that the white powdery substance was cocaine and the green leafy substance was marijuana, the magistrate court did not violate defendant's confrontation rights under the United States constitution and the New Mexico constitution, because the constitutional right of confrontation does not apply to probable cause determinations in preliminary examinations. State v. Lopez, 2013-NMSC-047, overruling Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789.

A preliminary examination is unknown to the common law and an accused is not entitled to such an examination, unless it is given him by constitutional or statutory provision. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Defendant has a state constitutional right to a preliminary hearing. Baez v. Rodriguez, 381 F.2d 35 (10th Cir. 1967).

Where defendant is charged by an information, he has a constitutional right to a preliminary examination. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

When the charge is by criminal information, defendant has a right to a preliminary examination. State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1969).

Right to hearing is matter of law. — The right to a preliminary hearing is not discretionary with the judge. A person is either entitled to it as a matter of law, or not at all. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

But there exists no absolute right to a preliminary hearing, and this section leaves it in the discretion of the prosecutor to proceed by indictment and thus to obviate the requirement of preliminary examination. State v. Peavler, 87 N.M. 443, 535 P.2d 650 (Ct. App.), rev'd, 88 N.M. 125, 537 P.2d 1387 (1975); State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Meaning of term "preliminary examination". — Court may assume that term "preliminary examination" was understood to mean preliminary examinations as were in vogue under existing laws of state at time constitutional amendment which is being construed was proposed and adopted. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Purpose and nature of hearing. — A preliminary hearing is not a trial of the person charged with the view of determining his guilt or innocence. Purposes of preliminary examination are, inter alia, (1) to inquire concerning commission of crime and accused's connection with it, (2) to inform accused of nature and character of crime charged, (3) to enable state to take necessary steps to bring accused to trial in event there is probable cause for believing him guilty, (4) to perpetuate testimony and (5) to determine amount of bail which will probably secure attendance of accused to answer charge. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971); State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968); State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Hearing as federal right. — The right to a preliminary hearing in the state of New Mexico is one guaranteed by the state constitution and only becomes a federal constitutional guarantee by the equal protection clause of the fourteenth amendment because it is a part of the due process of the state. Silva v. Cox, 351 F.2d 61 (10th Cir. 1965), cert. denied, 383 U.S. 919, 86 S. Ct. 915, 15 L. Ed. 2d 673 (1966).

A defendant in a state court is not entitled to a preliminary examination by virtue of a federal constitutional right. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Magistrate's jurisdiction over complaint is to conduct a preliminary hearing and, if probable cause is found that the defendant committed an offense, to bind him over to district court for trial. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Duties of magistrate. — Magistrate must determine from preliminary examination as a whole, and not merely from complaint alone, what offense has been committed; commitment by magistrate must name the offense found as a result of such examination. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

The effect of denying a constitutional right at a preliminary examination is the same as though there had been no hearing. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

No right to preliminary examination under indictment. — A reading of this section clearly reveals that no right to a preliminary examination exists when the presentment against an accused is by a grand jury indictment. State v. Mosley, 75 N.M. 348, 404 P.2d 304 (1965).

If the state chooses to proceed by indictment, the defendant has no right to a preliminary hearing, even where the proceedings against the defendant are initiated by a criminal complaint in magistrate court. State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975), rev'g 87 N.M. 443, 535 P.2d 650 (Ct. App. 1975).

Where defendant is not proceeded against by information, but by indictment, he is not entitled to a preliminary examination. The fact that proceedings against him are first initiated by a criminal complaint in the magistrate court does not obligate the state to proceed by preliminary examination and information rather than by indictment. State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973).

This provision affords a right to a preliminary hearing when the accused is charged by a criminal information, but does not afford a right to a preliminary hearing when the accused is indicted by a grand jury. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Standard of proof at preliminary hearing. — The test at a preliminary hearing is not whether guilt is established beyond a reasonable doubt, but whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused. State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968).

Admissibility in appellate court of preliminary hearing testimony. — The district attorney's statements that the state attempted to subpoena a material witness and that he was out of state were no more than bare recitals unsupported by factual elaboration, and where the record contained no evidence as to the circumstances of the state's alleged attempt and inability to subpoena the witness, the court of appeals refused to hold that the witness was unavailable for trial, and under Rule 804, N.M.R. Evid. (see now Rule 11-804 NMRA) the witness's preliminary hearing testimony was not admissible in evidence. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Hearing is prerequisite to holding on information. — This section requires a preliminary examination before an examining magistrate, or its waiver, as a prerequisite to holding any person on a criminal information. Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, overruled by State v. Lopez, 2013-NMSC-047.

Accused may challenge right of state to proceed against him until he has been accorded a valid preliminary hearing, unless he has theretofore waived his right thereto. Such challenge may be made by a plea in abatement or any other appropriate manner. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

The absence of either a preliminary examination or its intelligent waiver, or the denial of representation by counsel at such hearing, may be called to the attention of the court at any time prior to arraignment, by plea in abatement or in any other appropriate manner. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964); State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

The jurisdiction of the district court, acquired by the filing of the information, may be lost "in the course of the proceeding" by failure to remand for a preliminary examination when its absence is timely brought to the court's attention. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964); State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

Violation determined initially by state courts. — Where defendant, in federal habeas corpus, alleges that he was denied a preliminary hearing in violation of this section, when the federal court can find no indication, either in the record or by reference in appellant's brief, that the contention has been presented to and argued before New Mexico's state courts, the argument will not be decided by the federal court until first referred to the state judiciary. Campos v. Baker, 442 F.2d 331 (10th Cir. 1971).

Denial of the right of a defendant to call witnesses in his behalf, at a preliminary examination, was error which required the trial judge to sustain a plea in abatement for a full and complete preliminary examination. Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789 (1969), overruled by State v. Lopez, 2013-NMSC-047.

Determination of probable cause based on judicially-noticed testimony. — Where no witnesses testified at defendant’s preliminary hearing; the state offered testimony that the victim and a detective had given at a previous hearing before the magistrate pertaining to a different charge; the magistrate took judicial notice of the testimony and based solely on the judicially-noticed testimony, issued a determination of probable cause; defendant proceeded to a jury trial without challenging the preliminary hearing; and defendant claimed that defendant was deprived of the right to a preliminary hearing, defendant had no remedy for the error in the preliminary hearing. State v. Perez, 2014-NMCA-023, cert. denied, 2014-NMCERT-001.

Arraignment. — The statutes do not provide for an arraignment before a justice of the peace; rather, they provide for a preliminary examination by a committing magistrate and arraignment and trial before the district court. However, it is the practice for the magistrate to arraign the defendant at preliminary examination. State v. Elledge, 78 N.M. 157, 429 P.2d 355 (1967).

Powers of visiting judge. — Nonresident judge who sits at request of resident judge is vested with all the latter's powers, including that of holding preliminary hearings. State v. Encinias, 53 N.M. 343, 208 P.2d 155 (1949).

Hearing or waiver need not be proved by state. — The state, prosecuting by information, need not allege or prove that accused has had or waived preliminary examination. State v. Vigil, 33 N.M. 365, 266 P. 920 (1928).

Same charge in hearing and amended information. — Where information is amended, defendant has no constitutional right to an additional preliminary hearing when the preliminary hearing and the amended information pertain to the same statutory charge. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

The preliminary hearing is a critical stage of a criminal proceeding in which counsel must be made available. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Driving while intoxicated. — An accused has no right to a preliminary hearing on a misdemeanor charge of driving while intoxicated. State v. Greyeyes, 105 N.M. 549, 734 P.2d 789 (Ct. App.), cert. denied, 105 N.M. 521, 734 P.2d 761 (1987).

Counsel at preliminary examination. — The amount of time counsel spends with defendant prior to a hearing provides no basis for post-conviction relief, as the competence and effectiveness of counsel cannot be determined by the amount of time counsel spends or fails to spend with defendant. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971).

If represented by counsel when arraigned in district court, if no objection is made to a lack of counsel at the preliminary hearing stage, or even of the total absence of a preliminary hearing, without a showing of prejudice, there is a waiver of the right to counsel at the earlier stages. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Defendant's assertion that two prior felony convictions could not be used against him in prosecution under habitual criminal statute because they were constitutionally defective due to the absence of counsel at his preliminary examination in both prior felony convictions was without merit where the record showed that in each of the two prior felony convictions, defendant entered pleas of guilty, that in each of the guilty pleas, defendant had the advice of counsel, and where no claim was made that the pleas were involuntary, defendant's claimed defect was therefore waived when he pleaded guilty in the two prior felony proceedings. State v. Lopez, 84 N.M. 600, 506 P.2d 344 (Ct. App. 1973).

Absent a showing of prejudice, complaint of absence of counsel during interrogation by authorities and at preliminary hearing is waived by guilty plea. State v. Archie, 78 N.M. 443, 432 P.2d 408 (1967).

The right to representation at the preliminary hearing is waived upon entering a plea in district court when represented by counsel. State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968).

Failure to assign counsel prior to preliminary examination of an indigent defendant in a noncapital case is not ground for vacating a conviction or sentence based upon a plea of guilty, at least without a showing that prejudice resulted therefrom. Sanders v. Cox, 74 N.M. 524, 395 P.2d 353 (1964), cert. denied, 379 U.S. 978, 85 S. Ct. 680, 13 L. Ed. 2d 569 (1965).

Representation of juvenile by counsel at or during the preliminary investigation can be waived, if this is done knowingly and intelligently. Further, waiver is accomplished when, upon arraignment with counsel in district court, no objection is made to the failure to be

represented by counsel during the juvenile court investigation. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

If, at the time of arraignment, complaint had been made that counsel had not been provided in juvenile court, it would possibly have been error for the district court to refuse to remand to the juvenile court for a proper hearing. But if no objection is voiced, no reason can be advanced to hold there was no waiver of such defect in juvenile court when it is clear that the same shortcoming in the preliminary hearing was effectively waived. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Where juvenile petitioner received all benefits to which he would have been entitled as an adult, his voluntary plea of guilty after consulting counsel, and no showing of prejudice being made, amounted to a waiver of prior failure to provide counsel at a preliminary hearing. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

The right to counsel at the preliminary hearing or arraignment in the district court can be competently and intelligently waived and in doing so the constitutional rights of the accused will not be abridged. State v. Cisneros, 77 N.M. 361, 423 P.2d 45 (1967).

The entry of a plea in the district court after intelligent waiver of counsel, or when represented by competent counsel, served as a waiver of any defects in the preliminary hearing, including failure to advise of right or to provide counsel. State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (1966).

Waiver of preliminary examination. — Where the state informed the defendant prior to the videotaped deposition of the child victim that the state would add criminal sexual penetration of a minor charges if the child articulated facts sufficient to support the charges; the child testified that the defendant "licked" her vagina; the defendant was present at the deposition, but did not cross-examine the child; the state added a criminal sexual penetration of a minor charge on the day of trial; the defendant did not request a preliminary hearing and entered a plea of not guilty to the additional charges; the defendant waived his right to a preliminary hearing and he was not prejudiced by the addition of the criminal sexual penetration of a minor charge. State v. Ervin, 2008-NMCA-016, 143 N.M. 493, 177 P.3d 1067, cert. denied, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

A defendant who enters plea on arraignment without raising his objection waives right to a preliminary examination. State v. Gallegos, 46 N.M. 387, 129 P.2d 634 (1942).

In case where accused, when brought before examining magistrate, was told that he was entitled to have counsel represent him, that he was entitled to a continuance if he desired, and that it was not necessary for him to plead, but after being so advised accused stated that he was ready to plead, and pleaded guilty, he expressly waived a preliminary examination. State v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951).

Defendant, by his voluntary plea of guilty to the charge on which he was convicted and sentenced, waived his rights to a preliminary hearing with representation by counsel. State v. Marquez, 79 N.M. 6, 438 P.2d 890 (1968).

Objection that preliminary examination has not been waived must be raised before plea. State v. Vigil, 33 N.M. 365, 266 P. 920 (1928).

The trial court did not err in putting appellant to trial upon an information filed prior to the preliminary examination since, although no person shall be held on information without having had or waived a preliminary examination, appellant not only was accorded a hearing but waived this right by his plea. State v. Bailey, 62 N.M. 111, 305 P.2d 725 (1956).

The entry of a plea after intelligent waiver of counsel or when represented by competent counsel serves as a waiver of the right to a preliminary examination. State v. Darrah, 76 N.M. 671, 417 P.2d 805 (1966).

Where defendant enters a plea of guilty, he waives his right to a preliminary examination. State v. Darrah, 76 N.M. 671, 417 P.2d 805 (1966).

A plea of guilty or not guilty to an information filed in a district court, in which case no preliminary hearing has been held, constitutes a waiver of the constitutional right to a preliminary examination. Silva v. Cox, 351 F.2d 61 (10th Cir. 1965), cert. denied, 383 U.S. 919, 86 S. Ct. 915, 15 L. Ed. 2d 673 (1966).

The state constitutional guarantee of a preliminary hearing may be waived before a magistrate if the accused acknowledges his guilt of the offense charged. Silva v. Cox, 351 F.2d 61 (10th Cir. 1965), cert. denied, 383 U.S. 919, 86 S. Ct. 915, 15 L. Ed. 2d 673 (1966).

A defendant waives his right to a preliminary hearing when he competently, understandingly and voluntarily pleads to a charge, without asserting the absence of a preliminary hearing. Guerra v. Rodriguez, 372 F.2d 472 (10th Cir. 1967).

Defendant waived his right to a preliminary examination when he competently, understandingly and voluntarily pled to an information, without challenging the information on the ground that he had not been accorded a valid preliminary examination. Cranford v. Rodriguez, 373 F.2d 22 (10th Cir. 1967).

A defendant waives his right to a preliminary examination when he competently, understandingly and voluntarily pleads to an information, without challenging the information on the ground that he had not been accorded either a preliminary examination or a valid preliminary examination. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Defendant was entitled to a preliminary examination, at which he would be accorded his constitutional rights, before being placed on trial on the information, but he waived that right by his plea of not guilty, entered when he was adequately represented by counsel. The fact that the preliminary examination proceedings were void did not render defendant immune from a trial on the information, since at such trial he was provided with competent counsel and otherwise accorded his constitutional rights. Pece v. Cox, 354 F.2d 913 (10th Cir. 1965), cert. denied, 384 U.S. 1020, 86 S. Ct. 1984, 16 L. Ed. 2d 1044 (1966).

Defendant may be charged by information in the state district court, notwithstanding he either has not had a preliminary examination or has not had a valid preliminary examination. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

The question of whether a preliminary hearing was competently waived is one of fact and cannot be established by the mere written waiver executed without the advice of counsel. The competency of such a waiver can only be determined after a hearing thereon. State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

There is nothing in either the due process clause, nor in any decision which requires a remand to the magistrate's court, to permit an accused to waive his right to have a preliminary examination represented by counsel, rather than to waive the right in the district court to be so remanded. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

Where defendant's defense may have been prejudiced by the failure to grant a preliminary examination and when its absence was timely called to the court's attention, entry of a plea upon arraignment in the district court did not operate as a waiver of defendant's right to the preliminary examination. State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

If the accused has waived a preliminary examination, the state does not have an independent right to compel a preliminary examination over the defendant's waiver. State ex rel. Whitehead v. Vescovi-Dial, 1997-NMCA-126, 124 N.M. 375, 950 P.2d 818, cert. denied, 124 N.M. 268, 949 P.2d 282 (1997).

IV. GRAND JURY.

History of institution of grand jury. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Number of grand jurors. — The amendment to this article which took effect January 1, 1925, changing the number of grand jurors necessary to find an indictment, did not infringe any substantial or constitutional guaranty and was not ex post facto in applying to offenses committed prior to its adoption. State v. Kavanaugh, 32 N.M. 404, 258 P. 209 (1927).

A grand jury composed of more than 12 members is not a grand jury under the state constitution, and an indictment returned by that body is void and ineffective. State v. Garcia, 61 N.M. 404, 301 P.2d 337 (1956).

Fair cross section of community. — The right to a jury reflecting a fair cross section of the community under the New Mexico constitution is at least as broad as that guaranteed by the sixth amendment of the federal constitution. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Method of convening. — A grand jury may be convened either upon a taxpayer's petition or by an order of the district judge. State v. Mosley, 75 N.M. 348, 404 P.2d 304 (1965).

Duty of judge to comply with petition for grand jury. — A district judge does not enjoy discretionary authority to refuse to convene a grand jury requested by petition; a judge is mandated to convene the grand jury or otherwise substantially comply with the request. Cook v. Smith, 114 N.M. 41, 834 P.2d 418 (1992).

Petitions must contain sufficient information. — District courts may limit grand jury investigations to specific incidents identified in the petition. Therefore petition to convene a grand jury must contain sufficient information to enable the court to determine whether the petitioners seek a legitimate inquiry into alleged criminal conduct or malfeasance of a public official or whether petitioners seek nothing more than a witch hunt. District Court v. McKenna, 118 N.M. 402, 881 P.2d 1387 (1994), cert. denied, 514 U.S. 1018, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995).

The district court may require that a grand jury petition contain sufficient information to determine the signatories' status as registered voters. — The determination of whether the signatories of a grand jury petition are actually registered voters of the county is a factual determination properly within the discretion of the district court. Although Article II, Section 14 of the constitution of New Mexico does not require that the addresses of signatories appear on a grand jury petition and there are other possible forms of evidence of registered voter status, the district court may, in its discretion, require that the addresses of signatories appear on a grand jury petition for purposes of confirming the signatories registered voter status. Requiring a district court to accept a grand jury petition as sufficient to order a grand jury inquiry simply because the petition contains signatures that are spelled the same way as those of registered voters overlooks the judicial duty of the district court to ensure the actual validity of a grand jury petition. Convisser v. Ecoversity, 2013-NMSC-039, rev'g 2012-NMCA-008.

The addresses of persons signing a grand jury petition are not required. — Article II, Section 14 of the constitution of New Mexico requires only that the requisite number of signatures that can be matched to the voter rolls as those of registered voters be submitted in support of a petition for a grand jury investigation. The constitution does not require that the addresses of persons signing the petition accompany their

signatures so that the county clerk may verify that the signatories are registered voters. Once the county clerk determines that the required number of persons purporting to be registered voters in the county have provided their names and signatures, and those names correspond to the names of registered voters within the county, the constitution has been satisfied. In re Rescue Ecoversity Petition, 2012-NMCA-008, 270 P.3d 104, cert. granted, 2012-NMCERT-001.

The court of appeals' three-step burden-shifting procedure for evaluating grand jury petitions is not justified by law or reason. — Neither Article II, Section 14 of the constitution of New Mexico nor supreme court precedent prescribe shifting burdens or other special standards by which a district court is constrained in exercising judicial discretion to determine whether a grand jury petition has met the constitutional requirement of being signed by a specified number of actual registered voters of the county. The court of appeals' three-step burden-shifting procedure for evaluating grand jury petitions adds provisions to the constitutional mandate that are not justified by law or reason. Convisser v. Ecoversity, 2013-NMSC-039, rev'g 2012-NMCA-008.

Grand jury petition did not contain information to determine the status of the signatories as registered voters. — Where a grand jury petition was signed by more than the required number of voters; the names to the signatories were the same as the names of people who appeared on the county's voter registration rolls; the county clerk could not confirm that any of the signatories were actually registered voters, because the petition did not contain the signatories' addresses or any other information which could be used to confirm the signatories' registered voter status; and petitioner did not provide any evidence to prove that the signatories were actually registered voters of the county, the district court did not abuse it discretion in denying the petition on the ground that the petition did not contain sufficient information to determine the registered voter status of the signatories. Convisser v. Ecoversity, 2013-NMSC-039, rev'g 2012-NMCA-008.

Burden of proof that a grand jury petition is legally sufficient. — Once petitions to convene a grand jury are submitted, which demonstrate on their face that the signatories purport to be registered voters within the county and that they contain the names and signatures corresponding to the greater of two percent of registered voters or two hundred registered voters in the county, the petitioners have met their initial burden. Those who oppose the petition then have the burden to produce evidence demonstrating that the signatures on the petition are not those of registered voters within the county. Nevertheless, the ultimate burden of proof still generally rests with the petitioners whose evidence must be sufficient to overcome those objections raised by the opposition when the district court reviews the petition's sufficiency. In re Rescue Ecoversity Petition, 2012-NMCA-008, 270 P.3d 104, cert. granted, 2012-NMCERT-001.

Burden of proof that the grand jury petition is legally sufficient was met. — Where petitioners filed petitions to convene a grand jury which contained the printed names and signatures of the signatories below a heading which stated that the persons signing the petition were registered voters of the county; the petitions did not contain the

addresses of the signatories; and the county clerk confirmed that the petitions contained a sufficient number of signatures of individuals whose names matched the names of registered voters in the county, but could not verify that any of the individuals who signed the petitions were actually registered voters in the county without the addresses of the individuals, the petitioners met their burden of production upon presenting the names and signatures of a sufficient number of registered voters as confirmed by the county clerk. In re Rescue Ecoversity Petition, 2012-NMCA-008, 270 P.3d 104, cert. granted, 2012-NMCERT-001.

Effect of improper motives of signatory. — If a petition to convene a grand jury sufficiently delimits an area of inquiry that colorably lies within the permissible scope of grand jury inquiry and there is no challenge to the geographical jurisdiction or to the applicable statute of limitations, the petition should be granted. Although our system of justice does not allow the grand jury to be used as a tool by any dissatisfied person or political faction to intimidate or threaten a governing body, the improper motives of one signatory in the petition cannot be imputed to all of the other signatories. Pino v. Rich, 118 N.M. 426, 882 P.2d 17 (1994).

Residence as qualification for grand jury service is question of fact. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Residence for jury service similar to voting residence. — There is a similarity between residence for the purpose of voting and residence for the purpose of serving as a juror. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Residency not destroyed by temporary absence. — The temporary absence of a person from the county of his residence, without the intention of abandoning that residence, will not destroy that person's qualification to serve as a grand juror. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Effect of attack on eligibility of grand juror. — An attack on the eligibility of one grand juror does not raise an issue as to the jurisdiction of the court, but goes only to the procedural requirements for returning an indictment. State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

V. PERSONAL APPEARANCE.

Private conversation between judge and individual juror not reversible error. — No reversible error exists where the judge confers with prospective individual jurors without the presence of defendant or defense counsel when the conversation was invited by defense counsel and did not prejudice defendant. State v. Henry, 101 N.M. 277, 681 P.2d 62 (Ct. App. 1984).

Post-conviction relief. — Under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions made prior to September 1, 1975), a court could hear and determine a post-conviction motion without the presence of the prisoner.

To do so was not a denial of the constitutional right "to appear and defend" in criminal proceedings because prior to enactment of Rules of Criminal Procedure, post-conviction proceedings were civil, not criminal. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Where the motion for post-conviction relief is completely groundless, the trial court may determine the motion without the presence of defendant. State v. Sanchez, 78 N.M. 25, 420 P.2d 786 (Ct. App. 1966).

VI. REPRESENTATION BY COUNSEL.

A. RIGHT TO COUNSEL.

1. IN GENERAL.

Right to proceed pro se. — Where defendant did not file a motion to proceed pro se until three days into trial, the trial court did not abuse its discretion in denying defendant's motion based solely on the timeliness of the motion. State v. Garcia, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

Deprivation of counsel of choice. — Where the defendant's attorney interviewed the police officer who had arrested the defendant for drunk driving; the officer appeared to the attorney to be combative, called the attorney a "son of a bitch", did not respond to all of the attorney's questions, and used the officer's middle finger to point to documents; the attorney believed, based on information received through other officers, that the officer was making sure that the attorney could not do the attorney's job representing the defendant; the officer neither threatened to commit perjury nor threatened repercussions if the attorney did not withdraw as counsel for defendant; the prosecutor did not force the attorney to withdraw; the attorney withdrew voluntarily; and the attorney did not know how the defendant's case would be negatively impacted if the attorney continued to represent the defendant, the defendant's right to counsel of the defendant's choice was not violated. State v. Gamlen, 2009-NMCA-073, 146 N.M. 668, 213 P.3d 818.

Representation at critical stage of proceeding. — Defendant is entitled to be represented by counsel at every critical stage of the proceeding. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Right to counsel at a lineup is essential to due process. State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969).

Right to counsel during custodial interview. — Defendant had a right to have counsel present at the time of statement made during interview while defendant was in custody. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled by State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Right to assistance of counsel applies to both trial and appeal. State v. Lewis, 104 N.M. 218, 719 P.2d 445 (Ct. App. 1986).

Right while under DUI custodial arrest. — A person issued a citation and placed under custodial arrest for driving while under the influence of intoxicating liquor does not have a constitutional right to counsel immediately following a breath alcohol test since it did not amount to initiation of judicial criminal proceedings or prosecutorial commitment, nor was the period following administration of the test a critical stage. State v. Sandoval, 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984).

Mandatory jail sentence upon DWI conviction. — Provision of 66-8-102 NMSA 1978 subjecting a defendant who refuses to submit to chemical testing to a mandatory jail sentence upon conviction of DWI does not violate the constitutional right to counsel. State v. Kanikaynar, 1997-NMCA-036, 123 N.M. 283, 939 P.2d 1091, cert. quashed, 124 N.M. 269, 949 P.2d 283 (1997); Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999), cert. denied, 528 U.S. 1090, 120 S. Ct. 821, 145 L. Ed. 2d 691 (2000).

Right to counsel at arraignment. — A defendant has a constitutional right to counsel in criminal proceedings and thus has a constitutional right to be represented by counsel at his arraignment. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Hearing for suspension of jail sentence. — Where petitioner had no counsel at hearing where the suspension of jail sentence was revoked and he was ordered committed, where he was not advised of his right to have counsel appointed if he desired and was indigent, and where there was no intelligent waiver of that right, there was a denial of his constitutional rights. Blea v. Cox, 75 N.M. 265, 403 P.2d 701 (1965), overruled on other grounds State v. Mendoza, 91 N.M. 688, 579 P.2d 1255 (1978).

Right to court-appointed counsel. — Absent competent and intelligent waiver, a person charged with crime in a state court who is a pauper and unable to employ counsel is entitled to have an attorney appointed to defend him. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

When the offense with which the defendant is charged is punishable by imprisonment in the penitentiary, the court is required to assign counsel if the prisoner has not the financial means to procure counsel. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966).

Showing of indigency is prerequisite to the right of court-appointed counsel. State v. Powers, 75 N.M. 141, 401 P.2d 775 (1965).

It is not necessary for indigent defendant to request the appointment of counsel in order to preserve his right to counsel. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966).

Determination of indigency. — The limited determination of indigency for purposes of right to court-appointed counsel under the standard of pauperism does not conform to constitutional mandate. Anaya v. Baker, 427 F.2d 73 (10th Cir. 1970).

No right to appointment of particular counsel. — An indigent defendant may not compel the court to appoint such counsel as defendant may choose. Such appointment lies within the sound discretion of the trial court. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Defendant is not entitled as matter of right to participate as counsel in his own defense with his court-appointed counsel. State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981).

Standby counsel. — Even when standby counsel is appointed, the trial court must ensure that defendant is aware of the hazards and disadvantages of self-representation. Although appointment of standby counsel is preferred, the presence of advisory counsel in the courtroom does not, by itself, relieve the trial court of its duty to ensure that defendant's waiver is made knowingly and intelligently. State v. Castillo, 110 N.M. 54, 791 P.2d 808 (Ct. App. 1990), cert. denied, 110 N.M. 44, 791 P.2d 798 (1990).

A knowing and voluntary waiver of counsel was not established, where the trial court, without further inquiry of defendant concerning whether he in fact desired to proceed pro se, informed the jury that defendant had fired his public defender and would be representing himself, and then instructed the trial attorney to remain at counsel table as standby counsel. State v. Castillo, 110 N.M. 54, 791 P.2d 808 (Ct. App. 1990), cert. denied, 110 N.M. 44, 791 P.2d 798 (1990).

Reappointment of counsel. — When a defendant requests the court to reappoint counsel, the court should apply the following factors: (1) the defendant’s prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation; (2) the reasons set forth for the request; (3) the length and stage of the proceedings; (4) disruption or delay which reasonably might be expected to ensue from the granting of the motion; and (5) the likelihood of the defendant’s effectiveness in defending against the charges if required to continue to act as defendant’s own attorney. State v. Archuleta, 2012-NMCA-007, 269 P.3d 924, cert. denied, 2011-NMCERT-012.

Where defendant, who was initially represented by counsel, requested that defendant be allowed to appear pro se; the trial court thoroughly and adequately advised defendant of the risks of self-representation and defendant understood the risks; defendant had the benefit of previously appointed counsel who assisted defendant before defendant appeared pro se; months later, defendant moved to reappoint counsel on the day before trial; defendant did not articulate why defendant needed additional assistance to prepare a defense; the case was a routine stolen property matter and defendant never expressed any concern regarding the nature or complexity of the case; and reappointing counsel would have caused the court and the prosecution significant

inconvenience, the court did not abuse its discretion in denying defendant's motion. State v. Archuleta, 2012-NMCA-007, 269 P.3d 924, cert. denied, 2011-NMCERT-012.

Refusal to permit counsel to argue point. — On charge that buyer under conditional sales contract unlawfully obtained possession of automobile valued at more than $100, refusal to permit accused's counsel to argue whether such value had been established by evidence violated accused's constitutional right to representation by counsel and statutory right to be heard before jury by an attorney. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941).

No right to counsel when motion groundless. — Where the motion for post-conviction relief is completely groundless, the trial court need not appoint counsel to represent defendant in connection with the motion. State v. Sanchez, 78 N.M. 25, 420 P.2d 786 (Ct. App. 1966).

Right to counsel when substantial issue raised. — Counsel was not required to be appointed to represent defendant in connection with his post-conviction motion until a factual basis was alleged which raised a substantial issue. State v. Barefield, 80 N.M. 265, 454 P.2d 279 (Ct. App. 1969).

Determination of whether right has been denied. — The obligation of the state court trial judge to fully safeguard the right to counsel has been stated many times by the United States supreme court. That court has stated that no hard and fast rule may be promulgated whereby it can be determined that a defendant's constitutional right to due process of law has been infringed. Rather, this determination must turn on the particular facts of each case, the circumstances present, which shall include consideration of the background, training, experience and conduct of the defendant. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Denial of right does not invalidate subsequent proceedings. — Where for six days after his arrest defendant was interrogated from time to time by officials but gave no statement and was not allowed to retain or consult with an attorney, defendant was denied his constitutional right to counsel during the first six days after his arrest. However, the denial of a naked constitutional right does not invalidate all subsequent proceedings nor necessarily prevent an accused from acting voluntarily in such proceedings, and where defendant subsequently retained counsel and pleaded guilty upon his advice, the plea was held to be voluntarily given. Murillo v. Cox, 360 F.2d 29 (10th Cir. 1966).

Failure to advise defendant of right to counsel. — Where failure of the police to advise the petitioner of his right to counsel or of his right to remain silent prior to interrogation of him was not shown to have been prejudicial to him at the trial, and no statement was in fact made nor was any testimony offered at the trial concerning any statement asserted to have been made by him, and there was nothing to indicate that the officers may have obtained evidence of any nature as a result of petitioner's

statements, then the denial of a naked constitutional right does not invalidate all subsequent proceedings. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

It is always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to his right to remain silent and to assistance of counsel, and when the issue is raised in an admissibility hearing it is for the court to objectively determine whether in the circumstances of the case the words were sufficient to convey the required warning. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Where no prejudice results from failure to assign counsel. — Failure to assign counsel to represent defendant before the magistrate or at his arraignment did not abridge defendant's constitutional rights where no prejudice was shown. Gantar v. Cox, 74 N.M. 526, 395 P.2d 354 (1964).

The absence of counsel at arraignment, the lack of a specific waiver by defendant, or the failure of the judge to specifically advise the defendant of his right to have appointed counsel at the arraignment does not amount to reversible error absent a showing of prejudice. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Where there was no evidence that the circumstances surrounding the arrest, the fact that the defendant had been in jail overnight without arraignment or the fact that he had no lawyer, in any way rendered his statement involuntary and as the trial court ruled, as a matter of law, that the confession was voluntary before submitting it to the jury under proper instructions requiring the jury to consider any questions concerning whether it was voluntary, defendant's constitutional rights were not abridged. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971), overruled by State v. Victorian, 84 N.M. 491, 505 P.2d 436 (1973).

Where defendant was given a hearing to ascertain if his confession was in fact involuntary on his Rule 93, N.M.R. Civ. P. motion (see now Rule 5-802 NMRA), (only applied to post-conviction proceedings prior to September 1, 1975) and the trial court found the statement or confession was voluntary, the fact that he was not furnished counsel prior to giving the statement is not a basis for setting aside his conviction. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Reference in testimony to exercise of right to counsel. — Defendant's argument that if the exercise of defendant's right to counsel lacked significant probative value any reference to the exercise of the right had an intolerable prejudicial impact requiring reversal was without merit since the relevant question is whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has burdened or will burden the exercise of the constitutional right. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Where the state elicited the fact that defendant engaged in constitutionally protected conduct (having a lawyer present at a lineup) only to show the fairness of the lineup procedure, defendant was not harmed by testimony that defendant had a right to counsel, and the trial court properly denied his motion for a mistrial. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Statement admissible though advice to right of counsel not given. — Trial court did not err in allowing admission of evidence of incriminating statement without prior showing of evidence that at the time of the claimed admission the defendant had been fully advised of his right to advice of legal counsel and his right not to be compelled to testify against himself where the statement was voluntarily made by defendant after he was arrested and released on bond, but was no longer in custody or being questioned, and where such statement was obtained neither surreptitiously nor by threat or promise. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Inadvertent or accidental out-of-court identification was not illegal and inadmissible even though defendant, at that time, was without an attorney, was not advised of his right to an attorney and did not waive this right. State v. Samora, 83 N.M. 222, 490 P.2d 480 (Ct. App. 1971).

2. WAIVER OF RIGHT TO COUNSEL.

Failure to object to lack of counsel. — Where defendant, with counsel, proceeded to trial without raising the issue of lack of counsel at arraignment or failure of the trial judge to advise defendant of his right to counsel, defendant waived the claimed error. Under such circumstances, court of appeals was not presuming waiver from a silent record, because the waiver appeared affirmatively. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Failure to object constitutes waiver of defects in proceedings. — Appellant could not complain of deprivation of constitutional rights when he was provided with competent counsel in the district court before arraignment, was allowed to preserve his right to object to any prior denial of rights, and then went to trial without raising the issue of prior failure to provide counsel. By so proceeding, he effectively waived his right to object to prior defects in the proceedings. State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (1966).

Vacillation by defendant may constitute waiver. — When an indigent defendant vacillates as to whether he desires to act pro se or have the services of court-appointed counsel, his vacillation may constitute a waiver of his right to self-representation. State v. Lewis, 104 N.M. 677, 726 P.2d 354 (Ct. App. 1986).

Effect of guilty plea. — By pleading guilty the defendant admits the acts well pleaded in the charge, waives all defenses other than that the indictment or information charges no offense, and waives the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury

trial, right to counsel subsequent to guilty plea and right to remain silent. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

Defendant, who voluntarily pleaded guilty, was not entitled to a post-conviction hearing under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions before September 1, 1975), for the purpose of determining whether or not the state obtained evidence, which warranted the filing of the complaint, as a result of a claimed questioning of him contrary to his constitutional rights to remain silent and to the aid of counsel. State v. Brewster, 78 N.M. 760, 438 P.2d 170 (1968).

Waiver of right to counsel. — Where officer knew that defendant had counsel and interviewed defendant without giving counsel an opportunity to be present, the officer's conduct was disapproved, but that did not make defendant's statement inadmissible if he intelligently waived the right to have counsel present. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled by State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Where a defendant, old enough to act intelligently, dismissed his attorney following advice from relatives and friends and thereafter entered a plea of guilty, fact that he was disappointed in severity of his sentence was insufficient for setting it aside. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943), 149 A.L.R. 1394.

Defendant charged with murder who had competent legal assistance from time shortly following his arrest until a day or two before sentence, when he discharged counsel, was not denied due process when shortly thereafter he withdrew his plea of not guilty and pleaded guilty to second-degree murder. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943), 149 A.L.R. 1394.

It may be assumed that a defendant, who had assistance of counsel for three months prior to pleading guilty to second-degree murder, knew of his constitutional right to counsel and had been advised concerning other important rights and details concerning his defense. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943), 149 A.L.R. 1394.

The exercise of the right to assistance of counsel is subject to the necessities of sound judicial administration; and the right may be waived if the defendant knows what he is doing and his choice is made with eyes open. Where defendant consistently asked for continuances and fired one counsel after another, the defendant had a full understanding of his right to counsel and deliberately discharged both his appointed counsel and his retained counsel with his eyes wide open. The right to counsel may not be used to play "a cat and mouse game" with the court, and by his actions the defendant waived his right to counsel. Leino v. United States, 338 F.2d 154 (10th Cir. 1964).

Where defendant voluntarily and knowingly waived his right to the aid of counsel at the time he made and signed the confession, and there is no evidence in the record from which it can be said that defendant was illiterate, inexperienced or otherwise not of

normal intelligence, nor that his will was overborne in any respect by the officers, and he was adequately warned, the conclusion that he was fully aware of his right to aid of counsel and waived the right is clearly supportable. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Accused may waive right to counsel provided that he has competent and intelligent knowledge as to his right. State v. Garcia, 47 N.M. 319, 142 P.2d 552 (1943), 149 A.L.R. 1394.

Advising a defendant of technical defenses which, as a layman, he could not reasonably be expected to understand would contribute nothing in arriving at an intelligent and understanding waiver of his right to counsel. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Failure of district judge to explain any possible defenses to criminal charges does not preclude a valid waiver of right to counsel. State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967).

Defendant's understanding of the advice concerning appointment of counsel is an item to be considered on the issue of waiver of those rights, but that understanding is to be considered with all the other evidence on the question. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

Court's obligation to make sure that the waiver of right to counsel is valid, and is predicated upon a meaningful decision of the accused, does not require any particular ritual or form of questioning. State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967).

No hard and fast rule can be laid down as to what must be stated in each case in order to adequately explain an accused's rights before permitting him to waive counsel. Each case must be decided on its own peculiar facts which shall include consideration of the background, education, training, experience and conduct of the accused and should proceed as long and as thoroughly as the circumstances demand. State v. Montler, 85 N.M. 60, 509 P.2d 252 (1973).

The trial judge, to assure that a defendant's waiver of counsel is intelligently and understandingly made, must investigate to the end that there can be no question about the waiver, which should include an explanation of the charge, the punishment provided by law, any possible defenses to the charge or circumstances in mitigation thereof and explain all other facts of the case essential for the accused to have a complete understanding. Cranford v. Rodriguez, 373 F.2d 22 (10th Cir. 1967).

When a defendant expressly waives his right to counsel, he is not entitled to claim that he was denied the right. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

Burden of proof for enhanced sentence. — Once a defendant makes a prima facie showing, challenging the validity of his prior uncounseled convictions, the burden shifts

to the state to establish by a preponderance of the evidence that the conviction was not obtained in violation of defendant's constitutional rights. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), cert. denied, 111 N.M. 529, 807 P.2d 227 (1991), overruled by State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Burden of establishing waiver of right to counsel. — Claims that the state's burden of establishing a waiver of right to counsel is not met where there is a conflict in the evidence is not the law, since it is for the trial court to weigh the evidentiary conflicts. State v. Briggs, 81 N.M. 581, 469 P.2d 730 (Ct. App. 1970).

Where upon the first interview defendant expressly declined to make any statement, then a second or further interview was not barred, but there was imposed upon the prosecution a "heavy burden" to establish that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to the aid of counsel. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Waiver of counsel at interrogation. — Where defendant accompanied a police officer to the police station for questioning about the death of defendant’s infant child; defendant was given Miranda warnings in full and signed a waiver of rights form; after defendant had been questioned for some time by the officer, defendant asserted the right to counsel and the officer stopped questioning defendant and left the room; after defendant had been left in the interview room for approximately one hour, defendant knocked on the door and asked to speak to the officer; defendant told the officer that defendant had changed defendant’s mind about wanting an attorney; the officer reminded defendant that defendant had invoked the right to counsel; and defendant then made an incriminating statement, defendant willingly and freely waived the previously invoked right to counsel. State v. Quinones, 2011-NMCA-018, 149 N.M. 294, 248 P.3d 336, cert. denied, 2011-NMCERT-001, 150 N.M. 559, 263 P.3d 901.

Interrogation must end once the right to counsel is invoked. — Officers must scrupulously honor a suspect’s right to counsel, once invoked, by ending the interrogation, so in a murder investigation, where the defendant made clear that he wanted the assistance of a lawyer and that he did not have anything to say to the officers, but where the investigating officers, instead of immediately terminating the interrogation, showed the defendant his bible to keep the defendant talking in hopes that he would make incriminating statements, and tried to convince the defendant to waive his rights and tell the officers what happened, the officers violated the defendant’s constitutional rights. State v. Madonda, 2016-NMSC-022.

Defendant will not be presumed to have waived right to counsel at arraignment if the record is silent as to waiver. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Burden on defendant to show that waiver not effective. — The burden is upon appellant to show that his waiver of right to counsel was not intelligently and understandingly made. State v. Gonzales, 77 N.M. 583, 425 P.2d 810 (1967).

Where the accused is found to have expressly waived counsel, the burden falls upon him, in a later federal habeas corpus proceeding, to show by a preponderance of the evidence that his acquiescence was not sufficiently, understandingly and intelligently made to amount to an effective waiver. Bortmess v. Rodriguez, 375 F.2d 113 (10th Cir. 1967).

B. EFFECTIVE REPRESENTATION.

Representing a mistrial as the only remedy for failure to find an interpreter for a juror in need of assistance. — Where, after voir dire, a juror informed the court that the juror did not understand the proceedings because English was not the juror's first language and needed an interpreter; defense counsel told the court that it was too late to obtain an interpreter and requested a mistrial; the court dismissed the juror for cause; and defendant claimed that defense counsel was ineffective in advising the court that it was too late to find an interpreter and in representing that a mistrial was the only appropriate remedy, defendant failed to establish a prima facie case of ineffective assistance of counsel. State v. Jim, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Presumption of ineffective assistance of counsel. — The conclusive presumption of ineffective assistance of counsel established in State v. Duran, 1986-NMCA-125, 105 N.M. 231, 731 P.2d 374 applies to appeals from a de novo trial in district court following a conviction in magistrate or municipal court. State v. Cannon, 2014-NMCA-058, cert. denied, 2014-NMCERT-006.

Where defendant was convicted of aggravated DWI by a jury in magistrate court; defendant timely appealed the conviction to district court and filed a demand for a jury trial; the district court denied defendant's request for a jury trial; at a bench trial, the district court found defendant guilty of DWI; and defendant filed an untimely notice of appeal with the district court, defense counsel was conclusively presumed to be ineffective. State v. Cannon, 2014-NMCA-058, cert. denied, 2014-NMCERT-006.

Consideration of claim of ineffective assistance of counsel without an evidentiary hearing. — Although the court is reluctant to consider an ineffective assistance of counsel claim on appeal without an evidentiary hearing, the court generally does not demand preservation of the issue, because effective assistance of counsel is a fundamental right. Depending on the adequacy of the record, the court may either dismiss or remand an ineffective assistance of counsel claim to allow for further development of the issue before the trial court. However, if the record is sufficiently developed, the court can rule on the issue without further inquiry by the trial court. Garcia v. State, 2010-NMSC-023, 148 N.M. 414, 237 P.3d 716.

Failure to correctly advise defendant of the possible sentence resulting from a guilty plea. — Where defendant was charged with the offense of intentional child abuse resulting in death; the child, who was 17 months of age, died in 2007; defendant was never charged with negligent child abuse resulting in death; and defendant entered a plea of guilty based on defense counsel's erroneous advise that negligent and

intentional child abuse resulting in death are both first degree felonies carrying a 30-year prison sentence and that defendant could be convicted and sentenced as a first degree felon even if the death of the child was an accident; because the relevant statutes and case law provided that negligent child abuse resulting in death required proof of criminal negligence, conviction of intentional child abuse resulting in the death of a child under the age of 12 was a noncapital felony, which carried a sentence of life imprisonment; and because defendant could have avoided conviction altogether by successfully arguing that if defendant caused the child's death, defendant did so negligently and not intentionally, defendant's guilty plea was not knowing and voluntary due to ineffective assistance of counsel; and because there was a reasonable probability that, given the state's evidence against defendant, defendant would have chosen to go to trial had defendant received adequate advise; and because defense counsel's misunderstanding of defendant's potential sentence prevented defense counsel from competently negotiating a plea agreement, defense counsel's deficient performance prejudiced defendant and defendant should be allowed to withdraw the guilty plea. Garcia v. State, 2010-NMSC-023, 148 N.M. 414, 237 P.3d 716.

Failure to protect a defendant's constitutional rights creates a presumption of ineffective assistance of counsel. — Defendant established a prima facie factual basis to support a hearing regarding whether his trial counsel was ineffective by failing to sufficiently assert and preserve defendant's right to a speedy trial under the sixth amendment, where defendant's trial counsel never asserted defendant's right to a speedy trial, pro forma or otherwise, where defendant did not acquiesce with any of his trial counsel's actions to postpone trial, where there was nothing in the record indicating that it was reasonable or necessary for trial counsel to disregard defendant's constitutional right to a speedy trial or fail to assert that right for nearly four years in his case, and where the evidence established that defendant's speedy trial claim had merit and a reasonable probability of success. The failure to protect a defendant's constitutional rights will create the presumption of ineffective assistance of counsel when counsel's action is critical to the preservation of the right itself. State v. Castro, 2016-NMCA-085, cert. granted, 2016-NMCERT-____.

Failure to interview the prosecution's medical experts and to retain a defense medical expert. — Where defendant was convicted of child abuse resulting in great bodily harm; the state presented the expert testimony of three doctors who were critical to proving the state's case; defense counsel possessed a list of the state's witnesses and a means of contacting the witnesses; defense counsel did not interview the state's medical experts and failed to consult with or retain a defense expert; and expert testimony was necessary to establish a factual basis for defendant's theory that the child's injuries were not new injuries that occurred during the time the child was with defendant, but stemmed from reinjury or exacerbated existing injuries, defendant established a prima facie case of ineffective assistance of counsel, because defense counsel acted unreasonably and without a strategic or tactical basis which prejudiced defendant's ability to present defendant's theory through effective cross-examination of the state's experts and to explain defendant's theory through defendant's own expert witness. State v. Aragon, 2009-NMCA-102, 147 N.M. 26, 216 P.3d 276.

Failure to present evidence of victim's past inability to stand trial. — Where defense counsel failed to present evidence that the shooting victim, who testified as a prosecution witness, had, in the past, been found incompetent to stand trial in several criminal cases in which the victim was a defendant; defense counsel tried to impeach the victim's credibility by using the victim's prior inconsistent statements, the victim's history of drug addiction and impaired mental state at the time of the crime for which defendant was being prosecuted, and the victim's felony convictions for burglary and forgery; and defense counsel's cross examination showed that the victim was unstable and defensive and was unable to focus during the cross examination, defense counsel's handling of the victim's credibility during cross examination was objectively reasonable. State v. Tafoya, 2012-NMSC-030, 285 P.3d 604.

Failure to file motion in mitigation of sentence. — Where defendant was convicted of child abuse resulting in great bodily harm; at the sentencing hearing, the district court spoke about the difficulties surrounding mandatory sentencing provisions and the unfairness that stemmed from removing the trial court's discretion; the court imposed the mandatory sentence; defense counsel suggested that the trial court could reduce the sentence based on mitigating factors; the court expressed doubt, but stated that if defense counsel filed a motion, the court would consider it; and defense counsel failed to file the motion, defendant failed to establish a prima facie case of ineffective assistance of counsel because defendant failed to establish that defendant was prejudiced by defense counsel's failure to file the motion. State v. Aragon, 2009-NMCA-102, 147 N.M. 26, 216 P.3d 276.

Counsel was not rendered ineffective by rulings of the court. — Where defendant was convicted of child abuse resulting in great bodily harm; the court denied a defense motion to exclude the testimony of two of the state's medical expert witnesses that were disclosed late by the state and any reference to certain medical records that the state had disclosed seven days earlier; the motion was filed three days before trial; defense counsel had two months to interview the witnesses before trial; the delay in securing interviews of the state witnesses was not late notice, but defense counsel's inaction and disagreement with the state about who was responsible for arranging the interviews; the state disclosed the medical records to defendant as soon as the state received the records; the records were as accessible to defense counsel as they were to the state; and the records pertained to the child's condition at the time of trial and not at or before the time the child was injured, the trial court's denial of the motion did not render defendant's counsel ineffective. State v. Aragon, 2009-NMCA-102, 147 N.M. 26, 216 P.3d 276.

Prima facie case for ineffective assistance of counsel. — Where defendant was charged with criminal sexual penetration of a child under thirteen; defense counsel did not object to clearly prejudicial hearsay testimony of the state's expert regarding defendant as the perpetrator and to character witnesses who testified to the truthfulness of the child; defense counsel did not retain and use or have available a defense expert to question or rebut the state's expert testimony as to the expert's qualifications to testify as a therapist with a master's degree, to diagnose adjustment disorder, to

conclude that adjustment disorder was consistent with sexual abuse, and to testify in a manner that would lead the jury to believe that there was sexual abuse and that it caused adjustment disorder; defense counsel asked the state's expert to give an opinion on causation; and defense counsel allowed damaging pretrial statements of the child, defendant established a prima facie case for ineffective assistance of counsel. State v. Dylan J., 2009-NMCA-027, 145 N.M. 719, 204 P.3d 44.

Failure to make a prima facie case of ineffective assistance of counsel. — A prima facie case for ineffective assistance of counsel is not made if there is a plausible, rational strategy or tactic to explain the counsel's conduct, and on direct appeal, the record is frequently insufficient to establish whether an action taken by defense counsel was reasonable or if it caused prejudice. State v. Astorga, 2015-NMSC-007.

Where defendant was charged with the murder of a law enforcement officer, defense counsel's failure to litigate evidence of a recording of the officer's call to dispatch, just prior to his murder, in which the officer may have indicated that he terminated all contact with defendant, it is impossible to determine, on direct appeal, whether defense counsel's performance fell below an objective standard of reasonableness without affording the State an opportunity to question defense counsel about whether he chose not to litigate the evidence as a matter of trial strategy, and it cannot be said to a reasonable probability that litigating the dispatch call would have produced a different result; defendant has failed to make a prima facie case of ineffective assistance of counsel. State v. Astorga, 2015-NMSC-007.

Failure to prove prima facie case for ineffective assistance of counsel. — Where the state sought to revoke defendant's probation; defense counsel met with defendant for the first time in court on the day of defendant's probation violation hearing and informed defendant that the state was offering defendant a seven-year sentence to resolve the case; defendant indicated that defendant did not want to accept the state's offer; the district court revoked defendant's probation because defendant failed to report to defendant's probation officer, failed to provide documentation that defendant received morphine while hospitalized, and missed counseling appointments; defense counsel admitted that defense counsel was ineffective in failing to properly advise defendant about the state's plea offer and proceeding to the hearing shortly after meeting defendant; defendant claimed that counsel was ineffective for failing to speak to the probation officer or drug counselor and failing to investigate defendant's claim that defendant had been hospitalized and could not report to the probation officer; and there was no evidentiary hearing on defendant's claims, defendant failed to present a prima facie case of ineffective assistance of counsel. State v. Cordova, 2014-NMCA-081, cert. denied, 2014-NMCERT-007.

Where defendant was charged with intentional child abuse; defense counsel did not call an expert witness on shaken baby syndrome; the record disclosed only that defense counsel made unsuccessful attempts to interview and consult with experts; the record did not contain any information regarding defense counsel's efforts with respect to any potential defense experts; and there was nothing in the record to indicate that a defense

expert was actually available to testify in support of defendant and what the content of the expert's testimony would have been, defendant did not make a prima facie case of ineffectiveness of counsel. State v. Quinones, 2011-NMCA-018, 149 N.M. 294, 248 P.3d 336, cert. denied, 2011-NMCERT-001, 150 N.M. 559, 263 P.3d 901.

Ineffective representation caused by court ruling. — Where the defendant was declared indigent; the defendant's family raised enough funds to retain private counsel to represent him; neither the defendant nor his family could afford to pay for expert witnesses that were essential to his defense; and given no alternative, defense counsel tried unsuccessfully to withdraw in favor of the public defender so that, with public financing, the defendant could put on an adequate defense, the court, by refusing to allow counsel to withdraw or to otherwise order that the necessary services be provided, put the defendant in the position of receiving ineffective assistance of counsel. State v. Schoonmaker, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105, rev'g 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302.

Failure to give advice about Sex Offender Registration and Notification Act registration requirements. — In a sex crimes case, defense counsel's performance is deficient when defense counsel fails to advise the defendant that a plea of guilty or no contest will almost certainly result in the defendant having to register as a sex offender under the Sex Offender Registration and Notification Act, and under such circumstances the defendant does not enter a plea knowingingly and voluntarily, and if the omission is prejudicial to the defendant, the district court must allow the defendant to withdraw the plea. State v. Edwards, 2007-NMCA-043, 141 N.M. 491, 157 P.3d 56, cert. quashed, 2007 NMCERT-008, 142 N.M. 436, 166 P.3d 1090.

Failure to advise a defendant of collateral sex offender registration requirements is per se deficient performance. — A defense attorney's failure to advise a defendant entering into a plea which requires Sex Offender Registration and Notification Act registration of that consequence is per se deficient performance under the first prong of the Strickland test. State v. Trammell, 2016-NMSC-030, *rev'g* 2014-NMCA-107, 336 P.3d 977.

Where defendant, who stole a truck, unaware that there was a twelve-year-old boy in the back seat, pleaded guilty to false imprisonment of a minor, which at the time was a sex offense requiring registration under the Sex Offender Registration and Notification Act (SORNA), and where, prior to defendant's plea, defense counsel failed to advise defendant of the SORNA registration consequences of his guilty plea, defendant's attorney's performance was per se deficient, because the failure to advise a defendant of collateral SORNA registration requirements has been a well-established prerequisite to the effective assistance of counsel when arranging a plea agreement, but defendant's claim of ineffective assistance of counsel failed, because defendant failed to establish a reasonable probability that, but for defense counsel's unprofessional errors, he would not have pleaded guilty and instead gone to trial, based on defendant's testimony that had he been advised that he was pleading to a sex offense, he would have tried to negotiate a different plea agreement, the fact that defendant received some benefits by

accepting the plea, and that the state had a strong case against defendant. State v. Trammell, 2016-NMSC-030, *rev'g* 2014-NMCA-107, 336 P.3d 977.

The rule of State v. Edwards, 2007-NMCA-043, applies retroactively. — The rule of State v. Edwards, 2007-NMCA-043, 141 N.M. 491, 157 P.3d 56, that defense counsel has an affirmative duty to advise a defendant charged with a sex offense that a guilty plea or no contest will almost certainly subject the defendant to the registration requirements of the Sex Offender Registration and Notification Act, was not a new rule of procedure and applies retroactively. State v. Trammell, 2014-NMCA-107, cert. granted, 2014-NMCERT-010.

Failure to give advise about Sex Offender Registration and Notification Act requirements. — Where defendant, who stole a vehicle, discovered after driving away that a minor child was in the vehicle; in 2004, defendant pleaded guilty to false imprisonment of a minor which at the time was a sex offense that required registration under the Sex Offender Registration and Notification Act; defense counsel did not inform defendant that as a consequence of defendant's plea, defendant would be subject to sex offender registration or conditions of sex offender probation and parole; and defendant was not informed that defendant was subject to sex offender registration until defendant was released from custody, defendant's assistance of counsel was ineffective and defendant should be allowed to withdraw the guilty plea. State v. Trammell, 2014-NMCA-107, cert. granted, 2014-NMCERT-010.

Failure to advise defendant of changes in sex offender registration law. — Where defendant, after pleading guilty to child solicitation by electronic device in 2014, claimed that he received ineffective assistance of counsel because his attorney failed to advise him that, due to a change in the law while his case was pending, sex offender registration for convictions of child solicitation by electronic device was required after, but not before July 1, 2013, defendant failed to demonstrate that the fact that his case persisted beyond July 1, 2013 was caused by his attorney's failure to advise him of his opportunity for amnesty from sex offender registration, and defendant failed to demonstrate that he suffered prejudice as a result of his attorney's failure to advise him of the legislature's sex offender registration amnesty window for pending child solicitation charges resolved between the enactment of the new law and its effective date. State v. Morgan, 2016-NMCA-089, cert. denied, 2016-NMCERT-____.

Advice regarding immigration consequences of a guilty plea. — The general rule that criminal defense counsel, after determining the immigration status of the defendant, must read and interpret federal immigration law and specifically advise the defendant whether a guilty plea will result in almost certain deportation requires at a minimum that the attorney advise the defendant of the specific federal statutes that apply to the specific charges contained in a proposed plea agreement and of consequences, as shown in the statutes, that will flow from a plea of guilty. State v. Carlos, 2006-NMCA-141, 140 N.M. 688, 147 P.3d 897.

Inadequate advice regarding immigration consequences of guilty plea. — Where defendant pleaded guilty to possession of eight ounces or more of marijuana, a fourth degree felony and a deportable offense under federal law, defense counsel's advice that it was a possibility that defendant might be deported was misleading and deficient, because given the provisions of the applicable federal provisions, defendant's deportation was a virtual certainty given the crime to which she was pleading, and the district court could have reasonably concluded that defendant's lack of understanding was due to her counsel's failure to explain the consequences to her well or clearly enough, and that defendant was prejudiced by the deficient performance. State v. Gutierrez, 2016-NMCA-077.

Retroactive application of State v. Paredaz. — The holding of State v. Paredaz, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799, that a criminal defense attorney who represents a noncitizen client must advise that client of the specific immigration consequences of pleading guilty to pending charges and that an attorney's failure to do so will be ineffective assistance of counsel if the client was prejudiced applies retroactively to 1990 when New Mexico rules and forms were amended to require attorneys to advise their client about the possible immigration consequences of a guilty plea. Ramirez v. State, 2014-NMSC-023, aff'g 2012-NMCA-057, 278 P.3d 569.

Where in 1997, petitioner pleaded guilty to misdemeanors; in 2009, petitioner learned that the guilty pleas rendered petitioner inadmissible to the United States; petitioner's attorney never advised petitioner about any immigration consequences of petitioner's guilty pleas; had petitioner known about the immigration consequences of petitioner's guilty pleas, petitioner would not have pleaded guilty; and petitioner sought to vacate the guilty pleas on the basis of ineffective assistance of counsel, petitioner had a viable claim for withdrawal of petitioner's 1997 guilty pleas based on ineffective assistance of counsel. Ramirez v. State, 2014-NMSC-023, aff'g 2012-NMCA-057, 278 P.3d 569.

Attorney's affirmative duty to inform defendants of immigration consequences. — A defendant's attorney has an affirmative duty to determine the specific risk of deportation for his client and to inform his client of the possible impact on his immigration status if he accepts a guilty plea, and the law requires a definite prediction as to the likelihood of deportation based on the crimes to which a defendant intends to plead and the crimes listed in federal law for which a defendant can be deported; if an attorney provides incorrect advice or misrepresents the consequences of a plea to his client, his performance is objectively unreasonable. State v. Tejeiro, 2015-NMCA-029.

Where defendant's trial counsel failed to inform defendant of the risk of deportation or other possible immigration consequences, trial counsel's performance fell below the objective standard of reasonableness. State v. Tejeiro, 2015-NMCA-029.

Prejudice, in the context of a motion to withdraw a guilty plea. — To establish prejudice in an ineffective assistance of counsel claim in the context of a motion to withdraw a guilty plea, a petitioner need only demonstrate a reasonable probability that he would have rejected the plea as offered had he known of the immigration

consequences, and show that a decision to reject the plea bargain would have been rational under the circumstances. State v. Tejeiro, 2015-NMCA-029.

Where defendant who was convicted of a trafficking charge claimed ineffective assistance of counsel and moved to withdraw his guilty plea after learning that he could be removed from the United States, the evidence of defendant's pre-conviction efforts to inform the trial court of defendant's circumstances and his intent to avoid deportation, his post-conviction behavior in moving to withdraw his guilty plea after learning of his deportation consequences, along with evidence of the harshness of immigration consequences, established a reasonable probability that defendant would have rejected the plea offer if his attorney had competently advised him. State v. Tejeiro, 2015-NMCA-029.

Court's warning regarding immigration consequences does not cure prejudice caused by defense counsel's deficient representation. — A judicial warning of immigration consequences, by itself, cannot cure the prejudice caused by a defense attorney's deficient performance in failing to advise his client of the specific immigration consequences of a guilty plea. State v. Favela, 2015-NMSC-005, *aff'g* 2013-NMCA-102, 311 P.3d 1213.

Where defendant, who was a Mexican national, pleaded guilty to aggravated battery and driving under the influence of alcohol, defense counsel failed to advise defendant of the specific immigration consequences of his guilty plea; at defendant's plea and disposition hearing, the trial court warned defendant that a conviction would result in defendant's deportation, and defendant responded that he understood the consequences of pleading guilty, the trial court's warning was not sufficient to cure the prejudice caused by defense counsel's deficient performance because the judge cannot gauge the defendant's priorities, counsel defendants on how to proceed, or use the information strategically in negotiating pleas. State v. Favela, 2015-NMSC-005, *aff'g* 2013-NMCA-102, 311 P.3d 1213.

Court's warning regarding immigration consequences does not cure counsel's deficient representation. — A court's warning or advisement to a defendant regarding possible immigration consequences of accepting a plea is never, by itself, sufficient to cure the prejudice that results from ineffective assistance of counsel in failing to advise the defendant of the immigration consequences of a plea. State v. Favela, 2013-NMCA-102, cert. granted, 2013-NMCERT-010.

Where defendant, who was a Mexican national, pleaded guilty to aggravated battery and driving under the influence; defense counsel failed to advise defendant of the immigration consequences of pleading guilty; at defendant's plea and disposition hearing, the trial court warned defendant that a conviction would result in defendant's deportation; and defendant responded that defendant understood the consequences of a guilty plea, the trial court's warning was not sufficient to cure defense counsel's deficient representation. State v. Favela, 2013-NMCA-102, cert. granted, 2013-NMCERT-010.

Court inquiry into defense counsel's advisement concerning immigration consequences of a plea. — In cases in which the district court is presented with a guilty or nolo contendere plea by a foreign national, the district court should inquire of both the defendant and the defendant's lawyer the extent to which the immigration consequences of accepting the plea were discussed (1) before the defendant signed the plea agreement, (2) before the defendant entered a plea in court, and (3) before sentencing. State v. Favela, 2013-NMCA-102, cert. granted, 2013-NMCERT-010.

Failure of attorney to advise defendant of all possible defenses is no basis for post-conviction claim of incompetency of counsel. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Where the trial court's finding that petitioner did not discuss with his attorney any fight between himself and the deceased was supported by substantial evidence, there could have been no obligation on or reason for the attorney to discuss with defendant the matter of self-defense, and petitioner could not claim any violation of any constitutional or other right which would make his conviction on a voluntary plea of guilty subject to collateral attack under Rule 93, N.M.R. Civ. P. (now Rule 5-802 NMRA). Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Failure to raise violation of the Religious Freedom Restoration Act as a defense. — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of criminal sexual contact of a minor and of contributing to the delinquency of a minor based on unclothed experiences with two teenage children; defendant claimed that because defendant believed that touching the children was a religious act, defendant was not guilty of committing a crime; defendant claimed that defense counsel's failure to raise a defense based specifically on the Religious Freedom Restoration Act, 28-33-1 NMSA 1978 et seq., constituted ineffective assistance of counsel; defense counsel frequently raised defendant's religion as a defense; and the criminal sexual contact of a minor statute, 30-9-13 NMSA 1978, and the contributing to the delinquency of a minor statute, 30-6-3 NMSA 1978, do not violate the Religious Freedom Restoration Act, because the statutes are laws of general applicability that do not directly discriminate against or among religions, the protection of minors from sexual abuse and delinquency is a compelling governmental interest, and the statutes are the least restrictive means of achieving the government's goal of protecting minors from sexual abuse and delinquency, defense counsel was not ineffective for failing to raise a defense based specifically on the Religious Freedom Restoration Act. State v. Bent, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

Failure to advise defendant of all possible penalties. — Where defendant's original attorney testified at the hearing on the motion for post-conviction relief that he had advised defendant of all possible penalties for the offense charged, the trial court found defendant had been fully advised by competent counsel as to the penalties, and this finding was supported by substantial evidence. The mere fact that defendant testified the attorney had told him the penalty would be imprisonment for a period of from three to 25 years, which was contrary to the attorney's testimony, did not make the attorney's

testimony insubstantial and thereby provide a basis for post-conviction relief on grounds of incompetency of counsel. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Though the accused should ordinarily be advised of the maximum and minimum sentences which can be imposed as well as the consecutive sentence possibilities, failure to do so does not preclude a valid waiver of right to counsel where defendant clearly understood that consecutive sentences could be imposed. State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967).

Failure to advise defendant that judge could be precluded from sitting. — Defendant's post-conviction claim that he was denied adequate counsel because his attorney had failed to advise him that the judge who resentenced him could be precluded from sitting since that judge had been district attorney at original criminal proceedings was without merit where defendant was aware that the judge had been prosecuting attorney, had been so informed by both the judge and his attorneys, and had specifically consented to the judge. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

Failure to advise of right to appeal a conviction and sentence on a guilty plea, standing by itself, does not establish incompetency of counsel. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

Failure to file a timely notice of appeal. — A criminal defendant, whose counsel files an untimely notice of appeal from the district court’s on-record review of a metropolitan court decision, is entitled to a conclusive presumption of ineffective assistance of counsel. State v. Vigil, 2014-NMCA-096, cert. granted, 2014-NMCERT-009.

Presumption of ineffective assistance of counsel for failure to timely file a notice of appeal still applies after four years of inaction. — The first and foremost reason that the passage of time alone does not prevent application of the presumption of ineffective assistance of counsel for failure to timely file a notice of appeal is based on the fundamental premise that the rights implicated by the presumption, the right to appeal and the right to effective assistance of counsel, protect a defendant’s fundamental liberty interest in a fair trial. This interest is no less significant after the deadline for appeal than it was before the deadline, nor does it diminish over time, and therefore where defendant appealed from a stipulated corrected sentence that was entered four years after the original judgment and sentence, after which defendant filed neither an appeal nor an affidavit of waiver, the presumption of ineffective assistance of counsel for failure to file a timely notice of appeal still applied. State v. Dorais, 2016-NMCA-049, cert. denied, 2016-NMCERT-____.

Representation to which defendant is entitled is something more than a pro forma appearance. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

Sham, farce or mockery of justice need not be shown. — The "sham and mockery" standard is rejected in favor of the "reasonably competent" test. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

"Reasonably competent" test. — The sixth amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

In considering a claim of ineffective assistance, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. State v. Dean, 105 N.M. 5, 727 P.2d 944 (Ct. App. 1986), cert. denied, 104 N.M. 702, 726 P.2d 856 (1986).

Adoption of the "reasonably competent" standard does not represent a departure from case law in this state but merely formalizes a trend found in assistance of counsel cases over the last several years. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

Even though courts have articulated the "sham and mockery" test, they have been in fact applying the more stringent "reasonably competent" test, and formal adoption of this standard represents only a change in name. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

Court decides whether counsel to be discharged. — Whether the dissatisfaction of an indigent accused with his court-appointed counsel warrants discharge of that counsel and appointment of new counsel is for the trial court, in its discretion, to decide. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Burden of sustaining charge of inadequate representation rests upon defendant. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Where appellant attributed his conviction to the incompetence of his court-appointed counsel, the burden of sustaining this charge was on the appellant. State v. Hudman, 78 N.M. 370, 431 P.2d 748 (1967).

Burden of showing prejudice from defective performance. — Even if counsel's performance was constitutionally defective, the defendant must still affirmatively prove prejudice. In other words, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Brazeal, 109 N.M. 752, 790 P.2d 1033 (Ct. App. 1990), cert. denied, 109 N.M. 631, 788 P.2d 931 (1990).

Claim that appointed counsel was not experienced in criminal practice and therefore defendant was not given adequate assistance of counsel was too general. Where the claim was not supported by specific factual allegation, it did not provide a

basis for post-conviction relief. State v. Hibbs, 79 N.M. 709, 448 P.2d 815 (Ct. App. 1968).

Where defendant's assertions as to competency of counsel are conclusions, they fall far short of raising an issue that the trial was a mockery of justice, a sham or a farce. Pavlich v. State, 79 N.M. 473, 444 P.2d 984 (1968).

A claim of "failing to properly represent" is too general to raise an issue as to incompetency of counsel. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Claim that defendant's counsel was grossly incompetent is too vague to provide a basis for relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Defendant's statement, "I don't believe my lawyer did his level best to win the case," raised no issue as to whether the proceedings leading to defendant's conviction were a sham, farce or mockery, and thus presented no issue for review. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Counsel must be given a wide latitude in his representation of his client. State v. Helker, 88 N.M. 650, 545 P.2d 1028 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976), cert. denied, 429 U.S. 836, 97 S. Ct. 103, 50 L. Ed. 2d 102 (1976).

Reviewing court will not second guess counsel. — On questions of whether counsel effectively represented his client, reviewing court will not attempt to second guess trial counsel on appeal. State v. Helker, 88 N.M. 650, 545 P.2d 1028 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976), cert. denied, 429 U.S. 836, 97 S. Ct. 103, 50 L. Ed. 2d 102 (1976).

Bad tactics or strategy do not amount to incompetency. — If in fact the trial attorney, by introducing the portion of the transcript, used bad tactics or improvident strategy, this did not amount to incompetency or ineffective assistance of counsel. State v. Garcia, 85 N.M. 460, 513 P.2d 394 (1973).

Bad tactics and improvident strategy do not necessarily amount to ineffective assistance of counsel. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

Bad tactics and improvident strategy do not necessarily amount to ineffective assistance of counsel, and defendant is denied effective assistance of counsel only where the trial considered as a whole was a mockery of justice, a sham or farce. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Ineffectiveness of counsel is not established just because a case is lost. Neither is it established when there is a showing of improvident strategy, bad tactics, mistake, carelessness or inexperience on the part of counsel. State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969); State v. Baca, 80 N.M. 488, 458 P.2d 92 (Ct. App. 1969).

Where, with knowledge of the inadmissibility, no objection was made to evidence concerning the polygraph test and the results, this was seen as a trial tactic which, in hindsight, was unsuccessful and not as a failure of the trial court to protect defendant's rights, a denial of a fair trial, or a denial of due process. The admission of the evidence which could have been excluded was the decision of defendant and his counsel. State v. Chavez, 80 N.M. 786, 461 P.2d 919 (Ct. App. 1969).

Failure to call a witness does not establish inadequacy and provides no basis for relief as the decision to call or not to call a witness is a matter of trial tactics and strategy within the control of counsel. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971).

Failure to call expert witness, without specifying what expert would testify to, did not establish a prima facie case of ineffective assistance of counsel. — Where defendant was convicted of voluntary manslaughter, his claim that his attorney was ineffective for failing to call an expert witness, to provide expert testimony on the trajectory of bullets, to corroborate the theory of self-defense failed to establish a prima facie case of ineffective assistance of counsel, because defendant's claim that the expert could have provided useful information, without specifying what the expert would have testified to, did not demonstrate that his counsel's errors prejudiced the defense such that there was a reasonable probability that the outcome of the trial would have been different. State v. Hobbs, 2016-NMCA-006, cert. denied, 2015-NMCERT-012.

Amount of time counsel spends with client. — The competence of court-appointed counsel at probation revocation hearings could not be determined by the amount of time he spent or failed to spend with the accused. Such an allegation, therefore, did not constitute grounds upon which relief could be granted under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions made before September 1, 1975). The failure of an attorney to confer with his client, without more, could not establish the incompetence of that attorney. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Sufficient time to prepare. — Defendant's trial counsel had adequate time to prepare for trial, which resulted in an adequate defense effort where counsel who represented defendant at trial testified in the evidentiary hearing that he was appointed prior to and represented appellant at his arraignment, that he conferred with defendant at length on several occasions, conducted other investigations, and filed a variety of motions prior to the trial, and that even with additional time he could not have afforded a better defense for defendant. Campos v. Baker, 442 F.2d 331 (10th Cir. 1971).

Prejudice not presumed from short time for preparation. — Prejudice would not be presumed solely from the short time (one week) between the appointment of defense counsel and the trial, where, although a week was a short time to prepare for a felony case, it was a simple case, defense counsel was experienced, and defense counsel was greatly aided in preparation by the prior work on the case. State v. Brazeal, 109

N.M. 752, 790 P.2d 1033 (Ct. App. 1990), cert. denied, 109 N.M. 631, 788 P.2d 931 (1990).

Lack of preparedness due to defendant. — Defendant's claim that his right to "prepared" counsel was denied him by the terms the trial court attached to a continuance was without merit where the record showed any lack of preparedness on the part of defendant's counsel was due to defendant's dilatoriness. In such circumstances, it could not be said that the trial court abused its discretion. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Refusal of counsel to discuss certain issues with defendant. — Defendant's plea of guilty could not have been freely, intelligently or knowingly given if court-appointed counsel did not and would not discuss any of such possible issues as police reports, potential defenses or relevant statutory requirements, with defendant. The items, considered together and in relation to the "facts" related in the police report, show manifest error was committed by the trial court in not permitting defendant to withdraw his plea of guilty. The issue is whether under the foregoing undisputed facts, defendant had effective assistance of counsel. State v. Kincheloe, 87 N.M. 34, 528 P.2d 893 (Ct. App. 1974).

Fact that counsel advises defendant to plead guilty does not establish incompetence and does not provide a basis for post-conviction relief. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct. App. 1970).

The bare fact that counsel advised appellant to plead guilty to one count rather than to risk the consequences of conviction of other charges does not indicate ineffectual representation by counsel. The plea by the appellant may well have been most beneficial to him. State v. Pavlich, 80 N.M. 747, 461 P.2d 229 (1969).

Defense counsel's failure to interview key witnesses prior to trial, to file appropriate motions, interpose timely and proper objections, submit appropriate instructions, and failure to move to exclude the hearsay statement of defendant's husband, all combined to deprive defendant of a fair trial. State v. Crislip, 109 N.M. 351, 785 P.2d 262 (Ct. App. 1989), cert. denied, 109 N.M. 262, 784 P.2d 1005 (1989).

Failure of counsel to allege perjury. — Defendant's post-conviction claim that his counsel was incompetent because he failed to bring "perjury" to the attention of the trial judge, apart from the vagueness of the claim, was insufficient in that it is not contended that counsel knew of the alleged "perjury." State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Failure of counsel to check on legality of arrest. — Post-conviction claim of incompetency of counsel based on defense attorney's failure to have subpoenas issued for witnesses and to check on the circumstances of the allegedly illegal arrest was insufficient to raise an issue as to incompetency of counsel. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Advice concerning testimony by defendant. — Defense counsel's asking defendant to provide an innocent explanation for the use of a straw and razor blade, in the face of evidence that those items are frequently used as drug paraphernalia and uncontroverted stitpulated testimony that residue on the items taken from defendant's residence tested positive for cocaine, constituted prima facie ineffective assistance of counsel. State v. Richardson, 114 N.M. 725, 845 P.2d 819 (Ct. App. 1992), cert. denied, 114 N.M. 550, 844 P.2d 130 (1992), abrogated, Allen v. LeMaster, 2012-NMSC-001, 267 P.3d 806.

Representation of two defendants by same attorney is not per se a violation of constitutional guarantees of effective counsel. Only where a court requires an attorney to represent two codefendants whose interests are in conflict is one of the defendants' sixth amendment right to effective counsel denied. State v. Hernandez, 100 N.M. 501, 672 P.2d 1132 (1983).

Separate counsel for codefendant. — Appellant's claim of prejudice arising from the failure of the trial court to assign separate counsel for him was found to be lacking in merit because no conflict of interest is shown to exist between appellant and his codefendant. State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), cert. denied, 80 N.M. 33, 450 P.2d 633 (1969).

Where defendant and codefendant were tried jointly and convicted for murder, defendant's assertion on motion for post-conviction relief that he was denied effective counsel on basis of conflict between interests of the two defendants due to fact that codefendant did actual killing while defendant was convicted of aiding and abetting, and due to variations in their confessions concerning details of the crime, was without merit where trial court's unattached finding was that confessions were consistent with one another, and that information concerning defendant in the confession of codefendant were cumulative only, and did not prejudice defendant. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Joint representation of defendants is not inherent error; it is error only if there was a conflict of interest or if prejudice resulted. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Conflict of interest on part of attorney. — A defendant is denied his constitutional right of effective assistance of counsel if his attorney represents conflicting interests without a disclosure of such facts and a waiver of the conflict by the defendant and when ineffective assistance of counsel is alleged due to conflict of interest between the defendant and the victim, an appellate court will assume prejudice and none need be shown or proved. State v. Aguilar, 87 N.M. 503, 536 P.2d 263 (Ct. App. 1975).

Constitutional rights violated only by actual conflict of interest, not mere possibility. — The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his constitutional rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v.

Robinson, 99 N.M. 674, 662 P.2d 1341 (1983), cert. denied, 464 U.S. 851, 104 S. Ct. 161, 78 L. Ed. 2d 147 (1983); State v. Hernandez, 100 N.M. 501, 672 P.2d 1132 (1983).

Indigent defendants are deprived of the effective assistance of counsel when counsel for the defendants are inadequately compensated. State v. Young, 2007-NMSC-058, 143 N.M. 1, 172 P.3d 138.

Constitutionality of flat-fee arrangements for indigent defense contract counsel. — Where the New Mexico legislature, in its 2015 general appropriation to the law office of the public defender (LOPD), specifically provided that the appropriations to the public defender department shall not be used to pay hourly reimbursement rates to contract attorneys, the district court erred in entering an order requiring the LOPD to pay contract counsel hourly rates and the state to provide additional funding, nullifying the legislature's prohibition of the payment of hourly rates to indigent defense contract counsel as violative of the federal and state constitutions, based on its conclusion that the flat-fee rates paid to contract counsel by the LOPD contravene the constitutional guarantee of effective assistance of counsel; an indigent criminal defendant who is represented by contract counsel who is compensated under a flat-fee arrangement does not necessarily receive ineffective assistance of counsel. Kerr v. Parsons, 2016-NMSC-028.

Indigent defendant represented by pro bono counsel is constitutionally entitled to public funding for expert witness fees, provided that the expert witness meets all of the standards promulgated by the public defender department. Constitutional right to be provided with basic tools of an adequate defense is not contingent upon the appointment of counsel by the public defender department. State v. Brown, 2006-NMSC-023, 139 N.M. 466, 134 P.3d 753, rev'g 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073.

A district court has no authority to order the public defender department to pay expert witness fees from unspecified state funds where counsel represent the indigent defendant pro bono for no fee. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, rev'd, 2006-NMSC-023, 139 N.M. 466, 134 P.3d 753.

Payment for expert witness. — Defendants who select their own counsel must take all the consequences that go along with that selection, and one such consequence is that public funding will not be available for expert witness services. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, rev'd, 2006-NMSC-023, 139 N.M. 466, 134 P.3d 753.

Adequate representation by one attorney sufficient. — Court would not inquire as to the number of attorneys necessary to represent a criminal defendant but as to whether he was effectively represented, and where defendant's trial counsel adequately cross-examined the state's witnesses, including its expert witnesses, and offered witnesses to attack the credibility of state's main witness, defendant was adequately represented. State v. Hernandez, 115 N.M. 6, 846 P.2d 312 (1993).

Special assistant attorney general acting as defense attorney. — Convicted defendant did receive the effective assistance of counsel in fact and did receive the assistance of competent counsel as a matter of law, even though defense counsel was engaged as a special assistant attorney general of New Mexico, where the court found that representation of defendant, both in pretrial proceedings and during the trial, was entirely adequate and professionally competent, and said that statute prohibiting any assistants of the attorney general from acting as defense counsel would be modified in special cases to avoid injustice, and that it was well within the trial court's discretion to refuse strict application and to treat the rule as having been modified to "avoid injustice." Lucero v. United States, 335 F.2d 912 (10th Cir. 1964).

A failure to object does not establish ineffective assistance of counsel. — Where defense counsel did not object to reference in testimony to defendant's impending court date, prior jail time, and previous altercations with the victim and the state presented strong evidence of defendant's guilt of the charges, defendant failed to establish a prima facie case of ineffective assistance of counsel based on the failure to object. State v. Sotelo, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

A failure to object does not establish ineffective counsel. State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969); State v. Rubio, 110 N.M. 605, 798 P.2d 206 (Ct. App.), cert. denied, 110 N.M. 641, 798 P.2d 591 (1990).

Counsel's failure to object at trial to a prior conviction did not amount to ineffective assistance, since defendant did not show counsel's performance to be deficient or prejudicial. United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir.), cert. denied, 510 U.S. 927, 114 S. Ct. 334, 126 L. Ed. 2d 279 (1993).

The defense counsel's failure to object to the trial court's failure to instruct the jury on the element of mens rea in the defendant's case did not constitute ineffective assistance of counsel since the defendant's mens rea with respect to felony murder was conclusively established by his own testimony and was fully corroborated by the state's evidence; there was no evidence presented by either side that cast doubt on the fact that the defendant fired his rifle at the intended robbery victim, knowing his act created a strong probability of death or great bodily harm; the outcome of the trial would most assuredly have been the same had the jury been instructed on the omitted mens rea element. State v. Lopez, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017.

Failure to object to search and seizure. — Where police, who were looking for an intoxicated driver, found defendant's car, which matched the description of the car of the intoxicated driver, parked in front of a house; the police entered the house, found defendant sleeping on a couch and administered field sobriety tests and a breath test which indicated that defendant was intoxicated; defendant was arrested for aggravated DWI; because defense counsel did not file a motion to suppress the evidence obtained as a result of the officers' warrantless entry into the house, defendant claimed that defense counsel provided inadequate assistance of counsel; and defendant was not the owner of the house or a guest and did not have permission to be in the house,

defendant failed to establish a prima facie claim of ineffective assistance of counsel because the police entry into the other person's house did not violate defendant's own reasonable expectation of privacy in the house. State v. Crocco, 2014-NMSC-016, *rev'g* 2013-NMCA-033, 296 P.3d 1224.

Failure to object to unconstitutional search and seizure. — Where police officers, who were attempting to locate an individual who had driven a car into the front yard of a residence, entered the residence, and left when confronted by the owner of the residence; the officers found the car parked in front of another residence; the front door of the residence was unlocked and the officers entered the residence without a warrant, announced that they were police officers, and found the defendant passed out on a couch; defendant exhibited signs of extreme intoxication; the officers administered field sobriety tests and breath tests which showed that defendant was intoxicated; defendant was convicted of aggravated driving while intoxicated; the record did not support a warrantless entry based on the emergency assistance doctrine, because the officers did not have reasonable grounds to believe that there was an emergency that required their immediate assistance to protect life or property, the officers had no basis for believing that any one was inside the house or that delaying entry would endanger a person's life or health, and other than the location of defendant's car in front of the residence, the officers had no reasonable basis to believe that defendant was in the residence; and defense counsel did not move to suppress the evidence gained from the warrantless entry, defendant made a prima facie showing of ineffective assistance of counsel based on defense counsel's failure to move to suppress the evidence gained from the warrantless search and defendant suffered prejudice as a result. State v. Crocco, 2013-NMCA-033, 296 P.3d 1224, *rev'd*, 2014-NMSC-016.

Failure to move to suppress evidence seized during illegal search. — Where police officers responded to a disturbance at defendant's apartment; the officers knocked on defendant's door and asked to come into the apartment to speak with defendant about some concerns the officers had; defendant allowed the officers to enter the apartment to speak to defendant; when the officers became aware that another person was in a bedroom, an officer went down the hallway to clear the bedroom and observed cocaine in the kitchen; the officers arrested defendant for possession of cocaine and drug paraphernalia; defense counsel moved to suppress the evidence on the grounds that the police entered defendant's apartment without consent or a warrant and that the officers lacked probable cause to conduct the knock-and-talk procedure; defense counsel did not move for suppression on the ground that by entering the hallway and bedroom, the officers exceeded the scope of defendant's consent to enter the apartment; and defendant's argument regarding the scope of consent was not preserved, defendant made a prima facie showing of ineffective assistance of counsel for failing to move to suppress the evidence based on the scope of defendant's consent to search the apartment. State v. Mosley, 2014-NMCA-094.

Failure to move to suppress drug evidence seized during an unconstitutional search. — Where defendant was charged with possession of controlled substances and possession of drug paraphernalia, defense counsel's failure to move to suppress

drugs and drug paraphernalia fell below the standard of a reasonably competent attorney where the evidence established that the arresting officer found drug paraphernalia in defendant's vehicle during a search of defendant's vehicle that did not fall within one of the recognized exceptions to the warrant requirement, and the evidence recovered was subject to suppression. Defendant made a prima facie case of ineffective assistance of counsel by showing that a reasonably competent attorney would have moved to suppress the evidence against him under established principles of New Mexico's search and seizure jurisprudence, and that he was prejudiced by trial counsel's deficient performance. State v. Howl, 2016-NMCA-084, cert. denied, 2016-NMCERT-____.

Failure to investigate lack-of-capacity defense. — Where defendant had a history of mental illness and refused to cooperate with defense counsel; upon motion of the prosecutor, the trial court ordered a psychological evaluation of defendant; and the evaluation did not determine defendant's ability to form the requisite intent to commit the charged offense, defense counsel had a duty to ascertain whether a defense of mental capacity was warranted, and if the defense was warranted, to present the defense at trial. State v. Lewis, 104 N.M. 677, 726 P.2d 354 (Ct. App. 1986).

Failure to request instruction. — The defendant in a prosecution for criminal sexual penetration was denied effective assistance of counsel where his trial counsel failed to request, and the trial court did not issue, an intoxication instruction, even though the evidence plainly would have been sufficient to require such an instruction, such an instruction would not have been inconsistent with the defense's "strategy" of arguing consent, and the absence of such an instruction was clearly prejudicial. Florez v. Williams, 281 F.3d 1136 (10th Cir. 2002), cert. denied, 537 U.S.1054, 123 S. Ct. 624, 154 L. Ed. 2d 532 (2002).

The defendant in a prosecution for criminal sexual penetration was denied effective assistance of counsel when his trial counsel failed to request lesser included offense instructions since it was unreasonable to rely on an unbelievable simple consent defense and there was a reasonable probability that the judge would have issued instructions on the lesser included offenses and that the jury would have convicted on those offenses. Florez v. Williams, 281 F.3d 1136 (10th Cir. 2002), cert. denied, 537 U.S. 1054, 123 S. Ct. 624, 154 L. Ed. 2d 532 (2002).

Failure to object to instruction. — Where there was evidence that defendant had consumed alcohol and marijuana; there was no evidence that defendant was intoxicated at the time defendant murdered the victim; and defendant's counsel did not request a voluntary intoxication instruction, but chose to pursue defendant's alibi-based defense rather than the contradictory voluntary intoxication defense, defendant's counsel did not render ineffective assistance of counsel on behalf of defendant. State v. Garcia, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

Failure to subpeona police officers. — Where defendant and another assailant broke into the home of the victim armed with metal bars or bats and defendant struck victim

with a metal bar; defendant's aggravated burglary conviction was supported by the testimony of the victim, the victim's spouse and the victim's child; the trial court excluded testimony from two police officers to the effect that damage done to the victim's back door had occurred prior to the night of the break-in; and defense counsel decided not to take steps to secure the testimony of the officers because defense counsel did not believe that the officer's testimony would make a difference in the case, defense counsel was not ineffective because the decision not to call the officers was a tactical decision. State v. Trujillo, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

Counsel who moves for mistrial following juror's prejudicial comment not deficient. — Defense counsel's performance was not deficient where, following a juror's comment in open court that the defendant should not be allowed close to a gun and shells, the attorney moved for a mistrial (though there was no proof that there was sufficient evidence to justify a mistrial) rather than asking the trial court to voir dire the juror or excuse the juror. State v. Price, 104 N.M. 703, 726 P.2d 857 (Ct. App. 1986), cert. quashed, 104 N.M. 702, 726 P.2d 856 (1986), modified, State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991).

Counsel on appeal must be active advocate, rather than a mere friend of the court assisting in a detached evaluation of appellant's claim. However, once counsel, in his professional judgment, finds a nonfrivolous issue and vigorously argues it, the federal constitutional right to effective assistance of counsel is satisfied. State v. Boyer, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985).

Illness of defendant's attorney. — Trial court's denial of defense counsel's motion for a continuance based on his illness was not a violation of defendant's right to effective representation absent proof that the condition compromised counsel's ability to provide effective representation on the day in question. State v. Aragon, 1999-NMCA-060, 127 N.M. 393, 981 P.2d 1211.

VII. RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES.

A. IN GENERAL.

Principles of confrontation clause analysis. — The following principles are essential to confrontation clause analysis: (1) an out-of-court statement that is both testimonial and offered to prove the truth of the matter asserted may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant; (2) a statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution; (3) when determining whether an out-of-court statement is testimonial, there is no meaningful distinction between factual observations and conclusions requiring skill and judgment; (4) even if a statement does not target a specific individual, the statement may still be testimonial; (5) the fact that an out-of-court statement is not inherently inculpatory does not make it non-testimonial; (6) the

confrontation clause is violated only if the testimonial statement is offered to prove the truth of the matter asserted; and (7) an out-of-court statement that is disclosed to the fact-finder as the basis for an expert's opinion is offered for the truth of the matter asserted and therefore, the declarant must testify at trial and be subject to cross-examination, or alternatively, must be unavailable, and the defendant must have had a prior opportunity to cross-examine the declarant. State v. Navarette, 2013-NMSC-003, 294 P.3d 435.

Autopsy reports are testimonial. — Autopsy reports regarding individuals who suffered a violent death are testimonial for purposes of confrontation clause analysis, because medical examiners are required by 24-11-8 NMSA 1978 to report their findings to the district attorney. State v. Navarette, 2013-NMSC-003, 294 P.3d 435.

Opinions of a pathologist based on the observation in an autopsy report performed by an non-testifying pathologist. — The confrontation clause precludes a forensic pathologist from relating subjective observations recorded in an autopsy report as a basis for the pathologist's trial opinions, when the pathologist neither participated in nor observed the autopsy performed on the decedent. State v. Navarette, 2013-NMSC-003, 294 P.3d 435.

Where defendant, who was a passenger in a parked vehicle, shot and killed the victim, who was leaning into the open driver's window; defendant was more than two feet from the victim; there was conflicting evidence as to whether defendant or the driver of the vehicle shot the victim; to assist the jury in determining who shot the victim, the state's expert witness was permitted to give an opinion, based on the observations recorded in the autopsy report, that the gun was not within two feet of the victim; the autopsy report was never offered into evidence; the witness testified that another pathologist had performed the autopsy as part of a homicide investigation and that the witness had neither participated in nor observed the pathologist perform the autopsy; the pathologist did not testify at trial; and defendant did not have a prior opportunity to cross-examine the pathologist, defendant's confrontation rights were violated because the witness related testimonial hearsay to the jury in support of the witness' opinions. State v. Navarette, 2013-NMSC-003, 294 P.3d 435.

Hearsay rule and the confrontation clause. — The hearsay rule and the confrontation clause are not co-extensive. The hearsay rule is intended to ensure that the jury is not exposed to unreliable evidence, even when the declarant testifies at trial and is subject to cross-examination. The confrontation clause guarantees the accused in a criminal trial the right to be confronted with the witnesses against the accused, regardless of how trustworthy the out-of-court statement may appear to be. State v. Mendez, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328, rev'g 2009-NMCA-060, 146 N.M. 409, 211 P.3d 206 and overruling in part State v. Ortega, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929.

Admission of a co-defendant's conviction violated the confrontation clause. — Where defendant was charged with accessory to murder and kidnapping and

conspiracy to murder and kidnap the victim; defendant's co-conspirators pled guilty or no contest to conspiracy to murder the victim in the same homicide underlying the charges against defendant; the trial court instructed the jury that without requiring testimony or other proof, the court had taken judicial notice of the co-conspirators' convictions and that the jury could accept the convictions as fact; and the co-conspirators did not testify at defendant's trial, the admission of the co-conspirators' convictions violated defendant's right to confront the witnesses against defendant. State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Testimony about the victim's death based on an autopsy report prepared by a non-testifying medical examiner. — Where the forensic pathologist who performed the autopsy on the victim was not available to testify at defendant's trial; the state qualified a substitute pathologist who was not present at the autopsy and did not prepare any of the autopsy records to testify as to the cause and manner of the victim's death; the substitute pathologist relied on the autopsy report, diagrams produced by the pathologist who performed the autopsy, medical reports, the field-investigator report, the toxicology report, photographs and x-rays taken during the autopsy, and photographs taken at the scene of the homicide; the substitute pathologist not rely on raw data to express an independent opinion, but essentially parroted the subjective statements of the pathologist who performed the autopsy, the district court erred in allowing testimony about the victim's autopsy from a witness who had no personal knowledge about the autopsy. State v. Sisneros, 2013-NMSC-049.

Testimony about an autopsy report prepared by a non-testifying medical examiner violated the defendant's right of confrontation. — Where the former supervisor of the medical examiner who prepared an autopsy report of the infant victim testified to the autopsy; the supervisor testified that the supervisor was testifying for the medical examiner, read directly some of the contents of the autopsy report to the jury, and testified to the medical examiner's observations and notations that were made during the autopsy; the statements in the autopsy report were testimonial; defendant did not have an opportunity to cross-examine the medical examiner prior to trial; and the State did not show that the medical examiner was unavailable as a witness, the admission of the autopsy report into evidence violated defendant's right to confrontation. State v. Jaramillo, 2012-NMCA-029, 272 P.3d 682, cert. denied, 2012-NMCERT-002.

Admission of testimony about a non-testifying medical examiner's autopsy report was not harmless error. — Where the trial court erroneously admitted an autopsy report of the infant victim based on the testimony of the former supervisor of the medical examiner who prepared the autopsy report; the autopsy report contained the signatures of four other medical examiners who had reviewed and confirmed the autopsy report; the cause and manner of death as human caused was critical; no other evidence could have proven that the victim's death was a homicide caused by defendant's abuse; and the credibility of the supervisor's testimony was bolstered by the autopsy report and the corroborative opinions of the four other medical examiners who signed the autopsy report, the erroneous admission of the autopsy report was not harmless error. State v. Jaramillo, 2012-NMCA-029, 272 P.3d 682, cert. denied, 2012-NMCERT-002.

Testimony about the victim's death based on an autopsy report prepared by a non-testifying medical examiner. — Allowing an expert to testify based on information in the autopsy report of another analyst, assuming the autopsy report itself is not introduced into evidence is not a per se violation of the confrontation clause. Until the expert testimony crosses the line from the formation of an independent opinion based on underlying raw data to a reliance on the conclusions and opinions of the author of the autopsy report or a mere parroting of the report's findings, the testimony is admissible subject to the rules of evidence. State v. Gonzales, 2012-NMCA-034, 274 P.3d 151.

Where the state called an expert witness to testify about the circumstances of the victim's death; the witness did not perform the autopsy on the victim or prepare the autopsy report; and the state told the court that the state did not intend to offer the autopsy report into evidence, that the witness would not rely on the conclusions or opinions of the forensic pathologist who prepared the autopsy report, and that the witness would rely on the witness's review of photographs of the body and other raw data, if the witness offered the witness' own opinions and conclusion as an expert witness and avoided parroting the testimonial statements of the forensic pathologist who prepared the autopsy report, then the witness' testimony would not run afoul of defendant's right to confrontation. State v. Gonzales, 2012-NMCA-034, 274 P.3d 151.

Testimony of supervising pathologist regarding autopsy. — Where defendant was charged with intentional child abuse resulting in the death of a child under the age of twelve; the court admitted the testimony of the supervising pathologist who did not actually perform the autopsy on the child; the supervising pathologist went through every feature of the autopsy with the forensic pathologist who performed the autopsy, including the microscopic exam, examination of the body and the injuries, and examination of all the photographs; the supervising pathologist participated in making the autopsy report findings; the autopsy report was not introduced into evidence; and the supervising pathologist's testimony included the supervising pathologist's own opinion reached after reviewing the records prepared with the assistance of the forensic pathologist, the supervising pathologist had sufficient personal knowledge to testify as to what the forsenic pathologist had discovered through the autopsy and the testimony of the supervising pathologist regarding the autopsy did not violate the confrontation clause. State v. Cabezuela, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

Testimony of participating pathologist regarding autopsy. — In defendant's felony murder trial, where the chief medical investigator who had personal knowledge of and participated in the autopsy and preparation of the autopsy findings, and reviewed and signed the autopsy report, it was not a violation of defendant's confrontation rights to allow the witness to testify about his own observations from his examination of the body, the wounds, and the bullet trajectories. State v. Marquez, 2016-NMSC-025.

Testimony of supervising pathologist regarding autopsy report. — Where expert in forensic pathology testified regarding the victim's autopsy in a murder trial, but only supervised and oversaw a trainee pathologist in the execution of the autopsy, defendant

was not denied his right to confront witnesses against him where the autopsy report was prepared in the expert's office under her direction and supervision, was reviewed, altered, and approved in accordance with her professional judgment, and was the product of her own independent participation in the autopsy, and thus testimony in connection to the autopsy report, including the opinions she rendered, was her own, was made under oath, and was subject to cross-examination. State v. Smith, 2016-NMSC-007.

Testimony concerning a forensic laboratory report. — Where the court admitted a forensic laboratory report that a substance was cocaine; the report was admitted into evidence through the testimony of a forensic chemist who did not conduct the tests underlying the report; the witness's testimony was an explanation regarding how the test was performed and the witness's approval of the testing chemist's results; there was nothing in the witness's testimony indicating that the witness relied on the witness's own analysis to arrive at the witness's own conclusions; the only other evidence that the substance was cocaine was the testimony of a police officer who performed a field test on the substance; and the state failed to prove the scientific reliability of the field test, the admission of the laboratory report and the witness's testimony regarding the testing chemist's opinion was error, the error was not harmless, and the error violated defendant's right of confrontation. State v. Delgado, 2010-NMCA-078, 148 N.M. 870, 242 P.3d 437, cert. denied, 2010-NMCERT-007.

Testimony and opinion based on raw data from infrared spectrophotometer. — Where police officers sent a substance that field tested as methamphetamine to the crime laboratory for testing; the forensic laboratory supervisor, who was a forensic scientist, reviewed the raw data produced by a spectrophotometer and testified that the substance was methamphetamine based on the supervisor's own analysis of the raw data; the laboratory analyst who placed the substance onto the spectrophotometer did not testify; and the state did not attempt to admit into evidence any declaration or conclusion of the laboratory analyst or any report of the testing process, defendant was not denied the right to confront the laboratory analyst because the laboratory analyst's activities did not come within the confrontation requirement and the supervisor testified to the supervisor's independent conclusion as to the nature of the substance based on the supervisor's analysis of the raw data and not upon any testimonial statement or conclusion of the laboratory analyst. State v. Huettl, 2013-NMCA-038, 305 P.3d 956, cert. granted, 2013-NMCERT-003.

Confrontation of witnesses at probation revocation hearings. — The right to confront and cross-examine witnesses at probation revocation hearings is guaranteed by the due process clause of the fourteenth amendment, not by the confrontation clause of the sixth amendment. State v. Guthrie, 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, rev'd, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

The right protected in probation revocations is not the sixth amendment right to confrontation, which is guaranteed every accused in a criminal trial, but rather the more generally worded right to due process of law secured by the fourteenth amendment and

a probationer is entitled to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation. State v. Guthrie, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, rev'g 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, and overruling State v. Phillips, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546.

The need-for-confrontation analysis in probation revocations is a spectrum that requires the trial court to focus on the relative need for confrontation to protect the truth-finding process and the substantial reliability of the evidence. If the need is significant and the court specifies the reasons why, then the witness must appear and be subject to confrontation, regardless of the reasons for the witness's absence. If the need for confrontation is not significant and the court specifies why, then it does not matter whether the witness is available or not. The end of the spectrum where there is good cause for not requiring confrontation, where live testimony and cross-examination has no utility to the fact-finding process, includes situations in which the state's evidence is uncontested, corroborated by other reliable evidence, and documented by a reliable source without a motive to fabricate and situations where an objective conclusion, a routine recording, or a negative fact, make the demeanor and credibility of the witness less relevant to the truth-finding process. The end of the spectrum where there is no good cause for not requiring confrontation, where the state's failure to produce the witness deprives the defendant of due process, includes situations where evidence is contested by the defendant, unsupported or contradicted, and its source has a motive to fabricate and situations where the evidence is about a subjective, judgment-based observation that is subject to inference and interpretation, and makes a conclusion that is central to the necessary proof that the defendant violated probation. State v. Guthrie, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, rev'g 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, and overruling State v. Phillips, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546.

Where defendant agreed to attend a residential treatment program as a condition of supervised probation; defendant failed to complete the treatment program; defendant's probation officer, who had filed the probation violation report, was not called to testify at the probation revocation hearing; the probation officer's supervisor, who was called to testify, referred to documents in defendant's probation file, including the probation violation report and a fax from the treatment center, to testify that defendant had not completed the treatment program; the supervisor had no personal knowledge about defendant or about the case, had never spoken to anyone from the treatment center and had not independently investigated the allegations against defendant; defendant did not contest the allegations or offer any evidence in mitigation; the fact of defendant's non-compliance with the condition of probation was established by the written statement from the treatment center; and the district judge's observation that defendant had been arrested in a county in which there was no residential treatment center corroborated the state's evidence that defendant had violated probation, the district judge had good cause for not allowing defendant to confront and cross-examine defendant's probation officer. State v. Guthrie, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904, rev'g 2009-

NMCA-036, 145 N.M. 761, 204 P.3d 1271, and overruling State v. Phillips, 2006-NMCA-001, 138 N.M. 730, 126 P.3d 546.

Admission of accomplice's interrogation statement. — Where the trial court granted the defendant's accomplice, who had invoked the accomplice's fifth amendment privilege against self-incrimination to avoid testifying at the defendant's trial, limited immunity which extended only to the accomplice's verification of the accuracy of the transcript of the accomplice's police interrogation statement, but did not cover the accomplice's answers to substantive questions about the events described in the statement, the admission into evidence of the accomplice's statement denied the defendant the constitutional right to confront the witness against the defendant. State v. Zamarripa, 2009-NMSC-001, 145 N.M. 402, 199 P.3d 846.

Breath alcohol test certification. — Evidence of the certification process for breath alcoholic content machines and the actual certification of the machine used to test the breath alcohol content of the defendant is preliminary factual evidence to establish a foundation for the admission of evidence to be used at trial and defendant was not denied his right to confront witnesses against him where the state did not offer the testimony of the person who had actual knowledge of the certification process of breath alcohol content machines and the actual certification of the machine that was used to test the defendant's breath alcohol content. State v. Granillo-Marcias, 2008-NMCA-021, 143 N.M 455, 176 P.3d 1187, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 672.

Rebuttal witness. — Where a prosecution rebuttal witness was not named on the state's witness list, the rebuttal witness was not discovered as a witness until the same day she was presented as a witness, the trial court allowed counsel for the defendant and the co-defendant to interview the rebuttal witness before she was called as a witness, and the rebuttal witness testified about statements made by the co-defendant and said nothing about the defendant, the trial court did not abuse its discretion when it allowed the rebuttal witness to testify for the state. State v. Dominguez, 2007-NMSC-060, 142 N.M. 811, 171 P.3d 750.

Telephonic evidence. — The mere inconvenience to a witness in a criminal case is not a sufficient ground to permit the witness to testify by telephone. State v. Almanza, 2007-NMCA-073, 141 N.M. 751, 160 P.3d 932.

Purpose of the confrontation clause. — The central purpose of the Confrontation Clause, to ensure the reliability of evidence, is served by the combined effect of physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. A defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. State v. Thomas, 2016-NMSC-024.

Inconvenience to the witness is not sufficient reason to dispense with right to confront accusatory witness. — In defendant's first-degree murder trial, where a police forensic scientist, living outside of New Mexico, testified via Skype, there was nothing in the record to demonstrate that the use of two-way video was necessary to further an important public policy, where the district court did not conduct an evidentiary hearing or enter any findings on the issue, the admission of remote testimony violated defendant's sixth amendment right to confrontation. Moreover, the constitutional error was not harmless because there was no reasonable probability that the testimony of the absent forensic analyst did not influence the verdict, where the expert witness was the only analyst who had actually tested the DNA samples, and she testified to the results of the measurements she performed, and the DNA profiles were offered as the sole evidence that implicated defendant in the crime. State v. Thomas, 2016-NMSC-024.

Witness' medical condition was insufficient to justify video conference. — Where, at defendant's trial for murder and tampering with evidence, defendant's parent was allowed to testify using Skype; and based on a letter from the parent's doctor that the parent was suffering from severe stress, anxiety and depression and was physically and psychologically unable to travel, the district court found that it was medically necessary for the parent to testify via video, the doctor's letter was inadequate as a matter of law to support the conclusion that the parent could not testify in person. State v. Schwartz, 2014-NMCA-066, cert. denied, 2014-NMCERT-006.

Evidence by video conference. — Where defendant lived with the victim for approximately one and a half months before the victim disappeared; two months later, the victim's decomposed body was discovered wrapped in a blue air mattress and sheets, and covered with a mattress in an alley approximately 500 feet from defendant's apartment; at defendant's trial for murder and tampering with evidence, two forensic scientists and defendant's parent were allowed to testify using Skype; the forensic scientists testified about DNA analysis that resulted in the identification of the body and provided a possible link between the body and defendant, which were essential elements of the state's case; and the parent testified about defendant's relationship with the victim and that the parent had purchased and sent defendant a blue air mattress, a set of sheets and a blanket, and authenticated letters from defendant acknowledging receipt of the air mattress and stating that the victim had gone to Mexico, the district court erred in permitting the witnesses to testify via video and the error was not harmless. State v. Schwartz, 2014-NMCA-066, cert. denied, 2014-NMCERT-006.

Evidence by video conference. — Where, at defendant's trial for driving while under the influence, the district court allowed an analyst to testify via two-way video conference as to the conduct and results of a blood test on the grounds that to appear in person, the analyst would have to drive seven hours, resulting in the state laboratory division being shorthanded and the analyst inconvenienced in the analyst's work, and the analyst provided the only testimony proving that defendant had alcohol in defendant's system, the error was the district court did not establish the requisite necessity for allowing video testimony in lieu of live testimony with the result that defendant's rights under the confrontation clause were violated and not harmless,

because there was a reasonable possibility that the results of defendant's blood test influenced the jury's decision to convict defendant. State v. Smith, 2013-NMCA-081, cert. denied, 2013-NMCERT-006.

Testimony by video conference. — Where a witness from the scientific laboratories division was necessary to prove that the substance defendant transferred was marijuana; the trial occurred in Aztec, New Mexico; the witness worked in Santa Fe, New Mexico; and for the convenience of the witness, the court allowed the witness to testify by video conference without giving defendant an opportunity to respond to the state's motion or to be heard, defendant was denied the constitutional right to confront a critical witness against defendant. State v. Chung, 2012-NMCA-049, 290 P.3d 269, cert. quashed, 2013-NMCERT-003, 300 P.3d 1182.

Officer's observations of victim during interview. — Although the taped interview of the victim was testimonial and inadmissible, the testimony of the officer who was present during the interview regarding his observations of the victim during the interview was admissible. State v. Romero, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694, aff'g 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842.

Police case agent not required to testify. — Where defendant was charged with criminal sexual contact of a minor because defendant caused the ten-year-old victim to touch defendant's unclothed penis while in bed; a police case agent interviewed all witnesses in the case and was responsible for the entire investigation; the state listed the agent as a witness and subpoenaed the agent for trial; the state did not call the agent as a witness or use information from the agent's investigation to prove its case; defendant did not subpoena the agent; and the trial court did not require the agent to testify, the trial court did not violate defendant's confrontation rights or due process rights by not requiring the agent to testify. State v. Trujillo, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008, 296 P.3d 491.

Forfeiture by wrongdoing. — The prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness. State v. Romero, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694, aff'g 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842.

Intent to silence. — The state must prove intent to silence a witness in all cases, including the murder of a witness, where the state contends that defendant forfeited all of his confrontation clause objections under the doctrine of forfeiture by wrongdoing. State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

Right of confrontation is fundamental. — It is fundamental that a person accused of crime is entitled to be confronted with the witnesses against him as well as the right to cross-examine said witnesses. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968).

There can be no question that every defendant has the right, subject to certain exceptions, to be confronted by the witnesses who testify against him and to cross-examine such witnesses. State v. Trimble, 78 N.M. 346, 431 P.2d 488 (1967).

Right of cross-examination is a valuable one which cannot be so restricted as to deprive party entirely of opportunity to test witness's credibility. State v. Martin, 53 N.M. 413, 209 P.2d 525 (1949).

Every person accused of a crime has the constitutionally protected right to face his accuser. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled by Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

Right of confrontation is essential to fair trial. — The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Right of confrontation must be interpreted in light of existing law. — A person's constitutional right to face his accuser in a criminal prosecution must be interpreted in light of the law as it existed at the time it was adopted. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled by Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

Extent of right of confrontation. — The right of confrontation extends only to the right to be confronted with witnesses against the accused. State v. Roybal, 107 N.M. 309, 756 P.2d 1204 (Ct. App. 1988), overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Violation of right to confrontation was harmless error. — Where the trial court erroneously admitted the testimony of a forensic pathologist who, prior to trial, consulted a forensic odontologist for his expert opinion regarding bite marks on the decedent, and who testified at trial, based on the forensic odontologist’s opinions, that one of the bite marks was more likely than not an adult human bite mark, another injury was suggestive of an adult human bite mark, and a third injury was probably not a bite mark; the testimony based on the odontologist’s opinions deprived the defendant of her constitutional right to confront witnesses against her. The error, however, was harmless because the forensic pathologist’s testimony about the apparent bite marks was a very minor portion of her overall testimony, and her testimony about bite marks did not relate to the cause and manner of decedent’s death which was blunt force trauma and traumatic brain injury, not from injuries resulting in bite marks; moreover, defendant admitted during her police interview that she had bitten the decedent. The bite mark testimony, though rising to the level of constitutional error, had little, if any, effect on the verdict and there was no reasonable possibility that the error contributed to the verdict. State v. Cabezuela, 2015-NMSC-016.

Infringement of the right of confrontation cannot be harmless error. — It is a right so basic to a fair trial that its infraction can never be treated as harmless error. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Right of confrontation is equal to right against self-incrimination. — One person's right against self-incrimination and another's right to be confronted with the witnesses against him cannot be balanced. Both rights stand on an equal footing, and neither is more important than the other. State v. Curtis, 87 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

Confrontation is right, not rule of evidence. — The right of confrontation is not a mere rule of evidence or procedure but a constitutional right of primary importance in the truth-finding process, because a more effective method of eliciting the truth than effective cross-examination has not yet been devised. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Right to ascertain what testimony will be. — Defendant has constitutional right to compulsory process to obtain witnesses in his behalf. He has also right, personally or by attorney, to ascertain what their testimony will be. State v. Cooley, 19 N.M. 91, 140 P. 1111 (1914).

Right applies to preliminary examination. — When the constitution grants to an accused the right to be confronted by the witness against him, it grants that right at all of the criminal proceedings, including the preliminary examination. Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789 (1969), overruled by State v. Lopez, 2013-NMSC-047.

No right to confront witness who is not "against" defendant. — The constitutional guarantee of confrontation extends only to the right "to be confronted with the witnesses against him." Where witness was not a witness against defendant and nothing stated by witness to the police in any way could be construed as connecting defendant with the crime, trial court did not err in not allowing defendant to confront witness at trial. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968).

Where defense witnesses are beyond jurisdiction of court, but state has admitted that they would testify to facts stated in motion for continuance, if present, overruling the motion is not a denial of rights under this section. State v. Nieto, 34 N.M. 232, 280 P. 248 (1929).

Prior testimony of witness usually inadmissible. — Unless there has been a waiver of the right of confrontation, or it has been shown that the witness is unavailable after due diligence has been used by the state to attempt to produce him at trial, admission of a witness's prior recorded testimony violates a defendant's right of confrontation. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Prior sexual conduct. — Even though evidence of a victim's prior sexual conduct may be admissible to show bias, motive to fabricate or for other purposes consistent with the constitutional right of confrontation, the trial court did not err in rejecting such evidence where defendant failed to show that it was material and relevant, and that its probative value equaled or outweighed its inflammatory nature. State v. Johnson, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869, rev'g 121 N.M. 77, 908 P.2d 770 (Ct. App. 1995).

De novo review is the proper standard of review for analyzing cases implicating both the rape shield rule and the Confrontation Clause. State v. Montoya, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Analysis of cases implicating both the rape shield rule and the Confrontation Clause. — When a defendant makes a claim that the rape shield law bars evidence implicating the defendant's confrontation rights, the district court must first identify a theory of relevance implicating the defendant's constitutional right to confrontation and then weigh whether evidence elicited under that theory would be more prejudicial than probative. State v. Montoya, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Application of rape shield rule violated Confrontation Clause. — Where defendant and the victim, who had a sexual relationship for two years, began arguing about a telephone call that defendant had received; during the argument, defendant indicated to the victim that defendant wanted sex; defendant and the victim went into defendant's bedroom where defendant got on top of the victim and tried to remove the victim's clothes; the victim told the defendant "no" several times and pushed and kicked defendant until defendant stopped making sexual advances; defendant was indicted for kidnapping with intent to commit a sexual offense; the district court refused to allow defendant on cross-examination to ask the victim whether the victim and defendant had a long-standing sexual relationship and whether they had a history of engaging in sex after an argument as "make-up sex" to resolve disputes for the purpose of showing that defendant never intended to sexually assault the victim but was pursuing consensual "make-up sex" as defendant and the victim had done after arguments in the past; the victim was the sole material witness against defendant and the only witness who could provide testimony necessary for defendant's theory of the case; and the evidence was relevant to defendant's defense and would not have had a prejudicial impact on the victim, the district court's ruling violated defendant's confrontation right because it denied defendant an opportunity to present a full and fair defense. State v. Montoya, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Application of the rape shield rule did not implicate the confrontation clause. — Where defendant and the victim had been arguing; defendant wanted to have sex with the victim, but the victim refused; defendant got on top of the victim and attempted to remove the victim's clothing; the victim pushed and kicked defendant until defendant stopped; defendant did not force the victim to have sex; defendant was charged with kidnapping and attempt to commit criminal sexual penetration; to show that defendant did not have specific intent to commit the crimes, defendant sought to introduce evidence of the sexual history of the victim and defendant to show that the defendant's

intent and the victim's belief was that defendant was trying to have sex to "make-up" just as they had done in the past; the district court precluded defendant from inquiring into the party's sexual history; defendant claimed that defendant's confrontation rights had been violated because defendant was unable to challenge an opposing version of the facts, the district court's exclusion of the evidence did not implicate or violate the confrontation clause, because defendant sought not to confront the victim, but to use the victim's testimony as evidence unrelated to the truth or accuracy of the victim's testimony. State v. Montoya, 2013-NMCA-076, cert. granted, 2012-NMCERT-005.

Telephone company records used for verification. — Telephone company records used only to verify that a telephone number given by a person who had called an embezzlement victim was assigned to someone named "Armijo" did not constitute a statement by an "accuser" within the constitutional guaranty of confrontation. State v. Roybal, 107 N.M. 309, 756 P.2d 1204 (Ct. App. 1988), overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Right to inspect prior statement of witness. — When a witness called to testify by the state in a preliminary examination has made a prior written statement concerning the matter about which he is called to testify, the accused is entitled to an order directing the prosecution to produce for inspection all statements or reports of such witness in its possession touching the events about which the witness will testify. Any other result would be to deny the accused his constitutional right to confront the witnesses against him and would have the same effect as though he were denied a preliminary examination. Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789 (1969), overruled by State v. Lopez, 2013-NMSC-047.

No right to confront victim who is not a witness. — The words, "to be confronted with the witnesses against him," which appear in this section should not be construed as being synonymous with the words, "to be confronted with his victim." A witness is one who testifies under oath, and the constitutional guarantee contemplates confrontation only by those who actually testify against the accused, or whose testimony or statements are in some way brought to the attention of the court and jury upon the trial. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

There was no deprivation of appellant's right of confrontation by the alleged victim of his crime as guaranteed by this section, where at no time did appellant seek a continuance based on the absence of evidence, where he made no statement as to what evidence he believed might be developed from the victim, if called as a witness, where at no time did he indicate that he desired to call the victim as a witness, and where the victim was not called as a witness, nor was one word of his testimony even offered by the state by way of deposition, prior testimony or otherwise. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

The right of confrontation does not embrace a situation where no prior testimony, statement or utterance of any kind by the victim was brought to the attention of the jury, and none was offered by the state. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Admission of co-defendants' custodial statements was harmless error. — The erroneous admission of the custodial statements of defendant's co-defendants was harmless beyond a reasonable doubt where the co-defendants' statements were merely additional evidence tending to prove what had already been demonstrated by physical evidence and the defendant's own statements. State v. Lopez, 2007-NMSC-037, 142 N.M. 138, 164 P.3d 19, rev'g 2006-NMCA-671, 139 N.M. 705, 137 P.3d 645.

Inadmissibility of codefendant's extrajudicial statement. — The trial court erred in permitting a codefendant's written extrajudicial statement to be read to the jury since the state cited no other independent corroborative evidence which tended to lend reliability to the codefendant's untested and unsworn statement. State v. Lancaster, 116 N.M. 41, 859 P.2d 1068 (Ct. App. 1993), superseded by rule, State v. Gutierrez, 1998-NMCA-172, 126 N.M. 366, 969 P.2d 970.

Right to obtain transcripts. — The state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. There can be no doubt that the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. Two factors that are relevant to the determination of need are: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. This rule should be construed liberally in favor of a defendant's right to equal protection of the law and effective cross-examination. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

A particularized need for the grand jury testimony of a witness must be shown before a grand jury transcript may be made available to an accused, but where such need is shown, a failure to furnish the transcript would impair the accused's right of cross-examination, and, thus, the full exercise of his right of confrontation. State v. Felter, 85 N.M. 619, 515 P.2d 138 (1973).

Where defendant's basic defense was to persuade the jury that certain statements relied on heavily by the state were involuntary, and that the officer who testified about the circumstances of these statements testified differently at trial than at the suppression hearing, a copy of the prior hearing transcript would have been invaluable, and where there were different judges, court reporters and attorneys in the hearing on the motion to suppress, on the motion for a transcript, and at trial, there were no reasonable alternatives to a transcript of the prior hearing. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

A transcript of prior testimony is a most useful tool in mounting an attack upon the credibility of witnesses, and the refusal to give a defendant a copy of the grand jury testimony of witnesses who would also testify at trial on the same subject matter has been held to deny him the right of effective cross-examination. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Statute authorizing testimony of any witness taken in any court in state to be used in subsequent trial permits transcript of testimony of witness, taken at preliminary hearing, to be read in at trial; such statute is declaratory of common law and does not contravene constitutional right to be confronted by witnesses. State v. Moore, 40 N.M. 344, 59 P.2d 902 (1936).

Transcript inadmissible where no cross-examination took place. — Where accused, in former trial, has been denied right to cross-examine hostile witness, it is error to admit transcript of witness's testimony in subsequent trial. State v. Halsey, 34 N.M. 223, 279 P. 945 (1929).

Inadmissibility of guilty pleas of third persons. — Upon trial of one charged with unlawfully and knowingly permitting game of chance for money to be played on premises occupied by him, record of information charging third persons with unlawfully gaming and their pleas of guilty thereto were inadmissible as depriving defendant of constitutional right to be confronted by witness against him. State v. Martino, 25 N.M. 47, 176 P. 815 (1918).

The alibi rule does not violate the right to compulsory process, since it does not prevent a defendant from compelling the attendance of witnesses, but, rather, provides reasonable conditions for the presentation of alibi evidence. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Proceeding pursuant to rules. — The question of a denial of the constitutional right of confrontation was cognizable under a proceeding pursuant to Rule 93, N.M.R. Civ. P. (now superseded by Rule 5-802 NMRA). Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Waiver of right of confrontation. — Where defendant, who had consumed a large quantity of alcohol and who was walking along a ditch with friends, encountered the victim sitting with a friend; defendant's friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; during defendant's police interview, defendant maintained that defendant remembered little of what took place due to intoxication; the police told defendant what witnesses said had happened; in response, defendant stated that "I'm guessing that's what happened" and that the witnesses were sober and knew everything; the transcript of the interview contained the testimonial statements of absent witnesses; defendant refused to accept the state's redaction proposals, which would have safeguarded defendant's confrontation right, and sought to redact incriminatory witness statements and retain exculpatory statements, which the state would not accept; and defendant first sought admission of the entire, unredacted transcript, then sought to exclude the transcript as a violation of defendant's confrontation right, and finally requested that the entire transcript be admitted, the admission of the transcript into evidence did not violate defendant's confrontation right because defendant waived the constitutional objection and invited the error. State v. Jim, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) requires that state criminal records show an understanding waiver by a defendant entering a guilty plea of three constitutional rights: (1) the privilege against compulsory self-incrimination, (2) the right to trial by jury and (3) the right to confront one's accusers. State v. Guy, 81 N.M. 641, 471 P.2d 675 (Ct. App. 1970).

While the right of cross-examination is a fundamental right, it does not follow that such a fundamental right equates with the concept of fundamental error. There is a difference between such a fundamental right and fundamental error. The latter cannot be waived and is always available to this court on behalf of the accused. But the theory of fundamental error is bottomed upon the innocence of the accused or a corruption of actual justice. On the other hand, most rights, however fundamental, may be waived or lost by the accused. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969).

Intentional waiver of right did not occur. — Where defense counsel initially acquiesced to the admission of two-way video testimony by a state's witness, but where there was no discussion in the record between the district court and defendant concerning his confrontation rights, there is no evidence that defendant understood those rights or that he voluntarily agreed to waive them. It is the court's obligation to make sure that a waiver is valid and predicated upon a meaningful decision by the defendant. State v. Thomas, 2016-NMSC-024.

Right to confront witnesses not waived. — Where, over the defendant's objection, the trial court granted the state leave to give the defendant's accomplice, who had invoked the fifth amendment privilege against self-incrimination, limited immunity which extended only to the accomplice's verification of the accuracy of the transcript of the accomplice's police interrogation statement, but did not cover the accomplice's answers to substantive questioning about the events described in the statement, and where, in the context of the trial court's ruling, the defendant stipulated to the introduction of the statement and then waived cross-examination of the accomplice on the accuracy of the statement, the defendant did not waive the right to cross-examine the accomplice on the events described in the statement. State v. Zamarripa, 2009-NMSC-001, 145 N.M. 402, 199 P.3d 846.

Compulsory process within discretion of trial court. — Compulsory process in criminal cases involves such disparate elements as surprise, diligence, materiality and maintenance of orderly procedures; and the decision is largely within the discretion of the trial court. State v. Montoya, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Where four days prior to trial the family of an 80-year-old woman suffering from severe hypertension and anxiety showed the judge a physician's note stating that the woman should not appear as a witness, and the court promptly referred the matter to defense counsel, but defense counsel neither sought a continuance, sought to take the woman's deposition nor took any other action on the pretrial information but rather waited until the trial was in progress and then sought the issuance of a bench warrant, there was no

abuse of discretion and no violation of the right to compulsory process by the trial court's refusal to issue the bench warrant. State v. Montoya, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Compulsory process was not denied. — Where defendant and the occupants of a house exchanged multiple gun shots; the shots defendant fired at the house killed one victim and injured another victim; defendant was tried for first degree murder with the predicate felony of shooting at a dwelling and separately for shooting at a dwelling; defendant subpoenaed a witness whom defendant believed shot at defendant; the witness failed to appear to testify; the district court suggested that the proper remedy was a bench warrant for the arrest of the witness; and defendant declined the issuance of a bench warrant because it would be a waste of time, defendant's right to compulsory process was not violated. State v. Torrez, 2013-NMSC-034.

Right denied where unexplained comparison of computer printouts with defendant's records. — Defendant was denied her constitutional right of confrontation at her trial for embezzlement, where the only evidence of shortages attributable to her was obtained by an unexplained comparison of computer printouts with her own records and there was no evidence that the state's only witness understood how the printouts were prepared. State v. Austin, 104 N.M. 573, 725 P.2d 252 (Ct. App. 1985), cert. quashed, 104 N.M. 632, 725 P.2d 832 (1986).

B. TESTIMONIAL STATEMENTS.

Statements in autopsy report prepared to establish the cause and manner of death were testimonial. — Where an autopsy of the infant victim was requested, because the child had symptoms of a severe brain injury commonly associated with trauma; the medical examiner conducted the autopsy to establish the cause and manner of the victim's death and prepared the autopsy report for use in a criminal prosecution; and the medical examiner's finding of homicide was critical to substantiate allegations that defendant abused the victim and caused the victim's death, the statements contained in the autopsy report were testimonial. State v. Jaramillo, 2012-NMCA-029, 272 P.3d 682, cert. denied, 2012-NMCERT-002.

Statements made during police interrogation. — Where circumstances surrounding victim's statement taken by police officer bear indicia of a formal police interrogation, the statement is testimonial in nature and should be excluded unless the trial court finds that defendant forfeited his confrontation right. State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

Statements to sexual abuse nurse examiner. — Victim's statements to a sexual abuse nurse examiner, which identified the defendant and accused him of sexual assault, and that were made several weeks after the assault, were testimonial statements and were inadmissible. State v. Romero, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694, aff'g 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842.

Document not testimonial. — Where there was no showing that the declarants of an intake report and psychological assessment of minor victims of sexual abuse had a relationship with law enforcement or that the documents were prepared in a manner to suggest possible law enforcement or prosecutorial abuse in order to facilitate proof in an anticipated criminal proceeding, neither the intake report nor the prior assessment were testimonial in nature. State v. Paiz, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011, 140 N.M. 846, 149 P.3d 943.

Sexual assault nurse examiner examination. — The primary purpose of a sexual assault nurse examiner (SANE) examination is to prepare, collect, evaluate and dispose of evidence relevant to later criminal prosecution and statements made by a child victim of criminal sexual penetration to a SANE nurse are testimonial in nature. State v. Ortega, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929, cert. denied, 2007-NMCERT-012, 143 N.M. 213, 175 P.3d 307.

Sexual assault nurse examiner's statements on labels affixed to an examination kit are testimonial hearsay. — A sexual assault nurse examiner's (SANE) statements on labels affixed to an examination kit are testimonial hearsay because the SANE nurse would have reasonably understood those statements' sole purpose to be for use in investigating and prosecuting criminal charges against defendant, and allowing an expert witness, who was not present when the child victim's examination kit examination was performed, to testify that defendant's DNA had been found on the child victim based on inferences from labels on the examination kit prepared by the SANE nurse would violate defendant's confrontation clause rights, because the statements identifying various swabs affixed to the examination kit go to the issue of whether defendant improperly touched the child victim and therefore reflect directly on defendant's guilt or innocence. State v. Carmona, 2016-NMCA-050, cert. denied, 2016-NMCERT-____.

Statements for use at later trial. — Where statements were made by victim to a non-government sexual assault nurse examiner during physical examination, and where the victim visited the sexual assault nurse examiner in connection with a police investigation and at the suggestion of the investigating police officer, and not merely to obtain medical treatment, the victim's statements were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial and should be excluded unless the trial court finds that defendant forfeited his confrontation right. State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

Motive of person eliciting statement. — Motive of person eliciting statement from victim is relevant in determining whether victim's statement is testimonial because it bears on the intent and understanding of the declarant as to the production of testimony for use at a later trial. State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

The facts that sexual assault nurse examiner who was specifically trained in forensic evidence collection and chain of custody and who had qualified as an expert witness indicated that nurse and victim interviewed by nurse realized that statements taken by nurse might be used at later trial and were testimonial in nature. State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

Victim's statements to 911 operator and police officer were nontestimonial. — Where an altercation occurred between defendant and the victim and defendant shot the victim who later died from the gunshot wounds; defendant drove away from the scene of the shooting; the victim told a 911 operator and a police officer that defendant shot the victim; the location of defendant after the shooting was unknown; the interrogations of the victim by the 911 operator and the police officer were quick, unstructured, and conducted at the scene of the shooting; the victim told the police officer that defendant was going to a school to shoot their children; and defendant was a former SWAT team member, the victim's statements were non-testimonial and did not violate defendant's right to confrontation because the interrogations by the 911 operator and the police officer were conducted in the context of an ongoing emergency to enable the police to meet the emergency. State v. Largo, 2012-NMSC-015, 278 P.3d 532.

Witness' statements told to 911 operator were non-testimonial statements. — Where the victim was shot when the victim and a friend went outside the victim's house to see who was sitting in a car in front of the house; within five minutes of the shooting, the victim's spouse called 911 and in response to questions asked by the 911 operator, the spouse told the operator what the friend had told the spouse about the description of the shooter, the car in which the shooter left the scene and the direction the shooter fled; defendant was subsequently apprehended and convicted of the murder of the victim; at trial, the friend's statements were introduced through the testimony of the spouse; and the friend, who was incarcerated in another state, did not testify and was not previously subject to cross-examination, the friend's statements were non-testimonial and the introduction of the friend's statements did not violate the confrontation clause. State v. Sisneros, 2013-NMSC-049.

Statements made during secretly videotaped conversations by police were not testimonial. — Where defendant was accused of murdering the victim in the presence of defendant's friend; the police placed defendant and the friend in a room together and secretly videotaped their conversation; defendant and the friend both made inculpatory statements implicating themselves in the shooting; the videotaped conversation was admitted at trial; and because the friend was unavailable to testify at trial, defendant was unable to cross-examine the friend, no police interrogation occurred, the statements of defendant and the friend were not testimonial, and the admission of the videotaped conversation did not violate the confrontation clause. State v. Telles, 2011-NMCA-083, 150 N.M. 465, 261 P.3d 1097, cert. denied, 2011-NMCERT-007, 268 P.3d 46.

On-scene statement to police officers. — Although on-scene statements to police officers in response to initial questioning will generally be non-testimonial, such statements should be considered testimonial if there are articulable indications that either the officer or the declarant was trying to procure or provide testimony. However, when it appears that the officer's primary goal was to secure the scene or give immediate aid to victims and the declarant's primary goal was to get aid, the statement will be considered non-testimonal. State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

On-scene videotapes. — Where the trial court admitted videotaped statements of the victims of defendant's attack; the videotape was taken from a police officer's patrol car when the officer responded to a call about a fight in progress and when the police were trying to secure the scene by finding out if there were other suspects or victims; and the statements were spontaneous and made in response to a general inquiry by the police about what was happening; the statements were not testimonial. State v. Gutierrez, 2011-NMCA-088, 150 N.M. 505, 263 P.3d 282, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Autopsy photographs are not testimonial. — An autopsy photograph depicting a murder victim's wounds does not depict a person making an oral or written assertion or performing nonverbal conduct intended as an assertion, and as such, photographs of this nature are not statements and do not constitute testimonial statements, and therefore the forensic pathologist's testimony and the autopsy photographs introduced in defendant's murder trial did not violate defendant's sixth amendment right to confront the evidence against him. State v. Smith, 2016-NMSC-007.

The scientific aspects of a breathalyzer machine are non-testimonial facts. — The scientific reliability and functionality of a breathalyzer machine, which are foundational issues that are only subject to challenge through expert testimony, are non-testimonial facts and do not implicate the confrontation clause. State v. Anaya, 2012-NMCA-094, 287 P.3d 956, cert. denied, 2012-NMCERT-007.

Scientific accuracy and reliability of a breathalyzer machine. — Where the court admitted the results of defendant's breath alcohol test results after police officers testified regarding the procedure for administering defendant's breathalyzer test, the regulations and procedures for certifying and calibrating the breathalyzer machine, the officers' belief that the breathalyzer machine was working properly and that the test was properly administered, and the officers' certification to administer breathalyzer tests and experience administering breathalyzer tests; the officers testified that they had no knowledge of the breathalyzer machine's inner workings; and defendant claimed that defendant's confrontation rights had been violated because the breath test results had been admitted without testimony from a witness, whom defendant could cross-examine, as to the scientific accuracy and reliability of the breathalyzer machine, the confrontation clause did not apply because the scientific aspects of the breathalyzer machine are non-testimonial facts. State v. Anaya, 2012-NMCA-094, 287 P.3d 956, cert. denied, 2012-NMCERT-007.

Blood alcohol test reports are testimonial statements governed by the confrontation clause. State v. Bullcoming, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, rev'g in part 2008-NMCA-097, 144 N.M. 546, 189 P.3d 679, and overruling State v. Dedman, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628, rev'd, 131 S.Ct. 621, 177 L.Ed. 2d 1152.

Forensic laboratory report is not testimonial evidence. — The report of the analysis and test results of a forensic chemist from the New Mexico public safety crime lab is not testimonial evidence. State v. Delgado, 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert. granted, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 43.

Chemical forensic reports prepared for use in prosecution of criminal cases are testimonial statements. — Where an analyst at a public laboratory prepared a chemical forensic report of the analyst's analysis of a white, crystal-like substance at the request of police officers who had found the substance in defendant's possession; the analyst performed the analysis and prepared a report in the normal and ordinary course of business of the laboratory; the generation and maintenance of the report was part of the duties and responsibilities of the laboratory; the majority of work done in the laboratory was for criminal prosecution purposes; the laboratory's purpose for conducting forensic analysis and reporting the results was for prosecuting criminal cases at trial and not as a function of the laboratory's administrative activities; the analyst who performed the analysis and prepared the report was not present to testify at defendant's trial; and the report was admitted into evidence through the testimony of a separate analyst who did not perform the analysis or prepare the report, the report was inadmissible as a testimonial statement and the admission of the report into evidence violated defendant's right to confrontation. State v. Aragon, 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280, overruling State v. Christian, 119 N.M. 776, 895 P.2d 676 (Ct. App. 1995), overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Testimony concerning a forensic laboratory report. — Where a forensic chemist from the New Mexico department of public safety testified concerning the analysis of another chemist from the crime lab based on the report of the other chemist's test results, the defendant's right to confront and cross-examine the chemist who wrote the report was not violated, because the report was admissible as a business record and the report was not testimonial evidence. State v. Delgado, 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert. granted, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 43.

Content of note from anonymous observer. — A note that an anonymous observer handed the victim of auto burglary that contained a physical description of the thief and a description and license plate number of the vehicle in which the thief left the scene was not testimonial and its admission into evidence through the testimony of the victim was not barred by the confrontation clause. State v. Chavez, 2008-NMCA-125, 144 N.M. 849, 192 P.3d 1226, cert. denied, 2008-NMCERT-008, 145 N.M. 254, 195 P.3d 1266.

A plea of guilty or no contest constitutes a testimonial statement because such a knowing and voluntary statement would lead an objective witness to believe that the statement would be available for use at a later trial. State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Admission of plea of guilty or no contest implicates the confrontation clause. — As a testimonial statement, a co-defendant's plea of guilty or no contest is inadmissible against a defendant to prove the truth of the matter asserted unless the demands of the confrontation clause have been met. The defendant must have an opportunity to cross-examine the co-defendant concerning the plea agreement. State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Testimonial statements. — Codefendants' statements to police that were given at the police station during the police investigation of a child's death and that were given soon after the death of the child when the police were attempting to discover the cause of the child's death and to obtain inculpatory statements from the codefendants were testimonial and the admission of the statement constituted a per se violation of the defendant's right to confront the witnesses against him. State v. Walters, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068, aff'g in part, rev'g in part 2006-NMCA-071, 139 N.M. 705, 137 P.3d 645.

Where, after police officers searched defendant's residence for child pornography, the codefendant told the codefendant's child that the codefendant caught defendant looking at child pornography on the computer and it was reasonable to anticipate that the statement would be used in a later trial, the statement was a testimonial statement and was properly excluded from the evidence. State v. Gurule, 2011-NMCA-063, 150 N.M. 49, 256 P.3d 992, rev'd, 2013-NMSC-025.

Statements between family members are not testimonial statements. — Where defendant's codefendant told the codefendant's child that the codefendant had witnessed defendant watching child pornography on their computer, the statement was a non-testimonial statement made between two family members and did not implicate the confrontation clause. State v. Gurule, 2013-NMSC-025, rev'g 2011-NMCA-063, 150 N.M. 49, 256 P.3d 992.

Admission of testimonial statements not harmless. — Where defendant was charged with conspiracy to commit intentional child abuse; there was no direct evidence of conspiracy; and the testimonial statements of defendant's codefendants, which constituted circumstantial evidence of the conspiracy, were important to the prosecution's case, the admission of the codefendant's statements was not harmless beyond a reasonable doubt. State v. Walters, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068, aff'g in part, rev'g in part 2006-NMCA-071, 139 N.M. 705, 137 P.3d 645.

Admission of testimonial statements was harmless. — The admission of the codefendant's testimonial statements was harmless beyond a reasonable doubt where the statements were cumulative of defendant's confession and defendant's confession

was consistent with the physical evidence. State v. Walters, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068, aff'g in part, rev'g in part 2006-NMCA-071, 139 N.M. 705, 137 P.3d 645.

A co-defendant's statements to a friend that the co-defendant murdered the decedent and that defendant told him to shoot the decedent was not testimonial. State v. Silva, 2007-NMCA-117, 142 N.M. 686, 168 P.3d 1110, cert. granted, 2007-NMCERT-008, aff'd in part, rev'd in part, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

Admission of codefendants' custodial statements. — Where the questioning of the defendant's codefendants by the police was an attempt to prove past events potentially relevant to later criminal prosecution, the admission of the codefendants' statements to the police was a per se violation of the defendant's right to confront the witnesses against her. State v. Lopez, 2007-NMSC-037, 142 N.M. 138, 164 P.3d 19, rev'g 2006-NMCA-071, 139 N.M. 705, 137 P.3d 645.

Grand jury testimony by a victim is testimonial in nature and is not admissible absent a finding that the defendant forfeited his confrontation right. State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, aff'd, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694.

C. HEARSAY EVIDENCE.

Factors considered in constitutional analysis of hearsay. – In evaluating the "sufficient guarantees of trustworthiness" of a hearsay statement required under the confrontation clause of the New Mexico constitution, New Mexico courts consider four factors leading to unreliability: (1) ambiguity; (2) lack of candor; (3) faulty memory; and (4) misperception; the statement may be admitted only where the test of cross-examination would be of marginal utility, a standard that precludes admission of hearsay statements that contain equivocation and contradiction. State v. Gurule, 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

Blood alcohol test reports are admissible through separate qualified analyst. — Where defendant was convicted of aggravated DWI; the analyst who prepared the laboratory report of defendant's blood draw merely transcribed the results generated by a gas chromatograph machine to prepare the laboratory report; the analyst was not required to interpret the test results, exercise independent judgment or employ any particular methodology in transcribing the results from the gas chromatograph machine to the laboratory report; the analyst who prepared the laboratory report was not available to testify at defendant's trial; and the state presented the laboratory report though a separate analyst at the laboratory, the live, in-court testimony of the separate qualified analyst was sufficient to fulfill defendant's right to confrontation. State v. Bullcoming, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, rev'g in part 2008-NMCA-097, 144 N.M. 546, 189 P.3d 679 and overruling State v. Dedman, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628, rev'd, 131 S.Ct. 2705, 177 L.Ed. 2d 610.

Where a forensic toxicologist, who was qualified as an expert, testified that the toxicologist received the kit containing defendant's blood, checked the seals to assure that they had not been tampered with, tested defendant's BAC using a gas chromatograph, and prepared a report; that defendant's blood sample came in a standard SLD blood kit; that the toxicologist checked the identifications on the specimen against the report of blood alcohol analysis form and identified the blood-drawer's signature on the form as a registered nurse and the blood-drawer's employer as a medical center; that the toxicologist recorded the results of the lab tests after which a reviewer reviewed the work; and that the test results were entered on the form and signed by the toxicologist as an analyst for SLD; and the toxicologist was available to be cross-examined regarding the operation of the testing machine and the SLD's procedures, defendant's confrontation right was not violated and the blood-alcohol report of the results of the machine-tested blood sample was admissible into evidence. State v. Nez, 2010-NMCA-092, 148 N.M. 914, 242 P.3d 481, cert. denied, 2010-NMCERT-009, 149 N.M. 49, 243 P.3d 753.

Admission of hearsay statements was harmless error. — Where defendant's co-defendant was arguing with the victim over money owed by the victim to the co-defendant; the co-defendant pulled a gun and told the victim to go with the co-defendant; the victim got into the victim's car and while the co-defendant was standing outside the car, the victim started the car and hit the gas; defendant and the co-defendant shot and killed the victim; at trial, the chief medical investigator testified that a toxicology report, which was prepared by and signed by the chief of the state laboratory division's toxicology bureau, showed that small amounts of alcohol, marijuana metabolites, amphetamine and methamphetamine were found in the victim's body; and the state used the toxicology report to prove that the victim did not die from drug or alcohol use but rather from gunshot wounds, the witness' testimony regarding the toxicology report violated defendant's confrontation rights, but the violation was harmless error because the victim's toxicity levels were not important to the state's first degree murder case, and the state had presented evidence that the victim died of gunshot wounds, and the toxicology evidence was not important to the state's attempted kidnapping case because the toxicology evidence was proffered to establish the cause of death. State v. Ortega, 2014-NMSC-017.

Where defendant was convicted of aggravated DWI; defendant's vehicle rear-ended another vehicle; defendant fled the scene of the accident; the arresting officer testified that defendant's brother told the officer that defendant had been driving the vehicle; the admission of the brother's statement had no other purpose than to prove that defendant was the driver of the vehicle; the driver of the other vehicle testified that defendant had bloodshot eyes and alcohol on defendant's breath when defendant fled the accident scene; and two officers testified that when defendant was apprehended, defendant had watery, bloodshot eyes, slurred speech, smelled of alcohol, and failed field sobriety tests, there was substantial evidence to support defendant's conviction without reference to the brother's statement and the admission of the hearsay statement was harmless. State v. Bullcoming, 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, rev'g in part

2008-NMCA-097, 144 N.M. 546, 189 P.3d 679, and overruling State v. Dedman, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628, rev'd, 131 S.Ct. 2705, 177 L.Ed. 2d 610.

Any consideration of the reliability of forensic reports is irrelevant to a determination of confrontation clause requirements. State v. Aragon, 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280, overruling State v. Christian, 119 N.M. 776, 895 P.2d 676 (Ct. App. 1995), overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Testimony about a non-testifying analyst's chemical forensic report was inadmissible hearsay. — Where an analyst at a public laboratory prepared a chemical forensic report of the analyst's analysis of a white, crystal-like substance at the request of police officers who had found the substance in defendant's possession; the analyst who performed the analysis and prepared the report was not present to testify at defendant's trial; the report was admitted into evidence through the testimony of a separate testifying analyst who did not perform the analysis or prepare the report; the testifying analyst's testimony was a restatement of the non-testifying analyst's conclusory opinion regarding the narcotic content of the substance, its weight, and its purity as stated in the non-testifying analyst's report; and the testifying analyst did not express an opinion based on the data in the report, the report was inadmissible testimonial hearsay and the admission of the report into evidence violated defendant's right to confrontation. State v. Aragon, 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280, overruling State v. Christian, 119 N.M. 776, 895 P.2d 676 (Ct. App. 1995), overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Admission of non-testifying analyst's chemical forensic report was harmless error. — Where police officers found a small bag and a large bag of a white, crystal-like substance associated with defendant; separate analysts at a public laboratory each analyzed a bag of the substance and prepared separate reports of the results; the analyst who performed the analysis of the substance in the small bag and prepared the report of the results was not present to testify at defendant's trial; the report of the non-testifying analyst was admitted into evidence through the testimony of the analyst who analyzed the substance in the large bag; and defendant's conviction of possession of a controlled substance was supported by the testifying analyst's testimony concerning the analysis of the substance in the large bag, the admission of the hearsay testimony about the non-testifying analyst's report was harmless error. State v. Aragon, 2010-NMSC-008, 147 N.M. 474, 225 P.3d 1280, overruling State v. Christian, 119 N.M. 776, 895 P.2d 676 (Ct. App. 1995), overruled by State v. Tollardo, 2012-NMSC-008, 275 P.3d 110.

Admission of non-testifying analyst's chemical forensic report was not harmless error. — Where police officers sent a substance in a baggie that was in defendant's possession to the crime laboratory for forensic testing; the testing analyst completed a report finding cocaine; at defendant's trial, an expert witness, who had not personally tested the substance or completed the report, testified about whether the report contained a result, whether the testing analyst had reached a conclusion about the

substance, what the testing analyst's conclusion was, and whether the expert witness agreed with the testing analyst's conclusion; the expert witness never testified unequivocally that the conclusion in the report was the expert witness's opinion, and not the opinion of the testing analyst; defendant had no opportunity to cross-examine the testing analyst; the state did not contend that the testing analyst was unavailable for trial; and a police officer who field tested the substance did not testify to the results of the field test, the admission of the report violated defendant's right to confrontation and was not harmless error because without the admission of the report and the testimony based on it, there was no evidence that the substance was cocaine. State v. Moncayo, 2012-NMCA-066, 284 P.3d 423.

Hearsay not offered to prove the truth of matter asserted. — Where a police officer testified that in the course of the officer's investigation of the alleged burglary of the defendant's home, the officer interviewed a suspect in the burglary, that the suspect told the officer that the defendant tried to rape the suspect when the suspect was a minor, that the defendant drugged the suspect and tried to get the suspect to do sexual favors for the defendant, and that the defendant took nude and sexually explicit photographs of the suspect and other people; the suspect did not appear at the defendant's trial; and the testimony was offered to show why the officer's investigation proceeded from burglary to sexual misconduct, not to prove the elements of the offenses for which the defendant was convicted, the admission of the officer's statements regarding the suspect did not constitute fundamental error. State v. Dietrich, 2009-NMCA-031, 145 N.M. 733, 204 P.3d 748, cert. denied, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

Admission of child's hearsay statements identifying defendant as the perpetrator of sexual abuse was not plain error. — Where defendant was charged with criminal sexual penetration of a child under thirteen; a counselor for sexually abused children testified once on direct examination that the victim stated to the counselor that defendant told the victim to hold defendant's penis, that the victim was made to perform oral sex with defendant, and that defendant made the victim promise to keep the abuse secret; and the statements were made at the end of the victim's treatment and were not necessary for the counselor's diagnosis or to explain the basis of the counselor's expert opinion, the error in admitting the victim's statements that defendant was the perpetrator of the sexual abuse was not plain error. State v. Dylan J., 2009-NMCA-027, 145 N.M. 719, 204 P.3d 44.

Admissibility of transcript of 911 call. — Where defendant was charged with aggravated battery and aggravated assault against a household member; on the date the incident occurred, defendant's cohabitant called 911 from a neighbor's house only moments after defendant attacked the cohabitant; the cohabitant was crying throughout the call; the cohabitant informed the operator that the cohabitant was experiencing pain and reported that defendant had violently attacked the cohabitant with a metal pole; the cohabitant stated that the cohabitant was uncertain whether defendant would harm the cohabitant's children; the cohabitant informed the operator that defendant appeared to be under the influence of alcohol or drugs; the cohabitant provided the operator with the identity and description of defendant and informed the operator about whether

defendant had a proclivity for violence, whether defendant was likely to flee the area, and whether defendant was armed with a dangerous weapon; the cohabitant was not available at trial; and defendant had not had an opportunity to cross examine the cohabitant, the cohabitant's statements were not testimonial in nature and the admission of the 911 transcript did not violate defendant's sixth amendment rights under the confrontation clause. State v. Soliz, 2009-NMCA-079, 146 N.M. 616, 213 P.3d 520, cert. quashed, 2010-NMCERT-008, 148 N.M. 943, 242 P.3d 1289.

Double hearsay to establish private search. — Defendant was denied her right to confrontation where the state sought to justify a warrantless search of a package addressed to the defendant on the basis that the state was merely repeating a search previously undertaken by private parties without state involvement by the testimony of a law enforcement officer that an employee of a bus company in Los Angeles had informed the officer that another employee of the bus company had opened the package in Denver and discovered that it contained marijuana. State v. Rivera, 2007-NMCA-104, 142 N.M. 427, 166 P.3d 488, rev'd, 2008-NMSC-056, 144 N.M. 836, 192 P.3d 1213.

Admission of statement with "indicia of reliability". — The trial court may admit, as substantive evidence, a statement by an accomplice who was not subject to cross-examination where the statement bears sufficient "indicia of reliability" to satisfy confrontation clause concerns. State v. Earnest, 106 N.M. 411, 744 P.2d 539, cert. denied, 484 U.S. 924, 108 S. Ct. 284, 98 L. Ed. 2d 245 (1987).

Unavailability of hearsay declarant. — When a hearsay declarant is not present for cross-examination at trial, a showing that he or she is unavailable is required, and, even then, the declarant's statement is admissible only if it bears adequate indicia of reliability. State v. Lopez, 1996-NMCA-101, 122 N.M. 459, 926 P.2d 784, cert. denied, 122 N.M. 279, 923 P.2d 1164 (1996).

Use of hearsay predisposition report to determine delinquency held unconstitutional. — When a predisposition report received by a judge in a juvenile delinquency case is composed primarily of hearsay evidence which would be clearly incompetent within the meaning of former 32-1-31 NMSA 1978 in either of the adjudicatory phases of the proceedings, and it is not shown to be competent, material and relevant in nature, then to use such evidence to determine delinquency is constitutionally impermissible as a denial of the child's constitutional right to confront and cross-examine the witnesses against him; the juvenile is entitled to a fact-finding process that measures up to the essentials of due process and fair treatment. Doe v. State, 92 N.M. 74, 582 P.2d 1287 (1978).

Statement against penal interest. — The exception to the hearsay rule for statements against penal interest found in Rule 11-804(B)(3) NMRA is a firmly rooted hearsay exception for purposes of satisfying the indicia of reliability requirement of the constitutional right to confrontation. State v. Torres, 1998-NMSC-052, 126 N.M. 477,

971 P.2d 1267, overruled by State v. Alvarez-Lopez, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

Admissibility of shooting victim's statements. — Victim's statement in greeting defendant just prior to shooting was supported by particularized guarantees of trustworthiness and the trial court's admission of the statement did not violate defendant's right of confrontation. State v. Salgado, 1999-NMSC-008, 126 N.M. 691, 974 P.2d 661.

Parties to hearsay statements available for cross-examination. — Because the victim of the crime was subject to cross-examination and all of the witnesses whose testimony indicated the guilt of the defendant were present and cross-examined, the defendant's rights to due process and to confront and cross-examine witnesses against him were not violated when the trial court admitted into evidence statements made by the victim after the crime was committed to her mother, sister and sister-in-law. State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

D. RIGHT TO CROSS-EXAMINE WITNESSES.

Defendant was deprived of right to confront and cross-examine state's witness where deposition, taken for purposes of the preliminary hearing with the defense counsel's consent, had been recorded but the tape recorder malfunctioned and rendered the recording inaudible, whereupon the parties, to facilitate the preliminary hearing, had entered into a stipulation summarizing the deposition testimony, and subsequently at trial the state, unable to secure the witness' attendance because he had moved from the state, offered into evidence the tape recording. Millican v. State, 91 N.M. 792, 581 P.2d 1287 (1978).

Defendant was not denied the opportunity to confront the witness who offered testimony against him. — In defendant’s trial for shoplifting and conspiracy to commit shoplifting, where the security officer of the department store testified that he received from the police the merchandise that defendant stole, that he handed each item received from the police to the customer service manager to scan for value, and that he supervised the scanning of each item, defendant was provided with the opportunity to confront the witness providing the testimonial statement establishing the fact used against him, *i.e.*, the selection of the merchandise to be priced. State v. Gallegos, 2016-NMCA-076, cert. denied, 2016-NMCERT-____.

Right denied by admission of certain res gestae statements. — Admission of testimony concerning statements of children of shooting victims admitted under res gestae exception to hearsay rule denied defendant his constitutional right of confrontation where cross-examination might have revealed poor memory and that statements of one child were partly based on what other child had told him or on what he had overheard. State v. Lunn, 82 N.M. 526, 484 P.2d 368 (Ct. App. 1971).

Admission of calibration logs of breath-alcohol device. — Admission as business records of calibration logs and printout from a breath-alcohol device in a prosecution for careless driving and driving while intoxicated did not deny the defendant his right to confront witnesses. State v. Ruiz, 120 N.M. 534, 903 P.2d 845 (Ct. App. 1995), cert. denied, 120 N.M. 498, 903 P.2d 240 (1995), abrogated, State v. Martinez, 2007-NMSC-025, 141 N.M. 713, 160 P.3d 894.

The admission of testimony about a non-testifying analyst's blood alcohol report violated defendant's right of confrontation. — Where a certified report showing defendant's blood alcohol content was admitted into evidence, where the analyst who certified the results of the blood testing did not testify, and where another state laboratory division employee, who reviewed the analyst's documentation but did not observe the testing, testified about the results of the test, defendant's right to confront the analyst whose certified statement was admitted into evidence was violated. State v. Dorais, 2016-NMCA-049, cert. denied, 2016-NMCERT-____.

Accused's right of confrontation denied. — Where the defendant's sole defense in his rape trial was that the child victim consented to sexual intercourse with him and then fabricated an allegation of rape because her parents, who were opposed to premarital sex because of their deep religious convictions, had previously punished the victim for engaging in consensual sex with someone else, the defendant was denied his constitutional right of confrontation when the trial court prohibited the defendant from cross-examining the victim and her parents about the victim's prior sexual encounter and the punishment that the victim received from her parents as a result of that encounter and the error was not harmless beyond a reasonable doubt. State v. Stephen F., 2008-NMSC-037, 144 N.M. 360, 188 P.3d 84, aff'g, 2007-NMCA-025, 141 N.M. 199, 152 P.3d 842.

Limitation of cross-examination concerning witness perjury. — The district court's refusal to allow the defendant to cross-examine the state's main witness concerning the state's promise not to prosecute the witness for perjury if his trial testimony varied from his deposition testimony, violated the defendant's confrontation right and the error was not harmless because the witness' testimony was crucial to the state's case and the witness' credibility and bias was an important issue in the case. State v. Silva, 2007-NMCA-117, 142 N.M. 686, 168 P.3d 1110, aff'd in part, rev'd in part, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

Limitation on cross-examination did not violate defendant's rights. — Where defendant, in his trial for criminal sexual penetration perpetrated in the commission of a felony, claimed that the district court erred by limiting the cross-examination of the child victim, the district court did not err in limiting how defendant could refer to two of the victim's prior adult felony convictions when the court allowed defendant to elicit that the victim had frequent encounters with the criminal justice system and allowed defendant to argue that the victim was exaggerating his story to get a deal on some of his other charges. The district court's limitations on cross-examination did not violate defendant's rights under the confrontation clause, where the court did not prevent defendant from

creating a record regarding potential credibility problems with the victim's testimony, did not limit defendant's cross-examination regarding the victim's prior convictions for crimes of dishonesty, and permitted defendant to elicit general information illustrating that the victim had significant experience with the criminal justice system. State v. Samora, 2016-NMSC-031.

Opportunity and similar motive to cross-examine. — Where defendant was freely allowed to cross-examine prosecution witness without any restrictions at the preliminary hearing about whether any crime was committed and whether defendant was involved, defendant had an opportunity and similar motive to cross-examine the witness at the preliminary hearing as defendant would have at trial, there were no circumstances showing a real difference in defendant's motive to cross-examine the witness differently at the preliminary hearing than at trial, and the witness later became unavailable to testify at trial, the admission of defendant's recorded preliminary hearing testimony at the trial did not violate defendant's right to confront the witness against him. State v. Henderson, 2006-NMCA-059, 139 N.M. 595, 136 P.3d 1005, cert. denied, 2006-NMCERT-005, 139 N.M. 567, 136 P.3d 568, cert denied, 549 U.S. 999, 127 S. Ct. 503, 166 L. Ed. 2d 376 (2006).

The purposes of confrontation are to secure for the accused the right of cross-examination; the right of the accused, the court and the jury to observe the deportment and conduct of the witness while testifying; and the moral effect produced upon the witness by requiring him to testify at the trial. State v. James, 76 N.M. 376, 415 P.2d 350 (1966); Millican v. State, 91 N.M. 792, 581 P.2d 1287 (1978); State v. Maestas, 92 N.M. 135, 584 P.2d 182 (Ct. App. 1978).

The right of cross-examination is a part of the constitutional right to be confronted with the witnesses against one. State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973); Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert denied, 90 N.M. 637, 567 P.2d 486 (1977).

State has interest in rigorous cross-examination. — The state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and, in particular, the state should have no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Latitude to be given cross-examiner. — Cross-examination is necessarily exploratory, and it is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them, and to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief is to

deny a substantial right and withdraw one of the safeguards essential to a fair trial. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Restricted cross-examination may violate right to confront. — Trial court may not so restrict the cross-examination of a witness by the defendant that the defendant's right to confront the witnesses against him is infringed: the defense should have great latitude in cross-examining prosecution witnesses. Sanchez v. State, 103 N.M. 25, 702 P.2d 345 (1985).

Right is satisfied by opportunity to cross-examine. — The right of confrontation as provided by this section is satisfied if there was the opportunity to cross-examine; the observation of demeanor on the witness stand is a result of cross-examination but it is not part of the confrontation rights. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), aff'd, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Where accused has once had opportunity of meeting witness face to face in a lawfully constituted tribunal with opportunity for cross-examination, the constitutional provision has been met. State v. Jackson, 30 N.M. 309, 233 P. 49 (1924).

Even though the state failed to provide the defendant with the statement of a witness for almost one month after it was available, the defendant was not unfairly prejudiced since she had the opportunity to review the statement at length and to conduct an extensive cross-examination. State v. Setser, 1997-NMSC-004, 122 N.M. 794, 932 P.2d 484.

No right to cross-examine grand jury witnesses. — The constitution does not give defendant the right to cross-examine witnesses appearing before the grand jury. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Trial witness's grand jury testimony on same subject to cross-examination. — Once the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness's grand jury testimony relating to the crime for which defendant is charged. The witness may be cross-examined concerning that testimony. If otherwise, an accused is denied the right to confront the witnesses against him. State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973).

The function and importance of the constitutional right to be confronted with the witnesses against one and the concomitant right of cross-examination mandates retroactivity of the rule that once a witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness's grand jury testimony relating to the crime for which defendant is charged. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Counsel, not judge, decides whether grand jury minutes helpful. — Whether there is or is not anything in the grand jury minutes that might be of aid to the defendant in cross-examination should not be determined by a court; in the adversary system, it is enough for judges to judge, and a determination of what may be useful to the defense can properly and effectively be made only by an advocate. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Use of prior testimony when witness unavailable at trial. — Where defendant was charged with the rape and murder of the victim; the trial court admitted the preliminary hearing testimony of an unavailable witness; defendant had the opportunity to cross-examine the witness at the preliminary hearing; and defendant had the same motive for cross-examining the witness at the preliminary hearing and at trial to show that defendant did not rape and murder the victim, the admission of the witness's preliminary hearing testimony did not violate defendant's right to confront and cross-examine the unavailable witness. State v. Lopez, 2011-NMSC-035, 150 N.M. 179, 258 P.3d 458.

Where defendant's counsel cross-examined witness at the preliminary hearing, the trial court's admission into evidence of the transcript of the testimony of the witness taken at the preliminary hearing did not deny defendant's right of confrontation of witnesses where all reasonable attempts to locate witness had failed. State v. Mitchell, 86 N.M. 343, 524 P.2d 206 (Ct. App. 1974).

Where there was introduction at trial of prior testimony of a witness at the preliminary hearing, and that witness was not present at trial, but the record showed diligent efforts to locate the witness and showed defense counsel had opportunity to cross-examine the witness at the preliminary examination, there was no denial of the constitutional right to confront witnesses. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Prior testimony found admissible. — Trial court did not err in admitting testimony given at the bail bond hearing, in spite of the fact that defendant did not expect that any testimony taken there would be used for any other purpose and therefore did not cross-examine as fully as he might otherwise have done, since the bond hearing was conducted for the limited purpose of determining whether the accused should be admitted to bail, and in spite of the fact that the jury did not have the opportunity to observe witness's demeanor on the witness stand at the trial. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), aff'd, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Deposition admitted where deponent dead but opportunity for cross-examination existed. — Where the trial court admitted into evidence the videotaped deposition of the state's eyewitness, there were reasons of "public policy" and "necessities of the case" to allow the admission of the deposition, including the death of the deponent, and there was sufficient opportunity for cross-examination at the time of the deposition so that its introduction did not run counter to the confrontation clause. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled by Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

Use of sex crime child-victim's videotape deposition held proper. — In a prosecution for criminal sexual contact with a minor, use of the victim's videotape deposition did not deny the defendant the right of confrontation: the defendant was not deprived of his right to fairly and fully cross-examine the child during the deposition, and the jury, which heard the child's testimony and viewed the child, via videotape, while she testified, had an adequate opportunity to observe the child's demeanor. State v. Vigil, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

In a prosecution for sexual abuse, trial judge did not abuse his discretion in allowing the children to testify by way of depositions that were videotaped outside the presence of the defendant and then shown to the jury, as he made the requisite findings that the individualized harm which would otherwise result in the child victims outweighed the defendant's right to a face-to-face confrontation with his accusers. State v. Fairweather, 116 N.M. 456, 863 P.2d 1077 (1993).

Cross-examination as to prior convictions denied. — The defendant was not deprived of the opportunity to test the credibility of a key witness against him in violation of the sixth amendment where the trial court refused to allow the defense counsel to cross-examine the witness as to prior convictions which were 25 years old. State v. Litteral, 110 N.M. 138, 793 P.2d 268 (1990).

Reading testimony of absent witness. — In allowing the testimony of the witness to be read, the accused was denied his constitutional right of being confronted by the witnesses against him. The mere fact that the witness was absent from the jurisdiction of the court was not enough. The exercise of due diligence on the part of the officers, in an effort to secure his attendance, was essential to the admission of the testimony of the absent witness. State v. Bailey, 62 N.M. 111, 305 P.2d 725 (1956).

This section guarantees to an accused in a criminal prosecution the right to be confronted with the witnesses against him and as early as State v. Archer, 32 N.M. 319, 255 P. 396 (1927), it was held that it was error in the trial of a criminal case to deny an accused the right to cross-examine a witness concerning a prior written statement made by him. The denial of the right of an accused to fully cross-examine a hostile witness deprives him of the right guaranteed by the constitution "to be confronted with the witnesses against him." Mascarenas v. State, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789 (1969), overruled by State v. Lopez, 2013-NMSC-047.

Interlocking confessions of joint defendants. — Defendants were denied their constitutional rights to confrontation and cross-examination at their joint jury trial when the interlocking statements of each defendant to police were admitted into evidence and none of the defendants testified. State v. Walters, 2006-NMCA-071, 139 N.M. 705, 137 P.3d 645, aff'd in part, rev'd in part, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068.

No harmless error. — Where statements by defendants interlocked in material respects such that each statement was corroborated by the other in a form that was immune from cross-examination, no juror could reasonably be expected to isolate and

consider each statement only in connection with the defendant who made it. Where prosecutor urged jury to consider each defendant's statement against the other defendants, error in admitting defendants' statements at joint jury trial was not harmless error. State v. Walters, 2006-NMCA-071, 139 N.M. 705, 137 P.3d 645, aff'd in part, rev'd in part, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068.

Admission of a coconspirator's testimony may constitute a technical violation of the accused's right to confront and cross-examine the witnesses against him, but such admission does not require a reversal of conviction if it constituted error harmless beyond a reasonable doubt. Admission of such statements was harmless beyond a reasonable doubt where the properly admitted evidence of guilt was overwhelming, and the prejudicial effect of the codefendants' statements was insignificant by comparison. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

Cross-examination of defendant by codefendant. — Where one accused informed against or indicted jointly with another testifies in his own behalf and clearly incriminates the other, the latter may subject him to cross-examination. State v. Martin, 53 N.M. 413, 209 P.2d 525 (1949).

Refusal of codefendant to answer questions. — While the extent to which cross-examination may be allowed is largely within the discretion of the trial court, the right to cross-examine cannot be so restricted as to wholly deprive a party of the opportunity to test the credibility of a witness. Where testimony of a codefendant was virtually immune from the test of credibility, due to his refusal to answer defense counsel's questions on fifth amendment grounds so that the defendant was effectively denied the opportunity to show that the codefendant might be lying or a reason why he might want to lie in order to protect his brother, alleged by defendant to have been involved in the crime rather than he, codefendant was the only witness to place the defendant in the building and committing the burglary, the restriction and deprivation of cross-examination was prejudicial and defendant's motion for a mistrial should have been granted. State v. Curtis, 87 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

Refusal of witness to answer questions concerning his direct testimony. — Defendant had a right to cross-examine witness under his constitutional right of confrontation and as the questions that witness refused to answer did not concern collateral issues, the questions went to the truth of his direct testimony; therefore, because of witness's refusal to answer concerning the truth of his direct testimony, the opportunity for probing and testing his statement has failed. The effect is a loss of defendant's right of cross-examination. At the least, witness's statement was subject to a motion to strike. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969).

Right of confrontation not denied where defendant declined to cross-examine. — Where two witnesses were present at trial and available for a full range of cross-examination as to the circumstances surrounding an identification process, but the defendant chose not to cross-examine them, he was not denied his right to confront the witnesses against him. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978).

VIII. SPEEDY TRIAL.

A. IN GENERAL.

Delay in enforcing sentence. — The right to a speedy trial does not include delays after a defendant has been sentenced. State v. Calabaza, 2011-NMCA-053, 149 N.M. 612, 252 P.3d 836.

Time during appeal of dismissal of charges is excluded from the speedy trail analysis. — Where the charges against a defendant have been dismissed, the time during which no charges are pending against the defendant and the defendant's liberty is unrestrained while the case is on appeal should be excluded from the speedy trial analysis. State v. Parrish, 2011-NMCA-033, 149 N.M. 506, 252 P.3d 730, cert. denied, 2011-NMCERT-003, 150 N.M. 619, 264 P.3d 520.

Purpose of right to speedy trial. — The constitutional guarantee preventing undue delay between the time of the charge and trial has a three-fold purpose. It protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves him of long periods of time when there may be public suspicion because of an untried accusation; and it prevents him from being exposed to the hazard of a trial after so great a lapse of time that the means of proving his innocence may not be within his reach, as, for example, by loss of witnesses or the dulling of memory. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967), appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

The guarantee of a speedy trial is to prevent undue and oppressive incarceration prior to the trial, to minimize anxiety and concern accompanying public accusation, and to limit the possibility that long delay will impair the ability of the accused to defend himself. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

Orderly expedition of case requires deliberate pace. — Because of the many procedural safeguards provided an accused, criminal prosecutions are necessarily designed to move at a deliberate pace and a requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. Whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon the circumstances. The delay must not be purposeful or oppressive. The essential ingredient is orderly expedition and not mere speed. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967), appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

The right to a speedy trial is a relative right consistent with delays. The essential ingredient of this right is orderly expedition of the criminal process. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Right to speedy trial becomes applicable only upon the initiation of formal prosecution proceedings. — Pre-arrest, or pre-formal prosecution, delays may constitute a denial of due process. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Constitutional right to a speedy trial arises, or becomes applicable, only upon the initiation of formal prosecution proceedings. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

The right of a speedy trial arises, or comes into application, only upon the initiation of the formal prosecution proceedings, and where defendant complains only of the delay in initiating the prosecution, the constitutional guarantee of a speedy trial has no application. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

The filing of a complaint in magistrate court is insufficient to trigger a defendant's speedy trial right for felony charges. State v. Ross, 1999-NMCA-134, 128 N.M. 222, 991 P.2d 507, cert. quashed, 129 N.M. 208, 4 P.3d 36 (2000).

The New Mexico rule stated in 1971 was that the period prior to filing the indictment is not to be considered in determining whether there has been a violation of defendant's right to a speedy trial. But the United States supreme court has held that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the U.S. Const., amend. VI. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977), modified, Kilpatrick v. State, 103 N.M. 52, 702 P.2d 997 (1985).

Period prior to filing of indictment is not to be considered in determining whether there was a violation of defendant's constitutional right to a speedy trial. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

Speedy trial provisions inapplicable to probation revocation proceedings. — The time constraints of a speedy trial rule and the constitutional right, under the state and federal constitutions, to a speedy trial are inapplicable to probation revocation proceedings; however, a delay in the institution and prosecution of probation revocation proceedings, along with a showing of prejudice to the probationer, may constitute a denial of due process, thereby requiring the state to waive any right to revoke the probation. State v. Chavez, 102 N.M. 279, 694 P.2d 927 (Ct. App. 1985).

Consenting to or acquiescing in delay. — Regardless of the fact that a delay in a particular case might have been construed to be a deprivation of the right to a speedy trial, the defendant cannot be heard to complain if he consented to or acquiesced in the delay. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Where defendant consents to the delay, he may not complain of a denial of the right to speedy trial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

To be denied a speedy trial, the delay must partake of the purposeful and oppressive, or even smack of deliberate, obstruction on the part of the government. Miller v. Rodriguez, 373 F.2d 26 (10th Cir. 1967).

Constitutional analysis not required even though six month rule violated. — If a violation of the six month rule of Rule 8-506 NMRA is found, the court is not required to automatically make a constitutional speedy trial analysis. County of Los Alamos v. Beckman, 120 N.M. 596, 904 P.2d 45 (Ct. App. 1995).

Determination of delay on case to case basis. — Every defendant charged with crime has the right to a speedy trial. Whether or not a delay amounts to an unconstitutional deprivation of this right depends on the circumstances of the particular case. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Delay caused by judicial review initiated by defendant. — Delay caused by judicial review initiated by the defendant would not be considered under a speedy-trial claim unless the defendant showed an unreasonable delay caused by the prosecution in that review, or a wholly unjustifiable delay by the reviewing court. State v. Wittgenstein, 119 N.M. 565, 893 P.2d 461 (Ct. App.), cert. denied, 119 N.M. 389, 890 P.2d 1321 (1995).

Extradition procedures must be used to avoid delay. — Where administrative machinery exists to secure extradition of person against whom charges are pending, the prosecutor has a constitutional duty to attempt to use it to avoid infringement upon defendant's right to speedy trial. The fact that a less cumbersome method of vindicating a prisoner's rights is not available does not excuse the failure to use available means. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

Claim of lack of speedy trial raised too late. — A claimed lack of a speedy trial does not provide a basis for post-conviction relief where the claim was not raised prior to trial. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Waiver of claim of undue delay. — Assuming there was undue delay, that delay did not deprive the magistrate of jurisdiction to bind defendant over to district court, and when defendant was arraigned in district court, his guilty plea waived the claim of undue delay in the absence of a showing of prejudice. State v. Elledge, 78 N.M. 157, 429 P.2d 355 (1967).

The entry of a voluntary plea of guilty constitutes a waiver of whatever right a defendant may have had to a speedy trial. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Where there is no showing of any prejudice to defendant by whatever delay may have occurred between his arrest and preliminary hearing and his position at trial could not

have been prejudiced, because he was convicted and sentenced upon his voluntary plea of guilty, the entry of his plea operated as a waiver of any claim of undue delay. State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct. App. 1969).

The entry of voluntary plea of guilty constituted a waiver of whatever right defendant may have had to a speedy trial. State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct. App. 1969).

B. FACTORS CONSIDERED IN ANALYSIS.

The presumption of prejudice based on length of delay is abolished. — The presumption that a defendant's right to a speedy trial has been violated based solely on the threshold determination that the length of delay is presumptively prejudicial is abolished. A presumptively prejudicial length of delay is simply a triggering mechanism, requiring further inquiry into the Baker factors, which includes the length of delay as one factor, for evaluating a claimed speedy trial violation. State v. Garza, 2009-NMSC-038, 146 N.M. 499, 212 P.3d 387.

Guidelines concerning presumptively prejudicial delay. — The guidelines for determining when the length of delay may be considered presumptively prejudicial and trigger a speedy trial inquiry are twelve months for simple cases, fifteen months for cases of intermediate complexity, and eighteen months for complex cases. These guidelines apply only to speedy trial motions to dismiss initiated on or after August 13, 2007. State v. Garza, 2009-NMSC-038, 146 N.M. 499, 212 P.3d 387.

Showing of particularized prejudice. — Generally, a defendant must show particularized prejudice of the kind against which the speedy trial right is intended to protect. However, if the length of delay and the reasons for the delay weigh heavily in the defendant's favor and the defendant has asserted the defendant's right and not acquiesced to the delay, then the defendant need not show prejudice for a court to conclude that the defendant's right has been violated. State v. Garza, 2009-NMSC-038, 146 N.M. 499, 212 P.3d 387.

Length of delay. — The mere circumstance of a significantly lengthy delay is insufficient in itself to establish a speedy trial violation and is to be balanced against other factors. State v. O'Neal, 2009-NMCA-020, 145 N.M. 604, 203 P.3d 135.

The Barker length of delay factor does not take into consideration the fault of the parties. — In evaluating the first *Barker* factor, the greater the delay, the more heavily it will potentially weigh against the state. The parties' fault in causing the delay is irrelevant to the analysis of the first *Barker* factor. The length of delay is an objective determination that is capable of measurement with some precision, and once established, it colors the rest of the speedy trial analysis. A delay that crosses the threshold for presumptive prejudice necessarily weighs in favor of the accused. A delay that crosses the bare minimum to trigger judicial examination of the claim does not weigh heavily in defendant's favor. Conversely, an extraordinary delay weighs heavily in

favor of defendant's speedy trial claim. State v. Serros, 2016-NMSC-008, *rev'g* No. 31,565, mem. op (N.M. Ct. App. Mar. 10, 2014) (non-precedential).

Extraordinary delay. — When the delay is extraordinary and the defendant is detained while awaiting trial, it may be appropriate to shift the focus to the state's efforts to bring the case to trial, at least when the record demonstrates that the defendant did not affirmatively cause or consent to the delay. Ordinarily, the actions of defense counsel are attributable to the defendant, but when the evidence indicates that defense counsel is acting contrary to the defendant's wishes, defense counsel's actions will not weigh against the defendant. An appellate court, therefore, must consider whether the defendant is to blame for the delays by personally causing or acquiescing to the delay in his case. If not, then a court must consider whether the state has met its obligation to bring the defendant's case to trial. State v. Serros, 2016-NMSC-008, *rev'g* No. 31,565, mem. op (N.M. Ct. App. Mar. 10, 2014) (non-precedential).

Where defendant was charged with criminal sexual penetration of a minor and where the length of delay in bringing him to trial was four years and three months, during which time defendant was detained in custodial segregation where he was alone in a cell for more than 23 hours a day, the delay was extraordinary and resulted in extreme prejudice, and where defendant's counsel caused most of the delay, but where there was no indication that defendant either personally caused or acquiesced to the delays, the state's actions, in repeatedly requesting to continue defendant's trial on behalf of defense counsel, amounted to negligent delay, which given the extraordinary length of the delay, weighed heavily against the state. The state negligently failed in its duty to bring defendant to trial and therefore violated defendant's constitutional right to a speedy trial. State v. Serros, 2016-NMSC-008, *rev'g* No. 31,565, mem. op (N.M. Ct. App. Mar. 10, 2014) (non-precedential).

Delay caused by state's interlocutory appeal may be weighed in calculating length of delay. — Delays in bringing a case to trial caused by the government's interlocutory appeal may be weighed in determining whether a defendant has suffered a violation of his rights to a speedy trial. State v. Suskiewich, 2016-NMCA-004, cert. denied, 2015-NMCERT-011.

Stipulated delay does not waive defendant's constitutional right to a speedy trial. — Where trial setting is vacated following defendant's motion for a continuance, and where parties stipulated that the delay resulting from the continuance would not count against the state in speedy trial determinations, the stipulation did not permanently waive the defendant's constitutional right to a speedy trial. State v. Taylor, 2015-NMCA-012.

Where defendant was charged with criminal sexual penetration and misdemeanor battery and where jury trial setting was vacated on defendant's motion which also stipulated that any delay resulting from the continuance would not count against the state in speedy trial determinations, and where state never requested a new trial setting, the stipulation did not permanently waive defendant's constitutional right to a speedy

trial, and the entire period of delay was attributable to the state and was weighed heavily against the state in the Barker v. Wingo analysis. State v. Taylor, 2015-NMCA-012.

Affirmative request for speedy trial. — Where the criminal prosecution was moving at a designedly deliberate pace consistent with the procedural safeguards afforded the defendant, defendant could not be heard to complain (at arraignment of denial of right to speedy trial) unless he had affirmatively made known his desire for a speedy trial previously. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct. App. 1969).

Defendant failed in his contention that he was denied a speedy trial because he did not ask for a speedy trial and he raised no question concerning the same before trial. State v. Rodriguez, 83 N.M. 180, 489 P.2d 1178 (1971).

Demands for a speedy trial weigh heavily in favor of defendant in determining whether delays were justified or not. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

The "demand" of trial necessary to avoid a waiver of right to speedy trial is not applicable in "extreme circumstances." State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Absent extreme circumstances, petitioner may not complain of the lack of a speedy trial unless he has affirmatively made known his desire for a speedy trial. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

A defendant may not be heard to complain of absence of speedy trial unless he has affirmatively made known his desire for such a trial. The accused must go on record in the attitude of demanding a trial or resisting delay or be deemed to have waived the privilege. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967), appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

Defendant's claim of lack of a speedy trial is not a ground for reversal unless defendant affirmatively made known his desire for a speedy trial. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Where defendant timely asserted his right to a speedy trial three times, this factor weighs against the state. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

Factors considered in judging reasonable delay. — Whether right to speedy trial has been denied depends on the reasonableness of the particular delay. In judging reasonableness, the court of appeals has looked to four factors to be considered: length of the delay; the reason for it; prejudice to the defendant; and waiver by the accused of the right. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972); State v. Barefield, 92 N.M. 768, 595 P.2d 406 (Ct. App. 1979).

Where there was no indication that delay was brought about by concerted acts of state officials, defendant was free on bond during the whole period of the continuances, and no undue and oppressive incarceration was involved, there was no denial of the right to a speedy trial. State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

In determining whether a defendant's right to a speedy trial has been abridged, trial court should weigh four factors: length of delay, reason for delay, defendant's assertion of his right and prejudice to defendant. Fact that defendant was not prejudiced by the delay is not of itself sufficient to deny a claim on this ground. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

There are at least four factors to be considered in determining whether a defendant has been denied a right to a speedy trial - length of the delay, reason for the delay, defendant's assertion of the right and prejudice to the defendant. They are related factors and must be considered together with such other circumstances as may be relevant. These factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977), modified, Kilpatrick v. State, 103 N.M. 52, 702 P.2d 997 (1985).

When an accused asserts that his right to a speedy trial has been violated because of a delay in bringing him to trial, the appellate court will analyze his claim under the four-factor balancing test set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). These factors are the length of the delay, the reason for the delay, the assertion of the right to a speedy trial, and the prejudice to the defendant as a result of the delay. State v. Tartaglia, 108 N.M. 411, 773 P.2d 356 (Ct. App. 1989), overruled by Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990).

Whenever there is a delay of more than six months between the time of arraignment and the date of the trial, four factors are to be considered in determining whether a defendant has been denied the right to a speedy trial. These are length of delay, reason for delay, defendant's assertion of his right, and ensuing prejudice to the defendant. State v. Mendoza, 108 N.M. 446, 774 P.2d 440 (1989).

Initially, the court determines whether the delay is presumptively prejudicial; if so, the length of delay is balanced against the reason for delay, the defendant's assertion of the right, and actual prejudice to the defendant. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Determination of whether delay is presumptively prejudicial requires consideration of the length of time between arrest and indictment and prosecution, the complexity of the charges, and the nature of the evidence against the accused. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Minimum delay required to trigger further inquiry. — A minimum of nine months delay is necessary to trigger further inquiry into the claim of a violation of the right to a speedy trial in simple cases, twelve months in cases of intermediate complexity, and fifteen months in complex cases. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Delay without prejudice does not violate right. — Where defendant claims a denial of a speedy trial solely because of the elapsed time between the offenses and his trial, but he does not claim any prejudice resulting from this elapsed time, defendant's claim is an insufficient basis for a holding that his constitutional right to a speedy trial has been denied. State v. Baca, 82 N.M. 144, 477 P.2d 320 (Ct. App. 1970).

That defendant was not taken before a magistrate for two and one-half days after his arrest provided no legal basis for relief where there is no showing or claim that the delay deprived defendant of a fair trial or that he was prejudiced in any way. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

To obtain a dismissal for preindictment delay, defendant must show that he has been substantially prejudiced. Where the contentions of prejudice in the trial court were (1) that a nine-month delay, between arrest and indictment, was a showing of prejudice and (2) that because defendant was intoxicated at the time of the offense he had a memory problem which had been compounded by the nine-month delay, neither claim was a showing of substantial prejudice, and the delay was not a violation of due process. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977), modified, Kilpatric v. State, 103 N.M. 52, 702 P.2d 997 (1985).

Without a showing of prejudice, delay in bringing the defendant before a magistrate provides no basis for reversal of the conviction. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Where the procedural defect is the delay in filing the information, absent a showing of prejudice from this delay, a prosecution under the information is proper. State v. Keener, 97 N.M. 295, 639 P.2d 582 (Ct. App. 1981), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

The defendant’s constitutional right to speedy sentencing was not violated where, despite a presumptively prejudicial delay in re-sentencing, the defendant did not show any actual prejudice because he did not show that he suffered undue anxiety or concern rising to the level of a constitutional violation, he failed to state what defense was impaired by the delay, and the record confirmed that the sentence initially imposed by the trial court would not have been reduced had the re-sentencing occurred earlier. State v. Brown, 2003-NMCA-110, 134 N.M. 356, 76 P.3d 1113.

The speedy trial right is not violated where there is no showing of prejudice. — Where there was a fourteen month delay between defendant’s arrest for DWI and his trial, but where the record did not support a finding of prejudice to defendant,

defendant's constitutional right to speedy trial was not violated. State v. Dorais, 2016-NMCA-049, cert. denied, 2016-NMCERT-____.

A showing of particularized prejudice is not necessary in cases in which the other *Barker* factors weigh heavily against the State. — A particularized showing of prejudice is not necessary in cases in which the other *Barker* factors weigh heavily in the defendant's favor and the defendant has not acquiesced in the delay. State v. Taylor, 2015-NMCA-012.

Where defendant was charged with criminal sexual penetration and misdemeanor battery and where the length of delay in bringing defendant to trial was excessively long for a simple case, the majority of the delay resulted from the State's inexcusable neglect, and defendant asserted his right to a speedy trial and did not acquiesce to the delay, defendant's failure to show particularized prejudice was not fatal to his speedy trial claim because the other *Barker* factors weighed heavily in defendant's favor. State v. Taylor, 2015-NMCA-012.

Showing of substantial prejudice prerequisite to dismissal for preindictment delay. — A showing of substantial prejudice is required before one can obtain a dismissal for preindictment delay. Elapsed time in itself does not determine whether prejudice has resulted from the delay, nor does every delay-caused detriment amount to substantial prejudice; where the defendant shows actual prejudice, it must be balanced against the reasons for the delay in determining whether he has been substantially prejudiced. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978), rejected in part, Gonzales v. State, 111 N.M. 363, 805 P.2d 630.

Substantial prejudice means actual prejudice to the defendant together with unreasonable delay of the prosecution in obtaining an indictment. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978), rejected in part, Gonzales v. State, 111 N.M. 363, 805 P.2d 630.

To make showing of actual prejudice defendant must establish in what respect his defense might have been more successful if the delay between his arrest and his indictment had been shorter. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978), rejected in part, Gonzales v. State, 111 N.M. 363, 805 P.2d 630.

A 23-month delay in the bringing of a defendant to trial is presumptively prejudicial. State v. Barefield, 92 N.M. 768, 595 P.2d 406 (Ct. App. 1979).

Mere possibility that deceased witness might have helped defendant's case is insufficient to establish actual prejudice in a delay between arrest and indictment. State v. Duran, 91 N.M. 756, 581 P.2d 19 (1978), rejected in part, Gonzales v. State, 111 N.M. 363, 805 P.2d 630.

The lengthy unexplained delay in the prosecution violated defendant's right to a speedy trial. State v. Kilpatrick, 104 N.M. 441, 722 P.2d 692 (Ct. App. 1986), cert. denied, 104 N.M. 378, 721 P.2d 1309 (1986).

Certain delays presumptively prejudicial. — In relation to the policy disclosed in former Rule 95, N.M.R. Civ. P. (superseded by Rule 5-604 NMRA), concerning right to speedy trial, delays of 15 months between arrest and trial and of 10 months between filing of information and trial were presumptively prejudicial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

A nine-month delay between arrest and indictment was presumptively prejudicial whether or not there was an explanation for the delay. The delay and the lack of explanation of the reason for the delay were two factors to be considered. However, the failure of defendant to show any prejudice was also to be considered. Where the trial court failed to consider the factors required to be considered and failed to apply the balancing test required, the order dismissing the indictment will be reversed and the cause is remanded with instructions to reinstate the indictment. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977), modified, Kilpatric v. State, 103 N.M. 52, 702 P.2d 997 (1985).

A twenty-seven month delay from the date of the indictment to the date defendant pleaded no contest is presumptively prejudicial. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

Burden is on state to show absence of prejudice. — Where delay is presumptively prejudicial, the state has the burden of demonstrating an absence of prejudice to the defendant. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Eleven and one-half month delay between date of arraignment and date available for trial was presumptively prejudicial and triggered inquiry into the four factors which must be balanced in deciding speedy trial issue: length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant. State v. Romero, 101 N.M. 661, 687 P.2d 96 (Ct. App. 1984).

Delay caused in part by defendant. — Defendant's motion for dismissal of the indictment because of a delay of 15 months from indictment to trial was properly denied when such delay was caused in part by the defendant because of vacating an early setting, and because of hearing on his own motions. State v. Montoya, 86 N.M. 119, 520 P.2d 275 (Ct. App. 1974).

Delay of about 19 months between arrest and trial did not warrant dismissal of charges where the defendant was responsible for some of the delay, he invoked his speedy trial rights just prior to trial, and he could not demonstrate any prejudice from his pretrial incarceration. State v. Ortiz-Burciaga, 1999-NMCA-146, 128 N.M. 382, 993 P.2d 96, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Where a defendant causes or contributes to the delay he may not complain of a denial of the right to speedy trial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

Where petitioner's plea of insanity was instrumental in delaying the disposition of his trial, and where, in addition, the petitioner had not asserted that the passage of time had impaired his ability to defend himself, thereby rendering the delay prejudicial or oppressive, his constitutional right to a speedy trial was not violated. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967), appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

One test in determining whether defendant was denied a speedy trial under this section is whether the delay was caused wholly by act of the state or whether some act of the defendant caused or contributed to the delay. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967), appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

A delay in conducting an appeal de novo in district court following the conviction in municipal court did not establish a deprivation of the defendant's constitutional rights since the defendant had a responsibility to try to keep the case from slipping through the cracks. Town of Bernalillo v. Garcia, 118 N.M. 610, 884 P.2d 501 (Ct. App. 1994), cert. denied, 118 N.M. 585, 883 P.2d 1282 (1994).

Twenty-one month delay in bringing defendant's case to trial was presumptively prejudicial, but none of the delays were attributable to the state; thus, defendant was not denied the right to a speedy trial. State v. Plouse, 2003-NMCA-048, 133 N.M. 495, 64 P.3d 522, cert. denied, 133 N.M. 539, 65 P.3d 1094 (2003).

Although a delay of 62 days over the minimum nine-month period was presumptively prejudicial in a "high end" simple case, the delay did not violate the defendant's constitutional right to a speedy trial where both parties were equally culpable in causing the delay, the defendant waited "until the eleventh hour" to specifically and meaningfully assert the right, and the defendant was primarily responsible for any prejudice to his case. State v. Laney, 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Interval of 52 days between arrest and trial, without more, is insufficient for a determination that a speedy trial has been denied. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Delay of 144 days from arrest to trial. — The time interval between arrest on March 3rd and trial on July 25th, without more, is insufficient for a determination that the right to a speedy trial has been denied. State v. Adams, 80 N.M. 426, 457 P.2d 223 (Ct. App. 1969).

A 15-month delay between arrest and trial was contrary to the purpose of the right to speedy trial because one of the purposes of that right is to prevent undue incarceration prior to trial. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct. App. 1972).

A six-year delay in imposing a correct sentence was not a denial of appellant's constitutional right to a speedy trial as guaranteed by U.S. Const., amend. VI, or this section. Miller v. Rodriguez, 373 F.2d 26 (10th Cir. 1967).

Delay caused by ongoing narcotics undercover operation. — A showing of reasonable delay in a defendant's prosecution, by reason of an ongoing narcotics undercover operation, is a permissible basis for preindictment delay. State v. Lewis, 107 N.M. 182, 754 P.2d 853 (Ct. App. 1988), cert. denied, 107 N.M. 151, 754 P.2d 528 (1988).

Thirteen-month delay in a prosecution for aggravated assault on a police officer was presumptively prejudicial, in light of the simple nature of the charge and the readily available evidence. State v. Lujan, 112 N.M. 346, 815 P.2d 642 (Ct. App. 1991), cert. denied, 112 N.M. 279, 814 P.2d 457 (1991).

C. SPECIFIC CASES.

Speedy trial denied. — Where defendant’s trial was delayed for approximately twenty-two months; defendant’s case was a complex case; defendant was incarcerated the entire time pending trial; the delay was attributable to the fact that although defendant diligently attempted to interview the state’s witnesses, the state repeatedly failed to schedule interviews or scheduled interviews and then cancelled the interviews; the state obtained numerous continuances and six-month rule extensions; defendant stipulated to several continuances and extensions because of the state’s failure to provide witness interviews; and defendant asserted the right to a speedy trial a month after defendant’s arraignment and two and one-half months before the last scheduled trial date, defendant’s right to a speedy trial was violated. State v. Moreno, 2010-NMCA-044, 148 N.M. 253, 233 P.3d 782, cert. denied, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1048.

Right to speedy trial violated. — Where defendant was charged with multiple counts of criminal sexual penetration of a minor and related felonies, a twenty-seven month delay in a case of intermediate complexity where the state was entirely responsible for the delay and where defendant asserted his right to a speedy trial several times and suffered particularized prejudice in the form of depression, anxiety and broken relationships with his children, and where the prejudice was exacerbated by the excessive pre-trial delay, all the Barker v. Wingo factors weighed against the state, the district court appropriately dismissed defendant’s charges on speedy trial grounds. State v. Montoya, 2015-NMCA-056.

Where defendant was convicted of forgery, embezzlement and tax evasion, the delay of forty-six months in bringing him to trial violated his constitutional right to a speedy trial

where over twenty-seven months of the delay weighed heavily against the state, where defendant asserted his right to a speedy trial four times, and where defendant was prejudiced by the delay when he lost his ability to work in his field or obtain other employment, exhausted his financial resources and lost his home, was ostracized by family members, and considered suicide as a remedy to his situation. State v. Moore, 2016-NMCA-067.

Four year delay. — Where defendant was indicted almost a year after defendant shot and killed the victim; defendant's trial occurred four years after defendant was indicted; defendant stipulated that the delay was not the fault of the state; the only time defendant asserted a right to a speedy trial was in a standard demand filed when defense counsel entered an appearance; the court had granted defendant four continuances; and defendant raised the right to a speedy trial for the first time on appeal, the delay in defendant's trial did not amount to fundamental error. State v. Largo, 2012-NMSC-015, 278 P.3d 532.

Right to speedy trial not violated. — Where there was a delay of 370 days between the date of defendant's arrest and the scheduled date of defendant's trial; defendant's case was a simple case; the state negligently delayed, for two months, filing charges in district court after the state had dismissed the charges in magistrate court; during the remainder of the delay, the case progressed with customary promptness; defendant did not assert the right to a speedy trial until the morning of the trial; defendant was on bond subject to restrictions on travel, possessing firearms and dangerous weapons, and possessing and consuming alcohol and entering liquor establishments; and defendant failed to substantiate defendant's alleged memory loss or any impairment to defendant's defense, defendant's right to a speedy trial was not violated. State v. Parrish, 2011-NMCA-033, 149 N.M. 506, 252 P.3d 730, cert. denied, 2011-NMCERT-003, 150 N.M. 619, 264 P.3d 520.

Where defendant was charged with the sexual abuse of defendant's step-child over a period of twelve years; fifty-five months elapsed between defendant's arrest and defendant's second trial; the state was responsible for approximately ten months of the delay waiting for DNA results; for approximately twelve months, the parties were working on discovery and obtaining a possible sex offender evaluation of defendant; the majority of the delay was caused by defendant's repeated change of counsel; defendant claimed that each of the eight attorneys who represented defendant were ineffective; the changes of counsel necessitated repeated continuances and extensions to allow substitute counsel to prepare a defense and because the court refused to allow defendant to appear pro se or to decide important motions when defendant was without counsel in an effort to ensure that defendant received adequate representation; defendant filed numerous demands for a speedy trial while defendant was simultaneously objecting to defense counsel's representation, requesting substitute counsel, and claiming that defense counsel needed additional time to prepare; during the delay, defendant was incarcerated in segregation because defendant could not post bond and for defendant's safety; and one defense witness whose testimony was wholly

speculative died, defendant's right to a speedy trial was not violated. State v. Fierro, 2012-NMCA-054, 278 P.3d 541, cert. denied, 2012-NMCERT-004.

Where defendant's trial for forgery was delayed for approximately 30 months, the majority of which was caused by defendant, where defendant's invocations of his right to a speedy trial lacked substantial basis because they coincided with procedural maneuvers which had the result of delaying the trial, and where defendant failed to demonstrate particularized prejudice arising from the delays, the district court did not err in concluding that defendant's right to a speedy trial was not violated. State v. Estrada, 2016-NMCA-066, cert. denied, 2016-NMCERT-____.

Delay caused by defendant's dilatory actions. — Where defendant was charged with offenses involving the sexual abuse of defendant's minor child; defendant was responsible for thirty-four months of the forty-three month delay in defendant's trial due to defendant's actions, which included filing pro se motions to dismiss three court-appointed defense counsel and entering defendant's appearance pro se, suing court-appointed counsel and the public defender's office, filing a motion to delay trial while defendant had back surgery, failing to conduct pretrial interviews of state witnesses and defense witnesses, failing to inform the district court that the psychologist employed by defendant to examine the victim and the victim's parent and siblings had advised defendant that the psychologist was not qualified to perform the interviews; and failing to inform the district court that defendant knew that defendant was incapable of preparing for trial without court-appointed counsel; defendant's motions to dismiss for a speedy trial violation were filed simultaneously with defendant's delay-causing actions, which included filing motions to withdraw court-appointed counsel and entry of an appearance pro se or a motion to dismiss on other grounds; and defendant's assertion that defendant suffered anxiety, stress and physical ailments due to the delay was not supported by medical evidence, defendant's right to a speedy trial was not violated. State v. Steinmetz, 2014-NMCA-070, cert. denied, 2014-NMCERT-006.

Delay caused by change of venue. — Where defendant was arrested on June 24, 2004 and indicted in Bernalillo county on July 8, 2004 for criminal sexual penetration, which resulted in the victim's pregnancy; defendant filed a motion to dismiss for improper venue on June 7, 2007 alleging that the crime occurred in Sandoval county; the district court dismissed the Bernalillo county charge without prejudice; defendant was indicted on December 4, 2008 in Sandoval county for the same offense; defendant's trial commenced on November 30, 2010; the state did not act in bad faith or to gain a tactical advantage; defendant filed numerous pro se motions in the Sandoval county case that were repetitive and confusing and caused significant delays in the case; defendant timely asserted defendant's right to a speedy trial; although defendant was incarcerated in Bernalillo county for related sexual acts against the victim, the incarceration did not derive from the Sandoval county case; because the Bernalillo county case and the Sandoval county case were separate cases, the delay was measured from the date defendant was indicted in Sandoval county; defendant failed to show that defendant suffered an unusual degree of anxiety and concern as a result of the pending charges; and defendant failed to make a particularized showing of

prejudice, defendant's right to a speedy trial was not violated. State v. Fierro, 2014-NMCA-004, cert. denied, 2013-NMCERT-012.

Right not forfeited because of incarceration. — A prisoner does not forfeit his right to a speedy trial solely because he is confined in the penitentiary under sentence for another offense. This is particularly true when the state that holds him in prison is the same state that presents the indictments. Raburn v. Nash, 78 N.M. 385, 431 P.2d 874 (1967), appeal dismissed, 389 U.S. 999, 88 S. Ct. 582, 19 L. Ed. 2d 613 (1967).

Defendant was responsible for the delay. — Where forty-one months elapsed between defendant's arrest and trial for first degree murder; in the first twelve months, defendant went through two of defendant's appointed defense attorneys and hampered pretrial preparation and discovery; in the next five months, newly appointed counsel had be become familiar with the extensive discovery, a failed plea agreement, and the defense's request for a determination of defendant's competency to stand trial; during the next fifteen months, defendant's competency examinations had to be scheduled three times because of defendant's obstructionist behavior, defendant refused to cooperate with a third appointed attorney and defendant's appointed attorney withdrew because defendant filed a federal lawsuit against the attorney; defendant filed a motion to proceed pro se and then changed defendant's mind; when the trial court denied a fourth attorney's effort to withdraw after defendant sued the attorney in federal court, the case was brought to trial; and defendant failed to show any particularized prejudice due to the delay, defendant's right to a speedy trial was not violated. State v. Samora, 2013-NMSC-038.

Right to speedy trial not violated. — Where defendant was charged with kidnapping and second-degree criminal sexual penetration; the trial was delayed for over 21 months; the case was of intermediate complexity; defendant spent three months in jail and was released a year and a half before trial; one of defendant's alibi witnesses died before trial; defendant did not notify defense counsel about the existence of the witness until the week before trial; defendant was able to call another alibi witness; most of the delay was caused by a backlog at the laboratory that was conducting DNA testing, and the remainder of the delay was caused by the district court's schedule; defendant objected to only one of the state's two motions for continuance; and defendant did not assert the right to a speedy trial until the day before trial, defendant's right to a speedy trial was not violated. State v. Montoya, 2011-NMCA-074, 150 N.M. 415, 259 P.3d 820.

Where there was a twenty-one-month delay between defendant's indictment for aggravated burglary and the setting of defendant's case for trial; six months of the delay was attributable to defendant's requests for continuances to permit defendant to recover the stolen property; one month elapsed between the time of defendant's arrest and defendant's indictment; two and one-half months elapsed between the indictment and the pretrial conference; one month elapsed between the pretrial conference and the docket call; the prosecution was granted a twenty-one day continuance, because it had not received information needed to determine whether to suggest a plea; three and one-half months elapsed while the trial judge considered defendant's request that the judge

enter a voluntary recusal; three and one-half months elapsed between the recusal and the assignment of a new trial judge; five months elapsed between the time the new trial judge was appointed and the date set for trial; there was no evidence that the state intentionally delayed the trial; defendant demanded a speedy trial when defendant filed an entry of appearance in magistrate court and one and a half months before the trial date; defendant spent one month incarcerated, wore an ankle monitor for three months and was prohibited from traveling out-of-state; and defendant did not show that the delay was prejudicial, defendant's right to a speedy trial was not violated. State v. Valencia, 2010-NMCA-005, 147 N.M. 432, 224 P.3d 659, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.2d 90.

Where defendant's trial was delayed five months beyond the presumptively prejudicial period; during the delay, the parties were involved in plea negotiations on three charges, two of which related to other crimes for which defendant had been separately indicted; defendant's case and the case against defendant's co-defendant were joined; five months of the delay was caused by the co-defendant's requests for continuances; defendant did not move for a severance of defendant's case and the co-defendant's case; defendant filed a motion for speedy trial seven days after defendant's arraignment and a motion to dismiss three weeks before the trial setting; defendant made no particularized showing that defendant suffered prejudice from pretrial incarceration or undue anxiety; defendant did not show that defendant's defense was impaired by the delay; and there was no evidence of deliberate delay by the state, defendant's right to a speedy trial was not violated. State v. Wilson, 2010-NMCA-018, 147 N.M. 706, 228 P.3d 490, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Where the defendant's trial was delayed for thirty-seven months; the delay began with the defendant's late-filed motion to suppress that caused the first trial date to be vacated; the defendant filed a motion to continue the suppression hearing which stated that the defendant did not object and agreed to waive any time limitation period or extension from the supreme court; the defendant filed a motion to continue the second trial based on the defendant's change of counsel; the third trial date was vacated because of inclement weather; the fourth trial date was vacated when the trial court declared a mistrial based in part on contact between the defendant and a juror; from the first trial through the continuance of the fourth trial, supreme court extensions of the six-month rule deadlines were obtained based on the defendant's waiver and with no objection by the defendant; the defendant did not assert his right to a speedy trial for thirty-four months after charges were filed in district court; the defendant presented no evidence that the delay caused any significant pretrial incarceration, anxiety and concern, or impairment of the defendant's defense; and the defendant did not waiver any right to a speedy trial, the defendant's right to a speedy trial was not violated. State v. O'Neal, 2009-NMCA-020, 145 N.M. 604, 203 P.3d 135.

Defendant not prejudiced by delay. — Where defendant was charged with possession of a controlled substance and other offenses; the case against defendant was simple, involving two police officers and a chemist; defendant's trial was delayed for 14 months; during the delay, one judge retired, another judge was designated and

then excused by defendant; the state did not request that a judge pro tempore be assigned; the state was unable to go to trial for six months because it did not have its drug analysis evidence; the state did not attempt to hasten the laboratory analysis; defendant objected to the state's motion for an extension of the trial deadline and filed a motion to dismiss for violation of defendant's right to a speedy trial at a pretrial hearing after the second judge had been appointed; and defendant was not incarcerated while waiting trial and the delay did not negatively impact defendant's preparation for trial, defendant's right to a speedy trial was not violated. State v. Gallegos, 2010-NMCA-032, 148 N.M. 182, 231 P.3d 1124.

No prejudice where defendant's case is strengthened by the delay. — Where defendant's trial was delayed for three years, approximately half of which was attributable to neutral causes or to defendant for the benefit of the defense, and where defendant's case was strengthened by the delay when new methods of DNA statistical analyses were implemented that increased the statistical probability that the DNA match to defendant was mistaken, the delay was not unconstitutionally prejudicial to defendant. State v. Smith, 2016-NMSC-007.

Minimal delay was not prejudicial. — Where defendant was arrested on May 8, 2006; a criminal complaint was filed in magistrate court on May 10, 2006; the complaint in magistrate court was dismissed and a criminal information was filed in district court on September 15, 2006; defendant was tried and convicted on June 28, 2007; the delay was only minimally over the presumptively prejudicial period of nine months; the delay was caused by the failure of the department of corrections to transport defendant for defendant's arraignment or preliminary hearing, the illness of the trial judge, and a late-discovered conflict regarding defendant's representation by the public defender department; and defendant failed to establish that defendant suffered prejudice by the delay, defendant's right to a speedy trial was not violated. State v. Lopez, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361, cert. denied, 2009-NMCERT-10, 147 N.M. 452, 224 P.3d 1257.

Nine year delay. — Where there was a nine year delay in bringing defendant to trial; defendant fled New Mexico after the indictment was filed against defendant in New Mexico; during the nine year delay, defendant was twice incarcerated in Texas, and the state of Texas notified New Mexico that defendant was available for prosecution when defendant was released from each incarceration in Texas; New Mexico failed to obtain custody of defendant upon defendant's release from incarceration in Texas; neither defendant nor the state invoked the Interstate Agreement on Detainers Act; and defendant's first assertion of the right to a speedy trial was at defendant's arraignment in New Mexico nine years after the indictment was filed, the defendant's right to a speedy trial was violated. State v. Palacio, 2009-NMCA-074, 146 N.M. 594, 212 P.3d 1148.

Five-year delay did not result in a speedy trial violation. — Where there was a five year delay between defendant's arrest and trial for criminal sexual penetration perpetrated in the commission of a felony, but where the record established that the

reasons for the delay weighed only slightly against the state, that defendant did not meaningfully assert his speedy trial right, and that defendant did not articulate any particularized prejudice, defendant's constitutional right to a speedy trial was not violated. State v. Samora, 2016-NMSC-031.

Delay of ten months and six days. — Where there was a delay of ten months and six days between the defendant's arrest and the defendant's trial for aggravated DWI; the delay was not extraordinary; the state delayed four months before dismissing the magistrate court case and refiling the charges in district court; the remainder of the delay was attributable to multiple reassignments of judges in the district court; the defendant made only one demand for a speedy trial as part of the defendant's waiver of arraignment and plea of not guilty in district court; the defendant spent two hours in jail and was released with normal bond restrictions; and the defendant failed to show particularized prejudice as a consequence of the delay, the defendant's right to a speedy trial was not violated. State v. Garza, 2009-NMSC-038, 146 N.M. 499, 212 P.3d 387.

Delay without prejudice does not violate right. — Where the defendant's trial was delayed for more that nine months because of the district court's crowded docket and unavailability of courtroom space; the defendant asserted his right to a speedy trial; the defendant was held in custody only for a brief period of time; the defendant did not experience a greater degree of oppression and anxiety while the charges against the defendant were pending than any other person who had been charged with the same offense would have experienced; and the state filed supplemental disclosures of witnesses when the defendant was incarcerated in another case, defendant was not prejudiced by the delay and his right to a speedy trial was not violated. State v. Hayes, 2009-NMCA-008, 145 N.M. 446, 200 P.3d 99, cert. denied, 2008-NMCERT-012, 145 N.M. 571, 203 P.3d 102.

Failure to demonstrate particularized prejudice. — Where the defendant's murder trial was delayed for twenty-six months, and where the defendant was held in custody the entire time, three of the Barker factors weighed slightly against the state due to administrative delay and the fact that defendant waited two years prior to asserting his right to a speedy trial; defendant's right to a speedy trial, however, was not denied because defendant failed to show that he suffered any undue anxiety, that he was unable to assist in his own defense in any way, that any witnesses were unable to remember any information needed for his defense, or that he was impaired in his defense in any other demonstrable manner as a result of the time that elapsed before he was brought to trial. Defendant's speedy trial right was not violated where the other factors do not weigh heavily in defendant's favor and because defendant has failed to demonstrate any particularized prejudice. State v. Thomas, 2016-NMSC-024.

Failure to show particularized prejudice precludes a determination of a speedy trial violation when the other factors do not weigh heavily against the state. — Where the defendant's trial was delayed for twenty-four months, three of the *Barker* factors weighed slightly against the state due to its failure to provide discovery, which

fell under the "negligent or administrative" category of delay, and where defendant asserted his right to a speedy trial by filing a motion to dismiss based on speedy trial grounds; defendant's right to a speedy trial, however, was not denied because defendant failed to show that he suffered any undue anxiety and failed to show particularized prejudice of the kind against which the speedy trial right is intended to protect. State v. Suskiewich, 2016-NMCA-004, cert. denied, 2015-NMCERT-011.

Right to speedy trial violated. — Where defendant's trial was delayed for nearly three and one-half years because defense counsel failed to pursue the issue of defendant's competency and the state failed to ascertain what was happening in the case or to move it forward, defendant was incarcerated during the delay, defendant's diminished intellectual capacity prevented him from asserting the right to a speedy trial and defense counsel was not in a position to make a speedy trial claim on defendant's behalf because of defense counsel's unmanageable caseload, and five years had passed since the crime was committed and the state offered no evidence to rebut defendant's allegation that the child victim's memory and therapy during the five-year period would make it difficult to determine what really happened in the case, defendant's right to a speedy trial was violated. State v. Stock, 2006-NMCA-140, 140 N.M. 676, 147 P.3d 885, cert. quashed, 2007-NMCERT-001, 141 N.M. 165, 152 P.3d 152.

Delay caused by administrative failures. — Where defendant was indicted for offenses relating to the use of federal election funds during defendant's tenure as secretary of state; defendant's trial was delayed for thirty-six months; the district court delayed eighteen months to rule on defendant's motion to disqualify the attorney general from prosecuting the case, delayed twenty-one months to rule on defendant's motion to sever defendant's case from the cases of defendant's co-defendants, and failed to hear dozens of motions filed by defendant and defendant's co-defendants; defendant filed three commence trial motions; defendant suffered extreme hypertension, insomnia and joint pain due to stress caused by the delay, which was supported by medical evidence; defendant lost defendant's job and was unable to find new employment; defendant suffered extreme public humiliation; and defendant's defense was impaired when a witness, who was involved in the formation and administration of the federal contract that was the basis for claims at issue in the case, died, defendant's right to a speedy trial was violated. State v. Vigil-Giron, 2014-NMCA-069, cert. denied, 2014-NMCERT-006.

Delay caused by negligence and administrative actions. — Where defendant was charged with two counts of criminal sexual contact of a minor and one count of interference with communications; defendant's trial was delayed twenty-four months; ten months of the delay were due to negligence and administrative reasons; defendant's trial was set and reset eight times before defendant was tried; several trial settings were vacated because the trial was set for a three-day period when three days were not available; the first trial was reset because one day fell on a holiday; a trial was reset because the trial was erroneously set for only one day; another trial was reset because one day fell on a mandatory furlough for state employees, which the district court was aware of and which left defense counsel without staff; and another trial was vacated

because of a pending defense motion that had not been heard; defendant filed four motions throughout the period of delay to dismiss for violation of defendant's right to a speedy trial; defendant objected to the state's motions for extensions to commence trial; and defendant was incarcerated during the entire period of delay, defendant's right to a speedy trial was violated. State v. Ochoa, 2014-NMCA-065, cert. granted, 2014-NMCERT-006.

Negligent and administrative delay without a showing of prejudice. — Thirty-two months of negligent and administrative delay between defendant's arrest and trial for shoplifting and possession of drug paraphernalia, without a showing of particularized prejudice, did not violate defendant's constitutional right to a speedy trial. State v. Gallegos, 2016-NMCA-076, cert. denied, 2016-NMCERT-____.

Extraordinary delay attributed to the state's negligence and administrative burdens violated defendant's right to a speedy trial. — Where defendant was charged with reckless child abuse resulting in death and tampering with evidence, defendant's right to a speedy trial was violated where the state's negligence and administrative burdens were responsible for most of the sixty-two month delay in bringing defendant to trial, where defendant asserted his right to a speedy trial four times during the extraordinary delay, and where undue prejudice was presumed because the first three *Barker* factors weighed heavily in defendant's favor. State v. Flores, 2015-NMCA-081, cert. denied, 2015-NMCERT-008.

Delay weighs against state. — Where defendant's trial commenced twenty-seven months after his indictment, and the state failed to arraign defendant on the charges until fourteen months after the indictment, and over half of the total delay was caused by the state's unjustified negligence in not knowing that defendant was in its custody, the delay weighs heavily against the state. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

Dismissal is proper where delay weighs "extremely heavily" against the state. — Where defendant's trial is delayed based on the state's own dilatory and deceptive conduct in prosecuting a case, the district court justly may dismiss the charges even though the remaining factors of the speedy trial analysis factor the accused only slightly. State v. Spearman, 2012-NMSC-023, 283 P.3d 272.

Delay weighed "extremely heavily" against the state. – Where defendant was charged with practicing architecture without a license, fraud and forgery; the district court dismissed the charges after a delay of sixteen months without going to trial; the state was responsible for all of the delay; the state requested four trial continuances, one continuance of a motion hearing and two extensions of the six-month time limit; the motions for continuance were based on the unavailability of prosecution witnesses, the need for time to respond to defense motions, and the assignment of a new prosecutor; defendant did not ask for any continuances and opposed one of the requests for a continuance; after the first trial continuance, the state amended its witness and exhibit lists and unduly complicated the case by providing defense counsel with multitudinous

documents through discovery which the trial court subsequently struck from the record as being irrelevant; and the district court found a pattern of delay on the part the state, the cause of the delay weighed extremely heavily against the state based on the state's own dilatory and deceptive conduct in prosecuting the case. State v. Spearman, 2012-NMSC-023, 283 P.3d 272.

Fourteen-month delay. — The state violated defendant's right to a speedy trial where there was an unexplained and unjustifiable 14-month gap between defendant's indictment and his arraignment. State v. Urban, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061.

Facts showing purposeful delay by state. — Where case was brought by information after grand jury failed to indict defendant on felony charges, where there was an unexplained delay of some ten and one-half months between the time of filing the information and the time defendant submitted to arrest upon learning that officers were looking for him, and where the uncontradicted showing was that defendant was available to the state at any time the state wished to proceed, this showed a purposeful delay by the state amounting to a denial of the right to a speedy trial. State v. Lucero, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977).

Deliberate delay by state resulting in substantial and undue prejudice to defendant violated the right to speedy trial. — Where defendant was charged with criminal sexual contact of a minor, the district court dismissed the simple case after a nineteen-month delay during which the state dismissed charges and refiled the same charges following the denial of the state's motion for continuance; the state's deliberate delay in dismissing charges on the eve of trial, and refiling the same charges eight days later resulting in twelve months of additional delay in rescheduling the trial, weighed heavily against the state, caused defendant to suffer personal hardship and anxiety for an unnecessarily prolonged period of time, and violated defendant's constitutional right to a speedy trial. State v. Lujan, 2015-NMCA-032.

Showing of delay not enough. — Trial court did not err in denying defendant's motion to dismiss for lack of speedy trial based on eleven and one-half months delay attributable to the state where defendant asserted his right to speedy trial only one month prior to available trial date and where his only assertion of possible prejudice was absence of psychiatrist who examined him. State v. Romero, 101 N.M. 661, 687 P.2d 96 (Ct. App. 1984).

Eighteen-month delay between arraignment and trial did not violate defendant's right to a speedy trial, where he acquiesced to a stay in the proceedings during determination of his competency and did not assert his right to a speedy trial until the day the trial began, six months after the trial court lifted the stay. State v. Mendoza, 108 N.M. 446, 774 P.2d 440 (1989).

Where trial was delayed for 26 months due to defendant's incarceration in another state, no adequate reason was given for delay, and defendant repeatedly insisted that

he be tried, defendant was denied his right to a speedy trial, despite an equivocal showing on the question of prejudice. State v. Harvey, 85 N.M. 214, 510 P.2d 1085 (Ct. App. 1973).

Charge under new information after previous dismissal. — Where charge against defendant was filed and then dismissed under writ of habeas corpus, prosecution and conviction three years later under information containing same charge did not violate defendant's constitutional right to a speedy public trial under this section. State v. Rhodes, 77 N.M. 536, 425 P.2d 47 (1967).

IX. IMPARTIAL JURY.

A. IN GENERAL.

Defendant's right to an impartial jury was not denied. — Where defendant was charged with shooting into a motor vehicle and killing the victim; defendant's ex-spouse testified that the ex-spouse knew one of the jurors, that the juror had told a mutual friend that defendant looked "scary" and had made negative comments about defendant to a potential juror who had not been selected for defendant's jury; the trial court questioned the potential juror, determined that the potential juror had no information that anyone else had heard the juror's negative comments, and excused the juror from defendant's jury; and the trial court questioned the remaining jurors to make sure that they had not been involved in any discussions of the case with anyone and reminded them not to discuss the case, the trial court did not abuse its discretion or impair defendant's right to a fair and unbiased jury. State v. Montoya, 2013-NMSC-020, 306 P.3d 426.

Admission of testimony as to child's truthfulness was not plain error. — Where defendant was charged with criminal sexual penetration of a child under thirteen; witnesses were allowed to testify as to the truthfulness of the child; defendant cross-examined the witnesses and advanced the theory that the child's testimony was not credible, the error in admitting the testimony that the child was truthful was not plain error. State v. Dylan J., 2009-NMCA-027, 145 N.M. 719, 204 P.3d 44.

Juror view of the defendant in shackles. — Where the defendant alleged that one of the potential jurors saw the defendant in shackles; one of the jurors did see the defendant begin to enter the courtroom escorted by police officers; the defendant was shackled at the time; and there was no showing that any of the potential jurors saw the defendant's shackles, the defendant was not prejudiced by the trial court's denial of the defendant's motion for a mistrial. State v. Casillas, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830, cert. denied, 2009-NMCERT-003, 146 N.M. 603, 213 P.3d 507.

Jury view of the defendant in a police car. — Where defendant, who was charged with murder, moved for a mistrial on the ground that four jurors had seen defendant arrive at the courthouse in a police car; there was no evidence that any jurors actually saw defendant in the police car and, if they did see defendant, there was no indication that the exposure was not inadvertent; and jurors would not be surprised to see

someone accused of murder in custody, defendant was not prejudiced to the extent necessary to warrant a mistrial. State v. Parvilus, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-002.

Mid-trial publicity. — When the trial court is alerted to mid-trial publicity, the court should first determine whether the publicity is inherently prejudicial. To determine whether the publicity is inherently prejudicial, the court should consider whether the publicity goes beyond the record or contains information that would be inadmissible at trial, how closely related the material is to matters at issue in the case, the timing of the publication during trial, and whether the material speculates on the guilt or innocence of the accused. The court should also consider the likelihood of juror exposure by looking at the prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instruction to avoid outside material, and how much time has elapsed between the trial court's last instruction and the publication of the prejudicial material. If the publicity is inherently prejudicial, the court should, either on its own motion or on the motion of either party, canvass the jury as a whole to assess whether any of the jurors were actually exposed to the publicity. If any of the jurors were actually exposed to the publicity, the court must conduct an individual voir dire of the juror to ensure that the fairness of the trial has not been compromised. State v. Holly, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844, 55 A.L.R. 6th 687.

Failure to canvass jury about mid-trial publicity was harmless error. — Where, on the second day of the defendant's trial for first degree murder, a small-town newspaper published an article that featured a banner headline that stated the defendant had plead guilty to racketeering and tampering with evidence charges arising from the same series of events as those involved in the defendant's murder trial, included information about the shooting and the victims the defendant was alleged to have shot, and contained statements from the prosecuting attorney implicating the defendant; the trial court frequently cautioned the jury to avoid news accounts of the trial, including a caution on the day before the article appeared; the trial court was not consulted about the article by defense counsel until two days after the article appeared; the trial court rejected defense counsel's request to voir dire the jury about their exposure to the article; defense counsel did not request that the jury be polled after the verdict to determine whether any juror was actually exposed to the article; most of the information in the article was placed before the jury during the trial; and the evidence of the defendant's guilt was overwhelming, any error that the trial court committed by rejecting the defendant's request to voir dire the jury was harmless. State v. Holly, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844.

Where defendant was charged with neglect of defendant's developmentally disabled adult child; during defendant's trial, a local newspaper published a story with an inflammatory headline containing implications of certain guilt; at the beginning of the trial, the court instructed the jury to avoid media coverage of the case and thereafter

consistently reminded to jury to avoid coverage of any kind; on the day the newspaper article appeared, the court instructed the jury to altogether avoid the newspaper in which the article was published; and evidence of the statements made in the article was presented at trial and defendant refuted one of the statements, the court did not err by not conducting a mid-trial voir dire of the jury concerning the newspaper article. State v. Greenwood, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

Judge's comment not fundamental error. — The district court's statement to the jury pool, while looking at defendant, that Americans must have some way "to take action against somebody who violates your rights" did not constitute fundamental error. State v. Ross, 2007-NMCA-126, 142 N.M. 597, 168 P.3d 169, cert. granted, 2007-NMCERT-009, 142 N.M. 716, 169 P.3d 409.

Sentence enhancement. — The enhancement of the defendant's basic sentence by the court pursuant to 31-18-15.1 NMSA 1978 violated the defendant's right to an impartial jury because the enhancement should have been based on findings by a jury using the reasonable doubt standard. State v. Bounds, 2007-NMCA-062, 141 N.M. 651, 159 P.3d 1136, cert. quashed, 2008-NMCERT-001, 143 N.M. 399, 176 P.3d 1131.

Communication between court and jury. — Where the jury, through the foreperson or a note, in the presence of the defendant and all counsel, but not in the presence of the jury, informs the court of its numerical split, with a minority favoring a not guilty verdict, and the court's instruction to the jury in regard to further deliberations is not made in open court, is oral, and is carried out through the foreperson who returns to the jury room and orally relays the court's instruction to the jury, the communication constitutes fundamental error. State v. Cortez, 2007-NMCA-054, 141 N.M. 623, 159 P.3d 1108, cert. quashed, 2008-NMCERT-002, 143 N.M. 667, 180 P.3d 674.

Inquiry as to the numerical breakdown of juror votes and direction to continue deliberations was not error. — Where, during the jury's deliberations, the jury foreperson asked the district court what the jury should do if it could not reach a unanimous decision; the district court asked the foreperson to provide a numeric breakdown of juror votes, excluding information regarding whether the votes favored conviction or acquittal, and whether further deliberations would be helpful; the foreperson responded that further time for deliberations would be of assistance and informed the court that ten of the jurors were in agreement; the district court then ordered the jury to deliberate another hour; and within an hour, the jury returned with a unanimous guilty verdict, the district court's communication with the jury was neither coercive nor expressing any preference that the holdout jurors should abandon their honest convictions and did not constitute fundamental error. State v. Jim, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Impartial jury means a jury where each and every one of the 12 members constituting the jury is totally free from any partiality whatsoever. State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960); Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971), rev'g 82 N.M. 682, 486 P.2d 618 (Ct. App. 1971).

Trial by impartial jury means a jury that does not favor one side more than another, treats all alike, is unbiased, equitable, fair and just. If the members of the jury do not have these qualifications, defendant is denied an impartial jury. State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct. App. 1968).

By "impartial jury" is meant a jury where each and every one of the 12 members constituting the jury is totally free from any partiality whatsoever. "Impartial" is defined in Webster's New International Dictionary (2nd Ed.), as "not partial; not favoring one more than another; treating all alike; unbiased; equitable; fair; just." Accordingly, the impartial jury which is guaranteed is one that does not favor one side more than another, treats all alike, is unbiased, equitable, fair and just. If any juror does not have these qualities, the jury upon which he serves is thereby deprived of its quality of impartiality. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

The difference in the purposes of this section and N.M. Const., art. II, § 12 is that § 12 guarantees a trial by jury while this section provides, among other things, that the trial shall be by an "impartial" jury. State v. Sweat, 78 N.M. 512, 433 P.2d 229 (Ct. App. 1967).

Burden of establishing partiality by juror is upon party making such a claim. State v. Baca, 99 N.M. 754, 664 P.2d 360 (1983).

Trial court must exercise discretion in process of obtaining fair trial. — The trial court has the duty of seeing that there is a fair and impartial jury. In doing so, it must exercise discretion. The trial court's decision will not be disturbed unless there is manifest error or a clear abuse of discretion. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970); State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970); State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct. App. 1968).

Court's decision as to juror not disturbed absent manifest error or abused discretion. — Where there is nothing to indicate either manifest error or abuse of discretion by the trial court in permitting a person to serve as a juror, then the trial court's decision will not be disturbed on appeal. State v. Baca, 99 N.M. 754, 664 P.2d 360 (1983).

Right applies to state as well as to defendant. — The right to trial by an impartial jury is a right extending to the public, represented by the state, as well as the criminally accused. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Juror's acquaintance with counsel. — The defendant did not show that the trial court abused its discretion in excusing a potential juror who was acquainted with defense counsel, even though at the time of voir dire she had no knowledge regarding the case.

State v. Jim, 107 N.M. 779, 765 P.2d 195 (Ct. App. 1988), cert. denied, 107 N.M. 720, 764 P.2d 491 (1988).

Any unauthorized contact with a juror is presumptively prejudicial to a criminal defendant. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971), rev'g 82 N.M. 682, 486 P.2d 618 (1971).

Refusal to take witness stand does not impair right to trial by impartial jury. — An accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury. State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

B. JURY SELECTION.

Denial of challenges for cause during jury selection. — Where defendant was charged with murder; during jury selection, one juror stated that the juror's cousin had been murdered; another juror stated that the juror's friend had been murdered; both jurors stated that although the defendant's trial would cause them to think about the murders of their loved ones, they would be fair and follow the instructions of the judge; and the trial court did not strike the jurors for cause, defendant's right to an impartial jury was not violated. State v. Johnson, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

Jury selection process. — Where defendant was charged with aggravated assault against a household member and criminal damage to property; defendant was tried for unrelated drug charges in January 2007; defendant was tried for the current charges in February 2007; the jury pool for the February trial consisted of 47 potential jurors; eight members of the jury pool for the February trial were on defendant's jury in the January trial; 22 members of the jury pool for the February trial sat through voir dire for the January trial; and 16 members of the jury pool for the February trial had no previous contact with either case, the jury selection process violated defendant's rights to due process and an impartial jury. State v. Quintana, 2009-NMCA-115, 147 N.M. 169, 218 P.3d 87.

Court's refusal to allow additional questions. — If the questions allowed are sufficient to probe juror bias on a specific issue, the court's refusal to allow additional fact-specific questions does not amount to an abuse of discretion. State v. Sosa, 1997-NMSC-032, 123 N.M. 564, 943 P.2d 1017.

No right to jury prejudiced in defendants' favor. — It is no error to excuse a prospective juror who indicates that he might be favorably prejudiced by the fact that defendants are members of the American Indian movement. Defendants are entitled to an impartial jury. They are not entitled to a juror prejudiced in their favor. State v.

Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), overruled by State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

Defendant's argument that he could not obtain a fair and impartial trial jury from a panel which did not include a member or members who might be partial to him was without merit. State v. Sluder, 82 N.M. 755, 487 P.2d 183 (Ct. App. 1971).

Right to challenge jurors. — The right to an impartial jury carries with it the concomitant right to take reasonable steps to insure that the jury is impartial. One of the most important methods of securing this right is the right to challenge. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Right to challenge jurors has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Full knowledge essential to exercise of right to challenge juror. — Full knowledge of all relevant and material matters that might bear on possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971), rev'g, 82 N.M. 682, 486 P.2d 618 (1971).

Challenge jury selection before jury sworn. — Generally, a challenge to jury selection must be made before the jury is sworn. State v. Wilson, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993), cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).

Excusing juror is matter of trial court's discretion. — The trial court has the duty of seeing that there is a fair and impartial jury and, in doing so, it must exercise discretion. The trial court's decision not to excuse a juror will not be disturbed unless there is a manifest error or a clear abuse of discretion. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

The trial court may properly exclude a juror for cause if the juror's views would substantially impair the performance of the juror's duties in accordance with the instructions and oath. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Trial court did not abuse discretion in refusing to disqualify prospective juror who was the wife of a railroad employee holding a commission as a special deputy sheriff for which he received no remuneration. State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960).

Peremptory challenges by multiple defendants. — In a prosecution for first degree murder, the defendant was not denied due process of law because the trial court failed to permit him to exercise 12 peremptory challenges for himself, but instead allowed the defendant and codefendant a total of 14 challenges. Multiple defendants have no constitutional right to more peremptory challenges than given them by rule, provided

they are given a fair trial by an impartial jury. State v. Sutphin, 107 N.M. 126, 753 P.2d 1314 (1988).

Voir dire on prejudice as to use of alcohol. — Trial court did not infringe defendant's right to impartial jury trial by restricting voir dire of prospective jurors on the question of prejudice as to the use of alcohol and denying a challenge to those jurors for cause, where jurors stated that, in spite of possible prejudice in this area, they would be able to listen to the evidence and the court's instructions and follow the law, and thereby reach a fair and impartial verdict. State v. Fransua, 85 N.M. 173, 510 P.2d 106, 58 A.L.R.3d 656 (Ct. App. 1973).

Peremptory challenges used on persons who should be excused for cause. — Prejudice is presumed where a party is compelled to use peremptory challenges on persons who should be excused for cause and that party exercises all of his or her peremptory challenges before the court completes the venire. Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

Bias alleged in driving under the influence case. — In a prosecution for driving under the influence, the defendant's right to an impartial jury was not denied by the court's refusal to strike a juror who stated that she believed alcohol was the cause of many problems and that she was a member of mothers against drunk drivers. The juror never stated that she would find against the defendant or that she believed that someone accused of a crime probably committed that crime if they had been using alcohol. State v. Wiberg, 107 N.M. 152, 754 P.2d 529 (Ct. App. 1988), cert. denied, 107 N.M. 106, 753 P.2d 352 (1988).

Voir dire on death penalty. — It is not improper to voir dire potential jurors on the death penalty merely because they do not have any discretion in imposing it. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

The trial court did not abuse its discretion in excluding prospective jurors who indicated that they would automatically vote against the death penalty. The basis for excluding these individuals was their inability to apply the law, rather than their religious views. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000); State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

The trial court did not abuse its discretion in complying with UJI 14-121 NMRA by not allowing defense counsel to refer prospective jurors specifically to "the case we are dealing with now" and, at the same time, allowing counsel for both sides considerable latitude in asking generalized, hypothetical questions. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Questions regarding jurors' ability to vote for death penalty. — It is not error to allow the prosecutor to question jurors to ascertain whether they could impose the death

penalty if they find that the aggravating circumstances outweigh the mitigating circumstances. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Selection of jury from panel which heard possibly damaging statements. — Where five prospective jurors made statements in the presence of other members of the jury panel that the name of defendant in a marijuana case had come up in another marijuana trial and were thus excused from jury duty, it was neither error nor abuse of discretion by trial court to select a jury from persons who heard these statements of excused members where nothing in the record indicated that the jurors selected were influenced by the statements or were other than impartial in reaching their verdict. State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct. App. 1968).

Excusing jurors with religious objections. — Where a potential juror's inability to perform his or her duty is based upon religious objection and belief, his or her removal does not violate the religious protections of this section, because exclusion from the jury is not based upon religious affiliation. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Relationship between juror and brother as retired police officer not, in itself, prejudicial. — The relationship between a juror and his brother as a retired police officer, or a misapprehension or misstatement on this matter made on a juror questionnaire or at voir dire by the juror, does not of itself constitute sufficient bias or partiality resulting in prejudice to the defendant's case. State v. Baca, 99 N.M. 754, 664 P.2d 360 (1983).

C. REPRESENTATIVE JURY.

Representative cross-section of the community. — Where the defendant moved to strike the jury pool on the grounds that because the court clerk was too lenient in excusing potential jurors and jury summonses were not in Spanish, there was a negative impact on the number of Hispanics reporting for jury duty with the result that Hispanics were systematically excluded from the jury venire and to show that the number of Hispanics were underrepresented, the defendant compared the percentage of Hispanics in the population at large with the number of individuals on the jury venire who had Hispanic surnames, the defendant failed to establish a prima facie case of systematic exclusion of Hispanics from the jury pool because Hispanic surnames do not accurately indicate the number of potential jurors who are in fact Hispanic; the court clerk excused jurors without regard to ethnicity; and the defendant offered no proof that those individuals in the community who spoke a language other than English necessarily spoke Spanish or that those individuals who spoke another language spoke only a language other than English. State v. Casillas, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830, cert. denied, 2009-NMCERT-003, 146 N.M. 603, 213 P.3d 507.

Test for determining violation of fair cross-section requirement. — To raise and resolve allegations of violation of the fair cross-section requirement, the defendant must demonstrate that the group alleged to be excluded is a distinctive group in the

community, the group's representation in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and this under-representation results from the systematic exclusion of the group in the jury-selection process, and the government must be provided the opportunity to defend its practices by demonstrating that a significant state interest is advanced by the process that results in the exclusion of a distinctive group. State v. Flores, 2015-NMCA-002, cert. granted, 2014-NMCERT-012.

Manipulation of jury venire. — Where the court clerk's systematic policy of placing all Spanish-only speaking prospective jurors in one panel, and effectively excluding these prospective jurors from all other panels, potentially violates both the prospective jurors' right to serve on a jury and the defendant's right to a fair and impartial jury. State v. Flores, 2015-NMCA-002, cert. granted, 2014-NMCERT-012.

Intentional discrimination. — New Mexico Const., art. II, §§ 14 and 18 preclude the state from using its peremptory challenges to strike jurors because of gender in a criminal case. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65, modified, State v. Dominquez, 115 N.M. 445, 853 P.2d 147.

The mere showing that the state has used its challenges to exclude members of a cognizable group will not, by itself, establish a prima facie showing. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

It is not essential that all of the members of a cognizable group be removed from the jury in order to establish a prima facie case of purposeful discrimination. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Although a showing that the state's challenges have caused the jury to contain no members of a cognizable group may help raise an inference of discrimination, this is not dispositive of the issue. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Burden of proof in intentional discrimination cases. — Once a defendant makes a prima facie showing of purposeful discrimination against members of a cognizable group, the burden shifts to the state to articulate a neutral explanation for the challenge that is related to the particular case and gives a clear, concise, reasonably specific, legitimate explanation for excusing the jurors. The determination of whether a defendant has made a prima facie showing and the determination of whether the defendant has carried his burden of persuasion on the issue are both factual determinations and are reviewed by this court under the substantial evidence standard. State v. Gonzales, 111

N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

To raise and resolve allegations of intentional discrimination on the basis of gender, a defendant must make a prima facie showing that the prosecution has used its peremptory challenges to purposefully discriminate against an excluded group. This prima facie showing may be made by showing 1) that the state has exercised its peremptory challenges to remove members of a cognizable group from the jury panel, and 2) that these facts and any other relevant circumstances raise an inference that the state used its challenges to exclude members of the panel solely on account of their membership in the excluded group. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

The rights of an accused in respect to the panel and final jury are (1) that there be no systematic, intentional exclusion of any section of the community and (2) that there be left as fitted for service no biased or prejudiced person. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Panel, not actual jury, must reflect community population. — There is no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Excusing jurors opposed to capital punishment. — Allowing the prosecutor in a first-degree murder trial to voir dire prospective jurors on their feelings regarding capital punishment and excusing for cause those jurors who were opposed to capital punishment did not deprive defendant of his right to trial by a cross-section of the community. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

The trial court did not err in denying the defendant's objection to the state's use of peremptory challenges to remove potential jurors who were reluctant to impose capital punishment. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Striking black prospective jurors for trial of Hispanic defendant. — Prosecutor's use of peremptory challenges to strike the only two blacks who had a chance to serve on the jury unconstitutionally deprived Hispanic defendant of a jury reflecting a representative cross section of the community. State v. Aragon, 109 N.M. 197, 784 P.2d 16 (1989).

Juror's unassertiveness. — The prosecution's peremptory challenge to remove the only black juror who could have served on the jury panel based on the prospective juror's failure to make eye contact and lack of assertiveness was not shown to be

purposeful discrimination or to be unsupported by substantial evidence. State v. Jones, 1996-NMCA-020, 121 N.M. 383, 911 P.2d 891, aff'd, 1997-NMSC-016, 123 N.M. 73, 934 P.2d 267.

No absolute right to jury of certain county. — The framers of the New Mexico constitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury of the county wherein the crime is alleged to have occurred. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

No right to have certain number of persons from particular precinct on jury. State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966).

Unintentional exclusion of political party members from jury wheel permissible. — Defendants' contention that the method of selecting names for the jury wheel precludes selection of a fair and impartial jury, where that jury wheel does not include the names of any members of their political group, is without merit where there is no showing that there was an intentional exclusion of party members as a group. State v. Lopez, 96 N.M. 456, 631 P.2d 1324 (Ct. App. 1981).

As is exclusion of nonvoting registered voters. — Where there is no proof that registered voters who do not vote are a "distinctive" or "cognizable" group which has been systematically excluded or substantially underrepresented, the exclusion is not unconstitutional. State v. Lopez, 96 N.M. 456, 631 P.2d 1324 (Ct. App. 1981).

D. JUROR CONDUCT.

Juror interruption during opening statement. — Where, during the trial of the defendant for a brutal murder, the trial judge stopped the proceedings during opening statements because a juror signaled for the judge’s attention; the judge conducted an individual voir dire of the juror in chambers where the juror stated that the juror was physically affected by the opening statements and was unable to continue sitting through the trial; the judge excused the juror for cause; and the remaining jurors were not distracted by the interruption, the trial court did not err by denying the defendant’s motion for a mistrial. State v. Gallegos, 2009-NMSC-017, 146 N.M. 88, 206 P.3d 993.

Juror questions about a plea bargain. — Where, during the trial of the defendant for a brutal murder, two jurors asked the bailiff if there was any chance that the case would be resolved by a plea bargain; after voir dire of the jurors, none of the jurors indicated that they had made up their minds about the trial; and the trial judge reminded the jurors not to discuss the case with anyone else, including the court staff, the trial court’s failure to declare a mistrial was not fundamental error. State v. Gallegos, 2009-NMSC-017, 146 N.M. 88, 206 P.3d 993.

It is the duty of a juror to make full and truthful answers to such questions as are asked, neither falsely stating any fact nor concealing any material matter. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971), rev’g 82 N.M. 682, 486 P.2d 618.

New trial awarded for false answers by juror. — If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy, and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, through no fault of his own, has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971), rev'g, 82 N.M. 682, 486 P.2d 618 (1971).

Concealing bias destroys integrity of jury. — The integrity of a jury is destroyed if one of the jurors serves while concealing bias. State v. Chavez, 78 N.M. 446, 432 P.2d 411 (1967).

Conversing with juror in absence of defendants. — Where, after the jury was selected but before it was sworn, one juror wanted to tell the trial court that she feared the other jurors were not intelligent enough to decide the case, in the presence of all counsel and defendants, and before anyone knew what the juror wanted, the participants decided that only the trial court and counsel would talk with the juror, and both counsel, by their remarks after the conversation, expressed satisfaction with the jury and with this particular juror, error, if any, in conversing with the juror in the absence of defendants was both harmless and invited. State v. Ramming, 106 N.M. 42, 738 P.2d 914 (Ct. App.), cert. denied, 106 N.M. 7, 738 P.2d 125 (1987), cert. denied, 484 U.S. 986, 108 S. Ct. 503, 98 L. Ed. 2d 501 (1987).

Misconduct involving information learned at trial. — A juror who first fabricated a story as to the defendant's alibi and told it to the jury, and then perjured herself under oath regarding that story during the initial hearing on a motion for a new trial, was not disqualified. Her fellow jurors were unaffected by her comments and her misconduct was motivated only by her appraisal of the evidence heard at trial and her desire for peer recognition, and was not clearly the product of personal experience or the gathering of extraneous information that would have disqualified her from serving and deliberating as one of the 12-person jury. State v. Sacoman, 107 N.M. 588, 762 P.2d 250 (1988).

Juror's lack of knowledge of English. — It would be a violation of this section and N.M. Const., art. II, § 12 to allow one unqualified juror to serve in a criminal cause for the reason that any verdict rendered in such a situation would be less than unanimous; and a juror who did not possess a working knowledge of English would be unable to serve, in the absence of an interpreter, because he could not possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused. When the court learned in the midst of the jury's deliberations that one juror did not understand English very well, it should have conducted a summary hearing to determine for itself the ability of the juror in question to understand

English. State v. Gallegos, 88 N.M. 487, 542 P.2d 832 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

X. VENUE.

The word "trial" in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict; and the term "trial" does not extend to such preliminary steps as the arraignment and giving of the pleas, nor does it comprehend a hearing in error. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Word "district" does not mean "judicial district," but simply means territory over which court may have jurisdiction. State v. Balles, 24 N.M. 16, 172 P. 196 (1918).

No absolute common-law right to jury of county where offense committed. — The right of a trial by jury as that right was known at the time of the adoption of the constitution did not include an absolute right to a trial by a jury of the county where the offense was committed, but that the right was conditioned upon the possibility of a fair and impartial trial being had in that county. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Proper venue when elements of offense committed in different counties. — In the event elements of a crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. Interfering with or depriving a custodial parent of their right to custody is an essential element of the crime of custodial interference as are the methods for accomplishing the interference or deprivation. Because deprivation is an element, where the person was deprived of the right of custody establishes a proper venue for the trial of the offense of custodial interference. State v. Lefthand, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

Where defendant violated an order of custody, issued by a Taos county district court, by depriving the father of the child of his right to custody, the father’s right to custody exists with him in his county of residence, the county in which he was given custody, and the county in which he was deprived of the custody of his son. Under the custodial interference statute, 30-4-4 NMSA 1978, a person may be charged in the place where the harm sought to be prevented by the statute results, and therefore venue may lie in Taos county district court. State v. Lefthand, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

Prosecution for violation of municipal ordinance must be laid in municipality where the violation presumably occurred. City of Roswell v. Gallegos, 77 N.M. 170, 420 P.2d 438 (1966).

Venue improper where offenses completed before reaching county. — Where the first six criminal sexual penetration offenses were completed before reaching Bernalillo

county, trial in Bernalillo county as to those offenses was improper. State v. Ramirez, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978).

Removal is a common-law right belonging to the New Mexico courts, and as such can be exercised by them in all cases, when not modified or controlled by state constitutional or statutory enactments. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

By the common law an accused had the right to be tried in the county in which the offense was alleged to have been committed, where the witnesses were supposed to have been accessible, and where he might have the benefit of his good character if he had established one there, but, if an impartial trial could not be had in such county, it was the practice to change the venue upon application of the people to some other county where such trial could be obtained. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Court may change venue sua sponte. — There is nothing in the constitution or statutes limiting the inherent power of the court to order a change of venue sua sponte when an impartial trial cannot be had in a particular district. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Motion for venue change by prosecution. — Trial court did not abuse its discretion in holding, following two highly publicized trials in Taos county, both of which ended in hung juries, that the prosecution was unable to obtain a fair trial in that county and the trial could be relocated. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967, cert. denied, 528 U.S. 894, 120 S. Ct. 222, 145 L. Ed. 2d 186 (1999).

Change of venue over defendant's objection. — Change of venue will lie in favor of state where impartial jury cannot be had in county where crime was allegedly committed. State v. Holloway, 19 N.M. 528, 146 P. 1066, 1915F L.R.A. 922 (1914). But see, State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972).

Venue of criminal case may be changed on application of state, even over objection of defendant, when public excitement and local prejudice would prevent fair trial. State v. Archer, 32 N.M. 319, 255 P. 396 (1927). But see, State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972).

Any statute which authorizes a change of venue in a criminal case, on motion of the state, from one county to another, or from one judicial district to another against the objection of the defendant, is void because it is in conflict with this section. State v. Tijerina, 84 N.M. 432, 504 P.2d 642 (1972), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Unnecessary to allege venue in indictment. — Rule of trial court that it is unnecessary to allege venue in indictment or information does not conflict with this section, and objection not made until after plea of guilty and conviction is waived. State v. Joyce, 41 N.M. 4, 62 P.2d 1150 (1936); State v. Wallace, 41 N.M. 3, 62 P.2d 1150 (1936); State v. Bogart, 41 N.M. 1, 62 P.2d 1149 (1936).

Objection that venue not alleged in indictment is waived if not made until after plea of guilty and conviction. State v. Joyce, 41 N.M. 4, 62 P.2d 1150 (1936); State v. Wallace, 41 N.M. 3, 62 P.2d 1150 (1936); State v. Bogart, 41 N.M. 1, 62 P.2d 1149 (1936).

Waiver of constitutional vicinage. — Once defendant has successfully moved for a change of venue, he cannot subsequently claim a constitutional right to the original venue, as he has waived his right to trial in the county of constitutional vicinage. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967, cert. denied, 528 U.S. 894, 120 S. Ct. 222, 145 L. Ed. 2d 186 (1999).

Waiver of right of venue. — If defendant had any right to object to trial for murder in the federal courthouse, she waived it by remaining silent until after her conviction. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Right to trial in the county or district in which the offense is alleged to have been committed is waived by failure to make timely objection. City of Roswell v. Gallegos, 77 N.M. 170, 420 P.2d 438 (1966).

Defendant's appearance and participation in preliminary examination, making bond to appear before district court and, after disqualifying presiding judge, waiving right to jury trial, signing stipulation for another judge to try case and requesting a continuance, resulted in waiver of his right to object to venue. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945).

The right to be tried in the county or district is a right or privilege to a particular venue which may be waived by an accused person in a number of ways, and when defendant goes to trial in another judicial district, without objection on his part, he has waived the privilege, and cannot be heard to say that the court trying him was without jurisdiction. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

This provision of the constitution confers a personal privilege of venue upon an accused, and that this privilege may be waived. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

To the extent that the language in State v. Glasscock, 76 N.M. 367, 415 P.2d 56 (1966) may suggest or be construed as holding that venue may not be waived, the opinion in that case is overruled. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

Record need not show waiver. — The record need not affirmatively show that the trial court fully informed defendant of his right of venue and of his privilege to waive this right, or at least was advised that defendant had been so fully informed; that defendant then affirmatively waived this right; and that the trial court then announced its satisfaction as to the genuineness of this waiver. State v. Lopez, 84 N.M. 805, 508 P.2d 1292 (1973).

Purpose of removal of causes. — All laws for removal of causes from one vicinage to another were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Racial makeup of county. — Although defendant argued he was prejudiced by prosecution's transfer of venue to a county with few Native Americans, he failed to present evidence of actual discrimination in the selection of the petit jury, and thus there was no constitutional violation. State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967.

Right not denied by trial in federal courthouse. — Where the trial was before a jury of the county where crime was committed, and was presided over by the judge of the district in which the county is located, appellant was denied none of the rights guaranteed her by this section or N.M. Const., art. II, § 12, notwithstanding the trial was in a federal courthouse. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Continuing crime. — Where police officer chased defendant, who was speeding, from Santa Fe county into Rio Arriba county where defendant was placed under arrest for an outstanding warrant, and where officer discovered drugs and drug paraphernalia during an inventory search of defendant's car, Santa Fe county venue was proper because trafficking by possession with intent to distribute is a continuing offense which occurred in each county through which defendant traveled while in possession of the drugs. State v. Roybal, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

XI. PROSECUTOR CONDUCT.

Prosecutor pointed out indicators of victim’s truthfulness. — Where, in closing arguments, after the prosecutor stated that it was the jury’s duty to determine the credibility of witnesses, the prosecutor stated that the prosecutor would point out indicators that would help the jury decide that the victim was not lying and that the victim was telling the truth; the prosecutor emphasized the victim’s emotions while on the stand, the consistency of the victim’s statements, and the absence of motive for the victim to be untruthful in the victim’s account of the events, there was no prosecutorial misconduct because the prosecutor’s statements regarding the victim’s veracity were not personal opinions of the prosecutor as to the victim’s credibility and were not

intended to incite the passion of the jury, but were focused on specific indicators presented to the jury throughout the trial as evidence of the truthfulness of the victim's account. State v. Dominguez, 2014-NMCA-064, cert. denied, 2014-NMCERT-005.

Evaluation of prosecutorial statements. — In determining whether prosecutorial statements constitute reversible error, the court considers whether the statements invade some distinct constitutional protection; whether the statements are isolated and brief, or repeated and pervasive; and whether the statements are invited by the defense. In applying these factors, the statements must be evaluated objectively in the context of the prosecutor's broader argument and the trial as a whole. State v. Sosa, 2009-NMSC-056, 147 N.M. 351, 223 P.3d 348, rev'g 2008-NMCA-134, 145 N.M. 68, 193 P.3d 955.

Prosecutorial statements. — Where defendant was convicted of sexual assault based on the victim's alleged inability to consent due to alcohol and perhaps drug-related intoxication; the trial court did not allow the victim to testify that the victim believed defendant had drugged the victim, but did allow the victim to testify that the victim felt drugged and allowed expert testimony regarding the nature and effects of date-rape drugs generally; in the state's initial closing argument, the prosecutor conceded the absence of any direct evidence of drugging, but reminded the jury of the circumstantial evidence of drugging; in response, defense counsel claimed there was no proof of drugs; and in rebuttal, the prosecutor stated that "Defense counsel says, no evidence of date rape drug. That is wrong. The judge wouldn't allow things – wouldn't allow you to hear things that you are not allowed to consider in evidence. That wouldn't come in," and then referred to the circumstantial evidence that supported a drugging theory; defense counsel did not object to the prosecutor's statements; the trial court did not intervene and admonish the prosecutor with regard to the prosecutor's statements; defense counsel did not mention the prosecutor's statements in defendant's motion for a new trial; the state's overwhelming evidence showed that defendant admitted to certain sexual acts with the victim and that the victim's extreme intoxication by alcohol impaired the victim's ability to consent; and defendant claimed that the prosecutors statement implied that drugging evidence did exist, but had been withheld from the jury by the court, the prosecutor's statements did not constitute fundamental error. State v. Sosa, 2009-NMSC-056, 147 N.M. 351, 223 P.3d 348, rev'g 2008-NMCA-134, 145 N.M. 68, 193 P.3d 955.

Where the defendant's defense to DWI was his allegation that he left the scene of the accident and encountered a group of men drinking vodka and that he drank a large quantity of vodka with them for about thirty minutes, the prosecutor's statement in closing argument that the defendant did not tell the police officers anything about drinking vodka with others related to the defendant's pre-arrest silence and did not violate the defendant's fifth amendment rights. State v. Bullcoming, 2008-NMCA-097, 144 N.M. 546, 189 P.3d 679; aff'd on other grounds, 2010 NMSC-007, 147 N.M. 487, 226 P.3d 1.

In a prosecution for criminal sexual contact of a minor and criminal sexual penetration, prosecutor's assertions that nothing the jury could do would diminish the mental anguish of the victims, but that the jury could "make it a lot worse"; inviting the jurors to imagine whether they would have screamed, "at least in your head", if they had been similarly assaulted as young children; and, asking the jurors to give the case the same consideration as if their relatives were the victims, although improper, were not sufficiently egregious, pervasive or prejudicial to deprive defendant of a fair trial. State v. Paiz, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011, 140 N.M. 846, 149 P.3d 943.

Where, in closing arguments, the prosecutor stated that the victim's rights in Article II, Section 24 of the New Mexico constitution take precedence over the trial rights of criminal defendants, the statements were improper, but did not deprive the defendant of a fair trial. State v. Dombos, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 666, 180 P.3d 673.

Where, during defendant's trial for impersonating a peace officer by pretending to be a border patrol agent, witnesses testified that defendant had stated that defendant had been enrolled in the border patrol academy and had left due to the death of defendant's father; and during closing argument, the prosecutor discussed defendant's credibility and claims that defendant left the academy because of the death of defendant's father and stated that "he had to kill his father", there was not a substantial likelihood that the statement prejudiced the jury so as to deny defendant a fair trial. State v. Ramos-Arenas, 2012-NMCA-117, 290 P.3d 733, cert. denied, 2012-NMCERT-010, 297 P.3d 332.

Characterizing police officer's testimony as "wrong". — Where the prosecuting attorney asked the defendant if a police officer's testimony was "wrong", the question was improper and the trial court should have sustained defense counsel's objection to the question. State v. Soto, 2007-NMCA-077, 142 N.M. 32, 162 P.3d 187, cert. denied, 2007-NMCERT-006, 142 N.M. 15, 162 P.3d 170.

Prosecutor's improper questions were harmful error. — Where the prosecuting attorney improperly asked the defendant if a police officer's testimony was "wrong"; the bulk of the state's evidence rested on the officer's testimony; and the improper question reflected on the credibility of the officer's testimony, the prosecutor's question in regard to the veracity and credibility of the officer's testimony was not harmless beyond a reasonable doubt. State v. Soto, 2007-NMCA-077, 142 N.M. 32, 162 P.3d 187, cert. denied, 2007-NMCERT-006, 142 N.M. 15, 162 P.3d 170.

Prosecutorial misconduct reviewed by writ of certiorari. — The supreme court had jurisdiction by writ of certiorari to review defendant's claim he was denied a fair trial because of prosecutorial misconduct. State v. Ashley, 1997-NMSC-049, 124 N.M. 1, 946 P.2d 205.

Prosecutorial misconduct. — Where defendant, who was initially stopped for not wearing a seatbelt during a routine seatbelt enforcement operation, was charged with DWI; during defense counsel's closing argument, defense counsel noted that the state had presented no evidence regarding the underlying seatbelt violation; in rebuttal, the prosecutor told the jury that defense counsel had lied when commenting on the absence of a seatbelt citation, while simultaneously waiving a copy of the seatbelt violation citation, which had not been introduced into evidence, in front of the jury; the trial court instructed the jury to disregard the prosecutor's statement accusing defense counsel of lying, because the prosecutor's actions were limited in scope and duration and because the seatbelt violation issue was peripheral to the evidence presented and the elements of DWI, the trial court's curative instruction was a sufficient response, the prosecutor's actions did not deprive defendant of a fair trial, and the trial court properly denied defendant's motion for mistrial. State v. Torres, 2012-NMSC-016, 279 P.3d 740.

Where, in closing arguments, the prosecutor referred to the defendant as "vile", a "sexual deviant" and a "sick" person, the statements were improper, but did not deprive the defendant of a fair trial. State v. Dombos, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 666, 180 P.3d 673.

Where the defendant's theory of the case was that when the defendant fired the gun at the victim, the defendant did not intend to kill the victim but rather to shoot the victim in the leg, and in closing argument the prosecutor said to the jury "don't point a gun to something you don't want to shoot, and don't shoot at something you don't intend to kill", the prosecutor used the fact that the defendant pointed a gun and shot the victim in order to argue that the jury should infer an intent to kill and the trial court did not abuse its discretion by refusing to declare a mistrial and by failing to offer a curative instruction. State v. Perry, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

Where defendant was convicted of first degree criminal sexual penetration and third degree criminal sexual contact of a minor; defendant alleged that the prosecutor improperly commented on defendant's right to counsel, because on cross-examination of defendant's mother, in an attempt to establish that defendant's mother was biased in defendant's favor, the prosecutor asked whether defendant's parents were paying defendant's attorney's fees and whether defendant's mother would be willing to help defendant in time of need; defendant alleged that the prosecutor attacked the integrity of defense counsel when the prosecutor implied that defense counsel was concealing evidence by prefacing a question to defendant's expert with the statement "isn't it true you told me before when I had a chance to interview you in the hall a couple of days ago"; defendant alleged that the prosecutor shifted the burden of proof by making a statement when defendant moved the admission of records into evidence that "the jury can decide for themselves if they're competent or not"; defendant alleged that the prosecutor appealed to the passions of the jury when the prosecutor said in response to a statement made by the victim's father on cross-examination that "I'm just trying to defend your daughter"; and defendant alleged that the prosecutor appealed to the passions of the jury when the prosecutor asked defendant "assuming for a minute you did sexually abuse" the victim, the prosecutor's improper conduct did not deprive

defendant of a fair trial. State v. Tafoya, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

Questioning defendant's rights improper. — The prosecutor's questioning of the defendant concerning his right to sit at the counsel table and hear everybody testify before he told his story was improper. State v. Carrasco, 1996-NMCA-114, 122 N.M. 554, 928 P.2d 939, rev'd in part, aff'd in part, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Imposing costs against state. — The rule in criminal cases is the same as that which is expressed for civil cases, in that a defendant's costs may be imposed against the state, its officers or agencies, only to the extent permitted by law. 1953-54 Op. Att'y Gen. No. 54-6035.

The state is entitled to a preliminary examination notwithstanding a waiver of the same by the accused. 1965 Op. Att'y Gen. No. 65-149.

Specific areas of inquiry established by statute. — In New Mexico, a grand jury may not lawfully inquire into any matter whatsoever. Specific areas of inquiry by a grand jury are established by statute. 1982 Op. Att'y Gen. No. 82-14.

Imprisonment contingent on assistance. — The sixth amendment to the United States constitution and this section guarantee the assistance of counsel to an accused. Courts have interpreted these provisions as requiring that no indigent criminal, whether accused of a felony or misdemeanor, may be sentenced to a term of imprisonment unless the state has afforded the accused the right to assistance of appointed counsel. 1987 Op. Att'y Gen. No. 87-43.

No indigent criminal defendant may be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense. 1981 Op. Att'y Gen. No. 81-04.

Indigent defendant has the right to have subpoenas served upon his witnesses by a sheriff without paying to that sheriff a fee for such service, or mileage expenses. 1953-54 Op. Att'y Gen. No. 54-6035.

Right of venue distinguished from magistrate's territorial jurisdiction. — The defendant's personal right of venue is a legal concept, separate and distinct from the territorial jurisdiction of the magistrate, and a statute affecting one does not necessarily affect the other. 1979 Op. Att'y Gen. No. 79-12.

Procedure regarding telephone testimony. — Any permissible use of telephone testimony in court proceedings would depend on the specific facts and circumstances involved. Assuming that such testimony is appropriate in some circumstances, the conclusion that a deposition witness must take an oath and testify in the presence of an

authorized officer also would apply to any testimony that a witness gives to the court over the telephone. 1988 Op. Att'y Gen. No. 88-81.

Law reviews. — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

For comment, "McGuinness v. State: Limiting the Use of Depositions at Trial," see 10 N.M. L. Rev. 207 (1979-1980).

For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M. L. Rev. 217 (1979-1980).

For note, "Criminal Procedure - Grand Jury - Inadmissible Evidence, Due Process," see 11 N.M. L. Rev. 451 (1981).

For note, "Custodial Interrogation in New Mexico: State v. Trujillo," see 12 N.M. L. Rev. 577 (1982).

For comment, "Procedural and Substantive Rights to the Media Govern Requests to Restrict News Coverage of Criminal Cases: State ex rel. New Mexico Press Ass'n v. Kaufman," see 14 N.M. L. Rev. 401 (1984).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

For note, "Striking the Right Balance in New Mexico's Rape Shield Law - State v. Johnson," see 28 N.M. L. Rev. 611 (1998).

For note, "Curbing Prosecutorial Power-Right to Waive Preliminary Hearing Remains Within Discretion of Defendant - *State ex rel. Whitehead v. Vescovi-Dial*," see 29 N.M. L. Rev. 445 (1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law §§ 632 to 1021; 38 Am. Jur. 2d Grand Jury §§ 3, 4, 16; 41 Am. Jur. 2d Indictments and Informations § 4 et seq.; 47 Am. Jur. 2d Jury § 6 et seq.; 75 Am. Jur. 2d Trial §§ 180, 182, 192, 196, 200, 205, 206, 228; 81 Am. Jur. 2d Witnesses §§ 1 to 3, 7, 802, 803, 812, 860.

Exclusion of public during criminal trial, 48 A.L.R.2d 1436.

Suppression before indictment or trial of confession unlawfully obtained, 1 A.L.R.2d 1012.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution, as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 A.L.R.2d 631.

Duty to advise accused as to right to assistance of counsel, 3 A.L.R.2d 1003.

Bill of particulars, right to, 5 A.L.R.2d 444.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 A.L.R.2d 1404.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction, 9 A.L.R.2d 661.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 A.L.R.2d 1439, 4 A.L.R.4th 617, 4 A.L.R.4th 1221.

Pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights, 18 A.L.R.2d 796.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society or similar organization or group, 19 A.L.R.2d 388.

Absence of accused at return of verdict in felony case, 23 A.L.R.2d 456.

Fingerprints, palm prints or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R.4th 1178.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Cross-examination of witness in criminal case as to whether, and with whom, he has talked about or discussed the facts of the case, 35 A.L.R.2d 1045.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Sufficiency of witness's claim of privilege, 51 A.L.R.2d 1178.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 55 A.L.R.2d 1072.

Waiver: right to waive indictment, information or other formal accusation, 56 A.L.R.2d 837.

Speedy trial, waiver or loss of accused's right to, 57 A.L.R.2d 302.

Cross-examination of prosecution's witness as to his motive for testifying, preventing or limiting, 62 A.L.R.2d 610.

Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury, 67 A.L.R.2d 245.

Privilege of party, witness or attorney while going to, attending or returning from court as extending to privilege from arrest for crime, 74 A.L.R.2d 592.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 A.L.R.2d 1390, 34 A.L.R.3d 470, 2 A.L.R.4th 27, 2 A.L.R.4th 807, 13 A.L.R.4th 533, 15 A.L.R.4th 582, 18 A.L.R.4th 360, 26 A.L.R. Fed. 218, 53 A.L.R. Fed. 140.

Jurisdiction or power of grand jury after expiration of term of court for which organized, 75 A.L.R.2d 544.

Right not to testify, duty of court to inform accused who is not represented by counsel, 79 A.L.R.2d 643.

Deaf, mute or blind person, criminal trial of, as satisfying right to confront witnesses, 80 A.L.R.2d 1084.

Propriety of criminal trial of one under influence of drugs or intoxicants at time of trial, 83 A.L.R.2d 1067.

Speedy trial, delay between filing of complaint or other charge and arrest of accused as violation of right to, 85 A.L.R.2d 980.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 A.L.R.2d 796.

Constitutionally protected right of accused indigent to appointment of counsel in state court prosecution, 93 A.L.R.2d 747.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 A.L.R.3d 1360.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 A.L.R.3d 990.

Accused's right to interview witness held in public custody, 14 A.L.R.3d 652.

Power of court to make or permit amendment of indictment, 17 A.L.R.3d 1181.

Accused's right to inspection of minutes of state grand jury, 20 A.L.R.3d 7.

Propriety and prejudicial effect of counsel's representing defendant in criminal case notwithstanding counsel's representation or former representation of prosecution witness, 27 A.L.R.3d 1431.

Validity of grand jury indictment where grand jury heard an incompetent witness, 39 A.L.R.3d 1064.

Propriety of requiring accused to give handwriting example, 43 A.L.R.3d 653.

Right of indigent defendant to assistance of counsel in proceedings to revoke probation, 44 A.L.R.3d 306.

Determination of indigency of accused entitling him to appointment of counsel, 51 A.L.R.3d 1108.

Necessity of alleging in indictment or information the limitation of actions - tolling the facts, 52 A.L.R.3d 922.

Right to counsel in contempt proceedings, 52 A.L.R.3d 1002.

Power of court to control evidence or witnesses going before grand jury, 52 A.L.R.3d 1316.

Right in child custody proceedings to cross-examine investigatory officer whose report is used by the court in its decision, 59 A.L.R.3d 1337.

Contempt: refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

Construction and application of state equal rights amendments forbidding determination of rights based on sex, 90 A.L.R.3d 150.

Use of abbreviation in indictment or information, 92 A.L.R.3d 494.

Accused's right to represent himself in state criminal proceeding - modern state cases, 98 A.L.R.3d 13.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 A.L.R.3d 1060.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case as ground of complaint by accused, 99 A.L.R.3d 1261.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client, 2 A.L.R.4th 27.

Waiver or estoppel in incompetent legal representation cases, 2 A.L.R.4th 807.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 A.L.R.4th 374.

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial, 3 A.L.R.4th 601.

Right of accused in criminal prosecution to presence of counsel at court-appointed or -approved psychiatric examination, 3 A.L.R.4th 910.

Power of court to change counsel appointed for indigent, against objections of accused and original counsel, 3 A.L.R.4th 1227.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters, 6 A.L.R.4th 1208.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 A.L.R.4th 180.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A.L.R.4th 942.

Adequacy of defense counsel's representation of criminal client regarding hypnosis and truth tests, 9 A.L.R.4th 354.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 A.L.R.4th 8.

Right of accused in state courts to inspection or disclosure of tape recording of his own statements, 10 A.L.R.4th 1092.

Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.

Adequacy of defense counsel's representation of criminal client regarding prior convictions, 14 A.L.R.4th 227.

Court's witnesses (other than expert) in state criminal prosecution, 16 A.L.R.4th 352.

Continuances at instances of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial, 16 A.L.R.4th 1283.

Propriety and prejudicial effect of witness testifying while in prison attire, 16 A.L.R.4th 1356.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel - state cases, 18 A.L.R.4th 360.

Denial of, or interference with, accused's right to have attorney initially contact accused, 18 A.L.R.4th 669.

Denial of accused's request for initial contact with attorney - drunk-driving cases, 18 A.L.R.4th 705.

Denial of accused's request for initial contact with attorney - cases involving offenses other than drunk driving, 18 A.L.R.4th 743.

Conditions interfering with accused's view of witness as violation of right of confrontation, 19 A.L.R.4th 1286.

Waiver of right to counsel by insistence upon speedy trial in state criminal case, 19 A.L.R.4th 1299.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions, 23 A.L.R.4th 955.

Individual's right to present complaint or evidence of criminal offense to grand jury, 24 A.L.R.4th 316.

Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts, 24 A.L.R.4th 430.

Propriety of requiring suspect or accused to alter, or to refrain from altering, physical or bodily appearance, 24 A.L.R.4th 592.

Validity and efficacy of minor's waiver of right to counsel - modern cases, 25 A.L.R.4th 1072.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial, 31 A.L.R.4th 676.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information, 39 A.L.R.4th 899.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

Propriety of governmental eaves-dropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony, 46 A.L.R.4th 1047.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 A.L.R.4th 1196.

Closed-circuit television witness examination, 61 A.L.R.4th 1155.

Age group underrepresentation in grand jury or petit jury venire, 62 A.L.R.4th 859.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 A.L.R.4th 183.

Ineffective assistance of counsel: misrepresentation, or failure to advise of immigration consequences of guilty plea - state cases, 65 A.L.R.4th 719.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time, 70 A.L.R.4th 632.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public, 74 A.L.R.4th 476.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 A.L.R.4th 1102.

What constitutes assertion of rights to counsel following Miranda warnings - state cases, 83 A.L.R.4th 443.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

When does delay in imposing sentence violate speedy trial provision, 86 A.L.R.4th 340.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant, 86 A.L.R.4th 698.

Necessity that waiver of accused's right to testify in own behalf be on the record, 90 A.L.R.4th 586.

Ineffective assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense, 8 A.L.R.5th 713.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 A.L.R.5th 871.

Disqualification or recusal of prosecuting attorney because of relationship with alleged victim or victim's family, 12 A.L.R.5th 909.

Exclusion of public and media from voir dire examination of prospective jurors in state criminal case, 16 A.L.R.5th 152.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel, 19 A.L.R.5th 351.

Determination of indigency entitling accused in state criminal case to appointment of counsel on appeal, 26 A.L.R.5th 765.

What persons or entities may assert or waive corporation's attorney-client privilege - modern cases, 28 A.L.R.5th 1.

Right of accused to have evidence or court proceedings interpreted, because accused or other participant in proceedings is not proficient in the language used, 32 A.L.R.5th 149.

Use of preemptory challenges to exclude caucasian persons, as a racial group, from criminal jury-post-batson state cases, 47 A.L.R.5th 259.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 A.L.R.5th 639.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 A.L.R.5th 1.

Observation through binoculars as constituting unreasonable search, 59 A.L.R.5th 615.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

Adequacy of defense counsel's representation of criminal client - issues of mental matters concerning persons, other than counsel's client, who are involved in criminal case, 80 A.L.R.5th 55.

Examination and challenge of state case jurors on basis of attitudes toward homosexuality, 80 A.L.R.5th 469.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving - cases focusing on presence of inculpatory evidence other than statements by accused and cases focusing on absence of particular inculpatory evidence, 90 A.L.R.5th 225.

Adequacy of defense counsel's representation of criminal client-conduct at trial regarding issues of insanity, 95 A.L.R.5th 125.

Denial of, or interference with, accused's right to have attorney initially contact accused, 96 A.L.R.5th 327.

Validity and efficacy of minor's waiver of right to counsel - cases decided since application of *Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), 101 A.L.R.5th 351.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused - federal cases, 41 A.L.R. Fed. 10.

Effect on federal criminal proceeding of unavailability to defendant of alien witness through deportation or other government action, 56 A.L.R. Fed. 698.

Waiver of right to trial by jury as affecting right to trial by jury on subsequent trial of same case in federal court, 66 A.L.R. Fed. 859.

Effect upon accused's sixth amendment right to impartial jury of jurors having served on jury hearing matter arising out of same transaction or series of transactions, 68 A.L.R. Fed. 919.

Appointment of counsel, in civil rights action, under forma pauperis provisions (28 USC § 1915(d)), 69 A.L.R. Fed. 666.

Necessity that Miranda warnings include express reference to right to have attorney present during interrogation, 77 A.L.R. Fed. 123.

What constitutes assertion of right to counsel following Miranda warnings - federal cases, 80 A.L.R. Fed. 622.

Constitutional right to counsel as ground for quashing or modifying federal grand jury subpoena directed to attorney, 83 A.L.R. Fed. 504.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of waiver of jury trial, 103 A.L.R. Fed. 867.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS § 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in presentment before magistrate, 124 A.L.R. Fed. 263.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement - modern cases, 132 A.L.R. Fed. 415.

16C C.J.S. Constitutional Law §§ 1013, 1014, 1016 to 1021, 1045 to 1052, 1067 to 1073; 22 C.J.S. Criminal Law §§ 277 to 320, 340 to 351; 22A C.J.S. Criminal Law §§ 446, 469 to 485, 578 to 590; 23 C.J.S. Criminal Law §§ 1115 to 1141; 23A C.J.S. Criminal Law § 1152; 24 C.J.S. Criminal Law §§ 1161 to 1167; 38A C.J.S. Grand Juries §§ 6, 7, 11, 20 et seq., 53; 42 C.J.S. Indictments and Informations § 6; 50 C.J.S. Juries §§ 10, 126; 97 C.J.S. Witnesses § 6.

Sec. 15. [Self-incrimination; double jeopardy.]

No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.

ANNOTATIONS

Cross references. — *See* Kearny Bill of Rights, cls. 7, 8 in Pamphlet 3.

For authority to grant immunity from prosecution under the Organized Crime Act, *see* 29-9-9 NMSA 1978.

For defense of double jeopardy being raised at any time and provision that defense may not be waived, *see* 30-1-10 NMSA 1978.

Comparable provisions. — Idaho Const., art. I, § 13.

Montana Const., art. II, § 25.

Utah Const., art. I, § 12.

Wyoming Const., art. I, § 11.

I. GENERAL CONSIDERATION.

II. SELF-INCRIMINATION.

A. IN GENERAL.

Test for Miranda custody. — The test for determining whether a defendant is in Miranda custody is not a test that uses a fourth amendment analysis of investigatory detention versus de facto arrest, but the objective test of whether the defendant's freedom of movement was restrained by formal arrest or of the degree of restraint associated with a formal arrest. State v. Wilson, 2007-NMCA-111, 142 N.M. 737, 169 P.3d 1184, cert. denied, 2007-NMCERT-008, 142 N.M. 435, 166 P.3d 1089.

Incomplete Miranda warnings. – Where the police officer began to read the defendant his Miranda warnings during a custodial interrogation, but was interrupted by the defendant who said that he understood his rights, and the police officer failed to inform the defendant that an attorney would be provided to him if he could not afford one and that any statements the defendant made could be used as evidence against him, the defendant did not waive his Miranda rights, the defendant's statements to the officer were not harmless beyond a reasonable doubt, and should have been suppressed. State v. Verdugo, 2007-NMCA-095, 142 N.M. 267, 164 P.3d 966, cert. quashed, 2008-NMCERT-011, 145 N.M. 532, 202 P.3d 125.

Miranda warning to hearing-impaired individual. — Where defendant was arrested for willfully discharging a firearm at a motor vehicle and taken to a police station for custodial interrogation; the interrogating officer read defendant's Miranda rights and asked defendant if defendant had a problem hearing; when defendant informed the officer that defendant had a hearing impairment, the officer gave defendant a copy of

the Miranda warnings, which defendant read aloud; the warnings did not notify defendant that defendant had a right to an interpreter at no cost before proceeding; defendant signed a waiver of rights and made incriminating statements; defendant admitted that defendant understood the Miranda warnings and voluntarily waived them; and defendant claimed that because defendant was not informed of defendant's right to a sign language interpreter as required by the federal Rehabilitation Act of 1973, 29 U.S.C. § 794(a), the Miranda warnings were insufficient and defendant's incriminating statements should have been suppressed, the district court did not err in denying defendant's motion to suppress the incriminating statements. State v. Casares, 2014-NMCA-024, cert. denied, 2014-NMCERT-001.

Voluntary statements inadmissible if Miranda procedures not followed. — Voluntariness relates to the trustworthiness or reliability of statements, whereas waiver of rights relates to the compliance with the strictures of Miranda; Miranda requires law enforcement officers, before questioning someone in custody, to give specified warnings and follow specified procedures during the course of an interrogation, and any statement given without compliance with these procedures cannot be admitted in evidence against the accused over his objection, even if it is wholly voluntary. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Miranda holds that if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease; this is directive only and does not require a warning prior to interrogation to the effect that defendant has a right to stop the questioning at any point and time. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

Miranda-type warnings in school disciplinary matters. — Miranda-type warnings are not required in cases involving in-school disciplinary matters since the purpose of most schoolhouse interrogations is to find facts related to violations of school rules or relating to social maladjustments of the child with a view toward correcting it, and giving Miranda-type warnings would only frustrate this purpose by putting the school official and student in an adversary position, in direct opposition to the school official's role of counselor. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Court to determine whether precautionary warning adequate. — It is always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to his right to remain silent and to assistance of counsel, and when the issue is raised in an admissibility hearing it is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Words of warning found adequate. — Warning given by the district attorney - that anything defendant said "could" (not "could and would") be used against him - was constitutionally adequate. State v. Briggs, 81 N.M. 581, 469 P.2d 730 (Ct. App. 1970).

Purpose of right against self-incrimination. — In the search and seizure context the prime purpose of an exclusionary rule is to deter future unlawful police conduct, and this rationale may be applicable to the right against compulsory self-incrimination. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Privilege of not being witness against oneself. — The privilege against self-incrimination is the privilege of not being a witness against oneself. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

Right against self-incrimination equal with right of confrontation. — One person's right against self-incrimination and another's right to be confronted with the witnesses against him cannot be balanced. Both rights stand on an equal footing, and neither is more important than the other. State v. Curtis, 87 N.M. 128, 529 P.2d 1249 (Ct. App. 1974).

Elements necessary to sustain privilege. — To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. State v. Zamora, 84 N.M. 245, 501 P.2d 689 (Ct. App. 1972).

Privilege against self-incrimination is limited to disclosures that are "testimonial" or "communicative" in nature. State v. Mordecai, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

The scope of the privilege against self-incrimination is limited to disclosures which are testimonial in nature. State v. Ramirez, 78 N.M. 584, 434 P.2d 703 (Ct. App. 1967).

State may require nontestimonial acts of criminal defendants. — The rule in New Mexico has consistently been that the state may require nontestimonial acts of criminal defendants which tend to identify them without offending the right to remain silent. State v. Baca, 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990), cert. denied, 111 N.M. 164, 803 P.2d 253 (1991).

Privilege does not include identifying physical characteristics by photograph. State v. Mordecai, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

The privilege against self-incrimination applies to disclosures that are "communicative" or "testimonial"; the privilege does not include identifying physical characteristics. State v. Jamerson, 85 N.M. 799, 518 P.2d 779 (Ct. App. 1974).

The act of allowing the prosecutrix to view the defendant for the purpose of identifying him did not violate his constitutional privilege against self-incrimination. State v. White, 77 N.M. 488, 424 P.2d 402 (1967).

Privilege does not include voice identification, wearing mask or walking. — Defendant's constitutional privilege against self-incrimination was not violated by the fact that, following arrest, defendant was brought before two prosecuting witnesses for the purpose of identification and was directed to talk for voice identification and to wear a mask of the kind claimed to have been worn by the robber and to walk for the purpose of supplying additional identifying characteristics. State v. Ramirez, 78 N.M. 584, 434 P.2d 703 (Ct. App. 1967).

Fingerprinting is not within the privilege against self-incrimination. — Therefore, motion during trial and alleged statement during closing argument, both of which referred to fingerprinting, did not violate the privilege. State v. Jamerson, 85 N.M. 799, 518 P.2d 779 (Ct. App. 1974).

Drawing of blood is not within the privilege against self-incrimination. — The privilege against self-incrimination applies to disclosures that are communicative or testimonial, and the defendant was not compelled to testify against himself by the drawing of blood from his body. State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Compelled handwriting not self-incrimination. — Compelled handwriting exemplars are nontestimonial and do not constitute self-incrimination. State v. Hovey, 106 N.M. 300, 742 P.2d 512 (1987).

Furnishing of handwriting exemplars is not within the privilege against self-incrimination. — Where the content of handwriting exemplars is neither testimonial nor communicative matter, defendant's privilege against self-incrimination is not violated by being compelled to furnish the exemplars. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Since handwriting exemplars themselves do not violate a defendant's constitutional privilege, the compulsion in furnishing the exemplars also do not violate the privilege. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Psychiatric examination is not within the privilege against self-incrimination. — A court-ordered psychiatric examination does not violate defendant's privilege against self-incrimination. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

A compelled psychological examination does not violate the rights of a criminal defendant who raises insanity as an affirmative defense, and who intends to present

expert testimony as to his sanity at trial. State v. Mireles, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Real or physical evidence is not within the privilege against self-incrimination. — The distinction which has emerged, often expressed in different ways, is that the privilege against self-incrimination is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it. State v. Williamson, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

Appellant's contention that the cutting of his hair and subsequent use for comparison with other hair was a violation of his rights against self-incrimination was without merit where, although the appellant was unaware of the nature of the future use of the samples taken, he made no protest. State v. Williamson, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968).

Trial judge determines whether question calls for incriminating answer. — Whether question propounded, on its face, calls for answer reasonably calculated or tending to incriminate the witness is for trial judge to say, after considering the matter from all standpoints, and the witness is not entitled to decide this matter for himself. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Witness compelled to answer nonincriminating question. — Prosecution may by proper questioning compel answer to fact within witness's knowledge, divulgence of which has no reasonable or rational likelihood of connecting witness with commission of crime. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Purpose of exclusionary rule. — In the search and seizure context the prime purpose of an exclusionary rule is to deter future unlawful police conduct, and this rationale may be applicable to the right against compulsory self-incrimination. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right, and by refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused, but where the official action was pursued in complete good faith, the deterrence rationale loses much of its force. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

One purpose of an exclusionary rule is related to the quality of the evidence, this issue being framed in terms of voluntariness, which was used as a test for protecting the courts from relying on untrustworthy evidence, before Miranda. State v. Ramirez, 89

N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Recordings of telephone calls from jail. — Where defendant made telephone calls from jail requesting that defendant's friends be present at defendant's trial ostensibly to influence the testimony of the state's witnesses; and when a call was placed at the jail, a digital message informed both parties to the call that the call may be recorded and monitored, the recording of the telephone calls did not violate the prohibition against self incrimination. State v. Johnson, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

Admissibility of statement made while released on bond. — Trial court did not err in allowing admission of evidence of incriminating statement voluntarily made by defendant after he was arrested and released on bond, but was no longer in custody or being questioned, and where such statement was obtained neither surreptitiously nor by threat or promise, without prior showing of evidence that at the time of the claimed admission the defendant had been fully advised of his right to advice of legal counsel and his right not to be compelled to testify against himself. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Admissibility of statement made at preliminary parole revocation hearing. — The defendant's right against self-incrimination was not violated when the defendant's statement admitting cocaine use made at a preliminary parole revocation hearing was used in a subsequent trial because the preliminary parole hearing is not distinguishable from other administrative and judicial proceedings in which a witness is only entitled to protection when the witness invokes the right and refuses to answer. State v. Gutierrez, 119 N.M. 618, 894 P.2d 395 (Ct. App. 1995), cert. denied, 119 N.M. 464, 891 P.2d 1218 (1995).

Questions answered at probation revocation hearing. — Where defendant at probation revocation hearing was not called or sworn as a witness, but was advised by the court as to the nature of each charge made against him and was asked whether or not the charge was true, and thereby was given an opportunity to admit or deny the charge, and where he was also given an opportunity to explain his plea to each charge, and in some instances he offered an explanation, this did not constitute compelled, coerced or required testimony by defendant against himself. These proceedings were in the nature of an arraignment. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Testimony before grand jury. — Witness may assert his immunity at trial even though he testified before grand jury. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Use of derivative use immunity. — Section 31-6-15 NMSA 1978 and Rules 5-116 and 11-412 NMRA, allow the government to compel a witness to testify and then prosecute the witness for the crimes mentioned in the compelled testimony, as long as neither the testimony itself nor any information directly or indirectly derived from the testimony is

used in the prosecution. However, it is not enough for the prosecutor to simply assert that all evidence to be used at trial was obtained prior to the defendant's immunized testimony; instead, the state must present testimony from key witnesses, along with testimony from the prosecutor and the investigators, that the witnesses had not had access or otherwise been exposed to the defendant's immunized testimony. State v. Vallejos, 118 N.M. 572, 883 P.2d 1269 (1994).

No right to warning of consequences of refusing blood test. — Miranda-type warnings are necessary only in situations of either testimonial or communicative evidence, and New Mexico has consistently excluded physical evidence from the scope of the protection; it follows that an accused has no constitutional right to a warning concerning the consequences of refusing a blood test. State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

No right to instruction on right to refuse blood test. — There is nothing in this section or N.M. Const., art. II, § 14, or in New Mexico laws or decisions which gives an accused the legal right to an instruction that he has a right to refuse to take a blood alcohol test, where defendant did not object to admission of evidence that he refused to take such test. State v. Fields, 74 N.M. 559, 395 P.2d 908 (1964).

Decision not to take stand does not impair right against self-incrimination. — An accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury. State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

The fact that in taking the stand in his own behalf, defendant may thereby incriminate himself, does not, in itself, establish that defendant was deprived of due process. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971).

Refusal of witness to answer incriminating question cannot prejudice parties. — When a witness, other than the accused, declines to answer a question on the ground his answer would tend to incriminate him, the refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Sufficient mental capacity required for defendant to make valid statement. — For defendant to make a valid statement the defendant must have had sufficient mental capacity at the time he made the statement, to be conscious of the physical acts performed by him, to retain them in his memory, and to state them with reasonable accuracy, and where there was evidence which met this standard, the trial court did not

err in refusing to suppress the statement. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

State has burden to show that statement not exploitive of prior illegal statement. — The fact that defendant may understand his rights at the time of a later statement does not discharge state's burden of showing that later statement is not exploitation of prior illegal statement, and it is improper to admit the later incriminating statement at trial. State v. Dickson, 82 N.M. 408, 482 P.2d 916 (Ct. App. 1971).

Promises of immunity. — Neither district attorney nor court is granted constitutional or statutory power, acting either singly or in concurrence, to extend immunity to a witness so as to compel him to testify regardless of incriminating character of his testimony. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Where defendant's presence at the scene of a burglary, which from the record appeared to have included larceny, could tend to incriminate him and subject him to prosecution for larceny, the district court could not properly require defendant to answer questions about whether defendant saw another person charged with burglary at the scene of the crime, in light of defendant's self-incrimination claim, and his refusal to answer did not constitute criminal contempt, even where the district attorney stated that "under no consideration would he file any other charges" against defendant growing out of the burglary. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Narrow scope of inquiry in consolidated cases. — Where prosecutions against two or more defendants are consolidated, the consolidation results in compelling adoption for both cases of the narrowest scope of inquiry applicable to either since witnesses may not be prejudiced in exercising their claims of privilege by having the scope of inquiry in the one case extended to the permissible scope obtaining in the other. Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949).

Results of polygraph test are not admissible over objection. Chavez v. New Mexico, 456 F.2d 1072 (10th Cir. 1972).

Where defendant had sought polygraph test and had freely and voluntarily agreed that the results thereof, and their interpretation by the examiner, would be admissible as evidence, and with full knowledge that all evidence as to the test, including the results and interpretation thereof by the examiner, could still be kept from the jury by objecting thereto, made no objection, defendant thereupon waived all rights he had concerning introduction into evidence of matters he claimed were self-incriminating. State v. Chavez, 82 N.M. 238, 478 P.2d 566 (Ct. App. 1970).

Results of voluntary polygraph test not equated with self-incrimination. — The voluntary submission by defendant to polygraph examination, which was conducted at his request, without first being given the Miranda warnings and without knowing all that would be asked of him, his responses thereto, and the results of the examination, is not to be equated with self-incrimination, nor is the examiner's interpretation of the results of

such examination to be equated with an interpretation from one language into another of self-incriminating statements. State v. Chavez, 82 N.M. 238, 478 P.2d 566 (Ct. App. 1970).

Interrogating accused in absence of counsel. — Any practice on the part of officials of interrogating an accused in the absence of his counsel whether retained or appointed is strongly disapproved, particularly after the accused has been charged with the crime and the interrogation is designed to secure evidence of guilt to be introduced in the criminal trial against the accused. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Alibi rule does not violate privilege against self-incrimination. — In applying the alibi rule so as to exclude evidence of alibi not disclosed to the district attorney and thus giving defendant a choice between foregoing the defense or taking the stand himself to present it, the trial court did not violate defendant's privilege against self-incrimination. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Applicability of privilege to corporations. — The evidentiary privilege against self-incrimination of this section, the fifth amendment of the U.S. constitution, and 29-9-9 NMSA 1978, does not apply to corporations or a corporation's agent in his representative capacity. Doe v. State ex rel. Governor's Organized Crime Prevention Comm'n, 114 N.M. 78, 835 P.2d 76 (1992).

Admissibility of tape recorded evidence. — Where informer making purchases of heroin from defendants had an electronic device concealed on his person that transmitted sounds to a receiver in a police car and the sounds were recorded on tape, defendants' contention that the tapes were erroneously admitted as evidence, that they were victims of an illegal search and seizure, and that their privilege against self-incrimination was violated was without merit. The informer having testified as to the conversations, the tapes were admissible to corroborate the informer's testimony. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Juvenile proceedings regarded as "criminal". — Juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Statute requiring any person who kills bovine to preserve its hide unmutilated for 30 days does not violate constitutional immunities from self-incrimination and unreasonable search and seizure. State v. Walker, 34 N.M. 405, 281 P. 481 (1929); *see also* State v. Knight, 34 N.M. 217, 279 P. 947 (1929).

B. STATEMENTS MADE DURING INTERROGATION.

Interrogation of a hospital patient. — Where a police officer interviewed the defendant in a hospital immediately following an automobile accident in which the defendant had been severely injured; although the defendant was in pain, the defendant was responsive to the officer's questions and gave coherent answers; the defendant made several inculpatory statements in response to the officer's questions, including an admission that the defendant had taken amphetamines and Loratab without a prescription; and there is no evidence that the officer restrained, threatened, promised special treatment or physically abused the defendant or prevented the defendant from terminating the interview, the defendant's statements were voluntary and the defendant was not subjected to a custodial interrogation. State v. LaCouture, 2009-NMCA-071, 146 N.M. 649, 213 P.3d 799, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Statutory rights of a child during an investigatory detention. — Miranda requires that suspects be advised of their rights under the Fifth Amendment of the United States Constitution prior to any questioning during a custodial interrogation. It is within the legislature's authority to provide greater statutory protection than accorded under the federal constitution. Under 32A-2-14 NMSA 1978, a child who is suspected or alleged of having committed a delinquent act cannot be interrogated or questioned during an investigatory detention unless the child is first advised of his or her statutory right to remain silent and the child knowingly, intelligently, and voluntarily waives his or her rights. The state bears the burden of proving that the child knowingly, intelligently, and voluntarily waived the statutory right to remain silent. The remedy for violating 32A-2-14 NMSA 1978 is to preclude the admission, in court proceedings, of any statement or confession elicited from the child. State v. Antonio T., 2015-NMSC-019, *rev'g* 2013-NMCA-035, 298 P.3d 484.

Questioning a child suspected of delinquent behavior by a school administrator in the presence of a law enforcement officer constitutes an investigatory detention. — When a child suspected of delinquent behavior is questioned in the presence of a law enforcement officer, that child is subjected to an investigatory detention, triggering the protections of 32A-2-14 NMSA 1978. State v. Antonio T., 2015-NMSC-019, *rev'g* 2013-NMCA-035, 298 P.3d 484.

Where the assistant principal of a high school suspected a seventeen-year-old student of being intoxicated and questioned the child in the presence of the student resource officer, a certified law enforcement officer, the questioning of the child constituted an investigatory detention, triggering the protections of 32A-2-14 NMSA 1978. The statements made by the child in response to the assistant principal's questions were inadmissible because the child was not advised of his statutory right to remain silent and the state failed to prove that the child knowingly, intelligently, and voluntarily waived his statutory right to remain silent. State v. Antonio T., 2015-NMSC-019, *rev'g* 2013-NMCA-035, 298 P.3d 484.

Interrogation of a student by a school administrator in the presence of a police officer. — Where a vice principal interrogated a high school student, who was

suspected of being intoxicated, in the vice principal's office in the presence of a uniformed police officer; the purpose of the vice principal's investigation was to ensure the safety of defendant and other students; the vice principal called the officer to administer a breath test and to protect the vice principal; the officer administered the breath test on defendant and searched a bathroom where defendant said defendant had disposed of a bottle of alcohol; defendant admitted to drinking; and defendant's statements were used in a defendant's juvenile case, defendant was not entitled to Miranda warnings from the vice principal despite the presence of the police officer because the interrogation constituted an investigatory detention, not a custodial detention, and the vice principal was acting to serve the school's interests in a safe environment, not on behalf of law enforcement. State v. Antonio T., 2013-NMCA-035, 298 P.3d 484, *rev'd*, 2015-NMSC-019.

Statement made during interrogation. — Where police officers went to the defendant's apartment to determine if the defendant had written a threatening message to the victim of aggravated stalking in violation of a temporary restraining order that the victim had obtained against the defendant; while the officers were parked in front of the apartment, the defendant pulled up in a vehicle, walked to the police officers and yelled that the defendant understood the officers were looking for the defendant; because the officers knew the defendant carried Ninja knives, the officers frisked the defendant; the defendant was not restrained in any manner; the officers questioned the defendant about the reason they were looking for the defendant; the defendant made a number of incriminating statements regarding the violation of the TRO and the threats the defendant had made to the victim; and the officers did not read the defendant's Miranda rights to the defendant during the encounter with the officers, the defendant was not in custody when the defendant made the incriminating statements during the interrogation and the defendant's incriminating statements were admissible into evidence. State v. Smile, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 584, 241 P.3d 182.

Statement made after arrest. — Where the defendant was arrested for aggravated stalking; during booking, the defendant became upset and agitated and started cursing the victim and what the victim had done to the defendant; and in response to the police officer's statement to the defendant to calm down and forget the victim, the defendant told the officer that the next time the police fingerprinted the defendant it would be for murder; the officer had not read the defendant's Miranda rights to the defendant; prior to the admission of the defendant's statement into evidence, the victim and the victim's friends testified that the defendant had threatened the victim and had engaged in a pattern of threatening behavior toward the victim; the police officers who had talked to the defendant prior to the defendant's arrest testified that the defendant said that the defendant would make the victim feel the defendant's pain and that the defendant would take care of the victim; and during the defendant's testimony, the defendant admitted to all of the essential elements of aggravated stalking, the admission of the defendant's statement into evidence was harmless error. State v. Smile, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 584, 241 P.3d 182.

Defendant not in custody when questioned. — Where the defendant was a passenger on a commercial bus; as part of a systematic search at a checkpoint, a dog trained to detect odors alerted to a bag marked with a tag number; no one on the bus claimed the bag; the police officers opened the bag and found bundles containing marijuana; the defendant was the only passenger who did not present a baggage ticket stub; when questioned on the bus, the defendant was sweating, shied away from the officer, and gave evasive answers; the bus company list matched the tag on the bag with the seat number that was occupied by the defendant; the officers asked the defendant to exit the bus, to empty his pockets, and to take off his shoes for safety reasons; officers found the ticket stub for the bag in the defendant's shoe; and the defendant then admitted that the drugs were his, the defendant was not in custody at the time the officer questioned him so as to invoke the defendant's right to Miranda warnings under the fifth amendment. State v. Munoz, 2008-NMCA-090, 144 N.M. 350, 187 P.3d 696, cert. quashed, 2009-NMCERT-009, 147 N.M. 423, 224 P.3d 650.

Defendant was not in custody. — Where defendant called police to help locate defendant's two-year old child, police spoke with defendant while defendant was with a friend in the friend's home; defendant agreed, at the officer's request, to go to the police station; the friend drove defendant to the police station where defendant waited, unattended, in an employee area and where defendant was permitted to nap and was offered food and drink; defendant was never placed in a locked or secured room, handcuffed or otherwise restrained; defendant was not forced, pressured, threatened or confronted with evidence of defendant's guilt; defendant was forthcoming with information, wanted to talk to the police, and was not advised that defendant was under arrest or told that defendant could not leave; defendant never informed the officers that defendant wanted to leave, that defendant was tired or that defendant did not want to give a statement; and a police officer gave defendant a ride back to defendant's friend's house and no arrest was made, defendant was not in custody and the trial court did not err in denying defendant's motion to suppress oral statements defendant made to police officers concerning defendant's negligently permitting child abuse that resulted in the death of defendant's child. State v. Vasquez, 2010-NMCA-041, 148 N.M. 202, 232 P.3d 438.

Handcuffed probationer was not in custody. — Where defendant was on supervised probation; the probation officer, who was conducting routine home visits, added defendant to the list of visits because defendant had tested positive for drugs; the probation officer and a drug task force officer knocked on defendant's door and saw defendant look out a window; defendant did not promptly open the door; after a while, defendant's spouse opened the door; defendant was locked in the bathroom and refused to come out; the officers saw a known felon and a fellow probationer leave through the back door; when defendant came out of the bathroom, the officers searched defendant and found a large amount of cash on defendant's person; defendant was handcuffed for officer safety; the officers told defendant that defendant was not under arrest; the officers did not read defendant's Miranda rights to defendant; defendant asked to talk privately to the probation officer to explain things and led the probation officer into the laundry room; the probation officer told defendant that the officers would

search the house and asked defendant if there was anything in the house that defendant was not supposed to have; defendant told the officer that defendant did have something and showed the probation officer where defendant had hidden drugs; and at trial, defendant moved to suppress all statements defendant made while handcuffed and the evidence seized as a result of those statements, defendant was not in custody or formally arrested for Fifth Amendment purposes when defendant answered the probation officer's questions and showed the probation officer the drugs. State v. Hermosillo, 2014-NMCA-102, cert. denied, 2014-NMCERT-009.

Custodial interrogation. — Where defendant initiated contact with police officers and voluntarily agreed to accompany them to the district attorney's office for an interview regarding the murder of defendant's friend; the officers handcuffed defendant and transported defendant in a marked police car to the district attorney's office; defendant was not placed in physical restraints during the interview; defendant was escorted at all times while at the district attorney's office, including smoke breaks outside the building; defendant was interrogated in a small room with the door closed and with two officers present at all times; the questioning officer accused defendant of murdering the victim, confronted defendant with evidence of guilt, and repeatedly directed defendant to confess; Miranda warnings were not given to defendant at any point during the interrogation; and the officers never informed defendant that defendant was not under arrest, that defendant was free to leave the room, or that defendant could terminate the interview at any time, defendant was subject to a custodial interrogation. State v. Olivas, 2011-NMCA-030, 149 N.M. 498, 252 P.3d 722, cert. denied, 2011-NMCERT-003, 150 N.M. 619, 264 P.3d 520.

Where defendant, who interrupted police interview of a witness at the scene of a motor vehicle accident in which defendant was involved, was physically escorted by a police officer to a police vehicle, told by the police officer that he would be arrested for obstruction if he kept talking to the witness, placed in the back seat of the police vehicle with the doors closed and locked, and later questioned while he was in the back of the police vehicle, the questioning constituted a custodial interrogation. State v. Snell, 2007-NMCA-113, 142 N.M. 452, 166 P.3d 1106, cert. quashed, 2008-NMCERT-004, 144 N.M. 49, 183 P.3d 934.

Statements given prior to custodial interrogation. — Where defendant, prior to interview given to district attorney and police chief in office where she worked, was told she did not have to say anything, but where she voluntarily disclosed that she knew decedent and had been with him shortly before he was found by police, and after which disclosure she was immediately given her Miranda warnings, defendant was not subject to custodial interrogation prior to her disclosure and therefore was not entitled to Miranda warnings prior to time they were given. State v. McLam, 82 N.M. 242, 478 P.2d 570 (Ct. App. 1970).

Where defendant talked with police officers briefly prior to receiving any warning as to his rights, but where at this stage he was disclaiming knowledge of what had happened to the victim; was expressing a desire and willingness to assist the police; was not being

accused by the police of any wrong; and was not in custody, and where immediately upon arrival at the police station, and prior to being questioned, he was advised of rights, trial court did err in refusing to suppress statements made to police by defendant. State v. Webb, 81 N.M. 508, 469 P.2d 153 (Ct. App. 1970).

Where appellant had neither been placed under arrest nor in any way detained when he volunteered the statement, and it was made in answer to a question concerning what occurred and can be described as an answer to a general question of a person who knew something of what transpired as a part of the fact-finding process, this is not prohibited by Miranda. State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968).

Where officer was in a fact-finding process when the question was asked and the incriminating statements made by appellant were voluntary, they were made before any type of custodial interrogation, within the meaning of Miranda, could be said to have begun. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

Admission of the statement by defendant did not violate his privilege against self-incrimination, where the remark by defendant was completely uncoerced, and was not made in connection with any interrogation of him and it was voluntarily made in response to a remark made by the officer, even where remark by the officer might have suggested some expected response, but was not put as a question to defendant, and did not suggest that the officer contemplated any such response as was made by defendant. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Where appellant had been neither placed under arrest nor in any way detained when he volunteered the incriminating statement, and it was made in answer to a question concerning what occurred and can be described as an answer to a general question of a person who knew something of what transpired as a part of the fact-finding process, the statement is not prohibited by Miranda. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

Where defendant is not in custody, nor under indictment nor being interrogated, the advisory system has not begun to operate against the defendant so as to require that he be informed of his right to remain silent. State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970).

Right against self-incrimination must involve an element of coercion since the clause provides that a person shall not be compelled to give evidence against himself; where defendant's statements were obtained in a manner indicating that they were given voluntarily within the meaning of fundamental fairness, then the deterrence of over-zealous and unlawful police activity would not be served by their exclusion. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Involuntary confession. — Promises of leniency on the part of police can be coercive and may render a defendant's subsequent statement involuntary. State v. Talayumptewa, 2015-NMCA-008.

Burden on the state. — On a claim that the police coerced a statement from defendant, the prosecution bears the burden of proving by a preponderance of the evidence that a defendant's statement was voluntary, that it was not extracted from an accused through fear, coercion, hope of reward, or other improper inducements, and an appellate court reviews the entire record and the circumstances under which the statement or confession was made in order to make an independent determination of whether a defendant's confession was voluntary. State v. Talayumptewa, 2015-NMCA-008.

Implied promises of leniency. — Where officers made numerous implied promises of leniency to defendant, including promises of reduced charges and less prison time, inducing defendant to make incriminatory statements, the district court did not err in finding the statements involuntary and in suppressing the evidence. State v. Talayumptewa, 2015-NMCA-008.

Voluntary statements admissible. — Admission of statements made by defendant while in custody after he had been advised of right not to answer questions and had made no request to have counsel is not constitutionally impermissible and does not constitute error on review. State v. Hall, 78 N.M. 564, 434 P.2d 386 (1967).

Time at which Miranda warnings should be given. — Defendant's claim that he should have been given the Miranda warnings immediately prior to selling the heroin to informer was without merit since defendant was neither in custody, under indictment nor being interrogated. His freedom of action had not been interfered with in any way, nor had the adversary system begun to operate against him. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Incriminating statements admitted. — Where there is no evidence that an officer knew or should have known that his simple statement, "Is he the one?" made to a fellow officer in the presence of the defendant, would result in defendant making incriminating statements, and there is no evidence of coercion or interrogation and no indication that defendant perceived that he was being interrogated, the trial court properly refused to suppress defendant's statements. State v. Edwards, 97 N.M. 141, 637 P.2d 572 (Ct. App.), cert. denied, 97 N.M. 621, 642 P.2d 607 (1981).

Statements made in taped interview. — Where defendant drove a pickup toward a group of children who were trick-or-treating on Halloween; the chaperone pushed the children out of the way but was struck and killed; defendant stopped and then left the scene of the accident; defendant was arrested; the arresting officer read defendant's Miranda rights and told defendant that defendant's interview would be recorded; at trial, defendant made a general objection to playing the interview on the ground that the evidence should be introduced through live testimony; the interview revealed that

defendant had prior convictions for driving while intoxicated, the district court did not err in denying defendant's motion for a mistrial because defendant's objection was not sufficiently specific to elicit a fair ruling as to the admission of the portion of the interview to which defendant objected and the evidence of defendant's guilt was overwhelming and there was no probability that defendant was convicted because of what the jury heard about defendant's prior convictions. State v. Melendrez, 2014-NMCA-062, cert. denied, 2014-NMCERT-006.

C. RIGHT TO REMAIN SILENT.

Prosecutorial misconduct. — The prosecutor's questions on cross-examination of the defendant and the prosecutor's closing argument to the jury focused on the defendant's failure to inform the investigating officer about exculpatory information that the defendant presented at trial, and which was inconsistent with the defendant's statements to the officer, were comments on the defendant's silence and constituted fundamental error. State v. Pacheco, 2007-NMCA-140, 142 N.M. 773, 170 P.3d 1011, cert. denied, 2007-NMCERT-010, 143 N.M. 73, 172 P.3d 1285.

Comment by expert. — A DNA expert's comment that "If I were a defendant, and I were falsely accused as being the source of biological evidence, I would want to continue testing until I found the probe that would prove the exclusion" was not an improper comment on defendant's right to remain silent. State v. Peters, 1997-NMCA-084, 123 N.M. 667, 944 P.2d 896, cert. denied, 123 N.M. 446, 942 P.2d 189 (1997).

Comment by state differs in effect from comment by witness. — Where the prosecutor comments on or inquires about the defendant's silence, such a reference can have an intolerable prejudicial impact and may require reversal under the "plain error" rule of the rules of evidence. Any reference to the defendant's silence by the state, if it lacks significant probative value, constitutes plain error and as such it would require reversal even if the defendant fails to timely object. However, where a witness refers to the defendant's silence, the defendant must object to this testimony in order to preserve the error. State v. Baca, 89 N.M. 204, 549 P.2d 282 (1976).

Burden on state to prove that error did not contribute to verdict. — When there is a reasonable possibility that prosecutor's inappropriate remark on defendant's exercise of his right to refuse to testify might have contributed to the conviction, the state, as beneficiary of that constitutional infringement, must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. State v. Martin, 84 N.M. 27, 498 P.2d 1370 (Ct. App. 1972).

Comment by prosecution on accused's failure to testify at trial is reversible error. Gonzales v. State, 94 N.M. 495, 612 P.2d 1306 (1980).

Comment on failure to testify found not to require reversal. — Where defendant did not object to the court's instruction regarding defendant's right to not testify and the district attorney's comment on defendant's failure to take the stand in his own behalf

closely followed the initial clause of the court's instruction, and the trial court firmly admonished the jury to attach no significance to the district attorney's remark and the jury stated that it would do so, then, under these circumstances, if the district attorney's comment was error, it did not amount to a violation of defendant's constitutional rights and does not require a reversal. State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

Comment on silence. — In trial of defendant for felony murder, prosecutor's comment to jury on defendant's failure to assert his claim of self-defense during pre-arrest and post-Miranda periods, to which defendant did not object, was not fundamental error where the comment did not directly call on the jury to infer guilt from defendant's silence because the prosecution offered evidence that was inconsistent with self-defense. State v. DeGraff, 2006-NMSC-011, 139 N.M. 211, 131 P.3d 61.

Prosecution's questions on defendant's post-arrest silence not necessarily reversible error. — Where prosecution is permitted to ask questions involving defendant's post-arrest silence, this will not constitute reversible error when these questions logically ensued and were invited by defendant's voluntary testimony and were not directed at post-arrest silence. State v. Molina, 101 N.M. 146, 679 P.2d 814 (1984).

State's comment on defendant's silence when asked for his identification did not violate his constitutional right to remain silent. State v. Baca, 111 N.M. 270, 804 P.2d 1089 (Ct. App. 1990), cert. denied, 111 N.M. 164, 803 P.2d 253 (1991).

Objections by prosecutor not construed as comment on failure to testify. — Where although the statements of the prosecutor in making his objections might possibly have been construed as suggesting that it was for the defendant to take the stand and make the explanations, the court was of the opinion that considering the time and the manner in which the statements came into the case they could not reasonably be construed as comments to the jury on defendant's failure to take the stand and testify on his own behalf. State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Silent defendant cannot complain of unfavorable inferences by jury. — If the jury feels that the facts are strong enough to call upon the defendant to offer explanatory evidence to counter them, and he prefers not to do so in the exercise of a constitutional right and privilege accorded him, he cannot justly complain if the jury draws inferences unfavorable to him under the circumstances. State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953).

Where defendant opens door to comment on failure to testify. — Where prosecutor's comments in closing argument on defendant's failure to testify could at best be characterized as indirect, where defendant "opened the door" to such comment in his own closing argument, thus effectively waiving any claim of error, and where trial

court instructed jury that no presumption was to be made from defendant's failure to testify, nor should prosecutor's remarks be given weight if contrary to statements of law given them by the court, defendant's constitutional right to remain silent was not violated. State v. Carmona, 84 N.M. 119, 500 P.2d 204 (Ct. App. 1972).

Where remarks of the prosecutor concerning defendant's failure to testify were clearly impermissible and in the absence of waiver would constitute reversible error, and where defendant objected to the prosecutor's remarks, but where, out of the hearing of the jury, the trial court indicated that the prosecutor's remark was invited by defendant's argument, and for unexplained reasons the record failed to include defendant's argument to the jury, court of appeals could not presume error; consequently, no reviewable question was presented. State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970), cert. denied, 401 U.S. 941, 91 S. Ct. 943, 28 L. Ed. 2d 221 (1971).

Generally, the prosecutor may not properly comment on a defendant's failure to testify, but such comment is permissible where the remarks of the prosecuting attorney were made by way of response to the comments of defendant's counsel concerning defendant's reasons for not testifying, and such remarks by the assistant district attorney were within the realm of reasonable reply to defendant's argument. State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973).

Where the prosecutor's comment on defendant's failure to take the stand was made in response to the defendant's own argument, the defendant waived any right which he might have had to claim violation of privilege against compulsory self-incrimination because of the prosecutor's comment. State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966).

No weight can be given accused's silence. — The constitution forbids prosecutor and court from commenting on an accused's failure to testify on his own behalf. Even where there is no interrogation and the accused merely remains silent, no weight whatever can be given to the accused's silence. State v. Ford, 80 N.M. 649, 459 P.2d 353 (Ct. App. 1969).

Plain error to question defendant's silence. — In defendant's murder trial, there being no basis for a question concerning defendant's silence at the time of his arrest, the district attorney's question about it was "plain error" because it was a comment by the district attorney on defendant's silence. State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

If the prosecution's reference to a defendant's silence at time of arrest lacks significant probative value, the reference to silence has an intolerable prejudicial impact requiring reversal. State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

Remaining silent in the face of an accusation, under a claim of right to do so until counsel can be consulted, is not such a circumstance as will permit admission of

testimony of the action of the accused or the content of the accusation. State v. Hatley, 72 N.M. 280, 383 P.2d 247 (1963).

Even if brother, not defendant, was asked the question. — The fact that the question regarding silence was asked of the brother and not the defendant makes no difference, since the prejudicial impact was the same. State v. Lara, 88 N.M. 233, 539 P.2d 623 (Ct. App. 1975).

Probative value must be outweighed by danger of unfair prejudice in order to exclude testimony. — Defendant's motion for mistrial was correctly denied when there was no showing that the probative value of testimony mentioning defendant's refusal to talk to interviewing detective was substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury as required by Rule 403, N.M.R. Evid. (see now Rule 11-403 NMRA). State v. Baca, 89 N.M. 204, 549 P.2d 282 (1976).

Showing prior inconsistent statements is not improper comment on defendant's silence. — Questioning defendant on cross-examination, after he testified that he had found certain stolen property in an abandoned house, about why he had not told the police the same thing when he was arrested was not an improper comment on his silence at the time of arrest. When arrested the defendant did not remain silent, not only stating that he did not know anything, but also offering an explanation which tended to deny his possession, the question was proper cross-examination under Rule 611, N.M.R. Evid. (see now Rule 11-611 NMRA), and was admissible for the purpose of impeaching defendant's credibility by showing prior inconsistent statements. State v. Olguin, 88 N.M. 511, 542 P.2d 1201 (Ct. App. 1975).

Eliciting hearsay statement regarding defendant. — It was improper for the prosecutor to call the defense's alibi witness during the prosecutor's case-in-chief and to attempt to impeach her by eliciting from her a prior statement made to her by the defendant. The defendant's statement was hearsay, and was not admissible as an exception under Rule 11-801 D(1) NMRA, since the defendant had not testified. Its admission into evidence approached a violation of his constitutional right not to testify. State v. Duran, 107 N.M. 603, 762 P.2d 890 (1988), superseded by rule, State v. Gutierrez, 1998-NMCA-172, 126 N.M. 366, 969 P.2d 970.

Fact that perjury is the crime with which witness might incriminate himself is immaterial. When a witness is asked a question the answer to which could show that he had already committed a crime (perjury at a prior trial or hearing), his refusal to answer is permissible almost by the definition of self-incrimination. State v. Zamora, 84 N.M. 245, 501 P.2d 689 (Ct. App. 1972).

Instruction on defendant's failure to testify. — It has been firmly established that an instruction on defendant's failure to testify is actually a benefit as a caution to the jury and is not erroneous, even though the defendant did not request it. State v. Garcia, 84 N.M. 519, 505 P.2d 862 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

Failure to request jury instruction. — Where defendant never requested an instruction on the voluntariness of certain statements made by him, any error committed by the court in failing to give one was waived. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Instruction not error though not requested by defendant. — Where trial court instructed the jury not to draw any inferences against petitioner because of his failure to testify in his own behalf, petitioner's contention that such instruction was error because he did not request such an instruction and that the instruction amounted to a comment concerning defendant's failure to testify was without merit since the instruction was for the benefit of a defendant. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Instruction that state could comment on defendant's failure to take stand was not denial of his constitutional protection against self-incrimination where the court did not make any comment and the prosecution made no comment or argument whatsoever on appellant's silence. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Statute not violative of section. — Statute providing that accused may testify but that his failure to do so would create no presumption against him and that accused was entitled to jury instruction on the subject if his failure to testify was the object of comment or argument did not violate this section. State v. Sandoval, 59 N.M. 85, 279 P.2d 850 (1955), overruled in part by State v. Miller, 76 N.M. 62, 412 P.2d 240 (1966).

D. WAIVER OF RIGHT AGAINST SELF-INCRIMINATION.

Waiver of right against self-incrimination. — Where a police officer arrested the defendant for striking his stepson; the officer read the defendant his Miranda rights, which the defendant acknowledged he understood; the defendant did not initially object to answering the officer’s questions; in response to a question about striking his stepson, the defendant stated that he did not think he should answer any further questions without having a lawyer present; the defendant agreed to answer questions about other topics; and later in response to an open-ended question, the defendant volunteered statements about the incident with his stepson, the defendant knowingly, intelligently and voluntarily waived his right against self-incrimination. State v. Bailey, 2008-NMCA-084, 144 N.M. 279, 186 P.3d 908, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Miranda rights can be waived only after the complete Miranda warnings have been given to the defendant. State v. Verdugo, 2007-NMCA-095, 142 N.M. 267, 164 P.3d 966, cert. quashed, 2008-NMCERT-011, 145 N.M. 532, 202 P.3d 125.

The test of voluntariness of waiver of right against self-incrimination is not dependent upon the utterance of a shibboleth, but rather upon a clear manifestation by words and circumstances of a free and unconstrained choice. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Burden on state to establish waiver of rights. — Where upon the first interview defendant expressly declined to make any statement, a second or further interview was not barred, but there was imposed upon the prosecution a "heavy burden" to establish that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to the aid of counsel. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969).

Burden on defendant to show that waiver not understandingly made. — Under Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964) the burden is on a defendant to prove his contentions that the waiver of his rights was not intelligently and understandingly made. State v. Beachum, 78 N.M. 390, 432 P.2d 101 (1967), cert. denied, 392 U.S. 911, 88 S. Ct. 2068, 20 L. Ed. 2d 1369 (1968).

Waiver need not be written. — A voluntary waiver of the right or privilege against self-incrimination need not be reduced to writing and signed by defendant. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Determinations of waiver and voluntariness binding on appellate court. — Where the evidence in prosecution for murder substantially supports the preliminary determination by the trial court, that waiver of right against incrimination was voluntary and a determination was made by the jury that the statements were voluntarily made, these determinations are binding upon court of appeals. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Where the judge, on record, passed on the voluntariness and admissibility of defendant's statements at a suppression hearing, and submitted the statements to the jury with a charge which complied with UJI Crim. 40.40 (*see now* UJI 14-5040 NMRA), the defendant's argument that his statements were the product of promises and inducements was to be considered with all the conflicting evidence, and it was not for the appellate court to substitute its own judgment for that of the trier of fact and the trial judge. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Transcript found necessary to determine voluntariness of statements. — Where defendant's basic defense was to persuade the jury that certain statements relied on heavily by the state were involuntary, and that the officer who testified about the circumstances of these statements testified differently at trial than at the suppression hearing, a copy of the prior hearing transcript would have been invaluable, and where there were different judges, court reporters and attorneys in the hearing on the motion to suppress, on the motion for a transcript, and at trial, there were no reasonable alternatives to a transcript of the prior hearing. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Waiver of rights as result of guilty plea. — Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) requires that state criminal records show an understanding waiver by a defendant entering a guilty plea of three constitutional rights:

(1) the privilege against compulsory self-incrimination, (2) the right to trial by jury, and (3) the right to confront one's accusers. State v. Guy, 81 N.M. 641, 471 P.2d 675 (Ct. App. 1970).

Plea of guilty, voluntarily made, foreclosed an accused's right to object to the manner in which he was arrested or how the evidence had been obtained against him. The plea was a waiver of all nonjurisdictional defenses, and sentence which followed such a plea of guilty was a result of the plea and not the evidence theretofore obtained. State v. Brewster, 78 N.M. 760, 438 P.2d 170 (1968).

Where appellant admittedly incriminated himself by his plea of guilty, he could not be heard to complain since by his plea he confessed the charge contained in the information. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

By pleading guilty the defendant admitted the acts well pleaded in the charge, waived all defenses other than that the indictment or information charges no offense, and waived the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty plea and right to remain silent. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

Defendant, who voluntarily pleaded guilty, was not entitled to a post-conviction hearing under Rule 93, N.M.R. Civ. P. (see now Rule 5-802 NMRA) (only applied to post-conviction motions before September 1, 1975), for the purpose of determining whether or not the state obtained evidence, which warranted the filing of the complaint, as a result of a claimed questioning of him contrary to his constitutional rights to remain silent and to the aid of counsel. State v. Brewster, 78 N.M. 760, 438 P.2d 170 (1968).

Plea of guilty must be voluntary. — It is fundamental that a plea of guilty must be voluntarily made. If not so made but induced by threats or promises, it is void and subject to collateral attack. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

It is a fundamental rule of criminal procedure that a judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. To withhold the privilege of withdrawing a guilty plea in order to reassume the position occupied prior to its entry would constitute a denial of due process of law. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967).

Plea of guilty is binding if made voluntarily after proper advice of counsel and with full understanding of the consequences. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Guilty plea found voluntary. — Defendant who was told by his attorney that if he didn't plead guilty to second-degree murder he would die in gas chamber could not claim on motion for post-conviction relief that his guilty plea was induced by coercion, threats or

promise of leniency, because such plea represented a choice between two alternatives and a voluntary selection of a plea to a lesser charge. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

Where for six days after his arrest defendant was interrogated from time to time by officials but gave no statement and was not allowed to retain or consult with an attorney, defendant was denied his constitutional right to counsel during the first six days after his arrest. However, the denial of a naked constitutional right does not invalidate all subsequent proceedings nor necessarily prevent an accused from acting voluntarily in such proceedings, and where defendant subsequently retained counsel and pleaded guilty upon his advice, the plea was held to be voluntarily given. Murillo v. Cox, 360 F.2d 29 (10th Cir. 1966).

The fact that alternatives are considered in reaching a decision to plead guilty does not necessarily render the decision involuntary, and where there is substantial evidence that a plea was made voluntarily after proper advice of counsel and with full understanding of the consequences, there is no basis for post-conviction relief. Mondragon v. State, 84 N.M. 175, 500 P.2d 999 (Ct. App. 1972).

Consequences of guilty plea must be understood. — Defendant's claim upon motion for post-conviction relief that trial court failed in its duty to inform him at the arraignment and before accepting his plea of guilty that the maximum possible penalty for second-degree murder was life imprisonment, thereby contributing to his failure to understand the consequences of his plea, was without merit where defendant had been fully advised by competent counsel as to both maximum and minimum penalties which could be imposed upon being adjudged guilty, and where defendant admitted that trial court asked if he understood the charge against him. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Failure to object waives right to exclude testimony. — Where no objection was made to the testimony of officer in which he related the content of his remark and defendant's response thereto and defendant had already been advised of his rights to an attorney and to remain silent, even if defendant had a right to have this testimony excluded, he waived such right when he failed to make objection thereto or to raise any question as to its admissibility. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Waiver of right to have public defender notified. — Failure of police to comply with 31-15-12 NMSA 1978, requiring that peace officers notify public defender of any person not represented by counsel who was being forcibly detained and charged with a crime, did not infringe upon defendant's rights against self-incrimination where defendant was advised of those rights both at time of arrest and booking, voluntarily acknowledged that he understood them and signed waiver of rights form. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976), rev’g 88 N.M. 395, 540 P.2d 875 (Ct. App. 1975).

Failure to sign written statement does not make oral statements inadmissible. — Where the record shows that defendant was warned of his rights and signed a waiver and that later he refused to sign a written statement and stated that he would wait until an attorney was present before he signed it, the trial court's admission of pretrial oral statements in evidence was not error as the fact that defendant declined to sign a written statement did not make his oral statement inadmissible as a matter of law. State v. Courtright, 83 N.M. 474, 493 P.2d 959 (Ct. App. 1972).

E. CONFESSIONS.

Admissibility of statements made by defendant in a telephone call. — Where a police officer, who was investigating threatening telephone calls and gun shots at a residence, answered a telephone call at the residence; during the telephone conversation, the caller made inculpatory remarks, identified himself as "Roberto" and as the shooter; the caller voluntarily initiated the call, could have and did terminate the call on his own initiative, and was not in any way restricted in his freedom of movement; and the caller was not told that he was speaking to a police officer until near the end of the conversation, and the caller was not in custody, the district court erred in ruling that the statements were inadmissible based on Miranda violations. State v. Hernandez, 2009-NMCA-096, 147 N.M. 1, 216 P.3d 251, cert. denied, 2009-NMCERT-007, 147 N.M. 362, 223 P.3d 359.

Invocation of right to remain silent. — Where police officers asked the defendant if the defendant was willing to talk and the defendant responded by saying that "I ain't really got too much to say", the defendant did not invoke his right to remain silent and the admission of the defendant's statements to the police officers did not violate the defendant's fifth amendment right to remain silent. State v. Perry, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

Clarification of whether the defendant has invoked the right to remain silent. — Where police officers asked the defendant if the defendant was willing to talk and the defendant responded by saying that "I ain't really got too much to say", the defendant's statement did not invoke the defendant's right to remain silent under the fifth amendment to the United States constitution, and N.M. Const., art. II, § 14 did not require the officers to clarify whether the defendant had invoked the right to remain silent. State v. Perry, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

Defendant invoked the right to remain silent. — Where a police interrogator advised defendant of defendant's Miranda rights and defendant acknowledged that defendant understood defendant's rights; the interrogator asked defendant if defendant wished to answer any questions and defendant replied "Not at the moment. Kind of intoxicated"; the interrogator told defendant that intoxication was not a reason that defendant could not talk to the interrogator, placed a written waiver of rights in front of defendant, and told defendant to sign the waiver if defendant wanted to talk; defendant replied "Like I said, not at the moment"; and the interrogator persisted in questioning defendant until defendant gave an incriminating statement, defendant unequivocally invoked the right to

remain silent, mandating that the interrogation immediately cease. State v. King, 2013-NMSC-014, 300 P.3d 732.

Interrogation must end once the right to remain silent is invoked. — Officers must scrupulously honor a suspect's right to remain silent, once invoked, by ending the interrogation, so in a murder investigation, where the defendant made clear that he wanted the assistance of a lawyer and that he did not have anything to say to the officers, but where the investigating officers, instead of immediately terminating the interrogation, showed the defendant his bible to keep the defendant talking in hopes that he would make incriminating statements, and tried to convince the defendant to waive his rights and tell the officers what happened, the officers violated the defendant's constitutional rights. State v. Madonda, 2016-NMSC-022.

***Corpus delicti* rule.** — A defendant's extrajudicial statements may be used to establish the *corpus delicti* when the prosecution is able to demonstrate the trustworthiness of the confession and introduce some independent evidence of a criminal act. State v. Wilson, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

Admissibility of confession to establish the *corpus delicti*. — Where admissible evidence is not available to corroborate a confession, the confession is not admissible and may not be used to establish the *corpus delicti* necessary for a conviction. State v. Hardy, 2012-NMCA-005, 268 P.3d 1278, cert. quashed, 2012-NMCERT-012, 299 P.3d 422-423.

Where defendant was charged with criminal sexual penetration of a minor; the victim told the victim's parent and a police officer about the sexual abuse; the victim was not cooperative with the prosecution; the only evidence the state could produce was the hearsay statements of the victim to the victim's parent and the police officer; and defendant confessed to committing the sexual abuse of the victim; the trial court properly dismissed the case because the state could not use the victim's hearsay statements to corroborate the confession, there was no admissible evidence to establish the *corpus delicti*, and defendant could not be convicted unless admissible evidence other than defendant's confession established the *corpus delicti*. State v. Hardy, 2012-NMCA-005, 268 P.3d 1278, cert. quashed, 2012-NMCERT-012, 299 P.3d 422-423.

Determination of admissibility of a confession at a preliminary hearing. — The district court should determine at a preliminary hearing whether the state has evidence that supports the essential facts admitted in a defendant's confession. First, the court assesses whether the confession's trustworthiness may be established by the state. Second, the court must ensure that the state has evidence that can corroborate the existence of the alleged loss or injury. At the preliminary hearing, the court can use inadmissible evidence to determine the trustworthiness of a confession. Admission of the confession at trial is conditioned upon the state adducing independently admissible evidence that can contribute to establishing the *corpus delicti*. At the preliminary hearing, the court should determine whether the state can provide admissible evidence

supporting the *corpus delicti*. State v. Hardy, 2012-NMCA-005, 268 P.3d 1278, cert. quashed, 2012-NMCERT-012, 299 P.3d 422-423.

Trustworthiness doctrine. — A defendant's extrajudicial statement may be used to establish the *corpus delicti* where the statement is shown to be trustworthy and where there is some independent evidence to confirm the existence of the alleged loss or injury. State v. Weisser, 2007-NMCA-015, 141 N.M. 93, 150 P.3d 1043.

Voluntary confession not violation of section. — When confession was freely and voluntarily made, it follows as a matter of course that appellant was not compelled to testify against himself in violation of this section. State v. Ascarate, 21 N.M. 191, 153 P. 1036 (1915), writ of error dismissed, 245 U.S. 625, 38 S. Ct. 8, 62 L. Ed. 517 (1917).

Massachusetts rule followed in New Mexico. — New Mexico procedure as to confessions does not follow the New York method; rather, the court of appeals follows the Massachusetts rule, i.e., the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

Judge's comment that voluntariness decided by jury. — Where after a hearing, the judge concluded that the defendant's incriminating statement met legal requirements for admissibility and his findings on disputed issues of fact are also ascertainable from the record, the trial court's statement that the issue of voluntariness was entirely up to the jury is no more than a comment that, having determined the statement was obtained in accordance with legal requirements, and was admissible as a matter of law, the final decision in connection with the statement was for the jury and as such was not constitutionally inadequate. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).

Involuntary confession not to be heard by jury. — A confession by the defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968).

Right to hearing on voluntariness of confession. — Where approximately 47 days before trial defendant filed a motion to suppress all statements made by the defendant relating to the offenses charged in the indictment, and where on the day of trial defendant renewed his motion to suppress, the trial court erred in not holding a hearing out of the presence of the jury in order to determine the voluntariness of the confession, since defendant had the constitutional right at some stage in the proceeding to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness; a determination uninfluenced by the truth or falsity of the confession. State v. LaCour, 84 N.M. 665, 506 P.2d 1212 (Ct. App. 1973).

Defendant alleging duress in the taking of his confession has a constitutional right to have a fair hearing and a reliable determination on the issue of voluntariness

uninfluenced by the truth or falsity of that confession. State v. Gurule, 84 N.M. 142, 500 P.2d 427 (Ct. App. 1972).

A prima facie case for admission of a confession is made where the officers testify that the confession was obtained without threat or coercion or promise of immunity. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Error not to hear defendant's statement on integrity of confession. — Any time a defendant makes it known he has something to say touching the integrity of a confession claimed to have been made by him, however incredible it may appear to the trial court, the judge must hear him. He has no choice. In declining to do so, the court commits reversible error. State v. Armijo, 64 N.M. 431, 329 P.2d 785 (1958).

Appellate court must accept determinations by triers of fact. — It is for the trial court in the preliminary inquiry out of the presence of the jury, and for the jury ultimately under proper instructions, to determine the question of the voluntariness of confessions, and the court of appeals must accept these determinations by the triers of the fact, unless the evidence is so lacking in support of these determinations as to work fundamental unfairness. State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct. App. 1967).

Confession made prior to appearance before magistrate. — Defendant's confession having been held to be voluntary by the trial court, and the evidence at the motion hearing not requiring a contrary conclusion, the fact that the statement was made prior to defendant's appearance before a magistrate did not require that the statement be suppressed. State v. Rael, 81 N.M. 791, 474 P.2d 83 (Ct. App. 1970).

Having determined that it was voluntary, the fact that appellant was not taken forthwith before a magistrate cannot be held to make the confession inadmissible. State v. Gray, 80 N.M. 751, 461 P.2d 233 (Ct. App. 1969).

Advice of counsel not essential. — A confession by a defendant at a time he is in custody and does not have counsel to advise him is not ipso facto involuntary and inadmissible. Pece v. Cox, 354 F.2d 913 (10th Cir. 1965), cert. denied, 384 U.S. 1020, 86 S. Ct. 1984, 16 L. Ed. 2d 1044 (1966).

A voluntary confession given before counsel was obtained is admissible. State v. Dena, 28 N.M. 479, 214 P. 583 (1923).

Promise of lesser punishment. — If the accused confesses because he was induced by the promise that his punishment will not be so severe as it otherwise might be, the confession is not admissible because it was not voluntary. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Inducement need not be made by a person in position of authority to be unlawful. — Where defendant in larceny case had a private conversation with a former district attorney after his arrest, the former district attorney was a person of some standing in

the community, who had been seen on the day of the crime by defendant with the victim of the larceny, and where defendant's mother had told her son to go to this man if he ever got into any trouble because he would help him out, defendant might reasonably have considered the promissor as a person able to afford him aid, and his confession, consisting of the act of showing the police where the stolen property was hidden and the statements made to the police after emerging from the conference room and on route to the cache site, was unlawfully induced, involuntary and, therefore, inadmissible. State v. Benavidez, 87 N.M. 223, 531 P.2d 957 (Ct. App. 1975).

A confession is presumed to be given by mentally competent person and the burden is on defendant to show that defendant was not mentally competent. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Test to determine mental competence to make voluntary confession. — For a defendant to make a valid confession, he must have had sufficient mental capacity at the time to be conscious of the physical acts performed by him, to retain them in his memory and to state them with reasonable accuracy. Mere mental instability or temporary lack of faculties only goes to the weight to be given the confession. The test used to determine mental competence to make a voluntary confession is whether the defendant's mental capacities and his actions after the commission of the crime clearly demonstrate that he had sufficient mental capacity at that time to be conscious of what he was doing, to retain memory of his actions and to relate with reasonable accuracy the details of his actions. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

When sanity hearing required. — An evidentiary hearing on the issue of involuntariness to confess due to insanity is constitutionally required when a defendant requests it or when the defendant attempts to offer proof that he was not mentally competent to make the confession. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Where defendant failed to demand evidentiary hearing regarding insanity and did not show that he had evidence to submit on his incompetence to confess, nor was there evidence in the record of coercion, prolonged interrogation or anything which might make the confession involuntary, it was proper for the court to admit the evidence of the confession, along with evidence of the defendant's state of mind at the time of the confession, to allow the jury to decide the weight to be accorded the confession. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Failure to object to admission of confession. — Objection to admission of a confession could not be considered if not made in trial court. State v. Layton, 32 N.M. 188, 252 P. 997 (1927).

No coercion shown. — Where the defendant argued that his confession to the murder of the victim was involuntary because the defendant had only an eighth grade education and that the defendant was intimidated to make the confession out of a fear of death that had been caused by a discussion of the death penalty between the defendant and police officers during the defendant's interrogation; the defendant had been the one who introduced the prospect of the death penalty for the murder of the victim; and during the discussion, in response to the defendant's question about what kind of deal the defendant could get, the police officers told the defendant that they would speak to the district attorney on the defendant's behalf if the defendant made a statement, the trial court properly admitted the defendant's confession. State v. Barr, 2009-NMSC-024, 146 N.M. 301, 210 P.3d 198.

Confession not coerced. — Where the defendant claimed the defendant's confession was involuntary because drugs and lack of sleep made the defendant hallucinate during the police interrogation and describe the defendant's hallucinations rather than the defendant's memory of reality, the police officers who interrogated the defendant made coercive statements, and the defendant admitted to actions that did not comport exactly with the victim's manner of death; the record did not support the defendant's claim that the defendant was describing things that did not exist; there was no indication in the record that the police officers who interrogated the defendant were aware of the defendant's vulnerable mental state; one police officer said to the defendant "they're gonna hammer you", "you're through", and "you're gonna be treated like a monster in court and you're never gonna get out of prison"; the medical examiner concluded that a ligature had strangled the victim; and the defendant's account was ambiguous about how strangulation occurred, the defendant's confession was voluntary. State v. Evans, 2009-NMSC-027, 146 N.M. 319, 210 P.3d 216.

Confession found voluntary. — Where defendant was arrested for sexual exploitation of children; at the police officer's request, defendant agreed to go to the police department for an interview; a police officer drove defendant to the police department; defendant was not handcuffed in the police car or in the interview room; although defendant was not placed under arrest, the officer informed defendant of defendant's Miranda rights; and the officer told defendant that the officer was not going to place defendant in jail that night regardless of what defendant said, that the police might be able to help defendant find treatment if defendant had a problem, and that the officer was the only thing standing between defendant and federal prosecution, under the totality of the circumstances, defendant's confession was not coerced and was voluntary. State v. Leeson, 2011-NMCA-068, 149 N.M. 823, 255 P.3d 401, cert. denied, 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718.

Where a child who was almost seventeen years of age confessed to murder while the child was held in a detention center; at the officer's request, the child agreed to visit with the officers; the officers read the child the child's Miranda rights, told the child that the interview would stop if the child wanted it to stop, and informed the child about the possible consequences of a conviction of murder; the child acknowledged by a nod of the child's head the reading of each Miranda right and after the rights were read, stated

that the child understood the child's Miranda rights; the officers, at the child's request, brought the child's mother into the interview room before they began questioning the child; during the interview, the child asked if the child could visit with the child's mother alone; the officers refused the request and the child then asked the child's mother to leave the room; the officers asked child to explain what happened; the child then confessed to the murder; the interview lasted less than one hour; the child had a lengthy juvenile arrest record, had been read Miranda rights on previous occasions, and on one occasion had refused to speak to authorities without a lawyer; and although a clinical psychologist testified that the child suffered from ADHD, that the child's primary language was Spanish, that the child was raised in a traditional Latino household that made the child deferential to authority figures, which would enable the officers to convince the child to confess, the child spoke fluent English, never claimed not to understand the questions, and gave detailed, narrative responses to the questions; the officers told the child that the officers could not promise the child anything about a possible sentence or disposition, and after confessing to the murder, the child asked the officers what they thought might happen, the child knowingly and intelligently waived the child's Miranda rights, voluntarily consented to the interrogation, and voluntarily confessed. State v. Gutierrez, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

Where defendant was charged with first-degree abuse of a child resulting in death; defendant was interviewed by the police on two occasions within a week; on each occasion, defendant and defendant's spouse drove to the police department; defendant was familiar with the police personnel because defendant's spouse worked at the police department; the interviewing officer explicitly told defendant that defendant was not under arrest, defendant was free to leave at any time, and defendant was under no obligation to speak to law enforcement; and at the second interview, in response to the officer's statement, defendant confessed to suffocating the child, the interview did not implicate defendant's Miranda rights and the confession did not violate defendant's right against self-incrimination. State v. Wilson, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

Where defendant was charged with first-degree abuse of a child resulting in death; defendant was interviewed by the police on two occasions within a week; at the second interview, defendant confessed to suffocating the child; after the first interview, defendant was self-admitted to a medical center for depression and suicidal thoughts; defendant was diagnosed with significant psychological problems and was prescribed an antipsychotic drug; medical staff testified that defendant's mental state was improving when defendant was self-discharged from the medical center, defendant was insightful into the nature of defendant's problems, and defendant was not exhibiting any side effects from medication; and the interviewing officer testified that at the second interview, defendant's responses were coherent and intelligent, defendant's handwritten letters showed good penmanship and clarity, and defendant did not appear to be under the influence of narcotics, defendant's confession was voluntary and did not violate defendant's right against self-incrimination. State v. Wilson, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

Where defendant and defendant's spouse accompanied a police officer to the police station for questioning about the death of defendant's infant child; although defendant and defendant's spouse were placed in separate interview rooms, they could hear each other and shouted back and forth between the interview rooms; defendant was able to leave the interview room to use the restroom; defendant asked for and received status updates from the officer; defendant was given Miranda warnings in full and signed a waiver of rights form; after the officer had questioned defendant for some time, defendant asserted the right to counsel and the officer ceased questioning defendant and left the room; after defendant had been left in the interview room for approximately one hour, defendant knocked on the door and asked to speak to the officer; defendant told the officer that defendant had changed defendant's mind about wanting an attorney; the officer reminded defendant that defendant had invoked the right to counsel; and defendant then made an incriminating statement, defendant's statement was voluntary. State v. Quinones, 2011-NMCA-018, 149 N.M. 294, 248 P.3d 336, cert. denied, 2011-NMCERT-001, 150 N.M. 559, 263 P.3d 901.

Where defendant voluntarily agreed to be interviewed by police officers; Miranda warnings were not given to defendant at any point during the interrogation; although defendant informed the officers that there was an outstanding warrant for defendant's arrest for an unrelated misdemeanor charge, defendant did not assert that the officers used the warrant to threaten or coerce defendant into giving a statement or that the officers promised defendant leniency on the warrant; and although defendant was fearful during the interrogation and felt pressured to talk, defendant did not assert that the fear or pressure was the result of police misconduct, defendant's statement was voluntary. State v. Olivas, 2011-NMCA-030, 149 N.M. 498, 252 P.3d 722, cert. denied, 2011-NMCERT-003, 150 N.M. 619, 264 P.3d 520.

Where defendant was questioned late at night, defendant's demeanor as shown on the videotape of his confession indicated that defendant was not too tired to proceed with the interrogation, and defendant did not argue that police officer took advantage of defendant's fatigue or that defendant was not able to understand the officer's questions or think rationally due to his fatigue; where officer told defendant that he would receive treatment if he confessed, but officer did not imply that defendant would get treatment instead of prison time or make promises regarding conviction or sentencing; and where officer referred to physical evidence, but officer did not misrepresent the evidence or affirmatively state that inculpating evidence had been found, defendant's confession at interrogation was voluntary. State v. Lobato, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, cert. denied, 2006-NMCERT-005, 139 N.M. 567, 136 P.3d 568.

Where there was no evidence that the circumstances surrounding the arrest, the fact that the defendant had been in jail overnight without arraignment, or the fact that he had no lawyer, in any way rendered his statement involuntary and as the trial court ruled, as a matter of law, that the confession was voluntary before submitting it to the jury under proper instructions requiring the jury to consider any questions concerning whether it was voluntary, defendant's constitutional rights were not abridged. State v. James, 83

N.M. 263, 490 P.2d 1236 (Ct. App. 1971), overruled by State v. Victorian, 84 N.M. 491, 505 P.2d 436 (1973).

Defendant's claim that his confession was involuntary was without merit, even though defendant agreed to waive his rights only if officers promised not to put him in the same cell with a codefendant, who might kill him, since the answer of the police officer to the effect that such would not be done was a natural one and not phrased in a threatening or otherwise unjustified manner. State v. LeMarr, 83 N.M. 18, 487 P.2d 1088 (1971).

Where defendant, before giving the confession, was twice advised of his right to make no statement and his right to consult with counsel, by two different officers, and at the suppression hearing the trial court made full inquiry into the voluntariness of the confession and determined that the defendant had knowingly and intelligently waived his right to remain silent, then trial court did not err in admitting into evidence the written confession of the defendant. State v. Baros, 87 N.M. 49, 529 P.2d 275 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Where the elapsed time of three and one-half hours from arrest to defendant's giving of statement of admission and the absence of counsel during that time did not, under the circumstances of the case, require a holding that the statement was involuntary and therefore should have been suppressed. State v. Rael, 81 N.M. 791, 474 P.2d 83 (Ct. App. 1970).

III. DOUBLE JEOPARDY.

A. IN GENERAL.

Tampering with evidence. — Where defendant shot the victim in the chest in defendant’s vehicle, drove the unconscious victim in the vehicle to an isolated area, shot the victim twice in the head while the victim was still alive, poured gasoline on the victim and lit the victim on fire; defendant gave the vehicle to a friend; and when the friend returned the vehicle, defendant set fire to the vehicle, defendant’s three convictions of tampering with evidence were not based on unitary conduct and did not violate defendant’s right to be free from double jeopardy. State v. Urioste, 2011-NMCA-121, 267 P.3d 820, cert. quashed, 2012-NMCERT-008.

Imposition of civil penalty and subsequent criminal prosecution. — The civil penalty authorized under Section 1-19A-17 NMSA 1978 is remedial and does not constitute punishment for double jeopardy purposes. The imposition of a civil penalty does not bar a subsequent criminal prosecution under the Voter Action Act for the same conduct for which the secretary of state assessed the civil penalty. State v. Block, 2011-NMCA-101, 150 N.M. 598, 263 P.3d 940.

Identical counts and jury instructions. — Where multiple counts of criminal sexual penetration of a minor in the indictment and the counts in the jury instructions were carbon-copy counts of each other, and where the child’s testimony distinguished facts

for each count and the defendant admitted to having sexual intercourse with the child on several occasions, there was sufficient evidence from which a jury could find separate incidents of criminal sexual penetration and there was no violation of double jeopardy. State v. Martinez, 2007-NMCA-160, 143 N.M. 96, 173 P.3d 18, cert. denied, 2007-NMCERT-011, 143 N.M. 156, 173 P.3d 763.

Double jeopardy was not violated by amendment of defendant's sentence. — Where the district court initially determined that defendant's 1972 uncounseled misdemeanor DWI conviction could not be used to enhance defendant's sentence for a 2009 aggravated DWI; the state asked the court to reconsider its ruling as a legal error six days after the court entered the sentence; the state did not present any new or supplemental evidence; the court determined that it had erred as a matter of law because defendant had not been sentenced to jail for the 1972 conviction; and the court amended defendant's sentence based on the legal error regarding the 1972 conviction, defendant did not have a reasonable expectation of finality in the original sentence because the state moved for reconsideration of the court's ruling on the validity of the 1972 sentence within the 30 days of the court's entry of the sentence and double jeopardy did not preclude the modification of defendant's sentence based on the legal error. State v. Redhouse, 2011-NMCA-118, 269 P.3d 8, cert. denied, 2011-NMCERT-011.

Sex offender registration. — Because the Albuquerque Sex Offender Registration and Notification Act ordinance is a regulatory scheme that is not punitive in intent or effect, the retroactive application of the ordinance does not violate the double jeopardy clause. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Double jeopardy did not attach at the time of oral sentencing. — Where defendant entered into a plea agreement which required defendant to make restitution to investors in defendant's limited liability company; the court orally sentenced defendant; defendant failed to make restitution; and the court withdrew defendant's plea and ordered defendant to stand trial, double jeopardy did not attach at the time of the oral sentencing and did not preclude the court from ordering defendant to stand trial because defendant could not have formed an expectation of finality in the oral sentence imposed pursuant to the plea agreement, the terms of which defendant either would not or could not keep. State v. Soutar, 2012-NMCA-024, 272 P.3d 154.

Oral rulings do not terminate jeopardy. State v. Vaughn, 2005-NMCA-076, 137 N.M. 674, 114 P.3d 354, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Policies underlying double jeopardy prohibition. — Several policies underlie the double jeopardy prohibition: First, guilt should be established by proving the elements of a crime to the satisfaction of a single jury, not by capitalizing on the increased probability of conviction resulting from repeated prosecutions before many juries; second, the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges; third, criminal trials should not become an instrument for unnecessarily badgering individuals;

and finally, judges should not impose multiple punishments for a single legislatively defined offense. State v. Tanton, 88 N.M. 5, 536 P.2d 269 (Ct. App.), rev'd, 88 N.M. 333, 540 P.2d 813 (1975).

This section applies to prevent a person from being punished twice for the same offense. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

The double jeopardy clause is designed to prohibit the government from harassing citizens by subjecting them to multiple suits on the same offense until a conviction is obtained. State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976).

The purpose of the double jeopardy prohibition is to prevent the government from harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials. State v. Lujan, 103 N.M. 667, 712 P.2d 13 (Ct. App. 1985), cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).

The goal of the multiple prosecution component of the double jeopardy clause is to protect a defendant from embarrassment, expense, ordeal, anxiety and insecurity, and to protect his right to conclusion of criminal charges against him. State v. Davis, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

Constitutional prohibition against "double jeopardy" designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. State v. Mares, 92 N.M. 687, 594 P.2d 347 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

No double jeopardy where significant time has elapsed. — The defense of double jeopardy did not apply to successive prosecutions where twenty months elapsed between the prior alleged violation and a distinct criminal act. City of Roswell v. Hancock, 1998-NMCA-130, 126 N.M. 109, 967 P.2d 449, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

Double jeopardy statute. — Section 30-1-10 NMSA 1978 provides the same protections as this section, although those protections are more clearly stated in the statute. State v. Lynch, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

In order to preserve claim that double jeopardy protection under the state constitution was more expansive than under federal constitution, defendant had to raise this claim in the trial court and provide a basis to interpret the state constitution differently. State v. Vaughn, 2005-NMCA-076, 137 N.M. 674, 114 P.3d 354, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

State protections broader than those of federal constitution. — The differences between this section and 30-1-10 NMSA 1978 suggest that the legislature was attempting to articulate the protections of this section as being broader than those of the

federal constitution. The statute says, more clearly than the constitutional provision, that the new trial ought not concern an offense of a greater degree than the degree of which the defendant had been convicted at the prior trial. State v. Lynch, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

State and federal provisions similar. — There is little to distinguish the language of state constitutional prohibition against double jeopardy from that found in the federal constitution. Since the two provisions are so similar in nature, they should be construed and interpreted in the same manner. State v. Rogers, 90 N.M. 604, 566 P.2d 1142 (1977).

Section subject to same construction as federal counterpart. — The double jeopardy clause in this section is subject to the same construction and interpretation as its counterpart in the fifth amendment to the United States constitution. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

The word "jeopardy" as used in the U.S. Const., amend. V and in this section is used in its technical sense and is only applicable to criminal proceedings. Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (Ct. App. 1971).

Application of double jeopardy clause. — The double jeopardy clause only comes to the aid of defendants subjected to multiple prosecutions for the identical offense, or in such situations in which collateral estoppel, the concept of lesser included offenses or the same evidence test apply. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), rev'g, 88 N.M. 5, 536 P.2d 269 (Ct. App. 1975).

Procedure to avoid double jeopardy. — In the event the jury finds a defendant guilty of two crimes arising from the same offense, simply merging the two felonies post-conviction is not enough. The trial court must explicitly vacate one of the convictions. Thus, the trial judge must both merge and vacate the underlying offense to avoid double jeopardy. State v. Garcia, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

Where defendant was convicted of both felony murder and the underlying predicate felony of armed robbery; the trial court merged the armed robbery conviction into the felony murder conviction, but did not vacate the armed robbery conviction; and the trial court sentenced defendant only for the felony murder conviction, the trial court erred by not vacating the armed robbery conviction. State v. Garcia, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

Legislative definition of offenses not affected. — Few, if any, limitations are imposed by the double jeopardy clause on the legislative power to define offenses. State v. Edwards, 102 N.M. 413, 696 P.2d 1006 (Ct. App. 1984), cert. quashed, 102 N.M. 412, 696 P.2d 1005 (1985).

Application to municipal violations. — State and federal constitutional prohibitions against double jeopardy apply to prosecutions for violation of municipal ordinances. City of Roswell v. Hancock, 1998-NMCA-130, 126 N.M. 109, 967 P.2d 449 (Ct. App.), cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

Guilty plea not a bar to raising issue on appeal. — The defendant was not barred by the fact that he pled guilty to the first two counts of a three count indictment, in which all of the counts were identically worded, including the name of the victim, from raising the double jeopardy claim on appeal. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App.), cert. denied, 119 N.M. 771, 895 P.2d 671 (1995).

Double jeopardy is a jurisdictional issue that can be raised on appeal even if not previously raised at trial. State v. Davis, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

Prosecution in both state and federal courts for same offense. — This section is subject to the doctrine of dual sovereignty, and does not prohibit the prosecution of a defendant in both state and federal courts for criminal charges arising out of an alleged criminal activity. Each government can determine what shall be an offense against its peace and dignity, thereby permitting each sovereign to prosecute regardless of what the other has done. State v. Rogers, 90 N.M. 604, 566 P.2d 1142 (1977), aff'g in part, rev'g in part, 90 N.M. 673, 568 P.2d 199 (Ct. App. 1977).

Under limited definition of double jeopardy in New Mexico, which used the "same evidence" test rather than the "same transaction" test, state was not precluded from prosecuting defendant for kidnapping and receiving stolen goods after defendant had been acquitted in federal court of bank robbery, which charge assumedly arose from the "same transaction" as the other charges. However, since the common-law collateral estoppel doctrine would have prevented the kidnapping conviction if not for the principle of dual sovereignty, that conviction was reversed on policy grounds. State v. Rogers, 90 N.M. 673, 568 P.2d 199 (Ct. App.), aff'd in part and rev'd in part, 90 N.M. 604, 566 P.2d 1142 (1977).

Factual basis must appear in record in order to support a double jeopardy defense. State v. Wood, 117 N.M. 682, 875 P.2d 1113 (Ct. App.), cert. denied, 117 N.M. 744, 877 P.2d 44 (1994).

Defendant's assertion of mere possibility of double jeopardy is insufficient to give rise to a constitutional issue in the court of appeals. State v. Newman, 83 N.M. 165, 489 P.2d 673 (Ct. App. 1971).

When defendant placed in jeopardy. — A defendant is placed in jeopardy when, after issue joined upon a valid indictment before a competent court, the jury is impaneled and sworn to try his case; territorial statute providing that nolle prosequi could not be entered after any testimony had been introduced for defendant would be violative of fundamental law and void if such law assumed to give the right to dismiss at any time before the defendant offered proof. United States v. Aurandt, 15 N.M. 292, 107 P. 1064,

27 L.R.A. (n.s.) 1181 (1910), overruled by State v. Klasner, 19 N.M. 474, 145 P. 679 (1914).

Assuming the court has jurisdiction, and prior proceedings are valid, jeopardy attaches when issue is joined upon an indictment or information, and the jury is impaneled and sworn to try the cause. Ex parte Williams, 58 N.M. 37, 265 P.2d 359 (1954).

Both a sufficient legal charge and a sufficient jurisdiction to try the charge must exist for jeopardy to attach. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Where defendant was charged with both aggravated battery and attempt, and where the lesser charge of attempt was dismissed prior to trial, it was not "double jeopardy" to proceed to try defendant on the charge of aggravated battery, because defendant was not tried on the attempt charge and the attempt charge was dismissed before any evidence was presented. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

The factors to be taken into consideration in determining whether a defendant's retrial will place him in double jeopardy after a prior trial has been aborted by the declaration of a mistrial not at his request include: (1) defendant's interest in having his fate determined by the jury first impaneled, which encompasses not only his right to have his trial completed by a particular panel, but also his interest in ending the dispute then and there with an acquittal, and would weigh heavily against retrial in all situations where jeopardy has attached (i.e., after the jury is sworn to try the case), and (2) the factor of avoiding giving the state a second bite of the apple in order to either strengthen its case or to alter its trial strategy to obtain a conviction. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Jeopardy attaches when issue is joined upon an indictment or information, and the jury is impaneled and sworn to try the cause, or, in nonjury cases, the presentation of at least some evidence on behalf of the state. State v. Rhodes, 76 N.M. 177, 413 P.2d 214 (1966); State v. Mares, 92 N.M. 687, 594 P.2d 347 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Jeopardy attaches upon a court’s entry of a default judgment. State v. Esparza, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

New adjudication of delinquency held double jeopardy. — It was error to rely solely on a predisposition report submitted after trial to support the finding that a child was in need of care and rehabilitation. Since jeopardy attached at the first hearing where the issue of delinquency was tried, it would violate the constitutional prohibition against double jeopardy to remand case for a new adjudication of delinquency. Doe v. State, 92 N.M. 74, 582 P.2d 1287 (1978).

Correction of jury verdict. — Where jury foreman mistakenly signed the not guilty verdict form when in fact the jury had unanimously found defendant guilty of DWI, the

trial court had announced that the jury was discharged, but the jury remained in the presence and control of the trial court and had not been subjected to outside influence or contamination, the trial court was entitled to correct the verdict form to reflect the true verdict of the jury and defendant's right to be free from double jeopardy was not violated. State v. Rodriguez, 2006-NMSC-018, 139 N.M. 450, 134 P.3d 737, rev'g 2004-NMCA-125, 136 N.M. 494, 100 P.3d 200.

Remand by children's court judge to special master. — As long as the special master's recommendations are not binding on the children's court judge, a special master is considered a ministerial rather than a judicial officer, and is without powers of adjudication. Under Rule 10-111 F NMRA, the children's court is not bound by the special master's findings and conclusions. Thus, there is no violation of the double jeopardy clause when the children's court judge remands to the special master prior to entering its findings and conclusions. State v. Billy M., 106 N.M. 123, 739 P.2d 992 (Ct. App.), cert. denied, 106 N.M. 95, 739 P.2d 509 (1987).

Where petitioner's claim of double jeopardy went outside the record and thus the "files and records of the case" did not conclusively show petitioner was not entitled to relief under that claim, he was entitled to an evidentiary hearing on that claim where the burden would be on him to prove a factual basis showing double jeopardy. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972).

Double jeopardy found. — Conviction for embezzling a sum as county clerk and ex officio clerk of the district court bars further prosecution for embezzling another sum as county clerk and ex officio probate clerk, where state is unable to show the conversion of any particular sum at any particular time. State v. Romero, 33 N.M. 314, 267 P. 66 (1928).

Where defendants were charged with felony murder, aggravated burglary and attempted robbery, and the jury returned a verdict of guilty as to attempted robbery and not guilty as to burglary, but even though they received an instruction on felony murder, reached no verdict as to either first-degree or second-degree murder, having declared that they were deadlocked, the trial court could not order retrial of murder charges without violating double jeopardy clause, since it concluded the proceedings without declaring a mistrial and without reserving power to retry those issues upon which the jury could not agree. State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976).

Double jeopardy not found. — Where defendant's motion to dismiss because of the vagueness of the "totaling" provision of 30-36-5 NMSA 1978 was sustained and the information was dismissed before a plea was entered, the proceeding did not consider the "merits" of the charge since it considered only whether the "totaling" provisions of 30-36-5 NMSA 1978 were void for vagueness. Therefore, since defendant had not yet been in jeopardy, reinstatement of the information by reviewing court did not subject him to double jeopardy. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Defendant's conviction of two larcenies did not amount to double jeopardy where he stole money from separate cash registers of separately owned shops located in same room divided only by low walls, since proof of theft of money from one shop would not have proved theft of money from the other, and therefore the evidence was not the same. State v. Bolen, 88 N.M. 647, 545 P.2d 1025 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. State v. Watkins, 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Since marijuana is not defined as a narcotic drug under the relevant statutes, a charge of violating 54-11-20, 1953 Comp., (now 30-31-20 NMSA 1978), which prohibited the sale of narcotic drugs, in the first proceeding brought against defendant for selling marijuana did not charge defendant with a public offense. Therefore, the court lacked jurisdiction in the first proceeding, and there was no basis for a claim of double jeopardy where defendant was later charged under the proper section. State v. Mabrey, 88 N.M. 227, 539 P.2d 617 (Ct. App. 1975).

Prosecutor misconduct. — Where the prosecutor committed misconduct in defendant’s initial trial because the prosecutor referred to hearsay statements in his cross-examination of defendant, which the prosecutor represented to have been made by third parties which were falsely stated, misleading and prejudicial to defendant’s rights; the misconduct was isolated and was not reflected in other parts of the trial, including closing, and the prosecutor did not know that the conduct was improper and prejudicial, the prosecutor’s misconduct was not so extraordinary as to require a bar to reprosecution based on double jeopardy concerns. State v. McClaugherty, 2007-NMCA-041, 141 N.M. 468, 157 P.3d 33, aff'd, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234.

B. PUNISHMENT.

Sentencing increase prohibited. — The constitutional protection against double jeopardy prohibits increasing a defendant's sentence once a defendant begins serving that sentence. State v. Duhon, 2005-NMCA-120, 138 N.M. 466, 122 P.3d 50, cert. quashed, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

This section prohibits double punishment for the same crime. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Respecting multiple punishments. – The double jeopardy clause in this section has not been construed more broadly than its federal counterpart in the context of multiple punishments. State v. Andazola, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

Merger of sentences. — Where defendant was convicted of first degree murder, felony murder and shooting from a motor vehicle resulting in great bodily harm, which provided the felonious act for the felony murder conviction; the convictions for first degree murder and shooting from a vehicle were based on the same act of shooting the victim; and at sentencing, the district court merged the felony murder and first degree convictions, defendant was subject to double jeopardy and the convictions for felony murder and shooting from a motor vehicle should have been vacated. State v. Sisneros, 2013-NMSC-049.

Federal constitutional principles applied. — Where the defendant, although referring to this section, neither argued that his rights were not adequately protected under the federal constitution nor justified a departure from federal precedent, his double jeopardy claim would be resolved under federal double jeopardy principles. State v. Andazola, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

Civil damages awarded after criminal conviction. — Punitive damage serves a civil end to an individual, while criminal sanctions serve a criminal end to the public and an award to punitive damages in tort action against defendant after defendant has been convicted of reckless driving and driving under the influence does not constitute double jeopardy. Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (Ct. App. 1971).

Revocation of juvenile probation after adult offenses. — The order of the children's court revoking the defendant's probation based on offenses committed by the defendant after he became an adult for which he was convicted and fined did not violate his constitutional rights guaranteeing protection against double jeopardy. A probation revocation proceeding is not a new criminal trial to impose a new punishment. Any new disposition given as the result of revocation relates back to defendant's original delinquent act and executes a penalty previously imposed. In re Lucio F.T., 119 N.M. 76, 888 P.2d 958 (Ct. App.), cert. denied, 119 N.M. 20, 888 P.2d 466 (1994).

Failure to allow good time credit for presentence confinement does not subject a prisoner to double jeopardy. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

Administrative plus statutory punishment for prison escape. — Even if administrative sanctions have been levied against defendant for his escape from prison, conviction under 30-22-9 NMSA 1978 did not constitute double jeopardy. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Administrative discipline of an escapee does not prohibit criminal prosecution for the escape nor do the two punishments constitute double jeopardy. State v. Millican, 84 N.M. 256, 501 P.2d 1076 (Ct. App. 1972).

Increased sentence resulting from Habitual Criminal Act. — Where defendant's first conviction, standing alone, was not the cause of an enhanced sentence, but rather the enhancement was due to the Habitual Criminal Act, defendant's enhanced punishment

was not prohibited as double jeopardy. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Double jeopardy generally does not attach in habitual offender sentencing proceedings especially where the state committed only procedural error. State v. Aragon, 116 N.M. 267, 861 P.2d 948 (1993).

Habitual offender enhancement of an escape conviction does not constitute double jeopardy. State v. Najar, 118 N.M. 230, 880 P.2d 327 (Ct. App.), cert. denied, 118 N.M. 90, 879 P.2d 91 (1994).

For purposes of double jeopardy, when a defendant is proven to be a habitual offender, enhancement is authorized, and the defendant's expectation of finality in the underlying sentence as the only sentence he may receive is destroyed; the enhanced sentence then supplants the original sentence and results in one, single, longer sentence for the crime. State v. Porras, 1999-NMCA-016, 126 N.M. 628, 973 P.2d 880.

Trial court acted illegally when it increased defendant's sentence from ninety days to three years on the underlying felony charges; once he began serving the original sentence, double jeopardy principles precluded increasing the sentence on the underlying charges, regardless of whether the sentence could be increased based upon his habitual offender status. State v. Porras, 1999-NMCA-016, 126 N.M. 628, 973 P.2d 880.

Defendant, a three-time felony offender, had no reasonable expectation of finality in a three-year probationary sentence for a larceny conviction; therefore, it was not a violation of his double jeopardy rights for the state to seek a subsequent conviction of defendant, during the probationary period, under the habitual offender laws. State v. Villalobos, 1998-NMSC-036, 126 N.M. 255, 968 P.2d 766.

Multiple uses of prior convictions does not violate double jeopardy. — Where defendant’s prior felony convictions were used to establish defendant’s status as a habitual offender for sentencing for attempted murder and to serve as the predicate felony for defendant’s conviction of felon in possession of a firearm, the double jeopardy clause was not violated. State v. Tafoya, 2012-NMSC-030, 285 P.3d 604.

Double use of conditional discharge. — Use of the defendant's prior conditional discharge to prove that he was a felon in order to convict him of the crime of felon in possession of a firearm and to enhance his sentence for underlying assault convictions did not violate his double jeopardy rights. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App.), cert. denied, 119 N.M. 771, 895 P.2d 671 (1995).

Increased sentence after original sentence set aside. — Where, at the defendant's behest, his sentence is set aside on appeal or by collateral attack, the imposition of a greater sentence does not violate federal or state double jeopardy principles. Tipton v. Baker, 432 F.2d 245 (10th Cir. 1970).

Increased sentence after trial de novo. — A greater sentence imposed by the district court for violation of certain municipal ordinances after a trial de novo does not deprive defendant of due process, nor does it amount to double jeopardy. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

Increase of punishment after defendant committed. — A trial court is without power to set aside a valid sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment. A judgment which attempts to do so is void, and the original judgment remains in force. State v. Allen, 82 N.M. 373, 482 P.2d 237 (1971); State v. Cheadle, 106 N.M. 391, 744 P.2d 166 (1987).

Where defendant has started to serve an eight-year sentence, it can be increased only if the underlying sentence itself is invalid. State v. Duhon, 2005-NMCA-120, 138 N.M. 466, 122 P.3d 50, cert. quashed, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

Increasing a sentence, after a defendant has commenced to serve it, is a violation of the constitutional guarantee against double jeopardy. State v. Allen, 82 N.M. 373, 482 P.2d 237 (1971); State v. Cheadle, 106 N.M. 391, 744 P.2d 166 (1987).

Amended judgment adding term of probation. — Trial court's filing of an amended judgment increasing defendant's sentence by adding a three-year term of probation violated the prohibition against double jeopardy. State v. Charlton, 115 N.M. 35, 846 P.2d 341 (Ct. App. 1992), cert. denied, 114 N.M. 577, 844 P.2d 827 (1993).

Additional evaluation of sentence raises no double jeopardy issue. — An order deferring sentence in no way represents a suspension or a final sentence, at least for purposes of jurisdiction. Where deferral is ordered for the purpose of additional evaluation as recommended by department of corrections, a statutory sentence subsequently imposed is not a second sentence, but the first sentence imposed in the case. Accordingly, there is no second sentence raising a double jeopardy issue and no absence of authority in the trial court to impose the statutory sentence. State v. Wood, 86 N.M. 731, 527 P.2d 494 (Ct. App.), cert. denied, 86 N.M. 730, 527 P.2d 493 (1974).

Consecutive sentences for crimes arising out of the same event do not constitute double jeopardy unless there has been a merger. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

All consecutive sentences for different offenses arising out of the same event do not necessarily violate the double jeopardy prohibition of the United States and New Mexico constitutions. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Separate, successive contempts are punishable as separate offenses, but where the supreme court cannot be sure from the judgment of conviction that defendant was not convicted of contempt by one judge for the same misconduct for which he was summarily convicted and sentenced by another judge, it cannot be sure that his rights against double jeopardy have not been violated. Consequently, the proper procedure to

be followed to protect against this possible violation of his rights, and to protect the rights of the public to have contempts of court punished, is to reverse the decision of the court of appeals affirming the conviction, reverse the judgment and sentence of the district court, and remand the cause to the district court for further proceedings. State v. Driscoll, 89 N.M. 541, 555 P.2d 136 (1976).

Increasing sentence based on consideration of element of offense. — Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under 30-9-11B(2) NMSA 1978, and he contended the trial court's consideration of physical injury suffered by the victim in increasing the basic sentence pursuant to 31-18-15.1 NMSA 1978 exposed him to double jeopardy, it was held that the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. State v. Bernal, 106 N.M. 117, 739 P.2d 986 (Ct. App.), cert. denied, 106 N.M. 81, 738 P.2d 1326 (1987).

Consideration of double jeopardy claim on second appeal. — Where defendant's double jeopardy claim was not decided in his first appeal, a double jeopardy claim may be raised on a second appeal, and the law of the case doctrine should not preclude the appeal, specifically where there is nothing in the record demonstrating that defendant intentionally waived or abandoned the argument. State v. Franco, 2016-NMCA-074, cert. denied, 2016-NMCERT-____.

Imposing a basic sentence based on the elements of a crime does not violate double jeopardy. — Where defendant claimed that he was being punished twice for a single death: first, when the death was used to satisfy the great bodily harm element of his shooting at a motor vehicle conviction, thus elevating that crime to a second degree felony, and second, when the death was used to impose a fifteen-year sentence pursuant to 31-18-15(A)(4) NMSA 1978, defendant's right to be free from double jeopardy was not violated because the legislature intended 31-18-15(A)(4) NMSA 1978 to be the basic sentence applicable to all second-degree felonies resulting in death. State v. Franco, 2016-NMCA-074, cert. denied, 2016-NMCERT-____.

Forfeiture. — The city ordinance that allowed city to enact civil forfeiture proceedings against drivers who continued to drive with revoked licenses served the remedial purpose of protecting the public and that the forfeiture of a motor vehicle used by a repeat offender and was not punitive; therefore, the drivers were not subjected to double jeopardy. City of Albuquerque ex rel. Albuquerque Police Dep't v. One (1) 1984 White Chevy UT., 2002-NMSC-014, 132 N.M. 187, 46 P.3d 94.

Prosecution and forfeiture generally. — State v. Nunez, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264, does not stand for the proposition that a criminal prosecution may never advance independently of a forfeiture proceeding. Rather, Nunez appears to mandate only proper initiation of the dual penalty proceeding, meaning that the criminal charges and the forfeiture proceeding must be merged or consolidated prior to the occurrence of any event that signals the attachment of jeopardy. State v. Esparza, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

A default forfeiture judgment and subsequent criminal prosecution in separate proceedings violate double jeopardy. — Where defendant was convicted for drug trafficking, conspiracy to commit drug trafficking, and possession of drug paraphernalia, he was twice put in jeopardy for the same crime when the state both forfeited his property and subjected him to a criminal trial when the two matters were not sought in a single, bifurcated proceeding, but where the criminal trial occurred nearly three years after the conclusion of the forfeiture action and the two matters were decided before different judges. Two separate proceedings resulting in two penalties based on the same conduct is contrary to double jeopardy principles. State v. Madrigal, 2015-NMCA-106, cert. denied, 2015-NMCERT-009.

C. TESTS.

Removal of child from the custody of the child's parents pending an investigation of child abuse is not a punishment. — Where the children, youth and families department investigated defendants for child abuse and found the allegations to be unsubstantiated; a tribal court held a custody hearing on the same allegations and ultimately returned the child to defendants; the defendant who was the primary caretaker agreed to temporary guardianship of the child during the investigation and tribal court proceeding; and the removal of the child from the custody of defendants for 14 months during the child abuse investigation by the department and the custody proceeding in tribal court was not intended to punish defendants, the state's prosecution of defendants for criminal child abuse did not violate double jeopardy. State v. Diggs, 2009-NMCA-099, 147 N.M. 122, 217 P.3d 608, cert. denied, 2009-NMCERT-007, 147 N.M. 362, 223 P.3d 359.

Conduct unitary. — Where defendant forged a check and attempted to present the check to a bank for payment, the conduct was unitary. State v. Lee, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Multiple shootings. — Where, during the course of a high speed chase, the defendant fired three shots from a bolt-action rifle at the pursuing officer; the shots were fired at different locations along the two mile route of the chase; and there were elapses of time between each shot, the shots were fired during a continuous course of conduct and constituted one act. State v. Demongey, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 560, 263 P.3d 901.

Conduct not unitary. — Where defendant had possession of cocaine when he received it from his supplier, defendant then brought the cocaine into a bathroom and put it on the counter so that he could separate a portion to sell to a state police undercover agent, and once defendant completed the sale to the undercover agent, defendant kept a portion of the cocaine, defendant's conduct was not unitary and defendant's convictions of trafficking cocaine, conspiracy to commit trafficking cocaine and possession of cocaine did not violate double jeopardy. State v. Contreras, 2007-

NMCA-045, 141 N.M. 434, 156 P.3d 725, cert. quashed, 2007-NMCERT-011, 143 N.M. 157, 173 P.3d 764.

Where defendant, who was convicted of both felony murder and aggravated burglary, used several weapons during the attack on the victim, the death of the victim was not caused by the initial attack alone, and there was an intervening struggle during which the victim defended himself, the defendant's conduct was not unitary, but consisted of two distinct acts. State v. DeGraff, 2006-NMSC-011, 139 N.M. 211, 131 P.3d 61.

Determination of whether same offense involved. — Various approaches have been used in determining whether the same offense is involved in a particular case and the result is that the prohibition against double jeopardy is not one rule, but several, each applying to a different situation, some of these being: (1) collateral estoppel which looks to all the relevant matters and determines whether or not the jury, in reaching its verdict in the first trial, necessarily or actually determined the same issues which the state attempts to raise in the second trial; (2) same evidence, where one determines whether the facts offered in support of one offense would sustain a conviction of a second offense, and if either charge requires the proof of facts to support a conviction which the other does not, the offenses are not the same; (3) lesser included offense, where conviction or acquittal of a lesser offense necessarily included in a greater offense bars prosecution for the greater offense; (4) merger of offenses, which requires determination of whether one criminal offense has merged in another and is not whether the two criminal acts are successive steps in the same transaction but whether one offense necessarily involves the other; and (5) same transaction, which requires a determination of whether the several offenses are the same, as where they arise out of the same transaction, and were committed at the same time, and were part of a continuous criminal act, and inspired by the same criminal intent, which is an essential element of each offense, they are susceptible of only one punishment. State v. Tanton, 88 N.M. 5, 536 P.2d 269 (Ct. App.), rev'd, 88 N.M. 333, 540 P.2d 813 (1975).

Determination of unitary nature of conduct. — Where a defendant convicted of multiple offenses claims double jeopardy, a reviewing court first determines whether defendant's conduct was unitary in nature so that the same acts were used to prove a violation of both statutes; and where the conduct is unitary, the court must then examine the statutes in question to determine whether the legislature intended that multiple punishments could be imposed for different criminal offenses resulting from the same conduct. State v. Duran, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998), overruled by State v. Laguna, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896.

Multi-punishment analysis. — There is a two-part test in the multi-punishment analysis for determining legislative intent to punish: (1) whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes, and (2) whether the legislature intended to create separately punishable offenses. Only if the first part of the test is answered in the affirmative, and the second in the negative, will

the double jeopardy clause prohibit multiple punishment in the same trial. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

Factors considered. — In determining whether the defendant's acts constituted a single offense or multiple offenses for purposes of double jeopardy, factors considered include the time between the acts, the location of the victim at the time of each act, the existence of any intervening event, distinctions in the manner of committing the acts, the defendant's intent, and the number of victims. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App.), cert. denied, 119 N.M. 771, 895 P.2d 671 (1995).

Words "same offense" mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Offense must be same in law and in fact. — The plea of double jeopardy is unavailing, unless the offense to which it is interposed is the same in law and in fact as the prior one under which defendant was placed in jeopardy. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968), overruled by State v. Maestas, 87 N.M. 6, 528 P.2d 650 (1974).

One offense cannot be split up into multiple prosecutions. — The same "offense" cannot be split into many parts and made the subject of innumerable prosecutions. The prosecution cannot split up into an indefinite number of charges what was in fact but one act and one offense. State v. Maestas, 87 N.M. 6, 528 P.2d 650 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974), overruled by State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Same transaction test disapproved. — The "same transaction" test, which is concerned with whether offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent, has not been imposed by the United States supreme court on the states in double jeopardy cases, and since its use is not mandated by this section, it is rejected and disapproved. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), rev'g 88 N.M. 5, 536 P.2d 269 (1975).

Separate offenses. — The bare facts that defendant's child had three skull fractures, eight broken ribs, a broken fibula and bruises, when taken with defendant's admission that he struck his child on three occasions, supported a finding that the acts producing the child's injuries were sufficiently discrete as to allow the imposition of consecutive sentences and did not violate the double jeopardy clause. State v. Ayala, 2006-NMCA-088, 140 N.M. 126, 140 P.3d 547, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

Collateral estoppel. — Under the rule of collateral estoppel any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated

between the parties and privies whether the claim or demand, purpose or subject matter of the two suits is the same or not. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Where the issue of defendant's sanity was an issue of fact in the first trial, insanity having been raised as an affirmative defense, it was actually litigated, and it was absolutely necessary to a decision in that trial, and the identical issue of fact, the sanity of the defendant, was raised in the second trial between the same parties (the state and the defendant) for offenses committed some 16 hours prior to the crime which was the subject of the first trial, it was held that the issue of insanity which was decided in defendant's favor at the first trial was the same issue of fact as the issue of insanity at the second trial and therefore collateral estoppel was a bar to the second trial. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

The principle of collateral estoppel bars relitigation between the same parties of issues actually determined at a previous trial; in a criminal trial context collateral estoppel is a constitutional defense raised by the defendant in a second trial after an acquittal in the first trial on the same issue. Where the defendant was convicted in municipal court of violation of certain traffic ordinances, he had no acquittal to raise in his defense in district court on charges of homicide by vehicle, and application of the principle of collateral estoppel was therefore inappropriate. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), rev'g 88 N.M. 5, 536 P.2d 269 (Ct. App. 1975).

If the doctrine of collateral estoppel would bar New Mexico from prosecuting a defendant a second time, and the doctrine is inapplicable solely because of the concept of dual sovereignty, as a matter of judicial policy, the prosecution will not be permitted in New Mexico. State v. Rogers, 90 N.M. 673, 568 P.2d 199 (Ct. App.), aff 'd in part and rev'd in part, 90 N.M. 604, 566 P.2d 1142 (1977).

The same evidence test is whether the facts offered in support of one offense would sustain a conviction of the other offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The test for determining whether two offenses are the same so as to bring into operation the prohibition against double jeopardy is the "same evidence" test which asks whether the facts offered in support of one offense would sustain a conviction of the other. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), rev'g 88 N.M. 5, 536 P.2d 269 (1975); State v. Smith, 94 N.M. 379, 610 P.2d 1208 (1980).

For double jeopardy, the test in determining whether the offenses charged are the same is whether the facts offered in support of one charge would sustain a conviction of the other. If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. Owens v. Abram, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 2d 719 (1955).

Same evidence test. — Under the "same evidence" test where different elements are required to be proved in order to sustain each of three convictions, and different evidence was admitted to prove the different elements, it appears that the three convictions are based in part on separate evidence and the prohibition against double jeopardy does not bar consecutive sentencing under the circumstances of the case. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Multiple acts may be divided into counts when not "one offense". — When multiple acts cannot be classified as "one offense" under the same evidence test, they may nevertheless be divided into multiple counts if some applicable policy so demands. State v. Smith, 94 N.M. 379, 610 P.2d 1208 (1980).

No double jeopardy where factual basis for two convictions differ. — If the factual basis for the alleged conviction for assault in municipal court and the factual basis for the aggravated assault conviction differed, then there would be no double jeopardy in conviction of defendant for both. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972).

Burden on defendant to prove that factual basis is the same. — If the factual basis for the alleged conviction for assault in municipal court and the factual basis for the aggravated assault conviction differ, then there would be no double jeopardy and the burden will be on defendant to prove a factual basis showing double jeopardy. State v. Woods, 85 N.M. 452, 513 P.2d 189 (Ct. App. 1973).

The test of merger is whether one crime necessarily involves the other. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

The test of whether one criminal offense has merged in another is not whether the two criminal acts are successive steps in the same transaction, but whether one offense necessarily involves the other. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

The true test of whether one criminal offense has merged in another is whether one crime necessarily involves another, as, for example, rape involves fornication, and robbery involves both assault and larceny. If a defendant commits a burglary and while in the burglarized dwelling he commits the crime of rape or kidnapping, his crimes do not merge for neither of them is necessarily involved in the other. When one of two criminal acts committed successively is not a necessary ingredient of the other, there

may be a conviction and sentence for both. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Whether defendant may be sentenced for each of his five crimes depends upon whether any one of the crimes has merged with any other of the crimes. If there has been a merger, defendant may not be sentenced for the merged offense. The test of merger is whether one of his crimes necessarily involves another of his crimes. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

The test of whether one criminal offense has merged in another is not whether two criminal acts are successive steps in the same transaction (the rejected same transaction test), but whether one offense necessarily involves the other. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The merger concept has aspects of the included offense concept, and in determining whether one offense necessarily involves another offense so that merger applies, the decisions have looked to the definitions of the crimes to see whether the elements are the same; this approach is similar to the approach used in determining whether an offense is an included offense (a determination of whether the greater offense can be committed without also committing the lesser). State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Whether defendant can be sentenced for two crimes depends upon whether one crime merges with the other. The test of merger is whether one crime necessarily involves the other. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

The true test of whether one criminal offense has merged in another is whether one crime necessarily involves another, as, for example, rape involves fornication, and robbery involves both assault and larceny. If a defendant commits a burglary and while in the burglarized dwelling he commits the crime of rape or kidnapping, his crimes do not merge, for neither of them is necessarily involved in the other. When one of two criminal acts committed successively is not a necessary ingredient of the other, there may be a conviction and sentence for both. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

The merger concept has aspects of the same evidence test because merger and the same evidence test are both concerned with whether more than one offense has been committed. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Prosecution for greater offense after trial for lesser offense. — Acquittal or conviction of lesser offense at former trial does not bar subsequent prosecution for greater offense, unless accused could have been convicted of the greater offense at the former trial on the same evidence as was used against him at the subsequent trial. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Felony prosecution of defendant for possession of cocaine subsequent to his misdemeanor conviction and sentence in magistrate court on a plea of guilty to possession of drug paraphernalia did not violate double jeopardy. State v. Darkis, 2000-NMCA-085, 129 N.M. 547, 10 P.3d 871.

Where court in which acquittal or conviction is had for lesser offense was without jurisdiction to try accused for the greater offense, a prosecution for the greater offense is not barred. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

A conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

A conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and vice versa. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

An acquittal of a lesser offense bars a subsequent prosecution for a greater offense where the lesser offense is included in the greater. Ex parte Williams, 58 N.M. 37, 265 P.2d 359 (1954).

In order to protect the right to appeal, a defendant convicted of a lesser offense overturned on appeal may not be retried for any greater offense. A defendant would not always pursue valid grounds for appeal after conviction of a lesser charge if he knew we would face the possibility of a trial on greater charges after reversal. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977), overruled by State v. Wardlow, 95 N.M. 585, 624 P.2d 527 (1981).

The possession of marijuana is a lesser offense necessarily included in the greater offense of distribution of marijuana, and where defendant is convicted of the lesser offense, the principles of double jeopardy bar the subsequent prosecution of the greater offense. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

Conviction of a lesser included offense bars prosecution of a greater offense, subject to one exception: if the court does not have jurisdiction to try the crime, double jeopardy cannot attach, since double jeopardy requires that a court have sufficient jurisdiction to try the charge. Where the magistrate court had no jurisdiction to try the charge of vehicular homicide while driving while intoxicated or recklessly driving, double jeopardy should not bar the vehicular homicide by driving while intoxicated charge. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), rev'g 88 N.M. 5, 536 P.2d 269 (Ct. App. (1975).

A conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. However, where the indictment against defendant was phrased in the alternative charging him with homicide by vehicle while violating either 66-8-102 NMSA 1978 or former 64-22-3, 1953 Comp., the

prosecution was not barred by a conviction in a municipal court for driving under the influence since the lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), rev'g 88 N.M. 5, 536 P.2d 269 (Ct. App. (1975).

For an offense to be included within another offense, the offense must be necessarily included in the offense charged in the indictment, and for an offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser, and in determining whether an offense is necessarily included, the court will look to the offense charged in the indictment. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

The jurisdictional exception to double jeopardy means that jeopardy cannot extend to an offense beyond the jurisdiction of the court in which the accused is tried. State v. Lujan, 103 N.M. 667, 712 P.2d 13 (Ct. App. 1985), cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).

The jurisdictional exception does not permit a successive persecution for a greater offense following acquittal of a lesser included offense; the prosecution of a greater offense over which an initial court lacked jurisdiction then includes a lesser included offense for which defendant was convicted; or successive prosecution that violates the core concerns of the double jeopardy clause of protecting finality, preventing government overreaching, and reducing the risk of erroneous convictions through rehearsed prosecution. In determining whether to restrict the jurisdictional exception under particular facts, it will be necessary to assess whether there has been prosecutorial overreaching or, instead, whether the defendant has attempted to use double jeopardy as a sword. State v. Rodriguez, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

D. MISTRIAL, DISMISSAL, APPEAL AND RETRIAL.

Declaration of mistrial over defendant's objection must be based on manifest necessity. — When a mistrial is declared over a defendant's objection and the jury is discharged, double jeopardy protection generally prohibits the defendant from being retried for the same offense unless the mistrial is found to have been declared for

reasons of manifest necessity. To say that a mistrial is required because of "manifest necessity" means that in order to preserve the ends of public justice, it is clear and evident that terminating the trial is necessary because of something extraordinary that occurred in the trial and that alternative measures cannot alleviate the problem so that the trial can continue to an impartial verdict. State v. Yazzie, 2010-NMCA-028, 147 N.M. 768, 228 P.3d 1188.

No manifest necessity for mistrial. — Where, in defendant's jury trial for battery on a household member, defense counsel asked the victim on cross-examination if the victim had pled guilty to battering defendant; before the victim answered the question, the prosecution objected to the question, the victim never answered the question, and the trial court sua sponte declared a mistrial; and the trial court failed to consider any alternative to declaring a mistrial, merely asking the victim whether the victim had pled guilty to battery on a household member did not warrant a mistrial over defendant's objection and defendant's subsequent trial subjected defendant to double jeopardy. State v. Yazzie, 2010-NMCA-028, 147 N.M. 768, 228 P.3d 1188.

Retrial after mistrial which is not at defendant's request. — To be balanced against the weighty interests of the defendant against retrial after declaration of a mistrial not at his request are the two considerations: (1) that there is a manifest necessity for the discharge of the first jury, or (2) that the ends of public justice would be defeated by carrying the first trial to final verdict. When the irregularity occurring at trial is of a procedural nature, not rising to the level of jurisdictional error, the necessity to discharge the jury has been held to be not manifest, but where the irregularity involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs defendant's interest in obtaining a verdict by his first choice of jury. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Failure of prosecution witness to appear at trial does not constitute manifest necessity. — A prosecution witness's failure to appear for the defendant's trial does not constitute manifest necessity for granting a mistrial after a jury has been sworn to hear the case. State v. Gutierrez, 2014-NMSC-031, *rev'g* 2012-NMCA-013, 269 P.3d 905.

Where defendant was charged with criminal sexual contact with the defendant's fifteen-year-old child; before trial defense counsel learned that, without notifying defense counsel, the prosecutor met with the victim; at the meeting, the victim attempted to recant the victim's grand jury testimony, the prosecutor informed the victim that the victim could be prosecuted for perjury and that the victim's child could be taken from the victim, and the prosecutor told the victim the prosecutor would transport the victim to the trial; the district court refused to hold an immediate hearing on the matter and selected and swore a jury to hear the case; the victim did not appear at trial to testify and the state could not locate the victim; and defendant did not procure the nonattendance of the victim; the district court abused its discretion in determining that there was manifest necessity for discontinuing the first trial and discharging the jury because of the failure of the prosecution witness to appear, and empaneling a new jury and retrying defendant

would violate defendant's double jeopardy protections. State v. Gutierrez, 2014-NMSC-031, *rev'g* 2012-NMCA-013, 269 P.3d 905.

Mistrial based on manifest necessity. — Where defendant was charged with criminal sexual contact of a minor; the 16-year-old victim testified at the grand jury hearing; the prosecutor and a special investigator interviewed the victim prior to trial to prepare the victim for trial and confirm that the victim had received a subpoena and would appear at trial; the victim recanted; the prosecutor and the investigator told the victim that the victim would be charged with perjury and that the victim's child would be sent to a home if the victim changed the victim's testimony, offered to find the victim a place to live if defendant's family threatened the victim, and offered to drive the victim to the courthouse; the victim did not appear at trial; the state moved for a mistrial prior to the commencement of trial testimony; and the trial court kept the jury impaneled, considered a continuance of two weeks, and granted a mistrial only after evidence was presented that the victim left the jurisdiction voluntarily, the victim's location was unknown and the time of the victim's return could not be determined, there was manifest necessity for a mistrial and double jeopardy did not bar retrial of defendant. State v. Gutierrez, 2012-NMCA-013, 269 P.3d 905, *rev'd*, 2014-NMSC-031.

A mistrial not moved for or consented to by the defendant must be based upon a manifest necessity or jeopardy attaches preventing retrial. The power to declare a mistrial must be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious reasons. There is no plain and obvious reason to declare a mistrial as to any included offense upon which the jury has reached a unanimous agreement of acquittal. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977), overruled by State v. Wardlow, 95 N.M. 585, 624 P.2d 527 (1981).

If defendant was put in jeopardy in an original proceeding, he cannot be again put in jeopardy in the absence of some compelling reason which requires a declaration of a mistrial. State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961).

Double jeopardy principles did not prevent state from retrying defendant for murder after the jury in his first trial could not reach a verdict and the judge granted a motion for a mistrial on the basis of manifest necessity. State v. Desnoyers, 2002-NMSC-031, 132 N.M. 756, 55 P.3d 968.

Upon appellate review of the declaration of a mistrial the question is whether the trial court exercised a sound discretion to ascertain that there was a manifest necessity for a mistrial. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

The law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; they are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere, but the power

ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where, after the second day of a trial, when jury instructions had already been settled, one of the jurors was frightened by a telephone call unrelated to the trial, and the record did not show that the juror's fear involved either the state or the defendant, and showed that the juror understood that the phone call was not to influence her deliberations in the present case, it was held that the trial court failed to exercise that sound discretion required of it in determining whether a manifest necessity or proper judicial administration mandated a mistrial, and accordingly, the order of the trial court denying defendant's motion (on double jeopardy grounds) to dismiss and setting a date for retrial was reversed and defendant ordered discharged. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where videotape of testimony of 11-year-old victim of alleged criminal sexual penetration was inaudible at trial and child was unavailable to testify in person because of illness and possible emotional harm, there existed a "manifest necessity" for declaring a mistrial so that double jeopardy did not bar defendant's retrial. State v. Messier, 101 N.M. 582, 686 P.2d 272 (Ct. App. 1984).

When retrial after declaration of a mistrial would not create unfairness to the accused, his interest against retrial may be subordinated to the public interest in substantive justice. State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988).

The extended illness of one of the participants in a criminal proceeding justifies the declaration of a mistrial for reasons of manifest necessity. State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988).

The standard for determining the existence of manifest necessity to declare a mistrial involves carefully weighing the defendant's right to have his trial completed against the public's interest in a fair trial and just judgment. State v. Callaway, 109 N.M. 564, 787 P.2d 1247 (Ct. App. 1989), rev'd, 109 N.M. 416, 785 P.2d 1035 (1990), cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

Juror illness. — Evidence of a juror's disability caused by the onset of a migraine headache provided manifest necessity for a mistrial. State v. Salazar, 1997-NMCA-088, 124 N.M. 23, 946 P.2d 227, cert. denied, 123 N.M. 626, 944 P.2d 274 (1997).

Mistrial on basis of "ends of public justice" test. — Where the failure of defendant to file a timely motion to suppress his statement resulted in prejudice to the state, and in such circumstances it was contrary to the ends of public justice to carry the first trial to a final verdict, the trial court did not abuse its discretion in declaring a mistrial; there was no double jeopardy. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled by State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

In determining whether a mistrial should be declared, the trial court must consider whether the ends of public justice would be defeated by carrying the first trial to a final verdict; this consideration for the ends of public justice is a concept separate from manifest necessity. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled by State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

The standard by which courts should evaluate a prosecutor's conduct, which causes a mistrial, to determine whether the conduct is willful is an objective one in light of the totality of the circumstances of the trial. The belief of the prosecutor regarding his or her own conduct is irrelevant to the analysis. State v. McClaugherty, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234, aff'g 2007-NMCA-041, 141 N.M. 468, 157 P.3d 33.

Where the prosecutor, in his cross-examination of the defendant, referred to two hearsay statements that did not exist in an attempt to introduce facts not in evidence through his questions; the prosecutor did not intend to call the declarants to testify and did not disavow the district court's misinterpretation that the declarants would testify; the prosecutor was an experienced prosecutor and is presumed to know that, where he had no intention to gain proper admission of the material, his use of inadmissible hearsay or facts not in evidence was improper and prejudicial to the defendant; and the prosecutor's egregious conduct implied that he was aware that the consequences of his conduct would be a mistrial or reversal, the prosecutor's misconduct was prejudicial and denied the defendant due process of law, was done with full knowledge of the impropriety of the conduct and in willful disregard of the resulting mistrial, retrial or reversal on appeal, and barred a retrial of the defendant under the double jeopardy clause. State v. McClaugherty, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234, aff'g 2007-NMCA-041, 141 N.M. 468, 157 P.3d 33.

Conduct of judge and prosecutor did not bar retrial. — Where the defendant signed a waiver of appointed attorney pursuant to the municipal court's practice of having defendants sign waivers of counsel regardless of whether counsel was actually available and the defendant was never advised about his right to counsel, the right against self-incrimination, the right to confront, cross-examine or compel the attendance of witnesses, or the right of appeal, the conduct of the municipal court and the prosecutor was not so unfairly prejudicial as to warrant vacation of defendant's conviction and the district court's remand of the case to the municipal court for a new trial did not violate the double jeopardy clause. Martinez v. Chavez, 2008-NMCA-071, 144 N.M. 166, 184 P.3d 1060, cert. denied, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

Prosecutor misconduct. — Where the state's main witness in the case against defendant was arrested for selling cocaine to an undercover police officer and agreed to assist the police in pursuing defendant's arrest; the prosecutor failed to disclose to defendant information about earlier unsuccessful attempts to purchase drugs from the state's main witness and failed to assert any privilege in regard to that information; the prosecutor elicited the main witness' testimony that the drug deal with the defendant

was the first time the main witness ever did a drug deal; and then the prosecutor argued to the jury that the drug deal with defendant was the first time the main witness had been involved with drugs, the prosecutors' conduct did not bar the retrial of the defendant under double jeopardy principles. State v. Cortez, 2007-NMCA-054, 141 N.M. 623, 159 P.3d 1108, cert. quashed, 2008-NMCERT-002, 143 N.M. 667, 180 P.3d 674.

Jeopardy may attach where prosecutor purposely precipitates mistrial. — Where the prosecutor engages in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials, double jeopardy attaches. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

"Purposeful" misconduct does not always create double jeopardy bar. — Where, during rebuttal argument, the prosecutor told the jury that he had been accused of withholding evidence, but that counsel for the defendant objected to the question about a prior conviction and thus succeeded in withholding evidence, this was prejudicial and purposeful misconduct, but such "purposeful" misconduct did not create a double jeopardy bar to the retrial of the defendant. State v. Day, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

A defendant may be retried following a mistrial where defense counsel could have pursued various actions to prevent the admission of irrelevant and prejudicial testimony or to mitigate the damage done by such testimony, once admitted, and the prosecutor's improper conduct was not so unfairly prejudicial that it could not be cured by any means short of a mistrial. State v. Huff, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998).

Prosecutorial comment not bar to retrial. — Prosecutor's comments on defendant's silence during the opening statement in the first trial, while sufficient to merit a mistrial, was not sufficiently egregious to bar retrial. State v. Foster, 1998-NMCA-163, 126 N.M. 177, 967 P.2d 852, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Double jeopardy did not bar reprosecution where a mistrial was declared on motion of defendants for the prosecutor's discovery abuses because the defendants failed to show why any prejudice resulting from the prosecutor's late disclosure could not have been cured by a remedy short of a mistrial. State v. Lucero, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Prohibiting retrial following mistrial for prosecutorial misconduct. — Retrial is barred when improper official conduct is so unfairly prejudicial that it cannot be cured by means short of a mistrial or a motion for a new trial, and the official knows that the conduct is improper and prejudicial and the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal. State v. Breit, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792.

Prosecutorial conduct did not bar a retrial. — Where defendant was charged with criminal sexual contact of a minor; the 16-year-old victim testified at the grand jury hearing; the prosecutor and a special investigator interviewed the victim prior to trial to prepare the victim for trial; the victim recanted; the prosecutor and the investigator told the victim that the victim's change in testimony might cause the victim to be charged with perjury and that the victim's child might be sent to a home, and advised the victim to tell the truth; the victim fled the jurisdiction and did not appear at the trial; the prosecutor did not know that the victim would flee as a result of the interview; and the trial court granted a mistrial, the state did not commit prosecutorial misconduct during the interview and double jeopardy did not bar retrial of defendant. State v. Gutierrez, 2012-NMCA-013, 269 P.3d 905, *rev'd*, 2014-NMSC-031.

Statements not in "willful disregard" of mistrial. — Prosecutorial statements as to defendant's post-arrest silence, although they were improper and warranted mistrial and possibly other sanctions, did not rise to the level of "willful disregard" of the possibility of mistrial so as to justify dismissal on double jeopardy grounds. State v. Pacheco, 1998-NMCA-164, 126 N.M. 278, 968 P.2d 789, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Number of trials not, per se, barred. — The number of trials involving the same defendant upon the same charges does not, per se, set up a double jeopardy bar. State v. Day, 94 N.M. 753, 617 P.2d 142 (1980), cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

Mistrial or new trial continues the jeopardy. — A mistrial or a new trial secured by plaintiff or defendant continues the jeopardy and does not renew it. State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976).

Mistrial on one of joined charges. — After a jury found the defendant guilty of driving while intoxicated but was unable to reach a verdict on a vehicular homicide count, the subsequent retrial of vehicular homicide did not subject the defendant to double jeopardy, as such an action could be characterized as a continuing prosecution of the vehicular homicide charge. State v. O'Kelley, 113 N.M. 25, 822 P.2d 122 (Ct. App.), cert. quashed, 113 N.M. 24, 822 P.2d 121 (1991).

Retrial after a mistrial is not barred by double jeopardy unless the mistrial was caused by prosecutorial overreaching. State v. Mazurek, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

Retrial after mistrial of lesser included offense not charged in the indictment. — Where defendant, who injured a horse, causing the horse's death, was indicted for felony extreme cruelty to animals; at defendant's trial, the district court, at the state's request and without objection from defendant, instructed the jury on the lesser included offense of misdemeanor cruelty to animals; the jury acquitted defendant of the felony charge; and the district court declared a mistrial on the misdemeanor charge due to jury deadlock, the state could retry defendant on the misdemeanor charge, which was not

explicitly charged in the indictment, without violating defendant's double jeopardy rights, because the mistrial did not terminate the jeopardy that attached to the misdemeanor charge. State v. Collier, 2013-NMSC-015, 301 P.3d 370.

Contemporaneous written order declaring mistrial not required. — Defendant was not subjected to double jeopardy because of the failure of the trial judge to enter a contemporaneous written order declaring a mistrial and reserving the case for retrial. State v. Reyes-Arreola, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

Where record is silent as to why first case ended in mistrial, an appellate court cannot say there was no compelling reason for the trial court granting a mistrial; therefore, the court of appeals cannot say the trial court erred in denying the claim of double jeopardy. State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Alternatives to declaration of mistrial. — Where there is no manifest necessity for declaring a mistrial, the trial court has some duty to inquire as to possible alternatives thereto. Affecting the scope of inquiry required are the factors of magnitude of prejudice and the point at which the proceedings are terminated, and as the magnitude of possible prejudice increases, less effort need be expended in seeking alternative resolutions, while conversely, as the length of trial wears on, more effort should be expended. State v. De Baca, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

A trial court has a duty to inquire into the alternatives before declaring a mistrial. The court, however, is not required to make a detailed record of each alternative considered before declaring a mistrial. State v. Callaway, 109 N.M. 564, 787 P.2d 1247 (Ct. App. 1989), rev'd, 109 N.M. 416, 785 P.2d 1035 (1990), cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

Discharging hung jury. — The court in the trial of criminal cases is vested with a large discretion as to the time allowed to a jury to deliberate and as to the time to discharge a hung jury. There is no fixed rule laid down to control this discretion and unless it has been grossly abused, a plea of former jeopardy cannot be sustained. State v. Brooks, 59 N.M. 130, 279 P.2d 1048 (1955).

Dismissal for insufficient evidence is an acquittal. — Where the municipal court found defendant guilty of driving while intoxicated in violation of a municipal ordinance; defendant appealed to the district court for a de novo trial; defendant did not assert at any point prior to the close of the municipality's case that the arresting officer lacked reasonable suspicion to initiate the DWI investigation and did not move to suppress the evidence flowing from the investigation; and after the municipality rested its case, the district court ruled that the arresting officer's DWI investigation was unlawful, suppressed all evidence from the investigation, and dismissed the DWI charges against defendant, implicitly holding that the evidence was insufficient to support defendant's conviction of DWI, the municipality's appeal was barred by double jeopardy because the

municipality had presented evidence against defendant to the district court and was barred from retrying defendant. City of Santa Fe v. Marquez, 2012-NMSC-031, 285 P.3d 637.

When the trial court excluded evidence for lack of foundation and determined that the evidence was insufficient to proceed against the defendant, the defendant was acquitted and double jeopardy does not allow the state to appeal the dismissal of the case based on a judge's decision to exclude evidence for lack of foundation. State v. Lizzol, 2007-NMSC-024, 141 N.M. 705, 160 P.3d 886, rev'g 2006-NMCA-130, 141 N.M. 721, 160 P.3d 902.

Procedural dismissals do not invoke double jeopardy protections. — Not all terminations of a criminal trial invoke double jeopardy protections. A defendant who obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence has not invoked his right to be free from double jeopardy. The state is entitled to appeal a final order dismissing its case on a procedural ground. Rulings that do not constitute true acquittals do not preclude continued prosecution. State v. Baca, 2015-NMSC-021, *rev'g* 2013-NMCA-060, 303 P.3d 858.

Dismissal unrelated to the sufficiency of the state's evidence did not trigger an acquittal, and double jeopardy does not bar continued prosecution. — In a DWI trial, where the magistrate judge's amended order of dismissal stated that defendant was acquitted, but where the record revealed that the magistrate judge, on defendant's motion, suppressed one witness's testimony and terminated the trial as sanctions for the state's violation of Rule 6-506A NMRA, the judge's order suppressing the testimony of the arresting officer as a sanction for the state's rule violation was not an evaluation of the sufficiency of the state's evidence, and the order of dismissal did not consider the potential testimony of the state's remaining witnesses or make any other determination that the state's evidence was insufficient to prove defendant had been driving under the influence of alcohol. The violation of Rule 6-506A NMRA was a procedural defect that did not trigger an acquittal because it was unrelated to the sufficiency of the state's evidence. The double jeopardy clause does not bar continued prosecution of defendant's DWI charge, because defendant's trial was terminated without a true determination of guilt or innocence. State v. Baca, 2015-NMSC-021, *rev'g* 2013-NMCA-060, 303 P.3d 858.

Dismissal for insufficient evidence is an acquittal. — Where the state filed a complaint in magistrate court against defendant for aggravated driving while intoxicated, but failed to comply with Rule 6-506 NMRA; after the arresting officer testified on direct examination, defendant asserted that the complaint failed to comply with Rule 6-506 NMRA and as a sanction, the magistrate court suppressed the officer's testimony; defendant then moved for a directed verdict; the magistrate court determined that the evidence was insufficient to prove the charge against defendant and dismissed the case with prejudice; and even though additional prosecution witnesses were waiting to testify, the prosecutor failed to make an offer of proof, the magistrate court's dismissal

constituted an acquittal and the state was barred from appealing to the district court on the basis that the magistrate court's suppression order was erroneous. State v. Baca, 2013-NMCA-060, 303 P.3d 858, cert. granted, 2013-NMCERT-005.

Dismissal for insufficient evidence precludes retrial on lesser included offense. — Where the state elected to charge defendant with attempted first degree murder and not to instruct the jury on attempted second degree murder; and defendant's conviction of attempted first degree murder was reversed and the sentence vacated because the evidence was insufficient to support the conviction, defendant's double jeopardy rights barred retrial of defendant for the lesser include charge of attempted second degree murder. State v. Slade, 2014-NMCA-088, cert. granted, 2014-NMCERT-008.

Mistrial on one of two separate charges. — Since the defendant was charged with attempted murder and aggravated battery and was convicted of aggravated battery, and since the two offenses were in separate counts and the jury was not instructed that it could convict on only one offense, its inability to return a verdict on the attempted murder charge was not an implicit acquittal and the state was not barred from pursuing an attempted murder charge on remand. State v. Martinez, 120 N.M. 677, 905 P.2d 715 (1995).

Retrial after acquittal by court lacking jurisdiction. — After the defendant's acquittal in a court lacking proper jurisdiction, the constitutional prohibitions against double jeopardy would not be violated by a retrial. State v. Hamilton, 107 N.M. 186, 754 P.2d 857 (Ct. App.), cert. denied, 107 N.M. 132, 753 P.2d 1320 (1988).

Retrial after release for lack of jurisdiction. — Where defendant served more than a year for prior conviction of larceny before being released on habeas corpus due to lack of jurisdiction, subsequent trial for same offense did not constitute double jeopardy. State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966).

Retrial on same charges. — Where, in defendant's first trial, defendant was charged with first degree murder under the alternative theories of felony murder and depraved mind murder; the jury returned a general verdict of first degree murder, but did not specify whether the verdict was based on felony murder, depraved mind murder or both; the judgment and sentence of the district court indicated that defendant was found guilty of murder in the first degree; defendant's conviction was reversed and the state refiled the charges; in the second trial, defendant was tried under both theories and convicted of felony murder; the jury did not enter a verdict on depraved mind murder; and defendant argued that because the judgment and sentence in the first trial stated that defendant was guilty of felony murder, defendant was implicitly acquitted of depraved mind murder and double jeopardy precluded the state from prosecuting defendant for depraved mind murder in the second trial, defendant's double jeopardy rights were not violated when defendant was retried for first degree murder under felony murder and depraved mind murder theories. State v. Torrez, 2013-NMSC-034.

No implied acquittal of greater offense. — Where the state brought charges of vehicular homicide and driving while intoxicated as separate counts, as opposed to lesser-included offenses, the jury's conviction of the defendant for driving while intoxicated and deadlock on vehicular homicide did not constitute an implied acquittal of vehicular homicide. An implied acquittal generally occurs when the jury is instructed to choose between a greater and a lesser offense, and chooses the lesser. State v. O'Kelley, 113 N.M. 25, 822 P.2d 122 (Ct. App.), cert. quashed, 113 N.M. 24, 822 P.2d 121 (1991).

Dismissal of felony charge by magistrate does not result in an acquittal because the magistrate court has no jurisdiction to try felony charges. Consequently, a subsequent indictment is not barred even if the magistrate determines in a preliminary hearing that there is no probable cause to bind over for trial in the district court. Moreover, since the magistrate court has no such jurisdiction, no double jeopardy problem can arise. State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975), rev'g 87 N.M. 443, 535 P.2d 650 (Ct. App. 1975).

Retrial due to error in proceedings. — The former jeopardy clause of the constitution does not preclude a retrial of a defendant whose sentence is set aside because of an error in the proceedings leading to the sentence or conviction. State v. Herrera, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972); State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

The former jeopardy clause of the constitution does not preclude a retrial of a defendant whose sentence is set aside because of an error in the proceedings leading to the sentence or conviction. This is equally true where the conviction is overturned on collateral rather than direct attack, by petition for habeas corpus for example. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967), abrogated State v. Wilson, 149 N.M. 273, 248 P.3d 315.

Sufficient evidence of intentional child abuse. — Where defendant’s conviction for intentional child abuse resulting in the death of a child under the age of 12 was reversed because the jury was improperly instructed as to the elements of the offense; defendant did not dispute that the child died due to a blunt force injury to the head and that the cause of death was homicide; in two police interviews, defendant admitted harming the child on the day and night of the incident; and in a third police interview, defendant stated that defendant’s friend harmed the child, there was sufficient evidence from which the jury could have found beyond a reasonable doubt that defendant intentionally abused the child and a retrial was not barred by double jeopardy. State v. Cabezuela, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

No jeopardy where case not tried on merits. — Where metropolitan court granted defendant's motion to dismiss charges of neglect on the grounds that defendant did not meet the statutory definition of a "care facility," but the case was not heard on its merits, jeopardy did not attach and the state could appeal without violating defendant's double jeopardy rights. State v. Davis, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

Retrial after nullification of former conviction. — Where former conviction of murder was nullified in a habeas corpus proceeding, effects of former proceeding were as if there had been no former trial and defendant could properly be tried again for murder without violating the double jeopardy provision of the constitution. Trujillo v. State, 79 N.M. 618, 447 P.2d 279 (1968).

Trial de novo after magistrate court conviction. — In a trial de novo resulting from a defendant's appeal of a magistrate court conviction, the district court had jurisdiction as well as a constitutional and statutory obligation to consider the defendant's pretrial double jeopardy claim. State v. Foster, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824, cert. denied, 134 N.M. 179, 74 P.3d 1071.

New charges following discharge on habeas corpus. — Having pleaded guilty when first arraigned, and having been discharged on habeas corpus, defendant is not placed in jeopardy a second time, contrary to his rights under this section of the constitution, when he is returned and new charges are filed following transfer from juvenile court. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Appeal by defendant. — The constitutional protection against double jeopardy does not prevent a second trial for the same offense when the defendant himself, by an appeal, has invoked the action which resulted in the second trial. State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

Alternative charges do not involve concept of double jeopardy. — The concept of double jeopardy is not involved in charging defendant with fraud or in the alternative embezzlement since the charges are in the alternative, nor are the concepts of included offenses, same evidence or merger. State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Trial de novo on alternative means of committing offense did not violate double jeopardy. — When a defendant is convicted based on one of two alternative means of committing a single crime, there is not an implied acquittal of the other alternative unless the conviction logically excludes guilt of the other alternative; if there is no implied acquittal, there is no constitutional prohibition against retrial of both alternatives after a conviction is set aside. State v. Ben, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

Where defendant was charged in magistrate court with multiple means of committing DWI, per se DWI and impaired to the slightest degree, and was convicted on the per se theory of DWI, defendant's double jeopardy rights were not violated when he was retried de novo on the impaired theory in the district court, because his conviction on the per se theory of DWI was not logically inconsistent with a finding of impaired DWI. State v. Ben, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

Jeopardy did not attach where indictment dismissed. — Double jeopardy had not attached so as to prevent reconsideration where the indictment was dismissed with

prejudice due to preindictment delay, but the court subsequently set aside its dismissal order and reinstated the indictment. State v. Gonzales, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), aff'd, 111 N.M. 363, 805 P.2d 630 (1991).

Dismissal of a charge by the district attorney in no way precludes the district attorney from subsequently informing against and prosecuting defendant for the same offense. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

Erroneous dismissal of charges. — Where, after defendant's trial, trial court erroneously entered order of dismissal of criminal charges on the ground that the state's evidence failed to support a verdict, but rather had intended to dismiss the charges for lack of venue, trial court did not decide any factual elements of the criminal charges and although jeopardy attached once the jury was empaneled and sworn, jeopardy was not terminated by the erroneous order of dismissal and did not bar the state's right to appeal the order of dismissal for lack of venue. State v. Roybal, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

Consideration of double jeopardy claim following second appeal. — When the trial court's decision that double jeopardy barred reprosecution of the defendant was reversed by the court of appeals, the law of the case doctrine did not bar consideration of the double jeopardy issue on appeal of the defendant's conviction at the second trial. State v. Breit, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792.

E. SPECIFIC OFFENSES.

1. HOMICIDE, ASSAULT AND BATTERY, HARASSMENT, KIDNAPPING.

Conviction of felony murder and acquittal of second-degree murder for the same homicide violated double jeopardy. — Where defendant and defendant’s companions were accosted by a rival gang in front of defendant’s family home, guns were pulled on both sides and defendant’s sibling was severely wounded by gunshots in the leg and abdomen; while defendant’s group were trying to help defendant’s sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant’s companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of heat-of-passion voluntary manslaughter, rather than second-degree murder, and of first-degree felony murder for the same homicide; and the jury deliberated and decided whether defendant committed second-degree murder as a lesser included offense of the alternative theory of first-degree murder, defendant’s acquittal of second-degree murder constitutionally protected defendant from further prosecution for that offense, whether in a stand-alone count, as a stepdown from deliberate first-degree murder, or as a component of felony murder. State v. Montoya, 2013-NMSC-020, 306 P.3d 426.

Aggravated battery upon a peace officer and attempted first degree murder. — Where defendant, who was imprisoned in a county detention center, attacked and stabbed a correctional officer five times with a metal shank, defendant's convictions for attempted murder and aggravated battery of a peace officer did not violate double jeopardy. State v. Urquizo, 2012-NMCA-113, 288 P.3d 919, cert. granted, 2012-NMCERT-011, 297 P.3d 1226.

Battery on a police officer and resisting an officer. — Where defendant, who was fleeing an officer stopped fleeing, turned toward the officer in an attack mode, and hit the officer twice in the face, the defendant's conduct was not unitary and the defendant's convictions of battery on a police officer and resisting an officer did not violate double jeopardy. State v. Lopez, 2008-NMCA-111, 144 N.M. 705, 191 P.3d 563, cert. denied, 2008-NMCERT-007, 144 N.M. 594, 189 P.3d 1216.

Petty-misdemeanor battery and aggravated battery. — Where defendant, who was in jail, pushed and punched another inmate; the inmate fell; defendant got on top of the inmate and punched the inmate; and then defendant stomped on the inmate's leg, shattering the leg; the acts of battery occurred close in time and sequence, in one location and with one victim; and there was no evidence that defendant's intention to commit a battery upon the victim was interrupted, altered or changed by the event which caused the victim to fall to the floor, that defendant did not intend to cause great bodily harm to the victim when defendant initiated the confrontation with the victim, or that the fact that the victim fell to the floor had any affect on defendant's state of mind during the confrontation, defendant's acts were not separated by sufficient indicia of distinctness to justify multiple punishments, and defendant's convictions for petty-misdemeanor battery and aggravated battery violated double jeopardy. State v. Garcia, 2009-NMCA-107, 147 N.M. 150, 217 P.3d 1048, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

Kidnapping and murder. — Where the evidence supported a finding that the defendant first restrained the victim for the purpose of sexually assaulting her and supported a finding that the defendant deliberately intended to make sure that the victim did not leave the place of the assault after the assault, the evidence supported a finding of two separate crimes of kidnapping and murder. State v. Saiz, 2008-NMSC-048, 144 N.M. 663, 191 P.3d 521, abrogated, State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783.

Defendant's convictions of first degree murder and shooting at or from a motor vehicle do not constitute a double jeopardy violation. State v. Riley, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

First degree murder and shooting at a dwelling. — Where defendant fired multiple shots at a house, killing one victim and wounding another victim; defendant was indicted for murder of the deceased victim and separately for the injury of the wounded victim; the district court instructed the jury that it had to find all of the elements of the felony murder, plus shooting at a dwelling with regard to the deceased victim, to support the

felony murder conviction; the district court did not require the jury to separately find defendant guilty of the same predicate felony of shooting at a dwelling with regard to the deceased victim; in a separate instruction, the district court required the jury to find the elements of shooting at a dwelling with regard to the wounded victim; and defendant was convicted of felony murder with shooting at a dwelling as the predicate felony and separately of shooting at a dwelling, defendant's double jeopardy rights were not violated, because defendant's conviction for felony murder with shooting at a dwelling as the predicate felony was based on different conduct from defendant's conviction of shooting at a dwelling. State v. Torrez, 2013-NMSC-034.

Attempted second degree murder and assault with intent to commit a violent felony on a peace officer are separately punishable offenses. State v. Demongey, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 500, 263 P.3d 962.

Kidnapping. — Where the defendant tied the victim by her wrists and ankles and then untied her and tried to force her to perform oral sex and where each incident was separated by days and intervening events that included consensual sex, drinking and daily activities, the convictions of the defendant for two incidences of kidnapping did not violate double jeopardy. State v. Dombos, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 666, 180 P.3d 673.

Kidnapping jury instructions. — Where the defendant was charged with two separate counts of kidnapping; the jury instructions for each count referred to the same time period; there was evidence to support two separate incidents; and the jury was specifically told by the court in writing in response to a question that to convict on both counts, the jury had to be convinced beyond a reasonable doubt that two different incidents occurred, the conviction of the defendant on both counts did not violate double jeopardy. State v. Dombos, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 666, 180 P.3d 673.

Convictions for kidnapping and aggravated assault did not violate double jeopardy. — Where defendants told the victims that they could not leave the apartment until missing drugs were found, prevented the victims from opening the door to the apartment as they tried to leave, held a knife to the throat of one victim and beat another victim to unconsciousness, and prevented the victims from leaving the apartment for approximately two hours, the jury could reasonably have concluded that the victims were confined in the apartment by force or intimidation when defendants told the victims that they could not leave and closed the door when the victims tried to leave, and that this conduct was independent of and distinct from one defendant's wielding of the knife. If the conduct is not unitary, there is no double jeopardy violation. State v. Herrera, 2015-NMCA-116, cert. denied, 2015-NMCERT-011.

General verdict of first degree murder based on alternative theories. — Defendant was subjected to double jeopardy when the defendant was charged with first-degree murder based on willful and deliberate murder or, in the alternative, based on felony

murder predicated on the felony of shooting at a motor vehicle resulting in great bodily harm, and when the jury returned a general verdict of first degree murder without specifying whether the jury relied on the theory of willful and deliberate murder or felony murder and returned a verdict of shooting at a motor vehicle resulting in great bodily harm. State v. Gonzales, 2007-NMSC-059, 143 N.M. 25, 172 P.3d 162.

Where defendant was placed under arrest when he "chest-butted" a peace officer, then struggled to get away from the officer and then kicked the officer when the officer attempted to handcuff him, defendant's conduct was unitary and his conviction for resisting, evading, or obstructing an officer was a lesser included offense of defendant's conviction of battery on an officer and violated double jeopardy. State v. Ford, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

Felony murder and attempted robbery. — Where defendant broke into the deceased victim's home with intent to rob him and almost immediately shot the deceased victim and then threatened the surviving victim with a gun and demanded that the surviving victim produce the money; the murder of the deceased victim was complete before defendant threatened the surviving victim; the attempted robbery of the deceased victim was not unitary with the attempted robbery of the surviving victim, and defendant's acts were separated by sufficient indicia of distinctness to justify the conviction of defendant for felony murder predicated on attempted robbery of the deceased victim and of attempted robbery of the surviving victim. State v. Bernal, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

Attempted first degree murder and aggravated battery. — Defendant's convictions for both attempted first degree murder and aggravated battery did not constitute double jeopardy. State v. Vallejos, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68 (2000).

Attempted first-degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. — Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first-degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. State v. Traeger, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, rev'd 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518 (2001).

Attempted murder and aggravated battery. — Where defendant was convicted of attempted murder and aggravated battery with a deadly weapon; defendant's conduct was unitary; the indictment for attempted murder required the state to prove that defendant attempted to commit murder and "began to do an act which constituted a substantial part of murder" but failed to commit the offense; the indictment for aggravated battery required the state to prove that defendant touched or applied force to the victims with a deadly weapon intending to injure the victims; the state's theory of the case to support both charges was that defendant beat, stabbed and slashed the victims; and the state offered the same testimony to prove both charges, the aggravated

battery elements were subsumed within the attempted murder elements and defendant's convictions violated the prohibition against double jeopardy. State v. Swick, 2012-NMSC-018, 279 P.3d 747, rev'g 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462 and overruling State v. Armendariz, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Voluntary manslaughter, aggravated battery and kidnapping. — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, and shot the victim twice in the head while the victim was still alive; and defendant used two different types of force to shoot the victim in the chest and to keep the unconscious victim in the vehicle, defendant's convictions of voluntary manslaughter for shooting the victim in the chest, aggravated battery for shooting the victim in the head, and kidnapping for keeping the victim in defendant's vehicle and transporting the victim to the isolated area were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. State v. Urioste, 2011-NMCA-121, 267 P.3d 820, cert. quashed, 2012-NMCERT-008, 296 P.3d 490.

Voluntary manslaughter and aggravated battery. — Where defendant killed victim with a machete and was convicted of voluntary manslaughter and aggravated battery based on the state's theory that victim was injured as a result of two distinct attacks; the evidence, however, did not establish the sequence of events or timing of victim's injuries nor did it conclusively establish how victim was positioned when each of his injuries occurred; defendant's conduct underlying both offenses was unitary because the jury could not have reasonably distinguished distinct factual bases for the voluntary manslaughter charge and the aggravated battery charge; in analyzing whether the legislature authorized multiple punishments for voluntary manslaughter and aggravated battery for unitary conduct, the court of appeals determined that aggravated battery is subsumed within voluntary manslaughter because both statutes punish overt acts against a person's safety, but take different degrees into consideration; defendant's convictions for both voluntary manslaughter and aggravated battery violated defendant's constitutional right to be free from double jeopardy. State v. Lucero, 2015-NMCA-040.

Second-degree murder and child abuse resulting in death. — Convictions of defendant for both second - degree murder and intentional child abuse resulting in death violated his right not to be placed in double jeopardy. State v. Mann, 2000-NMCA-088, 129 N.M. 600, 11 P.3d 564, aff'd, 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124.

Second degree murder and shooting at or from motor vehicle. — There was no double jeopardy violation for convictions for second degree murder and shooting at or from a motor vehicle because the testimony at trial permitted the inference that each conviction was based on distinct conduct and because the two statutes evince legislative intent to impose separate punishments for each crime. State v. Mireles, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Criminal solicitation and conspiracy to commit murder. — Even though, under Subsection D of Section 30-28-3 NMSA 1978, defendant could be convicted of criminal solicitation and conspiracy to commit murder, the trial court's merger of the two offenses for sentencing purposes violated his right to be protected from double jeopardy. State v. Vallejos, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68 (2000).

Conspiracy to commit first degree murder, robbery and first degree kidnapping. — Where defendant's co-defendant was arguing with the victim over money owed by the victim to the co-defendant; the co-defendant pulled a gun and told the victim to go with the co-defendant; the victim got into the victim's car and while the co-defendant was standing outside the car, the victim started the car and hit the gas; defendant and the co-defendant shot and killed the victim; defendant was convicted of first degree kidnapping; and the evidence showed that defendant and the co-defendant shared a common goal of collecting a debt from the victim; the three charged conspiracies occurred at or near the residence of the victims' friend and unfolded over a short period of time, the actions of defendant and the co-defendant overlapped and were mutually dependent, and the conspiracies involved only one victim, defendant's double jeopardy rights were violated because the evidence supported the existence of only one conspiracy. State v. Ortega, 2014-NMSC-017.

Conspiracy to commit kidnapping and aggravated arson. — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; defendant chided a secondary co-conspirator for being nervous and smoked marijuana with co-conspirator to calm the co-conspirator's nerves; defendant did not object when the primary co-conspirator considered killing the victim and burning the victim's car, but defended a secondary co-conspirator against the primary co-conspirator's violence; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant demanded that the primary co-conspirator determine what to do with the victim before defendant's child returned from school; defendant left the residence to take the child to a store where, at the direction of the primary co-conspirator, defendant purchased charcoal liter fluid; and while defendant remained at the residence with the child, defendant's co-conspirators put the victim in the trunk of the victim's car, drove the car to a school, doused the car with the liter fluid, and burned the car, defendant's separate convictions of conspiracy to commit kidnapping and aggravated arson violated double jeopardy because the conspiracies, which formed one overarching agreement, involved a single victim, occurred over a short time period, served to inflict personal injuries on the victim and prevent the victim from escaping, and the same persons participated in and were implicated by the conspiracy charges. State v. Bahney, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003, 293 P.3d 183.

Conspiracy to commit aggravated burglary and conspiracy to commit aggravated battery. — Where defendant and another assailant broke into the home of the victim armed with metal bars or bats and defendant struck defendant with a metal bar, there

was only one conspiracy to commit multiple crimes and defendant's conviction of the lesser conspiracy to commit aggravated battery violated double jeopardy. State v. Trujillo, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011, 297 P.3d 1226.

Kidnapping, aggravated arson and second-degree murder. — Where defendant was convicted of kidnapping, aggravated arson, and second-degree murder based on unitary conduct, defendant's convictions did not violate double jeopardy because each conviction required proof of a unique element that the other convictions did not required. State v. Bahney, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003, 293 P.3d 183.

Rape and battery. — Where defendant drove a truck across a road blocking the victim's car; defendant and the passenger in the truck approached the victim's car; defendant had a gun; defendant sexually assaulted the victim while the passenger held the victim's hands; and defendant was convicted of aggravated battery for bringing a pistol into the victim's car and for criminal sexual penetration (commission of a felony), because the force defendant used to gain entry into the victim's car while armed with a pistol was distinct from the force used to restrain the victim in order to commit criminal sexual penetration, defendant's conduct was not unitary and defendant's conviction of sexual penetration (commission of a felony) and aggravated battery did not violate defendant's double jeopardy rights. State v. Montoya, 2011-NMCA-074, 150 N.M. 415, 259 P.3d 820.

Felony murder and armed robbery. — Since the defendant's conduct in stabbing and robbing a cabdriver was unitary, the elements of armed robbery were subsumed by the elements of felony murder in the course of an armed robbery and conviction and sentencing of the defendant for both felony murder and the underlying felony of armed robbery violated double jeopardy. State v. Contreras, 120 N.M. 486, 903 P.2d 228 (1995).

Because convictions for felony murder and robbery arose out of unitary conduct, defendant's right to be free from double jeopardy was violated; as a result, the robbery conviction was vacated. State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807, modified, State v. Gallegos, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828, overruled by State v. Tollardo, 2012-NMSC-008, 275 P3d 110.

Kidnapping and felony murder. — Sentences for both kidnapping and felony murder did not violate double jeopardy since the kidnapping was sufficiently separated in time and space from the murder to establish two distinct crimes. State v. Kersey, 120 N.M. 517, 903 P.2d 828 (1995).

Kidnapping and battery. — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim's hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted

to run away, defendant put the victim in the vehicle and drove to a third location and again beat the victim and forced the victim to have intercourse with defendant; and defendant was convicted of kidnapping in the first degree and battery, defendant's convictions did not violate double jeopardy because defendant's conduct was not factually unitary or legally unitary because the jury could have determined that the victim suffered physical injuries when defendant dragged the victim from the vehicle, threw the victim into the bushes, pulled the victim's hair, or otherwise restrained the victim, all actions distinct from the hitting and kicking on which the battery charge was based. State v. Sotelo, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

Aggravated battery and armed robbery. — Both under the elements test and the included offense approach, the offense of aggravated battery does not merge with the armed robbery. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Since taking the victim's purse is a fact required to be proved under the armed robbery charge, but not under the aggravated battery charge, and application of force is a fact required to be proved under the aggravated battery charge, while threatened use of force is acceptable proof under the armed robbery charge, the elements of the two crimes are not the same, and the "same evidence" test does not apply. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Robbery and battery against a household member. — Where defendant, who was a former employee of a restaurant, had an intimate romantic relationship with the victim who was the assistant manager of the restaurant; under the guise of returning the victim's cell phone, defendant approached the victim outside the restaurant, grabbed two money bags containing receipts of the restaurant that the victim intended to deposit; and when defendant grabbed the money bags, defendant struck the victim in the face and fled the scene, defendant's conviction for robbery and battery against a household member did not violate double jeopardy. State v. Gutierrez, 2012-NMCA-095, 286 P.3d 608, cert. denied, 2012-NMCERT-008, 296 P.3d 490.

Battery and violation of domestic violence order. — Where provision in order prohibiting domestic violence (OPDV) prohibiting "battering in any manner" contained all elements of the statutorily defined offense of battery, a criminal prosecution for battery following a contempt proceeding for violating the OPDV violated prohibition against double jeopardy. State v. Powers, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

Battery and criminal sexual penetration. — Where defendant and defendant's spouse had been living apart; defendant broke into the spouse's house and as the spouse tried to flee, defendant pulled the spouse out of their child's room by the hair and began striking the spouse; the spouse ran outside the house and defendant dragged the spouse back into the house; once inside the house, defendant beat the spouse and forcibly had sexual contact with the spouse; a jury convicted defendant of

simple battery and disorderly conduct and the trial court declared a mistrial on the criminal sexual penetration charge, because the jury failed to reach a verdict on that count; and defendant was subsequently convicted of criminal sexual penetration at a second trial in which the state presented the same evidence it introduced at the first trial, defendant committed three separate and distinct offenses and double jeopardy did not prevent defendant from being convicted of criminal sexual penetration. Brescheisen v. Mondragon, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Rape and assault and battery. — Prosecution on charge of rape in district court was not barred although accused had pleaded guilty in justice court to charge of assault and battery based on same set of facts. State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950).

Assault. — An assault arising from a series of three successive shots fired at a single victim, not separated by a significant amount of time, and arising from a single, continuous intent constituted one offense, and conviction of the defendant on two counts of assault violated his double jeopardy rights. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App.), cert. denied, 119 N.M. 771, 895 P.2d 671 (1995).

Assault with intent to commit a violent felony and aggravated battery with a deadly weapon. — The double jeopardy clause does not prohibit sentencing for both assault with intent to commit a violent felony murder and for aggravated battery with a deadly weapon; one offense does not subsume the other and other indicia of legislative intent suggests an intent to punish separately. State v. Cowden, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972, cert. denied, 121 N.M. 644, 916 P.2d 844 (1996).

Aggravated battery with a deadly weapon and aggravated assault with a deadly weapon. — Where defendant was convicted of aggravated battery with a deadly weapon for shooting and injuring his son and for aggravated assault with a deadly weapon for assaulting his wife, who was standing next to defendant's son when he was shot, double jeopardy principles were not offended because each statute required proof of a fact that the other did not, and defendant's convictions for the two offenses involved distinct social harms committed against separate victims. State v. Branch, 2016-NMCA-071, cert. granted, 2016-NMCERT-____.

Firearm enhancements to convictions for aggravated battery with a deadly weapon and aggravated assault with a deadly weapon violate double jeopardy. — Where defendant was convicted of aggravated battery with a deadly weapon for shooting and injuring his son and for aggravated assault with a deadly weapon for assaulting his wife, who was standing next to defendant's son when he was shot, double jeopardy was violated because the firearm enhancements are subsumed within the underlying offenses, and punishment cannot be had for both the enhancements and the enhanced offenses. State v. Branch, 2016-NMCA-071, cert. granted, 2016-NMCERT-____.

Accessory to assault, battery and false imprisonment. — Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate double jeopardy. State v. Carrasco, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075, aff'g in part, rev'g in part, 1966-NMCA-114, 122 N.M. 554, 928 P.2d 939.

Assault with intent to commit rape and criminal sexual penetration. — There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

Violation of domestic violence order, kidnapping and attempted criminal sexual penetration. — Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the order prohibiting domestic violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. State v. Powers, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

Kidnapping and criminal sexual penetration. — Where defendant entered the victim’s house; defendant pulled a gun, put the gun to the victim’s head, and told the victim that defendant planned to rape the victim; defendant threatened to kill the victim’s child if the victim did not comply; defendant raped the victim; and defendant was convicted of kidnapping and second-degree criminal sexual penetration, defendant’s double jeopardy rights were not violated because the kidnapping was complete and factually distinct from the criminal sexual penetration when defendant pulled the gun from his clothing and it was not until defendant moved the victim to the bedroom that defendant used the gun to restrain the victim. State v. Dominguez, 2014-NMCA-064, cert. denied, 2014-NMCERT-005.

Where defendant drove a truck across a road blocking the victim’s car; defendant and the passenger in the truck approached the victim’s car; defendant had a gun; defendant sexually assaulted the victim while the passenger held the victim’s hands; and defendant was convicted of kidnapping and criminal sexual penetration (commission of a felony); the jury was instructed on the alternative theories that the kidnapping occurred when defendant confined the victim by blocking the highway with the truck or when defendant exerted force to restrain the victim while committing criminal sexual penetration; the record did not show which theory the jury adopted, because one basis for the kidnapping was the force of restraining the victim and because the force was the same force use to commit criminal sexual penetration, defendant’s conduct was unitary, the offense of kidnapping was subsumed in the criminal sexual penetration (commission of a felony) conviction, and defendant's conviction of kidnapping and criminal sexual penetration violated defendant’s double jeopardy rights. State v. Montoya, 2011-NMCA-074, 150 N.M. 415, 259 P.3d 820.

Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990).

Where the defendant took control of the car at gunpoint and then drove the victims to a remote location before raping them, the crime of kidnapping was complete before the act of criminal sexual penetration began; because the two crimes did not constitute a "unitary act," imposition of consecutive sentences was not double jeopardy. State v. Andazola, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

The fact that a kidnapping charge was used to raise a charge of criminal sexual penetration to a second-degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnapping statutes protect different social norms. State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990).

Harassment and stalking. — Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of harassment is subsumed into the offense of misdemeanor stalking. State v. Duran, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Violating protective order and stalking. — When the defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of the defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt adjudication. State v. Gonzales, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185, cert. denied, 123 N.M. 229, 938 P.2d 204 (1997).

2. CRIMES AGAINST CHILDREN.

Child abuse by endangerment and vehicular homicide. — Where defendant, who was severely drunk, collided with a vehicle in which two children were riding in the back seat, killing one child and injuring the other child, and because the state failed to prove that defendant was aware of the danger to the particular children who were the victims of defendant’s drunk driving, defendant’s conviction of negligent child abuse resulting in death was reversed, the subsequent prosecution of defendant for vehicular homicide would be prohibited under double jeopardy because vehicular homicide is a lesser-included offense of negligent child abuse, the evidence was sufficient to support vehicular homicide, and the lack of evidence that defendant’s actions imperiled a specific child could lead to acquittal on the negligent child abuse charge and conviction of vehicular homicide. State v. Gonzales, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271, cert. granted, 2011-NMCERT-008, 268 P.3d 514.

Child abuse by endangerment. — Where the defendant exposed all three of his children to unsafe living conditions and household dangers and placed his infant child in a drawer-bed that was too small and which, combined with the bedding, gave the child no room to move if the bedding interfered with the child's breathing, the evidence warranted a conviction of child abuse by endangerment with respect to the defendant's treatment of all three children and a separate conviction of child abuse by endangerment with respect to his treatment of his infant child. State v. Chavez, 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558, rev'd, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891.

Aggravated burglary and child endangerment. — Where the defendant was convicted of both aggravated burglary and child endangerment following a home invasion during which defendant held the fifteen-year-old victim at gunpoint, the offense of aggravated burglary was completed as soon as defendant, with the requisite intent, gained entry to the victim's home while armed with a handgun, and the child endangerment was completed when defendant forced his way into the child's home and placed a gun to the child's head, showing active disregard for that child's health. Because the crime of aggravated burglary was complete upon entry and before defendant endangered the victim by pointing the gun to his head, the conduct was not unitary, and multiple punishments were authorized. State v. Ramirez, 2016-NMCA-072, cert. denied, 2016-NMCERT-____.

Aggravated assault and child endangerment. — Where the defendant was convicted of both aggravated assault and child endangerment following a home invasion during which defendant held the fifteen-year-old victim at gunpoint, and where the state's theory was that child endangerment and aggravated assault were both committed when defendant pointed a gun at the victim, double jeopardy was not violated because the jury could have concluded that defendant did not act recklessly and yet still convicted him of aggravated assault, or the jury could have found that the victim's fear was not reasonable and still convicted defendant of child endangerment. Neither offense is a lesser offense subsumed within the other, and the modified Blockburger test does not foreclose multiple punishments. Moreover, the statutes were designed to protect different societal interests, the child endangerment statute addresses the risk of serious harm to defenseless children, and the aggravated assault statute is aimed at deterring aggression against other people in which the use of deadly weapons is involved. State v. Ramirez, 2016-NMCA-072, cert. denied, 2016-NMCERT-____.

Aggravated burglary and aggravated assault. — Where defendant was convicted of both aggravated burglary and aggravated assault following a home invasion during which defendant held the fifteen-year-old victim at gunpoint, ordered the victim to lock the door, and forced the victim, at gunpoint, to assist in a futile room-to-room search for an individual not present in the home, double jeopardy was not violated because the aggravated burglary was complete before the gun was pointed at the victim, which was the basis for the aggravated assault conviction, and therefore the conduct underlying the two offenses was not unitary. State v. Ramirez, 2016-NMCA-072, cert. denied, 2016-NMCERT-____.

Criminal sexual contact of a minor. — Where the defendant, who was a massage therapist, during the course of a one-hour massage, first massaged various parts of the minor victim's body, then her breasts, then finished the massage, and concluded the massage by touching the victim's vulva, and after the massage, the defendant touched the victim's buttocks when he gave the victim a hug, the three touchings were sufficiently separated in time to be considered separate offenses; and where the victim was face down at the beginning of the massage, lying on her back when the defendant touched her vulva and was in the defendant's living room when he touched her buttocks, the victim's positions were sufficiently distinct each time she was touched to support a finding of separate offenses for each touching. State v. Haskins, 2008-NMCA-086, 144 N.M. 287, 186 P.3d 916, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Where defendant massaged the child's nude body, touching her breasts, buttocks and vagina, there was one continuous course of conduct, not capable of being split into three charges merely because the defendant touched three different body parts. State v. Ervin, 2008-NMCA-016, 143 N.M. 493, 177 P.3d 1067, cert. denied, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

Contributing to the delinquency of a minor. — Where the defendant actively served varieties of alcohol over a considerable period of time at his home to invited minors and personally interacted with the minors, intending and encouraging different minors to drink to intoxication, the evidence established distinct offenses of contributing to the delinquency of each minor who attended the party and the defendant's separate convictions for each offense did not violate double jeopardy. State v. Stone, 2008-NMCA-062, 144 N.M. 78, 183 P.3d 963, cert. denied, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181.

Child abuse and murder. — Where a defendant was charged with numerous counts of child abuse resulting in death or great bodily injury and with murder, but the state did not charge or offer proof that the acts of child abuse arose as separate and distinct episodes, the rule of merger precluded the defendant's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. Although the state properly may charge in the alternative, where the defendant was convicted of one or more offenses which were merged into the greater offense he could be punished for only one. State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990) (events occurred prior to 1989 amendment to Section 30-6-1 NMSA 1978).

Criminal sexual contact of a minor and attempted criminal sexual penetration. — The offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser-included and greater-inclusive crimes because they each contain different elements and stand independently in relation to one another. State v. Mora, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

3. SEXUAL CRIMES.

Attempted criminal sexual penetration. — Where the only evidence supporting the defendant's conviction of separate counts of attempted criminal sexual penetration was the victim's testimony that on several occasions the defendant attempted to force the victim to perform fellatio and the victim distinguished each attempt by time and circumstance and described intervening events, the defendant's conviction of separate counts of attempted criminal sexual penetration did not violate double jeopardy. State v. Dombos, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 666, 180 P.3d 673.

Incest and criminal sexual penetration. — There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

4. PROPERTY CRIMES.

Fraud and securities fraud. — Defendant's convictions of fraud under 30-16-6 NMSA 1978 and securities fraud under 58-13B-30 and 58-13B-39 NMSA 1978, based on the same facts and conduct, did not violate double jeopardy. State v. Rivera, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

Forgery and attempted fraud. — Where defendant forged a check and attempted to present the check to a bank for payment; the jury was instructed that to find defendant guilty of forgery related to the check, the state had to prove that defendant gave or delivered the check to the bank knowing that the check had a false signature intending to injure, deceive or cheat the bank; and as to the fraud charge, the jury was instructed that to find that defendant misrepresented a fact to the bank intending to deceive or cheat the bank, the forgery offense was subsumed within the attempted fraud offense and defendant's convictions of forgery and attempted fraud violated double jeopardy. State v. Lee, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Aggravated burglary involving battery and aggravated burglary involving deadly weapon. — Where defendant, who was armed with a knife and who intended to steal a vehicle from the victims, entered the victims' home, stabbed one victim, and beat and stabbed the other victim; and defendant was convicted of aggravated burglary while committing a battery and aggravated burglary with a deadly weapon, defendant's convictions violated the prohibition against double jeopardy. State v. Swick, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-98, 148 N.M. 895, 242 P.3d 462 and *overruling* State v. Armendariz, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Where defendant entered the victims' home with intent to commit theft and stabbed and beat the victims, defendant's convictions of aggravated burglary involving battery and

aggravated burglary involving a deadly weapon did not violate double jeopardy. State v. Swick, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *rev'd*, 2012-NMSC-018, 279 P.3d 747.

Burglary and criminal trespass. — Where the defendant entered a store on the same day at three different times in violation of a criminal trespass warning; the defendant was convicted of burglary for stealing bottles of liquor when the defendant entered the store the first and second time and of criminal trespass when the defendant entered the store the third time, the defendant's convictions of burglary and criminal trespass did not violate double jeopardy because the criminal trespass charge arose out of a transaction that was separate in time and space from the two previous instances of criminal trespass. State v. Ramirez, 2008-NMCA-165, 145 N.M. 367, 198 P.3d 866, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

Receiving stolen property. — Under 30-16-11 NMSA 1978, a defendant's possession of a stolen firearm is a separate offense from simultaneous possession of other stolen items. State v. Watkins, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951, *overruling* State v. Smith, 100 N.M. 352, 670 P.2d 963 (Ct. App. 1983).

Unlawful possession of stolen vehicles. — Where defendant was convicted of four counts of receiving or transferring stolen vehicles for his unlawful possession of a stolen enclosed trailer, a snowmobile, and two all-terrain vehicles (ATV), and where defendant claimed that his four convictions based on a single statute violated the double jeopardy protection against multiple punishments for the same offense, defendant's four convictions were justified because the language of the statute indicates that the legislature sought to address the harm inflicted on the public by a particularized type of criminal enterprise: vehicle theft. Because 30-16D-4 NMSA 1978 appears designed to protect the public from the trafficking of stolen vehicles, it follows that the legislature intended to allow for separate charges for each stolen vehicle separately possessed by an individual. Defendant's acts of possession of a trailer, a snowmobile, and two ATVs are sufficiently distinct to justify four convictions for possession of a stolen vehicle. State v. Bernard, 2015-NMCA-089.

Fraud and forgery. — Defendant's convictions under the fraud and forgery statutes that arose out of unitary conduct do not violate double jeopardy. State v. Caldwell, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

Fraud and securities fraud. — A conviction for both general fraud and securities fraud does not violate double jeopardy or the general/specific rule. State v. Hornbeck, 2008-NMCA-039, 143 N.M. 562, 178 P.3d 847.

Forgery. — Where forged checks all reflected different dates and defendant's accomplice visited defendant on different occasions when defendant gave the accomplice a check to cash, there was substantial evidence to support the conclusion that each signing of a check was distinct enough to warrant separate forgery

convictions. State v. Glascock, 2008-NMCA-006, 143 N.M. 328, 176 P.3d 317, cert. quashed, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 43.

Common plan. — Defendant's convictions of conspiracy to commit fraud and conspiracy to commit forgery which stemmed from the defendant's refinancing of the marital home without his wife's permission or knowledge, arose from the same agreement and plan to refinance the home and violated double jeopardy. State v. Turner, 2007-NMCA-105, 142 N.M. 460, 166 P.3d 1114, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

Security fraud. — Defendant's convictions of separate counts of security fraud for each issuance of a promissory note and for each renewal or rollover of the existing promissory notes does not violate double jeopardy. State v. Collins, 2007-NMCA-106, 142 N.M. 419, 166 P.3d 480, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

Single intent not applicable to robbery. — Robbery is not merely a property crime, but a crime against a person and the robbery statute is designed to protect citizens from violence and to punish the use of violence. The legislature intended to allow separate charges for each individual against whom violence or the threat of violence is separately used. The unit of prosecution for robbery is not based on the defendant's intent. State v. Bernal, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

Where defendant had the intent to steal only one victim's property, but used separate and discrete acts of force and threats of force against two victims in an attempt to obtain that property, multiple attempted robbery charges do not violate double jeopardy. State v. Bernal, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

Larceny and burglary. — Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary. The elements of these two statutory crimes are not the same. They do not merge. Defendant could be convicted of and sentenced for both crimes. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

Burglary and larceny arising out of the same event do not constitute double jeopardy since there is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Larceny and armed robbery. — Larceny is necessary to, or incidental to the crime of armed robbery, is not a separate and distinct offense from that of armed robbery, and thus merges with the graver offense of armed robbery so as to prevent a double punishment by a sentence for each crime. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Transporting stolen livestock and larceny of livestock. — Defendant's conviction for transporting stolen livestock, when considered with his conviction for larceny of livestock, violated his constitutional right to be free of double jeopardy. State v. Clark, 2000-NMCA-052, 129 N.M. 194, 3 P.3d 689, cert. denied, 129 N.M. 207, 4 P.3d 35 (2000).

Larceny of cattle and failure to keep hide. — Where a person has been acquitted of larceny by the killing of cattle, a proceeding against him for failure to keep hide of animal killed for 30 days does not place him in double jeopardy. State v. Knight, 34 N.M. 217, 279 P. 947 (1929).

Armed robbery and receiving stolen property. — The fact that a defendant pleads guilty, or at least indicates his guilt and is thereupon convicted of receiving stolen property, which property later turns out to be a portion of the property taken by him in the armed robbery, in no way clothes him with immunity from being charged, tried and convicted of the far more serious offense of which he is guilty. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

The offenses of receiving stolen property and armed robbery fail to fall within the prohibition against punishment for more than one offense because the criminal intent essential to the felony of armed robbery is not an essential element of the petty misdemeanor of receiving stolen property. The offense of receiving stolen property cannot be included within the offense of armed robbery. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

The facts necessary to sustain a conviction of receiving stolen property could not possibly sustain a conviction of armed robbery, which is essential to make a prior conviction a bar to a subsequent prosecution and conviction for a greater offense. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

Armed robbery and unlawful taking of a motor vehicle. — Where the child was charged with armed robbery for taking both an automobile and the keys to the automobile in violation of Section 30-16-2 NMSA 1978 and for the unlawful taking of a motor vehicle in violation of Section 30-16D-1 NMSA 1978, the child’s conduct underlying both crimes was unitary; and both convictions required the same proof of the theft of the automobile, the unlawful taking of a motor vehicle conviction was subsumed by the robbery conviction and the child’s conviction for both resulted in double jeopardy. State v. Gutierrez, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

Attempted robbery and conspiracy. — Convictions for attempted robbery and conspiracy to commit robbery did not violate double jeopardy. State v. Carrasco, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075, aff'g in part, rev'g in part 1996-NMCA-114, 122 N.M. 554, 928 P.2d 939.

Burglary and possession of burglary tools. — The crime of possession of burglary tools does not merge with the crime of burglary. A defendant's sentence for each of

these crimes does not constitute double punishment. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Aggravated burglary and robbery. — Theft is a necessary element of robbery but it is not necessarily involved in aggravated burglary. Aggravated burglary requires only the element of intent to commit any felony or theft. One can commit a robbery without making an unauthorized entry, which is an element of aggravated burglary. The elements of the two crimes are not the same. The facts which prove the aggravated burglary are not the facts which prove the robbery. The crimes do not involve the same elements; therefore, a defendant can be sentenced for each of these crimes. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Criminal damage to property was a lesser included offense of breaking and entering. — Where defendant attempted to force entry into an apartment through the front door; the occupants of the apartment struggled to hold the door closed; defendant pushed the occupants back into the apartment about a foot and stepped into the apartment; while one occupant of the apartment attempted to call 911, defendant walked away; and when the other occupant opened the door to see which way defendant had gone, defendant returned and began kicking the door, defendant's initial act of trying to force open the door of the apartment and then returning minutes later to kick the door was unitary conduct and defendant's conviction of criminal damage to property, which was a lesser included offense of defendant's conviction of breaking and entering, violated defendant's right to be free from double jeopardy. State v. Sorrelhorse, 2011-NMCA-095, 150 N.M. 536, 263 P.3d 313, cert. denied, 2011-NMCERT-008, 268 P.3d 514.

5. CONTROLLED SUBSTANCES.

Trafficking methamphetamine by manufacture and possession of drug paraphernalia. — Where the defendant was convicted of trafficking methamphetamine by manufacture for possession of items that could be used to manufacture methamphetamine and possession of drug paraphernalia for possession of items that could be used to consume methamphetamine and marijuana and where the items used to consume drugs were not necessary to manufacture methamphetamine, the defendant's conduct was not unitary and the defendant's convictions did not violate double jeopardy. State v. Vance, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001,145 N.M. 656, 203 P.3d 871.

Possession of methamphetamine and possession of methamphetamine with intent to distribute. — The separate crimes of possession of methamphetamine and possession of methamphetamine with intent to distribute apply in the alternative when based on a single act of possession and defendant was subjected to double jeopardy. State v. Quick, 2009-NMSC-015, 146 N.M. 80, 206 P.3d 985.

Possession of methamphetamine and possession of drug paraphernalia. — The legislature did not intend to punish a defendant for possession of a controlled substance

and possession of paraphernalia, when the paraphernalia consists of only a container that is storing a personal supply of the charged controlled substance, and where the defendant was convicted of possession of methamphetamine and possession of drug paraphernalia based on the possession of a baggie that held the methamphetamine, the defendant's conviction of possession of drug paraphernalia violated double jeopardy. State v. Almeida, 2008-NMCA-068, 144 N.M. 235, 185 P.3d 1085.

Possession of methamphetamine is a lesser-included charge of possession with intent to distribute methamphetamine and a conviction of both charges when defendant's conduct was unitary is a violation of double jeopardy. State v. Lopez, 2008-NMCA-002, 143 N. M. 274, 175 P.3d 942.

Trafficking controlled substances with intent to distribute and conspiracy based on a single act. — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute in violation of 30-31-20(A) NMSA 1978, and conspiracy to commit the same crime in violation of 30-28-2(A) NMSA 1978, both charges based on evidence of a single sale of drugs by defendant; the defendant's conduct underlying both crimes was unitary, and the state relied on the same evidence, the single sale of drugs from defendant to the co-conspirator, as the basis to convict for both crimes; the defendant was convicted twice and is being punished twice for the same offense, resulting in a double jeopardy violation. State v. Silvas, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

Controlled substances violations. — Because civil forfeiture under the Controlled Substances Act (30-31-1 NMSA 1978 et seq.) is punishment for double-jeopardy purposes under the New Mexico constitution, all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. State v. Nunez, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264.

This section does not prohibit the legislature from assessing both civil and criminal penalties for violations of the Controlled Substances Act (30-31-1 NMSA 1978 et seq.). State v. Esparza, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

Drug trafficking in samples. — The defendant's distribution of drug samples and subsequent distribution of larger quantities of the same drugs to the same persons constituted separate transaction under the statute criminalizing drug trafficking and convictions on distinct counts of trafficking a controlled substance did not violate double jeopardy. State v. Borja-Guzman, 1996-NMCA-025, 121 N.M. 401, 912 P.2d 277, cert. denied, 121 N.M. 375, 911 P.2d 883 (1996).

Trafficking with intent to distribute drugs. — Where each of four counts of trafficking with intent to distribute narcotic drugs, arising from a sale to an informant, charged the defendant with selling a different drug, and double jeopardy did not bar separate

prosecutions, public policy demanded that the charges be prosecuted separately. State v. Smith, 94 N.M. 379, 610 P.2d 1208 (1980).

6. MOTOR VEHICLE CRIMES.

Transacting business as a broker-dealer without a license and selling unregistered securities. — Defendant's convictions of transacting business as a broker-dealer without a license under 58-13B-3 and 58-13B-39 NMSA 1978 and for selling unregistered securities under 58-13B-20 and 58-13B-39 NMSA 1978, based on transactions that were distinct and separate in time and that resulted in distinct and separate harm to different victims, did not violate double jeopardy. State v. Rivera, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

Simple DWI and aggravated DWI. — Where the sentencing order on simple DWI expressly continued proceedings to determine guilt of aggravated DWI, the order was interlocutory and did not terminate jeopardy because it clearly was not a resolution of the charge for which defendant was being tried. State v. Vaughn, 2005-NMCA-076, 137 N.M. 674, 114 P.3d 354, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Vehicular homicide and child abuse resulting in death. — Defendant's conduct underlying both vehicular homicide and child abuse resulting in death charges was the same. Therefore, his convictions and sentences for both offenses violated his right to be free from double jeopardy. State v. Santillanes, 2000-NMCA-017, 128 N.M. 752, 998 P.2d 1203, rev'd, 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456.

Vehicular homicide and leaving the scene of an accident. — Where defendant drove a pickup toward a group of children who were trick-or-treating on Halloween; the chaperone pushed the children out of the way but was struck and killed; the defendant stopped and then left the scene of the accident; defendant was convicted of homicide by vehicle under 66-8-101 NMSA 1978 and knowingly leaving the scene of an accident involving great bodily harm or death under 66-7-201 NMSA 1978, defendant's convictions did not violate defendant's double jeopardy rights. State v. Melendrez, 2014-NMCA-062, cert. denied, 2014-NMCERT-006.

Implied Consent Act violation and driving while intoxicated. — An administrative driver's license revocation under the Implied Consent Act did not constitute "punishment" for purposes of the double jeopardy clause; thus, the state was not barred from prosecuting an individual for driving under the influence (DWI) even though the individual had been subjected to an administrative hearing for driver's license revocation based on the same offense. State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995).

Driving while under the influence and homicide by vehicle. — Where the facts offered in municipal court to support a conviction for driving while under the influence of

intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court, under the same evidence test there was no double jeopardy when the state sought to prosecute the defendant for homicide by vehicle. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975), rev'g 88 N.M. 5, 536 P.2d 269 (Ct. App. 1975).

Where a defendant pleads guilty to the misdemeanor charges of driving while intoxicated and reckless driving in the magistrate court, he cannot then claim that a trial on the felony charge of homicide by vehicle while driving under the influence of intoxicating liquor in the district court is barred by the double jeopardy rule. Jeopardy cannot extend to an offense (i.e., homicide) beyond the jurisdiction of the magistrate court. State v. Manzanares, 100 N.M. 621, 674 P.2d 511 (1983), cert. denied, 471 U.S. 1057, 105 S. Ct. 2123, 85 L. Ed. 2d 487, rehearing denied, 472 U.S. 1013, 105 S. Ct. 2715, 86 L. Ed. 2d 729 (1985).

7. MISCELLANEOUS CRIMES.

Fraud and making false public voucher. — The double jeopardy clause does not prohibit the prosecution of an individual under both 30-16-6 NMSA 1978, fraud, and 30-23-3 NMSA 1978, making a false public voucher. State v. Ellenberger, 96 N.M. 287, 629 P.2d 1216 (1981).

Securities fraud. — Where defendants were charged with multiple counts of securities fraud and transacting business as a broker-dealer without a license after convincing an elderly couple to invest in a phony real estate investment project, a project to invest in commodities and a project to invest certain trust funds, the multiple convictions do not violate double jeopardy and can be punished separately where there was evidence that that the three convictions stemmed from three distinct offers to sell securities under the specific fraud statute, and there was sufficient indicia of distinctness to justify punishments for each transaction. State v. Maxwell, 2016-NMCA-082, cert. denied, 2016-NMCERT-____.

Charging defendant with three counts of assisting escape, in a prosecution arising out of the escape of three prison inmates, did not violate the constitutional prohibition against double jeopardy. State v. Martinez, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Evading an officer in car and on foot. — Where defendant led police on a high-speed automobile chase and then got out of his car and fled on foot, his acts supported only one crime founded on resisting, evading or obstructing an officer, and vacation of his convictions for two counts of evading an officer was required. State v. Lefebre, 2001-NMCA-009, 130 N.M. 130, 19 P.3d 825.

Securities violations. — Criminal prosecutions under the Securities Act, (now New Mexico Uniform Securities Act, 58-13C-101 NMSA 1978 et seq.), following administratively imposed civil penalties under that act, do not place defendants in double jeopardy under this section or under 30-1-10 NMSA 1978. State v. Kirby, 2003-

NMCA-074, 133 N.M. 782, 70 P.3d 772, cert. quashed, 133 N.M. 771, 70 P.3d 761 (2003).

Possession of computer child pornography. — Where defendant's computer contained twenty-five files, consisting of twenty-five separate images of child pornography that defendant had downloaded on five occasions, and defendant was convicted of twenty-five counts of sexual exploitation of children for possession of the illicit images, defendant was erroneously charged with and convicted on twenty-five counts because defendant's chargeable unlawful possession under 30-6A-3(B)(2) NMSA 1978 consisted of five separate and distinct downloads. State v. Ballard, 2012-NMCA-043, 276 P.3d 976, rev'd, State v. Olsson, 2014-NMSC-012.

Distribution of computer child pornography. — Where defendant possessed child pornography images in a shared file accessible on peer-to-peer software that third parties could download, defendant's acts did not have sufficient distinctness to justify multiple punishments, and defendant could only be charged with one count of distribution of child pornography, because his act of creating one distinct computer file containing multiple images of child pornography were not shown to be distinct with regard to any images placed in the shared file, no multiplicity of separate actions was alleged to have occurred, and no evidence was presented to establish that defendant personally sent any image to a third party. State v. Sena, 2016-NMCA-062, cert. granted, 2016-NMCERT-____.

Conspiracy and the completed offenses are separate offenses and conviction of both does not amount to double jeopardy. State v. Armijo, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Reference to refusal to take blood test. — Testimony relative to the refusal of a person charged with driving while intoxicated to take a blood-alcohol test is admissible in a criminal proceeding against him and does not violate a defendant's right against self-incrimination (opinion based in part on former 41-12-9, 1953 Comp., which permitted comment on a defendant's failure to testify in his own behalf). 1963-64 Op. Att'y Gen. No. 64-38.

A police officer may authorize the taking of blood from a dead person to determine alcoholic content without violating any rights the person or his heirs might have and without incurring any personal liability for his actions so long as the taking of blood is done in a manner consistent with the normal rule of human decency. 1959-60 Op. Att'y Gen. No. 60-104.

Procedure under legislative committees. — In the investigation of bribery charges by the legislature, members of the press appearing before its committee may be compelled to divulge the source of their information, but no person may be compelled to be a witness against himself in any criminal case, and this prohibition will be given a liberal construction, and each house of the legislature may determine its rules of procedure

and punish its members or others for contempt or disorderly conduct in its presence. 1937-38 Op. Att'y Gen. No. 38-2037.

Law reviews. — For comment, "Criminal Law - Appeal by State - Double Jeopardy," see 7 Nat. Resources J. 304 (1967).

For comment, "Two-Tiered Test for Double Jeopardy Analysis in New Mexico," see 10 N.M. L. Rev. 195 (1979-1980).

For note, "Custodial Interrogation in New Mexico: State v. Trujillo," see 12 N.M. L. Rev. 577 (1982).

For note, "Criminal Procedure - The Fifth Amendment Privilege Against Self-Incrimination Applies to Juveniles in Court-Ordered Psychological Evaluations: State v. Christopher P.," see 23 N.M. L. Rev. 305 (1993).

For note, "State Constitutional Law - New Mexico Rejects Prosecutorial Goading as Test for Double Jeopardy Bar - State v. Breit," see 28 N.M. L. Rev. 151 (1998).

For article, "New Developments in Fourth, Fifth and Sixth Amendment Law," see 31 N.M. L. Rev. 175 (2001).

For note, "Criminal Procedure - Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M. L. Rev. 401 (2001).

For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico - *State v. Santillanes*," see 32 N.M. L. Rev. 313 (2002).

For article, "Adding Charges on Retrial: Double Jeopardy, Interstitialism, and *State v. Lynch*", see 34 N.M. L. Rev. 539 (2004).

For article, "Complying with *Nunez*: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy after *State v. Exparza*", see 34 N.M. L. Rev. 561 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 243 to 314; 21A Am. Jur. 2d Criminal Law §§ 701 to 716, 936 to 952; 81 Am. Jur. 2d Witnesses §§ 80 to 90, 97 to 102, 117 to 122, 804, 961.

Perjury, acquittal as bar to prosecution of accused for, 89 A.L.R.3d 1098.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 A.L.R.2d 631.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 A.L.R.2d 1404.

Habeas corpus, former jeopardy as ground for, 8 A.L.R.2d 285.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 A.L.R.2d 1439, 4 A.L.R.4th 617, 4 A.L.R.4th 1221.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights, 18 A.L.R.2d 796.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society or similar organization or group, 19 A.L.R.2d 388.

Alleged incompetent as witness in lunacy inquisition, 22 A.L.R.2d 756.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Fingerprints, palm prints or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R.4th 1178.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Conviction or acquittal in criminal proceeding as bar to action for statutory damages or penalty, 42 A.L.R.2d 634.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense, 50 A.L.R.2d 943.

Conspiracy: conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 A.L.R.2d 1030, 29 A.L.R.5th 1.

Severance where codefendant has incriminated himself, 54 A.L.R.2d 830.

Lesser offense: conviction of lesser offense as bar to prosecution for greater on new trial, 61 A.L.R.2d 1141.

Appeal: conviction from which appeal is pending as bar to another prosecution for same offense under rule against double jeopardy, 61 A.L.R.2d 1224.

Jury: what constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of plea of former jeopardy, 63 A.L.R.2d 782.

Waiver of privilege against self-incrimination, testifying in civil proceeding as, 72 A.L.R.2d 830.

Guilty plea as basis of claim of double jeopardy in attempted subsequent prosecution for same offense, 75 A.L.R.2d 683.

Right not to testify, court's duty to inform accused who is not represented by counsel, 79 A.L.R.2d 643.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 A.L.R.2d 486.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

Former jeopardy as ground for prohibition, 94 A.L.R.2d 1048.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense, 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy, 6 A.L.R.3d 905.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 A.L.R.3d 990.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation, 10 A.L.R.3d 1054.

Homicide: earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 A.L.R.3d 834.

Increased punishment: propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 A.L.R.3d 1261.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under Miranda v. Arizona, 25 A.L.R.3d 1076.

Larceny: single or separate larceny predicated upon stealing property from different owners at the same time, 37 A.L.R.3d 1407.

Validity of statute, ordinance or regulation requiring fingerprinting of those engaging in specified occupations, 41 A.L.R.3d 732.

When does jeopardy attach in a nonjury trial, 49 A.L.R.3d 1039.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery committed of another person at the same time, 51 A.L.R.3d 693.

Censorship and evidentiary use of unconvicted prisoner's mail, 52 A.L.R.3d 548.

Acquittal in criminal proceeding as precluding revocation of probation on same charge, 76 A.L.R.3d 564.

Acquittal in criminal proceeding as precluding revocation of parole on same charge, 76 A.L.R.3d 578.

Instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Admissibility in evidence of confession made by accused in anticipation of, during or following polygraph examination, 89 A.L.R.3d 230.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 A.L.R.3d 997.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 A.L.R.4th 374.

Applicability of double jeopardy to juvenile court proceedings, 5 A.L.R.4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts - modern view, 6 A.L.R.4th 802.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Concern for possible victim (rescue doctrine) as justifying violation of Miranda requirements, 9 A.L.R.4th 595.

Propriety of using otherwise inadmissible statement, taken in violation of Miranda rule, to impeach criminal defendant's credibility - state cases, 14 A.L.R.4th 676.

Admissibility of evidence concerning words spoken while declarant was asleep or unconscious, 14 A.L.R.4th 802.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 A.L.R.4th 1014.

Right of partners to assert personal privilege against self-incrimination with respect to production of partnership books or records, 17 A.L.R.4th 1039.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 A.L.R.4th 368.

Impeachment of defense witness in criminal case by showing witness' prior silence or failure or refusal to testify, 20 A.L.R.4th 245.

Necessity and sufficiency of statements informing one under investigation for involuntary commitment of right to remain silent, 23 A.L.R.4th 563.

Right of prosecution to discovery of case-related notes, statements, and reports - state cases, 23 A.L.R.4th 799.

Propriety of increased sentence following revocation of probation, 23 A.L.R.4th 883.

Propriety of requiring suspect or accused to alter, or to refrain from altering, physical or bodily appearance, 24 A.L.R.4th 592.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Power of state court, during same term, to increase severity of lawful sentence - modern status, 26 A.L.R.4th 905.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Extent and determination of attorney's right or privilege against self-incrimination in disbarment or other disciplinary proceedings - post-Spevack cases, 30 A.L.R.4th 243.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error - modern cases, 32 A.L.R.4th 774.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial - state cases, 40 A.L.R.4th 741.

Propriety of governmental eaves-dropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Double jeopardy: various acts of weapons violations as separate or continuing offense, 80 A.L.R.4th 631.

What constitutes assertion of rights to counsel following Miranda warnings - state cases, 83 A.L.R.4th 443.

Admissibility, in prosecution in another state's jurisdiction, of confession or admission made pursuant to plea bargain with state authorities, 90 A.L.R.4th 1133.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 A.L.R.5th 262.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony - post-Kastigar cases, 29 A.L.R.5th 1.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping, 39 A.L.R.5th 283.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions-post-connelly cases, 48 A.L.R.5th 555.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs - Drugs or narcotics administered as part of medical treatment and drugs or intoxicants administered by the police, 96 A.L.R.5th 523.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts - Modern view, 97 A.L.R.5th 201.

Acquittal or conviction in state court as bar to federal prosecution based on same act or transaction, 18 A.L.R. Fed. 393.

Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings, 42 A.L.R. Fed. 793.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination, 55 A.L.R. Fed. 742.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force, 66 A.L.R. Fed. 119.

Display of physical appearance or characteristic of defendant for purpose of challenging prosecution evidence as "testimony" resulting in waiver of defendant's privilege against self-incrimination, 81 A.L.R. Fed. 892.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records - modern status, 87 A.L.R. Fed. 177.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS § 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in presentment before magistrate, 124 A.L.R. Fed. 263.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement - modern cases, 132 A.L.R. Fed. 415.

Double jeopardy considerations in federal criminal cases - supreme court cases, 162 A.L.R. Fed. 415.

22 C.J.S. Criminal Law §§ 208 to 276; 22A C.J.S. Criminal Law §§ 645 to 654; 98 C.J.S. Witnesses §§ 431 to 456.

Sec. 16. [Treason.]

Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. V, § 5.

Iowa Const., art. I, § 16.

Montana Const., art. II, § 30.

Utah Const., art. I, § 19.

Wyoming Const., art. I, § 26.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 70 Am. Jur. 2d Sedition, Subversive Activities and Treason §§ 80, 86, 93, 110.

87 C.J.S. Treason §§ 2 to 10, 13.

Sec. 17. [Freedom of speech and press; libel.]

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.

ANNOTATIONS

Cross references. — For provision allowing a special motion to dismiss an unwarranted or specious lawsuit against a person for conduct or speech in a public setting, *see* 38-2-9.1 and 38-2-9.2 NMSA 1978.

For the Uniform Single Publication Act, *see* 41-7-1 NMSA 1978 et seq.

See Kearny Bill of Rights, cl. 12.

Comparable provisions. — Idaho Const., art. I, § 9.

Iowa Const., art. I, § 7.

Montana Const., art. II, § 7.

Utah Const., art. I, § 15.

Wyoming Const., art. I, § 20.

I. FREEDOM OF SPEECH AND PRESS.

Prohibiting commercial photography business from discriminating based on sexual orientation did not violate freedom of expression. — Where plaintiff offered wedding photography services to the general public; plaintiff's business was a public accommodation under the Human Rights Act, 28-1-1 NMSA 1978 et seq.; plaintiff refused to photograph a same-sex commitment ceremony between defendant and defendant's partner on religious grounds; and plaintiff claimed that the act compelled plaintiff to express a positive image and message about same-sex commitment ceremonies contrary to plaintiff's beliefs, the act did not violate plaintiff's first amendment rights to refrain from speaking because the act only requires that businesses that operate as a public accommodation, cannot discriminate against potential clients based on their sexual orientation, it does not compel plaintiff to either speak a government-mandated message or to publish the speech of another person. Elane Photography, LLC v. Willock, 2013-NMSC-040, aff'g 2012-NMCA-086, 284 P.3d 428.

Where plaintiff violated the Human Rights Act, 28-1-1 NMSA 1978 et seq., by refusing on religious and moral grounds to photograph defendant's commitment ceremony with defendant's same-sex partner; and plaintiff claimed that the act violated plaintiff's freedom of expression because photography is an artistic expression entitled to first amendment protection, the act did not violate plaintiff's freedom of expression because the act regulated plaintiff's conduct in its commercial business, not its speech or right to express its views about same-sex relationships. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428, aff'd, 2013-NMSC-040, 309 P.3d 53.

Broad interpretation of licensing act violated freedom of speech. — Where respondent, who was a hydrologist and a member of the board of directors of a conservancy district, investigated the use of demolition and construction waste as rip-rap in ditches and prepared and presented a report to the board of directors criticizing the conservancy district's use of the rip-rap to prevent erosion; respondent used a civil engineering mathematical formula to compare the conveyance capacity of ditches that had rip-rap with ditches that had sandy bottoms and asserted that the rip-rap reduced conveyance capacity, led to flooding and bank erosion that could lead to failure; respondent criticized the district's engineer who directed the use of the rip-rap; respondent reiterated multiple times that respondent was not an engineer and insisted that the district hire a registered engineer to review respondent's report and to address the issue; and petitioner determined that respondent had practiced engineering without a license because respondent had applied engineering principles, equations and concepts to investigate and evaluate the flow of water in the district's ditches, the petitioner's broad interpretation and application of 61-23-23 NMSA 1978 violated

respondent's right to freedom of speech. N.M. Bd. of Licensure v. Turner, 2013-NMCA-067, 303 P.3d 875.

Ordinance imposed a prior restraint on free speech. — Where defendant stationed defendant and defendant's truck in a public street to solicit funds to support defendant's non-profit foundation; municipal ordinances prohibited solicitation of money at any time, place or manner unless a permit from the municipality had been obtained; the municipality did not provide instructions and procedures for applying for permits, standards for granting or denying permits, limitations on discretion to issue or deny permits, or regulations of the time, place, or manner of solicitation; and there was no evidence that the ordinances were narrowly tailored to serve a substantial, significant governmental interest or that the restrictions left open ample alternative channels for communication of the information defendant sought to give the public, the ordinances were facially invalid abridgments of first amendment speech. Village of Ruidoso v. Warner, 2012-NMCA-035, 274 P.3d 791.

Restrictions on an employee's right to speak. — To determine the constitutionality of restrictions on the right to speak, an appellate court must decide whether the speech at issue addresses a matter of public concern and if so, decide the proper balance between the employee's constitutional rights and the state's interest as an employer in promoting efficient provision of public services. Kane v. City of Albuquerque, 2015-NMSC-027.

Where the city of Albuquerque's charter and personnel rules prohibit employees of the city from being a candidate for, or from holding elective office of, the state of New Mexico or any of its political subdivisions, the charter and personnel rules did not impinge on petitioner's first amendment rights because the charter and personnel rules did not violate petitioner's right to speak on a matter of public concern because the mere fact of candidacy is not a matter of public concern, and laws that prohibit employees from running for elective office are justifiable because political activity may become a basis for the preferential treatment of employees and damage morale, and therefore impair government efficiency. Kane v. City of Albuquerque, 2015-NMSC-027.

Name change. — The district court did not deny the petitioner his right of free speech when the district court denied the petitioner's request to change his name to "Fuck Censorship!". In the Matter of Petition of Variable, 2008-NMCA-105, 144 N.M. 633, 190 P.3d 354.

Nonharmful publications are completely protected. — Constitutional liberty of speech and press gives complete immunity from legal censure and punishment for all publications that are not harmful, as judged by standards of common law in force at time of adoption of parallel amendment to federal constitution. Curry v. Journal Publishing Co., 41 N.M. 318, 68 P.2d 168 (1937), overruled by Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983).

Prohibiting any act designed to destroy government is unconstitutional. — Laws 1919, ch. 140, prohibiting performance of any act designed to destroy organized government and providing penalties for violation thereof, was unconstitutional as violative of constitutional right of free speech. State v. Diamond, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527 (1921).

Enjoining motion picture as nuisance would be censorship. — The injunction to abate a nuisance in former 40-34-1 to 40-34-21, 1953 Comp., now repealed, if applied to motion pictures, would be in the nature of censorship and prior restraint. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957) (provision inapplicable to showing of motion pictures in regular business establishment).

Zoning ordinance regulating adult amusement establishments did not abridge freedom of speech. — Where defendant, who operated an art-house movie theater, was prosecuted under the municipality's zoning ordinance covering adult amusement establishments for showing one pornographic film during a weekend festival of X-rated fare; the ordinance allowed adult films to be shown only in specified zones and prohibited the public screening of such films in other areas, including the area where the theater was located; about five percent of the municipality's area was zoned to allow the exhibition of adult films; the municipality enacted the ordinance not to regulate the content of films, but to combat the negative secondary effects produced by showing adult films; and defendant could show adult movies in areas of the municipality that were zoned for the exhibition of adult films, the ordinance was a constitutionally valid regulation of the time, place, and manner of the exhibition of adult films as applied to defendant and did not abridge defendant's freedom of speech. City of Albuquerque v. Pangaea Cinema, LLC, 2012-NMCA-075, 284 P.3d 1090, rev'd, 2013-NMSC-044, 310 P.3d 604.

Sit-in at university president's office may be punished. — Where defendants refused to honor the request of the university president to leave his office and refused to leave when he returned from lunch and had appointments to keep, they substantially interfered in the functioning of the president's business and 30-20-13 NMSA 1978, prior to the 1975 amendment thereof, was constitutionally applied to warrant their convictions. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Where 30-20-13 NMSA 1978, prior to the 1975 amendment thereto, vindicated the significant government interest in the control of campus disturbances, reasonable "time, place and manner" regulations were valid even though they incidentally suppressed otherwise protected conduct. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Conspiracy to boycott magazines is not protected. — Conspiracy to boycott or blacklist certain magazines by publications demanding that they be refused by newsdealers and readers is not protected by guarantee of free speech and press. Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920).

Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate; school officials do not possess absolute authority over their students, and among the activities to which schools are dedicated is personal communication among students, which is an important part of the educational process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

Personal intercommunication is only part of education. — Although personal intercommunication among students at schools, including universities, is an important part of the educational process, it is not the only, or even the most important, part of that process. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

Visitation in bedrooms by persons of opposite sex may be prohibited. — A regulation of the board of regents of the New Mexico state university which prohibited visitation by persons of the opposite sex in residence hall, or dormitory, bedrooms maintained by the regents on the university campus, except when moving into the residence halls and during annual homecoming celebrations, where the regents placed no restrictions on intervisitation between persons of the opposite sex in the lounges or lobbies of the residence halls, the student union building, library or other buildings, or at any other place on or off the campus, and no student was required to live in a residence hall, did not interfere appreciably, if at all, with the intercommunication important to the students of the university; the regulation was reasonable, served legitimate educational purposes and promoted the welfare of the students at the university. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

"Fighting words," the use of which is not protected by this constitutional provision, are those which tend to incite an immediate breach of the peace. State v. Wade, 100 N.M. 152, 667 P.2d 459 (Ct. App. 1983).

Highway Beautification Act, 67-12-1 NMSA 1978 et seq., does not abridge freedom of speech in violation of the United States and New Mexico constitutions. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Highway Beautification Act meets constitutionality test. — The Highway Beautification Act (67-12-1 NMSA 1978 et seq.) meets the three-pronged test used to determine whether a time, place and manner restriction is valid; the act's restrictions on plaintiffs' exercise of their freedom of speech is justified without reference to the content of the regulated speech; its restrictions on plaintiffs' freedom of speech serve a significant governmental interest and the act leaves open ample alternative channels for communication of the information. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Plaintiffs failed to rebut act's presumption. — Where the plaintiffs introduced no evidence that any of their stores, which availed themselves of on-premise or unzoned commercial or industrial area signs, had suffered a great loss of business, they failed to

rebut the presumption that the Highway Beautification Act provides adequate means for plaintiffs to exercise their freedom of speech. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Outdoor advertising signs not protected. — Plaintiffs' outdoor advertising signs do not constitute the type of speech protected by the first and fourteenth amendments to the United States constitution and this section. Stuckey's Stores, Inc. v. O'Cheskey, 93 N.M. 312, 600 P.2d 258 (1979), appeal dismissed, 446 U.S. 930, 100 S. Ct. 2145, 64 L. Ed. 2d 783 (1980).

Test for constitutionality of sign ordinance. — Where a sign ordinance does not prohibit speech altogether, the precise issue is whether the sign ordinance is a legitimate time, place and manner restriction on speech. The criteria to be analyzed are threefold: (1) does the restriction serve a significant government interest? (2) is the restriction justifiable without reference to the content of the regulated speech? and, (3) does the restriction leave open ample alternative channels of communication? Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Limited restriction on political signs proper. — Where the only restriction on political signs is that campaign signs be a certain size, be erected earlier than 60 days prior to a primary or general election, and that the campaign signs be removed within 10 days after the election to which the sign pertains, clearly such a limited restriction on these types of political signs furthers a significant government interest in aesthetics. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Sign ordinance held related to proper goals. — A sign ordinance regulating the size, height and number of signs is reasonably related to the proper goals of aesthetics and traffic safety. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Media's right to publish is not absolute. — Media’s right to publish may be limited to protect other interests, such as a defendant's right to a fair trial. State ex rel. N.M. Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Prior restraint gag orders on trial participants. — To ensure that an appropriate balance is struck between rights of free speech and the interest in fair and impartial adjudication, any prior restraint on public comment by trial participants must be accompanied by specific factual findings supporting the conclusion that further extrajudicial statements would pose a clear and present danger to the administration of justice. Twohig v. Blackmer, 1996-NMSC-023, 121 N.M. 746, 918 P.2d 332.

Publication of harassing and intimidating information was protected speech. — Where, in a contentious divorce and child custody proceeding, the district court ordered plaintiff to stop filing complaints, motions or other devices pertaining to the child’s guardian ad litem; plaintiff formed an organization called "Stop Court Abuse of

Children", filed a disciplinary complaint against the guardian through the organization and discussed the custody proceedings and published pleadings in the custody proceedings and the disciplinary complaint on the organization's website; the district court ordered plaintiff to remove the information from the website because the information was designed to harass and intimidate the guardian; and the court did not find that the information was defamatory, although the court's order was not a prior restraint, because the order was entered after plaintiff published the information, the order was constitutionally invalid because the court's finding that the information was harassing and intimidating was insufficient to show that the speech was not protected. Kimbrell v. Kimbrell, 2013-NMCA-070, 306 P.3d 495, rev'd, 2014-NMSC-027.

Test for ban on media coverage of trial. — If a ban on media coverage of a trial is sought for the purpose of protecting a defendant's right to a fair trial, the evidence must demonstrate that there is a substantial likelihood that the presence of cameras will deny the defendant a fair trial. However, if a limitation is sought to protect other interests, which involve important constitutional rights, a higher test should be required. The proponent of a ban should in that case prove that a serious and imminent threat to some other important interest exists. State ex rel. N.M. Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Procedure for determining media ban. — In deciding whether to exclude media coverage of a particular criminal participant, the trial judge should require evidence sufficient to support a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general and that such effect will be qualitatively different from coverage by other types of media. State ex rel. N.M. Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Before a criminal court places restrictions on the media, some minimum form of notice should be given to the media and a hearing held. Anyone present should be given an opportunity to object. These proceedings should take place in advance of the date set for trial, if possible, to avoid delays and postponements. State ex rel. N.M. Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

A court should weigh the competing interests of a criminal defendant and the public and determine if any news limitation sought would be effective in protecting the interests threatened and if it would be the least restrictive means available. Its consideration of these issues should be articulated in oral or written findings and conclusions in the record, but formal findings and conclusions are not necessary. The order must be no broader in application or duration than necessary to serve its purpose. State ex rel. N.M. Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

"Intolerable" standard for obscene materials. — The New Mexico constitution requires that the community must find allegedly obscene materials "intolerable" before they may be deemed as an "abuse" of the right to freely speak, write, and publish

sentiments on all subjects. City of Farmington v. Fawcett, 114 N.M. 537, 843 P.2d 839 (Ct. App.), cert. quashed, 114 N.M. 532, 843 P.2d 375 (1992).

This section of the New Mexico constitution requires that an "abuse" of free speech only occurs when the community cannot tolerate the matter. Thus, since a jury instruction based on acceptance was given, the defendant who was convicted of disseminating obscene material was entitled to a new trial so that the jury may be instructed on a community standard based on "tolerance." City of Farmington v. Fawcett, 114 N.M. 537, 843 P.2d 839 (Ct. App.), cert. quashed, 114 N.M. 532, 843 P.2d 375 (1992).

Contemporary community standards should be judged by whether the average person or community would be tolerant of the materials in the possession of another, even though most members of the community might themselves be offended; community tolerance thus determines whether the material is patently offensive. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Although the state's interest in protecting innocent children from sexual exploitation is far more compelling than its interest in protecting consenting adults, what the community finds tolerable for adults will be a far cry from what it will tolerate when visual materials include children; thus, the intolerance standard provides a workable model for patent offensiveness under the Sexual Exploitation of Children Act, 30-6A-1 to 30-6A-4 NMSA 1978. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Nude dancing in licensed liquor establishments not protected. — The state's power to regulate liquor under the twenty-first amendment outweighs any first amendment interest in nude dancing, and, therefore, 30-9-14.1 NMSA 1978 is constitutional insofar as it applies to the prohibition of indecent dancing in licensed liquor establishments. Nall v. Baca, 95 N.M. 783, 626 P.2d 1280 (1980).

Process of piercing female nipple is not sufficiently imbued with elements of communication, and exposing the female body this way for this purpose is not an artistic, dramatic, or educational form of expression entitled to free speech protection. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

Regulation of cost of utility's advertising charged to ratepayers not abridgement of free speech. — A public service commission order which allowed utility companies to include in their cost of service, and pass on to their ratepayers, expenditures for "informational" advertising (e.g., safety, billing practices, etc.), but not expenditures for "institutional" advertising (e.g., enhancement of corporate image), and which required that a utility show by clear and convincing evidence that an advertising expense is allowable did not unconstitutionally abridge freedom of speech. El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n, 103 N.M. 300, 706 P.2d 511 (1985).

II. LIBEL.

A. IN GENERAL.

The invasion of an individual's right of privacy is a tort for which recovery may be granted, but it does not exist where a person has sought and achieved prominence. Blount v. TD Publ'g Corp., 77 N.M. 384, 423 P.2d 421 (1966).

But right is subordinate to news dissemination. — The right of privacy is generally inferior and subordinate to the dissemination of news. Blount v. TD Publ'g Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Even though account affects persons not willingly participating in occurrence. — It is not an invasion of privacy to publish the account of an occurrence when it is of general interest even though the parties affected were not willing participants in the occurrence. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

The right of privacy is to be applied to the individual of ordinary sensibilities, not the supersensitive. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Official record may give privilege. — A publication may be privileged as a matter of law where it is based on an official record. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

Ignorance of contents is defense to distributors, not publishers. — In libel actions publishers cannot escape liability on ground of ignorance of the defamatory content, but mere distributors may avoid liability by showing that they had no reason to believe the information to be libelous. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

News is question for trier of fact. — Where the individual's right of privacy is concerned and where the right of the public to be informed is involved, news is a question of fact that should be resolved by the trier of the facts. Blount v. TD Publishing Corp., 77 N.M. 384, 423 P.2d 421 (1966).

B. CRIMINAL LIBEL.

Criminal libel laws are valid. — New Mexico by this section extends broad protection to speech and press, but also reserves a responsibility for their abuse and recognizes validity of criminal libel laws. Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919, reh'g denied, 343 U.S. 988, 72 S. Ct. 1070, 96 L. Ed. 1375 (1952).

Provided they do not limit use of truth as defense. — This section conflicted with former 40-27-22, 1953 Comp. (repealed), stating cases in which truth was defense to charge of libel, and repealed the statute insofar as it limited pleading and giving in

evidence of truth as defense in criminal libel suits. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Criminal contempt during criminal libel case may be pardoned. — Criminal contempt perpetrated while criminal libel case is before court is subject to pardoning power of governor. State v. Magee Publ'g Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924), overruled in part, State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965).

The right of a teacher or school employee to express his views is protected by constitutional guarantee to the extent that such is not detrimental to the employing school system and is not an open, willful refusal of a teacher to obey the reasonable rules and regulations of his or her employing board of education. 1963-64 Op. Att'y Gen. No. 64-47.

Within limits. — A public school teacher has a constitutional right to publish his ideas or opinions, sign petitions or speak his views, and such does not constitute cause for dismissal, violation of contract or insubordination unless such conduct clearly is demonstrated and found to actually amount to a disobedience of reasonable school policies, regulations, orders or rules, or such conduct amounts in fact to a rebellious, mutinous or disobedient action contrary to the best interests of the public school system. 1963-64 Op. Att'y Gen. No. 64-47.

Law reviews. — For article, "Love Lust in New Mexico and the Emerging Law of Obscenity," see 10 Nat. Resources J. 339 (1970).

For comment, "Official Symbols: Use and Abuse," see 1 N.M. L. Rev. 352 (1971).

For comment, "The Freedom of the Press vs. The Confidentiality Provisions in the New Mexico Children's Code," see 4 N.M. L. Rev. 119 (1973).

For note, "Constitutional Law - Regulating Nude Dancing in Liquor Establishments - The Preferred Position of the Twenty-First Amendment - Nall v. Baca," see 12 N.M. L. Rev. 611 (1982).

For article, "Survey of New Mexico Law, 1982-83: Constitutional Law," see 14 N.M. L. Rev. 77 (1984).

For article, "Defamation in New Mexico," see 14 N.M. L. Rev. 321 (1984).

For comment, "Procedural and Substantive Rights to the Media Govern Requests to Restrict News Coverage of Criminal Cases: State ex rel. New Mexico Press Ass'n v. Kaufman," see 14 N.M. L. Rev. 401 (1984).

For opinion, "The Development of Modern Libel Law: A Philosophic Analysis," see 16 N.M. L. Rev. 183 (1986).

For article, "University Anti-Discrimination Codes v. Free Speech," see 23 N.M. L. Rev. 169 (1993).

For note, "The Expansion of the Obscenity Doctrine in New Mexico; Is it Tolerable? *City of Farmington v. Fawcett*," see 24 N.M. L. Rev. 505 (1994).

For article, "Are There Any Limits on Judicial Candidates' Political Speech after *Republican Party of Minnesota v. White*?", see 33 N.M. L. Rev. 449 (2003).

For article, "Freedom of Speech and Freedom form Student-on-Student Sexual Harrassment in Public Schools: The Nexus between *Tinker v. Des Moines Independent Community School District* and *Davis v. Monroe County Board of Education*", see 33 N.M. L. Rev. 533 (2003).

For article, "Overbreadth Outside the First Amendment", see 34 N.M. L. Rev. 53 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 496 to 525; 50 Am. Jur. 2d Libel and Slander § 532.

Validity of municipal regulation of solicitation of magazine subscriptions, 9 A.L.R.2d 728.

Public regulation and prohibition of sound amplifiers or loudspeaker broadcasts in streets and other public places, 10 A.L.R.2d 627.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Constitutional right to freedom of speech as violated by conviction for disorderly conduct based on failure or refusal to obey police officer's order to move on, on street, 65 A.L.R.2d 1152.

Use of school property for other than public school or religious purposes, 94 A.L.R.2d 1274.

Modern concept of obscenity, 5 A.L.R.3d 1158.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Validity of blasphemy statutes or ordinances, 41 A.L.R.3d 519.

Peaceful picketing of private residence, 42 A.L.R.3d 1353.

Right of accused to have press or other media representatives excluded from criminal trial, 49 A.L.R.3d 1007.

Picketing court or judge as contempt, 58 A.L.R.3d 1297.

Consumer picketing to protest products, prices or services, 62 A.L.R.3d 227.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 A.L.R.3d 297.

Actionability of false newspaper report that plaintiff has been arrested, 93 A.L.R.3d 625.

Libel by newspaper headlines, 95 A.L.R.3d 660.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 A.L.R.3d 37.

Gesture as punishable obscenity, 99 A.L.R.3d 762.

Propriety of conditioning probation on defendant's not associating with particular person, 99 A.L.R.3d 967.

Rights of attorneys leaving firm with respect to firm clients, 1 A.L.R.4th 1164.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

Validity and construction of statutes or ordinances prohibiting or restricting distribution of commercial advertising to private residences - modern cases, 12 A.L.R.4th 851.

Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.

Insulting words addressed directly to police officer as breach of peace or disorderly conduct, 14 A.L.R.4th 1252.

Liability of commercial printer for defamatory statement contained in matter printed for another, 16 A.L.R.4th 1372.

Liability for personal injury or death allegedly resulting from television or radio broadcast, 20 A.L.R.4th 327.

Libel and slander: reports of pleadings as within privilege for reports of judicial proceedings, 20 A.L.R.4th 576.

Validity, construction, and effect of statutes, ordinances, or regulations prohibiting or regulating advertising of intoxicating liquors, 20 A.L.R.4th 600.

Libel and slander: attorneys' statements, to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged, 23 A.L.R.4th 932.

Defamation: loss of employer's qualified privilege to publish employee's work record or qualification, 24 A.L.R.4th 144.

Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395.

State constitutional protection of allegedly defamatory statements regarding private individual, 33 A.L.R.4th 212.

Libel and slander: privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings, 33 A.L.R.4th 632.

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Defamation: who is "libel-proof," 50 A.L.R.4th 1257.

Validity and construction of state court's order precluding publicity or comment about pending civil case by counsel, parties, or witnesses, 56 A.L.R.4th 1214.

False light invasion of privacy - Cognizability and elements, 57 A.L.R.4th 22.

False light invasion of privacy - Defenses and remedies, 57 A.L.R.4th 244.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation - post-New York Times cases, 57 A.L.R.4th 404.

Libel or slander: Defamation by statement made in jest, 57 A.L.R.4th 520.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

Standing of media representatives or organizations to seek review of, or to intervene to oppose, order closing criminal proceedings to public, 74 A.L.R.4th 476.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented businesses, 10 A.L.R.5th 538.

Validity and construction of statutes prohibiting harassment of hunters, fishermen, or trappers, 17 A.L.R.5th 837.

Who is "public figure" for purposes of defamation action, 19 A.L.R.5th 1.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261.

Propriety of exclusion of press or other media representatives from civil trial, 39 A.L.R.5th 103.

Propriety of publishing identity of sexual assault victim, 40 A.L.R.5th 787.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Who is "public official" for purposes of defamation action, 44 A.L.R.5th 193.

Libel and slander: charging one with breach or nonperformance of contract, 45 A.L.R.5th 739.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity, 52 A.L.R. 5th 195.

Defamation: publication of letter to editor in newspaper as actionable, 54 A.L.R.5th 443.

Validity of regulation by public-school authorities as to clothes or personal appearance of pupils, 58 A.L.R.5th 1.

Admissibility of evidence of public-opinion polls or surveys in obscenity prosecutions on issue whether materials in question are obscene, 59 A.L.R.5th 749.

Search and seizure: reasonable expectation of privacy in driveways, 60 A.L.R.5th 1.

First Amendment protection afforded to commercial and home video games, 106 A.L.R.5th 337.

Defamation of member of clergy, 108 A.L.R.5th 495, §§ 8-10

Defamation of church member by church official, 109 A.L.R.5th 541.

Right of press, in criminal proceeding, to have access to exhibits, transcripts, testimony, and communications not admitted in evidence or made part of public record, 39 A.L.R. Fed. 871.

Validity, under First Amendment and 42 USC § 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus, 50 A.L.R. Fed. 516.

Prohibition of federal agency's keeping of records on methods of individual exercise of First Amendment rights, under Privacy Act of 1974 (5 USC § 552a(e)(7)), 63 A.L.R. Fed. 674.

Access of public to broadcast facilities under first amendment, 66 A.L.R. Fed. 628.

Action under 42 USC § 1985(1) for conspiracy to defame or otherwise harm the reputation of federal official, 69 A.L.R. Fed. 913.

What oral statement of student is sufficiently disruptive so as to fall beyond protection of First Amendment, 76 A.L.R. Fed. 599.

Constitutionality of teaching or suppressing teaching of Biblical creationism or Darwinian evolution theory in public schools, 102 A.L.R. Fed. 537.

Constitutionality of teaching or otherwise promoting secular humanism in public schools, 103 A.L.R. Fed. 538.

First amendment protection for law enforcement employees subject to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9

What is "record" within meaning of Privacy Act of 1974 (5 USCS § 552a), 121 A.L.R. Fed. 465.

Protection of commercial speech under first amendment - Supreme Court cases, 164 A.L.R. Fed. 1

16B C.J.S. Constitutional Law §§§ 539 to 611; 53 C.J.S. Libel and Slander § 9.

Sec. 18. [Due process; equal protection; sex discrimination.]

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973. (As amended November 7, 1972, effective July 1, 1973).

ANNOTATIONS

Cross references. — *See* Kearny Bill of Rights, cl. 7. For inherent rights to life, liberty and property, *see* N.M. Const., art. II, § 4.

For taking property without just compensation, *see* N.M. Const., art. II, § 20.

For enacting general rather than special laws, *see* N.M. Const., art. IV, § 24.

For taxes being equal and uniform, *see* N.M. Const., art. VIII, § 1.

For human rights, *see* Chapter 28 NMSA 1978.

For rights under Children's Code, *see* 32A-1-16 and 32A-2-14 NMSA 1978.

The 1972 amendment, adding the last sentence, which was proposed by H.J.R. No. 2, § 1 (Laws 1972), was adopted at the general election held on November 7, 1972, by a vote of 155, 633 for and 64,823 against.

Comparable provisions. — Idaho Const., art. I, § 13.

Montana Const., art. II, §§ 4, 17.

Utah Const., art. I, § 7.

Wyoming Const., art. I, §§ 3, 6.

I. GENERAL CONSIDERATION.

This section protects only the rights of "persons" and does not embrace the state. State ex rel. N.M. State Hwy. Comm'n v. Taira, 78 N.M. 276, 430 P.2d 773 (1967).

II. DUE PROCESS.

A. GENERALLY.

Due process is a rather malleable principle which must be molded to the particular situation, considering both the rights of the parties and governmental interests involved. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

It requires that enactment be within legislative competency. — "Due process," by which only the individual may be deprived of his liberty, does not have regard merely to enforcement of the law, but searches also the authority for making the law. By judicial decision, the first and fundamental step in the due process or procedure of depriving the individual of liberty is the enactment of a statute within legislative competency. State v. Henry, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805 (1933).

An enactment must be applied for purpose consonant with legislative purpose. — Substantive due process of law may be roughly defined as the constitutional guaranty that no person will be deprived of his life, liberty or property for arbitrary reasons. Such a deprivation is constitutionally supportable only if the conduct from which the deprivation flows is proscribed by reasonable legislation (that is, legislation the enactment of which is within the scope of legislative authority), reasonably applied (that is, applied for a purpose consonant with the purpose of the legislation itself). Schware v.

Board of Bar Exam'rs, 60 N.M. 304, 291 P.2d 607 (1955), rev'd, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d. 796 (1957).

It has no application to public rights. — Laws 1919, ch. 83 (repealed), regarding school budgets, did not violate this section, for the due process clause of this section has no application to public rights. McKinley Cnty. Bd. of Educ. v. State Tax Comm'n, 28 N.M. 221, 210 P. 565 (1922).

"Liberty" embraces right to contract hours of employment. — "Liberty" embraces a man's right to contract as he will or can regarding his hours of employment. He, not the government, is to determine the matter. State v. Henry, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805 (1933).

Allowing reclamation district to contract does not deprive members of liberty. — A provision of a reclamation contract allowing a reclamation district to enter into a lawful contract with the United States for the improvement of the district and the increase of its water supply does not violate N.M. Const., art. II, § 4, and the due process clause of this section by depriving association members of the liberty to contract. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

Specific lack of due process must be alleged. — In attacking constitutionality of statute on due process grounds, it must be alleged in what respect it lacks due process. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

Impairment of complainer's rights must be shown. — Violation of due process can be urged only by those who can show an impairment of their rights thereby. Straus v. Foxworth, 231 U.S. 162, 34 S. Ct. 44, 58 L. Ed. 162 (1913); State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

Legislative enactments may be declared void for uncertainty if their meaning is so uncertain that the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended with any reasonable degree of certainty. N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Statute may violate due process if it is so vague that persons of common intelligence must necessarily guess at its meaning. State ex rel. Health & Social Servs. Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979).

It is not a violation of due process for the prosecutor to withhold circumstantial exculpatory evidence from the grand jury; he is obligated to present only direct exculpatory evidence. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

As to where terms "reasonable" or "unreasonable" are used. — The use of such terms as "reasonable" or "unreasonable" in defining standards of conduct or in

prescribing charges, allowances and the like have been held not to render a statute invalid for uncertainty and indefiniteness. N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Absolute or mathematical certainty is not required in the framing of a statute. N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Statute, not vague, may be overbroad. — Although a statute may pass a vagueness challenge, it may nonetheless be held unconstitutional under overbreadth considerations. State v. Ramos, 116 N.M. 123, 860 P.2d 765 (Ct. App.), cert. denied, 115 N.M. 795, 858 P.2d 1274 (1993).

Adoption of child conceived as result of rape. — Man convicted of criminal sexual penetration of a child had no constitutional right under the due process or equal protections clauses of the United States or New Mexico constitutions to withhold consent to adoption of the child conceived and born as a result of that act. Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261.

Malicious abuse of process. — The tort of malicious abuse of process must be construed narrowly in order to protect the right of access to the courts. Devaney v. Thriftway Mktg. Corp., 1998-NMSC-001, 124 N.M. 512, 953 P.2d 277, cert. denied, 524 U.S. 915, 118 S. Ct. 2296, 141 L. Ed. 2d 157 (1998).

A public office is not property, and the right to hold it is not a vested one. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Ordering performance of public duty does not injure personal or property right. — A public officer who is commanded to perform an official duty suffers neither in his personal nor his property rights, and these rights alone are safeguarded by the constitution. Board of Comm'rs v. District Court of Fourth Judicial Dist., 29 N.M. 244, 223 P. 516 (1924).

Natural parents have no property right in their children, and the paramount issue in an adoption proceeding is the welfare of the child. Gutierrez v. N.M. Dep't of Pub. Welfare, 74 N.M. 273, 393 P.2d 12 (1964).

Guardian may be appointed without notice to parent. — Appointment of a guardian of a minor without giving notice to parent does not violate the due process clause. State ex rel. Hockenhull v. Marshall, 58 N.M. 286, 270 P.2d 702 (1954).

Allowance of alimony is not a denial of due process. Bardin v. Bardin, 51 N.M. 2, 177 P.2d 167 (1947).

Navy retirement pay is earned property right. — Retirement plans and retirement pay are a mode of employee compensation and an earned property right which accrues by reason of an individual's years of service in the navy. LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969), overruled by Espinda v. Espinda, 96 N.M. 712, 634 P.2d 1264 (1981).

Conservation laws may not deprive property owners of constitutional rights. — The legislature may provide by law for the conservation of game animals and birds, but only so long as such laws do not deny to one having rights in privately owned land the due process or equal protection of the laws that the constitution guarantees to all persons. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965).

The state game commission may not create a game refuge or migratory bird resting ground on private land without consent, or without acquiring the necessary interest in the land by eminent domain or in such other manner as is authorized by law. Were it otherwise, the owner would be deprived of the right, enjoyed by others in the vicinity but outside the refuge, to hunt game on his own property and thereby be in violation of the due process and equal protection clauses of the constitution. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965).

As to vested rights, there are none in a particular remedy or procedure. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Red light camera ordinance. — Where a municipal red light camera ordinance provided that vehicle owners charged with a violation of the ordinance were entitled to receive notice of the violation along with detailed information about the basis for the charge; that vehicle owners were entitled to a hearing before an impartial hearing officer at no cost; that the municipality had the burden to prove the violation; that the vehicle owner was entitled to hear and challenge the evidence; that the hearing officer was required to render a decision in writing; and that the vehicle owner was entitled to appeal the hearing officer’s decision to district court and to recover costs if the appeal was successful, the ordinance did not violate the vehicle owner’s right to procedural due process. Titus v. City of Albuquerque, 2011-NMCA-038, 149 N.M. 556, 252 P.3d 780, cert. quashed, 2011-NMCERT-001, 300 P.3d 1182.

B. EXERCISE OF POLICE POWERS.

The police power of the state is paramount, and in the proper exercise thereof there may be a limitation in the use of or complete destruction of private property in order to advance public welfare without the necessity of compensation to the owner. Therefore, although utilities are permitted to locate their facilities within the public way and thereby obtain certain rights for limited purposes, these rights are subordinate to the rights of the traveling public and are subject to a reasonable exercise of the police power. State ex rel. State Hwy. Comm'n v. Town of Grants, 66 N.M. 355, 348 P.2d 274 (1960).

Salus populi est suprema lex represents the highest power possessed by the state. When properly invoked, all other guaranties, public or private, must yield. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956) (garbage collection ordinance upheld).

Police power must be exercised reasonably and not arbitrarily. — Former statutes dealing with licensing of contractors (Laws 1939, ch. 197, §§ 1, 3, 14 and 17, now repealed) were not unconstitutional under this section, since legislature may enact laws in exercise of its police powers which are not so unreasonable or arbitrary as to amount to confiscation of property or denial of right to engage in a particular trade, occupation or profession. Kaiser v. Thomson, 55 N.M. 270, 232 P.2d 142 (1951).

All property and property rights are held subject to the fair exercise of the police power of a municipality, and a reasonable regulation enacted for the benefit of public health, convenience, safety or general welfare is not an unconstitutional taking of property without due process. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941) ("Green River" ordinance held valid); Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941) (prohibiting keeping animals in restricted district held valid).

Section 77-17-12 NMSA 1978, requiring one killing a bovine to preserve its hide unmutilated for 30 days, is a reasonable police regulation and not a deprivation of property without due process. State v. Walker, 34 N.M. 405, 281 P. 481 (1929).

Garbage collection. — Defendant was not deprived of his property without due process by being required to pay the assessments where he received benefits in the collection and disposal of garbage from other premises in the community. The problem involved being a health problem, its solution bound defendant as well as other members of the community. Under 3-48-3 NMSA 1978, plaintiff can enforce the general system. City of Hobbs v. Chesport, Ltd., 76 N.M. 609, 417 P.2d 210 (1966).

Contract for garbage disposal. — The ordinance under which a city acted by resolution to authorize a contract for garbage disposal with a sanitation company was a police measure involving the health and welfare of all members of the community and not a violation of due process or equal protection as to persons engaged in the business of hauling garbage. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956).

Public nuisance may be enjoined. — Equity has power to enjoin a public nuisance, even though in doing so it may incidentally restrain the violation of a penal provision, and the constitutional guarantees are not violated thereby. State ex rel. Marron v. Compere, 44 N.M. 414, 103 P.2d 273 (1940) (unlawful practice of medicine).

Keeping citizens out of hospitals and off relief is proper. — Both hospitals and relief rolls are crowded, and it is a proper exercise of police power for the legislature to enact statutes which would tend to keep citizens out of the one and off of the other. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

Motorcycle helmets. — A city ordinance which requires the operator of a motorcycle to wear an approved safety helmet is an appropriate exercise of the city's police power and therefore is constitutional. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

Power to select type of helmet may be delegated. — The delegation to the commissioner of motor vehicles of the power to determine what type of helmet should be worn under an ordinance mandating the wearing of approved safety helmets by motorcycle operators did not deprive the appellee of due process, nor did the fact that the state commissioner of motor vehicles adopted the standards determined by the testing of a third person make such testing unreasonable. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

Nondiscriminatory economic policy may be enforced. — A state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process clause so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory. Rocky Mt. Whsle. Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643 (1961), appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

Unreasonable regulation violates due process. — An act which, under guise of regulation, constitutes an unreasonable exercise of police power violates due process. State ex rel. N.M. Dry Cleaning Bd. v. Cauthen, 48 N.M. 436, 152 P.2d 255 (1944).

Treatment of electric utility's interest in generating facility. — Exclusion of an electric utility's interest in a generating facility from its rate base, coupled with the public service commission's refusal to decertify the facility, did not violate the due process provisions or the takings clauses of the New Mexico and United States constitutions. Pub. Serv. Co. v. Pub. Serv. Comm'n, 112 N.M. 379, 815 P.2d 1169 (1991).

Ordinance banning pit bulls. — Village ordinance banning possession of American pit bull terriers was reasonably related to protecting the health and safety of the residents of the village; thus, the ordinance did not violate substantive due process. Garcia v. Vill. of Tijeras, 108 N.M. 116, 767 P.2d 355 (Ct. App.), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988).

Village ordinance banning American pit bull terriers, being a proper exercise of the village's police power was not a deprivation of property without due process even though it allowed for the destruction of private property. Garcia v. Vill. of Tijeras, 108 N.M. 116, 767 P.2d 355 (Ct. App.), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988).

C. REGULATION OF BUSINESSES AND PROFESSIONS.

Statute fixing maximum hours may be unconstitutional. — Portion of Laws 1933, ch. 149, which prohibited labor by male employees in mercantile establishments for

more than eight hours in a day or 48 hours in a week of six days was unconstitutional as violating liberty guaranteed by this provision. State v. Henry, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805 (1933). But see Sections 50-4-13 to 50-4-18 NMSA 1978 and notes thereto.

Terms of probation imposed on physician held not vague. — One of the terms of probation imposed by the board on a physician found guilty of unprofessional conduct for falsely prescribing demerol for the alleged use of another when in fact the drug was for his own use was that he not take or have in his possession "any dangerous drugs" without the consent of his psychiatrist. The physician thereafter prescribed the drug ritalin for a patient and diverted some of it for his own use. It was held that when the board revoked the physician's license for violating his probation, and that under the facts the terms thereof were not unconstitutionally vague. McDaniel v. N.M. Bd. of Med. Exam’rs, 86 N.M. 447, 525 P.2d 374 (1974).

Enactments relating to health. — Statute authorizing fixing minimum prices for barber work (former 61-17-37 NMSA 1978) had a direct relation to fulfillment of sanitary conditions required in barbershops for health of public, and did not violate due process. Arnold v. Board of Barber Exam'rs, 45 N.M. 57, 109 P.2d 779 (1941).

The right to practice a profession or vocation is a property right. Roberts v. State Bd. of Embalmers & Funeral Dirs., 78 N.M. 536, 434 P.2d 61 (1967).

Business or profession affecting welfare and health may be regulated. — The question of monopoly and restraint of trade must yield to a more important consideration, that of reasonably exercising the police power over a business or profession having a vital relationship to public welfare and health. State v. Collins, 61 N.M. 184, 297 P.2d 325 (1956).

Professional license application procedures. — A constitutional due process analysis under 61-1-3 NMSA 1978, governing application for a professional or occupational license, must consider and balance three factors: (1) the private interest affected, (2) the risk of an erroneous deprivation of the interest with the procedures used, and (3) the government's interest, including the fiscal and administrative burdens of providing additional procedures. Rex, Inc. v. N.M. Mfg. Housing Committee, 2003-NMCA-134, 134 N.M. 533, 80 P.3d 470.

Due process was not violated by issuance of domestic well permits. — Where plaintiff owned adjudicated surface rights in the Mimbres basin to irrigate plaintiff’s farm; the Mimbres basin was a fully appropriated and adjudicated basin and the state engineer had declared the basin closed; plaintiff claimed that 72-12-1.1 NMSA 1978 violated due process, because it authorized the state engineer to issue domestic well permits without determining the availability of unappropriated water and that the domestic wells authorized by the permits would necessarily impair senior water users; the state engineer’s regulations provided that domestic well permits were subject to priority administration; and plaintiff failed to show how the issuance of domestic well

permits caused, or would cause, any actual impairment of plaintiff's water rights, 72-12-1.1 NMSA 1978 did not facially violate plaintiff's due process rights. Bounds v. State ex rel. D'Antonio, 2013-NMSC-037, aff'g 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708.

Prohibiting banking by those not organized under law is constitutional. — Former State Banking Act (Laws 1915, ch. 67, now repealed) did not violate due process of law where it prohibited engaging in banking business to all except those organized under its provisions. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956).

Limiting number of insurance agents in town violates due process. — Statute (Laws 1925, ch. 135, § 69) prohibiting more than one agent of fire insurance company in each town offended against due process and special privileges clauses of the constitution. Franklin Fire Ins. Co. v. Montoya, 32 N.M. 88, 251 P. 390 (1926).

Right to practice law is not absolute. — Granting that membership in the legal profession is a species of property, as that word is employed in the constitution, the right to its enjoyment is not absolute and unfettered by any mode of regulation. Schware v. Board of Bar Exam'rs, 60 N.M. 304, 291 P.2d 607 (1955), rev'd, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957).

Provision as to prescribing qualifications of municipal judges is not discriminatory. — Section 35-14-3 NMSA 1978 on its face is not discriminatory and does not present an equal protection problem, since New Mexico's scheme does not establish classes of municipalities, some of which must have attorney judges and others which do not, and once a New Mexican municipality has determined the minimum educational and other qualifications for its municipal court judges, all defendants in that municipality are tried by judges that have met these qualifications, so that at the individual municipal court level there is equal treatment for all defendants with respect to the judges having satisfied the same qualifications. Furthermore, in New Mexico there exists an ameliorative feature which insures that if defendants tried before a nonattorney municipal judge want to have an attorney judge, then after trial or upon a nolo contendere or a guilty plea they could seek an immediate trial de novo in district court before an attorney judge. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Educational qualifications may be imposed on bar applicants. — The educational qualifications required of applicants before they are permitted to practice law in New Mexico do not violate the fourteenth amendment or this section, either in regard to the clause requiring due process of law or that providing for equal protection of the laws. Henington v. State Bd. of Bar Exam'rs, 60 N.M. 393, 291 P.2d 1108 (1956).

Failure to pass examination justifies denying admission to bar. — When one fails to pass an appropriate and properly administered bar examination, it is not unreasonable to say that he has demonstrated his lack of proficiency in law so as to justify denying him the right to be admitted to the bar. Accordingly, there has been no

denial of due process or equal protection. In re Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

Due process not denied without full hearing. — There is a rational basis for according an applicant a full due process hearing in the area of character determinations, and denying such full hearing on the matter of the validity of determinations as to intellectual and learning qualifications arrived at by examination or testing in accordance with recognized procedures and, therefore, petitioner was not denied due process or equal protection of the law by the lack of a full hearing concerning his failure of the bar examination. In re Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

Right to take bar examination may be denied for lack of good character. — The requirement of former Rule III of the rules governing admission to the bar of New Mexico, which provided "that the board of bar examiners may decline to permit any such applicant to take the [bar] examination when not satisfied of his good moral character," which in the same or similar language is universal in this country, could not seriously be challenged as unreasonable. Schware v. Board of Bar Exam'rs, 60 N.M. 304, 291 P.2d 607 (1955), rev'd, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) *see now* Rules 15-103 and 15-302 NMRA.

Applicant may be required to furnish character affidavit. — Applicant to take the New Mexico bar examination had to be shown to be a person of good moral character before he was eligible to take the bar examination, and requiring him to submit an affidavit of an attorney of New Mexico to that effect did not violate this section. Henington v. State Bd. of Bar Exam’rs, 60 N.M. 393, 291 P.2d 1108 (1956); *see now* Rules 15-103 and 15-302 NMRA.

Qualifications required must be connected with fitness to practice. — Petitioner was refused admission to the New Mexico bar examination by the board of bar examiners. He later requested a formal hearing on the denial of his application. At the hearing, the board told him for the first time why it had refused permission. Its reasons were: (1) use of aliases by the applicant; (2) former connection with subversive organizations; and (3) his record of arrests, thus failing to satisfy the board as to the requisite moral character for admission to the bar of New Mexico. He appealed to the New Mexico supreme court; the denial was upheld. However, the United States supreme court reversed, holding that a state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment. A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Schware v. Board of Bar Exam'rs, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957), rev’g 60 N.M. 304, 291 P.2d 607 (1955).

Activity as attorney may be reviewed. — Respondent's contentions that, in some way, he had been denied procedural and substantive due process of law and equal protection of the law has no validity where the conduct charged against him is wholly and entirely concerned with his activity as an attorney. In re Nelson, 79 N.M. 779, 450 P.2d 188 (1969).

Jockey's license is not vested right. — The license granted a jockey is a privilege similar to that granted to owners and trainers; it is not a vested right within the meaning of the due process clause of the state and federal constitutions. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

Liquor license is not a vested right. — A liquor license is a privilege and not property within the meaning of the due process and contract clauses of the constitutions of New Mexico and the nation, and in them licensees have no vested property rights. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953).

Door-to-door solicitation may be prohibited. — Frequent ringing of door bells of private residences by itinerant solicitors may in fact be a nuisance, and a local ordinance prohibiting such activity is not an unconstitutional taking of property. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941).

No denial of due process. — Where human services department executives contracted with managed care organizations in such a way that resulted in pharmacists being paid a dispensing fee of less than the statutory amount of $3.65, the pharmacists were not denied due process by the state because the pharmacists were being paid the dispensing fee under contracts the pharmacists voluntarily entered into with the managed care organizations, and because the violation of the substance of the state law is not a violation of a procedural guarantee. Starko, Inc. v. Gallegos, 2006-NMCA-085, 140 N.M. 136, 140 P.3d 1085, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

No denial of due process at pre-termination stage. — Procedural due process does not require the state to provide an employee with an impartial decisionmaker at the pre-termination stage of proceedings, as long as the employee is given access to a neutral post-termination tribunal that can resolve charges of improper motive. Wood v. City of Alamogordo, 2015-NMCA-059.

Where plaintiff employee of the Alamogordo department of public safety elected early retirement rather than being terminated from his employment when he became the subject of domestic abuse allegations, plaintiff’s procedural due process rights were not violated even though his employer made statements demonstrating bias, because plaintiff was not entitled to an impartial decisionmaker at the pre-termination stage and plaintiff’s employer was the person in the best position to know the charges against plaintiff and whether termination was warranted. Wood v. City of Alamogordo, 2015-NMCA-059.

No denial of procedural due process. — Where plaintiff, who was a certified nurse aide, was terminated by a health care facility for abusing residents of the facility; the department of health notified plaintiff that it had found the allegation to be valid; a hearing officer found that plaintiff had abused residents of the facility; the secretary of the department reviewed the hearing officers' report and ordered that plaintiff's name be placed on the nurse registry, effectively ending plaintiff's ability to find employment as a certified nurse aide; the department's regulations applicable to employees required a determination of the severity of abuse for purposes of deciding if an employee was to be placed on the registry; the regulations applicable to nurse aides did not require a determination of the severity of abuse and defined "abuse" to include conduct likely to cause harm to residents; and plaintiff claimed that plaintiff had been denied procedural due process because the regulations did not provide for an assessment of the severity of the alleged abuse or the impact of the abuse on the residents which created a risk of erroneous deprivation of plaintiff's property interest in continuing employment as a nurse aide, the regulations did not deprive plaintiff of procedural due process because the definition of "abuse" was sufficiently specific to put plaintiff on notice of the conduct that constituted abuse and plaintiff's conduct underwent three stages of review before the finding of abuse was placed on the registry. Victor v. N.M. Dep't of Health, 2014-NMCA-012.

D. TAXATION.

Notice as to the amount of taxation is an essential due process requirement in the collection of property taxes. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), rev'd, 89 N.M. 547, 555 P.2d 142 (1976).

The guarantee against the taking of property without due process of law, in taxation proceedings, has to do with the essentials of taxation only. All other matters are for the legislature, subject only to the principle that the taxpayer must have notice and opportunity to be heard as to the amount of the charge, either before or after the tax lien is fixed. Maxwell v. Page, 23 N.M. 356, 168 P. 492, 5 A.L.R. 155 (1917).

Due process does not require regulations listing procedures and methods of valuation. — Taxpayer was not denied due process because the former property tax department did not adopt regulations that listed the procedures to be followed and identified the methods of valuation in general use by the department and the applicable factors to be included in determining the value of property, since the amended statute did not require regulations, and taxpayer had the right of discovery by deposition of all the facts necessary to defend the assessed valuation of its property. Peterson Properties v. Valencia Cnty. Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

Evidence as to one of two valuations methods may be excluded. — Where former 72-29-5 B, 1953 Comp., fixed two methods of determining market value, namely sales of comparable property and the application of generally accepted appraisal techniques, taxpayer's offer of evidence of a valuation of comparable property was not relevant and

exclusion of such evidence did not deny taxpayer of due process. Peterson Properties v. Valencia Cnty. Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

Distinction may be made in assessing subdivided and unsubdivided agricultural land. — Distinction drawn by former 72-2-14.1, 1953 Comp., between subdivided and unsubdivided agricultural land, for tax valuation purposes, did not offend N.M. Const., art. VIII, § 1, and did not violate due process. Property Appraisal Dep't v. Ransom, 84 N.M. 637, 506 P.2d 794 (Ct. App. 1973).

Due process not violated by tax officials. — Taxation and revenue department did not violate taxpayer's right to due process by: (1) making an assessment before the taxpayer provided pertinent records; (2) targeting the taxpayer because it had no history of reporting compensating taxes; and (3) delaying 18 months from the time of an audit notice to the time of the field audit. Vivigen, Inc. v. Minzner, 117 N.M. 224, 870 P.2d 1382 (Ct. App. 1994).

Reasonable classifications in imposing privilege or excise taxes are permissible. — Reasonable classifications allowing the imposition of privilege taxes by the legislature does not deny equal protection or due process. Sunset Package Store, Inc. v. City of Carlsbad, 79 N.M. 260, 442 P.2d 572 (1968) (municipal license tax on sellers of alcoholic liquors).

It is for the legislature to adopt classifications for the imposition of excise taxes as it may deem proper, and any reasonable classification cannot be held to deny equal protection or due process. Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958).

Taxes on gasoline sales by both city and state are constitutional. — Former Municipal Code sections (Laws 1931, ch. 159) authorizing municipalities to levy tax on gasoline sales in addition to the state excise tax were not obnoxious to due process or equal protection or any other provision of the constitution as double taxation. Cont'l Oil Co. v. City of Santa Fe, 36 N.M. 343, 15 P.2d 667 (1932).

Taxation of dividends from foreign subsidiaries. — As relevant to the right of a state to tax dividends from foreign subsidiaries, due process requires that the income attributed to a state for tax purposes be rationally related to values connected with the taxing state. F.W. Woolworth Co. v. Taxation & Revenue Dep't, 458 U.S. 354, 102 S. Ct. 3128, 73 L. Ed. 2d 819, reh'g denied, 459 U.S. 961, 103 S. Ct. 274, 74 L. Ed. 2d 213 (1982).

State may take property for failure to pay taxes. — When the requirements of notice and hearing have been met, there is no denial of due process where the title to property is taken by the state for failure of the taxpayer to pay taxes, and this is particularly true when there has been a failure to redeem within the period of grace allowed therefor. State v. Thomson, 79 N.M. 748, 449 P.2d 656 (1969).

It is not a taking of property without due process to deed property to state after a delinquent tax sale. Yates v. Hawkins, 46 N.M. 249, 126 P.2d 476 (1942).

Notice of tax sale. — When the state taxation and revenue division holds a tax sale, that is a taking of property by the government, and the notice of such taking must comply with minimum due process standards under the United States and New Mexico constitutions. Patrick v. Rice, 112 N.M. 285, 814 P.2d 463 (Ct. App.), cert. denied, 112 N.M. 308, 815 P.2d 161 (1991).

Notice of tax sale was constitutionally inadequate where, although the state taxation and revenue division complied with statutory notice requirements, it failed to conduct a diligent search for the taxpayers' reasonably ascertainable new address. Patrick v. Rice, 112 N.M. 285, 814 P.2d 463 (Ct. App.), cert. denied, 112 N.M. 308, 815 P.2d 161 (1991).

The notice of a tax sale was constitutionally inadequate under both the United States and New Mexico constitutions, since the notice was mailed only to the taxpayer's old address, the notice was returned with a stamp indicating that the forwarding address had expired, and the new location of the taxpayer was reasonably ascertainable since she had submitted a change of address to the county assessor. Hoffman v. State Taxation & Revenue Dep't, 117 N.M. 263, 871 P.2d 27 (Ct. App. 1994).

Notice to parties affected by tax sale. — Due process requires that the state must provide notice of sale to parties whose interest in property would be affected by a tax sale, as long as that information is reasonably ascertainable. Brown v. Greig, 106 N.M. 202, 740 P.2d 1186 (Ct. App.), cert. denied, 106 N.M. 174, 740 P.2d 1158 (1987).

Where county tax officials and the property tax division were placed on notice that notices to a taxpayer were returned as undeliverable, but they did not check the estate tax records on file in the division's office, which would have indicated that the taxpayer had died and that a personal representative of the decedent's estate had been appointed, along with sufficient information whereby the name and address of the representative was readily ascertainable, the failure of the division to notify the representative invalidated the subsequent tax sale. Fulton v. Cornelius, 107 N.M. 362, 758 P.2d 312 (Ct. App. 1988).

E. NOTICE OF JUDICIAL AND ADMINISTRATIVE PROCEEDINGS.

Failure to provide notice of dates of noncompliance with court order. — Where, in a divorce action, the court entered an order which established the husband’s periods of responsibility with the party’s child, the husband filed a motion for an order to show cause why the wife should not be held in contempt for refusing to comply with the court’s order on specific dates; at the hearing on the order to show cause, the husband asserted that the wife had refused to comply with the court’s order on additional dates that were not included in the husband’s motion; the wife was not provided with notice prior to the hearing of the additional dates of noncompliance; and the district court found

the wife in contempt for failing to comply with the court's order on the additional dates, the wife's due process right to notice was violated and the district court erred when it held the wife in contempt for failing to comply with the scheduling order. Papatheofanis v. Allen, 2009-NMCA-084, 146 N.M. 840, 215 P.3d 778.

Notice of proceeding on oil well spacing increase application. — A proceeding on an oil and gas estate lessee's application for an increase in oil well spacing was adjudicatory, and the lessor was entitled to actual notice under the due process requirements of the New Mexico and United States constitutions. Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 817 P.2d 721 (1991).

Service of process statute may be applied retroactively. — Service of process statute is procedural in nature, and retrospective application does not affect substantial rights in violation of the constitution. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Erroneous decision does not alone violate due process. — State cannot be deemed to have violated due process simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. State v. Orfanakis, 22 N.M. 107, 159 P. 674 (1916).

All affected by decree must have notice and hearing. — Due process requires that all who may be bound or affected by a decree are entitled to notice and hearing, so that they may have their day in court. State ex rel. Reynolds v. Lewis, 84 N.M. 768, 508 P.2d 577 (1973); State ex rel. Reynolds v. Allman, 78 N.M. 1, 427 P.2d 886 (1967); City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (1962).

Lack of notice or hearing denies due process. — Court denied attorney due process of law by entering the judgment of contempt 26 days after the events involved, without notice or hearing. Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974), overruled by State v. Stout, 100 N.M. 472, 672 P.2d 645 (1983).

Under former juvenile code father ordered to attend daughter's delinquency hearing as a witness was denied due process when he was ordered at that hearing to pay support, since he had neither been advised that a judgment might be rendered against him, nor given opportunity to be heard. In re Downs, 82 N.M. 319, 481 P.2d 107 (1971).

The right to enjoin a party from seeking equitable relief in another court may be exercised in a proper case by a court having jurisdiction in order that its processes not be frustrated and to give complete relief, but it was error for the court in the instant case, without application or hearing, to restrain the appellant from proceeding in any other action in any other court as he may be advised under the circumstances disclosed by the record. Porter v. Robert Porter & Sons, 68 N.M. 97, 359 P.2d 134 (1961) (not deciding whether any other circumstances would make injunction proper).

A proposed plan of distribution of community grant land disclosed a pronounced absence of primary and elemental concepts of due process and equal protection of the

laws, in violation of constitutional guaranties existing in favor of owners of the beneficial interest in the common lands of the grant, where no appearance was entered by anyone representing absent "heirs", there was no authorization of the published notice nor compliance with the rules of civil procedure as to publication and no provision was made for determining who were the true owners or their "heirs". Armijo v. Town of Atrisco, 62 N.M. 440, 312 P.2d 91 (1957).

Failure to give notice pursuant to Rule 55(b), N.M.R. Civ. P., (now Rule 1-055 B NMRA) providing for entry of a default judgment, coupled with the giving of a default judgment without hearing or notice of hearing, when matters stood at issue, constitutes a violation of the due process clause of this section. Adams & McGahey v. Neill, 58 N.M. 782, 276 P.2d 913 (1954).

Lack of notice of default judgment. — A district court is not required by Rule 1-055(B), or by due process of law to set aside for lack of notice default judgments entered against a defendant who failed to appear in the action after being personally served with process. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Notice of damages hearing. — Having failed to appear and to put matters in issue, defendant was not entitled to notice of the damages hearing on constitutional grounds. Rodriguez v. Conant, 105 N.M. 746, 737 P.2d 527 (1987).

Prejudgment taking of property without notice and hearing is unconstitutional. — Former New Mexico replevin statutes, insofar as they provided for a prejudgment taking of property without notice and hearing, were unconstitutional as a violation of the constitutional prohibition of taking property without due process of law. Montoya v. Blackhurst, 84 N.M. 91, 500 P.2d 176 (1972).

Modification of judgment not sought or consented to. — Notice and a fair hearing must be afforded both parties to meet the requirements of due process, and therefore a court cannot modify a judgment when neither party has sought such relief and the issue has not been implicitly or explicitly consented to by the parties. Where the husband did not seek a modification of alimony, and neither party consented to a modification, the trial court's improper modification of future alimony was reversible error. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

Embodied in the term "procedural due process" is the opportunity to be heard and to present any defense. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App.), rev'd, 89 N.M. 547, 555 P.2d 142 (1976).

Notice and hearing must be provided. — Laws relating to community ditches (Laws 1915 §§ 5739 to 5743) were unconstitutional in that they made no provision for notice to owner of meeting of appraisers for purpose of fixing damages, nor for opportunity to be heard thereon. Janes v. West Puerto de Luna Community Ditch, 23 N.M. 495, 169 P. 309 (1917).

Statute may give adequate constructive notice. — A statute (Laws 1913, ch. 84, § 13) which fixed the time at which the state board of equalization should meet and which gave it power to increase or decrease values without giving actual notice to the persons affected thereby was constructive notice of legal or lawful action taken. W.S. Land & Cattle Co. v. McBridge, 28 N.M. 437, 214 P. 576 (1923).

F. JUDICIAL AND ADMINISTRATIVE PROCEEDINGS.

Amount of punitive damages. — Where the nineteen-year-old decedent backed into an unfenced, unprotected natural gas wellhead operated by the defendant and was burned to death and the defendant knew that there was a hazard of someone colliding with the wellhead, knew that if that happened excruciating bodily harm and death could result, knew that the well site was in a highly traveled area, and knew that erecting a barricade or fence would prevent the hazard, but chose not to barricade the well site, the defendant's conduct evinced indifference and a reckless disregard for the safety of the public that warranted significant punitive damages and the ratio of punitive damages to compensatory damages of 6.76 to 1 did not violate due process. Jolley v. Energen Resources Corp., 2008-NMCA-164, 145 N.M. 350, 198 P.3d 376, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124, cert. denied, 556 U.S. 1129, 129 S. Ct. 1633, 173 L. Ed. 2d 998 (2009).

An accused student does not have a constitutional right to cross-examine student accusers in a school disciplinary proceeding. Scanlon v. Las Cruces Pub. Schs., 2007-NMCA-150, 143 N.M. 48, 172 P.3d 185.

Person affected by class action. — Due process under both state and federal constitutions requires that a person affected by a class action be given notice of the action, and the absence of such notice requires a dismissal of the complaint. Eastham v. Public Employees' Retirement Ass'n Bd., 89 N.M. 399, 553 P.2d 679 (1976).

Liberty or property may not be taken unfairly. — Under due process every citizen is guaranteed that his liberty or property will not be taken from him unfairly. It also insures that he will be informed of any claim against him and will have a chance to present his side of the case. In re Downs, 82 N.M. 319, 481 P.2d 107 (1971).

Imposition of sanctions for failure to comply with discovery orders. — Where a party has been warned that failure to comply with the court's discovery orders may result in the imposition of sanctions under Rule 1-037B, N.M.R. Civ. P., and where the court, pursuant to Rule 1-043C, N.M.R. Civ. P., has determined that an evidentiary hearing under the circumstances is not necessary before ruling on a motion to impose sanctions, the imposition of such sanctions does not amount to a denial of due process. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231, 26 A.L.R. 4th 705 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

It is only where the sanction invoked is more stern than reasonably necessary, so as to rise to the level of a reprisal, that a denial of due process results. United Nuclear Corp.

v. General Atomic Co., 96 N.M. 155, 629 P.2d 231, 26 A.L.R. 4th 705 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Opportunity to present proof on motion to reopen water rights adjudication is necessary. — Unless it can be said that appellants had an opportunity to present proof and failed to do so, or that their motions to reopen the adjudication of their water rights showed a lack of any possible merit on its face, there can be no question that hearing and overruling appellants' motions does not amount to a complete determination of the issues between the parties so as to satisfy the requirements of due process. State ex rel. Reynolds v. Lewis, 84 N.M. 768, 508 P.2d 577 (1973); State v. Allman, 78 N.M. 1, 427 P.2d 886 (1967).

Seeking change of custody implicitly involves change of support. — The husband's action for a change of custody implicitly involved the consideration of future child support if a change of custody were made, and although it would have been better practice to plead for modification of child support when seeking a change of custody, failure to do so did not preclude consideration of the issue on due process grounds, since the questions of change of custody and child support are so inextricably related. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

There was no violation of due process at a change of custody hearing where the trial court first heard the husband's evidence regarding custody, including the testimony of the wife as a hostile witness, the wife's attorney extensively cross-examined the husband, and although the wife's attorney had waived his right to cross-examine the wife when she was called as a hostile witness by the husband, her testimony as to custody surfaced in her counterclaim for contempt; a full and fair opportunity to be heard was afforded both parties in this case. Corliss v. Corliss, 89 N.M. 235, 549 P.2d 1070 (1976).

Neglect and abuse proceedings must be conducted in a manner that affords the parents constitutional due process. The opportunity to confront witnesses in a civil neglect and abuse proceeding is not an absolute right. Instead, the right requires that parents be given a reasonable opportunity to confront and cross-examine a witness, including a child witness. Campos v. Murray, 2006-NMSC-020, 139 N.M. 454, 134 P.3d 741.

Admission of child's hearsay statements in abuse and neglect proceeding. — Whether parents were given due process depends on whether the procedures used for admission of a child's hearsay statements increased the risk of an erroneous finding of abuse, which could lead to the deprivation of the parents' fundamental right to maintain their relationship with the child and whether additional procedural safeguards would eliminate or lower that risk. Campos v. Murray, 2006-NMSC-020, 139 N.M. 454, 134 P.3d 741.

Due process required during hearing on motion for writ of ne exeat. — Due process is required during a hearing on a motion for writ of ne exeat, and is provided

when a defendant has timely notice, a reasonable opportunity to be heard, a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence, representation by counsel, and a hearing before an impartial decisionmaker. Atherton v. Gopin, 2015-NMCA-087.

Following entry of summary judgment for over $2,500,000 against defendant for violations of the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq., the district court issued a writ of ne exeat and ordered defendant to post a ne exeat bond in the amount of $100,000 based on evidence that defendant was about to remove assets from the jurisdiction of the district court, and following a hearing where the district court found that there was evidence that defendant had engaged in complex financial transactions for the purpose of preventing collection of the judgment, that defendant had dissipated assets during the pendency of the case, including the sale of property, and that defendant, who failed to appear at the hearing, had previously testified under oath that he would attend all future hearings in the case and would not flee the jurisdiction, the district court increased the ne exeat bond to $500,000 to prevent further dissipation of assets within the jurisdiction of the court and to secure defendant's appearance at future proceedings. Defendant's right to due process of law was not violated where defendant filed a response in opposition to the motion for writ of ne exeat, in which he disputed that he was dissipating assets from the state, where defendant had notice of and was present and represented by counsel at the hearing on the initial motion, where there was no indication in the record that defendant was denied the opportunity to present witnesses at the hearing, and where defendant submitted exhibits for the district court's review. Atherton v. Gopin, 2015-NMCA-087.

Workers' Compensation Act provision requiring use of the American medical association's guide to evaluate impairment is not violative of due process since it is not arbitrary and ensures a fair and impartial determination of disability. Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250.

Farm and ranch laborers exclusion does not survive rational basis review. — Section 52-1-6(A) NMSA 1978, which excludes farm and ranch laborers from the provisions of the Workers' Compensation Act, creates differential treatment among injured farm and ranch laborers from other employees of agricultural employers, and such a classification is not supported by evidence in the record nor a firm legal rationale sufficient to establish a rational relationship between the exclusion and the purported interests of cost savings to the agricultural industry, the unique administrative challenges created by farm and ranch workers, the unique economic aspects of agriculture, the protection of New Mexico's farming and ranching traditions, or in the application of tort law for injuries suffered by farm and ranch laborers, while any other workplace injury suffered by an employee of an agricultural employer goes through the workers' compensation system. Rodriguez v. Brand West Dairy, 2016-NMSC-029, *aff'g* 2015-NMCA-097, 356 P.3d 546.

Appointment of counsel not always required. — Due process does not require the appointment of counsel in every case where an indigent faces the possibility of

imprisonment if found to be in civil contempt for failure to comply with an order of support. State ex rel. Dep't of Human Servs. v. Rael, 97 N.M. 640, 642 P.2d 1099 (1982).

State-created procedure cannot vitiate right of access to courts. — When a plaintiff is required to resort to a state-created procedure, the procedure must not vitiate his right of access to the courts. Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983).

Failure to follow constitutional requirements in zone changes. — Where landowners applied to the county commission for a zone change; one of the county commissioners was a first cousin to one of the landowners and the county commissioner refused to recuse from voting on the application, the kinship-based disqualification in Article VI, Section 18 of the New Mexico constitution applied to the county commissioner and the participation of the county commission in the adjudication of the zone change denied petitioners, who opposed the zone change, due process. Los Chavez Cmty. Ass'n v. Valencia Cnty., 2012-NMCA-044, 277 P.3d 475.

Failure to follow statutory procedure in neglect and abuse proceeding denied respondent due process. — Where the parent was charged with neglect and abandonment of the parent's children; at the end of the hearing, after all evidence had been presented, CYFD asserted in its closing argument that there was sufficient evidence to support a finding of abuse; the court considered CYFD's argument as a motion to amend to conform to the evidence pursuant to Rule 1-015 NMRA and granted the motion to amend the petition to include a claim of abuse; the court did not hear the issue of abuse; and the court found that the parent neglected and abused the children, the parent's due process rights were violated by the amendment procedure because the court erred by relying on Rule 1-015 NMRA and by not holding a hearing on the abuse issue as required by Section 32A-1-18 NMSA 1978. State ex rel. CYFD v. Steve C., 2012-NMCA-045, 277 P.3d 484.

Failure to follow state statutory procedure does not necessarily amount to a violation of due process. Bird v. Lankford, 116 N.M. 408, 862 P.2d 1267 (Ct. App. 1993).

Competency determinations implicate due process. — Competency determinations implicate due process rights. A court violates a defendant's due process rights when it fails to inquire into competency after the defendant presents enough evidence to entitle him to a hearing on the issue. A hearing on the defendant's competency requires adequate notice, an adversarial hearing before an independent decision-maker, and a written statement from the fact finder clarifying the evidence relied upon and reasons for the decision. State v. Gutierrez, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

Where defendant was charged with numerous counts of attempted first-degree murder and other serious charges related to an incident where he trapped four adults and two children in a trailer and threatened them with firearms over several hours, the initial district judge, following a competency hearing, found that defendant was not competent to stand trial, that he was dangerous, and that he was not likely to become competent;

defendant was then provided a hearing before a different district court judge for the sole purpose of determining whether defendant had mental retardation; the second district court judge found, on her own motion, without notice, and without any argument from the state, that defendant had been proved competent beyond a reasonable doubt; defendant was denied his procedural right to effective and timely notice and the opportunity to present arguments and evidence before having a decision rendered against him as to competency; moreover the district judge, in failing to examine the factors for determining competency, never provided defendant with any justification for the decision and subsequent actions. State v. Gutierrez, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

The prosecution of a defendant who is incompetent to stand trial violates due process. — Where defendant was tried and convicted of numerous counts of attempted first-degree murder and other serious charges related to an incident where he trapped four adults and two children in a trailer and threatened them with firearms over several hours, the initial district judge found, following a competency hearing prior to trial, that defendant was not competent to stand trial, that he was dangerous, and that he was not likely to become competent; defendant was later provided a hearing before a different district judge for the sole purpose of determining whether defendant had mental retardation; the second district court judge found that defendant had been proved competent beyond a reasonable doubt without making any findings as to whether defendant understood the nature and significance of the proceedings, whether defendant had a factual understanding of the charges or whether defendant was able to assist in his own defense, and, without any evidence presented regarding whether defendant had made or could make progress toward competency, disregarded the prior ruling made by the initial district judge that it was unlikely defendant would attain competency in the future; the evidence presented at the mental retardation hearing was insufficient to rebut the existing presumption that defendant was incompetent to stand trial. Defendant's trial violated due process. State v. Gutierrez, 2015-NMCA-082, cert. denied, 2015-NMCERT-008.

Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law; a litigant must be given a full opportunity to be heard with all rights related thereto. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), rev'd, 89 N.M. 547, 555 P.2d 142 (1976).

Under the Declaratory Judgment Act, an actual controversy must exist to confer jurisdiction on the district courts. — Under the Declaratory Judgment Act, 44-6-1 through 44-6-15 NMSA 1978, courts in New Mexico have jurisdiction to adjudicate and declare rights and legal relations only in cases of actual controversy. An actual controversy is not present unless the issue raised by the litigant is ripe for judicial determination and the litigant has standing. AFSCME v. Board of Cnty. Comm'rs of Bernalillo Cnty., 2016-NMSC-017, vacating 2015-NMCA-070, 352 P.3d 682.

Where union sought to file a prohibited practice claim with the public employees labor relations board rather than with the county labor board, as designated by the labor-

management relations ordinances, claiming that filing with the county labor board would deprive the union and its members of due process because the county labor board's decisions are subject to a biased review by the county commission, the union did not establish the existence of an actual controversy, because the fact that the due process injury would materialize only if the county labor board found a prohibited practice, giving the county commission the right to review, the union failed to satisfy the justiciability requirements of ripeness and the injury-in-fact component of standing, and therefore the district court lacked jurisdiction to decide the merits of the action. AFSCME v. Board of Cnty. Comm'rs of Bernalillo Cnty., 2016-NMSC-017, vacating 2015-NMCA-070, 352 P.3d 682.

Procedural due process in administrative proceedings. — Procedural due process requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case. The inquiry is not whether the tribunal is actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average person sitting as a judge to try the case with bias for or against any issue presented. There is a presumption that administrative adjudicators perform their duties with honesty and integrity. The burden of overcoming the presumption of impartiality rests on the party making the assertion of bias. AFSCME v. Board of Cnty. Comm'rs of Bernalillo Cnty., 2015-NMCA-070, cert. granted, 2015-NMCERT-006.

County's dispute resolution procedures do not violate due process rights. — Where plaintiffs, the exclusive bargaining representatives for unionized public employees of Bernalillo county, claimed that the county's dispute resolution procedures violated the employees' procedural due process rights to a fair and impartial tribunal because the county commission has a vested interest in the adjudication of disputes and is inclined to favor management personnel over employees based on the facts that the county commission appoints the county manager and the county commission is not bound by the recommendations of the labor board in reviewing prohibited practice complaints, the court of appeals held that the county's dispute resolution procedures do not violate plaintiffs' due process rights to a fair and impartial tribunal because plaintiffs failed to present any evidence that the county's oversight over the county manager indicated an interest sufficient to presume that the county commission is biased in favor of management personnel. AFSCME v. Board of Cnty. Comm'rs of Bernalillo Cnty., 2015-NMCA-070, cert. granted, 2015-NMCERT-006.

Adoption of conclusions from a previous proceeding denied due process. — Where the PRC entered an order in a case that determined the price floor for promotional offerings by the utility intervenor; in a second case, the PRC incorporated findings from the first case into the order entered in the second case; the findings were based on evidence in the first case, and appellant was a party to the second case but not to the first case, appellant's due process rights were violated because appellant was denied the opportunity to present evidence and to examine and cross-examine witnesses regarding the PRC's decision in the first case. TW Telecom of N.M., LLC v. New Mexico Pub. Reg. Comm'n, 2011-NMSC-029, 150 N.M. 12, 256 P.3d 24.

The essence of justice is largely procedural. — Procedural fairness and regularity are the indispensable essence of liberty. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), rev'd, 89 N.M. 547, 555 P.2d 142 (1976).

Principles of fair and impartial tribunal apply to administrative proceedings as well as to trials; in fact, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication, where many of the customary safeguards affiliated with court proceedings have been relaxed in the interest of expedition and a supposed administrative efficiency. Reid v. New Mexico Bd. of Exam'rs in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

Revocation of teacher's license did not violate due process. — Where plaintiff was charged with engaging in inappropriate and improper sexual behavior with a fourteen-year-old victim at a charter school; a hearing officer found that the charges against plaintiff had not been proven by a preponderance of the evidence, based in part on the credibility of the witnesses, and recommended that the disciplinary action against plaintiff be dismissed; the secretary of public education reviewed the record and concluded that a preponderance of the evidence warranted revocation; the secretary's conclusions were supported by the record and were based on the secretary's analysis of the facts presented by the witnesses, the contradictions in the facts, and the victim's written statement, plaintiff was not denied due process by the fact that the secretary failed to observe the witnesses' demeanor or by the secretary's failure to defer to the hearing officer's proposed findings of fact. Skowronski v. New Mexico Pub. Educ. Dep't, 2013-NMCA-034, 298 P.3d 469, cert. granted, 2013-NMCERT-003.

Trier of fact must be disinterested. — At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case, and the inquiry is not whether he is actually biased or prejudiced but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. Reid v. New Mexico Bd. of Exam'rs in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

Failure to disqualify biased trier of fact denies due process of law. Reid v. New Mexico Bd. of Exam'rs in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

Any utilization of 61-1-7 NMSA 1978 which has the effect of allowing an administrative hearing, punitive in nature, to be conducted by a patently prejudiced tribunal must necessarily violate due process. Reid v. New Mexico Bd. of Exam'rs in Optometry, 92 N.M. 414, 589 P.2d 198 (1979).

Procedural due process embodies right to present witnesses. — A notion of fairness is included within the concept of procedural due process, and accordingly in a hearing before an administrative agency, the agency must examine both sides of the controversy taking and weighing the evidence that is offered and finding facts based on a consideration of the evidence, in order to fairly protect the interests and rights of all

who are involved; a refusal to allow witnesses to be called is a denial of procedural due process. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), rev'd, 89 N.M. 547, 555 P.2d 142 (1976).

Where by unlawfully excluding evidence and denying the right to discovery, the county valuation protests boards curtail taxpayers' right to be heard and to present any defense, and in so doing, they deprived appellants of their constitutionally guaranteed right to procedural due process, taxpayers were entitled to new hearings, at which evidence of valuation of comparable properties or other properties of the same class would be admissible in evidence and would be weighed by the boards in arriving at their decisions. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), rev'd, 89 N.M. 547, 555 P.2d 142 (1976).

Published procedures must be followed. — By failing to comply with its own published procedures, specifically by failing to give reasons for the proposed change, the environmental planning commission deprived petitioner of notice and the opportunity to prepare an adequate defense to the proposed downzoning, and this was a denial of procedural due process. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

The environmental planning commission deprived petitioner of his right to a meaningful and impartial decision-maker by hearing its own application without providing him with the protection of the procedural safeguards implicit in compliance with existing standards, and this was a denial of procedural due process. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

The city's environmental planning commission acted beyond its authority in initiating the zone change request, contrary to its own established procedures for accepting zone change applications, and as a consequence, denied petitioner, in violation of the requirements of due process, a meaningful and impartial hearing on his properly submitted zone change application; the same result is required even if the city planning department initiated the zone change application, since the planning department acted at the express direction of the planning commission, and, in any event, the application was made without the concurrence of any of the landowners whose interests were involved. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

Even though a landowner has no vested right in a particular zoning classification for his property and his property is subject to rezoning, he still has a right to rely on the requirement that anyone seeking to rezone his property to a more restrictive zoning must show that either there was a mistake in the original zoning or that a substantial change has occurred in the character of the neighborhood since the original zoning to such an extent that the reclassification or change ought to be made, and before a piecemeal zoning change is sought, these principles must be taken into account, particularly when the zoning change of a piece of property is sought by the zoning authority instead of by the owner of the property affected. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

Temporary restraint of apparently dangerous and insane person is proper. — Temporary restraint of an apparently insane person, without legal process, prior to institution of proceedings to determine his mental condition, is not improper if his being at large appears dangerous to himself or others. Ex parte Romero, 51 N.M. 201, 181 P.2d 811 (1947).

Statute requiring or authorizing detention may violate due process. — Statute which provided that a person received at a hospital for voluntary commitment because of some mental disorder shall be held for not more than 10 days after he gives notice in writing of his desire to leave (Laws 1939, ch. 43, § 1, now repealed) violated due process, as did provision that a person may be committed for up to 30 days on the certificate of a physician (Laws 1939, ch. 44, § 2, impliedly repealed by Laws 1941, ch. 75, § 3). Ex parte Romero, 51 N.M. 201, 181 P.2d 811 (1947).

Effective treatment, not just custodial care, must be furnished. — Mental illness is not a crime, and thus patients must be afforded some type of effective treatment since their liberty is abridged; mere custodial care is not sufficient. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

Some rights in criminal cases apply to civil commitments. — The civil commitment process, though technically a civil proceeding, has elements of both criminal and civil proceedings, a hybrid procedure, with some of the rights guaranteed to criminal defendants applicable to defendants in commitment hearings; thus, compliance with the due process requirements, as far as the burden of proof in commitment proceedings for the mentally ill is concerned, is mandated. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

Preponderance of evidence standard is unacceptable. — A preponderance of the evidence is definitely constitutionally unacceptable for civil commitment hearings, in view of the fact that fundamental liberties of the patient are so often at stake. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

Clear and convincing proof, not beyond reasonable doubt, suffices. — In the civil commitment situation the interests of the state are pitted against restrictions on the liberty of the individual, in considering whether there exists sufficient state interests to counterbalance the loss of individual liberty; the language of former 34-2-5, 1953 Comp., indicated that the aim of the state is to first protect society from the mentally ill, a manifestation of the state's police power, and also protect the mentally ill from themselves, while at the same time providing care and treatment, as parens patriae. The state's interests are sufficient and the realities of treatment, though not ideal, are adequate to justify subjecting individuals to possible commitment based on a "clear and convincing" standard of proof. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975). See 43-1-2 NMSA 1978 et seq.

Although the highest standard of proof would be desirable, in the civil commitment process, proof beyond a reasonable doubt is too stringent a standard to be applied;

proof that is clear, cogent and convincing is the highest standard of proof possible at the current state of the medical arts. For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true. In re Valdez, 88 N.M. 338, 540 P.2d 818 (1975).

G. SPECIFIC STATUTES AND REGULATIONS.

Cap on medical malpractice damages does not violate due process. — The cap on medical malpractice damages in 41-5-6 NMSA 1978 does not violate the due process clause of the United States Constitution. Salopek v. Friedman, 2013-NMCA-087.

The definitions of "convenience store" and "convenience goods" in the environmental improvement board regulations addressing violence against convenience store workers are not unconstitutionally vague. New Mexico Petroleum Marketers Assn. v. New Mexico Envtl. Improvement Bd. 2007-NMCA-060, 141 N.M. 678, 160 P.3d 587.

Rational basis level of review. — No fundamental rights are implicated by the application of the Albuquerque Sex Offender Registration and Notification Act ordinance and a person challenging the ordinance has the burden of showing that the ordinance is not rationally related to a legitimate governmental interest, or the absence of a firm legal rationale for the challenged provisions. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Substantive due process challenge. — Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty; the appropriate level of scrutiny of a statute challenged under substantive due process grounds depends on the nature and importance of the individual interests asserted and the classifications created by the statute. State v. Murillo, 2015-NMCA-046.

Physician aid in dying is not a fundamental liberty interest protected by the due process clause. — Where petitioners, two doctors and their patient, sought declaratory and injunctive relief to the effect that either 30-2-4 NMSA 1978, New Mexico's criminal statute prohibiting assisted suicide, did not apply to the conduct defined by petitioners as physician aid in dying, or even if the statute did apply to physician aid in dying, such an application would be unconstitutional, petitioners failed to establish a fundamental liberty interest protected by the due process clause of the New Mexico constitution, because there is a firm legal rationale behind the interest in protecting the integrity and ethics of the medical profession, the interest in protecting vulnerable groups, including the poor, the elderly, and disabled persons, from abuse, neglect, and mistakes due to the risk of subtle coercion and undue influence in end-of-life situations, and the legitimate concern that recognizing a right to physician aid in dying will lead to voluntary or involuntary euthanasia. Morris v. Brandenburg, 2016-NMSC-027, *aff'g* 2015-NMCA-100, 356 P.3d 564.

Aid in dying is not a fundamental liberty interest protected by the due process clause. — Where plaintiffs, two doctors and their terminally ill patient, sought a court declaration that they cannot be prosecuted under 30-2-4 NMSA 1978, alleging that the statute does not apply to aid in dying, and if it does, such application offends the substantive due process protections afforded by N.M. Const., Art. II, § 18, the district court erred in permanently enjoining the state from enforcing 30-2-4 NMSA 1978, because aid in dying is not a fundamental liberty interest protected by the due process clause of N.M. Const., Art. II, § 18 because aid in dying has not been recognized to exist under the due process clause as have other interests that are embedded in our democratic society; therefore a mentally competent, terminally ill patient's interest in a physician's assistance in dying is not a fundamental liberty interest under the state constitution Morris v. Brandenberg, 2015-NMCA-100, cert. denied, 2015-NMCERT-008.

Due process analysis applied to statute of repose. — The legislature may impose a statutory time deadline for commencing a cause of action as long as a reasonable time is provided for commencing suit. If a plaintiff is left with an unconstitutionally short period of time to file suit within the period of statute of repose, due process is violated. To fall under the due process exception to the statute of repose, the case must be unusual and involve exceptional circumstances resulting in an unusually short period of time within which to file suit. Cahn v. Berryman, 2015-NMCA-078, cert. granted, 2015-NMCERT-007.

Section 41-5-13 NMSA 1978 does not violate due process as applied. — Where plaintiff discovered she had a malpractice claim against defendant ten and one-half months before the statute of repose expired, and during the entire ten and one-half months period of time, the means for discovering defendant's identity were available and within plaintiff's control, plaintiff's due process rights were not violated because the ten and one-half month period was a constitutionally reasonable amount of time for plaintiff to bring her medical malpractice suit against defendant; plaintiff's claims against defendant were barred by 41-5-13 NMSA 1978 when plaintiff filed suit against defendant eleven months after the three-year statute of repose expired. Cahn v. Berryman, 2015-NMCA-078, cert. granted, 2015-NMCERT-007.

Constitutionality of statute making it unlawful to possess a switchblade knife. — Where defendant claimed that prohibiting the possession of switchblade knives violated his right to bear arms guaranteed under U.S. Const., amend. II, as applied to the states under the due process clause of U.S. Const., amend. XIV, the New Mexico court of appeals, applying intermediate scrutiny to 30-7-8 NMSA 1978, held that the statute is not repugnant to the right to bear arms under a federal standard and that defendant's federal substantive due process challenge fails. State v. Murillo, 2015-NMCA-046.

Practice of medicine. — Section 61-6-15 D(27) NMSA 1978, defining "unprofessional or dishonorable conduct" to include "conduct unbecoming in a person licensed to practice medicine, or detrimental to the best interests of the public" is not void for vagueness. McDaniel v. New Mexico Bd. of Med. Exam'rs, 86 N.M. 447, 525 P.2d 374 (1974).

Teachers contracts. — Former 73-12-13, 1953 Comp., relating to teachers' contracts, was held not to violate the constitution as being vague, indefinite or uncertain. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954), superseded by statute, Sanchez v. Board of Educ. of Town of Belen, 68 N.M. 440, 362 P.2d 979 (1961).

Regulations may be flexible without being overbroad. — Regulations adopted under the Environmental Improvement Act (Chapter 74, Article 1 NMSA 1978),legislative justification for which is found in such broadly applied terms as public interest, social well-being, environmental degradation and the like, were required to hold the difficult line between overbreadth or vagueness on the one hand and inflexibility and unworkable restriction on the other, and where the difficulty with rigid standards in the field of environmental regulation was readily apparent, it was held that the terms complained of were capable of reasonable application and were sufficient to limit and define the duties of the individuals and entities which would be governed by them. New Mexico Mun. League, Inc. v. New Mexico Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Regulations adopted pursuant to the Environmental Improvement Act (Chapter 74, Article 1 NMSA 1978) requiring that storage facilities shall be fly proof, rodent proof and leak proof were neither unconstitutionally vague nor impossible of accomplishment. New Mexico Mun. League, Inc. v. New Mexico Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Regulations adopted under the Environmental Improvement Act (Chapter 74, Article 1 NMSA 1978) requiring that any vehicle employed in collection or transportation of waste and refuse be cleaned at such times and in such manner as to prevent offensive odors and unsightliness were not constitutionally repugnant for vagueness. The question to be asked is: what might a reasonable person of average sensibilities consider to be an offensive odor or unsightly condition, and the answer is capable of common understanding. New Mexico Mun. League, Inc. v. New Mexico Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Regulation adopted pursuant to the Environmental Improvement Act (Chapter 74, Article 1 NMSA 1978) which provides that prior to the creation or modification of a system for the collection, transportation or disposal of solid waste the person who is operating or will operate the system shall obtain a registration certificate from the agency, where "modification" is defined as any significant change in the physical characteristics or method of operation of a system for the collection, transportation or disposal of solid waste, was not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Requirements of adequate means to prevent and extinguish fires at sanitary landfill sites and of one or more sanitary landfills or other disposal facilities, except modified landfills, for populations exceeding 3,000 and one or more sanitary landfills or other

disposal facilities, not excluding modified landfills for populations under 3,000 and of those responsible for disposal of waste collected from parks, recreational areas and highway rest areas, "as necessary," found in regulations adopted under the Environmental Improvement Act (Chapter 74, Article 1 NMSA 1978), were not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Envtl. Improvement Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Ninety-day torts claim notice provision constitutional. — The 90-day notice provision of the Tort Claims Act (41-4-1 NMSA 1978 et seq.) does not violate the constitutional right of access to the courts. Fulfilling the legislative purpose requires timely and reasonable notice to a governmental entity of potential claims which are rationally related to legitimate governmental interests in order to: (1) allow investigation of a matter while the evidence is fresh; (2) allow questioning of witnesses; (3) protect against stimulated or aggravated claims; and (4) allow consideration of whether a claim should be paid or not. Powell v. New Mexico State Hwy. & Transp. Dep't, 117 N.M. 415, 872 P.2d 388 (Ct. App.), cert. denied, 117 N.M. 524, 873 P.2d 270 (1994).

There was nothing arbitrary or discriminatory in the Cigarette Fair Trade Practice Act (former 57-2-1 NMSA 1978 et seq.), denying a wholesaler the right to sell below cost to a direct buying retailer but permitting such wholesaler the right to sell below cost to another wholesaler. Rocky Mt. Whsle. Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643 (1961), appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

The Cigarette Fair Trade Practice Act (former 57-2-1 NMSA 1978 et seq.) constituted a reasonable attempt by the state, in the interest of the general welfare, to protect free competition and bore a reasonable relation to the legislative purpose. Rocky Mt. Whsle. Co. v. Ponca Whsle. Mercantile Co., 68 N.M. 228, 360 P.2d 643 (1961), appeal dismissed, 368 U.S. 31, 82 S. Ct. 145, 7 L. Ed. 2d 90 (1961).

Notice of wrongful death claim against governmental entities. — Section 41-4-6 NMSA 1978, which requires those asserting a wrongful death claim against state or local public bodies to provide notice of the claim within six months, does not violate a claimant's equal protection or due process rights. Marrujo v. New Mexico State Hwy. Transp. Dep't, 118 N.M. 753, 887 P.2d 747 (1994).

The right to sue the government is not a fundamental right. — Where doctor sued his employer, the board of regents of the university of New Mexico and the university of New Mexico health sciences center, claiming retaliatory violation of due process, and where doctor argued that the Tort Claims Act (TCA) violated his rights to equal protection and to due process because the TCA violated his fundamental right to access to the courts by denying him the right to sue defendants for monetary damages, the district court did not err in determining that plaintiff’s claim was barred by the TCA in that absent a waiver of immunity under the TCA, a person may not sue the state for damages for violation of a state constitutional right; the right to sue the government for

tort damages is not a fundamental right, and the right of access to the courts does not create a right to unlimited governmental tort liability and does not guarantee the existence of a remedy. Wills v. Board of Regents of the Univ. of N.M., 2015-NMCA-105, cert. denied, 2015-NMCERT-009.

Tort Claims Act statute of limitations. — Where child was eight years old when she was assaulted and statute of limitations required that she file suit by age ten, it was unreasonable as a matter of law to expect the child to comply with the requirements of the statute of limitations at such a young age, and the application of the statute to the child violated her right to due process of law. Campos v. Murray, 2006-NMSC-020, 139 N.M. 454, 134 P.3d 741.

Corporate charter may be amended although character is changed. — Argument that a statute which attempted to change character of a legal entity from that of a corporation for the management of a community land grant to that of a domestic stock corporation was in violation of this section, in that it was an attempt by the legislature to divest the town of its vested rights without due process of law, was without merit since a state, through its police power, could make reasonable regulations of corporations, including alteration or amendment of corporate charters if that power had been duly reserved by the state, as was done in New Mexico. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

Whatever is meant by "sale" and "conveyance" in 49-2-7 NMSA 1978, the section does not include the procedure enacted to change the character of the corporation itself. To hold otherwise would produce the absurd implication that a land grant corporation could have been converted into a domestic stock corporation by 49-2-7 NMSA 1978 even before the enactment of 49-2-18 NMSA 1978. It would also produce a rather unexplainable conflict between the two provisions. Therefore, due process was not denied for failure to follow 49-2-7 NMSA 1978, since 49-2-18 NMSA 1978 was applicable statute. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

Without providing for personal service or absentee voting. — Argument that 49-2-18 NMSA 1978 lacks due process, because of its failure to require personal service or mailing of written notice of the meeting and its failure to provide for absentee voting, was without merit since there is no inherent right in a stockholder of a corporation to vote by proxy, and since reasonable notice and a fair opportunity are given to the "owners and proprietors" of the grant to attend the meeting at which the proposed corporation is considered. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

Compulsory arbitration is constitutional. — The procedures used in judicial tribunals need not be used in compulsory arbitration, so long as the arbitration procedures are sufficient to guarantee a fair proceeding. Therefore, the provisions of 22-10-17.1 NMSA 1978 mandating compulsory arbitration of the grievances of discharged school employees do not violate an employee's right of access to the courts, or right to jury

trial; nor do these provisions unconstitutionally delegate power to a nonjudicial tribunal. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Constitutional regulations and legislation. — Where the former health and social services department determined that plaintiff 's household was ineligible for food stamps, on the grounds that his "net food stamp income" exceeded the maximum allowable and in computing plaintiff 's income the department took into account certain disability insurance benefits which were being paid by the insurer directly to a finance company with whom plaintiff had two loans in accordance with a department regulation defining income to include payments made on behalf of the household by another, it was held that this regulation, as applied, did not deprive plaintiff of due process of law. Huerta v. Health & Social Servs. Dep't, 86 N.M. 480, 525 P.2d 407 (Ct. App. 1974).

The Horse Racing Act (Chapter 60, Article 1 NMSA 1978) and the regulations issued thereunder allowing suspension of a licensed jockey prior to a hearing provide constitutionally adequate due process of law. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

Laws 1939, ch. 197, denying an unlicensed contractor redress in the courts of the state for the collection of compensation due under contract, did not contravene the due process clause or deny equal protection of law as guaranteed by this section. Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955); *see* 60-13-30 NMSA 1978.

Laws 1931, ch. 131, § 1 (72-12-1 NMSA 1978), which declares ownership of underground waters to be in the public, does not violate N.M. Const., art. II, §§ 18 and 20, because patents from the United States issued after 1866, and particularly those issued after Desert Land Act of 1877, conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the act. State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950), appeal dismissed, 341 U.S. 924, 71 S. Ct. 798, 95 L. Ed. 1356 (1951).

Tax upon gasoline and motor fuel, authorized under portion of repealed Municipal Code (Laws 1947, ch. 122) to pay for special street improvement bonds, was not a taking without due process or a denial of equal protection of the laws. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Former 2% privilege tax (1937 amendment to 59-26-31 NMSA 1978) from which certain qualified benefit societies were exempted did not violate the due process and equal protection clauses of this section. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

The clause of the Workmen's Compensation Act (Chapter 52, Article 1 NMSA 1978) making provision for allowance of reasonable attorney's fees, is not unconstitutional as repugnant to the due process and equal protection clauses of the federal constitution or this section. New Mexico State Hwy. Dep't v. Bible, 38 N.M. 372, 34 P.2d 295 (1934).

Laws 1933, ch. 184 (38-3-10 NMSA 1978), as to disqualification of judges, does not deny due process of law or violate this provision. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Sections 73-14-1 to 73-17-24 NMSA 1978, relating to conservancy districts, do not violate the due process clause of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Laws 1903, ch. 42 (repealed), the Provisional Order Improvement Law for the paving of streets and alleys, as amended, did not violate the due process clause of this section. Hodges v. City of Roswell, 31 N.M. 384, 247 P. 310 (1926).

Section 36-1-22 NMSA 1978, permitting attorney general and district attorneys to compromise civil actions in which state or county is party, does not violate the due process and equal protection clauses of this section. State v. State Inv. Co., 30 N.M. 491, 239 P. 741 (1925) (tax suits).

Laws relating to abatement of wasteful artesian wells as nuisances (Laws 1915, §§ 265 to 268) did not violate the due process clause of this section. Eccles v. Ditto, 23 N.M. 235, 167 P. 726, 1918B L.R.A. 126 (1917); *see* 72-13-7 NMSA 1978.

Considered together, the pre- and post-termination procedures of the School Personnel Act (22-10A-27 and 22-10A-28 NMSA 1978) comport with due process requirements. West v. San Jon Bd. of Educ., 2003-NMCA-130, 134 N.M. 498, 79 P.3d 842, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

The limitation on attorney fees in 52-1-54 NMSA 1978 is rationally related to government interest in maximizing worker's award and minimizing litigation costs and does not violate equal protection or substantive due process. Wagner v. AGW Consultants, 2005-NMSC-016, 137 N.M. 734, 114 P.3d 1050.

Unconstitutional legislation. — The portion of the 1972 General Appropriation Act, Laws 1972, ch. 98, § 4 K, providing that no person who was classified as a "nonresident" for tuition purposes upon his initial enrollment in a public institution of higher education in the state, could have his status changed to that of a "resident" for tuition purposes unless he had maintained domicile in the state for a period of not less than one year, during which entire period he had not been enrolled, for as many as six hours, in any quarter or semester, as a student in any such institution, was unreasonable, arbitrary and violated the due process and equal protection clauses of the fourteenth amendment to the federal constitution and of this section. Robertson v. Regents of Univ. of N.M., 350 F. Supp. 100 (D.N.M. 1972).

Section 40-4-33, 1953 Comp. (repealed), concerning seizure and sale as estrays of calves or colts confined apart from their mothers and of confined freshly branded animals, was, prior to its amendment by Laws 1919, ch. 52, § 1, unconstitutional as

authorizing the taking of private property without due process. Lacey v. Lemmons, 22 N.M. 54, 159 P. 949, 1917A L.R.A. 1185 (1916).

Durational limits on benefits upheld. — A regulation imposing a 12-month durational limitation on the receipt of general assistance benefits did not violate the due process clause of the New Mexico constitution. Although the right to receive public assistance benefits is important, such right is a matter of statutory entitlement and is not explicitly or implicitly guaranteed by the New Mexico constitution. Moreover, the durational limit was rationally related to the human services department's purpose of conserving limited funds and was not retroactive merely because it utilized the characteristics of a defined group to describe the persons that the statute would affect, even though the defining characteristics arose before the regulation became effective. Howell v. Heim, 118 N.M. 500, 882 P.2d 541 (1994).

Unemployment benefits are a property interest protected by due process. — New Mexico's Unemployment Compensation Law, 51-1-1 to 51-1-59 NMSA 1978, creates a constitutionally protected property interest in unemployment benefits. N.M. Dep't of Workforce Solutions v. Garduño, 2016-NMSC-002, *rev'g* 2014-NMCA-050, 324 P.3d 377.

Where employee was initially determined to be eligible for unemployment benefits and where she continued to receive benefits during the appeal process, but was unaware that her employer had appealed the award of unemployment benefits because she did not receive notice of the appeal until the department of workforce solutions sent a notice of hearing 130 days after the initial determination of eligibility, the late notice did violate due process because employee was not deprived of an opportunity to be heard, the late notice did not prevent employee from participating in the appeal, and when employee was initially determined to be eligible for benefits, she was given notice of the potential consequences that she may have to pay back benefits to which she was not entitled. N.M. Dep't of Workforce Solutions v. Garduño, 2016-NMSC-002, *rev'g* 2014-NMCA-050, 324 P.3d 377.

H. CRIMINAL CASES.

1. IN GENERAL.

Suppression of statement made in police interview. — Where defendant, who was charged with criminal sexual contact of a minor, sought to suppress statements defendant made at a police interview; defendant voluntarily agreed to an interview and to permit a police officer to take defendant to the police station; at the interview, the officer informed defendant that defendant had not been charged with any crime, defendant was not under arrest; and defendant was free to leave at any time; the officer recited the Miranda warnings which defendant indicated that defendant understood; the officer presented defendant with a waiver form, reviewed it orally, and told defendant that defendant did not have to talk; and defendant signed the waiver, defendant's fifth amendment rights were not violated, defendant's statements were voluntary, and the

district court did not err in denying defendant's motion to suppress. State v. Garcia, 2013-NMCA-064, 302 P.3d 111, cert. denied, 2013-NMCERT-004.

Deviation from roadblock script. — Where officer, at a DWI roadblock, deviated from a supervisor-prepared script to ask defendant whether he had been drinking, the deviation was not a sufficient invasion into personal privacy and security to render defendant's roadblock detention unreasonable under the fourteenth amendment. State v. Duarte, 2007-NMCA-012, 140 N.M. 930, 149 P.3d 1027.

Withdrawal of individual prison inmate's visitation privileges without affording that inmate advance notice of the charges against the inmate, an opportunity to be heard and a statement of the evidence and reasons supporting the discipline would violate due process. Cordova v. LeMaster, 2004-NMSC-026, 136 N.M. 217, 96 P.3d 778.

Mere conclusion that due process was denied is not sufficient basis for relief. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

There must be showing of prejudice. — Where claims of deprivation of due process are asserted, there must be a showing of prejudice. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969), aff'g State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct. App. 1968).

There must be a showing of injury. — Not only must there be shown an abuse of discretion, but it must also have been to the injury of the defendant. State v. Nieto, 78 N.M. 155, 429 P.2d 353 (1967).

There must be a showing of impairment of rights. — A violation of due process can be urged only by those who can show an impairment of their rights in the application of the statute to them. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

If total result is fair, constitutional right has not been invaded. — In determining whether the deprivation of constitutional rights amounts to a denial of due process, the inquiry on habeas corpus is directed to a review of the entire proceedings, and if the total result was the granting to accused of a fair and deliberate trial, then no constitutional right has been invaded and the proceedings will not be disturbed. Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

Nonenforcement of an inapplicable statute does not violate any right of defendant under the concept of due process. Defendant must show how he has been denied due process. State v. Lujan, 79 N.M. 525, 445 P.2d 749 (Ct. App. 1968).

Denial of a naked constitutional right does not invalidate all subsequent proceedings. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

Unfairness at first trial is not cured by fair de novo trial. — If two trials are afforded a defendant, then due process requires that fairness and impartiality exist at both trials,

and unfairness or partiality at the first trial is not cured if the second de novo trial is fair and impartial. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Due process of law does not prohibit classification for legislative purposes. State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953) (statute providing penalty for act but excepting railroad employees upheld).

Vague statute violates due process. — The vagueness doctrine is based on notice and applies when a potential actor is exposed to criminal sanctions without a fair warning as to the nature of the proscribed activity, and therefore a statute violates due process if it is so vague that persons of common intelligence must necessarily guess at its meaning. State v. Najera, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).

Any statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974); State v. Orzen, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972); State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969); State v. Segotta, 100 N.M. 498, 672 P.2d 1129 (1983).

A reasonable degree of certainty in a criminal statute is an essential of due process of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969); State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App.), cert. denied, 95 N.M. 669, 625 P.2d 1186 (1981), cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled by State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Act constituting offense should be defined with certainty. — A penal statute should define the act necessary to constitute an offense with such certainty that a person who violates it must know that his act is criminal when he does it. State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App.), cert. denied, 95 N.M. 669, 625 P.2d 1186 (1981), cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled by State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Whole statute must be considered. — In determining the question of vagueness, the court will consider a statute as a whole. State v. Najera, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976); State v. Orzen, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972); State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Determining degree of crime by amount of harm is not unconstitutional. — Determining the degree of a crime by the amount of the harm done to the victim does not make the statute unconstitutionally vague. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Criminal sexual penetration could be committed by the use of force or coercion without the victim suffering personal injury as a result thereof, and the distinction between second and third degree criminal sexual penetration based on personal injury to the victim is not void for vagueness as a matter of law. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Return to state without warrant or waiver of extradition does not deny due process. — Defendants were not denied due process of law by their arrest in Arizona and return to New Mexico without warrant or waiver of extradition. The power of a court to try a person for a crime is not impaired by the manner with which he is brought within the court's jurisdiction. State v. Millican, 84 N.M. 256, 501 P.2d 1076 (Ct. App. 1972).

Valid arrest brings defendant properly before court. — Where appellant was arrested by drugstore owner who apprehended appellant outside his store in early morning, then appellant was properly arrested without warrant on probable cause, and appellant was properly before the justice of the peace (now magistrate) regardless of validity of final complaint of the store owner. State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967).

Intrusion into spouse's home to effect arrest. — Chief of police's unlawful intrusion into spouse's home to effect husband's arrest conducted without her consent violated her right to be free from the deprivation of her property rights without due process of law. Montes v. Gallegos, 812 F. Supp. 1165 (D.N.M. 1992).

Due process requires notice and an opportunity to be heard before bond can be revoked and a defendant remanded to custody. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

Due process only requires fair and impartial tribunal. — When analyzed with respect to the tribunal hearing a case, due process generally only requires that the tribunal be fair and impartial. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Conviction of an accused while he is legally incompetent violates due process of law. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968).

Presumption of sanity does not deny a defendant due process of law. It merely gives the defendant the burden of going forward with evidence of insanity; if he meets this burden, his sanity must be proved by the state beyond a reasonable doubt; if he fails to meet this burden, by introducing no evidence of insanity, by offering evidence disbelieved by the jury, or by offering evidence insufficient to rebut the presumption, the presumption of sanity decides the issue. State v. Lujan, 87 N.M. 400, 534 P.2d 1112 (1975), cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Examination by defendant's psychiatrist suffices, and under such circumstances, the state has no duty by constitutional mandate to furnish additional mental examinations. State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

Alibi rule does not violate due process. — Since New Mexico's alibi rule, Rule 32, N.M.R. Crim. P. (now Rule 5-508 NMRA), provides for reciprocal discovery rights and provides ample opportunity for an investigation of the facts, it does not violate due process. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Holding wrongful administrative action. — There is no violation of due process if a state court interpreting a state statute holds that a wrongful administrative action is no defense to a criminal prosecution and requires the defendant to seek correction of the wrongful action in civil proceedings; assuming the curtailment of inspections at defendant's plant was unauthorized, defendant had the choice of complying with the curtailment and thus not slaughtering and selling contrary to the statute, or petitioning the district court to require the inspections to continue, and when he did neither, but proceeded to violate the law, his violation would not be excused on the basis that an administrative official proceeded improperly. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Entrapment involves due process. — Entrapment, whether subjective or objective, involves matters of due process under this section. State v. Vallejos, 1997-NMSC-040, 123 N.M. 739, 945 P.2d 957, aff'g in part, rev'g in part 1996-NMCA-086, 122 N.M. 318, 924 P.2d 727.

Entrapment is not a defense of constitutional dimension, and New Mexico is not therefore bound to apply the law as announced by the United States supreme court. State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976), rev'g 88 N.M. 437, 540 P.2d 1326 (Ct. App. 1975).

Entrapment justifies inquiry into defendant's predisposition. — In entrapment cases, the focal issue is the intent or predisposition of the defendant to commit the crime, and if the defendant seeks acquittal by reason of entrapment, he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976), rev'g 88 N.M. 437, 540 P.2d 1326 (Ct. App. 1975).

Death penalty may be constitutional. — Under certain circumstances a citizen's life may be forfeited pursuant to due process of law and all other constitutionally guaranteed rights. State ex rel. Serna v. Hodges, 89 N.M. 351, 552 P.2d 787 (1976), overruled by State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976) (former mandatory and fully discretionary death penalty statutes violated prohibition against cruel and unusual punishment).

Juvenile must not be denied any of the protections guaranteed to adults by the constitution. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

When a juvenile is transferred to district court for criminal proceedings, all of the rights and safeguards in such cases required by law and the constitution of the United States

and the constitution of New Mexico must be accorded him. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

Juvenile has no right to more protections than adult. — If the procedure is sufficient for adults, the supreme court does not understand that a juvenile has a constitutional right to more. Nothing constitutionally requires that a juvenile receive anything more or better than is accorded an adult. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

2. PRETRIAL PROCEEDINGS.

Twenty-seven month charging period. — Where defendant was convicted of first degree criminal sexual penetration and third degree criminal sexual contact of a minor; the charging period was twenty-seven months; the crimes were alleged to have occurred while the victim was between five and seven years old; the victim did not have the capacity to provide particular dates or time periods for the incidents; the incidents occurred on a continuous basis and were not a few isolated events; defendant was often present in the same residence as the victim during the daytime and overnight; the nature of the offenses were such that they did not occur in the presence of other witnesses; because the victim suffered no physical injury, the offenses were not likely to be discovered immediately; according to the victim, defendant had vaginal intercourse with the victim "lots of times" and anal intercourse "about three times", defendant touched the victim's genitalia "about ten times" and made the victim touch the defendant's penis "about four times"; and defendant failed to demonstrate that defendant was prejudiced by the lengthy charging period, the charging period was not unreasonable and did not violate defendant's right to due process. State v. Tafoya, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

Preaccusation delay in juvenile delinquency proceedings. — The due process standard set forth in Gonzales v. State, 11 N.M. 363, 805 P.2d 630 (1991) apples to juveniles. State v. Lorenzo P., 2011-NMCA-013, 149 N.M. 373, 249 P.3d 85, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 262 P.3d 900.

Where a petition was filed against the child nine months after the police received a complaint and seven months after police initially suspected the child; the child presented no evidence of prejudice or intent to delay; the child argued that the child was prejudiced because the delay deprived the child of access to rehabilitative services; the district court had approximately three months between the time the petition was filed and the child turned twenty-one within which to provide rehabilitation services; and the child's other arguments of prejudice were mere conjectures, the delay between the incident and the filing of the petition did not violate due process. State v. Lorenzo P., 2011-NMCA-013, 149 N.M. 373, 249 P.3d 85, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 262 P.3d 900.

Involuntary antipsychotic drug treatment. — The due process standard to determine whether appropriate circumstances exist to support an order requiring the defendant to

submit to unwanted antipsychotic drug treatment solely for the purpose of establishing the defendant's trial competency is that important governmental interests are at stake; involuntary medication will significantly further the government's concomitant state interests of trying the defendant for a serious crime and providing the defendant with a fair trial; voluntary medication is necessary to further those interests; and administration of the drugs is medically appropriate. State v. Cantrell, 2008-NMSC-016, 143 N.M. 606, 179 P.3d 1214.

Factually indistinguishable counts. — An indictment that lists a series of identical counts denies the defendant adequate notice of the charges against him and fails to protect him from double jeopardy if the counts cannot be linked to particular, distinguishable criminal acts. State v. Dominguez, 2008-NMCA-029, 143 N.M. 549, 178 P.3d 834, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 672.

Preindictment delay is not grounds for dismissal unless prejudicial. — Where charges against defendant in Bernalillo county were dismissed without prejudice on June 7, 2007 on defendant's motion to dismiss for improper venue; defendant was indicted in Sandoval county for the same charges on December 4, 2008; and defendant provided no evidence or argument to show how defendant was prejudiced by the preindictment delay or that the state intentionally delayed the indictment to gain a tactical advantage, defendant's right to due process was not violated by the pre-indictment delay. State v. Fierro, 2014-NMCA-004, cert. denied, 2013-NMCERT-012.

To obtain a dismissal for preindictment delay defendant must show that he has been substantially prejudiced. Here the contentions of prejudice in the trial court were: (1) that a nine-month delay, between arrest and indictment, was a showing of prejudice, and (2) that because defendant was intoxicated at the time of the offense he had a memory problem which had been compounded by the nine-month delay. Neither claim was a showing of substantial prejudice, and the delay was not a violation of due process. State v. Tafoya, 91 N.M. 121, 570 P.2d 1148 (Ct. App. 1977), modified, Kilpatrick v. State, 103 N.M. 52, 702 P.2d 997 (1985).

Delay of 40 days between the commission of the offense and the arrest of defendant was not in itself suggestive of prejudice. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Where there is nothing in the record indicating that appellant was prejudiced in the delay in arraignment, the delay in holding a preliminary hearing is not a denial of due process. State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968).

Unless the preliminary delay in some way deprives an accused of a fair trial, there is no denial of due process of law. This is the rule in the federal as well as in the state courts. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

Absent prejudice in the fact that 22 days elapsed from the time minor was arrested until he appeared before the juvenile court, when counsel was appointed for him, he has not been denied due process of law. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

Some personal discomfort, occasioned by being jailed for a few hours awaiting preliminary examination, does not constitute a denial of due process or equal protection, nor can it be said to constitute cruel and unusual punishment. Christie v. Ninth Judicial Dist., 78 N.M. 469, 432 P.2d 825 (1967).

Undeniably, delay in charging a person as a habitual criminal involves due process. State v. Santillanes, 98 N.M. 448, 649 P.2d 516 (Ct. App. 1982).

Where a defendant was arrested and released, and was indicted approximately 21 months later, and all of his alibi witnesses had died in the interim, any prejudice to the defendant was outweighed by the reasons for the delay. State v. Gonzales, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), aff'd, 111 N.M. 363, 805 P.2d 630 (1991).

Information not stating date of offense may be void. — The information charging defendant with sodomy was void for failure to give him notice of the charges against him where it failed to state the date of the offense so as to specify which of three different acts subsequently testified to by the state's principal witness was charged, and defendant's conviction was reversed. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Using initials to identify offense denies due process. — The use of initials instead of words in a criminal complaint to identify the offense deprives defendant of due process of law. State v. Raley, 86 N.M. 190, 521 P.2d 1031 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Stating common name of offense, date and place suffices. — Where defendant's indictment for criminal trespass charged him with violation of a specific statutory section, stating the common name of the offense, a specific date of the offense, and that the offense occurred in McKinley county, New Mexico, it sufficiently informed defendant of what he must be prepared to meet and did not deprive him of due process. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Reference to repealed section where offense otherwise charged does not violate rights. — Defendant was not deprived of liberty without due process of law nor denied equal protection of the law under this section merely because the information charging him with embezzlement incorrectly referred to a repealed section, since the offense was otherwise sufficiently charged. Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954).

There is nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly where the charges arose out of the same events and carry the same penalties, and defendant is furnished with a most detailed statement of

fact, including the complete district attorney's file, police reports and a citation of authorities the state is relying on in support of each of the alternative charges. State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Waiver of rights in Spanish may satisfy due process. — Where the record reflected defendant's waiver in Spanish of his constitutional rights, the court of appeals took judicial notice of its English interpretation, and agreed with the trial court that the language of the waiver satisfied the requirements of due process. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds by City of Albuquerque v. Haywood, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93.

Waiving jury trial by voluntary guilty plea does not deny rights. — Where the record showed that defendant acknowledged his guilt and the trial court accepted his guilty plea, the court held defendant had waived his right to a jury trial and the execution of that waiver did not deny defendant due process or equal protection. State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct. App.), cert. denied, 81 N.M. 784, 474 P.2d 76 (1970).

Involuntary guilty plea is void. — A judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. To withhold the privilege of withdrawing a guilty plea in order to reassume the position occupied prior to its entry would constitute a denial of due process of law. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967).

Plea of nolo contendere. — If a plea of nolo contendere is entered under circumstances which render its acceptance fundamentally unfair or shocking to a sense of justice, the resulting conviction violates the due process clause. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966).

Provisions for certification of juvenile to district court held valid. — The provisions for certification of a juvenile to district court for trial as an adult (see 32A-2-13 NMSA 1978 et seq.) were not so vague, indefinite and lacking in any recognizable standard or criterion for a determination of certification as to deny him equal protection and due process afforded by this section. State v. Jimenez, 84 N.M. 335, 503 P.2d 315 (1972).

Preliminary hearing is not constitutionally required before delinquency trial. — Under former Juvenile Code, preliminary hearing prior to trial by jury to determine delinquency status was not constitutionally required, since code itself contained adequate safeguards to assure due process and fair treatment, and since proceedings and consequences of conviction under Juvenile Code were significantly different from proceedings and consequences of conviction under criminal law. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

3. TRIAL PROCEEDINGS.

Standard for courtroom closure. — New Mexico has adopted the "overriding interest" standard for any type of courtroom closure. State v. Turrietta, 2013-NMSC-036, rev'g 2011-NMCA-080, 150 N.M. 195, 258 P.3d 474.

Requirements of overriding interest standard for courtroom closure. — The overriding interest standard for closure of a courtroom requires that the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader that necessary to protect that interest, the district court must consider all reasonable alternatives to closing the proceedings, and the district court must make findings adequate to support the closure. State v. Turrietta, 2013-NMSC-036, rev'g 2011-NMCA-080, 150 N.M. 195, 258 P.3d 474.

Right to public trial was violated. — Where defendant, who was a member of a gang, shot and killed a member of another gang; the state requested that the courtroom be closed during the testimony of cooperating witnesses who were former gang members, because the state believed that gang members would pack the courtroom and intimidate the witnesses so that they would not testify; the witnesses testified that they had experienced threats and violence prior to trial; the state never offered sufficient proof that the threats and violence were directly related to defendant's case or that a link existed between the threats and violence and the witnesses' ability or willingness to testify; although the witnesses named gang members who had threatened or intimidated them, the district court excluded more than thirty people from the courtroom, including members of defendant's family and friends, without knowing whether the excluded people were gang affiliated; the district court did not consider all alternatives to closure, such as increased security or the wait-and-see method; and the district court's justification for the closure, which was based on the danger to the witnesses and the fact that a gang etching had been found outside the courtroom door, failed to mention any specific threat or possibility of intimidation, defendant's right to a public trial was violated. State v. Turrietta, 2013-NMSC-036, rev'g 2011-NMCA-080, 150 N.M. 195, 258 P.3d 474.

Failure to determine competency to stand trial. — Where defense counsel raised the issue of defendant's competency at defendant's preliminary hearing in magistrate court; the case was then transferred to district court; the district court ordered a competency evaluation of defendant; based on the results of the evaluation, defense counsel was satisfied that defendant was competent to stand trial, and the court entered an order finding defendant competent to stand trial; defense counsel again raised the issue of defendant's competency on the day of trial, prior to the start of trial; the court took no action and proceeded to trial; during the trial, defendant made noises, talking to someone who was not present in the courtroom; the court admonished defendant not to disrupt the trial; defense counsel attempted, but the court refused, to allow defense counsel to raise the issue of defendant's competency; the jury returned a verdict of guilty; defense counsel again raised the issue of defendant's competency; the court then permitted defense counsel to fully raise the issue and instructed defense counsel

to request a competency evaluation; based on the evaluation, the court found defendant to be incompetent, but declined to dismiss the charges and proceeded to sentence defendant, defendant was denied due process of law because the court erred when it refused to permit defense counsel to raise the issue of defendant's competency prior to and during trial, when it failed to stay the proceedings pending a determination of whether a reasonable doubt existed as to defendant's competency to stand trial, and after finding defendant incompetent. State v. Montoya, 2010-NMCA-067, 148 N.M. 495, 238 P.3d 369, cert. denied, 2010-NMCERT-006, 148 N.M. 583, 241 P.3d 181.

No mistrial for defendant's outburst during trial and subsequent restraint. — Where, during defendant's trial, defendant had an outburst in court where defendant abruptly stood up and stated, "I'm going to have to go somewhere, man. I can't handle this"; the outburst occurred as the court was recessing the trial; officers had to restrain defendant; some jurors witnessed the incident; the court polled the jurors individually to determine what they saw and heard and asked them whether what they witnessed would impact their ability to be fair and impartial; more than half of the jurors witnessed the incident; each juror stated that neither the incident nor shackling defendant in the courtroom during the remainder of the trial would affect their fairness and impartiality in deciding the case; and defendant was bound and shackled for the remainder of the trial, the trial court did not abuse its discretion in denying defendant's motion for mistrial. State v. Swick, 2012-NMSC-018, 279 P.3d 747, aff'g 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462.

Defendant secured in leg irons during trial. — Where defendant was in leg irons for the duration of the trial; defendant did not object to the use of leg irons, other than to request that they be removed if defendant testified; defendant did not testify; there was no indication that the jury saw the leg irons; and the district court stated that it would not remove the leg irons citing safety concerns and recent violent incidents in other states involving unsecured defendants, defendant's fundamental right to due process was not violated. State v. Johnson, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

Conviction of indistinguishable counts. — Where defendant was convicted of two counts of first degree criminal sexual penetration of a minor for vaginal penetration and two counts of first degree criminal sexual penetration of a minor for anal penetration; the state factually alleged that the charges arose out of one of four specific incidents; and at trial, the victim only described a pattern of vaginal CSPM and anal CSPM and said that each happened "lots of times", without relating any act to a specific incident, defendant's convictions violated defendant's right to due process, because the counts of vaginal CSPM were factually indistinguishable and the counts of anal CSPM were factually indistinguishable. State v. Tafoya, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

Due process requires adequate notice of the charges against a defendant. — Where the state charged defendant with twenty-four individual counts of child abuse based upon the child victim's allegations that defendant and his sons assaulted him with a stun gun numerous times between August and October 2010, the indictment did not

provide notice as to any specific instance in which defendant was alleged to be the principal abuser nor did it provide notice as to any specific instance in which defendant was alleged to be an accomplice to abuse inflicted by others. Defendant's constitutional rights to due process were violated. State v. Vargas, 2016-NMCA-038.

Sharing interpreters. — Where the trial court used a single interpreter to interpret for both the defendant, who was Vietnamese, and a Vietnamese juror; the interpreter was available to the defendant at all times; the defendant did not show prejudice; and the defendant's attorney suggested the procedure, there was neither structural nor fundamental error. State v. Nguyen, 2008-NMCA-073, 144 N.M. 197, 185 P.3d 368, cert. denied, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

Courts have power and duty to provide fair trial. — The courts of general jurisdiction have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake. The possession of such power involves its exercise as a duty whenever public or private interests require. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231 (1972), cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Facts of prior convictions. — Defendant is not entitled to have a jury find the facts of his prior convictions beyond a reasonable doubt under this section. State v. Sandoval, 2004-NMCA-046, 135 N.M. 420, 89 P.3d 92, cert. denied, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Multiplicity of counts held not unfair. — Where four of the eight counts against defendant were dismissed, and the jury acquitted on two counts and convicted on two counts, his argument that the multiplicity of counts and the evidence introduced in connection with those counts deprived him of a fair trial was not supported by the record. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Municipal judge need not be attorney. — Fairness is not so inextricably tied to the education of an attorney that without a legal education a municipal court judge cannot be fair. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Allowing nonattorney police court judges to preside over criminal cases arising from violations of municipal ordinances which are punishable by incarceration does not violate rights guaranteed by the state and federal constitutions. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Peremptory challenges by multiple defendants. — In a prosecution for first degree murder, the defendant was not denied due process of law because the trial court failed to permit him to exercise 12 peremptory challenges for himself, but instead allowed the defendant and codefendant a total of 14 challenges. Multiple defendants have no constitutional right to more peremptory challenges than given them by rule, provided

they are given a fair trial by an impartial jury. State v. Sutphin, 107 N.M. 126, 753 P.2d 1314 (1988).

Due process requires proof beyond reasonable doubt. — Proof beyond a reasonable doubt is the traditional burden which our system of criminal justice deems essential, and the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged; this standard applies not only to factual determinations of guilt, but also to the factual determination that a firearm was used, because that fact is a predicate for enhancing defendant's sentence. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

Court's failure to call eyewitnesses itself does not deny due process. — Refusal of trial court to call eyewitnesses to a killing as witnesses of the court did not deny due process to defendant. Absent a rare instance, such as where the prosecuting attorney informed the court that a witness was available, but the prosecutor declined to call him because he could not vouch for his truthfulness and veracity, the trial court should not call a witness in a criminal case, particularly where the case is being tried before a jury. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

No right to demand immunity for defense witness. — A defendant has no sixth amendment right to demand that any witness he chooses be immunized, and the prosecution's refusal to grant immunity to a defense witness who would allegedly offer exculpatory testimony to a defendant does not amount to a denial of due process or a violation of sixth amendment rights. State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App.), cert. denied, 98 N.M. 478, 649 P.2d 1391 (1982), overruled by State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.2d 783.

A ruling on a motion for continuance rests within the sound discretion of the court and will not be interfered with unless the record shows an abuse of such discretion. State v. Nieto, 78 N.M. 155, 429 P.2d 353 (1967).

Improper comment upon consequences of verdict. — Judge who was critical of the legal system during voir dire, implying that the system is governed by legislative whim rather than by well-settled principles, and who told the jury during trial of the consequences of their verdict, in terms of the mandated sentences for first- and second-degree murder, committed reversible error by depriving defendant of a fair trial. State v. Henderson, 1998-NMSC-018, 125 N.M. 434, 963 P.2d 511.

Trial judge's remarks held not to prevent fair trial. — Comments by the trial court to defense counsel that "you shouldn't be calling people like that as a witness," referring to an individual who had not been called by the defense, and that "if you don't want your witnesses cross-examined, don't call them," although indicative of impatience, did not display bias against or in favor of a party, nor did they amount to an undue interference by the trial court or show such a severe attitude that proper presentation of the cases

was prevented, and consequently, the remarks did not deprive defendant of a fair trial. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

The evidentiary basis for the indictment was not a matter for argument to the trial jury because it was irrelevant to the question of guilt or innocence, and the trial court could properly interrupt counsel's argument and require that the argument stay within matters pertinent to the trial; the interruption did not amount to judicial misconduct nor deny defendant a fair trial. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Instructions held to justify overruling objections to prosecutor's argument. — The trial court had wide discretion in dealing with counsel's argument, and did not abuse its discretion in overruling defendant's objections to the prosecutor's closing remarks about collateral offenses committed by defendant where the jury was instructed on three occasions - during the cross-examination of the psychologist, the cross-examination of the psychiatrist and upon final submission of the case to them - that references to such collateral offenses and to the fingerprint went only to the credibility of the experts and were not to be considered on the question of guilt. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Reading law on pardon and parole to jury does not deny due process. — That the trial court, in response to a question by the jury during the course of their deliberations, read to the jury the constitutional provision and the laws concerning pardon and parole did not deprive petitioner of a fair and impartial trial or of life and liberty without due process of law. Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960).

General intent instruction involves no presumption. — The existence or nonexistence of general criminal intent is a question of fact for the jury, and the general intent instruction submitted the issue to the jury as a question of fact; no presumption was involved in the instruction given. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977), rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

Instructions on effect of voluntary intoxication on intent may be refused. — Defendant's argument that since voluntary intoxication is not a defense to the existence of a general criminal intent, a general criminal intent is always conclusively presumed from the doing of the prohibited act, that conclusive presumptions are unconstitutional and thus the refusal of requested instructions on the effect of intoxication on defendant's ability to form a general criminal intent denied defendant the right to put on a defense was patently meritless. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977), rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

Instruction on exculpatory statements in confession held properly refused. — The trial court was not in error when it refused to give a requested instruction on exculpatory statements contained in defendant's confession, where the court adequately instructed as to self defense and defendant voluntarily took the stand and his own testimony

corresponded to the exculpatory matter contained in the confession introduced by the state. State v. Casaus, 73 N.M. 152, 386 P.2d 246 (1963).

Jury instructions as to accomplice testimony. — Trial court's refusal to use jury instruction tendered by defendant admonishing the jury to weigh accomplice testimony with greater care than other testimony, was proper under New Mexico law and practice, and did not violate defendant's constitutional right to due process. State v. Sarracino, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

Inquiry as to the numerical division of a jury is error in itself, because the error goes to a fair and impartial trial, and thus violates due process. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976) (giving rule prospective operation).

Where the jury had been deliberating from 3:10 p.m. until midnight, with a break for dinner, and after the trial court inquired and was informed that the numerical division was 11 to one, it gave the shotgun instruction over defendant's objection, this instruction was a lecture to one juror; within 25 minutes of this lecture, a guilty verdict was returned, and the court of appeals held that the inquiry as to numerical division followed by the shotgun instruction was coercive conduct requiring reversal. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Communication with juror is presumptively prejudicial. — In a criminal case any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, under due process deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

Probable or inherent prejudice requires new trial. — If the situation involves probable prejudice or inherent prejudice, there must be a new trial. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

Disqualification of jurors on basis of gender prohibited. — New Mexico Const., art. II, §§ 14 and 18 preclude the state from using its peremptory challenges to strike jurors because of gender in a criminal case. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App.), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

To raise and resolve allegations of intentional discrimination on the basis of gender, a defendant must make a prima facie showing that the prosecution has used its peremptory challenges to purposefully discriminate against an excluded group. This prima facie showing may be made by showing 1) that the state has exercised its

peremptory challenges to remove members of a cognizable group from the jury panel, and 2) that these facts and any other relevant circumstances raise an inference that the state used its challenges to exclude members of the panel solely on account of their membership in the excluded group. State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991), modified, State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Denying mistrial is decision that presumption was overcome. — It was for the trial court to determine whether the presumption of prejudice arising from unauthorized contact indirect or otherwise with the jury had been overcome. In denying the motion for a mistrial, the trial court, in effect, ruled that the presumption of prejudice had been overcome. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

"Make a wise decision" is not prejudicial. — No probable or inherent prejudice exists in the communication "make a wise decision". State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967).

"Return a verdict" is not prejudicial. — Under standards of due process, any unauthorized communication with a juror is presumptively prejudicial, but the record affirmatively showed no prejudice and overcame the presumption of prejudice where the jury was "ready to return a verdict", it informed the judge of this fact and, in addition, that one juror feared reprisal, and where the judge said no more than "return a verdict". State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Communication after verdict has been returned. — Conversation between judge and one juror concerning juror's fear of reprisal could not prejudice verdict which had already been received. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Combination of factors invading rights. — Failure to grant a continuance to allow defendant a reasonable time to prepare and present a defense, denial of his rights to subpoena witnesses and to have medical records produced, and granting the state's motion to suppress any evidence going to defendant's mental or physical condition, invaded defendant's constitutional rights to due process and a fair trial. March v. State, 105 N.M. 453, 734 P.2d 231 (1987).

Mistrial not necessitated by juror's comment, following presentation of evidence, regarding defendant's dangerousness. — A juror's comment in open court that defendant should not be allowed close proximity to a gun and shells did not necessitate a mistrial since the juror's comment clearly came after most of the evidence in the case had been presented and where there was ample evidence to support juror's conclusion that defendant was a dangerous person and the trial court immediately gave curative instructions. State v. Price, 104 N.M. 703, 726 P.2d 857 (Ct. App.), cert. quashed, 104 N.M. 702, 726 P.2d 856 (1986), modified, State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991).

Omitted necessary instruction on specific intent fundamental error. — The failure to instruct as to specific intent, when the conviction for the crime requires proof of specific intent, amounts to fundamental, reversible error. In such circumstances, the omitted instruction as to specific intent is a substantial and material omission. State v. Shade, 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986), cert. quashed, 104 N.M. 702, 726 P.2d 856, overruled by State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Summary contempt proceeding is proper for refusal to testify. — A refusal to answer questions in the presence of the court is a proper matter to be dealt with summarily, particularly where the witness is given opportunity to explain the basis of her refusal to the court, and there was no violation of due process on the basis that the court proceeded summarily. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Where the trial court took great care to make sure that a witness understood the question posed by the prosecution which she refused to answer and understood that she could be held in contempt if she persisted in her refusal to answer, even allowing her time to confer with her attorney, and made it clear that she could purge herself of the contempt by answering the questions in the presence of the jury, the summary contempt proceeding did not violate her right to due process. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Summary proceeding is proper even if proceeding is not labeled criminal. — Where a witness sentenced for contempt had notice that her refusal to answer would be a contempt and that sanctions in the form of a jail sentence or fine might be imposed, she was not deprived of due process on a theory of lack of notice because the court failed to label the contempt proceedings criminal. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

4. SENTENCING, APPEALS, PROBATION.

Confrontation of witnesses at probation revocation hearings. — The right to confront and cross-examine witnesses at probation revocation hearings is guaranteed by the due process clause of the fourteenth amendment, not by the confrontation clause of the sixth amendment. State v. Guthrie, 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, rev'd, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

Before revoking a defendant's probation based on hearsay, the district court must make a specific finding of good cause for not requiring confrontation by specifically addressing the state's problems in securing the presence of an absent witness or specifically stating the reasons that the hearsay evidence offered has particular indicia of accuracy and reliability such that it has probative value. State v. Guthrie, 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, rev'd, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

Where the defendant's probation officer did not appear at the hearing to revoke the defendant's probation; the only witness who testified at the hearing was the probation

officer's supervisor who was the custodian of probation violation reports filed by probation officers; the supervisor had no personal knowledge of the defendant's case except for what was contained in the probation officer's file; the supervisor read into evidence statements that were in the defendant's probation file; and the district court did not state any reasons why the evidence was sufficiently accurate or reliable so as to excuse the presence of the defendant's probation officer, the district court failed to make a specific finding of good cause for not calling the defendant's probation officer as a witness and the revocation of the defendant's probation based on the supervisor's testimony about statements included in the defendant's file violated the defendant's due process rights. State v. Guthrie, 2009-NMCA-036, 145 N.M. 761, 204 P.3d 1271, rev'd, 2011-NMSC-014, 150 N.M. 84, 257 P.3d 904.

Where defendant was placed under supervised probation on the condition that defendant complete a sex offender specific therapy program to include polygraph testing as deemed necessary by the therapist; at defendant's probation revocation hearing for failure to complete the program, the head of the forensic therapy service at the sex offender treatment center at which defendant was a patient, rather than the individual who actually administered and interpreted the polygraph test, was allowed to testify about the results of defendant's polygraph examination; and the polygraph test was central to proving the probation violation, because defendant was terminated from the program based on the interpretation and judgment-based determination of the individual who administered the polygraph test that defendant failed to admit the sexual offenses with which defendant was charged and could not be treated, defendant's fourth amendment right to due process was violated. State v. Castillo, 2012-NMCA-116, 290 P.3d 727, cert. denied, 2012-NMCERT-010.

Sex Offender Registration and Notification Act does not violate either the federal or the state due process clause. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Sex offender registration for kidnapping and false imprisonment. — The inclusion of kidnapping and false imprisonment as convictions requiring registration as a sex offender under the Albuquerque Sex Offender Registration and Notification Act ordinance is not rationally related to the legitimate interest of the city in protecting victims or potential victims of sex offenders because there is no firm legal rationale for including offenses with no sexual motivation as sex offenses and violates due process. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Public dissemination of sex offender information. — The requirement of the Albuquerque Sex Offender Registration and Notification Act ordinance that sex offender registration be included on city's website is rationally related to the city's interest in allowing the public and authorities to identify sex offenders accurately and to know their whereabouts and does not violate due process. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Sex offender location. — The provision of the Albuquerque Sex Offender Registration and Notification Act ordinance that, after the effective date of the ordinance, sex offenders are prohibited from occupying a residence within 1,000 feet of a school is rationally related to the city's interest in protecting children from sex offenders by preventing them from living within 1,000 feet of places where children congregate and does not violate due process. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Different sex offender registration requirements for residents and non-residents. — Where provisions of the Albuquerque Sex Offender Registration and Notification Act ordinance do not require registration of convicted sex offenders who reside in New Mexico and who are most likely to have the means and opportunity to re-offend in the city, but require registration of offenders who were convicted of sex offenses outside of New Mexico, who reside outside the state, and who are in the city only a limited number of days, the provisions are not rationally related to the city's interest in protecting citizens from sex offenders and violate equal protection guarantees. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Discrimination between sex offenders who are related to a child. — Where provisions of the Albuquerque Sex Offender Registration and Notification Act ordinance permit a grandparent sex offender to be alone with a grandchild, but prohibit a stepfather, brother or sister sex offender from being alone with a stepchild, brother or sister, the provisions are not rationally related to a legitimate governmental interest and violate equal protection guarantees. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Preservation of constitutional claim. — By tendering a proposed jury instruction to the court, defendant adequately preserved his right to appeal on the grounds that the instructions used violated his right to due process under the state constitutional claim. State v. Sarracino, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

Only constitutionality of statute under which convicted may be challenged. — Where defendant was convicted of violating 30-22-25 NMSA 1978, which is a lesser included offense of 30-22-23 NMSA 1978, which was charged in the indictment, his rights under the latter statute were not at issue, and he had no standing to challenge its constitutionality. State v. Bojorquez, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

If conviction was of lower crime, vagueness in distinguishing higher crime not considered. — Defendant's claims that definitional distinctions which go to the difference between first and second degree criminal sexual penetration are unconstitutionally vague were not considered by the court of appeals when defendant was convicted of second degree criminal sexual penetration. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Indeterminate sentence is not void. — The discretion vested in the probation and parole officials in determining reductions from the maximum sentence do not make an indeterminate sentence void for vagueness as a general proposition. State v. Deats, 83 N.M. 154, 489 P.2d 662 (Ct. App. 1971).

Aggravation of DWI conviction. — Aggravation of the defendant's DWI conviction under 66-8-102 NMSA 1978 for his refusal to submit to a chemical test even though he was not advised of the criminal consequences of that refusal did not violate federal or state due process provisions. State v. Kanikaynar, 1997-NMCA-036, 123 N.M. 283, 939 P.2d 1091; Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999), cert. denied, 528 U.S. 1090, 120 S. Ct. 821, 145 L. Ed. 2d 691 (2000).

Lack of good-time credit for presentence confinement constitutional. — New Mexico's statutory scheme, which does not allow good-time credit for presentence confinement, does not offend the equal protection and due process guarantees of the New Mexico and United States constitutions. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

No constitutional liberty interest in prisoner's good-time credits. – The unilateral revocation of a prisoner's erroneously granted good-time credits did not violate the due process clause of the constitution; because the granting of those credits was error in the first place, the petitioner did not have a liberty interest in them. Compton v. Lytle, 2003-NMSC-031, 134 N.M. 586, 81 P.3d 39 (decided under federal constitution), superseded by statute, State v. Tafoya, 2010-NMSC-019, 237 P.3d 693.

Not crediting time served under void sentence does not deny due process. — Time served by a defendant under a void conviction and sentence will not be credited upon another sentence imposed upon defendant under a conviction for a different offense, and failure to give him such credit does not deprive him of his liberty without due process of law in violation of this section. State v. Rhodes, 77 N.M. 536, 425 P.2d 47 (1967).

Good-time credit scheme. — State's statutory scheme making prisoners eligible for awards of good time credits for the periods of their post-sentencing confinement in correction department facilities and county jails but not for the periods of their presentence confinement in county jails does not offend the due process guarantees of the New Mexico and United States constitutions. State v. Aqui, 104 N.M. 345, 721 P.2d 771 (1986), cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986).

Risk of greater sentence upon trial de novo is not unfair. — The hazard of a greater sentence upon trial de novo for violation of municipal ordinance is not fundamentally unfair. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

A greater sentence imposed by a district court for violation of certain municipal ordinances after a trial de novo does not deprive defendant of due process, nor does it

amount to double jeopardy. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

Risk of greater sentence does not have unconstitutional "chilling effect" on right of appeal. — There was no "chilling effect" on defendant's right to appeal his conviction for violation of certain municipal ordinances where he took an appeal to the district court, and requiring defendant to choose between accepting the risk of a greater sentence or foregoing his appeal was not constitutionally impermissible under the facts of the case, since the choice was defendant's. City of Farmington v. Sandoval, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

Deprivation of due process not considered for first time on appeal. — Where record does not disclose that trial court was given opportunity to hear objections or exceptions on ground that accused was deprived of liberty without due process of law or that judgment ordering that driver's license be taken up for one year exceeded trial court's authority, the matter will not be considered on appeal. State v. Williams, 50 N.M. 28, 168 P.2d 850 (1946).

Indigent's appeal right conditioned on bonding requirement. — The right of an indigent defendant to an appeal cannot be conditioned upon a statutory bonding requirement. Mitchell v. County of Los Alamos, 112 N.M. 215, 813 P.2d 1013 (1991).

Denying motion to dismiss counsel immediately before post-conviction hearing held proper. — The denial of defendants' motions to dismiss counsel and grant a continuance so they could retain counsel immediately prior to post-conviction hearing was not an abuse of discretion nor was it a denial of due process. Bobrick v. State, 83 N.M. 657, 495 P.2d 1104 (Ct. App. 1972).

Right of indigent defendant to stay pending appeal. — An indigent defendant is entitled to a stay pending appeal, and a failure to post a supersedeas bond does not extinguish that right. Mitchell v. City of Farmington Police Dep't, 111 N.M. 746, 809 P.2d 1274 (1991).

Delay in enforcing sentence. — Under the totality of circumstances analysis to determine whether or not a delay in the enforcement of a sentence violates the defendant’s due process rights, the courts consider factors that include the length of time of the delay and the nature of the defendant’s circumstances at the time the state attempts to enforce the sentence, as well as whether the delay arose from a negligent mistake on the part of the court or from deliberate or grossly negligent action, whether the defendant bears any responsibility for the delay, and whether the defendant attempted to remedy the delay without success. State v. Calabaza, 2011-NMCA-053, 149 N.M. 612, 252 P.3d 836.

Where the court delayed enforcing defendant’s sentence for thirteen months due to a mistake as to whether defendant was serving the sentence during and after two appeals; defendant had been sentenced and knew that defendant could lose the

appeals and would then have to serve the sentence; the delay was not caused by deliberate action of the court; defendant made no attempt to learn the status of the appeals as time progressed; and when the delay was discovered, the court permitted defendant to serve the sentence in a community custody program, the delay in enforcing defendant's sentence did not violate defendant's due process rights. State v. Calabaza, 2011-NMCA-053, 149 N.M. 612, 252 P.3d 836.

Notice and hearing necessary to revoke suspended sentence. — The supreme court has said that a suspended sentence gives a defendant his right of personal liberty and that due process requires a notice and hearing before such suspension can be revoked. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968).

In an action to invoke a suspended sentence, a mere criminal charge was not evidence and affords no legal basis for the reinstatement of a sentence. A party defendant is entitled to be heard on the question whether she had violated the conditions of the suspension and on the question of identity. State v. Peoples, 69 N.M. 106, 364 P.2d 359 (1961), overruled by State v. Mendoza, 91 N.M. 688, 579 P.2d 1255 (1978).

Notice and hearing necessary to revoke probation. — The right of personal liberty is one of the highest rights of citizenship, and this right cannot be taken from a defendant in a probation revocation proceeding without notice and an opportunity to be heard without invading his constitutional rights. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968) (proceedings to revoke probation and impose sentence).

Notice and hearing not necessary to revoke parole. — A sentenced prisoner released on probation has no constitutional right to a hearing prior to its revocation, and any such right depends entirely upon the existence of a statutory provision. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (prisoner sentenced and paroled to detainer).

A parole revocation hearing may be summary in nature. Due process does not require a different result. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (prisoner sentenced and paroled to detainer).

Parole revocation hearing may be deferred. — Deferral of a parole revocation hearing following service of an intervening sentence is without prejudice and does not violate a defendant's due process rights where the parole violation was established by an intervening conviction. Moody v. Quintana, 89 N.M. 574, 555 P.2d 695 (1976).

A parolee was not entitled to an immediate parole revocation hearing following the issuance and lodging of a detainer warrant with an incarcerating institution and the fact that the paroling jurisdiction and the incarcerating jurisdiction were not the same did not create due process concerns. McDonald v. New Mexico Parole Bd., 955 F.2d 631 (10th Cir. 1991), cert. denied, 504 U.S. 920, 112 S. Ct. 1968, 118 L. Ed. 2d 568 (1992).

Jurisdiction to enforce original sentence is not lost by agreement to parole to detainer. — Where prisoner specifically agreed to parole to detainer in Arizona and to

conditions set forth in parole agreement, state does not lose jurisdiction over prisoner to enforce the original sentence upon violation of the parole terms, and exercise of such jurisdiction does not constitute a denial of due process. Snow v. Cox, 76 N.M. 238, 414 P.2d 217 (1966).

Commitment to girls' home "until further order" violates due process. — Commitment to "girls' welfare home at Albuquerque until the further order of the court in the premises" was not that required by Laws 1919, ch. 86, § 2 (repealed), and violated due process. Robinson v. State, 34 N.M. 557, 287 P. 288 (1930) (remanded for resentencing).

5. EVIDENCE, IDENTIFICATION, CONFESSIONS.

Right to public trial not violated. — Where defendant was involved in a gang-related shooting in which the victim was killed; the state called four confidential informants who were current or former gang members; prior to trial, the state informed the court that the informants freely gave information with no promise in return and that the informants were not paid; defendant claimed that the state suppressed evidence that the informants received or expected to receive compensation in exchange for their testimony; at trial, the state informed defendant that one of the informants had struck a deal to get released from jail in exchange for the informants' testimony; the other informants testified that they were motivated to become informants by the hope that they would receive favorable treatment from the state in exchange for their cooperation; and there was no evidence that the informants' hope was ever realized or that a deal with the state was ever reached, the state did not suppress material evidence and defendant was not deprived of due process. State v. Turrietta, 2011-NMCA-080, 150 N.M. 195, 258 P.3d 474, rev'd, 2013-NMSC-036.

Admitting testimony without proper foundation was harmless error. — Where the defendant was convicted of tampering with evidence because he had swiped a portion of white powder on a laminated card that was found in his wallet with his thumb and ate the powder; the trial court permitted a police officer to testify that a field test established that the white powdery substance was cocaine without a proper foundation; the defendant's actions were videotaped and the videotape was shown to the jury; and a police officer testified that he saw the defendant swipe the powder with his thumb and put it in his mouth, the admission of testimony about the results of the field test was harmless error. State v. McClennen, 2008-NMCA-130, 144 N.M. 878, 192 P.3d 1255.

Evidence will be excluded for unfair conduct of police. — Where police conduct offends standards of fundamental fairness under the due process clause, the evidence is excluded. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982).

Evidence from search incident to lawful arrest. — The trial court properly denied defendant's motion to suppress evidence seized from his person, where defendant was arrested for public drunkenness (prior to repeal of the offense of drunkenness), and the

police officer searched defendant, finding a marijuana cigarette and a glasses case which contained heroin, since the full search of the person of the suspect made incident to a lawful custodial arrest does not violate the constitution, and having authority to search for the glasses case, the right to open it naturally followed. State v. Barela, 88 N.M. 446, 541 P.2d 435 (Ct. App. 1975).

There is no right to warning concerning consequences of refusing blood test. — Miranda-type warnings are necessary only in situations of either testimonial or communicative evidence, and New Mexico has consistently excluded physical evidence from the scope of the protection. It follows that an accused has no constitutional right to a warning concerning the consequences of refusing a blood test. State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

Failure to give warnings is not prejudicial if statement is not made. — Failure of the police to advise the petitioner of his right to counsel or of his right to remain silent prior to their interrogation of him has not been shown to have prejudiced him at the trial, where no statement was in fact made, nor was any testimony offered at the trial concerning any statement asserted to have been made by him, and there is nothing showing that the officers may have obtained evidence of any nature as a result of petitioner's statements. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

Admitting statement on form containing warnings is not prejudicial. — Where petitioner had no attorney when the statement was given and claims that he had not been advised that he did not have to make any statement at all, and that if he did make a statement, it could be used against him in a trial, no prejudice is shown where it was typed on the form that he did not have to make any statement and a codefendant who was at the time represented by counsel also gave a statement which was admitted in evidence by the trial court after a foundation as to its voluntary character had been ruled on by the judge. Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964).

Statements induced by promise not kept invalidate proceedings. — When after petitioners gave statements to police upon reliance of a police detective, who after consultation with an assistant district attorney represented to the petitioners that if they would give the signed statements to the police department setting forth the nature and extent of their involvement, knowledge and other activities in connection with the murder of decedent, they would not be charged with the murder if they did not actually kill her, if petitioners were charged with murder, such a proceeding was invalid as it denied defendants due process of law. State ex rel. Plant v. Sceresse, 84 N.M. 312, 502 P.2d 1002 (1972).

Confession not shown voluntary may not be used for impeachment. — Admission of evidence of prior confession to impeach a defendant represents a denial of due process where voluntariness of such confession has not been shown and defendant denies or claims inability to recall the statement. State v. Turnbow, 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461 (1960).

Minority alone is not enough to require a conclusion that confessions are involuntary and inadmissible, but rather the age of the defendants is a factor to be considered when appraising the character of the confessions as voluntary or not. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Failure to advise of juvenile rights with other warnings does not taint confessions. — Where juveniles were advised of their rights guaranteed in criminal proceedings without any qualifications concerning age or representations with regard to rights to be treated as juveniles, if any illegality was present because the confessions were taken while the defendants were technically in the custody of the juvenile court, such fact did not taint the confessions to such an extent as to make them involuntary or to make their use "fundamentally unfair". State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Failure to notify parents or provide counsel immediately to drunk juveniles does not taint confessions. — That the parents of juvenile defendants were not advised of the juveniles' arrest, nor were the defendants immediately turned over to the juvenile authorities or provided legal counsel, and, furthermore, evidence of defendant's drinking and general physical conditions at the time of arrest did not necessitate a conclusion that defendant's confession was obtained by a denial of due process. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

Admitting evidence of suggestive identification denies due process. — The manner of an extra-judicial identification affects the admissibility of identification evidence at trial. If the extra-judicial identification, such as a lineup, was unnecessarily suggestive and conducive to irreparable mistaken identification, a defendant would be denied due process if evidence concerning such an extra-judicial identification was admitted at his trial. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

All circumstances must be considered. — A claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. The fairness of the lineup requires consideration of the totality of the circumstances. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Evidentiary hearing on fairness. — Where there is an issue as to an "illegal taint," the issue is to be resolved by a consideration of the totality of the circumstances surrounding the out-of-court identification. This requires an evidentiary hearing. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Where defendant had informed the trial court that he would call additional witnesses concerning the fairness of a lineup procedure, but the trial court ruled without permitting the additional witnesses to testify, the trial court did not decide whether under all the circumstances the lineup procedure was so unfair that evidence as to the lineup identification should have been excluded. Accordingly, court of appeals vacated the

conviction and sentence pending the trial court's determination. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

No hearing required where it is clear no claim of unfairness could be made. — Where during preparations for a lineup, there was a confrontation between defendant and the victim, and the victim identified defendant as the perpetrator of the crime immediately after this confrontation, but where both parties agreed that the confrontation was inadvertent, defendant's claim that he was entitled to an evidentiary hearing to determine whether the victim's in-court identification of defendant was tainted by the identification made after the inadvertent confrontation was without merit, since, on the basis of defendant's own representations to the court, no claim could be made of the presence or the influence of any improper suggestion exerted by the police. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

The one-to-one confrontation is not an unwarranted practice, because, under some circumstances, it may tend to insure accuracy in the identification, and there is no basis for a per se exclusionary rule because such confrontations are not per se violative of due process; absent special elements of unfairness, prompt on-the-scene confrontations do not violate due process. State v. Torres, 88 N.M. 574, 544 P.2d 289 (Ct. App. 1975).

Identification from driver's license photo may be shown. — Where victim's testimony was to the effect that intruder was in her presence for approximately an hour and 40 minutes and at the police station she described the intruder by height, style of haircut and "big lips", the fact that a policeman showed the victim a driver's license photograph when victim knew the driver's license came from the wallet she had taken from the rapist's pocket did not make it error to admit evidence of the out-of-court identification of defendant from the photographs, and the victim's in-court identification of the defendant was not inadmissible because of taint by an illegal pretrial identification. State v. Baldonado, 82 N.M. 581, 484 P.2d 1291 (Ct. App. 1971).

Improper extra-judicial identification does not require exclusion of untainted in-court identification. — Even where there has been an improper extra-judicial identification, this fact does not require the exclusion of an in-court identification which is independent of and not tainted by the extra-judicial identification. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Showing counsel was present does not require mistrial. — Where the state elicited the fact that defendant engaged in constitutionally protected conduct (having a lawyer present at a lineup) only to show the fairness of the lineup procedure, defendant was not harmed by testimony that defendant had a right to counsel, and the trial court properly denied his motion for a mistrial. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Lack of evidence on crucial element violates due process. — A conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

Where the record disclosed absolutely no evidence of knowledge by juvenile respondents, adjudged delinquent because of alleged possession of marijuana, of the character of the item they allegedly possessed, it was held that their fundamental rights were violated, in that serious questions as to their innocence were raised; consequently, the causes against the respondents were dismissed and all records thereof were ordered destroyed. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

It is a fundamental right of a party to be convicted of a crime, which is a necessary prerequisite to a determination of delinquency, based upon evidence of the elements of the crime, and in a prosecution for a violation of 30-31-23 NMSA 1978, the state must prove that the respondents had knowledge of the presence and character of the item possessed; a degree of furtiveness on the parts of juvenile respondents, in doing their smoking and passing a pipe around between buildings while changing classes, in light of a school regulation prohibiting the smoking of tobacco, was not conduct sufficient to imply that the smokers knew the character of the substance they were using. Doe v. State, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Generally, evidence of other crimes is prejudicial. — A person put on trial for an offense is to be convicted, if at all, on evidence showing he is guilty of that offense. The defendant is not to be convicted because, generally, he is a bad man, or has committed other crimes. Evidence of other offenses tends to prejudice the jury against the accused and predispose the jury to a belief in defendant's guilt. Thus, the established New Mexico procedure, with certain exceptions, is that proof of separate criminal offenses is not admissible, and it is prejudicial error to admit such proof. State v. Garcia, 83 N.M. 51, 487 P.2d 1356 (Ct. App. 1971).

Video of confession referred to drug use. — Where defendant was charged with sexual exploitation of children; the DVD recording of defendant’s confession was played at trial for the jury; in the video, defendant was heard making references to defendant’s past drug use on three occasions; the context of the drug references was that defendant had been clean since rehabilitation; defendant’s statements had not been elicited by the state; the parties agreed to redact references to other misconduct because defendant faced additional charges based on pornographic images in a separate case; defendant did not specifically move to redact the drug references; defendant did not review the redacted version of the DVD; the trial court gave a cautionary instruction after the first reference to drug use; and defendant did not immediately object to the two subsequent references, the court did not abuse its discretion in denying defendant’s motion for a mistrial. State v. Leeson, 2011-NMCA-068, 149 N.M. 823, 255 P.3d 401, cert. denied, 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718.

Accused may be impeached by criminal record if he testifies. — An accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury. State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972).

Evidence of another crime is admissible to establish his identity. — Prior to enactment of the Rules of Evidence, evidence of other crimes was admissible if it served to establish the identity of the person charged. Therefore, evidence of defendant's fingerprint at scene of another crime was admissible for impeachment purposes on the issue of identity, since it tended to establish that identity by characteristic conduct. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Experts in lie detection may be asked about collateral offenses. — Prior to enactment of the Rules of Evidence, it was not error to allow prosecution to ask experts who administered certain deception tests (polygraph, hypnosis, sodium amytol) whether they had been informed of certain collateral offenses committed by defendant and how they had evaluated such information in reaching their conclusions concerning defendant's guilt or innocence. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

Admitting polygraph tests is proper. — The rule that polygraph test results are inadmissible except when inter alia the tests are stipulated to by both parties to the case and no objection is offered at trial is: (1) mechanistic in nature; (2) inconsistent with the concept of due process; (3) repugnant to the announced purpose and construction of the New Mexico Rules of Evidence; and (4) particularly incompatible with the purposes and scope of Rules 401, 402, 702 and 703, N.M.R. Evid. (now Rules 11-401, 11-402, 11-702 and 11-703 NMRA). State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975), aff'g 87 N.M. 323, 532 P.2d 912 (Ct. App. 1975).

Where the unchallenged findings of the trial court in a murder trial recognized that defendant's profferred polygraph results were attended by circumstances of considerable reliability and the testimony was crucial to the defense on the question of intent and provocation, due process required the admission of the polygraph evidence. State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (Ct. App.), aff'd, 88 N.M. 184, 539 P.2d 204 (1975).

Loss of rock allegedly used by murder victim against defendant. — In murder case, where defendant allegedly shot decedent in a fight, and where it was not disputed that decedent struck defendant with a rock, the only dispute being whether defendant pulled the gun before or after being hit with the rock, the loss of the rock did not deprive defendant of due process. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

When the deprivation of evidence denies due process. — The deprivation of evidence constitutes reversible error where the prosecution either breached some duty or intentionally deprived the defendant of evidence, the evidence of which the defendant was deprived was material, and the defendant was prejudiced by the deprivation of the evidence. State v. Mendoza, 2016-NMCA-002.

Where defendant was convicted of child solicitation by electronic device, defendant claimed that he was denied his due process right to a fair trial because the state failed to preserve or destroyed electronic versions of the e-mail correspondence between him and the persona of a fifteen-year-old child when agents used an e-mail account that automatically deleted emails after a period of inactivity. Defendant was not denied his due process right to a fair trial because all of the emails between defendant and the "fifteen-year-old child" had been printed and the printed versions were disclosed to defendant prior to trial; the state did not intentionally delete the electronic version of the correspondence, the state satisfied its duty of preserving the evidence by printing the emails, making the electronic versions of the emails not material, and the destruction of the electronic version of the correspondence was not prejudicial to defendant. State v. Mendoza, 2016-NMCA-002.

Use of testimony from first trial held unfair under circumstances. — Where defendant was tried for murder for second time, use of the deceased witness's first trial testimony at the new trial violated this constitutional provision, because of the uncontradicted showing that at the first trial counsel proceeded under an arrangement which considered only the question of defendant's sanity, and gave no consideration to defendant's guilt or innocence, that the deceased witness had been questioned largely as a role-playing exercise by defense attorney, and that the trial judge later rejected the agreement between counsel about the insanity defense and found defendant guilty; use of deceased witness's testimony concerning guilt was fundamentally unfair under these circumstances because under the arrangement between counsel there was to be no meaningful inquiry concerning guilt. State v. Slayton, 90 N.M. 447, 564 P.2d 1329 (Ct. App. 1977).

Blood sample from unconscious defendant is admissible. — The admission in a prosecution for involuntary manslaughter of evidence based on the results of a blood test made of a blood sample taken from the defendant while he was unconscious, the use of which was protested both at the preliminary hearing and at the trial in district court, was not a denial of due process. Breithaupt v. Abram, 58 N.M. 385, 271 P.2d 827 (1954), aff'd, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).

Proof of accuracy of testing machine by lay witnesses. — Defendant was afforded due process where the accuracy of the testing machine was supported by lay testimony, subject to full rights of cross-examination by defendant, and his right to cross-examine and confront the witnesses against him was not abridged. State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

When admitting improper evidence without objection is fundamental error. — Defendant's assertion that the admission of irrelevant and prejudicial evidence that defendant wrecked the automobile he was accused of taking and that he refused medical treatment so deprived him of due process of law that his conviction should be reversed despite the fact that no objection was made was without merit, since the doctrine of fundamental error is to be resorted to in criminal cases only if the innocence of the defendant appears indisputable, the question of his guilt being so doubtful that it would shock the conscience to permit his conviction to stand, and the record did not disclose the presence of these elements. State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct. App. 1971).

Insufficient evidence of endangerment by medical neglect. — Where defendant, whose six-month-old baby died from a loss of blood associated with blunt abdominal trauma and a lacerated liver, was found not guilty of inflicting the injuries, but was convicted of negligently permitting endangerment by medical neglect, the state was required to put forth substantial evidence that defendant's neglect, failing to obtain medical care earlier, resulted in the child's death, but the state failed to present any evidence that defendant's neglect contributed to the child's death. Without some evidence to establish a causal connection between defendant's neglect and the death of the child, there was insufficient evidence to support defendant's conviction for endangerment by medical neglect. State v. Nichols, 2016-NMSC-001, *rev'g* 2014-NMCA-040, 321 P.3d 937.

Exclusion of evidence involving a collateral matter. — Where defendant, whose six-month-old baby died from a lacerated liver that was caused by blunt force trauma, was charged with child abuse due to medical negligence resulting in death; as part of defendant's defense that a third party was guilty, defendant wanted to introduce evidence that, in the days immediately following the death of the baby, defendant's spouse asked defendant's friend to pose as defendant and withdraw money from defendant's retirement account because the spouse planned to go to Mexico, which indicated the spouse's consciousness of guilt; and the district court refused to allow the friend to testify, the district court's ruling did not infringe on defendant's constitutional right to present a defense to the crime on which defendant was convicted because the excluded evidence did not support a defense that defendant did not negligently endanger the baby by failing to obtain medical treatment for the baby. State v. Nichols, 2014-NMCA-040, cert. granted, 2014-NMCERT-003.

6. PROSECUTOR CONDUCT.

Where the defendant claimed self-defense based on the violent character of the victim; the state failed to disclose the entire contents of a national crime information center report on the victim's criminal history to the defendant prior to trial; on the second day of trial, the state stipulated to the introduction into evidence of the entire NCIC report; and the defendant used the contents of the NCIC report during closing argument, the defendant's due process rights were not violated by the failure of the state to disclose the entire NCIC report prior to trial. State v. Balenquah, 2009-NMCA-

055, 146 N.M. 267, 208 P.3d 912, cert. denied, 2009-NMCERT-004, 146 N.M. 642, 213 P.3d 792.

Withholding evidence from grand jury. — It is not a violation of due process for the prosecutor to withhold circumstantial exculpatory evidence from the grand jury; he is obligated to present only direct exculpatory evidence. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Material false evidence in grand jury proceeding violates due process. — The knowing use of false evidence or the failure to correct false evidence at grand jury proceeding is a violation of due process where the evidence was material to the guilt or innocence of the accused. Where the only grand jury witness upon whose testimony the indictment was based gave false testimony, indictment based on such evidence violated defendant's right to due process. State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977).

Defendant could be denied due process by a prosecutor withholding exculpatory evidence from the jury, since the grand jury has a duty to protect a citizen against unfounded accusation, and only specified persons are authorized by statute to present matters to the grand jury. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Circumstances show deprivation of fundamental fairness by withholding exculpatory evidence. — Failure to inform the grand jury that in two of the robberies of which defendant was accused, fingerprints were found which did not match defendant's fingerprints, where in connection with these robberies there was positive identification that defendant was the robber and testimony by a detective that a victim had identified defendant in a lineup where she had not done so and stated that she was not sure by the faces but was by the voices, did not amount to a deprivation of fundamental fairness on the basis of evidence withheld from the grand jury, and there was no denial of due process. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Trickery and subornation of perjury by state denies due process. — In a criminal trial denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice, and in order to declare a denial of it there must be found that the absence of that fairness fatally infected the trial. If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law. State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961).

Personal projection of prosecutor into case denies due process. — Where the prosecuting attorney repeatedly projected himself personally into the trial events and upon one occasion the trial court engaged in a colloquy with the defendant upon a personal basis, although appellant failed to make timely objection to the conduct of the prosecutor or to the remarks of the court, prejudice resulted and denied appellant his right to a fair and impartial trial. Edgington v. United States, 324 F.2d 491 (10th Cir. 1963).

Deliberate use of material false evidence. — The deliberate use of false evidence knowingly by a prosecuting officer in a criminal case constitutes a denial of due process of law if such evidence is material to the guilt or innocence of the accused, and the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. It was held that the state's failure to correct false evidence which it had elicited concerning alleged bribes, which the state acknowledged was material as it went to the defense of entrapment, required that defendant be granted a new trial. State v. Hogervorst, 87 N.M. 458, 535 P.2d 1084 (Ct. App.), cert. denied, 87 N.M. 457, 535 P.2d 1083 (1975), cert. denied, 423 U.S. 1048, 96 S. Ct. 773, 46 L. Ed. 2d 636 (1976).

Suppression of requested favorable evidence. — Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970).

If evidence is material and defendant is prejudiced. — The deliberate suppression of evidence or the use of false evidence knowingly by a prosecuting officer in a criminal case constitutes a denial of due process of law if such evidence is material to the guilt or innocence of the accused, or to the penalty to be imposed, but the failure to show materiality of the suppressed evidence, that the prosecution's chief witness had married prior to trial but after preliminary hearing and had sworn and testified under maiden name, or prejudice resulting therefrom, renders the rule inapplicable. State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961).

Negligent investigation does not amount to suppression. — That the sheriff and the other investigating officers negligently failed to properly investigate and to preserve evidence at the scene of the homicide, or to make certain tests and measurements, does not amount to suppression of evidence bearing on self-defense or justification and deny due process of law. State v. Rose, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

State's failure to gather evidence. — Defendant's due process rights were not violated by the police only photographing the rock allegedly used to batter the defendant's girlfriend, rather than actual collecting it as physical evidence. State v. Ware, 118 N.M. 319, 881 P.2d 679 (1994), rev'g 118 N.M. 326, 881 P.2d 686 (Ct. App. 1993).

Failure to introduce evidence referred to in opening statement. — Where prosecutor in his opening statement indicated the jury would hear testimony as to the blood type of defendant and of the victim of the assault, but where no attempt was made to prove either of the blood types, this did not amount to misconduct on the part of the prosecutor requiring a reversal unless the prosecutor acted in bad faith. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Questioning witnesses, knowing they will invoke privilege not to answer. — Where the prosecutor knew that nondefendant witnesses would invoke their constitutional privilege when questioned as to their misconduct, and where the trial court in its discretion decided that the legitimate effect of such questioning - the attack on credibility - was not outweighed by prejudice to the defendant, the prosecutor's questioning was not improper and defendant was not denied due process. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Invoking fifth amendment privilege in presence of jury. — Where prosecution did not know that prosecution witness, who invoked the fifth amendment privilege not to testify in the presence of the jury, would invoke the fifth amendment privilege, there was no conscious prosecutorial misconduct and defendant was not prejudiced by the trial court's refusal to declare a mistrial. State v. Henderson, 2006-NMCA-059, 139 N.M. 595, 136 P.3d 1005, cert. denied, 2006-NMCERT-005, 139 N.M. 567, 136 P.3d 568, cert. denied, 549 U.S. 999, 127 S. Ct. 503, 166 L. Ed. 2d 376 (2006).

Improper questioning by prosecutor. — Asking the defendant whether another witness is mistaken or lying is strictly prohibited. State v. Duran, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

Where a defendant does not initiate any comment on the truthfulness of the testimony of other witnesses, the action of a prosecutor who asks the defendant whether another witness is mistaken or lying is prosecutorial misconduct. State v. Duran, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

Where the defendant accused witnesses of making false accusations about him, defendant provoked the prosecutor's improper questions to defendant about the truthfulness of the testimony of the witnesses, and where the prosecutor's questions were a minimal part of the total trial, the prosecutor's questions were not fundamental error. State v. Duran, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

Admonishment of prosecutor and proper instructions held to give due process. — Where there were three instances of improper remarks by the prosecutor, but where in each instance the prosecutor was admonished, the instructions told the jury that remarks of counsel were not to be considered as evidence, the jury was instructed not to consider what would have been the answers to questions which the court ruled could not be answered, it was instructed not to consider the court's reasons for its rulings, and it was instructed that it must follow the law as stated by the court, the prosecutor's misconduct did not deprive defendant of due process. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Filing of amended information not vindictive prosecution. — The filing of an amended information following the defendant's successful motion for a mistrial did not amount to vindictive prosecution, even though the amended information added two counts not contained in the original information, since it appeared that the prosecutor

added these counts because they were inadvertently omitted from the original written magistrate's bind over order and from the original information. State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

Proper for prosecutor to argue that death penalty protects people. — Prosecution's arguments during rebuttal that imposition of the death penalty would protect people both inside and outside of the prison was proper argument the effect of which was to merely point out to the jury the future dangerousness of this particular defendant. State v. Compton, 104 N.M. 683, 726 P.2d 837 (1986), cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed 2d265 (1986).

Prosecutorial discretion in determining cases warranting the death penalty. — The necessary and unavoidable discretion of prosecutors in determining which cases warrant the death penalty does not violate the New Mexico constitution. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Where death penalty decision clearly jury's responsibility, adverse prosecutorial comments alleviated. — Any adverse impact of comments by the prosecution during punishment phase of trial was alleviated because throughout both the closing and rebuttal arguments the prosecution made it perfectly clear that the decision concerning the death penalty was for the jury and further, defense counsel also made it unmistakably clear that the jury had sole responsibility for deciding defendant's fate. State v. Compton, 104 N.M. 683, 726 P.2d 837 (1986), cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

7. RIGHT TO COUNSEL.

The right to counsel at a lineup is essential to due process. State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969) (rule not retroactive and so inapplicable).

For former rule, *see* State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Where defendant was not harmed by evidence. — Defendant's argument that if the exercise of defendant's right to counsel lacked significant probative value, any reference to the exercise of the right had an intolerable prejudicial impact requiring reversal, was without merit since the relevant question is whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has burdened or will burden the exercise of the constitutional right. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Delay in appointing counsel. — Where the record does not show any prejudice from delays in the appointment of counsel or in holding the preliminary examination, and no prejudice is claimed, there was no denial of due process. State v. Paul, 83 N.M. 527, 494 P.2d 189 (Ct. App. 1972).

The taking of handwriting exemplars is not a "critical" stage of the criminal proceedings entitling the accused to the assistance of counsel. State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

Infringement of right to counsel depends on circumstances of case. — The obligation of the state court trial judge to fully safeguard the right to counsel has been stated many times by the United States supreme court. That court has stated that no hard and fast rule may be promulgated whereby it can be determined that a defendant's constitutional right to due process of law has been infringed. Rather, this determination must turn on the particular facts of each case, the circumstances present which shall include consideration of the background, training, experience and conduct of the defendant. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Limitation upon appointed counsel's fee is constitutional. — Defendant's argument that the statutory attorney fee limitation of $400 in defense of indigent criminal cases (31-16-8 NMSA 1978) was a denial of equal protection and due process was without merit where there was no claim that the defendant was poorly represented, nor were there any facts indicating how the statutory fee limitation so deprived the defendant. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971).

Right only denied when trial becomes "sham" or "farce". — Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not amount to ineffective assistance of counsel, unless taken as a whole the trial was a "mockery of justice". Otherwise expressed, counsel is presumed competent, and a defendant is denied his right only when the trial becomes a "sham" or a "farce". State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

Advice to plead guilty and inexperience are not incompetence. — The constitutional guarantee of assistance of counsel in a criminal action implies the "effective assistance of counsel". The fact, however, that an attorney advises his client to plead guilty in the hope of obtaining a lighter sentence is not an indication of incompetence, nor can inexperience be treated as the equivalent of incompetence. State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

Adequacy of representation in prior trial is issue under habitual criminal statute. — Question of the adequacy of representation so as to meet the requirements of due process in a prior trial and conviction in another state may be raised as an issue under the habitual criminal statute. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

Factors considered in time necessary to prepare defense. — The nature of the offense, the number of witnesses and the skill of the attorney are all variables to be taken into consideration in each case in considering the amount of time necessary to prepare a defense. State v. Nieto, 78 N.M. 155, 429 P.2d 353 (1967).

Police regulation prohibiting consulting attorney for four hours. — Where defendant, accused of driving while intoxicated, was refused permission to contact his

attorney and personal physician following booking by reason of police regulation that would not permit person arrested for intoxication to consult an attorney for four hours after arrest, but was treated by physician at county hospital within 30 minutes after reaching police headquarters, constitutional right to due process was not denied. City of Albuquerque v. Patrick, 63 N.M. 227, 316 P.2d 243 (1957).

Attorney, not judge, is chief guardian of defendant's rights. — The legal system is primarily of an adversary nature, the guardianship of the defendant's rights lying chiefly with his attorney, not the judge, and rights not asserted by the defendant's attorney generally are waived. Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976).

Voluntary guilty plea on advice of counsel is binding. — An involuntary plea of guilty is inconsistent with the constitutional guarantee of due process, but when a plea of guilty is made voluntarily after proper advice of counsel and with a full understanding of the consequences, the plea is binding. State v. Robbins, 77 N.M. 644, 427 P.2d 10 (1967), cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967).

The trial court is not obligated to explain the effect of a guilty plea entered by a defendant represented by counsel. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Counsel may be waived without deprivation of due process. — In case where sentencing court repeatedly cautioned appellant concerning gravity of habitual criminal charge, and where appellant's answers to questions by the court were by his own admission voluntarily given and where each of the prior convictions was freely acknowledged, the waiver of counsel was intelligently made, the appellant was not deprived of due process and, therefore, the district court's denial of the motion to vacate sentence made under Rule 93, N.M.R. Civ. P. (now Rule 5-802 NMRA) (which only applies to post-conviction motions made prior to September 1, 1975), was correct. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Counsel need not be appointed for appeal to United States supreme court. — Habeas corpus relief was refused on grounds that there was no constitutional compulsion requiring the supreme court of New Mexico to appoint counsel to assist defendant in taking an appeal in a criminal case from that court to the supreme court of the United States. Peters v. Cox, 341 F.2d 575 (10th Cir. 1965), cert. denied, 382 U.S. 863, 86 S. Ct. 126, 15 L. Ed. 2d 101 (1965).

Counsel is not required at parole revocation hearing. — Neither due process nor the applicable statutes require that parolees be provided with appointed counsel or represented by employed counsel when they appear before the parole board in a revocation hearing. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (prisoner sentenced and paroled to detainer).

8. SPECIFIC STATUTES.

Withdrawal of the six-month rule did not violate due process as an ex post facto law. — Where the district court dismissed defendant's case under the six-month rule without engaging in a speedy trial analysis because the state had failed to show exceptional circumstances for filing a motion for an extension of time to commence trial well beyond the deadlines required under Rule 5-604 NMRA; and the state's appeal from the order of dismissal was pending on May 12, 2010, the withdrawal of the six-month rule in defendant's case did not violate due process as an ex post facto law. State v. Romero, 2011-NMSC-013, 150 N.M. 80, 257 P.3d 900.

Phrase "use of force or coercion" is not unconstitutionally vague. — The language in Section 30-9-11 NMSA 1978, "perpetrated by the use of force or coercion", is not unconstitutionally vague, since the crime is defined in terms of a result that defendant causes, and if a defendant causes such a result by the use of force or coercion, force or coercion was the method which caused the result, that is, the crime. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Legislation held too vague. — Portion of city vagrancy ordinance proscribing either loitering in, about or on any street, land, avenue, alley, any other public way, public place, at any public gathering or assembly or in or about any store, shop or business or commercial establishment, or on any private property or place without lawful business there; or loitering about or on any public, private or parochial school, college, seminary grounds or buildings, either on foot or in or on any vehicle, without lawful business there, was unconstitutional upon its face for vagueness and overbreadth, because it condemned acts as criminal to which no reasonable person would attribute wrongdoing or misconduct. Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971).

The provisions of 30-36-5 NMSA 1978, concerning the "totaling" of amounts of worthless checks, are so vague that they offend due process and are void. Not all of the section, however, is unconstitutional. Only the "totaling" provisions are void, and those provisions are severable. Severing the "totaling" provisions from the section leaves the remaining portion of that section consistent with 30-36-4 NMSA 1978, which makes an offense out of each worthless check issued. Where defendant was convicted of issuing four worthless checks, he could have been sentenced for each offense under the remaining portion of 30-36-5 NMSA 1978. Therefore, the trial court erred in dismissing the information. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

The term "lewdness" in 40-34-15, 1953 Comp., now repealed, if dissociated from "assignation or prostitution", would be too vague and indefinite to comply with the due process of law requirements. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957) (holding term not intended to be dissociated).

Legislation held not too vague. — Section 30-6-2 NMSA 1978, making the abandonment of a dependent a criminal offense, is not unconstitutionally vague and does not violate due process, as the statute contains no requirement that affirmative

action be taken to obtain public welfare benefits. State v. Villalpando, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Section 30-20-13C NMSA 1978, prior to the 1975 amendment thereof, allowed control of campus disturbances in terms marked by flexibility and reasonable breadth, rather than meticulous specificity, and was not void for vagueness. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

The term "constructive transfer" in the definition of "deliver" in the Controlled Substances Act, 30-31-2 G NMSA 1978, is not void under the due process clause on the grounds of vagueness. State v. McHorse, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Defendant's argument as to unconstitutional vagueness of 30-31-23 B NMSA 1978 which makes possession of more than eight ounces of marijuana in the forms set out by statute a felony, was not well taken, since the language of definitional 30-31-2 O NMSA 1978, coupled with 30-31-23 B(3) NMSA 1978, is not so indefinite that men of common intelligence have to guess at its meaning and scope. State v. Olive, 85 N.M. 664, 515 P.2d 668 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Sections 30-19-3F and 30-19-4 B NMSA 1978 are not void for vagueness because they provide different punishment for the same act, since the two statutes do not relate to the same activity. Section 30-19-3 F NMSA 1978 requires a positive act by an accused relating to commercial gambling, while 30-19-4 B NMSA 1978 connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his control. State v. Marchiondo, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Defendant's contention that the words "held to service against the victim's will" in 30-4-1 NMSA 1978 have no general meaning which the public can comprehend was not supported by argument or authority and cannot find support in reason, and therefore the statute is not so vague as to violate due process. State v. Aguirre, 84 N.M. 376, 503 P.2d 1154 (1972).

Section 30-16-32 NMSA 1978 is not unconstitutionally vague, the language "signs the name of another" (which defendant argued is vague and ambiguous because it can reasonably be interpreted in two distinct ways) has but one meaning, and that is that "another" means "other than oneself". State v. Sweat, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

Former 40A-9-9, 1953 Comp., defining sexual assault as the indecent handling of or indecent exposure in the presence of a person under the age of 16, when considered in light of statute as a whole, was sufficiently precise to meet due process standards. State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Since criminal intent is construed to be a necessary element of crime of possession of burglary tools, Laws 1925, ch. 63, § 1, was not void for indefiniteness and uncertainty under the constitution. State v. Lawson, 59 N.M. 482, 286 P.2d 1076 (1955). See Section 30-16-5 NMSA 1978.

Section 30-16-5 NMSA 1978, as to possession of burglary tools, gives notice that one is exposed to criminal sanctions if one: (1) possesses an instrument or device, (2) the instrument or device is designed or commonly used to commit burglary, and (3) the instrument or device is possessed under circumstances evincing an intent to use the instrument or device in committing burglary, and thus the statute is not void for vagueness, since it gives fair warning that possession of the type of instrument described in the statute, and under the circumstances described in the statute, is a crime. State v. Najera, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).

Neither 30-9-11 nor 30-9-13 NMSA 1978 is unconstitutionally vague or overbroad, nor do the statutes encourage arbitrary or discriminatory prosecution. State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990).

The terms "without good cause", "protracted period", "maliciously", "detaining" and "deprive permanently" as used in 30-4-4 NMSA 1978, the custodial interference statute, are of such well recognized meaning that individuals are placed on notice of the conduct sought to be proscribed and, therefore, the statute and indictments brought thereunder are not unconstitutionally vague. State v. Luckie, 120 N.M. 274, 901 P.2d 205 (Ct. App.), cert. denied, 120 N.M. 184, 899 P.2d 1138 (1995).

Implied consent to sobriety test is constitutional. — The Implied Consent Act (66-8-105 to 66-8-112 NMSA 1978), framed upon the premise that when a person obtains a license to operate a motor vehicle, he impliedly consents to the sobriety test, violates neither due process nor equal protection. Commissioner of Motor Vehicles v. McCain, 84 N.M. 657, 506 P.2d 1204 (1973).

Abortion statute violates due process in part. — Portions of abortion statute, 30-5-1 NMSA 1978, which define "justified medical termination" (30-5-3 NMSA 1978 proscribes terminations that are not "justified medical terminations") as only existing where physician uses acceptable medical procedures in accredited hospitals upon certification by special hospital board that either continuation of pregnancy would result in death or grave injury to mother, child is likely to have grave physical or mental defects or pregnancy has resulted from rape or incest, are unconstitutional as violative of due process by virtue of holdings in Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973), and Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), reh'g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973). State v. Strance, 84 N.M. 670, 506 P.2d 1217 (Ct. App. 1973).

City noise ordinance not overly vague. — The examples as set out in a city ordinance proscribing certain unreasonably loud noises were not so vague that men of

common intelligence must guess at their meaning. 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).

III. EQUAL PROTECTION.

A. GENERALLY.

Cap on medical malpractice damages does not violate equal protection. — The cap on medical malpractice damages in 41-5-6 NMSA 1978 does not violate the equal protection clause of the United States Constitution. Salopek v. Friedman, 2013-NMCA-087.

Restrictions on engaging in business or profession must apply to all. — It is undoubtedly the right of every citizen to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons. State v. Collins, 61 N.M. 184, 297 P.2d 325 (1956).

Federal and state provisions correspond. — There is a close correspondence in meaning and purpose between the principles underlying the equal protection clauses of the U.S. Const., amend. XIV, and of this section and the general versus special law provisions of the Springer Act, former 48 U.S.C. § 1471, and of N.M. Const., art. IV, § 24. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

The standards for a violation of the equal protection clauses of the United States and New Mexico constitutions are the same. 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).

The three standards of review and a suggested fourth level of review, used in equal protection cases. Alvarez v. Chavez, 118 N.M. 732, 886 P.2d 461 (Ct. App. 1994), overruled on other grounds, Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305, overruling 119 N.M. 602, 893 P.2d 1006 (1995).

Only members of class discriminated against can complain. — Denial of equal rights can be urged only by those who can show that they belong to class discriminated against. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967); Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952); McKinley Cnty. Bd. of Educ. v. State Tax Comm'n, 28 N.M. 221, 210 P. 565 (1922); Pueblo of Isleta v. Tondre, 18 N.M. 388, 137 P. 86 (1913) (opinion on motion for rehearing).

Person who did not suggest that he might become purchaser of any bond under proposed bond issue could not complain that statute authorizing issuance and sale of revenue bonds to raise funds for building a municipal auditorium was discriminatory. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952).

Since plaintiff does not assert that it is a member of a suspect class or was denied a fundamental right, a state regulation need only be rationally related to a legitimate government purpose. E. Spire Communications, Inc. v. New Mexico Pub. Regulation Comm'n, 392 F.3d 1204 (10th Cir. 2004), aff'g 269 F. Supp. 2d 1310 (D.N.M. 2003).

Equal protection does not prohibit classification for legislative purposes, provided that there is a rational and natural basis therefor, that it is based on a substantial difference between those to whom it does and those to whom it does not apply, and that it is so framed as to embrace equally all who may be in like circumstances and situations. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970); Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969).

The fact that the legislature is entitled to enact statutes which apply only to limited subjects or persons without having the effect of making them special legislation is well recognized. Airco Supply Co. v. Albuquerque Nat'l Bank, 68 N.M. 195, 360 P.2d 386 (1961).

Classification must be reasonable. — There is no denial of the equal protection of the laws where a reasonable classification is made by the legislature and all persons within a given class are treated alike. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965), overruled in part, State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Judicial inquiry under the equal protection clause does not end with a showing of equal application among the members of the class defined by the legislation; the courts must also reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

A classification must be reasonable and not arbitrary, and the classification attempted, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences as distinguished from artificial ones. Mere difference, of itself, is not enough. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Classification, in order to be legal, must be rational; it must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

It is competent for the legislature to classify and adapt a law general in nature to a class, but such classification must be a natural, and not an arbitrary or fictitious one, and the operation of such general law must be as general throughout the state as is the genera therein provided for. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

Equal protection does not prohibit legislatively created classifications that are rationally based. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

All members of class must be treated alike. — Given a reasonable classification of subjects, "equal protection of the laws" is had if all within any given class are treated alike. All such classifications must be based upon some reasonable distinction. Pueblo of Isleta v. Tondre, 18 N.M. 388, 137 P. 86 (1913) (opinion on motion for rehearing).

The test as to whether legislation is general, and therefore constitutional, depends upon the reasonableness of the classification and whether the statute is general to the class it embraces, operating uniformly on all members of that class. Airco Supply Co. v. Albuquerque Nat'l Bank, 68 N.M. 195, 360 P.2d 386 (1961).

If legislation makes no arbitrary or unreasonable distinction within the sphere of its operation and accords substantially equal and uniform treatment to all persons similarly situated, the law complies with the equality provisions of state and federal constitutions. Weiser v. Albuquerque Oil & Gasoline Co., 64 N.M. 137, 325 P.2d 720 (1958); State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953).

While classification is proper, there must always be uniformity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

The reasonableness of a classification is in the first instance a legislative question. — The legislature is vested with a wide discretion in distinguishing, selecting and classifying. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969); Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967), cert. denied, 78 N.M. 704, 437 P.2d 165 (1968), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The legislature of a state has necessarily a wide range of discrimination in distinguishing, selecting and classifying; it is sufficient to satisfy the demands of the constitution if the classification is practical and not palpably arbitrary. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

It is in the first instance a legislative question as to whether a classification is reasonable. The policy reasons behind judicial reluctance to overturn statutes on other than grounds involving fundamental constitutional values involves separation of powers considerations whereby the judiciary defers to legislative determination as to whether a particular classification is rational. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Facts sustaining classification will be presumed. — The fact that the legislature has enacted laws applicable to only one community land grant, and has thus classified some of the grants differently, is entitled to great weight. Only if a statutory classification

is so devoid of reason to support it, as to amount to mere caprice, will it be stricken down. If any state of facts can be reasonably conceived which will sustain a classification, there is a presumption that such facts exist. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

If any state of facts can reasonably be conceived which will sustain a statutory classification, the statute is valid. Garcia v. Albuquerque Pub. Schs. 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).

Under the rational basis test, a statute will not be set aside if any state of the facts may be reasonably conceived to justify it, and any redeeming value of the classification is sufficient to render the statute constitutional. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Legislature's failure to compile legislative history does not mean that statute must fall. Different classifications are permitted and the court may glean the reason for those classifications from extrinsic sources. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Court will not inquire into wisdom of statute. — In keeping with the traditional self-restraint of the supreme court regarding constitutional challenges, it refuses to inquire into the wisdom, the policy or the justness of an act of the legislature, and only when the court is satisfied that the legislature has wandered outside the confines of the constitution by enacting unequal, oppressive and arbitrary legislation will such legislation be struck down. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Court cannot substitute its view in selecting and classifying for that of legislature. Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Unless the classification is clearly arbitrary and capricious or void for uncertainty, a court cannot substitute its views in selecting and classifying for those of the legislature. Michael J. Maloof & Co. v. Bureau of Revenue, 80 N.M. 485, 458 P.2d 89 (1969).

Any redeeming value of classification is sufficient. — The test as to whether a statute is unconstitutional under the equal protection clauses is very strict since any redeeming value of the classification is sufficient. Espanola Hous. Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977), rev'g 90 N.M. 799, 569 P.2d 1245 (1977).

Certain classifications and interests require strict scrutiny. — When a statute is challenged on the basis of the equal protection clause, specific tests are applicable. Where legislation involves "suspect classifications" (race, etc.) or touches "fundamental interests" (right to vote), it is subject to strict scrutiny. But where no such concerns are

present, legislation is subject to a more liberal critique. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Classification must be capricious to be stricken down. — Only if a classification is so devoid of any semblance of reason as to amount to mere caprice, depending on legislative fiat alone for support, is a court justified in striking down a legislative act as violative of constitutional guarantees. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969); Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967), cert. denied, 78 N.M. 704, 437 P.2d 165 (1968), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Is it so wholly devoid of any semblance of reason to support it, as to amount to mere caprice, depending on legislative fiat alone for support? If so, it will be stricken down as violating constitutional guarantees. But the fact that the legislature has adopted the classification is entitled to great weight. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

To show a violation of equal protection, it must be demonstrated that legislation is clearly arbitrary and unreasonable, not just that it is possibly arbitrary and unreasonable. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Only rational classification required unless personal rights trammeled or suspect classification. — Unless a challenged statute trammels fundamental personal rights or is drawn upon inherently suspect classifications, such as race, religion or alienage, the court presumes the constitutionality of the statutory discrimination and requires only that the classification challenged be rationally related to a legitimate state interest. Garcia v. Albuquerque Pub. Schs. 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).

Class-of-one equal protection. — A class-of-one exists when a plaintiff alleges that the plaintiff has been intentionally treated differently from other similarly situated and that there is no rational basis for the difference in treatment. The two elements that must be proven are that a public official inflicts a cost burden on one person without imposing it on those who are similarly situated in material respects and that there is no conceivable basis other than a wholly illegitimate motive for the official’s actions. Gentry v. Timberon Water and Sanitation Dist., 2012-NMCA-019, 270 P.3d 1286.

Absolute precision in classification is not required. — The basis underlying the equal protection doctrine is that persons similarly situated shall receive like treatment; it does not require absolute precision or mathematical nicety in the designation of classifications, but it does not tolerate classifications which are so grossly overinclusive as to defy notions of fairness and reasonableness. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Musgrove v. Department of Health & Social Servs., 84 N.M. 89, 499 P.2d 1011 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Absolutely equal treatment of parties performing similar service is not demanded in order for a legislative act to withstand an attack on its constitutionality, but it is nevertheless imperative that where classification is attempted, the same must be reasonable and based on real differences bearing a proper relationship to the classification, and there must be uniformity of treatment within each class. Community Pub. Serv. Co. v. New Mexico Pub. Serv. Comm'n, 76 N.M. 314, 414 P.2d 675, cert. denied, 385 U.S. 933, 87 S. Ct. 292, 17 L. Ed. 2d 213 (1966).

Power to classify carries with it power to establish different sets of rules applicable to the different classes, and it is not fatal that the particular rules within the set may result in some inequality when applied to specific instances. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932).

Changed circumstances may make fair classification unfair. — A classification that may once have had a fair and substantial relation to the objectives of the statute because of an existing factual setting may lose its relationship due to altered circumstances. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Unequal administration of apparently fair law violates constitution. — Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. However, unequal administration of the law or ordinance, so as to violate the state and United States constitutions, will not result unless an intentional or purposeful discrimination is shown, and this cannot be presumed. One must prove more than mere nonenforcement against other violators and present something which in effect amounts to an intentional violation of the essential principle of practiced uniformity. Barber's Super Mkts., Inc. v. City of Grants, 80 N.M. 533, 458 P.2d 785 (1969).

Classification based solely on time element is unreasonable. — To avoid constitutional prohibition, classification must be founded upon some pertinent or real differences as distinguished from artificial ones, and a legislative classification based wholly upon the time element when the time selected bears no reasonable relationship to object of the legislation is unreasonable and repugnant to constitution. State v. Sunset Ditch Co., 48 N.M. 17, 145 P.2d 219 (1944).

Statute which applied only to corporations organized under territorial law and not to corporations organized after statehood (Laws 1921, ch. 185) was unconstitutional because it denied equal protection of the law and impaired an obligation of contract. State v. Sunset Ditch Co., 48 N.M. 17, 145 P.2d 219 (1944).

Classification based upon possibility of fraud in some cases. — Although the prevention of fraud and collusion is a valid state interest, and the courts should take notice of fraud and collusion when found to exist in a particular instance, nevertheless the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class, and courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Right to vote may be reasonably restricted. — The state of New Mexico has the power to impose reasonable residence and other restrictions on the right to vote, so long as the restrictions are not discriminatory and are based on a reasonable classification. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Classification must serve valid state interest. — If a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest. As long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age and citizenship cannot stand unless the district or state can demonstrate that the classification serves a compelling state interest. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Discriminatory use of peremptory challenges violates equal protection in civil cases. — In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that racial discrimination in selecting a jury in a criminal case violates the equal protection clause of the United States constitution. The same approach described in *Batson* for determining the existence of racial discrimination in the jury selection of criminal cases also applies in civil cases. Bustos v. City of Clovis, 2016-NMCA-018, cert. denied, 2016-NMCERT-001.

Test to establish discriminatory use of peremptory challenges. — A three-part test is utilized to establish discriminatory use of peremptory challenges. First, the opponent of a peremptory challenge has the burden to establish a prima facie case indicating that the peremptory challenge has been exercised in a discriminatory way. To establish a prima facie case, the challenging party must show that a peremptory challenge was used to remove a member of a protected group from the jury panel, and the facts and other related circumstances raise an inference that the individual was excluded solely on the basis of his or her membership in a protected group. Second, if a prima facie showing is made, the burden then shifts to the proponent of the challenge to come forward with a race-neutral explanation for the challenge. If the explanation offered is

not neutral, then a finding of purposeful discrimination may be made without any further showing by the opponent to the challenge. Third, if a neutral explanation is tendered, the district court then determines whether the opponent of the strike has proved purposeful discrimination. Bustos v. City of Clovis, 2016-NMCA-018, cert. denied, 2016-NMCERT-001.

In a civil trial against defendant law enforcement officers, where claims were made for wrongful death, negligent infliction of emotional distress, loss of consortium, battery, and excessive force, and where defendants used three of their five peremptory challenges against prospective jurors with Hispanic surnames and used their one peremptory strike against a prospective alternate juror with a Hispanic surname, defendants' challenges indicated a pattern of conduct and a motive to keep Hispanics off of the jury. Plaintiffs established a prima facie case of discriminatory conduct in the exercise of peremptory challenges, but defendants failed to rebut the prima facie case by failing to articulate a race-neutral explanation for excusing one of the jurors. The jury selection in this case violated *Batson*. Bustos v. City of Clovis, 2016-NMCA-018, cert. denied, 2016-NMCERT-001.

B. SPECIFIC CLASSIFICATIONS.

Same-gender marriages. — Barring individuals from marrying and depriving them of the rights, protections and responsibilities of civil marriage solely because of their sexual orientation violates the equal protection clause of Article II, Section 18 of the New Mexico constitution. The state of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections and responsibilities that derive from civil marriage under New Mexico law. Griego v. Oliver, 2014-NMSC-003.

City of Albuquerque ordinance which prohibits public nudity does not make an invidious gender classification that operates to the disadvantage of women and does not violate the New Mexico equal rights amendment. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

City of Albuquerque ordinance which prohibits public nudity does not discriminate against women in violation of the equal rights amendment in the New Mexico constitution because it prohibits a women from showing her breast in a public place without a fully opaque covering of her entire nipple when there is no such prohibition against men. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

Standard of review of decisions of the commissioners of acequias. — The standard of review in an appeal to the district court from a decision by the commissioners of an acequia pursuant to 73-2-21 NMSA 1978, which permits the district court to set aside, reverse or remand the decision if the district court determines that the commissioners acted fraudulently, arbitrarily or capriciously, or that the

commissioners did not act in accordance with law, does not violate the equal protection clause of N.M. Const., art. II, § 18. Pena Blanca Partnership v. San Jose de Hernandez Cmty. Ditch, 2009-NMCA-016, 145 N.M. 555, 202 P.3d 814, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

Statute exempting county from requirement of single-member districts does not violate equal protection rights of residents. Montano v. Los Alamos Cnty., 1996-NMCA-108, 122 N.M. 454, 926 P.2d 307, cert. denied, 122 N.M. 416, 925 P.2d 882 (1996).

Limitation of city electors to county qualified property owners is reasonable. — The limitation of electors voting on municipal debt or bonds to those property owners who are otherwise qualified to vote in the county is based upon the practical and reasonable consideration that in New Mexico the voter registration records are kept and maintained by the county clerk, are readily available for use in checking qualifications of electors and are used by the municipalities in the county in the conduct of municipal elections. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967). See 3-30-2, 3-30-3 and 3-30-6 NMSA 1978.

Right to vote for legislature and constitutional amendment may not be distinguished. — There is no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments. One is no more a necessary ingredient of the democratic process than the other. Nor can it be said that an equal voice in selection of the legislature is of greater importance to a citizen than equality of weight in expression of views on changes in the basic charter, the constitution. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Requirement of two-thirds vote in each county for amendment is invalid. — A requirement of a two-thirds favorable vote in every county for the adoption of an amendment, when there is a wide disparity in population among counties, must result in greatly disproportionate values to votes in the different counties. Where a vote in one county outweighs 100 votes in another, the "one person, one vote" concept announced in Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), certainly is not met. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968). See N.M. Const., art. VII, § 3 and art. XIX, § 1.

Tort Claims Act constitutional. — The Tort Claims Act (41-4-1 to 41-4-27 NMSA 1978) does not violate the equal protection clauses of the United States and New Mexico constitutions. Garcia v. Albuquerque Pub. Schs. Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Educational qualifications may be imposed on bar applicants. — The educational qualifications required of applicants before they are permitted to practice law in New Mexico do not violate the fourteenth amendment or this section, either in regard to the clause requiring due process of law or that providing for equal protection of the laws. Henington v. State Bd. of Bar Exam’rs, 60 N.M. 393, 291 P.2d 1108 (1956).

Failure to pass examination justifies denying admission to bar. — When one fails to pass an appropriate and properly administered bar examination, it is not unreasonable to say that he has demonstrated his lack of proficiency in law so as to justify denying him the right to be admitted to the bar. Accordingly, there has been no denial of due process or equal protection. In re Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

Equal protection not denied without full hearing. — There is a rational basis for according an applicant a full due process hearing in the area of character determinations, and denying such full hearing on the matter of the validity of determinations as to intellectual and learning qualifications arrived at by examination or testing in accordance with recognized procedures and, therefore, petitioner was not denied due process or equal protection of the law by the lack of a full hearing concerning his failure of the bar examination. In re Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

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Due process not denied without full hearing. — There is a rational basis for according an applicant a full due process hearing in the area of character determinations, and denying such full hearing on the matter of the validity of determinations as to intellectual and learning qualifications arrived at by examination or testing in accordance with recognized procedures and, therefore, petitioner was not denied due process or equal protection of the law by the lack of a full hearing concerning his failure of the bar examination. In re Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

Right to take bar examination may be denied for lack of good character. — The requirement of former Rule III of the Rules Governing Admission to the Bar of New Mexico, which provided "that the board of bar examiners may decline to permit any such applicant to take the [bar] examination when not satisfied of his good moral character," which in the same or similar language is universal in this country, could not seriously be challenged as unreasonable. Schware v. Board of Bar Exam'rs, 60 N.M. 304, 291 P.2d 607 (1955), rev'd on other grounds, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957). See now Rules 15-103 and 15-302 NMRA.

Applicant may be required to furnish character affidavit. — Applicant to take the New Mexico bar examination had to be shown to be a person of good moral character before he was eligible to take the bar examination, and requiring him to submit an affidavit of an attorney of New Mexico to that effect did not violate this section. Henington v. State Bd. of Bar Exam'rs, 60 N.M. 393, 291 P.2d 1108 (1956). See now Rules 15-103 and 15-302 NMRA.

Qualifications required must be connected with fitness to practice. — Petitioner was refused admission to the New Mexico bar examination by the board of bar examiners. He later requested a formal hearing on the denial of his application. At the hearing, the board told him for the first time why it had refused permission. Its reasons were: (1) use of aliases by the applicant; (2) former connection with subversive organizations; and (3) his record of arrests, thus failing to satisfy the board as to the requisite moral character for admission to the bar of New Mexico. He appealed to the New Mexico supreme court; the denial was upheld. However, the United States supreme court reversed, holding that a state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment. A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. Schware v. Board of Bar Exam'rs, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957), rev'g 60 N.M. 304, 291 P.2d 607 (1955).

Activity as attorney may be reviewed. — Respondent's contentions that, in some way, he had been denied procedural and substantive due process of law and equal protection of the law has no validity where the conduct charged against him is wholly and entirely concerned with his activity as an attorney. In re Nelson, 79 N.M. 779, 450 P.2d 188 (1969).

License fee may be imposed on attorneys. — Enforcement of the former penalty provision of State Bar Act, Laws 1927, ch. 113, § 2 (deleted in 1949), did not deny to an attorney the equal protection of the laws. If power to impose a license fee is conceded, as it must be, then penalty which is designed solely to enforce payment of fee and which may be avoided altogether by payment is not arbitrary or unreasonable. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931), abrogated, In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.2d 905.

A license to operate a motor vehicle is a mere privilege and not a property right and is subject to reasonable regulation under the police power in the interest of public safety and welfare. Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960) (and an operator's license may be suspended on showing of habitual recklessness).

There may justly be classification between employer and employee; each may be made a class, and a different rule applied, because there are differences of situation

and in the considerations applicable to the various classes. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

Different minimum wages cannot be set for directly competing employers. — The former Wage and Hour Act (Laws 1955, ch. 200) constituted class legislation of the most objectionable kind insofar as it referred to drugstore employees. The classification was arbitrary and oppressive and without any valid reason for its basis. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

Under the provisions of § 3(a)(1) of the former Wage and Hour Act (Laws 1955, ch. 200), the owner of a variety store was required to pay his employees the minimum wage of $.75 per hour. On the other hand, his competitors' employees, because they worked in drugstores, whether they served food and drink for consumption on the premises or not were declared to be "service employees" and needed only be paid $.50 per hour. Thus, the variety store owner's competitors obtained a competitive advantage because they were entitled to pay a lower minimum wage to their employees performing the same functions as in direct competition with the variety store owner's employees. Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957).

Liability of hotelkeeper for theft or negligence may be limited. — A statute limiting liability of a hotelkeeper as to property of guest for theft or negligence of hotelkeeper or his servants, 57-6-1 NMSA 1978, is not unconstitutional under this section, which provides for equal protection of the laws. Weiser v. Albuquerque Oil & Gasoline Co., 64 N.M. 137, 325 P.2d 720 (1958).

Elections in certain counties as to drive-up windows for alcohol sales. — Subsection F (now G) of 60-7A-1 NMSA 1978, which provides for an election in eligible counties on the question: "Shall a retailer or dispenser be allowed to sell or deliver alcoholic beverages at any time from a drive-up window?" does not violate the equal protection clauses of the federal and state constitutions. Thompson v. McKinley Cnty., 112 N.M. 425, 816 P.2d 494 (1991).

Sovereign immunity doctrine is justified. — Plaintiff's novel argument that the doctrine of sovereign immunity arbitrarily and unreasonably creates two classes of plaintiffs (one that can be made whole for negligently inflicted injuries and one that cannot) was found to be without merit by the court of appeals, which believed there were substantive differences justifying the special treatment of states and their political subdivisions when carrying on their governmental functions. Dairyland Ins. Co. v. Board of Cnty. Comm'rs, 88 N.M. 180, 538 P.2d 1202 (Ct. App. 1975).

Different limitations may apply to suits against cities, counties and state. — Section 37-1-24 NMSA 1978 does not violate this section, since the fact that cities are limited in their expenditures and that the ability of cities to raise money to meet such expense is restricted, provides a rational basis for limiting the time period in which a suit may be brought against a city to one year, as opposed to a three-year period for suits

against the county or state. Espanola Hous. Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977), rev'g 90 N.M. 799, 568 P.2d 1245 (Ct. App. 1977).

Rational basis review of state liability cap. — Because the cap on tort recoveries against the state, provided in 41-4-19 NMSA 1978, affects economic interests, not fundamental rights, the appropriate level of constitutional scrutiny in an equal protection challenge is rational basis review, not the intermediate scrutiny necessary for statutes affecting fundamental rights. Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305, overruling 119 N.M. 602, 893 P.2d 1006 (1995).

Rational basis review of home rule charter under Municipal Charter Act and home rule amendment. — Where petitioner sought to have the San Miguel county commission appoint a charter commission providing for "home rule" government of the county, and where petitioner argued that the inclusion of Los Alamos county, and the failure to include San Miguel county, in the term "municipality" under the home rule amendment and the Municipal Charter Act would infringe on petitioner's right to local self-government in a manner that violates equal protection; court of appeals held that there is no fundamental right that is violated by a statutory and constitutional scheme that allows the residents of Los Alamos county to engage in county-based home rule while residents of other counties cannot; it is a rational policy choice for the legislature and the people of New Mexico to treat Los Alamos county differently from other counties on the basis of its size and its unique history and characteristics; under rational basis review, the legislative scheme challenged by petitioner does not violate equal protection guarantees. Einer v. Rivera, 2015-NMCA-045, cert. denied, 2015-NMCERT-003.

Limitations on governmental tort liability. — The New Mexico constitution's guarantee of access to the courts is not a guarantee of unlimited governmental tort liability. Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305, overruling 119 N.M. 602, 893 P.2d 1006 (Ct. App. 1995).

Intermediate scrutiny of cap on tort damages. — A tort victim's interest in full recovery of damages calls for a form of scrutiny somewhere between minimum rationality and strict scrutiny. Therefore, intermediate scrutiny should be applied to determine the constitutionality of the cap on damages in Subsection A(2) of 41-4-19 NMSA 1978 of the Tort Claims Act. Trujillo v. City of Albuquerque, 110 N.M. 621, 798 P.2d 571 (1990).

Protection of utility interests. — The preference in 62-9-1 NMSA 1978 indicated by its protection of mutual domestic water consumer associations from invasion by a regulated utility but not from an unregulated utility does not lack a rational basis, and an argument that it unconstitutionally discriminates against the invaded utility solely on the basis of the status of the invader was without merit. Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 904 P.2d 28 (1995).

Telephone order standard. — State corporation commission's (now public regulation commission's) order to a telephone local exchange carrier imposing a state-wide standard of zero primary orders held over 30 days did not violate equal protection under the federal or state constitutions. U.S. West Communications, Inc. v. New Mexico SCC, 1997-NMSC-031, 123 N.M. 554, 943 P.2d 1007.

Conservation laws may not deprive property owners of constitutional rights. — The legislature may provide by law for the conservation of game animals and birds, but only so long as such laws do not deny to one having rights in privately owned land the due process or equal protection of the laws that the constitution guarantees to all persons. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965).

The state game commission may not create a game refuge or migratory bird resting ground on private land without consent, or without acquiring the necessary interest in the land by eminent domain or in such other manner as is authorized by law. Were it otherwise, the owner would be deprived of the right, enjoyed by others in the vicinity but outside the refuge, to hunt game on his own property and thereby be in violation of the due process and equal protection clauses of the constitution. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965).

The classification imposed by the guest statute is unreasonable and arbitrary and does not rest upon some ground of difference having a fair and substantial relation to either of the objects of the legislation; as between those who are denied and those who are permitted recovery for negligently inflicted injuries, the classifications do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and of preventing collusive lawsuits, and therefore the New Mexico guest statute is unconstitutional and void as a denial of equal protection of the law under U.S. Const., amend. XIV, and this section. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975) (applicable to pending and future cases); *see* Laws 1935, ch. 15, §§ 1 and 2, compiled as 64-24-1 and 64-24-2, 1953 Comp., and recompiled by Laws 1978, ch. 35, §§ 275, as 64-5-102 and 64-5-103, 1953 Comp., all omitted from NMSA 1978.

No matter how laudable the state's interest in promoting hospitality, the former guest statute was irrational in allowing the host to abandon ordinary care and in denying to nonpaying guests the common-law remedy for negligently inflicting injury. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The protection of hospitality rationale which asserts that the classification scheme merely provides a higher standard of care for those who pay than for those who do not has been recognized by the courts in the case of common carriers, but cannot reasonably be applied to guests in passenger cars since there is no principle in our general legal scheme which dictates that one must pay for the right of protection from negligently inflicted injury. The classification fails not because it draws some distinction between paying and nonpaying guests, but because it penalizes nonpaying guests by depriving them completely of protection from ordinary negligence. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The "prevention of collusion" premise is unquestionably a legitimate state interest; however, compensation is not the distinguishing factor between collusive and noncollusive lawsuits, and the former guest statute was an impermissible means to achieve the prevention of collusion. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

The prevention of collusion rationale was insufficient to support the former guest statute: it is unreasonable and arbitrary, and thus unconstitutional, to do away with negligence actions for an entire class of persons solely because some undefined portion of the class may instigate fraudulent lawsuits. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

In terms of preventing collusion the former guest statute was both overinclusive and underinclusive: overinclusive in that it eliminated lawsuits between relatives and close friends even though collusion was absent, along with causes of action where no reasonable likelihood of collusion existed (i.e., those between driver and hitchhiker), and underinclusive in that it permits negligence suits by many who had no less reason to collude than those barred from suing. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Wrongful death statute classifications are reasonable. — Guarantee of equal protection of the laws does not deny to legislature the right to classify along reasonable lines; the wrongful death statute (41-2-1 to 41-2-4 NMSA 1978) does not violate this section. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932) (decided when statute provided for fixed amount of damages from carriers).

Where wrongful death statute limits recovery against an individual or business corporation to such damages as are fair and just, its constitutional rights are not violated because another section of the statute, dealing with another class, common carriers, provides that a fixed sum shall be paid in case of negligent death. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932).

Favoring nonresidents denies residents equal protection. — Discrimination favorable to nonresidents deprives residents of state of equal protection of the laws where distinction does not rest upon some real and substantial basis, and distinction in Laws 1939, ch. 236, § 1001(d) limiting importation of alcoholic liquor by residents was arbitrary and unreasonable. State v. Martinez, 48 N.M. 232, 149 P.2d 124, 155 A.L.R. 811 (1944).

Automobiles may be distinguished from other vehicles. — The objection that a statute like Laws 1912, ch. 28 (repealed), providing for state automobile licenses, is a special law, because it legislates only upon automobiles and does not attempt to legislate upon all vehicles using the public highways has been rejected; such an act applies to and affects alike all members of a class and is therefore a general and not a special law. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Nonresident motor vehicle owners or operators are one indivisible class. — Nonresident owners or operators of motor vehicles constitute a general class, and a statute which divides such class within itself by imposing a license fee on those gainfully employed and exempting those who are not is discriminatory and invalid. State v. Pate, 47 N.M. 182, 138 P.2d 1006 (1943).

Required use of passenger restraint device does not violate equal protection provisions. — Section 66-7-373B, (now A) NMSA 1978 which provides that failure to be secured by a child passenger restraint device or by a safety belt as required by the Safety Belt Use Act shall not in any instance constitute fault or negligence and shall not limit or apportion damages, does not violate the equal protection provisions of the United States and New Mexico constitutions. Armijo v. Atchison, T. & S.F. Ry., 754 F. Supp. 1526 (D.N.M. 1990), rev'd, 19 F.3d 547 (10th Cir. 1994).

Welfare benefits are not constitutionally required. — There is no constitutional requirement that New Mexico provide financial assistance to the needy. The authority for such assistance is statutory. New Mexico has considerable latitude to set its own standard of need and determine the level of benefits by the amount of funds devoted to the program. Padilla v. Health & Social Servs. Dep't, 84 N.M. 140, 500 P.2d 425 (Ct. App. 1972).

Insufficient assistance for shelter does not deny equal protection. — The former health and social services department did not deprive recipient of equal protection of the law in providing financial assistance for shelter in an amount insufficient to cover her unmet need for housing, since there was a rational basis for financial assistance, the amount of which was determined by the conveniences in the dwelling. Padilla v. Health & Social Servs. Dep't, 84 N.M. 140, 500 P.2d 425 (Ct. App. 1972).

Denying credit for rent paid relative does not deny equal protection. — A regulation is not unreasonable and unlawful when it denies a credit for rent actually paid to a relative and does not set up an unreasonable and arbitrary classification based upon no reasonable distinction between relatives and nonrelatives and is thus not discriminatory. Musgrove v. Department of Health & Social Servs., 84 N.M. 89, 499 P.2d 1011 (Ct. App.), cert. denied, 84 N.M. 77, 499 P.2d 999 (1972).

Time limitation on benefits to temporarily disabled persons without children does not deny equal protection. — A regulation of the former state health and social services department placing a six-month limitation on general assistance benefits paid to temporarily disabled needy persons with no minor children did not violate state and federal equal protection clauses, since it treated all temporarily disabled and needy persons exactly the same. Equal protection does not require but one classification based solely upon the length of time a temporary disability is suffered, and does not prohibit a single classification related to the availability of funds and a time period less than the entire period of the temporary disability, so long as the classification treats all who fall therein equally. Health & Social Servs. Dep't v. Garcia, 88 N.M. 640, 545 P.2d 1018 (1976), rev'g 88 N.M. 419, 540 P.2d 1308 (Ct. App. 1975).

Equalization of peremptory challenges unauthorized. — Rule 1-038E NMRA does not authorize an "equalization" of peremptory challenges and does not violate the right to equal protection under the New Mexico or federal constitutions. Gallegos ex rel. Gallegos v. Southwest Cmty. Health Servs., 117 N.M. 481, 872 P.2d 899 (Ct. App. 1994), cert. denied, 118 N.M. 311, 881 P.2d 56 (1994).

Constitutional regulations and legislation. — Where the former health and social services department determined that plaintiff 's household was ineligible for food stamps, on the grounds that his "net food stamp income" exceeded the maximum allowable and in computing plaintiff 's income the department took into account certain disability insurance benefits which were being paid by the insurer directly to a finance company with whom plaintiff had two loans in accordance with a department regulation defining income to include payments made on behalf of the household by another, it was held that this regulation, as applied, did not deprive plaintiff of due process of law. Huerta v. Health & Social Servs. Dep't, 86 N.M. 480, 525 P.2d 407 (Ct. App. 1974).

The Horse Racing Act, Chapter 60, Article 1 NMSA 1978, and the regulations issued thereunder allowing suspension of a licensed jockey prior to a hearing provide constitutionally adequate due process of law. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

Laws 1939, ch. 197, denying an unlicensed contractor redress in the courts of the state for the collection of compensation due under contract, did not contravene the due process clause or deny equal protection of law as guaranteed by this section. Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955). See 60-13-30 NMSA 1978.

Laws 1931, ch. 131, § 1 (72-12-1 NMSA 1978), which declares ownership of underground waters to be in the public, does not violate N.M. Const., art. II, §§ 18 and 20, because patents from the United States issued after 1866, and particularly those issued after Desert Land Act of 1877, conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the act. State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950), appeal dismissed, 341 U.S. 924, 71 S. Ct. 798, 95 L. Ed. 1356 (1951).

Tax upon gasoline and motor fuel, authorized under portion of repealed Municipal Code (Laws 1947, ch. 122) to pay for special street improvement bonds, was not a taking without due process or a denial of equal protection of the laws. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Former 2% privilege tax (1937 amendment to 59-26-31 NMSA 1978) from which certain qualified benefit societies were exempted did not violate the due process and equal protection clauses of this section. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

The clause of the Workmen's Compensation Act, 52-1-54 NMSA 1978, making provision for allowance of reasonable attorney's fees, is not unconstitutional as repugnant to the due process and equal protection clauses of the federal constitution or this section. New Mexico State Hwy. Dep't v. Bible, 38 N.M. 372, 34 P.2d 295 (1934).

Laws 1933, ch. 184 (38-3-10 NMSA 1978), as to disqualification of judges, does not deny due process of law or violate this provision. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Sections 73-14-1 to 73-17-24 NMSA 1978, relating to conservancy districts, do not violate the due process clause of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Laws 1903, ch. 42 (repealed), the Provisional Order Improvement Law for the paving of streets and alleys, as amended, did not violate the due process clause of this section. Hodges v. City of Roswell, 31 N.M. 384, 247 P. 310 (1926).

Section 36-1-22 NMSA 1978, permitting attorney general and district attorneys to compromise civil actions in which state or county is party, does not violate the due process and equal protection clauses of this section. State v. State Inv. Co., 30 N.M. 491, 239 P. 741 (1925) (tax suits).

Laws relating to abatement of wasteful artesian wells as nuisances (Laws 1915, §§ 265 to 268) did not violate the due process clause of this section. Eccles v. Ditto, 23 N.M. 235, 167 P. 726, 1918B L.R.A. 126 (1917); *see* 72-13-7 NMSA 1978.

Considered together, the pre- and post-termination procedures of the School Personnel Act, 22-10A-27 and 22-10A-28 NMSA 1978, comport with due process requirements. West v. San Jon Bd. of Educ., 2003-NMCA-130, 134 N.M. 498, 79 P.3d 842, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

The ordinance under which a city acted by resolution to authorize a contract for garbage disposal with a sanitation company was a police measure involving the health and welfare of all members of the community and not a violation of due process or equal protection as to persons engaged in the business of hauling garbage. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956).

Section 40-4-5 C NMSA 1978, establishing for jurisdiction in divorce cases involving the military different residency requirements than for the population in general, was held not violative of this section, as the requirements have a uniform operation throughout the state and they therefore need not affect every individual, every class or every community alike. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

The classification of irrigation ditches made by 73-9-1 NMSA 1978 was not repugnant to fourteenth amendment to United States constitution, nor to this section, as being class legislation. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Establishment of surviving parents as a separate class for purposes of awarding death benefits, apart from that of surviving spouses and dependent children, is not an unconstitutional distinction, nor violative of equal protection of the laws. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

The distinction between federal reclamation projects and other areas of water use in 72-9-4 NMSA 1978 is neither unreasonable nor arbitrary and the section does not deny equal protection. City of Raton v. Vermejo Conservancy Dist., 101 N.M. 95, 678 P.2d 1170 (1984).

The distinction between conservancy districts and other water users in 73-17-21 NMSA 1978 is neither unreasonable nor arbitrary and does not deny equal protection as there is an entire body of law applying to conservancy districts for the purpose of providing and maintaining flood protection, river control, drainage and water storage for irrigation needs and for distribution systems. City of Raton v. Vermejo Conservancy Dist., 101 N.M. 95, 678 P.2d 1170 (1984).

The operation of off-highway motorcycles is a potentially dangerous activity and the singling out of these vehicles in 66-3-1013 NMSA 1978 is not precluded by the equal protection clause. Vandolsen v. Constructors, Inc., 101 N.M. 109, 678 P.2d 1184 (Ct. App.), cert. denied, 101 N.M. 77, 678 P.2d 705 (1984).

Section 60-7A-1 NMSA 1978, regulating the sale of alcoholic beverages and allowing local option districts to prohibit Sunday sales, is a proper exercise of legislative power and does not violate equal protection of the laws under U.S. Const., amend. XIV, § 1 and this section, nor the prohibitions of the furtherance and establishment of religion clause of U.S. Const., amend. I and N.M. Const., art. II, § 11. Pruey v. Department of Alcoholic Beverage Control, 104 N.M. 10, 715 P.2d 458 (1986).

Village's classification, whereby owners of American pit bull terriers were treated differently than owners of other breeds of dog, was not violative of equal protection. Garcia v. Village of Tijeras, 108 N.M. 116, 767 P.2d 355 (Ct. App.), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988).

City ordinance limiting the selling of goods in the city's historic zone to New Mexico residents who were members of the Navajo Nation or of a federally recognized Indian tribe or pueblo violated the equal protection clause, where there was no factual predicate to suggest that the ordinance remedied past discrimination as to licensing in the zone. Tafoya v. City of Albuquerque, 751 F. Supp. 1527 (D.N.M. 1990).

The failure of 41-4-15 NMSA 1978 to provide a tolling provision for persons under a legal disability with claims against governmental entities does not violate the right of a

mentally handicapped plaintiff to equal protection of the laws. Jaramillo v. State, 111 N.M. 722, 809 P.2d 636 (Ct. App.), cert. denied, 111 N.M. 416, 806 P.2d 65 (1991).

A definition in the regulations of the mining commission that classified mining operations into different categories did not violate the dictates of equal protection. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App.), cert. denied, 120 N.M. 828, 907 P.2d 1009 (1995).

The workers' compensation permanent total disability benefit statute, 52-1-25 NMSA 1978, does not violate equal protection under the federal and state constitutions. Valdez v. Wal-Mart Stores, Inc., 1998-NMCA-030, 124 N.M. 655, 954 P.2d 87, cert. denied, 124 N.M. 589, 953 P.2d 1087.

The limitation on attorney fees in 52-1-54(I) NMSA 1978 is rationally related to government interest in maximizing worker's award and minimizing litigation costs and does not violate equal protection or substantive due process. Wagner v. AGW Consultants, 2005-NMSC-016, 137 N.M. 734, 114 P.3d 1050.

The small-business exemption in the Santa Fe minimum wage ordinance does not violate the equal protection guarantee contained in this section. New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785, 126 P.3d 1149.

Unconstitutional legislation. — The portion of the 1972 general appropriation act, Laws 1972, ch. 98, § 4 K, providing that no person who was classified as a "nonresident" for tuition purposes upon his initial enrollment in a public institution of higher education in the state could have his status changed to that of a "resident" for tuition purposes unless he had maintained domicile in the state for a period of not less than one year during which entire period he had not been enrolled, for as many as six hours, in any quarter or semester, as a student in any such institution, was unreasonable, arbitrary and violated the due process and equal protection clauses of the fourteenth amendment to the federal constitution and of this section. Robertson v. Regents of Univ. of N.M., 350 F. Supp. 100 (D.N.M. 1972).

Section 40-4-33, 1953 Comp. (repealed), concerning seizure and sale as estrays of calves or colts confined apart from their mothers and of confined freshly branded animals, was, prior to its amendment by Laws 1919, ch. 52, § 1, unconstitutional as authorizing the taking of private property without due process. Lacey v. Lemmons, 22 N.M. 54, 159 P. 949, 1917A L.R.A. 1185 (1916).

A section of the Fair Trade Act, Laws 1937, ch. 44, § 2 (repealed), was unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to the public health, safety or general welfare insofar as it concerned persons who were not parties to contracts provided for in Laws 1937, ch. 44, § 1 (repealed). Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

The cap on damages mandated by the Dramshop Act, 41-11-1 NMSA 1978 (alcohol licensee's liability), is constitutionally invalid as violative of the equal protection clause. Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 763 P.2d 1153 (1988), overruled by Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305 (1998).

County officers as bail bondsmen. — The prohibitions against county officers acting as bail bondsmen in 59A-51-4 and 59A-51-13C NMSA 1978 does satisfy heightened rational-basis scrutiny; thus, that element of the statutes is invalid under the equal protection clause of the New Mexico constitution. Alvarez v. Chavez, 118 N.M. 732, 886 P.2d 461 (Ct. App. 1994), overruled by Trujillo v. City of Albuquerque, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305.

Employment discrimination claim. — The law in New Mexico is unsettled as to whether a claim of discrimination in employment that is asserted under the New Mexico Human Rights Act (Chapter 28, Article 1 NMSA 1978) can also be maintained under the equal protection clause of the New Mexico constitution. Roybal v. City of Albuquerque, 653 F. Supp. 102 (D.N.M. 1986).

Workers' Compensation Act provision requiring use of the American medical association's guide to evaluate impairment is not violative of equal protection since it is rationally related to its purpose and does not result in dissimilar treatment of similarly-situated individuals. Madrid v. St. Joseph Hosp., 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250.

Constitutionality of farm and ranch laborer exclusion from Workers' Compensation Act. — Section 52-1-6(A) NMSA 1978, which excludes farm and ranch laborers from the provisions of the Workers' Compensation Act, violates the guarantee of equal protection where farm and ranch laborers seeking compensation for work-related injuries or disabilities are similarly situated to, but are treated differently than, other workers in the state who are likewise seeking compensation. The government's purported interests in the efficient administration of workers' compensation cases and in protecting the agricultural industry from the cost of providing workers' compensation coverage are without any rational basis and do not justify the arbitrary classification created by the exclusion. Rodriguez v. Brand West Dairy, 2015-NMCA-097, cert. granted, 2015-NMCERT-008, and cert. granted, 2015-NMCERT-008.

Workers' Compensation Act treatment of survivor's wrongful death actions not violative of equal protection. — Barring nondependent survivors of a deceased workman from pursuing a wrongful death action, while permitting nondependent survivors of a tort victim fatally injured outside the course and scope of his employment to bring such an action, is not violative of equal protection because the Workers' Compensation Act (Chapter 52, Article 1 NMSA 1978) provides for expeditious payment to the workman or his dependents without a showing of the employer's fault; it requires, in return, a limitation on the liability of the employer from common-law tort actions. Sanchez v. M.M. Sundt Constr. Co., 103 N.M. 294, 706 P.2d 158 (Ct. App. 1985).

Greater workers' compensation benefits for dependents not unconstitutional. — Setting a different, and more expansive, remedy provision in the Workers' Compensation Act (Chapter 52, Article 1 NMSA 1978) for dependent survivors of a deceased workman than for nondependents, is well within legislative prerogatives and is not violative of equal protection. Sanchez v. M.M. Sundt Constr. Co., 103 N.M. 294, 706 P.2d 158 (Ct. App. 1985).

Statutory limitation on attorney fees. — The statutory limitation on attorney fees that may be awarded in workers' compensation cases does not violate the due process or equal protection guarantees of the federal or state constitutions. Mieras v. Dyncorp, 1996-NMCA-095, 122 N.M. 401, 925 P.2d 518, cert. denied, 122 N.M. 279, 923 P.2d 1164 (1996).

Compulsory school attendance law must bear rational relation to legitimate state interest. — In the application of equal protection principles, the standard for reviewing the compulsory school attendance law is whether it bears some rational relation to a legitimate state interest. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

State may constitutionally prohibit home instruction by parent, guardian or custodian. — The exclusion of home instruction by a parent, guardian or custodian of a child from satisfying the requirements of the compulsory school attendance law does not violate equal protection as guaranteed in the United States and New Mexico constitutions. State v. Edgington, 99 N.M. 715, 663 P.2d 374 (Ct. App.), cert. denied, 99 N.M. 644, 662 P.2d 645 (1983), cert. denied, 464 U.S. 940, 104 S. Ct. 354, 78 L. Ed. 2d 318 (1983).

Immunity of public defenders from malpractice claims. — Public defenders, whether regular employees of the public defender's office or performing as contractors, are immune from malpractice claims, and statutes providing such immunity did not violate the equal protection rights of a represented defendant. Coyazo v. State, 120 N.M. 47, 897 P.2d 234 (Ct. App. 1995).

C. TAXATION.

Tax on resident vendor without tax on importations by nonresident is constitutional. — The failure of the legislature to protect resident vendor against the unfair competitions of importations into New Mexico, without the payment of a sales tax, of chemical reagents did not offend the equal protection clause of the constitution of either the United States or of New Mexico so as to invalidate the former school tax against him. Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958).

The legislature possesses great freedom in classification for tax purposes. Property Appraisal Dep't v. Ransom, 84 N.M. 637, 506 P.2d 794 (Ct. App. 1973)

(distinction for tax assessment between subdivided and unsubdivided agricultural land upheld).

In the exercise of its taxing power the state may select its subjects of taxation, and so long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend the state or federal constitutions. Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

Power of legislature to classify for purposes of taxation and to impose tax in question must be conceded if any reasonable or sound basis can be found to sustain it. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Including exemptions. — Inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation. Dikewood Corp. v. Bureau of Revenue, 74 N.M. 75, 390 P.2d 661 (1964).

Former act providing exemption for sales of tangible personal property to United States government but not for sales of services did not violate equal protection clause of this section. Dikewood Corp. v. Bureau of Revenue, 74 N.M. 75, 390 P.2d 661 (1964).

Every conceivable basis for tax classification must be negatived for successful attack. — In the field of taxation, more than in other fields, the legislature possesses the greatest freedom in classification, and to attack such a classification places the burden on the one attacking to negative every conceivable basis which might support the classification, and unless the classification is clearly arbitrary and capricious or void for uncertainty, the appellate court cannot substitute its views in selecting and classifying for those of the legislature. New Mexico Newspapers, Inc. v. Bureau of Revenue, 82 N.M. 436, 483 P.2d 317 (Ct. App. 1971); Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

In considering the equal protection issue it must be recognized that the legislature possesses great freedom in classifications in the tax field, and the taxpayer has the burden of negating every conceivable basis which might support the classification; unless the classification is clearly arbitrary and capricious, it cannot be held unconstitutional. Halliburton Co. v. Property Appraisal Dep't, 88 N.M. 476, 542 P.2d 56 (Ct. App. 1975).

Violations of constitutional uniform taxation requirements frequently result in violations of equal protection clauses. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Lease limitation exemption. — Constitutional guarantees of equal protection and uniform taxation are not violated by the provision of 7-36-4 NMSA 1978 for a 75-year limitation on leases qualifying for exemption. Welch v. Sandoval Cnty. Valuation

Protests Bd., 1997-NMCA-086, 123 N.M. 722, 945 P.2d 452, cert. denied, 123 NM. 627, 944 P.2d 275 (1997).

Taxpayer must show that taxing statute patently arbitrary and capricious or void for uncertainty in order to defeat the statute on constitutional grounds. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 685, 604 P.2d 835 (Ct. App. 1979).

Taxation of percentage of income. — New Mexico was not taxing an out-of-state activity where it included gain from the cutting of timber treated by the taxpayer as a sale or exchange for federal tax purposes, under the election offered by 26 U.S.C. § 631, in the apportionable business income of the corporation; the tax was not levied on the particular business activity of the taxpayer carried on within the borders of the taxing state, but on a percentage of the taxpayer's business income from all its business activity, and the taxation was not beyond the state's taxing authority; unrealized gain can be included in "net income" for state tax purposes. Champion Int'l Corp. v. Bureau of Revenue, 88 N.M. 411, 540 P.2d 1300 (Ct. App. 1975).

Reasonable classifications in imposing privilege or excise taxes are permissible. — Reasonable classifications allowing the imposition of privilege taxes by the legislature does not deny equal protection or due process. Sunset Package Store, Inc. v. City of Carlsbad, 79 N.M. 260, 442 P.2d 572 (1968) (municipal license tax on sellers of alcoholic liquors).

It is for the legislature to adopt classifications for the imposition of excise taxes as it may deem proper, and any reasonable classification cannot be held to deny equal protection or due process. Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958).

There is a substantial difference between those classes of persons who acquire title and ownership of property and those who acquire only the interest of a bailee under a lease agreement, and such a classification is not arbitrary or capricious and does not warrant the conclusion that the legislation is subject to constitutional objection. Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App.) (gross receipts and compensating taxes), cert. denied, 82 N.M. 81, 475 P.2d 778 (1970).

A classification of commodities, businesses or occupations for excise tax purposes, under which the classes are taxed at unequal rates or one class is taxed and another is exempted, will be upheld as constitutional if it is neither arbitrary nor capricious and rests upon some reasonable basis of difference or policy. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Tobacco taxes are valid. — In almost every case in which the question has arisen the courts have sustained the validity of statutes or ordinances imposing a tax on cigars, cigarettes and other forms of tobacco, as against objections based on violation of the rule requiring uniformity of taxation or constitutional provisions guaranteeing equal protection of the law. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Taxes on gasoline sales by both city and state are constitutional. — Former Municipal Code sections (Laws 1931, ch. 159) authorizing municipalities to levy tax on gasoline sales in addition to the state excise tax were not obnoxious to due process or equal protection or any other provision of the constitution as double taxation. Continental Oil Co. v. City of Santa Fe, 36 N.M. 343, 15 P.2d 667 (1932).

Gross receipts tax on sale of mobile homes constitutional. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979).

Gross receipts tax on franchise fees constitutional. — The imposition of gross receipts tax on franchise fees received from this state's dealers does not violate the due process clause or commerce clause and is proper where the franchisor is in the business of selling franchises, developing and marketing parts, receiving its primary source of income from the sale of franchises, collecting a percentage of the franchisee's gross receipts as a lease payment for use of the trademark and trade name and where its leased trademarks and trade names and their businesses are protected by the laws of this state; thus, franchisor is engaged in business in this state. AAMCO Transmissions v. Taxation & Revenue Dep't, 93 N.M. 389, 600 P.2d 841 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979), superseded by statute, Sonic Industries, Inc. v. State, 2000-NMCA-087, 129 N.M. 657, 11 P.3d 1219.

Different tax treatment cannot be based on reporting values to different offices. — A classification based solely on the use of machinery and equipment in more than one county is patently unreasonable, and cannot be defended on the basis of assessment procedures; administrative convenience in arriving at a valuation of the property involved does not show a rational basis for taxing inventories of contractors who report value to the property appraisal department rather than to the county assessor; the fact that taxpayers may reasonably be required to report their property values to different government offices because of differences in geographic operations does not provide a reasonable basis for a difference in tax treatment on the values reported. Halliburton Co. v. Property Appraisal Dep't, 88 N.M. 476, 542 P.2d 56 (Ct. App. 1975).

Where the effect of former 7-36-9 NMSA 1978 and former 72-6-4, 1953 Comp. (predecessor of 7-36-2 NMSA 1978), was that contractors whose machinery and equipment was used in more than one county were subject to property tax on sales inventories, and contractors whose machinery and equipment was not used in more than one county were not subject to property tax on sales inventories, it was held that this difference in tax treatment based solely on whether a contractor uses his equipment in more than one county was arbitrary and resulted in a denial of equal protection of the law, and therefore to the extent that valuation by the former property appraisal department deprived the taxpayer of the exemption in former 7-36-9 NMSA 1978, that statute was unconstitutional. Halliburton Co. v. Property Appraisal Dep't, 88 N.M. 476, 542 P.2d 56 (Ct. App. 1975).

Factors in determining discrimination in property revaluation plan. — In determining whether a property revaluation plan constitutes intentional and arbitrary

discrimination in violation of N.M. Const., art. VIII, § 1 and this section, all relevant circumstances should be taken into consideration. Such factors should include, but not be limited to, the resources realistically available to the assessing authority, the time limitations involved in the plan, the availability of other alternatives and the amount of temporary inequalities in valuations which result from the cyclical implementation of the plan. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Taxpayer must not be subjected to discrimination in imposition of property tax burden which results from systematic, arbitrary or intentional revaluation of some property at a figure greatly in excess of the undervaluation of other like properties. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Inequality in yearly reappraisals of property unconstitutional. — Singling out one or a few taxpayers for reappraisals for several years in succession while virtually all other owners of comparable properties do not undergo a single reappraisal in the same period is an inequality that is neither temporary nor constitutional. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Temporary inequalities constitutional. — Temporary inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

Assessment based on invalid automatic carry-over, unconstitutional. — Where a taxpayer's 1975 assessment is not based on any new reappraisal, but is the result of an automatic carry-over of a 1974 assessment which was constitutionally invalid, the 1975 assessment is unconstitutional. Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

There is a substantial difference between underground and open-pit mines sufficient to support a distinction between them for tax purposes. Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Exemption based on time of residence. — Section 7-37-5C(3)(e) NMSA 1978 violates equal protection by limiting a tax exemption to those Vietnam veterans who resided in the state before May 8, 1976. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985), rev'g 101 N.M. 172, 679 P.2d 840 (Ct. App 1984) (decided prior to 1986 amendment of 7-37-5 NMSA 1978, which eliminated residency requirement).

D. CRIMINAL CASES.

Requiring interlock devices for driving while under the influence of drugs. — Subsection N of 66-8-102 NMSA 1978, mandating installation of an interlock device on vehicles driven by persons convicted of driving while intoxicated does not violate the

equal protection clause of the United States and New Mexico constitutions as applied to DWI offenders whose impairment is not caused by alcohol, but by drugs. State v. Valdez, 2013-NMCA-016, 293 P.3d 909, cert. denied, 2012-NMCERT-012, 299 P.3d 422-423.

Where defendant pled guilty to a first time offense of driving while intoxicated; the results of blood tests showed the presence of prescription drugs, but no alcohol, in defendant's system; and the district court ordered defendant to install in defendant's vehicle an ignition interlock device, which detected only alcohol, not drugs, the district court's order did not violate equal protection. State v. Valdez, 2013-NMCA-016, 293 P.3d 909, cert. denied, 2012-NMCERT-012, 299 P.3d 422-423.

Making cattle rustling a felony regardless of value is constitutional. — The portion of larceny statute, 30-16-1 NMSA 1978, which made it a felony to steal livestock regardless of its value, applied to all persons who steal livestock in the state of New Mexico and did not constitute special legislation contrary to N.M. Const., art. IV, § 24, nor did it deny defendant equal protection under the law. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

Statute proscribing child abuse does not deny equal protection simply because it makes a distinction between those persons who batter a child and those persons who batter an adult, since children, who are oftentimes defenseless, are in need of greater protection than adults, and a stricter penalty is one means of attaining this greater degree of protection. State v. Lucero, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975). See 30-6-1 NMSA 1978.

Statute penalizing failure to support dependent. — Section 30-6-2 NMSA 1978 does not violate equal protection because the statute does not provide that public welfare benefits must be sought or because the statute applies only to those persons who leave minor children dependent on public support, as the partial correction of the social evil has a rational relation to the object of the legislation. State v. Villalpando, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Credit card fraud statute. — Section 30-16-32 NMSA 1978 is directed to the prevention of fraud in connection with credit cards, sales slips or agreements and applies when a person, with the requisite intent, signs a name other than his own or the name of a fictitious person. Thus, defendant's argument that the statute denies to defendant and others in his class the equal protection of the laws because the class of people who use the credit card of another with the same name as theirs, and sign that name, which is both theirs and the cardholder's, are exempt from prosecution under the statute, since they are not signing "the name of another," is without merit. State v. Sweat, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

Statute as to harboring or aiding felon. — The exemptions from the application of 30-22-4 NMSA 1978, as to harboring or aiding a felon, of certain named groups of persons on the basis of relationship to the felon are reasonable classifications and do not violate

the equal protection clauses of the New Mexico and United States constitutions. State v. Lucero, 88 N.M. 441, 541 P.2d 430 (1975).

Failure of Controlled Substances Act to say when marijuana must be weighed. — The fact that Controlled Substances Act (Chapter 30, Article 31 NMSA 1978) did not specifically state when weighing of marijuana was to be done did not mean that 30-31-23 B(3) NMSA 1978, as applied to defendant convicted of possession of more than eight ounces of "green" marijuana, was a violation of his rights to equal protection, since it was the possession of marijuana on the date of the offense which was the prohibited act and not the amount in some subsequent form suitable to a particular defendant. State v. Olive, 85 N.M. 664, 515 P.2d 668 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Implied consent to sobriety test is constitutional. — The Implied Consent Act (66-8-105 to 66-8-112 NMSA 1978), framed upon the premise that when a person obtains a license to operate a motor vehicle, he impliedly consents to the sobriety test, violates neither due process nor equal protection. Commissioner of Motor Vehicles v. McCain, 84 N.M. 657, 506 P.2d 1204 (1973).

Slight delay does not deny equal protection. — Some personal discomfort, occasioned by being jailed for a few hours awaiting preliminary examination, does not constitute a denial of due process or equal protection, nor can it be said to constitute cruel and unusual punishment. Christie v. Ninth Judicial Dist., 78 N.M. 469, 432 P.2d 825 (1967).

Failure to apply rules retroactively as to dismissal for delay. — Where a prior mistrial was declared, the case was reset for trial, but in the interim the New Mexico supreme court and legislature adopted rules and statutes providing for dismissal of indictments in certain unduly delayed trials, and the state declined to hold these provisions retroactive, the failure to apply these new rules retroactively was not a denial of equal protection. New Mexico v. Torres, 461 F.2d 342 (10th Cir. 1972).

In criminal trials a state cannot discriminate against a defendant on account of his poverty. Such discrimination would be a denial of equal protection of the law. State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969).

State must provide free transcript to indigent. — If the defendant is indigent, the state may not deny him a free transcript of the testimony at a preliminary hearing. State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969).

When transcript is necessary for effective defense or appeal. — The state must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. There can be no doubt that the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. Two factors that are relevant to the determination of need are: (1) the value

of the transcript to the defendant in connection with the appeal or trial for which it is sought and (2) the availability of alternative devices that would fulfill the same functions as a transcript. This rule should be construed liberally in favor of a defendant's right to equal protection of the law and effective cross-examination. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Where defendant's basic defense was to persuade the jury that certain statements relied on heavily by the state were involuntary, and that the officer who testified about the circumstances of these statements testified differently at trial than at the suppression hearing, a copy of the prior hearing transcript would have been invaluable, and where there were different judges, court reporters and attorneys in the hearing on the motion to suppress, on the motion for a transcript and at trial there were no reasonable alternatives to a transcript of the prior hearing. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Limitation upon appointed counsel's fee is constitutional. — Defendant's argument that the statutory attorney fee limitation of $400 in defense of indigent criminal cases (31-16-8 NMSA 1978) was a denial of equal protection and due process was without merit where there was no claim that the defendant was poorly represented, nor were there any facts indicating how the statutory fee limitation so deprived the defendant. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971).

Waiving jury trial by voluntary guilty plea does not deny rights. — Where the record showed that defendant acknowledged his guilt and the trial court accepted his guilty plea, the court held defendant had waived his right to a jury trial and the execution of that waiver did not deny defendant due process or equal protection. State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct. App.), cert. denied, 81 N.M. 784, 474 P.2d 76 (1970).

State may not have choice of which statute to prosecute under. — Where two statutes condemn certain conduct, the state does not have a choice in selecting the statute to be employed in a prosecution for violation. That view 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 and would do violence to the equal protection clauses of the state and federal constitutions. State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Last amended penalty provision will control if two condemn same act. — Where two statutes condemn the same act, they are in pari materia. If the penalty provisions are different, they are irreconcilable, but if the legislature has amended one of the penalty provisions and not amended the other penalty provision, it impliedly intended that its last expression would control. Accordingly, the prosecution is properly conducted under the amended statute. State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Where both penalty provisions are amended, special statute will be operative. State v. Riley, 82 N.M. 235, 478 P.2d 563 (1970).

Defendant must be charged under special statute. — Where two statutes condemn the same offense and one is a special statute and one is a general statute, the accused should be charged under the general statute. State v. Riley, 82 N.M. 235, 478 P.2d 563 (1970).

Prosecution under special, not general, statute does not deny equal protection. — Defendant's contention that he was denied equal protection because at time of conviction there existed two separate penalty provisions for possession of LSD, one constituting a felony, the other constituting a misdemeanor, thus giving the opportunity to enforce the laws without uniformity, was without merit, as one provision included "hallucinogenic drugs" but did not specifically define LSD as such, while the other section, under which defendant was charged, specifically proscribed the possession of LSD, and where there are two laws covering the same act, one being general and the other being specific, it is not a denial of equal protection to prosecute defendant under the special statute (since repealed). Campion v. State, 84 N.M. 137, 500 P.2d 422 (Ct. App. 1972).

Alleged discriminatory use of peremptory challenges. — Although the defendant established a prima facie case of discrimination involving the state's use of one of its peremptory challenges against the only black juror on the panel, the state rebutted the prima facie case by providing a racially-neutral explanation for its challenge. The juror had previously been on a jury that had failed to reach a verdict. State v. Goode, 107 N.M. 298, 756 P.2d 578 (Ct. App.), cert. denied, 107 N.M. 308, 756 P.2d 1203 (1988).

The prosecution's peremptory challenge to remove the only black juror who could have served on the jury panel based on the prospective juror's failure to make eye contact and lack of assertiveness was not shown to be purposeful discrimination or to be unsupported by substantial evidence. State v. Jones, 1996-NMCA-020, 121 N.M. 383, 911 P.2d 891, aff'd, 1997-NMSC-016, 123 N.M. 73, 934 P.2d 267.

Disallowance of juries in metropolitan court for petty criminal offenses. — 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 for petty criminal offenses is not arbitrary, unreasonable nor unrelated to a legitimate legislative purpose. Meyer v. Jones, 106 N.M. 708, 749 P.2d 93 (1988).

Guilty but mentally ill verdicts. — New Mexico statutory provisions authorizing a verdict of guilty but mentally ill do not impinge upon a defendant's right to a fair trial and do not violate the equal protection clauses of the United States and New Mexico constitutions. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Lack of good-time credit for presentence confinement constitutional. — New Mexico's statutory scheme, which does not allow good-time credit for presentence confinement, does not offend the equal protection and due process guarantees of the

New Mexico and United States constitutions. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

Failure to give retroactive effect to presentence confinement credit statute. — Failure to give 31-20-12 NMSA 1978, allowing credit for presentence confinement, retroactive effect did not violate the equal protection provisions of the state and federal constitutions. State v. Dalrymple, 79 N.M. 670, 448 P.2d 182 (Ct. App. 1968).

State's good time credit statutory scheme does not offend the constitutional guarantee of equal protection of the law; it is reasonable not to award good time credits for presentence confinement to detainees who are presumed innocent and therefore are not yet subject to rehabilitation efforts or to compulsory labor requirements, especially when they are held without systematic evaluation in county jails lacking rehabilitation programs. State v. Aqui, 104 N.M. 345, 721 P.2d 771 (1986), cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1988).

Failure to give credit for the time served under a void sentence when the defendant is retried and convicted and given a new sentence does not violate the equal protection clause of the New Mexico and United States constitutions. New Mexico allows credit for time served where the trial itself is valid, but the sentence alone is erroneous, but refuses credit where the trial itself is constitutionally defective, although the sentence is correct. Newman v. Rodriguez, 375 F.2d 712 (10th Cir. 1967).

Defendant may not be imprisoned solely for inability to pay costs. — A defendant may not be imprisoned beyond the maximum statutory sentence because of his inability to pay the costs assessed against him, as to do such would deprive defendant of equal protection of the law. State v. Chavez, 86 N.M. 199, 521 P.2d 1040 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Nonuniformity in sentencing is not deprivation of equal protection. — Lack of uniformity in enforcement of the law does not excuse a particular defendant's violation of the law and does not deprive a particular defendant of equal protection of the law. Campion v. State, 84 N.M. 137, 500 P.2d 422 (Ct. App. 1972); State v. Lujan, 79 N.M. 525, 445 P.2d 749 (Ct. App. 1968).

Defendant was not denied equal protection of the law because he received a sentence while others, similarly situated, did not. Campion v. State, 84 N.M. 137, 500 P.2d 422 (Ct. App. 1972).

Defendant was not denied equal protection of the law because he received an enhanced sentence as an habitual offender while others, similarly situated, did not. State v. Lujan, 79 N.M. 525, 445 P.2d 749 (Ct. App. 1968).

Nonuniformity in time served under same indeterminate sentence. — The fact that another prisoner may serve less, or more, time under the same indeterminate sentence does not violate equal protection, because this constitutional provision does not require

identical punishments and does not protect defendant from the consequences of his crime. State v. Deats, 83 N.M. 154, 489 P.2d 662 (Ct. App. 1971).

Repeated prosecutions against one person only. — Fact that defendant was the first person in 24 years to be tried three times for the same offense in his judicial district did not deny him equal protection, since state and federal constitutions did not require uniform enforcement of the law and did not protect defendant from the consequences of his crime. State v. Lunn, 88 N.M. 64, 537 P.2d 672 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976).

Prohibition against carrying concealed weapon. — Section 30-7-2 NMSA 1978, the prohibition against carrying a concealed weapon, does not violate equal protection on the basis that it impermissibly distinguishes between rich and poor in that home and vehicle owners may properly conceal weapons, but poor people do not own a residence or vehicle in which to conceal a weapon. State v. McDuffie, 106 N.M. 120, 739 P.2d 989 (Ct. App. 1987).

Counsel need not be appointed for appeal to United States supreme court. — Habeas corpus relief was refused on grounds that there was no constitutional compulsion requiring the supreme court of New Mexico to appoint counsel to assist defendant in taking an appeal in a criminal case from that court to the supreme court of the United States. Peters v. Cox, 341 F.2d 575 (10th Cir. 1965), cert. denied, 382 U.S. 863, 86 S. Ct. 126, 15 L. Ed. 2d 101 (1965).

IV. EQUAL RIGHTS AMENDMENT.

City of Albuquerque ordinance which prohibits public nudity does not make an invidious gender classification that operates to the disadvantage of women and does not violate the New Mexico equal rights amendment. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

City of Albuquerque ordinance which prohibits public nudity does not discriminate against women in violation of the equal rights amendment in the New Mexico constitution because it prohibits a women from showing her breast in a public place without a fully opaque covering of her entire nipple when there is no such prohibition against men. City of Albuquerque v. Sachs, 2004-NMCA-065, 135 N.M. 578, 92 P.3d 24, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Restrictions on funding for abortions. — Rule of the human services department prohibiting the use of state funds to pay for abortions for Medicaid-eligible women except when necessary to save the life of the mother, to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest violates the equal rights amendment. New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841, cert. denied, 526 U.S. 1020, 119 S. Ct. 1256, 143 L. Ed. 2d 352 (1999).

There is no absolute right of man and woman to associate. — The right of association has never been held to apply to the right of one individual to associate with another, and certainly it has never been construed as an absolute right of association between a man and woman at any and all places and times. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975). See notes to N.M. Const., art. II, § 17.

Conditions governing alimony not prescribed, except equal protection. — The equal rights amendment (amendment to this section by H.J.R. No. 2, § 1 (Laws 1972)) does not prescribe conditions governing when and why alimony should be granted, beyond the requirement of equal protection, particularly when the award of alimony includes support for the children. Schaab v. Schaab, 87 N.M. 220, 531 P.2d 954 (1974).

United States supreme court decisions are applicable to due process matters. — In view of the fact that the provisions of this section concerning due process and N.M. Const., art. II, § 20, concerning the taking of private property without just compensation, are worded exactly as those contained in U.S. Const., amend. V, the holdings of the United States supreme court are applicable to the issues presented in determining whether the graduated income tax provided for under the statutes, 7-2-1 NMSA 1978 et seq., does not violate either the due process clause or art. II, § 20. 1968 Op. Att'y Gen. No. 68-09 (tax not unconstitutional).

Serious problems may justify restrictions. — If a police measure is directed to a public interest of minor concern, while imposing serious restrictions in regulation or law of guaranteed rights to accomplish the interest, it tends to show it is unreasonable. On the other hand, the more insistent the public need, the more may private rights be restricted. 1961-62 Op. Att'y Gen. No. 61-13.

Nonparticipation by commissioner does not violate due process. — If an order of the corporation commission (now public regulation commission) is reasonable and based upon evidence adduced at public hearing, there is little merit to contention that the utility affected by the order has been deprived of due process of law because of nonparticipation of any member of the commission at the hearing proper. 1951-52 Op. Att'y Gen. No. 52-5473.

Laws 1937, ch. 168 (former 13-3-1 to 13-3-5 NMSA 1978), which was commonly referred to as the Public Printing Bill, was constitutional. 1937-38 Op. Att'y Gen. No. 37-1704.

Constitutional regulations and legislation. — Where an act of the legislature increases hunting or fishing license fees as of a certain date, any discrimination between persons on the basis of when they purchase a license is permissible, rational and unavoidable. 1963-64 Op. Att'y Gen. No. 64-91.

Unconstitutional legislation. — The citizenship requirements imposed by the Dental Act (former 61-5-1 NMSA 1978 et seq.) cannot be enforced consistently with constitutional guarantees of equal protection. 1980 Op. Att'y Gen. No. 80-20.

Immunity of public defenders from malpractice claims. — Neither the guarantee of the equal protection of the laws or the provision against local or special laws deny to the legislature the right to classify along reasonable lines. 1969 Op. Att'y Gen. No. 69-08.

The classification must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. 1961-62 Op. Att'y Gen. No. 61-68.

Prohibiting professionals from continuing present activities is arbitrary. — An act which would effectively prohibit architects, architect engineers and registered professional engineers from engaging in activities which they presently legally perform, involves an arbitrary division of a general class in violation of the constitution. 1967 Op. Att'y Gen. No. 67-34.

License may not be suspended without sufficient proof of fault. — A statute authorizing suspension of a driver's license is unconstitutional if it fails to require sufficient evidence of fault on the part of a driver involved in an accident resulting in the death or personal injury of another or serious property damage, in that the failure to include such a requirement denies to licensees the equal protection of the laws, contrary to this section. 1959-60 Op. Att'y Gen. No. 60-194. *See* 66-5-30 A(2) NMSA 1978, authorizing suspension when driver "has been . . . convicted in any accident. . . ."

Magistrates. — The requirement of 35-2-1 NMSA 1978 that magistrates in magistrate districts having a population of 100,000 (now 200,000) persons or more be lawyers is a reasonable legislative classification and does not violate this section or N.M. Const., art. IV, § 24. 1969 Op. Att'y Gen. No. 69-08.

Hunting and fishing fees. — There is no discrimination in an act which increases hunting or fishing license fees as of a certain effective date except that which may result from an individual's own action or inaction. 1963-64 Op. Att'y Gen. No. 64-91.

Teachers salaries. — Classification of teachers for salary purposes, based on residency, per se, bears no reasonable relationship to the teaching qualifications of the teacher, and on its face it is unreasonable and arbitrary. 1963-64 Op. Att'y Gen. No. 64-85.

Municipal clean indoor air ordinance did not violate the guarantee to equal protection of the laws because its smoking restrictions applied to some public places but not to others. 1989 Op. Att'y Gen. No. 89-03.

Present graduated income tax provisions do not conflict with the equal protection clause of this section. 1968 Op. Att'y Gen. No. 68-09. *See* 7-2-1 NMSA 1978 et seq.

Arbitrary classification between incomes would be invalid. — A statute making an arbitrary classification between incomes to be taxed and those in part or in whole exempt from or not subject to taxation is invalid. 1961-62 Op. Att'y Gen. No. 61-68.

Excluding women from military institute cadets is unconstitutional. — The exclusion of women from New Mexico military institute's cadet program violates the equal rights amendment. 1975 Op. Att'y Gen. No. 75-74.

Law reviews. — For note, "Police Power and the Design of Buildings," see 5 Nat. Resources J. 122 (1965).

For article, " 'To Purify the Bar': A Constitutional Approach to Non-Professional Misconduct," see 5 Nat. Resources J. 299 (1965).

For comment, "Land Use Planning - New Mexico's Green Belt Law," see 8 Nat. Resources J. 190 (1968).

For note, "Student Discipline Cases at State Universities in New Mexico - Procedural Due Process," see 1 N.M. L. Rev. 231 (1971).

For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M. L. Rev. 234 (1972).

For symposium, "The New Mexico Equal Rights Amendment: Introduction and Overview," see 3 N.M. L. Rev. 1 (1973).

For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M. L. Rev. 247 (1974).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M. L. Rev. 1 (1974).

For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For note, "McGeehan v. Bunch - Invalidating Statutory Tort Immunity Through a New Approach to Equal Protection Analysis," see 7 N.M. L. Rev. 251 (1977).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M. L. Rev. 113 (1978-79).

For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 Nat. Resources J. 411 (1979).

For comment, "Statutory Notice in Zoning Actions: Nesbit v. City of Albuquerque," see 10 N.M. L. Rev. 177 (1979-1980).

For note, "Contingent Remainders; Rule of Destructibility Abolished in New Mexico," see 10 N.M. L. Rev. 471 (1980).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M. L. Rev. 421 (1981).

For note, "Criminal Procedure - Grand Jury - Inadmissible Evidence, Due Process," see 11 N.M. L. Rev. 451 (1981).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M. L. Rev. 747 (1982).

For article, "Sexual Equality, the ERA and the Court - A Tale of Two Failures," see 13 N.M. L. Rev. 53 (1983).

For comment, "Procedural and Substantive Rights to the Media Govern Requests to Restrict News Coverage of Criminal Cases: State ex rel. New Mexico Press Ass'n v. Kaufman," see 14 N.M. L. Rev. 401 (1984).

For comment, "Compulsory School Attendance - Who Directs the Education of a Child? State v. Edgington," see 14 N.M. L. Rev. 453 (1984).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution," see 19 N.M. L. Rev. 511 (1989).

For article, "Delinking Disproportionality From Discrimination: Procedural Burdens as Proxy for Substantive Visions," see 23 N.M. L. Rev. 87 (1993).

For note, "Family Law - New Mexico Expands Due Process Rights of Parents in Termination of Parental Rights: In Re Ruth Anne E.," see 31 N.M. L. Rev. 439 (2001).

Parent's mental illness or mental deficiency as ground for termination of parental rights — constitutional issues, 110 A.L.R. 5th 579.

Constitutional and statutory validity of judicial videoconferencing, 115 A.L.R. 5th 509.

Application of workers' compensation laws to illegal aliens, 121 A.L.R. 5th 523.

Federal and state constitutional provisions and state statutes as prohibiting employment discrimination based on heterosexual conduct or relationship, 123 A.L.R. 5th 411.

Validity, construction, and application of governmental or private regulation of breast-feeding, 5 A.L.R. 6th 485.

Right of jailed or imprisoned parent to visit from minor child, 6 A.L.R. 6th 483.

Immunity of states in private actions for damages under Family and Medical Leave Act (29 U.S.C.A. §§ 2601 et seq.), 180 A.L.R. Fed. 579.

Propriety of federal court's abstention, under Railroad Commission of Tex. v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), as to federal constitutional due process or equal protection claim, 183 A.L.R. Fed. 379.

Validity, construction, and application of mandatory predeportation detention provision of Immigration and Nationality Act (8 U.S.C.A. § 1226(c)) as amended, 187 A.L.R. Fed. 325.

Forcible administration of antipsychotic medication to pretrial detainees — federal cases, 188 A.L.R. Fed. 285.

Validity, construction, and application of hardship standard for cancellation of removal of address under 8 U.S.C.A. § 1229b(b)(1)(D), including Jurisdictional Issues, 196 A.L.R. Fed. 337.

Marriage between persons of same sex — limited States and Canadian cases, 1 A.L.R. Fed. 2d 1.

Validity, construction, and application of Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C.A. § 1973ff et seq., 1 A.L.R. Fed. 2d 251.

Constitutional issues concerning punitive damages — Supreme Court cases, 1 A.L.R. Fed. 2d 529.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Civil Rights § 1 et seq.; 16A Am. Jur. 2d Constitutional Law §§ 552 to 600, 735 to 854; 45A Am. Jur. 2d Job Discrimination § 146 et seq.

Fair employment statutes designed to eliminate racial, religious or national discrimination in private employment, 37 A.L.R.5th 349.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Right to and appointment of counsel in juvenile court proceedings, 60 A.L.R.2d 691, 25 A.L.R.4th 1072.

Zoning regulations as affecting churches, 74 A.L.R.2d 377, 62 A.L.R.3d 197.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 A.L.R.2d 1390, 34 A.L.R.3d 470, 2 A.L.R.4th 27, 2 A.L.R.4th 807, 13 A.L.R.4th 533, 15 A.L.R.4th 582, 18 A.L.R.4th 360, 26 A.L.R. Fed. 218, 53 A.L.R. Fed. 140.

Procedural due process requirements in proceedings involving applications for admission to bar, 2 A.L.R.3d 1266.

Preconviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory, 4 A.L.R.3d 404.

Validity, as a matter of due process, of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated business transactions, 20 A.L.R.3d 1201.

Suppression of evidence by prosecution in criminal case as vitiating conviction under principles of due process of law, 34 A.L.R.3d 16.

Violation of due process or equal protection of law by exclusion of or discrimination against physician or surgeon by hospital authorities, 37 A.L.R.3d 645.

Discrimination on basis of illegitimacy as denial of constitutional rights, 38 A.L.R.3d 613.

Validity and construction of statute requiring defendant in criminal case to disclose matter as to alibi defense, 45 A.L.R.3d 958.

Incapacity caused by accident in suit as affecting notice of claim required as condition of holding local government unit liable for personal injury, 44 A.L.R.3d 1108.

Statute or ordinance respecting employment of women in places where intoxicating liquors are sold as class legislation or denial of equal protection of law, 46 A.L.R.3d 369.

Validity of municipal ordinance imposing income tax or license upon nonresidents employed in taxing jurisdiction, 48 A.L.R.3d 343.

Validity of statutes authorizing asexualization or sterilization of criminals or mental defectives, 53 A.L.R.3d 960.

Validity of statute imposing durational residency requirements for divorce applicants, 57 A.L.R.3d 221.

Necessity of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 A.L.R.3d 361.

Application of state law to sex discrimination in employment advertising, 66 A.L.R.3d 1237.

Application of state law to sex discrimination in sports, 66 A.L.R.3d 1262.

Validity under state law of self-help repossession of goods as per U.C.C. § 9-503, 75 A.L.R.3d 1061.

Validity of exception for specific kind of tort action in survival statute, 77 A.L.R.3d 1349.

Right of illegitimate child, after Levy v. Louisiana, to recover under wrongful death statute for death of putative father, 78 A.L.R.3d 1230.

Use of peremptory challenges to exclude from jury persons belonging to race or class, 79 A.L.R.3d 14, 20 A.L.R.5th 398.

Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights, 80 A.L.R.3d 1141.

Construction and application of state equal rights amendments forbidding determination of rights based on sex, 90 A.L.R.3d 158.

Validity of statutory classifications based on population - zoning, building, and land use statutes, 98 A.L.R.3d 679.

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 A.L.R.3d 916.

Validity of statutory classifications based on population - tax statutes, 98 A.L.R.3d 1083.

Constitutionality of rape laws limited to protection of females only, 99 A.L.R.3d 129.

Validity of statutes or rule providing that marriage or remarriage of woman operates as revocation of will previously executed by her, 99 A.L.R.3d 1020.

Constitutionality of assault and battery laws limited to protection of females or which provide greater penalties for males than for females, 5 A.L.R.4th 708.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

Validity, construction, and effect of "Sunday closing" or "blue" laws - modern status, 10 A.L.R.4th 246.

Sex discrimination in treatment of jail or prison inmates, 12 A.L.R.4th 1219.

Validity of law criminalizing wearing dress of opposite sex, 12 A.L.R.4th 1249.

Constitutionality of gender-based classifications in criminal laws proscribing nonsupport of spouse or child, 14 A.L.R.4th 717.

Statutes limiting time for commencement of action to establish paternity of illegitimate child as violating child's constitutional rights, 16 A.L.R.4th 926.

On-the-job sexual harassment as violation of state civil rights law, 18 A.L.R.4th 328.

Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women, 20 A.L.R.4th 1166.

Sufficiency of access to legal research facilities afforded defendant confined in state prison or local jail, 23 A.L.R.4th 590.

Right of accused to be present at suppression hearing or other hearings between court and attorneys concerning evidentiary questions, 23 A.L.R.4th 955.

Validity of statutes or regulations denying welfare benefits to claimants who transfer property for less than its full value, 24 A.L.R.4th 215.

In personam jurisdiction, under long-arm statute, over nonresident physician, dentist, or hospital in medical malpractice action, 25 A.L.R.4th 706.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Refusal to rent residential premises to persons with children as unlawful discrimination, 30 A.L.R.4th 1187.

Enforceability of agreement by law enforcement officials not to prosecute if accused would help in criminal investigation or would become witness against others, 32 A.L.R.4th 990.

Applicability and application of zoning regulations to single residences employed for group living of mentally retarded persons, 32 A.L.R.4th 1018.

Propriety of automobile insurer's policy of refusing insurance, or requiring advanced rates, because of age, sex, residence, or handicap, 33 A.L.R.4th 523.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family, 38 A.L.R.4th 267.

Propriety of governmental eaves-dropping on communications between accused and his attorney, 44 A.L.R.4th 841.

Drunk driving: motorist's right to private sobriety test, 45 A.L.R.4th 11.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness - state cases, 45 A.L.R.4th 602.

Podiatry or chiropody statutes: validity, construction, and application, 45 A.L.R.4th 888.

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Validity, construction, and application of state relocation assistance laws, 49 A.L.R.4th 491.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 A.L.R.4th 1063.

Local government tort liability: minority as affecting notice of claim requirement, 58 A.L.R.4th 402.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

Validity, construction, and effect of statutes establishing shoplifting as separate criminal offense, 64 A.L.R.4th 1088.

Homicide: cremation of victim's body as violation of accused's right, 70 A.L.R.4th 1091.

Nonconsensual treatment of involuntarily committed mentally ill persons with neuroleptic or antipsychotic drugs as violative of state constitutional guaranty, 74 A.L.R.4th 1099.

Validity of charitable gift or trust containing gender restrictions on beneficiaries, 90 A.L.R.4th 836.

Validity, construction, application, and effect of statute requiring conditions, in addition to expiration of time, for reinstatement of suspended or revoked driver's license, 2 A.L.R.5th 725.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Actions by state official involving defendant as constituting "outrageous" conduct violating due process guaranties, 18 A.L.R.5th 1.

Validity and application of statute or regulation authorizing revocation or suspension of driver's license for reason unrelated to use of, or ability to operate, motor vehicle, 18 A.L.R.5th 542.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee, 20 A.L.R.5th 229.

Validity of state or local gross receipts tax on gambling, 21 A.L.R.5th 812.

Application of statute denying access to courts or invalidating contracts where corporation fails to comply with regulatory statute as affected by compliance after commencement of action, 23 A.L.R.5th 744.

Right to compensation for real property damaged by law enforcement personnel in course of apprehending suspect, 23 A.L.R.5th 834.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 A.L.R.5th 245.

Zoning authority as estopped from revoking legally issued building permit, 26 A.L.R.5th 736.

Validity, construction, and application of state statutes prohibiting sale or possession of controlled substances within specified distance of schools, 27 A.L.R.5th 593.

Prejudicial effect, in civil case, of communications between judges and jurors, 33 A.L.R.5th 205.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities, 36 A.L.R.5th 161.

Judicial construction and application of state legislation prohibiting religious discrimination in employment, 37 A.L.R.5th 349.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions-post-connelly cases, 48 A.L.R.5th 555.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 A.L.R.5th 639.

Voir dire exclusions of men from state trial jury or jury panel - *post-J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, cases, 88 A.L.R.5th 67.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process, 93 A.L.R.5th 527.

Failure of state prosecutor to disclose fingerprint evidence as violating due process, 94 A.L.R.5th 393.

Failure of state prosecutor to disclose exculpatory ballistic evidence as violating due process, 95 A.L.R.5th 611.

Federal and state constitutional provisions as prohibiting discrimination in employment on basis of gay, lesbian, or bisexual sexual orientation or conduct, 96 A.L.R.5th 391.

Failure of state prosecutor to disclose exculpatory medical reports and tests as violating due process, 101 A.L.R.5th 187.

Failure of state prosecutor to disclose pretrial statement made by crime victim as violating due process, 102 A.L.R.5th 327.

Validity, construction, and operation of municipal ordinances proscribing or restricting smoking in restaurants, 103 A.L.R.5th 333, §§ 3, 5.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused - federal cases, 41 A.L.R. Fed. 10.

Refusal to hire, or dismissal from employment, on account of plaintiff's sexual lifestyle or sexual preference as violation of federal constitution or federal civil rights statutes, 42 A.L.R. Fed. 189.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in federal criminal proceedings, 45 A.L.R. Fed. 732.

Validity, under First Amendment and 42 USC § 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus, 50 A.L.R. Fed. 516.

Sex discrimination in law enforcement and corrections employment, 53 A.L.R. Fed. 31.

Actions, under 42 USC § 1983, for violations of federal statutes pertaining to rights of handicapped persons, 63 A.L.R. Fed. 215.

Effect of customer's interest or preference on establishing bona fide occupational qualification under Title VII of Civil Rights Act of 1964 (42 USC § 2000e-2(e)), 63 A.L.R. Fed. 402.

Constitutionality of provision, in Rule B, Supplemental Rules for Certain Admiralty and Maritime Claims, allowing attachment of goods and chattels without prior notice, 63 A.L.R. Fed. 651.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force, 66 A.L.R. Fed. 119.

Disparate impact test for sex discrimination in employment under Title VII of Civil Rights Act of 1964 (42 USC § 2000e et seq.), 68 A.L.R. Fed. 19.

Propriety of federal court's ordering state or local tax increase to effectuate civil rights decree, 76 A.L.R. Fed. 504.

What constitutes violation of 18 U.S.C. § 245(b), prohibiting interferences with civil rights, 76 A.L.R. Fed. 816.

Eligibility of illegitimate child for survivor's benefits under Social Security Act, pursuant to § 216(h)(2)(A) of act (42 USCS § 416(h)(2)(A)), where state intestacy law denying inheritance right, or application of that state law to § 216(h)(2)(A), may violate child's right to equal protection of laws, 116 A.L.R. Fed. 121.

When may person not named as respondent in charge filed with Equal Employment Opportunity Commission (EEOC) be sued under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 121 A.L.R. Fed. 1

Validity, construction, and application of 18 USCS § 1956, which criminalizes money laundering, 121 A.L.R. Fed. 525.

Who is "prevailing party" for purposes of awards of attorneys' fees under 42 USCS § 1973l(e), providing for such awards to prevailing parties in actions or proceedings to enforce voting guarantees under fourteenth or fifteenth amendment, 127 A.L.R. Fed. 1

Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 A.L.R. Fed. 465.

Right of Prevailing Plaintiffs to Recover Attorneys' Fees Under § 706(k) of Civil Rights Act of 1964 (42 USCS § 2000e5(k)), 132 A.L.R. Fed. 345.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes - nonemployment cases, 152 A.L.R. Fed. 1

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes - public employment cases, 153 A.L.R. Fed. 609.

Sex discrimination in public education under Title IX - supreme court cases, 158 A.L.R. Fed. 563.

Actions brought under 42 U.S.C.A. §§ 1981-1983 for racial discrimination - supreme court cases, 164 A.L.R. Fed. 483.

What constitutes reverse sex or gender discrimination against males violative of federal constitution or statutes - nonemployment cases, 166 A.L.R. Fed. 1

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes - public employment cases, 168 A.L.R. Fed. 1

Equal protection and due process clause challenges based on racial discrimination - supreme court cases, 172 A.L.R. Fed. 1

Equal protection and due process clause challenges based on sex discrimination - Supreme Court cases, 178 A.L.R. Fed. 25.

14 C.J.S. Supp. Civil Rights § 1 et seq.; 16B C.J.S. Constitutional Law §§ 700 to 870; 16C C.J.S. Constitutional Law §§ 871 to 1138; 16D C.J.S. Constitutional Law §§ 1139 to 1427.

Sec. 19. [Retroactive laws; bills of attainder; impairment of contracts.]

No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. I, § 16.

Iowa Const., art. I, § 21.

Montana Const., art. II, § 31.

Utah Const., art. I, § 18.

Wyoming Const., art. I, § 35.

Prohibition against ex post facto laws in this section is not at issue with amendment to 66-8-102 NMSA 1978 by House Bill 117 (Laws 2003, Ch. 90) and House Bill 278 (Laws 2003, Ch. 164) because House Bill 117 went into effect immediately under its emergency clause. State v. Smith, 2004-NMSC-032, 136 N.M. 372, 98 P.3d 1022, rev'g 2004-NMCA-026, 135 N.M. 162, 85 P.3d 804.

The prohibition against ex post facto laws does not apply to sanctions that are remedial in nature. — The constitutional prohibition against ex post facto laws is violated when a statute involving retroactivity is passed that makes criminal a previously innocent act, increases the punishment, or changes the proof necessary to convict the defendant. A statute or regulation is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. The constitutional prohibition on ex post facto laws applies only to penal statutes that disadvantage the offender affected by them; the prohibition does not apply to penalties that are considered remedial in nature. Whether a sanction constitutes punishment is determined by evaluating the government’s purpose in enacting the legislation, rather than evaluating the effect of the sanction on

the defendant. Yepa v. N.M. Taxation & Revenue Dep't., 2015-NMCA-099, cert. denied, 2015-NMCERT-008.

Where defendant was arrested for aggravated DWI and his license was revoked in 2008, and where defendant became eligible for license reinstatement in March of 2009, but he did not apply for reinstatement of his license until late July 2009, after the effective date of the 2009 amendment to 66-5-33.1 NMSA 1978, which amended the statutory license reinstatement requirements to include a minimum of six months of driving with an ignition interlock device before reinstatement of a revoked license, the district court erred in concluding that the motor vehicle division's application of the 2009 amendment constituted a violation of the constitutional prohibition against ex post facto laws, because the license revocation provision of the Implied Consent Act serves the legitimate non-punitive purpose of protecting the public from the dangers presented by drunk drivers and helps enforce regulatory compliance with the laws governing the licensed activity of driving; the revocation of a person's driver's license based on the conduct of either failing a blood-alcohol test or refusing to take a chemical test is consistent with the government's goals in implementing the Implied Consent Act and is therefore remedial, not punitive. Yepa v. N.M. Taxation & Revenue Dep't., 2015-NMCA-099, cert. denied, 2015-NMCERT-008.

The Fraud Against Taxpayers Act is predominantly remedial in nature and does not violate ex post facto principles. — The ex post facto clause prohibits retroactive application of penal legislation. The prohibition does not apply to penalties that are considered remedial in nature. The Fraud Against Taxpayers Act (FATA), 44-9-1 NMSA 1978 et seq., is predominantly remedial in nature; the specific legislative designation of FATA proceedings and penalties as "civil" indicate that the legislature intended to craft a civil statute, and not a single section of FATA specifies or punishes criminal conduct; the civil penalties and treble damages under FATA are predominantly compensatory and serve remedial purposes by encouraging qui tam plaintiffs to expose fraud and corruption in state government and by offsetting the costs incurred by the government. State ex rel. Foy v. Austin Capital Mgmt., Ltd., 2015-NMSC-025, *aff'g in part, rev'g in part*, 2013-NMCA-043, 297 P.3d 357.

The retroactive application of the Fraud Against Taxpayers Act is constitutional. — Because the treble damages under The Fraud Against Taxpayers Act (FATA), 44-9-1 NMSA 1978 et seq., are predominantly compensatory and remedial in nature, they do not violate the ex post facto clause of the United States constitution or the New Mexico constitution and may be applied retroactively. The New Mexico supreme court declined to determine whether the civil penalties under FATA, although they possess predominantly compensatory purposes, may be applied retroactively because the district court had not yet awarded a definitive civil penalty. State ex rel. Foy v. Austin Capital Mgmt., Ltd., 2015-NMSC-025, *aff'g in part, rev'g in part*, 2013-NMCA-043, 297 P.3d 357.

Sex Offender Registration and Notification Act does not violate either the federal or state ex post facto clause. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Sex offender registration. — Because the Albuquerque Sex Offender Registration and Notification Act ordinance is a regulatory scheme that is not punitive in intent or effect, the retroactive application of the ordinance does not violate the ex post facto clause. ACLU v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215.

Retroactive application of Sex Offender Registration and Notification Act (Chapter 29, Article 11A NMSA 1978) does not violate the New Mexico constitution's ex post facto clause. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Prohibition applies to judicial rulemaking. — A state constitutional prohibition on legislative enactments applies equally to judicial rulemaking. State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

Jury instructions. — Jury instructions which deprive an accused of a defense available at the time of his act are prohibited as ex post facto. State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

Withdrawal of six-month rule. — The retroactive withdrawal of the six-month rule from Rule 5-604 NMRA, which is a procedural rule, is not an unconstitutional ex post facto law under the United States Constitution. State v. Romero, 2011-NMSC-013, 150 N.M. 80, 257 P.3d 900.

Substitution of punishments permissible. — Statute substituting electrocution for hanging, and applicable to those under sentence of hanging on effective date of the statute, was not ex post facto. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931).

Age confinement must end under Children's Code . — The constitutional prohibition against ex post facto laws prevents the courts from applying the Children's Code (Chapter 32A NMSA 1978) adopted in 1993 to permit the confinement of a child until he or she reaches the age of twenty-one where the delinquent acts and original adjudication occurred while the prior code was in effect. State v. Adam M., 1998-NMCA-014, 124 N.M. 505, 953 P.2d 40.

Denial or obstruction of contract rights. — Statute which denies or obstructs preexisting contract rights is constitutionally objectionable even though it professes to act only upon the remedy. Rubalcava v. Garst, 53 N.M. 295, 206 P.2d 1154 (1949), opinion partly superseded and case remanded for inclusion of indispensable parties, 56 N.M. 647, 248 P.2d 207 (1952).

Oral adoption contract. — Law requiring written agreement of adoption to maintain claim against decedent's estate based upon adoption contract is not applicable to oral contract made and performed prior to its effective date. Rubalcava v. Garst, 53 N.M.

295, 206 P.2d 1154 (1949), opinion partly superseded and case remanded for inclusion of indispensable parties, 56 N.M. 647, 248 P.2d 207 (1952).

Existing contracts are subject to the legitimate exercise of the police power, and a sign ordinance is a legitimate exercise of the city's police power. Thus, such an ordinance does not unconstitutionally impair the obligation of a contract. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Alteration of contract by providing cost-of-living increases. — The governor's veto of cost-of-living increases, included in the general fund appropriation, for certain private employees of community based providers of mental health services who had contracted with the health and environment department, was valid. The legislature may not attempt to alter the terms of existing contractual relationships through the appropriation process. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Increase in workmen's compensation benefits. — To give amendment increasing maximum allowable medical benefits under workmen's compensation a retroactive effect would alter a substantial term of the contract existing between employer and employee at the time of injury, contrary to the constitutional provisions prohibiting impairment of contracts. Noffsker v. K. Barnett & Sons, 72 N.M. 471, 384 P.2d 1022 (1963).

Change in accrual rate of annual vacation leave for public employee. — The personnel board's decision that juvenile probation officers transferred from the judicial branch to the executive branch should accrue annual leave from the time of the transfer at rates specified under regulations for the executive branch and not at the judicial branch rates did not constitute an unconstitutional infringement of the employee's contract rights given that the legislation governing the transfer of the officers did not confer the right, contractual or otherwise, to retain the judicial branch rates of annual leave accrual and also given that statutes fixing the compensation or terms of public employment are presumed merely to establish public policy subject to legislative revision and not to create contractual or vested rights. Whitely v. New Mexico State Personnel Bd., 115 N.M. 308, 850 P.2d 1011 (1993).

Change of definition that denied sick leave incentive benefit. — Where a collective bargaining agreement permitted employees who were assigned to shift work in a twenty-four hour facility and who did not utilize sick leave for a calendar quarter to receive eight hours of administrative leave; after an arbitrator decided that the sick leave incentive benefit did not apply only to workers who worked an assignment that constituted an unending twenty-four-hour coverage of the job, the state personnel board adopted a regulation that defined "shift work schedule" to be a normal work schedule assigned to an employee as part of a rotating group of individuals that must continuously maintain a twenty-four hour operation; and the union claimed that some state agencies had in the past given the sick leave incentive to workers working in a twenty-four-hour facility even when the workers did not work in a position requiring continuous shifts within a twenty-four-hour period, that the state used the new definition

to deny the benefit to workers in jobs that did not require twenty-four-hour coverage, that the board attempted to circumvent the arbitrator's decision by adopting a definition that was the opposite of the definition the arbitrator had adopted, that the regulation denied sick leave incentive pay that the state had contractually agreed to provide and had paid in the past, and that the regulation impaired the agreement in violation of the contract clause of the United States constitution and the New Mexico constitution, the union's complaint adequately pled that the regulation would substantially impair an existing contract right so as to make the regulation unconstitutionally retroactive and stated a cause of action on which relief could be granted. AFSCME Council 18 v. State of N.M., 2013-NMCA-106.

Ratification bonus payable to members of public-sector bargaining unit. — Where a proposed provision of a public-sector collective bargaining agreement provided that upon ratification of the agreement all bargaining unit members would receive a ratification bonus of $500 to be paid by the first pay period after ratification to compensate bargaining unit members for the delay in implementing wage increases under the new agreement; and the bargaining unit members were public employees, Article IV, Section 27 applied to the members of the bargaining unit and payment of the bonus would violate Article IV, Section 27. Nat'l Union of Hosp. & Healthcare Employees v. Board of Regents, 2010-NMCA-102, 149 N.M. 107, 245 P.3d 51, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Payment of bounties earned. — A person earning bounties before law authorizing them was repealed was still entitled to the bounty. Hayner v. Board of Comm'rs, 29 N.M. 311, 222 P. 657 (1924).

Lease obligations not impaired. — General appropriations bill, Laws 1971, ch. 327, directing that vocational rehabilitation division of the state board of education should relocate its office from lessor's premises to a site more accessible to its clients, did not impair obligations of rental contract which specifically provided that lessee had right to terminate if directed by the legislature to move its offices. National Bldg. v. State Bd. of Educ., 85 N.M. 186, 510 P.2d 510 (1973).

Retrospective operation of statute prescribing costs. — The fact that enactments awarding attorneys' fees, which are valid exercises of the power to prescribe costs, operate retrospectively will not render them unconstitutional. Cutter Flying Serv., Inc. v. Straughan Chevrolet, Inc., 80 N.M. 646, 459 P.2d 350 (1969).

Statute of limitations. — In view of saving clause allowing reasonable time for pursuit of actions accruing prior to enactment, 37-1-24 NMSA 1978, providing limitations for suits against cities, towns and villages, was not an unconstitutional impairment of contract. Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

Repurchase rights alterable. — Legislature may at any time alter preference rights of former owners to repurchase property which state has acquired upon tax sale, because

there is no contract with the former owner and no vested rights are disturbed. Yates v. Hawkins, 46 N.M. 249, 126 P.2d 476 (1942).

Alteration of bank stockholders' liability. — Where bank stockholders' liability is changed pursuant to N.M. Const., art. XI, § 13, right of legislature to make the change has been reserved by the latter and does not violate this section. Melaven v. Schmidt, 34 N.M. 443, 283 P. 900 (1929).

Contract with debenture holders. — Statute authorizing refund of gasoline excise taxes only out of surplus not necessary to payment of interest and principal of highway debentures did not impair obligations of contract between state and debenture holders. Streit v. Lujan, 35 N.M. 672, 6 P.2d 205 (1931), appeal dismissed, 285 U.S. 527, 52 S. Ct. 405, 76 L. Ed. 924 (1932).

Limiting application of revenue. — Former act which limited the application of municipal revenue from public utilities did not impair obligation of contract. Dreyfus v. City of Socorro, 26 N.M. 127, 189 P. 878 (1920).

Retroactive law valid. — Laws 1923, ch. 140, § 515 (repealed), relating to liens of assessments for conservancy districts, did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

No vested rights in licenses. — A liquor license is a privilege and not property within the meaning of the due process and contract clauses of state and federal constitutions, and in them licensees have no vested property rights. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953).

A privilege or license to do business in a state is not a contract, and does not vest in the holder thereof the right to enforce the same under constitutional guarantees. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Privilege tax. — Former 2% privilege tax from which qualified benefit societies were exempted did not violate federal constitution, art. I, § 10, nor this section. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.), aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Prohibition on enforcement of prepayment penalty. — The prohibition on enforcement of a prepayment penalty in Subsection A of 48-7-19 NMSA 1978 is sufficiently justified by the significant and legitimate public purpose of promoting the alienability of land to withstand challenge under this section. Los Quatros, Inc. v. State Farm Life Ins. Co., 110 N.M. 750, 800 P.2d 184 (1990).

Taxes pledged for debt. — Former 67-19-3, 1953 Comp., violated this section and U.S. Const., art. I, § 10, cl. 1, insofar as it related to county, school district and municipal taxes, which by the Bateman Act (6-6-11 NMSA 1978) were pledged to the payment of

debts arising during the year for which taxes are levied. 1939-40 Op. Att'y Gen. 39-3127.

Retroactivity, per se, not invalid. — In the absence of an expressed prohibition, a law is not invalid merely because retroactive in operation. 1961-62 Op. Att'y Gen. No. 61-68.

This constitutional inhibition is applicable to city ordinances as it is to state statutes. 1961-62 Op. Att'y Gen. No. 62-62.

Ex post facto law defined. — An ex post facto law is defined as one which operating retrospectively and on penal or criminal matters only renders a previously innocent act criminal. 1969 Op. Att'y Gen. No. 69-10.

The scope of the prohibition against ex post facto laws is limited in its application to laws of a criminal nature. 1963-64 Op. Att'y Gen. No. 64-91.

Bill of attainder defined. — A bill of attainder is defined as a legislative act inflicting punishment without a judicial trial. 1969 Op. Att'y Gen. No. 69-10.

Law requiring corporation to change name invalid. — Name of foreign corporation admitted to do business in state becomes part of its assets, and state contracts that such corporation shall have right to use it and may not require it to be changed, and law attempting to do so is invalid. 1931-32 Op. Att'y Gen. No. 31-135.

State highway debentures issued under the law of 1933 are valid and are not affected by or subject to a referendum, as such law could not be suspended by referendum petition from which constitution exempts laws providing for preservation of public peace, safety and health, and prohibits enactment of ex post facto law or one impairing obligations of contracts. 1933-34 Op. Att'y Gen. No. 33-702.

Limitations on change of party affiliation. — A provision which would not preclude one from seeking office, but would merely prevent his changing of party affiliation between its enactment and the next election, would not be an unconstitutional interference with a vested right. 1969 Op. Att'y Gen. No. 69-10.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 634, 655, 682.

Retrospective modification of, or refusal to enforce, decree for alimony, separate maintenance, or support, 6 A.L.R.2d 1277, 52 A.L.R.2d 156.

Constitutionality, construction and application of statute or ordinance providing for reduction of pension or retirement benefit of public officer or employee because of independent income, 7 A.L.R.2d 692.

Reforestation: constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Attachment: contract impairment clause as affecting foreign attachment or garnishment in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R.2d 420.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Constitutionality of statute shifting the burden of federal excise tax, 26 A.L.R.2d 925.

Retrospective operation of legislation affecting estates by the entireties, 27 A.L.R.2d 868.

Derivative action: application to pending action or existing cause of action of statute regulating stockholders' actions, 32 A.L.R.2d 851.

Retrospective application of statute relating to trust investments, 35 A.L.R.2d 991.

Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as single drilling unit and the like, 37 A.L.R.2d 434.

Validity of statute or ordinance requiring real estate broker to procure license, 39 A.L.R.2d 606.

Venue statute, retroactive operation and effect of, 41 A.L.R.2d 798.

Construction, application, and effect of constitutional provisions or statutes relating to cumulative voting of stock for corporate directors, 43 A.L.R.2d 1322.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Cemetery: impairment of obligation of contract by public prohibition or regulation of location of, 50 A.L.R.2d 905.

Pension law modifications, retrospective operation of, 52 A.L.R.2d 437.

Validity of statute making private property owner liable to contractor's laborers, materialmen, or subcontractors where owner fails to exact bond or employ other means of securing their payment, 59 A.L.R.2d 885.

Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420.

Usury: constitutionality of retrospective operation of statute denying defense of usury to corporation, 63 A.L.R.2d 929.

Wrongful death, retroactive effect of statute changing manner and method of distribution of recovery or settlement for, 66 A.L.R.2d 1444.

Burial contracts: validity of retrospective operation of statutes regulating preneed contracts for the sale or furnishing of burial services and merchandise, 68 A.L.R.2d 1251.

State succession, transfer, inheritance, or estate tax in respect of life insurance and annuities, 73 A.L.R.2d 157.

Constitutionality of state legislation to reimburse public utilities for cost of relocating their facilities because of highway construction, conditioned upon federal reimbursement of the state under the terms of Federal-Aid Highway Act (23 USC sec. 123), 75 A.L.R.2d 419.

Public pension fund, validity and effect of retroactive change in rate of employee's contribution to, 78 A.L.R.2d 1197.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 A.L.R.2d 1080.

Prospective or retroactive operation of overruling decision, 10 A.L.R.3d 1371.

Long-arm statutes: retrospective operation of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated acts or transactions, 19 A.L.R.3d 138.

Divorce: retrospective effect of statute prescribing grounds of divorce, 23 A.L.R.3d 626.

Statutory change of age of majority as affecting preexisting status or rights, 75 A.L.R.3d 228.

Validity of statute canceling, destroying, nullifying, or limiting enforcement of possibilities of reverter or rights of re-entry for condition broken, 87 A.L.R.3d 1011.

16A C.J.S. Constitutional Law §§ 277, 392, 411, 429.

Sec. 20. [Eminent domain.]

Private property shall not be taken or damaged for public use without just compensation.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. I, § 14.

Iowa Const., art. I, § 18.

Montana Const., art. II, § 29.

Utah Const., art. I, § 22.

Wyoming Const., art. I, § 33.

Cross references. — For similar provision, *see* Kearny Bill of Rights, cl. 4.

For the Emiment Domain Code, *see* 42A-1-1 NMSA 1978 et seq.

For the Special Alternative Condemnation Procedure, *see* 42-2-1 NMSA 1978 et seq.

For rule governing presentment of eminent domain petition, *see* Rule 1-097 NMRA.

For jury instructions on eminent domain, *see* UJI 13-701 NMRA.

I. GENERAL CONSIDERATION.

A. IN GENERAL.

Ripeness. — Plaintiffs' facial challenge to the constitutionality of the city's animal control ordinance on the ground that the ordinance would result in a taking without just compensation because the ordinance required owners of unsterilized companion animals to obtain a permit and set a limit of four intact companion animals per household was not ripe for judicial determination where the plaintiffs did not allege that they had suffered an actual economic loss as a result of the ordinance and that just compensation would be unavailable to them. Rio Grande Kennel Club v. City of Albuquerque, 2008-NMCA-093, 144 N.M. 636, 190 P.3d 1131.

Actions under takings clause of United States constitution. — State constitutional sovereign immunity does not bar the rights and remedies found in the takings clause of the United States constitution when those rights and remedies are asserted against a state agency. The takings clause is self-executing and abrogates state immunity to suits for just compensation under the takings clause. Manning v. New Mexico Energy, Minerals & Natural Resources Dep't, 2006-NMSC-027, 140 N.M. 528, 144 P.3d 87.

State may appropriate private property under inherent power of eminent domain by a legislative act. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

Right to recover just compensation is conferred on condemnee by this section. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Taking or damages compensable. — In order for an owner to be entitled to compensation a taking is not required - it being sufficient if there are consequential damages. Board of Cnty. Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Jurisdiction of municipal condemnation of public utility. — The public utilities commission does not have jurisdiction over municipal condemnations of regulated water and sewer utilities. United Water N.M., Inc. v. New Mexico Pub. Util. Comm'n, 1996-NMSC-007, 121 N.M. 272, 910 P.2d 906.

County can unilaterally abandon condemnation proceedings following the entry of a permanent order of entry anytime before the entry of a final judgment confirming the compensation award, subject to paying compensation for the temporary taking that occurred and other expenses necessary to do equity. In assessing these damages and expenses, the court shall not award any damages for any reduction in value to the property based solely on the relocation of an adjoining road that was made necessary by the abandonment of the condemnation proceeding. In this case, because there is no permanent taking of the owner's property, the owner had no right to any incidental damages to what would have otherwise been the remainder of his property. County of Bernalillo v. Morris, 117 N.M. 398, 872 P.2d 371 (Ct. App.), cert. denied, 117 N.M. 524, 873 P.2d 270 (1994).

Deliberate harm required. — A property owner must allege and prove conduct on the part of the governmental actor more serious - in terms of culpability, or in terms of the probability of harm to an owner's property - than mere negligence. For an act to give rise to a claim for compensation under this section, the act must at least be one in which the risk of damage to the owner's property is actually foreseen by the governmental actor, or in which it is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental project. Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 114 N.M. 676, 845 P.2d 770 (1992).

There is no limitation on legislature's right to designate agencies that shall exercise the power of eminent domain except as restricted by the constitution. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

Public ownership of underground water constitutional. — Laws 1931, ch. 131 (72-12-1 to 72-12-10 NMSA 1978), which declares ownership of underground waters to be in the public, does not violate N.M. Const., art. II, §§ 18 and 20, because the patents from the United States issued after 1866, and particularly those issued after the Desert Land Act of 1877, conveyed no interest in, or right to, the use of surface or underlying water with which lands could be irrigated, except such portions thereof as were used to reclaim the particular land applied for under the act. State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007 (1950), appeal dismissed, 341 U.S. 924, 71 S. Ct. 798, 95 L. Ed. 1356 (1951).

Law authorizing uncompensated diversion of water invalid. — Section 72-5-26 NMSA 1978, insofar as it authorizes the delivery of water from a junior ditch into a

senior ditch and the diversion of the water above or below without compensation to the owner of the senior ditch, violates this section. Insofar as it authorizes diversion of water from other sources, it is unobjectionable. Miller v. Hagerman Irrigation Co., 20 N.M. 604, 151 P. 763 (1915).

B. TAKING OR DAMAGING.

Where plaintiff asserts unconstitutional taking of property without just compensation claim, if plaintiff cannot meet the requirement that it had a protectable property interest, it renders the governmental action as a taking without just compensation moot. E. Spire Communications, Inc. v. New Mexico Pub. Regulation Comm'n, 392 F.3d 1204 (10th Cir. 2004), aff'g 269 F. Supp. 2d 1310 (D.N.M. 2003).

Interference with property's use. — When interference with the use of property by its owner consists of actual entry upon land and its devotion to public use for more than a momentary period, "there is a taking of property in the constitutional sense, whether there has been any formal condemnation or not". City of Albuquerque v. Chapman, 77 N.M. 86, 419 P.2d 460 (1966).

A taking may occur by a municipality providing service in the certified area of a public utility. — A taking may occur, even if a public utility does not have the exclusive right to furnish utilities in a certified area under a certificate of public convenience and necessity, if the public utility proves that it had established infrastructure and was already serving customers in the certified area that is interfered with by a municipality. In the absence of any proof of tangible loss, that is, physical taking or stranded costs, a public utility is not entitled to just compensation when a municipality lawfully exercises its right to provide utilities in the public utility’s certified area. Moongate Water Co., Inc. v. City of Las Cruces, 2013-NMSC-018, 302 P.3d 405.

Municipality providing service in the certified area of a public utility was not a taking. — Where the public regulation commission issued the public utility a certificate of public convenience and necessity authorizing the public utility to provide water in an area outside the limits of the municipality; the municipality subsequently annexed three undeveloped tracts of land within the public utility’s certified area, subdivided the land, and committed itself to provide water to the subdivision; because the municipality had not elected to become subject to the Public Utilities Act (62-1-1 NMSA 1978 et seq.), and did not have a population of more than 200,000, the municipality was not subject to the act and the public utility’s certificate of public convenience and necessity did not prevent the municipality from competing with the public utility in the certified area; the public utility did not have any infrastructure, customers or physical assets in the subdivision, had not incurred any costs to serve the subdivision, and could not serve the subdivision without making significant infrastructure improvements; and the municipality did not take any of the public utility’s physical assets, the municipality did not engage in an unlawful taking of the public utility’s property. Moongate Water Co., Inc. v. City of Las Cruces, 2013-NMSC-018, 302 P.3d 405.

When regulatory prohibition held not to be "taking". — A regulation which imposes a reasonable restriction on the use of private property will not constitute a "taking" of that property if the regulation is: (1) reasonably related to a proper purpose; and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of his property. Thus, if a regulation simply prohibits the use of property for purposes declared to be injurious to the health, morals, or safety of the community, the prohibition cannot be deemed a "taking" of property for the public benefit. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Telephone orders standard. — State corporation commission's order to a telephone local exchange carrier imposing a state-wide standard of zero primary orders held over 30 days did not amount to an illegal taking of property under the federal or state constitutions. U.S. West Communications, Inc. v. New Mexico SCC, 1997-NMSC-031, 123 N.M. 554, 943 P.2d 1007.

Form not determinative. — Constitutional rights rest on substance, not on form; therefore, liability to pay compensation is not to be evaded by leaving title in the owner while depriving him of the beneficial use of the property. City of Albuquerque v. Chapman, 77 N.M. 86, 419 P.2d 460 (1966).

Acquisition by prescription is not a taking and does not require compensation to the landowner for the servitude. Luevano v. Maestas, 117 N.M. 580, 874 P.2d 788 (Ct. App. 1994).

No taking shown. — Where the preliminary order of entry was never made permanent and there was no physical entry or disturbance of the plaintiff's possession, no taking occurred. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973), modified, County of Dona Ana v. Bennett, 116 N.M. 778, 867 P.2d 1160 (1994).

Regulation not related to a proper purpose that does not deprive a property owner of all or substantially all beneficial use of property simply does not implicate an interest protected by the takings clause; thus, although a property owner may have a right to seek redress for an unlawful regulation, the method of redress is not a takings action. Estate of Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995).

Necessity of taking not for courts. — The question of the necessity or expediency of a taking in eminent domain lies with the legislature and is not a proper subject for judicial review. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

What damages compensable. — When an injury complained of is not due to interference of enjoyment by an abutter of his frontage on a public way, or by a riparian owner of his adjacency to a stream, and does not consist of any physical injury to property cognizable to the senses, there is ordinarily no damage for which the constitution requires compensation unless the injury is one for which a liability would

have existed at common law if it had been inflicted without statutory authority. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Damage to be special and direct. — Only one whose damage, occasioned by highway improvement, is special and direct as distinguished from remote and consequential, and which differs in kind from that of the general public, suffers a compensable injury. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Depreciation not always "damage". — Not every depreciation in the market value of land resulting from the proximity of a public improvement is a damage in the constitutional sense. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Nature of damage decided case by case. — The line between noncompensable damage through an exercise of the police power, and damage for which payment must be made for a taking under eminent domain is one not easily drawn, and the supreme court has not attempted to state a rule of universal application, but will decide each case as it arises. Board of Cnty. Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Authorized condemnor may be liable in trespass. — An authorized condemnor may be liable in trespass to a property owner for taking more land than is reasonably necessary or for causing excessive damage by the manner in which the taking occurs, but only when there is evidence of fraud, bad faith or gross abuse of discretion. North v. Public Serv. Co., 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983), cert. denied, 101 N.M. 11, 677 P.2d 624 (1984).

Damages for trespass when an authorized condemnor is liable cover only that portion of the damage over and above what results from the taking itself. North v. Public Serv. Co., 101 N.M. 222, 680 P.2d 603 (Ct. App. 1983), cert. denied, 101 N.M. 11, 677 P.2d 624 (1984).

Santa Fe minimum wage ordinance does not constitute a taking of private property in violation of the takings clause in this section. New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785, 126 P.3d 1149.

C. PUBLIC USE.

Taking authorized for public use only. — At the outset, there can be no question under the constitution that the taking or damaging of private property through eminent domain is permitted for none other than a public use. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970), superseded by statute, Santa Fe Southern Railway, Inc. v. Baucis Ltd. Liability Co., 1998-NMCA-002, 124 N.M. 430, 952 P.2d 31.

Nature of use for courts. — Necessity and expediency of the taking is a legislative question; whether use to which property is to be put is a public use is a judicial question. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

Private condemnation right may be created in private entity. — It is not unconstitutional for the legislature to create a private right of condemnation in a private entity, where the purpose is beneficial use of a vitally important natural resource. Kennedy v. Yates Petroleum Corp., 104 N.M. 596, 725 P.2d 572 (1986).

Natural gas pipeline deemed public use. — The trial court was correct in concluding that a natural gas pipeline bore a real and substantial relation to the public use as required by statute and case law. Kennedy v. Yates Petroleum Corp., 104 N.M. 596, 725 P.2d 572 (1986).

Beneficial use of water is public use, and condemnation of a right-of-way to make the beneficial use possible is clearly provided for in 72-1-5 NMSA 1978 and is constitutional. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970), superseded by statute, Santa Fe S. Ry., Inc. v. Baucis Ltd. Liability Co., 1998-NMCA-002, 124 N.M. 430, 952 P.2d 31.

Taking property for reservoir. — Taking property for a dam or reservoir to impound and conserve water power is a public use. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

Logging railroad as public use. — This section is not violated by 42-1-22 NMSA 1978, authorizing taking of property for logging railroad for public use, the question of public use being left to judicial determination. Threlkeld v. Third Judicial Dist. Court, 36 N.M. 350, 15 P.2d 671 (1932).

No public use in coal mining. — Insofar as Laws 1919, ch. 109 (42-1-31 to 42-1-34, 42-1-36, 42-1-37 NMSA 1978) impliedly declares a public use in business or industry of coal mining, it is violative of this section. Gallup Am. Coal Co. v. Gallup S.W. Coal Co., 39 N.M. 344, 47 P.2d 414 (1935).

No public use in relocation of nonowned ditch. — The relocation of borrow ditch, the use of which for purpose of irrigation was permissive only and subject to termination at will, was not a matter of public interest or concern and the taking of the private property of defendant upon which to relocate a ditch, which plaintiffs had no obligation, duty or right to relocate, is not a public use. Board of Cnty. Comm'rs v. Sykes, 74 N.M. 435, 394 P.2d 278 (1964).

II. COMPENSABLE TAKINGS.

The fact that ditch commissioners are given the right to alter, change the location of, enlarge, extend or reconstruct a ditch under the conditions set forth in 73-2-56 NMSA 1978 cannot be construed as giving them authority to take private property for these uses without just compensation, contrary to this section, and without regard to requisite procedures. Marjon v. Quintana, 82 N.M. 496, 484 P.2d 338 (1971).

Access to highway which landowners abut is property right of which they cannot be deprived without just compensation. State ex rel. State Hwy. Comm'n v. Mauney, 76 N.M. 36, 411 P.2d 1009 (1966).

Defendants, as owners of real estate abutting on a highway, have a right of access - the right of ingress and egress to and from their property - which is a property right - a special interest of which they cannot be deprived without just compensation. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Lowering of highway grade. — Depreciation in value of property by 20 inch lowering of grade of highway on which property abutted was compensable. Board of Cnty. Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Not every change of highway grade would be compensable. It must be a material change, and one which causes consequential damage. Board of Cnty. Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

Inclusion of private land in game refuge damaging. — The inclusion of private land within a game management area for the purpose of providing a place for migratory birds "to rest and feed unmolested" may result in consequential damage to the owner of private land included therein, contrary to this section, even though there was no actual taking of any part of the land itself. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965), appeal after remand, 77 N.M. 801, 427 P.2d 677 (1967) (holding that game commission could not include private land within game refuge without consent of owners or acquisition in lawful manner), overruled by New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

No duty on owner to minimize damage by harvesting crops. — Contention of game commission that at time of year when Canada geese arrive in New Mexico, crops should have been harvested and removed from fields so that enforced resting and feeding places would not constitute consequential damaging of private property without just compensation was without merit, as no requirement of law requires the owner of private land to remove his crops at any particular time. Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965), appeal after remand, 77 N.M. 801, 427 P.2d 677 (1967) (holding that game commission could not include private land within game refuge without consent of owners or acquisition in lawful manner), overruled by New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 607 P.2d 606 (1980).

Construction of utility lines. — Power utility constructing lines on private property had the duty to properly construct its lines and the obligation to justly compensate for the taking. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Fixing of reasonable rates mandated. — Private property may not be taken for public use without just compensation, and thus the failure of a regulatory commission to provide for rates that would provide a fair and reasonable rate of return (one that was

compensable) constituted a violation of due process. Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 90 N.M. 325, 563 P.2d 588 (1977).

Failure to increase rates as confiscation. — When it became obvious that the decision of the commission on new rates would be delayed and the company would suffer irreparable loss of revenue in the interim, failure to increase the rates was an unconstitutional confiscation of the company's property without due process of law. Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 90 N.M. 325, 563 P.2d 588 (1977).

Substitution of franchises. — Where telephone company was operating under 99-year franchise legally granted by county commissioners, it could not be compelled to accept new franchise from municipality imposing additional terms and burdens not contained in the original franchise; such compulsion would impair the obligation of contract and would take company's property without due process. Mountain States Tel. & Tel. Co. v. Town of Belen, 56 N.M. 415, 244 P.2d 1112 (1952).

Effect on city's liability of "dedication" after taking. — Where city had already occupied a 35-foot strip and put it to beneficial use under court authority, the filing of a plat by defendants showing public dedication of said strip did not relieve the city of liability to pay compensation therefor, as the defendants could no longer alienate it at this point; nor did the fact that condemnation had not yet been entered change the result. City of Albuquerque v. Chapman, 77 N.M. 86, 419 P.2d 460 (1966).

Taking of public property used in proprietary capacity compensable. — Public property held and used in a proprietary capacity may not be taken for another public use without payment of just compensation. Silver City Consol. Sch. Dist. No. 1 v. Bd. of Regents of N.M.W. Coll., 75 N.M. 106, 401 P.2d 95 (1965).

Municipal park lands not to be taken without compensation. — State highway commission [state transportation commission] may not occupy and use municipal park lands, the establishment and maintenance of which is a corporate or proprietary function, for highway purposes without payment of compensation. State ex rel. State Hwy. Comm'n v. City of Albuquerque, 67 N.M. 383, 355 P.2d 925 (1960).

Restrictive covenants are equitable easements and compensable property interests protected by this section. Leigh v. Village of Los Lunas, 2005-NMCA-025, 137 N.M. 119, 108 P.3d 525.

Compensation for highway use legislatively mandated. — The legislature has indicated an intent that compensation should be paid when public property is condemned for highway purposes, including property being used for a governmental as well as a proprietary purpose. State ex rel. State Hwy. Comm'n v. Board of Cnty. Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

III. NONCOMPENSABLE TAKINGS.

No compensation guaranteed government property under constitution. — Property owned by county and utilized in connection with county courthouse and county hospital, being public property used for governmental purposes, is not guaranteed compensation under this constitutional provision. State ex rel. State Hwy. Comm'n v. Board of Cnty. Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

Legislature may exercise control over property acquired by an agency of the state for the performance of a strictly public duty, devolved upon it by law, by requiring the state agency or governmental subdivision to transfer such property to another agency of the government to be devoted to a strictly public purpose without receiving compensation therefor. Silver City Consol. Sch. Dist. No. 1 v. Board of Regents of N.M.W. Coll., 75 N.M. 106, 401 P.2d 95 (1965) (upholding provisions of former law requiring state institution to convey property once used for high school to school district).

No special damage in closing portion of highway. — One whose property abuts upon a road or highway, a part of which is closed or vacated, has no special damage (unless his lands abut upon the closed portion thereof) if there remains a reasonable access to the main highway system. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Fact that defendants' travel to main highway system could be in only one direction and that the traveling public would find it less convenient to reach defendants' premises was a common injury inevitable in the building of highways. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

No special damage in obstructing portion of highway. — An obstruction placed in a highway by public authority and reasonably necessary for the protection of the public is not a special injury to an abutting landowner. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Where defendants' right of access to the road upon which their property abutted had not been affected, although it had been obstructed some 800 feet north of their property, preventing further travel in that direction, such injury, suffered in common with the general public was not compensable. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

No right in abutting landowners to direct access. — Abutters have a right of access to the public roads system, but it does not necessarily follow that they have a right of direct access to the main-traveled portions thereof. State ex rel. State Hwy. Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964).

Defendants never had direct access to a new highway, constructed upon a different location, and were not entitled to direct access to it. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

No right to be free of mere inconvenience. — Mere inconvenience resulting from the closing of streets or roads does not give rise to a legal right in one so inconvenienced, when another reasonable, although perhaps not equally accessible, means of ingress and egress is afforded. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968); State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Circuity of travel noncompensable where reasonable access afforded. — Once reasonable access is given to the main highway system by means of frontage roads, any circuity of travel occasioned by the loss of direct ingress and egress is noncompensable. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968).

Circuity of travel, as long as it is not unreasonable, and any loss in land value by reason of the diversion of express traffic, are noncompensable. State ex rel. State Hwy. Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964).

No vested interest in traffic flow. — A landowner, abutting on a public highway, enjoys no vested interest in the flow of public travel past his premises, and is not entitled to compensation for depreciation in his property value or loss of business resulting from diversion of traffic by the opening of a new highway. State ex rel. State Hwy. Comm'n v. Silva, 71 N.M. 350, 378 P.2d 595 (1962).

Loss of business from diversion of traffic noncompensable. — Landowner is not entitled to compensation for loss of business resulting from diversion of traffic by opening of more convenient route, since owner enjoys no vested interest in flow of public travel. Board of Cnty. Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945).

Even though a new road traverses a portion of claimant's land for which compensation is awarded, he is not entitled to judgment for consequential damages resulting from diversion of traffic. Board of Cnty. Comm'rs v. Slaughter, 49 N.M. 141, 158 P.2d 859 (1945).

Loss of business or of prospective business, because the traveling public cannot reach a roadside business establishment as readily as before, due to restriction of direct access, amounts only to a diversion of traffic and is noncompensable. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968).

Temporary interference from construction. — In New Mexico a condemnee may not recover damages by way of expenses or loss of business for temporary inconvenience, annoyance or interference with access occasioned by construction, unless the period of construction was unduly long or the conduct of the condemnor causing the loss was unreasonable, arbitrary or capricious. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Destruction of contaminated food not compensable. — The state is not required to make compensation when it seizes and destroys food found to be contaminated within the provisions of the New Mexico Food Act. State v. 44 Gunny Sacks of Grain, 83 N.M. 755, 497 P.2d 966 (1972).

The right to seize and destroy unfit or impure foods is predicated upon the police power, and does not fall within this section, which deals with takings "for public use", which is to say, by eminent domain. State v. 44 Gunny Sacks of Grain, 83 N.M. 755, 497 P.2d 966 (1972).

Forfeiture under drug laws. — Forfeiture under former Narcotic Drug Act of tractor and trailer used in transportation of amphetamines did not constitute the taking of property without just compensation. State v. One 1967 Peterbilt Tractor, 84 N.M. 652, 506 P.2d 1199 (1973).

Tax for street improvements. — A tax to pay off bonds issued for special street improvements does not constitute taking of private property for public use without just compensation as contemplated under this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Tax sale. — Acquisition of property by state through tax sale procedure is not a taking of private property for public use as contemplated by this section. Yates v. Hawkins, 46 N.M. 249, 126 P.2d 476 (1942).

Zoning. — As a valid exercise of the police power, zoning is not a compensable taking, even when it results in a substantial reduction in the value of property; any incidental economic loss involved is merely the price of living in a modern enlightened and progressive community. Only if governmental regulation deprives the owner of all beneficial use of his property will it be unconstitutional. Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976).

Treatment of electric utility's interest in generating facility. — Exclusion of an electric utility's interest in a generating facility from its rate base, coupled with the public service commission's refusal to decertify the facility, did not violate the due process provisions or the takings clauses of the New Mexico and United States constitutions. Public Serv. Co. v. Public Serv. Comm'n, 112 N.M. 379, 815 P.2d 1169 (1991).

Relocation of gas lines. — The state highway commission [state transportation commission] had no obligation to reimburse defendant utility for cost of relocating its gas lines because of widening and improving of state highway as it involved no damage to or taking of the property of the utility as contemplated by this section. State Hwy. Comm'n v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007, 75 A.L.R.2d 408 (1958), overruled by, State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Plugging and repairing wells. — Abatement of public nuisance under statute by plugging and repairing artesian wells, when owner fails to do so after notice, does not violate this section, since common-law right summarily to abate a nuisance is not in conflict with a constitutional provision protecting rights to property. Eccles v. Ditto, 23 N.M. 235, 167 P. 726, 1918B L.R.A. 126 (1917).

Location of treatment plant. — Mere location of a treatment plant in the neighborhood of plaintiffs' land gives rise to no cause of action unless it is a nuisance per se, which, generally speaking, a sewage disposal plant is not. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969).

Termination of permissive use of ditch. — Where use by a party of a ditch classified for irrigation by the irrigation district was permissive only, use for such purpose was subject to termination at will and vested in such party no property right as against the public. Board of Cnty. Comm'rs v. Sykes, 74 N.M. 435, 394 P.2d 278 (1964).

"Amortization" as constitutional alternative to just compensation. — If an amortization period is reasonable, it is a constitutional means for municipalities to terminate nonconforming uses and, as such, is a constitutional alternative to just compensation. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

"Amortization" does not connote a requirement of compensation, but merely suggests that a sign owner or user is put on notice that he has a certain period of time in which to make necessary adjustments to bring his nonconforming structure into conformity with a sign ordinance. Temple Baptist Church, Inc. v. City of Albuquerque, 98 N.M. 138, 646 P.2d 565 (1982).

Expenses of defending discontinued condemnation suit. — In the absence of bad faith or unreasonable delay upon the part of the party instituting condemnation proceedings which are ultimately discontinued, the owner is not constitutionally entitled to recover expenses and losses suffered during their pendency. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973), modified, County of Dona Ana v. Bennett, 116 N.M. 778, 867 P.2d 1160 (1994).

IV. MEASURE OF COMPENSATION.

Excess construction costs incurred for temporary physical taking. — The measure of damages for a temporary, but total, physical taking of a commercial property in the early stages of the construction of a project on the property may include, as a separate element of damages, the excess construction costs directly related to the interruption of the construction project that would not have been incurred but for the condemnor’s interference with the owners’ loss of possession and use of the property and may include, as a separate element of damages, reasonable expenditures demonstrably aimed at reducing the losses suffered by the owner. Primetime Hospitality, Inc. v. City of

Albuquerque, 2007-NMCA-129, 142 N.M. 663, 168 P. 3d 1087, rev'd, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, 49 A.L.R. 6th 765.

Fair rental value for temporary physical taking. — The measure of damages for a temporary, but total, physical taking of a commercial property in the early stages of the construction of a project on the property may include, as a separate element of damages, the rental value of the property for the period of delay. Primetime Hospitality, Inc. v. City of Albuquerque, 2007-NMCA-129, 142 N.M. 663, 168 P. 3d 1087, rev'd, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, 49 A.L.R. 6th 765.

The constitution does not mandate attorney fees in inverse condemnation cases. Primetime Hospitality, Inc. v. City of Albuquerque, 2007-NMCA-129, 142 N.M. 663, 168 P. 3d 1087, , rev'd, 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112, 49 A.L.R. 6th 765.

Credit for contribution in aid of construction. — The contribution in aid of construction that a school district paid a regulated public utility for a water line extension to receive water service cannot be credited against the amount awarded to the utility in an action by the school district to acquire the water line extension by eminent domain. Moriarty Mun. Sch. Dist. v. Thunder Mountain Water Co., 2006-NMCA-135, 140 N.M. 612, 145 P.3d 92, aff'd, 2007-NMSC-031, 141 N.M. 824, 161 P.3d 869.

"Just" compensation. — "Just" compensation can only mean that the framers of the constitution intended that a fair and reasonable amount of compensation should be awarded; it follows that the compensation must be fair and just to both sides. Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953), superseded by statute, Yates Petroleum Corp. v. Kennedy, 108 N.M. 564, 775 P.2d 1281 (1989).

Balance between damages and benefits. — Compensation is had when the balance is struck between the damages and the benefits conferred on him by the act complained of. Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953), superseded by statute, Yates Petroleum Corp. v. Kennedy, 108 N.M. 564, 775 P.2d 1281 (1989).

"Fair market value" explained. — "Fair market value" which includes in its determination all relative elements of injury and benefit received by the landowner is theoretically what a willing seller would take and a willing buyer offer, but as a willing seller is usually lacking in condemnation cases, the court has a special responsibility for seeing that the seller receives what is honestly due him, as well as for making sure that under the pressure of compulsion the seller does not gouge the public for more than his property is reasonably worth. Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953), superseded by statute, Yates Petroleum Corp. v. Kennedy, 108 N.M. 564, 775 P.2d 1281 (1989).

Value based on highest and best use. — The value of the property is determined by considering not merely the uses to which it was applied at the time of condemnation, but the highest and best uses to which it could be put. Determination of the highest and best use should be made with regard to the existing business or wants of the

community, or such as may be reasonably expected in the immediate future. City of Albuquerque v. PCA-Albuquerque #19, 115 N.M. 739, 858 P.2d 406 (1993).

"Before and after" rule. — The so-called "before and after" rule, whereby the owner of property is entitled to recover as compensation the amount the fair market value of his property is depreciated by the taking, is applicable where damage to property results from a change in grade of the abutting highway. Board of Cnty. Comm'rs v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

All elements of damage to be considered. — Denial of right to have all elements of damage resulting from condemnation considered in arriving at award would be of questionable constitutionality as permitting the taking or damaging of property without the payment of just compensation. State ex rel. State Hwy. Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969).

Dual responsibilities of state commission in evaluating damages. — This section makes it the responsibility of the highway commission not only to see that land necessary for public highways is obtained at a price fair to the public, but also to see that the property owner is fairly compensated; since the commission is a public body charged with these two responsibilities, there is no valid reason why use by a condemnee of the opinion of an expert employed by the commission and paid from public funds is unfair to the commission. State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

When frustration of future plans compensable. — While mere frustration of owner's hopes or plans for the future is a noncompensable element of damages, this is not the same as compensation based on planned future uses for which the property is adaptable by reason of location, state of improvement or other special elements of value inherent therein. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Plans for future properly considered. — Where property was already developed for commercial uses with definite plans and provisions in the existing structure having been made for the future development of the property for these uses, the trial court properly received into evidence these architectural plans and testimony relative thereto, and the consequent uses to which the property could be put were properly considered in arriving at appraisals of the damages suffered in taking of a portion of the property. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Alternate uses also relevant. — While it was proper for the jury in fixing damages to consider owner's plans for development of the property, the jury was also entitled to consider alternate plans for commercial development, as well as evidence of other uses for which the property was suitable or adaptable, in determining its before and after fair market value. State ex rel. State Hwy. Dep't v. Kistler-Collister Co., 88 N.M. 221, 539 P.2d 611 (1975).

Compensation to be determined even after default judgment. — Under 42-2-14 NMSA 1978, part of the act establishing special alternative condemnation procedure, after entry of default by the clerk, the court shall conduct a hearing and determine the amount of just compensation due; this is in recognition of this section, which provides that property shall not be taken or damaged without just compensation. Board of Cnty. Comm'rs v. Boyd, 70 N.M. 254, 372 P.2d 828 (1962).

Appraisal of damages caused by conservancy district. — Provision of Conservancy Act (73-17-18 NMSA 1978) providing for appraisal and hearing regarding damages to property caused by conservancy district pertaining to appraisal of damages has reference to damages to property in the sense employed in eminent domain proceedings. Zamora v. Middle Rio Grande Conservancy Dist., 44 N.M. 364, 102 P.2d 673 (1940).

Allowance of interest from date of condemnation petition was essential to just compensation under the circumstances, even though condemnees may have been responsible for first continuance. State ex rel. State Hwy. Comm'n v. Peace Found., Inc., 79 N.M. 576, 446 P.2d 443 (1968).

There is no constitutional requirement for payment in advance for the property taken. Timberlake v. Southern Pac. Co., 80 N.M. 770, 461 P.2d 903 (1969).

This section does not require payment in advance of the taking or damage. State Hwy. Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 389 P.2d 606 (1963).

Constitution does not require advance compensation for damaging private property in improvement of state highway. State Hwy. Comm'n v. Ruidoso Tel. Co., 73 N.M. 487, 389 P.2d 606 (1963); Summerford v. Board of Cnty. Comm'rs, 35 N.M. 374, 298 P. 410 (1931).

Date of taking. — Clearly and logically the date of taking, whether partial or whole, was the date on which the condemnor became vested with the legal right to possession, dominion and control over the real estate being condemned. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973), modified, County of Dona Ana v. Bennett, 116 N.M. 778, 867 P.2d 1160 (1994).

Restrictive covenant. — Measure of compensation for taking restrictive covenant is the difference between the fair market value of the lot benefitted by the restrictive covenant immediately before the taking and the value of the lot immediately after the taking. Leigh v. Village of Los Lunas, 2005-NMCA-025, 137 N.M. 119, 108 P.3d 525.

Taking of restrictive covenant occurred not when municipality purchased burdened lot, but when municipality began construction of improvements in violation of restrictive covenants. Leigh v. Village of Los Lunas, 2005-NMCA-025, 137 N.M. 119, 108 P.3d 525.

Awards improper. — Awards in condemnation proceeding which were far below and outside the bounds of the testimony of any witness were improper. AT & T Co. v. Walker, 77 N.M. 755, 427 P.2d 267 (1967).

V. INVERSE CONDEMNATION.

Factors to determine if pre-condemnation publicity and planning constitutes a taking. — To determine whether pre-condemnation publicity and planning constitute a taking, a court must consider whether the government had publicly announced a present intention to condemn the property in question and whether the government has done something that substantially interferes with the landowner's use and enjoyment of its property. Santa Fe Pacific Trust, Inc. v. City of Albuquerque, 2014-NMCA-093, cert. granted, 2014-NMCERT-008.

Publicity surrounding proposed condemnation was not a taking. — Where two mayors publicly targeted plaintiff's property as a potential location for an event arena; the municipality had informed plaintiff that plaintiff's property would be taken for that purpose; the municipality adopted a development plan that included the goal of constructing an event arena on a site that included plaintiff's property and began a process to determine the feasibility of constructing the event arena; the municipality issued a request for information and a request for proposals that included plaintiff's property and publicly announced the proposed project; the municipality attempted to purchase the property from plaintiff; local newspapers published many articles about the proposed project that mentioned plaintiff's property as a potential site; the municipal council never approved the acquisition or condemnation or appropriated funding for construction of an arena; some potential buyers and tenants of plaintiff's property were deterred by the possibility of imminent condemnation; and plaintiff sued the municipality for inverse condemnation alleging that plaintiff lost potential sales and leases because of the publicity surrounding the municipality's plan to condemn plaintiff's property, plaintiff failed to establish an inverse condemnation under the takings clause of the Fifth Amendment and under the New Mexico constitution and statutory law because the municipality's planning activities, which never came to fruition, did not prevent plaintiff from possessing the property or from using it. Santa Fe Pacific Trust, Inc. v. City of Albuquerque, 2014-NMCA-093, cert. granted, 2014-NMCERT-008.

No constitutional right to sue state. — Contention that this section necessarily implies consent to sue the state if private property is taken or damaged by a state agency or subdivision without compensation is expressly rejected. State ex rel. Board of Cnty. Comm'rs v. Burks, 75 N.M. 19, 399 P.2d 920 (1965).

Remedy of inverse condemnation explained. — If property has been actually taken or damaged for public use, and the person or agency taking or damaging the same for such purpose has failed for some reason to proceed by condemnation proceedings to exercise the power of eminent domain, though vested with that right, the remedy of inverse condemnation is available to secure the recovery of just compensation. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Actual taking not required for compensation. — In order for an owner of private property to be compensated, an actual taking of the property is not required; it is sufficient if there are consequential damages. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

Exclusive nature of remedy. — Landowners could not recover for the alleged trespasses upon the premises, and their only remedy, if any, was limited to a recovery of just compensation for property taken or damaged for public use by an action in the nature of inverse condemnation. Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

Damage must affect right of landowner separate from right of public. — In order to be compensated, damage to property must affect some right or interest which the landowner enjoys and which is not shared or enjoyed by the public generally. The damage must be different in kind, not merely in degree, from that suffered by the public in general. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

For inverse condemnation to be based upon a "damage", a property owner must suffer some compensable injury that is not suffered by the public in general. Estate of Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995).

Right to sue for damage caused by highway construction. — Constitutional right of compensation for damaging private property by construction or improvement of state highway may be enforced by civil action against party liable therefor. Summerford v. Board of Cnty. Comm'rs, 35 N.M. 374, 298 P. 410 (1931).

Where private property has been damaged through the methods followed or adopted in the design, construction or maintenance of a public highway, it constitutes damage for a public use for which adequate compensation is guaranteed to the owner by this section, and for which a county is subject to suit. Wheeler v. Board of Cnty. Comm'rs, 74 N.M. 165, 391 P.2d 664 (1964).

Counties are liable under the statutes to damages for lands taken for highway purposes by them or with their acquiescence. Mesich v. Board of Cnty. Comm'rs, 46 N.M. 412, 129 P.2d 974 (1942).

Members of state highway commission [state transportation commission] were not personally liable for compensation for cutting off ingress and egress to and from land by erecting viaduct on state highway without prior ascertainment and settlement of damages. Summerford v. Board of Cnty. Comm'rs, 35 N.M. 374, 298 P. 410 (1931).

Action maintainable by purchaser. — A person who holds interest in land under contract of sale may maintain an action for compensation. Mesich v. Board of Cnty. Comm'rs, 46 N.M. 412, 129 P.2d 974 (1942).

No action for interference with television reception. — The fact that an adjoining electrical transmission line will interfere with radio and television reception fails to state a cause of action for inverse condemnation. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

No action for unsightly structure. — Damages cannot be recovered because of the unsightly character of a structure, and aesthetic considerations are not compensable in the absence of a legislative provision. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

No action for noise. — Damages in inverse condemnation from noise are not allowed. Public Serv. Co. v. Catron, 98 N.M. 134, 646 P.2d 561 (1982).

Scope of section. — Constitutional provision that private property shall not be taken for public use without just compensation applies only to property taken under the power of eminent domain. 1959-60 Op. Att'y Gen. No. 60-70.

When compensation unnecessary. — Municipality is immune from constitutional requirement of compensating for injury to or "taking" of property only in the reasonable exercise of the police power, to the extent that it is required or necessary in order to advance the best interests of society in general. 1959-60 Op. Att'y Gen. No. 60-70.

Applicability of federal case law. — In view of the fact that the provisions of N.M. Const., art. II, § 18, concerning due process and this section, concerning the taking of private property without just compensation, are worded exactly as those contained in U.S. Const., amend. V, the holdings of the United States supreme court may be applicable to issues thereunder. 1968 Op. Att'y Gen. No. 68-09.

Graduated income tax valid. — Graduated income tax does not violate N.M. Const., art. II, § 18, or this section. 1968 Op. Att'y Gen. No. 68-09.

"Taking" defined. — "Taking" may be defined as entering upon private property for more than a momentary period and under the warrant or color of legal authority, devoting it to public use or otherwise informally appropriating or injuriously affecting it in such a way as to substantially oust the owner and deprive him of beneficial enjoyment thereof. 1974 Op. Att'y Gen. No. 74-16.

Private property cannot be taken for ditch without just compensation. 1969 Op. Att'y Gen. No. 69-96.

Township and section lines declared public highways. — Although 67-5-1 NMSA 1978 authorizes county commissioners to declare township and section lines public highways, they must provide compensation for any private property taken and comply with the ordinary statutory procedures for the establishment of county roads. 1988 Op. Att'y Gen. No. 88-59.

Law reviews. — For article, "Private Nuisance in New Mexico," see 4 N.M. L. Rev. 127 (1974).

For note, "The Use of Eminent Domain for Oil and Gas Pipelines in New Mexico," see 4 Nat. Resources J. 360 (1964).

For note, "Appropriation By the State of Minimum Flows in New Mexico Streams," see 15 Nat. Resources J. 809 (1975).

For comment on State ex rel. State Hwy. Comm'n v. Danfelser, 72 N.M. 361, 384 P.2d 241 (1963), cert. denied, 375 U.S. 969, 84 S. Ct. 487, 11 L. Ed. 2d 416 (1964), see 4 Nat. Resources J. 181 (1964).

For student symposium, "Constitutional Revision - Water Rights," see 9 Nat. Resources J. 471 (1969).

For note, "Natural Gas Pipelines and Eminent Domain: Can a Public Use Exist in a Pipeline?," see 25 Nat. Resources J. 829 (1985).

For comment, "Land Use Regulations and the Takings Clause: Are Courts Applying a Tougher Standard to Regulators after *Nollan*?," see 32 Nat. Resources J. 959 (1992).

For note, "Property Owners in Condemnation Actions May Receive Compensation for Diminution in Value to Their Property Caused by Public Perception: *City of Santa Fe v. Komis*," see 24 N.M. L. Rev. 535 (1994).

For note, "United Water New Mexico v. New Mexico Public Utility Commission: Why Rules Governing the Condemnation and Municipalization of Water Utilities May Not Apply to Electric Utilities," see 38 Nat. Resources J. 667 (1998).

For article, “Valuation of Minerals in Takings Cases,” see 42 Nat. Resources J. 185 (2002).

For student article “Will the Durational Element Endure? Only Time Will Tell: Temporary Regulatory Takings in the Courts of Federal Claims and Federal Circuit After Tahoe-Sierra”, 45 Nat. Resources J. 201 (2005).

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage, 104 A.L.R. 5th 503.

Right of out-of-state property owner to commence in, or remove to, federal court action involving taking of property by state, local government, or agency thereof, 4 A.L.R. Fed. 2 § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Eminent Domain, §§ 6, 17 et seq.

Compensation or damages for condemning a public utility plant, 392, 35 A.L.R.4th 1263.

Use or improvement of highway as establishing grade necessary to entitle abutting owner to compensation on subsequent change, 2 A.L.R.3d 985.

Restrictive covenant or right to enforcement thereof as compensable property right, 4 A.L.R.3d 1137.

Zoning as a factor in determination of damages in eminent domain, 9 A.L.R.3d 291.

Deduction of benefits in determining compensation or damages in proceedings involving opening, widening or otherwise altering highway, 13 A.L.R.3d 1149.

Restrictive covenant, existence of, as element in fixing value of property condemned, 22 A.L.R.3d 961.

Eminent domain: right to enter land for preliminary survey or examination, 29 A.L.R.3d 1104.

Platting or planning in anticipation of improvement as taking or damaging of property affected, 37 A.L.R.3d 127.

Cost of substitute facilities as measure of compensation paid to state or municipality for condemnations of public property, 40 A.L.R.3d 143.

Measure of damages for condemnation of cemetery lands, 42 A.L.R.3d 1314.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 A.L.R.3d 860.

Condemned property's location in relation to proposed site of building complex or similar improvement as factor fixing compensation, 51 A.L.R.3d 1050.

Goodwill or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 A.L.R.3d 581.

Compensation for diminution in value of remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 A.L.R.3d 488.

Consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 A.L.R.3d 534.

Determination of just compensation for condemnation of billboards or other advertising signs, 73 A.L.R.3d 1122.

Right to condemn property owned or used by private educational, charitable or religious organization, 80 A.L.R.3d 833.

Goodwill as element of damages for condemnation of property on which private business is conducted, 81 A.L.R.3d 198.

Recovery of value of improvements made with knowledge of impending condemnation, 98 A.L.R.3d 504.

Zoning regulations limiting use of property near airport as taking of property, 18 A.L.R.4th 542.

Local use zoning of wetlands or flood plain as taking without compensation, 19 A.L.R.4th 756.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 A.L.R.4th 863.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 A.L.R.4th 674.

Eminent domain: compensability of loss of view from owner's property - state cases, 25 A.L.R.4th 671.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, 44 A.L.R.4th 366.

Validity, construction, and application of state relocation assistance laws, 49 A.L.R.4th 491.

Inverse condemnation state court class actions, 49 A.L.R.4th 618.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 A.L.R.4th 1063.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property, 62 A.L.R.4th 1183.

Abutting owner's right to damages for limitation of access caused by traffic regulation, 15 A.L.R.5th 821.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than publicuse to which property is already appropriated - state takings, 49 A.L.R. 5th 769.

29A C.J.S. Eminent Domain §§ 4, 21 to 26.

Sec. 21. [Imprisonment for debt.]

No person shall be imprisoned for debt in any civil action.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. I, § 15.

Iowa Const., art. I, § 19.

Montana Const., art. II, § 27.

Utah Const., art. I, § 16.

Civil contempt fine. — Order that judgment debtor should be jailed until he paid civil contempt fine was not imprisonment for failure to pay a debt, nor did fact that payment of the fine would reduce prior judgment alter the situation. Atlas Corp. v. DeVilliers, 447 F.2d 799 (10th Cir. 1971), cert. denied, 405 U.S. 933, 92 S. Ct. 939, 30 L. Ed. 2d 809, rehearing denied, 405 U.S. 1033, 92 S. Ct. 1288, 31 L. Ed. 2d 491 (1972) (decided under former law).

It is not a violation of the constitutional provision against imprisonment for debt to jail a person who does not pay a contempt fine. Hall v. Hall, 114 N.M. 378, 838 P.2d 995 (Ct. App.), cert. denied, 114 N.M. 314, 838 P.2d 468 (1992).

Violation of restraining order. — Contempt decree imprisoning husband, for definite term or until sum was paid wife, for violating divorce action restraining order prohibiting removal of estate from jurisdiction, did not violate this section. In re Canavan, 17 N.M. 100, 130 P. 248 (1912); *see also*, Canavan v. Canavan, 18 N.M. 640, 139 P. 154, 51 L.R.A (n.s.) 972 (1914).

Failure of administrator to turn over money. — Where an administrator is committed for contempt in not paying over money ordered by court, statute against imprisonment for debt is violated. In re Jaramillo, 8 N.M. 598, 45 P. 1110 (1896).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law §§ 618 to 624.

Worthless check act as violating constitutional provision against imprisonment for debt, 23 A.L.R. 495.

Application to nonpayment of taxes, fees or other governmental obligations, 40 A.L.R. 77, 48 A.L.R.3d 1324.

Statute making husband's failure to support wife or family a criminal offense as violation of constitutional guarantee against imprisonment for debt, 48 A.L.R. 1195.

Payment, statute making refusal to pay for commodities a criminal offense as violating inhibition of imprisonment for debt, 76 A.L.R. 1338.

Execution, statute providing for proceedings supplementary to, as violating constitutional guarantee against imprisonment for debt, 106 A.L.R. 383.

Constitutional provision against imprisonment for debt as applicable in bastardy proceedings, 118 A.L.R. 1109.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like - modern cases. 79 A.L.R.4th 232.

16A C.J.S. Constitutional Law §§ 487 to 490.

Sec. 22. [Alien landownership.][Repealed.]

ANNOTATIONS

Repeals. — The repeal of NM Const., art. 2, § 22, which was proposed by S.J.R. 10 (Laws 2005), was adopted at the general election held November 7, 2006, by a vote of 330,309 for and 142,568 against.

Sec. 23. [Reserved rights.]

The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. I, § 21.

Iowa Const., art. I, § 25.

Montana Const., art. II, § 34.

Utah Const., art. I, § 25.

Wyoming Const., art. I, § 36.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 7, 280.

16 C.J.S. Constitutional Law §§ 53, 58; 16A C.J.S. Constitutional Law § 445.

Sec. 24. [Victim's rights.] (1992)

A. A victim of arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim's representative shall have the following rights as provided by law:

(1) the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;

(2) the right to timely disposition of the case;

(3) the right to be reasonably protected from the accused throughout the criminal justice process;

(4) the right to notification of court proceedings;

(5) the right to attend all public court proceedings the accused has the right to attend;

(6) the right to confer with the prosecution;

(7) the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

(8) the right to restitution from the person convicted of the criminal conduct that caused the victim's loss or injury;

(9) the right to information about the conviction, sentencing, imprisonment, escape or release of the accused;

(10) the right to have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause; and

(11) the right to promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting

attorney, unless there are compelling evidentiary reasons for retention of the victim's property.

B. A person accused or convicted of a crime against a victim shall have no standing to object to any failure by any person to comply with the provisions of Subsection A of Section 24 of Article 2 of the constitution of New Mexico.

C. The provisions of this amendment shall not take effect until the legislature enacts laws to implement this amendment. (As added November 3, 1992.)

ANNOTATIONS

Cross references. — For victim restitution, *see* 31-17-1 NMSA 1978.

For the Crime Victims Reparation Act, *see* 31-22-1 NMSA 1978 et seq.

For crime victim immunity, *see* 31-23-1 NMSA 1978.

For Victim Counselor Confidentiality Act, *see* 31-25-1 NMSA 1978 et seq.

For the Victims of Crime Act, *see* 31-26-1 NMSA 1978 et seq.

The 1992 amendment to Article 2, which was proposed by S.J.R. No. 4 (Laws 1992) and adopted at the general election held on November 3, 1992, by a vote of 324,509 for and 148,419 against, added this section.

Crimes committed before effective date of victim's rights laws — The effective date of the victim's rights laws did not affect the admission of victim impact evidence in a death penalty case. States are free to admit this type of evidence following the United States Supreme Court's ruling in Payne v. Tennessee, 501 U.S. 808 (1991), and 31-20A-1C and 31-20A-2B NMSA 1978 already provide authority for the admission of this type of evidence. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

The Rules of Evidence requiring relevance and the balancing of unfair prejudice also apply to testimony and exhibits that are introduced in a capital felony sentencing proceeding for the purpose of showing victim impact. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Defendant was not unfairly prejudiced by impact evidence that included a videotaped depiction of the victim prior to her death in addition to the testimony of two witnesses. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Section does not protect against waiver of privilege not to disclose medical records. — In a prosecution for criminal sexual penetration, this section did not apply to give the victim the right to release her medical and psychotherapy records to the police and state's attorneys and then invoke an absolute privilege against in camera inspection by the court or subsequent disclosure to other parties. State v. Gonzales, 1996-NMCA-026, 121 N.M. 421, 912 P.2d 297.

Victim impact testimony. — The application of this section and 31-26-4G NMSA 1978, granting the representatives of a murder victim the right to make a statement to the court at sentencing and at any post-sentencing hearings, does not violate ex post facto prohibitions. Nor do these sections prohibit the jury from hearing victim impact testimony. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

ARTICLE III
Distribution of Powers

Section 1. [Separation of departments; establishment of workers compensation body.]

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted. Nothing in this section, or elsewhere in this constitution, shall prevent the legislature from establishing, by statute, a body with statewide jurisdiction other than the courts of this state for the determination of rights and liabilities between persons when those rights and liabilities arise from transactions or occurrences involving personal injury sustained in the course of employment by an employee. The statute shall provide for the type and organization of the body, the mode of appointment or election of its members and such other matters as the legislature may deem necessary or proper. (As amended November 4, 1986.)

ANNOTATIONS

Cross references. — For the workers' compensation division, *see* 52-5-1 NMSA 1978.

Comparable provisions. — Idaho Const., art. II, § 1.

Iowa Const., art. III, § 1.

Montana Const., art. III, § 1.

Utah Const., art. V, § 1.

Wyoming Const., art. II, § 1.

The 1986 amendment, which was proposed by H.J.R. No. 7 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 173,989 for and 92,419 against, added the last two sentences.

I. GENERAL CONSIDERATION.

Cap on medical malpractice damages does not violate separation of powers. — The cap on medical malpractice damages in 41-5-6 NMSA 1978 does not violate the separation of powers clause in Article III, Section 1 of the constitution of New Mexico. Salopek v. Friedman, 2013-NMCA-087.

Abrogation of common law jurisdiction to correct illegal sentences. — Paragraph A of Rule 5-801 NMRA, which abrogated the common law jurisdiction of the district court to correct illegal sentences, does not violate the separation of powers doctrine. State v. Torres, 2012-NMCA-026, 272 P.3d 689, cert. quashed, 2013-NMCERT-001.

State constitutions are not grants of power to the legislative, executive or judiciary branches, but are limitations on the powers of each, and no branch of the state may add to, nor detract from, its clear mandate. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Each of three departments of government is equal and coordinate and responsible only to the people, and the courts are not warranted in assuming that their department is the only one to which it is safe to entrust enforcement of provisions of constitution regulating enactment of statutes. Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915).

Functions of departments. — The legislature makes, the executive executes and the judiciary construes the laws. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 9 P.2d 691 (1932).

What delegation impermissible. — No one of the three branches of government can effectively delegate any of the powers that peculiarly and intrinsically belong to that branch. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Members of one department not to manage affairs of others. — This article of constitution means that powers of state government shall be divided into three departments, and that members of one department shall have no part in management of either of the others. State ex rel. Chapman v. Truder, 35 N.M. 49, 289 P. 594 (1930).

Exercise of powers and duties. — One branch of the state government may not exercise powers and duties belonging to another. State ex rel. SCC v. McCulloh, 63 N.M. 436, 321 P.2d 207 (1957).

Occasional overlapping of powers contemplated. — Our constitution does not necessarily foreclose exercise by one department of the state of powers of another but

contemplates in unmistakable language that there are certain instances where the overlapping of power exists. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

The doctrine of separation of powers allows some overlap in the exercise of governmental functions. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Rule 5-805 NMRA does not violate separation of powers. — Subsection H of Rule 5-805 NMRA, which requires dismissal of a probation violation proceeding if the time limits to hold an adjudicatory hearing are not met, does not infringe upon the substantive rights granted by the legislature in 31-11-1 and 31-21-15 NMSA 1978 and does not violate the separation of powers doctrine. State v. Montoya, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Subsection H of Rule 5-805 NMRA, which requires dismissal of a probation violation proceeding if the time limits to hold an adjudicatory hearing are not met, does not infringe upon the substantive rights granted by the legislature in 31-11-1 and 31-21-15 NMSA 1978 and does not violate the separation of powers doctrine. State v. Montoya, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

The interests protected by maintaining separation of powers can best be furthered, not by requiring a total separation of functions among the branches, but by ensuring that adequate checks exist to keep each branch free from the control or coercive influence of the other branches. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Compulsory arbitration. — The "principle of check", which entails courts retaining power to make enforceable, binding judgments through review of agency determinations, requires that courts have an opportunity to review decisions of arbitrators in statutorily compelled arbitration such as is required by 22-10-17.1 NMSA 1978. Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

This article does not relate to municipal offices. State ex rel. Chapman v. Truder, 35 N.M. 49, 289 P. 594 (1930).

This section does not apply to the distribution of power within local governments. Board of Cnty. Comm'rs v. Padilla, 111 N.M. 278, 804 P.2d 1097 (Ct. App. 1990).

Applicability of section to public employees. — This section applies to public officers, not employees, in the different branches of government. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

To be a public officer, the person must be invested with sovereign power. State ex rel. Stratton v. Roswell Indep. Schs., 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

Governor lacked authority under separation of powers doctrine to bind the state by unilaterally entering into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Mandamus proceeding against governor. — The supreme court's issuance of writs commanding the governor to abide by a legislative decision extending the term of an agreement pursuant to the Public Employee Bargaining Act (Chapter 10, Article 7E NMSA 1978) and to recognize a statutory or constitutional right of petitioners to organize and collectively bargain would require the court to exceed its constitutional powers in violation of this section. State ex rel. AFSCME v. Johnson, 1999-NMSC-031, 128 N.M. 481, 994 P.2d 727.

Nature of functions of state corporation commission (now public regulation commission). — Functions of state corporation commission (now public regulation commission) are not confined to any of the three departments of government, but its duties and powers pervade them all. In re Atchison, T. & S.F. Ry., 37 N.M. 194, 20 P.2d 918 (1933).

Power of governor to pardon criminal contempt. — Criminal contempt is an offense against authority of court, community and state, not the judge personally, and hence is one in which state has power, through its governor, to extend grace and forgiveness, by means of pardoning power, without violating this section. State v. Magee Publ'g Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924), overruled by State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965).

Selection of specific programs for which funds to be used. — The governor's veto of the following language that appears as overstricken was valid: "Included in the general fund appropriation to the New Mexico center for women is fifty thousand dollars ($50,000) to be used for providing a training program for female inmates." The legislature is authorized to define the basic purpose for which funds are appropriated, but the selection and identification of specific programs is the responsibility of the executive branch of government. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Appropriation for specific data processing system. — The legislature, in appropriating funds for data processing services, overstepped its traditional oversight and appropriation functions when it used the appropriation process to name the general services department as the contracting party and the ISD-2 system as the system to be contracted for. Such legislative action effectively "swallowed up" the executive management function. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Necessity of preserving error. — On appeal, for a party to challenge a statute requiring registration of engineers, on constitutional grounds, as making a delegation of either legislative or judicial power to an administrative board, a motion must be

presented, ruled on and excepted to at trial in order to preserve the error for appeal. Hatfield v. New Mexico State Bd. of Registration for Prof'l Eng'rs & Land Surveyors, 60 N.M. 242, 290 P.2d 1077 (1955).

II. LEGISLATIVE DELEGATION OF POWER.

The legislature's delegation of authority in the Occupational Health and Safety Act, to the environmental improvement board to promulgate regulations addressing violence against convenience store workers does not violate the constitutional doctrine of separation of powers. New Mexico Petroleum Marketers Assn. v. New Mexico Envtl. Improvement Bd., 2007-NMCA-060, 141 N.M. 678, 160 P.3d 587.

Legislature may lawfully delegate authority to an administrative agency when that authority is restricted by specific legislative standards. Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980).

Where legislature delegates powers, reasonable standards must be provided as a guide in the exercise of the discretionary power conferred. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Workers' compensation administration. — Creation of a workers' compensation administration and vesting in it the power to decide controversies thereunder, is a valid exercise of legislative power. Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986), overruling State ex rel. Hovey Concrete Products Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957).

Creation of administrative board. — Powers conferred upon state loan board, created by Laws 1912, ch. 16 (executed), were not judicial but administrative, so that act did not violate this section. State v. Kelly, 27 N.M. 412, 202 P. 524, 21 A.L.R. 156 (1921).

Administrative body may be delegated power to make fact determinations to which the law, as set forth by the legislative body, is to be applied. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); Cont'l Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).

Powers in arbitration board. — Former annexation statute which provided that board of arbitrators should order annexation when it found that benefits of municipality were or could be made available in reasonable time to territory desired to be annexed and that board could not arbitrarily withhold annexation was not invalid as a delegation of legislative power. Cox v. City of Albuquerque, 53 N.M. 334, 207 P.2d 1017 (1949).

Reduction of annexation area by arbitration board. — Fact that board or arbitration provided for under former annexation act limited its finding of benefits to less than the whole area described in the plat, so that the area subject to annexation became reduced, did not constitute an unlawful delegation of legislative power. Cox v. City of Albuquerque, 53 N.M. 334, 207 P.2d 1017 (1949).

Determination of prevailing wage by commissioner. — Laws 1937, ch. 179 (former 6-6-6 to 6-6-10, 1953 Comp.), dealing with minimum wages on public works, was not unconstitutional as an unlawful delegation of legislative authority to the state labor commissioner (now replaced by the chief of the labor and industrial bureau of the employment service division) because the act did not establish any standard or formula by which he could determine the prevailing wage. City of Albuquerque v. Burrell, 64 N.M. 204, 326 P.2d 1088 (1958).

Spacing unit standards adequate. — The standards of preventing waste and protecting correlative rights, as laid out in 70-2-11 NMSA 1978, are sufficient to allow the oil conservation commission (now the oil conservation division) power under 70-2-18 NMSA 1978 to prorate and create standard or nonstandard spacing units to remain intact, the latter section not being an unlawful delegation of legislative power. Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 532 P.2d 582 (1975).

Assessment powers. — Procedure outlined in former Conservancy Act (Laws 1923, ch. 140) was not an unlawful delegation of the power of taxation vested in the legislature by the organic law. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Investigative powers in boundary commission. — Commitment to boundary commission of power to investigate question of proper location of a boundary is not a delegation of improper power. State ex rel. Clancy v. Hall, 23 N.M. 422, 168 P. 715 (1917).

Authorization of administrative rule-making not unconstitutional delegation. — Statute authorizing state game commission to promulgate rules concerning game animals and fish is a proper exercise of state's police power, and is not an unconstitutional delegation of legislative power. State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 67 P.2d 240 (1936).

Conferring of quasi-judicial powers on agencies. — Legislature, in exercising its police powers, may confer certain "quasi-judicial" powers on administrative agencies with regard to laws affecting the general public, but such powers do not extend to determinations of rights and liabilities between individuals. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

Quasi-judicial school board functions. — School board functions which are quasi-judicial do not constitute a violation of the separation of powers clause of the constitution as a delegation of judicial powers to the board. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954), superseded by statute, Sanchez v. Board of Educ. of Town of Belen, 68 N.M. 440, 362 P.2d 979 (1961).

Control of liquor traffic. — Pursuant to 60-6B-4 NMSA 1978, the delegation of the legislative authority to disapprove the transfer of a liquor license on moral as well as on safety and health grounds is within the traditional definition of the state's police power

and thus constitutional. Dick v. City of Portales, 116 N.M. 472, 863 P.2d 1093 (Ct. App. 1993), rev'd, 118 N.M. 541, 883 P.2d 127 (1994).

Revocation procedure not improper legislative delegation. — Former 67-21-21, 1953 Comp., purporting to confer power on the state board of registration for professional engineers and land surveyors to revoke the certificate of any registrant who is found guilty by the board after trial of gross negligence, incompetency or misconduct in the practice of his profession, is not an unlawful delegation of legislative power. Hatfield v. New Mexico State Bd. of Registration for Prof'l Eng'rs & Land Surveyors, 60 N.M. 242, 290 P.2d 1077 (1955).

Formation of college districts by petition not improper delegation. — This section was not violated by authorization in former 21-13-4 NMSA 1978 (repealed) for formation of junior college districts by petition method, as this was not a delegation of power but merely a statutory method for implementing the legislative determination of a purpose to be fulfilled. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Direction to governor to conform national guard. — Statute directing governor to issue such orders as might be necessary to conform the national guard of New Mexico to that prescribed by the war department was not a delegation of legislative authority. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Determination of property misuse improperly delegated. — Subdivision [Subsection] A(2) of 30-14-4 NMSA 1978, proscribing the remaining in or occupying of any public property after having been requested to leave by the lawful custodian or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use, is without sufficiently definite standards to be enforceable and, thus, an unconstitutional delegation of legislative power. State v. Jaramillo, 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972).

Legislature cannot delegate power to appropriate money. — Under constitutional separation-of-powers principles, the legislature cannot delegate its power to appropriate money unless specifically authorized by the state constitution. State ex rel. Schwartz v. Johnson, 120 N.M. 820, 907 P.2d 1001 (1995).

Reduction of budgets by board unconstitutional. — The unrestricted and unguided power contained in Laws 1961, ch. 254, § 24 (an appropriation section), whereby state board of finance could impose a reduction of up to ten percent on operating budgets simply if in its opinion the legislature had been overly generous, was an unconstitutional grant of legislative power and the board could not legally proceed thereunder. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Executive control of expenditures permissible. — Legislature, without the same constituting any violation of N.M. Const., art. IV, § 22, or of this section, may provide in the general appropriation bill for the executive to control the expenditure of the amounts

appropriated. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Pharmacy board allowed to schedule drugs. — To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of different drugs, is not an unconstitutional delegation of authority. Montoya v. O'Toole, 94 N.M. 303, 610 P.2d 190 (1980).

Unconstitutional delegation of zoning power. — Section 3-21-18 NMSA 1978, which permits private individuals to "create" a special zoning district without any limitation on the size and location of the district, is void as an unconstitutional delegation of legislative power because there is no standard to guide the private individuals in determining the size or location of the district. Deer Mesa Corp. v. Los Tres Valles Special Zoning Dist. Comm'n, 103 N.M. 675, 712 P.2d 21 (Ct. App. 1985).

III. LEGISLATION AFFECTING JUDICIARY.

A. LEGISLATION VALIDLY AFFECTING COURTS.

Court decisions may be modified by legislative enactment. — The legislature's plenary authority is limited only by the state and federal constitutions. Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Impartiality provision valid. — It is no invasion of judicial power for the legislature to say that such power shall not be exercised by judges who are believed by the litigants to be partial. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Longarm statute not violative of courts' powers. — Section 38-1-16 NMSA 1978 is not an unconstitutional invasion of the judicial branch in violation of the separation of powers provision of the constitution. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962).

Provision in 38-1-16 NMSA 1978, which allows substituted service on nonresidents involved in automobile accidents, does not constitute unconstitutional exercise of judicial powers by the legislature. Clews v. Stiles, 303 F.2d 290 (10th Cir. 1960), rev’g 181 F. Supp. 172 (D.N.M. 1960).

Domicile presumption valid. — The presumption of domicile established for military personnel stationed in this state for six months, under 40-4-5 NMSA 1978 (relating to jurisdictional requirements for dissolution of marriage), is not an unconstitutional interference with the judicial branch of government. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

No unconstitutional delegation of judicial powers. — Section 30-20-13 NMSA 1978, regarding interference, trespass and damage to public facilities and providing penalties therefor, does not unconstitutionally delegate judicial power since it contemplates ultimate determination by judge or jury that the person accused committed disruptive acts. State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Establishment of penalties for criminal behavior is solely within the province of the legislature. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981).

Legislative act making a sentence mandatory, and thus denying any right of the courts to suspend sentences, does not violate the doctrine of separation of powers. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981).

Procedural statute effective unless conflicts with court rule. — Since the supreme court has no quarrel with a statutory arrangement which seems reasonable and workable, a statute regulating practice and procedure, although not binding on the supreme court, is given effect until there is a conflict between it and a rule adopted by the court. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Legislation dealing with procedure in judicial proceedings is not automatically in violation of this section; rather, such legislation is unconstitutional only when it conflicts with procedure adopted by the supreme court. Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493 (Ct. App. 1984), aff'd in part and rev'd in part, 102 N.M. 482, 697 P.2d 482 (1985).

Legislative power to determine appealability. — The legislature has the power to determine in what district court cases, civil and criminal, the supreme court shall exercise appellate jurisdiction, except for those cases in which the district court has imposed a sentence of death or life imprisonment, for which the constitution has directly conferred appellate jurisdiction. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Tort Claims Act constitutional. — The legislature acted constitutionally in enacting the Tort Claims Act (41-4-1 to 41-4-27 NMSA 1978) following judicial abolition of sovereign immunity. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Authorization of rule-making. — Laws 1933, ch. 84, §§ 1, 2 (38-1-1 and 38-1-2 NMSA 1978), having authorized the supreme court to promulgate court rules, such rules do not delegate an exclusive legislative function to the courts. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Receiver appointment provision directory, not mandatory. — Provision in former 48-7-8, 1953 Comp., dealing with insolvency and involuntary liquidation of state banks, that the court should appoint the state bank examiner as receiver amounted to no more

than a recommendation to the judiciary to appoint him, as otherwise, the enactment would be unconstitutional in view of this section and N.M. Const., art. VI, § 13. Cooper v. Otero, 38 N.M. 164, 29 P.2d 341 (1934).

Judicial power validly conferred by Conservancy Act. — Powers and duties conferred upon district court by Conservancy Act (73-17-1 to 73-17-24 NMSA 1978) are essentially judicial, and do not violate this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Drainage District Law. — Drainage District Law of 1912, ch. 84 (73-6-1 to 73-7-56 NMSA 1978), providing for creation of drainage districts by petition filed in proper district court, did not violate this section, the duties imposed by the act being judicial in character. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

Filling municipal court vacancies. — A municipal ordinance establishing a procedure for filling a temporary vacancy on the municipal court did not violate this section. Aguilar v. City Comm'n, 1997-NMCA-045, 123 N.M. 333, 940 P.2d 181.

B. LEGISLATION IMPROPERLY CONFERRING POWERS ON COURTS.

Placing of original administrative jurisdiction in courts invalid. — A statutory amendment to 72-12-3 NMSA 1978 which permitted removal of application for use of underground water from the jurisdiction of the state engineer to be placed within the original jurisdiction of the courts was unconstitutional as violative of the separation of powers doctrine of this section. City of Hobbs v. State ex rel. Reynolds, 82 N.M. 102, 476 P.2d 500 (1970).

The 1967 amendment to 72-12-7 NMSA 1978, purporting to remove proceeding relating to change in location of well or use of water from administrative jurisdiction, and placing it within the original jurisdiction of the courts, violated separation of powers doctrine. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

De novo review of commission's decisions by courts unconstitutional. — Insofar as 70-2-25 NMSA 1978 purports to allow the district court, on appeal from order or decision of the oil conservation commission, to consider new evidence, to base its decision on the preponderance of the evidence or to modify the orders of the commission, it is void as an unconstitutional delegation of power, contravening this provision of the New Mexico constitution. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962).

Review of engineer's decision limited. — Section 72-7-1 NMSA 1978 does not permit the district court, in reviewing a decision of the state engineer, to hear new or additional evidence; review by the court is limited to questions of law and restricted to whether, based upon the legal evidence produced at the hearing before the state engineer, that officer acted fraudulently, arbitrarily or capriciously, whether his action was in

accordance with the law and the evidence, and whether it was within the scope of his authority. Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963), superseded by statute, Application of Carlsbad Irrigation District, 87 N.M. 149, 530 P.2d 943 (1974).

Courts generally not to perform administrative functions. — Just as a commission cannot perform a judicial function, neither can the court perform an administrative one. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963), superseded by statute, Application of Carlsbad Irrigation District, 87 N.M. 149, 530 P.2d 943 (1974).

Prerequisites to exercise by courts of administrative functions. — Before a court may exercise an administrative function, such as granting an extension of time to pay taxes and waiving penalty and interest for delinquency in payment, belonging inherently to another department of the government, it must appear that an appropriate attempt has been made to delegate such function to the courts, and that the attempt is not repugnant to this section. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 9 P.2d 691 (1932).

Granting liquor permits not for court. — The district court does not have the administrative function of determining whether or not a liquor permit should be granted. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953); Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940).

Cancellation of licenses. — The Liquor Control Act (former 60-3-1 NMSA 1978 et seq.) gave the court authority only to determine whether upon the facts and law, the action of the official in cancelling a license was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious; otherwise it would be a delegation of administrative authority to the district court in violation of the constitution. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953); Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940).

Impermissible for courts to zone. — To the extent that Laws 1927, ch. 27, § 8 (repealed) purports to allow the district court to zone land, it is void as an unconstitutional delegation of power to the judiciary, contravening this section. Coe v. City of Albuquerque, 76 N.M. 771, 418 P.2d 545 (1966), appeal after remand, 79 N.M. 92, 440 P.2d 130 (1968).

C. IMPROPER INTERFERENCE WITH JUDICIARY BY LEGISLATURE.

Infringement upon judiciary by state or local government barred. — This article bars any infringement upon the power and the authority of the judiciary by the executive and legislative branches at any level of state or local government. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Legislative enactments on procedure. — The distinction between substantive law and those rules of pleading, practice and procedure which are essential to the performance of the constitutional duties imposed upon the courts is not always clearly defined. There may be areas in which procedural matters so closely border upon substantive rights and remedies that legislative enactments with respect thereto would be proper. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Judiciary determines rules of procedure for cases within the judicial system, pursuant to its authority under the separation of powers doctrine. Angel Fire Corp. v. C.S. Cattle Co., 96 N.M. 651, 634 P.2d 202 (1981).

Attempts to regulate pleading, practice and procedure invalid. — The supreme court's constitutional power under this section and N.M. Const., art. VI, § 3, of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government, and statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in the supreme court. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

In the absence of the clearest language to the contrary in the constitution, the powers essential to the functioning of the courts are to be taken as committed solely to the supreme court to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1976).

Court has the power to regulate pleading, practice and procedure within the courts so that, on procedural matters such as time limitations for appeals, a rule adopted by the supreme court governs over an inconsistent statute. AAA v. SCC, 102 N.M. 527, 697 P.2d 946 (1985).

Procedural statute infringing on court's duties. — Statute providing for dismissal of actions not brought to conclusion within three years and exempting cases and proceedings in which there is to be a jury from the dismissal requirement is a procedural statute which infringes on court's completion of its duties under the constitution; the rule of court in effect at that time will prevail. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Creation of journalist's privilege invalid. — In view of the clear and unambiguous assertion of the supreme court in Rule 501, N.M.R. Evid. (now Rule 11-501 NMRA) that no person has a privilege, except as provided by constitution or rule of the court, and since under the New Mexico constitution the legislature lacks power to prescribe by statute rules of evidence and procedure, which power is vested exclusively in the supreme court, the journalist's privilege purportedly created by Subsection A of 38-6-7 NMSA 1978 is constitutionally invalid and cannot be relied upon or enforced in judicial

proceedings. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Expedition of criminal cases for courts. — Under the doctrine of separation of powers, the matter of expediting the flow of criminal cases through the courts is a peculiarly judicial function. State ex rel. Delgado v. Stanley, 83 N.M. 626, 495 P.2d 1073 (1972), abrogated, State v. Savedra, 2010-NMSC-025, 148 N.M. 301, 236 P.2d 20.

Legislative interference with quo warranto improper. — Since the constitution provides for separate and equal branches of government in New Mexico, any legislative measure which affects pleading, practice or procedure in relation to a power expressly vested by the constitution in the judiciary, such as quo warranto, cannot be deemed binding. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Portion of 44-3-6 NMSA 1978 which requires the name of the person rightfully entitled to the office involved in a quo warranto proceeding to be set forth in the complaint is invalid. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Legislature not to interfere with appellate procedure. — It would be utterly impossible for the court to live up to its responsibilities and to properly and expeditiously handle the matters which come before it on appeal and otherwise, if the legislature could determine and define the nature of the appellate process, establish the procedures to be followed in that process and fix time limitations within which the court must act. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Time of hearing appeals for court. — The time within which the supreme court must consider a matter before it is for that court to determine; it is purely a procedural matter. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Substitution of de novo hearing for appeal improper. — Legislature has no power to substitute a de novo hearing for an appeal from a judgment or order of the district court. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Legislature not to control practice of law. — Legislative attempts to confer any power over the control of the practice of law, including the power of suspension or disbarment, are violative of this section. In re Patton, 86 N.M. 52, 519 P.2d 288 (1974), abrogated, In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905.

Bar admission requirements. — The legislature may enact valid laws in fixing minimum but not maximum requirements for admission to the bar, but it may not require admission on standards other than as accepted or established by the courts; any legislation which attempts to do so is an invasion of the judicial power and violative of the constitutional provisions establishing the separate branches of government and

prohibiting the legislature from invading the judiciary. In re Sedillo, 66 N.M. 267, 347 P.2d 162 (1959).

Conflict of interest laws not regulation of law practice. — The application to former executive branch attorneys of Subsection C of 10-16-8 NMSA 1978, prohibiting former public officers and employees from representing persons for pay before their former government agency employer, is not an attempt by the legislature to regulate the practice of law and the provision does not violate separation of powers. Ortiz v. Taxation & Revenue Dep't, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109.

IV. JUDICIAL REVIEW OVER LEGISLATIVE AFFAIRS.

Power to make law is reserved exclusively to legislature, and any attempt to abdicate it in any particular field, though valid in form, must necessarily be held void. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Emergency clause for legislature. — It is exclusive function of legislature to determine whether legislation should carry an emergency clause precluding a referendum. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

Statutory construction upholding constitutionality adopted. — Where a statute is susceptible of two constructions, one supporting the act and giving it effect and the other rendering it unconstitutional and void, court must adopt that construction which will uphold statute's constitutionality. Abeytia v. Gibbons Garage, 26 N.M. 622, 195 P. 515 (1920); State ex rel. Clancy v. Hall, 23 N.M. 422, 168 P. 715 (1917).

Validity of legislation presumed. — The supreme court has repeatedly held that every presumption is to be indulged in favor of the validity and regularity of legislative enactments. A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation. McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

A statute is presumed to be constitutional unless it clearly violates some specific provision of the constitution. Likewise, an ordinance as well as a statute, is presumed to be valid, and the one who attacks it has the burden of establishing its invalidity. City of Albuquerque v. Jones, 87 N.M. 486, 535 P.2d 1337 (1975).

There is a presumption of the validity and regularity of legislative enactments. Courts must uphold the efficacy of statutes unless they are satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

Every presumption is in favor of the validity of legislative enactments. Garcia v. Albuquerque Pub. Schs. 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).

Supreme court will not enquire into the wisdom, policy or justness of legislation. Garcia v. Albuquerque Pub. Schs. Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

Review of legislative action. — The legislature is a coordinate branch of our state government; its prerogative in the matter of legislation is to be questioned solely from the standpoint of our federal or state constitutional limitations. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

The function of the courts in scrutinizing acts of the legislature is not to raise possible doubt nor to listen to captious criticism, since as the legislature possesses the sole power of enacting law, it will not be presumed that the people have intended to limit its power or practice by unreasonable or arbitrary restrictions. Every presumption is ordinarily to be indulged in favor of the validity and regularity of legislative acts and procedure. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970); State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Legislature to determine public need. — A determination of what is reasonably necessary for the preservation of the public health, safety and welfare of the general public is a legislative function and should not be interfered with, save in a clear case of abuse. State v. Collins, 61 N.M. 184, 297 P.2d 325 (1956).

Courts may not inquire into statutory policy. — Under the separation of powers doctrine, the courts may not inquire into statutory policy and may not substitute their views in the formulation of legislative provisions or classifications for those of the legislature. Gallegos v. Homestake Mining Co., 97 N.M. 717, 643 P.2d 281 (Ct. App. 1982).

No power in court to stay corporation commission (now public regulation commission) order. — A district court had no power to stay an order of state corporation commission (now public regulation commission) (an administrative board exercising a legislative function) pending a determination of whether the order was lawful and reasonable, in view of separation of powers doctrine. State ex rel. SCC v. McCulloh, 63 N.M. 436, 321 P.2d 207 (1957).

Power to review legislation prior to enforcement action. — The court of appeals did not have authority to review the constitutionality of the New Mexico Mining Act (69-36-1 to 69-36-20 NMSA 1978) in an appeal challenging regulations on their face before the mining commission took action to enforce the act. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App.), cert. denied, 120 N.M. 828, 907 P.2d 1009 (1995).

V. POWERS OF EXECUTIVE DEPARTMENT.

Judicial standards commission. — Because the judicial standards commission plays no role in the traditional functions of the judiciary, the governor's actions in removing the executive appointees to the commission did not infringe on the judiciary's performance of those functions. State ex rel. N.M. Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Public service commission's order unconstitutional. — Orders of the public service commission that effectively deregulated the retail side of the electric power industry in New Mexico in the absence of a statutory mandate from the legislature exceeded the commission's authority and violated the separation of powers doctrine. State ex rel. Sandel v. New Mexico Pub. Util. Comm'n, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.

Executive created public assistance policy unconstitutional. — Governor's implementation of public assistance policy through the human services department violated the separation of powers doctrine, because in changing eligibility requirements, it was an executive creation of substantive law. State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Cease and desist order against executive officers. — Cease and desist order was proper contempt sanction against governor and executive agency that continued implementation of public assistance program for several months following issuance of writ of mandamus by supreme court ordering the cessation of the program. State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Granting power to mining director constitutional. — Regulations of the mining commission granting power to the director, an employee of the commission, were not violative of the separation of powers doctrine. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App.), cert. denied, 120 N.M. 828, 907 P.2d 1009 (1995).

State engineer regulations to determine water rights priorities. — The state engineer exceeded the state engineer's statutory authority under 72-2-9.1 NMSA 1978 and violated the principles of separation of powers under Article III, Section 1 of the constitution of New Mexico when the state engineer adopted regulations that permitted the state engineer to determine water right priorities as among water rights owners and to curtail water usage based upon evidence contained in subfile orders, offers of judgment, hydrographic surveys, and permits issued by the state engineer. Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2011-NMCA-015, 149 N.M. 394, 249 P.3d 932, rev'd, 2012-NMSC-039, 289 P.3d 1232.

Executive privilege recognized. — Recognition of an executive privilege is required by the constitution of the state of New Mexico. State ex rel. Att'y Gen. v. First Judicial

Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981), abrogated, Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't, 2012-NMSC-026, 283 P.3d 853.

Executive privilege is a recognition by one branch of government, the judiciary, that another coequal branch of government, the executive, has the right not to be unduly subjected to scrutiny in a judicial proceeding where information in its possession is being sought by a litigant. The legislative and judicial branches of state government enjoy similar privileges which are required to be recognized by the supreme court under the constitution. State ex rel. Att'y Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Purposes of privilege. — Inherent in the successful functioning of an independent executive is the valid need for protection of communications between its members. The purposes of the executive privilege are to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure. State ex rel. Att'y Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Limitation on privilege. — Executive privilege does not protect communications, whether intended as confidential or not, between the executive department and members of the public or others not employed in the executive department. State ex rel. Att'y Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Privilege not absolute. — The mere fact that the executive department holds information and claims executive privilege does not of itself render the information exempt from judicial process. Nor does the fact that the privilege is of constitutional origin make the privilege absolute. State ex rel. Att'y Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Balancing test applied to determine disclosure. — Trial courts are required to determine whether the claim of executive privilege has been properly invoked in each situation. Once it is found that the privilege applies, the trial court must balance the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought. State ex rel. Att'y Gen. v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981).

Executive conditions on grants of capital outlay appropriations. — Executive Order 2013-006, which requires state agencies, local public bodies and other entities to meet criteria that exceed the conditions required under the 2013 Work New Mexico Act, Laws 2013, ch. 226, before they can receive and use capital outlay appropriations, violates the separation of powers mandated by Article III, Section 1 of the constitution of New Mexico. 2013 Op. Att’y Gen. No.13-03.

Appointment of legislator to executive council. — A state representative's appointment to an executive advisory council does not violate this section providing for the separation of powers. 1977 Op. Att'y Gen. No. 77-03.

Public school teachers and administrators in legislature. — School teachers are not "public officers" but only employees, and they are not barred by the separation of powers provision from being legislators. State ex rel. Stratton v. Roswell Indep. Schs., 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

A member of the state legislature is not precluded by state law from serving as an elected local school board member. 1991 Op. Att'y Gen. No. 91-02.

This state's strong constitutional separation-of-powers doctrine precludes public school teachers and administrators from serving in the legislature. 1988 Op. Att'y Gen. No. 88-20.

Representative serving on state defense force. — A New Mexico state representative may not serve in the New Mexico state defense Force; the offices of legislator and state defense force member are incompatible and serving on both would create a conflict of interest. 1988 Op. Att'y Gen. No. 88-71.

Naming of commission members by legislature. — Oil Conservation Act is not unconstitutional on the ground that since the legislature has named the members of the oil conservation commission there has been an invasion of the executive power of appointment. 1951-52 Op. Att'y Gen. No. 51-5397.

Charging fees for services. — In the absence of express authority, fees may not be charged by the board of trustees of the New Mexico supreme court law library to patrons using the library in order to generate income for the library. Administrative bodies do not have implied authority to charge fees for services. 1988 Op. Att'y Gen. No. 88-78.

Grand jury is a function of the courts; that is, of the judicial branch of government. 1982 Op. Att'y Gen. No. 82-14.

Delegation of authority to administrative agency. — The legislature has the power to establish administrative agencies and to delegate to them the enforcement of statutes regulating the conduct of professions. 1980 Op. Att'y Gen. No. 80-09.

Governor does not have authority to legislate the regulation of massage practitioners and he cannot delegate it to a massage board. 1980 Op. Att'y Gen. No. 80-09.

Executive agency controlling expenditure of appropriations. — The legislature may provide in the general appropriations bill for an executive agency to control the expenditure of the amounts appropriated without constituting a violation of the separation-of-powers provisions in this section. 1987 Op. Att'y Gen. No. 87-32.

Promulgation of collective bargaining rules by personnel board. — The words "among other things" at the beginning of 10-9-13 NMSA 1978 do not constitute a valid

delegation of legislative power, authorizing the personnel board to promulgate rules allowing state employees to bargain collectively with state agencies, since the state constitution commits New Mexico to the doctrine of separation of powers and also vests the legislative powers in the legislature. It is fundamental that no one of the three branches can delegate effectively any of the powers which belong to it. 1987 Op. Att'y Gen. No. 87-41.

Legislative review of administrative regulations proper. — Legislative review of administrative rules and regulations promulgated under delegated rule-making powers is consistent with the constitutional doctrine of separation of powers, and does not interfere with judicial prerogative. 1977 Op. Att'y Gen. No. 77-12.

Applicability of motor pool provisions to judiciary. — Procedures adopted under Laws 1968, ch. 43, § 11 (15-3-25 NMSA 1978) for operating the state motor pool are binding upon the judicial branch of the government unless the supreme court determines that such compliance would unreasonably impede or impair the functions of the judiciary. 1967-68 Op. Att'y Gen. No. 68-64.

Legislative grant of water rights invasion of judiciary's function. — Where exclusive jurisdiction has been given to the judiciary to determine water rights, the separation of powers doctrine forbids the legislature from granting such rights; therefore, proposed bill which would grant a water right of two-acre inches per acre foot to those holding water rights in the artesian basins would be unconstitutional. 1971-72 Op. Att'y Gen. No. 71-23.

Divestment of office by judicial action of questionable validity. — There is a very serious question as to whether a person can be divested of his legislative office by judicial action pursuant to a constitutional provision which on the face of it would disqualify him from holding office, because this presents a question of separation of power, and the courts will not interfere with the organization of one of the other equal branches of government. 1955-56 Op. Att'y Gen. No. 56-6400.

Attorney general not to interfere with legislative qualifications. — The attorney general has been granted no statutory authority to intervene in a determination by the legislature of whether public school teachers are qualified to serve, and, in fact, is barred from doing so by the separation of powers doctrine. 1975-76 Op. Att'y Gen. No. 75-21.

Law reviews. — For comment on Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962), see 3 Nat. Resources J. 178 (1963).

For comment on Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963), see 3 Nat. Resources J. 340 (1963).

For note, "Separation of Powers Doctrine in New Mexico," see 4 Nat. Resources J. 350 (1964).

For note, "Annexation of Unincorporated Territory in New Mexico," see 6 Nat. Resources J. 83 (1966).

For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For note, "Conservation, Lifeline Rates and Public Utility Regulatory Commissions," see 19 Nat. Resources J. 411 (1979).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

For annual survey of New Mexico criminal procedure, see 16 N.M. L. Rev. 25 (1986).

For survey of workers' compensation law in New Mexico, see 18 N.M. L. Rev. 579 (1988).

For 1984-88 survey of New Mexico administrative law, 19 N.M. L. Rev. 575 (1990).

For comment, "Deannexation: A proposed statute," see 20 N.M. L. Rev. 713 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 294 to 359.

Delegation of powers by various branches of government, 2 A.L.R. 882, 12 A.L.R. 1435, 27 A.L.R. 927, 32 A.L.R. 1406, 40 A.L.R. 347, 47 A.L.R. 70, 48 A.L.R. 454, 54 A.L.R. 1104, 55 A.L.R. 372, 70 A.L.R. 1243, 84 A.L.R. 1147, 86 A.L.R. 1554, 88 A.L.R. 1519, 91 A.L.R. 799, 92 A.L.R. 400, 96 A.L.R. 312, 96 A.L.R. 826.

Delegation of power to the judiciary, 6 A.L.R. 218, 18 A.L.R. 67, 34 A.L.R. 1128, 64 A.L.R. 1373, 69 A.L.R. 266, 70 A.L.R. 1284, 71 A.L.R. 821, 87 A.L.R. 546.

Delegation of power to the people, 6 A.L.R. 218, 18 A.L.R. 67, 20 A.L.R. 1491, 29 A.L.R. 41, 53 A.L.R. 149, 64 A.L.R. 1378, 70 A.L.R. 1062, 72 A.L.R. 1339, 76 A.L.R. 105, 123 A.L.R. 950.

Power of court to force the legislative body to apportion representatives or election districts as required by the constitution, 46 A.L.R. 964.

Censorship laws as delegations of power, 64 A.L.R. 505.

Governmental powers in peace-time emergency, 86 A.L.R. 1539, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Emergency as affecting validity of delegation of power to executive, 86 A.L.R. 1554, 88 A.L.R. 1519, 96 A.L.R. 312, 96 A.L.R. 826.

Constitutionality, construction, and application of provisions of state tax law for conformity with federal income tax law or administrative and judicial interpretation, 42 A.L.R.2d 797.

Validity, construction, and effect of statute, ordinance, or other measure involving chemical treatment of public water supply, 43 A.L.R.2d 453.

Arbitration statute as unconstitutional delegation of judicial power, 55 A.L.R.2d 432.

Construction and application, under state law, of doctrine of "executive privilege," 10 A.L.R.4th 355.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

16 C.J.S. Constitutional Law §§ 111 to 227.

ARTICLE IV
Legislative Department

Section 1. [Vesting of legislative power; location of sessions; referendum on legislation.]

The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico, and shall hold its sessions at the seat of government.

The people reserve the power to disapprove, suspend and annul any law enacted by the legislature, except general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except as in this constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws. Petitions disapproving any law other than those above excepted, enacted at the last preceding session of the legislature, shall be filed with the secretary of state not less than four months prior to the next general election. Such petitions shall be signed by not less than ten per centum of the qualified electors of each of three-fourths of the counties and in the aggregate by not less than ten per centum of the qualified electors of the state, as shown by the total number of votes cast at the last preceding general election.

The question of the approval or rejection of such law shall be submitted by the secretary of state to the electorate at the next general election; and if a majority of the legal votes cast thereon, and not less than forty per centum of the total number of legal votes cast at such general election, be cast for the rejection of such law, it shall be annulled and thereby repealed with the same effect as if the legislature had then repealed it, and such repeal shall revive any law repealed by the act so annulled; otherwise, it shall remain in force unless subsequently repealed by the legislature. If such petition or petitions be signed by not less than twenty-five per centum of the qualified electors under each of the foregoing conditions, and be filed with the secretary of state within ninety days after the adjournment of the session of the legislature at which such law was enacted, the operation thereof shall be thereupon suspended and the question of its approval or rejection shall be likewise submitted to a vote at the next ensuing general election. If a majority of the votes cast thereon and not less than forty per centum of the total number of votes cast at such general election be cast for its rejection, it shall be thereby annulled; otherwise, it shall go into effect upon publication of the certificate of the secretary of state declaring the result of the vote thereon. It shall be a felony for any person to sign any such petition with any name other than his own, or to sign his name more than once for the same measure, or to sign such petition when he is not a qualified elector in the county specified in such petition; provided, that nothing herein shall be construed to prohibit the writing thereon of the name of any person who cannot write, and who signs the same with his mark. The legislature shall enact laws necessary for the effective exercise of the power hereby reserved.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 1.

Montana Const., art. V, § 1.

Utah Const., art. VI, § 1.

Cross references. — For referendum petitions, *see* 1-17-1 to 1-17-14 NMSA 1978.

For statutes relating to the legislature, *see* Chapter 2, NMSA 1978.

I. GENERAL CONSIDERATION.

Section is self-executing. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Right of referendum narrow. — The omission by the framers of our constitution of the words "necessary" and "immediate" in the language of the exemption clause results in allowing the people of this state a much narrower right of referendum than is allowed in any other state in which the right is reserved. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Under this section the people have retained limited veto power closely akin to that of governor, but with difference that his power is general over all legislation. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

II. POWERS OF LEGISLATURE.

Legislature has plenary legislative authority limited only by the state and federal constitutions. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Legislature's plenary authority is limited only by the state and federal constitutions. — Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

The legislature acted constitutionally in enacting the Tort Claims Act (41-4-1 to 41-4-27 NMSA 1978) following judicial abolition of sovereign immunity. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Legislature to define crimes and punishments. — The legislature is the proper branch of government to determine what behavior should be proscribed under the police power, and to define crimes and provide for their punishment. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Power to define crimes and provide the punishment is a legislative function. State v. Allen, 77 N.M. 433, 423 P.2d 867 (1967); State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Legislature may provide criminal penalties for violation of rules and regulations under proper circumstances. State v. Allen, 77 N.M. 433, 423 P.2d 867 (1967).

Unnecessary restrictions not permissible. — Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Anticipatory legislation permissible. — The legislature may pass a statute in anticipation of adoption of an amendment to the constitution and to take effect thereon. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Legislature may amend existing law for clarification purposes just as effectively and certainly as for purposes of change. State ex rel. Dickson v. Aldridge, 66 N.M. 390, 348 P.2d 1002 (1960).

Delegation for carrying out legislative purposes valid. — Where a valid statute complete in itself enacts the general outlines of a governmental scheme, policy or purpose, and confers upon officials charged with the duty of assisting in administering the law and authority to make, subject to judicial review, rules and regulations, or to ascertain facts, upon which the statute by its own terms operates in carrying out the legislative purpose, such authority is not an unconstitutional delegation of legislative power. State v. Spears, 57 N.M. 400, 259 P.2d 356 (1953).

Standards to be given agency. — A legislative body may not vest unbridled or arbitrary power in an administrative agency but must furnish reasonably adequate standards to guide it, broad standards being permissible so long as they are capable of reasonable application and are sufficient to limit and define the agency's discretionary powers. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Delegation of power to board. — Laws 1951, ch. 224 (repealed), relating to licensing of real estate brokers, was not unconstitutional as a delegation of legislative power to an administrative board. State v. Spears, 57 N.M. 400, 259 P.2d 356, 39 A.L.R. 2d 595 (1953).

Rule-making powers delegable. — While the legislature may not delegate its power to make laws, it may vest in administrative officers and bodies a large measure of discretionary authority especially to make rules and regulations relating to the enforcement of the law. State v. Spears, 57 N.M. 400, 259 P.2d 356, 39 A.L.R. 2d 595(1953).

Rule-making powers must not abrogate underlying statute. — Legislature may not delegate authority to a board or commission to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty. State ex rel. McCulloch v. Ashby, 73 N.M. 267, 387 P.2d 588 (1963).

Workmen's compensation settlements by court. — Provisions in 52-1-30 and 52-1-56 NMSA 1978 authorizing court to direct or approve settlement of workmen's compensation claim, in installment payments or as a lump sum, guided by claimant's best interests, did not involve an unconstitutional delegation of authority. Livingston v. Loffland Bros., 86 N.M. 375, 524 P.2d 991 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974).

Petition by users of underground water. — Section 5 of Laws 1927, ch. 182 (repealed), providing for administration of the act as to any underground waters upon petition signed by ten percent of the users of such waters, did not delegate legislative power to the petitioners in violation of this section. Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).

Challenge to constitutionality of law. — In determining the constitutionality of a law, the presumption is that the legislature has performed its duty and kept within the bounds fixed by the constitution; and the judiciary will, if possible, give effect to the legislative

intent, unless it clearly appears to be in conflict with the constitution. Seidenberg v. New Mexico Bd. of Med. Exam'rs, 80 N.M. 135, 452 P.2d 469 (1969).

Every presumption is to be indulged in favor of validity and regularity of legislative enactments. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969).

Doubts resolved in favor of constitutionality. — Legislative acts should not be held unconstitutional unless no other conclusion can reasonably be reached and all doubts must be resolved in favor of constitutionality. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Standing to challenge legislation. — The constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby. State v. Kasakoff, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972); State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

III. EXEMPTIONS FROM REFERENDUM POWER.

Question of referability is one of "judicial" fact, in the sense that the court examines the enactment of the legislature in the light of the history thereof, including previous extant or repealed legislation on the subject, contemporaneous declarations of the legislature, the condition sought to be remedied by the act, and the consequences of any particular interpretation to be given it. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Initiation of constitutional amendment not subject to referendum. — Authority reposed in legislature to initiate constitutional amendments is different than its power to legislate, and is not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Procedure provided by legislature, in session as a convention to amend the constitution, which directs submission to the voters in order to effectuate the proposal for amendment, is a law, but not the kind of a law against which referendum may be directed under this article. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Enactment calling for special election to approve or reject proposed amendments to state constitution was not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Valid relationship to police power sufficient for exemption. — The question to be determined is whether an act reasonably provides for the preservation of the public peace, health or safety, which involves a determination of whether a valid relationship exists between the enactment and the preservation of either the public peace, health or safety. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Inclusiveness of public health measure. — Character of legislation as public health measure is not defeated by its failure to affect all or even a major percentage of people of state. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

The fact that a measure does not affect all or even a major portion of the people of the state does not deny it character as a measure providing for preservation of public peace, health or safety. Otto v. Buck, 61 N.M. 123, 295 P.2d 1028 (1956).

Former cigarette tax act exempt. — Laws 1943, ch. 95 (72-14-1, 1953 Comp. et seq., now repealed), which levied an excise tax on cigars and cigarettes to provide funds for needy aged so that they might have "a reasonable subsistence compatible with decency and health," was exempt from referendum since it reasonably provided for preservation of public peace, health or safety. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

Highway debentures as "public debt". — Gasoline Tax Act enacted by Laws 1949, ch. 42 (64-26-2, 64-26-3, 64-26-5 to 64-26-7, 1953 Comp., now repealed) was excepted from referendum as highway debentures were evidences of public debts in sense words "public debt" are used in this section. State ex rel. Linn v. Romero, 53 N.M. 402, 209 P.2d 179 (1949).

IV. REFERENDUM PROCEEDINGS.

Two referendum proceedings distinguished. — Proceedings for referendum initiated within 90 days after adjournment of the legislature, if successful, repeal no law, but annul it, while those initiated with a ten percent petition or after the 90-day period, if successful, repeal the law as though the legislature had then repealed it. In the first instance there was no operative act, while in the second the act, while inoperative, was a valid existing law. Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

Legislative declaration of emergency contained in act is final, and is conclusive and binding upon the courts. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

Emergency legislation not suspendable by referendum petition. — Where a law became effective immediately upon its passage by reason of an emergency declaration, it is not suspended by a referendum petition having the requisite number of signatures filed within 90 days after adjournment. Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

If a law has immediate effect, its nonreferable character is conclusively established, insofar as the 90-day clause is concerned. Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

Filing with secretary of state of referendum petition bearing required signatures of 25% of the qualified electors of the state does not have effect of suspending operation of a law already in effect by reason of an emergency clause, even though the law should be

one subject to referendum. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934); Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

Designation as emergency measure does not affect referability. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934).

Review of legislation effectuating referendum rights. — When legislature has passed such laws as it deems necessary to effective exercise of referendum, under duty imposed upon it by this section, this court will consider only whether something indispensable to such effective exercise is lacking. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Judicial notice of convention committee's report. — Court took judicial notice of fact that minority report of committee on legislative department at constitutional convention, proposing an initiative and referendum provision as a substitute for the language actually incorporated in the constitution, was rejected. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

Legislative declarations in classifying respected. — Unless patently untrue or absurd, legislative declarations in classifying for purposes of legislation will be respected by the courts. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943).

Duties of secretary of state in handling referendum petitions. — In checking signatures on a referendum petition, the secretary of state has authority only to reject typewritten, printed or incomplete names and has a duty to file the petitions as received within the time prescribed. 1949-50 Op. Att'y Gen. No. 49-5232.

Determination of whether signers of petition are genuine and duly qualified is a judicial function and not the duty of the secretary of state. 1937-38 Op. Att'y Gen. No. 37-1669.

Form of ballot. — The ballot for voting upon a referred act should bear the following instructions at the top: "Instructions to voters. If you desire to vote for the retention of the act, mark X in square opposite the words 'FOR APPROVAL OF THE ACT.' If you desire to vote against the retention of the act, mark X in the square opposite the words 'FOR REJECTION OF THE ACT.' " 1949-50 Op. Att'y Gen. No. 50-5315.

Power to enact statutes of limitation is legislative power, and the sovereign generally has the right to lay down any conditions, even if harsh or arbitrary, with which creditors must comply, as a condition of payment of their demands. 1957-58 Op. Att'y Gen. No. 58-05.

Full control over public revenue. — A state legislature has full control, not only over the levy of taxes but over the disposition of all public revenue; this power extends to such funds as are acquired by a political subdivision of the state, subject only to constitutional restrictions. 1957-58 Op. Att'y Gen. No. 57-219.

Legislature not bound to appropriation. — None of the actions taken by a local board of education, the board of educational finance, the voters in a local school district or the regents of the university of New Mexico can bind the legislature to an appropriation. 1980 Op. Att'y Gen. No. 80-03.

Delegation to outside agency impermissible. — A state legislature has no power to delegate any of its legislative powers to an outside agency. 1953-54 Op. Att'y Gen. No. 53-5645.

Adoption by reference to prospective federal legislation unconstitutional. — By the weight of authority, when an act adopts by reference future or prospective federal legislation, an unconstitutional delegation of legislative authority results. 1953-54 Op. Att'y Gen. No. 53-5645. See second paragraph of N.M. Const., art. IV, § 18, permitting reference to federal law for measure of taxes.

But adoption by reference to existing law valid. — A state does not invalidly delegate its legislative authority by adopting a law of the United States or another state, if such law is already in existence or operative. 1953-54 Op. Att'y Gen. No. 53-5645.

Authority in legislature to abolish or merge departments. — The legislature, having the power to create former departments of public health and of public welfare, was sole authority, absent constitutional amendment, authorized to abolish, merge or consolidate the two departments. 1953-54 Op. Att'y Gen. No. 54-5943.

Promulgation of collective bargaining rules by personnel board. — The words "among other things" at the beginning of 10-9-13 NMSA 1978 do not constitute a valid delegation of legislative power, authorizing the personnel board to promulgate rules allowing state employees to bargain collectively with state agencies, since the state constitution commits New Mexico to the doctrine of separation of powers and also vests the legislative powers in the legislature. It is fundamental that no one of the three branches can delegate effectively any of the powers which belong to it. 1987 Op. Att'y Gen. No. 87-41.

Even if the legislature could delegate its power to make law concerning public sector collective bargaining, and even if it intended to do so in the Personnel Act, it failed to do so properly, and the Rules for Labor-Management Relations (RLMR) promulgated by the personnel board are therefore void and a nullity, since the Personnel Act does not mention collective bargaining, much less any standards to guide the board in fashioning the RLMR. 1987 Op. Att'y Gen. No. 87-41.

Each house of legislature has full power to prescribe rules which it desires. 1953-54 Op. Att'y Gen. No. 53-5633.

Legislature by law can create investigating committee to investigate anything which concerns the legislature and which may by subject to legislation. 1955-56 Op. Att'y Gen. No. 55-6319.

Legislative committees to cease upon adjournment. — To allow a committee of one house of the legislature to function after adjournment of the body which created it would be allowing that house to pass a resolution having the effect of law, which power can only be exercised by the concurrence of both houses. 1959-60 Op. Att'y Gen. No. 59-65.

Effect of county calling voluntary referendum, absent authority. — In the absence of a constitutional reservation of the right of the people to hold referendum on county ordinances, and in the absence of a specific statutory authority requiring a referendum on ordinances, there is no authority for a county to call a voluntary referendum. Should such a referendum be held, it would not, regardless of its outcome, affect the adoption or validity of the ordinance. 1979 Op. Att'y Gen. No. 79-35.

Declarations by legislature unnecessary. — It is not necessary that a law expressly declare the relation if it is by its terms reasonably calculated to provide for one of the subjects exempted hereunder from popular referendum. 1965-66 Op. Att'y Gen. No. 65-67.

Ratification of amendment to federal constitution not referable. — A joint resolution ratifying a proposed amendment to the United States constitution is not a law to be submitted to the people. 1919-20 Op. Att'y Gen. No. 19-2304.

Valid relationship to police power sufficient for exemption. — All that is required to exempt a questioned law from popular referendum is that it bear a valid relationship to some permissible object for the exercise of the police power. State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192 (1943); *see also*, 1965-66 Op. Att'y Gen. No. 65-49.

Law need not be "necessary". — A law need only reasonably provide for one of three subjects of public peace, health or safety to be exempt from referendum; it does not have to be necessary for the preservation of one of these subjects. 1965-66 Op. Att'y Gen. No. 65-67.

Legislative declarations not necessarily followed. — A legislative declaration that a law provides for one of the subjects listed under this section as exempt from popular referendum is entitled to great respect, but is not necessarily binding on the courts. 1965-66 Op. Att'y Gen. No. 65-67.

Hospital care for indigents. — While Laws 1965, ch. 234, (27-5-1 NMSA 1978 et seq.) does not expressly declare that it provides for the public peace, health or safety, it reasonably provides for the public health by providing hospital care in that it encourages the treatment of indigents in the county; it is, therefore, exempt from referendum. 1965-66 Op. Att'y Gen. No. 65-67.

Fines. — Under N.M. Const., art. XII, § 4, all fines collected by the state go to the maintenance of the public schools, thus falling within the exemption provided in this section. 1955-56 Op. Att'y Gen. No. 55-6268.

Law not subject to referendum not suspended by petitions. — Laws 1933, ch. 171 (later repealed) was not subject to a referendum and was not suspended by filing of purported petitions for referendum as the act was necessary for the preservation of the public peace, health and safety, and the maintenance of the public schools. 1933-34 Op. Att'y Gen. No. 33-606.

Laws from last preceding section only referable. — This section specifically requires that any law which can be submitted to the electorate as a referendum measure must have been enacted at the last preceding legislative session; laws enacted in 1939 are no longer referable in 1965. 1965-66 Op. Att'y Gen. No. 65-49.

Meaning of percentage requirement. — The 40% total vote requirement in this section refers not to the votes cast on the proposition but to the total vote cast for the office of governor. 1963-64 Op. Att'y Gen. No. 64-137.

Laws in effect not suspended by referendum. — A referendum petition which is filed after the laws of a legislative session have gone into effect will not suspend the law. 1949-50 Op. Att'y Gen. No. 49-5220.

Annulment by referendum equivalent to legislative repeal. — In substance this section says that the effect of annulment of a law by referendum is the same as though it had been repealed by the legislature and such repeal shall revive any law repealed by the act so annulled. 1965-66 Op. Att'y Gen. No. 66-04.

Law reviews. — For article, "Rape Law: The Need For Reform," see 5 N.M. L. Rev. 279 (1975).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 318 to 331, 335 to 359; 42 Am. Jur. 2d Initiative and Referendum §§ 3 to 20; 72 Am. Jur. 2d States, Territories and Dependencies §§ 35 to 61.

Encroachment of legislative department upon judiciary, 3 A.L.R. 450, 4 A.L.R. 1552, 5 A.L.R. 94, 9 A.L.R. 1341, 15 A.L.R. 331, 25 A.L.R. 1136, 27 A.L.R. 411, 29 A.L.R. 1287, 35 A.L.R. 460, 46 A.L.R. 1179, 65 A.L.R. 525, 66 A.L.R. 1466, 67 A.L.R. 1451, 74 A.L.R. 579, 77 A.L.R. 629, 78 A.L.R. 1323, 79 A.L.R. 323, 86 A.L.R. 179, 92 A.L.R. 1258, 97 A.L.R. 1333, 101 A.L.R. 1215, 106 A.L.R. 361, 107 A.L.R. 1431, 120 A.L.R. 316, 124 A.L.R. 751, 127 A.L.R. 868, 144 A.L.R. 150, 162 A.L.R. 495, 171 A.L.R. 1352.

Declaring an act an emergency without specifying that it shall not be subject to referendum, 7 A.L.R. 530.

Constitutional requirements as to legislation or constitutional requirements, applicability of, to statutes or constitutional amendments under initiative or referendum powers, 62 A.L.R. 1349.

Initiative statute as in effect constitutional amendment, 62 A.L.R. 1352.

Referendum of question of repeal of statute in absence of constitutional amendment, 76 A.L.R. 1062.

Judicial decisions relating to adoption or repeal of amendments to federal constitution, 83 A.L.R. 1374, 87 A.L.R. 1321, 122 A.L.R. 717.

Delegation to judiciary of power to regulate motor vehicles, 87 A.L.R. 546.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects, 90 A.L.R. 572.

Time within which officer must perform duty to pass upon sufficiency of initiative, referendum or recall petition, 102 A.L.R. 51.

Construction and application of constitutional or statutory requirement as to short title, ballot title or explanation of nature of proposal in initiative, referendum or recall petition, 106 A.L.R. 555.

Withdrawal of names from initiative or referendum petition, 126 A.L.R. 1031, 27 A.L.R.2d 604.

Basis for computing majority essential to the adoption of a constitutional or other special proposition submitted to voters, 131 A.L.R. 1382.

Adoption by or under authority of state statute without specific enactment or reenactment of prospective federal legislation or federal administrative rules as unconstitutional delegation of legislative power, 133 A.L.R. 401.

Exception of certain laws from referendum, construction and application of express constitutional or statutory provision for, 146 A.L.R. 284, 100 A.L.R.2d 314.

Delegating authority to county or municipal corporation to make violation of ordinance crime or to provide criminal punishment, 174 A.L.R. 1343.

Taxpayer's capacity to maintain suit to enjoin submission of initiative, referendum or recall measure to voters, 6 A.L.R.2d 557.

Injunctive relief against submission of constitutional amendment, statute, municipal charter or municipal ordinance, on ground that proposed action would be unconstitutional, 19 A.L.R.2d 519.

Power of legislative body to amend, repeal or abrogate initiative or referendum measure, or to enact measure defeated on referendum, 33 A.L.R.2d 1118.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Legislative power to exempt from taxation property, purposes or uses additional to those specified in constitution, 61 A.L.R.2d 1031.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendum, 100 A.L.R.2d 314.

16 C.J.S. Constitutional Law §§ 113 to 168; 81A C.J.S. States § 40; 82 C.J.S. Statutes §§ 4, 117, 121.

Sec. 2. [Powers generally; disaster emergency procedure.]

In addition to the powers herein enumerated, the legislature shall have all powers necessary to the legislature of a free state, including the power to enact reasonable and appropriate laws to guarantee the continuity and effective operation of state and local government by providing emergency procedure for use only during periods of disaster emergency. A disaster emergency is defined as a period when damage or injury to persons or property in this state, caused by enemy attack, is of such magnitude that a state of martial law is declared to exist in the state, and a disaster emergency is declared by the chief executive officer of the United States and the chief executive officer of this state, and the legislature has not declared by joint resolution that the disaster emergency is ended. Upon the declaration of a disaster emergency the chief executive of the state shall within seven days call a special session of the legislature which shall remain in continuous session during the disaster emergency, and may recess from time to time for [not] more than three days. (As amended November 8, 1960.)

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For Emergency Powers Code, *see* 12-9B-1 NMSA 1978.

For the All Hazard Emergency Management Act, *see* 12-10-1 NMSA 1978 et seq.

For the Public Health Emergency Response Act, *see* 12-10A-1 NMSA 1978 et seq.

For the Intrastate Mutual Aid Act, *see* 12-10B-1 NMSA 1978 et seq.

For the Disaster Succession Act, *see* 12-11-1 NMSA 1978 et seq.

For the Legislative Disaster Succession Act, *see* 12-11-11 NMSA 1978 et seq.

For the Disaster Location Act, *see* 12-11-19 NMSA 1978 et seq.

For the Energy Emergency Powers Act, *see* 12-12-1 NMSA 1978 et seq.

For the Hazardous Materials Emergency Response Act, *see* 12-12-17 NMSA 1978 et seq.

For the Uniform Emergency Volunteer Health Practitioners Act, *see* 12-12A-1 NMSA 1978 et seq.

For the Volunteer Emergency Responder Job Protection Act, *see* 12-10C-1 NMSA 1978 et seq.

The 1960 amendment, which was proposed by H.J.R. No. 24 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 83,742 for and 37,591 against, added everything after "legislature of a free state."

Power to legislatively modify court decisions. — The legislature's plenary authority is limited only by the state and federal constitutions. Court decisions may be modified by legislative enactment in any manner and to any degree decided by the legislature, so long as the legislation conforms to constitutional standards. Ferguson v. New Mexico State Hwy. Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct. App. 1982), cert. denied, 99 N.M. 226, 656 P.2d 889 (1983).

Unreasonable restrictions impermissible. — Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Misuse of police power invalid. — Former 40A-17-5, 1953 Comp. (repealed), defining arson to include any "intentional" burning of property, was an unreasonable exercise of the police power as it could be used to punish innocent and beneficial destruction of property, and was therefore invalid. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Hearing on bribery charges. — In the matter of bribery charges by the legislature, members of the press appearing before its committee may be compelled to divulge the source of their information, but no person shall be compelled to be a witness against himself in any criminal case which perhaps includes such charges, and each house of

the legislature may determine its rules of procedure and punish its members for contempt or disorderly conduct in its presence. 1937-38 Op. Att'y Gen. No. 38-2037.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 41, 42; 78 Am. Jur. 2d War § 19.

Power of legislative body or committee to compel attendance of nonmember as witness, 50 A.L.R. 21, 65 A.L.R. 1518.

Subpoena duces tecum in proceeding before legislative committee, testing validity or scope of command of, 130 A.L.R. 339.

War conditions, power of legislature to relieve parties from public contracts because of, 137 A.L.R. 1256.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Legislative power to exempt from taxation property, purposes or uses additional to those specified in constitution, 61 A.L.R.2d 1031.

81A C.J.S. States § 40; 93 C.J.S. War and National Defense § 62.

Sec. 3. [Number and qualifications of members; single-member districts; reapportionment.]

A. Senators shall not be less than twenty-five years of age and representatives not less than twenty-one years of age at the time of their election. If any senator or representative permanently removes his residence from or maintains no residence in the district from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary.

B. The senate shall be composed of no more than forty-two members elected from single-member districts.

C. The house of representatives shall be composed of no more than seventy members elected from single-member districts.

D. Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership. (As repealed and reenacted November 2, 1976.)

ANNOTATIONS

Cross references. — For constitutional provision prohibiting appointment of legislator to civil office during or within one year after his term, *see* N.M. Const., art. IV, § 28.

Comparable provisions. — Idaho Const., art. III, §§ 4 to 6.

Iowa Const., art. III, §§ 4, 5, 22; amendment 26.

Montana Const., art. V, §§ 4, 9, 14.

Utah Const., art. VI, §§ 5, 6; art. IX, § 2.

Wyoming Const., art. III, §§ 2, 3, 8.

Repeals. — A concluding portion of N.M. Const., art. IV, entitled "Apportionment" and relating to the apportionment of legislative districts throughout the state was repealed in 1949 by the constitutional amendment of N.M. Const., art. IV, § 3.

The 1976 amendment, which was proposed by S.J.R. No. 4 (Laws 1976) and adopted at the general election held on November 2, 1976, with a vote of 130,364 for and 115,684 against, repealed and reenacted this section, which formerly read: "a. Senators shall not be less than twenty-five years of age and representatives not less than twenty-one years of age at the time of their election. If any senator or representative permanently removes his residence from or maintains no residence in the county from which he was elected, then he shall be deemed to have resigned and his successor shall be selected as provided in Section 4 of this article. No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments, except notaries public and officers of the militia who receive no salary.

"b. The senate shall consist of one senator from each county of the state. In the event the number of counties is hereafter increased or decreased, the number of senators shall be increased or decreased accordingly at the next election thereafter at which members of the senate are to be elected.

"c. Until changed as provided herein, the house of representatives shall consist of sixty-six members, composed of at least one member elected from each county of the state, provided that the county of Bernalillo shall elect a total of nine members; the counties of Chaves, Dona Ana, Eddy, Lea, McKinley, Rio Arriba, San Juan, San Miguel and Santa Fe shall elect a total of three members each; and the counties of Colfax, Curry, Grant, Otero, Quay, Roosevelt, Taos and Valencia shall elect a total of two members each.

"d. For the purpose only of selection in each county entitled to elect more than one member of the house of representatives, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there shall be representatives to be elected in such county, and only one member of the house of representatives shall be elected for each place designated. No county shall be

geographically divided for the purpose of designating places in the election of such members of the house of representatives. Each candidate shall designate, upon filing his petition, the position number for which he is a candidate, and the county clerk shall so designate him upon the ballot.

"e. Upon the creation of any new county, it shall be entitled to elect one member of the house of representatives at the next general election following its creation.

"f. Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion among the various counties the number of members of the house of representatives to be elected from each county, provided that each county shall be entitled to elect at least one member of the house of representatives, and that no member of the house of representatives shall represent or be elected by the voters of more than one county," and enacted a new Section 3 providing for a maximum limitation on the size of the legislature of no more than 42 members for the senate and 70 for the house of representatives and requiring that members be elected from single member districts. See catchline, "Former section unconstitutional," in notes below.

Factors courts must consider in drawing redistricting maps. — When a court is required to draw a redistricting plan, the court must draw a partisan-neutral map that complies with both the one person, one vote doctrine and the requirements of the Voting Rights Act of 1965, 42 U.S.C. § 1973. To accomplish this goal, partisan symmetry may be one consideration. In addition, maintaining the political ratios as close to the status quo as is practicable, accounting for any changes in statewide trends, will honor the required neutrality. Because redistricting involves criteria, policies and standards that have been publicly deliberated by both the legislative and executive branches of government, the court should apply legitimate and rational state policies relevant to our representative form of government, such as historic legislative redistricting guidelines regarding contiguity of precincts, compactness of districts, political and geographic boundaries, and the preservation of communities of interest. The court should also consider previous plans and policies, even plans the legislature failed to enact into law. Maestas v. Hall, 2012-NMSC-006, 274 P.3d 66.

Population deviations based on state policy are permissible. — When a court is required to draw a redistricting plan, the court is not required to rigidly adhere to maximum population equality of districts as long as the court can enunciate the state policy on which it relies in deviating from the ideal population. Maestas v. Hall, 2012-NMSC-006, 274 P.3d 66.

Voting Rights Act requirements. — If a voting district is drawn in a way that a voting block majority is usually able to defeat candidates supported by a politically cohesive, geographically insular minority group of sufficient size, the district will violate the Voting Rights Act of 1965, 42 U.S.C. § 1973. Maestas v. Hall, 2012-NMSC-006, 274 P.3d 66.

Where a minority community in a municipality was sufficiently large and geographically compact to constitute a single-member district, the minority community was politically cohesive, and the non-minority voters in the area voted sufficiently as a block to enable the non-minority voters to usually defeat the minority's preferred candidate, Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 required the district court to maintain an effective majority-minority district in the area unless specific findings were made before the court that Section 2 considerations were no longer relevant. Maestas v. Hall, 2012-NMSC-006, 274 P.3d 66.

Redistricting plan created partisan districts. — Where a redistricting plan increased the number of republican swing seats over prior partisan-neutral plans; increased the number of republican majority districts; and tilted the balance for the republican party by combining a republican and a democrat seat in an odd-shaped consolidated district where compactness was easy to achieve without any valid justification, the district court should have rejected the plan. Maestas v. Hall, 2012-NMSC-006, 274 P.3d 66.

Los Alamos county. — Since, in adopting the 1949 amendment to former art. IV, § 3, no proposition to remove Los Alamos county from the 28th representative district was submitted, nor any proposal made for its annexation to another contiguous district, the county remained in the district designated by the act which created it. State ex rel. Craig v. Mabry, 54 N.M. 158, 216 P.2d 694 (1950).

Redistricting is permitted only after the federal decennial census. — Where the governor vetoed the house-redistricting bill that the legislature adopted in the 2001 special session; in 2002, the district court adopted the house-redistricting plan that the governor had vetoed with some modifications; and the legislature did not subsequently adopt any house-redistricting plan, the legislature could not reapportion its membership until after publication of the official report of the 2010 federal census. 2007 Op. Att'y Gen. No. 07-02.

Former section unconstitutional. — Under the fourteenth amendment to the federal constitution, Subsection b of former art. IV, § 3, providing for one senator from each county, along with parts of the 1966 Senate Reapportionment Act (Laws 1966, ch. 27, §§ 1 to 51, now repealed), was invalid. Beauchamp v. Campbell, Civ. No. 5778 (D.N.M. 1966) (unreported); 1963-64 Op. Att'y Gen. No. 63-153.

Residence requirement explained. — At the time of qualification for office of representative or senator the person in question must maintain a residence within the county, that is to say, have place of abode therein, which place of abode must be maintained as a residence either full or part time; any failure to do so would constitute an abandonment of the office and resignation would be automatic. 1955-56 Op. Att'y Gen. No. 56-6400.

Though a state senator or representative actually maintains a house (and lives in it most of the time) outside of the district in which he by intention maintains his legal residence as further evidenced by his voting registration, he is properly qualified under our

statutes as a resident of the district in which he maintains his residence by intention and his voting registration, and he may properly be elected from such district to the legislature. 1951-52 Op. Att'y Gen. No. 52-5490. See 1955-56 Op. Att'y Gen. No. 56-6400, distinguishing prior opinions which had equated residence with domicile, due to new residence language in 1955 amendment rewriting former N.M. Const., art. IV, § 3.

Failure to maintain county residence deemed resignation. — As prescribed in this section, whenever a state representative no longer maintains his residence in the county from which he was elected, then he is deemed to have resigned from such office, and his successor is to be selected as prescribed in N.M. Const., art. IV, § 4. 1961-62 Op. Att'y Gen. No. 61-119.

Nature of absence to be considered. — The question of whether or not a senator or representative has actually permanently removed his residence from the county wherein he was elected, or whether such absence is merely temporary in character and not permanent, so as to create a vacancy in such legislative office, must necessarily be considered by the board of county commissioners as a prerequisite to their appointing a successor to fill such vacancy. 1961-62 Op. Att'y Gen. No. 61-119.

Only legislature is judge of qualifications of its members. 1961-62 Op. Att'y Gen. No. 61-131.

Final determination of the eligibility of individuals for legislative office is within the exclusive power of the particular legislative body itself to rule upon. 1961-62 Op. Att'y Gen. No. 61-119.

Section is concerned primarily with conflicts of interest involved in serving in the legislature while receiving other compensation. 1969 Op. Att'y Gen. No. 69-111.

Uniform state law commissioner does not hold office of trust or profit within the contemplation of the constitution, and may serve as a legislator. 1967 Op. Att'y Gen. No. 67-04.

Legislator may serve as delegate to western interstate nuclear board, which is not an office of trust or of profit since no provision is made for payment to such delegates. 1970 Op. Att'y Gen. No. 70-37.

Legislator may serve as elected local school board member. — A member of the state legislature is not precluded by state law from serving as an elected local school board member. 1991 Op. Att'y Gen. No. 91-02.

Professors. — A teaching professor in one of the state universities does not exercise any portion of sovereign power and is not in a post created by law; and while it may be said that a retired person holding emeritus status is occupying a position created by law, no portion of the sovereign power is exercised and such a status is not that of a civil officer. 1957-58 Op. Att'y Gen. No. 58-39.

School board. — A state senator cannot also hold office on the county board of education. 1919-20 Op. Att'y Gen. No. 20-2761.

Commission in national guard. — One may not serve as a member of the legislature while holding a commission in the national guard, although temporarily relieved from duties and without pay. 1925-26 Op. Att'y Gen. No. 25-3790.

Federal position. — Based on the applicable constitutional and statutory provisions, whether a state legislator may hold a position with the federal government depends upon whether that legislator at the time of qualifying holds an "office" or is simply an employee; the latter is permissible, the former not, if the office is one for trust or profit. 1972 Op. Att'y Gen. No. 72-61.

Acting postmaster holds office of trust or profit under the national government. 1957-58 Op. Att'y Gen. No. 58-233.

Selective service director. — Legislator appointed to the position of state director of selective service may not also continue in his legislative capacity, since the office is one of trust and profit of the national government. 1967 Op. Att'y Gen. No. 67-46.

Appointment as notary impermissible. — Under N.M. Const., art. IV, § 28, a member of the legislature may not be appointed a notary public, notwithstanding the fact that a notary public may be elected to the legislature under this section. 1917-18 Op. Att'y Gen. No. 17-1958.

Law reviews. — For note, "Redistricting: Easley v. Cromartie, 532 U.S. 234 (2001): Race-Based Redistricting and Unequal Protection," see 32 N.M. L. Rev. 491 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections §§ 7, 8, 9, 13, 16, 17, 21 et seq., 28, 37, 51; 72 Am. Jur. 2d States, Territories and Dependencies § 44.

Civil responsibility of member of legislative body for his vote therein, 22 A.L.R. 125.

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A.L.R.2d 632.

81A C.J.S. States §§ 42, 44, 62 to 78.

Sec. 4. [Terms of office of members; time of election; filling of vacancies.]

Members of the legislature shall be elected as follows: those senators from Bernalillo, Chaves, Curry, DeBaca, Grant, Lea, Lincoln, Luna, Sandoval, San Juan, San Miguel, Socorro, Taos, Torrance, Union and Valencia counties for a term of six years starting January 1, 1961, and after serving such terms shall be elected for a term of four

years thereafter; those senators from all other counties for the terms of four years, and members of the house of representatives for a term of two years. They shall be elected on the day provided by law for holding the general election of state officers or representatives in congress. If a vacancy occurs in the office of senator or member of the house of representatives, for any reason, the county commissioners of the county wherein the vacancy occurs shall fill such vacancy by appointment.

Such legislative appointments as provided in this section shall be for a term ending on December 31, subsequent to the next succeeding general election. (As amended September 15, 1953, and November 8, 1960.)

ANNOTATIONS

The 1953 amendment, which was proposed by H.J.R. No. 1 (Laws 1953) and adopted at a special election September 15, 1953, with a vote of 16,749 for and 10,758 against, changed the method of filling vacancies occurring in either house, vacancies formerly being filled by election held as designated by the governor, and added the last paragraph providing for the term of such appointments.

The 1960 amendment, which was proposed by S.J.R. No. 1 (Laws 1959) and adopted at the general election held November 8, 1960, with a vote of 61,842 for and 61,522 against, rewrote the first paragraph, which prior to amendment, read: "Members of the legislature shall be elected as follows: senators for the term of four years, and members of the house of representatives for the term of two years. They shall be elected on the day provided by law for holding the general election of state officers or representatives in congress. If a vacancy occurs in the office of senator or member of the house of representatives, for any reason, the county commissioners of the county wherein the vacancy occurs shall fill such vacancy by appointment; provided, however, that if a vacancy occurs in a legislative district composed of more than one (1) county, then the county commissioners of each county in the legislative district shall submit one name to the governor, who shall appoint the representative to fill such vacancy from the list of names so submitted by the respective county commissions." See catchline, "Unconstitutionality," in notes below.

Unconstitutionality. — First paragraph of this section is unconstitutional insofar as it refers to or pertains to the senate or senators, as are parts of the 1966 Senate Reapportionment Act (Laws 1966, ch. 27, §§ 1 to 51, now repealed), being violative of the fourteenth amendment to the United States constitution. Beauchamp v. Campbell, Civ. No. 5778 (D.N.M. 1966) (unreported).

This section is valid insofar as it relates to the filling of vacancies in single county legislative districts. 1969 Op. Att'y Gen. No. 69-57.

Validity. — First paragraph of section has been held invalid under fourteenth amendment to the United States constitution insofar as it refers to or pertains to the senate or senators. 1978 Op. Att'y Gen. No. 78-05; 1988 Op. Att'y Gen. No. 88-06.

Staggered terms for senators. — We are of the opinion that the Beauchamp case invalidated the staggered terms requirement in the first paragraph of this section and that there is thus no enforceable provision in the constitution of New Mexico that requires staggered terms for senators. 1988 Op. Att'y Gen. No. 88-06.

Terms for representatives. — The two-year term for members of the house of representatives, which was not declared unconstitutional, is still an operative part of the state constitution, and a constitutional amendment would be necessary to provide four-year terms for members of the house. 1973 Op. Att'y Gen. No. 73-11.

Phrase "next succeeding general election" as used in 2-8-9 NMSA 1978 (since repealed) and this section means the next election in time at which the office may be voted upon. 1978 Op. Att'y Gen. No. 78-05.

Board of commissioners to fill vacancies. — State constitution requires that when a vacancy occurs by reason of a change in a legislator's residence, the board of county commissioners must, upon determining that such vacancy exists, act to appoint a successor to such office. 1961-62 Op. Att'y Gen. No. 61-119.

In case of a vacancy during the term of a state senator and before a general election in midterm, the vacancy is filled by the county commissioners and the ballot vacancy is filled by the county committee. 1957-58 Op. Att'y Gen. No. 58-175.

Appointment method for multi-county senatorial districts. — Former 2-9-20 D(2), 1953 Comp., provided a method of appointment for multi-county senatorial districts in which a vacancy occurred, and was valid as carrying out the intent of this section. 1969 Op. Att'y Gen. No. 69-57.

Time of appointment. — After notification by newly elected legislator that he does not intend to qualify, and following expiration of the term of the incumbent representative, the county commissioners in regular or special session may appoint representative to fill the vacancy and certify the appointment to the secretary of state. 1961-62 Op. Att'y Gen. No. 62-145.

After election, qualification and subsequent resignation of a member of the twenty-seventh legislature, a vacancy occurred which was filled by appointment of the appropriate county commissioner, the appointee being entitled to continue in office until election and qualification of his successor at the next regular election for such office. 1965-66 Op. Att'y Gen. No. 65-47.

Mode of special election. — Prior to the 1953 amendment to this section, the governor was vested with plenary power as to the manner and procedure to be followed at a special election to fill vacancies contemplated by this section, provided only that such action be reasonable and gives adequate and timely notice to the electors involved. 1949-50 Op. Att'y Gen. No. 50-5325.

Acceptance of resignations. — Neither this section nor any statute authorizes the governor to accept the resignation of a member of the legislature. 1914 Op. Att'y Gen. No. 14-1318; 1917-18 Op. Att'y Gen. No. 18-2095.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

For comment on State ex rel. Palmer v. Miller, 74 N.M. 129, 391 P.2d 416 (1964), see 4 Nat. Resources J. 606 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 44.

Age, sex, residence, etc., validity of statute requiring information as to, as condition of right to vote, 14 A.L.R. 260.

Violation of law as regards time for keeping polls open as affecting election results, 66 A.L.R. 1159.

Constitutionality and construction of statutes providing for proportional representation, or other systems of preferential voting, in public elections, 110 A.L.R. 1521, 123 A.L.R. 252.

Validity of public election as affected by fact that it was held at time other than that fixed by law, 121 A.L.R. 987.

Voting by persons in military service, 140 A.L.R. 1100, 147 A.L.R. 1443, 148 A.L.R. 1402, 149 A.L.R. 1466, 150 A.L.R. 1460, 151 A.L.R. 1464, 152 A.L.R. 1459, 153 A.L.R. 1434, 154 A.L.R. 1459, 155 A.L.R. 1459.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Voting rights in state elections of residents of military establishments, 34 A.L.R.2d 1193.

Effect of conviction under federal law, or law of another state or country, on right to vote or hold public office, 39 A.L.R.3d 303.

81 C.J.S. States § 33.

Sec. 5. [Time and length of sessions; items considered in even-numbered years.]

A. Each regular session of the legislature shall begin annually at 12:00 noon on the third Tuesday of January. Every regular session of the legislature convening during an odd-numbered year shall remain in session not to exceed sixty days, and every regular

session of the legislature convening during an even-numbered year shall remain in session not to exceed thirty days. No special session of the legislature shall exceed thirty days.

B. Every regular session of the legislature convening during an even-numbered year shall consider only the following:

(1) budgets, appropriations and revenue bills;

(2) bills drawn pursuant to special messages of the governor; and

(3) bills of the last previous regular session vetoed by the governor.

(As amended November 5, 1940, November 5, 1946, and November 3, 1964.)

ANNOTATIONS

Cross references. — For calculation of end of legislative session, *see* 12-2A-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. III, § 8.

Iowa Const., amendment 36.

Montana Const., art. V, § 6.

Utah Const., art. VI, § 16.

Wyoming Const., art. III, § 6.

The 1940 amendment, which was proposed by H.J.R. No. 12 (Laws 1939) and adopted at the election held on November 5, 1940, with a vote of 31,490 for and 28,415 against, amended this section, which formerly had read: "The first session of the legislature shall begin at twelve o'clock, noon, on the day specified in the proclamation of the governor. Subsequent sessions shall begin at twelve o'clock, noon, on the second Tuesday of January next after each general election. No regular session shall exceed sixty days, except the first, which may be ninety days, and no special session shall exceed thirty days," to read: "Each regular session of the legislature shall begin at 12:00 noon on the second Tuesday of January next after each general election and shall remain in session not to exceed sixty days. Such session shall be divided into a first term of thirty days and a second term of thirty days, with a recess of thirty days between such terms. During the first term, all bills to be considered at the session shall be introduced, read not more than twice by title or in full, printed and referred to the appropriate committee. No bill shall be placed upon its third reading or finally passed during its first term, except appropriations for expenses of the legislature and such measures as shall be submitted for immediate legislative action by the governor

accompanied by a special message setting forth the facts making such action necessary for the general welfare.

"During the second term of such session, all bills introduced at the first term shall stand for final action at the second term. Notwithstanding any provision of any section of this constitution to the contrary, no bill shall be introduced at the second term except appropriations for expenses of the legislature, the general appropriations bill, bills to provide for the current expenses of the government, committee substitutes for bills introduced at the first term and such measures as may be submitted by the governor, accompanied by a special message showing necessity for legislative action. The members of the legislature shall be allowed their mileage for attending both the first and second terms of the legislature. No special session of the legislature shall exceed thirty days."

The 1946 amendment, which was proposed by H.J.R. No. 15 (Laws 1945) and adopted at the general election held on November 5, 1946, with a vote of 15,915 for and 6,925 against, amended the section to read: "Each regular session of the legislature shall begin at 12:00 noon on the second Tuesday of January next after each general election and shall remain in session not to exceed sixty days. No special session of the legislature shall exceed thirty days."

The 1964 amendment, which was proposed by S.J.R. No. 4, § 1 (Laws 1963) and adopted at the general election held on November 3, 1964, with a vote of 71,499 for and 50,785 against, amended the section to provide that regular sessions would begin on the third Tuesday of January and should remain in session no more than 60 days in odd-numbered years and 30 days in even-numbered years, as should special sessions, and to limit the matters to be considered by regular sessions convening during even-numbered years.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 3 (Laws 1959), which would have provided for regular sessions of the legislature, was submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment to this section proposed by S.J.R. No. 15, § 1 (Laws 1961), which would have provided for regular and special sessions of the legislature, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 20,880 for and 28,178 against.

An amendment to this section was proposed by House Memorial 32 (Laws 1969), which requested the constitutional convention to increase the length of the regular session to be held in odd-numbered years from 60 to 90 days and the session held in even-numbered years from 30 to 45 days. The proposed constitution was submitted to the people at the special election held on December 9, 1969, and defeated by a vote of 59,695 for and 63,331 against.

I. GENERAL CONSIDERATION.

Proposed constitutional amendments. — When the legislature acts to put a proposed constitutional amendment before the people, it does so pursuant to Article XIX, not Article IV. Therefore, its authority to consider the subject of constitutional amendments is not affected by the list of legislative topics in Subsection B. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Calculating effective date of new act. — In calculating effective date of a new act, the day of the event is to be excluded and the last day of the number constituting the specific period is included, so that statute becomes effective at the first moment of the applicable day after the event, such as first moment of ninetieth day after adjournment of legislature which enacted it. Garcia v. J.C. Penney Co., 52 N.M. 410, 200 P.2d 372 (1948).

II. LENGTH OF SESSIONS.

Section delimits time during which legislature may exercise legislative prerogative of enacting laws. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Law passed too late void. — On direct attack, inquiry may be made into the question of whether or not act or bill purportedly passed by the legislature within constitutional time limitation was in fact passed within that limitation. A law passed in contravention thereof would be void since the legislature would have ceased to be a legislative body by operation of the constitution and would therefore have been without authority to perform any lawmaking function. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Enrolled bill rule inapplicable. — Enrolled bill rule should not be applicable when a law is challenged as being passed in violation of this section. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Nondiscretionary and incidental duties not affected. — This section does not restrain legislature from complying fully with definitely imposed nondiscretionary lawmaking duties. It should not be construed to defeat the performance of mandatory incidental duties that are indispensable to effectuate lawmaking power already exercised in due and proper season. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

III. LIMITATIONS IN EVEN-NUMBERED YEARS.

Proposed constitutional amendments. — The purpose and intent of the framers of the constitution was to limit introduction of amendments to regular as opposed to special sessions, rather than to limit amendments to odd-numbered rather than even-numbered years or to unrestricted rather than restricted regular sessions. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Election for representatives in congress is general election, and a session of the legislature in 1913 following the general election in November, 1912 was a regular session. 1912-13 Op. Att'y Gen. No. 12-910.

Meaning of "budget". — The word "budget" may be defined for purposes of this section as a plan or method by means of which expenditures and revenues are controlled for a definite period by some budgetary authority so as to effect a balance between income and expenditures. 1966 Op. Att'y Gen. No. 66-08.

Meaning of "appropriation bill". — An appropriation bill is one which has as its primary and specific aim the setting apart of a certain sum of public money for a specified purpose. 1966 Op. Att'y Gen. No. 66-08.

An "appropriation bill," as defined for purposes of this section, is one which authorizes the expenditure of public moneys and stipulates the amount, manner and purpose of the various items of expenditure. 1966 Op. Att'y Gen. No. 66-08.

Disbursements distinguished. — There is a pronounced distinction between the "appropriation" or setting aside of a sum of money for a particular purpose and the actual "disbursement" of funds to meet the object of such an "appropriation". 1966 Op. Att'y Gen. No. 66-08.

General legislation carrying appropriation not included. — An "appropriation bill", for purposes of this section, does not include an act of general legislation; and a bill proposing such general legislation is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation, or because it carries an appropriation as an incident to the general legislation contained therein. 1966 Op. Att'y Gen. No. 66-08.

Meaning of "revenue bill". — Revenue bill is one which has for its principal purpose the raising of revenue, which fact appears in the bill. 1966 Op. Att'y Gen. No. 66-08.

The term "revenue bill" designates legislation providing for the assessment and collection of taxes to defray the expenses of government. 1966 Op. Att'y Gen. No. 66-08.

Principal object to be production of revenue. — A bill is not a revenue measure if production of revenue is not its principal object, even if production of revenue is incidental to its enforcement; bills enacted pursuant to the state's police power, even if they incidentally levy or impose a tax or license fee, are not revenue bills, but regulatory measures. 1966 Op. Att'y Gen. No. 66-08.

Amendment beyond governor's bill. — Where sole purpose of a bill submitted by the governor in a special message was to provide for the issuance of liquor licenses to public facilities as defined in the bill, an amendment on such bill providing for repeal of the fair-trade law would go far beyond the purpose of the bill as expressed in the

governor's message and would be beyond the scope of Subsection B(2). 1966 Op. Att'y Gen. No. 66-25.

What vetoed bills to be considered. — This section does not require the legislature to consider all bills of the last regular session vetoed by the governor; as to partially vetoed bills, only the portion partially vetoed is to be considered. 1965 Op. Att'y Gen. No. 65-140.

Procedure for overriding veto. — Legislature has power, absent constitutional provisions governing the subject, to decide the procedure to be used in considering a vetoed bill not acted upon before adjournment of first session. 1969 Op. Att'y Gen. No. 69-147.

Legislature has authority to promulgate rules governing procedure for reconsidering vote to override chief executive's veto. 1969 Op. Att'y Gen. No. 69-147.

Legislature has authority to determine whether the house of origin must again vote to override the governor's veto at the next even-year session, when during the odd-year session the house of origin voted to override the veto but the other house either failed to override or failed to take any action before adjournment. 1969 Op. Att'y Gen. No. 69-147.

Scope of limitations. — The limitations in Subsection B of this section applies only to the legislative function of the legislature. 1969-70 Op. Att'y Gen. No. 70-10.

Confirmatory function not limited. — Giving of advice and consent to appointments made by the governor is an administrative function given to the senate as part of the system of checks and balances in our government; it is a power which exists wherever the senate is in session and may be exercised whether the session is a regular-long, regular-short or special one. 1969-70 Op. Att'y Gen. No. 70-10.

Duty to act on appointments. — The senate has a constitutional duty to act on submitted appointments whenever it is next in session. 1969-70 Op. Att'y Gen. No. 70-10.

Provision, by its terms, applies to entire legislature, not to one of its constituent houses. 1969-70 Op. Att'y Gen. No. 70-10.

Limitation controlling. — Limitation on subjects which may be considered at regular sessions convened during even-numbered years, as found in this section, being the later amendment, controls over N.M. Const., art. XIX, § 1 (providing that any amendment may be proposed at any regular legislative session). 1965 Op. Att'y Gen. No. 65-212; 1969 Op. Att'y Gen. No. 69-151.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 41, 57, 59.

Power of legislature or branch thereof as to time of assembling and length of session, 56 A.L.R. 721.

81A C.J.S. States §§ 48, 49.

Sec. 6. [Special session; extraordinary session.]

Special sessions of the legislature may be called by the governor, but no business shall be transacted except such as relates to the objects specified in this proclamation. Provided, however, that when three-fifths of the members elected to the house of representatives and three-fifths of the members elected to the senate shall have certified to the governor of the state of New Mexico that in their opinion an emergency exists in the affairs of the state of New Mexico, it shall thereupon be the duty of said governor and mandatory upon him, within five days from the receipt of such certificate or certificates, to convene said legislature in extraordinary session for all purposes; and in the event said governor shall, within said time, Sundays excluded, fail or refuse to convene said legislature as aforesaid, then and in that event said legislature may convene itself in extraordinary session, as if convened in regular session, for all purposes, provided that such extraordinary self-convened session shall be limited to a period of thirty days, unless at the expiration of said period, there shall be pending an impeachment trial of some officer of the state government, in which event the legislature shall be authorized to remain in session until such trial shall have been completed. (As amended November 2, 1948.)

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 8; art. IV, § 9.

Iowa Const., amendment 36.

Montana Const., art. V, § 6; art. VI, § 11.

Utah Const., art. VII, § 6.

Wyoming Const., art. III, § 7; art. IV, § 4.

The 1948 amendment, which was proposed by S.J.R. No. 10 (Laws 1947) and adopted at the general election held on November 2, 1948, with a vote of 36,166 for and 24,184 against, amended this section by substituting "this" for "his" near the end of the first sentence and adding everything following the first sentence.

Proposed constitutional amendments. — The purpose and intent of the framers of the constitution was to limit introduction of amendments to regular as opposed to special sessions, rather than to limit amendments to odd-numbered rather than even-numbered years or to unrestricted rather than restricted regular sessions. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Procedure not alterable by legislature. — Procedure for calling of special sessions provided in this section may not be altered by an act of the legislature 1953-54 Op. Att'y Gen. No. 5626.

Constitutional amendment may be proposed during an extraordinary session convened pursuant to this section. 2000 Op. Att'y Gen. No. 00-01.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 59.

81A C.J.S. States § 49.

Sec. 7. [Judge of election and qualification of members; quorum.]

Each house shall be the judge of the election and qualifications of its own members. A majority of either house shall constitute a quorum to do business, but a less number may effect a temporary organization, adjourn from day to day and compel the attendance of absent members.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, §§ 9, 10.

Iowa Const., art. III, §§ 7, 8.

Montana Const., art. V, § 10.

Utah Const., art. VI, §§ 10, 11.

Wyoming Const., art. III, §§ 10, 11.

Only legislature is judge of qualifications of its members. 1961-62 Op. Att'y Gen. No. 61-131.

Legislature judge of seating qualifications of elected candidates. — Once a candidate has been elected, the legislature then is the sole judge as to his qualifications for seating, and the courts will not take jurisdiction in such a matter as it is a legislative problem. 1955-56 Op. Att'y Gen. No. 56-6400.

Unless and until the house of representatives refuses to seat a member who, since his election, has been convicted of a felony, the member will continue to occupy his office and no vacancy exists. 1961-62 Op. Att'y Gen. No. 61-131.

Only the legislature can determine the qualifications of its own members and hence, only the legislature can determine whether public school teachers are qualified to serve. 1975 Op. Att'y Gen. No. 75-21.

Final determination of vacancy for legislature. — The final determination of the eligibility of individuals for legislative office is within the exclusive power of the particular legislative body itself to rule upon; this authority also extends to determining whether or not a vacancy has occurred in the legislature for which a replacement may be seated. 1961-62 Op. Att'y Gen. No. 61-119.

In any instance wherein a question of procedure arises as to the action of the board of county commissioners in making a determination of the fact of vacancy in a legislative office, or in certifying or in evidencing the action taken by such county commission, the ultimate authority to decide such issue rests solely in the particular branch of the legislature wherein the vacancy is alleged to have occurred. 1961-62 Op. Att'y Gen. No. 61-119.

When membership begins. — A person who has been elected to the legislature, but who has not qualified, is not a member of that body for purposes of the constitutional prohibition against being appointed to any other civil office. 1961-62 Op. Att'y Gen. No. 62-145.

A person who was elected to the New Mexico legislature for the first time at the general election in November of 1962 is not a member of the legislature prior to being seated at the session to be convened in January, 1963. 1961-62 Op. Att'y Gen. No. 62-145.

Advice of attorney general. — Although only the legislature can determine the qualifications of its own members, this does not mean that the attorney general cannot or should not opine and advise the legislature what is legal in our constitutional system, so that the members of each house may be better informed when exercising its constitutional role of judging the election and qualifications of its members. 1988 Op. Att'y Gen. No. 88-20.

Law reviews. — For comment, "The Rise and Demise of the New Mexico Environmental Quality Act, 'Little Nepa' " see 14 Nat. Resources J. 401 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 37, 44, 58.

Jurisdiction of courts to determine election or qualifications of member of legislative body, and conclusiveness of its decision, as affected by constitutional or statutory provision making legislative body the judge of election and qualification of its own members, 107 A.L.R. 205.

81A C.J.S. States §§ 41, 44, 50, 51.

Sec. 8. [Call to order; presiding officers.]

The senate shall be called to order in the hall of the senate by the lieutenant governor. The senate shall elect a president pro tempore who shall preside in the

absence of the lieutenant governor and shall serve until the next session of the legislature. The house of representatives shall be called to order in the hall of said house by the secretary of state. He shall preside until the election of a speaker, who shall be the member receiving the highest number of votes for that office.

ANNOTATIONS

Adoption of rules for election of speaker. — While no specific power is granted the secretary of state, in presiding over the house of representatives, to vote or act other than as presiding officer until the election of the speaker, determination of rules under which an election might be had would be a necessary order of business concerning which the secretary of state would be empowered to accept motions. 1953-54 Op. Att'y Gen. No. 53-5633.

When secretary of state may break tie vote. — The secretary of state, as presiding officer of the house of representatives, has no authority to cast a vote to break a tie unless some rules are provided therefor. However, the house has the power to adopt a rule giving the secretary of state full power to vote to break a deadlock. 1953-54 Op. Att'y Gen. No. 53-5633.

Secretary to be notified of intent not to serve. — Since this section provides that the house of representatives shall be called to order by the secretary of state, notice that an elected individual does not intend to be sworn should be sent to the secretary of state. 1957-58 Op. Att'y Gen. No. 58-233.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 37, 38.

Civil responsibility of member of legislature for his vote therein, 22 A.L.R. 125.

81A C.J.S. States §§ 41, 61.

Sec. 9. [Selection and compensation of officers and employees.]

The legislature shall select its own officers and employees and fix their compensation. Each house shall have one chaplain, one chief clerk and one sergeant at arms; and there shall be one assistant chief clerk and one assistant sergeant at arms for each house; and each house may employ such enrolling clerks, reading clerks, stenographers, janitors and such subordinate employees in addition to those enumerated, as they may reasonably require and their compensation shall be fixed by the said legislature at the beginning of each session. (As amended November 2, 1948.)

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 9.

Iowa Const., art. III, § 7.

Montana Const., art. V, § 10.

Utah Const., art. VI, § 12.

Wyoming Const., art. III, § 10.

The 1948 amendment, which was proposed by H.J.R. No. 14 (Laws 1947) and adopted at the general election held on November 2, 1948, with a vote of 31,172 for and 28,633 against, deleted provisions fixing the maximum compensation for legislative employees; prior to amendment this section read: "The legislature shall choose its own officers and employees and fix their compensation, but the number and compensation shall never exceed the following: for each house, one chaplain at three dollars per day; one chief clerk and one sergeant-at-arms, each at six dollars per day; one assistant chief clerk and one assistant sergeant-at-arms, each at five dollars per day; two enrolling clerks and two reading clerks, each at five dollars per day; six stenographers for the senate and eight for the house, each at six dollars per day; and such subordinate employees in addition to the above as they may require, but the aggregate compensation of such additional employees shall not exceed twenty dollars per day for the senate and thirty dollars per day for the house."

This section does not constitute continuing appropriation and is not specific enough, without further appropriation, to act as an authorization for the drawing of a warrant against the state treasury, pursuant to N.M. Const., art. IV, § 30. 1985 Op. Att'y Gen. No. 85-02.

Law reviews. — For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 61.

Sec. 10. [Compensation of members.]

Each member of the legislature shall receive:

A. per diem at the internal revenue service per diem rate for the city of Santa Fe for each day's attendance during each session of the legislature and the internal revenue service standard mileage rate for each mile traveled in going to and returning from the seat of government by the usual traveled route, once each session as defined by Article 4, Section 5 of this constitution;

B. per diem expense and mileage at the same rates as provided in Subsection A of this section for service at meetings required by legislative committees established by the legislature to meet in the interim between sessions; and

C. no other compensation, perquisite or allowance. (As amended November 7, 1944, September 15, 1953, November 2, 1971, November 2, 1982 and November 5, 1996.)

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 23.

Montana Const., art. V, § 5.

Utah Const., art. VI, § 9.

Wyoming Const., art. III, § 6.

The 1944 amendment, which was proposed by H.J.R. No. 2 (Laws 1943) and adopted at the general election held on November 7, 1944, with a vote of 26,547 for and 23,041 against, amended this section, by increasing from $5.00 to $10.00 per day the compensation of the legislators and substituting "once each term of the session as defined by Section 5, Article IV of this constitution" for "once each session," so that as amended the section read: "Each member of the legislature shall receive as compensation for his services the sum of ten dollars ($10.00) for each days' attendance during each session, and ten cents (10) for each mile traveled in going to and returning from the seat of the government by the usual traveled route, once each term of the session as defined by Section 5, Article IV of this constitution, and he shall receive no other compensation, perquisite or allowance."

The 1953 amendment, which was proposed by S.J.R. No. 10 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 13,822 for and 13,567 against, amended this section by substituting "per diem expense the sum of not more than twenty" for "compensation for his services the sum of ten" and deleting "term of the" preceding "session as defined" and the parenthetical expressions "($10.00)" and "(10¢)."

The 1971 amendment, which was proposed by H.J.R. No. 2 (Laws 1971) and adopted at the special election held on November 2, 1971, with a vote of 41,583 for and 32,992 against, amended this section by breaking the existing language into an introductory phrase and two subsections, A and C, substituting "forty" for "twenty" in Subsection A and adding "as provided by law" near the middle of that subsection, deleting "and he shall receive" preceding "no other compensation" in Subsection C and adding Subsection B.

The 1982 amendment, which was proposed by H.J.R. No. 1 (Laws 1982) and adopted at the general election held on November 2, 1982, by a vote of 148,486 for and 112,763 against, substituted "seventy-five dollars ($75.00)" for "forty dollars," "twenty-five cents ($.25)" for "ten cents" and "Article 4, Section 5" for "Section 5, Article IV" in Subsection A and inserted "of this section" following "Subsection A" in Subsection B.

The 1996 amendment, which was proposed by H.J.R. No. 3 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 309,927 for and 155,265 against, substituted the internal revenue service per diem and standard mileage rate for the $75 per diem and the $.25 mileage rate in Subsection A.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 14 (Laws 1961), which would have provided for compensation of members of the legislature, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 16,411 for and 32,801 against.

An amendment to this section proposed by S.J.R. No. 14 (Laws 1965), which would have provided for increase in compensation of members of the legislature, was submitted to the people at the special election held on September 28, 1965. It was defeated by a vote of 13,087 for and 39,922 against.

An amendment to this section was proposed by House Memorial 32 (Laws 1969), which requested the constitutional convention to provide salaries for legislators of $3,600 per year, per diem and mileage of $20.00 per day and $.10 for each mile traveled in going to and returning from the seat of government by the usual, traveled route once each session. The proposed constitution was submitted to the people at the special election held on December 9, 1969, and defeated by a vote of 59,695 for and 63,331 against.

An amendment to this section proposed by S.J.R. No. 2 (Laws 1974), which would have repealed this section and enacted a new one providing for the appointment of a legislative compensation commission, was submitted to the people at the general election held on November 5, 1974. It was defeated by a vote of 47,104 for and 75,618 against.

An amendment to this section proposed by S.J.R. No. 14 (Laws 1978), which would have provided for a monthly salary of $300 to begin on January 1, 1979, and would have excepted "legislative retirement as established by law" from the present Subsection C, was submitted to the people at the general election on November 7, 1978. It was defeated by a vote of 90,068 for and 103,213 against.

An amendment to this section, proposed by S.J.R. Nos. 3, 6 and 12 (Laws 1980), which would have substituted "sixty dollars ($60.00)" for "forty dollars ($40.00)" and "twenty cents ($.20)" for "ten cents ($.10)" in Subsection A, was submitted to the people at the general election held on November 4, 1980. It was defeated by a vote of 105,693 for and 138,339 against.

An amendment to this section, proposed by H.J.R. No. 12 (Laws 1988), which would have added a Subsection C providing "annuity benefits in an amount not to exceed six thousand dollars ($6,000) annually under a retirement program as provided by law, provided that this subsection applies to any law providing for legislative retirement enacted after 1962; and" and would have redesignated present Subsection C as

Subsection D, was submitted to the people at the general election held on November 8, 1988. It was defeated by a vote of 162,657 for and 207,133 against.

An amendment to this section proposed by S.J.R. No. 15 (Laws 1990), which would have increased legislators' per diem expenses to $100 per day and would have added a Subsection C providing "a salary of not more than five hundred dollars ($500) a month; and" was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 78,643 for and 234,497 against.

An amendment to this section proposed by H.J.R. No. 10 (Laws 1992), which would have created a "citizens legislative compensation commission" to determine the salaries and expense allowances of the members of the legislature, was submitted to the people at the general election held on November 3, 1992. It was defeated by a vote of 215,628 for and 245,159 against.

An amendment to this section proposed by H.J.R. 10 (Laws 1994), which would have rewritten Subsection A to provide a legislative per diem and mileage and other expenses as provided by the Internal Revenue Code, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 181,842 for and 212,885 against.

Legislative retirement plan constitutional. — The retirement benefits for which legislators may be eligible under the legislative retirement plan do not constitute legislative compensation; accordingly, the plan does not violate the constitution. State ex rel. Udall v. Public Employees Retirement Bd., 120 N.M. 786, 907 P.2d 190 (1995), rev'g 118 N.M. 507, 882 P.2d 548 (1994).

No retirement benefits. — New Mexico legislators may not receive legislative retirement benefits: Legislators may receive only per diem and mileage under this section. 1987 Op. Att'y Gen. No. 87-62 (but see State v. Public Employees Retirement Bd., 120 N.M. 786, 907 P.2d 190 (1995)), rev'g 118 N.M. 507, 882 P.2d 548 (1994).

Intent of section. — The intent of this section was to place a limit on the per diem and travel expense legislators could receive for attending legislative sessions. 1971 Op. Att'y Gen. No. 71-11.

Requirement of per diem clause. — The per diem clause of Subsection A requires legislation to give effect to the maximum rate permitted, while the mileage clause is complete in itself. Nonetheless, in 2-1-8 NMSA 1978, the legislature has provided for payment of both rates while it is in session. 1979 Op. Att'y Gen. No. 79-40.

Distinction exists between legislative or governmental and personal expenses; expenses incurred in the performance of official duties are allowable, while purely personal expenses are considered perquisites of office forbidden by constitutional provision. 1971 Op. Att'y Gen. No. 71-18.

Per diem and travel between sessions. — This section does not prohibit the reimbursement of per diem and travel expenses to legislators when that expense is incurred under appropriate authorizing statutes and at a time when the legislature is not in session; and the legislature may enact a law reimbursing expenses incurred by legislators while performing legislative duties between legislative sessions. 1971 Op. Att'y Gen. No. 71-11 (opinion rendered prior to 1971 amendment to this section).

No reimbursement for actual expenses between sessions. — The state may not, by statute, authorize legislators to receive reimbursement from state funds for their actual expenses incurred in the performance of their official duties between sessions. Legislators are limited to the amounts specified in this section to cover their expenses during and between legislative sessions. 1993 Op. Att'y Gen. No. 93-06.

Legislators serving on commissions. — Legislators can serve as members of commissions created by the legislature and are entitled to receive per diem and expenses at the existing rates. 1951-52 Op. Att'y Gen. No. 51-5364.

Additional expense coverage impermissible. — An act of the legislature providing for payments to its members to cover expenses, in addition to the compensation provided for in the constitution, would violate the constitution and would be invalid if passed. 1949-50 Op. Att'y Gen. No. 49-5189.

Monthly salary unconstitutional. — A proposed statute providing for each member of the legislature to receive as compensation for legislative services rendered the state $300 for each month during no part of which the legislature is in session would probably be held unconstitutional by the courts. 1971 Op. Att'y Gen. No. 71-18.

Per diem expenses as compensation. — "Per diem" expenses, as authorized in this section, constitute "compensation" as defined in the Public Employees' Retirement Act (10-11-1 NMSA 1978 et seq.). 1959-60 Op. Att'y Gen. No. 59-68.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 56.

Per diem compensation of members and officers of legislature, 1 A.L.R. 286.

Illegal appointment or election of member of legislature as affecting right to salary, 7 A.L.R. 1682.

Construction and application of constitutional or statutory provision that member of congress or state legislature shall not, during term for which he is elected, be appointed

or elected to any civil office which shall have been created or the emoluments of which shall have been increased during term for which he was elected, 118 A.L.R. 182.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

De facto officer or employee, payment of salary to, as defense to action or proceeding by de jure officer or employee for salary, 64 A.L.R.2d 1375.

81A C.J.S. States §§ 46, 47.

Sec. 11. [Rules of procedure; contempt or disorderly conduct; expulsion of members.]

Each house may determine the rules of its procedure, punish its members or others for contempt or disorderly behavior in its presence and protect its members against violence; and may, with the concurrence of two-thirds of its members, expel a member, but not a second time for the same act. Punishment for contempt or disorderly behavior or by expulsion shall not be a bar to criminal prosecution.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, §§ 9, 11.

Montana Const., art. V, § 10.

Utah Const., art. VI, §§ 10, 12.

Wyoming Const., art. III, § 12.

Senate is ultimate judge of its own rules. 1970 Op. Att'y Gen. No. 70-21.

Rules governing election of speaker. — Secretary of state, while presiding over the house of representatives until the election of the speaker of the house, may accept motions concerning rules under which election should be had. 1953-54 Op. Att'y Gen. No. 53-5633.

Authorizing tie-breaking vote. — The house of representatives has the power to adopt a rule giving secretary of state power to vote to break a deadlock. 1953-54 Op. Att'y Gen. No. 53-5633.

Consideration of vetoed bills. — The legislature may adopt a rule relating to the procedure to be used in considering bills of the last regular session which were vetoed. 1965-66 Op. Att'y Gen. No. 65-140.

A legislature has power, absent constitutional provisions governing the subject, to decide the procedure to be used in considering a vetoed bill not acted upon before adjournment of the first session. 1969 Op. Att'y Gen. No. 69-147.

A legislature has authority to promulgate rules governing procedure for reconsidering a vote to override chief executive's veto. 1969 Op. Att'y Gen. No. 69-147.

The legislature has authority to determine whether the house of origin must again vote to override the governor's veto at the next even-year session, when during the odd-year session the house of origin voted to override the veto but the other house either failed to override or failed to take any action before adjournment. 1969 Op. Att'y Gen. No. 69-147.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 43 to 45, 48, 49.

Power of legislature or branch thereof as to time of assembly and length of session, 56 A.L.R. 721.

81A C.J.S. States §§ 43, 52, 59, 60.

Sec. 12. [Public sessions; journals.]

All sessions of each house shall be public. Each house shall keep a journal of its proceedings and the yeas and nays on any questions shall, at the request of one-fifth of the members present, be entered thereon. The original thereof shall be filed with the secretary of state at the close of the session, and shall be printed and published under his authority.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, §§ 12, 13.

Montana Const., art. V, § 10.

Utah Const., art. VI, §§ 14, 15.

Wyoming Const., art. III, §§ 13, 14.

Court took judicial notice of journal of senate, despite fact that it was not on file in office of secretary of state by reason of his refusal to receive and file it, where chief clerk of senate produced the same and testified that it was the senate journal in the same form as when he signed it. Earnest v. Sargent, 20 N.M. 427, 150 P. 1018 (1915). *See* Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Supreme court would take judicial notice of 1953 Senate Journal. Clary v. Denman Drilling Co., 58 N.M. 723, 276 P.2d 499 (1954).

Engrossed bill not generally contradicted by journal. — When a bill has been engrossed, enrolled and signed, the court will not look to the journal to ascertain whether it received a majority vote, except in case of measures passed over veto. Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915). *See*, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Where journal shows that a proposed constitutional amendment resolution received less votes than the constitution requires, but the resolution was enrolled, engrossed and signed as required by N.M. Const., art. IV, § 20, the enrolled and engrossed resolution will be given controlling force. Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917). *See*, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Even to prevent frustration of legislative intent. — Although journal entries reflected passage of an amendment to a bill amending workman's compensation statute, where this amendment was omitted from the enrolled and engrossed bill, apparently through error or neglect, the supreme court would not accept the journal entries as record of the bill actually passed, regardless of the fact that such record was made under constitutional provision, and even though such refusal would result in injustice to the injured workman and frustration of the legislative will. Clary v. Denman Drilling Co., 58 N.M. 723, 276 P.2d 499 (1954).

Phrase "members present", as used in the constitution, means physical presence. 1971 Op. Att'y Gen. No. 71-12.

Word "shall" makes this section mandatory. 1955-56 Op. Att'y Gen. No. 55-6167.

Journal to be published despite lack of appropriation. — The secretary of state should print and publish the journal as the law says he shall do, despite the fact that no appropriation has been made therefor; no action of the legislature is necessary to pay the cost of printing. 1955-56 Op. Att'y Gen. No. 55-6167.

Except for bill overriding veto. — Since there is no provision for certification of a bill which is passed over a gubernatorial veto, use probably may be made of the journal to determine whether the bill received the required two-thirds vote. 1964 Op. Att'y Gen. No. 64-40.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 46.

81A C.J.S. States § 54.

Sec. 13. [Privileges and immunities.]

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 7.

Iowa Const., art. III, § 11.

Montana Const., art. V, § 8.

Utah Const., art. VI, § 8.

Wyoming Const., art. III, § 16.

Origin of privilege. — The privilege for legislators first appeared in unequivocal form in the English bill of rights of 1689. 1969 Op. Att'y Gen. No. 69-83.

No license to commit crimes. — The privilege or immunity granted to members of the legislature does not grant any license to commit crimes. 1969 Op. Att'y Gen. No. 69-83.

Breach of peace. — The privileges and immunities clause protects legislators only from civil arrest. Thus, a state senator or representative who violates any criminal statute, including a misdemeanor statute, commits a "breach of the peace" and is not immune from arrest. 1993 Op. Att'y Gen. No. 93-04.

No immunity from service of civil process or subpoena. — Specific immunity from arrests for misdemeanors does not grant immunity from civil process, nor does it prevent the service of subpoenas on members of the deliberative body. 1969 Op. Att'y Gen. No. 69-83.

"Session." — A special committee session or interim committee session which occurs at a place and time other than regular and special legislative sessions constitutes a "session" as contemplated by the privileges and immunities clause, art. IV, § 13 of the New Mexico constitution. 1993 Op. Att'y Gen. No. 93-04.

Delegates to constitutional convention have privileges and immunities similar to those of the legislators although the privileges and immunities are less well defined and may not have the same broad scope as those granted to the legislators by this section. 1969 Op. Att'y Gen. No. 69-83.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 55.

Immunity of public officers from criminal arrest, 1 A.L.R. 1156.

Immunity of legislators from civil process, 94 A.L.R. 1470.

Defamation: nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings, 41 A.L.R.4th 1116.

81A C.J.S. States § 45.

Sec. 14. [Adjournment.]

Neither house shall, without the consent of the other, adjourn for more than three days, Sundays excepted; nor to any other place than that where the two houses are sitting; and on the day of the final adjournment they shall adjourn at twelve o'clock, noon.

ANNOTATIONS

Cross references. — For computation of time, *see* 12-2A-7 NMSA 1978.

Comparable provisions. — Iowa Const., art. III, § 14.

Montana Const., art. V, § 10.

Utah Const., art. VI, § 15.

Wyoming Const., art. III, § 15.

Length of adjournment proper. — An adjournment from Saturday, January 17th, until Thursday, January 22nd, is not a violation of this section. 1925-26 Op. Att'y Gen. No. 25-3793.

Longer adjournment authorized by concurrence. — Since neither house shall adjourn for more than three days without the other's consent under this section, it appears that if both houses concur, an adjournment for a longer period may be effected. 1943-44 Op. Att'y Gen. No. 43-4207.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 58.

Committee created by joint or concurrent resolution to function after adjournment of legislature, 28 A.L.R. 1158.

81A C.J.S. States § 50.

Sec. 15. [Laws to be passed by bill; alteration of bill; enacting clause; printing and reading of bill.]

No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose. The enacting clause of all bills shall be: "Be it enacted by the legislature of the state of New Mexico." Any bill may originate in either house. No bill, except bills to provide for the public peace, health and safety, and the codification or revision of the laws, shall become a law unless it has been printed, and read three different times in each house, not more than two of which readings shall be on the same day, and the third of which shall be in full.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, §§ 14, 15.

Iowa Const., art. III, § 15.

Utah Const., art. VI, § 22.

Courts will not look behind an enacted law in order to ensure that the legislature complied with the reading rule. N.M. Gamefowl Assn., Inc. v. State ex rel. King, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Broadening of act. — The purpose of an act is not so changed as to violate this section merely by broadening the act and making it more comprehensive as to details. Black Hawk Consol. Mines Co. v. Gallegos, 52 N.M. 74, 191 P.2d 996 (1948).

Reference statute. — Laws 1923, ch. 118 (since repealed), referring to intoxicating liquors, was a "reference statute," and the declaratory portion thereof was sufficient to meet the requirements of this section. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Multigraphed bill is a printed bill. 1923-24 Op. Att'y Gen. No. 23-3670.

House journal and bills are public records and should be open to public inspection at reasonable hours. 1925-26 Op. Att'y Gen. No. 25-3804.

Purpose of section is solely to prohibit amendments not germane to subject of legislation expressed in the title of the act purported to be amended. 1978 Op. Att'y Gen. No. 78-04.

Declaration directory. — Declaration of constitution that "no law shall be passed except by bill," can be considered merely as directory, as long as the legislative intent is clearly expressed. 1915-16 Op. Att'y Gen. No. 15-1470.

Legislature can appropriate money by joint resolution. 1915-16 Op. Att'y Gen. No. 15-1470.

Law reviews. — For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 50, 53, 56, 57, 59, 67.

Civil responsibility of member of legislative body for his vote therein, 22 A.L.R. 125.

Previous statute as affected by attempted but unconstitutional amendment, 66 A.L.R. 1483.

Applicability of constitutional provision requiring reenactment of altered or amended statute to one which leaves intact terms of original statute but transfers or extends its operation to another field, 67 A.L.R. 564.

Stage at which statute or ordinance passes beyond power of legislative body to reconsider or recall, 96 A.L.R. 1309.

Presumption of regular passage of statute as affected by legislative records showing that bill was defeated, 119 A.L.R. 460.

Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication, 5 A.L.R.2d 1270.

Adoption of compiled or revised statutes as giving effect to former repealed or suspended provisions therein, 12 A.L.R.2d 423.

Simultaneous repeal and reenactment of all, or part, of legislative act, 77 A.L.R.2d 336.

82 C.J.S. Statutes §§ 18, 19, 24 to 27.

Sec. 16. [Subject of bill in title; appropriation bills.]

The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 16.

Montana Const., art. V, § 11.

Utah Const., art. VI, § 22.

Wyoming Const., art. III, § 24.

I. GENERAL CONSIDERATION.

When constitutionality considered. — Constitutional questions raised under this or any other section of constitution will be decided only when necessary to a disposition of the case at hand. Ratliff v. Wingfield, 55 N.M. 494, 236 P.2d 725 (1951).

Objections to be grave. — This section will not be broadened in its operation by the court, as the objections to a statute should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it was not sufficiently expressed by the title. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585, 71 A.L.R. 3d 1 (1973), rev'g 84 N.M. 168, 500 P.2d 453 (Ct. App. 1972).

Section has no retroactive effect and does not invalidate territorial acts not conforming to its requirements. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Section does not apply to municipal ordinances. State ex rel. Ackerman v. City of Carlsbad, 39 N.M. 352, 47 P.2d 865 (1935).

"Codification" explained. — Real codification is to take greater latitude, and, without changing the existing system of laws, to add new laws, and to repeal old laws, both in harmony with it, so that the code will meet present exigencies and, so far as possible provide for the future. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Elements of revision. — A revision of statutes implies one, more or all of the following: (1) A reexamination of existing statutes; (2) a restatement of existing statutes in a corrected or improved form; (3) the restatement may or may not include material changes; (4) all parts and provisions of the former statute or statutes that are omitted are repealed; and (5) the revision displaces and repeals the former law as it stood relating to the subject or subjects within its purview. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967). See also, 1973 Op. Att'y Gen. No. 73-12.

Revision of statutes implies reexamination of them, the word being applied to a restatement of the law in a corrected or improved form, with or without material change. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Codification and revision of laws governing municipalities. — An amendment which codifies and revises the laws relating to cities, towns and villages into a municipal code as expressly stated in the title, and which in addition to collecting and rearranging prior statutes make some changes therein, omitting some matters and adding others, was valid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

II. SUBJECT IN TITLE.

A. IN GENERAL.

Primary purpose of provision is to prevent fraud or surprise by means of concealed or hidden provisions in an act which the title fails to express. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967); State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966); Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958); Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955); State v. Ellenberger, 96 N.M. 287, 629 P.2d 1216 (1981).

One of the primary purposes of the constitutional requirement is to prevent fraud or surprise upon the legislature by means of hidden or concealed provisions of which the title gives no intimation and which, therefore, through inadvertence or carelessness might be unintentionally adopted. Silver City Consol. Sch. Dist. No. 1 v. Board of Regents of N.M.W. Coll., 75 N.M. 106, 401 P.2d 95 (1965).

Test of adequacy. — The true test expressed in the section is whether the title fairly gives such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970); State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966); City of Albuquerque v. Campbell, 68 N.M. 75, 358 P.2d 698 (1960); superseded by statute, Clark v. Ruidoso Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963); State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Subject matter of bill to be germane to title. — If the subject matter of the bill is reasonably germane to the title of the act, it is sufficient to be valid under this section. United States Brewers Ass'n v. Director of N.M. Dep't of Alcoholic Beverage Control, 100 N.M. 216, 668 P.2d 1093 (1983), appeal dismissed, 465 U.S. 1093, 104 S. Ct. 1581, 80 L. Ed. 2d 115 (1984).

What mischief to be prevented. — The mischief intended to be prevented by this section includes, hodge-podge or log-rolling legislation, surprise or fraud on the legislature or not fairly apprising the people of the subjects of legislation so that they would have an opportunity to be heard on the subject. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974); Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970); City of Albuquerque v. Campbell, 68 N.M. 75, 358 P.2d 698 (1960), superseded by statute, Clark v. Ruidoso Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963).

General purpose is accomplished when law has one general object which is fairly indicated by its title. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Provision does not relate to headings of articles in the code. State v. Ellenberger, 96 N.M. 287, 629 P.2d 1216 (1981).

Title of statute need not be an index of everything in the act itself, but need only give notice of the subject matter of the legislation and is sufficient if, applying every reasonable intendment in favor of its validity, it may be said that the subject of the legislative enactment is expressed in its title. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969); Silver City Consol. Sch. Dist. No. 1 v. Board of Regents of N.M.W. Coll., 75 N.M. 106, 401 P.2d 95 (1965); Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965), overruled by State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966); Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Title of statute need not set forth details of an enactment; however, the details of a statute must be germane or related to the subject matter expressed in the title. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585, 71 A L.R. 3d 1 (1973), rev'g 84 N.M. 168, 500 P.2d 453 (Ct. App. 1972); Varela v. Mounho, 92 N.M. 147, 584 P.2d 194 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Where the "subject" of an act is children and that subject is clearly expressed, provisions within the act authorizing a change in the custody of a neglected child is a detail provided for accomplishing the legislative purpose of protecting children; such detail need not be set forth in the title of the bill to comply with the requirements of this section that the subject of every bill be clearly expressed in its title. State ex rel. Health & Social Servs. Dep't v. Natural Father, 93 N.M. 222, 598 P.2d 1182 (Ct. App. 1979).

Title need not disclose means and instrumentalities provided in the body of the act for accomplishing its purpose. Provisions reasonably necessary for attaining the object of the act embraced in the title are considered as included in the title. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585, 71 A L.R. 3d 1 (1973), rev'g 84 N.M. 168, 500 P.2d 453 (Ct. App. 1972); Grant v. State, 33 N.M. 633, 275 P. 95 (1929).

Scope of title of act is within discretion of legislature; it may be made broad and comprehensive, in which case the legislation under such title may be equally broad, or it may be narrow and restricted, in which case the body of the act must likewise be narrow and restricted. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

It is primarily for the legislature to determine whether the title of an act shall be broad and general or narrow and restricted. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Courts cannot enlarge scope of title; they are vested with no dispensing power. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Generality of title is no objection to it so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment could be considered as having a necessary or proper connection. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Broader title may embrace more. — The greater and broader the title, the greater the number of particulars or of subordinate subjects which may be embraced within it. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Amendatory act to be germane to earlier law. — Where an intention to amend a specific section of a prior act is announced in the title of an amendatory act, that amendatory act must be germane to the subject matter of the section sought to be amended. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Scrutinizing title of amended act. — Where an act is merely an amendment of an earlier one, the title of the earlier act is subject to scrutiny in determining whether there is compliance with the constitutional provision. State v. Sifford, 51 N.M. 430, 187 P.2d 540 (1947).

What body of amending act to contain. — When it appears from title of act that certain specific provisions of another act are to be amended, body of amending act may contain only matter which is reasonably germane to subject matter of sections which are stated by title to be subject of amendment. State ex rel. Salazar v. Humble Oil & Ref. Co., 55 N.M. 395, 234 P.2d 339 (1951).

Title provision of this section must be liberally construed; it is primarily for legislature to decide whether title of an act should be in broad and general terms or whether it should be narrow and restrictive. Albuquerque Bus Co. v. Everly, 53 N.M. 460, 211 P.2d 127 (1949).

Presumption of validity. — In applying this test, every presumption is indulged in favor of the validity of the act. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974); Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Case by case consideration. — Each case wherein the sufficiency of the title to a legislative act is questioned must be decided on its own set of facts and circumstances. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974); Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Savings clause compared. — Constitutional enjoinder that only so much of the act as is not so expressed in the title shall be void has equal, if not greater, force than a

savings clause passed as a part of a legislative act. Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (Ct. App. 1967), cert. denied, 78 N.M. 704, 437 P.2d 165 (1968), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Section inapplicable to ordinances. — Ordinances of a city operating under the commission form of government enacted under authority of 14-11-22, 1953 Comp., as those of cities operating under the mayor-council form, need not be entitled under the provisions of this section. City of Clovis v. North, 64 N.M. 229, 327 P.2d 305 (1958).

Determining legislative intent by title. — For the purpose of determining legislative intent, court may look to the title, and ordinarily it may be considered as a part of the act if necessary to its construction. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944).

But not to exclusion of statute proper. — Legislation should not be interpreted in the light of the title to the complete exclusion of words used in enactment proper. State ex rel. State Corp. Comm'n v. Old Abe Co., 43 N.M. 367, 94 P.2d 105, 124 A.L.R. 1084 (1939).

B. TITLE ADEQUATE.

Subject incidentally affected. — As sovereign immunity was not the subject of Laws 1941, ch. 192 (former 64-25-8 and 64-25-9, 1953 Comp.) relating to liability insurance on state vehicles and actions for injuries caused by such vehicles, and was affected only incidentally, failure to mention it in the title of the act did not violate this constitutional provision. City of Albuquerque v. Garcia, 84 N.M. 776, 508 P.2d 585, 71 A.L.R. 3d 1 (1973), rev'g 84 N.M. 168, 500 P.2d 453 (Ct. App. 1972).

Provisions for suit and trial are incident to annexation proceeding and failure to mention them in title of the act providing for such proceedings does not invalidate the statute. Crosthwait v. White, 55 N.M. 71, 226 P.2d 477 (1951).

"State" as covering political subdivisions. — Use in title of the term "state" when the act covers "political subdivisions" thereof did not result in a failure to clearly express the subject of the legislation in the title, as such usage could not have worked surprise or fraud upon the legislature, nor could the public have failed to take notice that the components that make up the state were included in the term. City of Albuquerque v. Campbell, 68 N.M. 75, 358 P.2d 698 (1960), superseded by statute, Clark v. Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963).

Former 5-6-17, 1953 Comp., was not unconstitutional under this section, since governing bodies of local subdivisions may reasonably be included within the term "all governing bodies of the state" if it is considered that "governing bodies of the state" means "governing bodies within the state", rather than "state governing bodies". Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966).

"Unlawful activities". — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities relating to controlled substances and provide penalties therefor are not unconstitutional because "unlawful activities" are not mentioned in the title of the act. State v. Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Abortion. — Provision of Laws 1929, § 35-310, that an attempt to produce abortion which culminates in the death of the woman shall be deemed murder in the second degree, is germane to a title denouncing "abortion". State v. Grissom, 35 N.M. 323, 298 P. 666 (1930).

Aggravated battery. — Section 30-3-5 NMSA 1978 does not violate this section by providing that an aggravated battery may be either a misdemeanor or a felony, as the title clearly shows that the subject of the act is aggravated battery and that more than one penalty is provided. State v. Segura, 83 N.M. 432, 492 P.2d 1295 (Ct. App. 1972).

Drive-up windows selling alcohol. — The title of the act which enacted Subsection F (now G) of 60-7A-1 NMSA 1978 was not unconstitutionally misleading. It fairly gave reasonable notice of the subject matter of the bill - to allow local elections to determine the fate of drive-up windows vending alcohol. Thompson v. McKinley Cnty., 112 N.M. 425, 816 P.2d 494 (1991).

Possession of burglar's tools. — Former 40-9-8, 1953 Comp. (Laws 1925, ch. 63) forbade the making, mending or possession of burglar's tools with criminal intent to use them or permit them to be used in the commission of a crime, not merely under circumstances evincing such an intent, and the offense prohibited was encompassed in the title of the act. State v. Lawson, 59 N.M. 482, 286 P.2d 1076 (1955).

Trafficking. — Defendant's contention that 30-31-20 NMSA 1978 violated this section because the statute was concerned with trafficking in controlled substances, while the title of the act of which it was a part did not include trafficking, was without merit since the title to an enactment need not set forth details if those details are germane to its subject matter, and prohibition on trafficking was a detail germane to drugs, their administration and penalties. State v. Romero, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Unlawful payment or receipt of public funds. — Title of former 41-812, 1941 Comp., reading "An act making it a felony to receive payment from public money purportedly for personal services where such services have not been rendered; providing penalties for the commission of said felony by receipt of or disbursement of such payments" gave sufficient notice to one reading it that in the act they could expect to find a provision denouncing as a felony the paying out of public funds, or causing them to be paid out, when services were not rendered by the parties paid.VState v. Aragon, 55 N.M. 423, 234 P.2d 358 (1951).

Word "racketeering" did not need to appear in title to Laws 1977, ch. 215, amending the Organized Crime Act (29-9-1 to 29-9-17 NMSA 1978), nor did the title violate this section even though the 1977 amendment for the first time authorized the commission to investigate racketeering, since racketeering is reasonably germane to the subject matter of organized crime. In re Governor's Organized Crime Prevention Comm'n, 91 N.M. 516, 577 P.2d 414 (1978).

Place of serving sentence. — The title to the 1961 amendment to Laws 1961, ch. 146 (54-7-15, 1953 Comp.) is sufficiently broad to give notice that the legislation prohibits the service of a part of the minimum sentence prescribed by law outside the penitentiary. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965), overruled by State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Restriction of "good time" credit. — Title to Laws 1961, ch. 146 (54-7-15, 1953 Comp.), did not fail to give adequate notice of the subject of the legislation nor offend the constitution as containing more than one subject; in phrase "to prohibit suspension or deferral of execution or imposition of sentence under certain conditions" the word "suspension" applied equally to suspension of imposition of sentence by court and suspension of its execution by the executive, and gave notice that credit for "good time" might likewise be restricted under certain conditions. Martinez v. Cox, 75 N.M. 417, 405 P.2d 659 (1965).

Rights to penitentiary property. — Title to Laws 1939, ch. 55 (33-2-2 NMSA 1978 et seq.) gave ample notice that it was concerned with "titles and rights" to penitentiary property, and it was not necessary for the title of the act to set forth the source of the titles to the property which it directed to be transferred to the penitentiary. State v. Thomson, 79 N.M. 748, 449 P.2d 656 (1969).

Liquor prohibition. — The title of Laws 1923, ch. 118 (since repealed), relating to prohibition of liquors, expressed the subject of that enactment with sufficient clearness to comply with this section. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Regulation of beer sales. — Titles of statutes regulating the sale of beer containing not more than 3.2% of alcohol, referring only to intoxicating liquors and not to nonintoxicating beverages, did not violate this section. State v. Hamm, 37 N.M. 437, 24 P.2d 282 (1933). (Laws 1927, ch. 89 and Laws 1929, ch. 37, both repealed).

Amendment relating to municipal powers. — Amendatory act (former 14-39-1, 1953 Comp.), pertaining to powers of municipality to grant franchises to public utilities, which fulfilled object of constitutional provision of enabling public and legislators to form competent opinion on merits of proposed change did not violate this provision by failing to set out as a part thereof all the powers of cities as enumerated in the original act. Albuquerque Bus Co. v. Everly, 53 N.M. 460, 211 P.2d 127 (1949).

Irrigation districts. — The title "An act in relation to irrigation districts" clearly expressed the subject of Laws 1919, ch. 41 (73-9-1 NMSA 1978 et seq.). Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Banking act. — Title 48 of the former State Banking Act (Laws 1915, ch. 67) was broad and did not violate this section. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956).

Revenue Bond Act. — Title of the former Revenue Bond Act (11-10-1, 1953 Comp. et seq.) gave reasonable notice of the subject matter of the statute and did not violate this section of the constitution. State v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Foreclosure suits. — Laws 1933, ch. 7 (39-4-13 to 39-4-16 NMSA 1978, relating to foreclosures on judgments) is not unconstitutional on the ground that its title does not clearly express the subject of the bill and that it embraces more than one subject, contrary to the provisions of this section. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958).

Claims against estate. — Sections 31-8-2 and 31-8-3, 1953 Comp., relating to claims against an estate, did not offend this section. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969).

Cigarette tax. — Laws 1951, ch. 92, §§ 1 to 6 (repealed), did not violate this section by failing to express the subject of the act; the "subject" of the act had to do with a tax upon the sale of cigarettes in municipalities, and the fact that the levy, collection and enforcement of the tax were given to municipalities did not change the subject of the legislation, but merely provided the machinery under which the tax might be effected. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Succession tax. — Argument that title to Laws 1921, ch. 179, insofar as Section 17 (31-16-20, 1953 Comp.) is concerned, offends against provisions of this section because the tax provided for is a "succession tax," which would not include inter vivos transfers, even though possession and enjoyment were postponed until death, was without merit, since the legislative intent was to make the vesting of the benefits or the succession the event giving rise to the tax, and not the transfer of title. Harvey v. Vigil, 78 N.M. 303, 430 P.2d 874 (1967).

Tax on property transfers. — Laws 1919, ch. 122 (since repealed), relating to taxation of property transfers, did not violate this section. State v. Gomez, 34 N.M. 250, 280 P. 251 (1929).

Tax for work of commission. — The title "An act to amend Section 4 of Chapter 114 of the session laws of 1949 (46-12-4, 1953 Comp. now repealed) relating to funds for the commission on alcoholism," read against the background of the act it amends, is sufficient to advise the reader that one is going to find in it provision for levy of a tax for

carrying on the work of the commission on alcoholism. Fowler v. Corlett, 56 N.M. 430, 244 P.2d 1122 (1952).

Limitations on tax collection. — A time limitation on the collection of tax may be an incident to its collection and administration and need not be expressed in its title. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Limitations on action. — The no action provision in 37-1-27 NMSA 1978, relating to limitations on actions for defective or unsafe conditions of improvements to real property, literally is a limitation on actions that may be brought, to which the reference in the title to "limitation on actions" logically and naturally connects, providing reasonable notice of the subject matter. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Time for tax appeal. — Laws 1921, ch. 133, § 436 (since repealed), limiting time for appeal from tax judgment, did not violate this section. Grant v. State, 33 N.M. 633, 275 P. 95 (1929).

Appeals procedure. — The title of Laws 1919, ch. 40 (16-4-19 to 16-4-21, 1953 Comp.), relating to procedure in appeals from probate court to district court, is sufficient to comply with this section. In re Ortiz's Estate, 31 N.M. 427, 246 P. 908 (1926).

C. TITLE INADEQUATE.

Only part omitted from title stricken. — Even in event something has been improperly omitted from the title of an act, the saving clause in this constitutional provision, indicating that only so much of the act as is not mentioned in the title shall be void, will save the act providing for annexation of portions of counties (4-3-1 NMSA 1978 et seq.). Crosthwait v. White, 55 N.M. 71, 226 P.2d 477 (1951).

Act purporting to make wholesale repeal violative of section. — The title to Laws 1947, ch. 175, reading "An act to repeal obsolete and superseded laws which are not included in the New Mexico 1941 compilation, as shown in parallel reference table volume 6 of the 1941 compilation," violated this section in that it did not clearly set out the subject of the bill. Tindall v. Bryan, 54 N.M. 112, 215 P.2d 354 (1949).

Amendments not pinpointed by title. — Though title of an amendatory act could have been in general terms and yet sufficient, where there is an attempt to amend specifically by pinpointing in title of amending act the sections of the earlier act to be changed, the amendment of sections not mentioned in the title is void. State ex rel. Salazar v. Humble Oil & Ref. Co., 55 N.M. 395, 234 P.2d 339 (1951).

Applicability of former guest statute to guests. — Former 64-24-1, 1953 Comp., the "guest statute," did not violate this section, which required the subject of every bill to be expressed in the title; although "guest" was not referred to in the title, reference to "passengers" gave reasonable notice of the subject, since guests in an automobile are

passengers. Mwijage v. Kipkemei, 85 N.M. 360, 512 P.2d 688 (Ct. App. 1973), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Application restricted to owner drivers. — Title of the guest statute, 64-24-1, 1953 Comp., is not phrased in broad or comprehensive terms, but restricts its application to owners of motor vehicles; therefore, insofar as the body of the statute limits the responsibility of nonowner drivers, it contravenes the restriction of this section. Gallegos v. Wallace, 74 N.M. 760, 398 P.2d 982 (1964), overruled by McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

Selection of jurors. — Laws 1923, ch. 131, relating to the selection of jurors, violated this section in that the title did not clearly express the subject of the act. State v. Candelaria, 28 N.M. 573, 215 P. 816 (1923).

Local alcohol option. — Where the title of Laws 1971, ch. 30, which act purported in part to provide for local option elections concerning the sale of alcoholic beverages on Sunday, recited that it related to alcoholic liquors, that it repealed certain statutory provisions (unrelated to such local option elections) and pertained to "hours and days of business," the title was restrictive in nature, and as it contained nothing germane to the elections contemplated, that portion (Subsection D of former 60-10-30 NMSA 1978) was unconstitutional under this section. Martinez v. Jaramillo, 86 N.M. 506, 525 P.2d 866 (1974).

School not covered in title. — The title of Laws 1921, ch. 48 (operative sections of which are now compiled as 4-11-1 to 4-11-3 NMSA 1978), creating a county and providing for bonds in aid thereof, is not broad enough to cover § 19 thereof providing for a high school, and the section is therefore void. State ex rel. Board of Educ. v. Saint, 28 N.M. 165, 210 P. 573 (1922).

Limitation on collection of different tax improper. — In a bill providing for separate administration of the privilege tax on producers of oil and gas, and eliminating such producers from former Emergency School Tax Act, an attempt to place a five-year limitation on the collection of taxes under both the Oil and Gas Emergency School Tax Act (7-31-1 NMSA 1978 et seq.) and the Emergency School Tax Act was improper since such a provision was not germane to either the general subject of the bill or the express wording of its title. Bureau of Revenue v. Dale J. Bellamah Corp., 82 N.M. 13, 474 P.2d 499 (1970).

Removal from ratemaking proceedings limited. — Section 63-9-14 NMSA 1978, by its terms, seems broad enough to cover removals from ratemaking proceedings, but it is part of the Telephone and Telegraph Company Certification Act and therefore can only apply to certification proceedings. Mountain States Tel. & Tel. Co. v. Corporation Comm'n, 99 N.M. 1, 653 P.2d 501 (1982).

III. SUBJECT OF BILL.

Term "subject" is to be given broad and extended meaning so as to authorize the legislature to include in one act all matters having a logical or natural connection. Silver City Consol. Sch. Dist. No. 1 v. Board of Regents of N.M.W. Coll., 75 N.M. 106, 401 P.2d 95 (1965).

In considering whether a statute embraces more than one subject, the term "subject" is to be given broad and extended meaning so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. Kilburn v. Jacobs, 44 N.M. 239, 101 P.2d 189 (1940); Johnson v. Greiner, 44 N.M. 230, 101 P.2d 183 (1940). *See also*, 1973 Op. Att'y Gen. No. 73-12.

More than one subject germane to issue. — When more than one subject in the act is germane to the main issue, it is constitutional. State v. Miller, 33 N.M. 200, 263 P. 510 (1927).

Purpose of limitation. — This constitutional limitation was designed for the exclusion of discordant provisions having no rational or logical relation to each other. State v. Roybal, 66 N.M. 416, 349 P.2d 332 (1960).

Titles liberally construed. — The court is firmly committed to the policy of applying a liberal construction to a specific title as well as to one containing broad and comprehensive language. Silver City Consol. Sch. Dist. No. 1 v. Board of Regents of N.M.W. Coll., 75 N.M. 106, 401 P.2d 95 (1965).

Wholesale repeal of laws. — Laws 1947, ch. 175, entitled "An act to repeal obsolete and superseded laws which are not included in the New Mexico 1941 compilation, as shown in parallel reference table volume 6 of the 1941 compilation," violated this section because it contained more than one subject. Tindall v. Bryan, 54 N.M. 112, 215 P.2d 354 (1949).

Abortion statute. — Statute denouncing attempt to produce abortion, and making such attempt, followed by death, murder in the second degree contained but one subject which was clearly expressed in its title. State v. Grissom, 35 N.M. 323, 298 P. 666 (1930).

Amendment of drug and cosmetic act. — Claim that statute of which 30-31-20 NMSA 1978 is a part violated this section, because the title of the act amended sections of drug and cosmetic act and, therefore, embraced both drugs and cosmetics, was without merit. The amendments were concerned with drugs, and under the broad and extended meaning given to word "subject," statute would not be held invalid. State v. Romero, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Drug penalties. — Section 54-7-15, 1953 Comp., relating to penalties for drug offenses did not embrace more than one subject. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965), overruled by State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966); Martinez v. Cox, 75 N.M. 417, 405 P.2d 659 (1965).

Immunity from gambling penalties. — Section 44-5-14 NMSA 1978, providing immunity from punishment for gamblers who file a claim for recovery of gambling losses, does not violate this section of the constitution on grounds that more than one subject is embraced within the act. State v. Schwartz, 70 N.M. 436, 374 P.2d 418 (1962).

Transportation and handling of explosives. — Statute penalizing, in one section, certain methods of transportation of explosives, and, in another section, the handling of explosives maliciously in, at or near "any building, railroad or any train or car, or any depot, stable, carhouse, theater, school, church, dwelling house or other place where human beings usually frequent, inhabit, assemble or pass" was not unconstitutional as embracing more than one subject. State v. Ornelas, 42 N.M. 17, 74 P.2d 723 (1937).

Explosives and deadly weapons in penal institutions. — Laws 1941, ch. 59, § 2 (40-41-4, 1953 Comp.) was not repugnant to this section for allegedly embracing more than one subject, by prohibiting the carrying of explosives or deadly weapons within area used for confinement of prisoners, since "explosives" and "deadly weapons" were not separate subjects of the act; rather, the prohibition against introduction of explosives and deadly weapons within such institutions was a means designed to carry general purpose of the act. State v. Williams, 71 N.M. 210, 377 P.2d 513 (1962).

Automobile licenses. — Laws 1912, ch. 28, repealed by Laws 1913, ch. 19, § 18, relating to automobile licenses, did not contain more than one general subject, or at least the subject was germane to that expressed in the title assuming that two subjects were included in the act. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Motor vehicles and trailers. — Laws 1925, ch. 82 (since repealed), relating to motor vehicles and trailers, was not unconstitutional on ground that title embraced more than one subject, the subjects mentioned being germane to the main subject. State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296 (1928).

Motor Vehicle Act. — Former Motor Vehicle Act (64-1-1, 1953 Comp. et seq.) is not constitutionally objectionable under this section in assertedly containing more than one subject; its subject was motor vehicles, and the mere inclusion of other provisions logically within the scope of the title and relating to the general subject did not violate the "one subject" restriction. State v. Roybal, 66 N.M. 416, 349 P.2d 332 (1960).

Capitol building and state parks. — Laws 1939, ch. 112, § 13, relating to the capitol building and state parks, contravenes this provision. Kilburn v. Jacobs, 44 N.M. 239, 101 P.2d 189 (1940); Johnson v. Greiner, 44 N.M. 230, 101 P.2d 183 (1940).

Drainage law. — Drainage law (73-6-1 to 73-7-56 NMSA 1978) is not unconstitutional on the theory that Section 82 thereof (73-7-56 NMSA 1978), dealing with eminent domain relates to a different subject than the remainder of the act. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

IV. APPROPRIATIONS.

Details of spending may be included. — This section is not to be construed to mean that nothing but bare appropriations shall be incorporated in a general appropriation bill; the details of expending the money so appropriated, which are necessarily connected with and related to the matter of providing the expenses of the government, and are so related, connected with and incidental to the subject of appropriations that they do not violate the constitution if incorporated in such general appropriation bill, may properly be included therein. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Provisions for accounting, expenditure, and issuance of certificates not precluded. — This provision does not preclude insertion in general appropriation bill of provisions for the accounting and expenditure of the money appropriated; this would include authorization for the issue and sale of certificates of indebtedness. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912).

Repeal by implication of existing general legislation. — Governor properly vetoed provision in appropriation bill requiring the information processing bureau, general services department, to finance capital outlay expenses from internal services funds and specifically prohibiting use of moneys from the equipment replacement fund to fund a statutory five-year funding scheme described in the Information Systems Act (repealed). Such provision amounted to general legislation which, if left unchallenged, would repeal by implication similar funding provisions in existing general legislation. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Limit on per diem and subsistence. — An appropriation bill which contains a limitation on per diem and subsistence for officials does not violate this section. State ex rel. Whittier v. Safford, 28 N.M. 531, 214 P. 759 (1923).

Directive to relocate agency permissible. — Legislature's directive, ordering the vocational rehabilitation division of state board of education to relocate its Albuquerque office to a site more accessible to its clients, was a matter germane to and naturally connected with the expenditures of moneys, and there was no violation of the provisions of this section by including such provision in the general appropriations act. National Bldg. v. State Bd. of Educ., 85 N.M. 186, 510 P.2d 510 (1973).

Appropriation to regulatory board not general legislation. — Appropriation to barber's board in 1953 general appropriation act had effect of temporarily superseding the appropriation contained in the Barbering Act (repealed) for the biennium in question; it did not constitute general legislation in an appropriation bill, as prohibited by this section. State ex rel. Prater v. State Bd. of Fin., 59 N.M. 121, 279 P.2d 1042 (1955).

Inclusion of permanent policy in appropriation improper. — Part of Laws 1912, ch. 83, § 18, relating to accounting for public funds, while it bore some relation to the general appropriation act of which it was a part, provided a permanent policy thereafter

to be pursued and was general legislation rendering it violative of the constitution. State ex rel. Delgado v. Sargent, 18 N.M. 131, 134 P. 218 (1913).

Disposition of funds beyond biennium unlawful. — Provision of 1953 general appropriation act that "all balances remaining to the credit of any above named boards shall revert to the general fund at the end of any fiscal year" contravened this section insofar as it attempted to speak for disposition of balances remaining with the boards beyond the biennium. State ex rel. Prater v. State Bd. of Fin., 59 N.M. 121, 279 P.2d 1042 (1955).

Separate bill necessary. — As this section declares that, except for the purposes which may be embraced in general appropriation bills, the moneys in the state treasury may be appropriated only by separate bills, and under N.M. Const., art. IV, § 30, such separate bill must distinctly specify the sum appropriated and the object to which it is to be applied, former 19-1-15 NMSA 1978 was unconstitutional insofar as it assumed to authorize repayment of money covered into the treasury and funded, as the property of the state, on the mere say-so of an administrative officer. McAdoo Petroleum Corp. v. Pankey, 35 N.M. 246, 294 P. 322 (1930).

Title need not state all matters covered. — It is not necessary that a title specifically set forth all of the matters included in the body of an enactment. 1969 Op. Att'y Gen. No. 69-131.

Effect of detailed title. — Where the title of an act begins with a general descriptive phrase, then goes on to describe the contents in more detail, the scope of the act is limited by the more detailed description, so that a provision not contained within the detailed description is void even though it falls within the general description contained in the first phase of the title. 1973 Op. Att'y Gen. No. 73-12.

Word "appropriation" unnecessary. — Since the title of Laws 1961, ch. 194, (former 64-13-73, 64-13-75.1 and 64-13-75.2, 1953 Comp.) relating to fees for operators' and chauffeurs' licenses, and providing, inter alia, for $.25 of each fee to be retained by the division, mentions "fees," the reader is apprised that in all probability the act will also contain a provision regarding the disposition of such fees, and the act need not be invalidated for failure to use the word "appropriation" in its title. 1961-62 Op. Att'y Gen. No. 61-122.

Emergency clause not part of subject. — This provision does not require that the title contain a statement that a bill carries an emergency clause, since the effective date of legislation is not any part of the subject of the law; therefore Laws 1939, ch. 1, § 4, an emergency clause, made that chapter, an appropriation act, effective on its passage and approval. 1939-40 Op. Att'y Gen. No. 39-3001.

License photographs. — Failure to mention in the title of Laws 1961, ch. 194 (amending 64-13-73, 64-13-75.1 and 64-13-75.2, 1953 Comp. relating to operators' and chauffeurs' licenses), that photographs are to be placed on drivers' licenses does not

violate this section; the photograph provision is simply a detail in the general licensing scheme and has a rational and logical connection therewith. 1961-62 Op. Att'y Gen. No. 61-122.

County salaries. — The purview or contents of Laws 1949, ch. 90 (former 15-43-4, 1953 Comp. relating to county officers' salaries), were germane to the title of the act. 1951-52 Op. Att'y Gen. No. 52-5474.

Oil Conservation Act. — The Oil Conservation Act of 1935 as amended in 1937, 1941 and 1949 was not violative of this section for failure to have the subject matter expressed clearly in the title. 1951-52 Op. Att'y Gen. No. 51-5397.

Veterans' tax exemption. — The title to the 1957 amendment to 72-1-14, 1953 Comp., reading: "List of soldiers entitled to exemption; Preparation by assessor; Additions," did not violate this section, since the amendment dealt only with the subject of the property tax exemption of veterans, and the method and time of obtaining such was germane to the title. 1969 Op. Att'y Gen. No. 69-131.

Only part of law embraced in title given effect. — Section 13-4-5 NMSA 1978, giving preference to materials produced within the state of New Mexico, where such materials are practicable in the construction and maintenance of public works, does not conflict with this section, even though the body of the act is broader than its title, but only so much of the act as is embraced in the title will be given effect. 1933-34 Op. Att'y Gen. No. 34-719.

Failure to underlineate. — This section may be violated in a case where new material, not mentioned in the title, is written into an amendatory bill with the underlineation required by Senate Rule 50, as was done in Laws 1939, ch. 173, § 1, which amended the law concerning the control of rural schools (73-9-7, 1953 Comp.), when the words "which supervisor shall be nominated by the county superintendent of schools" was inserted without being underlined. 1939-40 Op. Att'y Gen. No. 39-3106.

Abolishment of committee ineffective. — Because the title of Laws 1969, ch. 226, failed to contain language indicating that it was abolishing the committee on children and youth, the enactment violated the requirements of this section, and hence its attempt to repeal sections relating to that committee was void. 1969 Op. Att'y Gen. No. 69-45.

Stripping corporation commission (now public regulation commission) of control over aircraft. — Laws 1939, ch. 199, § 5 (64-1-18 NMSA 1978) violates this section since there is nothing in the title of the act of which it is a part to intimate in the least that the corporation commission (now public regulation commission) is to be stripped of its power over all aircraft. 1939-40 Op. Att'y Gen. No. 39-3258.

Protection of animals. — Statute entitled "An act for the protection of game and fish" cannot be transformed into an act for the protection of animals which cannot be included under the name of "game". 1915-16 Op. Att'y Gen. No. 15-1703.

County salaries. — Laws 1937, ch. 98 (since repealed), relating to county salaries, was unconstitutional because, inter alia, its title was probably not sufficient to cover its provisions. 1937-38 Op. Att'y Gen. No. 37-1652.

School boards. — Laws 1933, ch. 74 (later repealed), relating to boards of education, could not be workable in or operative for 1933, and it was unworkable and its title not sufficiently broad to meet this constitutional requirement. 1933-34 Op. Att'y Gen. No. 33-595.

What constitutes duplicity. — To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other; thus, all that is necessary under this section is that the act should embrace some one general subject. 1973 Op. Att'y Gen. No. 73-12.

Specific tuition schedules for institutions of higher education are proper subjects of an appropriations act. 1985 Op. Att'y Gen. No. 85-02.

Making of appropriations for legislature. — The state constitutional procedures applicable to the expenditure of state funds vests the authority to make appropriations in the legislature; therefore, the governor may not spend federal revenue-sharing funds without a legislative appropriation. 1973 Op. Att'y Gen. No. 73-09.

Appropriation to be for "public" purpose. — Question of whether an item of appropriation meets the "expense" test is ordinarily considered in terms of whether or not the proposed expenditure is for a "public," as distinguished from a "private" purpose; on this question, the legislature is vested with a large discretion and its determination will not be disturbed unless clearly arbitrary. 1959-60 Op. Att'y Gen. No. 59-79.

More than bare appropriation permissible. — This article does not require that the general appropriations bill be restricted to bare appropriations; it may contain language covering matters which are germane to and naturally and logically connected with the expenditures of the moneys provided in the bill, and only such matters as are foreign, not related to nor connected with such subject, are forbidden. 1977 Op. Att'y Gen. No. 77-11.

General appropriations bill may not reduce appropriation to administrative agency. — The legislature may not use a general appropriations bill to reduce the appropriation to an administrative agency so as to put it out of business. 1980 Op. Att'y Gen. No. 80-03.

Provisions for accounting, issuance of indebtedness must be incident to appropriation. — With a general appropriation may be included all matters germane thereto and directly connected therewith, such as provisions for the expenditure and accounting for the money, but such provisions are to have application only to matters incident to the main fact of the appropriation, and may not be considered as general legislation affecting matters not necessarily or directly connected with the appropriation legally made. 1961-62 Op. Att'y Gen. No. 62-88.

If the provision in the general appropriations act is so related, connected with and incidental to the subject of the appropriation and does not attempt to go beyond the current appropriation, the provision is constitutional. 1967 Op. Att'y Gen. No. 67-49.

Legislative intent determinative. — Where the legislature clearly intended the expenditure of the amount appropriated to the state board of finance to be for public purposes only, vulnerability of some particular determination by the board would be a challenge to the application of the provision in particular circumstances, and not a challenge to the constitutionality of the provision. 1959-60 Op. Att'y Gen. No. 59-79.

Appropriation for emergency and necessary expenses lawful. — Appropriation of $300,000 in 1959 general appropriation bill to state board of finance "for emergencies and necessary expenditures affecting the public welfare" was lawful. 1959-60 Op. Att'y Gen. No. 59-79.

Expenses for state educational institutions may be included in the general appropriation bill, under the authority contained in the phrase "and other expenses required by existing laws". 1912-13 Op. Att'y Gen. No. 12-876.

Allowing participation in public school insurance authority. — The language in Laws 1988, ch. 13, § 4 (p. 235), part of the 1988 General Appropriation Act, which allows Albuquerque public schools to participate in the public school insurance authority, clearly violates this section, which restricts the contents of general appropriation acts. 1988 Op. Att'y Gen. No. 88-58.

Legislature cannot exercise control over funds not appropriated by the general appropriations act by means of language in that act. 1967 Op. Att'y Gen. No. 67-49.

Legislature cannot impose conditions upon unappropriated funds. — The legislature does not have the power to impose conditions upon the expenditure of funds which it does not appropriate. 1980 Op. Att'y Gen. No. 80-40.

Provision referring to disposition of federal funds void. — The provision of the General Appropriations Act of 1980, Laws 1980, ch. 155, which refers to the disposition of federal funds received by the state auditor is a matter unrelated to an appropriation and is void. 1980 Op. Att'y Gen. No. 80-40.

Section not applicable to administration of federal funds. — This section, along with N.M. Const., art. IV, §§ 30 and 31, are restrictions in the objects, forms and disbursements of legislative appropriations of state funds; they have no application to a department's administration of federal or nonstate funds. 1975 Op. Att'y Gen. No. 75-10.

Section not applicable to agency's disposition of appropriation. — This section, along with N.M. Const., art. IV, §§ 30 and 31, imposes limits on the legislature's power to appropriate money and the treasurer's power to disburse it, but has nothing to do with an administrative agency's disposition of its appropriation. 1975 Op. Att'y Gen. No. 75-10.

Highway Beautification Act not appropriation. — Laws 1966, ch. 65 (67-12-1 NMSA 1978 et seq.), the Highway Beautification Act, is neither an appropriations bill nor a bill appropriating money within the meaning of this and other sections of article IV, as neither the title nor the body of the bill relates to the appropriation of funds; it is devoid of an appropriation. 1966 Op. Att'y Gen. No. 66-133.

Appropriation to several unrelated institutions unconstitutional. — A bill (not the general appropriations bill) appropriating money to three different types of institutions or associations which are not related is unconstitutional. 1937-38 Op. Att'y Gen. No. 37-1560.

Amendments to 22-2-8.2 NMSA 1978 made in the General Appropriation Act of 1989 were not proper, where the 1989 appropriations measure changed the effective dates for various actions under the statute and enlarged the authority of the state superintendent to waive class load requirements. The amendments constituted general legislation which, though necessary or desirable, could not constitutionally be included in an appropriations bill. 1989 Op. Att'y Gen. No. 89-26.

Conditions on amounts in miners' hospital base appropriation. — Conditions placed in the General Appropriation Bill of 1988 on the amounts in the miners' hospital base appropriation for personal services and employee benefits were valid because they were reasonably related to the amounts appropriated and did not attempt to control the details of how those amounts were expended after the appropriation was made. 1989 Op. Att'y Gen. No. 89-30.

Law reviews. — For comment, "Legislative Bodies - Conflict of Interest - Legislators Prohibited From Contracting With State," see 7 Nat. Resources J. 296 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 97 to 126.

Sufficiency of title of act licensing or otherwise regulating dealers in securities or other interests or obligations of third persons, 153 A.L.R. 874.

Constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Validity of legislation relating to publication of legal notices, 26 A.L.R.2d 655.

82 C.J.S. Statutes §§ 212 to 220.

Sec. 17. [Passage of bills.]

No bill shall be passed except by a vote of a majority of the members present in each house, nor unless on its final passage a vote be taken by yeas and nays, and entered on the journal.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 15.

Iowa Const., art. III, § 17.

Montana Const., art. V, § 11.

Utah Const., art. VI, § 22.

Wyoming Const., art. III, § 25.

"Members present". — The phrase "members present," as used in the state constitution, means physical presence. 1971 Op. Att'y Gen. No. 71-12.

Provision mandatory. — Constitutional provisions as to the number of votes required on final passage are mandatory and the validity of legislative enactments is dependent on compliance therewith. 1971 Op. Att'y Gen. No. 71-12.

Use of paired or proxy votes potentially unconstitutional. — The senate and house rules on paired or proxy voting do not automatically violate the constitution, but in the passage of a particular bill, use of such voting procedures could produce an unconstitutional statute, as when the paired or proxy vote was the one needed to pass a bill by a majority vote, which would not be known until after the fact. 1971 Op. Att'y Gen. No. 71-12.

Committee of one house not to function after adjournment. — Since the legislative power is vested in both the senate and house of representatives, that power can only be exercised by the concurrence of both houses; to allow a committee established by one house to function after adjournment of the body which created it would be allowing one house of the legislature to pass a resolution having the effect of law. 1959-60 Op. Att'y Gen. No. 59-65.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 50, 60 to 62, 65.

82 C.J.S. Statutes §§ 18, 42, 43, 45.

Sec. 18. [Amendment of statutes.]

No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full.

Notwithstanding the foregoing or any other provision of this constitution, the legislature, in any law imposing a tax or taxes, may define the amount on, in respect to or by which such tax or taxes are imposed or measured, by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time, and may prescribe exceptions or modifications to any such provision. (As amended November 3, 1964.)

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 18.

Wyoming Const., art. III, § 26.

The 1964 amendment, which was proposed by S.J.R. No. 26, § 1 (Laws 1963), and adopted on November 3, 1964, with a vote of 62,129 for and 51,937 against, added the second paragraph of this section.

Section has no retroactive effect and does not invalidate territorial acts not conforming to its requirements. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Prohibition of this section of the New Mexico constitution does not apply to legislation in existence at the time the constitution was adopted. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967), (concerning former 40-24-4, 1953 Comp., former felony murder statute).

Only procedural law may be adopted by reference. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958); Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953); Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929); State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Procedure for enforcement of judgment lien. — Laws 1933, ch. 7 (39-4-13 to 39-4-16 NMSA 1978) does not contravene this section; the act grants an optional procedure for the enforcement of judgment liens, and in this jurisdiction procedural law may be adopted by another statute by reference. Ballew v. Denson, 63 N.M. 370, 320 P.2d 382 (1958).

Repeal or amendment by implication. — Fact that an act may amend or repeal certain provisions of other statutes by implication does not offend against this section. State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296 (1928).

Clause making "inconsistent" laws inapplicable. — Former State Revenue Bond Act, Laws 1963, ch. 271 (11-10-1 to 11-10-26, 1953 Comp.), did not contravene this section by providing in 11-10-26, 1953 Comp., that all other laws inconsistent therewith should be inapplicable to the act; the court could find no preceding provisions so repugnant or inconsistent with the act that they were repealed thereby, the Bond Act being, as it provided in 11-10-24, 1953 Comp., supplemental and additional to powers conferred by other laws. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Amendment constitutional. — The amendment of Laws 1915, § 550 (77-17-13 NMSA 1978) by Laws 1919, ch. 53, providing penalty for failure to keep hides of bovine animals, complies fully with this section. State v. Knight, 34 N.M. 217, 279 P. 947 (1929).

Denial of remedy not amendment by reference. — Former 67-16-16, 1953 Comp., which enacted penalties, including denial of the mechanic's lien as a remedy, for failure of contractor to be licensed, does not violate this section as an attempt to amend the Mechanic's Lien Law by reference. Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955).

Authorization to approve bonds. — Former 21-13-14 NMSA 1978 of the Junior College Act, authorizing the attorney general to approve or disapprove bonds, was not legislation by reference and not in violation of this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Reference to manner of tax collection. — A statutory amendment (Laws 1951, ch. 218, now repealed) directing the collection of a tax levied thereby "in the manner now required by law for alcoholic beverages" is not invalid as an attempted extension of the Liquor Control Act by reference "not to a title but to a chapter number". Fowler v. Corlett, 56 N.M. 430, 244 P.2d 1122 (1952).

Extension of general revenue provisions over conservancy district assessments. — Sections 73-16-15 and 73-16-17 NMSA 1978, of the Conservancy Act (Laws 1927, ch. 45), extending general provisions of revenue acts to cover conservancy district assessments, when considered with other portions of such act, were not obnoxious to provisions of this section. Tondre v. Garcia, 45 N.M. 433, 116 P.2d 584 (1941).

Enhanced sentence provisions. — No new crime was created by the combined use of 30-16-2 and former 31-18-4 NMSA 1978 in an indictment, nor was any law revised or extended by reference; 30-16-2 NMSA 1978 defines robbery with a deadly weapon, the crime of which defendant was convicted, while former 31-18-4 NMSA 1978 specified various consequences if a finding was made that the deadly weapon used in the

robbery was a firearm, and served no other purpose in the indictment than to alert the defendant to possible sentencing consequences following a conviction. State v. Sanchez, 87 N.M. 140, 530 P.2d 404 (Ct. App. 1974).

Blind legislation void. — Laws 1927, ch. 182 (since repealed), making other laws apply to underground waters without designating such law, was void as in contravention of this section, since it was "blind legislation". Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).

Extension of Prohibition Act by reference to title. — Laws 1923, ch. 118, §§ 1, 2 (since repealed), violated this section in that they attempted to extend provisions of National Prohibition Act by reference to its title only without setting same out in full. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Reference to federal act as mere surplusage. — Reference to title of federal Reclamation Act in reclamation statutes (73-18-2, 73-18-12 to 73-18-14 NMSA 1978) did not violate this section, as reference was mere surplusage since the secretary of the interior was necessarily limited by the Reclamation Act in making the contract with the district, and once the contract was entered into, these statutes became an integral part thereof. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

Repeal as "revising" or "amending". — Action of the legislature in attempting to repeal a portion of an existing law was "revising" or "amending" it. 1969 Op. Att'y Gen. No. 69-15.

Purpose to eradicate "blind legislation". — The purpose of this provision is to eradicate the evil of so-called "blind legislation," that is, legislation which undertakes to revise, amend or extend existing legislation in such manner that the effect of the new statute cannot be determined without resorting to the previous legislation as well. 1957-58 Op. Att'y Gen. No. 58-85.

Amendment by implication. — The limitation in this section that "no law shall be revised or amended", does not absolutely proscribe and prohibit the amendment of an act by implication, but amendment of statutes by implication, like repeal by implication, is not favored and will not be upheld in doubtful cases. In order to find an amendment by implication there must be an irreconcilable inconsistency between the preexisting law and the statute being construed; if both provisions can coexist and be given effect, the courts will not find an amendment by implication. 1963-64 Op. Att'y Gen. No. 63-71.

Amendment of original law without reference to intermediate amendment. — Amendatory language of 1955 act, which amended Laws 1951, ch. 212, § 3 (former 54-3-3, 1953 Comp.), relating to permits and fees for food establishments, was to be considered as a part of, and existing with, the earlier statute, such that 1957 act further amending the 1951 law while making no reference to previous amendment in 1955 was

to be given effect, applying also to the intermediate and disregarded 1955 amendment. 1957-58 Op. Att'y Gen. No. 57-130.

Attempted repeal ineffective. — Legislature's attempt in Laws 1923, ch. 148, § 1431, to repeal portion of an existing law (so much of former 72-4-9 and 72-4-10, 1953 Comp., as referred to schools) by reference to the title of the law only violated this section and was of no force and effect. 1969 Op. Att'y Gen. No. 69-15.

Effect of amendment on unchanged portions of statute. — Where a statute is amended, the portions of the amended statute which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along, while the new parts are not to be taken as to have been the law prior to the passage of the amended statute. 1957-58 Op. Att'y Gen. No. 57-20.

Amending constitution. — Whatever legal consequences follow from the requirement that an ordinary law be set out in full must also follow where a constitutional provision is sought to be amended, and, under the established practice, is also set out in full. 1957-58 Op. Att'y Gen. No. 57-20.

Unamended portions of provision continued as law. — The first paragraph of N.M. Const., art. V, § 14, creating the highway commission, was not repealed and reenacted by the 1955 amendment thereof, which set the section out in full, underlining the changes made; thus the commission which was appointed prior to the latest amendment is still the lawful and duly appointed commission since the members thereof were appointed under a constitutional provision which has continued uninterrupted since its original enactment. 1957-58 Op. Att'y Gen. No. 57-20.

Measuring state tax as percentage of federal tax. — Proposed amendment to former 72-15-21, 1953 Comp., providing that resident individuals with an adjusted gross income of $10,000 or under, in lieu of personal exemptions and all other deductions, should pay a tax equal to 3% of the income tax payable to the United States under the Internal Revenue Code, would violate this section. 1953-54 Op. Att'y Gen. No. 53-5645 (opinion rendered prior to 1964 amendment to this section).

Law reviews. — For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

For article, "New Mexico Antitrust Law," see 9 N.M. L. Rev. 339 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 57.

Construction and application of constitutional provision against changing purpose of bill during passage, 158 A.L.R. 421.

Power of state legislature to limit the powers of a state constitutional convention, 158 A.L.R. 512.

Effect of modification or repeal of constitutional or statutory provision adopted by reference in another provision, 168 A.L.R. 627.

Constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication, 5 A.L.R.2d 1270.

Simultaneous repeal and reenactment of all, or part, of legislative act, 77 A.L.R.2d 336.

82 C.J.S. Statutes § 260.

Sec. 19. [Introduction of bills.]

Time limitation on the introduction of bills at any session of the legislature shall be established by law. (As amended November 8, 1932, and November 8, 1960.)

ANNOTATIONS

Cross references. — For constitutional provision relating to the length of legislative session, *see* N.M. Const., art. IV, § 5.

For adjournment of legislature, *see* N.M. Const., art. IV, § 14.

For limit on time within which bills may be introduced, *see* 2-6-1 NMSA 1978.

For computation of time, *see* 12-2A-7 NMSA 1978.

The 1932 amendment, which was proposed by H.J.R. 10 (Laws 1931) and adopted at the general election held on November 8, 1932, with a vote of 34,028 for and 14,739 against, amended this section, which formerly read: "No bill for the appropriation of money, except for the current expenses of the government, and no bill for the increase of compensation of any officer, or for the creation of any lucrative office, shall be introduced after the tenth day prior to the expiration of the session, as provided herein, except by unanimous consent of the house in which it is introduced. No bill shall be acted upon at any session unless introduced at that session," to read: "No bill shall be introduced at any regular session of the legislature subsequent to the forty-fifth legislative day, except the general appropriation bill, bills to provide for the current expenses of the government and such bills as may be referred to the legislature by the governor by special message specifically setting forth the emergency or necessity requiring such legislation."

The 1960 amendment, which was proposed by S.J.R. No. 4 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 58,840 for and 56,532

against, amended this section to provide that the time limitation for the introduction of bills should be set by law.

Challenging bill as late. — Contention that Laws 1917, ch. 111 (former 4-8-1 to 4-8-4, 1953 Comp., relating to the state boundary commission) was unconstitutional because it was introduced late and was actually a new bill for appropriation of money, though purporting to be a substitute for another bill, was not well taken in view of decision in Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915), holding that courts cannot go behind an enrolled and engrossed bill, properly authenticated and found in office of secretary of state. State ex rel. Clancy v. Hall, 23 N.M. 422, 168 P. 715 (1917). *See* Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974), authorizing inquiry into question of whether a challenged act was passed within the constitutional limitation set in N.M. Const., art. IV, § 5.

"Bill". — The definition of a "bill," liberally construed, refers to that document which when passed by both houses and signed by the governor becomes an act. 1951-52 Op. Att'y Gen. No. 51-5336.

Memorials and resolutions may be introduced after 45th legislative day set by this section prior to the 1960 amendment limitation for introduction of bills. 1951-52 Op. Att'y Gen. No. 51-5336.

Amendments to constitution. — The amendment of this section in 1932 merely amended the original section, and did not in any way amend by implication N.M. Const., art. XIX, § 1, providing that amendment to the constitution may be proposed in either house at any regular session thereof. 1951-52 Op. Att'y Gen. No. 51-5336.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 54.

Injunctive relief against submission of constitutional amendment, statute, municipal charter or municipal ordinance on ground that proposed action would be unconstitutional, 19 A.L.R.2d 519.

82 C.J.S. Statutes § 22.

Sec. 20. [Enrollment, engrossment and signing of bills.]

Immediately after the passage of any bill or resolution, it shall be enrolled and engrossed, and read publicly in full in each house, and thereupon shall be signed by the presiding officers of each house in open session, and the fact of such reading and signing shall be entered on the journal. No interlineation or erasure in a signed bill, shall be effective, unless certified thereon in express terms by the presiding officer of each house quoting the words interlined or erased, nor unless the fact of the making of such

interlineation or erasure be publicly announced in each house and entered on the journal.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 21.

Iowa Const., art. III, § 15.

Utah Const., art. VI, § 24.

Wyoming Const., art. III, § 28.

Constitutional requirements. — Where a law in the form as enacted by the legislature is enrolled and engrossed and read publicly in full in each house, and deposited with the secretary of state, constitutional requirements are met. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Section requires enrolling and engrossing of resolution proposing constitutional amendment. Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917).

Effect of time limitations. — While N.M. Const., art. IV, § 5, constitutes the time during which the legislature may exercise its legislative prerogative of enacting laws, this section does not operate to restrain the legislature from complying fully with definitely imposed nondiscretionary lawmaking duties; it should not in reason be construed to defeat the performance of mandatory incidental duties that are indispensable to be performed in order to effectuate the lawmaking power already exercised in due and proper season. Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Enrolled bill doctrine. — Under "enrolled and engrossed bill" doctrine, adopted by supreme court, an enrolled and engrossed bill, properly signed and authenticated, approved by the governor and deposited with the secretary of state is conclusive as to the regularity of its enactment, and court cannot look behind it to the journals to ascertain whether constitutional requirements have been met. Thompson v. Saunders, 52 N.M. 1, 189 P.2d 87 (1947); State ex rel. Wood v. King, 93 N.M. 715, 605 P.2d 223 (1979); *see also* Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917); Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915); *but see*, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974), authorizing inquiry into question of whether a challenged act was passed within the constitutional limitation set in N.M. Const., art. IV, § 5.

Section inapplicable to veto. — The significance of the enrolled and engrossed bill attaches to its enactment and approval as a law, not to its veto. State ex rel. Wood v. King, 93 N.M. 715, 605 P.2d 223 (1979).

Authority of presiding officers. — Presiding officers of the two houses of the legislature have authority to approve interlineations and erasures so the enrolled and

engrossed bill may compare exactly with the original measure in the form in which it was finally passed in both houses of the legislature, but they may not make changes in the enrolled and engrossed bill which would modify the original bill. 1951-52 Op. Att'y Gen. No. 51-5341.

Correction of obvious error. — Where, subsequent to passage of a certain joint resolution proposing a constitutional amendment to N.M. Const., art. VII, § 1, an error appeared in the enrolled and engrossed bill, which referred to § 2 rather than § 1, the secretary of state could correct the obvious error in the joint resolution without the additional signatures of the presiding officers of both houses; however, this opinion does not purport to establish as precedent discretionary authority in the office of the secretary of state for making changes or corrections in enrolled and engrossed legislative enactments which changes have not been previously called to the attention of the attorney general's office for a determination of the nature of the alleged errors. 1957-58 Op. Att'y Gen. No. 58-196.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 65, 68, 90.

Effect of failure of officers of legislature to sign bills as required by constitutional provisions, 95 A.L.R. 278.

82 C.J.S. Statutes §§ 60, 61.

Sec. 21. [Alteration or theft of bill.]

Any person who shall, without lawful authority, materially change or alter, or make away with, any bill pending in or passed by the legislature, shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the penitentiary for not less than one year nor more than five years.

Sec. 22. [Governor's approval or veto of bills.]

Every bill passed by the legislature shall, before it becomes a law, be presented to the governor for approval. If he approves, he shall sign it, and deposit it with the secretary of state; otherwise, he shall return it to the house in which it originated, with his objections, which shall be entered at large upon the journal; and such bill shall not become a law unless thereafter approved by two-thirds of the members present and voting in each house by yea and nay vote entered upon its journal. Any bill not returned by the governor within three days, Sundays excepted, after being presented to him, shall become a law, whether signed by him or not, unless the legislature by adjournment prevent such return. Every bill presented to the governor during the last three days of the session shall be approved by him within twenty days after the adjournment and shall be by him immediately deposited with the secretary of state. Unless so approved and signed by him such bill shall not become a law. The governor may in like manner approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and such

as are disapproved shall be void unless passed over his veto, as herein provided. (As amended September 15, 1953.)

ANNOTATIONS

Cross references. — For consideration by regular sessions of the legislature convening during even-numbered years of bills of the last previous regular session vetoed by the governor, *see* N.M. Const., art. IV, § 5.

For computation of time, *see* 12-2A-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, § 10.

Iowa Const., art. III, § 16.

Montana Const., art. VI, § 10.

Utah Const., art. VII, § 8.

Wyoming Const., art. IV, § 8.

The 1953 amendment, which was proposed by S.J.R. No. 13 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 17,787 for and 10,351 against, substituted "approved by him within twenty days after the adjournment" for "approved or disapproved by him within six days after the adjournment" in the fourth sentence of this section.

I. GENERAL CONSIDERATION.

Scope of partial veto power. — A governor uses the partial veto properly if the veto eliminates or destroys the whole of an item or part, otherwise leaving intact the legislative intent regarding the remaining provisions in the bill. All language that relates to the subject to be proscribed by the veto must be vetoed for the veto to be valid. In addition, the remaining legislation must continue to be a workable piece of legislation. State ex rel. Stewart v. Martinez, 2011-NMSC-045, 270 P.3d 96.

Appropriations for judicial salaries are subject to governor's veto power. — Judicial salaries must annually be established by the legislature in an appropriations act, as set forth in Subsection E of 34-1-9 NMSA 1978, and are subject to the governor's partial veto authority. State ex rel. Cisneros v. Martinez, 2015-NMSC-001.

Unconstitutional veto must be disregarded and bill given effect intended by the legislature. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Words "the bill" or "it" include original blue jacketed copy of the bill, as well as the enrolled and engrossed copy. State ex rel. Wood v. King, 93 N.M. 715, 605 P.2d 223 (1979).

Effect of enrolled bill. — An enrolled bill which has been signed by the speaker and president of the respective houses, as required by N.M. Const., art. IV, § 20, and approved by the governor and deposited with the secretary of state, as required by this section, is conclusive upon the courts as to the regularity of its enactment, since the signatures are a solemn declaration by the officers of a coordinate department that the bill as enrolled was enacted and approved. Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915); *see* Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Use of mandamus to question veto. — The manner in which the governor exercises the veto power is not beyond judicial review or control when its exercise is beyond the governor's constitutional authority, therefore, mandamus is a proper proceeding in which to question the constitutionality of vetoes or attempted vetoes. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Certificate of two-thirds vote. — Fact that certificates of presiding officers and chief clerks of respective houses showing passage of a bill by two-thirds vote over objections of governor were not attached to enrolled and engrossed bill was immaterial. Earnest v. Sargent, 20 N.M. 427, 150 P. 1018 (1915), overruled on other grounds, Dillon v. King, 87 N.M. 79, 529 P.2d 745 (1974).

Return of partially vetoed bill to legislature not required. — Nothing in the language of the last sentence calls upon the governor, once he has acted upon a measure submitted to him, to return the same to the legislature if such action takes place prior to adjournment; he may do so, if he so desires, and in such event it is only the part approved or disapproved which he is called upon to resubmit to the legislature, as the parts of the bill approved become a law without further action upon the part of the legislature. State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957).

II. GOVERNOR'S APPROVAL OR VETO POWER.

Partial veto rendered the act unworkable and incomplete. — Where the legislature amended Subsection I of 51-1-11 NMSA 1978 to change the effective date of a formula-based contribution schedule to calendar years after 2012 and to set a fixed contribution schedule for the year 2012 at Schedule 3; the governor vetoed the provision that fixed the 2012 contribution schedule at Schedule 3; and the partial veto resulted in the elimination of a contribution schedule for 2012 which effectively exempted established employers from making mandatory contributions to the unemployment compensation fund for calendar year 2012, the partial veto was unconstitutional because what remained after the partial veto was an incomplete and unworkable piece of legislation and the court ordered that the legislation be reinstated as passed by the legislature. State ex rel. Stewart v. Martinez, 2011-NMSC-045, 270 P.3d 96.

Partial veto of act not appropriating money invalid. — The governor's veto of Laws 1981, ch. 39, § 129, the severability clause of the Liquor Control Act (60-3A-1 NMSA 1978), was unconstitutional under this section because that act does not appropriate money and the governor's power of partial veto is limited to bills appropriating money. Chronis v. State ex rel. Rodriguez, 100 N.M. 342, 670 P.2d 953 (1983).

Exercise of veto power requires judgment and discretion on the part of the governor and he cannot be compelled by the legislature or by this court to exercise this power or to exercise it in a particular manner. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Power of partial veto is the power to disapprove, a negative power to delete or destroy a part or item, and not a positive power to alter, enlarge or increase the effect of the remaining parts or items or to enact or create new legislation by selective deletions. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Act not nullified by partial veto. — Where governor exercised partial veto as to portion of Liquor Control Act, Laws 1939, ch. 236 (former 60-3-1 NMSA 1978 et seq.) in order to prohibit Sunday sales, such partial veto did not nullify the whole act. State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957).

Governor’s partial veto must eliminate the whole of an item to be valid. — Where the legislature provided for two separate judicial raises in two separate appropriations, the governor’s partial veto of one appropriation failed to eliminate the second appropriation providing for judicial raises. State ex rel. Cisneros v. Martinez, 2015-NMSC-001.

III. BILLS APPROPRIATING MONEY.

Bill appropriating money distinguished from general appropriation. — The language found in the proviso "any bill appropriating money" is not synonymous with the phrase "general appropriation bills". State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957).

Partial veto power broadened. — Purpose for inclusion of the terms "part or parts," "item or items" and "parts or items" in our constitution was to extend or enlarge the partial veto power thereby conferred beyond the partial veto power conferred by the constitutions of other states; however, this does not mean that there are no limitations on the partial veto of bills appropriating money. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

No authority to reduce an appropriation. — The governor’s partial veto authority does not include the power to reduce an appropriation. State ex rel. Smith v. Martinez, 2011-NMSC-043, 150 N.M. 703, 265 P.3d 1276.

Where the legislature appropriated $150,000 for operations of the New Mexico mortgage finance authority and the governor struck the single numerical digit "1" from the appropriation to reduce the appropriation to $50,000, the governor violated the separation of powers doctrine and the partial veto was invalid and unconstitutional. State ex rel. Smith v. Martinez, 2011-NMSC-043, 150 N.M. 703, 265 P.3d 1276.

Legislature may not abridge governor's veto power by subtle drafting of conditions, limitations or restrictions upon appropriations, and the governor may not properly distort legislative appropriations or arrogate unto himself the power of making appropriations by carefully striking words, phrases or sentences from an item or part of an appropriation. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Governor may not defeat legislative purpose. — The legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated, and the governor may not distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Various line item vetoes of General Appropriation Act of 1988 upheld as proper and not gubernatorial enactment or creation of new legislation by selective line item veto decisions. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Provisions governing expenditures. — Although only the legislature can make appropriations, and the veto power can only be exercised as provided in the constitution, a distinction is recognized between appropriations and expenditures and there is no inhibition in the constitution to inclusion within the general appropriation law of provisions governing how the amounts appropriated are to be expended. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Control of expenditures by executive. — The legislature may constitutionally provide in the general appropriation bill for the executive to control the expenditure of amounts appropriated. State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 430, 367 P.2d 925 (1961).

Conditions imposed on purchase of equipment. — Legislation imposing conditions on the purchase of automation and data processing equipment by district attorneys was not an unreasonable injection of the legislature into the executive managerial function, and the governor's veto of such legislation was invalid. State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988).

Bill carrying emergency clause becomes law upon approval of governor by his signing said bill. 1951-52 Op. Att'y Gen. No. 51-5338.

Calculation of final three days. — In determining the final three days, Sundays excepted, in which bills are presented to the governor, legislative days are now to be used as opposed to calendar days. 1967 Op. Att'y Gen. No. 67-45.

Calculating 20-day period following adjournment. — In computing time after adjournment for the governor to sign a bill, calendar days must be used; the day of the event is excluded. 1967 Op. Att'y Gen. No. 67-45.

Bills presented to the governor on last three days of session must be approved by him within 20 days following adjournment to become law; in measuring this period, adjournment day is excluded. 1959-60 Op. Att'y Gen. No. 59-28.

The method of computation of this time is as follows: the day of adjournment does not count, and the twentieth day does count. 1957-58 Op. Att'y Gen. No. 57-56.

Veto power strictly construed. — This power has generally been viewed as an executive encroachment on the legislative function (an exception to the doctrine of the separation of powers), and as such it must be strictly construed. 1979 Op. Att'y Gen. No. 79-13.

The provisions of this section prescribing the manner of veto are mandatory, and failure to follow the defined procedure would nullify the veto. 1979 Op. Att'y Gen. No. 79-13.

Veto procedure mandatory. — The provisions of this section prescribing the manner and time of performance of vetoes by the governor are mandatory. 1969 Op. Att'y Gen. No. 69-20.

Deviations fatal to veto. — Deviation from constitutional provisions relating to the veto of bills by the governor, in respect to manner and time of the performance of the acts prescribed, result in the veto becoming a nullity and the vetoed bills become law. 1969 Op. Att'y Gen. No. 69-20.

An attempted veto was invalidated by failure to return the bill to its house of origin within three days as required by this section. 1969 Op. Att'y Gen. No. 69-21.

Unnecessary technicalities should not be allowed to frustrate purpose of constitutional veto provisions. 1979 Op. Att'y Gen. No. 79-13.

Purpose satisfied so long as house given opportunity to consider veto. — So long as the legislative body is given the opportunity to consider the executive veto, constitutional purposes are satisfied. 1979 Op. Att'y Gen. No. 79-13.

Return of enrolled and engrossed copy not essential. — The failure of the governor to return the enrolled and engrossed copy of a senate bill to the senate with the veto message does not render the veto invalid under this section. 1979 Op. Att'y Gen. No. 79-13.

Resolutions and proposed constitutional amendments not subject to veto. — Resolutions and proposed constitutional amendments do not have to be presented to the governor for approval and are not bills. 1965 Op. Att'y Gen. No. 65-212.

Procedure for overriding veto. — A legislature has authority to promulgate rules governing the procedure of reconsidering a vote to override a chief executive's veto. 1969 Op. Att'y Gen. No. 69-147.

A legislature has power, absent constitutional provisions governing the subject, to decide the procedure to be used in considering a vetoed bill not acted upon before adjournment of the first session. 1969 Op. Att'y Gen. No. 69-147.

The legislature has authority to determine whether the house of origin must again vote to override the governor's veto at the next even-year session, when during the odd-year session the house of origin voted to override the veto but the other house either failed to override or failed to take any action before adjournment. 1969 Op. Att'y Gen. No. 69-147.

Right of partial veto quasi-legislative. — When the governor exercises his right of partial veto he is exercising a quasi-legislative function. State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957). *See* 1973 Op. Att'y Gen. No. 73-09.

The governor is exercising a legislative function in the use of a line-item veto. 1969 Op. Att'y Gen. No. 69-116.

Power of partial veto is power to disapprove. 1981 Op. Att'y Gen. No. 81-12.

Legislature cannot abridge governor's power. — The legislature cannot by putting purpose, subject and amount inseparably together and calling it an "item" coerce the governor to approve all of the appropriation of an agency or nothing. 1969 Op. Att'y Gen. No. 69-25.

Appropriation by resolution usurpation of governor's power. — To appropriate a specific sum for a specific purpose out of any fund by legislative resolution is to deny the governor his constitutional veto power and his line item veto power over bills appropriating money and is an unconstitutional usurpation of the chief executive's constitutional powers. 1971 Op. Att'y Gen. No. 71-22.

Partial veto power not limited to language appropriating money. — The power of partial veto is not limited to language appropriating money but extends to any part of a bill of general legislation which contains incidental items of appropriation. 1981 Op. Att'y Gen. No. 81-12.

Governor may strike entire items within an appropriation act which includes both the amount of money designated and the accompanying language pursuant to this section,

but if he wishes to veto either the amount of money or the accompanying language, he must veto both. 1969 Op. Att'y Gen. No. 69-25.

Distribution directions subject to veto. — The governor's power to veto "part or parts" of an appropriation bill allows him to veto specific directions as to the manner and purpose of distribution of an appropriation found in the general appropriation act so long as the appropriation in the approved portions of the act was not made dependent or contingent on the vetoed provision. 1969 Op. Att'y Gen. No. 69-25.

Governor may not defeat legislative purpose. — A partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the legislature, by the careful striking of words, phrases, clauses or sentences. 1981 Op. Att'y Gen. No. 81-12.

Test for validity of partial veto. — The test of whether a partial veto is valid requires more than a determination that legislative intent has been defeated, for indeed, that would be the result of any partial veto. Rather, the determination must be made whether the remaining language is so distorted by the veto as to create legislation inconsistent with that enacted by the legislature. 1981 Op. Att'y Gen. No. 81-12.

Sections upon which appropriation contingent not to be vetoed. — The governor cannot constitutionally veto provisos or conditions upon which the appropriation in the approved portions of the appropriation act was made dependent or contingent. 1969 Op. Att'y Gen. No. 69-25.

Since under Section 6 of House Bill 300 (general appropriations act), the entire appropriations act is made contingent upon the definitions contained in Section 1, upon Section 5 (repealing a previous appropriation) and upon Section 6 (the contingency clause), the governor could not line item veto Sections 1, 5 or 6 in whole or in part without vetoing all of House Bill 300. 1970 Op. Att'y Gen. No. 70-18.

Act not subject to partial veto. — As laws 1966, ch. 65 (67-12-1 NMSA 1978 et seq.), the Highway Beautification Act, is neither an appropriations bill nor a bill appropriating money, it does not qualify as one of those types of measures upon which the governor can exercise his partial veto power, and the governor did not act within his constitutional authority in attempting to veto portions thereof. 1966 Op. Att'y Gen. No. 66-133.

Reduction of item invalid. — The attempted reduction by the governor of any appropriation, where that result was not full disapproval of such an item, is ineffective and a nullity. 1953-54 Op. Att'y Gen. No. 53-5738.

Effect of invalid veto attempt. — A legislative enactment is not invalidated by an invalid attempt to partially veto it; rather, the entire bill becomes law. 1966 Op. Att'y Gen. No. 66-133.

Effect of line-item veto on appropriation. — When the governor line-item vetoed one item for $22,400 in the appropriation for the labor and industrial commission (now the employment services division of the human services department) the only reasonable legislative intent discernible was that the commission then had $22,400 of unearmarked funds which could be used for the general purposes of the agency. 1969 Op. Att'y Gen. No. 69-116.

The labor and industrial commission (now the employment services division of the human services department) could spend any of the unallocated $22,400 found in its appropriation after the governor had vetoed a line-item earmarking this amount for any purpose within its statutory powers. 1969 Op. Att'y Gen. No. 69-58.

Legislative intent to be considered. — Legislative intent should be considered in examining an appropriation law after the governor has exercised his line-item veto power. 1969 Op. Att'y Gen. No. 69-116.

Total appropriation unchanged. — If the governor were to veto a line item for "salaries" in a state agency's appropriation, vetoing both amount and purpose, the total amount appropriated to the agency would not change, but the agency would be left without an appropriation for any salaries. 1969 Op. Att'y Gen. No. 69-25.

Return of partially vetoed bill to legislature should be done. — A bill, whether wholly or partially vetoed, during the legislative session which reached the governor during any period prior to the last three calendar days of the legislative session should be physically returned to the house originating the bill accompanied by the governor's veto message. 1959-60 Op. Att'y Gen. No. 59-28 (characterizing contrary language in State ex rel. Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957), as a "permissive procedure").

Law reviews. — For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?" see 9 Nat. Resources J. 430 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 69, 70, 76, 78, 79.

Vote necessary to pass bill over veto, 2 A.L.R. 1593.

Governor disapproving bill in part or with modifications, 35 A.L.R. 600, 99 A.L.R. 1277.

Unconstitutional veto as protection against civil or criminal responsibility for act or omission in reliance thereon, 53 A.L.R. 268.

Effect of initiative and referendum clause, 62 A.L.R. 1352.

What amounts to adjournment within constitutional provision that bill shall become law if not returned by executive within specified time unless adjournment prevents its return, 64 A.L.R. 1446.

Power of executive to sign bill after adjournment or during recess of legislature, 64 A.L.R. 1468.

Sunday as included in computing time for presentation of bill, 71 A.L.R. 1363.

Effect of failure of officers of legislature to sign bills as required by constitutional amendment, 95 A.L.R. 278.

Stage at which statute passes beyond the power of the legislature to reconsider or recall, 96 A.L.R. 1309.

Validity of veto as affected by failure to give reasons for vetoing or objections to measure vetoed, 119 A.L.R. 1189.

Devolution, in absence of governor, of veto and approval powers, upon lieutenant governor or other officer, 136 A.L.R. 1053.

82 C.J.S. Statutes §§ 47 to 59.

Sec. 23. [Effective date of law; emergency acts.]

Laws shall go into effect ninety days after the adjournment of the legislature enacting them, except general appropriation laws, which shall go into effect immediately upon their passage and approval. Any act necessary for the preservation of the public peace, health or safety, shall take effect immediately upon its passage and approval, provided it be passed by two-thirds vote of each house and such necessity be stated in a separate section.

ANNOTATIONS

Cross references. — For computation of time, *see* 12-2A-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. III, § 22.

Iowa Const., amendment 40.

Utah Const., art. VI, § 25.

Limitation set on shorter but not longer periods. — This section places limitation upon the right of the legislature to provided a shorter period than 90 days within which laws shall become effective, but does not preclude it from fixing a longer period. State ex rel. N.M. State Bank v. Montoya, 22 N.M. 215, 160 P. 359 (1916).

Pursuant to this provision the legislature may provide that legislative enactments should go into effect more than 90 days after their enactment, but the legislature cannot make nonemergency legislation effective less than 90 days after enactment. R.H. Fulton, Inc. v. New Mexico Bureau of Revenue, 85 N.M. 583, 514 P.2d 1079 (Ct. App. 1973).

"Passage of this act". — In Laws 1969, ch. 144, § 66, a temporary provision calling for the commissioner of revenue (now the director of the revenue division of the taxation and revenue department) to provide a system for registration of certain contracts entered into prior to "passage of this act," the quoted phrase is used in its technical sense to mean July 1, 1969, its effective date; to refer to any prior date would violate this section. R.H. Fulton, Inc. v. New Mexico Bureau of Revenue, 85 N.M. 583, 514 P.2d 1079 (Ct. App. 1973).

Computing 90-day period. — In calculating effective date of a new act, the day of the event is to be excluded and the last day of the number constituting the specific period is included, so that statute becomes effective at first moment of applicable day after the event, such as first moment of ninetieth day after adjournment of legislature. Garcia v. J.C. Penney Co., 52 N.M. 410, 200 P.2d 372 (1948).

Legislative declaration of emergency contained in act is final, and is conclusive and binding upon the courts. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355 (1933).

Effect of emergency clause on referability. — The question of the referable character of a given act is not determined in one way or the other by its designation as an emergency measure. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934); Todd v. Tierney, 38 N.M. 15, 27 P.2d 991 (1933).

Limitation set on shorter but not longer periods. 1963-64 Op. Att'y Gen. No. 63-54.

Unauthorized effective date provision null. — The April 1 effective date provision of Laws 1964 (1st S.S.), ch. 17 (17-3-1 NMSA 1978) was a nullity since the legislature adjourned on February 25, and since the act did not pass as an emergency measure, the legislature was proscribed by the constitution from providing that the act would go into effect sooner than 90 days after adjournment. 1963-64 Op. Att'y Gen. No. 64-91.

January effective date. — Laws 1915, ch. 57 (since repealed), by reason of its proviso in § 24 thereof, went into effect on January 1, 1917, though that date was more than the constitutional 90 days after adjournment of legislature. 1915-16 Op. Att'y Gen. No. 15-1602.

1957 session laws. — The effective date of laws passed by the 1957 session of the legislature which did not bear an emergency clause was June 7, 1957. 1957-58 Op. Att'y Gen. No. 57-50.

Computing 90-day period. — In computing the 90-day time period under this section, the adjournment day is excluded, and the statute begins to operate on the last day of the 90. 1963-64 Op. Att'y Gen. No. 64-91.

The rule now supported by nearly all the modern cases is that time is computed by excluding the day, or the day of the event, from which time is to be computed and including the last day of the number constituting the specific period. 1957-58 Op. Att'y Gen. No. 57-50.

"Two-thirds vote" explained. — The provision in regard to the "two-thirds vote of the house" necessary to adopt an emergency clause does not mean two-thirds of all members elected, but, a quorum being present and acting, a concurrence of two-thirds of such members is sufficient. 1923-24 Op. Att'y Gen. No. 23-3677.

Bill carrying emergency clause becomes law upon approval of governor by his signing said bill. 1951-52 Op. Att'y Gen. No. 51-5338.

Law reviews. — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For comment, "Land Use Planning - New Mexico's Green Belt Law," see 8 Nat. Resources J. 190 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d Statutes §§ 360, 361, 363 to 373.

Conclusiveness of legislative declaration of emergency requiring statute to take effect immediately, 7 A.L.R. 519, 110 A.L.R. 1435.

Date or event contemplated by term "passage," "enactment," "effective date," etc., employed by statute in fixing time of facts or conditions within its operation, 132 A.L.R. 1048.

Failure of governor to sign bill until after the date at which it is to become effective, 146 A.L.R. 693.

Stock of private corporation, effective date of statute prohibiting municipalities from acquiring or subscribing to, 152 A.L.R. 499.

Removal or suspension of constitutional limitation as affecting effective date of statute previously enacted, 171 A.L.R. 1079.

82 C.J.S. Statutes §§ 399 to 411.

Sec. 24. [Local or special laws.]

The legislature shall not pass local or special laws in any of the following cases: regulating county, precinct or district affairs; the jurisdiction and duties of justices of the peace, police magistrates and constables; the practice in courts of justice; the rate of interest on money; the punishment for crimes and misdemeanors; the assessment or collection of taxes or extending the time of collection thereof; the summoning and impaneling of jurors; the management of public schools; the sale or mortgaging of real estate of minors or others under disability; the change of venue in civil or criminal cases. Nor in the following cases: granting divorces; laying out, opening, altering or working roads or highways, except as to state roads extending into more than one county, and military roads; vacating roads, town plats, streets, alleys or public grounds; locating or changing county seats, or changing county lines, except in creating new counties; incorporating cities, towns or villages, or changing or amending the charter of any city, town or village; the opening or conducting of any election or designating the place of voting; declaring any person of age; chartering or licensing ferries, toll bridges, toll roads, banks, insurance companies or loan and trust companies; remitting fines, penalties, forfeitures or taxes; or refunding money paid into the state treasury, or relinquishing, extending or extinguishing, in whole or in part, any indebtedness or liability of any person or corporation, to the state or any municipality therein; creating, increasing or decreasing fees, percentages or allowances of public officers; changing the laws of descent; granting to any corporation, association or individual the right to lay down railroad tracks or any special or exclusive privilege, immunity or franchise, or amending existing charters for such purpose; changing the rules of evidence in any trial or inquiry; the limitation of actions; giving effect to any informal or invalid deed, will or other instrument; exempting property from taxation; restoring to citizenship any person convicted of an infamous crime; the adoption or legitimizing of children; changing the name of persons or places; and the creation, extension or impairment of liens. In every other case where a general law can be made applicable, no special law shall be enacted.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. III, § 19.

Iowa Const., art. III, § 30.

Montana Const., art. V, § 12.

Utah Const., art. VI, § 26.

Wyoming Const., art. III, § 27.

I. GENERAL CONSIDERATION.

"General law" defined. — A "general law" is one that relates to a subject of a general nature, or that affects all the people of the state, or all of a particular class. State v. Atchison, T. & S.F. Ry., 20 N.M. 562, 151 P. 305 (1915).

If a statute is general in its application to a particular class of persons or things and to all of the class within like circumstances, it is a general law. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

To be a "general law," it is only necessary that the law be framed in general terms and operate on all objects of legislation distinguished by a reasonable classification. It must be general in its application to a particular class and all of the classes within like circumstances. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

A law is general in nature if the subject of the statute may apply to, and affect the people of, every political subdivision of the state. Keiderling v. Sanchez, 91 N.M. 198, 572 P.2d 545 (1977).

Meaning of "special law". — A "special law" is one made for individual cases, or for less than a class of persons, or subjects, requiring laws appropriate to peculiar conditions or circumstances. State v. Atchison, T. & S.F. Ry., 20 N.M. 562, 151 P. 305 (1915).

A special statute is one that relates to particular persons or things of a class, or is made for individual cases, or for less than a class of persons or things requiring laws appropriate to its peculiar condition and circumstances. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

A special law is generally defined as legislation written in terms which makes it applicable only to named individuals or determinative situations. Keiderling v. Sanchez, 91 N.M. 198, 572 P.2d 545 (1977); Battaglini v. Town of Red River, 100 N.M. 287, 669 P.2d 1082 (1983).

What special laws proscribed. — It is only local or special laws relating to enumerated subjects, and those to which a general law can be made applicable, that are proscribed by this section. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Special laws concerning localities. — Prohibition in this section against passage of local or special laws regulating county, precinct and district affairs has reference to such affairs as concern localities in their governmental or corporate capacity. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Though a county is created and holds title to its property as a state instrumentality, legislative control over such property cannot be exercised by local or special law. State ex rel. Dow v. Graham, 33 N.M. 504, 270 P. 897 (1928).

Special laws permissible where general law cannot be made. — When a general law cannot be made applicable, but a law is required, special laws are permissible. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

There is nothing in the constitution which would invalidate a legislative act merely because it is special in character provided a local situation exists which under particular facts makes a general law inapplicable. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

This section does not exclude special legislation when a law is required and general legislation cannot apply. Thompson v. McKinley County, 112 N.M. 425, 816 P.2d 494 (1991).

What classification authorized. — Statutory or constitutional provisions against special legislation on a subject do not prevent legislature from dividing legislation into classes and applying different rules as to each. But classification must be based on substantial distinctions, and not be arbitrary, and must apply to every member of the class or every subject under similar conditions, embracing all and excluding none whose condition and circumstances render legislation necessary or appropriate to them as a class. State v. Atchison, T. & S.F. Ry., 20 N.M. 562, 151 P. 305 (1915).

Weight given legislature's classification. — Legislative voice upon subject of classification for purposes of legislation is supreme so long as there is to be found any reasonable basis for the distinction employed; fact that it appears unreasonable to the courts is not decisive. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Correspondence with equal protection clause. — There is a close correspondence in meaning and purpose between the principles underlying the equal protection clauses of the state and federal constitutions and the general versus special law provisions of the Springer Act, 48 U.S.C. § 1471 and of this section. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

II. VALID LEGISLATION.

Repeat drug trafficking offenses. — Section 30-31-20B(2) NMSA 1978 applies to all second and subsequent drug trafficking offenses; it does not violate the prohibition against special laws of this section. State v. Bejar, 104 N.M. 138, 717 P.2d 591 (Ct. App. 1985), cert. quashed, 104 N.M. 54, 716 P.2d 245 (1986).

Juvenile detention homes in first class counties. — Statute authorizing first class counties to establish and equip juvenile detention homes was not, by reason of its limitation to first class counties, local or special law. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

School district consolidation. — Subsection B of 22-4-3 NMSA 1978 does not contravene the prohibitions imposed by this section, as the statute has applicability to any and all school districts which come within the classification created thereby, the reasons for the classification of school districts are substantial and the classification is clearly reasonable. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Community land grants. — In view of the difference in the nature and origin of different community land grants, the long legislative history of enactments relating to control or management of the lands of specific grants, the fact that there is some discretion in the legislature to determine in which cases special laws should be passed, and in view of the special presumptions indulged in favor of the validity of legislation, the prohibitions against special legislation are not applicable to enactments relating to the governing or managing bodies of specific community land grants or to the manner in which these bodies exercise their powers of control, management and disposition over grant lands. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

Irrigation districts. — Laws 1919, ch. 41 (73-9-1 NMSA 1978 et seq.), relating to irrigation districts, is a general law. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Funds for irrigation reservoirs under federal trust grant. — Laws 1961, ch. 181 to 183, appropriating funds for purpose of carrying out terms of a federal trust grant for the establishment of reservoirs for irrigation purposes do not violate this section; in carrying out the purposes of the trust the passage of a general law would be virtually impossible. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Arroyo Flood Control Act. — The Arroyo Flood Control Act (72-16-1 NMSA 1978 et seq.) does not violate this section. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Former Conservancy Act. — The Conservancy Act (Laws 1923, ch. 140, now repealed) is a general law within the purview of this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Intoxicating liquors. — Laws 1919, ch. 151 (later repealed), relating to intoxicating liquors, was not a special law within prohibition of this section. State v. Foster, 28 N.M. 273, 212 P. 454 (1922).

Larceny of livestock. — Portion of larceny statute (30-16-1 NMSA 1978) making it a felony to steal livestock regardless of the value thereof applies to all persons who steal livestock in this state and does not constitute special legislation contrary to this section. State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

Mishandling of certain animals. — Since no one was excluded from operation of Laws 1901, ch. 23, § 4, (40-4-32, 1953 Comp.), providing penalty for mishandling certain animals, it did not violate this section. State v. Brooken, 19 N.M. 404, 143 P. 479, 1915B L.R.A 213 (1914).

Tax for construction of road. — This section does not prohibit enactment of special law levying tax for construction of state road, the assessment and collection being governed by general law. Borrowdale v. Board of Cnty. Comm'rs, 23 N.M. 1, 163 P. 721, 1917E L.R.A. 456 (1915).

Tax levies for schools. — Laws 1919, ch. 83 (since repealed), relating to tax levies for schools, was not a local and special law violating this section. McKinley Cnty. Bd. of Educ. v. State Tax Comm'n, 28 N.M. 221, 210 P. 565 (1922).

Residency requirements for divorce. — Establishment of different residency requirements for jurisdiction in divorce cases involving the military than for the population in general is not violative of this section as the requirements have a uniform operation throughout the state. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

Highway construction. — Construction of a Y to become part of a main trunk highway traversing the entire state was not violation of this section. Gallegos v. Conroy, 38 N.M. 154, 29 P.2d 334 (1934).

Laws 1915, ch. 23, creating a designated route for a state highway extending into more than one county, did not violate this section, even though provision was made for working the road in one county only. Borrowdale v. Board of Cnty. Comm'rs, 23 N.M. 1, 163 P. 721, 1917E L.R.A 456 (1915).

Creation of county and authorization of bond use. — Laws 1921, ch. 48 (4-11-1 NMSA 1978 et seq.), creating a county and providing for bonds in aid thereof, and authorizing use of bonds for courthouse and jail purposes without submission to vote, was not special legislation. Martinez v. Gallegos, 28 N.M. 170, 210 P. 575 (1922).

Annexation. — Sections 4-33-1 to 4-33-7 NMSA 1978, relating to annexation with or without a contest, do not violate this section. Youree v. Ellis, 58 N.M. 30, 265 P.2d 354 (1954).

Statute (4-33-1 to 4-33-7 NMSA 1978) providing for change of county lines and boundaries and annexation of portion of county by another is available to the inhabitants of any area in state where prescribed conditions obtain and is therefore a general and not a special law. Crosthwait v. White, 55 N.M. 71, 226 P.2d 477 (1951).

Former Public Moneys Bill. — The "Public Moneys Bill" (Laws 1915, ch. 57, § 12, amended by Laws 1917, ch. 70, § 2, both since repealed) was not violative of this section, but was entirely general in its character, operating in every county throughout the state with like effect. State ex rel. Farmers' & Stockmen's Bank v. Romero, 24 N.M. 649, 175 P. 771 (1918).

Limitations on suit against builders. — Section 37-1-27 NMSA 1978, which limits the time in which actions may be brought against builders, does not violate guarantee of equal protection and is not special legislation under this section, since there is a rational basis for distinguishing between those covered by the statute and owners and tenants (both of whom maintain a greater degree of control over premises) and materialmen (who use more standardized goods). Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Limitation on appeal of tax judgment. — Laws 1921, ch. 133, § 436 (since repealed), limiting time for appeal from tax judgment, did not violate this section. Grant v. State, 33 N.M. 633, 275 P. 95 (1929).

Lien priorities. — Statutes elevating special assessment liens to parity with liens for general taxes did not violate constitutional provision against the enactment of special or local laws. Waltom v. City of Portales, 42 N.M. 433, 81 P.2d 58 (1938).

Suits against municipalities. — Prohibition against special legislation does not apply to 37-1-24 NMSA 1978, relating to suits against cities, towns and villages, since the statute is framed in general terms and operates on all causes of action distinguished by a reasonable classification. Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

State Bar Act. — State Bar Act (former 36-2-2 NMSA 1978, repealed) was not void as special legislation, special taxation or relinquishment of indebtedness to state or municipality. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931), abrogated, In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905.

The appropriation of educational funds to private schools is unconstitutional. — N.M. Const., Art. XII, § 3 expressly prohibits the appropriation of public funds to sectarian, denominational or private schools. A public school under the control of the state can directly receive funds, while a private school not under the exclusive control of the state cannot receive either direct or indirect support. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Where petitioners filed a complaint for declaratory judgment against the secretary of the New Mexico public education department seeking a declaration that the state issuing instructional materials to students attending private schools is unconstitutional, the New Mexico supreme court held that the Instructional Material Law, §§ 22-15-1 through 22-15-14 NMSA 1978, in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions, and private schools as agents for the benefit of eligible students, violates N.M. Const., Art. XII, § 3, because the constitutional provision expressly restricts the use of public funds to other than sectarian schools and expressly prohibits the appropriation of educational funds to private schools. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Furnishing of instructional material to students attending private schools is not an unconstitutional appropriation. — The Instructional Material Law (IML), 22-15-1 through 22-15-14 NMSA 1978, in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions and private schools as agents for the benefit of eligible students, does not violate this section because under the IML, no funds are appropriated to any private school; the mere indirect or incidental benefit to the private schools does not violate this section. Moses v. Skandera, 2015-NMCA-036, cert. granted, 2015-NMCERT-001.

Grandfather clause in licensing act. — Provisions of former Real Estate Broker's License Act (Laws 1951, ch. 224, now repealed), requiring real estate board to issue a broker's license to all persons who possessed a license under the prior act without regard to whether or not such persons were competent to act as such, while at the same time requiring an examination of all other persons, did not contravene this section. State v. Spears, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595 (1953).

Special Hospital District Act. — The Special Hospital District Act (Chapter 4, Article 48A NMSA 1978) does not unconstitutionally delegate legislative authority. State ex rel. Angel Fire Home & Land Owners Ass'n, Inc. v. South Central Colfax Cnty. Special Hosp. Dist., 110 N.M. 496, 797 P.2d 285 (Ct. App. 1990), cert. denied, 110 N.M. 330, 795 P.2d 1022 (1990).

III. INVALID SPECIAL LEGISLATION.

Establishing highway in single county. — Laws 1921, ch. 77, establishing a state highway wholly within one county, violated this section. De Graftenreid v. Strong, 28 N.M. 91, 206 P. 694 (1922).

Changing county lines. — Statute attempting to abolish Catron county and to distribute its territory between an existing county and a county to be created violated provision of this section prohibiting passage of local or special laws changing county lines, except in creating new counties. State ex rel. Dow v. Graham, 33 N.M. 504, 270 P. 897 (1928).

Reimbursement to municipal utilities. — The provisions of Laws 1959, ch. 289, attempting to provide reimbursement of relocation costs for municipally-owned utilities retrospectively to March 29, 1957, were in direct conflict with the section. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Amendment of court rule. — Laws 1965, ch. 132, attempting to amend Rule 41(e), N.M.R. Civ. P. (see now Rule 1-041 E NMRA), to provide for dismissal of actions not brought to conclusion within three years infringed on court's duties and was also void under this section and N.M. Const., art. IV, § 34. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Consent to particular negligence suit. — Laws 1949, ch. 55, granting consent by state to be sued for personal injuries suffered by four minors because of negligence on part of state penitentiary employees, was unconstitutional as a special law inasmuch as a general law could have been made applicable. Vigil v. State, 56 N.M. 411, 244 P.2d 1110 (1952).

Laws 1947, ch. 162, allowing a particular person to sue the state for injuries resulting from its negligence, was a special law; since a general law could have been enacted, the act in question was void. Lucero v. New Mexico State Hwy. Dep't., 55 N.M. 157, 228 P.2d 945 (1951).

Employers mutual company. — Under existing New Mexico case law, the legislation creating the employers mutual company appears to be an unconstitutional special law chartering or licensing an insurance company. Because the company is intended to be operated as a private entity, it is not clear that the exemption from the prohibition against special laws created by other states' courts for public corporations would save the legislation. 1990 Op. Att'y Gen. No. 90-25.

"General law" defined. 1971 Op. Att'y Gen. No. 71-74.

Meaning of "special law". — A "special" law is a law relating to particular persons or things within a larger class. 1971 Op. Att'y Gen. No. 71-74 and 1965 Op. Att'y Gen. No. 65-21..

Special laws permissible where general law cannot be made. — The constitution does not forbid special laws; it states that no special law shall be enacted where a general law can be made applicable. 1971 Op. Att'y Gen. No. 71-74.

Reasonable classification permissible. — Neither the guarantee of equal protection of the laws nor the prohibition against local or special laws denies to the legislature the right to classify along reasonable lines. 1969 Op. Att'y Gen. No. 69-08.

Some reasonable basis for the creation of a special class affected by a law must exist before a special law is constitutional. 1967 Op. Att'y Gen. No. 67-48.

Appropriation for county bridge. — An appropriation to aid in the construction of a county wagon bridge over the Pecos river is not a special act regulating county affairs and is not prohibited by this section. 1912-13 Op. Att'y Gen. No. 13-994.

Prescribing park locations. — Although Laws 1971, ch. 311, a temporary provision containing an appropriation to the state park and recreation commission (now the state parks division of the natural resources department) named specific locations where parks should be constructed, all of which were within the city of Albuquerque or Bernalillo county, the courts' reluctance to find legislative enactments unconstitutional or to "second-guess" the legislature on the need for a special law would probably result in a holding that this section is constitutional, even though it is of very narrow special interest and effect. 1971 Op. Att'y Gen. No. 71-74.

Qualifications for magistrates. — The requirement that magistrates in magistrate districts having a population of 100,000 persons or more be lawyers is a reasonable legislative classification and does not violate N.M. Const., art. II, § 18 or this section. 1969 Op. Att'y Gen. No. 69-08.

Voluntary reappraisal program. — Laws 1966, ch. 26 (former 72-2-21.1, 1953 Comp. et seq., relating to reappraisal of property) did not violate this section, as the act applied equally to all counties and to all real property within the respective counties, and the fact that participation by a county was optional and that certain incentives were offered to

induce participation did not render it special legislation within the meaning of the constitutional prohibition. 1968 Op. Att'y Gen. No. 68-13.

Age of Majority Act. — The Age of Majority Act (28-6-1 NMSA 1978) does not contravene this section because it applies to and affects alike, all persons and things of the same class. 1971 Op. Att'y Gen. No. 71-117.

Watercourse name change. — There is nothing in this section to prevent the adoption of legislation to change the name of a watercourse from Whiskey Creek to Rio de Arenas. 1912-13 Op. Att'y Gen. No. 12-889.

Moral claims against state. — Moral claims against the state can be recognized only by the legislature; it can, upon proper recommendation of the governor, grant relief to one injured while in the employ of the state. 1923-24 Op. Att'y Gen. No. 24-3767.

Laws abolishing counties. — The legislature would be prohibited from passing a special law that would in effect or specifically abolish a county. When two or more counties consolidate under a general statute, however, they effectively are abolished, and a new entity would emerge. 1987 Op. Att'y Gen. No. 87-55.

Community ditches in particular counties. — Sections 73-3-1 NMSA 1978 et seq., relating to community ditches and made applicable only to certain counties, were invalid because they are in conflict with constitutional provision against local or special laws. 1915-16 Op. Att'y Gen. No. 16-1790.

Discrimination between water right holders. — To provide legislatively for carriage loss allowance only to those with water rights within artesian conservancy districts unconstitutionally discriminates against those with water rights in areas outside of artesian districts, and is precisely the type of legislation which this section was designed to prevent. 1971 Op. Att'y Gen. No. 71-23.

Changing county lines. — A new county consisting of all territory included in an existing county and portions of another cannot be created by statute, which would be a local or special law, for the result is to change county lines and not to create a new county. 1937-38 Op. Att'y Gen. No. 37-1531.

Preferential placement on ballot. — Listing the incumbents first on the primary election ballot and requiring all other candidate positions to be determined by lot is special legislation violative of this section. 1975 Op. Att'y Gen. No. 75-13.

Payment of particular account. — Passage of a special bill to provide for payment from public funds of an account for supplies sold to the state in good faith but in violation of the State Purchasing Act would probably violate this section, which prohibits enactment of special laws where general law can be made applicable. 1965 Op. Att'y Gen. No. 65-21.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For article, "Indian Sovereignty and the Tribal Right to Charter a Municipality for Non-Indians: A New Perspective for Jurisdiction on Indian Land," see 7 N.M. L. Rev. 153 (1977).

For note, "Annexation of Unincorporated Territory in New Mexico," see 6 Nat. Resources J. 83 (1966).

For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M. L. Rev. 217 (1979-80).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes §§ 4 to 10, 32.

Special legislation as affected by distinction between political and nonpolitical nature, 50 A.L.R. 1163.

Statute regulating banks and trust companies as special or class legislation, or as denying the equal protection of the laws, 111 A.L.R. 140.

Construction and application of constitutional provisions against special or local laws regulating practice in courts of justice, 134 A.L.R. 365.

Workmen's Compensation Act as in violation of constitutional provision prohibiting special or local laws regulating practice in courts of justice, 135 A.L.R. 383.

Moratorium statute as special legislation, 137 A.L.R. 1380, 147 A.L.R. 1311.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries, 155 A.L.R. 789.

Constitutionality of statute appropriating money to reimburse public officer or employee for money paid or liability incurred by him in consequence of breach of duty, 155 A.L.R. 1438.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

What constitutes moral obligation justifying appropriation of public moneys for benefit of an individual, 172 A.L.R. 1407.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

Validity and construction, as to claim alleging design defects, or statute imposing time limitations upon action against architect, 93 A.L.R.3d 1242.

Validity of statutory classifications based on population - jury selection statutes, 97 A.L.R.3d 434.

Validity of statutory classifications based on population - zoning, building, and land use statutes, 98 A.L.R.3d 679.

Validity of statutory classifications based on population - intoxicating liquor statutes, 100 A.L.R.3d 850.

82 C.J.S. Statutes §§ 166, 168.

Sec. 25. [Validating unauthorized official acts; fines against officers, etc.]

No law shall be enacted legalizing the unauthorized or invalid act of any officer, remitting any fine, penalty or judgment against any officer or validating any illegal use of public funds.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 50.

Private utility, use of municipal funds, credit or power of taxation to restore or repair, 13 A.L.R. 313.

Constitutionality of statutory plan for financing or refinancing smaller political units by larger political unit, 106 A.L.R. 608.

Encouragement or promotion of industry not in nature of public utility, carried on by private enterprise, as public purpose for which tax may be imposed or public money appropriated, 112 A.L.R. 571.

Constitutionality of appropriation of public funds for benefit of widow or other relative of deceased public officer or employee, 121 A.L.R. 1317.

82 C.J.S. Statutes § 211.

Sec. 26. [Grant of franchise or privilege.]

The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.

ANNOTATIONS

Comparable provisions. — Utah Const., art. VI, § 28.

Wyoming Const., art. III, § 27.

Construction. — This section forbids the granting to any corporation or person of any rights, franchises, privileges, immunities or exemptions which shall not inure equally to all such corporations or persons. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Garbage disposal franchise. — Constitutional guaranties against the granting of exclusive privileges to any person or corporation do not deny to the state or municipal subdivisions the power to grant to an individual the exclusive privilege to collect and dispose of garbage as a sanitary measure. Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956).

State Bar Act. — State Bar Act (former 36-2-2 NMSA 1978, repealed) did not violate this section. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931), abrogated, In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905.

Fishing and hunting privileges. — This section would be violated by treating public waters as part of a privately owned enclosure under licensing statute (43-301(9), 1941 Comp., repealed) which required holders of fishing and hunting licenses to obtain owner's consent before fishing or hunting upon the enclosure. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Limits on carrier's tort liability. — Wrongful death statutes (41-2-1 to 41-2-4 NMSA 1978) which formerly placed ceiling on amount recoverable from common carriers but not on recovery from private persons did not violate this section. De Soto Motor Corp. v. Stewart, 62 F.2d 914 (10th Cir. 1932).

Use of trust funds for irrigation systems. — Appropriation of funds from trust to state engineer for irrigation purposes in systems in certain counties, pursuant to Laws 1961, ch. 181 to 183, did not violate this section. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Insurance monopoly. — Laws 1925, ch. 135, § 69, prohibiting more than one agent of fire insurance company in each town violated due process and special privileges

clauses of constitution. Franklin Fire Ins. Co. v. Montoya, 32 N.M. 88, 251 P. 390 (1926).

Privilege tax and exemption. — Former 2% privilege tax, previously imposed under 59-26-31 NMSA 1978, from which qualified benefit societies were exempted did not violate this section; power of legislature to classify for purposes of taxation and to impose tax in question must be conceded if any reasonable or sound basis can be found to sustain it. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.) aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Legislature may constitutionally limit municipal electric system's right to serve area. — Where the legislature limits a municipal electric system's right to serve in an area, that legislative limitation does not constitute an unconstitutional exclusive franchise in violation of this section. Springer Elec. Coop. v. City of Raton, 99 N.M. 625, 661 P.2d 1324 (1983).

Reimbursement of municipal utilities' relocation costs improper. — Provisions of Laws 1959, ch. 289, attempting to provide for reimbursement of relocation costs for municipally-owned utilities on primary highway system, retrospectively to March 29, 1957, involved an attempt to grant rights, privileges or immunities in an unequal manner so as to be contrary to this section. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Private signs illegal on state fences. — An adjoining property owner may not legally post "no trespassing," "no hunting" or directional signs or information signs in connection with his ranch upon right-of-way fences belonging to the state and erected by the state highway commission [state transportation commission]. 1953-54 Op. Att'y Gen. No. 54-5934.

Rural electric cooperatives subject to regulations. — Rural electrification cooperatives are subject to the same regulations by the highway commission and the county or municipality for the use of rights-of-way as any other public utility, and would be subject to the penal features of 67-8-13 and 67-8-14 NMSA 1978, relating to wiring requirements. 1951-52 Op. Att'y Gen. No. 52-5624.

Purpose. — This provision appears to be part of the determination to prevent unequal and partial legislation or action on the part of government, favoring certain groups or individuals. 1970 Op. Att'y Gen. No. 70-53.

Beverage products franchise. — Contract giving a company the exclusive right to sell its beverage products on city premises is permissible under this section. 2000 Op. Att'y Gen. No. 00-04.

Franchises upheld as industry regulation. — There is considerable legislation which may in practice result in an exclusive grant or license being granted by municipalities or executive agencies of the state (e.g., public utility franchises, state park concessions,

motor carrier certificates, licenses to conduct parimutual horse racing); generally, these franchises or licenses are upheld and construed as not violating constitutional provisions against the granting of exclusive privileges or franchises on the basis that the public interest is served by the regulation of the industry and that all citizens are afforded an equal opportunity to receive the franchise. 1970 Op. Att'y Gen. No. 70-53.

Award of competitive franchise reserved. — A municipality, as a matter of law, retains the right to grant to any privately operated public utility corporation a franchise to engage in direct competition with any other such corporation operating pursuant to franchise previously granted. 1957-58 Op. Att'y Gen. No. 58-236.

Occupancy of palace by historical society as permissive license. — Since statehood, occupancy by the New Mexico historical society of a portion of the palace of the governors in Santa Fe has been in the nature of a tenancy or permissive license and is revocable at the discretion of the board of directors of the museum of New Mexico (now replaced by the museum division of the educational finance and cultural affairs department) since no special right could be properly invested in a private corporation by law to entitle it to enjoy permanent occupancy of a public building under the control of the state. 1963-64 Op. Att'y Gen. No. 64-41.

Car rental franchise at municipal airport. — Some doubt exists as to the constitutionality of a municipality granting an exclusive franchise or concession for a car rental at an airport funded with local bond money and federal funds; but the courts could uphold these concessions on the theory that the airport is a proprietary function and that the exclusive concession is a managerial prerogative, reasonably incidental to the conduct of an efficient airport operation. 1970 Op. Att'y Gen. No. 70-53.

Public printing bill. — Laws 1937, ch. 168 (former 13-3-1 to 13-3-5 NMSA 1978), which was commonly referred to as the public printing bill, was constitutional. 1937-38 Op. Att'y Gen. 37-1704.

Law reviews. — For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M. L. Rev. 271 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16A Am. Jur. 2d Constitutional Law § 785.

Special privileges, "Mothers" Pension Act, 3 A.L.R. 1233, 88 A.L.R. 1068.

Discrimination by degrees of punishment based upon age, color or sex, 3 A.L.R. 1614, 8 A.L.R. 854.

Discrimination, degree of penalty for violating Sunday laws, 8 A.L.R. 566.

Special privileges, old-age pension or assistance acts, 37 A.L.R. 1524, 86 A.L.R. 912, 101 A.L.R. 1215.

Population as basis of classification of water companies, 45 A.L.R. 1170.

License fees, discrimination against foreign corporations in imposition of, 49 A.L.R. 726, 77 A.L.R. 1490.

Blue Sky Laws, constitutionality of, 87 A.L.R. 45.

Competition by grantor of nonexclusive franchise, or provision therefor, as violation of constitutional rights of franchise holder, 114 A.L.R. 192.

Discrimination between business by Sunday laws, 119 A.L.R. 752.

Inclusion of different franchise rights or purposes in same ordinance, 127 A.L.R. 1049.

Cooperative group furnishing service to members only, constitutionality of statutes as to, or of application to, of public utility statute, 132 A.L.R. 1496.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Discretion of court to refuse to entertain action for nonstatutory tort occurring in another state or country, 48 A.L.R.2d 800.

16B C.J.S. Constitutional Law § 652.

Sec. 27. [Extra or increased compensation for officers, contractors, etc.]

No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution.

ANNOTATIONS

Cross references. — For provision prohibiting appointment of legislators to civil office and acquisition of interest in certain contracts with state or municipality by legislator during or within one year after service of term, *see* N.M. Const., art. IV, § 28.

Comparable provisions. — Iowa Const., art. III, § 31.

Wyoming Const., art. III, § 30.

I. GENERAL CONSIDERATION.

Purpose of this section was to secure official independence. Dorman v. Sargent, 20 N.M. 413, 150 P. 1021 (1915).

"Officer" defined. — A person who is elected to public office for a fixed and definite term and whose functions and duties affect the public is an officer within meaning of this section, without regard to whether the office is one created by the constitution or by the legislature. State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 222 P. 654, 31 A.L.R. 1310 (1924).

The constitutional prohibition against diminishing an officer's compensation during his term in office does not apply to public employees who do not hold "terms of office". This precludes application of the provision to public employees such as juvenile probation officers who are not hired for a definite term nor particular period of time, but who are removable, consistent with applicable personnel rules, at the discretion of the appointing authority. Whitely v. New Mexico State Personnel Bd., 115 N.M. 308, 850 P.2d 1011 (1993).

II. EXTRA COMPENSATION.

Increase in retirement benefits. — An act increasing benefits to public employees, and permitting those employees who had annuitant status under the 1947 act to participate therein provided they elected so to do by paying an additional lumpsum of money to the association does not violate New Mexico constitution as payment of extra compensation for services already performed. State ex rel. Hudgins v. Public Employees Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954).

Pension law not to cover former employees. — This section precludes payment of pension to one who has left service of the state prior to enactment of pension law. State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942).

Payment for additional services proper. — This section does not prevent legislature from appropriating money to pay for services rendered state by a servant or contractor outside scope of his previous employment. Laws 1915, ch. 86, § 1, and Laws 1917, ch. 28, § 1, appropriating money to cover additional matter not included in the original appropriation, do not violate this section. State ex rel. Sedillo v. Sargent, 24 N.M. 333, 171 P. 790 (1918).

III. INCREASE OR DIMINISHMENT OF OFFICER'S COMPENSATION.

Increasing or decreasing officers' compensation prohibited. — Laws 1923, ch. 49, § 2, was unconstitutional insofar as it operated to increase or diminish compensation of relators, who were a county clerk, a county assessor and a county treasurer. State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 222 P. 654 (1924), 31 A.L.R. 1310.

Salary increases granted by county commissions under 4-44-12.3 NMSA 1978, for elected officials who were in midterm on the date the increases took effect, violates this section. State ex rel. Haragan v. Harris, 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173.

Salary increase required by contract. — Where the state and the unions entered into collective bargaining agreements that covered salary increases for union employees in fiscal year 2009; the state determined that the legislature had not appropriated sufficient funds to cover the full salary increases for union employees and implemented salary increases for all employees that differed from those required by the agreements; after the end of the 2009 fiscal year, the arbitrator determined that the legislature had appropriated sufficient funds to cover the salary increases required by the agreements and that the state's pay package violated the terms of the agreements; and the arbitrator directed the state to adjust the union employee's salary levels for fiscal year 2010 to reflect the level they would have received had the salary increases been provided as required by the agreements, the arbitrator's award did not require an unconstitutional retroactive salary increase because the payment was compensation that union employees were contractually entitled to receive under the agreements but had failed to receive because of the state's breach of the agreements. State v. AFSCME Council 18, 2012-NMCA-114, 291 P.3d 600, cert. granted, 2012-NMCERT-011.

Requiring out of pocket expenditures as diminishment of compensation. — To require of officers the performance of duties requiring the expenditure of expense money out of the officer's own pocket, without reimbursement, would probably run afoul of constitutional provision against enacting a law diminishing the compensation of officers during their term of office. State ex rel. Peck v. Velarde, 39 N.M. 179, 43 P.2d 377 (1935).

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

County school superintendent is county officer, whose salary may not constitutionally be changed during his term of office. 1957-58 Op. Att'y Gen. No. 57-67.

Police judge's salary cannot be increased during term of office. 1953-54 Op. Att'y Gen. No. 53-5683.

Salary of municipal judge may not ordinarily be increased during the term for which he was elected. 1979 Op. Att'y Gen. No. 79-27.

Compensation increase justifiable only with additional duties. — The governing body of a municipality may increase the compensation paid to a municipal judge during his term of office only if it also defines additional duties of the office. An increase in salary during the term for which a judge was elected would not be justified because of increased costs of living or an anticipated increase in the amount of work to be done by the judge pursuant to his ordinary duties. 1979 Op. Att'y Gen. No. 79-27.

Governing body may increase salary. — Subject to applicable law or charter, the governing body of a municipality may enact an ordinance to increase the salary of its

members, but members serving during the term in which such an ordinance is enacted cannot benefit from the increase during that term. 1981 Op. Att'y Gen. No. 81-17.

Commissioners may not employ additional clerical assistance for county treasurer, as the payment of an assistant would be a violation of this provision. 1919-20 Op. Att'y Gen. No. 20-2571.

Imposition of income tax as diminishment of salary. — The imposition of state income tax upon salaries of all public officers of state, having a fixed and definite term of office by constitution or statute, would amount to a reduction of their compensation and was invalid, and such officials who were entitled to claim exemption were not required to make any return of such salary. 1933-34 Op. Att'y Gen. Nos. 34-741, 34-742.

Effect of repeal of salary provision. — Where statute setting a salary for district attorneys as ex officio juvenile court attorneys was repealed and replaced with a statute (part of the Children's Code) establishing the office of children's court attorney, which section contained no salary provision for a district attorney's service as children's court attorney, district attorneys should continue to receive their pre-Children's Code rate until expiration of their terms of office. 1972 Op. Att'y Gen. No. 72-45.

Deduction of juror's compensation not illegal diminishment. — There would be no illegality in a plan which required a deduction from an employee's ordinary compensation in the amount of the compensation received for jury duty as there would be no diminishment; the persons affected would continue to receive in salary an amount equal to their regular compensation. 1975 Op. Att'y Gen. No. 75-33.

Governing body of municipality may provide salary for themselves during their term of office if there was no salary provided when they took office. 1969 Op. Att'y Gen. No. 69-02.

This provision does not prohibit members of governing body from exercising the option, provided in 3-10-3 NMSA 1978, of receiving the statutory salary, by adopting an ordinance. 1969 Op. Att'y Gen. No. 69-02.

Governing body may increase salary. — Subject to applicable law or charter, the governing body of a municipality may enact an ordinance to increase the salary of its members, but members serving during the term in which such an ordinance is enacted cannot benefit from the increase during that term. 1981 Op. Att'y Gen. No. 81-17.

Salary increases during term of office. — An interpretation of 4-44-12.3B NMSA 1978, permitting an increase of county commissioner salaries during their terms of office, violates the restriction on salary changes during a public officer's term found under this section. 1994 Op. Att'y Gen. No. 94-09.

Legislature's provision of salary for members improper. — Proposed legislation providing for a $300 a month salary for each member of the legislature would probably be held unconstitutional by the courts. 1971 Op. Att'y Gen. No. 71-18.

Coinciding commencement of terms and operation of charter. — Where a county clerk, assessor and sheriff were elected to their respective offices in November of 1968, while the county charter setting the salaries for these offices did not become effective until January 1, 1969, there was no violation of this section, since the term of these officers did not commence until January 1, 1969, as provided by N.M. Const., art. XX, § 3. 1969 Op. Att'y Gen. No. 69-134.

Newly appointed probate judge may receive increased salary designated for that office by legislation enacted by the last legislature. 1959-60 Op. Att'y Gen. No. 60-60.

Reclassification of office. — Where a reclassification of a county office has been made, a reelected county officer may be paid the higher salary after his reelection, without doing violence to this provision; after the reclassification has been made the official is not getting additional compensation as he has new duties and is a new officer under the new classification. 1957-58 Op. Att'y Gen. No. 58-45.

Increase to statutory salary rate. — Where an elected county officer receives a budgeted salary less than the statutory salary, a subsequent increase in salary to the statutorily allowed salary does not violate the constitutional prohibition against salary increases because the officers would only be receiving what they were entitled to receive. 1968 Op. Att'y Gen. No. 68-60.

Social security modification permissible. — This section does not prohibit the modification of the federal-state agreement providing for social security coverage for state employees. 1957-58 Op. Att'y Gen. No. 57-61.

Use of subterfuge improper. — Constitution makers did not contemplate allowance of subterfuge whereby an incumbent would resign and be immediately reappointed, thus avoiding the constitutional prohibition against salary increase during his term. 1953-54 Op. Att'y Gen. No. 54-5995.

Salaries of county officers. — For discussion of statutory and constitutional provisions as to salaries of county officers, including jailer, under 1915 Salary Law, see 1915-16 Op. Att'y Gen. No. 15-1494.

Section to secure official independence. 1969 Op. Att'y Gen. No. 69-02.

"Except as otherwise provided". — When the constitution itself says that the salary for a particular office "shall be as prescribed by law," without any limiting phrase, such a provision must be construed as bringing the office within the "except as otherwise provided in this constitution" proviso of this article. 1973 Op. Att'y Gen. No. 73-08.

Word "officer" herein is broadly interpreted. 1967 Op. Att'y Gen. No. 67-02.

“Officer” defined. — An officer is a public officer if the office he holds is elective for a definite and certain tenure in the manner provided by law and his duties affect and are to be exercised for the benefit of the public for a stipulated compensation paid out of the public treasury. 1967 Op. Att'y Gen. No. 67-02.

This provision applies to all public officers, whether their offices be created by the constitution or by the legislature. 1969 Op. Att'y Gen. No. 69-02.

This section applies to municipal employees. 1988 Op. Att'y Gen. No. 88-40.

Municipal judge is public officer for purposes of this section. 1979 Op. Att'y Gen. No. 79-27.

Mayors and councilmen are public officers, being persons elected to public office for fixed and definite terms whose functions and duties affect the public. 1961-62 Op. Att'y Gen. No. 62-85, 1981 Op. Att'y Gen. No. 81-17.

Police judge was an "officer" under this constitutional section, and his salary could not be increased. 1967 Op. Att'y Gen. No. 67-02.

Deputy not an officer. — Since a deputy county official does not have a fixed term of office and serves at the pleasure of the appointing officer, the constitutional prohibition against increasing or decreasing a salary during the term of an officer does not apply to a deputy. 1959-60 Op. Att'y Gen. No. 59-100 and 1953-54 Op. Att'y Gen. No. 54-5985.

Section applicable to agencies. — As this constitutional provision precludes the legislature itself from granting retroactive salary increases, the agency, department or commission cannot grant them. 1971 Op. Att'y Gen. No. 71-44.

If the legislature itself is precluded from granting retroactive salary increases, it naturally follows that so too are all agencies, departments or institutions of state government. 1961-62 Op. Att'y Gen. No. 62-28.

"Trading" tax exemptions for health care. — Repeal of the state income tax exemptions for teacher pensions and public employee pensions does not remedy constitutional defects of the proposed retiree health care act under a theory that those exemptions would be "traded" for retiree health care. Those exemptions are not property rights, irrepealable contractual entitlements, or pension benefits. Hence, elimination of the favorable tax treatment for current retirees is not consideration for a multi-million dollar health care plan that the state proposes to provide them. 1990 Op. Att'y Gen. No. 90-03.

Retroactive pay increase prohibited. — The language and import of this section prohibits the giving of retroactive pay increases to state employees. 1957-58 Op. Att'y Gen. No. 57-17.

The legislature does not have the power, by an emergency appropriation, to give retroactive pay increases to state employees. 1957-58 Op. Att'y Gen. No. 57-17.

Retroactive salary increases violate this section of the constitution. 1957-58 Op. Att'y Gen. No. 57-308.

The former health and social services department could not make retroactive payment for salary increases in January of 1971 which were originally authorized during the last six months of 1970. 1971 Op. Att'y Gen. No. 71-07.

Administrative errors correctible. — Where salary increases for certain agency employees were required by state personnel board rules, but were not granted through a clerical or administrative error, backdating these salary increases to the proper date would not be the type of retroactivity prohibited by the constitution. 1971 Op. Att'y Gen. No. 71-44.

It is unlawful for county hospital to give employees discount on bills for services provided by that hospital. 1970 Op. Att'y Gen. No. 70-39.

Sick leave plan constitutional if contracted for. — A sick leave benefit plan established by contract as part of the compensation for services rendered would not violate this section. 1977 Op. Att'y Gen. No. 77-08.

Including payment of accumulated benefits on retirement. — The constitution would not prohibit legislation authorizing local school boards to devise a plan of compensation which would include the payment of benefits to retiring employees for accumulated unused sick leave. The various prohibitions contained in the New Mexico constitution would not be violated so long as the benefit was, in fact, bargained for consideration in the form of compensation for services rendered as defined by contract between the employee and the local school board. 1977 Op. Att'y Gen. No. 77-18.

Benefits not to be retroactive. — If a school board chooses to adopt, as part of a plan of compensation, benefits for unused accumulated sick leave, those benefits cannot be provided retroactively. This section provides that no law shall be enacted giving any extra compensation to public employees after services are rendered. 1977 Op. Att'y Gen. No. 77-18.

Increase in retirement benefits. — Payment of matching funds by an affiliated public employer under former 10-11-9 NMSA 1978 for contributing service credit for services rendered by an employee after August 1, 1947 and prior to the effective date of his membership in retirement association does not violate this section. 1966 Op. Att'y Gen. No. 66-87.

Retroactive application of benefit improvement. — The provisions of a municipal ordinance which allow retiring employees to convert to vacation leave any sick leave that has been accumulated prior to retirement may not be applied to employees who have retired prior to the enactment of the ordinance. 1988 Op. Att'y Gen. No. 88-40.

If the New Mexico school for the deaf established a sick leave buyback policy that permitted retiring employees to receive compensation for accrued sick leave, the policy could be applied to hours of sick leave accrued prior to the implementation of the policy. 1988 Op. Att'y Gen. No. 88-73.

Contribution to retirement system based on reclassification. — The proposal of the corrections department to pay the additional retirement system contribution of correctional officer specialists required as a result of their reclassification from "regular" to "state police" members under the public employees' retirement system is precluded by this section. 1981 Op. Att'y Gen. No. 81-16.

City council members assuming additional duties. — Incumbent Santa Fe city council members, unable to receive pay increases voted for new council members but who assume duties and responsibilities not assumed by all members, may not receive additional compensation for the performance of such duties. 1987 Op. Att'y Gen. No. 87-05.

Nature of per diem payments. — Whether the payment of per diem is additional compensation or merely reimbursed must be determined from the language accompanying the words "per diem" and the surrounding circumstances. 1969 Op. Att'y Gen. No. 69-134.

Grant in excess of contract price improper. — Where an appropriation was made to the university for building and installing a heating plant, and a contract was made for less than the appropriation, which amount was paid the contractor who defaulted leaving unsatisfied claims, the legislature may not grant a sum in excess of the contract price, and the balance of the appropriation will revert to the treasury. 1925-26 Op. Att'y Gen. No. 25-3800.

Recovery of improper increases. — If illegal retroactive salary increases have in fact been made, the public moneys so paid should be recovered back from the recipients thereof. 1961-62 Op. Att'y Gen. No. 62-28.

Increasing or decreasing officer's compensation prohibited. — By virtue of the provisions of this article, there is a definite prohibition against increasing or diminishing the compensation of any officer during his term of office. 1959-60 Op. Att'y Gen. No. 59-100.

This section would prohibit the legislature from either increasing or decreasing the compensation provided for in 3-10-3 NMSA 1978, relating to compensation of governing

bodies of noncharter municipalities, during the term of office of those members of the governing body holding office at the time. 1969 Op. Att'y Gen. No. 69-02.

Laws which have been enacted subsequent to the adoption of N.M. Const., art. X, § 1 (relating to the classification of counties and the salaries of county officers) in 1923, 1927 and 1929 are unconstitutional to the extent that they increase or diminish the compensation of county officers who have a definite and fixed tenure of office. 1929-30 Op. Att'y Gen. No. 29-14.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 439, 455, 456, 464; 65 Am. Jur. 2d Public Works and Contracts § 171.

Per diem compensation of officers of legislature, 1 A.L.R. 286.

Extra compensation for past services, power of legislature to grant, 23 A.L.R. 612.

Operation of statute fixing public officer's salary on basis of population or of the valuation of the taxable property, as contravening a constitutional provision that the salary of a public officer shall not be increased or diminished during his term, 139 A.L.R. 737.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

67 C.J.S. Officers and Public Employees §§ 229 to 236; 22 C.J.S. Supp. Public Contracts §§ 24, 27; 81A C.J.S. States §§ 168, 173.

Sec. 28. [Appointment of present and former legislators to office; interest of legislators in contracts.]

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

ANNOTATIONS

Cross references. — For provision making one holding office of profit or trust in state, local or national government at the time of qualifying ineligible to serve in the legislature, *see* N.M. Const., art. IV, § 3.

For prohibition against receipt by or payment to legislator of compensation for services rendered as state officer or employee other than that received as legislator, *see* 2-1-3, 2-1-4 NMSA 1978.

For Governmental Conduct Act, *see* Chapter 10, Article 16 NMSA 1978.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 3, § 1 (Laws 1961), which would have restricted appointment of members of the legislature to other civil offices and their interest in government contracts, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 17,874 for and 31,451 against.

An amendment to this section proposed by H.J.R. No. 3 (Laws 2010), which would have allowed members of the legislature to be appointed to civil office if they resigned from the legislature prior to appointment and if the civil office had not been created or the emoluments of the office increased during the member's term in the legislature, was submitted to the people at the general election held on November 2, 2010. It was defeated by a vote of 115,923 for and 394,574 against.

I. GENERAL CONSIDERATION.

Comparable provisions. — Montana Const., art. V, § 9.

Utah Const., art. VI, § 7.

Wyoming Const., art. III, § 8.

II. APPOINTMENT TO CIVIL OFFICE DURING TERM.

A. IN GENERAL.

Section applies only to appointments and not to elections. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

"Civil office". — Requirements for a civil office are: (1) it must be created by the constitution, by the legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) its powers and duties must be directly or impliedly defined by the legislature or through legislative authority; (4) its duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior office created or authorized by the legislature and placed by it under the control of a superior officer or body; (5) it must have some permanency or continuity and not be only temporary or occasional. State ex rel. Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936).

B. PROHIBITED APPOINTMENTS.

Section applies to appointments to the judiciary. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

C. PERMITTED APPOINTMENTS.

Legislator may accept position as rural school supervisor under an act passed when he was not a member of the legislature. State ex rel. Baca v. Otero, 33 N.M. 310, 267 P. 68 (1928).

School teacher and school administrator. — The prohibitive language of this section did not apply to a school teacher and a school administrator who were also members of the state legislature, since their respective contracts were not "with the state" and were not authorized by any law passed during their respective terms. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

Position of special tax attorney is not a public office, and quo warranto is not the proper proceeding to test right of an individual to hold that position while serving as a legislator. State ex rel. Gibson v. Fernandez, 40 N.M. 288, 58 P.2d 1197 (1936).

III. CIVIL OFFICE CREATED OR BENEFITTED DURING LEGISLATOR'S TERM.

Disinterestedness sought. — The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure the constituents some solemn pledge of his disinterestedness. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

"Emoluments". — Term "emoluments" does not refer merely to the fixed salary that is attached to an office, but includes such fees and compensation as the incumbent of the office is by law entitled to receive; in determining whether there has been an increase in the emoluments of a particular office, the various items of salary and other compensation which the incumbent was entitled to receive under the statute previously in effect must be taken together. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Increase in judicial salaries. — Argument that prohibition against appointment of legislator during or for one year after term for which he was elected to civil office, the emoluments of which were increased during that term, did not apply to judicial appointments because at the time of this section's adoption the legislature lacked power to increase judicial salaries was without merit. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

IV. CONTRACTS WITH STATE OR MUNICIPALITY.

Consolidation of older statutes without material change. — Compensation policy covering state highway commission [state transportation commission] employees

engaged in road building was not invalidated by fact that a legislator was interested in such a contract when the act was passed, in view of fact that statute was not new, but brought older statutes together with no material amendment. State ex rel. Maryland Cas. Co. v. State Hwy. Comm'n, 38 N.M. 482, 35 P.2d 308 (1934).

Contract of employment with school district. — The contracts of employment made between the legislators and a local school district for positions as a school instructor and a school administrator were not made "with the state" and thus were not prohibited by this section. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

A general appropriations bill increasing the salaries of public school employees did not authorize the legislators' employment contracts with a local school district as a school instructor and a school administrator as prohibited by this section. State ex rel. Stratton v. Roswell Indep. Schools, 111 N.M. 495, 806 P.2d 1085 (Ct. App. 1991).

Provision is concerned primarily with issue of conflict of interest involved in serving in the legislature while receiving other compensation. 1969 Op. Att'y Gen. No. 69-111.

"Member of legislature". — A person who has been elected to the legislature, but who has not qualified, is not a member of that body for purposes of the constitutional prohibition against being appointed to any other civil office. 1961-62 Op. Att'y Gen. No. 62-145.

A person who was elected to the New Mexico legislature for the first time at the general election in November of 1962 is not a member of the legislature prior to being seated at the session to be convened in January, 1963. 1961-62 Op. Att'y Gen. No. 62-145.

Lieutenant governor not member of legislative branch. — While the lieutenant governor presides over the senate, he is not a member of the legislative branch of government, but a member of the executive department; hence, he is not included within the scope of this section. 1965 Op. Att'y Gen. No. 65-229.

Term for which elected. — In this section the phrase "during the term for which he was elected" means the entire term, unaffected by a resignation from the legislative office. 1969 Op. Att'y Gen. No. 69-49.

Legislator cannot, by resigning office, remove himself from ban of this section, since the constitution phrased the restriction in the language during the term for which he was elected. 1972 Op. Att'y Gen. No. 72-10.

Resignation by a member of the legislature does not affect prohibition against holding appointive civil office during entire term for which he was elected; to hold otherwise would defeat the plain intention of this constitutional prohibition, and would render the section meaningless. 1959-60 Op. Att'y Gen. No. 60-139.

The prohibition of this section is applicable during the term for which the legislator was elected regardless of whether he resigns his office prior to the expiration of the term. A legislator may not, therefore, become eligible for an appointive civil office merely by resigning his position in the legislature. 1963-64 Op. Att'y Gen. No. 63-23.

"Appointment" is not restricted to appointment by the governor or any other individual. 1970 Op. Att'y Gen. No. 70-02.

Members of the mining safety board are appointed within the meaning of this section. 1969 Op. Att'y Gen. No. 69-05.

"Civil office" defined. 1963-64 Op. Att'y Gen. No. 63-23.

Section applies to any civil office in the state, be it state, county or municipal. 1972 Op. Att'y Gen. No. 72-61.

Requirement of taking oath does not define position as office. 1969 Op. Att'y Gen. No. 69-49.

Compensation or refusal of compensation has no bearing on question of whether or not a position is a civil office. 1969 Op. Att'y Gen. No. 69-49.

Constitutional ban applies only to civil office created by state and would not apply to one created by the federal government. 1967 Op. Att'y Gen. No. 67-46.

Prohibition of section would not reach "employee" of state as distinguished from one seeking to occupy a "civil office". 1957-58 Op. Att'y Gen. No. 57-40.

Elements distinguishing civil office from employment are: (1) the office must be created by law; (2) the office must have delegated to it a portion of the sovereign power; (3) the powers and duties of the office must be defined by law; (4) the duties must be performed independently of any superior control except as established by law; and (5) the office must have permanence and continuity. Of these elements, any or all may exist in the case of an ordinary employment except the distinctive one that the sovereign power must be vested in the position by the legislature. 1979 Op. Att'y Gen. No. 79-01.

Legislator was not qualified to serve as justice of peace (now replaced by magistrate courts) during his term in office. 1959-60 Op. Att'y Gen. No. 59-167.

Executive boards, agencies, institutions or departments. — It is not lawful for a legislator to serve on an executive board, agency, institution or department even though his appointment was made in the same manner as are appointments to standing committees in each house of the legislature. 1959-60 Op. Att'y Gen. No. 59-79.

Members of the legislature may not serve on the following boards and commissions: livestock board, state police board, capitol buildings improvement commission (functions of which have now been transferred to the director of the property control division of the department of finance and administration), board of regents of El Rito normal school (northern New Mexico state school), state fair commission and miners' hospital. 1959-60 Op. Att'y Gen. No. 59-140.

Position of department secretary is civil office within the meaning of this section. 1979 Op. Att'y Gen. No. 79-01.

Appointment of a former state legislator as secretary of the taxation and revenue department did not violate this section, even though the salary for that office was increased as a result of an appropriations bill which was intended to adjust salaries of state employees generally rather than to increase the salary for a particular office or class of offices. 1991 Op. Att'y Gen. No. 91-03.

Board of regents. — Membership on boards of regents of New Mexico state university and northern New Mexico normal school constitutes holding civil office, and legislators serving thereon are not legal members of these boards. 1959-60 Op. Att'y Gen. No. 59-93.

School board member. — A member of the state legislature is not precluded by state law from serving as an elected local school board member. 1991 Op. Att'y Gen. No. 91-02.

Administrative assistant. — A member of the state legislature is prohibited from accepting employment as an administrative assistant in one of the state educational institutions set forth in N.M. Const., art. XII, § 11. 1957-58 Op. Att'y Gen. No. 57-40.

Section prohibits appointment of legislator to mining safety advisory board. 1969 Op. Att'y Gen. No. 69-05.

Membership on board of educational finance constitutes civil office, and it is a violation of this section for a legislator to be a member of this board. 1959-60 Op. Att'y Gen. No. 59-93.

Office of highway commissioner is "civil office" within the meaning of this section. 1957-58 Op. Att'y Gen. No. 57-20.

River compact commission. — The position of the New Mexico commissioner on the Pecos river compact commission is a civil office within the terms of the New Mexico constitution and, therefore, a legislator may not be appointed to that office during the term of his legislative position. 1969 Op. Att'y Gen. No. 69-49.

County planning and zoning board. — A state representative cannot legally serve as a regularly appointed member of a county planning and zoning board. 1972 Op. Att'y Gen. No. 72-14.

Sovereign power must be vested in position by legislature else it is not a public office. 1979 Op. Att'y Gen. No. 79-28.

Member of state legislature may also serve as elected mayor of the city of Albuquerque, the prohibitions against dual office-holding being inapplicable, as the office of mayor is elective. 1977 Op. Att'y Gen. No. 77-26.

A person may serve both as mayor of a city and as state senator at the same time. 1959-60 Op. Att'y Gen. No. 60-24.

It is legal for legislator to serve on city council. 1959-60 Op. Att'y Gen. No. 59-196.

Legislator is not disqualified from membership on city school board. 1912-13 Op. Att'y Gen. No. 13-1143.

It is legal for a member of the New Mexico legislature to be a member of the municipal board of education and, if not on such a board now, he may be a candidate for election to such a municipal board of education. 1959-60 Op. Att'y Gen. No. 59-196.

Legislator may accept position as high school supervisor. — A member of the legislature may be employed as high school supervisor and is entitled to payment for such services for it is merely an employment and not an office, and she was not such member when power to employ in such capacity was granted. 1931-32 Op. Att'y Gen. No. 31-220.

School director. — There is a difference between the word "appointed" and the word "elected," and a member of the New Mexico legislature is eligible to hold office of school director by virtue of an election. 1915-16 Op. Att'y Gen. No. 16-1776.

Section does not prohibit legislator's employment as high school teacher, since it is not an appointment to a "civil office". 1939-40 Op. Att'y Gen. No. 39-3082.

University professors not civil officers. — Neither a teaching professor in a state university nor a retired person holding emeritus status is a civil officer, and such individuals would be eligible to run for the state legislature. 1957-58 Op. Att'y Gen. No. 58-39.

Member of legislature may be a notary public. 1929-30 Op. Att'y Gen. No. 29-105.

State legislator may serve as peanut commissioner. — As the position of peanut commissioner is elected rather than appointed, this section does not operate to prevent

a state legislator from serving in that capacity during a term for which he was elected. 1979 Op. Att'y Gen. No. 79-34.

Office of city attorney does not qualify as "civil office" since the city attorney's position is created and the duties defined by the governing board of the municipality and he does not possess a delegation of a portion of the sovereign power of the government. 1970 Op. Att'y Gen. No. 70-64.

Senator may hold position of special investigator for district attorney. 1959-60 Op. Att'y Gen. No. 60-32.

Office of deputy county assessor is not civil office. 1955-56 Op. Att'y Gen. No. 56-6530.

Advisory council to agency. — The appointment of a state representative to serve on the advisory council to the department of hospitals and institutions (now replaced by the public health division of the department of health) does not violate this section which prohibits the appointment of a legislator to a civil office during the term to which he was elected as a legislator. 1977 Op. Att'y Gen. No. 77-03.

Commission for promotion of uniform law. — A member of the commissioners for the promotion of uniformity of legislation in the United States does not hold a civil office so as to disqualify him from being a member of the state senate. 1967 Op. Att'y Gen. No. 67-04.

Delegate to Western Interstate Nuclear Compact is not civil officer. 1970 Op. Att'y Gen. No. 70-37.

County manager is not a civil officer. — A legislator may serve as a county manager during the term for which the legislator was elected. 1977 Op. Att'y Gen. 77-02.

State representative may hold a county job. 1972 Op. Att'y Gen. No. 72-60.

This provision does not prohibit the appointment of a member of the legislature as an employee of a county or municipality as distinguished from a county or municipal officer. 1972 Op. Att'y Gen. No. 72-60.

Deputy county clerk is mere employee and not civil officer within the contemplation of this section. 1955-56 Op. Att'y Gen. No. 55-6235.

Selective service director. — Holding of position of state selective service director by a former legislator during the term of office to which he was elected is not barred. 1967 Op. Att'y Gen. No. 67-46.

Purpose. — This section is designed to prevent a member of the legislature from benefitting from an act of the legislature of which he is a member at the expense of the general welfare. 1965 Op. Att'y Gen. No. 65-208.

Disinterestedness sought. — This provision is designed to prevent a legislator from using his position as such to help create a civil office or increase the salary thereof with a view toward being appointed to the office as soon as his term expires. 1967 Op. Att'y Gen. No. 67-38.

Acceptance of prior salary insufficient to remove bar. — Appointment of a person who was a member of the legislature during 1965 to 1966 to an office, the salary of which was increased in 1965, even where the former legislator agreed to take the office at the salary which was provided for the office prior to his service in the legislature would probably be held illegal by the courts. 1967 Op. Att'y Gen. No. 67-38.

Office established by legislature. — The appointment of a member of the thirteenth legislature to be director of transportation (which office has now been replaced by secretary of transportation) violated this constitutional provision, as the thirteenth legislature had authorized this office. 1937-38 Op. Att'y Gen. No. 37-1744.

Section applied to appointment as department secretary. — A member of the legislature whose term expired on December 31, 1978, would have been elected for a term during which the civil offices of department secretaries were created under the Executive Reorganization Act (9-1-1 to 9-1-10 NMSA 1978), and under this section such a person cannot be appointed as a secretary of a cabinet department in 1979, the year following the term in which the position of secretary was created. 1979 Op. Att'y Gen. No. 79-01.

Employment on commission enforcing new tax law. — A member of the legislature which enacted former income tax law could not accept employment by former state tax commission which enforced it during his term as such member, nor within a year after his term expired. 1933-34 Op. Att'y Gen. No. 34-711.

Increase in judicial salary. — In view of the fact that a justice of the peace (now replaced by magistrate courts) was a civil officer, and that the emoluments of the office were increased during the 1913 legislature, a member of the legislature should not be appointed to such office. 1914 Op. Att'y Gen. No. 14-1334.

Establishment of indigent defense fee schedule. — The establishment of a fee schedule under the Indigent Defense Act (31-16-1 NMSA 1978 et seq.) for representation of indigent defendants does not preclude attorney-legislators who served when the act was enacted in 1965 from being appointed and paid under that schedule. 1968 Op. Att'y Gen. No. 68-32.

Legislators may serve as members of commissions created by legislature and are entitled to receive per diem and expenses as provided by the act at the existing rates. 1951-52 Op. Att'y Gen. No. 51-5364.

Illegally appointed director to recover salary and expenses. — Appointment of member of the legislature which created the position of director of the division of field administration was in violation of this section, and in addition, if the position was a civil office, he could not be legally appointed thereto. But since he rendered services and incurred expenses and was a de facto officer, no de jure director having been appointed, and the state received benefits therefrom, his claim for salary and expenses should be allowed. 1939-40 Op. Att'y Gen. No. 39-3119.

Applicability. — Prohibition in the latter part of this section appears to apply only to the state and municipalities and not to counties. 1955-56 Op. Att'y Gen. No. 56-6530.

Effect of Conflict of Interest Act. — The Conflict of Interest Act (now Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978) does not disqualify or restrict a nonprofit organization's ability to enter into contracts with state agencies managed by a board of directors having as one of its members a state legislator. 1990 Op. Att'y Gen. No. 90-17.

Damages authorized against violators. — A legislator and other directors of a nonprofit organization may be found liable for damages for breach of fiduciary duty if they intentionally enter into a contract which is invalid under this section. 1990 Op. Att'y Gen. No. 90-17.

Authorization of alternative method of financing. — Where the power of the capitol buildings improvement commission (functions of which have now been transferred to the director of the property control division of the department of finance and administration) to furnish capitol buildings existed since 1945, while legislation in 1965 simply provided another method of financing for such purposes if the commission and the state board of finance decided to do so, a legislator who served in the 1965 session was not precluded from contracting with the state for capitol furnishings. 1965 Op. Att'y Gen. No. 65-208.

Fixing of publication rates. — This section is not violated by a member of the legislature who owns stock in a newspaper which publishes legal notices, because Laws 1912, ch. 49 (since repealed) fixed a maximum rate for the publication of delinquent tax lists and legal notices already required by law; the same is true with reference to the printing of forms and blanks required by Laws 1912, ch. 85, § 48 (17-3-7 NMSA 1978, relating to hunting and fishing licenses). 1912-13 Op. Att'y Gen. No. 12-916.

State legislator as employee of private contractor. — A private entity, either for-profit or nonprofit, that has a state legislator within its organization may enter into a contract

with the state provided that the contracting process is conducted in accordance with constitutional and statutory requirements. 2003 Op. Att'y Gen. No. 03-01.

A legislator who complies with legislative rules is entitled to receive his legislative per diem. His private sector employ is free to determine whether it should also compensate him for that day's work. 2003 Op. Att'y Gen. No. 03-01.

Contract of employment with school district. — A legislator is prohibited from entering into a contract of employment with a school district for one year after his term, if said contract was authorized by any law passed during his term. 1988 Op. Att'y Gen. No. 88-20.

Operation of school bus route. — A legislator is not barred by this section from contracting with a school bus district for the operation of a school bus route, authorization for which has been in our statutes for a great number of years. 1961-62 Op. Att'y Gen. No. 61-42.

Contracts under Indigent Defense Act. — The attorney-legislators who served in the second session of the twenty-eighth legislature may continue to be appointed to represent indigent defendants and may receive fees and expenses as authorized in the Indigent Defense Act (31-16-1 NMSA 1978 et seq.), but such attorneys would be precluded from entering into a contract authorized by 31-16-9 NMSA 1978 during the year after the term for which they had been elected. 1968 Op. Att'y Gen. No. 68-32.

Consulting services. — This section prohibits a water users association from contracting with a firm whose president and stockholder is a state legislator for consulting services in connection with a water installation project funded partly through a state contract authorized by the state legislature during the legislator's term in office. 1991 Op. Att'y Gen. No. 91-11.

Contract with community action agency. — A legislator contracting with a community action agency will have to ascertain how the agency is organized to determine whether the prohibitions of this section will apply. If it is a county, county agency or a private agency, the contract will not be covered by the provision, but if it is a municipality or municipal agency, the contract will be prohibited if it was authorized by law during the legislator's term. 1989 Op. Att'y Gen. No. 89-34.

Contract with municipal housing authority. — A municipal housing authority is designated by statute as an agency of a city, and this section applies to any interest a legislator may have in a contract with the housing authority authorized by law during his term. 1989 Op. Att'y Gen. No. 89-34.

Surety bond for new commission. — A member of the legislature which created the oil and gas accounting commission cannot write a surety bond for that commission. 1959-60 Op. Att'y Gen. No. 59-138.

Enactment of procedural purchasing act not determinative event. — This section prohibits a legislator, for the duration of his term or for one year thereafter, from entering into those contracts executed pursuant to the Public Purchases Act which were authorized by laws enacted while the legislator was a member of the legislature, the year in which the contract was authorized, and not the year in which the procedural Public Purchases Act was enacted, being determinative. 1967 Op. Att'y Gen. No. 67-133.

Violation of contract prohibition not criminal. — While this section prohibits any member of the legislature during the term for which he was elected and for one year thereafter from being interested directly or indirectly in any contract with the state or municipality which was authorized by any law passed during such term, such acts are not made a criminal offense. 1965 Op. Att'y Gen. No. 65-229.

Injunction or invalidation proceeding appropriate. — Execution of a contract prohibited by this section could be enjoined by any party having legal standing; if the contract had already been entered into, the appropriate procedure would be to bring a civil action to invalidate the contract. 1965 Op. Att'y Gen. No. 65-229.

Injunction could be brought against public officials authorized to execute contracts on behalf of the state or to disburse public funds for violation of this section by any person having standing to sue. 1967 Op. Att'y Gen. No. 67-133.

Prohibited contracts generally. — This section precludes a nonprofit organization from entering into a contract with the state or a state agency if the organization, within one year of entering the contract, had as a director a member of the legislature and the contract was authorized during that member's term. 1990 Op. Att'y Gen. No. 90-17.

Law reviews. — For comment, "Legislative Bodies - Conflict of Interest - Legislators Prohibited From Contracting With State," see 7 Nat. Resources J. 296 (1967).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 64 to 86, 338 to 347.

Constitutional or statutory inhibition of change of compensation of public officer as applicable to one appointed or elected to fill vacancy, 166 A.L.R. 842.

67 C.J.S. Officers and Public Employees §§ 24, 27 to 33, 204.

Sec. 29. [Laws creating debts.]

No law authorizing indebtedness shall be enacted which does not provide for levying a tax sufficient to pay the interest, and for the payment at maturity of the principal.

ANNOTATIONS

State Revenue Bond Act. — Former State Revenue Bond Act (Laws 1963, ch. 271, now repealed) did not violate this section. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Street improvement bonds. — Special street improvement bonds authorized under Laws 1947, ch. 122 (repealed) did not create a debt as contemplated by this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

State Highway Bond Act. — This section was not violated by the former State Highway Bond Act (Laws 1912, ch. 58). Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Public debt, permissive or mandatory character of legislation in relation to payment of, 103 A.L.R. 812.

81A C.J.S. States § 217.

Sec. 30. [Payments from treasury to be upon appropriations and warrant.]

Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.

ANNOTATIONS

Cross references. — For limitations on subjects to be embraced in general appropriation bills, and provision that other appropriations should be made by separate bills, *see* N.M. Const., art. IV, § 16.

Comparable provisions. — Wyoming Const., art. III, § 35.

Provision is designed to insure legislative control of public purse. Gamble v. Velarde, 36 N.M. 262, 13 P.2d 559 (1932).

Construction. — The constitutional limitation upon legislative power and practice should receive a reasonable construction with a view to effectuate their sound purpose, without unnecessarily or arbitrarily hampering legislation. Gamble v. Velarde, 36 N.M. 262, 13 P.2d 559 (1932).

Section prohibits expenditure of money unless appropriated by legislature, and an appropriation act is required to fix the amount and object of expenditure. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Salary provisions as continuing appropriations. — Where the constitution creates an office and prescribes the salary for it, the necessity for legislative appropriation is dispensed with on the ground that such a provision in a constitution is proprio vigore an appropriation; this rule has been extended to a general law fixing the amount of salary of a public officer, and prescribing its payment at particular periods. State ex rel. Fornoff v. Sargent, 18 N.M. 272, 136 P. 602 (1913).

Laws 1915, ch. 59, creating the office of state traveling auditor (since abolished) and fixing his salary, in connection with Laws 1889, ch. 32, §§ 2 and 3 (since repealed) and Laws 1897, § 2597, amounted to a continuing appropriation for such salary. Dorman v. Sargent, 20 N.M. 413, 150 P. 1021 (1915).

Laws 1905, ch. 5 (since repealed) which created the office of the superintendent of insurance and provided a permanent salary for him, amounted to a continuing appropriation out of the insurance fund and required no subsequent appropriations by the legislature. State ex rel. Chavez v. Sargent, 18 N.M. 627, 139 P. 144 (1914).

There is considerable doubt as to validity of setting a salary in the appropriation bill, which is different than that provided for in a specific statute. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

Withdrawal of contributions only proper upon appropriation. — Although there may be no legislation conferring upon the state board of public accountants authority to solicit voluntary contributions from its members, once such contributions are deposited in the state treasury, where they become commingled with other funds of the board, they can only be withdrawn through appropriations made by the legislature upon warrants drawn by the proper officer. New Mexico State Bd. of Pub. Accountancy v. Grant, 61 N.M. 287, 299 P.2d 464 (1956).

Refunds unlawful. — Former 19-1-15 NMSA 1978, relating to erroneous payments on lease or sale of state lands, violated this section insofar as it assumes to authorize repayments of moneys covered into the treasury and funded, as the property of the state, on the mere say-so of an administrative officer. McAdoo Petroleum Corp. v. Pankey, 35 N.M. 246, 294 P. 322 (1930).

Excise tax refund provisions valid. — Laws 1931, ch. 31 (former 64-26-31, 1953 Comp. et seq.), relating to refund of certain gasoline excise tax funds, sufficiently complied with provisions of this section. Gamble v. Velarde, 36 N.M. 262, 13 P.2d 559 (1932).

Appropriation to constitutional convention. — Expenditure of funds which had been appropriated to the constitutional convention could not be directed or controlled by the

president thereof. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Appropriation is only statement of maximum which may be spent. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Mandamus for drawing of warrant denied. — An irrigation district has no clear legal right to draw on income from land grant by congress, the use of which was limited to establishment of reservoirs and hydraulic engineering, and mandamus directed to the drawing of warrant thereon will be denied. Carson Reclamation Dist. v. Vigil, 31 N.M. 402, 246 P. 907 (1926).

Complaint to recover fees. — In action to recover license plate fees, complaint not charging that fees were collected for or on behalf of state or that they had been turned over to state treasurer was not defective for failing to show that an appropriation had been made by the legislature for refund of moneys collected. Lord v. Gallegos, 46 N.M. 221, 126 P.2d 290 (1942).

Provision is designed to insure legislative control of public purse. 1967 Op. Att'y Gen. No. 67-108.

This constitutional provision is directed toward state's money in treasury and its purpose is to insure legislative control and to exclude executive control over the purse strings of the state. 1965 Op. Att'y Gen. No. 65-151.

Applicability. — Provisions of this section are not applicable in instances where the funds are not paid out of the treasury by appropriation. 1961-62 Op. Att'y Gen. No. 62-88.

Federal funds in suspense accounts not affected. — New Mexico may accept federal matching funds which are eventually to be paid to charitable or benevolent institutions, which moneys, under 6-10-3 NMSA 1978, are put in suspense accounts and not deposited in the state treasury, without violating this section, since this money never becomes money of the state. 1967 Op. Att'y Gen. No. 67-07.

Section inapplicable to agency's disposition of appropriation. — This section imposes limits on the legislature's power to appropriate money and the treasurer's power to disburse it, but has nothing to do with an administrative agency's disposition of its appropriation. 1975 Op. Att'y Gen. No. 75-10.

Appropriations required. — To specify a purpose or use for public funds, the legislature is required by the constitution to prescribe the amount appropriated and the object to which it is to be applied. 1972 Op. Att'y Gen. No. 72-15.

With exception of payment on public debt, no money can be paid out of state treasury except upon appropriation made by legislature. 1931-32 Op. Att'y Gen. No. 31-75.

Appropriation for refund of erroneous payments. — The constitutional provision has been held by the court to prohibit the payment of any moneys out of the state treasury except upon appropriation, even though the moneys were erroneously paid to the state of New Mexico. 1955-56 Op. Att'y Gen. No. 56-6477.

Governor may not spend revenue-sharing funds without legislative appropriation. 1973 Op. Att'y Gen. No. 73-09.

Contributions by universities to executive department salaries. — Contributions by state universities to executive department officer salaries are consistent with the New Mexico constitution only if the legislature appropriated the contributions for that purpose or if the contributions are paid in exchange for services the cabinet officers perform for the universities. 2007 Op. Att'y Gen. No. 07-06.

Encumbrance of unappropriated sums improper. — A state agency may not undertake to legally obligate itself or the state to pay sums by contract beyond such amounts as are currently appropriated to such agency, nor may it purport in any manner to bind future legislatures to provide appropriations for payment of rentals for such public body. 1963-64 Op. Att'y Gen. No. 64-74.

Pledging of current funds for subsequent years not permissible. — The pledging of funds for one fiscal year to meet obligations of one or more subsequent fiscal years in order to prevent a reversion pursuant to specific language in the general appropriations act would violate this constitutional appropriation requiring legislative appropriations. 1967 Op. Att'y Gen. No. 67-71.

Restrictions on term of agency lease. — In the absence of express statutory provision otherwise providing, a state agency, department, bureau or commission may enter into a lease for rental of office space or other similar facilities only for such period of time as there exists legislative appropriations or other funds which are available to cover rental payments which will become legally due under the provisions of the lease contract. 1963-64 Op. Att'y Gen. No. 64-74.

A lease contract can be entered into by a state agency, department, bureau or commission for longer than the period of time for which the legislature has made appropriations or other funds available only if it expressly provides that the public body is under no obligation to continue such contract or to pay rental sums if legislative appropriations are not available or if the legislature by subsequent enactment restricts, reorganizes or abolishes such agency. 1963-64 Op. Att'y Gen. No. 64-74.

Authority required for tax refund. — An overpayment of a succession tax may not be refunded except on authority of the legislature. 1929-30 Op. Att'y Gen. No. 30-105.

Refunds unlawful. — In the absence of a specific refund statute in the act creating the state bank examiner (now director of the financial institutions division of the commerce

and industry department), his refund of a registration fee would be in contravention of this section and therefore unlawful. 1957-58 Op. Att'y Gen. No. 58-165.

Refund of nomination fees by state fair permissible. — A refund by the New Mexico state fair of nomination fees paid for the 1965 and 1966 New Mexico thoroughbred and quarter horse futurities upon the inadvertent nomination of certain ineligible race horses would not violate this section, as the fees had been deposited in a trust account, and had never reached the state treasury, and furthermore, the state fair had received this money not as fees paid to a state agency but as fees paid to a licensee of the state racing commission. 1965 Op. Att'y Gen. No. 65-151.

Correction of clerical error not improper. — Where the crediting of $677.35, which was really federal and not state money, to the general fund instead of to the vocational rehabilitation account was a clerical error, it could be corrected without violation of this section. 1963-64 Op. Att'y Gen. No. 64-04.

Appropriations to specify sums and objects. — It is axiomatic that under this section of the constitution money may be paid out of the treasury only upon appropriation made by the legislature, and that every appropriation law must distinctly specify the sum appropriated and the object to which it is to be applied. 1957-58 Op. Att'y Gen. No. 58-08.

Aligned with the power over appropriating funds to the state treasury for the operation of the state government is the authority to designate and specify how these funds will be spent. 1968 Op. Att'y Gen. No. 68-64.

Object of appropriation sufficiently specific. — Appropriation to state board of finance "for emergencies and necessary expenses affecting the public welfare" sufficiently specified the object of the appropriation; the legislature itself performed the legislative duty of making the appropriation and delegated to the state board of finance the power to make the factual determination on which disbursement of the appropriated fund hinges. 1959-60 Op. Att'y Gen. No. 59-79.

Specified purposes controlling. — Funds which have been appropriated to an agency may be expended only for the purpose or object specified in the appropriation. 1957-58 Op. Att'y Gen. No. 57-305.

Funds appropriated by the legislature to be used for acquisition of land and planning expenses for long-range capitol grounds and building improvement may not be used for the purpose of supervision, salvage planning, maintenance and protection of the old penitentiary buildings and site. 1957-58 Op. Att'y Gen. No. 57-305.

Bonds issued for airport other than the one specified. — Where the legislature clearly and unambiguously authorized issuance of severance tax bonds to enlarge the facilities of an existing airport in Questa, those bonds could not be used for a new airport at a site different from the existing airport. 1988 Op. Att'y Gen. No. 88-46.

Transfer between general and specific accounts must be authorized. — Public moneys cannot lawfully be transferred from the general appropriation account to a separate or specific fund unless authorized by statute. 1937-38 Op. Att'y Gen. No. 37-1668.

Transfers between line items not permissible. — The state highway commission [state transportation commission] may not take money appropriated by the legislature for one specific purpose and transfer it to another legislative line item for another purpose, if the total amount appropriated for one category would thereby be increased at the expense of the total for another category; if such a procedure were followed without legislative authorization therefor, it would permit the use of moneys for a purpose not authorized by the legislature when it made the appropriation. 1967 Op. Att'y Gen. No. 67-108.

Object of highway appropriations. — The policy-making power with reference to state highways and public roads formerly held by the legislature is now in the state highway commission [state transportation commission], but the legislature still retains the responsibility for designating the object to which appropriations are to be applied. 1951-52 Op. Att'y Gen. No. 52-5591.

Control of highway expenditures. — Neither the state board of finance nor the governor can exercise any control over expenditure of highway funds. 1951-52 Op. Att'y Gen. No. 52-5588.

State board of finance cannot alter specific appropriations in the absence of statutory or constitutional authorization. 1947-48 Op. Att'y Gen. No. 48-5129.

Advance determination of exact expenditure unnecessary. — The fact that the sum appropriated must be distinctly specified does not mean that the sum to be expended must be accurately determined in advance, but only that a maximum amount or limit be fixed. 1959-60 Op. Att'y Gen. No. 59-181.

Investment of trust proceeds controlled by Enabling Act. — The state treasurer is authorized to pay, out of the proceeds of the trust lands granted by § 10 of the Enabling Act, the necessary and reasonable costs of investment of the same, and this section cannot be construed so as to prohibit such actions; hence, investment of such funds in federal housing administration mortgages was not prohibited on grounds that no appropriation had been made to pay the one-half of one percent service charge essential for purchase of such mortgages. 1953-54 Op. Att'y Gen. No. 53-5788.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 36 to 48.

Liability for work done or materials furnished, etc., for state or federal governments in excess of appropriations, 19 A.L.R. 408.

Budget provisions of constitution or statute in relation to appropriation of state funds, 40 A.L.R. 1067.

Mandamus to compel appropriation for payment of salary of public officer or employee, 81 A.L.R. 1253.

Taxes illegally or erroneously exacted, constitutionality of statute providing for refund of, without providing means to pay it, 98 A.L.R. 289.

Unemployment insurance legislation, validity of provisions of, as to appropriations, 100 A.L.R. 697, 106 A.L.R. 243, 108 A.L.R. 613, 109 A.L.R. 1346, 118 A.L.R. 1220, 121 A.L.R. 1002.

Reimbursement of public officer or employee for money paid or liability incurred by him in consequence of breach of duty, validity of appropriation for, 155 A.L.R. 1438.

Statutory provisions creating office and fixing salary as continuing appropriation, 164 A.L.R. 928.

81A C.J.S. States §§ 230 to 240, 242 to 244.

Sec. 31. [Appropriations for charitable, educational, etc., purposes.]

No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state, but the legislature may, in its discretion, make appropriations for the charitable institutions and hospitals, for the maintenance of which annual appropriations were made by the legislative assembly of nineteen hundred and nine.

ANNOTATIONS

Cross references. — For constitutional provision prohibiting the giving of any extra compensation to public officers, etc., *see* N.M. Const., art. IV, § 27.

For provision prohibiting donations by the state or its subdivisions to any person or private enterprise, *see* N.M. Const., art. IX, § 14.

Comparable provisions. — Montana Const., art. V, § 11.

Increase in retirement benefits. — Provision of Laws 1953, ch. 162 (Public Employees Retirement Act, Chapter 10, Article 11 NMSA 1978), which permitted those employees who had annuitant status under the 1947 act to participate therein provided they elected so to do by paying an additional lump sum to the association equivalent to one and one-half percent of the total salary received during the last five years

immediately preceding retirement, does not violate this section. State ex rel. Hudgins v. Public Employees' Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954).

Irrigation projects. — Appropriations under Laws 1961, chs. 181, 182 and 183 are not, nor do they appear on their face to be, for charitable, educational or other benevolent purposes; making permanent water sources available for irrigation purposes throughout the state is an economic necessity, and the fact that nonprofit organizations may incidentally benefit from the appropriations made to the state engineer, who has absolute control of their expenditure, does not put them within the classifications of this section. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

State Bar Act. — State Bar Act (former 36-2-2 NMSA 1978, repealed) did not violate this section. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931), abrogated, In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905.

County fairs. — Laws 1913, ch. 51, regarding appropriations by counties to their fairs, contravened this section. Harrington v. Atteberry, 21 N.M. 50, 153 P. 1041 (1915).

Applicability. — This section imposes limits on the legislature's power to appropriate money and the treasurer's power to disburse it; it has nothing to do with an administrative agency's disposition of its appropriation, nor does it have any application to a department's administration of federal or nonstate moneys. 1975 Op. Att'y Gen. No. 75-10.

Bill appropriating state funds to state fair is constitutional, for such fair is an instrumentality and under the control of the state. 1937-38 Op. Att'y Gen. No. 37-1560.

Armory. — Proposal to obtain an appropriation of funds to the state armory board, a creature of the state and under its absolute control, and to apply such appropriation to the construction of an armory involved no infraction of this section. 1957-58 Op. Att'y Gen. No. 58-235.

Irrigation projects. — The fact that others may incidentally benefit from the appropriations made to the state engineer, who has absolute control over their expenditure, does not put them within the classifications of this section. 1979 Op. Att'y Gen. No. 79-07.

Park and recreation commission. — Appropriation to the park and recreation commission (now state parks division of the natural resources department), a state executive body, under the "absolute control" of the state, was not unconstitutional; argument that groups not under state control would get the benefit of the appropriation was irrelevant so long as the appropriation was placed in the hands and under the control of a state official. 1971 Op. Att'y Gen. No. 71-74.

Contributing service credit payments. — Payment of matching funds by an affiliated public employer for an employee's contributing service credit for services rendered after August 1, 1947, and prior to the effective date of his membership in the public employees retirement association, pursuant to former 10-11-9 NMSA 1978, would not violate this section. 1966 Op. Att'y Gen. No. 66-87.

Sick leave benefits. — This section would not prohibit legislation authorizing local school boards to devise a plan of compensation which would include the payment of benefits to retiring employees for accumulated, unused sick leave, so long as such benefits were, in fact, bargained for consideration in the form of compensation for services rendered as defined by contract between the employee and the local school board. 1977 Op. Att'y Gen. No. 77-18.

If the basis for a program of sick leave benefits for school employees is neither charitable nor benevolent but rather compensation for services rendered, then the prohibition of this section would not apply. 1977 Op. Att'y Gen. No. 77-08.

Private organization. — This section prohibits the use of public funds for the purpose of supporting any private organization. 1955-56 Op. Att'y Gen. No. 56-6426.

Private corporation. — Any appropriation to a private corporation whether directly or indirectly made would clearly be violative of constitutional provisions. 1963-64 Op. Att'y Gen. No. 64-41.

Privately owned county hospital. — County funds may not be donated to a county hospital owned by a private corporation. 1929-30 Op. Att'y Gen. No. 29-61.

County hospital run by private lessee. — The evident purpose of Laws 1955, ch. 224 (former 4-48-11, 4-48-14 NMSA 1978) was to provide a means by which a county operating a hospital itself could pay for such operation; for the county commissioners to use funds authorized thereby for support and maintenance of a hospital owned by the county but leased to a private organization would be in direct violation of this section. 1955-56 Op. Att'y Gen. No. 56-6426.

Public moneys may not be used in aid of denominational schools, and only for such benevolent purposes as were aided in Laws 1909, ch. 127, § 7 (since repealed). 1914 Op. Att'y Gen. No. 14-1344.

This section would be violated if public money was disbursed to nonpublic schools in order to purchase secular education service. 1969 Op. Att'y Gen. No. 69-06.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education may violate this provision, although the New Mexico Supreme Court has suggested that a constitutional issue is not raised if appropriations are made to a state agency, which in turn disburses the money. 1999 Op. Att'y Gen. No. 99-01.

Grants to defray tuition costs. — A bill providing that a sum of money be appropriated to the board of educational finance for allocation as grants to students for the purpose of defraying tuition costs at private colleges and universities may not violate this section because the legislative appropriation is not made to the students but to the board of educational finance, a state agency which would control the expenditure of the appropriation. 1979 Op. Att'y Gen. No. 79-07.

Hay purchase contributions. — Since assistance under the emergency roughage program was not limited to paupers or even to those who were in danger of becoming such, this section prohibits the state's contribution of $2.50 per ton toward the purchase of hay. 1957-58 Op. Att'y Gen. No. 57-62.

Historical society. — The state may not properly appropriate public moneys to the use and benefit of the historical society of New Mexico, a private corporation. 1963-64 Op. Att'y Gen. No. 64-41.

Federal matching funds in suspense accounts. — New Mexico may accept federal matching funds eventually to be paid to charitable or benevolent institutions where under 6-10-3 NMSA 1978 the moneys are put in suspense accounts and not deposited in the state treasury. 1967 Op. Att'y Gen. No. 67-07.

Law reviews. — For student symposium, "Constitutional Revision - State Aid to Private Enterprise in New Mexico," see 9 Nat. Resources J. 457 (1969).

For 1986-88 survey of New Mexico law of real property, 19 N.M. L. Rev. 751 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 68, 69, 71.

Purpose, particularity of specification of, required in appropriation bill, 20 A.L.R. 981.

Contract to pay for services or reimburse expenditures as within constitutional inhibition of aid to sectarian institutions, 22 A.L.R. 1319, 55 A.L.R. 320.

Pension to one who had left service of state prior to enactment of pension statute as violating constitutional prohibition of appropriation for benevolent purposes to any person not under absolute control of state, 142 A.L.R. 938.

Releasing public school pupils from attendance for purpose of attending religious education classes as use of public money for sectarian purpose, 2 A.L.R.2d 1371.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like to sectarian school, 81 A.L.R.2d 1309.

Use of public money for furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

81A C.J.S. States §§ 204 to 208, 211.

Sec. 32. [Remission of debts due state or municipalities.]

No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court. Provided that the obligations created by Special Session Laws 1955, Chapter 5, running to the state or any of its agencies, remaining unpaid on the effective date of this amendment are void. (As amended November 4, 1958.)

ANNOTATIONS

Comparable provisions. — Wyoming Const., art. III, § 40.

The 1958 amendment, which was proposed by H.J.R. No. 1 (Laws 1957) and adopted at the general election held on November 4, 1958, with a vote of 58,347 for and 28,802 against, added the second sentence.

Compiler's notes. — Laws 1955 (S.S.), ch. 5, which provided for the recovery of public assistance payments via claims against recipients' estates and liens against their realty, was repealed by Laws 1957, ch. 56, § 1.

District attorney's authority to settle tax suits is not restrained by this section. State v. State Inv. Co., 30 N.M. 491, 239 P. 741 (1925).

The trial court erred in declining to lend approval to stipulation of settlement entered into by the attorney general prior to entry of judgment in declaratory judgment suit relating to assessment of emergency school taxes against insurance adjusters. Lyle v. Luna, 65 N.M. 429, 338 P.2d 1060 (1959).

Tax lien dischargeable. — Laws 1921, ch. 133, § 474, offended this section insofar as it attempted to discharge personal liability for taxes duly assessed, or barred suit therefor, but not insofar as it discharged the lien of taxes. State v. Montoya, 32 N.M. 314, 255 P. 634 (1927).

Extension of tax sale redemption period permissible. — Laws 1913, ch. 84, § 38 (repealed), extending the time for redemption from tax sales made to the county, did not violate this section. Lewis v. Tipton, 29 N.M. 269, 222 P. 661 (1924).

Head of family and veteran exemptions. — The amendment of N.M. Const., art. VIII, § 5, in 1921 effected an exception to this section to the extent that the legislature is authorized to exempt the qualified property from a tax already a fixed liability or obligation, but this right to exempt did not extend to accrued road taxes. Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923).

Poll tax. — Laws 1923, ch. 148, §§ 621 and 622 (since repealed), making poll tax applicable to women, was inoperative for the year 1923 because of this section. Board of Educ. v. McRae, 29 N.M. 85, 218 P. 346 (1923).

Constitutional provision construed. — The first clause of N.M. Const. Art. IV, Sec. 32 restricts only the legislature from diminishing obligations owed to the state. Hem v. Toyota Motor Corp., 2015-NMSC-024, *overruling in part* Gutierrez v. Gutierrez, 1983-NMSC-016, 99 N.M. 333, 657 P.2d 1182.

In interpleader proceeding, where plaintiff's initial attorney agreed to give up his statutory priority over settlement funds, so the university of New Mexico hospital (UNMH) would be paid first, in exchange for the hospital agreeing to accept a lesser amount for plaintiff's outstanding medical bills, the New Mexico supreme court held that the first clause of N.M. Const. Art. IV, Sec. 32 is strictly a limitation on the legislature, and UNMH, as a state hospital, is not constitutionally prohibited from reducing undisputed obligations with patient-debtors. Hem v. Toyota Motor Corp., 2015-NMSC-024, *overruling in part* Gutierrez v. Gutierrez, 1983-NMSC-016, 99 N.M. 333, 657 P.2d 1182.

Hospital cannot accept part payment as satisfaction. — The New Mexico constitution prohibits a public hospital from accepting payment of less than the full amount of an undisputed legal obligation as a satisfaction. The state cannot compromise the amount owed to it for providing medical services unless a good faith dispute exists as to the amount of indebtedness or liability. Gutierrez v. Gutierrez, 99 N.M. 333, 657 P.2d 1182 (1983).

Cancellation of purchase contracts. — There is nothing in this section which prevents the cancellation of land purchase contracts, which contracts provide that upon default the state's only recourse is cancellation and retention of payments as liquidated damages, and nothing to prevent their lease to the defaulting contract holder. Vesely v. Ranch Realty Co., 38 N.M. 480, 35 P.2d 297 (1934).

Oil and gas lease. — Laws 1931, ch. 18 (19-10-1 NMSA 1978 et seq.), regarding conversion of leases, would be void insofar as it diminished obligation of oil and gas lessee to pay rental to state. Harry Leonard, Inc. v. Vesely, 39 N.M. 33, 38 P.2d 1112 (1934).

Lien priorities. — Statutes (Laws 1929, §§ 90-1217, 90-1701, now repealed) elevating assessment liens to parity with liens for general taxes did not violate this provision. Waltom v. City of Portales, 42 N.M. 433, 81 P.2d 58 (1938).

Conservancy districts. — Laws 1927, ch. 45 (73-14-1 NMSA 1978 et seq.), relating to conservancy districts, does not violate this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Power of court to compromise or reduce obligation. — The power of a court to extinguish an obligation owing to the state includes the power to compromise or reduce the obligation. White v. Sutherland, 92 N.M. 187, 585 P.2d 331 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Development agreements. — A home rule municipality has the authority to enter into a contract with a private developer in order to facilitate the construction of retail business establishments, which contract provides for the reimbursement or forgiveness of impact fees. 2002 Op. Att'y Gen. No. 02-02.

District attorney's authority to settle tax suits. — The authority to release a lien filed upon property to insure payment of delinquent taxes under former emergency school tax act was invested in former commissioner of revenue only after full payment of lien, penalties and interest; the attorney general or a district attorney could, in the event a proper proceeding was filed in court, and wherein the state was a proper party, compromise or settle such suit in the interests of the state. 1962 Op. Att'y Gen. No. 62-112.

Purpose. — This constitutional provision is intended to prevent public officials from releasing debts justly owed to a public body and to discourage collusion between public officials and private citizens. 1970 Op. Att'y Gen. Nos. 70-88, 70-04 and 1969 Op. Att'y Gen. No. 69-69 (debts owed the state).

Section authorizes only two methods of extinguishing obligations owed to a public body; one, payment, and the other a proper proceeding in court; a public body may remit or release debts or uncollectible accounts only by these two methods. 1970 Op. Att'y Gen. No. 70-88.

Obligations owed to a municipality, such as the lien upon a tract of land assessed under the street improvement district, may be properly extinguished in two manners only: either by payment of the penalty and the assessment into the proper treasury or by a proper proceeding in court. 1970 Op. Att'y Gen. No. 70-04.

Compromise or settlement of judgment as "proper proceeding in court". — A compromise and settlement of a judgment which is entered of record as a satisfaction of judgment would be a proper proceeding in court and would alert the public to the action of the district attorney or attorney general. 1969 Op. Att'y Gen. No. 69-69.

Section 36-1-22 NMSA 1978, relating to compromise or release of claims or judgments by attorney general or district attorney, is completely harmonious with this section. 1969 Op. Att'y Gen. No. 69-69.

Tax liability not forgivable. — The legislature can enact no law, by repeal of an existing tax statute or otherwise, which may have the effect of forgiving tax liability due the state or any municipal corporation therein. 1957-58 Op. Att'y Gen. No. 57-111.

The tax return provided for in former 72-10-2, 1953 Comp., could be required despite repeal of 72-10-1 to 72-10-6, 1953 Comp., by Laws 1957, ch. 66; since the tax was on gross earnings for 1956, it could not be forgiven. 1957-58 Op. Att'y Gen. No. 57-111.

Delinquent taxes aggregated against property cannot be remitted, even by the legislature, on the expectation that such property is to be improved and used for school purposes. 1929-30 Op. Att'y Gen. No. 29-117.

Penalty and interest on tax owed not waivable. — Once the tax, penalty and interest has been established as a debt of the state, there was no power in tax commissioner to waive either the penalty or interest. 1957-58 Op. Att'y Gen. No. 58-126.

Dissolved corporations must pay back due franchise tax before reinstatement, for repeal of Franchise Tax Law did not affect obligations arising before its repeal; but tax should be computed to date of dissolution rather than to date of such repeal. 1931-32 Op. Att'y Gen. No. 32-518.

Public general hospital may not forgive any portion of debt owed it by former patients; however, a proper court proceeding may reduce or extinguish such debts. 1966 Op. Att'y Gen. No. 66-18.

In view of this constitutional provision, state hospital has no authority to remit or release any debt or uncollectible account. 1953-54 Op. Att'y Gen. No. 53-5662.

Outstanding accounts cannot be written off as uncollectible; but where the state hospital finds a patient is indigent but originally committed as a paying patient, the board should have the status of such patient changed by submitting a petition to the district court which committed him, to avoid running uncollectible accounts in the future. 1953-54 Op. Att'y Gen. No. 53-5662.

Accounts barred by limitations could be removed from ledger of accounts receivable of a joint county-municipal hospital, thereby satisfying the constitutional requirements. 1970 Op. Att'y Gen. No. 70-88.

Collection of debts by credit bureau. — The memorial general hospital in Las Cruces, financed in part by the city of Las Cruces and Dona Ana county, may use the services of a credit bureau to collect bad debts for the hospital and pay for such services from revenues received by the hospital. 1959-60 Op. Att'y Gen. No. 59-212.

Rentals specified in state land lease contracts cannot be reduced, though a lease holder might surrender his lease and thereafter obtain a new lease containing a

unitization agreement and possibly modified rentals without violating this section. 1943-44 Op. Att'y Gen. No. 43-4210.

State land commissioner cannot order a reduction of rentals on existing state leases; while the prohibition of this section was for the legislature, yet an executive order of the land commissioner has the force of law, and the prohibition would extend to it. 1923-24 Op. Att'y Gen. Nos. 23-3705 and 23-3730.

Grazing lease may be canceled on petition of lessee and consent of the commissioner, as there is then no obligation due the state on unpaid rental notes, nor is the lessee liable for any difference in the rental contract with a subsequent lessee. 1925-26 Op. Att'y Gen. No. 26-3878.

Compromise of civil penalties. — A statute allowing the state corporation commission (now public regulation commission) to compromise civil penalties assessed for violations of the Pipeline Safety Act (70-3-11 to 70-3-20 NMSA 1978) would not violate this section. 1971 Op. Att'y Gen. No. 71-16.

Deferment of mortgage payments. — The state investment council may legally enter into an agreement with a mortgagor to defer the payment of principal or interest on a federally insured mortgage investment which is held by the council, so long as the original maturity date of the promissory note securing the mortgage investment is not changed. 1966 Op. Att'y Gen. No. 66-93.

Delinquent liquor license fees. — Neither board of county commissioners nor state comptroller may cancel delinquent liquor license fees inasmuch as these represent obligations owing to the state which cannot be discharged in any manner except by payment or by proper court proceedings. 1941-42 Op. Att'y Gen. No. 41-3871.

Under second sentence, obligations in question are flatly declared void; no further procedures are necessary to the enjoyment of the privilege conferred. 1957-58 Op. Att'y Gen. No. 58-242.

Constitutional amendment, adding second sentence of this section, is self-executing. 1957-58 Op. Att'y Gen. No. 58-242.

Execution of releases permissible. — The constitutional amendment embodied in the second sentence of this section operates to destroy the underlying obligation and to release the lien which secures payment thereof, without more; however, the department of public welfare (now human services department), is authorized to execute and deliver appropriate releases if requested. 1957-58 Op. Att'y Gen. No. 58-242.

Return of funds received prior to passage of amendment. — Funds being held by the department of welfare (now human services department) which, upon receipt, were subject to the requirement that they be deposited directly and unconditionally into the state treasury could not be regarded as remaining unpaid and could not be returned to

the payor; but to the extent that the department held, prior to November 20, 1958, funds which upon receipt were subject to the requirement that they be deposited in a suspense account in the state treasury, pending determination of whether or not they would become the absolute property of the state, such moneys could properly be returned to the payor. 1957-58 Op. Att'y Gen. No. 58-242.

Installment payments received by the department of public welfare (now human services department) prior to November 20, 1958, could not lawfully be returned to the payor. 1957-58 Op. Att'y Gen. No. 58-242.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 807, 819 to 826; 72 Am. Jur. 2d States, Territories and Dependencies § 86.

What amounts to "indebtedness" to state within constitutional or statutory provision as to release or compromise of same, 108 A.L.R. 376.

64 C.J.S. Municipal Corporations §§ 1880, 2073; 81A C.J.S. States §§ 223, 224.

Sec. 33. [Prosecutions under repealed laws.]

No person shall be exempt from prosecution and punishment for any crime or offenses against any law of this state by reason of the subsequent repeal of such law.

ANNOTATIONS

This section does not apply to 2002 amendment to 31-18-17 NMSA 1978 or to the interpretation of the amendment through 12-2A-16 NMSA 1978. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Repeal between arrest and filing of information no bar. — Fact that statute under which defendant was charged (for unlawful possession of LSD) was repealed after arrest but prior to filing of information did not bar or abate the proceedings against the defendant. State v. McAdams, 83 N.M. 544, 494 P.2d 622 (Ct. App. 1972).

Habitual Criminal Act. — Although habitual criminality is a status rather than an offense, so that prior convictions only relate to the punishment to be imposed in the last case in which the accused was convicted of a felony in this state, trial court's sentencing of defendant under Habitual Criminal Act which had been repealed by time of sentencing was valid. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Because the Habitual Offender Act was not repealed, this section is not implicated. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Negligent homicide. — Prosecution of automobile driver upon charge of negligent homicide under former 64-22-1, 1953 Comp., was not abated by subsequent repeal of the statute by Laws 1957, ch. 239. State v. Tracy, 64 N.M. 55, 323 P.2d 1096 (1958).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 384.

Witnesses, statute restoring competency of convicts as, as infringement of governor's pardoning power, 63 A.L.R. 982.

Crime, withdrawal by legislative act of power under which political body acted in punishing act as, as affecting prior offenses, 89 A.L.R. 1514.

Criminal prosecution, pendency of, within saving clause of statute, or principle which prevents application of statute to pending prosecution, 122 A.L.R. 670.

Penalty for second or subsequent offense, enhancement of, as affected by repeal of statute under which prior conviction was secured, 132 A.L.R. 105, 139 A.L.R. 673.

22 C.J.S. Criminal Law § 29; 82 C.J.S. Statutes §§ 434 to 439.

Sec. 34. [Change of rights or procedure in pending cases.]

No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Application to rule changes. — Article IV, Section 34 does not apply to rule changes implemented by the Supreme Court in the absence of some affirmative act by the supreme court to the contrary. Former opinions of the supreme court that state that Article IV, Section 34 does apply to court rules are not viable and should not be cited for that proposition. State v. Martinez, 2011-NMSC-010, 149 N.M. 370, 249 P.3d 82.

This section limits ability of legislature to enact legislation that affects pending litigation. State v. Stanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

This section applies to legislative action that changes a substantive right or remedy. State v. Stanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

This section expressly applies to either party in a pending case. State v. Stanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

Applicability of section to acts of regulatory agencies. — Although this section speaks only of acts of the legislature, it also applies to regulatory agencies created by

the legislature. The legislature cannot circumvent the constitutional prohibition by delegating the task to an agency. Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Applicability of section to administrative agencies. — This section applies to administrative agencies, such as the workers' compensation division. Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Constitutional amendment not "act of legislature". — The 1996 amendment of N.M. Const., art. XI, was not an "act of the legislature" within the meaning of this section. U.S. West Communications, Inc. v. New Mexico Pub. Regulation Comm'n, 1999-NMSC-024, 127 N.M. 375, 981 P.2d 789.

Effective date as determining factor. — Notice of enactment of a law is irrelevant under this section. The effective date is the determining factor. Pineda v. Grande Drilling Corp., 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991).

Statute prior to amendment applies to pending case. — Where a case is pending when an amended statute is enacted, the old statute applies to the case. U.S. Life Title Ins. Co. v. Romero, 98 N.M. 699, 652 P.2d 249 (Ct. App. 1982), cert. quashed, 98 N.M. 762, 652 P.2d 1213 (1982).

This section applies to "any pending case" and makes no reference to "parties" in the case. Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

"Pending case" refers to suit pending on some court docket and does not include a suit filed after the statute became effective on a cause of action arising prior to the statute. Gray v. Armijo, 70 N.M. 245, 372 P.2d 821 (1962); DiMatteo v. County of Dona Ana ex rel. Bd. of Cnty. Comm'rs, 109 N.M. 374, 785 P.2d 285 (Ct. App. 1989).

Case "pending" while under district court's control. — Judgments of the district court remain under control of the court for a period of 30 days, during which period a case remains a "pending case". Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Divorce decree with custody provisions not a "pending case". — Although trial court had continuing jurisdiction to modify divorce decree containing child custody provisions under the provisions of 40-4-7 NMSA 1978, that decree was considered final and not within the meaning of a "pending case" under this section; therefore, 28-6-1 NMSA 1978 (making the age of majority 18), which by its operation freed divorced father from making support payments to daughter who had reached age of 18, was not unconstitutional hereunder. Phelps v. Phelps, 85 N.M. 62, 509 P.2d 254 (1973).

Cause filed after dismissal of original as new case. — Second cause, filed within six months after dismissal of first, under 37-1-14 NMSA 1978, was a new case for all purposes, except for purposes of lowering the bar of the statute of limitations and

having been filed almost two years after the effective date of the long-arm statute, 38-1-16 NMSA 1978, its provisions were available; this section had no application, there having been no change of procedure after the case was filed. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Effect of removal of case to federal court. — Case removed to federal court and later remanded was "pending" notwithstanding fact that the jurisdiction of the state court was suspended while the case was before federal court. Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 115 N.M. 229, 849 P.2d 372 (Ct. App.), cert. denied, 115 N.M. 359, 851 P.2d 481 (1993).

Case not pending. — Although under the law as it formerly stood a state officer's salary was exempt from garnishment, application of Laws 1917, ch. 18, removing this exemption, did not violate this section, as final judgment in the case in question had been obtained long prior to enactment of the 1917 law. Stockard v. Hamilton, 25 N.M. 240, 180 P. 294 (1919).

Where a worker was injured and the employer began paying temporary disability benefits before Payment and Benefits Rule II(A)(3)(b) was promulgated, but the worker's compensation complaint was not filed until long after the rule became effective, and the claim was not placed on any court's docket until after the complaint was filed, the case was not pending, and the rule was constitutionally applied to the claim. Cass v. Timberman Corp., 110 N.M. 158, 793 P.2d 288 (Ct. App.), rev'd, 111 N.M. 184, 803 P.2d 669 (1990).

The fact that a worker's compensation judgment remains subject to modification during the entire period for which benefits were awarded, does not mean that a workers' compensation case is a "pending case" within the meaning of this constitutional provision. Church's Fried Chicken No. 1040 v. Hanson, 114 N.M. 730, 845 P.2d 824 (Ct. App. 1992), cert. denied, 114 N.M. 577, 844 P.2d 827 (1993).

Since the defendant in an action by a bank charged the bank with violations of usury and disclosure laws that were repealed more than a year before the conduct complained of took place, even though the repeal occurred after the bank filed its action, the repealed provisions did not apply after the final judgment was filed and the case was not pending. Century Bank v. Hymans, 120 N.M. 684, 905 P.2d 722 (Ct. App.), cert. denied, 120 N.M. 533, 903 P.2d 844 (1995).

Developer could not avoid a lawful vote by board of commissioners on a moratorium on subdivisions by filing a declaratory judgment action, so as to achieve "pending case" status under this section one month after the proposal of the moratorium but one-half hour prior to the vote. Santa Fe Trail Ranch II, Inc. v. Board of Cnty. Comm'rs, 1998-NMCA-099, 125 N.M. 360, 961 P.2d 785.

Final district court orders following appeals of decisions of administrative agencies were entered after the effective dates of 39-3-1.1 NMSA 1978 and Rule 12-505 NMRA.

Therefore, cases before the court of appeals for review were not "pending" cases within the meaning of this section. Hyden v. New Mexico Human Servs. Dep't, 2000-NMCA-002, 128 N.M. 423, 993 P.2d 740.

Where defendant did not appeal his judgment of conviction and sentence, defendant's criminal liability was not pending for the purpose of this section, as there had been a judgment of conviction and an exhaustion of his right to appeal his conviction, not only by virtue of his plea of guilty but also by the passage of the deadline to appeal. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

This constitutional provision applies to court rules. State v. DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct. App. 1977).

Rules adopted by the supreme court are not effective to change the procedure in any pending case. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

This section should be considered applicable to rules of court as well as statutes. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Supreme court orders as to the use of criminal jury instructions are not to be used, and are not intended to be used, to deprive defendants of a duress defense ex post facto. State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1982).

Applicability to land use cases. — For this section to apply to a land use decision by a regulatory body, the landowner must show initial approval of the proposed use and that the landowner substantially changed his position in reliance thereon. Santa Fe Trail Ranch II, Inc. v. Board of Cnty. Comm'rs, 1998-NMCA-099, 125 N.M. 360, 961 P.2d 785.

Application to divert water. — This section does not bar the court from considering cases subsequent to their initial filing of an application to divert water in 1982. Herrington v. Office of State Eng'r, 2004-NMCA-062, 135 N.M. 585, 92 P.3d 31, rev'd, 2006-NMSC-014, 139 N.MN. 368, 133 P.3d 258.

Retroactive application of change of credit for time served would be unconstitutional. — Where, in 2004, defendant pleaded guilty to a fourth degree aggravated DWI; in 2007, defendant was arrested for another DWI in violation of the 2004 probation conditions; in 2004, 66-8-102 NMSA 1978 gave defendant full credit for time served on probation; and in 2007, the statute gave defendant no credit for time served on probation, the 2007 no-credit statutory amendment did not apply to defendant's probation revocation for the 2004 offense, because the retroactive application of the 2007 no-credit version of 66-8-102 NMSA 1978 to defendant for the 2004 offense would increase the punishment allowable for the 2004 offense which would violate the ex post facto clauses of the United States and New Mexico

constitutions. State v. Ordunez, 2012-NMSC-024, 283 P.3d 282, rev'g 2010-NMCA-095, 148 N.M. 620, 241 P.3d 621.

II. RIGHT OR REMEDY.

Effect of repeal on sentencing. — The sentencing enhancement of 31-18-16.1 NMSA 1978, which was repealed prior to the defendant's trial, applied to the defendant because the defendant's criminal information, which charged him with a crime against the elderly, was pending when the legislature repealed that section. State v. Lucero, 2007-NMSC-041, 142 N.M. 102, 163 P.3d 489, rev'g 2006-NMCA-114, 140 N.M. 327, 142 P.3d 915.

Habitual offender statute. — This section precludes the effect of the 2002 amendment to the habitual offender statute when a supplemental criminal information is filed before, and defendant is sentenced after, the July 1, 2002 effective date of the amendment. State v. Stanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

Because no habitual offender proceedings were pending at the time the 2002 amendment to 31-18-17 NMSA 1978 became effective and because any right or remedy the state may have to prosecute habitual offenders does not ripen until after the conviction, there is no constitutional prohibition to applying the 2002 amendment to cases in which the supplemental information charging status was not filed before July 1, 2002. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

City cannot, by enacting ordinance, affect or change result of pending action, based upon valid ordinances existing at the time of the action. State ex rel. Edwards v. City of Clovis, 94 N.M. 136, 607 P.2d 1154 (1980).

Retroactive application of zoning ordinances. — The retroactive application of a new zoning ordinance to an administrative action in which the plaintiff only submitted an application for preliminary plat approval of its subdivision did not violate Article IV, Section 34 of the constitution of New Mexico because plaintiff did not establish a "vested right" under the vested rights approach. There are two prongs which must be met for a vested right to exist. First there must be approval by the regulatory body, and second, there must be a substantial change in position in reliance thereon. Brazos Land, Inc. v. Board of Cnty. Comm'rs, 115 N.M. 168, 848 P.2d 1095 (Ct. App. 1993).

No vested right to interest on illegally collected taxes. — Statutory requirement that the state pay interest on refunds of taxes judicially determined to have been illegally collected could not be said to create an obligation of the state to the taxpayer which gives rise to a vested right in the taxpayer within the meaning of the constitutional provision. Bradbury & Stamm Constr. Co. v. Bureau of Revenue, 70 N.M. 226, 372 P.2d 808 (1962).

Change in interest rate affects the rights or remedies of the parties, even if these rights or remedies are purely statutory, and therefore the statutory rate of interest in effect when a claim became a pending case is applicable to that case even if the rate of interest is changed prior to judgment. Hillelson v. Republic Ins. Co., 96 N.M. 36, 627 P.2d 878 (1981).

Administrator's compensation. — This section did not prohibit use of statute in effect at time of allowance of compensation to administrator, although it was different from statute in effect at commencement of estate proceeding. In re Hildebrand's Estate, 57 N.M. 778, 264 P.2d 674 (1953).

Damages in partial condemnation. — The language of former 42-1-10 NMSA 1978, relating to measure of damages to remainder in partial condemnation, did not amount to changing the rule during the pendency of a case in violation of this section, as former 42-1-10 NMSA 1978 did not alter, amend or modify any other existing statutes, but merely codifies the correct and existing rule of measure of damages in cases of a partial taking, in harmony and compliance with the payment of just compensation for the taking of private property as required by N.M. Const., art. II, § 20. State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 84 N.M. 424, 504 P.2d 634 (1972), modified County of Dona Ana v. Bennett, 116 N.M. 778, 867 P.2d 1160 (1994).

Change in mode of executing death penalty. — Statute (31-14-1 NMSA 1978 et seq.) substituting electrocution for hanging was not rendered violative of this section by fact that it was applicable to persons informed against before passage of the statute. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931).

Effect of intervening validating law on illegal school district consolidation. — In proceeding seeking an order mandamus to members of state and district boards of education and state superintendent to dissolve consolidation of two school districts, a validating statute passed by the legislature in 1967, which became effective after the action was commenced, could in no way alter rights as they existed when the action was commenced. State ex rel. Barela v. New Mexico State Bd. of Educ., 80 N.M. 220, 453 P.2d 583 (1969).

Continued viability of statutory principle despite repeal. — The Tort Claims Act (41-4-1 NMSA 1978 et seq.) was an extension of previous statutes that recognized a limited waiver of sovereign immunity. Accordingly, a claimant's remedy under former Section 5-6-20, 1953 Comp., to redress her 1974 injury due to the alleged negligence of a state agency did not abate upon the repeal of that statute in 1975, nor upon the enactment of the Tort Claim Act in 1976. Her claim was, thus, not barred under common-law sovereign immunity, but rather retained its vitality pursuant to former 5-6-20, 1953 Comp. Romero v. New Mexico Health & Env't Dep't, 107 N.M. 516, 760 P.2d 1282 (1988).

III. EVIDENCE OR PROCEDURE.

The Victim Counselor Confidentiality Act is consistent with the psychotherapist privilege in Rule 11-504 NMRA and does not conflict with this section. Albuquerque Rape Crisis Center v. Blackmer, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820.

Sex Offender Registration and Notification Act does not violate this section. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Where a constitutionally permissible retroactive application of Sex Offender Registration and Notification Act requirements to defendant made him subject to a probation violation if he knowingly failed to register and if he were found to have committed a felony by failing to register, this does not constitute a legislative act that changes rules of evidence or procedure in a pending case. Therefore, the legislative changes are too indirect, remote, and attenuated to be considered unconstitutional under this section. State v. Druktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050.

Class certification. — Where Rule 1-023(F) NMRA providing for appeal of grant or denial of class certification became effective after original suit was filed, but before appealing defendants became parties, appeal under Rule 1-023(F) NMRA was not available because the action was pending when the rule became effective. Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Changes affecting procedure for trial and appeal. — This section applied to legislative changes, during the six years between defendant's original charge and his conviction, to the procedure for the trial and appeal of DWI cases from metropolitan court. State v. Maynes, 2001-NMCA-022, 130 N.M. 452, 25 P.3d 902, cert. denied, 130 N.M. 213, 22 P.3d 681 (2001).

Evidence of seat belt non-use barred. — The purpose of this constitutional provision is to prevent legislative interference with adjudication of pending cases, and where 66-7-373(A) NMSA 1978 was in effect for nearly two decades prior to plaintiff’s cause of action, this constitutional provision was not violated. Rodriguez v. Williams, 2015-NMCA-074, cert. denied, 2015-NMCERT-006.

Enactment of "seat belt defense". — It was not error to exclude evidence of the plaintiff's failure to use seat belts because the defendant had no right or remedy with regard to seat belts prior to the adoption of 66-7-373 NMSA 1978, and application of the section did not violate this section of the constitution. Mott v. Sun Country Garden Prods., Inc., 120 N.M. 261, 901 P.2d 192 (Ct. App. 1995), cert. denied, 120 N.M. 68, 898 P.2d 120 (1995).

Prima facie evidence provision. — Laws 1921, ch. 133, § 455 (since repealed), declaring tax deed to be prima facie evidence of its own validity, could not be applied to cause of action pending at time of its passage. Hudson v. Phillips, 29 N.M. 101, 218 P. 787 (1923).

Disqualification of judge. — Laws 1933, ch. 184 (38-3-10 NMSA 1978), relating to disqualification of judges, did not violate this section as applied to a case pending when the statutes became effective. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Designation of motion day. — Designation of a certain day each month on which to hear motions with directions to clerk to notify attorneys and litigants, in place of former custom of hearing motions on notice by attorneys or order of court at irregular periods, was not such change in procedure as prescribed herein. Heron v. Gaylor, 53 N.M. 44, 201 P.2d 366 (1948).

Dismissal for lack of prosecution. — Laws 1965, ch. 132, purporting to amend Rule 41(e), N.M.R. Civ. P. (see now Rule 1-041 E NMRA), so as to extend from two to three years the period of inaction required for dismissal of suit, was a procedural statute and the changes therein incorporated could not be constitutionally applied in a pending case. Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966); Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969), holding that the 1965 act was void as infringing on the court's duties.

Laws 1937, ch. 121 (superseded by Rule 1-041 E NMRA), which provided for dismissal of suit with prejudice for failure to prosecute for two years, was void as to an action pending when the statute took effect. Pankey v. Hot Springs Nat'l Bank, 44 N.M. 59, 97 P.2d 391 (1939); State ex rel. Western Acceptance Corp. v. Moise, 44 N.M. 6, 96 P.2d 704 (1939); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939).

Preservation of error. — Because of this section, Laws 1927, ch. 93, § 11, repealing Laws 1917, ch. 43, § 37, dispensing with necessity for formal exceptions in cases tried by the court without a jury, could not be effective in a case instituted five days before the former act took effect. Bays v. Albuquerque Nat'l Bank, 34 N.M. 20, 275 P. 769 (1929).

Time for objections. — Trial court rule requiring objection to instructions to be made prior to retirement of jury was not applicable to prosecution pending at time of rule's adoption. State v. Hall, 40 N.M. 128, 55 P.2d 740 (1935).

Computation of time. — Rule change adding Saturdays, Sundays and legal holidays as period not to be included in the running of time was a change in procedure, effect of which in the case in question was to extend the time for filing of new trial motion from 10 to 12 days, and could not be applied to a pending case. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967).

Change in appeal procedure after filing of complaint. — Court of appeals lacked jurisdiction where teacher's original complaint was filed in 1963 but appeal from decision of the state board of education after hearing in 1969 was taken in accordance with provisions of statute that became effective in 1967, as this section provides that no legislative act shall affect the rights of any party in a pending case. Brown v. Board of Educ., 81 N.M. 460, 468 P.2d 431 (Ct. App. 1970).

Appeal in special proceedings. — Section 39-3-7 NMSA 1978, authorizing appeals from judgments of the district court in special statutory proceedings, did not apply to pending case relating to sale of property forfeited for taxes for less than the amount due thereon, since proceedings at institution of case were special and no valid provision had been made for an appeal. In re Sevilleta De La Joya Grant, 41 N.M. 305, 68 P.2d 160 (1937).

Issue to be raised at trial. — Where appellant was substituted as a defendant in the manner provided by Laws 1931, ch. 156, but did not question the constitutionality of the procedure at trial, he could not raise this objection on appeal on grounds that the act had not gone into effect until after the complaint was filed. In re Sevilleta De La Joya Grant, 41 N.M. 305, 68 P.2d 160 (1937); Shaffer v. McCulloh, 38 N.M. 179, 29 P.2d 486 (1934).

Language in this section may not be considered implied grant of legislative authority to enact rules in circumstances other than those expressly forbidden; the constitution itself forbids exercise of such power. Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Withdrawal of six-month trial rule. — Article IV, Section 34 does not apply to the retroactive withdrawal of the six-month rule from Rule 5-604 NMRA. State v. Romero, 2011-NMSC-013, 150 N.M. 80, 257 P.3d 900.

Parole and probation of juveniles. — 1969 amendments to former Juvenile Act constituting legislative removal of the power of the juvenile courts to parole or release juveniles committed to New Mexico boys' school or girls' home were not contrary to the provisions of this section, because no "right" of the juvenile has been affected. 1970 Op. Att'y Gen. No. 70-57.

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

For article, "Reflections on Fifteen Years of the *Teague v. Lane* Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine," see 35 N.M. L. Rev. 161 (2005).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 347 et seq.

Divorce: retrospective effect of statute prescribing grounds of divorce, 23 A.L.R.3d 626.

82 C.J.S. Statutes § 422.

Sec. 35. [Power and procedure for impeachment and trial.]

The sole power of impeachment shall be vested in the house of representatives, and a concurrence of a majority of all the members elected shall be necessary to the proper

exercise thereof. All impeachments shall be tried by the senate. When sitting for that purpose the senators shall be under oath or affirmation to do justice according to the law and the evidence. When the governor or lieutenant governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without the concurrence of two-thirds of the senators elected.

ANNOTATIONS

Cross references. — For officers subject to impeachment, *see* N.M. Const., art. IV, § 36.

Comparable provisions. — Idaho Const., art. V, §§ 3, 4.

Iowa Const., art. III, § 19.

Montana Const., art. V, § 13.

Utah Const., art. VI, §§ 17, 18.

Wyoming Const., art. III, § 17.

Impeachment does not preempt quo warranto. — Impeachment by the legislature does not preempt quo warranto as the exclusive means for removing a felon from public office. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Removal of appointed officer by governor. — State officer appointed by governor, with advice and consent of senate, can be removed by him under N.M. Const., art. V, § 5, regardless of whether he is subject to impeachment. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Law reviews. — For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?" see 9 Nat. Resources J. 430 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 211, 212, 216, 217.

Physical or mental disability as ground for impeachment, 28 A.L.R. 777.

Power of officer as affected by pendency of impeachment proceeding, 30 A.L.R. 1149.

Injunction as remedy against removal of public officer, 34 A.L.R.2d 554.

Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.

Power of court to remove or suspend judge, 53 A.L.R.3d 882.

67 C.J.S. Officers and Public Employees §§ 179, 181; 81A C.J.S. States §§ 98, 101.

Sec. 36. [Officers subject to impeachment.]

All state officers and judges of the district court shall be liable to impeachment for crimes, misdemeanors and malfeasance in office, but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of honor, trust or profit, or to vote under the laws of this state; but such officer or judge, whether convicted or acquitted shall, nevertheless, be liable to prosecution, trial, judgment, punishment or civil action, according to law. No officer shall exercise any powers or duties of his office after notice of his impeachment is served upon him until he is acquitted.

ANNOTATIONS

Cross references. — For power of impeachment, and exercise thereof, *see* N.M. Const., art. IV, § 35.

Comparable provisions. — Iowa Const., art. III, § 20.

Montana Const., art. V, § 13.

Utah Const., art. VI, § 19.

Wyoming Const., art. III, § 18.

Judicial officers. — Although the supreme court, upon proper recommendation of the board of bar commissioners, could hold an individual subject to discipline, even though he was a judge, insofar as his activities and standing as a member of the bar association were concerned, recommendation by the board to the court regarding a judge's alleged dishonest, illegal or fraudulent act could not as such affect the individual's capacity as a judge during his term of office, inasmuch as the constitution provides the only method for the removal of a judicial officer. In re Board of Comm'rs of State Bar, 65 N.M. 332, 337 P.2d 400 (1959).

Judicial immunity. — The judge reviewing the petition for a grand jury should consider that the alleged conduct may be protected under judicial immunity if the subject of the inquiry is a member of the judiciary. In doing so, however, the reviewing judge should also recognize that judicial immunity does not relieve a person from the consequences of criminal conduct. District Court v. McKenna, 118 N.M. 402, 881 P.2d 1387 (1994), cert. denied, 514 U.S. 1018, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995).

Officers appointed by governor are subject to removal by him, whether or not they may be impeached. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Legislators. — The impeachment route could be used to handle violation by a legislator of N.M. Const., art. IV, § 28 (relating to appointment of legislators to civil office and interests of legislators in contracts with the state or municipalities) or of art. IV, § 39 (relating to bribery or solicitation involving member of the legislature). 1965 Op. Att'y Gen. No. 65-229.

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 17 et seq.; 63A Am. Jur. 2d Public Officers and Employees §§ 213, 214, 218.

Physical or mental disability as ground for impeachment, 28 A.L.R. 777.

Power of officer as affected by pendency of impeachment proceeding, 30 A.L.R. 1149.

Offense under federal law or law of another state or country, conviction as vacating accused's holding of state or local office or as ground of removal, 20 A.L.R.2d 732.

Infamous crime, or one involving moral turpitude, constituting disqualification to hold public office, 52 A.L.R.2d 1314.

Abuse or misuse of contempt power as ground for removal or discipline of judge, 76 A.L.R.4th 982.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

48A C.J.S. Judges §§ 42 to 45; 67 C.J.S. Officers and Public Employees §§ 179 to 181; 81A C.J.S. States §§ 99, 101, 129.

Sec. 37. [Railroad passes.]

It shall not be lawful for a member of the legislature to use a pass, or to purchase or receive transportation over any railroad upon terms not open to the general public; and the violation of this section shall work a forfeiture of the office.

ANNOTATIONS

Cross references. — For prohibition against use of railroad passes by public officers, *see* N.M. Const., art. XX, § 14.

Purpose. — This provision was adopted for the primary purpose of eliminating graft upon the part of members of the legislature and to relieve said members of any feeling

of obligation toward a railroad company by virtue of possession of a free pass. 1933-34 Op. Att'y Gen. No. 33-603.

Use of railroad passes prohibited. — There is no legislation against accepting free passes on railroads, but under this section and N.M. Const., art. XX, § 14, members of the legislature, of the state board of equalization, of the corporation commission (now public regulation commission), judges of the supreme or district courts, district attorney, county commissioner and county auditor assessor are prohibited from accepting and using passes. 1912-13 Op. Att'y Gen. No. 12-877.

Grant or receipt of free passes by motor carrier unlawful. — No carrier is required to transport any state employee or other person free of charge whether traveling on official business or not, and it is unlawful for a motor carrier which is regulated by the state to grant passes to any such person or for such person to accept them. 1937-38 Op. Att'y Gen. No. 37-1761.

Prohibition inapplicable to railroad employees. — The prohibition does not apply to bona fide employees of the railroad companies or their wives, if they become legislators. 1939-40 Op. Att'y Gen. No. 39-3098.

The acceptance of a pass from a railroad company by a member of the legislature who is also regularly employed by such company would not be within the contemplation of this provision of the constitution. 1937-38 Op. Att'y Gen. No. 37-1545.

A railroad employee who becomes a member of the legislature does not come within the purview of this law prohibiting free passes. 1933-34 Op. Att'y Gen. No. 33-603.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Evidence of right to free transportation on public conveyance, 3 A.L.R. 387.

Carriers, free passes to public officials or employees, 8 A.L.R. 682.

Sec. 38. [Monopolies.]

The legislature shall enact laws to prevent trusts, monopolies and combinations in restraint of trade.

ANNOTATIONS

Cross references. — For restraints of trade, *see* 57-1-1 to 57-1-6 NMSA 1978.

For monopolies, restraints of trade and the like in the motion picture business, *see* 57-5-1 to 57-5-22 NMSA 1978.

For Unfair Practices Act, *see* 57-12-1 NMSA 1978 et seq.

For Price Discrimination Act, *see* 57-14-1 to 57-14-9 NMSA 1978.

For trade practices and frauds, *see* Article 16 of Chapter 59A NMSA 1978.

For improper trade practices in the sale of alcoholic beverages, *see* Article 8A of Chapter 60 NMSA 1978.

Comparable provisions. — Idaho Const., art. XI, § 18.

Utah Const., art. XII, § 20.

Wyoming Const., art. X, § 8.

Purpose. — The constitutional prohibition contained in this section is aimed at preventing such monopolies and combinations as would, in effect, result in a practically complete destruction of competition. Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

"Price control". — The makers of the constitution did not intend to include the words "price control" in this section. Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

Exercise of police power over business or profession. — While language of this section enjoins legislation tending to create monopolies, it must yield to the more important consideration of reasonably exercising the police power over a business or profession having a vital relation to public welfare and health; former 61-17-37 NMSA 1978, fixing a minimum price for barber work, had a direct relation to public health and did not violate this section. Arnold v. Board of Barber Exam'rs, 45 N.M. 57, 109 P.2d 779 (1941).

Former Fair Trade Act. — The Fair Trade Act (former Section 49-2-4, 1953 Comp.) did not violate this section of the state constitution. Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

Restrictions in townsite deeds on sale of alcohol. — This section is not violated by restricted deeds of an improvement company establishing a townsite and restricting forever the sale of intoxicating liquor in the town to one block, by such persons as are designated by the company, such restriction being for the benefit of the community and without intent to create a monopoly. Alamogordo Imp. Co. v. Prendergast, 45 N.M. 40, 109 P.2d 254 (1940).

Law reviews. — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M. L. Rev. 1 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54A Am. Jur. 2d Monopolies, Restraints of Trade and Unfair Trade Practices § 781 et seq.

Interstate transaction, applicability of state antitrust act to, 24 A.L.R. 787.

Constitutionality of statutes making certain facts presumptive evidence of violation of regulations, 51 A.L.R. 1169, 86 A.L.R. 179, 162 A.L.R. 495.

Statute prohibiting buyer or seller of commodities from fixing prices in one locality higher or lower than in another, 67 A.L.R.3d 26.

Reputation or repute, constitutionality of statute relating to combinations in restraint of trade which predicates criminality upon, 92 A.L.R. 1235.

Copyright owners, state's powers to prohibit combinations of, 136 A.L.R. 1438.

Application of state "fair trade" law to nonsigning reseller as violation of federal anti-trust laws, 19 A.L.R.2d 1139.

Filling stations: restrictive agreement or covenant in respect of purchase or handling of petroleum products by operator of filling station as in restraint of trade or in violation of antitrust statute, 26 A.L.R.2d 219.

Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420.

Public utilities: validity of contract between public utilities, other than carriers, dividing territory and customers, 70 A.L.R.2d 1326.

Banks: application to banks and banking institutions of antimonopoly or antitrust laws, 83 A.L.R.2d 374.

Validity, construction and effect of real estate broker's multiple listing agreement, 45 A.L.R.3d 190.

Propriety, under state law, of manufacturer's or supplier's refusal to sell medical product to individual physician, hospital, or clinic, 45 A.L.R.4th 1006.

58 C.J.S. Monopolies § 27.

Sec. 39. ["Bribery" and "solicitation" defined.]

Any member of the legislature who shall vote or use his influence for or against any matter pending in either house in consideration of any money, thing of value or promise thereof, shall be deemed guilty of bribery; and any member of the legislature or other person who shall directly or indirectly offer, give or promise any money, thing of value, privilege or personal advantage, to any member of the legislature to influence him to vote or work for or against any matter pending in either house; or any member of the legislature who shall solicit from any person or corporation any money, thing of value or

personal advantage for his vote or influence as such member shall be deemed guilty of solicitation of bribery.

ANNOTATIONS

Cross references. — For penalty for bribery, *see* N.M. Const., art. IV, § 40.

Comparable provisions. — Wyoming Const., art. III, § 42.

Statutory crime void. — The statutory crime of demanding or receiving a bribe as a public official (30-24-2 NMSA 1978) conflicts with the constitutional crime of soliciting a bribe as a member of the legislature and is therefore void. State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994), aff'd in part, set aside in part, 120 N.M. 740, 906 P.2d 731 (1995).

Word "person" includes individuals and entities that are not corporations; thus, in a prosecution for soliciting a bribe as a member of the legislature, it was not necessary for the state to prove that the entity from which the defendant solicited a bribe was a corporation. State v. Olguin, 120 N.M. 740, 906 P.2d 731 (1995), aff'g in part, setting aside in part, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Indictment hereunder need not allege that the matter was pending in either house. State v. Lucero, 20 N.M. 55, 146 P. 407 (1915).

Standard of proof. — Since violation of this section is a felony, the proof would have to be beyond a reasonable doubt. 1965 Op. Att'y Gen. No. 65-229.

This provision covers three types of activity, namely, (1) a legislator voting or using his influence for or against any pending legislation in consideration of any money, thing of value or promise thereof, (2) any legislator or other person who offers, gives or promises to give anything of value to a member of the legislature to influence him to vote or work for or against any pending legislation and (3) any legislator who solicits anything of value for his vote or influence. 1965 Op. Att'y Gen. No. 65-229.

Paid lobbyist. — A legislator who is a paid lobbyist on retainer would, in all probability, be precluded from voting on or in any way using his influence for or against any pending legislation which would directly affect the person or persons paying the retainer. 1965 Op. Att'y Gen. No. 65-229.

Section not applicable to lieutenant governor. — While the lieutenant governor presides over the senate, he is not a member of the legislative branch of government, but of the executive department, and is not included within the scope of this section. 1965 Op. Att'y Gen. No. 65-229.

Impeachment route could be used for violation of this section. 1965 Op. Att'y Gen. No. 65-229.

Enjoining violations. — Although only in limited instances will the courts enjoin the commission of a crime, where necessary to protect property and property rights from irreparable injury, the courts will issue an injunction; thus, it might be that the courts would enjoin a violation of this section. 1965 Op. Att'y Gen. No. 65-229.

Criminal prosecution. — While bribery and solicitation thereof are secretive crimes which usually come to light, if at all, after the offense has been committed, it is the duty of the district attorney to prosecute all crimes for the state, and if he fails or refuses to do so, the attorney general is authorized to act on behalf of the state if after a thorough investigation such action is ascertained to be advisable. 1965 Op. Att'y Gen. No. 65-229.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Bribery §§ 12 to 14.

Liability of one cooperating in bribery which he was incapable of committing personally, 74 A.L.R. 1114, 131 A.L.R. 1322.

Candidate, statement by, regarding salary or fees of office, as bribery, 106 A.L.R. 493.

Recovery of money paid or property transferred as a bribe, 60 A.L.R.2d 1273.

Entrapment to commit bribery or offer to bribe, 69 A.L.R.2d 1397.

Furnishing public official with meals, lodging or travel, or receipt of such benefits, as bribery, 67 A.L.R.3d 1231.

Criminal offense of bribery as affected by lack of authority of state public officer or employee, 73 A.L.R.3d 374.

11 C.J.S Bribery §§ 1 to 7.

Sec. 40. [Penalty for bribery.]

Any person convicted of any of the offenses mentioned in Sections thirty-seven and thirty-nine hereof, shall be deemed guilty of a felony and upon conviction shall be punished by fine of not more than one thousand dollars [($1,000)] or by imprisonment in the penitentiary for not less than one nor more than five years.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For bribery and solicitation involving legislators in general, *see* N.M. Const., art. IV, § 39.

Comparable provisions. — Wyoming Const., art. III, §§ 42, 43.

Standard of proof. — Since violation of N.M. Const., art. IV, § 39, is made a felony under this section, the proof would have to be proof beyond a reasonable doubt. 1965 Op. Att'y Gen. No. 65-229.

Sec. 41. [Compelling testimony in bribery cases.]

Any person may be compelled to testify in any lawful investigation or judicial proceeding against another charged with bribery or solicitation of bribery as defined herein, and shall not be permitted to withhold his testimony on the ground that it might incriminate or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding against him except for perjury in giving such testimony.

ANNOTATIONS

Cross references. — For constitutional guarantee against compulsory self-incrimination, *see* N.M. Const., art. II, § 15.

For perjury in general, *see* 30-25-1 NMSA 1978.

Comparable provisions. — Wyoming Const., art. III, § 44.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Other jurisdiction, privilege against self-incrimination as extending to danger of prosecution in, 59 A.L.R. 895, 82 A.L.R. 1380.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 118 A.L.R. 602, 53 A.L.R.2d 1030, 29 A.L.R.5th 1.

Assertion of privilege against self-incrimination, necessity and sufficiency of, as condition of statutory immunity of witness from prosecution, 145 A.L.R. 1416.

Waiver of privilege, in exchange for immunity from prosecution, as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 A.L.R.2d 631.

Grand jury, privilege against self-incrimination as to testimony before, 38 A.L.R.2d 225.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony - post-Kastigar cases, 29 A.L.R.5th 1.

Sec. 42. [Hearings on confirmation of gubernatorial appointments.]

The senate, in exercising its advice and consent responsibilities over gubernatorial appointments, may by resolution designate the members of an appropriate standing committee to operate as an interim committee during the interim between legislative sessions for the purpose of conducting hearings and taking testimony on the confirmation or rejection of gubernatorial appointments. Recommendations of the committee shall be submitted to the senate for action at the next succeeding legislative session. Members of such committee shall be paid per diem and mileage for attendance at such hearings at the same rates as legislators are paid for attendance at joint legislative interim committee meetings. The governor shall submit all appointments requiring senate confirmation to such committee within thirty days after the date of appointment. (As added November 4, 1986.)

ANNOTATIONS

Cross references. — For governor's appointive and removal power, including interim appointees, *see* N.M. Const., art. V, § 5.

For oath of officer, *see* N.M. Const., art. XX, § 1.

For holding office until successor qualified, *see* N.M. Const., art. XX, § 2.

For interim appointments when senate not in session, *see* N.M. Const., art. XX, § 5.

The 1986 amendment, which was proposed by S.J.R. No. 1 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 161,322 for and 103,134 against added new Section 42 to Article IV.

Compiler's notes. — An amendment to this article proposed by H.J.R. No. 15, § 1 (Laws 1965), which would have added a new Section 42, providing for the appointment of a legislative auditor, was submitted to the people at the special election held on September 28, 1965. It was defeated by a vote of 21,144 for and 29,162 against.

An amendment to this article proposed by S.J.R. No. 1, § 1 (Laws 1965), which would have added a new section, providing for the weighing of legislative votes for the purpose of securing to the people of New Mexico equal protection of the laws, was submitted to the people at the special election held on September 28, 1965. It was defeated by a vote of 16,299 for and 34,568 against.

Recess appointment of regent. — The failure of the legislature to act upon the governor's nomination of a person to the board of regents of an educational institution operates neither as "constructive consent" to, nor as rejection of, the nomination. A regent appointed by recess appointment may be replaced through a new gubernatorial nomination made during the next session of the legislature. 1991 Op. Att'y Gen. No. 91-04.

A nominee to the board of regents of an educational institution who is neither confirmed nor rejected by the senate cannot serve as regent unless, following adjournment of both houses of the legislature, the governor makes a recess appointment of the person, in which case, that person may serve as a full-fledged regent until the next session of the legislature. As either a de jure or de facto officer, the regent's actions are valid as to the public. The governor is not obliged to re-submit the former nominee to the next session of the legislature and may make a new nomination. The new nominee may assume the duties as regent, either upon approval by the senate or by a recess appointment by the governor if the senate fails to take any action. 1991 Op. Att'y Gen. No. 91-04.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor §§ 5 to 7; 63A Am. Jur. 2d Public Officers and Employees §§ 117, 119, 120.

67 C.J.S. Officers and Public Employees § 42; 81A C.J.S. States §§ 55, 84.

ARTICLE V
Executive Department

Section 1. [Composition of department; terms of office of members; residing and maintaining records at seat of government.]

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands, who shall, unless otherwise provided in the constitution of New Mexico, be elected for terms of four years beginning on the first day of January next after their election. The governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices.

Such officers shall, after having served two terms in a state office, be ineligible to hold that state office until one full term has intervened.

The officers of the executive department, except the lieutenant governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government.

Upon the adoption of this amendment by the people, the terms provided for in this section shall apply to those officers elected at the general election in 1990 and all state executive officers elected thereafter. (As amended November 3, 1914, November 4, 1958, effective January 1, 1959, November 6, 1962, November 3, 1970 and November 4, 1986.)

ANNOTATIONS

Cross references. — For qualifications of officers specified in this section, *see* N.M. Const., art. V, § 3.

For compensation of such officers, *see* N.M. Const., art. V, § 12 and 8-1-1 NMSA 1978.

For executive cabinet, *see* 9-1-3, 9-1-4 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, § 1.

Iowa Const., art. IV, § 1; amendment 32.

Montana Const., art. VI, §§ 1, 2.

Utah Const., art. VII, §§ 1, 2.

Wyoming Const., art. IV, § 1.

The 1914 amendment, which was proposed by S.J.R. No. 19 (Laws 1913) and adopted at the general election held on November 3, 1914, by a vote of 18,472 for and 12,257 against, amended this section, which formerly read, "The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction and commissioner of public lands, who shall be elected for the term of four years beginning on the first day of January next after their election.

"Such officers, except the commissioner of public lands and superintendent of public instruction, shall be ineligible to succeed themselves after serving one full term. The officers of the executive department, except the lieutenant governor, shall, during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government," to read, "The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction and commissioner or [of] public lands, who shall be elected for the term of two years beginning on the first day of January next after their election.

"Such officers shall, after having served two consecutive terms, be ineligible to hold any state office for two years thereafter.

"The officers of the executive department except the lieutenant governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government."

The 1958 amendment, which was proposed by S.J.R. No. 3, § 2 (Laws 1957) and adopted at the general election held on November 4, 1958, with a vote of 48,884 for and 41,795 against, omitted "superintendent of public instruction" from list of officers and added "unless otherwise provided in the constitution of New Mexico" following "who shall" in the first paragraph.

The 1962 amendment, which was proposed by S.J.R. No. 3, § 1 (Laws 1961) and adopted at the general election held on November 6, 1962, with a vote of 41,435 for and 22,383 against, added the second sentence to the first paragraph.

The 1970 amendment, which was proposed by S.J.R. No. 7, § 1 (Laws 1970) and adopted at the general election held on November 3, 1970, with a vote of 79,722 for and 59,426 against, substituted "term of four years" for "term of two years" in the first sentence of the first paragraph, rewrote the second paragraph to provide that after service of one term, executive officers would be ineligible to hold state office until passage of another full term, with an exception for the lieutenant governor, and added the fourth paragraph.

The 1986 amendment, which was proposed by H.J.R. No. 15 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 168,850 for and 106,013 against, substituted "terms" for "the term" in the first paragraph; in the second paragraph, substituted "two terms in a state office" for "one term," substituted "that" for "any" after "hold," and deleted the exception relating to the lieutenant governor at the end; substituted "1990" for "1970" in the last paragraph; and deleted the proviso at the end.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 2, § 1 (Laws 1959), which would have provided for a four-year term for executive officials, would have made such officers ineligible for office for four years after service of two consecutive four-year terms and would have provided for election of such officers, was submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment to this section proposed by H.J.R. No. 15, § 1 (Laws 1961), which would have deleted reference to the state auditor from the list of officers in the first paragraph, and an amendment proposed by S.J.R. No. 13, § 1 (Laws 1961), which would have provided for a four-year term for elected executive officials, would have made such officers ineligible for office after service of one four-year term and would have provided for election of such officers, were both submitted to the people at the special election held on September 19, 1961. They failed to pass because they did not receive the necessary majority.

An amendment to this section proposed by S.J.R. No. 25 (Laws 1975), which would have allowed state executive officers to serve two consecutive four-year terms, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 117,167 for and 181,201 against.

An amendment to this section, proposed by S.J.R. Nos. 5 and 6 (Laws 1979), which would have substituted "terms" for "the term" in the first sentence of the first paragraph, substituted "two consecutive terms in a state office" for "one term" in the second paragraph and substituted "1982" for "1970" and deleted the second sentence in the

fourth paragraph, was submitted to the people at the general election on November 4, 1980. It was defeated by a vote of 107,676 for and 138,393 against.

Powers of secretary of state. — The secretary of state does not have the power to change mandatory provisions of the Election Code. Weldon v. Sanders, 99 N.M. 160, 655 P.2d 1004 (1982).

Purpose of state auditor. — The office of state auditor was created and exists for the basic purpose of having a completely independent representative of the people, accountable to no one else, with the power, duty and authority to examine and pass upon the activities of state officers and agencies receiving and expending public moneys. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

Legislature cannot abolish a constitutional office nor deprive the office of a single prescribed constitutional duty; nor can this be done by indirection, such as depriving the officer of all statutory duties, thereby leaving the office in name only, an empty shell. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968); Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957).

Laws 1965, ch. 287 (former 4-24-1 to 4-24-25, 1953 Comp.), designed to take away from the state auditor all post-audit duties and place them with the legislative audit commission, and making the commission's appointee, the legislative auditor, responsible for substantially all the duties performed by the state auditor, was unconstitutional. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

Purely statutory duties transferable. — Since this section is silent as to the duties appertaining to the office of state auditor, the legislature had power to transfer purely statutory duties of the office previously performed by the auditor to another officer of its own choosing. Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957).

Laws 1957, ch. 252 (6-5-1 NMSA 1978), providing that warrants on state funds may be drawn only by director (now secretary) of department of finance and administration, was unconstitutional on theory that it removed from the state auditor, a constitutional officer, substantially all the powers and duties of that office. Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957).

No common-law powers in attorney general. — Absent common-law powers in the solicitor general, they would not have resided in the attorney general in 1912 when our constitution was adopted. The court will not prohibit district judge from proceeding further in action brought in the name of the state by district attorney for Santa Fe county, seeking recovery of certain amounts allegedly paid illegally to chairman of the state highway commission [state transportation commission], without permitting intervention of attorney general. State ex rel. Att'y Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

Land commissioner. — In order to avail themselves of the federal land grant provided by the Enabling Act, the people in their constitution created the office of commissioner of public lands. State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059 (1921).

Legislature empowered to create other executive officers. — Enumeration by the constitution of certain officers constituting the executive departments of the state does not necessarily deprive the legislature of the power to create other executive officers, although it cannot abolish any of those created by the constitution; N.M. Const., art. V, § 5, recognizes and provides for the appointment of all officers whose appointment or election is not otherwise provided for. Pollack v. Montoya, 55 N.M. 390, 234 P.2d 336 (1951).

Constitutional and statutory offices distinguished. — There is an obvious distinction between offices created under the constitution itself and executive officers created by statute; the latter are creatures of the legislature, and may have their duties changed or their offices abolished at any time the legislature so desires, unlike the former. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Governor and lieutenant governor to be voted on as unit. — It was the intention of the people, in amending this section and N.M. Const., art. V, § 2, to require that the governor and lieutenant governor be voted on as a unit; lacking one of them, namely the governor, there could be no candidate for lieutenant governor by himself, and mandamus would not lie to compel certification of his name. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Location of legislatively created offices not restricted hereunder. — The constitution makers did not intend to restrict the creation of additional executive offices, but only to specifically provide that the elective officials named must live and keep all of their records at the seat of government. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Standing to sue. — Relators, who were residents, citizens, qualified electors and citizens of the city and county of Santa Fe, suing in behalf of themselves and other citizens of the state similarly situated, were without standing to raise constitutional question in original proceeding in mandamus, seeking to require governor and eleven state boards or commissions to return and thereafter maintain the main offices of the agencies in question at the capital; but the supreme court, in its own discretion, would proceed to determine the question. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

State board of finance is an executive agency. 1959-60 Op. Att'y Gen. No. 59-79.

State tourist bureau is agency of executive branch of the state government and is under the control of the governor. 1957-58 Op. Att'y Gen. No. 57-166.

Constitutionality of amendment. — The 1970 session of the legislature proposed eight amendments to the constitution, although the attorney general has indicated that under N.M. Const., art. IV, § 5, constitutional amendments may not be considered in even-numbered years. 1965 Op. Att'y Gen. No. 65-212, 1969 Op. Att'y Gen. No. 69-151.

Powers of secretary of state. — Secretary of state has only such powers and authority as specifically granted by the constitution or by statute; he has no inherent or implied power to certify candidates not selected in a manner specifically provided by law. 1959-60 Op. Att'y Gen. No. 60-151.

Legislature cannot abolish a constitutional office. 1980 Op. Att'y Gen. No. 80-03.

Second sentence of first paragraph of this section is self-executing. 1962 Op. Att'y Gen. No. 62-149.

Reelection. — Incumbents of both state and county offices were eligible to reelection in 1916. 1915-16 Op. Att'y Gen. No. 15-1507.

Act not invalid. — An official act by the lieutenant governor, recorded "Done at the executive office", is not invalid although actually done at his residence in another city. 1921-22 Op. Att'y Gen. No. 21-2937.

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For article, " 'New Mexican Nationalism' and the Evolution of Energy Policy in New Mexico," see 17 Nat. Resources J. 283 (1977).

For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?" see 9 Nat. Resources J. 430 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 16, 17, 23, 32, 56, 154 to 156; 72 Am. Jur. 2d States, Territories and Dependencies § 62.

Power to abolish or discontinue office, 4 A.L.R. 205, 172 A.L.R. 1366.

Term of office, "during term for which elected," 5 A.L.R. 120, 40 A.L.R. 945.

Beginning of term, no time fixed for, 80 A.L.R. 1290, 135 A.L.R. 1173.

Power of legislature to extend term of public office, 97 A.L.R. 1428.

Doctrine of estoppel as applicable against one's right to hold a public office or his status as a public officer, 125 A.L.R. 294.

Constitutional or statutory provision referring to "employees" as including public officers, 5 A.L.R.2d 415.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Construction and effect of constitutional or statutory provisions disqualifying one for public office because of previous tenure of office, 59 A.L.R.2d 716.

Delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361.

Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.

Construction and application, under state law, of doctrine of "executive privilege," 10 A.L.R.4th 355.

67 C.J.S. Officers and Public Employees §§ 5, 13, 66 to 70; 81A C.J.S. States §§ 34, 80, 82.

Sec. 2. [Canvass of elections; tie votes.]

The returns of every election for state officers shall be sealed up and transmitted to the secretary of state, who, with the governor and chief justice, shall constitute the state canvassing board which shall canvass and declare the result of the election. The joint candidates having the highest number of votes cast for governor and lieutenant governor and the person having the highest number of votes for any other office, as shown by said returns, shall be declared duly elected. If two or more have an equal, and the highest, number of votes for the same office or offices, one of them, or any two for whom joint votes were cast for governor and lieutenant governor respectively, shall be chosen therefor by the legislature on joint ballot. (As amended November 6, 1962.)

ANNOTATIONS

Cross references. — For joint election of governor and lieutenant governor, *see* N.M. Const., art. V, § 1.

For the Election Code, *see* Chapter 1 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, § 2.

Iowa Const., art. IV, §§ 3 to 5.

Wyoming Const., art. IV, § 3.

"Returns". — "Returns" did not include registration lists, and state canvassing board had only the duty of canvassing returns, not ballots; for purpose of discovering discrepancies, errors and omissions on face of returns and directing their correction, the board might consider certificates, tally sheets and pollbooks as part of the "returns"; when corrected they would be reflected in the certificates, and it was the corrected certificate and those not requiring correction which were to be canvassed. Chavez v. Hockenhull, 39 N.M. 79, 39 P.2d 1027 (1934), superseded by statute, Reese v. Dempsy, 48 N.M. 417, 152 P.2d 157 (1944).

Powers of canvassers limited. — Canvassers had power to pass upon genuineness of returns before them, but beyond that their powers were purely ministerial. Determination by state canvassing board as to whether illegal or fraudulent votes had been cast, or had been cast in such numbers as to warrant excluding returns from the canvass, presented a judicial question wherein the board would be exercising judicial functions without legislative or constitutional warrant. Chavez v. Hockenhull, 39 N.M. 79, 39 P.2d 1027 (1934), superseded by statute, Reese v. Dempsy, 48 N.M. 417, 152 P.2d 157 (1944).

Governor and lieutenant governor to be voted on as unit. — It was the intention of the people in amending N.M. Const., art. V, § 1 and this section to require that the governor and lieutenant governor be voted on as a unit; lacking one of them, namely, the governor, there could be no candidate for lieutenant governor by himself, and mandamus would not lie to compel the certification of his name. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968).

Section does not provide for tie in school director election. — Unless the statute provides a method for determining a tie, there is no election and the incumbent holds over until a regular election. 1921-22 Op. Att'y Gen. No. 22-3379.

Results as determined by state canvass are public records and this determination constitutes the official record. 1964 Op. Att'y Gen. No. 64-35.

Poll book and ballots. — A general election which includes votes for state officers, presidential electors, members of congress, a highway bond issue and a constitutional amendment should require but one poll book, and one ballot for the constitutional amendment, and one for all the other matters to be voted upon. 1912-13 Op. Att'y Gen. No. 12-921.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections § 392 et seq.; 38 Am. Jur. 2d Governor § 2.

Officers conducting election, result as affected by lack of title or by defective title of, 1 A.L.R. 1535.

Statutory provisions relating to form or manner in which election from voting districts or precincts are to be made, failure to comply with, 106 A.L.R. 398.

Excess or illegal ballots, treatment of, when it is not known for which candidate or upon which side of a proposition they were cast, 155 A.L.R. 677.

Power of election officers to withdraw or change returns, 168 A.L.R. 855.

29 C.J.S. Elections §§ 222, 232, 235 to 239; 81A C.J.S. States §§ 80, 81.

Sec. 3. [Qualifications of executive officers.]

No person shall be eligible to any office specified in Section One, hereof, unless he be a citizen of the United States, at least thirty years of age, nor unless he shall have resided continuously in New Mexico for five years next preceding his election; nor to the office of attorney general, unless he be a licensed attorney of the supreme court of New Mexico in good standing; nor to the office of superintendent of public instruction unless he be a trained and experienced educator.

ANNOTATIONS

Cross references. — For qualifications for election to elective public office, *see* N.M. Const., art. VII, § 2.

Qualifications for governor's office. — This section should be read together with N.M. Const., art. VII, § 2, so that a person in order to hold the office of governor must be a citizen of the United States, at least 30 years of age, who has been a resident continuously for five years preceding his election, and who is a qualified elector in New Mexico. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R. 3d 290 (1968).

Convicted felon ineligible. — Denial of certification of name of individual nominated for governor by people's constitutional party was proper where candidate had been convicted of a felony in federal district court, as one must be a qualified elector in this state to hold office of governor; fact that an appeal was pending would not change this result. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R. 3d 290 (1968).

Residency requirement. — If a person is a resident for the purpose of voting in New Mexico elections, and has been for at least five continuous years preceding his election to an executive office of the state, he is qualified to be a candidate for, and hold such office. 1959-60 Op. Att'y Gen. No. 60-27.

Service in armed forces. — A person who has left the physical limits of the state to serve with the armed forces of the United States after having once established residence here is eligible to hold an executive office. 1959-60 Op. Att'y Gen. No. 60-27.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 36 to 46, 60 to 61.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

81A C.J.S. States §§ 15 to 21, 26, 34.

Sec. 4. [Governor's executive power; commander of militia.]

The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed. He shall be commander in chief of the military forces of the state, except when they are called into the service of the United States. He shall have power to call out the militia to preserve the public peace, execute the laws, suppress insurrection and repel invasion.

ANNOTATIONS

Cross references. — For authorized purposes of state indebtedness, including suppression of insurrection and public defense, *see* N.M. Const., art. IX, § 7.

For the militia generally, *see* N.M. Const., art. XVIII, §§ 1 and 2.

For heading cabinet, *see* 9-1-3 NMSA 1978.

For governor's power to call out the militia, *see* 20-2-6 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, §§ 4, 5.

Iowa Const., art. IV, §§ 7, 9.

Montana Const., art. VI, §§ 4, 13.

Utah Const., art. VII, §§ 4, 5.

Wyoming Const., art. IV, § 4.

Executive privilege. — The executive privilege in New Mexico, which derives from the constitution and which is reserved to and can be invoked only by the governor, extends only to documents that are communicative in nature, that are made to and from individuals in very close organizational and functional proximity to the governor, and that relate to decisions made by the governor in the performance of the governor’s constitutionally-mandated duties. Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't, 2012-NMSC-026, 283 P.3d 853.

Application of the executive privilege to the inspection of public records. — Courts considering the application of the executive privilege to a request for the inspection of public records under the Inspection of Public Records Act (Chapter 14, Article 2 NMSA 1978) must independently determine whether the documents at issue

are in fact covered by the privilege and whether the privilege has been invoked by the governor, to whom the privilege is reserved. Courts are not required to balance the competing needs of the executive and the party seeking disclosure. Where appropriate, courts should conduct an in camera view of the documents at issue as part of their evaluation of the privilege. Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't, 2012-NMSC-026, 283 P.3d 853.

Executive privilege did not apply to drivers' license records. — Where petitioners requested public documents from the motor vehicle division relating to the issuance of drivers' licenses to foreign nationals and to an audit of the license program ordered by the governor; the motor vehicle division redacted information pursuant to executive privilege; the redacted documents included communications regarding New Mexico's negotiations with the Mexican government regarding access to identity documents and discussions related to implementing the audit of the driver's license program; the documents at issue were principally internal emails between staff of the motor vehicle division, not communications with the governor or the governor's immediate staff; and the motor vehicle division, not the governor, asserted the executive privilege; the documents at issue did not qualify for the executive privilege. Republican Party of N.M. v. New Mexico Taxation & Revenue Dep't, 2012-NMSC-026, 283 P.3d 853, rev'g 2010-NMCA-080, 148 N.M. 877, 242 P.3d 444.

Governor is sole judge of facts that may seem to demand aid and assistance of military force of state. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

To provide for public defense embraces considerations of preparedness as well as execution. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Power of militia supersedes civil authorities. — Where governor, seeking to quell insurrection, calls out the militia, by executive process, and puts them in charge, such military forces do not act as sheriffs or deputy sheriffs, but their power supersedes the civil authorities. State ex rel. Roberts v. Swope, 38 N.M. 53, 28 P.2d 4 (1933).

Other provisions. — This section is in pari materia with N.M. Const., art. IX, § 7 (authorizing state indebtedness for certain purposes, including the suppressing of insurrection and public defense) and art. XVIII, § 2 (relating to the organization, discipline and equipment of the militia). State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Governor entitled to legislative immunity. — Actions of the governor recommending state appropriations for medicaid waivers, revamping the state personnel system and plan for growth in the medicaid programs were legislative in nature and therefore the governor is entitled to legislative immunity. Lewis v. New Mexico Dep't of Health, 275 F.Supp.2d 1319 (D.N.M. 2003).

Governor did not have authority to enter compacts with Indian tribes. — The governor could not rely on statutory authority to enter into compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

Governor has almost unlimited authority to suppress insurrection, and is himself the judge as to the local condition requiring it. 1919-20 Op. Att'y Gen. No. 19-2416.

Governor's authority not to be invaded by legislature. — Any attempt by the legislature to invade the authority vested in the governor by virtue of this section would be interference by one department of the government with another, contrary to Article 3 of the constitution. 1951-52 Op. Att'y Gen. No. 51-5438.

Limitation imposed by former 20-6-2 NMSA 1978, prior to its 1953 amendment, on the issuance of certificates of indebtedness by the governor without calling a special session of the legislature, was not in conflict with this section as it did not interfere with the governor's power to call out the militia. 1951-52 Op. Att'y Gen. No. 51-5438.

Governor does not have authority to legislate regulation of massage practitioners and he cannot delegate it to a massage board. 1980 Op. Att'y Gen. No. 80-09.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor § 4; 53 Am. Jur. 2d Military and Civil Defense §§ 3, 32, 34.

Mandamus to governor, 105 A.L.R. 1124.

Prohibition as means of controlling action of governor, 115 A.L.R. 14, 159 A.L.R. 627.

Devolution, in absence of governor, of veto and approval powers upon lieutenant governor or other officer, 136 A.L.R. 1053.

War, constitutionality, construction and application of statute conferring emergency powers on governor during, 150 A.L.R. 1488.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

6 C.J.S. Armed Services § 288 et seq.; 81A C.J.S. States § 130.

Sec. 5. [Governor's appointive and removal power; interim appointees.]

The governor shall nominate and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for and may remove any officer appointed by him unless otherwise provided by law. Should a vacancy occur in any state office, except lieutenant governor and member of the legislature, the

governor shall fill such office by appointment, and such appointee shall hold office until the next general election, when his successor shall be chosen for the unexpired term. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For vacancies in office of governor (or lieutenant governor) and succession to governorship, *see* N.M. Const., art. V, § 7.

For removal of state highway commissioners, *see* N.M. Const., art. V, § 14.

For governor's power to make interim appointments to fill vacancies in appointive offices between sessions of the legislature, *see* N.M. Const., art. XX, § 5.

For appointed secretaries of cabinet departments serving until final action by senate on confirmation, *see* 9-1-4 NMSA 1978.

For ineligibility of person whose appointment has been rejected by the senate to hold office under recess appointment, *see* 10-1-1 NMSA 1978.

For designation of three disaster successors to each executive office, *see* 12-11-5 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, § 6.

Montana Const., art. VI, § 8.

Utah Const., art. VII, § 10.

Wyoming Const., art. IV, § 7.

The 1988 amendment, which was proposed by H.J.R. No. 11, § 2 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 224,091 for and 145,206 against substituted "unless otherwise provided by law" for "for incompetency, neglect of duty or malfeasance in office" at the end of the first sentence.

No conflict with Article VI, Section 32. — This section addresses the power to remove officers. N.M. Const., art. VI, § 32, addresses the power to fill a vacancy. The two powers are not mutually exclusive, and one does not negate the other. State ex rel. N.M. Judicial Standards Comm’n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Staggered terms. — The use of staggered terms is not sufficient to limit the governor’s removal power under this section. While policies underlying staggered terms are important, such policies cannot override the governor’s express removal authority. State

ex rel. N.M. Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Appointment power for legislatively created offices not inherently in governor. — The Sales Tax Act of 1934 (Laws 1934 (S.S.), ch. 7) was not unconstitutional and in violation of this section because it did not make the "seller" a collector who should be appointed by the governor, but, instead, levied the tax on the "seller" and made former tax commission the collector of the tax. State ex rel. Attorney Gen. v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938).

The Drainage District Law of 1912 (73-6-1 NMSA 1978 et seq.) did not violate this section, the commissioners of drainage districts not being of the class contemplated. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

Governor has power to remove any officer appointed by him, including those appointed by and with consent of senate; he is not required to make charges, give notice or accord a hearing. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926); State ex rel. Duran v. Anaya, 102 N.M. 609, 698 P.2d 882 (1985).

Removal of members of the public employee relations board. — The governor does not have authority under Article V, Section 5 of the constitution of New Mexico to remove members of the public employee labor relations board created by 10-7E-8 NMSA 1978. AFSCME v. Martinez, 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952.

Governor may remove policy-making appointee for political reasons, without notice or hearing, and this power encompasses removal for expressions made by the appointee in contravention of the policy goals of the governor; however, a contrary rule may apply to a nonpolicy-making state employee. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976) (decided prior to 1988 amendment, which rewrote first sentence).

Governor's discretion not subject to court review. — Where an appointment is during pleasure, or for a fixed period, with a discretionary power of removal, the office may be vacated and the removal made ex parte, and because the office of governor is political, the discretion vested in the chief executive by the constitution and laws of the state respecting his official duties is not subject to control or review by the courts. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976).

Removal proceedings moot. — Removal proceedings based on conduct during a previous term are generally considered to be moot. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Commission as prima facie evidence of entitlement to office. — An appointment to office by the executive is complete upon delivery of the commission. When governor appointed and commissioned plaintiff, he gave him prima facie title to the office, and the commission, when issued, must be taken at least as prima facie evidence that the

person holding it is lawfully entitled to the office. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

Power of legislature to create offices. — Enumeration by constitution of certain officers constituting executive department of the state does not necessarily deprive the legislature of power to create other executive officers, although it cannot abolish any of those created by the constitution. Pollack v. Montoya, 55 N.M. 390, 234 P.2d 336 (1951).

Power of legislature to create offices. — Legislature may restrict membership on any legislatively created professional board to members of the profession, and may also enact a residential restriction so long as the restrictions on the terms are compatible with the elective restriction on executive officers in the constitution. 1953-54 Op. Att'y Gen. No. 53-5750.

Governor is under constitutional duty to submit appointments of officers to positions requiring the advice and consent of the senate at the next session of that body following the appointment. 1970 Op. Att'y Gen. No. 70-10.

Senate has constitutional duty to act on submitted appointments whenever it is next in session, in time for the governor to make a substitute appointment for anyone rejected by the senate. 1970 Op. Att'y Gen. No. 70-10.

Legislature's confirmatory power exercisable at any session. — Confirmation by the senate of appointments made by governor is not part of its legislative duties, but rather, is an administrative function given to the senate as part of the system of checks and balances, which exists whenever the senate is in session and may be exercised whether the session is a regular-long, regular-short or special one. 1970 Op. Att'y Gen. No. 70-10.

Legislature not to invade governor's prerogative. — In providing for the "consent" of the senate, it was not the intention of the constitutional draftsmen to permit the senate to instruct or otherwise assert the prerogative of the governor in making the nomination; to the contrary, the nominating authority is vested exclusively in the governor, but his appointing power is shared with the senate. 1961-62 Op. Att'y Gen. No. 61-17.

Commencement of appointee's term. — When a public officer is appointed while the senate is in session, the office holder can neither assume the duties nor exercise the powers of his office until the consent of the senate is given. 1961-62 Op. Att'y Gen. No. 61-17.

Appointment power for legislatively created offices not inherently in governor. — There would be no impediment to the legislature's placing the power of appointment for an office legislatively created in someone other than the governor, and in that event, it might also prescribe the authority to exercise the removal power and the manner of its exercise. 1957-58 Op. Att'y Gen. No. 58-10.

The appointments contemplated in the Oil Conservation Act (Laws 1935, ch. 72, as amended) are appointments "otherwise provided for" as those words are used in this section, and do not invade the governor's power of appointment. 1951-52, Op. Att'y Gen. No. 51-5397.

Conferral of appointive power on governor includes removal power. — The legislature lacks the power to restrict the governor's removal power over legislatively created offices where it has conferred the appointing power for these offices upon the governor. 1957-58 Op. Att'y Gen. No. 58-10.

Governor's power to remove member of real estate commission. — Since the governor may remove any person appointed by him or his predecessor, the governor can remove any member of the real estate commission at any time without notice or hearing. 1963-64 Op. Att'y Gen. No. 63-134.

Removal of board members. — Since no statutory method of removal was prescribed for former health and social services board, the method prescribed under this section would be the proper method for governor to proceed under. 1971 Op. Att'y Gen. No. 71-06.

Notice and hearing unnecessary for removal. — A public official who, under the law, has a fixed term of office, and who is removable only for specified causes, can be removed without notice or a hearing upon the charges. 1967 Op. Att'y Gen. No. 67-06.

An executive termination is a nullity only where there is a failure to state the reason for removal as required; neither proof of the stated reason nor a hearing thereon is required. 1957-58 Op. Att'y Gen. No. 57-179 (regarding a member of the economic development commission).

No proof of changes required. — The constitution does not require that a notice and hearing be given before a removal can be made and, therefore, no proof would be necessary of the charges made by the governor. 1953-54 Op. Att'y Gen. No. 53-5746.

Governor's power over highway commission greatly limited. — Passage of N.M. Const., art. V, § 14, was in direct derogation of this section, and was drawn to limit, almost to the point of abolition, the governor's power over the highway commission. 1957-58 Op. Att'y Gen No. 57-47.

Length of term of interim appointee to elective office. — Under this section an appointee to a state office holds his office only until the next general election, and the term of office of the elected successor commences upon the date he qualifies, since he has been elected to an office to fill a vacancy. 1951-52 Op. Att'y Gen. No. 52-5612.

Where appointees of the governor were holding state offices after a vacancy, until the next election, and no candidates for such office were nominated or elected as their

successors, they were entitled to hold office until their successors were duly qualified. 1925-26 Op. Att'y Gen. No. 26-3915.

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

For note, "The Public Service Commission: A Legal Analysis of an Administrative System," see 3 N.M. L. Rev. 184 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor §§ 5 to 8; 63A Am. Jur. 2d Public Officers and Employees §§ 95, 117, 119, 120, 219, 221 to 225, 231.

Power of legislature to abolish or discontinue office, 4 A.L.R. 205, 172 A.L.R. 1366.

Physical or mental disability as ground for removal from office, 28 A.L.R. 777.

Removal for failure to answer frankly questions asked during investigation, 77 A.L.R. 616.

Removal for bringing or defending action affecting personal rights or liabilities; collecting mileage after traveling without expense as ground for removal, 81 A.L.R. 493.

Implied power of appointing authority to remove officer whose tenure is not prescribed by law, though appointed for definite term, 91 A.L.R. 1097.

Membership in or affiliation with religious, political, social or criminal society or group as ground of removal of public officer, 116 A.L.R. 358.

Power of courts or judges in respect of removal of officers, 118 A.L.R. 170.

Constitutionality and construction of statute which fixes or specifies term of office but provides for removal without cause, 119 A.L.R. 1437.

Failure of public officer or employee to pay creditors on claims not related to his office or position as ground or justification for his removal or suspension, 127 A.L.R. 495.

Induction or voluntary enlistment in military service as creating a vacancy in, or as ground for removal from, public office or employment, 154 A.L.R. 1456, 156 A.L.R. 1457, 157 A.L.R. 1456.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for fixed term and until successor is appointed or elected is holding over, 164 A.L.R. 1248.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Conviction of offense under federal law or law of another state or country as ground for removal from state or local office, 20 A.L.R.2d 732.

Injunction as remedy against removal of public officer, 34 A.L.R.2d 554.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Infamous crime, or one involving moral turpitude constituting disqualification to hold office, 52 A.L.R.2d 1314.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Removal for misconduct during previous term of office, 42 A.L.R.3d 691.

67 C.J.S. Officers and Public Employees §§ 36, 40, 42, 117 to 126; 81A C.J.S. States §§ 84, 98, 99.

Sec. 6. [Governor's power to pardon and reprieve.]

Subject to such regulations as may be prescribed by law, the governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment.

ANNOTATIONS

Cross references. — For statutory provision relating to granting of pardon or restoration of civil rights after service of individual's sentence, *see* 31-13-1 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, § 7.

Iowa Const., art. IV, § 16.

Montana Const., art. VI, § 12.

Utah Const., art. VII, § 12.

Wyoming Const., art. IV, § 5.

Ultimate power and right to pardon is granted to governor, unrestrained by any consideration other than his conscience, wisdom and sense of public duty, although there may be regulations by law of the manner of its exercise. Ex parte Bustillos, 26 N.M. 449, 194 P. 886 (1920).

Legislative invasion of governor's rights unconstitutional. — Code 1915, § 5087 (since repealed), providing for issuance of pardons only upon recommendation of board of penitentiary commissioners, whether or not it was an "existing statute" when adopted and enacted into the code, constituted a plain invasion of rights and duties of the executive, and taken as a whole, was unconstitutional and inoperative. Ex parte Bustillos, 26 N.M. 449, 194 P. 886 (1920).

Statute permitting court to suspend sentence valid. — Laws 1909, ch. 32, § 1 (since repealed), authorizing suspension of sentence by district court, did not encroach upon this section. Ex parte Bates, 20 N.M. 542, 151 P. 698, 1916A L.R.A. 1285 (1915).

Governor has full power to pardon for direct criminal contempt of a court. Ex parte Magee, 31 N.M. 276, 242 P. 332 (1925).

Constructive criminal contempt pardonable. — Constructive criminal contempt is an offense against the state which has the power, through its executive, to extend grace or forgiveness. State v. Magee Publishing Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142 (1924), overruled by State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965).

Habitual offender sentences. — The governor has the power to pardon habitual offender sentences, even those not yet imposed on convictions in existence at the time the governor issues the pardon. State v. Mondragon, 107 N.M. 421, 759 P.2d 1003 (Ct. App.), cert. denied, 107 N.M. 267, 755 P.2d 605 (1988).

Effect of pardon on habitual criminal provisions. — An executive pardon of an offense which has provoked the court into imposing a life sentence under the habitual criminal act does not avail to deny the court authority to employ the same felony convictions again for the purpose of imposing another sentence under the habitual criminal act, if subsequent to the pardon the prisoner commits another felony. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

Revocation of pardon. — The governor may revoke a pardon he has issued before it has been delivered to and accepted by the pardonee. 1970 Op. Att'y Gen. No. 70-89.

Governor is without power to pardon conviction under municipal ordinance. City of Clovis v. Hamilton, 41 N.M. 4, 62 P.2d 1151 (1936).

Ward of court. — Pardon powers of the governor do not extend to a person adjudged to be a ward of the court, since such a person has not been convicted of crime. 1943-44 Op. Att'y Gen. No. 43-4315.

Governor does not have right to reinstate driver's license which had been revoked by the courts; governor's authority would be limited to pardoning conviction for the violation of the law which was the basis for the revocation of the license by the court. 1939-40 Op. Att'y Gen. No. 39-3083.

Retroactive application of statutory credits improper. — There is no constitutional authority under this section for the governor to apply the benefits of an act granting time credits to inmates while they appealed retroactively; such an act is neither a pardon nor a reprieve. 1968 Op. Att'y Gen. No. 68-57.

Prisoner sentenced to death may not be reprieved for indefinite period. 1921-22 Op. Att'y Gen. No. 21-3075.

Pardons are to be construed liberally in favor of the pardonee. 1970 Op. Att'y Gen. No. 70-85.

"Pardon" restores one to customary civil rights which ordinarily belong to a citizen of the state, including the right to vote and the right to hold office. 1970 Op. Att'y Gen. No. 70-85.

In the broad sense of the term "pardon," a "certificate restoring a person to full rights of citizenship" is a pardon; this method may be used to restore a federal ex-convict to his political rights. 1970 Op. Att'y Gen. No. 70-85.

This provision is clearly self-executing, and requires no legislative action to make it effective. Ex parte Bustillos, 26 N.M. 449, 194 P. 886 (1920).

Power to pardon is not inherent attribute of executive department, but rests solely in a grant by the people. 1970 Op. Att'y Gen. No. 70-85.

Ultimate power and right to pardon is granted to governor. — This provision is a plain and clear grant of the pardoning power, the exercise of which may be regulated by law so long as the prescribed regulation does not impair the ultimate power granted. 1970 Op. Att'y Gen. No. 70-85.

The power to grant "reprieves" and "pardons" is vested in the governor by this section. 1959-60 Op. Att'y Gen. No. 60-199.

In pardoning person convicted of misdemeanor, governor was not bound by legislative restriction. 1915-16 Op. Att'y Gen. No. 15-1667.

Power to grant partial pardons. — The governor has the power under the New Mexico constitution to grant a partial pardon conferring the right to vote and hold public office while denying the right to possess a firearm. 1992 Op. Att'y Gen. No. 92-09.

Parole or release by court after sentencing improper. — An inmate of the New Mexico industrial school (New Mexico boys school at Springer) who has been convicted and sentenced for crime, whether he has been removed to state penitentiary or not, can only be pardoned by the governor and may not be paroled or released by the court. 1941-42 Op. Att'y Gen. No. 42-4072.

Pardon of juveniles. — The governor did not have power to pardon boys sentenced to reform school who had merely been adjudged juvenile delinquents, but he did have power to pardon such boys who had first been convicted by court of competent jurisdiction of offense against the peace and dignity of the state. 1933-34 Op. Att'y Gen. No. 33-611.

Commutation of minor's punishment. — It is within power of governor to commute punishment of defendant, under 18 years of age at time crime was committed, from imprisonment in penitentiary to imprisonment in reform school. 1914 Op. Att'y Gen. No. 14-1175.

Pardon pending appeal. — The pardoning power of the governor might be exercised after conviction in the district court, pending appeal. 1917-18 Op. Att'y Gen. No. 18-2089.

Effect of pardon on eligibility for appointment as police officer. — An unconditional gubernatorial pardon allows a person convicted of a felony to be eligible for certification by the Law Enforcement Academy for permanent appointment as a police officer. However, if authorized by statute or regulation, a pardoned felon's character and the acts underlying the conviction may be considered in certification or licensing. 1992 Op. Att'y Gen. No. 92-09.

Effect of pardon on eligibility for license as private investigator. — An unconditional gubernatorial pardon allows a person convicted of a felony to be eligible for licensure as a private investigator. However, if authorized by statute or regulation, a pardoned felon's character in the acts underlying the conviction maybe considered in certification or licensing. 1992 Op. Att'y Gen. No. 92-09.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Pardon and Parole §§ 14 to 16, 22, 26 to 30.

Contempt, executive power to pardon for, 23 A.L.R. 524, 26 A.L.R. 21, 38 A.L.R. 171, 63 A.L.R. 226.

Statute authorizing court to suspend sentence as infringing executive pardoning power, 26 A.L.R. 400, 101 A.L.R. 402.

Lieutenant-governor, exercise of pardon power in absence or disability of governor, 32 A.L.R. 1162.

Formal requisites of pardon, 34 A.L.R. 212.

Statute permitting suspension of sentence for wife or family abandonment or nonsupport as encroachment on pardoning power of governor, 48 A.L.R. 1198.

Consent of convict as essential to pardon, commutation or reprieve, 52 A.L.R. 835.

Effect of pardon on previous offenses or punishment therefor, 57 A.L.R. 443.

Conditional pardons, 60 A.L.R. 1410.

Statute restoring competency of convicts as witnesses as infringing governor's pardoning power, 63 A.L.R. 982.

Judicial investigation of pardon by governor, 65 A.L.R. 1471.

Fine or penalty imposed in addition to imprisonment, pardon as affecting, 74 A.L.R. 1118.

Impeachment: pardon as affecting impeachment by proof of conviction of crime, 30 A.L.R.2d 893.

Habitual criminal statute, pardon as affecting consideration of earlier conviction in applying, 31 A.L.R.2d 1186.

Jury: procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed, 35 A.L.R.2d 769.

Offenses and convictions covered by pardon, 35 A.L.R.2d 1261.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

Jury: prejudicial effect of instruction of court as to possibility of pardon or parole, 12 A.L.R.3d 832.

Pardon as restoring public office or license or eligibility therefor, 58 A.L.R.3d 1191.

State pardon as affecting "convicted" status of one accused of violations of Gun Control Act of 1968 (18 USC §§ 921 et seq.), 44 A.L.R. Fed. 692.

67A C.J.S. Pardon and Parole §§ 6 to 10.

Sec. 7. [Succession to governorship.]

If at the time fixed for the beginning of the term of the governor, the governor-elect shall have died, the lieutenant governor-elect shall become governor. If a governor shall not have been chosen before the time fixed for the beginning of his term, or if the governor-elect shall have failed to qualify, then the lieutenant governor-elect shall act as governor until a governor shall have qualified; and the legislature may by law provide for the case wherein neither a governor-elect nor a lieutenant governor-elect shall have qualified, declaring who shall then act as governor, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a governor or lieutenant governor shall have qualified.

If after the governor-elect has qualified a vacancy occurs in the office of governor, the lieutenant governor shall succeed to that office, and to all the powers, duties and emoluments thereof, provided he has by that time qualified for the office of lieutenant governor. In case the governor is absent from the state, or is for any reason unable to perform his duties, the lieutenant governor shall act as governor, with all the powers, duties and emoluments of that office until such disability be removed. In case there is no lieutenant governor, or in case he is for any reason unable to perform the duties of governor, then the secretary of state shall perform the duties of governor, and, in case there is no secretary of state, then the president pro tempore of the senate, or in case there is no president pro tempore of the senate, or he is for any reason unable to perform the duties of governor, then the speaker of the house shall succeed to the office of governor, or act as governor as hereinbefore provided. (As amended November 2, 1948.)

ANNOTATIONS

Cross references. — For compensation of successor to governor's office, or person serving as acting governor, *see* 8-1-1 NMSA 1978.

For serving as member of cabinet, *see* 9-1-3 NMSA 1978.

For disaster successors to governor and his constitutional successors, *see* 12-11-4 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, §§ 12, 14.

Iowa Const., art. IV, § 17; amendment 20.

Montana Const., art. VI, § 6.

Utah Const., art. VII, § 11.

Wyoming Const., art. IV, § 6 (secretary of state to be acting governor).

The 1948 amendment, which was proposed by S.J.R. No. 14 (Laws 1947) and adopted at the general election held on November 2, 1948, with a vote of 35,730 for and 22,193 against, rewrote this section, adding the first paragraph and making numerous changes in the second paragraph. Prior to amendment, the section read: "In case of a vacancy in the office of governor, the lieutenant governor shall succeed to that office, and to all the powers, duties and emoluments thereof. In case the governor is absent from the state, or is for any reason unable to perform his duties, the lieutenant governor shall act as governor, with all the powers, duties and emoluments of that office until such disability be removed. In case there is no lieutenant governor, or in case he is for any reason unable to perform the duties of governor, then the secretary of state or, in case there is no secretary of state, or he is for any reason unable to perform the duties of governor,

then the president pro tempore of the senate shall succeed to the office of governor, or act as governor as hereinbefore provided."

Succession to entire unexpired term. — If the office of governor should become vacant prior to the 1972 election, the lieutenant governor would fill the entire unexpired term to which the governor had been elected. 1971 Op. Att'y Gen. No. 71-05.

Lieutenant governor may constitutionally execute delegated duties assigned by governor. 1971 Op. Att'y Gen. No. 71-15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor §§ 12 to 15.

Devolution, in absence of governor, of veto and approval powers upon lieutenant governor or other officer, 136 A.L.R. 1047.

81A C.J.S. States §§ 87 to 90.

Sec. 8. [Lieutenant governor to be president of senate.]

The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. IV, § 13.

Iowa Const., art. IV, § 18.

When lieutenant governor to vote. — The lieutenant governor must vote when the senate is equally divided on any question other than a joint resolution which proposes an amendment to the constitution. 1971 Op. Att'y Gen. No. 71-31.

The lieutenant governor is under a duty to cast vote authorized under this section, when the senate is evenly divided on a matter not a constitutional amendment. 1959-60 Op. Att'y Gen. No. 59-73.

Lieutenant governor may constitutionally execute delegated duties assigned by governor. 1971 Op. Att'y Gen. No. 71-15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 131.

Sec. 9. [Public accounts and reports.]

Each officer of the executive department and of the public institutions of the state shall keep an account of all moneys received by him and make reports thereof to the governor under oath, annually, and at such other times as the governor may require,

and shall, at least thirty days preceding each regular session of the legislature, make a full and complete report to the governor, who shall transmit the same to the legislature.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. IV, § 17.

Federal funds received by institutions of higher education. — State institutions of higher learning receiving federal funds must make full and complete reports thereof to the governor, who in turn must transmit these reports to the legislature; however, the fact that these reports are made available to the legislature for its information and use in the performance of its proper legislative functions does not confer on the legislature the power to limit or control the use or disbursement of these funds, which power rests with the boards of regents, subject to applicable law. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

Law reviews. — For article, "The Executive," see 7 Nat. Resources J. 267 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 353 to 355.

Clerks, assistants or deputies, liability of public officer for the defaults and misfeasance of, 1 A.L.R. 222, 102 A.L.R 174, 116 A.L.R. 1064, 71 A.L.R.2d 1140.

Constitutionality of statute relieving public officer from liability for loss of public funds, 38 A.L.R. 1512, 96 A.L.R. 295.

Imprisonment for withholding of state funds by public officer, 40 A.L.R. 82.

Diversion of money from one fund to another, liability of municipal officers for, 96 A.L.R. 664.

Settlement or compromise agreement with other officials or board or committee as affecting liability of officer in respect of public funds, 103 A.L.R. 1048.

Employee or subordinate, statutes relating to offenses in respect of public money in charge of officer as applicable to, 144 A.L.R. 590.

Payments made without compliance with procedure prescribed for payment of claims, liability of officer in respect of, 146 A.L.R. 762.

Interest or earnings received on public money in officer's possession, accountability for, 5 A.L.R.2d 257.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

67 C.J.S. Officers and Public Employees § 214; 81A C.J.S. States §§ 123, 229.

Sec. 10. [State seal.]

There shall be a state seal which shall be called the "Great Seal of the State of New Mexico," and shall be kept by the secretary of state.

ANNOTATIONS

Cross references. — For design of seal, *see* 12-3-1 NMSA 1978.

Comparable provisions. — Idaho Const., art. IV, § 15.

Iowa Const., art. IV, § 20.

Utah Const., art. VII, § 20.

Wyoming Const., art. IV, § 15.

Use of seal limited. — Use of the great seal of the state by anyone other than by the state of New Mexico, for any purpose, is not permitted. 1951-52 Op. Att'y Gen. No. 52-5569.

Removal from state not proper. — It would be a violation of the law of this state for the great seal of the state of New Mexico, or any replica thereof, to be transferred out of the state of New Mexico at any time. 1955-56 Op. Att'y Gen. No. 55-6261 (in response to proposal to take the seal to New York City for use in validating state bonds).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 39.

Sec. 11. [Commissions.]

All commissions shall issue in the name of the state, be signed by the governor and attested by the secretary of state, who shall affix the state seal thereto.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. IV, § 16.

Iowa Const., art. IV, § 21.

Utah Const., art. VII, § 19.

Commission as prima facie evidence of entitlement to office. — An appointment to office by the executive is complete upon delivery of the commission. When governor of territory appointed and commissioned an officer, he gave him prima facie title to the office, as the commission, when issued, must be taken at least as prima facie evidence that the person holding it is lawfully entitled to the office. Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 121 to 126.

67 C.J.S. Officers and Public Employees § 44; 81A C.J.S. States § 84.

Sec. 12. [Compensation of executive officers.]

The annual compensation to be paid to the officers mentioned in Section One of this article shall be as follows: governor, five thousand dollars [($5,000)]; secretary of state, three thousand dollars [($3,000)]; state auditor, three thousand dollars [($3,000)]; state treasurer, three thousand dollars [($3,000)]; attorney general, four thousand dollars [($4,000)]; superintendent of public instruction, three thousand dollars [$3,000)]; and commissioner of public lands, three thousand dollars [($3,000)]; which compensation shall be paid to the respective officers in equal quarterly payments.

The lieutenant governor shall receive ten dollars [($10.00)] per diem while acting as presiding officer of the senate, and mileage at the same rate as a state senator.

The compensation herein fixed shall be full payment for all services rendered by said officers and they shall receive no other fees or compensation whatsoever.

The compensation of any of said officers may be increased or decreased by law after the expiration of ten years from the date of the admission of New Mexico as a state.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For present salary schedule, *see* 8-1-1 NMSA 1978.

Comparable provisions. — Montana Const., art. VI, § 5.

Utah Const., art. VII, § 18.

Wyoming Const., art. IV, § 13.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 15, § 2 (Laws 1961), which would have provided that the compensation for officers mentioned in N.M. Const., art. V, § 1, be as set by law, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 17,649 for and 31,697 against.

The superintendent of public instruction, referred to in this section, was deleted from the enumeration of executive officers in Section 1 of this article by the 1958 amendment thereto.

Quarterly payments. — Officers whose salaries are fixed and payable quarterly are not entitled to receive them, nor are they due, except at end of each quarter. 1931-32 Op. Att'y Gen. No. 31-25.

Lieutenant governor's salary. — The legislature of the state of New Mexico may provide a salary for the lieutenant governor of the state of New Mexico which would, in effect, be more than $10.00 per diem while acting as presiding officer of the senate. 1971 Op. Att'y Gen. No. 71-15.

What additional payments to governor prohibited. — This section merely prohibits the governor from receiving any fees or compensation for services rendered by him as governor, and does not preclude his use of the contingent fund for the obligations of his official position, nor payment for nonofficial services. 1912-13 Op. Att'y Gen. No. 12-887.

Employment benefits. — Payments by the state, for a state official, for social security, group insurance and public employees' retirement association membership are not payments of additional fees or compensation in violation of this section. 1968 Op. Att'y Gen. No. 68-01.

Section does not prohibit state officer from holding another office not inconsistent with his elective office, nor to receive compensation therefor. 1912-13 Op. Att'y Gen. No. 12-875.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Governor § 3; 63A Am. Jur. 2d Public Officers and Employees §§ 431 to 471.

Per diem compensation, 1 A.L.R. 276.

New duties imposed on officer, increasing compensation for during term, 21 A.L.R. 256, 51 A.L.R. 1522, 170 A.L.R. 1438.

Nonconstitutional officer, constitutional inhibition against increase or decrease of compensation during term as applicable to, 31 A.L.R. 1316, 86 A.L.R. 1263.

Administrative officer or board, power to change compensation of employee or subordinate, 70 A.L.R. 1055.

Constitutional provision creating office and forbidding change in compensation during term as appropriation, 88 A.L.R. 1054.

Constitutional inhibition of change of officer's compensation as applicable to allowance for expenses or disbursements, 106 A.L.R. 779.

Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or of acceptance of reduced amount, 118 A.L.R. 1458, 160 A.L.R. 490.

Constitutional provision against increase or decrease of compensation of public officer as affecting power of legislature to effect decrease by means of administrative procedure or consent of officer, 127 A.L.R. 529.

Operation of statute fixing public officer's salary on basis of population or of the valuation of the taxable property, as contravening a constitutional provision that the salary of a public officer shall not be increased or diminished during his term, 139 A.L.R. 737.

Constitutional provision against increase in compensation of public officer during term of office as applicable to statute providing for first time for compensation for office, 144 A.L.R. 685.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

Constitutional or statutory inhibition of change of compensation of public officer as applicable to one appointed or elected to fill vacancy, 166 A.L.R. 842.

Constitutional provision against increasing compensation during term of office as applicable where new duties are imposed on officer after taking office, 170 A.L.R. 1438.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

67 C.J.S. Officers and Public Employees §§ 218 to 242; 81A C.J.S. States §§ 104 to 119.

Sec. 13. [Residence of public officers; election from equal districts.]

All district and municipal officers, county commissioners, school board members and municipal governing body members shall be residents of the political subdivision or district from which they are elected or for which they are appointed.

Counties, school districts and municipalities may be divided by their governing bodies into districts composed of populations as nearly equal as practicable for the purpose of electing the members of the respective governing bodies. (As amended November 8, 1960 and November 4, 1986.)

ANNOTATIONS

Cross references. — For qualifications for holding public office, *see* N.M. Const., art. VII, § 2.

For constitutional provision relating to municipal home rule, *see* N.M. Const., art. X, § 6.

For governor's power to fill vacancy in office of county commissioner, *see* N.M. Const., art. XX, § 4.

For county commission districts, *see* 4-38-3 NMSA 1978.

The 1960 amendment, which was proposed by H.J.R. No. 8 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 58,477 for and 58,102 against, added the second and third sentences.

The 1986 amendment, which was proposed by H.J.R. No. 9 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 181,880 for and 84,964 against, repealed existing Section 13 relating to the residence of public officers and adopted a new Section 13.

Purpose. — A reason for restricting candidates to residents of the district from which they seek election is to insure that each elected commissioner had knowledge of the problems and the needs of the district from which he is elected; it is properly within the spirit of such restriction, and will promote efficient filing administration, to require that a candidate be a resident of the district from which he seeks election at the time his name is certified. State ex rel. Rudolph v. Lujan, 85 N.M. 378, 512 P.2d 951 (1973).

Determination of residency. — Doubt concerning residence is to be resolved in favor of permanency of residence in precinct wherein one casts his ballot. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Dual abodes. — There is no reason, why, within the meaning of this section and N.M. Const., art. VII, § 2, a person may not have more than one place to reside in. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Restrictions on office-holding not to be increased. — The only restriction against the right of a citizen of the United States who is a resident of and a qualified voter within this state to hold any public office is that he must reside within the political subdivision for which he is elected or appointed. The legislature has no power to add restrictions

upon the right to hold office beyond those provided in the constitution. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

Laws 1919, ch. 111, § 3, requiring forfeiture of office of alderman when the holder moved beyond his ward, was void as it added restrictions to the right to hold public office in addition to those required by this section and N.M. Const., art. VII, § 2. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

Wards of municipality. — Wards of a municipality are not "political subdivisions" within this section. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924). But see, N.M. Const., art. X, § 6, relating to municipal home rule.

Irrigation districts are not "municipal corporations" within meaning of this section. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

District attorneys. — The constitution did not create a new class of officers to be known as "district officers," so the district attorney is a state, not a district, officer, and is precluded from receiving any compensation, fees, allowances or emoluments for or on account of his office, but is to have a salary appropriated for him. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Justices of the peace. — Justices of the peace (now magistrate courts) are precinct, not county, officers. Territory ex rel. Welter v. Witt, 16 N.M. 335, 117 P. 860 (1911).

Justices of the peace. — Justices of the peace are recognized as precinct officers. 1965 Op. Att'y Gen. No. 65-33.

Filing. — In order for a candidate for county commission or state representative to qualify for those offices, he must file in the district where he resides. 1966 Op. Att'y Gen. No. 66-30.

"Residence". — The word "residence" means to be in residence, one's place of abode, as distinguished from a place where one is employed or an office or place devoted strictly to commercial enterprise. 1972 Op. Att'y Gen. No. 72-06.

"Residence," within the meaning of this section of the constitution, has traditionally been construed as synonymous with "domicile". 1955-56 Op. Att'y Gen. No. 56-6445.

Dual abodes. — Municipal judge, resident of the municipality for over 30 years, who votes and has property and business interests therein, is qualified to hold elective office in that municipality despite fact that he is employed fulltime at a bank some distance away, where he has an additional residence in which he on occasion remains overnight; any doubt is resolved in favor of the permanency of residence in the precinct wherein the judge casts his ballot. 1975 Op. Att'y Gen. No. 75-26.

Restrictions on office-holding not to be increased. — The legislature has no power to add restrictions upon the right to hold public office beyond those provided in the constitution. 1959-60 Op. Att'y Gen. No. 60-222.

Section refers only to officer's qualification at time of election. 1915-16 Op. Att'y Gen. No. 16-1781.

The removal of a county commissioner from the district from which he was elected to another part of the county did not create a vacancy in the office. 1912-13 Op. Att'y Gen. No. 12-955; 1915-16 Op. Att'y Gen. No. 15-1516; 1919-20 Op. Att'y Gen. No. 19-2154.

Interim appointee to be resident. — Person appointed to fill vacancy in office of county commissioner must, at the time of appointment, be a resident of the commissioner district from which his predecessor was elected. 1915-16 Op. Att'y Gen. No. 16-1764.

Town board of trustees. — Any citizen who is a resident and qualified elector of the state and a resident of a town may hold office as a member of its board of trustees. 1933-34 Op. Att'y Gen. No. 34-736.

Municipal judge must be resident of municipality which he serves. 1969 Op. Att'y Gen. No. 69-11.

Members of municipal housing authority must be residents of political subdivision for which they are appointed. 1969 Op. Att'y Gen. No. 69-138.

Members of municipal planning commission must be residents of municipality which they are serving and one city or town could not designate the planning commission of another city or town to serve as its planning commission. 1959-60 Op. Att'y Gen. No. 59-201.

Municipal manager is not public officer of municipality for purposes of this section. 1979 Op. Att'y Gen. No. 79-28.

Municipal clerk not officer of municipality. — The duties of a municipal clerk are essentially ministerial and do not involve the delegation of any of the sovereign power of the municipality; this necessary element to establish the position of municipal clerk as an officer of the municipality is not present. 1979 Op. Att'y Gen. No. 79-28.

Municipal attorney not public officer. — None of the indicia of public office attach to the position of municipal attorney. 1979 Op. Att'y Gen. No. 79-28.

Police officers are employees, and not public officers, of municipality. 1979 Op. Att'y Gen. No. 79-28.

Ward residency requirements invalid in municipalities not under home rule. — As to municipalities which do not operate under the constitutional home-rule provision, a ward residency requirement, no matter by whom imposed, would add an additional, and therefore unconstitutional, restriction on the right to hold public office. 1973 Op. Att'y Gen. No. 73-76.

The legislature may not constitutionally require each city commissioner to reside in the district he represents. 1969 Op. Att'y Gen. No. 69-23.

Districts in home-rule municipalities to be represented by residents. — When districting of a municipality has been accomplished pursuant to N.M. Const., art. X, § 6, each member of the governing body must be a resident of and elected by the registered qualified electors in his district. 1971 Op. Att'y Gen. Nos. 71-26, 71-118.

School district is a political subdivision of the state. 1969 Op. Att'y Gen. No. 69-16.

A county school district is a political subdivision and district as those terms are employed in this section. 1957-58 Op. Att'y Gen. No. 57-183.

School board member must be resident of school district which he represents. 1963-64 Op. Att'y Gen. No. 64-20.

It is a prerequisite for holding office as a member of a municipal school board that the individual municipal school board member be a bona fide resident of the municipal school district. 1963-64 Op. Att'y Gen. No. 64-06.

A person who lives outside a school district may not serve on that district's school board. 1969 Op. Att'y Gen. No. 69-16.

Patrons of rural school district who are not residents thereof cannot hold office of its school director nor vote in its school election. 1931-32 Op. Att'y Gen. No. 32-419.

School board election proposal unconstitutional. — House bill purporting to divide the municipal school district in class A counties into five school board districts using senatorial districts to draw the lines which would require that members of the board of education be residents of and be elected by the qualified electors of a separate school board district would violate this section. 1967 Op. Att'y Gen. No. 67-33.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 247, 248; 63A Am. Jur. 2d Public Officers and Employees §§ 60 to 62.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 A.L.R.3d 1048.

20 C.J.S. Counties § 99; 62 C.J.S. Municipal Corporations § 479; 67 C.J.S. Officers and Employees § 26.

Sec. 14. [State transportation commission.]

There is created a "state transportation commission". The members of the state transportation commission shall be appointed, shall have such power and shall perform such duties as may be provided by law. Notwithstanding the provisions of Article 5, Section 5 of the constitution of New Mexico, state transportation commissioners shall only be removed as provided by law. (As repealed and re-enacted November 7, 1967; as amended November 5, 2002.)

ANNOTATIONS

Cross references. — For legislation relating to appointment, removal and powers of the state transportation commission, and creating a department of transportation exercising much of the authority formerly vested in the commission, *see* 67-3-2, 67-3-6 and 67-3-12 NMSA 1978.

For rule governing removal of public officials where jurisdiction has been conferred on the supreme court, *see* Rule 12-604 NMRA.

The 1949 amendment, which was proposed by H.J.R. No. 2 (Laws 1949) and was adopted by the people at a special election held on September 20, 1949, with a vote of 18,696 for and 9,618 against, added a Section 14 to N.M. Const., art. V. As adopted in 1949, the section read:

"A permanent commission to consist of five (5) members is hereby created, which shall be known as the 'state highway commission'.

"A. The state highway commission is empowered and charged with the duty of determining all matters of policy relating to state highways and public roads. It shall have general charge and supervision of all highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have complete charge of all matters pertaining to the expenditure of state funds for the construction, improvement and maintenance of public roads and bridges. It shall have charge of all matters pertaining to highway employees. It shall have the power to institute any legal proceedings deemed necessary to the exercise of its powers. It shall have all powers which are now or which may hereafter be conferred on it by law.

"B. There are hereby created five (5) highway commission districts as follows, to wit:

"District No. 1 which shall be composed of the counties of Catron, Socorro, Grant, Sierra, Dona Ana, Luna and Hidalgo.

"District No. 2 which shall be composed of the counties of Lea, Eddy, Chaves, Roosevelt, Curry, De Baca, Lincoln and Otero.

"District No. 3 which shall be composed of the counties of San Juan, McKinley, Valencia, Sandoval and Bernalillo.

"District No. 4 which shall be composed of the counties of Colfax, Union, Mora, Harding, San Miguel, Quay and Guadalupe.

"District No. 5 which shall be composed of the counties of Rio Arriba, Taos, Santa Fe, Torrance and Los Alamos.

"The state legislature in the event of the creation of any new county or counties, shall have the power to attach any such county or counties to any of the above districts to which said county or counties may be contiguous.

"C. The members of the commission shall be appointed by the governor with the advice and consent of the senate for overlapping terms of six (6) years each. One member shall be appointed from each of the five (5) aforesaid highway commission districts and such member shall reside in the district from which he shall be appointed. Change of residence of a highway commissioner to a place outside of the highway district from which he was appointed shall automatically terminate the term of such commissioner. No more than three (3) of the said commissioners shall belong to the same political party. Each of the said commissioners, in order to qualify as such, shall take the usual oath and execute in favor of the state a surety company bond, in a form approved by the attorney general, in the amount of twenty-five thousand dollars ($25,000.00) conditioned upon the faithful performance of his duties.

"The governor shall submit the appointment of commissioners to the state senate for confirmation not later than the 5th day of each regular session of the legislature. A three-fifths (3/5's) vote of the senate shall be required for confirmation. The appointment of such commissioner or commissioners shall become effective upon the date of confirmation by the senate and no commissioner shall be appointed in any event without confirmation of the senate except that commissioners may be appointed by a majority of the remaining members of the highway commission, to fill vacancies until the next regular session of the legislature, at which time an appointment shall be made for the balance of the unexpired term.

"In the event the governor should refuse or fail to submit the highway commissioners to the senate for confirmation in the manner above provided, the senate shall appoint and confirm the highway commissioners.

"The members first appointed shall determine by lot from among their group two (2) members to serve two (2) year terms, two (2) members to serve six (6) year terms, and one (1) member to serve a four (4) year term.

"D. Highway commissioners shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such commissioner. The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove highway commissioners under such rules as it may promulgate and its decision in connection with such matters shall be final.

"The state highway commission shall appoint a competent chief highway engineer, who shall be chief administrator of the highway commission and shall have charge of the hiring and firing of employees of the highway commission subject to the control and supervision of the highway commission." Section 2 of the resolution provided that the amendment should become effective the January 1st next following its adoption and that the governor should submit his appointments to the senate for confirmation at the next regular session of the legislature, which was the 1951 session.

The 1955 amendment, which was proposed by S.J.R. No. 11 (Laws 1955) amended Subsection A of § 14 as it then read, to read:

"A. The state highway commission is empowered and charged with the duty of determining all matters of policy relating to the design, construction, location, and maintenance of state highways and public roads. It shall have general charge and supervision of all the highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have charge, subject to such regulation as may hereafter be provided by law, of all matters pertaining to the expenditure of highway funds. It shall have the power to institute any legal proceedings deemed necessary to the exercise of its powers. It shall have all powers which are now or which may hereafter be conferred on it by law."

The 1967 amendment of this section, which was proposed by S.J.R. No. 3, § 1 (Laws 1967) and was adopted at the special election held on November 7, 1967, with a vote of 27,598 for and 25,338 against, repealed the former N.M. Const., art. V, § 14, and enacted the above section, creating a state highway commission to be appointed and removed and have such powers and duties as might be provided by law.

The 2002 amendment, which was proposed by H.J.R. No. 27 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 216,751 for and 205,494 against, substituted "state transportation" for "state highway" in three places.

Compiler's notes. — An amendment proposed by S.J.R. No. 17, § 1 (1959), which would have added a Section 15 to this article, concerning location of state offices, was submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment proposed by S.J.R. No. 2, § 2 (Laws 1959), which would have added a new and separate section to this article, concerning terms of state officers, was

submitted to the people at the general election held on November 8, 1960. It failed to pass because it did not receive the necessary majority.

An amendment proposed by S.J.R. No. 13, § 2 (Laws 1961), which would have added a new and separate section to this article, concerning terms of state officers, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 22,377 for and 29,483 against.

An amendment to this section proposed by H.J.R. No. 4, § 1 (Laws 1961), relating to the appointment of highway commissioners, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 24,658 for and 25,658 against.

An amendment proposed by S.J.R. No. 18, § 1 (Laws 1963), which would have repealed and reenacted a new Section 14 to provide for highway director and highway commission, was submitted to the people at the general election held on November 3, 1964. It was defeated by a vote of 54,547 for and 63,306 against.

Sections 67-3-2 to 67-3-8 NMSA 1978, enacted by Laws 1967, ch. 266, and based upon the adoption of the repeal and reenactment of art. V, § 14 proposed by S.J.R. No. 3, § 1 (Laws 1967), took effect when the constitutional provision was adopted November 7, 1967.

An amendment proposed by H.J.R. No. 2 (Laws 1993), which would have substituted "state transportation commission" for "state highway commission", was submitted to the people in the general election held on November 8, 1994. It was defeated by a vote of 174,276 for and 223,455 against.

Privileges and immunities. — Individual members of the New Mexico highway commission, while participating in a meeting thereof, enjoy all the privileges and immunities of the body as a whole. Adams v. Tatsch, 68 N.M. 446, 362 P.2d 984 (1961) (case decided prior to 1967 repeal and reenactment of this section).

Powers of state transportation commission formerly. — The state highway commission [state transportation commission], created by this section as it read prior to its 1967 repeal and reenactment, was empowered and charged with the duty of determining all matters of policy relating to state highways and given general charge and supervision of all of highways and bridges; it had complete charge of all matters pertaining to the expenditure of state funds for the construction and maintenance of public roads and bridges. State ex rel. State Hwy. Comm'n v. City of Albuquerque, 67 N.M. 383, 355 P.2d 925 (1960).

Removal proceedings moot. — Since the constitutional provision creating the office of highway commissioner and setting forth details concerning it was repealed in 1967, and provision made for a new commission which, to become operative, had to be implemented by legislation which might or might not create a similar or comparable

body, a commissioner whose removal was being attempted prior to the 1967 repeal and reenactment did not thereafter still hold the same office from which his removal was being attempted; hence, the court's jurisdiction over the removal proceeding was terminated and the action itself became moot. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Injunctive relief. — Petition brought by state highway commission [state transportation commission], seeking injunctive relief to compel removal of encroachments from a highway right-of-way, stated a cause of action, and the city in which the portion of the highway in question was located was not an indispensable party to the cause. State ex rel. State Hwy. Comm'n v. Ford, 74 N.M. 18, 389 P.2d 865 (1964) (case decided under this section as it read prior to the 1969 repeal and reenactment).

Office of highway commissioner is a "civil office" within the meaning of N.M. Const., art. IV, § 28, limiting appointment of legislators to civil office. 1957-58 Op. Att'y Gen. No. 57-20 (opinion rendered prior to 1967 repeal and reenactment of this section).

Law reviews. — For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For comment, "Constitutional Law - Delegation of Power - New Mexico Bypass Law," see 4 Nat. Resources J. 160 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Highways, Streets and Bridges § 13.

39A C.J.S. Highways §§ 154, 155, 157.

Sec. 15. [Confirmation of cabinet secretaries.]

The heads of all cabinet-level departments or agencies whose appointment is subject to confirmation by the senate shall be subject to confirmation or reconfirmation by the senate at the beginning of each term of a governor. (As added, November 4, 2008.)

ANNOTATIONS

The 2008 amendment to Article V, proposed by S.J.R. No. 1, § 1 (Laws 2008) and adopted at the general election held on November 4, 2008, by a vote of 490,160 for and 191,299 against, added this section.

Sec. 16. [Vacancy in the office of the lieutenant governor.]

Whenever there is a vacancy in the office of the lieutenant governor, the governor shall nominate a lieutenant governor who shall take office upon confirmation by a majority vote of all members elected to the senate and shall serve the remainder of the unexpired term. (As added November 4, 2008.)

ANNOTATIONS

The 2008 amendment to Article V, proposed by S.J.R. No. 8, § 1 (Laws 2008) and adopted at the general election held on November 4, 2008, by a vote of 477,975 for and 215,727 against, added this section.

ARTICLE VI
Judicial Department

Section 1. [Judicial power vested.]

The judicial power of the state shall be vested in the senate when sitting as a court of impeachment, a supreme court, a court of appeals, district courts; probate courts, magistrate courts and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state. (As amended September 28, 1965, and November 8, 1966.)

ANNOTATIONS

Cross references. — For impeachment by the senate, *see* N.M. Const., art. IV, §§ 35, 36.

For supreme court, *see* N.M. Const., art. VI, §§ 2 to 11 and 34-2-1 NMSA 1978 et seq.

For district courts, *see* N.M. Const., art. VI, §§ 12 to 22 and 34-6-1 NMSA 1978 et seq.

For provisions relating to probate courts and jurisdiction thereof, *see* N.M. Const., art. VI, § 23 , 34-7-1 NMSA 1978 and 45-1-302 NMSA 1978.

For magistrate courts, *see* N.M. Const., art. VI, § 26 and 35-1-1 NMSA 1978 et seq.

For court of appeals, *see* N.M. Const., art. VI, § 29 and 34-5-1 NMSA 1978 et seq.

For provision establishing childrens' courts as division of district courts, *see* 32A-1-5 NMSA 1978.

For municipal courts, *see* 35-14-1 NMSA 1978.

For metropolitan courts, *see* 34-8A-1 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 2.

Iowa Const., art. V, § 1.

Montana Const., art. VII, § 1.

Utah Const., art. VIII, § 1.

Wyoming Const., art. V, § 1.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 1 (Laws 1965) and adopted at a special election held on September 28, 1965, with a vote of 31,582 for and 18,477 against, added the words "a court of appeals" after "a supreme court."

The 1966 amendment, which was proposed by H.J.R. No. 34, § 1 (Laws 1965) and adopted at a general election held on November 8, 1966, with a vote of 81,055 for and 26,317 against, substituted "magistrate courts" for "justices of the peace" after "probate courts," inserted "district," preceding "county or municipality" and deleted "including juvenile courts" at the end of the section.

Witness use immunity. — The grant of witness use immunity is a power that the supreme court defines in the exercise of its inherent judicial authority. State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, rev'g 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and overruling State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), State v. Baca, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066 and State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

Where the prosecution of the defendant resulted in two mistrials that were caused by the state's witnesses and where a police officer, who was a key witness for both the state and the defendant, failed to appear for a third scheduled trial, because the state failed to subpoena him after representing to the court and to the defendant that it would do so, the court properly exercised its inherent power to control its docket when the court dismissed the case. State v. Candelaria, 2008-NMCA-120, 144 N.M. 797, 192 P.3d 792.

The court has authority to stay the prosecution of the death penalty in a capital case where indigent defendants are deprived of the effective assistance of counsel because counsel for the defendants are inadequately compensated. State v. Young, 2007-NMSC-058, 143 N.M. 1, 172 P.3d 138.

Creation of courts limited. — The framers of the state constitution in this section limited the creation of courts to those named therein, and "such courts inferior to the district courts as may be established by law from time to time in any county or municipality of the state, including juvenile courts". State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled on other grounds Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Establishment of inferior courts to be by general law. — Declaration in this section that inferior courts not enumerated might be established by law meant they might be established by general legislative enactments; it did not permit a city-manager city to establish a police court, provide for the election of a police magistrate and confer jurisdiction to decide cases involving violations of city ordinances. Stout v. City of Clovis, 37 N.M. 30, 16 P.2d 936 (1932).

Inherent power in absence of express authority. – This section grants courts an inherent power to exercise authority essential to their judicial function and management of their caseload, even absent express statutory authority or court rule. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

As a constitutional matter, the district court has a duty to conduct an independent review to ensure that protected speech is not criminalized; thus, a court has a duty to make a threshold determination of whether material that is alleged to be obscene is the type of hard core pornography that is unprotected speech. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Juvenile court as division of district court. — The juvenile court provided for in the 1955 Juvenile Code (former Section 13-8-19, 1953 Comp. et seq) was part and parcel of the district court and not an inferior court, and it was not violative of this section. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Appeals from juvenile court. — Legislature could not validly provide for direct appeal from juvenile court to supreme court, the juvenile court being a court inferior to the district court under this section (as it read prior to amendment). State v. Eychaner, 41 N.M. 677, 73 P.2d 805 (1937).

Controversies between individuals for courts. — The right to determine controversies between individual litigants stems from the state constitution and this power rests alone with the courts. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled by Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Presumption of retroactivity for new rules imposed by judicial decision in civil cases. — The supreme court has the power to apply a new rule prospectively, whether the rule is derived from overruling a past precedent or fashioning a new precedent, even though the decision announcing the rule has already been applied retroactively to the conduct of the litigants in the case in which the rule was announced. However, because of the desirability of treating similarly situated parties alike, a presumption of retroactivity for a new rule imposed by a judicial decision in a civil case is adopted. Beavers v. Johnson Controls World Servs., Inc., 118 N.M. 391, 881 P.2d 1376 (1994), rev'g 116 N.M. 29, 859 P.2d 497 (Ct. App. 1993).

Exercise of judicial powers by executive and legislature unconstitutional. — Any statutory scheme under which the executive and legislative branches of a municipal government can control or exercise the inherent powers of the judiciary would be violative of the state constitution. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Legislature may confer "quasi-judicial" power on administrative boards for the protection of the rights and interests of the public in general, the orders of which are not to be overruled if supported by substantial evidence, but nowhere does this power extend to a determination of rights and liabilities between individuals. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled by Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Unlawful delegation of judicial power. — The Workmen's Compensation Act of 1957 (Laws 1957, ch. 246, §§ 1 through 96, former 59-10-36 through 59-10-125, 1953 Comp.) was unconstitutional in that it constituted an unlawful delegation of judicial power to the commission in violation of N.M. Const., art. III, § 1 and this section. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled by Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Compulsory arbitration. — The "principle of check", which entails courts retaining power to make enforceable, binding judgments through review of agency determinations, requires that courts have an opportunity to review decisions of arbitrators in statutorily compelled arbitration such as required by 22-10-17.1 NMSA 1978 (now 22-10A-28 NMSA 1978). Board of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Reclamation contract infringing on court's power. — Provision in reclamation contract between the United States and conservancy district that if any assessment be judicially determined to be void, or the district be enjoined from making or collecting any assessment on such land, then such tract or water user should have no right to the benefits of the contract or the water made available, was illegal, as it purported to permit the secretary of the interior to override the court's decision and enforce his own mandate whether legal or illegal. Middle Rio Grande Water User's Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

Power of disbarment. — Portion of former 36-2-7 NMSA 1978 which purported to confer judicial power of suspension and disbarment on board of commissioners, was void insofar as it attempted to create an inferior tribunal with such judicial powers. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931), abrogated, In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905.

Board of loan commissioners. — Laws 1912, ch. 16, investing board of loan commissioners with power to ascertain and determine territorial and county debts and liabilities which were assumed by state under the constitution, did not confer judicial power upon the board. State v. Kelly, 27 N.M. 412, 202 P. 524 (1921).

Courts are not constituted as reviewing authority over other departments of the state or as guardian of the constitution. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Review of other departments limited. — Power of the courts is a judicial power, to hear and determine causes of action, and they cannot generally review or interfere with the acts of the legislative or executive departments, being empowered to enforce the supremacy of the constitution only when legislative enactments or executive proceedings are plainly violative thereof, and then only upon suit by one directly and adversely affected thereby. State ex rel. Gomez v. Campbell, 75 N.M. 86, 400 P.2d 956 (1965).

Courts not to consider wisdom of legislation. — It is not part of the duty of the courts to inquire into the wisdom, the policy or the justness of an act of the legislature; the court's duty is to ascertain and declare the intention of the legislature, and to give effect to the legislative will as expressed in the laws. Raton Pub. Serv. Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966).

Justices of the peace. — Under this section prior to amendment, a justice of the peace (now magistrate court) was a court, when publicly administering justice delegated to him by law. State v. Lazarovich, 27 N.M. 282, 200 P. 422 (1921).

Conservancy districts. — Laws 1927, ch. 45 (73-14-1 NMSA 1978 et seq.), establishing conservancy districts, does not create a new court in violation of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Indian's rights to invoke jurisdiction of courts. — An Indian has the same rights as are accorded to any other person to invoke the jurisdiction of the state courts to protect his legal rights in matters not affecting either the federal government or tribal relations. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

Courts of limited jurisdiction. — N.M. Const., art. VI, § 13, does not preclude the legislature from exercising the constitutional authority under this section and N.M. Const., art. VI, § 26, to grant injunctive authority to courts of limited jurisdiction. Martinez v. Sedillo, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

Law reviews. — For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

For article, "State ex rel. New Mexico Judicial Standards Commission v. Espinosa: Can Judicial Integrity Survive Executive Control?", see 34 N.M. L. Rev. 489 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 306 to 317, 334; 20 Am. Jur. 2d Courts § 1 et seq.

Mob or riot, statute creating municipal liability for, as a usurpation of judicial powers, 26 A.L.R.3d 1142.

Construction and Application of Political Question Doctrine by State Courts, 9 A.L.R. 6th 177.

16 C.J.S. Constitutional Law §§ 169 to 214; 21 C.J.S. Courts §§ 93, 94; 81A C.J.S. States §§ 20 to 22.

Sec. 2. [Supreme court; appellate jurisdiction.]

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal. (As amended September 28, 1965.)

ANNOTATIONS

Cross references. — For supreme court's original jurisdiction, supervisory control and power to issue extraordinary writs, *see* N.M. Const., art. VI, § 3.

For appellate jurisdiction of supreme court, *see* 34-5-14 NMSA 1978.

For appeals from metropolitan court, *see* 34-8A-6 NMSA 1978.

For appeals from magistrate court, *see* 35-13-1 NMSA 1978.

For appeals from district court, *see* 39-3-2 to 39-3-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 9.

Iowa Const., art. V, § 4.

Montana Const., art. VII, § 2.

Utah Const., art. VIII, § 3.

Wyoming Const., art. V, § 2.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 2 (Laws 1965) and adopted at a special election held on September 28, 1965, with a vote of 31,582 for and 18,477 against, amended this section to provide for a direct appeal to the supreme court in certain criminal cases and for other appeals to the supreme court as provided by law, and to guarantee an absolute right to one appeal. Prior to amendment, this section read: "The appellate jurisdiction of the supreme court shall be coextensive with the

state, and shall extend to all final judgments and decisions of the district courts, and said court shall have such appellate jurisdiction of interlocutory orders and decisions of the district courts as may be conferred by law."

No right of state to appeal. — Where there was sufficient evidence to support the state's petition to revoke the defendant's probation and the court considered the evidence in favor of revocation and recognized that it had jurisdiction to revoke the defendant's probation, but exercised its discretionary authority to deny and dismiss the state's petition, the disposition was not contrary to law and the state did not have a constitutional right to appeal the dismissal of the petition. State v. Grossetete, 2008-NMCA-088, 144 N.M. 346, 187 P.3d 692, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

Direct appeal of denial of motion to impose double jeopardy bar to retrial. — Where the trial court denied defendant's motion to bar a retrial on the grounds that the prosecutor had committed misconduct in defendant's initial trial, because hearsay statements as represented by the prosecutor to have been made by third parties were falsely stated, misleading and prejudicial to defendant's rights, which invoked defendant's double jeopardy rights, defendant had a right to directly appeal the trial court's order to the court of appeals. State v. McClaugherty, 2007-NMCA-041, 141 N.M. 468, 157 P.3d 33, aff'd, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234.

Right to appeal magistrate court's suppression order. — This section does not give the state the right to appeal a magistrate court's suppression order, because such an order is not a final judgment or order. State v. Heinsen, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040, aff'g 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627.

Appeal from final judgment exceptions. — State constitutional exceptions to the rule that an appeal may only be taken from a final judgment has been permitted where the court's order is practically final and where the state's interest is especially strong. State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

Appeals from grant of jury trial in delinquency proceedings. — Trial court's grant of a jury trial to a child in delinquency proceedings was not reviewable because the state's interest was not compelling enough to justify an exception to the final judgment rule. In re Larry K., 1999-NMCA-078, 127 N.M. 461, 982 P.2d 1060.

Phrase "provided by law" generally means "provided by statutes". State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

"Aggrieved party" is one whose personal interests are adversely affected by an order of the court. State v. Castillo, 94 N.M. 352, 610 P.2d 756 (Ct. App.), cert. quashed, 94 N.M. 675, 615 P.2d 992 (1980).

State's right to appeal independent of statutory authority. — Where the district court acts as a matter of law, the state's right to appeal stems from Article IV, Section 2

of the constitution of New Mexico and is independent of statutory authority. State v. Montoya, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where the district court dismissed the state's motion to revoke defendant's probation on the ground that the adjudicatory hearing on the motion did not occur within 100 days after defendant was arrested contrary to the requirement of Rule 5-805 NMRA, the district court acted as a matter of law and the state's right to appeal stemmed from Article IV, Section 2 of the constitution of New Mexico and was independent of 39-3-3 NMSA 1978. State v. Montoya, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

State made "aggrieved party" by criminal disposition contrary to law. — Since the state is a party to every criminal proceeding in the district courts, a claim of disposition contrary to law is a valid and legal grievance which indisputably makes the state "an aggrieved party". State v. Santillanes, 96 N.M. 482, 632 P.2d 359 (Ct. App. 1980), aff'd in part, rev'd in part, 96 N.M. 477, 632 P.2d 354 (1981).

The state constitution guarantees the state's right to appeal a disposition that is contrary to law if the state is aggrieved by that disposition. State v. Griego, 2004-NMCA-107, 136 N.M. 272, 96 P.3d 1192.

State made "aggrieved party" when fair jury verdict set aside. — When the jury reaches a verdict after a trial which is fair and free from error, and such a verdict is set aside, the state is "aggrieved" within the meaning of this section, and, thus, has authority to appeal an order granting a new trial. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

State made "aggrieved party" by ruling that sentencing statute is unconstitutional. — The state is an "aggrieved party" where the trial court refuses to enforce a state sentencing statute on the basis that it is unconstitutional, and the state has a constitutional right to an appeal. State v. Aguilar, 95 N.M. 578, 624 P.2d 520 (1981).

State does not have absolute right to appeal in every situation in which it may feel "aggrieved" by a trial court's ruling. State v. Aguilar, 95 N.M. 578, 624 P.2d 520 (1981).

When state can appeal order granting new criminal trial. — Although the state may appeal an order granting a new trial in a criminal case, an immediate appeal is limited to an order in which it is claimed that either: the grant of a new trial was based on an erroneous conclusion; or prejudicial legal error occurred during the trial; or, newly-discovered evidence warranted a new trial. Thus, an immediate appeal by the state of an order granting a new criminal trial is limited to issues of law. State v. Griffin, 117 N.M. 745, 877 P.2d 551 (1994).

Right of appeal was not granted by section prior to amendment. Jordan v. Jordan, 29 N.M. 95, 218 P. 1035 (1923); State v. Rosenwald Bros. Co., 23 N.M. 578, 170 P. 42 (1918); State v. Chacon, 19 N.M. 456, 145 P. 125 (1914), superseded by constitutional amendment, State v. Griffin, 117 N.M. 745, 877 P.2d 551 (1994).

Appeals by state. — This section, as it read prior to 1965 amendment, did not give state right to appeal from judgment sustaining plea in abatement to an indictment. Ex parte Carrillo, 22 N.M. 149, 158 P. 800 (1916).

Under this section as it read prior to 1965 amendment, state could not appeal from district court judgment sustaining demurrer to an information charging trespass on a school section. State v. Dallas, 22 N.M. 392, 163 P. 252 (1917).

Appeals from suppression orders. — Since the state has no constitutional appeal as of right from a suppression order, the time for filing such an appeal is governed by the ten-day limit set forth in 39-3-3B(2) NMSA 1978 and not the thirty-day limit provided for in Rule 12-201A NMRA. State v. Alvarez, 113 N.M. 82, 823 P.2d 324 (Ct. App.), cert. denied, 113 N.M. 23, 821 P.2d 1060 (1991).

Right to appeal criminal contempt conviction. — Under this section, as amended, the supreme court can no longer deny to an aggrieved party the right to an appeal; despite former supreme court rule denying appeal to one convicted of criminal contempt committed in the presence of the court, defendant had right to appeal such a conviction. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Right to appeal denial of motion implicating constitutional rights. — Under this section, the defendant had the right to appeal from an order denying a motion to dismiss a charge on the ground that trial of the charge would subject the defendant to double jeopardy. State v. Apodaca, 1997-NMCA-051, 123 N.M. 372, 940 P.2d 478.

Supreme court's exclusive jurisdiction. — The supreme court has exclusive jurisdiction over interlocutory appeals from pretrial release orders in cases where the defendant faces a possible sentence of life imprisonment or death. State v. Brown, 2014-NMSC-038.

No direct appeal where indictment procedure challenged. — The right conferred by N.M. Const., art. II, § 14 is satisfied by an indictment valid on its face and returned by a legally constituted grand jury. Once such an indictment is returned, there exists no right for immediate review pursuant to a writ of error or pursuant to this section. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. quashed, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

Right to appeal sentence. — Upon conviction defendant, who pleaded guilty, had an undoubted right to appeal his sentence. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Right to appeal involuntary commitment. — A person involuntarily committed to a mental hospital under 43-1-11 NMSA 1978 has a right to appeal under this section even though no appeal is provided for by statute. State v. Pernell, 92 N.M. 490, 590 P.2d 638 (Ct. App. 1979).

New trial mandated where appeal on record impossible. — Where defendant, convicted of larceny, gave timely notice of appeal, but due to unexplained technical difficulties, court reporter was unable to prepare a transcript of proceedings in the cause, and it was impossible to reconstruct a record of the proceedings because of trial counsel's inability to recall events at trial, defendant would be granted a new trial; to deny him a new trial would be to deny him his constitutional right of appeal. State v. Moore, 87 N.M. 412, 534 P.2d 1124 (Ct. App. 1975).

Supreme court determines death sentence proportionality. — The determination of death sentence proportionality is a matter to be addressed by the supreme court on appeal and is, by implication, within the supreme court's exclusive constitutional jurisdiction over death sentence appeals. Determinations of this type require review of the facts in the trial record pertaining to the crime, including evidence of aggravation and mitigation which is not fully developed until after conviction. State v. Wyrostek, 117 N.M. 514, 873 P.2d 260 (1994).

Discharge of prisoner not accorded right to appeal. — Where judgment and order was entered in habeas corpus proceeding on June 15, 1971, requiring petitioner's unconditional release unless prior to June 30, he was allowed his right to appeal his conviction based upon a timely motion for appeal filed pro se the previous November, and due to the state's neglect the requisite order of the district court permitting an appeal came too late, being entered on June 30 itself and furthermore, the state did not attempt by motion to seek relief from the June 15 order until September 27, 1971, petitioner would be released; writ of prohibition seeking to prohibit his discharge was not available to the state. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Dismissal for rule violations not abridgement of right to appeal. — The right of appeal is provided for in the constitution while the means for exercising that right are properly controlled by rules of procedure, and the defendant's constitutional right to appeal was not abridged by the dismissal for failure to follow procedural rules. Olguin v. State, 90 N.M. 303, 563 P.2d 97 (1977).

Time for appeal. — The amendment to this section did not alter the effect of the court rule fixing the time in which the guaranteed right to appeal should be exercised; that the appeal should be within a reasonable time, fixed at 30 days, is a procedural requirement and not in any sense a deprivation of a guaranteed right. State v. Garlick, 80 N.M. 352, 456 P.2d 185 (1969).

Dismissal of appeal because of actions of defendant. — If a defendant's former fugitive status has significantly interfered with the operation of the appellate process, dismissal of the defendant's appeal is appropriate. Here, because the defendant's

fugitive status caused the administrative purging of the record of his trial nine years after the trial, thus preventing the orderly disposition of his case, his appeal is dismissed. State v. Brown, 116 N.M. 705, 866 P.2d 1172 (Ct. App.), cert. denied, 116 N.M. 553, 865 P.2d 1197 (1993).

Appeal right not forfeited by escape. — A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement. He still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated. Mascarenas v. State, 94 N.M. 506, 612 P.2d 1317 (1980).

Appeals from conditional pleas. — A conditional plea agreement is a proper procedure to enable a defendant to reserve a significant pretrial issue for appeal in a case in which conviction seems certain unless the defendant prevails on the pretrial issue. State v. Hodge, 118 N.M. 410, 882 P.2d 1 (1994), rev'g 116 N.M. 491, 864 P.2d 307 (1993).

Section does not require written opinion; court of appeals' memorandum opinion, authorized by Rule 601(b)(1), N.M.R. App. P. (Crim.) (now Rule 12-405 B(1) NMRA), did not deprive defendant of right to appeal. Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Authority to remand for new sentence. — Appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense. The rationale for this holding is that there is no need to retry a defendant for a lesser included offense when the elements of a lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense. State v. Haynie, 116 N.M. 746, 867 P.2d 416 (1994).

Certiorari to court of appeals in criminal case. — The supreme court has the authority to issue writs of certiorari directed to the court of appeals in a criminal case where the conditions of 34-5-14 NMSA 1978 are met. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), rev'g 84 N.M. 451, 504 P.2d 1084 (1972), overruled on other grounds State v. Orosco, 113 N.M. 780, 833 P.2d 1146 (1992).

Refusal to hear issues denies appeal right. — For the supreme court to refuse on appeal to hear the issues which it once declined to review by writ of certiorari would be to effectively deny the defendant his right to appeal his conviction to that court. State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980).

Section applies to review of original jurisdiction cases. — Section 39-3-1.1E NMSA 1978, vesting the court of appeals with discretionary review authority of appeals to district court, does not violate this provision because Article 6, Section 2 applies only to appeals of original jurisdiction cases from district court and not to review of the district

court acting in an appellate capacity. VanderVossen v. City of Espanola, 2001-NMCA-016, 130 N.M. 287, 24 P.3d 319, cert. quashed, 131 N.M. 221, 34 P.3d 610 (2001).

Juvenile courts. — In face of this article legislature could not provide for direct appeal to supreme court from courts inferior to district court, including, at that time, juvenile courts (case decided under this section as it read prior to 1965 amendment). State v. Eychaner, 41 N.M. 677, 73 P.2d 805 (1937).

Habeas corpus. — Laws 1937, ch. 197 (39-3-7 NMSA 1978), authorizing appeals in special proceedings, does not authorize an appeal in habeas corpus proceedings from district court order remanding relator to custody of sheriff, since habeas corpus is not a special statutory proceeding. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Conservancy districts. — Laws 1923, ch. 140, § 903 (since repealed), relating to conservancy districts, did not deprive an appellant of the privilege of appeal, for Subdivision 2 thereof provided for appeals from all orders and decrees of the district court. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Court's review limited. — The supreme court's review of the evidence is only for the purpose of determining whether there was substantial evidence to support the trier of the facts. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

No power in supreme court to review de novo. — The constitution gives the supreme court appellate jurisdiction and also original jurisdiction and superintending control, but these powers do not include the power to review de novo the factual basis for the orders or judgments of district courts. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

While the legislature has the power to determine in what district court cases, civil and criminal, the supreme court shall exercise appellate jurisdiction (except where a sentence of death or life imprisonment has been imposed, in which cases appellate jurisdiction is directly conferred on the court), the legislature has no power to substitute a de novo hearing for an appeal from a judgment or order of the district court, and has no power to fix the time within which an appeal must be heard by the supreme court. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Summary calendar system of appeal constitutional. — There was no factual or legal basis for defendant's allegation of a due process violation due to New Mexico's summary calendar system of appeal, since assignment of a case to the summary calendar, which strictly limits the length of and time for submissions to the appellate court, does not violate due process as long as the defendant is able to properly present issues raised on appeal. State v. Ibarra, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993),

cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Defendant was not prejudiced by the trial court's limitation of the record, in light of the evidence and stipulations of the parties. State v. Martin, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Section 29-9-8B NMSA 1978 partially unconstitutional. — The last sentence in 29-9-8B NMSA 1978, allowing the discovery of the records of the governor's organized crime prevention commission only by supreme court order, is unconstitutional, as the legislature lacks the power to prescribe and regulate practice, pleading and procedure. In re Motion for a Subpoena Duces Tecum, 94 N.M. 1, 606 P.2d 539 (1980).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M. L. Rev. 53 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M. L. Rev. 271 (1982).

For article, "New Mexico's Summary Calendar for Disposition of Criminal Appeals: An Invitation for Inefficiency, Ineffectiveness and Injustice," see 24 N.M. L. Rev. 27 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 54 et seq.

New trial, grant of, by appellate court because of inability to perfect record for appeal, 13 A.L.R. 107, 16 A.L.R. 1158, 107 A.L.R. 603.

Superintending control over inferior tribunals, 112 A.L.R. 1351.

Issue of certiorari in exercise of power of superintending control, 112 A.L.R. 1370.

Issue of mandamus in exercise of power of superintending control, 112 A.L.R. 1371.

Appellate court's discretion to refuse exercise of its original jurisdiction to issue writs of mandamus, 165 A.L.R. 1431.

Power to confer original jurisdiction on courts to revoke or suspend public license, 168 A.L.R. 826.

21 C.J.S. Courts § 12 et seq.

Sec. 3. [Supreme court; original jurisdiction; supervisory control; extraordinary writs.]

The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending

control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

ANNOTATIONS

Cross references. — For certiorari to the court of appeals, *see* N.M. Const., art. VI, § 13, and Rule 12-502 NMRA.

For Uniform Certification of Questions of Law Act, *see* Chapter 39, Article 7 NMSA 1978.

For habeas corpus, *see* 44-1-1 NMSA 1978 et seq.

For provisions relating to mandamus, *see* 44-2-1 NMSA 1978.

For quo warranto, *see* 44-3-1 NMSA 1978.

For rule regarding writs of error, *see* Rule 12-503 NMRA.

For issuance of extraordinary writs, *see* Rule 12-504 NMRA.

Comparable provisions. — Idaho Const., art. V, § 9.

Iowa Const., art. V, § 4.

Montana Const., art. VII, § 2.

Utah Const., art. VIII, § 3.

Wyoming Const., art. V, § 3.

I. GENERAL CONSIDERATION.

Certiorari to court of appeals in criminal case. — Supreme court has authority to issue writs of certiorari directed to court of appeals in a criminal case where the conditions of 34-5-14 NMSA 1978 are met. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), rev'g 84 N.M. 451, 504 P.2d 1084 (Ct. App. 1972), overruled by State v. Orosco, 113 N.M. 780, 833 P.2d 1146 (1992).

No power of de novo review. — Powers of appellate jurisdiction and original jurisdiction and superintending control do not include the power to review de novo the

factual basis for the orders or judgments of district courts. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Lower court order imposing media ban in criminal case. — The news media has standing in the supreme court to intervene in a criminal case to question the validity of a lower court order impairing its ability to report the news. The proper approach lies in a separate action for declaratory judgment, mandamus or prohibition. State ex rel. N.M. Press Ass'n v. Kaufman, 98 N.M. 261, 648 P.2d 300 (1982).

Statute allowing discovery only on supreme court order is unconstitutional. — Section 29-9-8B NMSA 1978 partially unconstitutional. The last sentence in 29-9-8B NMSA 1978, allowing the discovery of the records of the governor's organized crime prevention commission only by supreme court order, is unconstitutional, as the legislature lacks the power to prescribe and regulate practice, pleading and procedure. In re Motion for a Subpoena Duces Tecum, 94 N.M. 1, 606 P.2d 539 (1980).

Attorneys' fees on settled appeal. — Where appellant and appellee compromised a case on appeal, without the intervention of their attorneys, and agreed to and prayed for dismissal of the appeal, a petition of attorneys for appellant asking court to modify district court decree to provide for attorneys' fees invoked the original jurisdiction of the supreme court in a manner not authorized by this section and could not be entertained. Thurman v. Grimes, 35 N.M. 498, 1 P.2d 972 (1931).

Supreme court may order a change of venue when remanding a case. Marsh v. State, 95 N.M. 224, 620 P.2d 878 (1980).

Writ of error as appropriate means for invoking collateral order doctrine. Carrillo v. Rostro, 114 N.M. 607, 845 P.2d 130 (1992).

II. SUPERINTENDING CONTROL.

The district court may not, through the sanction process, limit a litigant’s right to seek relief from a discovery order through a writ of superintending control or a writ of error in the supreme court. Chavez v. Lovelace Sandia Health System, 2008-NMCA-104, 144 N.M. 578, 189 P.3d 711.

Superintending control explained. — The power of superintending control is the power to control the course of ordinary litigation in inferior courts, as exercised at common law by the court of kings' bench and by the use of writs specifically mentioned in the constitution, and other writs there referred to or authorized. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Power of superintending control. — The power of superintending control is the power to control the course of ordinary litigation in inferior courts, and where appropriate, the power of superintending control permits the supreme court’s interposition to correct any

specie of error and is not limited to jurisdictional error, and the supreme court may also exercise the power of superintending control where it is deemed to be in the public interest to settle the question involved at the earliest moment. Kerr v. Parsons, 2016-NMSC-028.

Where the New Mexico legislature, in its 2015 general appropriation to the law office of the public defender (LOPD), specifically provided that the appropriations to the public defender department shall not be used to pay hourly reimbursement rates to contract attorneys, and where the district court entered an order requiring the LOPD to pay contract counsel hourly rates and the state to provide additional funding, nullifying the legislature's prohibition of the payment of hourly rates to indigent defense contract counsel as violative of the federal and state constitutions, based on its conclusion that the flat-fee rates paid to contract counsel by the LOPD contravene the constitutional guarantee of effective assistance of counsel, a petition for writ of superintending control was granted because it was in the public's interest to review the district court's order. Kerr v. Parsons, 2016-NMSC-028.

Not substitute for appeal. — The superintending control will not be invoked merely to perform the office of an appeal. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Control over administrative functions of inferior courts. — The constitutional grant of "superintending control" gives the New Mexico supreme court control over administrative functions of inferior courts. Russillo v. Scarborough, 727 F. Supp. 1402 (D.N.M. 1989), aff'd, 935 F.2d 1167 (10th Cir. 1991).

The supreme court has ultimate authority over administrative matters of the courts. Russillo v. Scarborough, 935 F.2d 1167 (10th Cir. 1991), aff'g 727 F. Supp. 1402 (D.N.M. 1989).

The power of superintending control includes the authority to order the metropolitan court to terminate its court administrator. Russillo v. Scarborough, 935 F.2d 1167 (10th Cir. 1991), aff'g 727 F. Supp. 1402 (D.N.M. 1989).

Superintending power will not be exercised except under unusual circumstances. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

When superintending control exercised. — The supreme court's superintending control will be exercised if the remedy by appeal is wholly or substantially inadequate, or if the exercise thereof will prevent irreparable mischief, great, extraordinary or exceptional hardship, costly delays or unusual burdens in the form of expenses. State ex rel. DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973); Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969); State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966); Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961); Rutledge v. Fort, 104 N.M. 7, 715 P.2d 455 (1986), overruled on other grounds Reese v. State, 106 N.M. 498, 745 P.2d 1146 (1987).

Power of superintending control is distinct from appellate and original jurisdiction of supreme court; therefore, even though petitioners had taken an appeal to this court from the orders of the trial court denying their motions to set aside the amended decree, the extremely unusual circumstances of this case made petitioners' remedy by appeal substantially inadequate, and compelled the court to exercise its superintending control. State ex rel. DuBois v. Ryan, 85 N.M. 575, 514 P.2d 851 (1973).

Superintending control is limited to control over inferior courts and does not restrict legislative powers to establish procedures for workers' compensation proceedings, including the authority of the worker's compensation administrator to appoint a workers' compensation judge pro tem. Carrillo v. Compusys, Inc., 1997-NMCA-003, 122 N.M. 720, 930 P.2d 1172, cert. denied, 122 N.M. 589, 929 P.2d 981.

Duty of court to uphold respect for courts. — The duty of the court under its power of superintending control is to make certain, insofar as humanly possible, that the traditional respect and high regard in which courts generally are held will in no way be encroached upon; the courts must not only be impartial, unbiased and fair, but, in addition, no suspicions to the contrary may be permitted to creep in. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Actions or proceedings under court's superintending control are for court alone and are not a proper consideration for the bar commission. In re Board of Comm'rs of State Bar, 65 N.M. 332, 337 P.2d 400 (1959).

Inherent power in supreme court to regulate procedure. — Supreme court's power of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

The supreme court of New Mexico has superintending control over all inferior courts, and thus the power to regulate and to promulgate rules regarding the pleadings, practice and procedure affecting the judicial branch of government. Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Supreme court has a superintending control over all inferior courts as well as jurisdiction and power to issue writs of certiorari; this constitutional power and jurisdiction carries with it the power to regulate pleading, practice and procedure in inferior courts and the circumstances under which such writs, including writs of certiorari, may issue. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973), aff'g 84 N.M. 456, 504 P.2d 1089 (Ct. App. 1972).

The power to provide rules of pleading, practice and procedure for the conduct of litigation in the district courts, as well as rules of appellate procedure, is lodged in the

supreme court under its power of superintending control. The constitutional grant of power to issue the writs by means of which the power of superintending control is exercised comprehends and carries with it the authority to exercise such powers to the extent that it can be exerted by those writs and other processes essential to its complete exercise. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

By Laws 1933, ch. 84 (38-1-1 and 38-1-2 NMSA 1978), authorizing the supreme court to promulgate rules of procedure, the legislature merely withdrew from the rule-making field wherein it had theretofore functioned as a coordinate branch of government with the court. The act was not a delegation of legislative power, but rather a mere abdication or withdrawal from the rule-making field, and the rules promulgated thereafter were issued pursuant to the supreme court's inherent power to prescribe such rules of practice, pleading and procedure as would facilitate the administration of justice. State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936).

Superintending control with respect to privileges. — The supreme court's constitutional power of superintending control with respect to privileges mandates that when a statutory privilege is not consistent with a rule of the supreme court, the statutory privilege is not given effect and the constitutional or court rule privilege prevails. State v. Strauch, 2015-NMSC-009, *rev'g* 2014-NMCA-020.

Where defendant, who was charged with criminal sexual contact of a minor, claimed that his communications with his social worker were privileged communications, the supreme court held that the provisions of 61-31-24(A) NMSA 1978, that arguably create social worker evidentiary privileges cannot prevent court-ordered disclosure of communications that would be mandated by the discovery and evidence rules of the supreme court. State v. Strauch, 2015-NMSC-009, *rev'g* 2014-NMCA-020.

Establishing pretrial procedure for evaluating aggravating circumstances. — The supreme court has the inherent authority to establish a pretrial procedure for evaluating aggravating circumstances in death penalty sentencing under its power of superintending control over lower state courts. State v. Ogden, 118 N.M. 234, 880 P.2d 845 (1994), cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294 (1994).

Exclusion of control by executive or legislature unconstitutional. — Any action of the executive or legislative branch of a municipal government which would preclude the supreme court or the district court from exercising its superintending or supervisory authority over the municipal court violates the state constitution. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Legislature lacks power to prescribe rules of practice and procedure, although it has in the past attempted to do so. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

In the absence of the clearest language to the contrary in the constitution, the powers essential to the functioning of the courts are to be taken as committed solely to the

supreme court to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in the supreme court. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Discipline of attorneys. — The inherent power of the supreme court of superintending control encompasses the authority and duty to determine what constitutes grounds for the discipline of lawyers and to discipline, for cause, any person admitted to practice law in New Mexico. Any legislative attempt to limit what conduct the supreme court may consider as grounds for imposing attorney discipline would be an unconstitutional infringement of the supreme court's authority to regulate the practice of law. In re Treinen, 2006-NMSC-013, 139 N.M. 318, 131 P.3d 1282.

Statutory rule of evidence invalid. — In view of the clear and unambiguous assertion of the supreme court in Rule 501, N.M.R. Evid. (now Rule 11-501 NMRA) that no person has a privilege, except as provided by constitution or rule of the court, and since under the New Mexico constitution the legislature lacks power to prescribe by statute rules of evidence and procedure, which power is vested exclusively in the supreme court, the journalistic privilege purportedly created by former 20-1-12.1 A, 1953 Comp., is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Legislature has no power to substitute de novo hearing for appeal from a judgment or order of the district court, and has no power to fix the time within which an appeal must be heard by the supreme court. Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

Issuance of writ held appropriate. — The question of whether the state was barred by the double jeopardy clause from prosecuting an individual for driving under the influence (DWI) once the individual had been subjected to an administrative hearing for driver's license revocation based on the same offense was one of great public importance requiring use of the supreme court's power of superintending control. State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995).

Issuance of writ held inappropriate. — Issuance of an alternative writ of superintending control restraining a district court from enforcing the portion of its sentence against a defendant awarding him meritorious good-time credit against his sentence for the period he spent in presentence confinement was inappropriate, where the state filed and then voluntarily withdrew an appeal of the district court's order and

where the public interest in the orderly administration of the criminal justice system was served by another decision of the supreme court of New Mexico. State ex rel. Schiff v. Murdoch, 104 N.M. 344, 721 P.2d 770 (1986).

Power of superintending control would be exercised in election contest involving office of lieutenant-governor. Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961).

Review of interlocutory order. — The supreme court will not invoke its extraordinary power of superintending control over all inferior courts to review an interlocutory order that plaintiff was real party in interest, where there is no great hardship in forcing the parties to await review of the final judgment. Albuquerque Gas & Elec. Co. v. Curtis, 43 N.M. 234, 89 P.2d 615 (1939).

Vacation of court order. — Supreme court was warranted in exercising its superintending control by vacating an order of the district court allowing an appeal from ad valorem tax valuation and enjoining the state tax commission from certifying tax assessments to county assessors, as entry of the order was an abuse of discretion under the provisions of Rules 65 and 66, N.M.R. Civ. P. (now Rules 1-065 and 1-066 NMRA). State ex rel. State Tax Comm'n v. First Judicial Dist. Court, 69 N.M. 295, 366 P.2d 143 (1961).

Game commission controversy. — In a case brought to enjoin and restrain the state game commission from authorizing its permittees and licensees to go upon state leased lands for the purpose of hunting wild game, where a writ of prohibition would issue as a matter of right had the order of the district court been threatened but not issued, the supreme court should exercise its right of superintending control. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Removal or discipline of judges. — The board of bar commissioners of state of New Mexico and its grievance or disciplinary committee have no jurisdiction as to a complaint made against a district judge with respect to the judge's actions in rebuking a grand jury. In re Board of Comm'rs of State Bar, 65 N.M. 332, 337 P.2d 400 (1959).

III. QUO WARRANTO.

Purpose of quo warranto. — Purpose of quo warranto is to ascertain whether a public officer is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Impeachment does not preempt quo warranto. — Impeachment by the legislature does not preempt quo warranto as the exclusive means for removing a felon from public office. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Felony conviction occurring during the term of an elective office. — Quo warranto is an appropriate procedure for removing an elected official when the elected official is

convicted of a felony during the elected official's term of office. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Jurisdiction in mandamus and quo warranto concurrent with district courts. — Under this section and N.M. Const., art. VI, § 13, the supreme and district courts each have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions in all cases, whether the proceeding was instituted by the attorney general, ex officio, in behalf of the state, or brought by some private person for the assertion of some private right. The supreme court will decline jurisdiction in absence of controlling necessity therefor, and will do so in all cases brought at instance of a private suitor. State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611 (1912).

Construing this section and N.M. Const., art. VI, § 13, the jurisdiction of the supreme court in quo warranto against state commissions and officers, while original, was concurrent with that of the district courts and not exclusive. State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611 (1912).

Liberal interpretation of quo warranto statutes. — Statutes such as those concerning quo warranto are remedial in character, and as such should be liberally interpreted to effectuate the objects intended. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

Statute inconsistent with court's powers. — The supreme court would not give approval to the portion of 44-3-6 NMSA 1978 which requires the name of the person rightfully entitled to the office involved in a quo warranto proceeding to be set forth in the complaint, at least not if it is meant to affect the subject matter jurisdiction of the court, especially since the statute is inconsistent with Rule 12(a), N.M.R. App. P. (Civ.), (now Rule 12-504 A NMRA) since in any situation where a vacancy was filled by appointment under such reasoning the court would be shorn of its constitutional powers vis-a-vis quo warranto, and presumably, with additional bits of legislative ingenuity, of its powers to issue other extraordinary writs as well. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

State indispensable party to quo warranto. — The state, through the attorney general, is an indispensable party plaintiff in a quo warranto proceeding to challenge the propriety of an election contest. State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975).

IV. MANDAMUS.

Mandamus against officers, boards and commissions. — The supreme court of New Mexico exercises constitutionally invested original jurisdiction in mandamus against all state officers, boards and commissions. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974).

A mandamus petition for an order precluding the governor from implementing compacts and revenue-sharing agreements with Indian tribes which would permit gaming on Indian lands pursuant to the federal Indian Gaming Regulatory Act was properly brought before the supreme court in an original proceeding. State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).

A writ of mandamus was an appropriate means of vacating an unconstitutional order of the public service commission. State ex rel. Sandel v. New Mexico Pub. Util. Comm'n, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55.

Supreme Court had original jurisdiction of writ of mandamus brought to compel governor to cease implementation of public assistance program which petitioners alleged exceeded his authority and failed to get required legislative approval. State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768.

Mandamus lies to compel performance of statutory duty only when it is clear and indisputable. Witt v. Hartman, 82 N.M. 170, 477 P.2d 608 (1970).

Relevant considerations in exercising original jurisdiction in mandamus. — The New Mexico supreme court will exercise its original jurisdiction in mandamus when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as direct appeal. N.M. Bldg. and Constr. Trades Council v. Dean, 2015-NMSC-023.

Where petitioners, an alliance of craft unions representing the interests of thousands of New Mexico employees working on public works projects throughout the state, sought a writ of mandamus ordering the director of the labor relations division of the New Mexico department of workforce solutions (director) to set prevailing wage and prevailing benefit rates in accordance with the Public Works Minimum Wage Act, §§ 13-4-10 to -17 NMSA 1978, mandamus was proper because petitioners presented a purely legal issue concerning whether the director had a nondiscretionary duty to set prevailing wage and benefit rates, the director's undisputed five-year delay in setting rates in accordance with the act warranted a speedy resolution, and the avenue for appeal provided for in the act had proven not to be an adequate remedy at law. N.M. Bldg. and Constr. Trades Council v. Dean, 2015-NMSC-023.

Mandamus to restore rights or privileges. — Mandamus is defined to include an order directing the restoration to the complainant of rights or privileges of which he has been illegally deprived. State ex rel. Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1977).

Mandamus directing district court to act. — Under its power of superintending control, supreme court could by mandamus direct district court to act, even though

remedy by appeal or writ of error existed, where such remedy was entirely inadequate. State ex rel. Meyers Co. v. Raynolds, 22 N.M. 473, 164 P. 830 (1917).

Mandamus was available to enforce provisions of Enabling Act in view of acceptance of act's provisions by adoption of N.M. Const., art. XXI, §§ 9 and 10. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

Publication of proposed amendments. — Supreme court had original jurisdiction at instance of individual voter to mandamus secretary of state to publish proposed amendments to state constitution. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

Mandamus was proper remedy for attacking constitutionality of statute in view of the possible inadequacy of other remedies and the necessity of an early decision on question of great public importance. Thompson v. Legislative Audit Comm'n, 79 N.M. 693, 448 P.2d 799 (1968).

Constitutionality of legislative act may be determined in mandamus action. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

Right to tenure is not enforceable by mandamus, as in absence of positive provision of law it is not a clear legal right. Lease v. Board of Regents of N.M. State Univ., 83 N.M. 781, 498 P.2d 310 (1972).

No jurisdiction to mandamus election recount by district judge. — The supreme court is without jurisdiction to mandamus a district judge to certify that a recount of ballots was made in his presence, since he is not a state officer, board or commission, or of an inferior court, but only a recount official performing a ministerial function. State ex rel. Scott v. Helmick, 35 N.M. 219, 294 P. 316 (1930). But see, 1-14-21 NMSA 1978.

V. PROHIBITION.

Prohibition defined. — The writ of prohibition is best defined as an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction of a matter over which it has no control, or from going beyond its legitimate powers in a matter in which it has jurisdiction. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

State corporation commission (now public regulation commission) is not an inferior court. — Since state corporation commission (now public regulation commission) is not an "inferior court", supreme court's original jurisdiction does not extend to a prohibitory action against such commission. Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 43 N.M. 503, 95 P.2d 676 (1939).

When writ of prohibition issued. — Even though the issuance of a writ of prohibition is within supreme court's discretion, the writ is issued almost as a matter of right when

the trial court is totally lacking in jurisdiction, or has exceeded its jurisdiction or is about to do so. When the order has already been issued, or when the court has jurisdiction but the order is erroneous, arbitrary and tyrannical, or would be gross injustice, or might result in irreparable injury, and there is no plain, speedy and adequate remedy unless it is issued, the supreme court may do so under power of superintending control by virtue of this section. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

If the inferior court or tribunal has jurisdiction of both the subject matter and of the person, where necessary, the writ of prohibition will not issue, but lacking such jurisdiction the writ will issue as a matter of right. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962); Gilmore v. District Court, 35 N.M. 157, 291 P. 295 (1930).

Where jurisdiction of both the subject matter and the parties is present, ordinarily prohibition will not issue; the question is not whether the court had a right to decide the issue in a particular way, but whether it had the right to decide it at all. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970); State ex rel. Kermac Nuclear Fuels Corp. v. Larrazolo, 70 N.M. 475, 375 P.2d 118 (1962).

Prohibition is properly invoked only against an inferior court to prevent such a court from acting either without jurisdiction or in excess of its jurisdiction. State ex rel. Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1977).

Prohibition invokable under exceptional circumstances. — Supreme court's power of supervisory control will be invoked by writ of prohibition where the remedy by appeal is inadequate or where irreparable mischief, great, extraordinary or exceptional hardship, costly delay and unusual burdens of expense would otherwise result. State ex rel. Transcontinental Bus Serv., Inc. v. Carmody, 53 N.M. 367, 208 P.2d 1073 (1949).

Judicial discretion. — Prohibition is not a writ of right, granted ex debito justitiae, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case; it is to be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are applicable. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Writ of prohibition may not be utilized for piecemeal review, or as a substitute for an appeal and an even greater violation of the judicial process would be to use it with an incomplete record to substitute supreme court's judgment for that of the trial court. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

Undoing of act performed is not purpose of prohibition in its usual sense. State Game Comm'n v. Tackett, 71 N.M. 400, 379 P.2d 54 (1962).

Use of prohibition limited. — Generally, writ of prohibition cannot be used to correct mere irregularities, or to perform functions of an appeal or writ of error. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Jurisdiction over state officers limited. — The supreme court's original jurisdiction over state officers is confined to mandamus and quo warranto; prohibition will not lie against the state corporation commission (now public regulation commission) at least in absence of controlling necessity therefor. Atchison, T. & S.F. Ry. v. State Corp. Comm'n, 43 N.M. 503, 95 P.2d 676 (1939).

District court is an "inferior court" within meaning of this section giving to supreme court jurisdiction to grant writ of prohibition. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Prohibition to stay court proceedings pending adjudication of constitutionality. — Where conflict existed in New Mexico judicial districts as to constitutionality of death penalty and allowing the situation to remain would result in unequal justice, a writ of prohibition to stop proceedings in conflicting cases until a determination of constitutionality could be made in the instant case was proper and would be made permanent. State ex rel. Serna v. Hodges, 89 N.M. 351, 552 P.2d 787 (1976), overruled on other grounds, State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

Issuance of writ proper. — The presence of an unauthorized person before the grand jury requires dismissal of the indictment without the necessity of showing prejudice, and writ of prohibition was properly issued under such circumstances. Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977).

Although writ of prohibition should not interfere with discretion of trial judge, where respondent trial judge had not exercised his discretion but had ruled that the defendants were entitled to grand jury testimony, police reports and witness statements as a matter of law, the writ was proper. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

Resort to power of superintending control. — Where problem was of importance to the state, and the supreme court's refusal to entertain jurisdiction might amount to a denial of justice, it would resort to the extraordinary writ and examine the entire matter in order to determine what result should have been reached, under its power of superintending control, as a true writ of prohibition would not be the proper remedy, since the court could not prohibit that which had already been done. State Racing Comm'n v. McManus, 82 N.M. 108, 476 P.2d 767 (1970).

Expense burden insufficient rationale for writ. — Fact that fairly unusual burdens of expense will have to be borne by relators, though unfortunate, was frequently a necessary adjunct to litigation of the type involved and was therefore insufficient to warrant issuance of a writ of prohibition. State ex rel. Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

Potential for wrong decision. — Fact that the district court might be about to decide matters wrongly was of no concern of the supreme court in merely investigating jurisdiction, nor was it material that the supreme court might on review be compelled to

reverse the case. State ex rel. Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

Writ not available. — Where judgment and order was entered in habeas corpus proceeding on June 15, 1971, requiring petitioner's unconditional release unless prior to June 30 he was allowed his right to appeal his conviction based upon a timely motion for appeal filed pro se the previous November, and due to the state's neglect the requisite order of the district court permitting an appeal came too late, being entered on June 30, and furthermore, the state did not attempt by motion to seek relief from the June 15 order until September 27, 1971, petitioner would be released; writ of prohibition seeking to prohibit his discharge was not available to the state. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Person seeking writ must prove essential allegations of petition; the court will presume that the action of the inferior court was correct and within the scope of its authority. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

Application for writ of prohibition should recite grounds for granting of the relief to the exclusion of allegations of evidence heard by the trial court. State v. Zinn, 80 N.M. 710, 460 P.2d 240 (1969).

VI. HABEAS CORPUS.

Even though a habeas corpus petitioner may not directly appeal a district court's adverse ruling to the supreme court, a habeas corpus petitioner may seek review in the supreme court by writ of certiorari. Cummings v. State, 2007-NMSC-048, 142 N.M. 656, 168 P.3d 1080.

Section gives supreme court original jurisdiction in habeas corpus proceedings. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Exercise of habeas corpus jurisdiction. — In absence of controlling necessity, the concurrent jurisdiction of this court in habeas corpus will not be exercised, and the petitioner will be relegated to an application in district court of county where he is restrained. Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).

Prisoner must apply to district court for habeas corpus before an original proceeding may be brought in the New Mexico supreme court. Cox v. Raburn, 314 F.2d 856 (10th Cir. 1963), cert. denied, 374 U.S. 853, 83 S. Ct. 1920, 10 L. Ed. 2d 1074 (1963).

New habeas proceeding in supreme court after petitioner's remand below. — An appeal from district court order in habeas corpus, remanding relator to sheriff's custody, will not lie in absence of statute, but relator may institute an original proceeding in habeas corpus under this section. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Remand of petitioner by district court not res judicata. — That district court remands petitioner for habeas corpus is not a bar to, nor res judicata in, a like proceeding in supreme court. Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).

Removal or discipline of judges. — This section and N.M. Const., art. VI, § 32, provide for removal or discipline (but not recall) of any justice, judge or magistrate for willful misconduct in office, willful and persistent failure to perform his duties or habitual intemperance. 1973 Op. Att'y Gen. No. 73-03.

The superintending control of the supreme court over inferior courts affords a present avenue for removal of any municipal judge should the situation so warrant. 1973 Op. Att'y Gen. No. 73-03.

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For comment on Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963), see 4 Nat. Resources J. 413 (1964).

For article, "Habeas Corpus in New Mexico," see 11 N.M. L. Rev. 291 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts §§ 72 et seq.

Propriety of federal court's considering state prisoner's petition under 28 USC § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

21 C.J.S. Courts § 12 et seq.

Sec. 4. [Supreme court; selection of chief justice.]

The supreme court of the state shall consist of at least five justices who shall be chosen as provided in this constitution. One of the justices shall be selected as chief justice as provided by law. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For power of legislature to increase number of justices to five, *see* N.M. Const., art. VI, § 10.

For vacancy in office of supreme court or district court justice, *see* N.M. Const., art. XX, § 4.

For governor's power to designate three disaster successors for each judge of the supreme court and district courts, *see* 12-11-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 6.

Iowa Const., art. V, § 2; amendment 21.

Montana Const., art. VII, § 3.

Utah Const., art. VIII, § 2.

Wyoming Const., art. V, § 4.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, rewrote this section to the extent that a detailed comparison would be impracticable. For former provisions, see Original Pamphlet.

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have repealed the present section and added a new section to read "The supreme court consists of not less than five justices. One of the justices shall be selected as chief justice as provided by law," was submitted to the people at the general election on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Number of justices. — The number of justices of the supreme court was increased to five by Laws 1929, ch. 9, § 1 (Section 34-2-1 NMSA 1978), under the authority granted by N.M. Const., art. VI, § 10.

Staggered terms. — This section and N.M. Const., art. VI, § 10 make clear the intent that staggered terms be maintained for the office of supreme court judge. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment, which rewrote this section).

Law reviews. — For comment on State ex rel. Palmer v. Miller, 74 N.M. 129, 391 P.2d 416 (1964), see 4 Nat. Resources J. 606 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 2; 46 Am. Jur. 2d Judges §§ 8, 9.

Successor judge, authority in dealing with unfinished business of previous judge, 54 A.L.R. 952, 58 A.L.R. 848.

Judgment, power to enter or authenticate, 58 A.L.R. 848.

Judge holding over without authority after expiration of term as a de facto officer, 71 A.L.R. 848.

Court's power to remove judges, 118 A.L.R. 171.

Right of party, in course of litigation, to challenge title or authority of judge or of person acting as judge, 144 A.L.R. 1207.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Power of court to remove or suspend judge, 53 A.L.R.3d 882.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

21 C.J.S. Courts § 123; 48A C.J.S. Judges § 13.

Sec. 5. [Supreme court; quorum; majority concurring in judgments.]

A majority of the justices of the supreme court shall be necessary to constitute a quorum for the transaction of business, and a majority of the justices must concur in any judgment of the court.

ANNOTATIONS

Comparable provisions. — Utah Const., art. VIII, § 2.

Wyoming Const., art. V, § 4.

Law reviews. — For comment, "Courts - Number of Justices Concurring in Opinion - Some Dangers of New Mexico's 'Three-Judge Court'," see 5 Nat. Resources J. 403 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 38.

21 C.J.S. Courts § 137.

Sec. 6. [Supreme court; absent or disqualified justice.]

When a justice of the supreme court shall be interested in any case, or be absent, or incapacitated, the remaining justices of the court may, in their discretion, call in any district judge of the state to act as a justice of the court.

ANNOTATIONS

Cross references. — For disqualification of justice, judge or magistrate to sit in certain causes, except with consent of parties thereto, *see* N.M. Const., art. VI, § 18.

For authority of chief justice to designate judge of the court of appeals to act as supreme court justice, *see* N.M. Const., art. VI, § 28.

For disqualification of judge in proceedings where his impartiality might be questioned, *see* Rule 21-211 NMRA.

Comparable provisions. — Idaho Const., art. V, § 6.

Montana Const., art. VII, § 3.

Utah Const., art. VIII, § 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86 et seq., 248 et seq.

Constitutionality of statute making mere filing of affidavit of bias or prejudice sufficient to disqualify judge, 5 A.L.R. 1275, 46 A.L.R. 1179.

Residence or ownership of property in city or other political subdivision which is party to or interested in action as disqualifying judge, 33 A.L.R. 1322.

Number of changes of judges, statute limiting, 104 A.L.R. 1494.

Criminal case, substitution of judge in, 114 A.L.R. 1214.

Constitutionality of statute which disqualifies judge upon peremptory challenge, 115 A.L.R. 855.

Party's right, in course of litigation, to challenge title or authority of substitute judge, 144 A.L.R. 1214.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse himself or to certify his disqualification, 45 A.L.R.2d 937, 56 A.L.R. Fed. 494.

Relationship to attorney as disqualifying judge, 50 A.L.R.2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member, 64 A.L.R.2d 600, 37 A.L.R.4th 1004.

Prior representation or activity as attorney or counsel as disqualifying judge, 72 A.L.R.2d 443, 16 A.L.R.4th 550.

Time for asserting disqualification, 73 A.L.R.2d 1238.

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886.

Intervenor's right to disqualify judge, 92 A.L.R.2d 1110.

Disqualification of judge for having decided different case against litigant, 21 A.L.R.3d 1369.

Disqualification of judge on ground of being a witness in the case, 22 A.L.R.3d 1198.

Disqualification of judge for bias against counsel for litigant, 23 A.L.R.3d 1416.

Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation, 25 A.L.R.3d 1331.

Disqualification of judge by state in criminal case for bias or prejudice, 68 A.L.R.3d 509.

Affidavit or motion for disqualification of judge as contempt, 70 A.L.R.3d 797.

Fine, penalty or forfeiture imposed upon defendant, disqualification of judge or one acting in judicial capacity by pecuniary interest in, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

Illness or incapacity of judge, prosecuting officer or prosecution witness as justifying delay in bringing accused speedily to trial in state cases, 78 A.L.R.3d 297.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

48A C.J.S. Judges §§ 98 to 185.

Sec. 7. [Supreme court; terms, sessions and recesses.]

The supreme court shall hold one term each year, commencing on the second Wednesday in January, and shall be at all times in session at the seat of government; provided, that the court may, from time to time, take such recess as in its judgment may be proper.

ANNOTATIONS

Cross references. — For terms, sessions and hearings of supreme court, *see* Rule 23-101 NMRA.

Comparable provisions. — Idaho Const., art. V, § 8.

Wyoming Const., art. V, § 7.

Control of judgments entered during term. — Supreme court had authority to set aside an order of dismissal two days after it was made, since both actions were in the same term, and court had full control of judgment entered during that term. Henderson v. Dreyfus, 26 N.M. 262, 191 P. 455 (1920).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 21 et seq.

Governor's calling of special or extra term of court, 16 A.L.R. 1308.

21 C.J.S. Courts §§ 111 to 123.

Sec. 8. [Supreme court; qualifications of justices.]

No person shall be qualified to hold the office of justice of the supreme court unless that person is at least thirty-five years old and has been in the actual practice of law for at least ten years preceding that person's assumption of office and has resided in this state for at least three years immediately preceding that person's assumption of office. The actual practice of law shall include a lawyer's service upon the bench of any court of this state. The increased qualifications provided by this 1988 amendment shall not apply to justices and judges serving at the time this amendment passes or elected at the general election in 1988. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For ineligibility of supreme court justice to be nominated or elected to nonjudicial office, *see* N.M. Const., art. VI, § 19.

For qualifications for holding office, *see* N.M. Const., art. VII, § 2.

Comparable provisions. — Montana Const., art. VII, § 9.

Utah Const., art. VIII, § 7.

Wyoming Const., art. V, § 8.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, rewrote this section to the extent that a detailed comparison would be impracticable. For former provisions, see Original Pamphlet.

Requirements. — The qualified judge must be practicing law and residing in New Mexico immediately prior to taking office and he must have been doing so for at least the preceding three (now 10) years. Hannett v. Jones, 104 N.M. 392, 722 P.2d 643 (1986).

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 6 et seq.

Incompatibility of office of judge and office in the military service, 26 A.L.R. 143, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Eligibility to office of judge of one who was not an attorney, 50 A.L.R. 1156.

Right of party in course of litigation to challenge eligibility of judge, 144 A.L.R. 1207.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Validity and construction of constitutional or statutory provision making legal knowledge a condition of eligibility for judicial office, 71 A.L.R.3d 498.

48A C.J.S. Judges §§ 15 to 18.

Sec. 9. [Supreme court; officers.]

The supreme court may appoint and remove at pleasure its reporter, bailiff, clerk and such other officers and assistants as may be prescribed by law.

ANNOTATIONS

Cross references. — For employment of a law clerk by each justice, *see* 34-2-7 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 1.

Clerk of court: liability of clerk of court or surety on bond for negligent or wrongful acts of deputies or assistants, 71 A.L.R.2d 1140.

21 C.J.S. Courts §§ 93 to 110.

Sec. 10. [Supreme court; additional justices.]

After the publication of the census of the United States in the year nineteen hundred and twenty, the legislature shall have power to increase the number of justices of the supreme court to five; provided, however, that no more than two of said justices shall be elected at one time, except to fill a vacancy.

ANNOTATIONS

Cross references. — For original number of supreme court justices, and term and election of same, *see* N.M. Const., art. VI, § 4.

Compiler's notes. — The number of justices of the supreme court was increased from three to five by Laws 1929, ch. 9, § 1 (Section 34-2-1 NMSA 1978), under the authority granted by this section.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have repealed this section, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Staggered terms. — New Mexico Const., art. VI, § 4 and this section make clear the intent that staggered terms be maintained for the office of supreme court judge. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment of N.M. Const., art. VI, § 4, which rewrote that section).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 4, 5.

21 C.J.S. Courts § 123.

Sec. 11. [Supreme court; salary of justices.]

The justices of the supreme court shall each receive such salary as may hereafter be fixed by law. (As amended September 15, 1953.)

ANNOTATIONS

Cross references. — For salaries of justices, *see* 34-1-9 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 17.

Iowa Const., amendment 21.

Montana Const., art. VII, § 7.

Utah Const., art. VIII, § 14.

Wyoming Const., art. V, § 17.

The 1953 amendment, which was proposed by H.J.R. No. 15 (Laws 1953) and adopted at a special election held on September 15, 1953, with a vote of 14,727 for and 12,114 against, amended this section to provide that salaries of supreme court justices should be fixed by law. Prior to amendment, the section provided for an annual salary of $6,000, payable quarterly.

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Appropriations for judicial salaries are subject to governor's veto power. — Judicial salaries must annually be established by the legislature in an appropriations act, as set forth in Subsection E of 34-1-9 NMSA 1978, and are subject to the governor's partial veto authority. State ex rel. Cisneros v. Martinez, 2015-NMSC-001.

Governor's partial veto must eliminate the whole of an item to be valid. — Where the legislature provided for two separate judicial raises in two separate appropriations, the governor's partial veto of one appropriation failed to eliminate the second appropriation providing for judicial raises. State ex rel. Cisneros v. Martinez, 2015-NMSC-001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 54 et seq.

48A C.J.S. Judges §§ 75 to 81, 84.

Sec. 12. [Judicial districts; district judges.]

The state shall be divided into judicial districts as may be provided by law. One or more judges shall be chosen for each district as provided in this constitution. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For power of legislature to increase the number of judges in any judicial district, to rearrange judicial district and increase the number thereof, *see* N.M. Const., art. VI, § 16.

For designation of original judicial districts, *see* N.M. Const., art. VI, § 25.

For vacancies on the District Court and Supreme Court, *see* N.M. Const., art. VI, §§ 34, 35 and 36.

For present division of state into 13 judicial districts, and number of judges in each district, *see* 34-6-1, 34-6-4 to 34-6-16 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 11.

Iowa Const., amendment 21.

Montana Const., art. VII, §§ 7, 8.

Utah Const., art. VIII, §§ 8, 9.

Wyoming Const., art. V, § 19.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present provisions for the former provisions which read "The state shall be divided into eight judicial districts and a judge shall be chosen for each district by the qualified electors thereof at the election for representatives in congress. The terms of office of the district judges shall be six years."

Compiler's notes. — New Mexico Const., art. VI, § 16, empowers the legislature to increase the number of judges in any judicial district, and to rearrange the districts, increase the number thereof and make provision for a district judge for any additional district. Pursuant to this authority, the number of judicial districts has been increased by the legislature to 13. See 34-6-1 NMSA 1978.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have, in the first sentence, substituted "at least thirteen" for "eight," substituted "one or more judges" for "a judge" and substituted "as provided in this constitution" for "by the qualified electors thereof at the election for representatives in congress" and would have deleted the last sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Concurrent terms. — Framers of the constitution intended for the terms of district judges to begin and end at the same time. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment, which rewrote this section).

District judges appointed pursuant to legislative act increasing the number of judges in certain districts and elected in the first general election following their appointment, hold office not for six years from date of election, but only until expiration of the terms of all other district judges. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954) (decided prior to 1988 amendment, which rewrote this section).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 6, 9.

Right of party in course of litigation to challenge title or authority of judge or of person acting as judge, 114 A.L.R. 1207.

Court's power to remove judges, 118 A.L.R. 171, 53 A.L.R.3d 882.

Pardon as restoring judge to office forfeited by conviction, 58 A.L.R.3d 1191.

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office, 71 A.L.R.3d 498.

21 C.J.S. Courts §§ 93 to 106; 48A C.J.S. Judges §§ 12 to 14.

Sec. 13. [District court; jurisdiction and terms.]

The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction. The district courts shall also have the power of naturalization in accordance with the laws of the United States. Until otherwise provided by law, at least two terms of the district court shall be held annually in each county, at the county seat.

ANNOTATIONS

Cross references. — For terms of district court, *see* 34-6-2 NMSA 1978.

For appeals from metropolitan court, *see* 34-8A-6 NMSA 1978.

For appeals from magistrate courts to district courts, *see* 35-13-1 NMSA 1978.

For appeals to and from district court, *see* 39-3-1 NMSA 1978.

For provisions relating to habeas corpus, *see* 44-1-1 NMSA 1978 et seq.

For mandamus, *see* 44-2-1 NMSA 1978 et seq.

For quo warranto proceedings, *see* 44-3-1 NMSA 1978 et seq.

For probate jurisdiction, *see* 45-1-302 and 45-1-302.1 NMSA 1978.

For writs issued by district court, *see* Rule 1-065 NMRA.

For writ of execution, *see* Rule 1-065.1 NMRA.

For writ of garnishment, *see* Rule 1-065.2 NMRA.

For injunction procedure, *see* Rule 1-066 NMRA.

Comparable provisions. — Idaho Const., art. V, § 20.

Iowa Const., art. V, § 6.

Montana Const., art. VII, § 4.

Utah Const., art. VIII, § 5.

Wyoming Const., art. V, §§ 10, 24.

I. GENERAL CONSIDERATION.

Delay in enforcing sentence. — Where the court delayed enforcing defendant's sentence for thirteen months due to a mistake as to whether defendant was serving the sentence during and after an appeal, the court did not lose jurisdiction to enforce the sentence. State v. Calabaza, 2011-NMCA-053, 149 N.M. 612, 252 P.3d 836.

Indian country. — Where a state road, which was built on land owned by the federal government and administered by the United States forest service pursuant to an easement granted to the state by the forest service, served as the border between two pueblos, but was not within either pueblo and where there has been no explicit congressional or executive action recognizing the property as Indian country or transferring the property for the use of Indians or to the bureau of Indian affairs, the road was not located in Indian country for purposes of criminal jurisdiction. State v. Quintana, 2008-NMSC-012, 143 N.M. 535, 178 P.3d 820, aff'g 2008-NMCA-025, 143 N.M. 538, 178 P.3d 823.

District courts have inherent power to sanction for contempt. — The district court has inherent power to sanction for contempt. The contempt power is necessary to allow courts to regulate their docket, promote judicial efficiency, and deter frivolous filings, and it has long been recognized that a court must be able to command the obedience of litigants and their attorneys if it is to perform its judicial functions. State ex rel. Children,

Youth & Families Dep't. v. Mercer-Smith, 2015-NMCA-093, cert. granted, 2015-NMCERT-008.

The district court properly invoked its inherent power to sanction for contempt where the children, youth and families department (CYFD), in an abuse and neglect case involving foster placement of children, engaged in activity and took direct actions that were in contempt of the district court's placement order and where parents suffered injuries caused by CYFD's contemptuous conduct, including past and future emotional distress, loss of enjoyment of life, and psychological expenses. State ex rel. Children, Youth & Families Dep't. v. Mercer-Smith, 2015-NMCA-093, cert. granted, 2015-NMCERT-008.

Civil contempt distinguished from criminal contempt. — Contempts procedurally are either civil or criminal in nature. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The elements necessary for a finding of civil contempt are (1) knowledge of the court's order, and (2) an ability to comply. Intent is not an essential element of contempt, but because knowledge of the district court's order is a prerequisite to contempt, the district court's order must not be ambiguous. State ex rel. Children, Youth & Families Dep't. v. Mercer-Smith, 2015-NMCA-093, cert. granted, 2015-NMCERT-008.

Sufficient evidence to support court's finding of contemptuous conduct. — Where the children, youth and families department (CYFD) defied a placement order issued by the district court in an abuse and neglect case involving foster placement of two children (children) in the custody of CYFD, the evidence was sufficient to support the district court's findings that CYFD engaged in activity and took direct actions that were in contempt of the placement order where evidence was presented that the placement order prohibited CYFD from placing children with their former counselors from a group home where the children were receiving treatment, because the district court was concerned that placement of the children with their former counselors created dual relationships that are forbidden by the code of ethics for counselors and therapists due to the risk of the therapists confusing their roles in children's lives, that the limitations in the placement order issued by the district court were understood by CYFD, that CYFD nevertheless arranged for children to spend the majority of their waking hours either in school or with the former counselors, and that the amount of contact between the children and the former counselors was tantamount to placement in the counselors' homes, thus violating the placement order. State ex rel. Children, Youth & Families Dep't. v. Mercer-Smith, 2015-NMCA-093, cert. granted, 2015-NMCERT-008.

Damages for civil contempt. — Compensatory damages for civil contempt serve to make reparation to the injured party and restore the parties to the position they would have held had the court's order been obeyed. The district court does not have discretion to deny compensatory damages, if established with reasonable certainty. State ex rel. Children, Youth & Families Dep't. v. Mercer-Smith, 2015-NMCA-093, cert. granted, 2015-NMCERT-008.

Where district court found that parents of two children in the custody of the children, youth and families department satisfied their burden of proving a violation of a court order, proximate cause, and damages, the parents were entitled to judgment for recovery of those damages. State ex rel. Children, Youth & Families Dep't. v. Mercer-Smith, 2015-NMCA-093, cert. granted, 2015-NMCERT-008.

Sufficient evidence to support district court's award of damages for civil contempt. — Where the children, youth and families department (CYFD) defied a placement order issued by the district court in an abuse and neglect case involving foster placement of two children (children) in the custody of CYFD, the evidence was sufficient to support the district court's award of damages to compensate children's parents for damage done to their chances of reconciliation with their daughters, where the evidence established that reconciliation between the children and parents was a goal and that that there were viable prospects for reconciliation prior to the placement order, that an expert in psychology submitted a letter to the district court prior to the placement hearing, and later admitted at the damages hearing, stating that any possibility of future reconciliation with the children and their parents would be significantly lessened if they were to reside with the children's former counselors, that CYFD nevertheless arranged for children to spend the majority of their waking hours either in school or with the former counselors, an amount of contact that was tantamount to placement in the counselors' homes, and that the parents of children suffered injuries and other harms caused by CYFD's contemptuous conduct, including past and future emotional distress, loss of enjoyment of life and psychological expenses. State ex rel. Children, Youth & Families Dep't. v. Mercer-Smith, 2015-NMCA-093, cert. granted, 2015-NMCERT-008.

Legislature may regulate court's contempt power. — Legislative directives may act to regulate the inherent power of a court to punish for contempt provided that the court retains sufficient power to protect itself and effectively administer its functions under the Code. State v. Julia S., 104 N.M. 222, 719 P.2d 449 (Ct. App. 1986).

Courts of limited jurisdiction. — This section does not limit the power to issue writs of injunction to the district court and does not preclude the legislature from exercising the constitutional authority under N.M. Const., art. VI, §§ 1 and 26, to grant injunctive authority to courts of limited jurisdiction. Martinez v. Sedillo, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

"Inferior courts". — District courts are inferior to supreme court, although term "inferior court" is usually applied to courts of limited or special jurisdiction. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

There are no fixed terms for nonjury trials, and unless waived by the parties, a case must be tried in the county required by the venue statute. Peisker v. Chavez, 46 N.M. 159, 123 P.2d 726 (1942).

Failure to state cause of action has no jurisdictional effect. — The failure of a complaint to state a cause of action does not interfere with or detract from the court's subject-matter jurisdiction. Such a failure has no jurisdictional effect. Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 789 P.2d 1250 (1990).

Expungement of arrest records. — Assuming an inherent power of the courts to expunge arrest records, the power must be exercised sparingly and only in extraordinary circumstances. Toth v. Albuquerque Police Dep't, 1997-NMCA-079, 123 N.M. 637, 944 P.2d 285.

II. ORIGINAL AND APPELLATE JURISDICTION.

No standing to challenge civil forfeiture ordinance. — Where the plaintiffs failed to demonstrate that they or their members have suffered an injury in fact or experienced the imminent threat of injury by the enforcement of a municipal ordinance that provided for the civil forfeiture of vehicles operated by persons arrested for DWI, the plaintiffs did not have standing to challenge the ordinance under the requirements for traditional standing, organizational standing, facial constitutional challenge of the ordinance, or the doctrine of great public importance. ACLU v. City of Albuquerque, 2007-NMCA-092, 142 N.M. 259, 164 P.3d 958, aff'd, 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222.

Review of magistrate court's suppression order. — The state may obtain judicial review of a suppression order of a magistrate court by filing a nolle prosequi to dismiss some or all of the charges in the magistrate court after the suppression order is entered, and refiling in the district court for a trial de novo. State v. Heinsen, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040, aff'g 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627.

Constitutional claims. — Without question, the district court has the authority to consider constitutional claims in the first instance. Maso v. State Taxation & Revenue Dep't, 2004-NMCA-025, 135 N.M. 152, 85 P.3d 276, aff'd 2004-NMSC-028, 136 N.M. 161, 96 P.3d 286.

Constitutional grant of "original jurisdiction" means the district courts are courts of general jurisdiction. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Original equity jurisdiction is in district courts and not justice courts (now magistrate courts). Durham v. Rasco, 30 N.M. 16, 227 P. 599 (1924).

Reduction of excessive fees. — It is clearly within the equitable power of the court to consider and reduce an excessive fee; thus if the trial court determines that the amount of attorney's fees specified in a contract is reasonable, it may order such amount paid, but when the reasonableness is challenged, it is incumbent upon the court to determine the value of the services rendered. Budagher v. Sunnyland Enters., Inc., 90 N.M. 365, 563 P.2d 1158 (1977).

Inherent power to appoint receivers. — Laws 1933, ch. 32 (repealed) providing that "court to which the application is made shall appoint the state bank examiner as such receiver" amounted to no more, in a judicial proceeding in a court of equity, than a recommendation to the judiciary to appoint him in the interests of economy and business management. Otherwise, the enactment would be unconstitutional in view of this section and N.M. Const., art. III, § 1, for courts of equity have inherent power to appoint receivers for corporations, and such appointment is a judicial function. Cooper v. Otero, 38 N.M. 164, 29 P.2d 341 (1934).

Jurisdiction in damage suit against utility. — The trial court correctly retained jurisdiction of a case seeking tort and contract damages against utility for failure to supply water meeting certain minimal standards of quality, since the environmental improvement agency (now the environmental improvement division of the health and environment department) and public service commission had no expertise in considering tort and contractual claims and was without power to grant the relief that plaintiffs asked; 74-6-13 NMSA 1978 of the Water Quality Act evidences the legislative intent that common-law remedies against water pollution be preserved. O'Hare v. Valley Util., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part, 89 N.M. 262, 550 P.2d 274 (1976).

Jurisdiction to try title to property. — Probate courts in New Mexico have no jurisdiction to try or determine title to either real or personal property as between an estate or heirs and devisees on the one hand and strangers to the estate on the other; this jurisdiction is vested exclusively in the district court. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070; McCann v. McCann, 46 N.M. 406, 129 P.2d 646 (1942).

Where a widow was incidentally an heir but her claim to one-half of the property involved was not the claim of an heir in administration, but was a claim arising under the community property system, the probate court was without jurisdiction to try her controverted claim of title to one-half the real estate involved as her share of the community. Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Jurisdiction in probate matter. — District courts had no original jurisdiction to allow a claim against an administrator and surety on his bond, where the probate court had jurisdiction and the claim had been filed, allowed and paid in part, and no appeal was taken from the action of such probate court, and where the complaint neither alleged grounds for nor prayed equitable relief, but asked a money judgment only. Michael v. Bush, 26 N.M. 612, 195 P. 904 (1921) (case decided prior to 1975 enactment of Probate Code, Chapter 45 NMSA 1978).

Charitable Solicitations Act. — Where the foundation does not point to any language in any federal statute expressly displacing the Charitable Solicitations Act, and the foundation has failed to demonstrate congress’ intent to preempt the field covered by

the act, the foundation’s argument that the act does not apply to it is rejected and the district court had subject matter jurisdiction to enforce the civil investigative demands. The Coulston Found. v. Madrid, 2004-NMCA-060, 135 N.M. 667, 92 P.3d 679.

Authority to issue garnishment. — Since garnishment is both a special proceeding, and a remedial writ, ancillary to the main action, the district courts have jurisdiction to issue writs of garnishment in the exercise of their jurisdiction in the main action only to the extent that jurisdiction over such special proceedings as garnishment is conferred by law; therefore, district court did not have jurisdiction to issue writ of garnishment where the amount in question was not in excess of the jurisdictional amount of magistrate courts having venue within the county. Postal Fin. Co. v. Sisneros, 84 N.M. 724, 507 P.2d 785 (1973).

Jurisdiction over felony offense. — Former 64-22-2, 1953 Comp., insofar as it purported to give justice of the peace authority to accept a guilty plea for felony offense of driving under the influence of liquor, violated this section and N.M. Const., art. VI, § 23. State v. Klantchnek, 59 N.M. 284, 283 P.2d 619 (1955).

Former 13-8-2, 1953 Comp., was unconstitutional insofar as it sought to confer "exclusive original jurisdiction" over those contributing to juvenile delinquency in juvenile courts, since constitution vests sole and exclusive jurisdiction for trial of felony cases in the district courts. State v. McKinley, 53 N.M. 106, 202 P.2d 964 (1949).

Under this section, sole and exclusive jurisdiction for the trial of felony cases is in the district courts. State v. Garcia, 93 N.M. 51, 596 P.2d 264 (1979).

Misdemeanor charges relating to felony must be tried in district court. — Because district court has original jurisdiction over all felony charges, when misdemeanor charges brought in magistrate's court are linked to a felony charge arising out of the same transaction, the trial should be in the district court. State v. Muise, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985), overruled by State v. Laguna, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896.

Jurisdiction is acquired in criminal case by filing of information. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

Where the prosecution was commenced by the filing of the information, upon that filing, the district court had jurisdiction; that jurisdiction was not lost by the failure of the trial court to note the date of filing on the information, where there was nothing showing defendant was prejudiced in his defense on the merits. State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973).

Effect on jurisdiction of remand of accused for preliminary hearing. — The district court does not lose jurisdiction of the information theretofore filed by abating it and remanding the accused to the magistrate for a proper preliminary hearing, nor is there

any requirement for the filing of a new information after such new preliminary examination. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

Failure to provide preliminary hearing. — Jurisdiction may be lost "in the course of the proceeding" by failure of the court to remand for a preliminary examination when its absence is timely brought to the attention of the district court; but defendant may waive his right to the examination. State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964).

District courts may perform pretrial review of death penalty aggravating circumstances. State v. Ogden, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294 (1994).

Burden of proof in attacking jurisdiction. — Burden was upon Indian defendant claiming through pretrial motions a lack of jurisdiction in the district court to try him, to prove the same, and having presented no evidence as to lack of jurisdiction, defendant did not meet his burden. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Jurisdiction over juveniles. — Provision allowing creation of inferior courts does not in any sense require that the jurisdiction of district courts over juveniles established by this section be transferred to a court inferior to the district court; to the contrary, the jurisdiction was placed in the district courts and was to remain there until an inferior juvenile court was created. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

District court is one of general jurisdiction under this section, and the fact that proceedings were instituted against defendant for murder committed when defendant was a juvenile after he had attained his majority did not preclude prosecution for the crime of murder. Trujillo v. State, 79 N.M. 618, 447 P.2d 279 (1968).

Juvenile court part of district court. — Juvenile court (now 32A-1-5 NMSA 1978 with the childrens' court, a division of the district court) was part and parcel of the district court, not an inferior court created pursuant to N.M. Const., art. VI, § 1, and was invulnerable to attack as violative of either N.M. Const., art. VI, § 1 or this section. Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Court has jurisdiction over guardianship, paternity and parental rights. — The district court, whether or not sitting as the children's court, has jurisdiction over disputes concerning guardianship, paternity and termination of parental rights. Thatcher v. Arnall, 94 N.M. 306, 610 P.2d 193 (1980).

Rule 10-111 NMRA limits inherent power of district judge to appoint a special master in children's court. State v. Doe, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979).

State court was without jurisdiction to restrain picketing which allegedly constituted unfair labor practices where there was no suggestion directly or indirectly that the picketing was attended by violence, as this matter has been preempted by federal

legislation. Your Food Stores of Santa Fe, Inc. v. Retail Clerks Local 1564, 121 F. Supp. 339 (D.N.M. 1954); *see also*, Retail Clerks Local 1564 v. Your Food Stores of Santa Fe, Inc., 225 F.2d 659 (10th Cir. 1955), rev'g 124 F. Supp. 697 (D.N.M. 1954).

Primary jurisdiction is essentially doctrine of comity between the courts and administrative agencies, and depends on whether the questions presented are exclusively factual issues within the peculiar expertise of the commission or if statutory interpretation or issues of law are significant, and specific legislative declarations that common-law remedies are unimpaired are uniformly respected when primary jurisdiction questions arise in the field of public nuisance. O'Hare v. Valley Util., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), rev'd in part, 89 N.M. 262, 550 P.2d 274 (1976).

Jurisdiction of utility condemnation proceedings. — Because the 2000 amendment to 62-6-4A NMSA 1978 exempted generation and transmission cooperatives from the regulatory jurisdiction of the Public Regulation Commission, the district court had jurisdiction under this section to consider an application under 42A-1-9 NMSA 1978 by a generation and transmission cooperative to enter and survey land for condemnation suitability studies. Tri-State Generation & Transmission Ass'n. v. King, 2003-NMSC-029, 134 N.M. 467, 78 P.3d 1226.

Jurisdiction of review of state board decision. — Legislatively-created boards, while clothed with certain quasi-judicial powers to administer agencies, are not courts, and in this instance the board was not acting in its quasi-judicial capacity. Because the board did not act as an inferior court or tribunal in denying benefits to the retiree, the district court's jurisdiction was not limited by this section. Rainaldi v. Public Employees Retirement Bd., 115 N.M. 650, 857 P.2d 761 (1993).

Licensing act. — Act to create boards for the licensing of contractors, and to vest them with administrative powers, did not contravene this section, vesting original jurisdiction of all matters and causes in the district courts. Fischer v. Rakagis, 59 N.M. 463, 286 P.2d 312 (1955).

Exhausting of administrative remedies. — The requirement of the Public Utility Act (62-3-1 NMSA 1978 et seq.) that a person first exhaust his administrative remedies before resorting to the courts does not violate this section, granting general jurisdiction to the district courts except as elsewhere limited by the constitution. Smith v. Southern Union Gas Co., 58 N.M. 197, 269 P.2d 745 (1954), explained in Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n, 67 N.M. 108, 353 P.2d 62 (1960).

Appellate jurisdiction over justice of peace courts. — District courts had appellate jurisdiction over all cases originating in justice of peace courts (now magistrate courts). Lea Cnty. State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Magistrate court order suppressing evidence. — The state does not have the statutory authority or constitutional right to immediately appeal a magistrate court order

suppressing evidence to the district court. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Preclusion of supervisory authority by executive or legislature unconstitutional. — Any action of the executive or legislative branch of a municipal government which would preclude the supreme court or the district court from exercising its superintending or supervisory authority over the municipal court violates the state constitution. Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

Appeal where district court sits as inferior court. — No provision is made by the constitution for an appeal from the district court sitting as an inferior tribunal to itself sitting as the district court. State ex rel. Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938).

Authority relative to arbitrations. — Once an arbitration award is granted, whether or not by a court-supervised process, the Uniform Arbitration Act (44-7A-1 NMSA 1978 et seq.) provides a mechanism for the courts to take jurisdiction to confirm the award, to vacate, modify or correct the award, within narrow statutory limits, to enforce an arbitration agreement under the act and to enter judgment on an award and to take appeals from various types of orders, including an order confirming or denying confirmation of an award, an order modifying or correcting an award or an order vacating an award without directing a rehearing. Daniels Ins. Agency, Inc. v. Jordan, 99 N.M. 297, 657 P.2d 624 (1982).

III. ISSUANCE OF WRITS.

Mandamus involving a suit pending in another court. — A district court is not uniformly required to deny a petition for mandamus out of deference to a suit that is pending before another district court. Rather, the district court, in exercising its discretion, should take into account the similarities of parties and issues and consider whether the district court first having jurisdiction over the matter is properly situated to settle the whole controversy and address the rights of the respective parties. Fastbucks of Roswell, N.M., LLC v. King, 2013-NMCA-008, 294 P.3d 1287.

Where the attorney general filed suit against defendants in the first district court alleging that defendants' lending practices and consumer loans were unconscionable under common law and the Unfair Practices Act (Chapter 57, Article 12 NMSA 1978); defendants filed a petition for writ of mandamus against the attorney general in the fifth district court to prohibit the attorney general from pursuing the first district court lawsuit on the grounds that defendants' loans complied with the Small Loan Act (58-15-1 NMSA 1978 et seq.), and that the attorney general was acting beyond the attorney general's statutory and constitutional power in bringing the first district court lawsuit; the fifth district court had jurisdiction to consider the mandamus petition and venue was proper in the fifth district court; defendants had the opportunity to raise the arguments raised in the mandamus petition in their defense to the first district court lawsuit; and the fifth district court dismissed the mandamus petition on the grounds that the writ of

mandamus would intrude on the first district court's jurisdiction and that the first district court provided an adequate forum for defendants to raise their challenges to the attorney general's powers, the fifth district court did not abuse its discretion in denying the petition for mandamus. Fastbucks of Roswell, N.M., LLC v. King, 2013-NMCA-008, 294 P.3d 1287.

Concurrent habeas corpus jurisdiction. — Supreme court and district court have concurrent jurisdiction in habeas corpus cases, and in absence of controlling necessity in the first instance, relator will be relegated to district court; the decision in the district court is not res judicata on a subsequent application to supreme court. Ex parte Nabors, 33 N.M. 324, 267 P. 58 (1928).

What court may grant writ of habeas. — One district court of this state may grant a writ of habeas corpus for the release from the state penitentiary of a prisoner held therein under a commitment from another district court; as intervenor was being detained within the first judicial district, there can be no question that the court in that district had jurisdiction to consider intervenor's petition for habeas corpus. State ex rel. Hanagan v. District Court of First Judicial Dist. ex rel. Cnty. of Santa Fe, 75 N.M. 390, 405 P.2d 232 (1965).

Evidence in habeas proceeding. — To establish absence or loss of jurisdiction in trial court through denial of petitioner's constitutional rights, evidence outside the record may be received in habeas corpus proceedings. Orosco v. Cox, 75 N.M. 431, 405 P.2d 668 (1965).

Habeas corpus is not "special statutory proceeding" within meaning of Laws 1937, ch. 197 (39-3-7 NMSA 1978) permitting appeal of such proceedings, and supreme court had no jurisdiction of appeal from district court order remanding relator to sheriff's custody, but he could thereafter institute proceedings in habeas corpus in the supreme court. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941).

Habeas corpus to attack adoption judgment. — A writ of habeas corpus is a permissible collateral attack on a judgment of adoption. Normand ex rel. Normand v. Ray, 107 N.M. 346, 758 P.2d 296 (1988).

Jurisdiction over state officers, boards and commissions. — Under this section and N.M. Const., art. VI, § 3, supreme and district courts each have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions in all cases, whether the proceeding was instituted by the attorney general ex officio, in behalf of the state for some prerogative purpose, or brought by some private person for the assertion of some private right; the supreme court will decline jurisdiction in absence of some controlling necessity therefor, and will do so in all cases brought at instance of a private suitor. State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611 (1912).

Right to tenure may not be enforced by mandamus, since in absence of positive provision of law it is not a clear legal right. Lease v. Board of Regents of N.M. State Univ., 83 N.M. 781, 498 P.2d 310 (1972).

Authority over canvassing board. — Under general power conferred upon it by constitution, district court had authority to make order compelling county canvassing board to canvass votes which had been delivered to it late, to cancel certificates of election issued before entire vote was canvassed and to issue new certificates if final canvass showed others to be elected. Board of Cnty. Comm'rs v. Chavez, 41 N.M. 300, 67 P.2d 1007 (1937). See also, 1-14-21 NMSA 1978.

Recount order. — Recount provisions of former Election Code (Laws 1929, ch. 41) constituted a special case or proceeding created by legislature in compliance with this section, enlarging jurisdiction of district court, but the judicial functions vested did not go beyond the order of recount, and additional functions vested in the district judge were ministerial. State ex rel. Scott v. Helmick, 35 N.M. 219, 294 P. 316 (1930).

Injunctions are granted to prevent irreparable injury for which there is no adequate and complete remedy at law. If an interference is of a continuous nature, the constant recurrence of which renders a remedy at law inadequate, except by a multiplicity of suits, then a sufficient ground for relief by injunction is afforded. Kennedy v. Bond, 80 N.M. 734, 460 P.2d 809 (1969).

Legislature may not deprive district courts of power to issue writs of injunction unless it provides an adequate remedy at law as a substitute; a statutory remedy for assessment of privilege tax requiring taxpayer who objects to validity of tax to bring an action every 60 days to recover payments made under protest, until final determination, is not an adequate remedy. Lougee v. New Mexico Bureau of Revenue Comm'r, 42 N.M. 115, 76 P.2d 6 (1937).

Sua sponte injunction inappropriate. — A district court may not issue an injunction on its own, without process and without prior notice. State v. Bailey, 118 N.M. 466, 882 P.2d 57 (Ct. App.), cert. denied, 118 N.M. 256, 880 P.2d 867 (1994).

Quo warranto against judge. — Quo warranto proceeding against person holding office of district judge is personal against the individual, not in his official character, and is within jurisdiction of district court. State ex rel. Holloman v. Leib, 17 N.M. 270, 125 P. 601 (1912).

Election contest remedy. — In adopting an election contest procedure as an exclusive private remedy, legislature has committed no offense against jurisdiction of district courts to issue writs of quo warranto. State ex rel. Abercrombie v. District Court, 37 N.M. 407, 24 P.2d 265 (1933).

District courts may issue writs of certiorari as ancillary process in aid of their jurisdiction. Lea Cnty. State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Certiorari distinguished from appeal. — Appeals and writs of error are in no sense to be compared to certiorari, and, generally speaking, the presence of the right to appeal makes inappropriate and unavailable the right to certiorari. Roberson v. Board of Educ., 78 N.M. 297, 430 P.2d 868, appeal after remand, 80 N.M. 672, 459 P.2d 834 (1969).

Use of certiorari to bring up transcript. — For purpose of exercising their jurisdiction of whatever kind or nature, the district courts are specifically authorized to issue various writs, including writ of certiorari. A writ of this nature may be employed by district court to bring up "a transcript of all entries made in his docket relating to the case" where a justice of peace fails to file this transcript. Rixey v. Burgin, 39 N.M. 176, 42 P.2d 1118 (1935).

Certiorari to bar commissioners. — District court has power to issue, hear and determine a writ of certiorari, directed to board of commissioners of state bar, and inquire into its jurisdiction to suspend an attorney from practice, since latter board is a tribunal inferior to district court. State ex rel. Board of Comm'rs of State Bar v. Kiker, 33 N.M. 6, 261 P. 816 (1927).

Certiorari to review licensing board decisions. — Because the Uniform Licensing Act (61-1-1 NMSA 1978 et seq.) did not provide a retired psychologist with a basis for appealing a decision of the New Mexico board of psychologist examiners to require an oral examination for reinstatement of her license, she could request a writ of certiorari to obtain review of the board's alleged due process violations. Mills v. New Mexico State Bd. of Psychologist Exam'rs, 1997-NMSC-028, 123 N.M. 421, 941 P.2d 502.

Challenge of driver's license revocation. — Driver's challenge of the revocation of his driver's license by motor vehicle division had to be in the form of a writ of certiorari, since his license was mandatorily revoked due to three DWI convictions and he had no other statutory means of appeal; because the remedy was a writ of certiorari, he was required to follow the jurisdictional requirements of Rule 1-075 NMRA. Masterman v. State Taxation & Revenue Dep't, 1998-NMCA-126, 125 N.M. 705, 964 P.2d 869.

Prohibition defined. — Writ of prohibition is best defined as an extraordinary writ, issued by superior court to inferior court to prevent latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction of a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Prohibition is preventive and not curative writ, and where garnishment proceedings in the magistrate court were an accomplished fact before the application for prohibition had been filed in the district court, a writ of prohibition could not properly issue to undo

or correct that which had already been accomplished. State ex rel. Alfred v. Anderson, 87 N.M. 106, 529 P.2d 1227 (1974).

Writ to be used with caution. — Prohibition is not a writ of right, granted ex debito justitiae, but rather one of sound judicial discretion, to be granted or withheld according to circumstances of each particular case; it is to be used with great caution for the furtherance of justice when none of the ordinary remedies provided by law are applicable. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Absent inferior court jurisdiction, prohibition to issue. — If the inferior court or tribunal has jurisdiction of both the subject matter and of the person where necessary, writ of prohibition will not issue, but absent such jurisdiction, the writ will issue as a matter of right. Gilmore v. District Court, 35 N.M. 157, 291 P. 295 (1930).

Magistrate court had subject matter and personal jurisdiction. — Where the state filed a criminal complaint in magistrate court charging defendant with two misdemeanor counts of criminal sexual contact; the complaint did not contain a sworn statement of facts; the state filed an amended complaint after the statute of limitations had expired; the district court issued an emergency writ of prohibition on the ground that the magistrate court lacked jurisdiction; the magistrate court had jurisdiction to make determinations regarding the sufficiency of the complaints and the alleged expiration of the statute of limitations and to try defendant on the misdemeanor charges; and defendant had a right to a de novo appeal to the district court from the magistrate court's decision, the writ of prohibition was not appropriate because the magistrate court had proper subject matter jurisdiction and personal jurisdiction and defendant had an adequate remedy at law. State v. Valerio, 2012-NMCA-022, 273 P.3d 12, cert. denied, 2012-NMCERT-001.

Prohibition cannot be used to correct mere irregularities, or to perform functions of an appeal or writ of error, as a general rule. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Prohibition against district court proceedings. — Mandamus and injunction proceedings were within jurisdiction of the respondent district court under the provisions of this section, and the supreme court would not prohibit the lower court from proceeding unless its jurisdiction was being exceeded or, in the exercise of superintending control, the supreme court was moved to do so to prevent irreparable mischief, exceptional hardship, costly delay and undue burdens of expense, or where the remedy by appeal was grossly inadequate. State ex rel. State Bd. of Educ. v. Montoya, 73 N.M. 162, 386 P.2d 252 (1963).

Where prisoner had been ordered discharged from custody of warden of penitentiary and the order was not appealed, it was final, and respondent-district court judge, sitting in the district in which prisoner was being detained, had jurisdiction to consider petition for habeas corpus; hence remedy of prohibition was not available to the state. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Wrongful issuance of search warrant. — Police officers and assistant district attorney were immune from liability for alleged wrongful issuance and service of a search warrant which was valid on its face, in which court ordered police officers to search for child being unlawfully held by parent, take him into custody, keep him safely and make a return of the proceedings on the warrant. Torres v. Glasgow, 80 N.M. 412, 456 P.2d 886 (Ct. App. 1969).

Contempt sanction warranted. — Trial judge properly invoked his inherent power to issue a contempt sanction to preserve the decorum, respect and dignity of the court where defendant refused to obey the trial judge's order to button his top button and fix his tie and by disrupting the proceedings through his disorderly attempts to leave. Purpura v. Purpura, 115 N.M. 80, 847 P.2d 314 (Ct. App. 1993), cert. denied, 115 N.M. 79, 847 P.2d 313 (1993).

Sex offenders. — Under its broad grant of jurisdiction and under the Sex Offender Registration and Notification Act (Chapter 29, Article 11A NMSA 1978), a district court has jurisdiction to determine whether a defendant is a sex offender and to give the defendant written notice of the registration requirements in 29-11A-7A NMSA 1978; however, the court is not authorized to order the defendant to comply with the registration requirements - that duty is legislatively mandated by 29-11A-4 NMSA 1978. State v. Brothers, 2002-NMCA-110, 133 N.M. 36, 59 P.3d 1268, cert. quashed, 134 N.M. 123, 73 P.3d 826 (2003).

Jurisdiction over violations of municipal ordinances. — A municipal court does not have exclusive jurisdiction where driving while intoxicated or acts of domestic violence are alleged to have occurred within the city limits and to violate both state laws and municipal ordinances, and a municipal peace officer may refer criminal charges to any prosecutor at any level for evaluation and prosecution in municipal, magistrate or district court. Nothing in the law binds an officer to file charges in municipal court where the charges stem from activities that allegedly violate a municipal ordinance and a state law or a county ordinance. 2008 Op. Att'y Gen. No. 08-06.

Not precluded from holding commitment hearing away from county seat. — Absent a showing by the "developmentally disabled" person that his substantive rights have in any way been abridged if his involuntary commitment hearing is not held at the county seat, the district court is not precluded from adopting the practice of holding such hearings at the commitment facility when, in its discretion, such practice would better serve the public convenience. 1979 Op. Att'y Gen. No. 79-20.

Review by commissioners not final. — Action of county commissioners in reviewing discretion of county superintendent as to creation of a new school district under Laws 1907, ch. 97, § 22 (since repealed) could not be final, notwithstanding that statute. 1914 Op. Att'y Gen. No. 14-1308.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

For article, "The Writ of Prohibition in New Mexico," see 5 N.M. L. Rev. 91 (1974).

For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M. L. Rev. 195 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M. L. Rev. 1 (1981).

For article, "Habeas Corpus in New Mexico," see 11 N.M. L. Rev. 291 (1981).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M. L. Rev. 97 (1982).

For comment, "The Subject Matter Jurisdiction of New Mexico District Courts over Civil Cases Involving Indians," see 15 N.M. L. Rev. 75 (1985).

For article, "Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History," see 18 N.M. L. Rev 483 (1988).

For article, "A Different Kind of Symmetry", see 34 N.M. L. Rev. 263 (2004).

For article, "Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule", see 35 N.M. L. Rev. 1 (2005).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts §§ 21, 54.

Availability of writ of prohibition or similar remedy against acts of public prosecutor, 16 A.L.R.4th 112.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

Family court jurisdiction to hear contract claims, 46 A.L.R.5th 735.

Effect, on jurisdiction of state court, of 28 USCS § 1446(e), relating to removal of civil case to federal court, 38 A.L.R. Fed. 824.

Propriety of federal court's considering state prisoner's petition under 28 USCS § 2254 where prisoner has exhausted state remedies as to some, but not all, claims in petition, 43 A.L.R. Fed. 631.

Removal to federal court, under 28 USCS § 1441(d), of civil action brought in state court against foreign state, 63 A.L.R. Fed. 808.

Existence of pendent jurisdiction of federal court over state claim when joined with claim arising under laws, treaties, or Constitution of United States, 75 A.L.R. Fed. 600.

21 C.J.S. Courts § 12 et seq.

Sec. 14. [District court; qualifications and residence requirement of judges.]

The qualifications of the district judges shall be the same as those of justices of the supreme court except that district judges shall have been in the actual practice of law for at least six years preceding assumption of office. Each district judge shall reside in the district for which the judge was elected or appointed. The increased qualifications provided by this 1988 amendment shall not apply to district judges serving at the time this amendment passes or elected at the general election in 1988. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For qualifications of supreme court justices, *see* N.M. Const., art. VI, § 8.

For qualifications for holding office generally, *see* N.M. Const., art. VII, § 2.

Comparable provisions. — Idaho Const., art. V, §§ 12, 23.

Montana Const., art. VII, § 9.

Utah Const., art. VIII, § 7.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present provisions for the former provisions which read "The qualifications of the district judges shall be the same as those of justices of the supreme court. Each district judge shall reside in the district for which he was elected."

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have substituted "appointed" for "elected" at the end of the second sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 6 et seq.

Incompatibility of office of judge and office of the military service, 26 A.L.R. 143, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Eligibility to office of judge of one who was not an attorney, 50 A.L.R. 1156.

Right of party in course of litigation to challenge eligibility of judge, 144 A.L.R. 1207.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 A.L.R.3d 1048.

Constitutional restrictions on nonattorney acting as judge in criminal proceedings, 71 A.L.R.3d 562.

Disqualification of judge, justice of the peace or similar judicial officer for pecuniary interest in fines, forfeitures or fees payable by litigants, 72 A.L.R.3d 375.

48 C.J.S. Judges §§ 14 to 18.

Sec. 15. [District court; judges pro tempore.]

A. Any district judge may hold district court in any county at the request of the judge of such district.

B. Whenever the public business may require, the chief justice of the supreme court shall designate any district judge of the state, or any justice of the supreme court when no district judge may be available within a reasonable time, to hold court in any district, and two or more judges may sit in any district or county separately at the same time.

C. If any district judge is disqualified from hearing any cause or is unable to expeditiously dispose of any cause in the district, the chief justice of the supreme court may designate any retired New Mexico district judge, court of appeals judge or supreme court justice, with said designees' consent, to hear and determine the cause and to act as district judge pro tempore for such cause.

D. If any judge shall be disqualified from hearing any cause in the district, the parties to such cause, or their attorneys of record, may select some member of the bar to hear and determine said cause, and act as judge pro tempore therein. (As amended November 8, 1938 and November 7, 1978.)

ANNOTATIONS

Cross references. — For disqualification of judges in certain cases, except with consent of parties, *see* N.M. Const., art. VI, § 18.

For filing of affidavit of disqualification, *see* 38-3-10 NMSA 1978.

For disqualification of judge in proceedings where his impartiality might be questioned, *see* Rule 21-400 NMRA.

Comparable provisions. — Idaho Const., art. V, § 12.

Montana Const., art. VII, § 6.

Utah Const., art. VIII, § 4.

The 1938 amendment, which was proposed by H.J.R. No. 26 (Laws 1937) and adopted at the general election held on November 8, 1938, by a vote of 44,503 for and 18,601 against, amended this section to allow the designation of a justice of the supreme court to hold court in a district where no district judge will be available within a reasonable time.

The 1978 amendment, which was proposed by S.J.R. No. 4 (Laws 1977) and adopted at the general election held on November 7, 1978, by a vote of 103,611 for and 87,969 against, designated the former first paragraph of this section as the present Subsection A, designated the first sentence of the former second paragraph of this section as present Subsection B, designated the second sentence of the former second paragraph of this section as present Subsection D, and added the present Subsection C.

Judge holding court at request of district judge. — A district judge may hold court outside his district, otherwise than by designation from the chief justice, only after being requested to do so by the judge of the district in which he is to hold court. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

A district judge may, by request of another district judge, made orally and without a formal order entered of record, hold court in the district of the latter, under this section. Former Supreme Court Rule 11, § 2, effective March 1, 1928, required a formal order and was to be followed. Massengill v. City of Clovis, 33 N.M. 318, 267 P. 70 (1928).

Powers of nonresident judge sitting at request of resident judge. — When a resident judge requests judge from another judicial district to act for him, the visiting judge has jurisdiction to hear all matters requiring action during the period of his designation whether they were pending in the court at time request was made or were filed at a later date. State v. Reed, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Nonresident judge who sits at request of a resident judge is vested with all the latter's powers, including that of holding preliminary hearings. State v. Encinias, 53 N.M. 343, 208 P.2d 155 (1949).

Rendering default judgment. — Any district judge, generally requested by resident judge to attend to judicial business of latter's district, may render default judgment at any place within the state. Hoffman v. White, 36 N.M. 250, 13 P.2d 553 (1932).

Signing bill of exceptions. — A district judge, sitting in a county outside of his district for and at the request of the resident judge, may settle and sign a bill of exceptions presented to him. State v. Stewart, 32 N.M. 242, 255 P. 393 (1927).

A resident district judge may designate a judge of another district, holding court in the district of the former, to sign and seal a bill of exceptions. First State Bank v. McNew, 32 N.M. 225, 252 P. 997 (1927).

Record of request. — A recital in the record by one district judge that he is sitting at request of regular judge of the court, under this section, is sufficient evidence to show jurisdiction to act, although better practice would be to have record show fact of such request by the regular presiding judge. State v. Kile, 29 N.M. 55, 218 P. 347 (1923).

Chief justice has power to designate any district judge to hold court in any district whenever, for any reason, the public business may require, or by reason of disqualification of the district judge. State ex rel. Holloman v. Leib, 17 N.M. 270, 125 P. 601 (1912); Vigil v. Reese, 96 N.M. 728, 634 P.2d 1280 (1981).

Although procedure under 38-3-9 NMSA 1978 for certification as to party's failure to agree upon a judge was not followed, it was proper under this section for the chief justice to designate a district judge having proper jurisdiction to try the case after defendant had disqualified all the judges of the district; thus there was no violation of defendant's right to due process when the designated judge overruled his motion to dismiss for lack of jurisdiction. Lohbeck v. Lohbeck, 69 N.M. 203, 365 P.2d 445 (1961).

Term "disqualified" encompasses voluntary recusal. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978), rev'g 92 N.M. 749, 595 P.2d 387 (Ct. App. 1978).

Designation as ministerial task. — In designating a judge pro tempore, the chief justice does not perform a judicial act and does not act as a court, but performs a ministerial task committed to him by the constitution. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

Designation is mandatory. — Whenever the public business demands, it becomes the mandatory duty of the chief justice to designate a district judge to hold court in any district of the state which so requires it and in event no such judge appears available within a reasonable time he may designate a supreme court justice. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

Designation may be exercised anywhere in state. — Since designation of judges is not a judicial act, the power of designation may be exercised by the chief justice anywhere in the state, and when he is absent from Santa Fe, the seat of the court, this power does not pass automatically to the next justice in order of seniority. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

Designation of judge to sign bill of exceptions. — If judge of district court in which a case was tried is unable to settle and sign a bill of exceptions, chief justice may designate another district judge to perform this official act. Schaefer v. Whitson, 31 N.M. 96, 241 P. 31 (1925).

Facts requiring designation must be determined by chief justice, and in doing so he may rely on facts presented to him by a district judge, though he is not confined to obtaining his information in that manner. State ex rel. Sedillo v. Anderson, 53 N.M. 441, 210 P.2d 626 (1949).

It was appropriate to appoint a district judge pro tempore on the basis that the presiding judge was unable to meet the demands of his criminal docket. State v. Madsen, 2000-NMCA-050, 129 N.M. 251, 5 P.3d 573, cert. denied, 129 N.M. 249, 4 P.3d 1240 (2000).

Jurisdiction of designated judge exclusive. — Where chief justice has designated a district judge other than the regular presiding judge of any given district to preside over the trial of any given cause, his jurisdiction of said cause is exclusive, and continues until the cause is disposed of or until his designation is rescinded. State v. Towndrow, 25 N.M. 203, 180 P. 282 (1919).

Powers of designated judge. — Designation by chief justice of a district judge to hold court in another district whenever the public business shall require vests designated judge with the same power as that possessed by regular presiding judge of the district. The designated judge is substituted for the regular presiding judge and for every purpose becomes the presiding judge, and may, when designated for that purpose, sign and settle a bill of exceptions. Ravany v. Equitable Life Assurance Soc'y of United States, 26 N.M. 41, 188 P. 1106 (1920).

Special master appointed by children's court pursuant to the authority granted by rule is not a judge pro tempore appointed in violation of this section because the special master's report to the children's court is only a recommendation and the children's court retains the final decision-making authority. State v. Jason F., 1998-NMSC-010, 125 N.M. 111, 957 P.2d 1145.

Agreement of parties on judge pro tempore. — When a judge has been disqualified upon an affidavit of prejudice under Laws 1933, ch. 184 (38-3-10 NMSA 1978) the parties may agree upon a member of the bar to act as judge pro tempore. Moruzzi v. Federal Life & Cas. Co., 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407 (1938).

District judge's act of orally removing himself from a case substantially complied with this section, and the substitute agreed upon by the parties had authority to preside in the case. Doe v. State, 91 N.M. 51, 570 P.2d 589 (1977), rev'g 91 N.M. 57, 570 P.2d 595 (Ct. App. 1977).

It is the public policy of this state, as evidenced by its constitution and laws, that regularly elected or appointed district judges shall preside over its district courts unless, because of disqualification of trial judge, the parties to a suit agree that a member of the bar may try a particular case as judge pro tempore. No other means is provided for the trial of causes in the district courts of this state. State ex rel. Tittmann v. McGhee, 41 N.M. 103, 64 P.2d 825 (1937).

No litigant is entitled to have any particular judge try case for him. State ex rel. Armijo v. Lujan, 45 N.M. 103, 111 P.2d 541 (1941).

Workers' compensation judge pro tem. — While this section does not provide authority for the pro tem appointment of administrative law judges, neither does it bar such appointment by appropriate officials outside the judiciary; thus, the director of the workers' compensation administration has authority to appoint a workers' compensation judge pro tem. Carrillo v. Compusys, Inc., 1997-NMCA-003, 122 N.M. 720, 930 P.2d 1172, cert. denied, 122 N.M. 589, 929 P.2d 981 (1997).

Jurisdiction of non-resident judge. — A judge holding court in one county at the request of the judge of the district would not have jurisdiction to adjudicate matters in another county in the district. 1912-13 Op. Att'y Gen. No. 12-873.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 25, 86 et seq., 248 et seq.

Number of changes of judge, statute limiting, 104 A.L.R. 1494.

Power of judge pro tempore or special judge, after expiration of period for which he was appointed, to entertain motion or assume further jurisdiction in case previously tried before him, 134 A.L.R. 1129.

Place of holding sessions of trial court as affecting validity of its proceedings, 18 A.L.R.3d 572.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

48A C.J.S. Judges §§ 71, 73, 74, 98 to 185.

Sec. 16. [District court; additional judges; redistricting.]

The legislature may increase the number of district judges in any judicial district, and they shall be elected or appointed as other district judges for that district. At any session after the publication of the census of the United States in the year nineteen hundred and twenty, the legislature may rearrange the districts of the state, increase the number thereof, and make provision for a district judge for any additional district. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For constitutional provision dividing state into judicial districts, *see* N.M. Const., art. VI, § 12.

For designation of original judicial districts, *see* N.M. Const., art. VI, § 25.

For present division of state into 13 judicial districts, and number of judges in each district, *see* 34-6-1, 34-6-4 to 34-6-16 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 11.

Iowa Const., art. V, § 10; amendment 8.

Montana Const., art. VII, § 6.

Utah Const., art. VIII, § 6.

Wyoming Const., art. V, § 21.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted "or appointed as other district judges for the district" for "as other district judges" at the end of the first sentence and "any session" for "its first session" near the beginning of the second sentence and deleted "and at the first session after each United States census thereafter" following "in the year nineteen hundred and twenty" in the second sentence.

Compiler's notes. — The number of judicial districts has been increased several times by the legislature. Section 34-6-1 NMSA 1978 now provides for and designates 13 judicial districts; 34-6-4 to 34-6-16 NMSA 1978 specify the number of judges in each district.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have substituted "appointed" for "elected" near the end of the first sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Concurrent terms. — Framers of the constitution intended for the terms of district judges to begin and end at the same time. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

District judges appointed pursuant to legislative act increasing the number of judges in certain districts and elected in the first general election following their appointment, held office not for six years from date of election, but only until expiration of the terms of all other district judges. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Procedure for filling new judgeship. — A law establishing an additional judgeship creates a vacancy in that office as of the date the post is to be filled, appointment to which is made pursuant to the constitution; a successor to such appointed judge is to be elected at the general election following the appointment, and the term of office for that individual is to end on the same date as all other district judgeships. 1974 Op. Att'y Gen. No. 74-31.

Legislature has no power of appointment of district court judges by implication from this section. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 4.

48A C.J.S. Judges § 8.

Sec. 17. [District court; judges' compensation.]

The legislature shall provide by law for the compensation of the judges of the district court. (As amended September 15, 1953.)

ANNOTATIONS

Cross references. — For salary of district court judges, *see* 34-1-9 NMSA 1978.

Comparable provisions. — Idaho Const., art. V, § 17.

Iowa Const., amendment 21.

Montana Const., art. VII, § 7.

Utah Const., art. VIII, § 14.

Wyoming Const., art. V, § 17.

The 1953 amendment to this section, which was proposed by H.J.R. No. 16 (Laws 1953) and adopted at a special election held on September 15, 1953, by a vote of 13,611 for and 12,998 against, amended this section to provide that the compensation of district judges should be set by the legislature. Prior to amendment the section provided that each judge should receive an annual salary of $4,500 payable quarterly.

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

District judge may not accrue vacation time, for which he may receive extra compensation upon the termination of his employment, in addition to the salary, provided for by law. 1966 Op. Att'y Gen. No. 66-142.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 54 et seq.

Widow or other relative of deceased judge, appropriation of public funds for benefit of, as violation of constitutional provision as to change in salary or extra compensation, 121 A.L.R. 1317.

Operation of statute fixing salary on basis of population or at valuation of taxable property as contravening constitutional provision against increase or diminution of salary during term, 139 A.L.R. 737.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

48A C.J.S. Judges §§ 75 to 81, 84.

Sec. 18. [Disqualification of judges or magistrates.]

No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest. (As amended November 8, 1966.)

ANNOTATIONS

Cross references. — For substitution of district court judge for absent or disqualified supreme court justice, *see* N.M. Const., art. VI, § 6.

For selection of district judge pro tempore by parties to cause in which district judge has been disqualified, *see* N.M. Const., art. VI, § 15.

For filing of affidavit of disqualification, *see* 38-3-10 NMSA 1978.

For designation of district judge where judge has been excused or recused, *see* Rules 1-088 and 5-105 NMRA.

For peremptory challenge to and excusal of district judge, *see* Rules 1-088.1 and 5-106 NMRA.

For excusal, recusal, or disability of magistrate, *see* Rules 2-106 and 6-106.

For excusal, recusal, or disability of metropolitan court judge, *see* Rules 3-106 and 7-106 NMRA.

For disqualification or recusal of municipal court judge, *see* Rule 8-106 NMRA.

For disqualification of judge in proceedings where his impartiality might be questioned, *see* Rule 21-400 NMRA.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 2 (Laws 1965) and adopted at the general election held on November 8, 1966, with a vote of 81,055 for and 26,317 against, amended this section by substituting "justice, judge or magistrate of any court" for "judge of any court nor justice of the peace" and "are" for "shall be" preceding "related to him," and deleting "the trial of" preceding "any cause in which either of the parties."

Purpose of this section is to secure to litigants a fair and impartial trial by an impartial and unbiased tribunal. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985).

Code of Judicial Conduct expands instances of disqualification. — The Code of Judicial Conduct sets up an objective standard (now in Rule 21-400 NMRA) geared to the appearance of justice, and, thus, expands the instances in which a judge should disqualify himself beyond those set out in this section. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985).

State is "party" to criminal case and is entitled to file an affidavit of disqualification of a district judge. State ex rel. Tittmann v. Hay, 40 N.M. 370, 60 P.2d 353 (1936).

"Interest". — "Interest" necessary to disqualify a judge must be a present pecuniary interest in the result, or actual bias or prejudice, and not some indirect, remote, speculative, theoretical or possible interest. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

The "interest" which would disqualify a justice of the peace (now magistrate courts) from sitting on a case, or constitute a denial of due process of law, must be more than the indirect possibility of his interest in the costs assessed against one convicted of a misdemeanor. State v. Gonzales, 43 N.M. 498, 95 P.2d 673 (1939).

An "interest" necessary to disqualify a judge under this constitutional provision may be an actual bias or prejudice. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231, 26 A.L.R. 4th 705 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Disqualifying bias must have extrajudicial source. — To be disqualifying, the alleged bias and prejudice must stem from an extrajudicial source, and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231, 26 A.L.R. 4th 705 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

To be disqualifying, the alleged bias and prejudice must stem from an extrajudicial source and must result in a decision on a personal bias, not on what the judge learned from sitting in the particular case. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462 (Ct. App. 1985).

Disqualification of judge on constitutional grounds is a substantive right; and except by consent of all parties, a judge is disqualified to sit in the trial of a case if he comes within any of the grounds for disqualification named in the constitution. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

Prejudiced or biased judge would deprive party of due process of law. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

Appeal not adequate remedy. — Requiring petitioner to stand trial before biased or prejudiced judge and then, if convicted, attempt to gain reversal, does not conform to adequate remedy. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Section does not contain absolute disqualification, but confers a right upon litigants which they might either exercise or waive by consent. Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Judge not disqualified in absence of action by party affected. — Where judge, before appointment, had been a member of a firm which had filed answers for several defendants in a quiet title action, and the plaintiff's attorney indicated that he would be disqualified, but no action was ever taken to disqualify the judge, the action of the judge in dismissing the action as to several defendants after a lapse of several years was not outside such judge's jurisdiction as the judge was not disqualified. Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Procedure for disqualification. — If a litigant chooses to avail himself of his constitutional right, then procedure requires that some motion, objection or other appropriate remedy be invoked calling the grounds of disqualification to the court's attention and demanding a ruling thereon. Midwest Royalties, Inc. v. Simmons, 61 N.M. 399, 301 P.2d 334 (1956).

Affidavit of disqualification. — Laws 1933, ch. 184 (38-3-10 NMSA 1978), relating to the filing of an affidavit of disqualification, does not violate this provision. State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Time for filing affidavit. — Trial court's refusal to honor disqualification affidavit filed two days before trial held proper. State v. Sanchez, 58 N.M. 77, 265 P.2d 684 (1954).

Disqualifications named in this section may be waived by the parties, as may the disqualification for prejudice under Laws 1933, ch. 184 (38-3-10 NMSA 1978), either by implication or specific act of the party having a right to rely on the statute. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

This provision does not contain an absolute disqualification, but confers a right on a litigant which he may either exercise or waive by consent; in the instant case, defendant not only waived right to disqualify the sentencing judge (who had been the district attorney who prosecuted defendant in the original proceedings), but actually agreed that he should preside. State v. Miller, 79 N.M. 392, 444 P.2d 577 (1968), cert. denied, 394 U.S. 1002, 89 S. Ct. 1597, 22 L. Ed. 2d 779 (1969).

The constitutional right to disqualify a judge may be waived. State v. Lucero, 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986).

Presumption of bias. — A judge is presumptively partial or biased if he is related to any party to the proceeding, if he has served as counsel or presided as a judge in the trial of the cause in a lower court or if he has a pecuniary interest. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966); State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933).

Hostility. — A person charged with a crime should not be required to proceed to trial before a presiding judge who has openly expressed animosity or hostility. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Participation in plea bargaining. — Defendant should not be required to face trial before a judge who has participated in any manner in efforts to get him to plead guilty. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Relationship to attorney working for contingent fee. — An attorney for a cause on a contingent fee basis was interested pecuniarily in outcome of the case, and was a party to the extent that such interest disqualified his father from sitting as judge. Defendant did not waive such constitutional disqualification where neither he nor his attorney knew

of other attorney's interest until after trial. Tharp v. Massengill, 38 N.M. 58, 28 P.2d 502 (1933).

Judge's relatives having ties to victim and district attorney. — Recusal of the judge at a murder trial was not required where the judge's brother-in-law was the attorney representing the victim's family in a wrongful death action against defendant and the judge's son was employed as a law clerk by the district attorney. State v. Fero, 105 N.M. 339, 732 P.2d 866 (1987).

Judge prohibited from trying case. — To require petitioner to go to trial for first degree murder before judge who held him in contempt at a hearing with no foundation or basis in law would be grossly improper; and under supreme court's power of superintending control, alternative writ of prohibition would be made permanent. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Respondent judge was not disqualified for expressing opinion that state could make out a prima facie case of first-degree murder after reading preliminary hearing transcript in connection with motion by petitioner that he be admitted to bail. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 410 P.2d 732 (1966).

Newspaper articles insufficient to warrant disqualification. — The possible effect of newspaper articles which discuss the impact of a judgment for one party is the very type of indirect, remote, speculative, theoretical or possible interest which is not sufficient to warrant disqualification. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Refusal to disqualify proper where bias not established. — Where a movant has failed to meet its burden of establishing that the judge has a personal or extrajudicial bias or prejudice against it, the judge's refusal to disqualify himself is proper. United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

Municipal judge can be disqualified. — Police judge disqualified hereunder may not preside at trial absent consent of all parties thereto. State ex rel. Miera v. Chavez, 70 N.M. 289, 373 P.2d 533 (1962).

Disqualification of small claims judge. — Former 34-8-7 NMSA 1978, relating to transfer of case to district court upon disqualification of small claims court judge, was a statutory declaration of this section; court's attention must be directed to a specific constitutional ground for disqualification. Stein v. Speer, 85 N.M. 418, 512 P.2d 1254 (1973).

Application to quasi-judicial decision makers. — County commissioners are subject to the kinship-based disqualification of Article VI, Section 18 of the constitution of New

Mexico when they sit in a quasi-judicial capacity. Los Chavez Cmty. Ass'n v. Valencia Cnty., 2012-NMCA-044, 277 P.3d 475.

Application to county commissioners in hearing zone change applications. — Where landowners applied to the county commission for a zone change; one of the county commissioners was a first cousin to one of the landowners and the county commissioner refused to recuse from voting on the application, the kinship-based disqualification in Article VI, Section 18 of the constitution of New Mexico applied to the county commissioner and the participation of the county commission in the adjudication of the zone change denied petitioners, who opposed the zone change, due process. Los Chavez Cmty. Ass'n v. Valencia Cnty., 2012-NMCA-044, 277 P.3d 475.

Sale of grant lands not void. — A district judge's approval of a sale of common lands of Tecolote land grant is not void, although the judge is disqualified as a relative of the purchaser. Kavanaugh v. Delgado, 35 N.M. 141, 290 P. 798 (1930).

Conservancy District Act. — Laws 1927, ch. 45, § 201 (73-14-4 NMSA 1978), providing that a judge shall not be disqualified by reason of holding land benefited by a conservancy district, does not of itself make the act violative of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Assistance of counsel. — Where defendant was aware that the judge who resentenced him had been prosecuting attorney at original proceedings, had been so informed by both the judge and his attorneys and had specifically consented to having the judge sit in the case, he could not claim in post-conviction proceedings that he was denied adequate assistance of counsel in the matter. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

This provision is self-executing; the right to disqualify hereunder does not depend upon statutory enactment. 1970 Op. Att'y Gen. No. 70-100.

Disqualification on grounds named herein is apparently not automatic. 1970 Op. Att'y Gen. No. 70-100.

Time of filing affidavit. — To disqualify a judge, the affidavit of disqualification called for in 38-3-10 NMSA 1978 must be filed before the court has acted judicially upon a material issue; however, this might not be the case if the grounds for disqualification came to light during or after the hearing. 1975 Op. Att'y Gen. No. 75-28.

It would subvert the judicial and administrative process to allow disqualification of a judge or board member based on impartiality, if a person before a tribunal could file an affidavit of disqualification after the judge or board members had heard the case. 1975 Op. Att'y Gen. No. 75-28.

Municipal or police judge can be disqualified. 1959-60 Op. Att'y Gen. No. 59-207.

A municipal judge may be disqualified by any of the parties to a proceeding before him, if any of the grounds mentioned herein are present. 1970 Op. Att'y Gen. No. 70-100.

Municipal judge can be disqualified only under this section. — A municipal judge cannot be disqualified under a statute providing for the disqualification of other types of judges, and in absence of a statute providing specifically for disqualification of municipal judges, there can be no disqualification of such judges except by way of the constitution; however, certain duties have been made obligatory on all judges by supreme court's adoption of canons of ethics. 1970 Op. Att'y Gen. No. 70-100.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M. L. Rev. 331 (1976).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M. L. Rev. 97 (1982).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M. L. Rev. 251 (1983).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M. L. Rev. 407 (1985).

For annual survey of New Mexico law of civil procedure, 19 N.M. L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86 et seq., 123, 137, 146, 149, 172, 175, 179.

48A C.J.S. Judges §§ 99, 107 to 129.

Constitutionality of statutes making mere filing of affidavit of bias or prejudice sufficient to disqualify judge, 5 A.L.R. 1275, 46 A.L.R. 1179.

Necessity as justifying action by judicial officer otherwise disqualified to act in particular case, 39 A.L.R. 1476.

Right of judge not legally disqualified to decline to act in legal proceeding upon personal grounds, 96 A.L.R. 546.

Constitutionality of statute which disqualifies judge upon peremptory challenge, 115 A.L.R. 855.

Modification of decree of divorce, statute providing for change of judge on ground of bias or prejudice as applicable to proceedings for, 143 A.L.R. 411.

Disqualification of judge in pending case as subject to revocation or removal, 162 A.L.R. 641.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse himself or to certify his disqualification, 45 A.L.R.2d 937, 56 A.L.R. Fed. 494.

Relationship to attorney as disqualifying judge, 50 A.L.R.2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member, 64 A.L.R.2d 600, 37 A.L.R.4th 1004.

Time for asserting disqualification of judge, and waiver of disqualification, 73 A.L.R.2d 1238.

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886.

Intervenor's right to disqualify judge, 92 A.L.R.2d 1110.

Disqualification of judge for having decided different case against litigant, 21 A.L.R.3d 1369.

Disqualification of judge on ground of being a witness in the case, 22 A.L.R.3d 1198.

Disqualification of judge for bias against counsel for litigant, 23 A.L.R.3d 1416.

Disqualification of judge because of his or another's holding or owning stock in corporation involved in litigation, 25 A.L.R.3d 1331.

Disqualification of original trial judge to sit on retrial after reversal or mistrial, 60 A.L.R.3d 176.

State's right to file affidavit disqualifying judge for bias or prejudice, 68 A.L.R.3d 509.

Constitutional restrictions on nonattorney acting as judge in criminal proceedings, 71 A.L.R.3d 562.

Fine, penalty or forfeiture imposed upon defendant, disqualification of judge or one acting in judicial capacity by pecuniary interest in, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by case as a ground for disqualification of judge, 75 A.L.R.3d 1021.

Illness or incapacity of judge, prosecuting officer or prosecution witness as justifying delay in bringing accused speedily to trial in state cases, 78 A.L.R.3d 297.

Disqualification of judge because of assault or threat against him by party or person associated with party, 25 A.L.R.4th 923.

Disqualification of judge because of political association or relation to attorney in case, 65 A.L.R.4th 73.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution, 91 A.L.R.5th 437.

Disqualification of judge under 28 U.S.C.A. § 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding, 163 A.L.R. Fed. 575.

Sec. 19. [Ineligibility of justices or judges for nonjudicial offices.]

No justice of the supreme court, judge of the court of appeals, judge of the district court or judge of a metropolitan court, while serving, shall be nominated, appointed or elected to any other office in this state except a judicial office. (As amended November 8, 1988.)

ANNOTATIONS

Cross references. — For governor's appointive and removal power, including interim appointees, *see* N.M. Const., art. V, § 5.

For division of state into judicial districts with judge chosen for each district, *see* N.M. Const., art. VI, § 12.

For magistrate districts and selection of magistrates, *see* N.M. Const., art. VI, § 26.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present provisions for the former provisions which read "No judge of the supreme or district courts shall be nominated or elected to any other than a judicial office in this state."

Chairman of municipal consolidation commission. — The appointment, under authority of the Joint Powers Agreements Act (11-1-1 to 11-1-7 NMSA 1978), of a district judge to be chairman of a joint commission for consolidation of two municipalities does not contravene this section; there is no incompatibility between the two positions, and the fact that some day an action of the commission might be before a court was not enough to make the positions incompatible. 1968 Op. Att'y Gen. No. 68-67.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 44 et seq.

48A C.J.S. Judges §§ 31, 43; 67 C.J.S. Officers and Public Employees §§ 27, 28, 32.

Sec. 20. [Style of writs and processes.]

All writs and processes shall issue, and all prosecution shall be conducted in the name of "The State of New Mexico."

ANNOTATIONS

Cross references. — For rule relating to process and service thereof, *see* Rule 1-004 NMRA.

For writs issued by district court, *see* Rule 1-065 NMRA.

Comparable provisions. — Iowa Const., art. V, § 8.

Wyoming Const., art. V, § 15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62B Am. Jur. 2d Process §§ 66 to 104.

Who is "person of suitable age and discretion" under statutes or rules relating to substituted service of process, 91 A.L.R.3d 827.

72 C.J.S. Process §§ 11, 13.

Sec. 21. [Judges as conservators of the peace; preliminary examinations in criminal cases.]

Justices of the supreme court, in the state, and district judges and magistrates, in their respective jurisdictions, shall be conservators of the peace. District judges and other judges or magistrates designated by law may hold preliminary examinations in criminal cases. (As amended November 8, 1966.)

ANNOTATIONS

Cross references. — For right to preliminary hearing of one held on an information, *see* N.M. Const., art. II, § 14.

For preliminary hearing procedure, *see* Rules 5-302, 6-202, and 7-202 NMRA.

Comparable provisions. — Iowa Const., art. V, § 7.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 3 (Laws 1965) and adopted at the general election held on November 8, 1966, with a vote of 81,055 for and

26,317 against, amended this section, substituting "and district judges . . . jurisdictions" for "district judges in their respective districts and justices of the peace in their respective counties" and "other judges or magistrates designated by law" for "justices of the peace."

Driving while intoxicated was breach of the peace, over which justice of the peace had jurisdiction. State v. Rue, 72 N.M. 212, 382 P.2d 697 (1963).

Power of nonresident judge to hold preliminary hearing. — Nonresident judge who sits at request of a resident judge is vested with all the latter's powers, including that of holding preliminary hearings. State v. Encinias, 53 N.M. 343, 208 P.2d 155 (1949).

Payment of autopsies with court funds. — The district courts are constitutionally designated as conservators of the peace. As such, and when autopsies are warranted in pursuit of that design, district court funds may be disbursed in payment of autopsies, on proper approval. 1957-58 Op. Att'y Gen. No. 58-83.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 22.

48A C.J.S. Judges § 53.

Sec. 22. [County clerk as district and probate court clerk.]

Until otherwise provided by law, a county clerk shall be elected in each county who shall, in the county for which he is elected perform all the duties now performed by the clerks of the district courts and clerks of the probate courts.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. V, § 16.

Compiler's notes. — Laws 1968, ch. 69, § 20 (34-6-19 NMSA 1978) provides for appointment of a clerk for each county of a judicial district and for appointment of deputy clerks as needed.

Certification of transcript. — A transcript of judgment may properly be certified by a county clerk unless a statutory change of designation has been made. Cannon v. First Nat'l Bank, 35 N.M. 193, 291 P. 924 (1930).

Powers of county clerk. — The county clerk succeeding to the offices of clerk of the district court and the probate clerk, pursuant to this section, could perform all duties and exercise all powers formerly devolving upon the court clerks, including the taking of acknowledgments. 1914 Op. Att'y Gen. No. 14-1442.

County clerk was entitled to salary specified by law but not to additional compensation for performing duties of clerk of district court, but deputy could be employed if duties required it. 1931-32 Op. Att'y Gen. No. 31-241.

Probate files. — As probate clerk, the county clerk is required to keep a record of decedents' estates and other probate matters; there is no statutory provision for the storage of such probate files at a place other than the county clerk's office. 1961-62 Op. Att'y Gen. No. 61-127; *see also*, 34-7-20 and 34-7-21 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Clerks of Court §§ 1, 2, 21, 28.

Per diem compensation of court clerks, 1 A.L.R. 280.

Civil service laws as applicable to court clerks, 14 A.L.R. 637.

Assistance, right of clerk of court to issue writs of, 21 A.L.R. 357.

Money paid to clerk of court by virtue of his office, liability for, 59 A.L.R. 60.

Records, discretion of clerk as to permitting examination or use of, by abstractor or insurer of title, 80 A.L.R. 773.

Removal of clerk, court's power as to, 118 A.L.R. 171.

Liability of county clerk or prothonotary, or surety on bond, for negligent or wrongful acts of deputies or assistants, 71 A.L.R.2d 1140.

21 C.J.S. Courts §§ 249 to 255.

Sec. 23. [Probate court.]

A probate court is hereby established for each county, which shall be a court of record, and, until otherwise provided by law, shall have the same jurisdiction as heretofore exercised by the probate courts of New Mexico and shall also have jurisdiction to determine heirship with respect to real property in all proceedings for the administration of decedents' estates. The legislature shall have power from time to time to confer upon the probate court in any county in this state jurisdiction to determine heirship in all probate proceedings, and shall have power also from time to time to confer upon the probate court in any county in this state general civil jurisdiction coextensive with the county; provided, however, that such court shall not have jurisdiction in civil causes in which the matter in controversy shall exceed in value three thousand dollars ($3,000.00) exclusive of interest and cost; nor in any action for malicious prosecution, slander and libel; nor in any action against officers for misconduct in office; nor in any action for the specific performance of contracts for the sale of real estate; nor in any action for the possession of land; nor in any matter

wherein the title or boundaries of land may be in dispute or drawn in question, except as title to real property may be affected by the determination of heirship; nor to grant writs of injunction, habeas corpus or extraordinary writs. Jurisdiction may be conferred upon the judges of said court to act as examining and committing magistrates in criminal cases, and upon said courts for the trial of misdemeanors in which the punishment cannot be imprisonment in the penitentiary, or in which the fine cannot be in excess of one thousand dollars ($1,000). A jury for the trial of such cases shall consist of six men. The legislature shall prescribe the qualifications and fix the compensation of probate judges. (As amended September 20, 1949.)

ANNOTATIONS

Cross references. — For salaries of probate judges, determined according to county classifications, *see* 4-44-1 NMSA 1978 et seq.

For Uniform Probate Code, *see* Chapter 45 NMSA 1978.

The 1949 amendment, which was proposed by S.J.R. No. 13 (Laws 1949) and adopted at the special election held on September 20, 1949, by a vote of 16,649 for and 10,771 against, amended this section to provide for jurisdiction in the probate courts to determine heirship with respect to real property in proceedings for administration of decedents' estates, to provide that the legislature would prescribe the qualifications and fix the compensation of probate judges and to delete a provision relating to transfer of cases in which the probate judge was disqualified. Prior to amendment this section read: "A probate court is hereby established for each county, which shall be a court of record, and, until otherwise provided by law, shall have the same jurisdiction as is now exercised by the probate courts of the Territory of New Mexico. The legislature shall have power from time to time to confer upon the probate court in any county in this state, general civil jurisdiction coextensive with the county; provided, however, that such court shall not have jurisdiction in civil causes in which the matter in controversy shall exceed in value one thousand dollars, exclusive of interest; nor in any action for malicious prosecution, divorce and alimony, slander and libel; nor in any action against officers for misconduct in office; nor in any action for the specific performance of contracts for the sale of real estate; nor in any action for the possession of land; nor in any matter wherein the title or boundaries of land may be in dispute or drawn in question; nor to grant writs of injunction, habeas corpus or extraordinary writs. Jurisdiction may be conferred upon the judges of said court to act as examining and committing magistrates in criminal cases, and upon said courts for the trial of misdemeanors in which the punishment cannot be imprisonment in the penitentiary, or in which the fine cannot be in excess of one thousand dollars. A jury for the trial of such cases shall consist of six men.

"Any civil or criminal case pending in the probate court, in which the probate judge is disqualified, shall be transferred to the district court of the same county for trial."

"Otherwise provided by law". — Phrase "until otherwise provided by law" means that the legislature has power to modify or alter the particular exercise of probate jurisdiction; included within this grant is power to confer concurrent probate jurisdiction upon the district courts. In re Will of Hickok, 61 N.M. 204, 297 P.2d 866 (1956).

Probate jurisdiction alterable. — Under this section it was not intended that the probate jurisdiction of these courts should remain frozen, but the legislature may alter, limit or extend jurisdiction of probate courts over all matters which by the English law and general law of this country are from their nature classed generally as within their probate jurisdiction. Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948), overruled by In re Conley's Will, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Probate jurisdiction not necessarily exclusive. — In view of this section and the fact that probate proceedings are special in their nature and creatures of statute, word "exclusive" should not be read into provisions of this section relating to probate court jurisdiction. In re Will of Hickok, 61 N.M. 204, 297 P.2d 866 (1956).

Determination of heirship by district courts constitutional. — Former 16-3-20, 1953 Comp., was not constitutionally objectionable hereunder in providing that district courts should have power to determine heirship in probate or administrative proceedings. In re Will of Hickok, 61 N.M. 204, 297 P.2d 866 (1956).

Scope of proviso concerning title or boundaries of land. — Proviso touching denial of jurisdiction in matters wherein title or boundaries of land are in dispute is a limitation on future legislative action relative to conferring additional civil jurisdiction on probate courts; it does not amount to a present grant of exclusive original jurisdiction in district courts on such matters. In re Conley's Will, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

No jurisdiction in probate courts to try title to property. — Probate courts have no jurisdiction to try or determine title to either real or personal property as between an estate or heirs and devises on the one hand and strangers to the estate on the other; this jurisdiction is vested exclusively in the district court. In re Conley's Will, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070; McCann v. McCann, 46 N.M. 406, 129 P.2d 646 (1942).

Where a widow was incidentally an heir but her claim to one-half of the property involved was not the claim of an heir in administration, but was a claim arising under the community property system, the probate court was without jurisdiction to try her controverted claim of title to one-half the real estate involved as her share of the community. In re Conley's Will, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Constitutional amendment of 1949 is self-implementing. In re Conley's Will, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Admission of wills to probate is primary function of probate courts, both in territorial days and since statehood, without notice taken of whether the property disposed of be real or personal estate. Humphries v. Le Breton, 55 N.M. 247, 230 P.2d 976 (1951).

Declaration of heirship. — A declaration of heirship is the declaration of a status, that the decedent is who he was and was known to be; and a probate court can, by its determination of heirship, finally settle the ownership of a decedent's estate, both real and personal. In re Conley's Will, 58 N.M. 771, 276 P.2d 906 (1954), superseded by statute, In re Estate of Harrington, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Attack on decree of heirship. — A decree of the probate court determining heirship, made without personal or constructive service of process upon ascertainable relatives of deceased, is open to direct or collateral attack. Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942).

Claim against administrator. — District courts had no original jurisdiction to allow a claim against an administrator and surety on his bond, where probate court had jurisdiction and claim had been filed, allowed and paid in part, and no appeal was taken from action of probate court, and where complaint neither alleged grounds for nor prayed for equitable relief, but asked only a money judgment. Michael v. Bush, 26 N.M. 612, 195 P. 904 (1921).

Appointment of administrator is void when will on file names executors. Baca v. Buel, 28 N.M. 225, 210 P. 571 (1922).

Tort claims not covered. — Statutes providing for filing of claims in the probate court, the serving of a copy and a notice of hearing and a presentment thereof to the probate court did not cover tort claims. Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952).

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Law reviews. — For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M. L. Rev. 5 (1976-77).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 69.

Contempt, power to punish for contempt, 8 A.L.R. 1551, 54 A.L.R. 322, 73 A.L.R. 1187.

Mandamus against probate courts, to compel surrogate to require witness to testify or produce documents, 41 A.L.R. 436.

Probate court, corepresentatives in, suits between, 63 A.L.R. 455.

Attorney's fees, allowance for in suit to remove estate from probate court, 79 A.L.R. 532, 142 A.L.R. 1459.

Jurisdiction to grant relief from election as to taking under will, 81 A.L.R. 760, 71 A.L.R.2d 942.

Jurisdiction to determine title when personal representative claims in own right, 90 A.L.R. 134.

Jurisdiction, guardianship court's exclusive, as against execution, attachment, etc., 92 A.L.R. 919.

Mandamus against probate courts, to compel approval of bonds, 92 A.L.R. 1211.

Compromise of liquidated contract claim or money judgment, power of court to authorize or approve, 155 A.L.R. 201.

Removal of child from state pending proceedings for custody as defeating jurisdiction to award custody, 171 A.L.R. 1405.

Jurisdiction of court to award custody of child domiciled in state but physically outside of it, 9 A.L.R.2d 434.

Nonresidence as affecting one's right to custody of child, 15 A.L.R.2d 432.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service and appearance, 15 A.L.R.2d 610.

Appealability of order, of court possessing probate jurisdiction, allowing or denying tardy presentation of claim to personal representative, 66 A.L.R.2d 659.

21 C.J.S. Courts § 76.

Sec. 24. [District attorneys.]

There shall be a district attorney for each judicial district, who shall be learned in the law, and who shall have been a resident of New Mexico for three years next prior to his election, shall be the law officer of the state and of the counties within his district, shall

be elected for a term of four years, and shall perform such duties and receive such salary as may be prescribed by law.

The legislature shall have the power to provide for the election of additional district attorneys in any judicial district and to designate the counties therein for which the district attorneys shall serve; but no district attorney shall be elected for any district of which he is not a resident.

ANNOTATIONS

Cross references. — For statutory provisions relating to district attorneys, *see* 36-1-1 NMSA 1978 et seq.

"Learned in the law" and being a "licensed attorney" are synonymous. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

"Learned in the law" was an expression well known and understood when the constitution was drafted, and as interpreted, the meaning is the same as "licensed attorney", the term used in N.M. Const., art. V, § 3, referring to qualifications for office of attorney general. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

Admission to practice law before the highest courts of a state amounts to a determination, prima facie at least, that an individual is learned in the law, and in the absence of such admission, a person is presumptively not learned in the law. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

Admission to practice, or qualification to be admitted, is no less a requirement for district attorneys than is true of supreme court justices; the only difference is that district attorneys need not have had the actual practice required in N.M. Const., art. VI, § 8. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

This article makes district attorney the law officer of the counties of his district. State ex rel. Board of Cnty. Comm'rs v. Board of Cnty. Comm'rs, 59 N.M. 9, 277 P.2d 960 (1954).

District attorney is judicial officer in the sense in which those words are used in law relating to bribery of officers. The office is created and its duties are broadly defined by this section of the constitution. It was evidently intended by the constitutional convention to classify the office as judicial, since this article establishes the judicial department. State v. Collins, 28 N.M. 230, 210 P. 569 (1922).

Attorney general and district attorneys may appear as relators on behalf of state. State ex rel. McCulloh v. Polhemus, 51 N.M. 282, 183 P.2d 153 (1947).

Authority to file action. — Suit on behalf of state to recover salary paid to state highway commission (state transportation commission) chairman could be filed by district attorney. State ex rel. Attorney Gen. v. Reese, 78 N.M. 241, 430 P.2d 399 (1967).

Services to county commissioners. — There are no legal services that can be rendered by a district attorney for the board of county commissioners for which he may exact extra compensation; the very act of advising the board with respect to the validity of a contract was an official act, required of his office. Hanagan v. Board of County Comm'rs, 64 N.M. 103, 325 P.2d 282 (1958).

Appearance on appeal. — District attorney has authority to take an appeal, but it is the prerogative and duty of attorney general to brief the case and to present it in supreme court; district attorney may appear on appeal in a criminal case only by permission of the attorney general and in association with him. State v. Aragon, 55 N.M. 421, 234 P.2d 356 (1950).

Compensation. — The district attorney is a state officer and is precluded from receiving fees, allowances or emoluments other than the salary provided by law. Until such law is enacted, he is not entitled to compensation, but it may date back to his induction into office. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Under Laws 1917, ch. 18 (since repealed), salary of a district attorney could be garnished in hands of disbursing officer of state, since constitution does not specify his salary. Stockard v. Hamilton, 25 N.M. 240, 180 P. 294 (1919).

Removal statute inapplicable. — As the district attorney in 1909, when 10-4-1 NMSA 1978 was passed, was an officer appointed by the governor of the state by and with the consent of the legislature, and not a "county, precinct, district, city, town or village officer elected by the people," district attorney is not amenable to removal under that section. State ex rel. Prince v. Rogers, 57 N.M. 686, 262 P.2d 779 (1953).

Paternity determinations. — Upon request by the welfare department (now human services department), a district attorney must assist in paternity determinations if the child is likely to be a public charge. 1959-60 Op. Att'y Gen. No. 59-47.

District attorney is required to represent soil conservation district in collecting for work done by the soil conservation district for members of their organization. 1959-60 Op. Att'y Gen. No. 59-47.

District attorney is not obligated to represent county sheriff in a civil suit. 1959-60 Op. Att'y Gen. No. 59-47.

Appearance in justice of peace courts. — In view of the above constitutional provision and the statutes of the state, the district attorney as chief law enforcement officer has the authority to appear in any case filed before any justice of the peace (now

magistrate courts) in any county in his district when, in his opinion, the interests of the people in his district require his participation. 1953-54 Op. Att'y Gen. No. 53-5669.

As a practical matter, district attorney may file a complaint in any justice of the peace court (now magistrate court) which he deems proper (absent an abuse of discretion) in any criminal action which he desires to prosecute, by virtue of the powers granted to him by 36-1-20 NMSA 1978 to appear in such courts. 1965 Op. Att'y Gen. No. 65-127.

District attorney was not vested with power to enforce directive requiring all complaints against offenders booked into McKinley county jail for violation of petty misdemeanor statute to be filed by sheriff or state police in justice of the peace court (now magistrate courts) located in county courthouse in order to eliminate time-consuming and expensive transportation of offenders to one of the other justice of the peace courts of the county. 1965 Op. Att'y Gen. No. 65-127.

Public Records Act. — District attorneys are state officers and office of district attorney falls within broad definition of "agency" as used in 14-3-1 NMSA 1978 of the Public Records Act; therefore, the records of the district attorney's office are subject to provisions of the act for purposes of care, custody, preservation and disposition. 1975 Op. Att'y Gen. No. 75-36.

Compensation. — District attorneys whose terms of office were to expire on December 31, 1972, were to continue until that time to receive salary prescribed in former 13-8-5, 1953 Comp., which had been repealed by Laws 1972, ch. 97, § 71, a portion of the Children's Code, as the section enacted in its stead contained no salary provision for a district attorney's service as children's court attorney. 1972 Op. Att'y Gen. No. 72-45.

Election by district electorate. — There is no language used in the constitution evincing any intention on the part of the constitutional convention to permit a district attorney to be elected by any group of voters more than or less than the district electorate of the district in which he is to serve. 1959-60 Op. Att'y Gen. No. 60-03.

Candidate for district attorney must run in all counties of the district. 1959-60 Op. Att'y Gen. No. 60-03.

Probate judge as assistant district attorney. — The duly elected probate judge for Colfax county may be appointed as assistant district attorney with limited authority only. 1957-58 Op. Att'y Gen. No. 58-237.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Prosecuting Attorneys §§ 1, 5 to 8.

Disbarment or suspension of attorney because of misconduct of, as prosecuting attorney, 9 A.L.R. 197, 43 A.L.R. 109, 55 A.L.R. 1375.

Contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee, validity of, 11 A.L.R. 1192.

Incompatibility of offices of district attorney and captain of volunteers, 26 A.L.R. 145, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Taxes, power of district attorney to remit, release or compromise, 99 A.L.R. 1068, 28 A.L.R.2d 1425.

Court's power to remove district attorney, 118 A.L.R. 173.

Prosecution for criminal offenses, duty and discretion of district or prosecuting attorney as regards, 155 A.L.R. 10.

Power of assistant or deputy prosecuting or district attorney to file information, or to sign or prosecute it in his own name, 80 A.L.R.2d 1067.

Constitutionality and construction of statute against public attorney representing private person in civil action, 82 A.L.R.2d 774.

Constitutionality and construction of statute prohibiting a prosecuting attorney from engaging in the private practice of law, 6 A.L.R.3d 562.

Disqualification or recusal of prosecuting attorney because of relationship with alleged victim or victim's family, 12 A.L.R.5th 909.

27 C.J.S. District and Prosecuting Attorneys §§ 1 to 10.

Sec. 25. Repealed. (2001)

ANNOTATIONS

Compiler's notes. — Section 1 of S.J.R. No. 21 (Laws 2001) proposed to amend Article 6 of the constitution of New Mexico by repealing Section 25, relating to the designation of judicial districts, as that provision has become outdated (see 34-6-1 NMSA 1978). The amendment was approved by the people at the general election on November 5, 2002, by the vote of 284,600 for and 128,542 against.

Sec. 26. [Magistrate court.]

The legislature shall establish a magistrate court to exercise limited original jurisdiction as may be provided by law. The magistrate court shall be composed of such districts and elective magistrates as may be provided by law. Magistrates shall be qualified electors of, and reside in, their respective districts, and the legislature shall prescribe other qualifications. Magistrates shall receive compensation as may be provided by law, which compensation shall not be diminished during their term of office.

Metropolitan court judges shall be chosen as provided in this constitution. (As repealed and reenacted November 8, 1966; as amended November 8, 1988.)

ANNOTATIONS

Cross references. — For statutory provisions relating to magistrates' courts, *see* 35-1-1 NMSA 1978 et seq.

Comparable provisions. — Montana Const., art. VII, § 5.

Utah Const., art. VIII, §§ 11, 14.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 4 (Laws 1965) and adopted at the general election held on November 8, 1966, with a vote of 81,055 for and 26,317 against, repealed this section and enacted a new Section 26, providing for establishment of magistrate courts. Prior to repeal and reenactment, this section read: "Justices of the peace, police magistrates and constables shall be elected in and for such districts as are or may be provided by law. The legislature shall prescribe the qualifications for these offices. Such justices and police magistrates shall not have jurisdiction in any matter in which the title to real estate or the boundaries of land may be in dispute or drawn in question or in which the debt or sum claimed shall be in excess of two hundred dollars exclusive of interest."

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added the last sentence.

"Limited jurisdiction". — The reference in this section and 35-1-1 NMSA 1978 to "limited" jurisdiction indicates that a magistrate is without authority to take action unless the authority has been affirmatively granted; neither provision authorizes a magistrate to set aside judgment in a criminal case. State v. Vega, 91 N.M. 22, 569 P.2d 948 (Ct. App. 1977).

"Limited" jurisdiction indicates that a magistrate is without authority to take action unless authority is affirmatively granted by the constitution or statutory provision. A magistrate has continuing control over a criminal judgment only until such time as the aggrieved party's opportunity to file an appeal expires. State v. Ramirez, 97 N.M. 125, 637 P.2d 556 (1981).

Writs of injunction. — N.M. Const., art. VI, § 13, does not preclude the legislature from exercising the constitutional authority under this section and N.M. Const., art. VI, § 1, to grant injunctive authority to courts of limited jurisdiction. Martinez v. Sedillo, 2005-NMCA-029, 137 N.M. 103, 107 P.3d 543.

Constitution did not define criminal jurisdiction of justices of peace (now magistrate courts), nor make a grant thereof, but merely recognized justices of the

peace courts as one of the tribunals upon which the judicial power of the state was vested, made them conservators of the peace, and thereby left the criminal jurisdiction of justices of the peace as fixed by the territorial legislature of 1876 until the enactment of further law. State v. Rue, 72 N.M. 212, 382 P.2d 697 (1963).

No discretionary right to refuse second complaint after no cause found in first. — A magistrate, who has previously heard evidence under an original criminal complaint and has found no probable cause, does not have a discretionary right to refuse the filing of a second complaint. State v. De La O, 102 N.M. 638, 698 P.2d 911 (Ct. App. 1985).

Magistrate court has no jurisdiction to set aside a jury verdict. Jaramillo v. O'Toole, 97 N.M. 345, 639 P.2d 1199 (1982).

No equitable jurisdiction was vested in justice court (now magistrate courts). Durham v. Rasco, 30 N.M. 16, 227 P. 599, 34 A.L.R. 838 (1924).

Creation of police court by city not authorized. — This section, prior to its repeal and reenactment, did not establish offices of justices of the peace, police magistrates and constables, but merely defined the manner of their selection. Hence, a commission-manager city could not create a police court or elect a police judge. Stout v. City of Clovis, 37 N.M. 30, 16 P.2d 936 (1932).

Damages on appeal to district court. — On appeal to district court in a trial de novo in forcible entry and detainer action, the district court was limited in the amount of damages it could award by the maximum award allowable in the justice court (now magistrate courts). Sanchez v. Reilly, 54 N.M. 264, 221 P.2d 560 (1950).

Right of venue distinguished from magistrate's territorial jurisdiction. — The defendant's personal right of venue is a legal concept, separate and distinct from the territorial jurisdiction of the magistrate, and a statute affecting one does not necessarily affect the other. 1979 Op. Att'y Gen. No. 79-12.

Statutory prescription of qualifications. — The requirement in 36-2-1 NMSA 1978 that magistrates must have the equivalent of a high school education does not violate N.M. Const., art. VII, § 2, relating to qualifications for office, because this section gives the legislature the power to prescribe qualifications for magistrate court judges. 1969 Op. Att'y Gen. No. 69-08.

Competency of defendants in courts of limited jurisdiction. — Except for metropolitan courts, courts of limited jurisdiction have no authority to hold competency hearings. 2003 Op. Att'y Gen. No. 03-04.

Courts of limited jurisdiction have no authority to commit defendants to a mental health facility. 2003 Op. Att'y Gen. No. 03-04.

Magistrate court may order restitution. — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Marriage ceremony outside of district. — A magistrate judge cannot perform a marriage ceremony outside of his district. 1988 Op. Att'y Gen. No. 88-36.

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 54 et seq.; 46 Am. Jur. 2d Judges § 3.

Pardon as restoring justice to office forfeited by conviction, 58 A.L.R.3d 1191.

Magistrates, criminal jurisdiction of municipal or other local courts, 102 A.L.R. 5th 525.

21 C.J.S. Courts § 12 et seq.; 48A C.J.S. Judges §§ 4, 14, 15, 18, 76 to 79.

Sec. 27. [Appeals from probate courts and other inferior courts.]

Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts to the district courts, and in all such appeals, trial shall be had de novo unless otherwise provided by law. (As amended November 8, 1966.)

ANNOTATIONS

Cross references. — For appeals from metropolitan court, *see* 34-8A-6 NMSA 1978.

For appeals from magistrate courts, *see* 35-13-1 to 35-13-3 NMSA 1978.

For appeals from municipal court, *see* 35-15-7 NMSA 1978.

For appeals to district court, *see* 39-3-1 NMSA 1978.

For Probate Code, *see* Chapter 45 NMSA 1978.

For rules relating to appeals from magistrate courts, *see* Rules 2-705 and 6-703 NMRA.

For rules relating to appeals from metropolitan court, *see* Rules 3-706 and 7-703 NMRA.

For rules relating to appeals from municipal court, *see* Rule 8-703 NMRA.

Comparable provisions. — Utah Const., art. VIII, § 5.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 5 (Laws 1965), and adopted at the general election held on November 8, 1966, by a vote of 81,055 for and 26,317 against, substituted "other inferior courts" for "justices of the peace" after "probate courts and" and inserted a comma after "such appeals."

Compiler's notes. — Under the Probate Code, Chapter 45 NMSA 1978, the probate courts have jurisdiction only over informal proceedings for probate of a will or appointment of a personal representative, which powers are shared concurrently with the district courts. See 45-1-302, 45-1-302.1 NMSA 1978. An interested person may file a petition under 45-3-401 NMSA 1978 to set aside or prevent informal probate of a will and commence a formal testacy proceeding, which proceeding may also involve appointment of a previously appointed, or a different, personal representative.

A municipality has a constitutional right to appeal an adverse final judgment or decision from a municipal to district court and the legislature may not abridge that right. City of Las Cruces v. Sanchez, 2007-NMSC-042, 142 N.M. 243, 164 P.3d 942.

District court reviews, de novo, the merits of pretrial motions on appeal. — Because the right of appeal from courts not of record is the right to a trial or hearing de novo in the district court, the district court must make an independent determination, de novo, of the merits of any pretrial motions raised by the parties on appeal. City of Farmington v. Pinon-Garcia, 2013-NMSC-046, aff'g 2012-NMCA-079, 284 P.3d 1086.

Scope of district court review of pretrial motions on appeal. — When a district court reviews a lower court’s grant or denial of a dispositive pretrial motion, it does so independently. The district court does not consider whether the lower court abused it discretion; rather, it must consider the merits of the motion without regard to what the lower court decided. City of Farmington v. Pinon-Garcia, 2013-NMSC-046, aff'g 2012-NMCA-079, 284 P.3d 1086.

District court independently determines the merits of pretrial motions on appeal. — Where defendant was arrested and charged in municipal court with DWI in violation of municipal ordinances; the municipal court granted defendant’s motion to dismiss all charges because the arresting officer, who was the only witness to observe defendant driving and who administered defendant’s breath alcohol test, did not appear at trial; and the municipality appealed the dismissal of the DWI charge to the district court, the district court was required to review, de novo, the merits of the municipal court’s pretrial ruling on defendant’s motion to dismiss the DWI charge and independently determine

the merits of the motion without regard to what the municipal court decided. City of Farmington v. Pinon-Garcia, 2013-NMSC-046, aff'g 2012-NMCA-079, 284 P.3d 1086.

Appeals are subject to de novo review of all issues raised in the lower court. — Where defendant was charged with various traffic violations; when the municipality's main witness, the arresting officer, failed to appear at trial, the municipal court dismissed the charges with prejudice; and the municipality appealed to district court, before the district court conducted a new trial on the charges against defendant, the district court was required to conduct de novo pretrial proceedings and review all preliminary matters raised by the parties, including whether it was appropriate for the municipal court to dismiss the charges against defendant. City of Farmington v. Pinon-Garcia, 2012-NMCA-079, 284 P.3d 1086, cert. granted, 2012-NMCERT-008.

State's constitutional right to appeal not codified. — The right of the state to appeal orders of suppression from the district court is created by statute as set forth in 39-3-3 NMSA 1978, which has been held not to be a statutory codification of the state's constitutional right to appeal. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Appeals from metropolitan court judgments by aggrieved defendants. — The legislature did not violate this section in authorizing appeals from metropolitan court judgments by aggrieved defendants. State v. Ball, 104 N.M. 176, 718 P.2d 686 (1986).

"Aggrieved" defendants. — A defendant who properly has entered a plea of guilty or nolo contendere in metropolitan court is not an "aggrieved" party entitled to appeal to the district court for a trial de novo. State v. Ball, 104 N.M. 176, 718 P.2d 686 (1986).

Appeal of justice court decision. — District courts had appellate jurisdiction over all cases originating in justice of peace courts (now magistrate courts). Lea Cnty. State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Rule restricting bases for state's appeals invalid. — Restrictive nature of Rule 7-703B NMRA in providing only two bases for appeal by the state, unconstitutionality of statute and insufficiency of complaint, limits the state's substantive right to appeal provided by the New Mexico constitution and is, therefore, invalid. Smith v. Love, 101 N.M. 355, 683 P.2d 37 (1984).

State appeal from magistrate court decision. — Pursuant to this section, the state is permitted to appeal to the district court from a final judgment or decision rendered by the magistrate court. State v. Barber, 108 N.M. 709, 778 P.2d 456 (Ct. App.), cert. denied, 108 N.M. 713, 778 P.2d 911 (1989).

Magistrate court orders suppressing evidence were not final orders in either an actual or practical sense. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

The state does not have the statutory authority or constitutional right to immediately appeal a magistrate court order suppressing evidence to the district court. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, aff'd, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Prosecution has no right to appeal the metropolitan court's suppression of evidence. State v. Giraudo, 99 N.M. 634, 661 P.2d 1333 (Ct. App. 1983).

Prosecution may appeal dismissal for failure to timely prosecute. — Since an order of dismissal for failure to timely prosecute is a final judgment, the prosecution may appeal it from the metropolitan court to the district court. State v. Giraudo, 99 N.M. 634, 661 P.2d 1333 (Ct. App. 1983).

Jurisdiction in inferior court. — Where unchallenged notice of appeal showed on its face that magistrate court originally had jurisdiction of case, district court could acquire jurisdiction even though transcript had not been filed. State v. McKee, 86 N.M. 733, 527 P.2d 496 (Ct. App.), cert. denied, 86 N.M. 730, 527 P.2d 493 (1974).

Where justice court (now magistrate court) had no jurisdiction, there was nothing to try de novo on appeal to district court, and the case should be dismissed on proper motion. Geren v. Lawson, 25 N.M. 415, 184 P. 216 (1919).

District court sitting in probate. — Order of district court sitting in probate could not be appealed to district court of general jurisdiction. Bell v. Kase, 87 N.M. 358, 533 P.2d 591 (1975) (case decided under former probate law).

Reasonable procedural requirements for appeals may be enacted by the legislature and a failure to comply with them will defeat the relief sought by the appeal. Levers v. Houston, 49 N.M. 169, 159 P.2d 761 (1945).

Until transcript was filed, district court could not proceed to trial on the merits, but it had jurisdiction of the cause to compel production of transcript so that it could proceed. Lea Cnty. State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Court rule valid. — A rule for the district court, providing that if the appellant shall not procure the cause to be timely docketed, the appellee may, on motion, have the cause docketed, and the appeal or certiorari dismissed, or, at his election, have his judgment affirmed, does not violate this section. Hignett v. Atchison, T. & S.F. Ry., 33 N.M. 620, 274 P. 44 (1928).

Review by certiorari does not provide for trial de novo in the higher court, whereas both the constitution and statutes relate to "appeals" from justice courts and require that the trial be de novo. Lea Cnty. State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935).

Appeal from metropolitan court governed by nature of offense. — Appeal from the metropolitan court is governed by the crime of which defendants are convicted rather than the type of trial; thus, defendant convicted of eluding an officer and reckless driving was entitled to a trial de novo, even though the trial was on the record. State v. Krause, 1998-NMCA-013, 124 N.M. 415, 951 P.2d 1076, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998).

Review of metropolitan court's dismissal of criminal complaint. — The district court erred in applying an appellate standard of review to affirm the metropolitan court's dismissal of a criminal complaint because the district court was instead required to make an independent determination of whether the "forthwith" requirement in Rule 7-201D NMRA was complied with. State v. Hicks, 105 N.M. 286, 731 P.2d 982 (Ct. App. 1986), cert. denied, 105 N.M. 290, 731 P.2d 1334 (1987).

Failure to preserve issue. — Because defendant failed to show the district court that he preserved issue in metropolitan court, the district court was not required to make an independent determination of whether the metropolitan court six-month rule was violated. State v. Hoffman, 114 N.M. 445, 839 P.2d 1333 (Ct. App.), cert. denied, 114 N.M. 520, 841 P.2d 1149 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 77 et seq.

Plea of guilty in justice of peace court as precluding appeal, 42 A.L.R.2d 995.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

4 C.J.S. Appeal and Error § 14 et seq.; 5 C.J.S. Appeal and Error §§ 723, 724.

Sec. 28. [Court of appeals; number, qualifications, compensation; quorum; majority concurring in judgment; power of chief justice to select acting justices.]

The court of appeals shall consist of not less than seven judges who shall be chosen as provided in this constitution, whose qualifications shall be the same as those of justices of the supreme court and whose compensation shall be as provided by law. The increased qualifications provided by this 1988 amendment shall not apply to court of appeals judges serving at the time this amendment passes or elected at the general election in 1988.

Three judges of the court of appeals shall constitute a quorum for the transaction of business, and a majority of those participating must concur in any judgment of the court.

When necessary, the chief justice of the supreme court may designate any justice of the supreme court, or any district judge of the state, to act as a judge of the court of

appeals, and the chief justice may designate any judge of the court of appeals to hold court in any district, or to act as a justice of the supreme court. (As added September 28, 1965; as amended November 8, 1988.)

ANNOTATIONS

Cross references. — For qualifications for supreme court justices, *see* N.M. Const., art. VI, § 8.

For statutory provisions relating to court of appeals, *see* 34-5-1 NMSA 1978 et seq.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 3 (Laws 1965), and adopted at a special election held on September 28, 1965, by a vote of 31,582 for and 18,477 against, added this section as new to article VI.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, substituted the present first paragraph for the former first paragraph, which reads as set out in the Original Pamphlet, deleted the former second paragraph which read "A vacancy in the office of judge of the court of appeals shall be filled by appointment of the governor for a period provided by law", and substituted "the chief justice may designate" for "he may designate" in the last paragraph.

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have substituted "consists" for "shall consist" near the beginning of the first sentence of the first paragraph, deleted "and election for terms of eight years" near the middle of the first paragraph, deleted "except that an initial term may be prescribed by law for less than eight years to provide maximum continuity" at the end of the first paragraph, deleted the second paragraph, deleted "shall" preceding "constitute" near the beginning of the third paragraph and deleted "of the state" following "any district judge" near the middle of the last paragraph, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

Qualifications. — The New Mexico constitution provides that judges of the court of appeals must satisfy the same qualifications as justices of the supreme court. Hannett v. Jones, 104 N.M. 392, 722 P.2d 643 (1986).

Opinion not binding where two judges concurred only in result. — The discussion and rationale underlying an opinion do not constitute binding precedent within the meaning of the state constitution where two judges concurred only in the result. Chadwick v. Public Serv. Co., 105 N.M. 272, 731 P.2d 968 (Ct. App.), cert. denied, 105 N.M. 290, 731 P.2d 1334 (1987), abrogated, Mathis v. Trailways, Inc., 111 N.M. 292, 804 P.2d 1111 (Ct. App. 1990).

Assignment of cases to advisory committees. — An experimental plan pursuant to which cases would be assigned by the court of appeals to advisory committees of experienced attorneys was not an unconstitutional delegation of judicial power, where the judges reviewed the records and briefs and decided the cases. Thompson v. Ruidoso-Sunland, Inc., 105 N.M. 487, 734 P.2d 267 (Ct. App. 1987).

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

For article, "History of the New Mexico Court of Appeals" see 22 N.M. L. Rev. 595 (1992).

Compensation. — The salaries of the judges of constitutionally established courts are not subject to the constitutional prohibition against an increase in compensation during the term for which they were elected. 1979 Op. Att'y Gen. No. 79-27.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 38; 46 Am. Jur. 2d Judges §§ 6 et seq., 14 et seq., 54, 239, 248 et seq.

Governor's calling of special or extra term of court, 16 A.L.R. 1306.

Party's right, in course of litigation, to challenge title or authority of substitute judge, 144 A.L.R. 1214.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

48A C.J.S. Judges §§ 8, 12, 13, 15 to 18, 69, 70, 75 to 81, 161 to 185.

Sec. 29. [Court of appeals; jurisdiction; issuance of writs.]

The court of appeals shall have no original jurisdiction. It may be authorized by law to review directly decisions of administrative agencies of the state, and it may be authorized by rules of the supreme court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction as may be provided by law. (As added September 28, 1965.)

ANNOTATIONS

Cross references. — For appellate jurisdiction of court of appeals, *see* 34-5-8 NMSA 1978.

The 1965 amendment, which was proposed by S.J.R. No. 5, § 4 (Laws 1965) and adopted at a special election held on September 28, 1965, by a vote of 31,582 for and 18,477 against, added this section as new to article VI.

Issuance of subpoenas duces tecum to a non-party was a collateral order reviewable by writ of error. — Where plaintiff sued defendants for employment discrimination; plaintiff's spouse, who was not a party to the action, maintained a private law practice; plaintiff alleged that upon filing the complaint, defendants retaliated against plaintiff by asserting irregularities with regard to the gross receipts tax records and returns of the spouse's private law practice; the district court issued subpoenas duces tecum to the spouse and to defendant taxation and revenue department for the spouse's gross receipts tax records and returns; the spouse moved to quash the subpoenas on the grounds that the gross receipts tax information was confidential and privileged; the district court denied the motion; the order denying the motion to quash practically disposed of all issues raised by the spouse; the issue of the spouse's rights and privilege concerning the confidentiality of the gross receipt tax information had nothing to do with the merits of plaintiff's action; and the district court's order was not a final order disposing of the merits of the underlying case and was effectively unreviewable on appeal from a final judgment because the spouse was not a party to the action, the district court's order authorizing the subpoenas was reviewable by writ of error under the collateral order doctrine. Breen v. New Mexico Taxation & Revenue Dep't, 2012-NMCA-101, 287 P.3d 379.

Scope of limited jurisdiction. — Jurisdiction of the court of appeals is limited to appeals from final judgments, interlocutory orders which practically dispose of the merits of an action, and final orders after entry of judgment which affect substantial rights. Thornton v. Gamble, 101 N.M. 764, 688 P.2d 1268 (Ct. App. 1984); Mitchell v. Mitchell, 104 N.M. 205, 719 P.2d 432 (Ct. App.), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986).

Court of appeals did not have original jurisdiction to treat defendant's evidentiary claim, asserted as an original motion for post-conviction relief in the appellate court, or in the alternative as an original petition for the writ of habeas corpus. State v. Gonzales, 79 N.M. 414, 444 P.2d 599 (Ct. App. 1968).

Direct appeal of denial of motion to impose double jeopardy bar to retrial. — Where the trial court denied defendant's motion to bar a retrial on the grounds that the prosecutor had committed misconduct in defendant's initial trial, because hearsay statements as represented by the prosecutor to have been made by third parties were falsely stated, misleading and prejudicial to defendant's rights, which invoked defendants double jeopardy rights, defendant had a right to directly appeal the trial court's order to the court of appeals. State v. McClaugherty, 2007-NMCA-041, 141 N.M. 468, 157 P.3d 33, aff'd, 2008-NMSC-044, 144 N.M. 483, 188 P.3d 1234.

Agency "decision" includes regulations. — Word "decision" in this section embraced regulations adopted by a joint municipal-county board created in accordance with the provision of the Air Quality Control Act (Chapter 74, Article 2 NMSA 1978), and filed

with the supreme court law librarian, and court of appeals could review such regulations under former 12-14-7, 1953 Comp., without violation of this section. Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd., 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

Pre-enforcement facial challenge of regulations unauthorized. — The court of appeals was without authority to review the constitutionality of the New Mexico Mining Act (69-36-1 NMSA 1978 et seq.) in an appeal challenging regulations on their face. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App.), cert. denied, 120 N.M. 828, 907 P.2d 1009 (1995).

Review of tax decision. — Court of appeals was authorized to review decisions of the commissioner of revenue (now director of the revenue division of the taxation and revenue department) directly. Union Cnty. Feedlot, Inc. v. Vigil, 79 N.M. 684, 448 P.2d 485 (Ct. App. 1968).

Writ of prohibition not in aid of appellate jurisdiction. — Writ of prohibition against district court judge in workmen's compensation case could not be issued by court of appeals, as the writ would not aid that court's appellate jurisdiction. State ex rel. Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967).

Appeal of criminal contempt conviction. — Defendant had the right to appeal his conviction for criminal contempt, and court of appeals had jurisdiction over such appeal. State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971).

Court of appeals has no authority to modify contempt sentence. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Court of appeals has jurisdiction to entertain a defendant's appeal of probation revocation. State v. Castillo, 94 N.M. 352, 610 P.2d 756 (Ct. App.), cert. quashed, 94 N.M. 675, 615 P.2d 992 (1980).

When court has jurisdiction over mandamus proceeding. — Where a mandamus proceeding is consolidated with a district court appeal from a decision of the personnel board, the court of appeals has jurisdiction over the mandamus parties. State ex rel. N.M. State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

Authority to remand for new sentence. — Appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense. The rationale for this holding is that there is no need to retry a defendant for a lesser included offense when the elements of a lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense. State v. Haynie, 116 N.M. 746, 867 P.2d 416 (1994).

Court is not bound by trial court interpretations of statutes and rules; rather it reviews them to determine whether they are legally correct. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Court of appeals is to follow precedents of supreme court; it is not free to abolish instructions approved by the supreme court although in appropriate situations it may consider whether the supreme court precedent is applicable. State v. Scott, 90 N.M. 256, 561 P.2d 1349 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977), overruled by State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

Jury instruction. — The court of appeals has no authority to review a claim that UJI Crim. 2.10 (now UJI 14-210 NMRA) is erroneous. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled by State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

The court of appeals is not precluded from considering error in jury instructions, but is precluded only from overruling those instructions that have been considered by the supreme court in actual cases and controversies that are controlling precedent. State v. Wilson, 116 N.M. 793, 867 P.2d 1175 (1994).

Effect of grand jury report. — Since no parties are involved, and no facts are found nor issues of law decided, the report of a grand jury is not a judgment. Therefore, that report does not constitute a final, appealable order. McKenzie v. Fifth Judicial Dist. Court, 107 N.M. 778, 765 P.2d 194 (Ct. App.), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988).

Law reviews. — For article, "Mandamus in New Mexico," see 4 N.M. L. Rev. 155 (1974).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M. L. Rev. 251 (1983).

For article, "History of the New Mexico Court of Appeals" see 22 N.M. L. Rev. 595 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 54 et seq.

New trial, grant of, by appellate court because of inability to perfect record for appeal, 13 A.L.R. 107, 16 A.L.R. 1158, 107 A.L.R. 603.

21 C.J.S. Courts § 9 et seq.; 72 C.J.S. Process §§ 2 to 10.

Sec. 30. [Fees collected by judiciary paid to state treasury.]

All fees collected by the judicial department shall be paid into the state treasury as may be provided by law and no justice, judge or magistrate of any court shall retain any fees as compensation or otherwise. (As added November 8, 1966.)

ANNOTATIONS

The 1966 amendment, which was proposed by H.J.R. No. 34, § 6 (Laws 1965), and adopted at the general election held on November 8, 1966, by a vote of 81,055 for and 26,317 against, added this section as new to article VI.

Penalty assessments for violations of county traffic ordinances are also public money for the purpose of this section. Board of Comm'rs v. Greacen, 2000-NMSC-016, 129 N.M. 177, 3 P.3d 672.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A C.J.S. Judges §§ 82, 83.

Sec. 31. [Justices of the peace abolished.]

Justices of the peace shall be abolished not later than five years from the effective date of this amendment and may, within this period, be abolished by law, and magistrate courts vested with appropriate jurisdiction. Until so abolished, justices of the peace shall be continued under existing laws. (As added November 8, 1966.)

ANNOTATIONS

Cross references. — For establishment of magistrate courts, *see* N.M. Const., art. VI, § 26 and 35-1-1 NMSA 1978.

For abolishment of office of justice of the peace, and transfer of powers and duties thereof to the magistrate courts, *see* 35-1-38 NMSA 1978.

The 1966 amendment, which was proposed by H.J.R. No. 34, § 7 (Laws 1965) and adopted at the general election held on November 8, 1966, by a vote of 81,055 for and 26,317 against, added this section as new to article VI.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 5.

48A C.J.S. Judges § 9.

Sec. 32. [Judicial standards commission.] (2011)

There is created the "judicial standards commission", consisting of two justices or judges, one magistrate, one municipal judge and two lawyers selected as may be provided by law to serve for terms of four years, and seven citizens, none of whom is a justice, judge or magistrate of any court or licensed to practice law in this state, who shall be appointed by the governor for five-year staggered terms as may be provided by

law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated. No act of the commission is valid unless concurred in by a majority of its members. The commission shall select one of the members appointed by the governor to serve as chair.

In accordance with this section, any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, persistent failure or inability to perform a judge's duties, or habitual intemperance, or may be retired for disability seriously interfering with the performance of the justice's, judge's or magistrate's duties that is, or is likely to become, of a permanent character. The commission may, after investigation it deems necessary, order a hearing to be held before it concerning the discipline, removal or retirement of a justice, judge or magistrate, or the commission may appoint three masters who are justices or judges of courts of record to hear and take evidence in the matter and to report their findings to the commission. After hearing or after considering the record and the findings and report of the masters, if the commission finds good cause, it shall recommend to the supreme court the discipline, removal or retirement of the justice, judge or magistrate.

The supreme court shall review the record of the proceedings on the law and facts and may permit the introduction of additional evidence, and it shall order the discipline, removal or retirement as it finds just and proper or wholly reject the recommendation. Upon an order for retirement, any justice, judge or magistrate participating in a statutory retirement program shall be retired with the same rights as if the justice, judge or magistrate had retired pursuant to the retirement program. Upon an order for removal, the justice, judge or magistrate shall thereby be removed from office, and the justice's, judge's or magistrate's salary shall cease from the date of the order.

All papers filed with the commission or its masters, and proceedings before the commission or its masters, are confidential. The filing of papers and giving of testimony before the commission or its masters is privileged in any action for defamation, except that the record filed by the commission in the supreme court continues privileged but, upon its filing, loses its confidential character, and a writing that was privileged prior to its filing with the commission or its masters does not lose its privilege by the filing. The commission shall promulgate regulations establishing procedures for hearings under this section. No justice, judge or magistrate who is a member of the commission or supreme court shall participate in any proceeding involving the justice's, judge's or magistrate's own discipline, removal or retirement.

This section is alternative to, and cumulative with, the removal of justices, judges and magistrates by impeachment and the original superintending control of the supreme court. (As added November 7, 1967; as amended November 7, 1978, November 3, 1998 and November 6, 2012.)

ANNOTATIONS

Cross references. — For power of impeachment, *see* N.M. Const., art. IV, §§ 35, 36.

For supreme court's superintending control over inferior courts, *see* N.M. Const., Art. VI, § 3.

For statutory provisions relating to the judicial standards commission, *see* 34-10-1 NMSA 1978 et seq.

For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, *see* the addenda to this article.

The 1967 amendment, which was proposed by H.J.R. No. 2 § 1 (Laws 1967) and adopted at the special election held on November 7, 1967, with a vote of 39,806 for and 11,646 against, added this section as new to article VI.

The 1978 amendment, which was proposed by S.J.R. No. 3 (Laws 1977) and adopted at the general election held on November 7, 1978, by a vote of 142,468 for and 53,660 against, substituted the present first sentence of the second paragraph for "In accordance with this section, any justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office, or willful and persistent failure to perform his duties or habitual intemperance, or he may be retired for disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character."

The 1998 amendment, which was proposed by S.J.R. No. 5, § 2 (Laws 1997) and adopted at the general election held November 3, 1998 by a vote of 213,354 for and 199,143 against, inserted "one magistrate" near the beginning of the first paragraph.

The 2012 amendment, which was proposed by H.J.R. No. 18 (Laws 2011) and adopted at a general election held on November 6, 2012 by a vote of 403,149 for and 266,171 against, increased the number of members of the judicial standards commission by adding a municipal judge and a public member; in the first paragraph, in the first sentence, after "one magistrate", added "one municipal judge" and after "terms of four years, and", deleted "six" and added "seven"; in the second paragraph, in the first sentence, after "interfering with the performance of", deleted "his" and added "the justice's, judge's or magistrate's"; in the third paragraph, in the second sentence, after "retired with the same rights as if", deleted "he" and added "the justice, judge or magistrate", and after "removed from office, and", deleted "his" and added "the justice's, judge's or magistrate's"; and in the last paragraph, in the fourth sentence, after "No justice, judge" added "or magistrate" and after "participate in any proceeding involving", deleted "his" and added "the justice's, judge's or magistrate's".

Willful misconduct required for discipline. — Where a municipal judge improperly issued criminal contempt complaints to two attorneys for their role in an appeal from his court based on his unfounded suspicion that the attorneys had misrepresented the municipal court proceedings to the district court; the judge researched the issues of

indirect contempt and what he could do if his decisions were being nullified by the attorneys; the judge failed to obtain a transcript of the district court proceedings to ascertain the facts before acting on his suspicions; and the judge failed to recuse himself, but dismissed the contempt complaints without hearing the case, the actions of the judge were negligent, but not willful, and were not grounds for discipline. In the Matter of Locatelli, 2007-NMSC-029, 141 N.M. 755, 161 P.3d 252.

No conflict with Article V, Section 5. — This section addresses the power to fill a vacancy. N.M. Const., art. V, § 5, addresses the power to remove officers. The two powers are not mutually exclusive, and one does not negate the other. State ex rel. N.M. Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Staggered terms. — The use of staggered terms is not sufficient to limit the governor's removal power under N.M. Const., art. V, § 5. While policies underlying staggered terms are important, such policies cannot override the governor's express removal authority. State ex rel. N.M. Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Removal of members. — Neither this section nor its implementing statutes provides a mechanism for the removal of commission members. State ex rel. N.M. Judicial Standards Comm'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197.

Recall of municipal judge. — Since this section creates a judicial standards commission and explicitly provides grounds for and general procedures to be followed in removing judges from office, no legislatively created means of removing judicial officers is contemplated; therefore, 3-14-16 NMSA 1978, providing for recall of elective officers in commission-manager municipalities, is contrary to this section insofar as it pertains to removal of municipal judges. Cooper v. Albuquerque City Comm'n, 85 N.M. 786, 518 P.2d 275 (1974).

Supreme court makes its own independent decision as to the removal of a judge on the merits. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Removal of judges. — Given the authority with which a judge is entrusted, as a matter of equal protection principles he or she may be distinguished from other county officials and be subjected to removal from office on less than proof beyond a reasonable doubt. In re Castellano, 119 N.M. 140, 889 P.2d 175 (1995).

The canons of judicial ethics do not control the determination of the issue of willful judicial misconduct under the constitution. They only furnish some proof of what constitutes appropriate judicial conduct. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Standard of proof to be applied in cases of judicial misconduct is clear and convincing evidence. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Discipline for misconduct during prior, different term of office. — Previous acts of misconduct on the part of a judge or justice, committed in his official capacity as a judge or justice during a prior term of judicial office, follow the judge to any subsequent judicial office. Those acts of misconduct may be the subject of disciplinary proceedings before the judicial standards commission during a present and different term of judicial office held by that judge or justice. In re Romero, 100 N.M. 180, 668 P.2d 296 (1983).

Candidates for judicial office are required to comply with all provisions of the code of judicial conduct and a judge may be disciplined for misconduct committed during an election campaign. In the Matter of Rodella, 2008-NMSC-050, 144 N.M. 617, 190 P.3d 338.

Where a judge was asked by a friend to obtain his father's release from jail; the judge called the jail and set bond; when no one was available to set bond, the judge changed his release order to release the defendant to the custody of his wife; the judge hand-delivered the release order to the jail; and the judge presided over the defendant's arraignment, the judge's conduct did not constitute willful misconduct in office. In the Matter of Rodella, 2008-NMSC-050, 144 N.M. 617, 190 P.3d 338.

Actions held to constitute willful misconduct. — Where a judge met ex parte with the complaining witness in a domestic violence case who had been subpoenaed by the state to testify in her husband's trial; the judge told the witness that she did not have to respond to the subpoena; the witness failed to appear at trial; the judge signed a document recusing himself when the prosecutor raised the issue of the judge's ex parte conversation with the witness; and later when the witness appeared, the judge recalled the case and dismissed it, the judge's conduct constituted willful misconduct in office. In the Matter of Rodella, 2008-NMSC-050, 144 N.M. 617, 190 P.3d 338.

A judge is without authority to direct the juvenile probation office to refrain from referring juvenile cases to the district attorney without the judge's prior written consent, or to relieve the district attorney as children's court attorney and to appoint private attorneys to act and to be compensated out of the district attorney's budget, and to do so constitutes bad faith, malicious abuse of judicial power and willful misconduct in office. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

It is willful misconduct in office for a judge knowingly to countermand orders of his presiding judge for a prisoner to be immediately transported to the state penitentiary. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Willful misconduct. — Where a magistrate court judge, who had developed a personal relationship with a defendant in a criminal case, asked the magistrate judge who was assigned to the defendant's case to make special concessions with regard to the defendant's bond, attempted to influence the disposition of the defendant's case, instructed the clerks of the magistrate court to issue a clearance for the defendant's driver's license in the same case, and attempted to influence a police officer who had stopped the car driven by the defendant for speeding; the judge evaded attempts to

serve him with an order of the judicial standards commission to submit to a drug test and refused to submit to a drug test; and the judge tested positive for cocaine and cocaine metabolites when the supreme court mandated that he comply with the commission's order, the judge's actions constituted willful judicial misconduct that warranted removal from judicial office. In the Matter of Garza, 2007-NMSC-028, 141 N.M. 831, 161 P.3d 876.

Failure to correct attorneys' mistakes not unjudicial conduct. — Mistakes made by attorneys in making applications for temporary restraining orders which are not noticed or corrected by judges do not automatically constitute unjudicial conduct. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Attorney may act as temporary presiding officer at hearing. — Proceedings before the judicial standards commission are not illegal because an attorney acts as temporary presiding officer of a hearing on specific charges of misconduct where the chairman of the commission is a lay person. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Municipal judge is not subject to recall election under either state law or the municipal charter; the superintending control of the supreme court over inferior courts affords a present avenue for removal of any municipal judge, should the situation so warrant. 1973 Op. Att'y Gen. No. 73-03.

Law reviews. — For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?" see 9 Nat. Resources J. 446 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 17 et seq.

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730.

48A C.J.S. Judges §§ 35-52.

Sec. 33. [Retention or rejection at general election.] (1994)

A. Each justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge shall have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election. Thereafter, each such justice or judge shall be subject to retention or rejection on a nonpartisan ballot. Retention of the judicial office shall require at least fifty-seven percent of the vote cast on the question of retention or rejection.

B. Each justice of the supreme court or judge of the court of appeals shall be subject to retention or rejection in like manner at the general election every eighth year.

C. Each district judge shall be subject to retention or rejection in like manner at the general election every sixth year.

D. Each metropolitan court judge shall be subject to retention or rejection in like manner at the general election every fourth year.

E. Every justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge holding office on January 1 next following the date of the election at which this amendment is adopted shall be deemed to have fulfilled the requirements of Subsection A of this section and the justice or judge shall be eligible for retention or rejection by the electorate at the general election next preceding the end of the term of which the justice or judge was last elected prior to the adoption of this amendment. (As added November 8, 1988, and as amended November 8, 1994.)

ANNOTATIONS

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

The 1994 amendment, proposed by S.J.R. No. 1 (Laws 1994) and adopted at the general election held on November 8, 1994 by a vote of 222,910 for and 166,639 against, added the last sentence of Subsection A requiring 57 percent of the vote cast for judicial retention.

Compiler's notes. — An amendment to Article VI, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 33 relating to elections for the retention or rejection of supreme court justices, judges of the court of appeals and district judges, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

When successor judge must stand for retention. — A district judge elected in a partisan election is subject to retention in the sixth year of the predecessor judge's term. State ex rel. King v. Raphaelson, 2015-NMSC-028.

Where the state of New Mexico, through the office of the attorney general, filed a petition for writ of quo warranto seeking to have the New Mexico supreme court remove a district court judge from the bench who, after her unsuccessful retention election, claimed to not be subject to a retention election until six years after her partisan election, the supreme court granted the state's petition for writ of quo warranto holding that New Mexico's judicial selection system was designed so that all district judges statewide are up for retention at the same time every six years. The district court judge was properly up for retention at the end of her predecessor's six-year term, rather than six years after her partisan election. State ex rel. King v. Raphaelson, 2015-NMSC-028.

N.M. Const., Art. VI, Section 33 does not govern the process of judicial succession. — This provision does not prohibit a judicial nominating commission from considering, and the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. Clark v. Mitchell, 2016-NMSC-005.

Where a tenth judicial district court judge failed to garner at least fifty-seven percent of the votes cast on the question of his retention as required by N.M. Const., Art. VI, § 33 of the New Mexico constitution, where the judge applied for the resulting judicial vacancy, and where the judicial nominating committee submitted for consideration the judge's name to the governor, who then appointed the judge to the vacant judicial position, petition for writ of quo warranto was denied because the New Mexico constitution does not prohibit a judicial nominating commission from considering, and the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. Clark v. Mitchell, 2016-NMSC-005.

Judicial officers holding office on January 1, 1995, but appointed to office after adoption of the 1994 amendment to this section, are deemed to have been elected to office in a partisan election, and are eligible for retention or rejection by the voters at the end of the term for which elected. 1995 Op. Att'y Gen. No. 95-03.

Simultaneous declarations of candidacy. — A district judge may not file a declaration of candidacy for retention of office and, at the same time, file a declaration of candidacy in a primary election for a statewide judicial office. 1990 Op. Att'y Gen. No. 90-04.

Law reviews. — For article, "Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election," see 30 N.M. L. Rev. 177 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 8 et seq.

48A C.J.S. Judges §§ 12 to 14, 21 to 24.

Sec. 34. [Vacancies in office; date for filing declaration of candidacy.] (2014)

The office of any justice or judge subject to the provisions of Article 6, Section 33 of this constitution becomes vacant on January 1 immediately following the general election at which the justice or judge is rejected by more than forty-three percent of those voting on the question of retention or rejection or on January 1 immediately following the date the justice or judge fails to file a declaration of candidacy for the retention of the justice's or judge's office in the general election at which the justice or judge would be subject to retention or rejection by the electorate. Otherwise, the office becomes vacant upon the date of the death, resignation or removal by impeachment of the justice or judge. (As added November 8, 1988; as amended November 8, 1994 and November 4, 2014.)

ANNOTATIONS

Compiler's notes. — An amendment to Article VI, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 34 relating to the duties of the judicial standards commission relative to retention elections, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

The 1994 amendment, proposed by S.J.R. No. 1 (Laws 1994) and adopted at the general election held on November 8, 1994 by a vote of 222,910 for and 166,639 against, substituted "more than forty-three percent of those voting" for "a majority of those voting" near the beginning of the section.

The 2014 amendment, proposed by S.J.R. No. 16 (Laws 2014) and adopted at the general election held on November 4, 2014 by a vote of 264,351 for and 159,580 against, allowed the legislature to set the date for filing declarations of candidacy for judicial retention elections; and deleted the former last sentence which provided that "The date for filing a declaration of candidacy for retention of office shall be the same as that for filing a declaration of candidacy in a primary election".

Applicability to removal under Art. VI, § 32. — This section refers to removal by impeachment or by those methods that under the constitutional scheme are analogous; it does not limit the supreme court's authority to act upon the judicial standards commission's petition for removal of a district court judge. In re Castellano, 119 N.M. 140, 889 P.2d 175 (1995).

Simultaneous declarations of candidacy. — A district judge may not file a declaration of candidacy for retention of office and, at the same time, file a declaration of candidacy in a primary election for a statewide judicial office. 1990 Op. Att'y Gen. No. 90-04.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 30 to 34.

Sec. 35. [Appellate judges nominating commission.]

There is created the "appellate judges nominating commission", consisting of: the chief justice of the supreme court or the chief justice's designee from the supreme court; two judges of the court of appeals appointed by the chief judge of the court of appeals; the governor, the speaker of the house of representatives and the president pro tempore of the senate shall each appoint two persons, one of whom shall be an attorney licensed to practice law in this state and the other who shall be a citizen who is

not licensed to practice law in any state; the dean of the university of New Mexico school of law, who shall serve as chairman of the commission and shall vote only in the event of a tie vote; four members of the state bar of New Mexico, representing civil and criminal prosecution and defense, appointed by the president of the state bar and the judges on this committee. The appointments shall be made in such manner that each of the two largest major political parties, as defined by the Election Code, shall be equally represented on the commission. If necessary, the president of the state bar and the judges on this committee shall make the minimum number of additional appointments of members of the state bar as is necessary to make each of the two largest major political parties be equally represented on the commission. These additional members of the state bar shall be appointed such that the diverse interests of the state bar are represented. The dean of the university of New Mexico school of law shall be the final arbiter of whether such diverse interests are represented. Members of the commission shall be appointed for terms as may be provided by law. If a position on the commission becomes vacant for any reason, the successor shall be selected by the original appointing authority in the same manner as the original appointment was made and shall serve for the remainder of the term vacated.

The commission shall actively solicit, accept and evaluate applications from qualified lawyers for the position of justice of the supreme court or judge of the court of appeals and may require an applicant to submit any information it deems relevant to the consideration of his application.

Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

Immediately after receiving the commission nominations, the governor may make one request of the commission for submission of additional names, and the commission shall promptly submit such additional names if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment to the judicial office. The governor shall fill a vacancy or appoint a successor to fill an impending vacancy in the office of justice of the supreme court or judge of the court of appeals within thirty days after receiving final nominations from the commission by appointing one of the persons nominated by the commission for appointment to that office. If the governor fails to make the appointment within that period or from those nominations, the appointment shall be made from those nominations by the chief justice or the acting chief justice of the supreme court. Any person appointed shall serve until the next general election. That person's successor shall be chosen at such election and shall hold the office until the expiration of the original term. (As added November 8, 1988.)

ANNOTATIONS

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, *see* the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Compiler's notes. — An amendment to Article VI, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 35 relating to the filling of judicial vacancies, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

When successor judge must stand for retention. — A district judge elected in a partisan election is subject to retention in the sixth year of the predecessor judge's term. State ex rel. King v. Raphaelson, 2015-NMSC-028.

Where the state of New Mexico, through the office of the attorney general, filed a petition for writ of quo warranto seeking to have the New Mexico supreme court remove a district court judge from the bench who, after her unsuccessful retention election, claimed to not be subject to a retention election until six years after her partisan election, the supreme court granted the state's petition for writ of quo warranto holding that New Mexico's judicial selection system was designed so that all district judges statewide are up for retention at the same time every six years. The district court judge was properly up for retention at the end of her predecessor's six-year term, rather than six years after her partisan election. State ex rel. King v. Raphaelson, 2015-NMSC-028.

The judicial succession process is separate and apart from the retention election process. — This provision does not prohibit a judicial nominating commission from considering, and the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. Clark v. Mitchell, 2016-NMSC-005.

Where a tenth judicial district court judge failed to garner at least fifty-seven percent of the votes cast on the question of his retention as required by N.M. Const., Art. VI, § 33 of the New Mexico constitution, where the judge applied for the resulting judicial vacancy, and where the judicial nominating committee submitted for consideration the judge's name to the governor, who then appointed the judge to the vacant judicial position, petition for writ of quo warranto was denied because the New Mexico constitution does not prohibit a judicial nominating commission from considering, and the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. Clark v. Mitchell, 2016-NMSC-005.

Law reviews. — For article, "Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election," see 30 N.M. L. Rev. 177 (2000).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 32 to 34.

Sec. 36. [District court judges nominating committee.]

There is created the "district court judges nominating committee" for each judicial district. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the "district judges nominating committee" except that: the chief judge of the district court of that judicial district or the chief judge's designee from that district court shall sit on the committee; there shall be only one appointment from the court of appeals; and the citizen members and state bar members shall be persons who reside in that judicial district. (As added November 8, 1988.)

ANNOTATIONS

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, *see* the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Compiler's notes. — An amendment to Article 6, proposed by S.J.R. No. 2 (Laws 1981), which would have added a new Section 36 relating to the determination of judicial vacancies, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

A district court nominating commission has a duty to actively solicit qualified applicants so as to make a good faith effort to provide the governor with a list of more that one recommended nominee. State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n, 2007-NMSC-023, 141 N.M. 657, 160 P.3d 566.

When successor judge must stand for retention. — A district judge elected in a partisan election is subject to retention in the sixth year of the predecessor judge’s term. State ex rel. King v. Raphaelson, 2015-NMSC-028.

Where the state of New Mexico, through the office of the attorney general, filed a petition for writ of quo warranto seeking to have the New Mexico supreme court remove a district court judge from the bench who, after her unsuccessful retention election, claimed to not be subject to a retention election until six years after her partisan election, the supreme court granted the state’s petition for writ of quo warranto holding that New Mexico’s judicial selection system was designed so that all district judges statewide are up for retention at the same time every six years. The district court judge was properly up for retention at the end of her predecessor’s six-year term, rather than six years after her partisan election. State ex rel. King v. Raphaelson, 2015-NMSC-028.

The judicial succession process is separate and apart from the retention election process. — This provision does not prohibit a judicial nominating commission from considering, and the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. Clark v. Mitchell, 2016-NMSC-005.

Where a tenth judicial district court judge failed to garner at least fifty-seven percent of the votes cast on the question of his retention as required by N.M. Const., Art. VI, § 33 of the New Mexico constitution, where the judge applied for the resulting judicial vacancy, and where the judicial nominating committee submitted for consideration the judge's name to the governor, who then appointed the judge to the vacant judicial position, petition for writ of quo warranto was denied because the New Mexico constitution does not prohibit a judicial nominating commission from considering, and the governor from appointing, an otherwise qualified judicial applicant to fill a vacant judicial office based on the judicial applicant's nonretention in the immediately preceding election. Clark v. Mitchell, 2016-NMSC-005.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 32 to 34.

Sec. 37. [Metropolitan court judges nominating committee.]

There is created the "metropolitan court judges nominating committee" for each metropolitan court. Each and every provision of Section 35 of Article 6 of this constitution shall apply to the metropolitan court judicial nominating committee except that: no judge of the court of appeals shall sit on the committee; the chief judge of the district court of the judicial district in which the metropolitan court is located or the chief judge's designee from that district court shall sit on the committee; the chief judge of that metropolitan court or the chief judge's designee from that metropolitan court shall sit on the committee only in the case of a vacancy in a metropolitan court; and the citizen members and state bar members shall be persons who reside in the judicial district in which that metropolitan court is located. (As added November 8, 1988.)

ANNOTATIONS

Cross references. — For the rules of the judicial nominating commission, oath, open meetings resolution, and applicant questionnaire, *see* the addenda to this article.

The 1988 amendment to Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 237 et seq.

48A C.J.S. Judges §§ 32 to 34.

Sec. 38. [Chief judge of district and metropolitan court districts.] (1996)

Each judicial district and metropolitan court district shall have a chief judge who shall have the administrative responsibility for that judicial district or metropolitan court district. Each chief judge shall be selected by a majority of the district judges or, in the case of the metropolitan court, by a majority of the metropolitan court judges in that judicial district or metropolitan court district. In the event of a tie, the senior judge shall be the chief judge. (As added November 8, 1988.)

ANNOTATIONS

The 1988 amendment Article VI, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 26.

48A C.J.S. Judges § 6.

Sec. 39. [Creation of public defender department and public defender commission.] (2012)

A. A "public defender department" is established as an independent state agency. The chief public defender is the administrative head of the public defender department. The term and qualifications of the chief public defender shall be as provided by law.

B. The "public defender commission" is established. The public defender commission shall appoint the chief public defender. The public defender commission shall exercise independent oversight of the department and provide guidance to the chief public defender in the administration of the department and the representation of indigent persons. The commission shall not interfere with the discretion or the professional judgment or advocacy of a public defender office, a public defender contractor or assigned counsel in the representation of individual cases. Terms, qualifications and membership of the public defender commission shall be as provided by law. (As added November 6, 2012.)

ANNOTATIONS

Cross references. — For the judicial standards commission, *see* N.M. Const., art. VI, § 32.

For the appellate judges nominating commission, *see* N.M. Const., art. VI, § 35.

For the district court judges nominating committee, *see* N.M. Const., art. VI, § 36.

For the metropolitan court judges nominating committee, *see* N.M. Const., art. VI, § 37.

The 2012 amendment to Article VI, which was proposed by H.J.R. No. 26 (Laws 2012) and adopted at a general election held on November 6, 2012 by a vote of 404,132 for and 247,242 against, added this section.

ADDENDA JUDICIAL NOMINATING COMMISSION

Explanatory Note. (2011)

AMENDMENT OF RULES GOVERNING

JUDICIAL NOMINATING COMMISSIONS AND COMMITTEES

OF THE STATE OF NEW MEXICO

Kevin K. Washburn, Dean of the University of New Mexico School of Law and Chair of the Appellate Judges Nominating Commissions established under Article VI, §§ 35, 36 and 37 of the New Mexico Constitution, submits to the New Mexico Compilation Commission for publication the following amendments to the Rules Governing the Judicial Nominating Commissions and Committees. These amendments to the rules were drafted to provide clear procedures for active solicitation of judicial candidates by commissioners and for procedures, including active solicitation, if the Governor requests additional names. To date, these rules, as amended, have been adopted by the Appellate Court Judicial Nominating Commission and the District Court Judges Nominating Committees for the First, Second, Third, Fifth, Eighth and Twelfth Districts, as well as the Bernalillo County Metropolitan Court Nominating Committee. One of the amendments, set forth in the current version as Section 11, has also been adopted by the Fourth, Sixth and Tenth Judicial District Judges Nominating Committees. These amendments will be presented for adoption by the remainder of the District Court Judges Committees when meetings in the remaining judicial districts are presented.

Kevin K. Washburn, Chair
Judicial Nominating Commissions

Rules of the Judicial Nominating Commission. (1996)

JUDICIAL NOMINATING COMMISSION RULES

SECTION 1. Rules.

A. These Rules shall be known as the "Rules Governing Judicial Nominating Commissions," and are applicable to the appellate judges nominating commission, the district court judges nominating committees and the metropolitan court judges nominating committee established under Article VI of the New Mexico Constitution.

B. These Rules shall be effective beginning upon adoption by each commission (Appellate, District, Bernalillo County Metropolitan).

C. By a majority vote of those commissioners present, each judicial nominating commission or committee may adopt additional rules consistent with the Rules Governing Judicial Nominating Commissions, Article VI of the New Mexico Constitution and state law.

SECTION 2. Role of the Chair.

A. Upon the occurrence of a judicial vacancy or an upcoming judicial vacancy, it is the responsibility of the chair to announce publicly the existence of the vacancy, the application and nomination process and the deadline for applications.

B. The chair shall provide notice of the vacancy to the persons charged by the constitution with the duty of appointing commissioners and shall coordinate the appointment of commissioners in accordance with the constitutional requirements.

C. The chair shall schedule the meetings of the commission and provide the media with notice of the date, time and place of the meetings.

D. The chair shall provide an application packet to applicants and persons nominated by others. For inclusion in the packet, the chair shall prepare a questionnaire requesting information relevant to the evaluation criteria specified in Section 5 of these Rules. Except as specified in the questionnaire, the questionnaire becomes public upon submission.

E. The chair, after the deadline for applications has passed, shall provide the media with the list of applicants who will be considered for the vacancy and date of interviews.

F. The chair shall prepare a proposed agenda and shall send the agenda and the applications to the commission members prior to the meeting.

G. The chair shall determine the order of interviews.

H. The chair shall send a list of the applicants to the Chief Disciplinary Counsel of the Disciplinary Board and request verification that none of the applicants has been the subject of a formal specification of charges.

I. The chair shall send a list of those applicants who are serving as judges in the state to the Executive Director of the Judicial Standards Commission and request verification that none of those applicants has been the subject of formal disciplinary charges.

J. Upon written request by a commissioner, the chair may seek additional information from the applicant or others relevant to the evaluation criteria specified in Section 5 of these Rules.

K. The chair shall preside over meetings of the commission.

L. The chair shall file the oaths of office executed by the commissioners with the Secretary of State.

SECTION 3. Role of the Commissioners.

A. Each commissioner shall take an oath of office prior to the start of a meeting of the commission.

B. Each commissioner shall disclose to the commission all current or past professional, family, business, and other special relationships with any of the applicants. These relationships shall not disqualify a commissioner from participating unless the commissioner feels that he/she cannot be impartial and cannot comply with his/her oath of office as to any applicant.

SECTION 4. Active Solicitation.

A. Upon the occurrence of a judicial vacancy or upcoming judicial vacancy, it is the responsibility of the chair and the commissioners to actively solicit applicants for the position in the following ways.

B. The chair shall advertise the vacancy in as many of the following ways as possible, given the amount of time and financial resources available:

1. Announce vacancy to media within the relevant jurisdiction.

2. Announce vacancy to state, county and local bar associations, including women, minority and specialty bars (including, for example and when appropriate, organizations representing prosecutors, criminal defense attorneys, government attorneys, trial lawyers, and insurance defense lawyers) by notification to their publications and/or listservs.

3. Send email announcement to all bar association members within the Judicial District.

4. Notify the Bar Commissioners who represent lawyers in the Judicial District, asking them to suggest candidates and encouraging them to personally contact qualified attorneys to ask them to apply.

5. Identify specific sections, divisions, or committees of the State Bar whose membership might have an interest in and qualifications for the new or vacant position, asking the chairs to suggest names, and encouraging them to personally contact qualified attorneys to ask them to apply.

6. Invite nominations of qualified candidates by third parties. Invite nominated candidates to apply.

7. Place notice on the Judicial Nominating Commission website, on court websites in the relevant jurisdiction, and on the Governor's website.

8. Send notice of the vacancy to previous applicants from the relevant jurisdiction.

9. Prepare educational materials about the application process and required qualifications and make them widely available.

10. Send letters out to each member of the bar of the relevant jurisdiction asking them to apply.

C. Commission member shall make every effort to identify qualified applicants and place telephone calls to encourage them to apply.

D. When actively seeking qualified applicants, commissioners shall inform the prospective applicant that being approached by a commissioner does not guarantee a nomination. Each applicant, whether actively recruited or independently seeking a nomination, will be subject to the same investigative and interview procedures. It is important for recruited applicants to realize that they will not be given special consideration simply because the commission is inviting their applications.

SECTION 5. Evaluative Criteria.

The commissioners shall evaluate the applicants on the basis of the constitutional requirements and the following evaluative criteria:

* physical and mental ability to perform the tasks required

* impartiality

* industry

* integrity

* professional skills

* community involvement

* social awareness

* collegiality

* writing ability

* decisiveness

* judicial temperament

* speaking ability

SECTION 6. Commission Meetings.

A. A majority of the commission shall constitute a quorum. Should the chair be absent, the commission will choose a chair from among its members.

B. Meetings shall be open to the public.

C. The public shall be notified of the meeting through notice in the media and in accordance with the commission's Open Meetings Act notice resolution.

D. The chair shall report on actions taken before the meeting on behalf of the commission pursuant to Section 2 of these Rules.

E. Members of the public shall be allotted time for comments or questions concerning the policies and procedures of the commission and also time for comments concerning individual applicants. Public comment by any individual shall be limited to 5 minutes.

SECTION 7. Interviews.

A. Interviews shall be conducted in the order determined by the chair, unless the commission determines that a change is warranted by the circumstances.

B. Unless the commission decides that a different time schedule would be appropriate, applicants shall be scheduled for interviews at intervals of at least 20 minutes and may choose to start with an opening statement of no more than 5 minutes.

C. Each commissioner shall be given the opportunity to question each applicant.

D. Each commissioner should ask each applicant about any information which the commissioner has learned or heard regarding the applicant and which the commissioner intends to raise in closed session.

E. The commission may, for good reason, hear any applicant on a confidential subject in closed session.

SECTION 8. Closed Session.

A. Following the interviews, the commission may go into closed session to discuss the applicants' qualifications and to evaluate them according to the evaluative criteria specified in Section 5 of these Rules. The discussion during closed session shall be confidential. The extent of confidentiality shall be determined by the commission, but, in any event, shall extend to prohibit express or implied attribution of comments or opinions to individual commissioners.

B. As part of the discussion of the applicants, straw votes, non-binding and by secret ballot, shall be taken to determine support for particular applicants.

C. Before each round of straw votes, the names of the applicants then under consideration shall be raised for discussion by the Commission.

D. Commissioners shall cast only one vote per applicant but may vote for as many of the applicants as he/she wishes.

E. When the commission, in closed session, after deliberations and at least two rounds of straw votes, believes that it is ready to vote in public session, the commission shall reconvene in open session for a final vote.

SECTION 9. Formal Vote.

A. The commission, using the evaluative criteria set forth in Section 5, shall determine which applicants are both qualified for judicial office and should be recommended to the Governor for appointment.

B. The formal vote shall take place in public session. The chair may vote only in the event of a tie. A vote of the majority of the commissioners present shall be required to recommend a nominee or nominees to the Governor.

C. In recognition of the fact that the New Mexico Constitution vests the Governor with the authority to appoint judges and that the commission does not select the judges, the commission should strive to recommend a list of two or more names for each position to the Governor.

SECTION 10. Recommendation to the Governor.

The chair shall send to the Governor, in alphabetical but unranked order, the names of the applicants recommended by the commission. The chair shall notify the media and all applicants of the commission's recommendation to the Governor.

SECTION 11. Request for Additional Names.

If, after receiving the recommendation of the commission, the Governor chooses to request additional names, the chair shall:

A. Actively solicit further applications for the position;

B. Schedule a second meeting of the commission;

C. Provide notice to the applicants, commissioners, media and public of the second meeting;

D. Supply to the media a list of additional applicants, if any;

E. Preside over a second meeting of the commission, following the process set out in these Rules under Sections 3 - 9, including notice to the Governor of any additional names recommended by the commission.

SECTION 12. Forms.

A. Oath/Affirmation of Office

B. Open Meetings Act Resolution

C. Applicant Questionnaire

Oath. (1996)

O A T H

I, _____, do solemnly swear that I will support the Constitution of the United States and the constitution and laws of the State of New Mexico; and that I will faithfully and impartially discharge the duties of the office of Commissioner, _____ Judicial Nominating Commission, on which I am about to enter, to the best of my ability, SO HELP ME GOD.

Commissioner's Signature

Sworn and subscribed before me this _____ day of _____, _____.

Notary's Signature

Title
My commission expires
_____

(This oath, when executed, must be forwarded immediately to the Secretary of State at Santa Fe, New Mexico, accompanied by the filing fee of $3.00)

Open Meetings Resolution. (1996)

JUDICIAL NOMINATING COMMISSION

OPEN MEETINGS RESOLUTION

WHEREAS, the [Appellate] [_____ Judicial District Court] [Metropolitan Court] Judges Nominating Commission ("Commission") met at _____ on _____, _____, at _____, a.m./p.m. as required per law; and

WHEREAS, Section 10-15-1(B) of the Open Meetings Act (NMSA 1978, Sections 10-15-1 to -4) states that, except as may be otherwise provided in the Constitution or the provisions of the Open Meetings Act, all meetings of a quorum of members of any board, council, commission, administrative adjudicatory body or other policymaking body of any state or local public agency held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such body, are declared to be public meetings open to the public at all times; and

WHEREAS, any meetings subject to the Open Meetings Act at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs shall be held only after reasonable notice to the public; and

WHEREAS, Section 10-15-1(D) of the Open Meetings Act requires the Commission to determine annually what constitutes reasonable notice of its public meetings;

NOW, THEREFORE, BE IT RESOLVED by the Commission that:

1. All meetings shall be held on the date and at the time and place indicated on the meeting notice.

2. Notice of meetings at which applicant interviews will be conducted will be given at least ten (10) days in advance of the meeting date. Notice of other, nonemergency meetings shall be given at least three (3) days in advance of the meeting date. The

notice for a meeting shall include an agenda or information on how the public may obtain a copy of the agenda. The agenda shall be available to the public at least twenty-four (24) hours before a meeting.

3. Emergency meetings will be called only under circumstances which demand immediate action to protect the health, safety and property of citizens or to protect the Commission from substantial financial loss. The Commission will avoid emergency meetings whenever possible. Emergency meetings may be called upon twenty-four (24) hours' notice, unless the threat of personal injury, property damage or financial loss require less notice. The notice for all emergency meetings shall include an agenda or information on how the public may obtain a copy of the agenda.

4. For purposes of the meetings described in paragraph 2 of this Resolution, notice of the date, time, place and agenda shall be placed in the Bar Bulletin and newspapers of general circulation in the state and posted at the Commission's office at _____. The Secretary shall also mail copies of the written notice or provide telephone notice to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation which have made a written request for notice of public meetings.

5. For purposes of emergency meetings described in paragraph 3 of this Resolution, notice of the date, time, place and agenda shall be posted at the Commission's office at _____. Telephone notice shall also be provided to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation which have made a written request for notice of public meetings.

6. In addition to the information specified above, all notices shall include the following language:

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact _____ at _____ at least one week prior to the meeting or as soon as possible. Public documents, including the agenda and minutes, can be provided in various accessible formats. Please contact _____ at _____ if a summary or other type of accessible format is needed.

7. The Commission may close a meeting to the public only if the subject matter of such discussion or action is exempted from the open meeting requirement under Section 10-15-1(H) of the Open Meetings Act.

(a) If any meeting is closed during an open meeting, such closure shall be approved by a majority vote of a quorum of the Commission taken during the open meeting. The authority for the closure and the subjects to be discussed shall be stated with reasonable specificity in the motion for closure and the vote on closure of each

individual member shall be recorded in the minutes. Only those subjects specified in the motion may be discussed in a closed meeting.

(b) If the decision to hold a closed meeting is made when the Commission is not in an open meeting, the closed meeting shall not be held until public notice, appropriate under the circumstances, stating the specific provision of law authorizing the closed meeting and the subjects to be discussed with reasonable specificity is given to the members and to the general public.

(c) Following completion of any closed meeting, the minutes shall state whether the matters discussed in the closed meeting were limited only to those specified in the motion or notice for closure.

(d) Except as provided in Section 10-15-1(H) of the Open Meetings Act, any action taken as a result of discussions in a closed meeting shall be made by vote of the Commission in an open public meeting.

Passed by the [Appellate] [_____ Judicial District Court] [Metropolitan Court] Judges Nominating Commission this day of _____, _____.

Applicant Questionnaire. (1996)

Name:

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the _____ (name of Court)

APPLICATION

PERSONAL

1. Full name:
2. County of Residence:
3. Birthplace:
4. If born outside the United States, give the basis for your citizenship:
5. Birth date:
6. Marital status:
7. If married, list spouse's full name:
8. Spouse's occupation:

9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts:
Answer:

10. List all places of residence, city and state, and approximate dates for the last 10 years:
Date(s) of residence:
Street address:
City:
State:
Zip code:

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work):
High school(s):
Colleges:
Law schools(s):

12. Bar admissions and dates:

EMPLOYMENT

13. List your present employment:
Date(s) of employment:
Employer:
Mailing address:
Business phone:
Position:
Duties:
Supervisor:

List your previous employment (beginning with most recent):

14. Dates of employment:
Employer:
Mailing address:
Business phone:
Business FAX:
Email address:
Position:

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:
Answer:

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?
Answer:

17. How extensive is your experience in Commercial Law?
Answer:

18. How extensive is your experience in Domestic Relations Law?
Answer:

19. How extensive is your experience in Juvenile Law?
Answer:

20. How extensive is your experience in Criminal Law?
Answer:

21. How extensive is your experience in Appellate Law?
Answer:

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.
Answer:

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.
Answer:

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.
Answer:

PUBLIC OFFICES, PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates
Public office:
Dates:

26. Activities in professional organizations, including offices held for last 10 years:
Professional organization:

Position held:
Dates:

Activities in civic organizations, including offices held for last 10 years:

27. Civic organization:
Position held:
Dates:

28. Avocational interests and hobbies:
Answer:

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.
Answer:

30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify.
Answer:

31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.

32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?
Answer:

33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?
Answer:

34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).
Answer:

35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial

question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?
Answer:

36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation in the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?
Answer:

37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?
Answer:

38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.
Answer:

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.
Answer:

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship.
Answer:

41. Do you foresee any conflicts under the New Mexico Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.
Answer:

42. Do you meet the constitutional qualifications for age, residency and years of practice for the judicial office for which you are applying? Please explain.
Answer.

43. Please explain your reasons for applying for a judicial position and what factors you

believe indicate that you are well suited for it.
Answer:

44. Does submission of this application express your willingness to accept judicial appointment to the _____ (name of court) if your name is chosen by the Governor?
Answer:

Items to Be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to the Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, the **original letters must be mailed directly to the Judicial Selection Office**.

2. Please attach a list of no more than eight references.

3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.

4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.

5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has

not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/: _____ Date: _____

Name: _____

[Instructions: The Applicant must complete the AFFIRMATION below.]

Waiver of Confidentiality – Professional Disciplinary Bodies and Judicial Disciplinary and Administrative Bodies

The undersigned applicant hereby waives, until the judicial position applied for is filled, the benefits of any statute, rule or regulation prescribing confidentiality of records of any

administrative or disciplinary committee of the State of New Mexico, including but not limited to the Disciplinary Board of the Supreme Court, the Board of Bar Examiners, the Judicial Standards Commission and the Judicial Performance Evaluation Commission; and does authorize any of the above to furnish to the Judicial Nominating Commission, any such information, including documents, records, bar association files regarding charges or complaints filed against the Judicial Nominating Commission or any of its members, agents or representatives to inspect and make copies of such documents, records, and other information. The undersigned does hereby release and discharge the Judicial Nominating Commission, its individual representatives, and any other person so furnishing information from any and all liability of every nature and kind arising out of the furnishing of information so provided concerning the applicant. The undersigned also expressly consents to the release of his/her name and this form to the public in the sole discretion of the Judicial Nominating Commission.

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein above on the instrument entitled, "Waiver of Confidentiality – Professional Disciplinary Bodies and Judicial Disciplinary Bodies"; that he/she has read the same and is aware of the content thereof; that the same is true and correct according to the best knowledge and belief of the undersigned; that he/she executed the same freely and voluntarily; and that he/she affirms the truth of all these statements under penalty of perjury.

/s/: _____ Date: _____

Please mail the completed and signed application, with attachments, to the Judicial Selection Office at the following address:
Chair, Judicial Selection Commission
UNM School of Law

ARTICLE VII
Elective Franchise

Section 1. [Qualifications of voters; absentee voting; school elections; registration.]

A. Every person who is a qualified elector pursuant to the constitution and laws of the United States and a citizen thereof shall be qualified to vote in all elections in New Mexico, subject to residency and registration requirements provided by law, except as restricted by statute either by reason of criminal conviction for a felony or by reason of mental incapacity, being limited only to those persons who are unable to mark their ballot and who are concurrently also unable to communicate their voting preference. The legislature may enact laws providing for absentee voting by qualified electors. All school elections shall be held at different times from partisan elections.

B. The legislature shall have the power to require the registration of the qualified electors as a requisite for voting and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise. Not more than two members of the board of registration and not more than two judges of election shall belong to the same political party at the time of their appointment. (As amended November 7, 1967, November 4, 2008, November 2, 2010, and November 4, 2014, as directed by N.M. Supreme Court Order No. S-1-SC-35524, approved September 21, 2016, in State of N.M. ex rel. League of Women Voters of N.M. v. Advisory Comm. to the N.M. Compilation Comm'n, 2016-NMSC-____.)

ANNOTATIONS

Cross references. — For special restrictions on amendment of this section, *see* N.M. Const., art. VI, § 3 and art. XIX, § 1, as qualified by notes thereunder.

For Election Code, *see* Chapter 1 NMSA 1978.

For governor's power to restore political rights of persons convicted of a felony, *see* N.M. Const. Art. V, §6.

Comparable provisions. — Idaho Const., art. VI, §§ 1 to 3.

Iowa Const., art. II, § 5; amendment 30.

Montana Const., art. IV, §§ 1, 2.

Utah Const., art. IV, §§ 2, 6, 8.

Wyoming Const., art. VI, §§ 1, 2, 5, 6.

The 1967 amendment, which was proposed by H.J.R. No. 7, § 1 (Laws 1967) and adopted at the special election held on November 7, 1967, with a vote of 42,101 for and 9,757 against, in the first paragraph, deleted "male" before "citizen" and "Indians not taxed" before "shall be qualified to vote" in the first sentence; added the second sentence relating to absentee voting; and deleted a provision at the end of the paragraph relating to women's suffrage in school elections.

The supreme court issued a writ of mandamus requiring the canvassing board to certify the passage of the amendment. See State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

The 2008 amendment, proposed by S.J.R No. 4 (Laws 2008) and adopted at the general election held on November 4, 2008, by a vote of 512,962 for and 175,767 against, provided for school elections to be held at the same time as other nonpartisan elections; in the first paragraph, after "the precinct in which", deleted "he" and added "the person", and after "different times from", deleted "other" and added "partisan"; and in the second paragraph, after "secrecy of the ballot", deleted the comma and added "and".

The 2010 amendment, proposed by S.J.R No. 6 (Laws 2010) and adopted at the general election held on November 2, 2010, by a vote of 290,593 for and 219,940 against, modernized the language on qualified electors by removing "idiots" and "insane persons" as descriptions of people prohibited from voting, restricted those with a mental incapacity from voting, defined "mental incapacity", removed residency and age requirements for voting, except as provided by law, and provided that the voting rights of people convicted of felonies could be restored by statute; in the first paragraph, deleted "Every citizen of the United States who is over the age of twenty-one years and has resided in New Mexico twelve months, in the county ninety days, and in the precinct in which he offers to vote thirty days, next preceding the election, except idiots, insane persons and persons convicted of a felonious or infamous crime unless restored to political rights, shall be qualified to vote at all elections for public officers." and added the new first sentence; and in the second paragraph, after "secrecy of the ballot", deleted the comma and added "and".

The 2014 amendment, proposed by H.J.R. No. 2 (Laws 2013) and adopted at the general election held on November 4, 2014, by a vote of 258,673 for and 189,783 against, provided for school elections to be held at the same time as other nonpartisan elections; in the first paragraph, added the paragraph designation "A.", after "the precinct in which", deleted "he" and added "the person", and after "different times from",

deleted "other" and added "partisan"; in the second paragraph, added the paragraph designation "B.", and after "secrecy of the ballot", deleted the comma and added "and".

Compiler's note. — The 2008, 2010, and 2014 amendments to N.M. Const., Art. VII, Sec. 1 were compiled in 2016, following the New Mexico Supreme Court's decision in State of New Mexico ex rel. League of Women Voters of New Mexico v. The Advisory Committee to the New Mexico Compilation Commission, S.Ct. No. S-1-SC-35524, in which the Court held "the proposed amendments to Article VII, Section 1 of the Constitution of the State of New Mexico on the 2008, 2010, and 2014 general election ballots did not restrict any rights contained in that section and each amendment therefore was passed by the requisite majority vote of qualified New Mexico electors," and that "the 2010 and 2014 amendments were intended to and did result in different changes to different subject matter of Article VII, Section 1, as reflected in the amendments' respective titles, and the 2014 amendment did not supersede the amendments adopted in the 2010 amendment." To view each amendment in its entirety, *see* the 2008, 2010, and 2014 session laws on *NMONESOURCE.COM*.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 3, § 1 (Laws 1955), which was substantially the same as the 1967 amendment, was submitted to the people at a special election held on September 20, 1955. It failed to pass because it did not receive the necessary majority of each county.

An amendment to this section proposed by S.J.R. No. 2 (Laws 1957), which was substantially the same as the 1967 amendment, was submitted to the people at the general election held on November 4, 1958. It failed to pass because it did not receive the necessary majority of each county.

An amendment to this section proposed by S.J.R. No. 9, § 1 (Laws 1961), which was substantially the same as the 1967 amendment, was submitted to the people at the special election held on September 19, 1961. It was defeated because it did not receive the necessary majority of each county.

An amendment to this section proposed by H.J.R. No. 13, § 1 (Laws 1963), which was substantially the same as the 1967 amendment, was submitted to the people at the general election held on November 3, 1964. It failed to pass because it did not receive the necessary majority of each county.

Senate Joint Memorial 6 (Laws 1969) referred to the constitutional convention an amendment to this section to allow 18 year olds to vote. The constitution submitted by the convention was rejected by the voters on December 9, 1969.

House Joint Memorial 19 (Laws 1969) referred to the constitutional convention an amendment "to permit new residents of this state to vote in presidential elections even though their length of residency does not qualify them as electors of the state." The constitution submitted by the convention was rejected by the voters on December 9, 1969.

An amendment to the constitution proposed by H.J.R. No. 15, § 1 (Laws 1970), which would have repealed Article VII and adopted a new Article VII, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 67,299 for and 63,279 against, failing to meet the voting requirements of N.M. Const., art. XIX, § 1.

Eight amendments to the constitution were proposed by the 1970 session of the legislature although the attorney general has stated that constitutional amendments may not be considered in even-numbered years. See 1965 Op. Att'y Gen. No. 65-212 and 1969 Op. Att'y Gen. No. 69-151.

An amendment to this section proposed by H.J.R. No. 1, § 1 (Laws 1971), which would have lowered the voting age to 18, was submitted to the people at a special election held on November 2, 1971. It was defeated by a vote of 47,767 for and 26,690 against.

Laws 1971, ch. 308, §§ 1 and 2 provided that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

An amendment to this section proposed by H.J.R. No. 31, § 1 (Laws 1973), which would have lowered the voting age to 18, reduced the residency requirement to 30 days in the state, county and precinct and added a provision relating to absentee voting, was submitted to the people at the special election held on November 6, 1973. It was defeated by a vote of 25,198 for and 16,455 against.

An amendment proposed by S.J.R. No. 3 (Laws 1994), which would have substituted "the age of eighteen years and who meets residency requirements established by law, except persons found by a court to be incapacitated for this purpose" for the language beginning "the age of twenty-one" and ending "insane persons", was submitted to the people in the general election held on November 8, 1994. It was defeated by a vote of 172,111 for and 210,576 against.

An amendment proposed by S.J.R. No. 10 (Laws 2001), which would have set 18, rather than 21, as the age of eligibility to vote and would have removed language excluding idiots and insane persons from those qualified to vote, was submitted to the people at the general election held on November 5, 2002. It was defeated by a vote of 184,077 for and 242,921 against.

Amendment XXVI of U.S. constitution. — The twenty-sixth amendment to the United States constitution provides that the right of United States citizens, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age, and gives congress enforcement power.

I. GENERAL CONSIDERATION.

Indian suffrage. — Indians in New Mexico are entitled to vote, the provisions of the New Mexico constitution to the contrary notwithstanding. Trujillo v. Garley, No. 1353 (D.N.M. Aug. 11, 1948).The case was not appealed.

Section was inapplicable to organization of junior college districts by petition and to elections held subsequent to such organization under 21-13-2, 21-13-4 and 21-13-6 NMSA 1978 (repealed); and provisions relating thereto were not invalid under this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

The residence requirement for junior college board members under 21-13-8 NMSA 1978 does not violate either N.M. Const., art. VII, § 2 or this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Authority of legislature. — Delegation of authority to legislature in second paragraph of this section covers regulation of method and mechanics of voting by those persons who are otherwise qualified electors and appear in person; legislature cannot enlarge the right beyond that delineated in first paragraph. Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003 (1944).

Ballots. — Under this section, it is competent for legislature to provide that ballots other than those printed by the respective county clerks shall not be cast, counted or canvassed in any election. State ex rel. Read v. Crist, 25 N.M. 175, 179 P. 629 (1919).

Secrecy of the ballot. — Laws 1915, § 1999 (repealed) providing for an examination of ballots by the board of county commissioners did not violate the provision of this section relating to enactment of laws securing the secrecy of the ballot. Hyde v. Bryan, 24 N.M. 457, 174 P. 419 (1918).

Maintaining secrecy of ballot is privilege personal to voter. Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979).

Compromising secrecy of ballot is not to be tolerated except in cases of paramount public importance; the purity of elections is the public interest which sometimes outweighs the individual's right to have his ballot kept secret. Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979).

Illegal voter has no privilege against testifying as to the persons for whom he voted. Kiehne v. Atwood, 93 N.M. 657, 604 P.2d 123 (1979).

Signature list requirements. — The legislature is charged with the duty of enacting laws to accomplish the purity of elections and protect against abuses, and signature list requirements provided by 1-8-2 and 1-8-3 NMSA 1978 are consistent with its authority and duty to do so; the state has a legitimate interest in trying to determine some degree of good faith on the part of the electors who sign nominating petitions, and in assuring at least a modicum of support for a political party and its nominees whose names are

placed on the general election ballot. People's Constitutional Party v. Evans, 83 N.M. 303, 491 P.2d 520 (1971).

Officers of irrigation districts are not "public officers" within meaning of this section, and hence requirement of certain qualifications for electors in irrigation districts does not violate this section in its meaning. Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Amendment accomplished. — The requirement of a two-thirds vote in each county being unconstitutional, and the demand of ratification by "at least three-fourths of the electors voting in the whole state" having been met when that percentage voting on the particular proposition favored it; the adoption of the constitutional amendment submitted as Amendment No. 7 at the election held on November 7, 1967 was accomplished; it should be certified as having been ratified. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment void. — Proposed 1919 constitutional amendment to permit absent voting (J.R. No. 12, Laws 1919) was void because it was never constitutionally adopted. Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320 (1936).

II. QUALIFICATIONS.

Felony convictions occurring during term of office. — A felony conviction that occurs during the term of an elective office disqualifies the elected official from continuing to hold that office effective upon entry of a judgment of conviction. State ex rel. King v. Sloan, 2011-NMSC-020, 149 N.M. 620, 253 P.3d 33.

Conviction in trial court was determinative, under this section, while said conviction was being appealed. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R. 3rd 290 (1968).

Conviction in federal court. — The conviction of a felony in a foreign jurisdiction, such as the federal court in this instance, should be considered by the courts of another state as being the conviction of a felony within the constitutional prohibition. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R.3d 290 (1968).

Indians have right to vote. — There is nothing in the constitution or the statutes which prohibits an Indian from voting in a proper election, provided he fulfills the statutory requirements required of any other voter. Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

Right to vote is not natural right, but a franchise conferred by organized government. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Naturalization. — Naturalization does not have the effect of automatically conferring the right to vote and the right to hold office in New Mexico. Lopez v. Kase, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

Right to vote cannot be denied by election officers. — The voter shall not be deprived of his rights as an elector either by fraud or mistake of election officers if it is possible to prevent it. Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864 (1944).

Qualification to serve as grand juror. — Grand juror did not have to be a properly registered voter to be a qualified elector, for purposes of sitting on the grand jury. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App. 1990), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1991).

A juror has only to meet the requirements of this section to be a qualified elector under 38-5-1 NMSA 1978, and therefore to be qualified to serve as a grand juror. State v. Chama Land & Cattle Co., 111 N.M. 317, 805 P.2d 86 (Ct. App. 1990), cert. denied, 111 N.M. 262, 804 P.2d 1081 (1991).

III. RESIDENCY.

Residency for federal senate nominees. — New Mexico scheme added an impermissible requirement of at least two years residency to qualifications for United States senator, and was therefore void, due to combination of one-year residency requirement of this section, along with provision of 1-4-2 NMSA 1978, permitting registration by one who will be a qualified elector at the next election (which, in effect, prevents one from registering to vote until he has resided in the state for one year), and the one-year party membership requirement found in 1-8-18 NMSA 1978, prior to amendment, for nomination by a political party. Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972).

Residence in place of employment. — One who is dependent on his earnings for support, and who accepts employment in a place with intention of remaining there so long as the employment is available, is entitled to vote there if other requirements are met. Klutts v. Jones, 21 N.M. 720, 158 P. 490, 1917A L.R.A. 291 (1916).

Los Alamos residents. — Residence in the condemned area of the Los Alamos project does not meet the constitutional requirement of "residence" for voting purposes, but bona fide residents on portions of land in the Los Alamos project occupied by the United States in a proprietary capacity only, remain subject to state jurisdiction in matters not inconsistent with the effective and free use of the land for which it was acquired and meet the constitutional requirements for voting. Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948). See, 1970 Op. Att'y Gen. No. 70-72, analyzing more recent court cases relating to voting rights of persons residing on federal enclaves.

Residence on reservation. — Indian reservation lying within geographic boundaries of the state is a part of the state, and residence for voting purposes, within the meaning of the constitution. Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

IV. VOTING PLACE.

Personal presence is contemplated by words "offers to vote" as used in this section. Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003 (1944) (case decided prior to 1967 amendment authorizing absentee voting).

Prior to amendment, section required manual delivery of ballot by the voter in person at the polls in the precinct of his residence, and Laws 1955, ch. 256, providing for voting by absentee ballot, was unconstitutional. State ex rel. West v. Thomas, 62 N.M. 103, 305 P.2d 376 (1956).

This section requires the manual delivery of the ballot at the polls by the elector in person. Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320 (1936) (case decided prior to 1967 amendment).

Voting to be in precinct of residence. — This section requires a voter to cast his ballot in the precinct in which he resides. Thompson v. Scheier, 40 N.M. 199, 57 P.2d 293 (1936) (case decided prior to 1967 amendment).

Voting place may be outside precinct. — The constitution does not require the machine or ballot box to be within the boundaries of a precinct as long as those casting their votes at the designated polling place are registered to vote in their precinct. Martinez v. Harris, 102 N.M. 2, 690 P.2d 445 (1984).

Polling places on reservation. — Inasmuch as there is residence on the reservation for voting purposes, there is no prohibition to the location of polling places thereon. Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

Municipal precincts. — This section does not provide that a person otherwise qualified to vote can have but one place to vote in all elections, or that he can be a resident of but one precinct with fixed territorial boundaries; hence, establishment by Municipal Code (3-30-1 NMSA 1978 et seq.) of "municipal precincts" and requirement that in municipal elections voters vote in different precinct or polling place than that in which they reside for purposes of county elections was not invalid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

V. SCHOOL ELECTIONS.

School bond election is school election. — School district bond election was a school election, within meaning of this section (and was one at which women were entitled to vote under former provision of this section providing for women's suffrage in school elections.) Klutts v. Jones, 20 N.M. 230, 148 P. 494 (1915).

Special school bond election for immediate and future construction of buildings and for purchase of school sites was a school election within this section. Johnston v. Board of Educ., 65 N.M. 147, 333 P.2d 1051 (1958).

"Other elections". — Fact that women had been granted right of suffrage since this section was adopted did not alter requirement that "all school elections shall be held at different times from other elections"; municipal elections were included in "other elections". Roswell Mun. Sch. Dist. No. 1 v. Patton, 40 N.M. 280, 58 P.2d 1192 (1936).

School consolidation not invalid. — Fact that some electors would cast vote for member of state board of education in judicial district other than that in which their children attended school did not render school consolidation invalid. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Registration not required to vote in school election. — There is no express constitutional or statutory requirement of registration as a condition to voting in special school bond election, but voter must be otherwise qualified elector. Johnston v. Board of Educ., 65 N.M. 147, 333 P.2d 1051 (1958).

Local option elections. — Qualifications of electors at local option election would be the same as in other elections and as prescribed by this section. 1915-16 Op. Att'y Gen. No. 15-1510.

Husband and wife may both vote in school bond election if they are owners of realty in the school district which realty is held as community property. 1963-64 Op. Att'y Gen. No. 64-27.

Municipal indebtedness. — The 1964 amendment of N.M. Const., art. IX, § 12, relating to municipal indebtedness, neither amends, applies to nor affects the provisions of this section. 1964 Op. Att'y Gen. No. 64-142.

Simultaneous school elections in multi-district county. — Two or more school districts situate in the same county may properly hold school bond elections on the same day. 1965 Op. Att'y Gen. No. 65-55.

Provision on school elections not self-executing. — This section is not self-executing, and pending legislative action, the county superintendent of schools will be elected with other county officers under existing law. 1912-13 Op. Att'y Gen. No. 12-956.

Registration not required to vote in school board election. — Registration for voting was not a necessary prerequisite to vote in a school bond election if the voter was otherwise qualified to vote in such election under former law. 1963-64 Op. Att'y Gen. No. 64-27.

Preemption of age requirement by federal constitution. — Adoption of the twenty-sixth amendment to the United States constitution has preempted state control of the field of voting age requirements; 18- to 20-year-olds are eligible to vote in New Mexico elections notwithstanding this section. 1971 Op. Att'y Gen. No. 71-119.

The twenty-sixth amendment to the United States constitution has superseded the age provision of this section. 1971 Op. Att'y Gen. No. 71-117.

Preemption by federal law. — This section is in direct conflict with the federal Voting Rights Act insofar as it prescribes age of 21 as a voting qualification. 1970 Op. Att'y Gen. No. 70-69.

Federal Voting Rights Act amendments of 1970, extending the 18-year-old suffrage to primary elections at which "federal" office-candidates are chosen, apply to all primary or other elections for president, vice-president, United States congressmen and United States senators, 1971 Op. Att'y Gen. No. 71-04.

Meaning of "idiots" and "insane persons". 1973 Op. Att'y Gen. No. 73-44.

Mental retardation. — Mentally retarded individuals who can understand the nature of their actions should be allowed to register and vote. 1974 Op. Att'y Gen. No. 74-35.

Care must be exercised not to disenfranchise persons who are merely enfeebled by old age or physical infirmities. 1973 Op. Att'y Gen. No. 73-44.

Bar of felons from voting constitutional. — It appears that there is no federal constitutional impediment to constitutional or statutory provisions barring convicted felons from voting. 1973 Op. Att'y Gen. No. 73-44.

"Conviction" occurs at trial level; it is the finding of guilt and has nothing to do with the sentence, and is not held in abeyance pending review. 1973 Op. Att'y Gen. No. 73-44.

Not serving of sentence. — Person receiving a suspended sentence or placed on probation loses the same rights he would lose if he were committed to the penitentiary. 1959-60 Op. Att'y Gen. No. 59-176.

Conviction in federal court. — Since under federal law offenses which may be punished by death or imprisonment for a term exceeding one year are felonies, and other offenses are misdemeanors, no felony under federal law occurred where the penalty is one-year imprisonment. 1957-58 Op. Att'y Gen. No. 58-55.

"Infamous crime". — A conviction in federal court of a violation of 18 U.S.C. § 242, relating to the deprivation of another individual's rights, privileges or immunities under color of law, probably does not constitute conviction of an "infamous crime" within the meaning of this section and N.M. Const., art. VII, § 1. 1957-58 Op. Att'y Gen. No. 58-55.

Restoration of "political rights" refers to powers of executive clemency granted to governor by N.M. Const., art. V, § 6. 1973 Op. Att'y Gen. No. 73-44.

A person seeking restoration of a franchise after a suspended sentence must go to the governor for relief, and likewise the procedure for restoration of the elective franchise to persons who have served all or part of their sentences in the penitentiary, by executive clemency, is set forth in Section 31-13-1 NMSA 1978. 1973 Op. Att'y Gen. No. 73-44.

Person convicted of infamous crime is not qualified to vote until restored to political rights, which requires action by the governor. 1915-16 Op. Att'y Gen. No. 15-1464.

Restoration of rights by convicting state. — A person's conviction in a foreign state would constitute no block to his being legally qualified to vote in this state if his political rights had been restored in the foreign state. 1953-54 Op. Att'y Gen. No. 54-6013.

Effect of dismissal order. — Dismissal order under Section 31-20-9 NMSA 1978 is intended to restore the right to vote automatically. 1973 Op. Att'y Gen. No. 73-44.

Indians in New Mexico are entitled to register and vote, the provisions of the New Mexico statutes and constitution notwithstanding. 1961-62 Op. Att'y Gen. No. 62-47.

Constitutional right to vote cannot be denied by official failure or defect, but the judges of election should satisfy themselves that the person who offers to vote is the same person whose name appears upon the registration list, although the name may be misspelled, or the wrong initials appear thereon. 1915-16 Op. Att'y Gen. No. 16-1720.

Rejection of voter. — Judges of election may, if a voter is challenged, examine the voter, and if satisfied, from the evidence presented or from their own knowledge, that the voter lacks the qualifications, reject the vote. 1914 Op. Att'y Gen. No. 14-1376.

Registration. — Framers of the constitution did not intend that registration be required to be a qualified elector. 1965 Op. Att'y Gen. No. 65-10.

Since the legislature did not require qualified voters to be registered, registration was not necessary for a qualified elector to vote in a county income surtax election. 1968 Op. Att'y Gen. No. 68-75.

Property tax. — In order to be able to vote in any municipal bond election, voter must have paid his property tax during the preceding year; this requirement does not exist for voters in elections for public officers. 1953-54 Op. Att'y Gen. No. 53-5643.

Residency requirements for certain elections superseded by federal law. — Portion of Voting Rights Act amendments of 1970 (42 U.S.C. §§ 1973aa to 1973bb-4) establishing a nationwide uniform residency period of 30 days in election for president and vice-president substantially changed the law in this regard. 1971 Op. Att'y Gen. No. 71-04.

Requirements of 42 U.S.C.A. 1973aa-1 eliminating durational residency requirements as a precondition for voting for presidential electors and prescribing standards for absentee registration and absentee voting in such presidential elections, apply to presidential primary elections. 1971 Op. Att'y Gen. No. 71-86.

Durational residency requirement is not applicable to elections held pursuant to Federal Voting Rights Compliance Act (Section 1-21-1 NMSA 1978 et seq.). 1971 Op. Att'y Gen. No. 71-119.

Residence is a matter of intention. 1970 Op. Att'y Gen. No. 70-72.

For the purpose of casting a ballot in any election in New Mexico, residence is to be determined on the basis of the intention of the party desiring to vote. 1959-60 Op. Att'y Gen. No. 60-94.

Residence is determined by intention of voter to establish domicil. 1912-13 Op. Att'y Gen. No. 13-1068.

Residence must be taken up in time. — One who merely intends to become a resident of the state at a given time, but does not actually begin such residence, until less than a year before a general election, is not a qualified elector. 1917-18 Op. Att'y Gen. No. 18-2137.

Student's residence. — Evidentiary facts supporting the intention of a student to establish residence in New Mexico should be construed with a liberal view. The fact that he is paying one type of tuition as opposed to another, or residing in a dormitory as opposed to a private residence, should not affect his status as a resident of this state for the purpose of exercising his constitutionally granted elective franchise. 1959-60 Op. Att'y Gen. No. 60-94. But see, N.M. Const., art. VII, § 4, as to acquisition or loss of residence by reason of presence or absence while employed in the service of the federal or state government, or while a student.

Twenty-sixth amendment to the United States Constitution had the effect of emancipating the 18- to 20-year-old voter for purposes of establishing his residence for voting purposes. 1971 Op. Att'y Gen. No. 71-119.

Soldiers' residence. — Soldiers who have actually maintained their residence as here prescribed are entitled to vote. But see, N.M. Const., art. VII, § 4, as to acquisition or loss of residence by reason of presence or absence while employed in the service of the state or federal government, or while a student. 1914 Op. Att'y Gen. No. 14-1324.

Rights of persons residing on federal enclaves to register and vote in New Mexico. 1970 Op. Att'y Gen. No. 70-72.

Voter qualifications at first state election. — Residential qualification of voter required by Laws 1897, § 1703, and not that required by this section, was applicable to first state election. 1909-12 Op. Att'y Gen. No. 13-1068.

Voting to be in precinct of residence. — If a precinct, or any portion thereof, is involved in any election whatsoever in this state, at least one polling place must be provided therein and all of the voters in that precinct involved in the election must be permitted and required to vote in that polling place. 1953-54 Op. Att'y Gen. No. 54-6067 (opinion rendered prior to 1967 amendment of this section).

This section means that a person must be afforded an opportunity to vote in his precinct, and thus any statute that permits consolidation of precincts is unconstitutional, unless the old precincts are abolished and a new precinct, including the area desired to be consolidated, is legally created. 1953-54 Op. Att'y Gen. No. 54-6067 (opinion rendered prior to 1967 amendment of this section).

1709, 1897 C.L. violated this provision in purporting to grant citizens the right to vote in any precinct of the state upon certificate of registration from their own precinct. 1912-13 Op. Att'y Gen. No. 12-951108 (opinion rendered prior to 1967 amendment of this section).

School bond election is school election. 1915-16 Op. Att'y Gen. No. 15-1550.

"School elections" include elections on bond issue for school building. 1912-13 Op. Att'y Gen. No. 13-1074.

Election of members of board of education is school election, and by the terms of this section such election cannot be held at the time of a city election, as provided by 1567, 1897 C.L. Until the legislature has acted and provided for a separate election, elected officers will hold over until their successors are qualified, by the terms of N.M. Const., art. XX, § 2. 1912-13 Op. Att'y Gen. No. 12-870 1/2.

Qualifications for voting in school election. — The provisions of this section and N.M. Const., art. IX, § 11, when read together, require that any person undertaking to vote in a school bond election must reside in such school district, and must own real estate therein and be otherwise qualified to vote. 1963-64 Op. Att'y Gen. No. 64-27.

Any person meeting the requirements of this section and N.M. Const., art. IX, § 11 is entitled to vote in a school bond election. 1963-64 Op. Att'y Gen. No. 64-27.

Law reviews. — For article, "The Legislature," see 8 Nat. Resources J. 148 (1968).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections §§ 103 et seq., 150 et seq.

Nonregistration as affecting legality of votes cast by persons otherwise qualified, 101 A.L.R. 657.

Constitutionality, construction and application of constitutional or statutory provisions which make payment of poll tax condition of right to vote, 139 A.L.R. 561.

Right of persons living in area acquired by federal government to provide housing facilities to persons engaged in national defense activities, to register and vote at elections in state, 142 A.L.R. 430.

Governing law as to existence or character of offense for which one has been convicted in a federal court, or court of another state, as bearing upon disqualification to vote, hold office, practice profession, sit on jury or the like, 175 A.L.R. 784.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

Military establishments, state voting rights of residents of, 34 A.L.R.2d 1193.

What constitutes conviction within constitutional or statutory provision disfranchising one convicted of crime, 36 A.L.R.2d 1238.

Absentee voters' laws, validity of, 97 A.L.R.2d 218.

Absentee voters' laws, construction and effect of, 97 A.L.R.2d 257.

Residence or domicile of student or teacher for purpose of voting, 98 A.L.R.2d 488, 44 A.L.R.3d 797.

Conviction in federal court, or in court of another state or country, as disqualification to vote at election, 39 A.L.R.3d 303.

Right of married woman to use maiden surname, 67 A.L.R.3d 1266.

Voting rights of persons mentally incapacitated, 80 A.L.R.3d 1116.

29 C.J.S. Elections §§ 15 to 35.

Sec. 2. [Qualifications for holding office.]

A. Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this constitution.

B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.

C. The right to hold public office in New Mexico shall not be denied or abridged on account of sex, and wherever the masculine gender is used in this constitution, in defining the qualifications for specific offices, it shall be construed to include the feminine gender. The payment of public road poll tax, school poll tax or service on juries shall not be made a prerequisite to the right of a person to vote or hold office. (As amended September 20, 1921, September 19, 1961, and November 6, 1973.)

ANNOTATIONS

Cross references. — For qualifications of state senators and representatives, *see* N.M. Const., art. IV, § 3.

For qualifications of executive officers, *see* N.M. Const., art. V, § 3.

For residence requirement for local public officers, *see* N.M. Const., art. V, § 13.

For qualifications of supreme court justices, district judges and judges of court of appeals, *see* N.M. Const., art. VI, §§ 8, 14 and 28, respectively.

For qualifications of district attorney, *see* N.M. Const., art. VI, § 24.

For qualifications of voters, *see* N.M. Const., art. VII, § 1.

For residence of members of governing body of home-rule municipality, *see* N.M. Const., art. X, § 6.

For qualifications of public officers and employees, *see* 10-1-1 NMSA 1978 et seq.

For Personnel Act, *see* 10-9-1 NMSA 1978 et seq.

Comparable provisions. — Montana Const., art. IV, § 4.

The 1921 amendment, which was proposed by H.J.R. No. 18 (Laws 1921) and adopted at a special election held on September 20, 1921, by a vote of 26,744 for and 19,751 against, amended this section to read: "Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this Constitution. The right to hold public office in the state of New Mexico shall not be denied or abridged on account of sex, and wherever the masculine gender is used in this Constitution, in

defining the qualifications for specific offices, it shall be construed to include the feminine gender. Provided, however, that the payment of public road poll tax, school poll tax or service on juries shall not be made a prerequisite to the right of a female to vote or hold office." Prior to amendment the section read: "Every male citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state, except as otherwise provided in this constitution; provided, however, that women possessing the qualifications of male electors prescribed in Paragraph one of this article shall be qualified to hold the office of county school superintendent, and shall also be eligible for election to the office of school director or members of a board of education."

The 1961 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1961), and adopted at the special election held on September 19, 1961, with a vote of 25,915 for and 23,417 against, divided the section into three subsections, in Subsection A inserted "elective" before "public office" and deleted "in the state" thereafter, inserted new matter as Subsection B, in Subsection C deleted "in the state of" before "New Mexico" and set off with a semicolon the proviso which had been a separate sentence.

The 1973 amendment, which was proposed by H.J.R. No. 7, § 1 (Laws 1973), and adopted at the special election held on November 6, 1973, with a vote of 33,215 for and 9,783 against, recast a proviso at the end of Subsection C as a separate sentence and substituted "person" for "female" near the end of that sentence.

I. GENERAL CONSIDERATION.

"Qualified" is equivalent to "eligible." Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

"Public officer" defined. — The officers of "a public corporation for a municipal purpose" are not "public officers" within the contemplation of this section. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

II. QUALIFICATIONS.

Naturalization. — Naturalization does not have the effect of automatically conferring the right to vote and the right to hold office in New Mexico. Lopez v. Kase, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

Dual pathways to restoration of civil rights. — Section 31-13-1 NMSA 1978 provides dual pathways to restoring civil rights. Subsection A provides for the restoration of civil rights for convicted felons who receive deferred sentences and have no criminal sentences to complete. Subsections C and E provide for the restoration of civil rights for convicted felons who receive and complete criminal sentences. United States of America v. Reese, 2014-NMSC-013.

Completion of deferred sentence. — Upon the completion of all conditions for a deferred sentence and the resulting dismissal of all charges, a person's civil rights, including the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess firearms, are restored by operation of law without the necessity of a pardon or certificate from the governor. United States of America v. Reese, 2014-NMSC-013.

Where defendant pleaded no contest to one felony count of tampering with evidence; the district court deferred sentencing and placed defendant on probation; defendant completed the conditions of deferment and the district court dismissed the charge of tampering with evidence; a decade later, defendant was indicted for violation of a federal statute that prohibited felons from possessing firearms based on defendant's felony conviction for tampering with evidence; federal law excluded any conviction for which a person had their civil rights restored; and the parties agreed that New Mexico had restored defendant's rights to vote, to serve on a jury and to possess firearms, but disagreed over whether New Mexico had restored defendant's right to hold public office because Subsection E, which addresses the right to hold public office, does not refer to deferred sentences, upon the completion of defendant's deferred sentence, all of defendant's civil rights were automatically restored, including the right to hold public office. United States of America v. Reese, 2014-NMSC-013.

Restoration of political rights. — A convicted felon who was elected to the position of county commissioner became eligible to hold that office when, prior to taking the oath of office, she applied for and received a certificate of restoration of full rights of citizenship from the governor of New Mexico. Lopez v. Kase, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

Sections construed together to determine governor's qualifications. — The constitution must be construed as a whole so that N.M. Const., art. V, § 3 and this section should be read together, thereby requiring that a person in order to hold the office of governor must be a citizen of the United States, at least 30 years of age, who has been a resident continuously for five years preceding his election and who is a qualified elector in New Mexico. State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445, 39 A.L.R. 3d 290 (1968).

Legislature has no power to make added restrictions to the right to hold public office. — Consequently, Laws 1919, ch. 111, § 3, which required aldermen to live within the ward for which they were elected, was void. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

Additional conditions not precluded. — The constitution does not provide that all qualified voters may hold public office without additional burdens or conditions. Board of Comm'rs v. District Court of Fourth Judicial Dist., 29 N.M. 244, 223 P. 516 (1924).

Restrictions on office-holding by public employee. — Section 10-9-21 NMSA 1978, which prohibits certain state employees from simultaneously holding public office, does

not violate this section, since it imposes no restriction on the employee's public office, but rather upon his job with the state. State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975).

Article VII, Section 2(A) is not implicated. — N.M. Const., Art. VII, § 2(A) only concerns the class of persons eligible to be chosen for elective public office; it does not concern the separate employment regulations this class of persons may have. This constitutional provision is not implicated if the position upon which the qualification is added is not an elective public office. The requirement that the holder of an appointive public office must tender his or her resignation upon becoming a candidate for another office, or that his or her filing for another office would work a resignation from the appointed position, does not prescribe additional qualifications for the elective public office. Kane v. City of Albuquerque, 2015-NMSC-027.

Where the city of Albuquerque's charter and personnel rules prohibit employees of the city from being a candidate for, or from holding elective office of, the state of New Mexico or any of its political subdivisions, the charter and personnel rules do not violate N.M. Const., Art. VII, § 2, because the city's employment provisions do not constitute qualifications for elective public office. The city's employee regulations are permissible qualifications and standards for holding an appointive position within the meaning of N.M. Const., Art. VII, § 2(B). Petitioner's appointive position as a city employee did not render her ineligible for the elective public office of a state legislator, but instead, her campaign for and service as a state legislator precluded her from continuing her appointive position as a city employee. Kane v. City of Albuquerque, 2015-NMSC-027.

Municipalities have authority to enact qualifications for appointive employee positions. — Under 3-13-4 NMSA 1978, municipalities have been delegated the legislative authority articulated in N.M. Const., Art. VII, § 2(B) to enact qualifications and standards for appointive employee positions. Kane v. City of Albuquerque, 2015-NMSC-027.

Where the city of Albuquerque's charter and personnel rules prohibit employees of the city from being a candidate for, or from holding elective office of, the state of New Mexico or any of its political subdivisions, the city's employee regulations are valid promulgations because pursuant to 3-13-4(A) NMSA 1978, municipalities have the legislative authority to impose restrictions on political activities that are qualifications and standards within the meaning of N.M. Const., Art. VII, § 2(B). The city's employment regulations prohibiting petitioner from seeking or holding elective public office were permissibly promulgated. Kane v. City of Albuquerque, 2015-NMSC-027.

Junior college district board members. — A junior college district is a quasi-municipal corporation, the officers of which, like those of irrigation districts, are not those contemplated by the constitution. Accordingly, this section does not restrict the legislature in fixing the qualifications of such board members. Daniels v. Watson, 75 N.M. 661, 410 P.2d 193 (1966).

Board of medical examiners. — Section 61-6-1 NMSA 1978, whereby the governor was obligated to appoint to the board of medical examiners nominees submitted by the New Mexico medical society, did not unconstitutionally usurp governor's power, since the legislature, and not the constitution, delegated this power, and the legislature could establish board member qualifications. Seidenberg v. New Mexico Bd. of Med. Exam'rs, 80 N.M. 135, 452 P.2d 469 (1969).

Former Sales Tax Act. — Sales Tax Act (Laws 1934 (S.S.), ch. 7, temporary in nature) did not violate constitution on theory that it made the "seller" a collector of taxes who must be appointed by the governor, and must have the qualifications of a public officer under this section; in fact the tax was levied against the seller and was collected by the state tax commission. State ex rel. Attorney Gen. v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938).

Bond requirement. — A statutory requirement, authorized by N.M. Const., art. XXII, § 19, that first state officers should furnish bond before being inducted into office and exercising the functions thereof, did not violate this section. Board of Comm'rs v. District Court of Fourth Judicial Dist., 29 N.M. 244, 223 P. 516 (1924).

Term limits not authorized in home rule municipalities. — The home rule amendment to the constitution does not allow home rule municipalities to impose eligibility requirements for municipal elected office beyond those set forth in the qualification clause and elsewhere in the constitution; thus, the provision of the city charter adopting term limits was not authorized. Cottrell v. Santillanes, 120 N.M. 367, 901 P.2d 785 (Ct. App.), cert. denied, 120 N.M. 213, 900 P.2d 962 (1995).

III. RESIDENCY.

Residence in subdivision for which elected or appointed. — The only general restriction against the right of every citizen of the United States who is a resident of, or a qualified voter within, this state to hold any public office is that all reside within the political subdivision for which they were elected or appointed. Gibbany v. Ford, 29 N.M. 621, 225 P. 577 (1924).

Acquiring municipal residence. — New Mexico Const., art. V, § 13 and this section fix no time that one must occupy a place or home in order to become a resident of a certain city, town or village when not coming from without the state. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Dual abodes. — There is no reason why, within the meaning of N.M. Const., art. V, § 13 and this section, a person may not have more than one place to reside in. State ex rel. Magee v. Williams, 57 N.M. 588, 261 P.2d 131 (1953).

Illegal registration does not "qualify" elector for office. — A candidate is not a "qualified elector" eligible for a state senate candidacy where, although he registered and voted in a precinct in that senate district, he was ineligible to so register and vote

because he actually resides outside the precinct and senate district. Thompson v. Robinson, 101 N.M. 703, 688 P.2d 21 (1984).

Out-of-state residence of employee. — The superintendent of the reform school was an employee and not an officer, and was not disqualified by being a resident of another state. 1912-13 Op. Att'y Gen. No. 13-1109.

"Public office" defined. — To be a public office: (1) the office must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. 1957-58 Op. Att'y Gen. No. 58-10.

Unconstitutional limitation on candidacy for Albuquerque mayor. — An Albuquerque city charter provision that no full-time elective official other than the mayor or the mayor pro tem can be a candidate for the office of mayor is unconstitutional, because it violates this section. 1985 Op. Att'y Gen. No. 85-04.

Any citizen who is qualified voter, can hold county office, subject to term limitations. 1915-16 Op. Att'y Gen. No. 15-1596.

Municipal board of trustees. — Any citizen who is a resident and qualified elector of the state and a resident of a town may hold office on its board of trustees. 1933-34 Op. Att'y Gen. No. 34-736.

Women are eligible to hold any office in state. 1921-22 Op. Att'y Gen. No. 22-3247.

A woman is qualified to hold the appointive office of state librarian. 1912-13 Op. Att'y Gen. No. 12-934.

Registration is not requirement for qualified elector. 1965 Op. Att'y Gen. No. 65-10.

Registration does not affect the qualifications of a candidate for public office, and the fact that a particular candidate is registered under her former name can have no bearing on the fact that she now appears as a candidate under her present real name. 1965 Op. Att'y Gen. No. 65-10.

Conviction of felony or infamous crime as disqualification. — To be qualified to hold any public office in this state a citizen must be a qualified elector in New Mexico;

since one convicted of a felony or infamous crime cannot vote for the election of public officers, he is also ineligible to hold public office. 1970 Op. Att'y Gen. No. 70-85.

Since only "qualified electors" may be candidates for municipal office, and since the constitution denies the status of "qualified elector" to a convicted felon, one who has been convicted of a federal felony and confined in federal prison may not be a candidate for municipal office. 1970 Op. Att'y Gen. No. 70-16.

Regardless of pending appeal. — Person who committed felony by assaulting a federal officer was ineligible to run for governor even though he was appealing; a judgment on a verdict of guilty is a conviction, regardless of the fact that an appeal is pending. 1968 Op. Att'y Gen. No. 68-98.

Conviction after election. — Unless and until the house of representatives refuses to seat a member who, since his election, has been convicted of a felony, the member will continue to occupy his office and no vacancy exists. 1961-62 Op. Att'y Gen. No. 61-131.

"Infamous crime". — A conviction in federal court of a violation of 18 U.S.C. § 242, relating to violation of citizen's rights, privileges and immunities under color of law, does not constitute a conviction of an "infamous crime" within the meaning of N.M. Const., art. VII, § 1 and this section. 1957-58 Op. Att'y Gen. No. 58-55.

Restoration of political rights. — Both the right to vote and the right to hold public office are restored if the governor exercises his constitutional power to restore a convicted felon to his political rights. 1970 Op. Att'y Gen. No. 70-85.

Minor could be appointed deputy county clerk and clerk of the district court, since the constitutional provision does not apply to the deputies of the officers. 1925-26 Op. Att'y Gen. No. 26-3894.

This article prohibits legislature from adding restrictions upon right to hold office beyond those provided in the constitution itself. 1961-62 Op. Att'y Gen. No. 62-106.

This section relates generally to the elective franchise and right to hold office, and is concerned entirely with the definition of the personal qualifications and characteristics of persons who may vote, hold office and sit as jurors. The legislature has no power to make added restrictions to such right to hold public office. 1939-40 Op. Att'y Gen. No. 40-3410.

Qualifications inconsistent with section. — Qualifications of county school superintendents fixed by Laws 1907, ch. 97, § 18 (since repealed) were inconsistent with, and abrogated by, original provision of this section that every male citizen who was a legal resident of the state and a qualified elector therein, was qualified to hold any public office except as otherwise provided in the constitution, and therefore, school superintendents were not required to submit themselves to the territorial board of education as to their qualifications. 1909-12 Op. Att'y Gen. No. 12-934.

Legislature authorized to impose restrictions on right to appointive office. — This constitutional provision empowers the legislature with the authority to impose statutory restrictions and qualifications upon the right of individuals to hold any appointive state office or employment. 1963-64 Op. Att'y Gen. No. 64-15.

Qualifications for magistrates. — Requirement in 35-2-1 NMSA 1978 that magistrates must have the equivalent of a high school education does not violate this section because N.M. Const., art. VI, § 26 gives the legislature the power to prescribe qualifications for magistrate court judges. 1969 Op. Att'y Gen. No. 69-08.

Prohibition of private law practice constitutional. — In prohibiting a small claims court judge from practicing law while in office under 34-8-3 NMSA 1978 (repealed, *see* 34-8A-4 NMSA 1978), the legislature is attaching a lawful condition to the holding of the office which in no way interferes with the class of persons eligible to hold public office under this section. 1963-64 Op. Att'y Gen. No. 63-58.

Surveyors. — Section 4-42-1 NMSA 1978 does not violate this section by requiring county surveyors to be practical land surveyors. 1968 Op. Att'y Gen. No. 68-114.

Offices not incompatible. — The offices of probate judge and deputy county treasurer were not incompatible under this section. 1917-18 Op. Att'y Gen. No. 17-2022.

Office holders to be citizens and residents. — This provision specifically requires all persons seeking to hold elective state office to be both a citizen and a resident of the state of New Mexico. 1963-64 Op. Att'y Gen. No. 64-15.

Residence in legislative district required. — Based on N.M. Const., art. VII, § 1 and this section, and on House Bill No. 2, § 6, Laws 1963 (S.S.) (repealed), candidates for the New Mexico house of representatives were to actually reside in the legislative district where they were seeking election and to be qualified electors in such legislative district. 1963-64 Op. Att'y Gen. No. 64-18.

Failure to fill residence requirements. — One who has not fulfilled the residence requirements for a qualified elector is not eligible to the office of probate judge. 1917-18 Op. Att'y Gen. No. 18-2137.

Person who established a business and home in Grant county about December 5, 1965 and since that time has lived there, and changed his voter registration to Grant county on March 2, 1966, but served as state representative from Catron county in the 1966 legislative session, was not eligible to run for nomination for state senator from Grant county in the 1966 primary election. 1966 Op. Att'y Gen. No. 66-47.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 37, 46, 51, 60 to 63.

Mental or physical disability as disqualification, 28 A.L.R. 777.

Women's suffrage amendment as affecting eligibility of women to office, 71 A.L.R. 1333.

Time as of which eligibility to office is to be determined, 88 A.L.R. 812, 143 A.L.R. 1026.

Residence or inhabitancy within district or other political unit for which he is elected or appointed as a necessary qualification of officer or candidate, in absence of express provision to that effect, 120 A.L.R. 672.

Nonregistration as affecting one's qualification to hold public office, 128 A.L.R. 1117.

Discrimination because of race, color or creed in respect of appointment, duties, etc., of public officers, 130 A.L.R. 1512.

Interest as stockholder or officer of corporation with which contract is made as affecting disqualification for serving in office, 140 A.L.R. 356.

Defeated candidate for nomination: constitutionality, construction and application of statute declaring him ineligible as a candidate at general election, 143 A.L.R. 603.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

Infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 A.L.R.2d 1314.

Previous tenure of office, construction and effect of constitutional or statutory provisions disqualifying one for public office because of, 59 A.L.R.2d 716.

Effect of conviction under federal law or law of another state or county, on right to vote or hold public office, 39 A.L.R.3d 303.

Pardon as restoring eligibility to public office, 58 A.L.R.3d 1191.

Validity of requirement that candidate for public office has been resident of governmental unit for a specified period, 65 A.L.R.3d 1048.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

67 C.J.S. Officers and Public Employees §§ 16, 20, 21, 26.

Sec. 3. [Religious and racial equality protected; restrictions on amendments.]

The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution; and the provisions of this section and of Section One of this article shall never be amended except upon a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state, and at least two-thirds of those voting in each county of the state, shall vote for such amendment.

ANNOTATIONS

Cross references. — For freedom of elections, *see* N.M. Const., art. II, § 8.

For equal protection guarantee, *see* N.M. Const., art. II, § 18.

For qualifications to vote for public officers, *see* N.M. Const., art. VII, § 1.

For restrictions on amendment of this section and N.M. Const., art. VII, § 1, *see* N.M. Const., art. XIX, § 1.

Where interpreter was present while jury deliberated defendant's guilt or innocence without the benefit of an oath or instruction to ensure that the interpreter neither participate in or interfere with the jury's deliberations, there is a presumption of prejudice. State v. Pacheco, 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553, rev'd, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

Interpreter's presence while jury deliberates is unauthorized in the absence of any appropriate protections. State v. Pacheco, 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553, rev'd, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

Interpreter may accompany non-English speaking juror into jury room during deliberations provided that the trial court first requires the interpreter to take an oath that he or she will not participate in or interfere with the jury's deliberations. State v. Pacheco, 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553, rev'd, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

Interpreter's oath insufficient. — Where the trial court only required an interpreter to take an oath to faithfully and impartially translate the witness's testimony, this oath was insufficient to safeguard against interference, or the appearance of interference, with the jury's deliberations. State v. Pacheco, 2006-NMCA-002, 138 N.M. 737, 126 P.3d 553, rev'd, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

Duty to protect non-English-speaking juror’s right to participate in jury service. — Judges and attorneys have responsibilities in protecting a non-English-speaking juror’s constitutional right to participate in jury service. The appellate record must demonstrate that a trial judge has made every reasonable effort to provide interpreters for non-

English-speaking jurors; defense attorneys must raise the unconstitutionality of proposed dismissals of jurors for lack of fluency in English; and prosecutors representing the state must protect the rights of all non-English-speaking New Mexicans to serve on juries, both because it is their duty to do so and because an otherwise unnecessary reversal and retrial may well be the consequence of denying those rights. State v. Samora, 2013-NMSC-038.

Right to sit upon juries. — Where, at the beginning of jury selection, the trial court asked a Spanish-speaking prospective juror, who had difficulty understanding the English language, if the juror understood English well enough to proceed with jury selection without the aid of an interpreter; the juror stated that the juror had been able to follow the discussions to that point; the trial court did not make an effort to find an interpreter for the juror; at the conclusion of voir dire, the juror admitted that the juror had not been able to understand a large part of the voir dire; the trial court dismissed the juror; defendant objected on the ground that the juror had understood English well enough to serve without an interpreter during voir dire, and there was no evidence that the jury was unfair or impartial and the evidence of defendant's guilt was substantial, the dismissal of the juror violated Article VII, Section 3 of the constitution of New Mexico Constitution, but the error was not fundamental error requiring reversal of defendant's convictions. State v. Samora, 2013-NMSC-038.

Where a potential juror's inability to perform his or her duty is based upon religious objection and belief, his or her removal does not violate the religious protections of this section, because exclusion from the jury is not based upon religious affiliation. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

The trial court did not abuse its discretion in excluding prospective jurors who indicated that they would automatically vote against the death penalty. The basis for excluding these individuals was their inability to apply the law, rather than their religious views. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000); State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

A defendant has standing to protect the rights of an excluded juror under this section. State v. Rico, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942.

This section requires that a trial court make every reasonable effort to accommodate a potential juror for whom language difficulties present a barrier to participation in court proceedings. State v. Rico, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942.

What constitutes sufficiently reasonable efforts to accommodate a potential juror with language difficulties will depend on the circumstances in which the problem arises. Whether a reviewing court will find a trial court's efforts in this regard reasonable will depend on several factors, including, but not limited to, the steps actually taken to protect the juror's rights, the rarity of the juror's native language and the difficulty that rarity has created in finding an interpreter, the stage of the jury selection process at

which it was discovered that an interpreter will be required, and the burden a continuance would have imposed on the court, the remainder of the jury panel, and the parties. State v. Rico, 2002-NMSC-022, 132 N.M. 570, 52 P.3d 942.

The absence of a written translation of jury instructions did not impair juror's ability to sit on a jury. — In defendant's trial for trafficking controlled substances, the district court's refusal to provide written translations of the jury instructions into Spanish did not violate the New Mexico Constitution, where any potential impairment of the juror's constitutional right to fully participate in the deliberative process was mitigated when two certified and sworn court interpreters accompanied the non-English speaking juror into the jury room to assist with the deliberative process. State v. Ortiz-Castillo, 2016-NMCA-045.

Two-thirds vote per county requirement violates federal constitution. — A requirement of a two-thirds favorable vote in every county, when there is a wide disparity in population among counties, must result in greatly disproportionate values to votes in the different counties, and violates the "one person, one vote" concept announced by the United States supreme court. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Construction of three-fourths vote provision. — Three-fourths vote requirement should be construed to mean three-fourths of those voting on the proposition in question, not three-fourths of those voting in the election. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment accomplished. — The requirement of a two-thirds vote in each county being unconstitutional, in view of disparity of population among counties, and the demand of ratification by "at least three-fourths of the electors voting in the whole state" having been met by favorable vote of three-fourths of those voting on the proposition in question, the adoption of constitutional amendment to N.M. Const., art. VII, § 1 submitted as Amendment No. 7 at the election held on November 7, 1967 was accomplished, and it should be certified as having been ratified. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment void. — The constitutional amendment permitting absentee voting, proposed by J.R. No. 12 (Laws 1919) to be added to this article, violated N.M. Const., art. VII, § 1, which at that time required voting in person, and was void because only a bare majority of the electors voted for its adoption. Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320 (1936).

School consolidation not invalid. — There is nothing in either N.M. Const., art. VII, § 1 or this section which suggests the right of an elector to cast his vote for candidate for office of state board of education from the judicial district in which the elector's child attends public school; his right is to vote for the candidate of his choice for this position, to be elected from the judicial district in which he has voting residence. School consolidation was not rendered invalid merely because certain parents would cast vote

for member of state board of education in judicial district other than one where children attended school. State ex rel. Apodaca v. New Mexico State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

Voter qualifications in municipal bond elections. — The amendment to N.M. Const., art. IX, § 12,which allows additional electors to vote in municipal bond elections, did not apply to or affect the general voter qualifications set forth in N.M. Const., art. VII, § 1, which qualifications remain exactly the same; art. VII, § 1, makes no provision for or mention of municipal bond elections, or the qualifications of electors at such elections. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Ratification of amendment. — Ratification of an amendment to N.M. Const., art. IX, § 12, required only a simple majority of the votes which are cast on the question, and this majority was attained. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Extraordinary vote requirements inapplicable. — Provisions of N.M. Const., art. XIX, § 1 and this section, requiring an extraordinary majority of votes for certain constitutional amendments, did not apply to the November 3, 1964 amendment to N.M. Const., art. IX, § 12. 1964 Op. Att'y Gen. No. 64-142.

Law reviews. — For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution," see 19 N.M. L. Rev. 511 (1989).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For note, "Peremptory Exclusion of Spanish-Speaking Jurors: Could *Hernandez v. New York* Happen Here?," see 23 N.M. L. Rev. 467 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 31, 44, 50; 25 Am. Jur. 2d Elections §§ 103 et seq., 112 et seq., 146 et seq., 157, 158, 160; 47 Am. Jur. 2d Jury § 159 et seq.; 63A Am. Jur. 2d Public Officers and Employees §§ 36, 44, 46, 48.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 A.L.R.2d 1291.

Actionability, under 42 U.S.C.S. § 1983, of claim arising out of maladministration of election, 66 A.L.R. Fed. 750.

16 C.J.S. Constitutional Law §§ 12, 14; 29 C.J.S. Elections §§ 15, 27, 31; 50 C.J.S. Juries §§ 134, 135, 140, 143; 67 C.J.S. Officers and Public Employees §§ 15 to 18, 21, 25.

Sec. 4. [Residence.]

No person shall be deemed to have acquired or lost residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. VI, § 5.

Compiler's notes. — Senate J.R. No. 3 (Laws 1953) proposed an amendment to this section to provide for absentee voting by adding the following sentence at the end of the section: "The legislature may enact laws providing for the voting of qualified electors who cannot be physically present at their polling places on the day of any election." The amendment received better than a 50% favorable vote at the special election held in September, 1953, but failed to become a part of the constitution under a ruling of the attorney general of Sept. 25, 1953 (1953-54 Op. Att'y Gen. No. 53-5819), in that it failed to receive the majority requisite under N.M. Const., art. XIX, § 1.

Section deals only with residence for voting or holding office; hence, legislature may confer resident status upon persons stationed within the state by military assignment for purposes of divorce jurisdiction. Wilson v. Wilson, 58 N.M. 411, 272 P.2d 319 (1954); *see also*, Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954).

New domicile may not be acquired by mere fact of stationing. — This section of constitution does not mean that a soldier stationed in this state may not acquire residence in New Mexico, but it does mean that he may not acquire a residence from the mere fact that he was stationed therein for whatever period of time he may be so stationed. Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948).

New domicile may be acquired by soldier just as by any civilian provided both the fact and the intent concur. Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948).

Residence is largely matter of intention, but a mere declaration of intention is insufficient if inconsistent with the facts and actions. A candidate for office is not ineligible because while away at school he voted in a local election. 1914 Op. Att'y Gen. Nos. 14-1324, 14-1333 and 14-1402.

Effect of tax payment. — Payment of state taxes may be considered as indicia of mental intent to maintain and keep New Mexico residency. 1963-64 Op. Att'y Gen. No. 64-26.

Temporary absence. — Once a bona fide residence is established in New Mexico, mere temporary absence from the state would not in and of itself alter residency. 1963-64 Op. Att'y Gen. No. 64-26.

Soldiers' right to vote. — Soldiers who have actually maintained their residence as herein prescribed are entitled to vote. 1919-20 Op. Att'y Gen. No. 20-2491.

Resident hunting license. — Army service alone is not sufficient to enable a person to acquire bona fide residence in this state for the purpose of obtaining a resident hunting license, but a resident of this state stationed outside its boundaries would still be entitled to such a license. 1931-32 Op. Att'y Gen. No. 31-280.

Holding office after out-of-state service. — A person who has left the physical limits of the state to serve with the armed forces of the United States after having once established residence here is eligible to hold an executive office. 1959-60 Op. Att'y Gen. No. 60-27.

Acquisition of residence in county where stationed. — This provision does not prevent persons who remove to a county while in service of the United States or this state from acquiring a residence in that county if they actually intend to do so. 1935-36 Op. Att'y Gen. No. 36-1348.

Resident student defined. — A resident student is one who shall have resided in the state of New Mexico for at least one year before registering as a student in any college or university in the state or whose parent or guardian shall have resided in the state for at least one year before such registration. 1951-52 Op. Att'y Gen. No. 51-5410.

Acquisition of resident status by student. — Under existing law one's status as a resident or nonresident student is not conditioned by any stated period of residing in New Mexico prior to matriculating in any state-supported college or university. Determination, in the final analysis, must be made by reference to the students' acts manifesting a desire to give up an earlier existing residence and to establish a new one in New Mexico, or a similar manifestation of parents in the case of unemancipated minor children. 1957-58 Op. Att'y Gen. No. 58-68.

Temporary attendance, without more, insufficient. — Students at the school of mines (New Mexico institute of mining and technology) are not qualified to vote in local city election by reason of temporary attendance at school there. 1937-38 Op. Att'y Gen. No. 38-1915.

Intent determinative. — Set of "uniform definitions" promulgated by the board of educational finance and purporting to define resident and nonresident students for administering tuition fees, were not in keeping with constitution and statutes of the state; any revision of the definitions must be made so as to give effect to one's manifest intent to become a resident of the state. 1957-58 Op. Att'y Gen. No. 58-68. *See also*, 1963-64 Op. Att'y Gen. No. 64-26.

A person cannot ordinarily acquire or lose residence while a student at any school, but it depends principally upon intention coupled with some overt act. 1935-36 Op. Att'y Gen. No. 36-1451.

Dependency is strong evidence of residence with parents, but a person cannot ordinarily acquire or lose residence while a student for it is principally a matter of intention. 1935-36 Op. Att'y Gen. No. 36-1279.

Effect of twenty-sixth amendment. — Twenty-sixth amendment to the federal constitution had effect of emancipating the 18- to 20-year-old voter for purposes of establishing his residence for voting purposes. 1971 Op. Att'y Gen. No. 71-119.

Evidence to be viewed liberally. — Evidentiary facts supporting the intention of a student to establish residence in New Mexico should be construed with a liberal view; the fact that he is paying one type of tuition as opposed to another, or residing in a dormitory as opposed to a private residence, should not affect his status as a resident of this state for the purpose of exercising his constitutionally granted elective franchise. 1959-60 Op. Att'y Gen. No. 60-94.

Attendance at out-of-state school. — The fact that a resident of this state is attending school outside its boundaries does not deprive him of his residence within the state. 1933-34 Op. Att'y Gen. No. 33-688.

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections § 163 et seq.

Age, sex, residence, etc., validity of statute requiring information as to, as condition of right to vote, 14 A.L.R. 160, 62 A.L.R. 1167, 74 A.L.R. 163.

Military establishment, state voting rights of residents of, 34 A.L.R.2d 1193.

Residence or domicile of student or teacher for purpose of voting, 98 A.L.R.2d 488, 44 A.L.R.3d 797.

29 C.J.S. Elections §§ 19, 21, 22, 24, 25.

Sec. 5. [Election by ballot; plurality elects candidate.] (2003)

A. All elections shall be by ballot.

B. The legislature may provide by law for runoff elections for all elections other than municipal, primary or statewide elections. If the legislature does not provide for runoff elections, the person who receives the highest number of votes for any office, except as provided in this section, and except in the cases of the offices of governor and

lieutenant governor, shall be declared elected to that office. The joint candidates receiving the highest number of votes for the offices of governor and lieutenant governor shall be declared elected to those offices.

C. In a municipal election, the candidate that receives the most votes for an office shall be declared elected to that office, unless the municipality has provided for runoff elections. A municipality may provide for runoff elections as follows:

(1) a municipality that has not adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may provide by ordinance for runoff elections;

(2) a municipality that has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico, and prior to the adoption of this amendment the charter provided for runoff elections, shall hold runoff elections pursuant to the charter; or

(3) a municipality that adopts or has adopted a charter pursuant to Article 10, Section 6 of the constitution of New Mexico may, subsequent to the adoption of this amendment, provide for runoff elections as provided in its charter. (As amended, November 6, 1962; November 2, 2004.)

ANNOTATIONS

Cross references. — For complementary provision relating to joint election of governor and lieutenant governor, *see* N.M. Const., art. V, § 1.

For the Election Code, *see* Chapter 1 NMSA 1978.

Comparable provisions. — Iowa Const., art. II, § 6.

Montana Const., art. IV, § 5.

Utah Const., art. IV, § 8.

Wyoming Const., art. VI, § 11.

The 1962 amendment, which was proposed by S.J.R. No. 3, § 3 (Laws 1961) and adopted at the general election held on November 6, 1962, with a vote of 41,435 for and 22,383 against, inserted "except in the cases of the offices of governor and lieutenant governor" following "office" in the first sentence and added the second sentence.

The 2003 amendment, which was proposed by H.J.R. 1 (Laws 2003) and adopted at a general election held November 2, 2004, by a vote of 401,026 for and 203,414 against, permits municipalities to provide for runoff elections to resolve those elections that do not produce a candidate who has received a statistically significant portion of the vote.

Constitutional mandate controlling. — Provision that election returns shall be filed with county clerk within 24 hours, though probably mandatory, must yield to constitutional mandate that the person receiving the highest number of votes shall be elected as well as to principle that voters should not be denied their rightful voice in government, in absence of showing that public interest could not be served by preserving validity of election. Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864 (1944).

Requirements for placement on ballot. — Requirements of 1-8-2 and 1-8-3 NMSA 1978 calling for lists of signatures of qualified electors, declaring party affiliation or endorsement of party's principles, to be submitted by minority parties which make nominations other than with a political convention, in order to place their nominees on the ballot, were consistent with legislature's authority and duty to secure the purity of elections and guard against abuse of the elective franchise. People's Constitutional Party v. Evans, 83 N.M. 303, 491 P.2d 520 (1971).

Election contest. — A contestant's claimed majority, adversely affected by conduct of election officials, affords grounds for an election contest. Seele v. Smith, 51 N.M. 484, 188 P.2d 337 (1947).

A complaint alleging that a candidate received a majority of the votes cast, and that the improper conduct of the election officials in refusing to count certain votes deprived him of victory, is sufficient to support an election contest. Weldon v. Sanders, 99 N.M. 160, 655 P.2d 1004 (1982).

Protection of voter's rights. — The voter shall not be deprived of his rights as an elector either by fraud or by mistake of election officers if it is possible to prevent it. Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864 (1944).

Voting machines. — Voting for justices of the peace (now magistrate courts) and constables may be properly conducted by voting machines where all other provisions of the law applicable to the installation and operations of voting machines are observed. 1953-54 Op. Att'y Gen. No. 53-5737.

Law reviews. — For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections §§ 298, 405; 38 Am. Jur. 2d Governor § 2.

Constitutionality of statute providing for use of voting machines, 66 A.L.R. 855.

Constitutionality of statute providing that candidates for certain offices shall be placed on nonpartisan ballots, 125 A.L.R. 1044.

Constitutional or other special proposition submitted to voters, basis for computing majority essential to adoption of, 131 A.L.R. 1382.

Excess of illegal ballots, treatment of, when it is not known for which candidate or upon which side of a proposition they were cast, 155 A.L.R. 677.

Official ballots or ballots conforming to requirements, failure to make available as affecting validity of election of public officer, 165 A.L.R. 1263.

Power of election officer to withdraw or change returns, 168 A.L.R. 855.

Governing law as to existence or character of offense for which one has been convicted in a federal court, or court of another state, as bearing upon disqualification to vote, hold office, practice profession, sit on jury, or the like, 175 A.L.R. 784.

Validity of write-in vote where candidate's surname only is written in on ballot, 86 A.L.R.2d 1025.

29 C.J.S. Elections §§ 149, 241.

ARTICLE VIII
Taxation and Revenue

Section 1. [Levy to be proportionate to value; uniform and equal taxes; percentage of value taxed; limitation on annual valuation increases.] (1997)

A. Except as provided in Subsection B of this section, taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class. Different methods may be provided by law to determine value of different kinds of property, but the percentage of value against which tax rates are assessed shall not exceed thirty-three and one-third percent.

B. The legislature shall provide by law for the valuation of residential property for property taxation purposes in a manner that limits annual increases in valuation of residential property. The limitation may be applied to classes of residential property taxpayers based on owner-occupancy, age or income. The limitations may be authorized statewide or at the option of a local jurisdiction and may include conditions under which the limitation is applied. Any valuation limitations authorized as a local jurisdiction option shall provide for applying statewide or multi-jurisdictional property tax rates to the value of the property as if the valuation increase limitation did not apply. (As amended November 3, 1914, November 2, 1971 and November 3, 1998.)

ANNOTATIONS

Cross references. — For statutory provisions relating to taxation generally, *see* Chapter 7 NMSA 1978.

For valuation of property, *see* 7-36-1 NMSA 1978 et seq.

For provisions relating to county valuation protests boards, *see* 7-38-25 NMSA 1978 et seq.

Comparable provisions. — Idaho Const., art. VII, §§ 2, 3, 5.

Montana Const., art. VIII, §§ 3, 4.

Utah Const., art. XIII, §§ 2, 3.

Wyoming Const., art. XV, § 11.

The 1914 amendment, which was proposed by J.R. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, rewrote this section which formerly read: "The rates of taxation shall be equal and uniform upon all subjects of taxation." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1971 amendment, which was proposed by H.J.R. No. 18 (Laws 1971) and was adopted at the special election held on November 2, 1971, with a vote of 43,262 for and 30,256 against, added the second sentence.

Laws 1971, ch. 308, §§ 1 and 2, provided that all constitutional amendments proposed by the Thirtieth Legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

The 1998 amendment, which was proposed by H.J.R. No. 19, § 2 (Laws 1997), and adopted at the general election held November 3, 1998, by a vote of 261,507 for and 169,513 against, designated the existing language as Subsection A, added "Except as provided in Subsection B of this section", and added Subsection B.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 1 (Laws 1969), which would have allowed classification of property for purpose of valuation, was, according to 1969-70 Op. Att'y Gen. No. 69-151, nullified by submission of proposed constitution to voters in 1969.

An amendment was proposed by H.J.R. No. 16 (Laws 1970), which would have repealed this article and adopted a new Article VIII, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 65,552 for and 71,537 against.

I. GENERAL CONSIDERATION.

Constitutional valuation limitations. — Article VIII, Section 1 of the New Mexico Constitution limits the legislature's existing plenary authority to impose valuation limitations based on taxpayer characteristics to the three enumerated characteristics of age, income and owner-occupancy. It does not impose any restrictions on the legislature's authority to impose limitations in valuation increases based on its classification of residential property. Zhao v. Montoya, 2014-NMSC-025, *aff'g in part* and *rev'g in part* 2012-NMCA-056, 280 P.3d 918.

Statute does not violate the New Mexico Constitution. — Section 7-36-21.2 NMSA 1978 does not violate the New Mexico Constitution because it creates an authorized class based on the nature of the property and not on the taxpayer and it does not violate the equal and uniform clause of Article VIII, Section 1 of the New Mexico Constitution because it furthers the legitimate state interest of fostering neighborhood preservation and stability by permitting older owners to pay progressively less taxes than new owners. Zhao v. Montoya, 2014-NMSC-025, *aff'g in part* and *rev'g in part* 2012-NMCA-056, 280 P.3d 918.

Where a property owner purchased a residential property in 2007 that had been assessed and valued at $243,786; in 2008 the property was valued at $362,600; another property owner purchased a new home "around the corner" from the owner's old home; in 2009, the old home was valued at $553,700 and the new home was valued at $902,500; and the owners claimed that they were entitled to the three percent limitation on increase in valuation that applied to other properties in the area that had not changed ownership, that 7-36-21.2 NMSA 1978 was unconstitutional because it created an unauthorized class of residential property taxpayers based solely upon the time of acquisition, not on the constitutionally permissible classifications of owner-occupancy, age or income, and violated the equal and uniform clause of Article VIII, Section 1 of the New Mexico Constitution, 7-36-21.2 NMSA 1978 was not unconstitutional because it created an authorized class based on the nature of property and not the taxpayer and because it furthered the legitimate state interest of fostering neighborhood preservation and stability by permitting older owners to pay progressively less taxes than new owners. Zhao v. Montoya, 2014-NMSC-025, *aff'g in part* and *rev'g in part* 2012-NMCA-056, 280 P.3d 918.

Valuation methods did not create a new class of taxpayers. — The different valuation methods under 7-36-21.2 NMSA 1978 for newly sold residential property and residential property owned more than a year do not create a new class of taxpayer in violation of Paragraph B of Article VIII, Section 1 of the constitution of New Mexico because 7-36-21.2 NMSA 1978 limits revaluation for taxation purposes based on owner-occupant status. Zhao v. Montoya, 2012-NMCA-056, 280 P.3d 918, *aff'd in part* and *rev'd in part*, 2014-NMSC-025.

Where homeowners bought and occupied new homes and in the year following their purchase, the county valued their property at significantly greater amounts for tax purposes than the county had valued the property for the previous owners; as a result of the revaluation, the property tax assessment for the property significantly increased;

and the homeowners claimed that 7-36-21.2 NMSA 1978 was unconstitutional because it created a new class of taxpayer based on the time of acquisition of property, 7-36-21.2 NMSA 1978 did not create a new class of taxpayer because the homeowners did not obtain the benefit of the limitation of increases in assessed value until they purchased the property, at which time, the homeowners became members of the class of owner-occupants to whom the limitation applies. Zhao v. Montoya, 2012-NMCA-056, 280 P.3d 918, *aff'd in part* and *rev'd in part*, 2014-NMSC-025.

Legislature's inherent power to tax. — The enumeration of subjects of taxation contained in this article was merely confirmatory of the legislature's inherent power to tax, and not a limitation thereon. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Court cannot substitute its view in selecting and classifying for that of legislature. Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Article covers whole subject of tax exemption and has repealed existing territorial provisions on the subject. Albuquerque Alumnae Ass'n of Kappa Kappa Gamma Fraternity v. Tierney, 37 N.M. 156, 20 P.2d 267 (1933). As to tax exemptions, see N.M. Const., art. VIII, §§ 3 and 5.

"Taxes," as used in this section, applies only to taxes, in the proper sense of the word, levied to raise revenue for general purposes. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Generally. — State board of equalization succeeded to all the power of the territorial board, which included fixing the value of shares of all national banks and other banking institutions, the tax to be imposed being in lieu of any taxes which otherwise might be assessed upon their property. First Nat'l Bank of Raton v. McBride, 20 N.M. 381, 149 P. 353 (1915) (decided prior to 1914 amendment).

State board of equalization had power to equalize valuations of property for taxation purposes by classes, both as between classes in the same county and as between counties throughout the state, and fact that the action taken resulted in increase or decrease of total valuations in state was immaterial. South Spring Ranch & Cattle Co. v. State Bd. of Equalization, 18 N.M. 531, 139 P. 159 (1914) (decided prior to 1914 amendment).

Taxpayer must show that taxing statute patently arbitrary and capricious or void for uncertainty in order to defeat the statute on constitutional grounds. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979).

II. TANGIBLE PROPERTY.

All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution or by its authority. Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434 (1939).

Phrase "taxes levied upon tangible property" as used in this section has same meaning as "taxes levied upon real or personal property" used in Section 2 of this article. Hamilton v. Arch Hurley Conservancy Dist., 42 N.M. 86, 75 P.2d 707 (1938).

Classification of property generally. — The constitution in this section and sections 3 and 5 of this article, in effect, classes tangible property into that exempt from taxation, that which may be exempted and that which must be taxed. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936).

Shares of bank stock are intangibles in respect to taxation. First State Bank v. State Tax Comm'n, 40 N.M. 319, 59 P.2d 667 (1936).

Section does not apply to license or privilege taxes. Veterans' Foreign Wars, Ledbetter-McReynolds Post No. 3015 v. Hull, 51 N.M. 478, 188 P.2d 334 (1947); State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296 (1928).

Privilege tax deemed nonproperty in nature. — Where the tax involved is a privilege tax, it is in the nature of a nonproperty tax to which this section is not applicable, and reasonable classifications allowing the imposition of such taxes by the legislature do not deny equal protection or due process. Sunset Package Store, Inc. v. City of Carlsbad, 79 N.M. 260, 442 P.2d 572 (1968).

Annual auto license fee not unconstitutional property tax. — Laws 1912, ch. 28 (repealed), fixing an annual license fee for operating an automobile was not unconstitutional as a property tax imposed without regard to value of property on which it was made, but was a license tax, since character of tax is not determined by the mode adopted in fixing its amount. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Gross receipts tax on sale of mobile homes constitutional. C & D Trailer Sales v. Taxation & Revenue Dep't, 93 N.M. 697, 604 P.2d 835 (Ct. App. 1979).

Assessment for conservancy district not "tax". — An assessment for conservancy district purposes made under Laws 1927, ch. 45 (73-14-1 NMSA 1978 et seq.) is not a tax within meaning of this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Laws 1923, ch. 140, § 502 (repealed), relating to conservancy districts and authorizing preliminary assessments to defray preliminary costs of surveys and engineers' fees, did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Succession tax not violative of section. — Laws 1919, ch. 122 (repealed), the Succession Tax Law, did not violate this section, since it did not tax tangible property. State v. Gomez, 34 N.M. 250, 280 P. 251 (1929).

Tax on gasoline not property taxation. — The first part of this section clearly refers to property taxation. The tax imposed upon the "sale or use of all gasoline sold or used in this state" is not property taxation, but, in effect, as in name, an excise tax. The state has the power to select this commodity, as distinguished from others, in order to impose an excise tax upon its sale or use; and since the tax operated impartially upon all, and with territorial uniformity throughout the state, it is "equal and uniform upon subjects of taxation of the same class". Bowman v. Continental Oil Co., 256 U.S. 642, 41 S. Ct. 606, 65 L. Ed. 1139 (1921).

Tax on extracted oil and gas held not property tax. — Tax imposed by Laws 1933, ch. 72 (repealed), upon oil and gas secured from the soil was an excise tax, and not a property tax on tangible property not in proportion to value thereof, and was not unconstitutional. Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934).

Separate taxation of oil and gas well equipment not precluded. — A tax on production of oil and gas wells, based on one-half of market value after deducting certain items, does not preclude separate taxation of equipment used in connection with such wells. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936).

There is a substantial difference between underground and open-pit mines sufficient to support a distinction between them for tax purposes. Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Dams and reservoirs are assessed and taxed separately at their situs, separately from the lands they irrigate. Storrie Project Water Users Ass'n v. Gonzales, 53 N.M. 421, 209 P.2d 530 (1949).

Affording relief to taxpayer. — The court will not ordinarily afford relief to a taxpayer whose property is not assessed more than the law provides. In re Taxes Assessed Against Property of Scholle, 42 N.M. 371, 78 P.2d 1116 (1938).

Remedy of taxpayer not assessed more than law allows. — A taxpayer who is not assessed more than the law provides has no cause for complaint in the courts in the absence of some well-defined and established scheme of discrimination or some fraudulent action, and the taxpayer's remedy is to have the assessing authority raise the value on the property claimed to be valued too low to a level with his own. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750, 76 A.L.R. 2d 1071 (1959).

Relief granted by state, not federal, courts. — If there is illegal discrimination as to the assessment against one or more taxpayers, New Mexico courts will grant relief and not require the taxpayer to proceed in the federal courts. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750 (1959).

Courts may not reclassify, revalue or reassess property. — Neither supreme court nor the district court may reclassify, revalue or reassess property, improperly classified by taxing officials, and consequently, assess at an excessive valuation. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Authority to settle tax suits not affected. — The authority of district attorneys to compromise and settle tax suits is not affected by this section. State v. State Inv. Co., 30 N.M. 491, 239 P. 741 (1925).

Sovereign immunity doctrine not applicable in mandamus proceeding. — In a mandamus proceeding to require the performance of a duty plainly required under the constitution, i.e., to prescribe an assessment ratio so that property shall be uniformly assessed in proportion to its value, the sovereign immunity doctrine is not applicable. State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

Burden on plaintiff to prove unreasonable assessment. — The burden is on the plaintiff to prove that an unreasonable number of typical or representative properties were assessed at a level considerably under the figure at which his property was assessed. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750, 76 A.L.R. 2d 1071 (1959).

Description of items by taxpayer. — The taxpayer is not required to describe each specific item, but certainly a large enough number so that the court can obtain a true account of the situation without engaging in conjecture. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750, 76 A.L.R. 2d 1071 (1959).

No appellate review of assessment when question moot or abstract. — When cause of action under this section is destroyed where neighboring county raises its tax assessment to figure higher than one in plaintiff's county and the issues involved in the trial court no longer exist, then an appellate court will not review a case merely to decide moot or abstract questions. Hamman v. Clayton Mun. Sch. Dist. No. 1, 74 N.M. 428, 394 P.2d 273 (1964).

III. EQUAL AND UNIFORM.

General requirements for validity of taxation. — The state may select its subjects of taxation, and, so long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend this section of the state constitution. Gruschus v. Bureau of Revenue, 74 N.M. 775, 399 P.2d 105

(1965); Anaconda Co. v. Property Tax Dep't, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Remedy for differential treatment of property. — A taxpayer is not entitled to an exemption under Article VIII, Section 1(A) of the New Mexico Constitution based on evidence that another taxpayer with similarly used property received such an exemption, absent a finding that the unequal taxation was intentional, fraudulent or discriminatory. CAVU Co. v. Martinez, 2014-NMSC-029, *aff'g in part* and *rev'g in part* 2013-NMCA-050, 302 P.3d 126.

Remedy where there is no constitutional violation. — Where the taxpayer's property was not actively used as a school on January 1, 2010 and was not used actively as a school until August 2010 when the fall semester began; the county assessor determined that the property did not qualify for an educational use exemption in 2010; and the taxpayer claimed that the taxpayer's property should be exempt from taxation because the county assessor had granted an exemption to another school that was not operating as a school on January 1, 2010 and that did not begin school operations until the fall semester of 2010; and the taxpayer did not offer any evidence or claim that the county assessor's disparate treatment of the two properties was the result of fraud or systematic discrimination, any disparity did not rise to a constitutional violation and the taxpayer's only remedy was to remove the exemption from the other school property, rather than to exempt the taxpayer's property from taxes. CAVU Co. v. Martinez, 2013-NMCA-050, 302 P.3d 126, cert. granted, 2013-NMCERT-004.

Uniformity clause of New Mexico constitution requires uniformity of property taxation within a county as well as statewide uniformity of assessments. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Rationale for section. — The rationale for the provision that "taxes shall be equal and uniform upon subjects of taxation of the same class" is that all property should bear its share of the cost of government. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Uniformity and equality do not mean mathematical exactitude in appraisals for tax purposes. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Invidious assessment. — Failing to tax all alike as result of wrong intentionally done by taxing officer was an "invidious assessment" and violated this section prior to its amendment. First Nat'l Bank v. McBride, 20 N.M. 381, 149 P. 353 (1915).

No violation of Uniformity Clause shown. — Although taxpayers were able to present evidence that a disparity existed between their lot and those of other lots in their subdivision, their failure to present any evidence that the disparity was substantial, intentional, or related to the overall assessment of the property, or that their lot was

overassessed militated against a finding that there was a constitutional violation of the uniformity clause. Hannahs v. Anderson, 1998-NMCA-152, 126 N.M. 1, 966 P.2d 168, cert. denied, 126 N.M. 532, 972 P.2d 351 (1998).

Duty of tax assessor. — A tax assessor has a constitutional duty to take the necessary action to require, so far as possible, equality and uniformity in taxation on a continuing basis. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Legislature is authorized to exempt certain property from taxation and none other. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

State may constitutionally tax one class and exempt other classes if the classification reasonably tends, in some lawful way, to facilitate the raising of revenue. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

There need be no relation between class of taxpayers and purpose of appropriation according to the supreme court of the United States in New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S. Ct. 721, 82 L. Ed. 1024 (1938). Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Valuations and taxes to be based on standard. — To have uniformity and equality in a form of tax, the valuations must be established by some standard, and after valuations are fixed, the taxes based upon such valuations must be levied by a standard. It is only thus that each taxpayer may bear his fair share of the burden of government. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Uniform method of taxation requires that each reappraisal be part of a systematic and definite plan which provides that all similar properties be valued in a like manner. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Violations of constitutional uniform taxation requirements frequently result in violations of equal protection clauses. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Taxpayer must not be subjected to discrimination in the imposition of a property tax burden which results from systematic, arbitrary, or intentional revaluation of some property at a figure greatly in excess of the undervaluation of other like properties. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

To support claim under uniformity clause of New Mexico constitution, the taxpayer must show that the inequality is substantial and amounts to an intentional violation of the essential principle of practical uniformity. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Factors in determining discrimination in property revaluation plan. — In determining whether a property revaluation plan constitutes intentional and arbitrary

discrimination in violation of this section and N.M. Const., art. II, § 18, all relevant circumstances should be taken into consideration. Such factors should include, but not be limited to, the resources realistically available to the assessing authority, the time limitations involved in the plan, the availability of other alternatives and the amount of temporary inequalities in valuations which result from the cyclical implementation of the plan. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Mere errors of judgment not unconstitutional discrimination. — Mere errors of judgment in estimating market value of property will not be sufficient to show unconstitutional discrimination in the assessment of unequal taxes, however, good faith alone will not justify an assessment which is discriminatory in fact. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

There exists no constitutional inhibition against double taxation. New Mexico State Bd. of Pub. Accountancy v. Grant, 61 N.M. 287, 299 P.2d 464 (1956).

Taxes must be equal and uniform upon subjects of same class. — There is no state constitutional inhibition against double taxation in the sense frequently used. The requirement that must be met to escape the stricture of its being illegal is that taxes must be equal and uniform upon subjects of the same class. Amarillo-Pecos Valley Truck Lines v. Gallegos, 44 N.M. 120, 99 P.2d 447 (1940).

"Double taxation" held not suffered. — An attorney who paid a $5.00 license fee for board of commissioners of state bar, a $1.00 license fee under Sales Tax Law and the gross income tax was held not to have suffered "double taxation" prohibited by this section. State ex rel. Attorney Gen. v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938).

Special tax districts no violation of section. — Where legislature by special law created a state road through two counties, it could require levy of special tax on all the property within one of the counties for purpose of providing a fund for improvement of the highway therein, since it thereby created a special taxing district, which it had the power to do, without violating this section. Borrowdale v. Board of Cnty. Comm'rs, 23 N.M. 1, 163 P. 721 (1916).

Taxes levied under district school bonds not in violation of section. — Taxes levied under a bond issued in accord with portions of Laws 1937, ch. 36 (repealed), providing that a school district within which is located a state school conducting a high school may vote, issue and sell district school bonds, for purpose of joining with the state school in erecting and furnishing a high school building, or purchasing ground therefor, were not in violation of this section, since the taxes were equal and uniform throughout the district. White v. Board of Educ., 42 N.M. 94, 75 P.2d 712 (1938).

Equality provision of section does not extend to local assessments for improvements levied upon property specially benefited thereby; it did not apply to conservancy district's preliminary fund assessment. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Exemption of industrial revenue bonds from taxation no violation of provisions. — Statute authorizing issuance of revenue bonds by municipality for industrial development and providing that bonds so authorized, the income therefrom, shall be exempt from all taxation by state on any subdivision, was not violation of constitutional provision requiring that taxes be equal and uniform insofar as the exemption was confined to municipal property. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Town pollution control project to be used by private corporations. — The fact that pollution control project to be used by private corporations and financed by funds from industrial revenue bonds was to be owned by the town, and therefore be exempt from ad valorem taxes, did not violate this section. Kennecott Copper Corp. v. Town of Hurley, 84 N.M. 743, 507 P.2d 1074 (1973).

Power of legislature to classify for purposes of taxation. — Former 2% privilege tax (1937 amendment to 59-26-31 NMSA 1978) from which qualified benefit societies were exempt did not violate this section. Power of legislature to classify for purposes of taxation and to impose tax in question must be conceded if any reasonable or sound basis can be found to sustain it. Sovereign Camp, W.O.W. v. Casados, 21 F. Supp. 989 (D.N.M.) 1938, aff'd, 305 U.S. 558, 59 S. Ct. 79, 83 L. Ed. 352 (1938).

Power to levy excise tax. — Given a reasonable classification of subjects, the power of the legislature to levy an excise tax is almost unlimited, at least so long as it does not go to the extent of extortion or confiscation. George E. Breece Lumber Co. v. Mirabal, 34 N.M. 643, 287 P. 699, 84 A.L.R. 827 (1930), aff'd, 283 U.S. 788, 51 S. Ct. 352, 75 L. Ed. 1415 (1931).

Excise tax need bear no relation to object. — That excise tax need bear no relation to the object for which the proceeds are to be expended is well settled. New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 58 S. Ct. 721, 82 L. Ed. 1024 (1938), and George E. Breece Lumber Co. v. Mirabal, 34 N.M. 643, 287 P. 699, 84 A.L.R. 827 (1930), aff'd, 283 U.S. 788, 51 S. Ct. 352, 75 L. Ed. 1415 (1931); Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Classification of commodities, businesses or occupations for excise tax purposes, under which the classes are taxed at unequal rates or one class is taxed and another is exempted, will be upheld as constitutional if it is not arbitrary nor capricious and rests upon some reasonable basis of difference or policy. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Excise tax upon use of gasoline for any purpose. — An excise tax laid upon the use of gasoline for any purpose in the state preserves equality and uniformity of taxation within constitutional requirements. George E. Breece Lumber Co. v. Mirabal, 34 N.M. 643, 287 P. 699, 84 A.L.R. 827 (1930), aff'd, 283 U.S. 788, 51 S. Ct. 352, 75 L. Ed. 1415 (1931).

Validity of tax on tobacco sustained. — In almost every case in which the question has arisen, the courts have sustained the validity of statutes or ordinances imposing a tax on cigars, cigarettes and other forms of tobacco, as against objections based on violation of the rule requiring uniformity of taxation or constitutional provisions guaranteeing equal protection of the law. Beatty v. City of Santa Fe, 57 N.M. 759, 263 P.2d 697 (1953).

Provisions relating to auto licenses. — Laws 1912, ch. 28 (repealed), providing for automobile licenses, did not conflict with constitutional provision with respect to equality and uniformity under authorities holding that constitutional provision is restricted to property tax. State v. Ingalls, 18 N.M. 211, 135 P. 1177 (1913).

Uniformity requirement as to taxes levied for county purposes. — This section does not require uniformity throughout the state as to taxes levied and assessed for purely county purposes, the requirement of uniformity being met in such case if operation of tax is equal and uniform throughout the county. Love v. Dunaway, 28 N.M. 557, 215 P. 822 (1923), superseded by statute, New Mexico Prop. Appraisal Dep't v. Board of Cnty. Comm'rs of Lea Cnty., 82 N.M. 267, 479 P.2d 771 (1971).

Making uniform state's share of ad valorem taxes. — There must be a uniform percentage ratio, or some other means of equalization, so as to make uniform the state's share of ad valorem taxes, and the manner by which it is done, the court leaves to the state tax commission (now property tax division of the taxation and revenue department). State ex rel. Castillo Corp. v. New Mexico State Tax Comm'n, 79 N.M. 357, 443 P.2d 850 (1968).

IV. METHODS.

Provisions relating to auto licenses not in contravention. — Provision in Laws 1925, ch. 82 (repealed), relating to automobile licenses, that county assessor should prepare an assessment roll of motor vehicles, fix the assessed valuation thereof, in accordance with a schedule prepared by state tax commission (now property tax division of the taxation and revenue department), specifying valuations of vehicles of the several makes, types and models, making proper allowances for depreciation, and extend the taxes thereon, did not contravene the uniformity clause of the constitution. State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296 (1928).

Continuing partial annual reappraisal not violative of section. — Where only 20% of a county was reappraised during the year and the equalization program was a continuing one, the reappraisal program did not violate this section of the constitution of New Mexico. Skinner v. New Mexico State Tax Comm'n, 66 N.M. 221, 345 P.2d 750, 76 A.L.R. 2d 1071 (1959).

Determination of value by "reasonable cash market value". — Generally, the "reasonable cash market value" reflected by sales of comparable property is to be used

to determine value if there have been such sales. Hardin v. State Tax Comm'n, 78 N.M. 477, 432 P.2d 833 (1967).

Determination where no "market value" for property. — In situations where property has no "market value" based on comparable sales earning capacity, cost of reproduction and original cost, less depreciation, furnish proper criteria for consideration in determining value. Hardin v. State Tax Comm'n, 78 N.M. 477, 432 P.2d 833 (1967).

Hypothetical or speculative values not to be used in determination. — Classification or assessment of property for tax purposes, premised upon hypothetical or speculative values believed, ultimately or at some later time, to be or become the true market value of such land, cannot legitimately be the basis of determining its value. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Discriminatory method for reappraising land entitles taxpayer to relief. — A well-defined and established scheme of discrimination in the method used for reappraising land within a county violates this section and entitles the taxpayer to relief. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Reassessment violating law may be enjoined. — Laws 1933, ch. 86 (repealed), providing for an assessment every four years and prohibiting increased assessments in intervening years and Laws 1933, ch. 104 (repealed), conferring power on county equalization board (now county valuation protests boards) to revise and revalue property except where such valuation is fixed by law or by state tax commission (now property tax division of the taxation and revenue department), conformed with this section, and a reassessment in violation of those laws could be enjoined. Vermejo Club v. French, 43 N.M. 45, 85 P.2d 90 (1938).

Evidence to arrive at uniformity in assessment. — To arrive at uniformity in the assessment of property for taxation, as provided in this section and N.M. Const., art. VIII, § 2, the taxing authority and the taxpayer can introduce evidence regarding the ratios of assessed values to market values as the latter are reflected in actual sales of any other real estate in the taxing district for a reasonable period prior to the assessment date. Peterson Properties v. Valencia Cnty. Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

Classification and valuation found excessive and discriminatory. — Classification and valuation of property suitable for grazing purposes at 10 times the valuation of other property of the same character and quality and similarly situated because of its classification as lots held for speculation for oil or other purposes, absent any evidence of such speculative purposes, was so excessive and discriminatory as to entitle taxpayer to relief, despite fact that some other owners of like tracts were similarly assessed or that these lands, while similar to grazing lands, were not actually used for grazing purposes. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Reasonable time limitation on completion of revaluation program. — Where a cyclical program of revaluation is undertaken, such plan need not necessarily be completed within a single year; however, it must be completed within a reasonably limited time. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Lack of adequate resources no excuse for unequal assessments. — Lack of adequate resources with which to undertake and complete a cyclical reappraisal within a reasonable time cannot be relied upon as an excuse for unequal tax assessments where the assessor has a mandatory duty to achieve equal and uniform property taxation. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Assessment based on invalid carry-over assessment unconstitutional. — Where taxpayer's 1975 assessment is not based on any new reappraisal, but is a result of an automatic carry-over of a 1974 assessment which was constitutionally invalid, the 1975 assessment is unconstitutional. Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

Inequality in yearly reappraisals of some property unconstitutional. — Singling out one or a few taxpayers for reappraisals for several years in succession while virtually all other owners of comparable properties do not undergo a single reappraisal in the same period is an inequality that is neither temporary nor constitutional. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978).

Temporary inequalities constitutional. — Since there is no requirement under this section for reappraisals of all comparable properties within a county to be completed within a single year, temporary inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. Ernest W. Hahn, Inc. v. County Assessor, 92 N.M. 609, 592 P.2d 965 (1978); Dale Bellamah Land Co. v. County of Bernalillo, 92 N.M. 615, 592 P.2d 971 (1978).

Equalization of valuation of property for taxation purposes. — State board of equalization under Laws 1913, ch. 84, § 13 (repealed), had power to equalize its valuation of property for taxation purposes by classes, both as between classes in the same county and as between counties throughout the state, and fact that action taken resulted in increase or decrease of total valuations in the state was immaterial. South Spring Ranch & Cattle Co. v. State Bd. of Equalization, 18 N.M. 531, 139 P. 159 (1914).

Under Laws 1915, ch. 54, § 6 (repealed), state tax commission (now property tax division of the taxation and revenue department) could only increase or decrease the entire property within a given county, except such as it had previously valued, and such as has been assessed at its actual value, by a uniform percentage. Taxes based on values set by the commission on varying percentages of increase or decrease could be enjoined. Maxwell Land Grant Co. v. Jones, 28 N.M. 427, 213 P. 1034 (1923).

Distinction between subdivided and unsubdivided agricultural land did not offend section. — Distinction drawn by former statute (72-2-14.1, 1953 Comp.) between subdivided and unsubdivided agricultural land, for tax purposes, did not offend this section and did not violate due process. Property Appraisal Dep't v. Ransom, 84 N.M. 637, 506 P.2d 794 (Ct. App. 1973).

Section 7-36-20 NMSA 1978 establishes special method of valuation for land used primarily for agricultural purposes, determined on the basis of the land's capacity to produce agricultural products. This "green belt" law is clearly an exception to the general mode of property valuation for tax purposes established by the property tax code and the New Mexico constitution, i.e., market value. County of Bernalillo v. Ambell, 94 N.M. 395, 611 P.2d 218 (1980).

Duty of county valuation protests boards to hear taxpayer's valuation protest on any grounds. — When the language of a statute is clear and unambiguous, the statute must be given its literal meaning; the language of 7-38-24 and 7-38-25 NMSA 1978 (formerly 72-2-37 and 72-2-38, 1953 Comp.) clearly and unambiguously gives to the county valuation protests boards the duty to hear a protest of the valuation of a taxpayer's property on any grounds whatsoever, including the grounds of allegedly unconstitutional discrimination in comparison with assessments of other properties. In re Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975), rev'd, 89 N.M. 547, 555 P.2d 142 (1976).

The 1914 amendment took effect as soon as election was closed. 1914 Op. Att'y Gen. No. 14-1404.

Provisions deemed separable. — It is the obvious conclusion of the United States supreme court that the second and third phrases of the first sentence are separable, the second being applicable solely to property taxes and the third applying to all other taxes, or at least to all excise taxes. 1961-62 Op. Att'y Gen. No. 61-68.

Liability of lessee of university-owned land. — The lessee of university-owned land is not liable for ad valorem taxes based on the assessed value of the land itself, as distinct from the value of the improvements erected upon the land. 1970 Op. Att'y Gen. No. 70-24.

Exemption of veterans from ad valorem taxes. — The veterans exemption laws do not exempt a veteran from the payment of ad valorem taxes for the taxable year during which property was purchased by the veteran from a nonveteran owning the property on January 1st of such year. 1959-60 Op. Att'y Gen. No. 59-133; *see also*, N.M. Const., art. VIII, § 5, and notes thereto.

Nonprofit water corporation subject to ad valorem taxation. — A nonprofit corporation organized to provide a community water system pursuant to 3-29-1 NMSA 1978 is not "another municipal corporation" and is subject to ad valorem taxation. 1968 Op. Att'y Gen. No. 68-38.

Timber may be separately assessed where it is owned by persons other than those owning the land upon which it stands. 1919-20 Op. Att'y Gen. No. 19-2389.

Evaluation and assessment generally. — In view of the fact that the adoption of the amendment in 1914 dissolved the board of equalization, and the county commissioners had not the power to evaluate the property of certain corporations and other property excluded by Laws 1913, ch. 81, § 4 (repealed), the evaluation and original assessment fell to county assessors under § 5 of that act. 1914 Op. Att'y Gen. No. 14-1399. For provisions relating to the county valuation protests boards, *see* 7-38-25 NMSA 1978 et seq.

Valuation of property for tax assessment purposes. — In arriving at the value of property for tax assessment purposes, mathematical formulae may lawfully be employed as a factor for determining the ultimate amount of tax due, but the validity of such formulae is dependent upon the proper consideration of all relevant factors. 1961-62 Op. Att'y Gen. No. 61-93.

Assessment of farm machinery and equipment. — Farm machinery and equipment for ad valorem tax purposes must be assessed in proportion to the full actual value of the property subject to the tax. 1961-62 Op. Att'y Gen. No. 61-93.

Assessment on net product violative of section. — Laws 1915, ch. 55 (repealed), providing that mines should be assessed for taxation on their net product violated this section. 1917-18 Op. Att'y Gen. No. 17-2050.

Income tax subject to section. — The income tax, being an excise tax, is subject to the limitations imposed by this section. A provision relating to such would violate the equality clause if it were given retroactive construction. 1961-62 Op. Att'y Gen. No. 61-68.

Arbitrary classification based on incomes invalid. — A statute making an arbitrary classification between incomes to be taxed and those in part or in whole exempt from or not subject to taxation is invalid. 1961-62 Op. Att'y Gen. No. 61-68.

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

For comment, "Land Use Planning - New Mexico's Green Belt Law," see 8 Nat. Resources J. 190 (1968).

For note, "Serrano v. Priest and Its Impact on New Mexico," see 2 N.M. L. Rev. 266 (1972).

For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

For comment, "Coal Taxation in the Western States: The Need for a Regional Tax Policy," see 16 Nat. Resources J. 415 (1976).

For comment, "Taxation of the Uranium Industry: An Economic Proposal," 7 N.M. L. Rev. 69 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation § 159.

Automobile license tax as affected by constitutional provisions as to uniformity and discrimination in taxation, 5 A.L.R. 761, 126 A.L.R. 761.

Business or profession as "property" as used in provision as to uniformity and equality of taxes, 34 A.L.R. 719.

Newspapers and magazines, equality and uniformity in taxation of, 35 A.L.R. 11, 110 A.L.R. 327.

Gasoline, equality and uniformity requirements as applicable to license tax on, 47 A.L.R. 985, 84 A.L.R. 839, 111 A.L.R. 185.

Dog taxes, discrimination in, 49 A.L.R. 850.

Additional tax levy necessitated by failure of some property owners to pay their proportions of original levy as violating requirement of uniformity, 79 A.L.R. 1157.

Tax anticipation warrants, relation of uniformity clause to, 99 A.L.R. 1039.

Installments, constitutionality of statute permitting payment of taxes in, 101 A.L.R. 1335.

Relieving property subject to assessment from all or part of such assessment, 105 A.L.R. 1169.

Quo warranto to test constitutionality of statutory provisions in respect to taxation, 109 A.L.R. 326.

Domicile of decedent as regards taxation, diverse adjudications by courts of different states as to, 121 A.L.R. 1200.

Taxation in same state of real property and debt secured by mortgage or other lien thereon as double taxation, 122 A.L.R. 742.

Notes or obligations secured by real estate mortgage and those unsecured, discrimination between, as regards property taxation or exemption therefrom, 129 A.L.R. 682.

Tolls as taxes within constitutional provisions respecting taxes, 167 A.L.R. 1356.

Who may complain of underassessment or nonassessment of property for taxation, 5 A.L.R.2d 576, 9 A.L.R.4th 428.

Military personnel, provisions of Soldiers' and Sailors' Civil Relief Act relating to taxation of property of, 32 A.L.R.2d 618.

"Blockage rule" or "blockage discount theory" in determining stock valuation for purposes of taxation of intangibles, 33 A.L.R.2d 607.

Eminent domain, rights in respect to real estate taxes where property is taken in, 45 A.L.R.2d 522.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Oil and gas royalty: expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return, 73 A.L.R.2d 1056.

Equal and uniform taxation, real estate tax equalization, reassessment, or revaluation program commenced, but not completed within the year, as violative of constitutional provisions requiring, 76 A.L.R.2d 1077.

Civil liability of tax assessor to taxpayer for excessive or improper assessment of real property, 82 A.L.R.2d 1148.

Laundries, taxation of self-service, 87 A.L.R.2d 1007.

Income or rental value as a factor in evaluation of real property for purposes of taxation, 96 A.L.R.2d 666.

Landlord and tenant: construction of provision of lease providing for escalation of rental in event of tax increases, 48 A.L.R.3d 287.

Property tax: exemption of property leased by and used for purposes of otherwise tax-exempt body, 55 A.L.R.3d 430.

Property tax: Business situs of intangibles held in trust in state other than beneficiary's domicil, 59 A.L.R.3d 837.

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 A.L.R.3d 916.

Validity of statutory classifications based on population - tax statutes, 98 A.L.R.3d 1083.

Classification, as real estate or personal property, of mobile homes or trailers for purposes of state or local taxation, 7 A.L.R.4th 1016.

84 C.J.S. Taxation §§ 21 to 38.

Sec. 2. [Property tax limits; exception.]

Taxes levied upon real or personal property for state revenue shall not exceed four mills annually on each dollar of the assessed valuation thereof except for the support of the educational, penal and charitable institutions of the state, payment of the state debt and interest thereon; and the total annual tax levy upon such property for all state purposes exclusive of necessary levies for the state debt shall not exceed ten mills; provided, however, that taxes levied upon real or personal tangible property for all purposes, except special levies on specific classes of property and except necessary levies for public debt, shall not exceed twenty mills annually on each dollar of the assessed valuation thereof, but laws may be passed authorizing additional taxes to be levied outside of such limitation when approved by at least a majority of the qualified electors of the taxing district who paid a property tax therein during the preceding year voting on such proposition. (As amended November 3, 1914, September 19, 1933, and November 7, 1967.)

ANNOTATIONS

Cross references. — For statutory provisions relating to property taxes generally, *see* Articles 35 to 38 of Chapter 7 NMSA 1978.

Comparable provisions. — Idaho Const., art. VII, § 9.

Wyoming Const., art. XV, § 4.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted that part of the present section preceding the proviso for the original section which read: "The legislature shall have power to provide for the levy and collection of license, franchise, excise, income, collateral and direct inheritance, legacy and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes, and other specific taxes, including taxes upon the production and output of mines, oil lands and forests; but no double taxation shall be permitted." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1933 amendment, which was proposed by S.J.R. No. 21 (Laws 1933) and adopted at a special election held on September 19, 1933, with a vote of 41,393 for and 27,541 against, added the proviso.

The 1967 amendment, which was proposed by H.J.R. No. 23, § 1 (Laws 1967) and adopted at a special election held on November 7, 1967, with a vote of 38,231 for and 13,682 against, inserted "qualified" preceding "electors" and "who paid a property tax therein during the preceding year" preceding "voting on" in the proviso.

I. GENERAL CONSIDERATION.

Phrase "taxes levied upon real or personal property" as used in this section has same meaning as "taxes levied upon tangible property" used in Section 1 of this article. Hamilton v. Arch Hurley Conservancy Dist., 42 N.M. 86, 75 P.2d 707 (1938).

Legislature has power to levy excise tax on gasoline. Lujan v. Triangle Oil Co., 38 N.M. 543, 37 P.2d 797 (1934). *See also* notes to N.M. Const., art. VIII, § 1.

Provisions authorizing levies for public highways and roads held valid. — Laws 1921, ch. 153 (temporary), authorizing levy of taxes and issuance and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to the state of federal funds under Federal Aid Road Act, was validated by adoption of amendment to state constitution, adding Section 16 to Article IX. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

Laws 1919, ch. 168 (temporary), authorizing and directing the counties of the state to levy a tax of three mills on the dollar for construction and maintenance of public roads in the several counties, and to meet allotments of federal funds, was not an act for raising of state revenue and did not violate this section. State v. Red River Valley Co., 28 N.M. 94, 206 P. 695 (1922).

Evidence regarding uniformity in assessment of property for taxation. — To arrive at uniformity in the assessment of property for taxation, as provided in N.M. Const., art. VIII, § 1 and this section, the taxing authority and the taxpayer can introduce evidence regarding the ratios of assessed values to market values as the latter are reflected in actual sales of any other real estate in the taxing district for a reasonable period prior to the assessment date. Peterson Properties v. Valencia Cnty. Valuation Protests Bd., 89 N.M. 239, 549 P.2d 1074 (Ct. App. 1976).

II. TWENTY-MILLS LIMITATION.

Conservancy district assessments not subject to limitation. — Conservancy district's preliminary fund assessment was not subject to the limitation provision of this section. Hamilton v. Arch Hurley Conservancy Dist., 42 N.M. 86, 75 P.2d 707 (1938).

Levy for tort judgment against county commissioners compelled. — Mandamus lay to compel state tax commission to approve a levy of tax to pay tort judgment against county commissioners; statutory debt limitation could not be interposed, especially where evidence failed to show that the combined rate would exceed the constitutional

20-mill limitation or the five-mill limitation on expenditures of county purposes and neither limitation would shield county from a forced levy to satisfy such a judgment. State ex rel. Martin v. Harris, 45 N.M. 335, 115 P.2d 80 (1941).

Levy for caring for indigent patients. — Constitutional provision permitting levies for public debts in excess of 20-mill limitation does not contemplate judgment for hospital against board of county commissioners for cost of care of indigent persons. Board of Dirs. of Mem. Gen. Hosp. v. County Indigent Hosp. Claims Bd., 77 N.M. 475, 423 P.2d 994 (1967).

Words "but laws may be passed authorizing additional taxes" should not be construed to provide that only laws which are passed authorizing additional taxes after the enactment of the constitutional amendment are effective. 1968 Op. Att'y Gen. No. 68-105.

Qualified electors those who paid property tax during preceding year. — This section would preclude the legislature from limiting persons entitled to vote on a special levy to those who own or pay property taxes. 1955-56 Op. Att'y Gen. No. 56-6492.

The effect of the 1967 amendment to this section was to amend former 21-16-12 and 21-16-17 NMSA 1978 by adding the additional qualification that those voting in district elections be those qualified electors who paid a property tax therein during the preceding year. 1968 Op. Att'y Gen. No. 68-105.

"Public debt" means judgments arising out of involuntary debt of a political subdivision. This includes tort judgments and possibly condemnation awards. It does not include debts for ordinary current obligation of the county. A judgment arising out of a contractual obligation may not be placed on the tax rolls if the levy would exceed the 20-mill limitation of this section. 1970 Op. Att'y Gen. No. 70-01.

Conservancy district assessments. — The assessments levied through the provisions of 73-18-8 NMSA 1978, relating to conservancy district reclamation, are not within the purview of the limitations imposed by this section, and thus are not subject to the 20-mill limitation. 1959-60 Op. Att'y Gen. No. 60-209.

Assessments of flood control authority. — The "one half of one mill" property tax which the Albuquerque flood control authority may levy pursuant to Subsection J (now I) of 72-16-22 NMSA 1978 is not a general tax, but a benefit assessment, and hence is not subject to the 20-mill limitation of this section. 1963-64 Op. Att'y Gen. No. 64-90.

Paving assessments against school district property. — Taxes levied for payment of paving assessments against school district property are levies for public debt and do not come within 20-mill limitation appearing in the proviso clause. 1933-34 Op. Att'y Gen. No. 34-765.

Exemption of church property. — If property is owned by a church, it is exempt from taxation, regardless of the use made of the property. 1925-26 Op. Att'y Gen. 26-3893 (opinion rendered prior to 1972 amendment).

Law reviews. — For comment, "Approaches to State Taxation of the Mining Industry," see 10 Nat. Resources J. 156 (1970).

For article, "Indians - Civil Jurisdiction in New Mexico - State, Federal and Tribal Courts," see 1 N.M. L. Rev. 196 (1971).

For note, "Serrano v. Priest and Its Impact on New Mexico," see 2 N.M. L. Rev. 266 (1972).

For article, "An Intergovernmental Approach to Tax Reform," see 4 N.M. L. Rev. 189 (1974).

For comment, "Coal Taxation in the Western States: The Need for a Regional Tax Policy," see 16 Nat. Resources J. 415 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation §§ 122, 126.

Corporate property, assessment at full value when valuations generally are illegally fixed lower, 3 A.L.R. 1370, 28 A.L.R. 983, 55 A.L.R. 503.

Limitation of power to tax as limitation on power to incur indebtedness, 97 A.L.R. 1103.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

84 C.J.S. Taxation § 56.

Sec. 3. [Tax-exempt property.]

The property of the United States, the state and all counties, towns, cities and school districts and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property not used for commercial purposes, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit and all bonds of the state of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation.

Provided, however, that any property acquired by public libraries, community ditches and all laterals thereof, property acquired by churches, property acquired and used for

educational or charitable purposes, and property acquired by cemeteries not used or held for private, or corporate profit, and property acquired by the Indian service and property acquired by the United States government or by the state of New Mexico by outright purchase or trade, where such property was, prior to such transfer, subject to the lien of any tax or assessment for the principal or interest of any bonded indebtedness shall not be exempt from such lien, nor from the payment of such taxes or assessments.

Exemptions of personal property from ad valorem taxation may be provided by law if approved by a three-fourths majority vote of all the members elected to each house of the legislature. (As amended November 3, 1914, November 5, 1946, and November 7, 1972.)

ANNOTATIONS

Cross references. — For exemption from property tax generally, *see* 7-36-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. VII, § 4.

Montana Const., art. VIII, § 5.

Utah Const., art. XIII, §§ 2, 3.

Wyoming Const., art. XV, § 12.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted the first paragraph, which was formerly Section 7 of this article, for language which read: "The enumeration of subjects of taxation in section two of this article shall not deprive the legislature of the power to require other subjects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1946 amendment, which was proposed by S.J.R. No. 3 (Laws 1945) and adopted at the general election held on November 5, 1946, with a vote of 15,645 for and 6,925 against, added the proviso.

The 1972 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1972) and adopted at the general election held on November 7, 1972, with a vote of 141,622 for and 73,386 against, inserted "not used for commercial purposes" following "church property" in the first paragraph and added the last paragraph.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 20, § 1 (Laws 1971), was submitted to the people at a special election held November 2, 1971. It was defeated by a vote of 26,059 for and 46,110 against.

An amendment to this section proposed by S.J.R. No. 19 (Laws 1975), which would have allowed the legislature to exempt from property taxation fractional interests in real property that is exempt from taxation under the constitution by reason of ownership if approved by three-fourths of the members of each house of the legislature, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 110,232 for and 155,761 against.

Laws 1983, ch. 110, § 1, which amends Laws 1903, ch. 51, provides that all property of the woman's board of trade and library association of Santa Fe and all other associations or corporations not conducted for financial gain, but rather for the education or social advancement of their members, is exempt from taxation.

Laws 1983, ch. 110, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

I. GENERAL CONSIDERATION.

Appropriate time period to establish exemption status. — The prior calendar year is the appropriate time period upon which to base a property's exemption status, and January 1 is the appropriate "cutoff date" under Article VIII, Section 3 of the New Mexico Constitution. CAVU Co. v. Martinez, 2014-NMSC-029, *aff'g in part* and *rev'g in part* 2013-NMCA-050, 302 P.3d 126.

Appropriate inquiry to determine validity of exempt status. — The appropriate inquiry into the validity of a property's exemption from taxation under the exemption provision of Article VIII, Section 3 of the New Mexico Constitution is whether use during the tax year furthers exempt purposes. CAVU Co. v. Martinez, 2014-NMSC-029, *aff'g in part* and *rev'g in part* 2013-NMCA-050, 302 P.3d 126.

Uses of the property furthered the educational purpose of the property. — Where the taxpayer developed and improved a twenty-six acre tract of land for operation of a school; the property was vacant from June 2008 through January 2010; the assessor denied the taxpayer's application for an educational use exemption for 2010 because the property was not used for educational purposes on January 1, 2009 and 2010; during 2009, the taxpayer actively sought out and negotiated with potential educational tenants, which resulted in the lease of the property by a private elementary school in 2010 and by an established college preparatory school in 2012; and the taxpayer turned down a proposed commercial lease of the property from a film company, the taxpayer used the property in a direct and immediate effort to further its educational use, embraced the use of the property for systematic educational instruction, and created a substantial public benefit, factors the county valuation protests board must consider in determining whether the taxpayer's use of the property was in furtherance of its exempt purpose. CAVU Co. v. Martinez, 2014-NMSC-029, *aff'g in part* and *rev'g in part* 2013-NMCA-050, 302 P.3d 126.

The determination of the exempt status of property is based on actual use. — The only relevant facts that determine the exempt status of property are facts pertaining to the actual use of the property, not whether the property is built for a certain purpose or the owner's intent for the property. CAVU Co. v. Martinez, 2013-NMCA-050, 302 P.3d 126, cert. granted, 2013-NMCERT-004.

Where the taxpayer's property was used as a school until May 2008, the property ceased to be used actively as a school after May, 2008 and was not used actively as a school again until August 2010; the taxpayer sought an educational tenant for the property during the interim; and the property was not in actual use for educational purposes for 2009, the property did not qualify for an educational use exemption in 2010. CAVU Co. v. Martinez, 2013-NMCA-050, 302 P.3d 126, cert. granted, 2013-NMCERT-004.

Purpose of tax exemption is to encourage religious, charitable, scientific, literary and educational associations not operating for the profit of any private shareholder or individual. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Purposes served by exempt institution. — For most types of exemptions from taxation an exempt institution must serve some worthy purpose, religious, charitable, educational or governmental or must further the public welfare in some special way. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Purpose of charitable exemption is to encourage charitable activities by providing them with tax relief, and to thereby promote the general welfare of society. The countervailing consideration is to limit the exemption within reasonable bounds so as to minimize the shift of the tax burden to nonexempt property owners. Another consideration in limiting exemptions is to avoid inequitable competition in the name of charity with nonexempt entities. Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Case-by-case determination of exemptions. — The constitution has provided a charitable exemption for which our cases recognize the propriety of a case-by-case analysis, and the statutory scheme provided by the legislature permits an orderly, expert, and consistent resolution of requests for an exemption on a case-by-case basis. Grand Lodge of Ancient & Accepted Masons v. Taxation & Revenue Dep't, 106 N.M. 179, 740 P.2d 1163 (Ct. App.), cert. denied, 106 N.M. 174, 740 P.2d 1158 (1987).

Classification of property. — The constitution, in effect, classes tangible property into that exempt from taxation, that which may be exempted and that which must be taxed. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936). See also N.M. Const., art. VIII, §§ 1, 5, and notes thereto.

Theory of exemptions. — The exemption granted to church property, public libraries, educational and charitable institutions and cemeteries not used or held for private or corporate profit proceeds upon the theory of the public good accomplished by them, and of the peculiar benefits derived by the public in general from their conduct. The exemption granted to property of the United States is perhaps compulsory; that to the state, all counties, towns, cities and school districts arises from public policy, which repudiates, as being utterly futile, the theory of the state taxing its own property in order to produce funds with which to operate its own affairs. State v. Locke, 29 N.M. 148, 219 P. 790, 30 A.L.R. 407 (1923).

II. EXEMPT PROPERTY.

A. IN GENERAL.

Authority of legislature. — The legislature is authorized to exempt certain property from taxation and none other. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Length thereof. — Tax exemption on property continues as long as the use is for the exempted purpose. Berger v. University of N.M., 28 N.M. 666, 217 P. 245 (1923).

Use of property determinative of right to exemption. — Use, rather than ownership, is determinative as criteria for exemption from tax liability. If the use is for charitable purposes, then the exemption from tax liability attaches. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

It is the use of property, not the declared objects and purposes of its owner, which determines the right to exemption under this section. United Veterans Org. v. New Mexico Prop. Appraisal Dep't, 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972).

Pro rata taxing according to separate uses. — Where one substantial part of a building that is owned by a charitable institution is directly and actually occupied and used for charitable purposes, and another substantial portion is primarily used for commercial leasing, such building is pro rata taxable according to its separate uses. Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Denial of exemption to leased property. — Foremost among the reasons why exemption from taxation is denied to property leased out by an otherwise tax-exempt body is that the property is put to a profitmaking or revenue-producing use by some private nonexempt person or organization. Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

On case by case basis. — Except to the extent that the facts as to use are so nearly alike as to logically compel like results, no case can be said to constitute a controlling precedent for another case in this area. BPOE, Lodge 461 v. New Mexico Property

Appraisal Dep't, 83 N.M. 445, 493 P.2d 411 (1972), aff'g 83 N.M. 505, 454 P.2d 167 (Ct. App. 1971).

Burden to establish right to exemption. — It is the burden of the organization seeking an exemption to establish its right to that exemption. United Veterans Org. v. New Mexico Prop. Appraisal Dep't, 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972).

Rule of strict construction of tax exemption provisions held not controlling in determining whether masonic lodge property is used for educational or charitable purposes. Temple Lodge No. 6, A.F. & A.M. v. Tierney, 37 N.M. 178, 20 P.2d 280 (1933).

Rule of construction in New Mexico is that of reasonable construction, without favor or prejudice to either the taxpayer or the state, to the end that the probable intent of the provision is effectuated and the public interests to be subserved thereby are furthered. BPOE, Lodge 461 v. New Mexico Prop. Appraisal Dep't, 83 N.M. 445, 493 P.2d 411 (1972); Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Use must be both substantial and primary. — To qualify for an exemption under this section, the educational or charitable use of property must be both substantial and primary. United Veterans Org. v. New Mexico Prop. Appraisal Dep't, 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972).

Although this section does not require property to be used exclusively for charitable purposes in order to come within the exemption, the uses for these purposes must be substantial and must be the primary uses made of the property. Retirement Ranch, Inc. v. Curry Cnty. Valuation Protest Bd., 89 N.M. 42, 546 P.2d 1199 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976); BPOE, Lodge 461 v. New Mexico Prop. Appraisal Dep't, 83 N.M. 445, 493 P.2d 411 (1972), aff'g 83 N.M. 505, 454 P.2d 167 (1971).

Where the primary use of the property was for the social and fraternal activities of the members and their families and guests of the members of the lodge and to be entitled to the exemption, the use of the property for charitable purposes has to be "substantial and primary," denial of the exemption by the property tax appeal board was proper. BPOE, Lodge No. 461 v. New Mexico Prop. Appraisal Dep't, 83 N.M. 505, 494 P.2d 167 (Ct. App. 1971), aff'd, 83 N.M. 445, 493 P.2d 411 (1972).

Exemption provided by section does not extend to special assessments for improvements, and the Drainage Law of 1912, ch. 84, § 39 (73-7-1 NMSA 1978), authorizing such assessments, is not void. Lake Arthur Drainage Dist. v. Board of Comm'rs, 29 N.M. 219, 222 P. 389 (1924).

Improvement assessments not deemed "tax". — A specific assessment of property for improvement, the cost of which is assessed against the property, is not a tax within the constitutional sense; but a drainage improvement on lands granted by the Enabling

Act could not be paid from the income fund, for the state had no authority to improve such lands. Lake Arthur Drainage Dist. v. Field, 27 N.M. 183, 199 P. 112 (1921).

Specific assessments on property for improvements, based on benefits, the cost of which is assessed against the property, is not a tax within the inhibition of this section, and Laws 1923, ch. 140, § 402 (repealed), regarding appraisal of benefits to property of public corporations, did not violate this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Res judicata and collateral estoppel in quiet title suits. — District court decree holding that certain property was exempt from taxation was res judicata as to a claim of exemption from taxes in a quiet title suit involving the realty. McDonald v. Padilla, 53 N.M. 116, 202 P.2d 970 (1948), superseded by statute, Webb v. Arizona Pub. Serv. Co., 95 N.M. 603, 624 P.2d 545 (1981).

In quiet title action in which question of exemption from taxes for 1936 and 1939 was involved, doctrine of collateral estoppel by judgment applied in view of 1920 decree which restrained assessor from assessing certain real estate on ground it was exempt from taxation. McDonald v. Padilla, 53 N.M. 116, 202 P.2d 970 (1948), superseded by statute, Webb v. Arizona Pub. Serv. Co., 95 N.M. 603, 624 P.2d 545 (1981).

Property which is constitutionally exempt from taxation is not required to be reported under 7-36-7B(1) NMSA 1978 and the assessor has no authority to value the property. Lovelace Ctr. for Health Sciences v. Beach, 93 N.M. 793, 606 P.2d 203 (Ct. App. 1980).

Remedy for claims of tax exemption for property owned by masonic lodges. — The legislature, in enacting a comprehensive scheme for administrative and judicial review, has provided the exclusive remedy for claims presented to the district court that property owned by all masonic lodges is exempt from taxation under this section and the administrative remedies provided by the legislature must be exhausted before a declaratory judgment action will lie. Grand Lodge of Ancient & Accepted Masons v. Taxation & Revenue Dep't, 106 N.M. 179, 740 P.2d 1163 (Ct. App.), cert. denied, 106 N.M. 174, 740 P.2d 1158 (1987).

B. GOVERNMENT PROPERTY.

Liability of federal contractor not taxation of government. — Where general contractor was required by contracts with federal government to furnish materials to be used on federal reservation in New Mexico, the contractor purchased the materials, became the owner thereof and was liable for the use or compensating tax under former statutory provisions (72-17-1, 1953 Comp.); and this was not taxation of government land or other government property. Robert E. McKee, Gen. Contractor v. Bureau of Revenue, 63 N.M. 185, 315 P.2d 832 (1957).

Irrigation districts are not "municipal corporations". Davy v. McNeill, 31 N.M. 7, 240 P. 482 (1925).

Town of Tome. — The organized town of Tome is not included in the term "other municipal corporations". Board of Trustees v. Sedillo, 28 N.M. 53, 210 P. 102 (1922).

All irrigation works exempt. — While community ditches and their laterals are exempt from taxation, other irrigation works are not. State ex rel. State Tax Comm'n v. San Luis Power & Water Co., 51 N.M. 294, 183 P.2d 605 (1947).

Relief when single irrigation work taxed. — In case a single irrigation works is singled out for taxation while other similar works go untaxed, the district court may grant such relief as may be proper. State ex rel. State Tax Comm'n v. San Luis Power & Water Co., 51 N.M. 294, 183 P.2d 605 (1947).

Taint of educational purposes. — If plaintiff engages casually in promotion, propaganda and lobbying activities, then its other activities are tainted with uneducational purposes, and if any evidence is presented of such activities, plaintiff loses its standing as an educational organization whose property is "used for educational purposes". NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Where the state retains title to state lands, the state property appraisal department is without authority to assess taxes against the land after the cancellation of a contract of sale. Any tax deed held by the department is void; therefore, any deed issuing from a foreclosure sale conveys nothing. Romero v. State, 97 N.M. 569, 642 P.2d 172 (1982).

Bonds of state or political subdivisions. — Nothing in the language of this section of the constitution requires an interpretation that only such bonds as evidence a debt of the state or its political subdivisions are exempt from taxation. State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 411 P.2d 984 (1966).

Municipal industrial development revenue bonds. — Statute authorizing issuance of revenue bonds by municipality for industrial development and providing that bonds so authorized, the income therefrom, shall be exempt from all taxation by state on any subdivision, was not violation of constitutional provision requiring that taxes be equal and uniform, insofar as the exemption was confined to municipal property. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Property of Las Vegas land grant is not exempt from taxation under this section, since it is not a town, city or other municipal corporation. State v. Board of Trustees, 28 N.M. 237, 210 P. 101 (1922).

Where the Las Vegas grant previously had been held for tax purposes not to be a town, city or other municipal corporation within the contemplation of this section, such holding

was equally applicable within the contemplation of the provisions of the N.M. Const., art. IV, § 24. Board of Trustees v. Montano, 82 N.M. 340, 481 P.2d 702 (1971).

Common lands of town of Atrisco in Atrisco land grant do not come within either Section 3 or Section 5 of this article and are, therefore, subject to taxation. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

Lands of community grant of town of Tome, incorporated under Laws 1891, ch. 86 (repealed), and §§ 2148-2184, 1897 C.L., held not exempt from taxation. Board of Trustees v. Sedillo, 28 N.M. 53, 210 P. 102 (1922).

One having lease to construct military housing on federal land. — Congress having explicitly removed the bar of sovereign immunity as it applied to property belonging to the United States, the immunity granted the federal government by this section and N.M. Const., art. XXI, § 2, clearly was not available to one who had a lease to construct military housing on federal land. It was his interest that was subject to taxation. Kirtland Heights, Inc. v. Board of Cnty. Comm'rs, 64 N.M. 179, 326 P.2d 672 (1958).

Dam impounding water for irrigation system, though owned by a nonprofit corporation distributing water to its shareholders, is not exempt from taxation. Storrie Project Water Users Ass'n v. Gonzales, 53 N.M. 421, 209 P.2d 530 (1949).

C. CHURCH PROPERTY.

Church property to have active use for tax-exempt status. — The constitutional language "all church property not used for commercial purposes" contemplates a concurrent affirmative, active, nontaxable use to qualify church-owned property for tax-exempt status. Grace, Inc. v. Board of Cnty. Comm'rs, 97 N.M. 260, 639 P.2d 69 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1981).

Houses and lots not deemed "church property". — A dwelling house and lot owned by a church, the rent for which is collected by the church and used for religious or charitable purposes, is not "church property". Church of Holy Faith, Inc. v. State Tax Comm'n, 39 N.M. 403, 48 P.2d 777 (1935).

A house and lot owned by a church and rented was not exempt from taxation as "church property", although church had acquired the property for the purpose of establishing a girls' school, but was not yet in financial condition to do so. Trustees of Prop. of Protestant Episcopal Church v. State Tax Comm'n, 39 N.M. 419, 48 P.2d 786 (1935).

Vacant lot which a church corporation had acquired for the purpose of building a church thereon sometime in the future is not church property pursuant to this provision. Grace, Inc. v. Board of Cnty. Comm'rs, 97 N.M. 260, 639 P.2d 69 (Ct. App.), cert. denied, 98 N.M. 50, 644 P.2d 1039 (1981).

Where church establishes nonprofit corporation to run nursing home facility, the facility is church-affiliated but is not "church property" for purposes of a tax exemption; however, where the substantial and primary use of such a facility is for charitable purposes, it is tax exempt. Retirement Ranch, Inc. v. Curry Cnty. Valuation Protest Bd., 89 N.M. 42, 546 P.2d 1199 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

D. EDUCATIONAL PURPOSES.

Phrase "used for educational purposes" means the direct, immediate, primary and substantial use of property that embraces systematic instruction in any and all branches of learning from which a substantial public benefit is derived. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Courts establish tax exempt standards for "used for educational purposes". — The legislature has seen fit to allow the courts to establish the standards under which property may be determined to be tax exempt when "used for educational purposes". NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

In determining reasonable construction of phrase "used for educational purposes," the direct and immediate use of the property must govern the decision, and not the remote and consequential benefit derived from its use. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Term "educational" is comprehensive, embracing mental, moral and physical education. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Educational institution seeking tax exemption need not prove it is supplying an educational benefit which the state would normally provide its citizens. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Scope of educational use. — Plaintiff private museum's use of its property to raise funds for operations and related programs and activities in schools or off-site did not detract from an educational use and purpose. Georgia O'Keeffe Museum v. County of Santa Fe, 2003-NMCA-003, 133 N.M. 297, 62 P.3d 754.

Portion of land for educational purposes exempted. — Where a portion of a plaintiff's land is primarily and substantially devoted to educational purposes, notwithstanding that the period of its instruction is very short, the subjects taught are confined to a narrow field and its purpose is utilitarian to the last degree, it is educational within the scope of that term as employed in the constitutional provision under consideration. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92

N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Educational function incidental to institution's activities. — When the facts of a case show that the educational function of an institution is merely incidental to its activities in pursuance of educational purposes, exemption from taxation may be denied. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Culture afforded by college sorority life is not "educational" within meaning of this section, exempting from taxation property used for educational purposes. Albuquerque Alumnae Ass'n of Kappa Kappa Gamma Fraternity v. Tierney, 37 N.M. 156, 20 P.2d 267 (1933).

Alumni association of university fraternity not exempt from taxation. NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

E. CHARITABLE PURPOSES.

Broad expression "used for educational or charitable purposes" necessarily imposes upon the courts a severe task of interpretation. Charity may "cover a multitude of sins". The line of demarcation cannot be projected. It can take shape only by the gradual process of adjudicating this or that purpose or use on the one side of it or on the other, or by change in the constitutional criteria. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967); NRA Special Contribution Fund v. Board of County Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

What is charity, and what is a charitable use, as these terms were understood by the membership of the constitutional convention, and by the ordinary voter who participated in adoption of the constitution containing this language, is the test to be applied. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

No all-embracing application of the term charity was contemplated by the drafters of the constitution. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

Property used in operation of a quasi-public low-rent housing project would not have been considered charitable when the constitution was adopted. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

Test for charitable property tax exemption. — To qualify for the charitable property tax exemption, the property must be used primarily and substantially for charitable purposes in a manner that benefits the public. El Castillo Retirement Residences v. Martinez, 2015-NMCA-041, overruling In re Miller, 1975-NMCA-116, 88 N.M. 492, 542

P.2d 1182, rev'd on other grounds by 1976-NMSC-039, 89 N.M. 547, 555 P.2d 142, and cert. granted, 2015-NMCERT-004.

Where retirement community claimed a charitable property tax exemption under this section, the evidence that retirement community was structured to be a self-sustaining retirement community, funded entirely by admission and monthly fees, served predominantly wealthy individuals who met certain physical, mental, and financial requirements, and did not accept Medicare or Medicaid recipients demonstrated that retirement community did not directly and immediately use its property primarily and substantially for a charitable purpose recognized under this section. El Castillo Retirement Residences v. Martinez, 2015-NMCA-041, overruling In re Miller, 1975-NMCA-116, 88 N.M. 492, 542 P.2d 1182, rev'd on other grounds by 1976-NMSC-039, 89 N.M. 547, 555 P.2d 142, and cert. granted, 2015-NMCERT-004.

English statute of charitable uses is in force in this state. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

Use by owner, not tenant. — The charitable use specified in this section should be construed to mean use by the owner of the property rather than the use to which the property is put by the tenant. Rutherford v. County Assessor, 89 N.M. 348, 552 P.2d 479 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976); Chapman's, Inc. v. Huffman, 90 N.M. 21, 559 P.2d 398 (1975); Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979).

Setting aside portion for charitable use not "substantial". — Where whole office building was organized for economic and not charitable use, setting aside 30% for hospital purposes is not substantial enough to make the hospital portion exempt from taxation under this section. Rutherford v. County Assessor, 89 N.M. 348, 552 P.2d 479 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Rental of rooms no effect on tax-exempt status. — Where a lodge owns a building used for lodge work and recreation and is engaged in philanthropical work, the fact that it rents rooms to some of its members, and a very few to prospective members, does not affect its tax-exempt status. Albuquerque Lodge, No. 461, B.P.O.E. v. Tierney, 39 N.M. 135, 42 P.2d 206 (1935).

Conservation of land is a charitable use if conservation of the land provides a substantial benefit to the public and if the property is used directly, immediately, primarily, and substantially for conservation and the use of the property promotes the object or purpose of conservation. Pecos River Open Spaces, Inc. v. County of San Miguel, 2013-NMCA-029.

Conservation of land in its natural and undeveloped state generally benefits the public in the context of environmental preservation and beautification of the State of New Mexico. Pecos River Open Spaces, Inc. v. County of San Miguel, 2013-NMCA-029.

Conservation of land in its natural and undeveloped state is a charitable use. — Where plaintiff, pursuant to its corporate purpose to acquire vacant, undeveloped, and unimproved land in the vicinity of the Pecos River, to preserve the land it its natural state, and thereby to contribute to the preservation of the environment and the ecology of the Pecos River for the benefit of New Mexico and its citizens, acquired a tract of vacant, undisturbed land located near the Pecos River; the land contained significant natural, open space, and historic resources; plaintiff granted a strict conservation easement on the property to another corporation which prevented, in perpetuity, the development of the land; defendant had a policy of conservation of the Pecos River; and the conservation of the land conferred a benefit on the public, the conservation of the land conferred a substantial public benefit and constituted a charitable purpose that qualified the land for tax exemption under Article VIII, Section 3 of the New Mexico Constitution. Pecos River Open Spaces, Inc. v. County of San Miguel, 2013-NMCA-029.

Facility used for caring for aged sick and infirm deemed "charitable". — Where the recipients of a nonprofit corporation's efforts are indeed sick and largely indigent, the facility used for the purpose of caring for the aged sick and infirm falls within the category of "charitable purpose". Retirement Ranch, Inc. v. Curry Cnty. Valuation Protest Bd., 89 N.M. 42, 546 P.2d 1199 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Use of property by masonic lodge held "charitable" within meaning of this section. Temple Lodge No. 6, A.F. & A.M. v. Tierney, 37 N.M. 178, 20 P.2d 280 (1933).

United veterans organization not exempt from property taxes. NRA Special Contribution Fund v. Board of Cnty. Comm'rs, 92 N.M. 541, 591 P.2d 672 (Ct. App. 1978), cert. quashed, 92 N.M. 464, 589 P.2d 1055 (1979).

Self-supporting low-cost housing. — Where there is an enterprise to furnish low-cost housing to a certain segment of the population that is intended to be self-supporting, without any thought that gifts or charity be involved, in that the tenants are required to pay for the premises occupied by them with the rentals being fixed so as to return the amount estimated as being necessary to pay out the project, the use is not charitable so as to exempt the property from taxes under this section. Mountain View Homes, Inc. v. State Tax Comm'n, 77 N.M. 649, 427 P.2d 13 (1967).

III. TRANSFERRED PROPERTY.

Generally. — When property is acquired by the state in its sovereign capacity, it thereupon becomes absolved, freed and relieved from any further liability for taxes previously assessed against it, and which are unpaid at the time it becomes so acquired; and from the moment of its acquisition, the power to enforce a lien is arrested or abated. State v. Locke, 29 N.M. 148, 219 P. 790, 30 A.L.R. 407 (1923) (decided prior to 1946 amendment).

Escheat property freed from liability for former taxes. — Land which is acquired by state through escheat is forthwith freed from any further liability for taxes previously levied, and there is no longer any power to collect or enforce the tax. Schmitz v. New Mexico State Tax Comm'n, 55 N.M. 320, 232 P.2d 986 (1951).

IV. AD VALOREM TAX EXEMPTIONS.

All tangible property subject to tax unless specifically exempt. — All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution or by its authority. Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434 (1939).

It is the policy of this state that tangible property must be taxed unless specifically exempted by the constitution, or by legislative act authorized by the constitution. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

Constitution sets forth only areas of allowable ad valorem tax exemption. 1969 Op. Att'y Gen. No. 69-137.

Veterans exemption laws do not exempt veteran from payment of ad valorem taxes for the taxable year during which property was purchased by the veteran from a nonveteran owning the property on January 1 of such year. 1959-60 Op. Att'y Gen. No. 59-133.

Section determinative of exempt status. — No matter how praiseworthy the purposes of a nonprofit organization may be and no matter the quantity of public benefit derived, this section of the constitution, in establishing its standard for tax exempt status, is determinative. 1957-58 Op. Att'y Gen. No. 58-02.

Section applicable only to property, not excise, taxes. — There is a difference between a property tax and an excise or privilege tax. The constitutional exemption does not extend to more than that to which it plainly refers - property and property taxes. It falls short of creating an exemption from the imposition of an excise tax such as the sales tax. 1955-56 Op. Att'y Gen. No. 55-6148.

Municipalities may legally assess and collect one cent gasoline tax from penitentiary, although it is a state agency, for it is an excise tax, where laws make no provision for exemption of state-owned vehicles, and by implication state consented to such tax. 1933-34 Op. Att'y Gen. No. 33-686.

State may neither enlarge nor diminish exemptions granted in and by this section. 1955-56 Op. Att'y Gen. No. 55-6267.

The enumeration of certain exemptions in this section precludes other statutory exemptions. 1917-18 Op. Att'y Gen. No. 18-2077.

Nonprofit water corporation. — A nonprofit corporation organized to provide a community water system pursuant to 3-29-1 NMSA 1978 is not "another municipal corporation," and is subject to ad valorem taxation. 1968 Op. Att'y Gen. No. 68-38.

Use of church property for religious or charitable purposes is necessary before the property is exempt. 1955-56 Op. Att'y Gen. No. 55-6088.

Fact that organization is nonprofit is not sufficient to bring it under the exemption of this section. No matter how praiseworthy the purposes of the organization are, it is still subject to taxation if the standards laid down are not met. 1959-60 Op. Att'y Gen. No. 60-63.

Unless used for educational, religious or charitable purposes. — The nonprofit character of the owner of property does not permit the granting of an exemption from ad valorem taxes unless the property is used for educational, religious or charitable purposes. 1969 Op. Att'y Gen. No. 69-137.

Nonprofit organizations have to pay an ad valorem tax on their property; for example, on union halls and lodge buildings, unless such property is used primarily for educational or charitable purposes. 1961-62 Op. Att'y Gen. No. 62-36.

Fact that club is nonprofit organization and at times may operate at financial loss is not sufficient to bring it within the terms of a constitutional exemption. Where it is apparent that it is used for social and recreational purposes to enhance the mutual happiness and enjoyment of its members and guests, property is not exempt from taxation and should be placed upon the tax rolls the same as any other taxable property. 1953-54 Op. Att'y Gen. No. 53-5740.

Use of property determines right to exemption. — The supreme court has stated that it is not what the purpose of an organization is, it is the use made of the property which is controlling in determining whether or not the exemption from taxation will apply. 1955-56 Op. Att'y Gen. No. 55-6171.

Use to be primary and dominant. — It is not the purpose for which an association is organized, but the use made of the property which is controlling. Further, the use on which the decision rests must be the primary and dominant use and not merely an incidental and sporadic use. 1959-60 Op. Att'y Gen. No. 60-63.

County club. — A country club which is primarily used for social and recreational purposes to enhance the mutual happiness and enjoyment of its members and guests is not exempt from taxation and should be placed on the tax rolls. 1953-54 Op. Att'y Gen. No. 53-5740.

Property need not be used solely for educational or charitable purposes. — All property used for educational or charitable purposes is exempt from taxation, and there

is no limitation that it must be used solely for that purpose. 1914 Op. Att'y Gen. No. 14-1365.

Sheriff's posse not primarily "educational or charitable". — Under this section, the Dona Ana county sheriff's posse, or any other sheriff's posse, is not a primarily educational or charitable enterprise. Hence, a tax-exempt status may not be claimed. 1957-58 Op. Att'y Gen. No. 58-02.

Chambers of commerce. — This section enumerates exemptions to taxes. Chambers of commerce are not included therein by name - the only enumeration under which chambers of commerce might be counted would be "all property used for educational or charitable purposes". A chamber of commerce purpose is neither educational nor charitable in the sense dealt with in this section. 1957-58 Op. Att'y Gen. No. 57-10.

Commercial television primarily entertainment, not educational. — The customary television programs of a commercial television station, whether broadcast or rebroadcast, are primarily for entertainment, and only primarily educational procedures are intended in this section, insofar as it pertains to the nonprofit class of tax exemptions. 1957-58 Op. Att'y Gen. No. 57-325.

Lessee of university-owned land is not liable for ad valorem taxes based on the assessed value of the land itself, as distinct from the value of the improvements erected upon the land. 1970 Op. Att'y Gen. No. 70-24.

Improvement assessments. — Assessment for local sewer improvement is not a tax from which state property is exempt, unless lands were granted to state by Enabling Act. 1931-32 Op. Att'y Gen. No. 31-49.

Real property owned by the state armory board held not subject to a paving assessment by a municipality for a street paving project adjoining such property. 1959-60 Op. Att'y Gen. No. 59-161. See also notes to N.M. Const., art. VIII, § 1.

Improvements made on federal or state land which immediately vest in federal or state governments are not taxable, but if they do not vest in such governments until the expiration or lapse of the lease, they are taxable. 1937-38 Op. Att'y Gen. No. 37-1589.

Taxation of oil and gas leases. — Oil and gas leases on state and government property cannot be assessed and taxed as such, but such leases on privately owned fee lands can be taxed, and production taxes are in lieu of other taxes. 1931-32 Op. Att'y Gen. No. 32-378.

Former exemption of newly constructed railroads. — Constitutional provisions cited in declaring that the constitutional amendment of 1914, omitting Section 8 of this article of prior constitution, which omitted section permitting legislature to exempt newly constructed railroads from taxation, gave rise to doubt as to whether prior statute, §§

1761 and 3881, 1897 C.L., so exempting such railroads, remained effective. 1915-16 Op. Att'y Gen. No. 15-1416.

Listing of exempt property on tax roll. — Exempt property should be properly described on the tax roll and should be valued at its proper value and listed as exempt. Payment made in lieu of taxes has no bearing upon the valuation and should not be considered by the assessor. 1955-56 Op. Att'y Gen. No. 55-6233.

Property of federal government and its agencies is exempt from property taxation in New Mexico. 1961-62 Op. Att'y Gen. No. 62-53.

Property owned by town or school district is exempt from the taxes imposed on the severance and sale of hydrocarbons. 1961-62 Op. Att'y Gen. No. 61-64.

Since the supreme court has stated directly that ownership of the property is the test in determining whether or not the exemption applies to property held by the state or school district, it goes without saying that property owned by a school district is exempt from taxation if the land is presently being used for school purposes. 1955-56 Op. Att'y Gen. No. 55-6183.

Property owned by town is exempt from real and personal property taxation. 1963-64 Op. Att'y Gen. No. 63-147.

Property of state university. — Under this section, it is apparent that property of a state university is not taxable. A property tax cannot be levied against that property. 1955-56 Op. Att'y Gen. No. 55-6146.

Municipal bonds. — Under this section, all bonds of municipalities are exempt from taxation. 1963-64 Op. Att'y Gen. No. 64-17.

Bonds of joint inter-community nonprofit corporation. — This section would be applicable to the bonds issued by a joint inter-community nonprofit water or natural gas corporation formed under the provisions of Laws 1955, ch. 18 (repealed), and under the Joint Powers Agreements Act. 1963-64 Op. Att'y Gen. No. 64-17.

Hospital used for charitable purposes. — The exemption from taxation extends to any hospital used for charitable purposes, even though service is given to some patients who pay for it. 1912-13 Op. Att'y Gen. No. 12-894.

Parsonages located on church property for the purpose of providing a place of residence for the parson, reverend, priest or other church officials are exempt from taxation. 1955-56 Op. Att'y Gen. No. 55-6124.

Property owned by fraternal order is exempt except such part as is rented for profit. 1925-26 Op. Att'y Gen. No. 26-3893.

The property of the Independent Order of Odd Fellows is exempt. 1914 Op. Att'y Gen. No. 14-1365.

Property of B.P.O. Elks held exempt from taxation if it came within the provisions of Laws 1903, ch. 51, § 3 (special act). 1912-13 Op. Att'y Gen. No. 13-1061.

Bi-state railroad. — The Cumbres and Toltec Railroad, a bi-state agency of New Mexico and Colorado, is immune from property taxes in the two states. 1990 Op. Att'y Gen. No. 90-18.

Effect of proviso in this section is to maintain the lien on property acquired by "outright purchase or trade" if the tax or other assessment secures a bonded indebtedness; no other tax lien survives when property is acquired by the state. Further, unless the property is acquired in the manner specified in the proviso, liens for taxes and assessments for bonded indebtedness would also be extinguished. 1978 Op. Att'y Gen. No. 78-08.

Property owned by property control division. — The property control division of the general services department is required to pay levies assessed by the middle Rio Grande conservancy district on real property owned by the property control division within the conservancy district. 1987 Op. Att'y Gen. No. 87-07.

Income-producing property of church is not exempt, although the proceeds therefrom are used for religious purposes. 1953-54 Op. Att'y Gen. No. 53-5740.

Property owned by high official of religious order is not exempt. 1925-26 Op. Att'y Gen. No. 26-3893.

Railroad hospital used and supported by employees is not exempt. 1925-26 Op. Att'y Gen. No. 26-3893.

Property owned by labor unions not used solely for an exempt purpose enumerated in the constitution is not exempt from property taxes. 1959-60 Op. Att'y Gen. No. 59-07.

Legacies to charitable or educational institutions. — This constitutional exemption does not apply to legacies to charitable or educational institutions which are subject to the inheritance tax. 1937-38 Op. Att'y Gen. No. 37-1618.

Tax liability where real property acquired by municipality. — The real property of any municipality within the state is exempt from taxation under the express provisions of this section, and a county assessor may not subject such real property, the title to which has passed to a municipality, with further liability for the payment of taxes. Although the tax lien upon such property is unenforceable against the real property so acquired by a municipality, the former owner in whose name the property was assessed on January 1

of such year remains personally responsible for the taxes upon the property for the remainder of the year. 1961-62 Op. Att'y Gen. No. 61-103.

Law reviews. — For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation §§ 307 to 318, 332 to 349, 362 to 391.

Construction and application of statutory and constitutional provisions exempting property of persons in military service, or formerly in such service, from taxation, 149 A.L.R. 1485.

Scope and application of exemption of cemeteries from taxation, 168 A.L.R. 283.

Construction of exemption of religious body or society from taxation or special assessment, 168 A.L.R. 1222.

Conditions: constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

Property used by personnel as living quarters or for recreation purposes as within contemplation of tax exemptions extended to property of religious, educational, charitable, or hospital organizations, 15 A.L.R.2d 1064, 55 A.L.R.3d 356, 55 A.L.R.3d 485, 61 A.L.R.4th 1105.

Stadium: exemption from taxation of municipally owned or operated stadium, auditorium and similar property, 16 A.L.R.2d 1376.

"Scientific institution" within property tax exemption provisions, 34 A.L.R.2d 1221.

Validity, construction, and effect of statutes providing for urban redevelopment by private enterprise, 44 A.L.R.2d 1414.

Time: tax exemption of real property as affected by time of acquisition of title by private owner entitled to exemption, 54 A.L.R.2d 996.

Additional property, etc.: legislative power to exempt from taxation property, purposes or uses additional to those specified in constitution, 61 A.L.R.2d 1031.

College fraternity or sorority house, 66 A.L.R.2d 904.

Dining rooms or restaurants as within tax exemptions extended to property of religious, educational, charitable or hospital organizations, 72 A.L.R.2d 521.

Church parking lots as entitled to tax exemptions, 75 A.L.R.2d 1106.

Blue Cross, Blue Shield, or other hospital or medical service corporation, 88 A.L.R.2d 1414.

Agricultural fair society or association engaged in education activities, property of, 89 A.L.R.2d 1104.

Charitable, educational or religious tax exemption of property held in trust for tax-exempt organization, 94 A.L.R.2d 626.

Schools: exemption of public school property from assessments for local improvements, 15 A.L.R.3d 847.

Receipt of pay from beneficiaries as affecting tax exemption of charitable institutions, 37 A.L.R.3d 1191.

Clubhouse: tax exemption of property used by fraternal or benevolent association for clubhouse or similar purposes, 39 A.L.R.3d 640.

What constitutes church, religious society or institution exempt from property tax under state constitutional or statutory provisions, 28 A.L.R.4th 344.

Exemption of nonprofit theater or concert hall from local property taxation, 42 A.L.R.4th 614.

Exemption from real-property taxation of residential facilities maintained by hospital for patients, staff, or others, 61 A.L.R.4th 1105.

Nursing homes as exempt from property taxation, 34 A.L.R.5th 529.

84 C.J.S. Taxation §§ 215 to 226, 251 to 254, 281 to 303.

Sec. 4. [Misuse and deposit of public money.]

Any public officer making any profit out of public money or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office. All public money not invested in interest-bearing securities shall be deposited in national banks in this state, in banks or trust companies incorporated under the laws of the state, in federal savings and loan associations in this state, in savings and loan associations incorporated under the laws of this state whose deposits are insured by an agency of the United States and in credit unions incorporated under the laws of this state or the United States to the extent that such deposits of public money in credit unions are insured by an agency of the United States, and the interest derived therefrom shall be applied in the manner

prescribed by law. The conditions of such deposits shall be provided by law. (As amended November 3, 1914, November 7, 1967 and November 4, 1986.)

ANNOTATIONS

Cross references. — For statutory provisions relating to public money, *see* 6-1-1 to 6-11-9 NMSA 1978.

Comparable provisions. — Wyoming Const., art. XV, §§ 7, 8.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, amended this section, which was formerly Section 10 of this article, and which, prior to this amendment read: "There shall be levied annually for state revenue a tax not to exceed four mills on each dollar of the assessed valuation of the property in the state, except for the support of the educational, penal and charitable institutions of the state, payment of the state debt and interest thereon. For the first two years after this Constitution goes into effect the total annual tax levy for all state purposes exclusive of necessary levies for the state debt shall not exceed twelve mills; and thereafter it shall not exceed ten mills." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1967 amendment, which was proposed by H.J.R. No. 11, § 1 (Laws 1967) and adopted at a special election held November 7, 1967, with a vote of 34,669 for and 18,785 against, inserted the provisions authorizing deposits in federal or insured domestic savings and loan associations and added the last sentence.

The 1986 amendment, which was proposed by H.J.R. No. 13 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 198,766 for and 78,948 against, substituted "money" for "moneys" in the first and second sentences and added the provisions relating to credit unions in the second sentence.

Meaning of provisions generally. — This section simply means that public funds, when not so used, shall be deposited for safekeeping in the named institutions; but when funds are required to meet public obligations they may be expended in a business way, and according to business methods and practices. Davy v. Day, 31 N.M. 519, 247 P. 842 (1926).

Section requires judicial finding of misuse. — This section does not require that a public officer be convicted of a felony before he can be disqualified, but merely requires a judicial finding that the officer has knowingly misused public funds. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

"Disqualification" synonymous with "forfeiture". — Though this section speaks of "disqualification" rather than "forfeiture," the terms are synonymous in this context, as both go to eligibility to hold office. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

Court may remove disqualified officers. — Where public officers are disqualified for a misuse of public funds, the court has the jurisdiction to remove them by a writ of quo warranto. State ex rel. Martinez v. Padilla, 94 N.M. 431, 612 P.2d 223 (1980).

Bonds may be payable outside state. — An irrigation district may issue its bonds and make them payable outside the state. Davy v. Day, 31 N.M. 519, 247 P. 842 (1926).

Installment sale not void. — Sale by municipality of its light and water system to utility company was not void under this section on ground only part of purchase price was paid in cash and balance was to be paid for on terms. City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878, 161 A.L.R. 504 (1945).

Exaction and deposition of interest. — State treasurer is not required to exact interest from banks in which he may, of his own volition, deposit public moneys; but where such moneys do earn interest, the interest is the property of the state, and treasurer may not contract to award it to any person. Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

Appropriations to private corporation prohibited. — The state may not properly appropriate public moneys to the use and benefit of the historical society of New Mexico, a private corporation. 1963-64 Op. Att'y Gen. No. 64-41.

Any appropriation to a private corporation, whether directly or indirectly made, would clearly be violative of the state constitutional provisions of N.M. Const., art. IV, § 31, art. VIII, § 4 and art. IX, § 14. 1963-64 Op. Att'y Gen. No. 64-41.

Public money may be invested in interest-bearing securities, but such investment of public funds is limited to those interest-bearing securities as may be provided by statute. 1970 Op. Att'y Gen. No. 70-98.

Loans to private individuals not included. — Investments of public funds are limited to such interest-bearing securities as are provided by statute, which does not include loans to private individuals. 1933-34 Op. Att'y Gen. No. 33-667.

Loans to resident students. — A student loan plan whereby the state could loan money to resident students who are enrolled in an institution of higher learning in the state, and who otherwise qualify under the federal-guaranteed loan program under the Higher Education Act of 1965, is not inconsistent with this section or N.M. Const., art. IX, § 14. 1970 Op. Att'y Gen. No. 70-23.

Investment in mutual funds or investment trusts. — Investment by the state treasurer in a mutual fund acting as an investment conduit (i.e., an open-end mutual fund or a unit investment trust meeting the requirements of Subsection O(1) of 6-10-10 NMSA 1978) is constitutional. 2000 Op. Att'y Gen. No. 00-03.

Deposit or investment of funds in savings and loan associations. — A savings and loan association, not being a bank, and a deposit or purchase of investment shares in such an institution not being one of the permissible investments of surplus county funds, a county could not deposit or invest any of its funds in such an institution. 1961-62 Op. Att'y Gen. No. 62-09 (opinion rendered prior to 1967 amendment).

Los Alamos county may not deposit its cemetery funds in a federally insured savings and loan association. 1961-62 Op. Att'y Gen. No. 62-09 (opinion rendered prior to 1967 amendment).

Interest on deposits. — Although it is provided that interest on county funds deposited or invested by county treasurers shall be applied according to law, it is not imperative that funds be deposited so that they draw interest. But a treasurer may not deposit county funds without interest in a bank of which he is a stockholder, for he personally would profit indirectly thereby. 1914 Op. Att'y Gen. No. 14-1392.

If county treasurer obtains interest on money deposited in banks, it belongs to the county and not to him, and should be accounted for as part of the county funds in his hands. 1915-16 Op. Att'y Gen. No. 15-1413.

Interest on principal in game protection fund is credited to state general fund. 1980 Op. Att'y Gen. No. 80-17.

Authority to require additional security from banks depends on statutory scheme. — The authority vested in the state board of finance by 6-10-20 NMSA 1978 to require additional security from banks depends on the other provisions of the statutory scheme. 1980 Op. Att'y Gen. No. 80-11.

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M. L. Rev. 1 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 7, 8, 10 to 12.

Interest: liability of public officer for interest or other earnings received on public money in his possession, 5 A.L.R.2d 257.

Contributions or subscriptions, construction of statute, forbidding solicitation or acceptance of, by public officers or employees, as regards purpose or object for which funds are solicited, 85 A.L.R. 1146.

Liability of public officer or his bond to public body in respect of fees or charges which he illegally or improperly collected from members of public, 99 A.L.R. 647.

Conduct contemplated by statute which makes neglect of duty by public officer or employee a punishable offense, 134 A.L.R. 1250.

Payments made without compliance with procedure prescribed for payment of claims, liability of officer in respect of, 146 A.L.R. 762.

81A C.J.S. States § 225.

Sec. 5. [Head of family and veteran exemptions.] (2004)

The legislature shall exempt from taxation the property of each head of the family in the amount of two thousand dollars ($2,000). The legislature shall also exempt from taxation the property, including the community or joint property of husband and wife, of every honorably discharged member of the armed forces of the United States and the widow or widower of every such honorably discharged member of the armed forces of the United States, in the sum of three thousand dollars ($3,000) in 2004; three thousand five hundred dollars ($3,500) in 2005; and four thousand dollars ($4,000) in 2006 and each subsequent year. Provided, that in every case where exemption is claimed on the ground of the claimant's having served with the armed forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property upon which exemption is claimed, shall be upon the claimant. (As amended November 3, 1914, September 20, 1921, September 20, 1949, September 15, 1953, November 6, 1973 and November 8, 1988, November 5, 2002, and November 2, 2004.)

ANNOTATIONS

Cross references. — For head-of-family exemption, *see* 7-37-4 NMSA 1978.

For veteran exemption, *see* 7-37-5 NMSA 1978.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, inserted the present first clause of this section, which was formerly in Section 11 of this article, and which, prior to this amendment read: "A state board of equalization is hereby created which shall consist of the governor, traveling auditor, state auditor, secretary of state and attorney general. Until otherwise provided, said board shall have and exercise all the powers now vested in the territorial board of equalization." See also compiler's note to N.M. Const., art. VIII, § 8.

The 1921 amendment, which was proposed by H.J.R. No. 41 (Laws 1921) and adopted at a special election held on September 20, 1921, with a vote of 24,216 for and 22,946 against, added provisions regarding discharged soldiers, sailors, marines, and army nurses and their widows, so that the section then read: "The legislature may exempt from taxation property of each head of a family to the amount of two hundred dollars, and the property of every honorably discharged soldier, sailor, marine and army nurse, and the widow of every such soldier, sailor, or marine, who served in the armed forces of the United States at any time during the period in which the United States was regularly and officially engaged in any war, in the sum of two thousand dollars. Provided, that in every case where exemption is claimed on the ground of the claimants

having served with the military or naval forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property, upon which exemption is claimed, shall be upon the claimant."

The 1949 amendment, which was proposed by H.J.R. No. 6 (Laws 1949) and adopted at a special election held on September 20, 1949, with a vote of 23,478 for and 5,238 against, inserted "including the community or joint property of husband and wife" and substituted "member of the armed forces of the United States and the widow of every such honorably discharged member of the armed forces of the United States" for "soldier, sailor, marine and army nurse, and the widow of every such soldier, sailor or marine" in the first sentence.

The 1953 amendment, which was proposed by S.J.R. No. 19 (Laws 1953) and adopted at a special election held on September 15, 1953, with vote of 20,700 for and 7,900 against, substituted "who served in such armed forces during any period in which they were or are engaged in armed conflict under orders of the President of the United States, and the widow of every such honorably discharged member of the armed forces of the United States, in the sum of two thousand dollars ($2,000)" for "and the widow of every such honorably discharged member of the armed forces of the United States who served in the armed forces of the United States at any time during which the United States was regularly and officially engaged in any war, in the sum of two thousand dollars ($2,000)" at the end of the first sentence.

The 1973 amendment, which was proposed by H.J.R. No. 5 (Laws 1973) and adopted at a special election held on November 6, 1973, with a vote of 31,358 for and 11,294 against, inserted "or widower" following "widow" in the first sentence.

The 1988 amendment, which was proposed by H.J.R. No. 3, § 2 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 282,926 for and 93,218 against, near the beginning, substituted "shall" for "may" and "two thousand dollars ($2,000) as follows: in 1989, the legislature shall exempt from taxation eight hundred dollars ($800), in 1991, one thousand four hundred dollars ($1,400) and beginning in 1993, two thousand dollars ($2,000). The legislature shall also exempt from taxation" for "two hundred dollars ($200) and ".

The 2002 amendment, which was proposed by S.J.R. No. 1 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 311,369 for and 123,260 against, deleted "as follows: in 1989, the legislature shall exempt from taxation eight hundred dollars ($800), in 1991, one thousand four hundred dollars ($1,400) and beginning in 1993, two thousand dollars ($2,000)" from the end of the first sentence and added "in tax years prior to 2003; two thousand five hundred dollars ($2,500) in 2003; three thousand dollars ($3,000) in 2004; three thousand five hundred dollars ($3,500) in 2005; and four thousand dollars ($4,000) in 2006 and each subsequent year" at the end of the second sentence.

The 2003 amendment, which was proposed by H.J.R. 2 (Laws 2003) and adopted at a general election held November 2, 2004, by a vote of 452,386 for and 214,844 against, provides a property tax exemption of each head of family and also to honorably discharged veterans.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 2 (Laws 1969), which would have allowed the legislature to exempt property from taxation, was, according to 1969-70 Op. Att'y Gen. No. 69-151, nullified by submission of the proposed constitution to the voters in 1969.

All tangible property subject to tax unless specifically exempt. — All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution, or by its authority. Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434 (1939).

It is the policy of this state that tangible property must be taxed unless specifically exempt by the constitution, or by legislative act authorized by the constitution. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

Territorial provisions deemed repealed. — The constitutional provisions covering the whole subject of exemption from taxation repealed the territorial statutes on that subject. Albuquerque Alumnae Ass'n of Kappa Kappa Gamma Fraternity v. Tierney, 37 N.M. 156, 20 P.2d 267 (1933).

Classification of property generally. — The constitution, in effect, classes tangible property into that exempt from taxation, that which may be exempted and that which must be taxed. State ex rel. Attorney Gen. v. State Tax Comm'n, 40 N.M. 299, 58 P.2d 1204 (1936). See also N.M. Const., art. VIII, §§ 1, 3, and notes thereto.

Power to grant exemptions. — Judicial department has no power to extend time fixed by legislature for payment of taxes or to postpone delinquency date designated in statute, since power to grant exemptions is legislative, unless given in the constitution itself, as in this section. State v. Fifth Judicial Dist. Court, 36 N.M. 151, 9 P.2d 691 (1932).

It is an open question in this jurisdiction whether the legislature has power to create tax exemptions, or to recognize any property as exempt, save as created or expressly authorized in the constitution. Oden Buick, Inc. v. Roehl, 36 N.M. 293, 13 P.2d 1093 (1932).

Effect of 1921 amendment. — Amendment of this section in 1921 had effect of modifying it pro tanto. Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923).

This section, as amended in 1921, permitted legislature to exempt soldiers of World War II as well as those of the first World War. Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946).

The amendment of this section in 1921 effected an exception to the earlier Section 32 of Article IV, to the extent that the legislature was authorized to exempt the qualified property from a tax already a fixed liability or obligation. This right to exempt did not extend to accrued taxes. Asplund v. Alarid, 29 N.M. 129, 219 P. 786 (1923).

Authority of legislature. — Legislature is authorized to exempt certain property from taxation and that means none other. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Extent of power granted. — The supreme court is concerned in this section with an express power granted by the people to the legislature to allow tax exemptions to soldiers of a class defined, and it is not privileged to restrict that power by reading into the provision granting it words that are not there; nor may it confine the language used to one narrow channel of meaning, granting a limited power, when a broader meaning, granting a broader power, is implicit in the terms used unless proofs show that the narrower sense was intended. Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946).

Legislature may require listing of all persons to whom exemptions may be allowed, either originally, by adding their names upon application to the assessor, or on order of district court, before delivery of tax rolls to county treasurer. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Name on list prima facie proof of right to exemption. — Name of honorably discharged soldier on list of assessments entitled to exemption stands as prima facie proof that he is entitled to the exemption, and it can be removed only on showing he is not so entitled. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Burden of establishing right to exemption. — Claimant of exemption has responsibility of furnishing necessary proof where assessor does not have knowledge which authorizes him to place claimant upon exemption list, since assessor need not search out this information. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

A war veteran has burden of establishing his right to the exemption and if he fails to follow the method prescribed by statute, he waives his right thereto. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Common lands of Atrisco not within exemptions. — The common lands of the town of Atrisco in the Atrisco land grant do not come within either this section or Section 3 of this article and are, therefore, subject to taxation. Town of Atrisco v. Monohan, 56 N.M. 70, 240 P.2d 216 (1952).

Community interest in property. — War veteran's wife's community interest in property was not entitled to exemption from taxation under this section. Dillard v. New

Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948) (decided prior to 1949 amendment).

Soldier's tax exemption statute (repealed) allowing exemptions to every honorably discharged soldier of any prior war, who served for 30 days or more in the armed forces of the United States at any time in which the nation was engaged in war, applied to a soldier of World War II, provided he acquired his residence prior to January 1, 1934. Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1946).

Where amendatory act increasing time of service to make exemption available to 90 days became effective on March 13, 1947, widow of World War I soldier who served more than 30 but less than 90 days was entitled to exemption on 1947 taxes, since exemption status was determined on January 1, 1947. Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12, 201 P.2d 345 (1948).

Exemption to be deducted from true or cash value of property. — The $200 exemption was to be deducted from true or cash value of taxpayer's property, since all property is taxable at that value, and not from the one-third thereof which legislature had fixed arbitrarily as the value for purposes of taxation. Samosa v. Lopez, 19 N.M. 312, 142 P. 927 (1914).

Voting in bond elections. — Property owner and his wife, exempt from property tax under this section, were qualified electors in voting on general obligation bonds for municipal improvements. Hair v. Motto, 82 N.M. 226, 478 P.2d 554 (1970).

Veteran voting in bond election. — A veteran whose exemption is $2,000 and who does not pay property tax above that sum is not entitled to vote in county bond elections. 1953-54 Op. Att'y Gen. No. 53-5809.

All tangible property subject to tax. — The constitution sets forth the only areas of allowable ad valorem tax exemption. 1969 Op. Att'y Gen. No. 69-137. See also N.M. Const., art. VIII, § 3, and notes thereto.

Section is not self-executing, and exemptions are granted by means of enabling legislation. 1963-64 Op. Att'y Gen. No. 64-24.

Residency requirements not set forth. — This section, in and of itself, does not set forth any requirements as to residency in order for one to qualify. 1963-64 Op. Att'y Gen. No. 64-24.

Authority to grant exemptions. — By this section, the legislature is authorized to grant an exemption on property to the value of $2,000 to one who qualifies as a veteran and $2,000 to one who qualifies as a widow (or widower now) of a veteran, and both exemptions to one who qualifies as both. 1964 Op. Att'y Gen. No. 64-125.

Legislature could limit the veterans' exemption to disabled members of the armed forces, but should take care to define carefully what it means by "disabled" so as to avoid endless controversy and litigation. 1947-48 Op. Att'y Gen. No. 47-4987.

Formal declaration of war held unnecessary. — This section and enabling legislation referred to "any time in which the United States is regularly and officially engaged in any war". This language did not say that the war must be declared. To be officially engaged in war does not necessarily mean that the United States must be in a formally declared war. In spite of the fact that there was an undeclared war, the United States was regularly and officially engaged in war in Korea. Therefore, a veteran of the Korean conflict was held entitled to a "soldier's tax" exemption. 1953-54 Op. Att'y Gen. No. 53-5660.

Veteran of Korean conflict is a "soldier" within the meaning of the constitution and statutes regarding tax exemption and is entitled to such exemption if otherwise qualified. 1953-54 Op. Att'y Gen. No. 53-5660.

Soldier's exemptions allowed and not allowed. — Exemptions held not allowable to the parents of a soldier, the husband of a war nurse or to a soldier whose property is in the name of his wife. Exemptions held allowed for a soldier's interest in his father's estate when established, to widows of Civil War veterans and to soldiers discharged for physical disability, after 30 days' service. 1923-24 Op. Att'y Gen. No. 23-3727.

No exemption from tax in year of purchase from nonveteran. — The veterans exemption laws do not exempt a veteran from the payment of ad valorem taxes for the taxable year during which property was purchased by the veteran from a nonveteran owning the property on January 1st of such year. 1959-60 Op. Att'y Gen. No. 59-133.

Participation in training in student's army training corps does not qualify a person for the tax exemption. 1957-58 Op. Att'y Gen. No. 58-94.

Civilian World War II merchant marine seamen held not exempt. — While congress has recognized the service of certain civilian groups in World War II for the purpose of receiving federal benefits, civilian World War II merchant marine seamen did not "serve in the armed forces of the United States" as contemplated in this provision and 7-37-5 NMSA 1978. 1989 Op. Att'y Gen. No. 89-01.

Full exemption where joint tenancy in veteran and nonveteran. — Where property is owned in joint tenancy by a veteran and a nonveteran, the exemption should be allowed to the full extent. 1963-64 Op. Att'y Gen. No. 63-148.

Partnership property held not within exemption. — Partnership property being neither joint or community property nor individually owned, and not individually owned under 54-1-25 NMSA 1978, did not come within any exemption for property tax granted by statute or authorized by the constitution; a veteran partner could not therefore apply any portion of his exemption pursuant to this section and 72-1-11 to 72-1-16, 1953

Comp. (repealed) (similar to 7-37-5 NMSA 1978) to property owned by a partnership of which he was a partner. 1963-64 Op. Att'y Gen. No. 63-148 (rendered under former law).

Levies of special taxes are not to be extended and assessed on livestock which is otherwise nontaxable because of the owner's soldier and head-of-family exemptions. 1937-38 Op. Att'y Gen. No. 37-1821.

Law reviews. — For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation § 334.

Time: tax exemption of real property as affected by time of acquisition of title by private owner entitled to exemption, 54 A.L.R.2d 996.

Military service as basis of exemption, 83 A.L.R. 1235.

Remission, release or compromise of tax as an invalid exemption from taxation, 99 A.L.R. 1068, 28 A.L.R.2d 1425.

Failure to claim or delay in claiming exemption for past years, tax exemption as affected by, 115 A.L.R. 1484.

Veterans of world war, state statutes relating to exemption from taxation of amount paid as pension, war risk insurance, compensation, bonus or other relief, 116 A.L.R. 1437.

Military service, construction and application of statutory and constitutional provisions exempting property of persons in, or formerly in, such service, from taxation, 149 A.L.R. 1485.

Taxation of rights of insured or beneficiary under insurance policy as affected by exemption statutes, 150 A.L.R. 796, 167 A.L.R. 1052.

Tax on property held under executory contract with exempt vendor, 166 A.L.R. 595.

Impairment of obligation of contract with respect to tax exemption, 173 A.L.R. 15.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

84 C.J.S. Taxation §§ 219, 241.

Sec. 6. [Assessment of lands.]

Lands held in large tracts shall not be assessed for taxation at any lower value per acre then [than] lands of the same character or quality and similarly situated, held in smaller tracts. The plowing of land shall not be considered as adding value thereto for the purpose of taxation. (As amended November 3, 1914.)

ANNOTATIONS

Bracketed material. — The bracketed word "than" was inserted by the compiler although the word "then" appears in the enrolled law. However, the correct wording appeared in Section 12 of this article in the original constitution, which was renumbered as this section by the 1914 amendment.

Cross references. — For valuation of property, *see* 7-36-1 et seq. NMSA 1978.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and was adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted the present section, which formerly was Section 12 of this article for former Section 6 which, prior to amendment, read: "The legislature shall have no power to release or discharge any county, city, town, school district or other municipal corporation or subdivision of the state, from its proportionate share of taxes levied for any purpose." See also compiler's note to N.M. Const., art. VIII, § 8.

Courts may not reclassify, revalue or reassess property. — Neither supreme court nor the district court may reclassify, revalue or reassess property, improperly classified by taxing officials, and consequently, assess at an excessive valuation. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Valuations to be established and taxes levied by some standard. — To have uniformity and equality in a form of tax, the valuations must be established by some standard, and after valuations are fixed, the taxes based upon such valuations must be levied by a standard. It is only thus that each taxpayer may bear his fair share of the burden of government. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963). See also N.M. Const., art. VIII, § 1, and notes thereto.

Assessment not to be premised upon hypothetical or speculative values. — Classification or assessment of property for tax purposes, premised upon hypothetical or speculative values believed, ultimately or at some later time, to be, or become, the true market value of such land, cannot legitimately be the basis of determining its value. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Valuation held excessive and discriminatory. — Classification and valuation of property suitable for grazing purposes at 10 times the valuation of other property of the same character and quality and similarly situated because of its classification as lots held for speculation for oil or other purposes, absent any evidence of such speculative purposes, was so excessive and discriminatory as to entitle taxpayer to relief, despite fact that some other owners of like tracts were similarly assessed or that these lands,

while similar to grazing lands, were not actually used for grazing purposes. Gerner v. State Tax Comm'n, 71 N.M. 385, 378 P.2d 619 (1963).

Valuation of farming land higher than grazing land permissible. — There is nothing to prohibit the valuation of farming land at a higher rate than grazing land. 1919-20 Op. Att'y Gen. No. 20-2743.

If the taxing authorities reasonably find that land which is farmed under the dry-farming method is of greater value than grazing lands in the vicinity, a greater assessed valuation would be legal. 1921-22 Op. Att'y Gen. No. 21-3172.

Seed planting and harrowing affect value. — Although the mere plowing of land does not affect its value, cultivation, seed planting and harrowing does. 1921-22 Op. Att'y Gen. No. 22-3383.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 Am. Jur. 2d State and Local Taxation §§ 759 to 769.

Corporate property, assessment of, at full value when valuations generally are illegally fixed lower, 3 A.L.R. 1370, 28 A.L.R. 983, 55 A.L.R. 503.

Prospective value as basis for valuation of land for purposes of property taxation, 24 A.L.R. 649.

Additional tax levy necessitated by failure of some property owners to pay their proportions of original levy as violating requirement of uniformity, 79 A.L.R. 1157.

Leasehold interest, method or rule for valuation of, 84 A.L.R. 1310.

Original cost of construction or reproduction cost as factors in assessing real property, 104 A.L.R. 790.

Appurtenant rights, easements, restrictions or charges in respect of land as factors in taxation, 108 A.L.R. 829.

Easement as factor in property taxation, 134 A.L.R. 963.

Flowage rights as factor in property taxation, 134 A.L.R. 963.

Price paid or received by taxpayer for property as evidence of its value for tax purposes, 160 A.L.R. 684.

84 C.J.S. Taxation § 411.

Sec. 7. [Judgments against local officials.]

No execution shall issue upon judgment rendered against the board of county commissioners of any county, or against any incorporated city, town or village, school district or board of education; or against any officer of any county, incorporated city, town or village, school district or board of education, upon any judgment recovered against him in his official capacity and for which the county, incorporated city, town or village, school district or board of education, is liable, but the same shall be paid out of the proceeds of a tax levy as other liabilities of counties, incorporated cities, towns or villages, school districts or boards of education, and when so collected shall be paid by the county treasurer to the judgment creditor. (As amended November 3, 1914.)

ANNOTATIONS

Cross references. — For statutory provisions relating to judgments generally, *see* Article 1 of Chapter 39 NMSA 1978.

For judgments, *see* Rule 1-054 NMRA.

The 1914 amendment, which was proposed by J.R. No. 10 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 18,468 for and 13,593 against, substituted the present section, which, prior to amendment was former Section 13 of this article, and former Section 7 of this article was incorporated as the first paragraph of Section 3 of this article. See also compiler's note to N.M. Const., art. VIII, § 8.

Generally. — This section cannot be relied upon to enforce an unauthorized judgment, nor is it self-executing. McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944).

No levy against county as a whole. — Only school district benefited shall be called upon to pay for materials used, and mandamus will not lie to compel levy against property of county as a whole to pay judgment against county board of education. McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944).

Constructive notice and knowledge chargeable. — One who sells to a county school board is chargeable with constructive notice and knowledge of statutes which govern payment of school obligations. McAtee v. Gutierrez, 48 N.M. 100, 146 P.2d 315 (1944).

Special tax to be levied to pay judgment. — Judgments against county can be paid only by county levying a sufficient special tax to pay them, and until such levy, they cannot be set off against taxes owed by judgment creditors, who cannot set them up as a defense when sued for taxes. 1933-34 Op. Att'y Gen. No. 33-604.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Relieving officer or public depository or his surety from liability for public funds as taxation for private purpose, 38 A.L.R. 1516, 96 A.L.R. 295.

Municipality's power to consent or confess to judgment against itself, 67 A.L.R. 1503.

Bonds, judgment in proceeding to secure judicial approval of, before issuance or sale, as required by statute, 87 A.L.R. 716, 102 A.L.R. 107.

Right to go behind money judgment against public body in a mandamus proceeding to enforce it, 155 A.L.R. 464.

Liability of public officer for accountability for interest or earnings received on public moneys in officer's possession, 5 A.L.R.2d 257.

67 C.J.S. Officers and Public Employees §§ 216, 217, 251 to 254.

Sec. 8. [Exemption of certain personalty in transit through the state.]

Personal property which is moving in interstate commerce through or over the state of New Mexico, or which was consigned to a warehouse, public or private, or factory within New Mexico from outside the state for storage in transit to a final destination outside the state of New Mexico, manufacturing, processing or fabricating while in transit to a final destination, whether specified when transportation begins or afterwards, which destination is also outside the state, shall be deemed not to have acquired a situs in New Mexico for purposes of taxation and shall be exempt from taxation. Such property shall not be deprived of such exemption because while in the warehouse the property is assembled, bound, joined, processed, disassembled, divided, cut, broken in bulk, relabeled or repackaged. (As added November 6, 1973.)

ANNOTATIONS

The 1973 amendment, which was proposed by H.J.R. No. 39 (Laws 1973) and adopted at a special election held on November 6, 1973, with a vote of 27,474 for and 13,899 against, added a new Section 8 to Article VIII.

Compiler's notes. — Sections 8 to 13 of the original constitution were deleted when the amendment proposed by J.R. No. 10 (Laws 1913) was adopted at the general election November 3, 1914, by a vote of 18,468 for and 13,593 against. The amendment amended Article VIII in its entirety and contained only seven sections. The contents of former Sections 10 to 13 of this article were inserted in present Sections 4 to 7 of this article, respectively. Former Sections 8 and 9, which were deleted, read as follows:

"Section 8. The power to license and tax corporations and corporate property shall not be relinquished or suspended by the state or any subdivision thereof; provided, that the legislature may, by general law, exempt new railroads from taxation for not more than six years, from and after the completion of any such railroad and branches; such railroad being deemed to be completed for the purpose of taxation as to any operative division thereof, when the same is opened for business to the public; and new sugar factories, smelters, reduction and refining works, and pumping plants for irrigation

purposes, and irrigation works, for not more than six years from and after their establishment."

"Sec. 9. All property within the territorial limits of the authority levying the tax, and subject to taxation, shall be taxed therein for state, county, municipal and other purposes; provided, that the state board of equalization shall determine the value of all property of railroad, express, sleeping-car, telegraph, telephone and other transportation or transmission companies, used by such companies in the operation of their railroad, express, sleeping-car, telegraph or telephone lines, or other transportation or transmission lines, and shall certify the value thereof as so determined to the county and municipal taxing authorities."

For decisions relating to former Sections 10 to 13 of this article, see notes to Sections 4 to 7 of this article.

Sec. 9. [Elected governing authority prerequisite to levy of tax.]

No tax or assessment of any kind shall be levied by any political subdivision whose enabling legislation does not provide for an elected governing authority. This section does not prohibit the levying or collection of a tax or special assessment by an initial appointed governing authority where the appointed governing authority will be replaced by an elected one within six years of the date the appointed authority takes office. The provisions of this section shall not be effective until July 1, 1976. (As added November 5, 1974.)

ANNOTATIONS

The 1974 amendment, which was proposed by H.J.R. No. 8 (Laws 1974) and adopted at the general election held on November 5, 1974, with a vote of 62,103 for and 62,083 against, added a new Section 9 to Article VIII. The resolution did not state whether the provision would be a new Section 9 in Article VIII, but the former compiler so designated it, and the present compiler has left it as such for the sake of consistency.

Compiler's notes. — See compiler's note to N.M. Const., art. VIII, § 8.

Fees imposed by mining commission constitutional. — The provision authorizing the imposition of fees by the mining commission was not violative of this section since the commission is not a political subdivision. Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 908 P.2d 776 (Ct. App.), cert. denied, 120 N.M. 828, 907 P.2d 1009 (1995).

Sec. 10. [Severance tax permanent fund.]

A. There shall be deposited in a permanent trust fund known as the "severance tax permanent fund" that part of state revenue derived from excise taxes that have been or shall be designated severance taxes imposed upon the severance of natural resources

within this state, in excess of that amount that has been or shall be reserved by statute for the payment of principal and interest on outstanding bonds to which severance tax revenue has been or shall be pledged. Money in the severance tax permanent fund shall be invested as provided by law. Distributions from the fund shall be appropriated by the legislature as other general operating revenue is appropriated for the benefit of the people of the state.

B. All additions to the fund and all earnings, including interest, dividends and capital gains from investment of the fund shall be credited to the corpus of the fund.

C. The annual distributions from the fund shall be one hundred two percent of the amount distributed in the immediately preceding fiscal year until the annual distributions equal four and seven-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years. Thereafter, the amount of the annual distributions shall be four and seven-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years.

D. The frequency and the time of the distributions made pursuant to Subsection C of this section shall be as provided by law. (As added November 2, 1976; as amended November 2, 1982 and November 5, 1996.)

ANNOTATIONS

Cross references. — For creation of severance tax permanent and income funds, *see* 7-27-3 NMSA 1978.

The 1976 amendment, which was proposed by H.J.R. No. 5 (Laws 1975) and adopted at the general election held on November 2, 1976, with a vote of 155,365 for and 99,386 against, added a new Section 10 to Article VIII. The resolution did not state whether the provision would be a new Section 10, but the former compiler so designated it, and the present compiler has left it as such for the sake of consistency.

The 1982 amendment, which was proposed by H.J.R. No. 12 (Laws 1981) and adopted at the general election held on November 2, 1982, by a vote of 125,727 for and 125,324 against, deleted the third sentence of the first paragraph, as set out in the original pamphlet.

The 1996 amendment, which was proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 307,442 for and 153,021 against, divided the section into subsections, rewrote Subsection A, and added Subsections B, C, and D.

Compiler's notes. — See compiler's note to N.M. Const., art. VIII, § 8.

An amendment proposed by H.J.R. No. 7 (Laws 1994), which would have rewritten this section to provide that all earnings of the fund be deposited in it and providing for limited

distributions from the fund was submitted to the people in the general election held on November 8, 1994. It was defeated by a vote of 173,924 for and 208,556 against.

Constitutionality of 1990 workers' compensation legislation. — The 1990 workers' compensation legislation is constitutionally infirm under this section to the extent the legislature intends to supplant its judgment for that of the state investment council and the state investment officer in determining whether to invest the severance tax permanent fund in bonds issued by the employers mutual company and to direct that the severance tax permanent fund purchase those bonds. To that extent also, the legislation may constitute a prohibited loan guaranty arrangement under N.M. Const., art. IX, § 14. However, the legislature has not clearly and unequivocally mandated the purchase. Consequently, it may not be concluded that the legislation is patently unconstitutional on those grounds. 1990 Op. Att'y Gen. No. 90-25.

Fund not "permanent" as contemplated in investment of permanent school fund. — The severance tax permanent fund is not a permanent fund as contemplated by N.M. Const., art. XII, § 7, relating to investment of permanent school fund. The severance tax fund and the various land grant permanent funds are fundamentally different. 1977 Op. Att'y Gen. No. 77-10.

Sec. 11. [Exemption of national guard members.]

ANNOTATIONS

Compiler's notes. — For disposition of former Article VIII, § 11, see compiler's note following Article VIII, § 8.

An amendment to Article VIII, proposed by H.J.R. No. 17 (Laws 1981), which would have added a new Section 11, establishing an income tax exemption for members of the national guard, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 113,247 for and 143,574 against.

Sec. 12, 13. Repealed.

ANNOTATIONS

Compiler's notes. — See compiler's note to N.M. Const., art. VIII, § 8.

Sec. 14. [Accrual of elderly taxpayers' real property taxes.]

ANNOTATIONS

Compiler's notes. — An amendment to Article VIII proposed by S.J.R. No. 1 (Laws 1978), which would have provided for the accrual of real property taxes during the lifetime of certain elderly taxpayers, the payment of which would be held in abeyance until death or transfer of the property, was submitted to the people at the general

election held on November 7, 1978. It was defeated by a vote of 78,796 for and 113,034 against. The resolution did not actually assign any section number to this amendment, but the compiler has assigned it Section 14 for the sake of numerical continuity.

Sec. 15. [Property tax exemption for disabled veterans.] (2001)

The legislature shall exempt from taxation the property, including the community or joint property of husband and wife, of every veteran of the armed forces of the United States who has been determined pursuant to federal law to have a one hundred percent permanent and total service-connected disability, if the veteran occupies the property as his principal place of residence. The legislature shall also provide this exemption from taxation for property owned by the widow or widower of a veteran who was eligible for the exemption provided in this section, if the widow or widower continues to occupy the property as his principal place of residence. The burden of proving eligibility for the exemption in this section is on the person claiming the exemption. (As added November 3, 1998; as amended November 5, 2002.)

ANNOTATIONS

Cross references. — For statutory provision, *see* 7-37-5.1 NMSA 1978.

The 1998 amendment to Article VIII, which was proposed by H.J.R. No. 21 (Laws 1998) and adopted at the general election held on November 3, 1998 by a vote of 279,787 for and 143,585 against, added this section.

The 2002 amendment, which was proposed by H.J.R. No. 5 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 314,948 for and 118,913 against, inserted "one hundred percent" near the middle of the first sentence, deleted "and has specially adapted the residence to his disability using a grant for specially adapted housing granted to the veteran by the federal government based on his permanent and total disability" from the end of the first sentence, and deleted "specially adapted" preceding "property" near the end of the second sentence.

Sec. 16. [Property tax exemption for property of veterans' organization chartered by United States congress.] (2010)

The legislature shall exempt from taxation the property of a veterans' organization chartered by the United States congress and used primarily for veterans and their families. The burden of proving eligibility for the exemption in this section is on the person claiming the exemption. (As added November 2, 2010.)

ANNOTATIONS

The 2010 amendment to Article VIII, proposed by S.J.R. No. 7 (Laws 2010) and adopted at the general election held on November 2, 2010, by a vote of 299,345 for and 217,045 against, added this section.

ARTICLE IX
State, County and Municipal Indebtedness

Section 1. [Debts of territory and its counties assumed.]

The state hereby assumes the debts and liabilities of the territory of New Mexico, and the debts of the counties thereof, which were valid and subsisting on June twentieth, nineteen hundred and ten, and pledges its faith and credit for the payment thereof. The legislature shall, at its first session, provide for the payment or refunding thereof by the issue and sale of bonds, or otherwise.

ANNOTATIONS

Comparable provisions. — Utah Const., art. III, Third.

Authority of state to issue certificate of indebtedness or borrow money. — Debts of territory became liabilities of state, and appropriations were made to pay deficiencies incurred by requirements of existing law, so there was no reason why state could not issue certificates of indebtedness or borrow money with which to pay such debts, so long as such evidences of indebtedness did not exceed constitutional limitations. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912).

Claims for wild animal bounties not authorized. — This section does not authorize payment by state of claims against a county for wild animal bounties. State ex rel. Beach v. Board of Loan Comm'rs, 19 N.M. 266, 142 P. 152 (1914).

Compensation for services rendered by county treasurer as practicing physician. — County treasurer, who was practicing physician, was entitled to compensation for services rendered to board of county commissioners for examining persons said to be insane, for medical attention to prisoners in jail and for making post-mortem examinations of bodies. 1915-16 Op. Att'y Gen. No 16-1760.

Compensation for services rendered by county clerk as surveyor. — County commissioners were not authorized to employ and pay a county clerk for services as a surveyor, which services the county surveyor was enjoined by law to perform. 1915-16 Op. Att'y Gen. No. 16-1760.

Liability to repay counties overpayment for territorial expenses. — The liability of the territory to repay, acknowledged by Laws 1907, ch. 92 (now obsolete), to certain counties their overpayment for territorial expenses required by Laws 1903, ch. 89 (now obsolete), is a liability assumed by the state by this section. 1912-13 Op. Att'y Gen. No. 12-888.

Payment of interest on territorial bonds. — Statutory and constitutional provisions referred to in holding that interest on series "A" state bonds, by which territorial bonds

for insane asylum and for military institute were assumed by the state, was properly payable from proceeds of sales and rentals of lands donated by congress to the two institutions respectively. 1915-16 Op. Att'y Gen. No. 15-1442.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 14, 15.

81A C.J.S. States §§ 4, 5.

Sec. 2. [Payment of county debts by another county.]

No county shall be required to pay any portion of the debt of any other county so assumed by the state, and the bonds of Grant and Santa Fe counties which were validated, approved and confirmed by act of congress of January sixteenth, eighteen hundred and ninety-seven, shall be paid as hereinafter provided.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 14, 15.

81A C.J.S. States §§ 4, 5.

Sec. 3. [State refunding bonds for assumed debts.]

The bonds authorized by law to provide for the payment of such indebtedness shall be issued in three series, as follows:

Series A. To provide for the payment of such debts and liabilities of the territory of New Mexico.

Series B. To provide for the payment of such debts of said counties.

Series C. To provide for the payment of the bonds and accrued interest thereon of Grant and Santa Fe counties which were validated, approved and confirmed by act of congress, January sixteenth, eighteen hundred and ninety-seven.

ANNOTATIONS

Payment of interest on territorial bonds. — Statutory and constitutional provisions referred to in holding that interest on series "A" state bonds, by which territorial bonds for insane hospital and for military institute were assumed by the state, was properly payable from proceeds of sales and rentals of lands donated by congress to the two institutions respectively. 1915-16 Op. Att'y Gen. No. 15-1442.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 85.

Funding or refunding obligations as subject to conditions respecting approval by voters, 97 A.L.R. 442.

Mandatory or permissive character of legislation in relation to payment of state bonds, 103 A.L.R. 813.

Smaller political units, constitutionality of statutory plan for financing or refinancing bonds of, by larger political units, 106 A.L.R. 608.

Power of municipality or other governmental body to issue refunding bonds to retire obligation in respect of which the creation and maintenance of a sinking fund by taxation is required, 157 A.L.R. 794.

Power of governmental unit to issue bonds as implying power to refund them, 1 A.L.R.2d 134.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining or improving stadium for use of professional athletic team, 67 A.L.R.3d 1186.

81A C.J.S. States § 259.

Sec. 4. [Sale of lands for certain bond payments.]

The proper officers of the state shall, as soon as practicable, select and locate the one million acres of land granted to the state by congress for the payment of the said bonds of Grant and Santa Fe counties, and sell the same or sufficient thereof to pay the interest and principal of the bonds of Series C issued as provided in Section Three hereof. The proceeds of rentals and sales of said land shall be kept in a separate fund and applied to the payment of the interest and principal of the bonds of Series C. Whenever there is not sufficient money in said fund to meet the interest and sinking fund requirements therefor, the deficiency shall be paid out of any funds of the state not otherwise appropriated, and shall be repaid to the state or to the several counties which may have furnished any portion thereof under a general levy, out of the proceeds subsequently received of rentals and sales of said lands.

Any money received by the state from rentals and sales of said lands in excess of the amounts required for the purposes above-mentioned shall be paid into the current and permanent school funds of the state respectively.

ANNOTATIONS

Law reviews. — For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

Sec. 5. [Remission of county debts to state prohibited.]

The legislature shall never enact any law releasing any county, or any of the taxable property therein, from its obligation to pay to the state any moneys expended by the state by reason of its assumption or payment of the debt of such county.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies § 86.

Smaller political units, constitutionality of statutory plan for financing or refinancing bonds of, by larger political units, 106 A.L.R. 608.

81A C.J.S. States § 209.

Sec. 6. [Militia warrants.]

No law shall ever be passed by the legislature validating or legalizing, directly or indirectly, the militia warrants alleged to be outstanding against the territory of New Mexico, or any portion thereof; and no such warrant shall be prima facie or conclusive evidence of the validity of the debt purporting to be evidenced thereby or by any other militia warrant. This provision shall not be construed as authorizing any suit against the state.

ANNOTATIONS

Payment of territorial militia warrants is permanently prohibited by this section. 1915-16 Op. Att'y Gen. No. 15-1654.

Sec. 7. [State indebtedness; purposes.]

The state may borrow money not exceeding the sum of two hundred thousand dollars [($200,000)] in the aggregate to meet casual deficits or failure in revenue, or for necessary expenses. The state may also contract debts to suppress insurrection and to provide for the public defense.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For state indebtedness, *see* 6-12-1, 6-12-2 and 6-12-6 to 6-12-14, NMSA 1978.

Comparable provisions. — Idaho Const., art. VIII, § 1.

Iowa Const., art. VII, §§ 2, 4.

Montana Const., art. VIII, § 8.

Utah Const., art. XIV, §§ 1, 2.

Wyoming Const., art. XVI, § 1.

Phrase "to provide for the public defense" means to provide a militia of the kind required by N.M. Const., art. XVIII, § 2. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Militia and public defense provisions in pari materia. — Constitutional provisions concerning the organization, discipline and equipment of the militia, the calling out of the militia and contracting debts to provide for public defense are in pari materia. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940). For constitutional provisions relating to the militia, see N.M. Const., art. XVIII.

Territorial debts included. — This section authorizes the issuance and sale of certificates of indebtedness for casual deficits or failure of revenue of the territory, as all debts and liabilities of the territory were assumed by the state. The legislature must be the sole judge of "necessary expenses". State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912). As to assumption of debts of territory by state, see N.M. Const., art. IX, § 1.

Debentures to anticipate proceeds of gasoline excise tax authorized by Laws 1927, ch. 20 (repealed) did not constitute state borrowing or debt requiring a popular referendum. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

State highway bonds issued under Laws 1912, ch. 58 (now executed), were clearly not within the exception specified in this section. Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

Laws 1921, ch. 153 (temporary), authorizing levy of taxes and issuance and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to the state of federal funds under Federal Aid Road Act (23 U.S.C. §§ 101 to 158) was validated by adoption of amendment to state constitution adding Section 16 to Article IX. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

See also notes to N.M. Const., art. IX, § 8.

Limitation not applicable to debts contracted to suppress insurrection or provide for public defense. — The $200,000 limitation on the state's borrowing to meet "casual deficits or failure in revenue, or for necessary expenses", does not apply to debts

contracted to suppress insurrection or to provide for the public defense. 1951-52 Op. Att'y Gen. No. 51-5438.

The last sentence in this section, to the effect that the state may also contract debts to suppress insurrection and to provide for the public defense, is authority for issuance of certificates of indebtedness for debts contracted without any limitation, dependent only upon the extent and degree of the emergency and the wisdom of the governor and legislature in meeting the same. 1953-54 Op. Att'y Gen. No. 53-5854.

Where purpose for which an agency proposes to contract a debt is not included in this section, N.M. Const., art. IX, § 8, specifically prohibits the contraction of the debt. 1957-58 Op. Att'y Gen. No. 58-228.

Debentures for construction of addition to capitol. — Proposed debentures provided for in Laws 1921, ch. 81 (now obsolete), relating to construction of an addition to the capitol building at Santa Fe, were not to pay an indebtedness of the state, but were to be issued in anticipation of the revenues. 1921-22 Op. Att'y Gen. No. 21-2980.

State highway bonds. — State highway debentures were held general obligations of the state within contemplation of U.S. Rev. Stat. § 5136 (12 U.S.C. § 24). 1937-38 Op. Att'y Gen. No. 37-1839.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 78, 80.

Power of legislature to add to or make more onerous the conditions or limitations prescribed by constitution upon incurring public debts, 106 A.L.R. 231.

Constitutional or statutory provision limiting state or municipal indebtedness or taxation or regulating issuance of bonds as affecting bonds or other obligations authorized but not delivered prior to adoption or effective date of the provision, 109 A.L.R. 961.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

81A C.J.S. States §§ 213 to 222.

Sec. 8. [State indebtedness; restrictions.]

A. No debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object; which law shall provide for an annual tax levy sufficient to pay the interest and to provide a sinking fund to pay the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect until it shall have been submitted to the qualified electors of the state and have received a majority of all the votes cast thereon at a general election; such law shall be published in full in at least one

newspaper in each county of the state, if one be published therein, once each week, for four successive weeks next preceding such election. No debt shall be so created if the total indebtedness of the state, exclusive of the debts of the territory, and the several counties thereof, assumed by the state, would thereby be made to exceed one percent of the assessed valuation of all the property subject to taxation in the state as shown by the preceding general assessment.

B. For the purposes of this section and Article 4, Section 29 of the constitution of New Mexico, a financing agreement entered into by the state for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made by the state pursuant to the financing agreement is not a debt if:

(1) there is no legal obligation for the state to continue the lease from year to year or to purchase the real property; and

(2) the agreement provides that the lease shall be terminated if sufficient appropriations are not available to meet the current lease payments. (As amended November 3, 1964 and November 7, 2006.)

ANNOTATIONS

Cross references. — For state indebtedness, *see* 6-12-1, 6-12-2 and 6-12-6 to 6-12-14 NMSA 1978.

The 2005 amendment, which was proposed by H.J.R. 9 (Laws 2005) and adopted at the general election by a vote of 337,019 for and 142,568 against, added ", after "against" and before the period, and added Subsection B to permit lease purchase agreements.

"Debt" is used in this section in the same sense as in Section 12 of this article, as comprehending a debt pledging for its repayment the general faith and credit of the state or municipality, and contemplating the levy of a general property tax as the source of funds with which to retire the debt. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Bonds for capitol additions not included. — Debentures authorized under Laws 1934 (S.S.), ch. 14 (repealed), to provide funds for the capitol addition building, which funds were to be supplied by a fee of $2.50 upon each civil action filed in the state courts, did not constitute a general obligation on the part of the state and were not within the interdiction of this section. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Single propositions required. — This section requires that the legislature submit single bond propositions to the voters. Ryan v. Gonzales, 114 N.M. 346, 838 P.2d 963 (1992).

"The betterment of the welfare of the people" is not a specified object that necessarily relates capital outlay projects to each other; and therefore proposition which lumped together objects with no commonality but welfare and which did not interrelate did not satisfy tests for commonality sufficient to satisfy the constitutional purpose of avoiding logrolling. Ryan v. Gonzales, 114 N.M. 346, 838 P.2d 963 (1992).

Unconstitutional debt created for erection and operation of state office building. — Laws 1941, ch. 62 (repealed), providing for erection and operation of state office building by the state office building commission, which was authorized to issue debentures payable from rentals received from state agencies leasing space, was unconstitutional as creating a debt of the state in the constitutional sense, not specified in N.M. Const., art. IX, § 7, which was not submitted for approval of electorate. Bryant v. State Office Bldg. Comm'n, 46 N.M. 58, 120 P.2d 452 (1941); State Office Bldg. Comm'n v. Trujillo, 46 N.M. 29, 120 P.2d 434 (1941).

Bonds of university not deemed obligations of state. — Bonds issued by the university of New Mexico under 21-7-15 to 21-7-25 NMSA 1978 are not obligations of the state; no provision for taxation to provide interest and sinking fund need be made and approval of voters is not necessary. The bonds are obligations of university. State v. Regents of Univ. of N.M., 32 N.M. 428, 258 P. 571 (1927). For statutory provisions relating to bonds and state educational institutions, see Chapter 6, Article 13 and Chapter 21 NMSA 1978.

Issuance of debentures in anticipation of proceeds of gasoline tax, as authorized by Laws 1927, ch. 20 (repealed), did not constitute state borrowing or debt requiring a popular referendum. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

Issuance in anticipation for construction and improvement of public highways. — Laws 1921, ch. 153 (temporary), authorizing levy of taxes and issuance and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to the state of federal funds under Federal Aid Road Act (23 U.S.C. §§ 101 to 158) was validated by adoption of amendment to state constitution adding Section 16 to Article IX. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

This section was not violated by State Highway Bond Act (Laws 1912, ch. 58, now executed). Catron v. Marron, 19 N.M. 200, 142 P. 380 (1914).

Laws 1949, ch. 42 (repealed), was excepted from popular referendum, as highway debentures were evidences of public debts in sense words "public debt" are used in N.M. Const., art. IV, § 1, relating to referendum on legislation. State ex rel. Linn v. Romero, 53 N.M. 402, 209 P.2d 179 (1949).

See also notes to N.M. Const., art. IX, § 7.

Bond issues. — This section does not apply to severance tax bonds. 1991 Op. Att'y Gen. No. 91-01.

When contraction of debt prohibited. — Where the purpose for which an agency proposes to contract a debt is not included in N.M. Const., art. IX, § 7, this section specifically prohibits the contraction of the debt. 1957-58 Op. Att'y Gen. No. 58-228.

Bonds for capitol additions. — Proposed debentures in Laws 1921, ch. 81 (now obsolete), relating to construction of an addition to the capitol building at Santa Fe, were not an indebtedness of the state under this section. 1921-22 Op. Att'y Gen. 21-2980.

Lease-purchase contract and installment purchase agreement with right of termination constitutional. — A contract in the nature of a lease-purchase or installment purchase agreement, with a right of termination by the lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

The mere fact that the state enters into a lease agreement with an option to purchase property in the future is not violative of this section. An option to purchase does not obligate the state to purchase the property; therefore there is no debt. 1975 Op. Att'y Gen. No. 75-15.

Long-term lease of disposal site for radioactive waste no violation. — There would be no violation of this section if the environmental improvement agency entered into a license agreement with a regulated business which would obligate the state for the long-term lease of a disposal site or tailings pile. The fact that the problems inherent in the licensing of radioactive waste disposal sites may necessitate payments to the state to absorb the cost of maintaining the sites and that that cost may someday be borne by the state does not create a contract of debt out of what is essentially an exercise of police power. 1976 Op. Att'y Gen. No. 76-36.

State highway debenture bonds, authorized by Laws 1955, ch. 269 (64-26-59 to 64-26-65 1953 Comp.), are such general obligations of the state as to place them within the constitutional provisions pertaining to restrictions upon state indebtedness. 1959-60 Op. Att'y Gen. No. 60-56.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories and Dependencies §§ 78, 80, 86.

Employees, submission to voters of bond issue for the purpose of paying, as essential to its validity, 96 A.L.R. 1204.

Funding or refunding obligations as subject to conditions respecting approval by voters, 97 A.L.R. 442.

Power of legislature to add to or make more onerous the conditions or limitations prescribed by constitution upon incurring public debts, 106 A.L.R. 231.

Retroactive effect of laws, constitutional or statutory provision limiting state or municipal indebtedness or taxation or regulating issuance of bonds as affecting bonds or other obligations authorized but not delivered prior to adoption or effective date of the provision, 109 A.L.R. 961.

Revenue or other bonds not creating indebtedness as within constitutional or statutory requirement of prior approval by electors of issuance of bonds or incurring indebtedness by municipality, 146 A.L.R. 604.

Bond issue in excess of amount authorized by law, validity of, within authorized debt, tax or voted limit, 175 A.L.R. 823.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

81A C.J.S. States §§ 213 to 222.

Sec. 9. [Use of borrowed funds.]

Any money borrowed by the state, or any county, district or municipality thereof, shall be applied to the purpose for which it was obtained, or to repay such loan, and to no other purpose whatever.

ANNOTATIONS

Comparable provisions. — Montana Const., art. VIII, § 11.

Utah Const., art. XIV, § 5.

Section places limitation on use of funds borrowed by municipality whose utility system, together with the net revenues derived therefrom, is the sole security therefor. Scott v. City of Truth or Consequences, 57 N.M. 688, 262 P.2d 780 (1953).

Revenues derived from municipally owned and operated revenue producing enterprises, for the purchases or improvement of which the municipality shall have issued its bonds, may not be used for other corporate purposes so long as rights of bondholders are outstanding. Scott v. City of Truth or Consequences, 57 N.M. 688, 262 P.2d 780 (1953).

Interest from investments deemed part of proceeds. — This section restricts the use of proceeds from general obligation bonds to the purpose for which they were obtained or to repay the loan. Interest obtained from the investment of such proceeds is part of those proceeds. The constitution restricts the use of any accrued interest to the purpose for which the bonds were issued and to pay the principal and interest on the bonds. Any other purpose would be inconsistent with the constitution and contrary to general law and cannot be authorized by the home rule doctrine, N.M. Const., art. X, § 6D. State ex rel. Bd. of Cnty. Comm'rs v. Montoya, 91 N.M. 421, 575 P.2d 605 (1978).

Interest from temporary investment not to be used for general operating expenses of city. — A city may not use the interest earned from the temporary investment of general obligation bond proceeds for general operating expenses of the city. Where there is no statute to the contrary, the interest earned becomes part of the fund by whose investment it was produced. Thus, the interest must be deposited in either the sinking fund (to repay the loan) or in the capital projects fund (to be used for purposes for which the proceeds were borrowed). 1976 Op. Att'y Gen. No. 76-16.

Limitation on expenditure of obligation bond. — In addition to actual construction-related costs, the proceeds of general obligation bond issues of a county may be expended only for the purchase of the construction site and for equipment which becomes an integral part of the building being constructed (i.e., fixtures) or which is of a permanent or nondepletable nature and reasonably necessary to the use of the building for its intended purpose (e.g., beds, mattresses and other permanent furnishings). 1980 Op. Att'y Gen. No. 80-02.

No authority to purchase building where bonds voted for new erection. — A town does not have authority to purchase, for municipal purposes, a building already erected from the proceeds of a bond issue voted for the purpose of erecting such a building. 1953-54 Op. Att'y Gen. No. 54-5957.

Building was altered or reconstructed to be new or different. — The power to become indebted to erect a public building does not include the power to become indebted to purchase such a building, unless, in connection with the purchase, the building is so altered or reconstructed as to amount to the erection of a new or different building. 1953-54 Op. Att'y Gen. No. 54-5957.

Proceeds from utility bond sale not usable for flood control. — Because this constitutional provision prohibits a municipality from applying proceeds from the sale of municipal bonds for any purpose other than that specified in the bond resolution, a municipality may not use moneys obtained from the sale of utility bonds for other purposes, such as flood control projects. 1963-64 Op. Att'y Gen. No. 63-98.

Bonds issued for airport other than the one specified. — Where the legislature clearly and unambiguously authorized issuance of severance tax bonds to enlarge the facilities of an existing airport in Questa, those bonds could not be used for a new airport at a site different from the existing airport. 1988 Op. Att'y Gen. No. 88-46.

Inapplicability of section to severance tax bonds. — This section does not apply to severance tax bonds. 1991 Op. Att'y Gen. No. 91-01.

Payment of salaries on authorized project not prohibited. — This section does not prohibit using proceeds of a bond issue to pay the salaries of payroll clerks, timekeepers or of all workers upon the proposed construction of a county hospital for the construction of which a bond issue was authorized. 1951-52 Op. Att'y Gen. No. 51-5426.

Disposition of surplus. — A surplus remaining in a trunk line sewer fund may not be expended for any other purpose, but may constitute a trust fund to repay bonds when due. 1925-26 Op. Att'y Gen. No. 26-3903.

Care of sick and indigent persons. — It was held not compulsory on the part of a county to pay for the care of sick and indigent persons at St. Mary's hospital which was already the recipient of a state appropriation. 1929-30 Op. Att'y Gen. No. 29-82.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Funds §§ 5, 36, 37, 39, 47.

81A C.J.S. States §§ 204 to 206.

Sec. 10. [County indebtedness; restrictions.] (1991)

No county shall borrow money except for the following purposes:

A. erecting, remodeling and making additions to necessary public buildings;

B. constructing or repairing public roads and bridges and purchasing capital equipment for such projects;

C. constructing or acquiring a system for supplying water, including the acquisition of water and water rights, necessary real estate or rights-of-way and easements;

D. constructing or acquiring a sewer system, including the necessary real estate or rights-of-way and easements;

E. constructing an airport or sanitary landfill, including the necessary real estate;

F. acquiring necessary real estate for open space, open space trails and related areas and facilities; or

G. the purchase of books and other library resources for libraries in the county.

In such cases, indebtedness shall be incurred only after the proposition to create such debt has been submitted to the registered voters of the county and approved by a majority of those voting thereon. No bonds issued for such purpose shall run for more than fifty years. Provided, however, that no money derived from general obligation bonds issued and sold hereunder shall be used for maintaining existing buildings and, if so, such bonds shall be invalid. (As amended November 3, 1964, November 2, 1982, November 8, 1988 and November 5, 1996.)

ANNOTATIONS

Cross references. — For bonds for county courthouses, *see* 4-49-1 to 4-49-21 NMSA 1978.

Comparable provisions. — Idaho Const., art. VIII, § 3.

Utah Const., art. XIV, §§ 3, 4, 7.

Wyoming Const., art. XVI, §§ 3, 4.

The 1964 amendment, which was proposed by S.J.R. No. 2 (Laws 1963) and adopted at the general election held on November 3, 1964, with a vote of 70,619 for and 47,858 against, inserted "remodeling and making additions to" following "erecting" near the beginning of the first sentence, substituted "has" for "shall have" preceding "been submitted" near the middle of the first sentence and added the proviso.

The 1982 amendment, which was proposed by H.J.R. No. 9 (Laws 1982), was adopted at the general election held on November 2, 1982, by a vote of 156,113 for and 97,644 against. The amendment restructured the former language which had one undesignated paragraph containing three sentences into the present provisions. The former first sentence was broken to constitute the present first paragraph and first sentence of the second paragraph, while the former second and third sentences are now the second and third sentences of the present second paragraph. The amendment, in the present first paragraph, substituted "following purposes" for "purpose of" in the introductory language, deleted "or" and "and" at the end of Subdivisions A and B, respectively, and added Subdivisions C to E. In the first sentence of the present second paragraph, the amendment inserted "indebtedness shall be incurred" and deleted "who paid a property tax therein during the preceding year" following "of the county."

The 1988 amendment, which was proposed by H.J.R. No. 10, § 2 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 228,519 for and 140,676 against, added Subsection F and substituted "registered voters" for "qualified electors" in the first sentence of the last paragraph.

The 1996 amendment, which was proposed by H.J.R. No. 18 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 228,751 for and

227,580 against, added Subsection F and redesignated existing Subsection F as Subsection G.

Compiler's notes. — Section 4-49-1 NMSA 1978, based upon the adoption of the amendment to this section proposed by S.J.R. No. 2 (Laws 1963), took effect when this amendment was adopted November 3, 1964.

An amendment to this section proposed by H.J.R. No. 7 (Laws 1991), which would have inserted "repairing" following "remodeling" in Subsection A, was submitted to the people at the general election held on November 3, 1992. It was defeated by a vote of 225,749 for and 246,366 against.

An amendment proposed by H.J.R. No. 9, (Laws 1993), which would have added a new Subsection F providing for acquiring real estate for open space and other public purposes and redesignating the existing Subsection F as Subsection G, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 192,861 for and 210,001 against.

I. GENERAL CONSIDERATION.

Intent of section. — Framers of constitution were thinking of a debt repayment from proceeds of property tax levy against the general assessment rolls, and the debt whose creation is prohibited or limited is one pledging the general faith and credit of the subdivision, with a consequent right in the holders of such indebtedness to look to the general taxing power to satisfy the debt. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Section is not self-executing, and therefore, counties, when proceeding to issue bonds for courthouse and jail purposes, must proceed according to the general laws provided in such cases. State ex rel. Haas v. Board of Comm'rs, 32 N.M. 309, 259 P. 37 (1927).

De Baca County Act (Laws 1917, ch. 11, § 17) (now obsolete), authorizing a bond issue for courthouse and jail purposes, was inoperative since it did not direct county to proceed in accord with general law. State ex rel. Haas v. Board of Comm'rs, 32 N.M. 309, 259 P. 37 (1927).

Section 4-11-3 NMSA 1978 authorized Harding county, created thereby, to issue bonds for courthouse and jail purposes without submission to a vote of the people as required by this section. Martinez v. Gallegos, 28 N.M. 170, 210 P. 575 (1922).

No applicability to liability of new county to parent county. — This section has no application to right of legislature, in creation of a new county, to fix liability of new county to parent county, and to require new county to issue bonds therefor. State ex rel. Perea v. Board of Comm'rs, 25 N.M. 338, 182 P. 865 (1919).

No applicability when debt payable from special funds. — The limitation contained in this section, prohibiting a county from incurring an indebtedness without first submitting the question of the indebtedness to a vote of the electorate, does not apply when the obligation is payable solely from a special fund or funds and the county has not pledged its general full faith and credit. Bolton v. Board of Cnty. Comm'rs, 119 N.M. 355, 890 P.2d 808 (Ct. App. 1994), cert. denied, 119 N.M. 311, 889 P.2d 1233 (1995).

Debt limitations applicable only to specified governmental subdivisions. — When Sections 10, 11, 12 and 13 of Article IX of the constitution are considered together, it appears that its framers intended to apply debt limitations only to the specified governmental subdivisions and to leave to the sound discretion of the legislature whether to limit other government agencies created by the legislature. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Special taxing district held not to create debt. — If legislature lawfully created a special taxing district, embracing territory within one county, for purpose of raising funds for improvement of portion of a new state road therein, then anticipation of revenue raised by such tax would not create a debt against the county in violation of this section, but simply a debt of taxpayers within such special district repayable out of proceeds of special tax. Borrowdale v. Board of Cnty. Comm'rs, 23 N.M. 1, 163 P. 721, 1917E L.R.A. 456 (1916).

A "debt" in the constitutional sense is an unconditional obligation. Allstate Leasing Corp. v. Board of County Comm'rs, 450 F.2d 26 (10th Cir. 1971).

Leasing of chattels not "debt". — The leasing of chattels by a municipality has been held to be a "contingent" obligation and, as such, not a "debt" as is prohibited under this section. Allstate Leasing Corp. v. Board of Cnty. Comm'rs, 450 F.2d 26 (10th Cir. 1971).

Lease-purchase agreements. — If an option price required to be paid by a county is nominal or nonexistent, a purported lease may be treated as a sale, creating the type of future economic commitment that requires the arrangement be approved by the voters, pursuant to this provision. Montano v. Gabaldon, 108 N.M. 94, 766 P.2d 1328 (1989).

Lease with option to purchase agreement requiring county to make semi-annual payments, denominated as rent, for the use of a new facility to be built by a private contractor on county-owned land was in essence an installment-purchase agreement, and such lease created indebtedness within the meaning of this provision. Montano v. Gabaldon, 108 N.M. 94, 766 P.2d 1328 (1989).

II. PURPOSES OF INDEBTEDNESS.

Words "no county shall borrow money except for the purpose (specified)" as used in this section are clear enough in their meaning to exclude the purchase of voting machines by pledging the general faith and credit of the county. Shoup Voting Mach. Corp. v. Board of Comm'rs, 57 N.M. 196, 256 P.2d 1068 (1953).

A board of county commissioners cannot bind the county by the creation of a debt for the payment of which it has no power to pledge the county's credit. Shoup Voting Mach. Corp. v. Board of Comm'rs, 57 N.M. 196, 256 P.2d 1068 (1953).

A board of county commissioners could not carry out the provisions of Laws 1951, ch. 192 (repealed), authorizing the purchase of voting machines to be paid for in annual installments over not more than 10 years, without incurring an indebtedness which is forbidden by the constitution. Shoup Voting Mach. Corp. v. Board of Comm'rs, 57 N.M. 196, 256 P.2d 1068 (1953).

Word "necessary" construed. — As used in this section, "necessary" is construed, not as meaning "indispensable," but as synonymous with "needful". Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Coronado memorial buildings not "necessary public buildings". — Laws 1939, ch. 149, authorizing county bond issues to be employed in constructing public auditoriums in fulfillment of legislative authorization to counties to co-operate with the New Mexico Fourth Centennial Coronado Corporation in conducting expositions commemorative of the four hundredth anniversary of the arrival in New Mexico in 1540 of Francisco Vasquez de Coronado, could not be sustained as authorizing necessary public buildings. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Juvenile detention home is a “necessary public building”. — Juvenile detention home for county of first class was a necessary public building within this section. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Legislative classification of juvenile detention homes for first class counties as necessary public buildings is entitled to great weight when question comes to court for determination. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Erection of school buildings. — Fact that one provision of the constitution authorizes school districts to buy a site upon which to erect school buildings, being thus more specific than another section, does not necessarily establish an intent to limit use of funds provided for under the other section to the erection of a bare building without site or equipment. Board of Cnty. Comm'rs v. McCulloh, 52 N.M. 210, 195 P.2d 1005 (1948).

Bonds for remodeling. — This section prevented a county from issuing bonds for purpose of remodeling a courthouse. Board of Comm'rs v. State, 43 N.M. 409, 94 P.2d 515 (1939) (decided prior to 1964 amendment).

III. PROCEDURE.

Bonds for construction of buildings on removal of county seat may not be issued until county commissioners have complied with constitutional requirements. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Anticipation of tax levies no violation. — Laws 1921, ch. 48, § 17 (temporary), providing for certificates of indebtedness to anticipate tax levies of a newly created county, did not violate this section. State v. Southern Pac. Co., 34 N.M. 306, 281 P. 29 (1929).

Bases for bond question before voters. — A road bond question may be placed before the voters either by special election on petition of voters under 67-6-3 NMSA 1978 or at a general election by resolution of the board of county commissioners under this section. State ex rel. Board of Cnty. Comm'rs v. Jones, 101 N.M. 660, 687 P.2d 95 (1984).

Duty to call election. — Board of county commissioners is under a legal obligation to call an election only when a petition is presented which meets all of the prescribed constitutional and statutory requirements, and any efforts on their part to reframe the petition to read in a legal manner would be ineffective since the petition must be in legal form at the moment it is presented to them. Kiddy v. Board of County Comm'rs, 57 N.M. 145, 255 P.2d 678 (1953).

Mandamus was properly refused where there was an unsettled judicial question as to whether board of county commissioners had been presented with a petition which called for a single or a dual proposition. Kiddy v. Board of Cnty. Comm'rs, 57 N.M. 145, 255 P.2d 678 (1953).

Variance between notice and actual use fatal. — Bond issue for erection of courthouse and jail was void where notice of election had stated the bond issue to be for erecting, remodeling and repairing the existing courthouse. There must be a substantial compliance with the constitution. Tom v. Board of Cnty. Comm'rs, 43 N.M. 292, 92 P.2d 167 (1939).

Propositions. — Proposals on two or more propositions may be submitted at same election and on same ballot, but each one must stand alone so that voters may have opportunity to express their choice independently upon each proposition. Carper v. Board of Cnty. Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

Over-all test as to whether proposal to build several county buildings constitutes one or more propositions "is the existence of a natural relationship between the various structures or objects united in one proposition so that they form but one rounded whole". Carper v. Board of Cnty. Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

Petition, under law providing for building of courthouses, jails and bridges, asking for a vote upon bond issues for courthouse and jail, designated separately, did not authorize submission by ballot as a joint proposition, and an election at which the ballot submitted a single proposition, for or against "courthouse and jail bonds", was void. Dickinson v. Board of Comm'rs, 34 N.M. 337, 281 P. 33 (1929).

Proposal to build two hospitals with isolation wards within same county, 35 miles apart, illegally joined two propositions and was properly disapproved by board of county commissioners. Kiddy v. Board of Cnty. Comm'rs, 57 N.M. 145, 255 P.2d 678 (1953); Carper v. Board of County Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

The language of Laws 1947, ch. 148, § 4 (4-48B-6 NMSA 1978) leaves no doubt that the legislature regarded the construction of each hospital, with or without an isolation ward, as a separate and independent proposition. Carper v. Board of Cnty. Comm'rs, 57 N.M. 137, 255 P.2d 673 (1953).

Lease-purchase agreements. — Despite the language of 6-6-12 NMSA 1978, certain lease purchase agreements may constitute the creation of "debt" within N.M. Const., art. IX, §§ 10, 11 and 12. 1969 Op. Att'y Gen. No. 69-39.

A contract in the nature of a lease-purchase or installment purchase agreement, with a right of termination by the lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

It is not necessary that ballots used have concealed number. 1937-38 Op. Att'y Gen. No. 38-2013.

Issuance of bonds. — When a city and a county build a hospital jointly, they must issue their respective bonds separately. 1947-48 Op. Att'y Gen. No. 47-5071.

Section relates to debt-contracting powers of counties, and provides that none can be contracted except after the proposition has been approved by a majority of the people voting thereon. 1933-34 Op. Att'y Gen. No. 33-656.

Section is a limitation on, and not a grant of, power to issue bonds. Board of Comm'rs v. State, 43 N.M. 409, 94 P.2d 515 (1939); 1980 Op. Att'y Gen. No. 80-02.

Enumeration of buildings by legislature. — While it is clear that the legislature cannot declare, carte blanche, any possible class of buildings as necessary, without violating this section, it certainly can declare certain other buildings other than those now enumerated as necessary. 1959-60 Op. Att'y Gen. No. 60-45.

Limitation on expenditure of obligation bonds. — In addition to actual construction-related costs, the proceeds of general obligation bond issues of a county may be expended only for the purchase of the construction site and for equipment which becomes an integral part of the building being constructed (i.e., fixtures) or which is of a permanent or nondepletable nature and reasonably necessary to the use of the building for its intended purpose (e.g., beds, mattresses and other permanent furnishings). 1980 Op. Att'y Gen. No. 80-02.

Bonds for remodeling. — An issuance of bonds by a county for the purpose of "remodeling" an old hospital was violative of this section. 1953-54 Op. Att'y Gen. No. 53-5678 (opinion rendered prior to 1964 amendment).

Effect of 1964 amendment. — This section was amended effective November 3, 1964, for the purpose of permitting bond moneys to be used for the purpose of remodeling and making additions to necessary public buildings. Prior to the amendment the county was limited, insofar as public buildings were concerned, to the use of bond moneys for the purpose of erecting necessary public buildings. 1966 Op. Att'y Gen. No. 66-01.

The 1964 amendment also added the proviso at the end of the section, which is designed to put the county on notice as to what it cannot do with bond moneys, and does not invalidate bonds in the hands of the bondholders. The purpose for which the bond moneys are to be used must be set out in the resolution and publication thereof, and if one such specified purpose is maintaining existing buildings, the bonds shall be invalidated at that point and cannot be issued even if a buyer has been selected. 1966 Op. Att'y Gen. No. 66-01.

Section inapplicable to revenue bonds repayable from special retirement fund. — This constitutional provision has been interpreted to pertain exclusively to general obligation bonds which are retired by funds resulting from the levy of a general property tax and not to revenue bonds which are repayable from a special fund created for their retirement. 1978 Op. Att'y Gen. No. 78-15.

Anticipation of tax levies. — The provisions of Laws 1929 (S.S.), ch. 1 (temporary), relating to the issuance of debentures by the state highway commission (state transportation commission) to anticipate the collection of tax levies, do not violate this section. 1929-30 Op. Att'y Gen. No. 29-106.

Definition of "lease-purchase arrangement" is invalid. — The last sentence of Subsection C of 6-15A-3 NMSA 1978, which equates a lease-purchase arrangement with "any debt" incurred for the acquisition of educational technology equipment, improperly expands the exception for lease-purchase arrangements under Subsection C of Section 11 of Article IX of the constitution of New Mexico beyond what the drafters intended and is invalid. 2008 Op. Att'y Gen. No. 08-01.

Employment contract between county board and county manager. — Employment contract between board of county commissioners and county manager, while not in violation of the Bateman Act (6-6-11 NMSA 1978 et seq.), which was enacted to require municipalities to live within their annual incomes, was nonetheless void because it created an unconstitutional debt of the county and was an illegal attempt to bind future boards. 1988 Op. Att'y Gen. No. 88-67.

Proposition to create debt to be submitted to vote. — The board of county commissioners cannot mortgage old courthouse and jail to raise funds to buy equipment for new courthouse, for county cannot borrow money except where proposition to create

debt is submitted to qualified electors of county who paid property tax in prior year and with approval of majority voting thereon. 1935-36 Op. Att'y Gen. No. 36-1447.

Necessity of notice. — The constitutional provisions of this section, although not specifying the exact procedure for conducting an election upon a bond issue, do imply (by reference) proper notice to the voters before the election. 1953-54 Op. Att'y Gen. No. 53-5656.

Variance between notice and actual use fatal. — Under the laws of the state of New Mexico, which require a specific procedure for notice of an election and holding of an election on a bond issue, any variance between the notice and the actual use of the funds would be fatal. 1953-54 Op. Att'y Gen. No. 53-5656.

The laws of this state require a specific procedure for notice and holding of an election on a bond issue, and any variance between the notice and the actual use of the funds would be fatal; it would prohibit splitting of the proceeds of bond sums by erecting one hospital for the osteopaths and another for the M.D.'s where that was not set forth in the notice. 1953-54 Op. Att'y Gen. No. 53-5656.

Conducting of election. — There being no constitutional inhibition against the use of one box for depositing ballots on the county bond proposition and other ordinary ballots cast at the general election, in the absence of a statutory restriction, the two types of ballots may be deposited in the same ballot box. And as to county fair bonds, no such statutory restriction exists. 1955-56 Op. Att'y Gen. No. 56-6524.

Law reviews. — For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchise Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions §§ 167 to 178; 64 Am. Jur. 2d Public Securities and Obligations §§ 50, 54, 65.

Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness, 71 A.L.R. 1318, 145 A.L.R. 1362.

Pledge or appropriation of revenue from utility or other property in payment therefor as indebtedness within constitutional or statutory indebtedness of municipality or other political subdivision, 72 A.L.R. 687, 96 A.L.R. 1385, 146 A.L.R. 328.

Obligation to meet which money is appropriated at time of its creation as indebtedness within limitation, 92 A.L.R. 1299, 134 A.L.R. 1399.

Constitutional or statutory debt limit as affected by existence of separate political units with identical or overlapping boundaries, 94 A.L.R. 818.

Liability for tort or judgment based on tort as within constitutional or statutory limitation on municipal indebtedness or tax rate for municipal purposes, 94 A.L.R. 937.

Allowance to contractor for extras in accordance with provisions of contract made before debt limit was reached as creation of indebtedness within meaning of debt limit provisions, 96 A.L.R. 397.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval of voters, 97 A.L.R. 442.

Limitation on power to tax as limitation on power to incur indebtedness, 97 A.L.R. 1103.

Liability imposed by reason of benefits from improvement made by independent public unit as debt within meaning of debt limitation, 98 A.L.R. 749.

Interest on indebtedness as part of debt within constitutional or statutory debt limitation, 100 A.L.R. 610.

Obligation payable from special fund created by fees, penalties or excise taxes as within debt limit, 100 A.L.R. 900.

Limitation of municipal indebtedness as affected by combination or merger of two or more municipalities, 103 A.L.R. 154.

Installments payable under continuing service contract as present indebtedness within organic limitation of municipal indebtedness, 103 A.L.R. 1160.

Municipal debt limit as affected by obligations to municipality, 105 A.L.R. 687.

Power of legislature to add to or make more onerous the conditions or limitations prescribed by constitution upon incurring public debts, 106 A.L.R. 231.

Constitutional or statutory provision limiting state or municipal indebtedness or taxation or regulating issuance of bonds as affecting bonds or other obligations authorized but not delivered prior to adoption or effective date of the provision, 109 A.L.R. 961.

Exception regarding "emergency," "urgency," etc., within statute or charter forbidding municipal corporation to expend money or incur indebtedness in absence, or in excess, of appropriation, 111 A.L.R. 703.

Aggregate of rent for entire period of lease of property to municipality as present indebtedness for purposes of condition of incurring, or limitation of amount of, municipal debt, 112 A.L.R. 278.

What are "necessary expenses" within exception in constitutional or statutory provision requiring vote of people to authorize contracting of debt by municipality, county or other political body, or limiting amount of such indebtedness, 113 A.L.R. 1202.

Right of municipality to invoke constitutional provisions against acts of state legislature, 116 A.L.R. 1037.

Actual levy or permissible maximum levy of taxes as determining limit of indebtedness of municipality, county or other political unit, under statute or constitutional provision limiting indebtedness with reference to income or revenue, 122 A.L.R. 330.

Existing sinking fund as a factor in determining whether indebtedness or proposed indebtedness of municipality or other political subdivision exceeds constitutional or statutory limit, 125 A.L.R. 1393.

Structures: inclusion of several structures or units as affecting validity of submission of proposition to voters at bond election, 4 A.L.R.2d 617.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining or improving stadium for use of professional athletic team, 67 A.L.R.3d 1186.

20 C.J.S. Counties §§ 185 to 192.

Sec. 11. [School district indebtedness; restrictions.]

A. Except as provided in Subsection C of this section, no school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes, and in such cases only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district as are owners of real estate within the school district and a majority of those voting on the question has voted in favor of creating such debt.

B. No school district shall ever become indebted in an amount exceeding six percent on the assessed valuation of the taxable property within the school district as shown by the preceding general assessment.

C. A school district may create a debt by entering into a lease-purchase arrangement to acquire education technology equipment without submitting the

proposition to a vote of the qualified electors of the district, but any debt created is subject to the limitation of Subsection B of this section.

D. For the purposes of this section, a financing agreement entered into by a school district or a charter school for the leasing of a building or other real property with an option to purchase for a price that is reduced according to the payments made by the school district or charter school pursuant to the financing agreement is not a debt if:

(1) there is no legal obligation for the school district or charter school to continue the lease from year to year or to purchase the real property; and

(2) the agreement provides that the lease shall be terminated if sufficient money is not available to meet the current lease payments. (As amended September 19, 1933, September 28, 1965, November 5, 1996 and November 7, 2006.)

ANNOTATIONS

Cross references. — For qualifications of voters, *see* N.M. Const., art. VII, § 1.

For propriety of refunding bonds, *see* N.M. Const., art. IX, § 15.

For provision limiting local government expenditures to income, *see* 6-6-11 NMSA 1978.

For exemptions from expenditure limitation, *see* 6-6-12 NMSA 1978.

For the Education Technology Equipment Act, *see* 6-15A-1 NMSA 1978 et seq.

For voter qualifications and procedures in school bond elections, *see* 22-18-2 NMSA 1978.

For requirement that voters be registered, *see* 22-18-4 NMSA 1978.

Comparable provisions. — Idaho Const., art. VIII, § 3.

Utah Const., art. XIV, §§ 3, 4.

The 1933 amendment, which was proposed by S.J.R. No. 7 (Laws 1933) and adopted at a special election held on September 19, 1933, with a vote of 44,862 for and 21,783 against, amended the first sentence of this section which formerly read: "No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to the qualified electors of the district, and approved by a majority of those voting thereon."

The 1965 amendment, which was proposed by S.J.R. No. 3 (Laws 1965) and adopted at a special election held on September 28, 1965, with a vote of 33,768 for and 17,287

against, amended this section which formerly read: "No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the district as are owners of real estate within such school district, and a majority of those voting on the question shall have voted in favor of creating such debt. No school district shall ever become indebted in an amount exceeding six per centum on the assessed valuation of the taxable property within such school district, as shown by the preceding general assessment."

The 1996 amendment, which was proposed by S.J.R. No. 1 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 238,126 for and 230,850 against, divided the section into subsections, added "Except as provided in Subsection C of this section" and made a stylistic change in Subsection A, and added Subsection C.

The 2005 amendment, which was proposed by H.J.R. 9 (Laws 2005) was adopted at the general election held November 7, 2006, by a vote of 337,019 for and 142,568 against, added ", after "against" and before the period, and added Subsection B to permit lease purchase agreements.

I. GENERAL CONSIDERATION.

"Debt" construed. — Framers of constitution considered a "debt," as used in this section and others in this article, as one repayable upon proceeds of property tax levy against general assessment rolls, so that a debt whose creation is thereby prohibited, or whose amount is limited, is one pledging general faith and credit of subdivision, with a consequent right in holders of such indebtedness to look to general taxing power for payment. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Debt limitations applicable only to specified governmental subdivisions. — When Sections 10, 11, 12 and 13 of Article IX of the constitution are considered together, it appears that its framers intended to apply debt limitations only to the specified governmental subdivisions and to leave to the sound discretion of the legislature whether to limit other government agencies created by the legislature. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Securities irregularly issued. — Where certificates of indebtedness of a school district had been issued irregularly and not in compliance with this section or statute under which they were issued, and the proceeds had gone into the construction of school buildings, or had been partially unaccounted for and misappropriated, bona fide holders of certificates were entitled to have buildings applied to their benefit, since the issuance was not of itself illegal. Shaw v. Board of Educ., 38 N.M. 298, 31 P.2d 993 (1934).

School Leasing Law held unconstitutional. — School Leasing Law (77-17-1 to 77-17-14, 1953 Comp., since repealed) was unconstitutional, since it was simply an effort by indirection to avoid the provisions of this section, relating to six percent debt limit placed on school districts. McKinley v. Alamogordo Mun. Sch. Dist. Auth., 81 N.M. 196, 465 P.2d 79 (1969).

II. VOTER QUALIFICATIONS.

A. IN GENERAL.

"Qualified electors" construed. — When framers of constitution used term "qualified electors of the district" in this section, they referred to the class of persons theretofore made qualified electors of the school district at all school elections, and by N.M. Const., art. VII, § 1, women were so qualified. Klutts v. Jones, 20 N.M. 230, 148 P. 494 (1915).

B. REAL ESTATE OWNERSHIP REQUIREMENT.

Real estate ownership requirement unconstitutional. — Notwithstanding our emphatic disagreement with the United States supreme court majority, City of Phoenix v. Kolodziejski, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970), renders this section inoperable insofar as it requires that only real property owners be permitted to vote in school bond elections. Board of Educ. v. Maloney, 82 N.M. 167, 477 P.2d 605 (1970).

Compelling state interest standard. — As long as election in question is not one of special interest, any classification restricting franchise on grounds other than residence, age and citizenship cannot stand unless district or state can demonstrate that the classification serves a compelling state interest. Hill v. Stone, 421 U.S. 289, 95 S. Ct. 1637, 44 L. Ed. 2d 172 (1975).

The state of New Mexico had no compelling interest in the exclusion of Navajo reservation residents from district bond election and properly included them since the parents of the children who live on the reservation have a distinct interest in district affairs. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Implementing statute unconstitutional. — Section 22-18-2 NMSA 1978, which implements this section, conflicts with equal protection clause of the United States constitution, insofar as it restricts franchise in school district bond elections to real estate owners or to those who have paid a property tax on property in the school district for the preceding year. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Generally. — There are two reasons for the real estate ownership provision: (1) to insure that the persons voting are relatively permanent members of the community whose schools would be affected; and (2) to allow those upon whom the tax burden would fall to make the decision which would raise taxes. Gomez v. Board of Educ., 76 N.M. 305, 414 P.2d 522 (1966).

Bona fide ownership required. — In order to qualify to vote in a school bond referendum, a person must be a bona fide owner of real estate within such school district. Grantees of small tracts of land conveyed for no consideration four days before the election by means of quitclaim deeds given for the purpose of qualifying grantees to vote in school bond election are not bona fide owners of real estate within the meaning of this constitutional provision. Gomez v. Board of Educ., 76 N.M. 305, 414 P.2d 522 (1966).

III. ELECTION PROCEDURES.

Essential procedures for obtaining bond issue. — In obtaining funds by issuing bonds for erecting public buildings, there must be notice to the interested electorate, of the purpose for which the funds are to be used, which purpose must be authorized by law, and not be within the inhibition of the constitution; and the electorate must be given an opportunity to approve or disapprove the issuance of the bonds, at an election held for that purpose. Board of Educ. v. Robinson, 57 N.M. 445, 259 P.2d 1028 (1953).

Words to be used. — Under this section, the resolution, notice and ballot need not include the exact words as stated in the constitution, but certainly the words used cannot be so broad that, in effect, the electorate is not advised of the actual purpose of the attempt to secure funds. Board of Educ. v. Hartley, 74 N.M. 469, 394 P.2d 985 (1964).

Language "for school purposes", with no other qualification, is too broad and therefore violates this section, because such language does not sufficiently apprise the voter of the exact purpose for which the election was held. Board of Educ. v. Hartley, 74 N.M. 469, 394 P.2d 985 (1964).

Referendum improper where one of proposed uses unconstitutional. — Where electorate was asked to vote upon the question of money for: (1) erecting and furnishing a school building, which was within the constitution, and (2) improvement of school buildings and grounds which were without the constitution, the duality of the questions presented denied the voters the right of free expression in a referendum on the single valid question embraced in the submission. Board of Educ. v. Robinson, 57 N.M. 445, 259 P.2d 1028 (1953).

Statements of school district officials regarding the use of bond proceeds. — A school district is required to use bond funds for the purposes specified in the resolution passed by the local school board for issuing the bonds, the notice of election on the bond issuance, and in the question posed on the ballot. The district is not bound by the statements and representations of district officials or employees regarding the use of bond proceeds that are not reflected in the resolution, notice and bond question. 2010 Op. Att’y Gen. No. 10-04.

Dormitories not school buildings. — While the balance of a building fund may be used for repairs for school buildings, dormitories for public schools are not school buildings, and such buildings are not authorized. 1919-20 Op. Att'y Gen. No. 19-2328.

Newly acquired territory should not be taxed for the bonded indebtedness of the original school district. 1921-22 Op. Att'y Gen. No. 22-3477.

Use of leases. — A school district cannot procure a loan from the federal government to erect school building, community house and gymnasium under Public Works Act by bond issue to be paid out of proceeds of taxation or revenue from such building, nor by a mortgage on it, but may do so by a lease of it to the governmental agency for term of years beyond term of the then members of the school board who must provide annual rentals for payments under the lease. 1933-34 Op. Att'y Gen. No. 33-685.

Lease-purchase agreements. — Despite the language of 6-6-12 NMSA 1978 certain lease-purchase agreements may constitute the creation of debt within N.M. Const., art. IX, §§ 10, 11 and 12. 1969 Op. Att'y Gen. No. 69-39.

A contract in the nature of a lease-purchase or installment purchase agreement, with a right of termination by the lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

Refunding bonds in principal amount greater than principal amount of outstanding bonds being refunded. — Subject to the approval of the department of finance and administration, a board of education may issue general obligation refunding bonds in a principal amount that is greater than the principal amount of the outstanding bonds being refunded, provided the proceeds of the refunding bonds are used only for the purpose of refunding existing school district general obligation indebtedness, as provided by law, and not for new capital outlay projects, operating costs of a school district or other purposes besides refunding. 2001 Op. Att'y Gen. No. 01-03.

"Qualified electors" construed. — Any person meeting the requirements of N.M. Const., art. VII, § 1 and this section is entitled to vote in a school bond election. 1963-64 Op. Att'y Gen. No. 64-27.

Reasonable proof of real property ownership. — Voting officials may demand from persons seeking to vote in school bond elections reasonable proof of their ownership of real property, such as recorded copies of real estate records or certified copies of real estate records, tax receipts, proof of death of former owner, affidavits of heirship, probate proceedings if initiated, and any other appropriate documents evidencing ownership of realty within the school district by such persons. 1963-64 Op. Att'y Gen. No. 64-34.

Interest may be fractional or undivided. — A person who owns an actual interest in real property within school district even though it be a fractional or an undivided interest,

and otherwise is qualified to vote, may vote in a school district general obligation bond issue. 1965 Op. Att'y Gen. No. 65-95 (opinion rendered under prior law).

Community property. — A husband and wife may both vote in a school bond election if they are owners of realty in school district, which realty is held as community property. 1963-64 Op. Att'y Gen. No. 64-27 (opinion rendered under prior law).

Purchasers. — The term "owners of real estate within such school district" as used in this constitutional provision includes purchasers of real estate under a real estate contract which has created an escrow arrangement whereby a warranty deed to such realty will be delivered to the purchasers of the realty upon payment of the full contract price. 1963-64 Op. Att'y Gen. No. 64-87 (opinion rendered under prior law).

Heirs. — Upon the death of an owner of real property situate in a local school district, the heirs or persons named in the will to take such real property immediately become vested with title to such land and such persons become owners of realty entitling them to vote in school bond elections. 1963-64 Op. Att'y Gen. No. 64-34 (opinion rendered under prior law).

Taxpayers on personal property are qualified electors at school bond election. 1931-32 Op. Att'y Gen. No. 31-30 (opinion rendered prior to amendments).

Voters exempt from taxes because of military service are qualified electors at school bond election. 1931-32 Op. Att'y Gen. No. 31-30 (opinion rendered prior to amendments).

Resident property owner delinquent in paying his taxes may vote in a school bond election unless he is so delinquent that the county treasurer has conveyed a tax deed to the state for delinquent taxes. In such event, upon the conveyance the former property owner is divested of ownership of such property and is no longer entitled to vote in school bond elections. 1965 Op. Att'y Gen. No. 65-54 (opinion rendered under prior law).

Payment of taxes before voting. — This section does not require that the elector shall have paid his property taxes before he may vote, but 22-18-2 NMSA 1978 requires that the original petition calling for a school bond election must contain the signatures of "qualified electors of the district who shall have paid a property tax therein during the preceding year". 1951-52 Op. Att'y Gen. No. 52-5513 (opinion rendered under prior law).

District held to terms of notice. — Proceeds from the sale of district school bonds voted for building and equipping a school house may not be devoted to the purchase of land upon which a school house could be erected. 1915-16 Op. Att'y Gen. No. 16-1807.

Law reviews. — For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchise Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 64 Am. Jur. 2d Public Securities and Obligations §§ 50, 54, 65 to 67; 68 Am. Jur. 2d Schools §§ 92 to 100.

Debts incurred for school purposes as part of municipal indebtedness, for purposes of debt limitation, 111 A.L.R. 544.

Structures: inclusion of several structures or units as affecting validity of submission of proposition to voters at bond election, 4 A.L.R.2d 617.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

Rescission of vote authorizing school district expenditure, or tax, 68 A.L.R.2d 1041.

79 C.J.S. Schools and School Districts §§ 323 to 328.

Sec. 12. [Municipal indebtedness; restrictions.]

No city, town or village shall contract any debt except by an ordinance, which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purposes to which the funds to be raised shall be applied, and which shall provide for the levy of a tax, not exceeding twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal. No such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or other officers of such city, town or village, or at any special election called for such purpose, have been submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year, and a majority of those voting on the question by ballot deposited in a separate ballot box when voting in a regular election, shall have voted in favor of creating such debt. A proposal which does not receive the required number of votes for adoption at any special election called for that purpose, shall not be resubmitted in any special election within a period of one year. For the purpose, only, of voting on the creation of the debt, any person owning property within the corporate limits of the city, town or village who has paid a property tax therein during the preceding year and who is otherwise qualified to vote in the county where such city, town or village is situated shall be a qualified elector. (As amended November 3, 1964.)

ANNOTATIONS

Cross references. — For registration and qualification of voters, *see* N.M. Const., art. VII, § 1.

For county and municipal debt limit, *see* N.M. Const., art. IX, § 13.

For refunding bonds, *see* N.M. Const., art. IX, § 15.

Comparable provisions. — Idaho Const., art. VIII, § 3.

Utah Const., art. XIV, §§ 3, 4.

The 1964 amendment, which was proposed by Senate Rules Committee substitute for H.J.R. Nos. 10 and 18 (Laws 1963) and adopted at the general election held on November 3, 1964, with a vote of 65,791 for and 53,237 against, inserted provisions for special elections in the third sentence and added the last two sentences.

I. GENERAL CONSIDERATION.

Section and enabling statutes constitutional. — The operable provisions of this section as interpreted by the New Mexico supreme court and the classifications and requirements of the enabling statutes for creation of municipal indebtedness, 3-30-2, 3-30-3, and 3-30-6 NMSA 1978, rationally promote legitimate state interests and are constitutionally justified. Snead v. City of Albuquerque, 663 F. Supp. 1084 (D.N.M. 1987), aff'd, 841 F.2d 1131 (10th Cir. 1987), cert. denied, 485 U.S. 1009, 108 S. Ct. 1475, 99 L. Ed. 2d 704 (1988).

N.M. Const., art. VII, § 1 and 1964 amendment can be construed harmoniously. — The provisions of N.M. Const., art. VII, § 1, do not provide that a person otherwise qualified to vote can have but one place to vote in all elections, or that he can be a resident of but one precinct with fixed territorial boundaries. N.M. Const., art. VII, § 1 expressly directs that the legislature "shall regulate the manner, time and places of voting". There is nothing in this directive which says that voting precincts must be geographically identical for all elections, or that an elector is entitled to cast his vote at the same place in all elections. That additional electors may now vote, in municipal bond elections, cannot be held to apply to or affect the general voter qualifications set forth in N.M. Const., art. VII, § 1. The voter qualifications expressly recited in § 1 remain exactly the same. This section makes no provision for or mention of municipal bond elections, or the qualifications of electors at such elections. The provision of the constitution relating to elector qualifications, which is affected by and to which the amendment does apply, is the provision previously contained in this section, concerning the qualifications of electors at elections on the question of incurring municipal indebtedness. The ratification of an amendment to this provision requires only a simple majority of the votes which are cast on the question, and this majority was attained. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Effect of section. — This section inhibits cities, towns and villages from entering into contracts which would, or might, create obligations resting upon future contingencies, and the amount of which is not fixed, definite and certain at time the contract is made. Thus, sewer construction debt for which town may become liable must be fixed, definite

and certain in amount at time it is incurred. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1939).

"Service contract doctrine" not applicable. — The "service contract doctrine," which states that a contract which obligates a municipality to pay a third party at the end of a year for all services performed during that year is not a "debt" within the meaning of constitutional debt restrictions, is not applicable in New Mexico. Hamilton Test Systems, Inc. v. City of Albuquerque, 103 N.M. 226, 704 P.2d 1102 (1985).

Nature of creditor irrelevant. — The intent and object to be accomplished was to safeguard the municipality and its citizens from ruinous taxation. The fact that an excessive indebtedness might be owing to an agency of the state instead of an individual does not alter the effect. State ex rel. State Hwy. Comm'n v. City of Aztec, 77 N.M. 524, 424 P.2d 801 (1967).

Only limitations of section self-executing. — This section and N.M. Const., art. IX, § 13, are not self-executing in that they do not confer power upon municipalities to contract indebtedness, independent of legislative authorization. But these limitations upon the debt contracting power are self-executing. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

In absence of legislation providing for an election, which must be followed, the authority to issue bonds at all is denied. Taos Cnty. Bd. of Educ. v. Sedillo, 44 N.M. 300, 101 P.2d 1027 (1940).

Power of legislature to prescribe conditions under which municipality may issue bonds is only limited by this section, but not otherwise controlled. Varney v. City of Albuquerque, 40 N.M. 90, 55 P.2d 40, 106 A.L.R. 222 (1936).

Debt limitations applicable only to specified governmental subdivisions. — When Sections 10, 11, 12 and 13 of Article IX of the constitution are considered together, it appears that its framers intended to apply debt limitations only to the specified governmental subdivisions and to leave to the sound discretion of the legislature whether to limit other government agencies created by the legislature. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Liability of annexed area. — This section was not violated by Laws 1947, ch. 211 (repealed), subjecting annexed area to taxation for retiring preexisting indebtedness of the city in the creation of which owners of annexed lands had no part. Cox v. City of Albuquerque, 53 N.M. 334, 207 P.2d 1017 (1949).

Municipal power to serve as trustee. — Subject to constitutional and statutory limitations upon this power, a municipality may constitute itself as trustee or agent of bondholders or certificate holders for purpose of making assessments and the enforcement and collection thereof when authorized by statute. Purcell v. City of Carlsbad, 126 F.2d 748 (10th Cir. 1942).

Town was not estopped to deny liability on sewer certificates issued by it without election required by constitution, though certificates recited compliance with requirements of law. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1939).

Municipal liability for unlawful disbursements. — Where bonds were made worthless by payment of other bonds out of numerical order, liability for the unlawful disbursement was not within statutory or constitutional limitations touching the creation and amount of municipal indebtedness. Fact that bonds were issued without submission to vote would not bar recovery on the bonds where sufficient assessments had been levied to meet indebtedness. Crist v. Town of Gallup, 51 N.M. 286, 183 P.2d 156 (1947), superseded by statute, Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

Void municipal guarantee severable from assessment provision. — Guarantee of city to pay to holders of sewer certificates, payable out of assessments, any deficiency not met by the assessments, was void, in view of this section, because there was no election; but the guarantee was severable so certificate holders could compel enforcement of liens against properties benefited and equitable distribution of funds derived therefrom. City of Santa Fe v. First Nat'l Bank, 41 N.M. 130, 65 P.2d 857 (1937).

Incidental use of property purchased by bond issue acceptable. — A municipality in its discretion may authorize its property to be used incidentally for a purpose other than that for which it is primarily purchased or constructed, if the use for incidental purposes does not interfere with the use for the primary purpose; if machinery which town proposed to install was necessary for present and reasonably anticipated needs for pumping water, for which it was authorized, fact that it proposed to use such equipment in connection with producing electricity or some other municipal use would not prevent its installation; otherwise, a town could be precluded from installing any kind of equipment that might be used incidentally for another purpose. Page v. Town of Gallup, 26 N.M. 239, 191 P. 460 (1920).

II. NATURE OF DEBTS TO WHICH SECTION APPLIES.

"Debt" construed. — The "debt" whose creation is prohibited, or the amount of which is limited by this section, is one pledging general faith and credit of municipality, with consequent right in holders of such indebtedness to look to general taxing power for payment. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

Obligations not engaging general taxing power not prohibited. — Revenue bonds or other state or municipal obligations which do not engage the general taxing power of the state, or a political subdivision thereof, are not within the prohibition of this section and N.M. Const., art. IX, § 13, either as to the requirement for approval of a popular referendum, or as exceeding constitutional limitation on indebtedness. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Revenue bonds, truly such, repayable from a special fund created for their retirement, payable solely and wholly from moneys derived from sources other than general taxation, do not constitute a general obligation on part of municipality. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952).

Special improvement bonds provided for under Laws 1947, ch. 122 (repealed), were not invalid on theory that they constituted a debt under this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Unconstitutional debt is not created by revenue bonds issued to improve and replace municipal waterworks to be paid from net revenues thereof. Seward v. Bowers, 37 N.M. 385, 24 P.2d 253 (1933).

City may be empowered to make contract for sewer improvements, without approving vote of the qualified taxpayers, so long as obligation of repayment is confined to the property benefited. City of Santa Fe v. First Nat'l Bank, 41 N.M. 130, 65 P.2d 857 (1937).

Paving bonds must be made payable out of moneys collected from assessments against the abutting lands and not otherwise. Munro v. City of Albuquerque, 48 N.M. 306, 150 P.2d 733 (1943).

Providing for municipal payment if assessments insufficient requires referendum. — Town sewer certificates specifying payment from special assessments, or by town in case of deficiency, were debts for which election was required. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1939).

Giving mortgage on municipal property requires referendum. — Borrowing of money on security of property already belonging to municipality, without giving lender any recourse against body corporate or its property other than the particular property pledged to secure the money advanced, is the creation of indebtedness within prohibition of constitution if the constitutional limitation of municipal indebtedness is thereby exceeded. The mortgage lien on municipal auditoriums declared by Section 5-3-3 NMSA 1978 creates a "debt" within prohibition of this section, except as the creation of same may have received an approving vote by referendum. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952).

Refunding bonds. — Where proceeds of municipal bonds were to be placed in escrow and invested in United States bonds for the sole purpose of paying off indebtedness on existing municipal bonds, the refunding bonds could not be considered as an increase in the city's indebtedness within this section and N.M. Const., art. IX, § 13, even though some 10 years would lapse between issuance of refunding bonds and final payment of original bonds, and though original bonds would not be paid immediately upon their initial callable date. City of Albuquerque v. Gott, 73 N.M. 439, 389 P.2d 207 (1964). For provision regarding refunding bonds, see N.M. Const., art. IX, § 15.

III. LIMITATION OF TAX LEVY.

Purpose of tax provision. — The provision of this section, providing "for the levy of a tax, not exceeding 12 mills on the dollar" and sufficient to pay the municipal debt, was inserted with the object of providing against the repudiation by a municipality of the indebtedness incurred by the ordinance, and to fix a limitation upon the amount of a single debt for purposes not excepted from its operation. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

Levy limitation inapplicable to debts for water and sewer systems. — The 12-mill levy limitation fixed by this section does not apply to debts contracted for purchase or construction of system for supplying water, or for a sewer system, for cities, towns or villages. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913). For debt limit and exceptions therefrom, see N.M. Const., art. IX, § 13.

While it is true the proviso regarding indebtedness contracted for supplying water for municipalities appears at the end of N.M. Const., art. IX, § 13, in order to carry out the manifest intention of the framers of the constitution, the supreme court has held that the proviso is, in effect, an independent provision, and that neither the limitation contained in this section, limiting the amount of the tax levy, nor the limitation contained in N.M. Const., art. IX, § 13, limiting the amount to which a municipality may become indebted, affect the debt contracting power of a municipality with regard to indebtedness incurred for supplying water for the municipality. City of Truth or Consequences v. Robinson, 58 N.M. 111, 266 P.2d 356 (1954).

Referendum not necessary for water and sewer systems. — Section 2402, 1897 C.L. (repealed), authorizing municipalities to contract indebtedness and issue bonds for specified purposes provided no debt was created, except for supplying water, without approval at regular election by majority of qualified elector-property owners was in full conformity, and in no way inconsistent, with this provision. Smith v. City of Raton, 18 N.M. 613, 140 P. 109 (1914).

All other safeguards apply to water and sewer systems. — Only that part of this section which conflicts with the proviso of N.M. Const., art. IX, § 13, is inapplicable to a debt contracted for purpose of building or purchasing sewer or waterworks systems; and all other safeguards apply to such debts. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1939).

Levy limitation not affected by administrative statute. — Fact that an administrative statute (Laws 1919, ch. 47, now repealed) provided that revenue from municipally owned utilities should be used to pay bond interest and principal did not affect requirement of tax levy in this section. State ex rel. City of Roswell v. State Tax Comm'n, 34 N.M. 303, 280 P. 258 (1929).

IV. ELECTIONS.

A. VOTER REQUIREMENTS.

Community property. — Married woman, otherwise a qualified elector, owning community property on which her husband paid tax, was qualified to vote in election on bond issue. Baca v. Village of Belen, 30 N.M. 541, 240 P. 803 (1925).

Property owner whose mortgagee paid assessed tax as agent for him and property owner exempt from payment of tax under soldier exemption provided in N.M. Const., art. VIII, § 5, were persons "who [had] paid a property tax during the preceding year" within constitutional and statutory requirements and therefore were qualified electors in voting on general obligation bond for municipal improvements. Hair v. Motto, 82 N.M. 226, 478 P.2d 554 (1970).

Vendors and vendees in real estate contracts were qualified electors in voting on general obligation bonds for municipal improvements. Hair v. Motto, 82 N.M. 226, 478 P.2d 554 (1970).

B. PROCEDURES.

Double proposition improper. — Cities, towns and villages were not authorized to submit to voters the joint proposition of issuing bonds for double purpose of constructing a waterworks system and building a system of sewers, without providing for a separate vote upon each question. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

Proposition contained single purpose. — Submission by city council to voters of proposition to issue bonds in a stated amount for purchase or erection of a system of waterworks was not a double proposition, but was to be construed in substance as a proposition to acquire waterworks, either by purchase or construction. City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174 P. 217, 5 A.L.R. 519 (1918).

Constitutional amendments treated differently. — Where there is but one portion of a single section affected, and the object or purpose of the amendment is confined to the manner in which municipal indebtedness is incurred, the fact that two points of change are involved, the fact that either might have been presented to the electorate separately, and the fact that there may be reasons why an elector might have desired one change and not the other, are not in themselves sufficient to hold the adoption of the amendment invalid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Two-thirds vote constitutional. — Section 5-3-9 NMSA 1978 authorizing cities to issue bonds for construction of public auditorium, on two-thirds vote of legal voters, did not run counter to this section of the constitution; statute precluded issuance of such bonds under prior statute authorizing issuance of bonds for construction of public or needful buildings on majority vote. Varney v. City of Albuquerque, 40 N.M. 90, 55 P.2d 40, 106 A.L.R. 222 (1936).

Illegal votes do not vitiate election. — Receiving by election officers at bond election of illegal or improper votes will not vitiate the election, unless it is shown affirmatively that the wrongful action changed the result. Sargent v. City of Santa Fe, 24 N.M. 411, 174 P. 424 (1918).

Amendment presumed valid. — The presumption that the 1964 amendment to this section is valid cannot reasonably be overcome. 1964 Op. Att'y Gen. No. 64-142.

N.M. Const., art. VII, § 1, and 1964 amendment to this section can be construed to operate harmoniously without absurd or unjust results, since the former would apply to all elections for public officers and the latter would apply, as its language directs, "For the purpose, only, of voting on the creation of the debt". 1964 Op. Att'y Gen. No. 64-142.

When a city and a county build hospital jointly, they must issue their respective bonds separately. 1947-48 Op. Att'y Gen. No. 47-5071.

Application of funds to another use. — Where application of the proceeds of a bond issue, voted for construction and extension of the water and sewer systems, to the payment of preexisting indebtedness incurred for work done earlier on those systems was not contemplated by the electors in their consent to the current bond issue, such use constitutes a misapplication of the proceeds of such bond issue as a matter of law. 1957-58 Op. Att'y Gen. No. 58-234.

Power to become indebted to erect public building does not include power to become indebted to purchase such a building unless in connection with purchase building is so altered or reconstructed as to amount to erection of a new or different building. 1953-54 Op. Att'y Gen. No. 54-5957.

Indemnification contract unconstitutional. — Provision in a contract between a city and a beverage company under which the city agreed to indemnify the company against certain liabilities is unconstitutional under the debt restrictions of this section. 2000 Op. Att'y Gen. No. 00-04.

Obligations not engaging general taxing power not prohibited. — No constitutional requirement existed requiring a bond election for corporations formed pursuant to 11-1-1 NMSA 1978 et seq. and 14-40-75, 1953 Comp. et seq. (repealed), to issue and sell bonds to acquire a jointly owned public gas utility system. 1963-64 Op. Att'y Gen. No. 64-17.

Levy not necessary where water rents sufficient to meet debt. — Under provision for the levying of a tax to cover interest and to provide a sinking fund in case municipal bonds are issued, the levying and collection of the tax are not necessary, where the return from water rents are more than enough to meet those charges. 1915-16 Op. Att'y Gen. No. 16-1766.

School bond issue is not debt of city, town or village. 1915-16 Op. Att'y Gen. No. 16-1809.

Lease-purchase agreements. — Despite the language of 6-6-12 NMSA 1978 certain lease-purchase agreements may constitute the creation of debt within this section and N.M. Const., art. IX, §§ 10 and 11. 1969 Op. Att'y Gen. No. 69-39.

A contract in the nature of a lease-purchase or installment purchase agreement, with right of termination by lessee, used as a method of financing the possible purchase of personal property by public entities of the state is constitutional and does not constitute the creation of a debt. 1976 Op. Att'y Gen. No. 76-20.

Option to purchase property. — Constitution allows New Mexico to fit into the prevailing view that a mere option to purchase property by a municipality does not create an indebtedness. 1972 Op. Att'y Gen. No. 72-30.

Payment of property tax prerequisite to voting. — In order to be able to vote in any municipal bond election, it is the universal requirement that the voters shall have paid their property tax during the preceding year. This requirement does not exist for voters in elections for public officers. 1953-54 Op. Att'y Gen. No. 53-5643.

"Property tax" construed. — The phrase "property tax," as used in this section, covers any kind of property. 1915-16 Op. Att'y Gen. No. 16-1766.

"The preceding year" construed. — As used in this section, the words "the preceding year" mean the period of time covering one year next preceding the election, and not the calendar year preceding the one in which the election is held. 1915-16 Op. Att'y Gen. No. 16-1756.

Prerequisite not met by payment of conservancy district assessment. — One who has paid a conservancy district assessment on property located in a municipality, but who has not paid an ad valorem property tax on property within the municipality during the preceding year, is not eligible to vote in a city bond election. 1961-62 Op. Att'y Gen. No. 62-51.

Voter qualifications on bond issues for sewers. — Ex-service men or heads of families whose property is exempt from taxation are not qualified to vote on municipal bond issues for sewers, but the wife who has community property on which her husband paid taxes is qualified, as are landowners who have paid tax the previous year, but not stockholders of corporation as such which has paid property tax. 1935-36 Op. Att'y Gen. No. 35-1104. For soldier exemption, see N.M. Const., art. VIII, § 5.

"Ballot box" mandatory. — The spirit of this section could be followed by the utilization of a separate voting machine for the bond election. However, this section does provide that a "separate ballot box" shall be used, and it is questionable whether in construing this language it would be wise to depart from the sense of the words actually used.

Therefore, that portion of Laws 1951, ch. 192, § 3 (repealed), relating to the use of voting machines in bond elections should be regarded as inconsistent with this section, requiring separate ballot boxes, and for that reason separate ballot boxes should be used in all municipal bond elections. 1953-54 Op. Att'y Gen. No. 53-5643.

Proposition must contain two separate propositions. — Bond election for issuance of bonds for a sewer system and disposal plant does not contain two separate propositions. 1925-26 Op. Att'y Gen. No. 26-3900.

Law reviews. — For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchises Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interest in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 599 to 605.

Failure to comply with constitutional or statutory requirement that municipality, at or after incurring indebtedness, shall provide a tax for its payment, as affecting validity of indebtedness or obligations issued therefor, 90 A.L.R. 1240.

Legislature's power to add to or make more onerous conditions prescribed by constitution upon incurring of public debt, 106 A.L.R. 231.

Validity, construction and application of statute or ordinance requiring that judgments against municipalities be paid in order of their entry or in other particular sequence, 138 A.L.R. 1303.

Revenue or other bonds or instruments not creating indebtedness as within constitutional or statutory requirement of prior approval by electors of incurring of indebtedness by municipality, 146 A.L.R. 604.

Inclusion of several structures or units as affecting validity of submission of proposition to voters at bond election, 4 A.L.R.2d 617.

Validity of municipal bonds issue as against owners of property, annexation of which to municipality became effective after date of election at which issue was approved by voters, 10 A.L.R.2d 559.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

Rescission of vote authorizing school district or other municipal bond issue, expenditure or tax, 68 A.L.R.2d 1041.

Construction and effect of absentee voters' laws, 97 A.L.R.2d 257.

64 C.J.S. Municipal Corporations §§ 1846 to 1855.

Sec. 13. [County and municipal debt limit; exceptions.]

No county, city, town or village shall ever become indebted to an amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such county, city, town or village, as shown by the last preceding assessment for state or county taxes; and all bonds or obligations issued in excess of such amount shall be void; provided, that any city, town or village may contract debts in excess of such limitation for the construction or purchase of a system for supplying water, or of a sewer system, for such city, town or village.

ANNOTATIONS

Cross references. — For restrictions on county indebtedness, *see* N.M. Const., art. IX, § 10.

For restrictions on municipal indebtedness, *see* N.M. Const., art. IX, § 12.

Comparable provisions. — Utah Const., art. XIV, § 4.

Wyoming Const., art. XVI, § 5.

I. GENERAL CONSIDERATION.

Evil aimed at by section was the proneness of municipalities, over-optimistic as to their futures, to adopt improvement programs in excess of their means of payment. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Conservancy assessments not debt contracted or incurred by city. — The Conservancy Act (Section 73-14-1 NMSA 1978 et seq.) authorized assessments against public corporations as such (73-16-2 NMSA 1978), required such assessments to be paid in not more than 10 annual installments (73-16-6 NMSA 1978), and required such installments to be paid by uniform tax upon all taxable property (73-16-15 NMSA 1978). A debt resulting from such assessments was not contracted or incurred by a city and hence did not violate this section. Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Limitations are self-executing. — This section and N.M. Const., art. IX, § 12, are not self-executing in that they confer no power upon municipalities to contract indebtedness, independent of legislative authorization. Their limitations on the debt-contracting power, however, are self-executing. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

Debt limitations applicable only to specified governmental subdivisions. — When Sections 10, 11, 12 and 13 of Article IX of the constitution are considered together, it appears that its framers intended to apply debt limitations only to the specified governmental subdivisions and to leave to the sound discretion of the legislature whether to limit other government agencies created by the legislature. Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Joint proposition unlawful. — Cities, towns and villages are not authorized to submit to the voters therein the joint proposition of issuing bonds for constructing a waterworks system and building a system of sewers, without providing for a separate vote upon each question. Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913).

Proposition to fund purchase or erection of water system not joint. — When city council submits to voters a proposition to issue bonds in a stated amount for purchase or erection of system of waterworks, it is not a double proposition, and does not fall within the rule announced in Lanigan v. Town of Gallup, 17 N.M. 627, 131 P. 997 (1913), but is to be construed as a proposition to acquire a waterworks system, either by purchase or construction. City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174 P. 217, 5 A.L.R. 519 (1918).

Water pumping machinery used for other municipal use. — Where town contracted to purchase machinery necessary for present and reasonably anticipated needs for pumping water, out of money received from bonds issued after an election for construction of waterworks, fact that it also proposed to use such machinery in connection with another municipal use could not operate to prevent town from installing the machinery. Page v. Town of Gallup, 26 N.M. 239, 191 P. 460 (1920).

II. NATURE OF DEBTS TO WHICH SECTION APPLIES.

"Become indebted" construed. — Construing this section with N.M. Const., art. IX, §§ 10 and 12, the phrase "become indebted" means in the light of its context "borrow money" or "contract debt". Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929), cert. denied, 280 U.S. 610, 50 S. Ct. 158, 74 L. Ed. 653 (1930).

Debt whose creation is prohibited or whose amount is limited in the constitution, is one pledging general faith and credit of subdivision with consequent right in holders of such indebtedness to look to general taxing power to satisfy their claims. State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, 39 N.M. 312, 46 P.2d 1097 (1935).

Revenue bonds not "debt". — The indebtedness created by revenue bonds or like municipal obligations are not the kind of "debt" framers of constitution had in mind and were talking about in N.M. Const., art. IX, § 12 and this section. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Revenue bonds or other state or municipal obligations which do not engage the general taxing power of the state, or a political subdivision thereof, are not within the prohibition of N.M. Const., art. IX, § 12 and this section either as to the requirement for approval of a popular referendum, or as exceeding constitutional limitation on indebtedness. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Special improvement bonds. — Special improvement bonds provided for under Laws 1947, ch. 122 (repealed), were not invalid on theory that they constituted a debt under this section. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

Refunding bonds. — Where proceeds of municipal bonds were to be placed in escrow and invested in United States bonds for the sole purpose of paying off indebtedness on existing municipal bonds, the refunding bonds could not be considered as an increase in the city's indebtedness within N.M. Const., art. IX, § 12 and this section, even though some 10 years would lapse between issuance of refunding bonds and final payment of original bonds and original bonds would not be paid immediately upon their initial callable date. City of Albuquerque v. Gott, 73 N.M. 439, 389 P.2d 207 (1964).

Mortgaging municipal property creates debt. — Borrowing of money on security of property already belonging to municipality, without giving bidder any recourse against body corporate or its property other than the particular property pledged to secure the money advanced, if the constitutional limitation of municipal indebtedness is thereby exceeded, is the creation of indebtedness within meaning of constitution; a city, to secure completion of its city hall, cannot contract to deed its uncompleted building and land in exchange for money for such completion, to rent the property where the rental amounts to interest on the amount advanced, and take an option to repurchase the property, where its debts exceed the constitutional limit, for the contract is in equitable effect a mortgage. Palmer v. City of Albuquerque, 19 N.M. 285, 142 P. 929, 1915A L.R.A. 1106 (1914).

III. PROVISO REGARDING WATER AND SEWER SYSTEMS.

Intent of proviso. — It was the intention of the framers of the constitution that no restraints should be laid on municipalities in their efforts to procure a water supply, by either the purchase or construction of systems for such purpose, or of sewer systems. City of Truth or Consequences v. Robinson, 58 N.M. 111, 266 P.2d 356 (1954).

No limitation upon amount of water system indebtedness. — Under the constitution, there is no limitation imposed upon amount of indebtedness which may be contracted for purpose of construction or purchase of a system for supplying water. City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174 P. 217, 5 A.L.R. 519 (1918).

Proviso also applies to tax levy provision. — The proviso of this section is not limited to that portion of the section which precedes it. While it is true the proviso regarding indebtedness contracted for supplying water for municipalities appears at the end of this section, in order to carry out the manifest intention of the framers of the constitution, the supreme court had held that the proviso is, in effect, an independent provision, and that neither the limitation contained in N.M. Const., art. IX, § 12, limiting the amount of the tax levy, nor the limitation contained in this section, limiting the amount to which a municipality may become indebted, affect the debt contracting power of a municipality with regard to indebtedness incurred for supplying water for the municipality. City of Truth or Consequences v. Robinson, 58 N.M. 111, 266 P.2d 356 (1954).

Only conflicting part of N.M. Const., art. IX, § 12, is inapplicable to debt contracted for purpose of building or purchasing sewer or waterworks systems, and all other safeguards apply to such debts. Henning v. Town of Hot Springs, 44 N.M. 321, 102 P.2d 25 (1939).

Revenue bonds for waterworks system. — Where a town, under the authority of Laws 1933, ch. 57 (repealed), issues revenue bonds for a loan for the betterment, replacement and improvement of its waterworks system, payable exclusively from net revenues derived from such municipal utility, it is clearly within the exemption of this section permitting debts in excess of the 4% limitation. Seward v. Bowers, 37 N.M. 385, 24 P.2d 253 (1933).

Proviso not applicable to electric light system. — Removal of limitation upon indebtedness for supplying water or a sewer system is not applicable to electric light system. 1915-16 Op. Att'y Gen. No. 15-1701.

Section does not authorize borrowing. — New Mexico Const., art. IX, § 12 and this section give no authority for borrowing money, and in this respect are not self-executing. 1953-54 Op. Att'y Gen. No. 53-5778.

Voter qualifications for bond issue elections. — Only resident voters in a municipality who have paid property tax therein the preceding year may vote at election for a bond issue. 1937-38 Op. Att'y Gen. No. 38-1907.

Complete exemption from all calculations. — Municipal indebtedness for water and sewer systems is outside of the 4% limitation, and sewer bonds should not be considered as part of bonded indebtedness within constitutional limit even after such bonds are issued. 1937-38 Op. Att'y Gen. No. 38-1891.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 592, 599.

Estoppel by recitals in bonds to set up violation of provision limiting indebtedness, 86 A.L.R. 1068, 158 A.L.R. 938.

Appropriation to meet obligation at time of its creation as affecting its character as an indebtedness within debt limitation, 92 A.L.R. 1299, 134 A.L.R. 1399.

Pledge or appropriation of revenue from utility or other property in payment therefor as debt within constitutional or statutory limitation, 96 A.L.R. 1385, 146 A.L.R. 328.

Taxation, limitation of power as to, as limitation of power to incur indebtedness, or vice versa, 97 A.L.R. 1103.

Disposition of revenues from operation of revenue-producing enterprise owned by municipal corporation, 103 A.L.R. 579, 165 A.L.R. 854.

Legislature's power to add to limitations prescribed by constitution limiting the public debt, 106 A.L.R. 231.

Ownership or operation of public utility by municipality or by private corporation (or individual) as basis of classification for legislative purpose, 109 A.L.R. 369.

Undelivered bonds or other obligations authorized but not delivered prior to adoption or effective date of debt limitation as affected by such limitation, 109 A.L.R. 961.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 A.L.R.2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 A.L.R.2d 903.

20 C.J.S. Counties § 188; 64 C.J.S. Municipal Corporations §§ 1846 to 1855.

Sec. 14. [Aid to private enterprise; veterans' scholarship programs; student loans; job opportunities; affordable housing.] (2009)

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section.

A. Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.

B. Nothing in this section prohibits the state from establishing a veterans' scholarship program for Vietnam conflict veterans who are post-secondary students at educational institutions under the exclusive control of the state by exempting such veterans from the payment of tuition. For the purposes of this subsection, a "Vietnam conflict veteran" is any person who has been honorably discharged from the armed

forces of the United States, who was a resident of New Mexico at the original time of entry into the armed forces from New Mexico or who has lived in New Mexico for ten years or more and who has been awarded a Vietnam campaign medal for service in the armed forces of this country in Vietnam during the period from August 5, 1964 to the official termination date of the Vietnam conflict as designated by executive order of the president of the United States.

C. The state may establish by law a program of loans to students of the healing arts, as defined by law, for residents of the state who, in return for the payment of educational expenses, contract with the state to practice their profession for a period of years after graduation within areas of the state designated by law.

D. Nothing in this section prohibits the state or a county or municipality from creating new job opportunities by providing land, buildings or infrastructure for facilities to support new or expanding businesses if this assistance is granted pursuant to general implementing legislation that is approved by a majority vote of those elected to each house of the legislature. The implementing legislation shall include adequate safeguards to protect public money or other resources used for the purposes authorized in this subsection. The implementing legislation shall further provide that:

(1) each specific county or municipal project providing assistance pursuant to this subsection need not be approved by the legislature but shall be approved by the county or municipality pursuant to procedures provided in the implementing legislation; and

(2) each specific state project providing assistance pursuant to this subsection shall be approved by law.

E. Nothing in this section prohibits the state, or the instrumentality of the state designated by the legislature as the state's housing authority, or a county or a municipality from:

(1) donating or otherwise providing or paying a portion of the costs of land for the construction on it of affordable housing;

(2) donating or otherwise providing or paying a portion of the costs of construction or renovation of affordable housing or the costs of conversion or renovation of buildings into affordable housing; or

(3) providing or paying the costs of financing or infrastructure necessary to support affordable housing projects.

F. The provisions of Subsection E of this section are not self-executing. Before the described assistance may be provided, enabling legislation shall be enacted by a majority vote of the members elected to each house of the legislature. This enabling legislation shall:

(1) define "affordable housing";

(2) establish eligibility criteria for the recipients of land, buildings and infrastructure;

(3) contain provisions to ensure the successful completion of affordable housing projects supported by assistance authorized pursuant to Subsection E of this section;

(4) require a county or municipality providing assistance pursuant to Subsection E of this section to give prior formal approval by ordinance for a specific affordable housing assistance grant and include in the ordinance the conditions of the grant;

(5) require prior approval by law of an affordable housing assistance grant by the state; and

(6) require the governing body of the instrumentality of the state, designated by the legislature as the state's housing authority, to give prior approval, by resolution, for affordable housing grants that are to be given by the instrumentality.

G. Nothing in this section prohibits the state from establishing a veterans' scholarship program, for military war veterans who are post-secondary students at educational institutions under the exclusive control of the state and who have exhausted all educational benefits offered by the United States department of defense or the United States department of veterans affairs, by exempting such veterans from the payment of tuition. For the purposes of this subsection, a "military war veteran" is any person who has been honorably discharged from the armed forces of the United States, who was a resident of New Mexico at the original time of entry into the armed forces or who has lived in New Mexico for ten years or more and who has been awarded a southwest Asia service medal, global war on terror service medal, Iraq campaign medal, Afghanistan campaign medal or any other medal issued for service in the armed forces of this country in support of any United States military campaign or armed conflict as defined by congress or by presidential executive order or any other campaign medal issued for service after August 1, 1990 in the armed forces of the United States during periods of armed conflict as defined by congress or by executive order. (As amended November 1, 1971, November 5, 1974, November 8, 1994, November 5, 2002, November 7, 2006 and November 2, 2010.)

ANNOTATIONS

Cross references. — For section prohibiting extra compensation for public officers, *see* N.M. Const., art. IV, § 27.

For prohibition of aid to charities, *see* N.M. Const., art. IV, § 31.

For misuse of public moneys, *see* N.M. Const., art. VIII, § 4.

For section prohibiting support of sectarian or private schools, *see* N.M. Const., art. XII, § 3.

For the Local Economic Development Act, *see* 5-10-1 NMSA 1978 et seq.

For Medical Student Loan for Service Act, *see* 21-22-1 NMSA 1978 et seq.

Comparable provisions. — Idaho Const., art. VIII, § 4.

Iowa Const., art. VII, § 1.

Utah Const., art. VI, § 29.

Wyoming Const., art. XVI, § 6.

The 1971 amendment, which was proposed to H.J.R. No. 15 (Laws 1971) and adopted at the special election held on November 2, 1971, with a vote of 38,002 for and 37,008 against, added the provision regarding a veterans' scholarship program at the end of the first sentence and added the second sentence.

The 1974 amendment, which was proposed by House Floor Substitute for H.J.R. No. 7 (Laws 1974) and adopted at the general election held on November 5, 1974 with a vote of 77,761 for and 49,294 against, added the last sentence.

The 1994 amendment, proposed by H.J.R. No. 12 (Laws 1993) and adopted at the general election held on November 8, 1994, by a vote of 209,019 for and 186,505 against, divided the section into subsections and added Subsection D relating to job and economic development opportunities.

The first 2002 amendment, which was proposed by H.J.R. No. 10 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 239, 437 for and 190,328 against, substituted "except as provided in Subsections A through F of this section" for "provided" at the end of the introductory paragraph and added Subsections E and F.

The second 2002 amendment, which was proposed by H.J.R. No. 18 (Laws 2001) and adopted at the general election held on November 5, 2002, by a vote of 303,444 for and 127,955 against, inserted "or who has lived in New Mexico for ten years or more" near the middle of the second sentence in Subsection B.

The 2006 amendment, which was proposed by H.J.R. 8 (Laws 2005) was adopted at the general election held November 7, 2006, by a vote of 266,861 for and 213,468 against, amended Subsection E to provide for the state housing authority, to provide for

governmental entities to pay a portion of the costs of construction of affordable housing and to add Paragraph (6) to provide for approval of affordable housing grants.

The 2010 amendment, which was proposed by H.J.R. No. 11 (Laws 2009) and adopted at the general election held on November 2, 2010, with a vote of 409,180 for and 119,195 against, in the first paragraph, changed "Subsections A through F" to "Subsections A through G"; and added Subsection G.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 11 (Laws 1967), which would have permitted creating new job opportunities, decreasing unemployment or improving the state's economy with loans to encourage economic development, was submitted to the people at the special election held on November 7, 1967. It was defeated by a vote of 22,353 for and 31,019 against.

An amendment to this section proposed by H.J.R. No. 23 (Laws 1970), which would have permitted student loan programs for post-secondary students at educational institutions under the exclusive control of the state, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 57,864 for and 78,061 against.

Eight amendments to the constitution were proposed by the 1970 session of the legislature although the attorney general has stated that constitutional amendments may not be considered in even-numbered years. See 1965-66 Op. Att'y Gen. No. 65-212 and 1969-70 Op. Att'y Gen. No. 69-151.

Special election. — Laws 1971, ch. 308, §§ 1 and 2, provided that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

I. GENERAL CONSIDERATION.

Enterprise's public purpose does not justify aid. — That a private enterprise serves a highly commendable public purpose alone does not warrant the state's or any county's or city's making a donation or pledging its credit in aid of it. State ex rel. Mechem v. Hannah, 63 N.M. 110, 314 P.2d 714 (1957); State Hwy. Comm'n v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007, 75 A.L.R.2d 408 (1958), overruled in part by State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

No language in section expressly proscribes "the giving of aid to private enterprise". Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Enabling Act provisions continue valid. — Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310) under which New Mexico became a state, became as much a part of New Mexico fundamental law as if it had been directly incorporated into the New Mexico

constitution, and provisions of the constitution forbidding donations or pledges of credit by New Mexico except as otherwise permitted allowed use of trust funds as required under the Enabling Act. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Loan or pledge of credit proscribed. — Laws 1939, ch. 149, authorizing counties to construct public auditoriums to cooperate with New Mexico Fourth Centennial Coronado Corporation in conducting exposition violated constitutional provision prohibiting any county from pledging its credit in aid of a public or private corporation. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940).

Tariff permitting utility to recover costs of relocation required by a local ordinance did not violate the antidonation clause of the New Mexico constitution. City of Albuquerque v. New Mexico Pub. Regulation Comm'n, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297.

Law regarding relocation of utilities in certain condemnation situations. — The 1959 act (55-7-21 and 55-7-22, 1953 Comp.; 67-8-15 to 67-8-21 NMSA 1978), by which (1) the legislature has authorized the commission itself to expend public funds for the relocation of utility facilities; (2) the utility, as to relocations, is under the absolute control of the commission and is merely acting as a contractor for the state; and (3) the legislature has expressly prohibited reimbursement for relocation in cases where there is a specific obligation on the part of the utility to relocate is not unconstitutional. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Payment of relocation costs to utility invalid. — Laws 1957, ch. 237, §§ 1(B) and (D) (repealed) are repugnant to this section, insofar as they provide for payment of relocation costs to utilities affected by highway projects. State Hwy. Comm'n v. Ruidoso Tel. Co., 65 N.M. 101, 332 P.2d 1019 (1958); State Hwy. Comm'n v. Mountain States Tel. & Tel. Co., 65 N.M. 99, 332 P.2d 1018 (1958); State Hwy. Comm'n v. Southern Union Gas Co., 65 N.M. 84, 332 P.2d 1007, 75 A.L.R. 2d 408 (1958), overruled in State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Special improvement bonds valid. — Special improvement bonds provided for under Laws 1947, ch. 122 (repealed) were not invalid on theory that they involved a lending of credit to private individuals. Stone v. City of Hobbs, 54 N.M. 237, 220 P.2d 704 (1950).

State Bar Act (Laws 1925, ch. 100) does not violate this section. — The power of the state over the board of commissioners of the state bar appears to be absolute. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931), abrogated, In re Bristol, 2006-NMSC-041, 140 N.M. 317, 142 P.3d 905.

Public employee benefits statute. — Section 10-11-4 NMSA 1978, increasing benefits to public employees, and permitting those employees who had annuitant status under Laws 1947, ch. 167 (repealed), to participate therein provided they elected so to do by paying an additional lump sum of money to the association does not violate N.M.

Const., art. IV, §§ 27 and 31 and this section, as the effect thereof is not to appropriate public money for private use nor to allow extra compensation to public officers for services already performed, nor does it constitute a donation or gratuity. State ex rel. Hudgins v. Public Employees Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954).

Flood protection appropriations. — Appropriations under Laws 1961, chs. 181, 182 and 183 (relating to flood protection) are not in violation of this section. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Money disbursed illegally must be paid back. — Public moneys are trust funds belonging to the people, and must be reimbursed by the recipient if they are paid out illegally by a public official, even though in good faith; and this is particularly true in a case involving a donation or gratuity. State ex rel. Callaway v. Axtell, 74 N.M. 339, 393 P.2d 451 (1964).

Section was never intended as a shield against responsibility for wrongful acts. Thus, where a sewage treatment facility is operated by a city in a manner which results in contamination of underground water to such a degree that it is offensive or dangerous for human consumption or use and is injurious to public health, safety and welfare and interferes with the exercise and enjoyment of public rights, including the right to use public property, the city has created a public nuisance within the meaning of 30-8-1 NMSA 1978 and relief in the nature of a mandatory injunction requiring abatement of the nuisance by ordering the city to extend its waterlines to residencies in and outside its limits free of hookup charges is no "donation" in violation of this section. State ex rel. N.M. Water Quality Control Comm'n v. City of Hobbs, 86 N.M. 444, 525 P.2d 371 (1974).

Judgment for damages for breach of contract is not a donation as defined in this section. Sanchez v. Board of Educ., 80 N.M. 286, 454 P.2d 768 (1969).

Contracts beneficial to whole community. — Contracts between municipalities and private enterprises that are beneficial to the community as a whole are not violative of this section, when they do not involve municipal investment in the project through the lending of municipal funds. Hotels of Distinction W., Inc. v. City of Albuquerque, 107 N.M. 257, 755 P.2d 595 (1988).

II. DONATION.

The appropriation of educational funds to private schools is unconstitutional. — N.M. Const., Art. XII, § 3 expressly prohibits the appropriation of public funds to sectarian, denominational or private schools. A public school under the control of the state can directly receive funds, while a private school not under the exclusive control of the state cannot receive either direct or indirect support. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Where petitioners filed a complaint for declaratory judgment against the secretary of the New Mexico public education department seeking a declaration that the state issuing instructional materials to students attending private schools is unconstitutional, the New Mexico supreme court held that the Instructional Material Law, §§ 22-15-1 through 22-15-14 NMSA 1978, in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions, and private schools as agents for the benefit of eligible students, violates N.M. Const., Art. XII, § 3, because the constitutional provision expressly restricts the use of public funds to other than sectarian schools and expressly prohibits the appropriation of educational funds to private schools. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Purpose of this section. — The purpose of this provision is to prevent public bodies from loaning their credit or from obtaining a financial interest in private enterprise. Moses v. Skandera, 2015-NMCA-036, cert. granted, 2015-NMCERT-001.

Furnishing of instructional material to students attending private schools is not an unconstitutional donation. — The Instructional Material Law (IML), 22-15-1 through 22-15-14 NMSA 1978, in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions and private schools as agents for the benefit of eligible students, does not violate this section because under the IML, there is no donation to a private school because there is neither a gift nor an allocation or appropriation of something of value without consideration; although private schools receive possession of the instructional material, as agents for the students, they never have an ownership interest in the instructional material. Moses v. Skandera, 2015-NMCA-036, cert. granted, 2015-NMCERT-001.

"Donation" construed. — The term "donation" as found in this proviso has been applied in its ordinary sense and meaning, as a "gift," an allocation or appropriation of something of value, without consideration, to a "person, association or public or private corporation". Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Phrase "giving of aid to private enterprise" should not be read into proviso prohibiting a donation to a private corporation as a matter of construction except where the "aid or benefit" disclosed, by reason of its nature and the circumstances surrounding it, takes on character as a donation in substance and effect. Accordingly, statute (Laws 1955, ch. 234, now repealed) authorizing issuance of bonds by municipalities to finance projects for the purpose of promoting industry and trade did not violate this section, proscribing the making of "any donation to or in aid of . . . a private corporation", by giving aid to private enterprise. Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).

Roughage drought feed appropriations unconstitutional. — Laws 1957, ch. 22, making appropriation to state board of finance for federal-state cooperative agreement for roughage drought feed program, violated provision of this section providing that state

shall not directly or indirectly make any donation to or in aid of any person. State ex rel. Mechem v. Hannah, 63 N.M. 110, 314 P.2d 714 (1957).

Ratification bonus payable to members of public-sector bargaining unit. — Where a proposed provision of a public-sector collective bargaining agreement provided that upon ratification of the agreement all bargaining unit members would receive a ratification bonus of $500 to be paid by the first pay period after ratification to compensate bargaining unit members for the delay in implementing wage increases under the new agreement; and the bargaining unit members were public employees, the bonus was a retroactive wage and payment of the bonus would violate Article IX, Section 14. Nat'l Union of Hosp. & Healthcare Employees v. Board of Regents, 2010-NMCA-102, 149 N.M. 107, 245 P.3d 51, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Retroactive benefits. — The provisions of Laws 1959, ch. 289 (55-7-21 and 55-7-22, 1953 Comp.), which attempt to provide for reimbursement of relocation costs retrospectively to March 29, 1957, are in direct conflict with this section. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

This section will not permit payment of pension to person who left service of state before passage of Pension Act. State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329, 142 A.L.R. 932 (1942).

County may not support county fair conducted by private corporation. — Laws 1913, ch. 51, appropriating money or directing a county to appropriate money to a private corporation engaged in conducting a county fair, for purpose of paying premiums on agricultural, horticultural and other exhibits, which was a duty assumed by such a corporation, conflicted with this section. Harrington v. Atteberry, 21 N.M. 50, 153 P. 1041 (1915).

Legislative pension benefits cannot be gifts because this section prohibits the state from directly or indirectly lending its credit or from making any donation to or in aid of any person. State ex rel. Udall v. Public Employees Retirement Bd., 118 N.M. 507, 882 P.2d 548 (Ct. App. 1994), rev'd, 120 N.M. 786, 907 P.2d 190 (1995).

Federal funds used for hotel development project. — City's channeling of federal funds to a hotel development project did not violate the antidonation clause. Hotels of Distinction W., Inc. v. City of Albuquerque, 107 N.M. 257, 755 P.2d 595 (1988).

III. BARGAINED-FOR EXCHANGE.

Purchase of water rights. — Section 72-1-2.4 NMSA 1978, which appropriates funds to purchase land with appurtenant water rights or rights to the delivery of water as a substitution for enforcement of priorities, does not violate the anti-donation clause because the state receives present value for its purchase even though subsequent

priority calls may diminish the value. State ex rel. State Eng'r v. Lewis, 2007-NMCA-008, 141 N.M. 1, 150 P.3d 375.

Where value received, bond issue appropriate. — A proposed bond issue to erect high school in conjunction with state school is not unconstitutional as a pledge of credit or donation by district in aid of state. District will get value received for every dollar put into the enterprise. White v. Board of Educ., 42 N.M. 94, 75 P.2d 712 (1938).

City may sell property on part cash, part credit terms. — Sale of city light and power system to privately owned public utility company, partly for cash and partly on terms, did not constitute a lending or pledging of credit and was not a donation under this section. City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878, 161 A.L.R. 504 (1945).

City must consider all aspects in fixing price. — Fact that election and election notice did not mention interest on delayed payments upon purchase of utility from city did not constitute a donation to utility company so long as this item was considered in determining the ultimate purchase and sale figure. City of Clovis v. Southwestern Pub. Serv. Co., 49 N.M. 270, 161 P.2d 878, 161 A.L.R. 504 (1945).

IV. RECIPIENTS OF AID.

"Public or private corporation" construed. — The language of this section wherein the words "public or private corporation" are used extends to the city's operation of water and sewage systems. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Proprietary function equivalent to private enterprise. — Operation of water and sewer systems is a proprietary function of a municipality, not a governmental function, and therefore must stand on the same footing as privately owned utility facilities. State ex rel. City of Albuquerque v. Lavender, 69 N.M. 220, 365 P.2d 652 (1961).

Intragovernmental transfers outside prohibition. — This provision has no application where the lending of credit is under legislative sanction by one subordinate governmental agency to another. Wiggs v. City of Albuquerque, 56 N.M. 214, 242 P.2d 865 (1952).

This section does not prevent the leasing of a state park to a city for $1.00 per year, even if such lease amounted to a donation, since this section is not applicable to a legislatively sanctioned donation by the state or one of its governmental agencies to another such agency. City of Gallup v. New Mexico State Park & Recreation Comm'n, 86 N.M. 745, 527 P.2d 786 (1974).

V. EXCEPTIONS FROM PROHIBITION.

Definition of "indigent patient" in 27-5-4C NMSA 1978 is not unconstitutional under this section. Humana of N.M., Inc. v. Board of Cnty. Comm'rs, 92 N.M. 34, 582 P.2d 806 (1978).

Sick leave benefits for state employees are not compensation for services rendered but are payable under this section, which prohibits donations to private persons, as provisions "for the care and maintenance of sick and indigent persons". 1983 Op. Att'y Gen. No. 83-04.

Effect of proviso regarding care of sick and indigent. — City could enter into contract with county whereby former conveys hospital facilities for a nominal amount and the added consideration that the county agree to provide for the care and maintenance of the city's sick and indigent citizens. By so doing, the restrictive provisions of this section would not be applicable. 1957-58 Op. Att'y Gen. No. 58-78.

Not necessary that recipients of aid be both sick and indigent. — To hold that a person must be both sick and indigent, rather than sick or indigent, would disqualify the large amount of recipients now obtaining welfare aid and old age assistance who are in financial need but are not sick. Therefore, the department of public health may use its moneys to provide drugs to persons who are ill with tuberculosis but not indigent. 1957-58 Op. Att'y Gen. No. 58-135.

Not necessary that person be sick when aid given. — Department of public health may provide drugs for preventing the development or reestablishment of a disease in a person presumed well at the time the drug is administered because such treatment serves a public purpose and is, therefore, not a donation or gift even though the recipients may be incidentally benefited. 1957-58 Op. Att'y Gen. No. 58-135.

Ambulance service proper. — It is legally possible to make an arrangement whereby county in the legitimate exercise of its health and welfare powers could provide ambulance service to sick and indigent residents of the county. 1961-62 Op. Att'y Gen. No. 61-84.

County road work for charitable institution. — It may be implied from construction of this section that a county would have the power to do road work for a charitable institution which was providing for the care of sick and indigent persons. 1969 Op. Att'y Gen. No. 69-103.

Pensions for blind persons. — A statute providing a "pension" plan for the blind without regard to financial need would not be constitutional. 1957-58 Op. Att'y Gen. No. 57-26.

Assistance to those not in danger of becoming paupers. — Since assistance under emergency roughage program is not limited to paupers or even to those who although not paupers are in danger of becoming such and is thus unable to come within the most liberal interpretation of the "sick and indigent persons" exception of this section, this

provision, as well as N.M. Const., art. IV, § 31, prohibits the state's contribution of $2.50 per ton toward the purchase of hay. 1957-58 Op. Att'y Gen. No. 57-62.

Aid to hospital operated by private lessee. — The evident purpose of Laws 1955, ch. 224 (4-48-11 and 4-48-14 NMSA 1978) was to provide a means by which the county operating the hospital itself could pay for such operation. To construe Laws 1955, ch. 224, as allowing the county commissioners to use the funds authorized in this section for the purpose of supporting and maintaining a hospital owned by the county but leased to a private organization, would be in direct violation of N.M. Const., art. IV, § 31 and this section. 1955-56 Op. Att'y Gen. No. 56-6426.

Courts should require reimbursement for copying costs incurred. — The supreme court and the court of appeals should require reasonable reimbursement for the costs incurred by them for copying opinions for the public or for retrieving their opinions for inspection. However, such a charge need not be made in those cases in which the courts receive some other form of consideration in return for supplying their opinions to private individuals or enterprises. 1979 Op. Att'y Gen. No. 79-14.

Intragovernmental transfers outside prohibition. — The prohibition against donations does not apply as between the state or one of its subordinate agencies and another such agency. 1979 Op. Att'y Gen. No. 79-02.

Donation between political subdivisions permitted. — A donation of property from one political subdivision of the state to another is not prohibited by this section. 1981 Op. Att'y Gen. No. 81-27.

Intent of this section was to prevent the giving of outright "grants" or the use of the city's credit by and for those who would not be entitled to get or receive credit in the first instance and to act as a curb on speculative ventures prevalent at the time of its adoption. 1955-56 Op. Att'y Gen. No. 56-6550.

Enterprise's public purpose does not justify aid. — Even if a donation is to be used for a public purpose, it is not exempt from constitutional prohibitions. 1979 Op. Att'y Gen. No. 79-02.

Outright gifts to individuals are in violation of this section, and the fact that an appropriation may be serving a highly commendable public purpose does not exempt it from this constitutional prohibition. 1979 Op. Att'y Gen. No. 79-07.

Conformity with aid of charities provision. — The language of this section was obviously designed to conform to the aid of charities provision of N.M. Const., art. IV, § 31. 1975 Op. Att'y Gen. No. 75-07.

Loan or pledge of credit proscribed. — The expenditure of $3,000 to be used in preliminary and advance work in preparing for the 1965 western association of state highway officials' convention is absolutely proscribed by this section of the New Mexico

constitution, even though the western association of state highway officials would reimburse the department from registration fees, since the proposed expenditure would amount at the very least to a pledging or lending of highway department credit to the association. 1963-64 Op. Att'y Gen. No. 64-81.

Limited contingent liability. — It is legal for school districts, irrigation districts and other public units to insure public property in authorized mutual insurance companies, if the contingent liability assumed by public body is limited in amount; but if such liability is not so limited, the constitutional provision would be violated. 1935-36 Op. Att'y Gen. No. 35-1214.

Student loan plan associated with federal law. — Plan whereby the state could loan money to resident students who are enrolled in an institution of higher learning in the state and who otherwise qualify under the federal guaranteed loan program under the Higher Education Act of 1965 (20 U.S.C. § 1001 et seq.) is not inconsistent with N.M. Const., art. VIII, § 4, or this section. 1970 Op. Att'y Gen. No. 70-23.

Grasshopper control program meets judicial tests. — The grasshopper control program meets the tests which have been established by the supreme court as meeting the requirements of this section; that is, (1) a public purpose is being served, and (2) complete control of the expenditure of the state's contribution rests in a state agency. Therefore, the appropriation made in Laws 1957, ch. 212, § 10, is constitutional. 1959-60 Op. Att'y Gen. No. 59-92.

Transportation of students to private schools. — If private schools or students were to reimburse the county pursuant to an enforceable contract for funds expended in contracting with a school district for the transportation of students to the private schools, there would be no violation of this provision. 1989 Op. Att'y Gen. No. 89-02.

Providing dormitory and meals to boy scouts. — The department of public safety cannot provide use of its dormitory and meals to a boy scouts of America troop at a substantially reduced cost. 1990 Op. Att'y Gen. No. 90-13.

Payment of mayor's annual dues in club. — This section prohibited the township of Mesilla from paying from public funds the mayor's annual dues for membership in the Las Cruces Forum, Inc. 1988 Op. Att'y Gen. No. 88-47.

"Trading" tax exemptions for health care. — Repeal of the state income tax exemptions for teacher pensions and public employee pensions does not remedy constitutional defects of the proposed retiree health care act under a theory that those exemptions would be "traded" for retiree health care. Those exemptions are not property rights, irrepealable contractual entitlements, or pension benefits. Hence, elimination of the favorable tax treatment for current retirees is not consideration for a multi-million dollar health care plan that the state proposes to provide them. 1990 Op. Att'y Gen. No. 90-03.

Municipalities without power to make gifts. — Municipal corporations are creatures of statute; they have only the powers with which they are invested by the statutes creating them. Powers of cities and towns are set out in 3-18-1 NMSA 1978. No power to make a gift of any kind is mentioned. 1959-60 Op. Att'y Gen. No. 60-160.

"Donation" construed. — A donation within the meaning of this section has been defined as a gift, an allocation or appropriation of something of value, without consideration. 1979 Op. Att'y Gen. Nos. 79-02 and 79-07.

Development agreements.— Under a development agreement, a home rule municipality may reimburse a developer out of gross receipts tax proceeds in exchange for the developer's services in building public infrastructure in connection with a contract to facilitate the construction of retail business establishments. 2002 Op. Att'y Gen. No. 02-02.

Tax exemptions and deductions not unconstitutional donations unless retroactive. — Gross receipts tax exemptions and deductions do not violate the antidonation clause of this section unless they are applied retroactively to taxes due and payable. 1991 Op. Att'y Gen. No. 91-14.

Constitutionality of 1990 workers' compensation legislation. — The latest pronouncements of the New Mexico supreme court indicate that a loan of state funds to the employers mutual company, as authorized by the workers' compensation law, violates the antidonation clause of this section. 1990 Op. Att'y Gen. No. 90-25.

Scholarships out of public money. — Grants of scholarships by state educational institutions out of public money, but not out of endowments for that purpose, would probably violate this section. 1937-38 Op. Att'y Gen. No. 37-1646.

Based on its authority to provide and charge tuition for educational services, a technical-vocational institute may, consistently with the antidonation clause, use public money for scholarships in the form of tuition waivers or reductions if the criteria used to award them are education-related and applied in a reasonable and even-handed manner. Past opinions suggesting that scholarship awards violate the antidonation clause are overruled to the extent they limit scholarships to those paid from private or federal sources. 1997 Op. Att'y Gen. No. 97-02.

No contributions to American legion memorial allowed. — County commissioners may not contribute $500 to an American legion war memorial which is erected upon the county courthouse grounds. 1943-44 Op. Att'y Gen. No. 43-4422.

Contributions to community chest. — It is not legal for the state fair to donate the proceeds, in excess of costs, from horse races to the community chest. 1955-56 Op. Att'y Gen. No. 55-6279.

Contributions to chamber of commerce. — A city cannot make donations to the chamber of commerce and include such contributions in the city budget. 1943-44 Op. Att'y Gen. No. 43-4368.

Arts commission may not pay expenses of students' art efforts. — Because it would be considered a donation, the New Mexico arts commission could not help defray the expenses of high school students painting and shipping a fence as a donation to the Kennedy center in Washington D.C., which was receiving such artistic donations from every state. 1967 Op. Att'y Gen. No. 67-30.

It is unconstitutional for school district to pay for students' insurance (of any type) with school district funds other than funds raised through the student activity account. 1963-64 Op. Att'y Gen. No. 64-83.

Use of school resources by school official running for office prohibited. — This section prohibits the use of school resources and personnel by school officials running for the state board of education or other elected office. 1992 Op. Att'y Gen. No. 92-04.

Reimbursement now permitted. — The public benefit exception to this section embraces reimbursement of travel expenses to prospective highway department employees as the benefit and convenience to the department constitutes consideration. 1981 Op. Att'y Gen. No. 81-05.

Users of public facilities must reimburse state for expenses. — It is incumbent upon any public agency or commission to obtain reimbursement for any actual expenses occasioned by reason of permitted private use of public facilities. 1963-64 Op. Att'y Gen. No. 64-92.

Conditions under which religious or private group may use school. — A local board of education may permit a particular religious denomination or private group to use public school buildings or facilities after school hours where such use, in the opinion of the school board, will not interfere with normal school activities; however, the school board may not in any respect sanction or give endorsement to such religious denominational programs. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Include equal treatment of all groups. — A local school board must, in exercising its discretion as to whether a particular religious denomination may use public school facilities after school hours, either make the use of school facilities available to all religious groups on an equal basis and without preference as to any particular group or not permit such use at all. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Reimbursement of school's expenses. — Since a school district may not in any manner lend its financial or other support to any private religious denomination, it is incumbent upon school authorities to obtain reimbursement for any actual expenses

occasioned by a religious group's private use of public school facilities. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Gratis transfer of portable classrooms not violative of section. — A gratis transfer by the public school capital outlay council of portable classrooms to local school boards does not violate this section since the prohibition does not apply as between the state and one of its subordinate agencies. 1980 Op. Att'y Gen. No. 80-05.

Providing school district employees with membership in private health club. — A school district may spend public funds to provide its full-time employees with membership in a private health club if the membership is provided in return for services rendered to the district. 1989 Op. Att'y Gen. No. 89-20.

Relocation costs of physicians. — Luna county could not use taxpayer funds to pay relocation costs of physicians opening a practice in the county. 1989 Op. Att'y Gen. No. 89-22.

Contributions to scouts or salvation army. — Municipality may not contribute or spend any money of fund to or for the girl scouts, boy scouts or the salvation army if the contribution is to those organizations in their private capacities. 1955-56 Op. Att'y Gen. No. 55-6253.

Even though their efforts come within spirit of statute. — Such groups as the 4-H, boy scouts and girl scouts conduct juvenile recreation programs that come within the spirit of 7-12-15 NMSA 1978. But the framers of the constitution have clearly provided that public funds shall not be donated to private persons or associations, and it is the court's opinion that the juvenile recreation fund cannot be expended by, or on behalf of, a 4-H club. 1961-62 Op. Att'y Gen. No. 61-02.

Disbursement to nonpublic schools unconstitutional. — New Mexico Const., art. IV, § 31, this section and art. XII, § 3, would be violated if public money was disbursed to nonpublic schools in order to purchase secular education service. 1969 Op. Att'y Gen. No. 69-06.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education constitutes an unconstitutional state donation to a private entity. 1999 Op. Att'y Gen. No. 99-01.

Transfer for nominal consideration within prohibition. — The county commissioners of Dona Ana county cannot convey through donation or nominal consideration county land to the county humane society, a nonprofit, charitable, private organization. 1967 Op. Att'y Gen. No. 67-149.

Retroactive benefits. — If retired district judges and retired supreme court justices were in state service at the time of the initial enactment of the judges retirement law (10-

12-1 NMSA 1978), such law would not be repugnant to this section. 1957-58 Op. Att'y Gen. No. 57-221.

Retroactive sick leave benefits would constitute an illegal donation as they would not be paid in consideration for services rendered. 1977 Op. Att'y Gen. No. 77-18.

School district would not be authorized to present a bonus to any teacher inasmuch as that would be giving extra compensation to a public servant after the services were rendered and a contract made. 1943-44 Op. Att'y Gen. No. 44-4440.

Counties may appropriate money for constructing building in which to show exhibits installed by counties at the state fair. 1915-16 Op. Att'y Gen. No. 15-1676.

Counties may pay to install displays which will benefit counties. — Counties may make appropriations with which to install displays at the state fair which, presumably, will be of benefit to the counties. 1915-16 Op. Att'y Gen. No. 15-1578.

Entertainment, travel, and meal expenditures. — Officials and employees of a technical-vocational institute may, within limitations, spend public money for certain entertainment, meals, travel, and membership expenses without violating the antidonation clause if the expenditures are demonstrably related to the institute's constitutionally or statutorily authorized functions and do not amount to a subsidy of private individuals or businesses. 1997 Op. Att'y Gen. No. 97-02.

Taxpayer political contribution designation option would violate section. — Legislation granting New Mexico taxpayers the option of designating $1.00 of their state income taxes for distribution as a contribution to a political party would be in violation of this section. 1979 Op. Att'y Gen. No. 79-02.

State retirement benefits for private employees. — Individuals employed by a private nongovernmental association are not eligible for retirement benefits from state funds. 1963-64 Op. Att'y Gen. No. 63-05.

Free public education for nonresidents. — To permit nonresident students to attend New Mexico public schools without payment of any kind would constitute a gift to them and would violate this section. 1978 Op. Att'y Gen. No. 78-14.

To the extent that a local school district would undertake the total burden of educating nonresident students without benefit of state allotment as dispensed on the basis of average daily membership, the school district would still be making a donation in aid of those students in violation of this section. 1978 Op. Att'y Gen. No. 78-14.

Grants to defray private tuition costs would be outright gifts. — Under the terms of a house bill providing that a sum of money be appropriated to the board of educational finance for allocation as grants to students for the purpose of defraying tuition costs at private colleges and universities, a grant to a student would appear to be an outright gift

as there is no consideration or benefit accruing to the state in exchange for the grant, nor any provision that it be repaid. 1979 Op. Att'y Gen. No. 79-07.

Judges' retirement benefits constitutional. — State may constitutionally pay its share to retired district judges and retired members of the supreme court for their retirement benefits. 1957-58 Op. Att'y Gen. No. 57-221.

Educational leave for state employees. — Provision for educational leave granted in accordance with state personnel board rules does not violate constitutional anti-donation provision when a state employee is granted educational leave with pay to attend a state university program for advanced study. 1972 Op. Att'y Gen. No. 72-67.

Payment of teachers' dues to education associations. — Within the bounds of state board regulations and the requirements of the Public School Finance Act (Chapter 22 Article 8 NMSA 1978), a local board of education could, without violating this article, make membership dues payments on behalf of individual employees who voluntarily elect to be members of the national education association of New Mexico, American federation of teachers, classroom teachers association or any other teacher/education association that is deemed appropriate by those who desire to join. 1976 Op. Att'y Gen. No. 76-27.

A public school of this state may lawfully expend public moneys in a reasonable amount for the purpose of the payment of membership dues to an association or organization having for its stated and actual purposes the providing of direct assistance and aid to effect the betterment of local education and the rendering of service and actual benefits to such schools in the advancement of public education, as long as such expenditures are in the best interest of the individual school concerned. 1963-64 Op. Att'y Gen. No. 63-05.

Gift of employee's share of retirement plan contribution prohibited. — An outright gift by the state of an employee's share of his retirement plan contribution is a donation in aid of a person and prohibited by this section. 1981 Op. Att'y Gen. No. 81-16.

Aid to Santa Fe film festival. — New Mexico film commission cannot provide the Santa Fe film festival the use of its offices and telephones without charge. 1987 Op. Att'y Gen. No. 87-33.

Providing space in capitol building to news media. — Providing free space in the state capitol building to the news media for use during legislative sessions is not an unconstitutional donation by the legislature. However, the allocation of private office space in the capitol to members of the press for their permanent use does constitute an unconstitutional donation under this section. 1992 Op. Att'y Gen. No. 92-03.

Free space for vending machines. — State and local governments may provide space for newspaper vending machines and similar devices free of charge without violating the antidonation clause unless the vending machines take up space otherwise

required for public or official use, require buildings to remain open after hours or require state agencies and local governments to provide custodial, maintenance, utility or other services. 1992 Op. Att'y Gen. No. 92-03.

Use of tax proceeds to operate privately owned racetrack. — The City of Raton would violate the anti-donation clause if it spent lodgers' tax proceeds to operate the privately owned La Mesa Park racetrack or to defer its expenses. 1988 Op. Att'y Gen. No. 88-38.

Conveyance price sufficiently related to value of property. — Arms-length conveyance of property from the New Mexico Military Institute to the New Mexico Military Institute Foundation was proper, and did not violate this section, where the $250,000 contract price bore a sufficient relationship to the actual value of the property. 1988 Op. Att'y Gen. No. 88-79.

Section prohibits appropriations without consideration. — This section does not prohibit indirect aid or benefit to a private corporation; it only prohibits an allocation or appropriation of something of value without consideration to a person, association or public or private corporation. 1967 Op. Att'y Gen. No. 67-29.

Bargained-for employee benefits valid. — Constitution would not prohibit legislation authorizing local school boards to devise plan of compensation which would include the payment of benefits to retiring employees for accumulated, unused sick leave. The various prohibitions contained in N.M. Const., art. IV, § 27, N.M. Const., art. IV, § 31 and this section would not be violated so long as the benefit was, in fact, bargained for consideration in the form of compensation for services rendered as defined by contract between the employee and the local school board. 1977 Op. Att'y Gen. No. 77-18.

Provision by state of group or other forms of insurance for the benefit of eligible employees is a valid use of public funds and not a pledge of credit or donation in contravention of the state constitution, since such contribution is in fact an increment to a public employee's salary and is a benefit to the state or its subdivisions through its concomitant effect of attracting and maintaining capable public personnel in public positions. 1963-64 Op. Att'y Gen. No. 64-83; 1939-40 Op. Att'y Gen. 40-3493.

Prohibition of section is directed against payment of obligation belonging to a public or private corporation. — Payment by school district of a contribution or advance to a public utility for construction purposes is not the payment of the utility's obligation and therefore is not a contribution within the scope of the constitutional prohibition. Furthermore, money so expended by a school district or any other such agency is money expended for value received and therefore not prohibited. 1966 Op. Att'y Gen. No. 66-58.

City may dispose of property received subject to reversionary interest. — Surrender of property donated to city subject to a reversionary interest may be effected without consideration, or the city could quitclaim its interest to another agency for $1.00

and "other good and valuable consideration" upon proper resolution of the city council and the grantee agency could then purchase the reversionary interest of the original donor. 1951-52 Op. Att'y Gen. No. 51-5427.

City may give credits for business reasons. — Consistent with this section, a city as owner of a natural gas system, in order to promote the use of natural gas and compete with other utilities, could give credits of $12.50 to $50.00 to customers if they installed a new gas water heater, changed to a gas water heater from another type of water heater or replaced the existing gas water heater with a new gas water heater. 1963-64 Op. Att'y Gen. No. 64-53.

Sale prices must be reasonably related to value. — County property can only be sold for at least an amount having some reasonable relation to the value of the property. 1967 Op. Att'y Gen. No. 67-149.

Outright contributions could not be made by municipality to community action agency under office of economic opportunity. — If the city wished to pay out any money to the community action committee, it could not make an outright contribution, but could pay moneys under the terms of a personal service contract. 1966 Op. Att'y Gen. No. 66-117.

Reimbursement now permitted. — The public benefit exception to this section embraces reimbursement of travel expenses to prospective highway department employees as the benefit and convenience to the department constitutes consideration. 1981 Op. Att'y Gen. No. 81-05.

Intergovernmental transfers not prohibited. 1957-58 Op. Att'y Gen. No. 58-231.

Municipality may not fund specially created nonprofit corporation. — City or county may not appropriate public funds for economic development to be used by nonprofit corporation formed for this purpose. 1967 Op. Att'y Gen. No. 67-29.

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

For student symposium, "Constitutional Revision - State Aid to Private Enterprise in New Mexico," see 9 Nat. Resources J. 457 (1969).

For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

For article, "State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response", see 28 N.M. L. Rev. 303 (1998).

For article, "New Mexico Taxes: Taking Another Look," see 32 N.M. L. Rev. 351 (2002).

For note, “Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris,” see 34 N.M. L. Rev. 194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 588, 589; 63A Am. Jur. 2d Public Funds §§ 3, 4, 60, 64, 68, 70.

Constitutionality of statute or ordinance authorizing use of public funds, credit, or power of taxation for restoration or repair of privately owned utility, 13 A.L.R. 313.

Releasing public school pupils from attendance for purpose of attending religious education classes as use of public money for sectarian purpose, 2 A.L.R.2d 1371.

Validity of legislation providing for additional retirement or disability allowances for public employees previously retired or disabled, 27 A.L.R.2d 1442.

Urban redevelopment by private enterprise, validity of statutes providing for, 44 A.L.R.2d 1414.

Constitutionality of state legislation to reimburse public utilities for cost of relocating their facilities because of highway construction, conditioned upon federal reimbursement of state under terms of Federal-Aid Highway Act (23 U.S.C. § 123), 75 A.L.R.2d 419.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Permissible use of funds from parking meters, 83 A.L.R.2d 625.

Use of public money for furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Use of school property for other than public school or religious purposes, 94 A.L.R.2d 1274.

20 C.J.S. Counties § 204; 64 C.J.S. Municipal Corporations § 1870; 79 C.J.S. Schools and School Districts § 330; 81A C.J.S. States §§ 204 to 208.

Sec. 15. [State and local refunding bonds.]

Nothing in this article shall be construed to prohibit the issue of bonds for the purpose of paying or refunding any valid state, county, district or municipal bonds and it

shall not be necessary to submit the question of the issue of such bonds to a vote as herein provided.

ANNOTATIONS

Municipal bonds to be put in escrow constitute refunding bonds. — Where proceeds of municipal bonds were to be placed in escrow and invested in United States bonds for the sole purpose of paying off indebtedness on existing municipal bonds over a 10-year period, the proposed issue constituted refunding bonds within contemplation of this section. City of Albuquerque v. Gott, 73 N.M. 439, 389 P.2d 207 (1964).

School refunding bonds. — Laws 1927, ch. 128 (6-15-11 to 6-15-19 NMSA 1978), authorizing issuance of refunding bonds that might be in excess of 6% of assessed valuation of taxable property within school district, did not run counter to the prohibition of Section 11 of this article, in view of the exemption in this section. Southwest Sec. Co. v. Board of Educ., 40 N.M. 59, 54 P.2d 412 (1936).

State refunding bonds. — Subject to the approval of the department of finance and administration, a board of education may issue general obligation refunding bonds in a principal amount that is greater than the principal amount of the outstanding bonds being refunded, provided the proceeds of the refunding bonds are used only for the purpose of refunding existing school district general obligation indebtedness, as provided by law, and not for new capital outlay projects, operating costs of a school district or other purposes besides refunding. 2001 Op. Att'y Gen. No. 01-03.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 656 to 659; 64 Am. Jur. 2d Public Securities and Obligations 131, 136, 261, 266 to 269; 72 Am. Jur. 2d States, Territories, and Dependencies § 85.

Special assessment bond, power of municipality to refund, 102 A.L.R. 202.

Smaller political units, constitutionality of statutory plan for financing or refinancing bonds of, by larger political unit, 106 A.L.R. 608.

Governmental unit's power to issue bonds as implying power to refund them, 1 A.L.R.2d 134.

20 C.J.S. Counties §§ 218 to 226; 64 C.J.S. Municipal Corporations § 1910; 81A C.J.S. States § 259.

Sec. 16. [State highway bonds.]

Laws enacted by the fifth legislature authorizing the issue and sale of state highway bonds for the purpose of providing funds for the construction and improvement of state highways and to enable the state to meet and secure allotments of federal funds to aid

in construction and improvement of roads, and laws so enacted authorizing the issue and sale of state highway debentures to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law for the state road fund, shall take effect without submitting them to the electors of the state, and notwithstanding that the total indebtedness of the state may thereby temporarily exceed one per centum of the assessed valuation of all the property subject to taxation in the state. Provided, that the total amount of such state highway bonds payable from proceeds of taxes levied on property outstanding at any one time shall not exceed two million dollars [($2,000,000)]. The legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of state highway debentures or which will divert any of such revenues to any other purpose so long as any of the said debentures issued to anticipate the collection thereof remain unpaid. (As added September 20, 1921.)

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For general popular referendum, *see* N.M. Const., art. IV, § 1.

For proper purposes of state indebtedness, *see* N.M. Const., art. IX, § 7.

For restrictions on indebtedness, *see* N.M. Const., art. IX, § 8.

The 1921 amendment to Article IX, which was proposed by H.J.R. No. 25 (Laws 1921) and adopted at a special election held on September 20, 1921, with a vote of 29,267 for and 21,259 against, added this section to the article.

Compiler's notes. — An amendment to this article, proposed by H.J.R. No. 4 (Laws 1990), which would have added a new Section 17 providing that obligations of the state or any political subdivision, agency, or instrumentality of the state, which are payable out of general revenues beyond the then current fiscal year, which are incurred after the effective date of the section and which are contingent upon annual appropriations, were to be incurred subject to the provisions of that section and were not to constitute debt, indebtedness or borrowing under and were not to be subject to the limitations of Sections 8, 10, 11, 12, and 13 of Article 9, was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 97,460 for and 210,575 against.

"So" construed. — If the word "so" had been omitted from this section, there would be no difficulty in interpreting the amendment as applying to laws at any time enacted. The word "so" may simply refer to "laws enacted by the . . . legislature". That meaning will be attached to it, because otherwise the mere inclusion of the word renders inapplicable an important and deliberately included provision, since there was no enactment of the fifth legislature to which it could apply. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

Section permits subsequent debentures without referendum. — By virtue of this section, debentures to anticipate proceeds of the gasoline excise tax, authorized by Laws 1927, ch. 20 (repealed), which were to be covered into the state road fund "to be used for maintenance, construction, and improvement of state highways and to meet the provisions of the Federal Aid Road Law (U.S. Comp. St. §§ 7477a to 7477i) [23 U.S.C. §§ 101 to 158]" did not constitute such state borrowing or debt as required popular referendum. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

Validating effect. — Provision of statute (Laws 1921, ch. 153) authorizing levy of taxes, and sale of state debentures in anticipation of taxes, for construction and improvement of public highways, and to meet, dollar for dollar, allotments to state of federal funds under Federal Aid Road Act (23 U.S.C. §§ 101 to 158) was validated for adoption of this section. Lopez v. State Hwy. Comm'n, 27 N.M. 300, 201 P. 1050 (1921).

Highway debentures excepted from referendum by another section. — Laws 1949, ch. 42 (repealed), was excepted from popular referendum because the highway debentures, payable from a fund, the source of a part of which is a general property tax, were evidences of public debts in sense words "public debt" are used in N.M. Const., art. IV, § 1. State ex rel. Linn v. Romero, 53 N.M. 402, 209 P.2d 179 (1949).

Tax refund valid. — Laws 1931, ch. 31 (repealed), authorizing refund of gasoline excise taxes only out of surplus not necessary to payment of interest and principal of highway debentures, did not violate provision of constitution against decrease of pledged revenues. Streit v. Lujan, 35 N.M. 672, 6 P.2d 205 (1931), appeal dismissed, 285 U.S. 527, 52 S. Ct. 405, 76 L. Ed. 924 (1932).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Highways, Streets, and Bridges, §§ 122, 124.

40 C.J.S. Highways § 176.

ARTICLE X
County and Municipal Corporations

Section 1. [Classification of counties; salaries and fees of county officers.]

The legislature shall at its first session classify the counties and fix salaries for all county officers, which shall also apply to those elected at the first election under this constitution. And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county.

ANNOTATIONS

Cross references. — For prohibition of extra compensation to public officers, *see* N.M. Const., art. IV, § 27.

For limitation of state officer to salary, *see* N.M. Const., art. XX, § 9.

For general salary provisions, *see* 4-44-1 to 4-44-45 NMSA 1978.

Comparable provisions. — Arizona Const., Art. XXII, § 17.

Idaho Const., art. XVIII, §§ 7, 8.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 7 (Laws 2007), which would have allowed a board of county commissioners to provide a midterm salary increase for elected county officers, was submitted to the people at the general election held on November 4, 2008. It was defeated by a vote of 184,781 for and 511,900 against.

I. GENERAL CONSIDERATION.

Intent of section. — Prior to adoption of the constitution, county officers had been compensated for their services upon a fee basis, but by N.M. Const., art. IV, § 27, and this section, it was intended to dispense with such method and to substitute in lieu thereof a salary method, with provision that such compensation should be neither increased nor diminished during term of any such officer. State ex rel. Peck v. Velarde, 39 N.M. 179, 43 P.2d 377 (1935); State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 222 P. 654, 31 A.L.R. 1310 (1924).

II. LEGISLATURE TO FIX SALARIES.

All county officers on salary. — The constitution requires all county officers to be placed upon a salary basis and prohibits them from receiving any other fees or emoluments of office. James v. Board of Comm'rs, 24 N.M. 509, 174 P. 1001 (1918).

Midterm salary increases unconstitutional. — Salary increases granted by county commissions under 4-44-12.3 NMSA 1978, for elected officials who were in midterm on the date the increases took effect, violated Article IV, § 27 of the New Mexico constitution. State ex rel. Haragan v. Harris, 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173.

Salary law required. — Under this section, the compensation of a county officer is dependent upon enactment of a salary law, and he cannot recover for his services until such a law is passed, and then only as provided by said act. No law had been heretofore enacted fixing the compensation of county clerk or tax assessor. Herbert v. Board of Cnty. Comm'rs, 18 N.M. 129, 134 P. 204 (1913); State ex rel. Delgado v. Romero, 17 N.M. 81, 124 P. 649 (1912).

Services deemed gratuitous without law. — Services of a public officer are deemed gratuitous unless a compensation is fixed therefor by statute. State ex rel. Baca v. Montoya, 20 N.M. 104, 146 P. 956 (1915).

Reimbursement proper where sheriff has paid out sums for employment of deputies. State ex rel. Garcia v. Board of Comm'rs, 21 N.M. 632, 157 P. 656 (1916).

No reimbursement when deputy county official was not entitled to compensation. State ex rel. Baca v. Montoya, 20 N.M. 104, 146 P. 956 (1915).

III. NO OTHER FEES TO OWN USE.

The last clause relating to fees is self-executing. State ex rel. Delgado v. Romero, 17 N.M. 81, 124 P. 649 (1912).

Constitution prohibits any emoluments additional to the "salary" fixed by law; a county clerk who fails to appoint a deputy to serve as clerk of district court is not entitled to compensation additional to statutory salary when he personally serves in that capacity. Nye v. Board of Comm'rs, 36 N.M. 169, 9 P.2d 1023 (1932).

District attorney cannot collect and retain to his own use any fees or emoluments of office under this section or under N.M. Const., art. XX, § 9. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

County clerk can only charge and accept statutory fee for issuing marriage license, regardless of the hour it is issued, and no sums in the form of an additional charge or gratuity can be accepted. 1953-54 Op. Att'y Gen. No. 53-5665.

Irrelevant that services performed for another jurisdiction. — County sheriff was not entitled to fees received by him for services performed in a city or town court where he had made arrests and fines had been assessed against, and paid by, defendants. 1915-16 Op. Att'y Gen. No. 16-1772.

Sheriff is chargeable with fee paid for the execution of the death penalty even though it does come from the state and not the county. 1917-18 Op. Att'y Gen. No. 17-2013.

County clerk may serve as deputy game warden. — This inhibition applies only to county officers, and there is no objection to a county clerk receiving, as deputy game warden, fees for issuing and reporting licenses and the receipts thereof. 1923-24 Op. Att'y Gen. No. 23-3691.

County treasurer may be paid for services as physician. — County treasurer may, as a physician, examine insane persons, attend prisoners at the county jail, and exhume a body by order of the district court, and receive compensation therefor. 1912-13 Op. Att'y Gen. No. 13-1141.

School superintendent cannot act as teacher. — The county superintendent of schools cannot draw a salary therefor and at the same time act as school teacher. 1919-20 Op. Att'y Gen. No. 20-2739.

Service as both county commissioner and teacher consistent with section. — This section, which provides in part that no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, applies only to those situations where extra compensation is received for performing duties prescribed by law to a particular office and for which a fixed compensation is provided. Clearly, the services performed by a school teacher do not fall within the duties prescribed by statute for the office of county commissioner. Therefore, an individual who has been elected to the office of county commissioner may legally accept a salary from a teaching position in an institution of higher learning in this state, as well as the salary provided by law for acting as a county commissioner. 1957-58 Op. Att'y Gen. No. 58-238.

Fees to be paid into county treasury. — Fees collected by county officers cannot be used for their compensation, even though no other compensation has been provided by the legislature, but must be turned into the county treasury. 1912-13 Op. Att'y Gen. No. 12-913.

County commissioner serving as tribal council member. — A Native American may serve as a tribal council member and as a county commissioner at the same time, as long as his duties as tribal council member do not physically interfere with his duties as county commissioner during the ordinary working hours of that position and the functions of the two positions are not otherwise incompatible. 1990 Op. Att'y Gen. No. 90-14.

Salary law required. 1955-1956 Op. Att'y Gen. No. 55-6291; 1915-16 Op. Att'y Gen. No. 15-1664.

Cut-off date and consequences. — The fee system for county officers having been abolished on January 6, 1912, a treasurer whose term expired on January 15, 1912, could collect a percentage on his tax collection only for six days. The percentage for collections from January 6 to January 15 could not be based on his fees for the previous year, but he would have to look to the legislature for relief. 1912-13 Op. Att'y Gen. No. 13-1133.

Judge prohibited from accepting gratuity for marriage ceremony. — Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico constitution. 1991 Op. Att'y Gen. No. 91-09.

Probate judge may perform marriage ceremony but cannot charge fee for such service for himself or the county. 1931-32 Op. Att'y Gen. No. 31-27.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Subdivisions § 33; 63A Am. Jur. 2d Public Officers and Employees §§ 431 to 434.

Challenging acts or proceedings by which its boundaries are affected, right of county as to, 86 A.L.R. 1373.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

20 C.J.S. Counties §§ 5, 107 to 121; 67 C.J.S. Officers and Public Employees §§ 219, 224.

Sec. 2. [Terms of county officers.] (1997)

A. In every county all elected officials shall serve four-year terms, subject to the provisions of Subsection B of this section.

B. In those counties that prior to 1992 have not had four-year terms for elected officials, the assessor, sheriff and probate judge shall be elected to four-year terms and the treasurer and clerk shall be elected to two-year terms in the first election following the adoption of this amendment. In subsequent elections, the treasurer and clerk shall be elected to four-year terms.

C. To provide for staggered county commission terms, in counties with three county commissioners, the terms of no more than two commissioners shall expire in the same year; and in counties with five county commissioners, the terms of no more than three commissioners shall expire in the same year.

D. All county officers, after having served two consecutive four-year terms, shall be ineligible to hold any county office for two years thereafter. (As amended, November 3, 1914; November 3, 1993; November 3, 1998.)

ANNOTATIONS

Cross references. — For tenure of office, *see* N.M. Const., art. XX, § 2.

For date terms of office begin, *see* N.M. Const., art XX, § 3.

For provisions regarding vacancies, *see* N.M. Const., art XX, §§ 4 and 5.

The 1914 amendment, which was proposed by J.R. No. 9 (Laws 1913) and adopted at the general election held on November 3, 1914, with a vote of 20,293 for and 12,125 against, completely rewrote this section which formerly read: "All county officers shall be elected for a term of four years and no county officer, except the county clerk and

probate judge, shall, after having served one full term be eligible to hold any county office for four years thereafter."

The 1992 amendment, which was proposed by S.J.R. No. 15 (Laws 1992) and adopted at the general election held on November 3, 1992, by a vote of 317,887 for and 151,625 against, rewrote this section, which formerly read: "All county officers shall be elected to a term of two years, and after having served two consecutive terms, shall be ineligible to hold any county office for two years thereafter".

The 1998 amendment, which was proposed by S.J.R. No. 12, § 2 (Laws 1997), and adopted at the general election held November 3, 1998, by a vote of 288,419 for and 136,010 against, substituted "county office" for "public office" near the end of Subsection D.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 9 (Laws 1957), which would have increased the term of office to four years and removed the limitation of the number of terms the county officers may serve, was submitted to the people at the general election held on November 4, 1958. It was defeated by a vote of 41,443 for and 44,442 against.

An amendment to this section proposed by S.J.R. No. 13 (Laws 1961), which would have increased the term of office to four years and provided a four-year ineligibility period after each term, was submitted to the people at the special election held on September 19, 1961. It was defeated by a vote of 22,377 for and 29,483 against.

House Joint Memorial 21 (Laws 1969) referred to the constitutional convention an amendment to this section to remove the limitations on terms for county officers. The proposed amendment was rejected by the voters on December 9, 1969.

An amendment to this section proposed by S.J.R. No. 5 (Laws 1973), which would have rewritten this section to provide a two-year term of office and an age limitation for county officers, was submitted to the people at a special election held on November 6, 1973. It was defeated by a vote of 18,825 for and 23,121 against.

An amendment to this section proposed by H.J.R. No. 2 (Laws 1975), which would have allowed county officers to serve unlimited terms of two years except as otherwise provided in the constitution, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 91,755 for and 190,645 against.

An amendment to this section, proposed by S.J.R. No. 2 (Laws 1982), which would have inserted "except sheriffs" following "officers" in the first sentence and would have added a second sentence which would have read "Sheriffs shall be eligible to hold the office of sheriff for an unlimited number of consecutive two-year terms," was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 109,611 for and 142,871 against.

An amendment to this section, proposed by H.J.R. No. 6 (Laws 1986), which would have allowed four consecutive terms, was submitted to the people at the general election held on November 4, 1986. It was defeated by a vote of 119,504 for and 156,177 against.

An amendment to this section, proposed by S.J.R. No. 9 (Laws 1999), which would have amended Subsection D to allow county officials to serve an unlimited number of terms was submitted to the people at the general election held on November 7, 2000. It was defeated by a vote of 134,319 for and 376,706 against.

An amendment to this section proposed by S.J.R. No. 5 (Laws 2010), which would have allowed county officers to serve three consecutive terms, was submitted to the people at the general election held on November 2, 2010. It was defeated by a vote of 91,205 for and 432,543 against.

Election to two terms bars third consecutive term. — Where a county sheriff was elected to two consecutive terms, but during the first term resigned for only eight minutes to clear up a technicality in his qualification for office, the sheriff is not eligible to seek election for a third consecutive term. Stephens v. Myers, 102 N.M. 1, 690 P.2d 444 (1984).

Effect of N.M. Const., art. X, § 7. — When N.M. Const., art. X, § 7 was added by constitutional amendment, this section ceased to apply to counties having a population greater than 100,000 and an assessed valuation greater than $75,000,000. Under N.M. Const., art. X, § 7, the offices of county commissioner for two-year terms in affected counties were in effect abolished and new offices of county commissioner with four-year terms were created, notwithstanding that the new provision does not expressly state that the old offices were abolished and new ones created. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978).

A county commissioner who has previously served a two-year term as county commissioner under this section and one four-year term under N.M. Const., art. X, § 7, may serve an additional four-year term under N.M. Const., art. X, § 7. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978).

Effect of N.M. Const., art. X, § 7. — A county commissioner who has served one term in office under this section and one term of office under N.M. Const., art. X, § 7, may not seek a third consecutive term. 1978 Op. Att'y Gen. No. 78-01. *See* Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978).

This section does limit the legislature's power to create the term of office of judge of small claims court. When the legislature chose to create a county officer of the small claims judge, this section limited the length of term of such officer. 1955-56 Op. Att'y Gen. No. 56-6358.

Meaning of section. — This section prohibits a person from serving three consecutive, four-year terms as a county officer in any capacity. There must be an interim period of two years before any person who, having served two terms consecutively, is eligible for another county office. 1959-60 Op. Att'y Gen. No. 59-115.

Ineligibility extends to all county offices. — A county officer who has served a full term as county commissioner, and a subsequent term as sheriff in the same county, is not eligible to appointment to a county office in a newly created county. 1921-22 Op. Att'y Gen. No. 21-2861.

Where a county official has just completed two terms of service by election, that county official is ineligible to be appointed to the office of the county treasurer. 1955-56 Op. Att'y Gen. No. 55-6240.

Ineligibility does not extend to state offices. — A county assessor who is now completing his second term can legally file and hold the office of state representative, since a state representative is a state officer. 1953-54 Op. Att'y Gen. No. 54-5938.

Ineligibility does not extend to district offices. — The magistrate court established under 35-1-1 NMSA 1978 is a district, not a county, office and is not within the restrictions of this section. 1968 Op. Att'y Gen. No. 68-71.

Appointees filling vacancies treated differently. — This section does not affect the eligibility of a candidate for county office who has been appointed to fill a vacancy in a county office for the unexpired term. 1914 Op. Att'y Gen. No. 14-1247.

A county officer who served by appointment for less than two years and has served one full term by election is eligible to serve for one more term before becoming ineligible to run under this section. 1949-50 Op. Att'y Gen. No. 50-5286.

Incumbent of two consecutive terms ineligible for appointment. — A vacancy in a county office occurs where the successor fails to qualify; the board of county commissioners must appoint a person to fill the vacancy and an incumbent who has already served two consecutive terms is ineligible for that appointment. 1979 Op. Att'y Gen. No. 79-19.

Effect of service during first years of statehood. — A county officer who served the first five years of statehood, and succeeded himself during the present term of office, has served two consecutive terms and is ineligible under this section. 1917-18 Op. Att'y Gen. No. 17-1993.

1916 election. — On account of 1914 amendment (changing term from four to two years and providing for ineligibility after two consecutive terms), incumbents of both state and county offices were eligible to reelection in 1916. 1915-16 Op. Att'y Gen. No. 15-1507.

Resignation before end of second term does not change ineligibility. — Irrespective of whether or not he resigns prior to the completion of his second term, a county officer is nevertheless ineligible to seek election for a third consecutive time. To apply any other meaning to this section would make a mockery of the intent of those who framed this section. 1959-60 Op. Att'y Gen. No. 59-115.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 155, 156.

Power to abolish or discontinue office, 4 A.L.R. 205, 172 A.L.R. 1366.

Power of board to appoint officer or make contract extending beyond its own term, 70 A.L.R. 794, 149 A.L.R. 336.

Power of legislature to extend term of public office, 97 A.L.R. 1428.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 A.L.R.2d 155.

20 C.J.S. Counties §§ 101, 102.

Sec. 3. [Removal of county seats.]

No county seat, where there are county buildings, shall be removed unless three-fifths of the votes cast by qualified electors on the question of removal at an election called and held as now or hereafter provided by law, be in favor of such removal. The proposition of removal shall not be submitted in the same county oftener than once in eight years.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XVIII, § 2.

Montana Const., art. XI, § 2.

Utah Const., art. XI, § 2.

Wyoming Const., art. XII, § 3.

Statute properly authorizes election. — Under this section, an election was properly authorized by 4-34-3 NMSA 1978. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Suit will lie to enjoin removal of county seat, since other legal remedies would not apply, and injunction would not interfere with the political department of government; but plaintiff in injunction proceeding would have burden of proving that city to which removal

was proposed was not selected by a requisite number of voters. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 54.

Legislative power to raise constitutional minimum of favorable votes imposed upon adoption of proposition to change county seat submitted to voters, 91 A.L.R. 1021.

Nonregistration as affecting one's qualification as signer of petition for change of county seat, 100 A.L.R. 1308.

Prohibition to restrain action of administrative officers as to relocation of county seat, 115 A.L.R. 33, 159 A.L.R. 627.

Withdrawal of name from petition, for change of county seat, or revocation of withdrawal, and time therefor, 126 A.L.R. 1031, 27 A.L.R.2d 604.

20 C.J.S. Counties §§ 49 to 62.

Sec. 4. [Combined city and county corporations.]

A. The legislature shall, by general law, provide for the formation of combined city and county municipal corporations, and for the manner of determining the territorial limits thereof, each of which shall be known as a "city and county," and, when organized, shall contain a population of at least fifty thousand (50,000) inhabitants. No such city and county shall be formed except by a majority vote of the qualified electors of the area proposed to be included therein, and if the proposed area includes any area not within the existing limits of a city, a majority of those electors living outside the city, voting separately shall be required. Any such city and county shall be permitted to frame a charter for its own government, and amend the same, in the manner provided by the legislature by general law for the formation and organization of such corporations.

B. Every such charter shall designate the respective officers of such city and county who shall perform the duties imposed by law upon county officers and shall make provisions for the payment of existing city and county indebtedness as hereinafter required. The officers of a city and county, their compensation, qualifications, term of office and manner of election or appointment, shall be as provided for in its charter, subject to general laws and applicable constitutional provisions. The salary of any elective or appointive officer of a city and county shall not be changed after his election or appointment or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed. Every such city and county shall have and enjoy all rights, powers and privileges asserted in its charter not inconsistent with its general laws, and, in addition thereto, such rights, powers and privileges as may be granted to it, or possessed and enjoyed by cities and counties of like population separately organized.

C. No city or county government existing outside the territorial limits of such city and county shall exercise any police, taxation or other powers within the territorial limits of such city and county, but all such powers shall be exercised by the city and county and the officers thereof, subject to such constitutional provisions and general laws as apply to either cities or counties.

D. In case an existing county is divided in the formation of city and county government, such city and county shall be liable for a just proportion of the existing debts or liabilities of the former county and shall account for and pay the county remaining a just proportion of the value of any real estate or other property owned by the former county and taken over by the city and county government, the method of determining such proportion shall be prescribed by general law, but such division shall not affect the rights of creditors.

E. Nothing herein contained shall be construed to alter or amend the existing constitutional provisions regarding apportionment of representation in the legislature or in the boundaries of legislative districts or judicial districts, nor the jurisdiction or organization of the district or probate courts. (As added September 20, 1949.)

ANNOTATIONS

Cross references. — For classification of counties, *see* 4-44-1 NMSA 1978.

The 1949 amendment to Article X, which was proposed by H.J.R. No. 13 (Laws 1949) and adopted at a special election held on September 20, 1949, by a vote of 15,140 for and 11,974 against, added this section to the article.

Section allows merger of class A county and city. — Sections 3-16-1 to 3-16-18 NMSA 1978 and this section allow a class A county and city to merge. 1971 Op. Att'y Gen. No. 71-124.

No charter until population reaches 50,000. — Los Alamos county may not adopt a charter providing for a combined city-county government until the population within the proposed territorial limits is 50,000 or more. 1961-62 Op. Att'y Gen. No. 62-96.

Section supersedes general vacancies provision. — The charter of a combined city and county may provide for filling vacancies in its commission contrary to the provisions of N.M. Const., art. XX, § 4, which specifies vacancy procedures. Where certain restrictions on the combined corporation are enumerated, as in Subsection E of this section, the omitted restrictions are intended to be overruleable. The latter date of this section further supports this conclusion, which leaves both constitutional provisions operative in the area covered by each. 1957-58 Op. Att'y Gen. No. 57-204.

Proper subjects of general laws. — The state may authorize by legislation abolition of county officers existing and the transfer of their functions to other offices, and provide

for the appointment rather than election of officials to carry on the duty of these officers. 1957-58 Op. Att'y Gen. No. 57-24.

"Appointive officer" construed. — An appointive officer is an officer so designated in the city-county charter. 1957-58 Op. Att'y Gen. No. 57-24.

"Term of office" construed. — A term of office is that designated by the city-county charter, or in the absence thereof, as provided by existing law for city and county offices. 1957-58 Op. Att'y Gen. No. 57-24.

Municipal code prevails over existing city charter. — Where the Municipal Code (Laws 1965, ch. 300, presently compiled as 3-1-1 NMSA 1978 et seq.) was adopted after and in conflict with the city charter of Gallup, the code prevails under this section and also because the code's savings clause (Laws 1965, ch. 300, § 592) said that all ordinances in effect should continue except as modified by the code. 1967 Op. Att'y Gen. No. 67-35.

Law reviews. — For note, "County Regulation of Land Use and Development," see 9 Nat. Resources J. 266 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 C.J.S. Counties § 44; 62 C.J.S. Municipal Corporations §§ 188, 196; 82 C.J.S. Statutes § 188.

Sec. 5. [Incorporated counties.]

Any county at the time of the adoption of this amendment, which is less than one hundred forty-four square miles in area and has a population of ten thousand or more may become an incorporated county by the following procedure:

A. upon the filing of a petition containing the signatures of at least ten percent of the registered voters in the county, the board of county commissioners shall appoint a charter commission consisting of not less than three persons to draft an incorporated county charter; or

B. the board of county commissioners may, upon its own initiative, appoint a charter commission consisting of not less than three persons to draft an incorporated county charter; and

C. the proposed charter drafted by the charter commission shall be submitted to the qualified voters of the county within one year after the appointment of the commission and if adopted by a majority of the qualified voters voting in the election the county shall become an incorporated county.

The charter of an incorporated county shall provide for the form and organization of the incorporated county government and shall designate those officers which shall be

elected, and those officers and employees which shall perform the duties assigned by law to county officers.

An incorporated county may exercise all powers and shall be subject to all limitations granted to municipalities by Article 9, Section 12 of the constitution of New Mexico and all powers granted to municipalities by statute.

A charter of an incorporated county shall be amended in accordance with the provisions of the charter.

Nothing herein contained shall be construed to alter or amend the existing constitutional provisions regarding apportionment of representation in the legislature or in the boundaries of legislative districts or judicial districts, nor the jurisdiction or organization of the district or probate courts.

The provisions of this amendment shall be self-executing. (As added November 3, 1964.)

ANNOTATIONS

The 1964 amendment to Article X, which was proposed by H.J.R. No. 12 (Laws 1963) and adopted at the general election held on November 3, 1964, by a vote of 82,163 for and 34,663 against, added this section to the article.

Extraterritorial land use regulation. — An incorporated county may exercise the extraterritorial planning, platting, subdividing and zoning jurisdiction of a municipality. All of the above, save zoning, may be concurrently exercised only with the adjacent county in which the land subject to extraterritorial jurisdiction may be situated. 1975 Op. Att'y Gen. No. 75-14.

Law reviews. — For note, "County Regulation of Land Use and Development," see 9 Nat. Resources J. 266 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 C.J.S. Counties § 4.

Sec. 6. [Municipal home rule.]

A. For the purpose of electing some or all of the members of the governing body of a municipality:

(1) the legislature may authorize a municipality by general law to be districted;

(2) if districts have not been established as authorized by law, the governing body of a municipality may, by resolution, authorize the districting of the municipality. The resolution shall not become effective in the municipality until approved by a majority vote in the municipality; and

(3) if districts have not been established as authorized by law or by resolution, the voters of a municipality, by a petition which is signed by not less than five percent of the registered qualified electors of the municipality and which specified the number of members of the governing body to be elected from districts, may require the governing body to submit to the registered qualified electors of the municipality, at the next regular municipal election held not less than sixty days after the petition is filed, a resolution requiring the districting of the municipality by its governing body. The resolution shall not become effective in the municipality until approved by a majority vote in the municipality. The signatures for a petition shall be collected within a six-months period.

B. Any member of the governing body of a municipality representing a district shall be a resident of, and elected by, the registered qualified electors of that district.

C. The registered qualified electors of a municipality may adopt, amend or repeal a charter in the manner provided by law. In the absence of law, the governing body of a municipality may appoint a charter commission upon its own initiative or shall appoint a charter commission upon the filing of a petition containing the signatures of at least five percent of the registered qualified electors of the municipality. The charter commission shall consist of not less than seven members who shall draft a proposed charter. The proposed charter shall be submitted to the registered qualified electors of the municipality within one year after the appointment of the charter commission. If the charter is approved by a majority vote in the municipality, it shall become effective at the time and in the manner provided in the charter.

D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.

E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities. (As added November 3, 1970.)

ANNOTATIONS

Cross references. — For Municipal Charter Act, *see* 3-15-1 to 3-15-16 NMSA 1978.

For municipal authority to issue franchises, *see* 3-42-1 NMSA 1978.

The 1970 amendment of Article X, which was proposed by committee substitute for H.J.R. No. 14 (Laws 1970) and adopted at the general election held on November 3, 1970, by a vote of 77,095 for and 60,867 against, added this section.

Compiler's notes. — Eight amendments to the constitution were proposed by the 1970 session of the legislature although the attorney general stated that constitutional amendments may not be considered in even-numbered years. 1965-66 Op. Att'y Gen. No. 65-212 and 1969-70 Op. Att'y Gen. No. 69-151.

An amendment to this article by addition of a sixth section to allow home rule for municipalities was proposed by H.J.R. No. 7 (Laws 1969). 1969-70 Op. Att'y Gen. No. 69-151 stated that, since the proposed new constitution was rejected by the voters in 1969, the resolution may be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose. The opinion further stated that the resolution could not be amended by the 1970 legislature. Committee substitute for H.J.R. No. 14 (Laws 1970) withdrew the amendment to this article proposed in 1969 and substituted another proposed amendment on the same subject (which voters approved on November 3, 1970).

Assisted outpatient treatment ordinance preempted by state law. — The Mental Health and Developmental Disabilities Code (Chapter 43, Article 1 NMSA 1978) and the Mental Health Care Treatment Decisions Act (Chapter 24, Article 7B NMSA 1978) create a comprehensive scheme governing the treatment of individuals with mental illness, with or without the consent of those individuals, which together preempt home-rule municipalities from enacting a separate ordinance regulating individuals with mental illness. Protection and Advocacy System v. City of Albuquerque, 2008-NMCA-149, 145 N.M. 156, 195 P.3d 1, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

Section controls over N.M. Const., art. XI, § 7. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

The charter provisions are self-executing in the sense that no further legislative act is necessary. A home rule municipality no longer has to look to the legislature for a grant of power to act, but looks only to legislative enactments to see if any express limitations have been placed on its power to act. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

This section must be read along with the Municipal Charter Act. — This section should not be read independently of the Municipal Charter Act, 3-15-1 NMSA 1978 et seq. This section states that registered qualified electors of a municipality may adopt a charter in the manner provided by law. The Municipal Charter Act is the law enacted by the legislature to implement the home rule amendment. The interpretation of this section is dependent on, not independent of, the Municipal Charter Act. Einer v. Rivera, 2015-NMCA-045, cert. denied, 2015-NMCERT-003.

San Miguel county is not a municipality for the purpose of the home rule amendment. — Where petitioner sought to have the San Miguel county commission appoint a charter commission providing for "home rule" government of the county, petitioner claimed that N.M. Const., art. X, § 6 was self-executing in that it provides that in the absence of law, the governing body of a municipality may appoint a charter

commission upon the filing of a petition of registered qualified electors; the court of appeals held that the Municipal Charter Act, 3-15-1 NMSA 1978 et seq., is the law enacted to implement the home rule amendment; there is no absence of law and San Miguel county cannot be considered a municipality for the purpose of the home rule amendment. Einer v. Rivera, 2015-NMCA-045, cert. denied, 2015-NMCERT-003.

Petty misdemeanor penalty for DWI. — Where a municipal ordinance prohibited exactly the same acts as those acts prohibited by state DWI statutes and the only substantive difference between the ordinance and state law was that the ordinance imposed a petty misdemeanor penalty and state law imposed a misdemeanor penalty, the ordinance was not inconsistent with state law. City of Rio Rancho v. Mazzei, 2010-NMCA-054, 148 N.M. 553, 239 P.3d 149, cert. denied, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1049.

A home rule municipality is free to impose any penalty for DWI that complies with Article X, Section 6 of the constitution of New Mexico and 3-17-1(C)(2) NMSA 1978. City of Rio Rancho v. Mazzei, 2010-NMCA-054, 148 N.M. 553, 239 P.3d 149, cert. denied, 2010-NMCERT-005, 148 N.M. 574, 240 P.3d 1049.

Albuquerque is home rule municipality. City of Albuquerque v. Chavez, 91 N.M. 559, 577 P.2d 457 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

Santa Fe is a home rule municipality. Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004).

Curfew ordinance preempted. — The Children's Code preempted a city from enacting a curfew ordinance because the ordinance established criminal sanctions of incarceration and fines for juvenile activity which is not unlawful when committed by adults. ACLU v. City of Albuquerque, 1999-NMSC-044, 128 N.M. 315, 992 P.2d 866.

Districting for municipalities with population over 10,000. — Section 3-12-1.1 NMSA 1978 sufficiently expresses the intent of the legislature to mandate that all municipalities with a population over 10,000 require their candidates for city council to reside in and be elected from single-member districts. Accordingly, it invalidates the city of Gallup's home rule election charter that allows at-large elections for city councilors. Casuse v. City of Gallup, 106 N.M. 571, 746 P.2d 1103 (1987).

Section not authority for condemnation. — This section merely grants the city general powers and clearly does not constitute express authority nor authority by necessary implication to condemn an existing public electric utility. City of Las Cruces v. El Paso Elec. Co., 904 F. Supp. 1238 (D.N.M. 1995).

Term limits not authorized in home rule municipalities. — The home rule amendment to the constitution does not allow home rule municipalities to impose eligibility requirements for municipal elected office beyond those set forth in the qualification clause and elsewhere in the constitution; thus, the provision of the city

charter adopting term limits was not authorized. Cottrell v. Santillanes, 120 N.M. 367, 901 P.2d 785 (Ct. App.), cert. denied, 120 N.M. 213, 900 P.2d 962 (1995).

State law preemption test. — The test to determine whether a state law preempts a home rule municipality's ordinance is: 1. Is the state law at issue a general law, and 2. Does the state law at issue expressly deny the power of the home-rule municipalities to regulate in that area? Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002), aff'd in part, 380 F.3d 1258 (10th Cir. 2004).

Local enactment of Santa Fe can be preempted by state statute if a general state law denies a home-rule municipality the power to regulate a given subject. Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir 2004), aff'g in part 244 F. Supp. 2d 1305 (D.N.M. 2002).

Local ordinance not preempted by state law. — Reading the New Mexico Telecommunications Act (Chapter 63, Article 9A NMSA 1978) and N.M. Const., art. XI, § 2 in *pari materia* with New Mexico's Municipal Code (Chapter 3 NMSA 1978), and N.M. Const., art. X, § 6, the provisions of a Santa Fe telecommunications ordinance, regulating the power to contract with a service provider and to enforce provisions related to land use and rights of way held by the city, were not preempted by state law, inasmuch as they did not purport to usurp New Mexico's public regulation commission power to issue certificates of public convenience and necessity to providers of public telecommunications services or to regulate rates and quality of service for intrastate telecommunications services. Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002), aff'd in part, 380 F.3d 1258 (10th Cir. 2004).

The City of Santa Fe ordinance which established procedures for telecommunications providers seeking access to city-owned rights-of-way is not preempted by state law. Quest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir 2004), aff'g in part 244 F. Supp. 2d 1305 (D.N.M. 2002).

Power to limit domestic wells. — Although 72-12-1 NMSA 1978, which authorizes the state engineer to issue permits to drill domestic wells, is a general law, 72-12-1 NMSA 1978 does not expressly deny, evince an intent to negate, or preempt the power of a home rule municipality to prohibit the drilling of domestic wells that have been permitted by the state engineer. Smith v. City of Santa Fe, 2006-NMCA-048, 139 N.M. 410, 133 P.3d 866, aff'd, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300.

"General law" distinguished from municipal law. — "General law" means a law that applies generally throughout the state or is of statewide concern as contrasted to "local" or "municipal" law. The subject matter of the general legislative enactment must pertain to those things of general concern to the people of the state. A law general in form cannot, under the constitution, deprive cities of the right to legislate on purely local affairs germane to the purposes for which the city was incorporated. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

The New Mexico Telecommunications Act (Chapter 63, Article 9A NMSA 1978), which regulates telecommunications rates, terms, and conditions of service at the statewide level, is a "general law" within the meaning of Subsection D. Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002), aff'd in part, 380 F.3d 1258 (10th Cir. 2004).

Test to determine whether activity is of general concern or of local concern is whether it is proprietary or governmental in character. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

Distinction between governmental and proprietary functions. — If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual or group of individuals could do the same thing. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

Proprietary activities are incidental to home rule. — If an activity is carried on by the municipality as an agent of the state, it is of general or public concern. If it is exercised by the city in its proprietary capacity, it is a power incidental to home rule. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Operation of water and sewer system is a proprietary function and not a governmental function. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Limousine service is proprietary rather than governmental function. City of Albuquerque v. New Mexico State Corp. Comm'n, 93 N.M. 719, 605 P.2d 227 (1979).

"Not expressly denied" construed. — "Not expressly denied" in Subsection D means that some express statement of the authority or power denied must be contained in a general law or otherwise no limitation exists. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Municipality denied power to create overtime compensation schedule. — The mandate under 50-4-2(A) NMSA 1978 to pay for "all services rendered" within a certain time period denies a home rule municipality the power to create its own overtime compensation schedule. Rainaldi v. City of Albuquerque, 2014-NMCA-112.

Example of specific denial of power. — Section 3-18-2 NMSA 1978 is an example of a specific denial of power whereby municipalities are prohibited from imposing an income tax or an ad valorem property tax, but are authorized to levy certain excise taxes if the ordinance imposing such a tax is approved by a majority vote in the municipality. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Power to decide number of city commissioners. — Neither 3-10-1A NMSA 1978 nor 3-14-6A NMSA 1978 is applicable to a home rule municipality to deny it the power to provide for a different number of city commissioners than as prescribed by them

because the composition of a municipal government is a matter of local, not statewide concern, and to construe otherwise would frustrate the purpose of this section. State ex rel. Haynes v. Bonem, 114 N.M. 627, 845 P.2d 150 (1992).

Air Quality Control Act does not deny localities power to impose criminal penalties. — The Air Quality Control Act (Chapter 74, Article 2 NMSA 1978) does not expressly deny the power to impose criminal penalties for violations of the act to counties and municipalities. Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984), cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985).

Rate charged for water or sewer service in excess of cost is not a tax or in the nature of a tax, regardless of how the fund derived therefrom is ultimately used. A municipality cannot impose taxes when acting in a proprietary capacity, but only when acting as an arm or agency of the state. A rate charged for a public utility service or product is not a tax, but a price at which and for which the public utility service or product is sold, and ultimate use of surplus funds derived therefrom for the support of municipal government will not cause it to assume the nature of taxes. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Application of sewer or water system revenues not limited. — Sections 3-26-2 and 3-27-4 NMSA 1978 do not limit or prohibit the application of revenues from the sewer or water system operated by a home rule city to other municipal purposes. The only limitation, as in the case of any legislative action or function by the city, is that it exercise its authority in a reasonable manner and act pursuant to constitutional authority. Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974).

Imposition of motor vehicle inspection fee not valid exercise of localities' home rule power. Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984), cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985).

Ordinance invalid under NLRA. — Clovis City ordinance which prohibits employers within Clovis from requiring, as a condition of employment, membership in a labor organization or payment of any dues, assessments, or other charges to a labor organization, and further prohibits employers from requiring any person to be referred by a labor organization as a condition of employment or from deducting union dues, fees, assessments or other charges from wages, unless the employee’s authorization for such deductions can be revoked at any time, is invalid under the National Labor Relations Act. New Mexico Fed'n of Labor v. City of Clovis, 735 F.Supp. 999 (D.N.M. 1990).

Municipal power to set a minimum wage higher than that of the Minimum Wage Act (13-4-10 NMSA 1978 et seq.) is not "expressly denied by general law" within the meaning of the home rule amendment. New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785, 126 P.3d 1149.

Minimum wage ordinance enacted by City of Santa Fe is within the power of the city to enact and is constitutional. New Mexican for Free Enter. v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785, 126 P.3d 1149.

Voter approval of capital projects. — A home rule municipality may require voter approval of capital projects before the municipality proceeds with a capital project. 2011 Op. Att'y Gen. No. 11-04.

Development agreements. — Under a development agreement, a home rule municipality may reimburse a developer out of gross receipts tax proceeds in exchange for the developer's services in building public infrastructure in connection with a contract to facilitate the construction of retail business establishments. 2002 Op. Att'y Gen. No. 02-02.

Legislature cannot draw district lines. — The legislature can only authorize municipal districting. The legislature itself cannot (and never intended that it would) "draw" the district lines. 1971 Op. Att'y Gen. No. 71-26.

Initial limited effect of Subsection B. — Sections 14-11-2 and 14-13-6 , 1953 Comp. (now 3-12-2 and 3-14-6 NMSA 1978), relating to candidate and elector qualifications, retain their validity despite Subsection B of this section so long as that section remains nonself-executing; that is, until a districting action provided for in Subsection A is taken. 1971 Op. Att'y Gen. No. 71-118.

Unconstitutional limitation on candidacy for Albuquerque mayor. — An Albuquerque city charter provision that no full-time elective official other than the mayor or the mayor pro tem can be a candidate for the office of mayor or the mayor pro tem is unconstitutional because it violates Article VII, section 2 of the New Mexico constitution. 1985 Op. Att'y Gen. No. 85-04.

Approval of proposed charter by governing body of municipality necessary condition to submitting the proposed charter to the electorate for adoption. 1979 Op. Att'y Gen. No. 79-24.

Powers of municipalities determined by legislature. — Except for home rule municipalities, municipalities are established by the legislature and may only exercise those powers and duties as are specifically defined by law. 1979 Op. Att'y Gen. No. 79-28.

General law may operate to preempt certain governmental activity. 1989 Op. Att'y Gen. No. 89-04.

The legislature has preempted the area of governmental provision of public employee and retiree insurance, and therefore a municipality does not possess home rule authority to pay health insurance costs of public retirees where there is no applicable authorizing legislation. 1989 Op. Att'y Gen. No. 89-04.

Ordinance prohibiting local body from imposing any tax increase. — A home rule municipality cannot, pursuant to an initiative petition, enact an ordinance that would prohibit the local governing body from imposing any tax increase, whether property or gross receipts and compensating taxes, without first putting the question of the tax increase to a vote of the qualified electors of the municipality, if such ordinance alters the requirements of the statute imposing the tax. 1990 Op. Att'y Gen. No. 90-20.

Waiver of liquor establishment distance requirement must be uniform and contain definable standards. — Any action taken by a home rule municipality to condition its consent to waive the distance requirement, relating to the location of a liquor establishment, must have uniform application to all persons requesting the waiver and must contain definable standards for the imposition of those conditions. 1980 Op. Att'y Gen. No. 80-23.

Salary increase for members of governing body. — Subject to the provisions of its charter, the governing body of a home-rule municipality may enact an ordinance to increase the salary of its members, but members serving during the term in which such an ordinance is enacted cannot benefit from the increase during that term. 1981 Op. Att'y Gen. No. 81-17.

Municipal authority not removed by general human rights law. — The passage of the Human Rights Act (Chapter 28, Article 1 NMSA 1978) did not remove the authority municipalities already possessed by virtue of the New Mexico constitution and 3-17-1 and 3-18-1 NMSA 1978. 1971 Op. Att'y Gen. No. 71-64.

Municipal ordinances cannot lower or be inconsistent with state standards. 1974 Op. Att'y Gen. No. 74-13; 1971 Op. Att'y Gen. No. 71-64.

Regulation of fireworks. — The Fireworks Licensing and Safety Act (Chapter 60, Article 2C NMSA 1978) denies all municipalities, including those with home rule charters, from regulating fireworks other than as provided by the statute. 1990 Op. Att'y Gen. No. 90-11.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M. L. Rev. 1 (1981).

For comment, "Contemplating the Dilemma Of Government as Speaker: Judicially Identified Limits On Government Speech In The Context Of Carter v. City of Las Cruces," see 27 N.M. L. Rev. 517 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 125 to 138, 147.

62 C.J.S. Municipal Corporations §§ 13, 108, 124, 390.

Sec. 7. [Five-member boards of county commissioners.] (1992)

The board of county commissioners by unanimous vote may adopt an ordinance to increase the size of the boards of county commissioners to five members. Upon creation of a five-member board, the county shall be divided by the incumbent board of county commissioners into five county commission districts that shall be compact, contiguous and as nearly equal in population as practicable. One county commissioner shall reside within and be elected from each county commission district. Change of residence to a place outside the district from which a county commissioner was elected shall automatically terminate the service of that commissioner and the office shall be declared vacant. (As added November 3, 1992.)

ANNOTATIONS

Cross references. — For terms of county officers, *see* N.M. Const., art. X, § 2.

For terms of county officers in counties not covered by this section, *see* N.M. Const., art. X, § 2.

For tenure of office, *see* N.M. Const., art. XX, § 2.

For membership and quorum of three or five member boards, *see* 4-38-2 NMSA 1978.

For election of county commissioners, *see* 4-38-6 NMSA 1978.

The 1973 amendment of Article X, proposed by H.J.R. No. 33 (Laws 1973) and adopted at the special election held on November 6, 1973, by a vote of 20,369 for and 19,865 against, added this section to the article.

The 1980 amendment, which was proposed by H.J.R. No. 4 (Laws 1979) and adopted at the general election held on November 4, 1980, by a vote of 132,542 for and 100,449 against, designated the three paragraphs of the former section as Subsection A and added Subsection B.

The 1988 amendment, which was proposed by S.J.R. No. 6, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 230,390 for and 123,799 against, added Subsections C and D.

The 1992 amendment, which was proposed by S.J.R. No. 15 (Laws 1992) and adopted at the general election held on November 3, 1992, by a vote of 317,887 for and 151,625 against, rewrote this section. For provisions of former section, see 1992 Replacement Pamphlet.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 4 (Laws 1975), which would have allowed voters in certain class B counties to provide for five-member boards of county commissioners to be elected from districts, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 110,893 for and 133,708 against.

Effect of section. — When this section was added by constitutional amendment, the old § 2 of article X ceased to apply to counties having a population greater than 100,000 and an assessed valuation greater than $75,000,000. Under this section the original offices of county commissioner for two-year terms in affected counties were in effect abolished and new offices of county commissioner with four-year terms were created, notwithstanding that this section does not expressly say that the old offices were abolished and new ones created. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978) (decided prior to 1992 amendment).

Third consecutive term. — A county commissioner who has previously served a two-year term as county commissioner under N.M. Const., art. X, § 2, and one four-year term under this section may serve an additional four-year term under this section. Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978) (decided prior to 1992 amendment).

Section is not self-executing. — As counties are but political subdivisions of the state, created by the legislature for the purpose of aiding in the administration of the affairs of the state, they have only such powers as are granted them by the legislature. The board of county commissioners had no power to district; the section is not self-executing; and the power to district rests in the state legislature. State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

County commissioner candidates must be nominated at primary election. — As there is no legislative act in the primary election code that provides for the nomination of county commissioner candidates other than through the primary election, except for political parties not eligible to participate in the primary, the candidates for such offices in the general election must be nominated at the primary election. State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

Electoral proclamation to specify district boundaries and terms of office. — Mandamus was properly granted to compel the governor to specify in his proclamation the boundaries of the district making up the office of county commissioner and terms of that office. State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974).

Reelection in counties increasing board to five members. — If a county increased its board of county commissioners to five members pursuant to former Subsections C and D, a county officer elected to a two-year term in 1988 could seek re-election for a four-year term in 1990 and a four-year term in 1994. 1989 Op. Att'y Gen. No. 89-28 (rendered prior to 1992 amendment).

A county commissioner who has served one term in office under N.M. Const., art. X, § 2, and one term of office under this section may not seek a third consecutive term. 1978 Op. Att'y Gen. No. 78-01. *See* Morris v. Gonzales, 91 N.M. 495, 576 P.2d 755 (1978) (decided prior to 1992 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 147, 148, 189.

20 C.J.S. Counties § 63 et seq.

Sec. 8. [New activity or service mandated by state rule or regulation.]

A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed. (As added November 6, 1984.)

ANNOTATIONS

The 1984 amendment to Article X, which was proposed by S.J.R. 7 (Laws 1984) and adopted at the general election held on November 6, 1984, by a vote of 220,101 for and 64,684 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 123.

20 C.J.S. Counties § 44; 62 C.J.S. Municipal Corporations §§ 193, 194.

Sec. 9. [Recall of elected county officials.] (1996)

A. An elected official of a county is subject to recall by the voters of the county. Subject to the provisions of Subsection B of this section, a petition for a recall election shall cite grounds of malfeasance or misfeasance in office or violation of the oath of office by the official concerned. The cited grounds shall be based upon acts or failures to act occurring during the current term of the official sought to be recalled. The recall petition shall be signed by registered voters:

(1) of the county if the official sought to be recalled was elected at-large; or

(2) of the district from which the official sought to be recalled was elected; and

(3) not less in number than thirty-three and one-third percent of the number of persons who voted in the election for the office in the last preceding general election at which the office was voted upon.

B. Prior to and as a condition of circulating a petition for recall pursuant to the provisions of Subsection A of this section, the factual allegations supporting the grounds of malfeasance or misfeasance in office or violation of the oath of office stated in the petition shall be presented to the district court for the county in which the recall is proposed to be conducted. The petition shall not be circulated unless, after a hearing in

which the proponents of the recall effort and the official sought to be recalled are given an opportunity to present evidence, the district court determines that probable cause exists for the grounds for recall.

C. After the requirements of Subsection B of this section are fulfilled, the petition shall be circulated and filed with the county clerk for verification of the signatures, as to both number and qualifications of the persons signing. If the county clerk verifies that the requisite number of signatures of registered voters appears on the petition, the question of recall of the official shall be placed on the ballot for a special election to be called and held within ninety days or the next occurring general election if that election is to be held within less than ninety days. If at the election a majority of the votes cast on the question of recall is in favor of recall, the official who is the subject of recall is recalled from the office, and a vacancy exists. That vacancy shall be filled in the manner provided by law for filling vacancies for that office.

D. A recall election shall not be conducted after May 1 in a calendar year in which an election is to be held for the office for which the recall is sought if the official sought to be recalled is a candidate for reelection to the office. No petition for recall of an elected county official shall be submitted more than once during the term for which the official is elected. (As added November 5, 1996.)

ANNOTATIONS

Compiler's notes. — This section, which was proposed by S.J.R. No. 21 (Laws 1996), was adopted at the general election held November 5, 1996, by a vote of 330,258 for and 132,969 against.

Court of appeals has jurisdiction to entertain appeals of probable cause determinations for recall by district courts under N.M. Const., art. X, § 9(B). Sparks v. Graves, 2006-NMCA-030, 139 N.M. 143, 130 P.3d 204.

Sec. 10. [Urban counties.] (2014)

A. A county that is less than one thousand five hundred square miles in area and has a population of three hundred thousand or more may become an urban county by the following procedure:

(1) the board of county commissioners shall appoint a charter commission consisting of not less than three persons to draft a proposed urban county charter;

(2) the proposed charter shall provide for the form and organization of the urban county government and shall designate those officers that shall be elected and those officers and employees that shall perform the duties assigned by law to county officers; and

(3) within one year after the appointment of the charter commission, the proposed charter shall be submitted to the qualified voters of the county and, if adopted by a majority of those voting, the county shall become an urban county. If, at the election or any subsequent election, the proposed charter is not adopted, then, after at least one year has elapsed after the election, pursuant to this section another charter commission may be appointed and another proposed charter may be submitted to the qualified voters for approval or disapproval.

B. An urban county may exercise all legislative powers and perform all governmental functions not expressly denied by general law or charter and may exercise all powers granted to and shall be subject to all limitations placed on municipalities by Article 9, Section 12 of the constitution of New Mexico. This grant of powers shall not include the power to enact private or civil laws except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a misdemeanor. No tax imposed by the governing body of an urban county, except a tax authorized by general law, shall become effective until approved by a majority vote in the urban county.

C. A charter of an urban county shall only be amended in accordance with the provisions of the charter.

D. If the charter of an urban county provides for a governing body composed of members elected by districts, a member representing a district shall be a resident and elected by the registered qualified electors of that district.

E. The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of urban counties.

F. The provisions of this section shall be self-executing. (As added November 7, 2000; as amended November 4, 2014.)

ANNOTATIONS

Compiler's notes. — This section, which was proposed by S.J.R. No. 26 (Laws 1999), was adopted at the general election held November 7, 2000, by a vote of 261,323 for and 225,439 against.

The 2014 amendment, proposed by S.J.R. No. 22 (Laws 2014) and adopted at the general election held on November 4, 2014 by a vote of 251,584 for and 173,316 against, allows certain counties to become urban counties; clarified the majority vote needed to adopt a county charter; in Subsection A, after "square miles in area and has" deleted "at the time of this amendment"; in Subsection A, Paragraph (1), after "county commissioners shall", deleted "by January 1, 2001"; in Subsection A, Paragraph (3), in the first sentence, after "if adopted by a majority of those", deleted "voters" and added "voting"; and in Subsection B, in the first sentence, after "functions not expressly denied", deleted "to municipalities, counties or urban counties", after "may exercise all

powers", added "granted to", and after "shall be subject to all the limitations", deleted "granted to" and added "placed on".

Sec. 11. [Single urban governments.] (1999)

A. A county that is less than one thousand five hundred square miles in area and has, at the time of this amendment, a population of three hundred thousand or more, and whether or not it is an urban county pursuant to Section 1 of this amendment, may provide for a single urban government by the following procedure:

(1) by January 1, 2003, a charter commission, composed of eleven members, shall be appointed to draft a proposed charter. Five members shall be appointed by the governing body of the county, five members shall be appointed by the municipality with a population greater than three hundred thousand and one member shall be appointed by the other ten members;

(2) the proposed charter shall:

(a) provide for the form and organization of the single urban government;

(b) designate those officers that shall be elected and those officers and employees that shall perform the duties assigned by law to county officers;

(c) provide for a transition period for elected county and city officials whose terms have not expired on the effective date of the charter; and

(d) provide for a transition period, no less than one year, to ensure the continuation of government services; and

(3) within one year after the appointment of the charter commission, the proposed charter shall be submitted to the qualified voters and, if adopted by a majority of those voters, the municipalities in that county with a population greater than ten thousand shall be disincorporated and the county shall be governed by a single urban government. If the proposed charter is not adopted by a majority of the qualified voters, then another charter commission shall be appointed and another election, within twelve months of the previous election, shall be held. If the proposed charter is not adopted by a majority of the qualified voters at the second or any subsequent election, then after at least two years have elapsed after the election, pursuant to this section another charter commission may be appointed and another proposed charter may be submitted to the qualified voters for approval or disapproval. As used in this paragraph, "qualified voter" means a registered voter of the county.

B. Upon the adoption of a charter pursuant to Subsection A of this section, any municipality within the county with a population greater than ten thousand is disincorporated and no future municipalities shall be incorporated. A county that adopts a charter pursuant to this section may exercise those powers granted to urban counties

by Section 1 of this amendment and is subject to the limitations imposed upon urban counties by that section. A county that adopts a charter pursuant to this section has the same power to enact taxes as any other county and as any municipality had before being disincorporated pursuant to this section.

C. A municipality, with a population of ten thousand or less, in a county that has adopted a charter pursuant to this section may become a part of the single urban government by a vote of a majority of the qualified voters within the municipality voting in an election held upon the filing of a petition containing the signatures of ten percent of the registered voters of that municipality. If a majority of the voters elect to become a part of the single urban government, then the municipality is disincorporated.

D. All property, debts, employees, records and contracts of a municipality disincorporated pursuant to this section shall be transferred to the county and become the property, debts, employees, records and contracts of the county. The rights of a municipality, disincorporated pursuant to this section, to receive taxes, fees, distributions or any other thing of value shall be transferred to the county. Any law granting any power or authorizing any distribution to a municipality disincorporated pursuant to this section shall be interpreted as granting the power or authorizing the distribution to the county.

E. The provisions of this section shall be self-executing. (As added November 7, 2000.)

ANNOTATIONS

Compiler's notes. — This section, which was proposed by S.J.R. No. 26 (Laws 1999), was adopted at the general election held November 7, 2000, by a vote of 261,323 for and 134,319 against.

ARTICLE XI
Corporations Other Than Municipal

Section 1. [Creation and composition of public regulation commission.] (2012)

The "public regulation commission" is created. The commission shall consist of five members elected from districts provided by law for staggered four-year terms beginning on January 1 of the year following their election; provided that those chosen at the first general election after the adoption of this section shall immediately classify themselves by lot, so that two of them shall hold office for two years and three of them for four years; and further provided that, after serving two terms, members shall be ineligible to hold office as a commission member until one full term has intervened. The legislature shall provide, by law, increased qualifications for commissioners and continuing education requirements for commissioners. The increased qualifications provided by

this 2012 amendment shall apply to public regulation commissioners elected at the general election in 2014 and subsequent elections and to commissioners appointed to fill a vacancy at any time after July 1, 2013. No commissioner or candidate for the commission shall accept anything of value from a person or entity whose charges for services to the public are regulated by the commission. (As added November 5, 1996; as amended November 6, 2012.)

ANNOTATIONS

Compiler's notes. — The repeal of Sections 1 through 12 and 15 through 17 of Article XI, effective January 1, 1999, proposed by H.J.R. No. 16 (Laws 1996) was adopted at the general election held November 5, 1996, by a vote of 232,788 for and 221,693 against. At that general election, new Sections 1 and 2 were adopted within this article.

The 2012 amendment, which was proposed by H.J.R. No. 11 (Laws 2012) and adopted at a general election held on November 6, 2012 by a vote of 542,928 for and 128,238 against, required the legislature to provide increased qualifications and continuing education requirements for public regulation commissioners that apply to commissioners elected at the general election in 2014 and subsequent elections and to commissioners appointed to fill a vacancies at any time after July 1, 2013; and added the third and fourth sentences.

In general. — The functions of the corporation commission (now public regulation commission) are not confined to any of the three departments of government named in N.M. Const., art. III, § 1, but its duties and powers pervade them all. In re Atchison, T. & S.F. Ry., 37 N.M. 194, 20 P.2d 918 (1933).

Legislative intent. — Section 8-7-4A NMSA 1978 is constitutional and a safe guide to the legislative intent behind this section. Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72.

Language following "provided that" is read as an exception to the general rule that precedes it. Therefore, there is no right under the New Mexico constitution to serve two four-year terms before being subjected to term limits. Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72.

Word "term", as used in this section, includes both a full four-year term and a shortened two-year term. Block v. Vigil-Giron, 2004-NMSC-003, 135 N.M. 24, 84 P.3d 72.

Amendment not "act of legislature". — The 1996 amendment of N.M. Const., art. XI, was not an "act of the legislature" within the meaning of N.M. Const., art. IV, § 34. U.S. West Communications, Inc. v. New Mexico Pub. Regulation Comm'n, 1999-NMSC-024, 127 N.M. 375, 981 P.2d 789.

Consecutive terms. — A public regulation commission commissioner elected to serve consecutive two-year and four-year terms may not run again for another four-year term until one full term has intervened. 2003 Op. Att'y Gen. No. 03-05.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?," see 9 Nat. Resources J. 430 (1969).

For article, "Cost of Service Indexing: An Analysis of New Mexico's Experiment in Public Utility Regulation," see 9 N.M. L. Rev. 287 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M. L. Rev. 1 (1981).

For article, "Survey of New Mexico Law, 1982-83: Administrative Law," see 14 N.M. L. Rev. 1 (1984).

For 1984-88 survey of New Mexico administrative law, 19 N.M. L. Rev. 575 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Corporations §§ 7 to 16.

Prohibition to control action of commission, 115 A.L.R. 34, 159 A.L.R. 627.

Sec. 2. [Responsibilities of public regulation commission.] (2012)

The public regulation commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; and other public service companies in such manner as the legislature shall provide. The public regulation commission shall have responsibility for regulating insurance companies and others engaged in risk assumption as provided by law until July 1, 2013. (As added November 5, 1996; as amended November 6, 2012.)

ANNOTATIONS

Compiler’s notes. — This section is compiled as a composite of the amendments proposed by H.J.R. 16, Section 1 (Laws 2012) and H.J.R. 17, Section 1 (Laws 2012)

and adopted at the general election held on November 6, 2012. Although Section 1 of H.J.R. 17 did not delete the authority of the public regulation commission to charter and regulate business corporations, the compiled section deleted that authority because the authority of the public regulation commission to charter and regulate business corporations was deleted in Section 1 of H.J.R. 16; the ballot question for H.J.R. 16 stated that Constitutional Amendment 3 proposed to amend Article 11, Section 2 and to enact a new section of Article 11 to remove authority to charter and regulate corporations from the public regulation commission and provide authority to charter corporations to the secretary of state; and Section 2 of H.J.R. 16 authorized the secretary of state to charter corporations. Although Section 1 of H.J.R. 16 did not delete the authority of the public regulation commission to regulate insurance companies and others engaged in risk assumption, the compiled section deleted that authority because the authority to regulate insurance companies and others engaged in risk assumption was deleted in Section 1 of H.J.R. 17; the ballot question for H.J.R. 17 stated that Constitutional Amendment 4 proposed to amend Article 11 to remove the regulation of insurance companies and others engaged in the assumption of risk from the public regulation commission and place it under a superintendent of insurance; and Section 2 of H.J.R. 17 created the office of superintendent of insurance and authorized the superintendent of insurance to regulate insurance companies and others engaged in risk assumption. The full texts of H.J.R. 16 (Laws 2012) and H.J.R. 17 (Laws 2012) are set out below.

H.J.R. No. 16 (Laws 2012), adopted at a general election held on November 6, 2012 by a vote of 326,536 for and 316,493 against, provided:

SECTION 1. It is proposed to amend Article 11, Section 2 of the constitution of New Mexico to read:

"The public regulation commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; insurance companies and others engaged in risk assumption; and other public service companies in such manner as the legislature shall provide."

SECTION 2. It is proposed to amend Article 11 of the constitution of New Mexico by adding a new section to read:

"The secretary of state shall have responsibility for chartering corporations in such a manner as the legislature shall provide."

H.J.R. No. 17 (Laws 2012), adopted at a general election held on November 6, 2012 by a vote of 330,873 for and 321,055 against, provided:

SECTION 1. It is proposed to amend Article 11, Section 2 of the constitution of New Mexico to read:

"The public regulation commission shall have responsibility for chartering and regulating business corporations in such manner as the legislature shall provide. The commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; and other public service companies in such manner as the legislature shall provide. The public regulation commission shall have responsibility for regulating insurance companies and others engaged in risk assumption as provided by law until July 1, 2013."

SECTION 2. It is proposed to amend Article 11 of the constitution of New Mexico by adding a new section to read:

"A. The office of "superintendent of insurance" is created as of July 1, 2013. The superintendent of insurance shall regulate insurance companies and others engaged in risk assumption in such manner as provided by law. The superintendent of insurance shall be appointed by the insurance nominating committee and serve for such terms as may be provided by law; provided that the term of the first superintendent of insurance appointed pursuant to this 2012 amendment shall begin on July 1, 2013 and end on December 31, 2015.

B. The insurance nominating committee shall be appointed and have such qualifications as may be provided by law. The insurance nominating committee shall evaluate applications for superintendent of insurance in accordance with qualifications for superintendent of insurance established by law."

Local ordinance not preempted by state law. — Reading the New Mexico Telecommunications Act (Chapter 63, Article 9A NMSA 1978) and N.M. Const., art. XI, § 2 in *pari materia* with New Mexico's Municipal Code (Chapter 3 NMSA 1978) and N.M. Const., art. X, § 6, the provisions of a Santa Fe telecommunications ordinance, regulating the power to contract with a service provider and to enforce provisions related to land use and rights of way held by the city, were not preempted by state law, inasmuch as they did not purport to usurp New Mexico's public regulation commission power to issue certificates of public convenience and necessity to providers of public telecommunications services or to regulate rates and quality of service for intrastate telecommunications services. Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002), aff'g in part, 380 F.3d 1258 (10th Cir. 2004).

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

For comment on State ex rel. Palmer v. Miller, 74 N.M. 129, 391 P.2d 416 (1964), see 4 Nat. Resources J. 606 (1964).

Sec. 3. to 12. Repealed. (1998)

ANNOTATIONS

Repeals. — The repeal of Sections 1 through 12 and 15 through 17 of Article XI, effective January 1, 1999, proposed by H.J.R. No. 16 (Laws 1996) was adopted at the general election held November 5, 1996, by a vote of 232,788 for and 221,693 against.

Sec. 13. [General corporation laws.]

The legislature shall provide for the organization of corporations by general law. All laws relating to corporations may be altered, amended or repealed by the legislature, at any time, when necessary for the public good and general welfare, and all corporations, doing business in this state, may, as to such business, be regulated, limited or restrained by laws not in conflict with the constitution of the United States or of this constitution.

ANNOTATIONS

Comparable provisions. — Utah Const., art. XII, § 1.

Wyoming Const., art. X, § 1.

Corporate form recognized prior to constitution. — Corporate form of business entity was recognized in New Mexico law even before adoption of the constitution. Shillinglaw v. Owen Shillinglaw Fuel Co., 70 N.M. 65, 370 P.2d 502 (1962).

Proper for legislature to change measure of bank stockholder's liability. — This section authorizes legislature to change measure of bank stockholder's liability when bank was organized after adoption of constitution. Laws 1915, ch. 67, § 40 (since repealed), as amended by Laws 1923, ch. 140, § 8 (since repealed), dealing with such liability, did not impair contract obligations. Melaven v. Schmidt, 34 N.M. 443, 283 P. 900 (1929).

Proper for legislature to provide for convertibility of types of corporations. — A state through its police power may make reasonable regulations of corporations, including alteration or amendment of corporate charters if that power has been duly reserved by the state, as in New Mexico. Thus, statute (49-2-18 NMSA 1978) which authorizes change in character of legal entity from corporation for management of community land grant to domestic stock corporation does not violate due process. Westland Dev. Co. v. Saavedra, 80 N.M. 615, 459 P.2d 141 (1969).

Proper for legislature to assign bank chartering investigations to office outside commission. — Legislature was not powerless under this section or N.M. Const., art. XI, § 6 (repealed), to designate state bank examiner (now director of the financial institutions division of the commerce and industry department), rather than corporation commission (now public regulation commission), the body to make determinative

findings preliminary to issuing charters to state banks. First Thrift & Loan Ass'n v. State ex rel. Robinson, 62 N.M. 61, 304 P.2d 582 (1956).

Power to regulate railway facilities reposes in commission. — This section applies to all corporations. But the power to regulate reserved to the legislature must relate to some phase of railroad business not pertaining to power to require railway companies to provide and maintain adequate agents and facilities, which power of regulation is reposed in the corporation commission (now public regulation commission) by N.M. Const., art. XI, § 7 (repealed). In re Atchison, T. & S.F. Ry., 37 N.M. 194, 20 P.2d 918 (1933).

Jurisdictional consent statute constitutional. — Although this section may restrict the application of substantive law to a foreign corporation, it does not limit the forums in which controversies are to be decided. It does not prohibit the enactment of a jurisdictional consent statute extending jurisdiction to registered foreign corporations. Werner v. Wal-Mart Stores, Inc., 116 N.M. 229, 861 P.2d 270 (Ct. App. 1993).

Constitutionality of employers mutual company. — Under existing New Mexico case law, the legislation creating the employers mutual company appears to be an unconstitutional special law chartering or licensing an insurance company. Because the company is intended to be operated as a private entity, it is not clear that the exemption from the prohibition against special laws created by other states' courts for public corporations would save the legislation. 1990 Op. Att'y Gen. No. 90-25.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Corporations § 13; 18A Am. Jur. 2d Corporations §§ 186 to 188.

18 C.J.S. Corporations §§ 20, 21.

Sec. 14. [Corporations subject to police power.]

The police power of this state is supreme over all corporations as well as individuals.

ANNOTATIONS

Comparable provisions. — Wyoming Const., art. X, § 2.

Police power prevails over property rights. — Fact that improvements were especially built for and adapted to business of importing and selling high-grade livestock and that plaintiffs would suffer financial loss if prevented from using them was not alone grounds for holding ordinance which prohibited keeping such livestock in designated part of city, void under federal or state constitution, as all property rights are held subject to fair exercise of police power, and reasonable regulation for benefit of public

health, convenience, safety or general welfare is not an unconstitutional taking of property in violation of contract, due process or equal protection clauses of federal constitution. Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941).

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Fine or penalty, power to impose for benefit of private individual or corporation, 13 A.L.R. 828, 19 A.L.R. 205.

Constitutional provision fixing liability of stockholders as limitation on power of legislature in that regard, 63 A.L.R. 870.

Validity of municipal regulation of solicitation of magazine subscriptions, 9 A.L.R.2d 728.

Sec. 15. to 17. Repealed.

ANNOTATIONS

Repeals. — The repeal of Sections 1 through 12 and 15 through 17 of Article XI, effective January 1, 1999, proposed by H.J.R. No. 16 (Laws 1996) was adopted at the general election held November 5, 1996, by a vote of 232,788 for and 221,693 against.

Sec. 18. [Eminent domain of corporate property.]

The right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to the public use, the same as the property of individuals.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XI, § 8.

Wyoming Const., art. X, § 14.

Compiler's notes. — An amendment to this article proposed by S.J.R. No. 2 (Laws 1955), which would have increased membership of corporation commission (now public regulation commission) and provided for effective regulation and control of public utilities, was submitted to the people at a special election held on September 20, 1955, and was defeated for lack of a majority. The defeat made ineffective amendments to public utility laws by Laws 1955, ch. 265, § 21, of which made the amendments dependent upon adoption of the constitutional amendment.

An amendment to this article proposed by S.J.R. No. 7 (Laws 1961) which would have provided for increase in membership of corporation commission (now public regulation commission) and effective regulation and control of public utilities, was submitted to the

people at a special election held on September 19, 1961. It was defeated by a vote of 23,850 for and 25,521 against.

Law reviews. — For comment on State ex rel. State Corp. Comm'n v. Zinn, 72 N.M. 29, 380 P.2d 182 (1963), see 3 Nat. Resources J. 356 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Eminent Domain § 110.

Constitutionality of provisions as to tribunal which shall fix amount of compensation for property taken, 74 A.L.R. 582.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated - state takings, 49 A.L.R. 5th 769.

Sec. 19. [Chartering corporations.] (2012)

The secretary of state shall have responsibility for chartering corporations in such a manner as the legislature shall provide. (As added November 6, 2012.)

ANNOTATIONS

The 2012 amendment to Article XI, which was proposed by H.J.R. No. 16, Section 2 (Laws 2012) and adopted at a general election held on November 6, 2012 by a vote of 326,536 for and 316,493 against, added this section.

Sec. 20. [Creation of office of superintendent of insurance.] (2012)

A. The office of "superintendent of insurance" is created as of July 1, 2013. The superintendent of insurance shall regulate insurance companies and others engaged in risk assumption in such manner as provided by law. The superintendent of insurance shall be appointed by the insurance nominating committee and serve for such terms as may be provided by law; provided that the term of the first superintendent of insurance appointed pursuant to this 2012 amendment shall begin on July 1, 2013 and end on December 31, 2015.

B. The insurance nominating committee shall be appointed and have such qualifications as may be provided by law. The insurance nominating committee shall evaluate applications for superintendent of insurance in accordance with qualifications for superintendent of insurance established by law. (As added November 6, 2012.)

ANNOTATIONS

The 2012 amendment to Article XI, which was proposed by H.J.R. No. 17, Section 2 (Laws 2012) and adopted at a general election held on November 6, 2012 by a vote of 330,873 for and 321,055 against, added this section.

ARTICLE XII
Education

Section 1. [Free public schools.]

A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.

ANNOTATIONS

Cross references. — For statute defining persons entitled to free public school education, *see* 22-1-4 NMSA 1978.

Comparable provisions. — Idaho Const., art. IX, § 1.

Montana Const., art. X, § 1.

Utah Const., art. X, § 1.

Wyoming Const., art. VII, § 1.

No contractual right to education. — The right and privilege to a free public education does not give rise to a contractual relationship for which an individual may sue for breach of contract. Rubio ex rel. Rubio v. Carlsbad Mun. Sch. Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

Only courses "sufficient for the education" should be "free" in the sense of this provision. Courses required of every student shall be without charge to the student, but reasonable fees may be charged for "elective" courses. New Mexico board of education shall define what are "required" or "elective" courses. Norton v. Board of Educ., 89 N.M. 470, 553 P.2d 1277 (1976).

Magnitude of school district constituting effective denial of free school. — If school districts are made so large that children are unable to make trip to school and back home each day, then they would be denied a free school just as effectively as if no school existed. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975); Strawn v. Russell, 54 N.M. 221, 219 P.2d 292 (1950).

State responsibility for education of Indians. — Indicative of congressional policy encouraging New Mexico to provide public education to all of its citizens, including Indians, is that part of state's enabling act which orders that provision be made for establishment and maintenance of system of public schools open to all children of the state and free from sectarian control, which order is picked up in this section and N.M. Const., art. XXI, § 1. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975). See June 20, 1910, 36 Stat. 557, ch. 310, §§ 6 to 9.

Federal government responsible too. — The federal government, in compliance with its treaty obligations to the Navajo tribe, also has a duty to provide for education and other services needed by Indians. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Education for the handicapped. — The state is obligated by both federal and New Mexico law to provide all its pre-college age children with appropriate educations. Under federal law relating to state programs receiving federal financial assistance, the state is forbidden from discriminating against the handicapped in meeting this obligation. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982), rev'g 495 F. Supp. 391 (D.N.M. 1980).

Section applicable only to residents. — This section has been interpreted as applicable only to those children who are residents of New Mexico. 1978 Op. Att'y Gen. No. 78-14.

Activity fees may only be charged by express legislative authority, even if not prohibited by constitution. There is no authority in the statutes, and the charging of these fees, if required as a condition to attendance at public school, is prohibited. 1955-56 Op. Att'y Gen. No. 55-6272.

When school board may allocate attendance. — So long as the statutory and constitutional minimum educational standards are satisfied, the local school board may allocate attendance within the district. 1979 Op. Att'y Gen. No. 79-36.

Proper for district attorney to sue for admittance of black children. — Exclusion of colored children from public school because of race is of such matter of public interest that district attorney could, as a matter of public duty and on behalf of the public, institute proceedings in court in name of parent, to compel school board to receive the children. 1915-16 Op. Att'y Gen. No. 15-1658.

Marriage not proper ground for exclusion. — Students of school age may not be excluded from public schools by reason of being married. 1957-58 Op. Att'y Gen. No. 57-258.

Removal for noncompliance with immunization statutes no constitutional deprivation. — "Disenrollment" of a student for noncompliance with immunization statutes (24-5-1 to 24-5-6 NMSA 1978) would not constitute deprivation of constitutional right to free public school education. 1975 Op. Att'y Gen. No. 75-70.

"Public school" for purposes of federal law. — Any school giving instruction up to and including the twelfth grade, supported in whole or in part by public funds of the state and managed by an elective or appointive body authorized by statutes of the state, is a public school for purposes of federal National Defense Education Act of 1958 (20 U.S.C. § 401 et seq.). 1959-60 Op. Att'y Gen. No. 59-150.

Vouchers for private school education. — This section does not preclude the state from providing tuition assistance in the form of vouchers for private education, as long as it continues to maintain a uniform system of free public schools; however, a constitutional challenge could be supported if the voucher program diverted state funds from public schools so that it compromised the state's ability to establish and maintain a sufficient public school system. 1999 Op. Att'y Gen. No. 99-01.

Summer and after-school remediation programs. — Section 22-2-8.6C NMSA 1978 (now 22-2C-8.6 NMSA 1978), which requires nonindigent parents of children in grades nine through 12 to pay the cost of optional summer and after-school remediation programs, does not offend the "free school guaranty" of this section, as it is construed by the New Mexico supreme court. 1990 Op. Att'y Gen. No. 90-06.

Creation of statewide magnet school. — Article XII, Section 1 of the New Mexico constitution does not preclude the legislature from establishing a statewide publicly funded magnet school, provided the legislature continues to maintain a uniform system of free public schools in the state. 2006 Op. Att'y Gen. No. 06-03.

Law reviews. — For note, "Serrano v. Priest and Its Impact on New Mexico," see 2 N.M. L. Rev. 266 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 5 to 7.

Constitutionality and construction of statutes in relation to admission of nonresident pupils to school privileges, 72 A.L.R. 499, 113 A.L.R. 177.

What is common or public school within contemplation of constitutional or statutory provision, 113 A.L.R. 697.

Power of public school authorities to set minimum or maximum age requirements for pupils in absence of specific statutory authority, 78 A.L.R.2d 1021.

Determination of residence or nonresidence for purpose of fixing tuition fees or the like in public school or college, 83 A.L.R.2d 497, 56 A.L.R.3d 641.

Marriage or pregnancy of public school student as ground for expulsion or exclusion or restriction of activities, 11 A.L.R.3d 996.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

78 C.J.S. Schools and School Districts § 4 et seq.; 78A C.J.S. Schools and School Districts §§ 697, 698.

Sec. 2. [Permanent school fund.] (1996)

The permanent school fund of the state shall consist of the proceeds of sales of Sections Two, Sixteen, Thirty-Two and Thirty-Six in each township of the state, or the lands selected in lieu thereof; the proceeds of sales of all lands that have been or may hereafter be granted to the state not otherwise appropriated by the terms and conditions of the grant; such portion of the proceeds of sales of land of the United States within the state as has been or may be granted by congress; all earnings, including interest, dividends and capital gains from investment of the permanent school fund; also all other grants, gifts and devises made to the state, the purpose of which is not otherwise specified. (As amended November 5, 1996.)

ANNOTATIONS

Compiler's notes. — An amendment proposed by H.J.R. No. 8 (Laws 1994), which would have inserted "all earnings, including interest, dividends and capital gains, from investment of the permanent school fund" following "congress" near the end of the section, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 187,216 for and 192,492 against.

The 1996 amendment, which was proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 307,442 for and 153,021 against, inserted "all earnings, including interest, dividends and capital gains from investment of the permanent school fund". Section 6 of S.J.R. No. 2 (Laws 1996) provides that this amendment shall not become effective without the consent of the United States congress. The United States Congress approved the amendment in P.L. 105-37, 111 Stat. 1113, the New Mexico Statehood and Enabling Act Amendments of 1997, approved August 7, 1997.

Constitution confirms Enabling Act grants. — Provisions of constitution confirm grants made to state under Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310, §§ 6 to 10, set out in Pamphlet 3). 1935-36 Op. Att'y Gen. No. 35-1204.

Land exchanges with United States proper. — Under this section and the Enabling Act (see Pamphlet 3), the state may relinquish title to United States to school lands for other lands taken in lieu thereof. 1933-34 Op. Att'y Gen. No. 34-785.

Under Taylor Grazing Act (43 U.S.C. § 315 et seq.), state may exchange its lands where title is vested in it for other lands of federal government through secretary of the interior, who has power to exchange such lands in same manner as provided for exchange of privately-owned lands. 1935-36 Op. Att'y Gen. No. 35-1204.

Rent for national forest lands applied to current fund. — Money received from United States from rental of school lands in the national forest, in accordance with Enabling Act (see Pamphlet 3), should be applied to state current school fund. 1912-13 Op. Att'y Gen. No. 13-977.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools § 87 et seq.

78 C.J.S. Schools and School Districts § 10.

Sec. 3. [Control of constitutional educational institutions; use of state land proceeds and other educational funds.]

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

ANNOTATIONS

Cross references. — For provisions establishing freedom of religion, *see* N.M. Const., art. II, § 11, and art. XII, § 9.

For general prohibition of aid to charities, *see* N.M. Const., art. IV, § 31.

For prohibition of aid to private enterprise, *see* N.M. Const., art. IX, § 14.

I. GENERAL CONSIDERATION.

Purpose of this section is to insure exclusive control by state over public educational system and to insure that none of state's public schools ever become sectarian or denominational. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Private schools not "rural school rooms". — Private or denominational schools are not "rural school rooms under the jurisdiction of the county school superintendent" for purposes of determining salary of county school superintendent under Section 73-5-1, 1953 Comp. (repealed). Thomson v. Board of Cnty. Comm'rs, 66 N.M. 159, 344 P.2d 171 (1959).

II. STATE CONTROL.

"Control" construed. — "Control" means control over curriculum, disciplinary control, financial control, administrative control and, in general, control over all affairs of the school. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Leasing school lands from Navajos does not prevent state control. — Fact that some schools to be constructed from proceeds of bond issue would be located on reservation lands leased from Navajo tribe would not prevent state from exercising exclusive control over such schools. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Proper to regulate teachers who are members of religious orders. — Members of religious orders who are employed as public school teachers must refrain from teaching sectarian religion and doctrines and from disseminating religious literature during such time, and wearing of religious garb and insignia must be barred during time members of religious orders are on duty as public school teachers. Teachers must be under actual control and supervision of responsible school authorities. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Barring disobedient from teaching in public schools. — Barring certain members of religious order from again teaching after they had knowingly taught sectarian religion in public schools during regular school hours was not improper. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

III. NO SUPPORT OF PRIVATE SCHOOLS.

The appropriation of educational funds to private schools is unconstitutional. — N.M. Const., Art. XII, § 3 expressly prohibits the appropriation of public funds to sectarian, denominational or private schools. A public school under the control of the state can directly receive funds, while a private school not under the exclusive control of the state cannot receive either direct or indirect support. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Where petitioners filed a complaint for declaratory judgment against the secretary of the New Mexico public education department seeking a declaration that the state issuing instructional materials to students attending private schools is unconstitutional, the New Mexico supreme court held that the Instructional Material Law, §§ 22-15-1 through 22-15-14 NMSA 1978, in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions, and private schools as agents for the benefit of eligible students, violates N.M. Const., Art. XII, § 3, because the constitutional provision expressly restricts the use of public funds to other than sectarian schools and expressly prohibits the appropriation of educational funds to private schools. Moses v. Skandera, 2015-NMSC-036, *rev'g* 2015-NMCA-036, 346 P.3d 396.

Purpose of this section. — The purpose of this provision is to insure exclusive control by the state over the public educational system, and to insure that none of the state's public schools ever become sectarian or denominational. Moses v. Skandera, 2015-NMCA-036, cert. granted, 2015-NMCERT-001.

Furnishing of instructional material to students attending private schools is not an unconstitutional support of private schools. — The Instructional Material Law (IML), 22-15-1 through 22-15-14 NMSA 1978, in which the New Mexico public education department purchases and distributes instructional material to school districts, state institutions and private schools as agents for the benefit of eligible students, does not violate this section because the focus of the IML is not to support private schools, but to provide instructional material for the benefit of students, the

program is secular in nature, and the state controls the use and disposition of the instructional material; although the private schools receive some benefit, this section will not be interpreted to prohibit indirect and incidental benefit when the legislative purpose of the IML does not focus on support of private schools. Moses v. Skandera, 2015-NMCA-036, cert. granted, 2015-NMCERT-001.

Salary to public school teacher not aid to religion. — Since salaries of members of religious orders who serve as teachers are the same as those of other teachers, this is not aid to religion or to the church denounced by federal and state constitutions. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Use of land grant funds to finance private or sectarian education programs. — The Enabling Act of June 20, 1910, 36 Stat. 557, ch. 310 and the constitution of New Mexico prohibit the state from using money, directly or indirectly, from the land grant permanent fund for private, sectarian or denominational schools. The distribution of land grant funds to a private, sectarian or denomination school would require amendments to the Enabling Act by congress and an amendment to the constitution of New Mexico proposed by the legislature and adopted by the state's voters. 2012 Op. Att'y Gen. No. 12-03.

Section forbids disbursement of public money to nonpublic schools. — New Mexico Const., art. IV, § 31, art. IX, § 14 and this section would be violated if public money was disbursed to nonpublic schools in order to purchase secular education service. 1969 Op. Att'y Gen. No. 69-06.

Voucher system would aid children, not schools. — Under a voucher system for exceptional children, parents would apply for money already allocated to their children and would use that money to purchase educational services at a private school. The money, therefore, is used for children and not for schools. The "support," if any, of private schools is only an indirect consequence. The prohibition in this section is limited to direct support of private schools, and thus voucher system would not be in violation of that provision. 1976 Op. Att'y Gen. No. 76-06.

Vouchers for private school education. — Tuition assistance in the form of vouchers for private education may constitute the unconstitutional use of public money for the support of sectarian, denominational or private schools. 1999 Op. Att'y Gen. No. 99-01.

Public school trucks may not be used to transport pupils of private schools. 1921-22 Op. Att'y Gen. No. 21-3170.

Driver of school bus can legally refuse to transport school children attending Catholic school, for county board of education is prohibited from using public school funds for benefit of sectarian schools. 1931-32 Op. Att'y Gen. No. 31-36.

Statute allowing transportation of students compelled to attend school proper. — Section 73-7-36, 1953 Comp. (repealed), extending scope of school bus transportation

by allowing transportation of all pupils attending school in compliance with compulsory school attendance laws under certain conditions does not violate constitution of New Mexico. 1951-52 Op. Att'y Gen. No. 51-5339.

Contracts for transportation of students to private schools. — While school districts may not provide transportation of students to private schools pursuant to this provision, a county may contract with a school district for such transportation pursuant to former 22-16-7 NMSA 1978 if the county is reimbursed for the cost of such transportation by the private schools or their students pursuant to an enforceable contract. 1989 Op. Att'y Gen. No. 89-02.

No religious instruction in public school buildings without payment. — In the absence of payment for such use, public school buildings may not be used for religious instruction. 1969 Op. Att'y Gen. No. 69-16.

Paying salary to teacher belonging to religious order not unconstitutional support. — Public money paid to members of a religious order teaching in the public schools, which would go to the religious order, is not support in violation of this section. 1979 Op. Att'y Gen. No. 79-07.

Indirect benefit may not invoke prohibition. — To the extent that proposed tuition grants for the purpose of defraying tuition costs at private colleges and universities are made to the students upon their application and not to private colleges, institutions and universities, the proposal did not authorize the direct support of private schools, and this distinction may be sufficient to avoid a violation of this section. 1979 Op. Att'y Gen. No. 79-07.

Noninterfering use of gymnasium proper. — School board may permit students from parochial schools to use gymnasiums or other school facilities if such use does not interfere with regular school activities, but they may not use public school property and funds for support of parochial schools. 1937-38 Op. Att'y Gen. No. 36-1479.

Conditions under which private group may use school. — A local board of education may permit a particular religious denomination or private group to use public school buildings or facilities after school hours where such use in the opinion of the school board will not interfere with normal school activities, but the board may not in any respect sanction or give endorsement to such religious denominational programs. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Include equal treatment of groups. — A local school board must, in exercising its discretion as to whether a particular religious denomination may use public school facilities after school hours, either make the use of school facilities available to all religious groups on an equal basis and without preference as to any particular group or not permit such use at all. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Reimbursement of school's actual expenses. — Since a school district may not in any manner lend its financial or other support to any private religious denominations, it is incumbent upon school authorities to obtain reimbursement for any actual expenses occasioned from a religious group's private use of public school facilities. 1963-64 Op. Att'y Gen. No. 63-106 (rendered under former law).

Contract for medical training in Colorado. — Contract entered into by university of New Mexico regents for medical training for limited number of students to be taught at university of Colorado would be valid and would not contravene constitution or laws of New Mexico if said contract would be so drawn as to withhold in New Mexico and the university such control as would not contravene this section. 1951-52 Op. Att'y Gen. No. 51-5334.

City ordinances inapplicable to university land. — Ordinances of city of Albuquerque dealing with crimes do not apply to land under control of board of regents of university of New Mexico, except for traffic offenses as provided in 35-14-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

State may not bar prayers at university functions. — State educational institution may neither order nor ban prayers at university functions. To do either act would violate constitutional duty of strict neutrality in church-state relations. 1970 Op. Att'y Gen. No. 70-27.

Law reviews. — For note, "Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris," see 34 N.M. L. Rev.194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 96, 97, 349, 365, 366.

Religious meeting in schoolhouse, 5 A.L.R. 886, 141 A.L.R. 1153, 75 A.L.R.2d 742.

Schoolhouse as a "public building," 19 A.L.R. 545.

Pledge or mortgage of property or income therefrom, power as to, 71 A.L.R. 828.

Hiring or leasing schoolhouse to private persons for occasional use, 86 A.L.R. 1175.

Lease of school property, power of school or local authorities as to grant of, 111 A.L.R. 1051.

Sectarianism in schools, 141 A.L.R. 1144.

Inclusion of period of service in sectarian school in determining public schoolteachers' seniority, salary or retirement benefits, as violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Use of school property for other than school or religious purposes, 94 A.L.R.2d 1274.

Lease or sublease of school property, power of municipal corporations as to, 47 A.L.R.3d 19.

Validity of local or state denial of public school courses or activities to private or parochial school students, 43 A.L.R.4th 776.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

78 C.J.S. Schools and School Districts §§ 11, 809 et seq.

Sec. 4. [Current school fund.]

All forfeitures, unless otherwise provided by law, and all fines collected under general laws; the net proceeds of property that may come to the state by escheat; the rentals of all school lands and other lands granted to the state, the disposition of which is not otherwise provided for by the terms of the grant or by act of congress shall constitute the current school fund of the state. (As amended November 2, 1971, November 4, 1986 and November 5, 1996.)

ANNOTATIONS

Comparable provisions. — Idaho Const., art. IX, § 4.

Montana Const., art. X, §§ 2, 3.

Utah Const., art. X, § 7.

Wyoming Const., art. VII, §§ 3, 5.

Compiler's notes. — Eight amendments to the constitution were proposed by 1970 session of legislature although attorney general stated that constitutional amendments

may not be considered in even-numbered years. 1969-70 Op. Att'y Gen. No. 69-151; 1965-66 Op. Att'y Gen. No. 65-212.

An amendment to this section proposed by S.J.R. No. 10 (Laws 1961), which would have provided for deduction of administrative costs from fines and forfeitures before transmission to current school fund, was submitted to the people at a special election held on September 19, 1961. It was defeated by a vote of 20,780 for and 28,202 against.

H.J.R. No. 3 (Laws 1969) proposed the repeal of this section but provided that the proposal would not be submitted to the people if the constitutional convention submitted a new constitution or an amendment to repeal this section. A proposed constitution was submitted to the voters and rejected on December 9, 1969.

H.J.R. No. 3 (Laws 1970), which proposed the repeal of this section, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 60,531 for and 68,720 against.

An amendment proposed by H.J.R. No. 8 (Laws 1994), which would have deleted "and the income derived from the permanent school fund" following "congress" near the end of the section, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 187,216 for and 192,492 against.

Special election. — Laws 1971, ch. 308, §§ 1 and 2, provides that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriates $171,000 for election expenses.

The 1971 amendment, which was proposed by S.J.R. No. 30 (Laws 1971) and adopted at the special election held on November 2, 1971, by a vote of 43,139 for and 28,945 against, deleted everything after the first sentence. The deleted provisions related to the school tax, distribution of the current school fund and the minimum school year.

The 1986 amendment, which was proposed by S.J.R. No. 11 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 181,813 for and 93,731 against, deleted "fines and" before "forfeitures" and added "unless otherwise provided by law and all fines" after "forfeitures" at the beginning of the section.

The 1996 amendment, which was proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 307,442 for and 153,021 against, deleted "and the income derived from the permanent school fund" following "act of congress" near the end and made a stylistic change. Section 6 of S.J.R. No. 2 (Laws 1996) provides that this amendment shall not become effective without the consent of the United States congress. The United States Congress approved the amendment in P.L. 105-37, 111 Stat. 1113, the New Mexico Statehood and Enabling Act Amendments of 1997, approved August 7, 1997.

County taxes for school maintenance valid. — Taxes levied in county for school maintenance under Laws 1917, ch. 105 (repealed), were county taxes levied for a public purpose and did not violate this section. Raynolds v. Swope, 28 N.M. 141, 207 P. 581 (1922).

"Common school current fund" appropriate name. — Although this section provides that school funds shall be kept in the "current school fund," the "common school income (now current) fund" created by 19-1-17 NMSA 1978 shall be carried in the treasurer's books and funds shall be transferred to the "common school (current) fund". 1912-13 Op. Att'y Gen. No. 12-947.

Section does away with previous statutory provisions on disposition of fines. — All fines must go into state treasury to credit of current school fund. This section does away with all previous statutory provisions on the subject. 1912-13 Op. Att'y Gen. No. 12-956.

Disposition of fines under game and fish law unconstitutional. — Laws 1912, ch. 85, § 49 (repealed), which provided that fines collected for violations of act for protection of game and fish should be sent to state treasurer and by him set aside to the "game protection fund," and § 50 (repealed), which provided that one-half of fines collected should go to state treasurer and be credited by him as aforesaid and the other half should go to persons instituting prosecution were unconstitutional insofar as they related to disposition of fines, being in direct conflict with this section requiring all fines collected under general laws to be credited to current school fund. 1915-16 Op. Att'y Gen. No. 15-1418.

Medical licensing fines go into current school fund. — Fines collected under Laws 1907, ch. 34 (superseded by 61-6-1 NMSA 1978 et seq., relating to licensing of doctors and surgeons), go into current school fund by virtue of this section. 1912-13 Op. Att'y Gen. No. 13-1030.

Proper disposition of fines levied by justices of the peace. — Justices of the peace should collect their own fines and report them to board of county commissioners who should see that such fines are paid to state treasurer for current school fund. 1937-38 Op. Att'y Gen. No. 37-1705.

Costs not part of fine. — Section 53-1-10, 1953 Comp. (repealed), relating to state game commission, is constitutional as it imposes costs in criminal cases which are not part of fine. 1931-32 Op. Att'y Gen. No. 31-259.

Payment made upon forfeiture of bond properly sent to state treasury. 1915-16 Op. Att'y Gen. No. 15-1680.

Fines exempt from referendum. — Under this section all fines collected by the state go to maintenance of public schools, thus falling within exemption from referendum provided in N.M. Const., art. IV, § 1. 1955-56 Op. Att'y Gen. No. 55-6268.

Proper disposition of escheated property. — Net proceeds of property that comes to state by escheat go into current school fund, and after expiration of a year, which is given to permit claims or administration of estate, such proceeds should be remitted to state treasurer. 1937-38 Op. Att'y Gen. No. 37-1795 (decided prior to 1986 amendment, inserting "unless otherwise provided by law").

Rental income from school lands goes into fund. — State superintendent of schools may no longer use income from rental, sale or lease of common school lands, but such funds must go into current school fund. 1912-13 Op. Att'y Gen. No. 13-1043.

Delinquent taxes provision subject to this section. — Section 72-7-32, 1953 Comp. (repealed), providing for 10% of delinquent taxes to be paid into tax commission fund, cannot divest taxes from levies for state current school fund, which must be used as provided in this section. 1939-40 Op. Att'y Gen. No. 39-3127.

Constitution does not require distribution of current school funds on any certain day. 1961-62 Op. Att'y Gen. No. 61-19 (opinion rendered prior to 1971 amendment).

Time for opening and closing schools. — County boards of education may set time for opening and closing of schools provided they comply with provisions of this section and 73-13-13, 1953 Comp. (repealed), requiring that school be maintained for at least seven months each year. 1949-50 Op. Att'y Gen. No. 50-5318 (opinion rendered prior to 1971 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 44, 45, 87 et seq., 92 to 97.

Injunction against enforcement of illegal school tax, upon joinder of several affected thereby, 32 A.L.R. 1273, 156 A.L.R. 319.

Recovery of tax illegally exacted, judgment in favor of taxpayer for, as subject to provisions of statute regarding substance and form, manner of collection or enforcement of judgment against political unit, 101 A.L.R. 800.

Common or public school, what is, within contemplation of constitutional or statutory provisions as to taxation, 113 A.L.R. 715.

Right of other governmental unit, or officers thereof, to compensation for collecting or disbursing special school taxes levied by school district, 114 A.L.R. 1098.

Kinds or types of contractual obligations within general terms "contracts," "obligations," etc., or specific terms "bonds," "notes," etc., in statute validating or legalizing obligations of public bodies, 128 A.L.R. 1411.

Rescission of vote authorizing school district bond issue, expenditure or tax, 68 A.L.R.2d 1041.

Amount of property which may be condemned for public school, 71 A.L.R.2d 1071.

Determination of school attendance, enrollment or pupil population for purpose of apportionment of funds, 80 A.L.R.2d 953.

78 C.J.S. Schools and School Districts §§ 10, 13; 78A C.J.S. Schools and School Districts § 558 et seq.

Sec. 5. [Compulsory school attendance.]

Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as may be prescribed by law.

ANNOTATIONS

Cross references. — For statutory provisions regarding compulsory school attendance, *see* 22-12-1 NMSA 1978 et seq.

No contractual right to education. — The right and privilege to a free public education does not give rise to a contractual relationship for which an individual may sue for breach of contract. Rubio ex rel. Rubio v. Carlsbad Mun. Sch. Dist., 106 N.M. 446, 744 P.2d 919 (Ct. App. 1987).

Duty to protect children. — Compulsory attendance laws in no way restrain a child's liberty so as to render the child and his parents unable to care for the child's basic needs. Thus, the state does not incur under the due process clause an affirmative duty to protect school children who attend state-run schools from deprivations by private actors merely on the basis of compulsory attendance laws. Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992), cert. denied, 507 U.S. 914, 113 S. Ct. 1266, 122 L. Ed. 2d 662 (1993).

Excuse from school to attend religious exercises requires specific legislation. — In order to excuse children from school for certain period of time to attend religious exercises away from school property, this section and 22-12-2 NMSA 1978 require that specific legislation be adopted. 1969 Op. Att'y Gen. No. 69-16.

Law reviews. — For comment, "Compulsory School Attendance - Who Directs the Education of a Child? State v. Edgington," see 14 N.M. L. Rev. 453 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 228 to 239.

Extent of legislative power with respect to attendance, 39 A.L.R. 477, 53 A.L.R. 832.

Releasing public school pupils from attendance for purpose of receiving religious instruction, 2 A.L.R.2d 1371.

Religious beliefs of parents as defense to prosecution for failure to comply with compulsory education law, 3 A.L.R.2d 1401.

Applicability of compulsory attendance law covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

What constitutes "private school" within statute making attendance at such a school compliance with compulsory school attendance law, 65 A.L.R.3d 1222.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

79 C.J.S. Schools and School Districts § 463.

Sec. 6. [Public education department; public education commission.] (2004)

A. There is hereby created a “public education department” and a “public education commission” that shall have such powers and duties as provided by law. The department shall be a cabinet department headed by a secretary of public education who is a qualified, experienced educator who shall be appointed by the governor and confirmed by the senate.

B. Ten members of the public education commission shall be elected for staggered terms of four years as provided by law. Commission members shall be residents of the public education commission district from which they are elected. Change of residence of a commission member to a place outside the district from which he was elected shall automatically terminate the term of that member.

C. The governor shall fill vacancies on the commission by appointment of a resident from the district in which the vacancy occurs until the next regular election for membership on the commission.

D. The secretary of public education shall have administrative and regulatory powers and duties, including all functions relating to the distribution of school funds and financial accounting for the public schools to be performed as provided by law.

E. The elected members of the 2003 state board of education shall constitute the public education commission, if this amendment is approved, until their terms expire and the districts from which the state board of education were elected shall constitute the state public education commission districts until changed by law. (As amended November 4, 1958, effective January 1, 1959, November 4, 1986, and September 23, 2003.)

ANNOTATIONS

Cross references. — For the public education department and commission, *see* the Public Education Department Act, 9-24-1 NMSA 1978 et seq.

Comparable provisions. — Idaho Const., art. IX, § 2.

Montana Const., art. X, § 9.

Utah Const., art. X, § 3.

Wyoming Const., art. VII, § 14.

The 1958 amendment, which was proposed by S.J.R. No. 3 (Laws 1957) and adopted at the general election held on November 4, 1958, with a vote of 48,884 for and 41,795 against, completely rewrote this section. Prior to amendment the section read: "A state board of education is hereby created, to consist of seven members. It shall have the control, management and direction of all public schools, under such regulations as may be provided by law. The governor and the state superintendent of public instruction shall be ex officio members of said board and the remaining five members shall be appointed by the governor, by and with the consent of the senate; and shall include the head of some state educational institution, a county superintendent of schools, and one other person actually connected with educational work. The legislature may provide for district or other school officers, subordinate to said board."

The 1986 amendment, which was proposed by H.J.R. No. 4 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 142,909 for and 126,928 against, repealed existing Section 6 relating to the state department of public education and the state board of education and adopted a new Section 6.

The 2003 amendment, which was proposed by S.J.R. Nos. 2, 5, 12, and 21 (Laws 2003) and adopted at the special election held September 23, 2003, by a vote of 101,542 for and 83,155 against, rewrote Subsection A, which had provided for the creation of a state department of public education and a state board of education and the appointment of a superintendent of public instruction by the board, substituted references to the public education commission for references to the state board of education throughout and deleted “who shall be state officers” preceding “shall be elected” in the first sentence of Subsection B, deleted former Subsection C, which had provided for the nomination by the senate and appointment by the governor of five members of the state board of education for staggered four-year terms, redesignated former Subsection D as present Subsection C and substituted “commission” for “board” twice in that subsection, deleted former Subsection E, which had provided for the transfer to the state department of public education of functions relating to distribution of funds and financial accounting for the public schools, and added present Subsections D and E.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 20 (Laws 1975), which would have repealed this section and adopted a new Section 6 providing

for a state board of education of nine members to be appointed by the governor with the consent of the senate, the members to be appointed so as to give geographic representation to all areas of the state, prescribing grounds and methods of removing members and granting the board specified powers and duties, to be exercised as provided by law, including the requirement that budgets and expenditures of funds by public schools be controlled by the board, was submitted to the people at the general election held on November 2, 1976. It was defeated by a vote of 94,258 for and 157,986 against.

For delayed repeals contingent on adoption of the September 23, 2003 amendment to Article 12, Section 6 of the constitution of New Mexico, see Articles 1, 2, 13, 13A and 15 of Chapter 22 NMSA 1978.

I. GENERAL CONSIDERATION.

Authority of secretary of public education to revoke teachers' licenses. — Article XII, Section 6 of the New Mexico Constitution, the Uniform Licensing Act (61-1-1 NMSA 1978 et seq.), the Public Education Department Act (Chapter 9, Article 24 NMSA 1978), the Public School Code (Chapter 22 NMSA 1978), and the School Personnel Act (Chapter 22, Article 10A NMSA 1978), do not preclude the secretary of public education from having exclusive authority to make the final decision to revoke a teacher's license. Skowronski v. New Mexico Pub. Educ. Dep't, 2013-NMCA-034, 298 P.3d 469, cert. granted, 2013-NMCERT-003.

Section not self-executing. — This section, requiring state board of education to determine public school policy and to have control, management and direction of all public schools, pursuant to authority and powers provided by law, is not self-executing. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

Appellate review. — It is not province of appellate court to retry case brought before it on appeal from state board. Wickersham v. State Bd. of Educ., 81 N.M. 188, 464 P.2d 918 (Ct. App. 1970).

Courts should not inquire into policy or justness of legislation. — Procedure for deciding whether to reemploy tenured teacher is provided by statute (former 22-10-15, 22-10-20 and 22-10-21 NMSA 1978), and it is not the appellate court's function to inquire into policy or justness of acts of legislature. Wickersham v. State Bd. of Educ., 81 N.M. 188, 464 P.2d 918 (Ct. App. 1970).

Deciding whether or not an administrator is fit to perform his duties is a question of policy, and the appellate court will not alter the state board's decision unless the court is convinced it is unreasonable, not supported by substantial evidence or not in accordance with law. Board of Educ. v. Jennings, 98 N.M. 602, 651 P.2d 1037 (Ct. App. 1982).

Courts may evaluate board's action by standard of reasonableness. — Courts have jurisdiction of purely legal questions which may arise in connection with teacher tenure statutes (22-10A-24 NMSA 1978 and former 22-10-15 NMSA 1978), and other educational acts, such as question here presented as to whether or not appellee had tenure; and action of state board of education would be subject to review on ground that it was wholly arbitrary, unlawful, unreasonable or capricious. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954), superseded by statute, Sanchez v. Board of Educ. of Town of Belen, 68 N.M. 440, 362 P.2d 979 (1961).

Appellate court review is limited to determination of whether constitutional body acted arbitrarily, unreasonably, unlawfully or capriciously. Wickersham v. State Bd. of Educ., 81 N.M. 188, 464 P.2d 918 (Ct. App. 1970).

II. POWERS OF BOARD.

Board powers. — Board has control, management and direction of public schools, but only as provided by law. Fort Sumner Mun. Sch. Bd. v. Parsons, 82 N.M. 610, 485 P.2d 366 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

Board has judicial powers. — It was within power of framers of constitution to confer upon state board of education such limited judicial powers as they deemed proper. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954).

Such judicial powers as have been conferred upon state board by legislature pursuant to 55-101, 1941 Comp. (repealed), fall clearly within constitutional authority conferred upon state board for control, management and direction of public schools. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954), superseded by statute, Sanchez v. Board of Educ. of Town of Belen, 68 N.M. 440, 362 P.2d 979 (1961).

Board decisions are conclusive. — Within limited area prescribed by this section, decisions of board are final and conclusive as between the parties and are not subject to review. McCormick v. Board of Educ., 58 N.M. 648, 274 P.2d 299 (1954), superseded by statute, Sanchez v. Board of Educ. of Town of Belen, 68 N.M. 440, 362 P.2d 979 (1961).

Power to hire and fire in municipal boards. — Power to employ and discharge teachers and other school employees was reposed in municipal boards of education. Bourne v. Board of Educ., 46 N.M. 310, 128 P.2d 733 (1942).

State board only has jurisdiction over teacher where teacher appeals to board from adverse ruling by local board of education. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

Affair may be found insufficient cause for firing. — It is within the province of the state board to decide that a private affair between consenting adults, an assistant

principal and a school secretary is not "good and just cause" to fire an employee. Board of Educ. v. Jennings, 98 N.M. 602, 651 P.2d 1037 (Ct. App. 1982).

Board without authority to manage private schools. — Legislature has constitutional authority to invest state board with power to approve courses of instruction in private schools, but 22-12-2 NMSA 1978 does not extend to board authority to supervise or exercise control or management over private schools. Santa Fe Cmty. Sch. v. State Bd. of Educ., 85 N.M. 783, 518 P.2d 272 (1974).

Board lacks exclusive power to remove district board members. — State board did not have exclusive power to remove member of district board of education. State ex rel. Hannah v. Armijo, 37 N.M. 423, 24 P.2d 274 (1933).

Board action not within purpose of its authority. — Suspension of teacher for incompatibility with membership on the state board of education does not fall within purpose of insuring high quality of public instruction. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

III. MEMBERSHIP OF BOARD.

Members of state board of education are state officers and not local officers. State ex rel. Apodaca v. State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

No right to elect board members from district where child attends school. — Although nothing in constitution or statutes prohibits school district from crossing either county or judicial district boundaries, and there is no requirement that children attend public schools within judicial district where they reside, yet there is nothing in N.M. Const., art. VII, §§ 1 and 3, which suggests that there is conferred on a qualified elector the right to cast his vote for a candidate for state board of education from judicial district in which elector's child attends public school. Rather, his right is to vote for the candidate of his choice, to be elected from the judicial district in which he has voting residence. State ex rel. Apodaca v. State Bd. of Educ., 82 N.M. 558, 484 P.2d 1268 (1971).

State board member appealing from local board action. — If teacher who is also member of state board should appeal from action of local board, the teacher would simply refrain from acting as member of the board in his case, just as would a member of any other trade or profession who appealed to board of which he was member. Amador v. State Bd. of Educ., 80 N.M. 336, 455 P.2d 840 (1969).

Board member's right to vote. — Ex-officio officers and members of state boards have right to vote unless that right is specifically denied them by constitution or statute. 1951-52 Op. Att'y Gen. No. 51-5408.

Distribution of bond proceeds. — Where the 2010 Capital Projects General Obligation Bond Act, Laws 2010, ch. 3, § 10 (2nd Spec. Sess.) appropriated two million

dollars ($2,000,000) to the public education department to purchase school books and instructional materials statewide and the act did not include specific restrictions on the bond proceeds other than a directive to "purchase school books and instructional materials statewide", the secretary of public education did not violate the act or any other applicable state law or abuse the secretary's discretion by distributing the bonds proceeds based on student enrollment to eighty-eight "award" schools across the state, with all but three recipients designated as either "A" or "top growth" schools. 2014 Op. Att'y Gen. 14-03.

Implementation of Paragraph E. — The department of education may implement the provisions contained in Subsection E notwithstanding the lack of legislation transferring the powers now vested in the office of education to the department of education. 1987 Op. Att'y Gen. No. 87-36.

Proper meeting place. — Constitution (art. XXI, § 6) necessitates that state board of education maintain its permanent office, books, records and files in Santa Fe at the state capital, and the board must in most instances hold its regular meetings at the state capitol. Nonetheless, pursuant to its constitutional and statutory authority to supervise the public schools, the board may from time to time hold meetings in various parts of the state to study, consider and decide matters pertinent to schools in the area where the meeting is held. 1963-64 Op. Att'y Gen. No. 64-21 (opinion rendered under Sections 73-1-1 and 73-1-7, 1953 Comp., now repealed).

Legislature determines scope of board's authority. — The authority granted the state board for "control, management and direction" of all public schools must be specifically defined by the legislature. It necessarily follows that legislature may also divest board of duties previously defined since the power and authority of board may be exercised only as "provided by law". Thus legislature may provide for repeal of 22-2-2 NMSA 1978, delegating duties of certification to the board. 1977 Op. Att'y Gen. No. 77-06.

Duty of board to establish routes from rural districts to high schools. — If necessity exists for establishment of routes from rural districts to high schools in municipal or independent school district, which would serve only rural district, county board of education, with approval of state board, would have right to establish such routes. Efficiency and convenience may require that such routes be established to serve both local districts and municipal or independent school district, and in such case boards of county and municipal or independent district to be served have right to establish them with approval of state board. But if boards could not agree, state board, under its authority and responsibility created by constitution, must establish routes when satisfactory ones are not proposed by August 15 of each year. 1939-40 Op. Att'y Gen. No. 39-3288.

Duty to approve proper high school budget estimates. — It is mandatory on state board of education and superintendent of public instruction to approve proper budget

estimates for high schools. 1931-32 Op. Att'y Gen. No. 32-452 (decided prior to 1986 amendment, adding Subsection E).

Board can ban smoking. — The state board of education can choose to ban smoking for both adults and minors in public school buildings and campuses since the New Mexico constitution grants the board broad authority to determine public school policy. 1994 Op. Att'y Gen. No. 94-03.

Teacher's salary cannot be based upon residence within district. — No school board may lawfully increase or decrease a teacher's salary solely upon basis of residence or nonresidence within school district. 1963-64 Op. Att'y Gen. No. 64-85.

Eligibility of school personnel. — An assistant superintendent employed by the Santa Fe school district may also serve as an elected member of the state board of education so long as the duties of membership on the state board do not physically interfere with the duties of the assistant superintendent during the ordinary working hours of that position and the two positions are not otherwise incompatible. 1992 Op. Att'y Gen. No. 92-04.

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act for New Mexico," see 8 Nat. Resources J. 114 (1968).

For student symposium, "Constitutional Revision - The Executive Branch - Long or Short Ballot?," see 9 Nat. Resources J. 430 (1969).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M. L. Rev. 1 (1981).

For annual survey of New Mexico law relating to administrative law, see 12 N.M. L. Rev. 1 (1982).

For 1984-88 survey of New Mexico administrative law, 19 N.M. L. Rev. 575 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 52 to 59.

Extent of power of school district to provide for the comfort and convenience of teachers and pupils, 7 A.L.R. 791, 52 A.L.R. 249.

Dismissal or suspension of pupil, personal liability of school authorities for, 42 A.L.R. 763.

Power of school board to make appointment of, or contract of employment with, teacher or superintendent of school for period beyond its own term, 70 A.L.R. 802, 149 A.L.R. 343.

Invalid public money obligation, personal liability of public officers to holders of, 87 A.L.R. 273.

Power of public school authorities to set minimum or maximum age requirements for pupils in absence of specific statutory authority, 78 A.L.R.2d 1021.

Tort liability of public schools and institutions of higher learning, 86 A.L.R.2d 489, 33 A.L.R.3d 703, 34 A.L.R.3d 1166, 34 A.L.R.3d 1210, 35 A.L.R.3d 725, 35 A.L.R.3d 758, 36 A.L.R.3d 361, 37 A.L.R.3d 712, 37 A.L.R.3d 738, 38 A.L.R.3d 830, 23 A.L.R.5th 1.

Student's right to compel school officials to issue degree diploma, or the like, 11 A.L.R.4th 1182.

Applicability and application of § 2 of Voting Rights Act of 1965 (42 USCS § 1973) to members of school board, 105 A.L.R. Fed. 254.

78 C.J.S. Schools and School Districts §§ 7, 81 et seq.

Sec. 7. [Investment of permanent school fund.] (2014)

A. As used in this section, "fund" means the permanent school fund described in Article 12, Section 2 of this constitution and all other permanent funds derived from lands granted or confirmed to the state by the act of congress of June 20, 1910, entitled "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states.".

B. The fund shall be invested by the state investment officer in accordance with policy regulations promulgated by the state investment council.

C. In making investments, the state investment officer, under the supervision of the state investment council, shall invest and manage the fund in accordance with the Uniform Prudent Investor Act.

D. The legislature may establish criteria for investing the fund if the criteria are enacted by a three-fourths' vote of the members elected to each house, but investment of the fund is subject to the following restrictions:

(1) not more than sixty-five percent of the book value of the fund shall be invested at any given time in corporate stocks;

(2) not more than ten percent of the voting stock of a corporation shall be held; and

(3) stocks eligible for purchase shall be restricted to those stocks of businesses listed upon a national stock exchange or included in a nationally recognized list of stocks.

E. All additions to the fund and all earnings, including interest, dividends and capital gains from investment of the fund shall be credited to the fund.

F. Except as provided in Subsection G of this section, the annual distributions from the fund shall be five percent of the average of the year-end market values of the fund for the immediately preceding five calendar years.

G. In addition to the annual distribution made pursuant to Subsection F of this section, unless suspended pursuant to Subsection H of this section, an additional annual distribution shall be made pursuant to the following schedule; provided that no distribution shall be made pursuant to the provisions of this subsection in any fiscal year if the average of the year-end market values of the fund for the immediately preceding five calendar years is less than ten billion dollars ($10,000,000,000):

(1) in fiscal years 2005 through 2012, an amount equal to eight-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years; provided that any additional distribution from the permanent school fund pursuant to this paragraph shall be used to implement and maintain educational reforms as provided by law; and

(2) in fiscal years 2013 through 2016, an amount equal to one-half percent of the average of the year-end market values of the fund for the immediately preceding five calendar years; provided that any additional distribution from the permanent school fund pursuant to this paragraph shall be used to implement and maintain educational reforms as provided by law.

H. The legislature, by a three-fifths' vote of the members elected to each house, may suspend any additional distribution provided for in Subsection G of this section. (As amended November 4, 1958, September 23, 1965, November 6, 1990, November 5, 1996, September 23, 2003 and November 4, 2014.)

ANNOTATIONS

Cross references. — For statutes establishing state investment council, *see* 6-8-1 et seq. NMSA 1978.

For powers and duties of state investment officer, *see* 6-8-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. IX, § 3.

Montana Const., art. X, § 3.

Utah Const., art. X, § 7.

Wyoming Const., art. VII, § 6.

The 1958 amendment, proposed by S.J.R. No. 12 (Laws 1957) and adopted at the general election held on November 4, 1958 by a vote of 56,877 for and 26,332 against, completely rewrote the section, which prior to amendment had read: "The principal of the permanent school fund shall be invested in the bonds of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein. The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must be first approved by the governor, attorney general and secretary of state. All losses from such funds, however occurring, shall be reimbursed by the state."

The 1965 amendment, proposed by H.J.R. No. 12 (Laws 1965) and adopted at a special election held on September 28, 1965 by a vote of 27,687 for and 22,502 against, designated the former second paragraph as the present third paragraph, increased therein the maximum investment in corporate stocks and bonds from 25% to 50% and inserted the present second paragraph.

The 1989 amendment, proposed by S.J.R. 12 (Laws 1989) and adopted at the general election held on November 6, 1990 by a vote of 189,456 for and 125,779 against, deleted the former last sentence of the first paragraph, which read "All losses from such interest-bearing notes or securities which have definite maturity dates shall be reimbursed by the state" and deleted the former second paragraph relating to sale of interest-bearing notes or securities by the state investment officer at less than their original acquisition cost under specified circumstances.

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 11 (Laws 1990), which would have deleted from the end the proviso beginning "and provided further" was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 137,565 for and 169,859 against.

An amendment proposed by H.J.R. No. 8 (Laws 1994), which would have rewritten this section to require earnings of the fund to be deposited to the credit of the fund and provide for limited distribution from the fund, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 187,216 for and 192,492 against.

The 1996 amendment, proposed by S.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996 by a vote of 307,442 for and 153,021 against, added Subsections A, D, E, and F and rewrote the remainder of the section. Section 6 of S.J.R. No. 2 (Laws 1996) provides that this amendment shall not become effective without the consent of the United States congress. The United States Congress

approved the amendment in P.L. 105-37, 111 Stat. 1113, the New Mexico Statehood and Enabling Act Amendments of 1997, approved August 7, 1997.

The 2003 amendment, proposed by S.J.R. Nos. 6 (Laws 2003) and adopted at the special election held September 23, 2003 by a vote of 92,198 for and 92,003 against, rewrote Subsection F, which had provided that annual distributions from the fund were to increase by 2% per year until the annual distributions reached a maximum value of 4.7% of the average of the year-end market values of the fund for the preceding five calendar years, and added Subsections G and H.

The 2014 amendment, proposed by H.J.R. No. 16 (Laws 2014) and adopted at the general election held on November 4, 2014 by a vote of 225,641 for and 202,072 against, increased the duty of care for the management and investment of the fund; removed the restriction on the percentage of the fund that may be invested in international securities; increased the threshold amount for distributions in addition to the annual distribution; in Subsection C, after "state investment council, shall", deleted "exercise the judgment and care under the circumstances then prevailing that businessmen of ordinary prudence, discretion and intelligence exercise in the management of their own affairs not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital" and added "invest and manage the fund in accordance with the Uniform Prudent Investor Act"; in Subsection D, deleted former Paragraph (4) which provided that "not more than fifteen percent of the book value of the fund may be invested in international securities at any single time"; and in Subsection G, after "five calendar years is less than", deleted "five billion eight hundred million dollars ($5,800,000,000)" and added "ten billion dollars ($10,000,000,000)".

Debentures to anticipate proceeds of gasoline excise tax proper investment. — Debentures to anticipate proceeds of gasoline excise tax, authorized by Laws 1927, ch. 20 (repealed), were eligible as an investment for permanent school fund, by virtue of 11-2-13, 1953 Comp. (repealed), even though the provisions of Laws 1927, ch. 20, to render them so eligible failed of passage by vote of three-fourths of members elected to each house, as required by this section. State v. Graham, 32 N.M. 485, 259 P. 623 (1927).

Bank deposit not proper. — This provision expressly limits the class of securities in which permanent school fund might be invested, until the legislature should otherwise provide. Joint R. No. 14 (Laws 1913), insofar as it required deposit of those funds in banks, was beyond legislative power and void, for such deposits were investments. State v. Marron, 18 N.M. 426, 137 P. 845 (1913).

Businesses "incorporated within the United States" construed. — The term "incorporated" as used in Article XII, § 7 does not have the same meaning as the statutory clause, "organized and operating"; a company "organized and operating within the United States" is not also "incorporated within the United States", if it was

incorporated outside of the United States. State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 812 P.2d 777 (1991).

Purchase of stock in foreign corporation. — The purchase by the state investment officer of stock in a corporation formed and made a legal entity in the Netherlands Antilles violated this section. State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 812 P.2d 777 (1991).

Duty of investment advisor. — A professional services contract, whereby an investment advisor would advise the state investment council and officer regarding investment of the equity portion of the state permanent fund and severance tax fund, obligated the investment advisor to provide advice consistent with this section and to recommend only stock of companies technically incorporated within the United States. To interpret the contract otherwise would not be reasonable and potentially would place the contract in jeopardy of being declared unenforceable as violative of public policy. State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 812 P.2d 777 (1991).

Use of land grant funds to finance private or sectarian education programs. — The Enabling Act of June 20, 1910, 36 Stat. 557, ch. 310 and the New Mexico Constitution prohibit the state from using money, directly or indirectly, from the land grant permanent fund for private, sectarian or denominational schools. The distribution of land grant funds to a private, sectarian or denomination school would require amendments to the Enabling Act by congress and an amendment to the New Mexico Constitution proposed by the legislature and adopted by the state's voters. 2012 Op. Att'y Gen. No. 12-03.

Increase of land grant funds to finance education programs. — Distributions from the land grant permanent fund may be increased and used for the support of early childhood learning programs, provided the funds go to public schools and the increased distribution is accomplished by the amendment of Article XII, Section 7 of the New Mexico Constitution. 2012 Op. Att'y Gen. No. 12-03.

Purpose of loss reimbursement provision. — Loss provision of constitution and detailed statutory provisions under which council operates (6-8-1 to 6-8-16 NMSA 1978) were conceived out of jealous regard by constitutional framers and members of legislature for the safekeeping of permanent funds held in trust for school children. 1961-62 Op. Att'y Gen. No. 62-46.

Reimbursement requirement not self-executing. — This section is not self-executing insofar as loss requirement is concerned. 1961-62 Op. Att'y Gen. No. 62-46.

"Loss" in this section refers to entire sale or transaction rather than to individual securities or to securities of a corporation or to securities of a certain type. 1971 Op. Att'y Gen. No. 71-113.

Exchange is distinct from separate sale and purchase. — "Exchange" is a term of art of precise import, meaning the giving of one thing for another and excluding transactions into which money enters either as consideration or as a basis of measure. 1961-62 Op. Att'y Gen. No. 62-46.

Separate transactions will not be construed together. — Placing together two money transactions so as to create a fiction that no loss occurred from the sale and purchase would be opening the door to eventual nullification of the constitutional requirement of loss reimbursement. A subsequent transaction cannot affect the fact of loss in any single transaction. 1961-62 Op. Att'y Gen. No. 62-46.

Investment officer to exercise sovereign power. — Constitution contemplates that state investment officer, in determining investments to be made, will be exercising portion of sovereign power of state. 1957-58 Op. Att'y Gen. No. 58-10.

Constitution and statutes vary in concepts of investment council. — The entire concept of the activities of the investment council, as reflected in act establishing council (6-8-1 to 6-8-16 NMSA 1978) appears at variance with concept reflected in this section. The constitution apparently visualizes the independent exercise of delegated sovereign power by the investment council acting as public officers. The legislation apparently reduces the function of the council to that of an advisory group. 1957-58 Op. Att'y Gen. No. 58-10.

Investment officer may use service of investment counselor or other sources of advice to aid in making an investment policy recommendation to investment council. 1959-60 Op. Att'y Gen. No. 59-21.

Council regulations likely to restrict scope of investments. — This section provides that investment council may prescribe policy regulations with respect to investment of permanent funds. Such regulations, in prescribing classifications of permissible investment, will necessarily restrict scope of investment authority to extent that by silence they exclude investments which might otherwise be permissible under the constitution. 1957-58 Op. Att'y Gen. No. 58-10.

Fund not "permanent" as contemplated in investment of permanent school fund. — The severance tax permanent fund is not a permanent fund as contemplated by this section. The severance tax fund and the various land grant permanent funds are fundamentally different. 1977 Op. Att'y Gen. No. 77-10.

Investment in mutual funds or investment trusts. — Investment by the state treasurer in a mutual fund acting as an investment conduit (i.e., an open-end mutual fund or a unit investment trust meeting the requirements of Subsection O of 6-10-10 NMSA 1978) is constitutional. 2000 Op. Att'y Gen. No. 00-03.

"Capital loss" means the difference between the original acquisition cost of bonds to be sold and the proceeds of sale. 1968 Op. Att'y Gen. No. 68-03.

Loss determined by sale transaction alone. — Whether capital loss will be realized and amount of the loss must be determined by considering sale of the bonds alone, without reference to higher-yielding bonds which will subsequently be purchased. 1968 Op. Att'y Gen. No. 68-03.

"Increased interest income" means annual income rather than total income. 1968 Op. Att'y Gen. No. 68-62.

Loss must be restored from income accruing from new investment in insured loans, and that income accruing from investment of recoveries of principal cannot be used to restore capital loss. 1968 Op. Att'y Gen. No. 68-62.

Loss must be amortized from portion of the increased interest income only. 1968 Op. Att'y Gen. No. 68-62.

New investment must yield increase in income after capital loss is restored to corpus of permanent fund. 1968 Op. Att'y Gen. No. 68-62.

Effect of 1965 amendment on offsetting gains and losses. — Since 1965 amendment to this section, the investment council has not had power to sell common stocks realizing a capital gain and to use such gain to offset loss taken on sale of fixed income security. 1968 Op. Att'y Gen. No. 68-116.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools § 89.

Particular purposes within contemplation of statute authorizing issuance of bonds or use of funds by school district for special purposes, 124 A.L.R. 883.

Stock of private corporation, constitutional or statutory provision prohibiting school districts from acquiring or subscribing to, 152 A.L.R. 495.

78 C.J.S. Schools and School Districts § 12.

Sec. 8. [Teachers to learn English and Spanish.]

The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.

ANNOTATIONS

Meaning of section. — This section does not require that all teachers in the state be proficient in both English and Spanish or that all teachers who teach Spanish-speaking

pupils be proficient in both English and Spanish. The clear intent is to teach English to Spanish-speaking students and to assure that the Spanish and English languages will always be available to prospective teachers in the teachers' colleges and that Spanish-speaking pupils will be provided the means and methods to learn the English language as well as other subjects of learning. 1968 Op. Att'y Gen. No. 68-15.

This section is a mandate to the legislature to provide teachers proficient in both English and Spanish to teach Spanish-speaking pupils; it does not require all teachers to have this proficiency. 1971 Op. Att'y Gen. No. 71-102.

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 298, 299.

78 C.J.S. Schools and School Districts § 264; 78A C.J.S. Schools and School Districts §§ 782, 783.

Sec. 9. [Religious tests in schools.]

No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this state, either as a teacher or student, and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever.

ANNOTATIONS

Cross references. — For provisions guaranteeing freedom of religion, *see* N.M. Const., art. II, § 11, and art. XXI, § 1.

For excusing students from school for religious instruction, *see* 22-12-3 NMSA 1978.

Comparable provisions. — Idaho Const., art. IX, § 6.

Montana Const., art. X, § 7.

Utah Const., art. X, § 8.

Wyoming Const., art. VII, § 12.

Court may properly enjoin dissemination of sectarian literature in schoolrooms. Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952).

Sister teaching in public school entitled to salary. — Under this section and N.M. Const., art. II, § 11, there can be nothing in the law prohibiting payment of sisters who are qualified and employed to teach in public schools. Such a law would result in making their religious life or religious vows a test of their admission as teachers to our public schools contrary to the constitution. 1939-40 Op. Att'y Gen. No. 39-3101.

There is no objection to reading portions of Bible without comment in public school assembly. 1921-22 Op. Att'y Gen. No. 22-3423.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 298, 299, 337 to 339, 349 to 358.

Sectarianism in schools, 5 A.L.R. 866, 141 A.L.R. 1144, 45 A.L.R.2d 742.

Power of school authorities to provide course of Bible study, 70 A.L.R. 1314.

Inclusion of period of service in sectarian school in determining public schoolteachers' seniority, salary or retirement benefits, as violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Releasing public school pupils from attendance for purpose of receiving religious instruction, 2 A.L.R.2d 1371.

Wearing of religious garb by public schoolteachers, 60 A.L.R.2d 300.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

79 C.J.S. Schools and School Districts § 447.

Sec. 10. [Educational rights of children of Spanish descent.]

Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public

educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section. This section shall never be amended except upon a vote of the people of this state, in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.

ANNOTATIONS

Two-thirds vote in each county required for amendment of section. — Like provisions in N.M. Const., art. VII, § 3, and art. XIX, § 1, were held to violate the "one man, one vote" requirement of the federal constitution, in State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968). The court did not rule on the validity of the two-thirds requirement in this section.

"Electors voting" construed. — Provision in N.M. Const., art. VII, § 3, requiring favorable vote of "at least three-fourths of the electors voting in the whole state" means three-fourths of all those voting on that particular proposition, even though they might constitute less than three-fourths of all those actually voting at election. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

For note, "Bilingual Education: Serna v. Portales Municipal Schools," see 5 N.M. L. Rev. 321 (1975).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution," see 19 N.M. L. Rev. 511 (1989).

For note, “Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris,” see 34 N.M. L. Rev. 194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Civil Rights §§ 61 to 68, 79.

De facto segregation of races in public schools, 11 A.L.R.3d 780.

79 C.J.S. Schools and School Districts § 447.

Sec. 11. [State educational institutions.] (2004)

The university of New Mexico, at Albuquerque; the New Mexico state university, near Las Cruces, formerly known as New Mexico college of agriculture and mechanic arts; the New Mexico highlands university, at Las Vegas, formerly known as New Mexico normal university; the western New Mexico university, at Silver City, formerly known as New Mexico western college and New Mexico normal school; the eastern New Mexico university, at Portales, formerly known as eastern New Mexico normal school; the New Mexico institute of mining and technology, at Socorro, formerly known as New Mexico school of mines; the New Mexico military institute, at Roswell, formerly known as New Mexico military institute; the New Mexico school for the blind and visually impaired, at Alamogordo, formerly known as New Mexico school for the visually handicapped; the New Mexico school for the deaf, at Santa Fe, formerly known as New Mexico asylum for the deaf and dumb; the northern New Mexico state school, at El Rito, formerly known as Spanish-American school; are hereby confirmed as state educational institutions. All lands, together with the natural products thereof and the money proceeds of any of the lands and products, held in trust for the institutions, respectively, under their former names, and all properties heretofore granted to, or owned by, or which may hereafter be granted or conveyed to, the institutions respectively, under their former names, shall, in like manner as heretofore, be held in trust for, or owned by or be considered granted to, the institutions individually under their names as hereinabove adopted and confirmed. The appropriations made and which may hereafter be made to the state by the United States for agriculture and mechanical colleges and experiment stations in connection therewith shall be paid to the New Mexico state university, formerly known as New Mexico college of agriculture and mechanic arts. (As repealed and reenacted November 8, 1960; as amended November 3, 1964; November 2, 2004.)

ANNOTATIONS

Cross references. — For severance tax bond acts for state educational institutions, *see* Appendix following Chapter 7, Article 27 NMSA 1978, Severance Tax Bonding Act.

Comparable provisions. — Idaho Const., art. IX, § 10.

Utah Const., art. X, § 4.

Wyoming Const., art. VII, § 15.

The 1960 amendment, which was proposed by H.J.R. No. 11 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 74,256 for and 44,823 against, repealed this section and enacted a new Section 11, which changed the names of several institutions and added the present second sentence.

The 1964 amendment, which was proposed by H.J.R. No. 11 (Laws 1963) and adopted at the general election held on November 3, 1964, by a vote of 89,084 for and

31,788 against, changed the name of New Mexico western college to western New Mexico university.

The 2004 amendment, which was proposed by H.J.R. 5 (Laws 2004) and adopted at a general election held November 2, 2004, by a vote of 462,144 for and 212,297 against, changed the name of the New Mexico school for the visually handicapped to the New Mexico school for the blind and visually impaired.

State owns state educational institutions. — By this section, state was made owner of state educational institutions. State v. Regents of Univ. of N.M., 32 N.M. 428, 258 P. 571 (1927) (decided before 1960 amendment).

Governmental immunity applies to state educational institutions. — Suit based upon tort against state agency (such as regents of state college), demanding judgment only to extent that such agency is protected by liability insurance, violates rule of governmental immunity from suit. Livingston v. Regents of N.M. College of Agric. & Mechanic Arts, 64 N.M. 306, 328 P.2d 78 (1958), superseded by statute, Clark v. Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963).

State institution is not subject to action in damages for negligence of its employees. Livingston v. Regents of N.M. Coll. of Agrl. & Mechanic Arts, 64 N.M. 306, 328 P.2d 78 (1958), superseded by statute, Clark v. Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963).

The university of New Mexico is a state agency, and, as such, the university, its regents and its admissions committee are entitled to eleventh amendment immunity, as are its employees acting in their official capacities. Buchwald v. University of N.M. Sch. of Med., 159 F.3d 487 (10th Cir. 1998).

Action against regents barred by eleventh amendment immunity. — A student at the New Mexico school of mines (now New Mexico institute of mining and technology) was barred from bringing an action in the United States district court for damages for personal injuries alleged to have resulted from the negligence of the school's board of regents in the operation of the school because the action was in effect against the state of New Mexico, and U.S. Const., amend. XI, barred federal jurisdiction. Korgich v. Regents of N.M. Sch. of Mines, 582 F.2d 549 (10th Cir. 1978).

State legislator prohibited from employment at state educational institution. — Member of state legislature is prohibited from accepting employment as administrative assistant in one of state educational institutions set forth in this section. 1957-58 Op. Att'y Gen. No. 57-40.

State educational institutions not public employers. — The New Mexico school for the deaf and other state educational institutions confirmed by this section are not public employers "other than the state" for purposes of the Public Employee Bargaining Act (Chapter 10, Article 7E NMSA 1978). The applicable statutory definitions indicate the

legislature's intent that state educational institutions be included within the term "state," and neither any other statutory provisions nor constitutional principles require deviation from this intent. 1993 Op. Att'y Gen. No. 93-05.

University officials may regulate ice cream vendors. — New Mexico state university officials may preclude sale of ice cream by private individuals from mobile ice cream truck on university streets providing reasons for regulation directly concern health, safety, education and welfare of students and are not so unreasonable and arbitrary as to offend due process of law under fourteenth amendment to United States constitution. 1961-62 Op. Att'y Gen. No. 62-38.

Characterization of schools for purposes of federal law. — New Mexico military institute and northern New Mexico state school are "secondary schools" for purpose of National Defense Education Act (20 U.S.C. § 401 et seq.). 1959-60 Op. Att'y Gen. No. 59-150.

Students may not be forced to attend particular public school. — Enrollment in another school within or without the local district would be subject to availability of accommodations and must be determined by the local board. 1979 Op. Att'y Gen. No. 79-36.

Valid intrusion by legislature of another governmental branch. — The failure to fund a branch campus does not put the university of New Mexico out of business, nor does it constitute an invalid intrusion of the legislature into another branch of government. 1980 Op. Att'y Gen. No. 80-03.

Creation of statewide magnet school. — The legislature has the authority to create a statewide magnet school for the arts without amending Article XII, Section 11 of the New Mexico constitution. 2006 Op. Att'y Gen. No. 06-03.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Colleges and Universities § 2.

Determination of residence or nonresidence for purpose of fixing tuition fees or the like in public school or college, 83 A.L.R.2d 497, 56 A.L.R.3d 641.

Validity and application of provisions governing determination of residency for purpose of fixing fee differential for out-of-state students in public college, 56 A.L.R.3d 641.

14A C.J.S. Colleges and Universities § 3.

Sec. 12. [Acceptance and use of Enabling Act educational grants.]

All lands granted under the provisions of the act of congress, entitled, "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states; and to enable the

people of Arizona to form a constitution and state government and be admitted into the union on an equal footing with the original states," for the purposes of said several institutions are hereby accepted and confirmed to said institutions, and shall be exclusively used for the purposes for which they were granted; provided, that one hundred and seventy thousand acres of the land granted by said act for normal school purposes are hereby equally apportioned between said three normal institutions, and the remaining thirty thousand acres thereof is reserved for a normal school which shall be established by the legislature and located in one of the counties of Union, Quay, Curry, Roosevelt, Chaves or Eddy.

ANNOTATIONS

Cross references. — For establishment of normal school in Roosevelt county, *see* 21-3-29 NMSA 1978.

Comparable provisions. — Arizona Const., art. X, § 1.

Montana Const., art. X, § 11.

Utah Const., art. XX, § 1.

"Act of congress" is Enabling Act. — The statutory reference in this section is to the Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310), which is set out in Pamphlet 3.

Bonds to anticipate income from institutional lands not state's obligations. — Building and improvement bonds issued under 21-7-13 to 21-7-25 NMSA 1978 to anticipate income from institutional lands, granted to the university of New Mexico by Enabling Act, and accepted and confirmed by this section for university purposes were not obligations of state, notwithstanding that constitution makes state owner of state educational institutions. State v. Regents of Univ. of N.M., 32 N.M. 428, 258 P. 571 (1927).

University money properly used for land purchase. — Any money received by state university can be used for purchase of lands. 1912-13 Op. Att'y Gen. No. 13-1082.

School ineligible to participate in grant made before its establishment. — Although normal schools at Las Vegas, Silver City and El Rito are confirmed as state institutions entitled to share in congressional grants of land, the school at El Rito may not participate in grant of 1898 (June 21, 1898, 30 Stat. 484, ch. 489) since the school was not established until 1909. 1917-18 Op. Att'y Gen. No. 17-1983.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Lands §§ 108, 112, 113, 115, 117, 121.

73A C.J.S. Public Lands §§ 66, 67, 76 to 101; 73B C.J.S. Public Lands, § 178 et seq.

Sec. 13. [Board of regents for educational institutions.] (2013)

A. The legislature shall provide for the control and management of each of the institutions, except the university of New Mexico, by a board of regents for each institution, consisting of five members, four of whom shall be qualified electors of the state of New Mexico, one of whom shall be a member of the student body of the institution and no more than three of whom at the time of their appointment shall be members of the same political party; provided, however, that the student body member provision in this subsection shall not apply to the New Mexico school for the deaf, the New Mexico military institute or the New Mexico school for the blind and visually impaired, and for each of those three institutions all five members of the board of regents shall be qualified electors of the state of New Mexico.

B. The governor shall nominate and by and with the consent of the senate shall appoint the members of each board of regents for each of the institutions. The terms of nonstudent members shall be for staggered terms of six years, and the terms of student members shall be two years.

C. The governor shall select, with the advice and consent of the senate, a student member from a list provided by the president of the institution. In making the list, the president of the institution shall give due consideration to the recommendations of the student body president of the institution. Following the approval by the voters of this 2014 amendment and upon the first vacancy of a position on the northern New Mexico state school board of regents, the governor shall nominate and by and with the consent of the senate shall appoint a student member to serve a two-year term.

D. The legislature shall provide for the control and management of the university of New Mexico by a board of regents consisting of seven members, six of whom shall be qualified electors of the state of New Mexico, one of whom shall be a member of the student body of the university of New Mexico and no more than four of whom at the time of their appointment shall be members of the same political party. The governor shall nominate and by and with the consent of the senate shall appoint the members of the board of regents. The present five members shall serve out their present terms. The two additional members shall be appointed in 1987 for terms of six years. Following the approval by the voters of this amendment and upon the first vacancy of a position held by a nonstudent member on the university of New Mexico's board of regents, the governor shall nominate and by and with the consent of the senate shall appoint a student member to serve a two-year term. The governor shall select, with the advice and consent of the senate, a student member from a list provided by the president of the university of New Mexico. In making the list, the president of the university of New Mexico shall give due consideration to the recommendations of the student body president of the university.

E. Members of the board shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member.

The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove members of the board under such rules as it may promulgate, and its decision in connection with such matters shall be final. (As amended September 20, 1949, effective January 1, 1950, November 4, 1986, November 8, 1994 and November 4, 2014.)

ANNOTATIONS

Cross references. — For statute granting regents power and duty to make rules and regulations for university government, *see* 21-7-7 NMSA 1978.

Comparable provisions. — Idaho Const., art. IX, § 10.

Montana Const., art. X, § 9.

Wyoming Const., art. VII, § 17.

The 1949 amendment, proposed by S.J.R. No. 11 (Laws 1949), adopted by the people at a special election held on September 20, 1949 by a vote of 16,918 for and 10,596 against and took effect on January 1, 1950, inserted the requirement that regents be qualified electors, changed their term of office from four to six years with staggered terms and added the second paragraph.

Compiler's notes. — An amendment to this section proposed by H.J.R. No. 13 (Laws 1970) which would have revised provisions relating to term of office and removal of members of board of regents, was submitted to the people at the general election held on November 3, 1970. It was defeated by a vote of 56,047 for and 74,927 against.

Eight amendments to constitution were proposed by 1970 session of legislature although attorney general has stated that constitutional amendments may not be considered in even-numbered years. 1969-70 Op. Att'y Gen. No. 69-151; 1965-66 Op. Att'y Gen. No. 65-212.

The 1986 amendment, proposed by H.J.R. No. 5 (Laws 1986) and adopted at the general election held on November 4, 1986 by a vote of 164,385 for and 108,118 against, added "except the University of New Mexico" near the beginning of the first paragraph and added the present second paragraph.

The 1994 amendment, proposed by S.J.R. No. 18 (Laws 1993) and adopted at the general election held on November 8, 1994 by a vote of 238,458 for and 165,119 against, rewrote this section to provide for a student body member on the board of regents for certain institutions of higher education.

The 2014 amendment, proposed by S.J.R. No. 7 (Laws 2013) and adopted at the general election held on November 4, 2014, with a vote of 282,620 for and 153,881 against, changed the board of regents of the northern New Mexico state school by filling

one regent position with a student; in Subsection A, after "the student body member provision in this", changed "section" to "subsection", after "the New Mexico military institute", deleted "the northern New Mexico state school", after "or the New Mexico school for the", added "blind and", after "visually", deleted "handicapped" and added "impaired", and after "and for each of those", deleted "four" and added "three"; in Subsection B, in the second sentence, after "The terms of nonstudent members shall be for", added "staggered terms of", after "six years", deleted "provided that of the five first appointed the terms of two shall be for two years, the terms for two shall be for four years, and the term of one shall be for six years" and added "and the terms of student members shall be two years", and deleted the former third sentence, which provided "Following the approval by the voters of this amendment and upon the first vacancy of a position held by a nonstudent member on each eligible institution's board of regents, the governor shall nominate and by and with the consent of the senate shall appoint a student member to serve a two year term"; and in Subsection C, added the last sentence.

I. GENERAL CONSIDERATION.

Applicability of provisions for interim appointments. — This section does not conflict with N.M. Const., art. XX, § 5, which provides for interim appointments. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Replacement of regents appointed to fill vacancies. — Even though the terms of regents who were appointed to fill vacancies had expired at the end of the terms of their predecessors, they were authorized to remain in office until their successors were appointed by the governor by and with the consent of the senate and they could not be summarily removed. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Taxpayer lacks standing to enforce duty of regents. — University of New Mexico is a creature of the constitution, augmented by 21-7-3 NMSA 1978, and the respondent regents owe their duties to the state, not to a private person. Thus relator, though a taxpayer, has no standing to enforce by mandamus a duty owing to the public. Womack v. Regents of Univ. of N.M., 82 N.M. 460, 483 P.2d 934 (1971).

Staggered terms. — This section creates a formal system of staggered terms for the board of regents of New Mexico tech under which no more than two regents are replaced in any given year. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

II. CONTROL AND MANAGEMENT OF INSTITUTIONS.

Proper to restrict visitation by opposite sex in dorms. — Power to control, manage and govern New Mexico state university is vested in regents, and its proper exercise necessarily includes exercise of broad discretion. An inherent part of the power is requiring students to adhere to generally accepted standards of conduct, and regulation forbidding visitation by persons of the opposite sex in residence hall or dormitory

bedrooms is consistent with generally accepted standards of conduct. Regulation did not interfere appreciably, if at all, with intercommunication important to students of university; it was reasonable, served legitimate educational purposes and promoted welfare of students at university. Futrell v. Ahrens, 88 N.M. 284, 540 P.2d 214 (1975).

Constitutionality of Public Employees Bargaining Act. — The Public Employees Bargaining Act, compiled in Chapter 10, Article 7D (now Article 7E), does not violate the autonomy of the university's board of regents as granted by this section. Nollen v. Reynolds, 1998-NMCA-108, 125 N.M. 387, 962 P.2d 633.

Legislature cannot appropriate institution funds. — Legislature has expressly recognized authority of institutions of higher learning to receive benefits and donations from United States and private individuals and corporations, to buy, sell, lease or mortgage real estate and to do all things which, in the opinions of the respective boards of regents, will be for the best interests of the institutions in the accomplishment of their purposes or objects; therefore, legislature lacks authority to appropriate these funds or to control the use thereof through the power of appropriation. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974). See Sections 21-3-4, 21-7-3, 21-8-3 and 21-11-4 NMSA 1978.

City cannot enforce ordinances on campuses. — With certain exceptions, jurisdiction of city of Albuquerque over university of New Mexico campus is limited to enforcement of state laws on campus. City ordinances dealing with crimes do not apply to land under control of board of regents of university of New Mexico except for traffic offenses as provided in 35-14-2 NMSA 1978. 1969 Op. Att'y Gen. No. 69-48.

Regent not to change political affiliation after appointment. — Member of board of regents of state educational institution may not change his political affiliation after his appointment to board in attempt to control political balance on board and appointive authority of governor under this section. 1971 Op. Att'y Gen. No. 71-30.

Individual appointed after legislative session. — If individual were appointed to board of regents of state educational institution after last legislative session, and such person has not been confirmed by state senate, governor would have authority to appoint someone else to office and submit latter's name for confirmation by senate. 1971 Op. Att'y Gen. No. 71-02.

Recess appointment of regent. — The failure of the legislature to act upon the governor's nomination of a person to the board of regents of an educational institution operates neither as "constructive consent" to, nor as rejection of, the nomination. A regent appointed by recess appointment may be replaced through a new gubernatorial nomination made during the next session of the legislature. 1991 Op. Att'y Gen. No. 91-04.

Term of appointee filling vacancy while senate not in session. — Appointee named to fill vacancy while senate is not in session may retain office until senate acts adversely upon his nomination. 1949-50 Op. Att'y Gen. No. 50-5324.

Amendment does not require legislative action to implement board's control. — Legislature need not take any action to implement provisions for control and management of each institution by a board of regents, for that part of 1949 amendment is not in conflict with original constitutional provision, and the legislature has already provided for such control and management. 1951-52 Op. Att'y Gen. No. 51-5331. *See* 21-7-3 NMSA 1978.

Board has traffic control and campus security jurisdiction. — Board of regents of university of New Mexico is specifically given traffic control jurisdiction on its property and may employ and assign duties of campus security officers. 1969 Op. Att'y Gen. No. 69-48. *See* 29-5-1, 29-5-1.1 and 29-5-2 NMSA 1978.

Board has right to determine use of school as election site. — Buildings of the New Mexico school for the visually handicapped or a portion of such institution may, upon approval of its board of regents, be made available as an election site whenever the board may grant such permission. However, such use would be contingent upon board approval and board's determination that such use would not endanger the lives and safety of students of the school. 1961-62 Op. Att'y Gen. No. 61-130.

Proper to regulate ice cream vendors. — New Mexico state university officials may preclude sale of ice cream by private individuals from mobile ice cream truck on university streets, providing reasons for regulation directly concern health, safety, education and welfare of students and are not so unreasonable and arbitrary as to offend due process of law under fourteenth amendment to United States constitution. 1961-62 Op. Att'y Gen. No. 62-38.

Regents cannot delegate right of final action. — It is not within power of regents to delegate right of final action to any other group or body within university. 1969 Op. Att'y Gen. No. 69-104.

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Colleges and Universities §§ 5, 11, 15.

14A C.J.S. Colleges and Universities §§ 15 to 17.

Sec. 14. [Recall of local school board members.]

Any elected local school board member is subject to recall by the voters of the school district from which elected. A petition for a recall election must cite grounds of malfeasance or misfeasance in office or violation of the oath of office by the member concerned. The recall petition shall be signed by registered voters not less in number than thirty-three and one-third percent of those who voted for the office at the last preceding election at which the office was voted upon. Procedures for filing petitions and for determining validity of signatures shall be as provided by law. If at the special election a majority of the votes cast on the question of recall are in favor thereof, the local school board member is recalled from office and the vacancy shall be filled as provided by law. (As added November 6, 1973 and as amended November 4, 1986.)

ANNOTATIONS

The 1973 amendment to Article XII, which was proposed by H.J.R. No. 21 (Laws 1973) and adopted at the special election held on November 6, 1973, by a vote of 22,227 for and 19,929 against, added this section.

The 1986 amendment, which was proposed by S.J.R. No. 1 (Laws 1985) and adopted at the general election held on November 4, 1986, by a vote of 178,149 for and 103,483 against, substituted the present fourth sentence for the existing one and deleted the former last sentence.

Compiler's notes. — An amendment proposed by S.J.R. No. 15 (Laws 1993), which would have repealed this section in its entirety, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 115,411 for and 281,588 against.

Recall for cause. — Constitution provides for recall for cause, and not recall at will. CAPS v. Board Members, 113 N.M. 729, 832 P.2d 790 (1992).

Legislature may not require individuals initiating recall to be responsible for cost of recall. 1976 Op. Att'y Gen. No. 76-40.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 187 to 210; 68 Am. Jur. 2d Schools § 57.

67 C.J.S. Officers and Public Employees §§ 182 to 185; 78 C.J.S. Schools and School Districts § 134 et seq.

Sec. 15. [Local school boards having seven single-member districts.]

In those local school districts having a population of more than two hundred thousand, as shown by the most recent decennial census, the qualified electors of the districts may choose to have a local school board composed of seven members, residents of and elected from single member districts.

If a majority of the qualified electors voting in such a district election vote to have a seven-member board, the school district shall be divided into seven local school board member districts which shall be compact, contiguous and as nearly equal in population as possible. One school board member shall reside within, and be elected from each local school board member district. Change of residence to a place outside the district from which a school board member was elected shall automatically terminate the service of that school board member and the office shall be declared vacant.

The school board member districts shall be established by resolution of the local school board with the approval of the state legislature, and may be changed once after each federal decennial census by the local school board with the approval of the state legislature.

The elections required under this amendment shall be called and conducted as provided by law for other local school board elections. The state board of education shall, by resolution, establish the terms of the first board elected after the creation of such a seven-member board. (As added November 4, 1980.)

ANNOTATIONS

Cross references. — For school district elections, *see* 1-22-3 NMSA 1978 et seq.

For local school boards generally, *see* 22-5-1 NMSA 1978 et seq.

For local school board member recall, *see* 22-7-1 NMSA 1978 et seq.

Compiler's notes. — An amendment to this section proposed by S.J.R. No. 6 (Laws 2007), which would have increased the size of certain school boards from seven to nine members, was submitted to the people at the general election held on November 4, 2008. and adopted by a vote of 368,438 for and 323,553 against, but was struck by the New Mexico supreme court.

The 1980 amendment to Article XII, which was proposed by H.J.R. Nos. 5 and 7 (Laws 1979) and adopted at the general election held on November 4, 1980, by a vote of 147,035 for and 95,385 against, added this section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 10, 11, 53, 54.

78 C.J.S. Schools and School Districts § 93 et seq.

ARTICLE XIII
Public Lands

Section 1. [Disposition of state lands.]

All lands belonging to the territory of New Mexico, and all lands granted, transferred or confirmed to the state by congress, and all lands hereafter acquired, are declared to be public lands of the state to be held or disposed of as may be provided by law for the purposes for which they have been or may be granted, donated or otherwise acquired; provided, that such of school Sections Two, Thirty-Two, Sixteen and Thirty-Six as are not contiguous to other state lands shall not be sold within the period of ten years next after the admission of New Mexico as a state for less than ten dollars [($10.00)] per acre.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For consent to provisions of Enabling Act, *see* N.M. Const., art. XXI, § 9.

For provision regarding leases reserving royalty to state, *see* N.M. Const., art. XXIV, § 1.

Comparable provisions. — Idaho Const., art. IX, § 8.

Montana Const., art. X, § 11.

Utah Const., art. XX, § 1.

Wyoming Const., art. XVIII, § 1.

Land vesting in state through tax proceedings is not public land. — If lands, title to which vests temporarily in name of New Mexico through tax proceedings, are "public lands," they become such by that portion of this section which reads, "and all lands hereafter acquired". However, the framers of the constitution and the people that adopted it intended that the term "public lands" be limited to lands acquired in a proprietary capacity. In the tax situation, title is taken in the name of the state so that lands may be sold and the money they represent be promptly remitted to agencies for which the taxes were assessed and the lands be restored to tax rolls as speedily as possible. Greene v. Esquibel, 58 N.M. 429, 272 P.2d 330 (1954).

United States as grantor of public lands can impose conditions on their use and has right to exact performance of such conditions. Ervien v. United States, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919).

Doctrine of acquiescence. — Title to state land cannot be obtained pursuant to the doctrine of acquiescence. This rule also applies to municipalities. Stone v. Rhodes, 107 N.M. 96, 752 P.2d 1112 (Ct. App. 1988).

Phrase appearing in this section, "all lands . . . hereafter acquired" is not all-inclusive. 1980 Op. Att'y Gen. No. 80-10.

Land granted to state for use of miners' hospital is public land under this section. 1964 Op. Att'y Gen. No. 64-130.

Allowable investments of funds from public lands. — Investment authority of state investment officer is limited to funds derived from lands granted state and its institutions, including any increase in permanent fund by virtue of investment of these funds by the officer. But there is no restriction as to period of time for which funds may be invested, therefore they are all subject to being invested for periods in excess of one year. Hence, these funds are all "moneys available for investment for a period in excess of one (1) year" within meaning of 6-8-9 NMSA 1978 (repealed), relating to allowable investments. 1961-62 Op. Att'y Gen. No. 62-76.

Legislation required to expend funds of congressional grant institutions. — In majority of cases, funds credited to institutions established under congressional land grants could be expended only by legislative enactment. 1912-13 Op. Att'y Gen. Nos. 13-1121, 13-1122 and 13-1126.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Lands §§ 113, 115, 117, 121.

Improvements placed on land by adverse claimant, right of grantee to, 6 A.L.R. 95.

Escheat of land granted to alien, necessity of judicial proceeding, 23 A.L.R. 1247, 79 A.L.R. 1364.

Crops grown by trespasser, right to, as against purchaser of the land, 39 A.L.R. 961, 57 A.L.R. 584.

Estoppel of one not party to sale or mortgage of public land by failure to disclose his interest in the property, 50 A.L.R. 790.

Prohibition to control action of land officers, 115 A.L.R. 31, 159 A.L.R. 627.

Constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters, 24 A.L.R.4th 294.

73B C.J.S. Public Lands §§ 178 to 197.

Sec. 2. [Duties of land commissioner.]

The commissioner of public lands shall select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law.

ANNOTATIONS

Cross references. — For provision regarding leases reserving royalty to state, *see* N.M. Const., art. XXIV, § 1.

For statutes providing for office of commissioner of public lands, *see* 19-1-1 to 19-1-24 NMSA 1978.

Comparable provisions. — Idaho Const., art. IX, § 7.

Montana Const., art. X, § 4.

Wyoming Const., art. XVIII, § 3.

Enabling Act. — Many notes refer to the Enabling Act, whereby congress established terms for the future admission of New Mexico into the Union. The Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310) is set out in Pamphlet 3.

I. GENERAL CONSIDERATION.

No specific time within which land should be classified. — Although it is constitutional duty of commissioner to classify the public land, no specific limitation of time is stated as to when classification should be made. State ex rel. Otto v. Field, 31 N.M. 120, 241 P. 1027 (1925).

State necessary party in suit concerning its reservation of mineral rights. — Quiet title suit brought by one holding contract of purchase of state lands against lessees of land from state for oil and gas exploration, seeking to set aside reservation of minerals included in such contract, was action against state as lessor, and state was a necessary party defendant. American Trust & Sav. Bank v. Scobee, 29 N.M. 436, 224 P. 788 (1924).

No mandamus against commissioner where action really against state. — Mandamus will not lie against commissioner of public lands to compel him to issue deed conveying public lands free from reservation of minerals therein, which reservation was contained in contract of sale, because it is, in effect, an action against the state. State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059 (1921).

Trespassing railroad could not urge cancellation of contract to purchase. — Railroad, which was not party to case before commissioner initiated by order to show cause why contract to purchase realty on which such railroad as trespasser had made

improvements should not be canceled, was not in position to urge that supreme court direct cancellation of contract. In re Dasburg, 45 N.M. 184, 113 P.2d 569 (1941).

II. EXTENT OF COMMISSIONER'S AUTHORITY.

Commissioner has power to alienate school trust lands. — Under this section and Laws 1929, §§ 132 to 162 (repealed), state land commissioner had power to alienate public lands held in trust for public schools, within limits and under terms of Enabling Act. In re Dasburg, 45 N.M. 184, 113 P.2d 569 (1941).

Commissioner has power to reserve mineral rights. — State, through commissioner of public lands, properly reserved minerals and mineral rights in selling and issuing its patent to school and asylum lands granted to state, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. Terry v. Midwest Ref. Co., 64 F.2d 428 (10th Cir.), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933).

Commissioner has power to cancel contract of sale. — Cancellation of contract of sale of state lands is within sound discretion of commissioner and does not violate this section. Vesely v. Ranch Realty Co., 38 N.M. 480, 35 P.2d 297 (1934).

Rulemaking authority of commissioner limited. — The commissioner of public lands has no authority to promulgate rules or regulations inconsistent with legislative enactments governing mineral leases on public lands. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

The commissioner exceeded his authority and usurped a legislative function in promulgating the definition of "proceeds" in a rule so that it would require state lessees to pay royalties even when gas was not extracted from the leased premises. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

Commissioner is limited to powers conferred by law. — Commissioner of public lands as agent of state has only such powers as are conferred upon him by constitution and statutes and as limited by Enabling Act. State ex rel. Del Curto v. District Court, 51 N.M. 297, 183 P.2d 607 (1947).

In selling lands belonging to state and issuing patents therefor commissioner is merely an agent of state and has those powers, and only those powers, given by law, and there is no specific authority given him to issue patent to portion of tract of land sold under contract when only that part covered by patent has been paid for and balance due under said contract has not been paid at time patent is issued. Zinn v. Hampson, 61 N.M. 407, 301 P.2d 518 (1956). See N.M. Const., art. XIII, § 3, relating to restrictions on patents under Enabling Act.

Special requirements for leases with terms longer than five years. — Leases of state lands for longer term than five years are required to be sold to highest bidder at

public sale after published advertisement of sale. State ex rel. McElroy v. Vesely, 40 N.M. 19, 52 P.2d 1090 (1935); Hart v. Walker, 40 N.M. 1, 52 P.2d 123 (1935).

Circumvention invalid. — No rights can be acquired by circumvention; commissioner had no power to cancel a contract to purchase when purchaser failed to show in his application improvements made by a railroad which was in the position of a trespasser. In re Dasburg, 45 N.M. 184, 113 P.2d 569 (1941).

Commissioner may not circumvent requirements of law. — Allowing the relinquishment of an existing lease on grazing or agricultural lands subject to Enabling Act, and application for new consolidated lease, having net result of a lease of more than five years' duration without opportunity for competitive bidding or adverse applications, is beyond discretion of commissioner. 1969 Op. Att'y Gen. No. 69-67.

Circumvention generally invalid. — No rights in public lands may be given or acquired contrary to law by circumvention, indirection or otherwise, no matter how valid or well-intentioned the underlying reason may be. 1969 Op. Att'y Gen. No. 69-67.

Invalid to postpone obligation to pay. — Effect of 19-7-12 NMSA 1978, relating to cancellation and granting of contracts, is to postpone obligation to pay for public lands; the statute offends constitution and is void. 1931-32 Op. Att'y Gen. No. 31-291.

Limited appropriation not invalid under Enabling Act. — Phrase "and such regulations as may be provided by law" does not render invalid an appropriation of not to exceed $10,000 on theory that if commissioner is limited to this expenditure, he would be prevented from properly classifying and intelligently administering public lands trust imposed by Enabling Act, especially since it does not appear that legislature intended to limit commissioner, in all things, to above sum. 1939-40 Op. Att'y Gen. No. 39-3202.

Personnel Act of 1959 (5-4-19 to 5-4-27, 1953 Comp., now repealed) applies to all state executive agencies. State land office (created by 19-1-1 NMSA 1978) is an executive agency and comes under the act. 1959-60 Op. Att'y Gen. No. 59-195.

State may exchange lands with federal government. — Under federal Taylor Grazing Act (43 U.S.C. § 315 et seq.) state may exchange its lands where title is vested in it for other lands of federal government through secretary of the interior who has power to exchange such lands in same manner as that provided for exchange of privately-owned lands. 1935-36 Op. Att'y Gen. No. 35-1204.

"Under provisions of the acts of congress" construed. — This section limiting control of commissioner to disposition of public lands "under provisions of the acts of congress" relates only to those lands New Mexico has received in trust from federal government for institutional purposes. 1953-54 Op. Att'y Gen. No. 53-5831.

Constitutional commission not limited to express powers. — Administrative commission created by constitution is not limited to powers expressly granted by constitution but may exercise all powers which may be necessary or essential in connection with performance of its duties. 1953-54 Op. Att'y Gen. No. 53-5831.

Commissioner has power to deed railroad right-of-way. — Commissioner may grant right-of-way of railroad company and execute deed without advertising and offering same at public auction. 1931-32 Op. Att'y Gen. No. 31-244.

Commissioner has power to remove land from restricted districts. — By necessary implication land commissioner has authority to rescind orders promulgated by him adding lands to restricted districts for oil and gas leasing, and procedure to be followed in withdrawing any lands from a restricted district is substantially the same as set out in 19-10-15 NMSA 1978, relating to rental districting. 1951-52 Op. Att'y Gen. No. 52-5604.

Institution to which land allocated cannot prevent sale by commissioner. — Except for certain transactions with United States, nothing in Enabling Act, constitution or statutes gives institution to which public land has been allocated either right or power to prevent commissioner from selling the land where he is acting procedurally according to the law. 1964 Op. Att'y Gen. No. 64-130.

Legislature without power to restrict expenditure of funds. — Commissioner of public lands is sole person entrusted with administration of funds of which he is trustee, subject to expenditure being reasonable, and legislature is not empowered, nor is governor under grant of legislative power, to restrict commissioner in expenditure of these funds. 1953-54 Op. Att'y Gen. No. 53-5781.

Commissioner lacks power to sell lands of highway commission. — Neither by constitution nor by statute has commissioner been given power to sell lands held by highway commission and acquired for its purposes. 1953-54 Op. Att'y Gen. No. 53-5831.

Exchange of state trust lands. — The commissioner of public lands may exchange state trust lands for other public or private lands of equal or greater value provided that the exchange transaction is in substantial conformity with the requirements of the federal Enabling Act, ch. 310, 36 stat. 557. As a consequence of this conclusion, 1988 Op. Att'y Gen. No. 88-35 is hereby overruled. 1991 Op. Att'y Gen. No. 91-15.

Commissioner's discretion limited by express provisions. — While commissioner has a great deal of discretionary authority in managing the public lands of state, his discretion is limited by express provisions in the law. 1969 Op. Att'y Gen. No. 69-67.

Commissioner not authorized to issue all oil and gas leases. — Section 19-10-1 NMSA 1978 does not grant the commissioner of public lands the exclusive authority to issue all oil and gas leases on any lands owned by the state. 1980 Op. Att'y Gen. No. 80-10.

Law reviews. — For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M. L. Rev. 1 (1981).

For 1984-88 survey of New Mexico administrative law, 19 N.M. L. Rev. 575 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Prohibition to control actions of land officers, 115 A.L.R. 31, 159 A.L.R. 627.

73B C.J.S. Public Lands §§ 178 to 183, 197.

Sec. 3. [Patents for public lands.]

The provisions of the Enabling Act (36 Stat. 557, 563) which prohibit the granting of a patent for a portion of a tract of public lands under sales contract because the full consideration for the entire tract is not or was not paid, are waived with respect to the following sales:

A. sale of a portion of a tract under sales contract, if the patent to that portion was issued on or before September 4, 1956;

B. sale of a portion of a tract under sales contract, if the right to purchase the portion is derived from an assignment made on or before September 4, 1956; or

C. sale of a portion of a tract under sales contract, or under a contract entered into in substitution of such contract, if the right to purchase all other portions of the tract were assigned or relinquished on or before September 4, 1956 by the person holding the contract.

The legislature may enact laws to carry out the purposes of this amendment. (As added November 3, 1964.)

ANNOTATIONS

The 1963 amendment to Article XIII, which was proposed by S.J.R. No. 3 (Laws 1963) and adopted at the general election held on November 3, 1964, by a vote of 72,258 for and 49,758 against, added this section.

Enabling Act. — The Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310), which authorized New Mexico to prepare for statehood, is set out in Pamphlet 3.

Congressional waiver of Enabling Act provisions. — Restrictions of Section 10 of Enabling Act as to issuance of patent to portion of tract sold under contract when only that part covered by patent had been paid for and balance due under contract had not

been paid at time patent was issued were waived as to patents issued prior to September 4, 1956. See act of May 27, 1961, 74 Stat. 85, P.L. 87-40.

Commissioner did not have authority to issue patent to portion of tract sold under contract when only that part covered by patent had been paid for and balance due under said contract had not been paid at the time patent was issued. Zinn v. Hampson, 61 N.M. 407, 301 P.2d 518 (1956) (decided prior to amendment adding this section).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Lands §§ 58, 113, 115, 117.

73B C.J.S. Public Lands §§ 178, 180, 184, 188 to 191.

ARTICLE XIV
Public Institutions

Section 1. [State institutions.]

The penitentiary at Santa Fe, the miners' hospital at Raton, the New Mexico state hospital at Las Vegas, the New Mexico boys' school at Springer, the girls' welfare home at Albuquerque, the Carrie Tingley crippled children's hospital at Truth or Consequences and the Los Lunas mental hospital at Los Lunas are hereby confirmed as state institutions. (As amended September 20, 1955 and November 8, 1960.)

ANNOTATIONS

Cross references. — For confirmation of state educational institutions, *see* N.M. Const., art XII, § 11.

For creation of Las Vagas medical center and Los Lunas medical center, *see* 23-1-13 NMSA 1978.

Comparable provisions. — Idaho Const., art. X, § 1.

Montana Const., art. XII, § 3.

The 1955 amendment, which was proposed by H.J.R. No. 15 (Laws 1955) and adopted at a special election held on September 20, 1955, by a vote of 18,702 for and 12,036 against, changed the names of the insane asylum and the reform school, respectively, to the state hospital and the boys' school.

The 1960 amendment, which was proposed by H.J.R. No. 14 (Laws 1959) and adopted at the general election held on November 8, 1960, with a vote of 75,987 for and 47,724 against, added the institutions following "boys' school at Springer."

Compiler's notes. — An amendment proposed by H.J.R. No. 10 (Laws 1993), which would have substituted "the New Mexico center for gerontology and psychiatry at Las Vegas" for "the New Mexico state hospital at Las Vegas" near the middle of the section, was submitted to the people at the general election held on November 8, 1994. It was defeated by a vote of 166,636 for and 231,931 against.

Miners' hospital. — In its constitution New Mexico expressly accepted conditions imposed on land grant trusts for miners' hospitals for disabled miners, confirmed the miners' hospital at Raton as a state institution, accepted all of the trust lands and stated that they would be "exclusively used for the purpose" for which they were granted. United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976).

No right to sue penitentiary in tort. — Section 42-1-1, 1953 Comp. (repealed), creating state penitentiary as public corporation with power to sue and be sued, did not grant right to sue it in tort inasmuch as such suit was in fact a suit against the state. Vigil v. Penitentiary of N.M., 52 N.M. 224, 195 P.2d 1014 (1948). But see Tort Claims Act, Section 41-4-1 NMSA 1978 et seq.

Boys' school cannot be sued absent specific legislation. — The New Mexico boys' school is a state institution and therefore a governmental agency, which cannot be sued in absence of specific legislative permission. 1963-64 Op. Att'y Gen. No. 64-79. But see Tort Claims Act, Section 41-4-1 NMSA 1978 et seq.

No amendment necessary should land grant beneficiary move. — So long as the seven institutions named in this section remain named as the land grant beneficiaries, no amendment of this section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

Hospital entitled to funds if remains essentially as defined. — If the Carrie Tingley crippled children's hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in this section, it would retain its entitlement to the funds derived from lands granted under the Enabling Act. 1980 Op. Att'y Gen. No. 80-16.

Authority to move penitentiary out of Santa Fe. — "The penitentiary at Santa Fe" is merely descriptive and not mandatory language. Under the broad powers granted by 33-2-2 and 33-2-5 NMSA 1978 to sell real, personal or mixed property, penitentiary commissioners have authority to move penitentiary out of county of Santa Fe if in their judgment they deem it necessary and proper for the operation and management of the penitentiary. 1953-54 Op. Att'y Gen. No. 53-5628.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Hospitals and Asylums § 2; 60 Am. Jur. 2d Penal and Correctional Institutions § 2.

State's immunity from tort liability as dependent on governmental or proprietary nature of function, 40 A.L.R. 927.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital, 25 A.L.R.2d 203, 18 A.L.R.4th 858.

Right of state or its political subdivision to maintain action in another state for support and maintenance of defendant's child, parent or dependent in plaintiff's institution, 67 A.L.R.2d 771.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability, 68 A.L.R.2d 1437.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 A.L.R.4th 136.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 A.L.R.4th 508.

7 C.J.S. Asylums § 4; 41 C.J.S. Hospitals § 6; 72 C.J.S. Prisons § 2.

Sec. 2. [Federal land grants and donations.]

All lands which have been or which may be granted to the state by congress for the purpose of said several institutions are hereby accepted for said several institutions with all other grants, donations or devices for the benefit of the same and shall be exclusively used for the purpose for which they were or may be granted, donated or devised.

ANNOTATIONS

Miners' hospital. — In its constitution New Mexico expressly accepted conditions imposed on land grant trusts for miners' hospitals for disabled miners, confirmed the miners' hospital at Raton as a state institution, accepted all of the trust lands and stated that they would be "exclusively used for the purpose" for which they were granted. United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976).

No amendment necessary should land grant beneficiary move. — So long as the seven institutions named in N.M. Const., art. XIV, § 1, remain named as the land grant beneficiaries, no amendment of that section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

Hospital entitled to funds if remains essentially as defined. — If the Carrie Tingley crippled children's hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in N.M. Const., art. XIV, § 1, it would retain its entitlement to the funds derived from lands granted under the Enabling Act. 1980 Op. Att'y Gen. No. 80-16.

Sec. 3. [Control and management.]

Each of said institutions shall be under such control and management as may be provided by law. (As amended September 20, 1955.)

ANNOTATIONS

Comparable provisions. — Idaho Const., art. X, §§ 1, 5.

The 1955 amendment, which was proposed by S.J.R. No. 20 (Laws 1955) and adopted at a special election held on September 20, 1955, by a vote of 18,407 for and 12,344 against, completely rewrote this section. Prior to amendment, this section read: "Each of said institutions shall be under the control and management of a board whose title, duties and powers shall be as may be provided by law. Each of said boards shall be composed of five members who shall hold office for the term of four years, and shall be appointed by the governor by and with the consent of the senate, and not more than three of whom shall belong to the same political party at the time of their appointment."

Extent legislature can alter control and management. — Legislature may alter control and management of institutions except that it cannot change number of members on board nor power of appointment which is in the governor, nor could it provide that all board members may be of same political party. 1959-60 Op. Att'y Gen. No. 60-26 (opinion construes section as it read before 1955 amendment).

No amendment necessary should land grant beneficiary move. — So long as the seven institutions named in N.M. Const., art. XIV, § 1, remain named as the land grant beneficiaries, no amendment of that section is necessary should one of the institutions move to another location. 1980 Op. Att'y Gen. No. 80-16.

Hospital entitled to funds if remains essentially as defined. — If the Carrie Tingley crippled children's hospital should move from Truth or Consequences to another location, but, nevertheless, remain essentially the institution defined in N.M. Const., art. XIV, § 1, it would retain its entitlement to the funds derived from lands granted under the Enabling Act. 1980 Op. Att'y Gen. No. 80-16.

Authority to move penitentiary out of Santa Fe. — "The penitentiary at Santa Fe" is merely descriptive and not mandatory language. Under the broad powers granted by 33-2-2 and 33-2-5 NMSA 1978 to sell real, personal or mixed property, penitentiary commissioners have authority to move penitentiary out of county of Santa Fe if in their judgment they deem it necessary and proper for the operation and management of the penitentiary. 1953-54 Op. Att'y Gen. No. 53-5628.

ARTICLE XV
Agriculture and Conservation

Section 1. [Department of agriculture.]

There shall be a department of agriculture which shall be under the control of the board of regents of the college of agriculture and mechanic arts; and the legislature shall provide lands and funds necessary for experimental farming and demonstrating by said department.

ANNOTATIONS

Compiler's notes. — The name of the New Mexico college of agriculture and mechanic arts was changed to New Mexico state university by N.M. Const., art XII, § 11, as repealed and reenacted on November 8, 1960.

Department entitled to file criminal charges in magistrate court. — This section establishes state department of agriculture as political subdivision of the state, thereby entitled, in cases within its jurisdiction, to file criminal charges in magistrate courts. 1969 Op. Att'y Gen. No. 69-66.

Without fee in proper cases. — No docket fee need be paid by department for filing complaints in magistrate courts provided complaint is filed by full-time, salaried county or state law enforcement officer, campus security officer, Indian tribal or pueblo law enforcement officer or municipal police officer. 1969 Op. Att'y Gen. No. 69-66.

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "An Administrative Procedure Act For New Mexico," see 8 Nat. Resources J. 114 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Agriculture §§ 20, 21.

Delegation of legislative power to board of health or other board, officer or group with regard to milk regulations, 18 A.L.R. 237, 42 A.L.R. 556, 58 A.L.R. 672, 80 A.L.R. 1225, 101 A.L.R. 64, 110 A.L.R. 644, 119 A.L.R. 243, 155 A.L.R. 1383.

Constitutionality of statutes relating to grading, packing or branding of farm products, 73 A.L.R. 1445.

Power, under statute for stabilization of market for agricultural crops, in respect of crop loans by public agency and the security therefor, 157 A.L.R. 338.

3 C.J.S. Agriculture § 6.

Sec. 2. [Forest fire prevention.]

The police power of the state shall extend to such control of private forest lands as shall be necessary for the prevention and suppression of forest fires.

ANNOTATIONS

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Fires § 2.

Constitutionality of reforestation or forest conservation legislation, 13 A.L.R.2d 1095.

Constitutional rights of owner as against destruction of building by public authorities, 14 A.L.R.2d 73.

98 C.J.S. Woods and Forests § 7.

ARTICLE XVI
Irrigation and Water Rights

Section 1. [Existing water rights confirmed.]

All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XV, § 1.

Montana Const., art. IX, § 3.

Utah Const., art. XVII, § 1.

Wyoming Const., art. VIII, § 1.

The federal reserved water rights doctrine does not apply to state lands that the federal government granted and conveyed to New Mexico in trust for purposes of supporting New Mexico schools. State of N.M. ex rel. State Eng'r v. Comm'r of Public Lands, 2009-NMCA-004, 145 N.M. 433, 200 P.3d 86, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124, cert. denied, 556 U.S. 1208, 129 S. Ct. 2075, 173 L.Ed 2d 1134 (2009).

New Mexico has not recognized inchoate water rights granted by Mexico or Spain. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (1994).

"Water" construed. — Waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are

included within the term "water" as used in this section. State ex rel. Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (1974); McBee v. Reynolds, 74 N.M. 783, 399 P.2d 110 (1965).

Water rights law extends to all parties. — New Mexico constitution and statutory law and case law of federal, territorial and New Mexico courts govern acquisition of water rights of all parties, including United States, state game commission of New Mexico and individual defendants. United States v. Ballard, 184 F. Supp. 1 (D.N.M. 1960).

Pueblo Indians excepted. — Water uses by pueblo Indians in New Mexico are not controlled by state water law or prior appropriation. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, New Mexico v. United States, 429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 572 (1977).

Expanding nature of pueblo right is not an existing right within the meaning of this section. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (1994).

Rights prior to water code protected. — Landowner was entitled to take water for irrigation where water right relied upon was initiated in 1903 by filing of affidavit with county clerk, prior to enactment of the water code (72-9-1 NMSA 1978), which carried a savings clause for prior existing rights. State ex rel. Bliss v. Davis, 63 N.M. 322, 319 P.2d 207 (1957).

Trial court erred in dismissing for failure to exhaust administrative remedies suit in which parties sought adjudication of claimed rights to use of waters of a draw. Fact that neither party had secured permit from state did not necessarily prevent acquisition by either or both of rights to beneficial use of waters from the draw by appropriation nor prevent acquisition of rights to use of waters by either as against the other. If claimed rights were acquired pursuant to common-law appropriations by parties or their predecessors in interest prior to enactment of state's water code (72-9-1 NMSA 1978), those rights were in no way dependent on existence of application to or permit from state engineer. May v. Torres, 86 N.M. 62, 519 P.2d 298 (1974).

Rights vested prior to the water code are subject to forfeiture. — Water rights that vested prior to the adoption of the New Mexico constitution are not immune from statutory forfeiture or common law abandonment. State ex rel. Office of the State Eng'r v. Elephant Butte Irrigation Dist., 2012-NMCA-090, 287 P.3d 324, cert. denied, 2012-NMCERT-008.

Where landowners were the owners of land that had been acquired in1881 by United States patents; the landowners claimed that the land had been irrigated prior to 1881 and that the date of appropriation was at least 1881; and although portions of the property had been farmed and irrigated prior to 1956, after 1956 the land was not farmed and water has not otherwise been put to beneficial use on any of the land, the landowner’s water rights were subject to forfeiture and common law abandonment.

State ex rel. Office of the State Eng'r v. Elephant Butte Irrigation Dist., 2012-NMCA-090, 287 P.3d 324, cert. denied, 2012-NMCERT-008.

State may regulate water rights. — State may in exercise of police power require license of any person drilling well in area determined by state engineer to be an underground source, the boundaries of which have been determined to be reasonably ascertainable. State v. Myers, 64 N.M. 186, 326 P.2d 1075 (1958).

Conservancy Act (Laws 1923, ch. 140, § 201, now repealed) was not repugnant to this section. In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683 (1925).

Eminent domain proper where water storage and conveyance for beneficial uses. — Beneficial use is of primary importance, not the particular purpose (ultimate use) to which water is put. Beneficial uses would be impossible to accomplish without means to transport or convey water from its source to place of utilization. Thus out of necessity the right of eminent domain is provided (72-1-5 NMSA 1978) for storage and conveyance of water for beneficial uses, not for irrigation or domestic purposes alone, but for all beneficial uses. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970), superseded by statute, Santa Fe Southern Railway Inc. v. Baucis Ltd. Liability Co., 1998-NMCA-002, 124 N.M. 430, 952 P.2d 31.

Limited riparian rights in New Mexico. — Riparian rights cannot be said to exist in such country as New Mexico to full extent of their recognition and existence at common law. 1915-16 Op. Att'y Gen. No. 16-1803.

Subsequent appropriations may not diminish riparian owner's supply. — Riparian owner, so far as he has any use for water flowing in his stream, must not have that right impaired by appropriations of water made subsequent to his beginning use of the water so that what he acquires will be materially diminished. 1915-16 Op. Att'y Gen. No. 16-1803.

Consent prerequisite to taking sand from river. — If state or its contractor takes sand from sand bar in middle of Chama river near highway project, it should obtain consent of abutting property-owners. 1937-38 Op. Att'y Gen. No. 38-1902.

Law reviews. — For comment, "Water Rights - Failure to Use - Forfeiture," see 6 Nat. Resources J. 127 (1966).

For student symposium, "Constitutional Revision - Water Rights," see 9 Nat. Resources J. 471 (1969).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For note, "New Mexico's National Forests and the Implied Reservation Doctrine," see 16 Nat. Resources J. 975 (1976).

For article, "Water Law Problems of Solar Hydrogen Production," see 18 Nat. Resources J. 521 (1978).

For article, "Economics and the Determination of Indian Reserved Water Rights," see 23 Nat. Resources J. 749 (1983).

For article, "Patterns of Cooperation in International Water Law: Principles and Institutions," see 25 Nat. Resources J. 563 (1985).

For article, "The Navajo Indian Irrigation Project and Quantification of Navajo *Winters* Rights," see 32 Nat. Resources J. 825 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 230, 318.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated - state takings, 49 A.L.R. 5th 769.

93 C.J.S. Waters § 157.

Sec. 2. [Appropriation of water.]

The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

ANNOTATIONS

Cross references. — For beneficial use as basis, measure and limit of right to use water, *see* N.M. Const., art. XVI, § 3.

I. GENERAL CONSIDERATION.

Prior appropriation is not exclusive. — The doctrine of prior appropriation does not require that resolution of existing and projected future water shortage issues be attempted exclusively through the procedure of a priority call when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods. State ex rel. State Eng'r v. Lewis, 2007-NMCA-008, 141 N.M. 1, 150 P.3d 375.

Pecos River settlement agreement. — The Pecos River settlement agreement, which recognizes prior appropriation rights, but subsumes individual interests to collective and

representative bodies; which provides for a comprehensive contractual water resource management program involving land and water rights purchases and development of well fields or the lease or purchase of existing wells to use as augmentation wells for purpose of pumping water to the Pecos River to augment its flow; and which is authorized by Section 72-1-2.4 NMSA 1978, is constitutional. State ex rel. State Eng'r v. Lewis, 2007-NMCA-008, 141 N.M. 1, 150 P.3d 375.

Priority administration. — Article 16, Section 2 of the constitution of New Mexico mandates priority administration of existing water rights. It does not mandate any particular permitting procedure or require identical permitting procedures for all appropriations. Bounds v. State ex rel. D'Antonio, 2013-NMSC-037, aff'g 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708.

Section 72-12-1.1 NMSA 1978 is not facially unconstitutional. — Section 72-12-1.1 NMSA 1978, the domestic well statute, does not violate the doctrine of prior appropriation set forth in the New Mexico constitution and is facially constitutional. Bounds v. State ex rel. D'Antonio, 2013-NMSC-037, aff'g 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708.

Where plaintiff owned adjudicated surface rights in the Mimbres basin to irrigate plaintiff's farm; the Mimbres basin was a fully appropriated and adjudicated basin and the state engineer had declared the basin closed; plaintiff facially challenged the constitutionality of 72-12-1.1 NMSA 1978 on the grounds that the statute authorized the state engineer to issue domestic well permits without determining the availability of unappropriated water, and that the domestic wells authorized by the permits would necessarily impair senior water users; and the state engineer's regulations provided that domestic well permits were subject to priority administration, 72-12-1.1 NMSA 1978 was not facially unconstitutional. Bounds v. State ex rel. D'Antonio, 2013-NMSC-037, aff'g 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708.

Section 72-12-1.1 NMSA 1978 does not on its face violate the priority doctrine or constitute an impermissible exception to that doctrine. Bounds v. State, 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708, aff'd, 2013-NMSC-037.

Water treated as natural resource for commerce clause analysis purposes. — For purposes of constitutional analysis under the commerce clause, water is to be treated the same as other natural resources. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

Prohibition of out-of-state export of ground water unconstitutional. — New Mexico's prohibition of the out-of-state export of ground water, derived from N.M. Const., art. XVI, §§ 2 and 3, and former 72-12-19 NMSA 1978, which statute, with minor exceptions, expressly prohibited the transport of ground water from New Mexico for use in another state, is unconstitutional, as such an embargo violates the commerce clause of U.S. Const., art. I. City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983).

Section is merely declaratory of prior existing law. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Implementing statute declaratory of existing law. — Laws 1927, ch. 182, § 1 (repealed), declaring waters of underground streams, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, to belong to public and be subject to appropriation for beneficial use, was not subversive of vested rights of owners of land overlying such waters, since it was declaratory of existing law. Yeo v. Tweedy, 34 N.M. 611, 286 P. 970 (1929).

Water rights law extends to all parties. — New Mexico constitution and statutory law and case law of federal, territorial and New Mexico courts govern acquisition of water rights of all parties, including United States, state game commission of New Mexico and individual defendants. United States v. Ballard, 184 F. Supp. 1 (D.N.M. 1960).

Pueblo Indians excepted. — Water uses by pueblo Indians in New Mexico are not controlled by state water law or prior appropriation. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, New Mexico v. United States, 429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 572 (1977).

State's control over public waters is plenary, subject probably only to governmental uses of United States. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

State may in exercise of police power require license of person drilling well in area determined by state engineer (now water resources division of natural resources department) to be an underground source, the boundaries of which have been determined to be reasonably ascertainable. State v. Myers, 64 N.M. 186, 326 P.2d 1075 (1958).

Prior confirmed title superior. — This section cannot operate to deprive a party of right of title derived from congressional act of confirmation and based upon early Mexican grant. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945). See N.M. Const., art. XVI, § 1.

Kinds of water within this provision. — Waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are public and subject to appropriation for beneficial use. McBee v. Reynolds, 74 N.M. 783, 399 P.2d 110 (1965).

Does not apply to artificial waters. — Artificial waters are not subject to appropriation under laws of New Mexico. Creator of an artificial flow of water is owner of the water so long as it is confined to his property, except possibly where it appears that artificial flow is created by agency which is of permanent nature and creator of flow has abandoned all claim to use of water. Hagerman Irrigation Co. v. East Grand Plains Drainage Dist., 25 N.M. 649, 187 P. 555 (1920).

No right to particular silt content. — An owner of surface water rights does not have a right to receive a particular silt content that has existed historically. Ensenada Land & Water Ass'n v. Sleeper, 107 N.M. 494, 760 P.2d 787 (Ct. App.), cert. quashed, 107 N.M. 413, 759 P.2d 200 (1988).

II. PUBLIC WATERS.

New Mexico does not recognize pueblo rights doctrine. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (Ct. App. 1990).

Pueblo rights doctrine is incompatible with water law in New Mexico and violates public policy. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (Ct. App. 1990).

Pueblo rights doctrine is inconsistent with New Mexico law and not protected by the Treaty of Guadalupe Hidalgo. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (Ct. App. 1990).

Pueblo rights doctrine is inconsistent with New Mexico's system of prior appropriation. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (Ct. App. 1990).

Water rights acquired by municipality under colonization grant from antecedent sovereigns is recognized in New Mexico in the same manner as other municipal water rights. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (Ct. App. 1990).

State controls the use of water because it does not part with ownership; it only allows a usufructuary right to water. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Waters already reserved for public use. — Waters need not be appropriated for public use since they are already reserved for such use, subject to being specifically appropriated for private beneficial use. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Alternative view nowhere expressed by state. — If it were intention that public waters should have been public only in sense that they could be diverted from natural channel through specific appropriation for irrigation, mining and other beneficial uses, apt language could have been used in the early statutes and constitution. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Alternative view not expressed by congress. — When congress confirmed title to lands in 1869 and when United States issued title thereto in 1873, federal government

did not limit or destroy right of general public to use public waters. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Sportsman may fish in public water so long as he does not trespass upon lands of another, and owner of underlying land cannot complain of fishing from boat upon public waters above. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Riparian owner lacks recreation rights distinct from general public's. — Riparian owner has no rights of recreation or fishery distinct from rights of general public where waters impounded are from natural streams which are public waters subject to jurisdiction of state game commission. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Continuance of public nature. — Where two perennial streams were public waters prior to building of dam, they continued to be public after waters from two streams were artificially impounded. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

State engineer to prevent instream flows despite failure of game commission so to provide. — Though at time state game commission negotiated for creation of reservoir by construction of dam, it did not press for recognition of public's right to fish in waters impounded, the public's right to use public waters in question was not thereby foreclosed. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

III. APPROPRIATION FOR BENEFICIAL USE.

New Mexico has adopted so-called appropriation doctrine of water use. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

Establishment of an existing water right. — To establish an existing water right, a claimant must demonstrate his intent to appropriate the water and show that he has actually diverted the water and applied it to beneficial use. Estate of Boyd v. United States, 2015-NMCA-018, cert. denied, 2015-NMCERT-001.

Where plaintiff who claimed an existing water right was not currently diverting or using water to which he claimed a right, but rather based his claim to water rights on the water rights and irrigation work from his predecessor in interest, who diverted irrigation water over one hundred years prior to the existing cause of action, plaintiff failed to establish an existing water right by failing to show that he had actually diverted the water and applied it to beneficial use. Estate of Boyd v. United States, 2015-NMCA-018, cert. denied, 2015-NMCERT-001.

Adjudication of rights is essential to operation of appropriation doctrine. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), cert. denied, New Mexico v. United States, 429 U.S. 1121, 97 S. Ct. 1157, 51 L. Ed. 2d 572 (1977).

Service of decision denying protest on attorney rather than on protestant, where protestant's well was mentioned in application to change use of existing rights, did not adjudicate protestant's rights to the well. Garbagni v. Metropolitan Inv., Inc., 110 N.M. 436, 796 P.2d 1132 (Ct. App.), cert. denied, 110 N.M. 330, 795 P.2d 1022 (1990).

No right to specific water. — Appropriator does not acquire any right to specific water flowing in public stream, though he may take therefrom a given quantity of water for specific purpose. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Municipal water rights must be determined by prior appropriation based on beneficial use regardless of a colonization grant from preceding sovereigns. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 686 (1994).

Colonization grant from antecedent sovereigns establishes date of priority, but the priority date applies only to the quantity of water put to beneficial use within a reasonable time of the initial appropriation. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (1994).

Determination of beneficial use is a question of fact. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Beneficial uses of water can be non-consumptive. — A beneficial use of water does not require its consumption. Both consumptive and non-consumptive uses of water can be beneficial uses. A non-consumptive, beneficial use can be the basis for an appropriation of water as much as a consumptive use. Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth., 2014-NMCA-032, cert. denied, 2014-NMCERT-002.

Non-consumptive use of water was a new beneficial use that required an appropriation. — Where applicant applied for a permit to divert native Rio Grande water, to which applicant had no appropriative right, to enable applicant to carry its San Juan-Chama water into the applicant’s water treatment plant for processing and distribution through applicant’s drinking water project; the application did not request an appropriation of the native Rio Grande water or a request to divert the water for a beneficial use; applicant claimed that it would not apply the water to beneficial use and that the water would not be consumptively used because it would be returned to the river in full measure; and the Middle Rio Grande Basin was fully appropriated, applicant’s diversion of native Rio Grande water was for a beneficial use which required an appropriation of the water to enable applicant to put the water to the beneficial use. Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth., 2014-NMCA-032, cert. denied, 2014-NMCERT-002.

A non-consumptive beneficial use of water in a fully appropriated basin. — The state engineer has the authority to determine whether a new non-consumptive use would or would not have any impact on the available water in a fully appropriated basin and whether it could be allowed under Section 72-5-7 NMSA 1978. A non-consumptive beneficial use piggy-backed onto a fully appropriated basin can, under certain appropriate circumstances, be a legitimate appropriation. Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth., 2014-NMCA-032, cert. denied, 2014-NMCERT-002.

"Beneficial use" construed. — "Beneficial use" to which public waters may be placed includes fishing and recreation. State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

Because water conservation and preservation is of utmost importance, maximum utilization is a fundamental requisite of "beneficial use". Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

The holding of Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981), does not broadly stand for the proposition that using San Juan-Chama Project water for recreation, fish and wildlife purposes is not “beneficial” under federal and state law. Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003).

Diverting San Juan-Chama Project water to prevent jeopardy to an endangered species of minnow is a “beneficial use” under New Mexico law. Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003).

Water not put to beneficial use within a reasonable time cannot be reserved by a municipality for future expansion. State v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, rev'g 118 N.M. 257, 880 P.2d 868 (1994).

Quantity of appropriation measured by amount applied to beneficial use. — Amount of water which has been applied to a beneficial use is a measure of quantity of appropriation. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

Use must be reasonable. — Use of water must not only be beneficial to lands of appropriator, but it must also be reasonable in relation thereto. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

No matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. Excessive diversion of water through waste cannot be regarded as diversion to beneficial use. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957); Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Interim administration of junior water uses of stream system constitutional. — In a suit to adjudicate rights to the surface and ground waters of an entire stream system, an order permitting the court to enjoin junior water users to show cause in individual

proceedings why their uses should not be enjoined pursuant to this section, such injunctions being subject to the right of each user to contest inter se the rights adjudicated for use through and by means of a senior irrigation project, and also subject to the right of each user to establish that his use of the public waters of the stream system should not be terminated to satisfy the senior rights adjudicated for use through the project, and appointing the state engineer as an interim watermaster to administer such orders of injunction as may be entered by the court in the proceedings which will be held pursuant to the order, does not violate rights to due process. State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699, 663 P.2d 358 (1983).

IV. EMINENT DOMAIN.

Interstate stream commission may condemn land in state's name. — Interstate stream commission is entitled to institute proceedings in name of state for condemnation of land for erecting dam and reservoir to impound and conserve water. State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P.2d 239 (1935).

Eminent domain proper where water storage and conveyance for beneficial uses. — Beneficial use is of primary importance, not the particular purpose (ultimate use) to which water is put. Beneficial uses would be impossible to accomplish without means to transport or convey water from its source to place of utilization. Thus out of necessity the right of eminent domain is provided (42-1-31 and 72-1-5 NMSA 1978) for storage and conveyance of water for beneficial uses, not for irrigation or domestic purposes alone, but for all beneficial uses. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970), superseded by statute, Santa Fe S. Ry., Inc. v. Baucis Ltd. Liab. Co., 1998-NMCA-002, 124 N.M. 430, 952 P.2d 31.

Confiscation for private use exception to general rule. — Private property can be taken only for public use, and effect of New Mexico law is to carve out an exception to this constitutional mandate in recognition of overriding considerations borne of necessity in an arid land where water is the life-blood of the community. W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967), rev'd on ground that federal action should be stayed awaiting state decision, 391 U.S. 593, 88 S. Ct. 1753, 20 L. Ed. 2d 835 (1968).

Conservancy district does not have authority to barter away vested water rights of landowners who have applied them to beneficial use. Waters are appurtenant to land and district stores and delivers them to the users. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 57 N.M. 287, 258 P.2d 391 (1953).

V. EQUITABLE APPORTIONMENT.

Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream. When both states recognize the doctrine of prior appropriation, priority becomes the "guiding principle" in an allocation between competing states, but state law is not

controlling. Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982), reh'g denied, 459 U.S. 1229, 103 S. Ct. 1418, 75 L. Ed. 2d 471 (1983).

Rule of priority is not sole criterion. — In the determination of an equitable apportionment of the water of the Vermejo river between Colorado and New Mexico, the rule of priority is not the sole criterion. While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both states and the balance of harm and benefit that might result from a diversion sought by Colorado. Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982), reh'g denied, 459 U.S. 1229, 103 S. Ct. 1418, 75 L. Ed. 2d 471 (1983).

Doctrine applies to claim for future uses. — The flexible doctrine of equitable apportionment clearly extends to a state's claim to divert water for future uses. Whether such a diversion should be permitted will turn on an examination of all factors relevant to a just apportionment. Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982), reh'g denied, 459 U.S. 1229, 103 S. Ct. 1418, 75 L. Ed. 2d 471 (1983).

Do not include stream beds. — Right to flow of water is quite distinct from ownership of bed of stream, and state does not own bed of any stream, except as riparian owner. 1939-40 Op. Att'y Gen. No. 39-3152.

Does not apply to artificial waters. 1961-62 Op. Att'y Gen. No. 61-38.

Access to public waters. — A private landowner cannot prevent persons from fishing in a public stream that flows across the landowner's property, provided the public stream is accessible without trespass across privately owned adjacent lands. 2014 Op. Att’y Gen. 14-04.

State engineer to protect instream flows. — Neither the New Mexico constitution nor statutes governing appropriation and use of surface water prohibit the state engineer from affording legal protection for instream flows for recreational, fish or wildlife, or ecological purposes, by conditioning approval of a transfer of an existing water right to an instream use on the installation of gauging devices. 1998 Op. Att'y Gen. No. 98-01.

Prior actual appropriation gives better right than administratively approved application. — Prior actual appropriation of water to a beneficial use, open and visible, will give better right to water than could be obtained under approved application to state engineer for right to appropriate. 1914 Op. Att'y Gen. No. 14-1271.

Appropriator may also condemn. — Applicant for appropriation of waters for irrigation purposes may acquire, by condemnation proceedings, right to use of project and right-of-way through existing ditch or canal of another appropriator, by enlargement. 1915-16 Op. Att'y Gen. No. 15-1508.

Law reviews. — For comment, "Water Rights - Failure to Use - Forfeiture," see 6 Nat. Resources J. 127 (1966).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For note, "Appropriation By the State of Minimum Flows in New Mexico Streams," see 15 Nat. Resources J. 809 (1975).

For note, "New Mexico's National Forests and the Implied Reservation Doctrine," see 16 Nat. Resources J. 975 (1976).

For comment, "Indian Pueblo Water Rights Not Subject to State Law Prior to Appropriation," see 17 Nat. Resources J. 341 (1977).

For article, "Water Law Problems of Solar Hydrogen Production," see 18 Nat. Resources J. 521 (1978).

For comment on geothermal energy and water law, see 19 Nat. Resources J. 445 (1979).

For note, "Brantley v. Carlsbad Irrigation District: Limits of the Templeton Doctrine Affirmed," see 19 Nat. Resources J. 669 (1979).

For comment, "Protection of the Means of Groundwater Diversion," see 20 Nat. Resources J. 625 (1980).

For comment, "New Mexico's Mine Dewatering Act: The Search for Rehoboth," see 20 Nat. Resources J. 653 (1980).

For article, "New Mexico Water Law: An Overview and Discussion of Current Issues," see 22 Nat. Resources J. 1045 (1982).

For article, "Legislation on Domestic and Industrial Uses of Water: A Comparative Review," see 24 Nat. Resources J. 143 (1984).

For note, "Commerce Clause Curbs State Control of Interstate Use of Ground Water: City of El Paso v. Reynolds," see 24 Nat. Resources J. 213 (1984).

For article, "Centralized Decisionmaking in the Administration of Groundwater Rights: The Experience of Arizona, California and New Mexico and Suggestions for the Future," see 24 Nat. Resources J. 641 (1984).

For comment, "Is There a Future for Proposed Water Uses in Equitable Apportionment Suits?," see 25 Nat. Resources J. 791 (1985).

For note, "Recent Developments in the El Paso/New Mexico Interstate Groundwater Controversy - The Constitutionality of New Mexico's New Municipality Water Planning State," see 29 Nat. Resources J. 223 (1989).

For note, "The Milagro Beanfield War Revisited in Ensenada Land & Water Ass'n v. Sleeper: Public Welfare Defies Transfer of Water Rights," see 29 Nat. Resources J. 861 (1989).

For article, “The Administration of the Middle Rio Grande Basin: 1956-2002,” see 42 Nat. Resources J. 939 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 229, 316.

Appropriation of subterranean and percolating waters, springs and wells, 55 A.L.R. 1444, 109 A.L.R. 395.

Right of appropriator of water to recapture water which has escaped or is otherwise no longer within his immediate possession, 89 A.L.R. 210.

Methods or means of diversion, appropriation of water as creating right to continue, as against subsequent appropriator, 121 A.L.R. 1044.

Riparian owner's right to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656.

Riparian owner's right to construct dikes, embankments or other structures necessary to maintain or restore bank of stream or to prevent flood, 23 A.L.R.2d 750.

Liability for obstruction or diversion of subterranean waters in use of land, 29 A.L.R.2d 1354.

Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 A.L.R.2d 143.

Modern status of rules governing interference with drainage of surface waters, 93 A.L.R.3d 1193.

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030.

Allocation of water space among lakefront owners, in absence of agreement or specification, 14 A.L.R.4th 1028.

Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891.

93 C.J.S. Waters § 157 et seq.

Sec. 3. [Beneficial use of water.]

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

ANNOTATIONS

Establishment of an existing water right. — To establish an existing water right, a claimant must demonstrate his intent to appropriate the water and show that he has actually diverted the water and applied it to beneficial use. Estate of Boyd v. United States, 2015-NMCA-018, cert. denied, 2015-NMCERT-001.

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Water rights law extends to all parties. — New Mexico constitution and statutory law and case law of federal, territorial and New Mexico courts govern acquisition of water rights of all parties, including United States, state game commission of New Mexico and individual defendants. United States v. Ballard, 184 F. Supp. 1 (D.N.M. 1960).

"Water" construed. — Waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are included within the term "water" as used in this section. State ex rel. Reynolds v. Mears,

86 N.M. 510, 525 P.2d 870 (1974); McBee v. Reynolds, 74 N.M. 783, 399 P.2d 110 (1965).

"Beneficial use" construed. — Beneficial use is the use of such water as may be necessary for some useful and beneficial purpose in connection with land from which it is taken. No one has right to use or divert water except for beneficial use. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

Conservation is beneficial use. — Attainment of state conservation purposes by state game commission is such a purpose as to constitute a useful or beneficial application of waters. United States v. Ballard, 184 F. Supp. 1 (D.N.M. 1960).

Quantity of appropriation measured by amount applied to beneficial use. — Amount of water which has been applied to a beneficial use is a measure of quantity of appropriation. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

Measuring water rights. — Where the state engineer utilized aerial photographs dating back to 1935 to measure water rights by the amount of water being placed in beneficial use and did not measure water that was declared and was not being beneficially used, the state engineer followed the basis of measurement required by the New Mexico constitution. Montgomery v. State Eng'r, 2005-NMCA-071, 137 N.M. 659, 114 P.3d 339, aff'd in part, rev'd in part, 2007-NMSC-002, 141 N.M. 21, 150 P.3d 971.

Appropriator can take only such water as he can beneficially use. Worley v. United States Borax & Chem. Corp., 78 N.M. 112, 428 P.2d 651 (1967).

Measure of right to appropriate water is actual beneficial use; that is, the amount of water necessary for effective use for purpose to which it is put under particular circumstances of soil conditions, method of conveyance, topography and climate. State ex rel. Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (1974).

A city cannot take for storage a quantity of water greatly in excess of its current needs and sales to other water users on the strength of mere speculation as to the demands of possible sales in the future. Such storage for possible future exchange is unreasonable and does not constitute a beneficial use. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

No one is entitled to receive water for a use not recognized as beneficial. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Excessive diversion is not beneficial use. — No matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Intended future use. — The concept of beneficial use requires actual use for some purpose that is socially accepted as beneficial. An intended future use is not sufficient to establish beneficial use if the water is not put to actual use within a reasonable span of time. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Diversion alone is not beneficial use. — There must be an ultimate, actual beneficial use of the water resulting from the diversion. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Mere diversion of water into a canal or ditch, without applying water to irrigating a crop or other valid use, does not satisfy the requirement of a beneficial use. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Preparatory use. — Running water over land without growing crops or irrigating native grasses may constitute a preparatory use of the water for a period of time, but doing so for a number of years can only be characterized as waste. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Diversion for irrigation. — Diversion of water into irrigation ditches or flooding the land with the diverted water does not, by itself, constitute irrigation for the purpose of establishing beneficial use; diversion for the purpose of irrigation contemplates that something will be grown. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

When water is diverted for agricultural purposes, the vesting of water rights occurs when crops are cultivated and not when preparatory steps are taken in anticipation of cultivation. State ex rel. Martinez v. McDermett, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

Water forfeited by nonuse. — Beneficial use is the basis, measure and limit of the right to use water in New Mexico, and unused water rights may be forfeited. United States ex rel. Acoma & Laguna Indian Pueblos v. Bluewater-Toltec Irrigation Dist., 580 F. Supp. 1434 (D.N.M. 1984), aff'd, 806 F.2d 986 (10th Cir. 1986).

Use must be reasonable. — Use of water must not only be beneficial to lands of appropriator, but it must also be reasonable in relation thereto. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

No matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. Excessive diversion of water through waste cannot be regarded as diversion to beneficial use. State ex rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957); Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Generally regarding eminent domain. — In determining whether use would inure to benefit of general public or only a few individuals, the public use being furthered is not

distribution of waters but the ultimate use of the water. The ultimate use of public waters in aid of coal mining is not a beneficial or public use so as to confer power of eminent domain for a right-of-way to divert such water. W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257 (10th Cir. 1967), rev'd on ground that federal action should be stayed awaiting state decision, 391 U.S. 593, 88 S. Ct. 1753, 20 L. Ed. 2d 835 (1968).

Eminent domain proper where water storage and conveyance for beneficial uses. — Beneficial use is of primary importance, not the particular purpose (ultimate use) to which water is put. Beneficial uses would be impossible to accomplish without means to transport or convey water from its source to place of utilization. Thus out of necessity the right of eminent domain is provided (42-1-31 and 72-1-5 NMSA 1978) for storage and conveyance of water for beneficial uses, not for irrigation or domestic purposes alone, but for all beneficial uses. Kaiser Steel Corp. v. W.S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970), superseded by statute, Santa Fe S. Ry., Inc. v. Baucis Ltd. Liab. Co., 1998-NMCA-002, 124 N.M. 430, 952 P.2d 31.

Liability for negligent use of water. — Beneficial use is the basis, measure and limit of right to use of water under this section, and when waters are willfully and negligently allowed to run on lands of others, liability attaches. Holloway v. Evans, 55 N.M. 601, 238 P.2d 457 (1951).

Lease of water by irrigation district is beneficial use. — Leasing or renting of water by irrigation district together with use thereof by lessee is beneficial use within requirement of this section. 1963-64 Op. Att'y Gen. No. 64-01.

Remainder subject to further appropriation. — By limiting right to use of water to a "beneficial use," constitution grants to appropriator only that quantity of water which is so applied, the remainder being subject to further appropriation for like purposes. 1915-16 Op. Att'y Gen. No. 15-1508.

Water right forfeited by nonuse. — There is no power under New Mexico water law to acquire a water right and hold it without using it. Water right is a usufructuary right which can be forfeited by nonuse. 1963-64 Op. Att'y Gen. No. 64-01.

State engineer to protect instream flows. — Neither the New Mexico constitution nor statutes governing appropriation and use of surface water prohibit the state engineer from affording legal protection for instream flows for recreational, fish or wildlife, or ecological purposes, by conditioning approval of a transfer of an existing water right to an instream use on the installation of gauging devices. 1998 Op. Att'y Gen. No. 98-01.

Law reviews. — For comment, "Water Rights - Failure to Use - Forfeiture," see 6 Nat. Resources J. 127 (1966).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For note, "New Mexico's National Forests and the Implied Reservation Doctrine," see 16 Nat. Resources J. 975 (1976).

For article, "Water Law Problems of Solar Hydrogen Production," see 18 Nat. Resources J. 521 (1978).

For comment, "Protection of the Means of Groundwater Diversion," see 20 Nat. Resources J. 625 (1980).

For comment, "New Mexico's Mine Dewatering Act: The Search for Rehoboth," see 20 Nat. Resources J. 653 (1980).

For article, "Centralized Decisionmaking in the Administration of Groundwater Rights: The Experience of Arizona, California and New Mexico and Suggestions for the Future," see 24 Nat. Resources J. 641 (1984).

For article, "The Law of Prior Appropriation: Possible Lessons for Hawaii," see 25 Nat. Resources J., 911 (1985).

For note, "Recent Developments in the El Paso/New Mexico Interstate Groundwater Controversy - The Constitutionality of New Mexico's New Municipality Water Planning Statute," see 29 Nat. Resources J. 223 (1989).

For note, "The Milagro Beanfield War Revisited in Ensenada Land & Water Ass'n v. Sleeper: Public Welfare Defies Transfer of Water Rights," see 29 Nat. Resources J. 861 (1989).

For note, "Contract for Nonbeneficial Use: New Mexico Water Law Is Drowned Out by Contract," see 32 Nat. Resources J. 149 (1992).

For article, “So Much Conflict, Yet So Much in Common: Considering the Similarities between Western Water Law and the Endangered Species Act”, see 44 Nat. Resources J. 29 (2004).

For article, “Water Transfer between North and South Carolina: An Option for Policy Reform”, see 45 Nat. Resources J. 441 (2005).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 330 to 332.

Measure and elements of damages for pollution of well or spring, 76 A.L.R.4th 629.

93 C.J.S. Waters § 172.

Sec. 4. [Drainage districts and systems.]

The legislature is authorized to provide by law for the organization and operation of drainage districts and systems.

ANNOTATIONS

Cross references. — For statutes implementing this section, *see* 73-6-1 to 73-6-44, 73-7-1 to 73-7-56, 73-8-1 to 73-8-60 NMSA 1978.

For irrigation districts, *see* 73-9-1 to 73-9-62, 73-10-1 to 73-10-50, 73-11-1 to 73-11-55, 73-12-1 to 73-12-57, 73-13-1 to 73-13-47 NMSA 1978.

Water rights law extends to all parties. — New Mexico constitution and statutory law and case law of federal, territorial and New Mexico courts govern acquisition of water rights of all parties, including United States, state game commission of New Mexico and individual defendants. United States v. Ballard, 184 F. Supp. 1 (D.N.M. 1960).

"Drainage district" not required designation. — Nothing in this provision requires legislation pertaining to removal of excess water from surface of an area to refer to or designate authority for such water control as a "drainage district". Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne, 74 N.M. 487, 394 P.2d 998 (1964).

Districts need not be corporations. — This provision does not necessarily contemplate that drainage districts shall be corporations. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

Drainage act constitutional. — New Mexico Drainage Act (Laws 1912, ch. 84, presently compiled as 73-6-1 NMSA 1978 et seq.) does not violate this section. In re Dexter-Greenfield Drainage Dist., 21 N.M. 286, 154 P. 382 (1915).

Section apparently authorizes provisions for acequias. — The grant under this section seems to be plenary and to authorize the legislature to provide for drainage districts, in such form as it in its discretion may adopt, and one form of such districts is the community acequia. 1963-64 Op. Att'y Gen. No. 63-112.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drains and Drainage Districts § 3 et seq.

Scope and import of term "owner" in statute relating to formation of drainage district, 2 A.L.R. 791, 95 A.L.R. 1085.

Park property, use of, for construction of water supply system, 18 A.L.R. 1265, 63 A.L.R. 484, 144 A.L.R. 486.

State's power to exact fee or require license for taking water from stream, 19 A.L.R. 649, 29 A.L.R. 1478.

Liability of drainage district for personal injuries, 33 A.L.R. 77.

Personal liability of officers of drainage districts for negligence of subordinates or employees causing damage to person or property, 61 A.L.R. 300.

Constitutionality of statutes for formation or change of irrigation districts, 69 A.L.R. 285.

Liability of irrigation district for damages, 69 A.L.R. 1231, 160 A.L.R. 1165.

Constitutionality and construction of statute which leaves to determination of private individuals boundaries of territory to be erected into water district, 70 A.L.R. 1064.

Estoppel of riparian owner to complain of diversion of water by municipal corporation, 74 A.L.R. 1129.

Discrimination between property within and that outside municipality or other governmental district as to public service or utility rates, 4 A.L.R.2d 595.

Relocation of easements (other than those originally arising by necessity); rights as between private parties, 80 A.L.R.2d 743.

28 C.J.S. Drains § 4.

Sec. 5. [Appeals in matters relating to water rights.]

In any appeal to the district court from the decision, act or refusal to act of any state executive officer or body in matters relating to water rights, the proceeding upon appeal shall be de novo as cases originally docketed in the district court unless otherwise provided by law. (As added November 7, 1967.)

ANNOTATIONS

The 1967 amendment of Article XVI, which was proposed by S.J.R. No. 7 (Laws 1967) and was adopted at a special election held on November 7, 1967, by a vote of 31,494 for and 19,571 against, added this section.

Compiler's notes. — An amendment to Article XVI, which would have added a new section similar to this one, was proposed by H.J.R. No. 29 (Laws 1965) and submitted to the people at a special election held on September 28, 1965. It was defeated by a vote of 23,718 for and 35,924 against.

Standard of review. — In appeals from the state engineer to the district court, the district court is limited to a de novo review of the issues decided by the state engineer. When the state engineer makes a summary determination that water is not available for appropriation, the district court is limited to review of the issue of whether water is available for appropriation, but when the state engineer determines that water is

available for appropriation, the district court must consider each constituent issue of a water rights application. Lion's Gate Water v. D'Antonio, 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622.

Where the state engineer determined that no unappropriated water was available for the applicant and rejected the applicant's application for a permit to appropriate water, the district court erred in determining that the district court had jurisdiction to hear all matters either presented to or which might have been presented to the state engineer. Lion's Gate Water v. D'Antonio, 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622.

Standard of review of decisions of the commissioners of acequias. — The standard of review in an appeal to the district court from a decision by the commissioners of an acequia pursuant to 73-2-21 NMSA 1978, which permits the district court to set aside, reverse or remand the decision if the district court determines that the commissioners acted fraudulently, arbitrarily or capriciously, or that the commissioners did not act in accordance with law, does not violate N.M. Const., art. XVI, § 5. Pena Blanca P'ship v. San Jose de Hernandez Cmty. Ditch, 2009-NMCA-016, 145 N.M. 555, 202 P.3d 814, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

Original proceeding in district court unconstitutional. — Proviso added to 75-2-15, 1953 Comp. in 1967 (since deleted), stating that that section was to have no application to hearings relating to underground waters required to be held in district court, was unconstitutional as a violation of separation of powers doctrine of state constitution; statute was not validated by subsequent adoption of N.M. Const., art. XVI, § 1, since constitutional amendment concerned appeal to district court, whereas contemplated hearings were original proceedings in district court. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

1967 amendment to 75-11-7, 1953 Comp. (since deleted), providing for district court review of state engineer's decision, was unconstitutional in that it violated separation of powers doctrine of state constitution; statute was not validated by subsequent adoption of N.M. Const., art. XVI, § 5, since that amendment specifically referred to "appeal" to district court, whereas the statute contemplated an original proceeding in district court without the requirement of a prior decision, act or refusal to act by state engineer. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

Court should have recited substance of its judgment, rather than merely affirming findings and decision of state engineer. Fort Sumner Irrigation Dist. v. Carlsbad Irrigation Dist., 87 N.M. 149, 530 P.2d 943 (1974).

Trial de novo afforded. — Where irrigation district appealed state engineer's findings and order approving transfer of certain water storage rights and at trial in district court evidence adduced at hearing before engineer was considered along with all additional relevant evidence desired by the parties, including witnesses, and no party was in any way foreclosed or limited in presentation of evidence it possessed and wished to

present, the proceedings conformed to trial de novo mandated by this section, although court merely affirmed findings and order of state engineer. Fort Sumner Irrigation Dist. v. Carlsbad Irrigation Dist., 87 N.M. 149, 530 P.2d 943 (1974).

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Resources J. 599 (1967).

For article, "Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas," see 11 Nat. Resources J. 48 (1971).

For article, "Congressional Quantification of Indian Reserved Water Rights: A Definite Solution or a Mirage?," see 20 Nat. Resources J. 17 (1980).

For comment, "Protection of the Means of Groundwater Diversion," see 20 Nat. Resources J. 625 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 78 Am. Jur. 2d Waters §§ 256, 258.

93 C.J.S. Waters § 204.

Sec. 6. [Water trust fund.]

A. The "water trust fund" is created in the state treasury to conserve and protect the water resources of New Mexico and to ensure that New Mexico has the water it needs for a strong and vibrant future. The purpose of the fund shall be to secure a supply of clean and safe water for New Mexico’s residents. The fund shall consist of money appropriated, donated or otherwise accrued to the fund. Money in the fund shall be invested by the state investment officer as land grant permanent funds are invested, and there shall be strict accountability and oversight measures as provided by the state investment council to ensure appropriate safety of and return on investments. Earnings from investment of the fund shall be credited to the fund. Money in the fund shall not revert or be expended for any purpose, but an annual distribution shall be made to the water project fund, which shall be used only to support critically needed projects that preserve and protect New Mexico's water supply and is in accordance with Subsection B of this section.

B. On July 1, 2008 and each fiscal year thereafter, an annual distribution shall be made from the water trust fund pursuant to law, and that distribution shall then be appropriated by the legislature only for water projects consistent with a state water plan and as otherwise provided by law. (As added November 7, 2006.)

ANNOTATIONS

Cross references. — For the water trust fund, *see* 72-4A-8 NMSA 1978.

For the water project fund, *see* 72-4A-9 NMSA 1978.

Compiler's note. — H.J.R. 6 (Laws 2006), which proposed a new section to provide for a water trust fund to NM const., art. 16, was adopted at the general election held on November 6, 2006, by a vote of 312,764 for and 163,136 against.

Appropriations. — Laws 2007, ch. 28, § 11, of the General Appropriation Act of 2007 provides for the transfer of $15,000,000 from the general fund to the water trust fund at the beginning of fiscal year 2008.

ARTICLE XVII
Mines and Mining

Section 1. [Inspector of mines.]

There shall be a state mine inspector who shall be appointed by the governor, by and with the advice and consent of the senate, for a term of four years, and whose duties and salary shall be as prescribed by law. The legislature may pass laws prescribing reasonable qualifications for the state mine inspector and deputy mine inspectors, and current legislative enactments prescribing such qualifications are declared to be in full force and effect. (As amended September 19, 1961.)

ANNOTATIONS

Cross references. — For applicability of federal Mining Inspection Act (26 Stat. 1104) in New Mexico, *see* N.M. Const., art. XXII, § 3.

For legislation relating to state inspector of mines, *see* Chapter 69, Articles 5 and 8 NMSA 1978.

The 1961 amendment, which was proposed by S.J.R. No. 23 (Laws 1961) and adopted at a special election held on September 19, 1961, with a vote of 29,773 for and 20,745 against, substituted "a state mine inspector" for "an inspector of mines" in the first sentence and added the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Mines and Minerals § 274 et seq.

58 C.J.S. Mines and Minerals § 237.

Sec. 2. [Mining regulations; employment of children under fourteen.]

The legislature shall enact laws requiring the proper ventilation of mines, the construction and maintenance of escapement shafts or slopes, and the adoption and use of appliances necessary to protect the health and secure the safety of employees therein. No children under the age of fourteen years shall be employed in mines.

ANNOTATIONS

Cross references. — For prohibition of certain mining work by children under 18, *see* 50-6-5 NMSA 1978.

For Mining Safety Act, *see* 69-8-1 NMSA 1978 et seq.

See also Chapter 69, NMSA 1978 for related mining statutes.

Attempt to comply with constitutional mandate. — Laws 1912, ch. 80 (repealed), was evidently an attempt to comply with this section's mandate. Melkusch v. Victor Am. Fuel Co., 21 N.M. 396, 155 P. 727 (1916).

Type of employment subject to age requirement. — It is apparent that the contemplated employment (separating mica near blasting area) is a mining operation as that term is defined in 69-4-1 NMSA 1978 (repealed), and therefore falls within prohibition of this section as to age of employment. 1957-58 Op. Att'y Gen. No. 58-204.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Mines and Minerals §§ 255, 256, 257, 260 et seq.; 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 23, 24, 131, 137, 138.

Quarries, gravel pits and the like as nuisances, 47 A.L.R.2d 490.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil or other natural products within municipal limits, 10 A.L.R.3d 1226.

30 C.J.S. Employers' Liability §§ 69, 70; 58 C.J.S. Mines and Minerals § 229.

ARTICLE XVIII
Militia

Section 1. [Composition, name and commander in chief of militia.]

The militia of this state shall consist of all able-bodied male citizens between the ages of eighteen and forty-five, except such as are exempt by laws of the United States or of this state. The organized militia shall be called the "national guard of New Mexico," of which the governor shall be the commander in chief.

ANNOTATIONS

Cross references. — For status of governor as commander in chief of state military forces, *see* N.M. Const., art. V, § 4.

Comparable provisions. — Idaho Const., art. XIV, § 1.

Iowa Const., art. VI, § 1.

Utah Const., art. XV, §§ 1, 2.

Wyoming Const., art. XVII, § 1.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M. L. Rev. 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Military and Civil Defense §§ 3, 26, 34.

Incompatibility of offices of judge and national guard officer, 26 A.L.R. 143, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Taxation for militia purposes as within constitutional prohibitions, 46 A.L.R. 723, 106 A.L.R. 906.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

6 C.J.S. Armed Services §§ 289, 291.

Sec. 2. [Organization, discipline and equipment of militia.]

The legislature shall provide for the organization, discipline and equipment of the militia, which shall conform as nearly as practicable to the organization, discipline and equipment of the regular army of the United States, and shall provide for the maintenance thereof.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XIV, § 2.

Iowa Const., art. VI, § 1.

Utah Const., art. XV, § 2.

Wyoming Const., art. XVII, § 2.

Meaning of section. — Constitution-makers did not say that legislature should organize the militia but mandated them to provide for organization of militia, and legislature has declared its legislative policy of establishing a militia. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Court-martial for felony not authorized absent war or public danger. — Section does not authorize legislature to provide that militiaman can be tried for felony by court-

martial or military court when no state of war or public danger exists. State ex rel. Sage v. Montoya, 65 N.M. 416, 338 P.2d 1051 (1959).

Provisions in pari materia. — Constitutional provisions concerning organization, discipline and equipment of militia, calling out of militia (N.M. Const., art. V, § 4) and contracting debts to provide for public defense (N.M. Const., art. IX, § 7) are in pari materia. State ex rel. Charlton v. French, 44 N.M. 169, 99 P.2d 715 (1940).

Salary of adjutant-general. — Adjutant-general of the state holds two offices, one a civil office and the other brigadier-general of the national guard of the state, and when ordered to duty as national guard officer, he is entitled to pay in both capacities. 1933-34 Op. Att'y Gen. No. 34-805.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Military and Civil Defense § 26.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

6 C.J.S. Armed Services § 288 et seq.

ARTICLE XIX
Amendments

Section 1. [Proposing and ratifying amendments.]

An amendment or amendments to this constitution may be proposed in either house of the legislature at a regular session; and if a majority of all members elected to each of the two houses voting separately votes in favor thereof, the proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon.

An amendment or amendments may also be proposed by an independent commission established by law for that purpose, and the amendment or amendments shall be submitted to the legislature for its review in accordance with the provisions of this section.

The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and shall further provide notice of the content and purpose of legislatively approved constitutional amendments in both English and Spanish to inform electors about the amendments in the time and manner provided by law. The secretary

of state shall also make reasonable efforts to provide notice of the content and purpose of legislatively approved constitutional amendments in indigenous languages and to minority language groups to inform electors about the amendments. Amendments approved by the legislature shall be voted upon at the next regular election held after the adjournment of that legislature or at a special election to be held not less than six months after the adjournment of that legislature, at such time and in such manner as the legislature may by law provide. An amendment that is ratified by a majority of the electors voting on the amendment shall become part of this constitution.

If two or more amendments are initiated by the legislature, they shall be so submitted as to enable the electors to vote on each of them separately. Amendments initiated by an independent commission created by law for that purpose may be submitted to the legislature separately or as a single ballot question, and any such commission-initiated amendments that are not substantially altered by the legislature may be submitted to the electors in the separate or single ballot question form recommended by the commission. No amendment shall restrict the rights created by Sections One and Three of Article VII hereof, on elective franchise, and Sections Eight and Ten of Article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting on the amendment vote in favor of that amendment. (As amended November 7, 1911 and November 5, 1996.)

ANNOTATIONS

Cross references. — For provision authorizing constitutional conventions, *see* N.M. Const., art. XIX, § 2.

For statutory provisions relating to constitutional amendments, *see* 1-16-1 to 1-16-13 NMSA 1978.

Comparable provisions. — Idaho Const., art. XX, §§ 1, 2.

Iowa Const., art. X, §§ 1, 2; amendment 22.

Utah Const., art. XXIII, § 1.

Wyoming Const., art. XX, §§ 1, 2.

The 1911 amendment, which was proposed by congress as part of the required amendment of Article XIX, and was incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39), which provided for admission of New Mexico as a state and stipulated that adoption of the amendment should be a prerequisite to admission, was adopted by the people at the first election of state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against. The amendment added the requirement that notice of proposed amendments be published in both English and Spanish wherever

possible, the provision for ratification at a special election and the three-fourths/two-thirds vote required for ratification of amendments to N.M. Const., art. VII, §§ 1 and 3, and art. XII, §§ 8 and 10. The amendment changed to a majority vote the former two-thirds vote of the legislature required to propose amendments for ratification and deleted a provision allowing a majority vote at limited times only. The amendment also deleted a requirement that amendments be ratified by vote of 40% of all votes cast at the election, statewide and in half of the counties, and a limitation on the number of amendments to be submitted per election (3).

The 1996 amendment, which was proposed by H.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 294,328 for and 166,415 against, added the second paragraph and divided the former last paragraph and rewrote those provisions.

Compiler's notes. — A proposal to amend this section, H.J.R. No. 16 (Laws 1965), was withdrawn by H.J.M. No. 15 (Laws 1966) due to defeat of proposed repeal of N.M. Const., art. XIX, § 5, at a special election held on September 28, 1965.

I. GENERAL CONSIDERATION.

Amendment required to change purpose of Enabling Act land grants. — Enforcement of change in purpose of grants of land made by Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310; *see* Pamphlet 3) is prohibited without a constitutional amendment. State v. State Bd. of Fin., 34 N.M. 394, 281 P. 456 (1929); Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922).

Office created by constitution may be abolished by adoption of amendment to constitution wherein provision creating office is repealed or the office otherwise eliminated. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Office holder has no vested right in the office, nor does he hold by contract. In re Thaxton, 78 N.M. 668, 437 P.2d 129 (1968).

Amendment validating unconstitutional statute. — Where constitutional amendment expressly or impliedly ratifies or confirms unconstitutional statute, it validates statute provided validation does not impair contract obligations or vested rights. Fellows v. Shultz, 81 N.M. 496, 469 P.2d 141 (1970).

New Mexico Const., art. XIX, §§ 1 and 2 construed. — This section and N.M. Const., art. XIX, § 2, are of equal dignity. This section is not to be read as if Section 2 did not exist; neither is there reason to read into Section 2 the limitation of this section (relating to publication) not included within language of Section 2. Interpretation which gives complete effect to both sections is required. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

This section applies where one or more amendments to present constitution are being considered, but does not apply where entirely new constitution is being weighed. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

This section clearly applies to amendments proposed in legislature, and N.M. Const., art. XIX, § 2, applies to revisions or amendments made by a convention called for that purpose. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Amendments to be submitted separately. — Amendment entitled "Proposing to Amend Articles 6 and 20 of the Constitution of New Mexico to Provide for Judicial Reform", approved by the voters on November 8, 1988, was not adopted unconstitutionally on the ground that it contained a number of independent proposals which should have been presented to the voters as separate amendments under this section. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

Although both prongs of the proposed amendment related to an overarching theme of gambling, more was required to demonstrate a single object; the requirement of a rational linchpin joining the various elements of an amendment serves to prevent the linking of independent propositions simply by the selection of a sufficiently broad overarching theme. State ex rel. Clark v. State Canvassing Bd., 119 N.M. 12, 888 P.2d 458 (1995).

The title of the proposed gambling amendment, while technically proper, exacerbated the problems inherent in the vice of logrolling, since the expression "and certain games of chance" did not alert the voter as to the nature or scope of the second prong of the amendment regarding video gaming; thus, the ballot language, while not defective in and of itself, reinforced the conclusion that the amendment logrolled together two independent objects by piggy-backing the passage of one on the popularity of the other. State ex rel. Clark v. State Canvassing Bd., 119 N.M. 12, 888 P.2d 458 (1995).

Subject of constitutional amendments. — When the legislature acts to put a proposed constitutional amendment before the people, it does so pursuant to Article XIX, not Article IV. Therefore, its authority to consider the subject of constitutional amendments is not affected by the list of legislative topics in N.M. Const., art. IV, § 5B. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

When legislature may introduce amendments. — The purpose and intent of the framers of the constitution was to limit introduction of amendments to regular as opposed to special sessions, rather than to limit amendments to odd-numbered rather than even-numbered years or to unrestricted rather than restricted regular sessions. State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 766 P.2d 305 (1988).

II. PROPOSAL OF AMENDMENTS.

Enrolled and engrossed resolution prevails over conflicting journal. — Where there is conflict between enrolled and engrossed resolution proposing constitutional amendment and the legislative journal, if that journal tends to show that resolution failed to receive number of votes required, the enrolled and engrossed resolution, properly authenticated, is to prevail over journal. Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917).

Amendment proposals not subject to referendum. — Authority reposed in legislature to initiate constitutional amendments is different than its power to legislate and is not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937).

III. PUBLICATION.

Publication requirements found only in this section. — When legislature stated in 1-16-4 NMSA 1978 that other questions to be ratified should have their full texts published "in accordance with the constitution of New Mexico," they referred necessarily to provision for publication in this section, as there is no other provision in constitution setting forth requirements for publication. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Mandamus action in supreme court to compel publication. — Supreme court had original jurisdiction at instance of individual voter to mandate secretary of state to publish proposed amendments to constitution. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1934).

IV. RATIFICATION.

Enactment ordering special election to ratify amendment not subject to referendum. — Enactment calling for special election to approve or reject proposed amendments to constitution was not subject to referendum. Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1934).

Amendments are to be submitted to electorate throughout the state. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Purpose of requirement that amendments be voted on separately. — Purpose of requirement that two or more amendments shall be so submitted as to enable electors to vote on each separately is to avoid vice commonly referred to as "logrolling" or "jockeying"; the particular vice in "logrolling" (presentation of double propositions to voters) lies in fact that such is inducive of fraud and it becomes uncertain whether either proposition could have been carried by vote had it been submitted singly. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Requirement should be liberally construed. — Such constitutional provisions should receive a liberal rather than narrow or technical construction, especially where

legislature obviously considered problem carefully and the matter has been submitted to the people. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

General submission valid if all changes germane to one object. — Constitutional amendment which embraces several subjects or items of change will be upheld as valid and may be submitted to electorate as one general proposition if all subjects or items of change contained in amendment are germane to one general object or purpose. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Oneness determination not readily overturned. — Courts should be reluctant to overturn legislative determination that proposed amendment will accomplish but one general object or purpose. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

Dual submissions upheld. — Where there is but one portion of a single section affected and the object or purpose of amendment is confined to manner in which municipal indebtedness is incurred, fact that two points of change are involved, that either might have been presented to electorate separately and that there may be reasons why an elector might have desired one change and not the other are not in themselves sufficient to hold adoption of amendment invalid. City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967).

V. PROVISO.

"Electors voting in the whole state" construed. — To construe "electors voting in the whole state" to mean all electors voting at the election, as distinguished from those voting on the particular amendment, would have effect of making the "unamendable section" even more unamendable than would otherwise be true. To so hold would in effect attribute to the convention, the United States congress and the ratifying electorate the intention of incorporating provisions which ostensibly provide for amendment while in fact making it impossible. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Requirement of two-thirds vote in every county violates "one person, one vote" rule. — Requirement of a two-thirds favorable vote in every county, when there is wide disparity in population among counties, must result in greatly disproportionate values to votes in different counties. Where, as here, a vote in one county outweighs 100 votes in another, the "one person, one vote" concept announced in Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), certainly is not met. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

To extent that a citizen's right to vote is debased, he is that much less a citizen. Fact that an individual lives here or there is not a legitimate reason for overweighting or diluting efficacy of his vote. The basic principle of representative government remains, and must remain, unchanged - the weight of a citizen's vote cannot be made to depend on where he lives. Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Two-thirds vote requirement is invalid under fourteenth amendment. — There cannot be political equality under U.S. Const., amend. XIV, to exercise right of elective franchise provided in N.M. Const., art. VII, so long as N.M. Const., art. VII, § 3, and this section contain the restriction on amendment. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

Amendment ratified by three-fourths vote held adopted. — Requirement of two-thirds vote in each county being unconstitutional, and demand of ratification by "at least three-fourths of the electors voting in the whole state" having been met, adoption of constitutional amendment submitted as Amendment No. 7 at election held on November 7, 1967, was accomplished; it should be certified as having been ratified. State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 437 P.2d 143 (1968).

"Amendment" construed. — All proposals which would effect a change in constitution, add to or take away from it, are amendments thereof, and "amendment" includes repeal of part of constitution so that such a proposal must be adopted at a regular session of legislature. 1941-42 Op. Att'y Gen. No. 42-4111.

Meaning of "published". — In order to insure that material is "published" in the newspaper and not merely "distributed" therein, it should be published either as part of a regular section of newspaper or as a separate section containing running head of newspaper, date of publication and some designation to indicate that it is a section of that day's newspaper. 1969 Op. Att'y Gen. No. 69-125.

Insert not proper. — Publication of proposed constitution and proclamation in form of an insert would be subject to legal attacks. 1969 Op. Att'y Gen. No. 69-125.

Amendment of entire article. — This section does not forbid submission to people by constitutional convention of an entire article on amendments as a single amendment. 1969 Op. Att'y Gen. No. 69-118.

No power to withdraw ratification. — State can repeal or amend a constitutional amendment in manner specified in this article, but where state has once ratified an amendment it has no power thereafter to withdraw such ratification. 1975 Op. Att'y Gen. No. 75-16.

Proviso applied. — In order to carry, an absentee voter amendment to constitution must have at least three-fourths of electors in the whole state vote for it and at least two-thirds of those voting in each county must vote for it, so that a majority of votes cast is insufficient. 1937-38 Op. Att'y Gen. No. 37-1760.

Amendments to be proposed at regular sessions. — Constitutional amendments may be proposed only at regular sessions of legislature convened pursuant to requirements of N.M. Const., art. IV, § 5. 1951-52 Op. Att'y Gen. No. 51-5398.

Framers of constitution meant for amendments to be proposed in regular sessions as they had defined that term in N.M. Const., art. IV, § 5; namely, during the year next after each general election. 1969 Op. Att'y Gen. No. 69-151.

Proposals during even-numbered years. — This section provides that any amendment may be proposed at any regular legislative session. On the other hand, N.M. Const., art. IV, § 5, provides that every regular session convening during even-numbered years shall consider only the three subjects enumerated therein. Limitation contained in N.M. Const., art. IV, § 5, being the later amendment, must control. 1965 Op. Att'y Gen. No. 65-212.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For comment, "The Last Bastion Crumbles: All Property Restrictions on Franchise Are Unconstitutional," see 1 N.M. L. Rev. 403 (1971).

For 1984-88 survey of New Mexico administrative law, 19 N.M. L. Rev. 575 (1990).

For article, "The Citizen's Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?", see 28 N.M. L. Rev. 227 (1998).

For note, “Indirect Funding of Sectarian Schools: A Discussion of the Constitutionality of State School Voucher Programs Under Federal and New Mexico Law After Zelman v. Simmons-Harris,” see 34 N.M. L. Rev. 194 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 29 to 57.

Construction of requirement that proposed constitutional amendment be entered in journal, 6 A.L.R. 1227, 41 A.L.R. 640.

Implied repeal of existing law by constitutional amendment, 36 A.L.R. 1456.

Proposition submitted as covering more than one amendment, 94 A.L.R. 1510.

Basis for computing majority essential to the adoption of a constitutional or other special proposition submitted to voters, 131 A.L.R. 1382.

Injunctive relief against submission of constitutional amendment, statute, municipal charter or municipal ordinance, on ground that proposed action would be unconstitutional, 19 A.L.R.2d 519.

16 C.J.S. Constitutional Law §§ 6 to 14.

Sec. 2. [Constitutional conventions.]

Whenever the legislature, by a two-thirds vote of the members elected to each house, deems it necessary to call a convention to revise or amend this constitution, they shall submit the question of calling such convention to the electors at the next general election, and if a majority of all the electors voting on such questions at said election in the state votes in favor of calling a convention, the legislature shall, at the next session, provide by law for calling the same. Such convention shall consist of at least as many delegates as there are members of the house of representatives.

Revisions or amendments proposed by a constitutional convention shall be submitted to the voters of the state at an election held on a date set by the convention. The revisions or amendments proposed by the convention may be submitted in whole or in part, or with alternatives, as determined by the convention. If a majority vote favors a proposal or alternative, it is adopted and becomes effective thirty days after the certification of the election returns unless otherwise provided by the convention. (As amended November 7, 1911 and November 5, 1996.)

ANNOTATIONS

Cross references. — For provision regarding constitutional amendments, *see* N.M. Const., art. XIX, § 1.

Comparable provisions. — Idaho Const., art. XX, §§ 3, 4.

Iowa Const., art. X, § 3.

Utah Const., art. XXIII, §§ 2, 3.

Wyoming Const., art. XX, §§ 3, 4.

The 1911 amendment, which was proposed by congress as part of the required amendment of Article XIX and was incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39) which provided for admission of New Mexico as a state and stipulated that adoption of the amendment should be a prerequisite to admission, was adopted by the people at the first election of state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against. The amendment inserted "on such question" following "electors voting" near the end of the first sentence and deleted a requirement that the calling of a convention be approved by a majority of electors voting in at least half of the counties.

The 1996 amendment, which was proposed by H.J.R. No. 2 (Laws 1996) and adopted at the general election held November 5, 1996, by a vote of 294,328 for and 166,415 against, rewrote the existing language and added the second paragraph.

Compiler's notes. — Laws 1969, ch. 134, called a constitutional convention for the purpose of considering, revising or amending the constitution. The convention drafted a proposed new constitution which was submitted to the people at a special election held on December 9, 1969. It was defeated by a vote of 59, 695 for and 63,331 against.

New Mexico Const., art. XIX, §§ 1 and 2 construed. — This section and N.M. Const., art. XIX, § 2, are of equal dignity. This section is not to be read as if Section 2 did not exist; neither is there reason to read into Section 2 the limitation of this section (relating to publication) not included within language of Section 2. Interpretation which gives complete effect to both sections is required. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

This section applies where one or more amendments to present constitution are being considered, but does not apply where entirely new constitution is being weighed. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

This section clearly applies to amendments proposed in legislature, and N.M. Const., art. XIX, § 2, applies to revisions or amendments made by a convention called for that purpose. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Question of holding convention must be submitted to electorate throughout state. State v. Perrault, 34 N.M. 438, 283 P. 902 (1929).

Publication requirements found in N.M. Const., art XIX, § 1. — Statement in 1-16-4 NMSA 1978 that questions to be ratified should have their full texts published "in accordance with the constitution of New Mexico" refers necessarily to provision for publication in N.M. Const., art. XIX, § 1, as there is no other provision in constitution setting forth requirements for publication. Therefore, compliance with publication provisions of N.M. Const., art. XIX, § 1, is required when question of adoption of new constitution is published. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Convention cannot legislate. — Purpose of calling convention is to "revise or amend" existing constitution - not to legislate; neither is convention given powers beyond those incident to its own conduct and performance of its duties and function. Where legislature has made necessary provision, appropriated money and provided for its expenditure, there is no area in which convention could properly exercise powers outside those mentioned in this section. State ex rel. Constitutional Convention v. Evans, 80 N.M. 720, 460 P.2d 250 (1969).

Convention may prescribe method of presenting product to voters. — Absent any constitutional or statutory directive on subject either at federal or state level, constitutional convention is free to prescribe method of presentation to voters as it sees fit. 1969 Op. Att'y Gen. No. 69-64.

Authors of New Mexico constitution and the United States congress concurred in not imposing restrictions on how convention "packages" its end product. 1969 Op. Att'y Gen. No. 69-64.

Convention may present new constitution in separate proposals. — Under this section, constitutional convention can submit new constitution to electorate in such a manner that voters will vote for or against separately presented proposals. 1969 Op. Att'y Gen. No. 69-105.

Convention may present both new constitution and amendments to old. — There are no legal obstacles to convention adopting and presenting to people an entire new constitution for acceptance or rejection and at same time presenting the article on amendments separately for acceptance or rejection as an amendment to present constitution. 1969 Op. Att'y Gen. No. 69-118.

Convention may present single proposition amending entire article. — Constitution does not forbid submission to people by convention of entire article on amendments as single amendment. 1969 Op. Att'y Gen. No. 69-118.

Legality of alternative contradictory provisions doubtful. — There is doubt as to legality of submitting constitution to electorate in such manner that voter will be allowed to approve either of two alternative contradictory provisions on certain issues. 1969 Op. Att'y Gen. No. 69-105.

Election for delegate required. — Even in county or legislative district where only one candidate filed for office of delegate to constitutional convention, election must be held. 1969 Op. Att'y Gen. No. 69-40.

No intent to disqualify public officers. — Legislature in calling constitutional convention intended that holding of public office not be, insofar as possible, a disqualification for position of delegate to convention. 1969 Op. Att'y Gen. No. 69-35.

Position of delegate is full-time, elective position for continuous period with specified duties which will presumably be carried out during both normal working and evening hours. 1969 Op. Att'y Gen. No. 69-35.

Unlawful for delegate to receive regular salary as elected official. — It would be unlawful for an elected official to continue to receive his salary while serving as delegate since individual holding office of county assessor or any other full-time, elective office, is physically incapable of performing duties of that office and those of delegate to convention at same time. 1969 Op. Att'y Gen. No. 69-35.

It would be contrary to law to pay salary to faculty member during time he is serving as a delegate to convention if his duties as delegate make it impossible for him to perform duties for which salary is paid. 1969 Op. Att'y Gen. No. 69-111.

Convention delegate and assessor incompatible positions. — In serving as delegate to constitutional convention, a county assessor would be holding incompatible positions and would be subject to suspension or removal under provisions of 10-3-1 NMSA 1978. 1969 Op. Att'y Gen. No. 69-35.

Campaigning during duty hours illegal. — Use by elected official of duty hours to campaign for office of delegate to constitutional convention during six weeks between filing for position and election of delegates would be illegal. 1969 Op. Att'y Gen. No. 69-35.

Convention officers not employees within meaning of retirement law. — Officers of constitutional convention who are compensated are not considered employees of an affiliated public employer within meaning of law providing for retirement of public officers and employees (10-11-1 NMSA 1978 et seq.). 1969 Op. Att'y Gen. No. 69-90.

Delegates' privileges and immunities. — Rationale for the privileges given legislators in N.M. Const., art. IV, § 13, should be applied to delegates to constitutional convention. Accordingly, delegates have privileges and immunities similar to those of legislators, but they are less well defined and may not have the same broad scope as those granted to legislators. 1969 Op. Att'y Gen. No. 69-83.

Privileges which should be applied to members of constitutional convention are: (1) freedom from harassment of misdemeanor prosecutions during term of convention; and (2) privilege to debate issues without fear of suits for defamation; however, the latter privilege should be characterized as "qualified," protecting only utterances made without actual malice. 1969 Op. Att'y Gen. No. 69-83.

Provisions of existing constitution must be complied with in order for amendment or revision of that constitution to be effective. Thus, constitutional convention is bound by procedural provisions of existing New Mexico constitution. 1969 Op. Att'y Gen. No. 69-105.

Nature of constitutional convention. — Constitutional convention is constitutional entity created by people separate and apart from ordinary functions of state government. 1969 Op. Att'y Gen. No. 69-90.

Convention is responsible to people of state directly and not to legislature. 1969 Op. Att'y Gen. No. 69-82.

Legislative authority over convention is limited to providing "for calling the same". 1969 Op. Att'y Gen. No. 69-82.

No advance restrictions. — Legislature cannot, or ought not to be permitted to, restrict constitutional convention in advance. 1969 Op. Att'y Gen. No. 69-82.

Legislative restrictions not ratified. — Since Laws 1969, ch. 134 (calling for a constitutional convention), was enacted pursuant to provisions of this section (that is, subsequent to vote of people in favor of convention), it cannot be argued that the people directly or indirectly ratified restrictions placed on convention by statute. 1969 Op. Att'y Gen. No. 69-82.

Convention has full control of all its proceedings. — Thus, convention need not follow Laws 1969, ch. 134, § 17(A), providing that convention be called to order by governor and immediately proceed to elect a president and other officers. 1969 Op. Att'y Gen. No. 69-82.

Limitation on money sole restriction of time. — The only restriction of time placed on constitutional convention results from a limitation on money since a convention may not appropriate itself money. 1969 Op. Att'y Gen. No. 69-82.

Constitution and "call" of convention are binding on convention to extent they deal with questions being considered. 1969 Op. Att'y Gen. No. 69-105.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

For article, "The Citizen's Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?", see 28 N.M. L. Rev. 227 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 35 to 37.

Repeal of constitutional provision or amendment, 36 A.L.R. 1456.

Power of state legislature to limit the powers of a state constitutional convention, 158 A.L.R. 512.

16 C.J.S. Constitutional Law §§ 8, 9.

Sec. 3. [Initiative restricted.]

If this constitution be in any way so amended as to allow laws to be enacted by direct vote of the electors the laws which may be so enacted shall be only such as might

be enacted by the legislature under the provisions of this constitution. (As amended November 7, 1911.)

ANNOTATIONS

1911 amendment. — As originally adopted, this section read as does the present text, but it was included in the required amendment of this article which was proposed by congress and incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39), providing for admission of New Mexico as a state, which stipulated that adoption of the amendment should be a prerequisite to admission. It was adopted by the people at the first election of state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against.

Law reviews. — For student symposium, "Constitutional Revision - Constitutional Amendment Process," see 9 Nat. Resources J. 422 (1969).

For article, "The Citizen's Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?", see 28 N.M. L. Rev. 227 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Initiative and Referendum § 13.

Initiative petition, amendment proposed by, 62 A.L.R. 1350.

Number of amendments that may be submitted under initiative and referendum clause, 62 A.L.R. 1350.

Proposition submitted to people as covering one or more than one proposed constitutional amendment, 94 A.L.R. 1510.

82 C.J.S. Statutes § 118.

Sec. 4. [Amendment of compact with United States.]

When the United States shall consent thereto, the legislature, by a majority vote of the members in each house, may submit to the people the question of amending any provision of Article XXI of this constitution on compact with the United States to the extent allowed by the act of congress permitting the same, and if a majority of the qualified electors who vote upon any such amendment shall vote in favor thereof the said article shall be thereby amended accordingly. (As amended November 7, 1911.)

ANNOTATIONS

Cross references. — For consent of congress necessary to amendment of compact, *see* N.M. Const., art. XXI, § 10.

1911 amendment. — As originally adopted, this section read as does the present text, but it was included in the required amendment of this article which was proposed by congress and incorporated in the congressional resolution of August 21, 1911 (37 Stat. 39), providing for admission of New Mexico as a state, which stipulated that adoption of the amendment should be a prerequisite to admission. It was adopted by the people at the first election of the state officers on November 7, 1911, by a vote of 34,897 for and 22,831 against.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Sec. 5. [Repealed.]

ANNOTATIONS

Repeals. — The repeal of this section, prohibiting revision of Section 1 of Article 19 of the Constitution, was proposed by H.J.R. No. 2 (Laws 1996) and was adopted at the general election held November 5, 1996, by a vote of 294,328 for and 166,415 against.

ARTICLE XX
Miscellaneous

Section 1. [Oath of officer.]

Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

ANNOTATIONS

Comparable provisions. — Utah Const., art. IV, § 10.

Wyoming Const., art. VI, § 20.

Effect of failure to take oath. — Mere appointment or election of an official, without his qualification, will not oust incumbent from office; to do so he must take an oath and give bond where required. Bowman Bank & Trust Co. v. First Nat'l Bank, 18 N.M. 589, 139 P. 148 (1914).

Assistant attorneys general need not be formally sworn in. — This section does not require assistant attorneys general appointed at the pleasure of the attorney general

pursuant to 8-5-5 NMSA 1978 to undergo the same formal swearing-in ceremony as the attorney general or other public official. State v. Koehler, 96 N.M. 293, 629 P.2d 1222 (1981).

Oath not required for members of continuing board. — Nothing in this constitutional provision or elsewhere requires members of a continuing board to subscribe to new oaths every time board is reconstituted either by appointment or election. 1957-58 Op. Att'y Gen. No. 58-210.

There is no legal objection to taking oath on Sunday. 1966 Op. Att'y Gen. No. 66-126.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 4, 131 to 132.

Member of grand or petit jury as officer within constitutional or statutory provisions in relation to oath or affirmation, 118 A.L.R. 1098.

Constitutional, statutory or charter provision as to time of taking oath of office and giving official bond as mandatory or directory, 158 A.L.R. 639.

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268.

67 C.J.S. Officers and Public Employees § 46.

Sec. 2. [Tenure of office.]

Every officer, unless removed, shall hold his office until his successor has duly qualified.

ANNOTATIONS

Cross references. — For succession in county or precinct office, *see* 10-3-3 NMSA 1978.

For succession of officers of boards of regents for state colleges and universities, *see* 21-7-5 NMSA 1978.

Appointed county clerk to serve until successor elected. — A county clerk appointed to the office upon the resignation of the elected clerk is to serve as county clerk until a successor clerk is elected by the county voters and duly qualified according to law. State ex rel. Walker v. Dilley, 86 N.M. 796, 528 P.2d 209 (1974).

Replacement of regents appointed to fill vacancies. — Even though the terms of regents who were appointed to fill vacancies had expired at the end of the terms of their predecessors, they were authorized to remain in office until their successors were

appointed by the governor by and with the consent of the senate and they could not be summarily removed. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Treasurer of the board of regents of New Mexico state university may continue functioning in that capacity after a new board is appointed, until his successor is elected by the new board and is qualified by filing the proper bond. Bowman Bank & Trust Co. v. First Nat'l Bank, 18 N.M. 589, 139 P. 148 (1914).

"Removal" contemplates statutory removals, and trial court was without power to oust officer where no successor had qualified. Haymaker v. State ex rel. McCain, 22 N.M. 400, 163 P. 248 (1917).

Proper to suspend pending removal investigation. — Law (10-4-20 and 10-4-25 NMSA 1978) which confers upon district courts power to suspend public official pending investigation of an accusation looking to his removal does not violate this section. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

Proper removal by governor conclusive on court. — If power of removal is vested in governor and he assigns a constitutional cause for removal, his action is conclusive on court. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Notice and hearing not prerequisites to removal unless specifically provided. — Where no provision of constitution or statute law requires that notice and hearing be given before removal can be made, neither notice nor hearing is a necessary condition precedent to a valid removal. State ex rel. Ulrick v. Sanchez, 32 N.M. 265, 255 P. 1077 (1926).

Incumbent holds over until successor qualifies. — This section continues incumbent in office beyond his term until his successor has duly qualified. State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

Expiration of term does not produce vacancy which may be filled by authority having power to fill vacancies. Territory ex rel. Klock v. Mann, 16 N.M. 744, 120 P. 313 (1911).

Dual office-holding does not produce vacancy. — Where person is appointed to office which is incompatible with office then held, no vacancy is created, except for purpose of supplying another person for the office; court, in absence of qualified successor, is without power to remove officeholder. State v. Blancett, 24 N.M. 433, 174 P. 207 (1918), dismissed for want of jurisdiction, 252 U.S. 574, 40 S. Ct. 395, 64 L. Ed. 723 (1920); Haymaker v. State ex rel. McCain, 22 N.M. 400, 163 P. 248 (1917).

Expiration of term does not produce vacancy. 1957-58 Op. Att'y Gen. No. 58-233.

County surveyor holds his office until his successor is qualified, and as long as he so holds there is no vacancy, and the board cannot appoint. 1921-22 Op. Att'y Gen. No. 21-2999.

Member of municipal board of education is an "officer" within the meaning of this section. 1957-58 Op. Att'y Gen. No. 57-43.

Public service commissioner is an "officer." 1971 Op. Att'y Gen. No. 71-09.

Incumbent holds office until successor qualifies. — When newly elected legislator fails to qualify for any reason, former member from district holds over and serves in ensuing legislature. 1943-44 Op. Att'y Gen. No. 43-4211.

Member of board of nursing home administrators. — Under the holdover provision of this section, a member of the board of nursing home administrators may continue to serve as a member of the board after his term expires and before his successor is duly appointed and qualified for that office. 1989 Op. Att'y Gen. No. 89-08.

Incumbent holds office until after next regular election. — Where county treasurer-elect dies before qualifying, incumbent would hold over until successor is elected at a regular election. 1921-22 Op. Att'y Gen. No. 22-3632.

Failure to have election effects hold-over. — Since election was not held for office of police judge at time last regular city election was held, person holding office prior to that date continues to hold it. 1955-56 Op. Att'y Gen. No. 56-6452.

Where appointment is made to fill vacancy in office of county commissioner and no one is elected to fill balance of unexpired term, appointee continues to exercise authority of such office until January 1 next succeeding the general election. 1964 Op. Att'y Gen. No. 64-139.

Even where election deliberately blocked. — Where, at meeting of board of directors of New Mexico insane asylum (now Las Vegas medical center) attended by statutory three-member quorum, on the statutory election day which was the second Monday in March, proceeding to elect a president was begun, and one member of such quorum, to block election, left the room, and remaining two members, less than a quorum, attempted to elect, the election, so attempted, was ineffective as such, and incumbent was entitled to remain in office until arrival of day upon which, next thereafter, an election could legally be held, which would be the second Monday in March of the next year. 1915-16 Op. Att'y Gen. No. 15-1469.

Creation of vacancy in office does not, ipso facto, terminate right of incumbent to hold the office. Under this constitutional provision every officer, unless removed, holds his office until his successor qualifies. 1959-60 Op. Att'y Gen. No. 60-154.

If resignation by operation of law occurs, incumbent school superintendent is still entitled to hold office until such time as his resignation is accepted by board of county commissioners and a successor is appointed and qualifies. 1959-60 Op. Att'y Gen. No. 60-154.

Section not designed to give incumbent additional term. — Failure of duly elected state officer to qualify creates vacancy which may be filled by appointment by governor. This section is not designed to give incumbent an additional term. 1923-24 Op. Att'y Gen. No. 23-3687.

Incumbent of two consecutive terms ineligible for appointment. — A vacancy in a county office occurs where the successor fails to qualify; the board of county commissioners must appoint a person to fill the vacancy and an incumbent who has already served two consecutive terms is ineligible for that appointment. 1979 Op. Att'y Gen. No. 79-19.

Hold-over and vacancy distinguished. — In the event senate should fail to confirm appointments of governor to highway commission, districts will be represented by commissioners who have been confirmed and who will hold over until governor can make an appointment during first five days of the next legislature, unless a vacancy is created by reason of happening of possible event such as death, resignation, moving from district or some other ineligibility to hold office. 1957-58 Op. Att'y Gen. No. 57-30.

Section does not apply to "position". — Since this section is applicable only to "offices", if person initially holds a "position," then acceptance of an incompatible office or position creates an automatic vacancy in the first position. 1961-62 Op. Att'y Gen. No. 62-101.

Incumbent retains authority until successor qualifies. — Incumbent justice of the peace holds over and is a de facto and de jure officer until his successor is elected and qualified. 1919-20 Op. Att'y Gen. No. 19-2186.

Although vacancy technically and legally existed, absent appointment by governor a resigning judge could legally continue to exercise functions and duties of that office inasmuch as his successor had not yet duly qualified, and thus designation executed by small claims court judge on day after his resignation was competent to empower district judge, who was designated to perform duties of judge of the small claims court, and said district judge could continue to act in that capacity until appointment and qualification of successor to small claims judge or until latter's incapacity was cured, whichever occurred sooner. 1964 Op. Att'y Gen. No. 64-146.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 166 to 169.

"Until" as word of inclusion or exclusion where term of office runs until a specified day, 16 A.L.R. 1100.

Right to resign before taking office, 19 A.L.R. 46.

Employee or officer, status of person as, as affected by tenure of office, 53 A.L.R. 606, 93 A.L.R. 333, 140 A.L.R. 1076.

Beginning or expiration of term of elective officer where no time is fixed by law, 80 A.L.R. 1290, 135 A.L.R. 1173.

When resignation of public officer becomes effective, 95 A.L.R. 215.

Power of legislature to extend term of public office, 97 A.L.R. 1428.

Constitutionality and construction of statute which fixes or specifies term of office, but provides for removal without cause, 119 A.L.R. 1437.

Duress as ground for withdrawing or avoiding resignation from public office, 132 A.L.R. 975.

Previous tenure of office, construction and effect of constitutional or statutory provisions disqualifying one for public office because of, 59 A.L.R.2d 716.

67 C.J.S. Officers and Public Employees §§ 71 to 73.

Sec. 3. [Date terms of office begin.]

The term of office of every state, county or district officer, except those elected at the first election held under this constitution, and those elected to fill vacancies, shall commence on the first day of January next after his election.

ANNOTATIONS

Cross references. — For term of persons elected to fill vacancies, *see* N.M. Const., art. XX, § 4, and art. V, § 5.

For commencement of terms of officers elected at first election, *see* N.M. Const., art. XXII, §§ 19 and 22.

"District officer" not special class. — It was not intention of section to create a class of officers, i.e., district officers, unknown to New Mexico and relieve them from inhibitions imposed upon all other designated officials. District attorneys are state officers. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Term of appointee filling vacancy. — Under N.M. Const., art. V, § 5, an appointee filling vacancy in state office holds his office only until next general election, and term of office of elected successor commences upon date he qualifies since he has been elected to an office to fill a vacancy. 1951-52 Op. Att'y Gen. No. 52-5612.

Election alone not enough to oust predecessor. — Election or appointment of officer does not serve to oust his predecessor from office. One must first qualify, i.e., take the oath and give bond where required. Election alone is not enough. 1957-58 Op. Att'y Gen. No. 58-233.

Section defines term for compensation purposes. — Fact that county clerk, assessor and sheriff were elected to respective offices in November of 1968 and charter for county setting salary for these offices did not become effective until January 1, 1969, was not violative of N.M. Const., art. IV, § 27 (relating to changes in compensation of public officers), since term of these officers did not commence until January 1, 1969, as provided by this section. 1969 Op. Att'y Gen. No. 69-134.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees § 160.

"Until" as word of inclusion or exclusion where term of office runs until a specified day, 16 A.L.R. 1100.

Beginning or expiration of term of elective office where no time fixed by law, 80 A.L.R. 1290, 135 A.L.R. 1173.

Time of giving official bond, constitutional, statutory or charter provision as to, as mandatory or directory, 158 A.L.R. 639.

Time of taking oath of office, constitutional, statutory or charter provision as to, as mandatory or directory, 158 A.L.R. 639.

67 C.J.S. Officers and Public Employees § 68.

Sec. 4. [Vacancies in offices of district attorney or county commissioner.]

If a vacancy occurs in the office of district attorney or county commissioner, the governor shall fill such vacancy by appointment, and such appointee shall hold such office until the next general election. His successor shall be chosen at such election and shall hold his office until the expiration of the original term. (As amended November 8, 1988.)

ANNOTATIONS

Comparable provisions. — Iowa Const., art. IV, § 10.

Montana Const., art. VI, § 8.

Utah Const., art. VII, § 9.

Wyoming Const., art. IV, § 7.

The 1988 amendment, which was proposed by S.J.R. No. 1, § 1 (Laws 1988) and adopted at the general election held on November 8, 1988, by a vote of 203,509 for and 159,957 against, in the first sentence, substituted "vacancy occurs" for "vacancy occur"

near the beginning and deleted ", judge of the supreme or district court" following "district attorney".

Compiler's notes. — An amendment to this section, proposed by S.J.R. No. 2 (Laws 1981), which would have deleted "judge of the supreme or district court" near the beginning of the first sentence, was submitted to the people at the general election held on November 2, 1982. It was defeated by a vote of 117,601 for and 139,643 against.

I. GENERAL CONSIDERATION.

Degree to which section is self-executing. — The first sentence of this section is self-enacting. The second sentence, however, quite obviously needs legislation to provide the manner of nomination and conduct of election and must be considered as not self-executing inasmuch as it merely indicates a principle without laying down rules having force of law. State ex rel. Noble v. Fiorina, 67 N.M. 366, 355 P.2d 497 (1960).

Terms beginning and ending at same time under all calculations. — Under all equations of vacancy in these offices, excepting only vacancy occurring by creation of a new district attorney, terms of district attorneys will begin and end at same time. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

II. VACANCY.

No qualification that vacancy be by specific reason. — There is no qualification that vacancy be by reason of death, resignation or any other specific reason. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

No incumbent required. — This section does not apply only in those cases where there was an incumbent in office. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

III. APPOINTEE.

Executive act cannot be exercised by legislature. — Where constitution makes act of appointment an executive one, it cannot be exercised by legislature, nor can legislature rob executive of such power by conferring it on outside agency of its own choosing. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

IV. SUCCESSOR.

Section applies to all political parties. — This section cannot be made effective only as to major political parties - it must apply to all parties. State ex rel. Noble v. Fiorina, 67 N.M. 366, 355 P.2d 497 (1960).

Last sentence effective as to district attorney only. — The last sentence of this section need not have been included insofar as it concerns office of county

commissioner. In the first instance, the term was limited to two years, and in the second, N.M. Const., art. VI, §§ 4 and 10, make clear the intent that scattered terms be maintained. Therefore, effective application of last sentence of section is addressed to office of district attorney. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Last sentence applies to all vacancies following an incumbent; assuming death of incumbent in office of district attorney, there can be no doubt that appointee or his successor (elected at general election following appointment) serves only until termination date of term of original incumbent. State ex rel. Swope v. Mechem, 58 N.M. 1, 265 P.2d 336 (1954).

Contrary charter provisions allowed. — Charter of combined city and county organization may provide for filling vacancies in commission thereof contrary to provisions of this section. 1957-58 Op. Att'y Gen. No. 57-204.

Resignations prior to approval of 1988 amendment. — The office of any supreme court justice, district court judge, or metropolitan court judge who resigns before the 1988 general election must be placed on the 1988 general election ballot in accordance with the requirements of 1-8-8 NMSA 1978. 1988 Op. Att'y Gen. No. 88-52.

Appointee need not reside in district. — Appointment of county commissioner, where vacancy exists, may be made regardless of district wherein person resides so long as person is otherwise qualified under laws of state and is a resident of the county. 1953-54 Op. Att'y Gen. No. 54-5907.

"Until the next general election" means the next election at which a successor to incumbent of office would have been elected if there had been no vacancy. 1959-60 Op. Att'y Gen. No. 60-151; 1989 Op. Att'y Gen. No. 89-11.

Term of office of appointee terminates at time of general election next succeeding his appointment. 1964 Op. Att'y Gen. No. 64-139.

No one elected for balance of unexpired term. — Where appointment is made to fill vacancy in office of county commissioner and no one is elected to fill balance of unexpired term though another person is elected for a regular term, appointee continues to exercise authority of such office until January 1 of the next succeeding general election or until the person elected qualifies if said person does not qualify on January 1. 1964 Op. Att'y Gen. No. 64-139.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 254; 63A Am. Jur. 2d Prosecuting Attorneys § 8; 63A Am. Jur. 2d Public Officers and Employees §§ 105, 135, 137.

Death or disability of one elected to office before qualifying as creating a vacancy, 74 A.L.R. 486.

Reconsideration of appointment to fill vacancy, 89 A.L.R. 141.

Election within contemplation of constitutional or statutory provisions relating to filling vacancy in public office occurring before expiration of regular term, 132 A.L.R. 574.

Military service, induction or voluntary service for, as creating vacancy in public office or employment, 143 A.L.R. 1470, 147 A.L.R. 1427, 148 A.L.R. 1400, 150 A.L.R. 1447, 151 A.L.R. 1462, 152 A.L.R. 1459, 154 A.L.R. 1456, 156 A.L.R. 1457, 157 A.L.R. 1456.

Validity of contract by officer with public for rendition of new or special service to be paid for in addition to regular compensation, 159 A.L.R. 606.

Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for fixed term and until successor is appointed or elected, is holding over, 164 A.L.R. 1248.

Conviction of offense under federal law or law of another state or county as vacating accused's holding of state or local office, 20 A.L.R.2d 732.

Power to appoint public officer for term commencing at or after expiration of term of appointing officer or body, 75 A.L.R.2d 1277.

Delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361.

20 C.J.S. Counties § 64; 27 C.J.S. District or Prosecuting Attorneys § 3; 67 C.J.S. Officers and Public Employees §§ 74 to 79.

Sec. 5. [Interim appointments.]

If, while the senate is not in session, a vacancy occur in any office the incumbent of which was appointed by the governor by and with the advice and consent of the senate, the governor shall appoint some qualified person to fill the same until the next session of the senate; and shall then appoint by and with the advice and consent of the senate some qualified person to fill said office for the period of the unexpired term.

ANNOTATIONS

Comparable provisions. — Utah Const., art. VII, § 10.

Applicability to appointments to board of regents. — This section does not conflict with N.M. Const., art. XII, § 13. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Replacement of regents appointed to fill vacancies. — Even though the terms of regents who were appointed to fill vacancies had expired at the end of the terms of their

predecessors, they were authorized to remain in office until their successors were appointed by the governor by and with the consent of the senate and they could not be summarily removed. Denish v. Johnson, 1996-NMSC-005, 121 N.M. 280, 910 P.2d 914.

Appointee subject to section but rejection not termination of official existence. — Appointment of member of board of regents of New Mexico normal university (now New Mexico highlands university) by governor five days after death of incumbent whose term of office had expired two days before his death, is nevertheless a vacation appointment to fill a vacancy, and appointee will hold office until, at next session of senate, a new appointment is made, and confirmed by senate. Action of senate in rejecting vacation appointee does not terminate his official existence. 1912-13 Op. Att'y Gen. No. 12-886 and 13-1016.

Recess appointment of regent. — A nominee to the board of regents of an educational institution who is neither confirmed nor rejected by the senate cannot serve as regent unless, following adjournment of both houses of the legislature, the governor makes a recess appointment of the person, in which case, that person may serve as a full-fledged regent until the next session of the legislature. As either a de jure or de facto officer, the regent's actions are valid as to the public. The governor is not obliged to re-submit the former nominee to the next session of the legislature and may make a new nomination. The new nominee may assume the duties as regent, either upon approval by the senate or by a recess appointment by the governor if the senate fails to take any action. 1991 Op. Att'y Gen. No. 91-04.

Section applies to initial appointments. — This section in terms applies only to vacancies in office occurring while senate is not in session, but requirement applies as well to initial appointments to offices created by legislature to be filled while senate is not in session. 1970 Op. Att'y Gen. No. 70-10.

"Next session" means any next session - regular-long, regular-short or special. 1970 Op. Att'y Gen. No. 70-10.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 119, 135, 137.

Right of de facto officer to salary or other compensation annexed to office, 93 A.L.R. 258, 151 A.L.R. 952.

Power of board to make appointment to office or contract extending beyond its own term, 149 A.L.R. 336, 75 A.L.R.2d 1277.

67 C.J.S. Officers and Public Employees §§ 42, 75 to 79; 81A C.J.S. States §§ 84, 87.

Sec. 6. [Date of general elections.]

General elections shall be held in the state on the Tuesday after the first Monday in November in each even-numbered year.

ANNOTATIONS

Comparable provisions. — Iowa Const., art. II, § 7, amendment 14.

Utah Const., art. IV, § 9.

Wyoming Const., art. VI, § 17.

"General election" in statute construed. — Term "general election" in statute (Laws 1897, ch. 40, § 1, repealed), authorizing city or town to effect change in its name by favorable vote of qualified electors at next "general election" following appropriate action by its governing body, contemplated the biennial election for choosing state and county officials and national representatives. Benson v. Williams, 56 N.M. 560, 246 P.2d 1046 (1952).

"General election" defined. — The term "general election" refers to the statewide biennial election when all state and county officials as well as the congressional representatives are elected. 1981 Op. Att'y Gen. No. 81-09.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections § 318.

Scheduling election on religious holiday as violation of federal constitutional rights, 44 A.L.R. Fed. 886.

29 C.J.S. Elections §§ 76, 77.

Sec. 7. [Canvass of returns for officers elected by more than one county.]

The returns of all elections for officers who are chosen by the electors of more than one county shall be canvassed by the county canvassing board of each county as to the vote within their respective counties. Said board shall immediately certify the number of votes received by each candidate for such office within such county, to the state canvassing board herein established, which shall canvass and declare the result of the election.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Elections § 394 et seq.

Statutory provision relating to form or manner in which election returns from voting districts or precincts are to be made, failure to comply with, 106 A.L.R. 398.

Deceased or disqualified person, result of election as affected by votes cast for, 133 A.L.R. 319.

Excess or illegal ballots, treatment of, when it is not known for which candidate or upon which side of a proposition they were cast, 155 A.L.R. 677.

Power of election officer to withdraw or change returns, 168 A.L.R. 855.

29 C.J.S. Elections §§ 222, 235 to 239.

Sec. 8. [First national election.]

In the event that New Mexico is admitted into the union as a state prior to the Tuesday next after the first Monday in November in the year nineteen hundred and twelve, and if no provision has been made by the state legislature therefor, an election shall be held in the state on the said Tuesday next after the first Monday in November, nineteen hundred and twelve, for the election of presidential electors; and such election shall be held as herein provided for the election upon the ratification of this constitution, and the returns thereof made to, and canvassed and certified by, the state canvassing board as herein provided in case of the election of state officers.

Sec. 9. [State officers limited to salaries.]

No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever, except the salary provided by law.

ANNOTATIONS

Cross references. — For prohibition of extra compensation to public officers, *see* N.M. Const., art. IV, § 27.

For fees collected by county officers, *see* N.M. Const., art. X, § 1.

For general salary provisions, *see* 2-1-3 to 2-1-11, 4-44-1 to 4-44-45 NMSA 1978.

Comparable provisions. — Utah Const., art. VII, § 18.

Intent of section. — It was intention of constitutional convention to abolish fee system as to officers indicated. State ex rel. Delgado v. Romero, 17 N.M. 81, 124 P. 649 (1912).

District attorney to receive salary only. — District attorney is a state officer and is precluded from receiving fees, allowances or emoluments other than salary provided by law. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

No extra compensation for official acts. — Boards of county commissioners have no duties to perform other than official duties, and all services rendered to such boards by district attorneys are official duties; therefore, there are no legal services that can be rendered by district attorney for board for which he may exact extra compensation. Act of advising board with respect to validity of contract was official act required of that office. Hanagan v. Board of Cnty. Comm'rs, 64 N.M. 103, 325 P.2d 282 (1958).

Prior inconsistent law not in force. — New Mexico Const., art. XXII, § 4, does not continue in force fee and salary provisions of Laws 1909, ch. 22, said law being inconsistent with this section. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Different situation when officer not salaried. — It may be that assistant district attorney and county commissioners may make arrangements for former's compensation when law contains no salary provision for said assistant. 1915-16 Op. Att'y Gen. No. 15-1655.

When person holds two offices. — This section does not prohibit state officer from holding another office not inconsistent with his elective office, nor from receiving compensation therefor. 1912-13 Op. Att'y Gen. No. 12-875.

Adjutant-general of the state holds two offices - one a civil office and the other brigadier-general of the national guard, and when ordered to duty as national guard officer, he is entitled to pay both as adjutant-general and as officer of guard. 1933-34 Op. Att'y Gen. No. 34-805.

When fees used in connection with office business. — Section prohibits receipt of fees to personal use of secretary of state but does not prevent collection of fees provided by law to be paid to secretary and their use in business of office. 1912-13 Op. Att'y Gen. No. 12-911.

Section does not prohibit governor from using contingent fund annually appropriated to him for any purpose properly connected with obligations of office. 1912-13 Op. Att'y Gen. No. 12-887.

Contributions by universities to executive department salaries. — Contributions by state universities to executive department officer salaries are consistent with the New Mexico constitution only if the legislature appropriated the contributions for that purpose or if the contributions are paid in exchange for services the cabinet officers perform for the universities. 2007 Op. Att'y Gen. No. 07-06.

Clerk prohibited from keeping excess federal fees. — This section, in addition to 34-6-37 NMSA 1978 (concerning disposition of court income), precludes district court clerk from keeping fees, collected in connection with passports and like federal functions, in excess of those remitted to federal government. 1968 Op. Att'y Gen. No. 68-77.

Judge prohibited from accepting gratuity for marriage ceremony. — Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico constitution. 1991 Op. Att'y Gen. No. 91-09.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees §§ 450, 451, 453.

Per diem compensation, 1 A.L.R. 276.

Stolen property, right of officer to compensation for services in recovering, 58 A.L.R. 1125.

Administrative officer's or board's power in respect of compensation of public officer under statute fixing maximum or minimum compensation, 70 A.L.R. 1050.

Priority or preference in payment of their salary or fees and expenses, right of public officers and employees to, 92 A.L.R. 635.

Constitutional or statutory limitation of compensation of public officer as applicable to one in governmental service who is paid in whole or part from funds not derived from taxation, 135 A.L.R. 1033.

Earnings, or opportunity of earning, from other sources, as reducing claim of public officer wrongfully excluded from his office, 150 A.L.R. 100.

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182.

Probate and guardianship proceedings, constitutionality of statutes which provide for fees for service of officers in, graduated according to the amount of the estate, 76 A.L.R.3d 1117.

67 C.J.S. Officers and Public Employees §§ 223, 224; 81A C.J.S. States § 106.

Sec. 10. [Child labor.]

The legislature shall enact suitable laws for the regulation of the employment of children.

ANNOTATIONS

Cross references. — For statutory provisions, *see* Chapter 50, Article 6 NMSA 1978.

Comparable provisions. — Idaho Const., art. XIII, § 4.

Utah Const., art. XVI, §§ 3, 8.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A Am. Jur. 2d Labor and Labor Relations § 3808 et seq.

Child labor laws as impairing obligation of contracts, 2 A.L.R. 1221.

43 C.J.S. Infants § 99; 51 C.J.S. Labor Relations §§ 3, 4; 51B C.J.S. Labor Relations §§ 1017, 1021, 1043, 1186, 1190, 1192.

Sec. 11. [Women as public officers.]

Women may hold the office of notary public and such other appointive offices as may be provided by law.

ANNOTATIONS

Comparable provisions. — Utah Const., art. IV, § 1.

Wyoming Const., art. VI, § 1.

Woman may be appointed state librarian. — A woman is qualified to hold appointive office of state librarian. 1912-13 Op. Att'y Gen. No. 12-934.

Assistant commissioner of public lands. — A woman may hold appointive office of assistant commissioner of public lands. 1919-20 Op. Att'y Gen. No. 20-2752.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees § 63.

Women's suffrage amendment as affecting eligibility of women to office, 71 A.L.R. 1333.

Notary public as officer under rule limiting right to hold office to males or electors, 79 A.L.R. 451.

67 C.J.S. Officers and Public Employees § 20.

Sec. 12. [Publication of laws in English and Spanish.]

For the first twenty years after this constitution goes into effect all laws passed by the legislature shall be published in both the English and Spanish languages and thereafter such publication shall be made as the legislature may provide.

ANNOTATIONS

Laws published as enacted. — Requirement of this section relates to publication of laws in the form of their enactment. State v. Armstrong, 31 N.M. 220, 243 P. 333 (1924).

Succeeding legislature may appropriate for extra services. — When legislature of 1915 appropriated money for translation of code from English into Spanish, succeeding legislature could constitutionally appropriate money to pay for extra services not contemplated by original appropriation. State ex rel. Sedillo v. Sargent, 24 N.M. 333, 171 P. 790 (1918).

Legislature may require dual publication and appropriate for translation. — Legislature has valid power to provide that all laws passed by it shall be published in both English and Spanish, and any appropriation voted by legislature to pay for translation is valid. 1951-52 Op. Att'y Gen. No. 5332.

Law reviews. — For comment, "Education and the Spanish-Speaking - An Attorney General's Opinion on Article XII, Section 8 of the New Mexico Constitution," see 3 N.M. L. Rev. 364 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 73 Am. Jur. 2d Statutes § 257.

82 C.J.S. Statutes §§ 63, 66.

Sec. 13. [Sacramental wines.]

The use of wines solely for sacramental purposes under church authority at any place within the state shall never be prohibited.

ANNOTATIONS

Spirit of section is against prohibition of sale for purpose specified. 1915-16 Op. Att'y Gen. No. 15-1529.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 45 Am. Jur. 2d Intoxicating Liquors §§ 31, 77.

48 C.J.S. Intoxicating Liquors § 230.

Sec. 14. [Public officers barred from using railroad passes.]

It shall not be lawful for the governor, any member of the state board of equalization, any member of the corporation commission [public regulation commission], any judge of the supreme or district court, any district attorney, any county commissioner or any county assessor, during his term of office to accept, hold or use any free pass; or purchase, receive or accept transportation over any railroad within this state for himself or his family upon terms not open to the general public; and any person violating the provisions hereof shall, upon conviction in a court of a competent jurisdiction, be

punished as provided in Sections Thirty-Seven and Forty of the article on Legislative Department in this constitution.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. For references to state corporation commission being construed as references to the public regulation commission, *see* Laws 1998, ch. 108, § 80.

Cross references. — For prohibition applicable to legislators, *see* N.M. Const., art. IV, § 37.

"Sections Thirty-Seven and Forty of the article on Legislative Department". — New Mexico Const., art. IV, § 37, provides that use of a pass or receipt of railroad transportation upon terms not open to general public shall work a forfeiture of legislator's office. Section 40 defines the offense as a felony and provides for punishment of fine or imprisonment. This section adopts the above sanctions for violation of its own like prohibitions.

Railroads may issue passes to assistant district attorneys. 1937-38 Op. Att'y Gen. No. 36-1491.

Intrastate motor carrier may not grant passes. — It is unlawful for an intrastate motor carrier which is regulated by state to grant passes to state employees or officials, or for such persons to accept them. 1937-38 Op. Att'y Gen. No. 37-1761.

No free transportation required. — No carrier is required to transport any state employee or other person free of charge whether traveling on official business or not. 1937-38 Op. Att'y Gen. No. 37-1761.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Carriers § 846.

13 C.J.S. Carriers § 499.

Sec. 15. [Penitentiary to be reformatory and industrial school; labor by inmates.]

The penitentiary is a reformatory and an industrial school, and all persons confined therein shall, so far as consistent with discipline and the public interest, be employed in some beneficial industry; and where a convict has a dependent family, his net earnings shall be paid to said family if necessary for their support.

ANNOTATIONS

Cross references. — For prohibition on leasing convict labor, *see* N.M. Const., art. XX, § 18.

Inmates not "employees". — Notwithstanding the fact that prison industries must comply with occupational health and safety standards, inmates engaged in prison-operated industries or enterprises are not "employees" of the penitentiary for purposes of filing an occupational health and safety complaint with the environmental improvement division. 1981 Op. Att'y Gen. No. 81-23.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 588, 604, 606; 60 Am. Jur. 2d Penal and Correctional Institutions §§ 100, 162 to 166, 168, 169.

Liability for death of or injury to prisoner, 46 A.L.R. 94, 50 A.L.R. 268, 61 A.L.R. 569.

Liability of lessee of convict labor for injury to convict, 46 A.L.R. 106, 50 A.L.R. 268, 61 A.L.R. 569.

Mandamus, under 28 USCS § 1361, to obtain change in prison condition or release of federal prisoner, 114 A.L.R. Fed. 225.

18 C.J.S. Convicts §§ 13 to 15; 72 C.J.S. Prisons and Rights of Prisoners §§ 59, 63.

Sec. 16. [Railroad's liability to employees.]

Every person, receiver or corporation owning or operating a railroad within this state shall be liable in damages for injury to, or the death of, any person in its employ, resulting from the negligence, in whole or in part, of said owner or operator, or of any of the officers, agents or employees thereof, or by reason of any defect or insufficiency, due to its negligence, in whole or in part, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

An action for negligently causing the death of an employee as above provided shall be maintained by the executor or administrator for the benefit of the employee's surviving widow or husband and children; or if none, then his parents; or if none, then the next of kin dependent upon said deceased. The amount recovered may be distributed as provided by law. Any contract or agreement made in advance of such injury with any employee waiving or limiting any right to recover such damages shall be void.

This provision shall not be construed to affect the provisions of Section Two of Article Twenty-Two of this constitution, being the article upon Schedule.

ANNOTATIONS

Cross references. — For general wrongful death action against public conveyance businesses, *see* 41-2-4 NMSA 1978.

For statute on injury to employees from defective equipment, *see* 63-3-23 NMSA 1978.

Compiler's notes. — New Mexico Const., art. XXII, § 2, referred to in the last paragraph of this section, provides that the Federal Employers' Liability Act (45 U.S.C. §§ 51 to 60) shall remain in force in this state to the same extent as it was in the New Mexico territory, until otherwise provided by law.

Except for the Morstad case (catchlined "Section abrogates common law fellow servant doctrine"), the cases annotated under this section were decided under the Federal Employers' Liability Act. However, according to the New Mexico supreme court in Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958), the Federal Employers' Liability Act is set out in this section and N.M. Const., art. XXII, § 2. Accordingly, the cases have been placed under this section.

Section abrogates common law fellow servant doctrine as to railroads. Morstad v. Atchison, T. & S.F. Ry., 23 N.M. 663, 170 P. 886 (1918).

Jurisdiction of federal district courts not curtailed. — Congress has not curtailed, withdrawn or denied jurisdiction of United States district courts by limiting right of removal. Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958).

Duty to assume jurisdiction over these federal rights. — State court having jurisdiction to enforce rights similar to those created by an act of congress has mandatory duty to assume jurisdiction over federally created rights. Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958).

Power in congress to force jurisdiction. — Congress, under supremacy clause of federal constitution, has power to force jurisdiction upon courts of the states where constitution of the state or legislature of the state has limited such jurisdiction. Bourguet v. Atchison, T. & S.F.R.R., 65 N.M. 200, 334 P.2d 1107 (1958).

What constitutes negligence is federal question. — What constitutes negligence under Federal Employers' Liability Act is a federal question and does not vary in accordance with differing conceptions of negligence applicable under state and local laws for other purposes, and federal decisional law formulating and applying concept governs. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

Test of a jury case is simply whether proofs justify with reason conclusion that employer negligence played any part, even the slightest, in producing injury or death for which damages are sought. It does not matter that from the evidence jury may also with reason, on grounds of probability, attribute result to other causes, including employee's contributory negligence. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959); Rogers v. Missouri Pac. R.R., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493, reh'g denied, 353 U.S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764 (1957).

Test whether employer is liable for providing defective or improper tools is not whether employer knew them to be unsafe, but whether it exercised reasonable care

and diligence to make them safe. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

No assumption of risk doctrine. — Every vestige of doctrine of assumption of risk has been eliminated. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

Employee need not request help first time he does job. — Defendant cannot escape liability because of plaintiff's failure to ask for additional help in performing assigned work for first time. Bourguet v. Atchison, T. & S.F. Ry., 65 N.M. 207, 334 P.2d 1112 (1959).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 32B Am. Jur. 2d Federal Employers' Liability and Compensation Acts § 5 et seq.; 27 Am. Jur. 2d Employment Relationship §§ 263 et seq., 393.

Validity of provisions denying right of action for simple negligence, 36 A.L.R. 1400.

Constitutionality of statutes imposing absolute liability on private persons or corporations, irrespective of negligence or breach of a specific statutory duty, for injury to person or property, 53 A.L.R. 875.

Employer's liability for negligence of an assistant procured or permitted by his employee without authority, 25 A.L.R.2d 984.

Defect in appliance or equipment as proximate cause of injury to railroad employee in repair or investigation thereof, 30 A.L.R.2d 1192.

Duty of railroad company towards employees with respect to close clearance of objects alongside track, 50 A.L.R.2d 674.

Surface of yard, duty of railroad company to prevent injury of employee due to, 57 A.L.R.2d 493.

Contributory negligence of railroad employee in jumping from moving train or car to avoid collision or other injury, 58 A.L.R.2d 1232.

Liability of master for injury or death of servant inflicted by fellow servant on master's premises where injury occurs outside working hours, 76 A.L.R.2d 1215.

Recovery of prejudgment interest in actions under the Federal Employers' Liability Act or Jones Act, 80 A.L.R. Fed. 185.

Excessiveness or adequacy of award of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS § 51 et seq.) - modern cases, 97 A.L.R. Fed. 189.

30 C.J.S. Employers' Liability § 1 et seq.; 74 C.J.S. Railroads § 370.

Sec. 17. [Repealed.]

ANNOTATIONS

Repeals. — House Joint Resolution No. 4 (Laws 1971), adopted at a special election held on November 2, 1971, by a vote of 49,971 for and 24,437 against, repealed this section, which formerly read: "There shall be a uniform system of textbooks for the public schools which shall not be changed more than once in six years."

Sec. 18. [Leasing of convict labor prohibited.]

The leasing of convict labor by the state is hereby prohibited.

ANNOTATIONS

Comparable provisions. — Utah Const., art. XVI, § 3.

Work-release programs must necessarily provide, even if only implicitly, that any prisoners working for private enterprise must act of their own accord and, when a prisoner voluntarily participated in a work-release program and was injured while under the direction of a private business, he was an employee of that business and thus entitled to workers' compensation benefits. Benavidez v. Sierra Blanca Motors, 120 N.M. 837, 907 P.2d 1018 (Ct. App. 1995), aff'd in part, rev'd in part on other grounds, 1996-NMSC-045, 122 N.M. 209, 922 P.2d 1205.

Generally. — Under § 3528, 1897 C.L., superintendent of penitentiary, under direction of board of penitentiary commissioners, could hire out labor of convicts to the best advantage. 1909-12 Op. Att'y Gen. No. 200.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 60 Am. Jur. 2d Penal and Correctional Institutions § 170.

18 C.J.S. Convicts § 19.

Sec. 19. [Eight-hour day in public employment.]

Eight hours shall constitute a day's work in all cases of employment by and on behalf of the state or any county or municipality thereof.

ANNOTATIONS

Comparable provisions. — Arizona Const., art. XVIII, § 1.

Idaho Const., art. XIII, § 2.

Oklahoma Const., art. XXIII, § 1.

Utah Const., art. XVI, § 6.

Wyoming Const., art. XIX, § 2.

This section is not self-executing but is a declaration of principle or policy as to number of hours employees of the class named should work to be entitled to a day's wages. Jaramillo v. City of Albuquerque, 64 N.M. 427, 329 P.2d 626 (1958).

Framers of New Mexico constitution literally transplanted Okla. Const., art. XXIII, § 1, to constitution of New Mexico with full knowledge that enabling legislation was necessary to its effectiveness. Jaramillo v. City of Albuquerque, 64 N.M. 427, 329 P.2d 626 (1958).

No duty on officials. — Section is not self-executing, so there is no duty imposed upon municipal officials, the violation of which affords grounds for removal from office, or which will sustain a mandamus action in case it is not performed. 1931-32 Op. Att'y Gen. No. 32-352.

Intent of section. — This provision is intended to limit state, county and municipal employment to eight hours per day, although it is possible to construe it as a fixed minimum day. 1931-32 Op. Att'y Gen. No. 31-152.

Section applies only to persons employed and paid by the day. 1912-13 Op. Att'y Gen. No. 12-968.

Eight-hour day not required. — There is no specific requirement, either constitutional or statutory, that employees of state work an eight-hour day. 1967 Op. Att'y Gen. No. 67-89.

Working more than eight hours not prevented. — Notwithstanding this section, there is nothing to prevent employment of persons to work more than eight hours and to be paid whatever may be agreed upon. 1912-13 Op. Att'y Gen. No. 12-968.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A Am. Jur. 2d Labor and Labor Relations § 3808 et seq.

51B C.J.S. Labor Relations § 1186 et seq.

Sec. 20. [Waiver of indictment; proceedings on information.]

Any person held by a committing magistrate to await the action of the grand jury on a charge of felony or other infamous crime, may in open court with the consent of the court and the district attorney, to be entered upon the record, waive indictment and plead to an information in the form of an indictment filed by the district attorney, and

further proceedings shall then be had upon said information with like force and effect as though it were an indictment duly returned by the grand jury.

ANNOTATIONS

Cross references. — For provision on indictment and information and rights of accused, *see* N.M. Const., art. II, § 14.

Generally regarding use of information. — Prior to 1923 amendment to N.M. Const., art. II, § 14, the permissive use of an information was surrounded by so many safeguards as to render it unlikely that framers could have contemplated that requirements of N.M. Const., art. II, § 14, could be waived otherwise than by provisions of this section. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Federal grand jury requirement not applicable to states. — Presentment or indictment of a grand jury, required by U.S. Const., amend. V, is not applicable to the states. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968).

No entitlement to grand jury indictment. — Defendant who was charged by criminal information was not entitled to be indicted by grand jury because under N.M. Const., art. II, § 14, a defendant may be charged either by grand jury action or by a criminal information. State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968).

This section inapplicable where information used. — Since defendant was charged by criminal information, provisions of this section concerning waiver of grand jury indictment and consent to such waiver are not applicable. Flores v. State, 79 N.M. 420, 444 P.2d 605 (Ct. App. 1968).

Even when person arrested before information filed. — Person arrested before information is filed is not forthwith entitled to grand jury action in his case, and subsequent filing of an information does not violate this section. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct. App. 1967).

"Open court" means a time and place when court is regularly organized for transaction of business, and must be limited to regular sessions of court held at time fixed by law or specially called by judge in accordance with law. 1912-13 Op. Att'y Gen. No. 12-891.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Indictments and Informations § 6 et seq.

"Infamous" offense, what is, within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 A.L.R. 1002.

Right to waive indictment, information, or other formal accusation, 56 A.L.R.2d 837.

42 C.J.S. Indictments and Informations § 7.

Sec. 21. [Pollution control.]

The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people. (As added November 2, 1971.)

ANNOTATIONS

Cross references. — For Pollution Control Revenue Bond Act, *see* 3-59-1 to 3-59-14 NMSA 1978.

Special election. — Laws 1971, ch. 308, §§ 1 and 2, provided that all constitutional amendments proposed by the thirtieth legislature be voted upon at a special election on the first Tuesday of November, 1971, unless otherwise specified, and appropriated $171,000 for election expenses.

New Mexico constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine. — Section 21 of Article XX of the New Mexico Constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, and it delegates the implementation of that specific duty to the legislature. The legislature has incorporated and implemented the common law public trust doctrine with regard to the process a person must follow in asserting his or her rights to protect the atmosphere by enacting the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, to address how protections for the atmosphere are implemented. The common law, where inconsistent with this statutory scheme, must yield to the governing statute. An individual may make a claim concerning the duty to protect the atmosphere, but such a claim must be raised within the existing constitutional and statutory framework and not alternatively through a separate cause of action, because a separate common law cause of action under the public trust doctrine would circumvent and render a nullity the process under the Air Quality Control Act that has established how competing interests are addressed and decisions are made regarding regulation of the atmosphere. Sanders-Reed v. Martinez, 2015-NMCA-063.

Where plaintiffs filed a civil complaint against the state of New Mexico seeking a judgment declaring that the common law public trust doctrine imposes a duty on the state to regulate greenhouse gas emissions in New Mexico, that the state's failure to devise a plan to mitigate the effects of climate change is a breach of the public trust duty, and that the state should be ordered to produce a plan for redressing and preventing the impairment to the atmosphere caused by greenhouse gases, summary judgment in favor of the state was appropriate where the legislature has enacted a statutory framework to address how protections for the atmosphere are implemented, and the common law, where inconsistent with the statutory scheme, must yield to the governing statute. Sanders-Reed v. Martinez, 2015-NMCA-063.

Law reviews. — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M. L. Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 1 et seq.

Secured lender liability: application of security interest exemption from definition of "owner or operator" under § 101(20)(A) of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9601 (20)(A)), 131 A.L.R. Fed. 293.

39A C.J.S. Health and Environment §§ 115 to 157.

Sec. 22. [Public employees and educational retirement systems trust funds; expenditures and encumbrances prohibited; administration; vesting of property rights.] (1998)

A. All funds, assets, proceeds, income, contributions, gifts and payments from any source whatsoever paid into or held by a public employees retirement system or an educational retirement system created by the laws of this state shall be held by each respective system in a trust fund to be administered and invested by each respective system for the sole and exclusive benefit of the members, retirees and other beneficiaries of that system. Expenditures from a system trust fund shall only be made for the benefit of the trust beneficiaries and for expenses of administering the system. A system trust fund shall never be used, diverted, loaned, assigned, pledged, invested, encumbered or appropriated for any other purpose. To the extent consistent with the provisions of this section, each trust fund shall be invested and the systems administered as provided by law.

B. The retirement board of the public employees retirement system and the board of the educational retirement system shall be the trustees for their respective systems and have the sole and exclusive fiduciary duty and responsibility for administration and investment of the trust fund held by their respective systems.

C. A retirement board shall have the sole and exclusive power and authority to adopt actuarial assumptions for its system based upon the recommendations made by an independent actuary with whom it contracts. The legislature shall not enact any law that increases the benefits paid by the system in any manner or changes the funding formula for a retirement plan unless adequate funding is provided.

D. Upon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions.

E. Nothing in this section shall be construed to prohibit modifications to retirement plans that enhance or preserve the actuarial soundness of an affected trust fund or individual retirement plan. (As added November 3, 1998.)

ANNOTATIONS

The 1998 amendment to Article XX, which was proposed by S.J.R. No. 6, § 1 (Laws 1998) and adopted at the general election held on November 3, 1998 by a vote of 336,043 for and 97,716 against, added this section.

Compiler's notes. — Section 2 of H.J.R. No. 11 (Laws 1993) proposed to amend the constitution by adding a new section providing for a statewide lottery and video machines. This amendment was submitted to the people at the general election held on November 8, 1994, but the New Mexico Supreme Court entered an order prohibiting the certification of the amendment as unconstitutional.

Property right in cost-of-living adjustments. — Any future cost-of-living adjustment to a retirement benefit is merely a year-to-year expectation that, until paid, does not, under the New Mexico constitution, create a vested property right in an annual cost-of-living adjustment calculated according to the statutory formula in effect on the date of the retiree's eligibility for retirement. Once paid, the cost-of-living adjustment becomes a part of the retirement benefit and a property right subject to constitutional protections. Bartlett v. Cameron, 2014-NMSC-002.

Where the legislature amended 22-11-31 NMSA 1978 in 2013 to reduce future amounts educational retirees might receive as a cost-of-living adjustment; and retirees sought to compel the education retirement board to pay them an annual cost-of-living adjustment for the entirety of their retirement, calculated according to the cost-of-living adjustment formula in effect on the date of their retirement on the grounds that under Article XX, Section 22 of the constitution of New Mexico, the retirees had a vested property interest in future cost-of-living adjustments based on the formula in effect on the date of their retirement, a cost-of-living adjustment to a retirement benefit is provided independently from the obligation and payment of a retirement benefit and retirees do not have a vested property interest in an annual cost-of-living adjustment calculated in accordance with the formula in effect at the time they were eligible for retirement. Bartlett v. Cameron, 2014-NMSC-002.

ARTICLE XXI
Compact with the United States

ANNOTATIONS

Cross references. — For amendment of compact with United States, *see* N.M. Const., art. XIX, § 4.

"Act of Congress". — Preamble refers to the Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310), which is set out in Pamphlet 3.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

Section 1. [Religious toleration; polygamy.]

Perfect toleration of religious sentiment shall be secured, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship. Polygamous or plural marriages and polygamous cohabitation are forever prohibited. (As amended September 15, 1953.)

ANNOTATIONS

Cross references. — For other provisions guaranteeing religious freedom, *see* N.M. Const., art. II, § 11, and art. XII, § 9.

For consent of congress to 1953 amendment, *see* 67 Stat. 586, ch. 502, § 3 (1953).

Comparable provisions. — Utah Const., art. III, First.

Wyoming Const., art. XXI, § 25.

The 1953 amendment, which was proposed by S.J.R. No. 11 (Laws 1953) and adopted at a special election held on September 15, 1953. with a vote of 18,410 for and 11,875 against, deleted provision at end of section applying to prohibition of sale, barter or gift of intoxicating liquors to Indians or introduction of such liquors into Indian country.

This section is the same as Enabling Act, § 2A. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940) (decided before 1953 amendment), superseded by statute, Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961).

Trial court determines whether belief is "religious". — Whether a defendant's belief is "religious" is to be decided by the trial court, and unless the trial court rules that the belief is religious, evidence of a defendant's religious belief should not be introduced before the jury. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Traditionalism of belief is a factor to be considered, particularly in connection with organizations, in determining whether a belief is religious; however, traditionalism, in itself, is not determinative because it would give no effect to conversions or to revelations. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Nature of belief factor to be considered in determining whether the belief is religious. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

But absence of organization espousing belief no factor. — The absence of an organization espousing the belief that a defendant contends is religious does not, in itself, determine whether an individual's belief is religious. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Congress had power to prohibit introduction of liquor into pueblo lands, notwithstanding that Indians had a fee simple title; such legislation did not encroach upon police power of state. United States v. Sandoval, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913) (decided before 1953 amendment).

Use of marijuana not intrinsic part of religion. — Where the evidence shows that defendant's belief was derived from defendant's personal views of the Bible, and those views under the evidence are no more than that the use and distribution of marijuana is permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Sunday laws not religious. — The Sunday laws (40-44-1 to 40-44-5, 1953 Comp., now repealed) are not for any religious observance nor founded upon any religious considerations. 1915-16 Op. Att'y Gen. No. 15-1570.

Observance of Saturday as Sunday does not excuse violation of Sunday laws (40-44-1 to 40-44-5, 1953 Comp., now repealed). 1915-16 Op. Att'y Gen. No. 15-1570.

Law reviews. — For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 10 Am. Jur. 2d Bigamy § 24; 16A Am. Jur. 2d Constitutional Law § 477; 52 Am. Jur. 2d Marriage §§ 92, 94.

Advertising matter, statute or ordinance relating to distribution of, as interference with religious freedom, 22 A.L.R. 1484, 114 A.L.R. 1446.

Bigamy, religious belief as affecting crime of, 24 A.L.R. 1237.

Vaccination of school children, requirement of, as invasion of religious liberty, 93 A.L.R. 1431.

Patriotic ritual, such as oath of allegiance or salute to flag, etc., power of legislature to require, 110 A.L.R. 383, 120 A.L.R. 655, 127 A.L.R. 1502, 141 A.L.R. 1030, 147 A.L.R. 698.

Solicitation of alms or contributions for charitable, religious or individual purposes, validity of statutory regulations of, 128 A.L.R. 1361, 130 A.L.R. 1504.

Public officers, discrimination because of religious creed in respect of appointment, compensation, etc., of, 130 A.L.R. 1516.

Streets or parks, legislation as to use of, for religious purposes, 133 A.L.R. 1415.

License tax or regulations, constitutional guarantee of freedom of religion as applied to, 141 A.L.R. 538, 146 A.L.R. 109, 152 A.L.R. 322.

Constitutionality of statute providing school bus service for pupils of parochial or private schools, 168 A.L.R. 1434.

Inclusion of period of service in sectarian school in determining public school teachers' seniority, salary or retirement benefits, as a violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Releasing public school pupils from attendance for purpose of receiving religious education, 2 A.L.R.2d 1371.

Compulsory education law, religious beliefs of parents as defense to prosecution for failure to comply with, 3 A.L.R.2d 1401.

Public regulation and prohibition of sound amplifiers or loud-speaker broadcasts in streets and other public places, 10 A.L.R.2d 627.

Guardian, consideration and weight of religious affiliations in appointment or removal of, 22 A.L.R.2d 696.

Sunday, construction of statute or ordinance prohibiting or regulating sports and games on, 24 A.L.R.2d 813.

Divorce, separation or annulment, racial, religious or political differences as ground for, 25 A.L.R.2d 928.

Statute, ordinance or other measure involving chemical treatment of public water supply as interference with religious freedom, 43 A.L.R.2d 453.

Wills or deeds: validity of provisions prohibiting, penalizing or requiring marriage to one of a particular religious faith, 50 A.L.R.2d 740.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Zoning regulations as affecting churches, 74 A.L.R.2d 377, 62 A.L.R.3d 197.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adults, 9 A.L.R.3d 1391.

Provision of religious facilities for prisoners, 12 A.L.R.3d 1276.

Validity of blasphemy statutes or ordinances, 41 A.L.R.3d 519.

Adoption proceedings, religion as factor in, 48 A.L.R.3d 383.

Religion as factor in child custody and visitation cases, 22 A.L.R.4th 971.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

10 C.J.S. Bigamy § 7; 16A C.J.S. Constitutional Law § 515; 55 C.J.S. Marriage § 17.

Sec. 2. [Control of unappropriated or Indian lands; taxation of federal government, nonresident and Indian property.]

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the congress of the United States has prescribed or may hereafter prescribe.

ANNOTATIONS

Comparable provisions. — Utah Const., art. III, Second.

Wyoming Const., art. XXI, § 26.

I. GENERAL CONSIDERATION.

This section is the same as Enabling Act, § 2B. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940), superseded by statute, Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961).

Lessee for construction on federal land subject to taxation. — Congress having explicitly removed bar of sovereign immunity as it applied to property belonging to United States, the immunity granted federal government by this section and N.M. Const., art. VIII, § 3 (relating to tax exempt property), clearly was not available to one who had lease to construct military housing on federal land; it was his interest that was subject to taxation. Kirtland Heights, Inc. v. Board of Cnty. Comm'rs, 64 N.M. 179, 326 P.2d 672 (1958).

Policy permitting sale of handcrafted works by Indians only, valid. — The policy of the state of New Mexico and that of the city of Santa Fe, which permits Indians to display and to sell their handcrafted jewelry, arts and crafts on the grounds of the museum of New Mexico and the palace of the governors, but which prohibits any persons other than Indians from offering for sale handcrafted jewelry and specifically forbids sales by persons other than Indians within the plaza, is valid. Livingston v. Ewing, 601 F.2d 1110 (10th Cir.), cert. denied, 444 U.S. 870, 100 S. Ct. 147, 62 L. Ed. 2d 95 (1979).

Pueblo Indians have no power to alienate Indian land except to United States since the fee of such lands is in the United States subject only to right of occupancy; thus, to acquire title in Indian lands, the title both of the Indian pueblo and of the United States must be acquired. United States ex rel. Pueblo of San Ildefonso v. Brewer, 184 F. Supp. 377 (D.N.M. 1960).

Indian authorities do not act under color of state law. — Pueblos do not derive their governmental powers from state nor from United States, and consequently there was no basis for holding that conduct of pueblo civil authorities of which protestant pueblo Indians complain (allegedly subjecting plaintiffs to indignities, threats and reprisals because of their faith) was done under color of state law, statute, ordinance, regulation, custom or usage. Toledo v. Pueblo De Jemez, 119 F. Supp. 429 (D.N.M. 1954).

Field sobriety tests performed in Indian country. — Field sobriety tests are procedural, rather than substantive, in nature because they are the investigative method by which the state enforces its substantive law prohibiting DWI, and in the absence of a tribal procedure governing the administration of field sobriety tests, a state officer may investigate a possible DWI by administering field sobriety tests in Indian country. State

v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869, aff'g 2008-NMCA-107, 144 N.M. 651, 190 P.3d 1146.

State officers' investigative authority in Indian country. — State officers have authority to enter Indian country to investigate off-reservation crimes committed in the officers' presence by Indians, so long as the investigation does not infringe on tribal sovereignty by circumventing or contravening a governing tribal procedure. State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869, aff'g 2008-NMCA-107, 144 N.M. 651, 190 P.3d 1146.

Where a state officer, who was not cross-commissioned with the bureau of Indian affairs or an Indian nation, tribe, or pueblo, observed a vehicle traveling on a county road at a high rate of speed in excess of the speed limit; the officer pursued the vehicle; the vehicle did not stop when the officer turned on the emergency lights or the siren of the police vehicle; when the vehicle crossed a bridge and entered the Navajo reservation, the driver threw a bottle containing a yellow liquid out of the passenger window; the vehicle stopped inside the Navajo reservation; defendant, who was driving the vehicle, had blood shot, watery eyes and smelled moderately of alcohol and admitted that defendant had thrown a bottle of beer out of the vehicle; defendant failed field sobriety tests; defendant was Navajo; and the Navajo Nation did not have a tribal procedure governing the administration of field sobriety tests, the traffic stop and the administration of the field sobriety tests did not infringe on the sovereignty of the Navajo Nation. State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869, aff'g 2008-NMCA-107, 144 N.M. 651, 190 P.3d 1146.

Motion to dismiss based on tribal sovereign immunity. — Where a road was owned by the bureau of land management since 1906 and was constructed in 1935 and used by the public since that time; in 2001, the BLM conveyed the property through which the road ran to defendant in fee simple; the BLM reserved an easement along the road for use as a road by the United States for public purposes; in 2002, the BLM conveyed its interest in the road to defendant; in plaintiff's action to declare the road a state public road, defendant moved to dismiss the complaint for lack of subject matter jurisdiction based on tribal sovereign immunity; and defendant offered no evidence of any property or governance interests in the road or that the road would threaten or affect defendant's sovereignty, the district court did not err in dismissing defendant's motion to dismiss because the allegations of the complaint, including the allegation that the road was a state public road, were presumed to be true for purposes of the motion and defendant failed to show any factual, legal or rational basis on which to invoke sovereign immunity. Hamaatsa, Inc. v. Pueblo of San Felipe, 2013-NMCA-094, cert. granted, 2013-NMCERT-009.

II. JURISDICTION OVER INDIANS.

A. IN GENERAL.

Infringement test reaffirmed. — The infringement test established in Williams v. Lee, 358 U.S. 217 (1959), applies to determine whether state court jurisdiction impinges on tribal sovereignty, even in cases where the rule established in Montana v. United States, 450 U.S. 544 (1981), commands the absence of tribal court jurisdiction. Hinkle v. Abeita, 2012-NMCA-074, 283 P.3d 877, cert. denied, 2012-NMCERT-006.

Where an Indian and a non-Indian were involved in a motor vehicle accident on a state highway within the exterior boundaries of an Indian Pueblo, the state district court did not have subject matter jurisdiction of a suit brought by the non-Indian against the Indian. Hinkle v. Abeita, 2012-NMCA-074, 283 P.3d 877, cert. denied, 2012-NMCERT-006.

Scope of sovereign immunity. — Without an explicit waiver, Indian tribes are immune from suit in state court, even if the suit results from commercial activity occurring off the tribal reservation. Antonio v. Inn of the Mountain Gods Resort & Casino, 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

Where worker was injured during the course of worker's employment by an Indian tribe at a ski run that was operated by the Indian tribe on federal not tribal land, the Indian tribe did not waive sovereign immunity by operating the ski run off tribal land, the location of the ski run off tribal land did not confer jurisdiction to the state, and the workers' compensation judge lacked subject matter jurisdiction of worker's claim. Antonio v. Inn of the Mountain Gods Resort & Casino, 2010-NMCA-077, 148 N.M. 858, 242 P.3d 425, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

Compact added nothing to authority and jurisdiction of United States over Indian land as it existed under earlier congressional acts. Martinez v. Martinez, 49 N.M. 83, 157 P.2d 484 (1945).

State disclaimed only proprietary interest in Indian lands. — Disclaimer in this section whereby people of New Mexico forever disclaimed all right and title to all lands lying within boundaries of state owned or held by any Indian or Indian tribes, right or title to which shall have been acquired through United States or any prior sovereignty, is a disclaimer of proprietary, rather than of governmental, interest. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

Civil jurisdiction over suit on promissory note against Indian who does not live on reservation is clearly a governmental and not a proprietary interest. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965).

Disclaimer of proprietary rather than governmental interest did not prevent New Mexico state courts from obtaining jurisdiction over Indian residing on Indian reservation established by United States government by issuing and serving process upon Indian

while he was on the reservation, such Indian having entered into a contract while off reservation and in this state; issuance and service of process was unrelated to any proprietary interest. State Sec., Inc. v. Anderson, 84 N.M. 629, 506 P.2d 786 (1973).

State's constitutional disclaimer of all right and title to Indian lands applies only to a proprietary interest in such lands and does not apply to a nonproprietary intent in subjecting the United States to a state action involving a general water right adjudication. Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. denied, 444 U.S. 995, 100 S. Ct. 530, 62 L. Ed. 2d 426 (1979).

Indian lands subject to absolute congressional jurisdiction and control. — State lacks jurisdiction over Indian lands until and unless Indian title is extinguished. Until such extinguishment of title, lands involved are subject to absolute jurisdiction and control of congress of United States. State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958), cert. denied, 357 U.S. 918, 78 S. Ct. 1359, 2 L. Ed. 2d 1363 (1958), overruled to extent opinion declared exclusive federal jurisdiction over Indian lands, State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

Congress legislates for pueblos. — Congress and not state of New Mexico legislates for pueblos of New Mexico. Toledo v. Pueblo De Jemez, 119 F. Supp. 429 (D.N.M. 1954).

No state governmental power absent congressional or supreme court sanction. — Terms upon which New Mexico was admitted as state and this section left no room for claim by state to governmental power over Indians or Indian lands except where such jurisdiction has been specifically granted by act of congress or sanctioned by decisions of supreme court of United States. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961), cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

State must act to accept jurisdiction granted. — Although congress did specifically act in 1953 to give its consent to state to assume jurisdiction over Indians within its boundaries, such jurisdiction is prohibited until state should amend its constitution or statute, removing any legal impediment to such assumption of jurisdiction. New Mexico has not seen fit to amend this section and so has not accepted jurisdiction over the Indians. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977); Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

Test for a dependent Indian community. — To determine if a particular tract of land is a dependent Indian community, the land in question must have been set aside by the federal government for the use of the Indians as Indian land and the land must be under federal superintendence. Congress or the executive must have taken some explicit action to create Indian country, and the set-aside requirement requires more than a transfer of land for Indian use, it requires that the transfer of land be for the purpose of a long-term settlement by an Indian community. State v. Steven B., 2015-NMSC-020,

rev'g 2013-NMCA-078, 306 P.3d 509 and No. 32,136, mem. op. N.M. Ct. App. April 9, 2013, and *overruling* State v. Dick, 1999-NMCA-062, 127 N.M. 382, 981 P.2d 796.

Parcel Three of Fort Wingate was not set aside for Indians as Indian land. — In a consolidated appeal, where respondents were both enrolled members of the Navajo Nation who were accused of criminal offenses committed on Parcel Three of Fort Wingate, the district court erred in concluding that it lacked jurisdiction over respondents based on the court's conclusion that the crimes were committed on Indian land. The New Mexico supreme court held that the crimes did not occur within Indian country as defined in the Indian Country Crimes Act, 18 U.S.C. §§ 1151 to 1170. The land in question was transferred by congress, through Public Law 567, to the department of interior for use by the bureau of Indian affairs for the primary purpose of educating children. Public Law 567 demonstrates that congress did not set aside Parcel Three of Fort Wingate for long-term settlement by an Indian community. Parcel Three was therefore not located in Indian country for purposes of state criminal jurisdiction. State v. Steven B., 2015-NMSC-020, *rev'g* 2013-NMCA-078, 306 P.3d 509 and No. 32,136, mem. op. N.M. Ct. App. April 9, 2013, and *overruling* State v. Dick, 1999-NMCA-062, 127 N.M. 382, 981 P.2d 796.

Jurisdiction over federal land set aside for Indian use. — Where a child, who was an enrolled member of the Navajo Nation, was charged with battery upon a school employee at a high school that was located on federal land set aside by congress for use by the bureau of Indian affairs; the BIA controlled all occupancy of the land, operated the high school and an elementary school on the land, primarily for the education of Indian children, and provided housing on the land for students and school employees; a school board elected at Navajo Nation elections established school policies, curriculum and budgets; the principals of the schools were BIA employees; law enforcement on the land was provided by the Navajo Nation, the county sheriff and state police; utility and fire protection services were not provided to any Indian entity; the Navajo Nation prosecuted misdemeanors that occurred at the schools in the Navajo Nation courts; in State v. Dick, 1999-NMCA-062,127 N.M. 382, 981 P.2d 796, the court held that the state did not have jurisdiction to prosecute a criminal defendant within the land, because the land was a dependent Indian community; and in United States v. M.C., 311 F. Supp. 2d 1281 (D.N.M. 2004), the court held that the land was not a dependent Indian community, because the school community was not located on tribal lands or land held in trust for Native Americans, the state did not have jurisdiction to prosecute the battery case because the court of appeals, following Dick, held that the schools were a "dependent Indian community" and the land was, therefore within "Indian country" as defined in 18 U.S.C. § 1151. State v. Steven B., 2013-NMCA-078, cert. granted, 2013-NMCERT-007.

Federal authority over Indians not exclusive. — Reservation is not a completely separate entity existing outside of political and governmental jurisdiction of New Mexico. State has some jurisdiction, and there is not and never has been "exclusive federal authority." Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

We reject broad assertion that federal government has exclusive jurisdiction over tribe for all purposes. Even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Test of validity of state action is whether such action interferes with right of reservation Indians to make their own laws and be ruled by them. Test is not exclusive jurisdiction of the Indians or of the United States over Indian reservation lands. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

Political nature of Indian tribes. — Indian tribes are distinct political entities with right to self-government, having exclusive authority within their territorial boundaries and not subject to laws of state in which they are located nor to federal laws except where applicability of federal laws or jurisdiction of courts is expressly conferred by federal legislation. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950, cert. denied, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961).

Limits of state jurisdiction are reservation self-government and federal law. — Even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law; neither Navajo tribal self-government nor rights granted or reserved by federal law would be in conflict with state's operation and exclusive control of schools located on reservation lands, leased by district with approval of both Navajo tribe and secretary of the interior. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Indian rights to sue and be sued in state courts. — In matters not affecting either the federal government or tribal relations, an Indian has the same status to sue and be sued in state courts as any other citizen, but when Indians do invoke jurisdiction of state courts, they are bound by decisions of these courts and cannot be heard to complain of adjudication of all claims and issues which can be and are properly asserted by or against them in suits which they have initiated. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966).

In matters not affecting either federal government or tribal relations, an Indian has same status to sue and be sued in state courts as any other citizen. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965).

Criteria for deciding whether interference with Indian self-government. — Criteria to be considered to determine whether or not application of state law would infringe upon self-government of Indians are: (1) whether parties are Indians or non-Indians, (2) whether cause of action arose within Indian reservation and (3) what is nature of interest to be protected. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977).

State should not fill vacuums in Indian law. — For state to move into areas where Indian law and procedure have not achieved degree of certainty of state law and

procedure would deny Indians the opportunity of developing their own system. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977).

B. SPECIFIC CASES.

City and county jurisdiction. — City and board of commissioners may not exercise claimed authority over lands if they would thereby interfere with self-government of the Tesuque pueblo or impair a right granted, reserved or preempted by congress. Sangre De Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 400 (1973).

Support obligations properly within state court jurisdiction. — Enforcement of the former New Mexico Revised Uniform Reciprocal Enforcement of Support Act (now Uniform Interstate Family Support Act, Chapter 40, Article 6A NMSA 1978) did not interfere with internal self-government of Zuni tribe or contravene an express federal grant or reservation by placing jurisdiction of actions to enforce support obligations in district courts of New Mexico rather than tribal courts, as support obligation here arises from marital relationship between appellant and appellee. Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 (1972).

Criminal prosecutions against non-Indians. — Exercise of jurisdiction by state courts over criminal offenses on Indian reservation lands, by non-Indians against non-Indians and where no Indian property is involved, would not affect authority of tribal counsel over reservation affairs and therefore would not infringe on right of Indians to govern themselves. State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

Enforcement of compulsory school attendance laws. — It has long been policy of federal government to encourage and support states in providing public education to Indian children whether they live on or off a reservation, and secretary of interior has been authorized to permit states to enforce penalties of state compulsory school attendance laws against Indian children and their parents, if tribe adopts resolution consenting to such enforcement. Navajo tribal code has given consent to application of state compulsory school attendance laws to Indians of Navajo tribe and their enforcement on lands of reservation wherever an established public school district lies or extends within such reservation. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Enforcement of real property laws. — Action for forcible entry and unlawful detainer deals directly with question of occupancy and ownership of land, and when land lies within a reservation, enforcement of owner's rights to such property by state court would infringe upon governmental powers of tribe, whether those owners are Indians or non-Indians. Civil jurisdiction of lands within reservation remains with tribe despite fact that tribal law makes no provision for a wrongful entry and detainer action. Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977).

Easement does not confer criminal jurisdiction. — Where federal government's permission for state to construct highway across Indian reservation was merely an easement, beneficial title in Indians was not extinguished, and state did not have criminal jurisdiction over Indian driving an automobile on such highway. State v. Begay, 63 N.M. 409, 320 P.2d 1017, cert. denied, 357 U.S. 918, 78 S. Ct. 1359, 2 L. Ed. 2d 1363 (1958), overruled on another point, State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963).

Criminal jurisdiction in land owned by Indian tribe. — Where defendant struck and killed a highway worker while defendant was driving under the influence of alcohol; defendant was an enrolled member of the Navajo Nation; the Navajo Nation owned the land upon which the accident occurred in fee simple title, paid county property taxes on the land, and used the land as "chapter land" for the development of a chapter house, which was a political subdivision of the Navajo Nation; and defendant did not present evidence to show that the accident site was within the boundaries of the Navajo Nation as they existed on the date of the accident, that the federal government designated the land as Indian country or transferred the land to Indians for use by Indians, that the land was a dependent Indian community, or that the land was within the boundaries of the Navajo Nation as established by the 1868 treaty between the Navajo Nation and the United States or was once an Indian allotment, the accident did not occur within Indian country as defined in the Indian Country Crimes Act, 18 U.S.C. §§1151 to 1170 (2010) and the state district court had jurisdiction over the case. State v. Vandever, 2013-NMCA-002, 292 P.3d 476, cert. denied, 2012-NMCERT-011.

State may adjudicate water rights. — This section does not prohibit state adjudication of Indian water rights since state would not be asserting a proprietary interest in Indian lands and since state can exercise power over Indians where, as in this case, federal government has specifically granted it. State ex rel. Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976).

Service proper on nonreservation Indians outside reservation. — Where nonreservation Indians were involved and service of process was not made within an Indian reservation, service of process upon these Indians on privately leased lands would not affect authority of tribal Indians over reservation affairs or impinge on right of reservation Indians to make their own laws or be governed by them. Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965).

III. TAXATION OF INDIANS.

Permanent improvements on reservation immune from property tax. — Permanent improvements on tribe's tax-exempt land would certainly be immune from state's ad valorem property tax. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

All reservation lands and property exempt. — This section clearly precludes state from taxing Indian lands and Indian property on the reservation. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Indian income earned on reservation. — New Mexico may not tax income and gross receipts of Indians residing on reservation when income and gross receipts involved are derived solely from activities within reservation. Hunt v. O'Cheskey, 85 N.M. 381, 512 P.2d 954 (Ct. App.), cert. quashed, 85 N.M. 388, 512 P.2d 961 (1973).

State may tax Indian property outside reservation. — By virtue of Enabling Act (*see* Pamphlet 3), federal government permitted state to tax, as other lands and property are taxed, any lands and other property outside of Indian reservation owned or held by any Indian. Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (Ct. App.), cert. denied, 83 N.M. 151, 489 P.2d 659 (1971), aff'd in part, rev'd in part on account of immunity from tax afforded by Indian Reorganization Act (25 U.S.C. § 465), 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Unless Congress forbids it, New Mexico retains right to tax all Indian land and Indian activities located or occurring outside of reservation. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973).

Implied congressional consent to reservation Indians acquiring property outside reservation. — This section's reservation to state of limited power to tax lands and property of Indians outside of reservations implies consent of congress to acquisition by reservation Indians of land and property outside of an Indian reservation. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

Taxing non-Indians' activities on Indian land does not violate this section, which is a disclaimer of proprietary interest, not of governmental control. G.M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (Ct. App.), cert. denied, 89 N.M. 321, 551 P.2d 1368 (1976).

Private non-Indian corporations cannot escape obligation to pay state taxes by locating their property on Indian reservations. Nothing forbids imposition of such a tax since it does not in any way infringe on right of reservation Indians to make their own laws and be ruled by them. Although the land itself cannot be taxed, the non-Indian property, which does not belong to and may not be acquired by United States or reserved for its use, can be. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

The gross receipts tax, Section 7-9-4 NMSA 1978, may be constitutionally imposed on a contractor doing work on an Indian reservation, where there is no imposition on the sovereignty of the United States or infringement of the Indian tribe's right to self-government. Tiffany Constr. Co. v. Bureau of Revenue, 96 N.M. 296, 629 P.2d 1225 (1981), aff'g in part, rev'g in part, 96 N.M. 304, 629 P.2d 1233 (Ct. App. 1980).

Claimant of adverse possession still must prove payment of taxes. — In suit by United States as guardian of pueblo of Taos to quiet title to certain lands granted pueblo Indians, such lands were not exempt from taxation so as to relieve claimants by adverse possession from proving, under Pueblo Lands Act (June 7, 1924, 43 Stat. 636, ch. 331, §§ 4 and 5), their payment of all taxes on the lands claimed which were assessed and levied in conformity with New Mexico laws. United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

No violation as to foreign corporations. — Foreign corporations are not taxed at higher rate than domestic corporations. 1912-13 Op. Att'y Gen. No. 12-883.

Indians are subject to road tax for benefit of roads outside their lands. 1915-16 Op. Att'y Gen. No. 15-1411.

State's power to tax federal property. — State may not impose taxes upon assets or property of any agency or branch of federal government, with the exception of real property, without consent of congress. 1957-58 Op. Att'y Gen. No. 57-189.

Severance tax applicable to federal areas. — Unless state has relinquished its legislative jurisdiction over federal areas, severance tax (Sections 7-26-1 to 7-26-9 NMSA 1978) is applicable thereto. 1951-52 Op. Att'y Gen. No. 51-5353.

Criminal prosecutions against non-Indians. 1933-34 Op. Att'y Gen. No. 34-779.

State may not condemn Indian lands. — Absolute sovereignty of Pueblo Indian lands having been ceded to United States, state may not condemn such lands for public highways. 1921-22 Op. Att'y Gen. No. 22-3255.

Jurisdiction over state offenses committed by Indians. — State courts have jurisdiction in offenses against law of state committed by pueblo Indians. 1914 Op. Att'y Gen. No. 14-1237.

No service of process on reservations. — Navajo Indian lands are outside of territorial jurisdiction of state courts, and therefore any attempt to make service of process on Navajo defendant within territorial limits of said lands would be a useless act. 1957-58 Op. Att'y Gen. No. 58-213.

No service of process without permission of Indian agent. — Officer of state cannot serve subpoena or arrest person on Indian reservation without permission of Indian agent. In such cases agent should be notified and should deliver or assist in delivering fugitive from justice to proper state authority. 1933-34 Op. Att'y Gen. No. 34-779.

Game laws apply to non-Indians everywhere. — State has jurisdiction to prosecute non-Indians violating hunting and fishing laws even though such violation occurs on Indian reservation. 1953-54 Op. Att'y Gen. No. 54-6041.

Game laws apply to Indians outside reservations absent special rights. — If there is no treaty or agreement between United States and Indian tribe recognizing or granting rights to Indians to hunt and fish outside Indian country, an Indian hunting or fishing in New Mexico outside Indian country is subject to laws of state the same as any other person. 1953-54 Op. Att'y Gen. No. 54-6041.

Game laws do not apply to Indians on reservations. — An Indian hunting or fishing on reservation not his own is still an Indian in Indian country and is exempt from game laws of state. 1953-54 Op. Att'y Gen. No. 54-6041.

Game laws apply if items transported elsewhere. — As to possession of hides, skins, pelts, heads and game animals, birds or fish or parts thereof, in the case of such items taken by an Indian on a reservation and transported elsewhere, state would have absolutely no jurisdiction whatsoever. 1953-54 Op. Att'y Gen. No. 54-6041.

State cannot regulate reservation gas systems. — Indians acquiring gas resources from sources wholly upon Indian reservations are not public utilities subject to regulation by public service commission of New Mexico. 1953-54 Op. Att'y Gen. No. 53-5690.

Indians operating gas distribution system wholly on reservation regardless of manner in which they acquire gas on reservation are not subject to laws of state in relation to regulation as public utilities. 1953-54 Op. Att'y Gen. No. 53-5690.

Indian rights to sue and be sued in state courts. — Civil courts of New Mexico are open to Indians as are federal courts should they feel that injunctive relief is necessary against members or employees of state highway commission [state transportation commission] for violation of their property rights. 1953-54 Op. Att'y Gen. No. 53-5632.

Right to vote and run in school elections. — If isolated segment of reservation upon which Indian resides was not specifically excluded from area covered by school district, the Indian, if otherwise qualified and registered, is entitled to vote in school election in precinct in which he lives, and he is also entitled to be a candidate and to hold office of member of school board of school district in which he resides. 1955-56 Op. Att'y Gen. No. 55-6087.

Inclusion of Indian lands in watershed district must comply with law. — Federal, reservation and state lands may be included in a watershed district only if officials charged with administering such lands specifically agree to inclusion of lands in the district. It would also be necessary that officials administering lands in question also agree to put up a pro rata share of district's budget based on value of lands included in district because the assessment is to be uniform throughout district. This amount may be difficult of computation since in most counties property exempt from taxation is not carried on tax rolls and the value of real property as indicated on tax rolls is a determining factor in computing assessment. 1961-62 Op. Att'y Gen. No. 61-87.

Property of Indian trader. — Personal property and improvements belonging to Indian trader and located in and upon Indian reservation, which may be removed by such trader on leaving the reservation, are subject to general property tax, but it is otherwise if such improvements become part of the land. 1935-36 Op. Att'y Gen. No. 35-875.

No tax on reservation gas pumps unless congress allows. — Service station on Apache reservation, operated by Mescalero Apache tribal enterprises, is liable for payment of New Mexico motor fuel tax (64-26-2 and 64-26-2.1, 1953 Comp., now repealed) by virtue of congressional authorization (4 U.S.C. § 104). 1957-58 Op. Att'y Gen. No. 57-263.

Land held under ordinary patent may be taxed. — Land held by pueblo Indian under ordinary patent from United States is taxable. 1915-16 Op. Att'y Gen. No. 15-1709.

Law reviews. — For note, "State Regulation of Oil and Gas Pools on State, Federal, Indian and Fee Lands," see 2 Nat. Resources J. 355 (1962).

For article, "The Bill of Rights and American Indian Tribal Governments," see 6 Nat. Resources J. 581 (1966).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

For article, "Indians - Civil Jurisdiction in New Mexico - State, Federal and Tribal Courts," see 1 N.M. L. Rev. 196 (1971).

For comment, "Indians - State Jurisdiction Over Real Estate Developments on Tribal Lands," see 2 N.M. L. Rev. 81 (1972).

For article, "The Indian Tax Cases - A Territorial Analysis," see 9 N.M. L. Rev. 221 (1979).

For article, "Survey of New Mexico Law, 1979-80: Indian Law," see 11 N.M. L. Rev. 189 (1981).

For article, "Tremors: Justice Scalia and Professor Clinton Re-Shape the Debate over the Cross-Boundary Enforcement of Tribal and State Judgments", see 34 N.M. L. Rev. 239 (2004).

For article, "A Different Kind of Symmetry", see 34 N.M. L. Rev. 263 (2004).

For article, "Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders", see 34 N.M. L. Rev. 297 (2004).

For article, "Enforcement of Tribal Court Tax Judgments Outside of Indian Country: The Ways and Means", see 34 N.M. L. Rev. 339 (2004).

For article, "Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders", see 34 N.M. L. Rev. 381 (2004).

For article, "Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule", see 35 N.M. L. Rev. 1 (2005).

For note, "State Fishing and Game Regulations Do Not Apply on Tribally Owned Reservation Land", see 23 Nat. Resources J. 4871 (1983).

For note, "Non-Lease Agreements Available for Indian Mineral Development," see 24 Nat. Resources J. 195 (1984).

For comment, "Administration of Reserved and Non-Reserved Water Rights on an Indian Reservation: Post-Adjudication Questions on the Big Horn River," see 32 Nat. Resources J. 681 (1992).

For article, "Tribal Authority Under the Clean Air Act: How Is It Working?", see 44 Nat. Resources J. 213 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Indians § 58 et seq.; 71 Am. Jur. 2d State and Local Taxation §§ 183, 221, 223, 235, 236.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 A.L.R.2d 744.

Leasehold estate in public property as subject of tax, 54 A.L.R.3d 402.

Taxation of property owned by public body but not devoted to public or governmental use, 54 A.L.R.3d 402.

Proof and extinguishment of aboriginal title to Indian lands, 41 A.L.R. Fed. 425.

Effect of federal assault statute (18 USCS § 113) on prosecutions under Assimilative Crimes Act (18 USCS § 13) making state criminal laws applicable to acts committed on federal reservations, 57 A.L.R. Fed. 957.

42 C.J.S. Indians §§ 30, 69, 70, 131; 84 C.J.S. Taxation §§ 27, 207, 212, 252, 258.

Sec. 3. [Assumption of territorial debts.]

The debts and liabilities of the territory of New Mexico and the debts of the counties thereof, which were valid and subsisting on the twentieth day of June, nineteen hundred and ten, are hereby assumed and shall be paid by this state; and this state shall, as to all such debts and liabilities, be subrogated to all the rights, including rights of indemnity and reimbursement, existing in favor of said territory or of any of the several counties

thereof on said date. Nothing in this article shall be construed as validating or in any manner legalizing any territorial, county, municipal or other bonds, warrants, obligations or evidences of indebtedness of, or claims against, said territory or any of the counties or municipalities thereof which now are or may be, at the time this state is admitted, invalid and illegal; nor shall the legislature of this state pass any law in any manner validating or legalizing the same.

ANNOTATIONS

Comparable provisions. — Utah Const., art. III, Third.

Wyoming Const., art. XXI, § 27.

Compiler's notes. — This section is the same as Enabling Act, § 2C.

Congress intended that "debts and liabilities" only should be covered, believing at time that there was practically no reimbursement to be made. Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922).

Claims against county for wild animal bounties. — Section does not authorize payment by state of claims against county for wild animal bounties. State ex rel. Beach v. Board of Loan Comm'rs, 19 N.M. 266, 142 P. 152 (1914).

State may pay interest from proceeds of donated lands. — Interest on series "A" state bonds, by which territorial bonds for insane hospital and for military institute were assumed by state, was properly payable from proceeds of sales and rentals of lands donated by congress to the two institutions. 1915-16 Op. Att'y Gen. No. 15-1442.

Law reviews. — For article, "Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects under the New Mexico Industrial Revenue Bond Act," see 3 N.M. L. Rev. 136 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States §§ 4, 5.

Sec. 4. [Public schools.]

Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control, and said schools shall always be conducted in English.

ANNOTATIONS

Cross references. — For provision for free public school system, *see* N.M. Const., art. XII, § 1.

For exclusive control of state, *see* N.M. Const., art. XII, § 3.

For teachers learning English and Spanish, *see* N.M. Const., art. XII, § 8.

For educational rights of children of Spanish descent, *see* N.M. Const., art. XII, § 10.

Comparable provisions. — Utah Const., art. III, Fourth.

Wyoming Const., art. XXI, § 28.

Congress encouraged state to provide public education to all citizens. — Indicative of congressional policy of encouraging New Mexico to provide public education to all of its citizens, including Indians, is § 2 D of Enabling Act (*see* Pamphlet 3) which orders that provision be made for establishment and maintenance of system of public schools open to all children of state and free from sectarian control, which mandate is picked up in N.M. Const., art. XII, § 1, and this section. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Federal government also has duty to educate Indians. — Federal government, in compliance with treaty obligations to Navajo tribe, has duty to provide for education and other services needed by Indians. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Large school districts effective denial of free education. — If school districts are made so large that children are unable to make trip to school and back home each day, then they are denied a free school just as effectively as if no school existed. Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

Teachers belonging to religious orders restricted. — Members of religious orders who are employed as public school teachers must refrain from teaching sectarian religion and doctrines and from disseminating religious literature while on duty; they must be under actual control and supervision of responsible school authorities. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Wearing of religious garb and insignia must be barred during time members of religious orders are on duty as public school teachers. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Penalty for sectarian teaching. — Barring certain members of religious orders from again teaching after they had knowingly taught sectarian religion during regular school hours was not improper. Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Non-English languages not excluded. — Phrase "said schools shall always be conducted in English" means that English shall always be used, but not to exclusion of every other language. 1971 Op. Att'y Gen. No. 71-102.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Schools §§ 6, 115, 337 to 346, 348 to 358.

Constitutionality and construction of statutes in relation to admission of nonresident pupils to school privileges, 72 A.L.R. 499, 113 A.L.R. 177.

What is common or public school within contemplation of constitutional or statutory provision, 113 A.L.R. 697.

Inclusion of period of service in sectarian school in determining public school teachers' seniority, salary or retirement benefits, as a violation of constitutional separation of church and state, 2 A.L.R.2d 1033.

Releasing public school pupils from attendance for purpose of receiving religious education, 2 A.L.R.2d 1371.

Compulsory education law, religious beliefs of parents as defense to prosecution for failure to comply with, 3 A.L.R.2d 1401.

Wearing of religious garb by public school teachers, 60 A.L.R.2d 300.

Use of public school premises for religious purposes during nonschool time, 79 A.L.R.2d 1148.

Public payment of tuition, scholarship or the like, to sectarian school, 81 A.L.R.2d 1309.

Furnishing free textbooks to sectarian school or student therein, 93 A.L.R.2d 986.

Constitutionality of regulation or policy governing prayer, meditation, or "moment of silence" in public schools, 110 A.L.R. Fed. 211.

Bible distribution or use in public schools - modern cases, 111 A.L.R. Fed. 121.

78 C.J.S. Schools and School Districts § 4 et seq.; 78A C.J.S. Schools and School Districts § 781.

Sec. 5. [Suffrage.]

This state shall never enact any law restricting or abridging the right of suffrage on account of race, color or previous condition of servitude. (As amended November 5, 1912.)

ANNOTATIONS

The 1912 amendment, which was proposed by J.R. No. 6 (Laws 1912) and was adopted by the people at the general election held on November 5, 1912, by a vote of 26,663 for and 13,678 against, deleted provisions requiring that all state officers and legislators be sufficiently fluent in English so as to conduct their duties without an

interpreter. The amendment was authorized by congressional resolution of August 21, 1911 (37 Stat. 39).

Law reviews. — For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Elections §§ 105 et seq., 146 et seq.

Political party, committee or officer, exclusion by, of persons from participating in primaries as voters or candidates, 70 A.L.R. 1501, 88 A.L.R. 473, 97 A.L.R. 685, 151 A.L.R. 1121.

29 C.J.S. Elections §§ 8, 31.

Sec. 6. [Capital.]

The capital of this state shall, until changed by the electors voting at an election provided for by the legislature of this state for that purpose, be at the city of Santa Fe, but no such election shall be called or provided for prior to the thirty-first day of December, nineteen hundred and twenty-five.

ANNOTATIONS

Santa Fe constitutes permanent location. — Congressional grant of land in 1898 to erect public buildings at capital of state when permanently located may be used for purposes of grant since no change in location of capital can be made until 1926. "Permanently located" does not mean "irrevocably located." 1923-24 Op. Att'y Gen. No. 24-3757.

There is a requirement of permanency as to the location of state capital. 1980 Op. Att'y Gen. No. 80-16.

State board of education based in capital. — Constitution necessitates that state board of education maintain its permanent office, books, records and files in Santa Fe at the state capital, and board must in most instances hold its regular meetings at the capital. 1964 Op. Att'y Gen. No. 64-21.

State board of education may meet elsewhere to consider local matters. — Pursuant to its authority to supervise the public schools, board may from time to time hold meetings in various parts of state to study, consider and decide matters pertinent to schools in area where meeting is held. 1964 Op. Att'y Gen. No. 64-21.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81A C.J.S. States § 38.

Sec. 7. [Reclamation projects.]

There are hereby reserved to the United States, with full acquiescence of the people of this state, all rights and powers for the carrying out of the provisions by the United States of the act of congress, entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if this state had remained a territory.

Sec. 8. [Allotted Indian lands subject to federal liquor control.]

Whenever hereafter any of the lands contained within Indian reservations or allotments in this state shall be allotted, sold, reserved or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation or other disposal, to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands owned or occupied by them on the twentieth day of June, nineteen hundred and ten, or which are occupied by them at the time of the admission of New Mexico as a state.

ANNOTATIONS

Section is the same as Enabling Act, § 2 H. Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838 (1940), superseded by statute, Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961). *See* Pamphlet 3.

Indians under protection of United States. — Pueblo Indians are under protection of United States as dependent communities, and their lands and property are subject to congressional legislation. United States v. Candelaria, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023 (1926). Compare United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

In the exercise of government's guardianship over Indians and their affairs, congress has power to prohibit introduction of liquor into lands of pueblos. United States v. Sandoval, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913). In connection with this case, *see* United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

Law reviews. — For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

Sec. 9. [Consent to Enabling Act provisions.]

This state and its people consent to all and singular the provisions of the said act of congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided.

ANNOTATIONS

Cross references. — For provisions regarding administration and disposition of public lands, *see* N.M. Const., art. XIII.

"Act of congress". — This section refers to Enabling Act (June 20, 1910, 36 Stat. 557, ch. 310, §§ 2, 6 to 12, 18), which is set out in Pamphlet 3.

Enabling Act part of New Mexico fundamental law. — Enabling Act became as much a part of New Mexico fundamental law as if it had been directly incorporated into New Mexico constitution, and provision forbidding donations or pledges of credit by state, except as otherwise permitted (N.M. Const., art. IX, § 14), allowed use of trust funds as required under Enabling Act. State ex rel. Interstate Stream Comm'n v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963).

Constitutional amendment required to overcome Enabling Act provisions. — Not only must congress consent to diversion from their original objects and purposes of proceeds from lands granted by congress to state, but state constitution must be amended before such consent can be effectuated. Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922). See N.M. Const., art. XXI, § 10, on irrevocability of compact.

State accepts conditions on land grant trusts for miners' hospitals. — In this section New Mexico expressly accepted conditions imposed on land grant trusts for miners' hospitals for disabled miners. United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976).

Meaning of "dispose." — The use of the word "dispose" in Section 10 of the Enabling Act does not grant the land commissioner additional, residual authority to convey trust land beyond a sale or lease. State ex rel. King v. Lyons, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

Exchanges of land. — The Enabling Act does not permit exchanges of land unless they are in-kind sales. Exchanges of land for appraised monetary value are in-kind sales that are subject to the sales provisions of Section 10 of the Enabling Act, including public auction to the highest and best bidder. The Enabling Act does not authorize the land commissioner to exchange land with private parties without application of the sale provisions of Section 10 of the Enabling Act. State ex rel. King v. Lyons, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

Public auction. — The requirement of Section 10 of the Enabling Act that public land be sold at public auction to the highest and best bidder provides for objective selection of the winning bid, while ensuring that the sale is open to competitive bidding. Competition is the means and the essential element by which an auction achieves the primary goal of obtaining the best return for the seller. Bargaining and negotiation between buyers and seller or between buyers prior to sale negates the essence of what

it means to have a public auction free and open to competition. State ex rel. King v. Lyons, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

Exchanges of land violated the Enabling Act. — Where private property owners applied to the land commissioner for exchanges of private land for state land; the private owners specified the land they desired to exchange for specific tracts of state land; the land commissioner appraised the exchange proposal for the land's values and the ability of the exchange to ameliorate management and access issues; the land commissioner negotiated with the private owners over an extensive period of time to plan a sale to meet the interests of the land commissioner and the private owners; the land commissioner's interest in the exchanges was to reduce "checkerboard" ownership of state land and to consolidate state land into larger, contiguous parcels to improve land management and reduce boundary and access issues; and after the parties had finalized their negotiations for the exchanges, the land commissioner published a notice of public auction offering the state land that had been agreed upon for exchange with the private owners, as a matter of law, the exchanges violated the requirement of Section 10 of the Enabling Act that state lands be sold or leased to the highest and best bidder at a public auction. State ex rel. King v. Lyons, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.

State cannot give absolute right to renewal of land lease. — In view of the inhibitions of Enabling Act, § 10 (regarding trust lands), N.M. Const., art. XXI, § 10 (relating to irrevocability of compact), and this section, no absolute right exists to renewal of a state land lease. Ellison v. Ellison, 48 N.M. 80, 146 P.2d 173 (1944).

State may give "preferred" right. — Statute (132-120, C.S. 1929, now repealed) giving absolute right to renewal of five-year grazing lease would be to that extent void, but "preferred" right of renewal may be given so long as it is not exclusive or absolute. State ex rel. McElroy v. Vesely, 40 N.M. 19, 52 P.2d 1090 (1935).

State properly reserved mineral rights. — State, through commissioner of public lands, properly reserved minerals and mineral rights in selling and in issuing its patent to school and asylum lands granted to it by government, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. Terry v. Midwest Ref. Co., 64 F.2d 428 (10th Cir., 1933), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933). See N.M. Const., art. XXIV, § 1.

Improper to divert income from granted lands to unauthorized purposes. — Drainage law (Laws 1917, ch. 69, as amended by Laws 1919, ch. 87) which directed commissioner of public lands to issue proper vouchers for drainage assessments, payable out of income derived from granted state lands of class benefited, was unconstitutional since under Enabling Act, § 10, state has no power to improve granted lands at expense of the lands or income derived therefrom. Lake Arthur Drainage Dist. v. Field, 27 N.M. 183, 199 P. 112 (1921).

It is breach of trust for commissioner to use funds derived from lands granted state for advertising resources and advantages of state, and he may be enjoined from so using the funds. Ervien v. United States, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919).

Irrigation district has no clear legal right to draw on income from land granted by congress, the use of which was limited to establishment of reservoirs and hydraulic engineering, and mandamus directed to drawing of warrant thereon will be denied. Carson Reclamation Dist. v. Vigil, 31 N.M. 402, 246 P. 907 (1926).

Laws 1951, ch. 181 (repealed) and ch. 227 (general appropriation bill), attempting diversion of trust funds derived from public lands to general fund for general purposes, were clearly unconstitutional and were mere nullities. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

Proper for commissioner of public lands to bring mandamus proceeding. — Mandamus is available to enforce provisions of Enabling Act in view of acceptance of its provisions by adoption of this section and N.M. Const., art. XXI, § 10, and commissioner of public lands is proper party to bring proceeding to prevent alleged illegal diversion of trust funds. State ex rel. Shepard v. Mechem, 56 N.M. 762, 250 P.2d 897 (1952).

Citizen may not sue to enjoin misapplication of proceeds. — Neither this section nor Enabling Act, § 10, give citizen right to sue to enjoin misapplication of proceeds of land grants. Asplund v. Hannett, 31 N.M. 641, 249 P. 1074 (1926).

Enabling Act part of New Mexico fundamental law. — By this section state consented to all provisions of Enabling Act and by virtue thereof constitution of New Mexico is subject to provisions of that act in same manner that it is subject to provisions of constitution of United States. 1953-54 Op. Att'y Gen. No. 53-5788.

Title to national forest lands. — Title of state to Sections 2, 16, 32 and 36, on which there had been on June 20, 1910, a completed survey finally approved by secretary of the interior, was not lost by embracement of such sections within national forests, but such sections which were unsurveyed on said date may be withdrawn by federal government for national forests at any time prior to completing such survey. 1937-38 Op. Att'y Gen. No. 37-1832. *See* Enabling Act, § 6 (Pamphlet 3).

Improper to divert income from granted land to unauthorized purposes. — Lands granted to state of New Mexico by United States are held by state in trust for purposes of the grant and no other purposes; diversion of land grant trust moneys to any other purpose, however salutary, is unconstitutional. 1957-58 Op. Att'y Gen. No. 57-314.

Law reviews. — For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

Sec. 10. [Compact irrevocable.]

This ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.

ANNOTATIONS

Cross references. — For amendment of compact with United States, *see* N.M. Const., art. XIX, § 4.

State consent to change requires constitutional amendment. — Congress in 1920 consented to change in regard to use of proceeds of land granted state, but state itself must adopt constitutional amendment whereby this consent can be carried into effect. Bryant v. Board of Loan Comm'rs, 28 N.M. 319, 211 P. 597 (1922). See N.M. Const., art. XIX, § 4.

Law reviews. — For note, "Procedural Problems in Amending New Mexico's Constitution," see 4 Nat. Resources J. 151 (1964).

For student symposium, "Constitutional Revision - Indians in the New Mexico Constitution," see 9 Nat. Resources J. 466 (1969).

For note, "Administration of Grazing Lands in New Mexico: A Breach of Trust," see 15 Nat. Resources J. 581 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 Am. Jur. 2d States, Territories, and Dependencies §§ 7, 12.

81A C.J.S. States §§ 4, 24, 27.

Sec. 11. [Consent to exchange of lands.]

This state and its people consent to the provisions of the act of congress, approved June 15, 1926, providing for such exchanges and the governor and other state officers mentioned in said act are hereby authorized to execute the necessary instrument or instruments to effect the exchange of lands therein provided for with the government of the United States; provided that in the determination of values of the lands now owned by the state of New Mexico, the value of the lands, the timber thereon and mineral rights pertaining thereto shall control the determination of value. The legislature may enact laws for the carrying out of the provisions hereof in accordance herewith. (As added November 8, 1932.)

ANNOTATIONS

The 1932 amendment to Article XXI, which was proposed by the senate steering committee substitute for H.J.R. No. 10 (Laws 1931) and was adopted at the general

election held on November 8, 1932, by a vote of 36,575 for and 16,349 against, added this section.

Compiler's notes. — An amendment to this article, proposed by H.J.R. No. 9 (Laws 1990), which would have added a new Section 12 providing authorization for the commissioner of public lands to exchange land under his control for land of the United States, a state agency or political subdivision, a public lands beneficiary, an Indian tribe or pueblo, or a private entity was submitted to the people at the general election held on November 6, 1990. It was defeated by a vote of 129,889 for and 177,245 against.

"Such exchanges". — "Such exchanges" near the beginning of this section refers to exchanges of state timberlands, scattered throughout the state, for larger tracts of federal grazing lands. See preamble to senate steering committee substitute for H.J.R. No. 10 (proposing this section) in Laws 1931.

ARTICLE XXII
Schedule

Section 1. [Effective date of constitution.]

This constitution shall take effect and be in full force immediately upon the admission of New Mexico into the union as a state.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 7.

Utah Const., art. XXIV, § 16.

Wyoming Const., art. XXI, § 8.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law § 63.

16 C.J.S. Constitutional Law § 15.

Sec. 2. [Federal Employers' Liability Act.]

Until otherwise provided by law, the act of congress of the United States, entitled, "An act relating to liability of common carriers, by railroads to their employees in certain cases," approved April twenty-two, nineteen hundred and eight, and all acts amendatory thereof, shall be and remain in force in this state to the same extent that they have been in force in the territory of New Mexico.

ANNOTATIONS

Cross references. — For substance of railroad's liability to employees, *see* N.M. Const., art. XX, § 16, and notes thereto.

"Act of congress". — The statute referred to in this section is the Federal Employers' Liability Act (45 U.S.C. §§ 51 to 60).

Am. Jur. 2d, A.L.R. and C.J.S. references. — State statutes and rules of law, applicability of, to Federal Employers' Liability Act, 12 A.L.R. 693, 36 A.L.R. 917, 89 A.L.R. 693.

Transportation Act as extending period for bringing suit under Federal Employers' Liability Act, 19 A.L.R. 683, 52 A.L.R. 296.

"Works," "ways," "equipment," "machinery," etc., meaning of, in Federal Employers' Liability Act, 23 A.L.R. 716.

Independence of contract considered with reference to Federal Employers' Liability Act, 43 A.L.R. 352.

Applicability of state statutes and rules of law as affecting construction and application of provisions of Federal Employers' Liability Act relating to contributory negligence, assumption of risk and comparative negligence, 89 A.L.R. 693.

Nonresident aliens, right to maintain action for wrongful death for benefit of, 138 A.L.R. 695.

Release or contract after injury as affected by provision of Federal Employers' Liability Act invalidating contract, rule, or device to exempt carrier from liability, 166 A.L.R. 648.

Federal Employers' Liability Act, as amended in 1939, as excluding state law, where employee is injured in course of acts contributory to intrastate and interstate commerce, 173 A.L.R. 794.

Loaned servant doctrine under Federal Employers' Liability Act, 1 A.L.R.2d 302.

Power of state or state court to decline jurisdiction of action under Federal Employer's Liability Act, 43 A.L.R.2d 774.

Liability, under Federal Employers' Liability Act, for injury to or death of employee riding train resulting from sudden stop, start, or jerk of train, 60 A.L.R.2d 637.

Applicability of state practice and procedure in actions brought in state courts, 79 A.L.R.2d 553.

Sec. 3. [Federal Mining Inspection Act.]

Until otherwise provided by law, the act of congress, entitled, "An act for the protection of the lives of miners," approved March three, eighteen hundred and ninety-one, and all acts amendatory thereof, shall be and remain in force in this state to the same extent that they have been in force in the territory of New Mexico; the words "governor of the state," are hereby substituted for the words "governor of such organized territory," and for the words "secretary of the interior" wherever the same appear in said acts; and the chief mine inspector for the territory of New Mexico, appointed by the president of the United States, is hereby authorized to perform the duties prescribed by said acts until superseded by the "inspector of mines" appointed by the governor, as elsewhere provided by the constitution, and he shall receive the same compensation from the state, as he received from the United States.

ANNOTATIONS

Cross references. — For provisions regarding state mine inspector, *see* N.M. Const., art. XVII, § 1 and 69-5-1 to 69-5-21 and 69-8-5 NMSA 1978.

For mine regulation and inspection generally, *see* Articles 4 and 5 of Chapter 69 NMSA 1978.

"Act of congress". — The statute referred to in this section is the Federal Mining Inspection Act (26 Stat. 1104, ch. 564).

Effect of act. — Congress provides method whereby operators of coal mines may be compelled to provide ventilation and other appliances necessary for safety of miners. 1914 Op. Att'y Gen. No. 14-1163.

Am. Jur. 2d, A.L.R. and C.J.S. references. — "Mine" defined, 11 A.L.R. 154.

Duty of employer with respect to timbering of mine as affected by his duty to inspect, 15 A.L.R. 1386.

Independence of contract considered with relation to statutes imposing on mine owners' duties with respect to security of workmen, 43 A.L.R. 353.

Custom as standard of care, 68 A.L.R. 1445.

Sec. 4. [Territorial laws.]

All laws of the territory of New Mexico in force at the time of its admission into the union as a state, not inconsistent with this constitution, shall be and remain in force as the laws of the state until they expire by their own limitation, or are altered or repealed; and all rights, actions, claims, contracts, liabilities and obligations, shall continue and remain unaffected by the change in the form of government.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 2.

Iowa Const., art. XII, § 2.

Utah Const., art. XXIV, § 2.

Wyoming Const., art. XXI, § 3.

I. GENERAL CONSIDERATION.

Applicability of prior laws generally. — In acquisition of territory by conquest or cession, jurisprudence not political but municipal in character, affecting personal property rights and domestic relations as they existed between people under government from which territory was carved, remain in full force until altered by government of United States. The civil law as it existed in Spain and New Mexico at time of Treaty of Guadalupe Hidalgo was in force in territory of New Mexico. In re Chavez, 149 F. 73 (8th Cir. 1906)(construing similar provision in Kearny Code. See Pamphlet 3.)

State, as to fiscal affairs, was mere successor of territory. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912).

Federal law does not affect state courts' jurisdiction and powers. — District courts of state derive their jurisdiction and powers from constitution and laws of state, and no act of congress concerning jurisdiction of courts in state had any effect after statehood came. Crist v. Abbott, 22 N.M. 417, 163 P. 1085 (1917).

Absent constitutional provision, existing laws govern. — It is presumed that it was intended that existing territorial laws were to govern election of justices of the peace, constables, school directors or other minor officers, where constitution made no provision for their election. Territory ex rel. Welter v. Witt, 16 N.M. 335, 117 P. 860 (1911).

Territorial statute not invalid because of method of enactment. — Section refers to conflict, if any, in substance of prior laws with constitution; it does not invalidate territorial law, validly enacted at time of its adoption, which would have been invalid under constitution on account of method of its enactment. State v. Elder, 19 N.M. 393, 143 P. 482 (1914).

Constitution may modify territorial law. — In absence of legislation subsequent to adoption of constitution, territorial law relative to elections for removal of county seats was carried forward, modified by N.M. Const., art. X, § 3, to extent that three-fifths vote was required instead of a majority. Orchard v. Board of Comm'rs, 42 N.M. 172, 76 P.2d 41 (1938).

Statutory law concerning issuance of writs of error by supreme court remained in force as modified by provisions of N.M. Const., art. VI, § 3. Farmers' Dev. Co. v. Rayado Land & Irrigation Co., 18 N.M. 138, 134 P. 216 (1913), criticized on another point, Canavan v. Canavan, 18 N.M. 468, 138 P. 200 (1914), superseded by statute, Hernandez v. Roberts, 24 N.M. 253, 173 P.1034 (1918).

Judicial constructions. — New Mexico wrongful death statutes (41-2-4 NMSA 1978) were adopted from territorial statutes, and construction thereof by territorial supreme court was also adopted with statutes. Mallory v. Pioneer S.W. Stages, Inc., 54 F.2d 559 (10th Cir. 1931).

Section provides for changes in statutory duties. — It is clear from reading this section that constitution-makers anticipated there might be need for changes in statutory duties from time to time and expressly provided therefor. Torres v. Grant, 63 N.M. 106, 314 P.2d 712 (1957).

II. CONSISTENCY WITH CONSTITUTION.

Municipal bonds provision not inconsistent with constitution. — Section 2402, 1897 C.L. (repealed), being part of Laws 1884, ch. 39, § 14, authorizing issuance of municipal bonds for certain purposes, was not inconsistent with N.M. Const., art. IX, § 12, and was continued in effect by this section. Smith v. City of Raton, 18 N.M. 613, 140 P. 109 (1914).

Territorial law not completely superseded. — While greater part of duties of superintendent of insurance was transferred by constitutional provision creating corporation commission (now public regulation commission), enough was left to office to justify view that old territorial law creating it remained in force. Mitchell v. National Sur. Co., 206 F. 807 (D.N.M. 1913).

Fee and salary provisions inconsistent. — This section did not continue in force the fee and salary provisions of Laws 1909, ch. 22 (now superseded in part), such law being inconsistent with N.M. Const., art. XX, § 9. State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617 (1912).

Burden of proving inconsistency. — One asserting inconsistency of territorial law with constitution must show it. Stout v. City of Clovis, 37 N.M. 30, 16 P.2d 936 (1932).

Territorial law not superseded. — Statute (Laws 1921, ch. 133, § 507, now repealed) giving state tax commission discretionary power to cause reassessment of property of a county, employing its own agents therefor, did not conflict with this section, which carried forward territorial law creating office of assessor. Herd v. State Tax Comm'n, 31 N.M. 44, 240 P. 988 (1925).

Fixed rights unaffected by contrary constitutional provision. — Where rights of city under lien of assessment for local improvement had accrued and become fixed at time

New Mexico became a state, such rights would not be affected by constitution, even if law and ordinance under which assessment was made were in conflict with constitution. City of Roswell v. Bateman, 20 N.M. 77, 146 P. 950 (1914).

Length of notary's term. — Appointment of notary public in 1911 holds good until expiration of term for which it was made. 1914 Op. Att'y Gen. No. 14-1207.

Pardon not restricted by territorial provision. — In pardoning person convicted of misdemeanor, governor was not bound by territorial legislative restriction. 1915-16 Op. Att'y Gen. No. 15-1667.

New enactments supersede territorial laws. — Territorial laws concerning salaries of officers remained in force only until adoption of salary bill by legislature. 1915-16 Op. Att'y Gen. No. 15-1494.

Effect of constitutional amendment on territorial law. — Constitutional amendment of 1914, deleting N.M. Const., art. VIII, § 8, which had permitted legislature to exempt newly constructed railroads from taxation, gave rise to doubt as to whether prior statute (Code 1915, §§ 4724 and 5432, now repealed) so exempting such railroads, remained effective. 1915-16 Op. Att'y Gen. No. 15-1416.

Sec. 5. [Pardons for violation of territorial laws.]

The pardoning power herein granted shall extend to all persons who have been convicted of offenses against the laws of the territory of New Mexico.

ANNOTATIONS

Cross references. — For grant of pardoning power to governor, *see* N.M. Const., art. V, § 6.

Sec. 6. [Territorial property vested in state.]

All property, real and personal, and all moneys, credits, claims and choses in action belonging to the territory of New Mexico, shall become the property of this state; and all debts, taxes, fines, penalties, escheats and forfeitures, which have accrued or may accrue to said territory, shall inure to this state.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 3.

Utah Const., art. XXIV, § 4.

Wyoming Const., art. XXI, § 4.

Sec. 7. [Obligations due territory or subdivision.]

All recognizances, bonds, obligations and undertakings entered into or executed to the territory of New Mexico, or to any county, school district, municipality, officer or official board therein, shall remain valid according to the terms thereof, and may be sued upon and recovered by the proper authority under the state law.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 4.

Utah Const., art. XXIV, § 5.

Wyoming Const., art. XXI, § 5.

Sec. 8. [Territorial judicial process and proceedings.]

All lawful process, writs, judgments, decrees, convictions and sentences issued, rendered, had or pronounced, in force at the time of the admission of the state, shall continue and remain in force to the same extent as if the change of government had not occurred, and shall be enforced and executed under the laws of the state.

ANNOTATIONS

Judgment by holdover territorial justice valid. — Judgment by territorial justice who was still holding office in January, 1912, his successor not having qualified and taken office, was not void. Luna v. Cerrillos Coal R.R., 29 N.M. 161, 218 P. 435 (1923), rehearing denied, 29 N.M. 647, 226 P. 655 (1924).

Sec. 9. [Territorial courts and officers; seals.]

All courts existing, and all persons holding offices or appointments under authority of said territory, at the time of the admission of the state, shall continue to hold and exercise their respective jurisdictions, functions, offices and appointments until superseded by the courts, officers or authorities provided for by this constitution.

Until otherwise provided by law, the seal of the territory shall be used as the seal of the state, and the seals of the several courts, officers and official boards in the territory shall be used as the seals of the corresponding courts, officers and official boards in the state; and for any new court, office or board created by this constitution, a seal may be adopted by the judge of said court, or the incumbent of said office, or by the said board.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, §§ 5, 17.

Utah Const., art. XXIV, §§ 6 to 8; 10.

Wyoming Const., art. XXI, §§ 6, 16.

Territorial officers in power until successors qualified. — Under this section, all officers holding office at time territory was admitted to statehood continued to hold office and to exercise functions thereof until their successors duly elected or appointed under statehood had qualified. Luna v. Cerrillos Coal R.R., 29 N.M. 161, 218 P. 435 (1923), rehearing denied, 29 N.M. 647, 226 P. 655 (1924).

Judgment by holdover territorial justice valid. — Judgment by territorial justice who was still holding office in January, 1912, his successor not having qualified and taken office, was not void. Luna v. Cerrillos Coal R.R., 29 N.M. 161, 218 P. 435 (1923), rehearing denied, 29 N.M. 647, 226 P. 655 (1924).

Status of superintendent of insurance. — Superintendent of insurance continued in office until superseded by corporation commission (now public regulation commission), and since he was not fully superseded by reason of legislative action, he could still exercise such functions of his office as were not specifically transferred to corporation commission (now public regulation commission). State ex rel. Chavez v. Sargent, 18 N.M. 627, 139 P. 144 (1914); *see also*, Mitchell v. National Sur. Co., 206 F. 807 (D.N.M. 1913).

Sec. 10. [Pending actions.]

All suits, indictments, criminal actions, bonds, process, matters and proceedings pending in any of the courts in the territory of New Mexico at the time of the organization of the courts provided for in this constitution shall be transferred to and proceed to determination in such courts of like or corresponding jurisdiction. And all civil causes of action and criminal offenses which shall have been commenced, or indictment found, shall be subject to action, prosecution, indictment and review in the proper courts of the state, in like manner and to the same extent as if the state had been created and said courts established prior to the accrual of such causes of action and the commission of such offenses.

Sec. 11. [Execution and deposit of constitution.]

This constitution shall be signed by the president and secretary of the constitutional convention, and such delegates as desire to sign the same, and shall be deposited in the office of the secretary of the territory where it may be signed at any time by any delegate.

Sec. 12. [Territorial obligations; names of political subdivisions.]

All lawful debts and obligations of the several counties of the territory of New Mexico not assumed by the state and of the school districts, municipalities, irrigation districts

and improvement districts, therein, existing at the time of its admission as a state, shall remain valid and unaffected by the change of government, until paid or refunded according to law; and all counties, municipalities and districts in said territory shall continue with the same names, boundaries and rights until changed in accordance with the constitution and laws of the state.

ANNOTATIONS

Purpose of section. — This section was made necessary by Enabling Act, § 2 C, which required state to assume payment of debts and liabilities which were valid and subsisting on June 20, 1910. One purpose of this section was to provide for validity of debts contracted by territory after June 20, 1910. State ex rel. Lucero v. Marron, 17 N.M. 304, 128 P. 485 (1912). See N.M. Const., art. XXI, § 3.

Sec. 13. [Election to ratify constitution.]

This constitution shall be submitted to the people of New Mexico for ratification at an election to be held on the twenty-first day of January, nineteen hundred and eleven, at which election the qualified voters of New Mexico shall vote directly for or against the same, and the governor of the territory of New Mexico shall forthwith issue his proclamation ordering said election to be held on said day.

Except as to the manner of making returns of said election and canvassing and certifying the result thereof, said election shall be held and conducted in the manner prescribed by the laws of New Mexico now in force.

ANNOTATIONS

Comparable provisions. — Idaho Const., art. XXI, § 6.

Utah Const., art. XXIV, § 14.

Wyoming Const., art. XXI, § 7.

Sec. 14. [Ballots for ratifying constitution.]

The ballots cast at said election in favor of the ratification of this constitution shall have printed or written thereon in both English and Spanish the words "For the Constitution"; and those against the ratification of the constitution shall have written or printed thereon in both English and Spanish the words "Against the Constitution"; and shall be counted and returned accordingly.

Sec. 15. [Canvass of ratification election returns.]

The returns of said election shall be made by the election officers direct to the secretary of the territory of New Mexico at Santa Fe, who, with the governor and the

chief justice of said territory, shall constitute a canvassing board, and they, or any two of them, shall meet at said city of Santa Fe on the third Monday after said election and shall canvass the same. Said canvassing board shall make and file with the secretary of the territory of New Mexico, a certificate signed by at least two of them, setting forth the number of votes cast at said election for or against the constitution, respectively.

Sec. 16. [Submission of constitution to president and congress.]

If a majority of the legal votes cast at said election as certified to by said canvassing board, shall be for constitution, it shall be deemed to be duly ratified by the people of New Mexico and the secretary of the territory of New Mexico shall forthwith cause to be submitted to the president of the United States and to congress for approval, a certified copy of this constitution, together with the statement of the votes cast thereon.

Sec. 17. [Proclamation for first election of officers.]

If congress and the president approve this constitution, or if the president approves the same and congress fails to disapprove the same during the next regular session thereof, the governor of New Mexico shall, within thirty days after receipt of notification from the president certifying said facts, issue his proclamation for an election at which officers for a full state government, including a governor, county officers, members of the state legislature, two representatives in congress to be elected at large from the state, and such other officers as this constitution prescribes, shall be chosen by the people; said election to take place not earlier than sixty days nor later than ninety days after the date of said proclamation by the governor ordering the same.

Sec. 18. [Conduct of first state election; certification of results to president.]

Said last-mentioned election shall be held, the returns thereof made, canvassed and certified to by the secretary of said territory, in the same manner, and under the same laws, including those as to qualifications of electors, shall be applicable thereto, as hereinbefore prescribed for holding, making of the returns, canvassing and certifying the same, of the election for the ratification or rejection of this constitution.

When said election of state and county officers, members of the legislature, representatives in congress, and other officers provided for in this constitution, shall be held and the returns thereof made, canvassed and certified as hereinbefore provided, the governor of the territory of New Mexico shall immediately certify the result of said election, as canvassed and certified as hereinbefore provided, to the president of the United States.

Sec. 19. [First state officers.]

Within thirty days after the issuance by the president of the United States of his proclamation announcing the result of said election so ascertained, all officers elected at such election, except members of the legislature, shall take the oath of office and give bond as required by this constitution or by the laws of the territory of New Mexico in case of like officers in the territory, county or district, and shall thereupon enter upon the duties of their respective offices; but the legislature may by law require such officers to give other or additional bonds as a condition of their continuance in office.

ANNOTATIONS

Section does not exempt officers elected subsequently to first election from giving bond. Board of Comm'rs v. District Court of Fourth Judicial Dist., 29 N.M. 244, 223 P. 516 (1924).

Sec. 20. [First legislative session; oaths of members; election of United States senators.]

The governor of the state, immediately upon his qualifying and entering upon the duties of his office, shall issue his proclamation convening the legislature at the seat of government on a day to be specified therein, not less than thirty nor more than sixty days after the date of said proclamation.

The members-elect of the legislature shall meet on the day specified, take the oath required by this constitution and within ten days after organization shall proceed to the election of two senators of the United States for the state of New Mexico, in the manner prescribed by the constitution and laws of the United States; and the governor and secretary of the state of New Mexico shall certify the election of the senators and representatives in congress in the manner required by law.

Sec. 21. [Supplementary legislation.]

The legislature shall pass all necessary laws to carry into effect the provisions of this constitution.

ANNOTATIONS

Self-executing provision defined. — A constitutional provision which is complete in itself needs no further legislation to put it in force, but is "self-executing." State v. Rogers, 31 N.M. 485, 247 P. 828 (1926).

Sec. 22. [Terms of first officers.]

The term of office of all officers elected at the election aforesaid shall commence on the date of their qualification and shall expire at the same time as if they had been

elected on the Tuesday next after the first Monday of November in the year nineteen hundred and twelve.

ANNOTATIONS

Compiler's notes. — This section is the end of the constitution as originally adopted. It closes with the following paragraph: "Done in open convention at the City of Santa Fe, in the Territory of New Mexico, this 21st day of November, in the year of our Lord, one thousand nine hundred and ten." The names of the signers of the constitution as originally adopted appear after Article XXIV.

Effect of section on 1913 legislative session. — In view of this section, 1913 session of legislature may be regarded as a second session of 1912 legislature, and it is not duty of secretary of state to call house of representatives to order on January 14, 1913, and preside until a speaker is elected since no new speaker need be elected. 1912-13 Op. Att'y Gen. No. 13-975.

ARTICLE XXIII
Intoxicating Liquors [Repealed]

ANNOTATIONS

Enactment. — New Mexico Const., art. XXIII, §§ 1 and 2, which were proposed by J.R. No. 17 (Laws 1917) and adopted by the people at a special election held in November, 1917, by a vote of 28,732 for and 12,147 against, prohibited the importation, manufacture, sale, barter, gift or offer of alcoholic liquors (except for scientific or sacramental purposes) from and after October 1, 1918 (Section 1), and provided for punishment for violations of the prohibition (Section 2).

Repeals. — Article XXIII was repealed by an amendment proposed by senate judiciary committee substitute for S.J.R. No. 2 (Laws 1933), which was adopted by the people at a special election held on September 19, 1933, by a vote of 53,429 for and 15,541 against. The amendment provided that all laws enacted at the regular session of the eleventh state legislature relating to intoxicating liquors shall be as valid as if enacted after adoption of said amendment or after any change in constitution or laws of United States relating to intoxicating liquors.

ARTICLE XXIV
Leases on State Land

Section 1. [Contracts for the development and production of minerals or development and operation of geothermal steam and waters on state lands.]

Leases and other contracts, reserving a royalty to the state, for the development and production of any and all minerals or for the development and operation of geothermal steam and waters on lands granted or confirmed to the state of New Mexico by the act of congress of June 20, 1910, entitled "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states," may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature; the rentals, royalties and other proceeds therefrom to be applied and conserved in accordance with the provisions of said act of congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made. (As added November 6, 1928; as amended November 7, 1967.)

ANNOTATIONS

The 1928 amendment to the constitution, which was proposed by H.J.R. No. 8 (Laws 1927) and adopted by the people at the general election held on November 6, 1928, by a vote of 40,650 for and 9,774 against, added this section as Article XXIV.

The 1967 amendment, which was proposed by H.J.R. No. 17 (Laws 1967) and adopted at a special election held on November 7, 1967, with a vote of 37,897 for and 14,765 against, inserted "or for the development and operation of geothermal steam and waters" after "all minerals" near the beginning of the section.

"Act of congress". — The statute referred to in this section is the Enabling Act for New Mexico (June 20, 1910, 36 Stat. 557, ch. 310), which is set out in Pamphlet 3.

State properly reserved mineral rights. — State, through commissioner of public lands, properly reserved minerals and mineral rights in selling and issuing its patent to school and asylum lands granted to it by government, and patentee was not entitled to ejectment against state's lessee of oil and gas rights. Terry v. Midwest Ref. Co., 64 F.2d 428 (10th Cir., 1933), cert. denied, 290 U.S. 660, 54 S. Ct. 74, 78 L. Ed. 571 (1933).

Rulemaking authority of commissioner of public lands limited. — The commissioner of public lands has no authority to promulgate rules or regulations inconsistent with legislative enactments governing mineral leases on public lands. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

The commissioner of public lands exceeded his authority and usurped a legislative function in promulgating the definition of "proceeds" in a rule so that it would require state lessees to pay royalties even when gas was not extracted from the leased premises. Harvey E. Yates Co. v. Powell, 98 F.3d 1222 (10th Cir. 1996).

Legislature may authorize changes in contract terms. — Legislature may authorize commissioner of public lands to change terms and provisions of mineral leases and

other contracts, thereby authorizing unitization agreements relative to state lands. 1943-44 Op. Att'y Gen. No. 43-4210.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53A Am. Jur. 2d Mines and Minerals § 33 et seq.; 63A Am. Jur. 2d Public Lands §§ 113, 121.

Improvements placed on land by adverse claimant, right of grantee to, 6 A.L.R. 95.

Escheat of land granted to alien, necessity of judicial proceeding, 23 A.L.R. 1247, 79 A.L.R. 1364.

Crops on public lands, rights in respect of, as between persons neither of whom have any authority from the government, 153 A.L.R. 508.

"Royalty" on oil or gas production within language of conveyance, exception or reservation, what constitutes, 4 A.L.R.2d 492.

Oil and gas as "minerals" within deed, lease or license, 37 A.L.R.2d 1440.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Expenses and taxes deductible by lessee in computing lessor's oil and gas royalty or other return, 73 A.L.R.2d 1056.

Clay, sand or gravel as "minerals" within deed, lease or license, 95 A.L.R.2d 843.

Construction of oil and gas lease as to the lessee's right and duty of geophysical or seismograph exploration or survey, 28 A.L.R.3d 1426.

73B C.J.S. Public Lands § 197.

Signers of the Constitution as Originally Adopted

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Convention.

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