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NEW MEXICO'S SUMMARY CALENDAR FOR DISPOSITION OF CRIMINAL APPEALS: AN INVITATION FOR INEFFICIENCY, INEFFECTIVENESS AND INJUSTICE

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As increasing appellate caseloads strain judicial and support resources available to appellate courts, the incentive for streamlining and expediting the appellate process to accommodate the needs of courts, counsel and litigants also increases. Traditional means for increasing work output, such as addition of judgeships and legal and clerical support staff, are often compromised by general funding problems facing many state jurisdictions, as well as the federal government. As a consequence, alternative means for expediting are sought, including reduction of judicial time involved for review of individual cases, restriction of oral argument and limitations on discretionary review. At the same time, fiscal pressures have focused attention on reduction of costs of reproduction of the record of trial as a means of recovering and rediverting financial resources toward the disposition process. One approach in addressing the overall picture, which includes the problems posed by delay, record production costs and scarcity of judicial resources, lies in the creation of summary disposition procedures. The summary calendaring of cases, relied on heavily by the New Mexico Court of Appeals in managing its criminal docket, may be seen as an important step in expediting the appellate process with attendant reductions in direct economic costs and allocation of judicial resources. However, the system poses serious constitutional questions for the integrity of the appellate process in criminal cases, as argued in this article.

Significant increases in appellate caseloads and strains placed upon already limited judicial resources have given rise to reliance on both traditional and innovative measures designed to control "dockets" and ease the effects of backlog. Dramatic action, such as the creation of intermediate appellate courts¹ and shifting decisionmaking authority,² have

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¹ For an interesting treatment of the history and role of the New Mexico Court of Appeals, see Thomas A. Donnelly and Pamela B. Minzer, History of the New Mexico Court of Appeals, 22 N.M. L. REV. 595 (1992); Taylor Mattis, Precedential Value of Decisions of the Court of Appeals for the State of New Mexico, 22 N.M. L. REV. 535 (1992).

² For example, in 1981, jurisdiction over direct appeals in non-capital criminal cases shifted from the Court of Criminal Appeals of Texas to the state's fourteen intermediate appellate courts, previously designated by the state constitution as Courts of Civil Appeals. The constitutional amendment and resulting change in appellate procedure was necessitated both by the sheer volume of criminal appeals taken and growth in backlog of cases from 1904 undecided cases at the end of 1977 to 2507 in 1978 to 3238 at the end of 1979 in the Court of Criminal Appeals. Robert W. Calvert, For Amendment Number 8, 43 Tex. B.J. 910 (1980); see e.g., Carl E.F. Dally & Patricia A. Brockway, Changes in Appellate Review following the 1980 Constitutional Amendment, 13 St.
marked attempts to address the problem in some jurisdictions. Other jurisdictions have sought to streamline the appellate-decisionmaking process or expand available resources to promote prompt disposition of appellate cases.

The most important factor in the national expansion of appellate court caseload is the increased availability of appellate review for indigent criminal defendants as a consequence of major United States Supreme Court decisions over the past three decades. The New Mexico Constitution, as opposed to the Federal Constitution, expressly provides for a right of appeal which ensures that all aggrieved criminal defendants may seek appellate review of their convictions in state court.

The tension created by a rapidly expanding caseload has two immediate consequences for maintenance of an orderly system of appellate disposition. First, it increases the burden on both institutional counsel—prosecution and defense counsel employed by agencies of government—and the appellate courts in terms of attorney and judge-hours which must be devoted to case disposition. Second, to the extent that caseload increases outstrip available lawyer and judge-hours devoted to case processing, the expanding caseload almost necessarily results in a pattern of increasing delay in the disposition time for resolving appeals.

The impact of these factors may devastate even the most thoughtfully-created appellate systems, since optimal caseload performance for both attorneys and judges can seldom be maintained without significant expansion of resources in terms of staffing. Staffing increases, however,
almost necessarily follow evidence of demand or need for additional staff. When needed expansion of judicial or staff resources is unduly slow or inadequate, the system is likely to become mired in delay in disposition resulting from the increasing accumulated workload of actors in the system.

One significant consequence which may result from increasing caseloads that is not addressed adequately or quickly with expanded resources is the tendency of the criminal appellate docket to take precedence over civil matters. This may be the result of a conscious plan or it may be the unstated need to finalize criminal matters expeditiously. Some state appellate systems address this tension by creating specialized appellate courts devoted to criminal matters, such as the Courts of Criminal Appeals of Oklahoma and Texas, the courts of last resort in criminal cases in those states, or intermediate courts of criminal appeals operating in Alabama, Alaska and Tennessee. New Mexico, consistent with the more common national practice, has retained general appellate jurisdiction in the court of appeals, rather than moving toward a system of specialization.

9. Moreover, increasing reliance on staff attorneys, rather than law clerks, may pose significant threats of compromise of the collective legal judgment of appellate justices. One study suggested the extremely high rate of agreement between staff counsel recommendations and final decisions reflects too much reliance on staff for appellate decisionmaking. Mary Lou Stow & Harold J. Spaeth, Centralized Research Staff: Is There a Monster in the Judicial Closet?, 75 JUDICATURE 216, 220 (1992).

10. For an interesting and brief discussion of the merits of specialized courts of criminal appeals, see Stanley Mosk & Gerald F. Uelmen, Opinion/Dissent: A Two-Part State Supreme Court, 11 PEPP. L. REV. 1 (1983). California Supreme Court Justice Mosk argued the desirability of separating criminal and civil review within the state supreme court, while Professor Uelmen argued for other mechanisms, including limitations on the flow of cases into the state supreme court; use of en banc review procedure in the courts of appeals; shifting primary responsibility for death penalty review to the courts of appeals; eliminating the traditional de novo appeal for cases taken from the courts of appeals; and eliminating supreme court original jurisdiction of extraordinary writs. Professor Uelmen felt these methods were preferable to splitting the work of the state supreme court justices.

11. OKLA. CONST. art. 7, § 4; OKLA. STAT. tit. 20, § 35 (1981) (creation of Court of Criminal Appeals); tit. 20, § 40 (defining appellate jurisdiction), and tit. 20, § 41 (defining jurisdiction to include habeas corpus).

12. TEX. CONST. art. 5, § 4 (creating Court of Criminal Appeals) and § 5 (defining jurisdiction of Court of Criminal Appeals).

13. ALA. CONST. amend. 328; ALA. CODE (1925) § 12-3-1 (creating Court of Criminal Appeals); § 12-3-9 (defining jurisdiction to include appellate review of misdemeanor and felony convictions, habeas corpus and post-conviction writs).


15. TENN. CODE ANN. § 16-5-101 (1980) (creating Court of Criminal Appeals); § 16-5-108 (defining jurisdiction to include felony and misdemeanor appellate jurisdiction and jurisdiction over habeas corpus and other writs, but expressly excluding jurisdiction in action solely to determine constitutionality of a state statute or municipal ordinance in subsection (c)).

16. N.M. R. APP. PROC. 12-102(B) provides that all appeals are taken to the Court of Appeals
The initial response to increased appellate caseload was the creation of the New Mexico Court of Appeals as an intermediate appellate court responsible for disposition of a significant portion of the system's overall direct appeal caseload. In criminal matters, the supreme court retains jurisdiction over first degree cases, applications for extraordinary relief, and discretionary jurisdiction to review decisions rendered by the court of appeals.

Within the framework of the two-tiered system of appellate courts, New Mexico has addressed the problems of increasing caseload and limited resources by attempting to avoid—and rather successfully—the type of case backlog which virtually paralyzes appellate practice in other jurisdictions. Two major innovations employed to assist in case management have been the use of summary calendaring by the court of appeals in the initial processing of appeals, and the introduction of audio trial transcripts to reduce costs and time delays associated with the production of transcribed, written records of trial. The latter innovation may ultimately be superseded by reliance on computer-generated transcripts which achieve the goal of rapid transmission of the trial record while reducing attorney and court time—that is necessary to review audio transcripts.

The summary calendaring system remains the most important device employed by the New Mexico Court of Appeals in caseload management. Its efficiency and fairness have previously been assumed. A study published in 1991 in *Judicature* and reprinted in the *New Mexico Law Review* is highly supportive of summary calendaring as a means of maintaining the court's traditionally rapid disposition time, while noting apparent problems posed by the process. The study is superficially correct in its

except those involving subject matter or procedure specifically reserved for the Supreme Court in subsection(a)(1)-(5) or which are expressly directed for review in the Supreme Court by the state constitution or action of that court.

17. N.M. R. App. Proc. 12-102(B). The New Mexico Rules of Appellate Procedure provide that all appeals not designated for assignment to the Supreme Court "shall be taken to the court of appeals." *Id.*


22. N.M. R. App. Proc. 12-211 includes the use of audio-taped records of trial as the record of trial for purposes of appeal. For a brief discussion of the impact of taped trial records, see Thomas B. Marvell, *Use of Tape Transcripts and Judge Substitutes*, 75 *Judicature* 95-96 (1991), a short postscript to his longer article on the use of the summary calendar by the New Mexico Court of Appeals. *See infra* note 23 and accompanying text. One of the most serious problems associated with the use of audio tapes has resulted from inaudibility or mechanical failures in the production of the taped transcript, a problem specifically addressed by subsection H of Rule 12-211. *See State v. Moore*, 87 N.M. 412, 534 P.2d 1124 (Ct. App. 1975) (failure to produce adequate taped transcript of proceedings requires new trial when reconstruction of record from agreed recollections of trial counsel impossible).


24. *Id.* at 94 ("Quantitative analysis indicates that the summary calendar, at least as applied to criminal cases, leads to less overall delay at the court.").

25. Marvell concludes:
conclusion: summary calendaring and disposition of appellate matters without full briefing or reference to the trial record should almost certainly result in rapid disposition. The question left unaddressed is whether the process is truly efficient if factors associated with the concerns of a system of justice, rather than simple processing, are considered.

Any critique of the summary calendar, as currently employed by the New Mexico Court of Appeals, should consider not only the time involved in disposition and number of cases disposed of per judge, but also whether the system ensures both effective representation of criminal appellants by counsel and correct disposition of claims. Regrettably, the court of appeals has opted for a system which does not provide these constitutionally-mandated assurances to criminal defendants. Yet, alternatives are available which would not jeopardize the prompt disposition of criminal cases—an important hallmark of a fair and just criminal justice system and one that the court has actively sought to maintain.

A. The Right to Appeal in Criminal Cases

Although the Federal Constitution contains no express right of appeal in criminal actions, the United States Supreme Court has effectively inferred the existence of a right to appellate review extending to all criminal defendants when review is available in any criminal action. Perhaps the most objectionable (aspects of the New Mexico summary calendaring process) are the lack of transcript and oral argument. Judges develop beliefs about the necessity of specific procedures from individual experiences and customs in their courts, and evidence that a procedure is more efficient is unlikely to change their views about what aspects of appellate procedure are necessary to maintain proper quality of review. We showed that reversal rates are not affected and that lawyers, except criminal defense lawyers, do not object to the procedures.

Id. at 95.

26. Marvell's study, id., demonstrates a substantial increase in dispositions per appellate judge with the corresponding introduction and increasing use of the summary calendar, with court of appeals judges averaging 32 dispositions per year in 1969 and 86 dispositions in 1990, and with two-thirds of the cases being decided by summary disposition in 1990. Id.

27. See id. at 87 n.9 (noting that disposition time in the court of appeals remains at well under one year, less than that typically required in other courts).


29. Douglas v. California, 372 U.S. 353 (1963). In Evitts v. Lucey, 469 U.S. 387 (1985), the Supreme Court held that indigent state court defendants are entitled to effective assistance of counsel on appeal, effectively overruling its much earlier decision in McKane v. Durston, 153 U.S. 684 (1894), in which the Court had expressly disclaimed that a right to appellate review exists in the provisions of the Federal Constitution. Despite then-Associate Justice Rehnquist's argument in dissent, relying on McKane as authority for the proposition that state court defendants continue to enjoy no federal right of appeal, application of the effective assistance guarantee of the Sixth Amendment to counsel's performance on appeal virtually isolates Justice Rehnquist's position as effectively rejected by the Court. More recently, in Murray v. Giarratano, 492 U.S. 1 (1989) and Pennsylvania v. Finley, 481 U.S. 551 (1987), the Court has held that, because a right to post-conviction review of criminal convictions is not of constitutional dimension, the Sixth Amendment guarantee of effective assistance in the prosecution of post-conviction claims will not be applicable to avoid procedural default which results from counsel's ineffectiveness. See Coleman v. Thompson, 111 S. Ct. 2546, 2565-66 (1992). The logic of recent decisions suggests that the issue of a federal right to some vehicle for appellate review of state court convictions has been resolved in favor of at least a one-step right to appeal or review.
Thus, while an indigent criminal accused has no expectation of a right to appeal in the event of conviction as a matter of right under the Federal Constitution, statutory or state constitutional recognition of appellate review as a matter of right will serve to afford all defendants access to the appellate courts. Because the New Mexico Constitution recognizes a criminal defendant’s right to appeal from a state court conviction, indigent criminal defendants are afforded the full range of procedural rights available in order to effectively prosecute the direct appeal in the state appellate courts.

1. Effective Assistance of Counsel on Appeal

The implied recognition of a right to appeal from a criminal conviction includes the right to effective assistance of counsel through the direct appeal. In Swenson v. Bosler, the Court concluded that a Missouri procedure permitting appointed counsel to withdraw from representation in non-frivolous appeals following the filing of a notice of appeal was constitutionally defective, because it deprived indigents of assistance of counsel in the prosecution of their appeals. Instead, appointed counsel faced with the prospect of representation in an appeal presenting only frivolous issues is required to research the record of trial and develop potentially meritorious issues for the reviewing court’s consideration.

The Court has balanced the role of the counsel as advocate and the interests of state court systems in preserving limited judicial resources by supporting procedures which recognize both counsel’s independence in representing the client and a duty to the appellate courts not to advance non-meritorious claims. In Jones v. Barnes, the Court concluded that the indigent appellant retains no right to have counsel present or to have counsel argue colorable claims if, in the attorney’s professional judgment, inclusion of issues lacking in probable success will prove detrimental to overall prospects for success. In McCoy v. Court of Appeals of Wisconsin, the Court upheld a state procedural rule requiring counsel not only to comply with Anders in fulfilling the duty of representation, but

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32. 386 U.S. 258 (1967).
33. Anders v. California, 386 U.S. 738 (1967) (“Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished to the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.”).
34. Id. (“The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of amicus curiae . . . . His role as advocate requires that he support his client’s appeal to the best of his ability.”).
36. Id. at 752-53 n.6. The Court recognized that only a limited number of litigation decisions are actually reserved to the client—the decision as to which plea is to be entered; whether jury trial should be waived; and whether or not the client will testify in his own behalf. Id.
also to provide argument demonstrating the non-merit in potential issues which are noted in the Anders-mandated review of the trial record. The Court persists in requiring that appointed counsel serve as advocate for the indigent criminal appellant,\(^3\) although it has balanced aggressive representation with a recognition that the appellate process may constitutionally impose a duty on appellate counsel to assist in preserving limited judicial resources. This goal may be achieved through restriction of issues advanced for review both as a matter of general legal ethics—avoiding prosecution of frivolous claims—and as a matter of strategy and tactics encouraged by skilled litigators, such as the decision to restrict the scope of appeal to those issues deemed most likely to be successful.\(^3\) This latter approach, however, is not without criticism. The most pointed criticism exists in the stinging dissent authored by Justice Brennan in *Jones v. Barnes*.\(^4\)

New Mexico has specifically addressed the question of issue selection by requiring counsel to present and argue meritorious issues in the brief on appeal, while identifying other issues that were specifically requested by the client.\(^4\) The treatment of counsel's duty by the New Mexico courts suggests a greater appreciation for aggressive representation in state criminal appeals than that imposed by the minimal standards of the Federal Constitution in the decisions of the United States Supreme Court. The requirement that counsel advance issues not considered meritorious as "Franklin" issues,\(^4\) for instance, demonstrates greater concern for the right of the accused to determine the course of the appeal than the responsibility imposed in *Jones v. Barnes*.\(^4\)

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40. 463 U.S. at 764. Justice Brennan pointed out that the Chief Justice's limited recognition of litigation decisions reserved to the individual defendant was drawn from the Model Rules of Professional Responsibility relating to the conduct of the trial by counsel, rather than appeal. Justice Brennan looked to the ABA Standards for Criminal Justice governing appellate strategy which concluded that the final decision on prosecuting colorable, but unpromising points on appeal rests with the client. In concluding, he observed: "I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime." *Jones*, 463 U.S. at 755-64 (Brennan, J., dissenting).

Justice Brennan was not alone in expressing this position, being joined in his dissent in *Jones* by Justice Marshall, and advancing a position also advocated by Justice Powell in his majority opinion in Polk County v. Dodson, 454 U.S. 312, 323 (1981), in which an indigent criminal appellant sued a public defender for malpractice as a result of her decision to withdraw from the appeal in compliance with *Anders*. The duties of defense counsel, noted Justice Powell, included the duty to advance all "colorable" claims in support of the indigent's appeal, while not advancing "frivolous" claims which would serve merely to congest the courts unnecessarily.
41. State v. Franklin, 78 N.M. 127, 128-29, 428 P.2d 982, 983-84 (1967); State v. Boyer, 103 N.M. 655, 658, 712 P.2d 1, 4 (Ct. App. 1985) (affirming *Jones v. Barnes* in principle based on counsel's assertion of meritorious claims in brief, while reaffirming *Franklin* requirement that all other issues be preserved in appellate brief).
2. Access to the Record on Appeal

Pivotal in the United States Supreme Court's implicit recognition of a right of appeal for criminal defendants have been the Court's decisions addressing the issue of indigent access to the trial record. In a series of decisions, the Court held that indigent defendants could not be denied access to state appellate review of their criminal convictions as a result of their lack of economic resources. Thus, in Griffin v. Illinois, the Court held that an indigent unable to afford transcription of the trial record in order to properly process an appeal could not be precluded from state appellate review without violation of the Equal Protection Clause. Subsequently, the Court held that requirement of prepayment of filing fees, when applied to indigent criminal defendants, improperly denied the defendants access to the state appellate courts in Burns v. Ohio.

In a series of decisions, the Court looked at the following situations concerning access to trial transcripts: (1) free transcripts were only provided to defendants who were able to convince the trial court that the interests of justice would be "promoted" by their access to the record; (2) free transcripts were only provided where the record was requested by a public defender; and (3) free transcripts were only available to indigents who could show that their appeals were not frivolous. Finally, the Court held that where a state system of post-conviction litigation includes a right of appeal, an indigent must be afforded a free transcript of the post-conviction writ hearing upon which to predicate his appeal. These decisions clearly establish that indigent criminal litigants cannot be disadvantaged in their right to invoke the appellate process as a result of their inability to pay the cost of transcription or preparation of the trial record which will serve as the record on appeal.

At least superficially, the operation of the New Mexico summary calendar does not offend the Equal Protection Clause as it has been applied in decisions of the United States Supreme Court considering availability of the record as a component of the appellate process. Rule 12-210(D)(1) of the appellate rules does not purport to limit access to the trial record to indigents nor does the rule require a greater showing of merit for indigent defendants who wish to obtain a copy of the trial record than would be required for non-indigent appellants. Instead, the rule expressly prevents the filing of the record in any case assigned to

43. 351 U.S. 12 (1956).
44. Id. at 18.
50. The rules of appellate procedure provide that when a case is placed on the summary calendar "a transcript of proceedings shall not be filed." N.M. R. APP. PROC. 12-210(D)(1).
the summary calendar⁵¹ and applies to indigent and non-indigent criminal appeals, as well as civil appeals,⁵² without reference to the status of the litigant.

3. The Threshold Constitutional Question

There are obvious constitutional questions raised by rule 12-210(D)(1) because it denies access to the trial record for cases placed on the summary calendar.⁵³ Clearly, were the summary calendar operating in New Mexico only to deny indigent criminal defendants access to the appellate record, the procedure would be subject to challenge under the Supreme Court's holdings in the free transcript cases.⁵⁴ However, because the operation of the summary calendaring procedure appears applicable to indigents and non-indigents alike, no apparent equal protection violation is evident from the language of the rule.⁵⁵

In practice, however, indigents are penalized by the denial of access to the appellate record in two ways. First, counsel is generally unable to provide the same level of appellate representation when he cannot review the trial record. This argument is discussed more fully in succeeding pages, but it clearly affects the Sixth Amendment rights of indigent defendants and is not, at least superficially, an equal protection problem.

The second problem compounds the first because clients who are able to afford reproduction of the transcript—particularly when the trial record has been preserved by audiotape—are able to procure the record. Access to copies of the taped or transcribed record affords counsel an advantage in preparing the docketing statement upon which the initial calendaring decision will turn, and in opposing the summary disposition proposed once the case is considered by the court of appeals. In effect, summary calendaring does suggest the existence of inequality of treatment of indigent defendants by operation of the appellate rules in those cases in which access to a transcript would enhance counsel's ability to both create the docketing statement and oppose summary disposition.

In such cases, retained counsel able to afford the cost of trial record preparation are placed in the more favorable position of providing counsel with a full record upon which to develop factual and legal arguments. To this extent, the summary calendar effectively operates to deprive

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⁵¹. See State v. Duran, 96 N.M. 364, 365, 630 P.2d 763, 764 (1981) (where State attached trial record as exhibit to brief, Supreme Court took judicial notice of exhibit while recognizing that record could not properly be filed in court of appeals because case was assigned to the summary calendar for disposition).
⁵³. In Bundy v. Wilson, 815 F.2d 125 (1st Cir. 1987), the First Circuit concluded that the New Hampshire summary disposition system, which deprived the accused access to the record or a right of argument in filing his petition for review, violated federal due process guarantees. Id. at 135.
⁵⁴. See supra notes 43-49 and accompanying text.
⁵⁵. N.M. R. App. Proc. 12-210(D)(1) ("If the case is placed on the summary calendar (1) a transcript of proceedings shall not be filed.").
indigent litigants of access to an appellate record in those cases in which the appeal is initially deemed to be without merit by the court of appeals in its decision to calendar the case for summary disposition.

B. The Inefficiency Inherent in Summary Calendaring

The use of the summary calendar by the New Mexico Court of Appeals as a means to expedite appellate review incorporates a number of features of the appellate process which reduce, rather than enhance, efficiency in processing criminal appeals. The negative features of this approach are apparent in three components of the summary calendaring process.

1. Reliance on the Docketing Statement

First, the summary disposition of cases necessarily depends upon the creation of a document separate from the notice of appeal. The "docketing statement" is a means of both advancing and limiting issues presented for review as well as offering supporting factual summary and legal authority for those issues advanced.

The docketing statement requirement poses certain distinct problems for trial and appellate attorneys, although in many respects it mirrors standard procedure in other jurisdictions. For example, the notice of appeal utilized in other jurisdictions may also require some discussion of the evidence developed at trial and a statement of the issues to be raised on appeal. The critical difference lies in the fact that use of the summary calendar means that a New Mexico appeal may be decided almost exclusively on the information contained in the docketing statement and issues raised by trial counsel, unless appellate counsel successfully

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57. N.M. R. App. Proc. 12-208 sets forth the requirements for properly docketing the appeal. N.M. R. App. Proc. 12-208(B)(4) requires inclusion in the docketing statement of the issues presented in the appeal, including disclosure of the context in which the issues arose and the means by which error has been preserved.
58. N.M. R. App. Proc. 12-208(B)(3) requires the docketing statement to include a summary of relevant facts supporting the issues presented by the appeal.
60. See, e.g., Colo. R. App. Proc. 3 (requiring counsel to set forth statement of issues which will be raised on appeal). In comparison, Ark. R. App. Proc. 3(e) requires counsel to indicate which portions of the transcript of trial have been ordered for purposes of appeal, but makes no general requirement for a statement of issues. If, however, counsel designates only a partial transcript for filing, subsection (g) requires a statement of points upon which the appellant intends to rely. A general notice of appeal is the only instrument required to trigger the appellate process and invoke the jurisdiction of the appellate court in a Texas criminal appeal under Tex. R. App. Proc. 40(b). A cost bond or affidavit of inability to pay is the critical document for invoking the jurisdiction of the appellate court in a civil action, pursuant to subsection (a) of the Texas rule.
61. State v. Moore, 109 N.M. 119, 782 P.2d 91 (Ct. App.), cert. denied, 109 N.M. 54, 781 P.2d 782 (1989) (issues are to be raised by trial counsel, not appellate counsel after picking through the transcript for possible errors).
The notice of appeal is a relatively simple document in New Mexico, the thirty day period for filing, subject to extension by the trial court, serves only to extend the due date for filing the much more

Consequently, neglect or error on the part of trial counsel in reconstructing the evidence or in assessing the viability of potential issues for appellate review may effectively doom the criminal appeal under New Mexico procedure. In contrast, the typical process utilized in other jurisdictions focuses on the role of appellate counsel in researching the trial record for support for colorable or meritorious issues which will be included in the appellate brief.

Moreover, the inclusion of the docketing statement in the appellate process as a second document which must be prepared by trial counsel results in certain unnecessary delay. First, the notice of appeal itself must be filed within thirty days after entry of the decision from which appeal is taken. This time period may be extended by the trial court for an additional thirty days on a showing of good cause. While a lengthy period for filing the notice of appeal in civil cases may facilitate post-judgment settlement, no comparable delay is necessary in criminal actions. In contrast to the thirty day period for filing in federal civil appeals, subject to extension of up to sixty total days following entry of judgment, the time for filing a notice of appeal by the defense in a federal prosecution is ten days following entry of the order subject to appeal. Similarly brief periods of time for filing the notice of appeal exist in other state appellate systems.

Although the notice of appeal is a relatively simple document in New Mexico, the thirty day period for filing, subject to extension by the trial court, serves only to extend the due date for filing the much more

63. N.M. R. App. Proc. 12-210(D)(3) provides that counsel opposing proposed disposition by assignment to summary calendar has ten days to file memorandum in opposition demonstrating need for contrary disposition or assignment to another calendar. State v. Sisneros, 98 N.M. 201, 202-03, 647 P.2d 403, 404-05 (1982).

64. N.M. R. App. Proc. 12-210(D)(3) not only provides for contravening memoranda once assignment is made to the summary calendar, but also permits amendment of the docketing statement for "good cause shown with the permission of the appellate court." See State v. Rael, 100 N.M. 193, 195-97, 668 P.2d 309, 311-13 (Ct. App.), cert. denied, 100 N.M. 192, 668 P.2d 308 (1983) (discussing the proper approach for seeking leave to amend the docketing statement to raise new issues once the case has been assigned to the summary calendar).

65. Since the statement of the evidence contained in the docketing statement is taken as correct unless specifically challenged, State v. Anaya, 98 N.M. 211, 212, 647 P.2d 413, 414 (1982), any failure of recollection by trial counsel is likely to result in one of two unfavorable consequences: when facts critical to the defendant's position are omitted or stated in a less favorable light than a fair reading of the trial record would indicate, the defendant's prospects for success on appeal are compromised. Conversely, if trial counsel erroneously provides a statement of facts more favorable to his client than warranted by a fair reading of the record, opposing counsel will be obligated to challenge the inaccuracy if necessary in opposing summary disposition. Of course, advancement of factual error in the docketing statement may also warrant imposition of sanctions against trial counsel when warranted by the circumstances and nature of the error or omission. State v. Fulton, 99 N.M. 348, 657 P.2d 1197 (Ct. App. 1983).


67. N.M. R. App. Proc. 12-201(E). The time for filing the notice of appeal may also effectively be extended by the filing of post-trial motions, pursuant to subsection (D) of this rule.


69. See, e.g., Ark. R. App. Proc. 4(a) (notice of appeal due ten days from entry of order appealed from).
comprehensive docketing statement. The applicable rule permits trial counsel an additional period of some thirty days,\textsuperscript{70} again subject to extension, but only by the appellate court,\textsuperscript{71} for filing the docketing statement.

The delay in filing the docketing statement, fixed by rule at sixty days and easily subject to increase through motions for extension of time for filing, means that reliance on the docketing statement prepared by trial counsel as a critical element in the appellate process inherently delays prosecution of the appeal. Particularly with the availability of taped and computer-assisted written transcripts of proceedings which do not involve extensive delay in preparation time, the allocation of the burden of constructing the docketing statement on trial counsel necessarily infringes on time that could otherwise be spent by appellate counsel in reviewing the record and preparing the opening brief on appeal.

In fact, the sixty day delay for filing the docketing statement consumes a period of time greater than that which would be required for full review of the record and briefing by appellate counsel by simply shortening the filing time for notice of appeal and ordering immediate transfer and filing of the trial record in the court of appeals. The time allocated for the creation and filing of the docketing statement under the current system exceeds the fifteen day period for filing and the thirty days typically available for filing the opening brief in an action assigned to the general calendar, would be filed prior to the time allocated for creation and filing of the docketing statement in the system currently in use.\textsuperscript{72}

The current use of the summary calendar is dependent on the filing of the docketing statement by trial counsel, a procedure which delays actual disposition of the appeal by extending the time before determination of issues even begins. Errors, omissions or general unfamiliarity with the law may all serve to seriously undermine the reliability of the docketing statement as an instrument properly reflecting both the state of the evidence and colorable claims raised in the proceedings below, requiring further delay for correction at the calendaring stage and after.\textsuperscript{73}

Consequently, the advantages in terms of record preparation time which result from technological innovation in the creation of the trial transcript for use on appeal are compromised by the failure to fully utilize the

\textsuperscript{70} N.M. R. App. Proc. 12-208(B).


\textsuperscript{72} N.M. R. App. Proc. 12-210(B)(2); N.M. R. App. Proc. 12-210(C)(2) provides that cases are assigned to disposition on the legal calendar when briefing involves disputed matters of law only and the facts are not in dispute. See, e.g., State v. Ervin, 96 N.M. 366, 367, 630 P.2d 765, 766 (Ct. App. 1981) (case assigned to legal calendar for resolution of issue relating to proper definition of term "dwelling house" where facts were not in dispute).

same advantages in the appellate process. This is particularly true when neither trial nor appellate counsel rely on taped transcripts or computer-assisted written transcripts in prosecuting the appeal, and are forced by the nature of the summary calendar to rely on the recollection of trial counsel and the client to reconstruct the issues necessary to prepare the docketing statement.

2. The Calendaring Notice and Responsive Pleading

Second, the process requires preliminary review and proposed disposition of the issues advanced in the docketing statement without full briefing on the merits. At this point, summary calendaring is peculiarly flawed because it operates to permit litigation by way of response to a calendaring notice which recommends a proposed disposition by the party adversely affected by the recommended disposition. While the proposed disposition, which includes assignment of the case to the summary calendar, may reflect a correct judgment on the issues as presented, opposing counsel is afforded the opportunity to respond to the notice by offering additional argument, as well as additional factual support not initially included in the docketing statement in support of the party's position.

Since filing of the appellate record is not ordered upon assignment of a case to the summary calendar, appellate counsel—most typically the Appellate Division of the New Mexico Public Defender Department—are forced to respond to a proposed summary disposition without access to the trial record. In order to properly represent the client's interest, it is essential that appellate counsel ascertain whether the facts advanced by trial counsel in the docketing statement are both accurately reported and sufficiently comprehensive to include all relevant testimony and other evidence necessary to properly apply controlling principles of law to the evidence in order to render a proper disposition of the claims raised on appeal.

In State v. Rael, the court of appeals rejected a motion to amend the

74. Counsel is under a duty to advise the appellate court in the notice of appeal whether or not the transcript has been prepared by traditional methods or the proceedings were taped, pursuant to N.M. R. APP. PROC. 12-208(B)(6).

75. The applicable rule, N.M. R. APP. PROC. 12-210(D)(3), contemplates not only litigation on the merits of issues raised in the docketing statement, but also litigation focusing on the appropriateness of assignment of the case to the summary calendar for disposition itself.

76. State v. Sisneros, 98 N.M. at 202-203, 647 P.2d at 414-15 ("The opposing party to summary disposition must come forward and specifically point out errors in fact and in law.").

77. The need to respond to the initial calendaring notice presents a problem not only in terms of the need to explore both factual and legal claims before the court, but the sheer volume of proposed summary dispositions may exhaust the resources of the Public Defender Department's Appellate Division. The stress of expanding caseloads prompted a near open conflict between the Public Defender and the Court of Appeals over case management difficulties occasioned by extension requests sought by the Appellate Division in order to adequately respond to calendaring notices issued by the Court. Lisa Driscoll, Confrontation Between COA & PD's Appellate Division Averted, 32 N.M. Bar Bull. 21 at 7-8 (May 27, 1993) (reporting diversion of funds from Public Defender conflict cases budget to overload cases to provide private counsel representation in pending appeals on contract from Public Defender Department).
docketing statement filed on behalf of the defendant by appellate counsel.\textsuperscript{78} Counsel sought to amend the docketing statement to add the issue of insufficient evidence to support conviction. The court denied the motion and concluded that it was made "solely for the purpose of obtaining a transcript or a copy of the proceedings, if taped." The court also stated that this procedure is "not permissible, nor is it to be tolerated."\textsuperscript{79}

The \textit{Rael} court's position on amending the docketing statement to include new issues on appeal was succinctly stated in its conclusions:

At some point, trial and appellate counsel must find the courage and integrity to be honest with the court and their clients regarding the merits of an appeal; and that should be, we think, either before or at the time of filing an initial docketing statement.\textsuperscript{80}

The problem with the court's position is that trial counsel is under no duty or obligation by rule to contact appellate counsel to discuss the merits of the appeal prior to the creation of the docketing statement. Unless trial counsel initiates contact, appellate counsel has no way to know if consultation is necessary or will prove valuable. The point at which appellate counsel receives notice that further communication with the trial attorney will be essential is with service of the calendaring notice assigning the case to the summary calendar. Once the calendaring notice is served, appellate counsel must then address the factual or legal issues preliminarily disposed of by the appellate court in its calendar assignment and initial disposition and then respond, when appropriate.

This process requires counsel to either contact trial counsel and the accused directly within a ten day period to respond to the calendaring notice, or to employ means outside the appellate rules to obtain and review the record of trial. Since there is some cost for reproduction of the trial record, even in the event that taped transcripts have been utilized in the judicial district in which the trial took place, indigent clients are effectively disabled from obtaining a trial record to benefit the work of their appellate attorneys.

Once appellate counsel does respond to the calendaring notice with either assertion of new factual grounds or legal authority, or successfully moves to amend the docketing statement to raise new issues not previously set forth in that document,\textsuperscript{81} the appellate court must evaluate the new arguments and either respond with a second proposal for summary disposition or recalendar the cause for full briefing. In either event, additional time must be spent by the court and its Prehearing Division to (a) consider the arguments advanced by counsel opposing summary disposition

\textsuperscript{78} 100 N.M. 193, 197, 668 P.2d 309, 313 (Ct. App.), \textit{cert. denied}, 100 N.M. 192, 668 P.2d 308 (1983).
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
and reach a decision and statement of grounds resulting in disposition of the contentions, (b) issue a new calendaring notice setting forth additional rationale for summary disposition, or (c) reassign the case to another calendar for full briefing, which would also include a briefing on the full trial record if the cause is reassigned to the general calendar.

3. The Problem of Successive Calendaring Assignments

Once a case initially assigned to the summary calendar is successfully litigated by opposing counsel, the system in place effectively generates more delay than would be typical in a system relying on full briefing of the trial record for all appeals. Assignment of the case for summary disposition involves expenditure of judicial and attorney time. Rather than resolving the case with a final decision, as would be the case after a full briefing and a decision on the merits, the appellate court and its prehearing staff are required to make a preliminary decision on the merits. This decision is then subject to another round of litigation based on the filing of the successive memorandum in opposition.

The time and resource savings envisioned by reliance on summary disposition rapidly disappear if the initial proposed disposition is challenged. The successful challenge which leads to reassignment may result from trial counsel neglect or error in failing to advance all colorable issues—requiring amendment of the docketing statement for consideration of issues not previously raised. Alternatively, the successful opposition may also be predicated on trial counsel’s failure to advance all facts essential for disposition, or as a result of error in the legal interpretation offered in support of the preliminary summary disposition.82

The unnecessary delay resulting from operation of the summary calendar is reflected in individual cases like *State v. Richardson*,83 which involved the issuing of three different calendaring notices by the court of appeals, and finally resulted in assignment of the case to the general calendar. The record in *Richardson* demonstrates that the docketing statement was initially filed on June 14, 1991. Other calendaring notices were also filed on July 3, 1991, September 27, 1991 and November 1, 1991, with the first notice proposing summary affirmance, the second proposing summary reversal based on an amendment to the docketing statement to include a new issue, and the third assigning the case to the general calendar for full briefing.

The record on appeal was finally completed and filed on January 9, 1992 with briefing concluded by the parties on March 31, 1992. Six months later, the case was finally decided in an opinion issued by the

82. For instance, in *State v. Anaya*, 98 N.M. 211, 213-14, 647 P.2d 413, 415-16 (1982), the state supreme court reversed the summary reversal of conviction based on insufficiency of the evidence offered in support of the State’s case at trial. The supreme court concluded that reversal on insufficiency was inappropriate in light of the jury verdict convicting the defendant and recitation in the State’s memorandum brief in opposition of facts showing a positive eyewitness identification of the defendant and remanded the cause for reassignment to a “proper” calendar.

court of appeals. The delay was compounded by the grant of a thirty-day extension for filing the docketing statement after thirty days had expired between the entry of judgment and filing of the notice of appeal. A consequence of this delay and additional delay attributable to requests by appellants’ counsel and the Attorney General was to extend the time for filing memoranda in opposition and for time given to briefing. The court’s decision was finally issued almost three years after the defendant was initially charged in December, 1989, and more than two years after his conviction on July 20, 1990.

Certainly, the pattern of delay evidenced in Richardson is not typical, yet it is a direct product of the use of a calendaring system that requires counsel to speculate on the conduct of the trial because of denial of the appellate record. Nor are successive calendaring notices rare in the operation of the summary calendar. Once litigation over the content of the trial record or existence of meritorious issues not reflected in the docketing statement commences in response to the proposed summary disposition, the smoothness of the calendar envisioned by the court in its appellate rules and decisions is no longer reflected in the actual conduct of the case.

C. Interference with Effective Assistance of Counsel

The role of appellate counsel, as envisioned in indigent criminal appeals by the Supreme Court in Jones v. Barnes, is to provide effective and efficient representation based upon counsel’s best professional judgment. The Jones opinion deferred to counsel’s professional judgment regarding strategy in the selection of points for inclusion in the brief on appeal, rather than preserving any right on the part of the accused to dictate strategy. Proper discharge of the role of appellate counsel as “active

84. Information provided by internal departmental memorandum filed by Assistant Appellate Defender Susan Gibbs to Appellate Defender Sheila Lewis dated Oct. 7, 1992 (on file with the author).


86. E.g., State v. Anaya, 98 N.M. at 212, 647 P.2d at 414 (“We believe that assignment to the summary calendar . . . is proper in cases where the application of legal principles to the facts involved is clear and where no genuine issue of substantial evidence is involved.”).

87. Other courts and commentators advocate a different approach, that of deferring to the client’s directive after disclosure of counsel’s professional judgment on the likely merits of questionable points of error and the prospects that inclusion of these points in the brief on appeal may dilute the overall strength of the brief. See NLADA Standards for Appellate Defender Offices, Standard I(0)9 (1980), which states:

Each appellate defender office should adopt clearly articulated procedures for dealing with clients who desire to raise individual issues in cases which the attorney believes to be without arguable merit. Such procedure should be sufficient to insure
advocate requires counsel to review the trial record in assessing the merits of the client's case and then advance those issues warranting review on the merits by the appellate court. The operation of the summary calendar interferes with counsel's exercise of professional judgment in two specific respects, both of which result in unnecessary complication of the disposition process.

1. The Problem of Lack of Access to the Trial Record

The most critical problem posed by counsel forced to respond to a summary calendaring assignment is the inability to know what happened at trial. This is a problem also shared by the appellate court due to its forced reliance on trial counsel's representations in the docketing statement or contrary assertions set forth in a memorandum in opposition.

Traditionally, the court of appeals has discouraged any access to the trial transcript once a case has been assigned to the summary calendar for disposition. The court cautions against submitting opposing memoranda designed to obtain a transcript that would permit counsel to "pick through the transcript for possible error." Recent action by the court demonstrates, however, its own lack of fidelity to reliance solely upon docketing statements or facts asserted in controverting memoranda. For

that the issue desired by the client is presented to the appellate court in an appropriate manner so as to receive the serious attention of the court. It is preferable to have counsel include the issue in the brief submitted, if at all possible.


Moreover, the United States Supreme Court has taken an approach inconsistent with its holding in Jones v. Barnes regarding capital cases in which the death penalty has been imposed, urging counsel to raise and reviewing courts to provide "careful scrutiny in the review of every colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983).

88. Anders, 386 U.S. at 744.
89. Id.
90. STANDARDS FOR CRIMINAL JUSTICE, § 21-3.2(b) (ABA 1986) provides:

(i) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal . . . . Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal, or to eliminate contentions lacking in substance.

(ii) If the client chooses to proceed with an appeal against the advise of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

91. For example, in State v. Olloway, 95 N.M. 167, 168, 619 P.2d 843, 844 (Ct. App. 1980), the court considered an issue relating to sufficiency of the evidence adduced to support appellant's conviction for receiving stolen property. The court initially assigned the case to the summary calendar, proposing summary affirmance. Subsequently, the case was recalendared, this time proposing summary reversal. Following response by the State to this proposed disposition, the court authored an opinion affirming the conviction, finally relying on statements of the evidence contained in the defendant's docketing statement to conclude that sufficient circumstantial evidence supported the conviction.

example, in *State v. Montoya*, the court directed counsel for the parties to "listen to the tapes" of a witness' testimony and "file in this court a stipulated written transcript of the relevant portions of that testimony within 14 days of this order." This order modifies typical procedure in a summary calendar case, but it also imposes another period of delay in the resolution of the appeal. This delay would not be necessary if the trial transcript had been filed in the court of appeals in the first place.

Similarly, in *State v. Baca*, the court's calendaring notice specifically noted that the defendant and trial counsel were unable to recall a particular fact, but further observed that there was "no indication that appellate counsel has attempted to have trial counsel review, or that she herself has attempted to review the transcript to determine the material facts pertinent" to an issue subject to a motion to amend the docketing statement. In *State v. Jackson*, the court in its second calendaring notice rejected appellate counsel's argument concerning an exhibit because the exhibit had not previously been presented to the court in support of counsel's legal issue. The court directed supplementation of the record with the exhibit and applicable testimony, despite the fact that the appellate rules allow exhibits to be filed only in actions assigned to the general calendar. Interestingly, in support of its order, the court's calendar notice cites *State v. Jim* for the proposition that defendant bears the burden of providing a record sufficient for review of the issues raised on appeal. This criticism is hardly fair in light of the fact that the court's own calendaring assignment worked to deprive counsel, and the decision-making panel, of a complete trial record upon which the case could properly be decided.

Lack of precision in the understanding of the testimony and additional evidence adduced at trial is particularly troubling when appellate counsel is forced to address any of four distinct aspects of criminal appeals.

**a. Sufficiency of Evidence Challenges**

Challenges based on insufficient evidence are particularly important in the prosecution of criminal appeals because a finding of evidentiary insufficiency requires reversal and acquittal under the Fifth Amendment's

96. *Id.* (second calendar notice at 3).
98. *Id.* (second calendar notice at 5). ("If defendant desires to again contest this issue, he is instructed to supplement the record proper with the presentence report in his memorandum in opposition and to provide this court with the alleged testimony in support of his position.").
99. N.M. R. APP. PROC. 12-212.
101. *Id.*
protection against double jeopardy.\textsuperscript{102} The state's burden is to adduce evidence sufficient to establish or prove each element of the offense charged beyond a reasonable doubt when viewed from the perspective of a rational trier of fact.\textsuperscript{103}

Without access to the full record of trial, however, appellate counsel cannot make an independent determination as to whether sufficient evidence was adduced at trial, or whether the summary of evidence included in the docketing statement is accurate or complete to permit a correct assessment.\textsuperscript{104} Evidentiary insufficiency questions are equally troubling to the court of appeals,\textsuperscript{105} particularly in light of the fact that a jury has found the evidence sufficient in reaching a collective decision to convict.\textsuperscript{106}

In \textit{State v. Charlton},\textsuperscript{107} the court's second calendaring notice addressing the sufficiency question indicated the perception of the calendaring judge that appellate counsel was under some duty to review the trial transcript in asserting her client's position in response to the proposed disposition. The notice also indicated that six additional issues had been raised in response to the original proposed disposition relating to sentencing matters and that defendant's claims were, at least in part, meritorious and deserving summary reversal.\textsuperscript{108} Appellate counsel partially grounded her sufficiency argument on the fact that trial counsel did not prepare the docketing statement and it was, therefore, inherently suspect. The calendar notice includes the following response:

\begin{quote}
Defendant suggests that because the attorney who prepared the docketing statement was not the attorney who represented him at trial this issue (sufficiency) should not be affirmed on the summary calendar. (M.I.O. 2) Defendant appears to contend that this case should be
\end{quote}

\begin{thebibliography}{99}
\bibitem{102} Greene v. Massey, 437 U.S. 19 (1978). \textit{But see} Lockhart v. Nelson, 488 U.S. 33 (1988) (no right to application of double jeopardy bar when reversal based on error in admission of evidence, even though in absence of improperly admitted evidence totality of evidence would have been insufficient for state to meet its burden of proof).
\bibitem{104} This concern is occasionally shared by the appellate courts. In \textit{State v. Lopez}, 107 N.M. 450, 760 P.2d 142 (1988), Justice Walters, a champion of summary calendaring while a member of the Court of Appeals, observed:

\begin{quote}
We agree, as the calendaring notice indicated, that an appellate court must review the evidence in a light most favorable to the State in determining whether the evidence at trial supports conviction, and that an appellate court will not substitute its judgment for that of the jury (citation omitted). \textit{But we are perplexed in determining how the court could have reviewed the evidence when, on summary disposition, it did not have a transcript of the trial before it. An appellate court cannot make a determination of the sufficiency of the evidence when it has not reviewed the evidence presented at trial unless the facts of the docketing statement clearly establish no doubt of the sufficiency of the evidence.}
\end{quote}

\textit{Id.} (emphasis added).
\bibitem{106} State v. Anaya, 98 N.M. 211, 212, 647 P.2d 413, 414 (1982).
\bibitem{108} State v. Charlton, No. 14070 (N.M. Ct. App. Sept. 22, 1992) (second calendar notice at 2-3). These included challenges to an order purporting to "banish" the defendant as part of the sentence imposed in the case which the calendaring judge concluded contravenes public policy.
\end{thebibliography}
placed on the general calendar to review the transcript of proceedings in order to determine what evidence was introduced at trial. However, there is no indication that the attorney who prepared the docketing statement did not have an opportunity to discuss the case with trial counsel or have access to the transcript of proceedings. Nor is there any indication that appellate counsel was unsuccessful in seeking to have trial counsel review, or that she herself has attempted to review the transcript, by reviewing the court reporter's notes to determine what evidence was presented.\

Even the calendaring court was unable to rely upon factual representations made in the docketing statement as accurate and complete. Moreover, while non-filing of the trial record is an additional measure taken to achieve the goals of cost and time reduction, the second calendar notice issued in *Charlton* effectively directs appellate counsel to surreptitiously review the record in order to discharge her duty to the court and client. The more reasonable approach in this situation would have been to assign the case to the general calendar so that counsel would have access to the trial record instead of engaging in the delaying process of repetitive calendar notices and memoranda filed in opposition.

b. Grounds Preserved for Appellate Review

One problem in determining whether an issue should be advanced on appeal involves the proper preservation of error in the trial court. This is particularly true when alternative theories may be advanced in support of a single proposition, such as when state constitutional provisions afford greater protection for a criminal accused than comparable provisions of the Federal Constitution.

The docketing statement must identify issues raised for appeal and indicate the means by which error was preserved in the trial court. However, the docketing statement is created by trial counsel subsequent to the trial and is subject to a filing date of up to sixty days after entry of judgment, excluding extensions of time granted for filing of either

109. *Id.* at 2 (emphasis added).

110. State v. Calanche, 91 N.M. 390, 574 P.2d 1018 (Ct. App. 1978) ("When a case is assigned to the summary calendar, the facts in the docketing statement are accepted as true unless contested.").


112. For example, in State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App. 1991), the court considered the defendant's claim that he had a greater expectation of privacy in the area outside the curtilage of his home, under Article II, section 10 of the New Mexico Constitution, than that recognized under the Fourth Amendment to the Federal Constitution. The claim was raised in the docketing statement, but not preserved at the hearing on the pretrial motion to suppress. *Id.* at 454, 816 P.2d at 523. The court addressed the issue on the merits despite the failure of preservation. Subsequently, in State v. Allen, 114 N.M. 146, 835 P.2d 862 (Ct. App. 1992), the court held that failure to argue state constitutional provisions in the trial court waived this theory for relief on appeal.


114. N.M. R. App. Proc. 12-201(A) requires that notice of appeal be filed within 30 days after entry of judgment. Rule 12-208(B) then requires the filing of the docketing statement within thirty days after the filing of the notice of appeal. Thus, up to sixty days may pass before the docketing statement is actually filed.
If error is preserved by written motion and ruling, counsel should be able to demonstrate the grounds relied on in the trial court. But when issues involve errors allegedly committed during the course of the trial itself, such as the admission or exclusion of evidence, trial counsel is more likely to rely on personal recollection in setting forth the means by which error was preserved. This process invites either an inaccurate representation of the preservation process as a result of imprecision in recollection or expansion in the docketing statement of theories supporting the issue when counsel is able to supplement reflection with reference to caselaw, statutory and rules provisions, and constitutional guarantees.

Appellate counsel is obligated to argue preservation based on the information supplied in the docketing statement or as a result of post-calendaring conversations with trial counsel. If an issue has been improperly or inadequately preserved or counsel has erred in his personal recollection of the theories urged in the trial court, appellate counsel may argue the issue as if it were properly preserved below, whereas a review of the trial transcript would demonstrate that the issue was not properly preserved for appellate review. The exercise of appellate counsel’s best professional judgment is compromised in those situations in which denial of access to the record fails to afford counsel a full appreciation for the actual state of the record as to the nature of the issue, supporting testimony and preservation efforts undertaken by counsel.

c. Fundamental Error

New Mexico retains a significant body of caselaw devoted to fundamental error. The caselaw includes certain errors occurring during trial which are not reflected in the record proper on appeal, such as improper comment on the accused’s silence. The failure of trial counsel to properly preserve error, however, does not itself constitute fundamental error so that the unpreserved error becomes subject to appellate review.

The problem posed by the potential commission of fundamental error is that without review of the trial transcript, appellate counsel cannot reasonably determine whether such error might have occurred at trial from the docketing statement. Counsel, unaware of the violation involved and therefore failing to interpose a timely objection, may not be sufficiently advised by the time of preparation of the docketing statement to recognize the error. Assuming that the fundamental error doctrine

115. Counsel may obtain an extension time for filing the notice of appeal from the trial court for thirty days for good cause shown under N.M. R. App. Proc. 12-201(E)(1).
protects those rights that are central to a fair trial even in the absence of timely and correct action by trial counsel,\textsuperscript{119} denial of access to the record of trial precludes a proper evaluation by appellate counsel as to whether or not certain errors of a fundamental nature in fact did occur.

d. Effective Assistance Assessments

The entitlement to effective assistance of counsel requires an appropriate forum for vindication of violation of the right.\textsuperscript{120} Often, a question of ineffectiveness may be so intertwined with the conduct of the trial that a correct assessment as to the trial counsel's performance or competence may be made on the trial record itself. Other deficiencies in performance will require an evidentiary hearing most appropriately conducted in the context of a collateral attack on the conviction.\textsuperscript{121}

Although the litigant is entitled to raise a claim of ineffectiveness by post-conviction action, appellate counsel may often make a well-considered judgment as to the assistance afforded at trial reflected in the transcript of proceedings. Summary calendaring not only precludes this preliminary assessment from being made by appellate counsel, but also insulates ineffectiveness from disclosure and relief because counsel performing incompetently at trial may well perform with equal lack of ability or concern when creating the docketing statement.

2. Issue Selection

The core of the majority's approach to counsel's duties in Jones v. Barnes lies in a recognition of the professional judgment counsel may bring to the determination regarding which issues should be argued on appeal.\textsuperscript{122} The operation of the summary calendar, however, frustrates counsel's exercise of professional judgment in correctly assessing which issues should be argued vigorously, which should be abandoned upon consultation with the client, and which should be included in the briefs as "Franklin" issues.\textsuperscript{123}

The court of appeals has repeatedly condemned the practice of counsel "pick[ing] through the transcript for possible error,"\textsuperscript{124} yet New Mexico's

\textsuperscript{119} State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978) (appellate court under duty to reverse on issues of demonstrated fundamental or jurisdictional error); State v. Moore, 109 N.M. 119, 130, 782 P.2d 91, 102 (Ct. App. 1989) (new issues of fundamental or jurisdictional error may be raised in appellate brief being supported by good cause).

\textsuperscript{120} State v. Luna, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979) (claim of ineffectiveness may be raised as a matter of fundamental error).


\textsuperscript{122} 463 U.S. at 752-53.


\textsuperscript{124} See, e.g., State v. Jacobs, 91 N.M. at 450, 575 P.2d 954, 959 (Ct. App.), cert. denied, 91
published decisions are replete with references to abandonment of issues included in the docketing statement which have not been fully briefed in a case either originally assigned or reassigned to the general calendar.\textsuperscript{125} The fact that appellate counsel routinely abandon issues advanced by trial counsel in the docketing statement\textsuperscript{126} demonstrates the extent to which appellate counsel in New Mexico exhibit that exercise of professional judgment relied upon in Jones v. Barnes.

The problem posed by the summary calendar is that, uncertain of the accuracy of factual representations made in the docketing statement as to the nature of the evidence or preservation effort made by counsel, cautious appellate counsel will likely err in favor of urging an issue, rather than abandoning it. This means that undue litigation results from advancement of appellate issues in the docketing statement asserted by trial counsel. Unfortunately, these issues cannot be independently tested by appellate counsel to determine their viability without an opportunity to review the trial transcript or record of proceedings. Moreover, counsel may attempt to expand issues on appeal through a motion to amend the docketing statement based upon representations made by the client or trial counsel which ultimately would prove non-meritorious when the case is reassigned to a calendar for full briefing on the trial record.\textsuperscript{127}

Access to the record of trial serves to permit counsel to search for meritorious issues which may be raised on appeal but have not been included in the docketing statement. It also facilitates evaluation of less colorable claims. A fuller understanding of the lack of merit in many issues advanced in the docketing statement permits counsel to advise the client of the wisdom in abandoning meritless claims and instead focusing the court's attention on issues suggesting more favorable prospects for relief.

CONCLUSION

Operation of the New Mexico summary calendaring procedure offers superficially attractive advantages of expedition of the appellate process with concomitant savings of judicial time and costs associated with preparation of the trial record. In reality, the summary calendar entails significant hazards for the criminal appellate process by depriving litigants of the most effective representation which can be afforded by appellate


\textsuperscript{127} See, e.g., State v. Munoz, 111 N.M. 118, 802 P.2d 23 (Ct. App.), cert. denied, 111 N.M. 136, 802 P.2d 645 (1990) (counsel's failure to brief issue subject to motion to amend docketing statement despite directive to brief both issue and motion for amendment, results in rejection of motion to amend and rejection of relief on merits of issue).
counsel. Denial of access to the record of trial precludes the most efficient utilization of attorney time, and often results in issuance of successive calendaring notices which extend, rather than shorten, the time required for disposition of criminal appeals.

In considering alternative approaches to streamlining the appellate process, the American Bar Association (ABA) rejected the use of devices designed to pre-screen or eliminate frivolous appeals because they were viewed as "impracticable" and "unsound" in principle. Instead, the ABA has promoted efforts to streamline appellate case processing by endorsing expedited appeals "so long as they continue to ensure that the judges are adequately informed as to the facts and the proceedings below . . . ." A working understanding of the New Mexico summary calendaring process demonstrates the accuracy of the ABA concern that any device designed to pre-screen or expedite a criminal appeal should ensure that meritorious issues are not compromised by the device.

128. In Brooks v. Tennessee, 406 U.S. 605 (1972), the Supreme Court held that operation of a state procedural rule requiring an accused to testify first if intending to testify in his own defense served to render representation ineffective under the Sixth Amendment. The underlying rationale of the Court's ruling was that the rule impaired counsel in the exercise of his best professional judgment by requiring that the testimony decision be made without opportunity to assess the strengths and weaknesses of other defense witnesses having already undergone cross-examination.

Denial of access to the trial record poses the same type of procedural restriction on the exercise of professional judgment by appellate counsel, who must litigate in a virtual vacuum, and may subject the New Mexico calendaring system to a similar Sixth Amendment attack.

129. STANDARDS FOR CRIMINAL JUSTICE, § 21-2.4 & cmt. (ABA 1986).

130. Id. § 21-3.4(a).