STATE V. MCCALL, 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958 (Ct. App. 1983)
CASE HISTORY ALERT: affected by 1984-NMSC-007

STATE OF NEW MEXICO, Plaintiff-Appellee,
vs.
D.A. McCALL a/k/a D. McCALL, Defendant-Appellant

No. 5922

COURT OF APPEALS OF NEW MEXICO

1983-NMCA-109, 101 N.M. 616, 686 P.2d 958

September 06, 1983

Appeal from the District Court of Bernalillo County, Cole, Judge

Petition for Writ of Certiorari Quashed June 18, 1984

COUNSEL

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JUDGES

Walters, C.J., wrote the opinion. WE CONCUR: Ramon Lopez, J., C. Fincher Neal, J.

AUTHOR: WALTERS

OPINION

WALTERS, Chief Judge.

ON REHEARING

{1} Both parties filed petitions for rehearing. Upon the panel's reconsideration of the points raised, the opinion previously filed is withdrawn and the following substituted therefor.

{2} In a trial to the court, the jury having been waived, defendant was found guilty of three counts of fraud, three counts of securities fraud, three counts of conspiracy to

commit fraud, and two counts of solicitation to commit fraud, all contrary to NMSA 1978, § 30-16-6 (Cum. Supp.1982); NMSA 1978, §§ 58-13-39 and -43; NMSA 1978, § 30-28-2 (Cum. Supp.1982); and NMSA 1978, § 30-28-3 (Cum. Supp.1982), respectively. From a judgment and sentence suspending all but six months' imprisonment and $40,000 in fines on all counts, defendant appeals. This case is the third appeal reaching this court for decision, thus far, in connection with charges that defendants criminally obtained low income housing loans under a State program.

FACTS

{3} State v. Griffin, 100 N.M. 75, 665 P.2d 1166 (Ct. App.1983), details the background of the low income housing program established in New Mexico through the Mortgage Finance Authority (MFA) legislation, NMSA 1978, §§ 58-18-1 through 58-18-27 (Repl. Pamp.1982). In addition to the facts outlined there and pertinent to this appeal are additional facts, including trial court findings, that Mortgage Guaranty Insurance Company (MGIC) had a pre-agreed contract with MFA to insure the various loans purchased by MFA from the private lending institutions which participated in the program, and that MFA had committed itself to purchase all such loans from the lending institutions. MGIC required from the lender, before issuing insurance, a "loan package" which included the loan application, verification of down payment, verification of the applicant's employment and income, and appraisal of the property. MGIC relied upon the lender's approval of the loan application as a guide to its issuance of insurance. It was not seriously disputed that MFA's loan standards or requirements were not uniformly applied, and that they frequently changed from day to day and from applicant to applicant.

{4} Three properties were involved in the charges on which this defendant was convicted. Defendant's secretary made application for an MFA loan on the first property (which was owned by defendant), falsely representing her income (verified by defendant), the amount of her savings, that the down payment on the property was from her funds, and that she intended to occupy the property. The house was deeded back to defendant by his secretary approximately three months after the loan was approved and the sale made. In addition to these proofs, the court found that the secretary's sole intention was to receive $1,000 from defendant for obtaining the loan and to aid him in refinancing his property; and that defendant's intention was to have a loan approved that would be insured by MGIC and purchased by MFA, to his benefit, "for the sole purpose of refinancing his ownership interest" in the property.

{5} An application for a loan to purchase the second property was made by an employee of a title company jointly owned by defendant, by the chairman of MFA, and by one other person. That application pertained to another home owned by defendant, but its occupancy and ultimate ownership was to be by one other than the employee-applicant. The other person could not himself qualify for an MFA loan because of his history of erratic income. In the application, the employee falsely represented her income, moneys owned by her in her checking account, that the down payment on the property was from her funds, and that she intended to occupy the premises. She was

paid $500 from title company funds for making the application; the property was appraised by defendant at a figure that resulted in her receipt of a loan covering 100 percent of the purchase price. MGIC insured the loan and MFA purchased it from the lender, and defendant received the proceeds in payment of the sale of his house.

{6} Defendant's secretary again was the loan applicant in the third transaction, approximately ten months after she had received her first loan. Defendant was convicted of fraud, security fraud, and conspiracy to commit fraud in connection with the third loan upon evidence that the secretary had made a down payment on a house she wanted to buy with funds advanced by defendant, and had signed a purchase agreement to close approximately 30 days later. In her application for the MFA loan, she overstated her income and falsely represented deposits in her savings account as hers when in fact they were defendant's funds. Defendant verified her income to the lending institution. Because the loan had not been fully processed by the date of closing, defendant bought the house from the seller under the same terms as had been agreed upon between the seller and his secretary, and he then agreed to sell the house to his secretary at a price $5,500 higher than she had agreed to pay under her original agreement with the first seller. The secretary ultimately obtained the loan and defendant received the proceeds as the new seller of the property.

{7} Appellant raises thirteen issues on appeal. We have grouped them and we discuss (I) Grand jury proceedings and pre-trial rulings; (II) Sufficiency of the evidence; and (III) The sentences imposed.

I.

A. **Publicity**

{8} On November 22, 1981, while a grand jury was considering the indictment returned against defendant, an extensive newspaper story appeared in the Albuquerque Journal describing allegations of fraudulent dealings and falsification of records in connection with home loans made by a Santa Fe lending institution. Defendant was prominently named in the article. On November 30th defendant moved that the grand jury be discharged from considering any matter pertaining to him, but an indictment was returned against him on December 4, 1981 before the motion was heard.

{9} However, on December 1st the Assistant Attorney General told the grand jurors:

There were a couple of things that I think we needed to go ahead and address before we get going. I think that Judge Baca may also want to instruct you in this regard. If anybody read any newspaper accounts dealing with any of the individuals who have been discussed during these proceedings, you are to ignore those newspaper articles and any decision which you render in this proceeding should be based solely, and I emphasize solely, on the evidence and testimony that is presented to you during this grand jury proceedings.

Defendant then moved to subpoena the grand jurors to determine whether any of them had knowledge of the publicity and to dismiss the indictment if appropriate. Defendant's motions were denied.

{10} The request for dismissal was based on two grand jury statutes. First, the oath taken by grand jurors speaks of their receipt of "legal evidence" and proscribes indicting "through malice, hatred or ill will." NMSA 1978, § 31-6-6(A)(1) (Cum. Supp.1982). Second, NMSA 1978, § 31-6-11(A) (Cum. Supp.1982), suggests that the grand jury must rest an indictment only upon the evidence submitted to it. As a prelude to his argument, defendant alleges error in the court's failure to require the testimony of grand jurors to establish whether they had read the article and were affected by it.

{11} There is merit to defendant's contentions to the extent that he is entitled to relief if the grand jurors had read the article and it influenced their findings. NMSA 1978, Evid.R. 606(b), allows juror testimony on the subject of extraneous prejudicial information having been injected into the jury's deliberations. **See also** D. Louisell & C. Mueller, Federal Evidence, § 292, at 168 (1979). Defendant may not be penalized for not tendering what the jurors' testimony would have been; grand jurors are bound by an oath of secrecy not to talk to defense counsel. Section 31-6-6(A)(1).

{12} This point of error rests on the presumption of prejudice that arises when certain grand jury statutes are violated. **Davis v. Traub,** 90 N.M. 498, 565 P.2d 1015 (1977) (unauthorized person before grand jury); **Baird v. State,** 90 N.M. 667, 568 P.2d 193 (1977) (prosecutor present during deliberations); **State v. Hill,** 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975) (unauthorized person, who was private prosecutor, present before grand jury).

{13} On the question of potentially prejudicial publicity, there is substantial federal authority establishing that it does not go to the heart of the grand jury system, and it is to be expected in so many cases that it will not vitiate an indictment. 8 J. Moore's Federal Practice, para. 6.04[9] (1982); D. Louisell & C. Mueller, **supra;** 1 C. Wright, Federal Practice and Procedure, § 102, at 210 (2d ed. 1982). Professor Wright points out that no indictment has ever been dismissed on the claim of bias resulting from massive pre-indictment publicity. **Id. United States v. Mandel,** 415 F. Supp. 1033, 1061-65 (D.Md. 1976), ably analyzes the considerations which preponderate to reject such an attack on the indictment. That analysis was echoed by the trial court below, i.e., that there will almost always be widespread publicity in sensational cases; if dismissal for pre-indictment publicity were to result, many prominent or notorious persons could avoid the criminal process completely.

{14} The general rule stated in the federal cases is that if lack of bias is a specific requirement of grand jurors, the bare fact of publicity does not show bias. **Estes v. United States,** 335 F.2d 609 (5th Cir. 1964), **cert. denied,** 379 U.S. 964, 85 S. Ct. 656, 13 L. Ed. 2d 559 (1965). Publicity may only result in dismissal if it is generated by the government toward the end of unfairly biasing the grand jurors. **United States v.**

Mandel. There is no allegation and no evidence that the article about which complaint is made in this case was so induced.

{15} The grand jury statutes cited by defendant, as we have said, prescribe legal evidence and proscribe malice. The New Mexico Supreme Court has approved an explanatory instruction for use in grand jury proceedings. NMSA 1978, UJI Crim. 60.00 (Repl. Pamp.1982). The instruction recognizes the possibility that grand jurors will read or hear matters about the case being considered; it instructs the jury to decide the case solely on the evidence presented to it. The prosecutor cautioned the jury to that effect. We are unable to hold that the trial court erred in not questioning the grand jurors and in not dismissing the indictment. **See Buzbee v. Donnelly,** 96 N.M. 692, 706, 634 P.2d 1244, 1258 (1981).

B. **Prosecutor Misconduct**

{16} The trial court denied defendant's motion to dismiss the indictment for prosecutor misconduct before the grand jury. Defendant's claim of error is predicated on a statement of the prosecutor to the grand jurors that he was requesting an indictment on those crimes which he, as their legal advisor, felt had been committed. His comment occurred near the end of the presentment and again after the jury was instructed. The prosecutor, however, corrected himself and said that these were the crimes "that the evidence seems to reflect." He told the jurors several times that it was their decision to determine whether there was probable cause to indict, and that such a decision was solely within their province.

{17} This case is not similar to **State v. Good,** 10 Ariz. App. 556, 460 P.2d 662 (1969), relied upon by the defendant. In **Good,** the prosecutor repeatedly exhorted the grand jury to indict. In our view, this case is more like **State v. Ballinger,** No. 5311 (Ct. App.)(opinion on remand filed March 15, 1983), where the grand jury heard a mass of evidence, and the prosecutor's comment was inadvertent rather than deliberate.

{18} The prosecutor is to instruct the jury on applicable charges. NMSA 1978, UJI Crim. 60.10 (Repl. Pamp.1982). In explaining to the jurors the purpose of the instructions, the prosecutor lapsed into prohibited comment on what charges he felt the jury should return. But because his remarks were corrected and tempered with repeated instructions to "decide the case for yourselves on the evidence," it was not misconduct of a nature requiring dismissal of the indictment. **State v. Ballinger; State v. Martinez,** 97 N.M. 585, 642 P.2d 188 (Ct. App.1982); **State v. Saiz,** 92 N.M. 776, 595 P.2d 414 (Ct. App.1979).

C. **Subpoena of Bank Records**

{19} The State, and perhaps the grand jury (we did not search the record), issued a subpoena to defendant's banks for production of defendant's bank records, and the banks complied. Defendant moved to quash the subpoena(s), and, alternatively, to suppress all materials obtained by such subpoena(s). The motions were denied.

{20} NMSA 1978, § 14-7-1 provides:

14-7-1 Requiring notice of intent to gain access to records of financial institutions.

A. At least seven days prior to a state agency, board or commission requesting or gaining access to or copies of the records of a person, corporation, company or organization, maintained by a bank, savings and loan association, small loan company or other similar financial institution, the agency, board or commission shall notify by certified or registered mail, the person, corporation, company or other organization of its intent to gain access or acquire such records.

B. The requirement of notice set forth in Subsection A of this section shall not apply to the audit of any bank, savings and loan association, small loan company or other similar financial institution by a state agency, when conducted pursuant to the agency's statutory directive.

C. The provisions of Subsection A of this section shall not apply to requests for records made pursuant to an administrative subpoena. In such instances at least twenty-four hours' notice shall be given to the person, corporation, company or organization.

Defendant was not given the statutory notice.

{21} The United States Supreme Court, in **United States v. Miller,** 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), held that bank records, including checks, deposit slips, financial statements, and monthly statements, are not within any zone of privacy protected by the Fourth Amendment. They were decided, in **Miller,** to be items of information voluntarily conveyed by the depositor to the banks, and thus information exposed to all of the banks' employees in the ordinary course of business without any anticipation of privacy.

{22} The **Miller** decision has been vehemently criticized by at least one eminent authority. 1 W. LaFave, Search and Seizure, § 2.7(c) (1978). LaFave stamps the result "dead wrong" and the reasoning "woefully inadequate." **Id.** at p. 411. Professor LaFave contends that the Supreme Court ignored modern realities of life and based its decision on notions of property long since rejected in Fourth Amendment analyses. He points out, citing respectable precedent, that banks are a necessity in the transactions of daily life and that people do not, by their use, knowingly expose or surrender their personal histories to public scrutiny. Rather, they disclose information in their checks to their banks for the sole purpose of debiting, crediting, or balancing their accounts. Moreover, banks recognize their role as the agent of their depositors and they keep customer transactions private. The bank has virtually no occasion to reconstruct a customer's life, or any interest in doing so, by its cursory viewing of underlying transactional information in its customers' accounts. To give the government the right to do that, says LaFave, is "pernicious." **Id.** at 417. **See** cases therein cited.

{23} Some state courts have similarly analyzed searches of personal records and declared that state constitutional law imposes a privacy interest in bank and business records. **E. g., Burrows v. Superior Court of San Bernadino County,** 13 Cal.3d 238, 118 Cal. Rptr. 166, 529 P.2d 590 (1974) (bank records); **People v. Blair,** 25 Cal.3d 640, 159 Cal. Rptr. 818, 602 P.2d 738 (1979) (credit card and telephone call records); **Charnes v. DiGiacomo,** 200 Colo. 94, 612 P.2d 1117 (1980) (bank records). **In Commonwealth v. DeJohn,** 486 Pa. 32, 403 A.2d 1283 (1979), **cert. denied,** 444 U.S. 1032, 100 S. Ct. 704, 62 L. Ed. 2d 668 (1980), the Pennsylvania Supreme Court called the **Miller** decision "a dangerous precedent, with great potential for abuse," and held that the Pennsylvania Constitution protected against such unreasonable searches and seizures absent valid legal process. In **DiGiacomo,** a subpoena for bank records was upheld, but it is significant that the statute there authorizing administrative subpoenas required the agency to make a showing satisfactory to a district court judge that the court should cause the subpoena to issue. Statutes may enlarge constitutional rights, **State v. Wilson,** 92 N.M. 54, 582 P.2d 826 (Ct. App. 1978), but they may not impinge upon, conflict with, or reduce constitutional protections. **See State ex rel. Dow v. Graham,** 33 N.M. 504, 270 P. 897 (1928).

{24} It is not necessary for us to decide at this time whether New Mexico would interpret the statute authorizing the administrative subpoena according to **Miller,** or otherwise under our state constitution as California, Colorado and Pennsylvania courts have done, or whether a grand jury subpoena falls under the requirements of § 14-17-1. Defendant has not cited us to any portion of the record supporting his claim that the grand jury subpoenaed his bank records. There is testimony by defendant at a pretrial hearing that some of defendant's business documents were referred to in the grand jury transcripts that he had read, and that loan officers of two banks had told him they had responded to a grand jury subpoena. But we are not told where that evidence is in the record before us; we do do not know what the evidence consists of that he complains about; we are not advised whether exhibit documents were those so obtained, or in what manner, if any, they prejudiced defendant. **Cf. State v. Martin,** 90 N.M. 524, 565 P.2d 1041 (Ct. App.1977).

{25} Nor need we consider whether the failure in this case to give defendant notice, as required by the statute, would require suppression of the fruits of the State's subpoena issued for trial. The trial judge effectively suppressed the records, ruling that any evidence obtained by the subpoena, other than defendant's financial statement which had previously been introduced by defendant at an earlier hearing, could not be examined by the State until both defendant and the trial court had been alerted and, tacitly, an examination authorized.

{26} Additionally, with 144 packets of compound exhibits offered by the State and only an abstract contention that defendant's privacy interest was invaded, without specific citation to the tapes, the kinds of records obtained, or the prejudice resulting to defendant, we would engage in impermissible speculation to decide the privacy issue attaching to either the grand jury or trial stage of the proceedings below. **See Perez v.**

Gallegos, 87 N.M. 161, 530 P.2d 1155 (1974). Appellate courts do not render advisory opinions. **State v. Herrod,** 84 N.M. 418, 504 P.2d 26 (Ct. App.1972).

D. **Notice of the Charges**

{27} In two separate points defendant urges that the trial court improperly denied his motions for a statement of facts and to compel the State to elect the precise theory of culpability upon which the charges would be tried. The several counts of the indictment alleged crimes committed by various alterative means and against various alternative persons or entities. Defendant complains that the manner of charging in Count I, for example, exposed him to defending against a potential of 12 separate means of committing the crime alleged; in Count II, for example, against 56 possible methods of committing securities fraud.

{28} The exponential variations in the multiple counts resulting from the alternative and cumulative form of charging throughout the indictment indeed exposed defendant to a broad field of allegedly illegal conduct. New Mexico's appellate courts, however, have held that access by the defendant to the grand jury proceedings, and maintenance by the prosecutor of an "open file" policy for defendant's examination, obviates the requirement to furnish a statement of facts sufficient to allow defendant to prepare his defense, **State v. Hicks,** 89 N.M. 568, 555 P.2d 689 (1976), and its progeny; **see State v. Sheets,** 94 N.M. 356, 610 P.2d 760 (Ct. App.1980). We have no authority to change that rule. **Alexander v. Delgado,** 84 N.M. 717, 507 P.2d 778 (1973).

{29} Regarding the request for election, **State v. Gurule,** 90 N.M. 87, 559 P.2d 1214 (Ct. App.1977), and **State v. Ortiz,** 90 N.M. 319, 563 P.2d 113 (Ct. App.1977), instruct that it is not unfair and there is no deficiency in notice to the defendant when one offense is charged but multiple ways in which the offense could have been committed are alternatively alleged, and the State's file is open for inspection by defendant. **Cf. State v. Coulter,** 84 N.M. 647, 506 P.2d 804 (Ct. App.1973). The implication is inescapable that the State is not required to elect its precise theory of defendant's unlawful conduct. **Sanchez v. State,** 97 N.M. 445, 640 P.2d 1325 (1982), is not to the contrary. The **Sanchez** indictment attempted to charge defendant alternatively, cumulatively, and vaguely, for the purpose of converting separate crimes into a single offense solely to elevate several misdemeanor crimes to the status of a single third degree felony. Those are not the facts of this case; "stacking" is not an issue.

{30} If, as defendant argues, we are unable to review the extent of the State's "open file" because the record before us does not clearly identify or specify the contents of that file, the onus for the deficiency in the record must be borne by defendant. **State v. Duran,** 91 N.M. 756, 581 P.2d 19 (1978). We are not told, however, that any evidence produced by the State at trial came as a surprise to defendant or was withheld from defendant's knowledge prior to trial. The trial court was careful, at the hearing on defendant's motions, to require a thorough explanation by the State of the charges, the names of witnesses, the names of alleged conspirators, the individuals or entities who relied on representations made, the basis of values alleged, and the State's theory of

the security fraud charges. Those requirements should have met the needs stated by defendant's motions. Consequently, we are not persuaded that defendant did not have sufficient notice and information to adequately prepare his defenses to the charges of the indictment.

E. **Severance**

{31} Defendant asked the trial court for severances that would permit separate trials on each transaction alleged in the indictment, contending that the evidence produced on each offense charged, multiplied by the number of similar charges relating to five separate mortgage transactions, would create massive prejudice to defendant and severely tax the fact-finder's impartiality.

{32} Joinder of the offenses in the indictment is authorized by NMSA 1978, R. Crim.P. 10 (Repl. Pamp.1980). Severance of the counts for trial is a matter of discretion for the trial court, **State v. McGill,** 89 N.M. 631, 556 P.2d 39 (Ct. App.1976); NMSA 1978, R. Crim.P. 34 (Repl. Pamp.1980); but that discretion must be exercised diligently to assure that prejudice does not prevail because of evidence heard on one count that would be inadmissible on another, or because the number of charged offenses alone would impart an aura of guilt. **Cf. State v. Paschall,** 74 N.M. 750, 398 P.2d 439 (1965).

{33} The danger, however, of improperly influencing the fact-finder by these circumstances is not present in this case. The denial of a severance occurred after defendant had waived a jury and agreed to trial by the court. The trial court is presumed to have disregarded incompetent evidence, **Matter of Doe,** 89 N.M. 700, 556 P.2d 1176 (Ct. App.1976); defendant's acquittal on 10 counts of the indictment dispels any notion that the number of offenses charged disturbed the impartiality of the trial judge. **See State v. Sero,** 82 N.M. 17, 474 P.2d 503 (Ct. App.1970).

II.

A. **Evidence of Fraud**

{34} NMSA 1978, UJI Crim. 16.30 (Repl. Pamp.1982), sets forth the essential elements of fraud to be:

1. The defendant, by any words or conduct, [made a promise he had no intention of keeping] [misrepresented a fact] to [name of victim] intending to deceive or cheat [name of victim];

2. Because of the [promise] [misrepresentation] and [name of victim]'s reliance on it, defendant obtained [describe property or state amount of money];

3. This [property] belonged to someone other than the defendant; and

[4. The [property] had a market value of over ;

5. This happened in New Mexico on or about the day of, 19.

{35} The trial court made 78 separate findings of fact, many of those findings having several sub-parts. It appears from the findings regarding fraud that defendant's convictions on those counts were predicated upon his accessory status, incident to the initiatory misrepresentations by his secretary and other employee in the three transactions first described in this opinion, and defendant's participation in the misrepresentations made by those employee-applicants to the lending institutions. If sustained by the evidence, defendant's convictions as an accessory were not improper. **See** NMSA 1978 § 30-1-13; **State v. Wall,** 94 N.M. 169, 608 P.2d 145 (1980).

{36} Defendant's employees would have been ineligible for MFA loans if the MFA standards, guidelines and regulations had been formalized and adhered to. Significantly, the MFA regulations were not recorded as required by NMSA 1978, § 14-4-5, so as to give them validity and enforceability. Although there was ample evidence that defendant was a ground-floor participant in the MFA program, was a business partner of the chairman of MFA, was a longtime realtor and broker, knew the general credit requirements lenders demanded of home loan borrowers, and was aware that MFA funds were intended to be used for low income applicants who were creditworthy, we do not disregard the fact that the State's entire case was built upon charges of misrepresentations of the applicants regarding owner occupancy, income-debt ratio, and property values. All of those factors related to unenforceable MFA requirements. Defendant's actual knowledge of MFA's vacillating guidelines cannot elevate mere "policy" of MFA to the status of valid and binding regulations for which a conviction could be had if they were violated. **See State v. Joyce,** 94 N.M. 618, 614 P.2d 30 (Ct. App.1980), where conviction of criminal trespass based on violation of an invalid and unenforceable state agency's policy -- because not filed according to the State Rules Act -- was reversed with directions to discharge the defendant.

{37} The State argues that the trial court found the lenders had applied normal lending criteria, consistent with MFA criteria, to determine creditworthiness. The findings so reflect. But creditworthiness -- the income-debt ratio of the applicants -- was only one of the MFA requirements McCall's principals were found to have misrepresented. It cannot be doubted that the very core of the prosecution was accessory liability for violations of MFA criteria which led to obtaining "a thing of value... to wit, a low interest mortgage loan." The misrepresentations may have constituted one of the first elements of fraud, **see** U.J.I. Crim. 16.30, but they were not misrepresentations that constituted a violation of a statute, or of valid and enforceable rules or regulations so that, without more, they were criminal acts.

{38} Defendant persuasively argues that without a victim, there can be no fraud; and because of the way the MFA program operated, none of the alternative "victims" listed in the indictment were damaged. That is, the lenders suffered no damage because MFA bought and paid for the loans; MGIC was not damaged because it was paid premiums for insurance issued; MFA was not injured because its money went to the lending

institutions, not defendant, and it receives repayment from the borrowers. There was no evidence that any entity had suffered any losses on the three properties involved.

{39} Defendant correctly states the "generally accepted rule that a loss or injury in an essential element of the crime of obtaining a thing of value under false pretenses." Annot., 53 A.L.R.2d 1215, 2 (1957). It is essential to a civil claim for fraud that "fraud without damage or damage without fraud give no cause of action." **Bank v. Broyles,** 16 N.M. 414, 120 P. 670 (1911). However, because it frequently has been said that it is not necessary for a criminal conviction that the person alleged to have been defrauded shall have sustained a pecuniary loss, **e.g., State v. Hines,** 243 S.E.2d 782 (N.C. App.1978); **People v. Talbott,** 65 Cal. App.2d 654, 151 P.2d 317 (1944), the requirement for loss or damage, if money damages are missing, often has been glossed over or completely ignored in criminal prosecutions. The rule, however, still exists.

{40} It must be shown that the victim, in relying upon the defendant's false representation, suffered a loss or was otherwise prejudiced. But it is not necessary that the victim suffer actual pecuniary loss. The loss is suffered even though the victim incurs a mere conditional or future liability, as where it is based upon a negotiable instrument. The victim suffers no loss and the defendant is guilty of no crime if the victim received everything to which he was entitled under his agreement with the defendant.

{41} 3 Wharton's Criminal Law 498-500, 442 (C. Torcia 14th ed. 1981). At 3 H. Underhill's Criminal Evidence 1808, 792 (5th ed. 1957), the author likewise reminds that "[i]t must be proved beyond a reasonable doubt that the property obtained by the false pretenses had some value, and that the representations operated to injure or prejudice the person to whom they were made."

{42} The necessity for proof of loss or damage is emphasized by the language of New Mexico's jury instruction, **supra,** which calls for a "victim" in two of its essential elements. (**Cf.** CALJIC 14.10 (1979 Rev.) where references are to "other person" rather then to "victim.") It is true that many criminal offenses do not require that another be victimized by the wrongdoer, **e.g,** possession of controlled substances, switchblades, explosives; prostitution, driving while intoxicated, and others. But the New Mexico Supreme Court has decided, by the adoption of UJI 16.30, that this jurisdiction follows the general rule requiring loss or damage to a victim to sustain the crime of fraud.

{43} In **State v. Griffin** we held that "victim," in the context of New Mexico's restitution statute (NMSA 1978, § 31-17-1 (Repl. Pamp.1981)) as applied to securities fraud, could be a human being or a legal entity, but restitution could not be ordered unless the victim had suffered actual damage as a result of defendant's criminal activity. We are not here concerned with restitution, nor are we dealing with a statute that defines "victim," but when we give effect to the instruction which requires a victim, and examine for loss or damage to the one allegedly defrauded, the impact of **Griffin** cannot be wholly overlooked. In determining the meaning of an undefined word in an instruction, the Committee Commentary to UJI Crim. 1.08 states that "[t]he UJI avoids definitions of words which have an ordinary or common meaning." The statutory definition of NMSA

1978, § 31-17-1A, stated in **Griffin,** which identifies a victim as one who has suffered actual damage, does not differ significantly from the judicial definition of "victim": "A victim is defined as someone injured under any of various conditions." **Lister v. State,** 226 S.2d 238, 239 (Fla. App.1969). One of the dictionary definitions is: "Someone put to death, tortured, or mutilated by another: a person subjected to oppression, deprivation or suffering," applying to "anyone who suffers either as a result of ruthless design or incidentally or accidentally." Webster's Third New International Dictionary (1978 ed.) We are satisfied that "victim" has the common-sense meaning of one who has suffered injury or damage at the hands of or by reason of the conduct of another.

{44} Subparagraph 1 of the fraud instruction establishes as an element of the crime of fraud the necessity for proving that misrepresentation was made to the "victim." In this case, any and all misrepresentations were made to the lenders. There is no contention and there was no proof, and the court did not find, that those lenders suffered any losses in the three transactions upon which McCall was convicted. Indeed, the evidence was that MFA purchased the loans and the lenders were fully paid. The State argues that the institutions undertook greater risks than they would have if the true facts had been known, and they thereby suffered a detriment. That sophism ignores the prearranged agreement that MFA would purchase all loans advanced by participating lending agencies. In point of actual fact, the lenders undertook no risk at all. There likewise was an absence of proof that any of the entities allegedly defrauded sustained any damages as a result of the misrepresentations made or any reliance upon those misrepresentations.

{45} The Supreme Court of Kansas correctly assessed the element of loss almost a century ago in **State v. Palmer,** 50 Kan. 318, 32 P. 29, 30 (1893), and some of its language is especially applicable to the facts of the case now before us:

The mere obtaining of money under false pretenses does not alone constitute a crime. The money must be obtained to the injury of some one. Though money is obtained by misrepresentation, if no injury follows, no crime is accomplished. In this case the defendant was undoubtedly guilty of many flagrant misrepresentations and other dishonest acts; but if all such misrepresentations and dishonorable acts did not result in injury to [the victim], she cannot be convicted in this state simply because, upon the face of things, she is bad.... It will not do to convict on general principles because the evidence shows the defendant devoid of common honesty.

{46} Proof of misrepresentations by defendant's principals, without evidence of damage to any of the entities connected with the transactions alleged, is not enough. All of the elements of the crime charged must be proved before defendant can be found guilty of fraud. The State failed in such proof, and the convictions for fraud must be set aside.

B. **Evidence of Securities Fraud**

{47} Defendant presents three arguments for setting aside the securities fraud convictions. We find no merit in his contentions that the transactions were not "in

connection with an offer, sale or purchase of any security" which, if fraudulent, are prohibited by NMSA 1978, § 58-13-39, or that the crimes so prohibited do not apply to the securities or transactions here involved because they are exempted under other sections of the New Mexico Securities Act. The phrase "in connection with," as related to the statute, has not been interpreted in New Mexico. However, the United States Supreme Court has said that "connection" is construed broadly so that if fraud "touches" on the sale of security, the requisite connection exists. **Superintendent of Insurance v. Bankers Life and Casualty Co.,** 404 U.S. 6, 92 S. Ct. 165, 30 L. Ed. 2d 128 (1971). **Tully v. Mott Supermarkets, Inc.,** 540 F.2d 187 (3rd Cir.1976), requires that there be a causal connection between the fraud and the sale. In **Annot.,** 3 ALR Fed. 819 (1970), at 824, it is stated that the "in connection with" requirement is met when there is a purchase or sale in reliance on the fraud. Other federal cases to like effect may be found at notes 481 and 521 of 15 U.S.C.A. 78(j). Federal authority on federal statutes similar to state law is persuasive in New Mexico. **State v. Weddle,** 77 N.M. 420, 423 P.2d 611 (1967). If all the elements of fraud were met in this case, the transactions would fall within the definition of securities fraud because "in connection with an offer, sale or purchase of any security."

{48} Nor do the statutory exemptions of §§ 58-13-29 and -30 offer any aid to defendant. The exemptions are from registrations and fees for certain persons and securities; they are not exemptions from prosecution. **See** NMSA 1978, §§ 58-13-20, -30. But we do agree that if there was insufficient evidence of fraud, there could be no conviction for securities fraud.

{49} It is manifest, from the language of the criminal statute defining securities fraud, § 58-13-39A, that it is necessary to prove conduct that would constitute the crime of fraud before one may be found guilty of securities fraud. Securities fraud is statutorily defined by using the very terms "fraud" and "defraud." Even if the trial court based defendant's convictions of fraud on an accessory basis, the underlying claim of "fraud" of the principals was, still, directly or indirectly, "in connection with" an offer, sale, or purchase of those instruments which constituted "securities," as that word was defined in **State v. Sheets,** 94 N.M. 356, 610 P.2d 760 (Ct. App.1980). The notes given by the applicants created the very securities which constituted the foundation for the charges against defendant for securities fraud.

{50} Defendant's "accessory" participation at the applicants' stage in each transaction was merely the opening gambit in the completed acts which, if fraudulent, would have constituted fraud and securities fraud. **State v. Quintana,** 69 N.M. 51, 364 P.2d 120 (1961). The evidence used in an attempt to prove defendant's guilt of participation in the alleged charges of fraud was part and parcel of the same evidence that was used in attempting to prove his guilt in each crime of securities fraud. **See State v. Tanton,** 88 N.M. 333, 540 P.2d 813 (1975). Stated simply, one cannot be guilty of securities fraud if, in connection with the purchase, sale or offer of a security, he has not committed a **fraud** by any of the methods listed in § 58-13-39. The offense of securities fraud "necessarily involves" the offense of fraud. **See State v. Martinez,** 77 N.M. 745, 427 P.2d 260 (1967).

{51} All elements of a crime must be proven if a conviction is to be sustained. As we have already held, absent evidence of damage to a victim, fraud is not proven. Without proof of fraud, there is no proof of securities fraud. The convictions for securities fraud must also be set aside.

C. **Solicitation and Conspiracy**

{52} Defendant next claims that failure to prove the underlying elements of the crimes of fraud and securities fraud vitiates the crimes of solicitation and conspiracy to commit those crimes. We disagree; one may conspire to commit a crime without any success at all, and still be found guilty. **See State v. Lopez,** 81 N.M. 107, 464 P.2d 23 (Ct. App.1969). The offense of conspiracy is complete when the agreement is reached. **State v. Davis,** 92 N.M. 341, 587 P.2d 1352 (Ct. App.1978). It was not defendant's or his principals' fault that no injury or damage was suffered in this case so as to preclude convictions on the fraud and securities fraud counts; the evidence discloses their complete disregard for any detrimental consequences to others as a result of their misrepresentations. They conspired to obtain an advantage by misrepresentation even if others were injured or damaged in the process.

{53} Defendant urges further, however, that § 30-28-3(D) prohibits findings of guilt on charges of both solicitation and conspiracy. That subsection reads:

D. A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of criminal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or coconspirators, or the crime or crimes committed by the person solicited.

The above portion of the statute appears designed to handle the theory of merger. **See State v. Sandoval,** 90 N.M. 260, 561 P.2d 1353 (Ct. App.1977).

{54} The first sentence provides for no liability when the solicitation is necessarily incidental to the principal offense solicited. Thus, if the theory of defendant's guilt for the principal offense of fraud was that of accessory liability for fraud, and the trial court's findings sustain that supposition, solicitation would be necessarily incidental to the offense solicited and there could be no liability for solicitation.

{55} The second sentence provides that a person is "not guilty" of solicitation when the solicitation constitutes a felony offense other than criminal solicitation. Consequently, if the solicitation constitutes conspiracy, defendant would be guilty of the conspiracy and not of the solicitation.

{56} The third sentence provides that a person may be prosecuted for and convicted of all offenses in the situations covered by the first two sentences. This must mean that the prosecution need not make a pretrial or pre-instruction election; rather, all offenses may be submitted to the jury. The "no liability" or "not guilty" determinations contained in the first two sentences would then be made at the time of entering the judgment and sentence. Thus, one could not be separately sentenced for two offenses if his case fit within the first two sentences of § 30-28-3D. **See State v. Gallegos,** 92 N.M. 370, 588 P.2d 1045 (Ct. App.1978).

{57} There remains the question whether there may be adjudications of guilt when the offenses charged fall within the first two sentences. **See Gallegos; see also State v. Keener,** 97 N.M. 295, 639 P.2d 582 (Ct. App.1981). The first two sentences of subsection D provide that there may not be; the third sentence indicates that a defendant could be adjudicated guilty if "convicted" is defined as it was in **Keener.** But **Keener** arrived at its holding by an interpretation of the Rules of Evidence. Although such an interpretation is not required here, we do not see any barrier to a formal adjudication of guilt on both counts so long as there is no separate sentence on each count. A possible collateral consequence, **see Gallegos,** in terms of habitual liability if defendant were to later commit a crime, is avoided by the express terms of NMSA 1978, § 31-18-17 (Repl. Pamp.1981), since the solicitation convictions here are part of the same transactions related to the other offenses charged.

{58} Nonetheless, defendant is entitled to relief under § 30-28-3(D). He was adjudicated guilty on two counts of solicitation to commit fraud; at the same time, he was adjudicated guilty on the fraud and conspiracy to commit fraud counts. Even though we reverse the fraud convictions for failure of the State to prove and the court to find an essential element of fraud (injury, loss, or damage), defendant could not be liable even as an accomplice for criminal solicitation because of the first sentence of § 30-28-3(D). But since the solicitation also constituted a conspiracy, not dependent on guilt of fraud, defendant properly could be adjudged guilty of conspiracy and not of solicitation under the second sentence of the same subsection.

III.

A. **Sentences for Fraud, Security Fraud, Solicitation and Conspiracy**

{59} The trial court assessed fines of $5,000 or $10,000 on each of the 11 counts on which defendant was found guilty. Additionally, imprisonment ranging from 18 months to 9 years was imposed on each guilty court, all sentences to run concurrently. As to each count, all but 6 months was suspended; payment of the aggregate of the fines in excess of $40,000 was also suspended. The total fines of $70,000 would become payable by defendant, however, upon breach of any condition of probation. The probation conditions were made terms and conditions of the suspended sentences. The possible liability for payment of $70,000 in fines is not consistent with our reversal of eight convictions carrying fines totaling $55,000, nor with the provisions of § 30-28-3(D) regarding the prohibition against double sentencing for solicitation and conspiracy.

{60} Therefore, the sentences of imprisonment and the fines assessed for fraud, securities fraud, and solicitation must be vacated.

B. **Disparity of Sentences Imposed**

{61} As a final argument, defendant calls our attention to sentences imposed by other divisions of the Second Judicial District Court upon defendants convicted of similar MFA-related offenses, and asks us to set aside the sentences and fines in this case on grounds that the trial court abused its discretion and, consequently, denied defendant's right to due process.

{62} We allowed defendant to supplement the appellate record by filing the record of dispositions in other divisions of the Second Judicial District, relating to ten other MFA cases. That record discloses that, on nolo contendere or guilty pleas, some defendants were fined and others were required to "make restitution" (**see State v. Steele,** 22 SBB 895 (Ct. App.1983), but that seven defendants received deferred sentences of imprisonment, and the remaining three were given wholly suspended sentences. Defendant was the only person accused of a like crime who went to trial, and the only defendant among those charged who was sentenced to serve any period of incarceration. In his brief, defendant says the other ten dispositions (or most of them) were submitted for the trial judge's consideration prior to defendant's sentencing. We do not have a record before us of the sentencing proceedings, but the State does not dispute defendant's representation in that regard. **But see State v. Duran,** 91 N.M. 756, 581 P.2d 19 (1978), and **State v. Padilla,** 95 N.M. 86, 619 P.2d 190 (Ct. App.1980).

{63} Defendant relies on two Illinois cases to urge that we compare the imprisonment sentence he received with the deferred or totally suspended sentences imposed on the other defendants convicted of the same crimes. The authority for such an appellate review in Illinois, toward the end of reducing a sentence imposed by the trial court, stems from its S. Ct. Rule 615(b)(4), Ill. Rev. Stat. ch. 110A, para. 615(b)(4) (1979). New Mexico does not have a parallel rule; this court has no such authority to **reduce** a lawful sentence imposed. On rehearing, we are urged to consider the decision of the United States Supreme Court in **Solem v. Helm,** 51 U.S.L.W. 5019 (U.S. June 28, 1983), wherein the Court held that a claim of cruel and unusual (and, therefore, unconstitutional) punishment may be gauged by objective criteria distilled to "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 51 U.S.L.W. at 5023. We have previously held that if a sentence imposed accords with the law regarding sentencing, it is not an abuse of discretion for the trial court to impose the lawful sentence allowed. **See State v. Augustus,** 97 N.M. 100, 637 P.2d 50 (Ct. App.1981), and cases therein cited. In the absence of abuse of discretion, the claim of due process violation would also fall. **State v. Mabry,** 96 N.M. 317, 630 P.2d 269 (1981), held that a lawful sentence of imprisonment is not excessive as a matter of law. Under those New Mexico decisions prior to **Helm,** it could hardly be excessive, then, if a portion of the time imposed were suspended, as was done here.

{64} We observe, however, that the trial court will be required to vacate eight convictions and eight fines upon remand of this case. It will then become the trial court's obligation at that time to reconsider the conditions and nature of the sentences imposed, in view of our reduction of the number of convictions upon which fines and terms of sentences may operate and, as **Helm** directs, in view of the gravity of defendant's offenses and the dispositions made by other judges in similar cases in the same jurisdiction.

{65} The matter remanded to the trial court to vacate the convictions and the fines and terms of incarceration imposed on Counts, I, II, IV, X, XI, XIII, XVII, and XVIII, and to otherwise modify the judgment and sentence in accordance with this opinion.

{66} IT IS SO ORDERED.

WE CONCUR: Ramon Lopez, J., C. Fincher Neal, J.