Thus Far and No Further: The New Mexico Supreme Court's Failure to Expand the Rights of the Criminally Accused Beyond Search and Seizure Under the State Constitution

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Thus Far and No Further: The New Mexico Supreme Court's Failure to Expand the Rights of the Criminally Accused Beyond Search and Seizure Under the State Constitution
INTRODUCTION

The New Mexico Supreme Court has at once been both proactive and conservative in expanding the rights of the accused under the State Constitution. In the field of search and seizure, the Court has been extremely active in heeding Justice Brennan's call to the states to expand liberties under state constitutions. Article II, Section 10 of the New Mexico Constitution, the search and seizure provision paralleling the Fourth Amendment, has been given an interpretation significantly broader than its federal counterpart. The New Mexico courts have gone out of their way to depart from federal precedent in numerous areas including rejecting the Gates totality of the circumstances test for finding probable cause in a warrant, the Leon good-faith exception, the vehicle and border checkpoint exceptions, the public arrest standard, and the standard for public school searches.

Through this jurisprudence the Court has articulated standards for when to depart from federal precedent and how to raise and preserve an argument that the state constitution provides more protection than the federal. At times, the court has gone to great lengths to disagree with and criticize the U.S. Supreme Court for its parochial view of the right to be free from unreasonable search and seizure and has expressed no qualms

in departing from federal precedent. The court has even used these greater protections to
exclude evidence sought to be introduced in state court that was seized by federal
agents—effectively eliminating any silver platter doctrine.

Interestingly, at the same time, the court has failed to expand other rights of the
accused with few exceptions. The inconsistency in the Court’s dogged insistence on
expanding search and seizure rights and its persistent refusal to expand rights in other
areas of criminal procedure is striking. That the Court has only recently expanded rights
in the area of search and seizure, yet refused to in other areas, is equally baffling.

This paper seeks to explore some of the reasons why this dichotomy has occurred
and offers a few strategies to argue for expansion in three other areas. These include the
privilege against self-incrimination, the right to counsel, and the right to confrontation.
These subjects were chosen because they have, from time to time, been identified as
some of the more fundamental rights possessed by the accused. Perhaps not unrelated,
they also appear to have the largest effect on the guilt-innocence determination—the
ultimate determination to be made in a criminal case.

Part I will discuss the Court’s expansion in the area of search and seizure.
Concomitant to the Court’s expansion in this field, has been the development of the
procedure for arguing for expansion, including the proper method for raising and
preserving a state constitutional claim. Part II will overview the Court’s current positions
on a few selected subcategories of each of the three categories mentioned above. Finally,

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2 The Court has done some minimal expansion in the areas of double jeopardy, see State v. Breit, 122 N.M. 655, 930 P.2d 792, and jury trial rights for juveniles. See Peyton v. Nord, 78 N.M. 717, 724, 437 P.2d 716, 723 (1968).
Part III will explore possible arguments and strategies for persuading the Court to expand these rights and depart from its propensity to be in lock step with federal precedent.

I. NEW MEXICO’S INDEPENDENT SEARCH AND SEIZURE JURISPRUDENCE

Article II, Section 10 of the New Mexico Constitution provides:

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

It was not until 1989, in *State v. Cordova*, that the New Mexico Supreme Court first departed from federal precedent reading this provision more broadly than its federal counterpart, the Fourth Amendment. However, it would not be until almost four years later when the Court handed down *State v. Gutierrez*, the case that was the catalyst for departing from federal search and seizure jurisprudence. The procedure for departing from federal precedent under the New Mexico Constitution and raising and preserving the issue properly was only recently set out seven years ago, in *State v. Gomez*.

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4 The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Although, New Mexico’s provision differs slightly from the federal provision, the Court has not largely relied on textual differences in expanding search and seizure rights under the state constitution.


Nevertheless, the Court has made numerous departures from federal precedent in the last fifteen years.


In *State v. Cordova*, the New Mexico Supreme Court departed from federal search and seizure jurisprudence for the first time. Under established Fourth Amendment law, when an affidavit is used in an application for a search warrant, the affidavit must contain sufficient facts to allow the reviewing magistrate to independently determine if probable cause exists to issue the warrant. All too often, those affidavits rely on confidential police informants (CI) to demonstrate the existence of probable cause. To satisfy the probable cause requirement in an affidavit based wholly or in part on hearsay provided by a CI, the United States Supreme Court developed what came to be known as the *Aguilar-Spinelli* test based on *Aguilar v. Texas*, and *Spinelli v. United States*. In order for such an affidavit to be constitutional, the test requires the magistrate

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9 *Cordova*, 109 N.M. at 213, 784 P.2d at 33. This of course preserves one of the fundamental requirements of the Fourth Amendment that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation...." U.S. Const. Amdt. 4.

10 *Cordova*, 109 N.M. at 213, 784 P.2d at 33.


be provided with some of the underlying circumstances that demonstrate (1) the CI’s basis of knowledge, and (2) how the officer determined the CI was credible or truthful.\(^\text{13}\)

The U.S. Supreme Court overruled the *Aguilar-Spinelli* test in *Gates v. Illinois*,\(^\text{14}\) in favor of a totality of the circumstances test. Under the *Gates* analysis, the basis of knowledge and veracity or credibility determinations are still important factors, but law enforcement no longer is required to meet both prongs in order to satisfy the probable cause requirement.\(^\text{15}\) The Court changed the standard based on its belief that lower courts were applying the two-prong *Aguilar-Spinelli* test too rigidly.\(^\text{16}\) This, the Court believed, was inconsistent with the probable cause standard of the Fourth Amendment, which is a “fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”\(^\text{17}\)

Prior to *Gates*, New Mexico followed *Aguilar-Spinelli*. After *Gates*, the New Mexico Supreme Court used *Cordova* to determine whether *Gates* or *Aguilar-Spinelli* would apply to affidavits based on CI hearsay information.\(^\text{18}\) In making this determination, the court found the primary reason for abandoning *Aguilar-Spinelli* in *Gates*—the overly rigid and technical application of the two prong test—had not proved

\(^{13}\) *Cordova*, 109 N.M. at 213, 784 P.2d at 33. These requirements are commonly referred to as (1) the basis of knowledge test, and (2) the veracity or credibility test. *Id.*


\(^{15}\) *Cordova*, 109 N.M. at 215, 784 P.2d at 34.

\(^{16}\) *Id.*

\(^{17}\) *Gates*, 462 U.S. at 232; see also *Cordova*, 109 N.M. at 215, n. 6, 784 P.2d at 34 (explaining that based on this rigidity, the Court believed the value of anonymous tips in would be diminished and officers may resort to warrantless searches).

\(^{18}\) *Cordova*, 109 N.M. at 212, 784 P.2d at 32.
to be true in New Mexico.\textsuperscript{19} The court cited numerous cases evincing its practical, common sense oriented, and deferential approach to determining the existence of probable cause under these circumstances.\textsuperscript{20} Further, the court noted:

\textit{We believe these principles to be firmly and deeply rooted in the fundamental precepts of the constitutional requirement that no warrant issue without a written showing of probable cause before a detached and neutral magistrate.}\textsuperscript{21}

Accordingly, the court concluded the \textit{Aguilar-Spinelli} test "better effectuat[ed] the principles behind Article II, Section 10... than does the 'totality of the circumstances' test set out in Gates."\textsuperscript{22}

While \textit{Cordova} marked the first departure from federal precedent, \textit{State v. Gutierrez}\textsuperscript{23} was the springboard for the court's rampant departure from federal search and seizure jurisprudence. \textit{Gutierrez} rejected the U.S. Supreme Court's so-called good faith or \textit{Leon} exception.\textsuperscript{24} This exception, adopted in \textit{United States v. Leon}\textsuperscript{25} allows evidence to be admitted at trial that was seized pursuant to an invalid warrant, so long as the officers who seized the evidence relied on the warrant in good faith.\textsuperscript{26} In short, although

\begin{itemize}
\item \textsuperscript{19} \textit{Id.} at 216, 35.
\item \textsuperscript{20} \textit{Id.} The court also noted that New Mexico's rules do not encourage rigid application for instance, when an affidavit contains information from a highly credible CI, but fails to show the CI's basis of knowledge. \textit{Id.} Instead, in close cases like this, the rules encourage the magistrate to extract further information either from the officer or by calling the CI as to testify. \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 217, 36. The court was careful to note this holding was pursuant to its role in interpreting the state constitution. \textit{Id.} It went on to hold the affidavit in that case to be insufficient for failure to adequately demonstrate the CI's basis of knowledge. \textit{Id.}
\item \textsuperscript{23} 116 N.M. 431, 863 P.2d 1052 (1993).
\item \textsuperscript{24} \textit{Id.} at 447, 1068.
\item \textsuperscript{25} 468 U.S. 897 (1984).
\item \textsuperscript{26} \textit{Id.}
\end{itemize}
the warrant is lacking sufficient facts to establish probable cause, if “it was
understandable for a reasonably well-trained officer... to think that the warrant
application comported with the requirements of the Fourth Amendment,” then the
evidence seized will not be suppressed.\textsuperscript{27} The decision was premised on the Court’s
understanding of the nature of the exclusionary rule.\textsuperscript{28} The Court stated that the
exclusionary rule was not a “necessary corollary of the Fourth Amendment,” but rather is
solely for the purpose of deterring misconduct among law enforcement.\textsuperscript{29} Accordingly,
once an invalid warrant has issued and been executed by an officer acting in good faith,
the exclusionary rule serves no purpose.\textsuperscript{30} Penalizing one who has acted in good faith
can have no deterrent effect on future misconduct.\textsuperscript{31}

To determine if the good-faith exception should apply under the state constitution,
the New Mexico court first examined its own jurisprudence with regard to the
exclusionary rule.\textsuperscript{32} Interestingly, New Mexico refused to adopt the federal exclusionary
rule until it was applied to the states through the Fourteenth Amendment in \textit{Mapp v.
Ohio}.\textsuperscript{33} Subsequently, the court interpreted the state constitution in lock step with the

\textsuperscript{27} Gutierrez, 116 N.M. at 437, 863 P.2d at 1058 (internal quotations and citations omitted).

\textsuperscript{28} Id.

\textsuperscript{29} Id. at 437-38, 1058-59. Although the U.S. Supreme Court has previously relied on preserving judicial
integrity as well as deterrence as justifications for the exclusionary rule, it is clear that deterrence is now the
predominant focus.

\textsuperscript{30} Leon, 468 U.S. at 920-21.

\textsuperscript{31} Id.

\textsuperscript{32} See Gutierrez, 116 N.M. at 438, 863 P.2d at 1059.

\textsuperscript{33} 367 U.S. 643 (1961). Even after \textit{Mapp}, New Mexico “grudgingly” accepted the exclusionary rule.
\textit{Gutierrez}, 116 N.M. at 439, 863 P.2d at 1060 (noting that New Mexico acknowledged \textit{Mapp}, but in each
case found a reason why the evidence would not be suppressed).
federal interpretations of the U.S. Constitution until Cordova. In discussing its opinion in Cordova, the Gutierrez court emphasized that the decision to depart from federal precedent was based on its belief that the Aguilar-Spinelli test reflected fundamental principles and precepts of the state constitution’s search and seizure requirements. It appeared, therefore, in light of Cordova, that although the court had not interpreted Article II, Section 10 differently than the Fourth Amendment from 1911 up until 1989, it was willing to give this provision an independent interpretation.

The court next attempted to ascertain the Framers’ intent with regard to Article II, Section 10 to determine whether any exclusionary rule was intended. It went through a tortured analysis, examining search and seizure law at the time the constitution was made in 1911. Unfortunately, the court could not come to any definitive conclusions about what the Framers’ intended with regard to exclusion of evidence, concluding the most reasonable inference is that they left it to the courts to make this interpretation.

Against this background, the court, relying in part on interpretation of similar provisions in sister states, held the exclusionary rule was included within the right to be free from unreasonable search and seizure. The court was clear that the exclusionary rule was not a judicial remedy, but a necessary part of the right. The Framers’ did not

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34 Gutierrez, 116 N.M. at 440, 863 P.2d at 1061.

35 Id.

36 See id. at 442-43, 1063-64.

37 Id. at 443-44, 1064-65.

38 Id. at 445, 1066.

39 Id.
intend to create a mere "code of ethics under an honor system." Thus, the exclusionary rule is necessary to "effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure." The court believed the exclusionary rule was simply a form of judicial review over executive conduct. It explained:

The right to be free from unreasonable searches and seizures is in a sense a passive right, unlike the active rights of free speech and free exercise of religion. It is perhaps this nature of the right and the context in which it arises that make troublesome judicial review of violations... When a court finds the government has unconstitutionally restricted a person's speech, the court orders the restraint lifted and enjoins further restraint... Once a violation of Article II, Section 10 has been established, we do no more than return the parties to where they stood before the right was violated.

Thus, just as lifting a restraint on speech is not a mere judicial remedy, neither is excluding evidence seized in violation of constitutional search and seizure requirements.

The good-faith exception cannot survive in a judicial environment that gives constitutional status to the exclusionary rule. It is incompatible with the notion that the exclusionary rule effectuates the right in the pending case. As the focus of the right is properly on the individual, it matters not what motive the officer, or anyone else had when that individual's rights were violated. Once a violation has occurred, the only

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40 Id.

41 Id. at 446, 1067 (citing Thomas S. Schrock & Robert C. Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 324-26 (1974) (suggesting that the exclusionary rule is simply another name for judicial review of executive conduct)).

42 Id.

43 Id.

44 Id.

45 Id. at 447, 1068.
proper thing to do, as a judiciary bound to review the actions of the executive and legislative branches, is exclude the evidence.

B. **State v. Gomez: The Process for Arguing for A Departure from Federal Precedent.**

*Gutierrez,* expanding on the seed planted in *Cordova,* laid the theoretical and legal foundation for departing from federal search and seizure precedent. If *Gutierrez* can be seen as the foundation, *State v. Gomez* is the structure built on that foundation. It not only expanded Article II, Section 10 further beyond its federal counterpart, but it laid out the procedural requirements for raising, preserving, and arguing any departure from federal precedent based on state constitutional grounds.

In *Gomez,* the court considered whether Article II, Section 10 allowed for a so-called “vehicle exception” to warrantless searches of automobiles, as the U.S. Supreme court had so interpreted for the Fourth Amendment. Typically, under federal law, in order to perform some type of search on officer needs probable cause and either a warrant or an exigent circumstance permitting a warrantless search. With respect to automobiles, the U.S. Supreme Court has held that an officer may search any lawfully stopped vehicle and closed containers within the vehicle if the officer has probable cause that a seizable item will be found. This bright-line exception is founded on two

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47 *Gomez,* 1997-NMSC-006, ¶ 1, 122 N.M. at 779, 932 P.2d at 3.

48 An exigent circumstance has been defined as “an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall imminent escape of a suspect or destruction of evidence. *State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct. App. 1986).

suppositions: (1) the inherent mobility of automobiles creates exigent circumstances, and (2) there is a lesser expectation of privacy in the contents of motor vehicles because of pervasive regulation.\(^{50}\)

In rejecting a bright-line vehicle exception the court noted that since 
\textit{Cordova}, it has given independent meaning to Article II, Section 10.\(^{51}\) It further noted that in this independent interpretation, the court has given strong preference for warrants.\(^{52}\) In the context of a vehicle search, warrants are preferable because they inject "a neutral magistrate into the process of searching a vehicle or containers within it...[which] provides a layer of protection from unreasonable searches and seizures."\(^{53}\) To overcome this stringent warrant requirement and conduct a warrantless search of an automobile, the circumstances must be such that a reasonably well-trained officer would believe an exigency exists.\(^{54}\) The court refused to create a bright-line exception, preferring instead that each case be decided based its own set of facts and circumstances. Indeed, the court departed from federal precedent because it disagreed with the application of bright-line

\(^{50}\) Gomez, 1997-NMSC-006, ¶ 34.

\(^{51}\) Id. at ¶ 35.

\(^{52}\) Id. at ¶ 36. There is great debate among scholars and jurists as to the intent of the Framers of the Bill of Rights regarding the use of warrants. Some believe the Framers meant warrants to always be used absent emergency circumstances, while others contend the warrant clause in the Fourth Amendment was designed solely to eradicate the general warrant. \textit{See generally}, Akhil Reed Amar, \textit{Fourth Amendment First Principles}, 107 Harv. L. Rev. 757 (1994); Thomas Y. Davies, \textit{Recovering the Original Fourth Amendment}, 98 Mich. L. Rev. 547 (1999); Joseph D. Grano, \textit{Rethinking the Fourth Amendment Warrant Requirement}, 19 Am. Crim. L. Rev. 603 (1982).

\(^{53}\) Gomez, 1997-NMSC-006, ¶ 38. The magistrate acts as a buffer between the law enforcement officer and the citizen subject to search and prevents the competitive aspects of crime fighting from compromising the officer's judgment. \textit{Id.}

\(^{54}\) Id. at ¶ 40.
rules in light of the “fact-specific nature of the reasonableness inquiry.” The U.S.
Supreme Court’s automobile exception was thus at odds with the overarching principle
behind the freedom from unreasonable searches and seizures.

The Gomez court’s departure from the federal automobile exception marked an
important expansion of state constitutional rights. Equally, important was the second
issue of determining the necessary steps to raising and preserving a state constitutional
claim as well as adopting an analytical approach used to determine if departure from
federal precedent is warranted.

The court first dealt with the proper analytical approach to determine if departure
is warranted. State constitutional interpretation can be classified into three approaches:
(1) lock-step, (2) primacy, or (3) interstitial. A state court using the lock-step approach
will simply follow federal precedent in interpreting its own constitution and refuse to
expand state constitutional rights beyond those of the federal. The primacy approach
holds that a state court will look first to its own constitution and precedent to determine if
the right asserted is protected. If the right is protected, the court need not examine the
federal question. Conversely, under the interstitial approach, the court looks first to

55 Id. at ¶ 45, (quoting Ohio v. Robinette, 519 U.S. 33 (1996) (preferring totality of circumstances approach
over any “litmus paper test” in recognition of the infinite variations in the facts and circumstances
surrounding a search and/or seizure)).

56 While research reveals that the court has not strictly followed this approach, as will be argued in this
paper, supra, using the court’s approach makes for better argument for expansion in areas where the court
has yet to do so.

57 Gomez, 1997-NMSC-006, ¶ 18; see generally Shirley S. Abrahamson, Criminal Law and State
Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141 (1985) (discussing
approaches).


59 Id.
federal law. If federal law protects the right being asserted, the state court will not look to its own constitution. On the other hand, if federal law does not protect the right, then the court will conduct an independent examination to assess whether its state constitution should provide more protection. Noting its recent abandonment of the lock-step approach, the court adopted the interstitial approach as the most effective way to maintain national uniformity while still providing for independent state constitutional rights.

Accordingly, the interstitial approach informed the procedure for properly raising and preserving a claim. If there is established case law that interprets a provision of the state constitution more broadly, the claim is preserved by asserting the state constitutional principle sought to be applied and showing the factual basis needed for the trial judge to rule on the issue. If a litigant is claiming a right that has not been interpreted more broadly than its federal counterpart, then “a party also must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision.” The court refused to require the party cite specified criteria for departing from federal precedent. Significantly, however, the court cited three reasons for departing from federal precedent under the interstitial approach: (1) a flawed

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60 Id. at 19.
61 Id.
62 Id.
63 Id. at ¶ 21.
64 Id. at ¶ 22.
65 Id. at ¶ 23.
66 Id. at ¶ 23, n. 3 (noting that other states do have such a requirement).
federal analysis, (2) structural differences between state and federal government, or (3) distinctive state characteristics. 67


In a prime example of its willingness to expand the search and seizure protections afforded under the state constitution, the court held that evidence sought to be introduced in state court that was seized by federal agents legally under the Fourth Amendment, but illegally under Article II, Section 10, will be suppressed. 68 This holding was premised on the Gutierrez opinion’s declaration that Article II, Section 10 “is an expression of the fundamental notion that every person in this state is entitled to be free from unwarranted government intrusion.” 69 Therefore, federal agents who exercise jurisdiction over New Mexico inhabitants should not be free to violate those inhabitants state constitutional rights. 70 While the court found that it could not control the actions of federal agents or constrain them in any way, it does possess the authority and has the duty to prevent

67 Id. at ¶ 19. As discussed, supra, the court departed from the federal vehicle exception viewing it as inconsistent with the case-by-case reasonableness approach generally used in search and seizure analysis. Thus, Gomez provides a good example of a departure based on a flawed federal analysis. See also Cordova, 109 N.M. at 216, 784 P.2d at 35 (departing for distinctive state characteristics); Gutierrez, 116 N.M. at 445, 863 P.2d at 1066 (same); State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 51, 130 N.M. 386, 407, 25 P.3d 225, 246 (Baca, J., concurring in judgment) (stating that when specific textual differences exist between the state and federal constitution, departure is warranted for “structural differences between the state and federal government”).

68 Cardenas-Alvarez, 2001-NMSC-017, ¶ 18.

69 Id. (emphasis added). The court also relied on the purpose behind the exclusionary rule—to “effectuate in the pending case the constitutional right of the accused to be free from unreasonable searches and seizures.” Id.

70 Id.
evidence that is seized in violation of the state constitution from being used in state court.\footnote{Id. at ¶ 19.}

\textit{Cardenas-Alvarez} marked yet another departure from federal precedent regarding searches and seizures of automobiles. The court held the New Mexico constitution required that after Border Patrol agent at a fixed border checkpoint has asked about a motorist’s citizenship and has reviewed the motorist’s documents, any further detention requires reasonable suspicion of criminal activity.\footnote{Id. at 20.} Under the federal analog, a lesser standard was used.\footnote{See State v. Cardenas-Alvarez, 2000-NMCA-009, ¶ 12, 128 N.M. 570, 574, 995 P.2d 492, 496.} To prolong a stop beyond the routine citizenship and vehicle documents inquiry, an agent must believe “suspicious circumstances” exist.\footnote{Id.}

\section*{II. NEW MEXICO’S LOCK-STEP CRIMINAL PROCEDURAL RIGHTS JURISPRUDENCE}

In marked contrast to the New Mexico court’s willingness to independently interpret Article II, Section 10, other fundamental rights of the accused have been interpreted in lock step with federal precedent. Although this paper will only cover a few subcategories of the privilege against self-incrimination, the right to counsel, and the right to confrontation, other important areas of criminal procedure have also been interpreted in lock step with their federal analogs. This section will briefly cover the court’s current positions on the selected subcategories. There is very little in the way of reasoning as to why the court has refused to depart, as the issue is either not addressed or the court simply acknowledges its refusal to depart without stating its reasons.

\footnote{Id. at ¶ 19.}

\footnote{Id. at 20.}

\footnote{See State v. Cardenas-Alvarez, 2000-NMCA-009, ¶ 12, 128 N.M. 570, 574, 995 P.2d 492, 496.}

\footnote{Id.}
A. The Privilege Against Self-Incrimination: Involuntary Statements and Miranda Rights.

Article II, Section 15 of the New Mexico Constitution provides: “No person shall be compelled to testify against himself in a criminal proceeding....” Similarly, the Fifth Amendment to the U.S. Constitution reads: “No person...shall be compelled in any criminal case to be a witness against himself....” In Miranda v. Arizona, the U.S. Supreme Court held that in order to effectuate this right and prevent police coerciveness which may lead to a confession given involuntarily, the police must inform an accused who is in custody, prior to questioning, of his or her right to remain silent, the right to have an attorney present during questioning, and that an attorney will be provided by the state if the accused cannot afford one.

In implementing Miranda, many questions arise as to when an accused is in custody, when the right has been asserted, when the right has been waived, and when the right has been violated. This author found no case where the New Mexico courts departed from federal precedent in these areas. Indeed, the courts have been in lock step with federal precedent.76

Not unrelated to the protections provided by Miranda, the U.S. Supreme Court has also held that involuntary or coerced statements cannot be introduced at trial as they violate the Fifth Amendment self-incrimination clause as well as due process.77 The Court, however, will not reverse a conviction where such a statement was introduced

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76 See e.g. State v. Gutierrez, 119 N.M. 618, 894 P.2d 395 (Ct. App. 1995) (holding that Fifth Amendment and Article II, Section 15 both require a defendant to claim the privilege in order for him to be “compelled” within the meaning of those provisions).
against a defendant if the government can prove beyond a reasonable doubt that the erroneous admission of the confession did not affect the trial outcome. This harmless error analysis is the subject of much criticism and skepticism as to its accuracy. Once again, the New Mexico courts have followed this harmless error rule in lock step with the U.S. Supreme Court.

B. The Right to Counsel: Effective Assistance.

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence.” Its state counterpart, Article II, Section 14 provides: “In all criminal prosecutions, the accused shall have the right to... defend himself... by counsel.” The U.S. Supreme Court has held that the right to assistance of counsel means an accused must have effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel under both the state and federal constitutions an accused must show his or her “counsel’s performance fell below the standard of a reasonably competent attorney and, due to the deficient performance, the defense was prejudiced.” Prejudice is shown if there is a reasonable probability that, but for the errors, the jury would have had a reasonable doubt

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79 See Charles J. Ogletree, Jr., Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions, 105 Harv. L. Rev. 152 (1991); Saul M. Kassin & Holly Sukel, Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule, 21 Law & Hum. Behav. 27 (1997) (finding in studies of mock jurors that a confession increases the conviction rate, even when jurors treated it as coerced and claimed it had no effect on their verdict).


82 Crislip, 109 N.M. at 353, 785 P.2d at 264.
of the defendant’s guilt.83 Once again, New Mexico uses the same test for establishing ineffective assistance as is used by the Supreme Court.84

C. The Right to Confrontation: Out of Court Statements.

The Sixth Amendment to the U.S. Constitution and Article II, Section 14 of the New Mexico Constitution both provide the accused with the right to confront and cross-examine their accusers. The Clause’s ultimate goal is to “ensure reliability of evidence... but... [i]t commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”85 The U.S. Supreme Court recently altered its Confrontation Clause jurisprudence with regard to out of court statements. They held that out of court statements that are testimonial are barred from use at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine.86 The New Mexico Supreme Court has refused to interpret the state Confrontation Clause any more broadly than the federal with regard to out of court statements.87

III. ARGUING FOR EXPANSION BASED ON THE GUTIERREZ FUNDAMENTAL RIGHTS NOTION

There are several strategies to argue for an expansion from federal precedent under the New Mexico Constitution. First, however, it is absolutely essential that the

83 Id. at 354, 265; Strickland, 466 U.S. at 695.
86 Id. at 1369.
87 State v. Alvarez-Lopez, 2004-NMSC-030, ¶ 6, 98 P.3d 699, 703 (stating, without explanation, that they would not interpret the state Confrontation Clause wider than its federal counterpart).
accused properly preserve the state constitutional claim as provided in Gomez. As Gomez requires, if the court has not expanded on the right presently being asserted, the accused must assert the right sought to be protected, establish a factual basis for the claim and assert, in the trial court that the state constitutional provision should be interpreted more expansively than its federal counterpart and provide reasons for interpreting the state provision differently from the federal provision.\footnote{See Part I-B, supra.}

It is this final requirement—providing reasons for interpreting the state provision more broadly than the federal—where parties likely fail to provide persuasive grounds for departure. There are, however, many different approaches and strategies for doing so. For instance, if the text differs in a significant way from its federal analog there may be an argument for broader protections.\footnote{One example is many state constitutions instead of using the standard privilege against self-incrimination language, will provide that “no person is required to give evidence against himself.” Thus, an argument that this encompasses more than just statements or testimony may be successful.} A unique history of the state constitution may also provide fertile grounds for argument. This history can be found in historical records, books, law reviews, newspaper articles, and other reliable sources.\footnote{See Jennifer Friesen, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS CLAIMS AND DEFENSES, Volume I, 1.8(d) (3d ed. 2000) (hereinafter Friesen Treatise).} Related case law from sister states can be persuasive authority for expansion; however, over reliance on sister states, especially where the decision is based on textual or historical differences which are not present in New Mexico, may undermine this approach.\footnote{Id.} Finally, Gomez provides three reasons for departing from federal precedent under the interstitalism
approach: a flawed federal analysis, structural differences between state and federal
government, or distinctive state characteristics.

While these strategies may have varying success, they can be profoundly more
fruitful when used through the vehicle of the fundamental rights notion. *Gutierrez* and its
search and seizure progeny provide the groundwork for a fundamental rights expansion
argument. The overriding premise of any argument for expansion should be based on the
notion that the right sought to be protected is fundamental. The court’s role in protecting
this right is not merely an instrumental approach, but a guardian of rights function. The
reason for expanding, therefore, is not a different history or text, or a flawed federal
analysis, but rather is because the right is fundamental and the court has a duty to ensure
the protection and effectuation of that right. Discussions regarding sister states’
approaches or flawed analyses would only be used to show the court why the right is or is
not being protected or effectuated.

The *Gutierrez* court was able to establish its responsibility and duty to interpret
the New Mexico Constitution to ensure the fundamental rights it provides are protected
because it determined the Framers’ of the state constitution intended this to be the Court’s
role. In *Gutierrez*, the court was speaking to the use of the exclusionary rule as
constitutionally required to effectuate the protection from unreasonable search and
seizure, but this can be expanded to other fundamental protections provided to the
accused.

A. The Privilege Against Self-Incrimination
This privilege “reflects many of our fundamental values and most noble aspirations.” It marks “an important advance in the development of our liberty—‘one of the great landmarks in man’s struggle to make himself civilized.’” Indeed, “the sovereign intrudes on a narrow autonomous sphere when it encourages self-harming self-accusation.” At the core of the privilege is society’s “unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.” In other words, an accused forced to testify will have to choose between incriminating himself and facing punishment, lying and facing a perjury prosecution, or refusing to answer and facing contempt charges.

*Miranda* was premised on the notion that in custodial interrogations coercion and police pressure may entice a defendant to incriminate himself. The *Miranda* warnings were therefore necessary to prevent a defendant from involuntarily incriminating himself and to remedy the inequities between police and the accused in a custodial interrogation setting. However, interrogations that take place when an accused is not “in custody” can have equal amounts of coercion and pressure. Further, any statements given to police during non-custodial interrogation are admissible at trial to be used against the accused.

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No state has yet to require *Miranda* warnings for non-custodial interrogations, but it seems such interrogations, under some circumstances, would implicate the fundamental precepts of the privilege against self-incrimination just as much as custodial interrogations. If the appropriate factual circumstances arose, especially where a non-custodial interrogation was particularly coercive, it may be appropriate to argue that the state constitution requires a *Miranda*-type warning. It should not matter that the accused is not legally in custody if the purposes behind the privilege are implicated. From a fundamental rights perspective, the court has the duty to ensure the privilege can be effectuated and in some non-custodial cases, this may require a *Miranda* warning.

One area where some states have departed from federal precedent is in determining if an accused has invoked his right to have counsel present during questioning. Under federal law, if a suspect is equivocal or ambiguous about requesting an attorney, police may continue questioning and the burden will fall on him to prove the request was unequivocal. Some states, on the other hand, provide greater protection by requiring the police to clarify, without coercion, as to whether a suspect is invoking his *Miranda* right to counsel. Delaware also requires the police to repeat the *Miranda* warnings if a suspect has been ambiguous in invoking the *Miranda* rights.

Another area where states have departed is when an attorney is attempting to reach a defendant who is in custody or is demanding that questioning cease until the

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97 Friesen Treatise at § 12.2(c).
98 Friesen Treatise at § 12-2(c)(3)(i).
99 Id.
100 Id.
101 Id.
attorney can speak with the defendant.\textsuperscript{102} Typically under federal law, only the defendant can invoke his rights, and thus any statement given will be admissible, even though the police knew his attorney was attempting to reach him. Oregon, conversely, has suppressed statements taken after an accused’s attorney attempted to reach him or was demanding to see the accused.\textsuperscript{103}

With regard to coerced confessions, some states have been willing to depart from federal precedent. Hawaii has held, for instance, that such confessions, whether taken by police or non-police actors will be suppressed.\textsuperscript{104} Under federal law, only confessions coerced by police or prosecutors will be suppressed.\textsuperscript{105} The Hawaii court reasoned that the purpose of excluding involuntary confessions is due to their unreliability.\textsuperscript{106} Thus, the confession will be just as unreliable and therefore excludable from use at trial, regardless of who extracts it. This is similar to a fundamental rights notion in that regardless of who took the confession, the only way to effectuate the right to be free from forced self-incrimination is to exclude the evidence from court.

Finally, under federal law, even if a confession is found to be coerced on appeal, the reviewing court will conduct a harmless error analysis to determine whether the conviction should be reversed.\textsuperscript{107} Although there have not been departures from this

\begin{footnotesize}
\textsuperscript{102} Id.  \\
\textsuperscript{103} See State v. Simonson, 878 P.2d 409 (Ore. 1994); State v. Haynes, 602 P.2d 272 (Ore. 1979).  \\
\textsuperscript{104} State v. Bowe, 881 P.2d 538 (Haw. 1994).  \\
\textsuperscript{105} Colorado v. Connelly, 479 U.S. 157 (1986).  \\
\textsuperscript{106} Bowe, 881 P.2d 538.  \\
\textsuperscript{107} See Part II-A, supra.
\end{footnotesize}
standard, the harmless error review seems contrary to protecting fundamental rights. In Gutierrez, the court stated the only way to effectuate the right in the case was to exclude the evidence; thereby, placing the party in the position he was in before his rights were violated. To affect the same result for coerced confessions, the court should require reversal anytime a confession is found to be coerced, especially in light of the impact a confession may have on the jury.

B. The Right to Counsel: Effective Assistance

A fundamental tenet to our system of justice is that counsel for a defendant in a criminal case is a necessity, not a luxury. Absent a lawyer, the accused "faces the danger of conviction because he does not know how to establish his innocence." Indeed most agree, "the very legitimacy of the American criminal justice system depends in considerable part on the participation of competent, ethical defense lawyers who diligently represent their clients' best interests." Furthermore, if the right to counsel is to be effectuated "defendants cannot be left to the mercies of incompetent counsel." Thus, defendants are not only entitled to be represented by counsel, but to have effective assistance of counsel.

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108 Friesen Treatise at § 12-2(c)(1).
109 See note 79, supra.
112 Joshua Dressler, UNDERSTANDING CRIMINAL PROCEDURE, 595 (3d ed. 2002).
Nevertheless, the standard, for proving ineffective assistance of counsel is extremely difficult for a defendant to meet.\textsuperscript{115} Not only must the defendant prove his attorney’s conduct fell below prevailing professional standards, but he must also show that the mistake changed the outcome of the trial.\textsuperscript{116} Only California, Hawaii, and Maine have used a less stringent standard under their state constitutions.\textsuperscript{117} In Hawaii, a defendant need only show (1) there were specific errors reflecting counsel’s lack of skill, judgment, or diligence, and (2) such errors resulted in either the withdrawal or substantial impairment of potentially meritorious defenses.\textsuperscript{118}

Hawaii departs from the stricter federal standard because it is “unduly difficult for defendants to meet... [and] Hawaii’s Constitution... afford[s] greater protection of their right to effective assistance of counsel.”\textsuperscript{119} This is precisely how a fundamental rights approach should operate. In this instance, the federal analysis is flawed because it is too stringent and does not allow the fundamental right of effective assistance of counsel to be effectuated. Therefore, the standard is lessened to a degree the court feels appropriate to effectuate the right. Utilizing Gutierrez, this approach could be adopted in New Mexico.

C. The Right to Confrontation: Out of Court Statements

\textsuperscript{115} See Part II-B, supra.

\textsuperscript{116} Id.

\textsuperscript{117} Friesen Treatise at § 12-10(a).

\textsuperscript{118} State v. Aplaca, 837 P.2d 1298, 1305 (Haw. 1992).

\textsuperscript{119} Id. at 1305 n. 2. California and Maine depart on similar grounds using similar tests for proving ineffective assistance. See In re Felipe Evangelista Sixto, 48 Cal.3d 1247 (1989); Lang v. Murch, 438 A.2d 914 (Maine 1981).
No state has departed from the new Confrontation Clause test for out of court statements created in *Crawford*.\(^{120}\) Nonetheless, a prime example of how the fundamental rights approach can be used to expand state constitutional rights arises from that case. The U.S. Supreme Court found that only testimonial out-of-court statements would be subject to the requirements of unavailability of the declarant and a prior opportunity to cross.\(^{121}\) This begs the question of what statements will be considered testimonial. In *Crawford*, Justice Scalia, who authored the majority opinion, refused to establish a test, but stated that statements to the police in custodial interrogation and grand jury testimony would certainly qualify.\(^{122}\)

One commonly used out of court statement was not mentioned. This is the questionable use of a co-defendant’s statement, put into evidence by a third party who heard the statement. These statements are often used when the co-defendant refuses to cooperate against the defendant and is made unavailable to testify by asserting the Fifth Amendment privilege. The New Mexico Supreme Court, however, has suggested in dicta that such a statement would not be testimonial, especially where the third party is a friend, family member or acquaintance of the co-defendant and is told the statement in casual conversation.\(^{123}\)

If this issue were squarely before the court, it may be persuaded to depart from *Crawford* and apply the rule to some or all non-testimonial statements based on a fundamental rights approach to New Mexico’s Confrontation Clause. For instance,

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\(^{120}\) *See Section II-C, supra.*

\(^{121}\) *Crawford*, 124 S. Ct. at 1369.

\(^{122}\) *Id.* at 1372.

imagine a case where a co-defendant tells a friend the defendant told the co-defendant to kill a person and the defendant would pay the co-defendant. Subsequently, that friend testified about this statement at trial and the co-defendant refuses to testify exercising his right to remain silent. The whole purpose of the Confrontation Clause, by its language, is to allow a defendant to confront his accusers and ensure the evidence they offer is reliable by use of cross-examination. However, under federal precedent, merely because the out of court statement is not testimonial, the Confrontation Clause is not violated. On the other hand, a fundamental rights approach would hold that the only way to effectuate the right of confrontation in that case would be either to allow cross-examination or suppress the statement. Testimonial or not, the court's are required to protect the defendant's fundamental right to face his accuser's, and confront and cross-examine them.

CONCLUSION

The New Mexico Supreme Court has been more than willing to expand search and seizure protection to its citizens under the state constitution. At first, it appeared the court was using a fundamental rights justification to depart from federal precedent. More recently, however, the court appears to depart from federal search and seizure jurisprudence solely because they have done so in the past. This perhaps explains why the court has not departed in other areas of criminal procedure. And it gives advocates very little to explain why the court should depart from federal precedent as required to preserve a claim under Gomez.


The court needs to be refocused on its fundamental rights approach it enunciated in *Gutierrez*, in the area of search and seizure as well as other fundamental protections for the criminally accused. This approach provides a reasoned and sound basis for departing from federal precedent and avoids the pitfalls of presuming federal law is correct unless a specifically delineated reason is provided. It will also create an independent rights jurisprudence for New Mexico, thereby upholding the courts' duty to interpret its own state constitution as it deems appropriate.