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Raising and Preserving for Review Claims for Expanded
Protections for Criminal Defendants under the
New Mexico State Constitution
Raising and Preserving for Review Claims for Expanded Protections for Criminal Defendants under the New Mexico State Constitution

by
Bruce Evan Thompson

Written originally for Professors Michael Browde and Christian Fritz

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Recourse to our state constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned.”

Introduction

The U.S. Supreme Court has expressly acknowledged that each state has the “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” Because states are bound by the Supremacy Clause and by the Fourteenth Amendment to the U.S. Constitution, by which the U.S. Supreme Court has applied all but three of the protections granted in the federal Bill of Rights to the states, the rights afforded under federal law represent the “minimum floor of rights below which state courts cannot slip.” Therefore, state supreme courts, as the interpreter of their own state constitutions, have the inherent authority to create the “ceiling” of individual rights and protections, at least with respect to that state’s government action.

It is not difficult to see why the U.S. Supreme Court might explicitly decide to afford only a bare minimum of federal constitutional protections. Applying long-standing principles of federalism, the Court must be “ever mindful that its rulings apply throughout the land, and accordingly [the Justices] must be sensitive to the disparities in local needs and local conditions.

1 State v. Gunwall, 720 P.2d 808, 813 (Wash. 1986).
2 Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). It is interesting to note that by citing the U.S. Supreme Court at the outset for this proposition, I have intimated an implicit deference to that Court which this paper intends to disavow.
3 The U.S. Supreme Court has not addressed the incorporation of the Second Amendment right to keep and bear arms and the Third Amendment right not to quarter soldiers in times of peace, and has expressly held that the Fifth Amendment right to indictment by grand jury does not apply against the states. Hurtado v. California, 110 U.S. 516 (1884).
4 See Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1334 (1982).
5 It is theoretically interesting to hypothesize an application of greater state constitutional protections against the federal government, on the basis of the Ninth Amendment’s guarantee that the “enumeration … of certain rights shall not be construed to deny or disparage others retained by the people.”
from state to state." In other words, the U.S. Supreme Court must be careful not to tread too fiercely on individual states' ability to craft well-fitting laws and to exercise their inherent police power as they see fit. Therefore, according to this view, the U.S. Supreme Court must balance its duty to safeguard the basic protections afforded by the U.S. Constitution against its obligation to respect the autonomy of the states and their local legislative processes.

On the other hand, state appellate courts, by virtue of their narrower scope of review and their proximity to the subject of the legislation, have the luxury to craft constitutional protections out of their own state constitutions that are better tailored to "local needs and local conditions" than federal protections could ever be. While these state courts of course could never depart below the floor of federal constitutional protections, each one has the power to create its own framework above that floor, bestowing greater protections according to the values and ideals of that state as reflected in that state's constitution, legislative history and common law. It is conceivable, then, that fifty active jurisprudential systems might co-exist, separate and independent from the federal judiciary, each of which individually reviews its state constitutional protections with whatever deference it sees fit to the corresponding federal jurisprudence.

The widespread advent of this "judicial federalism" is a relatively recent phenomenon and its rise has been attributed to a backlash by state judiciaries against the Burger Court's aggressive chipping away at civil liberties protections forged by the previous Warren Court. It is not surprising that, during the incorporation period of the 1960's, when the Warren Court was expanding the scope of federal constitutional rights, civil rights litigants had little need to invoke state constitutional provisions. However, with the shrinking of those same federal civil rights protections under the Burger and Rehnquist Courts, beginning in the 1970's, state courts began

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to rediscover the importance of their own state constitutions in protecting individual liberties.\textsuperscript{8}

As a response to the Burger Court's erosions of those earlier protections, Justice Brennan exhorted:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.\textsuperscript{9}

According to Brennan's view, our liberties are not fully realized without a healthy and vigorous interpretation of state constitutions by state appellate courts.

A major theme of this dynamic judicial federalism of course is an acknowledgement of the ongoing "conversation in progress" between advocates and state courts about what the precise scope of state constitutional protections will be.\textsuperscript{10} State courts cannot expand state constitutional rights \textit{sua sponte}, which means that such pioneering expansions of state constitutional protections require that particular issues be preserved at trial, raised for review, and painstakingly briefed and argued on appeal. In the context of criminal defendants' rights in particular and civil rights generally, the vitality of the expansion of state constitutional jurisprudence depends entirely on the creativity and zeal with which advocates preserve and pursue such previously unexplored state constitutional claims.

I intend for this paper to lay a basic groundwork for defense counsel in New Mexico to use in the preservation and advocacy of criminal defendants' state constitutional claims. It bears stating at the outset that perhaps the greatest pitfall for an advocate in this field is for one to

\textsuperscript{8} Or more accurately, advocates began to urge state constitutional rights claims on state courts, and state courts were then obliged to assess the merit of those claims. Michael B. Browde, \textit{State v. Gomez and the Continuing Conversation Over New Mexico's State Constitutional Rights Jurisprudence}, 28 N.M. L. Rev. 387 (1998).


make the assumption that, because the New Mexico Supreme Court has refused to grant a particular constitutional protection in the past, that ruling cannot be successfully challenged in the future. For reasons that will become clear, New Mexico's "interstitial" approach to constitutional jurisprudence permits (and in fact encourages) appellate review of earlier rulings that were based solely on an interpretation of the federal constitution.

New Mexico Interstitialism

In State v. Gomez, the New Mexico Supreme Court formally announced the adoption of an approach to state constitutional jurisprudence the court called "interstitialism." There, the defendant was charged in state district court with possession of a Schedule I controlled substance. The trial court denied Gomez's motion to suppress the fruits of the search of his car and fanny pack on the grounds that the search was conducted without a search warrant and without exigent circumstances to justify a warrantless search. Gomez was convicted, and the Court of Appeals affirmed, holding that Gomez had failed to preserve at the trial court stage his objection that the search was invalid under Article II, Section 10 of the New Mexico Constitution.

Having granted certiorari to address what was required to "fairly invoke" and preserve for review a search and seizure claim under Article II, Section 10, the Gomez court first addressed the extent to which the court would defer to federal precedent in analyzing the state constitutional claim. Here, the Court announced its formal rejection of the "lock-step" analysis

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12 Gomez, 122 N.M. at 784, 932 P.2d at 8.
13 While the Court did not squarely address the federal issue (because the Fourth Amendment claim was not properly before it), the search was clearly admissible under federal law. U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982) (holding that where an officer has probable cause to search an entire vehicle, the officer may conduct a warrantless search, without a showing of exigent circumstances, of every part of the vehicle and its contents, including all containers and packages, that may conceal the object of the search).
as inconsistent with the jurisprudential approach expressed in *State ex rel. Serna v. Hodges*.14

Under the lock-step analysis, state courts would automatically deter to the federal constitutional interpretation when construing parallel (i.e. identical or substantially identical) provisions of the state constitution. In other words, if the federal constitution protected a particular individual right, then New Mexico courts simply followed the federal precedent; if the federal constitution did not protect the asserted right, then New Mexico courts would follow that precedent without independently addressing and interpreting the parallel provision in the New Mexico Constitution.15 In *Hodges*, the Court held that it is “not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, ‘unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter.’”16 Given that the state supreme court is “the ultimate arbiter of the law of New Mexico,”17 the *Gomez* court followed the lead set in *Hodges* and expressly rejected the lock-step analysis in favor of the “interstitial” approach.

In those cases in which the asserted right is protected under the federal constitution, the interstitial approach in fact tracks the lock-step approach: The court looks first to the federal constitution, and if the asserted right is protected, the inquiry ends and the state constitutional claim is not reached.18 The interstitial approach diverges from the lock-step approach, however,

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15 *Gomez*, 122 N.M. at 782, 932 P.2d at 6. See *e.g.* *State v. Garcia*, 76 N.M. 171, 174, 413 P.2d 210, 212 (1966) (referring to Article II, Section 10 as “almost identical” to the Fourth Amendment).

16 Id. at 356, quoting *People v. Brisendine*, 13 Cal.3d 528, 548, 531 P.2d 1099, 1112 (1975).

17 *Gomez*, 122 N.M. at 782, 932 P.2d at 6, quoting *Hodges*, 89 N.M. at 356, 552 P.2d at 792.

18 *Gomez*, 122 N.M. at 783, 932 P.2d at 7. This is the reverse of the arguably more logical “primacy” approach, which would be to analyze all state claims first in order to determine whether the federal constitution is necessary at all to intervene as a last resort between a state and an individual. See Hans A. Linde, *Without “Due Process”: Unconstitutional Law In Oregon*, 49 Or. L.Rev. 125, 133-35 (1970) (arguing that Fourteenth Amendment “due
when the federal constitution does not protect the asserted right. In these cases, the court then
looks to the New Mexico Constitution to see whether its parallel provision provides more
expansive protection than its federal analog. If so, then the court is free to diverge from federal
precedent and determine the outcome under "independent and adequate" state grounds.\(^\text{19}\)

It is widely believed that the adoption of the interstitial approach announced in Gomez
was of groundbreaking importance to a "mature jurisprudence."\(^\text{20}\) However, Gomez
intersitialism merely provides the vehicle by which greater state constitutional protections might
be explored and a divergence from the path of federal precedent might be forged. Again,
because state courts cannot expand state constitutional rights \textit{sua sponte}, the true pioneers must
be those criminal defense lawyers and other civil rights advocates who assiduously preserve state
constitutional claims and argue them on appeal.

\textbf{Preserving Claims for Appeal}

Justice Ransom in Gomez laid out the basic framework for litigants at the trial court level
to follow when preserving a state constitutional claim for appeal. The threshold question is
whether there is some established New Mexico precedent for construing the state constitutional
provision more broadly. If so, then counsel must at a minimum invoke the constitutional
principle at issue and lay a sufficient factual basis for a ruling:

\begin{quote}
If established precedent construes the provision to provide more protection than
its federal counterpart, the claim may be preserved by (1) asserting the
constitutional principle that provides the protection sought under the New Mexico
Constitution, and (2) showing the factual basis needed for the trial court to rule on
the issue. This is no more than is required of litigants asserting a right under the
federal constitution, a federal statute, a state statute, or common law. That is,
\end{quote}

\(^{20}\) See e.g. Browde, supra note 8, at 387.
Rule 12-216 requires that litigants “fairly invoke” a ruling by the trial court in order to raise that question on appeal.21

Under this “established precedent” rule, Gomez met the requirements of Rule 12-216(A) by (1) stating in his motion to suppress that Article II, Section 10 invalidates the search and seizure of his car and fanny pack because the search was conducted “without a search warrant, [and without] exigent circumstances to justify a warrantless search;”22 and (2) developing the facts, based on officer testimony, sufficient for a ruling that exigent circumstances were not present, thereby bringing the case outside the scope of Ross23 and within the scope of New Mexico cases interpreting Article II, Section 10.24

If there is no established New Mexico precedent on which to base a claim of independent state constitutional protections, more is required of the advocate at the trial court stage:

[W]hen a party asserts a state constitutional right that has not been interpreted differently than its federal analog, 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.25

Because Gomez was decided in the context of a situation where trial counsel could rely on established precedent, Gomez does not explore in detail what more would be required in the case of a state constitutional claim that lacks such established precedent. The question for the advocate then becomes: What constitutes “reasons for interpreting the state provision differently” adequate to preserve the claim? The Gomez court gives due deference to the constraints trial counsel face in the heat of trial: “It is impractical to require trial counsel to

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21 Gomez, 122 N.M. at 784, 932 P.2d at 8.
22 Id. In oral argument before the trial court, Gomez cited State v. Coleman, 87 N.M. 153, 530 P.2d 947 (Ct.App.1974) for the proposition that exigent circumstances were required to justify the officer’s warrantless search. Gomez held that this citation was sufficient to alert the trial court that Article II, Section 10 provides more expansive protection than, and should be interpreted differently from, the Fourth Amendment.
24 Gomez, 122 N.M. at 784-85, 932 P.2d at 8-9.
25 Gomez, 122 N.M. at 784, 932 P.2d at 8.
develop the arguments, articulate rationale, and cite authorities that may appear in an appellate brief."

On the other hand, the Court requires something more than just the bare assertion that the state constitutional provision at issue should be interpreted more expansively.

The *Gomez* court, in outlining past reasons that New Mexico courts have departed from federal precedent, provides a rough guide for the practitioner to use in future cases. It is important to note that the Court, unlike courts in other states, declines to dictate "specified criteria for departing from federal interpretation of the federal counterpart." In other words, trial counsel are not bound to follow the criteria suggested in past rulings of the Court that diverge from federal precedent, but rather are encouraged to be creative in their arguments and analysis. According to the Court, past reasons for departure from federal precedent under New Mexico law include: (1) flawed federal analysis, (2) distinctive state characteristics, and (3) undeveloped federal analogs. Again, this is clearly not intended to be an exhaustive list, as footnote 3 explicitly declares. Footnote 3 refers the practitioner to Justice Handler's concurring opinion in the New Jersey case, *State v. Hunt*, which enumerates seven additional possible reasons.

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26 *Gomez*, 122 N.M. at 786, 932 P.2d at 10.
27 *Gomez*, 122 N.M. at 784, 932 P.2d at 8, footnote 3.
28 Id.
29 Citing *Campos v. State*, 117 N.M.155, 870 P.2d 117 (1994) (rejecting the blanket federal rule that warrantless felony arrests based on probable cause are constitutionally permissible in public places, holding that in New Mexico, each case must be decided on its own facts and circumstances); and *State v. Gutierrez*, 116 N.M. 431, 863 P.2d 1052 (1993) (rejecting the federal "good faith" exception to the exclusionary rule, holding that in NM, evidence searched or seized in violation of Art. 2, Sec. 10 must be excluded at trial, whether or not the officer acted in reasonable reliance on a defective warrant).
30 Citing *State v. Cordova*, 109 N.M. 211, 784 P.2d 30 (1989) (rejecting the Gates "totality of the circumstances" analysis in favor of the more exacting Aguilar-Spinelli test to determine whether an informant's tip has established probable cause for issuance of a warrant, finding that New Mexico has not experienced the "rigidity and technicalities" that led to the federal courts' abandonment of the Aguilar-Spinelli test); and *State v. Sutton*, 112 N.M. 449, 816 P.2d 518 (Ct.App. 1991) (critiquing the federal "open fields" doctrine, because unique patterns of property ownership and land use in New Mexico might leave room for a reasonable expectation of privacy, and therefore Art. 2, § 10 protections, even in open fields).
31 Citing *State v. Attaway*, 117 N.M. 141, 870 P.2d 103 (1994) (adopting a "knock-and-announce" requirement for entry of a home to execute a warrant, even though the Fourth Amendment at the time had no analogous requirement). A similar constitutional interpretation was adopted at the federal level one year later in *Wilson v. Arkansas*, 514 U.S. 927 (1995).
rationales that might serve to justify departure from federal precedent: (1) differences in textual language; (2) legislative history; (3) preexisting state law; (4) structural differences between the federal and the state constitution; (5) matters of particular state interest or local concern; (6) state traditions; and (7) public attitudes. By citing to Justice Handler's concurring opinion in \textit{Hunt}, and other cases that suggest possible rationales for state courts to follow, the \textit{Gomez}
The Vermont Supreme Court stated it this way: “The imaginative lawyer is still the fountainhead of our finest jurisprudence.”  

Avoiding the Peña Trap

In *Gomez*, defense counsel relied on *Coleman* for the proposition that exigent circumstances were required to justify the officer’s warrantless search of a vehicle and its contents. In *Coleman*, the New Mexico Court of Appeals held that a showing of probable cause alone, without a finding of exigent circumstances, did not provide the requisite foundation for a warrantless search of a closed burlap sack located inside defendant’s automobile. *Coleman* was decided in 1974 — eight years before the U.S. Supreme Court decided *Ross* — in lock-step with the federal rule that prevailed at the time.

However, prosecutors in *Gomez* relied on *Peña*, a case decided in 1989 that adopted the *Ross* rule, again in lock-step with (changed) federal precedent. *Peña* held that discovery of a roach clip with marijuana residue in the ashtray of defendant’s car established probable cause to search the entire interior of the vehicle, including a brown bag found within, pursuant to the *Ross* exception to the warrant requirement. The *Peña* court discussed only the protection afforded under the Fourth Amendment as interpreted in *Ross*, and did not undertake any independent

374, 586 A.2d 887 (1991) (citing text of the state constitutional provision; history of the provision, including state common law; related case law from other states; and policy considerations, including unique issues of state and local concern, and applicability within modern state constitutional jurisprudence); and *State v. Jewett*, 146 Vt. 221, 500 A.2d 233 (1985) (citing textual language and history of the state provision; related case law from “sibling” states; and the application of economic and sociological research to state and local concerns).

41 *Jewett*, 146 Vt. at 228, 500 A.2d at 237.
42 *Gomez*, 122 N.M. at 781, 932 P.2d at 5.
43 *Coleman*, 87 N.M. at 155, 530 P.2d at 949.
46 *Peña*, 108 N.M. at 761, 779 P.2d at 539.
analysis of the protection afforded by Article II, Section 10 or Coleman. In fact, neither Article II, Section 10 nor Coleman is even mentioned in the text of Peña, presumably because it was considered unnecessary to discuss state common law decided in lock-step with federal precedent that had since been overruled.47

The prosecution’s reliance on Peña, however, turned out to be misplaced. The Gomez court, in committing itself to the interstitial approach, did not view itself to be bound by a case that applied the lock-step approach to federal precedent:

The fact that Peña would not require a showing of exigent circumstances to justify a warrantless search of an automobile does not compel us to hold that such a showing is not required. We no longer follow United States Supreme Court interpretation of the Fourth Amendment in our interpretation of Article II, Section 10. Therefore, Peña is not controlling in this case.

The court concluded that New Mexico affords greater protection of individual rights than the federal constitution in the area of search and seizure, and based that conclusion on its recognition of New Mexico’s “strong preference for warrants”48 and its determination that the mobile nature of automobiles did not automatically create exigent circumstances in every case. However, there was no way for defense counsel to know, prior to the outcome of Gomez, that Peña was vulnerable to attack on the ground that it failed to address the state constitutional claim.

This, then, is the Peña trap: Because Peña was good law at the time of Gomez’s trial, his defense counsel could easily have concluded that Peña, which was decided by the New Mexico Supreme Court only seven years earlier, was controlling. By expressly declaring that Peña was not controlling, the Gomez court opened the door for the future rejection of any state law precedent that follows the lock-step approach. After Gomez, it is now a trap to rely on otherwise

47 Indeed, according to the Court in Gomez, “Peña represents the high-water mark of our interpretation of Article II, Section 10 in lock-step with the United States Supreme Court interpretation of the Fourth Amendment.” Gomez, 122 N.M. at 787, 932 P.2d at 11.
48 Id.
sound New Mexico case law without first inquiring whether the precedent is vulnerable to attack under *Gomez* interstitialism. To avoid this trap, it is now incumbent on defense counsel not only to know what New Mexico cases are relevant to a particular constitutional claim, but to determine whether those cases were decided in lock-step with federal precedent, in which case there is room for state constitutional claims to be advanced. I would argue that New Mexico's interstitial approach to constitutional jurisprudence not only permits but in fact encourages appellate review of earlier rulings that were based solely on an interpretation of the federal constitution.

**Conclusion**

The advent of “judicial federalism” in general and the adoption of the interstitial approach in particular have created a trend in New Mexico toward the articulation of greater, more expansive protections of rights and privileges under the state constitution than federal precedent provides. By virtue of their special knowledge of local traditions, values and conditions and their duty to ensure “the full realization of our liberties,” New Mexico courts have the concomitant duty to craft independent constitutional protections out of the New Mexico Constitution that are better tailored to New Mexico than the federal protections could ever be.

A major theme of this *Gomez* interstitialism is the recognition of the ongoing “conversation in progress” between advocates and state courts about what the precise scope of burgeoning state constitutional protections will be. To engage effectively in this conversation, advocates must be ever vigilant in assessing whether relevant state precedent has been decided under the lock-step approach, in which case it is inherently vulnerable to challenge under *Gomez*.

49 Justice Brennan, supra note 9, 90 Harv. L. Rev. 489.
Furthermore, when making these challenges under independent state constitutional grounds, advocates must also in their briefing and argumentation be cognizant of the many possible rationales that might serve to justify departure from federal precedent. With these considerations in mind, the promise of a vital and creative state constitutional jurisprudence may be realized through the vitality and creativity with which advocates bring state constitutional claims before the judiciary.