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THE NEW FEDERALISM: NEW MEXICO'S EXPERIENCE WITH INDEPENDENT STATE CONSTITUTIONAL ANALYSIS OF FOURTH AMENDMENT RIGHTS

Curtis Hayes*

I. INTRODUCTION

Application of the New Mexico Constitution's protections regarding search and seizure can lead to better outcomes for criminal defendants than application of the Fourth Amendment protections enshrined in the U.S. Constitution. In *State v. Gomez*,¹ the New Mexico Supreme Court adopted an approach to constitutional analysis that serves as a guide to attorneys seeking these protections for their clients. In *Gomez* and in subsequent rulings, New Mexico courts have applied that approach in a wide range of search and seizure contexts, including pretextual stops, questioning of drivers and passengers, vehicle searches, roadblocks and checkpoints, and probationer/parolee searches.

This article briefly examines four approaches to state versus federal constitutional decision making and the precedent that led to the New Mexico Supreme Court's adoption of the interstitial approach to search and seizure analysis.² The article then reviews those cases in which New Mexico appellate courts have held that the New Mexico Constitution's analog to the Fourth Amendment offers greater protection than the nearly identical language of the Fourth Amendment.

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1. 1997-NMSC-006, 932 P.2d 1.

2. See *infra* text accompanying note 18.

II. NEW FEDERALISM AND STATE CONSTITUTIONAL ANALYSIS

In the early 1970s, state appellate courts across the country began to examine whether state constitutions offered different or better protections than those found in the federal Bill of Rights. This movement became known as New Federalism.³ Since then, four theoretical constructs have emerged. Each outlines when, if ever, a state court should apply state constitutional protections in addition to federal protections.

A. *Historical Background*

In 1961, the ruling in *Mapp v. Ohio*⁴ triggered the "due process revolution," whereby almost all of the procedural rights delineated in the Bill of Rights were incorporated into the Due Process Clause of the Fourteenth Amendment and made applicable to the states.⁵ Prior to that time, state constitutions served as the "primary protectors of individual rights."⁶

State courts often failed in that protective role.⁷ The due process revolution stemmed from a negative assumption about state courts:

Without the Supreme Court to stand over [the states], ready to review and reverse, the state courts would fail to provide the minimal rights that all defendants were entitled to at all times. In short, incorporation was motivated by the Mississippi Problem: the assumption that the state bench was, at its worst, racist and incompetent, and merely competent most of the time.⁸

The federalization of constitutional criminal procedure in the 1960s meant that state courts could and did ignore state constitutions.⁹ But in

3. See e.g., Donald E. Wilkes Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

4. 367 U.S. 643 (1961).

5. Rights not incorporated include the right to grand jury review, *Hurtado v. California*, 110 U.S. 516 (1884), the right to a twelve person jury, *Williams v. Florida*, 399 U.S. 78 (1970), and the right to a unanimous jury verdict, *Apodaca v. Oregon*, 406 U.S. 404 (1972). The Supreme Court has never explicitly incorporated the Eight Amendment rights to no excessive bail or fines.

6. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 201 (1998).

7. Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 65 (1996).

8. *Id.*

9. Shirley Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144-45 (1985).

the early 1970s, some state jurists became concerned that the U.S. Supreme Court was retreating in its protection of individual rights and began to re-examine their own constitutions.¹⁰ This impetus came from both “liberal” and “conservative” quarters. Liberals might have been expected to support an interpretation that comported with federal rights and protections, and they did.¹¹ Conservatives, who traditionally supported state sovereignty and rights, argued in favor of using state constitutions to “return states to their original role of protecting the rights of people in their states. . . .”¹² Some from the conservative perspective argued that the time had come to begin “dis-incorporating” from the Fourteenth Amendment those rights “not demonstrably essential to the safeguarding of fundamental rights.”¹³

To an extent, the U.S. Supreme Court encouraged state courts to use state constitutions as the basis for their rulings. For example, in *PruneYard Shopping Center v. Robbins*, the court held that the California Constitution¹⁴ could apply where the First Amendment did not.¹⁵ In *Michigan v. Long*,¹⁶ the Court wrote that “[i]f the state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”¹⁷

Many states have taken the Supreme Court up on its offer to leave them alone. State courts tend to fall into four camps on the issue of when to engage in independent analysis of a state constitutional provision.¹⁸

10. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–02 (1977). This article is sometimes heralded as triggering the emergence of the New Federalism, however, as noted in Justice Brennan’s article, it had already begun with decisions in California, New Jersey, Hawaii, Michigan, South Dakota, and Maine, and it had already been the subject of several law review articles.

11. See e.g., J. Thomas Sullivan, *Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions*, 39 N.M. L. REV. 407, 410 (2009) (discussing the movement as a reaction to the “conservative shift” of the U.S. Supreme Court).

12. Van Cleave, *supra* note 6, at 201.

13. Latzer, *supra* note 7, at 129.

14. CAL. CONST. art I, § 2 (“Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”). CAL. CONST. art I, § 3 (“[P]eople have the right to . . . petition government for redress of grievances”).

15. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

16. 463 U.S. 1032 (1983).

17. *Id.* at 3476. The court labeled this holding the “plain statement” rule. *Id.* at 3477 n.7.

18. Van Cleave, *supra* note 6, at 206; see also Jennifer Cutcliffe Juste, Note, *CONSTITUTIONAL LAW—The Effect of State Constitutional Interpretation on New*

The camps are variously labeled, but here are referred to as “lockstep,” “interstitial,” “dual sovereignty,” and “primacy.”

B. *Four Approaches to New Federalism*

Under the lockstep approach—also called the “dependent interpretation,” “parallelism,” “clone,” and “absolute harmony” approach¹⁹—which assumes that when the language defining a particular right in the federal and state constitutions is either identical or “substantially equivalent,” the federal interpretation applies.²⁰ The primary argument in favor of the lockstep approach is uniformity in the law.²¹ As Colorado Chief Justice Ericson stated in his dissent in a Colorado case, *People v. Corr*, “law enforcement officers . . . should not have to anticipate that a federally guaranteed right will be given broader interpretation under an all but identical provision in a state constitution.”²² Professor Rachel Van Cleave noted that the primary argument against this approach is that “state constitutions . . . were products of different periods of history, different areas of the country, with different concerns in mind, as compared to the circumstances surrounding the drafting of the National Constitution.”²³

The “interstitial” approach has been referred to as the “supplemental” or the “second-look” approach.²⁴ Under interstitial analysis, the state court first examines whether the governmental action in controversy violates the federal Constitution. If so, the federal interpretation is applied. If not, then the court examines whether the comparable state constitutional provision provides broader protections.²⁵

Mexico's Civil and Criminal Procedure—State v. Gomez, 28 N.M. L. REV. 355, 357 (1998). The analysis of state court decisions concerning departure from federal precedent in these articles is not new, but they both contain good summaries of the arguments for and against each position.

19. Van Cleave, *supra* note 6, at 207.

20. See Blair v. Pitchess, 486 P.2d 1242, 1251, n.6 (1971). Florida has mandated this approach in its search and seizure jurisprudence by way of a constitutional amendment adopted in 1982, which provides “[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.” FLA. CONST. art. I, § 12.

21. David Henderson, *Setting the Ground Rules for a Conversation in Progress*, 3 N.M. BAR J. 42, 45–46 (1997).

22. 682 P.2d 20, 33 (Colo. 1984) (Erickson, J. dissenting).

23. Van Cleave, *supra* note 6, at 208.

24. *Id.* at 209.

25. Cutcliffe Juste, *supra* note 18, at 359.

In an often-cited²⁶ concurring opinion,²⁷ Justice Handler of the New Jersey Supreme Court listed seven circumstances in which it would be appropriate for a state court to find that a state constitutional provision had a scope different from its analog in the Bill of Rights: (1) the language of the comparable provision is sufficiently different;²⁸ (2) the state's legislative history reveals such intent;²⁹ (3) state law predates adoption of the state constitutional provision;³⁰ (4) the state and federal constitutional provisions differ structurally (for example, a provision in the Bill of Rights might be expressed as a restriction on government, *e.g.*, "Congress shall make no law . . . abridging the freedom of speech," not as a positive affirmation, *e.g.*, "[e]very person may freely speak, write, and publish his sentiments on all subjects.");³¹ (5) a matter is of particular state interest or local concern;³² (6) a state has distinctive history or traditions;³³ or (7) a state's citizens have distinctive attitudes.³⁴

Critics of the interstitial approach argue that it makes a state constitution inferior to the federal Constitution. Decisions in which a state constitutional provision prevails are criticized as unduly "result oriented,"³⁵ that they represent unwarranted judicial activism on the part of liberal state court judges,³⁶ and that they lead to a lack of uniformity in the law.³⁷

Under the dual sovereignty approach, a state court analyzes both state and federal constitutional provisions in every case in which a constitutional claim is pressed.³⁸ Arguments for and against this approach resemble those of the interstitial approach,³⁹ but critics also argue that the dual sovereignty approach violates the principle that cases should be decided narrowly.⁴⁰ That is, if the governmental action violates one constitution, then a court should not indulge in analysis of the other constitution.

26. *E.g.*, *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 35, 25 P.3d 225, 239 (citing *State v. Hunt*, 450 A.2d 952 (N.J. 1982) (Handler, J., concurring)).

27. *Hunt*, 450 A.2d 952 (Handler, J., concurring).

28. *Id.* at 965.

29. *Id.*

30. *Id.*

31. *Id.* at 966.

32. *Id.*

33. *Id.*

34. *Id.*

35. Van Cleave, *supra* note 6, at 209.

36. *See, e.g.*, Paul Kahn, *State Constitutionalism and the Problem of Fairness*, 30 VAL. U. L. REV. 459 (1996).

37. Henderson, *supra* note 21.

38. Van Cleave, *supra* note 6, at 211.

39. *See id.*

40. Cutcliffe Juste, *supra* note 18, at 360.

The primacy approach is the converse of the interstitial approach: the state court examines whether the governmental action violates the state, not the federal, constitution.⁴¹ Only if the state constitution approves the governmental action does the state court examine the federal constitution.

The arguments in favor of the primacy approach resemble those in favor of the interstitial approach. Proponents add that the primacy approach returns a state constitution to its historical role as the primary source of individual liberties vis-à-vis state governmental action.⁴² Moreover, the primacy approach encourages judicial economy, as it subjects fewer decisions to U.S. Supreme Court review.⁴³ Critics contend that state courts, removed from the discourse on the federal Constitution, create inconsistency in the law⁴⁴ and that no state's needs are so individual as to justify deviating from the national standard.⁴⁵

III. *STATE V. GOMEZ*: NEW MEXICO'S INTERSTITIAL APPROACH TO FOURTH AMENDMENT ANALYSIS

In *State v. Gomez*,⁴⁶ the New Mexico Supreme Court formally adopted the interstitial approach for determining the scope of individual rights in search and seizure cases. Accordingly, New Mexico courts look first to the Fourth Amendment and federal interpretations to identify a protected right; if none is found, then the courts analyze the issue under article II, section 10 of the New Mexico Constitution.

Gomez addressed when it is appropriate for the nearly identical search and seizure provisions of the federal and New Mexico constitutions to have different meanings. The federal provision—the Fourth Amendment—provides:

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.

41. Van Cleave, *supra* note 6, at 214.

42. *Id.* at 215.

43. Cutcliffe Juste, *supra* note 18, at 359.

44. *Id.*

45. See James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

46. 1997-NMSC-006, 932 P.2d 1.

The comparable provision of the New Mexico Constitution—article II, section 10—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.

In adopting the interstitial approach, the *Gomez* court explored whether a warrantless seizure of drug paraphernalia from a vehicle required exigent circumstances and, if it did, whether exigent circumstances existed. In *Gomez*, a sheriff's deputy was dispatched to a "party disturbance" and found approximately fifty to sixty people around a home in a rural area.⁴⁷ As the deputy approached the defendant's car, the defendant appeared to be stuffing something under the seat.⁴⁸ The defendant got out of the car, locked the door, and shut it as the deputy reached the side of the car.⁴⁹ The deputy smelled the odors of burned and unburned marijuana.⁵⁰ The deputy handcuffed the defendant, searched him, and put him in the police car.⁵¹ By then, several more officers had arrived.⁵² The deputy looked into the defendant's car and saw, in plain view, a brass pipe, a pair of hemostats, and some loose marijuana.⁵³ The deputy searched the defendant's car and found a fanny pack containing tabs of paper he believed to be LSD.⁵⁴

At a suppression hearing, the deputy's testimony addressed whether an emergency existed to justify the warrantless search.⁵⁵ The deputy said that he was concerned that he and the other officers might not be able to secure the car in light of the number of potentially hostile onlookers. He added that the car could have been removed if the police had left it unattended while obtaining a warrant.⁵⁶

47. *Id.* ¶ 4, 932 P.2d at 4.

48. *Id.* ¶ 5, 932 P.3d at 4.

49. *Id.*

50. *Id.*

51. *Id.* ¶ 6, 932 P.3d at 4.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* ¶ 8, 932 P.3d at 4.

56. *Id.*

The state relied on *United States v. Ross*⁵⁷ and two New Mexico cases⁵⁸ in arguing that “probable cause alone justify[ed] searching a movable vehicle and its closed containers.”⁵⁹ The defendant did not argue that the officer lacked probable cause to search the vehicle. Rather, he argued that, under the New Mexico Constitution, only exigent circumstances could justify the warrantless search.⁶⁰ The defendant supported his argument by citing a New Mexico case⁶¹ in which the warrantless search of a burlap sack in a car parked at a sheriff’s office was held to be unconstitutional.

Gomez noted that, until 1989, the state constitution had been interpreted in lockstep with the U.S. Constitution.⁶² Then, in *State v. Cordova*,⁶³ the court held that the meaning of a state constitutional provision may differ from its federal analog. The *Cordova* court, however, did not identify circumstances under which deviating from the federal ruling was appropriate. *Gomez* identified three circumstances under which a state court using the interstitial approach may depart from federal precedent: (1) when the federal analysis is “flawed”; (2) when there are “structural

57. 456 U.S. 798 (1982). The holding of *Ross* that probable cause alone without any showing of actual exigency justifies a warrantless search of an automobile was reaffirmed by the Supreme Court in *Maryland v. Dyson*, 527 U.S. 465 (1999). This principle was first expounded in *Carroll v. United States*, 267 U.S. 132 (1925), and is often referred to as the *Carroll Doctrine*.⁷

58. *State v. Pena*, 108 N.M. 760, 779 P.2d 538 (1989); *State v. Apodaca*, 112 N.M. 302, 814 P.2d 1030 (Ct. App. 1991).

59. *Gomez*, 1997-NMSC-006, ¶ 9, 932 P.2d at 5.

60. *Id.* ¶ 10, 932 P.2d at 5.

61. *Id.* (citing *State v. Coleman*, 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974)). The court in *Coleman* never mentioned which constitution had been violated. In any event, the ruling was consistent with federal courts’ rulings at the time that closed packages in vehicles were not covered by the bright-line rule that a movable vehicle is, per se, an exigent circumstance. See Cutcliffe Juste, *supra* note 18, at 370.

62. *Gomez*, 1997-NMSC-006, ¶ 16, 932 P.2d at 6. The earliest case cited by the court as an example of the lockstep approach is *State v. Garcia*, which simply notes that the Fourth Amendment and article II, section 10 are “almost identical.” 76 N.M. 171, 174, 413 P.2d 210, 212 (1966). The court then conducts a Fourth Amendment analysis without any further mention of article II, section 10.

63. 109 N.M. 211, 784 P.2d 30 (1989), discussed *infra* note 87. Earlier cases note that the New Mexico Constitution could be independently interpreted, but they have not done so. See *State v. Deltenre*, 77 N.M. 497, 424 P.2d 782 (1967) (reviewing the legality of an arrest based upon information supplied by a confidential informant); *State ex rel Serna v. Hodges*, 89 N.M. 351, 552 P.2d 787 (1976) (reviewing the constitutionality of the death penalty).

differences” between state and federal government; and (3) when “state characteristics” are “distinctive.”⁶⁴

The court commented that “[s]ince abandoning the lock-step model, our tacit approach to interpretation of the New Mexico Constitution has been interstitial, providing broader protection where we have found the federal analysis unpersuasive either because we deemed it flawed, . . . or because of distinctive state characteristics . . . or because of undeveloped federal analogs.”⁶⁵ In a footnote, the court added, “[w]e decline to follow those states that require litigants to address . . . specified criteria for departing from federal interpretation of the federal counterpart.”⁶⁶ Hence, the court implied that, when interpreting the state constitution, there might be other circumstances in which a departure from the federal ruling is appropriate.

The court then explicitly adopted the interstitial approach, rather than the primacy approach, for two reasons.⁶⁷ First, the court stated that it would be inefficient to develop state constitutional law independently, “when parallel Federal issues have been exhaustively discussed by the United States Supreme Court and commentators.”⁶⁸ Second, the court observed a general need for national uniformity concerning fundamental constitutional rights.⁶⁹

The court then used the interstitial approach to resolve the case. The court noted that, “[u]nder current federal interpretation of the Fourth Amendment, the constitutional protection against warrantless searches and seizures admits of a bright-line exception that permits a warrantless search of a lawfully stopped automobile and any closed containers in the automobile.” The court explained the automobile exception in federal law: (1) The inherent mobility of automobiles creates exigent circumstances and (2) a lower expectation of privacy attaches to the contents of an automobile because of the “pervasive regulation of vehicles traveling

64. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7 (citing Colloquium, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982)).

65. *Id.* ¶ 20, 932 P.2d at 7. This list of rationales replaces “structural differences between state and federal government” with “undeveloped federal analogs;” however, subsequent cases most often refer to the list discussed *supra* note 64.

66. *Gomez*, 1997-NMSC-006, ¶ 23, n.3, 932 P.2d at 8, n.3.

67. The court did not discuss or even mention the dual sovereignty approach.

68. *Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7 (quoting Colloquium, *supra* note 64, at 1358).

69. *Id.*

on public highways.”⁷⁰ The court ruled the deputy’s actions were valid under the Fourth Amendment.⁷¹

The court then turned to article II, section 10 of the New Mexico Constitution. The court noted that it had “consistently . . . expressed a strong preference for warrants”⁷² and held that “a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances.”⁷³ The court continued:

By compelling the officer to show a neutral magistrate facts from which that impartial judicial representative could conclude that probable cause exists to justify searching that vehicle and its containers for contraband, the law enforcement organizations of this state are prevented from allowing the competitive pressures of fighting crime to compromise their judgment about whether or not to carry out a given search.⁷⁴

Without saying so, the court used the “flawed federal analysis” rationale as the justification for departing from the federal bright-line rule. The court wrote:

[q]uite simply, if there is no *reasonable* basis for believing an automobile will be moved or its search will be otherwise compromised by delay, then a warrant is required. While it may be true that in most cases involving vehicles there will be exigent circumstances justifying a warrantless search, we do not accept the federal bright line automobile exception.⁷⁵

The departure from the federal bright-line rule did not help the defendant; the court ruled that it was objectively reasonable for the deputy to believe that exigent circumstances existed.⁷⁶ The search was legal and the defendant’s conviction stood.

IV. PRE-*GOMEZ* CASES IN NEW MEXICO

Although *Gomez* was the first case formally to adopt the interstitial approach, New Mexico appellate courts had been using it prior to the

70. *Gomez*, 1997-NMSC-006, ¶ 34, 932 P.2d at 10–11.

71. *Id.*

72. *Id.* ¶ 36, 932 P.2d at 11.

73. *Id.* ¶ 39, 932 P.2d at 12.

74. *Id.* ¶ 38, 932 P.2d at 11–12.

75. *Id.* ¶ 44, 932 P.2d at 13 (emphasis in original).

76. *Id.* ¶ 43, 932 P.2d at 12.

Gomez decision. In *State v. Cordova*,⁷⁷ the New Mexico Supreme Court held that it would not follow the “totality of the circumstances” test established by U.S. Supreme Court in *Illinois v. Gates* for probable cause based upon unnamed informants.⁷⁸ Instead, New Mexico would continue to adhere to the more stringent *Aguilar-Spinelli* test.⁷⁹

Under the *Aguilar-Spinelli* test, in order for information supplied by an unnamed source to establish probable cause, two prongs must be met: “basis of knowledge” and “credibility or reliability.”⁸⁰ The “basis of knowledge” prong requires that there be a substantial basis for the informant’s knowledge.⁸¹ The second prong requires that the informant be reliable or credible.⁸² In *Gates*,⁸³ the U.S. Supreme Court held that, though these factors are relevant in establishing probable cause, the Fourth Amendment does not require that they be met.⁸⁴ Rather, the Fourth Amendment requires only that the “totality of circumstances” establish probable cause.⁸⁵

However, in New Mexico, the *Cordova* court ruled that the *Aguilar-Spinelli* test “better effectuate[s] the principles behind Article II, Section 10 of [the] Constitution than does the ‘totality of circumstances’ test set out in *Gates*.”⁸⁶ The court commented that the U.S. Supreme Court’s primary reason for abandoning the *Aguilar-Spinelli* test was that lower courts were applying the test too rigidly.⁸⁷ The *Cordova* court distinguished New Mexico in this context: New Mexico courts had not applied the test too rigidly.⁸⁸ The court explained:

We are convinced that our rules,⁸⁹ while providing a flexible, common sense framework, also provide structure for the inquiry into

77. 109 N.M. 211, 784 P.2d 30 (1989).

78. 462 U.S. 213 (1983).

79. Named after the U. S. Supreme Court cases *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), this test was later abandoned by the Supreme Court. *Gates*, 462 U.S. at 239.

80. *Cordova*, 109 N.M. at 212, 784 P.2d at 31.

81. *Id.* at 214, 784 P.2d at 33.

82. *Id.* at 213, 784 P.2d at 32.

83. *Gates*, 462 U.S. 213.

84. *Id.* at 241.

85. *Id.* at 238.

86. *Cordova*, 109 N.M. at 217, 784 P.2d at 36.

87. *Id.* at 215, 784 P.2d at 34. While the *Cordova* opinion did not elaborate on this, in *Illinois v. Gates* the U.S. Supreme Court noted that “an elaborate set of legal rules” had developed to enforce the *Aguilar-Spinelli* test. 462 U.S. 213, 229.

88. *Cordova*, 109 N.M. at 216, 784 P.2d at 36.

89. The requirements of the *Aguilar-Spinelli* test are embodied in Rule 5-211(E) NMRA 1986.

whether probable cause has been demonstrated. The fact that “non-lawyers” are involved in drafting applications for search warrants underscores rather than obviates the need for such structure.⁹⁰

While the interstitial approach calls first for an examination into whether a governmental action violates the U.S. Constitution, the *Cordova* court skipped this step. The court never determined whether the affidavit at issue was sufficient under the federal totality of the circumstances test.

The *Gomez* court cited *Cordova* as providing an example of “distinctive state characteristics” that justify independent analysis under the state constitution.⁹¹ *Gomez* also cited a second example of the distinctive state characteristics rationale, *State v. Sutton*.⁹² In *Sutton*, the court of appeals confronted the validity of a warrantless search of a rural parcel of land on which two plots of marijuana were found.⁹³ The court first reviewed rulings from the U.S. Supreme Court that established and refined the open fields doctrine⁹⁴ and determined that the plots, outside an owner’s curtilage, were not protected under the Fourth Amendment.⁹⁵ The *Sutton* court then turned to article II, section 10 in addressing whether there was a reasonable expectation of privacy in property located outside of the curtilage.⁹⁶ It observed that because the state constitution used the term “homes”—not, as in the Fourth Amendment, “houses”—the state constitution might offer a broader scope of protec-

90. *Cordova*, 109 N.M. at 216, 784 P.2d at 35. The court held that an affidavit stating that a confidential informant had provided an officer with information in the past that the officer had found to be “true and correct from personal observation and investigation,” did meet the second prong of the *Aguilar-Spinelli* test. However, the confidential informant telling the officer that the defendant had brought heroin into town and was selling it at his house and that heroin users had been at the house did not meet the second prong, as the affidavit did not state the basis of those conclusions. *Id.* at 36–37.

91. 1997-NMSC-006, ¶ 20, 932 P.2d 1, 7 (citing *Cordova*, 109 N.M. 211, 784 P.2d 30).

92. *Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d at 7 (citing *State v. Sutton*, 112 N.M. 449, 816 P.2d 518 (Ct. App. 1991)).

93. *Sutton*, 112 N.M. at 450–51, 816 P.2d at 519–20.

94. *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170 (1984); *Hester v. United States*, 267 U.S. 57 (1924). (The open fields doctrine provides that open areas outside the area immediately surrounding a home are not protected by the Fourth Amendment.)

95. *Sutton*, 112 N.M. at 451–54, 816 P.2d at 520–23. The “curtilage” is the yard or land surrounding a house, usually enclosed by a fence or wall. BLACK’S LAW DICTIONARY 441 (9th ed. 2009).

96. *Id.* at 454, 816 P.2d at 523.

tion.⁹⁷ *Sutton* ruled, however, that it was unnecessary to define the scope of the privacy interest protected by the state constitution, as the defendant had done nothing to establish a reasonable expectation of privacy, such as posting signs on the land or erecting substantial fences around the plots.⁹⁸

Gomez cited *State v. Gutierrez*⁹⁹ as an example of the flawed federal analysis rationale.¹⁰⁰ In *Gutierrez*, the New Mexico Supreme Court ruled that the state constitution does not permit a federally recognized “good faith” exception¹⁰¹ to the exclusionary rule developed by the U.S. Supreme Court in *United States v. Leon*.¹⁰² The district court judge in *Gutierrez* had authorized officers to execute a search warrant by entering the defendant’s home without knocking.¹⁰³ The New Mexico Supreme Court held that exigent circumstances to justify such an entry did not exist, so the search was invalid.¹⁰⁴ The state argued that, since the judge condoned the unannounced entry, the federal good faith exception should apply.¹⁰⁵

The *Gutierrez* court held that the *Leon* analysis was flawed.¹⁰⁶ It first discussed three rationales for the state-recognized exclusionary rule: (1) judicial integrity is compromised if the judiciary allows illegally obtained evidence to enter courts;¹⁰⁷ (2) excluding illegally obtained evidence deters illegal police activity;¹⁰⁸ and (3) the exclusionary rule is intended “to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure.”¹⁰⁹ The court continued, “[d]enying the government the fruits of unconstitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches and seizures by preserving the rights of the accused to the same extent as if the government’s officers had stayed within the law.”¹¹⁰ The *Gutierrez*

97. *Id.* at 455, 816 P.2d at 524.

98. *Id.*

99. 116 N.M. 431, 863 P.2d 1052 (1993); see, e.g., Shannon Oliver, Note, *Refusing to “Turn the Other Cheek”—New Mexico Rejects Federal “Good Faith” Exception to the Exclusionary Rule: State v. Gutierrez*, 24 N.M. L. REV. 545 (1994).

100. *State v. Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d 1, 7.

101. That exception states that when the police act in good faith in obtaining a search warrant, any evidence discovered by the search will be allowed at trial even if the warrant is later invalidated. *United States v. Leon*, 468 U.S. 897, 920 (1984).

102. *Gutierrez*, 116 N.M. at 447, 863 P.2d at 1068 (discussing *Leon*, 468 U.S. 897).

103. *Id.* at 432, 863 P.2d at 1053.

104. *Id.* at 434, 863 P.2d at 1056.

105. *Id.* at 433, 863 P.2d at 1055.

106. *Id.* at 437–38, 863 P.2d at 1058–59.

107. *Id.* at 446, 863 P.2d at 1066.

108. *Id.* at 447, 863 P.2d at 1058.

109. *Id.* at 446, 863 P.2d at 1067.

110. *Id.*

court viewed the *Leon* analysis as flawed because the *Leon* court examined only the “deterrence of the police” rationale, and not the judicial integrity or constitutional right rationales.¹¹¹ *Gutierrez* based its decision on the third rationale, that the exclusionary rule preserves the right of the accused to be free from unreasonable search and seizure regardless of whether a police officer or a magistrate caused the constitution to be violated.¹¹² The court, declining to follow the federal good faith exception, held that the evidence should be suppressed.¹¹³

Although not cited in *Gomez*, *State v. Wright*¹¹⁴ offers another instructional view of the flawed federal analysis rationale. In *Wright*, the New Mexico Court of Appeals rejected the federal “apparent authority” theory of consent to search advanced by the U.S. Supreme Court in *Illinois v. Rodriguez*.¹¹⁵ In *Rodriguez*, the defendant’s girlfriend, who did not have actual authority to consent to a search of the defendant’s apartment, allowed the police to search.¹¹⁶ The court held that the fruits of the search should be allowed as evidence because the police had a reasonable belief that the girlfriend had actual authority. In its discussion of *Rodriguez*, the *Wright* court held that the same reason for rejecting the good faith exception, i.e., protecting individuals’ constitutional right to be free from unreasonable searches and seizures, supported the rejection of an apparent authority exception to the warrant requirement.¹¹⁷ Consequently, there is no apparent authority rule under article II, section 10.

The *Gomez* court cited *Campos v. State*¹¹⁸ as a second example of the flawed federal analysis rationale.¹¹⁹ In *Campos*, the court held that article II, section 10 requires probable cause and exigent circumstances for a warrantless felony arrest. This holding diverged from the relevant U.S. Supreme Court rule, which provides that a public felony arrest may

111. *Id.* at 437–38, 863 P.2d at 1058–59. *Leon* held that misconduct would not be deterred by applying the exclusionary rule to situations in which police are acting in good faith in obtaining a warrant. *Leon*, 468 U.S. 897, 919–20.

112. *Gutierrez*, 116 N.M. at 446–47, 863 P.2d at 1067–68.

113. *Id.* at 447, 863 P.2d at 1068.

114. 119 N.M. 559, 893 P.2d 455 (Ct.App. 1995); see, e.g., Kathleen M. Wilson, Note, *State Constitutional Law—New Mexico Rejects Apparent Authority to Consent as A Valid Basis for Warrantless Searches: State v. Wright*, 26 N.M. L. REV. 571 (1996).

115. *Wright*, 119 N.M. 559, 893 P.2d 455 (discussing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)).

116. *Rodriguez*, 497 U.S. at 179.

117. *Wright*, 119 N.M. at 564–65, 893 P.2d at 460–61.

118. 117 N.M. 155, 870 P.2d 117 (1994); see, e.g., Wendy F. Jones, Note, *State Constitutional Law—New Mexico Requires Exigent Circumstances for Warrantless Public Arrests: Campos v. State*, 25 N.M. L. REV. 315 (1995).

119. *State v. Gomez*, 1997-NMSC-006, ¶¶ 19–20, 932 P.2d 1, 7 (citing *Campos*, 117 N.M. 155, 870 P.2d 117).

be made without a warrant, regardless of whether any exigency exists.¹²⁰ The *Campos* court did not evaluate the federal analysis; rather, it simply stated that New Mexico courts had expressed a strong preference for warrants:

[O]ur constitution and case law lead us to hold that for a warrantless arrest to be reasonable the arresting officer must show that the officer had probable cause to believe the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant. If an officer observes the person arrested commit a felony, exigency will be presumed.¹²¹

The *Gomez* court cited only one case, *State v. Attaway*, as an example of the “undeveloped federal analogs” rationale.¹²² In *Attaway*, the New Mexico Supreme Court held that article II, section 10 requires that, absent exigent circumstances, an officer must knock, announce identity and purpose, and wait a reasonable period of time before entering a residence to execute a warrant.¹²³ *Attaway* predated the U.S. Supreme Court’s holding that the Fourth Amendment presumes a “knock and announce” requirement.¹²⁴

V. POST-GOMEZ CASES

In interpreting article II, section 10, *Gomez* developed three rationales to justify departing from federal courts’ interpretations of the Fourth Amendment. One rationale, “structural differences between federal and state government,”¹²⁵ has not been used explicitly in a search and seizure case. The remaining two, flawed federal analysis¹²⁶ and distinctive state characteristics,¹²⁷ are often used in tandem. That is, the reason for additional protection of privacy rights based on the distinctive state characteristics of New Mexico’s constitution and constitutional history is a

120. See *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Watson*, 423 U.S. 411 (1976).

121. *State v. Attaway*, 117 N.M. 141, 159, 870 P.2d 103, 121 (1994).

122. *Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d at 7 (citing *Attaway*, 117 N.M. 141, 870 P.2d 103).

123. Both an arrest and a search warrant were being executed in *Attaway*. 117 N.M. at 143, 870 P.2d at 105.

124. *Wilson v. Arkansas*, 514 U.S. 927 (1995).

125. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7 (citing Colloquium, *supra* note 64, at 1358).

126. *Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d at 7.

127. *Id.*

court's conclusion that the federal rule is based on a flawed analysis of the Fourth Amendment. Thus, flawed federal analysis, whether explicitly referred to or not, is almost always the starting point when the courts have cited distinctive state characteristics. Cases in which the New Mexico courts have not stated a reason for departure from federal precedent generally contain an implicit criticism of federal precedent.

A. "Seizure" of a person: When does it occur?

*State v. Garcia*¹²⁸ examined whether the New Mexico Constitution defines the seizure of a person in the same way as the U.S. Constitution does under *California v. Hodari D.*¹²⁹ In *Hodari D.*, the U.S. Supreme Court held that a person who was attempting to elude police was not seized for purposes of Fourth Amendment protections until there is either "a laying on of hands or application of physical force to restrain movement . . . or, where that is absent, *submission* to the assertion of authority."¹³⁰

The defendant in *Garcia* was observed by a police officer walking across the street near the address to which the officer had been dispatched regarding a possible incident of domestic violence.¹³¹ Without any basis to believe that the defendant was involved in the incident, the officer stopped his patrol car and spotlighted the defendant.¹³² He ordered the defendant to stop several times, as the defendant continued walking and "fumbling in his pockets."¹³³ Fearing the defendant was about to run and that he might have a weapon in his pocket, the officer sprayed the defendant with pepper spray and then tackled him.¹³⁴ After the pepper spray and before the tackling, an item fell to the ground that turned out to be crack cocaine.¹³⁵

The New Mexico Supreme Court concluded that "there is serious uncertainty regarding whether the United States Supreme Court would suppress the evidence in this case under the Fourth Amendment's protections against unreasonable searches and seizures."¹³⁶ This uncertainty concerned whether the seizure of the defendant by spraying him with

128. 2009-NMSC-046, 217 P.3d 1032.

129. *Id.* ¶ 26, 217 P.3d at 1040 (discussing *California v. Hodari D.*, 499 U.S. 621 (1991)).

130. *Hodari D.*, 499 U.S. at 1550–51 (emphasis in original).

131. *Garcia*, 2009-NMSC-046, ¶ 2, 217 P.3d at 1035.

132. *Id.*

133. *Id.*

134. *Id.* ¶¶ 4–5, 217 P.3d at 1035.

135. *Id.* ¶¶ 5–6, 217 P.3d at 1035.

136. *Id.* ¶ 25, 217 P.3d at 1040.

pepper spray “ended the moment the officer stopped spraying him with mace”¹³⁷ and whether the seizure of the crack was a fruit of an illegal seizure and thus subject to the exclusionary rule.¹³⁸

The *Garcia* court looked to article II, section 10 for a resolution. The defendant asked the court to depart from *Hodari D.*, arguing that the reasoning in that ruling was flawed.¹³⁹ The court declined and instead turned to what it called the “distinctive New Mexico characteristics” rationale.¹⁴⁰

The court began by outlining three purposes served by article II, section 10 of the New Mexico Constitution: “It is the foundation of both personal privacy and the integrity of the criminal justice system, as well as the ultimate regulator of police conduct.”¹⁴¹ It concluded that regulating police conduct was the most important concern in the case.¹⁴² The court noted that the *Hodari D.* ruling focused on the suspect’s reaction, rather than the officer’s conduct,¹⁴³ providing that a suspect who submits to an officer’s authority is deemed to be seized at that time, but a suspect who does not submit is not seized until there is an application of force upon the suspect.¹⁴⁴ The court then noted that numerous other states have refused to follow *Hodari D.*, highlighting many of the criticisms of *Hodari D.* by state appellate courts: “seriously flawed,”¹⁴⁵ “unprincipled, a departure from Supreme Court precedent, and unwise policy,”¹⁴⁶ “part of a trend which has left the Fourth Amendment ‘atrophied to the condition of a vestigial organ,’”¹⁴⁷ and “the latest manifestation of the Court’s surreal and Orwellian view of personal security in contemporary America.”¹⁴⁸ *Garcia* concluded that “*Hodari D.*’s modification of the reasonable person standard weakens the right to be secure from unreasona-

137. *Id.* ¶ 22, 217 P.3d at 1039.

138. *Id.*

139. *Id.* ¶ 27, 217 P.3d at 1040.

140. *Id.*

141. *Id.* ¶ 31, 217 P.3d at 1041.

142. *Id.*

143. *Id.* ¶ 32, 217 P.3d at 1041.

144. *Id.*

145. *Id.* ¶ 33, 217 P.3d at 1042 (citing *California v. Hodari D.*, 499 U.S. 621, 637 (1991) (Stevens, J., dissenting)).

146. *Id.*

147. *Id.* (quoting *State v. Quino*, 840 P.2d 358, 365 (1992) (Levinson, J., concurring)).

148. *Id.* (quoting Ronald J. Bacigal, *The Right of the People to be Secure*, 82 Ky. L.J. 145, 146 (1994)).

ble searches and seizures beyond a point which may be countenanced under our state constitution.”¹⁴⁹

The distinctive New Mexico characteristic is not clearly identified by the court, but it appears to be that “the robust character and honored history of [article II, section 10] with special attention to its purpose of police regulation.”¹⁵⁰ The court established the standard under article II, section 10 of the New Mexico Constitution as whether, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”¹⁵¹ Applying that test to the facts at hand, the court concluded that the defendant was in custody when the officer first ordered him to stop.¹⁵² As the officer lacked any reasonable suspicion to place the defendant into investigative detention, the seizure of the crack cocaine was a fruit of the poisonous tree.¹⁵³ *Garcia* serves as an example of the New Mexico Supreme Court using distinctive state characteristics as the stated reason for departing from federal precedent but starting the analysis by criticizing the applicable federal precedent.

B. *Pretextual Stops: Rejected on State Constitutional Grounds*

A “pretextual stop” is a traffic stop or other type of investigative detention in which a reasonable officer would not have made the stop for the reason articulated by the detaining officer.¹⁵⁴ A pretextual stop occurs, for example, when an officer who suspects—but lacks reasonable suspicion—that a driver is guilty of drug possession stops the driver for a minor traffic violation. In *Whren v. United States*,¹⁵⁵ the U.S. Supreme Court upheld the constitutionality of pretextual traffic stops. In contrast, the New Mexico Court of Appeals in *State v. Ochoa*¹⁵⁶ held that pretextual stops violate article II, section 10 of the New Mexico Constitution. The *Ochoa* court impliedly used the flawed federal analysis rationale but cited distinctive state characteristics as the basis for the departure from *Whren*.¹⁵⁷

149. *Id.* ¶ 34, 217 P.3d at 1042.

150. *Id.* ¶ 31, 217 P.3d at 1041.

151. *Id.* ¶ 37, 217 P.3d at 1042 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

152. *Id.* ¶ 41, 217 P.3d at 1043.

153. *Id.* ¶ 47, 217 P.3d at 1044.

154. David A. Harris, “*Driving While Black*” and all other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

155. 517 U.S. 806 (1996).

156. 2009-NMCA-002, 206 P.3d 143.

157. *Id.* ¶ 20, 206 P.3d at 151.

In *Whren*, two plainclothes detectives in an unmarked car stopped a driver for turning without signaling and driving off at an unreasonable speed.¹⁵⁸ When one of the officers approached the car, he saw the passenger holding what looked like two bags of crack cocaine. The officer found more drugs in the car in a subsequent search.¹⁵⁹ The court commented that a pretextual analysis in the context of a traffic stop is inappropriate since the probable cause requirement for a traffic stop provides adequate Fourth Amendment protection.¹⁶⁰

In *Ochoa*, the New Mexico Court of Appeals addressed the question of whether pretextual stops violate article II, section 10.¹⁶¹ There, a narcotics detective saw the defendant's car parked in front of a residence under surveillance.¹⁶² When the defendant drove away, the detective radioed for a patrol officer to stop the car because the defendant was not wearing a seatbelt.¹⁶³ After stopping the car, the officer arrested the defendant, who had outstanding arrest warrants.¹⁶⁴ The defendant consented to a search, and the officer found methamphetamine and a pipe.¹⁶⁵

The court did not explicitly use the flawed federal analysis rationale, but it did point out that *Whren* "suffered widespread criticism of its legal reasoning, policy choices, and consequences."¹⁶⁶ The court highlighted the main criticism of *Whren*: that virtually every driver commits some violation of the traffic laws,¹⁶⁷ which gives police "unbridled" discretion.¹⁶⁸ The court concluded:

[W]e are not persuaded, as the *Whren* court was, that probable cause and reasonable suspicion standards are sufficient to limit police discretion to enforcement of traffic offenses The extensive regulation of all manner of driving subjects virtually all drivers to the whim of officers who choose to selectively enforce the traffic code for improper purposes.¹⁶⁹

158. *Whren*, 517 U.S. at 808.

159. *Id.* at 808–09.

160. *Id.* at 818. The court's use of the term "probable cause" is problematic in light of its previous ruling in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), that reasonable suspicion is the proper test to evaluate the constitutionality of traffic stops.

161. 2009-NMCA-002, ¶ 20, 206 P.3d at 151.

162. *Id.* ¶ 2, 206 P.3d at 147.

163. *Id.*

164. *Id.*

165. *Id.* ¶ 3, 206 P.3d at 147.

166. *Id.* ¶ 13, 206 P.3d at 148.

167. *Id.* ¶ 17, 206 P.3d at 150.

168. *Id.*

169. *Id.* ¶ 18, 206 P.3d at 150.

The court also alluded to the distinctive state characteristics rationale by mentioning a line of New Mexico cases eschewing bright-line rules. It continued, “*Whren* ‘established a bright-line rule that any technical violation of a traffic code legitimizes a stop, even if the stop is merely pretext for an investigation of some other crime.’”¹⁷⁰

Holding that that the New Mexico Constitution prohibits pretextual stops, the court established guidelines to determine if a stop is pretextual. One consideration is “the objective reasonableness of an officer’s actions and the subjective intent of the officer—the real reason for the stop.”¹⁷¹ The court found the traffic stop unconstitutional.

The New Mexico Supreme Court has had two opportunities to either uphold or overrule the court of appeals’ holding in *Ochoa*. It first granted and then quashed certiorari in *Ochoa*.¹⁷² Then, in *State v. Gonzales*,¹⁷³ the court remanded the case to the district court for a factual determination that avoided addressing the ruling in *Ochoa*. In *Gonzales*, a detective working on a tip that the driver was transporting drugs told a patrol officer to stop the car for a window tinting violation. The detective admitted that the traffic stop was a pretext for the drug investigation.¹⁷⁴ The supreme court remanded the case to the district court to determine whether the detective had reasonable suspicion to place the defendant into investigative detention for a drug investigation.¹⁷⁵ The New Mexico Supreme Court thus left standing the court of appeals’ use in *Ochoa* of an explicit citation to distinctive state characteristics as the basis for departure from federal precedent while devoting substantially more analysis to criticizing the federal precedent.

C. Questioning Drivers: Greater Protections under Article II, Section 10

In a line of cases beginning with *Albuquerque v. Haywood*,¹⁷⁶ the New Mexico appellate courts had held that the Fourth Amendment prohibited officers from asking questions unrelated to the initial purpose of the stop unless there was reasonable suspicion to support the questioning. But in the 2009 case *Arizona v. Johnson*,¹⁷⁷ the U.S. Supreme Court held

170. *Id.* ¶ 25, 206 P.3d at 152 (quoting *United States v. Mosley*, 454 F.3d 249, 253 (3d Cir. 2006)).

171. *Id.* ¶ 39, 206 P.3d at 155.

172. *State v. Ochoa*, 2009-NMCA-002, 206 P.3d 143.

173. 2011-NMSC-012, 257 P.3d 894.

174. *Id.* ¶ 6, 257 P.3d at 896.

175. *Id.* ¶¶ 16–17, 257 P.3d at 898–99.

176. 1998-NMCA-029, ¶ 18, 954 P.2d 93, 98, *overruled by State v. Leyva*, 2011-NMSC-009, 250 P.3d 861.

177. 555 U.S. 323, 333 (2009).

that officers may ask questions unrelated to the reason for a traffic stop as long as the questioning did not prolong the length of the detention. *Johnson* forced New Mexico courts to reconsider their Fourth Amendment analysis. In *State v. Leyba*,¹⁷⁸ the New Mexico Supreme Court held that the rule limiting questioning on topics not related to the initial purpose of the investigative detention was grounded in article II, section 10.

1. Fourth Amendment analysis of the rules concerning questioning of drivers

In *Haywood*,¹⁷⁹ the city of Albuquerque had attempted to confiscate \$28,000 in cash and a handgun uncovered in a traffic stop.¹⁸⁰ An officer stopped the defendant for not having a visible license plate or tag.¹⁸¹ After getting the defendant's license and registration,¹⁸² the officer asked the defendant if he had any guns or knives in the car.¹⁸³ The defendant answered that there was a handgun under the seat.¹⁸⁴ The officer asked the defendant to exit the car, and, collecting the gun, saw a ski mask, shotgun shells, and binoculars.¹⁸⁵ A second officer then searched the vehicle and found a white plastic bag containing cash.¹⁸⁶ Finding no evidence of any criminal activity, the officers released the defendant but retained the cash and the gun.¹⁸⁷

With little discussion, the court of appeals held that the first officer did not have reasonable suspicion to ask the defendant if he had any guns or knives in the vehicle.¹⁸⁸ Therefore, the ultimate recovery of the gun and the cash were fruits of illegal questioning.¹⁸⁹

The following year, in *State v. Taylor*,¹⁹⁰ the court expanded the *Haywood* ruling to questions about drugs. In *Taylor*, two officers stopped the defendant in response to a report that he and a passenger were throwing

178. 2011-NMSC-009, ¶ 63, 250 P.3d 861, 880.

179. 1998-NMCA-029, 954 P.2d 93.

180. *Id.* ¶ 8, 954 P.2d at 96.

181. *Id.* ¶ 3, 954 P.2d at 95.

182. The New Mexico Supreme Court had previously ruled that such paperwork may always be requested during a traffic stop, regardless of the purpose of the stop. *State v. Reynolds*, 119 N.M. 383, 890 P.2d 1315 (1995).

183. *Haywood*, 1998-NMCA-029, ¶ 5, 954 P.2d at 95.

184. *Id.*

185. *Id.*

186. *Id.* ¶ 6, 954 P.2d at 95.

187. *Id.* ¶ 8, 954 P.2d at 96.

188. *Id.* ¶ 16, 954 P.2d at 97.

189. *Id.* ¶ 18, 954 P.2d at 98.

190. 1999-NMCA-022, 973 P.2d 246.

trash from the window of their car, which was parked in a dirt lot.¹⁹¹ Both suspects denied littering.¹⁹² As one officer checked the suspects' identification for warrants and warrants, the second officer asked the suspects if they had any guns, alcohol, or illegal drugs in the car.¹⁹³ They denied having any.¹⁹⁴ The officer asked if he could search the car.¹⁹⁵ The defendant consented, and the officer found crack cocaine.¹⁹⁶

Citing *Haywood*, the court of appeals held that the officer "was not entitled to ask about illegal drugs and alcohol because drugs and alcohol were unrelated to the purpose of the investigatory stop, which was to investigate allegations of littering and a larceny that had occurred about six months earlier."¹⁹⁷ Like *Haywood*, *Taylor* was based on an interpretation of the Fourth Amendment, not article II, section 10.

In *State v. Duran*, the New Mexico Supreme Court first addressed the issue of whether an officer may ask questions unrelated to the initial purpose of the stop without first developing reasonable suspicion related to those questions.¹⁹⁸ An officer stopped the defendant to determine if the improperly placed tag in the rear window of her vehicle was a valid temporary registration.¹⁹⁹ When the officer asked the defendant for her license, vehicle registration, and proof of insurance, he noticed a floor jack, loose tools, and the odor of gasoline.²⁰⁰ The defendant had just purchased the car, and there were irregularities in her paperwork.²⁰¹ The officer asked the defendant about her travel plans.²⁰² She answered that she and her passenger were traveling from Silver City to Las Cruces, a route that, if followed directly, would not have put them on the road where they were stopped.²⁰³ When the officer asked the passenger about their travel plans, she replied that they were traveling from Las Cruces to Albuquer-

191. *Id.* ¶ 2, 973 P.2d at 248.

192. *Id.* ¶ 3, 973 P.2d at 248.

193. *Id.* ¶ 4, 973 P.2d at 249.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* ¶ 20, 973 P.2d at 252.

198. 2005-NMSC-034, 120 P.3d. 836, *overruled by* State v. Leyva, 2011-NMSC-009, 250 P.3d 861.

199. *Id.* ¶ 3, 120 P.3d at 839.

200. *Id.* ¶ 4, 120 P.3d at 839.

201. *Id.* ¶ 7, 120 P.3d at 839. The bill of sale was hand-written even though it listed a dealer as the seller, the odometer disclosure statement was signed but not completed, and the temporary tag was set to expire in less than one month from the date of sale, which was unusual. *Id.*

202. *Id.* ¶ 8, 120 P.3d at 840.

203. *Id.*

que, another route that did not directly coincide with the road on which they were traveling.²⁰⁴

The officer observed not only a number of other inconsistencies in the defendant's answers, but also her extreme nervousness while giving those answers.²⁰⁵ The officer issued a citation for the improper tag location and then asked the defendant if she had any drugs or weapons in the car.²⁰⁶ She denied having any. The defendant and her passenger then consented in writing to a vehicle search.²⁰⁷ With the help of a Border Patrol officer using a fiber optic scope, the officer found a large amount of marijuana in the gas tank.²⁰⁸

The court reviewed the case under only a Fourth Amendment analysis. The court noted the split of authority in cases dealing with questioning about unrelated topics: Some courts permitted the questioning if it does not increase the length of the stop; others required that questioning be reasonably related to the initial purpose of the stop.²⁰⁹ The court elaborated that, among the latter group of cases, some embraced a bright-line rule allowing questions about travel plans, which courts considered related to the initial purpose of a traffic stop, while other courts evaluated the question case by case.²¹⁰

The *Duran* court sided with the line of authority that evaluated case-by-case whether travel plans are a permissible topic of questioning, permitting it if they are reasonably related to the initial purpose of the stop.²¹¹ The court decided that the officers' questions about travel plans were related to the initial purpose of the stop, an improperly displayed tag. The court determined that, while the officer did not have reasonable suspicion of drug activity at that time, there was a connection between the travel plans and the concerns about the paperwork.²¹²

The court then examined whether the officer's questions about drugs and request for consent to search the vehicle were permissible. The court quoted *Taylor* for the proposition that "an officer may expand the scope of the search or seizure during the investigatory stop only where the officer has reasonable and articulable suspicion that other criminal

204. *Id.* ¶ 13, 120 P.3d at 840.

205. *Id.* ¶ 12, 120 P.3d at 840.

206. *Id.* ¶¶ 14–15, 120 P.3d at 840–41.

207. *Id.* ¶ 15, 120 P.3d at 841.

208. *Id.* ¶ 16, 120 P.3d at 841.

209. *Id.* ¶¶ 31–32, 120 P.3d at 841.

210. *Id.*

211. *Id.* ¶ 34, 120 P.3d at 845.

212. *Id.* ¶ 42, 120 P.3d at 848.

activity has been or may be afoot.”²¹³ The court distinguished the case’s facts from those of *Haywood* and *Taylor* and established that the officer in *Duran* had reasonable suspicion to expand the scope of questioning to drugs.²¹⁴ Therefore, the officer’s question about drugs and request for consent to search were proper.²¹⁵ This opinion was based on the Fourth Amendment and did not examine article II, section 10.

Two later New Mexico Supreme Court cases also used a Fourth Amendment analysis to evaluate the propriety of an officer’s asking about drugs during a traffic stop. The facts in *State v. Van Dang*²¹⁶ resembled those in *Duran*.²¹⁷ In *Van Dang*, the defendant was driving a rental car when he was stopped for speeding.²¹⁸ The rental contract did not authorize the defendant to drive the car, a fact that made the officer suspicious.²¹⁹ The defendant said that his uncle had rented the car and allowed him to drive it.²²⁰ The officer requested that dispatch try to determine through the rental company if the car was stolen.²²¹ In the meantime, he asked the defendant and his passenger about their travel plans; they gave inconsistent answers.²²² After waiting twenty-five minutes to hear from the rental car company, the officer asked the two if they had any drugs in the vehicle, which they denied.²²³ At the officer’s request, the two consented to a vehicle search.²²⁴ The officer found approximately 20,000 Ecstasy pills in the trunk.²²⁵ The court determined that the officer had developed reasonable suspicion to ask the drug-related questions.²²⁶

In *State v. Funderburg*,²²⁷ the court addressed the issue of whether finding drugs on a passenger gives police reasonable suspicion to question the driver of the vehicle. The officer stopped the defendant because his car matched the description of one that, a few hours before, had been

213. *Id.* ¶ 23, 120 P.3d at 843 (quoting *State v. Taylor*, 1999-NMCA-022, ¶ 20, 973 P.2d 246, 252).

214. *Id.* ¶ 41, 120 P.3d at 847–48.

215. *Id.* ¶ 42, 120 P.3d at 843.

216. 2005-NMSC-033, 120 P.3d 830.

217. *State v. Duran*, 2005-NMSC-034, 120 P.3d. 836, *overruled by State v. Leyva*, 2011-NMSC-009, 250 P.3d 861.

218. 2005-NMSC-033, ¶ 1, 120 P.3d 830, 832.

219. *Id.*

220. *Id.* ¶ 2, 120 P.3d at 832.

221. *Id.* ¶ 1, 120 P.3d at 832.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* ¶ 16, 120 P.3d at 836.

227. 2008-NMSC-026, 183 P.3d 922.

connected to the passing of a forged check.²²⁸ The officer ordered one of the two passengers, the alleged forger, out of the vehicle.²²⁹ The passenger seemed nervous and repeatedly put his hand into his pocket.²³⁰ The officer asked what was in his pocket, and he admitted that he had a marijuana pipe, which the officer recovered.²³¹ After arresting the passenger, the officer returned to the car and asked the driver whether there was anything in the car that he should know about.²³² The defendant said that there was not, and the officer asked for and received consent to search.²³³ The officer found a pipe and methamphetamine.²³⁴ The court held that the officer had reasonable suspicion to ask about the contents of the car and for consent to search.²³⁵

2. Article II, section 10 analysis of the rules concerning questioning of drivers

In 2009, the U.S. Supreme Court in *Arizona v. Johnson*²³⁶ resolved the circuit split on whether reasonable suspicion is required for the police to ask questions unrelated to the initial purpose of the stop. The Supreme Court answered in the negative; thereafter, the New Mexico Supreme Court turned to the New Mexico Constitution to address the issue.

In *Johnson*, the defendant was a passenger in a car stopped because its registration had been suspended for an insurance violation.²³⁷ The officer suspected, based on his observations of clothing and behavior, that the passenger was a gang member.²³⁸ During questioning, the officer learned that the passenger was a convicted felon.²³⁹ The officer asked him to get out of the car, conducted a pat-down search, and found a concealed gun.²⁴⁰

The court noted that, when the police stop a vehicle, the passenger is in detention.²⁴¹ However, the court held that the questioning related to gang affiliation was not a violation of the Fourth Amendment: “An of-

228. *Id.* ¶ 2, 183 P.3d at 924.

229. *Id.* ¶ 4, 183 P.3d at 925.

230. *Id.*

231. *Id.*

232. *Id.* ¶ 5, 183 P.3d at 925.

233. *Id.*

234. *Id.*

235. *Id.* ¶ 33, 183 P.3d at 931.

236. 555 U.S. 323 (2009).

237. *Id.* at 327.

238. *Id.* at 328.

239. *Id.*

240. *Id.*

241. *Id.* at 326.

ficer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."²⁴²

Johnson rendered invalid the New Mexico line of cases that relied on the Fourth Amendment to require reasonable suspicion for such additional questioning. In *State v. Leyba*, the New Mexico Supreme Court reevaluated the issue by analyzing it under article II, section 10.²⁴³

The *Leyba* defendant was a driver who was stopped for speeding.²⁴⁴ Before the defendant came to a full stop, the officer saw him lean over as if to hide something under the passenger seat.²⁴⁵ The officer determined that the defendant's license was suspended.²⁴⁶ After issuing three traffic citations, the officer asked if the vehicle contained any "knives, needles, guns, or drugs."²⁴⁷ The defendant admitted there was marijuana in the car.²⁴⁸ The officer received consent to search and found not only marijuana, but also methamphetamine.²⁴⁹

The *Leyba* court first applied *Johnson* and concluded that the officer's question about the vehicle's contents did not violate the Fourth Amendment.²⁵⁰ The court went on to evaluate whether the question violated article II, section 10. The court cited the "[t]he extra layer of protection from unreasonable searches and seizures" as a "distinct state characteristic of New Mexico constitutional law"²⁵¹ in holding that the New Mexico Constitution should be interpreted differently from the federal Constitution. However, the court included a lengthy critique of *Johnson* and other federal precedents that established "bright-line rules" rather than using a "fact-based, case-by-case approach. . . ."²⁵² The court noted that article II, section 10 is "calibrated slightly differently than the Fourth Amendment."²⁵³ The court continued, "New Mexico courts have consistently rejected bright-line rules in favor of an examination into the reasonableness of officers' actions under the circumstances of each

242. *Id.* at 333.

243. 2011-NMSC-009, 250 P.3d 861.

244. *Id.* ¶ 4, 250 P.3d at 864.

245. *Id.*

246. *Id.*

247. *Id.* ¶ 6, 250 P.3d at 864–65.

248. *Id.*

249. *Id.*

250. *Id.* ¶ 10, 250 P.3d at 866.

251. *Id.* ¶ 51, 250 P.3d at 877 (quoting *State v. Cardenez-Alvarez*, 2001-NMSC-017, ¶ 15, 25 P.3d 225, 231).

252. *Id.* ¶¶ 54–56, 250 P.3d at 878–79.

253. *Id.* ¶ 53, 250 P.3d at 878.

case.”²⁵⁴ Requiring reasonable suspicion for questions unrelated to the initial purpose of the traffic stop “ensures that investigating officers do not engage in ‘fishing expeditions’ during traffic stops.”²⁵⁵

The court went on to note that the U.S. Supreme Court’s bright-line rule “has come under criticism from scholars and courts alike.”²⁵⁶ The court quoted Professor Wayne R. LaFave:

[The rule] amount[s] to nothing more than an encouragement of police to engage in pretextual traffic stops so that they may engage in interrogation about drugs in a custodial setting. . . . The correct rule is that followed by some other courts: that in strict accordance with *Terry* and its progeny, questioning during a traffic stop must be limited to the purpose of a traffic stop and thus may not be extended to the subject of drugs.²⁵⁷

Ultimately, however, the court ruled in favor of the state. It based its ruling on the officer’s observation of the defendant’s “furtive movement—appearing to hide something under the passenger seat—before stopping.”²⁵⁸ This gave the officer reasonable suspicion to ask about the “presence of weapons or other contraband in the vehicle.”²⁵⁹ *Leyba* serves as another example of the court explicitly citing distinctive state characteristics as the basis for the ruling, but flawed federal analysis is strongly implied as a basis in the lengthy criticism of federal precedent.

D. Questioning Passengers: Only When Reasonable Suspicion Exists

Since *State v. Affsprung*,²⁶⁰ the New Mexico Court of Appeals has consistently held that passengers may not be questioned absent individualized reasonable suspicion of criminal activity or dangerousness. The rule initially was based on a Fourth Amendment analysis. However, as with questioning of drivers, *Arizona v. Johnson*²⁶¹ forced the New Mexico appellate courts to base the rule on article II, section 10.

254. *Id.* ¶ 54, 250 P.3d at 878.

255. *Id.* ¶ 55, 250 P.3d at 878.

256. *Id.* ¶ 56, 250 P.3d at 879.

257. *Id.* (quoting Wayne R. LaFave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1887 (2004)).

258. *Id.* ¶ 60, 250 P.3d at 880.

259. *Id.*

260. 2004-NMCA-038, 87 P.3d 1088.

261. 555 U.S. 323 (2009).

1. Fourth Amendment analysis of rules concerning questioning of passengers

In *Affsprung*, an officer asked the defendant, a passenger, for identification.²⁶² The car was stopped for a “faulty license plate light.”²⁶³ The passenger told the officer his name, date of birth, and Social Security number.²⁶⁴ Based on that information, the officer learned that there was a warrant for the defendant’s arrest.²⁶⁵ The search incident to arrest revealed methamphetamine and drug paraphernalia in the defendant’s pockets.²⁶⁶

The New Mexico Court of Appeals first analyzed whether the defendant was in custody. The court concluded that the defendant was in custody, as “few passengers in this circumstance would, in our view, feel free to ignore the officer’s request for identification, or feel free to get out of the vehicle and leave the area after either refusing to give the information or even after providing it.”²⁶⁷ The court added that an officer’s generalized concern for personal safety does not outweigh a passenger’s Fourth Amendment right to be free from unwarranted questioning.²⁶⁸

A passenger who owns a vehicle might be required to produce identification. In *State v. Rubio*,²⁶⁹ the defendant was a passenger in a car stopped because the driver was not wearing a seatbelt.²⁷⁰ The officer asked the driver to identify the car’s owner after the driver “had a difficult time presenting the paperwork.”²⁷¹ The driver pointed to the defendant, who was sitting in the front passenger seat.²⁷² The officer asked the defendant for identification, which he produced.²⁷³ The officer then ran a check and learned that the defendant had an outstanding arrest warrant.²⁷⁴ The officer searched the car and found marijuana and crack cocaine.²⁷⁵

The court held that it was reasonable for the officer to ask the owner to produce identification, as he “was responsible for assuring that the ve-

262. 2004-NMCA-038, ¶ 2, 87 P.3d 1088, 1090.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* ¶ 16, 87 P.3d at 1094.

268. *Id.* ¶ 20, 87 P.3d at 1094.

269. 2006-NMCA-067, 136 P.3d 1022.

270. *Id.* ¶ 3, 136 P.3d at 1024.

271. *Id.* ¶ 4, 136 P.3d at 1024.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

hicle was properly registered and insured, and was also responsible for giving permission to the driver to operate the vehicle.”²⁷⁶ As to the check for warrants, the court noted that “our case law considers the continuing intrusion of a computer check relating to license and registration as a *de minimus* procedure related to the government’s and the officer’s legitimate interests in making sure that the driver is properly licensed and driving a vehicle that is properly registered and insured.”²⁷⁷

In *State v. Patterson*,²⁷⁸ the court of appeals clarified the standard for questioning passengers and reinforced the need for individualized suspicion. The ruling consolidated two cases involving defendant passengers.²⁷⁹ The *Patterson* defendant was a passenger in a car parked late at night in a closed business’s lot.²⁸⁰ An officer approached the car and asked the driver what they were doing there.²⁸¹ After seeing an open beer container in the car, the officer patted down the driver and found a glass pipe.²⁸² The officer asked the defendant for identification.²⁸³ The officer recognized the defendant as someone who had been booked a few days earlier.²⁸⁴ He asked the defendant to get out of the car and saw the defendant pull something out of his pocket: a baggie of methamphetamine.²⁸⁵

The defendant in the other (consolidated) case, *State v. Swanson*,²⁸⁶ was a passenger in a car that, late at night, pulled into a parking lot in an apparent attempt to avoid a roadblock.²⁸⁷ The officer pulled up behind the car and, after telling the three occupants to stay in the car, asked them why they were avoiding the roadblock.²⁸⁸ One of the passengers said that the car was overheating.²⁸⁹ All three occupants appeared to be “very nervous and avoiding eye contact.”²⁹⁰ The officer ordered the occupants to get out of the car.²⁹¹ The defendant was asked to empty his pockets.²⁹²

276. *Id.* ¶ 18, 136 P.3d at 1027.

277. *Id.* ¶ 20, 136 P.3d at 1027.

278. 2006-NMCA-037, 131 P.3d 1286.

279. *Id.*

280. *Id.* ¶ 2, 131 P.3d at 1288.

281. *Id.* ¶ 3, 131 P.3d at 1288.

282. *Id.*

283. *Id.* ¶ 4, 131 P.3d at 1289.

284. *Id.* ¶ 5, 131 P.3d at 1289.

285. *Id.* ¶ 6, 131 P.3d at 1289.

286. *Id.* ¶ 8, 131 P.3d at 1289.

287. *Id.*

288. *Id.* ¶ 9, 131 P.3d at 1289.

289. *Id.*

290. *Id.*

291. *Id.* ¶ 10, 131 P.3d at 1289.

292. *Id.* ¶ 11, 131 P.3d at 1289.

He complied and produced drug paraphernalia, marijuana, and methamphetamine.²⁹³

After concluding that both defendants were in investigatory detention, the court examined in each defendant's case whether the officers had individualized reasonable suspicion. The court held that neither finding drugs on the driver nor the observation of the open beer container gave the police individualized reasonable suspicion of the first defendant's drug possession:²⁹⁴ "Mere presence was not sufficient to create an individualized suspicion that defendant Patterson was in violation of the open container law."²⁹⁵ As to the second defendant, the court ruled that there were no facts to support a reasonable suspicion of criminal behavior.²⁹⁶

2. Article II, section 10 analysis of the rules concerning questioning of passengers

In *State v. Portillo*,²⁹⁷ the New Mexico Court of Appeals extended *State v. Leyba*,²⁹⁸ which used article II, section 10 in limiting the questioning of drivers, to apply to the questioning of passengers. The defendant was the passenger in a car stopped for speeding.²⁹⁹ The defendant avoided eye contact with the officer by looking straight ahead while the officer collected the driver's paperwork.³⁰⁰ The officer told the driver to go to the patrol car so the officer could issue a citation.³⁰¹ In the meantime, a second officer arrived to watch the defendant.³⁰² After issuing the citation, the first officer told the driver that he was free to leave.³⁰³ As the driver was returning to his car, the officer asked him if he had any drugs or weapons in the vehicle.³⁰⁴ The driver said he did not and consented to a vehicle search.³⁰⁵ Before the search, the officer asked the passenger the

293. *Id.* ¶¶ 11-12, 131 P.3d at 1289-90.

294. *Id.* ¶ 28, 131 P.3d at 1293.

295. *Id.*

296. *Id.* ¶ 29, 131 P.3d at 1293.

297. 2011-NMCA-079, 256 P.3d 466.

298. 2011-NMSC-009, 250 P.3d 861.

299. *Portillo*, 2011-NMCA-079, ¶ 4, 258 P.2d at 468.

300. *Id.*

301. *Id.* ¶ 5, 131 P.3d at 469.

302. *Id.* ¶ 4, 131 P.3d at 468.

303. *Id.* ¶ 5, 131 P.3d at 469.

304. *Id.*

305. *Id.*

same question; he, too, said “no” and consented to a vehicle search.³⁰⁶ The officer found illegal drugs.³⁰⁷

The court first determined that the defendant was in detention: The first officer had told the second officer to watch the defendant while he was issuing the citation.³⁰⁸ Furthermore, the defendant was not informed that he was free to leave.³⁰⁹ Because the defendant was in investigative detention, the court applied the *Leyva* holding.

The court commented that *Leyva* departed from the Fourth Amendment analysis, which examined whether the questioning prolonged the stop.³¹⁰ The court held that article II, section 10 required reasonable suspicion in order to expand the scope of questioning of passengers.³¹¹ Nevertheless, the court did not overrule its previous holdings based on the Fourth Amendment rule. Ultimately, the court determined that the defendant’s behavior did not give the officer reasonable suspicion of illegal drug or weapon possession.³¹² Aside from citing *Leyba*, the decision in *Portillo* provides no rationale for the departure from the federal rule.

E. Vehicle Searches: Reasonableness and Exigent Circumstances

The U.S. Supreme Court has developed several doctrines authorizing police to conduct warrantless vehicle searches, including protective sweep for weapons; search incident to arrest; probable cause related to a vehicle containing contraband or evidence of a crime; and inventory search.³¹³ Here, too, is an area in which the New Mexico appellate courts have expressed distaste for the U.S. Supreme Court’s bright-line rules, preferring instead to analyze search and seizure requirements under article II, section 10.

The New Mexico appellate courts’ first opportunity to apply *State v. Gomez*³¹⁴ was in *State v. Arredondo*,³¹⁵ which involved a review of almost

306. *Id.* ¶ 6, 131 P.3d at 469.

307. *Id.* ¶ 7, 131 P.3d at 469.

308. *Id.* ¶ 11, 131 P.3d at 469.

309. *Id.* ¶ 17, 131 P.3d at 470.

310. *Id.* ¶ 21, 131 P.3d at 471.

311. *Id.* ¶ 22, 131 P.3d at 471-72.

312. *Id.* ¶ 23, 131 P.3d at 472. While beyond the scope of this article, the court did go on to hold that the defendant could contest the search of the car as the drugs were the fruit of the illegal questioning of both the defendant and the driver. This seems contrary to the principle that a passenger generally does not have standing to contest an illegal search of a vehicle. *See generally* *Rakas v. Illinois*, 439 U.S. 128 (1978).

313. JACQUELINE R. KANOVITZ & MICHAEL I. KANOVITZ, *CONSTITUTIONAL LAW* 207 (10th ed. 2005).

314. 1997-NMSC-006, 932 P.2d 1.

315. 1997-NMCA-081, 944 P.2d 276.

all of the federal doctrines justifying warrantless searches of vehicles. In *Arredondo*, the court of appeals held that the U.S. Supreme Court's bright-line rule allowing a police officer to search a vehicle's passenger compartment upon arrest of an occupant does not apply under article II, section 10.³¹⁶ Applying *Gomez*, the court also rejected the *Carroll* Doctrine, the Fourth Amendment rule that probable cause of evidence in a movable vehicle is, per se, an exigent circumstance, regardless of the facts.³¹⁷

In *Arredondo*, an officer had stopped the defendant's car because of suspicion that the driver had just assaulted someone with a handgun.³¹⁸ During a protective sweep of the inside of the car, the officer observed a small amount of marijuana on the floor.³¹⁹ After the protective sweep, the officer spoke briefly with the defendant.³²⁰ The officer then conducted a more thorough search of the car and discovered cocaine in a small hole that had been cut into the dashboard.³²¹

The court ruled that the first search was a valid protective sweep³²² but that the second was invalid.³²³ The court held that the second search, based on probable cause, was invalid because there was no showing of exigent circumstances, as required by *Gomez*.³²⁴ The court explained that the logic of *Gomez* also required a rejection of the bright-line rule allowing a complete search of the passenger compartment of a vehicle after the valid arrest of an occupant.³²⁵ The court wrote that New Mexico courts' interpretation of article II, section 10 "eschew[s] bright line rules and instead emphasizes the fact specific nature of the reasonableness inquiry."³²⁶ In *Arredondo*, no reason for a search incident to arrest, e.g., that the arrested defendant could have gotten a weapon, or hidden or destroyed evidence within his immediate control, was present.³²⁷ A pro-

316. The U.S. Supreme Court has since abandoned the bright-line rule allowing police to conduct a search incident to arrest of the passenger compartment of a vehicle, regardless of whether that area is truly within the immediate control of the arrestee. See *Arizona v. Gant*, 556 U.S. 332 (2009).

317. See *Carroll v. United States*, 276 U.S. 132 (1925).

318. *Arredondo*, 1997-NMCA-081, ¶ 2, 944 P.2d at 279.

319. *Id.* ¶ 6, 944 P.2d at 279.

320. *Id.* ¶ 7, 944 P.2d at 280.

321. *Id.*

322. *Id.* ¶ 12, 944 P.2d at 280.

323. *Id.* ¶ 22, 944 P.2d at 283.

324. *Id.* ¶ 23, 944 P.2d at 283.

325. *Id.*

326. *Id.* ¶ 28, 944 P.2d at 284.

327. *Id.* ¶ 23, 944 P.2d at 284.

tective sweep had been conducted and the defendant was “detained outside the vehicle.”³²⁸

Arredondo does not articulate a rationale for departing from the federal *Carroll* Doctrine or the federal rule allowing the search of a vehicle as part of a search incident to arrest. The court simply cited *Gomez* and its expressed distaste for bright-line rules as adequate justification.³²⁹

1. Vehicle Searches Based on Probable Cause

In *State v. Warsaw*, the New Mexico Court of Appeals again applied *Gomez* in the context of a search based on probable cause that evidence was inside a vehicle.³³⁰ *Warsaw* gave the court an opportunity to emphasize that the *Carroll* Doctrine³³¹ was not valid under article II, section 10.

In *Warsaw*, a driver who had been in an accident told a tow-truck driver that there was a pound of cocaine in his trunk.³³² The police were notified about the defendant’s statement, and brought a drug-sniffing dog to the impound lot.³³³ The dog alerted to the presence of drugs and the trunk was pried and cut open.³³⁴ Inside were three-and-a-half pounds of cocaine.³³⁵

The court first determined that the search was valid under the Fourth Amendment.³³⁶ It then determined that the warrantless search was not conducted under exigent circumstances and therefore was invalid under article II, section 10.³³⁷ Like *Arredondo*,³³⁸ *Warsaw* does not articulate a rationale for the departure from the *Carroll* Doctrine but simply cites to *Gomez* as justification.³³⁹

In *State v. Jones*, the New Mexico Court of Appeals departed from the federal rule by holding invalid the warrantless seizure of evidence in

328. *Id.* ¶ 29, 944 P.2d at 284. It is not clear whether the defendant was handcuffed, but “backup” had arrived. *Id.* ¶ 6, 944 P.2d at 279. The court also rejected the state’s argument that the evidence would have inevitably been discovered during an inventory search, as there was no showing that the vehicle would have been impounded and searched pursuant to an established departmental policy. *Id.* ¶ 29, 944 P.2d at 284.

329. *Id.* ¶ 28, 944 P.2d at 284.

330. 1998-NMCA-044, ¶ 18, 956 P.2d 139, 143.

331. *United States v. Ross*, 456 U.S. 798 (1982).

332. *Warsaw*, 1998-NMCA-044, ¶ 8, 956 P.2d at 142.

333. *Id.* ¶ 5, 956 P.2d at 141.

334. *Id.* ¶ 10, 956 P.2d at 142.

335. *Id.*

336. *Id.* ¶ 17, 956 P.2d at 143.

337. *Id.* ¶ 19, 956 P.2d at 143.

338. *State v. Arredondo*, 1997-NMCA-081, 944 P.2d 276.

339. *Warsaw*, 1998-NMCA-044, ¶ 18, 956 P.2d 139, 143.

plain view in a vehicle.³⁴⁰ The *Carroll* Doctrine³⁴¹ permits the warrantless seizure of not only the item in plain view but also other evidence or contraband discovered during a subsequent vehicle search.³⁴²

The *Jones*³⁴³ defendant was parked on a public street late at night.³⁴⁴ An officer approached.³⁴⁵ The officer was concerned because there recently had been several burglaries in the area, and he knew the defendant had been involved with drugs.³⁴⁶ When the defendant responded that he had stopped to blow his nose, the officer's concern grew.³⁴⁷ He asked the defendant if he had any weapons.³⁴⁸ The defendant produced a pocketknife but refused the officer's request for consent to search the vehicle.³⁴⁹ The officer then went around the vehicle with a flashlight and saw, in plain view but partially covered by a towel, a hypodermic plunger and needle.³⁵⁰ He immediately seized the items.³⁵¹ In moving the towel, he found a package wrapped in a way he believed was used for drugs, so he also seized the package, which was later discovered to contain cocaine.³⁵²

The court noted that plain view of evidence within a building does not justify warrantless entry into the building to seize the evidence unless there are exigent circumstances or another exception to the warrant requirement.³⁵³ The court continued:

In *Gomez*, our Supreme Court . . . extended to persons in automobiles the same search and seizure protections under Article II, Section 10, of the New Mexico Constitution that apply to dwellings with regard to the exigent circumstances exception to the warrant requirement. We believe it logically follows that the same rule that applies to dwellings requiring a warrant prior to a seizure of evidence seen in plain view from outside the residence would also apply to automobiles under Article II, Section 10.³⁵⁴

340. 2002-NMCA-019, ¶ 13, 40 P.3d 1030, 1033.

341. *See Carroll v. United States*, 276 U.S. 132 (1925).

342. *E.g., Wyoming v. Houghton*, 526 U.S. 295 (1999).

343. *Jones*, 2002-NMCA-019, ¶ 13, 40 P.3d at 1033.

344. *Id.* ¶ 2, 40 P.3d at 1031.

345. *Id.*

346. *Id.*

347. *Id.* ¶ 3, 40 P.3d at 1031.

348. *Id.*

349. *Id.* ¶¶ 3–4, 40 P.3d at 1032.

350. *Id.* ¶ 5, 40 P.3d at 1032.

351. *Id.*

352. *Id.*

353. *Id.* ¶ 12, 40 P.3d at 1033.

354. *Id.* ¶ 14, 40 P.3d at 1033–34.

Because the *Jones* officer was not faced with exigent circumstances, the warrantless entry into the car to seize evidence was unconstitutional. The *Jones* court did not articulate which rationale justifies departure from the federal rule allowing warrantless seizure of contraband in plain view in an automobile. As with previous cases, the court simply relied on *Gomez*³⁵⁵ to arrive at its holding.³⁵⁶

Initially, in *State v. Garcia*,³⁵⁷ the New Mexico Supreme Court agreed with the *Jones* holding. The *Garcia* defendant was a passenger in a vehicle stopped for a license plate violation.³⁵⁸ Before the car came to a complete stop, the defendant got out and then defied the officer's order to get back in.³⁵⁹ The defendant "stared at [the officer] with an aggressive look described as a 'thousand yard stare.'" ³⁶⁰ After citing the driver, the officer returned to the vehicle and saw a gun protruding from underneath the back of the passenger seat.³⁶¹ He ordered the driver and the defendant to get out of the car, and removed the gun.³⁶² The defendant then admitted that he was a convicted felon.³⁶³

The court examined whether there were exigent circumstances to justify the warrantless gun seizure. The court wrote that, "even with an object in plain view, an officer may not enter the car and seize the object, without either consent, a warrant, or exigent circumstances."³⁶⁴ Nevertheless, the court found the seizure to be a valid protective sweep. The court held that "[t]he officers searched the car and seized the gun, not as evidence of a crime, but in a reasonable effort to secure the scene."³⁶⁵ As with the previous court of appeals cases holding that evidence in plain view in a vehicle may not be seized in the absence of a warrant or exigent circumstances, *Garcia* did not articulate a rationale for departure from the federal rule.

In *State v. Bomboy*,³⁶⁶ the New Mexico Supreme Court overruled *Jones* and *Garcia*. In *Bomboy*, the court was less eager than the court of appeals in *Jones* to reject entirely the *Carroll* Doctrine, and it authorized

355. *State v. Gomez*, 1997-NMSC-006, 932 P.2d 1.

356. *Jones*, 2002-NMCA-019, ¶ 15, 40 P.3d at 1034.

357. 2005-NMSC-017, 116 P.3d 72.

358. *Id.* ¶ 2, 116 P.3d at 74.

359. *Id.*

360. *Id.*

361. *Id.* ¶ 4, 116 P.3d at 74.

362. *Id.*

363. *Id.* ¶ 5, 116 P.3d at 74.

364. *Id.* ¶ 29, 116 P.3d at 79.

365. *Id.* ¶ 32, 116 P.3d at 80.

366. 2008-NMSC-029, 184 P.3d 1045.

the warrantless seizure of items in plain view, though not the entire vehicle.³⁶⁷

In *Bomboy*, the defendant was a driver who was stopped for a traffic offense.³⁶⁸ The officer saw plastic baggies, which appeared to contain methamphetamine, between the car's seats.³⁶⁹ The officer arrested the defendant and seized the baggies, which, it was later shown, contained methamphetamine.³⁷⁰

The New Mexico Supreme Court rejected the *Jones* court's equation of the privacy expectation in an automobile to the privacy expectation in a residence.³⁷¹ The court noted that there is "a heightened expectation of privacy in one's home."³⁷² It also noted that the *Gomez* court did not determine whether, absent exigent circumstances, the warrantless seizure of items in plain view would have been valid under the New Mexico Constitution.³⁷³

The *Bomboy* court referred to the two-part test that Justice Harlan discussed in his concurring opinion in *Katz v. United States*,³⁷⁴ which determines whether an expectation of privacy is reasonable under the Fourth Amendment.³⁷⁵ In the first prong, a court asks whether the individual has a subjective expectation of privacy. In the second prong, a court asks whether society would recognize that expectation as reasonable.

The court concluded: "[e]ven if Defendant did expect privacy in this area, society would not recognize such an expectation as reasonable given its conspicuous nature. Therefore, [the officer] reaching into the car is not considered an infringement on a legitimate expectation of privacy."³⁷⁶ The court characterized as dictum its statement in *Garcia* that plain view does not justify warrantless entry into a vehicle.³⁷⁷ The court did not address whether, as accepted under the *Carroll* Doctrine, the police may conduct a warrantless search of the entire vehicle after discovering evidence in plain view.

367. *Id.* ¶ 18, 184 P.3d at 1049.

368. The only traffic offense the defendant was charged with was having a defective license plate lamp. *Id.* ¶ 1, 184 P.3d at 1046.

369. *Id.*

370. *Id.*

371. *Id.* ¶ 12, 184 P.3d at 1048.

372. *Id.* ¶ 11, 184 P.3d at 1048.

373. *Id.* ¶ 8, 184 P.3d at 1047.

374. *Id.* ¶ 10, 184 P.3d at 1047–48; see also *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

375. *Bomboy*, 2008-NMSC-029, ¶ 10, 184 P.3d at 1047–48.

376. *Id.*

377. *Id.* ¶ 12, 184 P.3d at 1048.

2. Vehicle Searches Based on Search Incident to Arrest

Under *Arizona v. Gant*,³⁷⁸ the federal rule permits officers to search the passenger compartment of a car as a search incident to arrest, regardless of whether the passenger compartment is actually within an arrestee's reach.³⁷⁹ In a line of cases consistent with *Gomez*'s³⁸⁰ rejection of a bright-line search and seizure rule, New Mexico appellate courts have required that, for a passenger compartment area to be searchable, it must be within the immediate control of the arrestee.

The court of appeals first rejected the federal rule in *State v. Arredondo*³⁸¹ and then in *State v. Gutierrez*³⁸² and *State v. Pittman*.³⁸³ In *State v. Rowell*,³⁸⁴ the New Mexico Supreme Court placed its imprimatur on the rule that the New Mexico Constitution allows a search incident to arrest only when the vehicle is within the immediate control of the arrestee. The court of appeals based its departure from the federal rule on the distinctive state characteristics rationale, commenting that "[t]he extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law."³⁸⁵ The New Mexico Supreme Court, however, used the flawed federal analysis rationale.

During a traffic stop, the officer in *Rowell* saw a bag of marijuana protruding from the defendant's shirt pocket.³⁸⁶ The officer arrested him for possession of marijuana.³⁸⁷ The officer asked the defendant if there were any weapons in the car.³⁸⁸ At first, the defendant denied having any, but then he admitted that there was a shotgun.³⁸⁹ Once the defendant was in the patrol car, the officer returned to the car and searched it.³⁹⁰ He found the shotgun, a pistol, a wooden club, and a knife.³⁹¹ Because the stop took place in the parking lot of a high school, the defendant was

378. 556 U.S. 332 (2009).

379. See *New York v. Belton*, 453 U.S. 454 (1981); *Thornton v. United States*, 541 U.S. 615 (2004).

380. *State v. Gomez*, 1997-NMSC-006, 932 P.2d 1.

381. 1997-NMCA-081, 944 P.2d 276.

382. 2004-NMCA-081, 94 P.3d 18.

383. 2006-NMCA-006, 127 P.3d 1116.

384. 2008-NMSC-041, 188 P.3d 95.

385. *Pittman*, 2006-NMCA-006, ¶ 14, 127 P.3d at 1120 (alteration in original) (quoting *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15, 392, 25 P.3d 225).

386. *Rowell*, 2008-NMSC-041, ¶ 2, 188 P.3d at 97.

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* ¶ 3, 188 P.3d at 97.

391. *Id.*

charged with four counts of carrying a deadly weapon on school premises, a felony.³⁹²

Rejecting the state's request to follow the federal rule, the court commented:

The federal use of a search incident to arrest rationale to sanction a warrantless search that has nothing to do with its underlying justification—preventing the arrestee from gaining access to weapons or evidence—is an anomaly that has been criticized widely. The *Belton-Thornton* approach^[393] has been described in the legal literature as being devoid of a reasoned basis in constitutional doctrine and lacking in reasonable guidance to police officers and courts who must apply it.³⁹⁴

The court reasoned that, because the arrestee was locked in the back of the patrol car, he could not have returned to his car to access weapons or evidence.³⁹⁵

The court then examined whether exigent circumstances justified a search of the car based on probable cause that the defendant possessed a deadly weapon on school premises.³⁹⁶ The court noted that school was in session and students were on a lunch break.³⁹⁷ The court concluded that the officer did have exigent circumstances to conduct a warrantless search.³⁹⁸ *Rowell* is unusual in its explicit, rather than implicit, use of the flawed federal analysis rationale as the basis to depart from the federal rule that existed at the time, allowing warrantless search of the passenger compartment of a vehicle as a search incident, regardless of the circumstances.

F. DWI Roadblocks: An Eight-Factor Test

In *City of Las Cruces v. Betancourt*,³⁹⁹ the New Mexico Court of Appeals held that sobriety roadblocks are not a per se violation of the Fourth Amendment. In doing so, the court outlined eight factors “that

392. *Id.* ¶ 5, 188 P.3d at 97; see also NMSA § 30-7-2.1 (1978) (makes carrying a deadly weapon on school premises a fourth degree felony).

393. See *New York v. Belton*, 453 U.S. 454 (1981) (allowed the search of the passenger compartment of a vehicle as a search incident to arrest, regardless of whether the arrestee could actually access the interior of the vehicle).

394. *Rowell*, 2008-NMSC-041, ¶ 20, 188 P.3d at 100 (citations omitted).

395. *Id.* ¶ 25, 188 P.3d at 101.

396. *Id.* ¶ 27, 188 P.3d at 102.

397. *Id.* ¶ 33, 188 P.3d at 103.

398. *Id.*

399. 105 N.M. 655, 735 P.2d 1161 (1987).

will be considered in determining the reasonableness of a roadblock”⁴⁰⁰ under the Fourth Amendment. The U.S. Supreme Court subsequently held that sobriety roadblocks are not a violation of the Fourth Amendment if conducted in a reasonable manner.⁴⁰¹ The Supreme Court balanced “the state’s interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual’s privacy caused by the checkpoints”⁴⁰² to conclude that sobriety roadblocks conducted by the Michigan State Police were a reasonable seizure and did not violate the Fourth Amendment.⁴⁰³

In *State v. Madelena*,⁴⁰⁴ the defendant argued that the eight *Betancourt* factors used to evaluate the reasonableness of a DWI roadblock are not simply an aid to conducting a Fourth Amendment balancing of interest but are, in fact, additional requirements based on article II, section 10 of the New Mexico Constitution.⁴⁰⁵ The court of appeals recognized that *Betancourt* was based on the Fourth Amendment but held that “[t]he eight factors impose additional and stricter guidelines than the balancing test used by the United States Supreme Court in *Sitz*.”⁴⁰⁶ The court noted that the New Mexico Supreme Court “has departed from the United States Supreme Court when the latter has abandoned or redefined established constitutional interpretation,”⁴⁰⁷ but the court did not elaborate on the justification for departing from federal precedent. Ultimately, the court held that the roadblock at issue was constitutional as all eight of the *Betancourt* factors were present.⁴⁰⁸ The court did not, however, specify which of the three balancing rationales justified use of a stricter test based on article II, section 10 than the “reasonableness” test based on the Fourth Amendment as articulated in *Sitz*.⁴⁰⁹

400. The eight factors are the role of supervisory personnel, restrictions on discretion of field officers, safety, reasonable location, time and duration, indicia of official nature of the roadblock, length and nature of detention, and advance publicity. *Betancourt*, 105 N.M. at 658–59, 735 P.2d at 1164–65.

401. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

402. *Id.* at 448–49. (citing *Brown v. Texas*, 443 U.S. 47 (1979)).

403. *Id.* at 455.

404. 121 N.M. 63, 908 P.2d 756 (Ct. App. 1995).

405. *Id.* at 65, 908 P.2d at 759.

406. *Id.* at 69, 908 P.2d at 762.

407. *Id.* at 68, 908 P.2d at 761.

408. *Id.* at 71, 908 P.2d at 764.

409. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

G. Border Patrol Checkpoints

Two topics concerning New Mexico's deviation from federal precedent have been addressed in cases arising out of Border Patrol checkpoints. First is the permissible scope for questioning of individuals stopped at such roadblocks. Second is whether Border Patrol agents must have exigent circumstances to conduct a warrantless search of a vehicle. The New Mexico appellate courts have deviated from the federal rule on both issues. In *State v. Cardenas-Alvarez*,⁴¹⁰ the New Mexico Supreme Court held that article II, section 10 of the New Mexico Constitution requires that questioning beyond the stated purpose of a Border Patrol roadblock be based upon reasonable suspicion of criminal activity. In *State v. Snyder*,⁴¹¹ the New Mexico Court of Appeals required that Border Patrol officers have exigent circumstances to conduct a warrantless search of a vehicle when there is probable cause or evidence that contraband is located in the vehicle.

1. Permissible questioning at Border Patrol checkpoints

The New Mexico Supreme Court addressed the issue of whether article II, section 10 of the New Mexico Constitution limits questioning by Border Patrol agents at checkpoints in *State v. Cardenas-Alvarez*.⁴¹² The defendant, a resident alien, was stopped at a permanent checkpoint driving a truck with Mexican license plates.⁴¹³ The Border Patrol agent asked him several questions concerning his travel itinerary.⁴¹⁴ The defendant said he was driving from El Paso to Albuquerque in a vehicle he had borrowed from a friend to pick up another vehicle he had purchased.⁴¹⁵ Several things aroused the agent's suspicion,⁴¹⁶ so he ordered the defendant to go to a secondary inspection area where he obtained consent to search the vehicle.⁴¹⁷ With the assistance of a sniffer dog, the agent found eighty-five pounds of marijuana in the gas tank.⁴¹⁸

The court first addressed the federal rule:

410. 2001-NMSC-017, 25 P.3d 225.

411. 1998-NMCA-166, 967 P.2d 843.

412. 2001-NMSC-017, 25 P.3d 225.

413. *Id.* ¶ 1, 25 P.3d at 227.

414. *Id.* ¶ 2, 25 P.3d at 227.

415. *Id.*

416. The defendant did not have anyone with him to assist with the second vehicle and was traveling on a secondary highway, rather than the interstate, late at night. *Id.* ¶ 3, 25 P.3d at 227.

417. *Id.* ¶¶ 3-4, 25 P.3d at 227.

418. *Id.* ¶ 4, 25 P.3d at 227.

With regard to the scope of the detention, federal courts have held that a routine stop may include more than questions regarding citizenship and immigration. “[A] few brief questions concerning such things as vehicle ownership, cargo, destination and travel plans may be appropriate [at a routine checkpoint stop] if reasonably related to the agent’s duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband.”⁴¹⁹

The court held that the agent’s questioning of the defendant did not violate the federal rule.⁴²⁰

The court then addressed article II, section 10 of the New Mexico Constitution.⁴²¹ Citing pre-*Gomez* cases,⁴²² the court held the New Mexico Constitution prohibits “the prolongation of a border checkpoint stop once questions regarding citizenship and immigration status have been answered, unless the officer conducting the stop reasonably suspects the defendant of criminal activity.”⁴²³ The court concluded that the agent in this case had not developed reasonable suspicion of criminal activity during his questioning about the defendant’s immigration status.⁴²⁴

The court then discussed the rationale for departing from federal precedent. “We do not find flaw in the federal analysis, nor do we detect structural differences between state and federal government that warrant departure from federal precedent. Our examination of New Mexico law, however, does reveal distinctive state characteristics that command our departure from federal law governing border checkpoint detentions.”⁴²⁵ The distinctive state characteristic is “[t]he extra layer of protection from unreasonable searches and seizures involving automobiles . . . of New Mexico constitutional law.”⁴²⁶

419. *Id.* ¶ 9, 25 P.3d at 229 (alterations in original) (quoting *United States v. Rascon-Ortiz*, 994 F.2d 749, 752 (1993)).

420. *Id.*

421. Beyond the scope of this article is the issue of whether the New Mexico Constitution applies to the conduct of federal officers in a prosecution in a New Mexico court. Suffice to say, the majority held that it does. *Id.* ¶ 20, 25 P.3d at 233.

422. *State v. Galloway*, 116 N.M. 8, 859 P.2d 476 (Ct. App. 1993); *State v. Affsprung*, 115 N.M. 546, 854 P.2d 873 (Ct. App. 1993); *State v. Estrada*, 111 N.M. 798, 810 P.2d 817 (Ct. App. 1991). These cases based their holdings on the Fourth Amendment.

423. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 16, 25 P.3d at 231.

424. *Id.* ¶ 20, 25 P.3d at 233.

425. *Id.* ¶ 14, 25 P.3d at 230–31.

426. *Id.* ¶ 15, 25 P.3d at 231.

2. Warrantless searches of vehicles at Border Patrol checkpoints

The second issue that has arisen at Border Patrol checkpoints is whether warrantless searches require exigent circumstances in the absence of valid consent. Not surprisingly, the New Mexico Court of Appeals has concluded that exigent circumstances are required. Two cases involving the same Border Patrol checkpoint near Orogrande illustrate the fact-specific nature of the inquiry as to the existence of exigency.

In *State v. Snyder*,⁴²⁷ the defendant appeared to be nervous and was trembling when asked about his citizenship and itinerary.⁴²⁸ He said he was traveling from Phoenix, Arizona to Garden City, Kansas.⁴²⁹ Orogrande is not along the most direct route between those two cities.⁴³⁰ The agent asked if he could have a drug dog sniff around the vehicle, to which the defendant consented.⁴³¹ The dog alerted and marijuana was then discovered in the spare tire located underneath the rear of the defendant's truck.⁴³²

The court first determined that the search did not violate the Fourth Amendment.⁴³³ The court then determined that the New Mexico Constitution does regulate the conduct of federal officers when the prosecution is brought in state court.⁴³⁴ The court noted that, while excluding evidence obtained by federal agents may not serve to deter federal agents, the New Mexico Supreme Court has held that the New Mexico exclusionary rule, unlike the federal exclusionary rule, serves purposes other than deterrence of the police.⁴³⁵ The New Mexico rule examines whether there was a violation of the constitution and, if so, the evidence will be suppressed.⁴³⁶ Thus, in New Mexico it is irrelevant whom the government actor was that violated the constitution or whether the exclusion will have a deterrent effect.⁴³⁷

Finally, the court examined whether the agent had sufficient exigency to forego obtaining a warrant. The court noted that the check occurred at 7:30 p.m., there were only two agents at the checkpoint, and

427. 1998-NMCA-166, 967 P.2d 843.

428. *Id.* ¶ 2, 967 P.2d at 844.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* ¶ 3, 967 P.2d at 845.

433. *Id.* ¶ 9, 967 P.2d at 846.

434. *Id.* ¶ 18, 967 P.2d at 848.

435. *Id.* ¶ 15, 967 P.2d at 847.

436. *Id.*

437. *Id.*

that the nearest magistrate was thirty-five miles away in Alamogordo.⁴³⁸ The court questioned whether the intrusiveness of detaining the defendant while one agent drove to Alamogordo to get a warrant, which “may ripen into a de facto arrest, would be any less than the intrusiveness of conducting an immediate warrantless search.”⁴³⁹ “In this situation, it was not unreasonable for the agents to believe that exigent circumstances justified an immediate warrantless search. . . .”⁴⁴⁰

Five years later, in *State v. Gallegos*,⁴⁴¹ the court addressed another appeal arising out of the Orogrande checkpoint. It was 8 p.m. when the defendant was stopped at the checkpoint.⁴⁴² She was visibly trembling when the agent asked her about her travel plans.⁴⁴³ Upon request, she gave the agent permission to look in the trunk.⁴⁴⁴ Finding no contraband, the agent then obtained consent for the drug dog to be brought over to sniff the vehicle.⁴⁴⁵ The dog alerted, and agents found marijuana hidden under the foam in the rear bumper.⁴⁴⁶

The court began by noting the similarities between this case and *Snyder*.⁴⁴⁷ However, in this case, there were three, rather than two, agents on site; there was a fax machine available; and there was a magistrate judge on duty.⁴⁴⁸ The court noted: “[t]he State offered no evidence to show that the time necessary to obtain a warrant would be excessive, thus, raising the possibility of de facto arrest. Consequently, we limit our holding in *Snyder* to the specific circumstance of that case.”⁴⁴⁹ The court went on to suggest that, in light of the fact that Orogrande is a permanent checkpoint and conducting searches for contraband is not unexpected, the Border Patrol needed to have procedures in place to minimize the time necessary to obtain a warrant.⁴⁵⁰

Neither *Snyder* nor *Gallegos* articulated a rationale for departing from the federal *Carroll* Doctrine, allowing warrantless searches of vehi-

438. *Id.* ¶ 21, 967 P.2d at 849.

439. *Id.* ¶ 24, 967 P.2d at 849.

440. *Id.*

441. 2003-NMCA-079, 70 P.3d 1277.

442. *Id.* ¶ 2, 70 P.3d at 1279.

443. *Id.*

444. *Id.* ¶ 4, 70 P.3d at 1279.

445. *Id.* ¶ 5, 70 P.3d at 1279.

446. *Id.*

447. *Id.* ¶ 13, 70 P.3d at 1281.

448. *Id.* ¶ 15, 70 P.3d at 1281.

449. *Id.*

450. *Id.* ¶ 19, 70 P.3d at 1282.

cles based on probable cause, regardless of whether any exigency exists. Both cases simply cited *Gomez* as controlling precedent.⁴⁵¹

H. Probationer/Parolee Searches

In *State v. Marquart*,⁴⁵² the New Mexico Court of Appeals held, contrary to the federal rule, that the exclusionary rule applies to probation revocation hearings under article II, section 10 of the New Mexico Constitution. The defendant was on probation for a drug charge and the probation revocation hearing was held because methamphetamine was found on his person during a traffic stop.⁴⁵³ The court of appeals noted that the majority of federal circuits had ruled that the exclusionary rule does not apply to probation revocation hearings.⁴⁵⁴ The court held that the logic of *Gutierrez*,⁴⁵⁵ however, mandated that the exclusionary rule apply to probation hearings in New Mexico.⁴⁵⁶ Since the purpose of the exclusionary rule "is to effectuate in the pending case the constitutional right of the accused,"⁴⁵⁷ and it is not just a "mere judicial remedy"⁴⁵⁸ to deter police, it does not matter that the hearing to determine whether the defendant committed some wrongful act for which he should be punished is a probation revocation hearing rather than a criminal trial.

Although the court did not explicitly state it, *Marquart* appeared to rely on distinctive state characteristics and flawed federal analysis as the reasons for departing from the federal rule. *Gutierrez*, on which the court relied, had held that the New Mexico exclusionary rule serves purposes other than the sole purpose served by the federal exclusionary rule, i.e., to deter police conduct.⁴⁵⁹ In doing so, *Gutierrez* had criticized the federal rule allowing a good faith exception to the exclusionary rule.

I. Garbage

In *California v. Greenwood*,⁴⁶⁰ the U.S. Supreme Court held that it is not a violation of the Fourth Amendment for the police to seize and

451. *State v. Snyder*, 1998-NMCA-166, ¶ 1, 967 P.2d 843, 844; *Gallegos*, 2003-NMCA-079, ¶ 10, 70 P.3d at 1280.

452. 1997-NMCA-090, ¶ 1, 945 P.2d 1027, 1028.

453. *Id.* ¶ 5, 945 P.2d at 1028.

454. *Id.* ¶ 10, 945 P.2d at 1029. The U.S. Supreme Court has since ruled that the federal exclusionary rule does not apply to parole revocation hearings. *Penn. Bd. of Probation v. Scott*, 524 U.S. 357, 359 (1998).

455. *Oliver*, *supra* note 99.

456. *Marquart*, 1997-NMCA-090, ¶ 17, 945 P.2d at 1031.

457. *Id.*

458. *Id.*

459. *See* discussion *supra* note 99.

460. 486 U.S. 35 (1988).

search garbage that has been put on the curb in opaque bags for collection by trash haulers. In *State v. Granville*,⁴⁶¹ the New Mexico Court of Appeals used the distinctive state characteristics rationale to deviate from *Greenwood*.

The U.S. Supreme Court in *Greenwood* applied Justice Harlan's two-part test outlined in his concurring opinion in *Katz v. United States*.⁴⁶² The gist of the *Greenwood* ruling is that society does not find an expectation of privacy in trash to be reasonable because it is accessible to other members of the public, to trash collectors, and to animals.⁴⁶³

In *Granville*,⁴⁶⁴ the New Mexico Court of Appeals followed the distinctive state characteristics rationale to deviate from *Greenwood*. The police seized the defendant's trash bags from trash containers in the alley behind his brother's house.⁴⁶⁵ Based on evidence found in the trash bags and additional information supplied by three confidential informants, police officers obtained a search warrant for the residence.⁴⁶⁶ Officers found drugs, and the defendant was charged with possession of cocaine and marijuana.⁴⁶⁷

In what is probably the most thorough discussion of New Mexico's rationale for departing from federal precedent, the court began by noting that the majority of state courts have upheld the warrantless and suspicionless search and seizure of garbage.⁴⁶⁸ The court then cited several state cases that have held there is a reasonable expectation of privacy in garbage because of the "indicia of personal, private affairs that can be found in an individual's garbage."⁴⁶⁹ The court noted that "[o]ur Supreme Court has emphasized New Mexico's strong preference for warrants in order to preserve the values of privacy and sanctity of the home that are embodied by [article II, section 10]"⁴⁷⁰ and that this principle was applicable to garbage searches. The court stated that the fact that strangers might rummage through a person's trash does not mean that there is not

461. 2006-NMCA-098, 142 P.3d 933.

462. *See supra* text accompanying notes 374–76. The test requires that there be both a subjectively and an objectively reasonable expectation of privacy for there to be Fourth Amendment protection of a privacy interest.

463. *Greenwood*, 486 U.S. at 40.

464. 2006-NMCA-098, 142 P.3d 933.

465. *Id.* ¶ 3, 142 P.3d at 935.

466. *Id.* ¶ 4, 142 P.3d at 935.

467. *Id.* ¶ 5, 142 P.3d at 935. Included in the trash was a gas bill for the residence in the defendant's name.

468. *Id.* ¶ 20, 142 P.3d at 939.

469. *Id.* ¶ 22, 142 P.3d at 940.

470. *Id.* ¶ 24, 142 P.3d at 940.

a reasonable expectation of privacy.⁴⁷¹ The expectation is that only the garbage collection company will remove the bags and that the bags will be taken to the landfill unopened.⁴⁷² The constitution protects people from intrusions by the government, not private parties.⁴⁷³ Finally, the court pointed out that the New Mexico Constitution uses the term “homes and effects”⁴⁷⁴ and that garbage contains “evidence of intimate and private affairs that are conducted within the *home*. . . .”⁴⁷⁵ Therefore, “an individual in New Mexico has a reasonable expectation of privacy in his garbage placed for collection in an opaque container and . . . this privacy interest is protected by Article II, Section 10.”⁴⁷⁶ *Granville* is unusual in that it uses the distinctive state characteristics rationale and spends more time discussing those unique characteristics than criticizing the federal rule.

J. Confidential Informants

*In re Shon Daniel K.*⁴⁷⁷ reaffirmed that the *Aguilar-Spinelli* test⁴⁷⁸ is still required for article II, section 10. In that case, a search warrant was issued after two “concerned citizens” told officers that some juveniles, including the respondent, were selling stolen liquor from a residence.⁴⁷⁹ One of the sources had seen the liquor at the house within forty-eight hours of the issuance of the warrant. The court found the affidavit insufficient as it contained no indicia of the reliability of these two informants other than “they came forward of their own . . . accord, without promise of reward or special consideration for any pending charges.”⁴⁸⁰

K. Arrest for Non-jailable Offenses

In *Atwater v. City of Lago Vista*,⁴⁸¹ the U.S. Supreme Court held that arrest for a non-jailable offense does not violate the Fourth Amendment as long as probable cause exists. In *State v. Rodarte*,⁴⁸² the New Mexico Court of Appeals held that article II, section 10 of the New Mexico Con-

471. *Id.* ¶ 30, 142 P.3d at 942.

472. *Id.* ¶ 31, 142 P.3d at 943.

473. *Id.*

474. As opposed to the Fourth Amendment’s “houses and effects.”

475. *Granville*, 2006-NMCA-098, ¶ 33, 142 P.3d at 944 (emphasis added).

476. *Id.*

477. 1998-NMCA-069, 959 P.2d 553.

478. See discussion *supra* note 78.

479. *In re Shon Daniel K.*, 1998-NMCA-069, ¶ 3, 959 P.2d at 556.

480. *Id.*

481. 532 U.S. 318, 323 (2001).

482. 2005-NMCA-141, ¶ 1, 125 P.3d 647, 647.

stitution does not allow for the arrest of individuals for crimes for which the specified punishment does not include incarceration.

The defendant in *Rodarte* was arrested for being a minor in possession of alcohol,⁴⁸³ and a small amount of cocaine was subsequently found in the back seat of the patrol car after he was transported to jail.⁴⁸⁴ The *Rodarte* court first took notice of *Atwater*,⁴⁸⁵ in which the U.S. Supreme Court held that arrest for a non-jailable offense does not violate the Fourth Amendment as long as probable cause that the arrestee violated the law exists.⁴⁸⁶ The court then reviewed Justice O'Connor's dissent, in which she employed a balancing test to conclude that the severity of the intrusion into privacy that is caused by arrest is not outweighed by the government's "limited" interests in arresting for such minor offenses.⁴⁸⁷ Instead of a bright-line rule always allowing arrest for non-jailable offenses, she "would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion' of a full custodial arrest."⁴⁸⁸

The New Mexico Court of Appeals noted prior New Mexico Supreme Court decisions that eschewed "bright-line, per se rules."⁴⁸⁹ The court then adopted the rule suggested by Justice O'Connor.⁴⁹⁰ The court did not explain its reasons to deviate from federal precedent. Its reference to prior New Mexico Supreme Court decisions criticizing federal "bright-line, per-se rules" and its reliance on Justice O'Connor's dissent criticizing the majority opinion in *Atwater*, implicates the flawed federal analysis rationale.

The next year, the court of appeals addressed a similar issue in *State v. Bricker*.⁴⁹¹ The defendant in *Bricker* was arrested for driving with a suspended license.⁴⁹² The applicable statute⁴⁹³ provides that a driver

483. *Id.* ¶ 3, 125 P.3d at 648. Section 60-7B-1 provides for penalties fines and community service for a first offense. Second and third or subsequent offenses may include suspension of the offender's drivers license. NMSA 1978 § 60-7B-1 (2004).

484. *Rodarte*, 2005-NMCA-141, ¶ 3, 125 P.3d at 648.

485. *Atwater*, 532 U.S. at 323.

486. *Id.* at 353.

487. *Id.* at 364.

488. *Id.* at 366 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

489. *Rodarte*, 2005-NMCA-141, ¶ 13, 125 P.3d at 650.

490. *Id.* ¶ 14, 125 P.3d at 650.

491. 2006-NMCA-052, 134 P.3d 800.

492. *Id.* ¶ 1, 134 P.3d at 801 (methamphetamine and a syringe were found on his person at the jail).

493. NMSA 1978, § 66-8-122 (1985).

should be arrested for this offense only if the license was suspended for specified reasons.⁴⁹⁴ The reason the defendant's license was suspended was unknown as the state had not introduced evidence on that issue.⁴⁹⁵ Therefore, the court concluded that the arrest was a violation of the statute.⁴⁹⁶

The court did acknowledge that this case was different from *Atwater* and *Rodarte* because the penalty for driving on a suspended license can include incarceration.⁴⁹⁷ The court held, however, that the potential penalty "alters nothing. [The New Mexico] Legislature has stated in no uncertain terms that persons who violate a misdemeanor covered by Section 66-8-123(A) shall be cited and released from custody. That the traffic offense is jailable is irrelevant. Jailability cannot justify overlooking an unlawful custodial arrest. . . ."⁴⁹⁸ The court then went on to hold that violation of a statute can be considered in evaluating the constitutionality of the government action.⁴⁹⁹ The court concluded that arresting officer's statutory violation also constituted a violation of article II, section 10 of the New Mexico Constitution.⁵⁰⁰

The court referred to *Rodarte* and Justice O'Connor's dissent in *Atwater* as providing the rationale for departing from federal precedent.⁵⁰¹ As in *Rodarte*, the court did not elaborate as to which rationale it relied upon, but, just as in *Rodarte*, the court's reliance on Justice O'Connor's criticism of *Atwater* certainly implies that the court feels that the federal analysis is flawed.

VI. CONCLUSION

Following the 1997 decision in *State v. Gomez*,⁵⁰² New Mexico courts have provided greater search and seizure protection under the New Mexico Constitution than is available under the U.S. Constitution. However, in the majority of cases in which the New Mexico appellate courts have

494. *Bricker*, 2006-NMCA-052, ¶ 5, 134 P.3d at 801. The specified reasons are for a DWI conviction, for refusing to submit to a blood-alcohol (B/A) test, or for driving with a B/A higher than .08 percent (person 21 or older) or .02 percent (person under the age of 21).

495. *Id.* ¶ 6, 134 P.3d at 802.

496. *Id.*

497. *Id.* ¶ 27, 134 P.3d at 807. Section 66-5-39 provides for a penalty of up to 364 days in jail. NMSA 1978, § 66-5-39 (1993).

498. *Bricker*, 2006-NMCA-052, ¶ 27, 134 P.3d at 807.

499. *See id.* ¶ 28, 134 P.3d at 807.

500. *Id.* ¶ 30, 134 P.3d at 808.

501. *See id.* ¶¶ 22-27, 134 P.3d at 805-07.

502. *See Gomez*, 1997-NMSC-006, 932 P.2d 1.

departed from the federal rule in a given area, the courts do not tell us upon which of the rationales for departure they are relying.⁵⁰³ The New Mexico appellate courts have shown a particular distaste for bright-line rules promulgated by the U.S. Supreme Court, which do not effectuate the actual purpose underlying a particular search. For example, the reason that officers can conduct warrantless exigent circumstances searches is that there is a concern that delay in obtaining a warrant may result in the evidence being concealed or destroyed. Unlike the U.S. Supreme Court, the New Mexico courts are unwilling to allow searches of automobiles based upon probable cause unless there truly is such a concern.⁵⁰⁴ Nor will a search incident to arrest of an automobile be allowed unless there truly is a concern that the arrested person could lunge to obtain a weapon or evidence.⁵⁰⁵

Flawed federal analysis remains the most often-used rationale for departure from the federal rule, whether it is explicitly stated in the opinion or impliedly applied by the inclusion of substantial criticism of federal precedent in the opinion. While both *Cordova*⁵⁰⁶ and *Sutton*⁵⁰⁷ were cited in *Gomez* as examples of the distinctive state characteristics rationale, a reading of the cases reveals strongly implied criticisms of federal cases and only passing mention of any distinctive state characteristics. Similarly, several post-*Gomez* cases that declare distinctive state characteristics as the reason for departing from federal precedent also impliedly rely on flawed federal analysis by including substantial criticism of the logic underlying the federal precedent. These include *Garcia*,⁵⁰⁸ *Ochoa*,⁵⁰⁹ and *Leyva*.⁵¹⁰ Cases that do not provide any reason for departure from the

503. See *supra* notes 125–27 and accompanying text.

504. See *State v. Arredondo*, 1997-NMCA-081, ¶ 26, 944 P.2d 267, 284; *State v. Warsaw*, 1998-NMCA-044, ¶ 19, 956 P.2d 139, 143.

505. See *State v. Rowell*, 2008-NMSC-041, 188 P.3d 95.

506. See *State v. Cordova*, 109 N.M. 211, 217, 784 P.2d 30, 36 (retaining *Aguilar-Spinelli* as the test for evaluating unnamed sources as the basis for probable cause).

507. See *State v. Sutton*, 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct. App. 1991) (indicating that article II, section 10 might protect “open fields” where there is a legitimate expectation of privacy).

508. See *State v. Garcia* 2009-NMSC-046, ¶ 37, 217 P.3d 1032, 1042. (holding that a person is not “seized” pursuant to article II, section 10, unless a reasonable person would not feel free to leave).

509. See *State v. Ochoa*, 2009-NMCA-002, ¶ 1, 206 P.3d 143, 146 (holding that pretext stops violate article II, section 10).

510. See *State v. Leyva*, 2011-NMSC-009, ¶ 23, 250 P.3d 861, 870 (requiring reasonable suspicion to expand the scope of questioning of an individual in investigatory detention beyond the scope of the original reason for the detention). This case also relied on the “distinctive state characteristics” rationale by noting that article II, section 10 is “calibrated differently” than the Fourth Amendment.

federal rule also often include substantial criticism of the applicable federal rule. These include *Arredondo*,⁵¹¹ *Madelena*,⁵¹² *Rodarte*,⁵¹³ and *Bricker*.⁵¹⁴ Two post-*Gomez* cases, *Cardenez-Alvarez*⁵¹⁵ and *Granville*⁵¹⁶ are rare in that they focused their analysis primarily on the distinctive state characteristics reasoning, and no post-*Gomez* case appears to rely on the structural differences between federal and state government or undeveloped federal analogs rationales. *Rowell*⁵¹⁷ is unique in explicitly relying on the flawed federal analysis rationale. Regardless of the rationale used by the court in doing so, the effect is to provide greater search and seizure protections under article II, section 10 of the New Mexico Constitution than the U.S. Constitution's Fourth Amendment.

511. *State v. Arredondo*, 1997-NMCA-081, ¶ 15, 944 P.2d 276, 281 (restricting warrantless searches of vehicles to situations where actual exigency exists).

512. *State v. Madalena*, 121 N.M. 63, 69, 908 P.2d 756, 762 (holding that the New Mexico test for determining the reasonableness of sobriety roadblocks is stricter than the Fourth Amendment test).

513. *State v. Rodarte*, 2005-NMCA-141, ¶ 1, 125 P.3d 647, 647 (holding that arrest for an offense that does not include incarceration as a possible penalty must be justified by an actual need to detain the suspect).

514. *State v. Bricker*, 2006-NMCA-052, ¶ 23, 134 P.3d 800, 805–06 (arrest for an offense defined by statute as “non-jailable,” in that a citation should be issued in lieu of arrest, may also violate article II, section 10).

515. *State v. Cardenez-Alvarez*, 2001-NMSC-017, ¶ 20, 25 P.3d 225, 233 (holding that Border Patrol agents may only expand questioning at their checkpoints beyond the topics of citizenship and immigration status based upon reasonable suspicion).

516. *State v. Granville*, 2006-NMCA-098, ¶ 1, 142 P.3d 933, 935 (finding a reasonable expectation of privacy in garbage placed on the curb for collection).

517. *State v. Rowell*, 2008-NMSC-041, ¶ 25, 188 P.3d 95, 101 (restricting search incident to arrest to situations where there is an actual concern the suspect could obtain a weapon or evidence from the interior of a vehicle).