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Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions

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DEVELOPING A STATE CONSTITUTIONAL LAW STRATEGY IN NEW MEXICO CRIMINAL PROSECUTIONS

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ABSTRACT

This article includes a review of the process by which the New Mexico courts have developed an independent state constitutional jurisprudence reflecting more expansive protections of individual rights than those afforded by the Federal Constitution, as interpreted in the decisions of the United States Supreme Court. It addresses the existing body of state constitutional law and suggests possibilities for further developments, including both the substantive aspects of state constitutional topics and the procedural requirements for asserting state constitutional protections as alternative sources for protection of individual rights. It documents how far New Mexico has come in developing a state constitutional jurisprudence reflecting the traditionally strong independent approach taken by New Mexico in addressing the relationship between the institution of government and its people.

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INTRODUCTION

The imaginative lawyer is still the fountainhead of our finest jurisprudence.[1]

Criminal defense lawyers are charged with the duty of protecting the rights of their clients who face potential loss of liberty, and sometimes their lives, as a consequence of being charged with criminal offenses.[2] In the middle of the last century, the United States Supreme Court undertook a major reform of the criminal justice system by aggressively interpreting the criminal procedure guarantees included in the Bill of Rights, and in selectively incorporating[3] those guarantees to afford those federal constitutional protections to state court defendants.[4] It left intact

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1. State v. Jewett, 500 A.2d 233, 237 (Vt. 1985)

2. The New Mexico Rules of Professional Conduct establish parameters for representation that serve to inform criminal defense attorneys with regard to their duties to their clients. The fundamental rule is simple: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 16-101 NMRA. The rules further provide that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Rule 16-103 NMRA.

With respect to the most critical concern for many criminal defendants—that they can trust counsel to represent them aggressively despite their actual guilt—the Rules also address the thorny problem for laypersons:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. *A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established*.

Rule 16-301 NMRA (emphasis added).

3. Significant judicial and scholarly comment has focused on the doctrine of "selective incorporation." *See, e.g.*, Akhil R. Amar, *The Bill of Rights and the Fourteeenth Amendment*, 101 YALE L.J. 1193 (1992); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965). For discussion of the "selective incorporation" doctrine in the Supreme Court's opinions, including the differing views, see, for example, *Adamson v. California*, 332 U.S. 46 (1947), and the separate opinions of Justices Frankfurter, *id.* at 59, 63–65 and Black, *id.* at 68, 71–90. The *Adamson* majority concluded that the Fifth Amendment protection against self-incrimination did not apply to a California capital prosecution. *Id.* at 54–55. *Adamson* was overruled in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

4. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (applying protection against double jeopardy to state proceedings); *Malloy*, 378 U.S. at 6 (applying Fifth Amendment privilege against self-incrimination in state proceedings); Mapp v. Ohio, 367 U.S. 643 (1961) (applying exclusionary rule to require suppression in state court prosecutions of physical evidence seized in violation of Fourth Amendment). The important rights secured by the Sixth Amendment were made applicable in state proceedings in a series of important cases, including the right to jury trial, *see* Duncan v. Louisiana, 391 U.S. 145, 150 (1968), the right to speedy trial, *see* Klopfer v. North Carolina, 386 U.S. 213 (1967), the right to confrontation, *see* Pointer v. Texas, 380 U.S. 400 (1965), the right to compulsory process to obtain testimony and develop a defense, *see* Washington v. Texas, 388 U.S. 14 (1967), and the right to assistance of counsel, *see* Gideon v. Wainwright, 372 U.S. 335 (1963). More recently, the Court relied on the right to notice in the accusation as a basis for requiring charging of factual allegations used for sentencing enhancement in the charging instrument in state proceedings. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000). The right to trial only upon an indictment returned by a grand jury was held not to apply to the states in *Hurtado v. California*, 110 U.S. 516, 538 (1884).

In 1971, the Supreme Court rejected a challenge to the death penalty in *McGautha v. California*, 402 U.S. 183 (1971), *vacated*, Crampton v. Ohio, 408 U.S. 941 (1972), in which the central claim had been that the capital sentencing scheme failed to impose limits on the exercise of the sentencer's discretion in setting punishment at death. Justice Harlan wrote the majority opinion in his last term on the Court. A year later, a majority of the Court reversed its position, voiding all existing state death penalty statutes in *Furman v. Georgia*, 408 U.S. 238 (1972), and finding that the lack of effective standards or criteria for capital sentencing resulted in an unconstitutional application of the death penalty. Thus, the Court incorporated the protections afforded by the Cruel and Unusual Punishment Clause of the Eighth Amendment as an essential element of its death penalty jurisprudence.

the autonomy of state legislatures, for the most part, in defining criminal offenses and recognizing theories of criminal defense under state law.[5]

The past quarter century, however, has seen a conservative shift in the posture of the Supreme Court, resulting in a less expansive approach to federal constitutional criminal procedure protections, although the Court has continued to issue rulings favorable to the defense in a number of contexts.[6] As concerns for federalism have tended to prevail generally over development of individual rights, the Court has carefully guarded its authority to interpret federal constitutional protections. For example, in *Oregon v. Hass*,[7] the Court rejected the Oregon Supreme Court's statement that it could "interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court" noting that this statement was "not the law and surely must be an inadvertent error."[8] The *Hass* Court further explained that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[9]

As a more conservative Court began to restrict protections or impose limitations on federal constitutional criminal procedures,[10] state courts began to develop an alternative jurisprudence based upon state, rather than federal, constitutional protections. This movement was advanced by a seminal law review article written by Justice William Brennan,[11] and was reflected in a growing independence of state

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5. Patterson v. New York, 432 U.S. 197, 201–02 (1977).

6. Perhaps most significantly, the Court has continued to carefully review due process issues arising in the context of state capital prosecutions, rendering decisions favorable to state capital defendants. *See, e.g.*, House v. Bell, 547 U.S. 518, 553–55 (2006) (holding newly discovered evidence cast sufficient doubt on integrity of conviction and sentence to warrant review in federal habeas corpus); Holmes v. South Carolina, 547 U.S. 319, 328–31 (2006) (reversing state rule limiting use of forensic evidence to develop evidence of alternative suspects responsible for capital crime); Roper v. Simmons, 543 U.S. 551 (2005) (execution of defendant under the age of eighteen at the time of offense prohibited by Eighth and Fourteenth Amendments); Miller-El v. Dretke, 545 U.S. 231 (2005) (holding prosecutor's exercise of peremptory challenges in capital prosecution demonstrated racial discriminatory intent, despite contrary findings of state and lower federal courts); Bradshaw v. Stumpf, 545 U.S. 175 (2005) (remanding for reconsideration of propriety of death sentence where prosecutor used inconsistent theories in pursuing death penalty against co-defendants); Rompilla v. Beard, 545 U.S. 374 (2005) (trial counsel rendered ineffective assistance in failing to examine file on defendant's prior conviction admitted at capital sentencing hearing); Deck v. Missouri, 544 U.S. 622, 632–35 (2005) (shackling of defendant during capital sentencing hearing improper).

7. 420 U.S. 714 (1975).

8. *Id.* at 719 n.4 (internal quotation marks omitted) (quoting State v. Florance, 527 P.2d 1202, 1208 (1974)).

9. *Id*. at 719 (emphasis in original).

10. *E.g.*, United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (recognizing a "good faith" exception to warrant requirement where warrant defective due to clerical or other error made inadvertently). The New Mexico Supreme Court subsequently rejected *Leon* in *State v. Gutierrez*, 116 N.M. 431, 432, 863 P.2d 1052, 1053 (1993), interpreting article II, section 10 of the New Mexico constitution as precluding the "good-faith" exception applied by the U.S. Supreme Court. For additional comment, see Shannon Oliver, *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).

11. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977) (noting that determinations relying on state constitutional law are beyond the reach of federal review). The practical approach to using these alternative sources of law is examined in Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635

appellate courts, including the New Mexico Supreme Court.[12] Justice Brennan observed:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[13]

Because New Mexico has clearly asserted its independent role in evaluating state constitutional protections applicable in criminal prosecutions, prosecutors and defense lawyers practicing in state courts must be aware of appellate decisions relying on state constitutional interpretation and application bearing on issues raised in individual cases. Defense counsel, as well, must approach issues not already protected under state law with a creative eye toward anticipating directions in which the New Mexico Supreme Court may be persuaded to move and toward preservation of state constitutional and legal claims[14] that may benefit their clients.

I. DEVELOPMENT OF STATE CONSTITUTIONAL JURISPRUDENCE IN NEW MEXICO

The New Mexico Supreme Court began articulating a constitutional criminal procedure jurisprudence based on its interpretation of protections afforded under the state constitution as early as 1976, virtually contemporaneous with the emergence of this approach in other jurisdictions.[15] The court announced, in *State*

(1987). *See also* Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940))).

12. For an enlightening judicial perspective on the historical development of New Mexico constitutional law as an alternative source of protection of individual rights in criminal prosecutions, see Justice Franchini's opinion for the majority in *State v. Cardenas-Alvarez*, 2001-NMSC-017, 25 P.3d 225, and Justice Baca's concurring opinion, *id.* ¶ 25, 25 P.3d at 234. The case involved the question of whether federal agents were bound to observe state law in detaining and searching individuals at the border with Mexico leading to arrest and prosecution in New Mexico state courts. *See also* Rebecca N. Turner, Note, *Search and Seizure Law:* State v. Cardenas-Alvarez*: The Jurisdictional Reach of State Constitutions—Applying State Search and Seizure Standards to Federal Agents*, 32 N.M. L. REV. 531 (2002).

13. Brennan, *supra* note 11, at 491.

14. State law-based claims may not only be predicated on state constitutional protections, but on state law or procedural rules, as well, although state courts are not bound to apply federal precedent in terms of remedies. Thus, in *Virginia v. Moore*, 128 S.Ct. 1598, 1606–08 (2008), the Court held that where searches violate personal privacy interests protected under state law, but not by the Fourth Amendment, suppression of improperly seized evidence—the remedy applied to Fourth Amendment violations as a matter of federal law, *see* Mapp v. Ohio, 367 U.S. 643, 655–58 (1961)—was not constitutionally required. States may require suppression of illegally seized evidence, but are compelled to do so only where the violation is based on a privacy interest recognized and protected under the Fourth Amendment. However, in *State v. Snyder*, the New Mexico Court of Appeals held that the exclusionary rule applies in a state court prosecution to evidence seized by federal border agents, who were found to be in violation of the state constitution. 1998-NMCA-166, ¶ 1, 967 P.2d 843, 844 ("Based on the independent grounds provided by our state constitution, we determine that the exclusionary rule under Article II, Section 10 applies to the use of evidence in a New Mexico state court proceeding when that evidence resulted from a search conducted by federal border-patrol agents at a checkpoint in New Mexico."); *accord* State v. Wagoner, 2001-NMCA-014, ¶ 29, 24 P.3d 306, 314.

15. For scholarly analysis of the New Mexico Supreme Court's development of an independent state constitutional jurisprudence, see Michael B. Browde, State v. Gomez *and the Continuing Conversation over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387 (1998); Jennifer C. Juste, *Constitutional*

ex rel. Serna v. Hodges,[16] that it was rejecting the so-called "lock-step" approach to constitutional interpretation in which state constitutional protections were simply held to have the same scope as analogous federal provisions as interpreted by the United States Supreme Court. The court explained, "We are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so…."[17] It had recognized that the state constitution might provide a more expansive protection than analogous federal provisions earlier in *State v. Deltenre*.[18] There, the court observed that an arrest must comport not only with federal constitutional requirements, but also standards imposed under state law, while declining to find that the arrest violated New Mexico law.[19]

A. Recognition and Application of State Constitutional Protections

A significant break with the dominance of federal constitutional jurisprudence in matters of criminal procedure came with the 1989 decision in *State v. Cordova*,[20] when the New Mexico Supreme Court declined to follow the United States Supreme Court's lead in replacing the *Aguilar/Spinelli*[21] test for determining the sufficiency of probable cause for issuance of a search warrant in favor of the totality of circumstances test announced in *Illinois v. Gates*.[22] The *Aguilar/Spinelli* test focused the magistrate's attention on two specific issues: (1) the credibility of the informer supplying information to police seeking the warrant,[23] and (2) corroboration of the information disclosed[24] as the necessary elements of the test for probable cause. In *Gates*, the Court permitted the magistrate to consider the entirety of the circumstances in considering whether to issue the warrant.[25] The warrant in *Gates* was issued on the basis of a corroborated tip provided by an anonymous informant.[26]

Law—The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure—State v. Gomez, 28 N.M. L. REV. 355 (1998); Robert F. Williams, *New Mexico State Constitutional Law Comes of Age*, 28 N.M. L. REV. 379 (1998); and Gene E. Franchini, *New Mexico Independent Adjudication*, 61 ALB. L. REV. 1495 (1998).

16. 89 N.M. 351, 552 P.2d 787 (1976), *overruled on other grounds by* State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

17. *Id.* at 356, 552 P.2d at 792; *accord* State v. Gomez, 122 N.M. 777, 782, 932 P.2d 618, 662 (1997) ("[A]s the ultimate arbiters of the law of New Mexico[,][w]e are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution….").

18. 77 N.M. 497, 424 P.2d 782 (1966), *overruled on other grounds by* State v. Martinez, 94 N.M. 436, 439, 612 P.2d 228, 231 (1980).

19. *Id.* at 503–04, 424 P.2d at 786.

20. 109 N.M. 211, 784 P.2d 30 (1989).

21. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). These cases were abrogated by *Illinois v. Gates*, 462 U.S. 213 (1983).

22. 462 U.S. 213 (1983).

23. *Aguilar*, 378 U.S. at 114.

24. *Spinelli*, 393 U.S. at 415–16.

25. 462 U.S. at 230–31, 238–39.

26. *Id.* at 225–26. The Court observed that the tip alone was likely insufficient to establish probable cause. *Id.* at 227. However, it noted that the supporting affidavit, which confirmed one of the factual assertions in the anonymous tip, would have tended to corroborate the information provided by the anonymous informant. *Id.* at 227–28. In reversing the state supreme court, the *Gates* majority concluded that the information was sufficient to

In rejecting *Gates* in *Cordova*,[27] New Mexico joined other states[28] in maintaining a preference for the two-pronged *Aguilar/Spinelli* test as that to be applied as a matter of state constitutional law.[29] Yet, although the court expressly held that it was deciding the case based on application of the state constitution,[30] the *Aguilar/Spinelli* test was derived not from an independent reading of the protection afforded by article II, section 10 of the New Mexico constitution, but from prior decisions of the United States Supreme Court interpreting the warrant requirement contained in the Fourth Amendment. Nevertheless, the court reasoned that *Aguilar/Spinelli* had essentially been adopted by New Mexico courts and correctly expressed the state's experience and practice.[31]

B. Adoption of the "Interstitial Approach" to Construction of State Constitutional Protections

Some eight years following its decision in *Cordova*, the New Mexico Supreme Court would explain its view in developing an organized body of state constitutional jurisprudence in *State v. Gomez*.[32] The court adopted the "interstitial approach" to the articulation of state law-based rights. New Mexico's "interstitial approach" recognizes that state constitutional protections may be interpreted more broadly than their federal constitutional counterparts in certain circumstances, "diverg[ing] from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."[33] The departure does not require a finding of all three grounds set forth in *Gomez*; any one of the three will support the appellate court's evaluation of the argument for more expansive protection under state law than that available under federal law.[34]

In adopting this approach, New Mexico again rejected the "lock-step" alternative in which state constitutional guarantees are construed as co-extensive with

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establish probable cause for Fourth Amendment purposes. *Id.* at 245–46. In dissent, Justice Stevens argued that information supporting the warrant would not even satisfy the totality of circumstances test adopted by the majority. *Id.* at 291, 293–94 (Stevens, J., dissenting). Justice Brennan, joined by Justice Marshall, also dissenting, agreed with Justice Stevens's assessment of the inadequacy of the information supporting the warrant. *Id.* at 274 (Brennan, J., dissenting).

27. 109 N.M. 211, 217, 784 P.2d 30, 36 (1989).

28. *Id.*; *accord* State v. Jones, 706 P.2d 317 (Alaska 1985); State v. Kimbro, 496 A.2d 498 (Conn. 1985); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985), *on remand from* Massachusetts v. Upton, 466 U.S. 727 (1984); People v. Griminger, 524 N.E.2d 409 (N.Y. 1988); State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989); State v. Jackson, 688 P.2d 136 (Wash. 1984); *see also* Neil Colman McCabe, *Criminal Law Developments Under State Constitutions, 1989–1990*, 3 EMERGING ISSUES ST. CONST. L. 1, 10 (1990) (discussing rejection of *Gates* by Tennessee and New Mexico courts).

29. *Cordova*, 109 N.M. at 217, 784 P.2d at 36 ("We conclude that our present court rules better effectuate the principles behind Article II, Section 10 of our Constitution than does the 'totality of the circumstances' test set out in *Gates*.").

30. *Id.* at 212 n.1, 784 P.2d at 31.

31. *Id.* at 215–16, 784 P.2d at 36–37 (citing SCRA 5-211(E), now Rule 5-211(E) NMRA).

32. 1997-NMSC-006, ¶¶ 19–20, 932 P.2d 1, 7.

33. *Id.* ¶ 19, 932 P.2d at 7.

34. *See, e.g.*, State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 14, 25 P.3d 225, 230–31 ("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 characteristics that command our departure from federal law governing border checkpoint detentions.").

comparable federal constitutional protections.[35] Once the court determines that the Federal Constitution, as interpreted or applied by the Supreme Court, does not afford the accused the protection claimed, it then proceeds to consider whether the preserved state law claim merits relief on the alternative, state law basis.[36]

1. The Requirement for Preservation of State Constitutional Claims by Trial Objection

The *Gomez* court also held that preservation of the state constitutional claim was sufficient if the state constitutional provision relied upon is expressly raised by the litigant.[37] However, the preservation requirement imposed by the *Gomez* court requires not only that trial counsel expressly claim reliance on a state constitutional protection when the state claim has not been previously addressed, but "also must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision."[38] The rationale for this preservation requirement may not be altogether clear with regard to every claim because the interpretation of the New Mexico constitution would appear to be primarily the function of the state's *appellate* courts.[39]

However, some claims are not dependent upon factual analysis, and presumably, the appellate court could proceed to review the state constitutional theory asserted by trial counsel without regard to the specific factual context in which the claim arises, just as the appellate court might review a legal claim de novo because factual findings made by the trial court are extraneous to the issue.[40] Additionally, the court

35. *Gomez*, 1997-NMSC-006, ¶ 16, 932 P.2d at 6.

36. An alternative approach, labeled the "primacy approach," requires the state court to initially determine if state law affords the protection claimed by the defendant. If it does, the court does not need to consider the analogous federal protection. If state law does not afford the protection, the state court then looks to federal protection to decide the claim on the merits of the federal constitutional issue raised. *Id.* ¶¶ 18–19, 932 P.2d at 7 (citing Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1170 (1985), and noting other jurisdictions adopting the "primacy approach," *e.g.*, State v. Rowe, 480 A.2d 778 (Me. 1984); State v. Chaisson, 486 A.2d 297 (N.H. 1984); State v. Soriano, 684 P.2d 1220 (Or. 1984); State v. Jackson, 688 P.2d 136 (Wash. 1984)). Of course, only if the defendant does not plead reliance on federal constitutional protections would a state court be free not to proceed by considering the applicability of federal law. But, presumably, under this approach, a defendant offering only a generalized constitutional claim, not invoking federal protections, might fail to preserve a federal constitutional claim. *E.g.*, Hinkston v. State, 10 S.W.3d 906, 909 (Ark. 2000) (where trial court excluded mental state evidence arguably admissible under state law, failure to additionally assert violation of Sixth Amendment Compulsory Process Clause resulted in state supreme court refusing to consider federal constitutional claim on the merits on appeal).

37. *Gomez*, 1997-NMSC-006, ¶ 22, 932 P.2d at 8 ("[T]he claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue.").

38. *Id.* ¶ 23, 932 P.2d at 8 (emphasis omitted).

39. Both the New Mexico Supreme Court and New Mexico Court of Appeals have been actively involved in interpreting the state constitution. *See, e.g.*, State v. Granville, 2006-NMCA-098, 142 P.3d 933 (holding that state charter protects an individual's privacy interest in his garbage, contrary to *California v. Greenwood*, 486 U.S. 35, 37 (1988)). But, in *Granville*, the state constitutional law question was initially decided by the trial court in the accused's favor. *Id.* ¶ 16, 142 P.3d at 938.

40. *E.g.*, State v. Rodarte, 2005-NMCA-141, ¶ 5, 125 P.3d 647, 648 ("Because this case presents only the pure legal question of whether the New Mexico Constitution permits arrests for minor offenses that cannot result in jail time, we conduct a de novo review of the trial court's denial of the motion to suppress.").

recognized that appellate counsel often function in a somewhat superior position to develop the proper analysis supporting a new claim, observing:

> The rule announced today is also a recognition of realities separating trial and appellate practice. Although we expect trial counsel to be well-advised of state constitutional law on a particular subject affecting his or her client's interests, we also recognize that the arguments a trial lawyer reasonably can be expected to articulate on an issue arising in the heat of trial are far different from what an appellate lawyer may develop after reflection, research, and substantial briefing. It is impractical to require trial counsel to develop the arguments, articulate rationale, and cite authorities that may appear in an appellate brief. Here, the record establishes unambiguously that Gomez invoked a principle recognized under the New Mexico Constitution, the facts needed for a ruling on exigent circumstances were developed, and the trial court made a ruling on exigent circumstances. Therefore, the issue was preserved.[41]

Nevertheless, the state's appellate courts have yet to modify or recognize exceptions to the preservation rules, as articulated.

Thus, the *Gomez* court explained that the accused's theory must be presented to enable the trial court to "tailor proceedings and to effectuate an appropriate ruling on the issue."[42] If, in fact, a New Mexico trial court does fashion a ruling predicated on interpretation of the state constitution and the accused is acquitted, the State might effectively be prejudiced by its inability to challenge the trial court's determination by appeal that would reinstate the prosecution.[43] But, that consideration aside, the need for development of the factual basis on which the claim is predicated underlies the logic in the preservation requirement.[44]

Moreover, the requirement for preservation of the state constitutional or law-based claim of greater protection of an individual right than that afforded by the Federal Constitution is peculiarly a matter within the discretion of the state's courts. In *State v. Muñoz*, for instance, the court of appeals rejected the argument that the preservation requirement for these claims violated equal protection because litigants not relying on state constitutional or law-based claims are permitted to raise their claims as matters of fundamental error on appeal[45] when they have not been properly preserved by trial objection.[46]

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41. *Gomez*, 1997-NMSC-006, ¶ 31, 932 P.2d at 10.

42. *Id.* ¶ 23, 932 P.2d at 8.

43. Even a legally improper basis for acquittal would bar retrial as a matter of federal constitutional double jeopardy protection afforded by the Fifth Amendment. An acquittal terminates jeopardy on the charges tried. An acquittal occurs whenever a jury returns a verdict of acquittal, *see* Smith v. Massachusetts, 543 U.S. 462, 467 (2005), a trial is terminated because of lack of evidence, *see* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (court ordered acquittal after jury unable to reach verdict), or a conviction is reversed on appeal as a result of insufficient evidence, *see* Burks v. United States, 437 U.S. 1 (1978); Greene v. Massey, 437 U.S. 19 (1978). Reversal for trial error does not bar retrial. *Burks*, 437 U.S. at 15; United States v. Tateo, 377 U.S. 463, 465–66 (1964).

44. Rule 12-216(A) NMRA; *see also Gomez*, 1997-NMSC-006, ¶ 14, 932 P.2d at 6 ("In Fullen v. Fullen, 21 N.M. 212, 153 P. 294 (1915), this Court surveyed appellate preservation rules of other jurisdictions and noted that '[i]t is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the lower court.'").

45. Rule 12-216(B)(2) NMRA.

46. State v. Muñoz, 2008-NMCA-090, ¶¶ 28–30, 187 P.3d 696, 704–05, *cert. granted*, 2008-NMCERT-006, 188 P.3d 105 (Table, No. 31,151).

While disclaiming that it intended to require litigants to preserve their state constitutional claims in strict compliance with criteria by which those claims may afford relief when comparable federal protections would not, the *Gomez* court nonetheless suggested criteria advanced in other jurisdictions, affording direction to New Mexico litigants.[47] These criteria remain influential in providing trial attorneys with grounds for more expansive protections afforded by the state constitution than those articulated by the Supreme Court in construing comparable provisions of the Federal Constitution. The criteria and their use in New Mexico cases will be discussed in Part III of this article.

2. Application of the Fundamental Error Doctrine

While explaining the preservation requirement for state constitutional claims in some detail, the *Gomez* court also, inexplicably, interjected the fundamental error concept into the discussion. The court noted that the issue raised by *Gomez* involved a search and seizure claim implicating privacy interests under the state constitution, observing: "Even if Gomez's contentions before the trial court had failed to preserve the state constitutional claim, we could nevertheless consider it because freedom from illegal search and seizure is a *fundamental* right."[48] The problem is that in suggesting that state constitutional claims may be the subject of fundamental error analysis, the *Gomez* court implicitly undercut its own demand that trial counsel preserve error by proper objection and, when a novel interpretation is required, supply a theoretical basis for the interpretation sought.

In *State v. Barber*,[49] the New Mexico Supreme Court held that in order for a claim to qualify for review as a matter of fundamental error, it:

> must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.[50]

The *Barber* court offered a lengthy historical analysis of the concept of fundamental error in New Mexico, noting that while actual innocence may be a controlling factor in the determination that error should be evaluated as fundamental, not all cognizable fundamental error claims do arise in the context of disputed guilt.[51] The court observed that the second *strand* of fundamental error doctrine focuses more on process and the integrity of the adversarial system.

Since claims asserting New Mexico constitutional grounds will almost necessarily implicate fundamental protections, the *Gomez* court's reference to the applicability of fundamental error review to claims arising under the state constitution would appear to open the door to appellate review of these claims irrespective of compliance with preservation requirements also set out in *Gomez*. However, the post-*Gomez* history of the appellate courts' treatment of unpreserved

47. *Gomez*, 1997-NMSC-006, ¶ 23 n.3, 932 P.2d at 8.
48. *Id.* ¶ 31 n.4, 932 P.2d at 10 (emphasis added).
49. 2004-NMSC-019, 92 P.3d 633.
50. *Id.* ¶ 8, 92 P.3d at 636 (citing State v. Garcia, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942)).
51. *Id.* ¶¶ 14, 16.

claims of state constitutional protections suggests nothing less than that trial counsel's failure to preserve a state law basis for protection of the client's rights will result in waiver of the issue on appeal. The inconsistency in the signals sent is compounded by rejection of fundamental error claims predicated on state constitutional protections.[52]

An example of the operation of the preservation requirement in the context of fundamental rights is presented in *State v. Silva*.[53] The issue involved a question of fundamental rights secured by the Federal Constitution. The state supreme court reversed the court of appeals, which had itself reversed the appellant's conviction based on a fundamental error claim. The court of appeals found that the trial court erred in depriving trial counsel of an opportunity to impeach a witness on cross-examination with the fact that the prosecution had promised not to prosecute him in return for his testimony.[54] Both courts concluded that the objection was not properly preserved at trial because counsel failed to assert the defendant's Sixth Amendment claim, having only raised the witness's Fifth Amendment right not to incriminate himself during questioning at his deposition.[55] While the supreme court agreed that the trial court had erred,[56] it rejected the relief afforded by the court of appeals because even an error affecting a fundamental right does not necessarily result in relief.[57] The *Silva* court explained:

> [W]e will use the doctrine to reverse a conviction only "if the defendant's guilt is so questionable that upholding a conviction would shock the conscience, or where, notwithstanding the apparent culpability of the defendant, substantial justice has not been served. Substantial justice has not been served when a fundamental unfairness within the system has undermined judicial integrity."[58]

The supreme court then noted that two different factors could require relief once there is a finding of error resulting in the violation of a fundamental right. First, evidence conclusively demonstrating the accused's actual innocence warrants relief.[59] Alternatively, even if the defendant's innocence is not established in the record, relief is warranted when the error results in unfairness undermining the credibility of the justice system.[60]

In *Silva*, the preservation problem was created because trial counsel had phrased his objection in terms of the Fifth Amendment rights of the witness, rather than the Sixth Amendment confrontation right afforded the accused. Because counsel did not

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52. *See* State v. Garcia, 2008-NMCA-044, ¶ 10, 182 P.3d 146, 149–50 *rev'd*, 2009-NMSC-046, *available at* http://www.nmcompcomm.us/nmcases/NMSC/2009/09sc-046.pdf; State v. Snell, 2007-NMCA-113, ¶ 8, 166 P.3d 1106, 1109–10.

53. 2008-NMSC-051, 192 P.3d 1192, *affirming in part and reversing in part*, 2007-NMCA-117, 168 P.3d 1110.

54. *Id.* ¶ 9, 192 P.3d at 1194–95.

55. *Id.* ¶¶ 9–10, 192 P.3d at 1194–95.

56. *Id.* ¶ 12, 192 P.3d at 1195. The trial court prevented defense counsel from cross-examining the witness with respect to whether the State had offered him anything in return for his testimony.

57. *Id.* ¶ 13, 192 P.3d at 1196.

58. *Id.* (citing Campos v. Bravo, 2007-NMSC-021, ¶ 8, 161 P.3d 846, 849).

59. *Id.* ¶ 14, 192 P.3d at 1196 (citing State v. Garcia, 19 N.M. 414, 422, 143 P. 1012, 1015 (1914) (reversing where evidence showed defendant unconscious at the time of the offense and, therefore, indisputably innocent)).

60. *Id.* ¶ 14, 192 P.3d at 1196.

explicitly rely on the Sixth Amendment, the error was not preserved at trial for review on appeal. Thus, even though violation of a fundamental *right* was implicated by the trial court's limitation on cross-examination in *Silva*, trial counsel's failure to preserve error in terms of phrasing the objection as a Sixth Amendment confrontation violation was critical in depriving the defendant of reliance on the favorable harmless error standard of *Chapman v. California* for review of federal constitutional claims generally.[61]

Moreover, because the *Silva* court found that the trial court had permitted extensive cross-examination and impeachment of the witness, characterizing the cross as "practically devastating the witness," it concluded that fundamental error did not occur at trial.[62] The extent of cross permitted and the success of the cross-examination were sufficient to rebut the argument that the trial court's error in limiting trial counsel's questioning did not demonstrate fundamental error warranting relief in the absence of a timely and correct objection.[63] The supreme court's conclusion that fundamental error had not occurred was, in fact, consistent with the formula applied by the United States Supreme Court in *Delaware v. Van Arsdall*[64] for assessing when a limitation upon cross-examination—as opposed to a denial of cross examination—results in a violation of confrontation under the Sixth Amendment.[65]

In *State v. Garcia*, the appellant argued that the application of differing standards with regard to preservation of claims based on state constitutional protections violates equal protection in discriminating against those defendants who did not fully preserve their state constitutional claims by offering a rationale at trial as to why state law affords broader relief than federal constitutional protections.[66] The underlying facts suggested an interesting claim raising the applicability of the Supreme Court's decision in *California v. Hodari D.*, in which the Court rejected an illegal seizure claim where the defendant ran when he saw officers and then dropped crack cocaine while they were chasing him.[67] The *Hodari D.* Court found that because the defendant escaped from a momentary interference with his liberty

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61. 386 U.S. 18, 24 (1967) (holding that the burden of proving that constitutional error is harmless beyond a reasonable doubt is placed upon the beneficiary of the error).

62. *Silva*, 2008-NMSC-051, ¶ 15, 192 P.3d at 1196.

63. *Id.*

64. 475 U.S. 673 (1986).

65. In evaluating a confrontation claim based on limitation on cross, the *Van Arsdall* Court set forth the following test employed by the reviewing court:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684. The reviewing court then conducts a harmless error analysis, in light of the factors identified by the Court as bearing on the issue of prejudice. *Id.* at 684 (remanding to state court for harmless error analysis).

66. State v. Garcia, 2008-NMCA-044, ¶¶ 29–32, 182 P.3d 146, 153–54, *rev'd*, 2009-NMSC-046, *available at* http://www.nmcompcomm.us/nmcases/NMSC/2009/09sc-046.pdf.

67. California v. Hodari D., 499 U.S. 621, 622–23 (1991).

and did not actually submit to the show of authority by police, he had not been seized at the time he fled and dropped the contraband, thus abandoning it.[68]

The state court of appeals applied *Hodari D.* in *State v. Rector*,[69] where the defendant had dropped the contraband before either being physically restrained by officers or otherwise submitting to their show of authority. Garcia attempted to distinguish his case from *Hodari D.* and *Rector*, arguing that he had been restrained when an officer pepper-sprayed him after his repeated refusals to stop at the command of police.[70] The *Garcia* court concluded that because he had not submitted to authority before disposing of the cocaine, he could not show that he had been deprived of his liberty by virtue of acquiescence to the officer's order for him to stop.[71] It then rejected his argument that being pepper-sprayed amounted to a physical restraint under *Hodari D.*[72] Instead, the court held that Garcia was not restrained or in physical custody when he threw the contraband away, abandoning the cocaine.[73]

The court of appeals also addressed the argument in *Garcia* that greater protection is afforded to New Mexico defendants under the state constitution than that provided by the Fourth Amendment, first noting that this issue had specifically been left open in prior cases.[74] But the court expressly declined to address the claim on the merits, holding that the claim had not been properly preserved in the trial court for appellate review.[75] The court of appeals, however, did address the merits of Garcia's claim, argued on appeal, that the application of the preservation requirement to claimed violations of the state constitution, rather than permitting such claims to be advanced as fundamental error in the absence of preservation, constituted an equal protection violation. The court found the argument to be "inherently flawed."[76]

The court of appeals also reasoned that there was no discrimination against those litigants who failed to preserve their state constitutional claims properly at trial. Instead, it found that the application of the preservation rule simply differentiated between those litigants complying with the preservation requirement dictated by the supreme court, and those who failed to comply, explaining, "Defendant cannot demonstrate that the preservation requirement discussed in Gomez draws a classification that discriminates against his class in the exercise of his appellate rights. Defendant was treated differently due to his failure to follow established rules of appellate procedure."[77]

The intermediate court's rationale was likely correct in terms of the precise question it addressed, but there are additional considerations that suggest that the

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68. *Id.* at 627–29.
69. 2005-NMCA-014, ¶¶ 6–8, 105 P.3d 341, 342–43.
70. *Garcia*, 2008-NMCA-044, ¶ 8, 182 P.3d at 149.
71. *Id.* ¶ 17, 182 P.3d at 151.
72. *Id.* ¶¶ 18, 20–25, 182 P.3d at 151–53.
73. *Id.* ¶ 28, 182 P.3d at 153.
74. *Id.* ¶ 9, 182 P.3d at 149 (citing State v. Harbison, 2007-NMSC-016, ¶ 16 n.3, 156 P.3d 30, 35; *Rector*, 2005-NMCA-014, ¶ 5, 105 P.3d 341, 342).
75. *Id.*
76. *Id.* ¶ 30, 182 P.3d at 154.
77. *Id.* ¶ 31, 182 P.3d at 154.

strict compliance with the preservation requirement might ultimately be reconsidered. However, in reviewing the case on writ of certiorari, the New Mexico Supreme Court reconsidered the preservation question, holding that the strict requirement for defendants to develop their theories for expanded protection under the state constitution did not apply on the facts of the case.[78] Instead, the court observed that the state constitutional claim had been argued in response to the disposition by the court of appeals, which had held that Garcia had not been *seized* and thus, that his suppression argument failed under *Hodari D.*[79] Finding that the state constitutional issue regarding the nature of the seizure itself had not become contested until the case was argued in the court of appeals, Justice Serna concluded for the court that the requirement that the defendant fully develop his state constitutional claim before the trial court did not bar the consideration of his argument on appeal:[80] "Defendant's state constitutional claim was a *response* to the State's argument for affirmance on what amounted to right-for-any-reason grounds."[81]

On the merits, the *Garcia* court rejected *Hodari D.*'s more rigid view of the seizure requirement in favor of the traditional analysis articulated by the Supreme Court in *United States v. Mendenhall*.[82] The *Mendenhall* approach focused on whether a reasonable person in the circumstances would share the suspect's perception that he was under arrest because he was not "free to leave" the scene when confronted by an officer.[83] In rejecting *Hodari D.*'s less-protective test, the court noted substantial criticism by other state courts that had similarly refused to abandon the *Mendenhall* standard.[84] The court ultimately reversed the lower courts and ordered the evidence suppressed, relying on state constitutional principles.[85]

The relaxation of the preservation rule in *Garcia* suggests that the state supreme court could well alter the preservation requirement in light of its experience in developing state constitutional law since *Gomez*. Justice Bosson, in his special concurrence, for instance, offered to initiate a full discussion of the preservation requirement for state constitutional law claims: "I write separately to stimulate (hopefully) a dialogue regarding what we reasonably should continue to demand today—over twelve years after *Gomez*—to preserve a search and seizure argument under Article II, Section 10 of the New Mexico Constitution."[86] He argued that because Garcia's counsel had moved to suppress the evidence and expressly relied on article II, section 10 the existing expanded view of the privacy protection recognized by the state courts provided sufficient notice of his reliance on this body of law to preserve the issue for appellate review.[87]

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78. State v. Garcia, 2009-NMSC-046, *available at* http://www.nmcompcomm.us/nmcases/NMSC/2009/09sc-046.pdf.

79. *See id.*; *see also supra* text accompanying notes 73–75.

80. *Garcia*, 2009-NMSC-046, ¶¶ 10–12.

81. *Id.* ¶ 12.

82. *Id.* ¶¶ 34–35.

83. 446 U.S. 544, 554 (1980) (holding that an individual is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

84. *Garcia*, 2009-NMSC-046, ¶ 33.

85. *Id.* ¶ 47.

86. *Id.* ¶ 50 (Bosson, J., specially concurring).

87. *Id.* ¶ 53.

There is reason for altering the preservation requirement with regard to certain state constitutional law claims.[88] In *Garcia*, for instance, trial counsel stated its reliance on the alternative state constitutional provision, but failed to complete the preservation requirement by advancing an argument as to why the state constitution affords broader protection than the Fourth Amendment.[89] Consequently, the courts were, at the least, on notice that counsel intended reliance on the state constitution, and the facts were sufficiently developed so that both the trial and appellate courts could make that determination without regard to any supporting policy argument, a view consistent with Justice Bosson's *Garcia* concurrence. Therefore, in *Garcia* at least, the additional obligation to preserve error by advancing the policy argument does not really suggest a rational basis for not addressing Garcia's state constitutional argument on the merits. This is particularly true in light of the fact that the courts had already been apprised of the limitations of *Hodari D.* and possible alternative remedy under the state constitution in *Rector*.

On the other hand, the equal protection argument might be framed differently, although perhaps only in the context of a future case. The question would be why litigants advancing state constitutional law claims are denied the benefit of fundamental error review while those asserting federal constitutional claims or non-constitutional state law claims may rely on the fundamental error doctrine on appeal when trial counsel has failed to preserve error at all. If, in fact, the issue otherwise warrants review because it implicates a fundamental right protected by the New Mexico Constitution and denial of the right has compromised justice, such as by contributing to the conviction of an innocent accused or undermining the credibility of the process, then arguably, restriction of the accused's right to claim fundamental error as a matter of protections afforded by the state constitution would appear unjustified.[90]

But, in response, one might consider the nature of appellate review of unpreserved claims of error generally. Some claims warrant review precisely because the settled law dictates reversal to avoid prejudice. This is essentially the test for "plain error," as discussed by the Supreme Court in *United States v. Olano*[91] in applying Rule 52(b) of the Federal Rules of Criminal Procedure.[92] There the Court held that unpreserved error could warrant review and reversal despite the failure to timely object if the appellant can show that there was a deviation from normal procedure constituting an "error" in the trial court; that the error was

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88. Justice Bosson's reasoning is rather compelling:

> We cannot allow the development of our state Constitution to be retarded by overly burdensome, hyper-technical, and impractical preservation requirements. As New Mexico's highest court, it is our duty and privilege to interpret and develop the New Mexico Constitution. In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking.

Id. ¶ 57.

89. *Id.* ¶ 7(majority opinion); *id.* ¶¶ 52–53 (Bosson, J., specially concurring).

90. State v. Silva, 2008-NMSC-051, ¶ 14, 192 P.3d 1192, 1196.

91. 507 U.S. 725, 731–37 (1993).

92. FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). Similarly, Rule 103(d) of the Federal Rules of Evidence provides, in the context of admission or exclusion of evidence at trial: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

"plain," or "obvious"; and that the error "affects substantial rights," meaning that it was prejudicial in most instances, affecting the outcome of the proceedings in the trial court.[93] Using this analysis, review of "plain error" does not contemplate recognition of newly defined rights at all, precisely because that recognition is contrary to the notion that the error is obvious or clear.

Of course, fundamental error analysis can also apply to recognition of new rights or applications of existing rights. The *Olano* Court's explanation of the fundamental error review in federal proceedings as limited to "plain error" is not controlling on state law or the interpretation of a state court's authority to review for fundamental error. In fact, the New Mexico standard for determination of fundamental error, as articulated in *State v. Barber*,[94] would seemingly provide a far more creative, or expansive, view of the authority of the state courts for considering unpreserved claims of error that compromise the integrity of the criminal process or undermine confidence in the accuracy or fairness of the conviction.

The supreme court's disposition of the claims raised in *Garcia* may ultimately reshape New Mexico's approach to the development of state constitutional law in recognizing a more liberal preservation policy. Or, it may well leave intact the preservation requirement that has controlled appellate review since its articulation in *Gomez*.[95] Nevertheless, the decisions in *Garcia* and *Silva* demonstrate the difficulty in relying on fundamental error in raising novel claims of constitutional error. Presumably, because the contours of established federal constitutional doctrine are already well-defined, reviewing courts are fully capable of assessing the claims on the merits based on the record of trial. But reliance on fundamental error asserted on appeal advancing state constitutional error claims is likely to be even more difficult, in part, because appellate counsel will often be asking the reviewing court to speculate on the nature of the claim based on what may be an underdeveloped factual record.

3. Concomitant Preservation of Federal and State Claims in the Absence of Federal Precedent

A final comment on the "interstitial approach" is worth noting. Counsel arguing for a more expansive protection of individual rights, whether under the New Mexico Constitution or other state law, should bear in mind that the interstitial approach contemplates at least two different scenarios. First, counsel may look to state law because the Federal Constitution has already been interpreted by the United States Supreme Court not to afford protections for the defendant on the facts raised by the case.[96] In this situation, counsel seeks a more expansive protection under state law

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93. *Olano*, 507 U.S. at 733–34.

94. *See supra* notes 49–51 and accompanying text.

95. State v. Gomez, 1997-NMSC-006, ¶¶ 22–23, 932 P.2d at 8.

96. *See, e.g.*, Campos v. State, 870 P.2d 117, 120–21 (1994) (interpreting article II, section 10 of the New Mexico constitution to require that a warrantless arrest must be based on probable cause and exigent circumstances, contrary to *United States v. Watson*, 423 U.S. 411, 423, (1976)). Another example of this situation is presented by the litigation in *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001), in which the United States Supreme Court summarily reversed the state supreme court's holding in *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000), that a pretextual arrest and search were prohibited by the Fourth Amendment, "flatly contrary" to the Court's prior decision in *Whren v. United States*, 517 U.S. 806 (1996). On remand, the Arkansas court again upheld suppression

than that which would apply if the New Mexico courts were to consider the construction of federal constitutional guarantees adequate to fully protect the rights claimed in the individual prosecution.[97]

Alternatively, counsel may be asking the state courts to interpret state law with respect to a specific claim upon which there exists no federal constitutional precedent at all, or none that is directly applicable.[98] For example, in *State v. Sarracino*,[99] the court rejected the defendant's argument that New Mexico law afforded greater due process protection for state court defendants than the Fourteenth Amendment, while holding that the state constitutional claim had been preserved by the tendering of a proposed jury instruction cautioning jurors of the potential unreliability of testimony offered by an accomplice. Yet, the court observed that Sarracino could point to no federal constitutional authority on point warranting comparative review. Instead, the court observed:

> [T]he federal practice on which Sarracino relied for his proposed instruction is founded in rules of procedure rather than constitutional doctrine. As a result, there is not an existing federal constitutional scheme from which Sarracino could urge that this Court, or the district court, depart. Instead, we believe that, by tendering his proposed instruction, Sarracino preserved the question whether New Mexico's jury instructions adequately respond to the concerns accompanying accomplice testimony, or whether New Mexico's existing practice should be changed. In our own review of this question, we deem it necessary to resort to constitutional principles.[100]

Thus, state law may provide protections that have not been addressed in federal constitutional litigation, or that may pre-date consideration of comparable claims. For example, well before the United States Supreme Court's decision in *Batson v. Kentucky*,[101] the New Mexico court recognized in *State v. Crespin*[102] that, under article II, section 4 of the New Mexico constitution, the exclusion of a substantial number of minority jurors in a single case could raise the inference of systematic exclusion by the prosecutor. In *Batson*, the Court held that the difficulties in proving a violation of the rights of prospective jurors under *Swain v. Alabama*,[103] which required proof of systematic exclusion of minority jurors based on evidence relating

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of the evidence, this time on state constitutional grounds. State v. Sullivan, 74 S.W.3d 215, 222 (Ark. 2002).

97. An example of the state court's consideration of the effect of New Mexico statutory law may be seen in *State v. Javier M.*, 2001-NMSC-030, 33 P.3d 1, where the court concluded that provisions of section 32A-2-14 of the New Mexico Statutes, relating to the rights of juvenile offenders subject to questioning, are not intended to merely incorporate or reflect the federal constitutional principle set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Javier M.*, 2001-NMSC-030, ¶ 32, 33 P.3d at 14.

98. Even if there is no Supreme Court precedent on point, however, that does not necessarily end the inquiry because lower federal court precedent may inform the state appellate courts and provide a basis for distinguishing federal and state protections. *See, e.g.*, State v. Cardenas-Alvarez, 2001-NMSC-017, ¶¶ 7–10, 25 P.3d 225, 228–30 (comparing the New Mexico standard of "reasonable suspicion" to justify extended detention following traffic stop with the federal standard, applied by Tenth Circuit Court of Appeals in *United States v. Chavira*, 9 F.3d 888, 889 (10th Cir. 1993), of mere "suspicious circumstances" for extended border stop, and holding that state law affords more protection than Federal Constitution under circumstances).

99. 1998-NMSC-022, ¶ 11, 964 P.2d 72, 76–77.

100. *Id.* ¶ 11, 964 P.2d at 77.

101. 476 U.S. 89 (1986).

102. 94 N.M. 486, 612 P.2d 716 (1980).

103. 380 U.S. 202 (1965).

to a number of trials in a jurisdiction,[104] were simply too difficult to meet.[105] Thus, *Crespin* articulated a state constitutional basis for a more expansive protection afforded state court defendants than that afforded under *Swain*,[106] at least until the Court modified the process for demonstrating an impermissible use of peremptory challenges in *Batson*.

Similarly, a more expansive protection for individual rights under state law may arise from legislative action, rather than from judicial decisions construing the state constitution. Two years after the Supreme Court rejected a challenge to the execution of mentally retarded inmates in *Penry v. Lynaugh*,[107] the New Mexico legislature enacted a statutory prohibition on execution of mentally retarded capital defendants,[108] providing a protection not available under the Eighth Amendment until the decision in *Penry* was abrogated in *Atkins v. Virginia*.[109]

But, trial counsel should also be aware of the need to assert federal constitutional grounds at trial in addition to arguing state constitutional protection when there is no existing Supreme Court precedent dictating the disposition of the issue as a matter of federal constitutional law. The reason is two-fold. First, it is not entirely unlikely that where the appropriate federal constitutional protection has not been interpreted or applied with regard to the issue under consideration, the state courts will rule in favor of the accused by interpreting the Federal Constitution to afford the protection sought.[110] Second, if the state courts reject the accused's reliance on federal constitutional protections and then also refuse to find that the state constitution affords more expansive protection for the right asserted,[111] counsel will

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104. *Id.* at 223–24.

105. *Batson*, 476 U.S. at 96.

106. *Crespin*, 94 N.M. at 487–88, 612 P.2d at 717–18.

107. 492 U.S. 302, 340 (1989).

108. NMSA 1978, § 31-20A-2.1 (1991). The statute was upheld in *State v. Flores*, 2004-NMSC-021, ¶ 11, 93 P.3d 1264, 1269. *See* Alethia V.P. Allen, Note, State v. Flores*: In the Wake of* Atkins v. Virginia*, New Mexico Tackles Capital Punishment for Defendants with Mental Disabilities*, 35 N.M. L. REV. 557 (2005).

109. 536 U.S. 304, 321 (2002).

110. *See, e.g.*, ACLU of N.M. v. City of Albuquerque, 2006-NMCA-078, 137 P.3d 1215. The plaintiff sought relief under both state and Federal Constitutions in a civil action challenging an Albuquerque city ordinance limiting the rights of registered sex offenders. The court of appeals granted relief, but confined its analysis to the federal constitutional claims asserted, noting: "We agree that broader protections may be available under the state constitution, and that the ACLU has preserved the issue for review. However, since we hold that the challenged provisions violate the Fourth Amendment, we need not reach the possibly broader protections afforded under the state constitution." *Id.* ¶ 39, 137 P.3d at 1229–30.

111. For example, in *State v. Sandoval*, 2004-NMCA-046, 89 P.3d 92, the court of appeals rejected the defendant's reliance on the state constitution in arguing that proof of prior convictions used for purposes of enhancement of his sentence should be determined by the application of the reasonable doubt standard. Sandoval fully preserved the issue for review, relying on the rationale of the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), requiring proof of allegations of facts warranting increase of sentence above the presumptive statutuory sentence—in *Apprendi*, proof that the accused acted with racial animus in committing the offense—be determined by the trier of fact using the reasonable doubt standard of proof. However, the Court had previously rejected the requirement for proof of prior convictions using the reasonable doubt standard in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and the *Apprendi* Court did not overrule that case. 530 U.S. at 487.

Sandoval preserved his claim under both state and Federal Constitutions. 2004-NMCA-046, ¶¶ 2–3, 89 P.3d at 93. On appeal, the court of appeals noted that the Supreme Court had expressly declined to apply *Apprendi* to overrule *Almendarez-Torres* in *Harris v. United States*, 536 U.S. 545 (2002), and so, rejected Sandoval's federal constitutional claim. 2004-NMCA-046, ¶¶ 2–3, 89 P.3d at 93–94. It then considered Sandoval's state constitutional claim resting on article II, sections 12 and 18, arguing that the United States Supreme Court's

have preserved the federal constitutional claim for review by the Supreme Court on certiorari,[112] or by review in federal habeas corpus.[113]

However, one important consequence of success on a federal constitutional claim in state court proceedings is that the State may also petition for review in the Supreme Court, and, if the state court has ruled too expansively, the relief it has afforded may essentially be lost in that process.[114] The significance of a state constitutional decision lies in the fact that the United States Supreme Court has no jurisdiction to review a state court decision resting on "adequate and independent" state law grounds. In *Michigan v. Long*, the Court explained:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[115]

The significance of the Court's holding is not only that state court decisions resting on interpretation or construction of federal constitutional law, rather than state law, are subject to review by writ of certiorari, but that decisions that arguably are intertwined with federal constitutional analysis or ambiguous in the source of their rationale are presumptively subject to the Court's review.[116]

The potential for review on certiorari when a state court has afforded the accused relief based upon a federal constitutional guarantee that may result in reversal might suggest that counsel should rely exclusively on state constitutional provisions in order to avoid the possibility that the interpretation of the Federal Constitution will provide a basis for the United States Supreme Court's assertion of jurisdiction. But

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disposition of the question was inadequate based upon all three generic challenges recognized in *State v. Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d 1, 7. He argued that the federal analysis was flawed; that there are structural differences between the state and federal governments warranting different treatment of the claimed right under state law; and that the state constitution has distinctive characteristics. 2004-NMCA-046, ¶ 6, 89 P.3d at 94. However, the court of appeals rejected the state constitutional argument that Sandoval's counsel had preserved at trial and argued on appeal. *Id.* ¶ 7, 89 P.3d at 94.

112. 28 U.S.C. § 1257(a) (2006) authorizes the U.S. Supreme Court to review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had…."

113. 28 U.S.C. § 2254 (2006) defines the federal habeas remedy for petitioners challenging convictions imposed in state court proceedings. Under subsection (d)(1) the federal habeas court is limited to granting relief only when the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.…"

114. *E.g.*, New Mexico v. Earnest, 477 U.S. 648 (1986) (vacating reversal of conviction ordered by state supreme court and remanding for further proceedings where New Mexico Supreme Court held that defendant's Sixth Amendment right to confrontation was violated by admission of non-testifying accomplice's statement to police inculpating defendant).

115. 463 U.S. 1032, 1040–41 (1983).

116. *Id.* at 1042 & n.8.

the interstitial approach, in theory, requires trial counsel to preserve claims alternatively on federal and state law grounds in order to permit the state courts to properly consider whether a state constitutional provision provides more expansive protection than its federal analog. Moreover, because New Mexico courts have a tradition of aggressive consideration of the state constitutional law alternative, counsel should protect the client's rights as fully as possible, assuming that reversal of a state court holding on certiorari will then trigger review under the state law ground argued alternatively once the case is remanded to the state courts.[117]

II. THE EXISTING BODY OF NEW MEXICO CONSTITUTIONAL LAW

The New Mexico appellate courts have developed a substantial body of case law in which state law sources have been used to provide more expansive protections for individuals prosecuted for criminal offenses. Consequently, defense lawyers practicing in the state's courts must be familiar with those existing decisions that may provide relief and do not require the "heavy lifting" involved in developing arguments for further expansion of procedural rights for their clients. Similarly, prosecutors should be alert to existing precedent in assessing the response required to limit the applications of these protections to those situations expressly authorized by the state courts. Generically, two particular categories of protections have been the focus of the development of this body of law: privacy protections and due process protections arising in the context of prior jeopardy.

A. Privacy Protection Now Recognized by New Mexico Courts

There now exists a substantial body of state constitutional law articulated by the New Mexico Supreme Court that provides greater protection than the Federal Constitution to the state's residents, generally, and to criminal defendants prosecuted in the state courts.

1. Substantive Protection of Privacy Interests

The most significant development in terms of state constitutional doctrine under New Mexico law has involved the expansive interpretation of personal privacy derived from article II, section 10 of the New Mexico Constitution. That section 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.[118]

Although differing somewhat in wording from the Fourth Amendment, the content of the two provisions appears to be substantially the same, with the federal protection providing:

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117. *See, e.g.*, cases cited *supra* note 96.
118. N.M. CONST. art. II, § 10.

> 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 of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[119]

Despite the relative similarity in textual language, New Mexico courts have demonstrated their greatest activism in state constitutional interpretation with regard to consideration of privacy interests. For instance, in *State v. Gutierrez*, the court summarized this concern: "Article II, Section 10 of the New Mexico Constitution expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions."[120] This commitment has been reflected in a range of decisions addressing arrests and searches resulting in suppression of evidence in state courts.

a. Test for Probable Cause

As explained earlier,[121] the New Mexico Supreme Court's most important step in its initial development in state constitutional law is reflected in its decision in *State v. Cordova*,[122] where the New Mexico Supreme Court declined to follow the United States Supreme Court's lead in replacing the *Aguilar/Spinelli*[123] test for determining the sufficiency of probable cause for issuance of a search warrant in favor of the totality of circumstances test announced in *Illinois v. Gates*.[124]

b. Requirement and Execution of Warrants

In *State v. Attaway*,[125] New Mexico developed state constitutional doctrine without expressly departing from federal precedent[126] in holding that under article II, section 10 of the state constitution, officers executing a warrant are required to knock and announce their intent to serve the warrant before entering a residence.[127] The court considered at length the holding in *Ker v. California*, where a fragmented Court considered the applicability of the common law knock-and-announce rule to Fourth Amendment claims.[128]

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119. U.S. CONST. amend. IV.
120. 116 N.M. 431, 444, 863 P.2d 1052, 1065 (1993).
121. *See supra* Part I.A.
122. 109 N.M. 211, 784 P.2d 30 (1989).
123. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).
124. 462 U.S. 213, 238 (1983).
125. 117 N.M. 141, 151–52, 870 P.2d 103, 113–14 (1994).
126. *Id.* at 147, 870 P.2d at 109 ("The Supreme Court has not determined whether officers executing a search warrant must knock and announce prior to entry. The Court follows the general rule that the Fourth Amendment prohibits only unreasonable searches.").
127. *Id.* at 149, 870 P.2d at 111. The court predicated its state constitutional analysis on an objective approach in evaluating whether a search and seizure is *reasonable*: "The application of objective criteria in determining whether officers have violated the knock and announce requirements will secure the right of each citizen to be free from unreasonable searches and seizures and, at the same time, will provide law enforcement with clear standards of conduct." *Id.*
128. *Id.* at 146–49, 870 P.2d at 108–11 (citing *Ker*, 374 U.S. 23, 46 (1963)). The Court first discussed the common law rule from *Semayne's Case*, 77 Eng.Rep. 194 (K.B. 1603) and contemporary commentary. *Id.* at 146–48, 870 P.2d at 108–10. It next examined *Ker*. *Id.* at 147–49, 870 P.2d at 109–11. In *Ker*, four Justices, led

The *Attaway* court relied on the prior decision of the court of appeals in *State v. Baca*,[129] where that court explained:

> [W]e are obliged to look to the common law to determine what procedure must be followed prior to a forced entry. We recognize that some uncertainty exists as to common law requirements. Our view is that an officer, prior to forcible entry, must give notice of authority and purpose, and be denied admittance. This is a general standard. Noncompliance with this standard is justified if exigent circumstances exist.[130]

The state supreme court, essentially adopting the reasoning of the court of appeals in *Baca*, concluded: "We believe that the rule of announcement in *Baca* rests on state constitutional grounds. The requirement that officers executing a search warrant announce their identity and purpose and be denied admission is a critical component of a reasonable search under Article II, Section 10."[131]

The rule is not absolute, as the supreme court explained, allowing for flexibility where strict compliance with the requirement for notice of the officers' presence and purpose would likely threaten their safety.[132] Consequently, on the facts presented showing a reasonable perception that the subject was dangerous, having previously threatened police, the court held that officers were justified in entering without strictly complying with the knock-and-announce rule.[133]

c. Search Incident to Arrest Under Warrant

In *State v. Pittman*,[134] the New Mexico Court of Appeals rejected the interpretation of Fourth Amendment protections relied on by the Supreme Court in *Thornton v. United States*[135] and *Chimel v. California*.[136] The issue in *Pittman,* as to the officer's authority to search incident to a lawful arrest, arose in the context of an arrest for failure to appear following a routine traffic stop and check for outstanding warrants. The suspect had left and locked his car prior to the arrest, but was returned to the car in order to get identification.[137] When the defendant asked the officer if he could then give the car keys to his grandmother, who lived in the apartments where he had stopped, the officer took the keys and searched the

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by Justice Clark, would have upheld the search, *see* 374 U.S. at 45, while Justice Brennan concluded that the search violated the Fourth Amendment, acknowledging that under appropriate facts, the search would have been justified. *Id.* 45. The dissenters viewed the officers' actions as indicators of the reasonableness of the search, rather than importing the common law rule into Fourth Amendment requirements. *Id.* at 41.

129. 87 N.M. 12, 528 P.2d 356 (Ct. App. 1974) ("New Mexico has no statute setting forth the requirements of announcement prior to a forcible entry when executing a search warrant nor do we have a deep history of common-law decisions on the question. Yet, recent opinions [*Baca*] from our intermediate appellate court have suggested that Article II, Section 10 incorporates a knock-and-announce requirement.").

130. *Id.* at 13–14, 528 P.2d at 657–58 (internal citations omitted).

131. *Attaway*, 171 N.M. at 150, 870 P.2d at 112.

132. *Id.* at 151–53 & n.7, 870 P.3d at 113–15 (noting circumstances warranting departures from rule).

133. *Id.* at 153–54, 870 P.3d at 115–16.

134. 2006-NMCA-006, ¶ 13, 127 P.3d 1116, 1120.

135. 541 U.S. 615 (2004).

136. 395 U.S. 752 (1969).

137. *Pittman*, 2006-NMCA-006, ¶¶ 2–3, 127 P.3d at 1118.

vehicle, finding a loaded pistol under the front seat, resulting in the suspect being charged as a felon in possession of a firearm, in addition to the traffic offense.[138]

The court recognized the concerns expressed in *Chimel* and *Thornton* regarding the need for protection of officers from use of weapons, as well as the need to protect against destruction of evidence, that may justify search of a vehicle incident to a lawful arrest.[139] Concluding that Pittman probably could not prevail on a federal constitutional claim in light of the existing caselaw, the court turned to a consideration of his state constitutional claim.[140]

The *Pittman* court looked to prior decisions in *State v. Arredondo*[141] and *State v. Garcia*,[142] in which the bright line rule authorizing a search of the passenger compartment of a vehicle pursuant to a search incident to arrest had been held constitutionally permissible under the Fourth Amendment.[143] Instead of applying the federal bright line rule, the court embraced the position taken in *Garcia* and *Arredondo*, calling for a case-by-case determination of reasonableness of the search.[144] The *Pittman* court concluded: "Because of New Mexico's strong preference for a warrant, we hold that even after a valid arrest, one of *Chimel*'s two rationales must be present before an officer may search a vehicle without a warrant."[145]

The search in *Pittman* could not be upheld under article II, section 10 precisely because the arresting officer had testified that he neither felt threatened nor expected to find any evidence of criminal activity at the time of the search.[146] Rejecting the State's speculative argument justifying the search under *Chimel*, the court instead concluded, in part:

> We are unpersuaded by the State's attempts to create a sense of danger and urgency by characterizing the grandmother as an unknown, possibly sinister person who might use the gun to try to help Defendant escape, or who might pose some danger to the public. During the suppression hearing, no testimony was elicited about the grandmother's nature or the officer's judgment of her nature. Moreover, if the officer really feared possible consequences from delivering the keys to Defendant's grandmother, he had the option of keeping the car keys and transporting Defendant to jail.[147]

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138. *Id.* ¶¶ 4–5, 127 P.3d at 1118.

139. *Id.* ¶¶ 7–9, 127 P.3d at 1118–19 ("Underlying the weapon removal rationale for a search incident to an arrest is a very 'legitimate and weighty' concern for officer safety."); *id.* ¶ 10, 127 P.3d at 1119 ("The evidence concealment/destruction rationale for a search incident to an arrest is based on the need to act quickly or else lose critical evidence of a crime which the police have probable cause to believe the suspect committed.").

140. *Id.* ¶ 13, 127 P.3d at 1120.

141. 1997-NMCA-081, ¶ 28, 944 P.2d 276, 285, *overruled on other grounds by* State v. Steinzig, 1999-NMCA-107, ¶ 29, 987 P.2d 409, 418.

142. 2005-NMSC-017, ¶ 30, 116 P.3d 72, 79.

143. *Pittman*, 2006-NMCA-006, ¶ 15, 127 P.3d at 1121. The federal bright line rule was articulated in *New York v. Belton*, 453 U.S. 454, 460 (1981) ("Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.").

144. *Pittman*, 2006-NMCA-006, ¶ 25, 127 P.3d at 1123.

145. *Id.* ¶ 16, 127 P.3d at 1121.

146. *Id.* ¶ 4, 127 P.3d at 1118.

147. *Id.* ¶ 19, 127 P.3d at 1121–22.

The court similarly rejected the remainder of the State's speculative arguments and held that article II, section 10 requires a showing of threat to the officer's safety or realistic concern over the potential destruction or loss of evidence before the search of an automobile is reasonable as incident to the driver's lawful arrest.[148] The court noted in its analysis that its conclusion was based upon the "distinctive state characteristics" of New Mexico reflected in prior decisions rejecting application of the federal bright-line standard.[149]

d. Limitations on Arrest

In two cases the New Mexico Court of Appeals has concluded that the state constitutional protection against seizure affords broader protection against arrest than that required by the Fourth Amendment, as interpreted by the United States Supreme Court. In *State v. Bricker*,[150] the court held that a custodial arrest for an offense for which only citation was authorized by the legislature violated state constitutional protections, requiring suppression of evidence seized during a search of the arrestee at the station.[151] Because the custodial arrest was not authorized by state law, the court concluded that it was "unreasonable" under article II, section 10 of the state constitution.[152]

Bricker followed the court's decision in *State v. Rodarte*,[153] in which the court held that an arrest for a non-jailable offense solely on the basis of probable cause violates the protection afforded by the state constitution.[154] The *Rodarte* court noted that the Supreme Court, in *Atwater v. City of Lago Vista*,[155] had held that a custodial arrest for a non-jailable offense is permissible under the Fourth Amendment, but the *Rodarte* court concluded that greater privacy protection was afforded by article II, section 10, finding that such arrests are prohibited under state law in the absence of "specific and articulable" facts justifying arrest.[156] The court found that the facts did not warrant Rodarte's arrest:

> In this case, there do not appear to have been any circumstances that made it necessary for the officer to arrest Defendant. There is no suggestion that Defendant acted in a violent or confrontational manner. He was not driving the vehicle, and he appears to have complied with all of the officer's requests. In these circumstances, a citation would likely have "serve[d] the State's…law enforcement interests every bit as effectively as an arrest."[157]

In both *Rodarte* and *Bricker*, the state court suggested its view that the *Atwater* majority's analysis was flawed, and instead followed Justice O'Connor's reasoning

148. *Id.* ¶¶ 23–24, 127 P.3d at 1122–23.
149. *Id.* ¶ 25, 127 P.3d at 1123.
150. 2006-NMCA-052, 134 P.3d 800. The defendant was arrested under a municipal ordinance authorizing arrest for the offense of driving while license suspended, in conflict with a state statute, NMSA 1978, § 66-8-123(A) (1989). *Id.* ¶¶ 3–4 & n.1, 134 P.3d at 801.
151. *Id.* ¶¶ 2, 30, 134 P.3d at 801, 807–08.
152. *Id.* ¶ 20, 134 P.3d at 805.
153. 2005-NMCA-141, 125 P.3d 647.
154. *Id.* ¶ 1, 125 P.3d at 647.
155. 532 U.S. 318, 323, 354 (2001).
156. *Rodarte*, 2005-NMCA-141, ¶ 14, 125 P.3d at 651.
157. *Id.* ¶ 15, 125 P.3d at 651.

for the four *Atwater* dissenters.[158] It rejected arrest based solely on probable cause, holding that in order to support custodial arrest "there must be specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion of a full custodial arrest."[159] The court noted not only its view that Justice O'Connor's analysis in her *Atwater* dissent was the better view, but also that her approach comported with traditional New Mexico analysis.[160]

e. Border Stops

The significance of New Mexico's international border shared with Mexico cannot be underestimated, particularly considering the significance of cross-border immigration and drug-trafficking prosecutions in federal[161] and state criminal dockets. In *State v. Cardenas-Alvarez*, the court held that extended detention of the accused at a border checkpoint was unlawful under article II, section 10.[162] In doing so, the supreme court reversed the court of appeals' conclusion that the detention also violated federal law.[163] Both courts noted that federal law does not require the showing of "reasonable suspicion," required in *State v. Galloway*, to justify extended detention at the border.[164] While the court of appeals relied on Tenth Circuit caselaw indicating that detention requires only "suspicious circumstances,"[165] the supreme court corrected the appellate court on this point, holding that no finding of suspicion is required for detention at the border under federal law, observing: "Under federal law, Defendant's detention constituted a routine border checkpoint stop and therefore need not have been supported by suspicious circumstances."[166]

In holding that article II, section 10 provides greater protection for border detainees than the Fourth Amendment, the court explained: "Our examination of New Mexico law, however, does reveal distinctive characteristics that command our departure from federal law governing border checkpoint detentions."[167] One important factor for the court was the consistent recognition in prior New Mexico decisions of the higher requirement of suspicion required for detention under state law, even when the detention arises at the border, noted by the court in *Cardenas-Alvarez*.[168] The court also noted its general understanding of the scope of article II,

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158. State v. Bricker, 2006-NMCA-052, ¶¶ 22–23, 134 P.3d 800, 805; *Rodarte*, 2005-NMCA-141, ¶ 8, 125 P.3d at 649.

159. *Rodarte*, 2005-NMCA-141, ¶ 14, 125 P.3d at 651 (quoting *Atwater*, 532 U.S. at 366 (O'Connor, J., dissenting)); *see also Bricker*, 2006-NMCA-052, ¶ 23, 134 P.3d at 805–06.

160. *Rodarte*, 2005-NMCA-141, ¶ 14, 125 P.3d at 651.

161. *See, e.g.*, United States v. Rascon-Ortiz, 994 F.2d 749, 752 (10th Cir. 1993) (noting "the agent's duty to prevent the unauthorized entry of individuals into this country and to prevent the smuggling of contraband").

162. 2001-NMSC-017, ¶ 5, 25 P.3d 225, 228. For in-depth analysis of *Cardenas-Alvarez*, see Turner, *supra* note 12.

163. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 7, 25 P.3d at 228 (citing State v. Cardenas-Alvarez, 2000-NMCA-009, ¶ 18, 995 P.2d 492, 497–98).

164. *Id.* ¶ 12, 25 P.3d at 230.

165. United States v. Chavira, 9 F.3d 888, 889 (10th Cir. 1993).

166. *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 7, 25 P.3d at 228.

167. *Id.* ¶ 14, 25 P.3d at 231.

168. *Id.* ¶ 16, 25 P.3d at 231.

section 10 as broader than that afforded by the Fourth Amendment based on its traditional view that the individual does not suffer a diminished expectation of privacy simply because he is in his automobile, noting that "[t]he extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law."[169]

f. Warrantless Arrests and Stops

In *Campos v. State*,[170] the court held, in interpreting the state constitutional warrant requirement, that a warrantless arrest must be based on probable cause and exigent circumstances.[171] The court declined to hold that the New Mexico requirement paralleled the Supreme Court's interpretation of the Fourth Amendment in *United States v. Watson*,[172] where the Court stated that criminal prosecutions based on warrantless arrests made in public should not be encumbered "with endless litigation with respect to the existence of exigent circumstances."[173] The court noted that in previous warrantless arrest cases, the facts consistently demonstrated the existence of exigent circumstances, such as evidence of attempted flight, suggestion of destruction of evidence, or the fact that defendant was armed.[174] In *Campos*, however, the fact that the suspect was arrested while driving did not constitute an exigent circumstance because the officer was aware the day before that the suspect would be driving his car the following day.[175] Based on prior state decisions and the constitutional preference for use of warrants, the court concluded:

> [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 that 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 committing a felony, exigency will be presumed.[176]

In *State v. Ochoa*,[177] the court of appeals, on remand from the state supreme court, departed from Supreme Court precedent in *Whren v. United States*,[178] holding that pretextual stops are inconsistent with the protections affording individual privacy in automobiles under the New Mexico Constitution.[179] The court expressed

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169. *Id.* ¶ 15, 25 P.3d at 231.
170. 117 N.M. 155, 870 P.2d 117 (1994).
171. *Id.* at 159, 870 P.2d at 121.
172. 423 U.S. 411 (1976).
173. *Id.* at 423.
174. *Campos*, 117 N.M. at 159, 870 P.2d at 121.
175. *Id.* at 160, 870 P.2d at 122. The court noted that generally the fact that the suspect is driving will satisfy the requirement for proof of an exigency justifying immediate arrest without obtaining a warrant, citing *State v. Capps*, 97 N.M. 453, 455–56, 641 P.2d 484, 486–87 (1982) and distinguishing the two decisions because the officer had prior knowledge that Campos would be driving and could presumably have obtained a warrant to arrest.
176. *Campos*, 117 N.M. at 159, 870 P.2d at 121.
177. 2009-NMCA-002, 206 P.3d 143, *cert. granted*, 2008-NMCERT-012, 203 P.3d 103. The supreme court reversed the initial reversal of the defendant's conviction by the court of appeals. State v. Ochoa, 2006-NMCA-131, 144 P.3d 132, *rev'd*, 2008-NMSC-023, 182 P.3d 130.
178. 517 U.S. 806 (1996).
179. *Ochoa*, 2009-NMCA-002, ¶ 12, 206 P.3d at 148.

concern over the virtually unbridled police discretion that would result from using enforcement of the traffic laws pretextually to conduct investigations not based on probable cause.[180]

g. Search Incident to Warrantless Automobile Stop

In *Cardenas-Alvarez*, the court noted its general understanding of the scope of article II, section 10 when compared with the Fourth Amendment, observing: "The extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law" based on the court's rejection of "the federal automobile exception to the warrant requirement" in "dismiss[ing] the notion that an individual lowers his expectation of privacy when he enters an automobile."[181]

Moreover, the New Mexico constitutional preference for warrants was paramount in the court's reasoning in another automobile case, *State v. Rowell*.[182] The court explained: "'[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable,' subject only to well delineated exceptions."[183] The *Rowell* court considered alternative theories supporting seizure of weapons from an automobile located on a school parking lot after being stopped for speeding. The seizure also included drugs and drug paraphernalia triggered by the observation of a packet of marijuana in plain view in the suspect's pocket. Once the driver was arrested for possession of marijuana, a further search of the vehicle produced the paraphernalia, and later, he told the officer that there was a shotgun in the back seat of the car.[184]

The court considered two theories supporting the seizure of the gun from the car. First, the State argued that the search could be justified as incident to an arrest and second, that the search was supported by the presence of exigent circumstances.[185] The court rejected the former, affirming its prior decision in *State v. Gomez* that required a showing of probable cause and exigent circumstances for search of an automobile.[186] Because the suspect had already been removed from the automobile and the area searched was no longer within his immediate access, the court held that under New Mexico law, the authority to conduct the search of the automobile as a search incident to arrest could not be justified.[187] This holding departed from the Supreme Court's holding in *New York v. Belton*,[188] permitting searches of the area within the arrestee's previous reach even when he had already been removed from the vehicle,[189] a position that the Court itself retreated from in its decision in

180. *Id.* ¶¶ 17–18, 206 P.3d at 150.
181. State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 15, 25 P.3d 225, 231.
182. 2008-NMSC-041, 188 P.3d 95.
183. *Id.* ¶ 10, 188 P.3d at 98 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).
184. *Id.* ¶ 2, 188 P.3d at 97.
185. *Id.* ¶ 5, 188 P.3d at 97.
186. *Id.* ¶ 1, 188 P.3d at 97, *aff'g* 1997-NMSC-006, 932 P.2d 1.
187. *Id.* ¶ 25, 188 P.3d at 101.
188. 453 U.S. 454 (1981).
189. *Id.* at 460.

Arizona v. Gant.[190] In *Gant*, the majority rejected the bright line rule of *Belton*[191] authorizing police to search the vehicle subsequent to the arrest of the driver, opting for a more limited approach in which once the arrest has been effected and the occupants removed from the vehicle, the authority to search is restricted by the necessity of showing probable cause.[192] The majority concluded that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[193]

The *Rowell* court observed that in *Thornton v. United States*, the Supreme Court extended *Belton* to include searches of automobiles that had previously been occupied by an arrestee even when he had not been removed from the vehicle at the time of the arrest.[194] The combined effect of *Belton* and *Thornton* had been to virtually eviscerate the warrant requirement with regard to automobile searches. While continuing to recognize the validity of automobile searches incident to lawful stops or arrests when exigent circumstances justify the officer's immediate action,[195] the *Rowell* court held the officer's authority to search was based only on exigent circumstances making it impractical to first secure a warrant.[196] The holding in *Gant*, reflecting the majority's appreciation that a number of states, like New Mexico, had declined to follow *Belton*,[197] may not provide additional protection for privacy interests than that afforded under *Rowell* and *Gomez* in interpreting the state constitution. However, consistent with the interstitial approach to constitutional construction, it does suggest that automobile privacy-based suppression issues may be resolved under *Gant* as a matter of Fourth Amendment law, rather than on the state constitutional protection.[198]

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190. 129 S. Ct. 1710 (2009).

191. 453 U.S. at 460. Justice Breyer, dissenting in *Gant*, criticized the majority's rejection of the "bright-line" rule of *Belton*, arguing that the considerable reliance on the Court's formulation there, including its subsequent decision in *Thornton v. United States*, 541 U.S. 615, 17 (2004), did not warrant rejection of that line of authority based on stare decisis considerations, suggesting that he might have joined the majority had *Gant* presented an issue of first impression for the Court. 129 S. Ct. at 1726 (Breyer, J., dissenting).

192. *Gant*, 129 S. Ct. at 1714 (majority opinion) ("[W]e hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.").

193. *Id.*

194. State v. Rowell, 2008-NMSC-041, ¶ 16, 188 P.3d 95, 99 (citing Thornton v. United States, 541 U.S. 615, 17. (2004)).

195. *See id.* ¶¶ 23, 28, 188 P.3d at 101, 102.

196. *Id.* ¶ 36, 188 P.3d at 103.

197. *Gant*, 129 S. Ct. at 1716 ("The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles.").

198. However, having firmly articulated the state constitutional provision, it would also seem reasonable that counsel relying on established state constitutional precedent would not in any sense forfeit that protection by failing to assert a Fourth Amendment claim based on *Gant*. Given the split decision in *Gant*, with Justices Alito, joined by Chief Justice Roberts, and Justices Kennedy and Brennan, in part, dissenting, *id.* at 1726 (Alito, J., dissenting), counsel might well be wary that a Fourth Amendment-based suppression decision could eventually prompt the State to seek review by certiorari in an effort to overturn or distinguish *Gant*. A decision resting squarely on the state constitutional protection applied in *Gomez* and *Rowell* would not be subject to review by the United States Supreme Court since it would rest on an adequate and independent state law ground. *See Michigan v. Long*, 463 U.S. 1032 (1983); *see also supra* notes 110–16 and accompanying text.

Rowell reflects not only the recognition of a differing degree of protection afforded by the state constitutional privacy protection, but also serves as an example of departure from federal constitutional interpretation when the state court finds the Supreme Court's analysis is flawed.[199] However, the *Rowell* court did not hold that the seizure of the weapon was unreasonable, because the existence of the weapon on school property constituted an exigent circumstance supporting seizure without a warrant,[200] and the officer had probable cause once the suspect admitted the presence of the shotgun in his car on school property.[201] Thus, even though the state constitution may afford more protection to the individual with respect to one theory, that protection may not bar official action based on an alternative theory.

Similarly, the court of appeals held that a search made pursuant to a vehicle stop may be justified by a showing of exigent circumstances in *State v. Weidner*.[202] Where the officer observes an item in plain view after making a lawful stop that he reasonably believes to be evidence of crime, the seizure is "consistent with the exigent circumstances exception to the warrant requirement."[203] *Weidner* reaffirmed the principle in *Gomez*[204] regarding the requirement for exigent circumstances to support a warrantless search of an automobile, reflecting a departure from federal precedent in *United States v. Ross*.[205]

h. Road Blocks

In *State v. Madalena*,[206] the court applied an eight-factor test for determining the reasonableness of stop and detention by police using a roadblock.[207] The court concluded that this test was stricter than the test recognized by the Supreme Court.[208] The defendant argued that New Mexico requires greater protection of personal privacy interests under article II, section 10, of the state constitution, conceding that the roadblock at which he was stopped, detained, and arrested for driving while intoxicated would have passed the Fourth Amendment test for reasonableness[209] applied by the Supreme Court in *Michigan Department of State*

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199. *See Rowell*, 2008-NMSC-041, ¶ 18, 188 P.3d at 100.

200. *Id.* ¶ 36, 188 P.3d at 103.

201. *Id.* ¶ 27, 188 P.3d at 102.

202. 2007-NMCA-063, ¶ 15, 158 P.3d 1025, 1030–31.

203. State v. Bomboy, 2008-NMSC-029, ¶ 17, 184 P.3d 1045, 1049; *see also* State v. Gomez, 1997-NMSC-006, ¶ 39, 932 P.2d 1, 12 (Exigent circumstances are defined as "'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.'" (quoting State v. Copeland, 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct. App. 1986))).

204. 1997-NMSC-006, ¶¶ 33–40, 932 P.2d 1, 10–12.

205. 456 U.S. 798, 800, 809 (1982) (holding that police officers having probable cause to believe a lawfully stopped vehicle contains concealed contraband may search containers and compartments not within plain view even without prior issuance of search warrant).

206. 121 N.M. 63, 908 P.2d 756 (Ct. App. 1995).

207. *Id.* at 70–71, 908 P.2d at 763–64.

208. *Id.* at 69, 908 P.2d at 762. The court's opinion in *Madalena* provides a concise and excellent history of the development of state constitutional doctrine relating to protection of individual privacy interests affording broader protection than that ensured in the Supreme Court's Fourth Amendment decisions. *See id.* at 68–70, 908 P.2d at 761–63. It also provides a valuable survey of the development of state constitutional protections in the context of roadblocks in other jurisdictions. *Id.* at 68 nn.1–2, 98 P.2d at 761.

209. *Id.* at 67, 908 P.2d at 760. The defendant also relied on article II, section 4, which provides that "[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and

Police v. Sitz.[210] Roadblocks had previously been upheld as constitutional under state law in *City of Las Cruces v. Betancourt*[211] and *State v. Bates*,[212] but the *Madalena* court noted that while roadblocks had been upheld in *Bates*, the defendant there did not assert that greater protection was afforded to individual privacy interests under the state constitution than under the Fourth Amendment.[213]

In *Betancourt*, the court had noted eight factors governing the conduct of the roadblock that ensured adequate protection of individual privacy interests.[214] However, the Supreme Court, in *Sitz*, had upheld use of a more general balancing test of public safety, effectiveness of roadblocks, and personal privacy interests[215] in determining that a roadblock was not violative of Fourth Amendment protections.[216] But, in *Madalena*, the court noted that the eight-factor test applied in *Betancourt* reflected the constitutional protection afforded under article II, section 10, identifying yet another aspect of the privacy protection in which the state provision is more expansive than the Fourth Amendment.[217] The court reasoned that the factors identified in *Betancourt* served to establish "objective criteria" by which the reasonableness of a search or seizure can be assessed, distinguishing the state constitutional protection from the more fluid balancing test employed as a Fourth Amendment constitutional threshold in *Sitz*.[218]

2. Fundamental Reliance on the Exclusionary Rule

The state appellate courts have secured enforcement of the state constitutional privacy protection in significant ways. First, in *Snyder* and *Wagoner*, the court of appeals held that the remedy for a violation of the privacy protection afforded by the state constitution is exclusion of evidence seized in violation of state law.[219] Second, in *State v. Lujan*,[220] that court also recognized the application of "the fruit

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obtaining safety and happiness." *Id.*

210. 496 U.S. 444, 455 (1990). Subsequently, in *Sitz v. Department of State Police*, 485 N.W.2d 135, 139 (Mich. Ct. App. 1992), *aff'd*, 506 N.W.2d 209 (Mich. 1993), roadblocks were held violative of state constitutional protections, as noted by the *Madalena* court, 121 N.M. at 68 n.2, 908 P.2d at 768.

211. 105 N.M. 655, 657, 735 P.2d 1161, 1163 (Ct. App. 1987).

212. 120 N.M. 457, 463, 902 P.2d 1060, 1066 (Ct. App. 1995).

213. *Madalena*, 121 N.M. at 67, 908 P.2d at 760.

214. *Betancourt*, 105 N.M. at 658–59, 735 P.2d at 1164–65. The eight safeguards include guidelines for the role of supervisory personnel in establishing policy and directing the roadblock operation; restriction on discretion afforded officers operating the roadblock in selection of vehicles to be stopped; consideration of safety in location of roadblock to avoid undue traffic congestion or possible peril for motorists or officers; selection of a reasonable location, including avoiding locations likely to result in stops of automobiles driven predominantly by members of particular ethnic groups, i.e., prevention of profiling in the location of the roadblock; establishing reasonable time limits for the operations, relating especially to the times when intoxicated drivers are most likely to be on the road; using devices to identify the roadblock as an official operation to motorists; limiting duration of stops to reasonably achieve purpose of the roadblock; and affording the public notification, in advance, of the use of a roadblock.

215. *Sitz*, 496 U.S. at 448–50.

216. *Id.* at 455.

217. *Madalena*, 121 N.M. at 69, 908 P.2d at 762.

218. *Id.*

219. *See supra* note 14.

220. 2008-NMCA-003, 175 P.3d 327.

of the poisonous tree doctrine," extending the reach of the exclusionary rule to evidence ultimately seized as a direct result of an illegal search.[221]

In *State v. Gutierrez*,[222] the court declined to follow[223] the Supreme Court's lead in *United States v. Leon*[224] in its holding that the rule of exclusion of evidence did not require suppression of evidence seized in good faith reliance on a defective search warrant.[225] The *Gutierrez* court discerned that the state policy on exclusion is not predicated on deterrence of police misconduct, an approach that would arguably not be served if the police officer relies on a defective warrant in good faith because it cannot be directed at an officer's good faith understanding of the warrant's legality if designed to deter illegal conduct.[226] Instead, the court viewed exclusion as necessary to restore the parties to their positions had the illegal intrusion on privacy never occurred: "Denying 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."[227]

Another aspect of the rule of exclusion to illegal seizures or searches in violation of state constitutional provisions or state law is worth noting. In *Virginia v. Moore*,[228] the Supreme Court reinforced the autonomy of state courts to develop state law alternative theories for disposition of claims raising federal constitutional protection analogs. The *Moore* Court held that where state actors violate privacy rights protected under state constitutional provisions or statutes, but not by the Fourth Amendment, the suppression of the improperly seized evidence is not binding upon state courts.[229] Thus, while violations of Fourth Amendment rights require suppression of evidence under *Mapp v. Ohio*,[230] the prophylactic rule designed to prevent constitutional violations in the investigation process does not necessarily apply to violations for acts contrary only to state law.

The *Moore* decision recognizes greater autonomy in the enforcement of state law, affording state courts the option of adopting suppression of illegally or impermissibly seized evidence as a remedy, but not to the exclusion of alternate remedies. Thus, while New Mexico recognizes exclusion as a necessary remedy for violation of the state constitutional privacy protection, it does so as a matter of state constitutional policy, rather than a policy mandating exclusion as a result of federal constitutional requirement.

The significance of New Mexico precedent in this respect will likely be reinforced because of the Supreme Court's recent decision in *Herring v. United States*,[231] where a 5–4 majority again diluted the protections afforded by the Fourth

221. *Id.* ¶¶ 9–21, 175 P.3d at 329–32.
222. 116 N.M. 431, 863 P.2d 1052 (1993). For in-depth analysis of *Gutierrez*, see Oliver, *supra* note 10.
223. *Gutierrez*, 116 N.M. at 447, 863 P.2d at 1068.
224. 468 U.S. 897 (1984).
225. *Id.* at 922.
226. *Gutierrez*, 116 N.M. at 446, 863 P.2d at 1067.
227. *Id.*
228. 128 S. Ct. 1598 (2008).
229. *Id.* at 1606–07.
230. 367 U.S. 643 (1961).
231. 129 S. Ct. 695 (2009).

Amendment. The majority concluded that suppression of evidence was not constitutionally required where the evidence was seized pursuant to a search conducted as a result of the officer's good faith belief that there was an outstanding warrant for the defendant.[232] The warrant had been recalled, but as a result of a clerical error, it had not been removed from the active list.[233]

The *Herring* majority predicated its analysis on the Court's observation in *Illinois v. Gates*: "The fact that a Fourth Amendment violation occurred—*i.e.,* that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies."[234] Analyzing the deterrent value of the rule in light of prior decisions[235] and holding that unintentional violations of the Fourth Amendment do not warrant exclusion of illegally seized evidence, the Court held:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. *As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level*.[236]

The Court's decision does not eviscerate the exclusionary rule, but it certainly reflects a step in the direction of restriction of the requirement for its application, effectively opening the door to case-by-case consideration of whether the constitutional violation was the result of deliberate or grossly negligent actions by police. Arguably, it serves to shift the default position from exclusion to admission, perhaps ultimately requiring that officers acted deliberately, recklessly or with gross negligence in exercising their authority to arrest and search.[237] The deterrent effect will necessarily be diluted as trial courts, acting as fact-finders, will find it convenient to conclude that any error in the exercise of an officer's discretion was the result of misperception or inadvertence.

Herring is consistent with an earlier decision of the Court in *Hudson v. Michigan*, a plurality holding in which Justice Kennedy provided a fifth vote to avoid exclusion of evidence seized by police entering a residence with a warrant, but without properly knocking and announcing before entering.[238] Justice Kennedy, while arguing that the exclusionary rule remained intact, nevertheless, voted to uphold the search and seizure because "the relevant evidence was discovered not

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232. *Id.* at 704.
233. *Id.* at 698.
234. *Id.* at 700 (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)).
235. *See id.* at 699–701 (discussing, for example, *United States v. Leon*, 468 U.S. 897, 910 (1984)).
236. *Id.* at 702 (emphasis added).
237. The extent to which the *Herring* majority is willing to excuse police infractions on individual privacy is illustrated by its recognition of a threshold for liability in a context similar to the facts presented in the case. The court stated, "If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation." *Id.* at 703. The standard for suppression would virtually insulate all police conduct in maintaining a warrant system because flaws approaching those justifying exclusion under the *Herring* majority's analysis would almost certainly compromise the ability of police to operate effectively.
238. Hudson v. Michigan, 547 U.S. 586, 599 (2006).

because of a failure to knock-and-announce, but because of a subsequent search pursuant to a lawful warrant." [239]

The Court's recent retreat from reliance on the exclusionary rule to enforce protections afforded by the Fourth Amendment may ultimately have little effect on New Mexico prosecutions. First, the state courts have rejected application of federal doctrine in comparable situations, rejecting the "good faith" principle excusing police error in *United States v. Leon* in *State v. Gutierrez*,[240] and affirmatively adopting a "knock and announce" principle as a component of the state constitutional protection in *State v. Attaway*.[241] The independent approach to state constitutional construction demonstrated in these New Mexico decisions suggests that regardless of the extent to which the Supreme Court may retreat from exclusion as a primary means of inducing law enforcement compliance with constitutional guarantees, New Mexico courts will remain firmly committed to prior decisions construing and applying article II, section 10.

B. Double or Prior Jeopardy and Due Process Protections

The New Mexico Supreme Court has also been active in explaining the protections afforded by article II, section 15 of the state constitution. The court has given particular attention to the double jeopardy clause. Section 15 provides:

> No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.[242]

Similarly, section 18, the state constitutional provision recognizing due process, remains an important independent source of relief on some claims. It provides, "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."[243]

1. Double or Prior Jeopardy Protection

One of the most powerful decisions reflecting state constitutional protections issued by the New Mexico Supreme Court is *State v. Breit*.[244] There, the court held that section 15 may be asserted to bar reprosecution in the event a trial is terminated as a result of prosecutorial misconduct resulting in mistrial. Citing its prior decision

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239. *Id.* at 604 (Kennedy, J., concurring in part and concurring in the judgment). Assuming that the infraction occurs when police execute an otherwise valid warrant, it is difficult to ascertain when a knock-and-announce violation would ever require suppression. But Justice Kennedy observed that if a "widespread pattern of violations" could be demonstrated, that would be cause for "grave concern." Still, he was unwilling to concede that even if the common practice included violation of the rule, exclusion of seized evidence would be necessary or justified. *Id.*

240. *See supra* notes 222–27 and accompanying text.

241. *See supra* notes 125–33 and accompanying text.

242. N.M. CONST. art. II, § 15.

243. *Id.* § 18.

244. 1996-NMSC-067, 930 P.2d 792.

in *State v. Day*, and adopting its language, the *Breit* court defined the parameters of the state rule: "In New Mexico, the rule barring reprosecution applies in those situations in which 'the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials.'"[245] The *Breit* court contrasted this rule with the Supreme Court's position in *Oregon v. Kennedy*, where it had held that mistrial on defendant's motion barred retrial only when the prosecutor engaged in misconduct designed to "goad" the defendant into moving for mistrial.[246] Rather than conforming the *Day* rule to the Supreme Court's more limited formulation for protection under the Fifth Amendment, the *Breit* court embraced *Day* and reaffirmed it as the appropriate standard for state prosecutions.[247] The court noted that *Day* followed an earlier expression in *United States v. Dinitz*,[248] where the Supreme Court condemned misconduct in more aggressive terms:

> Prior to *Kennedy*, federal courts pointed to a broader range of prosecutorial misconduct that would bar retrial of a defendant. These included situations in which the prosecution demonstrated gross negligence or intentional misconduct, was motivated by bad faith or malice, engaged in oppressive tactics, and acted to seriously prejudice and harass the defendant.[249]

But the *Breit* court was unwilling to follow the Supreme Court's lead in retreating from its more ambitious expressions to the narrow rule limiting application of double jeopardy protection to situations in which the prosecution goads the defense into moving for mistrial. Instead of requiring the accused to sustain the burden of proving this degree of intent or malice on the part of the prosecution, the state supreme court concluded: "We believe, however, that the *Kennedy* court improvidently failed to weigh the effects of the misconduct of prosecutors who do not subjectively intend to provoke a mistrial."[250]

The court then explained that, having adopted the reasoning of the Supreme Court and lower federal courts in formulating the *Day* test, the Supreme Court's restriction of the federal protection in the subsequent decision in *Kennedy* would not require New Mexico to retreat from its former position in order to remain consistent with federal doctrine.[251] Thus, the court reaffirmed its position in *Day*, announcing the following rule defining the scope of the state constitutional double jeopardy protection:

> Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official

245. *Id.* ¶ 2, 930 P.2d at 795 (quoting State v. Day, 94 N.M. 753, 757, 615 P.2d 142, 146 (1980)).
246. *Id.* (citing Oregon v. Kennedy, 456 U.S. 667, 679 (1982)).
247. *See id.* ¶ 3, 930 P.2d at 795.
248. *See id.* ¶ 26, 930 P.2d at 801 ("Th[e *Day*] standard was an amalgam of various pronouncements by the United States Supreme Court." (citing United States v. Dinitz, 424 U.S. 600, 611 (1976))).
249. *Id.* ¶ 17, 930 P.2d at 798 (citing *Dinitz*, 424 U.S. at 611).
250. *Id.* ¶ 18, 930 P.2d at 798.
251. *See id.* ¶ 27, 930 P.2d at 801–02.

> either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.[252]

Finally, applying its rule to the facts in the case, the court concluded that the prosecutor's misconduct "was unrelenting and pervasive," relying on the findings of the trial court that included reference to non-verbal, "wordless misconduct" that would typically not appear in a record or transcript of the proceedings.[253] Holding that mistrial was the only cure for the cumulative effect of the misconduct, which was to deny the defendant a fair trial, the supreme court held that re-trial was barred by the state constitutional double jeopardy protection.[254]

In *State v. Lynch*, the supreme court found that the defendant's re-trial on a charge of first-degree murder would not be barred under the Fifth Amendment following the reversal of his conviction for second-degree murder based on trial error.[255] The court reasoned that because Lynch had never been acquitted by implication of the first-degree murder,[256] having only been tried for the offense of second degree, federal case law would not bar him from being tried for the greater offense since the case was reversed and remanded on appeal.[257]

However, the state constitutional protection against double jeopardy is phrased in terms of more specific language than the Fifth Amendment, which simply provides, in pertinent part: "No person shall…be subject for the same offence to be twice put in jeopardy of life or limb." In comparison, article II, section 15 reads:

> No person shall…be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he [or she] may not again be tried for an offense or degree of the offense greater than the one of which he [or she] was convicted.[258]

The interpretation of the meaning of the concluding clause confronted the *Lynch* court because the State prosecuted the defendant for first-degree murder following reversal of his conviction on second-degree murder based on newly available evidence of the defendant's expressed intent to kill the victim based on techniques he claimed to have learned in prison. The defendant's admissions were apparently

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252. *Id.* ¶ 32, 930 P.2d at 803.

253. *Id.* ¶ 45, 930 P.2d at 806.

254. *See id.* ¶ 48, 930 P.2d at 806–07.

255. State v. Lynch, 2003-NMSC-020, ¶¶ 4, 11, 74 P.3d 73, 75, 76; *see also* Cara Mickelsen, Note, *Adding Charges on Retrial: Double Jeopardy, Interstitialism, and* State v. Lynch, 34 N.M. L. REV. 539 (2004) (providing an in-depth analysis of *Lynch*).

256. Acquittal by implication occurs when the jury is instructed on greater and lesser degrees of the offense and convicts on the lesser. *See* Price v. Georgia, 398 U.S. 323, 327–29 (1970); Green v. United States, 355 U.S. 184, 190–91 (1957).

257. *See Lynch*, 2003-NMSC-020, ¶ 10, 74 P.3d at 76 (citing *Green*, 355 U.S. at 189 (holding that a defendant who obtains a reversal for trial error on appeal resulting in a remand for new trial essentially "waives" his double jeopardy protection in moving for the reversal)).

258. N.M. CONST. art. II, § 15. The court noted the parallel language in the state statute implementing the constitutional protection:

> When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he [or she] may not again be tried for a crime or degree of the crime greater than the one of which he [or she] was originally convicted.

Lynch, 2003-NMSC-020, ¶ 12, 74 P.3d at 77 (quoting NMSA 1978, § 30-1-10 (1963)).

made to a witness prior to the crime, but were not disclosed to the prosecution prior to the initial trial in the case. Once aware of this additional evidence of deliberate intent, the prosecution recharged him with first-degree murder.[259]

Here, the issue required resolution of the additional language appearing in the New Mexico Constitution, rather than simply interpretation of language paralleling the Federal Constitution in light of state tradition. In a 3–2 split decision, the majority concluded that the language of article II, section 15 did, in fact, require reversal of Lynch's subsequent conviction.[260] In reaching that decision, the majority rejected the State's argument that the constitutional language would not apply unless an accused was "again" being tried for the higher degree of offense; since Lynch was not tried for first-degree murder originally, his second trial would not reflect that he was being tried "again" for this offense.[261] Instead, the majority concluded "[t]he phrase 'again be tried' refers to any subsequent prosecution, regardless of whether the greater offense was charged in the original trial."[262] Moreover, in considering section 30-1-10, the implementing legislation,[263] the majority observed that the Legislature had clarified the arguably confusing reference to being tried "again,"[264] suggesting that "the Legislature was attempting to articulate the protections of Article II, Section 15 as being broader than those of the federal constitution."[265]

In holding for Lynch, the court continued its willingness to find more expansive protections for individual criminal defendants under the state constitution than those recognized under comparable federal provisions. The decision is particularly important, however, because not only did the state constitution come into play, but the court's interpretation was clearly influenced by other state law, reminding counsel that not only can a state law argument be grounded in the constitution, but also in the state's statutes and rules of procedure or evidence.[266]

Finally, in *State v. Nunez*, the supreme court held that while the Double Jeopardy Clause of the Federal Constitution does not prevent the state from bringing separate criminal and civil forfeiture actions for the same offense under the Controlled Substances Act, forfeiture of property related to drug crimes is considered

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259. *See Lynch*, 2003-NMSC-020, ¶¶ 2–5, 74 P.3d at 74–75.
260. *See id.* ¶ 26, 74 P.3d at 81.
261. *See id.* ¶ 16, 74 P.3d at 78.
262. *Id.*
263. *See supra* note 258.
264. *Lynch*, 2003-NMSC-020, ¶ 22, 74 P.3d at 79–80 ("The statute omits the phrase 'upon which any person has been convicted' following 'indictment' at the beginning of the sentence, and adds the word 'originally' before 'convicted,' at the end of the sentence.").
265. *Id.*
266. For example, in *State v. Henderson*, 2006-NMCA-059, 136 P.3d 1005, the court considered the defendant's Sixth Amendment objection to admission of the preliminary hearing testimony of the complaining witness who could not be located to be subpoenaed for trial. The court observed:

> We first determine whether the preliminary hearing testimony was properly admitted under the Rules of Evidence because if the hearsay testimony was improperly admitted to Defendant's prejudice, we are not required to decide the *Crawford* [*v. Washington*, 541 U.S. 36 (2004)] constitutional issue. The admissibility of evidence as an exception to the hearsay rule is separate from the objection based on confrontation grounds, and its admission is reviewed for an abuse of discretion.

Id. ¶ 8, 136 P.3d at 1007 (citation omitted).

punishment under state law.[267] Consequently, civil forfeiture triggers the double jeopardy protection afforded by article II, section 15, of the New Mexico constitution.

The *Nunez* court specifically rejected the Supreme Court's conclusion in *United States v. Ursurey* that civil forfeiture of drug-related property does not constitute "punishment" for purposes of the Fifth Amendment.[268] In applying a different approach to state court forfeiture proceedings the supreme court looked to New Mexico tradition in treating civil forfeiture proceedings as "punishment,"[269] thus implicating prior jeopardy protections when prosecution and forfeiture are the subject of successive, rather than concurrent, proceedings. Based on state law tradition, the court concluded that adopting an approach consistent to the Supreme Court's interpretation of the federal double jeopardy protection would effectively require the court "to dismantle, a significant body of settled law, much of which was decided independently of federal case law."[270]

Moreover, the *Nunez* court noted that the statutory language implementing the double jeopardy protection of article II, section 15 confers a broader protection than the Fifth Amendment, in expressly prohibiting the application of waiver to prior jeopardy claims.[271] The relevant part of section 30-1-10 provides: "No person shall be twice put in jeopardy for the same crime. *The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment*."[272] The significance of the court's reference to the statute is, again, that the interpretation of the state constitution is properly reflected in the traditional understanding of its protections. The approach to state constitutional protections reflected in legislative enactments implementing the constitutional protections proves to be an important indicator of common understanding and tradition with regard to the values underlying the state constitutional protection.

In rejecting the Supreme Court's lead in interpreting the Fifth Amendment prior jeopardy protection restrictively with respect to use of civil forfeiture proceedings in the seizure of drug-related property, the *Nunez* court offered an important perspective on its view of the comparative values reflected in the two constitutional provisions. It concluded: "When compared to recent United States Supreme Court Fifth-Amendment jurisprudence, New Mexico's constitutional and statutory protection against double jeopardy, *on its face, is of a different nature, more encompassing and inviolate*."[273] This description of the New Mexico constitutional protection against double jeopardy should afford direction to the state courts and counsel in shaping novel arguments about the scope of article II, section 15 in the

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267. 2000-NMSC-013, ¶ 1, 2 P.3d 264, 270 (citing NMSA 1978, §§ 30-3-1 to -41 (1997)); *see also* Janice Greger Shipon, Note, *Double Jeopardy—No Legislative Deference: Civil Forfeiture of Drug Related Property Constitutes Double Jeopardy Under the New Mexico Constitution.* State v. Nunez*, 2 P.3D 264 (N.M. 1999)*, 32 RUTGERS L.J. 1358 (2001) (providing an in-depth analysis of *Nunez*).

268. *Nunez*, 2000-NMSC-013, ¶ 6, 2 P.3d at 272 (citing United States v. Ursery, 518 U.S. 267, 292 (1996)).

269. *See id.* ¶ 17, 2 P.3d at 272.

270. *Id.*

271. *See id.* ¶ 25, 2 P.3d at 274 (citing NMSA 1978, § 30-1-10 (1963)).

272. *Id.* (quoting NMSA 1978, § 30-1-10 (1963)).

273. *Id.* ¶ 27, 2 P.3d at 274 (emphasis added).

protection of individual rights from repetitive governmental action. More directly, it resolved the question of whether multiple proceedings could be used to extract penalties from drug offenders, rejecting this approach under state law.

2. Due Process Protection

Almost, perhaps all, protections afforded to individuals in the criminal process suggest a broader protection based upon notions of fundamental fairness that are the core value of due process.[274] However, claims wholly dependent on due process protection afforded by constitutional protections are not uncommon. Two important New Mexico decisions demonstrate the way in which due process may provide the lynchpin for development of favorable constitutional interpretation for individual defendants.

In *Montoya v. Ulibarri*, the New Mexico Supreme Court held that a petitioner asserting and proving a claim of actual innocence in the state post-conviction process is entitled to relief from his conviction.[275] In contrast, the United States Supreme Court has thus far rejected claims that actual innocence warrants relief from the conviction as a matter of federal due process.[276] Because the petitioner in *Montoya* sought relief under both the state and Federal Constitutions, the court relied on the interstitial analytical approach in responding to the claims,[277] explaining: "[W]e identify both structural differences between our state government and the federal government as well as distinctive state characteristics that warrant a departure from the federal rule not to hear the freestanding innocence claims of habeas petitioners."[278]

The court noted that a critical difference in the posture of the federal and state governments in addressing claims of actual innocence would lie in the principle of federalism.[279] Because the federal courts generally respect the judgments of state courts, the intrusion into state criminal process necessitated by federal habeas review of state court judgments is traditionally limited to those claims in which conviction or sentence has resulted from violation of a procedural right protected by the Federal Constitution. Absent a procedural violation, the accused's actual innocence does not give rise to an independent due process violation under the Fourteenth Amendment. Consequently, the Supreme Court has rejected the notion that federal courts are free to intervene to force the release of innocent state court defendants, even, thus far, when execution would result from failure to intervene.[280]

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274. Fundamental fairness is intrinsic within the concept of due process that is provided by the New Mexico constitution. *See* State v. Vallejos, 1997-NMSC-040, ¶ 17, 945 P.2d 957, 962.

275. 2007-NMSC-035, ¶ 1, 163 P.3d 476, 478. *See infra* Part III.B.1.e. The New Mexico constitution expressly recognizes due process and equal protection concepts that generally parallel those afforded by the Fourteenth Amendment. The state constitutional provision reads: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18.

276. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993).

277. *Montoya*, 2007-NMSC-035, ¶ 14, 163 P.3d at 481.

278. *Id.* ¶ 19, 163 P.3d at 482–83.

279. *See id.* ¶ 20, 163 P.3d at 483.

280. *Id.* ¶ 15, 163 P.3d at 481–82 (citing *Herrera*, 506 U.S. at 404 ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.")).

The New Mexico court, operating without the constraint of federalism limiting the authority of the state courts,[281] noted: "We believe that to ignore a claim of actual innocence would be fundamentally unfair."[282] Instead of restricting application of habeas corpus to claims based on procedural violations only, the court concluded that the refusal to address a freestanding claim of actual innocence would ultimately compromise the prestige and authority of the judiciary.[283] This led the court to recognize broader state constitutional due process protection for New Mexico defendants than that afforded the same defendants under the Federal Due Process Clause, concluding, "in view of our state interest in insuring accuracy and the superior ability of our state courts to make accurate factual findings, we find sufficient reason to depart from the federal decision not to recognize freestanding innocence claims brought by habeas petitioners."[284]

In another important state constitutional due process case, *State v. Vallejos*,[285] the court held that the entrapment defense implicated due process values precisely because it arises from a claim of excessive or outrageous governmental conduct. The court concluded that the state constitutional protection afforded a basis for this substantive defense that could not be constrained by legislation.[286] Rejecting the argument that judicial construction of the parameters of the defense would constitute an improper invasion on power reserved to the legislature, the court affirmed its obligation to interpret the state constitution, including those provisions that protect against "arbitrary and oppressive governmental conduct."[287] In proceeding to consider the extent to which the entrapment defense is dictated by due process considerations, the court observed: "The doctrine of separation of powers does not preclude us in any way from recognizing a due process violation where police exceed the standards of proper investigation."[288]

But *Vallejos* did not reflect a deliberate departure from federal doctrine; instead, the court expressly relied on federal decisions,[289] and decisions from other jurisdictions,[290] in affirming the protection afforded by reliance on entrapment when governmental action exceeds the proper limits recognized as consistent with the state constitution's due process provision. However, the *Vallejos* court did recognize a significant distinction in the way in which the entrapment defense may be viewed in terms of a subjective perspective—emphasizing the legislative

281. *Id.* ¶¶ 21, 23, 163 P.3d at 483.

282. *Id.* ¶ 23, 163 P.3d at 484.

283. "Rather than being concerned with principles of federalism, the New Mexico Constitution is obligated to protect our State's sovereignty. Intrinsic within state sovereignty is an interest protecting the credibility of the state judiciary." *Id.* ¶ 21, 163 P.3d at 483 (citations omitted).

284. *Id.*

285. 1997-NMSC-040, ¶¶ 30–32, 945 P.2d 957, 965–66.

286. *Id.* ¶ 32, 945 P.2d at 966.

287. *Id.* ¶ 31, 945 P.2d at 966 (citations omitted).

288. *Id.*

289. *Id.* ¶ 30, 945 P.2d at 965–66. Moreover, in applying state law to the claim of entrapment actually presented, the *Vallejos* court contrasted the facts in the case with the facts in *United States v. Diggs*, 8 F.3d 1520 (10th Cir. 1993), noting the far more oppressive activity in the federal prosecution not warranting relief under federal due process. *Vallejos*, 1997-NMSC-040, ¶¶ 36–37, 945 P.2d at 967–68. The state court also rejected the defendant's claim on the merits under state due process. *Id.* ¶ 41, 945 P.2d at 969.

290. *Id.* ¶ 29, 945 P.2d at 965.

determination that the defense is viewed from the perspective of the accused.[291] In contrast, an objective perspective requires the conduct of the government to be viewed without regard to the subjective expectation or predisposition of the accused. The court noted that "[i]n some states, and in the federal courts, subjective entrapment is analyzed as a matter of legislative intent."[292]

Instead of limiting the application of the defense to either subjective or objective tests, the *Vallejos* court chose to apply an alternative test recognizing both approaches, concluding:

> We agree that all forms of entrapment constitute violations of due process. We therefore conclude that principles of due process protected in Article II, Section 18 of the New Mexico Constitution are implicated whenever police exceed the standards of proper investigation, create a likelihood that an ordinary person will be ensnared, or actually ensnare such a person.[293]

Relying on a theory of objective entrapment, an accused may assert the defense as a matter of law subject to resolution by pre-trial motion, permitting the trial court to consider the evidence supporting the claim of outrageous behavior without the issue of the impact of that behavior on the accused ever being submitted to the trier of fact.[294] This represents an important procedural option available to New Mexico defendants attributable to the court's expansive interpretation of the state constitutional due process protection.

C. Procedural Issues in Relying on Existing State Constitutional Law

The development of state law affording more expansive protection of individual rights, as well as the protection of rights afforded by consideration of both federal and state law procedural guarantees, requires trial counsel to fully appreciate the nature of the claim asserted and the proper use of existing precedent. In order to provide representation that is "competent," requiring that counsel exercise that degree of "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,"[295] counsel must be prepared to rely on existing precedent that offers relief for the client under either or both the state and Federal Constitutions, state law, and procedural rules. Moreover, while the protection afforded by state law only applies in state proceedings, counsel's failure to preserve claims based on state law analogs to federal constitutional protections, or independent sources of state law, may serve as the basis for an ineffective assistance

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291. The court gave an excellent explanation of subjective entrapment, explaining that the action of police in selling heroin to an individual whom they knew to be an addict might result in acquittal by a jury convinced that this behavior constituted something more than merely affording the accused an opportunity to commit the crime, even though he "'was already willing to commit the crime…before first being approached' by the police." *Id.* ¶ 34 n.11, 945 P.2d at 967 (citing State v. Sheetz, 113 N.M. 324, 328–29, 825 P.2d 614, 618–19 (Ct. App. 1991)).

292. *Id.* ¶ 32, 945 P.2d at 966–67.

293. *Id.*

294. *Id.* ¶ 34, 945 P.2d at 967. The court compared the procedure to that of suppression, where the evidentiary hearing focuses on the conduct of the police or other government agents and the determination is made on the basis of whether their conduct exceeded the proper bounds of their discretion.

295. Rule 16-101 NMRA.

claim predicated on both state constitutional protection and the Sixth Amendment.[296]

1. Preservation Rules

Preservation of state law grounds with respect to those protections previously articulated by the New Mexico Supreme Court does not require trial counsel to argue a rationale for more expansive interpretation of state law than that required when the claimed theory for relief has not already been recognized as affording relief by the appellate courts. Further, if the defendant prevails on the state constitutional claim in the trial court, the preservation rule is relaxed if the court's ruling is challenged by the State by interlocutory appeal. For instance, in *State v. Granville*,[297] the State contested the trial court's finding that a state constitutional violation had occurred by arguing that the defendant had failed to preserve error.[298] The court of appeals observed that when the defendant bases his objection on *existing* precedent there is no need for greater explanation of the claim than normally required for preservation.[299] The trial court ordered suppression on a state constitutional claim arising from the claimed privacy interest of the accused in his garbage.[300] The State was required to take an interlocutory appeal, consequently resulting in a more relaxed preservation requirement for this issue by the defendant on appeal, than if the defendant had himself been in the posture of attacking the trial court's rejection of his state constitutional law claim.[301] The rationale for the difference in posture likely lies in the appellate court's appreciation of the fact that when the trial court rules for the accused in such a situation, it implicitly finds that the trial court was clearly apprised of the nature of the claim and supporting theory. On the other hand, if the accused fails to properly preserve error by thoroughly arguing the basis for his claim, the trial court may simply not have had the requisite information in order to make a fully informed judgment on its merits.

2. Concomitant Reliance on Federal Constitutional Protections

Even counsel thoroughly versed in decisions grounding more expansive views of individual rights implicated in criminal prosecutions in the New Mexico Constitution, state statutes, or procedural rules may hesitate at simply relying on state precedent in support of their claims. Most commonly, it would seem

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296. Kimmelman v. Morrison, 477 U.S. 365, 374–76 (1986). In *Kimmelman*, the Court held that failure to assert a violation of the Fourth Amendment seizure of evidence in state court, typically foreclosed from federal habeas review under *Stone v. Powell*, 428 U.S. 465 (1976), could still form the basis for an ineffective assistance of counsel claim that would remain cognizable in a federal habeas action brought pursuant to 28 U.S.C. § 2254. *Kimmelman*, 477 U.S. at 382–83.

297. 2006-NMCA-098, 142 P.3d 933.

298. *Id.* ¶ 12, 142 P.3d at 937.

299. *Id.* ¶ 13, 142 P.3d at 937 ("When existing precedent construes a state constitutional provision as providing broader protection than its federal counterpart, the preservation of the state constitutional claim requires no more than preservation of any other claim for appellate review.").

300. *Id.* ¶ 6, 142 P.3d at 936.

301. The court observed: "As the appellee, however, Defendant was not strictly required to preserve his arguments; we affirm if the trial court decision was right for any reason, as long as the arguments in favor of affirmance are not fact based such that it would be unfair to entertain them for the first time on appeal without notice to the appellant." *Id.* ¶ 12, 142 P.3d at 937.

appropriate to always couch support for a privacy-based claim arising in the context of a seizure or search in terms of the Fourth Amendment, as well as a more expansive holding articulated under article II, section 10 of the state constitution.

The reason is that while counsel may have concluded that the precise situation is controlled by existing state law precedent, if that determination is incorrect, the federal claim is preserved for federal review. Although counsel may also believe that favorable disposition by the United States Supreme Court would be unlikely on the claim, in fact, the Court continues to consider unresolved Fourth Amendment claims in favor of criminal defendants. For instance, in *Georgia v. Randolph*,[302] the Court held that if an individual who is physically present expressly refuses to give consent to a search of his residence, then the consent given by another person who might appear authorized to consent is constitutionally inadequate to validate the search of the property and subsequent seizure of evidence.[303] If the Fourth Amendment-based claim for relief in a *Randolph* situation were preserved at the time the decision issues, the defendant would be entitled to relief on the basis of *Randolph* on appeal in the state courts while his case is pending, or in the United States Supreme Court if the same claim were pending on certiorari when the decision in *Randolph* was announced.[304] A failure to preserve the federal constitutional ground for the claim might result in default or forfeiture if, in fact, counsel's reliance on the state precedent proves to be in error, and a decision of the United States Supreme Court ends up favoring the accused. In such a circumstance, the failure to preserve the federal constitutional claim could well deprive the defense of the benefit of the Supreme Court's decision because the New Mexico appellate courts would not be under a burden to enforce a federal constitutional decision in the absence of a preserved claim.[305]

However, if counsel does argue both federal constitutional and state law protections, proper preservation of the state law-based claim for later purposes requires that counsel obtain a ruling on the state law ground, rather than simply a rejection of the Fourth Amendment theory for relief. The reason is that while the *interstitial* approach to state constitutional interpretation requires the courts to first consider whether protection is afforded by the Federal Constitution, a failure to obtain a ruling on the state law analog could result in a forfeiture of the state law ground for relief, just as a failure to *assert* a state law analog may be deemed a forfeiture.

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302. 547 U.S. 103 (2006).

303. *Id.* at 106.

304. The Supreme Court's retroactivity doctrine, predicated on the due process guarantee, provides that decisions announcing "new" rules of federal constitutional criminal procedure apply to benefit all defendants whose preserved claims remain pending on "direct appeal" at the time the decision announcing a new rule is issued. Griffith v. Kentucky, 479 U.S. 314, 316 (1987). "New rules" are essentially interpretations or applications of federal constitutionally protected rights that mark a break with existing precedent. If the Court's decision is not one dictated by prior decisions, "precedent," then it is a "new" rule for purpose of *Griffith*'s retroactivity doctrine. Teague v. Lane, 489 U.S. 288, 301 (1989). "Direct appeal" for purposes of *Griffith*, includes the period for filing or pendency of a petition for writ of certiorari in the Supreme Court. The direct appeal is thus concluded with denial of the petition for writ of certiorari or disposition of the claim when certiorari has been granted. *Griffith*, 479 U.S. at 321 n.6.

305. *See, e.g*, Hinkston v. State, 10 S.W.3d 906, 909 (Ark. 2000).

III. ARGUING FOR NEW INTERPRETATION OR APPLICATION OF STATE LAW THAT PROTECTS INDIVIDUAL RIGHTS

When counsel relies on a claim for more expansive relief than that provided for by the Federal Constitution, or presumably, a claim for novel relief not previously addressed as a matter of federal constitutional protection or state law, the intellectual burden of persuasion is increased. Defense counsel must be prepared not only to identify the provision of the state constitution or state law affording relief on the facts, but if the federal analog has already been interpreted not to afford the necessary protection on the facts, counsel must offer the trial court a rationale for why state law provides greater protection for the client.

It is not altogether clear that when writing on a clean slate, counsel would be required to offer an explanation that speculates on how the United States Supreme Court would interpret the federal constitutional analog, but it seems likely that counsel should be prepared to do so or risk failure of the claim. The reason is simple: even in asserting a new claim or interpretation of a federally protected right, counsel should advance an argument based on existing precedent that seeks to extend the protections afforded by that existing precedent, arguing by analogy.

Additionally, if there is no controlling federal precedent, counsel should assert both the federal and state grounds for protection because it is always possible that the Supreme Court would grant relief on a new construction of federal constitutional law, whereas the state court, writing on that same clean slate might not. Failure to assert the federal claim would result in a disposition only on state law grounds, barring review on certiorari by the Supreme Court.[306]

A. Preservation Rules

Counsel asserting a state law ground for greater protection of the client's rights than that afforded by the Federal Constitution must not only state the source for that ground and develop a factual predicate for the claim,[307] but also offer a theoretical basis for the more expansive protection. In *Gomez*, the court expressly held:

> However, when a party asserts a state constitutional right that has *not* been interpreted differently than its federal analog, a party also must assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision.[308]

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306. *See, e.g.*, Howell v. Mississippi, 543 U.S. 440, 443–44 (2005) (holding that failure to preserve claim on federal constitutional grounds in state courts deprives Supreme Court of jurisdiction to consider claim on writ of certiorari); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

307. In *Gomez*, for instance, the appellate court observed that trial counsel had developed a factual record upon which the legal claim rested, providing the necessary foundation for assessing the claim on the merits, as well as prejudice to the rights of the accused. State v. Gomez, 1997-NMSC-006, ¶ 27, 932 P.2d 1, 9. The court distinguished trial counsel's care in developing the record with the absence of necessary supporting factual records in *State v. De Jesus-Santibanez*, 119 N.M. 578, 580, 893 P.2d 474, 476 (Ct. App. 1995), and *State v. Ramzy*, 116 N.M. 748, 751, 867 P.2d 418, 421 (Ct. App. 1993), noting that in both "the opposing party was deprived of the chance to develop facts relevant to the claim, in this case all relevant facts are present in the record to determine the existence of exigent circumstances." *Gomez*, 1997-NMSC-006, ¶ 27, 932 P.2d at 9.

308. *Gomez*, 1997-NMSC-006, ¶ 23, 932 P.2d at 8; State v. Snell, 2007-NMCA-113, ¶ 8, 166 P.3d 1106, 1109–10.

A failure to properly preserve the claim by developing a theory for greater protection for the client under state law than that provided by the Federal Constitution results in a waiver of the state law claim so that the appellate court only reviews the federal claim, even when counsel has stated reliance on the New Mexico constitution in making the objection.[309]

As noted earlier, the trial court's suppression order in *Granville*[310] on a state constitutional claim was based on the accused's claimed privacy interest in his garbage. The State's position challenging the trial court's decision on interlocutory appeal resulted in the relaxation of the usual preservation requirement, thus benefiting the defendant.[311]

Granville demonstrates why a party asserting a new claim under state law is required to present the claim to the trial court, rather than simply asserting it as a matter of fundamental error in the state appellate courts.[312] The *Granville* court noted that the importance of developing a factual basis for the claim and the context of the claim—protection of the accused's garbage from a search not under warrant[313]—illustrate precisely the type of unique set of facts often relied upon by the courts in their decisions. There, the court devoted extensive discussion of the nature of garbage and its collection in concluding that under the state constitution, an individual may retain an expectation of privacy in their garbage.[314]

B. Creative Approaches to New Substantive Claims

State courts have looked to a variety of devices for development of more expansive protections afforded for criminal defendants than those provided by the Federal Constitution. In *Gomez*, the New Mexico Supreme Court, in fact, noted decisions from four other state courts that had expounded on the process of arguing for these broader protections, essentially directing the state's lawyers to consider the contexts identified in those decisions that would suggest litigation strategies for assertion of state constitutional claims.[315] The *Gomez* court cited cases from the New Jersey,[316] New York,[317] Pennsylvania,[318] and Vermont[319] high courts that

309. State v. Garcia, 2008-NMCA-044, ¶ 10, 182 P.3d 146, 149–50, *rev'd*, 2009-NMSC-046, *available at* http://www.nmcompcomm.us/nmcases/NMSC/2009/09sc-046.pdf.

310. 2006-NMCA-098, ¶ 2, 142 P.3d 933, 935.

311. *See supra* notes 297–301 and accompanying text.

312. *Granville*, 2006-NMCA-098, ¶ 16, 142 P.3d at 938 ("Based on the record, we conclude that the trial court clearly had an opportunity to rule on the issue *and was armed with the legal assertions and facts necessary to do so*." (emphasis added)).

313. *Id.* ¶ 34, 142 P.3d at 944 ("We emphasize that this ruling does not preclude a search of an individual's garbage by law enforcement. We merely conclude that a search of an individual's garbage must be supported by probable cause and a warrant, unless exigent circumstances exist or another doctrine, such as plain view, negates the individual's expectation of privacy.").

314. *Id.* ¶¶ 25–32, 142 P.3d at 941–43.

315. State v. Gomez, 1997-NMSC-006, ¶ 23, 932 P.2d 1, 8 (citing State v. Hunt, 450 A.2d 952, 962–67 (N.J. 1982) (Handler, J., concurring); People v. P.J. Video, Inc., 501 N.E.2d 556 (N.Y. 1986); Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991); State v. Jewett, 500 A.2d 233, 236–38 (Vt. 1985)).

316. *Hunt*, 450 A.2d at 962–67 (Handler, J., concurring).

317. *P.J. Video, Inc.*, 501 N.E.2d at 560.

318. *Edmunds*, 586 A.2d at 895.

319. *Jewett*, 500 A.2d at 236–38.

provide a fairly consistent framework for the development of state constitutional law.

1. Justice Handler's Framework for Analysis

The most comprehensive discussion of theoretical support for more expansive reading of state constitutional protections noted by the *Gomez* court is found in Justice Handler's concurring opinion in the New Jersey case, *State v. Hunt*.[320] Justice Handler argued that there are at least seven differing grounds for interpretation of state constitutional provisions independent of federal constitutional case law, supporting each with references to prior New Jersey decisions and decisions from other jurisdictions. Often, these considerations overlap in terms of theory or application, or provide alternative bases of support in interpretation of state constitutional provisions. His framework, moreover, is reflected in the other decisions cited in *Gomez*, and is based on the following grounds he identified.

a. Textual Language

Justice Handler first noted that different interpretations of constitutional values between the federal and state charters may be predicated on comparison of different wording and intended scope of protection implicated by language differences.[321] A difference in textual language was identified as a basis for distinguishing the scope of protections afforded by federal and state constitutional provisions in the other opinions cited in *Gomez*.[322]

An example of reliance on differences in textual language is demonstrated in the Michigan Supreme Court's view of a mandatory life sentence without possibility of parole imposed on even first offenders convicted of certain drug trafficking offenses. The Michigan Court of Appeals rather summarily rejected a claim that the sentence violated the "cruel *and* unusual" punishment provision of the Eighth Amendment in *People v. Harmelin*.[323] On certiorari, the Supreme Court agreed, deferring to the legislature's judgment in proscribing sentences for serious offenses in *Harmelin v. Michigan*.[324] Following the Court's disposition in *Harmelin*, however, the state supreme court struck down the sentencing scheme in *People v. Bullock*,[325] this time predicating its holding on the state constitutional protection against imposition of "cruel *or* unusual punishments."[326] The court explained: "In the case of a divided United States Supreme Court decision, we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of that Court, and not the majority, for purposes of interpreting our own Michigan Constitution."[327]

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320. *Hunt*, 450 A.2d at 962 (Handler, J., concurring).
321. *Id.* at 965 ("A state constitution's language may itself provide a basis for reaching a result different from that which could be obtained under federal law.").
322. *See P.J. Video, Inc.*, 501 N.E.2d at 560; *Edmunds*, 586 A.2d at 895; *Jewett*, 500 A.2d at 236.
323. People v. Harmelin, 440 N.W.2d 75, 80 (Mich. Ct. App. 1989).
324. Harmelin v. Michigan, 501 U.S. 957 (1991), *aff'g* 440 N.W.2d 75 (Mich. Ct. App. 1989).
325. People v. Bullock, 485 N.W.2d 866, 872–76 (Mich. 1992).
326. *Id.* at 870 n.8 (applying MICH. CONST. art. I, § 16).
327. *Id.* at 870.

The Michigan court found that one rationale for interpreting state constitutional provisions differently than the interpretation of a comparable provision in the Federal Constitution by the United States Supreme Court involved examination of the text itself. Here, the state court noted that the phrasing of the state constitution in prohibiting "cruel *or* unusual" punishments, as opposed to "cruel *and* unusual" punishments—the language of the Eighth Amendment—offered a basis for distinguishing between the scope of protection contemplated by the two documents.[328] Moreover, the *Bullock* court noted that it had previously observed that the precise language of the state constitutional provision suggested that some punishments not necessarily cruel, such as incarceration, might still fall under the prohibition of imposition of an unusual punishment, such as an unusually oppressive length of imprisonment.[329]

b. Legislative History

Justice Handler next noted the use of legislative history as a means of determining whether a state constitutional provision was intended to afford broader protection of individual rights than that found in the comparable federal constitutional provision.[330] This is obviously particularly valuable when the textual language in the two provisions is identical or nearly so.

An example of the use of legislative history as a vehicle for constitutional interpretation in New Mexico is presented in *City of Farmington v. Fawcett*.[331] There, the defendant complained in an obscenity prosecution that the free speech guarantee included in the state constitution protected the content of publications that were the subject of the municipal ordinance under which he was prosecuted.[332] The text of the free speech guarantee in the New Mexico constitution provides, in pertinent part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."[333]

The court rejected the claim that obscenity is protected by the language of the free speech guarantee in the state constitution.[334] In so concluding, it engaged in a historical analysis in an effort to determine whether the original intent reflected in section 17 was to make freedom of expression absolute under state law, tracing the history from the government of General Kearny, established with the occupation of Santa Fe during the Mexican War in 1846.[335] It traced the history of the free speech protection through the constitutional history of the territory and state, ultimately

328. *Id.* at 872. The court noted that in *People v. Collins*, 475 N.W.2d 684 (Mich. 1991), it had observed that a "significant textual difference…between parallel provisions of the state and federal constitutions may constitute a 'compelling reason' for a different and broader interpretation of the state provision." *Bullock*, 485 N.W.2d at 872.

329. *Id.* (citing People v. Lorentzen, 194 N.W.2d 827 (Mich. 1972)).

330. State v. Hunt, 450 A.2d 952, 965 (N.J. 1982) (Handler, J., concurring). Resort to legislative history was also mentioned in *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 564 (N.Y. 1986), and *Commonwealth v. Edmunds*, 586 A.2d 887, 895–99 (Pa. 1991).

331. 114 N.M. 537, 843 P.2d 839 (Ct. App. 1992).

332. *Id.* at 540, 843 P.2d at 842.

333. N.M. CONST. art. II, § 17.

334. *Fawcett*, 114 N.M. at 541–42, 843 P.2d at 843–44.

335. *Id.* at 542, 843 P.2d at 844.

rejecting the argument that the state constitution of 1910 protected obscenity.[336] While finding that the constitutional history of the free speech protection was not conclusive, the court concluded that the history "augur[ed] in favor of finding that the language of Article II, Section 17, was not intended to preclude the regulation of obscenity as an abuse of free speech."[337] In *Fawcett*, the New Mexico court engaged in the type of historical analysis suggested by Justice Handler in his suggested framework for interpretation of state constitutional protections.

c. Preexisting State Law

Third, Justice Handler suggested reliance on pre-existing case law in the jurisdiction.[338] This approach was followed by the New Mexico court in rejecting *Illinois v. Gates* in favor of continued reliance on the *Aguilar/Spinelli* test[339] in *State v. Cordova*.[340] Similarly, the New York court in *People v. P.J. Video, Inc.* characterized this line of analysis as "noninterpretive," meaning that it does not involve an attempt to discern a more expansive interpretation of constitutional language by reference to text or history, but by looking to the application of the right in prior decisions of the courts. The court explained: "[N]oninterpretive review proceeds from a judicial perception of sound policy, justice and fundamental fairness. A noninterpretive analysis attempts to discover, for example, any preexisting State statutory or common law defining the scope of the individual right in question."[341]

d. Structural Differences

Next, Justice Handler argued that structural differences between the federal and state constitutional approaches to governmental authority may provide a rational basis for differentiating between the scope of protections afforded under the different documents. He argued, for example, that this type of structural difference can be discerned from the intent of the Federal Constitution to allocate specific authority to the national government, while the New Jersey Constitution, serves to limit the authority of the state government while reserving power for the people.[342] Consequently, in the example he provides, of the protection afforded by the First Amendment and comparable provision of the state constitution, the former is couched in terms of an express limitation on the power of the national government to burden free speech, while the state provision affirmatively protects individual

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336. *Id.* at 543, 843 P.2d at 845.

337. *Id.* at 543–44, 843 P.2d at 845–46.

338. State v. Hunt, 450 A.2d 952, 965 (N.J. 1982) (Handler, J., concurring).

339. *See supra* notes 20–31 and accompanying text.

340. 109 N.M. 211, 217, 784 P.2d 30, 36 (1989) ("We conclude that our present court rules better effectuate the principles behind Article II, Section 10 of our Constitution than does the 'totality of the circumstances' test set out in *Gates*.").

341. People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986) (citing Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1001 (1985)). It is also the approach advocated later in this article with respect to reassertion of the state courts' traditional characterization of the confrontation right as embracing, virtually by necessity, the right to cross-examination. *See infra* Part III.C.3.

342. *Hunt*, 450 A.2d at 965–66 (Handler, J., concurring).

speech:[343] "Every person may freely speak, write and publish his sentiments on all subjects.…"[344]

A similar distinction can be drawn between the protection accorded exercise of religious belief by the First Amendment—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"[345]—and the express language of the New Mexico constitution. The state charter provides:

> Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.[346]

The state constitutional protection of religious freedom is not couched in terms of limitation on the authority of the state, but rather, as Justice Handler might observe, in terms of the right of the individual to "worship God according to the dictates of his own conscience."

e. Matters of Particular State Interest or Local Concern

The fifth proposition cited by Justice Handler involves the recognition of matters of particular local concern, such as the jurisdiction's management of its court system. For example, he noted that New Jersey had adopted a broader standing doctrine for challenges to seizures and searches than that afforded federal litigants raising Fourth Amendment claims.[347] He explained that the court expanded the standing rule based on local considerations: "We felt free to do so because that question implicated the management of our own court system, which is of peculiarly local concern. It also reflected a strong state policy in favor of access to our courts and liberalized standing to vindicate legal claims."[348]

The New Mexico Supreme Court took essentially this same position in *Montoya v. Ulibarri*,[349] where the court held that a petitioner asserting and proving a claim of actual innocence in the state post-conviction process is entitled to relief from his conviction.[350] In contrast, the United States Supreme Court has thus far rejected claims that actual innocence warrants relief from the conviction as a matter of

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343. *Id.* at 966 n.2 (quoting the First Amendment: "'Congress shall make no law…abridging the freedom of speech'" (citation omitted)).

344. N.J. CONST. art. 1, par. 6. See also discussion of New Mexico constitution free speech clause, *supra* Part III.B.1.b.

345. U.S. CONST. amend. I.

346. N.M. CONST. art. II, § 11.

347. For example, in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), and *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court held that only an individual having a personal privacy interest in the place or thing to be searched has standing to object to the seizure as illegal.

348. State v. Hunt, 450 A.2d 952, 966 (N.J. 1982) (Handler, J., concurring).

349. 2007-NMSC-035, 163 P.3d 476. For a discussion of *Montoya v. Ulibarri* see *supra* Part II.B.2.

350. The New Mexico constitution expressly recognizes due process and equal protection concepts that generally parallel those afforded by the Fourteenth Amendment. The state constitutional provision reads: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18.

federal due process.[351] Because the petitioner in *Montoya* sought relief under both the state and Federal constitutions, the court relied on the interstitial analytical approach in responding to the claims,[352] explaining: "[W]e identify both structural differences between our state government and the federal government as well as distinctive state characteristics that warrant a departure from the federal rule not to hear the freestanding innocence claims of habeas petitioners."[353]

The *Montoya* court expressly relied on two distinct factors identified by Justice Handler in *Hunt*, structural differences between the state and federal governments[354] and distinctive characteristics of the state.[355] Its decision reflects both its appreciation that within the federal system, the Supreme Court restricted federal habeas relief to claims predicated on violations of federally protected rights, essentially holding that consideration of claims of actual innocence not tied to violations of procedural rights would result in unwarranted intrusion into state judicial and executive clemency processes.[356] With regard to structural differences, the *Montoya* court noted that as a state court, it was not bound by principles of federalism in its approach to state habeas corpus remedies. Justice Maes wrote: "Rather than being concerned with principles of federalism, the New Mexico Constitution is obligated to protect our State's sovereignty. Intrinsic within state sovereignty is an interest protecting the credibility of the state judiciary."[357]

Instead of being confined to consideration only of procedural claims dictated by principles of federalism, the *Montoya* court instead concluded that New Mexico, as a matter of distinctive character of the state, would not accept incarceration of an innocent defendant because of its threat to the integrity of jury verdicts and the state's court system. Justice Maes explained: "[I]n view of our state interest in insuring accuracy and the superior ability of our state courts to make accurate factual findings, we find sufficient reason to depart from the federal decision not to recognize freestanding innocence claims brought by habeas petitioners."[358] Moreover, the court concluded that the incarceration of an innocent defendant would violate both the due process protection[359] and prohibition of cruel and unusual punishment[360] contained in article II, sections 13 and 18 of the state constitution.[361] Consequently, the court proceeded to develop the appropriate test for determination of claims of actual innocence challenging state court convictions on the merits,[362] eventually rejecting Montoya's claim.[363] Because the Supreme

351. Herrera v. Collins, 506 U.S. 390, 400 (1993).
352. *Montoya*, 2007-NMSC-035, ¶ 14, 163 P.3d at 481.
353. *Id.* ¶ 19, 163 P.3d at 482–83.
354. *Id.* ¶¶ 20–21, 163 P.3d at 483; State v. Hunt, 450 A.2d 952, 956–66 (N.J. 1982) (Hander, J., concurring).
355. *Montoya*, 2007-NMSC-035, ¶¶ 23–24, 163 P.3d at 483–84; *Hunt*, 450 A.2d at 966 (Handler, J., concurring).
356. *Herrera*, 506 U.S. at 401, 415–17.
357. *Montoya*, 2007-NMSC-035, ¶ 21, 163 P.3d at 483.
358. *Id.*
359. *Id.* ¶ 23, 163 P.3d at 484.
360. *Id.* ¶ 24, 163 P.3d at 484.
361. N.M. CONST. art. II, §§ 13, 18.
362. *Montoya*, 2007-NMSC-035, ¶¶ 26–33, 163 P.3d at 485–87.
363. *Id.* ¶¶ 33–36, 163 P.3d at 487–88.

Court's interpretation of federal constitutional protections in *Herrera v. Collins* rejected—though equivocally[364]—claims that Herrera's conviction would violate federal law and warrant habeas relief, the *Montoya* court's application of state constitutional law clearly represents more expansive protection for New Mexico defendants petitioning state, rather than federal courts for relief from their convictions.

f. State Traditions

Sixth, Justice Handler noted that a state court might interpret a state constitutional protection more broadly than the interpretation afforded the comparable federal constitutional provision based on state tradition. He noted, for instance, that New Jersey requires a higher degree of performance by counsel in criminal cases than that imposed by the Sixth Amendment, based upon the state's "firm policy regarding the proper role for attorneys in criminal trials."[365]

The New Mexico Supreme Court's decision in *State v. Breit*[366] reflects something of the same kind of concern for state tradition in the conduct of criminal trials. In *Breit* the court extended due process and double jeopardy protections beyond that afforded defendants under the Fifth Amendment decision in *Oregon v. Kennedy*[367] in protecting the right to fair trial. In *Kennedy*, the Court held that where mistrial is granted on motion of the defendant, retrial is barred when the mistrial motion itself is the result of the prosecution "goading" the defense into moving for mistrial based on repeated acts of misconduct.[368] Breit was convicted in a second trial after the trial court granted a motion for new trial based on prosecutorial misconduct following his conviction.[369] Citing prior New Mexico case law, the *Breit* court noted "[i]n New Mexico, the rule barring reprosecution applies in those situations in which 'the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials.'"[370] The court noted that under the federal standard imposed in *Kennedy*, Breit's retrial following a first trial tainted by prosecutorial misconduct would not have been barred by double jeopardy. The state court distanced itself from the limitation imposed in

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364. The Court clearly rejected Herrera's claim, but both the majority, Herrera v. Collins, 506 U.S. 390, 417 (1993), and Justices O'Connor and Kennedy, concurring, *id.* at 426 (O'Connor, J., concurring), suggested that a more credible claim of actual innocence than that advanced by Herrera might require relief from execution. Justice White conceded that a viable claim might exist if the petitioner could show that no rational jury would have convicted him on the evidence presented based on application of the reasonable doubt standard. *Id.* at 429 (White, J., concurring).

365. State v. Hunt, 450 A.2d 952, 966 (N.J. 1982) (Handler, J., concurring). For discussion of the New Mexico constitutional guarantee of effective assistance and how it might expand upon the Sixth Amendment protection, see *infra* Part III.C.4.

366. 1996-NMSC-067, 930 P.2d 792.

367. 456 U.S. 667 (1982).

368. *Id.* at 679.

369. *Breit*, 1996-NMSC-067, ¶ 1, 930 P.2d at 794. Breit's motion to dismiss based on double jeopardy grounds was granted by the trial court, but the court of appeals reversed on the state's appeal from the dismissal order. The supreme court denied certiorari to review the court of appeals decision. Breit v. State, 113 N.M. 1, 820 P.2d 435 (1991). He was then retried and convicted a second time. *Breit*, 1996-NMSC-067, ¶ 7, 930 P.2d at 795.

370. *Id.* ¶ 2, 930 P.2d at 794 (citing State v. Day, 94 N.M. 753, 757, 617 P.2d 142, 146 (1980)). *Day* was decided four years after *Oregon v. Kennedy*.

Kennedy that the termination of the first trial must have resulted from the defense being goaded into moving for mistrial and offered a more expansive interpretation[371] of the protection afforded by the double jeopardy guarantee under the state constitution.[372]

The court noted that it was not bound by the federal standard articulated in *Kennedy* in formulating its state constitutional test.[373] Consequently, it articulated a broader protection under the state constitution for prior jeopardy claims when conviction has been tainted by extreme misconduct, explaining: "as a general principle, we need not, in interpreting the provisions of our State Constitution, adopt the standard that is applicable to the comparable federal provision."[374] Thus, the *Breit* court concluded, in applying the state constitutional standard to his claim:

> [S]o pervasive and outrageous was the misconduct of the prosecutor in Breit's first trial that we are compelled to join other states in concluding that the narrow *Kennedy* rule based solely on prosecutorial intent does not adequately protect double-jeopardy interests. We do not overrule *Day* in this opinion. Rather, we interpret *Day* to be describing instances of misconduct in which the prosecutor acts in willful disregard of the resulting mistrial, retrial, or reversal on appeal. Under this standard, the reprosecution of Breit is barred.[375]

Breit arguably reflects precisely the type of concern for state attitudes toward the administration of the criminal justice system that may warrant a departure from federal precedent in interpreting comparable state constitutional protections to fit with local standards. Moreover, it is particularly important in emphasizing the extent to which precedent from other jurisdictions, also reflecting state attitudes, may serve to inform the New Mexico court regarding alternative approaches to the resolution of constitutional issues.

g. Public Attitudes

Finally, the seventh ground supporting more expansive protection afforded by state constitutional provisions than that recognized under the Federal Constitution would lie in general attitudes held by the public in the jurisdiction. Justice Handler noted that New Jersey had not applied this theory in evaluating protection afforded under the state constitution, but cited to other jurisdictions that had applied this theory.[376] New Mexico also appears to have done so.

In the extradition litigation involving Timothy Reed, a fugitive from Ohio claiming that his return to the Ohio prison system would result in his murder, the New Mexico courts essentially took the position that the state provided sanctuary

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371. *Breit*, 1996-NMSC-067, ¶¶ 32–36, 930 P.2d at 803–04. The court explained, "some state courts have adopted a more encompassing standard for the double-jeopardy clauses of their state constitutions than *Kennedy* would allow for the Fifth Amendment to the U.S. Constitution." *Id.* ¶ 24, 930 P.2d at 800. It also engaged in a lengthy examination of decisions from other jurisdictions applying more protective standards for double jeopardy claims than *Kennedy*. *Id.* ¶¶ 19–23, 28–31, 930 P.2d at 798–800, 802–03.

372. N.M. CONST. art. II, § 15.

373. *Breit*, 1996-NMSC-067, ¶ 27, 930 P.2d at 801.

374. *Id.*

375. *Id.* ¶ 3, 930 P.2d at 795.

376. State v. Hunt, 450 A.2d 952, 966–67 (N.J. 1982) (Handler, J., concurring) (citations omitted).

for those who were subject to repression or reprisal if extradited.[377] It relied on the state constitution as general authority for the proposition that the state affords greater protection for those seeking relief from oppression, explaining:

> In addition to our own Bill of Rights, the New Mexico Constitution offers unique protections that are not duplicated by its federal counterpart. We do not construe any provision of the federal constitution to require a New Mexico court to ignore its own constitutional guarantees of life and liberty and safety.[378]

Because Reed was an activist for prison reform and had written extensively about prison conditions in Ohio, the state district court found that his fear of unlawful retaliation was well-founded.[379] The state supreme court held that Reed was not "fugitive" subject to mandatory extradition,[380] relying on the fact that the New Mexico version[381] of the Uniform Extradition Act,[382] unlike the federal statute,[383] expressly guarantees "due process and habeas corpus rights of the defendant." [384] The court rejected a simplistic inquiry into whether Reed was present in New Mexico while being sought by Ohio in understanding the question of his status as a "fugitive," observing "if the courts of the asylum state are limited to so narrow a definition of 'fugitive from justice,' then any argument on the fugitivity element would be meaningless."[385]

Concluding that the requirement that mandatory extradition be based on the accused's status as a "fugitive,"[386] the state supreme court rejected the simplistic analysis it had criticized and upheld the district court's denial of extradition.[387] Justice Franchini wrote for the majority: "In this case, we conclude that, because he was forced by the conduct of government officials to flee the State of Ohio, Reed's mere presence in New Mexico does not render him a fugitive from justice."[388] He then amplified the majority's position:

> The focus of our analysis is whether Reed is a "fugitive from justice"; in other words, whether he seeks to avoid the maintenance and administration of what is just. The facts demonstrate conclusively that Ohio's conduct toward Reed was not just. Reed is thus not a fugitive from justice. Rather, he is a refugee from injustice.[389]

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377. Reed v. State *ex rel.* Ortiz, 1997-NMSC-055, 947 P.2d 86, *rev'd*, 524 U.S. 151 (1998).

378. *Id.* ¶ 93, 947 P.2d at 104–05.

379. Reed v. Ortiz, No. 94-1 CR Misc., 1995 WL 118952, *6–8 (D.N.M. Jan. 20, 1995), *aff'd*, 1997-NMSC-055, 947 P.2d 86, *rev'd*, 524 U.S. 151 (1998). The state supreme court relied on the trial court's findings in holding that Reed was not a "fugitive" required to be extradited. *Reed*, 1997-NMSC-055, ¶¶ 3–33, 947 P.2d at 89–93.

380. *Reed*, 1997-NMSC-055, ¶ 44, 947 P.2d at 95.

381. NMSA 1978, §§ 31-4-1 to -30 (1937).

382. Unif. Criminal Extradition Act § 2, 11 U.L.A. 113 (1995).

383. 18 U.S.C. § 3182 (2006).

384. *Reed*, 1997-NMSC-055, ¶ 61, 947 P.2d at 98.

385. *Id.* ¶ 82, 947 P.2d at 102.

386. Michigan v. Doran, 439 U.S. 282, 289 (1978).

387. *Reed*, 1997-NMSC-055, ¶ 83, 947 P.2d at 102 ("This pointless determination cannot logically be the limit of the *Doran* fugitivity analysis.").

388. *Id.* ¶ 84, 947 P.2d at 103.

389. *Id.* ¶ 86, 947 P.2d at 103.

Perhaps concerned that the court would be viewed as unduly resistant to the normal process of constitutionally mandated extradition, Justice Franchini further explained why the court found it necessary to contradict usual process, writing:

> Throughout this opinion we have emphasized that, in the context of extradition law, Reed's situation is unique. There is no controlling authority that addresses all of the peculiar circumstances of this case. We have closely studied and sought guidance from the many judicial opinions and accepted canons of extradition law. Nevertheless, a mechanical reading of this precedent would overlook important elements of Reed's case and militate the intolerable result of sending him back to face death or great bodily harm. Whatever a court's mandate may be under extradition law, it is clearly not to send a defendant back to face such a fate.[390]

He then explained that Reed was subject to the protection of New Mexico authorities by the state constitution:

> The New Mexico Constitution requires that we grant Reed's writ of habeas corpus. Reed faced the deprivation of his life without due process of law if he had remained in Ohio. The New Mexico Constitution cannot tolerate such an outcome. Moreover, Reed was precluded from seeking safety in Ohio. The deprivation of his life would have been carried out under color of state law and Reed was denied any legal recourse against this deprivation. He fled to New Mexico for the express purpose of finding safety. For this reason, Reed properly comes under the protection of Article II, Section 4 of the New Mexico Constitution which guarantees the right "of seeking and obtaining safety." Reed did not flee from justice. He sought refuge from injustice.[391]

Despite the state supreme court's best efforts on Reed's behalf, the United States Supreme Court disagreed and summarily reversed the state court decision in a *per curiam* order.[392] Characterizing Reed's allegations as "serious charges,"[393] and accepting the state court's determination that the charges were credible, the Court nonetheless ruled "this is simply not the kind of issue that may be tried in the asylum State," noting that in "case after case" it had held that claims arising from the actions of the demanding state had to be tried in the courts of the demanding state.[394]

Moreover, the Supreme Court expressly noted a "sanctuary" right claimed under the state constitution: "The Supreme Court of New Mexico also held that the New Mexico Constitution's provision guaranteeing the right 'of seeking and obtaining safety' prevailed over the State's duty under Article IV of the United States Constitution."[395] But it rejected the notion that the state constitutional protection

390. *Id.* ¶ 106, 947 P.2d at 108.
391. *Id.* ¶ 124, 947 P.2d at 112 (citation omitted).
392. New Mexico *ex rel.* Ortiz v. Reed, 524 U.S. 151, 155 (1998).
393. *Id.* at 153.
394. *Id.*
395. *Id.* at 154.

could override the mandatory "commands of the Extradition Clause"[396] of the federal constitution.[397]

Although the state court's assertion of local public policy values failed in *Reed*, the approach taken reflects the type of policy concern unique to the state that may warrant more expansive protections for individual rights under the state constitution than afforded by the national charter.[398] The New York court in *P.J. Video* noted the same ground for examining state constitutional protections, citing "distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right."[399] Similarly, the Pennsylvania court in *Edmunds* noted that it is appropriate to take into account "policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence."[400]

Despite the comprehensive theoretical approach taken by Justice Handler, his observations are certainly not exclusive. Neither is his framework exhaustive. But it certainly provides an important starting point for state constitutional interpretation and proved compelling for the New Mexico court in *Gomez*.

2. Factors Critical to New Mexico Constitutional Decision Making

In considering how to frame arguments for more expansive interpretation of New Mexico state constitutional provisions to those afforded by comparable federal constitutional guarantees, defense counsel should consider not only the framework articulated by Justice Handler identifying general factors warranting differing interpretation of rights, but also look to factors peculiar to New Mexico, as well. In *State v. Granville*, for instance, the court examined the claim that an individual's garbage was subject to privacy protection by considering "distinct state characteristics," noting that: "When interpreting Article II, Section 10, the New Mexico Supreme Court has emphasized its strong belief in the protection of individual privacy."[401]

In considering those factors that make New Mexico distinctive, counsel should look beyond the legal aspects of Justice Handler's framework for state constitutional law analysis.[402] In particular, counsel should consider the role of the state's multi-cultural demographic makeup in influencing public attitudes and policies. This makeup includes the recognition that New Mexico is, at a minimum, a bilingual state in terms of actual language usage. It is also a border state, resulting in significant interaction with a population not only from outside its state borders,

396. U.S. CONST. art. IV, § 2, cl. 2.

397. *Reed*, 524 U.S. at 154.

398. The Supreme Court's ultimate rejection of the state court's reasoning reflects, in part, the tensions that often mark different perspectives between states, evident in their traditions and public values, from a national perspective, ranging from contrary positions over slavery that led to the Civil War to the disputed authority of states to legalize medical use of marihuana.

399. People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986).

400. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

401. 2006-NMCA-098, ¶ 19, 142 P.3d 933, 939 (citing State v. Attaway, 117 N.M. 141, 150 n.6, 870 P.2d 103, 112).

402. Three factors may influence judicial interpretation of the state constitution: (1) New Mexico is a relatively "new" state, having achieved statehood in 1912; (2) it is a "tri-cultural" state; and (3) it is a border state. *See* Memorandum from N.M. Pub. Defender Dep't, Appellate Division (2008, revised) (copy on file with author).

but across the national border with Mexico. Consequently, it is subject to influences not only from Mexico, but other Latin American nations that press toward the United States border in terms of population shifts and political and social traditions. Further, in many respects, the state remains rural and agricultural.

At the same time, there is a significant historical relationship between the state government of New Mexico and the Native American tribal governments that operate simultaneously within the state's borders. This often creates interesting questions of joint and separate sovereignty as a consequence of their unique relationship within the national federal governmental structure.[403]

These demographic features are not entirely unique among the states, but they certainly differentiate the cultural contexts in which the state's legal institutions and law operates from the majority of other American states. Further, the interaction of the different cultures contributes to recognition of significant tolerance for disparate cultural and social traditions, creating in a real sense, a more liberal popular perspective in social affairs. This liberality may also be seen in terms of tolerance that has attracted artists[404] and intellectuals[405] who have shaped an important

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403. For example, see *State v. Harrison*, 2008-NMCA-107, 190 P.3d 1146, where the court of appeals considered the legality of an arrest made on the Navajo reservation by a state police officer who was not cross-commissioned as an officer with authority to arrest on Navajo land, but who followed the accused onto the reservation after observing him drive over twenty miles in excess of the speed limit on a state road. *Id.* ¶ 2, 190 P.3d at 1147. The court upheld the arrest, noting that the officer had acted legally. *Id.* ¶ 9, 190 P.3d at 1148. The court's concern for the relationship between Navajo and state authority was evident in its concluding paragraph:

> We conclude this opinion by noting that Officer Charley scrupulously respected Navajo Nation sovereignty. Officer Charley recognized the limits of his authority and did not arrest Defendant. After concluding that Defendant was driving while intoxicated, Officer Charley was faced with a predicament because he recognized he had no authority to arrest Defendant and because no Navajo police officers were available. Rather than allowing a suspected drunk driver to get back into his vehicle and possibly injure or kill people, Officer Charley allowed Defendant the opportunity to try getting someone else to give him a ride. Learning that no ride was available, Officer Charley allowed Defendant to leave the scene walking. There was no injury to the sovereignty of the Navajo Nation.

Id. ¶ 15, 190 P.3d at 1150.

404. New Mexico has traditionally been uniquely situated to attract visual artists, reflected in the creation of the Taos and Santa Fe artists colonies. *See, e.g.*, ARRELL MORGAN GIBSON, THE SANTA FE AND TAOS COLONIES: AGE OF THE MUSES, 1900–1942 (Univ. of Oklahoma Press 1983); EDNA ROBERTSON & SARAH NESTON, ARTISTS OF THE CANYONS AND CAMINOS: SANTA FE, THE EARLY YEARS (Ancient City Press 1996); SHERRY CLAYTON TAGGETT & TED SCHWARTZ, PAINTBRUSHES AND PISTOLS: HOW THE TAOS ARTISTS SOLD THE WEST (John Muir Publications 1990) (histories of development and impact of Taos and Santa Fe artists colonies). The greatest American representational painter of the 20th century, Georgia O'Keeffe, began painting in New Mexico in the late 1920s, first visiting during the summers, later moving to Abiquiu in the late 1940s, where she spent the greater part of her remaining productive career. For her reflections, see GEORGIA O'KEEFFE, GEORGIA O'KEEFFE (Viking Press 1976). Expansion of artistic activity in Albuquerque, in part centered at the University of New Mexico, *see* Tisha Blankenship, *Jonson Gallery at UNM*, 11 THE COLLECTOR'S GUIDE TO THE ALBUQUERQUE METRO AREA, *available at* http://www.collectorsguide.com/ab/abfa20.shtml (last visited May 7, 2009) (discussing work and career of Raymond Jonson, long-time faculty member in the University of New Mexico Art Department and founder of the modernist Transcendental Painting Group), was evidenced by the relocation of the Tamarind [Lithography] Institute from Los Angeles to Albuquerque in the 1960s. For a brief history of the Tamarind Institute, see Clinton Adams, *An Informed Energy: Lithography and Tamarind*, 1 GRAPHEION (Spring 1997), *available at* http://tamarind.unm.edu/adams.html (last visited May 1, 2009). *See also* CLINTON ADAMS, PRINTMAKING IN NEW MEXICO, 1880–1990 (Univ. of New Mexico Press 1991) (history of printmaking in the state).

405. For instance, the Manhattan Project of World War II, brought an influence of nationally and internationally famous scientists and engineers to Los Alamos for the development of atomic weapons. *See* GERALD D. NASH, THE AMERICAN WEST TRANSFORMED: THE IMPACT OF THE SECOND WORLD WAR 163–65 (Indiana Univ. Press 1985) (noting the impact of influx of American and émigré scientists on Los Alamos to work on the

aesthetic appreciation common to differing elements of New Mexican society. Similarly, other important institutions, such as the Catholic Church and its significant presence and history in New Mexico, also shape the state's tri-cultural perspective.[406]

As a disclaimer, while both the Pennsylvania[407] and Vermont[408] courts noted that an important consideration in the development of state constitutional law is the treatment of similar questions by other jurisdictions, the existence of foreign precedents alone is typically likely to be insufficient to justify an interpretation of the state constitution in a manner more expansive than that of comparable federal constitutional provisions. The New Mexico courts have evidenced significant interest in examining authority from other jurisdictions in considering arguments supporting expansive interpretation of the state constitution, but do not seem to have approached the task because of the existence of these decisions.[409] Rather, they are viewed as support for independent analysis undertaken by the New Mexico courts.[410]

Manhattan Project in World War II). The continuing influence of nuclear science in the state's intellectual makeup is still reflected in the Los Alamos and Sandia National Laboratories. *See* Sue Major Holmes, *Energy Secretary Visits Sandia Lab*, LAS CRUCES SUN-NEWS, April 10, 2009, *available at* http://www.lcsun-news.com/dona_ana_news/ci_12114172 (last visited May 1, 2009) ("Many scientists came to one of the weapons labs—Sandia and Los Alamos in New Mexico and Lawrence Livermore in California—to work in esoteric areas, [U.S. Secretary of Energy Steven] Chu said. But as they matured in what he called 'the natural life cycle of a scientist,' they realized they also wanted their work to have an impact on the real world.").

406. *See generally* PAUL HORGAN, THE HEROIC TRIAD: BACKGROUNDS OF OUR THREE SOUTHWESTERN CULTURES (Holt, Rinehart, Winston 1970) (analyzing cultural influences and interactions of Native-American, Spanish/Mexican American, and Anglo cultures on development of New Mexico history).

407. Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991) (suggesting reliance on related case-law from other states).

408. State v. Jewett, 500 A.2d 233, 237 (Vt. 1985) (suggesting extrapolating from approaches or holdings in other jurisdictions with similar constitutional provisions).

409. For instance in *State v. Sarracino*, 1998-NMSC-022, 964 P.2d 72, the court rejected arguments that New Mexico should revise its approach to trial court comment on the credibility of witnesses by instructing jurors that testimony of accomplices should be viewed with suspicion. *Id.* ¶ 9, 964 P.2d at 76. The defendant argued that instruction was warranted as a matter of federal due process and relied on practices in other jurisdictions. *Id.* ¶ 10, 964 P.2d at 76. The court concluded that there was no requirement for such instruction as a matter of due process, *id.* ¶ 11, 964 P.2d at 77, confirmed the position previously taken under state law restricting the authority of trial judges to comment on evidence, *id.* ¶¶ 13–14, 964 P.2d at 77–78, and noted, but did not accept, conflicting positions taken by courts in other states, *id.* ¶¶ 16–17, 964 P.2d at 78–79.

410. See *State v. Gutierrez*, 116 N.M. 431, 435–36, 863 P.2d 1052, 1056–57 (1993), where the court explained:

> We reiterate that in exercising our constitutional duty to interpret the organic laws of this state, we independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures. In so doing, we seek guidance from decisions of the United States Supreme Court interpreting the federal search and seizure provision, from the decisions of courts of our sister states interpreting their correlative state constitutional guarantees, and from the common law. However, when this Court cites federal opinions, or opinions from courts of sister states, in interpreting a New Mexico constitutional provision we do so not because we consider ourselves bound to do so by our understanding of federal or state doctrines, but because we find the views expressed persuasive and because we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions.

C. Areas for Exploration of Expanded State Constitutional Protections

New Mexico trial counsel considering preservation of state constitutional claims should think creatively about the possibilities for obtaining favorable treatment of arguments for more expansive protections than those afforded under comparable federal constitutional provisions. The willingness of the state courts to consider novel arguments, particularly with regard to privacy and due process issues should encourage counsel to develop approaches to other traditional sources of constitutional protections for the benefit of their clients. The following discussions address areas of potential interest in future litigation.

1. Additional Expansion of the Privacy Protection

Even given the expansive protections afforded New Mexico defendants by prior decisions interpreting the protection afforded by the state constitution, there will likely always be arguments that can be advanced for even broader protection than afforded under the Fourth Amendment. The starting point for expanding upon existing interpretations should likely be the court's expression in *State v. Gutierrez*: "Article II, Section 10 [of the New Mexico Constitution] expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusion."[411]

Counsel arguing for expansion should undoubtedly always note in their positions at trial that the state's jurisprudential history unequivocally demonstrates a commitment to examine novel claims regarding protections of personal autonomy and privacy. The expansion of protections afforded under the state constitution has taken place, moreover, without any substantively significant difference in language between the text of article II, section 10 and the Fourth Amendment.[412] Given the fact that the state constitutional provision does not clearly support a more expanded view of personal autonomy and privacy, the development of the New Mexico analog to the Fourth Amendment must be attributed to the independence of the state's appellate courts in analyzing factors warranting the more expansive interpretation, such as the state's cultural traditions, geography, and social structure.

In light of the supreme court's own reliance on case law from other states in developing its rationale for development of New Mexico constitutional law,[413] counsel should be prepared to use favorable decisions from other states in support of a claim that further expansion of the state constitutional privacy protection is warranted. For example, Montana recently departed from federal precedent in *State v. Goetz*,[414] holding that the privacy guarantee contained in the state constitution prohibits the recording of conversations between a suspect and undercover drug agent or informant without a warrant.[415] The court held that the state constitution

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411. *Id.* at 444, 863 P.2d at 1065.

412. *See supra* text accompanying notes 118–19. The wording of the two provisions is comparable, with structural and stylistic differences in phrasing.

413. State v. Gomez, 1997-NMSC-006, ¶ 23 n.3, 932 P.2d 1, 8.

414. 191 P.3d 489 (Mont. 2008).

415. *Id.* at 504. The *Goetz* court recognized its own prior conflicting decisions in resolving the issue. *Id.* at 494. In *State v. Solis*, 693 P.2d 518 (Mont. 1984), the court had held that the warrantless electronic monitoring and

provided broader protection for personal privacy than that recognized under the United States Constitution, rejecting the Supreme Court's decision in *United States v. White*.[416]

Or, counsel might consider reliance on the Arkansas decision in *Griffin v. State*,[417] where the court held that nighttime incursions on a defendant's curtilage are illegal under the Arkansas constitution.[418] New Mexico is a rural state, like Arkansas, and that fact may warrant a greater protection of a homeowner's curtilage.

2. Waiver of Rights, Self-incrimination

There is some potential for development of independent state constitutional protection relating to the waiver of a defendant's rights, particularly the rights subject to advice pursuant to *Miranda v. Arizona*.[419] In determining whether a suspect has knowingly and intelligently waived his rights to remain silent or to assistance of counsel,[420] the Supreme Court has been relatively deferential to police in terms of their interpretation of the suspect's understanding of the rights that they have waived when a statement elicited as a result of interrogation is challenged under *Miranda*. For instance, in *Davis v. United States*,[421] the Court held that unless a suspect makes an *unequivocal* request for counsel[422] an officer's perception that the suspect, in fact, intends to waive counsel and talk to the officer is controlling on

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recording of the defendant's conversations with an undercover law enforcement officer violated article II, sections 10 and 11 of the Montana constitution, even though the undercover officer consented to the monitoring. The State relied on a subsequent decision, State v. Brown, 755 P.2d 1364 (Mont. 1988), in which the supreme court had held that electronic monitoring of a conversation between two people, with one's consent, did not constitute a search subject to the search warrant requirement.

416. 401 U.S. 745 (1971). The *Goetz* court observed that its prior discussion of the state constitutional protection in *Brown* had paralleled the Supreme Court's analysis in *White*. *Goetz*, 191 P.3d at 496. The *Goetz* majority explained:

> [O]ur resolution of [*Brown*] merely paralleled federal jurisprudence on the subject and failed to properly analyze the greater rights guaranteed by Montana's Constitution. Stated differently, having stated without equivocation that the Montana Constitution expressly provides more privacy protection than that inferred from the United States Constitution—with the corresponding obligation to provide an independent analysis under the Montana Constitution—we failed to follow through.

191 P.3d at 496 (citing *Brown*, 755 P.2d at 1370–71).

Justice Morris, concurring and dissenting in *Goetz*, observed that the West Virginia court had already rejected the Supreme Court's analysis in *White*, in *State v. Mullens*, 650 S.E.2d 169 (W. Va. 2007), applying the West Virginia Constitution. *Goetz*, 191 P.3d at 508 (Morris, J., concurring and dissenting). However, he noted that in *Mullens*, the court distinguished between an invasion of the privacy of the home in the recording of a conversation from the recording of a conversation occurring outside the home, as in a vehicle, where the expectation of privacy is diminished. *Id.*

417. 67 S.W.3d 582, 584 (Ark. 2002).

418. ARK. CONST. art. II, § 15.

419. 384 U.S. 486 (1966).

420. The key test is whether the accused can make a "knowing and intelligent waiver" of rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In *Aguilar v. State*, 106 N.M. 798, 751 P.2d 178 (1988), the court held that the State had failed to demonstrate a knowing and intelligent waiver of rights where the defendant had a history of hospitalization for mental illness and suffered from subnormal intelligence. *See id.* at 799, 751 P.2d at 179. The court also noted that the intelligence test establishing his level of functioning was also questionable because it was conducted in English, while his primary language was Spanish. *See id.* at 804, 751 P.2d at 184.

421. 512 U.S. 452 (1994).

422. *Id.* at 459, 461–62.

the factual issue of the suspect's waiver of his Sixth Amendment right to counsel and Fifth Amendment right to remain silent.[423] In contrast, the New Mexico Supreme Court has explained that in reviewing a challenge to the claimed waiver of rights, it will look to "the totality of the circumstances and the particular facts surrounding each case, including consideration of the mental and physical condition, background, experience and conduct of the accused."[424] This test, more comprehensive than the Supreme Court's test in *Davis*,[425]—which depended almost exclusively on the officer's assessment of the suspect's waiver of rights—was applied in the context of the claimed violation of Fifth Amendment rights in *State v. Barrera*.[426] There, the issue focused on the suspect's comprehension of English and the court concluded that the warnings were adequate because they were given orally and in writing in both English and Spanish.[427]

The most obvious concern for New Mexico defendants with regard to whether waivers of rights are knowingly and intelligently made is the potential for misunderstanding due to varying degrees in language proficiency. New Mexico cases demonstrate a rather consistent regard by law enforcement officers that warnings are given in both English and Spanish in an effort either to ensure that waivers are properly made prior to interrogation or to simply provide a record for response to objections in the pre-trial process.[428] But, this is not necessarily the case, as then-Judge Bosson noted in his concurrence in *State v. Castillo-Sanchez*.[429] He observed:

> I also note my reservation about why the *Miranda* warnings and the *Miranda* waiver form were not read to Defendant *on the record* and his consent similarly captured on the record. Far too much of what may or may not have occurred was left off the record and depended upon the officer's recollection. *There is no excuse for such sloppy police practice in today's world, particularly when it was known that Defendant was coming from Mexico and in all probability spoke little or no English. Proof of Defendant's comprehension and waiver of his* Miranda *rights should have been visible, and audible*, from a clear record

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423. The *Davis* Court noted that the case actually involved the extension of Fifth and Sixth Amendment protections to the military as a matter of Presidential order, and that it had never construed these constitutional protections to the military directly. *Id.* at 457 n.*. However, because the Court of Military Appeals, had previously held that the protections afforded by the amendments apply to a military proceeding, the Court proceeded on the assumption that the amendments do apply to military proceedings because the parties had not contested the point. *Id.*

424. State v. Barrera, 2001-NMSC-014, ¶ 28, 22 P.3d 1177, 1185 (citation omitted).

425. *Davis*, 512 U.S. at 459 ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.…Rather, the suspect must unambiguously request counsel.…Although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (internal citations omitted)).

426. 2001-NMSC-014, ¶ 28 n.1, 22 P.3d at 1184–85.

427. *Id.* ¶ 31, 22 P.3d at 1186.

428. *E.g.*, State v. Bravo, 2006-NMCA-019, ¶ 17, 128 P.3d 1070, 1075. The *Bravo* court noted that in *Davis*, 512 U.S. at 460, the Supreme Court had recognized the possibility that where a suspect is fluent only in Spanish, there was a danger that the purpose of *Miranda* warnings would be compromised by the language factor. *Bravo*, 2006-NMCA-019, ¶ 16, 128 P.3d at 1074–75.

429. 1999-NMCA-085, 984 P.2d 787.

> without subjecting Defendant, and this Court, to the vicissitudes of imperfect memory, potentially colored by an overweening ambition to convict.[430]

Then-Judge Bosson did not find the record so inadequate as to justify dissent, but his more general observations are particularly telling with regard to the potential for development of state constitutional jurisprudence. For example, he virtually invited counsel to argue that New Mexico law requires more protection for suspects than the Supreme Court's standard in *Davis* which is clearly deferential to law enforcement, noting:

> I agree with the opinion of the majority and its discussion of this case in light of United States Supreme Court precedent which binds this Court with respect to the federal constitution. *It is unfortunate a better record was not made below on which we could consider a different standard under our state constitution*.[431]

Moreover, he advanced the analysis that defense counsel could argue at trial in preserving the state constitutional claim for appellate review, observing: "Given the linguistic and cultural differences our state enjoys, not to mention our border with Mexico, our citizens should demand no less as part of intelligent, responsible law enforcement."[432]

In addition to the cultural differences noted in the concurrence that may warrant broader constitutional protection for suspects interrogated in New Mexico than that afforded under the Fifth and Sixth Amendments, there is a potentially significant difference in the language used in the state constitution that counsel advancing an expansive state law argument should consider. The self-incrimination clauses of the state and federal constitutions are roughly equivalent.[433]

However, article II, section 14 of the state constitution provides:

> In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; *to have the charge and testimony interpreted to him in a language that he understands*; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.[434]

The language of section 14 clearly recognizes the linguistic differences noted by then-Judge Bosson as an express protection afforded by the New Mexico Constitution. It would make little sense for this protection only to be afforded as a matter of formal charging without the suspect being advised of the basis for his arrest and interrogation in language he can understand.

Applying both the language of section 14 and the rationale advanced by the concurrence in *Castillo-Sanchez*, a creative New Mexico defense lawyer should

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430. *Id.* ¶ 35, 984 P.2d at 796, (Bosson, J., concurring) (emphasis added).
431. *Id.* ¶ 34, 984 P.2d at 795 (emphasis added).
432. *Id.*
433. The New Mexico constitution provides: "No person shall be compelled to testify against himself in a criminal proceeding." N.M. CONST. art II, § 15. The Fifth Amendment provides, in pertinent, comparable part: "No person…shall be compelled in any criminal case to be a witness against himself."
434. N.M. CONST. art. II, § 14 (emphasis added).

advance the argument that the state constitution affords greater protection for an accused challenging his confession based on failure of the warnings to result in a knowing waiver of rights. Of course, the argument must be predicated on a proper factual foundation demonstrating the relevance of the language issue in order to warrant a finding of reversible error, even though the appellate courts could always recognize the existence of the broader state constitutional protection in a case in which it did not actually apply the protection to afford a defendant relief.[435]

3. Confrontation and Cross-examination

The Supreme Court's decision in *Crawford v. Washington*,[436] re-opened the door to the protection of the rights of an accused protected by the Sixth Amendment Confrontation Clause[437] through primary reliance on cross-examination for testing the credibility of out-of-court statements made by a witness not available to testify at trial. Although the Court overruled prior decisions[438] permitting admission of uncrossed statements based upon "indicia of reliability" demonstrating their trustworthiness,[439] its rationale extends only to those statements that are "testimonial" in nature:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.[440]

Thus, *Crawford* does not ensure confrontation by cross-examination with respect to all out-of-court statements or hearsay that the prosecution may offer at trial.

Nevertheless, *Crawford* has served to generate additional reconsideration of the Sixth Amendment confrontation protection in contexts other than admission of accomplice confessions, the context in which Crawford's claim arose. For instance, in *Davis v. Washington* and its companion case, *Hammon v. Indiana*,[441] the Court

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435. For instance, a court may find that error has been waived by a failure to object. In *State v. Jones*, 88 N.M. 110, 112, 537 P.2d 1006, 1008 (Ct. App. 1975), the court held that the trial court had given the jury an instruction on the recent unexplained possession presumption that effectively provided that the presumption was mandatory, in violation of constitutional precedent rejecting mandatory presumptions in criminal cases. However, because the defendant failed to object and the appellate court declined to hold the error fundamentally defective, it essentially announced a new rule without affording the defendant its benefit due to the failure to preserve error. *Id.* at 114, 537 P.2d at 1010.

436. 541 U.S. 36 (2004).

437. The Sixth Amendment provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."

438. Lee v. Illinois, 476 U.S. 530, 543 (1986); Ohio v. Roberts, 448 U.S. 56, 66 (1980).

439. *Crawford*, 541 U.S. at 67.

440. *Id.* at 68.

441. 547 U.S. 813 (2006).

considered whether a 911 emergency call to police is admissible if the complainant is unavailable to testify at trial. When the call itself simply reports the emergency, the Court held that it is not "testimonial" in nature, simply being a call for help, whereas, in *Hammon*, the statement was designed to provide police with information about the offense, reflecting the kind of questioning that is "testimonial."[442]

Similarly, the admissibility of results of scientific tests without an opportunity for the defense to cross-examine the expert or technician conducting the test has generated conflicting lower court decisions.[443] The New Mexico courts have, thus far, held that cross-examination of the technician or expert who actually conducted the test in issue, is not constitutionally required.[444] However, the more recent case, *State v. Bullcoming*, is now before the state supreme court on grant of certiorari, and will almost certainly be resolved in accord with the United States Supreme Court's disposition of the issue in *Melendez-Diaz v. Massachusetts*.[445] Although there is a significant factual distinction between the New Mexico decisions, in which no cross-examination violation was found where the State offered drug test results through an expert witness subject to cross-examination at trial, and *Melendez-Diaz*, where the prosecution merely introduced the verified results of the tests without a sponsoring witness or the technician who had conducted the tests,[446] the majority opinion in *Melendez-Diaz* apparently forecloses reliance on affidavits in lieu of the live testimony of analysts who actually performed the scientific test involved.[447] This distinction could arguably serve to distinguish the position eventually taken by the Supreme Court in *Melendez-Diaz* from the context in which cross-examination claims have been asserted in the New Mexico cases, *State v. Dedman* and *Bullcoming*. However, the Supreme Court's emphasis on cross-examination of the analyst who actually conducted the scientific test suggests that even live testimony

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442. *Id.* at 829 ("It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged.…").

443. *Compare*, State v. Caulfield, 722 N.W.2d 304 (Minn. 2006) (holding that a report containing laboratory test analysis was "testimonial" and inadmissible without opportunity to cross-examine the analyst), *with* People v. Geier, 161 P.3d 104 (Cal. 2007) (holding that a report of DNA test results was not "testimonial"), *and* Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005) (holding that certificate of lab analysis identifying nature and quantity of substance was not "testimonial"), *abrogated by* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), *and* United States v. Feliz, 467 F.3d 227 (2d Cir. 2006) (holding that autopsy report was a "business record," not "testimonial"). *See also* Rollins v. State, 897 A.2d 821 (Md. 2006) (distinguishing between statements of "fact" and statements of "opinion" in autopsy reports, and holding that the latter are testimonial but the former are not).

In *United States v. Lamons*, 532 F.3d 1251 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 524 (2008), the Eleventh Circuit rejected a *Crawford* challenge to the admission of a recording made by a cockpit voice recorder in an aircraft, holding that the testimonial hearsay framework of *Crawford* applies only to the live testimony of humans, and not to evidence reproduced mechanically. *Id.* at 1262–63.

444. State v. Dedman, 2004-NMSC-037, 102 P.3d 628; State v. Bullcoming, 2008-NMCA-097, 189 P.3d 679.

445. 129 S. Ct. 2527 (2009).

446. *See* Melendez-Diaz v. Commonwealth, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished table decision), *available at* 2007 WL 2189152, at *4 n.3.

447. *Melendez-Diaz*, 129 S. Ct. at 2532 ("In short, under our decision in Crawford the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." (internal quotation marks and citation omitted)).

of another expert based on reported examination results will not meet the Court's demand for strict application of the Sixth Amendment confrontation guarantee.[448]

Further, in *Giles v. California*,[449] the Court applied its renewed interest in evaluating the expansion of the confrontation concept again in overruling the long-standing precedent of *Reynolds v. United States*,[450] that held that where the defendant had procured the absence of the witness and, therefore, was responsible for his unavailability, the Sixth Amendment did not bar admission of the witness's statement despite the lack of an opportunity for cross-examination by the defense.

The New Mexico Supreme Court recognized and applied *Crawford* in *State v. Johnson*,[451] which was pending on direct appeal when the Supreme Court announced its decision in *Crawford*.[452] Moreover, the court applied *Crawford* retroactively to afford relief to the state habeas petitioner, Earnest, in *State v. Forbes*,[453] based on its conclusion that Earnest properly relied on his right to cross-examine his purported accomplice who had confessed to police in an effort to negotiate favorable treatment following their arrest. The history of the litigation is somewhat complex. The court initially reversed Earnest's conviction,[454] relying on *Douglas v. Alabama*.[455]

Prior to the Supreme Court's holding in *Ohio v. Roberts*, *Douglas* required the testing of accomplice statements by cross-examination at trial as a matter of the Sixth Amendment confrontation guarantee.[456] Subsequently, the Court adopted the "indicia of reliability" test in *Ohio v. Roberts* to permit admission of statements not subjected to testing by cross-examination when the statements were deemed sufficiently trustworthy to be admitted without affording the accused an opportunity to engage in cross-examination. The reliability requirement, according to *Ohio v. Roberts*, is met when the statement falls within a "firmly rooted exception to the hearsay rule" traditionally recognized as justifying admission, or the statement has "particular guarantees of trustworthiness."[457] The Court extended the "indicia of reliability" test articulated in *Roberts* to include jointly inculpatory statements made by accomplices to police in *Lee v. Illinois*,[458] Ironically, the *Lee* majority did not find that the accomplice's statement was properly admitted and Lee was afforded relief from the conviction.[459]

Shortly after issuing its decision in *Lee*, the Supreme Court vacated the reversal ordered by the New Mexico Supreme Court in *State v. Earnest* (*Earnest I*)[460] and

448. *Id.*
449. 128 S. Ct. 2678 (2008).
450. 98 U.S. 145 (1879).
451. 2004-NMSC-029, ¶¶ 2, 7, 98 P.3d 998, 1001–02.
452. *Id.* ¶ 2, 98 P.3d at 1001–02.
453. 2005-NMSC-027, 119 P.3d 144, *cert. denied*, 549 U.S. 1274 (2007). For an in-depth discussion of the *Forbes* decision in light of the lengthy litigation in the *Earnest* case, see J. Thomas Sullivan, Crawford, *Retroactivity and The Importance of Being Earnest*, 92 MARQ. L. REV. 231 (2008).
454. State v. Earnest (*Earnest I*), 103 N.M. 95, 99, 703 P.2d 872, 876 (1985).
455. 380 U.S. 415 (1965).
456. *Id.* at 418–20.
457. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
458. 476 U.S. 530, 543 (1986).
459. *Id.* at 545.
460. State v. Earnest (*Earnest I*), 103 N.M. 95, 99, 703 P.2d 872, 876 (1985).

remanded for reconsideration in light of its decision in *Lee*.[461] Although the Supreme Court had itself never overruled *Douglas*,[462] as the *Crawford* Court noted,[463] then-Associate Justice Rehnquist, joined by the Chief Justice, and Justices Powell and O'Connor, argued that *Lee* overruled *Douglas v. Alabama* by implication in adopting the rationale of *Ohio v. Roberts*. [464]

On remand from the order vacating its judgment for reconsideration in light of *Lee v. Illinois*, the New Mexico Supreme Court affirmed Earnest's convictions.[465] In so doing, it followed Justice Rehnquist's lead and concluded that the accomplice's statement to the police demonstrated sufficient indicia of reliability to warrant admission despite his unavailability for cross-examination.[466] The primary basis for its decision was its characterization of the accomplice's statement as a declaration against his penal interest[467] because it exposed him to prosecution for a capital crime and potential death sentence.[468] The court had consistently held that the penal interest exception constituted a "firmly rooted" exception to the hearsay rule following its decision affirming Earnest's conviction on remand from the United States Supreme Court.[469] It persisted in this view even after the four Justice plurality in *Lilly v. Virginia*[470] concluded that the penal interest exception was not "firmly rooted" for purposes of federal confrontation analysis.[471]

The decision in *Crawford* effectively reversed the state court's position, at least with regard to admissibility of testimonial hearsay statements of accomplices that had previously been admitted without cross-examination based on application of the penal interest exception. Consequently, once the *Crawford* Court rejected the alternative rationale for admission of hearsay advanced in *Ohio v. Roberts*,[472] the New Mexico Supreme Court seized on the decision to afford relief to Earnest,[473]

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461. New Mexico v. Earnest, 477 U.S. 648 (1986).

462. *Id.* at 649.

463. Crawford v. Washington, 541 U.S. 36, 57 (2004).

464. *Earnest*, 477 U.S. at 649 (Rehnquist, J., concurring).

465. State v. Earnest (*Earnest II*), 106 N.M. 411, 744 P.2d 539 (1987).

466. *Id.* at 412, 744 P.2d at 540.

467. Curiously, the court never addressed the text or applicability of the state's evidence rule governing admission of declarations against penal interest:

> (3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Rule 11-804(B)(3) NMRA.

468. *Earnest II*, 106 N.M. at 412, 744 P.2d at 540.

469. State v. Torres, 1998-NMSC-052, ¶ 11, 971 P.2d 1267, 1280. The court held in *Torres* that statements against penal interest function as per se exceptions to the general confrontation requirements because such statements are firmly rooted exceptions to the hearsay rule and therefore bear "adequate indicia of reliability." *Id.* ¶¶ 29–32, 971 P.2d at 1278–80; *accord* State v. Martinez-Rodriguez, 2001-NMSC-029, 33 P.3d 267; State v. Gonzales, 1999-NMSC-033, ¶ 5, 989 P.2d 419, 421.

470. 527 U.S. 116 (1999).

471. *Id.* at 127–34. The plurality concluded: "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id.* at 134 n.5.

472. 541 U.S. 36, 67 (2004).

473. State v. Forbes, 2005-NMSC-027, ¶ 13, 119 P.3d 144, 148–49.

whose reliance on *Douglas* was reflected both in trial counsel's preservation of error by proper objection[474] and the court's reliance on *Douglas* to initially reverse Earnest's conviction.[475]

The posture of the state supreme court in *State v. Forbes* may offer opportunities for expanding cross-examination as a necessary trial protection beyond testimonial statements in New Mexico prosecutions.[476] The reason is that *confrontation* had traditionally been characterized as the right of *cross-examination* in decisions construing the state constitutional protection. Arguably, the court's reaffirmation of pre-*Roberts* Sixth Amendment jurisprudence in *Forbes*—its reference to the revitalization of *Douglas*, the basis for its initial reversal of Earnest's conviction—would logically provide a basis for reviewing the court's treatment of the state constitutional guarantee in article 2, section 14. That section provides, in pertinent part: "In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him.…"[477]

While the language of article II, section 14 does not differ at all from the comparable definition of the confrontation guarantee of the Sixth Amendment, the New Mexico courts had traditionally interpreted the guarantee more restrictively in terms of ensuring that the right embraces the opportunity for cross-examination. This is not to suggest that testimony or evidence not subject to cross-examination had always been excluded, of course, because traditional exceptions to the hearsay rule had provided vehicles for admissibility despite the absence of cross-examination.[478] However, the state courts had developed a clear appreciation for the significance of the cross-examination right in the conduct of criminal trials.

In *State v. James*,[479] the state supreme court described the confrontation guarantee of the state constitution in the following terms:

> The purposes of confrontation are to secure to the accused the rights of cross-examination; the right of the accused, the court and the jury to observe the deportment and conduct of the witness while testifying; and the moral effect produced upon the witness by requiring him to testify at trial.[480]

The *James* court's characterization was consistent with prior decisions, tracing its history to *Territory v. Ayer*,[481] where the court held that previously cross-examined testimony was admissible where the witness was not available at trial because the

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474. *Id.* ¶¶ 8–9, 119 P.3d at 147.

475. State v. Earnest (*Earnest I*), 103 N.M. 95, 99, 703 P.2d 872, 876 (1985).

476. However, the court was very clear to point out that it was only affording relief to Earnest and not applying a general rule providing retroactive effect to *Crawford* claims not directly at issue in *Forbes*. *Forbes*, 2005-NMSC-027, ¶ 14, 119 P.3d at 149.

477. N.M. CONST. art. II, § 14.

478. *See, e.g.*, State v. Quintana, 98 N.M. 17, 644 P.2d 531 (1982) (dying declaration); State v. Robinson, 94 N.M. 693, 616 P.2d 406 (1980) (excited utterance); State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976) (co-conspirator declaration).

479. 76 N.M. 376, 415 P.2d 350 (1966).

480. *Id.* at 380, 415 P.2d at 352 (citing Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965)).

481. 15 N.M. 581, 113 P. 604 (N.M. Terr. 1910), *rev'd on other grounds*, Ayer v. Territory, 201 F. 497 (8th Cir. 1912).

accused had been afforded an opportunity to cross and had done so.[482] The court consistently held that an opportunity for cross-examination was the lynchpin for admissibility determinations in subsequent decisions applying article II, section 14.[483] For instance, in *State v. Martin*,[484] the court explained: "[O]ur constitution provides that a defendant has the right to be confronted with the witnesses against him, and *this means that he not only has the right to look upon such witnesses, but to cross examine them*."[485]

The court of appeals has followed the supreme court's lead, affirming that cross-examination is an essential element in the state constitutional confrontation guarantee in *State v. Holly*[486] and subsequent decisions.[487] In *Valles v. State*,[488] moreover, the court noted that federal decisions construing comparable federal constitutional guarantees are instructive in providing guidance for state constitutional construction, but did not hold that either the federal decision was controlling, or that the parameters of the right defined by federal decisions necessarily would bind state interpretation.[489]

New Mexico courts have developed state constitutional law governing the right, affirming the cross-examination requirement, while explaining when the protection had been afforded despite the inability to cross a witness at trial.[490] For example, in *State v. Duran*,[491] the court held that a prior decision to decline to engage in cross-examination, when available, did not deny confrontation because the opportunity was available and the right to engage in cross-examination may be waived, as may other rights secured by the constitution.[492] And, in *State v. Martinez*,[493] the court construed the guarantee as fulfilled when counsel was available at the prior proceeding and had an opportunity to cross-examine the witness.[494] Moreover, the *Martinez* court observed that the construction of the constitutional guarantee is controlled by the understanding of the right at the time of the adoption of the

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482. *Ayer*, 15 N.M. at 585, 113 P. at 605. Justice Mechem's opinion was consistent with the decision in *Mattox v. United States*, 156 U.S. 237 (1895), where the Supreme Court held that the prior testimony of a witness could be admitted at trial when his unavailability was due to death and he had been cross-examined in the prior proceeding.

483. State v. Jackson, 30 N.M. 309, 317, 233 P. 49, 52 (1924).

484. 53 N.M. 413, 209 P.2d 525 (1949).

485. *Id.* at 417, 209 P.2d at 527 (emphasis added).

486. 79 N.M. 516, 518, 445 P.2d 393, 395 (Ct. App. 1968).

487. *See* State v. Sparks, 85 N.M. 429, 430, 512 P.2d 1265, 1266 (Ct. App. 1973).

488. 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977).

489. *Id.* at 349–50, 563 P.2d at 612–13.

490. For example, the court reversed based on an improper limitation on cross-examination by the trial court in *Sanchez v. State*, 103 N.M. 25, 27, 702 P.2d 345, 347 (1985). Where the witness was available for cross-examination at trial, the court held that statements of the witness otherwise excludable as hearsay would not demonstrate error under the state constitution confrontation protection. State v. Martinez, 99 N.M. 353, 356, 658 P.2d 428, 431 (1983) (distinguishing between confrontation and effect of cross-examination in permitting jurors to observe and assess demeanor of witness and concluding that latter is not part of the confrontation guarantee under state constitution); State v. Maestas, 92 N.M. 135, 146, 584 P.2d 182, 193 (Ct. App. 1978).

491. 91 N.M. 756, 581 P.2d 19 (1978).

492. *Id.* at 758, 581 P.2d at 21 (finding no confrontation violation where defense counsel elected not to cross-examine witnesses who identified defendant from photograph and prosecutor subsequently elicited testimony from officer concerning their identification).

493. 95 N.M. 445, 448, 623 P.2d 565, 568 (1981), *overruled on other grounds by* Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

494. *Id.* at 448, 623 P.2d at 568.

constitution,[495] and expressly relied on *Douglas v. Alabama* in its interpretation of the meaning of the right, while relying on the state constitution in deciding the case.[496]

The history of confrontation analysis under article II, section 14 demonstrates a consistent state constitutional requirement for cross-examination and preference for in-court examination from Territorial days until the court's departure from this doctrine in affirming Earnest's conviction on remand from the United States Supreme Court in 1987.[497] While Earnest asserted his state constitutional claim in his original brief, and developed the argument fully on remand,[498] the state supreme court did not address the state constitutional theory in affirming his conviction.[499] Similarly, he re-asserted the state constitutional claim again in his first application for state post-conviction relief[500] and, again, as an alternative basis for relief in his second application, following *Crawford*.[501]

The supreme court's retroactive application of *Crawford* to afford Earnest relief suggests the court's independent thinking that may now afford defendants renewed interest in the cross-examination protection traditionally afforded under article II, section 14. The court's holding in *Forbes*, moreover, has now been reinforced by the Supreme Court's decision in *Danforth v. Minnesota*[502] holding that state courts are free to afford retroactive application of its decisions announcing new rules of federal constitutional criminal procedure, regardless of the Court's own determination that the rules do not warrant mandatory retroactive application as a matter of federal due process.[503] The state court's approach in *Forbes*, and its continuing interest in the development of state constitutional law, may afford even greater latitude in arguing for broader protection of the confrontation right in state court trials, whether flowing from the state constitutional protection or retroactive application.

One obvious possibility is to challenge admission of hearsay statements purportedly made by declarants whose credibility may be suspect. Two specific circumstances suggest the particular value of cross-examination. The first involves co-conspirator declarations which are, of course, typically excluded from the definition of hearsay even though they are clearly out-of-court statements.[504] They

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495. *Id.*

496. *Id.*

497. State v. Earnest (*Earnest II*), 106 N.M. 411, 412, 744 P.2d 539, 540 (1987).

498. Brief for the Defendant/Appellant on Remand from the Supreme Court of the United States at 2–7, *Earnest II*, 106 N.M. 411, 744 P.2d 539 (No. 15,162).

499. *Earnest II*, 106 N.M. at 412, 744 P.2d at 540. In the brief on remand, the author argued vigorously that the state court should consider Earnest's reliance on the New Mexico constitutional confrontation protection as an alternative basis for review. Regardless of what the court may have thought about the quality of briefing, it did not discuss the state constitutional analog to the Sixth Amendment Confrontation Clause in affirming the conviction.

500. Petition for Writ of Habeas Corpus, State v. Earnest, No. CR-82-54-W (N.M. 5th. Jud. Dist. Ct. Aug. 29, 1990).

501. Petition for Writ of Habeas Corpus, State v. Earnest, No. CR-82-54-W (N.M. 5th. Jud. Dist. Ct. Oct. 1, 2004).

502. 128 S. Ct. 1029, 1033 (2008).

503. For a more thorough discussion of *Danforth* and its significance, see J. Thomas Sullivan, Danforth*, Retroactivity and Federalism*, 61 OKLA. L. REV. 425 (2008).

504. For instance, the Federal Rules of Evidence provide that a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

are admissible because the statements of co-conspirators, arguably in furtherance of the conspiracy, are presumably reliable.[505] But they are made by individuals involved in criminal activity, by definition,[506] whose interests may not always reflect an unsophisticated approach to the information they may be conveying in their statements. In *United States v Inadi*, the Supreme Court rejected the argument that cross-examination would afford a substantial test of the reliability of the out-of-court declarations:

> Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.
>
> In addition, the relative positions of the parties will have changed substantially between the time of the statements and the trial. The declarant and the defendant will have changed from partners in an illegal conspiracy to suspects or defendants in a criminal trial, each with information potentially damaging to the other. The declarant himself may be facing indictment or trial, in which case he has little incentive to aid the prosecution, and yet will be equally wary of coming to the aid of his former partners in crime. In that situation, *it is extremely unlikely that in-court testimony will recapture the evidentiary significance of statements made when the conspiracy was operating in full force*.[507]

This analysis, however, disregards the obvious potential for cross-examination to permit jurors to assess the credibility of the out-of-court statement in terms of the declarant's demeanor in court, or his motives to implicate the accused in the conspiracy. When the prosecution intends to use the co-conspirator as a witness at trial and negotiates an agreement or seeks a grant of immunity to compel the testimony, the out-of-court declaration is unnecessary and jurors may make the credibility assessment that they routinely do with regard to the testimony of every live witness.

However, when the prosecution relies on co-conspirator declarations made to a non-compromised witness, such as an undercover officer or informant privy to the conspiracy, jurors must rely on the prosecution's witness in assessing whether the co-conspirator declaration was accurately reported by the witness or even, in fact, ever made. Moreover, there is no opportunity for the defense to test the intent of the declarant because the testifying witness would likely not be able to offer speculation about what the declarant intended when incriminating the defendant, or whether he was truthful in terms of the actual contents of the statement. Just as testimonial statements of accomplices—made after police are aware of the accomplice's involvement—are treated as inherently suspect in the Supreme Court's confrontation jurisprudence,[508] co-conspirator declarations are admissible precisely

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FED. R. EVID. 801(d)(2)(E).

505. United States v. Inadi, 475 U.S. 387, 395 (1986) (holding that co-conspirator declarations are admissible without showing of unavailability).

506. *Id.* ("Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand.").

507. *Id.* at 395 (emphasis added).

508. *See* Lilly v. Virginia, 527 U.S. 116, 131 (1999); Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting) (such statements "have traditionally been viewed with special suspicion"); Lee v. Illinois, 476 U.S.

because it is assumed that they are made in furtherance of the conspiracy and are, therefore, reliable. But this assumption is undeniably naïve or cynical, given the admittedly criminal character of the declarant.

The *Inadi* Court may be correct in concluding that in-court testimony is likely to lose much of the import of the out-of-court declaration. But that difference inures to the benefit of the prosecutor offering the statement without having to produce the declarant to be tested under oath. Given the strong preference for cross-examination in prior New Mexico decisions, it is arguable that admission of co-conspirator declarations based on their presumed reliability should be reconsidered.

The same problem is posed by admission of non-testimonial declarations against penal interest, admitted without the opportunity for cross-examination, based on their presumed reliability. Clearly, the New Mexico Supreme Court has persisted in holding that this exception to the usual exclusion for hearsay satisfies the requirement for a firmly rooted exception to the hearsay rule under state law, even though the Supreme Court in *Lilly* basically rejected this position.[509] As with co-conspirator declarations, the character of the declarant, who by definition admits his own involvement in criminal activity, should caution against the naïve or cynical assumption that the statement will always be reliable and not the product of the declarant's interest in implicating others in the criminal activity whether they were actually involved or not.

The answer to the problems posed by admitting co-conspirator declarations and non-testimonial declarations against penal interest and the problems of assessing the accuracy of any incriminating allegation and the general credibility of the declarant and testifying witness may be addressed by considering the availability of the declarant. Under either theory of admissibility, the declarant is unlikely to be available to be called by the defense because of his ability to assert his Fifth Amendment right to remain silent.[510] The co-conspirator declaration theory avoids this concern by making unavailability irrelevant to the admissibility determination, while statements offered as declarations against penal interest do require a showing of unavailability.[511] Of course, if the prosecutor negotiates for the declarant's testimony at trial, or if the declarant is forced to testify under a grant of immunity sought by the prosecution, the declarant will be subjected to cross-examination and any confrontation concern arising from the lack of cross-examination will be obviated.

The simple way to ensure that the cross-examination option remains available to the defense, even upon admission of out-of-court declarations, is to recognize a right of the defendant to force the prosecution to produce the declarant and make him available by seeking an immunity order from the trial court.[512] New Mexico

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530, 541 (1986); Bruton v. United States, 391 U.S. 123, 136 (1968) (such statements are "inevitably suspect").

509. *See* State v. Desnoyers, 2002-NMSC-031, ¶¶ 8–10, 55 P.3d 968, 974–75; State v. Martinez-Rodriguez, 2001-NMSC-029, ¶ 27, 33 P.3d 267, 278 ("We are unpersuaded by Defendant's argument and reaffirm that, in New Mexico, a statement against penal interest within the meaning of Rule 11-804(B)(3) is a firmly rooted exception to the hearsay rule."); State v. Gonzales, 1999-NMSC-033, ¶ 36, 989 P.2d 419, 427 (rejecting *Lilly* plurality's discrediting of penal interest exception as "firmly rooted").

510. *See Inadi*, 475 U.S. at 396.

511. Rule 11-804(B)(3) NMRA.

512. A prosecutor interested in forcing a reluctant witness to testify may move the trial court for an order

courts have had occasion to consider whether circumstances will warrant a judicial expansion of the immunity option that is almost always limited to the prosecution.[513] The New Mexico courts had consistently rejected arguments that due process requires recognition of a right for defendants to seek compelled immunity orders from the trial court,[514] except when the prosecution has engaged in deliberate misconduct,[515] until the supreme court's recent and rather dramatic reversal of its position in *State v. Belanger*.[516]

In *Belanger*, the court reassessed its prior rejection of court-ordered immunity based on a defense request in an extensive and well-reasoned opinion in which the court explained in depth the controlling, but not exclusive, authority of the state courts in matters of judicial procedure.[517] In terms of the power to order immunity over the objections of a witness asserting his right to remain silent, the court noted that in New Mexico law, the authority to order the witness to testify was grounded in judicial rule-making, while on the federal level, the authority is provided to the courts by Congress.[518]

Most courts, like the New Mexico courts prior to *Belanger*, that have considered the option of authorizing the trial court to immunize a witness whose testimony may be critical to the defense have been extremely reluctant to recognize any such right.[519] The significant exception had always been the Third Circuit, which recognized that in some cases the defense should be entitled to compel the prosecution to seek an immunity order to force a witness to testify who would otherwise refuse.[520] But without the option, defendants are placed in an inherently unfair position in many trials. The State has almost unlimited power to coerce a witness through the immunity process, quite apart from the other positive incentives that are available to induce reluctant witnesses to testify. When it relies on uncrossed out-of-court statements under either the co-conspirator or penal interest

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granting use immunity for the witness's testimony. *See, e.g.*, State v. Cheadle, 101 N.M. 282, 286–87, 681 P.2d 708, 712–13 (1983), *overruled on other grounds by* State v. Belanger, 2009-NMSC-025, 210 P.3d 783 (holding that under New Mexico and federal law, prosecutor is afforded the option of seeking immunity order for reluctant witness claiming privilege against self-incrimination). Once immunity is conferred in response to assertion of the Fifth Amendment privilege against self-incrimination, which initially insulates a potential defendant from being forced to testify when their truthful testimony may serve to inculpate them, the trial court is empowered to order the immunized witness to testify. Kastigar v. United States, 406 U.S. 441 (1972). Once the witness testifies under immunity order, the burden is placed on the prosecution to prove that it did not use the immunized testimony or any evidence derived from the immunized testimony as a basis for then prosecuting the witness. United States v. North, 910 F.2d 843 (D.C. Cir. 1990). Failure to comply may result in contempt proceedings. NMSA 1978, § 31-6-15(A) (1979); Shillitani v. United States, 384 U.S. 364 (1966).

513. *E.g.*, State v. Baca, 1997-NMSC-045, 946 P.2d 1066; *Cheadle*, 101 N.M. 282, 681 P.2d 708; State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982), *overruled by Belanger*, 2009-NMSC-025, 210 P.3d 783.

514. *See* State v. Belanger, 2007-NMCA-143, ¶ 6, 170 P.3d at 531, *rev'd*, 2009-NMSC-025, 210 P.3d 783.

515. *See* Sanchez, 98 N.M. at 432–33, 649 P.2d at 500–01 (holding that absent a showing of prosecutorial misconduct, the "courts have no power to independently fashion witness use immunity under the guise of due process").

516. 2009-NMSC-025, 210 P.3d 783.

517. *Id.* ¶¶ 31–35, 210 P.3d at 790–92.

518. *Id.* ¶¶ 22–30, 35, 210 P.3d at 789–91, 792.

519. *See* United States v. Thevis, 665 F.2d 616 (5th Cir. 1982); People v. Adams, 423 N.E.2d 379, 381–82 (N.Y. 1981). In *Autry v. McKaskle*, 465 U.S. 1085 (1984), the Court denied certiorari in a death penalty case in which one issue raised was the defendant's need to have a witness testify under grant of immunity. Justice Marshall dissented, noting a conflict between the circuits on this issue.

520. Gov't of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980).

theories, the defense is handicapped in its ability to at least attempt to test the reliability of the statement or declarant, or both, through cross-examination before the jury.

Belanger not only strengthens the Confrontation right, it arguably does so in two different ways. First, it affords the defense a powerful, although not unlimited tool, for presenting evidence that also implicates compulsory process protection because it affords the defendant the option for requiring testimony from reluctant witnesses. And second, it suggests that the prosecution must use the immunity power to present hearsay declarants whose statements may be non-custodial and, thus, not subject to the direct command of *Crawford*, for live testimony subject to cross-examination. Because this live testimony is most likely to be presented before the trial jury, it enhances the traditional protection afforded by face-to-face confrontation at trial.

In *Coy v. Iowa*,[521] Justice Scalia wrote for the majority in reiterating the constitutional preference for face-to-face confrontation between the accused and witnesses against him in the presence of the jury: "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[522] Even the *Roberts* Court conceded the constitutional preference for face-to-face confrontation.[523]

Given the power of cross-examination to afford jurors the ability to accurately assess the evidence the prosecution offers in support of the defendant's conviction, New Mexico lawyers should consider arguing for a reassessment of the state constitution's confrontation protection afforded by article II, section 14 in light of the state's traditional jurisprudence equating confrontation with cross-examination.

4. Effective Assistance of Counsel

Although the New Mexico courts have yet to apply similar analysis to the effective assistance of counsel guarantee included in the state constitution,[524] the supreme court left open the question of whether a New Mexico defendant might be entitled to greater protection than under the Sixth Amendment[525] counterpart in *Patterson v. LeMaster*.[526] New Mexico courts have consistently used the Supreme Court's Sixth Amendment test for counsel's effectiveness set out in *Strickland v.*

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521. 487 U.S. 1012 (1988).

522. *Id.* at 1016. *Coy* would appear to repudiate, by implication, the New Mexico Supreme Court's rationale in *State v. Martinez*, 99 N.M. 353, 356, 658 P.2d 428, 431 (1983), in holding that the jury's opportunity to observe the demeanor of the testifying witness is not part of the confrontation guarantee.

523. "The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial.…" Ohio v. Roberts, 448 U.S. 56, 62 (1980) (citing California v. Green, 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause.")).

524. The New Mexico Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel.…" N.M. CONST. art II, § 14.

525. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right…to have Assistance of counsel for his defence." In *State v. Woodruff*, 1997-NMSC-061, 951 P.2d 605, the court rejected the defendant's argument that the New Mexico Constitution affords broader protection for the right to counsel than that provided by the Sixth Amendment. *Id.* ¶ 22, 951 P.2d at 611 ("[W]e conclude that we have no basis for expanding the protection provided by the New Mexico Constitution beyond that provided, on these facts, by the federal constitution.").

526. 2001-NMSC-013, 21 P.3d 1032.

Washington,[527] which requires proof that counsel performed defectively and that as a consequence, there was a reasonable probability of a different outcome but for counsel's defective performance.[528]

Since New Mexico courts have applied the *Strickland* test to a wide range of claims of defective performance,[529] one might question why greater protection should be recognized for the performance of counsel than that afforded by *Strickland*, which has been extended to cover claims of defective performance arising during sentencing[530] and on appeal.[531] But, in fact, state courts,[532] including New Mexico courts, have already been enforcing a more rigorous test for performance of counsel in select situations than that recognized, at this point, as part of the Sixth Amendment guarantee.

For example, in *State v. Paredez*,[533] the state supreme court found that counsel rendered ineffective assistance in failing to advise a defendant that he would almost certainly be deported when he entered a particular plea, and as a result the defendant must be allowed to withdraw his plea as being involuntary and unknowing.[534] The court noted that no federal court to have considered this question had concluded that counsel's effectiveness in representation would be undermined by failure to advise a client of immigration consequences of a conviction obtained on plea of guilty.[535] The Supreme Court has now granted certiorari in *Padilla v. Kentucky* to consider the same issue as a matter of Sixth Amendment effective assistance.[536]

Similarly, in *State v. Edwards*,[537] a sex crimes case, the court of appeals held that defense counsel's performance was deficient where he failed to advise the defendant that a plea of guilty or no contest would result in mandatory registration

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527. 466 U.S. 668, 687 (1984).

528. *See* State v. Hester, 1999-NMSC-020, ¶ 9, 979 P.2d 729, 731; State v. Baca, 1997-NMSC-045, ¶ 20, 946 P.2d 1066, 1070–71; State v. Gonzales, 113 N.M. 221, 229–30, 824 P.2d 1023, 1031–32 (1992).

529. For instance, in *Duncan v. Kerby*, 115 N.M. 344, 349, 851 P.2d 466, 471 (1993), the court held that counsel's failure to develop and give notice of an alibi defense and call supporting witnesses constituted ineffective assistance. Similarly, in *State v. Crislip* the court held that a failure to investigate and call a key witness constituted defective performance. 109 N.M. 351, 357, 785 P.2d 262, 268 (Ct. App. 1989), *overruled on other grounds by* Santillanes v. State, 115 N.M. 215, 215–20, 849 P.2d 358, 358–63 (1993).

530. Glover v. United States, 531 U.S. 198 (2001).

531. Smith v. Robbins, 528 U.S. 259, 285–88 (2000).

532. *See, e.g.*, People v. Henry, 744 N.E.2d 112, 113–14 (N.Y. 2000) (rejecting *Strickland* standard in favor of "meaningful representation" standard).

533. 2004-NMSC-036, 101 P.3d 799. For in depth analysis of *Paredez*, see Tyler Atkins, Note, *Immigration Consequences of Guilty Pleas: What* State v. Paredez *Means to New Mexico Criminal Defendants and Defense Attorneys*, 36 N.M. L. REV. 603 (2006).

534. *Paredez*, 2004-NMSC-036, ¶¶ 12–16, 101 P.3d at 803–04.

535. *Id.* ¶ 9, 101 P.3d at 803. The court noted:

> Neither the Supreme Court nor the federal circuits have held that the trial court must inform defendants of all possible consequences flowing from a guilty plea. The trial court only has a duty to ensure that the defendant understands the "direct" consequences of the plea but is under no duty to advise the defendant of the plea's "collateral" consequences.

Id. (citing United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)). The court also noted, "Each federal circuit that has directly considered the issue has held that deportation is a collateral consequence of pleading guilty so that the trial court is not required to inform the defendant of the immigration consequences of his or her plea." *Id.* (citations omitted).

536. 253 S.W.3d 482 (Ky. 2008), *cert. granted*, 129 S. Ct. 1317 (2009).

537. 2007-NMCA-043, 157 P.3d 56.

as a sex offender[538] under the New Mexico Sex Offender Registration and Notification Act.[539] *Paredez* and *Edwards* demonstrate the more aggressive posture taken by the state courts with respect to defining the parameters of effective representation in terms of counsel's duties to ensure that the client's plea of guilty is knowingly and intelligently made. However, both decisions rest on Sixth Amendment, rather than New Mexico constitutional protection afforded by article II, section 14.[540]

The argument should be advanced, however, that New Mexico defense counsel can only represent their clients effectively if they are properly informed and use claims recognized under state law. Thus, the very existence of a body of New Mexico constitutional law creates an expectation that counsel will utilize the existing body of law to protect the client's rights. Moreover, in light of the interest of New Mexico courts in the continuing development of state constitutional law, counsel should comply with the procedure established in *Gomez* and other state constitutional law decisions in raising and arguing novel claims asserting more favorable protection for their clients under the state constitution than that otherwise afforded by federal constitutional protections. While failure to do so may not necessarily result in deficient performance or incompetence, New Mexico state constitutional law decisions suggest a dual responsibility: defense counsel should make creative legal arguments based on the state constitution and ensure that they are properly preserved for appellate review.

Arguably, counsel's failure to argue both may not demonstrate Sixth Amendment violations in terms of defective performance because they do not arise from failure to assert claims protected by the Federal Constitution.[541] This is almost certainly the case with regard to a duty to raise new issues, even if a failure to rely on existing state constitutional law does implicate the Sixth Amendment protection.[542] Further, appellate counsel might be expected to assert claims of fundamental error for claims

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538. *Id.* ¶ 31, 157 P.3d at 64–65 (distinguishing, by implication, State v. Moore, 2004-NMCA-035, ¶ 24, 86 P.3d 635, 643 (holding that a guilty plea is not rendered involuntary or unknowing simply because trial court did not admonish defendant that mandatory registration as sex offender would be required upon conviction)).

539. NMSA 1978, § 29-11A-4(A), (C) (2005).

540. *Paredez*, 2004-NMSC-036, ¶¶ 13–16, 19–20, 101 P.3d at 804, 805; *Edwards*, 2007-NMCA-043, ¶¶ 20–21, 157 P.3d at 62.

541. For instance, the second circuit has addressed the question of whether the Sixth Amendment effective assistance guarantee encompasses the duty to assert state law claims arising from more expansive interpretation of state constitutional protections. *See* Sellan v. Kuhlman, 261 F.3d 303, 309–10 (2d Cir. 2001) (petitioner may claim ineffective assistance of appellate counsel based on counsel's failure to raise state law claim on appeal); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994) ("The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim."); Claudio v. Scully, 982 F.2d 798, 803 n.5 (2d Cir. 1992) ("The federal constitutional right to effective assistance of counsel may be violated by an attorney's failure to raise a meritorious state law claim or defense.").

542. By analogy, in *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986), the Court held that the Sixth Amendment effective assistance guarantee included the duty to litigate constitutional claims that would otherwise not be cognizable in a federal habeas action. Thus, counsel's failure to appeal the state trial court's denial of a suppression motion permitted the Fourth Amendment issue to be evaluated on habeas review, even though a direct Fourth Amendment suppression claim relating to the seizure would have been barred under *Stone v. Powell*, 428 U.S. 465 (1976). *Kimmelman*, 477 U.S. at 378. The seventh circuit employed similar reasoning in *Holman v. Page*, 95 F.3d 481, 482–83 (7th Cir. 1996).

not preserved by trial counsel, at least for those fundamental errors previously identified in the opinions of the New Mexico appellate courts.[543]

5. Cruel and Unusual Punishment

In *State v. Rueda*,[544] the defendant argued that the enhanced sentence she suffered as a habitual criminal violated federal[545] and state constitutional protections[546] against the infliction of cruel and unusual punishment. Rueda's punishment was enhanced to eight years as a result of her multiple convictions for shoplifting, at least one of which was over fifteen years old.[547] Although habitual sentencing had been upheld by the state supreme court,[548] the *Rueda* court noted that "not every sentence will withstand constitutional scrutiny if it is found to contravene rights guaranteed under either the federal or state constitution."[549] However, the court rejected Rueda's argument based on her five felony-shoplifting convictions.[550]

What is particularly important in *Rueda* is that the court also rejected the State's argument that it was barred from reviewing the challenge under the state constitution. The court emphatically responded: "We reject the State's assertion that a defendant may not invoke a proportionality review under Article II, Section 13 of the New Mexico State Constitution."[551] The court further rejected the State's argument that proportionality review was constitutionally precluded in non-capital cases, examining the Supreme Court's decisions in *Solem v. Helm*[552] and *Harmelin v. Michigan*,[553] in concluding that even as a matter of Eighth Amendment interpretation, proportionality review remained viable for consideration of non-capital sentencing schemes. Despite the fact that the Court overruled *Solem* in *Harmelin*, rejecting its endorsement of broad proportionality review,[554] the *Rueda* court adopted the Fifth Circuit's position in *McGruder v. Puckett*,[555] where that court concluded:

> By applying a head-count analysis, we find that seven members of the Court supported a continued Eighth Amendment guaranty against disproportional sentences. Only four justices, however, supported the continued application of all three factors in *Solem,* and five justices rejected it. Thus, this much is clear: disproportionality survives; *Solem* does not. Only Justice Kennedy's opinion reflects that view. It is to his opinion, therefore, that we turn for direction.

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543. *See supra* text accompanying notes 49–60.
544. 1999-NMCA-033, 975 P.2d 351.
545. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
546. N.M. CONST. art. II, § 13. The entirety of the constitutional protection is this reference: "nor cruel and unusual punishment inflicted." The court in *Rueda* recognized the identical wording of the state and federal constitutional provisions with regard to this particular concern. *Rueda*, 1999-NMCA-033, ¶ 8, 975 P.2d at 353.
547. *Rueda*, 1999-NMCA-033, ¶ 16, 975 P.2d at 354.
548. State v. Davis, 104 N.M. 229, 230, 719 P.2d 807, 808 (1986).
549. *Rueda*, 1999-NMCA-033, ¶ 10, 975 P.2d at 353.
550. *Id.* ¶ 16, 975 P.2d at 354.
551. *Id.* ¶ 13, 975 P.2d at 354.
552. 463 U.S. 277, 292 (1983).
553. 501 U.S. 957, 1001 (1991).
554. *Id.* at 960–67.
555. 954 F.2d 313 (5th Cir. 1992).

> Accordingly, we will initially make a threshold comparison of the gravity of [the defendant's] offenses against the severity of his sentence.[556]

Although recognizing that proportionality challenges will only rarely succeed, the *Rueda* court also noted that prior challenges based on the cruel and unusual punishment protection had been advanced in state litigation.[557]

Rueda was unsuccessful in challenging her own sentence,[558] but the court's opinion serves to leave the door open to sentencing challenges under the state constitution, precisely because it rejects the State's argument that it is barred from reviewing constitutional challenges to sentences imposed by the Legislature. In addition, in *Montoya v. Ulibarri*, the court held that conviction and incarceration of an innocent defendant violates the state constitutional prohibition of "cruel and unusual punishment,"[559] suggesting that the state constitution may provide an additional basis for challenging convictions.

6. Jury Service, and Freedom of Religion

The New Mexico Constitution provides a much more detailed protection for religious freedom than the rather brief reference in the First Amendment to the United States Constitution, which provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.…"[560] In contrast, article II, section 11 of the state constitution provides:

> Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.[561]

The protection afforded the individual in matters of faith is far more comprehensive than that literally expressed in the First Amendment and it may offer a very important option for trial counsel in New Mexico cases based on the religious preference of prospective jurors and the use of peremptory challenges.

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556. *Id.* at 316. The Fifth Circuit then explained: "Only if we infer that the sentence is grossly disproportionate to the offense will we then consider the remaining factors of the *Solem* test and compare the sentence received to (1) sentences for similar crimes in the same jurisdiction and (2) sentences for the same crime in other jurisdictions." *Id.*

557. State v. Rueda, 1999-NMCA-033, ¶¶ 10–11, 14, 975 P.2d 351, 353–54. The court cited *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 22, 915 P.2d 318, 324 (reviewing whether sentencing child as adult pursuant to youthful offender statute constituted cruel and unusual punishment), and *State v. Arrington*, 115 N.M. 559, 561, 855 P.2d 133, 135 (Ct. App. 1993) (holding a "mandatory sentence is still subject to constitutional scrutiny"). It also noted that Arrington's successful challenge was predicated on an allegation of inadequate medical care available for the defendant in prison, rather than the punishment authorized by the Legislature and that, subsequently, Arrington's sentence had been upheld where the evidence showed that medical care was, in fact, available at the state's penitentiary for women. State v. Arrington, 120 N.M. 54, 897 P.2d 241 (Ct. App. 1995).

558. *Rueda*, 1999-NMCA-033, ¶ 17, 975 P.2d at 355.

559. Montoya v. Ulibarri, 2007-NMSC-035, ¶ 24, 163 P.3d 476, 484.

560. U.S. CONST. amend. I.

561. N.M. CONST. art. II, § 11.

The constitutional principle that deserves consideration involves the use of peremptory challenges by the prosecution to exclude members of cognizable groups from jury service. In *Batson v. Kentucky*,[562] the Court reaffirmed the basic right of citizens to participate in the civic event of jury service[563] and, by extension, recognized an implicit right of litigants not to be subjected to trial before juries from which minority citizens had been excluded through discriminatory use of peremptories.[564] The *Batson* principle was extended to preclude discriminatory use of peremptories against prospective jurors based on gender in *J.E.B. v. Alabama ex rel T.B.*[565] The prohibition against discriminatory use of peremptories is now fully protective of the rights of the criminal defendant[566] and indeed, any party in criminal[567] or civil litigation.[568]

However, the Supreme Court has not extended the *Batson* principle to the exercise of peremptories based upon the religious beliefs or affiliation of a prospective juror, although the issue was placed directly before the Court in *Davis v. Minnesota*,[569] drawing a sharp dissent to the denial of certiorari from Justice Thomas,[570] joined by Justice Scalia. The issue of whether peremptories can be directed at prospective jurors on the basis of religious belief or affiliation thus remains unresolved as a matter of federal constitutional law.[571]

There are two provisions in the New Mexico Constitution that would appear to preclude exercise of peremptory challenges based on the religious belief or affiliation of a prospective juror. The relevant part of article II, section 11 provides: "no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship."[572] This language

562. 476 U.S. 79, 89 (1986).

563. In *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879) the Court held that the statutory exclusion of African Americans from jury service is unconstitutional. The discriminatory exclusion of minority jurors through exercise of peremptory challenges was, similarly, held unconstitutional in *Swain v. Alabama*, 380 U.S. 202, 222–24 (1965).

564. *Batson*, 476 U.S. at 85–86; Powers v. Ohio, 499 U.S. 400 (1991) (holding that claim of discriminatory use of peremptories to exclude black jurors may be made by white defendant in criminal trial).

565. 511 U.S. 127, 135, 137 n.6 (1994).

566. New Mexico took steps to provide more complete protection against discriminatory use of peremptories than that afforded by the Supreme Court's requirement in *Swain*. *See supra* notes 101–06 and accompanying text. Under *Swain*, the defendant must have been able to demonstrate a pattern of discriminatory strikes by the prosecutor in order to obtain relief. *Batson* supplanted the *Swain* standard for demonstrating discriminatory use of peremptories by permitting the defendant to challenge the state's use of peremptories in an individual trial. *Batson*, 476 U.S. at 92–93.

567. Georgia v. McCollum, 505 U.S. 42 (1992) (extending *Batson* to prohibit discriminatory use of peremptory strikes by counsel for criminal defendant).

568. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending *Batson* to prohibit use of premptories in a discriminatory manner by counsel in civil litigation).

569. 511 U.S. 1115 (1994).

570. *Id.* (Thomas, J., dissenting). Justice Thomas noted that at trial the prosecutor had offered the explanation for his exercise of the strike as based on his experience that "Jahovah Witness [sic] are reluctant to exercise authority over their fellow human beings in this Court House." *Id.* (citing Davis v. State, 504 N.W.2d 767, 768 (Minn. 1993)).

571. The Texas courts, for instance, have taken the position that the constitutional prohibition against discriminatory exercise of peremptory challenges does not extend to strikes based on a juror's religious beliefs. *See* Casarez v. State, 913 S.W.2d 468 (Tex. Crim. App. 1995) (op. on rehearing). The rationale is that religious belief involves a personal decision and that the particular tenets of the religious belief adopted by the prospective juror may afford counsel a rational basis for exercising a strike against that juror.

572. N.M. CONST. art. II, § 11.

clearly protects jury service as a component of citizenship and is reinforced by another state constitutional provision, article VII, section 3, which provides, in pertinent part: "[t]he right of any citizen of the [S]tate to…sit upon juries[] shall never be restricted, abridged or impaired on account of religion…."[573]

In a capital prosecution, *State v. Clark*,[574] the defendant argued that exclusion of jurors based on religious opposition to the death penalty violated protection of religious freedom afforded by the state constitution. The court concluded that jurors who were excluded from service on the trial jury were disqualified not on the basis of religion, but due to their inability "to view the proceedings impartially and perform their duties in accordance with the juror's oath, not because of their religious opinion or affiliation."[575]

The *Clark* court's holding is consistent with federal constitutional policy articulated in *Witherspoon v. Illinois*.[576] *Witherspoon*, taken with the Court's rejection of the argument that exclusion of capital punishment opponents produces conviction-prone juries in *Lockhart v. McCree*,[577] certainly supports the court's position. The strict limitation imposed by *Witherspoon*, however, permits exclusion of those jurors who cannot vote fairly on the evidence presented at either the guilt/innocence or punishment phases of trial. It does not authorize exclusion of prospective jurors who may have grave misgivings about capital punishment, but who profess that they remain able to consider the evidence without predisposition and can return a verdict based on the evidence presented, rather than skewing their perceptions of the evidence to ensure that the death sentence will not be imposed.[578]

Repeal of the death penalty by the state legislature[579] effectively moots reconsideration of *Clark*, of course. However, the broader issue regarding use of peremptory strikes to exclude prospective jurors on the basis of religious belief or preference remains an unsettled question under both the United States and New Mexico Constitutions.

CONCLUSIONS

The requirement of Rule 101 of the Rules of Professional Responsibility, that a lawyer should "provide competent representation," has certain important state constitutional law implications for New Mexico criminal lawyers. In order to provide competent representation in New Mexico criminal proceedings, the requirement that counsel act with "legal knowledge, skill, thoroughness and preparation reasonably necessary" imposes the duty to fully and accurately advise the client about alternative litigation tactics and strategies and to protect the client's legal rights. This requirement also means that counsel must be familiar with New

573. *Id.* art. VIII, § 3.
574. 1999-NMSC-035, 990 P.2d 793.
575. *Id.* ¶ 16, 990 P.2d at 803.
576. 391 U.S. 510, 517–18 (1968).
577. 476 U.S. 162, 173–77 (1986).
578. Adams v. Texas, 448 U.S. 38, 46–49 (1980) (holding that jurors opposed to capital punishment, but capable of responding fairly and directly to punishment interrogatories used to determine punishment cannot be disqualified under *Witherspoon*).
579. *See* Associated Press, "Death Penalty Is Repealed in New Mexico," N.Y. TIMES, Mar. 18, 2009, *available at* http://www.nytimes.com/2009/03/19/us/19execute.html (last visited Oct. 1, 2009).

Mexico state constitutional precedent and the process for preserving and asserting novel state law claims.

The ethical requirement that criminal defense counsel approach representation with thoroughness and preparation suggests that counsel engage in a continual learning process about the developing state constitutional law and then develop a strategy for using state constitutional rights on behalf of the accused.

The burden on New Mexico criminal lawyers to understand and apply state constitutional protections is made all the more important by the aggressive approach taken by the state's appellate courts in evaluating claims for constitutional interpretation offering more expansive protections than those afforded by comparable federal constitutional provisions. Because the courts have engaged in significant interpretive activity and clearly indicated preservation requirements for assertion of existing state constitutional rules and arguing for expansive interpretations of other provisions, the obligation to use existing state constitutional protections should clearly be viewed as part of the guarantee of effective assistance under both the state and Federal Constitutions. Further, the history of the state courts' activism and delineation of proper approaches with regard to new claims or new applications to analogous factual contexts virtually invites creative litigation in the future. As the Vermont court reminds us, that creativity reflects the legal imagination that will continue to constitute our finest jurisprudence.[580]

580. State v. Jewett, 500 A.2d 233, 238 (Vt. 1985).