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New Mexico State Constitutional Law Comes of Age

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> Our own constitutional law has matured and we today adopt preservation requirements that reflect that fact.
>
> Justice Richard Ransom[1]

The 1997 New Mexico Supreme Court decision in *State v. Gomez*[2] reflects a maturation in New Mexico's independent state constitutional rights jurisprudence. The opinion, written by Justice Ransom for a unanimous court, can be classified as a "teaching opinion,"[3] in the sense that it provides a variety of lessons for the bench and bar of New Mexico, as well as those around the country who are interested in state constitutional law. The opinion provides clear, flexible guidance for both lower courts and counsel, in the form of important *substantive* state constitutional law reasoning and useful *procedural* guidance for the raising of state constitutional claims and the preservation of such claims on appeal.

Substantively, *Gomez*, which held that an automobile could not be searched without a warrant unless there were exigent circumstances, built on earlier independent state constitutional jurisprudence in New Mexico. Specifically, Justice Ransom analogized the facts of *Gomez* to those in *Campos v. State*,[4] which prohibited warrantless arrests in the absence of exigent circumstances.

Procedurally, the *Gomez* court addressed the sequential methodology issue in resolving state constitutional rights claims in areas where there are also potentially applicable federal constitutional provisions.[5] The court specifically adopted the "interstitial" approach[6] instead of the "primacy" approach[7] because:

> [w]hen federal protections are extensive and well-articulated, state court decisionmaking that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide,

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1. State v. Gomez, 122 N.M. 777, 786, 932 P.2d 1,10 (1997). As this article went to press, Chief Justice Gene Franchini published *New Mexico Independent Adjudication*, 61 ALBANY L. REV. 1495 (1998), which includes a discussion of *Gomez*.

2. *Id.* For an excellent, early analysis of *Gomez*, see David Henderson, *Setting the Ground Rules for a Conversation in Progress: Part I*, 3 N.M. B.J., July-Aug. 1997, at 42; *Part II*, 3 N.M. B.J., Sept.-Oct. 1997, at 33.

3. *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1019 (1997) (describing "teaching opinion" as "alerting the bar and bench to the possibilities of independent state constitutional analysis and educating them in the techniques of making state constitutional arguments.").

4. 117 N.M. 155, 870 P.2d 117 (1994).

5. *Cf.* Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 TEMP. L. REV. 1003, 1004 n.5 (1994) ("The term 'potentially applicable state constitutional provisions' is superior to terms such as 'analogous,' 'related,' or 'parallel,' which imply a subordinate status for the state constitution.").

6. *See* Williams, *supra* note 3, at 1018.

7. *See id.*

> particularly when parallel federal issues have been exhaustively discussed by the United States Supreme Court and commentators.[8]

Unlike many courts which utilize the interstitial approach, however, the *Gomez* court specifically rejected use of the "criteria approach":[9]

> We decline to follow those states that require litigants to address in the trial court specified criteria for departing from federal interpretation of the federal counterpart. However, we note that several state courts have outlined a number of criteria that trial counsel in New Mexico might profitably consult in framing state constitutional arguments.[10]

Gomez sets forth explicit instructions for lawyers and lower court judges with respect to the procedural questions concerning the raising, and preservation, of state constitutional claims in New Mexico.[11] Specifically, Justice Ransom addressed the problem of preservation of state constitutional claims on appeal. The state argued that Gomez's state constitutional claim was not preserved at trial "because of his failure to cite to the specific cases in which Article II, Section 10 was interpreted to provide broader protection than the Fourth Amendment."[12] The defendant resisted this approach:

> He contends that the Court of Appeals created for state constitutional claims a "special preservation rule" that treats the New Mexico Constitution as a "poor cousin" of the United States Constitution. Under this special rule, arguments in the trial court sufficed to preserve the Fourth Amendment issue but failed to preserve the broader-protection issue. Gomez contends this frustrates the role of New Mexico appellate courts in interpreting the state constitution and diminishes the force of decisions interpreting the state constitution independently. Gomez argues that the requirements for preserving a state constitutional claim should be identical to those for preserving a federal constitutional claim.[13]

Justice Ransom noted that the rules for preservation of claims had been developed during the "lockstep" era, before the rediscovery of state constitutional rights.[14] Recognizing that the rule concerning preservation of rights limits parties' powers, not the courts',[15] he held that where a litigant raises a claim based on a state constitutional provision analogous to a federal constitutional provision:

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8. State v. Gomez, 122 N.M. 777, 783, 932 P.2d 1, 7 (1997) (quoting *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)).

9. *See* Williams, *supra* note 3, at 1021.

10. *Gomez*, 122 N.M. at 784 n.3, 932 P.2d at 8 n.3. "Under this methodology, the state supreme court, in what seems like a teaching opinion, sets forth a list of circumstances (criteria or factors) under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution." Williams, *supra* note 3, at 1021.

11. By contrast, courts in other states have struggled with these procedural issues for years. *See* Williams, *supra* note 3, at 1027-28, 1028 n.71, 1037-39.

12. *Gomez*, 122 N.M. at 781, 932 P.2d at 5.

13. *Id.* at 781-82, 932 P.2d at 5-6.

14. *See id.* at 782, 932 P.2d at 6.

15. *See id.* at 782 n.2, 932 P.2d at 6 n.2.

> [T]he requirements for preserving the claim for appellate review depend on current New Mexico precedent construing that state constitutional provision. If established precedent construes the provision to provide more protection than its federal counterpart, the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue. This is no more than is required of litigants asserting a right under the federal constitution, a federal statute, a state statute, or common law. . . .
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> . . . 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. This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue.[16]

Justice Ransom explained:

> 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.[17]

One might reasonably ask what the building blocks were that led to the *Gomez* decision. The decision seems to have drawn on the lessons, and is the logical outgrowth, of the first generation of the "New Judicial Federalism," both in New Mexico and nationally.[18] It both consolidated earlier learning and broke new ground.

The field of criminal procedure has in many ways provided the driving force behind the "New Judicial Federalism," as state courts have exercised the freedom to disagree with, or at least to consider reaching a different result from, United States Supreme Court decisions thought by many not to be sufficiently protective of defendants' rights. As Jennifer Friesen has pointed out, it is "[n]o accident that

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16. *Id.* at 784, 932 P.2d at 8. In footnote 3 Justice Ransom rejected the criteria approach. *See id.* at 784 n.3, 932 P.2d at 8 n.3. *See supra* note 10 and accompanying text.

17. *Id.* at 786, 932 P.2d at 10 (footnote omitted). Justice Ransom noted, in footnote 4, that even if the search and seizure claim had not been properly preserved, the court could reach it because it was a fundamental right. *See id.* at 786 n.4, 932 P.2d at 10 n.4.

18. For consideration of this first generation at the national level, *see* Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

the best-publicized uses of state constitutions have been as defenses to criminal . . . liability. . . . Appellate criminal cases applying state constitutions are plentiful, in large part because attorneys are paid to file and brief them."[19] Further, asserting state constitutional criminal procedure claims provides the potential opportunity to "evade" more limited holdings of the United States Supreme Court under the federal Constitution.[20] On the other side, the prosecution must understand state constitutional law intelligently to resist and effectively defend against reliance on state constitutional arguments.

As early as 1976, the New Mexico Supreme Court made the following statement:

> We [consider Article II, § 13 of the New Mexico Constitution] as the ultimate arbiter of the law of New Mexico. 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, "unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."[21]

This occurred a year before Justice Brennan's famous 1977 *Harvard Law Review* article[22] which is generally credited as the beginning of the "New Judicial Federalism."[23] The 1976 pronouncement provides some of the underpinning for a decision like *Gomez*. However, similar sentiments appeared in New Mexico law even earlier.

In 1967, the New Mexico Supreme Court had recognized that even if a warrantless arrest were valid under the federal Constitution, it "must still be tested by New Mexico standards." Nevertheless, upon analysis, the court found that there was "nothing in New Mexico cases which vitiates the validity of the arrest[.]"[24]

Following this, in 1975, the New Mexico Supreme Court struck down the automobile guest statute[25] as violative of state constitutional equal protection principles.[26] Additionally, in 1988, the New Mexico Supreme Court struck down the $50,000 damage cap of the Dramshop Act.[27] Although initially concluding that the tests for equal protection analysis were essentially the same under Federal and New Mexico constitutional law,[28] the court relied on its 1975 automobile guest statute

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19. Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1270 (1985). *See generally*, BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW (1995).

20. *See* Donald E. Wilkes, Jr., *More On the New Federalism In Criminal Procedure*, 63 KY. L.J. 873, 873 n.2 (1975).

21. State *ex rel.* Serna v. Hodges, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976) (quoting People v. Brisendine, 531 P.2d 1099, 1104 (Cal. 1975)), *overruled on other grounds by* State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

22. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

23. Williams, *supra* note 18, at xv.

24. State v. Deltenre, 77 N.M. 497, 501, 424 P.2d 782, 786 (1966), *overruled on other grounds by* State v. Martinez, 94 N.M. 436, 612 P.2d 228 (1980).

25. *See* N.M. STAT. ANN. § 64-24-1 (Repl. Vol. 1972) (omitted from 1978 recompilation after being held unconstitutional as noted in N.M. STAT. ANN. § 66-5-101 to -102 (Repl. Pamp. 1994) compiler's notes).

26. *See* McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975).

27. *See* Richardson v. Carnegie Library Restaurant, Inc., 107 N.M. 688, 763 P.2d 1153 (1988).

28. *See id.* at 1157-58.

case,[29] and admitted that "[a]lthough we have referred to the Supreme Court's use of the third, intermediate standard of review . . . on occasion we have muddied the constitutional waters in New Mexico by interchangeably using the rational basis and intermediate tests as if they were identical."[30] The court went on to clarify the problem, concluding that "[t]he test might better be stated as one assuring that classifications are based on *real* differences bearing a rational and proper relationship to the classification."[31] The court cited to several out-of-state cases invalidating damage caps under state constitutions,[32] and concluded:

> It is clear from the foregoing discussion that the limitation of a full tort recovery at issue here under Section 41-11-1(I) implicates a substantial and important individual interest. For substantial and important individual interests, we invoke an intermediate standard of review because we think it best strikes the balance between the legislature's constitutional prerogative to deliberate over and counterbalance the variety of interests involved in social and economic issues, and the judiciary's constitutional responsibility to strictly scrutinize legislation that either infringes upon fundamental rights or impacts upon suspect classes. Viewing this constitutional balance within the separation of powers context, which is the gist of opposition to it, we are satisfied that we neither trample arbitrarily upon the legislature's preferred position of direct, political accountability to the electorate, nor do we forsake our duty to protect individuals from the deleterious effects of controversial social and economic legislation that, in this case at least, could result in economic devastation of innocent victims simply by the fortuitous happenstance of the tortfeasor's status. We see no usurpation of power in a heightened scrutiny of legislation in those limited circumstances when the class implicated is so sensitive to injustice and the rights affected are so substantial and important that they warrant special judicial attention.[33]

This reveals a sophisticated and independent approach to state constitutional equal protection doctrine.[34] These example cases illustrate that civil matters, as well as criminal procedure,[35] can raise important state constitutional issues.[36]

This trend of independent state constitutional analysis has continued in areas beyond equal protection concerns. For example, in 1989, the Court rejected the

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29. *McGeehan*, 88 N.M. 308, 540 P.2d 238.

30. *Richardson*, 107 N.M. at 694, 763 P.2d at 1159.

31. *Id.* at 1159 (emphasis added).

32. *See id.* at 1160.

33. *Id.* at 1163.

34. *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985) (criticizing use of same tests for state and federal equality guarantees).

35. *See* sources cited *supra* note 19 and accompanying text.

36. *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (2d ed. 1996). The approach has been utilized by lower courts in New Mexico to confront the controversial question of abortion funding for poor women. *See* Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 451-53 (1996). It remains to be seen, however, whether New Mexico will recognize a cause of action for money damages for violations of the state constitution, a major issue around the country. *See* Paul R. Owen, *Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights*, 25 N.M. L. REV. 173 (1995); FRIESEN, *supra* this note, at 425-37; ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS at 365-74 (2d ed. 1993).

United States Supreme Court's plurality *Gates*[37] totality of the circumstances test for probable cause in issuing search warrants.[38] This decision, also written by Justice Ransom, concluded that New Mexico had not experienced the problems that led to the United States Supreme Court's change of federal constitutional doctrine.[39] This appears to be a decision based on differing "constitutional strategies," as described by Professor Lawrence Sager.[40] In addition, this decision reflects the influence of subconstitutional decisionmaking[41] with respect to rights, being based partially on New Mexico court rules.[42]

Additionally, in 1993, in an opinion written by then Chief Justice Ransom,[43] the court rejected the United States Supreme Court's *Leon* good faith exception to the probable cause requirement for search warrants.[44] This opinion contained a model *Michigan v. Long*[45] "plain statement":

> 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

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37. *See* Illinois v. Gates, 462 U.S. 213 (1983).

38. *See* State v. Cordova, 109 N.M. 211, 216-17, 784 P.2d 30, 35-36 (1989).

39. *See id.* at 35.

40. Pointing to the substantial role of "strategic" considerations in judicial enforcement of constitutional norms, Sager identified the possibility of state and federal courts employing different "strategies" in constitutional interpretation. State courts, interpreting their own constitutions, may see the need to employ different strategies, even though they are applying similar "norms of political morality." Sager concluded:

> State judges confront institutional environments and histories that vary dramatically from state to state, and that differ, in any one state, from the homogenized, abstracted, national vision from which the Supreme Court is forced to operate. It is natural and appropriate that in fashioning constitutional rules the state judges' instrumental impulses and judgments differ.
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> In light of the substantial strategic element in the composition of constitutional rules, the sensitivity of strategic concerns to variations in the political and social climate, the differences in the regulatory scope of the federal and state judiciaries, the diversity of state institutions, and the special familiarity of state judges with the actual working of those institutions, variations among state and federal constitutional rules ought to be both expected and welcomed.

Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 975-76 (1985).

41. *See* Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727 (1992); WILLIAMS, *supra* note 36, at 194-200 (considering subconstitutional state rights protections).

42. *See Cordova*, 109 N.M. at 216-17, 784 P.2d at 35-36.

43. State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993).

44. United States v. Leon, 468 U.S. 897 (1984).

45. 463 U.S. 1032 (1983). A survey of over 500 decisions, however, from all 50 states, between the 1983 *Long* decision and the beginning of 1988, concluded that "few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions." Felicia A. Rosenfeld, Note, *Fulfilling the Goals of* Michigan v. Long: *The State Court Reaction*, 56 FORDHAM L. REV. 1041, 1068 (1988); Richard W. Westling, Comment, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379 (1988)(pointing out that more cases were reinstated on state grounds after *Long* than before the decision).

> 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.[46]

The opinion includes a deep historical analysis of both the pre-incorporation and post-incorporation New Mexico exclusionary rule and search and seizure clause,[47] further strategic[48] analysis evaluating the differing cost/benefit analysis at the state and federal level, and an analysis of sibling jurisdiction decisions on the matter.[49]

In 1994, in another decision written by then Chief Justice Ransom,[50] the court concluded that a "knock and announce rule" for the execution of search warrants "advances important values,"[51] and serves the interest of protecting from unreasonable searches and seizures.[52] These conclusions also reflect strategic calculations in state constitutional decisionmaking.[53] Justice Baca made a very interesting and important argument in his special concurrence. He contended that the "knock and announce rule" should not be elevated to constitutional status, but rather should be left to the subconstitutional realm of common law and statutory law.[54]

Also in 1994, in still another opinion by then Chief Justice Ransom,[55] the court, citing its earlier decisions, stated:

> We recently have shown our willingness to accord defendants more protection under our search and seizure provision than the federal courts accord under the Fourth Amendment . . . . In light of these decisions, we must decline to adopt the blanket federal rule that all warrantless arrests of felons based on probable cause are constitutionally permissible in public places.[56]

In 1996, in an opinion by current Chief Justice Franchini,[57] the court developed a double jeopardy doctrine independent of the United States Supreme Court's decision in *Oregon v. Kennedy*.[58]

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46. *Gutierrez*, 116 N.M. at 435-36, 863 P.2d at 1056-57.
47. *See id.* at 441-45, 863 P.2d at 1062-66.
48. *See id.* at 440, 863 P.2d at 1061.
49. *See id.* at 447 n.10, 863 P.2d at 1068 n.10. The 1993 *Gutierrez* decision also illustrates the important role of intermediate appeals courts in the development of state constitutional law. Specifically, the New Mexico Court of Appeals had also rejected the *Leon* good faith exception even before the issue went before the New Mexico Supreme Court. *See* State v. Gutierrez, 112 N.M. 774, 819 P.2d 1332 (Ct. App. 1991). This reflects the continually growing sophistication of the Court of Appeals with respect to matters of independent state constitutional rights adjudication. *See, e.g., id.*; State v. Hernandez, 122 N.M. 809, 932 P.2d 499 (Ct. App. 1996); State v. Diaz, 122 N.M. 384, 925 P.2d 4 (Ct. App. 1996); State v. Bates, 120 N.M. 457, 902 P.2d 1060 (Ct. App. 1995).
50. State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).
51. *See id.* at 150, 870 P.2d at 112.
52. *See id.*
53. *See* Sager, *supra* note 40, at 964.
54. *See Attaway*, 117 N.M. at 154-55, 870 P.2d at 116-17.
55. Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994).
56. *Id.* at 158, 870 P.2d at 120.
57. State v. Breit, 122 N.M. 655, 930 P.2d 792 (1996).
58. 456 U.S. 667 (1982).

Concluding that the federal rule "does not adequately protect" a defendant's double jeopardy interest, the court abandoned its earlier "lockstep" double jeopardy doctrine that it had followed prior to *Kennedy*:

> We have stated that our State Constitution's double-jeopardy provision "is subject to the same construction and interpretation as its counterpart in the Fifth Amendment to the United States Constitution." That does not mean, however, that we must embrace United States Supreme Court precedent when it changes a standard formerly adopted by this Court. In *Gutierrez* we stated that we will "undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees." This is one of those situations.[59]

This approach reflects an important recognition that even though a state court has embarked on a "lockstep" approach, that does not bind the state court in the future.[60]

Although the 1997 *Gomez* decision is a major milestone in state constitutional law, both in New Mexico and nationally, it was not unexpected. It is clear that it built on a series of New Mexico Supreme Court decisions expanding and refining the scope of independent New Mexico state constitutional law.

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59. *Breit*, 122 N.M. at 663-64, 930 P.2d at 800-801 (citations omitted).

60. As Justice Robert Utter of Washington pointed out, state courts should carefully scrutinize older cases using federal analysis "to determine whether [their pronouncements] constitute actual holdings and, if not, whether they were based on assumptions that are no longer valid." Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 507 (1984).