NEW MEXICO LAW REVIEW

Volume 24
Issue 3 *Summer 1994*

Summer 1994

State Constitutional Law - Refusing to Turn the Other Cheek - New Mexico Rejects Federal Good Faith Exception to the Exclusionary Rule: State v. Gutierrez

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STATE CONSTITUTIONAL LAW—Refusing to "Turn the Other Cheek"—New Mexico Rejects Federal "Good Faith" Exception to the Exclusionary Rule: *State v. Gutierrez*

I. INTRODUCTION

I love *NYPD BLUE*. The police officers are protectors of ordinary citizens, thoughtful intelligent human beings and a scourge to criminals. If they blink or wink at the faux pas of a colleague, or overlook a point of procedure, it is to protect the innocent—to shelter those the system might otherwise injure. But to quote the esteemed Justice Douglas, "Of course, the education we receive from mystery stories and television shows . . . is, however, a distorted reflection of the constitutional system under which we are supposed to live."[1] In *State v. Gutierrez*,[2] we are reminded that the constitution protects the innocent *and* the guilty from unlawful search and seizure.

In *Gutierrez*, the Supreme Court of New Mexico affirmed the court of appeals[3] and rejected the application of the federal "good faith" exception[4] to the New Mexico Constitution's exclusionary rule.[5] In so doing, the court joined those courts which only in recent years have considered the "good faith" of a police officer in relation to a violation of a citizen's constitutional rights. This Note provides an overview of the federal exclusionary rule doctrine, examines the rationale of *Gutierrez*, and explores the implications of this bold decision.

II. STATEMENT OF THE CASE

On August 14, 1989, five officers of the Albuquerque Police Department (APD) Valley Impact Team, Narcotics Unit, burst unannounced into the home of Mr. and Mrs. Gutierrez and their son Johnny Garcia.[6] Officer Carla Gandara opened the door, ran in, yelled "Police, down!" and then ran directly to the back of the house.[7] Officers seized contraband

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1. Draper v. United States, 358 U.S. 307, 315 (1958) (Douglas, J., dissenting).
2. State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993) [hereinafter *Gutierrez II*].
3. State v. Gutierrez, 112 N.M. 774, 819 P.2d 1332 (Ct. App. 1991) [hereinafter *Gutierrez I*].
4. The United States Supreme Court developed the "good faith" exception in United States v. Leon, 468 U.S. 897 (1984).
5. N.M. CONST. art. II, § 10, provides:
   > The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.
6. *Gutierrez II*, 116 N.M. at 432, 863 P.2d at 1053.
7. *Id.*

at the residence, and defendants were later indicted on various drug charges.[8]

Ten days before this incident, the district judge issued a warrant authorizing an *unannounced-entry*[9] search warrant "for the protection of the officers and for the preservation of evidence."[10] The "no-knock" warrant was based on an affidavit presented to the district judge by Officer Carla Gandara.[11] The affidavit asserted that drugs are often destroyed before officers can enter the premises of persons suspected of drug trafficking.[12] Yet, the affidavit failed to give any specific evidence that Officer Gandara had reason to believe drugs would be destroyed upon a police-knock at the Gutierrez residence.[13]

At the hearing on defendant's motion to suppress evidence, Officer Gandara testified that she had a "good faith" belief that the warrant was valid.[14] Nevertheless, the trial court granted the defendant's motion to suppress, concluding that the United States and New Mexico Constitutions require an officer executing a warrant to knock and announce her purpose prior to entry absent exigent circumstances.[15] Moreover, particularly in this case, the trial court explained that there were insufficient exigent circumstances to permit a "no-knock" entry.[16]

On appeal, the New Mexico Court of Appeals rejected the "good faith" exception pursuant to article II, section 10 of the New Mexico Constitution.[17] Thus, the court affirmed the trial court's order suppressing evidence as a result of the execution of a "no-knock" search warrant at the defendant's residence.[18] "The court criticized the *Leon* Court's cost-benefit analysis of the exclusionary rule,"[19] believing that the good

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8. *Id.* at 432-33, 863 P.2d at 1053-54 ("Nothing in the record suggest[ed] that the officers discovered weapons of any sort.").

The Grand Jury indicted Reymundo and Gloria Gutierrez, husband and wife, and Gloria's son, Johnny Garcia, on three counts: "possession of a controlled substance with intent to distribute . . . , conspiracy to commit possession of a controlled substance with intent to distribute . . . , and possession of drug paraphernalia . . . ." *Id.* at 433, 963 P.2d at 1054.

9. "Warrants that authorize unannounced entry by executing officers have come to be known as 'no-knock' warrants." *Id.* at 432, 863 P.2d at 1053 n.1.

10. *Gutierrez II*, 116 N.M. at 432, 863 P.2d at 1053.

11. *Id.*

12. *Id.*

13. *Id.* A "no-knock" warrant is something of an anomaly, for it requires a predetermination of exigent circumstances. Most jurisdictions do not allow the predetermination of exigent circumstances. *See id.* at 433, 863 P.2d at 1054; *see also*, 2 WAYNE R. LAFAVE, SEARCH & SEIZURE § 4.8 (g) (2d ed. 1986); State v. Eminowicz, 520 P.2d 330 (Ariz. Ct. App. 1974). *Compare* State v. Cleveland, 348 N.W.2d 512 (Wis. 1984). The court in *Gutierrez II* explicitly refused to address "the validity of a judicial predetermination of necessity for unannounced entry." 116 N.M. at 433, 863 P.2d at 1054.

14. Tr. of Suppress. Hr'g at 52.

15. *Gutierrez II*, 116 N.M. at 433, 863 P.2d at 1054.

16. *Id.* The exigent circumstance exception is one exception to the warrant clause of the Fourth Amendment. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1968) (finding that "in most instances, failure to comply with the warrant requirement can only be excused by exigent circumstances").

17. *Gutierrez I*, 112 N.M. at 780, 819 P.2d at 1338. "Writing for a two-judge majority, Judge Chavez held that the New Mexico Constitution does not embody a good faith exception to [the exclusionary rule]." *Gutierrez II*, 116 N.M. at 433, 863 P.2d at 1054 (citation omitted).

18. *Gutierrez I*, 112 N.M. at 780, 819 P.2d at 1338.

19. *Gutierrez II*, 116 N.M. at 433, 863 P.2d at 1054.

faith exception "swallowed" the constitutional requirement of probable cause.[20]

The New Mexico Supreme Court granted the State's petition for certiorari. At issue was whether the evidence of contraband seized by police, pursuant to a state search warrant which violates article II, section 10 of the New Mexico Constitution, may nonetheless be accepted by a New Mexico court under the "good faith" theory created by the United States Supreme Court in *United States v. Leon*.[21]

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. The Federal Exclusionary Rule before Leon

Appreciating the full import of *Leon* requires consideration of the history of the Court's exclusionary rule jurisprudence. Just over seventy-five years ago, the United States Supreme Court held that evidence seized in violation of the Fourth Amendment was inadmissible in federal criminal prosecutions.[22]

This doctrine, which came to be known as the exclusionary rule, rested on the principle that it was wrong for the government to profit from the unconstitutional acts of its agents.[23] Thus, this rationale established the constitutional basis of the exclusionary rule.[24]

In 1961, the Court extended the exclusionary rule to the states in *Mapp v. Ohio*.[25] Following *Mapp*, the exclusionary rule was expanded to protect the rights of individuals not only under the Fourth Amendment, but also for violations of Fifth[26] and Sixth Amendment[27] rights. The Warren Court gradually created an exclusionary rule that relied on traditional probable cause warrant analysis to decide reasonableness.[28] Since the Warren Court, the Court has consistently limited the application of the exclusionary rule to select judicial proceedings.[29]

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20. *Gutierrez I*, 112 N.M. at 780, 819 P.2d at 1338.

21. *Gutierrez II*, 116 N.M. at 432-33, 863 P.2d at 1053-54 (citing United States v. Leon, 468 U.S. 897 (1984)).

22. Weeks v. United States, 232 U.S. 383, 398 (1914) (stating that the use of seized evidence involved a "denial of the constitutional rights of the accused," the Court banned the use of evidence secured through "illegal search and seizure" in federal prosecution).

23. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in certain ways, is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

24. *Id.* at 390-93.

25. 367 U.S. 643, 660 (1961).

26. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

27. *See* Massiah v. United States, 377 U.S. 201, 201-06 (1964).

28. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (deciding that outside of a search of the area within an arrestee's control, a search of the premises must be made pursuant to a warrant based on probable cause); Desist v. United States, 394 U.S. 244 (1969) (holding that when authorized, electronic eavesdropping can be done only with probable cause); Warden v. Hayden, 387 U.S. 294 (1967) (suggesting that warrantless searches are unreasonable absent exigent circumstances).

29. Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that the exclusionary rule does not apply in a civil deportation hearing); United States v. Calandra, 414 U.S. 338 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained in an unlawful search).

Today, some scholars maintain that the Supreme Court has opened a pandora's box of exceptions to the exclusionary rule.[30] The erosion of the exclusionary rule began by naming deterrence as the sole purpose of the exclusionary rule.[31] Since then, the Court has moved from the constitutional theory of the exclusionary rule to a theory premised on deterrence and cost-benefit analysis.

The result, according to some scholars, is that the exclusionary rule is now so fraught with exceptions that it is dishonest of the Supreme Court to continue its case-by-case exclusionary rule charade.[32] Furthermore, cases over the last two decades have pierced the prophylactic effect of the exclusionary rule by transforming the Fourth Amendment's probable cause requirement into an amorphous fact-driven "common-sense" standard.[33] That standard, for all practical purposes, has whittled away the Fourth Amendment's prohibition against illegal search and seizure with an essentially duplicative two-pronged test:[34] the "reasonableness test"[35] and the "balancing test."[36] The reasonableness test considers whether a reasonable officer would have known that her actions violated the Fourth Amendment, and whether the individual whose right to privacy was violated had a reasonable expectation of privacy.[37] Scholars maintain that underlying the reasonableness test is a cost-benefit analysis that balances the government's interest in prosecuting and convicting the guilty by protecting seized evidence against an individual's Fourth Amendment

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30. *See generally* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974) (asserting that the good faith exception puts a premium on keeping police ignorant of Fourth Amendment law).

31. *See* United States v. Calandra, 414 U.S. 338, 348 (1974) (the exclusionary rule is a judicially created remedy generally to safeguard Fourth Amendment rights through its deterrent effect, rather than to protect the individual rights of an aggrieved party).

32. *See* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment* 44 VAND. L. REV. 473, 521-29 (1991). *See generally* Craig D. Uchida et al., *Acting in Good Faith: The Effects of United States v. Leon on the Police and Courts*, 30 ARIZ. L. REV. 467, 485 (1988). Indeed, the good faith standard has proven so hard to challenge that after *Leon*, the number of motions to suppress filed in warrant cases diminished significantly, and of those filed even fewer are granted. *Id.* at 492-93.

33. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230-41 (1983) (holding that probable cause to issue a search warrant is determined by evaluating the totality of the circumstances).

34. *See, e.g.*, Robert Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOWARD L. J. 239 (1993). Professor Ward argues that the utilization of the reasonable person test to determine whether a person's consent to a search is voluntary ignores the history of racial and ethnic tensions between the police and members of a particular community. *Id.* at 253.

35. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985); O'Connor v. Ortega, 480 U.S. 709 (1987) (using a "reasonableness test" to determine that the searches were constitutional).

36. For an in-depth critique of the Court's "balancing test," see Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on The Scaffold: But Was It A Fair Trial?*, 22 AM. CRIM. L. REV. 84, 87 (1984) ("While this cost-benefit analysis appears neutral and detached, the Court balances with its thumb on the scale.").

37. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709. Justice O'Connor stated: "Because petitioners have an 'individualized suspicion' of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today." *Id.* at 726; *see also* United States v. Martinez-Fuente, 428 U.S. 543, 561 (1976).

right to privacy.[38] Thus, the Court, while relaxing the strictures of previous Fourth Amendment holdings, avoided explicitly overturning any Fourth Amendment decisions of the Warren Court.[39] In effect, the Court has created a new exception to the exclusionary rule for every case in which the government's interest in prosecution can be valued over the individual's right to privacy.[40]

B. *The Leon Decision*

The United States Supreme Court culminated its weakening of the exclusionary rule in *United States v. Leon*.[41] In *Leon*, the police launched a narcotics investigation after receiving information from an informant concerning suspicious activities.[42] Based on the informant's observations, the police secured warrants from a state court judge to search residences and automobiles belonging to the suspects.[43] These searches uncovered drug contraband and paraphernalia and the suspects were charged in federal court on various drug offenses.[44]

The district court found that the affidavit in support of the warrant did not establish probable cause and ordered the evidence suppressed.[45] The Ninth Circuit affirmed,[46] ruling that the affidavit did not meet the *Aguilar-Spinelli*[47] test requiring that an affidavit establish the informant's credibility or basis of knowledge.[48]

In a six to three decision, the Supreme Court reversed. The Court held that the Fourth Amendment exclusionary rule should be modified so as not to exclude evidence obtained by officers acting in reasonable reliance on a search warrant later found to be insupportable by probable cause and thus illegal.[49] As long as the officer was acting in "good faith," these illegal warrants were excusable and the fruits of the "good faith" unlawful search were admissible.[50]

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38. For a thorough discussion of the erosion of the warrant requirement and a criticism of the reasonableness approach as applied to government drug testing of employees, see Note, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343 (1990). *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1988); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (eliminating the individualized suspicion requirement when the government has a special need to perform drug testing).

39. *See generally* Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989).

40. *See supra* notes 37-38.

41. 468 U.S. 897, 913 (1984).

42. *Id.* at 901-02.

43. *Id.* at 902.

44. *Id.*

45. *Id.* at 903 n.2.

46. *Id.* at 904.

47. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

48. In Illinois v. Gates, 462 U.S. 213 (1983), the Court abandoned the *Aguilar-Spinelli* test and replaced it with a "totality of the circumstances approach" to probable cause. In State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989), the Supreme Court of New Mexico declined to adopt the new federal constitutional interpretation.

49. United States v. Leon, 468 U.S. 897, 922 (1984).

50. *Id.* at 919.

Thus, an illegal police search and seizure was not barred by the Fourth Amendment[51] as long as the officer reasonably believed the warrant was lawful.[52] Furthermore, the Court held that the trial court made a "harmless" error by condoning these actions.[53]

In dissent, Justice Brennan declared that the "Court's gradual but determined strangulation" of the exclusionary rule had completed "the Court's victory over the Fourth Amendment."[54] In fact, suppression of unlawfully seized evidence is confined to four exceptions to the "good faith" exception: (1) if a magistrate is not neutral and detached; (2) if an affidavit in support of the warrant is knowingly and recklessly false; (3) if the affidavit clearly lacked probable cause, or (4) if the affidavit is facially deficient; that is, if it fails to particularize "the place to be searched or the things to be seized," then the warrant is deemed defective.[55]

Regardless of whether the warrant is defective, the fruits of "good faith" searches and seizures are admissible, as long as the prosecution can establish "good faith" without burdening the court with a "substantial expenditure of judicial time."[56] In any event, the *Leon* test shifted the focus of constitutional analysis from the rights of the individual to the state of mind of the police officer at the time the warrant was issued.[57]

What inspired the Court to deconstruct federal Fourth Amendment jurisprudence? To fight the "war on drugs."[58] In numerous drug cases since *Leon*, the Court has loosened the rules surrounding search warrants.[59] Given the working relationship between the "war on drugs" and the "good faith" exception to the exclusionary rule, scholars believe that one rationale underlying the "good faith" exception is that only *guilty* people involved in drug trafficking are denied their constitutional right

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51. The plain language of the Fourth Amendment states in pertinent part: "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

52. "A warrant issued by a magistrate normally suffices to establish that a law enforcement officer has 'acted in good faith in conducting the search.'" *Leon*, 468 U.S. at 922 (quoting United States v. Ross, 456 U.S. 798, 823 n.32 (1982)).

53. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916.

54. *Leon*, 468 U.S. at 928 (Brennan, J., dissenting); *see also* Wolf v. Colorado, 338 U.S. 25 (1949) (holding that the protection of the Fourth Amendment is of no value if letters and private documents can be illegally seized and used in evidence against a citizen accused of an offense).

55. *Leon*, 468 U.S. at 923.

56. *Id.* at 924.

57. *Id.* at 922 n.20.

58. *See* Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219, 257; *see also* Dan Baum, *The War on Drugs, 12 Years Later*, A.B.A. J., March 1993, at 74 n.3 (pointing out that federal, state and local governments spent about 100 billion dollars during the Bush administration. Two-thirds of the federal drug budget went to pay for more police, drug agents, prosecutors and prisons).

59. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983); McCray v. Illinois, 386 U.S. 300 (1967) (allowing the issuance of search warrants based on anonymous information); Oliver v. United States, 466 U.S. 170 (1984) (allowing the warrantless search of fields, barns, and other private property near a residence); Massachusetts v. Sheppard, 468 U.S. 981 (1984); Maryland v. Garrison, 480 U.S. 79 (1987) (allowing the use of evidence obtained under a defective search warrant because officers acted with "good faith"); Florida v. Riley, 488 U.S. 445 (1989) (lowering the permissible ceiling for aerial warrantless searches to 400 feet).

to privacy.[60] This rationale is a small consolation to those who are caught up in an illegal search and seizure.

C. *The Leon Legacy in the Highest State Courts*

In *Gutierrez*, the New Mexico Supreme Court joins the highest courts of nine states to reject the "good faith" exception as a matter of judicial policy: Massachusetts, Michigan, Montana, New York, New Jersey, North Carolina, Oregon, Pennsylvania, and Wisconsin.[61] Generally, these state courts have based their exclusionary rule on state law, unwilling to adopt the federal rationale for the exclusionary rule.[62]

The New Mexico Supreme Court in *Gutierrez* also based its rejection of the "good faith" exception on state law. However, this decision represents the first case in which a New Mexico court has clearly explained the reach of the state constitution in relation to the federal exclusionary rule.

Prior to *Mapp*, New Mexico courts refused to adopt the exclusionary rule expounded by *Weeks v. United States*.[63] Likewise, New Mexico cases following *Mapp* failed to explore the reach of article II of the state constitution apart from the federal exclusionary rule.[64]

For instance, in *State v. Dillon*, the court rejected *Weeks* and reasoned that the exclusionary rule benefitted only the guilty.[65] In *Dillon*, the defendant was prosecuted for possession of "intoxicating liquor for sale."[66] The court overruled the motion to suppress the "intoxicating liquor"[67] even though the sheriff had seized the liquor under a search warrant

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60. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (eliminating Fourth Amendment violations from constitutional errors worthy of habeas review and reserving Fourth Amendment protection for the innocent, not the guilty).

61. *See, e.g.*, People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); State v. Novembrino, 519 A.2d 820 (N.J. 1987); State v. Carter, 370 S.E.2d 553 (N.C. 1988); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). *See generally* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Ken Gormley, *State Constitutions and Criminal Procedure: A Primer for the 21st Century*, 67 OR. L. REV. 689 (1988).

62. *See, e.g.*, *Novembrino*, 519 A.2d at 857 ("[O]ur State Constitution h[as] not diluted the effectiveness of our criminal justice system to the uncertain effects that we believe will inevitably accompany the good faith exception to the federal exclusionary rule.").

63. *Gutierrez II*, 116 N.M. 431, 438, 863 P.2d 1052, 1059 (citing State v. Dillon, 34 N.M. 366, 377, 281 P. 474, 479 (1929)).

64. *Gutierrez II*, 116 N.M. at 439, 863 P.2d at 1060 (citing State v. Garcia, 76 N.M. 171, 174-75, 413 P.2d 210, 212-13 (1966) (holding it is not a search to observe that which occurs in a public place)); *see also* State v. Lucero, 70 N.M. 268, 275, 372 P.2d 837, 842 (1962) (denying suppression under federal rule that a warrant is not required for the search of a movable vehicle if officers have reasonable cause to believe that it contains contraband).

65. The court reasoned:

> The innocent could derive no benefit from an interpretation of the constitutional guaranty into the rule of evidence contended for, and surely the guilty are not entitled to, and were never intended to be given a benefit and protection which are not shared equally by the innocent.

Dillon, 34 N.M. at 375, 281 P. at 478.

66. *Dillon*, 34 N.M. at 336, 281 P. at 474.

67. *Id.*

that the trial court found and the Attorney General conceded was illegal.[68] The court in *Dillon* applied a balancing test. The court reasoned:

> If the constitutional rights of the people were really involved, practical considerations would be excluded. Considering that they are not involved, and considering it as a choice between evils, we choose what we deem the lesser.[69]

In *Gutierrez*, the court overruled *Dillon*, rejecting its balancing test and its reasoning that the exclusionary rule benefits only the guilty.[70]

The *Gutierrez* court considered a number of New Mexico cases finding searches constitutionally reasonable under federal standards.[71] However, those cases did not discuss these federal standards in relation to the federal "good faith" exception to the exclusionary rule.[72] In *Gutierrez*, the court searched for New Mexico case law that independently explored the reach of article II, section 10.[73] For the most part, it came up dry. For example, the court in *State v. Snedeker* had applied the United States Supreme Court's Fourth Amendment cost-benefit analysis; however, it did not review article II of the state constitution.[74]

Apparently, the only New Mexico case that the court could turn to for an interpretation of article II, section 10 was *State v. Cordova*.[75] Article II, section 10 of the New Mexico Constitution provides that "no warrant . . . shall issue . . . without a written showing of probable cause, supported by oath or affirmation . . . ."[76] In *Cordova*, the New Mexico Supreme Court held that the two-prong test set forth in *Aguilar-Spinelli* properly describes the New Mexico Constitution's protection against unreasonable searches and seizures.[77] Hence, the New Mexico Supreme Court rejected the "totality of the circumstances" analysis of probable cause announced by the United States Supreme Court in *Illinois v. Gates*.[78]

Possibly the court chose to follow *Cordova* because it represents the moment at which the court recognized its first departure from federal Fourth Amendment jurisprudence.[79] At the very least, we know that *Cordova* opened the door for state Fourth Amendment jurisprudence in

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68. *Id.*

69. *Dillon*, 34 N.M. at 378, 281 P. at 486.

70. *Gutierrez II*, 116 N.M. at 436 n.9, 863 P.2d at 1067 n.9.

71. *Id.* at 440, 863 P.2d at 1061.

72. *Id.* (citing State v. Herrera, 102 N.M. 254, 258-59, 694 P.2d 510, 514-15 (holding that a search was illegal under both federal and state constitutions, but without discussing the state constitution), *cert. denied*, 471 U.S. 1103 (1985)).

73. *Gutierrez II*, 116 N.M. at 440, 863 P.2d at 1061.

74. 99 N.M. 286, 288-89, 657 P.2d 613, 615-16 (1982) (quoting Stone v. Powell, 428 U.S. 465, 485-86 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.")).

75. *Gutierrez II*, 116 N.M. at 440, 863 P.2d at 1061 (citing State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989)).

76. N.M. CONST. art. II, § 10.

77. *Gutierrez II*, 116 N.M. at 440, 863 P.2d at 1062 (citing Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969)).

78. *Gutierrez II*, 116 N.M. at 440, 863 P.2d at 1062 (citing Illinois v. Gates, 462 U.S. 213 (1983)).

79. *Gutierrez I*, 112 N.M. 774, 778, 819 P.2d 1332, 1336 (Ct. App. 1991).

New Mexico. The court's decision in *Gutierrez* marks the continuation of "a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees."[80]

IV. RATIONALE OF THE *GUTIERREZ* COURT

In *Gutierrez*, the New Mexico Supreme Court held that evidence obtained by virtue of an invalid search warrant may not be admitted under the exclusionary rule's "good faith" exception.[81] Rather, the court found that article II, section 10 of the New Mexico Constitution prohibits unreasonable searches and seizures and mandates the issuance of search warrants only upon a showing of probable cause.[82]

In order to derive the meaning and scope of state constitutional guarantees under article II, the court first turned to the difficult task of determining the framers' intent. After considering the historical context in which New Mexico gained statehood, Chief Justice Ransom concluded that the framers may have simply adopted article II, giving little or no thought to its "scope, meaning or effect."[83]

Thus, the court turned to case law relevant to article II, from which the New Mexico search and seizure law may have emerged.[84] The *Gutierrez* court discovered that at the time the text of the New Mexico Constitution was under consideration, one federal district court and two state supreme courts had held inadmissible evidence obtained in violation of the constitutional right to be free from illegal searches and seizures.[85] Again, the court found it difficult to draw any definitive conclusions about the framers' intent from the context of the issue's common-law history.[86]

The court concluded that the most reasonable inference to be drawn from the history of the adoption of article II was "that the framers were aware of the controversy and left interpretation to the courts rather than address the exclusion directly in the text of the constitution."[87] This conclusion freed the Court to interpret article II by drawing on exclusionary rule rationale, reasoning and policy created by courts from around the country.

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80. *Gutierrez II*, 116 N.M. at 440, 863 P.2d at 1061.

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

82. *Id.* at 444-47, 863 P.2d at 1065-68.

83. *Id.* at 441, 863 P.2d at 1062 (citing ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846-1912 272-304 (1968); *Proceedings of the Constitutional Convention of the Proposed State of New Mexico* (1910)).

84. *Id.* at 438-40, 863 P.2d at 1059-61.

85. *Id.* at 442, 863 P.2d at 1063 (citing Boyd v. United States, 116 U.S. 616 (1886) ("[F]orcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."); United States v. Wong Quong Wong, 94 F. 832 (D. Vt. 1899) (excluding letters obtained by unlawful search and seizure); State v. Sheridan, 96 N.W. 730 (Iowa 1903) (holding that evidence obtained in violation of the Iowa's search and seizure provision is to be excluded for trial)).

86. *Gutierrez II*, 116 N.M. at 443, 863 P.2d at 1064.

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

To begin its state constitutional analysis, the court relied upon *United States v. Mounday*,[88] an opinion that was later to reappear in *Weeks v. United States*.[89] The *Gutierrez* court's return to the exclusionary rule's Fourth Amendment roots, found in and prior to *Weeks*, clearly shows its decision to articulate a rule of exclusion based on state constitutional guarantees, rather than on federal theories of deterrence, cost-benefit analysis or judicial integrity.[90]

Thus, the court focused on those constitutional guarantees:

> We ask, much as the court in *Mounday* asked, how this Court can effectuate the constitutional right to be free from unreasonable search and seizure. The answer to us is clear: to deny the government the use of evidence obtained pursuant to an unlawful search. This, we believe, is the rationale at work in *Weeks*.[91]

The court argued that the criticism that the exclusionary rule benefits only the guilty misses the point.[92] Rather, the exclusionary rule is "the necessary corollary of the constitutional mandate."[93] This standard embraces the notion that "admission of improperly seized evidence denigrates the integrity of the judiciary—judges become accomplices to unconstitutional executive conduct."[94]

Beyond the issue of judicial integrity, the supreme court adopted a vision of the exclusionary rule that enforces the constitutional guarantee that each individual be free from unreasonable search and seizure.[95]

> Denying the government the fruits of unconstitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches

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88. 208 F. 186 (D. Kan. 1913). The defendants in *Mounday* filed a request for the return of property seized pursuant to an illegal search. The court granted application and ordered the property returned. The *Gutierrez* Court quoted from the *Mounday* opinion:

> In order to secure such proof and assist the government in overcoming the presumption of innocence which attends upon defendants and all other citizens until lawful conviction had, shall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done defendants by the ruthless invasion of their constitutional rights, and become a party to the wrongful act by permitting the use of the fruits of such act? Such is not my conception of the sanctity of rights expressly guaranteed by the Constitution to a citizen.

Gutierrez II, 116 N.M. at 444-45, 863 P.2d at 1065-66 (quoting *Mounday*, 208 F. at 189.).

89. 232 U.S. 383 (1914) (explaining the rationale for excluding evidence obtained in violation of the Fourth Amendment enforcement of the Constitution).

90. *Gutierrez II*, 116 N.M. at 442, 863 P.2d at 1063 (relying on State v. Slamon, 50 A. 1097 (Vt. 1901) and State v. Sheridan, 96 N.W. 730 (Iowa 1903)).

91. *Gutierrez II*, 116 N.M. at 445, 863 P.2d at 1066.

92. *Id.* at 446, 863 P.2d at 1067 n.9 (citing State v. Davis, 666 P.2d 802 (Or. 1983) (en banc) (under the Oregon Constitution the exclusionary rule is "to preserve that person's rights to the same extent as if the government's officers had stayed within the law")).

93. *Id.* (stating that the exclusionary rule is a necessary corollary to the constitutional mandate to exclude evidence seized in violation of art. II, § 10 in a criminal action founded on illegal government conduct; this is to be distinguished from the issue of illegal searches that do not lead to criminal prosecution).

94. *Id.* at 446-47, 863 P.2d at 1067-68 ("The basis we articulate today for the exclusionary rule . . . is incompatible with any exception based on the good-faith reliance of the officer on the magistrate's determination either of probable cause or of the reasonableness of the search.").

95. *Id.*

> and seizures by preserving the rights of the accused to the same extent as if the government's officers has stayed within the law.[96]

The Supreme Court of New Mexico should be applauded for interpreting the New Mexico Constitution so that the judiciary, through the exclusionary rule, can give meaning to the right to be free from unreasonable searches and seizures. In *State v. Gutierrez*, the court has refused to sanction police misconduct by "turning the other cheek."[97]

V. CONCLUSION

United States v. Leon created an exception to the exclusionary rule which provided that whenever an officer executed a search pursuant to a warrant that later proved invalid, her "good faith" belief in the warrant would preserve otherwise excludable evidence. The New Mexico Supreme Court has rejected the "good faith" exception.

The New Mexico Supreme Court understands that the "good faith" exception is a procedural "Catch 22." In effect, the United States Supreme Court promises, in advance, that only the rights of the guilty will be violated because only the guilty would suffer an illegal search and seizure of evidence. The Court assumes that the innocent will not be subject to an illegal search or seizure, because of the "good faith" of a police officer.

This reasoning overlooks a basic tenet of due process underlying the criminal justice system: people are innocent until proven guilty. Under the "good faith" exception, people can be proven guilty with illegally seized evidence because they are assumed guilty once evidence has been seized. The state can prove they are guilty because they are assumed guilty if their rights have been violated, as long as the governmental interest in the arrest outweighs that particular individual's constitutional rights.[98]

In *Gutierrez*, the New Mexico Supreme Court held that the "good faith" exception to the federal exclusionary rule is incompatible with the constitutional protection found under article II; thus, the fruits of the search conducted in the Gutierrez' home were suppressed because the actions of the police violated the New Mexico Constitution.[99] Although *Gutierrez* does not address the ultimate validity of judicial predetermination of "no-knock" warrants,[100] it sends a clear message to lower courts that police need more than a "good faith" belief in exigent

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

97. *Id.*

98. To illustrate this point consider the Court's decision to permit pretrial preventive detention in U.S. v. Salerno, 481 U.S. 739 (1987). The Court considered the constitutionality of the Bail Reform Act, 18 U.S.C. § 3142(f), and explicitly ruled that in times of war or insurrection "the government's regulatory interest in community safety can outweigh an individual's liberty interest." 481 U.S. at 748.

99. *Gutierrez II*, 116 N.M. at 447, 863 P.2d at 1068.

100. *Id.* at 435, 863 P.2d at 1056.

circumstances. In order to obtain a valid search warrant, the police must particularize facts of exigent circumstances in an affidavit; otherwise, material seized during the search will be excluded from evidence as the fruit of unconstitutional conduct. Hereafter in New Mexico, the police will be allowed to burst into the homes of individuals unannounced only *if* exigent circumstance, in fact, exist.

SHANNON OLIVER