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## Constitutional Law - The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure - State v. Gomez

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# CONSTITUTIONAL LAW—The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure—*State v. Gomez*

## I. INTRODUCTION

In *State v. Gomez*,<sup>1</sup> the New Mexico Supreme Court formally adopted the interstitial approach to state constitutional interpretation.<sup>2</sup> Under this approach, the court first examines an individual's claim to protection under the United States Constitution. If the federal claim fails, the court will then determine if the state constitution supplements or amplifies the right in question. After engaging in this analysis, the *Gomez* court held that the New Mexico Constitution affords broader protection to individuals in the realm of automobile searches under Article II, Section 10 than is provided by the United States Constitution under the Fourth Amendment.<sup>3</sup> Thus, New Mexico rejected the federal bright-line auto exception to the warrant requirement: A warrantless search of an automobile, and of containers found within automobiles, now requires a showing of a reasonable belief that exigent circumstances<sup>4</sup> existed in order to be justified.<sup>5</sup> Furthermore, preserving a state constitutional issue for appeal is dependent upon current New Mexico precedent which construes the constitutional provision in question; a party need not specifically cite cases which give rise to a more expansive interpretation of the right asserted under state law than under federal precedent.<sup>6</sup>

This Note will analyze the various theoretical approaches to state constitutional interpretation and their respective impact on practitioners. It will then proceed to explore the evolution of the appellate preservation rule and the development of federal and New Mexico search and seizure law. This Note should demonstrate how the decision to adopt the interstitial approach has affected both civil and criminal procedure in New Mexico.

## II. STATEMENT OF THE CASE

On the evening of June 13, 1994, Lea County Deputy Sheriff Payne was dispatched to a "party disturbance" near Lovington, New Mexico.<sup>7</sup> At the scene, approximately fifty to sixty people were congregated around cars parked along both sides of a dirt road. As Payne approached the car of Alfredo Gomez (defendant), someone yelled "The cops!". Gomez began to move frantically about inside the car and Payne "heard the sound of a tin container being shut and saw Gomez furtively stuff something under the front seat." Both Gomez and Payne exited their respective cars at the same time and Payne grabbed Gomez's car door as Gomez attempted to

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1. 122 N.M. 777, 932 P.2d 1 (1997).

2. *See id.* at 783, 932 P.2d at 7.

3. *See id.* at 787-88, 932 P.2d at 11-12.

4. "Exigent circumstances means 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." *State v. Copeland*, 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct. App.), *cert. denied*, 104 N.M. 702, 726 P.2d 856 (1986) (citing *State v. Chavez*, 98 N.M. 61, 644 P.2d 1050 (Ct. App. 1982)).

5. *See Gomez*, 122 N.M. at 788, 932 P.2d at 12.

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

7. *See id.* at 780, 932 P.2d at 4. Unless otherwise cited, all subsequent references to the facts of this case refer to *Gomez*, 122 N.M. at 779-81, 932 P.2d at 3-5.

shut it. Smelling the odor of marijuana, Payne arrested Gomez and secured him in the patrol car.

By this time, additional officers had arrived on the scene and, looking through the window of Gomez's car, Payne observed marijuana scattered on the console, seat, and floorboard. Payne also saw items commonly used for smoking marijuana: a brass pipe and a pair of hemostats. Deputy Sheriff Payne then opened the door and searched the car's interior. As a result of this warrantless search, Payne found a tin container and a fanny pack filled with tabs of white paper and small "baggies." Payne seized these items, which were later introduced at trial against Gomez as evidence of lysergic acid diethylamide (LSD) possession.

At trial, defense counsel moved to suppress the evidence found in the car. The defense argued the evidence was seized by Payne in the midst of conducting a warrantless search of Gomez's automobile and that exigent circumstances were not present.<sup>8</sup> The State argued that probable cause alone justifies searching a movable vehicle and its closed containers.<sup>9</sup> Although the defense asserted there was precedent in New Mexico requiring a showing of exigent circumstances, the trial court denied the motion to suppress and concluded that with the marijuana and paraphernalia in plain view, Payne had probable cause to search the entire vehicle.<sup>10</sup>

Gomez appealed to the New Mexico Court of Appeals. However, that court refused to review Gomez's claim that Article II, Section 10 of the New Mexico Constitution affords him broader protection than the Fourth Amendment of the United States Constitution.<sup>11</sup> The court held that the claim was not properly preserved because Gomez did not mention the state constitution at trial nor did he articulate specific arguments why it may be interpreted to afford greater protection under the circumstances of his case.<sup>12</sup>

The Supreme Court of New Mexico reversed in part and held that the trial court should have been alerted to the broader protection issue.<sup>13</sup> By invoking the principle of exigency previously recognized under the state constitution and by developing the facts needed for a ruling on that question, Gomez met the preservation requirements of Rule 12-216(A).<sup>14</sup> The court formally adopted the interstitial approach to state constitutional interpretation and held that, in New Mexico a warrantless search of an automobile, and of containers found within the auto, is only justified if the State shows reasonable grounds for the officer's belief that exigent circumstances existed.<sup>15</sup> Nonetheless, this watermark decision did not help

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8. See *id.* at 779, 932 P.2d at 3.

9. See *id.* at 781, 932 P.2d at 5. The State invoked *United States v. Ross*, 456 U.S. 798 (1982), *State v. Pena*, 108 N.M. 760 (1989), and *State v. Apodaca*, 112 N.M. 302, 814 P.2d 1030 (Ct. App.), *cert. denied*, 112 N.M. 220, 813 P.2d 1018 (1991), in support of its proposition that the warrant requirement does not apply to movable automobiles and closed containers found within. The court correctly noted that these cases were decided under the lock-step analysis, a state constitutional interpretation approach, which New Mexico now rejects. See *id.* at 787, 932 P.2d at 11.

10. See *id.* at 779, 932 P.2d at 3.

11. See *id.*

12. See *id.*

13. See *id.* at 784, 932 P.2d at 8.

14. See *id.* See also N.M. R. APP. P. 12-216(A) (mandating that to preserve an issue for appellate review a ruling or decision by the trial court must have been fairly invoked).

15. See *Gomez*, 122 N.M. at 788, 932 P.2d at 12.

Mr. Gomez. Finding it was reasonable for Deputy Sheriff Payne to believe that exigent circumstances called for an immediate search of the automobile, the Supreme Court affirmed Gomez's conviction.<sup>16</sup>

### III. APPROACH TO STATE CONSTITUTIONAL INTERPRETATION

#### A. *Historical and Contextual Background*

Throughout most of our nation's history, state constitutional provisions have provided the sole source of protection against governmental intrusion into our civil liberties. Thus, the federal Bill of Rights was originally construed to apply against federal action only. Then, during the 1960s, the Warren Court incorporated selective provisions of the Bill of Rights into the Fourteenth Amendment and began to use the federal Constitution as a regulator of all governmental intervention in citizens' lives. Several expansionist rulings by the Warren Court turned the United States Constitution into the primary tool for safeguarding individual rights.<sup>17</sup> It was generally assumed that state constitutions provided no greater protection than that afforded by Supreme Court interpretations of federal liberty guarantees; therefore, state constitutional law fell dormant.<sup>18</sup>

Concurrent with the Burger and Rehnquist Court's attempts to scale back on individual rights, there has been a reawakening of state constitutional jurisprudence.<sup>19</sup> This growing trend, dubbed the "new federalism" movement, was spurred on in part by dissenting opinions of Justices Brennan and Marshall in which they encouraged state courts to independently examine their own state constitutional provisions.<sup>20</sup> Thus, states increasingly resort to their own law when federal guarantees prove inadequate protection against governmental intrusion. There are four primary theoretical approaches that state courts utilize when engaging in state constitutional interpretation: lock-step; primacy; interstitial; and dual sovereignty. The particular approach employed may determine the vitality of the state's constitutional jurisprudence and precisely how a litigator should present a state constitutional claim before the state judiciary.

#### 1. Lock-Step

State courts following the lock-step approach do not engage in independent analysis of their state constitution. Instead, where a state constitutional provision has a federal analog, lock-step jurisdictions will adopt the Supreme Court's interpretation of the individual right in question as their own. Their theoretical framework embodies a mirroring presumption: the content of a state constitutional right is assumed to "mirror" the content of any corresponding federal guarantee,

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16. See *id.* at 789, 932 P.2d at 13. Apparently, the situation was deemed exigent in part due to the crowd of onlookers.

17. See John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993).

18. See WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE*, § 2.10, at 94 (2d ed. 1992).

19. See *id.* See also Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636-38 (1987).

20. See Utter & Pitler, *supra* note 19, at 638.

regardless of textual or historical differences between the two documents. If a federal provision does not provide an individual with protection against a governmental intrusion, the state constitution will not be independently scrutinized. States which apply the lock-step method do so out of a self-imposed compulsion to keep their interpretation of the breadth of state constitutional rights in line with Supreme Court analysis of analogous federal rights.

The lock-step approach has attracted numerous critics. States following this method do a disservice to the concept of federalism because lock-step does not recognize that the American system of government is composed of more than one sovereign. "[A]bsolute deference violates a state judge's duty to independently interpret the scope of the state constitution."<sup>21</sup> Another inherent and unavoidable danger of the lock-step model is that state constitutional jurisprudence will never be fully developed. Supreme Court Justice William Brennan emphasized that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. 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."<sup>22</sup> Thus, states following the lock-step approach arguably abrogate the obligation the state judiciary owes to its own citizens to uphold and independently interpret the state constitution.<sup>23</sup>

## 2. Primacy

The primacy model is the antithesis of lock-step. States which have adopted this approach (including Oregon, Washington, Maine, and New Hampshire) endow their state constitutional provisions with a totally independent reading. "The primacy approach views state constitutions as the primary sources of individual rights, with the U.S. Constitution providing a second layer of protection."<sup>24</sup> In keeping with this theory, the methodology employed is to first examine and interpret the state provision.<sup>25</sup> If the right is protected, the federal Constitution need not be examined at all.<sup>26</sup> Primacy courts will turn to the federal Constitution only if the state constitution fails to support the defendant's claim.<sup>27</sup> "Courts using this approach do not consider federal law and analysis presumptively valid, viewing them instead as no more persuasive than decisions of sister state supreme courts."<sup>28</sup>

Primacy appears to be one of the more polemic approaches to state constitutional interpretation—attracting vocal supporters and critics alike. Primacy advocates emphasize that this methodology is truest to our governmental system in which states have sovereign powers<sup>29</sup> and it best reflects prevalent attitudes amongst the

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21. *Id.* at 646.

22. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

23. See Utter & Pitler, *supra* note 19, at 645.

24. Shaw, *supra* note 17, at 1025.

25. See Utter & Pitler, *supra* note 19, at 647.

26. See *id.*

27. See Shaw, *supra* note 17, at 1025-26.

28. Utter & Pitler, *supra* note 19, at 647.

29. See Linda White Atkins, Note, *Federalism, Uniformity, and the State Constitution—State v. Gunwall*, 62 WASH. L. REV. 569, 574 (1987).

state's citizenry.<sup>30</sup> Since the state constitution is always examined, primacy advances the growth of state constitutional jurisprudence. It may also be considered the most efficient approach in many respects. Primacy courts are able to preserve judicial resources because time is not spent unnecessarily addressing additional claims if the case can be resolved under state law.<sup>31</sup> In addition, primacy promotes efficiency because state courts employing the primacy methodology can effectively avoid reversal on appeal, since it is clear their cases are decided on the basis of state grounds alone.<sup>32</sup> This also serves to reduce the United States Supreme Court's caseload, thus creating a more efficient judicial system as a whole.

On the other hand, opponents argue that basing a decision solely on state grounds is essentially an undemocratic attempt to avoid federal scrutiny. Primacy critics also point out that primacy diminishes the amount of state court commentary on federal law. Although that decrease may be viewed as preserving judicial resources, on the negative side, the lack of input from state judges reduces the state's role in developing federal jurisprudence.<sup>33</sup> Furthermore, critics charge that the methodology employed by primacy courts ignores the need for national uniformity as a factor in decision-making<sup>34</sup> (although the relative importance of this point is debatable).

### 3. Interstitial

The interstitial approach has been lauded as a methodology that "reflects the modern role of the U.S. Constitution as the 'basic protector of fundamental liberties,' while allowing states the opportunity to supplement the minimum protections afforded by the U.S. Constitution."<sup>35</sup> In accordance with this view, interstitial jurisdictions first address the federal constitutional issue.<sup>36</sup> If the state court finds the governmental action in question violates the United States Constitution as interpreted by the federal judiciary, it will not engage in independent analysis of the analogous state constitutional provision.<sup>37</sup> The state constitutional issue is only reached if the federal Constitution does not recognize the individual's claim as a protected right.<sup>38</sup>

In contrast to primacy, federal precedent is considered highly persuasive and presumptively correct; however, in contrast to lock-step, federal precedent is not binding upon state constitutional interpretation.<sup>39</sup> While this deference to the federal analysis can be overcome, most state courts employing the interstitial model will not deviate from federal precedent unless litigants can expressly justify the

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30. See Shaw, *supra* note 17, at 1027-28.

31. See *id.* at 1027.

32. See *id.*

33. See Utter & Pitler, *supra* note 19, at 648.

34. See *id.*

35. Shaw, *supra* note 17, at 1028 (citing Stewart J. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 718 (1983)).

36. See *State v. Gomez*, 122 N.M. 777, 783, 932 P.2d 1, 7 (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982)).

37. See *id.*

38. See *id.* See also Shaw, *supra* note 17, at 1028.

39. See Utter & Pitler, *supra* note 19, at 648-49.

deviation by referring to specified criteria which demonstrates that the state and federal provisions have different meanings.

Some commentators have suggested that the interstitial model impedes development of state constitutional law because the tendency may be to interpret state provisions in conformity with the federal analysis.<sup>40</sup> Moreover, the possibility of reversal on appeal is an ever-present danger in jurisdictions relying on the interstitial methodology.<sup>41</sup> Since federal law is always analyzed under this approach, state courts must be vigilant in declaring that their opinions which diverge from federal precedent are based on "adequate and independent state grounds."<sup>42</sup>

#### 4. Dual Sovereignty

Under the dual sovereignty view of federalism, both the state and the federal constitutions provide independent and equivalent sources of individual rights.<sup>43</sup> Consistent with this notion, the dual sovereignty methodology mandates an examination of both sources in every case. States following the dual sovereignty approach may begin their analysis with either source. Regardless of the order of analysis, the state law will always be examined, "even if the defendant's challenge would succeed, in the court's opinion, on federal grounds alone."<sup>44</sup> Dual sovereignty respects the integrity of the federalist system: it acknowledges the Supreme Court's view of what is and is not appropriate for protection nationally, while it develops a body of state constitutional law that recognizes distinctions and the value of experimentation. However, the primary benefit of this approach may very well be that dual sovereignty jurisdictions fulfill the requirements of *Michigan v. Long*,<sup>45</sup> thus insulating their decisions from potential Supreme Court review and reversal.

From a different standpoint, this seemingly positive aspect of dual sovereignty can be considered an impediment to the democratic process. This is so because courts that base their judgments on both the state and federal constitutions escape federal judicial review and, at the state level, inhibit legislative initiatives to modify unpopular decisions in accord with popular attitudes.<sup>46</sup> In addition, dual sovereignty could be criticized for violating the legal principle of deciding cases narrowly. Since both documents are analyzed, even if the law of one would suffice, the court is forced to engage in writing dicta. Although the additional commentary may be useful in helping to develop federal jurisprudence, it is an inefficient and impractical use of judicial resources.

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40. See *id.* at 650-51.

41. See *id.*

42. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The Supreme Court stated: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1040-41.

43. See Shaw, *supra* note 17, at 1028-29.

44. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1171 (1985).

45. 463 U.S. 1032 (1983). *Michigan v. Long* holds that state decisions clearly based on adequate and independent state grounds will not be subject to federal review. See *id.* at 1040-41.

46. See George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996-99 (1979).

### B. *New Mexico's Adoption of the Interstitial Approach*

Since statehood, the New Mexico Constitution has traditionally been interpreted in lock-step with the federal Constitution. Not until the 1976 decision of *State ex rel. Serna v. Hodges*<sup>47</sup> did New Mexico pronounce its sovereign right to independently scrutinize its state constitution. However, state constitutional provisions were not construed any more broadly than Supreme Court interpretations of similar federal guarantees until a 1989 decision rejecting the federal "totality of the circumstances" test for probable cause.<sup>48</sup> Since then, in the realm of search and seizure law, the New Mexico judiciary has often found Article II, Section 10 of the state constitution fertile ground for extending protection to individuals beyond the level provided by its federal counterpart, the Fourth Amendment.<sup>49</sup> This is true despite the identical language of the two provisions. In arriving at these decisions, New Mexico tacitly employed the interstitial approach, resorting to the state constitution only after finding the federal analysis unpersuasive.<sup>50</sup> However, it was not until *Gomez* that the New Mexico Supreme Court formally pronounced that it was adopting the interstitial method of state constitutional interpretation.<sup>51</sup>

Since lock-step had previously been discarded as an inappropriate approach for a federalist system,<sup>52</sup> in deciding *Gomez* the New Mexico Supreme Court conceptualized its choice as one between the interstitial approach and primacy.<sup>53</sup> The court did not explore, nor did it even give lip service to, the advantages and disadvantages of adopting the dual-sovereignty methodology. The court backed up its preference for the interstitial method by citing to scholarly and judicial commentary emphasizing the importance of preserving national uniformity.<sup>54</sup> The *Gomez* opinion quotes a passage from a New Jersey case, *State v. Hunt*,<sup>55</sup> which is instructive regarding the particular concerns of the New Mexico Supreme Court. The main points emphasize that: "cooperation must exist in a truly effective federalist system"; "some consistency and uniformity between state and federal governments in certain areas of judicial administration is desirable"; and "state

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47. 89 N.M. 351, 356, 552 P.2d 787, 792 (1976), *overruled in part on other grounds by* *State v. Rondeau*, 81 N.M. 408, 412, 553 P.2d 688, 692 (1976).

48. See Shannon Oliver, Note, *Refusing to "Turn the Other Cheek"—New Mexico Rejects Federal "Good Faith" Exception to the Exclusionary Rule*: *State v. Gutierrez*, 24 N.M. L. REV. 545, 552 (1994) (discussing *State v. Cordova*, 109 N.M. 211, 784 P.2d 30 (1989)).

49. See *Campos v. State*, 117 N.M. 155, 870 P.2d 117 (1994) (*Campos II*, *rev'g State v. Campos*, 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991) (*Campos I*) (finding exigent circumstances are required for warrantless arrests in New Mexico); *State v. Attaway*, 117 N.M. 141, 870 P.2d 103 (1994); *State v. Gutierrez*, 116 N.M. 431, 863 P.2d 1052 (1993) (rejecting federal "good faith" exception to the exclusionary rule); *State v. Wright*, 119 N.M. 559, 893 P.2d 455 (Ct. App. 1995). See also Kathleen M. Wilson, Note, *State Constitutional Law—New Mexico Rejects Apparent Authority to Consent as a Valid Basis for Warrantless Searches*: *State v. Wright*, 26 N.M. L. REV. 571, 579 (1996).

50. See *State v. Gomez*, 122 N.M. 777, 783, 932 P.2d 1, 7 (1997) (discussing reasons for finding federal analysis unpersuasive: perceived flaw; distinctive state characteristics; undeveloped area of federal law).

51. See *id.*

52. See *Hodges*, 89 N.M. at 356, 552 P.2d at 792.

53. See *Gomez*, 122 N.M. at 783, 932 P.2d at 7 ("We today specifically adopt the interstitial in preference to the primacy approach . . .").

54. See *id.*

55. 450 A.2d 952 (N.J. 1982) (Handler, J., concurring).



courts should be sensitive to developments in federal law.”<sup>56</sup> The interstitial approach permits independent state analysis when necessary, yet it does not require separate analysis in cases where the court agrees with federal precedent. When the federal analysis is reasoned and articulate, New Mexico sees no reason to “reinvent the wheel.”<sup>57</sup> The *Gomez* court held that, under the interstitial method, the New Mexico judiciary may diverge from federal precedent under any one of the following circumstances: 1) when the federal analysis is deemed flawed, thus unpersuasive; 2) when there are distinctive state characteristics which call for a different approach; 3) when structural differences are apparent between state and federal government; or 4) when the federal analog has not yet been developed.<sup>58</sup>

### C. *Analysis and Implications*

The New Mexico Supreme Court’s decision to officially adopt an approach to state constitutional interpretation should be applauded. It should provide numerous benefits, such as encouraging litigators to present state constitutional claims and not to simply rely upon federal precedent. In this respect, it will promote the development of a sound body of state constitutional jurisprudence. Furthermore, adopting a particular methodology should lead to consistent, predictable, and reasonable state court decision-making. Employing one approach “theoretically remov[es] the opportunity for the judiciaries to arbitrarily apply state constitutional provisions.”<sup>59</sup> Another vital consideration is that the failure to adopt a particular approach opens the state court to criticism that its judgments are result-oriented (because outcomes could potentially be manipulated by choosing different approaches to address different issues).

The court’s decision to specifically choose the interstitial approach over the other alternatives may provoke controversy within the state, but it is also commendable. New Mexico Supreme Court Chief Justice Franchini stated in a speech at the New Mexico Law Review’s Symposium on State Constitutional Law: “*Gomez* will be the permanent legacy of Justice Ransom.”<sup>60</sup> This statement was not made in reference to the changes in criminal procedure and appellate preservation the opinion demands, but to the decision to embrace the interstitial methodology. It is a rational, moderate choice that takes into account judicial administration and political realities, while giving due deference to both the United States and New Mexico Constitutions. The interstitial approach permits the court to take advantage of the large body of law that has developed outside of New Mexico’s borders and to engage in experimentation when deemed necessary. The *Gomez* court recognized the efficiency factor involved in utilizing the federal analysis where the individual right in question was already protected under federal law, thereby avoiding the

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56. See *Gomez*, 122 N.M. at 784, 932 P.2d at 8 (quoting *Hunt*, 450 A.2d at 964 (Handler, J., concurring)).

57. Interview with Scott Davidson, law clerk to Justice Ransom, in Santa Fe, N.M. (1997) (notes on file with author).

58. See *Gomez*, 122 N.M. at 783, 932 P.2d at 7.

59. Shaw, *supra* note 17, at 1025.

60. New Mexico Supreme Court Chief Justice Gene Franchini, Address at the New Mexico Law Review State Constitutional Law Symposium (November 7, 1997).

necessity of "reinventing the wheel."<sup>61</sup> The political considerations underlying the court's preference for the interstitial approach (as opposed to primacy) include the fact that the legislature has the authority to reign in the judiciary by amending the state constitution in such a way as to force the judiciary to decide cases in lock-step with federal analysis. For example, the Florida legislature, in reaction to an unpopular judicial decision which granted broader protection under the state constitution, promulgated and passed a state amendment mandating state conformity with the federal construction of search and seizure jurisprudence.<sup>62</sup> The danger is real because the same bill has been introduced by New Mexico's legislature (although it failed at the committee level). Moreover, a state judgeship is an elected position. Thus, the court naturally prefers to have the prestige and authority of the United States Supreme Court's analysis to buttress any polemic decision they may make.<sup>63</sup>

The sagacity of choosing the interstitial approach because it helps to preserve national uniformity is questionable. First, national uniformity already exists with regard to minimum protections because the United States Constitution sets the floor which no state may fall below. Second, striving for and maintaining the preservation of national uniformity as a worthwhile ideal could arguably impede state experimentation and inhibit the development of a truly independent and robust body of state constitutional law. Nevertheless, the interstitial methodology appears to value both uniformity and diversity. Also, in this mobile age, a profusion of different standards of protection of basic civil liberties could create confusion for both officers and individuals alike.<sup>64</sup> Furthermore, New Mexico's choice of the interstitial approach is in line with historical reality. Unlike New England states, the United States Constitution preceded New Mexico's state constitution. Thus, the federal constitution provided the basis for many of our own constitutional provisions and not the other way around.

Through *Gomez*, the New Mexico Supreme Court has demonstrated its receptivity to state constitutional arguments. Thus, competent representation requires New Mexico practitioners to explore every possible argument under both federal and state constitutions, even if the textual language is identical. The *Gomez* decision also teaches that prosecutors should be wary of arguing that federal precedent compels a certain conclusion.

To best represent a client, practitioners should attempt to distinguish between the federal and state arguments and present the state constitutional argument during every stage of the litigation; for example, in pre-trial motions, at trial, and on appeal.<sup>65</sup> In order to preserve the issue for appellate review, it is particularly important to give reasons justifying departure from the federal analysis if your argument has not previously been embraced by New Mexico courts. If there is New Mexico precedent interpreting the state provision more broadly than its federal

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61. Interview with Scott Davidson, former law clerk to Justice Ransom, in Santa Fe, N.M. (1997) (notes on file with author).

62. See FLA. CONST. art. 1, § 12.

63. See Shaw, *supra* note 17, at 1047-48.

64. See Deukmejian & Thompson, *supra* note 46, at 995.

65. See Utter & Pitler, *supra* note 19, at 653.

counterpart, then counsel should be sure to at least make reference to the specific state provision and the case law or the principle involved, and develop the facts necessary for a ruling on the issue.<sup>66</sup>

New Mexico lawyers can play an important role in developing the state's constitutional jurisprudence by helping the court formulate a principled basis for repudiating federal precedent. Basing your argument on reasoned factors will help you convince the court, and help the court convince the public, that the state constitution supports an outcome at odds with the federal analysis. As a guide to practitioners, the *Gomez* court enumerated reasons it has utilized in past cases to depart from federal precedent.<sup>67</sup> These reasons include: 1) flawed federal analysis; 2) state characteristics which distinguish New Mexico from the nation as a whole; and 3) undeveloped federal analogs.<sup>68</sup> However, this list is not meant to be exclusive. The *Gomez* opinion has paved the way for innovative constitutional argumentation by refusing to require practitioners to refer only to criteria specified by the court as acceptable.<sup>69</sup> Other state courts have adopted this "specified criteria" approach, promulgated by Justice Handler's concurring opinion in *State v. Hunt*.<sup>70</sup> Justice Handler suggested that the following seven reasons could justify a state's divergence from federal constitutional interpretation: 1) differences in textual language; 2) legislative history; 3) preexisting state law; 4) structural differences; 5) matters of particular state interest or local concern; 6) state traditions; and 7) public attitudes.<sup>71</sup> It is important to note that, due to *Gomez*, New Mexico practitioners are not constrained by this criteria in framing their state constitutional argument: they are welcome to present more creative justifications. Nevertheless, litigators would be wise to consult this list and perhaps reference one or more of the criteria in court, or to analogize their case to one of the above-enumerated reasons previously utilized by the New Mexico judiciary to justify a divergence from federal precedent. Although not required, referencing this criteria may give the argument more weight, and at the very least, consulting this list should help to spark ideas during the preparation stage.

A strong state constitutional argument can be based on other sources as well. For instance, reference can be made to federal dissenting opinions or to sister state court opinions that diverge from federal precedent and provide arguments which seem more reasonable for New Mexico's situation than the currently prevailing federal analysis.<sup>72</sup> Also, it may be possible to cite early New Mexico opinions that demonstrate an independent body of state law was developing in a particular direction prior to any Supreme Court pronouncement on the issue.<sup>73</sup>

Justice Ransom has now retired; however, through *Gomez*, he has left his mark on the manner in which state constitutional arguments will be argued by

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66. See *State v. Gomez*, 122 N.M. 777, 785-86, 932 P.2d 1, 9-10 (1997).

67. See *id.* at 783, 932 P.2d at 7.

68. See *id.*

69. See *id.* at 784 n.3, 932 P.2d at 8 n.3.

70. 450 A.2d 952 (N.J. 1982).

71. See *id.* at 965-67 (Handler, J., concurring).

72. See Phyllis Skloot Bamberger, *Boosting Your Case with Your State Constitution*, ABA J., Mar. 1, 1986, at 49-50.

73. See *id.* at 50.

practitioners and how they will be decided by the judiciary. New Mexico has adopted a principled methodology for examining the state constitution. The success of New Mexico's state constitutionalism may now depend on whether practitioners will actively participate in developing arguments based on state constitutional provisions and whether the judiciary will employ the interstitial approach in a consistent and coherent manner. Prospects appear positive. Recently, in *State v. Vallejos*,<sup>74</sup> the New Mexico Supreme Court cited *Gomez* and applied the interstitial method of constitutional analysis to a defendant's state due process claim.<sup>75</sup>

#### IV. APPLICATION OF THE INTERSTITIAL APPROACH IN *STATE V. GOMEZ*

The particular methodology utilized by a court to interpret state constitutional provisions has a profound effect on the outcome of both procedural and substantive legal decisions. After adopting the interstitial approach, the *Gomez* court then immediately employed that approach to answer two questions raised by the present case: 1) How to preserve a state constitutional issue on appeal; and 2) Whether exigent circumstances would be required for warrantless searches of automobiles in New Mexico. The following analysis will explore these two issues.

##### A. *Preservation of State Constitutional Issue for Appellate Review*

###### 1. Background

Since the beginning of the twentieth century, New Mexico's judiciary has ruled that issues will not be heard on appeal unless a ruling on the issue was fairly invoked at the trial level.<sup>76</sup> This rule has been codified as Rule 12-216(A) in New Mexico's Rules of Appellate Procedure, and it serves the double objectives of promoting fairness and judicial efficiency. Central to the idea of justice is that all parties to a controversy should have the opportunity to present evidence and arguments that bear on the opposing side's contentions. Efficiency requires that this development of facts and argument be done at the trial level alone. If otherwise, district judges could not make appropriate rulings because they would not be alerted to the substance of particular arguments and each stage in the appellate process could potentially result in a new trial. Under Rule 12-216(B), if a ruling on an issue is not "fairly invoked" at the trial level, the appellate system will consider the contention only if it consists of a jurisdictional question, or if it involves a question of general public interest, fundamental error or a party's rights.<sup>77</sup>

A question that has plagued the courts and litigating parties alike is: What type of argument constitutes "fairly invoked"? In making a freedom of speech claim, the defendant in *State v. Ongley*<sup>78</sup> cited to the relevant sections of both the United States

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74. 123 N.M. 739, 945 P.2d 957 (1997).

75. See *id.* at 749, 945 P.2d at 967.

76. See *Fullen v. Fullen*, 21 N.M. 212, 225, 153 P. 294, 297 (1915). See also N.M. R. APP. P. 12-216(A).

77. See N.M. R. APP. P. 12-216(B).

78. 118 N.M. 431, 882 P.2d 22 (Ct. App. 1994), modified by *State v. Gomez*, 122 N.M. 777, 932 P.2d 1 (1997).

and New Mexico constitutions; nevertheless, the appellate court refused to review the issue because the defendant "did not specifically argue below that the New Mexico Constitution provided a broader degree of protection than the United States Constitution . . . ."<sup>79</sup> The court opined that specific argument was needed in order to alert the trial judge that a different level of protection may be involved.<sup>80</sup> In a similar vein, the court of appeals held a year later that general reference to the state constitution as a document more protective of individual rights than the federal constitution did not preserve a defendant's specific claim on appeal that an informant's reliability is more critically examined under New Mexico law than federal law.<sup>81</sup> Although counsel for the defendant did cross-examine the arresting officer regarding the informant's credibility, the issue was not pressed after the officer invoked privilege.<sup>82</sup> This strict standard requiring specificity for preserving a state constitutional claim for appellate review was the governing interpretation of Rule 12-216(A) at the time the New Mexico Supreme Court decided *Gomez*.

## 2. *Gomez* Preservation Rule

Before the *Gomez* court could decide the substantive issue of whether the New Mexico Constitution requires a showing of exigent circumstances to justify warrantless searches of automobiles and containers found within, the court had to examine the procedural question regarding whether *Gomez* had properly preserved that particular issue for appeal. The New Mexico Court of Appeals refused to examine *Gomez*'s state constitutional claim.<sup>83</sup> According to the appellate court, *Gomez* had not met the burden, as set forth in Rule 12-216(A)<sup>84</sup> and explicated in *State v. De Jesus-Santibañez*,<sup>85</sup> for preserving an issue for appellate review.<sup>86</sup> In backing up its ruling, the court of appeals stated that *Gomez*'s argument at the trial level "not only failed to articulate why the New Mexico Constitution affords greater protection under these circumstances, but failed to even mention the state constitution."<sup>87</sup> This statement perhaps represents an oversight of the appellate court because *Gomez* clearly invoked Article II, Section 10 of the New Mexico Constitution in his Motion to Suppress, which was submitted and argued before the trial court.<sup>88</sup>

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79. *Id.* at 432, 882 P.2d at 23.

80. *See id.*

81. *See State v. De Jesus-Santibañez*, 119 N.M. 578, 580, 893 P.2d 474, 476 (Ct. App.), *cert. denied*, 119 N.M. 464, 891 P.2d 1218 (1995).

82. *See id.*

83. *See State v. Gomez*, 122 N.M. 777, 781, 932 P.2d 1, 5 (1997).

84. N.M. R. APP. P. 12-216(A).

85. 119 N.M. 578, 580, 893 P.2d 474, 476 (Ct. App.), *cert. denied*, 119 N.M. 464, 891 P.2d 1218 (1995) (defendant invoked broader protection argument at trial level but issue was not properly preserved for appeal because defendant failed to advance specific argument on appeal).

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

87. *Id.*

88. *See Defendant's Motion to Suppress at 2, Gomez*, (No. 94-299), asserting: "Evidence obtained from Alfredo Gomez's car—including the closed container—should be suppressed as the fruits of an arrest and search violative of the Fourth Amendment to the United States Constitution, and Section 10, Article II of the New Mexico Constitution." *Id.*

While setting straight the appellate court's misstatement of fact,<sup>89</sup> the New Mexico Supreme Court established a new test for state courts to employ in determining whether a constitutional claim has been properly preserved.<sup>90</sup> The new test is a refinement of previously applied requirements as set forth in *State v. De Jesus-Santibañez*.<sup>91</sup> When a party requests a form of protection that has already been recognized under New Mexico precedent, the court construes Rule 12-216(A) to require that the party: 1) assert the constitutional principle; and 2) show a factual basis complete enough for the trial court to rule on the issue.<sup>92</sup> If there is no New Mexico precedential case law supportive of the right to the protection requested, the party must specifically assert the reasons why New Mexico should now interpret the state provision more broadly than its federal counterpart, in addition to fulfilling steps one and two above.<sup>93</sup> This predicate is sufficient to alert both the trial court and the opposing party to the constitutional claim, and thus satisfies the mandate of Rule 12-216(A) that reviewing courts only consider questions raised in the lower court.

The court in *Gomez* held that the defendant met the requirements of Rule 12-216(A) as established in its new test.<sup>94</sup> The defendant had invoked the New Mexico Constitution in his motion to suppress, and, at trial, he implicitly asserted the exigent circumstances principle by referring to *State v. Coleman*.<sup>95</sup> Furthermore, he met part two of the test because Deputy Payne testified to the circumstances surrounding the search, thus establishing enough of a factual basis to permit the court to rule on whether the exigencies of the situation required a warrantless search.<sup>96</sup> Since there is established precedent interpreting Article II, Section 10 of the New Mexico Constitution more broadly than the Fourth Amendment, the defendant in *Gomez* did not need to cite to specific cases nor brief reasons why New Mexico should diverge from federal law in this area.<sup>97</sup> The *Gomez* court rejected the State's argument that litigants must cite to the specific cases which broadly construe the state constitutional provision at issue by stating:

Where New Mexico courts have taken a different path than federal courts, our precedent governs regardless of whether a party cites specific cases in support of a constitutional principle, so long as the party has asserted the principle recognized in the cases and has developed the facts adequately to give the opposing party an opportunity to respond and to give the court an opportunity to rule.<sup>98</sup>

In reaching its decision, the court explicitly acknowledged the differences between trial and appellate practice that make it impracticable to require litigators

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89. See *Gomez*, 122 N.M. at 784, 932 P.2d at 8.

90. See *id.* at 785, 932 P.2d at 9.

91. 119 N.M. 578, 580-81, 893 P.2d 474, 476-77, *cert denied*, 119 N.M. 464, 891 P.2d 1218 (1995).

92. See *Gomez*, 122 N.M. at 784, 932 P.2d at 8.

93. See *id.*

94. See *id.* at 784-85, 932 P.2d at 8-9.

95. 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

96. See *Gomez*, 122 N.M. at 785, 932 P.2d at 9.

97. See *id.* at 784, 932 P.2d at 8.

98. *Id.* at 785-86, 932 P.2d at 9-10.

to fully brief state constitutional arguments at the trial level.<sup>99</sup> Furthermore, the court recognized that preservation of state constitutional issues should not be subject to a higher standard than are federal constitutional issues.<sup>100</sup> The approach employed by the court of appeals in the past made it difficult to raise issues on appeal. Through *Gomez*, the New Mexico Supreme Court has facilitated its ability to hear important state constitutional claims.

### 3. Analysis and Implications

The *Gomez* ruling on preserving an issue for appellate review constitutes a needed clarification of New Mexico's preservation law and facilitates an expansion of state constitutional jurisprudence. The test for preserving an issue for appellate review formulated by the *Gomez* opinion refines and clarifies previous requirements.<sup>101</sup> The New Mexico Supreme Court has appropriately ruled that preserving a state constitutional claim demands no more effort than what is required to preserve a federal constitutional claim.<sup>102</sup> In effect, the *Gomez* opinion advises the court of appeals that a more generous standard should be applied to the determination of whether the court should hear particular issues. The *Gomez* rule recognizes the differences between trial and appellate practice and the difficulty of fully preparing a state constitutional claim before trial.<sup>103</sup> If the State had prevailed, practitioners would be forced to either engage in in-depth research and explication of state constitutional claims at the trial level or abandon issues that could have forcefully impacted a client's case and the development of New Mexico's constitutional jurisprudence.

After *Gomez*, there are certain steps practitioners must take to ensure potential state constitutional claims will be preserved for appellate review. The threshold question to address is whether there is New Mexico precedent construing the state constitutional provision as providing broader protection than its federal analog.<sup>104</sup> If so, counsel must be sure to, at a minimum, invoke the constitutional principle at issue. Specific cases need not be cited;<sup>105</sup> however, mentioning cases will aid the trial court in reaching a speedier and more thorough decision. It can also help buttress the substantive argument and further insulate the issue from attacks questioning its proper preservation at the appellate level. A second necessary step is for counsel to adequately develop the facts in order to give the opposing party a chance to respond and the trial court the opportunity to rule on the issue.<sup>106</sup>

On the other hand, if the state constitutional claim being asserted is a novel one (i.e. the provision in question has not previously been interpreted as furnishing more protection than its federal counterpart), additional steps must be taken to ensure the

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99. See *id.* at 786, 932 P.2d at 10.

100. See *id.*

101. See *id.* at 786, 932 P.2d at 10.

102. See *id.* at 781-82, 932 P.2d at 5-6.

103. See *id.* at 786, 932 P.2d at 10.

104. See *id.* at 784, 932 P.2d at 8 (stating that "the requirements for preserving the claim for appellate review depend on current New Mexico precedent construing that state constitutional provision").

105. See *id.* at 785-86, 932 P.2d at 9-10 (holding that a party need only assert the principle involved when New Mexico precedent diverges from the federal approach).

106. See *id.*

issue will be preserved for appellate review. At the trial level, besides developing the factual predicate, counsel must argue for a broader reading of the right under the New Mexico Constitution *and* provide reasons justifying the requested expansion of the right.<sup>107</sup> In other words, if New Mexico has traditionally construed a state constitutional provision in line with the federal interpretation of an analogous provision under the United States Constitution, counsel must coherently explain why New Mexico should now depart from that federal construction.

## B. Search and Seizure Law

### 1. Historical Background of the Automobile Exception

The Fourth Amendment to the United States Constitution imposes a warrant requirement<sup>108</sup> in order to safeguard individual privacy from overly-intrusive governmental actions. Over the years, a few well-defined exceptions to the warrant requirement have developed in recognition of the practical realities of law enforcement in modern-day America. The automobile exception has its roots in *Carroll v. United States*,<sup>109</sup> a 1925 case which authorized warrantless searches of automobiles when there is probable cause to believe the vehicle contains contraband.<sup>110</sup> The Court in *Carroll* reviewed congressional legislation and noted that historically the Fourth Amendment has been construed

as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.<sup>111</sup>

Nevertheless, it did not necessarily follow that this exception applied equally to closed containers, such as luggage, found inside the automobile. In *United States v. Chadwick*,<sup>112</sup> the Supreme Court ruled that a warrantless search of a footlocker was not justified simply because it was located within a vehicle.<sup>113</sup> The Court rejected the extension of the automobile exception of the general warrant requirement to closed packages and containers found within the vehicle.<sup>114</sup> This

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107. See *id.* at 784, 932 P.2d at 8.

108. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

109. 267 U.S. 132 (1925). The *Carroll* Court upheld a warrantless search of an automobile suspected of carrying liquor during the prohibition era. See *id.* at 153. The decision was based on the inherent mobility of automobiles and the impracticability of awaiting a warrant when the occupants were not under arrest. See *id.*

110. See *id.*

111. *Id.*

112. 433 U.S. 1 (1977).

113. See *id.* at 13. The Court, however, did acknowledge that generally there is a diminished expectation of privacy in vehicles because an auto's main function is transportation and an auto does not normally serve as a residence. See *id.* at 12.

114. See *id.* at 13. There is a higher expectation of privacy in containers such as footlockers because a



principle was reaffirmed in *Arkansas v. Sanders*<sup>115</sup> and *Robbins v. California*.<sup>116</sup> However, the Court shifted course in *United States v. Ross*.<sup>117</sup> In *Ross*, the Court held that the scope of the automobile exception may permissibly extend to cover searches of closed containers found within a vehicle if there is probable cause to believe that contraband is concealed somewhere within.<sup>118</sup> Finally, in *California v. Acevedo*,<sup>119</sup> the Supreme Court concluded "that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders*."<sup>120</sup>

Twenty-three years ago, in *State v. Coleman*,<sup>121</sup> the New Mexico Court of Appeals held that a showing of probable cause, combined with exigent circumstances, provides the requisite foundation for a warrantless search of a closed burlap sack located inside a vehicle.<sup>122</sup> Although the court found that the officers had probable cause to believe that the defendant's car contained marijuana, exigent circumstances did not exist because the car was parked outside the Sheriff's office when the search took place and the car's occupants had been placed under arrest.<sup>123</sup> Thus, the court affirmed the trial court's suppression of the evidence pertaining to marijuana found within the burlap sack.<sup>124</sup> This case did not diverge from the federal view prevalent at the time, which refused to create a blanket exception to the warrant requirement for closed containers found within automobiles. The *Coleman* court recognized that under some circumstances a warrantless search of a vehicle's containers may be constitutionally justified; however, the State must meet the requirements of the two-part probable cause and exigent circumstances test.<sup>125</sup>

However, when the New Mexico Supreme Court heard argument in *State v. Pena*<sup>126</sup> in 1989, the federal system had by then decided *Ross*.<sup>127</sup> *Ross* held that a search of the contents of a vehicle, including closed containers, only required probable cause to believe that the vehicle contained contraband.<sup>128</sup> The *Ross* Court made no mention of an "exigent circumstances" requirement. *Pena* ignored

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footlocker is "not open to public view" and is intended as a "repository of personal effects." See *id.*

115. 442 U.S. 753, 763 (1979) (holding that warrantless search of suitcase found in trunk of vehicle was impermissible under the Fourth Amendment; the rationale being that the luggage itself is not mobile if removed from the automobile).

116. 453 U.S. 420, 425-27 (1981) (holding that warrantless search of opaque plastic package in car was in violation of the Fourth Amendment; all containers are equally protected by the Constitution unless their contents are in plain view).

117. 456 U.S. 798 (1982).

118. See *id.* at 825 ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."). The *Ross* decision did not overrule *Arkansas v. Sanders*; rather, it limited *Sanders* to requiring a warrant when there is probable cause to search the particular container, but not requiring one when there is probable cause to search the entire vehicle. See *id.* at 824.

119. 500 U.S. 565 (1991).

120. *Id.* at 579.

121. 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

122. See *id.* at 154, 530 P.2d at 948.

123. See *id.* at 155, 530 P.2d at 949.

124. See *id.*

125. See *id.* at 154, 530 P.2d at 948.

126. 108 N.M. 760, 779 P.2d 538 (1989).

127. *Ross* was decided in 1982. See *United States v. Ross*, 456 U.S. 798 (1982).

128. See *id.* at 825.

*Coleman*'s exigent circumstances requirement and instead decided in lock-step<sup>129</sup> with the federal principle established in *Ross*. *Pena* held that discovery of a roach clip with marijuana residue in the ashtray of defendant's car gave a police officer probable cause that justified a warrantless search of the vehicle's interior, including a brown bag found within, under the automobile exception to the warrant requirement.<sup>130</sup> In accordance with traditional lock-step analysis, the *Pena* Court only discussed the protection afforded by the Fourth Amendment to the United States Constitution and the federal *Ross* precedent. The *Pena* court did not undertake an independent analysis of the protection afforded by Article II, Section 10 of the New Mexico Constitution.

However, in *State v. Cordova*<sup>131</sup> (a case decided the same year as *Pena*), the New Mexico Supreme Court finally diverged from the lock-step approach both theoretically and in practice by rejecting the notion that federal precedent should always serve as a guide in interpreting the New Mexico Constitution.<sup>132</sup> In interpreting the New Mexico Constitution independently of the federal construction of an analogous United States constitutional provision, the *Cordova* court underscored its reliance on local conditions as opposed to the national situation by stating: "Our holding today . . . reflects our close acquaintance with the problems and traditions of our state. By necessity, we are better acquainted with these factors than is the United States Supreme Court."<sup>133</sup>

Despite finding that the New Mexico Constitution on occasion may afford greater protection to individual rights than its federal counterpart, New Mexico continued to interpret its search and seizure provision in line with *Ross*, which does not require a showing of exigent circumstances in addition to probable cause with respect to warrantless searches of containers found within automobiles.<sup>134</sup> Then, in 1994, the New Mexico Supreme Court departed from federal precedent in the realm of searches and seizures.<sup>135</sup> In *Campos v. State*, the court held that "for a warrantless arrest to be reasonable, it must be based upon both probable cause and sufficient exigent circumstances."<sup>136</sup> In contrast, the federal rule establishes that warrantless arrests based on probable cause alone are constitutionally permissible.<sup>137</sup> In justifying its adoption of more expansive protection, the New Mexico Supreme Court followed the interstitial approach to state constitutional analysis without explicitly saying it was doing so. The court in *Campos* first examined federal precedent. After finding that federal law did not help the petitioner, it looked to prior New Mexico decisions which exhibited New Mexico's strong preference for

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129. See discussion *supra* Part III.A.1 for an explanation of the lock-step method of state constitutional interpretation.

130. See *Pena*, 108 N.M. at 761, 779 P.2d at 539.

131. 109 N.M. 211, 784 P.2d 30 (1989).

132. See *id.* at 217, 784 P.2d at 36 (rejecting the federal "totality-of-circumstances" test in favor of a two-part test requiring a showing of basis of knowledge and credibility in regard to the amount of information that must be supplied in an application for a search warrant).

133. *Id.* at 216, 784 P.2d at 35 n.8.

134. See *State v. Apodaca*, 112 N.M. 302, 814 P.2d 1030 (Ct. App. 1991) (where officer had probable cause to search entire vehicle, warrantless search of suitcase found in trunk was lawful).

135. See *Campos v. State*, 117 N.M. 155, 870 P.2d 117 (1994).

136. See *id.* at 156, 870 P.2d at 118.

137. See *id.* at 158, 870 P.2d at 120 (referring to *United States v. Watson*, 423 U.S. 411, 423 (1976)).

a warrant.<sup>138</sup> In addition, the court exhibited its distaste for bright-line rules by holding that: "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. We do this because we believe that each case must be reviewed in light of its own facts and circumstances."<sup>139</sup>

## 2. The *Gomez* Court's Adoption of the Exigent Circumstances Requirement

After officially adopting the interstitial methodology, the New Mexico Supreme Court then applied that approach to the facts in *Gomez* in order to answer the substantive question of whether, contrary to federal precedent, New Mexico law requires exigent circumstances before a warrantless search of an automobile and its containers could be deemed valid.<sup>140</sup> As mentioned earlier, the court of appeals did not address this question because it ruled that the substantive issue had not been properly preserved. The New Mexico Supreme Court acknowledged that under federal law an officer may conduct an automobile search on probable cause alone.<sup>141</sup> Since federal law did not provide the protection requested by *Gomez*, the court was obliged, consistent with the interstitial method, to consider the constitutional implications of the issue under state law. In arriving at its holding that "a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances,"<sup>142</sup> the New Mexico Supreme Court explicitly rejected both the federal rationale and state law relying on the federal precedent.<sup>143</sup>

As required by the interstitial approach, the New Mexico Supreme Court first examined federal law. It found that the Supreme Court has carved out a bright-line automobile exception to the Fourth Amendment's warrant requirement which also encompasses closed containers found within automobiles.<sup>144</sup> The Supreme Court has articulated two primary reasons for creating the automobile exception: the belief that exigent circumstances always exist because automobiles are inherently mobile;<sup>145</sup> and the belief that individuals have a lesser expectation of privacy in their automobiles than in their homes due to the existence of "pervasive" vehicle regulation.<sup>146</sup>

In *Gomez*, prosecutors based their argument primarily upon *State v. Pena*,<sup>147</sup> a case which accepted the federal viewpoint and held that in New Mexico warrantless searches of automobiles were justified on the basis of probable cause alone.<sup>148</sup> The New Mexico Supreme Court did not grant much weight to this argument because the *Pena* decision came down when the court was still treating Article II, Section

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138. See *id.* at 159, 870 P.2d at 121.

139. *Id.* at 158, 870 P.2d at 120.

140. See *Gomez*, 122 N.M. at 786, 932 P.2d at 10.

141. See *id.*

142. *Id.* at 788, 932 P.2d at 12.

143. See *id.* at 787-88, 932 P.2d at 11-12.

144. See *id.* at 786, 932 P.2d at 10 (citing *California v. Acevedo*, 500 U.S. 565, 575-76 (1991); *United States v. Ross*, 456 U.S. 798, 800 (1982)).

145. See *id.* at 787, 932 P.2d at 11 (citing *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970)).

146. See *id.* (citing *California v. Carney*, 471 U.S. 386, 392 (1985)).

147. 108 N.M. 760, 779 P.2d 538 (1989).

148. See *id.* at 762, 779 P.2d at 540.

10 of the New Mexico Constitution as analogous to the federal Fourth Amendment.<sup>149</sup> Although lock-step had been intellectually discarded by *State ex rel. Serna v. Hodges*, that decision had no practical effect on subsequent cases, such as *Pena*, because the judiciary continued to interpret state analogs of federal provisions as having identical meaning; it was not truly engaging in independent analysis of state constitutional provisions. Since the *Gomez* court committed itself to the interstitial approach, it did not see itself bound by a case which blindly followed federal precedent without taking the next step of independently interpreting whether New Mexico law affords broader protection. Thus, the State's reliance on *Pena* was misplaced because the court opined that *Pena* was not controlling precedent.<sup>150</sup>

The *Gomez* court concluded that New Mexico affords broader protection of individual rights than the United States Constitution in the realm of search and seizure law. It reached this watershed decision by examining the warrant requirement. First, the court recognized the "strong preference for warrants"<sup>151</sup> in New Mexico and looked at the practical implications of the requirement. The State tried to support its reliance on *Pena* with the argument that the citizen does not benefit from the warrant requirement when there is probable cause because the governmental intrusion is perhaps greater when both the individual and car are detained while officers attempt to secure a warrant.<sup>152</sup> The logic supporting this argument is that if there is probable cause, a warrant will be forthcoming and a search inevitable. Therefore, the argument continues, it could be considered more intrusive to subject individuals, particularly innocent ones, to a lengthy waiting period when an on-the-scene check could be conducted. However, the weakness of this argument is that it puts the determination of probable cause into the hands of the officer, rather than a neutral magistrate. Thus, the *Gomez* court rejected the State's argument, and, instead, emphasized the vital role played by neutral magistrates in protecting the public from exposure to potentially unreasonable searches and seizures carried out by overzealous officers who may compromise their judgment in their eagerness to fight crime by effecting an immediate arrest.<sup>153</sup> In support of its decision, the court cited arguments in favor of the warrant requirement propounded by the Supreme Court in *United States v. Chadwick*.<sup>154</sup> In *Chadwick*, the Supreme Court emphasized that the warrant requirement safeguards the public against improper searches; provides an assurance of propriety; and limits the bounds of the search to those deemed justified by a magistrate exercising detached scrutiny over the matter.<sup>155</sup>

Moreover, the *Gomez* court opined that there was no valid justification behind the bright-line exception to the warrant requirement for automobiles, or for closed

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149. See *Gomez*, 122 N.M. at 787, 932 P.2d at 11 (stating "[i]n *Pena*, we treated the two search and seizure provisions interchangeably and in effect regarded Fourth Amendment precedent as binding on us in interpreting Article II, Section 10.").

150. See *id.*

151. *Id.*

152. See *id.*

153. See *id.* at 787-88, 932 P.2d at 11-12.

154. 433 U.S. 1 (1977).

155. See *Gomez*, 122 N.M. at 787, 932 P.2d at 11 (quoting *United States v. Chadwick*, 433 U.S. at 9).

containers found within automobiles, created by federal precedent.<sup>156</sup> While acknowledging that exigent circumstances may surround most searches of vehicles, the New Mexico Supreme Court disagreed with the federal reasoning that the mobile nature of automobiles creates exigent circumstances in every case.<sup>157</sup> The court recognized that, under certain fact patterns, there may be "no reasonable basis for believing an automobile will be moved or its search will otherwise be compromised by delay"<sup>158</sup>; in those situations exhibiting a lack of exigency, a warrant is required. The court further justified its divergence by implying that the United States Supreme Court seems to be distancing itself from its own precedent. The blanket automobile exception contradicts the Supreme Court's recent pronouncement in *Ohio v. Robinette*<sup>159</sup> that the Court eschews bright-line rules because they do not take into account the innumerable variations in circumstances.<sup>160</sup> The *Gomez* opinion responds to this federal inconsistency by stating: "We regard the automobile exception as a failure to recognize such variations."<sup>161</sup> Thus, the *Gomez* court reached its decision to depart from federal precedent by focusing on New Mexico's preference for warrants; by concluding that the federal reasoning is flawed; and by insinuating that there may be a future federal reversal.

After adopting the principle of exigency, the New Mexico Supreme Court then declared that a reasonableness standard will be applied to cases to determine whether the officer acted appropriately in conducting a warrantless search of an automobile.<sup>162</sup> The *Gomez* court held that "[w]here the officer has an objectively reasonable basis for believing exigent circumstances require an immediate warrantless search, then the search is valid."<sup>163</sup> The court made clear that exigent circumstances included reason to believe that evidence will be destroyed if the officer waits to secure a warrant.<sup>164</sup> In addition, if reasonable minds could differ, the court proclaimed that due deference should be granted the officer's judgment.<sup>165</sup> Applying this standard to the facts of the present case, the *Gomez* court noted that it was late at night and numerous party-goers surrounded the defendant's car.<sup>166</sup> Deputy Payne testified that he believed the car would have been removed, or the evidence destroyed, if he had waited for a warrant.<sup>167</sup> Also, Payne felt that other options were closed off to him: confiscating the car keys may not have deterred a potentially rowdy crowd; and, due to the late hour, the wait for a tow-truck to arrive on the scene may have been lengthy.<sup>168</sup> Therefore, the *Gomez* court found that it was reasonable for Deputy Payne to conclude that exigent circumstances necessitated

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156. See *id.* at 789, 932 P.2d at 13.

157. See *id.*

158. *Id.*

159. 117 S. Ct. 417 (1996).

160. See *Gomez*, 122 N.M. at 789, 932 P.2d at 13 (quoting *Robinette*, 117 S. Ct. at 421).

161. *Id.*

162. See *id.* at 788, 932 P.2d at 12.

163. *Id.*

164. See *id.*

165. See *id.*

166. See *id.*

167. See *id.*

168. See *id.*

an immediate warrantless search of Gomez's vehicle.<sup>169</sup> Thus, the court's holding that warrantless searches of automobiles and of containers found within require a showing of exigent circumstances ultimately constituted no reprieve for defendant Gomez.

### 3. Analysis and Implications

After *Gomez*, in the state of New Mexico, a warrantless search of an automobile and containers found within requires an objectively reasonable showing of exigent circumstances; whereas nationally, a simple showing of probable cause to search will suffice.<sup>170</sup> The *Gomez* decision clearly reveals that the New Mexico judiciary is intent upon fully exploring and developing an independent state jurisprudence in the arena of individual civil liberties, particularly in regard to protection against unreasonable search and seizure. This is not a new notion that suddenly struck the fancy of the court; rather, Article II, Section 10 of the New Mexico Constitution has been independently interpreted to afford broader protection than what is nationally required in various cases over the last seven years.<sup>171</sup> For example, New Mexico had already exhibited a tendency to guard against incursions into the warrant requirement in *Campos v. State*,<sup>172</sup> a case which held that exigent circumstances were required to justify warrantless arrests in public places.<sup>173</sup> The *Gomez* court's rejection of the federal bright-line automobile exception to the warrant requirement is in line with the court's pronouncement that the interpretation of a state constitutional provision will not simply mirror that of its federal analogue if the federal analysis is deemed flawed or unpersuasive.<sup>174</sup> In this case, New Mexico appropriately diverges from the federal interpretation because the bright-line auto exception fails to recognize factual variations. Exigent circumstances are not inherent to every search involving automobiles. Not every vehicle is mobile, and those that are can almost always be disabled by confiscating the keys or impounding the vehicle until a warrant is issued.

Furthermore, the federal expansion of the automobile exception to the warrant requirement to include closed containers found within goes far beyond the original purpose of the exception with little reasoned analysis. Closed containers are certainly not inherently mobile; moreover, containers are utilized as a repository of personal effects, thus a higher expectation of privacy attaches to the contents of containers (particularly those which are closed and opaque.) Since a requirement of exigent circumstances sensibly protects privacy rights and the integrity of the warrant requirement, and since it appears that the Supreme Court is attempting to move away from bright-line rules,<sup>175</sup> perhaps the *Gomez* opinion will one day play

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169. See *id.*

170. See *id.* at 786-88, 932 P.2d at 10-12.

171. See New Mexico Supreme Court Chief Justice Gene Franchini, Address at the New Mexico Law Review State Constitutional Law Symposium (November 7, 1997) (notes on file with author). See also *Gomez*, 122 N.M. at 788, 932 P.2d at 12.

172. 117 N.M. 155, 870 P.2d 117 (1994).

173. See *id.* at 158, 870 P.2d at 120.

174. See *Gomez*, 122 N.M. at 783, 932 P.2d at 7.

175. See *id.* at 789, 932 P.2d at 13 (referring to the Supreme Court's pronouncement in *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996), that it "expressly disavow[s] any 'litmus-paper test' . . . in recognition of the 'endless

a role in provoking a future reversal of the federal bright-line automobile and container exception.

Surprisingly, an individual's expectation of privacy did not seem to play a role in the *Gomez* court's decision-making process. It is unfortunate that the *Gomez* opinion does not distinguish between searches of automobiles and searches of closed containers within automobiles. It would be rational to require a higher showing of exigency in order to justify warrantless searches of closed containers (although any absolute rule requiring a warrant in every case would probably go too far in undermining officer safety and ability to appropriately respond under particularly stressful conditions). In addition, the court could have also justified its departure from federal precedent by referring to the expectation of privacy standard in the context of distinctive state characteristics. For instance, the *Gomez* decision could have been based upon a recognition of the poverty which afflicts New Mexico and the reality that many vehicles within the state are propped up on blocks and utilized as homes.

The *Gomez* opinion should provoke questions within New Mexico's legal community such as: Is the application of the newly stated exigent circumstances rule too deferential to officers? Does the opinion grant broader protection only in theory? The *Gomez* court may have weakened its own rule by finding that Deputy Payne was reasonable in believing that exigencies existed even when the vehicle owner had been placed under arrest and police were able to watch the car until a tow-truck arrived.<sup>176</sup> Nevertheless, the court exhibited its own leanings when it mentioned in dicta that impoundment perhaps would have been preferable to a warrantless search.<sup>177</sup> Thus, New Mexico practitioners faced with a similar case should be prepared to explain to the court why impoundment was or was not (depending on whether you represent the prosecution or the defense) a viable option. Due to the narrow application of the exigent circumstances rule in *Gomez*, the case may have little effect on how future police investigatory operations are conducted. However, in preparing for trial, counsel on both sides should be aware that officers must be able to articulate specific reasons why they believed it necessary to proceed with a warrantless search.

## V. CONCLUSION

*State v. Gomez*<sup>178</sup> is a significant case for New Mexico practitioners for both its substantive and procedural pronouncements. In the area of criminal law, the *Gomez* decision requires the State to prove the existence of exigent circumstances any time a warrantless search is conducted of vehicles, and of containers found within, before it may utilize the evidence obtained in a court of law. The warrant requirement under Article II, Section 10 of the New Mexico Constitution is thus more stringently

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variations in the facts and circumstances' implicating the Fourth Amendment").

176. See *Gomez*, 122 N.M. at 788, 932 P.2d at 12.

177. See *id.* The New Mexico Supreme Court specifically stated: "It would have been reasonable—and perhaps preferable—for Deputy Payne to have refrained from searching the vehicle and closed containers within it until after it was impounded, at which point he could have obtained a warrant. This course of action would have shown more deference to the warrant process." *Id.*

178. 122 N.M. 777, 932 P.2d 1 (1997).

applied against law enforcement in order to protect individual rights than is its parallel provision in the federal system—the Fourth Amendment of the United States Constitution. In arriving at this expansive view of the New Mexico Constitution, the court formally adopted the interstitial method of state constitutional interpretation as the theoretical approach of choice in New Mexico. By doing so, the *Gomez* court has demonstrated the vitality of the New Mexico Constitution as a tool for safeguarding individual rights. In analyzing a constitutional issue, the judiciary will first examine federal precedent; if it finds the federal analysis unpersuasive, broader protection of civil liberties may be granted based on the New Mexico Constitution. The practical consequences of relying solely on federal law could be devastating for litigators and their clients. When asserting or denying a constitutional claim, litigators must invoke both federal and state constitutions and learn how to make effective arguments under each. If you do not prevail on your state constitutional claim at trial, the *Gomez* decision makes preserving the issue for appellate review less daunting. *Gomez* illustrates how New Mexico state constitutional jurisprudence is rapidly expanding: Here's your chance to partake in its development.

JENNIFER CUTCLIFFE JUSTE