

# ARTICLE II, SECTION 10 OF THE NEW MEXICO CONSTITUTION

The Most Developed Bill of Rights  
Provision in State Law  
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## LANGUAGE OF ARTICLE II, SECTION 10 & THE FOURTH AMENDMENT TO THE US CONSTITUTION

- Article II, Section 10: “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.”
- Compare 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.”

## PURPOSE FOR INCREASED PROTECTIONS

- The purpose of Article II, Section 10 is to provide New Mexico citizens constitutional rights that exceed those provided under the Fourth Amendment because Article II Section 10 has “distinctive characteristics,” which differentiate the two.
- When interpreting Article II, Section 10, the New Mexico Supreme Court has emphasized its strong belief in the protection of individual privacy....” *State v. Granville*, 2006–NMCA–098, ¶ 19, 140 N.M. 345.
- It is important to develop an independent jurisprudence of state constitutional rights.
  - Michael B. Browde, *State v. Gomez and the Continuing Conversation over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M.L. REV. 387 (1998)
- These protections are not just limited to NM State Actors! *See State v. Cardenas-Alvarez*, 2001-NMSC-017, 130 N.M. 386

## THE VEHICLE OF INCREASED PROTECTIONS: THE INTERSTITIAL APPROACH

- Courts use the interstitial approach to analyze state constitutional claims when they are raised with analogous federal constitutional claims. *See State v. Gomez*, 1997-NMDC-006, 122 N.M. 777.

### Two Steps

1. New Mexico courts will first determine whether the claimed right is protected under the U.S. Constitution. *See Id* ¶ 19. .
  - If the right is protected under the federal constitution, Courts do not reach the state constitutional claim. *Id*; *see also State v. Davis*, 2015-NMSC-034, ¶ 52 (holding aerial surveillance was unlawful under the 4th and therefore not undergoing a state constitutional analysis.)
2. Courts will then move to the analysis of the any state constitutional claim to determine whether increased protections are afforded under the New Mexico Constitution. *Id*.

# THE INTERSTITIAL APPROACH: REQUIREMENTS FOR LITIGANTS

## PRESERVATION

The requirements under this approach  
can be broken into two categories:



Preserving claims **without** established  
precedent (the stringent *Gomez* standard).



Preserving claims **with** established  
precedent  
(the lower *Gomez* standard).

## PRESERVING CLAIMS WITHOUT ESTABLISHED PRECEDENT

**What needs to be shown under the interstitial approach when the right has not been interpreted differently than its federal counterpart:**

- Must assert a state constitutional right *and* assert *in the trial court* that the “state constitutional provision at issue should be interpreted more expansively than the federal counter part and provide reasons for interpreting the state provision differently from the federal provision.” *Gomez*, 1997-NMSC-006.

### **Why?**

- This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue

**This is most likely unnecessary for claims stemming from Section 10.**

## PRESERVATION WITH ESTABLISHED PRECEDENT

**When a litigant asserts protection under a New Mexico Constitutional that is construed to provide more protection than its federal counterpart, the claim may be preserved by:**

- Asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and
- Showing the factual basis needed for the trial court to rule on the issue. This is *no more* than is required of litigants asserting a right under the federal constitution, a federal statute, a state statute, or common

**Essentially, litigants need only “fairly invoke” a ruling by the trial court to raise such a question on appeal. Generally, the only requirement to assert a claim on appeal is: (1) assertion of a legal claim, and (2) development of the facts.**

**CITE SECTION 10!**

## ARTICLE 11, SECTION 10 PRESERVATION: THE LOWER GOMEZ REQUIREMENT



“It is well established Article II, Section 10 provides **more** protection against unreasonable searches and seizures than the Fourth Amendment.” *State v. Leyva*, 2011-NMSC-009, ¶ 51, 149 N.M. 435.



Therefore, a litigant asserting his or her rights were violated under Section 10 will have met the less stringent of the *Gomez* preservation requirements. *Id.* ¶ 50 (“a plethora of precedent already interprets Article II, Section 10 more expansively than the fourth amendment.”).



There are several categories of specific conduct that are established as increased protections under Article II, Section 10.



## CATEGORIES OF ESTABLISHED PROTECTIONS THAT ARE NOT INCREASED

### Several protections are NOT increased under Article II, Section 10

#### Knock and talk

- *State v. Flores*, 2008-NMCA-074, ¶ 8, 144 N.M. 217,

#### Plain view (but maybe not plain feel-*Minnesota v. Dickerson*, 508 U.S. 366)

- If following a lawful stop on a roadway, an item in an automobile is in plain view and the officer has probable cause to believe the item is evidence of a crime, the officer may seize the item. *State v. Bomboy*, 2008-NMSC-029, ¶ 17, 144 N.M. 151.

#### International border patrol checkpoints:

- *State v. Sanchez*, 2015-NMSC-018, ¶ 2.

# CATEGORIES OF ESTABLISHED INCREASED PROTECTIONS

## Categories of GREATER protections under Article II, Section 10

- Trash pulls
- The search of automobiles
- Search incident to arrest
- Questioning a driver/passenger
- Pretextual Stops
- Disclaimer: Not all violations of these protections make strong standalone civil rights claims; however, they may support expansion under Section 10 in a new area, or support a damage claim that flowed from the violation.

## ANOTHER PERSON'S TRASH

- A search of garbage set out for collection must be supported by a warrant and probable cause in New Mexico.
  - *State v. Crane*, 2014-NMSC-026 (We reiterate that in the context of garbage searches by police, the analysis does not depend upon the differences between an “effect” and a “home”—that one can be moved while the other cannot. It depends instead upon whether there were steps taken, as in this case, to keep the property private from inspection by others, including police).
- “In light of the greater privacy protections provided by Article II, Section 10, as interpreted by our Supreme Court, we conclude that an expectation of privacy in garbage set out for collection is reasonable in New Mexico.”
  - *State v. Granville*, 2006-NMCA-098, ¶ 33.



# THE SEARCH OF AUTOMOBILES

- Section 10 of the New Mexico Constitution gives broader protection to individuals in the area of automobile searches than is provided by the Fourth Amendment.
- New Mexico rejects the bright line exception that permits a warrantless search of a lawfully stopped automobile *and* any closed containers within the automobile due to the inherent exigent nature of an automobile. *See Gomez*, 1997-NMSC-006, ¶ 34
- Under Section 10 “a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances.” *Id.* ¶ 39.
- *State v. Copeland* defined exigent circumstances as “an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.” 1986-NMCA-083, ¶ 14.



# SEARCH INCIDENT TO ARREST

- Section 10 only permits a search of a defendant's automobile incident to arrest unless the area of the vehicle "searched was within the range of arrestee's potential ability to access any weapons, evidence, or means of escape." *State v. Rowell*, 2008-NMSC-041, ¶ 23.
- There seems to be a lot of deference given to officer discretion to decide this "potential ability" of the arrestee. ¶ 24.
- SCOTUS, in *Arizona v. Gant*, 556 U.S. 332 (2009), caught up to NM and since abandoned the bright-line rule allowing police to conduct a search incident to arrest of the passenger compartment of a vehicle, regardless of whether it is within the immediate control of the arrestee. However, this stands as another example of New Mexico increasing protections above and beyond the 4<sup>th</sup> Amendment.



## QUESTIONING THE DRIVER DURING A STOP

- Section 10 requires that all questions asked during the investigation of a traffic stop be reasonably related to the initial reason for the stop. Unrelated questions are permissible when supported by independent reasonable suspicion, for reasons of officer safety, or if the interaction has developed into a consensual encounter. *State v. Leyva*, 2011-NMSC-009, ¶ 55.
- Essentially, the approach that initial questions must be reasonably related to the reason for the stop, unless there is independent reasonable suspicion.



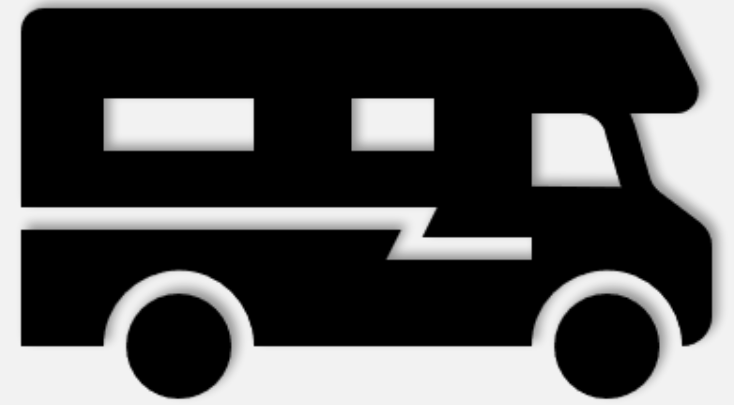
## QUESTIONING THE PASSENGERS DURING A STOP

- The rule requiring independent reasonable suspicion was extended to passengers in *State v. Portillo*, 2011-NMCA-079, ¶ 1.
- In *Portillo*, the driver consented to search the vehicle, and this did not affect the defendant-passenger's rights under Section 10. *Id.* ¶ ¶ 5, 34.



# INTERIOR BORDER PATROL CHECKPOINTS

- **Questioning:** A prolonged stop after questions about citizenship and immigration have been answered violates Section 10 unless there is reasonable suspicion of criminal activity. *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 16.
- Notably, this is limited to *interior* border patrol checkpoints, and does not apply to international fixed checkpoints (such as Santa Teresa Port of Entry). See *State v. Sanchez*, 2015-NMSC-018, ¶ 2.

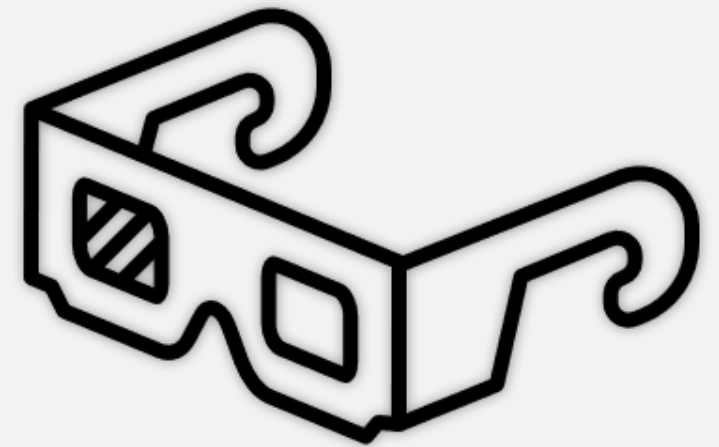




# PRETEXTUAL STOPS

- Pretextual stops not permitted under New Mexico constitutional law, despite being allowed under the US. Constitution. See *State v. Ochoa*, 2009-NMCA-002, ¶ 15.

- “The extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law.” *Cardenas-Alvarez*, 2001-NMSC-017, ¶ 15.



## NON-JAILABLE OFFENSES

- “[U]nder Article II, Section 10, probable cause that a non-jailable offense has been committed does not automatically make arrest reasonable, and that for such arrests to be reasonable, there must be specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant intrusion’ of a full custodial arrest.” (internal citation and alterations omitted. *State v. Rodarte*, 2005-NMCA-141, ¶ 14.
- Essentially, when the specified punishment of an offense does not include incarceration, “that individual should not be deprived of his or her liberty through arrest unless there is a legitimate reason for the deprivation.” ¶ 20.



## EXCLUSIONARY RULE IN REVOCATION HEARINGS

- Unlike the federal rule, where evidence tainted by the fruit of the poisonous tree doctrine is still admissible in revocation hearings, the same is not true under Section 10. *State v. Marquart*, 1997-NMCA-090, ¶ 1, 123 N.M. 809.



# SEIZURES

- An individual is seized under Section 10 when a reasonable person would not feel free to leave. *State v. Garcia*, 2009-NMSC-046, ¶ 26.
- Albeit similar, New Mexico rejects the modification to the reasonable person standard set out in *California v. Hodari D.*, 499 U.S. 621, 628 (1991), and instead maintains the *Mendenhall* standard. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).
- Many states have done this, claiming that the *Mendenhall* standard focuses on police conduct, whereas the *Hodari D.* test turns on the suspect's subjective reaction, which makes application turn on the defendant, rather than police conduct. *Garcia*, 2009-NMSC-046, ¶ 32.



- “In the absence of affirmative legislation, the courts of this state have consistently declined to permit individuals to bring private lawsuits to enforce rights guaranteed by the New Mexico Constitution” *Barreras v. State of New Mexico Corr. Dept.*, 2003-NMCA-027, ¶ 24, 133 N.M. 313.
- With the affirmative legislation of the Civil Rights Act, Individuals may now bring private lawsuits enforce rights guaranteed by Article II, Section 10.

#### Possible Claims

- False Arrest
- Excessive force
- Illegal search/seizure leading to arrest
- Malicious Abuse of Process

## POTENTIAL CLAIMS ARISING FROM SECTION 10 AND THE CIVIL RIGHTS ACT

## FALSE ARREST

- To establish false arrest, one must show that a factual question exists whether the law enforcement officer had probable cause to arrest. *Santillo*, 2007-NMCA-159, ¶ 11.
- Otherwise, false arrest is one way of committing false imprisonment. *Id.* ¶ 11.
  - Which occurs when a person intentionally confines or restrains another person without consent and with knowledge that he has no lawful authority to do so. *Id.*

## EXCESSIVE FORCE

- Article II, Section 10 provides more protection than the 4th. “The Court does not believe that the Supreme Court of New Mexico would require New Mexico citizens to prove an actual injury to sustain a claim of excessive force.” (actual non-de minimus injury required under 4th Amdt) *Sisneros v. Fisher*, 685 F. Supp. 2d 1188, 1222 (D.N.M. 2010) (Browning J.).
- However, precise elements have not been established. *Id.*: see also *State v. Ellis*, 144 N.M. 253, 186 P.3d 245 (2008).
  - This is a good thing to establish new elements and distance from federal requirements such as specific injury requirements (“non-de minimis”).
- While the TCA has likely done so all along, the Civil Rights Act now provides a more straightforward vehicle for violations of the right to be free from unreasonable seizure and excessive force.

# MALICIOUS ABUSE OF PROCESS

## Elements of Malicious Abuse of Process

- (1) A person initiates judicial proceedings against another,
- (2) he or she commits an act in the use of process that would not be proper in the regular process of the claim, (3) a primary motive in misusing the process is to accomplish an illegitimate end, and
- (4) the person against whom the proceedings are initiated suffers damages. *Santillo*, 2007-NMCA-159, ¶ 13.

### **The second element can be based of two theories:**

- 1. The proceedings were initiated without **probable cause** or
- 2. By demonstrating a procedural “irregularity or impropriety **suggesting extortion, delay, or harassment.**” *Id.* see also UJI 13-1639 NMRA (probable cause) UJI 13-1640 (procedural impropriety).



## MAP THEORY 1: PROBABLE CAUSE

- Probable cause to arrest a person occurs only “when the facts and circumstances within the officers’ knowledge, and of which they had reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been, or is being, committed.” *Santillo*, 2007-NMCA-159, ¶ 14.

## THEORY 1: THE PROBLEM

- The problem: the government relied on fabricated information for **probable cause**;
- SCOTUS has held it violates the 4th to “knowingly, or with reckless disregard for the truth” include false statements in the affidavit supplying the probable cause for an arrest. *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir.1996).

## THEORY I: THE SOLUTION

- The current solution: Where false statements have been relied on to establish probable cause, the existence of probable cause for purposes of Section 1983 malicious prosecution claim is determined by setting aside the false information and determining whether, absent that false information, there is still probable cause.
- Article II, Section 10 should again provide increased protections in this context as well. The solution above is the *minimum* under the 4th Amendment.
  - Note the federal test has different elements than NM.
- Malicious Abuse of Process now has an additional vehicle in the Civil Rights act and is supported by increased protections under Section 10.

## MAP THEORY 2: PROCEDURAL IMPROPRIETY

- Procedural impropriety may exist when “despite the existence of probable cause, process has been perverted to accomplish an ulterior purpose [extortion, delay, or harassment, for which it was not designed, [and] even if properly begun, has been perverted to accomplish an ulterior purpose for which it was not designed.” *Santillo*, ¶ 22 (internal citations omitted).

## THEORY 2: HOW TO ESTABLISH

- How to show extortion: quid pro quo evidence.
- How to show delay/harassment:
  - What are the facts and circumstances of:
    1. the plaintiff's arrest? (i.e., was it necessary to arrest the plaintiff at their bar on a busy Friday night? Was it necessary to seize cash and inventory at the time of the plaintiff's arrest?) Could you cite in lieu of arrest?
    2. the case's introduction in court (i.e., was there a bond? what about conditions of release? what were they?)
    3. the prosecutorial history of the case? (i.e., was the underlying criminal case dismissed because the State missed critical deadlines for the preliminary hearing or to produce discovery?). *Santillo*, ¶¶ 22-26.

# WHY IS THE EXTENT OF ARTICLE II, SECTION 10 IMPORTANT?

- The strong development of this Bill of Rights provision in New Mexico jurisprudence stems in large part from criminal defense cases. While these do not always make strong civil rights claims, the extent at which they increase protections is informative.
- The same has not been done for civil rights claims like excessive force. The New Mexico Civil rights act provides a vehicle for these claims, and Article II, Section 10 should follow the pattern of increased protections in many facets of civil rights law.
- Because Section 10 provides greater protections than that of the Fourth Amendment, all claims under the New Mexico Civil Rights act should lean on Article II, Section 10 for support, which will have the desired effect of creating case law separate from, and more favorable than, the federal body of case law!

# WHY IS THE EXTENT OF ARTICLE II, SECTION 10 IMPORTANT?

- We can also use the exclusionary rule (the bulk of Section 10 case law) in a civil rights context.
- In New Mexico there is no good faith exception. *State v. Gutierrez*, 1993-NMSC-062, ¶ 56
  - Much like the exclusionary rule, everything that happens after an illegal arrest/illegal entry is part of damages for a civil rights claim without a good faith exception.
  - This may also mirror the successive tortfeasor doctrine. *Payne v. Hall*, 2006-NMSC-029, ¶ 13 (imposing joint and several liability on the original tortfeasor for the full extent of injuries caused by a successive tortfeasor.)
- Additionally, seek a ruling like *Cortez v. McCauley*, 478 F.3d 1108, 1127 (10th Cir. 2007), where an illegal arrest may provide for damages resulting from *reasonable and* unreasonable force in effectuating the arrest. A similar ruling may provide for damages in situations where an illegal arrest is apparent, but a successful excessive force claim is difficult.

# DON'T FORGET THE TORT CLAIMS ACT

- Until July 1, 2021, the primary affirmative legislation that expressly waived Immunity was the TCA.
- The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for... deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.” See NMSA 1978, § 41-4-12 (2020).
- Other claims will still be made under the TCA such as: (negligently causing) assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights, the independent tort of negligent spoliation of evidence or the independent tort of intentional spoliation of evidence. See *id.*



# CLOSING THOUGHTS

- Section 10 is likely to provide greater protections than the Fourth Amendment throughout its development in civil rights claims.
- This is a new area of law, and federal law is simply the floor of the constitutional protections. Claims brought under the Civil Rights Act and Section 10 have the opportunity to create a much higher ceiling of protections for individuals in New Mexico.
- When litigating starting points, don't hesitate to look for a better "floor" to spring off of than the 10th Circuit. Indeed, the 9th and 4th Circuits may provide better "floors."