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New York vs. "The Rest of the Country": State Constitutional Criminal Procedure

Barry Latzer

NEW YORK vs. "THE REST OF THE COUNTY": STATE CONSTITUTIONAL CRIMINAL PROCEDURE

Barry Latzer[1]

Professor Barry Latzer:

Thank you Judge. My name is Barry Latzer. I am a professor at John Jay College of Criminal Justice. My topic is State Constitutional Criminal Procedure Law in New York and how New York differs from the rest of the country.

As most of you know, the New York Court of Appeals has come under rather sharp attack because of its criminal procedure decisions.[2] Governor Pataki has sharply criticized the court for being insensitive to crime victims, and to the police and their

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[2] *See* Vincent Martin Bonventre & Judi A. DeMarco, *Court of Appeals Bashing: A Reality Check*, 69 N.Y. St. B.J. 10, July-Aug., (1997). Governor Pataki, along with New York Attorney General Dennis Vacco, has sharply criticized the court of appeals as being too lenient on criminals. *Id.* Attorney General Vacco "decried the 'arcane technicalities and liberal interpretations' that have interfered with police work 'at a time when innocent, young children are being killed and maimed.'" *Id.* "Governor Pataki protested the current 'imbalance' created by the Court of Appeals that 'tips the scales in favor of criminal rights.'" *See also* Sarah Metzgar, *Pataki Proposes Empowering Police in Evidence Cases*, TIMES UNION, Jan. 30, 1996, at A1. The New York City Police Commissioner "ridiculed the screwball Court of Appeals for living off in Disneyland somewhere"; John Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, WASHINGTON POST, Mar. 14, 1996 at A3.

needs.[3] He has also said that the court of appeals has "developed a network of law that is very different from the rest of the country."[4] He was referring to criminal procedure law.[5]

Professor Bonventre,[6] for whom I am the designated speaker, conducted a study to test the proposition that New York was different from the rest of the country in the area of criminal procedure.[7] He concluded that it was not so.[8] Professor Bonventre tested the proposition by looking at the actual criminal appeal dispositions by the highest courts in New York and other northeastern states, Vermont, Massachusetts, Connecticut, New Jersey, and Pennsylvania. He looked at these dispositions over a six-year period, then counted to see which dispositions were favorable to the defendants and which were favorable to the prosecution. He concluded that New York was roughly in the mainstream.[9] New York was not as favorable to the prosecution

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[3] Bonventre & DeMarco, *supra* note 2, at 10. Governor Pataki has stated that the court of appeals was going "way too far in putting the rights of the defendant to hide behind particular technicalities ahead of the rights of the people to walk the streets, go to school and live safely at home." *Id.*

[4] *Id.* Governor Pataki verbally abused the Court of Appeals at a news conference in November 1995, where he "berated" the court for its "'irrational, mindless procedural safeguards' for criminals." *Id.* Governor Pataki also stated that "'[t]he other 49 states have a common-sense system of justice.' He accused the Court of Appeals of "'creating their own rules' and thereby developing a 'network of law' that is 'very different from the rest of the country.'" *Id.*

[5] *Id.*

[6] Vincent M. Bonventre is a Professor of Law at Albany Law School. He was scheduled to participate in this conference, but was unable to attend.

[7] Bonventre & DeMarco, *supra* note 2, at 10.

[8] *Id.* A study of the decisions in criminal cases of the New York Court of Appeals as well as the high courts of five of New York's neighboring states "revealed that the decisional output of the New York tribunal is not at all 'very different from the rest of the country.'" *Id.* "More specifically, a comparative look at criminal appeal dispositions by the high courts of New York, Vermont, Massachusetts, Connecticut, New Jersey, and Pennsylvania for the six year period from 1990 through 1995 shows that the New York court is fairly middle of the road." *Id.*

[9] *Id.* Every decision rendered between the years 1990 and 1995 in an appeal from a criminal prosecution was considered, and in the case of New York, there were a total of 604 appeals counted. *Id.* Out of those decisions, the

as Vermont and not as favorable to defendants as New Jersey, but fell somewhere in the middle.[10] Therefore, these findings partially rebutted the allegation that New York was out of the mainstream in relation to state constitutional criminal procedure decisions.

Professor Bonventre supported his findings with additional studies of actual doctrinal decisions of the courts. Specifically, he looked at the actual substance of their rulings. Again, he compared New York to the same five states.[11] Once again, he found that those states had rejected Supreme Court decisions and broadened the state constitutional rights almost to the same extent that New York had.[12] He concluded that New York was not different from the mainstream.[13] I have two criticisms of Professor Bonventre's approach and will draw a slightly different conclusion.

In relation to the counting of dispositions, Norman Olch,[14] a colleague of mine at John Jay College, also conducted a study. Professor Olch employed a similar technique, but he confined his study to one year.[15] However, he did not compare New York to other states.[16]

New York Court of Appeals ruled in favor of the prosecution 61.5 percent of the time, which placed it firmly within the six-court spectrum. *Id.*

[10] *Id.* New York's 61.5 percent pro-prosecution record is almost the average of Vermont's high of 72 percent and New Jersey's low of 55 percent. *Id.* "The New York tribunal shares the middle ground among the six state courts with the Massachusetts Supreme Judicial Court -- albeit the somewhat less pro-prosecution side of that middle." *Id.* There is no indication from this study that the New York Court of Appeals is exceptionally pro-defendant. *Id.*

[11] Bonventre & DeMarco, *supra* note 2, at 9.

[12] Bonventre & DeMarco, *supra* note 2, at 10; *see also supra* note 9 and accompanying text.

[13] Bonventre & DeMarco, *supra* note 2, at 11; *see also supra* note 10 and accompanying text.

[14] Norman Olch is a Professor of Law at John Jay College of Criminal Justice. He wrote an article in the New York Law Journal entitled *Soft on Crime? Not the New York Court of Appeals*. N.Y. L.J., May 6, 1996, at 1.

[15] *Id.* Professor Olch's study shows that from the period of December 1, 1994 through November 30, 1995, the Court of Appeals ruled in favor of the prosecution in 75.6 percent of its criminal cases. *Id.* According to Olch, this is strongly pro-prosecution. *Id.* Olch stated that "no one would call the

There is a problem with counting dispositions. I am not saying that it does not yield a fruitful result at all, but there could be many reasons for a disposition in a case. A disposition may not only have to do with the substantive rights that are involved. Furthermore, not all cases are equal. Some cases are much more important than others. Some cases make major doctrinal decisions that influence law in the state, both broadly and for many years to come.[17] Some cases are relatively minor; they do make significant new law. Rather, they are merely clarification cases, clarifying already-existing law. Therefore, by counting cases, you start with an assumption that all cases are created equal. However, they are not. So even though the doctrinal approach is also subject to criticism - it requires interpretation, which injects subjective elements into one's analysis the doctrinal approach is to be preferred.

I criticize Professor Bonventre for studying only the northeastern states. Many of these states are just as liberal and as rights expansive as New York. Accordingly, to say New York is

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current United States Supreme Court a coddler of criminals, yet defendants are far better there." *Id.* "In the combined total of criminal appeals decided by the Supreme Court in the two term period ending June 1995, defendants prevailed 35 percent of the time, a considerably higher success rate than 25 percent at New York's high tribunal. *Id.* Thus, "[a] court which hand victories to 1 percent of all who seek access to the court can hardly be described as 'criminal friendly.'" *Id.*

[16] Bonventre & DeMarco, *supra* note 2, at 12. Olch's studies "shed no light on whether the Court of Appeals' record of 'protecting the guilty' is out of line with that of other state supreme courts--either because of the frequency with which New York's high court sides with criminal defendants or because its position on the issues are 'very different.'" *Id.*

[17] *See* Harry N. Scheiber, *Innovation, Resistance, and Change: A History Of Judicial Reform and the California Courts, 1966-1990*, 66 S. CAL. L. REV. 2049, 2120 (1993). "That the content of state supreme court dockets and the doctrinal direction of decisions varied significantly from one state to another is indicated by the standard scholarly study of historic change in the business of these courts to 1970." *Id.* "Obviously there can be major shifts in direction, in important areas of constitutional law and common law, when the composition and ideological coloration of a court change abruptly." *Id. See also* Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190 (1991).

no more liberal and rights expansive than New Jersey or Connecticut is not saying very much. The better approach is to compare New York's output in state constitutional criminal procedure to the output of all the other states. I tried to do this. I selected the cases in which the New York Court of Appeals broadened rights on state constitutional grounds. That means that the state rejected the narrower rights position of the United States Supreme Court. Then, I examined these same issues in the other states that reached the state constitutional question.

For example, the first issue on the chart (reproduced below) here is the good faith exception[18] In *Unites States v. Leon*,[19] the United States Supreme Court established a good faith exception to the exclusionary rule where police rely in reasonable good faith upon a search warrant which later proves defective. The evidence seized pursuant to the invalid warrant is not to be excluded, but rather is to be admitted. The good faith doctrine is presumably based on the Fourth Amendment.[20]

In preparing my treatise, I analyzed the criminal procedure output of all fifty states on the state constitutional provisions.[21] What I found was a deep division among the state courts on state constitutional grounds in relation to this good faith rule, the *Leon* rule.[22] You have to keep in mind that a number of states have never reached the state constitutional issue on this. Presumably, they follow the United States Supreme Court's rule on federal

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[18] *See* U.S. v. Leon, 468 U.S. 897 (1984). The *good faith exception* rule comes into effect when the Fourth Amendment exclusionary rule is modified to permit admission of evidence that "was seized in reasonable, good faith reliance on a search warrant that is subsequently held to be defective." *Id.* at 905.

[19] *Id.*

[20] U.S. CONST. amend. IV. The Fourth Amendment of the United States Constitution states in pertinent part: "[N]o 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." *Id.* I say "presumably," because the Supreme Court created some doubt when it declared that the exclusionary rule is but a "judicially created remedy," and not a Fourth Amendment right. *Leon*, 468 U.S. at 906.

[21] BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW (1995).

[22] *Id.* §§ 2:11-2:13.

Fourth Amendment grounds. That is, they have a good faith rule in that state, but the basis for that rule is the federal Fourth Amendment.[23] When a state is in this posture, it means that the state court may at some point change its mind. A state court may later claim that it had a good faith rule, but that was because it was following the Fourteenth Amendment, which incorporates the exclusionary rule along with its good faith exception. Therefore, the state court may claim that it was simply enunciating federal constitutional law; however, that does not prevent the state from reconsidering the issue as a state constitutional matter.

To determine whether, as Governor Pataki says, New York is out of touch or out of the mainstream, one might fairly take into account all of the states that have not reached the state constitutional issue.[24] I did not do this in this study, but it seems to me one could take that position. In other words, one could add up all of the state courts that follow the *Leon* rule on the basis of the Fourth Amendment. One could then add to that list all of the state courts that follow the *Leon* rule on the basis of their state search and seizure provisions. Then, one must look at all of the state courts, including New York, which reject the *Leon* rule based upon the state constitution.

The problem with this methodology is that it gives too mush weight to state decisions which merely follow the mandate of the Fourteenth Amendment. If a state constitutional issue is not raised then the state court may not reach it and must therefore decide the case on the federal issue that was raised. As the state court must, in this situation, follow the dictates of the United States Supreme Court, its decision is not necessarily an endorsement of the Supreme Court doctrine.

Therefore, in determining whether or not New York is out of touch with the rest of the country, I have examined only state constitutional law decisions. These are a truer indicator of the positions of the state courts. If one finds that there are deep

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[23] *Id.* (stating that for a "search warrant, to be valid, [it] must be supported by an affidavit establishing probable cause."). The court did not mention any state constitutional provisions in its decision. *Id.*

[24] *Id.*

divisions among the other states on state constitutional grounds in relation to an issue, an issue that New York decided contrary to the United States Supreme Court's rule, one must conclude that New York is not out of touch on that issue. New York is simply reflecting the deep division among the state courts on this issue. However, if one finds that when other states reached the state constitutional question, they adopted the Supreme Court's rationale, then there is a good argument to be made that at least as to that issue, New York is out of the mainstream.

The Table below presents cases on sixteen criminal procedure issues, including search and seizure, *Miranda*, and right to counsel issues. For each issue, the New York Court of Appeals has rejected the federal approach, basing its decision upon the Constitution of the State of New York. The Table also indicates which states have disagreed with New York, and have adopted the position of the United States Supreme Court on state constitutional grounds, and which states have, like New York, repudiated the federal rule on state grounds.

We should not forget that even though the state has the prerogative to interpret its state constitutional provisions more broadly then their federal constitutional counterparts, it also has the prerogative to interpret its provisions in the same way that the Supreme Court interprets or even more narrowly.[25] I do not agree with those who say that a state court is not permitted to interpret a state provision more narrowly than the United States Supreme Court interprets a comparable provision. I do not believe that is correct. Rather, I think it is accurate to say the states may not *enforce* narrower rights where to do so would undermine broader federal constitutional rights; no state has the authority to do that.[26] They do have the right to *interpret* the state constitution more narrowly. If the Supreme Court were

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[25] Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123, 1125-30 (1992).

[26] To do so would violate the Supremacy Clause. U.S. CONST. art. VI, § 2. Article VI, § 2 provides in pertinent part that the "Constitution, and the Law of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." *Id.*

ever to change its mind and reconsider its overly broad interpretations of the Fourteenth Amendment Due Process Clause, as I urged in a recent publication,[27] we may reach the day where some of those rights narrowing state constitutional interpretations could become enforceable. In any event, for the purpose of this talk, I have examined only those state court decisions based on state constitutional law that have adopted the same position as the Supreme Court, or have broader rights.

As the Table makes clear, the states are really quite closely divided on some of the issues. Let us examine the good faith issue again. By my count, ten states currently endorse the *Leon* rule as a matter of state constitutional law and ten states, eleven, if you count New York, have rejected the *Leon* rule. Whatever you think of the substance of the good faith issue, it seems fair to say that New York is not out of the mainstream. However, if you examine the states that are ruling only on the basis of federal constitutional law, and if you add them in, then perhaps you could say New York, along with the other states which reject *Leon* on state constitutional grounds, is somewhat out of the mainstream. If you look at the state courts that have ruled solely on the state constitutional question, however, New York is in there with roughly half of the other states that have reached the question. So it seems to me that one cannot say, based on this type of division, that New York is out of the mainstream. There are, however, five decisions where New York is out there by itself. I will now examine these five New York contrary decisions. In New York, the effective assistance of counsel standard is different than the federal standard.[28] Whether it is more rigorous or less demanding than the *Strickland* test is not yet clear. But it certainly appears to be different.

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[27] *See* Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. OF CRIM. L. & CRIMINOLOGY 63 (1996).

[28] While state law relies on the defendant showing a lack of "meaningful representation," in People v. Baldi, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981), a defendant alleging a violation under the Federal Constitution must satisfy the two-part test of Strickland v. Washington, 466 U.S.668 (1984).

Those of you familiar with *Miranda* law are probably aware that New York's right to counsel rule is much more rigid than the federal rule.[29] *Edwards v. Arizona*[30] provides that the right to counsel, once asserted, may be waived at the initiation of the uncounselled suspect. By contrast, *People v. Cunningham*[31] provides that such waiver is valid only in the presence of counsel.

Protective vehicle searches were approved by the Supreme Court in the *Michigan v. Long*[32] case. *People v. Torres* is the New York Court of Appeals case on this issue.[33] It has aroused a great deal of criticism that I think is justified. New York is almost by itself in rejecting the position of the United States Supreme Court in *Michigan v. Long*.

The Supreme Court held in *Michigan v. Long*[34] that if police have reason to believe -- I do not think they use the term

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[29] Barry Latzer, *State Constitutional Criminal Law*, §§ 4:9, 4:11, 5:2.

[30] 451 U.S. 477 (1981) (holding that "Miranda was not intended to require that every reference to an attorney, regardless of its ambiguity must be construed as an invocation of the Miranda rights.").

[31] 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S. 421 (1980).

[32] 463 U.S. 1032 (1983). In *Long*, while on patrol in a rural area, two officers spotted a vehicle that drove into a ditch. *Id.* at 1035. After receiving no response to various questions and spotting a knife in the passenger's compartment of the vehicle, the officers frisked the respondent, who was the sole occupant of the car. *Id.* at 1036. One of the officers then spotted a pouch on the front seat of the vehicle and discovered that the pouch contained marijuana. *Id.* After finding nothing as a result of a subsequent search of the car, the officers impounded the vehicle and opened the trunk, discovering about seventy five pounds of marijuana. *Id.* The issue presented here was whether the officer had the authority to search the passenger compartment. *Id.* at 1037. The Court held the officer did have the authority. *Id.* at 1053.

[33] *Torres*, 74 N.Y.2d at 224, 543 N.E.2d at 61, 544 N.Y.S.2d at 796. This case involved an anonymous phone call to the police, which informed them that a wanted male convicted of homicide could be found at a certain barber shop. *Id.* at 226, 543 N.E.2d at 62, 544 N.Y.S.2d at 797. After driving to the location and spotting the defendant enter a car, detectives frisked the two occupants. *Id.* In addition, one of the detectives obtained a bag from the front seat, noticed the shape of a gun, and found weapons in the bag. *Id.* The issue here was whether the detective had enough probable cause to search the interior of defendant's car. *Id.* at 227, 543 N.E.2d at 63, 544 N.Y.S.2d at 798. The Court held for the defendant. *Id.*

[34] 463 U.S. 1032 (1983).

"reasonable suspicion" in that case, but most authorities just translate that as reasonable suspicion --there may be a weapon in a vehicle, they may conduct a limited search within that vehicle only in the areas where that weapon may be hidden.[35] Borrowing from *Terry v. Ohio*,[36] which upheld weapons frisks of pedestrians on reasonable suspicion, the Court applied the same standard to vehicle searches for weapons.[37]

Now, in the *People v. Torres*[38] case, the New York Court of Appeals rejected this rule, although when my students press me to tell them exactly what rule New York has, I have to say I am quite hard pressed. I think the law in this case is rather unclear. Here are the facts. The police received a tip that one Popo, who was wanted for murder, was having his hair cut at a barber shop on 116th St. and Third Avenue in Manhattan.[39] The anonymous caller described him as a large, six-foot tall Hispanic male, wearing a white sweater, driving a black El Dorado and carrying a gun in a shoulder bag. That fact is going to be crucial. Two detectives went to the barber shop. They saw a man matching Popo's description. They watched him leave with another man and they watched him enter a black El Dorado. The detectives approached with guns drawn, ordered the men out of the car, frisked them and seized the shoulder bag, which the suspect had left in the car. After noting its weight and feeling the shape of the gun from the outside, the detective opened the bag and found a revolver with live ammunition. The charge was, of course, a

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[35] *Id.* at 1049.

> The search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of the weapons.

Id.

[36] Terry v. Ohio, 392 U.S. 1 (1967).

[37] *Long*, 463 U.S. at 1032.

[38] 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989).

[39] *Id.* at 226, 543 N.E.2d at 62, 544 N.Y.S.2d at 797.

weapons crime.[40] The Court of Appeals, assuming arguendo that the tip supported both the order to get out of the vehicle and the frisk of the men, held that there was no justification for reaching into the car and removing the bag.[41]

The court reasoned that under the New York Constitution, an entry into a vehicle is a significant encroachment into a citizen's privacy that must be justified at its inception and reasonably related in scope and propensity to the circumstances which rendered the intrusion permissible.[42] No legitimate law enforcement concerns justified the intrusion here. The officers had removed the men from the vehicle and patted them down.[43] Any residual fears could have been eliminated by the less intrusive step of asking them to move away from the car.[44] The scenario in *Michigan v. Long*, in which upon re-entry into the vehicle, the suspect could have reached for a concealed weapon and threatened the police, was dismissed as farfetched.[45]

It does not strike me as farfetched. Had it been decided on the basis of *Michigan v. Long*, the *Diaz* search would have been upheld on federal constitutional grounds because surely the police had reason to believe there was a weapon in this car. After all, the tipster said Popo would be carrying a black shoulder bag with a gun. Popo, or Diaz, whatever his real name was, left a black shoulder bag in the car. So, for the court of appeals to say that this search violated the New York State Constitution, seems to me to have opened them up to some serious criticism.

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[40] *Id.* at 227, 543 N.E.2d at 62, 544 N.Y.S.2d at 797-98. "The defendant pleaded guilty to third degree criminal possession of a weapon after his motion to suppress the physical evidence had been denied." *Id.*

[41] *Id.* at 227, 543 N.E.2d at 63, 544 N.Y.S.2d at 798. The Court of Appeals stated: "At most, the detectives may have had a reasonable basis for suspecting the presence of a gun, however, their information did not rise to the level of probable cause to search closed containers within the car's passenger compartment for a weapon." *Id.*

[42] *Id.* at 229-30, 543 N.E.2d at 65, 544 N.Y.S.2d at 800.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 230-31, 543 N.E.2d at 65, 544 N.Y.S.2d at 800.

We find that very few courts in the United States have rejected the *Michigan v. Long* rule on state constitutional grounds. But the *Diaz* court seemed to be eager to announce that it was rejecting *Michigan v. Long*. In fact, quite frankly, I would say that seemed to be the primary motivation for the decision.[46]

In *People v. Diaz*,[47] New York anticipated the *Minnesota v. Dickerson*[48] ruling with regard to the issue of plain touch searches. There is a difference between the *Dickerson* case and the New York Court of Appeals decision in *Diaz*.[49] The difference has to do with whether a police officer can get a good sense of what he is touching when he touches it. The Supreme Court apparently thinks that feeling something provides more information to a police officer than the New York Court of Appeals believes it provides.[50] The New York court has established a per se rule that patting a pocket never justifies a further intrusion once the officer concludes that the pocket does not contain a weapon. This is far less flexible then the Supreme Court's *Dickerson* rule.

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[46] *Torres*, 74 N.Y.2d at 227, 543 N.E.2d at 63, 544 N.Y.S.2d at 798. The New York Court of Appeals has "demonstrated its willingness to adopt more protective standards under the New York State Constitution 'when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of the citizens of New York.'" *Id.*

[47] 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993). The issue in this case was "whether the warrantless search of defendant's pocket was justified by information allegedly obtained by the police in conducting an authorized protective pat-down. *Id.* at 107, 612 N.E.2d at 299, 595 N.Y.S.2d at 941. In this case, officers saw groups meeting on sidewalks, while passing objects to each other. *Id.* at 108, 612 N.E.2d at 299, 595 N.Y.S.2d at 941. Defendant in this case also abruptly changed direction when he spotted the officers. *Id.* One of the officers noticed a bulge in defendant's pocket when he called defendant over to the car. *Id.* When one of the officers feared there was a weapon in defendant's pockets, he grabbed the pocket and felt vials. *Id.* The vials turned out to be filled with crack. *Id.* at 108, 612 N.E.2d at 300, 595 N.Y.S.2d at 942. The court held that the search was unreasonable under the circumstances and the vials were inadmissible. *Id.*

[48] 508 U.S. 366 (1993).

[49] *Diaz*, 81 N.Y.2d at 106, 612 N.E.2d at 298, 595 N.Y.S.2d at 940.

[50] *Dickerson*, 508 U.S. at 366 (1993).

Finally, the fifth area would be the *Gates* rule[51] respecting warrants. The *Illinois v. Gates* [52] case relaxed the requirements for testing search warrants. Although that ruling came under a great deal of criticism, nearly half the states have endorsed the *Gates* ruling as a matter of state constitutional law, and only five states, counting New York, have rejected it in some fashion.

What do I conclude from this little survey? My conclusion is that Governor Pataki is not entirely wrong when he says that the New York Court of Appeals is out of the mainstream. He can point to the five cases discussed above – five cases which, as my analysis shows, enunciate doctrines rejected by most of the other states. On the other hand, there are ten New York rights-broadening decisions on issues which have sharply divided the states, and therefore, the expansion of rights by the Court of Appeals is hardly unprecedented or unusual. With respect to these cases, New York is not out of the mainstream. Thus, my conclusion is that Governor is partly right, which is a nice safe position to be in after having delivered all of these criticisms. Thank you so much.

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[51] *See* Illinois v. Gates, 462 U.S. 213 (1983). This case involved respondents indicted for violation of Iowa drug laws after police officers found marijuana and other contraband in their residence and vehicle. *Id.* at 2320. The police acted pursuant to a warrant. *Id.* There was a question to the sufficiency of the affidavit that was submitted to get the warrant. *Id.* at 2321. The Court ruled against respondents in abandoning the rigid "two-pronged test" which analyzes the "informant's reliability" and his "basis for knowledge." *Id.* at 2329. Instead the Court used a "totality of the circumstances" analysis to reach its holding. *Id.*

[52] *Id.*

Issue	NY Case	# of States adopting Federal rule	# of States rejecting Federal rule
Good faith exception[1]	*Bigelow*[2]	10[3]	10[4]
Inevitable discovery[5]	*Stith*[6]	6[7]	4[8]
Dog sniff[9]	*Dunn*[10]	7[11]	5[12]
Open fields[13]	*Scott*[14]	4[15]	4[16]
Gates[17]	*Griminger* [18]	25[19]	4[20]
Search-incident to arrrest[21]	*Gokey*[22] & *Smith*[23]	11[24]	4[25]
Seizure defined (*Hodari D.*) [26]	*Bora*[27]	7[28]	10[29]
VIN search[30]	*Class*[31]	1[32]	1[33]
Plain touch[34]	*Diaz*[35]	12[36]	0
Weapons search of car (*Long*)[37]	*Torres*[38]	5[39]	1[40]
Belton[41]	*Blasich*[42]	12[43]	7[44]

Edwards v. Arizona[45]	*Cunningham*[46] & *Davis*[47]	9[48]	0
Moran v. Burbine[49]	*Pinzon*[50]	6[51]	8[52]
Elstad[53]	*Bethea*[54]	3[55]	3[55]
New York v. Harris[57]	*Harris*[58]	1[59]	1[60]
Effective assistance of counsel[61]	*Ellis*[62]	34[63]	3[64]

[1] United States v. Leon, 468 U.S. 897 (1984) (holding that exclusionary rule not applicable when police rely on warrant subsequently ruled invalid).

[2] People v. Bigelow 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985) (declining on state constitutional grounds to apply a good faith exception where a search warrant was defective whether measured by the *Aguilar-Spinelli* or the *Gates* standard). "[I]f the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future." *Id.* at 427.

[3] Jackson v. Arkansas, 722 S.W.2d 831 (1987) (relying on rules of criminal procedure); Johnson v. Florida, 660 So. 2d 648 (1995), *cert. denied*, 116 S. Ct. 1550 (1996); Lloyd v. Indiana, 677 N.E.2d 71 (1997); Crayton v. Commonwealth, 846 S.W.2d 684 (Ky. 1992), *cert. denied*, 114 S. Ct. 165 (1993); Louisiana v. Wood, 457 So.2d 206 (1984); Missouri v. Sweeney, 701 S.W.2d 420 (1985); Ohio v. Wilmoth, 490 N.E.2d 1236 (1986) (not clearly relying on the state constitution); South Dakota v. Saiz, 427 N.W.2d 825 (1988); Janis v. Commonwealth, 472 S.E.2d 649, 652 (Va. 1996) (stating that "no justification exists for drawing a distinction between the two constitutional

provisions--federal and state--for purposes of good faith analysis."); Hyde v. Wyoming, 769 P.2d 376 (1989).

[4] Connecticut v. Marsala, 579 A.2d 58 (1990); Idaho v. Guzman, 842 P2d 660 (1992); People v. Krueger, 675 N.E.2d 604 (Ill. 1996) (declining on state constitutional grounds to apply the good-faith exception established in Illinois v. Krull, 480 U.S. 340 (1987); People v. Sundling, 395 N.W.2d 308 (Mich. 1986); New Jersey v. Novembrino, 519 A.2d 820 (1987); New Mexico v. Gutierrez, 863 P.2d 1052 (1993); North Carolina v. Carter, 370 S.E.2d 553 (1988); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991); Vermont v. Oakes, 598 A.2d 119 (1991); Washington v. Crawley, 808 P.2d 773 (1991).

[5] Nix v. Williams, 467 U.S. 431 (1984) (holding that body of murder victim not suppressed despite illegally obtained admission about its location where the state showed that a search of the area would have occurred anyway).

[6] People v. Stith, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987) (unlike the federal rule, the New York constitutional inevitable discovery rule is inapplicable to "primary evidence").

[7] Connecticut v. Miller, 630 A.2d 1315, 1326 (1993); New Hampshire v. Beede, 406 A.2d 125 (1979); North Carolina v. Garner, 417 S.E.2d 502 (1992); Ohio v. Wilson, 646 N.E.2d 863, 865 (1994) (per curiam); Pennsylvania v. Rood, 686 A.2d 442 (1996); Washington v. Richman, 933 P.2d 1088 (1997).

[8] Arizona v. Ault, 724 P.2d 545 (1986); Hawaii v. Lopez, 896 P.2d 889 (1995); Massachessetts v. O'Connor (1989); New Jersey v. Sugar (1985) (reliance on state constitutional law unclear).

[9] United States v. Place, 462 U.S. 696 (1983) (holding that exposure of luggage to a dog trained as a drug-detector is not a "search" within the meaning of the Fourth Amendment).

[10] People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990) (use of dogs in an apartment hallway is a search under the state constitution, valid only where police have reasonable suspicion).

[11] People v. Mayberry, 644 P.2d 810 (Cal. 1982); Keefe v. Georgia, 376 S.E.2d 406 (1988); Hawaii v Snitkin, (1984); Kansas v. McMillin, 927 P.2d 949 (1996); Louisiana v. Senegal, 664 So. 2d 832 (1995) (reliance on the state constitution is unclear); Oregon v. Slowikowski, 761 P.2d 1315 (1988); Washington v. Boyce, 723 P.2d 28 (1986).

[12] McGahan v Alaska, 807 P.2d 506 (1991); Colorado v. Boylan, 854 P.2d 807 (1993); Connecticut v. Torres, 645 A.2d 529 (1994); New Hampshire v. Pellicci, 580 A.2d 710 (1990); Pennsylvania v. Johnston, 530 A.2d 74 (1987).

[13] Oliver v. United States, 466 U.S. 170 (1984) (holding that police officers may enter and search privately owned land outside the curtilage of a home without a warrant).

[14] People v. Scott, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (holding that fencing or posting of private property established a reasonable expectation of privacy under the state constitution).

[15] *Id.*

[16] Hawaii v. Barnett, 703 P.2d 680 (1985); Montana v. Bullock, 901 P.2d 61 (1995); Oregon v. Dixson, 766 P.2d 1015 (1988); Vermont v. Kirchoff, 587 A.2d 988 (1991).

[17] Illinois v. Gates, 462 U.S.213 (1983) (substituting the totality-of-the-circumstances test for the *Aguliar-Spinelli*, two pronged test for determining the validity of a warrant).

[18] People v. Griminger, 71 N.Y.2d 635, 524 N.E.2d 409, 529 N.Y.S.2d 55 (1988) (rejecting on state constitutional grounds the totality-of-the-circumstances test for warrants).

[19] People v. Pannebaker, 714 P.2d 904 (1986); Connecticut v. Barton, (1991); Florida v. Butler, 655 So.2d 1123 (1995); Idaho v. Lang (1983); People v Tisler, (Ill. 1984); Iowa v. Bousman, 387 N.W.2d 605 (1986); Kansas v. Rose, 665 P.2d 1111 (1983); Beemer v. Commonwealth, 665 S.W.2d 912 (Ky. 1984); Maine v. Marquis, 525 A.2d 1041 (1987); Potts v. Maryland (1984); McCommon v. Mississisippi, 467 So.2d 940 (1985); Missouri v. Woodworth, 941 S.W.2d 679 (1997); Montana v. Sundberg (1988); New Hampshire v. Carroll, 645 A.2d 82 (1988); New Jersey v. Novembrino (1987); North Carolina v. Arrington (1984); North Dakota v. Ringquist, 433 N.W.2d 207 (1988); Langham v. Oklahoma, 787 P.2d 1279 (1990); Rhode Island v. King, 693 A.2d 658 (1997); Bower v. Texas, 769 SW2d 887 (1989); Utah v. Yoder, 935 P.2d 534 (1997); West Virginia v. Adkins, 346 S.E.2d 762 (1986); Wisconsin v. Anderson, 406 N.W.2d 398 (1987); Bonsness v. Wyoming, 672 P2d 1291 (1983).

[20] Alaska v. Jones, 706 P.2d 317 (1985); Massachessetts v. Upton, 476 N.E.2d 548 (1985); Tennessee v. Jacumin, 778 S.W.2d 430 (1989); Washington v. Jackson, 688 P.2d 136 (1984).

[21] United States v. Robinson, 414 U.S. 218 (1973) (holding that a search incident to a custodial arrest requires no additional justification).

[22] People v. Gokey, 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983).

[23] People v. Smith, 59 N.Y.2d 454, 452 N.E.2d 1224, 465 N.Y.S.2d 896 (1983) (search-incident to arrest held invalid absent exigent circumstances).

[24] People v. Hoskins, 461 N.E.2d 941 (Ill. 1984); Maine v. Paris, 343 A.2d 588 (1975); People v. Champion, 549 N.W.2d 849 (1996); Shell v. Mississippi, 554 So.2d 887 (1989); Montana v. Jellison,769 P.2d 711 (1989); Nebraska v. Brooks, 560 N.W.2d 180 (1997); New Hampshire v. Farnsworth, 497 A.2d 835 (1985); Tennessee v. Transou, 928 S.W.2d 949 (1996); Rogers v. Texas, 774 S.W.2d 247 (1989); Utah v. Lopes, 552 P.2d 120 (1976); Roose v. Wyoming, 759 P.2d 478 (1985).

[25] Zehrung v. Alaska, 569 P.2d 189 (1987); Hawaii v. Barrett, 701 P.2d 1277 (1985); Massachussetts v. Madera, 521 N.E.2d 738 (1985); Oregon v. Caraher, 653 P.2d 942 (1982).

[26] California v. Hodari D., 499 U.S. 621 (1991) (holding that there is no seizure unless the citizen actually submits to police show of authority, or there is an application of physical force).

[27] People v. Bora, 83 N.Y.2d 531, 634 N.E.2d 168, 611 N.Y.S.2d 796 (1994) (holding that test for seizure is whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his freedom).

[28] Perez v. Florida, 620 So. 2d 1256 (1993); Idaho v. Agundis, 903 P.2d 752 (1995); Henderson v. Maryland, 597 A.2d 486 (1991); Nebraska v. Cronin, 509 N.W.2d 673 (1993); Oregon v. Holmes, 813 P.2d 28 (1991); Johnson v. Texas, 912 S.W.2d 227 (1995); Washington v. Young, 935 P.2d 1372 (1997).

[29] Rogers-Dwight v. Alaska, 899 P.2d 1389 (1995); People v. Hill, 929 P.2d 735 (Colo. 1996); Connecticut v. Oquendo, 613 A.2d 1300 (1992); Hawaii v. Quino, 840 P.2d 358 (1992); Louisiana v. Tucker, 626 So.2d 707 (1993); Massachussetts v. Thinh Van Cao, 644 N.E.2d 1294 (1995); *In re* E.D.J., 502 N.W.2d 779 (Minn. 1993); New Hampshire v. Quezada, 681 A.2d 79 (1996); New Jersey v. Tucker, 642 A.2d 401 (1994); Pennsylvania v. Matos, 672 A.2d 769 (1996)

[30] New York v. Class, 475 U.S. 106 (1986) (holding that warrantless entry into a lawfully stopped automobile to observe the Vehicle Identification Number (VIN) on the dashboard does not violate the Fourth Amendment).

[31] People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (reinstating on state constitutional grounds the judgment rendered in People v. Class, 472 N.E.2d 1009 (1984), *rev'd*, New York v. Class, 475 U.S. 106 (1976).

[32] *Id.*

[33] Utah v. Larocco, 794 P.2d 460 (1990).

[34] Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (holding that officer may make warrantless seizure of nonthreatening contraband where, during lawful pat down, its identity is immediately apparent).

[35] People v. Diaz, 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993) (holding that once the patting officer determines that a pocket contains no weapon, the New York constitutional *Terry* rule will support no further searching).

[36] People v. Mitchell, 650 N.E.2d 1014 (1995); C.D.T. v. Indiana, 653 N.E.2d 1041 (1995); Kansas v. Wonders, 929 P.2d 792 (1996); Kentucky v. Crowder, 884 S.W.2d 649 (1994); Lousiana v. Denis, 691 So.2d 1295 (1997); Michigan v. Champion, 549 N.W.2d 849 (1996), *cert. denied*, Minnesota v. Burton, 556 N.W.2d 600 (1996); Missouri v. Rushing, 935 S.W.2d 30 (1996); New Jersey v. Jackson, 648 A.2d 738 (1994); Pennsylvania v. Dorsey, 654 A.2d 1086 (1995); South Dakota v. Tilton, 561 N.W.2d 660 (1997); Heiman v. Texas, 923 S.W.2d 622 (1995).

[37] Michigan v. Long, 463 U.S. 1032 (1983) (holding that search of automobile passenger compartment upheld where the officers have a reasonable belief that the occupant is dangerous and may gain immediate control of weapons, and the search is limited to those areas in which a weapon may be placed or hidden).

[38] People v. Torres, 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989) (entry into vehicle to remove a bag believed to contain a weapon not justified where, under the circumstances, the officers were not threatened).

[39] Connecticut v. Wilkins, 692 A.2d 1233 (1997); Florida v. Dilyerd, 467 So.2d 301 (1985); Massachussetts v. Moses., 557 N.E.2d 14 (Mass. 1990); Ohio v. Jackson, 673 N.E.2d 685 (1996); Washington v. Kennedy, 726 P.2d 445 (1986).

[40] Oregon v. Bates, 747 P2d 991 (1987).

[41] New York v. Belton, 453 U.S. 454 (1981) (holding that incident to the lawful custodial arrest of the occupant of an automobile police may search the passenger compartment of that automobile and the contents of any containers found therein).

[42] People v. Blasich, 73 N.Y. 2d 673, 541 N.E.2d 40, 543 N.Y.S. 40 (1989) (contrary to the Federal Constitution, a search of a vehicle incident to the arrest of an occupant is not justified by the mere fact of arrest, but only by the arrest plus the presence of exigent circumstances).

[43] Stout v. Arkansas, 898 S.W.2d 457 (1995); People v. McMillon, 892 P.2d 879 (Colo. 1995); Connecticut v. Waller, 612 A.2d 1189 (1992); Iowa v. Sanders, 312 N.W.2d 534 (1981); People v. Ragland, 385 N.W.2d 772 (1986); Missouri v. Darrington, 896 S.W.2d 727 (1995); North Dakota v. Hensel, 417 N.W.2d 849 (1989); South Dakota v. Rice, 327 N.W.2d 128 (1982); Osban v. Texas, 726 S.W.2d 107 (1986); Utah ex rel. K.K.C., 636 P.2d 1044 (1981) (not clearly relying on the state constitution); West Virginia v. Flint, 301 S.E.2d 765 (1983); Wisconsin v. Fry, 388 N.W.2d 565 (1986).

[44] Hawaii v. Ritte, 710 P.2d 1197 (1985); Idaho v. Charpentier, 1997 WL 526023 (1997); Lousiana v. Hernandez, 410 So.2d 1381 (1982); Nevada v. Greenwald, 858 P.2d 36 (1993); New Hampshire v. Sterndale, 656 A.2d 409 (1995); Ohio v. Brown, 588 N.E.2d 113 (1992); Washington v. Stroud, 720 P.2d 436 (1986).

[45] Edwards v. Arizona, 451 U.S. 477 (1981) (once the custodial suspect asserts the right to counsel for the purpose of dealing with police interrogation, a resumption of questioning is prohibited unless counsel is provided, or the accused himself initiates further communication with the police).

[46] People v. Cunningham, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (holding that once the custodial suspect asserts the right to counsel reinterrogation is prohibited absent a waiver in the presence of counsel).

[47] People v. Davis, 75 N.Y.2d 517, 553 N.E.2d 1008, 554 N.Y.S.2d 460 (1990) (holding that if a suspect asserts the right to counsel in a noncustodial

setting he may subsequently waive the right without the presence of an attorney).

[48] People v. Mattson, 789 P.2d 983 (Cal. 1990); Traylor v. Florida, 596 So.2d 957 (1992); People v. Fayne, 669 N.E.2d 1172 (Ill. App. 1996); Lousiana v. Willie, 410 So.2d 1019 (1982); Missouri v. Mease, 842 S.W.2d 98 (1992); New Hampshire v. Grant-Chase, 665 A.2d 380 (1995), *cert. denied*, 116 S. Ct. 1431 (1996); Oregon v. Kell, 734 P.2d 334 (1987); West Virginia v. Sowards, 280 S.E.2d 721 (1981) (per curiam); Wells v. Wyoming, 846 P.2d 589 (1992).

[49] Moran v. Burbine, 475 U.S. 412 (1996) (holding that where police did not tell custodial suspect that an attorney hired by his sister was trying to contact him, his waiver and confession were proper, as there is no federal constitutional requirement that police inform a suspect of an attorney's efforts to reach him).

[50] People v. Pinzon, 44 N.Y.2d 458, 377 N.E.2d 721, 406 N.Y.S.2d 268 (1978) (holding that suspect's family may retain lawyer on his behalf and waiver of counsel is invalid unless made in the presence of counsel).

[51] Arizona v. Transon, 924 P.2d 486 (1996); People v. Page, 907 P.2d 624 (Colo. 1995), *cert. denied*, Colo. LEXIS 823 (1995); Lodowski v. Maryland, 513 A.2d 299 (1986); Terrell v. State, 891 S.W.2d 307, 310 (1994); Washington v. Earls, 805 P.2d 211 (1991); Wisconsin v. Hanson, 401 N.W.2d 771 (1987).

[52] Connecticut v. Stoddard, 537 A.2d 446 (1988); Bryan v. Delaware, 571 A.2d 170 (1990); Haliburton v. Florida, 514 So.2d 1088 (1987); People v. McCauley, 645 N.E.2d 923 (Ill. 1994); Lousiana v. Matthews, 408 So.2d 1274 (1982); People v. Bender, 551 N.W.2d 71 (Mich. 1996); New Jersey v. Reed, 627 A.2d 630 (1992) (relying on common law and statute); Lewis v. Oklahoma, 695 P.2d 528 (1984).

[53] Oregon v. Elstad, 470 U.S. 298 (1985) (holding that voluntary unwarned statement, though inadmissible under *Miranda*, does not taint second statement obtained after warnings and waiver).

[54] People v. Bethea, 67 N.Y.2d 364, 493 N.E.2d 937, 502 N.Y.S.2d 713 (1986) (per curiam) (unwarned statement taints second warned statement where latter is part of a continuous chain of events).

[55] People v. Trujillo, 938 P.2d 117 (1997); New Hampshire v. Aubuchont, 679 A.2d 1147 (1996); Oregon v. Elstad, 717 P.2d 174 (1986).

[56] Arizona v. Carrillo, 750 P.2d 883 (1988) (dictum; not clearly relying on state constitution); Massachussettsv. Smith, 593 N.E.2d 1288 (1992)(state common law); Tennessee v. Smith, 834 S.W.2d 915 (1992).

[57] New York v. Harris, 495 U.S. 14 (1990) (holding that a *Payton* violation (warrantless home entry to arrest) does not taint a subsequent stationhouse confession where it was not the product of being in unlawful custody).

[58] People v. Harris, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991) (on remand, rejecting the federal rule on the basis of the state constitution).

[59] Michigan v. Dowdy, 536 N.W.2d 794 (1995).

[60] Connecticut v. Geisler, 610 A.2d 1225 (1992).

[61] Strickland v. Washington, 466 U.S. 668 (1984) (holding that defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial).

[62] People v. Ellis, 81 N.Y.2d 854, 613 N.E.2d 529, 597 N.Y.S.2d 623 (1993) (impossible to formulate a litmus test for ineffective legal representation; attorney must provide "meaningful representation.").

[63] People v. Rowland, 841 P.2d 897 (Cal. 1992); Davis v. People, 871 P.2d 769 (Colo. 1994); Aillon v. Meachum, 559 A.2d 206 (Conn. 1989); White v. Georgia, 455 S.E.2d 117 (1995); Idaho v. Youngblood, 786 P.2d 1127 (1990); Illinois v. Newbern, 659 N.E.2d 6 (1995); Richardson v. Indiana, 476 N.E.2d 497 (1985); Iowa v. Hepperle, 530 N.W.2d 735 (1995); Baker v. Kansas,755 P2d 493 (1988); McQueen v. Kentucky, 721 S.W.2d 694 (1986); Lousiana v. Berry, 430 So.2d 1005 (1983); Harris v. Maryland, 496 A.2d 1074 (1985); Michigan v. Pickens, 521 N.W.2d 797 (1994); Wiley v. Mississippi, 517 So.2d 1373 (1987); Montana v. Johnson, 719 P.2d 771 (1986); Nebraska v. Nearhood, 448 N.W.2d 399 (1989); New Hampshire v. Fennell, 578 A.2d 329 (1990); New Jersey v. Fritz, 519 A.2d 336 (1987); New Mexico v. Hernandez, 846 P.2d 312 (1993); North Carolina v. Braswell, 324 S.E.2d 241 (1985); Woehlhoff v. North Dakota, 487 N.W.2d 16 (1992); Ohio v. Bradley, 538 N.E.2d 373, 379 (1989) (not clearly relying on the state constitution); Moen v. Peterson, 824 P.2d 404 (Or. 1992); Pennsylvania v. Pierce, 527 A.2d 973 (1987); Rhode Island v. Brennan, 627 A.2d 842 (1993); Jones v South Dakota, 353 N.W.2d 781 (1984); Davis v. Tennessee, 912 S.W.2d 689 (1995); Boyd v. Texas, 811 S.W.2d 105 (1991); Utah v. Lairby, 699 P.2d 1187 (1984); *In re* Bruyette, 556 A.2d 568 (Vt. 1988); Washington v. Mierz, 901 P.2d 286 (1995); West Virginia v. Wood, 460 S.E.2d 771 (1995); Wisconsin v. Sanchez, 548 N.W.2d 69 (1996); Campbell v. Wyoming, 728 P.2d 628 (1986).

[64] Hawaii v. Aplaca, 837 P.2d 1298 (1992); Tribou v. Maine, 552 A.2d 1262 (1989); Commonwealth v. Lykus, 546 N.E.2d 159 (Mass. 1989).