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Search & Seizure

People v. Scott[1512]
(decided April 2, 1992)

Defendant claimed that his right to be free of illegal searches and seizures was violated under both the New York[1513] and the United States[1514] Constitutions when a police inspector and an informant, at the direction of the state police, conducted warrantless searches of his field.[1515] Because defendant had marked his rural property with "no trespassing" signs, he claimed that he had established a privacy expectation recognized as a protected right under both constitutions.[1516]

The New York Court of Appeals held that "where landowners fence or post 'No Trespassing' signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected and that they will be free from unwanted intrusions is reasonable."[1517] The court refused to follow the United States Supreme Court decision in *Oliver v. United States*,[1518] declaring that the protection offered by *Oliver* to individuals is inadequate under the mandate of article I, section 12 of the New York State Constitution.[1519] Since the court found the entries by the

1512. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

1513. N.Y. CONST. art. I, §12.

1514. U.S. CONST. amend. IV.

1515. *Scott*, 79 N.Y.2d at 478-79, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. Defendant's property consisted of 165 acres located on rural, hilly terrain consisting of undeveloped fields and woodlands. *Id.*

1516. *Id.* at 479, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. Defendant claimed that the informant's and the police officer's invasion of his land "constituted an illegal trespass." People v. Scott, 169 A.D.2d 1023, 1025, 565 N.Y.S.2d 576, 577 (3d Dep't 1991).

1517. *Scott*, 79 N.Y.2d at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

1518. 466 U.S. 170, 177 (1984) (Court held that "the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment.").

1519. *Scott*, 79 N.Y.2d at 487, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922.

informant and the police to be illegal,[1520] it declared the search warrant "a nullity," and suppressed the evidence seized.[1521] The court of appeals vacated the order of the third department, granted defendant's motion to suppress the evidence and dismissed the indictment.[1522]

In the fall of 1987, Collar, a private citizen on a hunting trip, followed a wounded deer onto defendant's land.[1523] While on defendant's property, he noticed what appeared to be remnants of marijuana growth.[1524] In the summer of 1988, he again entered upon the defendant's land where he saw approximately 50 marijuana plants growing on the property.[1525] After this occasion, Collar notified the state police who requested that he provide them with a leaf from the plants growing on defendant's land.[1526] Subsequent to obtaining the leaf, a state police investigator accompanied Collar to the marijuana site and observed the plants.[1527] Defendant lived in a mobile home located on the property and had "no trespassing" signs posted around the perimeter of the property at all points of entry. The signs were observed by both the informant and the police.[1528] However, the marijuana plants were located approximately 300-400 yards away from defendant's home, which, the court noted, was outside the curtilage of the mobile home.[1529]

1520. *See id.* at 487, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928. "Despite the People's urging, we do not dismiss so lightly the fact that the police were violating defendant's property rights and committing criminal and civil trespass by entering the land." *Id.*; *but see,* United States v. Oliver, 466 U.S. 170, 183 (1984) (police intrusion upon an open field, while a trespass at common law, is not a search and did not render such conduct illegal).

1521. *Scott,* 79 N.Y.2d at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

1522. *Id.* at 491, 593 N.E.2d at 1339, 583 N.Y.S.2d at 931.

1523. *Id.* at 479, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922.

1524. *Id.*

1525. *Id.*

1526. *Id.*

1527. *Id.*

1528. *Id.* at 479, 593 N.E.2d at 1330-31, 583 N.Y.S.2d at 922-23 (signs were posted every 20 to 30 feet around the perimeter of the defendant's property).

1529. *Id.* at 479, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923. The marihuana grown in the open field was not within the "curtilage" of the mobile home. *Id.*

The investigator applied for and was issued a search warrant.[1530] The application included the *in camera* testimony of Collar, the marijuana leaf recovered from the defendant's property, the investigator's personal observations, tax maps which proved that Scott owned the land in question, and a report of an anonymous telephone tip verifying the marijuana growth on defendant's property.[1531] Upon execution of the warrant, the police recovered approximately 200 marijuana plants and other related items.[1532]

Following the search, the defendant was arrested and, after being informed of his rights, admitted to ownership of the land, and the growth of marijuana on his property. He was convicted of criminal possession of marijuana in the first degree.[1533] Scott appealed his conviction to the third department which unanimously upheld the lower court decision.[1534]

Curtilage is defined as "the land or grounds surrounding the dwelling, which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." BLACK'S LAW DICTIONARY 348 (6th ed. 1990). At common law, this area is considered part of the home itself for Fourth Amendment purposes. In defining the extent of the home's curtilage, courts looks at four factors:

> [T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 294-95 (1987).

1530. *Scott*, 79 N.Y.2d at 479, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922.

1531. People v. Scott, 169 A.D.2d 1023, 1025, 565 N.Y.S.2d 576, 577 (3d Dep't 1991), *rev'd*, People v. Scott 79 N.Y.2d 474, 593 N.E.2d 1328, N.Y.S.2d 920 (1992).

1532. *Id.*

1533. *Id.* at 1024, 565 N.Y.S.2d at 576.

1534. *Id.* at 1025, 565 N.Y.S.2d at 577. The third department noted that the "open fields" doctrine enunciated in *Oliver v. United States* denied defendant any expectation of privacy. The court determined that the "open fields" doctrine is followed in New York, and supported this claim by citing to People v. Reynolds, 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988) and People v. Joeger, 111 A.D.2d 944, 490 N.Y.S.2d 41 (3d Dep't 1985). In *Reynolds*, the New York Court of Appeals held that a warrantless governmental invasion upon an open field which is not fenced in nor marked by "no trespassing" signs is not unconstitutional. 71 N.Y.2d at 555, 523

The court of appeals reversed, and ordered that the guilty plea be vacated, the evidence suppressed, and the indictment dismissed.[1535] It declared that nothing in its previous decision the appellate division relied upon *People v. Reynolds*,[1536] prohibited it from rejecting *Oliver* "if [the court is] persuaded that the proper safeguarding of fundamental constitutional rights requires that [it to do] so."[1537] The court distinguished the *Reynolds* case from the present one by stating that the defendant in *Reynolds*, unlike defendant *Scott*, had not fenced her property or posted warning signs in order to protect her privacy rights.[1538] As a result, the *Reynolds* court never addressed the issue of whether the court could, "contrary to the Supreme Court's holding in *Oliver*, create an expectation of privacy cognizable under article I, section 12 of [the New York State Constitution]" when a defendant has erected fences or "no trespassing" signs around his property in order to protect his privacy rights.[1539]

N.E.2d at 292, 528 N.Y.S.2d at 16. In so holding, the court determined that the *Oliver* rule provides that "neither the erection of fences nor the posting of "No Trespassing" signs on otherwise open land will establish a legitimate expectation of privacy in the sense required by the Fourth Amendment." *Id.* at 556, 523 N.E.2d at 292, 528 N.Y.S.2d at 16. In *Joeger*, the court rejected the defendant's argument that the marijuana found in his field as a result of a warrantless search should be suppressed because it was partially fenced and marked with no trespassing signs. 111 A.D.2d at 945, 490 N.Y.S.2d at 42. The court observed that "[t]he *Oliver* ruling was followed by this court in . . . [People v. Gustafson, 101 A.D.2d 920, 921, 475 N.Y.S.2d 913, 914 (3d Dep't 1984), and saw] no reason to alter that holding here." *Joeger*, 111 A.D.2d. at 945, 490 N.Y.S.2d at 42-43.

1535. *Scott*, 79 N.Y.2d at 491, 593 N.E.2d at 1339, 583 N.Y.S.2d at 931.

1536. 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988).

1537. *Scott*, 79 N.Y.2d at 480, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923; *see also* People v. P.-J. Video, Inc., 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986). The court held that "[a]lthough State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them." *Id.*

1538. *Scott*, 79 N.Y.2d at 480, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923.

1539. *Id.* In *Reynolds*, the court, referring to the *Oliver* rule, declared that it need not "address the applicability of th[at] case[] because defendant makes no claim here that her property was bounded by fencing, marked by signs warning against trespassing, or that she in any other way overtly demonstrated an

The court of appeals defended its adoption of a more protective measure than the *Oliver* rule by declaring that its decision is consistent with prior New York decisions "involving rights protected by article I, section 12 of the State Constitution."[1540] In support of its ruling, the court cited its prior decisions, such as *People v. Torres*.[1541] In *Torres*, the court refused to follow the Supreme Court's "expansive view of the *Terry v. Ohio*[1542] 'stop and frisk' procedure," adopted in *Michigan v. Long*[1543] regarding the search of closed containers found in an automobile's passenger compartment.[1544] Instead, the New York Court of Appeals adopted a more protective measure in order to promote "'predictability and precision in judicial review of search and seizure cases.'"[1545] Similarly, in *People v. Dunn*,[1546] the court of appeals found that the institution of a canine sniff (for purpose of narcotics detection) outside the defendant's apartment, even though it could only disclose evidence of criminality (not specifics, like the type of drugs or the quantity involved), was a "search within the meaning of Article I, section 12 of [the New York] Constitution[,]" and therefore, an invasion of the defendant's expectation of privacy.[1547] The *Dunn* court equated the

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expectation that members of the public should not enter upon the land." *Reynolds*, 71 N.Y.2d at 556, 523 N.E.2d at 293, 528 N.Y.S.2d at 17.

1540. *Scott*, 79 N.Y.2d at 480, 593 N.E.2d at 1331, 583 N.Y.S.2d at 923.

1541. 74 N.Y.2d 224, 543 N.E.2d 61, 544 N.Y.S.2d 796 (1989).

1542. 392 U.S. 1, 27 (1968) (Court held that police officer engaged in investigative stop may conduct protective pat-down of suspect's outer clothing if officer reasonably fears for his or her safety).

1543. 463 U.S. 1032 (1983).

1544. *Torres*, 74 N.Y.2d at 227-28, 543 N.E.2d at 61, 544 N.Y.S.2d at 798.

1545. *Id.* (defendant's expectation of privacy as to the inside of car and its personal contents was violated when police officers searched the car after an initial frisk of the defendant revealed no danger to the officers' safety); *see also* People v. Class, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986) (court held that police officer's "nonconsensual entry" into defendant's car to determine vehicle identification number violated New York Constitution where such entry is only based on traffic violation stop).

1546. 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990).

odors coming from defendant's apartment to the sound waves "harnessed by the electronic surveillance equipment in *Katz v. United States.*"[1548] Further, in *Patchogue-Medford Congress of Teachers v. Board of Education,*[1549] the court found that a urine drug test required by a government employer violated the individual employee's expectation of privacy, and submission of the individual to such a test involved a search and seizure under article I, section 12.[1550] The court reasoned that "the act of discharging urine is a private . . . one and the product may contain revealing information concerning an individual's personal life and habits for those analyzing it."[1551]

The *Scott* court interpreted the *Oliver* rule on search and seizure to hold that "in land outside the curtilage the [property] owner has no constitutionally protectible interest[, and r]egardless of steps taken to assure privacy, such as posting . . . of [warning

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1547. *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392. The *Dunn* court declared that regardless of "such a method's discriminate and nonintrusive nature, it remains a way of detecting the contents of a private place." *Id.* at 24-25, 564 N.E.2d at 1057, 563 N.Y.S.2d at 391.

1548. *Id.* at 25, 564 N.E.2d at 1058, 563 N.Y.S.2d at 392; *see also* Katz v. United States, 389 U.S. 347 (1967). In *Katz*, the Court found the government's surveillance of a public telephone booth with the aid of an electronic listening device violated the defendant's privacy "upon which he had justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment." *Id.* at 353. The Court stated that simply because the electronic device used did not penetrate the telephone booth walls had no constitutional significance because the "Fourth Amendment protects people — and not simply areas — against unreasonable searches and seizures . . . ." *Id.* at 352-53.

1549. 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

1550. *Id.* at 67-68, 510 N.E.2d at 326, 517 N.Y.S.2d at 461.

1551. *Id.* The court refused to accept the argument of the School Board that an individual cannot have a reasonable expectation of privacy in urine which is eliminated from the body, or, in other words, is "intentionally abandoned or discarded." *Id.* The court agreed that urine is a waste product "periodically eliminated from the body," but declared that an individual had "privacy interests in a waste product before it is abandoned." *Id.* It went on to state that the discharge of "urine is a private [act] . . . and the [urine] may contain revealing information concerning an individual's personal life and habits for those capable of analyzing it." *Id.*

signs] . . ., the police may enter without a warrant."[1552] The court of appeals decided to reject the *Oliver* rule, and instead looked to the New York Constitution to give its citizenry extra privacy protection it found to be essential.[1553] The court of appeals preferred to follow *Katz v. United States* and its progeny.[1554]

The court stated several reasons for its decision. First, the court of appeals criticized the *Oliver* rule as a return to what it called the "abandoned *Hester-Olmstead* conception of the Fourth Amendment."[1555] The court claimed that both *Hester v. United States*,[1556] and the *Olmstead v. United States*[1557] interpreted the Fourth Amendment literally. As a result, the court determined that under the *Hester-Olmstead* rule "a warrantless search of land was constitutionally prohibited only if it involved a physical trespass by a government agent into the residence itself or its curtilage."[1558] This rule was later abandoned by the Supreme Court in its decision in *Katz v. United States*, which declared that the "Fourth Amendment protects people — and not simply areas."[1559] Justice Harlan's concurring opinion in *Katz*, formulated the now familiar two-part "expectation of privacy" test.[1560] It requires "that a person have exhibited an actual

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1552. *Scott*, 79 N.Y.2d at 484-85, 593 N.E.2d at 1328, 583 N.Y.S.2d at 926.

1553. *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

1554. *Id.* at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928.

1555. *Id.* at 489-90, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

1556. 265 U.S. 57 (1924).

1557. 277 U.S. 438 (1928), *overruled by* Zwickler v. Koota, 389 U.S. 241 (1967).

1558. *Scott*, 79 N.Y.2d at 481, 593 N.E.2d at 1332, 583 N.Y.S.2d at 924; *see also* Hester v. United States 265 U.S. 57, 59 (1924). The *Hester* Court held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and affects,' is not extended to the open fields." *Id.*; *see also* Olmstead v. United States, 277 U.S. 438, 486 (1928). The *Olmstead* Court held that the "'wire tapping' operations of federal prohibition agents were not a 'search and seizure' in violation of the security of the 'persons, houses, papers, and effects' of the petitioners in the constitutional sense or within the intendment of the Fourth Amendment." *Id.*

1559. Katz v. United States, 389 U.S. 347, 353 (1967).

1560. *Id.* at 361 (Harlan, J., concurring).

(subjective) expectation of privacy, [and] that the expectation be one that society is prepared to recognize as 'reasonable.'"[1561]

The court of appeals maintained that "[a]fter *Oliver*, it was well settled that for land outside of the curtilage an owner was entitled to no Fourth Amendment protection, even for secluded property which has been fenced or posted."[1562] Since the *Oliver* rule provided that "an expectation of privacy in land outside the curtilage . . . *is not one which society is prepared to recognize as reasonable,*"[1563] the *Scott* court refused to adopt it.

Second, the court of appeals stated that a rule which declared that a property owner never has a reasonable privacy expectation in open fields "is repugnant to New York's acceptance of 'the right to be let alone' as a fundamental right deserving legal protection."[1564] The court pointed out that such New York statutes as the Penal Code, article 140, sections 140.05[1565] and 140.10[1566] recognize the land owner's right to exclude others from his property, by viewing the violation of such rights as trespass.[1567] Furthermore, since the court held, contrary to the

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1561. *Id.* (Harlan, J., concurring).

1562. *Scott*, 79 N.Y.2d at 482, 593 N.E.2d at 1333, 583 N.Y.S.2d at 925.

1563. *Id.* at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927 [emphasis added]. The court categorized the *Oliver* rule as absolute: on "land outside the curtilage . . . has no constitutionary protectible interest . . . [r]egardless of steps taken to assure privacy . . . ." *Id* at 484, 593 N.E.2d at 1334, 583 N.Y.S.2d at 926.

1564. *Id.* at 490, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

1565. N.Y. PENAL LAW § 140.05 (McKinney 1975). Section 140.05 states in part: "A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises. Trespass is a violation." *Id.*

1566. N.Y. PENAL LAW § 140.10 (McKinney 1975). Section 140.10 states:

"A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders" *Id.*

1567. The court stated "[t]hat a landowner has a legal right to exclude the public is recognized in the[se] sections of New York Penal Law dealing with offenses involving damage to and intrusion upon property." *Scott*, 79 N.Y.2d at 487, 593 N.E.2d at 1335; 583 N.Y.S.2d at 927.

third department's finding of support among the New York courts for the *Oliver* rule, that the New York courts have consistently followed the *Katz* concept of protecting persons, not places,[1568] it decided that following the *Oliver* "property-oriented approach" would be contrary to New York law.[1569]

Third, the court of appeals rejected the idea of state agents "roam[ing] at will without permission on private property in search of incriminating evidence [, as] repugnant to the most basic notions of fairness in our criminal law."[1570] The court interpreted the *Oliver* decision to suggest that the defendant's criminal activity, discovered by the government's illegal trespass, can be a factor in deciding whether the government violated the defendant's privacy rights.[1571] The court vehemently rejected this approach,[1572] calling it an "after-the-fact justification for illegal police conduct," and declared such to be out of step with New York's "recognition of fairness as an essential concern in criminal jurisprudence."[1573]

1568. *Scott*, 79 N.Y.2d at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928; *see generally* Seelig v. Koehler, 76 N.Y.2d 87, 92, 556 N.E.2d 125, 127, 665 N.Y.S.2d 832, 834 (court upheld random urine testing of all correction officers based on the fact that they had been subjected to urinalysis tests during the job probationary period, thereby reducing their privacy interests), *cert. denied*, 111 S. Ct. 134 (1990); People v. Gokey, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724, 469 N.Y.S.2d 618, 619 (1983) (state constitution protects an individual's right to privacy in "property within . . . immediate control unless "exigent circumstances" exist).

1569. *Scott*, 79 N.Y.2d at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928.

1570. *Id.* at 490, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

1571. *Id.* at 488, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

1572. *Id.* at 487, 593 N.E.2d at 1336, 583 N.Y.S.2d 928 (quoting Olmstead v. United States, 277 U.S. 438, 485 (Brandeis, J., dissenting)) ("If the Government becomes a lawbreaker, it breeds contempt for law.").

1573. *Id.* at 488, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928. The court, citing People v. Gleeson, 36 N.Y.2d 462, 330 N.E.2d 72, 369 N.Y.S.2d 113 (1975), stated that it had previously "suppress[ed] evidence under the Fourth Amendment and article I, § 12 . . . [due] to the illegal conduct of the police in obtaining the evidence through a trespass on private property." *Id.* at 487-88, 593 N.E.2d at 1336, 583 N.Y.S.2d at 928. *But see*, People v. Reynolds, 71 N.Y.2d 552, 558, 523 N.E.2d 291, 293, 528 N.Y.S.2d 15, 17 (1988) ("Unlike the police activity we see here, the trespass in *Gleeson* extended into the primary building of the landowner.").

The majority took exception to the dissent's reproachment of the court because it exercised its authority under the state constitution in contravention to the rule in *Oliver*. In rebuttal, the majority noted that "[n]owhere does the dissent take issue with the basic proposition that in a free society the police should not be permitted to encroach upon private property against the owner's will and then use the fruits of their trespass as incriminating evidence."[1574] The court, in response to the dissent's accusation that it scuttled the requirements of the noninterpretive method of analysis, also declared itself unwilling to interpret the New York State Constitution "in 'Lockstep' with the Supreme Court's interpretations of similarly worded provisions of the Federal Constitution."[1575] Instead, the court saw its role as requiring a case by case analysis of the particular federal constitutional rule implicated as discussed by Judge Titone in *People v. Keta*.[1576]

Judge Kaye, in her concurring opinion, responded to the dissent by stressing the fact that in recent years, the court of appeals judges have found "something distinctive about New York State" that required the court to reject the United States Supreme Court's stance on the issue.[1577] Judge Kaye disagreed with the dissent's view that the court, in differentiaing federal law, is imposing "a personally preferred view of the constitutional universe" on the legal conclusions of cases like this one.[1578] First, Judge Kaye declared that as much as the court may want to follow a rigid formula in judging cases like *Scott*, sooner or later, it must make a judgment "as to the application of existing precedents to new facts."[1579] Second, she refused to accept the dissent's call for a rigid following of an "ironclad

1574. *Scott*, 79 N.Y.2d at 489, 593 N.E.2d at 1337, 583 N.Y.S.2d at 929.

1575. *Id.* at 490, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

1576. *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

1577. *Id.* at 503, 593 N.E.2d at 1346, 583 N.Y.S.2d at 938 (Kaye, J., concurring).

1578. *Id.* (Kaye, J., concurring).

1579. *Id.* at 504, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, J., concurring).

checklist."[1580] Judge Kaye agreed that the court should be faithful to its precedents, and, unlike the dissent, found the court's decision to be true to precedents.[1581]

Judge Kaye further declared that a state court is perfectly justified in choosing "*greater* safeguards as a matter of State law" than are provided by federal law.[1582] She pointed to the abundant support for this opinion found in such cases as *California v. Greenwood*,[1583] where the Supreme Court declared that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."[1584] Furthermore, Justice Steven's concurring opinion in *Massachusetts v. Upton*[1585] declared that in our system of government, the states "remain the primary guardian of the liberty of the people."[1586] Finally, Judge Kaye declared that "by recognizing greater safeguards as a matter of State law," states can act as "'laboratories' for national law."[1587]

1580. *Id.* (Kaye, J., concurring).

1581. *Id.* (Kaye, J., concurring).

1582. *Id.* at 504-05, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, J., concurring) (emphasis added).

1583. 486 U.S. 35 (1988).

1584. *Id.* at 43.

1585. 466 U.S. 727 (1984).

1586. *Id.* at 739 (Stevens, J., concurring); *see also* Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("[I]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, [the Supreme Court] will not undertake to review the decision."); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (Court held that private shopping center owner's prohibition against distribution of handbills unrelated to center's operation on center's premises does not limit "the authority of the [s]tate to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution"); Oregon v. Hass, 420 U.S. 714, 719 (1975) ("a [s]tate is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards").

1587. *Scott*, 79 N.Y.2d at 505-06, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Kaye, J., concurring) quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In demonstrating how a state has served as a "laboratory" for national law in the past, Judge Kaye mentioned such cases as Batson v. Kentucky, 476 U.S. 79 (1986). In *Batson*, the

Justice Bellacosa dissented, arguing that the state constitution is a "mirror equivalent of the Fourth Amendment prohibition against unreasonable searches and seizures."[1588] He also asserted that the United States Supreme Court had ruled on the particular issue in this case in *Oliver v. United States* and had concluded that "there is no Fourth Amendment unreasonable search and seizure protection or violation."[1589] Judge Bellacosa declared that the only prior state decisions addressing the present issue were consistent with the *Oliver* ruling.[1590] He stated that the majority must have "'[s]ufficient reasons'" for disagreeing with the Supreme Court before it does so[1591] and the majority's

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defendant claimed that he was "denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Id.* at 82. The *Batson* court stated that "[f]ollowing the lead of a number of state courts construing their State's constitution," two federal courts have also held that "peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment." *Id.* at n.1.

1588. *Scott*, 79 N.Y.2d at 507, 593 N.E.2d at 1349, 583 N.Y.S.2d at 941 (Bellacosa, J., dissenting).

1589. *Id.* at 509, 593 N.E.2d at 1350, 583 N.Y.S.2d at 942 (Bellacosa, J., dissenting).

1590. *See* People v. Reynolds, 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988). The *Reynolds* court, in agreement with the *Oliver* ruling, held that Article I, § 12 of the New York Constitution conforms with that of the Fourth Amendment, and therefore, the defendant, having taken no precautions to exclude the public from her land, had no reasonable expectation of privacy in open fields and woods. *Id.* at 557, 523 N.E.2d at 293, 528 N.Y.S.2d at 17.

1591. *Scott*, 79 N.Y.2d at 509-10, 593 N.E.2d 1350, 583 N.Y.S.2d at 942 (Bellacosa, J., dissenting); *see, e.g.*, People v. Harris, 77 N.Y.2d 434, 570 N.E.2d 1051, 77 N.Y.S.2d 434 (1991). According to the *Harris* court, sufficient reasons for disagreeing with the United States Supreme Court can be found in "any preexisting State statutory common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the Sate citizenry toward the definition, scope or protection of the individual right." *Id.* at 438, 570 N.E.2d at 1053, 563 N.Y.S.2d at 704. In *Harris*, the court declared that "the safeguards guaranteed by this State's Right to counsel clause are unique," and is "substantially greater than that recognized "by other states and federal courts." *Id.* at 439, 570 N.E.2d at 1054, 563 N.Y.S.2d at 705. The court described article I, section 6 of the

"ground for departure from the United States Supreme Court rulings [was] unfounded."[1592] In his view, the majority, in reaching its conclusion, relied basically on the ancient law of trespass, which is not a "unique New York interest."[1593]

Judge Bellacosa claimed that "there must be some disciplined analytical method to provide precedential guidance and to justify the desired outcome by reasoned articulation."[1594] He found that application of the noninterpretive analysis as discussed in *People v. P. J. Video, Inc.*[1595] would give the court such an outcome.[1596] This type of an analysis, according to *P. J. Video,* should stem from "a judicial perception of sound policy, justice and fundamental fairness."[1597] But, he stressed that the majority in *Scott* did not bother to use any formulated "method of analysis," and instead relied on a "conclusory" test.[1598] He further stated that the majority's decision is totally unfounded because it was actually based upon "readily distinguishable

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New York Constitution as a "'cherished principle,' rooted in this State's prerevolutionary constitutional law and developed 'independent of its Federal counterpart.'" *Id.* Therefore, the "protection of the right to counsel has become a matter of singular concern in New York . . . ." *Id.*

1592. *Scott,* 79 N.Y.2d at 511, 593 N.E.2d at 1351-52, 583 N.Y.S.2d at 943-44 (Bellacosa, J., dissenting).

1593. *Id.* at 512, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).

1594. *Id.* at 511, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943 (Bellacosa, J., dissenting).

1595. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied,* 479 U.S. 1091 (1987). The *P.J. Video* court contrasts the noninterpretive approach to a decision on a constitutional issue, where the court bases its opinion on policy and fairness reasons, to an interpretive approach, where the court analyzes the difference in the textual language of the state and federal constitutions. *Id.* at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

1596. *Scott,* 79 N.Y.2d at 511, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).

1597. *P.J. Video,* 68 N.Y.2d at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

1598. *Scott,* 79 N.Y.2d at 510, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943 (Bellacosa, J., dissenting).

cases," rather than, as the majority declares, on supportive cases.[1599]

Judge Bellacosa believed that instead of analyzing the particular right in question, the majority effected a "nonspecific, uncharted constitutional privacy ground."[1600] According to his harsh criticism of the majority opinion, the court created a new form of state constitutional analysis which "may be deployed whenever any future majority of this court simply chooses to differ with a particular United States Supreme Court decision and interpretation."[1601] Finally, Judge Bellacosa criticized the majority for rejecting uniformity in constitutional adjudication because, he asserted, "uniformity endures as an important policy ingredient in constitutional analysis, . . . especially in cases marked by joint Federal and State . . . law enforcement efforts" such as drug cultivation cases (of which *Scott* is a good example).[1602] Judge Bellacosa maintained that the *Scott* decision will "inevitably . . . sow confusion in understanding the law."[1603] He declared that the *Scott* and *Keta* decisions have left "New York's adjudicative process . . . bereft of any external or internal doctrinal disciplines, [and that it] is this vacuum to which the dissent strongly objects," and *not* (as the concurrence interpreted) to the doctrine that states should have the right to "interpret their own State constitutions where appropriate to supplement rights guaranteed by the Federal Constitution . . . ."[1604]

Current federal law on search and seizure is expressed in *Oliver v. United States*,[1605] where the Supreme Court refused to find a legitimate expectation of privacy where the defendant had erected

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1599. *Id.* at 512, 593 N.E.2d at 1352, 583 N.Y.S.2d at 944 (Bellacosa, J., dissenting).

1600. *Id.* at 513, 593 N.E.2d at 1353, 583 N.Y.S.2d at 945 (Bellacosa, J., dissenting).

1601. *Id.* (Bellacosa, J., dissenting).

1602. *Id.* at 515, 593 N.E.2d at 1354, 583 N.Y.S.2d at 946 (Bellacosa, J., dissenting).

1603. *Id.* (Bellacosa, J., dissenting).

1604. *Id.* at 518, 593 N.E.2d at 1356, 583 N.Y.S.2d at 948 (Bellacosa, J., dissenting).

1605. 466 U.S. 170 (1984).

fences and "no trespassing" signs around his marijuana field.[1606] The Court declared that neither the fence nor the signs "demonstrate . . . that the expectation of privacy was legitimate in the sense required by the Fourth amendment."[1607] Refusing to follow the *Oliver* open-fields doctrine in this case, the New York Court of Appeals held that where landowners fence or post "no trespassing" signs on their private property, the expectation of privacy and freedom from intrusions is reasonable.[1608] The court of appeals decided that, under New York law, "a greater degree of protection must be given" to the individual than is given under the federal law.[1609]

People v. Keta[1610]
(decided April 2, 1992)

Defendant Keta, owner of a vehicle dismantling operation, claimed that evidence seized by the police during a warrantless administrative search of his business, pursuant to the New York Vehicle and Traffic Law (VTL) section 415-a(5)(a),[1611] violated

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1606. *Id.* at 182.

1607. *Id.*

1608. *Scott*, 79 N.Y.2d at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

1609. *Id.*

1610. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

1611. N.Y. VEH. & TRAF. LAW § 415-a(5)(a) (McKinney 1986 & Supp. 1993). Section 415-a(5)(a) provides in pertinent part:

> Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. Such records shall be maintained in a manner and form prescribed by the commissioner. . . . Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises.