WE'RE FROM VERMONT AND WE DO WHAT WE WANT:

A "RE"-EXAMINATION OF THE CRIMINAL JURISPRUDENCE OF THE VERMONT SUPREME COURT

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The State of Vermont has long been an enigma to some outsiders. Many view the state—known mostly for its maple syrup, Ben & Jerry's ice cream, and a screaming former governor—as a bastion of liberal thinking and progressive politics.[1] However, for being the second-least populated state in the Union, Vermont has a great diversity of cultures and political views within its Green Mountains. From the French-speaking inhabitants of the Northeast Kingdom, to the *nouveaux riches* of South Burlington, from the quarry workers of Rutland County, to the commuters along the I-91 Corridor, and on to the so-called 'ski-bums' of its many mountain peaks and the throwback 'hippies' populating Burlington, the citizens of Vermont continue to live by a simple credo perhaps best stated by one of its most famous citizens, Robert Frost.[2]

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* J.D., *magna cum laude*, Albany Law School, 2008; B.A., St. Lawrence University, 2001. I would like to thank all of my family and friends from Vermont for the inspiration and motivation for this Article. In addition, I would like to thank the entire Law Review Board for their guidance throughout the writing process. Lastly, I would like to thank my parents, Justin and my beautiful wife, Elizabeth, for their constant love and support at all points in my life.

[1] *See* Mark Leibovich, *The Socialist Senator*, N.Y. TIMES MAG., Jan. 21, 2007, at 6 ("In recent years, Vermont has joined—perhaps surpassed—states like Massachusetts and New York in the top tier of liberal outposts.").

[2]

Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;

Then took the other, as just as fair,
And having perhaps the better claim,
Because it was grassy and wanted wear;
Though as for that the passing there
Had worn them really about the same,

This independence, this choice of the road less traveled, seen in nearly all Vermonters, is also evident in the decision-making and jurisprudence of its Supreme Court. Many outsiders perhaps know the Vermont Supreme Court best for its controversial decision regarding the State's prohibition of same-sex marriage in *Baker v. Vermont*.[3] For the most part, however, the comings and goings of the Vermont Supreme Court go largely unnoticed by members of the legal community without the State, which one might imagine is just what Vermonters prefer.

This Study is not aimed at enlightening members of the bar outside the State, but rather is aimed at enlightening the members within as to the court's current criminal jurisprudence.[4] In addition, an ancillary aim of this Study is to educate practitioners on the court's liberal judicial philosophy as it relates to state constitutional adjudication. The Study is sub-titled a "re"-examination of criminal jurisprudence because this is not the first, nor will it be the last attempt to examine and evaluate the Vermont Supreme Court's criminal jurisprudence.

In 1997, Jason J. Legg investigated the "decisionmaking [sic] profile of the Vermont Supreme Court in state constitutional criminal cases."[5] This Study is a re-examination and re-evaluation of that work, with consideration of the decisions rendered by the

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And both that morning equally lay
In leaves no step had trodden black.
Oh, I kept the first for another day!
Yet knowing how way leads on to way,
I doubted if I should ever come back.

I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.

Robert Frost, *The Road Not Taken*, *in* MOUNTAIN INTERVAL (1920).

[3] *See* 744 A.2d 864, 886 (Vt. 1999). *See also* William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. Rev. 853, 853 (2001) (examining the ramifications of the court's decision).

[4] "The purpose [of conducting a high court study] is to discern possible jurisprudential, ideological, sociological, or other patterns and common threads in the court's state constitutional decisions, as well as in the opinions and voting records of the court's individual members." Vincent Martin Bonventre, *Editor's Foreword*, 60 ALB. L .REV. 1511, 1512–13 (1997).

[5] Jason J. Legg, *The Green Mountain Boys Still Love Their Freedom: Criminal Jurisprudence of the Vermont Supreme Court*, 60 ALB. L. Rev. 1799, 1799 (1997).

Vermont high court over the last half decade. Since 1997, the Vermont high court and our Nation have undergone a variety of changes, and this Study will re-examine some of Legg's conclusions regarding the direction of the court. In addition, the Study will evaluate and reveal the current direction and attitude of the Vermont Supreme Court relative to criminal jurisprudence.

Despite these changes, this Study will demonstrate that things have not changed when it comes to the Vermont Supreme Court's decision-making trends. The court continues to follow the "Due Process Model"[6] of criminal adjudication when evaluating possible *Miranda* violations, confessions, interrogations, and searches and seizures.[7] In addition, the court continues to adhere to the "Crime Control Model"[8] of criminal adjudication once a citizen has been arrested and brought to trial and ultimately convicted.[9]

Similar to Legg's prior work, the First Section of this Study will provide a primer on state constitutional adjudication and the approaches taken by state courts and practitioners who wish to take, or advocate for, the road less traveled. The Second Section will examine the methodology used in the Study. Sections Three through Six will focus on the four divisions of the criminal process discussed in Section Two – (1) *Miranda*, Self-Incrimination, and Confessions; (2) Search and Seizure; (3) Post-Investigation, Bail, and Trial; and (4) Post-Trial and Sentencing. The Study's conclusion will focus on the voting trends of the current Vermont justices as well as the direction of the court as a whole.

I. STATE CONSTITUTIONAL ADJUDICATION

Many commentators, scholars, and practitioners alike have waxed poetic about the concepts of judicial federalism and state constitutional adjudication.[10] This Study will not attempt to add to

[6] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 163–65 (1968) (identifying the "Due Process" and "Crime Control" models of judicial decision making in criminal process).

[7] *See infra* Sections III & IV.

[8] See PACKER, *supra* note 6, at 163–65.

[9] *See infra* Section V & VI.

[10] *See, e.g.*, Vincent Martin Bonventre, *Beyond The Reemergence—"Inverse Incorporation" and Other Prospects for State Constitutional Law*, 53 ALB. L. Rev. 403, 403 (1989); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 1, 1 (1988); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11–12

what is already a well-versed and well-stocked scholarly discussion. Rather, as I noted in my Introduction, this Study will attempt to educate the practitioner about the current trends of the Vermont Supreme Court regarding criminal jurisprudence.

In developing effective constitutional arguments, it is critical for any lawyer to have at least a minimal understanding of state constitutional methodology. Most lawyers leave law school with Supreme Court tunnel vision "because most law school courses on constitutional law are dominated by U.S. Supreme Court decisions and lack specific attention to state constitutions."[11] Even a cursory search of the curriculum of some of America's top law schools reveals an almost total lack of any courses regarding state constitutional adjudication.[12] This, however, should not excuse today's practitioners and today's judges from being aware that their respective states do actually have a constitution that is separate and distinct from the United States Constitution.[13]

Over the past century, as more and more commentators and courts have begun to realize the value of state constitutional adjudication, four distinct methodologies or approaches to decision making have developed: (1) lockstep;[14] (2) dual reliance;[15] (3)

(1995).

[11] Michael F.J. Piecuch, *State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 ALB. L. REV. 1757, 1765 (1997) (citation omitted). *See also* Kaye, *supra* note 10, at 12 n.63 ("I believe it is largely the failure of our nation's law schools to teach state constitutional law that has resulted in the poor grade earned by the vast majority of counsel who fail to develop state constitutional issues in their court filings.").

[12] This is based on a review of the listed courses for Chicago, Columbia, Cornell, Harvard, New York University, Stanford, and Yale Law Schools. One understands that our nation's top law schools perhaps feel that they best serve their students, presumably the best and the brightest, by focusing on United State Supreme Court decisions; however, the argument should be made, but not in this Study, that these schools drive the formation of curricula at all schools who compete for the lawyers of tomorrow.

[13] *See generally* Kaye, *supra* note 10, at 1112 ("Many of us [judges] had grown so federalized, so accustomed to the Supreme Court of the United States as the fount of constitutional wisdom, that we barely remembered that our state even had a constitution."); State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (""The fact that law clerks working for state judges have only been taught or are familiar with *federal* cases brings a federal bias to the various states as they fan out after graduation from "federally" oriented law schools."" (quoting Charles G. Douglas III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1147 (1978)).

[14] *See, e.g.*, People v. Markham, 775 P.2d 1042, 1045–47 (Cal. 1989); People v. Tinsler, 469 N.E.2d 147, 155–57 (Ill. 1984); People v. Gonzalez, 465 N.E.2d 823, 824–25 (N.Y. 1984).

[15] *See, e.g.*, O'Neill v. Oakgrove Constr. Inc., 523 N.E.2d 277, 280–81 (N.Y. 1988); State v. Badger, 450 A.2d 336, 346–47 (Vt. 1982); State v. Coe, 679 P.2d 353, 361–62 (Wash. 1984).

primacy;[16] and (4) supplemental or interstitial.[17]

Under the *lockstep* approach, the state court acts only as an intermediate federal court and applies the dictates of the United States Supreme Court.[18] "[T]he state court never actually considers its own constitution. . . . [and] merely declares that its state constitution grants the same protections and liberties as those granted under the federal constitution."[19]

Under the *dual reliance* approach,[20] state courts discuss or rely upon both federal and state law in forming their decisions.[21] Although this method gives the practitioner the opportunity to see how the court weaves the two constitutions together, unless the court bases its ultimate decision on independent and adequate state grounds, it will leave itself open to review by the United States Supreme Court on the federal analysis.[22]

Under the *primacy* approach, the state court looks first to its own state constitution and federal law takes a secondary position.[23] By asserting its autonomy, a state court may never address federal law if it feels that its own constitution provides a particular right or protection.[24]

Lastly, under the *supplemental* or *interstitial* approach, the state court looks first to the federal constitution to see if it protects the

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[16] *See, e.g.*, Massachusetts v. Upton, 466 U.S. 727, 735–36 (1984) (Stevens, J., concurring); State v. Ball, 471 A.2d 347, 350 (N.H. 1983); State v. Beno, 341 N.W.2d 668, 674 (Wis. 1984).

[17] *See, e.g.*, State v. Bolt, 689 P.2d 519, 523–24 (Ariz. 1984); People v. Kohl, 527 N.E.2d 1182, 1185 (N.Y. 1988); State v. Reece, 757 P.2d 947, 954 (Wash. 1988).

[18] *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788–93 (1992).

[19] Legg, *supra* note 5, at 1803. *See also* Stewart F. Hancock, Jr., *The State Constitution, A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271, 284 (1993) (stating that "[t]he 'Lockstep' model presumes that a state court will simply interpret the state constitution in accord with the Supreme Court's interpretation of analogous Federal Constitutional provisions").

[20] In addition, some scholars refer to this as the "dual sovereignty" approach. *See, e.g.*, Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1026–30 (1985).

[21] *See* Legg, *supra* note 5, at 1803–04.

[22] *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 980–82 (1985). *See also* Michigan v. Long, 463 U.S. 1032, 1041–42 (1983) (articulating that the Court would not review state court decisions based on an issue of federal law when, "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds").

[23] *See* Utter, *supra* note 20, at 1028.

[24] *See* Legg, *supra* note 5, at 1804.

right.[25] Only after determining that the federal constitution is not dispositive will the state court then examine the right under its state constitution.[26] The Supreme Court, therefore, sets the minimum level for constitutional rights, and "the state court of last resort determines whether supplemental protection is afforded as a matter of state law."[27] State courts will find greater protections under its constitution when it appears that there are "textual differences, legislative history supporting a broader reading of the state provision, state law predating United States Supreme Court decisions, differences between federal and state judicial structures, subject matter of particular state or local interest, state traditions, [or] public attitudes in the state."[28]

II. METHODOLOGY

Based primarily upon Legg's prior methodology, this Study examines Vermont Supreme Court decisions dealing with state constitutional criminal justice claims. Some cases examine party claims under both the Vermont State Constitution and the United States Constitution. The scope of this Study is cases examined by the Vermont high court from January of 2002 until December of 2007, a six-year span. In total, the Study examines seventy-nine cases, including those in which the court decisions came via an Entry Order.

For the sake of organization, and to allow for comparison to Legg's study, this Study categorizes the large number of cases into four distinct divisions: (1) *Miranda*, Self-Incrimination, and Confessions; (2) Search and Seizure; (3) Post-Investigation, Bail, and Trial; and (4) Post-Trial and Sentencing.[29] The organization was largely accomplished by analyzing the primary focus of the majority opinion and/or the dissenting opinion; however, some cases analyzed two or more issues that required that the Study consider these cases in two distinct divisions.[30] Obviously, given the volume of cases in the

[25] *See id.*; Pollock, *supra* note 22, at 984–85.

[26] Pollock, *supra* note 22, at 984–85.

[27] Legg, *supra* note 5, at 1805.

[28] Utter, *supra* note 20, at 1028. *See also* Legg, *supra* note 5, at 1805–06.

[29] These divisions differ slightly from those used by Legg in his 1997 study. Legg included cases related to bail decisions in the last division, Post-Trial, whereas this Study includes those cases within the third division of cases, Post-Investigation. *See* Legg, *supra* note 5, at 1833–37.

[30] *See, e.g.*, State v. Provost, 896 A.2d 55, 60–61, 63–66 (Vt. 2005) (analyzing both *Miranda*

Study, each case is not and cannot be fully examined. The cases analyzed within this Study were chosen because of their novelty, their departure from historical federal precedent, and/or disagreement amongst the Vermont justices as to their proper holdings.

Given the historical trend of independent thinking of both the Vermont Supreme Court and the state itself, this Study will abstain from using the politically-charged terms, used by Legg in his study, of "conservative" and "liberal" when analyzing court decisions and voting records. Instead, this Study will use the more apropos terms of "pro-prosecution" or "pro-defendant" when describing and analyzing individual voting styles and judicial philosophies.[31]

Although this Study will not examine the concept of legal realism per se, it is something that all must consider when conducting a study of high court voting patterns.[32] No matter how a judge frames the reasoning for his or her decision—whether it be based on objective factors, the facts of the case, analogies to other case law, legislative history, historical precedent, or legal scholarship[33]—ultimately, it is the "judge's background, education, religion, beliefs, values, and philosophies [that] demonstrate [how] the judge will vote."[34] As Benjamin N. Cardozo stated in *The Nature of the Judicial Process*:

> Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and

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and sentencing issues).

[31] *See* Seth Forrest Gilbertson, *New Hampshire: "Live Free or Die," But in the Meantime . . .*, 69 ALB. L. REV. 591, 599 (2006). *Cf.* Legg, *supra* note 5, at 1839 (using the terms "conservative" and "liberal"). *See generally* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163 (1994).

> "[C]onservative" signifies support for the government or prosecution against claims of civil rights and liberties, equal protection, or rights of the accused. Additionally, "conservative" might signify a preference for limiting the scope of protection provided for rights and liberties. In contrast, "liberal" . . . might indicate a preference for extending the scope of protection provided for such rights and liberties.

Id. at 1166 n.11. For comparison purposes, this Study equates "liberal" or "conservative," as used by Legg in his 1997 study, to "pro-defendant" or "pro-prosecution," respectively.

[32] *See, e.g.*, Jason A. Cherna, *The Indiana Supreme Court's Voting Patterns in Criminal Decisions*, 70 ALB. L. REV. 1125, 1127–29 (2007); Legg, *supra* note 5, at 1806–07.

[33] Cherna, *supra* note 32, at 1128 (citing Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, *The Path of the Law*, Address at Boston University School of Law (Jan. 8, 1897), *in* 110 HARV. L. REV. 991, 1000 (1997)).

[34] Legg, *supra* note 5, at 1807 (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11–12 (1921)).

> more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience.[35]

III. *MIRANDA*, SELF-INCRIMINATION, AND CONFESSIONS

"The Vermont Supreme Court [continues to] carefully protect[] its citizens from overzealous police investigative procedures";[36] however, it appears that with the passage of ten years and the inevitable turnover of justices, the extent of that protection has started to decline slightly.[37] Although this Study primarily examines the court's state constitutional jurisprudence in criminal cases, the areas of *Miranda* rights and right to counsel created by the Fifth[38] and Sixth[39] Amendments to the United States Constitution and Article 10 of the Vermont Constitution[40] requires an additional examination of statutory law.

Over the last six years, the Vermont court has examined numerous appeals arising from the state legislature's creation of a statutory right to counsel under 23 V.S.A. § 1202(c).[41] This

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[35] CARDOZO, *supra* note 34, at 9.

[36] Legg, *supra* note 5, at 1807.

[37] *See* tbls.2 & 3 *infra*, respectively. *Compare* Legg, *supra* note 5, at 1839, 1840 tbls.1 & 2.

[38] The Fifth Amendment to the United States Constitution states, in part, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[39] The Sixth Amendment to the United States Constitution states, in part, "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[40] Article 10 of Chapter One of the Vermont Constitution states, in part, "[t]hat in all prosecutions for criminal offenses, a person hath a right to be heard by oneself and by counsel; . . . nor can a person be compelled to give evidence against oneself." VT. CONST. ch. 1, art. 10.

[41] *See, e.g.*, State v. Bonvie, 936 A.2d 1291, 1292 (Vt. 2007); State v. May, 878 A.2d 250, 252 (Vt. 2005); State v. Powers, 852 A.2d 605, 607 (Vt. 2004); State v. Roya, 807 A.2d 371, 371–72 (Vt. 2002); State v. Sherwood, 800 A.2d 463, 464 (Vt. 2002). The statute reads:

> A person who is requested by a law enforcement officer to submit to an evidentiary test or tests has a right as herein limited to consult an attorney before deciding whether or not to submit to such a test or tests. The person must decide whether or not to submit to the evidentiary test or tests within a reasonable time and no later than 30 minutes from the time of the initial attempt to contact the attorney. The person must make a decision about whether or not to submit to the test or tests at the expiration of the 30 minutes regardless of whether a consultation took place.

legislation has created much of the same debate seen in constitutional law cases: scope of the protection; interpretation of statutory language; burdens of proof; and waiver. This Study addresses the constitutional issues first, and then examines the court's decisions regarding the statutorily created right to counsel.

A. State Constitutional Adjudication

In 1997, Legg found that the Vermont high court applies more stringent state constitutional protections against self-incrimination than those seen in federal courts,[42] and that tradition continues today.[43] In *State v. Peterson*,[44] the court refused to follow *United States v. Patane*,[45] a decision in which the United States Supreme Court "held that physical evidence uncovered as a result of a *Miranda* violation need not be suppressed."[46] In rejecting the *Patane* rule, the *Peterson* court initially noted that "'Article 10 privilege against self-incrimination and that contained in the Fifth Amendment are synonymous,'" but when it comes to "the scope of the remedy for the *Miranda* violation . . . [its] precedents take a different view from that of the United States Supreme Court."[47]

VT. STAT. ANN. tit. 23, § 1202(c) (2008).

[42] *See* Legg, *supra* note 5, at 1807–08.

[43] The Vermont court does, however, recognize many of the federal standards in the areas of *Miranda*, self-incrimination, and the exclusionary rule. For example, in *State v. Beer*, the court recognized the Supreme Court's definition and scope of "custodial interrogation" for *Miranda*. *See* 864 A.2d 643, 650, 651 (Vt. 2004) (citing Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) and Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980)). *See also* State v. Pontbriand, 878 A.2d 227, 230 (Vt. 2005); State v. LeClaire, 819 A.2d 719, 725–26 (Vt. 2003); State v. Benoit, 795 A.2d 1188, 1190–91 (Vt. 2002). In addition, in *State v. Yoh*, the court recognized that voluntary, incriminating statements made by a defendant to police after he has asserted his right to counsel are not a violation of *Miranda* if the defendant initiated further conversation on his own. 910 A.2d 853, 861–62 (Vt. 2006) (citing Edwards v. Arizona, 451 U.S. 477, 484–85 (1981)).

[44] 923 A.2d 585 (Vt. 2007).

[45] 542 U.S. 630 (2004).

[46] *Peterson*, 923 A.2d at 587 (citing *Patane*, 542 U.S. at 636). The *Patane* Court, in separate opinions, held that the "'Self-Incrimination Clause . . . is not implicated by the admission into evidence of the physical fruit of a voluntary statement,'" *id.* at 588, and the admission of such evidence does "'not run the risk of admitting into trial an accused's coerced incriminating statements against himself." *Id.* at 589 (quoting *Patane*, 542 U.S. at 645 (Kennedy, J., concurring)).

[47] *Id.* at 590 (quoting State v. Rheaume, 853 A.2d 1259 (Vt. 2004); citing State v. Oakes, 598 A.2d 119, 121–22 (Vt. 1991)). For a further discussion of *Oakes*, see Legg, *supra* note 5, at 1821–22. *See also* State v. Brunelle, 534 A.2d 198, 201–03 (Vt. 1987) (refusing to accept the Supreme Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), to allow the use of statements taken in violation of *Miranda* for impeachment); Legg, *supra* note 5, at 1809–11 (examining *Brunelle*).

Justice Dooley, writing for the court, highlighted that the court's decision in *State v. Brunelle*,[48] which built upon its prior decision in *State v. Badger*,[49] "demonstrate[d] that [its] adherence to *Miranda* under Article 10 does not include adherence to the federal exclusionary rule for *Miranda* violations."[50] The exclusionary rule was developed for *Miranda* violations because the "'[i]ntroduction of [physical] evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct.'"[51] Dooley concluded that "[t]he approach of *Patane* . . . would create an incentive to violate *Miranda*,"[52] which the court could not adhere to under Article 10 of the Vermont Constitution.[53]

One instance of the Vermont high court departing from its usual judicial philosophy of rejecting federal standards in *Miranda* cases is seen in *State v. Rheaume*.[54] In *Rheaume*, the court addressed the "'routine booking question exception'" to *Miranda*.[55] The defendant in *Rheaume*, charged with a third DUI offense,[56] argued that his responses to questions posed to him by a state trooper during processing, and after asserting his right to remain silent, violated *Miranda*, and thus, should be suppressed.[57] Defendant conceded that a routine booking question exception existed under federal law, but urged the court to adopt a more stringent standard under Article 10 of the Vermont Constitution.[58]

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[48] 534 A.2d 198.

[49] 450 A.2d 336, 338–39, 340, 341, 343, 350 (Vt. 1982) (suppressing physical evidence taken in violation of *Miranda*).

[50] *Peterson*, 923 A.2d at 591.

[51] *Id.* at 591 (quoting *Badger*, 450 A.2d at 349).

[52] *Id.* at 592.

[53] *See id.* at 593.

[54] 853 A.2d 1259 (Vt. 2004).

[55] *Id.* At 1261 (citation omitted). *See* Pennsylvania v. Muniz, 496 U.S. 582, 601–02, 608 (1990) (recognizing that routine booking questions regarding necessary biographical information are exempt from *Miranda* protections).

[56] In Vermont, a third DUI offense is a felony. *See* VT. STAT. ANN. tit. 23, § 1210(d) (2008); VT. STAT. ANN. tit. 23, § 1201 (2008). Section 1211 of Title 23, defines what qualifies as a "previous DUI violation." VT. STAT. ANN. tit. 23, § 1211 (2008). In *State v. Pecora*, 928 A.2d 479, 481–82 (Vt. 2007), the court decided that a defendant's right to a jury trial under the Vermont Constitution did not extend to the use of prior, out-of-state DUI convictions in a sentencing enhancement proceeding.

[57] *Rheaume*, 853 A.2d at 1259–60. Using the information defendant provided, "the trooper obtained copies of defendant's two prior DUI convictions." *Id.* at 1260.

[58] *Id.* at 1261.

Justice Dooley, writing for the court, initially examined whether defendant's argument fit within the federal exception to *Miranda*.[59] Noting that the trooper's questions "were apparently routine, were asked as part of routine processing . . . were similar to the questions asked in *Muniz*,"[60] and the trooper had no intention to solicit incriminating evidence with the questions,[61] Dooley concluded that the federal exception would have applied in this case.[62] Turning the court's attention towards defendant's claim under Article 10, Justice Dooley highlighted that the court recognized that a violation of *Miranda* is also a violation of Article 10; however, the "[court] ha[d] not gone further and found a violation . . . where the United States Supreme Court ha[d] not done so."[63] Dismissing defendant's historical/textual,[64] policy,[65] and foreign-precedential arguments,[66] the court concluded that "none of the analysis considerations . . . lead us to the conclusion that we should reject *Muniz* under Chapter I, Article 10 of the Vermont Constitution."[67]

In addition to the adoption of the federal standard in *Rheaume*, the court refused to expand individual rights and protections under the Vermont Constitution in other areas. In *State v. Benoir*,[68] the court refused to create a state constitutional right to have the state pay for an independent blood test for DUI arrests.[69]

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[59] *See id.* at 1261–64. Justice Dooley noted that in "many of the federal and state decisions adopting the routine booking exception, suspects were questioned without first being given the *Miranda* warnings"—contrary to the defendant in *Rheaume*—however, "it makes no difference with respect to the . . . exception whether defendant did or did not receive the warnings prior to questioning because the identification questions fall outside the scope of *Miranda*." *Id.* at 1263 n.3.

[60] *Id.* at 1263.

[61] *Id.* at 1264.

[62] *See id.* at 1263–64.

[63] *Id.* at 1264 (citing State v. Brunelle, 534 A.2d 198 (Vt. 1987)). *See also* Legg, *supra* note 5, at 1809–11 (examining the Vermont Supreme Court's holding in *Brunelle*).

[64] *See Rheaume*, 853 A.2d at 1264–65. "[W]e have consistently held that, in its application to adults, the Article 10 privilege against self-incrimination and that contained in the Fifth Amendment are synonymous." *Id.* at 1265 (citations omitted).

[65] *See id.* at 1268–69. "[P]olicy interests weigh heavily against defendant's position where the questions go to the identity of the person the police have arrested." *Id.* at 1268.

[66] *See id.* at 1265–68.

[67] *Id.* at 1269. *See also* State v. Jewett, 500 A.2d 233, 236–37 (Vt. 1985) (outlining the framework for "constitutional inquiry" by the Vermont Supreme Court).

[68] 819 A.2d 699 (Vt. 2002).

[69] *See id.* at 702. The court found unpersuasive the defendant's argument that a DUI suspect has a due process right to an independent test. "[A Due Process] right generally derives from the right of an accused to attempt to obtain exculpatory evidence, the state's duty to preserve such evidence, and the evanescent nature of blood alcohol evidence . . . . [and], the facts do not demonstrate that the state violated such a right, if it

B. State Statutory Adjudication

As noted above, the Vermont Legislature created a limited statutory right to counsel for DUI suspects whereby they could "consult with an attorney before either submitting to an evidentiary breath test or refusing."[70] As the court noted in *State v. Powers*, for "[o]ver nearly thirty years" it has refined the scope and boundaries of this statutory protection.[71] Officers must inform a suspect of his right to counsel before administering an evidentiary breath test;[72] the suspect must be given a reasonable time to invoke that right;[73] and that conversation must be meaningful and "reasonably private."[74] This statutory right "operates as a supplement to the *Miranda* warnings, explaining the implications of Vermont's implied consent and criminal refusal laws,"[75] but the statute does not create additional constitutional protections.[76]

The two issues of major contention that arose from the statutory protection over the last six years came in the discussion over what constitutes a "reasonably private" discussion between suspect and counsel,[77] and the length to which the State must go to ensure that a DUI suspect gets the opportunity to consult an attorney.[78]

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existed." *Id.* (citations omitted). *See also* State v. Marallo, 817 A.2d 1271, 1272 (Vt. 2002) (noting that a defendant does not have a constitutional right to counsel during the drawing of a blood sample for identification because it occurs during a non-critical stage).

[70] State v. Powers, 852 A.2d 605, 609 (Vt. 2004); *see also* VT. STAT. ANN. tit. 23, § 1202(c), (d)(4) (2008).

[71] 852 A.2d at 609.

[72] *Id.* (citing State v. Duff, 394 A.2d 1145, 1146 (Vt. 1978)). *See also* State v. May, 878 A.2d 250, 255 (Vt. 2005) (holding that a defendant has no statutory right to counsel before deciding whether to take an evidentiary breath test pursuant to VT. STAT. ANN. tit. 23, § 1203(f)); State v. Roya, 807 A.2d 371, 373 (Vt. 2002) (holding that a defendant must show that he was prejudiced by a violation in order to suppress breath test evidence).

[73] *See* State v. Bonvie, 936 A.2d 1291, 1294–95 (Vt. 2007). "The operator must decide whether to take the test 'within a reasonable time and no later than 30 minutes from the time of the initial attempt to contact the attorney . . . regardless of whether a consultation took place.'" *Id.* at 1294 (citing VT. STAT. ANN. tit. 23, § 1202(c)).

[74] *Powers*, 852 A.2d at 609 (quoting State v. Sherwood, 800 A.2d 463, 465 (Vt. 2002) (*see* discussion *infra* notes 79–98 and accompanying text)).

[75] State v. Velez, 819 A.2d 712, 713 (Vt. 2003) (citing State v. Morale, 811 A.2d 185, 189–90 (Vt. 2002)).

[76] *See* State v. Coburn, 898 A.2d 128, 131–33 (Vt. 2006). "[B]ecause a breath test is not compelled, neither Fifth Amendment rights against self-incrimination nor the necessity of a *Miranda* warning attach to a request for a breath test or to any response such a request might provoke." *Id.* at 132 (citing *Morale*, 811 A.2d at 188–89).

[77] *See* State v. Sherwood, 800 A.2d 463, 465 (Vt. 2002).

[78] *See* State v. Velez, 819 A.2d 712, 713 (Vt. 2003).

In *State v. Sherwood*,[79] the court addressed the meaning and scope of a DUI suspect's right to a private consultation under 23 V.S.A. § 1202(c).[80] In *Sherwood*, a defendant argued that his statutory right to consult counsel under 23 V.S.A. § 1202(c) was violated when his conversation with counsel was videotaped by the state.[81] Defendant urged the court to dismiss his DUI charges because he had been denied a private consultation with his counsel and the State had violated his rights under the Fourth Amendment to the United States Constitution and Article 11 of the Vermont Constitution.[82]

Chief Justice Amestoy, writing for the majority, indicated that "[a]bsolute privacy is not required . . . [but, the court] must balance the defendant's right to a public consultation with an attorney with the public's need to preserve important evidence."[83] Therefore, Amestoy noted, "a defendant's statutory right to counsel is violated where the police unjustifiably monitor a defendant's legal consultation and the monitoring . . . restricts the defendant's ability to meaningfully engage with his attorney,"[84] which requires the court to conduct an objective evaluation of the totality of the circumstances under which the consultation took place.[85] Chief Justice Amestoy concluded that under this objective evaluation, the state had violated the defendant's right to a private consultation.[86]

The court continued that its "inquiry d[id] not end here, however,"

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[79] 800 A.2d at 463.

[80] *Id.* at 465.

[81] *See id.* at 464. The conversation took place in the police barracks after the defendant had been arrested and processed by the state trooper. *Id.* The trooper's standard practice was to videotape the entire processing so as to eliminate any possible claim by a suspect that the State had tampered with the tape. *Id.*

[82] *Id.* at 465, 467. The court did not address defendant's constitutional claims because he failed to raise them before the district court. *Id.* at 467.

[83] *Id.* at 465. "[T]he opportunity for legal consultation must be both meaningful and reasonably private." *Id.*

[84] *Id.* at 465–66 (citing State v. West, 557 A.2d 873, 876–77 (Vt. 1988)).

[85] *See id.* at 466.

[86] *Id.* Although Chief Justice Amestoy no longer sits on the bench, it is important for a practitioner to be aware of his voting record since the court often calls upon retired justices to sit for oral argument and vote when other justices are unavailable or conflicted out. His voting record demonstrates, at 91% (92%, 86%, 100%, and 100%, respectively), a decidedly pro-prosecution pattern; in fact, excluding Justice Reiss, who voted in only one decision, Chief Justice Amestoy has the highest pro-prosecution percentage for this Study. *See* tbls.2, 4, 6, 8 & 10. This does not change when examining his record in divided cases where his voting pattern is 89% pro-prosecution (100%, 75%, n/a, and 100%, respectively). *See* tbls.3, 5, 7, 9 & 11. Most notable, perhaps, is the fact that out of the eight written opinions Amestoy wrote that are included in this Study, only one is pro-defendant. *See* tbl.12.

because its must also determine whether the defendant's consultation was "meaningful."[87] In evaluating the "meaningfulness" of the consultation, the court noted that the defendant had not been aware of the recording while it happened, he did not feel inhibited in the conversation, and the State had not attempted to use the video as evidence.[88] The defendant countered, however, that the court should adopt an automatic dismissal in cases such as this so as "to deter law enforcement from deceptively taping confidential communications between DUI suspects and their lawyers."[89] The court refused to adopt such an "extraordinary remedy" because the defendant had failed to show some "causal nexus . . . between the alleged illegality and the evidence" or how the State's actions had prejudiced any of his substantial rights.[90]

Justice Johnson dissented from the opinion, believing that the majority's holding had "eviscerate[d]" the statutory right to consult counsel in private and "mock[ed] the hallmark of consultation with a lawyer—the confidentiality of attorney-client communications."[91] Justice Johnson agreed with the majority that the test in determining whether the defendant's right to counsel is an objective

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[87] 800 A.2d at 466.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 466, 467. "[W]e find it instructive that dismissal is not the remedy we employ when redressing unconstitutional searches and seizures and violations of a defendant's constitutional privilege against self-incrimination." *Id.* at 467. Justice Morse concurred in judgment but chose to write separate to refute certain contentions of the dissenting opinion. *Id.* at 468 (Morse, J., concurring).

The court brought some more clarity on this issue in *State v. Powers*, 852 A.2d 605 (Vt. 2004). In *Powers*, an officer had informed a defendant that their conversation was recorded during processing. *Id.* at 607. When the defendant invoked his right to consult counsel, the officer left the room and turned off the recording device, but the officer did not tell the defendant of this fact. *Id.* at 608. Defendant moved to suppress the results of his breath test because "[he] believed that his conversation with an attorney during a DUI processing was being recorded, and this belief prevented him from asking whether his prior arrest would affect his current charges." *Id.* at 607. In reversing the lower court's denial of a defendant's suppression motion, Justice Skoglund indicated that similar to the situation in *Sherwood*, "the State violated defendant's right to a reasonably private consultation with an attorney." *Id.* at 610. Contrary to *Sherwood*, however, the defendant established that he felt inhibited during his conversation with counsel, and thus, that the State had "violated [his] statutory right to a meaningful consultation with his attorney." *Id.* at 610–11. Furthermore, the defendant was able to establish the "casual nexus . . . between the alleged illegality and the evidence [the] defendant [sought] to [suppress]." *Id.* at 611 (citation and internal quotations omitted).

[91] *Sherwood*, 800 A.2d at 468 (Johnson, J., dissenting). Justice Skoglund joined in the dissent. *Id.* at 471.

one,[92] however, felt that the majority had failed to use such a test.[93] Johnson contended that the majority's examination of whether the defendant felt inhibited or prejudiced by the recording—requiring an examination of his subjective experience—"ma[de] clearly impermissible police practices permissible, depending on how they might have been perceived by the defendant."[94] She concluded—

> [T]he majority's contention that defendant must show prejudice fails to recognize that a defendant would be hard-pressed to present evidence that *surreptitious* videotaping interfered with his contact with his attorney. The effect of the majority's reasoning is to condone secret videotaping as long as a defendant is unaware he is being monitored.[95]

In addition, Johnson disagreed with the majority's conclusion that an outright dismissal is an inappropriate remedy for a violation of the right to counsel in this case.[96] She noted that "the police and the state's attorney [had] demonstrated a flagrant disregard for defendant's right" to counsel throughout the case,[97] and the State had failed, in Johnson's opinion, to show any exigency for not stopping the taping during the defendant's conversation.[98]

In *State v. Velez*,[99] the court confronted the question of how far the State must go to ensure that a DUI suspect gets an opportunity

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[92] *Id.* at 468. "Under the facts of this case, the appropriate inquiry is whether a reasonable person would feel free and uninhibited to consult with his attorney if he knew the police were monitoring his every word." *Id.* at 469.

[93] *See id.*

[94] *Id.* (citation omitted).

[95] *Id.* at 470.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 471. "Additionally, the assurance that the conversation was not listened to or will not be used in defendant's prosecution rings hollow. Because the prosecution has already viewed the videotape of the conversation, there is no way to ensure that defendant will not be harmed by the information contained therein." *Id.* at 470.

It appears that Justice Johnson continues to follow her pro-defendant voting pattern identified by Legg in his 1997 study. *See* Legg, *supra* note 5, at 1816–17 n.77. *See also id.* at 1843, 1844 tbls.9 & 10. Of course, as with the entire Vermont Supreme Court, her voting record demonstrates a pro-prosecution trend, when compared to the voting records of her fellow justices, her distinction appears. Her cumulative 65% pro-prosecution voting record is the lowest among all of the justices in this Study (60%, 52%, 73%, and 81%, respectively). *See* tbls.2, 4, 6, 8 & 10. In addition, the distinction is even more apparent when examining her voting record in divided cases, where she votes pro-prosecution only 7% of the time (0%, 0%, 50%, and 0%, respectively), compared to the entire court's 47%. *See* tbls.3, 5, 7, 9 & 11. It appears that, similar to Legg's findings in 1997, Justice Johnson is a firm member of the court's pro-defendant block. *See* Legg, *supra* note 5, at 1824 n.112.

[99] 819 A.2d 712 (Vt. 2003).

to speak to counsel. In *Velez*, the defendant, stopped for drunk driving, invoked his right to consult counsel, but the on-call public defender refused to speak with him because the arresting officer did not provide the attorney with information regarding the defendant's motor vehicle record.[100] In affirming the lower court's decision to suppress the defendant's breath test result, the court concluded that the State's actions, via the public defender, "deprived defendant of any opportunity whatsoever for a private consultation with an attorney."[101] "However imperfect such a consultation may have been, it would have provided defendant with an opportunity to ask questions about the way Vermont's statutory scheme worked and what decision would make sense given his driving record."[102]

IV. SEARCH & SEIZURE

As Jason Legg found in 1997, the Vermont Supreme Court "continues to follow the due process model when considering search and seizure cases."[103] The Court continues to cite that Vermont's strong traditional "values of privacy and individual freedom—embodied in Article 11— . . . require greater protection than that afforded by the federal Constitution."[104] Over the last five years, the

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[100] *Id.* at 713.

> The transcript of the processing of [the defendant] for DUI shows that [he] was bewildered and panicked as a result of the inconsistency between the trooper's statements, first, that as a DUI detainee, [he] had a right to consult with an attorney, but second, that the attorney contacted was refusing to speak with him.

Id. at 714.

Pursuant to 23 V.S.A. § 1202(g), the State Public Defender's office must provide twenty-four hour "coverage" for DUI detainees. *See id.*; VT. STAT. ANN. tit. 23, § 1202(g) (2008).

[101] *Velez*, 819 A.2d at 714.

[102] *Id.* at 714–15. "The refusal of a public defender to speak with a DUI detainee frustrates [the] statutory scheme, resulting in no less serious a violation of the detainee's rights than ensues when a police officer fails to assist a detainee in obtaining a meaningful consultation in accordance with the statute." *Id.* at 715.

Chief Justice Amestoy, joined by Justice Skoglund, dissented in the decision, noting that the statutory "right to consult with counsel is limited in scope" and the defendant in this case "had the full benefit of the statutorily created—and statutorily limited—right to require the State to make a good faith effort to contact counsel within the thirty-minute time period." *Id.* at 718, 719 (Amestoy, C.J., dissenting).

[103] Legg, *supra* note 5, at 1814. *Compare id.* at 1840–41 tbls.3 & 4, *with infra* tbls.4 & 5. In fact, the numbers are identical with the Vermont court voting pro-prosecution 62% of the time in the 1997 study and in this Study.

[104] State v. Bauder, 924 A.2d 38, 42 (Vt. 2007); *see also* Legg, *supra* note 5, at 1814 (discussing how the Vermont high court "has repeatedly noted that an individual's right to privacy and freedom from government interference has its foundations in strong state traditions").

Vermont court has continued to depart from the precedent of its sister courts when examining a citizen's protection from unreasonable search and seizure. Furthermore, the warrantless search continues to be "a rare creature in Vermont."[105]

One notable departure from federal precedent that has developed since 1997 is the court's refusal to adopt the current *Gates'* totality of the circumstances test when evaluating warrants based upon hearsay evidence.[106] The Vermont court does, however, continue to

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[105] Legg, *supra* note 5, at 1814. *See, e.g.*, State v. Chicoine, 928 A.2d 484 (Vt. 2007); *Bauder*, 924 A.2d at 38 (examined further *infra* notes 139–64 and accompanying text); State v. Chapman, 800 A.2d 446 (Vt. 2002) (examined further *infra* note 111). One federally recognized exception to the warrant requirement that the court has not addressed is the "community living exception." "[This] exception permits officers to execute a warrant that merely describes the place to be searched by its outward appearance . . . . [and] applies only where the officers could not have known or anticipated that they would encounter separate privacy interests inside the premises prior to executing the warrant." State v. Quigley, 892 A.2d 211, 218 (Vt. 2005) (citing United States v. Santore, 290 F.2d 51, 67 (2d Cir. 1960)). In *Quigley*, the court recognized that it had held "that Article Eleven provides broader protection than the Fourth Amendment, and have rejected certain judicially-crafted exceptions to the warrant requirement," but the defendant in *Quigley* had not argued for broader protection under Article Eleven, and thus, the court "reserve[d] full consideration of this issue for another day." *Id.* Although the court has not had the opportunity to address the "community living exception" since *Quigley*, there is little doubt that the court would reject acceptance of the federal standard given its long tradition of doing so.

[106] *See* Illinois v. Gates, 462 U.S. 213, 232 n.7, 238–39 (1983) (describing the totality of the circumstances test). In his 1997 study, Legg mistakenly stated that the Vermont court utilized the *Gates* test "for determining the existence of probable cause to support a search or a warrant." Legg, *supra* note 5, at 1814–15, 1815 n.75. Although the court does utilize the *Gates* test for warrantless searches, the court still "continue[s] to apply the two-pronged test to [probable cause determinations for search warrants] under the Vermont Constitution." State v. Goldberg, 872 A.2d 378, 381 (Vt. 2005) (citing State v. Alger, 559 A.2d 1087, 1090 (Vt. 1989)).

In *State v. Goldberg*, the Vermont Supreme Court reversed a lower court's order denying defendant's motion to suppress evidence seized during a search because the warrant upon which the search was conducted failed to satisfy the two-pronged, *Aguilar-Spinelli* test. *Goldberg*, 872 A.2d at 384. In applying the *Aguilar-Spinelli* test, rather than the *Gates* test adopted by the United States Supreme Court, the court noted, "[t]he *Aguilar-Spinelli* standard strikes an appropriate balance between individual Vermonters' right to privacy and the police's important interest in preventing crime." *Id.* at 381–82. In *Goldberg*, an informant contacted the police and offered information regarding a possible marijuana growing operation in Chittenden County. *Id.* at 380. Based upon the informant's allegations, a DMV check of the defendants to confirm identities, and a cursory drive-by of the defendants' property, the police submitted an affidavit for a warrant authorizing a search of defendants' home. *Id.* During the subsequent search, police uncovered evidence of a growing operation and the defendants were convicted of cultivating and possessing marijuana. *Id.* at 379.

Applying the *Aguilar-Spinelli* test, the Vermont court found that the first prong of the test—the informant's basis of knowledge, see *Aguilar v. Texas*, 378 U.S. 108, 114 (1964)—had been satisfied by the informant's personal observations. *Goldberg*, 872 A.2d at 382. The court noted, however, that affidavit failed to establish the second prong of test—the informant's credibility or veracity, see *Spinelli v. United States*, 393 U.S. 410, 413 (1969)—and therefore, "it did not establish the probable cause necessary to issue the search warrant." *Goldberg*, 872

follow the *Gates* test when evaluating probable cause for a warrantless search.[107] In addition, the court continues, despite acknowledging that the Vermont Constitution "may require greater protection than that afforded by the federal Constitution,"[108] to follow federal standards regarding DUI checkpoints,[109] administrative searches,[110] and the *Terry* standards for evaluating "stops."[111]

A.2d at 382. "An affidavit may establish an informant's credibility in either of two ways: (1) by demonstrating his or her inherent credibility as a source; or (2) by demonstrating the reliability of the information he or she has provided on the occasion in question." *Id.* (citing State v. Alger, 559 A.2d 1087, 1091 (Vt. 1989)). Noting that the informant was providing the information for consideration in his own pending criminal case, the lack of corroboration of informant's information by the police, and citing similar conclusions by sister states, see *id.* at 382–84, the Vermont court "decline[d] . . . to depart from the established standards governing the reliability of hearsay information in probable cause determinations." *Id.* at 384. The court concluded that the affidavit failed to establish the informant's credibility, failed to satisfy the *Aguilar-Spinelli* test, and thus, the evidence seized as a result of the search should be suppressed. *Id.* "[The] application [of the exclusionary rule] here encourages police to diligently corroborate information from a potentially unreliable source." *Id.* It also "helps protect Vermonters' right to privacy . . . [and] ultimately result[s] in more thorough and careful police work." *Id.*

[107] *See, e.g.*, State v. Simoneau, 833 A.2d 1280, 1285 (Vt. 2003); State v. Lawrence, 834 A.2d 10, 15 (Vt. 2003); State v. Chapman, 800 A.2d 446, 449 (Vt. 2002).

[108] *Bauder*, 924 A.2d at 42.

[109] *See, e.g.*, State v. Williams, 933 A.2d 239, 241–42 (Vt. 2007) (affirming a DUI checkpoint under the six criteria announced in *State v. Martin*, 496 A.2d 442, 449 (Vt. 1985)).

[110] *See, e.g.*, King v. Gorczyk, 825 A.2d 16, 25–30 (Vt. 2003) (affirming the Department of Corrections' random drug testing policy). *See also* State v. McQuillan, 825 A.2d 804 (Vt. 2003) (examining the admissibility of breathalyzer tests).

[111] *See, e.g.*, *Chapman*, 800 A.2d at 448–51. *See also* State v. Ford, 940 A.2d 687 (Vt. 2007) (examining the scope of the plain-touch doctrine); *Simoneau*, 833 A.2d 1280 (Vt. 2003) (affirming that officer had reasonable and articulable suspicion to stop defendant). *See generally* Terry v. Ohio, 392 U.S. 1 (1968) (examining the circumstances under which an officer can briefly detain a suspect). The court in *Chapman* reversed a lower court's decision denying defendant's motion to suppress "all statements and evidence in his civil suspension proceeding" stemming from an arrest for driving while intoxicated. *Chapman*, 800 A.2d at 448. The arrest resulted from an interesting set of facts: an officer, responding to a call regarding a vehicle off the road, noticed a set of footprints in the snow heading north away from a Ford Explorer, which was located about four feet off the roadway. *Id.* The officer drove along the roadway north until he came to a local store, "where he asked the store owner if anyone had come to the store to report their vehicle off the road." *Id.* After being informed that there had been a person at the pay phone on the side of the store, the officer discovered a fresh set of footprints in the snow leading away from the phone. *Id.* Following the tracks behind the store, the officer came upon a person hidden in a "darkened area." *Id.* It was at this point that the officer drew his weapon and ordered the person to come out into the light and to hold his hands out where the officer could see them. *Id.* The officer then ordered the person to get down on his knees and proceeded to frisk him. *Id.* After holstering his gun, the officer asked the defendant if he had any weapons and conducted a field interview. *Id.* Based upon the interview, the officer's observations, and field dexterity tests, the defendant was "ultimately processed . . . for DUI." *Id.* Prior to his civil suspension hearing, the defendant moved to suppress all statements and evidence, "argu[ing] that he was subjected to a de facto

arrest [without] probable cause" in violation of the United States and Vermont Constitutions. *Id.*

After briefly examining its own precedents in the area, the majority moved onto a further examination of the issue using federal precedents. *See id.* at 448–50. The court noted that "[a]n investigative detention employs 'the least intrusive means reasonably available to verify or dispel the officer's suspicion,'" *id.* at 449 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983), and that "'[i]f the totality of circumstances indicates that an encounter has become too intrusive to be classified as an investigative detention, the encounter is a full-scale arrest, and the government must establish that the arrest is supported by probable cause.'" *Id.* (quoting United States v. Hastamorir, 881 F.2d 1551, 1556 (11th Cir. 1989)). Assessing the situation in this case, the court cited the officer's use of his weapon to secure the defendant despite the lack of any evidence that defendant had committed a serious criminal activity or was armed or that defendant presented "a significant risk of danger to the officer." *Id.* at 450. The court concluded that these factors did not support the officer's intrusive actions, and thus, it held that any evidence obtained during the de facto arrest to be inadmissible. *Id.* at 452. Justice Dooley concurred in the judgment, holding that "the detention . . . cannot be justified by either reasonable and articulable suspicion or the community caretaking function." *Id.* at 452 (Dooley, J., concurring).

Justice Morse, who was joined by Chief Justice Amestoy, dissented on the grounds that the majority had "create[d] . . . a dangerous dilemma for our law enforcement personnel" by indulging in unwarranted "'second guessing.'" *Id.* at 453. Justice Morse believed that the fact that it was night time, the "circuitous set of foot prints" led behind an isolated building, and that the officer had come upon an individual hiding behind a dark corner, "amply support[ed] the trial court's finding that the investigating officer acted reasonably." *Id.* "[T]he reasonableness of an investigative detention must be judged from the perspective of the officer on the scene in light of the totality of the circumstances[,]" *id.* at 454, and not "from the serenity of a judge's chambers." *Id.* at 453 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). Justice Morse concluded,

> [I]t appears to me self-evident that the officer exercised precisely [the] amount of force reasonably necessary to ensure his safety . . . . [and a]ccordingly, I find no basis in the record to support a conclusion that the officer utilized such excessive force that it transformed the nature of the seizure from an investigatory stop into an arrest requiring probable cause.

Id. at 454, 455.

Like former Chief Justice Amestoy, Justice Morse no longer sits on the bench of the high court, but it is important to reflect on his voting record. Justice Morse's voting record, when compared to Legg's 1997 evaluation, shows a distinct turnaround in judicial philosophy. Legg noted that "Justice Morse ha[d] compiled a [pro-defendant] voting record." Legg, *supra* note 5, at 1809 n.46. However, it appears that Morse has changed his ways over the past ten years. In the cumulative cases, Justice Morse has voted pro-prosecution 86% of the time (86%, 78%, 100%, and 100%, respectively), which is greater than the entire court's record of 72%. *See infra* tbls.2, 4, 6, 8 & 10. This is significant change if one considers that Justice Morse voted pro-prosecution only 71% of the time, versus the entire court's 77% in the 1997 study. *See* Legg, *supra* note 5, at 1843 tbl.9. An even greater change is demonstrated when examining Morse's voting record in divided cases. In divided cases, Justice Morse voted pro-prosecution 72% of the time (67%, 67%, n/a, and 100%, respectively), which is significantly greater than the entire court's record of 47%. *See infra* tbls.3, 5, 7, 9 & 11. In 1997, in divided cases, Morse voted pro-prosecution 46% of the time, as compared to entire court's 61%. *See* Legg, *supra* note 5, at 1844 tbl.10. In 1997, Legg considered Justice Morse and Skoglund to be the "liberal block" of the Vermont court. *Id.* at 1824 n.112. Although it appears that Johnson continues to form a part of the liberal block, *see supra* note 98, it would appear that Justice Morse altered his judicial philosophy post-1997 toward a more pro-prosecutorial stance.

As Legg noted in 1997, the court continues to reject "several federal precedents and standards in favor of more stringent requirements under the state constitution."[112] Legg noted that the Vermont court declined to adopt the United States Supreme Court's "open fields" doctrine,[113] the warrantless recording of a defendant's conversation,[114] the "good faith" exception to the warrant

[112] Legg, *supra* note 5, at 1818.

[113] *Id.* at 1818–20 (discussing the court's rejection of the United States Supreme Court's holding in *Oliver v. United States*, 466 U.S. 170 (1984), in *State v. Kirchoff*, 587 A.2d 988 (Vt. 1991)).

[114] *Id.* at 1819 (discussing the court's rejection of the United States Supreme Court's holding in *Katz v.United States*, 389 U.S. 347 (1967), in *State v. Blow*, 602 A.2d 552 (Vt. 1991)). The Vermont court further expanded this protection in *State v. Geraw*, 795 A.2d 1219 (Vt. 2002). In *Geraw*, the court refused to accept the proposition that its holding in *Blow* did not extend to situations where the in-home, taped conversation was between the defendant and police officers. *Id.* at 1220, 1222–23. In *Geraw*, two police detectives interviewed the defendant at his home regarding an allegation of sexual abuse of a minor. *Id.* at 1220. The detectives identified themselves, defendant invited them into his home, and answered the officers' questions regarding the alleged sexual relationship. *Id.* The detectives, however, did not inform the defendant that they were secretly taping the conversation. *Id.*

In reaching its decision, the court stated that although it "disagreed at times about the degree of emphasis to be placed on the location of the search and seizure . . . [it has] consistently agreed . . . that the home represents a unique historical category with 'special expectations of privacy' warranting the strongest constitutional protection from warrant searches and seizures." *Id.* at 1222 (citations omitted). The court noted that its prohibition on warrantless recording of suspects' conversations is contrary to the precedent of the United States Supreme Court, *see* United States v. White, 401 U.S. 745, 751 (1971), and its sister courts. *Geraw*, 795 A.2d at 1222 n.2. The court went onto to note that the underlying reasoning of *Blow* remains and "heightened expectation of privacy render[s] it objectively reasonable to expect that conversations in the privacy of one's home would not be surreptitiously invaded by warrantless transmission or recording." *Id.* at 1223. Striking at the heart of its rationale, the court concluded that "[a]ny Vermonter who sits around the kitchen table conversing—as defendant did here—has a reasonable right to expect that he or she is not being secretly monitored or recorded." *Id.* at 1224; *cf.* State v. Muhammad, 927 A.2d 769 (Vt. 2007) (allowing an informant to testify at trial regarding his conversation with defendant even though informant had worn a wire during the in-home conversation).

Justice Skoglund, who was joined by Chief Justice Amestoy, dissented on the grounds that there could be no "reasonable expectation that a conversation[] . . . between a suspect and police detectives investigating a crime will be private, regardless of where that conversation takes place." *Geraw*, 795 A.2d at 1226–27 (Skoglund, J., dissenting). Justice Skoglund stated, after examining the United States Supreme Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), that the Vermont court had abandoned its own historical precedent of analyzing the "reasonable expectation of privacy." *See Geraw*, 795 A.2d at 1228–29 (Skoglund, J., dissenting). Instead, according to Justice Skoglund, the majority relied too heavily on the fact that the conversation took place in defendant's home and "neglect[ed] to analyze whether the conversation was a private one, one in which an individual would retain a subjective expectation of privacy, and whether society is prepared to recognize that expectation as 'reasonable.'" *Id.* At 1229. Since the "defendant invited the officers into his home and agreed to talk" to them about his alleged misconduct, *id.*, and "[b]ecause Article 11 [of the Vermont Consitution] protects people, not places," *id.* at 1232, Justice Skoglund concluded that "Vermonters would not find reasonable a suspect's expectations that his

requirement,[115] and a citizen's "legitimate expectation of privacy in their garbage such that law enforcement could not search secured trash bags without a warrant."[116]

Since 1997, the Vermont court has expanded both its departure from the federal system and the protection of its citizens. In *State v. Sprague*,[117] Justice Skoglund, writing for the majority, clarified the court's position regarding a police officer's ability to remove a driver from his vehicle during a lawful detention for a traffic violation. Prior to *Sprague*, the court had "implicitly" rejected the United States Supreme Court's holding in *Pennsylvania v. Mimms*,[118] that "when an automobile is lawfully stopped for a traffic violation, a police officer may, as a matter of course, order the driver to exit the vehicle."[119] The court noted that although it had "implicitly" rejected this rule in *State v. Jewett*,[120] and *State v. Caron*,[121] it was taking this opportunity to make its rule explicit.[122]

In *Sprague*, a police officer pulled defendant over after clocking defendant's vehicle traveling seventy-nine miles per hour.[123] Although there was no indication of drunk driving or any other traffic violation or offense, the officer asked defendant if "'[he would] mind having a seat in [the officer's] car while [he] check[ed the

responses to police questions about possible involvement in a crime [to be] private," *id.* at 1233, and thus, the lower court erred in suppressing the tape recording. *Id.* at 1232.

Justice Skoglund's voting record is quite interesting. Her voting record demonstrates that she, like the Vermont court as a whole, is decidedly pro-prosecution, voting pro-prosecution 73% of the time (78%, 62%, 71%, and 88%, respectively) as compared to the entire court's record of 72% pro-prosecution. *See infra* tbls.2, 4, 6, 8 & 10. However, in divided cases, Skoglund's voting record demonstrates a shift in the opposite direction, voting pro-prosecution only 47% of the time (75%, 29%, 50%, and 50%, respectively), which is identical to the entire court which also voted pro-prosecution in 47% of the cases. *See infra* tbls.3, 5, 7, 9 & 11. Skoglund's dissent in *Geraw* takes on added significance because, despite her voting pattern in divided cases, she took a more pro-prosecution approach; in fact, *Geraw* was her only pro-prosecution dissent of the cases examined for this Study.

[115] Legg, *supra* note 5, at 1821–22 (discussing the court's rejection of the United States Supreme Court's holding in *United States v. Leon*, 468 U.S. 897 (1984), in *State v. Oakes*, 598 A.2d 119 (Vt. 1991)).

[116] Legg, *supra* note 5, at 1822–24 (discussing the court's rejection of the United States Supreme Court's holding in *California v. Greenwood*, 486 U.S. 35, 40–41 (1988), in *State v. Morris*, 680 A.2d 90 (Vt. 1996)).

[117] 824 A.2d 539 (Vt. 2003).

[118] 434 U.S. 106, 111 (1977).

[119] *Sprague*, 824 A.2d at 54 (citing *Mimms*, 434 U.S. at 111).

[120] 532 A.2d 958, 961 (Vt. 1987).

[121] 586 A.2d 1127, 1132 (Vt. 1990).

[122] *See Sprague*, 824 A.2d at 545.

[123] *Id.* at 541.

defendant's] license.'"[124] Upon exiting his vehicle, the defendant was asked whether he had any weapons and was asked to empty his pockets.[125] The defendant complied with the officer's request and removed a small baggy containing marijuana from his pocket and, upon further questioning by the officer, consented to a search of both his vehicle and home.[126] The search revealed several marijuana plants and defendant was subsequently charged with possession.[127] Defendant moved to suppress the evidence on the grounds that "the 'request' [to] exit [his vehicle] constituted a further seizure requiring reasonable suspicion of criminal activity under Chapter I, Article 11 of the Vermont Constitution."[128]

Relying on the court's implicit rejection of *Mimms*, Justice Skoglund made explicit that the court and the Vermont Consitution,

> [R]equir[ed] [a rule with] a minimal level of objective justification for a police officer to order a driver from his or her vehicle [to] strike[] the proper balance . . . between the need to ensure the officer's safety and the constitutional imperative of requiring individualized, accountable decisionmaking for every governmental intrusion upon personal liberties.[129]

Justice Skoglund went to onto clarify that "[t]he facts sufficient to justify an exit order need be no more than an objective circumstance . . . [demonstrating that] a reasonable officer . . . believe[d] it was necessary to protect the officer's . . . safety."[130] Finding that in this case, the record was "virtually bereft of any reasonable, objective basis for the officer's exit request,"[131] the court reversed the lower's court decision and

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[124] *Id.* at 542.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 543. Article 11 of Chapter I of the Vermont Constitution states:

> [T]he people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

VT. CONST. ch. 1, art. 11.

[129] *Sprague*, 824 A.2d at 545.

[130] *Id.* at 546.

[131] *Id.*

granted defendant's motion to suppress.[132]

Chief Justice Amestoy concurred in judgment, but took the opportunity to clarify that although "some minimal showing of necessity for removing the driver" is required, "the threshold showing for such an exit order is relatively low."[133] In addition, it should be from the perspective of a trained law enforcement officer in the field, "'not in terms of library analysis by scholars,'"[134] that courts should judge the justification for an exit order.[135]

In another concurring opinion, Justice Dooley indicated that "there is an alternative way to reach the same result" and that the court should be wary of "discourag[ing] policy formulation in the legislative branch."[136] Justice Dooley contended that the court could have reached the same result using the common law[137] and thereby, "leav[ing] more flexibility to the Legislature" to craft a more "workable balance between officer safety, and the need to investigate suspected criminal activity, and the privacy interests of the operator and passengers."[138]

In *State v. Bauder*,[139] the court considered whether to adopt the federal standard allowing for the warrantless search of vehicle under the search-incident-to-arrest doctrine.[140] The search-incident-to-arrest doctrine permits officers to "search [the] passenger compartment and the contents of any containers found therein as a 'contemporaneous incident [to an] arrest.'"[141] In *Bauder*, Justice Johnson, writing for the majority, began her discussion by noting that the "traditional Vermont values of privacy

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[132] *Id.* at 550. Justice Skoglund concluded her decision by noting,

> This is fundamentally a case about preserving personal freedom. The erosion of liberty is a slow, subtle process, and we are long gone down the road before a memory of what we used to have causes us to look back and notice our loss. Vermonters should be assured that when they are stopped for speeding the consequence is a ticket and a fine, not a license for law enforcement to exploit a temporary advantage.

Id.

[133] *Id.* at 551 (Amestoy, C.J., concurring).

[134] *Id.* (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

[135] *See id.*

[136] *Id.* at 552 (Dooley, J., concurring).

[137] *See id.*

[138] *Id.* at 552, 554. This opinion follows the philosophy espoused by Justice Dooley in *State v. Anderson*, 890 A.2d 68, 73 (Vt. 2005) (Dooley, J., dissenting), that the court should defer to the Legislature to enact or refine Vermont law.

[139] 924 A.2d 38 (Vt. 2007).

[140] The United States Supreme Court set forth the doctrine in *New York v. Belton*, 453 U.S. 454 (1981).

[141] *Bauder*, 924 A.2d at 45 (quoting *Belton*, 453 U.S. at 460–61).

and individual freedom . . . may require greater protection than that afforded by the federal Constitution."[142] Johnson rejected the adaptation of a "bright-line" rule regarding an officer's freedom to conduct a search-incident-to-arrest,[143] because it removes any checks on arbitrary enforcement of the law.[144]

Justice Johnson, citing various authorities,[145] concluded that, absent any exigent circumstances "that render[] a warrant application impracticable," "the principles and values underlying Article 11 . . . simply forbids a warrantless search,"[146] and adopted a more "traditional rule" that requires "officers [to] demonstrate a need to secure their own safety or preserve evidence."[147] "The State . . . offers . . . no persuasive evidence or argument . . . to demonstrate how defendant . . . presented any form of threat. . . . , [which] is essential to justify a warrantless . . . search."[148] Apparently not content to leave the court's holding where it was, Justice Johnson took the next six-pages of her opinion to confront Justice Dooley's dissent[149] and his assertion that there are "more

[142] *Id.* at 42. (citing State v. Sprague, 824 A.2d 539 (Vt. 2003) (discussed *supra* notes 123–38); State v. Kirchoff, 587 A.2d 988 (Vt. 1991); State v. Savva, 616 A.2d 774 (Vt. 1991)).

[143] *See id.* at 43 (citing *Sprague*, 824 A.2d 539 (rejecting the adoption of a bright-line rule for removal of suspects from vehicles), and, *Kirchoff*, 587 A.2d at 988 (rejecting the adoption of the federal bright-line rule for searching the curtilage of a suspect's home)).

[144] *See id.*

[145] *See id.* at 45–46 (citing Justice Brennan's dissent in *Belton*, 453 U.S. at 465–66, 468, 469–71 (Brennan, J., dissenting); Camacho v. State 75 P.3d 370 (Nev. 2003); State v. Eckel, 888 A.2d 1266 (N.J. 2006); State v. Pittman, 127 P.3d 1116 (N.M. Ct. App. 2005); Commonwealth v. White, 669 A.2d 896 (Pa. 1995); *and* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1(c) (4th ed. 2004)).

[146] *Bauder*, 924 A.2d at 46.

[147] *Id.* at 47.

[148] *Id.* In *Bauder*, the defendant had been arrested for driving under the influence and placed in the police cruiser. *Id.* at 41. After placing defendant in the cruiser, the officer searched defendant's car and found evidence of marijuana, ecstasy, and stolen property. *Id.* at 41, 42.

[149] *See id.* at 47–52. The language of the entire case represents one of the few distinct examples of warring judicial philosophies on the Vermont court. In fact, the Vermont justices as a whole rarely file dissents, with only twenty-nine total dissenting opinions filed from 2002 to 2007 (13, 9, 6, 6, 3, and 3, respectively). *See* ANNUAL STATISTICS, VERMONT JUDICIARY, *available at* http://www.vermontjudiciary.org/Statistics/default.aspx (last visited Sept. 1, 2008). The tit-for-tat between Justice Johnson and Dooley is by far the most heated of all divided cases in this Study.

Justice Dooley's voting pattern is, as it was in 1997, "difficult to pin down." Legg, *supra* note 5, at 1814–15 n.74. In cumulative cases, his record remains decidedly pro-prosecution, voting pro-prosecution 75% (79%, 65%, 79%, and 81%, respectively)—compared to 72% of the time in 1997. *See* tbls.2, 4, 6, 8 & 10; Legg, *supra* note 5, at 1843 tbl.9. In addition, this is true for his record in divided cases, in which his voting record is 47% pro-prosecution (50%, 43%, 100%, and 0%, respectively), compared to 38% in 1997. *See* tbls.3, 5, 7, 9 & 11; Legg,

suitable 'independent grounds' [for a] decision."[150]

Justice Dooley dissented from the majority, opining that "[the court's] analysis trivializes the very important safety and evidence-gathering interests that are at stake . . . , while exaggerating the privacy interests."[151] He stated that "the majority's broad constitutional holding is wholly unnecessary because the search of defendant's vehicle in this case is fully justified under principles this Court has already adopted."[152] Dooley contended that the search of the defendant's vehicle was supported by (1) the plain-view exception,[153] (2) the fact that circumstances indicated that the vehicle might have been stolen,[154] (3) the inevitable-discovery

supra note 5, at 1844 tbl.10. The majority of his written opinions tend to turn on whether he feels that the court should allow the legislature to act—if he feels that the legislature has spoken on an issue, then he tends to vote pro-prosecution. If he feels that the court is deciding an issue best left to the legislature, then he tends to vote pro-defendant. *See infra* note 204 and accompanying text (discussing Justice Dooley's judicial philosophy).

[150] *Bauder*, 924 A.2d at 48.

[151] *Id.* at 53 (Dooley, J., dissenting). In addition to Justice Dooley's dissent, Chief Justice Reiber filed a separate dissenting opinion in which he agrees with the majority's holding regarding the plain-view exception and search-incident-to-arrest, but believes that "the search was justified by the circumstances indicating that the vehicle might have been stolen." *Id.* at 72 (Reiber, C.J., dissenting).

[152] *Id.* at 53 (Dooley, J., dissenting).

[153] *See id.* at 54–57. Justice Dooley contended that the three requirements for the plain-view exception, *see id.* at 54 (citing State v. Trudeau, 683 A.2d 725, 727 (Vt. 1996)), were adequately supported by the evidence. As support for this position Justice Dooley cites (1) the officer's testimony at trial that "a parking meter was laying uncovered on the floor of [defendant's] vehicle," *id.* at 54, (2) "the officer had made a lawful stop and was lawfully positioned outside the vehicle," *see id.* at 54–55, and (3) the exigent circumstances of "the release of the passenger, the uncertainty over ownership . . . , and the possibility of the police leaving the car by the roadside." *Id.* at 57.

The majority refutes Dooley's reasoning and observes that the officer did not become aware of the parking meter until after he searched the inside of the car, *id.* at 49, and to "allow[] the seizure of objects which the officer did *not* observe—as advocated by the dissent—would eviscerate [the plain-view doctrine's] fundamental evidentiary and legal grounding." *Id.* at 49–50. In addition, the majority notes that addressing the plain-view exception "serves [no] jurisprudential purpose" because neither party briefed the issue nor argued it at trial or on appeal. *Id.* at 50.

[154] *See id.* at 57–59 (Dooley, J., dissenting). Justice Dooley believed that regardless of whether defendant had been placed in custody, exigent circumstances still authorized the officer to conduct a search of the vehicle to locate ownership documents. *See id.* at 57–58. Furthermore, Dooley contends, "[t]he majority's emphasis on the officer's subjective motivations . . . turn[s] police officers into constitutional law scholars who have to predict the developing law and how this Court will rule." *Id.* at 59.

The majority dismisses this argument by noting that "[i]t relies, essentially, on the so-called 'automobile exception' to the warrant requirement, which . . . requires a showing of both probable cause . . . and exigent circumstances." *Id.* at 50 (majority opinion). The majority found that neither requirement, despite Justice Dooley's argument to the contrary, was satisfied under the facts here. *See id.* at 50–51.

doctrine,[155] and (4) pre-*Belton* search-and-seizure law.[156]

Justice Dooley's principal basis for his dissent, however, is his opposing belief that "the values underlying Article 11 do not prohibit police from conducting warrantless searches of [vehicles] . . . following the arrest of the operator for an offense involving the use of the vehicle."[157] In addition, contrary to the majority's position, Dooley believes that the court should adopt a "bright-line rule involving automobile searches incident to an arrest"[158] because of reduced expectation of privacy in automobiles,[159] the exigent circumstances surrounding such stops,[160] and the need to ensure the safety of law enforcement officers and

[155] *See id.* at 56 n.11 (Dooley, J., dissenting). Justice Dooley contends that it is the majority's interpretation of the facts that lends itself to the application of the inevitable-discovery doctrine. *Id.*; *see also* Nix v. Williams, 467 U.S. 431, 440 (1984) (discussing the recognition of an inevitable discovery exception to the exclusionary rule). According to Dooley, under "the majority's version of the facts . . . , [if] the arresting officer had determined from the outset . . . that the [defendant's] vehicle was to be seized and impounded, then the evidence could have been admitted pursuant to the inevitable-discovery rule." *Bauder*, 924 A.2d at 56 n.11 (Dooley, J., dissenting).

The majority dismisses this argument summarily by noting that the officer "had determined only to 'ground' the vehicle, i.e., to leave it in . . . the private lot where it was parked" prior to conducting the search, and the decision to impound the vehicle was based upon the evidence discovered during that search. *Id.* at 51 (majority opinion).

[156] *See id.* at 59–60 (Dooley, J., dissenting). Justice Dooley contends that the pre-*Belton* precedent of *Chimel v. California*, 395 U.S. 752 (1969), upon which the majority relies, allows for the officer's search in *Bauder*. *See Bauder*, 924 A.2d at 59–60 (Dooley, J., dissenting); *see also* State v. Meunier, 409 A.2d 583, 584 (Vt. 1979) *and* State v. Mayer, 283 A.2d 863, 865 (Vt. 1971) (analyzing *Chimel* rule under Vermont State Constitution). In *Chimel*, the United States Supreme Court created the "grab-area rule," whereby police could "search areas within the reach of suspects contemporaneously with arrests to protect themselves and to prevent the destruction of evidence." *Bauder*, 924 A.2d at 60 (Dooley, J., dissenting) (citing *Chimel*, 395 U.S. at 766). In addition, Dooley dismisses the majority's contention that *Chimel* "require[s] a showing of 'exigent circumstances' to justify a search incident to an arrest," and thus, he concludes that "even if *Belton* had never been decided, and this Court were required to analyze the case under *Chimel*, I would affirm the trial court's denial of defendant's motion to suppress." *Id.* at 60.

[157] *Id.*

[158] *Id.* at 63. Dooley rejects the majority's assertion that the court's precedents prohibit bright-line rules. *See id.* at 62–63. Insisting, rather, that "in circumstances where there was a need for certainty," the court has adopted a bright-line rule if it is found to be reasonable. *Id.* at 62 (citing State v. Martin, 496 A.2d 442 (Vt. 1985)). "[T]he proper question is not whether *Belton* should be rejected because it embodies a bright-line rule, but rather, whether a bright-line rule is justified in the circumstances and whether *Belton* embodies a reasonable bright line." *Id.* at 63.

[159] *See id.* at 63–65 (discussing the court's prior applications of search-and-seizure law to vehicle searches).

[160] *See id.* at 63, 65–66 (examining the exigent circumstances surrounding the officer's stop in *Bauder*). "I can think of no greater example of the need to apply constitutional search-and-seizure rules 'on the spur (and in the heat) of the moment' than during a roadside stop of an automobile of a likely intoxicated driver in the middle of the night." *Id.* at 63.

the preservation of evidence.[161] Justice Dooley acknowledged that a full adaptation of the *Belton* doctrine would be inappropriate,[162] but believed that "a bright-line rule allowing searches of a vehicle's passenger compartment . . . does not unduly infringe upon reasonable expectations of privacy of those operating motor vehicles on [Vermont] highways."[163] He concluded:

> When an operator or occupant of a vehicle is arrested for DUI, a crime that is committed with the vehicle, it is eminently reasonable to allow police to conduct a warrantless search of the open passenger compartment of the vehicle for evidence related to the crime, such as alcohol or other drugs.[164]

An interesting two-step recently performed by the Vermont court, and perhaps a departure from its normal pro-defendant philosophy in search-and-seizure cases, can be seen in *State v. Pratt*[165] and *State v. Davis*.[166] In *Pratt*, the court affirmed a lower court's denial of defendant's motion to suppress evidence obtained as a result of DUI stop and arrest.[167] The officer in *Pratt* had stopped defendant after observing him "drift back and forth within his lane several times"[168] and that "'based on [the officer's] training and experience' he recognized this type of drifting as a sign of impairment."[169] In *Davis*, under similar facts and decided five days after *Pratt*, the court summarily affirmed a lower court's order granting a defendant's motion to suppress DUI evidence.[170] Like *Pratt*, the officer in *Davis* stopped defendant after observing her drift back and

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[161] *See id.* at 66–68. "[I]t is unacceptable to put the officer in the position of making a constitutional calculation of whether the restrained defendant can reach a gun . . . ." *Id.* at 67. The majority strongly refutes Dooley's assertion that its holding "removes safety protections for law enforcement officers" and retorts that "[it] yield[s] to no one on this Court in [its] commitment to the safety of Vermont law-enforcement officers in the field." *Id.* at 52 (majority opinion).

[162] *See id.* at 63, 70 (Dooley, J., dissenting).

[163] *Id.* at 70–71. Justice Dooley cites various sister courts that have fully adopted *Belton* or a narrow version of the doctrine. *Id.* at 69–70 (citing State v. Waller, 612 A.2d 1189, 1193–94 (Conn. 1992); People v. Blasich, 541 N.E.2d 40, 42 (N.Y. 1989); State v. Murrell, 764 N.E.2d 986, 991–92 (Ohio 2002)).

[164] *Id.* at 71 (footnotes omitted).

[165] 932 A.2d 1039 (Vt. 2007).

[166] 933 A.2d 224 (Vt. 2007).

[167] *See Pratt*, 932 A.2d at 1040.

[168] *Id.* at 1041.

[169] *Id.* at 1040.

[170] *Davis*, 933 A.2d at 225.

forth in her lane.[171] The difference in the court's decision appeared to turn on the fact that the officer in *Davis*, contrary to the officer in *Pratt*, failed to articulate how his "observations led him to a reasonable and articulable suspicion that a crime was being committed."[172] One can debate the validity of the court's distinction between the cases, but it appears that the court, through *Davis*, wished to limit its decision in *Pratt* to a clearly defined set of circumstances.[173]

V. POST-INVESTIGATION, BAIL, AND TRIAL

Once the prosecution has survived the many protections that the Vermont Supreme Court has put in place for the defendant during the initial investigation phase of a crime,[174] the court begins to turn the cards in the prosecution's favor. Along with this transition, the court's adherence to the "due process model" approach of criminal adjudication begins to slide back across the spectrum towards the crime control orientation approach.[175]

Regarding a defendant's waiver of his right to legal counsel, the Vermont court continues to remain in lockstep with the federal precedents.[176] The Vermont Constitution, like its federal counterpart, guarantees a criminal defendant a right to legal counsel.[177] The Vermont Supreme Court recognizes, as does its federal counterpart, that a defendant can waive this right.[178] The waiver, however, is valid only if the state can show that the waiver was "voluntary, knowing, and intelligent."[179] As the court described in *State v. Van Aelsytn*, this requires a consideration of "the totality

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[171] *Id.* at 225–26. In addition to the drifting, defendant failed to respond to the initial attempts of the officer to pull her over. *Id.*

[172] *Id.* at 227.

[173] Justice Johnson, in her dissent to *Pratt*, while acknowledging the validity of the majority's rationale, *Pratt*, 932 A.2d at 1043 (Johnson, J., dissenting), believes that the adoption of such a bright-line rule—"drifting within one's lane of traffic"—will soon "subject [the driving public] to unforeseen invasions of privacy on a virtually daily basis." *Id.* at 1045.

[174] *See supra* Parts III & IV.

[175] *See supra* note 6. Of course, this transition is all relative. The court, taken as a whole, tends to follow a crime control orientation approach. *See infra* tbl.10.

[176] *See, e.g.*, State v. Van Aelstyn, 917 A.2d 471 (Vt. 2007); State v. Brown, 890 A.2d 79 (Vt. 2005).

[177] U.S. CONST. amend. VI; VT. CONST. ch. I, art. 10.

[178] *See Van Aelstyn*, 917 A.2d at 474; *Brown*, 890 A.2d at 86. *See also* Faretta v. California, 422 U.S. 806, 835 (1975); Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).

[179] *Van Aelstyn*, 917 A.2d at 474 (citations omitted).

of circumstances"[180]—known as a *Merrill* inquiry—that requires courts to examine "'the defendant's experience, motives, and understanding of what he is undertaking . . . and then to provide a clear explanation of the adverse consequences of pro se representation.'"[181]

An examination of the recent decisions by the Vermont high court reveals that it continues to follow its pro-prosecution, crime control approach when evaluating a defendant's assertion of involuntary waiver of counsel at trial.[182] The one case in which the court held otherwise, *State v. Tribble*,[183] presented a situation in which the trial court had failed to make any substantive inquiries into the defendant's background or discuss the defendant's decision with him. Also, the defendant suffered from mental health issues that affected his ability to interact with his lawyers.[184] These are factors that undoubtedly weighed heavily in the Supreme Court's decision, but which the average practitioner would not face on a daily basis.

In *State v. Martin*,[185] the court considered whether a trial court violated a defendant's right not to testify during its jury instruction.[186] The defendant in *Martin* had "requested that the court remove any mention of [his] failure to testify" during its jury instructions.[187] However, the instruction was mistakenly left in the final instructions.[188] Defendant argued that the trial court's failure to adhere to his request violated his self-incrimination protection under Article 10.[189] Justice Burgess, writing for the court, found that history had determined that the drafters of Article 10

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[180] *Id.*

[181] *Id.* at 476 (quoting State v. Merrill, 584 A.2d 1129, 1132 (Vt. 1990)). *See also* State v. Tribble, 892 A.2d 232, 240 (Vt. 2005) (holding that an indigent defendant did not make a knowing and voluntary waiver of his right to counsel).

[182] *See, e.g.*, *Van Aelstyn*, 917 A.2d at 475–77; *Brown*, 890 A.2d 86–87.

[183] 892 A.2d at 232.

[184] *Id.* at 240–42.

[185] No. 2004-405, 2007 WL 4633337 (Vt. Sept. 7, 2007).

[186] *See id.* ¶ 43. The court instructed the jury regarding defendant's right not to testify after he had requested that it not be given. *Id.*

[187] *Id.* at ¶ 44.

[188] *See id.* As a result, the defendant requested that the court make an additional instruction that "stress[ed] that declining to testify cannot [be] weigh[ed] against the defendant." *Id.*

[189] *See id.* at ¶ 43. For the language of Article 10, see *supra* note 40. The defendant acknowledged that the instruction did not violate his federal constitutional rights under the Fifth Amendment. *Martin*, 2007 WL 4633337, ¶ 43. *See also* Lakeside v. Oregon, 435 U.S. 333 (1978) (holding that the giving of an instruction over the defendant's objection does not violate the Fifth Amendment).

considered "criminal defendants . . . [to be] incompetent and not permitted to testify at trial when Article 10 was written, so the drafters of Article 10 were unlikely to have contemplated its application to defendants declining to testify."[190] In holding that the Vermont Constitution provided no greater protection that the Fifth Amendment, he noted that "[w]here there is no violation of Article 10 in telling a jury that it may consider a defendant's silence, there cannot be a violation of the same clause when the trial court here explicitly warned the jury that it was *not* to consider the defendant's silence against him."[191]

One of the more noteworthy, albeit non-constitutional, decisions levied by the Vermont high court came in *State v. Sexton*,[192] in which the court addressed the defense of insanity. In *Sexton*, the defendant, charged with the murder of a Japanese exchange student, sought to dismiss the charge by the defense of insanity.[193] The defendant contended that in the six months prior to the murder "he had taken a variety of illegal drugs . . . [and] that on the night of the incident he felt that he needed to kill people and 'gather their souls.'"[194] After notifying the State that he intended to assert a defense of insanity, the defendant was examined and evaluated by a State psychiatrist who concluded that although the defendant was insane at the time of the incident, the insanity had been "caused

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[190] *Id.* ¶ 45 (citing *State v. Baker*, 53 A.2d 53, 56–57 (Vt. 1947)). "What the framers intended to guard against in Article 10 . . . was inquisitional torture and Star Chamber-type proceedings to force defendants to take oath against themselves . . . ." *Id.*

[191] *Id.* Justice Burgess, the newest member of the high court, based on the comparatively small amount of data available, appears to be a rather solid member of the pro-prosecution block. His voting record, 71% pro-prosecution (50%, 60%, 83%, and 100%, respectively), compares favorably to that other pro-prosecution block members, Chief Justice Reiber and Justice Dooley. *See* tbls.2, 4, 6, 8 & 10. *See also supra* note 149 (discussing Justice Dooley's voting record); *infra* note 199 (discussing Chief Justice Reiber's voting record). It is difficult to determine Justice Burgess's voting philosophy in divided cases since the data pool is so small, but the fact that his only written opinions are pro-prosecution indicates that his voting philosophy is, and will continue to be, thus. *See* tbls.11 & 12.

[192] 904 A.2d 1092 (Vt. 2006).

[193] *Id.* at 1094–95. The defendant had confessed to the crime in a rather bizarre manner: while the police were investigating the crime scene, defendant laid down in front of a police cruiser and upon questioning stated, "'Just cuf me, I know I did something bad, I just don't know what.'" *Id.* at 1095.

Vermont's definition for legal insanity is defined as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

VT. STAT. ANN. tit. 13, § 4801(a)(1) (2008).

[194] *Sexton*, 904 A.2d at 1095.

solely by defendant's voluntary use of illegal drugs."[195]

Chief Justice Reiber, writing for the majority, overturned the lower court decision allowing the defendant to assert the insanity defense.[196] Reiber noted that intoxication by drugs or alcohol was not considered a mental disease or defect under the settled insanity doctrine. In addition, although Vermont had not defined "mental disease or defect" to specifically exclude intoxication by drugs or alcohol, the "underlying rationale for the settled insanity doctrine . . . of 'the futility of punishment,'" warranted against the inclusion of intoxication by drugs or alcohol as a mental disease or defect.[197] The Chief Justice felt that the situation presented by *Sexton* did not present itself as the "suitable factual setting for resolution of the issue."[198] The defendant acknowledged that his drug use had only lasted two months and had ended two or three weeks prior to the incident, which Reiber felt highlighted the fact that the defendant had not and could not establish that he was suffering from mental disease or defect brought on by long-term, habitual, or chronic drug use at the time of the incident.[199]

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[195] *Id.* In a pre-trial evaluation to determine whether the defendant was competent to stand trial, another court-appointed psychiatrist had also concluded that the defendant was insane at the time of the incident and possibly suffered from a previously undiagnosed mental disease. *Id.* Defendant's treating psychiatrist disagreed with the prior evaluation and concluded that defendant suffered from a personality disorder rather than a major mental disease. *Id.*

[196] *See id.* at 1096, 1111. The high court affirmed the lower court's decision that allowed the defendant to assert the defense of diminished capacity as a means of "mitigating the degree of homicide from murder to voluntary manslaughter." *Id.* at 1097–98.

[197] *See id.* at 1099–02. Reiber does note, however, that scholars and courts alike have accepted the use of the insanity defense by individuals who have established that their continuing, habitual, and long-term use of drugs and alcohol has caused them to develop permanent or chronic mental disorders. *Id.* at 1100–01.

[198] *Id.* at 1103.

[199] *See id.* at 1103–05. Reiber also dismissed an alternative insanity theory used by the lower court that the defendant's drug use, albeit brief, had triggered a latent mental disease or defect. *Id.* at 1105. He felt that this alternative rationale would allow the defendant to use his voluntary decision to use illegal drugs as an excuse for his criminal actions. *See id.* at 1106.

This opinion is representative of most of Chief Justice Reiber's opinions. His voting record indicates that he, like the majority of the court, is decidedly pro-prosecution; voting pro-prosecution 69% of time (64%, 54%, 67%, and 89%, respectively). *See* tbls.2, 4, 6, 8 & 10. Unlike some of his fellow justices, Chief Justice Reiber's voting record appears to remain constant in divided cases, again voting pro-prosecution 67% of time (100%, 67%, 50%, and 0%, respectively). *See* tbls.3, 5, 7, 9 & 11. A closer review of his actual writings demonstrates that he is very pragmatic in how he approaches each legal issue. His opinion here and his one paragraph dissent in *State v. Bauder*, 924 A.2d 38 (Vt. 2007) (discussed *supra* notes 139–64), reveal that Vermont's newest Chief Justice, at least when it comes to criminal cases, attempts to take a very non-confrontational and respectful approach to opinion writing.

Justice Dooley, writing in dissent, felt that the majority had improperly characterized the certified question and, by doing so, it had affectively restricted the availability of the insanity defense to individuals in drug cases.[200] Dooley believed that the majority placed too much emphasize on the term "intoxication," which he acknowledged could not be an absolute excuse to criminal liability.[201] The defendant, Dooley contended, was not attempting to assert a defense of intoxication, but rather a defense of insanity by mental disease triggered by the intoxication of the illegal drugs.[202] The majority's review of the facts with intoxication as the basis resulted, Dooley felt, in a narrowing of the insanity defense and deviation from Vermont's own statutory definition of insanity.[203] Dooley concluded that the majority's decision placed too much emphasis on policy grounds, ignoring the factual circumstances of the case and eschewing statutory directives.[204]

One pro-defendant decision of note is *State v. Hance, Jr.*,[205] where Justice Skoglund, writing for the court, held that a cash-only bail condition violated Chapter II, § 40 of the Vermont Constitution.[206] In *Hance, Jr.*, the defendant, who was charged with a DUI and possession of cocaine, argued that a cash-only bail provision created by the Vermont State Legislature in 2002 violated state

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[200] *See id.* at 1111–17 (Dooley, J, affirming in part and dissenting in part).

[201] *Id.* at 1112.

[202] *See id.*

[203] *See id.* at 1114–16, 1123–28.

[204] *See id.* at 1132. This case provides another example of Justice Dooley's philosophy of judicial restraint. *See supra* notes 136–38, 149; *see also* State v. Anderson, 890 A.2d 68, 73–79 (Vt. 2005) (Dooley, J., dissenting) (dissenting from majority opinion because it "trie[d] to deconstruct the [Vermont] statute to make the pieces fit").

[205] 910 A.2d 874 (Vt. 2006).

[206] *Id.* at 877.

> Excessive bail shall not be exacted for bailable offenses. All persons shall be bailable by sufficient sureties, except as follows:
>
> (1) A person accused of an offense punishable by death or life imprisonment may be held without bail when the evidence of guilt is great.
>
> (2) A person accused of a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence. A person held without bail prior to trial under this paragraph shall be entitled to review de novo by a single justice of the Supreme Court forthwith.
>
> (3) A person awaiting sentence, or sentenced pending appeal, may be held without bail for any offense.
>
> . . . .

VT. CONST. ch. 2, §. 40.

constitutional requirements regarding bail.[207] Skoglund conducted a historical analysis of the state's bail clause and found that it was "primarily aimed at protecting a defendant's liberty interest and, concomitantly, serving the court's interest in having the defendant appear at trial."[208] Skoglund reasoned that to allow the state "[t]o construe the 'sufficient sureties' clause as permitting cash-only bail would increase the government power to engage in pretrial confinement."[209] In addition, it "would impermissibly restrict an accused's ability to negotiate with a surety to avoid pretrial confinement."[210] Accordingly, Justice Skoglund held that the statutorily created cash-only bail bond was unconstitutional.[211]

Legg characterized this phase of the criminal adjudication process, "Post-Investigation Cases,"[212] which included, for example, the court's examination of a defendant's right to a speedy trial;[213] a defendant's right to a jury trial;[214] and the standard of review for a defendant's lost evidence claim.[215] In examination of the entire

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[207] *Hance, Jr.*, 910 A.2d at 877, 878.

[208] *Id.* at 878–79, 880.

[209] *Id.* at 880. *See also supra* note 206 (text of the Vermont bail clause).

[210] *Id.* at 882.

[211] *Id.*

[212] Legg, *supra* note 5, at 1825.

[213] *See id.* at 1825–26 (discussing the court's reliance on federal precedent when examining a possible violation of speedy trial protections in State v. Keith, 628 A.2d 1247 (Vt. 1993)). Legg notes that the court in *Keith* was displeased that the defendant failed to argue for greater protection under the Vermont Constitution. *Id.* at 1826.

> 'It may be necessary to look to our own constitution for a satisfactory solution that has not been forthcoming under the federal test. Reliance on the Vermont Constitution may be necessary because, unlike most states and the federal government, Vermont has no statutory right to a speedy trial to back up the infrequently employed federal constitutional right. . . . Not only defendants, but the public as well, should have some reasonable guaranty that criminal cases will be heard in a timely manner.'

Id. (quoting *Keith*, 628 A.2d at 1255) (citations omitted).

It appears, however, that defendants have failed to heed the court call because in *State v. Beer*, 864 A.2d 643 (Vt. 2004), the defendant did not make a speedy trial claim under the state constitution and the court was again limited to the examination of the federal constitution and federal precedents. *See id.* at 652–53.

[214] *See* Legg, *supra* note 5, at 1829–30 (discussing the court's reversal of defendant's conviction because of an invalid waiver of his right to a jury trial in *State v. Coita*, 568 A.2d 424, 424 (Vt. 1989)).

[215] *See id.* at 1830–31 (discussing the court's examination of federal precedent in State v. Delisle, 648 A.2d 632 (Vt. 1994)). In *State v. Gibney*, 825 A.2d 32, 42 (Vt. 2003), the Vermont Supreme Court reaffirmed its decision in *Delisle* that Article 10 of the Vermont Constitution offers broader protections against the destruction of possible exculpatory evidence by the State than the Federal Constitution. The test under Article 10 "balances the culpability of the government's actions and the prejudice to a defendant." *Id.*

> [The Article 10 test] first requires that the defendant show a 'reasonable possibility' that the lost evidence would have been favorable. If the defendant makes the requisite

area, Legg concluded that the court appears more "willingly to grant its brethren and members of the defense bar greater latitude than the investigatory and prosecutory hounds of the state."[216]

As noted earlier, this Study expanded the scope of cases in post-investigation phase of criminal adjudication beyond those seen in Legg's study, however, his conclusions continue to ring true. The court continues to follow the "crime control model" of criminal adjudication and the individual justices, despite their prior pro-defendant trends seen in cases involving *Miranda* or Search and Seizure, tend to shift the judicial philosophies towards pro-prosecution.

VI. POST-TRIAL AND SENTENCING

A review of this division of criminal jurisprudence cases reveals that the court continues, as a whole, to employ the "crime control" approach. Although the court no longer has a universal voting pattern of pro-prosecution,[217] this Study shows that it continues "to avoid [the] extension of individual rights into the post-investigation and arrest arenas."[218] Over the past six years the court has delved into a variety of different issues in this division; however, the main recurring issue was sentencing.[219]

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showing, the court must perform 'a pragmatic balancing' of three factors:

> (1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial.

Id. at 42–43 (citation omitted).

The *Gibney* court concluded that the lost evidence, investigators' notes, was "not important to defendant's case and that their loss did not substantially prejudice defendant . . . [because] the notes contained no additional exculpatory information." *Id.* at 44.

[216] Legg, *supra* note 5, at 1833. "One might argue that this is simply human nature; no person wishes to impose any more stringent requirements upon himself than absolutely necessary." *Id.*

[217] *Id.* at 1842–43. *Compare* Tables 7 & 8, *with* Tables 8 & 9.

[218] Legg, *supra* note 5, at 1833.

[219] In fact, out of the sixteen cases considered in this area, nine addressed the issue of sentencing and sentence enhancement. *See* State v. King, No. 06-334, 2007 WL 4633436 (Vt. Nov. 16, 2007); State v. Pecora, 928 A.2d 479 (Vt. 2007); State v. White, No. 2006-285, 2006-435, 2006-436, 2007 WL 4633415 (Vt. Nov. 9, 2007); State v. Gibney, 869 A.2d 118 (Vt. 2005); State v. Provost, 896 A.2d 55 (Vt. 2005); State v. Gibney, 825 A.2d 32 (Vt. 2003); State v. Stevens, 825 A.2d 8 (Vt. 2003); State v. Boskind, 807 A.2d 358 (Vt. 2002); State v. Keiser, 807 A.2d 378 (Vt. 2002).

In addition, the court addressed the issue of probation and probation hearings. In *State v. Benjamin*, 929 A.2d 1276 (Vt. 2007), the court reiterated that it will apply the federal *Barker v. Wingo* balancing test when evaluating the reasonableness of a delay in final revocation of defendant's probation hearing. *Id.* at 1281. *See also* State v. Sylvester, No. 2006-487, 2007 WL 4633429 (Vt. Dec. 12, 2007) (discussing the due process protections and evidentiary

In *State v. Provost*,[220] the court addressed the application of the United States Supreme Courts decision in *Apprendi v. New Jersey*.[221] In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[222] In *Provost*, Justice Johnson, writing for the court, vacated the defendant's sentence of four consecutive terms of life without parole for four counts of first degree murder, holding that Vermont's homicide sentencing scheme was unconstitutional.[223] The state argued that the defendant's sentence of life without parole was not "a different punishment from the presumptive sentence of thirty-five years to life."[224] The court, persuaded by the reasoning of its sister courts,[225] disagreed with the state's position and found "that life without parole and life with a minimum term of imprisonment are different sentences for *Apprendi* purposes."[226] The court ultimately held "that 13 V.S.A. § 2303(a) violates the rule in *Apprendi* and *Blakely* because it requires the sentencing court to weigh specific aggravating and mitigating factors not found by a jury beyond a reasonable doubt before imposing a sentence of life without parole."[227]

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burdens for probation hearings).

[220] 896 A.2d 55 (Vt. 2005).

[221] 530 U.S. 466 (2000).

[222] *Id.* at 490. The Supreme Court went onto clarify this holding in *Blakely v. Washington*, 542 U.S. 296 (2004), by stating that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303 (emphasis omitted).

[223] *See Provost*, 896 A.2d at 58, 64. *Cf. Stevens*, 825 A.2d at 12 (discussing the application of *Apprendi*). *See generally* VT. STAT. ANN. tit. 13, § 2303 (2008) ("Penalties for first and second degree murder."). The statute lists eight aggravating and seven mitigating factors for increasing or decreasing the minimum term of a life sentence. *See id.*

[224] *Provost*, 896 A.2d at 65.

[225] *See id.*

[226] *Id.*

[227] *Id.* In addition, the court dismissed the state's contention that the error was harmless because the trial court could have made its determination based solely on permissible factors—prior convictions and multiple victims. *Id.* The court, however, disagreed with this position in that the Vermont statute required a balancing test between the mitigating and aggravating factors, both of which must be found by the jury. *See id.* at 65–66. Without the mitigating factors, the trial court could not permissibly balance the two permissible aggravating factors. *Id.* at 66. *See also* State v. Gibney, 869 A.2d 118, 119 (Vt. 2005) (holding that a defendant waives an *Apprendi* challenge because he never argued that the jury must determine the aggravating and mitigating factors).

In 2005, the Vermont State Legislature amended the homicide-sentencing statute to comply with Sixth Amendment protections and the courts ruling in *Provost*. *See* VT. STAT.

In another sentencing case, *State v. Boskind*,[228] the court dealt with the issue of whether and where a defendant may challenge a prior conviction used by the trial court to enhance a sentence.[229] In *Boskind*, Chief Justice Amestoy, writing for the majority, held that a defendant's challenge is "not limited solely to claims of invalidity [of a prior conviction] based upon a violation of the right to counsel,"[230] but "such challenges should occur in post-conviction relief procedures, not at sentencing hearings."[231] Justice Dooley, joined by Justice Johnson, dissented in the decision, holding that the majority's decision would likely "provide relief only after the defendant has served the enhanced sentence. Thus, the remedy [would] come[] too late to be meaningful."[232] Dooley reasoned that a defendant who successfully challenges a prior conviction will have that conviction overturned, but this might not occur until after the defendant has served his subsequent, enhanced sentence based upon that prior conviction.[233]

In 2004, in *In re* Carter,[234] the court held that a defendant's pre-sentence interview with a probation officer is "a critical stage of the sentencing process and, therefore, a Sixth Amendment right to counsel attaches to the interview."[235] In *State v. Rideout*,[236] the

ANN. tit. 13, § 2303 (2008). *See also In re* Fitzgerald, No. 2005-347, 2007 WL 4633323 (Vt. Nov. 13, 2007) *and* State v. White, No. 2006-285, 2006-435, 2006-436, 2007 WL 4633415 (Vt. Nov. 9, 2007) (discussing the retroactivity of the *Provost* decision in light of the amendments to the homicide-sentencing statute).

[228] 807 A.2d 358 (Vt. 2002).

[229] *See id.* at 360. More precisely, the question the court addressed was "(a) whether a defendant may collaterally challenge a prior conviction which the State intends to rely upon to enhance a sentence when the challenge is based on a claim other than a violation of the right to counsel, and (b) if so, where that challenge should take place." *Id.* at 362.

[230] *Id.*

[231] *Id.* at 363. "We also are unpersuaded by defendants' argument that requiring a defendant to proceed in a forum other than the sentencing court 'would be cumbersome and lavishly wasteful of resources.'" *Id.* at 364. *See also* State v. Pecora, 928 A.2d 479, 480 (Vt. 2007) (holding that a defendant's right to a jury trial under the Vermont Constitution did not extend to the use of prior, out-of-state DUI convictions in a sentencing enhancement proceeding).

[232] *Boskind*, 807 A.2d at 366 (Dooley, J., dissenting).

[233] *See id.* at 366. In addition, he dismissed the majority's contention that allowing a defendant to challenge predicate convictions during the sentencing hearing would turn the hearing into a separate trial and result in "a substantial burden on the . . . court." *Id.* at 369.

[234] 848 A.2d 281 (Vt. 2004).

[235] *Id.* at 301. For a full rendition of what the *Carter* defendant said during his interview, which Justice Dooley referred to as "sentencing suicide," see *id.* at 290–91. "[The defendant's] criminal conduct warranted a long sentence of incarceration, but in a single paragraph he ensured that he would spend virtually all of his adult life in jail." *Id.* at 296. *See also id.* at 301–06 (Amestoy, C.J., dissenting) (holding that a pre-sentence interview is not a "critical

court held that a sentencing court's use of a defendant's juvenile convictions as predicate offenses for the purposes of recidivist and habitual sentencing did not violate the Eighth Amendment protection against cruel and unusual punishment.[237]

VII. CONCLUSION

As I noted at the outset, despite the changes that have occurred within and without the State of Vermont and the United States as a whole, the direction and judicial philosophy of the Vermont Supreme Court remains constant. What sets the court apart from its sister states and the federal brethren is its willingness to adhere to a judicial independence when evaluating particular areas of criminal adjudication.

The court continues to differentiate itself from its federal brethren by offering further and more stringent protection of individuals from the misuse and misapplication of the fruits of *Miranda* violations. The court did, however, concede some ground to crime control method by recognizing the "routine booking exception" to *Miranda*.[238] In addition, the court refined the scope and meaning of Vermont's guaranty of a "reasonably private conversation" in the context of a DUI investigation by giving the lower courts a clear balancing test to conduct in such cases.[239]

As seen in Legg's earlier study, today the court continues to follow the due process model when considering search and seizure cases; conducting stricter and more stringent evaluations of pre-investigation and pre-arrest situations. The court clarified that Vermont applies the *Aguilar-Spinelli* test when evaluating warrants based upon hearsay evidence.[240] Since Legg's study in 1997, the court has taken even further steps to diverge its

stage" and any reliance by the sentencing court on defendant's un-counseled statements was harmless error). *See generally* United States v. Wade, 388 U.S. 218, 224, 227 (1967) (holding that a defendant's Sixth Amendment right to counsel attaches during all "critical stages" of the adversarial proceedings against him).

[236] 933 A.2d 706 (Vt. 2007).

[237] *See id.* at 713–20. *See generally* Solem v. Helm, 463 U.S. 277, 279, 283–284 (1983) (striking down a recidivist's sentence of imprisonment on Eighth Amendment grounds).

[238] *See supra* notes 54–67 (discussing the Court's decision in *State v. Rheaume*, 853 A.2d 1259 (Vt. 2004)).

[239] *See supra* notes 79–98 (discussing the Court's decision in *State v. Sherwood*, 800 A.2d 463 (Vt. 2002)).

[240] *See supra* note 106 (discussing the Court's decision in *State v. Goldberg*, 872 A.2d 378 (Vt. 2005)).

jurisprudence from other courts. First, it rejected the federal exception to the warrant requirement that allowed for police to remove individuals from a vehicle during a routine traffic stop.[241] Second, the court rejected the federal "search-incident-to-arrest exception."[242] Lastly, although the court has not taken the explicit steps towards the rejection of the federal "community living exception," dicta in *State v. Quigley* demonstrates that if given the opportunity, it would rejected this as well.[243]

When the court begins to evaluate possible *Miranda* violations, confessions, interrogations, and searches and seizures, prosecutors and police will continue to face a difficult challenge if they want to establish an exception to Article 10 or 11 of the state constitution. The court, if properly prompted by defendant's counsel, continues to differentiate the state constitution from its federal counterpart, and continues to expand and enhance the rights of defendant's when it comes to pre-investigation and pre-arrest situations.

However, when evaluating post-arrest and trial situations, the court falls in line with its general, overall criminal adjudication approach of the crime control method. The court's faith in the investigatory and adjudicative work of the police and courts increases, and the defendant no longer gets the benefit of the doubt.

In the "Post-Investigation, Bail, and Trial" area, the court's decisions touched upon a defendant's right to waive counsel,[244] right not to testify at trial,[245] and the right to assert a defense of insanity,[246] with the court's decisions falling to the prosecution in each area. In the "Post-Trial and Sentencing" area, although the court has departed from its universal voting pattern of pro-prosecution seen in Legg's 1997 study, it is still decidedly pro-prosecution. The cases outlined in this Study do show, however, that the court does and will take a pro-defendant position on certain

[241] *See supra* notes 117–38 (discussing the Court's decision in *State v. Sprague*, 824 A.2d 539 (Vt. 2003))

[242] *See supra* notes 139–73 (discussing the Court's decision in *State v. Bauder*, 924 A.2d 38 (Vt. 2007)).

[243] *See supra* note 105 (discussing dicta found in *State v. Quigley*, 892 A.2d 211 (Vt. 2005)).

[244] *See supra* notes 180–84 (discussing the Court's decisions in *State v. Van Aelsytn*, 917 A.2d 471 (Vt. 2007) and *State v. Tribble*, 892 A.2d 232 (Vt. 2005)).

[245] *See supra* notes 185–91 (discussing the Court's decision in *State v. Martin*, No. 2004-405, 2007 WL 4633337 (Vt. Sept. 7, 2007)).

[246] *See supra* notes 192–204 (discussing the Court's decision in *State v. Sexton*, 904 A.2d 1092 (Vt. 2006)).

issues (*e.g.*, sentencing enhancement), but does so with an eye towards the federal, not state, constitutional protections.[247]

As this Study noted in the beginning, despite the court's willingness to diverge from federal precedents on certain issues, it had and still has an overall pro-prosecution tilt to it. Voting records reveal that there is a relatively strong pro-prosecution block in the form of Chief Justice Reiber and Justice Burgess. Justice Johnson appears to provide the court with its one constant pro-defendant voice; however, as the Study has repeatedly stated, this is all relative. Justice Dooley tends to lean towards the pro-prosecution side on a majority of cases, with some of his most ardent opinions coming in this area, but his voting record does reveal a rather dramatic shift to pro-defendant in divide cases. As noted above, Justice Skoglund appears to provide the swing vote in the divided cases, as the court's opinions track her own voting record.

This Study's goal was to enlighten the member's of the Vermont bar as to the state's high court's current criminal jurisprudence and philosophy. Although, one should never bet their lifesavings on the whims of a court, this Study, as it took readers along a fairly well-trodden road, leads to perhaps an all too apparent conclusion—A state prosecutor walking up the courtroom stairs at 109 State Street to argue a criminal appeal should feel fairly confident about his or her case, but as long as the Vermont Supreme Court exists, this pioneering prosecutor will find a tough road ahead of him or her if he tries to pry open an exception to Article 10 or 11 of the Vermont State Constitution.

[247] *See supra* notes 220–37 (discussing the Court's decisions in *State v. Provost*, 896 A.2d 55 (Vt. 2005), and *In re* Carter, 848 A.2d 281 (Vt. 2004)).

Table One
Cumulative Cases Deciding Criminal Justice Claims

2002
State v. Benoir, 819 A.2d 699 (Vt. 2002) (mem.).
State v. Benoit, 795 A.2d 1188 (Vt. 2002) (mem.).
State v. Boskind, 807 A.2d 358 (Vt. 2002).
State v. Chapman, 800 A.2d 446 (Vt. 2002).
State v. Geraw, 795 A.2d 1219 (Vt. 2002).
State v. Hill, 816 A.2d 440 (Vt. 2002) (mem.).
State v. Keiser, 807 A.2d 378 (Vt. 2002).
State v. Marallo, 817 A.2d 1271 (Vt. 2002) (mem.).
State v. Morale, 811 A.2d 185 (Vt. 2002).
State v. Nguyen, 795 A.2d 538 (Vt. 2002) (mem.).
State v. Roya, 807 A.2d 371 (Vt. 2002) (mem.).
State v. Schofner, 800 A.2d 1072 (Vt. 2002) (mem.).
State v. Sherwood, 800 A.2d 463 (Vt. 2002).
State v. Thompson, 816 A.2d 550 (Vt. 2002) (mem.).
State v. Turnbaugh, 811 A.2d 662 (Vt. 2002) (mem.).

2003
King v. Gorczyk, 825 A.2d 16 (Vt. 2003).
State v. Beauregard, 820 A.2d 183 (Vt. 2003) (mem.).
State v. Gibney, 825 A.2d 32 (Vt. 2003).
State v. Lambert, 830 A.2d 9 (Vt. 2003).
State v. Lawrence, 834 A.2d 10 (Vt. 2003) (mem.).
State v. LeClaire, 819 A.2d 719 (Vt. 2003).
State v. McQuillan, 825 A.2d 804 (Vt. 2003).
State v. Simoneau, 833 A.2d 1280 (Vt. 2003).
State v. Sprague, 824 A.2d 539 (Vt. 2003).
State v. Stevens, 825 A.2d 8 (Vt. 2003) (mem.).
State v. Velez, 819 A.2d 712 (Vt. 2003).

2004
In re Carter, 848 A.2d 281 (Vt. 2004).
State v. Beer, 864 A.2d 643 (Vt. 2004).
State v. Freeman, 857 A.2d 295 (Vt. 2004) (mem.).
State v. Gemler, 844 A.2d 757 (Vt. 2004).
State v. Jestice, 861 A.2d 1060 (Vt. 2004) (mem.).
State v. Powers, 852 A.2d 605 (Vt. 2004).
State v. Rheaume, 853 A.2d 1259 (Vt. 2004).

State v. Stevens, 848 A.2d 330 (Vt. 2004) (mem.).
State v. Vezina, 857 A.2d 313 (Vt. 2004) (mem.).
State v. Voorheis, 844 A.2d 794 (Vt. 2004).

2005

In re Sleigh, 872 A.2d 363 (Vt. 2005) (mem.).
State v. Anderson, 890 A.2d 68 (Vt. 2005).
State v. Brown, 890 A.2d 79 (Vt. 2005).
State v. Gibney. 869 A.2d 118 (Vt. 2005) (mem.).
State v. Goldberg, 872 A.2d 378 (Vt. 2005).
State v. May, 878 A.2d 250 (Vt. 2005) (mem.).
State v. Pontbriand, 878 A.2d 227 (Vt. 2005).
State v. Provost, 896 A.2d 55 (Vt. 2005).
State v. Quigley, 892 A.2d 211 (Vt. 2005) (mem.).
State v. Rheaume, 889 A.2d 711 (Vt. 2005).
State v. Tribble, 892 A.2d 232 (Vt. 2005).

2006

State v. Baird, 908 A.2d 475 (Vt. 2006).
State v. Coburn, 898 A.2d 128 (Vt. 2006).
State v. Deyo, 915 A.2d 249 (Vt. 2006).
State v. Green, 904 A.2d 87 (Vt. 2006) (mem.).
State v. Hance, Jr., 910 A.2d 874 (Vt. 2006).
State v. Nault, 908 A.2d 408 (Vt. 2006) (mem.).
State v. Yoh, 910 A.2d 853 (Vt. 2006).

2007

In re Fitzgerald, No. 2005-347, 2007 WL 4633323 (Vt. Nov. 13, 2007) (mem.).
State v. Bauder, 924 A.2d 38 (Vt. 2007).
State v. Benjamin, 929 A.2d 1276 (Vt. 2007).
State v. Bonvie, 936 A.2d 1291 (Vt. 2007).
State v. Chicoine, 928 A.2d 484 (Vt. 2007) (mem.).
State v. Davis, 933 A.2d 224 (Vt. 2007) (mem.).
State v. Ford II, 940 A.2d 687 (Vt. 2007).
State v. King, No. 2006-334, 2007 WL 4633436 (Vt. Nov. 16, 2007) (mem.).
State v. Martin, No. 2004-405, 2007 WL 4633337 (Vt. Sept. 7, 2007).
State v. Muhammad, 927 A.2d 769 (Vt. 2007) (mem.).
State v. Neumann, No. 2006-366, 2007 WL 4633412 (Vt. Nov. 21,

2007).

State v. Pecora, 928 A.2d 479 (Vt. 2007) (mem.).

State v. Peterson, 923 A.2d 585 (Vt. 2007).

State v. Pratt, 932 A.2d 1039 (Vt. 2007).

State v. Prior, 917 A.2d 466 (Vt. 2007) (mem.).

State v. Rideout, 933 A.2d 706 (Vt. 2007).

State v. St. Martin, 925 A.2d 999 (Vt. 2007) (mem.).

State v. Sylvester, No. 2006-487, 2007 WL 4633429 (Vt. Dec. 12, 2007) (mem.).

State v. Van Aelstyn, 917 A.2d 471 (Vt. 2007).

State v. White, No. 2006-285, 2006-435, 2006-436, 2007 WL 4633415 (Vt. Nov. 9, 2007).

State v. Wigg, 928 A.2d 494 (Vt. 2007) (mem.).

State v. Williams, 933 A.2d 239 (Vt. 2007) (mem.).

Table Two*
Cumulative Miranda, Confessions, and Exclusionary Rule Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	86%	14%
Amestoy	92%	8%
Burgess	50%	50%
Dooley	79%	21%
Gibson	100%	0%
Johnson	60%	40%
Morse	86%	14%
Reiber	64%	36%
Skoglund	78%	22%
COURT	**76%**	**24%**

* The cases considered for this Table represent all of the cases that were considered in this Study. This Table does not represent a classification of divided cases, which are contained in Table Three. The cases that were relied upon for this table are: State v. Bonvie, 936 A.2d 1291 (Vt. 2007); State v. Martin, No. 2004-405, 2007 WL 4633337 (Vt. Sept. 7, 2007); State v. Peterson, 923 A.2d 585 (Vt. 2007); State v. Coburn, 898 A.2d 128 (Vt. 2006); State v. Yoh, 910 A.2d 853 (Vt. 2006); State v. May, 878 A.2d 250 (Vt. 2005) (mem.); State v. Pontbriand, 878 A.2d 227 (Vt. 2005); State v. Provost, 896 A.2d 55 (Vt. 2005); State v. Beer, 864 A.2d 643 (Vt. 2004); State v. Gemler, 844 A.2d 757 (Vt. 2004); State v. Powers, 852 A.2d 605 (Vt.

2004); State v. Rheaume, 853 A.2d 1259 (Vt. 2004); State v. Voorheis, 844 A.2d 794 (Vt. 2004); State v. LeClaire, 819 A.2d 719 (Vt. 2003); State v. Velez, 819 A.2d 712 (Vt. 2003); State v. Benoir, 819 A.2d 699 (Vt. 2002) (mem.); State v. Benoit, 795 A.2d 1188 (Vt. 2002) (mem.); State v. Marallo, 817 A.2d 1271 (Vt. 2002) (mem.); State v. Morale, Jr., 811 A.2d 185 (Vt. 2002); State v. Roya, 807 A.2d 371 (Vt. 2002) (mem.); State v. Sherwood, 800 A.2d 463 (Vt. 2002).

Table Three*
Divided Miranda, Confessions, and Exclusionary Rule Cases

Justice	**Pro-Prosecution**	**Pro-Defendant**
Allen	100%	0%
Amestoy	100%	0%
Dooley	50%	50%
Johnson	0%	100%
Morse	67%	33%
Reiber	100%	0%
Skoglund	75%	25%
COURT	**75%**	**25%**

* This Table represents all of the cases in which a concurring or dissenting opinion was filed by a justice, thereby indicating that there was some difference of opinion in the court. The cases that were relied upon for this table are: State v. Pontbriand, 878 A.2d 227 (Vt. 2005); State v. Velez, 819 A.2d 712 (Vt. 2003); State v. Roya, 807 A.2d 371 (Vt. 2002) (mem.); State v. Sherwood, 800 A.2d 463 (Vt. 2002).

Table Four*
Cumulative Search & Seizure Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	63%	37%
Amestoy	86%	14%
Burgess	60%	40%
Dooley	65%	35%
Johnson	52%	48%
Morse	78%	22%
Reiber	54%	46%
Reiss	100%	0%
Skoglund	62%	38%
COURT	**62%**	**38%**

* The cases considered for this Table represent all of the cases that were considered in this Study. This Table does not represent a classification of divided cases, which are contained in Table Five. The cases that were relied upon for this table are: State v. Bauder, 924 A.2d 38 (Vt. 2007); State v. Chicoine, 928 A.2d 484 (Vt. 2007) (mem.); State v. Davis, 933 A.2d 224 (Vt. 2007) (mem.); State v. Ford, 940 A.2d 687 (Vt. 2007); State v. Muhammad, 927 A.2d 769 (Vt. 2007) (mem.); State v. Pratt, 932 A.2d 1039 (Vt. 2007); State v. St. Martin, 925 A.2d 999 (Vt. 2007) (mem.); State v. Williams, 933 A.2d 239 (Vt. 2007) (mem.); State v. Nault, 908 A.2d 408 (Vt. 2006) (mem.); State v. Goldberg, 872 A.2d 378 (Vt. 2005); State v. Quigley, 892 A.2d 211 (Vt. 2005) (mem.); State v. Rheaume, 889 A.2d 711 (Vt. 2005); State v. Freeman, 857 A.2d 295 (Vt. 2004) (mem.); State v. Jestice, 861 A.2d 1060 (Vt. 2004) (mem.); State v. Stevens, 848 A.2d 330 (Vt. 2004) (mem.); King v. Gorczyk, 825 A.2d 16 (Vt. 2003); State v. Beauregard, 820 A.2d 183 (Vt. 2003) (mem.); State v. Lawrence, 834 A.2d 10 (Vt. 2003) (mem.); State v. McQuillan, 825 A.2d 804 (Vt. 2003); State v. Simoneau, 833 A.2d 1280 (Vt. 2003); State v. Sprague, 824 A.2d 539 (Vt. 2003); State v. Benoit, 795 A.2d 1188 (Vt. 2002) (mem.); State v. Chapman, 800 A.2d 446 (Vt. 2002); State v. Geraw, 795 A.2d 1219 (Vt. 2002); State v. Schofner, 800 A.2d 1072 (Vt. 2002) (mem.); State v. Thompson, 816 A.2d 550 (Vt. 2002) (mem.).

Table Five*
Divided Search & Seizure Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	0%	100%
Amestoy	75%	25%
Burgess	100%	0%
Dooley	43%	57%
Johnson	0%	100%
Morse	67%	33%
Reiber	67%	33%
Skoglund	29%	71%
COURT	**29%**	**71%**

* This Table represents all of the cases in which a concurring or dissenting opinion was filed by a justice, thereby indicating that there was some difference of opinion in the court. The cases that were relied upon for this table are: State v. Bauder, 924 A.2d 38 (Vt. 2007); State v. Pratt, 932 A.2d 1039 (Vt. 2007); State v. Quigley, 892 A.2d 211 (Vt. 2005) (mem.); State v. Sprague, 824 A.2d 539 (Vt. 2003); State v. Geraw, 795 A.2d 1219 (Vt. 2002); State v. Schofner, 800 A.2d 1072 (Vt. 2002) (mem.).

Table Six*
Cumulative Post-Investigation Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	40%	60%
Amestoy	100%	0%
Burgess	83%	17%
Dooley	79%	21%
Gibson	100%	0%
Johnson	73%	27%
Morse	100%	0%
Reiber	67%	33%
Skoglund	71%	29%
COURT	**73%**	**27%**

* The cases considered for this Table represent all of the cases that were considered in this Study. This Table does not represent a classification of divided cases, which are contained in Table Seven. The cases that were relied upon for this table are: State v. Benjamin, 929 A.2d 1276 (Vt. 2007); State v. Neumann, No. 2006-

366, 2007 WL 4633412 (Vt. Nov. 21, 2007); State v. Prior, 917 A.2d 466 (Vt. 2007) (mem.); State v. Van Aelstyn, 917 A.2d 471 (Vt. 2007); State v. Deyo, 915 A.2d 249 (Vt. 2006); State v. Anderson, 890 A.2d 68 (Vt. 2005); State v. Brown, 890 A.2d 79 (Vt. 2005) (considered for both its pro-prosecution and pro-defendant holdings); State v. Tribble, 892 A.2d 232 (Vt. 2005); State v. Beer, 864 A.2d 643 (Vt. 2004); State v. Vezina, 857 A.2d 313 (Vt. 2004) (mem.); State v. Lambert, 830 A.2d 9 (Vt. 2003); State v. Nguyen, 795 A.2d 538 (Vt. 2002) (mem.); State v. Turnbaugh, 811 A.2d 662 (Vt. 2002) (mem.).

Table Seven*
Divided Post-Investigation Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	0	100%
Dooley	100%	0%
Johnson	50%	50%
Reiber	50%	50%
Skoglund	50%	50%
COURT	**50%**	**50%**

* This Table represents all of the cases in which a concurring or dissenting opinion was filed by a justice, thereby indicating that there was some difference of opinion in the court. The cases that were relied upon for this table are: State v. Deyo, 915 A.2d 249 (Vt. 2006); State v. Anderson, 890 A.2d 68 (Vt. 2005).

Table Eight*
Cumulative Post-Trial Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	100%	0%
Amestoy	100%	0%
Burgess	100%	0%
Dooley	81%	19%
Gibson	50%	50%
Johnson	81%	19%
Morse	100%	0%
Reiber	89%	11%
Skoglund	88%	12%
COURT	**88%**	**12%**

* The cases considered for this Table represent all of the cases that were considered in this Study. This Table does not represent a classification of divided cases, which are contained in Table Nine. The cases that were relied upon for this table are: *In re* Fitzgerald, No. 2005-347, 2007 WL 4633323 (Vt. Nov. 13, 2007) (mem.); State v. King, No. 2006-334, 2007 WL 4633436 (Vt. Nov. 16, 2007) (mem.); State v. Pecora, 928 A.2d 479 (Vt. 2007) (mem.); State v. Rideout, 933 A.2d 706 (Vt. 2007); State v. Sylvester, No. 2006-487, 2007 WL 4633429 (Vt. Dec. 12, 2007) (mem.); State v. White, No. 2006-285, 2006-435, 2006-436, 2007 WL 4633415 (Vt. Nov. 9, 2007); State v. Baird, 908 A.2d 475 (Vt. 2006); State v. Green, 904 A.2d 87 (Vt. 2006) (mem.); State v. Gibney, 869 A.2d 118 (Vt. 2005) (mem.); State v. Provost, 896 A.2d 55 (Vt. 2005); *In re* Carter, 848 A.2d 281 (Vt. 2004); State v. Gibney, 825 A.2d 32 (Vt. 2003); State v. Stevens, 825 A.2d 8 (Vt. 2003) (mem.); State v. Boskind, 807 A.2d 358 (Vt. 2002); State v. Hill, Jr., 816 A.2d 440 (Vt. 2002) (mem.); State v. Keiser, 807 A.2d 378 (Vt. 2002).

Table Nine*
Divided Post-Trial Cases

Justice	Pro-Prosecution	Pro-Defendant
Amestoy	100%	0%
Dooley	0%	100%
Johnson	0%	100%
Morse	100%	0%
Skoglund	50%	50%
COURT	**50%**	**50%**

* This Table represents all of the cases in which a concurring or dissenting opinion was filed by a justice, thereby indicating that there was some difference of opinion in the court. The cases that were relied upon for this table are: *In re* Carter, 848 A.2d 281 (Vt. 2004); State v. Boskind, 807 A.2d 358 (Vt. 2002).

Table Ten*
Cumulative Criminal Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	70%	30%
Amestoy	91%	9%
Burgess	71%	29%
Dooley	75%	25%
Gibson	83%	17%
Johnson	65%	35%
Morse	86%	14%
Reiber	69%	31%
Reiss	100%	0%
Skoglund	73%	27%
COURT	**72%**	**28%**

* This Table represents all cases considered in the compilation of Tables Two, Four, Six, and Eight. The cases represented in this table include all of the cases considered in this Study.

Table Eleven*
Divided Criminal Cases

Justice	Pro-Prosecution	Pro-Defendant
Allen	25%	75%
Amestoy	89%	11%
Burgess	100%	0%
Dooley	47%	53%
Johnson	7%	93%
Morse	72%	28%
Reiber	67%	33%
Skoglund	47%	53%
COURT	**47%**	**53%**

* This Table represents all of the cases in which a dissenting or concurring opinion was filed, thereby indicating that the court was divided in some manner. The cases considered represent all divided cases considered in the compilation of Tables Three, Five, Seven, and Nine. The Table represents closely divided cases in which the legal principles may not have been a certainty.

Table Twelve*
Cumulative Written Opinions

Justice	Pro-Prosecution	Pro-Defendant
Allen	1	1
Amestoy	7	1
Burgess	3	–
Dooley	10	9
Johnson	4	8
Morse	3	–
Reiber	5	1
Skoglund	6	6

* This Table represents written opinions—majority, concurrence, or dissent—written and filed by the justices. The cases represented in this table included all the cases included in this Study.