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Fixing O'Boyle v. State - Traffic Detentions under Wyoming's Emerging Search-and-Seizure Standard

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COMMENT

Fixing *O'Boyle v. State*—Traffic Detentions Under Wyoming's Emerging Search-and-Seizure Standard

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I. INTRODUCTION

This comment focuses on how an independent search-and-seizure standard, now being re-created by the Wyoming Supreme Court under the state's constitution, should treat traffic detentions.[1] Traffic detentions encompass the span of time after the traveler halts the vehicle, when the officer inspects the driver's credentials and writes the citation.[2] The brief stop forms a significant nexus between people's lives and law enforcement, providing opportunity for the officer to view the driver, look at the interior of the vehicle, examine the passengers and ask questions about the driver's business.[3] During these routine activities, the officer may come to believe that the driver or the vehicle is involved in a crime—frequently

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[1] Vasquez v. State, 990 P.2d 476, 485 (Wyo. 1999) (stating that Article 1, Section 4 of the Wyoming Constitution "deserves and requires the development of sound principles upon which to decide the search and seizure issues arising from state law enforcement").

[2] Lindsay v. State, 108 P.3d 852, 857 (Wyo. 2005).

[3] *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 9.3 (4th ed. 2004) ("[T]he renewed interest in traffic enforcement is attributable to a federally-sponsored initiative related to the 'war on drugs.'").

the transportation of contraband.[4] Police often use these observations to develop probable cause to investigate matters that lie outside of the limited scope of traffic violations, leading to detention of the driver or a search of the vehicle.[5]

Since the early 1960s, the Fourth Amendment has governed traffic detentions in Wyoming, and the Wyoming Supreme Court has held that protections provided under the Wyoming Constitution and the Fourth Amendment were the same.[6] But in 1999, the Wyoming Supreme Court recognized in *Vasquez v. State* its duty to create an independent search-and-seizure standard under the Wyoming Constitution, stating that sound principles should be developed under the state constitution for deciding search-and-seizure issues.[7] According to the court, The Wyoming Constitution "is a unique document, the supreme law of [the] state, and this is sufficient reason to decide that it should be at issue whenever an individual believes a constitutionally guaranteed right has been violated."[8] The new standard "may provide greater protection [of citizen's rights] . . . ; or may provide less, in which case the federal law would prevail . . . ."[9]

The Wyoming Supreme Court's decision to create an independent standard arose out of its dissatisfaction with how the Fourth Amendment was being applied to traffic stops.[10] The court noted that a significant amount of traffic traverses Wyoming on its way to other areas of the country, and accompanying that traffic is a considerable amount of drugs.[11] As a result, federal drug interdiction efforts

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[4] *See id.*

[5] O'Boyle v. State, 117 P.3d 401, 419 (Wyo. 2005) (expressing dissatisfaction over the aggressive tactics of law enforcement seeking to search vehicles).

[6] *Vasquez*, 990 p.2d at 483-84 ("This practice was essentially required in order to comply with the [United States] Supreme Court's expansive protection provided to individual rights during the 1960s and 1970s . . . .").

[7] *Id.* at 485. The court stated,

> Just as we have done with other state constitutional provisions which have no federal counterpart, we think that Article 1, Section 4 deserves and requires the development of sound principles upon which to decide the search and seizure issues arising from state law enforcement action despite its federal counterpart and the activity it generates for the United States Supreme Court.

Id.

[8] *Id.*

[9] *Id. See* Saldana v. State, 846 P.2d 604, 612 (Wyo. 1993) (noting that the United States Supreme Court permits states to provide more protections than those offered federally, at the state's legislative or judicial discretion). In *Vasquez*, the court declared that Article 1, Section 4 is separate from the Fourth Amendment and "requires an independent interpretation regardless of its similarities to or differences from the Federal Constitution." *Vasquez*, 990 P.2d at 486.

[10] *See* O'Boyle v. State, 117 P.3d 401, 411 (Wyo. 2005).

[11] *Id.*

have targeted the state's highways.[12] Consequently, state citizens traveling upon Wyoming highways have been imposed upon by aggressive investigatory techniques, disapproved of by the Wyoming Supreme Court, but allowed under the Fourth Amendment.[13] An independent standard relieves the Wyoming Supreme Court from the burden of following the federal standard, giving the court some control over how it treats the state's citizens.[14] But employing an independent standard requires turning away from the well-established body of case law related to traffic stops under the Fourth Amendment.[15] This federal case law provides officers at traffic stops specific guidance regarding what actions are reasonable and what actions are not, and it strives to balance the rights of citizens against legitimate governmental interests, including investigation and prevention of crime.[16]

In *O'Boyle v. State*—the one opportunity the Wyoming Supreme Court has had to address traffic detention under the Wyoming Constitution—the court failed to achieve the clarity and balance existent under the Fourth Amendment.[17]

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[12] *Id.*

[13] *Id.*

[14] *See id. at* 422. (Voigt, J., concurring). While agreeing with the majority decision to create an independent search-and-seizure standard, Justice Voigt criticized how federal courts have regulated traffic detentions under the federal standard. *Id.* He called the practice of routinely turning traffic stops into drug investigations "intellectually dishonest." *Id.* Also, he stated that courts have applied the standard inconsistently, and rather than trying to stretch the federal traffic-detention rule to include drug control efforts, he stated that a rule should be devised which identifies "what investigative steps directed at drug interdiction" during a traffic detention "are constitutionally reasonable." *Id.*

[15] See 4 LAFAVE, *supra* note 3, § 9.3, for an analysis of the Fourth Amendment traffic-detention doctrine.

[16] *See id.*

[17] O'Boyle v. State, 117 P.3d 401 (Wyo. 2005). The Wyoming Supreme Court has decided other cases under Article 1, Section 4 that included traffic stops, but they focused on issues other than traffic detention. *See* Vasquez v. State, 990 P.2d 476 (Wyo., 1999) *and* Johnson v. State, 137 P.3d 903 (Wyo. 2006). *Vasquez* concerned a search subsequent to an arrest. 990 P.2d at 478. The facts provided no information about the stop and provided no basis for a traffic-detention analysis. *See id.* at 479. *Johnson* was an inventory search. 137 P.3d at 909. The case provided an analysis of the stop, but the analysis mixed state and federal authorities and made no effort to distinguish state law. *Id.* at 906 (citing cases decided under the state constitution, *O'Boyle* and *Vasquez*, in the same analysis as Campbell v. State, 97 P.3d 781 (Wyo. 2004), which relied upon federal law). In *Johnson*, the Wyoming Supreme Court made no attempt to create a standard independent from federal law because the court held that the federal and state standards for inventory searches are identical. *Johnson*, 137 P.3d at 908-09. The recently decided case *Fertig v. State* held that a traffic stop initiated by an officer who witnesses a traffic violation is reasonable under Article 1, Section 4, even when the stop was made as a pretext for other investigation. Fertig v. State, 2006 WY 148, ¶ 28. Although the reason for and execution of the stop is likely to impact how the court perceives the traffic detention, how the stop was conducted

The traffic-detention holding in *O'Boyle* gave no guidance to officers, and it failed to explain what factors the court found relevant when evaluating an officer's reasonableness, leaving no basis for predicting the court's future actions.[18] As a consequence, the state's current traffic-detention rule fails to meet basic governmental needs, making Wyoming's rule a mere pale cousin to its federal counterpart.[19]

A traffic detention rule that fails to address basic governmental needs is inconsistent with the history of Article 1, Section 4, which may be distinct from the Fourth Amendment, but arises from the same sources in England and early America.[20] In the first part of the last century, a significant amount of contraband liquor traversed the state's highways during the Prohibition Era.[21] Under the Wyoming Constitution, the court regulated law enforcement's efforts to control this traffic, while extending guidance to officers and proper explanation of factors relevant to the court's reasoning.[22] Therefore, a traffic-detention rule that provides specific guidance to officers and legitimizes the need to investigate criminal activity is not only desirable, but consistent with the Wyoming Constitution and its history.[23]

A Wyoming traffic-detention rule scrupulously based on Wyoming law would also address a separate, but related issue—the federal requirement that state constitutional rulings be based upon "adequate state ground."[24] The United States Supreme Court held that it has the power to review decisions by state courts that intermix state and federal constitutional doctrines, or that fail to provide an adequate state rationale for a constitutional decision.[25] A close look at *O'Boyle* reveals that the Wyoming Supreme Court explained the unreasonableness of some of the officer's actions by drawing upon federal concepts that have no officially

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is a separate issue from the traffic detention, as *Fertig*, itself, acknowledged. *Id.* ¶ 23 ("Significantly, however, in *O'Boyle*, the focus of our constitutional analysis involved an evaluation of police conduct after the stop. We did not question an officer's authority to initiate a traffic stop after an observed traffic violation. . . .").

[18] *See infra* notes 178-93 and accompanying text.

[19] *See* 4 LAFAVE, *supra* note 3, § 9.1(a) (observing that the practice of stopping and frisking suspicious persons is a "time-honored police procedure," and police have long recognized it as a distinct procedure from other police procedures such as arrest, or search incident to arrest).

[20] *See* State v. Peterson, 194 P. 342, 344-45 (Wyo. 1920) (noting that provisions against unreasonable search and seizure are "one of the fundamental props of English and American liberty").

[21] *See* State v. Young, 281 P. 17 (Wyo. 1929).

[22] *See id* at 19-20 (adopting holdings from other states that provide examples of reasonable officer conduct at traffic stops). *See also infra* notes 103-37 and accompanying text.

[23] *See infra* notes 103-37 and accompanying text.

[24] Michigan v. Long, 463 U.S. 1032, 1037-44 (1983).

[25] *Id.* at 1040-41.

recognized basis in Wyoming law.[26] This not only illustrates the insufficiency of the state's current traffic-detention doctrine—which appears incapable of providing an adequate rationale for the court's decision—it intermixes state and federal ideas in a manner which is inconsistent with the dictates of *Michigan v. Long*.[27] A sufficient traffic-detention doctrine based upon Wyoming law would meet the standard advanced by the United States Supreme Court in *Long* and ensure that decisions made under the Wyoming Constitution are consistent with Wyoming's legal history.[28]

In summary, the Wyoming Supreme Court articulated in *O'Boyle* under the Wyoming Constitution a traffic-detention rule that fails to recognize legitimate governmental interests, and the rule is so insufficiently grounded in state law that it cannot be understood without drawing upon Fourth Amendment concepts. However, the history of search-and-seizure in Wyoming provides ample basis for a doctrine that is adequately grounded in state law and sufficient to address governmental interests. This comment, first, describes how Wyoming's current search-and-seizure doctrine evolved historically. Next, it examines federal and state law to determine the framework that the Wyoming Supreme Court must operate within if it is to have a doctrine that is truly independent from the United States Constitution. Third, this comment provides a rationale for creating an independent search-and-seizure doctrine, using six factors identified by the Wyoming Supreme Court as relevant in a state constitutional argument. Finally, this analysis recommends a traffic-detention standard based upon the case law and constitutional history of Wyoming.

II. BACKGROUND

A. How We Got Here

In 1889, the delegates to the Wyoming Constitutional Convention gathered in Cheyenne and drafted the Wyoming Constitution in twenty-five days.[29] Fittingly, one of the reasons for this flurry of activity was dissatisfaction over how the Wyoming territory was being managed by federal authorities, and a perception by key persons of the desirability for the territory to become independent from the

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[26] *See infra* notes 167-91 and accompanying text.

[27] *See Long*, 463 U.S. at 1042.

[28] Saldana v. State, 846 P.2d 604, 623 (Wyo. 1993) (Golden, J. concurring) ("Only by the customary process of research and reasoning can there be principled development of a body of state constitutional law that does not seek merely to sidestep review by the United States Supreme Court in isolated cases but one that truly supports the state constitution, as state court judges and lawyers are charged to do.").

[29] ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION, A REFERENCE GUIDE 1 (G. Alan Tarr ed., Greenwood Press, Reference Guides to the State Constitutions of the United States No. 7) (1993).

federal government under a state constitution.[30] For the purposes of this discussion of search and seizure at traffic stops, the convention succeeded—creating a constitution that stood apart from the Fourth Amendment and operated on its own.[31] The Wyoming Constitution had to operate independently because in that era the federal constitution had no power over state and local authorities.[32] Therefore, once the state constitution was approved by Congress, a sheriff was subject to Article 1, Section 4 of the Wyoming Constitution, but not the Fourth Amendment of the United States Constitution.[33] If the sheriff unreasonably searched a traveler, he answered not to the United States Supreme Court in Washington, D.C., but to the Wyoming Supreme Court in Cheyenne.[34] Therefore, the Wyoming Supreme Court was part of a two-tiered system for protecting citizens' rights: The actions of federal authorities were regulated by the United States Constitution, and the Wyoming Supreme Court was the sole protector of citizens' rights from violations by state authorities.[35] Consequently, for the next seventy years Wyoming courts considered the reasoning of federal courts regarding the Fourth Amendment persuasive, but not controlling, and the highest law for state officials was the Wyoming Constitution.[36]

This changed in 1961 when the United States Supreme Court decided *Mapp v. Ohio*.[37] *Mapp* incorporated the Fourth Amendment into the Fourteenth Amendment, requiring states to offer search-and-seizure protections that were at least equivalent to those that regulated federal authorities.[38] After the passage of *Mapp*, the Wyoming Supreme Court's search-and-seizure standard was no longer independent, and decisions could be reviewed by the United States Supreme Court.[39] Like most state courts, the Wyoming Supreme Court's reaction to *Mapp* was to interpret search-and-seizure issues using the Fourth Amendment, meaning the Wyoming Constitution no longer acted as the primary protector of citizens' rights.[40] But the Wyoming Supreme Court continued to refer to the state constitu-

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[30] *Id.* at 1.

[31] State v. Peterson 194 P. 342, 350 (Wyo. 1920). ("As to the Fourth Amendment to the Constitution of the United States, it has been held to operate solely on the federal government, its courts and officers, and not as a limitation upon the powers of the states.").

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] Mapp v. Ohio, 367 U.S. 643 (1961).

[38] Vasquez v. State, 990 P.2d 476, 483-84 (Wyo. 1999) (citing Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)). For an explanation of the rationales underlying *Mapp* and the effect that *Mapp* had on the application of state search-and-seizure law in Wyoming and other states, see *infra* notes 85-93.

[39] *Vasquez*, 990 P.2d at 483-84. *See also infra* notes 92-93 and accompanying text.

[40] *Vasquez*, 990 P.2d at 483-84. *See also infra* notes 92-93 and accompanying text.

tion in its search-and-seizure analyses, causing an intermixing of state and federal search-and-seizure authorities.[41] Through the 1960s, state courts across the nation found the pre-eminence of the United States Constitution satisfactory because the progressive Warren Court was aggressively protecting citizens' rights.[42]

After the Warren Court, however, United States Supreme Court began to lessen protections extended to defendants, and state courts across the nation resumed their role in the two-tiered system of state and federal protections that existed prior to *Mapp*.[43] State courts could offer equal or greater protections than the United States Constitution, but if they offered less, then the Federal Constitution applied.[44] In 1999, the Wyoming Supreme Court announced that it, too, would resume its role as the provider of an independent standard of search-and-seizure protections.[45]

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[41] *See* Jessee v. State, 640 P.2d 56, 62 (Wyo. 1982). *Jessee* relied upon a federal doctrine expounded in Ker v. State of California, 374 U.S. 23 (1963), while stating that the doctrine was consistent with holdings in the Wyoming case State v. George, 231 P. 683 (Wyo. 1924). *Jessee*, 640 P.2d at 62.

[42] *Vasquez*, 990 P.2d at 485 ("But now, in the aftermath of the Warren Court's criminal procedure rulings, the Wyoming Supreme Court appears to follow federal precedent and typically treats this provision as offering no greater protection than does the Fourth Amendment."). *See also* Justice Walter J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 490-95 nn.2-36 and accompanying text (1977) (describing how federal protections expanded during the 1960s under the United States Constitution).

[43] *See* Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 525, 528 (1986). According to the author, following the "Burger Court's retreat from the activist posture assumed by the Warren Court [during the 1960s] in the area of individual rights," lawyers nationwide discovered that state courts provided protections unavailable under the Federal Constitution. *Id.* Justice William J. Brennan, in a seminal law-review article, urged state courts to "step into the breach" and use their own constitutions to replace rights no longer being protected under the Federal Constitution:

> With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the [United States Supreme] Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own [scrutiny].

William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

[44] O'Boyle v. State, 117 P.3d 401, 408 (Wyo. 2005) (citing Mapp v. Ohio, 367 U.S. 643, 654 (1961)).

[45] Vasquez v. State, 990 P.2d 476, 485 (Wyo. 1999).

The intermingling of state and federal authorities by state courts across the nation following *Mapp* complicated the United States Supreme Court's task of supervising the Federal Constitution.[46] Although the Court serves as the protector of the United States Constitution, the Tenth Amendment prohibits it from interpreting state constitutional law.[47] As a result of the commingling, the United States Supreme Court occasionally had difficulty determining whether a search-and-seizure decision by a state court was grounded upon the federal or state constitution.[48] A series of tests evolved for determining when decisions were based upon federal law; however, the Court became dissatisfied with these because they could not be applied consistently.[49] In 1983, the Court responded with *Michigan v. Long*, which created the standard that the Wyoming Supreme Court must meet if it is to have a search-and-seizure rule which is invulnerable to federal review, and therefore, truly independent.[50]

B. Establishing Independent State Ground

The approach used in Wyoming to distinguish protections offered under the Wyoming Constitution from those provided federally starts with the premise that the Wyoming Constitution is an independent source of citizens' rights that operates in parallel to the United States Constitution.[51] The seminal explanation of the Wyoming approach was provided by Justice Golden in his concurrence to *Saldana*

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[46] *See* Michigan v. Long, 463 U.S. 1032, 1038-39 (1983).

[47] Saldana v. State, 846 P.2d 604, 612 (Wyo. 1993).

[48] *Long*, 463 U.S. at 1038-39.

[49] *See id.* at 1039.

[50] *Id.* at 1039-40. The dictates of *Michigan v. Long* have been handled inconsistently by both state courts and the United States Supreme Court. *See* Ken Gormley, *The Silver Anniversary of New Judicial Federalism*, 66 ALB. L. REV. 797, 801-05 (2003) (noting that over-technical decisions by the United States Supreme Court have caused unnecessary review of state decisions and frustrated state courts) *and* Patricia Fahlbusch & Daniel Gonzalez, Case Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Ground*, 42 U. MIAMI L. REV. 159 (1987) (exploring the variety of ways that state courts have responded to *Long*). *Michigan v. Long* included an escape provision that allowed state courts to avoid review by including a plain statement indicating that the decision was based on state, not federal, law. 463 U.S. 1032, 1041 (1983). As long as the plain statement was present, the United States Supreme Court said it would refrain from reviewing the decision under the United States Constitution. *Id.* Consequently, some state courts have relied upon use of a plain statement to prevent review while continuing to intermix state and federal constitutional doctrine. State v. Gunwall, 720 P.2d 808, 811-12 (Wyo. 1986) (noting that relying upon a statement that a decision rests on state law rather than providing an explanation of the underlying rationale for the decision provides no "rational basis for counsel to predict the future course of state decisional law").

[51] *See* Saldana v. State, 846 P.2d 604, 622-24 (Wyo. 1993) (Golden, J., concurring). For a comparison of the text of Article 1, Section 4 and the Fourth Amendment, *see infra* notes 196-99 and accompanying text.

v. State.[52] He stated that an appellant seeking to have an issue considered under the Wyoming Constitution "must do more than ask, he must show" that the argument presented deserves consideration under the state constitution.[53] Justice Golden explained that the court will refuse to consider arguments under the state constitution unless they are accompanied by sufficient analysis and authority.[54] Lacking that, the Wyoming Supreme Court will decide the issue under federal constitutional law.[55] Justice Golden noted six "non-exclusive neutral factors" the court finds relevant when weighing which constitution, the state or the federal, offers greater protections: "(1) the textual language [of the constitutional provision]; (2) the differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."[56]

Justice Golden drew this approach from the Washington case *State v. Gunwall*.[57] The Washington Supreme Court in *Gunwall* stated that the six factors were useful for "suggesting to counsel where briefing might . . . be directed" when advancing an argument that a case should be decided on independent state constitutional grounds.[58] The six factors also help to ensure that should the court rely upon independent state constitutional grounds, the decision is based upon sound legal reasons, and not "merely substituting [the court's] notion of justice for that of duly elected legislative bodies or the United States Supreme Court."[59] The Washington court provided the following explanations of the six factors:

> 1. *The textual language of the state constitution.* The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution. It may be more explicit or it may have no precise federal counterpart at all.

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[52] *Id.* at 622-25 (Golden, J., concurring).

[53] *Id.* at 621 (Golden, J., concurring).

[54] *Id.* (Golden, J., concurring) ("It is not the function of this court to frame appellant's argument or draw his issues for him.").

[55] *Id.* (Golden, J., concurring).

[56] *Saldana*, 846 P.2d at 622 (Golden, J., concurring).

[57] *Id.* at 621-23 (Golden, J., concurring) (citing State v. Gunwall, 720 P.2d 808 (Wash. 1986)). In *Gunwall*, the Washington court determined whether the Washington Constitution allowed law enforcement to obtain, without "proper legal process," long-distance phone records and pen registers listing calls dialed from a particular phone number. 720 P.2d at 811. After an analysis of the six factors, the Washington court determined that the Washington Constitution provided greater protections than the Fourth Amendment, requiring that authorities go through a judicial process before obtaining phone numbers from long-distance records and pen registers. *Id.* at 816.

[58] *Gunwall*, 720 P.2d at 816.

[59] *Id.*

2. *Significant differences in the texts of parallel provisions of the federal and state constitutions.* Such differences may also warrant reliance on the state constitution. Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.

3. *State constitutional and common law history.* This may reflect an intention to confer greater protection from the state government than the federal constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law.

4. *Preexisting state law.* Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.

5. *Differences in structure between the federal and state constitutions.* The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in . . . [the] state['s] constitution may be seen as a guaranty of those rights rather than as a restriction on them.

6. *Matters of particular state interest or local concern.* Is the subject matter local in character, or does there appear to be a need for national uniformity? The former may be more appropriately addressed by resorting to the state constitution.[60]

According to Justice Golden, an analysis based on these factors fosters "principled" decisions that provide a sufficient basis for predicting the court's direction.[61] He stated that merely "sidestepping" review by the United States Supreme Court under *Long* is not enough: "A grudging parallel citation to a state constitution, or

[60] *Id.* at 812-13 (emphasis added).
[61] *Saldana*, 846 P.2d at 623 (Golden, J., concurring).

an argument that the state particularly values the rights of its citizens, in a brief devoted to federal law does nothing to aid in the development of state jurisprudence . . . ."[62] Those reading the decision should be able to tell what factors would lead the court "to decide one way or the other."[63] The goal is to create, through "the customary process of research and reasoning," a "principled . . . body of state constitutional law" that "truly supports the state constitution, as state court judges and lawyers are charged to do."[64] As a result, a "principled basis for repudiating federal precedent" is created that provides a "rational basis for counsel to predict the future course of state decisional law."[65] Therefore, Wyoming's traffic-detention rule should sufficiently describe the relevant factors so that those reading a decision can know why the court determined the reasonableness or unreasonableness of the officer's actions, and decisions made under the rule should provide a basis for predicting the court's future actions.[66]

C. Search and Seizure

A Wyoming traffic-detention rule must be consistent with Wyoming's overall search-and-seizure doctrine. Though the Fourth Amendment of the United States Constitution and Article 1, Section 4 of the Wyoming Constitution are nearly identical textually, the two provisions evolved independently, and the courts have given them differing interpretations.[67] Early Wyoming cases held that Article 1, Section 4 was bound tightly to the right against self-incrimination, which is expressed in the Wyoming Constitution through Article 1, Section 11.[68] This caused Article 1, Section 4 and the Fourth Amendment to receive distinct interpretations and has given the right against self-incrimination considerable force in

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[62] *Id.* (Golden, J., concurring).
[63] *Id.* (Golden, J., concurring).
[64] *Id.* (Golden, J., concurring).
[65] *Gunwall*, 720 P.2d at 812.
[66] *Saldana*, 846 P.2d at 623 (Golden, J., concurring).
[67] William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 500 n.78 (1977) ("[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased."). *See also* Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 652 (1983) (stating that a constitutional provision in Oregon should receive a different interpretation than a similar provision of the United States Constitution, even though both have identical language). For a comparison of the text of Article 1, Section 4 and the Fourth Amendment, *see infra* notes 195-99 and accompanying text.
[68] State v. George, 231 P. 683, 685 (Wyo. 1924) (holding that using evidence gathered from a defendant through an illegal search is equivalent to forcing the defendant to testify against himself).

Wyoming.[69] The tie between self-incrimination and search and seizure was such that the Wyoming Supreme Court used the connection as the basis for Wyoming's version of the exclusionary rule.[70]

The court described the connection in *State v. George*.[71] Relying upon the United States Supreme Court case *Boyd v. United States*, the Wyoming court held that an unreasonable seizure of a person's papers, and use of those papers as evidence, was the equivalent of forcing the defendant to testify against herself.[72] Then the Wyoming court took the principle further, stating that no difference existed between using papers that were unreasonably confiscated as evidence and using *any other property* seized unreasonably from a person's premises.[73] The court equated use of evidence seized unreasonably from a person's possession to using testimony acquired through duress:

> What is the difference in principle in forcing a defendant to speak against himself by word of mouth, and in forcing, by an unlawful search, the secret things of his home to give evidence against him? We see none. His home is as sacred from illegal force as his person. When his home speaks, he speaks—they speak with the same voice.[74]

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[69] *See* Tobin v. State, 255 P. 788, 788-89 (Wyo. 1927) (indicating that the warrantless entry of a premises without permission of owner, and subsequent confiscation of contraband found therein, violated protections against unreasonable search and seizure, due process and self-incrimination); State v. George, 231 P. 683, 686 (Wyo. 1924) (holding that use of evidence taken from a defendant's possession through an unreasonable search is equivalent to forcing him to testify against himself); Wiggin v. State, 206 P. 373, 376 (Wyo. 1922) (noting that an arrest made under an illegal warrant, which led to the confiscation of the hide from a stolen cow, implicated both Article 1, Section 4 and Article 1, Section 11 of the Wyoming Constitution); State v. Peterson, 194 P. 342, 352-54 (Wyo. 1920) (holding that return of contraband liquor confiscated through an illegal warrant was necessary because to do otherwise would violate search-and-seizure rights as well as the right against self-incrimination); Maki v. State, 112 P. 334, 336 (Wyo. 1911) (holding that persons placed in detention must be advised that they have the right to remain silent, fifty years before federal courts reached a similar decision in Miranda v. Arizona, 383 U.S. 436 (1966)).

[70] *George*, 231 P. at 686.

[71] *Id.* at 684 ("Both of the foregoing constitutional provisions [Article 1, Section 4 and Article 1, Section 11] were referred to in the *Peterson* [194 P. 342 (Wyo. 1920)] case, as well as the *Wiggin* [206 P. 373 (Wyo. 1922)] case, but their interrelation was not clearly pointed out, and it will be necessary here to do so in view of the contentions that are made herein by the defendant.").

[72] *Id.* at 685 (referring to Boyd v. United States, 116 U.S. 616 (1886)).

[73] *Id.* ("There does not, however, appear to be any difference in principle between documents which may be used in evidence against a defendant and any other property which may be so used.").

[74] *Id.* (quoting Tucker v. State, 90 So. 845 (Miss. 1922)).

Based on this reasoning, the Wyoming court concluded that unreasonably seized evidence could not be used against a defendant.[75] In a later case, the Wyoming court held it immaterial that evidence uncovered in an unreasonable search was contraband, forbidding the use of contraband after it was unreasonably seized from a premises.[76]

An examination of the history of the Fourth Amendment shows that federal restrictions regarding the use of unreasonably seized material proceeded along a different path than those offered in Wyoming, although the two began from a similar starting point. In the late Nineteenth Century, the United States Supreme Court also connected search and seizure with the right against self-incrimination, but the connection under the federal doctrine eventually lost its force.[77] The federal courts made this connection through *Boyd v. United States*—the same case relied upon by the Wyoming Supreme Court.[78] However, the protections provided under the federal doctrine were more limited than those offered in Wyoming, reaching private papers and books, but not other types of personal property.[79]

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[75] *Id.* at 686.

[76] Tobin v. State, 255 P. 788, 789 (Wyo. 1927).

[77] *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 2.6(e) (4th ed. 2004).

[78] *See supra* note 72 and accompanying text.

[79] 1 LAFAVE, *supra* note 77, § 2.6(e). It should be noted that though the Wyoming Supreme Court's decision to extend protections under *Boyd* to personal property other than papers and books appears to depart from federal doctrine, as a practical matter the Fourth Amendment and the Wyoming provision had a similar reach because of a Fourth Amendment concept called the "mere-evidence rule." *See* 1 *id.* § 2.6(d). The mere-evidence rule, which has since fallen into disuse, stated that possessions that were not fruits or instrumentalities of a crime were "mere evidence," and therefore, could not be subject to a search warrant. *See* 1 *id.* § 2.6(e), at 703-05 nn.150-59 and accompanying text. Therefore, like Wyoming's extension of the right against self-incrimination, the mere-evidence rule protected personal property other than books or writings. *See* 1 *id.* § 2.6(e), at 707 nn.167-69 (describing how the mere evidence rule and the link that existed between the Fourth Amendment and the Fifth Amendment provided similar protections). The mere-evidence rule came into American law from England through *Boyd*, the same case that linked search and seizure with the right against self-incrimination. *Compare* 1 *id.* § 2.6(d), at 703-04 nn.150-52 (noting that the mere-evidence rule was introduced into American law through *Boyd*, which relied upon the famous English case Entick v. Carrington, 19 How.St.Tri. 1029 (1765)) *and* State v. George, 231 P. 683, 685 (Wyo. 1924) (relying upon *Boyd* and *Entick* to link Section 4 and Section 11 of Article 1). The term "mere evidence" was never used in connection with search and seizure by Wyoming courts, and every time the Wyoming Supreme Court cited *Boyd*, the reference was firmly connected with the right against self-incrimination; therefore, though the mere-evidence rule had considerable force under federal law, it was never incorporated into Wyoming's search-and-seizure doctrine. *See* Tobin v. State, 255 P. 788, 798 (Wyo. 1927) (citing *Boyd* to support the notion that the United States Supreme Court has stressed the importance of protecting rights offered under the Fourth Amendment and Fifth Amendment, in

As the doctrine evolved, lower courts administered the link between the Fourth Amendment and Fifth Amendment inconsistently, causing the doctrine to remain controversial until the United States Supreme Court settled the issue in *Andresen v. Maryland* in 1976.[80]

Andresen weakened the link between search and seizure and the right against self-incrimination by creating a distinction between the act of compelling a defendant to produce papers, and the use of papers as evidence after the papers became available to authorities through legitimate means.[81] After *Andresen*, use of a writing against a defendant was not a violation of the right against self-incrimination if authorities acquired the writing by a means that involved no compulsion.[82] Some saw this as a retreat. Supreme Court Justice William J. Brennan, Jr., noted that the overturning of *Boyd* was one of several decisions by the Burger court that withdrew protections granted by the United States Supreme Court during the 1960s under the Bill of Rights.[83] Reacting to this withdrawal, Brennan urged state

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support of the link between search and seizure and self-incrimination under state law); State v. Crump, 246 P. 241, 242 (Wyo. 1926) (using *Boyd* to support the notion that just as Section 4 and Section 11 are linked under state law, under federal law, the "Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment"). The mere-evidence rule became plagued with exceptions, and in the end was so ineffective that the United States Supreme Court put it to death in 1967 with *Warden v. Heyden,* 387 U.S. 294 (1976). *See* 1 LAFAVE *supra*, § 2.6(d), at 706-77 nn.164-66.

[80] 1 LAFAVE, *supra* note 77, § 2.6(e), at 708 nn.172-75 and accompanying text (referencing Andresen v. Maryland, 472 U.S. 463 (1976)).

[81] 1 LAFAVE, *supra* note 77, § 2.6(e), at 708 nn.172-75 and accompanying text.

[82] 1 LAFAVE, *supra* note 77, § 2.6(e), at 710 n.184 (citing State v. Barrett, 401 N.W.2d 184 (Iowa 1987) (using as evidence a personal journal containing death threats is permissible when the journal was given to police by a restaurant employee after it was left at the restaurant) *and* State v. Andrei, 574 A.2d 295 (Me. 1990) (holding that a diary can be used as evidence after being presented to police by the writer's spouse because the police acquisition of the diary involved no compulsion).

[83] Justice Walter J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 496-97 nn.45-54 and accompanying text (1977). In support of his assertion that the Court had withdrawn protections previously offered between 1962 and 1969 under the Bill of Rights, Brennan cited the following cases: Hudgens v. N.L.R.B., 424 U.S. 507 (1976) (finding the First Amendment "insufficiently flexible to guarantee access to essential public forums when in our evolving society those traditional forums are under private ownership in the form of suburban shopping centers"); Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) (holding the First Amendment no longer invalidated "a system of restrictions on motion-picture theaters based upon the content of their presentations"); United States v. Watson, 423 U.S. 411 (1976) (finding it reasonable for a postal authority to make a warrantless arrest in a public place when there existed probable cause based upon reliable information, and when the arrest was conducted under a statute authorizing arrests based upon a reasonable belief that a crime was occurring in the postal authority's presence); United States v. Robinson, 414 U.S. 218

courts to "step into the breach" and grant independent protections that replaced those no longer offered federally.[84]

The federal tenet departed further from that offered in Wyoming when tensions between the federal doctrine and search-and-seizure doctrines employed by states led to the total demise of *Boyd*, and eventually to *Mapp v. Ohio*.[85] The notoriety of *Boyd* deteriorated largely at the hands of state officials through the "silver platter doctrine."[86] The "silver-platter doctrine" allowed state officials to acquire evidence in a manner prohibited by federal law, who then passed that evidence on to federal officials.[87] Then the federal officials could introduce the suspect evidence in federal court.[88] This diminished the effectiveness of the federal exclusionary rule.[89] In its repudiation of the "silver-platter doctrine" in *Elkins v. United States*, the United States Supreme Court recognized that the lack of uniformity between state and federal exclusionary doctrines had led to violations of the Fourth Amendment.[90] This set the stage for *Mapp v. Ohio*, which required states to grant search-and-seizure doctrines that were, at least, equivalent to those offered by federal courts.[91]

Wyoming, like other states, followed the precepts of *Mapp* by applying the federal Fourth Amendment search-and-seizure doctrine instead of its own.[92] Thus, the federal exclusionary rule became the mechanism that caused Wyoming's search-and-seizure doctrine to fall into hibernation for thirty-eight years, until the Wyoming Supreme Court revived it in 1999 with *Vasquez v. State*.[93]

(1973) *and* Gustafson v. Florida, 414 U.S. 260 (1973) *and* South Dakota v. Opperman, 428 U.S. 364 (1976) (refusing to hold unreasonable warrantless searches subsequent to arrest and warrantless inventory searches of automobiles); United States v. Watson, 423 U.S. 411 (1976) *and* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that authorities need not demonstrate that a suspect in custody knew of his right to refuse before granting consent to allow a search); United States v. Janis, 428 U.S. 433 (1976) (holding that unreasonably collected evidence can be used when the search or seizure was conducted by authorities acting in good faith); Brennan, *supra* note 83, at 496-97 nn.45-54 and accompanying text.

[84] Brennan, *supra* note 83, at 503.

[85] *See* 1 LAFAVE, *supra* note 77, § 1.1(d) (referring to Mapp v. Ohio, 367 U.S. 643 (1961)).

[86] *See* 1 LAFAVE, *supra* note 77, § 1.1(d).

[87] *See* 1 *id.*

[88] *See* 1 *id.*

[89] *See* 1 *id.*

[90] Elkins v. United States, 364 U.S. 206, 223-24 (1960).

[91] *See* Vasquez v. State, 990 P.2d 476, 484 (Wyo. 1999) (citing Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)). Of course, states can still have search-and-seizure doctrines under their own constitutions, but to be enforced those doctrines must, at a minimum, grant protections equivalent to those offered under the Fourth Amendment. *Id.*

[92] *Id.*

[93] *Id.* at 485.

Significantly, the concurrence to *Mapp* written by Justice Black unknowingly gave final acknowledgement to the common sources of the Wyoming and federal exclusionary doctrines by stating that an exclusionary rule based solely upon the Fourth Amendment was unconvincing, but when the Fourth Amendment was considered together with the Fifth Amendment's ban against compelled self-incrimination, "a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."[94] Since *Mapp*, the United State Supreme Court has drawn distinctions between the Fourth Amendment and the Fifth Amendment, stating that the two provisions have different purposes, and therefore, the exclusionary rules provided under the two provisions are subject to different analysis.[95] Therefore, the federal search-and-seizure doctrine is distinct from Wyoming's in that under the federal rule, the link between the Fourth Amendment and the Fifth Amendment is tenuous.[96]

The Wyoming Supreme Court has yet to acknowledge, in the post-*Vasquez* era, that a link exists between search and seizure and the right against self-incrimination.[97] This does not mean that the link has not operated in the background; for example, in *O'Boyle*, the Wyoming Supreme Court relied upon *Tobin v. State*, which like other pre-*Mapp* cases placed a pre-eminence upon the right against self-incrimination.[98] Consequently, even if the Wyoming Supreme Court has yet to recognize the close link between search and seizure and the right against self-incrimination, the concept already has impacted the court's search-and-seizure decisions.[99]

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[94] *Mapp*, 367 U.S. at 661-62 (Black, J., concurring).

[95] *See* Brown v. Illinois, 422 U.S. 590, 601 (1975) (holding that the exclusionary rule, when used to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth Amendment, since it is directed at all unlawful searches and not merely those that happen to produce incriminating material); *see also* 1 LAFAVE, *supra* note 77, § 2.6(e). Significantly, the United States Supreme Court has limited use of the exclusionary rule to those instances where the rule acts as a disincentive to unreasonable officials. 1 LAFAVE, *supra* note 77, §§ 1.1(f)-1.2(f). The Wyoming Supreme Court never applied a similar limitation to Wyoming's exclusionary rule.

[96] 1 LAFAVE, *supra* note 77, §§ 1.1(f)-1.2(f).

[97] *See* Page v. State, 63 P.3d 904, 911 (Wyo. 2003) (stating that the Wyoming Supreme Court has yet to be called upon to determine whether the good-faith exception applies to the Wyoming exclusionary rule).

[98] O'Boyle v. State, 117 P.3d 401, 413 (Wyo. 2005). *See* Tobin v. State, 255 P. 788, 788 (Wyo. 1927) (accepting the defendant's argument that sheriff's actions were in violation of Section 4 (search and seizure), Section 11 (right against self-incrimination), and Section 6 (due process) of Article 1 of the Wyoming Constitution).

[99] *See O'Boyle*, 117 P.3d at 412 (relying upon *Tobin* for the court's holding that peaceful submission does not grant consent to search, which is consistent with Wyoming's pre-*Mapp* stance on the right against self-incrimination).

In summary, even though Article 1, Section 4 of the Wyoming Constitution and the Fourth Amendment of the United States Constitution are nearly identical textually, over time the documents have received distinctive interpretations.[100] Early in the last century, the Wyoming Supreme Court bound Article 1, Section 4 up with the right against self-incrimination, which finds its expression under the Wyoming Constitution in Article 1, Section 11.[101] In contrast, the most recent holdings of United States Supreme Court state that the Fourth Amendment and the Fifth Amendment serve distinct purposes, and the two should receive separate analysis.[102] Therefore, in spite of the textual similarities between Article 1, Section 4 and the Fourth Amendment, the two are supported by a different set of rationales, and it cannot be assumed that the two provisions provide identical protections to travelers who become subject to search-and-seizure activities during a traffic detention.

D. Reasonableness

A traffic-detention rule must also be consistent with the Wyoming provision that allows officers to investigate if they have a reasonable belief that a crime is underway.[103] For example, in *State v. George* a deputy, who was on property legally, discovered sheep he reasonably believed to be stolen.[104] Following up on this, the deputy later went to the suspect's residence with other men and met the suspect in the yard.[105] The deputy had a warrant, but because the warrant had been granted improperly, it was invalid.[106] The deputy arrested the man and seized stolen sheep from a group located within sight near the residence.[107] Then the deputy and the men with him proceeded to another band located on the open range and seized thirty-two other sheep that appeared to be stolen.[108] The Wyoming Supreme

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[100] *See supra* notes 67-99.

[101] *See supra* notes 68-76.

[102] *See supra* note 95 and accompanying text.

[103] State v. Young, 281 P. 17, 19 (Wyo. 1929) (citing favorably State *ex rel.* Hansen v. District Court, 233 P. 126, 129 (Mont. 1925) (holding that an officer may conduct reasonable investigations when the facts and circumstances would cause a reasonable man, acting in good faith, to believe that a crime was being committed in his presence).

[104] State v. George, 231 P. 683, 684 (Wyo. 1924).

[105] *Id.*

[106] *Id.* The court stated that the affidavit was "substantially in the form as the [improper] warrant considered . . . in the case of *Wiggin v. State*," adding that the prosecution in *George* "conceded" that the form was improper. *Id.* (citing Wiggin v. State, 206 P. 373 (Wyo. 1922)). In *Wiggin*, an affidavit was issued based upon the officer's "belief" that evidence of a crime could be found at a location, rather than on information with enough particularity to allow the magistrate to independently assess whether the officer had probable cause. 206 P. at 376. (citing State v. Peterson, 194 P. 342 (Wyo. 1920)).

[107] *George*, 231 P. at 684.

[108] *Id.*

Court held that even though the warrant was improper, the officer had probable cause to believe that a felony had occurred, and the officer had a right to be at the arrest location, so the arrest was reasonable.[109] Furthermore, because the officer had legal access to the location of the sheep, the court allowed the seizure of the stolen livestock.[110]

Consistent with *George*, the court held in *State v. Kelly* that in some circumstances a warrantless search of a motorized vehicle may be allowed.[111] However, the court also noted that an officer must have good reason to make the initial stop:

> [It] would ordinarily be intolerable and unreasonable, if an officer or anyone else were authorized to stop every automobile on the chance of finding liquor and thus subject persons lawfully using the highways to the inconvenience and indignity of a search without a search warrant; that those entitled to use the public highways, have a right of free passage without interruption of search, unless a competent official authorized to search has probable cause for believing that a vehicle is carrying contraband or illegal goods.[112]

The Wyoming Supreme Court noted "the distinction that has always been observed in the laws of the United States between a home and vehicles."[113] While a warrantless search of a home is prohibited in almost all circumstances, a search of an automobile without a warrant is subject to a lower standard, meaning the warrantless search of a vehicle "cannot be said to be unreasonable under all circumstances."[114]

Many of the pre-*Mapp* cases indicate factors that could be relevant for weighing the reasonableness of an officer's actions at modern traffic stops.[115] Of these

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[109] *Id.* at 690.

[110] *Id.* at 689 (noting that when the officer has lawful access and evidence of a crime is visible to the officer, "ready to be taken," the evidence may be seized upon lawful arrest of the defendant).

[111] State v. Kelly, 268 P. 571, 572 (Wyo. 1928) (noting that "a search of an automobile without a warrant, authorized by law, cannot be said to be unreasonable under all circumstances").

[112] *Id.* (relying upon Carroll v. United States, 267 U.S. 132 (1925)).

[113] *Id.*

[114] *Id.*

[115] The Wyoming Supreme Court actively interpreted Article 1, Section 4 during the Prohibition Era (1920-1933), when law enforcement resources were focused upon the interdiction of forbidden liquor. *See* State v. Munger, 4 P.2d 1094 (Wyo. 1931); State v. Young, 281 P. 17 (Wyo. 1929); State v. Kelly, 268 P. 571 (Wyo. 1928).

early cases, *State v. Young* is of particular interest.[116] Although the chief holding of the case concerned a search incident to a lawful arrest, within the case the court adopted a series of search-and-seizure holdings from other states related to traffic detentions.[117] These included *State ex rel. Hansen v. District Court* (Montana), holding that no violation of the state search-and-seizure provisions occurred when facts were such that "a reasonable man, acting in good faith, [would] believe that a crime was being committed in his presence"; *Sands v. State* (Oklahoma), holding no violation of the state's search-and-seizure provision occurred when an officer, attracted by the odor of whiskey, discovers whiskey kegs by using a flashlight to look through the isinglass of an automobile; *State v. Loftis* (Missouri), holding that an officer may use all senses, including the sense of smell, to reach a reasonable belief that a crime is occurring in the officer's presence; and *State v. Connor* (Missouri), holding it reasonable for an officer to investigate because of the "unusual parking of [a] car," which led to the smelling of whiskey from the car, which led to observing a jug through an open car window and then through an open door, which led, finally, to a physical examination and seizure of the jug.[118] From these holdings, it can be determined that the Wyoming Constitution allows officers involved in traffic detentions to investigate when the facts are such that a reasonable man would conclude a crime is occurring in his presence; officers can use their senses, including sight and smell, to reach that reasonable belief; and they can take reasonable steps to investigate, such as look inside a window using a flashlight.[119]

The pre-*Mapp* cases also illustrate that an officer's conduct must be reasonable in all circumstances, supporting the principle that the officer must have a just reason for initiating the contact that leads to the search.[120] In *State v. Munger*, an officer contacted two people sitting in a car, a passenger and a driver.[121] The driver, who was the defendant in the case, was charged later for possession of a bottle of liquor, while the passenger was arrested at the scene for being intoxicated.[122] The officer seized the bottle of liquor after finding it in the front of the car between the two men.[123] But the officer's discovery of the liquor occurred after the officer removed the driver's friend from the passenger side of the vehicle while making the arrest.[124] The court found that being drunk was not a crime statutorily or under

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[116] *Young*, 281 P. 17 (Wyo. 1929).
[117] *Id.* at 19-21.
[118] *Id.* (citing State *ex. rel* Hansen, 233 P. 126, 129 (Mont. 1925); Sands v. State, 252 P. 72 (Okla. 1927); State v. Loftis, 292 S.W. 29 (Mo. 1927); State v. Connor, 300 S.W. 685 (Mo. 1927)).
[119] *Id.*
[120] *See* State v. Munger, 4 P.2d 1094, 1095 (Wyo. 1931).
[121] *Id.* at 1094.
[122] *Id.*
[123] *Id.*
[124] *Id.*

the common law, so the arrest was unlawful.[125] Because the arrest was unreasonable and the officer made no showing to indicate that he had probable cause to believe the vehicle contained alcohol, fruits from the arrest were not allowed, and the bottle of liquor was excluded from evidence.[126] This case demonstrated that unreasonable actions by an officer early in a traffic detention can cause evidence discovered later in the stop to be inadmissible.[127]

Although the Wyoming Supreme Court, prior to *Mapp*, placed a premium upon the state's sovereignty, the Wyoming court also stated expressly that the state's search-and-seizure rule should consider the needs of the nation as a whole when weighing what search-and-seizure actions are reasonable.[128] The court not only stated this expressly, but demonstrated this through its close examination of the Fourth Amendment, and through the scrutiny it gave federal cases before deciding its own issues under the Wyoming Constitution.[129] The court's concern seemed to be that the state act in unison with the United States rather than be a disruptive influence.[130] Therefore, even though Wyoming's pre-*Mapp* search-and-seizure cases were not in lock-step with the Fourth Amendment, the cases would not appear to support a traffic-detention doctrine that varies wildly from protections provided under federal law.[131]

Finally, it should be noted that even though the pre-*Mapp* cases relevant to a Wyoming traffic-detention rule have never been overturned and appear to be good law, many of them have lain dormant since the passage of *Mapp v. Ohio* in 1961.[132] The Wyoming Supreme Court's refusal to acknowledge arguments unless properly raised in the lower courts using the six *Saldana* factors have resulted

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[125] *Munger*, 4 P.2d at 1095.

[126] *Id.* (citing State v. Peterson, 194 P. 342 (Wyo. 1920).

[127] *See id.*

[128] State v. George, 231 P. 683, 686-87 (Wyo. 1924). The court stated,

> The Government of the United States is not a foreign government in its relation to the Government of the States, the agents of the former are not agents of a foreign government in relation to the latter, and any contrary doctrine could not but be deprecated as sowing pernicious seeds of ultimate disruption of the nation. These factors, and others, should be duly considered when the specific [search-and-seizure] question presented comes before us.

Id. at 687.

[129] *See* State v. Peterson, 194 P. 342, 352-53 (Wyo. 1920) (adopting the United States Supreme Court's reasoning from Weeks v. United States, 232 U.S. 383 (1914)).

[130] *See George*, 231 P. at 686-87.

[131] *See supra* note 128.

[132] *See* Vasquez v. State, 990 P.2d 476, 484 (Wyo. 1999) (referencing Mapp v. Ohio, 376 U.S. 643 (1961)).

in a piecemeal reintroduction of the pre-*Mapp* search-and-seizure doctrine.[133] Only a limited number of search-and-seizure issues have been brought current by the Wyoming Supreme Court through recent decisions.[134] In *Vasquez*, the court addressed searches incident to arrest, refusing to adopt the federal *Belton* rule because the rule was inconsistent with early state doctrine.[135] In *O'Boyle*, the court relied upon *Tobin v. State*, holding that state must show by "clear and convincing testimony" that consent to search at a traffic stop was voluntarily given.[136] In *Johnson v. State*, the court held that Wyoming's inventory search rule is identical to the federal rule.[137] Whether the Wyoming Supreme Court will choose to revive the entirety of the pre-*Mapp* search-and-seizure reasonableness doctrine remains uncertain.

E. Traffic Detentions under the Fourth Amendment

A sufficient traffic-detention doctrine must base itself upon the nature of traffic stops.[138] Under the Fourth Amendment, the purpose of a traffic stop is not to support the investigation of crimes, but to enforce traffic laws.[139] Therefore, the stop is limited in scope and short in duration.[140] These characteristics resemble those of investigative detention.[141] Consequently, federal search-and-seizure doctrine holds that the limited characteristics of traffic stops are consistent with the two-prong test of *Terry v. Ohio*.[142] The two-prong test requires, first, that the reason for the stop be justified, and, second, that all actions during the stop remain within the scope defined by the stop's purpose—in the case of a traffic detention, the issuance of a traffic citation.[143] What an officer can do without exceeding the scope of a traffic stop has been strictly established.[144]

Therefore, under the *Terry* doctrine, the Wyoming Supreme Court has established specific guidelines regarding what is reasonable for an officer to do during a traffic stop.[145] Traffic stops must be "temporary, lasting no longer than necessary to effectuate the purpose of the stop," and the officer must carefully tailor the

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[133] For an explication of the six *Saldana* factors, *see supra* notes 57-66 and accompanying text.

[134] *See Vasquez*, 990 P.2d at 476 *and* O'Boyle v. State, 117 P.3d 401 (Wyo. 2005).

[135] *Vasquez*, 990 P.2d at 489 (referring to New York v. Belton, 453 U.S. 454 (1981)). For an explication of the *Belton* rule, *see infra* note 181.

[136] *O'Boyle*, 117 P.3d at 413 n.9 (relying upon Tobin v. State, 255 P. 788 (Wyo. 1927)).

[137] 137 P.3d 907, 908-09 (Wyo. 2006).

[138] *See* Lindsay v. State, 108 P.3d 852, 857 (Wyo. 2005).

[139] *See id.*

[140] *See id.*

[141] *See id.*

[142] *Id.* at 856-57.

[143] *Lindsay*, 108 P.3d at 856-57.

[144] *Id.* at 857.

[145] *Id.*

stop to "its underlying justification."[146] An officer may request the driver's proof of insurance, operating license, and vehicle registration, and may run a computer check and issue a citation.[147] Once the officer issues the citation and checks the documentation, the traveler "must be allowed to proceed without further delay."[148] To justify any "searches" beyond these actions, the officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[149]

Although the Fourth Amendment case law is very specific with regard to what an officer can do at a traffic stop when the stated governmental interest is the enforcement of traffic laws, an officer who is legitimately in pursuit of another interest might be allowed greater freedom.[150] The case law weighs the interest against the intrusiveness of the search or seizure.[151] Some interests warrant more intrusion than others; for example, safety creates a higher interest than the enforcement of laws.[152] Therefore, in *Terry v. Ohio* the United States Supreme Court found it reasonable for the officer to pat down the outside of the defendant's clothing in search of weapons, though a pat-down would have been impermissible if conducted merely to investigate the suspect's suspicious behavior.[153] When the government invades a protected interest, *Terry* holds that the only test for reasonableness is whether the action's intrusiveness outweighs the government's need to search.[154] The Fourth Amendment, therefore, employs a balancing test—weighing the need for governmental action against the privacy interest that the government seeks to invade.[155]

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[146] Campbell v. State, 97 P.3d 781, 784 (Wyo. 2004) (quoting United States v. Wood, 106 F.3d 942, 945 (10th Cir. 1997)).

[147] *Campbell*, 97 P.3d at 785 (citing Damato v. State, 64 P.3d at 700, 706 (Wyo. 2003)).

[148] *Id.*

[149] Terry v. Ohio, 392 U.S. 1, 21 (1968). Federal circuit courts differ over what is allowable during a traffic stop. For example, the Tenth Circuit held that the officer cannot ask the traveler directly about suspected illegal activities without expanding the scope of the traffic stop, unless the questions concern issues pertinent to officer safety. United States v. Holt, 264 F.3d 1215, 1221 (10th Cir. 2001). However, the Fifth Circuit held such questions allowable in any case. United States v. Shabazz, 993 F.2d 431, 436 (5th Cir. 1993). *See* United States v. Flowers, 2004 U.S. Dist. LEXIS 10111 (D. Fla. 2004) (comparing the rules in the Tenth and Fifth Circuits).

[150] *See Terry*, 392 U.S. at 21.

[151] *See Terry*, 392 U.S. at 23-24 (noting that officer safety is a higher interest than the investigation of crime and warrants a greater amount of intrusion into the subject's person).

[152] *Id.*

[153] *Id.*

[154] *Id.* at 21.

[155] *See id.* at 23-24.

The amount of intrusion of an officer's actions is measured by how much inconvenience the intrusion creates, or the privacy interest that it invades.[156] For example, an officer can arrange to routinely run a drug dog around the outside of a car while a traffic ticket is being issued so long as use of the dog does nothing to delay the traveler's departure.[157] The Fourth Amendment permits this because, according to the Court, the use of an adequately trained drug dog only reveals the presence of illegal drugs, which are contraband and, therefore, not an interest that "society is prepared to consider reasonable."[158] But use of the dog becomes a seizure under the Fourth Amendment if the use delays the traveler and causes inconvenience.[159] The delay expands the scope of the stop into a drug investigation, which cannot be pursued unless the officer has some level of proof that a crime is occurring.[160] Therefore, the amount of delay is one consideration the court finds relevant in determining an officer's reasonableness.[161] Other considerations include the amount of intimidation or official show of force made by the officer, whether the officer's request for consent to search was coercive, whether a reasonable person, given the entirety of the circumstances, would feel free to leave.[162]

Thus, the Fourth Amendment's traffic detention rule is specifically designed to fit the limitations and scope inherent in a traffic stop.[163] The rule provides specific guidance to officers conducting the stop, indicating what actions are reasonable and what are not.[164] Furthermore, Fourth Amendment decisions include discussions that indicate what factors courts consider relevant when deciding whether an officer's actions are reasonable, providing a basis for predicting future decisions.[165] Therefore, the Fourth Amendment's traffic-detention rule is sufficient

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[156] *See id.*

[157] Illinois v. Caballes, 543 U.S. 405, 407-08 (2005).

[158] *Id.* at 408.

[159] *Id.* at 407-08 (noting with approval that the Illinois Supreme Court held in People v. Cox, 782 N.E.2d 275 (2002) that a use of a drug dog that lengthened a stop created a seizure requiring at least reasonable suspicion).

[160] United States v. Place, 462 U.S. 696, 702 (1983) (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)) (noting that police have authority to make a "forcible stop" when the officer has "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity").

[161] *See supra* note 159 and accompanying text.

[162] *See* 4 LAFAVE, *supra* note 3, § 9.3. LaFave criticizes some courts for exceeding the bounds of *Terry* by allowing officers to seek consent from the travelers for a vehicle search though the officers have no reasonable suspicion that contraband is present. 4 *Id.* § 9.3(e), at 397 nn.213-17 and accompanying text.

[163] *See supra* notes 138-49 and accompanying text.

[164] *See supra* notes 145-49 and accompanying text.

[165] *See supra* notes 156-62 and accompanying text for a discussion of factors relevant to determining whether the employment of a drug dog during a traffic detention is reasonable.

to meet all of the requirements put forth by Justice Golden in *Saldana v. State* for the Wyoming Constitution, providing a "principled basis for the decisions" and a "rational basis for counsel to predict the future course of . . . decisional law."[166]

F. Traffic Detentions under Article 1, Section 4

As mentioned earlier, the one opportunity the Wyoming Supreme Court has had to decide a traffic-detention issue since its decision to revitalize Wyoming's search-and-seizure doctrine came in *O'Boyle v. State*.[167] The *O'Boyle* decision analyzed three phases of the traffic stop: The traffic stop and the initial detention, a second detention and further questioning, and the defendant's consent to search.[168] Each phase was considered twice, once under the Wyoming Constitution and once under the Fourth Amendment.[169] This comment focuses on the first stage, the traffic stop and the initial detention. The other two holdings are not relevant to this discussion because they occurred after the traffic detention.[170]

The circumstances of *O'Boyle* arose out of a typical traffic stop. Kevin O'Boyle was pulled over for driving 79 in a 75 mile-per-hour zone on Interstate 80 near Cheyenne, Wyoming.[171] The trooper asked O'Boyle to walk back and sit in the cruiser while the trooper conducted the usual procedures associated with a traffic stop.[172] The trooper requested O'Boyle's criminal history from dispatch, and as he waited for the reply, he questioned O'Boyle extensively, asking over thirty questions.[173] As the trooper waited for the criminal history and continued

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[166] *See supra* notes 61-66 and accompanying text.

[167] *See supra* note 17 and accompanying text.

[168] *See* O'Boyle v. State, 117 P.3d 401, 409 (Wyo. 2005).

[169] *Compare id.* at 409-14 (Article 1, Section 4) *with id.* at 414-19 (Fourth Amendment).

[170] *See supra* notes 2-5 and accompanying text.

[171] *O'Boyle*, 117 P.3d at 404.

[172] *Id.*

[173] *Id.* The Wyoming Supreme Court's interpretation of the Fourth Amendment held that a trooper could not ask directly about drug trafficking or other wrongdoing without, first, having a reasonable articulable suspicion that the allegation was true, so the questioning may have been an attempt to raise a suspicion by uncovering discrepancies in O'Boyle's cover story. *See* Campbell v. State, 785 P.3d 781, 785 (Wyo. 2004). The interrogation included a series of questions that would be routine if asked by themselves, including, where was O'Boyle headed, how long did he plan to stay, where was he coming from, what did he do for a living, how long had he had been doing it, who was filling in for him while he was gone, how long had his son been in Boston, what college did his son attend, what courses was his son taking in college, was his son living on campus, where would O'Boyle stay while visiting his son, why was he driving rather than flying, why was the rental car in his daughter's name, where was his daughter at the time, how many daughters did he have, and what was the price of airfare from San Francisco to Boston. *O'Boyle*, 117 P.3d at 404.

questioning, he requested that a second trooper bring a drug dog.[174] Finally, the trooper indicated that O'Boyle was free to leave and returned the suspect's documents.[175] But as O'Boyle walked back to his vehicle, the officer questioned him again, ultimately obtaining O'Boyle's agreement to search the vehicle.[176] Inside the vehicle, the trooper found five pounds of marijuana.[177]

The traffic-detention rule articulated in *O'Boyle* by the Wyoming Supreme Court holds that "only unreasonable searches are forbidden, and whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case."[178] This same rule is used by the court in all search-and-seizure analyses under the Wyoming Constitution, and the court makes no effort to distinguish traffic detentions from other search-and-seizure problems.[179] The first prong of this test—"only unreasonable searches are forbidden"—appears to permit any official pursuit of information, provided that the pursuit is reasonable.[180] The second prong—"whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case"—seems to eschew the simplicity of bright lines, requiring that the court consider the circumstances in their entirety.[181]

The court's rubric in *O'Boyle*—"whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case"—failed to indi-

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[174] *O'Boyle*, 117 P.3d at 404.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at 409-10.

[179] *Id.* at 410. The court states: "In the broader context of searches and seizures *in general* and for purposes of considering Mr. O'Boyle's claim . . . what is important about Vasquez is our holding that Article 1, Section 4 requires that searches and seizures be reasonable under all the circumstances.") *Id.* (emphasis added).

[180] State v. George, 231 P. 683, 687 (Wyo. 1924)("Not all searches and seizures are forbidden, but only those that are unreasonable.").

[181] Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999) (holding that Article 1, Section 4 eschews the bright-line rule of *Belton*, and "maintains a standard that requires a search be reasonable under all of the circumstances as determined by the judiciary, in light of the historical intent of [Wyoming's] search and seizure provision"). The holding of New York v. Belton, 453 U.S. 454 (1981) was designed to simplify a series of conflicting United States Supreme Court cases regarding searches of automobile passenger compartments subsequent to the arrest of the driver. *Id.* at 480 (interpreting *Belton*, 453 U.S. at 458). The *Belton* rule allowed police to search the entire passenger compartment, including areas of the car out of reach of the driver such as sealed containers. *Id.* at 481 (interpreting *Belton*, 453 U.S. at 460-61). The Wyoming Supreme Court held that the *Belton* rule was designed to serve a "national citizenry" and should not be applied to Wyoming. *Id.* at 489. Rejecting the bright line offered by *Belton*, the court limited the search to areas of the vehicle within the driver's reach, adopting a seamless standard that requires the court to consider all the circumstances of the case. *Id.* ("Is this result a narrower application than *Belton*? We think so.").

cate what factors the court found relevant under Wyoming law for determining the reasonableness of the officer's actions, forcing the court to rely upon Fourth Amendment concepts.[182] For example, the court observed that "Mr. O'Boyle had been detained and subjected to persistent and sustained questioning that unreasonably *expanded the scope of the stop far beyond the speeding offense into a full-blown drug investigation.*"[183] But the notion that a traffic stop has a "scope" that should not be exceeded arises not from the Wyoming Constitution, but from the Fourth Amendment and the *Terry* two-prong test.[184] Furthermore, the opinion stated that the officer lacked "reasonable suspicion of other criminal activities."[185] The term "reasonable suspicion" is borrowed from *Terry* and its progeny and has no direct counterpart in Wyoming law.[186]

The Wyoming Supreme Court's analysis did include one doctrine grounded in Wyoming law when it noted that at "no time during this phase of the detention did [the trooper] ask Mr. O'Boyle for his consent to this type of questioning or detention."[187] The trooper's questions could be seen as an attempt to illicit incriminating information from the defendant, which is discouraged by case law interpreting the Wyoming Constitution.[188] However, without pertinent authority

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[182] *See* O'Boyle v. State, 117 P.3d 401, 410-11 (Wyo. 2005).

[183] *Id.* at 410 (emphasis added).

[184] Terry v. Ohio, 392 U.S. 1, 19-20 (1968) ("And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."). Wyoming law has never defined a traffic detention as having a scope. *See* State v. Young, 281 P. 17 (1929). The concept of "scope" would be useful if applied to a Wyoming traffic stop; however, to do so without expressly adopting the term blurs the distinction between Article 1, Section 4 and the Fourth Amendment. Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 651 (1983) (advising those who make state constitutional arguments to avoid "commonplace federal jurisprudential buzz words" because "[t]hey may very well impede your argument rather than clarify it.").

[185] O'Boyle v. State, 117 P.3d 401, 410 (Wyo. 2005).

[186] The test promulgated by Wyoming courts differed from that of *Terry* in that *Terry* was designed to prevent crime, while the Wyoming test was designed to uncover crimes in progress. *Compare* 4 LAFAVE, *supra* note 3, § 9.2(a), at 282-83 nn.2-4 and accompanying text (noting that under *Terry*, crime *prevention* is the basis for the officer's reasonable belief that a crime is afoot) *and* State v. Young, 281 P. 17, 19 (Wyo. 1929) (quoting State *ex rel.* Hansen, v. District Court, 233 P. 126, 129 (Mont. 1929) ("Applying the test laid down by this court in the cases heretofore cited, were those facts and circumstances such as to cause a reasonable man, acting in good faith, to believe that a crime *was being committed in his presence*?")) (emphasis added).

[187] *O'Boyle*, 117 P.3d at 410-11.

[188] *See supra* notes 67-102 and accompanying text.

or explanation, the doctrine's use in this case provided no basis for understanding the court's decision or for predicting future decisions.[189]

Therefore, the *O'Boyle* traffic-detention rule failed to provide specific guidance to officers regarding what actions are reasonable and unreasonable, and the description of factors that the court considered relevant to determining the reasonableness of a traffic stop provided an insufficient basis for determining the court's future actions.[190] Consequently, the decision fell short of Justice Golden's ideal, as expressed in *Saldana v. State*, that state constitutional decisions provide a "principled . . . body of state constitutional law" that "truly supports the state constitution, as state court judges and lawyers are charged to do."[191]

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[189] *See* Saldana v. State, 846 P.2d 604, 623 (Wyo. 1993) (Golden, J., concurring).

[190] *See id.* Unfortunately, in *Fertig* the court not only acknowledged, but legitimized the use of federal concepts to support Wyoming's search-and-seizure law. Fertig v. State, 2006 WY 148, ¶ 19 ("In *O'Boyle* we tacitly endorsed the two-pronged *Terry* inquiry as providing an appropriate analytical framework for our reasonableness inquiry under Article 1, Section 4."). Furthermore, in *Fertig* the Wyoming Supreme Court relied upon federal law, and it referred to law in other states, but it offered nothing more than a general acknowledgement of Wyoming case law. *Id.* ¶¶ 17-27. While recognizing that the Fourth Amendment is persuasive in Wyoming and should be considered, reliance upon federal law without any consideration of Wyoming cases and history does nothing to create the "principled" body of state law advocated in *Saldana v. State* by Justice Golden and blurs the distinction between federal and state search-and-seizure doctrines. *See* Saldana v. State, 846 P.2d 604 (Wyo. 1993) (Golden, J., concurring). Even though the analysis in *Fertig* never cited Wyoming law, Wyoming cases could have been used to support the result. First, the facts were such that a reasonable person would believe that a traffic violation occurred in the officer's presence, which justified the initial stop. *Id.* ¶ 10 ("Mr. Fertig does not dispute that he was speeding or was clocked traveling 38 mph in a 30 mph zone."). *See* State v. Young, 281 P. 17, 19 (Wyo. 1929) (citing State *ex rel.* Hansen v. District Court, 233 P. 126 (Mont. 1925) (noting that an arrest is not unreasonable when the conditions surrounding the arrest are such to cause a reasonable man to believe a crime was occurring in the officer's presence). Furthermore, the officer observed Fertig's drug paraphernalia by standing outside the vehicle in a place the officer was permitted to be. *Fertig*, 2006 WY 142, ¶ 6. *See* State v. George, 231 P. 686 (Wyo. 1924) (holding that an officer had the power to seize stolen sheep because he was authorized to be on the property). The defendant, with his own actions, exposed the drug paraphernalia to the officer's view through the vehicle's window. *Fertig*, 2006 WY 142, ¶ 6. *See Young*, 281 P. at 19 (citing Sands v. State, 252 P. 72 (Okla. 1927) (noting an arrest is not unreasonable when an officer, standing outside of a vehicle, observes contraband within the vehicle).

[191] *Saldana*, 846 P.2d at 623.

III. ANALYSIS

A. Analysis of the Six "Neutral Non-exclusive Factors"

The question naturally arises, what would a properly grounded traffic-detention rule look like under the Wyoming Constitution? As was established earlier, this question requires an analysis of six factors that the Wyoming Supreme Court considers relevant to deciding whether the state constitution extends rights which differ from those offered by the United States Constitution: 1) the textual language of the provisions; 2) differences in the texts; 3) constitutional history; 4) state law which existed prior to the Wyoming Constitution; 5) structural differences between the two constitutions; and 6) matters of particular state or local concern.[192] Not only must a traffic-detention rule be consistent with these factors, it must fit in with Wyoming's general search-and-seizure doctrine as it has evolved over time.[193] This inquiry will proceed with an analysis of the six factors, asking of each, does the factor support a traffic-detention rule which provides greater or lesser protection than the Fourth Amendment?

1. Text and Textual Differences

An analysis of the first and second *Saldana* factors considers the text of Article 1, Section 4, and any differences between the text of the Wyoming provision and the Fourth Amendment, to determine whether protections at traffic detentions under the Wyoming Constitution should differ from those offered federally.[194] As mentioned already, the text of Article 1, Section 4 is identical to the Fourth Amendment except that the Wyoming provision requires an affidavit.[195] The Fourth Amendment reads as follows,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The text of Article 1, Section 4, reads,

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon prob-

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[192] *Id.* at 622.

[193] O'Boyle v. State, 117 P.3d 401, 410 (Wyo. 2005).

[194] *See supra* note 60 and accompanying text.

[195] State v. Peterson, 194 P. 342, 344-45 (Wyo. 1920).

> able cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

According to the Wyoming Supreme Court, the affidavit requirement creates a higher standard than the Fourth Amendment because the Wyoming document requires a permanent record.[196] But in *Vasquez*, the court rejected arguments that the mere presence of the affidavit requirement demonstrated an intent by the framers to provide greater protections overall, holding that the "slight textual difference demonstrates little."[197] Furthermore, the warrant requirement has minimal importance for traffic detentions because of the exigency that allows warrantless searches of mobile vehicles.[198] Consequently, the differences in the text, in itself, appears to say little regarding whether protections provided under Article 1, Section 4 for travelers during traffic detentions should be greater or lesser than those provided under the Fourth Amendment, other than to indicate that the two provisions are not identical.[199] However, as mentioned earlier, the texts of the two provisions are supported by distinctive rationales.[200] Consequently, even though their texts resemble each other, historically they have been given differing interpretations, and the two provisions have produced unique analytical methods, leading to similar, but not identical results.[201] Therefore, determining whether the first and second *Saldana* factors support greater or lesser protection at traffic detentions depends upon how those analytical methods apply to each case.[202] The only conclusion that can be reached is that the two provisions may be similar, but they are not identical.[203]

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[196] Vasquez v. State, 990 P.2d 476, 483 (Wyo. 1999) (quoting State v. Peterson, 194 P. 342, 346 (1920)).

[197] *Id.* at 485.

[198] *See supra* notes 111-14 and accompanying text.

[199] *See Vasquez*, 990 P.2d at 485 ("[T]he slight textual difference demonstrates little.").

[200] *See supra* notes 68-104 and accompanying text.

[201] *See* J. William J. Brennan Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977) ("[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.").

[202] *Vasquez*, 900 P.2d at 485 ("It is a unique document, the supreme law of our state, and this is sufficient reason to decide that it should be at issue whenever an individual believes a constitutionally guaranteed right has been violated.").

[203] *But see supra* notes 128-31 and accompanying text (noting that Wyoming law requires that holdings under the Wyoming Constitution consider the needs of the nation as a whole and do not appear to support search-and-seizure rules that vary wildly from federal law).

2. *Constitutional and Common-law History*

The Wyoming Supreme Court has held that too little evidence can be found in Wyoming's constitutional history to support a notion that the framers intended to offer greater protections than the Fourth Amendment.[204] During debates, the members of the Wyoming Constitutional Convention referred more frequently to constitutions from other states than to the United States Constitution.[205] For example, the delegates referred to the Colorado Constitution more than twenty times, Pennsylvania seven times, Montana and Illinois five, and Nebraska and Nevada four.[206] In comparison, the United States Constitution was referenced three times.[207] The delegates passed Article 1, Section 4 with very little discussion.[208] Based on this, nothing conclusive can be drawn from the history other than the framers drew upon a variety of sources, as well as the United States Constitution, during the drafting of Article 1, Section 4.[209] For purposes of establishing an independent traffic-detention rule, this history provides no indication that Article 1, Section 4 is derivative of the Fourth Amendment.[210] However, some authorities have indicated that Wyoming Supreme Court judges early in the Twentieth Century, some of whom served as delegates to the 1889 constitutional convention, believed that the Article 1, Section 4 provided greater protections.[211]

3. *Structural Differences*

Because the law that existed during the adoption of the Wyoming Constitution appears to offer little that is relevant to a discussion regarding traffic detentions, this analysis skips the fourth of the six *Saldana* factors and turns to the fifth:

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[204] Vasquez v. State, 990 P.2d 476, 484-85 (Wyo. 1999) (citing KEITER *supra* note 29, at 11-12) ("Although the Wyoming Declaration of Rights was passed 'without rancorous debate,' there is evidence the framers 'endorsed the principle of liberal construction of the Declaration of Rights.'").

[205] KEITER, *supra* note 29, at 4.

[206] *Id.*

[207] *Id.*

[208] *See* JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING (1889) (Cheyenne: Daily Sun, Book and Job Printing Co., 1893).

[209] *See* KEITER, *supra* note 29, at 4.

[210] *See Vasquez*, 990 P.2d 476, 484-85.

[211] *Id.* at 485 (noting that this belief led the Wyoming Supreme Court to adopt the equivalent to *Miranda* rights fifty years before they were adopted in federal court). Delegates to the Wyoming Constitutional Convention who also served on the Wyoming Supreme Court around the turn of the last century included Asbury B. Conway, from September 11, 1890 to December 8, 1897; Charles N. Potter, from 1895 until 1926; Jesse Knight, from 1898 to 1905. MARIE ERWIN, 2 WYOMING BLUE BOOK 200-05 (Virginia Cole Trenholm ed., Wyoming State Archives and Historical Department) (1974).

structural differences between the two constitutions.[212] The Washington Supreme Court—which requires an analysis of the same six factors for issues raised under its state constitution—discerned that state constitutions and the Federal Constitution differ in structure because the two perform different functions.[213] The Federal Constitution is a "grant of power from the states," while the "state's constitution is a limit on the state's power."[214] These structural differences "always" suggest that the state should offer an independent standard of its own.[215] Therefore, the structural differences indicate that a separate analysis under the state constitution is warranted, but they provide no indication as to whether the protections provided under Article 1, Section 4 of the Wyoming Constitution should be greater, lesser, or equal to those under the Fourth Amendment.

4. Issues of Local and State Concern

The Wyoming Supreme Court expressed an issue of local and state concern in *O'Boyle v. State* that, according to the court, differentiates Wyoming and creates a need for a search-and-seizure standard for traffic stops unique to the state.[216] The court observed that the state's strategic location makes it a conduit for drugs headed to other areas of the country.[217] In response, a state and national law-enforcement effort has subjected travelers on the state's highways to aggressive drug interdiction tactics that impact the innocent and the guilty, and according to the court, Wyoming citizens have had rights impinged upon for the benefit of

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[212] *See supra* note 60 and accompanying text. The fourth *Saldana* factor is "pre-existing state law." *See supra* note 60 and accompanying text.

[213] State v. Young, 867 P.2d 593, 596 (Wash. 1994).

[214] *Id.* (citing State v. Smith, 814 P.2d 652, 663 (Wash. 1991) ("[T]he United States Constitution is a grant of limited power authorizing the federal government to exercise only those constitutionally enumerated powers, whereas the state constitution imposes limitations on the otherwise plenary power of the state.")).

[215] *Id.*

[216] O'Boyle v. State, 117 P.3d 401, 411 (Wyo. 2005).

[217] *Id.* The court stated,

> The State of Wyoming is bisected north and south and east and west by two major interstate highways. Interstate 80 provides drug traffickers with easy west to east access across the United States and is a well-known route for transporting drugs. The annual average daily traffic on I-80 near Cheyenne, where Mr. O'Boyle was stopped, is over 20,000 vehicles. Wyoming citizens operate a significant number of these vehicles. Traffic stops along I-80 are a routine part of the national drug interdiction program. Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year.

Id. (quotations and citations omitted).

people living in other areas.[218] The court objected to stops initiated as pretexts to searches for drugs and their "resulting intrusion upon the privacy rights of Wyoming citizens," and it criticized troopers who routinely ask travelers aggressive questions about travel plans without articulable reasons to suspect the travelers carried contraband.[219]

The Wyoming Supreme Court's observations gave no recognition to a countervailing problem that can also be expressed as an issue of state and local concern—not all drugs on Wyoming's highways are headed elsewhere.[220] Some drugs are consumed in Wyoming communities, as evidenced by the increasing number of drug cases in Wyoming courts.[221] Therefore, drug interdiction is not just a national concern, and if Wyoming's traffic detention doctrine is to have any legitimacy, it must articulate how drug interdiction is to be pursued without violating people's rights.[222]

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[218] *Id.* The court stated,

> Our location along a nationally recognized drug trafficking corridor likely results in a disproportionately large percentage of Wyoming's comparatively small population being subjected to what have become routine requests to relinquish their privacy rights by detention, invasive questioning and searches—all without reasonable suspicion of criminal activity other than the offense giving rise to the stop.

Id. The court provided no evidence that drug interdiction has unfairly impacted Wyoming citizens other than its expression that victimization was "likely." *See id.*

[219] *Id.* ("We previously have expressed disapproval of the use of traffic violations as a pretext to conduct narcotics investigations.") (citing Damato v. State, 64 P.3d 700, 706 (Wyo. 2003)).

[220] U.S. Dep't of Justice, Nat'l Drug Intelligence Cntr., Wyoming Drug Threat Assessment, Prod. No. 2002-SO389WY-001 December 2001, at 8, *available at* http://www.usdoj.gov/ndic/pubs07/712/712p.pdf (last visited November 26, 2006). The Department of Justice describes Wyoming as "both a destination and a transit area" for methamphetamine. *Id.* at 15. The primary method of transportation through Wyoming is by private vehicle using interstate highway. *Id.*

[221] *Id.* at 9. Between 1999 and 2000, twenty-three sheriff's departments and forty-three police departments in Wyoming reported the following increases in drug arrests: arrests of female juveniles increased from 106 to 122; arrests of adult females from 254 to 301; arrests of adult males from 1381 to 1479; but arrests of juvenile males decreased from 448 to 362. *Id.* Categories increased in related areas; for example, arrests of adult males for manufacturing and sale of illicit drugs increased from 173 to 195. *Id.*

[222] *See O'Boyle*, 117 P.3d at 422 (Voigt, J. concurring). Justice Voigt chided courts in general for being intellectually dishonest, stating that in many cases traffic stops are really attempts to interdict drugs, and if treated as such, the discussion would be less "phony": "[t]he real question should be, given the major drug problem facing this country and the huge amount of drugs being transported on our nation's highways, what investigatory steps directed at drug interdiction are constitutionally reasonable in a traffic stop situation." *Id.* However, Justice Voigt gave no indication as to what those "reasonable" drug interdiction steps might include. *Id.*

In summary, the relevant *Saldana* factors show that a method for independently analyzing traffic detentions under the Wyoming Constitution is warranted. However, only two of the factors indicate that the protections provided under the Wyoming Constitution might be greater than those provided under the Fourth Amendment, and both these indications appear suspect upon closer examination. For example, a look at the third factor—Wyoming's constitutional history—reveals that Wyoming Supreme Court justices early in the last century believed that the Wyoming Constitution provided greater Bill of Rights-type protections than the United States Constitution; therefore, those early courts required that suspects be given warnings similar to those now demanded by *Miranda*.[223] But in the 1960s, the Warren Court greatly expanded Fourth Amendment protections, so no one can know whether those same justices, if they were available for consultation today, would believe that protections provided by Article 1, Section 4 continue to be greater.[224] Regarding the sixth *Saldana* factor—state and local concern—the Wyoming Supreme Court has held that nationwide drug interdiction has unfairly impacted Wyoming citizens, necessitating a traffic-detention rule that grants additional protections to travelers detained by authorities.[225] The Wyoming Supreme Court's reasoning, however, offers no evidence that Wyoming citizens are impacted any more than citizens of other states, and the court ignores a countervailing state and local concern—Wyoming's very serious drug problem, which creates a strong governmental interest in drug interdiction.[226] Given this, the analysis of the six factors provides no clear indications as to whether protections under Article 1, Section 4 should be greater or lesser than the Fourth Amendment. Therefore, the court must discern the reasonableness of individual traffic detentions using factors identified in the state's cases.

B. Recommended Traffic Detention Rule

The Wyoming Supreme Court remains the true arbiter of the state's constitution, and the court has considerable discretion regarding how Article 1, Section 4 should be interpreted. For this reason, it seems unwise to make specific predictions regarding what the court might do. Therefore, this analysis avoids specific recommendations and instead looks to define what is consistent with Wyoming law as it currently stands, considering the six factors the court indicated were relevant in *Saldana*.[227] This comment also notes that Wyoming case law continues to hold

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[223] *See supra* note 211 and accompanying text (referring to Miranda v. Arizona, 384 U.S. 436 (1966)).

[224] *See supra* notes 37-42 and accompanying text.

[225] *See supra* notes 216-19 and accompanying text.

[226] *See supra* notes 220-22 and accompanying text.

[227] *See supra* notes 51-66 and accompanying text.

that the Fourth Amendment is persuasive with regard to Article 1, Section 4, and conceivably, the court could do as other state courts have done and incorporate portions of federal law into Wyoming's traffic-detention rule.[228]

Most of the factors mentioned in this analysis have not been recognized by the Wyoming Supreme Court since it announced in *Vasquez v. State* its intention to consider search-and-seizure cases under the Wyoming Constitution.[229] Therefore, this analysis assumes that though the pre-*Mapp* cases appear to be good law, their precedential value remains questionable until their holdings are recognized by the current court.[230]

A typical traffic detention occurs when an officer pulls over a traveler for a minor traffic offense. The detention lasts from the moment of the stop until the officer returns the traveler's documents and says that the traveler is free to go.[231] Until the documents are returned, the traveler cannot leave, and therefore, is in the officer's custody.[232] According to Wyoming cases, the following factors are relevant to determining the reasonableness of the stop:

The reasonableness of the initial stop and the continued reasonableness of the officer's actions. In Wyoming a traffic detention must be consistent with the state's general search-and-seizure standard as articulated in *State v. Peterson*.[233] That standard holds that "only unreasonable searches are forbidden, and whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case."[234] Hence, Wyoming cases indicate that the officer's actions must be reasonable in their entirety, and that any information that comes to light because of an officer's unreasonableness cannot be used as evidence.[235] The cases also indicate that an investigation must be initiated in "good faith."[236] The require-

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[228] Saldana v. State, 846 P.2d 604, 611 (Wyo. 1993) ("Even though the federal law establishes minimum requirements for individual protection and does not mandate any maximum criteria as to the degree of protection afforded an individual under state law, federal interpretations of the Fourth Amendment are regarded as persuasive . . . .").

[229] *See supra* notes 132-37.

[230] *See supra* notes 132-37.

[231] *See supra* notes 2-5 and accompanying text.

[232] *See supra* notes 2-5 and accompanying text.

[233] State v. Peterson, 194 P. 342, 345 (Wyo. 1920); Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999); O'Boyle v. State, 117 P.3d 401, 409-10 (Wyo. 2005).

[234] *O'Boyle*, 117 P.3d at 409-10.

[235] State v. Munger, 4 P.2d 1094, 1095 (Wyo. 1931). *See supra* notes 120-27.

[236] State v. Young, 281 P. 17, 19 (Wyo. 1929) (quoting State *ex rel.* Hansen v. District Court, 233 P. 126, 129 (Mont. 1925)).

ment that the officer act in good-faith appears to be a higher standard than the Fourth Amendment provides in that the requirement seems to weigh the officer's intentions, which under the Fourth Amendment is not considered material.[237] Although how much higher remains unclear.[238] In any event, the officer must have a valid reason for initiating the traffic stop, and all of the officer's actions must be reasonable in the light of the circumstances.[239]

Whether the suspect was compelled to produce evidence. The close connection between Section 4 and Section 11 of Article 1 means the court is likely to discourage any action by authorities that appears to compel self-incrimination, which Wyoming law interprets very broadly.[240] For example, Wyoming's definition of self-incrimination includes the unreasonable seizure of personal property from a suspect's possession for use as evidence.[241] Consequently, Wyoming's case law requires close scrutiny of any questioning by the officer about travel plans, as well as a close examination of efforts to obtain consent to search a vehicle.[242] Any seizure of personal property from a vehicle for use as evidence would seem to risk violating the prohibition against compelled self-incrimination, unless the property is contraband or the fruit of a crime.[243]

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[237] *See* Scott v. United States, 436 U.S. 128, 138 (1978) (noting that an officer's state of mind cannot invalidate "an action taken [by an officer] as long as the circumstances, viewed objectively, justify that action").

[238] *See* O'Boyle, 117 P.3d at 411 (citing Damato v. State, 64 P.3d 700 (Wyo. 2003) ("In *Damato*, we joined in another state court's expression of concern about sanctioning conduct 'where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.'")). Based upon the reasoning of *Damato*, an officer's intentions must figure into the analysis somehow; however, the Wyoming Supreme Court held in *Fertig* that a reasonable traffic stop cannot be made unreasonable because an officer's intentions were to investigate another matter. Fertig v. State, 2006 WY 148, ¶ 27 (noting that efforts to enforce traffic laws are objectively reasonable because they are based on violations of the law). For an analysis of the stop in *Fertig* using Wyoming case law, *see supra* note 190. The provision that the officer act in good faith would certainly prohibit the officer from *misleading* a defendant, and thereby obtaining evidence, because that would compel the defendant to provide self-incriminating evidence. Wiggin v. State, 206 P. 373, 377-78 (Wyo. 1922) ("A search pursuant to an admission gained unlawfully by stealth, force or coercion is illegal. . . .").

[239] *See supra* notes 111-14 and accompanying text.

[240] *See supra* notes 68-102 and accompanying text.

[241] *See supra* notes 73-76 and accompanying text. For an analysis of the related Fourth Amendment doctrine, see *supra* notes 77-84 and accompanying text.

[242] O'Boyle, 117 P.3d at 411-15.

[243] *See supra* notes 68-102.

However, the cases are not so restrictive as to deny officers of all avenues of investigation.[244] For example, the cases allow officers to ask about contraband, provided that the questioning is not coercive.[245] Also, the protections of personal property do not appear to extend to property that is stolen, contraband or otherwise illegal.[246] And an officer who reasonably believes a felony is in progress can arrest the suspect without a warrant.[247] Therefore, during a traffic detention, an officer who has sufficient evidence can make arrests and confiscate evidence, provided that the officer's actions are reasonable.

Sufficiency of the evidence. Once in contact with a suspect, an officer can act on information indicating a crime is underway provided that the officer's actions are "in good faith," and the evidence is such that "a reasonable man, acting in good faith, [would] believe that a crime was being committed in his presence."[248]

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[244] Wiggin v. State, 206 P. 373, 376 (Wyo. 1922) ("The law is well settled that an officer has the right to search the party arrested and take from his person and from his possession property reasonably believed to be connected with the crime, and the fruits, means or evidences thereof, and he may take and hold them to be disposed of as the court directs.").

[245] *Id.* at 378. In dicta, the court stated that an officer should be able to ask a defendant in custody about stolen property that the officer reasonably believed to be in the suspect's possession, provided the questioning was not coercive. *Id. But see id.* at 377-78 ("A search made pursuant to an admission gained unlawfully by stealth, force or coercion is illegal, and it has been held that coercion is implied when the officer displays his badge or shows an illegal warrant and thus obtains the acquiescence for admission.") *and* Maki v. State, 112 P. 334, 336 (Wyo. 1911) ("The person so under arrest and charged . . . and who is without counsel is entitled to be informed of his right to decline to be a witness, or to answer any question and properly cautioned as essential elements in determining the voluntary character of his statements then and there made.").

[246] *See* State v. George, 231 P. 683, 689 (Wyo. 1924) (holding that an officer may confiscate contraband upon the arrest of the suspect).

[247] *Id.* at 690 ("Where a felony has been committed, . . . a peace officer may arrest without a warrant, one whom he has reasonable or probable grounds to suspect of having committed the felony."). The case law is more limited regarding the arrest of misdemeanors, for which the power to arrest without a warrant is limited to instances where the offense occurred in the presence of an officer. *Id.* at 689-90.

[248] State v. Young, 281 P. 17, 19 (Wyo. 1929) (quoting State *ex rel.* Hansen v. District Court, 233 P. 126, 129 (Mont. 1925)). The language of *Hansen*, quoted in *Young*, suggests an objective test based upon a hypothetical reasonable observer. *Id.* ("[W]ere those facts and circumstances such as to cause a *reasonable man*, acting in good faith, to believe that a crime was being committed in his presence?") (emphasis added). Noting that the test evokes the *reasonable man*, rather than the *reasonable officer*, the Wyoming Supreme Court may need to resolve what role officer training plays in the application of this test, considering that a reasonable man, lacking a reasonable officer's training and experience, might reach a different conclusion when confronted with identical information. *See* 4 LAFAVE, *supra* note 3, § 9.5(e)-(f) (indicating that in some circumstances the Fourth Amendment allows investigative detentions when officer training indicates that the suspect fits a drug profile or when a suspect acts suspiciously).

To gather this evidence, all of the officer's senses can come into play, including the sense of smell.[249] As an officer reasonably acquires incriminating information, the investigation can expand.[250] For example, an officer acted reasonably when he approached a car after noticing it was parked in an unusual manner, who then smelled whiskey through a window, looked—first through the window, then through an open door—and saw a jug of whiskey, and then examined the jug and seized it.[251] Given this, an officer involved in a traffic detention who observes an odor or something to cause him to reasonably believe a crime is underway, can act on those beliefs.

Naturally, the factors mentioned in this comment create a mere skeleton of a complete traffic-detention rule and should be developed with additional research and future court decisions. Also, nothing prevents the court from incorporating portions of the federal traffic-detention doctrine into Wyoming law, as other courts have done, or from redefining terms already in existence within state law. If, however, the Wyoming Supreme Court chooses to incorporate federal doctrine, it should do so expressly, and clearly describe how the amended doctrine is to be applied, thereby ensuring that it meets its goal of creating a "principled" traffic-detention doctrine based on Wyoming legal concepts.[252]

IV. CONCLUSION

The current traffic detention doctrine under the Wyoming Constitution as articulated in *O'Boyle* is insufficient. It provides no practical guidance to law enforcement, an insufficient explanation of the factors that the court finds relevant, and no basis for predicting future court decisions. Therefore, the state rule is a poor substitute for the federal traffic-detention rule under *Terry v. Ohio*, which gives not only ample guidance to law enforcement, but a basis for predicting future court decisions. Furthermore, the concepts employed by the court to explain the unreasonableness of certain actions by the officer in *O'Boyle* cannot be understood without referring to federal case law. Therefore, that portion of the *O'Boyle* decision fails to meet the Wyoming Supreme Court's stated goal of creating a "principled" basis for decisions based upon the state constitution. This

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[249] *Young*, 281 P. at 19 (quoting State v. Loftis, 292 S.W. 29 (Mo. 1927) (noting that it was reasonable for an officer to discover whiskey kegs by looking into a vehicle after being attracted by the odor of whiskey)).

[250] *See id.*

[251] *See id.* at 20 (citing State v. Connor, 300 S.W. 685) (Mo. 1927) ("Under such circumstances, no search warrant was necessary, because the deputy sheriff had before him ample facts and information upon which to base, not only a conclusion of probable cause, but a well-founded belief that the car contained contraband goods and that a felony had been committed.").

[252] Saldana v. State, 846 P.2d 604, 623 (Golden, J., concurring).

insufficient traffic-detention rule is inconsistent with Wyoming case law and the Wyoming Constitution, which contains ample basis for a sufficient traffic-detention rule. The Wyoming Supreme Court should pursue its stated goal and create a principled traffic-detention rule based upon Wyoming law.