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Bruce Ledewitz
Duquesne University, ledewitz@duq.edu

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Bruce Ledewitz
Professor of Law

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THE ROLE OF LOWER STATE COURTS IN ADAPTING
STATE LAW TO CHANGED FEDERAL
INTERPRETATIONS

Bruce Ledewitz*

It is by now well accepted that when the United States Supreme Court
changes its view on an issue, state supreme courts1 are generally free to retain
the superseded federal rule as a matter of state constitutional law. A great
deal of advice in the literature directed to state supreme courts suggests how
the decision to follow or not to follow the new federal precedent should be
made.2 Ultimately, the state supreme court has authority to make this decision
by whatever methodology, or lack thereof, the court chooses.

But what does—or should—happen before the state supreme court decides
whether to follow the new federal precedent? Cases do not, after all, begin
in a state’s highest court. They begin in trial courts, proceed sometimes
to intermediate appellate courts, and ultimately end up in the state’s highest
court.3

This paper examines the question of what lower state courts should do
when confronted with changed federal precedent before the state’s highest
court makes its ruling. Part I presents this context and assesses some of the
options available to lower courts. Part II examines an example of such a
situation as it unfolded when Pennsylvania’s Superior Court decided the impact
of California v. Hodari D.4 on Pennsylvania case law. The Pennsylvania
case study is instructive because although it is generally accepted that state
constitutional law can properly diverge from federal constitutional law, the
Pennsylvania experience shows how difficult it sometimes can be to characterize
state cases decided under a previous federal standard.

* Professor of Law, Duquesne University School of Law.
1. Throughout this paper, I refer to the highest state court deciding an issue as the “state
supreme court.” This practice, strictly speaking, is inaccurate. In New York, for example, the
highest court is the Court of Appeals of New York. Also, the highest court deciding an issue
might be an intermediate appellate court. Nevertheless, the reference is a handy tool.
2. See generally Ronald K. L. Collins, Reliance on State Constitutions: Away From a Restrainted
Approach, 9 HASTINGS CONST. L.Q. 1 (1981). For a particular example of this situation,
see Professor Jennifer Frensen’s short description of the reaction to Employment Division v
3. However, if the state supreme court has discretion not to hear cases, the decision of the
state’s intermediate court might control indefinitely.
I. General Considerations

When a state's highest court applies federal constitutional analysis to cases in a particular area—be it the test for a valid search warrant, the protection awarded commercial speech, or any other constitutional issue—there are four approaches the court could take with regard to potentially applicable state constitutional provisions. First, the state supreme court could at any point acknowledge the state constitution and expressly adopt the prevailing federal standard as a matter of state constitutional law. Alternatively, the state court could refer—more or less in passing—to the state provision while applying the federal standard, thus ambiguously suggesting that the federal standard is the same as the state standard. As a third possibility, the state court might be silent about the state constitution altogether. Finally, a state court might apply federal law even though it may disagree with the federal standard and would apply a different standard under the state constitution.

In the first situation, a subsequent change in federal law presumably would have no effect in a trial or intermediate level state court. For example, if a state's highest court announced that Miranda v. Arizona rested on state constitutional authority, as well as on federal constitutional authority, subsequent dramatic changes by the United States Supreme Court in interpreting or overruling Miranda would not affect outcomes or reasoning in the lower state courts. Lower courts would retain Miranda as it had been understood previously.

Similarly, in the fourth situation, the state supreme court would have, for all practical purposes, already ruled on the state law issue; the court would have said how and why the standard under the state constitution differs from the federal standard. If the new federal standard were consistent with the standard the state supreme court already has endorsed, the lower state courts would be bound to apply the new federal rule.

The second and third situations are more problematic. When the state supreme court ambiguously refers to state law, it might not be clear to lower courts whether the supreme court intended to establish an independent state judiciary. The decision facing a lower court in such a situation would be

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5. The term "potentially applicable state constitutional provisions" is superior to terms such as "analogous," "related," or "parallel," which imply a subordinate status for the state constitution.


7. Obviously, I am oversimplifying here. If the United States Supreme Court overruled Miranda, this description would apply. If, however, the Court mildly reinterpreted Miranda, as is more likely, there might be serious controversy about "which" Miranda remained binding state law.

8. As Professor Barry Latzer has written, nothing prevents a state supreme court from interpreting a state standard as less protective of individual rights than existing federal law. See Barry Latzer, Four Half-Truths About State Constitutional Law, 65 Temp. L. Rev. 1123, 1125-30 (1993). In such a situation, federal law will control.
similar to that which confronted the United States Supreme Court in Michigan v. Long.9

In Long, the Court set out to resolve once and for all the issue of adequate and independent state grounds. That doctrine, roughly stated, is that the Court lacks jurisdiction to review a case from a state court when the decision in the case rests on state law grounds that are both adequate to sustain the judgment and independent of federal law. In such cases, any Supreme Court action would have advisory opinion status because of the Court’s inability to review issues of state law.10

In Long, all of the Justices agreed with this account and its implications.11 The issue that divided the Justices was what the Court should do when the reliance on state law in a state court opinion is not clearly independent of federal law. The Michigan Supreme Court held that the search in Long violated article I, section 11 of the Michigan Constitution, as well as the Fourth Amendment. However, the opinion largely relied on Terry v. Ohio12 and other sources of federal law.13 Thus, the Michigan Supreme Court decision was not clearly independent of federal law.

For the majority, the issue in Long was whether the state law holding was genuine or, instead, whether the Michigan court was simply suggesting that any violation of the Fourth Amendment would amount to a violation of section 11 by definition. Of course, if the latter were the case, a contrary holding by the United States Supreme Court on the Fourth Amendment issue would likely lead, on remand, to a change in the state law holding as well. In that scenario, a United States Supreme Court decision on the federal law issue would not be an advisory opinion.

Dissenting in Long, Justice Stevens offered a different approach to the independent state grounds analysis. Unlike the majority, if a state court does not clearly establish its state law holding independent of federal law, Justice Stevens would presume that the state law holding is independent.14 Con-

10. This account is set forth in Justice O’Connor’s majority opinion in Long itself. Id. at 1041-42. Professor Latzer argues that the adequate and independent state ground doctrine is premised on a constitutional principle, not on purely prudential reasons. Latzer, supra note 8, at 112-51. Though I find Professor Latzer’s account unconvincing, his view does not affect the issue I am dealing with here—the obligation of lower state court judges. Clearly, they are bound to apply a state supreme court’s view on any state law issue.
11. Justice Stevens wrote in his dissent that these premises are a ‘common ground’ for the Court. Only Justice Stevens dissented on the adequate and independent state ground issue. Long, 463 U.S. at 1065 (Stevens, J., dissenting). Justice Blackmun seemed to agree with Justice Stevens but did not dissent. Id. at 1054 (Blackmun, J., concurring). Justices Brennan and Marshall dissented on a substantive Fourth Amendment issue. Id. at 1054 (Brennan and Marshall, J., dissenting).
13. See Long, 463 U.S. at 1036-38 (Michigan Supreme Court only referred to state constitution twice).
14. Id. at 1050-57.
versely, under such circumstances, the majority would presume that the holding is not independent of federal law.\(^{15}\)

A lower state court facing a changed United States Supreme Court interpretation of federal law sometimes is in a position analogous to that of the United States Supreme Court in \textit{Long}. If, in the past, the state supreme court has merely referred to state law grounds within a line of federally based decisions (as in the second situation discussed above), the lower court might agree with the \textit{Long} majority that the state law comments were merely supplemental to the federal holdings. There would thus be a temptation to discount the prior state law references.

Though understandable, a lower state court should resist this temptation. A lower state court should indulge Justice Stevens' presumption rather than that of Justice O'Connor. In other words, a lower state court should have formal regard for any discussion of state law by its state supreme court. If the state supreme court has said that the state constitution requires a certain result, lower state courts should continue to apply that state precedent in the face of changed federal law, no matter how questionable the independence of that state law holding may be.

Lower state courts should always presume an independent state ground because Justice O'Connor's approach, though perhaps justifiable in terms of the United States Supreme Court's obligation to oversee the development of federal law, is an insult to state judges. Justice O'Connor presumes that when state judges write that a particular outcome is premised on state law, as in \textit{Long}, the judges often do not mean what they say. Rather, these state judges really mean that the outcome of the case is premised on federal law alone. Accordingly, Justice O'Connor expects a change in the interpretation of federal law to change the state law outcome. Justice O'Connor may well be correct, empirically, that such confusion often exists in state supreme courts. But while an affront to the competence of state supreme court judges may be acceptable when it comes from a United States Supreme Court Justice, there is no reason for lower state judges to indulge a presumption that their highest state court does not mean what it says.

The above discussion leaves only the third situation noted above—that the state supreme court has been silent about the state constitution when applying federal case law to particular issues before the state courts. In that situation, what should lower state courts do when federal law changes?

One obvious practice would be for the lower state court to utilize its own best judgment as to whether it should interpret the state constitution to follow the new federal rule. In some states, such an examination is simply an instance of first-impression state constitutional interpretation. In other states, more formal methods have been specified for such interpretation. For example, the Pennsylvania Supreme Court has specified four factors that lower state courts can, or perhaps must, apply where the state supreme court has remained silent on a constitutional provision and applied federal law.

\(^{15}\) \textit{Long}, 463 U.S. at 1040-41.
These factors are: "an examination of the text of the constitutional article, the history of its application, the jurisprudence of the question in state, and the policy considerations behind the constitutional provision." 16 In either event, the state supreme court's silence on the state constitutional issue might permit the lower state court to use its own best judgment about following the new federal rule.

The above discussion inevitably raises the question: what does judicial "silence" mean in this context? If a state supreme court has applied a federal rule for some number of years, surely something can be said about how the state supreme court has received that rule. Has there been judicial criticism of the rule? Has the rule proved easy to follow? Are the police or other relevant factors used to it? To some extent, these factors could be considered in deciding whether to adopt the new federal rule as a matter of first impression. But these considerations also point to the unexpected depth that the simple description, "silent," fails to express.

An example of judicial "silence" that spoke occurred in Pennsylvania in the line of cases that culminated in Commonwealth v. Gray. 17 From 1964 to 1983, Pennsylvania was bound to apply Aguilar v. Texas 18 and, later, Spinelli v. United States 19 to analyze probable cause for search warrants based on information received from confidential informants. Then, in 1983, the United States Supreme Court adopted the "totality of the circumstances" standard in Illinois v. Gates. 20 When the question arose whether Pennsylvania would follow Gates or would, instead, retain Aguilar-Spinelli under the Pennsylvania Constitution, the Gray court decided to follow Gates.

One year before Gray was decided, in Commonwealth v. Chandler, 21 the Pennsylvania Supreme Court had referred to the Gates approach as "more practical" than Aguilar-Spinelli. 22 Although this dicta did not determine the state constitutional issue decided in Gray, 23 the court's comment foreshadowed its ultimate decision. Chandler indicated that the Pennsylvania Supreme Court was leaning towards adopting Gates. A lower court addressing that question after Chandler would undoubtedly have followed Gates even though the issue was formally open. 24

22. Id. at 853.
23. Because it was not a holding on the state law issue, this judicial criticism does not fall within the fourth situation outlined above. This is "silence," but obviously is very close to a holding on the state law issue.
The Chandler comment was a dramatic instance of "silence" that nonetheless indicated a state supreme court's likely holding in regard to a new federal standard. Recently, the Pennsylvania Superior Court faced a much less expressive silence in deciding whether to follow California v. Hodari D. That experience will help flesh out the general discussion of silence on state law issues set out above.

II. Superior Court Confronts Hodari D.

In Hodari D., the United States Supreme Court considered whether a suspect was "seized" for purposes of the Fourth Amendment. In Hodari D., the suspect fled at the approach of an unmarked police car, at which point an identified police officer chased him. When the officer was almost upon him, the suspect threw away a small packet that turned out to be crack cocaine. The California Court of Appeal suppressed the drugs, holding that the police chase constituted a seizure of Hodari D. Since this seizure was without reasonable suspicion, the court suppressed the evidence as the fruit of an illegal seizure.

In his majority opinion, Justice Scalia reversed the state court decision, holding that Hodari D. had not been seized at the time he dropped the package, and therefore, the drugs could be admitted into evidence as abandoned property. The dropped package then could serve as justification for the actual seizure that occurred moments later. The Court held that a suspect's flight from a show of police authority does not constitute a seizure. A seizure for Fourth Amendment purposes requires the "laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful" or "submission to the assertion of authority." Running away after being told to stop is not enough to establish a seizure.

Justice Scalia did not acknowledge that Hodari D. changed the federal standard of seizure at all. Indeed, as Justice Stevens stated in his dissent, Justice Scalia's opinion treated the definition of the term "seizure" as having been an "open question" until Hodari D. was decided. Specifically, Justice Scalia found that a seemingly contrary definition of seizure in United States v. Mendenhall was a "necessary, but not a sufficient condition for seizure." Conversely, the dissent treated Mendenhall as the previously prevailing test of "seizure."

25. 113 S. Ct. 1547 (1993).
26. Id. at 1549.
27. Id. at 1550-51 (emphasis in original).
28. Id. at 1551 n.3.
29. Id. at 1556 (Stevens, J., dissenting).
31. Hodari D., 113 S. Ct. at 1551 (emphasis in original). The Mendenhall test states: "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the arrest, a reasonable person would have believed that he was not free to leave." Mendenhall, 446 U.S. at 554.
In Pennsylvania, the first post-\textit{Hodari D.} seizure case to consider whether to adopt the \textit{Hodari D.} seizure standard was \textit{Commonwealth v. Peterfield}.\textsuperscript{32} In \textit{Peterfield}, a split-three-judge panel of the superior court upheld the admission in evidence of a gun that had been dropped by the defendant after police unsuccessfully ordered the defendant “to stop.”\textsuperscript{33} Judge Kelly wrote the lead opinion; Judge McEwen concurred in the result; and Judge Ford Elliott dissented.

Because \textit{Peterfield} was factually similar to \textit{Hodari D.}, Judges Kelly and Ford Elliott found \textit{Hodari D.} controlling, if applicable. They differed on whether \textit{Hodari D.} should be adopted as the standard for seizure under article I, section 8 of the Pennsylvania Constitution.\textsuperscript{34} For Judge Kelly, the Pennsylvania constitutional issue was a matter of first impression. Although there were prior Pennsylvania seizure cases, all such cases identified by Judge Kelly rested exclusively on federal standards. None of these cases could be relied upon by the defendant on the state constitutional issue no matter how much the facts underlying their holdings might conflict with the facts and holding in \textit{Hodari D.}. Because these cases had been based on federal law, to the extent that their holdings conflict with the United States Supreme Court’s most recent definition of the term “seizure,” they must be seen as having been overruled, \textit{sub silentio}, by \textit{California v. Hodari D.}, . . . as the United States Supreme Court is always the final arbiter of the United States Constitution.\textsuperscript{35}

By declaring that precedent was overruled \textit{sub silentio}, Judge Kelly was able to treat the seizure issue as open when, under existing state precedent, the issue was actually clear. If prior Pennsylvania case law applied, \textit{Peterfield} had been seized.\textsuperscript{36} Judge Kelly ultimately ruled that article I, section 8 would continue to follow federal law, as it had in the past, since no proper argument to the contrary had been presented.\textsuperscript{37}

In contrast, Judge Ford Elliott pointed out in her dissent that the state constitutional issue could be addressed because there had been no reason for

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\textsuperscript{33} Id. at 541.
\textsuperscript{34} Article I, § 8 of the Pennsylvania Constitution provides as follows: The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.
\textsuperscript{35} Peterfield, 609 A.2d at 543.
\textsuperscript{36} Judge Kelly did not take issue with Judge Ford Elliott’s conclusion that under Commonwealth v. Jeffries, 311 A.2d 914 (Pa. 1973), property abandoned because of an unlawful act by the police is not abandoned, and under Commonwealth v. Jones, 378 A.2d 835 (Pa. 1977), cert. denied, 435 U.S. 947 (1978), a police order to stop is a seizure, which is unlawful if unjustified.
\textsuperscript{37} Judge Kelly faulted the defendant for failing to anticipate \textit{Hodari D.} and to brief the issue of its adoption under the standards of \textit{Commonwealth v. Edmunds}, even though \textit{Hodari D.} was decided only three weeks before oral argument and one month after the parties filed their briefs. \textit{Peterfield}, 609 A.2d at 544-45. It does not appear that the court gave defense counsel an opportunity to rebrief the case in light of \textit{Hodari D}.
either side to consider a new seizure standard; no one knew Hodari D. would be decided. Once Judge Ford Elliott disposed of the waiver issue, she opined that when federal standards become less protective of individual rights, state law that previously had followed the federal standard should not be interpreted automatically to continue to follow federal standards. Instead, when federal law changes, there must be an independent decision whether to adopt the new federal standard. Even in the case of a previous interpretation of a state constitutional provision as "co-extensive" with federal law, the change in the federal standard must be looked at anew.38

Judge Ford Elliott proposed a rule for lower state courts to follow when the Pennsylvania Supreme Court has not addressed changed federal law. She proposed that "until a change in federal constitutional requirements is ratified by the Pennsylvania Supreme Court, a lower Pennsylvania court must treat an analogous state constitutional claim as a matter of independent constitutional interpretation, no matter how closely federal authority has been followed in the past."39 This rule would not mean that the lower court must reject the new federal standard. When Judge Ford Elliott referred to "independent interpretation"40 and "independent analysis,"41 she clearly meant that the issue could go either way. Judge Ford Elliott's proposed rule only eliminates a presumption that the new federal standard should be followed.

In Commonwealth v. Carroll,42 Judge Cavanaugh, joined by Judges Hudock and Tarnia, accused Judge Ford Elliott of proposing that when federal law changes "an intermediate appellate court must await the Pennsylvania Supreme Court's ratification of the change and must automatically assume that our Commonwealth's Constitution affords the more expansive interpretation."43 In other words, the Carroll court interpreted Judge Ford Elliott's proposal to mean that the new federal standard must be rejected until the state supreme court rules otherwise. However, that is clearly not what Judge Ford Elliott wrote. Independent interpretation and analysis are not the same as an "independent outcome."

Although Judge Cavanaugh inaccurately characterized what Judge Ford Elliott wrote, he correctly described what Judge Ford Elliott actually did in her dissent in Peterfield. Despite the reference to Edmunds, Judge Ford Elliott did not apply independent interpretation or analysis. Instead, as Judge Cavanaugh complained, she seemed to treat the new federal standard, Hodari D., as foreclosed by prior state case law.

38. This explains Judge Ford Elliott's reference to Edmunds as authoritative at the beginning of her opinion. Peterfield, 609 A.2d at 551 (Ford Elliott, J., dissenting).
39. Id. at 552 (Ford Elliott, J., dissenting) (quoting Bruce Ledewitz, The State Constitution Assumes New Importance, Pa. L.J. Rep., Nov. 5, 1984, at 10.) Although this is a misquotation of the original source, as pointed out by Judge Cavanaugh in his concurrence in Commonwealth v. Carroll, 628 A.2d 398, 406 (Pa. Super. Ct. 1993), it is the rule Judge Ford Elliott wishes to adopt.
40. Peterfield, 609 A.2d at 552 (Ford Elliott, J., dissenting).
41. Id. at 546 (Ford Elliott, J., dissenting).
43. Id. at 406.
Although not explained in the dissent, the apparent reason why the superior court was not free, in Judge Ford Elliott's view, to adopt Hodari D. lay in the relationship of Hodari D. to prior Pennsylvania case law and the proper role of a lower state court in interpreting that law. Judge Ford Elliott's starting point was that Hodari D. represents "a radical departure from the law of this Commonwealth on forced abandonment." By "law of this Commonwealth," the judge did not mean holdings premised on state law, but simply holdings by state courts, especially the state supreme court, on the forced abandonment/seizure issue. These cases, which were contrary to Hodari D., and which Judge Kelly held had been overruled sub silentio, remained binding precedent for Judge Ford Elliott. An intermediate appellate court "may not" ignore a "long line of precedent in this jurisdiction." Judge Ford Elliott did not contest that this "long line of precedent" represented Fourth Amendment interpretation when Pennsylvania courts decided them. Nevertheless, these cases still defined "seizure" for state law purposes. Thus, Judge Ford Elliott was not actually deciding whether Hodari D. should be adopted as the proper test for seizure under the state constitution. Instead, she simply continued to apply existing state court precedent on the seizure issue.

In Peterfield, two approaches to a changed federal standard emerged. Judge Kelly's approach relied on waiver of the state constitutional issue. Here, federal law controls merely because it has always controlled in the past. The second view, which Judge Ford Elliott actually practiced, was that lower state courts should continue to apply existing state precedent, even if premised on federal law, when federal standards change.

The Pennsylvania Superior Court used two different approaches in the new case in which it considered the state law seizure issue. In Commonwealth v. Carroll, a nine-judge panel, finding the matter still open, considered whether to adopt the definition of seizure formulated in Hodari D. for purposes of the state constitution. Because the facts of Carroll were sufficiently similar to those in Hodari D. and Peterfield, all nine judges agreed that Hodari D. would control the
case if applicable under Pennsylvania law. In *Carroll*, a man was approached by a police officer who lacked probable cause, articulable suspicion, or any reason to approach him. After *Carroll* fled into an alley, the officer pursued him. In the alley, *Carroll* stumbled and dropped two packets of drugs. Obviously, if the pursuit had been a seizure, the drugs would have to be suppressed. However, under *Hodari D.*, the pursuit would not constitute a seizure and the drugs would be admitted in evidence as abandoned property.

The superior court split 5-4 over whether to adopt *Hodari D.* Judge Cirillo, writing for the five-judge majority, treated the seizure issue as an occasion for straightforward application of *Commonwealth v. Edmunds*’ four-part test for interpreting the state constitution. For the majority, *Hodari D.* was a matter of first impression. In applying the first *Edmunds* factor, it appeared that the text of the Pennsylvania Constitution did not affect the seizure issue. Of more interest for Judge Cirillo was the second consideration, the history of article I, section 8’s application in the state courts. Here, somewhat akin to Judge Kelly’s opinion in *Peterfield*, Judge Cirillo pointed out that even though the approaches of past state cases were plainly inconsistent with that of *Hodari D.*, the cases were all premised on the Fourth Amendment. Thus, these cases did not “prevent[ ]” the court from adopting *Hodari D.* In applying the third prong of the *Edmunds* test, Judge Cirillo noted that twenty-three states adopted *Hodari D.*, while five states chose not to accept it. On the last factor, Judge Cirillo defended *Hodari D.*’s definition of seizures because the decision left the matter in the hands of the citizen, who needs only end an encounter with the police if he or she wishes to do so. If, upon exercising that right, the citizen is restrained, then a seizure has occurred.

The four *Edmunds* factors were also present in Judge Johnson’s dissenting opinion. Like Judge Cirillo, Judge Johnson did not place much reliance on the first prong of the test. Furthermore, Judge Johnson characterized the acceptance of *Hodari D.* in other states quite differently than did the majority opinion. On the policy issue, the dissent predicted an unreasonable ex-

50. Id. at 398.
51. See supra note 16 and accompanying text.
52. The text of the two provisions is 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.

U.S. Const. amend. IV.
The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

53. *Carroll*, 628 A.2d at 402.
panson of police authority to confront citizens under the Hodari D. standard.54

Under the second prong of the Edmunds test—the history of the provision’s application—the dissenting opinion took a fully divergent position from that of Judge Cirillo. Judge Johnson wrote in his opinion that Hodari D. is inconsistent with “settled Pennsylvania precedent”55 and that adopting it “would be to overrule all existing precedent on the law of seizure in Pennsylvania.”56

Judge Johnson must have meant “to overrule” in a figurative sense. Obviously, an intermediate court like the Pennsylvania Superior Court cannot overrule precedent set by the state supreme court. Either as stated by Judge Kelly in Peterfield,57 such state cases were overruled sub silentio when the federal standard changed, or these cases were still binding on the Carroll court.

Since Judge Johnson regarded this state case law as still valid, his application of the Edmunds factors, while undertaken in good faith, ultimately had to lead to rejection of the Hodari D. standard. Prior state precedent always controls the outcome in a lower state court. If a lower court judge finds a state supreme court opinion that clearly decides an issue, the judge must apply that decision. Thus, both Judge Johnson and, earlier, Judge Ford Elliott ended up applying the existing state case law, which, as all the judges conceded, is inconsistent with Hodari D.

Judge Cavanaugh’s concurring opinion in Carroll also purported to apply the Edmunds factors to the Hodari D. seizure issue. But, like Judge Johnson, Judge Cavanaugh’s assumptions precluded full application of the four factors. Judge Cavanaugh adopted the pre-Edmunds language of Commonwealth v. Gray58 that there should be a “compelling reason”59 before a court interprets the Pennsylvania Constitution to provide greater protection than does the United States Constitution. The defendant in Carroll failed to satisfy the “heavy burden of persuasion in convincing a court that our Commonwealth’s Constitution differs from the Federal Constitution.”60

As a general proposition, these assertions by Judge Cavanaugh are plainly inconsistent with Edmunds, which does not even count federal case law as one of the four primary factors to consider in interpreting the state constitution. One could almost say that the very purpose of Edmunds was to move the judiciary away from this sort of ‘aping’ of federal law by state judges.

54. See id. at 498-18 (Johnson, J., dissenting) (state constitution provides different protection than Fourth Amendment).
55. Id. at 408 (Johnson, J., dissenting).
56. Id. at 418 (Johnson, J., dissenting).
59. Id. at 926.
60. Carroll, 628 A.2d at 405 (Cavanaugh, J., concurring).
On the other hand, it is true that the Pennsylvania law on seizure had followed Fourth Amendment interpretation up to Hodari D. One could easily say that this case law was still binding, not as Judges Johnson and Ford Elliott would have it, as a matter of outcome, but as a matter of what law controls. The case law had suggested that federal law controls. That could have remained true. Thus, while Judge Cavanaugh's presumption violates Edmunds, his conclusion need not do so.

The various Peterfield and Carroll opinions, then, identify four options that lower state courts may follow when federal law that had previously been applied in state court decisions changes. These options are: (1) The lower court can avoid the issue through a mechanism like waiver; (2) The court can discount prior state case law completely and decide the state constitutional issue anew; (3) The court can consider the prior state case law binding on the merits and reject the new federal standard until the state supreme court rules otherwise; and (4) The court can consider the prior state case law binding as an interpretive method and continue to apply federal law—the new federal standard. The crucial variable in deciding which option to use is the role of prior state case law.

III. CONCLUSION: WHAT WEIGHT SHOULD BE ACCORDED PRIOR STATE CASE LAW?

Of the four approaches, waiver will not always delay consideration of the new federal standard long enough for the state supreme court to decide the issue. For this reason, waiver may be discounted.

Of the remaining three approaches, the fresh look, which regards state case law as implicitly overruled, is the least satisfactory approach. The fresh look approach forces lower state courts to ignore the state's own past experience with the issue. For example, once Judge Cirillo in Carroll observed that state case law had been premised on federal law, he could say nothing more about those cases. He did not endorse or criticize the prior approach, nor did he discuss the cases themselves. Under this approach, prior state law did not count at all, which is not a sensible posture for a lower state court.

There is no simple way to decide between the remaining two approaches to prior state case law—binding on the merits versus binding on the interpretive method. Binding on the merits will always be the approach more protective of individual rights. Binding on the method will always cause state courts to follow the new United States Supreme Court majority. Is then anything more to be said than that?

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61 Judge Kelly followed this approach in Petersfield, 679 A.2d at 543.
62 These categories control the situation when the prior state case law is silent on the state constitution. If, conversely, the state supreme court has criticized the old federal standard as too expansive, the court has, in effect, already suggested that state law provides less protection than did the old federal standard. That should usually lead to adoption in lower courts of the new federal standard when federal law changes.
CHANGED FEDERAL INTERPRETATIONS

The advantage of binding on the merits is that when a state system has been applying a rule for some period of time without judicial criticism, it will usually be true that the judges have been satisfied with the rule. At least that is a fair guess when no contrary evidence is present. Where the state supreme court had been satisfied with the old rule, that certainty counts as a reason not to change the rule. Also, all of the other relevant legal actors are presumably also used to the rule. This should lead to placing at least some burden of persuasion on the party urging adoption of a new federal standard. Since, in the Hodari D. context, the prior state case law did not indicate any dissatisfaction with the then existing federal standard, there was not a good enough reason for a lower court to change that standard.

This mild presumption is by no means absolute. Ultimately, the goal of the lower state court is to predict what the state supreme court will do. If the lower court judges themselves regard the new federal standard as greatly superior to the old, they may infer that their state justices will feel the same way. Thus, a good reason exists to adopt the new federal standard under the state constitution.

This discussion is premised on prior silence by the state supreme court in an area of federal application. When federal law changes in that context, application of existing state case law causes state precedent to assist state courts in interpreting a state constitution. By continually relying on that case law, lower state courts will have a starting point where they can begin to evaluate the federal changes in light of that state law.