THE PRACTICAL EFFECT OF THE "NEW FEDERALISM" ON POLICE CONDUCT IN NEW JERSEY

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I have been asked to speak briefly—as a career prosecutor and an unabashed advocate—about those cases wherein the New Jersey Supreme Court has ruled that Article I, Paragraph 7 of the New Jersey Constitution affords greater protection against unreasonable searches and seizures than the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. On those occasions, our Supreme Court has "respectfully parted company"[1] with its federal counterpart. For this reason, these are sometimes referred to as "divergence" cases.

By my reckoning, there have been at least ten instances[2] where the New

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The view expressed in these remarks are those of Mr. Susswein and do not necessarily reflect the opinions held by the Attorney General or the New Jersey Division of Criminal Justice.

[1]State v. Alston, 88 N.J. 211, 226, 440 A.2d 1311, 1319 (1981); *see also* State v. Hempele, 120 N.J. 182, 196, 576 A.2d 793, 800 (1990).

[2]*See* State v. Saez, 139 N.J. 279, 653 A.2d 1130 (1995) (invoking the New Jersey Constitution to invalidate warrantless surveillance of drug activity through crack in basement wall by police who were invited into adjoining premises by tenant); State v. Pierce, 136 N.J. 184, 642 A.2d 947 (1994) (rejecting *New York v. Belton*, 453 U.S. 454 (1981), insofar as *Belton* indiscriminately authorizes vehicular searches based on contemporaneous arrests for motor vehicle offenses); State v. Smith, 134 N.J. 599, 637 A.2d 158 (1994) (rejecting *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), to the extent that *Mimms* automatically allows police to require that passengers exit from stopped vehicle, and reaching a different result than *Maryland v. Wilson*, 117 S. Ct. 882 (1997)); State v. Tucker, 136 N.J. 158, 642 A.2d 400 (1994) (rejecting the analysis in *California v. Hodari*, 499 U.S. 621 (1991), of when

Jersey Supreme Court has diverged on a search and seizure issue, not counting cases involving Fifth Amendment, Sixth Amendment, and *Miranda* issues.[3] Sometimes the divergence from federal precedent is stark and explicit, such as in the cases involving garbage searches, telephone billing records, the rejection of the federal "standing" cases, and the rejection by our Court of the so-called "good faith" exception to the exclusionary rule. Other times, however, the divergence is more subtle, such as when the New Jersey Supreme Court in *State v. Sugar (II)*[4] embraced the concept of "inevitable discovery," but elected

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"seizure" occurs); State v. Sugar (II), 100 N.J. 214, 495 A.2d 90 (1985) (adopting "inevitable discovery rule," but rejecting "preponderance of the evidence" standard of proof set by *Nix v. Williams*, 467 U.S. 431 (1984), in favor of "clear and convincing" standard); State v. Alston, 88 N.J. 211, 440 A.2d 1311(1981) (rejecting *Rakas v. Illinois*, 439 U.S. 128 (1979), by holding that New Jersey criteria for standing to contest validity of searches and seizures are more liberal than federal standard)); State v. Hempele, 120 N.J. 182, 576 A.2d 793 (1982) (rejecting *California v. Greenwood*, 486 U.S. 35 (1988), by holding that the New Jersey Constitution requires a warrant for police searches of residential garbage); State v. Hunt, 91 N.J. 388, 450 A.2d 952 (1982) (rejecting *Smith v. Maryland*, 442 U.S. 735 (1979), by holding that the N.J. Constitution creates a privacy interest in telephone toll billing records and requires a warrant for their seizure); State v. Novembrino, 105 N.J. 1985, 519 A.2d 820 (1987) (rejecting *United States v. Leon*, 468 U.S. 897 (1984), by holding there is no good faith exception to the exclusionary rule under the N.J. Constitution); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (rejecting *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), by holding that under the New Jersey Constitution, the State has a heavier burden of establishing voluntariness of defendant's consent to a search because it must be affirmatively demonstrated that the defendant knew that he had a right to refuse consent).

[3]The New Jersey Constitution does not include a provision that expressly establishes a privilege against self-incrimination. The New Jersey Supreme Court has therefore relied upon a state common law privilege against self-incrimination in diverging from Fifth Amendment case law. *See* State v. Reed, 133 N.J. 237, 627 A.2d 630 (1993) (rejecting *Moran v. Burbine*, 475 U.S. 412 (1986), by holding that police have a duty to advise defendant in custody of the presence of a lawyer summoned by a third party); State v. Sanchez, 129 N.J. 261, 609 A.2d 400 (1992) (rejecting *Patterson v. Illinois*, 487 U.S. 285 (1988), by holding that as a general rule, after indictment and before arraignment, prosecutors or their representatives should not initiate a conversation with defendants without the consent of defense counsel); *In re* Grand Jury Proceedings of Guarino, 104 N.J. 218, 516 A.2d 1063 (1986) (rejecting *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 487 U.S. 201 (1988), by holding that in reviewing motion to quash grand jury subpoena for production of documents, a court's self-incrimination privilege analysis must focus on the contents of the documents, not on the testimonial compulsion involved in the act of producing them); State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986) (imposing a requirement not previously or since imposed by the United States Supreme Court when there is a cessation of a custodial interrogation by requiring police to administer fresh *Miranda* warnings before interrogation resumes).

[4]100 N.J. 214, 495 A.2d 90 (1985).

to require prosecutors to meet a higher standard of proof [5]—clear and convincing evidence—than the preponderance of the evidence burden established under federal precedent.[6]

One of the most eloquent explanations for this divergence phenomenon was stated by Justice Clifford, who is here today, in his majority opinion in *State v. Hempele*.[7] This is the case wherein the New Jersey Supreme Court found, contrary to the ruling of the United States Supreme Court in *California v. Greenwood*,[8] that people enjoy a cognizable expectation of privacy in the contents of garbage placed out on the curb for collection. In that case, Justice Clifford noted in his inimitable style that although the United States Supreme Court,

> may be the polestar that guides us, as we navigate the New Jersey Constitution, we [the New Jersey Supreme Court] bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.[9]

While I do not like the result in that case, I must concede that this is an impressive and poetic articulation of the divergence doctrine. To state the obvious, prosecutors, as advocates in an adversarial system, oppose these efforts to rely on the State Constitution because, by definition, at least in the context of criminal law and procedure, divergence necessarily works only in one direction, and that is to afford those suspected of criminal offenses with greater protections, and thus a greater opportunity to exclude the evidence of guilt. The Federal Constitution, of course, sets the minimum standards of protection for citizens as against unreasonable searches and seizures conducted by police.[10]

I should point out, however, that whatever the intent of the courts, these

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[5] *Id.* at 240, 495 A.2d at 104.

[6] California v. Greenwood, 486 U.S. 35 (1988).

[7] 120 N.J. 182, 576 A.2d 793 (1990).

[8] 486 U.S. 35 (1988).

[9] 120 N.J. at 196, 576 A.2d at 800.

[10] *See* State v. Hunt, 91 N.J. 338, 353, 450 A.2d 952, 959 (1982) (Pashman, J., concurring).

state court decisions do not necessarily provide *all* New Jersey citizens with greater protections than are enjoyed by United States citizens-at- large, even with respect to searches conducted in this state by New Jersey law enforcement officers, since these expanded state rights will not be recognized if the ensuing criminal case happens to be prosecuted by the United States Attorney in federal district court. So, to be perfectly technical, state criminal defendants, those who appear in state courts, are the only *guaranteed* beneficiaries of these added protections.

Now, having said that, and noting that prosecutors as advocates invariably oppose these efforts for a more expansive reading of Article 1, Paragraph 7, I acknowledge that no one today seriously challenges the authority of the New Jersey Supreme Court to interpret the state constitution and to have the last word in matters of state criminal procedure. I caution, however, and this follows on Judge Humphreys remarks, that the expansion of liberties for some under the guise of independent state grounds may unwittingly result in a restriction of liberties for others. I do not mean to suggest that our system of justice is, in all cases, a "zero sum" game where, for example, victory for a defendant in a motion to suppress necessarily implies a loss to the public. But there are costs and benefits to be balanced. Chief Justice Weintraub once wrote for a unanimous New Jersey Supreme Court in *State v. Bisaacia*[11] that, "the first right of the individual is to be protected from attack. That is why we have government, as the preamble of the federal constitution plainly says."[12] And there are many on my side of the "v"— prosecutors—who believe that efforts to interpret the state constitution more expansively will serve unwittingly to put police officers at greater risk of harm and to undermine the protections against criminal attack for law abiding citizens.[13]

Obviously, the reason for this has to do with the nature of the remedy fashioned by the courts to redress violations of both the state and federal constitutions: the exclusionary rule. There is, without question, a cost that is ex-

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[11]58 N.J. 586, 590, 279 A.2d 675, 677 (1971).

[12]*Id.*

[13]In *Bisaacia*, the New Jersey Supreme Court observed that:

> When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate state or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp v. Ohio*, 367 U.S. 643 (1961), denies the innocent the protection due them.

Bisaacia, 58 N.J. at 590.

acted when we release a guilty[14] defendant because the "constable has blundered," and it is therefore appropriate to balance those costs against the intended and actual benefits of the suppression remedy.

As all of you know, the exclusionary rule did not exist at the time that the United States Constitution and the Bill of Rights were ratified. And, as Judge Humphreys has noted, during the 1947 New Jersey Constitutional Convention, in contrast, the merits of the then fairly young federal exclusionary rule were expressly considered.[15] Specifically, an amendment was proposed at the Convention that would have added the following sentence to Article I, Paragraph 7: "Nothing obtained in violation hereof shall be received into evidence." The delegates debated the value of the exclusionary rule and defeated the proposed amendment by a final vote of 45-26.

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[14]In *State v. Gerardo*, 53 N.J. 261, 250 A.2d 130 (1969), Chief Justice Weintraub observed that, "[n]or should the topic [the impact of the exclusionary rule] be obscured by invoking the presumption of innocence. The presumption has no role on a motion to suppress. Such motions are not made for an academic end. The purpose is to suppress proof which will likely convict, so that offenders will go free," *Id.* at 263, 250 A.2d at 131.

[15]1 CONVENTION PROCEEDINGS RECORD, 598-608 , Aug. 19, 1947. The New Jersey Convention's explicit consideration of the merits of the exclusionary rule is in sharp contrast to the events giving rise to the drafting and adoption of the Federal Fourth and Fifth Amendments, where the issue of an exclusionary rule or other remedial sanction was never openly discussed. *See* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1381 (1983).

This does not mean that the delegates intended permanently to "embed" the rule of admissibility into New Jersey law, *see* Eleuteri v. Richman, 26 N.J. 506, 511, 141 A.2d 46, 49 (1958), since it was intended that the State Legislature would remain free to employ the exclusionary remedy as it saw fit. This notion was expressly raised during the debate. Delegate Park explained, for example:

> This [the rule of admissibility] is the law of New Jersey. The Legislature is well aware of it. If the Legislature had thought it necessary to correct it, a simple amendment to the old Evidence Act would have accomplished it. An amendment to the Evidence Act will accomplish it if the Legislature deems that there is any merit in the proposals . . .

1 CONVENTION PROCEEDINGS RECORD, *supra*, at 603.

Another delegate, Judge Edward McGrath, similarly remarked, "[t]o begin with, we are discussing a question of evidence which can be cured by the Legislature and which has no place in the Constitution." *Id.* at 606. In fact, the Legislature has on occasion seen fit to employ the exclusionary remedy. *See, e.g.*, N.J.S.A. 2A:156A (New Jersey Wiretapping and Electronic Surveillance Act).

In recent times, however, it has generally been assumed, without much reflection or discussion, that the exclusionary rule must be invoked whenever a substantive privacy right under Article 1, Paragraph 7 is violated. The state exclusionary rule has therefore taken on a life of its own, through judicial interpretation, and the remedy that was once fashioned by the federal courts as a means for accomplishing an end now seems to have become an end unto itself, imposed by state courts reflexively and, if I may use the phrase, "mandatorily" whenever there is a search or seizure determined to be illegal.

I do not mean to be disrespectful, but I have always found it ironic that many of those lawyers and judges who, on very earnest philosophical grounds, rail against "mandatory sentencing" of convicted criminals are nonetheless perfectly comfortable with a system that features a mandatory sanction - the exclusionary rule - to punish law enforcement officers, even where those officers are not culpable and have made, for example, a "good faith" mistake.[16]

That was not always the law in New Jersey. In *Eleuteri v. Richman*,[17] a case decided in 1958, a unanimous Supreme Court noted that, "the exclusionary rule has the role of a deterrent—a device to compel respect for the guarantee by removing an incentive to disregard it. It is calculated to prevent; not to repair. *The postulate is an enforcement official indifferent to basic rights.*"[18] The Court in *Eleuiteri*, also recognized that:

> [a]n illegal search and seizure . . . does not inevitably import conscious illegality. On the contrary, there may be no purpose to flout the Constitution, but only a failure in good faith to stay within the complex rules relating to search and seizure. It is one thing to condemn the product of an arrogant defiance of the Constitution; it is another to impose the sanction when the official intends to respect his oath of office, but is found to be mistaken, let us say, by the margin of a single vote.[19]

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[16]The New Jersey Supreme Court, in *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820 (1987), rejected the so called good faith exception to the exclusionary rule.

[17]26 N.J. 506, 141 A.2d 46 (1958).

[18]*Id.* at 513, 141 A.2d at 51 (emphasis added). Portions of this phraseology have frequently been used to describe the nature and purpose of the exclusionary rule, and appeared almost verbatim, for example in *Elkins v. United States*, 364 U.S. 206, 217 (1960), a case that overruled the "silver platter" doctrine and that might have become an especially noteworthy landmark had it not been eclipsed by *Mapp v. Ohio*, 367 U.S. 643 (1961). Chief Justice Weintraub, a frequent critic of the exclusionary rule, ironically appears to have been the true author of this oft-quoted phrase.

[19]*Eleuteri*, 16 N.J. at 514, 141 A.2d at 51.

Under the present case law in New Jersey, however, the arguments raised by Chief Justice Weintraub in *Eleuteri* and a long series of cases from that era[20] are no longer relevant, although I think that such issues should be resurrected in a thoughtful examination of the exclusionary rule.

The current exclusionary rule is essentially an all-or-nothing remedy, and unlike our laws and practices for deterring and punishing criminals, the courts today generally do not attempt to tailor this sanction to address the seriousness of the violation, much less the individual characteristics and "offense history" of the offending officer.

What continues to be relevant, of course, is the consideration in each case of whether, in fact, the state courts should "respectfully part company" with the United States Supreme Court in interpreting the *substantive* rights embodied in Article I, Paragraph 7, which, by the way, is virtually identical to the text of the Fourth Amendment.[21] In *State v. Hunt*[22] the court held that, "[d]ivergent interpretations are unsatisfactory from a public perspective, particularly when the historical roots and purposes of the federal and state provi-

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[20]The New Jersey Supreme Court's reaction to *Mapp* can be described as grudging acceptance. The Court refused to extend the exclusionary rule beyond what it believed to be the bare minimum requirements established in *Mapp*. *See e.g.*, State v. Bisaccia, 58 N.J. 586, 279 A.2d 675 (1971); State v. Zito, 54 N.J. 206, 254 A.2d 769 (1969); State v. Gerardo, 53 N.J. 261, 250 A.2d 130 (1969); State v. Davis, 50 N.J. 16, 231 A.2d 793 (1967); State v. Smith, 37 N.J. 481, 181 A.2d 761 (1962); State v. Carbone, 38 N.J. 19, 183 A.2d 1 (1962).

[21]The Fourth Amendment provides:

> 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 person or things to be seized.

U.S. CONST. amend. IV. Article 1, Paragraph 7 of the New Jersey Constitution provides:

> 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 except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

N.J. CONST. art. I, ¶ 7 (1947).

[22]91 N.J. 338, 450 A.2d 952 (1982).

sions are the same."[23]

Justice Handler's concurring opinion in *Hunt* undertook the first serious judicial effort in New Jersey to identify and explain the standards for *when* the court should diverge from federal precedent. There is no question that the court has the authority to do so. The real issue is, when should that occur? Justice Handler noted that, "[t]here is a danger . . . in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere."[24] Most importantly, he recognized that independent state grounds should not spring merely from intuition or a desire to achieve a certain litigation result, but rather "from a process that is reasonable and reasoned."[25] Justice Pollock voiced similar concerns in an article on State Constitutions that appeared in the *Rutgers Law Review* in 1983, when he observed that it "will become increasingly important for state courts to develop a rationale to explain when they will rely on their state constitutions."[26]

In an attempt to explain and rationalize the court's decision-making process, Justice Handler, in his concurring opinion in *Hunt*, identified a number of these relevant criteria already mentioned today, including: the textual language of the constitutional provisions; legislative history; differences in pre-existing state law; structural differences in the designs of the state and federal constitutions; matters of particular interest or local concern; state traditions; and public attitudes.[27] In *State v. Williams*,[28] the New Jersey Supreme Court in 1983 unanimously adopted many of those enumerated criteria and also identified additional considerations, including the definitiveness of the United States Supreme Court's determination of a legal issue, the importance of the case, and the interest of the public. By unanimously adopted divergence criteria, however numerous or broadly defined, the Court recognized that the question whether it will, in fact, depart from a particular federal precedent should be susceptible to meaningful analysis, and *reasoned prediction*.

That leads me, at long last, to the *practical* problem that is the greatest concern for me as a police instructor on search and seizure issues. Police offi-

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[23]*Id.* at 345, 450 A.2d at 955.

[24]*Id.* at 361, 450 A.2d at 963 (Handler, J., concurring).

[25]*Id.* at 367, 450 A.2d at 967 (Handler, J., concurring).

[26]Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983).

[27]*Hunt*, 91 N.J. at 363-68, 450 A.2d at 965-67 (Handler, J., concurring).

[28]93 N.J. 39 (1983).

cers have come to accept, grudgingly I grant you, that the courts and prosecutors will always second-guess their split-second decisions. That is inevitable and unavoidable and, I might add, is supposed to be taken into account in determining in the first place whether the police conduct was unreasonable.[29] It is far more troubling, however, when police officers and their police legal advisors cannot figure out what they are expected to do under the state constitution. When a new United States Supreme Court decision is handed down, we carefully review it and try to predict whether it will be adopted by the State Supreme Court - and that's not an easy task.

On more than one occasion, I have refused to train police officers on a new federal rule expanding their authority. I recall, for example, when I was executive assistant prosecutor in Union County, raising the hackles of some of my colleagues when I refused to train police on the rule established in 1991 by the United States Supreme Court in *California v. Hodari*,[30] which held that a seizure under the Fourth Amendment does not occur until either the suspect submits to a police command to stop or halt, or until there has been a physical touching of the suspect. As it turned out, the New Jersey Supreme Court rejected the *Hodari* rule in *State v. Tucker*,[31] which was decided in 1994.

On other occasions, however, my predictions were wrong, and by refusing to train on United States Supreme Court precedent, I may have put officers unnecessarily at risk of harm - and I have to sleep with that. For example, because I anticipated that our court would diverge, I did not teach officers about the rule established in *Michigan v. Long*,[32] wherein the United States Supreme Court held, over a very vigorous dissent, that police may "frisk" the passenger cabin of an automobile for weapons based on a mere reasonable suspicion, as opposed to full probable cause. As it turned out, to my surprise quite frankly, our court in *State v. Lund*[33] embraced the "auto frisk" doctrine. Given my caution, and frankly my lack of prescience, however, the officers that I trained were, for several years, denied the opportunity to use a tactic that was designed expressly by the United States Supreme Court to protect them from

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[29]*See* State v. Gerardo, 52 N.J. 255, 261, 245 A.2d 177, 180 (1969) (stating that police conduct should be measured by reasonable necessity often reflecting the tumult of the streets); State v. Bynum, 259 N.J. Super 417, 614 A.2d 156 (App. Div. 1992) (stating that police must often act on the spur of the moment without the opportunity for abstract contemplation that judges enjoy).

[30]499 U.S. 621 (1991).

[31]136 N.J. 158, 642 A.2d 401 (1994).

[32]463 U.S. 1032 (1983).

[33]119 N.J. 35, 573 A.2d 1376 (1990).

harm and that is now deemed by state courts to be perfectly reasonable and appropriate.

The *practical*, albeit clearly unintended, effect of the divergence doctrine, therefore, can be to "chill" *reasonable* police conduct as easily as to deter unreasonable police conduct. Because an officer's good faith reliance on federal precedent is now deemed by the New Jersey Supreme Court to be almost irrelevant, a police officer can be sanctioned by state courts for relying on a clear and unambiguous rule designed by federal courts to facilitate the enforcement of our criminal laws and to protect officers from the perils they routinely face.

In *State v. Pierce*,[34] our Supreme Court in 1994 spoke of a "steadily-evolving commitment" by our state courts to provide citizens "enhanced" protections under our state constitution. That is, I suspect, an intentional reference to the court's increasing willingness to diverge, as the court becomes more comfortable and experienced with this practice. In the process, however, the court, respectfully, seems to have moved away from a careful, or at least explicit, analysis of the divergence criteria set out by Justice Handler in *Hunt*, as well as in other cases. The court today tends to focus more on the nature and the forcefulness of any dissenting opinions in the United States Supreme Court case at issue, and on the weight of published authority in other states—states that did not participate in the drafting of *our* 1947 constitution.

In effect, the analysis today focuses as much on whether the majority of the United States Supreme Court was "right," as on whether Article 1, paragraph 7 of the state constitution was meant to be interpreted differently from the Fourth Amendment. I would note that Justice O'Hern has voiced similar concerns, more eloquently that I am capable of doing, in his concurring/dissenting opinion in *Hempele*, a case that he said was not about garbage, so much as about the values of federalism and of the moral authority of the United States Supreme Court and our resolute trust in that Court as guardian of our liberties.[35]

During our discussion today, we heard mention of whether there is a "presumption" that our court would follow a United States Supreme Court precedent, and Justice O'Hern suggested that such a presumption might well exist.[36] Regrettably, I do not believe that is a safe assumption. I believe, and I train assistant prosecutors, that we act at our peril if we assume that our state

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[34]136 N.J. 184, 209, 642 A.2d 947, 960 (1994).

[35]*Hempele*, 120 N.J. at 225-26 (O'Hern, J., concurring in part and dissenting in part).

[36]*See* Daniel J. O'Hern, *The New Jersey Constitution: A Charter to Cherish*, 7 SETON HALL CONST. L.J. 827 (1997).

courts will defer to the nation's highest court. We as lawyers are absolutely free to cite to that federal precedent, but police officers, ironically, are not necessarily free to rely on that precedent. This is a very difficult thing to explain to rank and file law enforcement officers.

To help us address these issues, and at least to make it possible for the New Jersey law enforcement community to develop more uniform, if not correct, predictions, we are establishing a new Statewide Search and Seizure Committee, pursuant to the Governor's Drug Enforcement, Education, and Awareness program.

I want to conclude by noting two specific examples of the practical difficulties posed by divergence for the law enforcement community. As you may have read, on February 19, the United States Supreme Court decided *Maryland v. Wilson*,[37] holding that under the Fourth Amendment, a police officer may routinely order passengers to exit a lawfully-stopped motor vehicle.[38] In *State v. Smith*,[39] the New Jersey Supreme Court in 1994 reached a different result, holding that an officer may only order a passenger out of a lawfully-stopped vehicle if the officer can articulate facts that warrant heightened caution. In this instance, the New Jersey Supreme Court beat the United States Supreme Court to the issue by a full two years, and so, as one might expect, there is little in the text of the state court decision to indicate whether the rule in *State v. Smith* was required by the state constitution, as distinct from the federal constitution. The court noted, "today we decide whether, and under what condition [*Pennsylvania v.*] *Mimms* should be extended to passengers. We apply the balancing test required by the state *and* federal constitutions."[40] The first part of that opinion featured a very extensive discussion of the state constitution with respect to the *Mimms* rule as to drivers. The New Jersey Supreme Court, after careful analysis, chose to follow the federal rule that allows police routinely to order drivers to exit lawfully stopped vehicles.[41] In the portion of the opinion concerning passengers, however, the court offered no significant analysis of the state constitution, save the one-word reference to the state constitution that I just quoted.

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[37]117 S. Ct. 882 (1997).

[38]That had been the rule for a long time under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), with respect to drivers of lawfully stopped vehicles, and in dicta, that was true with respect to passengers.

[39]134 N.J. 599, 637 A.2d 158 (1994).

[40]*Id.* at 614, 637 A.2d at 165 (emphasis added).

[41]*Id.* at 609, 637 A.2d at 162-63.

For the record, and again at the risk of being unduly cautious, given the court's explicit, albeit cursory,[42] reference to the state constitution, we have decided to announce to the law enforcement community that that the rule established by the court in *Smith* continues to be binding on all law enforcement officers in this state, and that they may not take advantage of the bright-line rule recently established by the United States Supreme Court in *Maryland v. Wilson*.[43] We may be wrong. By the way, if someone does violate the *Smith* rule, we will take on our role as advocates to defend their conduct and we will take our chances on appeal. But we must train prospectively. We may be wrong and, frankly, I worry that an officer someday may be injured unnecessarily as a result of our cautious prediction.

State v. Pierce,[44] which was decided in 1994, is another case that is very disturbing from a police trainer's perspective. In *Pierce*, the court held that the bright-line rule established by the United States Supreme Court in 1981 in *New York v. Belton*,[45] —that officers may search the entire passenger cabin of a vehicle when a driver or passenger is lawfully arrested therein—does not apply if the arrest is for a mere motor vehicle offense. We understand this new limitation, although we have struggled with the question whether this rule was meant to apply to drunk driving arrests, which technically are under Title 39, since the reasons given by the court for its holding in *Pierce* seem not to apply in the more serious context of a drunk driving offense. More to the point, the *Pierce* court observed, if only in *dicta*, that:

> although we have not heretofore been required to determine whether the

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[42]The United States Supreme Court has openly criticized state court decisions that purport to rely on independent state grounds (which has the effect of precluding federal review) without explaining why the state constitution should be interpreted differently from its federal counterpart. *See* South Dakota v. Neville, 459 U.S. 553, 557-58 (1993); Michigan v. Long, 463 U.S. 1032 (1983). Justice Pollock concluded that:

> The message to state courts is clear. It will not be sufficient to decide a case on federal grounds and then append an unsupported comment that the result is also supported by the state constitution. A state court must carefully set forth the reasons that it believes the state constitution leads to a different conclusion.

Pollock, *supra* note 26, at 721 (footnote omitted).

[43]117 S. Ct. 882 (1997).

[44]136 N.J. 184, 642 A.2d 947 (1994).

[45]453 U.S. 454 (1981).

> holding in Belton was compatible with the rights protected by Article 1, Paragraph 7 of the New Jersey Constitution, we need not address that issue in our disposition of this appeal - its resolution is not essential to our decision and the issue is significant enough to warrant additional briefing and argument.

Consequently, we in law enforcement seem to have been placed on notice that we may not be on firm footing if we rely on *Belton*, a case that was decided thirteen years before *Pierce*, and that is commonly relied on by police to justify this species of "search incident to arrest." And although the court said that there usually are other grounds to justify a warrantless search of the passenger cabin, I suspect that the court may be empirically wrong on this score.

More than two years have passed since *Pierce* was decided and as far as I am aware, there has been no additional briefing and argument on this "significant" issue, much less final resolution. In this instance, at the risk of not being cautious and prudent, we are continuing to train officers that they may follow the rule established in *Belton*. If it should turn out that we are wrong and that it was a mistake to rely on more than a decade and a half of not only federal, but also state appellate division precedent, evidence is going to be suppressed and any number of defendants, including violent, dangerous ones, may go free.

Time does not permit me this afternoon to list, much less discuss in detail all of the outstanding divergence issues that have yet to be resolved. I would only mention in passing that we in law enforcement are struggling today with whether the New Jersey Supreme Court will accept the rule announced by the United States Supreme Court in *Horton v. California*,[46] a 1990 case wherein the Federal Court held that while "inadvertence" is a characteristic of most legitimate "plain view" seizures, it is not a necessary element or precondition. We are also at a loss to know exactly how our state court will react to *California v. Acevedo*,[47] a 1991 case wherein a sharply divided court, with only a five-member majority, altered if not abandoned the *Chadwick-Sanders* rule concerning the search of containers under the so-called "automobile exception" to the warrant requirement. We just have no idea what the rule is in New Jersey under our state constitution.

In closing, we recognize that the state constitution is and must be a living,

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[46]496 U.S. 128 (1990).

[47]500 U.S. 565 (1991). *Compare* State v. Demeter, 124 N.J. 374, 378, 590 A.2d 1179, 1181-82 (1991) (expressly declining to "debate the ruling of the Supreme Court in *Acevedo*) *with* State v. Lugo, 249 N.J. Super 565, 592 A.2d 1234 (App. Div. 1992) (following rule established in *Acevedo*).

breathing document. Sometimes, as Mr. Moczula mentioned, it is amended by public referendum, as when Article I, Paragraph 22, the Victims' Rights Amendment,[48] was added.[49] That will, I think, eventually prove to be one of the most significant expansions of the rights of New Jersey citizens, and I wish I could have spent more time this afternoon discussing that constitutional amendment.

More often, the state constitution is amended through judicial interpretations of existing text. Both are perfectly legitimate means by which we make certain that our constitution remains responsive to current and future needs. All we ask, as law enforcement officers, is that if the rules are going to change, *and they will*, and if we are to be expected to abide by those changing rules under penalty of the exclusion of otherwise probative evidence of guilt, then we should be able, in fairness, to figure out what those rules are.

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[48]Article 1, Paragraph 22 was added to the New Jersey Constitution, effective December 5, 1991. It provides in pertinent part that:

> A victim of crime shall be treated with fairness, compassion, and respect by the criminal justice system. A victim of crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature.

N.J. CONST. art. 1, ¶ 22.

[49]*See* Boris Moczula, *"Submitted to the People": The Authority of the Electorate to Shape State Constitutional Rights*, 7 SETON HALL CONST. L.J. 849 (1997).