CRIMINAL PROCEDURE—SEARCH AND SEIZURE—NEW JERSEY REJECTS "GOOD-FAITH" EXCEPTION TO EXCLUSIONARY RULE—*State v. Novembrino*, 105 N.J. 95, 519 A.2d 820 (1987).

Increasingly, state supreme courts are interpreting their state constitutions to afford greater protection of individual rights than that extended by the United States Supreme Court under the Federal Constitution.[1] Although the Federal Constitution sets forth the minimum standard for the protection of constitutional rights, the United States Supreme Court has held that each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[2] This power is subject to two relatively minor limitations.[3] First, the state court must expressly indicate that a particular decision rests on "adequate and independent state grounds."[4] Second, state constitutional provisions may not be construed to contravene extant federal constitutional protections.[5]

The New Jersey Supreme Court has been recognized as a forerunner in the development of state constitutional law.[6] The court has, in specific instances, construed the New Jersey Constitution to provide more expansive protection against unreasonable searches and seizures than that afforded by its federal counterpart.[7] In *State v. Novembrino*,[8] the Supreme Court of New

---

[1] *See* Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 708, 708 (1983). *See also* Brennan, *State Constitutions and the Protection of Individual Rights* 489 (1977). *See generally*, *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985) [hereinafter *Symposium*]; *Developments in the Law—The Interpretation of State Constitutional Rights*, 97 HARV. L. REV. 1324 (1982) [hereinafter *Developments*].

[2] *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (citing Cooper v. California, 386 U.S. 58, 62 (1967)); Oregon v. Hass, 420 U.S. 714, 719 (1975) (citing Sibron v. New York, 392 U.S. 40, 60-61 (1968)); Cooper v. California, 386 U.S. 58, 62 (1967)).

[3] Sager, *Foreward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985).

[4] *Id.* at 959 n.1 (quoting Michigan v. Long, 103 S. Ct. 3469, 3476 (1983)).

[5] *Id.* at 959.

[6] *See* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1160; Brennan, *Foreward* to Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 707 (1983).

[7] *See* State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (person has protectible interest in telephone toll billing records under New Jersey Constitution art. I, para. 7); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981) (concluding that possessory interest in property is adequate to confer standing to challenge validity of search of

Jersey interpreted Article I, paragraph 7 of the state constitution to reject the "good-faith" exception to the exclusionary rule created by the United States Supreme Court.[9]

In 1983, Ottavio Novembrino, the owner of a service station in Bayonne, New Jersey, was arrested and charged with possession of controlled dangerous substances and possession of controlled substances with intent to distribute.[10] Novembrino moved to suppress evidence obtained during a nonconsensual search of his gas station.[11] Novembrino argued that the search warrant that the police relied upon was issued without probable cause.[12] He also maintained that the evidence was seized before the warrant had been issued.[13]

At the suppression hearing the parties related different accounts regarding the circumstances surrounding Novembrino's arrest and the search of his garage.[14] Detective Higgins, who prepared the search warrant application, testified that on June 2, 1983, two police officers stopped Novembrino as he was leaving his gas station.[15] While one officer engaged in a pat-down search of the defendant, the other officer searched his car.[16] Novembrino was not arrested, but he agreed to accompany the officers to the station house.[17]

Higgins further testified that at the police station Novembrino was given *Miranda* warnings.[18] After Novembrino refused to allow the police to search his garage, Higgins stated that he attempted to procure a search warrant.[19] He recounted that he

---

automobile); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (holding that validity of consent to search depends on knowledge of the right to refuse consent).

8 105 N.J. 95, 519 A.2d 820 (1987).

9 *Id.* at 157-58, 519 A.2d at 856-57.

10 *Id.* at 102, 519 A.2d at 823. Novembrino was indicted for possession of phentormine, diazepam, cocaine, hashish and marijuana in violation of N.J. STAT. ANN. § 24:21-20(a)(1) to -(4) (West Supp. 1987) and possession of phentormine, cocaine, and diazepam with intent to distribute in violation of N.J. STAT. ANN. § 24:21-19(a)(1) (West Supp. 1987). State v. Novembrino, 200 N.J. Super. 229, 232, 491 A.2d 37, 39 (App. Div. 1985), *aff'd*, 105 N.J. 95 (1987).

11 *Novembrino*, 105 N.J. at 102, 519 A.2d at 823.

12 *Id.* at 103, 519 A.2d at 824.

13 *Id.*

14 *Id.* at 102, 519 A.2d at 824.

15 *Id.*

16 *Id.*

17 *Id.* Detective Higgins stated that Novembrino "drove to the station in his own car, accompanied by one of the officers." *Id.* The detective said, however, that neither officer advised Novembrino that he was free to leave. *Id.*

18 *Id.*

19 *Id.*

prepared an affidavit in support of the warrant[20] and that he later met a Bayonne municipal court judge at a shopping center, where the affidavit was reviewed and the search warrant signed.[21] The affidavit stated, among other things, that the officer had "received information from an informant who ha[d] proven reliable in several investigations" that the defendant was selling narcotics.[22] Higgins further stated that the informant had witnessed the defendant dealing drugs from his service station.[23] The affiant likewise asserted that he and another officer had observed what they "believed to be drug transactions" during a four-hour surveillance of the station.[24] Finally, Higgins testified that he took the search warrant and returned to the gas station where the defendant and another detective were waiting.[25] After showing the defendant the warrant, Higgins stated that Novembrino unlocked the door and led the officers to the contraband.[26]

In contrast, Novembrino testified that following the initial stop and search of his car, he was taken to the police station and strip-searched.[27] The defendant claimed that he was then taken

---

20 *Id.* Higgins stated that "this was the first such affidavit he had ever prepared and estimated that its preparation took approximately ten or fifteen minutes." *Id.*

21 *Id.* at 102-03, 519 A.2d at 824.

22 *Id.* at 104, 519 A.2d at 824. The relevant portion of the affidavit stated:

> I received information from an informant who has proven reliable in several investigations (with the information he supplied), that 'Otto' above description, is engaged in the illegal sales of cocaine and marijuana. My informant stated that Otto usually keeps the drugs in his gas station at above location. He (informant) also stated that he witnessed 'Otto' dealing drugs from his gas station. I, along with Det. Ralph Scianni, conducted a surveillance of subject and his station on Thurs., 6/2/83, between the hours of 3:00 PM and 7:00 PM, and observed Otto meeting with several persons, after leaving his station and making what we believed to be drug transactions. During the surveillance, we observed one person making a transaction with Otto and checked on his vehicle and called the narcotics squad to inquire on his relationship with drugs. They told us that said person has been arrested for cocaine and other violations and they felt that Otto and the other person are involved in drug activity. From the information received from our informant and from our observations, we do feel that a search of Otto's gas station should be conducted for illegal contraband. We checked on ownership of the station and it belongs to Otto who we have presently in headquarters on this investigation. Otto was advised of his rights and refused a search of his station but appeared to be very nervous.

*Id.*, 519 A.2d at 824-25.

23 *Id.*, 519 A.2d at 824.

24 *Id.*, 519 A.2d at 824-25.

25 *Id.* at 103, 519 A.2d at 824.

26 *Id.*

27 *Id.*

back to the garage by Higgins and the other officer.[28] He asserted that they took his key, unlocked the door, searched the premises and discovered the contraband.[29] Novembrino further maintained that a warrant was not shown to him until eleven o'clock that evening, long after the evidence had been seized.[30]

Declining to rule on whether the search warrant was issued prior to the search, the trial court excluded the evidence on the ground that the affidavit supporting the warrant failed to show probable cause.[31] The state appealed, and the appellate division remanded for determination of when the search warrant was issued.[32] On remand, the trial court found that the warrant had been issued prior to the seizure.[33] The appellate division upheld that finding and agreed with the lower court's previous determination that the affidavit did not establish probable cause.[34]

The appellate division then considered the state's alternative contention that, in the absence of probable cause, the evidence could be admitted pursuant to the "good-faith" exception to the exclusionary rule recognized by the United States Supreme Court in *United States v. Leon*.[35] The appellate court ruled that the New Jersey Constitution precludes a good faith exception to the exclusionary rule because of its tendency to "undermine the constitutional requirement of probable cause."[36] The Supreme Court of New Jersey granted the state's motion for leave to appeal.[37] The supreme court affirmed that the affidavit did not es-

---

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 103-04, 519 A.2d at 824-25. The appellate division stated:

> The affidavit . . . simply revealed that a police informant concluded for unknown reasons that defendant was a drug dealer, that a person previously arrested for possession of cocaine was seen at defendant's gas station engaged in some unspecified activities which caused a detective, whose education, training and experiences are unknown, to conclude that criminal activities in the form of violations of Title 24 were taking place at the gas station. The totality of the circumstances spelled out in the affidavit failed to contain a single objective fact tending to engender a "well grounded suspicion" that a crime was being committed.

*Id.* at 104, 519 A.2d at 825 (quoting State v. Novembrino, 200 N.J. Super. 229, 236, 491 A.2d 37, 41 (App. Div. 1985)).

35 *Id. See infra* notes 200-205 and accompanying text (discussing United States v. Leon, 468 U.S. 897 (1984)).

36 *Novembrino*, 105 N.J. at 105, 519 A.2d at 825.

37 State v. Novembrino, 101 N.J. 305, 501 A.2d 962 (1985).

tablish probable cause.[38] Moreover, the court held that the state constitution's guarantee against unreasonable searches and seizures would not tolerate the good faith exception established in *Leon*, and thus the court refused to recognize it.[39]

The language of New Jersey's constitutional guarantee against unreasonable searches and seizures is virtually identical to that contained in the fourth amendment to the United States Constitution.[40] Both the New Jersey and federal constitutions designate probable cause as the standard by which an unreasonable search and seizure is distinguished from one that is permissible in a free society.[41] Probable cause has been defined by the New Jersey and federal judiciaries as a "showing . . . not merely of belief or suspicion, but of underlying facts or circumstances which would warrant a prudent man in believing that the law was being violated."[42] Moreover, like its federal counterpart, the state's judiciary contemplates probable cause as "a flexible, nontechnical concept" which best accommodates the often competing interests of efficient criminal law enforcement and the citizens' right to privacy.[43]

Most appellate decisions involving probable cause issues are concerned with information obtained from unidentified police in-

---

38 *Novembrino*, 105 N.J. at 129, 519 A.2d at 840.

39 *Id.* at 157-58, 519 A.2d at 856-57.

40 *Id.* at 99-100, 519 A.2d at 822. Article I, paragraph 7 of the New Jersey Constitution states:

> 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, para. 7.

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 persons or things to be seized.

U.S. CONST. amend. IV.

41 *Novembrino*, 105 N.J. at 106, 519 A.2d at 826.

42 State v. Macri, 39 N.J. 250, 260, 188 A.2d 389, 395 (1963). *See also* Henry v. United States, 361 U.S. 98, 102 (1959). Probable cause exists "[if] the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." *Id.* (citing Stacey v. Emery, 97 U.S. 642, 645 (1878)).

43 State v. Kasabucki, 52 N.J. 110, 116, 244 A.2d 101, 104 (1968). *See also* Brinegar v. United States, 338 U.S. 160, 176 (1949) ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests.")

formants.[44] New Jersey decisions concerning the validity of search warrants issued on the basis of informants' tips have generally embraced the principles espoused by the United States Supreme Court.[45]

Although the United States Supreme Court had previously approved search warrants partially based on hearsay,[46] it was not until 1960, in *Jones v. United States*,[47] that the Court expressly upheld a search warrant based on information obtained from an unidentified police informant.[48] Specifically, *Jones* held that a search warrant affidavit which sets out the personal observations of someone other than the affiant is sufficient provided "a substantial basis for crediting the hearsay is presented."[49] The *Jones* majority, however, did not set forth specific guidelines regarding the type of information that would satisfy the standard.[50]

In *State v. Macri*,[51] the New Jersey Supreme Court considered the validity of search warrants issued on the basis of informants'

---

44 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 612 (2d ed. 1987). Professor LaFave observed that "this particular facet of Fourth Amendment law" has not been "set out with remarkable clarity." *Id.*

45 *See, e.g.*, State v. Perry, 59 N.J. 383, 283 A.2d 330 (1971); State v. Macri, 39 N.J. 250, 188 A.2d 389 (1963).

46 *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949). *See also* Draper v. United States, 358 U.S. 307 (1959). In *Draper*, the Court considered the validity of a search, incidental to a warrantless arrest which was based solely on an informant's statement that the defendant was engaged in criminal activity. *Id.* at 309-10. The defendant contended that the evidence obtained during the search was inadmissible because the officer lacked probable cause to arrest him. *Id.* at 311. He characterized the informant's tip as hearsay and, hence, legally insufficient to establish probable cause to justify a warrantless arrest. *Id.* The Court upheld the search, noting that the informant was known to the arresting officer as reliable and, furthermore the officer "personally verified" the informant's information as to the defendant's appearance and location at a certain time. *Id.* at 313.

47 362 U.S. 257 (1960).

48 *Id.* In *Jones*, the defendant moved to suppress evidence of narcotics obtained during a search of an apartment he was occupying. *Id.* at 258-59. The search warrant was based on a federal narcotics officer's affidavit which stated that he had received a tip from an unnamed informant that the defendant was engaged in drug trafficking, that the informant had purchased drugs from the defendant previously, and that the same information had been received from other sources. *Id.* at 268-69. The affidavit also stated that the informant had previously given correct information. *Id.* at 268.

49 *Id.* at 269.

50 *See id.* The *Jones* Court held that an issuing magistrate need not be "convinced of the presence" of contraband or other evidence at a particular location. *See id.* at 271. Justice Douglas, in a separate opinion stated that he would have required the magistrate to "know the evidence on which the police propose[d] to act." *Id.* at 273 (Douglas, J. concurring in part and dissenting in part). Justice Douglas asserted that anything less would reduce the magistrate to a "tool of police interests." *Id.*

51 39 N.J. 250, 188 A.2d 389 (1963).

tips.[52] At issue in *Macri* was an affidavit based on a tip received from an unidentified police officer in which the affiant asserted that a bookmaking operation was being conducted at a certain location by the defendants.[53] A companion case[54] involved a detective's affidavit which stated his belief, formulated as a result of an informant's tip and his own surveillance, that the defendants were involved in illegal gambling activities.[55] Citing the *Jones* standard, the *Macri* court deemed both warrants invalid because neither set forth "[t]he underlying facts and circumstances which gave rise to the [officers'] suspicion[s]."[56]

In 1964, the United States Supreme Court decided *Aguilar v. Texas*,[57] which involved a search warrant issued pursuant to an affidavit which stated only that the police officers had obtained credible information from a reliable source and believed that narcotics could be found at a certain location.[58] The affidavit provided no further details regarding either the informant or the tip.[59] In *Aguilar* the Supreme Court set forth a two-part test by which state courts were to evaluate probable cause in search warrants issued upon tips from police informants.[60] The test's first, or "basis-of-knowledge," prong required that the informant's tip provide the issuing magistrate with facts sufficient to enable him to determine whether the informant had an adequate basis for his allegation that the defendant was engaged in criminal activity, or that evidence of criminal involvement could be found at a specific location.[61] The second, or "veracity," prong required that the

---

52 *See id.* at 253-55, 188 A.2d at 390-92.

53 *Id.* at 253, 188 A.2d at 390. The affiant had received his information from another police officer who, in turn, had received his information from an anonymous letter. *Id.*, 188 A.2d at 391.

54 *See id.* at 252, 188 A.2d at 390. In the lower courts, the companion case was entitled *State v. Viscito*. *See id.*, 188 A.2d at 390.

55 *Id.* at 253-54, 188 A.2d at 391.

56 *See id.* at 262, 188 A.2d at 395-96. *See also supra* note 49 and accompanying text (discussing *Jones* standard).

57 378 U.S. 108 (1964).

58 *Id.* at 109.

59 *Id.* at 109 n.1.

60 *Id.* at 114.

61 *See id.* With regard to the affidavit in *Aguilar*, the Court asserted:

> The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted

affidavit reveal "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' "[62]

The *Aguilar* test was broadened five years later by the Supreme Court in *Spinelli v. United States*,[63] a case involving a search warrant affidavit that was "more ample" than the affidavit in *Aguilar*.[64] Under this new approach an informant's tip was "first [to] be measured against *Aguilar*'s standards so that its probative value [could] be assessed."[65] If the tip was deemed insufficient under *Aguilar*, any details contained in the remainder of the affidavit which corroborated the tip could then be considered.[66] *Spinelli* also provided an additional method of satisfying the *Aguilar* basis-of-knowledge prong.[67] Absent a direct statement providing details of the method employed by the informant to gather his information, the Court stated that an informant's basis of knowledge could be inferred from a sufficient description of the accused criminal's activity.[68]

---

"without question" the informant's "suspicion," "belief" or "mere conclusion."

*Id.* at 113-14.

62 *Id.* at 114. The two prong standard, according to the Court, would ensure that the probable cause determination would be drawn "by a neutral and detached magistrate," as the Constitution requires . . .[and not] "by a police officer 'engaged in the often competitive enterprise of ferreting out crime.' " *Id.* at 114-15 (quoting Giordenello v. United States, 357 U.S. 480, 486 (1957); Johnson v. United States, 333 U.S. 10, 14 (1947)).

63 393 U.S. 410 (1969).

64 *Id.* at 413. The relevant portions of the affidavit stated that the FBI had kept Spinelli, who was subsequently arrested for illegal gambling activities, under surveillance for five days during August of 1965. *Id.* It also indicated that Spinelli was followed to a particular apartment which, the FBI later discovered, contained two listed telephone numbers. *Id.* at 413-14. The affidavit stated that the defendant was known to the FBI as a bookmaker, and that a "confidential reliable informant" had told the FBI that the defendant was engaged in a bookmaking operation utilizing telephones which had been assigned the same numbers as those in the apartment surveilled. *Id.* at 414.

65 *Id.* at 415.

66 *Id.* The Court maintained that "[a]t this stage as well . . . the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration?" *Id.*

67 *See id.* at 416.

68 *See id.* The Court stated that: "The detail provided by the informant in *Draper v. United States* . . . provide[d] a suitable benchmark." *Id.* In *Draper*, the informant did not state the manner in which he secured his information; he merely "reported that Draper had gone to Chicago the day before by train and that he would return . . . with three ounces of heroin on one of two specified mornings." *Id.* at 416. The informant also described in detail the clothes the defendant would be wearing. *Id.*

The first post-*Aguilar* informant case decided by the New Jersey Supreme Court, *State v. Kasabucki*,[69] neither acknowledged nor applied the new standard.[70] In *Kasabucki*, a warrant had issued on the basis of a letter received by the Union County Prosecutor from the New York City Police Department.[71] The letter stated that the department had received confidential information that the defendant's telephone was "being used for illegal gambling purposes."[72] The court applied a general reasonableness test, stating that the issuing magistrate must make a "practical and realistic" evaluation of a police officer's affidavit.[73] In doing so, the court elaborated, the judge should take into account the expertise of policemen.[74] On this basis, the court upheld the warrant stating "that the letter had a ring of authenticity."[75] The court viewed the confidential information as substantial and reliable[76] and held that the circumstances justified the issuance of the warrant.[77]

The New Jersey Supreme Court only twice considered search warrant applications under the *Aguilar-Spinelli* analysis.[78] In *State v. Perry*,[79] a police officer submitted an affidavit that stated that he had received a tip from an informant that the defendant was concealing stolen property in his apartment.[80] The affidavit also contained a list, provided by the informant, of the contraband.[81] The court concluded that the affidavit satisfied *Aguilar*'s "veracity" prong because it explicitly stated that the affiant had

---

at 416-17. The *Draper* Court asserted that such detail would enable a magistrate reasonably to "infer that the informant had obtained his information in a reliable way." *Id.* at 417. In the *Spinelli* case, however, the informant merely asserted that Spinelli was using certain telephones in an illegal gambling operation. *Id.* Such a "meager report" was insufficient to meet the *Spinelli* test. *See id.* The Court also stated that an informant's veracity, if sufficiently detailed in the affidavit, could be bolstered by a corroborative investigation. *See id.*

69 52 N.J. 110, 244 A.2d 101 (1968).

70 *See id.*

71 *Id.* at 118, 244 A.2d at 104-05.

72 *Id.*, 244 A.2d at 105.

73 *See id.* at 117, 244 A.2d at 104.

74 *Id.*

75 *Id.* at 120, 244 A.2d at 106.

76 *Id.*

77 *Id.* at 123, 244 A.2d at 107.

78 *See* State v. Ebron, 61 N.J. 207, 294 A.2d 1 (1972); State v. Perry, 59 N.J. 383, 283 A.2d 330 (1971). *See also infra* notes 79-87 and accompanying text (discussing *Ebron* and *Perry*).

79 59 N.J. 383, 283 A.2d 330 (1971).

80 *Id.* at 387, 283 A.2d at 333.

81 *Id.* at 388, 283 A.2d at 333.

previously received reliable information from the informant.[82] The court, likewise, held that the informant's specification of the various stolen articles contained in the apartment was "of the type . . . the *Spinelli* court regarded as sufficient to establish that the information was obtained in a reliable way," thus satisfying the second part of the test.[83]

The following year in *State v. Ebron*,[84] the court considered a search warrant affidavit which established the informant's past reliability, but provided no details as to the basis of the informant's knowledge that the defendant was selling drugs from his mother's home.[85] The *Ebron* court upheld the warrant, however, under the *Aguilar-Spinelli* test.[86] The court reasoned that the independent surveillance of the home, as described in the affidavit, enhanced the informer's tip.[87]

In 1984, the United States Supreme Court rejected the *Aguilar-Spinelli*'s requirements in *Illinois v. Gates*,[88] and opted to return to "the totality-of-the-circumstances analysis that traditionally ha[d] informed probable-cause determinations."[89] At issue in *Gates* was a search warrant issued on the basis of a tip, contained in an anonymous letter sent to an Illinois police department, that was partially corroborated by police surveillance.[90] The Court offered several reasons for its abandonment of the test. Fore-

---

82 *Id.* at 390, 293 A.2d at 334.

83 *Id.* at 392, 283 A.2d at 335. The *Perry* court observed that "the magistrate . . . could well have believed, based on common experience, when the several items described are so diversified, and include among them such an unusual article as a doctor's bag, and their location particularized, that the informant knew from personal knowledge what he was talking about." *Id.* at 393, 283 A.2d at 335.

84 61 N.J. 207, 294 A.2d 1 (1972).

85 *See id.* at 211-12, 294 A.2d at 3. The affidavit stated that the affiant believed the defendant was selling drugs from his home, based "upon information said to have been received from reliable sources and from an informer who had proven reliable in the past." *Id.* at 211, 294 A.2d at 3. The affidavit further declared that the location to be searched had been placed under surveillance for three days and that known drug addicts were observed visiting the premises. *Id.* The affidavit also stated that the defendant's mother, the owner of the premises, was at that time appealing a prior drug conviction. *Id.* at 211-12, 294 A.2d at 3.

86 *Id.* at 212, 294 A.2d at 4.

87 *Id.* at 213, 294 A.2d at 4. The court held that the independent surveillance, the subsequent identification of the seven known drug users, and the mother's dereliction were all "entitled to some weight on the probable cause issue." *Id.*

88 462 U.S. 213 (1984).

89 *Id.* at 238 (citations omitted).

90 *Id.* at 225-26. The letter stated that the Gates' "strictly ma[d]e their living on selling drugs." *Id.* at 225. The letter described in detail the Gates' method of operation and specified the date of the next drug transaction. *Id.* Police surveillance of the Gates' activities corroborated most of the allegations in the letter. *Id.* at 226.

most was the majority's view, articulated by Justice Rehnquist, that the two-pronged test of *Aguilar-Spinelli* resulted in "excessively technical dissection of informants' tips" by focusing exclusively on the isolated and independent issues of an informant's veracity and basis of knowledge.[91] The totality of the circumstances test, on the other hand, "permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip."[92]

The court further justified its new standard observing that the quanta of proof required to establish probable cause is less than that required to prove a defendant's guilt in a criminal trial.[93] Moreover, the Court noted that search warrant affidavits are usually prepared by non-lawyers and the warrants are often issued by lay-persons ignorant of the latest judicial refinements in the probable cause area.[94] Furthermore, the *Gates* court viewed strict after-the-fact scrutiny of search warrant affidavits as "inconsistent with the [f]ourth [a]mendment's strong preference for searches conducted pursuant to a warrant."[95] The Court observed that the technicalities of *Aguilar-Spinelli* would encourage resort to warrantless searches, thus thwarting the warrant preference.[96] Finally, the Court stated that rigorous application of the old test provided a serious impediment to law enforcement and would greatly reduce the value of informant's tips in police work.[97]

In formulating the new test, the Court emphasized that an informant's veracity, basis of knowledge, and reliability are still highly relevant issues to be considered in the probable cause determination.[98] Under the *Gates* test, the task of the issuing magistrate is simply:

> to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, includ-

---

91 *Id.* at 233-35. The Court stated that these two elements "are better understood as relevant considerations in the totality-of-the-circumstances analysis." *Id.* at 233. The Court observed that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* (citing Adams v. Williams, 407 U.S. 143 (1972); United States v. Harris, 403 U.S. 573 (1971)).

92 *Id.* at 234.

93 *See id.* at 235.

94 *Id.*

95 *Id.* at 236.

96 *Id.*

97 *Id.* at 237.

98 *Id.* at 230.

> ing the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[99]

Hearkening back to *Jones*, the Court held that the duty of the reviewing court is merely "to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed."[100]

Although both the federal and New Jersey constitutions prohibit unreasonable searches and seizures, neither authority contains enforcement or remedial provisions. In 1914, the United States Supreme Court, in *Weeks v. United States*,[101] created the exclusionary rule, which bars the admission of evidence obtained in violation of the fourth amendment in a federal criminal trial.[102] Prior to 1961, state courts were not required to apply the exclusionary rule, so long as other "equally effective" methods were employed to enforce the protections of the fourth amendment.[103] New Jersey, like most other states, did not recognize the rule.[104] Instead, the state judiciary steadfastly endorsed the proposition "that competent proof shall be available for the prosecution of the offense notwithstanding illegality in the seizure."[105]

---

99 *Id.* at 238.

100 *Id.* at 238-39 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

101 232 U.S. 383 (1914).

102 *Id.* In *Weeks*, the Court limited the application of the exclusionary remedy to federal courts and federal officials. *Id.* at 398. The Court rested its holding on two grounds. First, the Court stated that the federal courts should not sanction "a manifest neglect if not an open defiance of the Constitution" by police officers. *Id.* at 394. Second, the Court reasoned that unless illegally obtained evidence was excluded, there would be no value to the protections of the fourth amendment. *Id.* at 393.

103 Wolf v. Colorado, 338 U.S. 25, 31 (1949). In *Wolf*, the Supreme Court held that the right to be free from arbitrary governmental intrusion is "implicit in the 'concept of ordered liberty' " and thus enforceable against the states via the due process clause of the fourteenth amendment. *Id.* at 27-28. The Court refused, however, to incorporate the exclusionary rule. *Id.* at 33. The Court's conclusion was based on its analysis of the treatment the rule had received in the state courts since its inception. *Id.* at 29. The Court noted that before *Weeks*, twenty-seven states had considered adoption of the exclusionary rule. *Id.* Of these, twenty-six had declined to adopt it. *Id.* Moreover, since Weeks, forty-seven states had considered the exclusionary doctrine: thirty-one had rejected it and sixteen had endorsed it. *Id.* Also, the Court noted that ten jurisdictions in the United Kingdom and the British Commonwealth of Nations had considered adoption of the rule and not one had done so. *Id.* at 30. Finally, the Court was convinced that the other remedies made available by the States to victims of police transgressions were sufficient to redress the constitutional violation. *Id.* at 30-32.

104 *Id.* at 29-30.

105 Eleuteri v. Richman, 26 N.J. 506, 509-10, 141 A.2d 46, 48 (1958) (citations omitted).

In the years following *Weeks*, litigants occasionally urged the New Jersey Supreme Court to adopt the federal rule.[106] In *State v. Alexander*,[107] the court declined to do so, remaining unconvinced of the efficacy of "discarding a rule of constitutional construction which has for many years demonstrated its practical worth and its soundness in the administration of justice in this jurisdiction."[108] The *Alexander* court stated that abandonment of the rule of admissibility would have been "a step backward and inimical to the public good."[109]

The court reaffirmed this position seven years later in *Eleuteri v. Richman*.[110] In rejecting the plaintiff's motion to suppress evidence obtained during a "clearly illegal" search,[111] Chief Justice Weintraub balanced the two purposes of the exclusionary rule, the deterrence of illegal police conduct and the preservation of judicial integrity, against society's need for effective law enforcement.[112] The court emphasized that the rule benefits only the guilty and that it envelops with uncertainty an area of law enforcement which requires clarity and consistency.[113] Moreover, the Chief Justice asserted that since states contend with more violent crimes, the stakes of setting criminals free are greater at the state level than at the federal level.[114] The *Eleuteri* court stated that the suppression of evidence was not remedial in nature.[115] Rather, the court held that the rule was merely a deterrent device designed "to compel respect for the guaranty by removing an incentive to disregard it."[116] Ultimately, the court refused to adopt such a wide sanction in a case where its deterrent purpose would not be served.[117]

---

106 *See infra* notes 107-117 and accompanying text.

107 7 N.J. 585, 83 A.2d 441 (1951).

108 *Id.* at 595, 83 A.2d at 445-46.

109 *Id.*, 83 A.2d at 446.

110 26 N.J. 506, 141 A.2d 46 (1958).

111 *See id.* at 508, 141 A.2d at 47. The plaintiffs in *Eleuteri* commenced an action in the chancery division to suppress evidence obtained pursuant to a search warrant issued by a magistrate authorizing "a search beyond the territorial jurisdiction of his court." *Id.* at 507-08, 141 A.2d at 47.

112 *Id.* at 511-12, 141 A.2d at 49. Chief Justice Weintraub was a staunch opponent of the exclusionary rule. For an excellent discussion of the history of the exclusionary rule during Chief Justice Weintraub's tenure, see Wefing, *New Jersey Supreme Court v. United States Supreme Court*, 7 SETON HALL L. REV. 771 (1976).

113 *Eleuteri*, 26 N.J. at 512-13, 141 A.2d at 49-50.

114 *Id.* at 512, 141 A.2d at 50. The court also stated that "there [was] no persuasive evidence that the constitutional guaranty fares better in jurisdictions which embrace the federal rule." *Id.* at 513, 141 A.2d at 50.

115 *Id.*

116 *Id.*

117 *See id.* at 515, 141 A.2d at 51-52.

Three years later, however, the United States Supreme Court, in *Mapp v. Ohio*,[118] stated that the exclusionary rule was constitutionally required, and held it applicable to the states through the due process clause of the fourteenth amendment.[119] The *Mapp* court concluded that to hold otherwise would provide the right to be free from unreasonable state intrusion but actually to withhold its enjoyment.[120] The *Mapp* Court asserted that the exclusionary rule served two distinct purposes: the deterrence of unlawful police conduct and the preservation of judicial integrity.[121]

Five months after the *Mapp* decision, the New Jersey Supreme Court first recognized the exclusionary rule in *State v. Valentin*.[122] The defendant in *Valentin* was indicted for concealing a shotgun in his automobile without a permit.[123] He moved to exclude the shotgun as evidence on the ground that it was procured by means of an unconstitutional search and seizure.[124] The trial court denied the motion without receiving an offer of proof by the prosecutor on the issue of the legality of the search.[125] The supreme court remanded the case for reconsideration of the issue in light of *Mapp*.[126]

---

118 367 U.S. 643 (1961).

119 *Id.* at 657. In *Mapp*, the Court reconsidered the factual grounds on which the Court based its decision in *Wolf v. Colorado*. *Id.* at 651. The Court noted that while prior to *Wolf* "almost two-thirds of the [s]tates were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it . . . have wholly or partly adopted or adhered to the *Weeks* rule." *Id.* (citations omitted). The Court also stated that the other remedies provided by the states to victims of fourth amendment violations had proven to be "worthless and futile." *Id.* at 652.

120 *Id.* at 656.

121 *Id.* at 656, 659.

122 36 N.J. 41, 174 A.2d 737 (1961).

123 *Id.* at 42, 174 A.2d at 737.

124 *Id.* at 42-43, 174 A.2d at 737.

125 *Id.* at 43, 174 A.2d 738. The *Valentin* court noted that the prosecution was not remiss in failing to submit an offer of proof in light of the fact that at the time of the trial New Jersey's rule of admissibility was still intact. *Id.*

126 *Id.* at 44, 174 A.2d at 737. *Mapp*'s effective incorporation of the exclusionary rule did little to abate the New Jersey Supreme Court's antagonism toward its application. *See* Wefing, *supra* note 112, at 777-794. Under the leadership of Weintraub, whose tenure as Chief Justice continued until 1973, the court consistently avoided the suppression of evidence in criminal trials. *See id.* Of the sixty search and seizure cases decided between 1962 and 1973, only eight resulted in the granting of criminal defendants' suppression motions. *Id.* at 777, 780. Fifty-one suppression motions were denied, and one case was remanded for further proceedings in the trial court. *Id.* at 780.

These statistics are attributable to the Weintraub court's conviction that "the right of the individual to live free from criminal attack in his home, his work, and the streets" outweighed the individual's right to be protected against unreasonable intrusion by law enforcement officials. *Id.* at 786 n.51 (quoting State v. Davis, 50 N.J. 16, 22, 231 A.2d 793, 796 (1967), *cert. denied*, 389 U.S. 105 (1968)). A second

Following *Valentin*, the New Jersey Supreme Court abided by *Mapp* and suppressed evidence obtained pursuant to unconstitutional police practices.[127] The court did not, however, embrace the federal courts' reasoning behind the exclusionary rule.[128] The New Jersey Supreme Court ignored the judicial integrity rationale and viewed the sole purpose of the exclusionary rule to be the deterrence of unlawful police conduct.[129] As a result of this distinction, the court avoided application of the exclusionary rule when its deterrent purpose was not served.[130]

In *State v. Gerardo*,[131] the court refused to suppress evidence in a state prosecution which had been properly procured by federal officials for use in a federal case which was no longer maintainable.[132] The court stated that "[s]uppression is ordered, not to rectify a wrong already done, but to deter future violations" of insolence in office.[133] The court deemed the suppression of evidence, in cases where there was no official misconduct, a "waste" of an innocent person's right to be free from criminal attack.[134]

Two years later, in *State v. Bisaccia*,[135] the court questioned whether the exclusionary rule effectuated its deterrent purpose at

---

factor underlying the Weintraub court's resistance to suppression was the exclusionary rule's interference with the criminal justice systems' truthfinding function. *Id.* at 783.

127 *See, e.g.*, State v. Valencia, 93 N.J. 126, 459 A.2d 1149 (1983) (granting suppression motion where state failed to prove minimal procedural requirements to assure reliability of telephone authorized search); State v. Ercolano, 79 N.J. 25, 397 A.2d 1062 (1979) (granting suppression motion where justification for impoundment of a vehicle and subsequent warrantless search was insufficient); State v. Fariello, 71 N.J. 552, 366 A.2d 1313 (1976) (granting suppression motion where search warrant affidavit lacked probable cause and issuing magistrate made no transcription or summary of officer's testimony).

128 *See, e.g.*, State v. Bisacci, 58 N.J. 586, 279 A.2d 675 (1971). *See infra* notes 135-142 and accompanying text (discussing *Bisacci*).

129 *See, e.g.*, State v. Zito, 54 N.J. 206, 210, 254 A.2d 769, 771 (1969) ("Suppression is a judge-made device to deter future acts of insolence in office rather than to rectify a wrong already done.").

130 *See, e.g.*, Delguidice v. New Jersey Racing Comm'n, 100 N.J. 79, 494 A.2d 1007 (1985); State v. Burstein, 85 N.J. 394, 427 A.2d 525 (1981); State v. Bisacci, 58 N.J. 586, 279 A.2d 675 (1971); State v. Gerardo, 53 N.J. 261, 250 A.2d 130 (1969).

131 53 N.J. 261, 250 A.2d 130 (1969).

132 *Id.* at 263, 250 A.2d at 131.

133 *Id.* at 267, 250 A.2d at 133.

134 *Id.* For largely the same reasons, the court concluded in *State v. Zito* that a police officer's reliance on a statute later held unconstitutional was not unreasonable and did not require suppression of the evidence seized. State v. Zito, 54 N.J. 206, 210-11, 254 A.2d 769, 771 (1969). The court stated that suppression in that instance would result in "a windfall to the criminal, and serve no laudable end." *Id.* at 213, 254 A.2d at 772.

135 58 N.J. 586, 279 A.2d 675 (1971).

all.[136] Writing for the majority, Chief Justice Weintraub stated that when truthful evidence is suppressed, "the pain . . . is felt, not by the inanimate [s]tate or by some penitent policeman, but by the offender's next victims."[137] The court also asserted that the rule's resultant release of guilty criminals "blunt[s] and breed[s] contempt for the deterrent thrust of the criminal law."[138] The court stressed that the exclusionary rule was created solely for the purpose of ending insolence in office,[139] and viewed *Mapp* as requiring suppression even when the police and issuing magistrate acted in good faith.[140] In the Chief Justice's view, this indiscriminate suppression constituted "overkill."[141] As such, the court refused to suppress evidence obtained pursuant to a search warrant, the only defect of which was the erroneous listing of the premises to be searched as number 371, instead of 375.[142]

Ten years later, in *State v. Burstein*,[143] the New Jersey Supreme Court reaffirmed deterrence as the exclusionary rule's primary justification.[144] The court denied retroactive effect to its decision in *State v. Cerbo*,[145] in which it had held that a delay in sealing tapes of intercepted conversations required suppression absent a satisfactory explanation.[146] One of the factors to be considered in the determination of retroactivity, the *Burstein* court pointed out, was whether retroactive application would further the rule's purpose.[147] The court stated that "[i]n cases where the new rule is an exclusionary rule, meant solely to deter illegal police conduct, the new rule is

---

136 *Id.* at 589, 279 A.2d at 677. The court stated that: "The question is whether suppression of the truth with the consequent acquittal of the guilty is a fair and an effective measure to that end." *Id.* The court concluded that it is doubtful "[t]hat suppression is effective in curtailing infractions of the [fourth] [a]mendment." *Id.*

137 *Id.* at 590, 279 A.2d at 677.

138 *Id.* The court also stated that "*Mapp* has left [s]tate officers quite at sea as to what is expected of them." *Id.* The court likewise complained that "[s]tate courts (and the federal bench as well) are drained of energy sorely needed for the trial of criminal and civil cases, as motions to suppress are piled upon motions, appeals upon appeals, and post-conviction proceedings upon post-conviction proceedings." *Id.* at 591, 279 A.2d at 677.

139 *Id.*

140 *Id.* at 591-92, 279 A.2d at 677.

141 *Id.* at 591, 279 A.2d at 677.

142 *Id.* at 592-93, 279 A.2d at 678.

143 85 N.J. 394, 427 A.2d 525 (1981).

144 *See id.*

145 78 N.J. 595, 397 A.2d 671 (1979).

146 *Id.* at 601-02, 397 A.2d at 674.

147 *Burstein*, 85 N.J. at 406, 427 A.2d at 531. The other two factors to be considered, according to the court, were: (1) "the reliance placed on the old rule by those charged with administering it;" and (2) "the effect that retroactive application would have on the administration of justice." *Id.* (citations omitted).

virtually never given retroactive effect . . . [because] the deterrent purposes of such a rule would not be advanced by applying it to past misconduct."[148]

In *Delguidice v. New Jersey Racing Commission*,[149] the court held that a finding of entrapment and subsequent dismissal of criminal charges against a jockey who had accepted a bribe did not require suppression of incriminating evidence in a licensing hearing before the New Jersey Racing Commission.[150] The court concluded that the exclusionary rule's deterrent purpose would not be "efficaciously served" by suppressing the evidence in the licensing hearing.[151] The court noted that the state police were the sole offending officials, and concluded that "the deterrent effect of excluding evidence [was] highly attenuated when the entity forbidden from using the evidence [was] not the same entity whose agents engaged in the illegal maneuvers."[152] Moreover, the state police had already been sanctioned by a dismissal of the criminal proceedings.[153] The court also rejected the appellant's contention that the imperative of judicial integrity mandated exclusion of the evidence.[154] The court noted that in this instance, as with most fourth amendment violations, "the evidence [was] unquestionably accurate and the wrong [was] complete by the time the evidence reache[d] the court."[155] Thus, the court reasoned that the only question was whether the admission of the evidence would encourage misconduct by law en-

---

148 *Id.*

149 100 N.J. 79, 494 A.2d 1007 (1985).

150 *Id.* at 92, 494 A.2d at 1013. Delguidice initially was charged with "conspiracy to rig a publicly-exhibited contest . . . and for agreeing to accept a benefit for rigging a publicly-exhibited contest." *Id.* at 81, 494 A.2d at 1008. The law division dismissed the criminal indictments, however, determining that the state police officers' actions in procuring them were "sufficiently improper as to warrant a finding of entrapment." *Id.*

The New Jersey Racing Commission then informed Delguidice that it would not renew his license for the following year. *Id.* at 82, 494 A.2d at 1008. This decision was affirmed in a formal hearing. *Id.* Delguidice appealed the Racing Commission's decision on the ground that, because the undercover police investigation tactics had been deemed offensive, "all evidence relating to the dismissed criminal indictments should have been excluded from the licensing hearing." *Id.* The appellate division reversed, however, holding that admitting such evidence was proper because excluding it "would have no substantial deterrent effect upon future unlawful police conduct." *Id.* at 82-83, 494 A.2d at 1008-09 (citing United States v. Janis, 428 U.S. 433 (1976)).

151 *Id.* at 84, 494 A.2d at 1009 (quoting United States v. Janis, 428 U.S. 433, 453-54 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974)).

152 *Id.* at 87, 494 A.2d at 1011.

153 *Id.*

154 *Id.* at 88, 494 A.2d at 1011-12.

155 *Id.* at 89, 494 A.2d at 1012.

forcement officials in the future.[156] For this reason, the court declared that the goal of revoking racing licenses was not sufficiently important to law enforcement officials to encourage them to resort to illegal techniques to gather evidence otherwise inadmissible in criminal proceedings.[157]

New Jersey's continued endorsement of the deterrence rationale foreshadowed later developments of the exclusionary rule in the United States Supreme Court. Following the *Weeks* decision, the Supreme Court consistently recognized deterrence and judicial integrity as two distinct purposes served by the exclusionary rule.[158] In its decisions since *Mapp v. Ohio*, however, the Court has recognized the rule's deterrent purpose to the virtual exclusion of the judicial integrity rationale.[159] This has resulted in the Court's restriction of the rule's application to only those cases in which the deterrent purpose would be served.[160] This in turn has caused a substantial reduction of the rule's scope in the federal arena.[161]

In *Linkletter v. Walker*,[162] the United States Supreme Court held that the exclusionary rule was not applicable to state court convictions which had become final before the *Mapp* decision.[163] The Court stated that all of its decisions since 1949 "requiring the exclusion of illegal evidence ha[d] been based on the necessity for an effective deterrent to illegal police action."[164] In the Court's view,

---

156 *Id.*

157 *Id.*

158 *See* Elkins v. United States, 364 U.S. 206, 217, 222 (1960). Justice Stewart, writing for the Court, stated in *Elkins* that the exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217 (citing Eleuteri v. Richman, 26 N.J. 506, 513, 141 A.2d 46, 50 (1958)). The Court further stated that "there is another consideration—the imperative of judicial integrity. . . . If the Government becomes a lawbreaker, it breeds contempt for the law . . . .To declare that . . . the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." *Id.* at 222-23, (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

159 *See infra* notes 162-199 and accompanying text.

160 *See id.*

161 *See id.*

162 381 U.S. 618 (1965).

163 *Id.* at 640. In *Linkletter*, the defendant's burglary conviction had been affirmed by the Supreme Court of Louisiana in February 1960, over a year before *Mapp* was decided. *Id.* at 621. After the *Mapp* decision, Linkletter filed a habeas corpus petition seeking *Mapp's* retroactive application. *Id.* The Court considered the underlying purpose of *Mapp*, the reliance placed upon *Wolf* by the police officers in question, and effect that a retroactive application of *Mapp* would have on the judicial system. *Id.* at 636. The Court held that the retroactive application of *Mapp* "would tax the administration of justice to the utmost." *Id.* at 637.

164 *Id.* at 636-37.

releasing the prisoners involved would not correct police misconduct which occurred prior to the decision in *Mapp*.[165]

In *Alderman v. United States*,[166] the Court held that a defendant whose rights had not been violated by the government's transgression of the fourth amendment did not have standing to move to suppress evidence seized in violation of a codefendant's fourth amendment right.[167] Engaging in a cost-benefit analysis, the *Alderman* court stated it was "not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[168]

Five years later, in *United States v. Calandra*,[169] the Court refused to extend the exclusionary rule to grand jury proceedings.[170] The Court recognized only the rule's broad deterrent purpose, and stated that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[171] According to the *Calandra* Court, application of the rule in the grand jury context would only deter police conduct consciously undertaken to discover evidence exclusively to be used in a grand jury proceeding.[172] The Court maintained that the likelihood of such an occurrence was "substantially negated" by the fact that evidence so obtained would not be admissible later at trial.[173] The Court utilized the *Alderman* balancing approach and held that the speculative and minimal advance of the rule's deterrent purpose was outweighed by the substantial imposition that application of the rule would have on the grand jury.[174] Significantly, the Court declared that the exclusionary rule

---

165 *Id.* at 637.

166 394 U.S. 165 (1969).

167 *Id.* at 171-72. In *Alderman*, after the defendants had been convicted of conspiring to transmit death threats via interstate commerce, it was discovered that one of their places of business had been the target of unlawful electronic surveillance by the government. *Id.* at 167-68. The defendants sought to suppress the evidence obtained as a result of the eavesdropping. *Id.* at 171. They argued that "if evidence [was] inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it [was] also inadmissible against his codefendant or co-conspirator." *Id.*

168 *Id.* at 174-75.

169 414 U.S. 338 (1974)

170 *Id.* at 342.

171 *Id.* at 348.

172 *Id.* at 351.

173 *Id.*

174 *Id.* at 351-52. The Court stressed the necessity of weighing the "potential

was merely "a judicially created remedy designed to safeguard [f]ourth [a]mendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[175]

In 1976, two more significant limitations were created.[176] In *Stone v. Powell*,[177] the Court refused to consider the exclusionary rule in habeas corpus proceedings.[178] The Court held that once a defendant has had an opportunity to litigate the suppression issue in a state court, he may not be granted habeas corpus relief because the evidence offered at trial was the product of an unconstitutional search or seizure.[179] The Court emphasized the costs of extending the rule to collateral review of fourth amendment claims.[180] The Court stated that the overall deterrent effect of the rule would not be significantly diminished if defendants were barred from relitigating the exclusionary issue on review of state convictions.[181] The Court also reiterated its conclusion that the exclusionary rule was not a constitutional right.[182]

In *United States v. Janis*,[183] the Court declared the exclusionary rule inapplicable in civil proceedings.[184] Applying the cost-benefit analysis, the Court stated that "the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule and, as is nearly always the case with the rule, concededly relevant and

---

damage to the role and functions of the grand jury . . . [against] the benefits to be derived from this proposed extension of the exclusionary rule." *Id.* at 350-51.

175 *Id.* at 348. This holding contradicted the assertion in *Mapp* that the exclusionary rule was a constitutional right. *See supra* notes 118-121 and accompanying text.

176 *See infra* notes 177-186 and accompanying text.

177 428 U.S. 465 (1976).

178 *Id.* at 494.

179 *Id.* at 481-82.

180 *Id.* at 489-90. The Court reasoned that "[a]pplication of the rule . . . deflects the truthfinding process and often frees the guilty." *Id.* at 490. Thus, the Court noted that application of the rule "may well have the . . . effect of generating disrespect for the law and administration of justice." *Id.* at 491.

181 *Id.* at 493.

182 *Id.* at 486.

183 428 U.S. 433 (1976).

184 *Id.* at 454. In *Janis*, the Internal Revenue Service (IRS) made a tax assessment against the defendants who were arrested on gambling charges. *Id.* at 436-37. The IRS placed a levy upon cash seized by state police officers pursuant to a search warrant. *Id.* at 437. The warrant was later deemed defective in state court. *Id.* at 438. Defendants then filed a claim for a refund of the money levied upon by the IRS. *Id.* The Court of Appeals for the Ninth Circuit affirmed the district court's holding that the defendants were entitled to a refund as all of the evidence used in making the assessment was obtained in violation of the defendants' fourth amendment rights. *Id.* at 438.

reliable evidence would be rendered unavailable."[185] Since application of the rule was not likely to result in appreciable deterrence, the Court deemed its use in a federal civil proceeding unwarranted.[186]

Two decisions, *United States v. Peltier*[187] and *Michigan v. DeFillippo*,[188] foreshadowed the Court's ultimate recognition of the good-faith exception to the exclusionary rule.[189] In *Peltier*, the Court refused to apply retroactively its decision in *Almeida-Sanchez v. United States*,[190] which set forth the standard for determining the legality of border searches.[191] The *Peltier* Court stated that because the search in question had occurred prior to its decision in *Almeida-Sanchez*, the police could not have known the conduct employed in searching the defendant was unlawful.[192] The judicial integrity rationale resurfaced briefly in the *Peltier* Court's statement that "if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner."[193] Moreover, the Court stated that the rule's deterrent purpose could only be effected if the police officer knew or should have known that the search was invalid under the fourth amendment.[194]

Similarly, in *De Fillippo*, the good-faith exception was implicated in the Court's holding that the exclusionary rule was unavailable when a defendant was arrested under to a law later declared unconstitutional.[195] The defendant in *DeFillippo* was arrested under to a Detroit ordinance which allowed police to detain an individual and question him if the officer reasonably believed that the suspect's behavior warranted further criminal investigation.[196] An amendment to the ordinance provided that it was unlawful for any person detained "to refuse to identify himself and produce evidence of his

185 *Id.* at 447.
186 *Id.* at 454.
187 422 U.S. 531 (1975).
188 443 U.S. 31 (1979).
189 *See infra* notes 190-199 and accompanying text.
190 413 U.S. 266 (1973).
191 *Peltier*, 422 U.S. at 532-535.
192 *Id.* at 541-42.
193 *Id.* at 537.
194 *Id.* at 542.
195 *See* Michigan v. DeFillippo, 443 U.S. 31, 37-38 (1979).
196 *Id.* at 33.

identity."[197] A search made incidental to the defendant's arrest yielded narcotics.[198] When the ordinance was later declared unconstitutionally vague, the defendant unsuccessfully argued that his fourth amendment rights were violated as a result of the search.[199]

In 1984, the United States Supreme Court finally adopted a good-faith exception to the exclusionary rule in *United States v. Leon*.[200] The Court held "that evidence obtained in violation of the [f]ourth [a]mendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded, as a matter of federal law, from the case-in-chief of federal and state criminal prosecutions."[201] The Court maintained that the marginal benefits produced by excluding evidence gathered in objectively reasonable reliance upon a search warrant later deemed invalid could not justify the costs of exclusion.[202]

The *Leon* Court emphasized that the exclusionary rule is not constitutionally compelled, and that its sole purpose is deterrence.[203] For the suppression of evidence to effect this purpose,

---

197 *Id.*

198 *Id.* at 34.

199 *Id.* at 35.

200 468 U.S. 897 (1984). In *Leon*, a search warrant issued on the basis of a partially corroborated informant's tip was found to be insufficient for lack of probable cause by the district court. *Id.* at 903. This finding was affirmed by the Court of Appeals for the Ninth Circuit. *Id.* at 904. Both the district and circuit courts rejected the government's request to recognize a good faith exception to the exclusionary rule. *Id.* at 904-05. The government did not request review of the probable cause issue in its petition for certiorari to the United States Supreme Court; rather, it confined the scope of the petition to the question of whether the "exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *Id.* at 905.

201 *See id.* at 927 (Blackmun, J., concurring). The Court emphasized the objective reasonableness requirement and maintained that the good faith exception will not apply in cases where a police officer intentionally misleads the magistrate issuing the search warrant. *Id.* at 922-23. Likewise, the exception will not apply in cases where the magistrate wholly abandons his judicial role since in such cases no well-trained officer would reasonably rely on the warrant. *Id.* at 923. Nor would a police officer be justified "in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)). Finally, the Court stated that an officer's reliance on a warrant that "fail[ed] to particularize the place to be searched or the things to be seized" or was otherwise facially deficient, would not trigger the good faith exception. *Id.*

202 *Id.* at 922.

203 *See id.* at 906, 909-10. The Court reiterated that "[t]he rule . . . operates as 'a judicially created remedy designed to safeguard [f]ourth [a]mendment rights generally though its deterrent effect, rather than a personal constitutional right of the

Justice White stated, it must engender a change of conduct among law enforcement personnel or a change of policy within law enforcement agencies.[204] The Court concluded that such a result is not reached when officers reasonably rely on a warrant.[205]

The New Jersey Supreme Court has rendered several decisions which have collaterally affected the scope of the exclusionary rule, making the suppression remedy available in New Jersey courts in instances where it would be unavailable in the federal courts.[206] In 1975, the Supreme Court of New Jersey in *State v. Johnson*,[207] considered the meaning of the term "voluntariness" in the context of consent searches.[208] The *Johnson* court acknowledged that the United States Supreme Court had held that voluntariness was to be determined by the "totality-of-the circumstances" test.[209] The court relied on the state constitutional provision against unreasonable searches and seizures to reject the federal approach, and hold that before a person could be deemed to have consented to a search, the state must show that he knowingly waived his constitutional right to refuse consent.[210] Thus, the *Johnson* court provided that a criminal defendant could move to suppress evidence on the issue of waiver, although such a motion was unavailable in a federal proceeding.[211]

In *State v. Alston*,[212] the court used the state constitution to reject three decisions by the United States Supreme Court which, cumulatively, denied standing to any defendant who failed to establish "a reasonable expectation of privacy in the particular area searched,

---

party aggrieved.' " *Id.* at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

204 *Id.* at 918. The Court stressed that the rule's deterrent purpose was not even implicated in cases involving defective warrants issued by magistrates as the "rule is designed to deter police misconduct rather than punish the errors of judges and Magistrates." *Id.* at 916. The Court also noted that judges have no personal interest in the outcome of criminal prosecutions. *Id.* at 917. Thus, according to the Court, "admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective [would not] in any way reduce judicial officers' professional incentives to comply with the [f]ourth [a]mendment, encourage them to repeat their mistakes, or lead to the granting of colorable warrant requests." *Id.*

205 *Id.*

206 *See infra* notes 207-18 and accompanying text (discussing State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975)).

207 68 N.J. 349, 346 A.2d 66 (1975).

208 *Id.* at 352, 346 A.2d at 67.

209 *Id.* at 352, 346 A.2d at 67 (citing Schneckloff v. Bustamonte, 412 U.S. 218, 235-47 (1973)).

210 *Id.* at 353-54, 346 A.2d at 67-68.

211 *See id.* at 354, 346 A.2d at 68.

212 88 N.J. 211, 440 A.2d 1311 (1981).

even where the movant [was] the owner or legitimate possessor of the property seized."[213] Unlike a federal criminal defendant, the *Alston* court held that a criminal defendant in New Jersey could maintain a suppression motion whenever he had a possessory, proprietary or participatory interest in the place unlawfully searched or the objects unlawfully seized.[214]

The following year in *State v. Hunt*,[215] the court again used the state constitution to reject a United States Supreme Court decision which had held that there was no reasonable expectation of privacy in a pen register under the fourth amendment.[216] The court stated that "sound policy reasons" justified a departure from federal precedent.[217] Because of New Jersey's settled policy of protecting telephonic communications, the court held that a person has a protectible interest in toll billing records.[218]

In *State v. Novembrino*, the Supreme Court of New Jersey again interpreted the state constitution to provide greater protection for the rights of criminal defendants than has been afforded by the United States Supreme Court under the federal constitution.[219] Underscoring the state constitution's intolerance of warrants issued without probable cause, the court rejected the "good-faith" exception to the exclusionary rule set forth in *Leon*.[220]

In an opinion by Justice Stein, the *Novembrino* court initially assessed the validity of the disputed search warrant in light of the constitutionally prescribed standard of probable cause.[221] Noting that the relevant federal case law was not characterized "by clarity and

---

213 *Id.* at 224-25, 440 A.2d at 1317-18 (citing Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978)). In *Rakas v. Illinois*, the Supreme Court held that passengers in an automobile, who had neither a possessory nor property interest in either the vehicle or the objects seized, did not have their constitutional rights violated by a search of the vehicle. 439 U.S. 128, 148 (1978). In *United States v. Salvucci*, the Court rejected the doctrine of "automatic standing" which provided that a person charged with a possessory crime automatically had standing to object to the validity of the search and seizure. 448 U.S. 83, 95 (1980). In *Rawlings v. Kentucky*, the companion case to *Salvucci*, the Court held that a defendant had no standing to object to a search of another's purse. 448 U.S. 98, 106 (1980).

214 *Alston*, 88 N.J. at 228, 440 A.2d at 1319.

215 91 N.J. 338, 450 A.2d 952 (1982).

216 *Id.* at 343, 450 A.2d at 954-55. *Contra* Smith v. Maryland, 442 U.S. 735 (1979). A pen register "records the numbers dialed on a telephone." *Hunt*, 91 N.J. at 342, 450 A.2d at 953.

217 *Id.* at 345, 450 A.2d at 955.

218 *Id.* at 345-47, 450 A.2d at 955-56.

219 *See* State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987).

220 *Id.* at 157-58, 519 A.2d at 856-57.

221 *Id.* at 105, 519 A.2d at 825-26.

consistency," the court reviewed both the state and federal cases involving the issue of probable cause in the context of search warrants based on informant's tips to determine the proper standard of review.[222] The court stated that New Jersey decisions on probable cause recognized the same principles articulated by the federal courts.[223] The *Novembrino* court concluded that the "totality-of-the-circumstances" test, adopted by the United States Supreme Court in *Illinois v. Gates*, was the appropriate standard by which to review the sufficiency of search warrants under the New Jersey Constitution.[224] The court asserted that the *Gates* test, which incorporated the veracity and basis of knowledge prongs of *Aguilar-Spinelli*, was substantially consistent with the court's traditional approach to the resolution of probable cause issues.[225]

Turning to the affidavit in question, the court concluded that the informant's allegations, by themselves, were insufficient to support a showing of probable cause.[226] Although the reference in the affidavit to the unidentified informant satisfied the credibility requirements of *Aguilar-Spinelli*, the court observed that the substance of the tip was "meager indeed."[227] Specifically, the affidavit lacked any precise reference as to when the informant had witnessed the alleged drug transactions.[228] Thus, Justice Stein concluded that the issuing magistrate had no reason to suspect that a present search of the defendant's premises would produce evidence of criminal activity.[229] Moreover, the court considered the informant's statements regarding the drug deals he claimed to have witnessed as "bald conclusion[s], allegedly based on personal observation, but unsupported by any reference to dates, events, or circumstances."[230]

Further, the majority stated that the officers' own observations,

---

222 *Id.* at 108, 519 A.2d at 827.

223 *Id.* at 119-20, 519 A.2d at 835.

224 *Id.* at 122, 519 A.2d at 836. *See supra* notes 88-100 and accompanying text (discussing Illinois v. Gates, 462 U.S. 213 (1984)).

225 *Id.* at 123; 519 A.2d at 837.

226 *Id.* at 125, 519 A.2d at 838.

227 *Id.* at 124, 519 A.2d at 837. According to Justice Stein, the veracity prong was satisfied by the detective's "unvarnished statement that [the informant] 'ha[d] proven reliable in several investigations [in the past] (with the information he supplied).'" *Id.* at 123, 519 A.2d at 837. The court pointed out that it had previously accepted "similarly undetailed endorsements" by law enforcement affiants regarding the veracity of informants. *Id.* The affidavit further satisfied the basis-of-knowledge prong by the informant's assertion that he had witnessed the defendant dealing drugs from the gas station. *Id.* at 124, 519 A.2d at 837.

228 *Id.*

229 *Id.*

230 *Id.* at 125, 519 A.2d at 838.

described in the affidavit, did not adequately serve to supplement the informant's assertions.[231] The court pointed out that the affidavit was devoid of any reference to the officers' previous experience in narcotics investigations, a factor to be accorded some weight in the assessment of probable cause.[232] The crucial flaw, according to the court, was that the affidavit contained no specific facts to support the officers' suspicions that the defendant was conducting drug transactions.[233] The affidavit asserted merely that the officers had "observed [Novembrino] meeting with several persons, after leaving his station and making what [they] believed to be drug transactions."[234] Justice Stein noted that had the officers reasonably believed "that they were in fact witnessing drug transactions, they would have been authorized to [make an immediate] arrest."[235] Significantly, no arrest occurred.[236]

Moreover, the court ruled that because the affidavit failed to indicate with precision the officer's observations and the basis for their belief that drugs were being sold, the issuing judge could not have concluded that the officer's suspicions were reasonable.[237] The court considered the detectives' assertions "even less certain and less persuasive than the conclusory and vague allegations of the informant."[238] Thus, the court determined that even combined with the informant's allegations, the officers' observations failed to provide the issuing judge with facts sufficient to permit a reasonable inference that the probable cause existed.[239]

The court next addressed the state's request that the unlawfully seized evidence be held admissible under the good-faith exception to the exclusionary rule enunciated in *United States v. Leon*.[240] The court assumed without deciding the question that the decision

---

231 *Id.* at 128, 619 A.2d at 839.
232 *Id.* at 126, 519 A.2d at 838.
233 *Id.* at 127, 519 A.2d at 839.
234 *Id.* at 126, 519 A.2d at 839.
235 *Id.* (citations omitted).
236 *Id.* at 127, 519 A.2d at 839.
237 *Id.*
238 *Id.* at 128, 519 A.2d at 839.
239 *Id.* Collaterally, the court took note of the affidavit's hasty preparation, the officers' inexperience in preparing search warrant affidavits and the fact that the affidavit was not reviewed by a superior officer. *Id.* at 129, 519 A.2d at 840. The court stated that its recognition of these factors reflected its "conviction that an affidavit in support of a search warrant must be carefully prepared and reviewed to assure that it faithfully reflects the results of the police investigation and provides a judge with sufficient detail to enable him to perform his constitutionally-mandated review." *Id.*
240 *Id.* at 129-30, 519 A.2d at 840 (citing United States v. Leon, 468 U.S. 897 (1984)).

in *Leon* was intended to apply retroactively.[241] The court also adopted, without admitting its correctness, the appellate division's finding that the detectives' reliance on the warrant in question was objectively reasonable.[242]

The court commenced its analysis of the merits of adopting a good-faith exception with an overview of the historical development of the exclusionary rule.[243] The court noted that since the rule became enforceable against the states in 1961, its scope had been steadily diminished.[244] Justice Stein examined the rule's treatment during the 1970's, attributing its compression to the Burger Court's abandonment of the "judicial integrity" rationale and recognition of deterrence as the rule's exclusive justification.[245] Equally responsible, according to Justice Stein, has been the Supreme Court's consistent application, in suppression cases, of a cost-benefit analysis under which the rule's deterrent benefits are balanced against the cost to society of suppressing relevant evidence.[246] The court noted that in cases where the exclusionary rule's deterrent purpose was not advanced, it has not been applied.[247]

The court undertook an extensive analysis of both the majority and minority opinions in *Leon*.[248] According to Justice Stein, *Leon* represented "the most significant limitation of the exclusionary rule since its genesis," because no decision antedating it had specifically contradicted the firmly entrenched principle that unlawfully seized evidence was inadmissible in criminal prosecutions.[249] Ultimately, the court interpreted *Leon* to indicate that "in suppression cases involving warrants the application of the exclusionary rule [would] be the exception, and recognition of the good-faith 'exception' [would]

---

241 *See id.* at 130, 519 A.2d at 841. Justice Stein noted the Eighth Circuit's observation, in *United States v. Sager*, that "on the day *Leon* was decided the Supreme Court granted *certiorari* and vacated the judgments in several fourth-amendment cases, remanding them for further consideration in light of *Leon*." *Id.* (citing United States v. Sager, 743 F.2d 1261, 1264-65 (1984), *cert. denied*, 469 U.S. 1217 (1985)). Justice Stein further observed that the federal appeals courts that have considered the issue have determined that *Leon* applies retroactively. *Id.* at 131, 519 A.2d at 841.

242 *Id.* at 132, 519 A.2d at 842. As a prerequisite to application of the good-faith exception to the exclusionary rule, *Leon* requires a finding that the officer acted in good-faith upon an improperly issued warrant. *See Leon*, 468 U.S. at 922-23.

243 *See Novembrino*, 105 N.J. at 132-39, 519 A.2d at 842-45.

244 *Id.* at 137, 519 A.2d at 844.

245 *See id.* at 137-39, 519 A.2d at 844-45.

246 *See id.*

247 *See id.*

248 *See id.* at 139-44, 519 A.2d at 845-49.

249 *Id.* at 138-39, 519 A.2d at 845.

be the prevailing standard."[250] Since this result would "undermine the constitutionally-guaranteed standard of probable cause," the New Jersey Supreme Court declined to endorse it.[251]

Acknowledging the value of uniformity between state and federal courts in administration of criminal laws, the court nevertheless justified its rejection of *Leon* by stating that it had frequently construed New Jersey's own constitutional provision against unreasonable searches and seizures to afford broader protection than that offered by the fourth amendment.[252] The resolution of constitutional issues on independent state grounds was permissible, the court stated, when matters of "particular state interest," such as individual privacy rights and enforcement of criminal laws, are at stake.[253] The court asserted that recognition of the good-faith exception would disserve the state's strong interest in preserving the constitutional guarantee that search warrants "shall not issue except upon probable cause."[254]

The court examined the extent of the state's interest in the preservation of a strict standard of probable cause.[255] Justice Stein noted that prior to the *Mapp* decision, New Jersey, like most other states,[256] did not recognize the exclusionary rule, but adhered instead to a rule of admissibility even in cases where the search and seizure were deemed unconstitutional.[257] The majority asserted, however, that since 1961, the exclusionary rule has become a fixture of New Jersey jurisprudence, and all illegally obtained evidence has consistently been suppressed.[258]

---

250 *Id.* at 139, 519 A.2d at 846. The court emphasized the *Leon* Court's statement that suppression of evidence would henceforth "be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* (quoting United States v. Leon, 468 U.S. 897, 918 (1984)).

251 *Id.* at 157-58, 519 A.2d at 856-57.

252 *Id.* at 145, 154, 519 A.2d at 849-50, 854-55, (citing State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975)). *See supra* notes 206-218 and accompanying text.

253 *See Novembrino*, 105 N.J. at 146, 519 A.2d at 850.

254 *See id.* at 155, 519 A.2d at 855 (quoting N.J. CONST. art. I, para. 7).

255 *See id.* at 146-54, 519 A.2d at 850-55.

256 *See supra* notes 103-04 and accompanying text.

257 *Novembrino*, 105 N.J. at 147, 519 A.2d at 850 (citing Eleuteri v. Richman, 26 N.J. 506, 141 A.2d 46 (1958)). The court also pointed out that the delegates to New Jersey's Constitutional Convention of 1947 expressly rejected an amendment that would have incorporated the exclusionary rule into Article 1, paragraph 7. *Id.*, 519 A.2d at 850-51.

258 *Id.* at 148, 519 A.2d at 851 (citing State v. Valentin, 36 N.J. 41, 174 A.2d 737 (1961)).

The court discussed several recent developments in the state's criminal justice system which were further illustrative of the extent of the state's interest in the maintenance of the probable cause standard.[259] Justice Stein pointed out that the state legislature had incorporated the exclusionary rule in the New Jersey Wiretapping and Electronic Surveillance Control Act of 1968.[260] He observed that this statute specifically requires the suppression of any evidence obtained through an interception which is unauthorized, insufficiently authorized, or otherwise inconsistent with the statutory guidelines.[261] Significantly, the court noted that although good faith reliance by a police officer on an invalid authorization is a defense to any proceeding instituted against him, the statute nonetheless requires the suppression of the wrongfully obtained evidence.[262]

The majority further observed that state law enforcement agencies have also instituted measures designed to ensure the vitality of the probable cause standard.[263] Noted by the court was a presentment issued by a grand jury in Union County condemning the issuance of a search warrant because of defects in the local police procedure.[264] The court also cited a joint policy statement issued by the Attorney General and the County Prosecutor's Association, the intent of which was to accomplish the "institutionalization of a systematic search warrant review procedure in New Jersey."[265] Justice Stein observed that the statement provides for statewide mandatory review, by an authorized official, of all search warrant applications.[266] In addition, he noted that the state offers regular search warrant training programs to all municipal court judges.[267]

The court "assumed" that the combined effect of these initiatives would be to maximize "compliance with the probable-cause standard and minimize the incidents of suppression of evidence because of defectively-issued warrants."[268] In this context, the court also took note of a recent study of suppression motions conducted by the Administrative Office of the Courts.[269] The study suggested that in New Jersey the suppression of evidence obtained pursuant to

---

259 *Id.* at 149-52, 519 A.2d at 852-53.
260 *Id.* at 149, 519 A.2d at 852.
261 *Id.*
262 *Id.*
263 *Id.* at 150, 519 A.2d at 852.
264 *Id.*
265 *Id.*
266 *Id.*
267 *Id.*
268 *Id.* at 150-51, 519 A.2d at 852-53.
269 *Id.* at 151-52, 519 A.2d at 853.

invalid search warrants was relatively uncommon and posed no serious threat to law enforcement efforts.[270]

The court next focused on "the inevitable tension between the proposed good faith exception and the [constitutional] guarantee . . . that search warrants 'shall not issue except upon probable cause.' "[271] Justice Stein posited that the state's demonstrated commitment to the constitutional mandate of probable cause would be undermined by recognition of the good faith exception because of the disincentive to comply with the constitutional standard it inevitably creates.[272] The court reasoned that because *Leon* eliminates any sanction for non-compliance with the probable cause strictures, the quality of evidence offered in search warrant applications would "inevitably and inexorably" be diminished.[273]

Further justifying this position, the court stated that other jurisdictions have refused to adopt the good-faith exception because of its tendency to dilute the constitutional standard.[274] Moreover, Justice Stein asserted that unlike at the federal level, New Jersey has experienced no "dilution of the probable cause standard," but rather, has enhanced efforts to ensure its vitality.[275] Nor, he pointed out, has application of the exclusionary rule hampered effective enforcement of the state's criminal laws.[276] The court conceded the possible efficacy of a good-faith exception in jurisdictions where warrants are issued by "non-lawyer magistrates," and the likelihood of defective warrants is increased.[277] Justice Stein concluded that these considerations were "plainly" not applicable in New Jersey.[278] Ultimately, the court held that the exclusionary rule is "an integral element of [the] state-constitutional guarantee" against unreasonable searches and seizures.[279] The court specifically rejected the exclusivity of the deterrence rationale and stated that "[t]he rule . . . serves as the indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches."[280]

In a concurring opinion, Justice Handler agreed with the majority's adoption of the *Gates* totality-of-the-circumstances test, and,

---

270 *Id.*
271 *Id.* at 155, 519 A.2d at 855 (quoting N.J. CONST. art. I, para. 7).
272 *See id.* at 152-53, 519 A.2d at 853-54.
273 *Id.* at 153, 519 A.2d at 854.
274 *See id.* at 154 n.38, 519 A.2d at 855 n.38.
275 *See id.* at 155, 519 A.2d at 855.
276 *Id.*
277 *Id.* at 156, 519 A.2d at 855.
278 *Id.*, 519 A.2d at 856.
279 *Id.* at 157, 519 A.2d at 856.
280 *Id.*

likewise, with its determination that the affidavit underlying the search warrant lacked probable cause.[281] He also agreed with the majority's rejection of the good-faith exception because of its tendency to dilute the probable cause standard.[282] Justice Handler disapproved, however, of the court's elevation of the exclusionary rule to a constitutional right.[283] Rather, he viewed the rule as a judicially-created remedy that, although legally potent, and vitally necessary to ensure constitutional compliance, is merely ancillary to an individual's constitutional right to be free from unreasonable searches and seizures.[284] He stated that he would continue to apply the rule as a matter of state common law.[285]

Justice Handler stated that the majority's characterization of the rule as a constitutional right was not supported by case law, constitutional history, or sound public policy.[286] He asserted that since the inception of the exclusionary rule in New Jersey, the court "ha[d] consistently and unfailingly stressed its deterrent purpose and its origins as a court-created remedy designed to discourage improper police conduct."[287] Justice Handler stated that the scope of the rule, rather than the purpose, had been broadened to include police misconduct that was mistaken or misguided, as well as intentional.[288] Strong judicial deference had traditionally not been paid, he observed, to either the judicial integrity or compensation rationales.[289] As such, Justice Handler considered it "an exaggeration to say that the rule . . . ha[d] acquired constitutional stature."[290] Thus, Justice Handler deemed it unnecessary and unwise for the court to transpose "an ancillary rule . . . from a common-law doctrine into a constitutional right."[291] Such a step, he asserted, not only would preclude future judicial development of the rule or possible alterna-

---

281 *Id.* at 160-61, 519 A.2d at 858 (Handler, J., concurring). Justice Handler asserted that the majority's "extensive exposition" of the probable cause issue was unnecessary, and suggested that the majority should simply have adopted "the sound position of the [a]ppellate [d]ivision." *Id.*

282 *Id.* at 161, 519 A.2d at 858 (Handler, J., concurring).

283 *Id.* at 160, 519 A.2d at 858 (Handler, J., concurring).

284 *Id.* at 163, 519 A.2d at 859-60 (Handler, J., concurring).

285 *Id.* at 174, 519 A.2d at 864-65 (Handler, J., concurring).

286 *Id.* at 164, 519 A.2d at 860 (Handler, J., concurring).

287 *Id.* at 166, 519 A.2d at 861 (Handler, J., concurring). Justice Handler also posited that the rule had only been employed to remedy culpable police misconduct. *Id.* at 165, 519 A.2d at 861.

288 *Id.* at 166, 519 A.2d at 861 (Handler, J., concurring).

289 *Id.* at 167-68, 519 A.2d at 862 (Handler, J., concurring).

290 *Id.* at 167, 519 A.2d at 862. (Handler, J., concurring). Justice Handler also noted the express defeat of the exclusionary rule amendment at the 1947 Constitutional Convention. *Id.* at 169, 519 A.2d at 863 (Handler, J., concurring).

291 *Id.* at 170, 519 A.2d at 863-64 (Handler, J., concurring).

tives, but would also prohibit the other government branches from exercising their responsibilities with respect to enforcement of the constitutional guarantee against unreasonable searches and seizures.[292]

Justice Garibaldi filed a separate opinion in which she concurred with the majority's decision to adopt the *Gates* totality-of-the-circumstances test,[293] but dissented from the court's rejection of the good-faith exception.[294] She asserted that the *Leon* doctrine reflects a more thoughtful appreciation of the high costs of the exclusionary rule, and better accommodates the often competing interests of the public in effective law enforcement and the individual in protection against unreasonable governmental intrusion.[295] Like Justice Handler, Justice Garibaldi objected to the majority's characterization of the exclusionary rule as a constitutional right.[296]

Justice Garibaldi's dissent rested on two specific grounds.[297] First, she disagreed with the majority's conclusion that the good-faith exception undermines police compliance with the constitutional requirement of probable cause.[298] She believed the major justification behind the exclusionary rule to be deterrence of improper police conduct.[299] The justice emphasized that the good-faith exception is invoked only when an officer has acted reasonably, but mistakenly, in his assessment of probable cause.[300] Applying the exclusionary rule in such instances cannot serve to deter future violations, Justice Garibaldi asserted, but rather serves only to keep "relevant and probative evidence from the jury, thereby substantially impairing or aborting the trial."[301] Justice Garibaldi further maintained that unchecked application of the exclusionary rule could actually undermine the rule's deterrent function.[302] Justice

---

292 *Id.* at 170-71, 519 A.2d at 864 (Handler, J., concurring).

293 *Id.* at 174, 519 A.2d at 866 (Garibaldi, J., concurring in part and dissenting in part).

294 *Id.* at 174-75, 519 A.2d at 866 (Garibaldi, J., concurring in part and dissenting in part).

295 *Id.* at 175, 519 A.2d at 866 (Garibaldi, J., concurring in part and dissenting in part).

296 *Id.*

297 *See id.*

298 *Id.* at 178, 519 A.2d at 868 (Garibaldi, J., concurring in part and dissenting in part).

299 *Id.* at 175, 519 A.2d at 866 (Garibaldi, J., concurring in part and dissenting in part).

300 *Id.* at 178-79, 519 A.2d at 868 (Garibaldi, J., concurring in part and dissenting in part).

301 *Id.* at 180, 519 A.2d at 869 (Garibaldi, J., concurring in part and dissenting in part).

302 *Id.* at 178, 519 A.2d at 868 (Garibaldi, J., concurring in part and dissenting in

Garibaldi disagreed with the majority's assumption that police officers would use the good-faith exception deliberately to secure and execute insufficient search warrants.[303] Rather, she maintained that adequate protection against such abuse was built into the requirement that search warrants be issued by neutral and detached judges.[304]

Secondly, Justice Garibaldi maintained that there exist no independent constitutional grounds justifying the majority's deviation from federal law.[305] She maintained that the *Leon* rule and its rationale have long been recognized in New Jersey precedents, traditions and practice.[306] Examining the history of the exclusionary rule in New Jersey, Justice Garibaldi concluded that because the court has always viewed deterrence as the prime justification for the rule, it has only been applied to redress culpable police misconduct.[307] She also argued that New Jersey courts have measured the validity of searches and seizures by the same objective reasonableness test utilized by the United States Supreme Court in *Leon*.[308] Moreover, Justice Garibaldi noted that as in *Leon*, the New Jersey courts have measured police officers' conduct "in a practical and realistic manner."[309] Therefore, Justice Garibaldi asserted "that New Jersey has no historical attachment to the exclusionary rule."[310] Applying the good-faith exception to the facts of the *Novembrino* case, Justice Gari-

---

part). Justice Garibaldi cited one critic's observation that "[i]nstead of disciplining their employees, police departments generally have adopted the attitude that the courts cannot be satisfied, that the rules are hopelessly complicated and subject to change, and that the suppression of evidence is the courts' problem and not the departments.' " *Id.* (quoting Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050 (1974)).

303 *Id.* at 180-81, 519 A.2d at 869 (Garibaldi, J., concurring in part and dissenting in part).

304 *Id.* In this context, Justice Garibaldi cited the suppression motion survey conducted by the Administrative Office of the Courts. *Id.* at 181 n.2, 519 A.2d at 869-70 n.2 (Garibaldi, J., concurring in part and dissenting in part). Since only one of the eighty-two motions studied involved a search conducted pursuant to a search warrant, Justice Garibaldi, in contrast to the majority, concluded "that judges [were] acting properly in reviewing search warrant applications." *Id. See supra* text accompanying notes 269-70 for the majority's interpretation of these statistics.

305 *Novembrino*, 105 N.J. at 182, 519 A.2d at 870 (Garibaldi, J., concurring in part and dissenting in part).

306 *Id.*

307 *Id.* at 184, 519 A.2d at 871 (Garibaldi, J., concurring in part and dissenting in part).

308 *See id.* at 185, 519 A.2d at 872 (Garibaldi, J., concurring in part and dissenting in part).

309 *Id.*

310 *Id.* at 186, 519 A.2d at 872-73 (Garibaldi, J., concurring in part and dissenting in part).

baldi concluded that the judgment of the appellate division should have been reversed and the evidence held admissible.[311]

On the surface, the New Jersey Supreme Court's rejection of the good-faith exception to the exclusionary rule is not surprising in view of the court's demonstrated tendency to be more liberal than the United States Supreme Court in protecting criminal defendants' constitutional rights. What is surprising is the court's unanimous endorsement of the *Gates* totality-of-the-circumstances analysis to assess the validity of search warrants. The court rejected *Leon* because it feared the good-faith exception will promote the demise of the constitutional standard of probable cause.[312] The adoption of the more lenient *Gates* test is inconsistent with this reasoning.

Criticism of the totality-of-the-circumstances approach to probable cause is abundant. Some have characterized the standard as overly-permissive towards unlawful police practices in that it substantially reduces the role of the issuing magistrate in reviewing search warrant applications and enforcing the probable cause requirements.[313] Others maintain that the *Gates* decision has reduced the probable cause standard to nothing more than a general reasonableness test, validating searches based on a "mere suspicion" that evidence of a crime will be found at a particular location.[314] Justice White, in his concurring opinion in *Gates* went so far as to predict that the decision would cause "an evisceration of the probable-cause standard."[315] Notwithstanding the validity of the various criticisms, one inevitable result of New Jersey's application of the totality-of-the-circumstances test will be determinations of probable cause in search warrants which, under the more rigorous *Aguilar-Spinelli* inquiry, would not have been made.

The majority might more appropriately have vindicated the state's strong interest in preserving the probable cause guarantee by rejecting *Gates*, not *Leon*. As one scholar has noted, most search and seizure decisions involve questions of probable cause.[316] Very few

---

311 *Id.* at 187, 519 A.2d at 873 (Garibaldi, J., concurring in part and dissenting in part).

312 *Id.* at 157-58, 158, 519 A.2d at 856-57.

313 *See* Mascolo, *Probable Cause Revisited: Some Disturbing Implications Emanating from Illinois v. Gates*, 6 W. NEW ENG. L. REV. 331, 331-32 (1983); Cover, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 184 (1983).

314 *See* Mascolo, *supra* note 313, at 413-14; Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 237, 340 (1984).

315 *Gates*, 462 U.S. at 272 (White, J., concurring).

316 J. Wefing, Thoughts on State v. Novembrino and the New Jersey Constitutional Provisions on Search and Seizure 10 (1987) (unpublished manuscript) (available in the files of SETON HALL LAW REVIEW).

search and seizure decisions "involve the good-faith exception."[317] Justice Stein himself observed that suppression motions based on defective search warrants are infrequently granted in New Jersey.[318] The majority rejected *Leon* so as not to "disrupt the highly effective procedures" implemented by the state to ensure the vitality of the probable cause guarantee.[319] Rejection for this reason is unwarranted. As one expert has noted, recognition of the *Gates* test "totally obviates" the need for a good-faith exception, since "[a]fter *Gates* it does not require very much to issue a warrant, [and] it takes even less to uphold one on review."[320]

The court's reasoning behind its rejection of the good-faith exception is, likewise, unpersuasive. The relevant case law supports Justice Garibaldi's assertion that in New Jersey, deterrence has been the exclusionary rule's dominant justification.[321] Also validated by the decisions is her suggestion that the New Jersey courts have, in the past, recognized a type of good-faith exception by refusing to suppress evidence in cases where the police misconduct was not culpable.[322] The majority opinion ignored these precedents and selectively cited cases that support its proposition that "the exclusionary rule has become imbedded in [the state's] jurisprudence."[323] Indeed, the rule has become entrenched in New Jersey's criminal law, but only because the United States Supreme Court mandated this result in *Mapp v. Ohio*. Similarly unprecedented is Justice Stein's assertion that the exclusionary rule serves the additional purpose of "vindicating the constitutional right to be free from unreasonable searches" and seizures.[324] Thus, although the court's transformation of the exclusionary rule into a constitutional right may be laudable, it is not supported by precedent.

In *State v. Novembrino*, the New Jersey Supreme Court has, for the fourth time, used the state constitution as justification for departing from federal search and seizure law.[325] Although this prac-

---

317 *Id.*

318 *Novembrino*, 105 N.J. at 152, 519 A.2d at 853.

319 *Id.* at 158, 519 A.2d at 857.

320 Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 552, 589 (1984).

321 *Novembrino*, 105 N.J. at 175, 519 A.2d at 866 (Garibaldi, J., concurring in part and dissenting in part).

322 *Id.* at 184, 519 A.2d at 871 (Garibaldi, J., concurring in part and dissenting in part).

323 *See id.* at 148, 519 A.2d at 851.

324 *See id.* at 157, 519 A.2d at 856.

325 For a discussion of the other three decisions, *see supra* notes 206-18 and accompanying text.

tice has been sanctioned and encouraged by the United States Supreme Court,[326] significant debate exists as to the circumstances that justify a state's deviation from federal precedent and the methods employed by the states in substituting state for federal constitutional law.[327] Advocates of the "primacy" approach argue that federal law should be considered "only after all claims resting on state law have failed to provide the requested protections."[328] This approach has been criticized for its unrealistic failure to recognize the current fact of federal dominance in the protection of individual rights.[329] New Jersey implicitly has endorsed the "interstitial" model, under which the state recognizes the federal doctrine as dominant, and "asks whether and how to criticize, amplify, or supplement this doctrine to yield more extensive constitutional protections."[330]

The court has not, however, clearly indicated when it will follow federal law and when it will look to state law to determine the contours of a particular constitutional right. *Novembrino* provided the court with an occasion to establish the necessary guidelines. The court neither seized the opportunity, nor acknowledged the necessity of doing so. Instead, the *Novembrino* majority relied on the vague standard announced in *State v. Hunt*, that "[s]ound policy reasons . . . may justify a departure" from federal precedent.[331]

In a concurring opinion in *Hunt*, Justice Handler acknowledged that notions of "healthy federalism" justified the state courts' trend of acting independently under their own state constitutions.[332] He also recognized, however, the value of consistency and uniformity in certain areas of constitutional law.[333] He, thus, deemed it necessary to elucidate criteria to determine when the Constitution of New Jersey may appropriately be invoked to provide greater protection of individual rights.[334] The factors to be considered include textual and structural differences between the two constitutions, legislative history, preexisting state law matters of particular state interest, state traditions, and public opinion.[335] Interestingly, in his concur-

---

326 *See supra* note 2 and accompanying text.

327 *See generally Developments*, *supra* note 1, at 1324.

328 *Id.* at 1356.

329 *Id.* at 1357.

330 *Id.* at 1357-58. *See also* Pollock, *supra* note 1, at 718-22.

331 *Hunt*, 91 N.J. at 345, 450 A.2d at 955. *See supra* notes 215-18 and accompanying text (discussing *Hunt*).

332 *Hunt*, 91 N.J. at 362-63, 450 A.2d at 964 (Handler, J., concurring).

333 *Id.* at 363, 450 A.2d at 964 (Handler, J., concurring).

334 *Id.*, 450 A.2d at 965 (Handler, J., concurring).

335 *Id.* at 364-68, 450 A.2d at 965-67 (Handler, J., concurring).

ring opinion in *Novembrino*, Justice Handler did not allude to the analysis he proposed in *Hunt*.[336] Perhaps this is because utilization of the suggested criteria would have compelled rejection of the totality-of-the-circumstances test for probable cause and adoption of the good-faith exception.[337]

*Nancy McDonald*

---

336 *See Novembrino*, 105 N.J. at 159-74, 519 A.2d 857-66 (Handler, J., concurring).
337 Wefing, *supra* note 316, at 10.