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DEVELOPMENTS IN THE LAW

Court of Appeals adopts elevated standard in determining probable cause for alleged obscenity violations

The fourth amendment to the United States Constitution¹ provides protection against unreasonable search and seizure in the absence of probable cause.² State constitutions are constrained to

¹ U.S. CONST. amend. IV. The fourth amendment provides that:

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.

Id.

The essence of the fourth amendment was explained by Justice Brandeis:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The fourth amendment expresses the determination of the drafters of the Bill of Rights, who vividly remembered the “general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.” *Stanford v. Texas*, 379 U.S. 476, 481 (1964). These writs gave customs officers the authority to search anywhere for goods imported in violation of British tax laws. *See id.* They were denounced as “‘the worst instrument of arbitrary power, the most destructive of English liberty. . .’ because they placed ‘the liberty of every man in the hands of every petty officer.’” *Id.* (quoting James Otis). The Bill of Rights acknowledged that the “unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.” *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961).

The courts have adopted the philosophy that general warrants should be rejected in this country as they were in England. *See, e.g., Boyd v. United States*, 116 U.S. 616, 622 (1886) (compulsory production of private books and papers violates fourth amendment). The Court in *Boyd* asserted that those who had framed the fourth amendment were undoubtedly familiar with England’s rejection of general warrants. *See id.* at 626-27. *See also F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776* (1965) (history of search and seizure in England).

² *See W. LAFAVE, SEARCH AND SEIZURE* § 3.1, at 437 (1978). Under the fourth amendment, no arrest or search may stand in the absence of probable cause. *See id.* § 3.2, at 495. Neither Congress nor law enforcement officers are free to compromise the fourth amendment. *See id.* The “doctrine is based in part upon the need to guard against arbitrary and discriminatory enforcement. . . .” *Id.* at 497. The finding of probable cause may rest upon evidence which is inadmissible in a criminal trial. *See Draper v. United States*, 358 U.S. 307, 311 (1959). The evidence required need not establish guilt. *See Henry v. United States*, 361 U.S. 98, 102 (1959) (citing *Brinegar v. United States*, 338 U.S. 160 (1949)); *Draper v. United States*, 358 U.S. 307 (1959). Probable cause exists when an officer, acting prudently, examines the facts and circumstances and believes that an offense has been committed. *See Henry*, 361 U.S. at 102; *United States v. Di Re*, 332 U.S. 581, 592 (1948); *Director Gen. v. Kastenbaum*, 263 U.S. 25, 28 (1923); *Stacey v. Emery*, 97 U.S. 642, 645 (1878). Probable

provide at least the same minimum levels of protection against such unjustified invasions of privacy as are provided under the federal Constitution.³ In our system of federalism, however, the states are permitted to extend greater protection of rights and liberties to their citizens under their own state constitutions.⁴ New York has

cause generally "means less than evidence which would justify condemnation." *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813).

New York courts have defined probable cause in the same manner. See *People v. Bigelow*, 66 N.Y.2d 417, 423, 488 N.E.2d 451, 455, 497 N.Y.S.2d 630, 634 (1985); *People v. Hanlon*, 36 N.Y.2d 549, 559, 330 N.E.2d 631, 637, 369 N.Y.S.2d 677, 684-85 (1975); *People v. Marshall*, 13 N.Y.2d 28, 34, 191 N.E.2d 798, 801, 241 N.Y.S.2d 417, 421 (1963). The function of probable cause is to guarantee a high probability that any invasion involved in the search can be justified by the discovery of the claimed items. See generally Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687-992 (1961) (discussion of fourth amendment protections).

Another protection afforded by probable cause is the requirement that the search warrant be reviewed by a neutral and detached magistrate. See *W. LAFAVE, supra*, § 3.1, at 447-48. The protection further requires that any inferences be judged by an independent body. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (magistrate and not police must perform detached function); *United States v. Ventressa*, 380 U.S. 102, 109 (1965) (same). New York courts follow the same approach. See *Monserrate v. Upper Court St. Book Store*, 49 N.Y.2d 306, 309, 401 N.E.2d 414, 415-16, 425 N.Y.S.2d 304, 306 (1980) (quoting *People v. Potwora*, 48 N.Y.2d 91, 95, 397 N.E.2d 361, 364, 421 N.Y.S.2d 850, 853 (1979)). In New York, the existence of probable cause is determined solely by the magistrate. See *People v. Abronovitz*, 31 N.Y.2d 160, 165, 286 N.E.2d 721, 723, 335 N.Y.S.2d 279, 282 (1972); *People v. Williams*, 20 N.Y.2d 388, 391, 229 N.E.2d 839, 840, 281 N.Y.S.2d 169, 171 (1967).

³ See *J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW* § 1.6, at 21 (3d ed. 1986). The states are free to interpret state laws and state constitutions as long as they do not violate principles of federal law. *Id.* The federal Constitution establishes minimum guarantees of rights and the states may grant additional liberties without violating its provisions. See generally *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* § 5-20, at 300-06 (1978) (state sovereignty overview).

⁴ See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *State v. Kaluna*, 55 Haw. 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974). Over the past several years many states have increased the liberties granted to their own citizens beyond those granted by the federal Constitution. See *e.g.*, *Horton v. Meskill*, 172 Conn. 615, 648-49, 376 A.2d 359, 374-75 (1977) (education a fundamental right under state constitution); *People v. Clyne*, 189 Colo. 412, 413, 541 P.2d 71, 73 (1975) (state constitution does not allow full search in arrest for traffic violation). It is generally accepted that state courts have independence on issues of state law. See *Cooper v. California*, 386 U.S. 58, 62 (1967). In support of the trend toward expanding individual rights under state constitutions, Justice Brennan wrote that federalism "must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms." Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). Where a sufficient and independent state ground exists, the Supreme Court has refused to review such cases so as to avoid rendering advisory opinions as well as out of deference to the independence of state courts. See *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The Court, however, will avoid reviewing a decision based on a state constitution only "[i]f the

chosen, in a number of instances, to provide increased protection of rights to its citizens under its state constitution.⁵ Recently, in *People v. P.J. Video*,⁶ the New York Court of Appeals held that the state constitution provides greater protection than the federal Constitution against search and seizure of allegedly obscene materials, and requires a standard of probable cause for issuance of search warrants in connection with purported obscenity violations.⁷

In *P.J. Video*, the defendants were charged with six counts of obscenity in the third degree under Penal Law section 235.05(1).⁸ A criminal investigator, under the direction of the Erie County District Attorney's Office, was assigned to review ten video cassettes rented from the defendants.⁹ The investigator viewed the movies in their entirety and summarized the theme and conduct of each film in affidavits which were annexed to the application for

state court decision indicates clearly and expressly that it is alternatively based on *bona fide* separate, adequate, and independent grounds. . . ." *Id.* at 1041. See also Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1318 (1985) (discussion of problems and benefits of state activism); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 321 (1977) (applauding independent state interpretation "as useful source of constitutional interpretation"). Since the inception of this country, diversity has been a hallmark of the federal and state court systems. See Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 977-78 (1985). This has had a beneficial effect on the efficiency of the judicial system. See Hart, *The Relationship Between State and Federal Law*, 54 COLUM. L. REV. 489, 506 (1954).

⁵ See *infra* note 25.

⁶ *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 107 S. Ct. 1301 (1987).

⁷ See *id.* at 309, 501 N.E.2d at 564, 508 N.Y.S.2d at 915.

⁸ See *id.* at 299, 501 N.E.2d at 558, 508 N.Y.S.2d at 909. Section 235.05 of the Penal Law provides that: "A person is guilty of obscenity in the third degree when, knowing its content and character, he: 1. Promotes, or possesses with intent to promote, any obscene material." N.Y. PENAL LAW § 235.05(1) (McKinney Supp. 1986). The Penal Law defines any material or performance as obscene if:

(a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion, or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

N.Y. PENAL LAW § 235.00(1) (McKinney 1980).

⁹ *People v. P.J. Video, Inc.*, 65 N.Y.2d 566, 574, 483 N.E.2d 1120, 1126, 493 N.Y.S.2d 988, 994 (1985) (Jasen, J., dissenting), *rev'd*, 106 S. Ct. 1610 (1986).

the warrant authorizing the search of the defendants' premises.¹⁰ Upon review by a justice of the Erie County Supreme Court, a warrant was issued.¹¹ In the execution of the warrant, the defendants' premises were searched and copies of the movies named in the warrant, together with certain other documents, seized as evidence for trial.¹² The defendants, in an omnibus motion before the Depew Village Court, sought suppression of the seized films.¹³ Granting the motion, the court held that there could be no finding of probable cause based solely on the police investigator's allegations of obscenity.¹⁴ The order of suppression was affirmed by the County Court, Erie County, which held that the issuing magistrate, who had not investigated or viewed the films, had improperly relied on the affidavits alone.¹⁵

The Court of Appeals affirmed, holding that a higher standard was required in the evaluation of a warrant application when such items as books and films were involved, since their seizure might constitute a prior restraint based on content.¹⁶ The court stated that in applying the fourth amendment to seizure of such items, a court must act with "scrupulous exactitude."¹⁷ On certiorari, the Supreme Court reversed, holding that the affidavits satisfied the fourth amendment warrant requirement, and remanded the case to the Court of Appeals to determine whether article 1, section 12 of the New York Constitution imposed a higher standard for the issuance of search warrants for allegedly obscene materials.¹⁸

¹⁰ *Id.* (Jasen, J., dissenting). In the affidavits, the investigator identified each film by title and noted the time required to view each film. *Id.* at 570, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991. Each affidavit contained between fifteen and twenty typewritten lines describing the films. *Id.* at 570, 483 N.E.2d at 1123-24, 493 N.Y.S.2d at 991-92.

¹¹ *Id.* at 574, 483 N.E.2d at 1126, 493 N.Y.S.2d at 994 (Jasen, J., dissenting). The warrant issued by the magistrate specifically named the tapes to be seized and authorized a search of personal papers or documents that would identify the owner, lessee, or whoever had control or custody of the premises. *Id.* (Jasen, J., dissenting).

¹² *Id.* (Jasen, J., dissenting). The defendants were charged with promoting obscenity in regard to only five of the ten films named in the warrant. *Id.* at 575, 483 N.E.2d at 1126, 493 N.Y.S.2d at 994 (Jasen, J., dissenting).

¹³ *Id.* (Jasen, J., dissenting). Defense counsel argued that a magistrate must view the film in question before he may issue a search warrant, a contention later rejected by both the United States Supreme Court and the New York Court of Appeals. *See P.J. Video, Inc.*, 68 N.Y.2d at 317-18, 501 N.E.2d at 570, 508 N.Y.S.2d at 921 (Hancock, J., dissenting).

¹⁴ *See P.J. Video, Inc.*, 65 N.Y.2d at 576 n.2, 483 N.E.2d at 1127 n.2, 493 N.Y.S.2d at 995 n.2 (Jasen, J., dissenting).

¹⁵ *See id.* at 576, 483 N.E.2d at 1127, 493 N.Y.S.2d at 995 (Jasen, J., dissenting).

¹⁶ *See id.* at 569-70, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991.

¹⁷ *Id.* at 570, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991.

¹⁸ *See New York v. P.J. Video, Inc.*, 106 S. Ct. 1610 (1986). The Supreme Court stated

On remand, the Court of Appeals reinstated its original affirmation of the county court order, holding that the warrant application did not support a finding of probable cause under article 1, section 12 of the state constitution.¹⁹ Judge Simons, writing for the majority, reaffirmed that it is only the magistrate who, from the information submitted or available to him, can determine probable cause.²⁰ The court reasserted its earlier view that the materials seized "presumptively enjoyed First Amendment protection,"²¹ which required the magistrate to perform his duty with "scrupulous exactitude."²² Judge Simons reasoned that the Supreme Court's application of the *Illinois v. Gates* test to an obscenity case reflected a "dilution of the requirements of judicial supervision in the warrant process, and . . . a departure from prior law."²³ The court emphasized the state's power to interpret article 1, section 12 of the New York State Constitution as requiring more evidence to establish probable cause than that required under the federal Constitution,²⁴ and noted that the court had not hesitated in the past

"an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally." *Id.* at 1615. The Court contended it has never held that a higher standard of probable cause is required where the first amendment is involved. *See id.* at 1614.

¹⁹ *See P.J. Video, Inc.*, 68 N.Y.2d at 309, 501 N.E.2d at 564, 508 N.Y.S.2d at 915. Although the court conceded that the affidavits satisfied section 235.00(1)(b) of the Penal Law, it stated that satisfaction of subsections (a) and (c) had not been established. *See id.* at 300-01, 501 N.E.2d at 559, 508 N.Y.S.2d at 910.

²⁰ *See id.* at 300, 501 N.E.2d at 588, 508 N.Y.S.2d at 909.

²¹ *See id.* The first amendment states, in pertinent part: "Congress shall make no law . . . prohibiting . . . or abridging the freedom of speech, or freedom of the press. . . ." U.S. CONST. amend. I. Motion pictures are protected by the first amendment. *See Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 690 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

²² *P.J. Video, Inc.*, 68 N.Y.2d at 300, 501 N.E.2d at 558, 508 N.Y.S.2d at 909. The term "scrupulous exactitude" was first used in *Stanford v. Texas*, 379 U.S. 476, 485 (1965). *See supra* note 17 and accompanying text; *infra* note 35 and accompanying text.

²³ *See P.J. Video, Inc.*, 68 N.Y.2d at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913; *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). In *Gates*, the Court developed a new test for the determination of probable cause in the issuance of warrants based on hearsay, stating that the issuing magistrate was simply to determine whether, given the circumstances described in the affidavit before him, there was "a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238. *Gates* abandoned the *Aguilar-Spinelli* test, *see id.* at 238, which was developed in *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964). The *Aguilar-Spinelli* test was developed to verify the basis of an informant's knowledge and to insure the reliability of the information given. *See Gates*, 462 U.S. at 237; *P.J. Video, Inc.*, 68 N.Y.2d at 301, 501 N.E.2d at 559, 508 N.Y.S.2d at 910.

²⁴ *See P.J. Video, Inc.*, 68 N.Y.2d at 302, 501 N.E.2d at 559-60, 508 N.Y.S.2d at 910-11.

to so protect basic constitutional rights.²⁵ Judge Simons commented that the court in this instance was merely upholding the consistent application of this standard to protect rights of New York citizens.²⁶

Dissenting, Judge Hancock rejected the court's contention that it was merely preserving rights protected under the New York State Constitution, but no longer protected under the federal Constitution.²⁷ The dissent contended that the Supreme Court's reference to the *Gates* test had not diluted judicial supervision in the warrant process and argued that the federal standard for determining probable cause had not changed.²⁸ Judge Hancock asserted that the court was applying the higher standard of evaluation for prior restraint to an area where such a standard was inapplicable.²⁹ While supporting the court's right to adopt a higher standard of evaluation in warrant applications for alleged obscenity violations,³⁰ the dissent could not reconcile the majority view with previous New York decisions, and argued that the court was adopting a new standard without specifically enunciating that standard.³¹

Although states may interpret their own constitutions to provide broader rights and liberties than those afforded by the federal

See also supra note 4 and accompanying text.

²⁵ *See P.J. Video, Inc.*, 68 N.Y.2d at 303-05, 501 N.E.2d at 561-62, 508 N.Y.S. at 912-13. *See also* *People v. Class*, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986) (officer's nonconsensual entry into automobile violates state constitution); *People v. Johnson*, 66 N.Y.2d 398, 407, 488 N.E.2d 439, 445, 497 N.Y.S.2d 618, 624 (1985) (standard to judge police conduct is state constitution, rejecting *Gates* test); *People v. Bigelow*, 66 N.Y.2d 417, 427, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630, 637 (1985) (refusing to accept the Supreme Court's "good faith exception" on state constitutional grounds).

²⁶ *See P.J. Video, Inc.*, 68 N.Y.2d at 307, 501 N.E.2d at 563, 508 N.Y.S.2d at 914.

²⁷ *See id.* at 311, 501 N.E.2d at 566, 508 N.Y.S.2d at 917 (Hancock, J., dissenting). The dissent argued that the majority was creating more stringent requirements for the seizure of materials as evidence in obscenity cases. *See id.* (Hancock, J., dissenting).

²⁸ *See id.* at 318-19, 501 N.E.2d at 571, 508 N.Y.S.2d at 922 (Hancock, J., dissenting). The dissent contended that, although the Supreme Court had made reference to the *Gates* test, the Court was actually applying the established rule in assessing the adequacy of a warrant application. *See id.* (Hancock, J., dissenting). Judge Hancock noted that, since the *Gates* test applied to hearsay only, it was not applicable in the instant case. *Id.* (Hancock, J., dissenting).

²⁹ *See id.* at 312, 501 N.E.2d at 566-67, 508 N.Y.S.2d at 913 (Hancock, J., dissenting). Prior restraint is defined as "an infringement upon constitutional right to disseminate matters that are ordinarily protected by the First Amendment without there first being a judicial determination that the material does not qualify for First Amendment protection." BLACK'S LAW DICTIONARY 1075 (5th ed. 1979).

³⁰ *See P.J. Video, Inc.*, 68 N.Y.2d at 309, 501 N.E.2d at 565, 508 N.Y.S.2d at 916 (Hancock, J., dissenting).

³¹ *See id.* at 314, 501 N.E.2d at 568, 508 N.Y.S.2d at 919 (Hancock, J., dissenting).

Constitution, it is submitted that, by requiring the elements of the Penal Law to be detailed specifically in the warrant application, the court in *P.J. Video* provides no guidance to either law enforcement or judicial personnel in an area of the law based on subjective judicial decision.³² The court's holding in *P.J. Video* thereby adopts a higher standard of review for the issuance of search warrants authorizing the seizure of allegedly obscene materials.³³ As a result, although it is not required that the magistrate view the film prior to issuing a warrant, the court, by requiring the affiant to supply highly detailed factual information, may have made such review necessary.³⁴ It is suggested that the court's application of "scrupulous exactitude" to materials afforded first amendment protection is misguided in this case.³⁵ It is established that when there has been no prior restraint and the materials sought are to

³² Courts and legislatures have been unable to fashion a satisfactory definition of obscenity. See *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting). Justice Stewart noted the difficulty of defining obscenity, and concluded "I know it when I see it." See *id.* at 197 (Stewart, J., concurring).

³³ See *P.J. Video, Inc.*, 68 N.Y.2d at 307, 501 N.E.2d at 563, 508 N.Y.S.2d at 914.

³⁴ See *Heller v. New York*, 413 U.S. 483 (1973). There is no absolute right to a prior adversary hearing where allegedly obscene material is seized. *Id.* at 488; *People v. P.J. Video, Inc.*, 65 N.Y.2d 566, 571, 483 N.E.2d 1120, 1124, 493 N.Y.S.2d 988, 992 (1985), *rev'd*, 106 S. Ct. 1610 (1986). It is suggested the standard adopted by the court in *P.J. Video* will further slow the judicial process as well as intimidate law enforcement officials in the prosecution of individuals allegedly distributing obscene materials. The court's claim that it is adhering to its established "clear and definable standard of review" developed in *People v. Hanlon*, 36 N.Y.2d 549, 330 N.E.2d 631, 369 N.Y.S.2d 677 (1975), is not supported by the language of *Hanlon*. *Hanlon* stated that, when determining the existence of probable cause, "search warrant applications should not be read in a hypertechnical manner . . . [but rather] . . . must be considered in the clear light of everyday experience and accorded all reasonable inferences." *Hanlon*, 36 N.Y.2d at 559, 330 N.E.2d at 637, 369 N.Y.S.2d at 685.

Furthermore, the New York Court of Appeals has never before required such a high degree of specificity for affidavits in support of search warrant applications to seize allegedly obscene materials. See *People v. Potwora*, 48 N.Y.2d 91, 397 N.E.2d 361, 421 N.Y.S.2d 850 (1979); *People v. Abronovitz*, 31 N.Y.2d 160, 286 N.E.2d 721, 335 N.Y.S.2d 279 (1972); *People v. Rothenberg*, 20 N.Y.2d 35, 228 N.E.2d 379, 281 N.Y.S.2d 316 (1967).

³⁵ Cf. *Stanford v. Texas*, 379 U.S. 476 (1965). In *Stanford*, law enforcement officers searched the defendant's premises under a search warrant authorizing the seizure of Communist literature and materials. See *id.* at 478. The Court held the language of the warrant to be too broad, stating that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most *scrupulous exactitude* when the 'things' are books. . . ." *Id.* at 485 (emphasis added). It is suggested that the *Stanford* Court was expressing its distaste for general warrants, and thus requiring that, if the material to be seized is protected by the first amendment, the warrant must be exact in its description. The Court of Appeals, therefore, misconstrued *Stanford* when stating that "the magistrate was required to perform his duty with 'scrupulous exactitude.'" *P.J. Video, Inc.*, 68 N.Y.2d at 300, 501 N.E.2d at 558, 508 N.Y.S.2d at 910.

be used as evidence in a criminal proceeding, a higher standard of review for the issuance of a warrant is not required.³⁶ Finally, it is suggested that the Supreme Court's reference to the *Gates* test does not lend support to the majority's view that the Supreme Court was reducing the required level of scrutiny in the warrant process, or applying anything other than the established rule in determining probable cause.³⁷

Edwin G. Oswald

CIVIL PRACTICE LAW AND RULES

CPLR 13-A: A district attorney may attach the personal assets of a defendant, prior to conviction, without establishing that the attached assets are the proceeds of a crime

Article 13-A of the CPLR was designed to "take the profit out of crime."¹ The article provides for a civil forfeiture action² by a

³⁶ See *Heller v. New York*, 413 U.S. 483, 491 (1973). In *Heller*, the Supreme Court held that the film in question was not subject to a prior restraint, as there was no threat of destruction, and the warrant was issued by a neutral magistrate; therefore, the seizure as evidence was permissible. See *id.* at 492. It is suggested that, although *P.J. Video* is not a prior restraint case, the Court of Appeals has improperly applied the Supreme Court's analysis for prior restraint cases to it.

³⁷ See *New York v. P.J. Video, Inc.*, 106 S. Ct. at 1615 n.6. The *Gates* test is in fact not applicable to *P.J. Video* where no informant is involved, inasmuch as such an informant is a necessary factor in the *Gates* analysis. See *P.J. Video, Inc.*, 68 N.Y.2d at 318-19, 501 N.E.2d at 571, 508 N.Y.S.2d at 922.

¹ Governor's Memorandum on Approval of ch. 669, N.Y. Laws (Aug. 1, 1984), reprinted in [1984] N.Y. Laws 3627 (McKinney). On approving article 13-A, Governor Cuomo stressed the importance of the bill as a weapon "against illicit drug trafficking, and other forms of organized crime." *Id.* at 3628. Article 13-A, which took effect August 1, 1984, repealed and replaced the prior article 13-A, which had been enacted the preceding year. See CPLR 1310-52 (McKinney Supp. 1987). The new article contains more detailed provisions on burden of proof, presumptions, and the claims of third parties to property associated with the commission of a crime. See Girese, *Forfeiture: A New, Comprehensive Legislative Tool in War Against Crime*, N.Y.L.J., Apr. 25, 1985, at 17, col. 1, col. 2.

² See CPLR 1311(1) (McKinney Supp. 1987). This section provides that "[a]ny action under this article . . . shall be civil, remedial and *in personam* in nature and shall not be deemed a penalty or criminal forfeiture for any purpose." *Id.* By labeling the action "civil," the Legislature has made available other elements of the CPLR, such as provisional remedies, which may be unavailable in a criminal prosecution. See CPLR 1350 (McKinney Supp. 1987).

A forfeiture action which is interpreted as criminal may run afoul of the double jeopardy clause. See U.S. Const. amend. V; see also Note, *A Definition of Punishment for Im-*