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ARTICLE I, SECTION 12 OF THE NEW YORK STATE CONSTITUTION: REVISED INTERPRETATION IN WAKE OF NEW FEDERAL STANDARDS?

In language identical to that of the fourth amendment, section 12 of Article I of the New York State Constitution specifically proscribes "unreasonable searches and seizures." For a search or seizure to be reasonable and not violative of constitutional rights, probable cause must exist. Hearsay information may form the ba-

1 N.Y. Const. art. I, § 12. This section provides in pertinent part:
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.* New York's proscription against unreasonable search and seizure began as a "creature of statute," section 8 of the Civil Rights Law, and in 1938 was incorporated into the New York State Constitution. *See* People v. Richter's Jewelers, Inc., 291 N.Y. 161, 168, 51 N.E.2d 690, 693 (1943); People v. DeFore, 242 N.Y. 13, 23, 150 N.E. 585, 589 (1926). Because the wording of the state provision duplicates verbatim the language of the fourth amendment, see U.S. Const. amend. IV, the New York courts have relied, with few exceptions, see infra note 44, upon both constitutional provisions to interpret search and seizure law. See People v. Belton, 55 N.Y.2d 49, 57, 432 N.E.2d 745, 749, 447 N.Y.S.2d 873, 877 (1982)(Gabrielli, J., concurring); People v. Elwell, 50 N.Y.2d 231, 236, 406 N.E.2d 471, 474, 428 N.Y.S.2d 655, 658 (1980); People v. Kreichman, 37 N.Y.2d 693, 696, 339 N.E.2d 182, 184, 376 N.Y.S.2d 497, 501 (1975). The constitutional provision "protects the privacy interests of the people of our State, not only in their persons, but in their houses, papers and effects as well, against the unfettered discretion of government officials to search or seize." *Belton*, 55 N.Y.2d at 52, 432 N.E.2d at 745, 447 N.Y.S.2d at 874; *see also* People v. Hicks, 38 N.Y.2d 90, 92, 341 N.E.2d 227, 229, 378 N.Y.S.2d 660, 662 (1975)(both state and federal constitutions protect citizens' privacy from unwarranted intrusion).


2 See, *e.g.*, *Dunaway* v. New York, 442 U.S. 200, 213 (1979)(seizures under fourth amendment "reasonable" if based on probable cause); *Brinegar* v. United States, 338 U.S. 160, 176 (1949)(probable cause standards safeguard citizenry from unreasonable invasion of privacy); *see generally* J. HALL, JR., *SEARCH AND SEIZURE §§ 5.1-5.31* (1982 & Supp. 1985)(discussing constitutional predicate of probable cause). The purpose of the probable cause requirement is to protect the "innocent and guilty alike from search or arrest based upon
sis for establishing probable cause but must preliminarily satisfy a

Although eluding precise definition, "probable cause" has been described as the reasonable belief, acquired from all the facts and circumstances known to the law enforcement officer, that an offense occurred or that evidence of the offense is located in the place to be searched. See Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar, 338 U.S. at 175-76; Carroll v. United States, 267 U.S. 132, 162 (1925); Hicks, 38 N.Y.2d at 92, 341 N.E.2d at 229, 378 N.Y.S.2d at 662-63. Probable cause defies exact definition since it entails probabilities: "These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar, 338 U.S. at 175.


Article 690 of the Criminal Procedure Law, codifying search warrant requirements in New York law, typifies the probable cause prerequisite. See N.Y. CRIM. Proc. LAW §§ 690.10, 690.35(2)(b) (McKinney 1984) ("reasonable cause" requirement); see also id. at § 690.10, commentary at 366 ("reasonable cause" is New York's statutory equivalent of the probable cause standard); id. at § 140.10(1)(a), (b) (reasonable cause requirement for warrantless arrest).

As used herein, "hearsay" is discussed in the context of probable cause and not as the term is denoted in the law of evidence. In evidence, hearsay signifies an out-of-court statement "offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." E. Cleary, McCormick on Evidence § 246, at 584 (1972). Generally, hearsay is not admissible evidence in a trial, see Fed. R. Evid. 802, but the rule against hearsay contains numerous exceptions. See id. at 803, 804.

In the context of probable cause, hearsay is admissible in the application for a warrant. See N.Y. CRIM. Proc. LAW § 690.35(2)(c) (McKinney 1984). It is also admissible to determine probable cause in a warrantless arrest or search situation. See, e.g., Etwell, 50 N.Y.2d at 241, 406 N.E.2d at 477, 428 N.Y.S.2d at 661 (with appropriate safeguards, hearsay informant provides probable cause in warrantless situation). In both cases the officer is testifying to information that is not based on personal observation, but relayed second-hand through an informant. See People v. Petralia, 62 N.Y.2d 47, 51, 464 N.E.2d 424, 426, 476 N.Y.S.2d 56, 58 (inter-police bulletin is hearsay information), cert. denied, 469 U.S. 852 (1984); Hicks, 38 N.Y.2d at 91, 341 N.E.2d at 228, 378 N.Y.S.2d at 662 (1975)(private citizen supplied hearsay information for search warrant); People v. Taggart, 20 N.Y.2d 335, 337, 229 N.E.2d 581, 583, 283 N.Y.S.2d 1, 4 (1967)(anonymous informant to provide basis for police action), cert. denied, 392 U.S. 667 (1968). See also Comment, People v. Etwell: Hearsay Informants and Probable Cause, 47 Brooklyn L. Rev. 283, 288 (1980) (discussing whether information supplied by informant may constitute probable cause).

The legality of hearsay as a predicate for probable cause originated with the Supreme Court decision of Draper v. United States, 358 U.S. 307 (1959), which upheld a warrantless arrest upon an informant's assertion and police corroboration. See id. at 310-12. The Court rejected the notion that the foundation for police action must be evidence which would be competent to prove guilt at a criminal trial. Id. at 311-12. The Supreme Court subsequently stated that hearsay alone may form the basis for a warrant "so long as there was a substan-
test of trustworthiness⁴ to abate any constitutional infringements. Absent a finding of probable cause the illegally obtained evidence may be excluded from the criminal trial.⁵ In a number of recent decisions based on the fourth amendment, the Supreme Court has retracted some of the protections previously afforded the criminal defendant by mitigating the substantive requirements for a probable cause determination based on hearsay and by modifying the exclusionary rule.⁶ Recently, however, in People v. Johnson⁷ and People v. Bigelow,⁸ the New York Court of Appeals declined to adopt these new federal standards, thereby granting the criminal defendant greater protection from police intrusion under the New York Constitution.⁹

⁴ See Aguilar v. Texas, 378 U.S. 108 (1964). Aguilar devised the two-prong test to determine whether the hearsay data was sufficiently trustworthy to establish probable cause: "The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was "credible" or his information "reliable.""


⁹ See Johnson, 66 N.Y.2d at 406-07, 488 N.E.2d at 445, 497 N.Y.S.2d at 624; Bigelow,
In Johnson, the defendant was arrested without a warrant for the felony-murder of a storeowner. The arrest was based solely upon the allegations of a hearsay informant. After the defendant was taken into custody and read his Miranda rights, he confessed to the crime. In Bigelow, the defendant was arrested without a warrant for criminal possession of a controlled substance subsequent to a police investigation and corroboration by a hearsay informant. The defendant was taken into custody and his vehicle impounded. Thereafter, a search warrant was issued authorizing a search of defendant’s person and automobile for cocaine. Police investigators uncovered amphetamines, hypodermic needles and cash. In both Johnson and Bigelow, the defendant moved to suppress the evidence—the inculpating statements and the contraband, respectively—but each suppression court found probable cause for the police action and denied the motion. In each case, the defendant was convicted. The Appellate Division reversed the

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10 Johnson, 66 N.Y.2d at 400, 488 N.E.2d at 441, 497 N.Y.S.2d at 620.
11 Id. at 400-02, 488 N.E.2d at 441-42, 497 N.Y.S.2d at 620-21. Soon after the homicide, Joseph Di Prospro told police interrogating him on an unrelated charge that Bolivar Abreu shot the storeowner. Id. at 401, 488 N.E.2d at 441, 497 N.Y.S.2d at 620. Upon questioning by a detective, Abreu implicated Di Prospro and defendant in the crime by recounting a conversation between the two wherein the shooting was discussed. Abreu asserted that he, Di Prospro and defendant exchanged a rifle for a .38 caliber revolver presumably used in the crime, and identified other robberies committed by Di Prospro and the defendant. Id. The detective then arrested defendant solely upon Abreu’s statement without corroboration or identification by others. Id. at 401-02, 488 N.E.2d at 442, 497 N.Y.S.2d at 621.
12 Bigelow, 66 N.Y.2d at 421-22, 488 N.E.2d at 453, 497 N.Y.S.2d at 633. In the course of investigating drug trafficking in western New York, the police learned that defendant had wired a large sum of money to a Florida area “known for drug activity,” received two packages and mail from Florida in two rented post-office boxes and frequented the apartment of Sutz, a known drug user and part-time drug dealer. Id. at 421, 488 N.E.2d at 453-54, 497 N.Y.S.2d at 632-33. These observations led police to suspect defendant of narcotics trafficking. Id., 488 N.E.2d at 454, 497 N.Y.S.2d at 633. On the day of his arrest, police observed defendant retrieve a package from the post office and then enter the Sutz apartment. Id. While the Sutz apartment was surveyed, an informant was contacted who alleged that the defendant was a “druggie” from Florida who dealt in cocaine and had conducted recent drug transactions. Id.
14 Id. at 422, 488 N.E.2d at 454, 497 N.Y.S.2d at 633.
15 Id. After the defendant was taken into custody, a county judge arrived at the police station, examined the officer in camera, although he did not interview the informant, and issued the search warrant. Id.
16 Id.
18 Johnson, 66 N.Y.2d at 400, 488 N.E.2d at 453, 497 N.Y.S.2d at 620; Bigelow, 66
judgment of conviction in Bigelow and granted the motion to suppress the evidence; in Johnson, however, the judgment was affirmed without opinion. In Johnson and Bigelow, the New York Court of Appeals concluded that probable cause for the police action was not demonstrated and consequently the evidence should have been suppressed. Writing for the court, Judge Simons aligned the two cases according to their hearsay emphasis, but distinguished the analyses upon the presence of a warrant. In Johnson, Judge Simons held that, in a warrantless arrest or search, the rule recently adopted by the Supreme Court to determine probable cause based upon hearsay information, the Gates "totality of the circumstances" test, was inapplicable as a matter of state constitutional law. Although Bigelow involved a search warrant, Judge Simons refrained from adopting Gates in that particular factual setting since the most minimal indicia of probable cause under any standard was lacking. Consequently, in both Johnson and Bigelow, the court applied the stringent Aguilar-Spinelli test, rejected by the Supreme Court, to determine that the reliability of the informant and the factual basis of the information were not demonstrated and probable cause did not exist. The evidence in Bigelow

N.Y.2d at 420, 488 N.E.2d at 453, 497 N.Y.S.2d at 632.

19 People v. Bigelow, 105 App. Div. 2d 1110, 1110-11, 482 N.Y.S.2d 397, 398 (4th Dep't 1984). The Appellate Division determined that under the Aguilar-Spinelli test the informant's "basis of knowledge" was not demonstrated and the evidence should have been suppressed. Id. at 1111, 482 N.Y.S.2d at 398.


21 See Johnson, 66 N.Y.2d at 400, 488 N.E.2d at 441, 497 N.Y.S.2d at 620; Bigelow, 66 N.Y.2d at 422, 488 N.E.2d at 455, 497 N.Y.S.2d at 634.

22 See Johnson, 66 N.Y.2d at 402-05, 488 N.E.2d at 442-44, 497 N.Y.S.2d at 621-23; Bigelow, 66 N.Y.2d at 423-25, 488 N.E.2d at 455-56, 497 N.Y.S.2d at 634-35. Although Johnson and Bigelow resulted in implementation of the Aguilar-Spinelli test to determine the probativeness of the hearsay information, the similarity of analysis ended in Johnson when the legality of warrantless police conduct was assessed under more severe standards than those required for conduct pursuant to a warrant. Compare Johnson, 66 N.Y.2d at 405-07, 488 N.E.2d at 444-46, 497 N.Y.S.2d at 623-25 ("totality of circumstances" rule established in Gates does not apply to warrantless arrests) with Bigelow, 66 N.Y.2d at 423-25, 488 N.E.2d at 456-57, 497 N.Y.S.2d at 634-35 (no need to apply Gates rule in testing search warrant).


24 See Johnson, 66 N.Y.2d at 406-07, 488 N.E.2d at 445, 497 N.Y.S.2d at 624.

25 See Bigelow, 66 N.Y.2d at 425, 488 N.E.2d at 456, 497 N.Y.S.2d at 635.

26 See Gates, 462 U.S. at 238 (Aguilar-Spinelli two prong test rejected in favor of "totality of circumstances" test); infra notes 50-53 and accompanying text.

27 See Johnson, 66 N.Y.2d at 405-07, 488 N.E.2d at 444-46, 497 N.Y.S.2d at 623-25;
was ordered suppressed despite the People’s contention that the contraband should have been admitted pursuant to the Supreme Court’s “good-faith” exception rule of *United States v. Leon.*

Under the auspices of the New York State Constitution, Judge Simons declined to apply *Leon* since the purpose of the exclusionary rule—deterrence of police misconduct—was subserved under the *Bigelow* facts.

It is submitted that the *Johnson* and *Bigelow* decisions are not a barrier to implementation of the federal standards determining probable cause and exclusion from evidence when the police act lawfully and pursuant to a warrant. The New York Court of Appeals has the discretion to interpret the state constitution’s provisions against unreasonable search and seizure differently from the interpretation of the fourth amendment given by the Supreme Court. Indeed, in *Johnson*, the court held that under the New York State Constitution, when police do not obtain a warrant, probable cause based upon hearsay must be assessed according to

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29 *Bigelow*, 66 N.Y.2d at 427, 488 N.E.2d at 458, 497 N.Y.S.2d at 637. In *Johnson*, Judge Titone wrote a separate concurrence stressing that the exclusionary rule is a judicial remedy and not a constitutional mandate. *Johnson*, 66 N.Y.2d at 408, 488 N.E.2d at 446, 497 N.Y.S.2d at 625 (Titone, J., concurring). Judge Titone agreed, however, that suppression was appropriate since a warrant was not obtained for the arrest. *Id.* at 415-16, 488 N.E.2d at 451, 497 N.Y.S.2d at 630.

the stringent Aguilar-Spinelli rules. However, in Bigelow, the court was not as resolute. Conceivably, by not affirmatively rejecting the less stringent Gates analysis when police act pursuant to a warrant, the court is implying that it will follow a policy of uniformity with the federal judiciary in the interpretation of constitutional issues involving search and seizure. Similarly, Bigelow does not prevent implementation of a Leon "good-faith" exception to suppression of illegally obtained evidence when the facts of the particular case evidence "legal" police behavior.

Soon after the Supreme Court decided that hearsay information could form the basis for probable cause, lower courts addressing the issue of probable cause were required to determine if a "substantial basis for crediting the hearsay" existed. The Aguilar-Spinelli test evolved as a necessary vehicle for proving the reliability and trustworthiness of the hearsay information. Since its

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31 See Johnson, 66 N.Y.2d at 406, 488 N.E.2d at 444-45, 497 N.Y.S.2d at 624. In his concurrence, Judge Titone noted, however, that since the Supreme Court had not addressed the applicability of Gates and Leon to warrantless seizures, the Court of Appeals would follow a policy of deference to federal law. Id. at 415, 488 N.E.2d at 451, 497 N.Y.S.2d at 630 (Titone, J., concurring).

32 See Bigelow, 66 N.Y.2d at 424-25, 488 N.E.2d at 456, 497 N.Y.S.2d at 635. The court concluded that "[t]here is no reason for us to adopt ... [Gates] in testing this search warrant because the People's evidence would not meet minimum standards of probable cause even if Gates was applied." Id. at 425, 488 N.E.2d at 456, 497 N.Y.S.2d at 635.

33 See People v. Ponder, 54 N.Y.2d 160, 165, 429 N.E.2d 735, 737, 445 N.Y.S.2d 57, 59 (1981). The identical language contained in section 12 of article I of the New York State Constitution and the fourth amendment supports a policy of uniformity with federal standards in search and seizure interpretation. Id. It has been averred that to construe section 12 of article I differently from or as providing greater protection for the criminal defendant than that offered by the federal constitution, the plain language of our state constitution must provide for it. See Belton, 55 N.Y.2d at 56-57, 432 N.E.2d at 749, 447 N.Y.S.2d at 877. But see infra notes 42-44 and accompanying text wherein the Court of Appeals diverged from the Supreme Court analysis.

34 See infra notes 72-74 and accompanying text.

35 See Jones v. United States, 362 U.S. 257, 269 (1960). Therein, the Supreme Court determined that hearsay alone may form the basis for a finding of probable cause sufficient to uphold a search warrant if there was adequate reason to believe the hearsay. Id. at 269-71. In Jones, the magistrate was justified in the determination of probable cause since, in the warrant application, the informant gave specific locations of the defendant's heroin supply and admitted to purchasing drugs from the defendant, id. at 267 n.2, the informant had provided accurate information in the past, id. at 268-69, the present information was verified by other sources, id., and the defendant had admitted to using narcotics. Id. at 269. See supra note 3 and accompanying text for a discussion of hearsay as a basis for probable cause.

36 See supra note 4. By applying the Aguilar-Spinelli test to a warrant, "a Magistrate would be assured that the source was reliable, and could judge for himself the persuasiveness of the facts relied on thereby determining the probable accuracy of the information and
adoption by the Supreme Court, New York has followed the two prong Aguilar-Spinelli analysis to evaluate hearsay.37

Within the first “veracity” prong, the reviewing judge must be assured that the informant providing the hearsay tip was credible or that the information itself was reliable.38 In New York, following the federal court analysis, this requirement is satisfied when the informant has given reliable and accurate information in the past, leading to conviction,39 made a declaration against penal interest,40 the information was independently corroborated by police investigation41 or was given under oath.42 Under the second prong, the


In Aguilar, a search warrant was issued solely upon the following information contained in the police officers’ affidavit: “Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics . . . are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.” Aguilar v. Texas, 378 U.S. 108, 109 (1964). The Court determined that the informant’s mere conclusions, as contained in the affidavit, could not allow a magistrate to “judge for himself the persuasiveness of the facts relied on . . . to show probable cause.” Id. at 114 (quoting Giordenello v. United States, 357 U.S. 474, 486 (1958)). Since the affidavit did not provide a sufficient basis for a finding of probable cause, the search warrant should not have issued. Id. at 115.


38 See Aguilar, 378 U.S. at 114; Hanlon, 36 N.Y.2d at 556, 330 N.E.2d at 635, 369 N.Y.S.2d at 681-82. The Court of Appeals has noted that there is “no one acid test of reliability . . . [i]n most cases, a combination of factors, considered together, lead the court to conclude that an informant is worthy of belief.” Rodriguez, 52 N.Y.2d at 489, 420 N.E.2d at 950, 438 N.Y.S.2d at 758.


40 See United States v. Harris, 403 U.S. 573, 583 (1971). A declaration against penal interest is a statement made by the informant admitting major elements of a crime. See id. The Harris Court declared that admissions of crime “carry their own indicia of credibility.” Id. This is because the police know the informant’s identity and may use the incriminating statement against the person if the information proves false. Johnson, 66 N.Y.2d at 404, 488 N.E.2d at 443, 497 N.Y.S.2d at 622; see Comforto, 62 N.Y.2d at 727, 465 N.E.2d at 355, 476 N.Y.S.2d at 816 (1984); People v. Wright, 37 N.Y.2d 88, 90-91, 332 N.E.2d 331, 332, 371 N.Y.S.2d 460, 462 (1975); People v. Garcia, 103 App. Div. 2d 753, 754, 477 N.Y.S.2d 223, 225 (2d Dep’t 1984); see generally 1 W. La Fave, Search and Seizure § 3.5[c] (1978) (2d ed. 1987) (discussion of admissions against interest).


42 See People v. Wheatman, 29 N.Y.2d 337, 345, 277 N.E.2d 662, 665, 327 N.Y.S.2d 643,
informant’s “basis for the knowledge” must be elucidated, thereby establishing that the information was not based upon “rumor . . . or mere suspicion.”43 Within this second prong, New York has diverged from the Supreme Court analysis by demanding a more stringent showing of the informant’s basis of knowledge when a warrant is not sought.44 Apparently it is within this warrantless arrest and search situation that New York follows its own path of protection for the criminal defendant.

It is within the dichotomy of warrant and warrantless search and seizure that New York has “declined to interpret the State constitutional protection . . . so narrowly.”45 Although the fourth


43 People v. Elwell, 50 N.Y.2d 231, 236, 406 N.E.2d 471, 474, 428 N.Y.S.2d 655, 658 (1980). As there is no presumption that the informant has personally observed the suspect, “the basis of knowledge test is . . . intended to weed out, as not of sufficient quality, data received by the informant from others who have not themselves observed facts suggestive of criminal activity.” Id. at 237, 406 N.E.2d at 474-75, 428 N.Y.S.2d at 659. This prong ensures that police action will not be authorized upon rumor or mere suspicion. See Nathanson v. United States, 290 U.S. 41, 47 (1933).

44 Elwell, 50 N.Y.2d at 234-35, 406 N.E.2d at 473, 428 N.Y.S.2d at 657. The Court of Appeals held that in a warrantless arrest or search wherein the informer has not revealed the basis for the knowledge imparted, there must be confirmation of detailed criminal activity. Id. at 234, 406 N.E.2d at 473, 428 N.Y.S.2d at 657. Specifically, the court stated that warrantless police action:

will be sustained only when the police observe conduct suggestive of, or directly involving, the criminal activity about which an informant who did not indicate the basis for his knowledge has given information to the police, or when the information furnished about the criminal activity is so detailed as to make clear that it must have been based on personal observation of that activity.

Id. at 241, 406 N.E.2d at 477, 428 N.Y.S.2d at 662. To the extent that Spinelli and Draper imposed a less stringent test under the fourth amendment, the court declined to interpret section 12 of article I similarly. Id. at 235, 406 N.E.2d at 473, 428 N.Y.S.2d at 657. In a warrant situation, Spinelli permitted self-verifying detail to satisfy the “basis” prong, wherein the tip was so sufficiently detailed that it evidenced personal observation. Spinelli v. United States, 393 U.S. 410, 416-17 (1969). See generally Comment, supra note 3, at 301-03 (stating that while the Elwell court accepted the federal rule that information can be so detailed as to be self-verifying and thus sufficient to establish probable cause for warrantless activity, the court rejected the Draper rule that such detail may be of innocent activity as well as criminal).

45 People v. Gokey, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724, 469 N.Y.S.2d 618, 619 (1983). In Gokey, a warrantless search incident to an arrest was conducted of property within the immediate control or “grab area” of the defendant. Id. The court noted that, pursuant to the federal rule, a custodial arrest provides per se justification for a search of any container within the “immediate control” of the arrestee. Id. The court declined to follow this rule, holding on stare decisis that “[u]nder the State Constitution, an individual’s right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances.” Id. Al-
amendment and section 12 of article I are identical in language, New York has interpreted its constitutional provision to grant heightened protection to the criminal defendant in a warrantless situation. 46 Therefore, the result attained in Johnson—rejection of a less demanding test for showing probable cause based upon hearsay—was to be expected. 47

A different set of considerations exist when an arrest or search is conducted pursuant to a warrant. 48 There is a marked preference


46 See supra note 43. The New York Court of Appeals has stated:
We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the States free to provide greater rights for its citizens through its Constitution, statutes or rule making authority . . .


47 In addition to the different constitutional analysis employed by the New York Court of Appeals regarding warrantless arrests and searches, the Johnson court made a policy judgment possibly waiting for the Supreme Court to specifically address this issue and apply the Gates standard to warrantless police action. See Johnson, 66 N.Y.2d at 406-07, 488 N.E.2d at 444-45, 497 N.Y.S.2d at 623-24.

48 See United States v. Ventresca, 380 U.S. 102, 106-07 (1965); People v. Hanlon, 36 N.Y.2d 549, 558, 330 N.E.2d 631, 636-37, 369 N.Y.S.2d 677, 684 (1975). "Where a search warrant has been secured, the bona fides of the police will be presumed and the subsequent search upheld in a marginal or doubtful case." Id. at 558, 330 N.E.2d at 637, 369 N.Y.S.2d at 684. This presumption ensues from the judiciary's preference for resort to a magistrate's disinterested determination of probable cause. See Aguilar v. Texas, 378 U.S. 108, 110-11 (1964); Johnson v. United States, 333 U.S. 10, 13-14 (1948); People v. Hicks, 38 N.Y.2d 90, 92, 341 N.E.2d 227, 229, 378 N.Y.S.2d 660, 662-63 (1975). The "preference for warrants bespeaks an aversion to the existence of unchecked and unlimited power in the hands of those employed to enforce laws. However, where a search warrant has been obtained the dangers of unbridled power are minimized." Hanlon, 36 N.Y.2d at 559-60, 330 N.E.2d at 637, 369 N.Y.S.2d at 685. See also People v. Eliwell, 50 N.Y.2d 231, 242, 406 N.E.2d 471, 478, 428 N.Y.S.2d 655, 682 (1980) (to satisfy the "basis of knowledge" prong a magistrate may utilize observation of confirmed noncriminal detail, but in warrantless situation the determination of probable cause is much more demanding).
for warrants and courts often engage in a lessened scrutiny of probable cause when reviewing a search or arrest authorized by a warrant. Warrants enable "a neutral and detached magistrate" to determine, meditatively and before unnecessary police intrusion, the existence of probable cause rather than delegating this responsibility to a law enforcement officer engaged in the "often competitive enterprise of ferreting out crime." The Supreme Court recently reinforced this preference in Illinois v. Gates, holding that whether hearsay information constitutes probable cause for the issuance of a warrant is a determination to be made by the magistrate considering the "totality of the circumstances." The Supreme Court abandoned the two-prong Aguilar-Spinelli test in favor of this more flexible and deferential standard that utilizes the "veracity" and "basis of knowledge" prongs as well as any other variables bearing on the probativeness of the information.

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47 See Bigelow, 66 N.Y.2d at 424 n.*, 488 N.E.2d at 456 n.*, 497 N.Y.S.2d at 635 n.* (1986).

48 See supra note 46.

49 462 U.S. 213 (1983). In Gates, the police received an anonymous letter implicating the defendants in drug trafficking between Florida and Illinois. Id. at 225. Independent police observation corroborated specifics contained in the letter. Id. at 226. A search warrant issued based upon the anonymous letter and police investigation. Id.

50 Gates, 462 U.S. at 230. The Court stated that the Aguilar-Spinelli test does not consist of independent requirements but rather "closely intertwined issues that may usefully illuminate the common sense, practical question whether there is 'probable cause.'" Id.

51 Id. at 238. The Court believed that the new approach would facilitate accommodation of the competing public and private interests under the fourth amendment. Id. at 239. Judge Jasen, dissenting in Elwell, admonished a "rigid rule of uniform application" as the determination of probable cause based upon hearsay is not a "static concept." See People v. Elwell, 50 N.Y.2d 231, 246, 406 N.E.2d 471, 480, 428 N.Y.S.2d 655, 665 (1980).

52 Gates, 462 U.S. at 238. In discussing its new approach to probable cause the Court observed that informants' tips vary in probativeness and "[r]igid legal rules are ill-suited to an area of such diversity." Id. at 232. Pursuant to the "totality of circumstances" analysis, a deficiency in the basis of knowledge prong may be compensated for by a very reliable informant. See id. at 232-33. Decisions in New York courts have indicated that certain informants are "better" than others, allowing for a near presumption of reliability. Compare People v. Comforto, 62 N.Y.2d 725, 726, 465 N.E.2d 354, 355, 476 N.Y.S.2d 815, 816 (1984)(citizen informant coming forward voluntarily allows reasonable inference of trustworthiness) with People v. DeBour, 40 N.Y.2d 210, 226, 352 N.E.2d 562, 574, 386 N.Y.S.2d 375, 387 (1976)(anonymous tips inherently "devoid of reliability" thus necessitating further police action before intrusion permissible). The logic of the Gates standard is demonstrated when two informants are presented, one an identified citizen and the other anonymous. Although the identified citizen is presumed to be reliable, both that person and the anonymous informant will be rejected under the Aguilar-Spinelli test if the basis of knowledge is
Subsequent to the Gates decision, lower New York courts have been uncertain of which hearsay standard to use, usually employing both.\textsuperscript{55} The Court of Appeals, declining to consider the effect of Gates on a previous occasion,\textsuperscript{57} has utilized the “totality of the circumstances” language before in its assessment of hearsay information, probable cause and warrants.\textsuperscript{58}

Due to the court’s policy of uniformity with the federal interpretation of search and seizure law,\textsuperscript{59} and its historical treatment of hearsay and warrants,\textsuperscript{60} it appears that the Gates rationale has been adopted sub silentio in a warrant situation. Therefore, until the state constitution is interpreted so as to definitively adopt or not averred in the affidavit in consideration of probable cause.

In Bigelow, the Court of Appeals analyzed the facts under the Gates analysis and concluded that the failure to demonstrate the informant's basis of knowledge was not off-set by a showing of reliability. Bigelow, 66 N.Y.2d at 426, 497 N.Y.S.2d at 636. The informant had only given information to the police leading to one arrest which resulted in an acquittal. Id. Although the informant was already at the police station, the magistrate did not examine him. Id. at 422, 497 N.Y.S.2d at 633. It has been held that when the magistrate knew who the informer was and how the information was acquired, the reliability of the information was certain. See People v. Hicks, 38 N.Y.2d 90, 93, 341 N.E.2d 227, 230, 378 N.Y.S.2d 660, 664 (1975). If the magistrate had conducted an examination of the informant, the Gates analysis would have yielded a finding of probable cause. See People v. Brown, 40 N.Y.2d 183, 187, 352 N.E.2d 545, 547-48, 386 N.Y.S.2d 359, 361 (1976); People v. Darden, 34 N.Y.2d 177, 181, 313 N.E.2d 49, 52, 356 N.Y.S.2d 582, 585-86 (1974).

\textsuperscript{55} See, e.g., People v. Lopez, 95 App. Div. 2d 241, 251, 465 N.Y.S.2d 998, 1005 (2d Dep't 1983)(unnecessary to consider which standard to use since under either test informant's tip proved reliable); People v. Acevedo, 128 Misc. 2d 405, 410, 488 N.Y.S.2d 537 541 (Sup. Ct. Crim. T. Kings County 1985)(same); People v. Mingo, 125 Misc. 2d 373, 377 n.*, 479 N.Y.S.2d 669, 672 n.* (Sup. Ct. Crim. T. N. Y. County 1984)(same).

\textsuperscript{57} See People v. Landy, 59 N.Y.2d 369, 375 n.*, 452 N.E.2d 1185, 1188 n.*, 465 N.Y.S.2d 857, 860 n.* (1983). The court employed an alternative analysis, disregarding the hearsay information, to determine that probable cause existed for the arrest and subsequent search. Id. at 376, 452 N.Y.S.2d at 1188-89, 465 N.Y.S.2d at 861.

\textsuperscript{58} See, e.g., People v. Wirchansky, 41 N.Y.2d 130, 136, 359 N.E.2d 666, 670, 391 N.Y.S.2d 70, 75 (1976). Therein the court noted that if one of the following items were present—hearsay information without specification of source, independent police corroboration or criminal reputation of defendant—no probable cause would exist; yet, in a given case the totality of circumstances might support a finding of probable cause. Id. In Wirchansky, however, the crucial element was the police observation and since it could be interpreted as innocent activity, the tip and defendant's reputation did not elevate the activity to a finding of probable cause. Id. The finding in Bigelow was extremely similar. See Bigelow, 66 N.Y.2d at 424, 497 N.Y.S.2d at 635; supra notes 13-15. See also People v. Hanlon, 38 N.Y.2d 548, 559, 330 N.E.2d 631, 637, 369 N.Y.S.2d 677, 685 (1975)(magistrate should consider all aspects of information supporting the application to determine probable cause).

\textsuperscript{59} See supra notes 43 and 44 and accompanying text.

\textsuperscript{60} See supra notes 33-42 and accompanying text.
reject a Gates analysis for all probable cause determinations, it is submitted that the less stringent federal approach may be used on a case-by-case basis when the factual scenario entails lawful police conduct.\footnote{The Wirchansky case espoused this conclusion, wherein a Gates approach was considered. See Wirchansky, 41 N.Y.2d at 136, 359 N.E.2d at 670, 391 N.Y.S.2d at 75; supra note 56. The crucial element in Wirchansky was police observation (as in Bigelow) and the court asserted that if the informant's tip did not disclose criminal activity, the police themselves must provide underlying circumstances from which the magistrate could decide illegal activity was present. Id. at 135, 359 N.E.2d at 670, 391 N.Y.S.2d at 74. Police action of this sort was not present in Bigelow.}


The exclusionary rule does not mandate the exclusion of illegally obtained evidence since the right to exclusion of such evidence is not a constitutional right.\footnote{People v. Adams, 176 N.Y. 351, 356, 68 N.E. 636, 638 (1903), aff'd, 192 U.S. 585 (1904). In Adams, the New York Court of Appeals rejected the contention that the state constitutional provision against unreasonable searches and seizures created an exclusionary rule. See id. at 358-59, 68 N.E. at 639-40. The Adams court held that in a criminal case it will "not take notice how . . . [the evidence was] obtained, whether lawfully or unlawfully, nor will it frame issues to determine that question." Id. at 357, 68 N.E. at 638 (citation omitted).} Rather, New York has ac-
cepted the Supreme Court’s rationale by invoking the rule only when its “remedial objectives are most ‘efficaciously served’ and not merely ‘tenuously demonstrable.’”

In *Bigelow*, the People asserted in the alternative that if the probable cause for the search was not demonstrated, the contraband could still be admitted pursuant to the “good-faith” exception to the exclusionary rule. This modification of the exclusionary rule was accepted in *United States v. Leon*, which permitted illegally obtained evidence to be admitted if the police acted objectively in good faith by relying upon the search warrant.

Adams was followed in *People v. DeFore*, 242 N.Y. 13 (1926), wherein Judge Cardozo refused to suppress evidence based upon the New York Civil Rights Law, section 8 (the predecessor of article I, section 12). *Id.* at 17-19.

In 1938 the New York State Constitution was amended by the addition of article I, section 12. See *People v. Richter's Jewelers, Inc.*, 291 N.Y. 161, 166-68, 51 N.E.2d 690, 692-93 (1943). The court noted that since the statute interpreted in DeFore was incorporated into the constitution verbatim, the rule admitting evidence would be given like effect. *Id.* at 168, 51 N.E.2d at 693. *See also Johnson*, 66 N.Y.2d at 408-11, 488 N.E.2d at 446-48, 497 N.Y.S.2d at 625-27 (Titone, J., concurring)(above mentioned cases evidenced that exclusionary rule not a constitutional mandate).

In 1961, the exclusionary rule was extended to state prosecutions. See *Mapp v. Ohio*, 367 U.S. 643 (1961). In 1962, section 813-c of the Code of Criminal Procedure was enacted “to provide an orderly procedure for the application of the exclusionary rule.” *People v. Salerno*, 38 Misc. 2d 467, 469, 235 N.Y.S.2d 879, 882 (Sup. Ct. Bronx County 1962).

Article 710 of the Criminal Procedure Law codifies the exclusionary rule by permitting a motion to suppress evidence. See N.Y. CRIM. PROC. LAW § 710.20 (McKinney 1984). At the suppression hearing the People have the burden of going forward to establish the legality of the challenged conduct but the defendant has the ultimate burden of proving the illegality. *See People v. Petralia*, 62 N.Y.2d 47, 52, 464 N.E.2d 541, 544, 412 N.Y.S.2d 877, 881 (1981);

Although the Supreme Court modified the exclusionary rule in *Leon*, the New York Court of Appeals has recognized that the rule should be applied where its primary purpose—deterrence of police misconduct—would be furthered. See *People v. Adams*, 53 N.Y.2d 1, 9, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981); *People v. McGrath*, 46 N.Y.2d 12, 21, 385 N.E.2d 541, 544, 412 N.Y.S.2d 801, 804 (1978), *cert. denied*, 440 U.S. 972 (1979). Therein, it was observed: “[e]mploying a balancing approach, the court has declined to apply the exclusionary rule in those areas where the ultimate effectuation of its remedial objectives is only tenuously demonstrable.” *Id.* For a general discussion of *Leon*, see Bloom,
low, the court concluded that if the illegally seized contraband was to be admitted, “the exclusionary rule’s purpose . . . [would be] completely frustrated,” and thus held the exception to be inapplicable.\footnote{Bigelow, 66 N.Y.2d at 427, 488 N.E.2d at 458, 497 N.Y.S.2d at 637. Specifically the court determined that admission of the contraband would place a premium on the illegal police action and encourage future lawless acts by others. Id.} In reaching this determination the Bigelow court did not consider the good faith of the police\footnote{Id. at 428, 488 N.E.2d at 457, 497 N.Y.S.2d at 436. It should be noted that even though the court in Bigelow did not adopt Leon, the New York Court of Appeals has applied Leon’s rationale before. See, e.g., People v. Young, 55 N.Y.2d 419, 425, 434 N.E.2d 1068, 1071, 449 N.Y.S.2d 701, 704 (1982)(application of exclusionary rule is dependent “upon balancing of its probable deterrent effect against its detrimental impact”) (quoting People v. McGrath, 46 N.Y.2d 12, 21, 385 N.E.2d 541, 544, 412 N.Y.S.2d 701, 704 (1978)).} but rather implicated a balancing approach in deciding whether the exception should apply.\footnote{See supra note 69 and accompanying text.} This approach, akin to the analysis used by the Supreme Court in Leon,\footnote{See supra note 70.} signals the possibility that in a subsequent case the evaluation of the societal costs and deterrent benefits of the exclusionary rule may lead to application of the exception. Peculiar to the Bigelow facts, the deterrent benefits outweighed any costs to society by excluding the evidence.\footnote{See supra note 72 and accompanying text.}

In Bigelow and Johnson the New York Court of Appeals had its first opportunity\footnote{See supra note 73 and accompanying text.} to set the state law precedent in the determination of probable cause and exclusion of evidence in light of recent federal law modifications. Johnson explicitly rejected any attempts to dilute the requisite findings for probable cause based upon hearsay pursuant to a warrantless arrest.\footnote{See Johnson, 66 N.Y.2d at 406, 488 N.E.2d at 445, 497 N.Y.S.2d at 624.} Bigelow, however, leaves this area of law in a great degree of uncertainty. It is submitted that Bigelow should be viewed as a provisional decision, peculiar to its fact pattern, wherein an explicit rejection or acceptance of the Gates/Leon standards will have to await a case involving less “illegal police action and . . . lawless acts.”\footnote{Bigelow, 66 N.Y.2d at 427, 488 N.E.2d at 458, 497 N.Y.S.2d at 637.} With increased police lawfulness, the effect of the federal rules can be vigorously tested. Until a “bright-line” rule of law is implemented in situations involving lawful police conduct, it is further submit-
ted that lower courts may review probable cause and suppression determinations upon the facts and circumstances of each case using the federal rules for guidance. Interpretation of our state constitution and the policy of uniformity with the federal judiciary in search and seizure law supports such a result.

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