State of New York
Court of Appeals

OPINION

No. 9
The People &c.,
Appellant,
v.
Tyrone D. Gordon,
Respondent.

Guy Arcidiacono, for appellant.
Jonathan B. Manley, for respondent.

WILSON, J.:

Over several days, police officers observed Mr. Gordon selling heroin from his home; in addition to the surveillance, undercover officers engaged in drug transactions with Mr. Gordon and conducted a controlled buy using an informant. Based on that information,

the court issued a search warrant authorizing a search of Mr. Gordon's "person" and the "entire premises." In the proceedings below, Supreme Court held that although the police had probable cause to search Mr. Gordon and his residence, the warrant did not encompass the search of two vehicles located outside the residence, and the police lacked probable cause to search those vehicles. As a result, Supreme Court ordered the suppression of physical evidence seized from the two vehicles. On appeal, the Appellate Division affirmed, and we now do so as well. Because the search warrant in this case contained no references to the vehicles and the record supports the finding of Supreme Court that the search warrant materials failed to provide probable cause to search the vehicles, the evidence seized therefrom was properly suppressed.

I.

During the course of a narcotics investigation, police officers observed Mr. Gordon and at least one associate selling narcotics from a private residence; on several occasions, Mr. Gordon or an associate exited the residence, walked to the street and delivered an object to a waiting person in exchange for money. As part of the investigation, detectives prepared a search warrant application that alleged the following: (1) on August 13 and August 25, 2015, undercover detectives had engaged in two controlled buys of heroin from Mr. Gordon, (2) a confidential informant had participated in a third controlled purchase from Mr. Gordon, and (3) the detectives had observed several more likely narcotics sales on the evenings of August 25 and 26, 2015. In all cases, the alleged sales followed the same pattern: a car would arrive on the street outside the residence, Mr. Gordon or another

person would emerge from the residence, approach the prospective buyer, and then return to the residence a few minutes later.

Based on the surveillance and undercover purchases, the detectives applied for and obtained a search warrant authorizing a search of "the person of Tyrone Gordon . . . and the entire premises" from which Mr. Gordon was seen emerging. The warrant was issued on August 28, 2015 and executed one week later. As a result of the search of the residence, the police found a handgun, but a separate individual (not Mr. Gordon) was charged with possession of that weapon. No other contraband was found on Mr. Gordon's person or in the interior of the residence.

The factual materials prepared for the search warrant made no mention of any vehicles associated with Mr. Gordon or the premises as allegedly being involved in the observed criminal activity. Nonetheless, as part of the search of the "entire premises," police officers searched two vehicles found onsite: a Nissan Maxima and a Chevrolet sedan. The Nissan, which was registered to Mr. Gordon's cousin, was parked in the driveway of the residence. From the search of the Nissan, the police retrieved quantities of heroin, cocaine, and assorted drug paraphernalia. The Chevrolet, parked in the backyard behind two fences, was unregistered. A search of the Chevrolet revealed a loaded handgun.

Mr. Gordon was arrested and arraigned on a 9-count indictment. Counts 5 through 9 rested in large part on the physical evidence seized from the two vehicles. In an omnibus motion, Mr. Gordon moved to suppress that evidence. Mr. Gordon based his argument on several of our prior decisions, including *People v Dumper* (28 NY2d 296 [1971]) and *People v Hansen* (38 NY2d 17 [1975], *abrogated on other grounds by People v Ponder*,

54 NY2d 160 [1981] [abrogating automatic standing]). Based on our prior precedent and interpretations thereof by the lower courts, Mr. Gordon argued that the police officers lacked the particularized probable cause necessary to search the vehicles. The factual allegations, Mr. Gordon contended, supported at most a search of Mr. Gordon's person and his residence and not the vehicles located outside the residence.

Supreme Court granted Mr. Gordon's motion to suppress. Supreme Court explained that in New York, a search warrant must list "each specific area of the building, area or vehicle to be searched" and "[p]robable cause must be shown in each instance." Reviewing the warrant materials, Supreme Court concluded that probable cause was lacking in this case because the detective's affidavit made no mention of the vehicles or otherwise "provide[d] any specific probable cause [to believe] that the vehicles were involved in the criminal activity." The Appellate Division affirmed, concurring in Supreme Court's conclusion that "the search warrant did not particularize that a search of the vehicles was permitted" and "probable cause to search those vehicles had not been established in the application for the search warrant" (169 AD3d 714, 714-715 [2d Dept 2019] [internal citations omitted]). A Judge of this Court granted the People's motion for leave to appeal (33 NY3d 976 [2019]), and we now affirm.

II.

The parties dispute the proper standards for evaluating the sufficiency of the warrant application and whether the search of the vehicles conformed to the warrant's directives. Mr. Gordon relies primarily on New York precedent; the People look instead to federal caselaw for guidance. The People rely heavily on *United States v Ross* (456 US 798

[1982]) and several decisions of Federal Courts of Appeals that have determined, under the U.S. Constitution, that a warrant to search an "entire premises" may, under certain circumstances, impliedly authorize a search of automobiles found on the property (*e.g. United States v Pennington*, 287 F3d 739, 745 [8th Cir 2002]; *United States v Percival*, 756 F2d 600, 611-613 [7th Cir 1985]).

In *Ross*, the Supreme Court held that when police officers have probable cause to conduct a warrantless search of the trunk of a vehicle—based on an informant's tip that narcotics were being kept in the trunk of the car—the police may open a paper bag found inside the trunk (*Ross*, 456 US at 801). The Supreme Court did not address whether a search of an automobile could be upheld when the information supporting a warrant application is determined by a magistrate to justify the search of a premises but makes no mention of vehicles located on the property. The People and dissent contend that we should extend the reasoning of *Ross* to hold, as some Federal Courts of Appeals have, that vehicles located outside a residence are no different from any other "closets, chests, drawers, [or] containers" located within (*id*. at 821).

Those federal courts extending *Ross* to automobiles on the theory that an automobile is no different than a paper bag have found difficulty in arriving at a single standard for determining what vehicles may be searched: they disagree regarding whether police officers may search any vehicle found onsite during the execution of a premises warrant or only those vehicles that are "owned or controlled by the owner of . . . the premises" (*Percival*, 756 F2d at 600; *compare United States v Reivich*, 793 F2d 957, 963 [8th Cir 1986] [exempting "vehicle(s) of a guest or other caller" from the permissible scope of a

premises warrant] *with United States v Cole*, 628 F2d 897, 899-900 [5th Cir 1980] [upholding the search of a truck of a third party that arrived on the property during the execution of the premises warrant]).

Ross itself does not govern the situation here, and we are skeptical of the wisdom of the federal appellate cases extending it.[1] Nonetheless, we decline, as a matter of state constitutional law, to adopt either version of the federal rule advocated by the People. As explained below, the constitutional principles we have developed in this area, including judicial monitoring of the search warrant process and the importance of probable cause and particularity, strongly weigh against the People's proposed rule.

III.

A search warrant must be based on probable cause and describe with particularity the areas to be searched (*see People v Rainey*, 14 NY2d 35, 38 [1964]). We have on several occasions addressed the permissible scope of a search based on allegations of illegal activity occurring at a residence or premises (*see e.g. People v Nieves*, 36 NY2d 396, 400

[1] The Supreme Court in *Ross* cautioned that the scope of the search must be narrowly constrained to the specific area as to which probable cause existed. The Court explained that under the Fourth Amendment, "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence *does not justify a search of the entire cab*" (*Ross*, 456 US at 824 [emphasis added]). For analogous reasons, although the allegations here were sufficient to justify a search of the residence and of Mr. Gordon's person, the warrant materials raised no facts to indicate that Mr. Gordon hid narcotics anywhere outside his person or the residence. The People's interpretation of *Ross*—that if evidence of a criminal activity is alleged to occur in part of a premises, the scope of a search must necessarily extend to all areas of the premises—stretches *Ross* beyond its holding and disregards its cautionary example.

[1975] [a person's mere presence on the premises where suspected gambling is occurring is insufficient to justify a search]).

In *People v Rainey*, police officers tendered factual allegations sufficient to establish that the defendant's residence likely contained forged or illicit goods. As a consequence, police officers obtained a warrant for the "entire premises" of 529 Monroe Street, notwithstanding the fact that when they applied for the warrant, the police officers knew that the address contained two separate apartments—one belonging to the suspect of the search, the other to an innocent third party. Attached to the third party's apartment was a shed. Acting pursuant to the authority to search the "entire premises," the police canvassed both apartments and the shed, retrieving from the latter a check writer and set of blank checks believed to have been used in the suspect's check-forging activities. The defendant controverted the warrant, arguing that it was "constitutionally deficient for not 'particularly describing the place to be searched'" (*Rainey*, 14 NY2d at 36, citing NY Const, art I, §12; US Const, 4th Amend]). We agreed, and held that "[f]or purposes of satisfying the State and Federal constitutional requirements, the searching of two or of more residential apartments in the same building is no different from searching two or more separate residential houses. Probable cause must be shown in each instance" (*id*. at 37).

Rainey established that probable cause to search a suspect's residence did not encompass the authority to search a separate residence, even if both were located on the same premises. *Rainey* did not address whether the need to provide particular probable cause for separate residences extended to providing particularized probable cause for vehicles found at or associated with a residence. Two subsequent cases did. In *People v*

Dumper, we held that evidence seized from a vehicle that arrived on a premises during the search of those premises must be suppressed. Our decision in *Dumper* rested on two grounds. We first held that the underlying warrant for the residence lacked sufficient factual allegations to authorize a search of the residence (*Dumper,* 28 NY2d at 298). We then concluded that even if the affidavit had been sufficient to support a search of the residence, the warrant failed "in any event [to] justify a search of the automobile which had just been driven into the driveway" (*id*. at 299). Citing *Rainey*, we reiterated that under our precedent, the "scope of the search has been carefully limited" and "probable cause must be shown in each instance" (*id*.). We explained that:

> "a warrant must describe the premises to be searched, and this warrant did not include the automobile, which was not on the premises when the police came with the warrant but which was driven into the driveway while police were there, [and therefore] it did not justify [a] search of the car" (*id*).

We next addressed the search of a vehicle associated with a residence in *People v Hansen*. In *Hansen*, we held that police officers had sufficient cause to search Hansen's residence after surveilling the residence for some time and observing pipes, scales, and other narcotics materials (*Hansen*, 38 NY2d at 20). However, we held that the police lacked sufficient evidence to search a vehicle that had been seen coming and going from the residence. We explained:

> "The observations of the police were that this van had made 'trips in and out carrying at least one other person in addition to the driver', and that it was 'the sole vehicle observed entering and leaving these premises on a regular basis'. The affidavit contained no indication as to dates, times, frequency or purpose and was open to the interpretation that other vehicles might have entered or left the premises on a

> nonregular basis. Additionally no observation was reported as to any movement of persons between the house and the van. The activity described in the affidavit, without more, was innocuous and as consistent with innocence as with criminal activity" (*id*.).

Applying the doctrine of severability, we upheld the search of Hansen's residence but directed that the evidence seized from the van should be suppressed.

Finally, in *People v Sciacca* (45 NY2d 122 [1978]), we held that tax investigators who had a valid warrant to search an automobile exceeded the scope of that warrant by entering into a private garage in order to execute the search of the vehicle. Citing *Hansen* and *Dumper*, we stated:

> "It is clear that a warrant to search a building does not include authority to search vehicles at the premises (*People v Hansen*, 38 NY2d 17; *People v Dumper*, 28 NY2d 296). The converse is also true. Authority to search a vehicle does not include authority to enter private premises to effect a search of a vehicle within those premises. The Constitution (NY Const, art I, §12; US Const, 4th Amdt) requires that a warrant particularly describe the place to be searched and the Criminal Procedure Law provides for the issuance of warrants to search persons, premises or vehicles (CPL 690.15). The fact that premises are generally fixed while persons and vehicles are moveable presents a problem to officers executing search warrants. However, the constitutional mandate of particularity of the place to be searched may not be circumvented by implication as the People urge. We cannot accept the argument that the entry into the private garage was a permissible incident of the right to search pursuant to a warrant. The warrant here authorized the search of a particular van and nothing else. The garage had a structural and functional existence distinct from defendant's van which should have been recognized by the investigators" (*id*. at 127).

In *Sciacca*, our statement that "a warrant to search a building does not include authority to search vehicles at the premises" was arguably dicta because the facts there involved

whether a search warrant for a vehicle authorized an intrusion into a premises, and not vice versa. Yet that statement represents our Court's understanding of the meaning of our prior decisions in *Hansen* and *Dumper*, one that, as we noted in *Sciacca*, accords with the legislature's prescription of "what and who" are subject to search pursuant to a New York warrant (*see* CPL 690.15 [1] ["A search warrant must direct a search of one or more of the following: (a) A designated or described place or premises; (b) A designated or described vehicle . . . (c) A designated or described person"]).

The requirement that warrants must describe with particularity the places, vehicles, and persons to be searched is vital to judicial supervision of the warrant process (*see People v P.J. Video, Inc.*, 68 NY2d 296, 305-306 [1986]). Warrants "interpose the detached and independent judgment of a neutral Magistrate between the interested viewpoint of those engaged in ferreting out crime and potential encroachments on the sanctity and privacy of the individual" (*People v Hanlon*, 36 NY2d 549, 558 [1975]). To further that role, our constitution assigns to the magistrate the tasks of evaluating whether probable cause exists to initiate a search and defining the subjects to be searched (*see Nieves*, 36 NY2d at 402 ["In reviewing the validity of a search warrant to determine whether it was supported by probable cause or whether it contained a sufficiently particular description of its target, the critical facts and circumstances for the reviewing court are those which were made known to the issuing Magistrate at the time the warrant application was determined"]).

The particularity requirement protects the magistrate's determination regarding the permissible scope of the search. Thus, to be valid, a search warrant must be "specific enough to leave no discretion to the executing officer" (*People v Brown*, 96 NY2d 80, 84

[2001], quoting *People v Darling*, 95 NY2d 530, 537 [2000]). So important is the role of the neutral and detached magistrate that we have in the past parted ways from federal constitutional jurisprudence when we believed that an emerging rule of federal constitutional law "dilute[s] . . . the requirements of judicial supervision in the warrant process" (*P.J. Video*, 68 NY2d at 305; *see also People v Gokey*, 60 NY2d 309 [1983]; *People v Scott*, 79 NY2d 474, 487 [1992]; *People v Keta*, 79 NY2d 474, 498 [1992] [declining to incorporate a federal rule permitting warrantless searches of business establishments in light of the paramount importance of "advance judicial oversight" under Article 1, Section 12 of the State Constitution]; *P.J. Video*, 68 NY2d at 306 [distinguishing federal constitutional law in part of the grounds that New York imposes a "rigorous, fact-specific standard of review . . . upon the magistrate determining probable cause"]).

IV.

Supreme Court's probable cause analysis is consonant with our prior cases and the record supports its finding, affirmed by the Appellate Division, that the warrant application failed to establish probable cause to search the two vehicles. The application contained no mention of the existence of the vehicles ultimately searched, much less evidence connecting them to any criminality. Indeed, the observed pattern, as described in the affidavit, was for Mr. Gordon to proceed from the residence to the street and back, without detouring to any vehicles parked at the residence. As in *Hansen*, "no observation was reported as to any movement of persons between the house and the [vehicles]" (*Hansen*, 38 NY2d at 20) that would substantiate a belief that the vehicles searched were utilized in the alleged criminal activity.

Nor do we believe that the warrant for Mr. Gordon's "person" or "premises"—in the context of the factual allegations averred by the detectives—authorized a search of the vehicles. As we stated in *Hansen*, the mere presence of a vehicle seen at the sight of premises wherein the police suspect criminal activity to be occurring does not by itself provide probable cause to search the vehicle (*see id*. at 21).

Our conclusion that the officers in this case exceeded the scope of the warrant finds support both in our prior cases and in the Criminal Procedure Law (CPL) (*see Hanlon*, 36 NY2d at 559 ["(P)robable cause (must be) demonstrated as a matter of fact in the manner prescribed by statute (CPL art. 690) and decisional law"]). Section 690.15 (1) of the CPL states:

> "1. A search warrant must direct a search of one or more of the following:
>
> (a) A designated or described place or premises;
>
> (b) A designated or described vehicle, as that term is defined in section 10.00 of the penal law;
>
> (c) A designated or described person."

In this case, the police officers obtained a search warrant for two out of the three: (1) "the person of Tyrone Gordon" and (2) "the entire premises" from which Mr. Gordon was seen emerging. The legislature's instruction that a warrant may direct a search of "one or more of the following" strongly suggests that a warrant which directs the search of only one category (*e.g.* a premises) does not impliedly encompass the others. Moreover, to the extent to which vehicle searches are authorized in a warrant, the vehicles must be "designated or described" (CPL 690.15 [1] [b]). Here, no vehicle was designated or

described in the warrant, and the People have not argued that the police had probable cause to engage in a search of anything outside of what was designated or described in the warrant. The People's contention that a search warrant authorizing the search of a premises encompasses an implicit grant of authority to search all vehicles located on the property undermines the legislature's delineation of three distinct categories as appropriate subjects of a search (*see Matter of Orens v Novello*, 99 NY2d 180, 187 [2002] ["When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended"], quoting *Matter of Albano v Kirby*, 36 NY2d 526, 530 [1975]; *Rangolan v County of Nassau*, 96 NY2d 42, 47 [2001] ["where . . . the Legislature uses different terms in various parts of a statute, courts may reasonably infer that different concepts are intended"]). Our prior decisional law and the CPL's differentiation between premises, vehicles, and persons both support the view that specific descriptions or designations, backed by particularized probable cause, are required for a search of each.

We are not persuaded by the People's attempts to distinguish our prior cases. In *Hansen*, the police surveilled the van in question, recorded its repeated travels to and from the residence, and specifically mentioned the vehicle in the warrant. Nonetheless, we held that there was "not sufficient evidence to support a finding of probable cause justifying a search of the Speake Dodge van" because there had been no allegations of criminal activity specifically linking the vehicle to the residence (*Hansen*, 38 NY2d at 20). In this case, by comparison, the warrant application contained no mention whatsoever of the existence of the vehicles ultimately searched, much less evidence connecting them to any criminality.

Adopting the People's position would lead to the incongruous result that proof that a vehicle had an ongoing connection with a property would be insufficient to justify a search, while a warrant application that makes no mention of the vehicle would somehow provide greater cause to search that vehicle.

Likewise, the People attempt to distinguish *People v Dumper* by arguing that the salient difference in *Dumper* was that the vehicle was driven onto the property during the execution of the warrant. We are not convinced that constitutional protections turn on such accidents of timing; an automobile not mentioned in a premises search warrant, whether arriving one minute before or one minute after the search commences, should be entitled to the same protection under our constitution. Indeed, we observed in *Dumper* that—pursuant to both constitutional and statutory directives—a "warrant must describe the premises to be searched" and "this warrant did not include the automobile" (*Dumper*, 28 NY2d at 299). The significance of that conclusion relates back to the basic standards for issuing and reviewing search warrants (*see Nieves*, 36 NY2d at 402 ["In reviewing the validity of a search warrant . . . the critical facts and circumstances for the reviewing court are those which were made known to the issuing Magistrate at the time the warrant application was determined"]). The reason the warrant did not describe the vehicles in this case, as in *Dumper*, is that the warrant application materials failed to mention the vehicles, which consequently fell beyond the scope of the warrant.

Even were we writing on a blank slate, we would not adopt the rule advocated by the People. The touchstone of the constitutional protection for privacy, under Article 1, Section 12 of the State Constitution, is whether a person has a reasonable expectation of

privacy (*see Scott*, 79 NY2d at 488). Those expectations must at times give way to "compelling police interest[s]" (*People v Class*, 63 NY2d 491, 495 [1984], *revd and remanded by New York v Class*, 475 US 106 [1986], *reaffirmed on state constitutional grounds by People v Class*, 67 NY2d 431 [1986]). Even then, the permissible "scope of a search has been carefully limited" by the requirement for probable cause and a particular description of the subjects to be searched (*Dumper*, 28 NY2d at 299). Those limits have not been honored in this case. Individuals do not cede legitimate expectations of privacy when they park a vehicle at the house of a friend, acquaintance or stranger. In the case of automobiles, unlike desks, closets or trunks, the risks of innocent invasions of privacy are substantially higher, given the commonplace occurrence of traveling by car to visit other places and people. Moreover, automobiles, unlike other containers, are typically titled and registered, and are also more often in public view, providing police officers with the means of establishing connections between the vehicle and the target of the search. No such connections were made here.

The dissent offers an array of arguments for how probable cause to search the vehicles could be established by their proximity to alleged drug trafficking. Even were we to put aside the contrary reasoning of *Hansen* and *Dumper*, the dissent never addresses the fundamental tenets of our search warrant jurisprudence: it is the magistrate, and not the police officer, who determines the scope of the search conducted pursuant to a warrant (*Hanlon*, 36 NY2d at 559; *P.J. Video*, 68 NY2d at 307 [noting that *Hanlon* "imposed a specific, nondelegable burden on the magistrate which required that (the magistrate), not the police, determine probable cause"]). That determination must be based upon the factual

allegations presented in the warrant application (*Nieves*, 36 NY2d at 402). To satisfy the constitutional requirement for particularity, the description setting forth the search must "leave no discretion to the executing officer[s]" (*Brown*, 96 NY2d at 84). If, as the dissent says, trafficking in drugs provides probable cause to search vehicles, the officers can set forth the results of their investigation, describe the vehicles they have observed, and make their case to the magistrate. If that proof is insufficient to convince the magistrate to authorize a search of the vehicles, allowing a search because the vehicles are located on a premises would constitute an unconstitutional bootstrapping.[2]

Finally, the dissent argues that we are bound to decide this case purely as an application of the Supreme Court's decision in *United States v Ross* because Mr. Gordon has not preserved a claim under the State Constitution. Contrary to the assertion of the dissent, this issue has been preserved and developed by both parties throughout the course

[2] The dissent does not choose between the two differing federal rules—one permitting the search of all vehicles and the other limited to those vehicles that appear, based on "objectively reasonable indicia present at the time of the search," to be owned or controlled by the target of the warrant—because the vehicles here were ultimately conceded to be either owned or controlled by Mr. Gordon. That misses the fundamental point: whether a sufficient basis exists to search the automobiles is a question, in the first instance, for the judge issuing the warrant, not one left to the discretion of the police. Although the dissent characterizes the warrant issued here as supported by probable cause as to the entire premises including whatever vehicles happened to be there, the determination of whether probable cause existed to search any vehicle was not presented to the judge who issued the warrant. Thus, whereas the dissent claims that the question of overbreadth can be resolved in another case, its approach would, in fact, decide that question as a matter of law, eliminating any need for particularized probable cause to search any vehicle on the premises. It cannot seriously be asserted that the police would have probable cause to search a vehicle parked on the driveway by a visitor mere minutes before execution of the warrant. Yet the dissent's view of the scope of a premises warrant leaves that choice solely to the discretion of the officers executing the warrant, a result that is anathema to the constitutional warrant requirement itself.

of this litigation, which is perhaps why the People themselves have not argued that Mr. Gordon's contentions are unpreserved.

The debate below focused on the merits of adopting the People's interpretation of the federal standard in light of our prior precedent. Before Supreme Court, Mr. Gordon cited the same New York caselaw discussed above to argue that New York law has "consistently adhered to the position that a search warrant must specify the area to be searched." Those cases rested on both the New York and U.S. Constitutions as well as the Criminal Procedure Law to require a greater degree of protection for searches of vehicles than is now required under the federal circuit court law cited by the People. Before Supreme Court, the People responded by attempting to distinguish our prior decisions and arguing that, if they were distinguishable and therefore not controlling, Supreme Court should adopt the People's preferred rule interpreting the Fourth Amendment. In reply, Mr. Gordon specifically rejected the importation of the federal circuit court law into this context and contended that the People's position would amount to a "detour from established precedent." For reasons explained above, Mr. Gordon is correct that adopting the People's position would amount to a substantial deviation from the rule to which we have adhered under both the Fourth Amendment and Article 1, Section 12 of the State Constitution, requiring warrants to provide particularization between vehicles and real property, even when a vehicle is located on real property.[3]

[3] The posture of this appeal is, therefore, substantially different from prior cases such as *People v Garvin* (30 NY3d 174 [2017]). In *Garvin*, the defendant did not argue in the initial suppression hearing that New York provided any greater protections to individuals

Our prior decisions, relied upon by Mr. Gordon and the courts below, depended upon both the State and Federal Constitutions as well as the Criminal Procedure Law. In this area of constitutional law, we have set forth principles that would be unduly weakened by the People's preferred rule (*see People v Johnson*, 66 NY2d 398, 407 [1985]).

The dissent faults our prior decisions in *Hansen*, *Dumper*, *Sciacca*, and *Rainey* for failing to conduct an extensive analysis of whether state constitutional protections deviate from federal constitutional protections in this context, while simultaneously acknowledging that our state caselaw delineating that particular analysis postdates those decisions. Nevertheless, in our view, that does not render our repeated citations to the State Constitution meaningless. Although a defendant must preserve a state constitutional analysis, Mr. Gordon has maintained throughout this litigation that the holdings of our

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subject to warrantless arrests than federal jurisdictions. Quite the opposite—Mr. Garvin argued for suppression under *Payton v New York* (445 US 573 [1980]), a U.S. Supreme Court case setting forth a federal constitutional rule. Although Mr. Garvin included a bare parallel citation to the State Constitution, he did not argue that there were any substantive differences between New York and federal law and his arguments focused solely upon the proper interpretation and application of the federal rule. As a consequence, our opinion addressed the question presented to the lower courts—whether, under *Payton*, the arrest of Mr. Garvin was unconstitutional. We answered that question in the negative and concluded secondarily that Mr. Garvin had not preserved any independent argument under New York law. By contrast, Mr. Gordon has throughout this litigation relied exclusively upon New York caselaw that cites to both the State and Federal Constitutions, and he objected in the courts below to the importation of federal circuit court caselaw in this area on the grounds that to do so would be inconsistent with the New York rule that our Court has developed. The issue of whether we should hew closely to our prior precedent or adopt, as a matter of state law, an emerging rule of federal constitutional law has been consistently litigated by both parties throughout this case. Indeed, the courts below necessarily concluded, in rejecting the People's arguments for the adoption of some version of the federal rule, that *Ross* and its progeny were not controlling as a matter of New York state law under our prior precedent. Thus, this issue is fully preserved for our review.

jurisprudence should not follow the federal appellate extensions of *United States v Ross*, and that the rationale and considerations that undergird our jurisprudence counsel against adopting any extension of *Ross* that might displace them. Thus, Mr. Gordon preserved the argument that, notwithstanding *United States v Ross* and related federal circuit court decisions, our state law remains the same as we articulated in our decisions in *Hansen*, *Dumper*, *Sciacca*, and *Rainey*. To address the continued viability of caselaw premised upon our interpretation of *both* the U.S. and the State Constitutions, we now clarify that—at the very least—those cases accurately set forth our state constitutional law. To avoid answering the state constitutional component on preservation grounds would be to overrule those cases as a matter of federal and state constitutional law, while concomitantly maintaining that defendant failed to preserve a state constitutional claim. We decline to distort our preservation rule in such a manner where, as here, the claim was brought to the attention of the courts below, litigated by the parties, and addressed by the courts.

Our Court has never adopted a "fixed analytical formula for determining when the proper protection of fundamental rights requires resort to the State Constitution" (*Scott*, 79 NY2d at 491). In the context of Article 1, Section 12, we have done so when, among other considerations, "the aims of predictability and precision in judicial review of search and seizure cases . . . are best promoted by applying State constitutional standards" (*Johnson*, 66 NY2d at 407) and when the "constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court (*Scott*, 79 NY2d at 504 [Kaye, C.J., concurring]).

Although some Federal Courts of Appeals have interpreted the Fourth Amendment in a manner that might permit the search here, we decline to follow suit. Instead, we exercise our independent authority to follow our existing state constitutional jurisprudence, even if federal constitutional jurisprudence has changed, because "we are persuaded that the proper safeguarding of fundamental constitutional rights requires that we do so" (*Scott*, 79 NY2d at 480; *see generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489 [1977]; Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 16-20 [2018] [counseling against state high courts engaging in "lockstepping" and describing instead the virtues of independent assessments of parallel constitutional provisions]; Goodwin Liu, *State Courts and Constitutional Structure*, 128 Yale LJ 1304, 1311 [2019] [noting that "redundancy (of constitutional interpretation) makes innovation and variation possible and, for that reason, is a vital feature of our federal system"]).

Because the supporting affidavits did not describe the vehicles to be searched at all, never mind with any particular allegations connecting them to criminal activity, the record supports the affirmed finding that there was no probable cause to search the vehicles. Accordingly, the order of the Appellate Division should be affirmed.

FEINMAN, J. (dissenting):

The determinative question on appeal is whether a valid warrant, supported by probable cause and authorizing the search of the "entire premises," permits the search of vehicles parked on the designated premises, when the vehicles may contain the items

authorized to be seized by the warrant, but the warrant does not specifically mention the vehicles. While this Court has not yet had the opportunity to answer it, the question is certainly not a novel one for courts. Every federal circuit court of appeals and every state high court that has addressed the question—until today—concluded that vehicles are no different than other containers that might be found on premises, and, thus, heeding the directive from the United States Supreme Court that there is no constitutional distinction between types of containers, held that vehicles parked on the premises may reasonably be searched if they may contain the object of the search.

A majority of this Court, however, answers that question in the negative. The majority disagrees with every federal court and state high court, and posits that the Fourth Amendment prohibits the search of the vehicles here (majority op at 20). That belief, in turn, appears to be grounded in a series of inapposite New York cases decided prior to the seminal Supreme Court case, *United States v Ross* (456 US 798 [1982]). With respect to its treatment of the New York State Constitution, the majority, without clarifying whether it interprets the relevant state constitutional provision as diverging from its federal counterpart, reaches two very problematic conclusions: first, that defendant preserved an argument that our State Constitution provides more protection than the Fourth Amendment, by simply citing New York cases, even though those cases contain no discussion of the State Constitution; and second, that those earlier decisions by this Court somehow justify, with no further analysis, a constitutional rule applicable to this case. Both conclusions fundamentally alter our jurisprudence. I dissent.

I.

In this case, the Suffolk County Police Department applied for and obtained a warrant to search the "person of" defendant and "the entire premises located at" an address believed to be defendant's residence, "a 1 story ranch style house." The warrant further described the premises to include an "attached carport," "a cement driveway," "a cement walkway that leads to the front door," and a "chain link fence." The warrant authorized the police to search for, among other things, heroin, money as the proceeds of an illicit drug business, cell phones, computers, and drug paraphernalia.

The warrant application also detailed drug sales that took place in the street in front of the premises, including a controlled buy with a confidential informant, two undercover buys, and other transactions observed during surveillance of the premises. During each alleged sale, a driver pulled up in front of the premises in their vehicle, and defendant exited his residence, approached the vehicle, and then returned to the house. For the controlled and undercover buys, defendant agreed in advance to meet at his residence for the purpose of selling heroin. The deponent set forth his experience, stating that he had been involved in more than 1,000 drug-related arrests, that he was familiar with the modus operandi of heroin dealers, that the activity taking place at the premises was consistent with narcotics transactions, and, based on the above, there was probable cause to believe drugs would be "found at the above described premises." The warrant application did not refer to any vehicles.

During execution of the warrant, the police searched two vehicles: (1) a Nissan Maxima parked on the driveway of the property and (2) an unregistered 2000 Chevrolet

sedan parked in the backyard. Defendant's expectation of privacy in the vehicles is not disputed. In the Nissan, which defendant was borrowing from the owner, the police found heroin, marijuana, cocaine, money, and drug paraphernalia. In the Chevrolet, which defendant owned, the police recovered a loaded handgun from the engine block.

Defendant sought to suppress all evidence seized from the Nissan and Chevrolet. His sole contention was that the search of the vehicles was outside the scope of the search permitted by the warrant, noting that the vehicles were not in an attached garage and thus not part of the home. The People opposed, arguing that the search warrant was not restricted to the private dwelling, but authorized the search of the "entire premises," which includes the house located at the address as well as the surrounding curtilage, and that the search of the vehicles parked thereon was reasonable as they could and did contain contraband sought by the warrant. Supreme Court granted suppression, on constraint of *People v Sciacca* (45 NY2d 122 [1978]), and the Appellate Division affirmed on the determinative ground that the "search warrant did not particularize that a search of the vehicles was permitted" (169 AD3d 714, 714-715 [2d Dept 2019]). A Judge of this Court granted the People leave to appeal (33 NY3d 976 [2019]).

II.

A.

Where a search warrant authorizes the search of premises, a separate showing of probable cause is not required to search containers found on the designated premises, if the object of the search could be found therein. For example, "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests,

drawers, and containers in which the weapon might be found" (*Ross*, 456 US at 821). In *Ross*, the United States Supreme Court held that, where police officers have probable cause to believe that contraband is concealed somewhere within a vehicle, they may conduct a warrantless search of every part of it and its contents, including all containers and packages, that may conceal the object of the search (*id.* at 825; *see People v Langen*, 60 NY2d 170, 180-181 [1983] [applying *Ross* and declining to adopt a different rule under the New York State Constitution]). The Court broadly stated that a "lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search" (*Ross*, 456 US at 820-821). "This rule applies equally to *all* containers" (*id.* at 822 [emphasis added]). There is no "constitutional distinction between 'worthy' and 'unworthy' containers" (*id.*). As the Supreme Court has explained, "[e]ven though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction" (*id.*).

Federal courts, applying *Ross*, have found that vehicles located in the area to be searched are a type of container—worthy of no more protection than other types of containers (*see e.g. United States v Evans*, 92 F3d 540, 543 [7th Cir 1996] ["It seems to us that a car parked in a garage is just another interior container, like a closet or a desk"]; *United States v Percival*, 756 F2d 600, 612 [7th Cir 1985] ["Although a car is less fixed than a closet or cabinet, . . . it is no less fixed than a suitcase or handbag found on the premises, both of which can readily be searched under *Ross* if capable of containing the

object of the search"]). Accordingly, those courts have held that, under the Fourth Amendment, "[a] search warrant authorizing a search of a certain premises generally includes any vehicles located within its curtilage if the objects of the search might be located therein" (*United States v Gottschalk*, 915 F2d 1459, 1461 [10th Cir 1990]; *accord United States v Armstrong*, 546 Fed Appx 936, 939 [11th Cir 2013]; *United States v Johnson*, 640 F3d 843, 845 [8th Cir 2011]; *United States v Patterson*, 278 F3d 315, 318 [4th Cir 2002]; *Evans*, 92 F3d at 543; *United States v Duque*, 62 F3d 1146, 1151 [9th Cir 1995]; *United States v Singer*, 970 F2d 1414, 1417-1418 [5th Cir 1992]; *United States v Reivich*, 793 F2d 957, 963 [8th Cir 1986]; *Percival*, 756 F2d at 612; *United States v Asselin*, 775 F2d 445, 447 [1st Cir 1985]).[1]

Moreover, every other state high court that has addressed this issue has, like the federal courts, held that a warrant authorizing a search of the entire premises permits the police to search vehicles located thereon.[2] Nearly 30 years ago, an Appellate Division

[1] While there may be some disagreement among the federal courts whether the vehicle must be owned or controlled by the owner of the premises (*see Percival*, 756 F2d at 612), or, alternatively, whether it is enough that the vehicle appears, based on objectively reasonable indicia present at the time of the search, to be so owned or controlled (*see Gottschalk*, 915 F2d at 1461), it is undisputed here that defendant owned or controlled both vehicles.

[2] *See e.g. Hardin v State*, 148 NE3d 932, 941-942 (Ind 2020); *State v Hidalgo*, 296 Neb 912, 921, 896 NW2d 148, 155 (2017); *State v Patterson*, 304 Kan 272, 279-281, 371 P3d 893, 898-899 (2016); *State v Lowe*, 369 NC 360, 366-368, 794 SE2d 282, 286-287 (2016); *McLeod v State*, 297 Ga 99, 105, 772 SE2d 641, 646 (2015); *State v Stout*, 356 Mont 468, 485, 237 P3d 37, 49 (2010); *Commonwealth v Fernandez*, 458 Mass 137, 146, 934 NE2d 810, 818 (2010); *State v Smith*, 827 So2d 1122, 1123 (La 2002); *State v O'Brien*, 223 Wis2d 303, 318, 588 NW2d 8, 14 (1999); *State v Harnisch*, 113 Nev 214, 219, 931 P2d 1359, 1363 (1997); *State v Lewis*, 270 NW2d 891, 897 (Minn 1978); *Matter of One 1970 Ford Van, I.D. No. 14GHJ55174, License No. CB 4030*, 111 Ariz 522, 523, 533 P2d 1157, 1158 (1975); *Lawson v State*, 176 Tenn 457, 143 SW2d 716, 717 (1940).

court applied *Ross* to reach the same conclusion (*see People v Powers*, 173 AD2d 886, 888-889 [3d Dept 1991] [interpreting *Ross* to permit the search of a vehicle owned or controlled by the owner of the premises authorized to be searched by the warrant], *lv denied* 78 NY2d 1079 [1991]). Applying *Ross*, I would likewise hold that, where a warrant authorizes a search of the entire premises for items that could be found in a vehicle on those premises, it is reasonable to search a vehicle parked thereon, just as it would be for other containers found on the premises.

Here, based on the uncontroverted probable cause to believe that defendant was engaged in drug trafficking on and around the premises of his residence, the warrant directed to the "entire premises" was sufficiently particular to "enable the searcher to identify the persons, places or things that [a court] has previously determined should be searched or seized" (*see People v Nieves*, 36 NY2d 396, 401 [1975]). Moreover, a search of vehicles is reasonable insofar as defendant may have secreted the objects of the search, i.e., drugs and other evidence of trafficking, in his vehicles (*id.* at 402 [the "ultimate mandate of reasonableness" "depend(s) upon the facts and circumstances"]). Because a driveway and a backyard located within the curtilage are part of the "entire premises," there was no constitutional impediment to the police search of the two vehicles.

B.

The majority's response to the analysis of *Ross* conducted by all the federal circuit courts and other state courts that have considered the issue is to express "skeptic[ism]," with an added footnote that explains that the Supreme Court in *Ross* did not disturb the fundamental principle that searches must be bound by probable cause (majority op at 6 and

n 1). One should hope not. That Court did, however, leave no doubt—at least in the view of any other court to consider the issue—that the Fourth Amendment permits the search of containers found on the premises, such as the vehicles here.

Nevertheless, the majority insists that vehicles are special containers, arbitrarily favoring vehicles over other transportable containers, such as backpacks and rollable luggage, and containers normally located outdoors, such as mailboxes. I see no persuasive rationale why, if a bicycle and a car are parked next to each other on a driveway, it is reasonable to search the bicycle's closed basket but unreasonable to search the car's trunk. The majority says that "automobiles, unlike other containers, are typically titled and registered," "more often in public view," and used for traveling "to visit other places and people" (majority op at 15). But those are all well settled reasons why there is a *reduced* expectation of privacy in automobiles—not reasons to invent greater protections for them (*see e.g. South Dakota v Opperman*, 428 US 364, 367-368 [1976]; *People v Galak*, 81 NY2d 463, 467 [1993]).

The majority seems primarily concerned about the possibility that vehicles parked on a target's premises might belong to a visiting friend or acquaintance (majority op at 15, 16 n 2)—a possibility I view as quite remote where, for example, the vehicle is found in an enclosed structure (such as a garage), in a backyard, or behind a gate, or when no visiting friend or acquaintance is in fact present at the premises. Nevertheless, this concern exists

equally for all containers, not just vehicles.[3] Instead of attempting to ameliorate the concern by, as other courts have done, fashioning an appropriate rule (*see* n 1, *supra*), the majority categorically prohibits the search of vehicles pursuant to a premises warrant unless the vehicles are identified in the warrant application and supported by a separate showing of probable cause, making vehicles concealed on premises effectively search proof. There is no justification for such an extreme position.

C.

Rather than forthright basing this extreme position on the Fourth Amendment and application of Supreme Court precedent—a decision that would theoretically be more readily reviewed by the Supreme Court (perhaps because this Court has now become an outlier and created a "split" in the interpretation of *Ross*)—the majority relies, in some unspecified way, on our case law that not only is inapposite, but also predates *Ross* and was decided without the benefit of subsequent constitutional law on the import of containers located in the areas designated to be searched in warrants. While the majority characterizes these cases as setting forth state constitutional law—simply by retroactively

[3] For example, in determining when containers such as purses and handbags owned by third persons may be searched pursuant to a premises warrant, some courts apply a "physical possession" analysis, focusing on the physical location of the container and whether the third person wore the container at the time it was searched (*see United States v Vogl*, 7 Fed Appx 810, 815 [10th Cir 2001], citing *United States v Johnson*, 475 F2d 977, 979 [DC Cir 1973]). Other courts examine the "relationship between the person whose personal effects are searched and the place which is the subject of the search" "as the agents perceive[ ] it when they execute[ ] the search warrant" (*e.g. United States v Giwa*, 831 F2d 538, 544-545 [5th Cir 1987]). No court, however, has ever said—as the majority seems to do today with respect to vehicles—that a search of a container is prohibited unless the container is identified in the warrant application.

decreeing them to do so (majority op at 19)—it is not clear if the majority intends these cases to stand for our contrary interpretation of the Federal Constitution, to form some kind of common-law rule, to be an implied application of the Criminal Procedure Law, or to express a heightened state constitutional standard.

As an initial matter, these cases are factually distinguishable in pivotal aspects from the issue we are deciding and are not in conflict with *Ross*. In *People v Sciacca* (45 NY2d 122 [1978]), we held that a warrant authorizing a search of a defendant's van does not permit a forcible warrantless entry into another person's locked building—a garage—in order to execute the warrant (*id.* at 126-127). The actions of the investigators in breaking and entering into the building were unreasonable, as there was "no evidence whatever which would indicate that the garage was a premises where the controlled activity was taking place. The garage was completely distinct, indeed incidental, to any illegal activity" (*id.* at 128).

Our statement in that case, unrelated to specific facts before the Court, that "a warrant to search a building does not include authority to search vehicles at the premises" (*id.* at 127) is dictum and, in any event, lacks context as to its intended application. The plain import of this language is that a warrant to search a discrete structure ("a building") does not authorize a search of any container located on the grounds upon which the structure is situated ("vehicles at the premises"), because a search of the latter would exceed the scope of the warrant. As the Court made clear, the fact that the warrant in *Sciacca* "authorized the search of a particular van and nothing else" did not mean that "a vehicle may never be searched while on private property" (*id.* [citing to federal and state

case law]). To the extent that the dictum in *Sciacca* was referring to a scenario where a search warrant only describes a particular structure, it has no application where, as here, instead of limiting the search to a specific structure, the search warrant authorizes a search of the "entire premises," which, as particularized in this case, included the house as well as surrounding private property.

People v Dumper (28 NY2d 296 [1971]), cited in *Sciacca*, is also unavailing. In *Dumper*, the search warrant was similarly directed at discrete structures, including "a one story wood frame cottage with white sidewall, green roof" and a "cottage east of a main house" (*id.* at 299). Additionally, in *Dumper*, we invalidated the search warrant based on the absence of probable cause of criminal activity to sustain *any* search. Here, there is no dispute that the search warrant was supported by probable cause to believe that defendant was involved in narcotics trafficking on his premises, and, unlike the vehicle in *Dumper*, defendant's vehicles were parked on the premises when the police arrived to execute the warrant. As noted above, the extent to which a vehicle (or any container for that matter) located in the area authorized to be searched must be connected to the target or to the premises in order for a search of it to be reasonable has generated some disagreement among courts (*see* nn 1, 3, *supra*). In the appropriate case, *Dumper* may be relevant in assessing how we would decide that issue, but it is not relevant here.

People v Hansen (38 NY2d 17 [1975]), also cited by the Court in *Sciacca*, is likewise factually inapposite and not controlling. The issue in *Hansen* was whether there was probable cause for the search warrant directed at "two separate target locations discretely described," namely a residence and an "automotive van *wherever located*" (*id.*

at 21 [emphasis added]). In that case, police saw drugs in the home when they were investigating a burglary and later obtained a warrant for the home and the van (*id.* at 20). We concluded that there was probable cause to search the target residence for the drugs observed by the police, as the information in the warrant was not stale, but there was no probable cause to search the van, as the presence of the drugs in the house was not indicative of more than possession—in other words, no evidence of narcotics trafficking (*see id.* at 20-21). Here, by contrast, the question is whether the officers exceeded the scope of a valid search warrant for evidence of an illicit drug business conducted from the premises—an issue not addressed by this Court in *Hansen*. In *Hansen*, it appears that the Court rejected the argument that the affidavit on which the warrant was issued provided probable cause of trafficking, because it was factually deficient and the trafficking-related allegation was unreliable hearsay, thus undermining the related argument that there was probable cause to search the van as part of a drug business or because it was otherwise connected to the drugs in the house (*id.*). Like *Sciacca* and *Dumper*, *Hansen* focused on the basic tenets of probable cause of criminal activity in the warrants at issue and did not address the question here. In light of the *Hansen* Court's conclusion that there was no probable cause to search the van, the Court certainly did not confront whether the warrant to search the residence covered a search of the van "wherever located." Nor did it confront whether the van could reasonably be searched if the van was located on the residence when

the van was searched—how could it, after all, given that its opinion does not even indicate whether the van was in fact located on the residence when it was searched.[4]

III.

It is the majority's treatment of the state constitutional issue that is most problematic. The majority sets out for new territory both in terms of preservation of the issue and in determining when our decisions establish a state constitutional standard greater than that of the Fourth Amendment.

A.

Before the motion court, defendant argued that he was entitled to suppression because the search of the vehicles fell outside the scope of the warrant. Defendant did not support that argument with any state constitutional analysis. Instead, defendant supported his suppression argument with citations to this Court's decisions in *Rainey*, *Dumper*, *Hansen*, and *Sciacca*. The only reference to the New York Constitution in those decisions comes in the form of a parallel reference or citation to New York Constitution article I, § 12 and the Fourth Amendment of the United States Constitution (*see Sciacca*, 45 NY2d at 127; *Hansen*, 38 NY2d at 22; *Dumper*, 28 NY2d at 299; *People v Rainey*, 14 NY2d 35,

[4] The majority's intimation that I am interpreting "premises" and "vehicle" in CPL 690.15 (1) to have the same meaning is a straw person (*see* majority op at 13). That statute says that a warrant may direct a search of "premises" and/or of a "vehicle." The latter raises issues as to whether the vehicle may be searched where it is found (*see e.g. Sciacca*, 45 NY2d at 125-127); because premises have a fixed location, the former does not. Contrary to the majority's misapprehension, the statute is not relevant to the issue of whether a search warrant for the entire premises includes vehicles located on the premises—as such a warrant does for all other containers in which the object of the search may be found.

38 [1964]). When the People invoked *Ross* in their response papers, defendant ignored the argument.[5]

Nevertheless, the majority argues that defendant's reliance on those cases, without more, was sufficient to preserve a state constitutional argument (*see* majority op at 16-17). I disagree.

This Court has never held that a mere reference or citation to both a state constitutional provision and its federal counterpart is enough to preserve an argument that the parallel state provision provides for heightened protection. Indeed, a parallel citation indicates a belief by the litigant (or the court) that the state and federal provisions at issue are coextensive. Instead, this Court has repeatedly held that, to preserve a state constitutional argument, a defendant must specifically argue below that the New York Constitution provides greater protection than the Federal Constitution (*see e.g. People v Garvin*, 30 NY3d 174, 185 n 8 [2017] ["Any issues regarding whether New York Constitution, article I, § 12 provides *greater* protection . . . are unpreserved here because, in the suppression hearing, defendant did not argue that the State Constitution provides greater protections than its federal counterpart"][6]; *People v Hansen*, 99 NY2d 339, 344,

[5] The majority's statement, noting that defendant "rejected the importation of the federal circuit court law into this context and contended that the People's position would amount to a 'detour from established precedent'" (majority op at 17), leaves a mistaken impression that defendant made a state constitutional argument. He did not; rather defendant made the obvious point that a ruling interpreting the Federal Constitution by a federal court—other than the Supreme Court—is not binding on our state courts (*see Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.*, 24 NY3d 538, 551 [2014]).

[6] The majority states that, "[i]n *Garvin*, the defendant did not argue in the initial suppression hearing that New York provided any greater protections to individuals subject

345 n 4 [2003] [holding that the defendant failed to preserve "grounds to impose any heightened due process procedures" under the State Constitution, even though his due-process challenge below referenced both the State and Federal Constitutions]). Thus, the majority upsets—to say the least—this Court's well settled preservation rules holding that defendant preserved an argument that the State Constitution provides heightened protection simply by citing several New York cases in which the sole reference to the New York Constitution is in a parallel cite with the Federal Constitution.

B.

Worse still, the majority's preservation rule will have the effect of transforming those same cases, and any other cases that employ parallel citations to the State and Federal Constitutions, into seminal state constitutional decisions, irrespective of the fact that those cases are wholly devoid of any basis for concluding that the New York Constitution

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to warrantless arrests than federal jurisdictions" (majority op at 17-18 n 3). I agree. And so, it is unclear to me how the majority is distinguishing *Garvin* from the present case, given that the dissent there made clear that, unlike defendant here, in *Garvin*, the defendant expressly argued at nisi prius that his state constitutional rights were violated:

> "[a]t the suppression hearing, Mr. Garvin's counsel expressly advised the Court that he was relying on the omnibus motion papers previously filed with the Court. Those papers expressly state: 'The Defendant moves for a hearing to determine whether Defendant was improperly seized and unlawfully detained in violation of the Defendant's constitutional rights derived from both the United States Constitution, Fourth and Fourteenth Amendments, *New York State Constitution, Article [I], Section 12*' (emphasis added). Furthermore, Mr. Garvin maintained at the hearing that the violation of 'both his federal and state constitutional rights' was specifically intended to circumvent his right to counsel" (30 NY3d at 214 n 5 [Wilson, J., dissenting]).

provides greater protection than the Fourth Amendment in the context of the issues they addressed. "[I]t is highly awkward, if not impossible, to use a case as the basis for an argument about the meaning of the state constitution if it is unclear from the case itself whether the case is even about the state constitution" (James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich L Rev 761, 783 [1992]). The majority's rejoinder—that the absence of any discussion of the State Constitution "does not render our repeated citations to [it] meaningless" (majority op at 18)—makes a parallel citation the equivalent of principled state constitutional discourse.

As discussed, *Sciacca*, *Hansen*, *Dumper*, and *Rainey* all contain parallel references to New York Constitution art I, § 12 and the Fourth Amendment, without distinguishing between the guarantees afforded by the two provisions. Additionally, all of those cases either directly rely on federal case law, or rely on New York cases that turned on federal case law, in deciding the search-and-seizure issues before them (*see Sciacca*, 45 NY2d at 127-129; *Hansen*, 38 NY2d at 21-23; *Dumper*, 28 NY2d at 299; *Rainey*, 14 NY2d at 38). This not only underscores that the corresponding state and federal constitutional provisions reach the same result, but also demonstrates that, traditionally, the Court "follow[ed] a policy of uniformity with the federal courts" when considering search-and-seizure arguments (Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L Rev 399, 417 [1987]; *see e.g. People v Ponder*, 54 NY2d 160, 165 [1981] ["(S)ection 12 of article I of the New York State Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal courts"]).

Indeed, the cases cited by defendant predate the "dawn of active New York State constitutionalism" in the 1980s, before which the "state constitutional protection against unreasonable searches and seizures mostly lay judicially dormant" (Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 Brook L Rev 1, 103, 213 [1996]). Although this Court has, starting in the 1980s, adopted "independent standards" under the State Constitution,[7] we have also continued to stress that the history of article I, § 12 of the New York Constitution "supports the presumption" that the provision against unlawful searches and seizures conforms with that found in the Fourth Amendment (*People v P.J. Video, Inc.*, 68 NY2d 296, 304 [1986], quoting *People v Johnson*, 66 NY2d 398, 406-407 [1985]). We delineated an "independent body" of search-and-seizure law under the State Constitution, and we have explained that, because the state and federal provisions contain similar language and share a common history, any divergence in meaning must derive from a "noninterpretive analysis" focused on "circumstances peculiar to New York" (*People v Harris*, 77 NY2d 434, 438-439 [1991]). Given that the cases cited by defendant did not engage in this weighty undertaking, it would be inappropriate to interpret those cases as creating a separately enforceable state constitutional standard. The majority's "clarif[ication]" of the cases (which comes nearly a half century later), transforming them

[7] The 1980 decision in *People v. Elwell* was the "first time that the Court of Appeals expressly recognized Article one, Section twelve of the New York State Constitution as a source of substantive search and seizure protection broader than that of the Fourth Amendment" (Pitler, 62 Brook L Rev at 132).

into state constitutional decisions, is nothing short of judicial legerdemain (majority op at 19).

The importance of upholding our preservation rule that requires a defendant to make a specific state constitutional argument is buttressed by United States Supreme Court precedent concerning an independent state ground for purposes of that Court's jurisdiction (*see Michigan v Long*, 463 US 1032, 1044 [1983]). The Supreme Court has held that a passing parallel reference to the State and Federal Constitutions is insufficient to satisfy the plain-statement rule—i.e., that a case was decided on a state-law ground (*see e.g. New York v Class*, 475 US 106, 109 [1986] [New York Court of Appeals opinion failed to satisfy the plain-statement rule where it mentioned the New York Constitution "but once, and then only in direct conjunction with the United States Constitution," and made "use of both federal and New York cases in its analysis, generally citing both for the same proposition"]; *New York v P.J. Video, Inc.*, 475 US 868, 872 n 4 [1986] [same, where the opinion "cited the New York Constitution only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution"]). This jurisdictional rule is grounded in the principle of federalism (*see Long*, 463 US at 1041, quoting *Minnesota v National Tea Co.*, 309 US 551, 557 [1940] ["'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action'"]).

Discipline in this area benefits not only the Supreme Court in determining its own jurisdiction, but also this Court in establishing a respected body of state constitutional law. In doing so, we must "marshal[] distinct state texts and histories and draw our [own] conclusions" in order to "dignify state constitutions as independent sources of law" (Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 177 [2018]). Failing to do so, we accomplish the reverse.

Order affirmed. Opinion by Judge Wilson. Judges Rivera, Stein and Fahey concur. Judge Feinman dissents in an opinion in which Chief Judge DiFiore and Judge Garcia concur.

Decided February 18, 2021