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Constitutional Law: Taking a Soft Look at Probable Cause: an Obscene Result for First Amendment Protections

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CONSTITUTIONAL LAW: TAKING A SOFT LOOK AT PROBABLE CAUSE: AN OBSCENE RESULT FOR FIRST AMENDMENT PROTECTIONS

Has the Chief Justice of the United States Supreme Court, William Rehnquist, misread a decision by New York's highest court? Or has the Supreme Court, by redefining Court precedent, purposely narrowed the probable cause standard for reviewing a warrant application for seizure of items presumptively protected by the first amendment? In *New York v. P.J. Video, Inc.* ("*P.J. Video II*"),[1] the Supreme Court reversed the New York Court of Appeals ("*P.J. Video I*")[2] and held that a higher probable cause standard was not required for issuance of a warrant to seize particular "adult" videocassettes protected under the first amendment than to seize any other item.[3] In an opinion authored by Chief Justice Rehnquist,[4] the Court concluded that seizure of materials which are presumptively protected by the first amendment should be reviewed under the same standard of probable cause that is used to review warrant applications generally.[5]

FACTS

In *P.J. Video II,* the defendant, P.J. Video, was charged with six counts of obscenity under New York law.[6] The charges arose out of an investigation by the Erie County District Attorney's Office. An investigator reviewed approximately ten videocassette movies which had been rented from the defendants' store. The investigator thereafter executed affidavits summarizing the theme of and conduct depicted in each film.[7]

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1. New York v. P.J. Video, Inc., 106 S. Ct. 1610 (1986) *rev'g* State v. P.J. Video, Inc., 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985).

2. State v. P.J. Video, Inc., 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985).

3. *P.J. Video II,* 106 S. Ct. at 1615. This case involved a 6-3 decision in which Marshall, J., filed a dissenting opinion with Brennan and Stevens, JJ., joining. *Id.* at 1619.

4. In October, 1986, Justice Rehnquist was sworn in as Chief Justice of the United States Supreme Court. However, throughout the majority of this casenote, Rehnquist will be referred to as Justice Rehnquist since he authored *P.J. Video II* in his former capacity.

5. *P.J. Video II,* 106 S. Ct. at 1615.

6. New York law provides in part: "A person is guilty of obscenity in the third degree when, knowing its content and character, he:

"1. Promotes, or possesses with the intent to promote, any obscene material. . . . "

Id. at 1612 n.1 (citing N.Y. Penal law § 235.05(1) (McKinney Supp. 1986)).

7. The five films that formed the basis for the obscenity charges were "California Valley

At trial, P.J. Video moved to suppress the seized videocassettes, claiming that the warrant authorizing seizure was issued without probable cause to believe that the movies were obscene.[8] The New York Court of Appeals affirmed a lower court ruling which upheld the motion to suppress the evidence.[9] The United States Supreme Court reversed the New York high court, holding that the affidavits describing the movies seized[10] were sufficient for the magistrate to authorize seizure of the "obscene" materials.[11]

MAJORITY'S REASONING

In *P.J. Video II,* Justice Rehnquist reasoned that the law was clearly established in a long line of precedent[12] that defined the requirements for obtaining such a search warrant.[13] According to Rehnquist, the first amendment would not be violated by issuance of such a warrant if a neutral magistrate, before issuing the warrant, either personally viewed the materials seized or was provided with affidavits which adequately described, in detail, the conduct depicted in those materials.[14] The Supreme Court reversed the state court decision, saying that the court of

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Girls," "Taboo," "Taboo II," "All American Girls," and the always popular "Debbie Does Dallas." *Id.* at 1613 n.3.

8. New York law defines "obscene" as follows: "Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interests in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value." *Id.* at 1612 n.1 (citing N.Y. Penal law § 235.00 (McKinney Supp. 1986)). *See also* Miller v. California, 413 U.S. 15, *reh'g denied,* 414 U.S. 881 (1973).

9. *P.J. Video II,* 106 S. Ct. at 1613. The Village of Depew Justice Court granted the motion for suppression because the issuing justice had not personally viewed the movies. The New York Court of Appeals affirmed the ruling without relying on the lower court's theory. The court of appeals held that a "higher" standard for evaluation of a warrant application existed when seeking to seize such things as books and films. *P.J. Video I,* 65 N.Y.2d at 569, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991.

10. These affidavits merely described specific scenes in the seized movies. They were the sole information examined by the magistrate. Out of a list of approximately 30 potentially obscene videocassettes, 10 affidavits were executed and the films were seized. The defendants were charged with violating the New York obscenity law with respect to only 5 of the 10 movies. The Court did not discuss any evidence as to how the list was narrowed and what differed between the five obscene films and the other five. *P.J. Video II,* 106 S. Ct. at 1616-19.

11. *Id.*

12. *Id.* at 1615 (citing Roaden v. Kentucky, 413 U.S. 496 (1973); Heller v. New York, 413 U.S. 483 (1973); Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Marcus v. Search Warrant, 367 U.S. 717 (1961)).

13. *See infra* notes 39-55 and accompanying text.

14. *P.J. Video II,* 106 S. Ct. at 1614 n.5. *See also Lee Art Theatre,* 392 U.S. at 637.

appeals used a "higher standard for evaluation of a warrant application seeking to seize such things as books and films, as distinguished from one seeking to seize weapons or drugs."[15]

Moreover, Justice Rehnquist concluded that by applying a higher standard for review of probable cause, the New York Court of Appeals was creating a new requirement beyond those defined in Supreme Court precedent. Instead, the proper standard for the magistrate reviewing the warrant application should have been whether "a probability or substantial chance of criminal activity, not an actual showing of such activity" existed.[16] Hence, the Supreme Court reasoned that by using the words "higher standard," the New York Court of Appeals went beyond precedent, creating its own new standard for review.

ANALYSIS

Although at first glance the Supreme Court decision appears well-reasoned, closer scrutiny reveals that the New York Court of Appeals in *P.J. Video I* did not require warrants for seizure of first amendment materials to be tested under a higher standard. Rather, the court of appeals properly followed precedent when noting that materials protected by the first amendment should not be seized without using "scrupulous exactitude" in the warrant issuing procedure.[17] Hence, Rehnquist's understanding of *P.J. Video I* appears to be incorrect. Although the New York Court of Appeals does use the phrase "higher standard" in *P.J. Video I*, the Supreme Court misconstrued the use of that language. A review of the New York high court's decision and of Supreme Court precedent pertaining to this issue will demonstrate that the dissent in *P.J. Video II* was correct and that *P.J. Video I* should not have been reversed.

P.J. Video II turns on the issue of the proper standard of probable cause for obtaining a search warrant to seize materials presumptively protected by the first amendment. The New York Court of Appeals con-

15. *P.J. Video II*, 106 S. Ct. at 1613 (citing *Roaden*, 413 U.S. at 504; *Marcus*, 367 U.S. at 730-31). The term "higher standard" is mentioned only once in the New York Court of Appeals' opinion. *P.J. Video I*, 65 N.Y.2d at 569, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991. In fact, the dissent in the present case noted that no extraordinary standard of scrutiny was applied to the determination of probable cause. *P.J. Video II*, 106 S. Ct. at 1620 (Marshall, J., dissenting). *See infra* note 43 and accompanying text.

16. *P.J. Video II*, 106 S. Ct. at 1616 (citing Illinois v. Gates, 462 U.S. 213, 244 n.13 (1983)). *See also* Locke v. United States, 11 U.S. 339 (1813).

17. *P.J. Video II*, 106 S. Ct. at 1614 n.5. *See also P.J. Video I*, 65 N.Y.2d at 569, 483 N.E.2d at 1122-23, 493 N.Y.S.2d at 990-91 (where the New York Court of Appeals argued that the magistrate should have before him the "full facts from which inference might be drawn, and information necessary to determine their reliability" and he must undertake a searching inquiry of them).

cluded that, due to certain protections and guarantees of the first amendment, a great degree of thoroughness should be administered when a magistrate considers interfering with such vital interests.[18] This emphasis on exactness is demanded when a magistrate specifically analyzes first amendment materials. Without such exactness, first amendment guarantees might soon be eroded. The magistrate, when reviewing an application for such a warrant, must "focus searchingly on the question of obscenity."[19]

In reviewing the *P.J. Video I* decision, Justice Rehnquist examined the express language used by the New York Court of Appeals rather than the broad meaning. Focusing on the words "higher standard," the Supreme Court reasoned that an additional requirement was created by the New York high court which apparently was to be implemented when establishing probable cause for seizing materials presumptively protected by the first amendment. According to Rehnquist, no distinction should be made between the type of materials seized and hence the court of appeals should have implemented the standard set forth in *Illinois v. Gates*.[20] As concluded by the Court, the standard should have been one applicable to all warrants generally. "The term 'probable cause,' . . . means less than evidence which would justify condemnation. . . ." "The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavits before him, . . . there is a fair probabilty that contraband or evidence of a crime will be found in a particular place."[21]

This narrow reading of the language in *P.J. Video I* misconstrues the intended meaning of the New York Court of Appeals. When the court of appeals used the words "higher standard," the court was merely suggesting the need for a more careful and precise scrutinization when determining items to be "probably" obscene. In fact, the phrase "higher standard" was only mentioned once in *P.J. Video I*. Moreover, the dissent in *P.J. Video II* correctly notes that no "extraordinary standard of scrutiny" was applied to the "determination of probable cause."[22] The

18. *P.J. Video I*, 65 N.Y.2d at 572, 483 N.E.2d at 1125, 493 N.Y.S.2d at 993. Although this degree of thoroughness is not self-defining, it does seem to imply that the magistrate should scrutinize the information presented to see whether it clearly demonstrates a "probable" violation of the obscenity test. Also, the magistrate should be wary of any first amendment infringements, applying procedures enunciated *infra* notes 39-55 and accompanying text.

19. *P.J. Video II*, 106 S. Ct. at 1614. *See also Lee Art Theatre*, 392 U.S. at 637 and *Marcus*, 367 U.S. at 732.

20. *P.J. Video II*, 106 S. Ct. at 1615-16 (citing Illinois v. Gates, 462 U.S. at 235, 238-39).

21. *Id. See e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (quoting Locke v. United States, 11 U.S. 348 (1813)).

22. *P.J. Video II*, 106 S. Ct. at 1620 (Marshall, J., dissenting).

New York Court of Appeals, more accurately, concluded that to authorize seizure of items protected by the first amendment, the magistrate must act with scrupulous exactitude.[23] Such exactitude may not be required for warrants concerning drugs, possession of which is not constitutionally guaranteed.

Although the New York high court's approach stressing exactness is not clearly definable, it appears that first amendment guarantees would be ensured when a "sufficiency of the material before the magistrate" exists.[24] The magistrate is required to "take a 'hard look' at it, exercising care to adhere to the proper legal standard so that his subjective views or those of the police do not infringe upon the constitutional rights of citizens."[25] This goal presumably can only be achieved by presenting the magistrate with proper and thorough information upon which he or she can administer the applicable procedures. Thus, in reviewing the affidavits in the present case, the New York Court of Appeals determined that when carefully examining the evidence of probable cause (and considering first amendment interests), the magistrate was not provided sufficient evidence to issue a search warrant.[26]

In *P.J. Video II,* Justice Rehnquist held that it was "clear beyond peradventure that the warrant was supported by probable cause to believe that the five films were obscene under New York law."[27] The Supreme Court thus concluded that the affidavits contained sufficient information for a magistrate to determine a fair probability that criminal activity existed.[28] Unfortunately, the Court fails to explain this conclusion. The affidavits mentioned nothing specifically about whether the films had any artistic value or how it should be regarded in light of contemporary community standards. A more precise approach would scrutinize these elements from the applicable obscenity statute.

It is ironic that in the Supreme Court's desire to prevent any "higher" standard or any alteration of its own Court decisions, the Court itself acted in the careless, imprecise fashion which the New York Court of Appeals had attempted to prevent. As the New York high court

23. *P.J. Video I,* 65 N.Y.2d at 572, 483 N.E.2d at 1123, 493 N.Y.S.2d at 993. *See also* Maryland v. Macon, 105 S. Ct. 2778 (1985) (where the Supreme Court held that when a county detective purchased several magazines from a book store, such actions did not constitute a search and seizure within the meaning of the fourth amendment and thus the magazines were properly admitted in evidence as pertaining to the obscenity charges).

24. *P.J. Video I,* 65 N.Y.2d at 572, 483 N.E.2d at 1125, 493 N.Y.S.2d at 992-93.

25. *Id.* at 572, 483 N.E.2d at 1125, 493 N.Y.S.2d at 993.

26. *Id.*

27. *P.J. Video II,* 106 S. Ct. at 1616.

28. *Id.*

feared, *P.J. Video II* was decided without the Court taking a "hard look" at the evidence when establishing probable cause for seizure of items presumptively guaranteed by the first amendment.[29] As pointed out by the dissent in *P.J. Video II*, the affidavits "merely catalogued" specific sex acts in the films, without examining the films as a whole[30], which is required under obscenity laws. The affidavits say "nothing about whether the film, considered as a whole, has any artistic value . . . [or anything] about how the film should be regarded in light of contemporary community standards."[31]

The dissent in *P.J. Video II* determined that, by requiring sufficient evidence as to the elements of obscenity pursuant to New York law, probable cause could not be established. " 'There must be enough information before [the issuing magistrate] in one form or another . . . to enable him to judge the obscenity of the film, not of isolated scenes from it.' "[32] The dissent determined that such sufficient information did not exist.[33] In contrast, the majority inferred probable cause with respect to only two of the three elements of obscenity.[34] This conclusion by the Court is never substantiated. Instead, the majority without discussion found "beyond peradventure" that the affidavits set out the requisite probable cause.[35] Unfortunately, such an approach which allows for probable cause to be inferred fails to adequately protect special first amendment interests.

Although no Supreme Court case has conclusively held that a higher standard is applied for warrants to seize items protected by the first amendment, Supreme Court precedent cited in both *P.J. Video I* and

29. *Id.* at 1620-21 (Marshall, J., dissenting).

30. *Id. See supra* notes 6-8.

31. *P.J. Video II*, 106 S. Ct. at 1621 (Marshall, J., dissenting). *See also* Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985). In *Brockett*, the Court considered an action challenging the constitutionality of a Washington moral nuisance statute which set forth a comprehensive scheme for criminal and civil penalties for those dealing in obscenities. The Supreme Court partially invalidated the statute only insofar as it contained the word "lust" which should have been understood as including constitutionally protected materials.

In fact, several of the films in the present case were declared by New York to be outside the consitutional boundaries of obscenity. *See* United States v. Various Articles of Obscene Merchandise, 709 F.2d 132 (2nd Cir. 1983) (where the Second Circuit held that various articles of merchandise seized were not obscene or patently offensive based upon the contemporary community standard in the New York area). By failing to provide the magistrate with evidence as to whether community standards may potentially be violated, even probable cause (not just actual obscenity violations) of obscenity may be lacking.

32. *P.J. Video II*, 106 S. Ct. at 1620 (Marshall, J., dissenting) (quoting *P.J. Video I*, 65 N.Y.2d at 571, 483 N.E.2d at 1124, 493 N.Y.S.2d at 993).

33. *P.J. Video II*, 106 S. Ct. at 1620 (Marshall, J., dissenting).

34. *Id. See P.J. Video II*, 106 S. Ct. at 1616.

35. *P.J. Video II*, 106 S. Ct. at 1616.

P.J. Video II does recognize the need to protect unique first amendment interests.[36] The New York Court of Appeals based its decision on this precedent. However, Justice Rehnquist appears to redefine the case law without expressly modifying or reversing the precedent.[37]

According to Justice Rehnquist, the proper standard to be applied has been set forth in many Supreme Court cases. "In our view, the long-standing *special protections* . . . are adequate to ensure that first amendment interests will not be impaired by the issuance and execution of warrants authorizing the seizure of books or films."[38] Although Rehnquist alludes to "special protections" of items within the first amendment, he concludes that a general probable cause standard should be uniformly applied. That rule is contrary to the very precedent he relies on and possibly encroaches on first amendment rights.

When examining the Supreme Court precedent cited, it appears that a more precise standard does exist in the first amendment field, just as understood by the New York Court of Appeals. In *Roaden v. Kentucky*,[39] the Court acknowledged the inherent danger when items are seized without addressing first amendment concerns. In *Roaden*, a county sheriff viewed a sexually explicit film at a drive-in theater. At the conclusion of the showing, the sheriff seized one copy of the film without any prior judicial determination of obscenity. The Supreme Court held the seizure to be unreasonable not because it would have been easy to obtain a warrant, but rather because it constituted a prior restraint of the right of expression.[40] The Court noted:

> A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. . . . The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under the fourth or fourteenth amendment standards.[41]

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36. *See infra* notes 39-55 and accompanying text.

37. *P.J. Video II*, 106 S. Ct. at 1615.

38. *Id.* (emphasis added). However, it is unclear whether the so-called "special protections" enunciated in the cited cases (*See infra* notes 39-55 and accompanying text) remain applicable if the current probable cause standard for first amendment materials follows Illinois v. Gates. 462 U.S. 213 (1983). *See supra* note 21 and accompanying text.

39. Roaden v. Kentucky, 413 U.S. 496 (1973). Interestingly, this opinion was joined by Justice Rehnquist.

40. *Id.*

41. *Id.* at 501-02 (citations omitted).

Hence, the *Roaden* Court found that due to the possibility of an unconstitutional prior restraint of free speech, a higher hurdle exists in the evaluation of reasonableness,[42] which effectively prevents the police from relying on the "exigency exception to the fourth amendment warrant requirements."[43] Justice Rehnquist cited *Roaden* but he does not distinguish the holding nor the Court's language which recognized unique first amendment concerns. *Roaden* should not be distinguished merely because *P.J. Video I* did not involve seizure by a police officer. Although *P.J. Video I* involved a seizure authorized by a magistrate, both cases acknowledged the necessity of following special procedures before issuing a warrant. More importantly, *Roaden* recognized generally that such a seizure may involve a prior restraint on the freedom of expression. By requiring the magistrate to carefully examine evidence of each obscenity element, the likelihood of an unlawful prior restraint will be lessened.

Before the *Roaden* decision, the Court in *Marcus v. Search Warrant*[44] and in *A Quantity of Books v. Kansas*[45] ruled that a large-scale seizure of books or films had to be preceded by an adversarial hearing on the question of obscenity. In *Marcus*, a warrant was issued without any scrutiny of the seized material by a judge and was based on conclusory assertions of a single police officer. The Court noted that special procedures had to be followed prior to seizure.[46] "[A] State's power to suppress obscenity is limited by the constitutional protections for free expression."[47]

The sense of this holding was reaffirmed in *A Quantity of Books*, holding unconstitutional a "massive seizure" of books from a commercial bookstore for the purpose of destroying the books as contraband. The Court recognized the requirement of an adversary hearing prior to seizure and emphasized that standards for seizing allegedly obscene books should differ from those applied with respect to narcotics, gam-

42. *Id.* at 504.

43. *Roaden,* 413 U.S. at 504. The majority in *P.J. Video II* warned that this "higher hurdle . . . of reasonableness" does not establish a greater standard of probable cause for seizure of first amendment materials. *P.J. Video II,* 106 S. Ct. at 1615 n.6. However, the New York Court of Appeals did not implement a greater requirement for review, but rather recognized the need for a systematic procedural approach to fully protect first amendment principles.

44. 367 U.S. 717 (1961).

45. 378 U.S. 205 (1964).

46. *Marcus,* 367 U.S. at 731-32. Such special procedures appear to allow the owner of the seized materials opportunity to contest the propriety of such seizure. Also, the warrant application must be presented to a judge with a detailed description as to precisely why the materials "probably" violate the obscenity laws.

47. *Id.* at 730.

bling paraphernalia and other contraband.[48] Neither *Marcus* nor *A Quantity of Books,* which both recognized special first amendment protections, are distinguished by Rehnquist. Although both cases involved a mass seizure of materials, they are applicable to the present case because these cases recognize the need for some type of judicial hearing where the adverse party may raise first amendment concerns before the issuing magistrate. Arguably it may no longer be true that this hearing must occur prior to seizure, however the desirability of giving the adverse party prompt opportunity to contest seizure prior to trial remains. It is unclear whether this procedure will be required if a general "fair probability" standard is implemented as the *P.J. Video II* Court advises. Such special procedural guidelines may not be required because not all materials (such as drugs) are presumptively protected by the Constitution. In other words, by merely following a "fair probability" approach, an issuing magistrate may not be required to carefully consider first amendment interests, but could generally determine whether criminal activity exists. If criminal activity is apparent any potential first amendment protections may be bypassed.

In *Lee Art Theatre, Inc. v. Virginia,*[49] the Court held that an application for a warrant to seize materials protected by the first amendment had to provide the magistrate with precise factual evidence as to obscenity.[50] The Court examined the constitutionality of a warrant for seizure of films from a commercial theater. The warrant application before the magistrate was based solely on a police officer's affidavit describing the films. As stated by the Court:

> [T]he procedure under which the warrant issued solely upon conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a *procedure 'designed to focus searchingly on the question of obscenity,'* and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression.[51]

In *P.J. Video II,* the affidavits in question merely selected specific scenes without delving into the film's content as a whole when compared to the applicable community standards.[52] *Lee Art Theatre* appears to imply that in focusing searchingly on the elements of obscenity, the affi-

48. *A Quantity of Books,* 378 U.S. at 211-12.
49. 392 U.S. 636 (1968).
50. *Id.* at 637.
51. *Id.* (quoting *Marcus,* 367 U.S. at 732) (emphasis added).
52. *See supra* note 31 and accompanying text.

davit must specifically demonstrate these elements of obscenity. This is especially necessary since generally a judge does not personally view the materials. Hence, as in *Lee Art Theatre*, the affidavits presented to the magistrate cannot be based on general assertions made by the investigating officer. Similarly, as in *P.J. Video I*, by merely selecting specific scenes from the films, a magistrate will not be presented the proper evidence as to violation of the applicable obscenity laws.

The New York Court of Appeals further relied on *Stanford v. Texas*,[53] a case in which a district judge issued a warrant authorizing the seizure of books and other written instruments concerning the communist party of Texas.[54] There, evidence obtained through a general warrant was suppressed by the Court in order to protect ideas and expressions. The Supreme Court in *P.J. Video II* failed to demonstrate why the expressions in the materials seized from the defendants should not also be protected from seizure.

The only precedent that Rehnquist elaborates on in detail is *Heller v. New York*.[55] In *Heller*, a judge, upon the request of police officers, viewed a sexually explicit film. Without a prior adversary hearing, the judge signed warrants for seizure of the film. The Supreme Court held that a prior adversary hearing was not required to safeguard first amendment interests when probable cause was determined by a neutral magistrate following a prompt post-seizure hearing.[56] Rehnquist emphasized that when a magistrate examines the sufficiency of probable cause prior to seizure, first amendment interests would be properly protected.[57]

However, the Supreme Court in *P.J. Video II* further held that in order to determine probable cause, the magistrate need merely question whether the affidavit contains sufficient information for a magistrate to determine a "fair probability that criminal activity existed."[58] Following this standard, it is questionable whether the magistrate must implement any other procedures to safeguard first amendment rights. Although the special procedures enunciated in the cited precedent do not imply that a higher amount of probable cause be shown, the case law does suggest the need for exactness when specifically examining items presumptively protected by the first amendment.[59] The New York Court of Appeals in *P.J. Video I* recognized such a unique concern for precise judicial procedures

53. 379 U.S. 476 (1965).
54. *Id.* at 477.
55. 413 U.S. 483 (1973).
56. *Id.* at 488.
57. *P.J. Video II*, 106 S. Ct. at 1614-15.
58. *Id.* at 1616.
59. *See supra* notes 39-55 and accompanying text.

which are not necessarily required when seizing such items as drugs.[60]

CONCLUSION

It is arguable that a more precise approach could be considered a "higher" standard. However, in the available case law, unique procedural safeguards exist which are intended to protect first amendment interests.[61] The evidence must provide a magistrate sufficient information and descriptions of the materials in order to apply the proper obscenity test. Also, the needs of the police will be addressed with an acknowledgement that the items in question are presumptively protected by the Constitution. No such recognition of constitutional guarantees exists when seizing other types of materials. Therefore, by requiring a systematic procedural approach when reviewing applications for seizure of first amendment items, such constituitonal freedoms will be protected. It does not appear that the basic standard for review set out in *P.J. Video II* will adequately ensure those constitutional rights.

Thus, the Supreme Court's decision in *P.J. Video II* will most likely have an unfortunate impact. *P.J. Video II* turns back the clock on the advance of first amendment rights; the Court has narrowed the protection of the first amendment when reviewing applications for search warrants. This newly-defined standard is contrary to the Supreme Court's own precedent in the area. Moreover, the impact will be a movement away from exercising "special procedural protections" when seizing materials presumptively guaranteed by the first amendment.[62] The Court may not have considered the chilling effect this will have on free speech.

In general, the Supreme Court will not allow state courts to increase standards set by the Court. The Supreme Court recognizes the need for certainty and uniformity when applying first and fourth amendment standards. The *P.J. Video II* decision appears to have been a concern for uniformity in obtaining a warrant for seizure of all types of materials. However, the New York Court of Appeals recognized the necessity of uniform procedures that address certain first amendment interests; a judicial procedure which sets out guidelines when examining the seizure of

60. *P.J. Video I,* 65 N.Y.2d at 569, 483 N.E.2d at 1123, 493 N.Y.S.2d at 990.

61. *See supra* notes 39-55 and accompanying text.

62. As argued by the dissent, "The New York courts have unanimously held in this case that the affidavits were insufficient to [find probable cause]. The majority's eagerness to reverse that fact-bound determination in order to expedite an obscenity prosecution is inappropriate and reflects a dubious notion of this Court's institutional role." *P.J. Video II,* 106 S. Ct. at 1622 (Marshall, J., dissenting). *See supra* note 37 and accompanying text.

items presumptively protected by the Constitution. Thus, after *P.J. Video II*, it is unclear whether any special procedures remain beyond merely allowing a police officer to determine whether a fair probability of criminal activity exists.

This problem of clearly defining uniform seizure procedures in the obscenity field is further compounded when each state applies its own obscenity statute. In other words, first amendment rights may differ between states depending on the various approaches in labeling the materials as probably being criminal activity. However, in all cases involving the seizure of materials presumptively protected, the mere seizure of such items will effect more than due process rights of a fair trial. Substantive first amendment rights may be violated by the pre-trial seizure. A standard based solely on fair probability that a crime exists may not properly safeguard such constitutional rights especially since each state may take a varied approach to obscenity violations.

Hence, the Supreme Court's decision further confuses rather than clarifies obscenity prevention. By requiring a general probable cause standard for reviewing all warrant applications, the Court leaves unsettled precisely which judicial procedures remain in order to protect first amendment rights even where criminal activity may exist. Thus, not only does the application of the obscenity test vary among states, the procedures for establishing probable cause to obtain a search warrant is left unclear under the new interpretation of several Supreme Court cases addressing the issue. If the Court's desire for uniformity prompted a narrowing of the probable cause standard, this unfortunately comes at the expense of first amendment interests.

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