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Anticipatory Search Warrants: The Supreme Court's Opportunity to Reexamine the Framework of the Fourth Amendment

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RECENT DEVELOPMENT

Anticipatory Search Warrants: The Supreme Court's Opportunity to Reexamine the Framework of the Fourth Amendment

I. INTRODUCTION

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause."[1] Although its language is

1. The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place

relatively clear, the application of the Fourth Amendment has created more controversy than the application of perhaps any other constitutional amendment.[2] Given the questions raised by a police-endorsed practice of anticipatory search warrants,[3] the search and seizure debate is far from over.

An anticipatory search warrant[4] is a warrant based on a showing of probable cause that particular evidence of a crime will exist at a specific location in the future.[5] Challenges to the validity of prospective search warrants generally focus on the absence of present probable cause.[6] Finding that the benefits associated with this investigative device outweigh any inherent uncertainties, most lower courts have held that the use of anticipatory search warrants under limited circumstances is not unconstitutional per se.[7] The United States Supreme Court, however, has never addressed the constitutionality of prospective search warrants.[8] A Supreme Court decision on anticipatory search warrants

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to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.

2. *See* 1 W. LAFAVE, SEARCH AND SEIZURE at IX (2d ed. 1987) (stating that "it is beyond question that the Fourth Amendment has been the subject of more litigation than any other provision in the Bill of Rights").

3. *See* DiPietro, *Anticipatory Search Warrants*, 59 FBI L. ENFORCEMENT BULL. 27 (July 1990) (encouraging the use of anticipatory search warrants in the practice of law enforcement).

4. An anticipatory search warrant is also known as a prospective search warrant.

5. *See* 2 W. LAFAVE, *supra* note 2, § 3.7(c), at 94.

6. *Id.* at 699. By definition, anticipation is an "act of doing or taking a thing *before its proper time*," BLACK'S LAW DICTIONARY 93 (6th ed. 1990) (emphasis added), and a prospective act is one "contemplating the future." *Id.* at 1222.

7. *See, e.g.*, Rivera v. United States, 928 F.2d 592 (2d Cir. 1991); United States v. Rey, 923 F.2d 1217 (6th Cir. 1991); United States v. Garcia, 882 F.2d 699 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989); United States v. Dornhofer, 859 F.2d 1195 (4th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989); United States v. Goodwin, 854 F.2d 33 (4th Cir. 1988); United States v. Hale, 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986); United States v. Goff, 681 F.2d 1238 (9th Cir. 1982); United States v. Lowe, 575 F.2d 1193 (6th Cir.), *cert. denied*, 439 U.S. 869 (1978); United States v. Outland, 476 F.2d 581 (6th Cir. 1973); United States *ex rel.* Beal v. Skaff, 418 F.2d 430 (7th Cir. 1969); United States v. McElrath, 759 F. Supp. 1391 (D. Minn. 1991); United States v. Moore, 742 F. Supp. 727 (N.D.N.Y. 1990); Rivera v. United States, 728 F. Supp. 250 (S.D.N.Y. 1990), *aff'd in part, vacated in part*, 928 F.2d 592 (2d Cir. 1991); United States v. Zygarowski, 724 F. Supp. 1052 (D. Mass. 1989); United States v. McGriff, 678 F. Supp. 1010 (E.D.N.Y. 1988); United States v. Feldman, 366 F. Supp. 356 (D. Haw. 1973); Johnson v. State, 617 P.2d 1117 (Alaska 1980); Alvidres v. Superior Court, 90 Cal. Rptr. 682 (Cal. Ct. App. 1970); Commonwealth v. Soares, 424 N.E.2d 221 (Mass. 1981); People v. Glen, 282 N.E.2d 614 (N.Y.), *cert. denied*, 409 U.S. 849 (1972); State v. Coker, 746 S.W.2d 167 (Tenn. 1987), *cert. denied*, 488 U.S. 871 (1988). *But see* United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); United States *ex rel.* Campbell v. Rundle, 327 F.2d 153 (3d Cir. 1964); United States v. Flippen, 674 F. Supp. 536 (E.D. Va. 1987), *aff'd*, 861 F.2d 266 (4th Cir. 1988); State v. Berge, 634 P.2d 947 (Ariz. 1981).

8. The Supreme Court has acknowledged the prospective nature of search warrants indirectly. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 102 (1979) (noting that "[a] search warrant is, by definition, an anticipatory authorization"); Dalia v. United States, 441 U.S. 238, 257 n.19 (1979) (finding that "[n]othing in the decisions of this Court . . . indicates that officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution"); United

would present the opportunity to reexamine the framework of the Fourth Amendment.

In theory, Fourth Amendment jurisprudence has sought to balance individual privacy interests against law enforcement interests.[9] Recent decisions, however, have disturbed the search and seizure equilibrium by favoring the government's interest in law enforcement over individual privacy interests.[10] A Supreme Court decision on anticipatory search warrants could restore the traditional balance underlying the Fourth Amendment by reexamining issues raised by prospective search warrants such as the warrant requirement[11] and the present probable cause inquiry.[12] The Court also could provide much-needed guidance on broader search and seizure concerns such as the probable cause doctrine[13] and the exclusionary rule.[14] Moreover, a comprehensive examination of anticipatory search warrants by the Supreme Court would bring greater stability to search and seizure jurisprudence.[15]

This Recent Development attempts to analyze the constitutionality of anticipatory search warrants in a manner that allows for a critical examination of the current status of the Fourth Amendment. Part II

States v. Watson, 423 U.S. 411, 450 n.15 (1976) (Marshall, J., dissenting) (stating that "[a] warrant based on anticipated facts is premature and void"). The Court also has held wiretapping to be constitutionally permissible pursuant to a warrant, thus implying that police may seize future conversations. Berger v. New York, 388 U.S. 41 (1967).

9. As recently as 1990, the Court observed that "[o]ur cases show that in determining [the] reasonableness [of a particular search], we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Maryland v. Buie, 110 S. Ct. 1093, 1096 (1990); *see also* New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); United States v. Place, 462 U.S. 697, 703 (1983); United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); Delaware v. Prouse, 440 U.S. 648, 654 (1979).

10. Scholars have observed that the Court's recent conservative bent has led to restrictions on the scope of Fourth Amendment protections. *See, e.g.*, Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); *see also* Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 296 (1983); Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375, 375-76 (1986); Note, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B.U. L. REV. 111, 124 n.78 (1990). The retirement of Justices Brennan and Marshall likely will strengthen the Court's conservative dominance.

11. *See infra* subpart V(A).

12. *See infra* subpart V(B).

13. *See infra* subpart V(B).

14. *See infra* subpart V(C).

15. While this Recent Development primarily explores the constitutional validity of anticipatory search warrants, its broader purpose is to examine critically the framework of the Fourth Amendment. The Supreme Court, of course, could decide the validity of prospective search warrants without reaching other Fourth Amendment issues. Such an approach, however, would bandage temporarily a doctrine in need of major surgery. Thus, this Recent Development suggests that the Supreme Court should utilize the opportunity to examine the constitutionality of anticipatory search warrants in order to restore the traditional balance under the Fourth Amendment.

examines the Fourth Amendment issues raised by prospective search warrants through a discussion of two recent lower court decisions. Part III charts the erosion of the Fourth Amendment doctrines pertinent to anticipatory search warrants. Part IV discusses the multifactor test proposed in *United States v. Garcia*[16] for determining the validity of prospective search warrants. Part V demonstrates how the Supreme Court could reaffirm the traditional values of the Fourth Amendment by carefully limiting the constitutional validity of anticipatory search warrants. Part VI concludes that prospective search warrants could fit within the constitutional framework in a way that helps attain a proper balance of the interests underlying the Fourth Amendment.

II. Recent Development

The use of anticipatory search warrants creates a variety of Fourth Amendment concerns. The decisions in *United States v. Goodwin*[17] and *United States v. Flippen*[18] illustrate some of the issues that are raised by these warrants.

The prosecutions in both *Goodwin* and *Flippen* arose out of a government child pornography reverse sting operation[19] known as "Operation Looking Glass."[20] The government created a Hong Kong company, the Far Eastern Trading Company (Far Eastern), as an undercover child pornography mail order service.[21] After identifying the defendants as possible subjects,[22] the government sent each target a catalog and an order form,[23] and the defendants subsequently purchased materials from the Far Eastern catalog.[24] After the government received the

16. 882 F.2d 699 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989).

17. 854 F.2d 33 (4th Cir. 1988).

18. 674 F. Supp. 536 (E.D. Va. 1987), *aff'd*, 861 F.2d 266 (4th Cir. 1988).

19. In reverse sting operations, government agents provide individuals inclined to receive contraband an opportunity to buy contraband material and then arrest them after completing the transaction. *See* United States v. Frazier, 30 M.J. 1231, 1233 (A.C.M.R. 1990).

20. *Goodwin*, 854 F.2d at 34, 36; *Flippen*, 674 F. Supp. at 538. The Operation Looking Glass investigation was designed to identify and prosecute persons who received child pornography in the mail in violation of 18 U.S.C. § 2252. *Goodwin*, 854 F.2d at 34; *Flippen*, 674 F. Supp. at 538.

21. *Goodwin*, 854 F.2d at 34; *Flippen*, 674 F. Supp. at 538.

22. Goodwin came to the government's attention when he placed an advertisement in a "swinger's magazine." A test letter confirmed his interest in receiving child pornography. *Goodwin*, 854 F.2d at 34. *United States v. Flippen* involved two defendants, Clough and Flippen. Agents identified Clough as a possible subject after the police reported numerous anonymous complaints that young boys were spending a great deal of time near his home. Moreover, in a questionnaire sent in conjunction with another undercover operation, Clough asserted that he collected pornography. *Flippen*, 674 F. Supp. at 538. Agents targeted Flippen after a postal inspector seized a child pornography magazine addressed to him. The police also had received anonymous telephone complaints alleging that young boys had been visiting his apartment. *Id.*

23. *Goodwin*, 854 F.2d at 35; *Flippen*, 674 F. Supp. at 538.

24. Goodwin and Clough each ordered four magazines with titles like *Children Love*, *Torrid*

purchase orders, the Postal Service agents prepared for the controlled delivery[25] of the contraband.[26] The agents then obtained anticipatory search warrants for the pornographic materials.[27] The prospective warrants were executed, the government agents seized various pornographic contraband,[28] and the defendants were indicted for receiving child pornography in violation of Section 2252 of Title 18 of the United States Code.[29]

A. *The* Goodwin *Decision*

Goodwin challenged the anticipatory search warrant on the grounds that it violated the Fourth Amendment.[30] He asserted that the magistrate improperly issued the search warrant prior to the delivery of the magazines.[31] Goodwin claimed that the prospective warrants were unconstitutional because no probable cause existed to believe that the pornographic materials were at his house at the time the warrant was issued.[32]

Following the analysis of the Ninth Circuit in *United States v.*

Tots, and *Boys Who Love Boys*. *Goodwin*, 854 F.2d at 35; *Flippen*, 674 F. Supp. at 538. Flippen purchased one such magazine and a video tape entitled *Pre-Teen Trio*. *Flippen*, 674 F. Supp. at 538.

25. One commentator has observed that government officials most commonly use anticipatory warrants in controlled delivery cases. *See* 2 W. LAFAVE, *supra* note 2, § 3.7(c), at 94-95.

26. *Goodwin*, 854 F.2d at 35-36; *Flippen*, 674 F. Supp. at 538.

27. *Goodwin*, 854 F.2d at 36; *Flippen*, 674 F. Supp. at 538.

28. In *Goodwin* the pornographic package was delivered at approximately 1:00 p.m. About three hours later, the government executed the search warrant at the defendant's home and seized, among other things, the child pornography magazines delivered that afternoon, evidence of correspondence with Far Eastern, and "a large volume of nudist and sexually explicit material depicting children as well as adults." 854 F.2d at 36.

In *Flippen* the search warrants obtained prior to the controlled deliveries were to be executed once the pornographic packages arrived at the defendants' residences. After the government agent witnessed the delivery to Flippen's house, they began the search and seized "over 530 video tapes and nearly 30 magazines." 674 F. Supp. at 538. Details were not given about the materials recovered from Clough's home.

29. Section 2252 provides:

> (a) Any person who-
>
> . . . .
>
> (2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce . . . or mailed . . . if-
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252 (1988).

30. *Goodwin*, 854 F.2d at 36.

31. *Id.*

32. *Id.*

Hale,[33] the *Goodwin* court affirmed the validity of anticipatory search warrants.[34] In *Hale*, a case that also involved the controlled delivery of child pornographic materials, the court reasoned that prior issuance of a warrant was permissible when the evidence was on a "sure course" to its destination, such as when it had been placed in the mail.[35] The *Goodwin* court observed that the government inspector's affidavit described Goodwin's predisposition to, and requests for, child pornographic materials, verified his residence, and assured the magistrate that the materials would be delivered by mail.[36] Consequently, the court rejected Goodwin's probable cause challenge on the grounds that the government had satisfied the "sure course" test.[37]

B. *The* Flippen *Decision*

In *Flippen* the defendants also attacked the anticipatory search warrant for lack of probable cause.[38] They argued that no probable cause existed at the time of issuance to believe that the contraband listed in the warrant was in their homes because that material was, in fact, still in the government's possession.[39] Citing *Brinegar v. United States*,[40] the defendants asserted that the magistrate issued the search warrant improperly because he had insufficient information to believe the seizable items were located in the place to be searched.[41]

Although it recognized *Hale* as the leading case on anticipatory search warrants in the child pornography context, the *Flippen* court rejected both the reasoning and the holding of *Hale*.[42] The *Flippen* court noted that *Hale* relied on *United States v. Goff*,[43] a decision upholding the use of prospective warrants in drug contexts.[44] The *Flippen* court proceeded to distinguish the need for prospective warrants in

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33. 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986).

34. *Goodwin*, 854 F.2d at 36. The court also rejected Goodwin's alternative claim that the government's conduct was so outrageous as to violate due process. *Id.* at 36-37. *See also* United States v. Jacobson, 916 F.2d 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1686 (1991); United States v. Mitchell, 915 F.2d 521 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1618 (1991).

35. *Goodwin*, 854 F.2d at 36 (quoting United States v. Hale, 784 F.2d 1465, 1468 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986)).

36. *Goodwin*, 854 F.2d at 36.

37. *Id.*

38. United States v. Flippen, 674 F. Supp. 536, 538-39 (E.D. Va. 1987), *aff'd*, 861 F.2d 266 (4th Cir. 1988).

39. *Id.*

40. 338 U.S. 160 (1949). *See infra* notes 61-63 and accompanying text.

41. *Flippen*, 674 F. Supp. at 539.

42. *Id.*

43. 681 F.2d 1238 (9th Cir. 1982).

44. *Flippen*, 674 F. Supp. at 539.

child pornography cases from that in drug cases.[45] The court observed that, unlike drug investigations, child pornography investigations involve no exigency.[46] That is, child pornography is not distributed or consumed upon delivery; recipients of child pornography almost always keep the contraband in their own homes.[47] Because the element of exigency that exists in drug cases was lacking, the court reasoned that the government had time to seek an ordinary warrant or a telephonic warrant.[48] Therefore, the *Flippen* court held that anticipatory search warrants are impermissible in the context of child pornography investigations.[49] The court could not suppress the evidence procured by the anticipatory warrant, however, because the search fell within the good faith exception to the exclusionary rule.[50]

III. LEGAL BACKGROUND

A. *The Warrant "Requirement"*

In *Katz v. United States*[51] the Supreme Court held that searches and seizures conducted without a warrant "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[52] The purpose of the warrant requirement is to protect individual privacy interests by assuring that governmental intrusions are properly limited.[53] The warrant process also provides the scrutiny of a detached and neutral magistrate to ensure that the intrusion is justified.[54] With these safeguards in mind, *Katz* established a per se warrant mandate.

Subsequent decisions, however, have limited significantly the practical impact of the *Katz* doctrine. The Supreme Court, for example, has affirmed warrantless police intrusions by concluding that the activity did not constitute a search or seizure and, therefore, did not invoke any Fourth Amendment protections.[55] Moreover, even if police activity rises

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45. *Id.*

46. *Id.* For a discussion on the relationship between anticipatory search warrants and the exigency exception, see *infra* notes 117-29 and accompanying text.

47. *Flippen*, 674 F. Supp. at 539-40.

48. *Id.* at 540 & n.4. For a discussion on telephonic warrants, see Alpert, *Telephonic Search Warrants*, 38 U. MIAMI L. REV. 625 (1984).

49. *Flippen* 674 F. Supp. at 540.

50. *Id. See* United States v. Leon, 468 U.S. 897 (1984). For a discussion of the relationship between anticipatory search warrants and the good faith exception, see *infra* notes 153-60 and accompanying text.

51. 389 U.S. 347 (1967).

52. *Id.* at 357 (emphasis, footnote omitted).

53. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621-22 (1989).

54. *Id.*

55. In *Katz* the Court rejected the historical notion of a search as defined according to property law concepts. *See Katz*, 389 U.S. at 351 (finding that "the Fourth Amendment protects peo-

to the level of a search or seizure, it is likely that the act will fall within one of the numerous exceptions to the warrant requirement.[56] Consequently, the potentially unequivocal *Katz* per se rule has withered into a mere preference, and not a "requirement," for search warrants.[57]

B. *The "Probable" Cause Doctrine*

The Fourth Amendment requires that all searches and seizures be based on probable cause regardless of the existence of a warrant.[58] Because probable cause, by definition, deals with probabilities,[59] it is inherently impossible to quantify.[60] In *Brinegar v. United States*[61] the Supreme Court reasoned that probable cause should be more than mere suspicion, but less than the evidence needed for a conviction.[62] In choosing these parameters, the Court sought to balance the often conflicting interests in individual privacy and effective law enforcement.[63]

Although the Supreme Court purports to adhere to this delicate balance, recent decisions seem to tip the probable cause scale in favor of the government's interest in law enforcement. The clearest illustra-

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ple, not places"); Boyd v. United States, 116 U.S. 616 (1886). In its place, *Katz* constructed a two-pronged test to determine what constitutes a search: (1) a person must have "an actual (subjective) expectation of privacy"; and (2) that expectation must be "one that society is prepared to recognize as 'reasonable.' " *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Subsequent to its holding in *Katz*, the Court has upheld many warrantless police intrusions by finding in each case that no search occurred because the defendant could not have justifiably relied on a privacy expectation under the circumstances. *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989); California v. Greenwood, 486 U.S. 35 (1988); California v. Ciraolo, 476 U.S. 207 (1986); Dow Chemical Co. v. United States, 476 U.S. 227 (1986); Smith v. Maryland, 442 U.S. 735 (1979); United States v. White, 401 U.S. 745 (1971). *See generally* LaFave, *The Forgotten Motto of* Obsta Principiis *in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291 (1986).

56. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (automobile searches); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory searches); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative searches); Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances).

57. *See* United States v. Leon, 468 U.S. 897, 914 (1984) (stating "we have expressed a strong preference for warrants and declared that 'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail' ") (quoting United States v. Ventresca, 380 U.S. 102, 106 (1965)); *see also* Illinois v. Gates, 462 U.S. 213, 236 (1983); Spinelli v. United States, 393 U.S. 410, 419 (1969); Aguilar v. Texas, 378 U.S. 108, 111 (1964).

58. *See* Wong Sun v. United States, 371 U.S. 471, 478-79 (1963); Draper v. United States, 358 U.S. 307 (1959).

59. Brinegar v. United States, 338 U.S. 160, 175 (1949) (noting that probable cause concerns "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act").

60. *See* Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971).

61. 338 U.S. 160 (1949).

62. *Id.* at 175.

63. *Id.* at 176.

tion of this trend is the evolving permissive standard for evaluating probable cause based on an informant's tip.

In *Aguilar v. Texas*[64] the Supreme Court announced a two-pronged test to establish probable cause based on an informant's tip. In order to get a warrant under this test, the government had to demonstrate: (1) the informant's basis of knowledge—the "basis-of-knowledge" prong; and (2) the credibility of the informant or the reliability of his statement—the "veracity" prong.[65] The Court refined and clarified the two-pronged test in *Spinelli v. United States*.[66] According to *Spinelli*, extensive detail in a tip could cure an insufficiency in the basis-of-knowledge prong, because such detail would indicate that the informant was relying on more than mere rumor.[67] *Spinelli* also recognized that independent corroboration could remedy a deficiency in the veracity prong.[68] If both prongs of the *Aguilar-Spinelli* test were met, the informant's tip would establish probable cause.

In *Illinois v. Gates*[69] the Supreme Court abandoned the *Aguilar-Spinelli* test and replaced it with a "totality-of-the-circumstances" approach.[70] The *Gates* Court reasoned that while the two prongs were highly relevant,[71] they should not be dispositive in a magistrate's probable cause determination.[72] The Court noted that the basis-of-knowledge and veracity prongs are not independent of one another; a strong showing in one may compensate for a deficiency in the other.[73] *Gates* implied that courts should not apply rigid rules to determine the existence of probable cause.[74] After *Gates* a magistrate simply must consider all the relevant circumstances and make a common-sense determination as to probable cause.[75]

On the positive side, by adopting the totality-of-the-circumstances test, the *Gates* Court sought to encourage the use of search warrants.[76]

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64. 378 U.S. 108 (1964).

65. [T]he magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable."

Id. at 114.

66. 393 U.S. 410 (1969).

67. *Id.* at 416; *see also* Draper v. United States, 358 U.S. 307 (1959).

68. *Spinelli*, 393 U.S. at 415.

69. 462 U.S. 213 (1983).

70. *Id.* at 238.

71. *Id.* at 230.

72. *Id.*

73. *Id.* at 233.

74. *Id.* at 230-32.

75. *Id.* at 238.

76. *See id.* at 236.

On the negative side, however, the *Gates* decision disrupted the delicate balance between private and governmental interests that the *Aguilar-Spinelli* model established.[77] Consequently, like the warrant "requirement,"[78] the "probable" cause doctrine of the Fourth Amendment is weaker because of judicial construction favoring the interests of law enforcement.

C. *The "Exclusionary" Rule*

The exclusionary rule, a judicially created remedy, provides that evidence obtained in violation of a defendant's constitutional rights must be suppressed from the government's case-in-chief.[79] Although the Supreme Court has noted several justifications for this doctrine,[80] the rule serves primarily to deter unconstitutional police action.[81] In theory, the exclusionary rule protects individuals' privacy interests by removing the incentive for police to disregard the Constitution.[82] Even though the rule sometimes may bar the admission of probative evidence, the Supreme Court has recognized that without this remedy the Fourth Amendment would be essentially meaningless.[83]

Although powerful in principle, decisions construing the exclusionary rule have limited its application severely. As a primary restriction, the Court has narrowed the scope of the rule through a strict standing doctrine.[84] The test for challenging evidence under the exclusionary rule

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77. *Gates* has attracted a great deal of criticism. *See, e.g.*, Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551 (1984); Mascolo, *Probable Cause Revisited: Some Disturbing Implications Emanating from* Illinois v. Gates, 6 W. NEW ENG. L. REV. 331 (1983). *But see* Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH. J.L. REF. 465 (1984).

78. *See supra* subpart III(A).

79. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

80. Under a "privacy" rationale, the exclusionary rule prohibits further invasion of privacy by suppressing the evidence from an unlawful search or seizure. *Contra* United States v. Calandra, 414 U.S. 338 (1974). The "judicial integrity" rationale rests on the theory that courts should not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Elkins v. United States, 364 U.S. 206, 223 (1960).

81. *See* United States v. Janis, 428 U.S. 433, 446 (1976) (stating that "the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct' " (quoting *Calandra*, 414 U.S. at 347)); *Calandra*, 414 U.S. at 348 (explaining that the exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect"); *Elkins*, 364 U.S. at 217 (noting that the exclusionary rule is "calculated to prevent, not to repair").

82. The protection of individual privacy is a natural consequence of police deterrence. *See Calandra*, 414 U.S. at 354 (finding that "[t]he purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects").

83. *Mapp*, 367 U.S. at 655 (noting that without the exclusionary rule, the Fourth Amendment would be reduced to "a form of words").

84. Standing is a principle by which the court determines whether a person is a proper party to request adjudication of a certain issue. *See Ex parte* Levitt, 302 U.S. 633, 634 (1937).

has evolved from automatic[85] standing to the requirement of a legitimate expectation of privacy.[86] Even if the defendant can suppress the unconstitutionally obtained evidence from the government's case-in-chief, the government still can introduce the evidence for impeachment purposes.[87] Furthermore, while the exclusionary rule should suppress all evidence derived from an illegal search or seizure, this so-called fruit of the poisonous tree[88] may nonetheless be admitted under the independent source exception,[89] the inevitable discovery doctrine,[90] or through a finding of attenuation of the taint.[91] With so many loopholes, one must question whether the "exclusionary" rule could ever live up to its name.

If these limitations had not already rendered the exclusionary rule meaningless, the Supreme Court's decision in *United States v. Leon*[92] diluted the doctrine almost to that point. In *Leon* the Supreme Court adopted a good faith exception to the exclusionary rule allowing the admission of evidence acquired under a defective search warrant.[93] In creating this exception, the Court reasoned that the deterrence rationale does not apply to officers acting under an objectively valid warrant because the exclusionary rule was intended to deter police misconduct, not judicial errors.[94] According to the majority's analysis, the judicial-deterrence benefits of excluding evidence seized pursuant to an invalid warrant do not outweigh the costs of suppression—fewer convictions

85. *See* Jones v. United States, 362 U.S. 257 (1960).

86. Rakas v. Illinois, 439 U.S. 128 (1978). The current standing requirement parallels the *Katz* test for determining whether there was a search or seizure. *See supra* note 56 and accompanying text.

87. *See* United States v. Havens, 446 U.S. 620 (1980); Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954).

88. The fruit of the poisonous tree doctrine posits that all evidence (the "fruit") derived from an illegal search (the "poisonous tree") must be suppressed, whether it was obtained directly through the illegal search itself, or indirectly using information obtained in the illegal search. *See* Wong Sun v. United States, 371 U.S. 471, 484 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939).

89. The independent source exception to the fruit of the poisonous tree doctrine permits evidence obtained after an illegal search to be admitted if it can be traced to a legitimate source outside of the unlawful search. *See* Segura v. United States, 468 U.S. 796, 813-15 (1984).

90. Under the inevitable discovery doctrine, evidence obtained in an illegal search may be admitted if the prosecution can show by a preponderance of the evidence that the information ultimately would have been discovered by lawful means. *See* Nix v. Williams, 467 U.S. 431, 444 (1984).

91. The attenuation of the taint doctrine posits that in certain cases the connection between the original illegal conduct and the evidence sought to he excluded may become so attenuated that admission of the evidence would not implicate the constitutional values underlying the exclusionary rule. *See Wong Sun*, 371 U.S. at 491; *Nardone*, 308 U.S. at 341.

92. 468 U.S. 897 (1984).

93. *Id.* at 913; *see also* Illinois v. Krull, 480 U.S. 340, 348 (1987); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

94. *Leon*, 468 U.S. at 916-17.

and lighter sentences.[95]

In creating the good faith exception, the Court hoped both to encourage the police to use warrants and to heighten the credibility of the issuing magistrate's determination of probable cause.[96] The Court carefully structured the exception to avoid making the exclusionary rule necessarily inapplicable whenever a police officer acts pursuant to a warrant.[97] Nevertheless, like other recent Fourth Amendment decisions,[98] *Leon* placed another weight on the scale in favor of the interests of law enforcement at the expense of individual privacy interests. This Recent Development suggests how the Supreme Court can recognize the constitutionality of another police practice—anticipatory search warrants—without completely knocking the scale to the ground.

IV. THE *GARCIA* MODEL

In *United States v. Garcia*[99] the defendants, participants in a cocaine operation, employed military servicemen stationed in Panama to smuggle cocaine into the United States.[100] On one drug run, customs officials searched two of the servicemen couriers and discovered thirty-three kilograms of cocaine.[101] Thereafter, the couriers agreed to assist the government with a controlled delivery of the contraband.[102] Before the cocaine was delivered, the drug enforcement agents obtained an anticipatory warrant to search the targeted apartment.[103] The execution of the prospective warrant was contingent on the delivery of the contraband.[104] Shortly after the couriers delivered the drugs, the agents entered the premises, searched the apartment, and seized the cocaine along with other incriminating evidence.[105]

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95. *Id.*

96. *Id.* at 913-16.

97. The good faith exception does not apply in situations in which the officer did not have reasonable grounds to believe the warrant was properly issued. The exception could not be invoked if the officer acted under a misleading or facially deficient warrant or if the magistrate "wholly abandoned his judicial role." *Id.* at 923.

98. *See supra* subparts III(A) & (B).

99. 882 F.2d 699 (2d Cir.), *cert. denied*, 110 S. Ct. 348 (1989).

100. *Id.* at 700.

101. The customs officials initiated the search after noticing that the servicemen appeared nervous and that one was named on a "customs alert list." *Id.* For a discussion on the legal justification for searches of suspected drug couriers, see Special Project, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311 (1990).

102. *Garcia*, 882 F.2d at 701. *See supra* note 25.

103. The agents received a prospective warrant to search the apartment for "cocaine, traces of cocaine, currency, drug records, and narcotics paraphernalia." 882 F.2d at 701.

104. *Id.*

105. In addition to the 33 kilograms of cocaine, the agents seized airline stickers and Panamanian newspapers. *Id.*

Throughout the trial[106] and on appeal, Wilson-Grant, a codefendant in the conspiracy, moved to suppress the materials seized in the search.[107] She argued that the magistrate issued the search warrant improperly because no probable cause existed at the time of issuance to believe that the contraband was located on the premises.[108] Wilson-Grant asserted that an anticipatory search warrant based on an expectation of future probable cause violates the Fourth Amendment.[109]

In rejecting this argument, the *Garcia* court observed that although anticipatory search warrants, by definition, are issued before the events necessary to trigger a search have transpired, such warrants do not lack probable cause.[110] The court focused on the existence of probable cause at the moment of execution, rather than at the issuance of the search warrant.[111] The Second Circuit reasoned, therefore, that sufficient probable cause would be present at the time of the search if: (1) the government agent produces independent evidence indicating a "sure course"[112] of delivery; and (2) the magistrate conditions the warrant's execution on the occurrence of that delivery.[113]

The *Garcia* court clarified the nature of these restrictions. In order to provide the magistrate with independent evidence that the contraband will be located at the premises upon execution, the government's affidavit must show: (1) that the agent believes that the delivery will occur; (2) how the agent obtained his belief; (3) the reliability of the agent's sources; and (4) the role the agent will play in the delivery.[114] Additionally, in accordance with the second prong of the *Garcia* test, the magistrate should condition the anticipatory warrant explicitly on a stated occurrence to prevent both premature execution and manipulation by government officials.[115] Finally, the *Garcia* court remarked that

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106. Both before and during the trial, Wilson-Grant moved to suppress the items recovered during the search. The district court consistently rejected her arguments. *Id.*

107. The court of appeals recognized that Wilson-Grant, a nonresident of the apartment, may have lacked standing to bring this claim due to an insufficient privacy expectation in the premises. *Id.*; *see supra* notes 84-86 and accompanying text. The government, however, waived the standing argument since it did not raise the claim in the district court. *Garcia*, 882 F.2d at 701.

108. *Id.* at 702. Alternatively, Wilson-Grant argued that even if the warrant was validly issued, it was executed prematurely because the contraband had not heen delivered when the agents entered the premises. The court, however, found that the courier's entrance into the apartment constituted "sufficient delivery" and thus fulfilled the condition necessary for execution. *Id.* at 704.

109. *Id.* at 702.

110. *Id.*

111. *Id.* (citing United States v. Lowe, 575 F.2d 1193, 1194 (6th Cir.), *cert. denied*, 439 U.S. 869 (1978)).

112. *See supra* note 36 and accompanying text.

113. *Garcia*, 882 F.2d at 702.

114. *Id.* at 703; United States v. Moore, 742 F. Supp. 727, 734 (N.D.N.Y. 1990).

115. *Garcia*, 882 F.2d at 703-04. If the stated contingency does not occur, the warrant becomes void. *Id.* at 702; *Moore*, 742 F. Supp. at 734.

the magistrate should strictly observe the particularity requirement of the Fourth Amendment in order to limit governmental abuse of prospective warrants.[116]

In holding that anticipatory search warrants are not unconstitutional per se if issued within the enumerated guidelines, the *Garcia* model sought to balance both the interests of law enforcement and individual Fourth Amendment rights.[117] The court recognized that prospective warrants encourage government officials to obtain judicial approval of a search.[118] The court also observed that an anticipatory search warrant may be an effective device when police officials must act under narrow time constraints.[119] The *Garcia* court reasoned that an agent should obtain a prospective warrant under such conditions rather than proceed under the exigency exception to the warrant requirement and risk suppression under the exclusionary rule.[120] In sum, the *Garcia* model attempts to fit anticipatory search warrants, an effective law enforcement tool, within the Fourth Amendment framework without significantly diminishing individual privacy interests.

V. THE FOURTH AMENDMENT ANALYSIS

By addressing the constitutional validity of anticipatory search warrants, the Supreme Court could reexamine the framework of the Fourth Amendment.[121] Although in theory the Fourth Amendment attempts to balance individual privacy interests against the aims of law enforcement, in practice decisions have favored the latter concern.[122] A proper constitutional analysis of anticipatory search warrants could direct the amendment toward its necessary equilibrium.

A. The Warrant Requirement

The Supreme Court could strengthen the warrant requirement by upholding the constitutionality of prospective search warrants. As the *Garcia* court observed, anticipatory warrants encourage law enforce-

116. *Garcia*, 882 F.2d at 704; *Moore*, 742 F. Supp. at 734. The particularity requirement of the Fourth Amendment limits the authorization to search to specific areas or items for which probable cause exists, thus prohibiting "general" search warrants. *See* 2 W. LAFAVE, *supra* note 2, § 4.5.

117. *See Garcia*, 882 F.2d at 703.

118. *Id.*

119. *Id.*

120. *See id.*

121. The Supreme Court, in fact, has granted certiorari in a case arising out of the *Goodwin* and *Flippen* factual situation. United States v. Jacobson, 916 F.2d 467 (8th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1618 (1991). In *Jacobson* the Eighth Circuit reviewed the government's involvement in the reverse sting operation under the Fifth Amendment's due process clause, but unfortunately did not address the constitutionality of anticipatory search warrants.

122. *See supra* notes 9-11 and accompanying text.

ment officials to use the warrant process.[123] A search conducted under a warrant protects individual privacy interests from unauthorized governmental intrusion by providing an impartial judicial officer's oversight.[124] Since the availability of prospective warrants invites greater use of warrants, protection of individual privacy should increase in accordance with such police practice.

Although *Katz* established a per se warrant requirement, numerous exceptions have minimized the force of this rule.[125] Anticipatory search warrants could redirect the Fourth Amendment focus toward the *Katz* mandate by restricting the need for at least one of the exceptions to the *Katz* rule—the exigency exception.[126] As the *Garcia* court noted, police officials can seek anticipatory warrants even under narrow time constraints.[127] Since by definition prospective warrants anticipate the unlawful activity, the availability of these warrants should reduce the number of exigencies that otherwise would justify a warrantless search. By obtaining an anticipatory search warrant, a police officer promotes individual privacy interests by seeking a magistrate's supervision.[128] Since this rationale applies to any warrant exception whose justification is exigency,[129] anticipatory search warrants could be the initial step toward reestablishing *Katz* as the rule, rather than the exception.

The *Katz* Court, however, did not contemplate the use of anticipatory search warrants. Prospective search warrants that are based on a showing of future probable cause differ from their traditional counterparts. Unlike warrantless searches, searches employing anticipatory warrants under exigent circumstances are more likely to be justified police intrusions due to the additional protection supplied by the warrant process.[130] When law enforcement officials are not acting under such time pressure, no apparent justification exists for deviating from the traditional search warrant. Therefore, some courts reason that anticipatory search warrants should be restricted to situations involving exigency.[131]

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123. *See supra* text accompanying note 118.

124. *See supra* text accompanying note 54.

125. *See supra* text accompanying note 56.

126. Exigency refers to emergency situations requiring an immediate warrantless search. *See* Warden v. Hayden, 387 U.S. 294 (1967).

127. *See supra* text accompanying notes 119-20.

128. *See supra* text accompanying note 54.

129. *See* Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977) (stating that "every 'exception' to the warrant requirement derives from an emergency situation, where to obtain a search warrant would defer police activity that must be performed punctually to be effective").

130. *See supra* text accompanying notes 119-20.

131. *See supra* subpart II(B). The *Flippen* court placed the exigency limitation on anticipatory search warrants by holding that the use of such warrants is impermissible in the context of child pornography investigations because government officials have time to seek a search warrant

This limit on prospective warrants would be problematic, however. Government officials typically seek anticipatory search warrants in controlled delivery cases.[132] In this setting, the police generally cannot ensure a priori the exigency necessary to conduct a warrantless search.[133] If a magistrate could not issue an anticipatory warrant in controlled delivery situations, the officer has two remaining options: (1) foregoing the search until sufficient evidence arises to obtain a traditional warrant; or (2) searching without a warrant in hope of a later judicial finding of a warrant exception. Neither choice properly balances the competing interests of the Fourth Amendment. Under the first option, while individual privacy interests might benefit from the increased probable cause scrutiny, the costs to law enforcement in terms of lost convictions would be too great. Courts also should discourage the second alternative because the individual privacy interest suffers when police searches are conducted without judicial supervision. Anticipatory search warrants effectively resolve this dilemma.

The *Garcia* model for allowing anticipatory search warrants permits an adequate balancing of Fourth Amendment interests. By requiring that the government prove that the contraband is on a "sure course" to its destination,[134] the *Garcia* model shields individuals from unjustified searches. Since the magistrate further conditions the warrant's execution on a stated occurrence,[135] the court retains the necessary supervisory power while the government benefits from the use of another law enforcement device. A carefully structured anticipatory search warrant procedure balances Fourth Amendment considerations by allowing future searches only upon the occurrence of specific contingencies.

B. The Probable Cause Doctrine

Since anticipatory search warrants generally are challenged on the basis of inadequate probable cause,[136] the Supreme Court also has the opportunity to clarify the probable cause doctrine. By addressing the *Garcia* model for probable cause, the Court also could reevaluate the propriety of the *Gates* totality-of-the-circumstances test.

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through normal channels. *See* United States v. Flippen, 674 F. Supp. 536, 540 (E.D. Va. 1987), *aff'd*, 861 F.2d 266 (4th Cir. 1988).

132. *See supra* note 25.

133. In the controlled delivery of child pornography, for example, generally no exigency exists because collectors typically retain the contraband in their homes. *See supra* text accompanying notes 46-47.

134. *See supra* text accompanying note 112.

135. *See supra* note 113 and accompanying text.

136. *See supra* text accompanying note 6.

A defendant typically attacks the constitutionality of prospective search warrants by claiming that no present probable cause existed at the time of issuance.[137] According to this argument, a magistrate may issue a search warrant only upon a showing of probable cause that the criminal evidence is located in a specified place at that time.[138] Since an anticipatory search warrant is based on probable cause that the object of the search will be at a particular place in the future, and not that it is currently there, the defendant infers a Fourth Amendment violation.[139]

The present probable cause argument, however, contains an inherent flaw. As the *Garcia* court reasoned, the critical probable cause inquiry should focus on the likelihood that the criminal evidence will be found in a particular place on execution, not on issuance, of the search warrant.[140] While present possession may indicate a probability of future possession, anticipatory search warrants can predict with greater certainty the object's location at the time of the search.[141] By obtaining a prospective search warrant, police officers minimize the risk that probable cause information may become stale,[142] a concern particularly troublesome in the controlled delivery context.[143] Furthermore, a magistrate could guard against the opposite concern, premature execution, by conditioning the validity of an anticipatory search warrant on a specified occurrence.[144] With a prospective search warrant, the government gains an effective law enforcement device, while an impartial magistrate's determination that there will be probable cause at the time of the intrusion protects individual privacy interests.

To obtain a warrant based on probable cause for a future search, the government's affidavit must provide a magistrate with sufficient information to conclude that the seizable evidence will be at the specified

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137. *See supra* text accompanying note 6.

138. *See* Steagald v. United States, 451 U.S. 204, 213 (1981) (stating that "[a] search warrant . . . is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police").

139. *See supra* notes 6, 31 & 41 and accompanying text.

140. *See supra* note 111 and accompanying text.

141. People v. Glen, 282 N.E.2d 614, 617 (N.Y.), *cert. denied*, 409 U.S. 849 (1972). *See* 2 W. LAFAVE, *supra* note 2, § 3.7(c), at 97-98.

142. A search warrant becomes "stale" when the information upon which its issuance is based has become so dated as to no longer give rise to probable cause. *See* Syro v. United States, 287 U.S. 206 (1932). The degree of delay that will make probable cause information "stale" depends on the particular facts of the case. *See* 2 W. LAFAVE, *supra* note 2, § 3.7(a).

143. *See, e.g.*, State v. Gallant, 531 A.2d 1282, 1284 (Me. 1987); People v. David, 326 N.W.2d 485, 487-88 (Mich. Ct. App. 1982); People v. Broilo, 228 N.W.2d 456, 458 (Mich. Ct. App. 1975).

144. In controlled delivery situations, for example, actual delivery would be the specified occurrence. *See supra* note 113 and accompanying text.

location upon execution.[145] The *Garcia* model provides a judicial officer with criteria for determining the probable cause needed to issue a prospective warrant. According to the *Garcia* test, a magistrate must be satisfied that the evidence is on a "sure course" to its destination.[146] To fulfill this requirement, the government's affidavit must show, among other things, the officer's basis of knowledge and the reliability of his sources.[147]

Since the *Garcia* model closely parallels the two-pronged *Aguilar-Spinelli* test,[148] the Supreme Court could undertake a much-needed reevaluation of the propriety of the *Gates* totality-of-the-circumstances test while determining the validity of anticipatory search warrants. The *Gates* Court mischaracterized the *Aguilar-Spinelli* test as unduly rigid[149] because structured criteria are needed for a magistrate to determine probable cause with greater accuracy. While the *Gates* test enables a judicial officer to issue more warrants, the probable cause doctrine suffers in the process. By eliminating the independent status of the two prongs, *Gates* permits a magistrate to issue warrants based on less than credible information.[150] In effect, under the standardless *Gates* approach, the police officer, not the magistrate, determines the existence of probable cause.[151] The totality-of-the-circumstances test unduly favors law enforcement interests at the cost of individual privacy interests.

The *Aguilar-Spinelli* two-pronged test recognized the inherent difficulty of measuring probable cause based on an informant's tip. Since anticipatory search warrants depend on an equally problematic determination—probable cause for a future search—an issuing magistrate similarly should have heightened guidance in order to limit the potential for government abuse. The multifactor *Garcia* test compensates for the uncertainty associated with prospective search warrants. By requiring a more intense probable cause scrutiny for anticipatory search war-

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145. *Glen*, 282 N.E.2d at 617. *See* 2 W. LAFAVE, supra note 2, § 3.7(c), at 97-98.

146. *See supra* text accompanying note 112.

147. As a final prerequisite to issuance, *Garcia* instructs the magistrate to condition the execution of the anticipatory search warrant upon a stated occurrence. *See supra* note 113 and accompanying text.

148. *See supra* notes 64-68 and accompanying text.

149. Illinois v. Gates, 462 U.S. 213, 225-30 (1983).

150. For example, a highly detailed tip does not necessarily support the veracity of an informant. Similarly, information from an informant with a strong reputation for truthfulness does not automatically demonstrate a basis for knowing. *See* 1 W. LAFAVE, *supra* note 2, § 3.3(b).

151. Professor Abraham Goldstein observed that magistrates rarely inquire into the issue of probable cause in any detail. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1182-83 (1987). To meet the reliability and credibility goals of the warrant process, Professor Goldstein argues for the institution of a process-oriented standard for the post-warrant review of a magistrate's probable cause finding. *Id.* at 1215-17.

rants, the Supreme Court could take the initial step toward correcting the erosion of probable cause that is epitomized by the *Gates* standard. This requirement would result in a more equitable balance of all Fourth Amendment interests.

C. *The Exclusionary Rule*

Finally, the Supreme Court must consider how a decision validating anticipatory search warrants would affect the exclusionary rule. In theory, the exclusionary rule deters unconstitutional privacy invasions by excluding illegally obtained evidence from the government's case-in-chief.[152] The rule has lost much of its deterrent power, however, particularly after *Leon* established the good faith exception.[153] The Supreme Court's endorsement of yet another type of search warrant on which police could claim good faith reliance could weaken the exclusionary rule further.[154] Alternatively, in upholding the constitutionality of anticipatory search warrants, the Court could reassess *Leon* in order to return the Fourth Amendment balance that underlies the exclusionary rule.

The Supreme Court should seize this opportunity to reexamine the value of the good faith exception.[155] In *Leon* the Court relied on the substantial costs incurred in applying the exclusionary rule to justify the good faith exception while admitting that the rule's impact was "insubstantial."[156] The Supreme Court also focused mistakenly on the impropriety of deterring the behavior of the issuing magistrate.[157] While

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152. *See supra* note 79 and accompanying text.

153. *See* Note, *Errors in Good Faith: The* Leon *Exception Six Years Later*, 89 MICH. L. REV. 625, 627 (1990) (stating that "the exclusionary rule's goal of deterrence would hest he served by the pre-*Leon* rule which, because it retained a simple, inviolate exclusionary sanction in its central application, would more often be properly enforced"); Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1030-55 (1987) (an empirical study of the Narcotics Section of the Chicago Police Department showed that the exclusionary rule deters unlawful police searches and the *Leon* good faith exception undermines this deterrence).

154. The *Flippen* decision illustrates the need to review the good faith exception as part of a proper examination of anticipatory search warrants. *See supra* subpart II(B).

155. *See generally* Note, *A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with* United States v. Leon, 41 VAND. L. REV. 811, 821-34 (1988) (noting the flaws in the *Leon* Court's rationale and the adverse consequences of that decision).

156. *Compare* United States v. Leon, 468 U.S. 897, 907 (1984) (noting that "[t]he substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern") *with id.* at 907 n.6 (recognizing that researchers "have concluded that the impact of the exclusionary rule is insubstantial").

This inconsistency is magnified further by the realization that the Court manipulated the data underlying the cost inquiry in order to create the good faitb exception. *Leon* based the costs of the exclusionary rule on all cases instead of focusing on those in which evidence would be suppressed despite a facially valid warrant. *See* 1 W. LAFAVE, *supra* noto 2, § 1.3(c), at 52.

157. *See supra* note 94 and accompanying text.

the exclusionary rule seeks primarily to deter unconstitutional police action, it stands more broadly as a check on the entire warrant process. Moreover, the Fourth Amendment inherently restricts the discretion of both the police and the issuing judicial officer.[158] Consequently, if the exclusionary rule cannot suppress evidence procured under a defective search warrant, the integrity of the warrant system and the Fourth Amendment suffers.

The good faith exception gives undue weight to the interests of law enforcement over those of individual privacy. In ruling on the constitutionality of anticipatory search warrants, the Supreme Court could address this inequity. As the *Garcia* court noted, prospective search warrants, by their nature, are subject to abuse by the government.[159] The Supreme Court would expand this potential for abuse if it extended the *Leon* good faith exception to anticipatory search warrants.[160] By refusing to apply the good faith exception to prospective search warrants, however, the Court could minimize police misconduct and move toward reestablishing the proper balance of Fourth Amendment interests.[161]

VI. CONCLUSION

The Supreme Court should uphold the constitutionality of anticipatory search warrants. Because of the specialized nature of these warrants, however, the Court must restrict their use. The multifactor *Garcia* test compensates for the uncertainty inherent in prospective search warrants. By adopting the *Garcia* model, the Court would validate another investigative tool for law enforcement agents and simultaneously protect individual privacy interests under the Fourth Amendment.

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158. The Fourth Amendment contains several inherent restrictions:

> The right of the people to be secure in their persons, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and *no Warrants shall issue, but upon probable cause, supported by Oath or affirmation*, and *particularly describing the place to be searched, and the persons or things to be seized.*

U.S. CONST. amend. IV (emphasis added).

159. Anticipatory search warrants are particularly susceptible to manipulation by the government because these warrants are based on probable cause for a future search. *See supra* notes 115-16 and accompanying text.

160. The exclusionary rule's traditional deterrence is needed to minimize the government's potential misuse of anticipatory search warrants. For example, if a court invalidates a prospective search warrant under the *Garcia* model, but nevertheless admits the evidence procured by the illegal search under the good faith exception, the deterrence and individual privacy protections provided by the multifactor anticipatory search warrant test are lost.

161. The Supreme Court recently observed that "[t]he occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values." James v. Illinois, 110 S. Ct. 648, 651 (1990).

Although the Fourth Amendment, in theory, seeks to balance individual privacy interests against law enforcement interests, the judicial trend has manipulated the scale in favor of law enforcement. A proper analysis of anticipatory search warrants would correct this inequity. By upholding the use of prospective search warrants, the Supreme Court could empower the *Katz* per se rule by limiting the need for exceptions to the warrant requirement. By following the *Garcia* model, the Court could strengthen the probable cause doctrine by addressing the shortcomings of the standardless *Gates* totality-of-the-circumstances test. Finally, the Court could restore the exclusionary rule by finding that the good faith exception impairs the integrity of the warrant process and the Fourth Amendment.

The Supreme Court should take the opportunity to repair the framework of the Fourth Amendment through a traditionally sound analysis of anticipatory search warrants. Although this Recent Development represents an idealistic view of the underlying values of the Fourth Amendment, all hope of balancing individual privacy and law enforcement interests is not lost. In the words of Justice Antonin Scalia, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."[162] Amen.

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162. Arizona v. Hicks, 480 U.S. 321, 329 (1987).

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