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ILLINOIS v. GATES: PROBABLE CAUSE REDEFINED?

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INTRODUCTION

In *Illinois v. Gates*,[1] the United States Supreme Court abandoned the two-prong test of *Aguilar v. Texas*[2] and *Spinelli v. United States*[3] as the sole criterion for determining whether information received from an anonymous tipster amounted to probable cause to issue a search warrant. In lieu of this so-called "rigid"[4] approach, the Court adopted a "totality of the circumstances" analysis.[5] In so doing, the Court retained the *Aguilar-Spinelli* factors as "relevant considerations" in assessing the viability of an affidavit in support of a search warrant, but failed to supply any further guidance as to what constitutes probable cause in anonymous tip cases.[6]

This article will explore the evolution of hearsay information as a basis for probable cause to search and will discuss *Gates* in light of prior law. Additionally, the issue of whether a "good faith" exception to the exclusionary rule should be adopted will also be considered. The article will conclude with a discussion of the potential impact of *Gates* in both the federal and state systems.

THE EVOLUTION OF HEARSAY AS IT RELATES TO PROBABLE CAUSE

The notion that hearsay supplied by an informant might amount to probable cause to arrest and search originated in

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1. 103 S. Ct. 2317 (1983).
2. 378 U.S. 108 (1964).
3. 393 U.S. 410 (1969).
4. Illinois v. Gates, 103 S. Ct. 2317, 2329 (1983).
5. *Id.* at 2328.
6. *Id.* at 2329.

Draper v. United States.[7] In *Draper*, a previously used and reliable tipster supplied a federal agent with very precise information that the defendant was involved in drug sales.[8] The agent then conducted a surveillance which proved that this information was accurate.[9] The United States Supreme Court held that the specific and exact information supplied by the previously reliable informant, even though hearsay, provided ample probable cause for the warrantless arrest and search.[10]

After *Draper*, the Court decided *Jones v. United States*[11] and for the first time concluded that an affidavit predicated on hearsay could support a search warrant.[12] The *Jones* Court concluded that certain statements,[13] coupled with police corroba-

7. Draper v. United States, 358 U.S. 307 (1959). In *Draper*, the informant, Hereford, told a federal drug agent, Agent Marsh, that Draper had recently taken up a stated address in Denver. Herford told Marsh that Draper was selling drugs to several addicts in the Denver area. Some four days later, Hereford told Marsh that Draper had gone to Chicago the day before, by train and that he would return by train with three ounces of heroin on either September 8 or 9, 1958. Hereford described Draper to Agent Marsh as being a male Negro of light brown complexion, 27 years old, 5 feet eight inches tall, 160 pounds, and that he was wearing a light-colored raincoat, brown slacks and black shoes. Hereford also told Marsh that Draper would be carrying a tan zippered bag and habitually walked at a fast pace. On September 9, Agent Marsh was at the Denver Union Station and saw a person with the exact physical attributes and wearing the precise clothing described by the informant alight from an incoming train from Chicago. Marsh watched this person, Draper, walking quickly and carrying a tan zippered bag, all in accordance with the information supplied by Hereford. In *Draper*, the question before the Court was whether all the facts and circumstances gave Agent Marsh "probable cause to conduct a warrantless arrest of Draper and search his person incident to the arrest." *Id.* at 309-11.

8. *Id.* at 309.

9. *Id.* at 309-10.

10. *Id.* at 312-13.

11. 362 U.S. 257 (1960). In *Jones*, the court reversed a federal drug conviction on the question of whether Jones was unreasonably denied the opportunity to seek suppression. The Court held in the affirmative, invoking the "automatic standing" rule in favor of one charged with a possessory offense, and accordingly vacated the conviction. However, the Court did proceed to examine the affidavit for a search warrant. *Id.* at 267-69.

12. 362 U.S. at 271.

13. 362 U.S. at 269. The defendant in *Jones* cited Nathanson v. United States, 290 U.S. 41 (1933), which held that an affidavit which merely states there is cause to search, without providing the facts upon which such belief is based, was insufficient to establish probable cause. Didone, the affiant, stated that he had received information that the defendant and another were involved in the sale of illegal drugs and kept a supply of heroin on hand in their apartment. He also swore that the informant claimed to have purchased drugs from the defendant on many occasions, most recently the day before the warrant was sought. Didone stated that the informant had given reliable information on many previous occasions and that other sources substantiated the information. It was on this basis that Didone founded his belief that illegal drugs were secreted in the defendant's apartment. The *Jones* Court distinguished *Nathanson* on the following basis: "The question here is whether an affidavit which sets out personal observa-

tion and the fact that the defendant was known to the police as a drug user, constituted a "substantial basis for crediting the hearsay."[14]

After *Jones* and *Draper*, there was little question that hearsay could provide probable cause for both a warrantless arrest and an affidavit to support a search warrant, so long as there was a substantial basis for believing that the hearsay was credible. Subsequent case law served to refine what, exactly, constituted a "substantial basis."

The Two-Pronged Analysis of Aguilar *and* Spinelli

The criteria for determining the sufficiency of affidavits for search warrants based on hearsay information developed into a two-fold test in *Aguilar v. Texas*[15] and *Spinelli v. United States*.[16] For six years these oft-cited cases occuppied the attention of legal practitioners and commentators alike. In *Aguilar*, the affidavit submitted in the application for a search warrant provided in relevant part:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.[17]

The *Aguilar* Court reiterated that a complaint for a search warrant must enable a neutral and detached magistrate to determine whether probable cause exists — the complaint must do more than state the conclusions of the officer seeking the warrant.[18] The affidavit in *Aguilar* failed to pass muster. The allegations contained in the informant's affidavit were mere conclusions of an unidentified informant. There was no allegation that either the affiant or his source spoke with personal knowledge.[19] Consequently, the magistrate could not judge for

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tions relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations, but those of another." 362 U.S. at 269.

14. *Id.* Justice Douglas dissented to that part of the ruling that there was probable cause to search on the ground that, although "faceless informers" may give police cause to search, this is not enough, i.e., the magistrate issuing the warrant must also be convinced: "the magistrate should know the evidence on which the police propose to act" or else become a "tool of police interests." *Id.* at 273 (Douglas, J., dissenting).

15. 378 U.S. 108 (1964).

16. 393 U.S. 410 (1969).

17. Aguilar v. Texas, 378 U.S. 108, 109 (1964) (Footnotes omitted).

18. *Id.* at 114-15.

19. *Id.* at 113-14.

himself whether probable cause existed. The Court reasoned that:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was "credible" or his information "reliable."[20]

In *Spinelli v. United States*,[21] the Court granted certiorari so that the principles announced in *Aguilar* could be further explicated.[22] In *Spinelli*, the affidavit at issue was based, in part, on a report from an unidentified informant and, in part, on an independent FBI investigation purportedly corroborating the informant's tip. The informant, described as "reliable",[23] had advised the FBI that Spinelli was conducting a bookmaking operation and using specified telephone numbers in so doing. The affidavit also stated that the affiant-special agent and other law enforcement personnel knew Spinelli as a gambler and bookmaker.[24] The Court found that the affidavit was insufficient on the ground that the affiant offered the magistrate no facts in sup-

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20. *Id.* at 114 (citations omitted).

21. 393 U.S. 410 (1969).

22. *Id.* at 413. Both Andresen v. Maryland, 427 U.S. 463 (1976) and Zurcher v. Stanford Daily, 436 U.S. 547 (1978), discussed, in part, search warrants. In Andresen, the Court relied on *Aguilar*, while finding that the affidavit(s) provided ample probable cause for the search warrant. Andresen, 427 U.S. 463, 478, n.9 (1976). In *Zurcher*, the Court held that search warrants are directed at places and things, not persons, and that probable cause to search does not depend on the culpability of the owner of the premises. A probable cause discussion is found in *Zurcher*, 436 U.S. at 556 n.6.

It should be noted that probable cause standards are different as between search warrants and arrest warrants. As the *Zurcher* Court noted:

> Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched. By comparison, the right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has 'reasonably grounds to believe'—sometimes stated 'probable cause to believe'—that a felony has been committed by the person to be arrested. Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant must be supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical.
>
> In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location.

Zurcher, 436 U.S. at 557 n.6, *quoting*, Comment, 28 U. CHI. L. REV. 664, 687 (1961) (footnotes omitted).

23. 393 U.S. 410, 414 (1969).

24. *Id.*

port of his conclusion that the informant was reliable. More importantly, the tip did not contain a statement of the "underlying circumstances" from which the informer concluded that Spinelli was conducting a bookmaking operation.[25] *Spinelli* created the now familiar "two-pronged" test for determining whether hearsay information is sufficiently credible to constitute probable cause to issue a search warrant.

The first prong has come to be known as the "basis of knowledge" prong. This refers to the underlying circumstances which led to the informant's conclusion that criminal activity exists.[26] The second prong is the "veracity" prong, which addresses the credibility of the informant or the reliability of his information.[27]

The basis of knowledge prong is directed at the question of how the tipster came to his knowledge. That is, did the tipster see something firsthand, hear something firsthand, or is he merely passing on a rumor heard from someone else? This prong is not concerned with the conclusions or opinions of the tipster, but it is concerned with the raw data of his senses. If the tip relates events within the tipster's firsthand knowledge and not the tipster's conclusions, the reviewing magistrate will be able to draw his own conclusions, rather than rely on those of the tipster.[28]

Under the notion of "self-verifying detail" found in *Spinelli v. United States*,[29] an affidavit which does not meet the "basis of

25. 393 U.S. at 416. In *Gates*, the Illinois Supreme Court found the facts of *Spinelli* very similar to those before the Court in these respects. People v. Gates, 85 Ill. 2d 376, 386, 423 N.E.2d 887, 891 (1981).

26. *See infra* note 28 and accompanying text.

27. *See infra* notes 32, 33 and accompanying text.

28. Stanley v. State, 19 Md. App. 508, 313 A.2d 847 (1974). A concise explanation of the basis of knowledge requirement is found in *Stanley* where Judge Moylan wrote:

> *Aguilar* was concerned with the ultimate trustworthiness of hearsay information. All hearsay was not to be rejected out of hand; neither was all hearsay to be uncritically accepted; some guidelines had to be devised to separate the wheat from the chaff. *Aguilar* sought first to ascertain the actual source of the incriminating information. The "basis of knowledge" prong was designed to locate that source and to examine the validity of his conclusion. It was not concerned with the integrity of the informant (that test would come later via the other prong) but only with his ratiocinative process—not with the honesty of his narration but with the nature of his perception: (How did he reach *his* conclusion? Did he see something or hear something firsthand or did he merely pass on a story or rumor from someone else? Or did he simply jump to a wrong conclusion on the basis of inadequate or ambiguous observations?). The simple thrust of the "basis of knowledge" prong was that the informant must not pass on his conclusion, let alone the conclusion of someone else, but must furnish the raw data of his senses, so that the reviewing judge could draw his own conclusion from that data. *Id.* at 525, 313 A.2d at 858.

29. 393 U.S. 410 (1969).

knowledge" test because it fails to set forth the circumstances under which the confidential information was obtained may be cured if the information is so detailed that the magistrate "could reasonably infer that the informant had gained his information in a reliable way."[30] However, police corroboration may serve to support a claim that the information was reliable.[31]

The second prong of *Aguilar* may be referred to as the "veracity" prong. For hearsay declarations to support a search warrant, a magistrate must be convinced of the honesty of the tipster, or of the truthfulness of his information. Concisely stated, the veracity prong:

> Once having located the original source—the person who saw, heard or smelled something firsthand—then and only then did *Aguilar* look to the "veracity" of that source. As a substitute for the classic trustworthiness device of the oath, it sought some alternative guarantee that the declarant spoke truthfully. It sought "some of the underlying circumstances from which the officer concluded that his informant was 'credible,' or his information 'reliable'." The "veracity" prong, in precise terms, has two disjunctive spurs, seeking *either* (a) the inherent "credibility" of the person himself *or* (b) some other circumstances reasonably assuring the "reliability" of the information on the particular occasion of its being furnished.[32]

The veracity requirement is usually met by a recitation in the affidavit of previous instances in which the affiant-police officer has obtained information from the informant that led to various arrests and convictions.[33]

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30. *Id.* at 417. As noted in Stanley v. State, 19 Md. App. 507, 533, 313 A.2d 847, 862 (1974), specificity cannot satisfy the "veracity" prong since "[i]f the informant were concocting a story out of . . . whole cloth, he could fabricate in fine detail as easily as with rough brush strokes." *Id.*

31. Stanley v. State, 19 Md. App. 507, 531, 313 A.2d 847, 861-62. *Stanley* held that corroboration may not satisfy the basis of knowledge prong. Courts are not, however, in agreement on this issue. *See, e.g.*, W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 3.3 (1978); Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974). The Illinois Supreme Court in *Gates* found this issue unnecessary since the nature of the corroboration was insufficient to satisfy either prong. 85 Ill. 2d 376, 390, 423 N.E.2d 887, 893 (1981).

32. Stanley v. State, 19 Md. App. 525, 313 A.2d at 858. In Franks v. Delaware, 438 U.S. 154, 155-56 (1978), the Court held that a defendant may challenge statements made by an affiant to establish probable cause for a search warrant if such statements were made with knowledge of their falsity and were critical to finding of probable cause.

33. *See, e.g.*, McCray v. Illinois, 386 U.S. 300, 305 (1967) (police officers need not be required to disclose the informant's identity if trial judge is convinced that the officers did rely in good faith on credible information supplied by a reliable tipster). In United States v. Harris, 403 U.S. 573, 583 (1971), the Court concluded that the alternate "reliability" route of satisfying the veracity prong may be satisfied when an informant admits certain activities against his own penal interest. *Harris* is cited for this proposition in United States v. Karathanos, 531 F.2d 26, 31 (2d Cir. 1976). In United

THE "GOOD-FAITH" EXCEPTION

Against the backdrop of the *Aguilar-Spinelli* analysis arose the so-called "good-faith" exception, a concept which has engendered a plethora of legal commentaries in recent years.[34] In general terms, the good-faith exception, if adopted, would permit the introduction of evidence obtained in violation of the fourth amendment but with the *reasonable belief* that the search and seizure at issue was consistent with the fourth amendment.[35] Proponents of the good-faith exception rely on the argument that since the rationale for the exclusionary rule is to deter illegal police conduct, the rule should not apply when police are in good faith attempting to comply with the law.[36] The following discussion will analyze the pros and cons of the good-faith exception with special emphasis on the arguments raised before the United States Supreme Court in *Gates*.

"The Reason for the Rule"

The exclusionary rule dates back to 1914, when the United States Supreme Court decided, in *Weeks v. United States*,[37] that evidence obtained by federal officers in violation of a criminal defendant's fourth amendment rights could not be admitted in a federal prosecution.[38] In so doing, the Court enunciated as the rationale for such an exclusion the judiciary's refusal to sanction unconstitutional conduct.[39]

States v. McNally, 473 F.2d 934 (3rd Cir. 1973), it was held that *Harris* did not overrule the two-pronged test. *Id.* at 938-39.

34. *See, e.g.*, LaFave, *The Fourth Amendment in an Imperfect World: On Drawing Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307 (1982); Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875 (1982); Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule*, National Legal Center for the Public Interest (1982); LaFave, *The Exclusionary Rule Bills: Hearings on S.101, S.751 and S.1995 Before the Subcomm. on Criminal Law of the Sen. Judiciary*, 97th Cong., 1st Sess., 329, 793-974 (1981); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L. REV. 365 (1981).

35. For an excellent discussion of the good-faith exception, see Mertens & Wasserstrom, *supra* note 34, at 365.

36. *See, e.g.*, Petitioner's Brief on Reargument, Illinois v. Gates, 103 S. Ct. 2317 (1983).

37. 232 U.S. 383 (1914).

38. *Id.* at 398. Use of such improperly obtained evidence at trial is tantamount to prejudicial error. *Id.*

39. The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike,

It was not until 1961, in *Mapp v. Ohio*,[40] that the exclusionary rule was applied to the states via the fourteenth amendment. By some interpretations, the *Mapp* Court went so far as to state that the exclusionary rule was constitutionally mandated, rather than a mere rule of evidence.[41] *Mapp* reiterated that "the purpose of the exclusionary rule 'is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' "[42] As a secondary rationale, of special importance when the results of the rule seem unfair,[43] is the "imperative" of judicial integrity.[44] The *Mapp* Court explained that the government's disregard of its own laws could have a destructive effect and would breed contempt for the law.[45] In light of the various exceptions already carved out of the exclusionary rule, the concept of judicial integrity seems to have fallen by the wayside.[46]

In various instances the Supreme Court has refused to apply the exclusionary rule, usually in reliance on a "reason for the rule" analysis. For example, illegally seized evidence is ad-

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whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 391-92.

The *Weeks* Court refused to apply the same sanction to papers and property seized by police on the ground the fourth amendment applied only to federal officials. *Id.* at 398.

40. 367 U.S. 643 (1961). Prior to *Mapp*, the Court rejected the "silver platter" doctrine which had permitted the federal courts to use evidence seized in violation of the United States Constitution by state agents. *See* Elkins v. United States, 364 U.S. 206 (1960). *Mapp* expressly overruled Wolf v. Colorado, 338 U.S. 25 (1949), holding that the fourth amendment proscription against unreasonable searches and seizures applied to the states. *Mapp*, 367 U.S. 643. The *Wolf* Court had refused to require state courts to enforce the fourth amendment via the exclusionary rule. *Wolf*, 338 U.S. 25.

41. The *Mapp* Court characterized the exclusionary rule as "an essential part" of the fourth and fourteenth amendments. 367 U.S. 643, 657 (1961).

42. 367 U.S. at 656, *quoting*, Elkins v. United States, 364 U.S. at 217. *See also* Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (exclusion is necessary as "an effective deterrent to illegal police action").

43. That is, when the criminal goes free "because the constable has blundered." People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

44. 367 U.S. 643, 659, *quoting*, Elkins v. United States, 364 U.S. 206, 222 (1960).

45. *Id.* at 659, *citing*, Olmstead v. United States, 277 U.S. 438, 485 (1928) (J. Brandeis dissenting).

46. *See infra* notes 47-52 and accompanying text.

missible in grand jury proceedings on the ground that any benefit obtained by exclusion is outweighed by the detriment to grand jury functions.[47] In *United States v. Havens*,[48] the Court refused to apply the rule when unlawfully obtained evidence was used to impeach the defendant's testimony at his criminal trial. The rule does not apply in certain civil tax proceedings, again because the societal costs of exclusion outweigh any potential deterrent effect on police.[49]

The increasingly stringent standing requirements have cast further limits on the rule.[50] For example, dissatisfaction on the part of the Supreme Court was clearly manifested in both the holding and dissent of *Stone*.[51] In *Stone*, the majority denied federal habeas corpus relief on fourth amendment claims to state court prisioners who had a full and fair opportunity to litigate their claims in state court.[52] Justice White's dissent went even further. Justice White argued for a good faith exception to the exclusionary rule.[53] His dissent would assume great importance in future cases.

United States v. Williams

Given the exceptions to the exclusionary rule as a manifestation of judicial distaste for its operation, it should have come as no surprise that the broader good-faith exception would eventually be advanced. Dissatisfaction with the rule eventually culminated in *United States v. Williams*.[54] In *Williams*, the Fifth Circuit expressly adopted the good-faith exception. The battle commenced.

The facts of *Williams* are of particular interest because the court need never have reached the good faith issue. In June 1976, an agent of the Drug Enforcement Agency, Special Agent Markonni, arrested Jo Ann Williams in Ohio for possession of a controlled substance.[55] Williams eventually pled guilty and was

47. United States v. Calandra, 414 U.S. 338, 349 (1974).
48. United States v. Havens, 446 U.S. 620, 627-28 (1980).
49. United States v. Janis, 428 U.S. 433, 454 (1976).
50. United States v. Payner, 447 U.S. 727, 735-36 (1980).
51. 428 U.S. 465 (1976).
52. *Id.* at 494.
53. *Id.* at 541-42.
54. United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).
55. *Id.* at 833. The suspect was allegedly in possession of heroin and charged with a violation of 21 U.S.C. § 841(a)(1) (1976) of the Controlled Substances Act which provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally — (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

sentenced to three years imprisonment.[56] She was released on bond pending appeal. A condition of her release was that she remain in Ohio.[57]

Some months later Agent Markonni, on assignment at the Atlanta International Airport, recognized Williams as she disembarked from a nonstop flight from Los Angeles.[58] Markonni was aware of Williams' previous conviction and the travel restrictions of her appeal bond.[59] He eventually arrested Williams for violation of the travel restrictions.[60] A search incident to the arrest uncovered a packet of heroin in Williams' coat pocket.[61] Williams moved to suppress all evidence of the heroin on the ground that Agent Markonni had no authority to arrest her for violating the bond restrictions.[62] The trial court agreed and the government appealed.[63]

A panel for the Fifth Circuit Court of Appeals rejected the government's argument that Markonni had probable cause to arrest Williams for violating the conditions of her bail release.[64] The government also argued that Markonni could have validly arrested Williams for violating the travel restrictions of her appeal bond.[65] The government's theory was that such a violation constituted a criminal offense and that the arrest was valid under the Bail Reform Act.[66] The court disagreed[67] and held

56. United States v. Williams, 622 F.2d at 833. Prior to pleading guilty, the defendant made a motion to suppress the heroin, but this motion was denied. *Id.*

57. *Id.*

58. *Id.* at 834.

59. *Id.* at 835. Markonni identified himself and asked Williams for identification and her airline ticket. The ticket indicated she was en route to Lexington, Kentucky. Markonni then asked Williams if she had permission to travel outside Ohio, and she replied "no," that this was the "first time." *Id.* She told Markonni she was going to Lexington because she now lived there. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 835. Markonni arrested Williams a second time for violation of the Controlled Substances Act. The following day, Markonni sought and obtained a search warrant for Williams' luggage, based on the heroin found on her person and Markonni's prior dealings with her. *Id.* at 834-35. The search of the luggage revealed more heroin. *Id.* at 835.

63. United States v. Williams, 594 F.2d 86, 97-98 (5th Cir. 1979), *rev'd*, 622 F.2d 830 (1980)(en banc), *cert. denied*, 449 U.S. 1127 (1981).

64. 594 F.2d at 92. The court held that bail jumping must involve a willful failure to appear in court. Markonni had no reason to believe that Williams had missed a court appearance. *Id.*

65. *Id.*

66. *Id. See* 18 U.S.C. §§ 3141-3152 (1976).

67. 594 F.2d at 94. The court stated that the violation of a bond condition merely authorizes a court to determine whether punitive action is warranted; it does not authorize a warrantless arrest. Under 18 U.S.C. § 3146(c), the judge who imposed the travel restriction is authorized to issue an arrest

that the arrest was invalid and the heroin should be supressed.[68] Judge Clark dissented, contending that the heroin should not be suppressed.[69] Judge Clark reasoned that the deterrent purpose of the exclusionary rule was not served because the officer did not act "in a way he either knew or should have known was wrongful."[70]

The unusual events that followed indicate that the Fifth Circuit was eager to adopt a good faith exception. A rehearing was granted on the court's own motion and the government filed a supplemental brief arguing the good-faith exception.[71] The court issued two separate majority opinions reversing the district court.[72] In the first, a sixteen-judge majority held that Williams had committed criminal contempt by violating the conditions of her appeal bond and that Markonni therefore had authority for arresting her on that ground.[73] In the second opinion, thirteen judges reversed the lower court on the ground that the heroin should not have been suppressed because Agent Markonni acted in good faith.[74]

The second majority in *Williams* invoked a traditional "reason for the rule" analysis in adopting the good-faith exception:

> [W]e now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also.[75]

The court identified two types of violations of the probable

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warrant if the restriction is violated. In *Williams*, no such warrant was issued. *Id.* at 93-94.

68. *Id.* at 95.

69. *Id.* at 97 (Clark, J., dissenting).

70. *Id.*

71. *Id.* at 98; *see* United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

72. All twenty-four judges joined in one of the two majority opinions; five judges joined in both. None of the judges dissented, but two special concurrences were filed. Two of the judges who joined in the second majority opinion concurred specially on the ground that it was proper to decide whether the evidence was admissible under the good faith exception rather than deciding whether the search was valid. 622 F.2d at 847.

73. *Id.* at 836-39. Ms. Williams was found to have violated 18 U.S.C. § 401(3), in that her willful breach of the bond restriction was a criminal contempt. The arrest itself was found valid under 21 U.S.C. § 878(3) because the defendant's criminal contempt was "an offense against the United States." *Id.* at 839.

74. United States v. Williams, 622 F.2d at 846-47. For an exhaustive critique of the second opinion, see Mertons & Wasserstrom, *supra* note 34, at 365.

75. United States v. Williams, 622 F.2d at 840.

cause requirement of the fourth amendment.[76] The first was termed a "good faith mistake".[77] The second, "technical violation" occurs when an officer has relied on a statute later ruled unconstitutional, a judicial precedent later overruled, or a warrant later invalidated.[78] According to the court, technical violations have already been accorded the benefit of the good-faith exception.[79]

The *Williams* court then addressed the "good-faith mistake" facet of the exclusionary rule[80] and concluded that Agent Markonni arrested Williams in the good faith belief that Williams was in violation of a federal statute relating to bond conditions.[81] There being no question that Agent Markonni acted reasonably, the court found that the evidence should not have been suppressed.[82]

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76. *Id.* at 840-41, *citing*, Ball, *Good Faith and the Fourth Amendment: The Reasonable Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMONOLOGY 635, 638-39 (1978).

77. *United States v. Williams, 622 F.2d at 841.*

78. *Id.*

79. *Id.* In support, the court cited Michigan v. DeFillippo, 443 U.S. 31 (1979), in which the Supreme Court admitted evidence seized after a warrantless arrest based on the violation of a statute later held unconstitutional. *See also* United States v. Peltier, 422 U.S. 531 (1975) (evidence seized in border search; statute later found unconstitutional as construed); United States v. Carden, 529 F.2d 443 (5th Cir.), *cert. denied*, 429 U.S. 848 (1976) (statute held unconstitutional); United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971) (city ordinance held unconstitutional).

The *Williams* Courts' interpretation of the above-cited cases as support for a good faith exception is subject to substantial criticism. First, such cases are factually distinguishable from *Williams*. Second, probable cause existed at the time of arrest in each case. *See* Mertons and Wasserstrom, *supra* note 34, at 425-26.

80. United States v. Williams, 622 F.2d at 844. Some judicially created exceptions were cited, such as United States v. Janis, 428 U.S. 433 (1976). In *Janis*, the Supreme Court held that evidence obtained in good faith reliance on a search warrant by state police was admissible in a federal tax proceeding although the warrant was later found defective. Also relied on was Michigan v. Tucker, 417 U.S. 433 (1974). *Tucker* is actually a fifth amendment case in which a suspect was interrogated by police without first having been given *Miranda* warnings. Because the police acted in good faith, the statements made by the suspect were admitted. *Id.* at 447. The *Williams* court also relied on United States v. Hill, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975), and United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).

81. United States v. Williams, 622 F.2d at 846. The statute relied on was 18 U.S.C. § 3146 (1982), which deals with the court's power to impose bond restrictions. The *Williams* court had first determined that § 3146 relates only to bond violations which involved missing a court appearance. The court noted that the Fifth Circuit had not, at the time of Williams' arrest, decided the precise scope of § 3146. Thus, the case was found to involve both facets — "technical violation" and "good faith mistake" — of the exclusionary rule. *Id.*

82. United States v. Williams, 622 F.2d at 847.

ILLINOIS V. GATES

With *Aguilar* and *Spinelli* providing the established test for determining the validity of an affidavit for a search warrant based on hearsay information from a confidential informant, and the spectre of the good faith exception lurking in the background, the case of *Illinois v. Gates* arose.[83] The Supreme Court had denied certiorari on *United States v. Williams,*[84] the seminal case on good faith, before *Gates* came up for oral argument. In fact, *Williams* was decided before *Gates* was heard in the Illinois Supreme Court.[85] The State of Illinois did not raise the good faith issue before the United States Supreme Court in their Petition for Certiorari, and the State's subsequent motion to include this issue was denied.[86] It appeared then, that *Gates* would not be the vehicle by which the good-faith exception reached the United States Supreme Court. Oral argument was heard on the original question presented for review in October, 1982. Then, in an extraordinary move, the Court, *sua sponte*, requested that the parties address the following additional question:

> [W]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief

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83. 103 S. Ct. 2317 (1983). Prior to *Gates*, the United States Supreme Court had never determined under what circumstances a tip from an *anonymous* informant may constitute probable cause. A confidential informant is one whose identity is known to the law enforcement official. In McCray v. Illinois, 386 U.S. 300, 312-14 (1967), the United States Supreme Court held that police are not required to divulge the identity of a confidential informant when the information he provides results in the suspect's arrest. A citizen informant is one who reports criminal conduct to the police as a matter of civic duty. Such persons are generally considered more reliable than the confidential informant, who is usually himself a member of the criminal milieu. *See* Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the* Spinelli/Draper *Dichotomy in* Illinois v. Gates, 20 AMER. CRIM. L. REV. 99, n.1 (1982) (herinafter cited as *Anonymous Tips*).

Some commentators have contended that a tip from an anonymous informant is presumptively unreliable because neither the magistrate nor law enforcement officials can determine his motives—i.e., revenge or civic duty. *See Anonymous Tips, supra*, at 107. By definition, it would be most difficult to establish the reliability of such a tipster. It has been suggested that the specificity of the tip and police corroboration of incriminating details should satisfy the reliability test. *Id.* at 123. As will be seen, the United States Supreme Court declined to adopt a separate test for anonymous tipsters.

84. 449 U.S. 1127 (1981).

85. *Williams* was decided on July 31, 1980. *Williams*, 622 F.2d 830. The Illinois Supreme Court decided *Gates* on June 26, 1981. People v. Gates, 85 Ill. 2d 376, 423 N.E.2d 887 (1981). Neither the *Williams* case nor the good faith issue was raised before any of the Illinois courts hearing *Gates*.

86. 102 S. Ct. 1607 (1982).

that the search and seizure at issue was consistent with the Fourth Amendment.[87]

It appeared that the future of the exclusionary rule would soon be determined under the following facts.

On May 3, 1978, the Bloomingdale, Illinois police department received an anonymous handwritten letter by mail which alleged that Lance and Susan Gates were drug dealers.[88] The letter further stated that the Gates were planning a trip to Florida for the purpose of obtaining illegal drugs.

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue, his wife, drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys [sic] down and drives it back. Sue flys [sic] back after she drops the car off in Florida. May 3 [sic] she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee [sic] if you watch them carefully you will make a big catch. They are friends with some big drugs [sic] dealers, who visit their house often.
>
> Lance & Susan Gates
> Greenway
> in Condominiums.[89]

The Bloomingdale Chief of Police passed the letter on to Detective Charles Mader.[90] Mader requested a specific address for the Gates' from the Secretary of State's office in Springfield.[91]

It was discovered that an Illinois driver's license had been issued to a Lance Gates who resided at 209-D Darthmouth, Bloomingdale, Illinois.[92] Mader then communicated with a "reliable" informant[93] who reviewed financial records and reported that Lance Gates resided at 198-B Greenway Drive, Bloomingdale, Illinois.[94]

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87. Order of November 29, 1982, Illinois v. Gates, 103 S. Ct. 436 (1982).
88. Illinois v. Gates, 103 S. Ct. 2317, 2325 (1983).
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. This person was described as "a confidential informant who had provided reliable information to Mader during the previous two years." Petitioner's Opening Brief on Merits at 3, Illinois v. Gates, 103 S. Ct. 2317 (1983).
94. Illinois v. Gates, 103 S. Ct. at 2325 (1983).

A Chicago police officer assigned to O'Hare Airport informed Mader that an L. Gates had made a reservation with Eastern Airlines on Flight 245, departing on May 5 at 4:15 P.M. and arriving in West Palm Beach, Florida.[95] On May 5, Mader spoke to William Morely, an agent with the D.E.A. Morely told Mader that an individual using the name Lance Gates boarded Flight 245.[96] On May 6, Morely informed Mader that Gates had arrived in West Palm Beach, took a cab to the West Palm Beach Holiday Inn and entered a room registered to Susan Gates.[97] Gates and an unidentified woman left the room at 7:00 A.M. and entered a car with Illinois plates.[98] The plates were registered to Lance B. Gates but were issued for a different car.[99] The car was last seen driving north on an interstate highway.[100]

Based on this information, Mader obtained a search warrant from the Circuit Court of DuPage County for both the Gates' Bloomingdale residence and the car they had been driving in Florida.[101] In the early morning hours of May 7, the Gates returned to their home on Greenway Drive and were immediately served with a search warrant.[102] A search of the car revealed approximately 350 pounds of marijuana in several large bundles.[103] Upon searching the Gates' residence, Bloomingdale police discovered more marijuana and also weapons, ammunition, and drug parphernalia.[104] The Gates were indicted for unlawful possession of cannibis with intent to deliver[105] and unlawful possession of a controlled substance.[106] Lance Gates was separately indicted for possession of an unlicensed firearm.[107]

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95. *Id.*

96. *Id.*

97. *Id.* at 2325-26.

98. *Id.*

99. *Id.* at 2326.

100. *Id.*

101. *Id.*

102. *Id.* at 2320.

103. *Id.* at 2326.

104. *Id.*

105. ILL. REV. STAT. ch. 561/2, § 705(e) (1975). "It is unlawful for any person knowingly to manufacture, deliver, or possess with intent to deliver or manufacture cannabis. Any person who violates this Section . . . is guilty of a . . . felony." *Id.*

106. ILL. REV. STAT. ch. 561/2, § 1402(b) (1975). "[I]t is unlawful for any person knowingly to possess a controlled substance. Any person who violates this Section . . . is guilty of a . . . felony." *Id.*

107. ILL. REV. STAT. ch. 38, § 83-2 (1975). "No person may acquire or possess any firearm . . . without having in his possession a Firearms Owner's Identification Card." *Id.*

The Motion to Suppress

Attorney James W. Reilley, for the defendants, filed a motion to quash the search warrant and suppress all evidence thereby obtained before Circuit Court Judge William Hopf.[108] The motion presented the following allegations: (1) the affidavit failed to allege any illegal activity on the Gates' part, (2) the author of the anonymous letter was not a reliable informant in that there was no claim he or she had ever provided information in the past,[109] (3) there was no allegation the informant had any personal knowledge of illegal activity on the defendants' part,[110] (4) the letter failed to state the underlying circumstances from which the magistrate could conclude the information was reliable, and (5) the affidavit failed to meet the test of *United States v. Harris*[111] in that no criminal activity was corroborated nor was there any basis for crediting the hearsay on the ground of statement against penal interest.[112]

Judge Hopf agreed that the search warrant should be quashed and the evidence suppressed.[113] The State appealed the suppression order solely on the issue of whether the warrant and affidavit in support thereof met the *Aguilar-Spinelli* standards.[114]

The Illinois Courts

The Illinois Appellate Court affirmed the trial court.[115] In an opinion written by Justice Lindberg of the Second District, the initial issue addressed was whether the affidavit met the basis of

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108. Defendant's Motion to Suppress, People v. Gates, No. 78 CF 658, 659 (Cir. Ct. Ill).

109. This allegation was obviously based on the reliability prong of *Aguilar* and *Spinelli*.

110. This speaks to the "basis of knowledge" prong of *Aguilar* and *Spinelli*.

111. United States v. Harris, 403 U.S. 573 (1971).

112. *See supra* note 33.

113. People v. Gates, No. 78 CF 658, 659, 78 CM 1764, slip. op. at 2 (Cir. Ct. Ill. October 26, 1978). The court noted that the letter failed to indicate how the informant received his information, e.g., the basis of knowledge, nor was there a statement against penal interest. As to corroboration, the court noted that the investigation merely corroborated the conclusory allegations made in the letter and failed to reveal any per se criminal activities. Judge Hopf admitted that in close cases preference should be given in favor of probable cause when the validity of a warrant is at issue, but stated: "However, I am also concerned for a possible danger fraught by the issuance of a search warrant which relies so heavily upon an anonymous letter which gives us no clue as to the relationship or how information was procured." (Tr. MTS. at 13).

114. People v. Gates, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980).

115. *Id.*

knowledge prong of *Aguilar*.[116] The court quickly concluded that this test was not satisfied. The affidavit did not reveal the manner in which the anonymous tipster obtained his information.[117] The question thus became "whether the judge could reasonably infer that the information was gained in a reliable fashion because of the great amount of detail supplied by the informer."[118] The court concluded, using *Draper v. United States*[119] as a yardstick, that the detail in the anonymous letter could not pass muster — the letter contained no more than "general allegations" that the Gates were involved in narcotics sales.[120] Nor could the judge reasonably assume the informant spoke from personal knowledge. In contrast to the letter in *Gates*, the informant in *Draper* gave specific details as to the physical description and travel plans of the suspect.[121]

The final question before the appellate court was whether independent police corroboration cured the defective affidavit.[122] The State's claim of "full corroboration" was summarily

116. *Id.* at 753, 403 N.E.2d at 80 (1980).

117. *Id.* at 755, 403 N.E.2d at 80. In contrast, the court cited People v. Gomez, 80 Ill. App. 3d 668, 399 N.E.2d 1030 (1980), in which the affidavit stated that the informant had personal knowledge that a crime had been committed, and People v. Swift, 61 Ill. App. 3d 486, 378 N.E.2d 234 (1978), in which the defendant requested the informer to participate in the crime.

118. People v. Gates, 82 Ill. App. 3d 749, 753, 403 N.E.2d 77, 80 (1980), *citing*, Spinelli v. United States, 393 U.S. 410, 417 (1968) (self-verifying detail could satisfy basis of knowledge prong).

119. 358 U.S. 307 (1959).

120. People v. Gates, 82 Ill. App. 3d 749, 754, 403 N.E.2d 77, 80-81 (1980). In particular, the court noted that there was a lack of detail regarding the Florida trip. *Id.* at 754, 403 N.E.2d at 81.

121. *Id.* at 754, 403 N.E.2d at 80-81. The anonymous letter contains no more than general allegations that defendants were involved in narcotics sales. Although the anonymous informer did state that the Gates would soon drive to Florida and return with a load of drugs in their car, no details regarding this trip were set forth in the letter. These general allegations fall far short of the specifics necessary for a judge to properly infer that the anonymous informer had gathered his information in a reliable way. Nor could the judge reasonably assume that the anonymous informer had personal knowledge on the basis of the statements set forth in the anonymous letter. In contrast to the case at bar, the informer in *Draper* supplied police with a detailed physicial description of the accused, the time and date of his arrival in Denver by train, and a description of the clothes he would be wearing. The informer also stated that the accused had a habit of walking very fast. (*Draper*, 358 U.S. at 309-10 [(1959)]). When confronted with such detail, a judge could reasonably infer that the informer either had personal knowledge of the transaction or had obtained his information in a reliable way. The informer in the instant case set forth few details, however, and he may have obtained his information through rumor or through another unreliable method.

Id.

122. *Id.*

rejected.[123] In fact, the court stated that corroboration may only satisfy the veracity prong of *Aguilar*; it cannot serve to establish that the informant obtained his information in a reliable manner.[124] In conclusion, the court stated that to accept the State's argument "would permit government invasion of the privacy of persons solely on the basis of anonymous tips, made perhaps out of spite or based upon unsubstantiated rumor"[125] simply because the police were able to corroborate innocent details.[126]

The State once again appealed, and once again the good-faith exception was neither briefed nor argued.[127] Citing *Aguilar*, the Illinois Supreme Court agreed with the appellate court that the informant's letter did not meet the basis of knowledge prong.[128] Although the court could have concluded its opinion at this point, the majority instead chose to comment on the veracity prong.[129] Again, the affidavit failed to pass muster. There was no declaration against penal interest which would provide any indicia of reliability.[130]

Next the *Gates* court considered whether the information was so detailed that the magistrate " 'could reasonably infer that the informant had gained his information in a reliable way.' "[131]

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123. *Id.*

124. *Id.* at 754-55, 403 N.E.2d at 81. In support, the court cited Stanley v. State, 19 Md. App. 508, 531, 313 A.2d 847, 861-62 (1974).

125. People v. Gates, 82 Ill. App. 3d at 755, 403 N.E.2d at 81.

126. *Id. But see*, United States v. Tuley, 546 F.2d 1264 (5th Cir. 1977) (probable cause found though source not revealed because innocent detail sufficiently corroborated), *cert. denied*, 434 U.S. 837; United States v. Myers, 538 F.2d 424 (D.D.C. 1976) (corroboration of innocent details coupled with defendant's sufficient for probable cause), *cert. denied*, 430 U.S. 908; Horton v. State, 262 Ark. 211, 555 S.W.2d 226 (1977) (information from reliable informant sufficient basis for probable cause; State v. Gilbert, 24 Or. App. 907, 547 P.2d 632 (1976) (probable cause based on corroboration of innocent details).

127. The unusual circumstances under which the good faith issue came before the United States Supreme Court is discussed *supra* at text accompanying notes 80-87.

128. People v. Gates, 85 Ill. 2d 376, 383-84, 423 N.E.2d 887, 890 (1981). The majority opinion was written by Justice Ward. Justice Moran wrote a dissenting opinion in which Justice Underwood joined. As grounds for their finding, the majority noted that, although the informant stated that the Gates made their living by dealing in drugs, he failed to state the source of his knowledge. No basis of knowledge for allegations regarding the Florida trip and the existence of drugs in the Gates' basement was given. Further, "[t]here is no statement made that the informant ever saw drugs or was inside the defendants' residence or even that someone had told him of any of these claimed facts." *Id.* at 384, 423 N.E.2d at 890.

129. *Id.* at 384, 423 N.E.2d at 890-91.

130. *Id.* at 385-86, 423 N.E.2d at 891.

131. *Id.* at 387-88, 423 N.E.2d at 891-92 *quoting* Spinelli v. United States, 393 U.S. 410, 417 (1969)). Under *Spinelli*, the type of detail supplied by the informant in Draper v. United States, 358 U.S. 307 (1959), provides a suitable yardstick by which to determine whether sufficient specifity exists. Self-

The Court first enunciated the concept that self-verifying detail may cure a defect in the basis of knowledge in *Spinelli*.[132] A review of the letter led the *Gates* court to conclude that the letter lacked the necessary specificity.[133]

Finally, police corroboration did not cure the basis of knowledge defect.[134] The corroboration was only of innocent activity, insufficient to support a finding of probable cause.[135] The dissenting justices argued that the necessary specificity of detail and police corroboration existed to show that the informant had obtained his information in a reliable manner.[136]

On appeal to the United States Supreme Court, the question originally presented for review was "[w]hether detailed information provided to police by an anonymous informer, coupled with government corroboration of the information, provided probable cause for the issuance of a search warrant."[137] Ultimately, the good faith issue was also briefed and argued.[138] Because the Court's disposition of *Gates* never settled the question of the good-faith exception to the exclusionary rule, the arguments on probable cause are relevant and merit discussion.

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verifying detail may only be used when the informant has failed to meet the basis of knowledge prong — it may not cure a failure in the veracity prong. The *Gates* court cautioned against the use of self-verifying detail; the detail must be such that the magistrate can determine that the informant is relying upon more than casual rumor or accusations based only on the suspect's general reputation. People v. Gates, 85 Ill. 2d at 388, 423 N.E.2d at 892.

132. 393 U.S. 410 (1969).

133. 85 Ill. 2d 376, 389, 423 N.E.2d 887, 891-93. The court noted that, unlike the informant in *Draper*, the informant in *Gates*, was anonymous. *Id.*

134. *Id.* at 390, 423 N.E.2d at 893. The court did not decide as had the appellate court, that police corroboration could not cure the veracity prong, although courts are not in agreement on this issue.

135. *Id.* at 390, 423 N.E.2d at 894, *citing* Whiteley v. Warden, 401 U.S. 560 (1971).

136. *Id.* at 390-91, 423 N.E.2d at 893-96. The dissenters reviewed the affidavits in *Aguilar* and *Spinelli* and the testimony of the agent in *Draper* and contended that, as in *Draper*, "a specific, detailed and *future* sequence of events was supplied by the informant's letter," and, in *Gates*, as in *Draper*, the police investigation corroborated every detail of the information. Further, the dissenters claimed, both specificity and detail satisfied the veracity prong. *Id.* at 393-95, 423 N.E.2d at 893-96.

137. Petitioner's Petition for Certiorari at i, Illinois v. Gates, 103 S. Ct. 2317 (1983). Jurisdiction was invoked under 28 U.S.C. § 1257(3), the state claiming that the defendants had set up a violation of the United States Constitution in the courts below. Whether federal jurisdiction truly existed became a substantial issue in the defendant's case. *See infra* notes 185-187 and accompanying text.

138. Petitioner's Brief on Reargument, Illinois v. Gates, 103 S. Ct. 2317 (1983).

The State's Case

Illinois first claimed that the magistrate's determination of probable cause was proper — that the facts and circumstances before him had been sufficient to lead a prudent person to believe that illegal drugs were in the Gates' car and home.[139] In support of this argument, the State relied on the anonymous letter and police corroboration of the tip. The letter, it was claimed, described the Gates' activities "in detail," describing the defendants by name. The "detail" relied on was, in essence, merely a repetition of the contents of the letter. The State characterized the tipster as "an ordinary citizen who volunteered his information"[140] with no financial incentive to fabricate accusations. In support of its claim of corroboration, the State pointed to the following facts contained in the letter which were verified: the Gates' address, the fact that Lance Gates flew to Florida on May 5, that upon arrival he went to a room registered to his wife, and the circumstances of the Gates' departure the next day.[141] The State also claimed that the affidavit was sufficient under *Aguilar* and *Spinelli*.[142] Finally, the State asserted that *Aguilar*'s two-prong test should be overruled and the Court should "return" to the rule of *Jones v. United States*[143] — that probable cause could be founded on hearsay as long as there existed a "substantial basis" for crediting the hearsay.[144] The State referred to this as the "traditional standard,"[145] claiming that *Aguilar*'s two-pronged analysis in many instances proved "unworkable",[146] was often disregarded by the courts,[147] and served

139. Petitioner's Opening Brief on Merits at 7-8, Illinois v. Gates, 103 S. Ct. 2317 (1983).

140. *Id.* at 8-9.

141. *Id.* at 9. The state also noted that the circumstances revealed by the investigation lent reliability to the tip. *Id.*

142. *Id.* at 16-17. The state claimed that the facts presented were more like *Draper* than *Aguilar* and *Spinelli* — that the search warrant was more detailed, the corroboration more extensive and the surrounding circumstances more reliable indicia of probably cause than in *Aguilar* and in *Spinelli*. The veracity prong of *Aguilar* was met because of police corroboration and because the "citizen informant" was without any motive to lie. *Id.* at 17-21. The basis of knowledge prong was met by the "detail" of the informant's letter and police corroboration.

143. 362 U.S. 257 (1960). For a discussion of *Jones*, *see supra* notes 11-14 and accompanying text.

144. Petitioner's Opening Brief on the Merits at 24-25, Illinois v. Gates, 103 S. Ct. 2317 (1983).

145. *Id.* at 24-26.

146. For example, a citizen informer who had never given tips in the past could not meet the veracity prong. Further, the basis of knowledge prong posed difficulties because witnesses often express themselves in conclusory terms.

147. In support of this, the state cited Adams v. Williams, 407 U.S. 143 (1972); Chambers v. Maroney, 399 U.S. 42 (1970); Jaben v. United States, 381

to confuse the police.[148] Accordingly, the State urged the Court to "return" to the prior, more practical and nontechnical rule of *Brinegar*[149] and *Jones*,[150] under which all hearsay is "admissible," its weight to be determined by the facts and circumstances of each particular case.[151]

In reply, the respondents argued that *Aguilar* should not be overruled and was merely a refinement of both *Draper v. United States* and *Jones*.[152] In support, the respondents traced the evolution of hearsay as it relates to probable cause and contended that the affidavit failed to meet the veracity prong of the *Aguilar* test. Second, it was claimed that the Court should either remand the case to the Illinois Supreme Court for clarification or dismiss the certiorari petition as having been improvidently granted because the record below did not indicate whether the decision of the Illinois Supreme Court was based on the United States Constitution, the Illinois Constitution, or both.[153] In essence, the respondents were claiming that there may have been an independent and adequate state ground for the findings of the Illinois Supreme Court.[154] It was in this posture that oral arguments were first had before the Court in October of 1982. Round two began the next month, when the parties were requested to address the good-faith issue.

In support of the good-faith exception, the State pointed to instances in which the exclusionary rule had been invoked although its deterrence rationale was not applicable because of

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U.S. 214 (1965). Petitioner's Opening Brief on the Merits at 24, Illinois v. Gates, 103 S. Ct. 2317 (1983).

148. Petitioner's Opening Brief on the Merits at 28-29, Illinois v. Gates, 103 S. Ct. 2317 (1983).

149. Brinegar v. United States, 338 U.S. 160 (1949), cited for the proposition that probable cause deals with probablities, not technicalities.

150. 362 U.S. 257 (1960).

151. Petitioner's Opening Brief on the Merits at 24-31, Illinois v. Gates, 103 S. Ct. 2317 (1983).

152. Brief for the Repsondents at 7-8, Illinois v. Gates, 103 S. Ct. 2317 (1983).

153. *Id.* at 24-27.

154. *See* California v. Krivda, 409 U.S. 33 (1972). The respondents cited People v. Martin, 70 Ill. App. 3d 36, 388 N.E.2d 278 (1979), for the proposition that there existed a state standard of probable cause. Also relied on was ILL. REV. STAT. ch. 38, § 114-12(a)(2) (1979), which permits a defendant to challenge an unlawful search or seizure and to suppress any evidence on the ground that probable cause did not exist for the issuance of the search warrant.

The respondent's final argument was that many of the cases relied on by the state were inapplicable to the instant case because they involved *warrantless* arrests and searches and were distinguishable on other facts. Brief for the Respondents at 27-30, Illinois v. Gates, 103 S. Ct. 2317 (1983).

the absence of police misconduct.[155] The State claimed that, to avoid such unjust results, a magistrate's reasonable determination of probable cause should not be overturned on a motion to suppress when the reviewing judge is of the opinion that the magistrate was mistaken.[156] In such cases, the deterrence rationale is simply not served.[157] By the time of the motion to suppress, the fourth amendment violation is complete. The proper inquiry, then, is whether deterrence of future police misconduct would be served by suppression. When police have acted reasonably, the State argued, suppression can only keep probative, reliable evidence from the trier of fact.[158] Finally, the State once again urged a "return" to the previous standard of *Brinegar* and *Jones*.[159]

On reargument, the respondent's first, and perhaps most persuasive, argument was that the judgment below was supported by an independent and adequate state ground. Thus, the case at bar did not present the proper occasion to consider whether the federal exclusionary rule should be modified.[160] The respondents noted that the Illinois Supreme Court cited both the fourth amendment to the United States Constitution and article I, section 6 of the Illinois Constitution. In 1923, Illinois adopted an exclusionary rule in *People v. Brocamp*,[161] almost forty years before the federal equivalent was applied to the states in *Mapp v. Ohio*.[162] Although the Court in *Wolf v. Colo-*

155. *See, e.g.*, People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971) (complaint did not show probable cause for search warrant); People v. Palanza, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978) (information for search warrant was not proven credible); People v. Davenport, 19 Ill. App. 3d 426, 311 N.E.2d 751 (1974) (affidavit insufficient to allow for search warrant); Bridger v. State, 503 S.W.2d 801 (Tex. 1974) (hearsay information must prove more than suspicion to obtain search warrant).

156. Petitioner's Brief on Reargument at 11, Illinois v. Gates, 103 S. Ct. 2317 (1983).

157. The state also claimed that neither is the judicial integrity rationale served, for the same reasons. It characterized this as meaning simply that a court should not encourage violations of constitutional rights. *Id.* at 14.

158. Petitioner's Opening Brief on the Merits at 29, Illinois v. Gates 103 S. Ct. 2317 (1983), *citing*, Stone v. Powell, 428 U.S. 465, 540 (1946) (White, J., concurring).

159. Petitioner's Opening Brief on the Merits at 16-18, Illinois v. Gates, 103 S. Ct. 2317 (1983).

160. Respondents' Brief on Reargument at 6-10, Illinois v. Gates, 103 S. Ct. 2317 (1983).

161. 307 Ill. 448, 138 N.E.728, 732 (1923). The Illinois Supreme Court stated, "[our] holding is that the unlawful search and seizure aforesaid violates the provision of our [Illinois] *State Constitution*." (emphasis added) *See also* People v. Perry, 1 Ill. 2d 482, 116 N.E.2d 360 (1953); People v. Castree, 311 Ill. 392, 142 N.E. 112 (1924).

162. 367 U.S. 643 (1961). In fact, Illinois adopted the rule before Wolf v. Colorado, 338 U.S. 25 (1949), in which the fourth amendment was made

rado[163] refused to apply the exclusionary rule to the states, the respondents pointed out, the Illinois Supreme Court refused to follow *Wolf* and abandon the State exclusionary rule.[164] The Illinois courts are free, the respondents contended, to impose a higher standard on searches and seizures than that required by the Federal Constitution.[165] Finally, the respondents claimed that the record below was insufficient to determine whether the police or magistrate acted in good faith.[166]

As for the good-faith exception itself, the respondents' argument was that its adoption would dilute the deterrent purpose of the exclusionary rule as well as the law of probable cause.[167] While acknowledging other exceptions to the rule,[168] the respondents characterized a good faith exception as qualitatively different — no other exception abolished the constitutional mandate of probable cause to search.[169]

It was pointed out by the respondents that the fourth amendment by its terms prohibited "unreasonable" searches — a "reasonable mistake" exception was therefore illogical.[170]

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binding on the states, but the court declined to apply the exclusionary rule to the states.

163. 338 U.S. 25 (1949).

164. *See* City of Chicago v. Lord, 7 Ill. 2d 379, 130 N.E.2d 504 (1955) (noting that the Illinois exclusionary rule rests on "state and federal constitutional consideration").

165. Respondents' Brief on Reargument at 10, Illinois v. Gates, 103 S. Ct. 2317 (1983), *citing*, Cooper v. California, 386 U.S. 58, 62 (1967). *See also*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (detailed discussion of state's rights).

166. Respondents' Brief of Reargument at 11, Illinois v. Gates, 103 S. Ct. 2317 (1983). The respondents also argued that the State had waived the issue of good faith by failing to raise it in the courts below. *Id.*

167. *Id.* at 16-47.

168. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule not applicable in grand jury proceedings).

169. Respondents' Brief on Reargument at 21, Illinois v. Gates, 103 S. Ct. 2317 (1983).

170. *Id.* at 32-33. In support, respondent quoted the following testimony:

> In short, the fourth amendment already has a reasonableness requirement in it. When the courts say that a search was no good, or a pat down was no good, they are telling the police officer, 'You acted unreasonably,' The objective standard, a reasonable police officer under those circumstances would have known that this was not sufficient for a pat down, it was not sufficient for a stop, it was not sufficient for a full search. That is what the fourth amendment says against unreasonable searches and seizures. *The Exclusionary Rule Bills: Hearings on S. 101, S. 751 and S. 1995 Before the Subcommitte on Criminal Law of the Senate Committee on the Judiciary*, 97th Cong., 1st Sess. 152 (1981) (testimony of Leon Friedman) [hereinafter *Hearings*]. Similarly, another commentator warns:
>
> > Inclusion of the reasonableness prong in the good faith test is, in fact, somewhat ironic given that the fourth amendment proscription is itself couched in the language of reasonableness. Where a

Moreover, under the facts of the case, the "mistake" could not be characterized as reasonable.[171] To adopt a good faith or reasonable belief exception would make warrants unreviewable by a neutral and detached magistrate — the decision to search, respondents warned, would be entirely within the discretion of law enforcement personnel. As for the deterrence function of the rule, the respondents pointed out:

> Much of the discussion of deterrence and police conduct in the briefs of Petitioner and supporting *amici* totally fails to comprehend that the law of search and seizure must apply to *institutions*, not just to individuals. Particularly in a warrant setting, a search is likely to involve a chain of individual officers who are involved in the investigation, the application for a warrant, and the actual conduct of the search. In short, warrant searches are institutional actions. It makes no sense to try to judge the 'good faith,' 'reasonableness' or 'good conduct' of such institutional actions by looking only to the behavior of a single officer.[172]

> court applying the good faith test holds that an officer's erroneous belief was reasonable, the court will in effect be suggesting that either (1) it is permissible for an officer to be ignorant of certain portions of the fourth amendment, or (2) it is permissible for an officer to use less than his best judgment, perception, or efforts in seeking to comply with fourth amendment requirements. In other words, all that is required of officers is a reasonable good faith attempt to conform to the law. This sounds reasonable — until, of course, one considers extending the same innocuous language to other areas like legislators and the first amendment, or to defendants in antitrust cases.

Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY, 875, 897-98 (1982)(footnotes omitted).

171. On this point, the respondents stated that it was unreasonable to base a warrant on a tip of unknown origin or reliability and the police corroboration was of entirely innocent activity. Thus, there was misconduct on the objective, *malum prohibitum* standard. The lack of intensive investigative efforts by police belied the State's claim that no intentional misconduct occurred. The respondents also questioned the propriety of an objective standard which would disallow an inquiry into the actual good faith of the police. Respondents' Brief on Reargument at 22-31, 43-47, Illinois v. Gates, 103 S. Ct. 2317 (1983).

172. *Id.* at 47-48. *See also The Exclusionary Rule Bills: Hearings on S-101, S. 751 and S. 1995 Before the Subcommittee on Criminal Law of the Senate Judiciary*, 97th Congress, 1st Session 329, 793-974 (1981) [hereinafter cited as *Senate Hearings*], particularly the following testimony of Professor W. LaFave:

> To apply the exclusionary rule when an individual officer oversteps his bounds but not when the violation of the fourth amendment is caused by systemic defects, it seems to me, would be to turn the fourth amendment on its head.

Justice Stevens noted this point in his concurring opinion in Dunaway v. New York, 442 U.S. at 221:

> The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole — not the aberrant individual officer — to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional

The respondents then turned to the heart of the good-faith argument—were the costs of the exclusionary rule greater than its benefits? Empirical studies were cited to the contrary—most motions to suppress were found to be in nonviolent, possessory crimes, *i.e.*, drugs, gambling, pornography.[173] For example, one study of the impact of the exclusionary rule in federal prosecutions indicated evidence was excluded in only 1.3% of 2,804 prosecutions, only half of which resulted in dismissals, mostly of drug prosecutions.[174] This portion of the respondent's brief con-

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rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

See also Justice Harlan's insightful opinion in Whitely v. Warden, 401 U.S. 560 (1971). In *Whiteley*, this Court flatly rejected the idea that the good faith-reasonable belief of the arresting officer at the end of a chain of police information was relevant when police at the earlier stages in the chain had acted unlawfully and without probable cause. The Respondents argued that the same analysis should apply to warrants that were obtained on less than probable cause. It is *irrelevant* whether the officer executing a warrant acts with good faith if the officer who applied for it acted without probable cause. Respondents' Brief on Reargument at 47-48, Illinois v. Gates, 103 S. Ct. 2317 (1983).

173. Early studies seeking to assess the impact of the exclusionary rule found that the large bulk of motions to suppress evidence were concentrated in narcotics, weapons and gambling cases, and that there was a negligible level of successful motions to suppress in serious, violent crime. For example, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 686-87 (1970), reports 1965 data for Washington, D.C., showing that successful motions to suppress were made in only 1% of all other felonies.

More recently, two major studies by the Institute for Law and Social Research (INSLAW) have found that the exclusionary rule combined with suppression due to violations of other due process rights, results in only minimal levels of rejections of complaints by prosecutors or dismissals by courts. M. FORST, WHAT HAPPENS AFTER ARREST, 67-68 (1977), reports that in the District of Columbia less than 1% of all potential prosecutions were rejected by prosecutors and less than 2% of all prosecutions were dismissed by courts based on all due process violations, including illegal searches. A later multi-city study, Kathleen Brosi, *A Cross-City Comparison of Felony Case Processing* (1979), examined felony cases in four cities and concluded that the exclusionary rule has "little impact on the overall flow of criminal cases after arrest." She found that rejections by prosecutors in potential victimless crime categories for due process reasons, including illegal searches, ranged from only 2% to 4% in three cities and reached 9% in one. *Id.* at 16, Table 2.

174. This study was conducted by the Comptroller General of the United States, Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 11, 13, 14 (1979). Only 0.4% of cases studies declined by prosecutors were rejected because of illegally seized evidence. Of 520,993 felony complaints referred to California district attorneys, only 0.8% were rejected on fourth amendment grounds. National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* (Dec. 1982) [hereinafter *NIJ Report*].

The Bureau of Criminal Statistics data also shows that no murder prosecutions and only 0.096% of forcible rape prosecutions, 0.057% of robbery prosecutions, and 0.131% of assault prosecutions were rejected for illegal searches. *See* Davies, *Do Criminal Due Process Principles Make a Differ-*

cluded with the respondents characterizing the costs of lost convictions not simply as the costs of the exclusionary rule, but more fundamentally, the costs of police illegality:[175]

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.[176]

As a corollary to the foregoing, the respondents claimed that the limited costs of the rule were not disproportionate to the value of the fourth amendment and the deterrent benefits of the rule.[177] The respondents' final argument was that, if any modifi-

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ence?, 1982 AM. F. RES. J. 247, 267. Comparison of the actual number of the rejected prosecutions in each crime category reported by Davies with the numbers in the *NIJ Report*, *supra*, at 12, Table 3, shows the same negligible effect on violent crimes. *See generally*, Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment*, 62 *Judicature* 66 (1978). *See also* Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, I *Criminal Justice Ethics*, 28.30 (1982); Wilson, *The Evidence is In — Can We Use It?*, Washington Post, Oct. 21, 1981, at A-27, col. 2: "[I]t would be a mistake, I think, to argue that the rule has contributed materially to the increase in crime. Very few prosecutions for the kinds of crime we most fear — mugging, burglaries, robberies — involve searches that might be challenged as unreasonable . . . ."

175. Respondents' Brief on Reargument at 53, Illinois v. Gates, 103 S. Ct. 2317 (1983).

176. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

177. Respondents' Brief on Reargument at 54, Illinois v. Gates, 103 S. Ct. 2317 (1983). Professor Yale Kamisar was cited for the observation that:

> At the same time some critics of the exclusionary rule are urging its elimination or substantial modification on the ground, *inter alia*, that it has had little if any effect on police behavior and little if any impact on the amount of pre-*Mapp* illegality, other critics are calling for the rule's repeal or revision on the ground, *inter alia*, that in recent years the police have attained *such a high incidence of compliance with Fourth Amendment requirements* that 'the absolute sanctions of the Exclusionary Rule are no longer necessary to police them.' Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment*, 62 JUDICATURE 66, 72-73 (1978).

Respondents' Brief on Reargument at 54, n.24, Illinois v. Gates, 103 S. Ct. 2317 (1983). *See also* Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, I CRIMINAL JUSTICE ETHICS, 28.30 (1982); Senate Hearings, *supra* note 174 at 808 (testimony of Judge Herbert Stern); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307, 343 (1982).

Also cited was Chief Justice Burger's warning regarding the deleterious consequences of any overruling of the exclusionary rule:

> In a sense, our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming the Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases.

cation to the exclusionary rule was adopted, it should be applied prospectively.[178] Oral arguments on the second set of briefs were heard in March of 1983, but it was not until June that the United States Supreme Court handed down the decision.

United States Supreme Court

When the Court's decision in *Gates*[179] came down in June, 1983, those awaiting a resolution to the good faith debate were somewhat disappointed when the Court expressly decided to forego the issue entirely.[180] Instead, the Court adopted a less restrictive test for determining the validity of affidavits for search warrants based on informant's tips. The majority opinion, written by Justice Rehnquist, was joined by Chief Justice Burger and Justices Blackmun, Powell and O'Connor.[181] Justice White wrote a separate concurring opinion.[182] Two separate dissents were filed — one by Justice Brennan, in which Justice Marshall joined, and the second by Justice Stevens, in which Justice Brennan joined.[183]

As for the good-faith issue, the majority declined to consider it on the ground that it was "not pressed or passed upon below" in the Illinois courts and thus not within the purview of the Supreme Court's certiorari jurisdiction.[184] The relevant statute, 28 U.S.C. § 1257(3), which derives from section 25 of the Judiciary Act of 1789, provides that the Court has certiorari jurisdiction from final judgments of the highest state court when a federal question is presented.[185] Section 25 of the Judiciary Act,

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Bivens v. Six Unknown Agents, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting). Respondents submitted that precisely the same warning applied to a "wholesale good faith" exception. Respondent's Brief on Reargument at 59-60, Illinois v. Gates, 103 S. Ct. 2317 (1983).

178. Respondents' Brief on Reargument at 60-66, Illinois v. Gates, 103 S. Ct. 2317 (1983). *See* United States v. Johnson, 457 U.S. 537, 548-50 (1982); United States v. Peltier, 422 U.S. 531 (1975); Stovall v. Denno, 388 U.S. 293, 297 (1967).

179. Illinois v. Gates, 103 S. Ct. 2317 (1983).

180. *Id.* at 2321.

181. *Id.* at 2320.

182. *Id.* at 2326 (White, J., concurring).

183. *Id.* at 2351 (Brennan, J., dissenting); *Id.* at 2360 (Stevens, J., dissenting).

184. *Id.* at 2321.

185. The relevant portion of the statute reads:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows . . .(3) By writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of the United States.

28 U.S.C. § 1257(3) (1976). This provision is derived from the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85.

the Court noted, has been interpreted to mean that certiorari jurisdiction does not exist unless the federal question was either raised or decided in the state court.[186] Whether this rule was prudential or jurisdictional was not decided.[187]

In *Gates*, the relevant aspect of the "not pressed or passed upon below" rule was to what extent the federal question must have been raised or decided in the state court. Some cases involve a federal question which is only an "enlargement" of an argument or so connected in substance with an issue raised below that the rule is satisfied.[188] The Court stated that although the fourth amendment issue was argued at every level of the state proceedings, "[t]he state never . . . raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered."[189] Accordingly, the Court refused to treat the good-faith exception as a mere "enlargement" of the fourth amendment issue. The Court also noted that, although this case involved the failure to raise a defense to a federal right considered below, rather than the failure of a proponent to assert a federal claim, the underlying justifications for the rule required that the same result be obtained.[190] Lastly, because of the great significance of the good-faith issue and the need for an adequate factual record, the Court found even greater justification for a strict construction of the "pressed or passed upon below" rule.[191]

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186. Crowell v. Randall, 35 U.S. (10 Pet.) 368, 391 (1836). The rule is not so strictly interpreted as to require that the federal claim be both raised and decided below — either is sufficient. *See* Illinois v. Gates, 103 S. Ct. 2317, 2321, n.1 (1983).

187. Illinois v. Gates, 103 S. Ct. at 2322. The jurisdictional character of the "not pressed or passed upon" is found in Hill v. California, 401 U.S. 797, 805-806 (1971) and State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154, 160 (1945). The rule was treated as prudential in nature in Vachon v. New Hampshire, 414 U.S. 478 (1974) and Terminiello v. Chicago, 337 U.S. 1 (1949).

188. Illinois v. Gates, 103 S. Ct. at 2322 (1983).

189. *Id.* The good faith exception was never subject to any "real contest" below and was found to be a separate issue from the substantive fourth amendment claim previously argued. *Id.* at 2323-24.

190. *Id.* at 2323. This was the first case before the Supreme Court in which the rule was applied in such circumstances. There are three justifications put forth for the "not pressed or passed upon below" rule. First, it is likely that, in a case where the rule applies, the record on the federal issue will be inadequate. Second, the federal courts should defer to the state courts to give them the opportunity to consider the constitutionality of the state officials' actions. Finally, the rule gives state courts the chance to decide the case on an independent and adequate state ground. *Id.*

191. *Id.* at 2325: "The public importance of our decisions in *Weeks* and *Mapp* and the emotions engendered by the [good faith] debate surrounding these decisions counsel that we meticulously observe our customary procedural rules." The references to "prudential" and "procedural" in this

Finally, the majority turned to the issue of "whether respondents' rights under the fourth and fourteenth amendments were violated by the search of their car and house."[192] The Court reviewed the facts[193] and agreed with the Illinois Supreme Court that the anonymous letter itself could not provide a basis for the magistrate's finding of probable cause.[194] The majority disagreed, however, with the method by which the Illinois Supreme Court determined that police corroboration was also insufficient — the *Aguilar* and *Spinelli* test. The Court stated,

> "[w]e agree with the Illinois Supreme Court that an informant's 'veracity', 'reliability' and 'basis of knowledge' are all highly relevant — We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."[195]

In lieu of the two-pronged *Aguilar* test, the Court adopted a "totality of the circumstances" approach.[196] The Court justified the approach by stating that the standard for probable cause is a "practical, nontechnical conception",[197] to be determined in common sense terms as understood by law enforcement personnel, not by legal scholars.[198] Rigid legal rules are poorly suited to test a fluid, diverse concept such as probable cause.[199] Further, instead of an independent consideration of veracity and basis of knowledge, the two prongs should be treated as "relevant considerations" in determining probable cause, so that a deficiency in one prong may be cured by a strong showing in the other.[200] The Court also stated that, because affidavits are often prepared by non-attorneys and warrants issued by lay persons, the legal requirements for their sufficiency should not be over-

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portion of the opinion indicate that, at least under the facts presented in *Gates*, the "not pressed or passed upon below" rule is not jurisdictional. *Id.*

192. *Id.* at 2325.

193. The Court characterized the address supplied by the confidential informant at Mader's request as a "more recent address." *Id.* There is nothing in the record though to indicate it was any more than a *different* address than that first given by the anonymous tipster.

194. *Id.* at 2326. The Court noted that neither the informant's reliability or basis of knowledge was supplied in the letter. *Id.*

195. *Id.* at 2327-28.

196. *Id.* at 2328.

197. *Id.*, *quoting*, Brinegar v. United States, 338 U.S. 160, 176 (1949).

198. *Id.*

199. *Id.*

200. *Id.* at 2329. The Court cited as an example that an informant may be so well known for reliable tips that failure to specify his basis of knowledge in one case should not be fatal. *Id.*

technical.[201] In keeping with this elastic approach and in light of the fourth amendment's preference for searches conducted pursuant to a warrant, review of a search warrant should not be *de novo*. The Court reiterated that the reviewing court should only determine whether the magistrate had a "substantial basis" for believing that a search would reveal contraband.[202]

The majority's final justification for abandoning the *Aguilar* approach was of a practical nature— the strictures of such a rigid standard might seriously impede the law enforcement process.[203] Anonymous tips would be of little help to police because most "ordinary citizens" do not satisfy the basis of knowledge requirement and their veracity is often unknown.[204] Citing pre-*Aguilar* cases and apparently rejecting the respondents' contention that *Aguilar* was merely a refinement of, rather than departure from, earlier law,[205] the Court went on to discuss the boundaries of the "totality of the circumstances" standard which it characterizes as the "traditional" analysis.[206]

Finally, the majority discussed the importance of police corroboration of an informant's tip in determining whether the "totality of the circumstances" amounts to probable cause.[207] The majority cited *Draper v. United States*[208] as "the classic case on the value of corroborative efforts of police officials"[209] and compared the facts of *Draper* to those in *Gates*. The Court concluded that "[t]he showing of probable cause in the present case was fully as compelling as that in *Draper*."[210] The investigations of Detective Mader and the DEA suggested the Gates'

201. *Id.* at 2330.

202. *Id.* at 2331, *citing*, Jones v. United States, 362 U.S. 257, 271 (1960).

203. *Id.* at 2331-32.

204. *Id.*

205. *Id.* at 2332. For this the Court cited United States v. Ventresca, 380 U.S. 102 (1965); Jones v. United States, 362 U.S. 257 (1960); Brinegar v. United States, 338 U.S. 160 (1949).

206. Respondent's Brief at 7, Illinois v. Gates, 103 S. Ct. 2317 (1983). The majority's concept of what constitutes a "totality of the circumstances" is somewhat unclear. More than a sworn statement of an affiant that "he has cause to suspect and does believe" that contraband exists in a certain place is required, *see* Nathanson v. United States, 290 U.S. 41 (1933), nor will an affidavit such as that at issue in Aguilar v. Texas, 378 U.S. 108 (1964), suffice. Just what is enough, however, was not clarified: "But when we move beyond the 'bare bones' affidavits presented in cases such as *Nathanson* and *Aguilar*, this area simply does not lend itself to a prescribed set of rules, like that which had developed from *Spinelli*." Illinois v. Gates, 103 S. Ct. 2317, 2332-33 (1983). The majority pointed out that *Spinelli* could very well have been wrongly decided. *Id.* at 2332 n.11.

207. *Id.* at 2334-35.

208. 358 U.S. 307 (1959).

209. 103 S. Ct. 2317, 2334 (1983).

210. *Id.* at 2334.

involvement in drug trafficking.[211] The court also found that other facts suggested a "pre-arranged drug run."[212] In addition to these circumstances, the majority found that the magistrate also could have relied on the anonymous letter, corroborated "in major part" by Detective Mader's investigative efforts.[213] As for the lack of information regarding the tipster's reliability, the Court concluded that this factor paled in significance after independent police investigations corroborated the letter's predictions.[214] The Court further concluded that the letter's detail, especially the "accurate information" regarding the Gates' travel plans, indicated that the letter was reliable.[215] The majority acknowledged that the letter also failed to meet the basis of knowledge test but that police corroboration cured this defect as well.[216] Furthermore, police corroboration created a "fair probability" that the tipster got his information from a reliable source.[217]

In his concurring opinion, Justice White contended that the good-faith exception was properly before the Court, and should be applied in this case.[218] In his view, the good-faith issue was embraced by the fourth amendment claim and therefore was "pressed or passed upon below."[219] Like the exclusionary rule, "the issues surrounding a proposed good faith modification are intricately and inseverably tied to the nature of the fourth

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211. *Id.* at 2334-35.

212. *Id.* The facts which the Court found to suggest a prearranged drug run were Lance Gates's flight to Florida, his brief one-night motel stay and return next day north to Chicago in a family car which was "conveniently" awaiting him in West Palm Beach. *Id.* at 2334.

213. *Id.* at 2334-35.

214. *Id.* at 2335. The Court did note that the lack of reliability was significant at the time the letter was received by the Bloomingdale Police. The corroboration cited included the presence of the Gates' car in Florida, the fact that Lance Gates would be in Florida and would drive north toward Bloomingdale. All these details indicated to the Court that the informant was probably reliable. *Id.* In support, Justice White's concurring opinion from *Spinelli* was quoted: "[b]ecause an informant is right about some things, he is more probably right about other facts." *Id.*, *citing*, Spinelli v. United States, 393 U.S. at 427. The *Gates* Court's treatment of corroboration of innocent details is discussed *supra* notes 168-174 and accompanying text.

215. Illinois v. Gates, 103 S. Ct. at 2335. Such information was significant because it could only be obtained from the Gates' themselves or a close associate. To call all of this "accurate" is disputable. The tipster was in error when he or she stated that Susan Gates would fly home from Florida when, in fact, she drove home with her husband. The majority noted this inaccuracy, *Id.* at 2335-36 n.14, but found it relatively insignificant.

216. *Id.*

217. *Id.* at 2336. Thus, contrary to *Stanley v. State*, a lack of facts in the affidavit regarding the informant's basis of knowledge can be cured by police corroboration. *Id. See supra* notes 28-31 and accompanying text.

218. *Id.* at 2336 (White, J., concurring).

219. *Id.* at 2337.

amendment violation."[220] Justice White went on to consider the propriety of a good faith exception and in a traditional "reason for the rule" analysis, urged its adoption.[221] He concluded his concurrence by analyzing the warrant under *Aguilar* and *Spinelli* and found, in his view, that the warrant was also valid under this approach.[222]

Justice Brennan dissented based on two grounds—that the warrant was invalid even under the "totality of the circumstances" standard and that the *Aguilar* and *Spinelli* test should be retained.[223] In support of the second ground, Justice Brennan reviewed the development of the use of hearsay to supply probable cause for the issuance of a warrant stating that the relevant case law stood for a single proposition: "[F]indings of probable cause, and attendant intrusions, should not be authorized unless there is some assurance that the information on which they are based has been obtained in a reliable way by an honest or credible person."[224] There is a need to structure this inquiry and this need, the dissent argued, was fulfilled by the two-prong test.[225] Justice Brennan pointed out that all but one of the cases relied on by the majority were decided before *Aguilar* and that none of them was inconsistent with *Aguilar*.[226] Justice Brennan criticized the majority opinion for failing to lend importance to the value of reliable, credible information as a basis for probable cause.[227] Justice Brennan expressed a fear, shared by Justice White, that the rejection of *Aguilar* portends

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220. *Id.* at 2338. Justice White characterized the majority's holding that a magistrate have only a "substantial basis" for finding probable cause was itself merely a "variation of the good faith theme." *Id.* Nor was he persuaded by the Court's rationale on this issue. *Id.*

221. *Id.* at 2340. Justice White's treatment of the good-faith issue is discussed in full, *supra* notes 219-220 and accompanying text, in connection with three cases on review before the Supreme Court in the October 1983 term. It is likely at least one of these cases will finally dispose of this question. *See* United States v. Leon, 701 F.2d 187 (9th Cir. 1983), *cert. granted*, 103 S. Ct. 3535 (1983); Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983); People v. Quintero, — Colo. — 657 P.2d 948 (1983), *cert. granted*, 103 S. Ct. 3535 (1983).

222. 103 S. Ct. 2317, 2350-51 (1983) (White, J., concurring).

223. *Id.* at 2351-57 (Brennan, J., and Marshall, J., dissenting.).

224. *Id.* at 2357-58.

225. *Id.* at 2358. The *Aguilar-Spinelli* test, Brennan claimed, served to inform police and magistrates of the type of information they should demand in the warrant process. Also, it informed the magistrate of his proper role in determining whether probable cause exists. This, therefore, will ensure the function of the magistrate as a neutral and detached arbiter of probable cause. *Id.*

226. *Id.* at 2357. Brennan argued that the "practical, nontechnical" concept of probable cause advanced by the majority was indeed advanced by the two-prong test. *Id.* at 2359.

227. *Id.*

an erosion of the probable cause standard.[228]

The second dissent, by Justice Stevens, asserted that, as to the search of the car, the majority should have vacated the judgment of the Illinois Supreme Court and remanded the case for reconsideration in light of the United States Supreme Court's decision in *United States v. Ross*.[229] Justice Stevens also argued that the search of the house was without probable cause.[230] Of particular importance to Justice Stevens was the informant's misdescription of Susan Gates' travel plans.[231] Justice Stevens interpreted this discrepancy as casting doubt on the letter as a whole.[232]

THE EFFECT OF *GATES* ON FOURTH AMENDMENT JURISPRUDENCE

The fourth amendment guarantees individuals the right to be "secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause."[233] The essential protection of the warrant requirement is that probable cause to issue a warrant must be determined by a neutral and detached magistrate[234] and not by law enforcement personnel "engaged in the often competitive enterprise of ferreting out crime."[235] To ensure the independence of the magistrate and the constitutional

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228. *Id.* The dissent concluded with this dire prediction:

> By replacing *Aguilar* and *Spinelli* with a test that provides no assurance that magistrates, rather than the police, or informants, will make determinations of probable cause; imposes no structure on magistrates' probable cause inquiries; and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person, today's decision threatens to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

Id. (citation omitted).

229. *Id.* at 2361-62. (Stevens, J., dissenting).

230. *Id.* at 2361.

231. *Id.* at 2360-61. This "material" discrepancy was determined to be important for three reasons: (1) it cast doubt on the prediction regarding the amount of drugs in the Gates' home; (2) it made the Gates' conduct appear less unusual; and (3) it made the letter itself less reliable. Justice Stevens' dissent noted that the critical time for determining the existence of probable cause was upon the issuance of the warrant, so that the fact that the Gates' drove all night and had marijuana in their car was irrelevant. *Id.* at 2361 n.6.

232. *Id.* at 2360.

233. U.S. CONST. amend. IV. The fourth amendment rights have been characterized as belonging "in the catalog of indispensable freedoms . . . . Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

234. *See* Illinois v. Gates, 103 S. Ct. at 2351-53 (Brennan, J., dissenting).

235. Johnson v. United States, 333 U.S. 10, 14 (1947).

mandate of probable cause, the courts developed the requirement that magistrates be provided with the underlying facts and circumstances that support the officer's conclusions that criminal activity is afoot.[236] Pursuant to this requirement, the body of law relating to hearsay affidavits for search warrants developed. When an officer provided the magistrate with objective data establishing a hearsay informant as credible and his information as reliable, the magistrate *himself* was able to determine whether probable cause exists.[237] This determination did not depend on the mere conclusion of an overly zealous police officer or his informant, whose motivation may also be questionable.[238]

One must examine the Supreme Court's holding in *Gates* with the foregoing concerns in mind because the Court's abandonment of *Aguilar* and *Spinelli* cannot constitutionally be read as an abandonment of the requirement of a neutral, detached, and independent magistrate. The majority agreed with the Illinois courts that the letter itself failed to establish probable cause.[239] It was the investigative efforts of the police that brought the affidavit up to constitutional standards.[240] The Court stated that *Draper* was the benchmark by which the Court measured the value of the police investigation and it concluded that "the showing of probable cause in . . . [*Gates*] was fully as compelling as that in *Draper*."[241]

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236. Illinois v. Gates, 103 S. Ct. at 2352 (Brennan, J., dissenting).

237. *See, e.g.*, Giordenello v. United States, 357 U.S. 480 (1958).

238. Aguilar v. Texas, 378 U.S. 108, 113-15 (1964).

239. Illinois v. Gates, 103 S. Ct. 2317, 2326 (1983). The Court concluded "[t]he letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities." *Id.*

240. *Id.* at 2334. The corroboration alone, the Court noted, "at least suggested that the Gates were involved in drug trafficking," noting that Florida was a well-known source of drugs and Lance Gates's travel plans which were "as suggestive of a prearranged drug run, as . . . of an ordinary vacation trip." *Id.*

241. *Id.* According to the majority, the *Draper* tip might not have met the two-pronged test. *Id.* at n.12. Courts have struggled with reconciling *Draper* with *Spinelli* because in *Draper* the tip did not indicate the informant's basis of knowledge, although the informant was established as reliable. Draper v. United States, 358 U.S. 307, 309 (1959). Further, portions of the *Spinelli* opinion indicated that police must corroborate activity that suggests illegal, rather than merely innocent, conduct. Spinelli v. United States, 393 U.S. 410, 418 (1969). Nevertheless, the detail of the tip in *Draper*, was interpreted in *Spinelli* to satisfy the basis of knowledge prong. *Id.* at 417 (detail enabled magistrate to infer that "the informant had gained his information in a reliable way") One commentator suggested that *Draper* and *Spinelli* could be reconciled by adopting a three-part analysis which recognizes the following: (1) Tips from confidential informants are presumptively more reliable than those from anonymous tipsters; (2) Specific

The Court's reliance on *Draper* is subject to substantial criticism. The majority refused to distinguish *Draper* on the ground that the *Draper* informant[242] had been a special employee of the Bureau of Narcotics, had given reliable information on several occasions in the past,[243] and was therefore unquestionably reliable. The *Gates* Court also failed to recognize that the tip in *Draper* was far more specific than the anonymous letter in *Gates*.[244] The *Draper* informant supplied a highly detailed description of the suspect, including his dress and style of walking.[245] The detail in the *Draper* tip, Justice Harlan wrote in *Spinelli*, satisfied the basis of knowledge requirement because it enabled the magistrate to infer that "the informant had gained his information in a reliable way."[246] Conversely, the *Gates* letter was far more general and failed to supply even an address or physical description of the suspects.[247]

Draper differs from *Gates* in the extent of police corroboration as well. In *Draper*, every detail of the tip was corroborated by police investigation except the ultimate fact — whether the suspect possessed heroin.[248] In *Gates*, the independent investigation turned up two conflicting addresses[249] and revealed that the tipster inaccurately described Susan Gates' travel plans.[250] In fact, the police, in *Gates*, did not even verify that Susan was the woman who left West Palm Beach with Lance Gates on May

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tips show a more reliable basis of knowledge than general tips; and (3) Corroboration of incriminating details indicates greater reliability than corroboration of innocent details. *Anonymous Tips*, *supra* note 83, at 122-25. Thus, because the *Draper* tip was so highly detailed, the police needed to verify only innocent details while the sparse tip in *Spinelli* required corroboration of incriminating facts. *Id.* at 124.

242. 103 S. Ct. at 2335. The Court recognized this distinction but found that it paled in significance after the police investigation had occurred. Therefore, under *Gates*, as under Spinelli v. United States, 393 U.S. 410, 427 (White, J., concurring), corroboration may still cure a defect in veracity. *See* Illinois v. Gates, 103 S. Ct. at 2335.

243. Draper v. United States, 358 U.S. 307, 309 (1959).

244. Illinois v. Gates, 103 S. Ct. at 2334-35. The "details" were given added force when the Court characterized them as of a type likely to be obtained only from the Gates themselves or a close associate. *Id.* at 2335.

245. *See supra* notes 7-10 and accompanying text.

246. 393 U.S. at 417. Interestingly, the *Spinelli* Court expressly rejected a "totality of circumstances" approach. *Id.* at 415.

247. *See supra* text accompanying notes 87-89.

248. Draper v. United States, 358 U.S. 307, 313 (1959). Because every other detail was verified, the police had " 'reasonable grounds' to believe that the remaining unverified bit of Hereford's information — that Draper would have the heroin with him — was likewise true." *Id.*

249. *See supra* notes 92-94 and accompanying text.

250. Illinois v. Gates, 103 S. Ct. at 2335. The majority refused to characterize this as a material mistake. *Id.* at 2335 n.14. Justice Stevens, in his dissent, found this discrepancy very important. *Id.* at 2360 (Stevens, J., dissenting).

6; nor did they know how long she was in Florida or how she travelled there.[251] There was no corroboration of the statement that the Gates' car was "loaded up with drugs" or that their car contained any contraband on the return trip. Of course, the fruits of the search cannot be considered as verification of the tip.[252] Unlike the *Draper* tip, many of the statements in the *Gates* letter were mere conclusions, rather than specific details capable of verification, *i.e.*, that the Gates' "strictly make their living on selling drugs" and "brag about the fact they never have to work, and make their entire living on pushers."[253]

Perhaps more significant is that the *Gates* court refused to view an anonymous tipster as any less reliable than a confidential informant. One commentator has suggested that anonymous informants be presumed inherently unreliable because their motives are open to question.[254] After the Court's decision in *Gates*, an anonymous tipster is subject to the same test as one who has provided reliable information on many previous occasions. This result seems to fly in the face of the Court's purportedly "common sense approach". Legal commentators have cautioned against the potential dangers of using anonymous tips as a basis for a search.[255] Such tips, which may merely be an offhand remark, invite abuse by overzealous police in investigating crime and obtaining warrants. Anonymous tips are "frequently mere boasts of hypothetical illegal activities that are never performed, but are fabricated to impress listeners."[256] It has been recommended that in cases such as *Gates*, where the

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251. *See supra* text at 208-218 discussing police corroboration in *Gates*.

252. An inadequate showing of probable cause may not be cured by post-search evidence. Coolidge v. New Hampshire, 403 U.S. 443, 450-51 (1971). Yet Justice Stevens accused the majority of being influenced by the fruits of the search in *Gates*. Illinois v. Gates, 103 S. Ct. at 2361 (Stevens, J., dissenting).

253. Illinois v. Gates, 103 S. Ct. at 2325. *See supra* notes 88-90 and accompanying text.

254. *Anonymous Tips, supra* note 83, at 125.

255. *Id.* at 106-07:

> A tip from an anonymous informant is presumptively unreliable because the police and the magistrate cannot know the motives of the anonymous informant — he may be motivated by a sense of civic duty, revenge, or a desire to eliminate criminal competition. The police and the magistrate do not know if the informant is supplying information against his penal interest or has previously provided any, must less accurate, information to the police. The motives of anonymous informants may include harassment of a neighbor or a racial minority. In addition, the police and the magistrate cannot possible know how the informant obtained the information, nor can they obtain additional information from him or her. Thus, tips from anonymous informants are presumptively unreliable unless overcome by external considerations.

Id. Justice Stevens's dissent agreed with this approach. 103 S. Ct. at 2361.

256. *Anonymous Tips, supra* note 83, at 121-22.

tip was both anonymous and sparsely detailed, the courts should require that police corroborate incriminating details in order to establish probable cause.[257]

The long-range effects of the *Gates* "totality of circumstances" approach can, of course, only be hypothesized. It is likely, however, that the role of the neutral and detached magistrate will be curtailed.[258] When the tipster's veracity and basis of knowledge are not set forth in the affidavit, the magistrate will be forced to rely on the conclusions of the police officer/affiant as to the value of the tip. Thus, the decision to search is left to law enforcement personnel, rather than to the magistrate, and the essential protection of the warrant clause is nullified. We can expect more searches, based on less reliable evidence, simply because the *Gates* standard is more lenient than that required under former law.

The long-range effect on the law of probable cause also merits some concern. The deference accorded the magistrate's decision to issue a search warrant,[259] coupled with judicial preference for searches based on a warrant,[260] renders the constitutional basis for questionable searches difficult to question on review. Even assuming that the police will attempt to comply with the law of probable cause, the vagaries inherent in the "totality of the circumstances" approach will frustrate their efforts. The magistrate will also suffer from the lack of a well-defined standard. Precedent will be of little assistance because of the elastic nature of the new standard. It may be predicted that the resultant body of case law in the probable cause area will be a hodge-podge, overly dependent on the facts of each case, and of little assistance to the police, magistrates, and reviewing courts in making probable cause determinations in the future.[261]

There is no question that the "totality of circumstances" analysis encompasses a substantially more lenient approach to the law of probable cause. The question remains whether state courts will adopt the *Gates* analysis or choose instead to remain faithful to the principles of *Aguilar* and *Spinelli*.

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257. *Id.* at 124-25.

258. This concern was voiced by Justice Brennan in his dissent, Illinois v. Gates, 103 S. Ct. at 2359, but the majority reasoned that the magistrate would remain free to exact whatever assurances were found necessary in making probable cause determinations. *Id.* at 2332.

259. The task of a reviewing court is simply to determine whether the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. Jones v. United States, 362 U.S. 257, 271 (1960).

260. Illinois v. Gates, 103 S. Ct. at 2331.

261. Justice Brennan's dissent was based largely on this concern. Illinois v. Gates, 103 S. Ct. at 2355.

It is a well-accepted principle of state sovereignty that a state court has the power to require higher standards for searches and seizures than those required by the Federal Constitution.[262] The classic case on this point is *South Dakota v. Opperman*.[263] At issue in *Opperman* was the admissibility of evidence seized pursuant to an inventory search.[264] The South Dakota Supreme Court held that the search was unreasonable,[265] but the United States Supreme Court reversed and remanded the case for further proceedings not inconsistent with its opinion.[266] The South Dakota Supreme Court, on rehearing, then found that the inventory search violated the search and seizure prcvision of the state constitution.[267]

In support of its holding, the court stated:

> There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution. [citation omitted]. This court is the final authority on interpretation and enforcement of the South Dakota Constitution. We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution. Admittedly the language of Article VI, § 11 is almost identical to that found in the Fourth Amendment; however, we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning. We find that logic and a sound regard for the purposes of the protection afforded by S.D. Const., Art. VI § 11 warrant a higher standard of protection for the individual in this instance that the United States Supreme Court found necessary under the Fourth Amendment.[268]

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262. Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967). *Cf.* Oregon v. Hass, 420 U.S. 714, 719-20 (1975) (state court decided case on federal constitutional grounds so that defendant's claim of a stricter state constitutional provision regarding compulsory self-incrimination was rejected). *See also* People v. Disbrow, 16 Cal. 3d 10, 545 P.2d 272, 127 Cal. Rtpr. 360 (1976); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975); Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, *cert. denied* 417 U.S. 969 (1974); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973). More recently, the Alaska Supreme Court held that the rules of "standing" in search and seizure cases are less stringent in Alaska courts than in the federal system. Waring v. State, 34 Crim. L. Rep. 1002, Oct. 5, 1983).

263. 428 U.S. 364, *on remand*, State v. Opperman, 228 N.W.2d 152 (S.D. 1975).

264. 247 N.W.2d 673, 674 (S.D. 1976).

265. 228 N.W.2d 152 (S.D. 1975).

266. 428 U.S. at 364.

267. 247N.W.2d at 674.

268. *Id.* at 674-75 (footnotes omitted). Recently, one commentator noted that states are increasingly using their own constitutions in their area of individual rights. Ronald K. L. Collins, *State Constitutional Law, Important Precedents Emerging as States Use Their Constitutions*, The Nat. L. J., Mon-

Consequently, the Illinois courts are free to retain the two-pronged test of *Aguilar* and *Spinelli* or they may choose instead the "totality of circumstances" approach advanced by the United States Supreme Court. The defendants informally requested a hearing before the Illinois Supreme Court on this point,[269] but this request was denied and the case was directed to the trial court. As of this writing, the defendants are expected to urge the trial court to reject the "totality of circumstances" analysis.

Thus far, the Illinois Supreme Court has interpreted the Illinois Constitutions' search and seizure provision to accord with the *Aguilar-Spinelli* analysis.[270] As discussed earlier, the Illinois Supreme Court adopted the exclusionary rule, based on the Illinois Constitution, prior to *Mapp v. Ohio*,[271] in which the United States Supreme Court applied the rule to the states,[272] and even before the fourth amendment itself was applied to the states via the fourteenth amendment.[273] Illinois courts continue to cite the state constitution in suppressing illegally seized evidence,[274] as well as a state statute which codifies the exclusionary rule.[275] In fact, the Illinois Supreme Court cited the state constitution in holding that the search in *Gates* was unconstitutional.[276]

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day, Sept. 19, 1983, p.25-28. In the criminal area, the author cited *In re* Reed, 33 Cal. 3d 914, 603 P.2d 216, 191 Cal. Rptr. 658 (1983) (state cruel and unusual punishment clause); Attorney General v. Colleton, 387 Mass. 790, 444 N.E.2d 915 (1982) (state prohibition against self-incrimination requires transactional immunity though fifth amendment requires only derivative use type); State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983) (state court rejected federal double jeopardy rule); State v. Bowry, 295 Or. 337, 667 P.2d 996 (1983) (search and seizure); State v. Freeland, 295 Or. 367, 667 P.2d 509 (1983) (privileges and immunities in context of prosecutor's decision to initiate criminal cases by indictment or information); State v. Zegeer, 296 S.E.2d 873, (W.Va.), *on rehearing* 296 S.E.2d 881 (W. Va. 1982) (state constitutional provisions against cruel and unusual punishment).

269. Letter from James W. Reilley, attorney for Lance and Susan Gates dated July 1, 1983.

270. *See, e.g.*, People v. Parker, 42 Ill. 2d 42, 245 N.E.2d 487 (1969).

271. 367 U.S. 643 (1961).

272. People v. Brocamp, 307 Ill. 448, 138 N.E.728 (1923). *See also*, People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924).

273. Wolf v. Colorado, 338 U.S. 25 (1949).

274. *See, e.g.*, People v. Parren, 24 Ill. 2d 572, 182 N.E.2d 662 (1962): "Under neither [Article II, § 6 of the Illinois Constitution nor the federal fourth amendment] may a conviction stand when it is based upon evidence that is the product of an unreasonable search and seizure." *Id.* at 575, 182 N.E.2d at 664.

275. ILL. REV. STAT. ch. 38, § 114-12 (1976).

276. People v. Gates, 85 Ill. 2d 376, 381-82, 423 N.E.2d 887, 889 (1981). The court stated that "[b]oth the Constitution of the United States . . . and the Constitution of Illinois . . . provide assurance against unreasonable searches and seizures of person and property." *Id.* The defendants argued that this constituted an independent and adequate state ground for the Illinois Supreme Court's decision. *See supra* notes 161-166 and accompanying

Since *Gates* was decided, the Illinois Supreme Court has had the opportunity to accept or reject the "totality of circumstances" approach, but has managed to sidestep the issue. In *People v. Winters*,[277] decided in the May, 1983 term, the court found a search proper under both *Aguilar* and *Gates*. The court first applied *Aguilar*'s two-pronged test to the facts and found both the basis of knowledge and veracity requirements satisfied.[278] The court also cited *Illinois v. Gates*, noting that "strict adherence to the *Aguilar-Spinelli* test has been abandoned," but found under either approach probable cause existed.[279] Nowhere did the court expressly adopt *Gates* in lieu of the *Aguilar-Spinelli* approach.

A similar analysis was used in *People v. Exline*,[280] decided

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text. Accordingly, the very least the United States Supreme Court should have done was to remand the case to the Illinois Supreme Court for reconsideration in light of the decision on the federal issue. *See, e.g.*, California v. Krivda, 409 U.S. 33 (1972) (case remanded to determine whether state court decision rested on adequate and independent state ground). Instead, the Supreme Court simply reversed and the Illinois Supreme Court then remanded to the trial court. Illinois v. Gates, 103 S. Ct. at 2336.

277. 97 Ill. 2d 151, 454 N.E.2d 299 (1983). In *Winters*, a police officer learned from a "telephone informant" that three named persons were responsible for Fotomat robberies. The informant was known to be reliable but said he got his information from an unidentified third person, whose reliability the officer could not attest to. The informant said the robbers lived in Lisle, Illinois, and drove a 1975 maroon-over-white Pontiac. This vehicle was linked to one of the named parties. The police watched the car and followed as two persons drive it to a Fotomat. One of the passengers got out of the car, pulled a knit cap over his face, and knocked on the Fotomat window. The employee refused to respond and the Pontiac left the scene. The police followed it to a restaurant, and soon after the man was seen running from the restaurant. Shortly thereafter, the restaurant reported a robbery. The police lost sight of the Pontiac but found it later at the apartment complex which had been the original point of surveillance. The police stood outside the door of one of the apartments and heard voices "discussing splitting up money and saving enough money for bond." *Id.* at 154-56, 454 N.E.2d at 301-02. A warrantless search of the apartment revealed a money bag. It was the legality of this entry that was at issue. *Id.* at 159, 459 N.E.2d at 303. The Illinois Supreme Court agreed with the State that, when the Pontiac was found at the apartment complex, the police had probable cause to believe the suspects were in the apartment. *Id.*

278. At this juncture, the court stated:

> The specificity of detail as to the activities that the occupants of the maroon-over-white Pontiac did engage in on the evening of January 4, 1979, satisfied the 'basis of knowledge prong,' while the course of events on January 4, 1979, showing that the informant's tip was reliable satisfied the 'veracity prong' . . . .

Id. at 160-161, 454 N.E.2d at 344. The court also cited the "substantial" independent police corroboration as satisfying both prongs of *Aguilar*. *Id.* at 161, 454 N.E.2d at 304.

279. *Id.* The entry was found reasonable because of exigent circumstances: the police were in pursuit of an armed suspect and faced a "genuine emergency." *Id.* (citing People v. Abney, 81 Ill. 2d 159, 407 N.E.2d 543 (1980)).

280. 98 Ill. 2d 150, 456 N.E.2d 112 (1983).

in October, 1983. In *Exline*, a search warrant was issued authorizing the search of the apartment of Jeff Smith for cannabis and drug-related paraphernalia.[281] The warrant was supported by the affidavit of a Metropolitan Area Narcotics Squad agent. The agent stated that a confidential informant could buy cannabis from Smith, had done so in the past, and that Smith lived at apartment number 110 at 1860 B. Aycliff Court, in Joliet, Illinois.[282] The agent arranged three controlled purchases using his informant and during the subsequent search of the apartment the defendant, who resided with Smith, was present.[283] She was arrested and charged with prior related offenses.[284]

The Illinois Supreme Court expressly refrained from deciding whether *Gates* should be applied prospectively or retroactively, because "under either approach [*Gates* or *Aguilar-Spinelli*], the affidavit contained sufficient information to sustain a determination of probable cause."[285] The court initially performed a traditional *Aguilar-Spinelli* analysis, the precise issue being whether the police had probable cause to believe the informant bought the cannabis at the defendant's apartment.[286] The court cited *Spinelli* and *Brinegar* for the proposition that the question of probable cause was one of a non-technical, common sense nature and found that probable cause existed in the *Exline* case.[287] After discussing the facts, the court concluded:

> [W]e hold that the informant's credibility was sufficiently established, and the warrant was therefore not obtained in violation of *Aguilar* and *Spinelli*. It follows that the affidavit complied with the less rigid standard for determining probable cause set forth in *Illinois v. Gates*. . . .[288]

After discussing the "totality of the circumstances" test, the *Exline* court concluded that there existed a "fair probability" that narcotics would be found in Smith's apartment, with special emphasis on the reliability provided by the three controlled

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281. *Id.* at 152, 456 N.E.2d at 113.

282. *Id.*, 456 N.E.2d at 113-14. The telephone directory listed Smith at this address. *Id.* at 152-53, 456 N.E.2d at 114.

283. *Id.* at 153, 456 N.E.2d at 114.

284. *Id.*

285. *Id.*

286. *Id.* at 153-54, 456 N.E.2d at 114. The police never actually observed the informant enter Smith's apartment which was located in an apartment complex. *Id.*

287. *Id.* at 154-55, 456 N.E.2d at 114-115. The court noted that the affiant-agent had personal knowledge of all the facts in the affidavit except whether Smith was the actual perpetrator. Also, police corroboration of some details provided by the tipster lent credence to those unconfirmed details. This corroboration could also satisfy the veracity prong in cases where the informant cooperated closely with police.

288. *Id.* at 155, 456 N.E.2d at 115.

purchases.[289] Justice Goldenhersh's dissent, in *Exline*, was based in part, on his belief that the Illinois courts were not required to follow the *Gates* decision.[290]

CONCLUSION

The United States Supreme Court's decision in *Illinois v. Gates* is subject to substantial criticism, especially with regard to the Court's reliance on *Draper* as controlling law.[291] The new "totality of the circumstances" test with its inherent vagaries promises at the very least to confuse the lower courts,[292] magistrates, and law enforcement personnel. Most disturbing is the potential for police abuse of fourth amendment rights in the future, because the *Gates* approach is both unclear and less demanding than the abandoned *Aguilar-Spinelli* standard.[293] The future of the good-faith exception to the exclusionary rule

289. *Id.* at 155-56, 456 N.E.2d at 115. Justice Goldenhersh dissented on the ground that there was insufficient evidence of the informant's reliability to support a search of that particular apartment. *Id.* at 156-57, 456 N.E.2d at 116 (Goldenhersh, J., dissenting). The dissent also criticized the majority for "blindly" following the United States Supreme Court in *Gates* although the Illinois Supreme Court had previously decided *Gates* on the basis of the federal and state constitutions. *Id.* *See also* United States v. Kolodziej, 706 F.2d 590 (5th Cir. 1983) held even under relaxed *Gates* standard, warrant based on affidavit which failed to include informant's basis of knowledge or strong showing of reliability could not be upheld).

290. *See supra* note 289.

291. Recently, Justice Rehnquist, in a speech before the Washington Trial Lawyer's Conference, sought to explain the Court's decision in *Gates*, stating that the dispute "was a classic case of one side having the facts, [presumably the State], and the other side having the law [the defense]." Justice Rehnquist said that during oral argument the State's lawyer "stressed over and over again the facts . . . and played down the importance of the two Supreme Court decisions," while the Gates' attorney "emphasized very heavily the legal ramifications of these decisions, and played down the facts." He further noted that "I think it can fairly be said that each of the two times the Justices of our Court came off the bench after hearing the case argued, a majority of us felt that the facts simply 'reeked' of probable cause." Justice Rehnquist added that it was the Justices' view "that if there were previous decisions of our court that would have prevented a finding of probable cause in this case, it was very likely those decisions were incorrect." 129 CHI. DAILY. L. BULL. 209, Oct. 18, 1983, at 1, 18. By these statements, one is reminded of the dissenting opinion of Justice Stevens, in which he stated: "I must surmise that the Court's evaluation of the warrant's validity has been colored by subsequent events.'" Illinois v. Gates, 103 S. Ct. at 2361 (Stevens, J., dissenting).

292. The analysis engaged in by the Illinois Supreme Court in *Winters* and *Exline*, discussed *supra*, notes 277-290 and accompanying text, utilizing both a traditional *Aguilar* approach and citing the new *Gates* approach, is indicative of the confusion likely to result from *Gates*.

293. Judge Moylan of the Maryland Court of Appeals and author of the oft-cited Stanley v. State, 19 Md. App. 507, 313 A.2d 847 (1974), dismissed the totality of circumstances test as a "flight from analysis." *Id.* at 522, 313 A.2d at 856. *See also* Moylan, *supra* note 31, at 741.

awaits the proper vehicle for decision.[294] A recent survey indicates a growing trend in favor of such an exception,[295] although there remains substantial opposition in the legal community.[296] Whatever the future status of the good-faith exception, the lower federal courts will already have their hands full grappling with the boundaries of the *Gates* standard. Whether the Illinois courts choose to retain the *Aguilar-Spinelli* test, or follow the federal courts, may very well be determined by the return of *People v. Gates* to the Illinois courts.[297]

294. This term, the United States Supreme Court will hear three cases that present the opportunity to decide the good faith issue. United States v. Leon, 701 F.2d 187 (9th Cir.) (decision not reported), *cert. granted*, 103 S. Ct. 3535 (1983); Colorado v. Quintero, — Colo —, 657 P.2d 948, *cert. granted*, 103 S. Ct. 3535 (1983); Massachusetts v. Shepard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983). Last June, the Oregon Supreme Court declined to review a case involving a good faith exception to the exclusionary rule under the state constitution despite the United States Supreme Court having granted certiorari in the above-cited cases. State v. Davis, 62 Or. App. 772, 662 P.2d 13, *cert. denied*, — Or. —, 688 P.2d 381 (1983). *See also* 5 NAT'L L.J. 45, July 18, 1983 at 3, 22.

295. A recent survey conducted for the American Bar Association Journal indicated that in 1982, 42% of the attorneys polled favored a good faith exception. In 1983, that figure rose to 49%. 69 A.B.A.J. 1218-19 (1983).

296. For example, the Illinois State Bar Association has decided to file an *amicus curiae* brief urging the United States Supreme Court to reject the good faith exception in one of three cases cited *supra* note 295. Memo from Joshua Sachs of the Illinois State Bar Association, *Amicus Curiae* Subcommittee, dated Sept. 15, 1983, to James W. Reilley, Attorney for Lance and Susan Gates.

297. The defense attorneys for Lance and Susan Gates filed pretrial motions in November 1983. The trial court has not yet ruled on these motions. Telephone conversation with Ms. Christine Curran, April 2, 1984.