



10-1982

Illinois v. Gates

Lewis F. Powell Jr.

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though may
be wrong

PRELIMINARY MEMORANDUM

November 25 Conference
List 1, Sheet 3

No. 81-430 CSY

Illinois

Cert to Ill S Ct (Ward for the
court; Moran [diss] with
Underwood)

v.

Gates, et ux.

State/Criminal Timely

SUMMARY: The state contends that a letter from an
anonymous informer, together with corroborating circumstances,
was sufficient probable cause under Aguilar for issuance of a
search warrant.

FACTS and DECISIONS BELOW: Police in Bloomingdale,

Illinois, received an anonymous letter regarding the resps. It

The decision below seems wrong, but I am not sure the case
is certworthy. The question is, whether corroboration of anonymous
letter by innocent activity is sufficient to provide probable

listed their address and stated that they made their living selling drugs. Further, the letter described their method of operation. According to the letter, resp Sue would drive resps' car to Florida where it would be loaded with drugs. Resp Lance would fly to Florida and drive the car back. Then Sue would return by plane. Moreover, the letter warned that Sue would drive to Florida on May 3 as part of another drug transaction. And, the letter told the police that resps had over \$100,000 in drugs in their basement.

With the help of a confidential informant who provided police with access to financial records, the police confirmed that the letter gave resps' correct address. Police also discovered that L. Gates had a reservation on a May 5 flight to Florida. A DEA agent followed Lance, who flew to Florida and went to a motel room registered to Sue. The agent saw Lance leave with a woman (presumably Sue) in a car with Illinois tags. The police found that the tags were registered in Lance's name, but for a different car.

The police then obtained a search warrant from an Illinois court to search resps' home and the car they were using in Florida. Resps arrived back at their home by car on May 7. The police were waiting, searched the trunk of resps' car, and found 350 lbs of marijuana. In the house were marijuana, weapons, and drug paraphernalia. In addition, resps were in possession of cocaine.

Resps were indicted for drug offenses, and Lance was charged with possession of an unlicensed firearm. Pretrial, resps moved

to suppress the fruits of the search, contending that the letter did not provide probable cause for the warrant. They argued that the anonymous letter did not set forth the underlying circumstances on which the informer based his report or underlying circumstances which would indicate that the letter was reliable, as required by Aguilar v. Texas, 378 U.S. 108 (1964). They also contended that the police investigation did not corroborate the accusation that the resps were involved in criminal activity. The trial court agreed with resps, and the Ill Ct App affirmed.

The Ill S Ct also affirmed. Aguilar has two prongs, a "basis of knowledge" prong and a veracity prong. The letter fails the first test, because it did not describe how the informer knew that resps were involved in the drug trade. The informer's report may have been based on hearsay, not the informer's personal observation. The letter also fails the veracity test, because the police had no idea who the informer was. They had no way of knowing whether the informer could be trusted or not. And, unlike the informer in United States v. Harris, 403 U.S. 573 (1971), this informant made no statement against penal interest.

Furthermore, the corroborating police investigation did not cure these deficiencies. See Spinelli v. United States, 393 U.S. 410 (1969). The police determined that the informer gave resps' correct address and that resps' were driving back from Florida, but those details did not establish that the informer's letter was based on personal knowledge rather than rumor. Also, the

police investigation discovered no criminal activity before the search. Thus, the police had no reason to think that this anonymous informer wrote from personal knowledge or that he was reliable. The investigation was not sufficient to satisfy Aguilar.

The dissent thought that the corroborating investigation, combined with the detail of the letter, satisfied Augilar. The corroborating information demonstrated that the informer had an adequate basis for his knowledge. This case is like Draper v. United States, 358 U.S. 307 (1959), in which the police confirmed the details of an informer's story to obtain probable cause. The corroborating information also showed that the informer was probably telling the truth. The police may have discovered only innocent activity, but the informer's letter contained many details which proved accurate, so that the innocent activity became suspicious in light of the letter's accusations.

CONTENTIONS: The state elaborates on the arguments of the dissent. When an informer's tip is sufficiently detailed, it will confirm itself. See Spinelli, 393 U.S. at 425 (White, J., concurring). This case is like Draper, in which the informer's report was corroborated and the Court found probable cause. It is not like Spinelli, in which the Court found no probable cause because the informer provided few details and the police investigation supplied only limited corroboration. See also Whitely v. Warden, 401 U.S. 560 (1971) (informant's tip can supply probable cause together with information gathered by police). In

addition, under Draper, innocent activity can help to provide probable cause, if it corroborates an informant's story.

Resps observe that all three Illinois courts determined: (1) the anonymous letter did not describe the means by which the informer obtained his information; (2) the corroboration of innocent detail was insufficient to cure the inadequate "basis of knowledge" information in the letter; (3) reliance on Draper is misplaced, because that case involved a previously reliable informer, one who supplied a greater degree of specificity of detail.

Resps also insist that this is a fact-bound case applying the established rules of Aguilar. Furthermore, the case involves an anonymous letter, a notoriously unreliable source of information.

DISCUSSION: This case boils down to a factual dispute over whether it is more like Spinelli or Draper. Three Illinois courts decided that the corroboration in this case did not demonstrate that a tip in an anonymous letter provided probable cause. Although the tip ultimately proved correct, there was no reason to believe that the author of the letter would tell the truth, and the police investigation revealed no criminal activity. The Illinois S Ct might have reasonably found probable cause, based on the corroboration of several details in the letter. But its decision is not clearly in error, and this case is fact-bound.

I recommend denial.

There is a response.

November 5, 1981

Holleman

Opn in petn

D

February 26, 1982 Conference
List 1, Sheet 5

No. 81-430

ILLINOIS

v.

GATES, et ux.

Motion of Petition for Leave to
Amend or Enlarge Questions Presented
for Review

SUMMARY: Although it was not raised in the courts below, petr moves to
amend or enlarge the question presented in its petn for cert to the Ill. S.Ct.,
granted on January 11, 1982, to include the issue of the "good faith"
exception to the exclusionary rule.

FACTS: Acting on a letter from an anonymous informant concerning drug
dealings by the resps, the police confirmed some of the facts alleged in the
letter, consulted with an assistant state's attorney who wrote the complaint,
and then obtained a search warrant from an associate judge. The trial court
agreed with resps that the anonymous letter and the police investigation
failed to provide adequate probable cause under Aguilar v. Texas, 378 U.S. 108
(1964). The Ill. Ct. App. and the Ill. S.Ct. affirmed. The cert petn was

Deny? This would change this from an easy reversal to a case of major
proportions. It could be argued that the good faith exception

filed in August 1981 and on January 11, 1982, the Court granted cert on the following question:

Whether detailed information provided to police by an anonymous informer, coupled with government corroboration of the information, provide probable cause for the issuance of a search warrant?

CONTENTIONS: Petr states that subsequent to the hearing of this case in the Ill. courts, the good faith exception to the exclusionary rule has received serious attention by appellate courts. Citing, inter alia, Costello v. United States, 365 U.S. 265, 284-85 (1961) and Blonder-Tongue Labs, Inc. v. Univ. of Ill. Foundation, 402 U.S. 313, 319-21 (1971), the petr argues that this Court has considered issues not raised below where there has been a change in the law or where a "basic unfairness might escape review. . ." (Motion at 3). Petr also notes that in Taylor v. Alabama, No. 81-5152, cert granted on November 3, 1981, (Dunaway issue) the State of Alabama and amicus have raised the good faith exception in their briefs. The record in this case, claims the petr, establishes that the police acted in good faith in obtaining the warrant. Thus, the Question Presented should be enlarged or amended to include the following:

Assuming, arguendo, that the information used to obtain the search warrant did not satisfy Aguilar v. Texas, 378 U.S. 108 (1964), should the evidence obtained under the warrant nevertheless be admitted at trial because the police acted in a reasonable good faith belief in the validity of the warrant?

DISCUSSION: Rule 21.1(a) of this Court's Rules states in part that:

The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

Embodied in this rule is the proposition that this Court will generally not review issues not raised below or in the petition. See generally, Stern and

Gressman, Supreme Court Practice, 456-465 (1978). Exceptions to the rule exist, as noted by petr, supra. But petr's arguments for now amending the question to include a matter not raised below or in the cert petn are not persuasive. The good faith exception to the exclusionary rule is not a late-breaking development;¹ petr could have at least raised the issue in its cert petn in August 1981 rather than waiting until the eleventh hour to move for an amendment.² There being no compelling arguments for granting an exception to the general rule of limiting plenary review to issues presented below, this motion should be denied.

There is no response.

2/24/82

Schlueter

PJC

¹The good faith exception was, according to the petr, given first "significant judicial recognition" in United States v. Williams, 622 F.2d 830, 846-847 (5th Cir. 1980) (en banc), cert den. 101 S.Ct. 946 (1981). Petr is apparently discounting recognition of the exception by commentators and members of this Court. See e.g., Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., concurring).

²Petr's brief on the merits is due on February 25, 1982.

issue is fairly subsumed within the Q granted. The key thing would be to alert both parties to brief the issue -- which ~~this~~ a grant of this motion would do. So granting the motion to consider the good faith rule does have some logical support if you are so inclined. You may wish to join 3 or 4 on this.

My view is that it probably is better to wait for a square presentation of this point in the opinion below before reckoning with a good faith exception. The Court denied in US v. Williams (CAS 1980) (see n. 1 of memo), where the issue was squarely presented. The desirability of waiting for a direct presentation of the issue is greater b/c this comes from a state court. jw

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: JAN 5 1982

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

ILLINOIS v. LANCE GATES ET UX.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 81-430. Decided January —, 1982

CHIEF JUSTICE BURGER, dissenting.

I dissent for the reason that the Illinois Supreme Court clearly misapplies well settled law that a detailed tip from an anonymous informant, which is subsequently corroborated by the police, presents sufficient probable cause to support a search warrant. *Draper v. United States*, 358 U. S. 307 (1959).

The Bloomington, Illinois police department received an anonymous letter giving respondents' address and stating that they made their living selling drugs. The letter contained a detailed description of respondents method of operation: that respondent Susan Gates would drive her car to Florida where it would be loaded with drugs; that respondent Lance Gates would fly to Florida and drive the car back; that respondent Susan Gates would then return by airplane. The letter stated that a drug transaction would occur on May 3d. Finally, the letter stated that respondents had over \$100,000 in drugs in their basement.

The police confirmed, through a confidential informant, that the address in the letter was correct. Respondent Lance Gates made a reservation and flew to Florida on May 5th. He went to a motel room registered to his wife and later left in an automobile with tags registered in his name, although for another automobile. After observing this detailed corroboration of the anonymous letter, the Bloomington police obtained a warrant to search respondents home and the car that they were using in Florida. When respondents arrived back in Illinois by car on May 7th, the police

I'm still inclined to Diss.

J. Ct. is wrong, but in view of state of our pocket, there is a c/w.

I'd join 5 to Rev Summary

New Note

I would agree that the case is wrongly decided below but am not sure it is certworthy. I doubt that summary disposition would work because neither Draper nor Spinelli precisely cover the situation when the informant's identity + reliability is totally unknown to police.

searched the trunk of the car and found 350 pounds of marijuana. A search of the house revealed marijuana, weapons, and drug paraphernalia.

The activities of respondents corresponded almost precisely with the predictive statements contained in the letter, making this an *a fortiori* case under *Draper v. United States*, 358 U. S. 307 (1959). Despite this strong corroboration, the Illinois courts suppressed the evidence obtained from the search warrants. Applying the two-pronged test of *Aguilar v. Texas*, 378 U. S. 108 (1964), the Illinois Supreme Court concluded that the anonymous letter failed either to state the basis of the informant's knowledge or to provide sufficient information to evaluate the truthfulness of the informant.* The Illinois court found the substantial corroboration insufficient to cure these defects because it failed to establish that the informant based the tip on personal knowledge. The Illinois Court—misapplying *Draper*—also concluded that great detail in the anonymous tip is not, alone, sufficient to establish the veracity of the informant. Finally, the Court observed that the corroborating evidence was of "clearly innocent" activity.

In *Draper v. United States*, 358 U. S. 307 (1959), this Court found probable cause when a previously-reliable informant supplied information describing the defendant's clothing and physical appearance and stating that the defendant would be at a train at a certain time as part of a drug transaction. The police arrested and searched defendant after the information from the informant was corroborated by the personal observation of the police. The activity involved in *Draper*, like the activity in this case, was not criminal when viewed in isolation. When Draper's activity was viewed in

*The Illinois Supreme Court cited provisions from both the federal and state constitutions. It is readily apparent from the decision, however, that the Illinois Supreme Court was relying on federal constitutional grounds to justify its holding. *State Tax Comm'n v. Van Cott*, 306 U. S. 511, 514 (1939) (state and federal grounds so interwoven that it is impossible to conclude that the judgment rests on an independent interpretation of state law).

Draper ?

corroborated
actually in
Draper
was not
criminal
- it was
innocent.

But the tip
was given
by an informant
known to be
reliable.

light of the informant's information, however, it took on an "aura of suspicion" sufficient to justify a finding of probable cause. *Spinelli v. United States*, 393 U. S. 410, 418 (1969).

In *Spinelli, supra*, an affidavit in support of a search warrant contained information that a "confidential reliable informant" had stated that a bookkeeping operation was being maintained at a certain address. The police also observed activities consistent with a bookkeeping operation, but which were in themselves innocent. In holding that the informant's information was not sufficient to establish probable cause, the Court noted that "it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U. S., at 416 (emphasis added). In this case, as in *Draper*, the judicial officer issuing the warrant could reasonably infer from the detailed information, which was provided by the informant and subsequently corroborated by the police, that the informant was indeed trustworthy and had obtained his information in a "reliable way." *Spinelli*, 393 U. S., at 417. Verification of reliability of both the information and the informant was the purpose of the two-pronged *Aguilar* rule. *Draper* and *Spinelli* establish that this verification may come from the police corroboration of the detailed tip of an anonymous informant.


In light of the established guidelines of *Draper* and *Spinelli*, I would grant the petition for certiorari and sum-
marily reverse the holding of the Illinois Supreme Court.

insufficient
detail

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 5, 1982



MEMORANDUM TO THE CONFERENCE

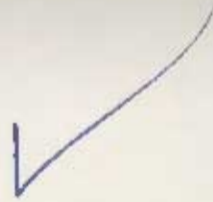
Re: 81-430 - Illinois v. Gates

The suggested order for reargument in this case is
as follows:

"This case is restored to the calendar for reargument. In addition to the question presented in the petition for certiorari and previously argued here, the parties are requested to address the question whether 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 that the search and seizure at issue was consistent with the Fourth Amendment."

BRW

November 11, 1982



81-430 - Illinois v. Gates

JUSTICE STEVENS, dissenting.

Earlier this year the Court decided not to allow the Illinois Attorney General to argue the question it now asks the parties to address. That decision was consistent with the Court's settled practice of not permitting a party to advance a ground for reversal that was not presented below. The reversal today of the Court's earlier decision is not only a flagrant departure from its settled practice, but also raises serious questions concerning the Court's management of its certiorari jurisdiction. I am therefore unable to join the Court's decision to order reargument of this case.

I

As a matter of ordinary procedure, the burdens of litigation are minimized and the decisional process is expedited if a court is consistent in its rulings as a case progresses. We set a poor example for other judges when we suddenly reverse our prior rulings in the same case.

On February 8, 1982, the State of Illinois filed a motion seeking leave to amend or enlarge the question presented for review in this case. The motion asked the Court to incorporate the following question:

"Assuming, arguendo, that the information used to obtain the search warrant did not satisfy Aguilar v. Texas, 378 U.S. 108 (1964), should the evidence obtained under the warrant nevertheless be admitted at trial because the police acted in a reasonable good faith belief in the validity of the warrant?"

On March 1, 1982, the Court unanimously denied that motion. On October 13, 1982, the parties presented an hour of argument; they respected our decision and did not attempt to argue the question of good faith. Today, the Court asks the parties to reargue the case in order to address the very question it would not allow the parties to argue last month. This type of inconsistent decisionmaking always imposes unnecessary costs on litigants and is wasteful of the judiciary's most scarce resource--time.

II

As a matter of appellate practice, it is generally undesirable to permit a party to seek reversal of a lower court's judgment on a ground that the lower court had no opportunity to consider.¹ It is especially poor practice to do so when the

¹Of course, there is no impediment to presenting a new argument as an alternative basis for affirming the decision below. E. g., Hankerson v. North Carolina, 432 U.S. 233, 240 n.6
Footnote continued on next page.

basis for reversal involves a factual issue on which neither party adduced any evidence. Those considerations apply with special force when the judgment of the highest court of a sovereign state is being reviewed.²

Each of these considerations applies to the additional question on which the Court has ordered reargument. Neither party gave the Circuit Court of DuPage County, the Appellate Court of Illinois, Second District, or the Supreme Court of

(1977).

²Writing for the Court in Cardinale v. Louisiana, 349 U.S. 437, JUSTICE WHITE made it clear that this view represents the Court's traditional stance.

"The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before [Crowell v. Randell, 10 Pet. 368 (1836)], Miller v. Nicholls, 4 Wheat. 311, 315 (1819), and since, e.g., Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc., 360 U.S. 334, 342, n.7 (1959); State Farm Mutual Automobile Ins. Co. v. Duell, 324 U.S. 154, 160-163 (1945); McGoldrick v. Compagnie General Transatlantique, 309 U.S. 430, 434-435 (1940); Whitney v. California, 274 U.S. 357, 362-363 (1927); Dewey v. Des Moines, 173 U.S. 193, 197-201 (1899); Murdock v. City of Memphis, 20 Wall. 590 (1875).

* * *

"Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." 394 U.S., at 438-439.

See also New York ex rel. Cohn v. Graves, 300 U.S. 308, 317 (1937); Wilson v. Cook, 327 U.S. 474, 483-484 (1946); Lear, Inc. v. Adkins, 395 U.S. 653, 677-682 (WHITE, J., concurring). See generally R. Stern & E. Gressman, Supreme Court Practice 456-465 (5th ed. 1978).

Illinois an opportunity to consider the question. Neither party offered any evidence concerning the state of mind of the magistrate when he issued the warrant, the state of mind of the officers who obtained the warrant, or the state of mind of the officers who executed the warrant. In short, the new issue was not "fairly presented" to the state courts. Cf. Picard v. Connor, 404 U.S. 270 (1971).

III

As a matter of power, the Court's action is subject to question. That question is serious whether one assumes that the Illinois courts decided the Fourth Amendment question correctly or incorrectly.

On the one hand, if it is assumed that the Supreme Court of Illinois correctly decided the only federal question that was presented to it,³ this Court has a duty to affirm its judgment. See New York ex rel. Cohn v. Graves, 300 U.S. 308, 317 (1937). If the only federal question presented by a certiorari petition is unworthy of review, or does not identify a legitimate basis for reversal, this Court has no power to grant certiorari simply because it would like to address some other federal question.

³The Supreme Court of Illinois held that the Fourth Amendment prohibits a magistrate from issuing a search warrant on the basis of an affidavit such as that filed by the police officer in this case.

For neither Article III of the Constitution nor the jurisdictional statutes enacted by Congress vest this Court with any roving authority to decide federal questions that have not been properly raised in adversary litigation.

On the other hand, if it is assumed that the Supreme Court of Illinois has incorrectly decided the federal question that was presented to it, this Court has a duty to reverse its judgment. That duty could be performed by simply answering the question decided below, without reaching the additional question on which the Court orders reargument today. It is, of course, a settled canon of our constitutional jurisprudence that we do not decide constitutional questions unless it is necessary to do so to resolve an actual case or controversy. See e.g., Minnick v. California Dept. of Corrections, 452 U.S. 105, 122-27 (1981).

Thus, however the Court resolves the merits of the federal question that has already been argued, the action it takes today sheds a distressing light on the Court's conception of the scope of its powers. Accordingly, I respectfully dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 4, 1982

Re: No. 81-430 Illinois v. Gates

Dear John:

I doubt the wisdom of adding the question you propose for reargument in this case to the question already formulated by Byron. It seems to me we already have one basis for reversal which seems to command a majority of the Court; retrenching somewhat from Aguilar and Spinelli and re-establishing Draper. The reason, as I understood it, why you suggested the case should be re-argued if a majority wished to reach the question now posed by Byron was that the petitioner itself had requested an enlargement of the questions presented to include that issue, and its request had been denied by the Court. But I see no reason for simply adding a "garden variety" probable cause issue under the decision in Ross; I dare say there would be few, if any, to grant certiorari in the first place if that were all the case involved.

Sincerely,

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



November 12, 1982

Re: No. 81-430 - ILLINOIS v. GATES

Dear John:

Please join me in your dissent circulated today.

Sincerely,

T.M.
T.M.

Justice Stevens

cc: The Conference

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: NOV 12 '82

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-480

ILLINOIS, PETITIONER *v.* LANCE GATES, ET UX.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ILLINOIS

[November —, 1982]

JUSTICE STEVENS, dissenting.

Earlier this year the Court decided not to allow the Illinois Attorney General to argue the question it now asks the parties to address. That decision was consistent with the Court's settled practice of not permitting a party to advance a ground for reversal that was not presented below. The reversal today of the Court's earlier decision is not only a flagrant departure from its settled practice, but also raises serious questions concerning the Court's management of its certiorari jurisdiction. I am therefore unable to join the Court's decision to order reargument of this case.

I

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"Assuming, arguendo, that the information used to obtain the search warrant did not satisfy *Aguilar v. Texas*,

378 U. S. 108 (1964), should the evidence obtained under the warrant nevertheless be admitted at trial because the police acted in a reasonable good faith belief in the validity of the warrant?"

On March 1, 1982, the Court unanimously denied that motion. On October 13, 1982, the parties presented an hour of argument; they respected our decision and did not attempt to argue the question of good faith. Today, the Court asks the parties to reargue the case in order to address the very question it would not allow the parties to argue last month. This type of inconsistent decisionmaking always imposes unnecessary costs on litigants and is wasteful of the judiciary's most scarce resource—time.

II

As a matter of appellate practice, it is generally undesirable to permit a party to seek reversal of a lower court's judgment on a ground that the lower court had no opportunity to consider.¹ It is especially poor practice to do so when the basis for reversal involves a factual issue on which neither party adduced any evidence. Those considerations apply with special force when the judgment of the highest court of a sovereign state is being reviewed.² Each of these con-

¹Of course, there is no impediment to presenting a new argument as an alternative basis for affirming the decision below. *E. g.*, *Hankerson v. North Carolina*, 432 U. S. 233, 240 n. 6 (1977).

²Writing for the Court in *Cardinale v. Louisiana*, 349 U. S. 437, JUSTICE WHITE made it clear that this view represents the Court's traditional stance.

"The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before [*Crowell v. Randell*, 10 Pet. 368 (1836)], *Miller v. Nicholls*, 4 Wheat. 311, 315 (1819), and since, *e. g.*, *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U. S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U. S. 154, 160-163 (1945); *McGoldrick v. Compagnie General Transatlantique*, 309 U. S. 430, 434-435 (1940); *Whit-*

siderations applies to the additional question on which the Court has ordered reargument. Neither party gave the Circuit Court of DuPage County, the Appellate Court of Illinois, Second District, or the Supreme Court of Illinois an opportunity to consider the question. Neither party offered any evidence concerning the state of mind of the magistrate when he issued the warrant, the state of mind of the officers who obtained the warrant, or the state of mind of the officers who executed the warrant. In short, the new issue was not "fairly presented" to the state courts. Cf. *Picard v. Connor*, 404 U. S. 270 (1971).

III

As a matter of power, the Court's action is subject to question. That question is serious whether one assumes that the Illinois courts decided the Fourth Amendment question correctly or incorrectly.

On the one hand, if it is assumed that the Supreme Court of Illinois correctly decided the only federal question that was presented to it,² this Court has a duty to affirm its judgment. See *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 317 (1937). If the only federal question presented by a certiorari petition is unworthy of review, or does not identify a legiti-

ney v. California, 274 U. S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U. S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 20 Wall. 590 (1875).

* * *

"Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." 394 U. S., at 438-439.

See also *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 317 (1937); *Wilson v. Cook*, 327 U. S. 474, 483-484 (1946); *Lear, Inc. v. Adkins*, 395 U. S. 653, 677-682 (WHITE, J., concurring). See generally R. Stern & E. Gressman, *Supreme Court Practice* 456-465 (5th ed. 1978).

²The Supreme Court of Illinois held that the Fourth Amendment prohibits a magistrate from issuing a search warrant on the basis of an affidavit such as that filed by the police officer in this case.

mate basis for reversal, this Court has no power to grant certiorari simply because it would like to address some other federal question. For neither Article III of the Constitution nor the jurisdictional statutes enacted by Congress vest this Court with any roving authority to decide federal questions that have not been properly raised in adversary litigation.

On the other hand, if it is assumed that the Supreme Court of Illinois has incorrectly decided the federal question that was presented to it, this Court has a duty to reverse its judgment. That duty could be performed by simply answering the question decided below, without reaching the additional question on which the Court orders reargument today. It is, of course, a settled canon of our constitutional jurisprudence that we do not decide constitutional questions unless it is necessary to do so to resolve an actual case or controversy. See *e. g.*, *Minnick v. California Dept. of Corrections*, 452 U. S. 105, 122-127 (1981).

Thus, however the Court resolves the merits of the federal question that has already been argued, the action it takes today sheds a distressing light on the Court's conception of the scope of its powers. Accordingly, I respectfully dissent.

77-1,2,3

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: NOV 15 '82

No. 81-430

ILLINOIS, PETITIONER v. LANCE GATES, ET UX.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ILLINOIS**

[November —, 1982]

JUSTICE STEVENS, with whom JUSTICE BRENNAN and
JUSTICE MARSHALL join, dissenting.

Earlier this year the Court decided not to allow the Illinois Attorney General to argue the question it now asks the parties to address. That decision was consistent with the Court's settled practice of not permitting a party to advance a ground for reversal that was not presented below. The reversal today of the Court's earlier decision is not only a flagrant departure from its settled practice, but also raises serious questions concerning the Court's management of its certiorari jurisdiction. I am therefore unable to join the Court's decision to order reargument of this case.

I

As a matter of ordinary procedure, the burdens of litigation are minimized and the decisional process is expedited if a court is consistent in its rulings as a case progresses. We set a poor example for other judges when we suddenly reverse our prior rulings in the same case.

On February 8, 1982, the State of Illinois filed a motion seeking leave to amend or enlarge the question presented for review in this case. The motion asked the Court to incorporate the following question:

"Assuming, arguendo, that the information used to ob-

WJB and TM have joined.

Otherwise only minor changes.

Mike

tain the search warrant did not satisfy *Aguilar v. Texas*, 378 U. S. 108 (1964), should the evidence obtained under the warrant nevertheless be admitted at trial because the police acted in a reasonable good faith belief in the validity of the warrant?"

On March 1, 1982, the Court unanimously denied that motion. On October 13, 1982, the parties presented an hour of argument; they respected our decision and did not attempt to argue the question of good faith. Today, the Court asks the parties to reargue the case in order to address the very question it would not allow the parties to argue last month. This type of inconsistent decisionmaking always imposes unnecessary costs on litigants and is wasteful of the judiciary's most scarce resource—time.

II

As a matter of appellate practice, it is generally undesirable to permit a party to seek reversal of a lower court's judgment on a ground that the lower court had no opportunity to consider.¹ It is especially poor practice to do so when the basis for reversal involves a factual issue on which neither party adduced any evidence. Those considerations apply with added force when the judgment of the highest court of a sovereign state is being reviewed.²

¹ Of course, there is no impediment to presenting a new argument as an alternative basis for affirming the decision below. *E. g.*, *Hankerson v. North Carolina*, 432 U. S. 233, 240 n. 6 (1977).

² Writing for the Court in *Cardinale v. Louisiana*, 349 U. S. 437, JUSTICE WHITE made it clear that this view represents the Court's traditional stance.

"The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before [*Crowell v. Randell*, 10 Pet. 368 (1836)], *Miller v. Nicholls*, 4 Wheat. 311, 315 (1819), and since, *s. g.*, *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U. S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U. S.

Each of these considerations applies to the additional question on which the Court has ordered reargument. Neither party gave the Circuit Court of DuPage County, the Appellate Court of Illinois, Second District, or the Supreme Court of Illinois an opportunity to consider the question. Neither party offered any evidence concerning the state of mind of the magistrate when he issued the warrant, the state of mind of the officers who obtained the warrant, or the state of mind of the officers who executed the warrant. In short, the new issue was not "fairly presented" to the state courts. Cf. *Picard v. Connor*, 404 U. S. 270 (1971).

III

As a matter of power, the Court's action is subject to question. That question is serious whether one assumes that the Illinois courts decided the Fourth Amendment question correctly or incorrectly.

On the one hand, if it is assumed that the Supreme Court of Illinois correctly decided the only federal question that was presented to it,⁸ this Court has a duty to affirm its judgment. See *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 317 (1937). If the only federal question presented by a certiorari

154, 160-163 (1945); *McGoldrick v. Compagnie General Transatlantique*, 309 U. S. 430, 434-435 (1940); *Whitney v. California*, 274 U. S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U. S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 20 Wall. 590 (1875).

* * *

"Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." 394 U. S., at 438-439.

See also *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 317 (1937); *Wilson v. Cook*, 327 U. S. 474, 483-484 (1946); *Lear, Inc. v. Adkins*, 395 U. S. 653, 677-682 (1969) (WHITE, J., concurring). See generally R. Stern & E. Gressman, *Supreme Court Practice* 456-465 (5th ed. 1978).

⁸The Supreme Court of Illinois held that the Fourth Amendment prohibits a magistrate from issuing a search warrant on the basis of an affidavit such as that filed by the police officer in this case.

petition is unworthy of review, or does not identify a legitimate basis for reversal, this Court has no power to grant certiorari simply because it would like to address some other federal question. For neither Article III of the Constitution nor the jurisdictional statutes enacted by Congress vest this Court with any roving authority to decide federal questions that have not been properly raised in adversary litigation.

On the other hand, if it is assumed that the Supreme Court of Illinois has incorrectly decided the federal question that was presented to it, this Court has a duty to reverse its judgment. That duty could be performed by simply answering the question decided below, without reaching the additional question on which the Court orders reargument today. It is, of course, a settled canon of our constitutional jurisprudence that we do not decide constitutional questions unless it is necessary to do so to resolve an actual case or controversy. See *e. g.*, *Minnick v. California Dept. of Corrections*, 452 U. S. 105, 122-127 (1981).

Thus, however the Court resolves the merits of the federal question that has already been argued, the action it takes today sheds a distressing light on the Court's conception of the scope of its powers. Accordingly, I respectfully dissent.

Received 10/7

mfs 10/06/82

Mike thinks ~~the~~ Aguilar controls
this case. He views the information
provided by ~~anonymous~~ anonymous letter
as insufficient + ambiguous.

Nor does he think the
extent of verification by police
was sufficient to confirm the
reliability of the letter.

Mike thinks - & I agree - that
this is a fact specific application
of Aguilar & that we should not have
granted case. But it is here.

Mike makes the best case for
affirmance. I am not yet persuaded.

BENCH MEMORANDUM

No. 81-430

Police conduct here, as Mike
agrees, was both reasonable &
commendable. Illinois v. Gates I am inclined to

Michael F. Sturley

October 6, 1982

Think the detail of "tip" (it was
considerable), plus subsequent
verification of the essentials,
Question Presented
take this case well out of the
Aguilar concern.

Was information provided by anonymous tip, coupled with
police corroboration of some of the innocent information, suffi-
cient to provide probable cause for the issuance of a search
warrant?

Outline of Memorandum

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I. Background

A. Facts

On May 3, 1978, the Bloomingdale (Illinois) police chief received a handwritten letter in the mail. The letter read, in its entirety, as follows:

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 fl[ie]s down and drives it back. Sue fl[ie]s back after she drops the car off in Florida. May 3 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.

*Detailed
facts
checked
out by
police*

They brag about the fact they never have to work, and make their entire living on pushers.

I guar[a]ntee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.

Lance & Sue Gates
Greenway
in Condominiums.

The letter was entirely anonymous: it was unsigned and there was no return address. The police chief passed it on to a detective in the department for investigation.

According to the Illinois Secretary of State's office, a Lance B. Gates, living at 209D Dartmouth in Bloomingdale, had been issued an Illinois driver's license. The physical description given on the license indicated that Gates was a 30-year-old male, 5' 11" tall, with brown eyes and hair, and weighing 220 pounds. A reliable "confidential informant" told police that a Lance B. Gates, who had formerly lived at 209D Dartmouth, now

lived at 198B Greenway Drive in Bloomingdale. Further investigation revealed that an L. Gates had reserved a seat for May 5 on Eastern Airlines flight 245 from Chicago to West Palm Beach, Florida. The call-back number on the reservation was 980-8427. According to Illinois Bell Telephone Company records, this number was issued to Lance Gates at 189B Greenway Drive in Bloomingdale.¹

Pursuant to an arrangement with the Bloomingdale police, a DEA agent observed all of the passengers boarding Eastern Airlines flight 245 on May 5. ✓ One passenger used the name Lance Gates and ✓ matched the physical description from the driver's license. Other DEA agents observed the arrival of flight 245 in West Palm Beach. The passenger identified as Gates remained in the airport for an hour, then took a taxi to the West Palm Beach Holiday Inn. There he entered a room registered in the name of ✓ Susan Gates.

The following morning at 7:00, Gates and an unidentified female left the Holiday Inn and entered a red and gray Mercury bearing Illinois license RS8437. (This license number was issued to Lance B. Gates for a 1975 Hornet station wagon.) The two left West Palm Beach in the Mercury on the northbound interstate highway. The driving time from West Palm Beach to Bloomingdale is approximately 21-23 hours.

The police presented all of this information to an asso-

¹It is not clear whether 198B or 189B is the correct address.

ciate judge of the county circuit court. He granted a search warrant for the resps' residence and the Mercury they were driving from Florida. At 5:15 a.m. on May 7, resps arrived home driving the Mercury. Police met them on arrival, served the search warrant, and searched the car and home. They discovered 350 pounds of marijuana in the car, and other incriminating evidence in both car and home. *Welcome*

B. Decisions Below

Resps moved before trial to quash the search warrant and suppress the evidence obtained as a result of the search. They argued that the information provided by the anonymous letter, even when coupled with the police corroboration of innocent details, was insufficient to provide probable cause for the issuance of the warrant. The [✓]TC granted the motion.

The [✓]App. Ct. and the [✓]Ill. S.Ct. affirmed, each holding that the warrant failed to comply with the requirements of Aguilar v. Texas, 378 U.S. 108 (1964). The affidavit in support of the warrant had not satisfied either the "basis of knowledge" or the "veracity" prong of the Aguilar test. The "self-verifying detail" doctrine of Spinelli v. United States, 393 U.S. 410 (1969), was not satisfied, and thus could not save the warrant.

Justice Moran, joined by Justice Underwood, dissented in the Ill. S.Ct. He argued that this case more closely resembled *Desaut* Draper v. United States, 358 U.S. 307 (1959), than Aguilar or Spinelli.

II. Discussion

True In working on this case, I cannot help remembering the well-worn maxim that "hard cases make bad law." I have read the CHIEF JUSTICE's proposed dissent from denial of cert, arguing that the decision below should be summarily reversed, and this reinforces my concern. As in almost all exclusionary rule cases, the defendants are [✓]undeniably guilty--but that is obviously irrelevant. What really makes this a hard case is the fact that the police did absolutely nothing wrong. They made what appears to have been an honest effort to investigate the anonymous tip, verifying as much detail as they could in the time available. They presented the results of their labors to a supposedly neutral and detached judicial officer to obtain a search warrant. And they executed the warrant in an entirely reasonable manner. It is almost offensive to see two large-scale drug dealers go free because an associate judge of the county circuit court made a mistake in issuing the warrant, but I think that any other course would seriously erode the meaning of "probable cause." *?* Although I have noted your preliminary inclination to reverse, I recommend that the decision below be affirmed.

A. The Legal Standards

In Aguilar v. Texas, 378 U.S. 108 (1964), the police obtained a search warrant from a justice of the peace on the basis of an affidavit claiming "reliable information from a credible person" that narcotics were illegally kept on the premises in question. The affidavit did not explain why the information was

reliable or the person credible. The Court held that this was inadequate, and announced a two-part test of Aguilar

Although an affidavit may be based on hearsay information ..., the magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant ... was "credible" or his information "reliable."

Id., at 114 (footnote omitted). Point [1] has come to be known as the "basis of knowledge" prong of the Aguilar test, and point [2] as the "veracity" prong.

Dicta in Spinelli v. United States, 393 U.S. 410 (1969), relaxed the "basis of knowledge" prong slightly. There the police were again relying on information from a known confidential informant, and there was again no indication of the source of his information. The Court declared:

In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

must
be
more
than
"casual
rumor"

Id., at 416. The Court cited Draper v. United States, 358 U.S. 307 (1959), as an example of a case where the informant provided information so detailed that a magistrate could reasonably infer that it had been obtained in a reliable way. The information in Spinelli, however, was so general that it "could easily have been obtained from an offhand remark heard at a neighborhood bar." 393 U.S., at 417. This has been cited as the "self-verifying detail" doctrine. (Why doesn't it apply here?)

Spinelli also considered the possibility that independent police investigation verifying portions of the informant's information could be sufficient to save a tip that was inadequate on its own. The Court suggested that a tip that was partially corroborated might be "as reliable as one which passes Aguilar's requirements when standing alone," id., at 416, but found that such was not the case there. The tipster had informed police that the suspect was conducting illegal gambling operations in a particular apartment with particular telephone numbers. The investigation had revealed that the suspect regularly travelled to the apartment, and that the telephones were located inside it. In rejecting the government's argument, the Court declared:

At most, these [independent investigative efforts] indicated that [the suspect] could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against [the suspect] on the basis of information obtained in a reliable way.

Id., at 417. This situation was again contrasted with Draper, where the police corroborated information so detailed that it could only have been obtained by a person with an appropriate basis of knowledge.

B. The Informant's Basis of Information

Simply reading the letter that initiated the investigation here, supra page 2, it immediately strikes me that the sole source of information was "rumor" in the community. If I had to guess the author's identity, I would say that she is a housewife whose husband is a blue-collar laborer. Although he works hard,

?
This
never
would
have
occurred
to me.

you they still have trouble making ends meet, so she resents the easy wealth that she hears resps have acquired. This is, of course, mere conjecture. Such a letter could just as easily have been written by the victim of the Gates child's latest practical joke, or someone playing a malicious practical joke on resps. Perhaps even a jealous business rival.² The important fact here is that nothing in the letter makes any of these possibilities unlikely. Nor are they disproven by the additional evidence. On the contrary, the police corroboration strengthens my belief that the tipster's information was based on community rumor. ??

To begin with, it seems clear that the anonymous informant had no direct contact with resps. Although (s)he knew that resps lived "in the condominiums," this is not the specific sort of information that someone with direct knowledge would have.³ It "could easily have been obtained from an offhand remark heard at a neighborhood bar." Spinelli, supra, 393 U.S., at 417. The last two paragraphs also smack of a rumor being repeated. It is very unlikely that the informant had seen any of the "big drugs dealers who visit their house often" when (s)he does not know which house is resps'. And the letter does not sound as if it were written by someone to whom resps would directly "brag about the fact they never have to work."

not these details

²If the author had known resps' address, I might have guessed an irate neighbor upset by loud parties late at night.

³THE CHIEF JUSTICE states in his proposed dissent from denial of cert that the letter gave resps' address. I assume he based this statement on the pool memo, which makes the same error.

The strongest information in the letter is the part characterized by the CHIEF JUSTICE as "a detailed description of respondent[s'] method of operation." I view the detail as the sort that could easily be obtained through neighborhood gossip. If the letter conveyed all of the information that the informant had, gossip is the only likely source. There is no specific detail, such as the informant in Draper provided. The letter was obviously written with this particular trip in mind, but there is no mention of the flight that Lance Gates would take, or even the city in Florida that was involved. The letter does not even mention the type of drugs in which resps dealt. Even the dollar figures sound like the product of rumor. \$100,000 is a lot of money, and would clearly seem staggering to anyone in the community. But for a full-time drug dealer, the amount seems low. It is not a sum that would be stressed so heavily by someone who had first-hand familiarity with the business.⁴ In essence, the letter here does nothing more than set out the bare outlines of a simple, five-step process: (1) Sue drives the car down to Florida. (2) Sue flies back to Bloomingdale. (3) The car is "loaded up with drugs." (4) Lance flies down to Florida. (5) Lance drives the car back to Bloomingdale. I do not see enough there

⁴In one of my cases last year, for example, the government arranged a controlled buy from a full-time dealer for well over \$100,000. This was a single sale on the street, and the dealer tried to convince the undercover agent to take twice the amount--but the government did not have the funds. Evidence at trial indicated that a delivery to "the stash" would be about two orders of magnitude higher.

to satisfy the Aguilar test.

The state argues that the police investigation corroborated enough details in the letter to provide probable cause. *what about statement that Sue would drive car to Fla & few days later name would fly & bring car back.* disageee. In the first place, the details that were corroborated *?* were the least specific. The police verified that resps lived "in the condominiums." They in fact learned the specific address (although there was some disagreement between their confidential informant and the telephone company) that someone with first-hand knowledge of resps could easily have provided. And they learned that Lance was flying down to a city in Florida "a few days" after May 3. Once again, the police obtained the specific information that someone with first-hand knowledge could have provided. *But why did not police get this before the letter was basis of investigation & was proved correct*

Even more important, though, was the result of the police attempt to corroborate some of the slightly more specific information. Here they discovered that the anonymous informant had the rough idea (such as could be learned from neighborhood rumor) but did not have it "quite right." The informant, for example, had said that Sue would drive the car down to Florida on May 3, "leav[e] it to be loaded up with drugs," and fly back. The police never did verify how and when Sue and the car reached Florida, although the obvious inference is that she drove down at some point. But she did not "dro[p] the car off," and "leav[e] it to be loaded up with drugs," nor did she fly back back to Chicago while Lance drove the car. Even with corroboration, the letter does not satisfy the "basis of information" prong of the Aguilar test. *?*

C. The Informant's Veracity

Under Aguilar, the magistrate issuing the warrant must be able to conclude that the informant was "credible" and his information "reliable." As an example, the Aguilar Court specifically endorsed the affidavit in Jones v. United States, 362 U.S. 257, 267 n.2 (1960). That affidavit told the commissioner that the informant had provided reliable information in the past, and that the information in question had also been obtained from other sources. 378 U.S., at 114 & n.5.

Here, in contrast, there ~~is nothing~~ to indicate that the author of the anonymous letter is credible, or that his/her information is reliable. The state argues that a "citizen informant" should be presumed reliable, since there is no apparent motive to lie. It cites cases in which crime victims, eye-witnesses, or witnesses sought out by the police have given information that has been found acceptable. But these are all cases in which witnesses' identities were known to the police, and the witnesses were known to have been in a position to obtain the information on which the police relied. None involved an anonymous tipster. Although the state may be correct to say that there was no apparent motive for a "citizen informant" to lie, this is only because nothing⁵ is apparent about the informant. There was also no apparent motive to tell the truth. There are numerous possible motives to lie, and the anonymous letter pro-

*except the
corroboration
by
police*

⁵The state frequently stresses his/her citizenship, but even this is conjecture.

vides the perfect opportunity to do so without fear of responsibility. Furthermore, even if the state is correct, its argument could prove only that the informant thought (s)he was telling the truth. There is no reason to suppose that (s)he in fact knew the truth. Perhaps (s)he honestly believed that anyone travelling to Florida was a drug dealer.

The state also argues that the suspicious circumstances of the trip tended to show that the letter was credible. The argument is essentially that resps satisfied a "drug courier profile" like the one at issue in Florida v. Royer, No. 80-2146.

at least unusual
This is ridiculous. The only suspicious aspect of the trip was Lance's rapid turn-around,⁶ and there are many possible explanations for that. There was no suggestion that Lance paid for his trip in cash, or carried little luggage. Other circumstances also tend to indicate that the trip was legitimate. Unlike almost every drug courier profile case, Lance travelled under his own name, and gave the airline his proper telephone number. He did not rush out of the airport in West Palm Beach, but waited an hour before leaving. Susan had registered in the Holiday Inn under her own name. The car's license plates were issued to Lance in his own name.⁷ In sum, resps did not fit any rational

⁶Note that Susan did not necessarily have a rapid turn-around. Even if the letter is correct on this point, she at least spent a few days in Florida--much longer than would be needed simply to pick up drugs.

⁷The discrepancy between the Mercury, which resps were driving, and the Hornet, for which the plates were issued, may indicate some illegality, but it does not indicate drug-running.

"drug courier profile." Furthermore, even if they did, that would not necessarily provide probable cause. In most of the drug courier profile cases, the courts have held at best that conformity with the profile provided articulable suspicion justifying a limited intrusion--not probable cause justifying an arrest or search.

Even with corroboration that the police were able to obtain, the letter does not satisfy the "veracity" prong of the Aguilar test. ?

D. The Context of the Case

The principal difficulty I have with this case is the context in which the issue is presented to the Court. The question, unfortunately, is not whether the police acted reasonably. I think they ^{certainly} ~~probably~~ did. The question is whether there was probable cause to justify the issuance of a search warrant, and this is a different issue.

The Court denied the state's motion to amend or enlarge the question presented to include the issue of a "good faith" exception to the exclusionary rule. The amici nevertheless brief the point, so I will mention it here. In this situation the exclusionary rule does not serve any direct deterrent purpose. Indeed, the police should not be deterred from presenting their evidence to a neutral magistrate to obtain a search warrant. But if the exclusionary rule did not apply in these circumstances, the magistrate's decision--made in an ex parte proceeding--would be effectively isolated from appellate review.

some are

There would then be a real risk that some magistrates would become little more than "rubber stamps" for police requests. The Court should take care to prevent such a result. See Aguilar, supra, 378 U.S., at 111 ("[T]he court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police.").

Concluding that the circumstances presented here were sufficient to support a finding of probable cause would also have far-reaching consequences. I have no doubt that the police had articulable suspicion sufficient to justify a limited investigatory stop.⁸ This would have been a very different case if the police had approached resps and asked them what they were carrying in their trunk. If probable cause were determined on a continuum, this would also be a different case. I do not argue that it was necessarily "unreasonable" for the police to make the limited intrusion that was made here. But the Court has always rejected such balancing tests. See, e.g., Dunaway v. New York, 442 U.S. 200, 213-14 (1979). It is therefore not enough that the police may have had sufficient cause to justify a very limited search. They conducted a search requiring a warrant, and as a result "probable cause" is required. If the Court relaxes the standards of probable cause here, it relaxes them in the context

⁸The state relies heavily on Adams v. Williams, 407 U.S. 143 (1972), claiming that there was less evidence of probable cause there than here. Williams, however, was initially a Terry-stop case. It was only after the officer discovered a weapon that there was probable cause to justify the arrest and the search that revealed the drugs.

of a much more intrusive search. It even relaxes them in the context of an arrest, for although the conclusions justifying search and arrest warrants are different, each must be supported by the same level of probable cause. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547, 556 n.6 (1978). The evidence here supported the conclusion that resps were guilty more strongly than it supported the conclusion that there would be drugs in the car and house, but it seems clear that, prior to the discovery of the marijuana, the police did not have probable cause to arrest resps at 5:15 a.m. Yet the legal standard is theoretically the same.

III. Conclusion

The proper disposition of this case would have been to *you* deny cert. It is little more than a factual dispute over the application of the Aguilar principles. It is not governed by Draper. An affirmance will simply establish that Aguilar retains precedential force, clarifying that a totally anonymous tipster is not a better source of information than a confidential informant known to the police. A reversal, on the other hand, could seriously undermine the meaning of "probable cause," making not only searches, but also arrests, easier to obtain on the basis of community rumor. }

*Depends on
how case is
written.*

Biebel (Ant AG 9 ll)

9 ll. Ct. held that corroborative evidence cannot satisfy ~~but~~ the "basis of knowledge" prong of Aguilar.

A detailed letter to def. from an anonymous tip from an informer.

Hearsay may satisfy "prob. cause".
(we have so held).

Drove back non-stop, arriving home at 5 AM on Sun. A.M.

Tip "inherently suspicious".

Relies on Adams v. Winer 407 U.S. 143
(WHR)

Should abandon two prong analysis - can demonstrate confusion if they are analyzed separately. The test should be whether all facts & circumstances, viewed together, establish probable cause.

Reilly (Reply)

Relied on the two prong test

Biber (Reply)

9 P S suggests a distinction
bet. the warrant to search car
& search house.

But apt. was not searched until
after drugs were found in car.

Powell

10/12/82

81-430 rel v Gale

Informants letter;

Every
fact of
any
importance
was found
to be
exactly
right.

Each is
a ~~facially~~
innocent.

But the
total
bundle of
verified
facts refuted
co-incidence.

At this point
there was
probably
cause. The
magistrate
would have been
doubtful not to
issue warrant - if

1. Named couple - verified
2. Address - substantially
Purchaser in Fla verified
3. Wife ~~drove~~ car down - verified in
on May 3rd Fla by reg. in
His name
4. H. flies down in few days - He died
(on May 5) (verified)
5. H. drives car back - He died
(verified)

At W/Palm Beach
rooms reg. in W's name

- ~~6. H.~~
6. H. arrived back on May 7
(the drive taken
21-23 hours)

On arrival, pursuant to
warrant - search of car: 350 lbs
marijuana

The above detail is "self-verifying".
And warrant may issue on
probable cause - what a reasonable
person would believe these facts

Apart from all else, one does not
ordinarily fly to Fla on one day,
pick up his car (w/o his wife who

Draper/Spurlock
(not a guest)
contracts.
Info. here is
so detailed.

was found
to be
exactly
right.

Each is
a ~~facially~~
innocent.

But the
total
bundle of
verified
facts refute
co-incidence.

At this point
there was
probably
cause. The
magistrate
would have been
hesitant not to
issue warrant - if

Apart from all else, one does not
ordinarily fly to Fla on one day,
pick up his car (w/o his wife who
drove it down), & return to Ill. two
days later.

on May 3rd

Fla by reg. in
His name

4. It. flies down in few days - He died
(on May 5) (verified)

5. It. drives car back - He died
(verified)

At W/Palm Beach
room reg. in W's name

~~on~~ #

6. It. arrived back on May 7
(the drive taken
21-23 hours)

On arrival, pursuant to
warrant - search of car: 350 lbs
marijuana

The above detail is "self-verifying".
And warrant may issue on
probable cause - what a reasonable
person would believe.
These facts

Draper/Spiller
(not a quoted)
contract.
Info. here is
so detailed,
magistrate
reasonably
could rely on it.

The Chief Justice

Rev.

Too much emphasis on "anonymity" factor of a "tipster."

Draper is highly relevant authority.

Case has not been tried. Issue on suppression motion.

Could agree to remand or to search of house.

Justice Brennan

Aff'm

Agurs & Spinella control. Letter was insufficiently specific to satisfy the "basis of knowledge" prong.

Draper doesn't control - is distinguishable.

State almost conceded search of house was improper.

Justice White

Rev.

Would dispose of this case by holding officers acted in good faith. Then in good case to modify E/R. ~~to~~ Apply objective test of good faith ~~to~~

If we follow Draper "self-verification" ~~But~~ this is a stronger case because here conduct - inherently suspicious verified the information.

Would prefer to modify E/R. Presumption in favor of ~~the~~ validity of warrant.

No different difference between auto & house.

In Draper there was no verification of major facts. So this is clearer case.

Justice Marshall Affirm

Justice Blackmun Rev.

Not fond of Aguilar

There is a Forquer case

Could go with Byrum on ???

Justice Powell Rev.

See my yellow pad notes.

I would merge the separate prongs of Aguilar.

The self-verification here was fully concerning as to auto. Not as clear as to the house.

I am interested in BRW view as to a good faith exception to E/R.

See my concurring op. in Brown v. Ill

Rev

Would rely on Draper - not Aguilar & Spinella

Intervent in B & W's proposal.

There is a presumption in favor of validity of warrant.

Justice Stevens

Affirm as to House; Rev as to Car (tentative)

Magistrate did ^{not} know the Gates were returning to their home.

Warrant should be analyzed at time it was issued. Facts not fully convincing at that time.

Clear as to ~~the~~ validity of search of car but ~~not~~ valid as to House.

No relevance to ^{fact that car had} car having wrong license as both cars were in H's name.

Little weight as to ?

Justice O'Connor

Rev

Draper approach is an alternate approach to Aguilar. - self verification.

Aguilar tests also are met here.

Could join Byron on "good faith exception".

we did not pass on the
"good faith" E/Rule issue, in
pages too long & verbose (pp 2-9)

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

4/11

Reminder of op. is outrageously
long essay on Spinelli
& why its "two-prong" test should be
rejected for a 1st DRAFT

From: Justice Rehnquist

APR 11 1983

Circulated: _____

Recirculated: _____

"totality
of circumstances
test"

SUPREME COURT OF THE UNITED STATES

No. 81-430

ILLINOIS, PETITIONER v. LANCE GATES ET UX.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ILLINOIS

[April —, 1983]

I joined
on 4/28
LTP

I probably
can join this.
The 9
could
decide
this case
on Draper
that WHR
addressed
belatedly
in Part IV.
I may
write a
few words
about
Draper

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents Lance and Susan Gates were indicted for violation of state drug laws after police officers, executing a search warrant, discovered marijuana and other contraband in their automobile and home. Prior to trial the Gates moved to suppress evidence seized during this search. The Illinois Supreme Court affirmed the decisions of lower state courts granting the motion. It held that the affidavit submitted in support of the State's application for a warrant to search the Gates's property was inadequate under this Court's decisions in *Aguilar v. Texas*, 378 U. S. 108 (1964) and *Spinelli v. United States*, 393 U. S. 410 (1969).

We granted certiorari to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip. After receiving briefs and hearing oral argument on this question, however, we requested the parties to address an additional question:

"Whether 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

that the search and seizure at issue was consistent with the Fourth Amendment."

We decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it. Rather, we consider the question originally presented in the petition for certiorari, and conclude that the Illinois Supreme Court read the requirements of our Fourth Amendment decisions too restrictively. Initially, however, we set forth our reasons for not addressing the question regarding modification of the exclusionary rule framed in our order of November 29, 1982,
— U. S. —.

I

Our certiorari jurisdiction over decisions from state courts derives from 28 U. S. C. § 1257, which provides that "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." The provision derives, albeit with important alterations, see, *e. g.*, Act of December 23, 1914, c. 2, 38 Stat. 790; Act of June 25, 1948, c. 646, 62 Stat. 929, from the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85.

Although we have spoken frequently on the meaning of § 1257 and its predecessors, our decisions are in some respects not entirely clear. We held early on that § 25 of the Judiciary Act of 1789 furnished us with no jurisdiction unless a federal question had been both raised and decided in the state court below. As Justice Story wrote in *Crowell v. Randell*, 10 Pet. 368, 391 (1836), "If both of these requirements do not appear on the record, the appellate jurisdiction fails." See also *Owings v. Norwood's Lessee*, 5 Cranch. 344 (1809).¹

¹ The apparent rule of *Crowell v. Randell*, *supra*, that a federal claim

More recently, in *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 435-436 (1940), the Court observed:

But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

Finally, the Court seemed to reaffirm the jurisdictional character of the rule against our deciding claims "not pressed nor passed upon" in state court in *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U. S. 154, 160 (1945), where

have been *both* raised and addressed in state court was generally not understood in the literal fashion in which it was phrased. See R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 60 (1951). Instead, the Court developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in state court. See, e. g., *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 435-436 (1940); *State Farm Mutual Insurance Co. v. Duel*, 324 U. S. 154, 160 (1945).

we explained that "Since the [state] Supreme Court did not pass on the question, we may not do so." See also *Hill v. California*, 401 U. S. 797, 805-806 (1971).

Notwithstanding these decisions, however, several of our more recent cases have treated the so-called "not pressed or passed upon below" rule as merely a prudential restriction. In *Terminiello v. Chicago*, 337 U. S. 1 (1949), the Court reversed a state criminal conviction on a ground not urged in state court, nor even in this Court. Likewise, in *Vachon v. New Hampshire*, 414 U. S. 478 (1974), the Court summarily reversed a state criminal conviction on the ground, not raised in state court, or here, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment. The Court indicated in a footnote, *id.*, at 479, n. 3, that it possessed discretion to ignore the failure to raise in state court the question on which it decided the case.

In addition to this lack of clarity as to the character of the "not pressed or passed upon below" rule, we have recognized that it often may be unclear whether the particular federal question presented in this Court was raised or passed upon below. In *Dewey v. Des Moines*, 173 U. S. 193, 197-198 (1899), the fullest treatment of the subject, the Court said that "if the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."² We have not attempted, and likely

²In *Dewey*, certain assessments had been levied against the owner of property abutting a street paved by the city; a state trial court ordered that the property be forfeited when the assessments were not paid, and in

would not have been able, to draw a clear-cut line between cases involving only an "enlargement" of questions presented below and those involving entirely new questions.

The application of these principles in the instant case is not entirely straightforward. It is clear in this case that respondents expressly raised, at every level of the Illinois judicial system, the claim that the Fourth Amendment had been violated by the actions of the Illinois police and that the evidence seized by the officers should be excluded from their trial. It also is clear that the State challenged, at every level of the Illinois court system, respondents' claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, 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.

The case, of course, is before us on the State's petition for a writ of certiorari. Since the Act of December 23, 1914, c. 2, 38 Stat. 790, jurisdiction has been vested in this Court to review state court decisions even when a claimed federal right has been upheld. Our prior decisions interpreting the "not pressed or passed on below" rule have not, however, involved a State's failure to raise a defense to a federal right or remedy asserted below. As explained below, however, we

addition, held appellant personally liable for the amount by which the assessments exceeded the value of the lots. In state court the appellant argued that the imposition of personal liability against him violated the Due Process Clause of the Fourteenth Amendment, because he had not received personal notice of the assessment proceedings. In this Court, he also attempted to argue that the assessment itself constituted a taking under the Fourteenth Amendment. The Court held that, beyond arising from a single factual occurrence, the two claims "are not in anywise necessarily connected," *id.*, at 198. Because of this, we concluded that appellant's taking claim could not be considered.

can see no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim.

We have identified several purposes underlying the "not pressed or passed upon" rule: for the most part, these are as applicable to the State's failure to have opposed the assertion of a particular federal right, as to a party's failure to have asserted the claim. First, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U. S. 437, 439 (1969). Exactly the same difficulty exists when the state urges modification of an existing constitutional right or accompanying remedy. Here, for example, the record contains little, if anything, regarding the subjective good faith of the police officers that searched the Gates's property—which might well be an important consideration in fashioning a good faith exception to the exclusionary rule. Our consideration of the modification of the exclusionary rule plainly would benefit from a record containing such facts.

Likewise, "due regard for the appropriate relationship of this Court to state courts," *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 435-436 (1940), demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions. Finally, by requiring that the State first argue to the state courts that the federal exclusionary rule should be modified, we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground. See *Cardinale*, *supra*, 394 U. S., at 439. Illinois, for example, adopted an exclusionary rule as early as 1923, see *People v. Brocamp*, 138 N. E. 728 (1923), and might adhere to its view even if it thought we would conclude that the federal rule should be modified. In short, the reasons supporting our refusal to

hear federal claims not raised in state court apply with equal force to the State's failure to challenge the availability of a well-settled federal remedy. Whether the "not pressed or passed upon below" rule is jurisdictional, as our earlier decisions indicate, see —, *supra*, or prudential, as several of our later decisions assume, nor whether its character might be different in cases like this from its character elsewhere we need not decide. Whatever the character of the rule may be, consideration of the question presented in our order of November 29, 1982, would be contrary to the sound justifications for the "not pressed or passed upon below" rule, and we thus decide not to pass on the issue.

The fact that the Illinois courts affirmatively applied the federal exclusionary rule—suppressing evidence against respondents—does not affect our conclusion. In *Morrison v. Watson*, 154 U. S. 111 (1894), the Court was asked to consider whether a state statute impaired the appellant's contract with the appellee. It declined to hear the case because the question presented here had not been pressed or passed on below. The Court acknowledged that the lower court's opinion had restated the conclusion, set forth in an earlier decision of that court, that the state statute did not impermissibly impair contractual obligations. Nonetheless, it held that there was no showing that "there was any real contest at any stage of this case upon the point," *id.*, at 115, and that without such a contest, the routine restatement and application of settled law by an appellate court did not satisfy the "not pressed or passed upon below" rule. Similarly, in the present case, although the Illinois courts applied the federal exclusionary rule, there was never "any real contest" upon the point. The application of the exclusionary rule was merely a routine act, once a violation of the Fourth Amendment had been found, and not the considered judgment of the Illinois courts on the question whether application of a modified rule would be warranted on the facts of this case. In such circumstances, absent the adversarial dispute necessary

2

to apprise the state court of the arguments for not applying the exclusionary rule, we will not consider the question whether the exclusionary rule should be modified.

Likewise, we do not believe that the State's repeated opposition to respondent's substantive Fourth Amendment claims suffices to have raised the question whether the exclusionary rule should be modified. The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally" and not "a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U. S. 338, 348 (1974). The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. See, e. g., *United States v. Havens*, 446 U. S. 620 (1980); *United States v. Ceccolini*, 435 U. S. 268 (1978); *United States v. Calandra*, *supra*; *Stone v. Powell*, 428 U. S. 465 (1976). Because of this distinction, we cannot say that modification or abolition of the exclusionary rule is "so connected with [the substantive Fourth Amendment right at issue] as to form but another ground or reason for alleging the invalidity" of the judgment. *Dewey v. Des Moines*, *supra*, 173 U. S., at 197-198. Rather, the rule's modification was, for purposes of the "not pressed or passed upon below" rule, a separate claim that had to be specifically presented to the State courts.

Finally, weighty prudential considerations militate against our considering the question presented in our order of November 29, 1983. The extent of the continued vitality of the rules that have developed from our decisions in *Weeks v. United States*, 232 U. S. 383 (1961), and *Mapp v. Ohio*, 367 U. S. 643 (1961), is an issue of unusual significance. Sufficient evidence of this lies just in the comments on the issue that members of this Court recently have made, e. g., *Bivens v. Six Unknown Named Agents*, 403 U. S. 388, 415 (1971)

(BURGER, C. J., dissenting); *Coolidge v. New Hampshire*, 403 U. S. 443, 490 (1971) (Harlan, J., concurring); *id.*, at 502 (Black, J., dissenting); *Stone v. Powell*, 428 U. S. 465, 537-539 (1976) (WHITE, J., dissenting); *Brewer v. Williams*, 430 U. S. 387, 413-414 (1977) (POWELL, J., concurring); *Robbins v. California*, 453 U. S. 420, 437, 443-444 (1981) (REHNQUIST, J., dissenting). Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we "promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions." *Mapp v. Ohio*, *supra*, 367 U. S., at 677 (Harlan, J., dissenting). Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of "untoward practical ramifications," *id.*, at 676 (Harlan, J., dissenting), not foreseen at the time of decision. The public importance of our decisions in *Weeks* and *Mapp* and the emotions engendered by the debate surrounding these decisions counsel that we meticulously observe our customary procedural rules. By following this course, we promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions. A wise exercise of the powers confided in this Court dictates that we reserve for another day the question whether the exclusionary rule should be modified.

II

We now turn to the question presented in the State's original petition for certiorari, which requires us to decide whether respondents' rights under the Fourth and Fourteenth Amendments were violated by the search of their car and house. A chronological statement of events usefully introduces the issues at stake. Bloomingdale, Ill., is a suburb

of Chicago located in DuPage County. On May 3, 1978, the Bloomingdale Police Department received by mail an anonymous handwritten letter which read as follows:

"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 where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 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 if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.

Lance & Susan Gates
Greenway
in Condominiums"

The letter was referred by the Chief of Police of the Bloomingdale Police Department to Detective Mader, who decided to pursue the tip. Mader learned, from the office of the Illinois Secretary of State, that an Illinois driver's license had been issued to one Lance Gates, residing at a stated address in Bloomingdale. He contacted a confidential informant, whose examination of certain financial records revealed a more recent address for the Gates, and he also learned from a police officer assigned to O'Hare Airport that "L. Gates" had made a reservation on Eastern Airlines flight 245 to West Palm Beach, Fla., scheduled to depart from Chicago on May 5 at 4:15 p.m.

Mader then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7:00 a.m. the next morning, Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove northbound on an interstate frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomington was approximately 22 to 24 hours.

Mader signed an affidavit setting forth the foregoing facts, and submitted it to a judge of the Circuit Court of DuPage County, together with a copy of the anonymous letter. The judge of that court thereupon issued a search warrant for the Gates's residence and for their automobile. The judge, in deciding to issue the warrant, could have determined that the *modus operandi* of the Gates had been substantially corroborated. As the anonymous letter predicted, Lance Gates had flown from Chicago to West Palm Beach late in the afternoon of May 5th, had checked into a hotel room registered in the name of his wife, and, at 7:00 a.m. the following morning, had headed north, accompanied by an unidentified woman, out of West Palm Beach on an interstate highway used by travelers from South Florida to Chicago in an automobile bearing a license plate issued to him. 9ll.

At 5:15 a.m. on March 7th, only 36 hours after he had flown out of Chicago, Lance Gates, and his wife, returned to their home in Bloomington, driving the car in which they had left West Palm Beach some 22 hours earlier. The Bloomington police were awaiting them, searched the trunk of the Mer-

cury, and uncovered approximately 350 pounds of marijuana. A search of the Gates's home revealed marijuana, weapons, and other contraband. The Illinois Circuit Court ordered suppression of all these items, on the ground that the affidavit submitted to the Circuit Judge failed to support the necessary determination of probable cause to believe that the Gates's automobile and home contained the contraband in question. This decision was affirmed in turn by the Illinois Appellate Court and by a divided vote of the Supreme Court of Illinois.

2 The Illinois Supreme Court concluded—and we are inclined to agree—that, standing alone, the anonymous letter sent to the Bloomington Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gates's car and home. The 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's criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gates's home and car. See *Aguilar v. Texas*, 378 U. S. 108, 109, n. 1 (1964); *Nathanson v. United States*, 290 U. S. 41 (1933).

The Illinois Supreme Court also properly recognized that Detective Mader's affidavit might be capable of supplementing the anonymous letter with information sufficient to permit a determination of probable cause. See *Whitely v. Warden*, 401 U. S. 560, 567 (1971). In holding that the affidavit in fact did not contain sufficient additional information to sustain a determination of probable cause, the Illinois court applied a "two-pronged test," derived from our decision in *Spinelli v. United States*, 393 U. S. 410 (1969).³ The Illinois

Why such
tentative
language?

³In *Spinelli*, police officers observed Mr. Spinelli going to and from a

Supreme Court, like some others, apparently understood *Spinelli* as requiring that the anonymous letter satisfy each of two independent requirements before it could be relied on. *J. A.*, at 5. According to this view, the letter, as supplemented by Mader's affidavit, first had to adequately reveal the "basis of knowledge" of the letter writer—the particular means by which he came by the information given in his report. Second, it had to provide facts sufficiently establishing either the "veracity" of the affiant's informant, or, alternatively, the "reliability" of the informant's report in this particular case.

The Illinois court, alluding to an elaborate set of legal rules that have developed among various lower courts to enforce the "two-pronged test,"⁴ found that the test had not been

particular apartment, which the telephone company said contained two telephones with stated numbers. The officers also were "informed by a confidential reliable informant that William Spinelli [was engaging in illegal gambling activities]" at the apartment, and that he used two phones, with numbers corresponding to those possessed by the police. The officers submitted an affidavit with this information to a magistrate and obtained a warrant to search Spinelli's apartment. We held that the magistrate could have made his determination of probable cause only by "abdication of his constitutional function," *id.*, at 416. The Government's affidavit contained absolutely no information regarding the informant's reliability. Thus, it did not satisfy *Aguilar's* requirement that such affidavits contain "some of the underlying circumstances" indicating that "the informant . . . was 'credible'" or that "his information [was] 'reliable.'" *Aguilar, supra*, 378 U. S., at 114. In addition, the tip failed to satisfy *Aguilar's* requirement that it detail "some of the underlying circumstances from which the informant concluded that . . . narcotics were where he claimed they were." We also held that if the tip concerning Spinelli had contained "sufficient detail" to permit the magistrate to conclude "that he [was] relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation," 398 U. S., at 416, then he properly could have relied on it; we thought, however, that the tip lacked the requisite detail to permit this "self-verifying detail" analysis.

⁴See, e. g., *Stanley v. State*, 313 A. 2d 847 (Md. App. 1974). In summary, these rules posit that the "veracity" prong of the *Spinelli* test has

satisfied. First, the "veracity" prong was not satisfied because, "there was simply no basis [for] . . . conclud[ing] that the anonymous person [that wrote the letter to the Bloomington Police Department] was credible." J. A., at 7a. The court indicated that corroboration by police of details contained in the letter might never satisfy the "veracity" prong, and in any event, could not do so if, as in the present case, only "innocent" details are corroborated. J. A., at 12. In addition, the letter gave no indication of the basis of its writer's knowledge of the Gates's activities. The Illinois court understood *Spinelli* as permitting the detail contained in a tip to be used to infer that the informant had a reliable basis for his statements, but it thought that the anonymous letter failed to provide sufficient detail to permit such an inference. Thus, it concluded that no showing of probable cause had been made.

We agree with the Illinois Supreme Court that an informant's "veracity," "reliability" and "basis of knowledge" are

two "spurs"—the informant's "credibility" and the "reliability" of his information. Various interpretations are advanced for the meaning of the "reliability" spur of the "veracity" prong. Both the "basis of knowledge" prong and the "veracity" prong are treated as entirely separate requirements, which must be independently satisfied in every case in order to sustain a determination of probable cause. See n. 5, *infra*. Some ancillary doctrines are relied on to satisfy certain of the foregoing requirements. For example, the "self-verifying detail" of a tip may satisfy the "basis of knowledge" requirement, although not the "credibility" spur of the "veracity" prong. See J. A. 10a. Conversely, corroboration would seem not capable of supporting the "basis of knowledge" prong, but only the "veracity" prong. *Id.*, at 12a.

The decision in *Stanley*, while expressly approving and conscientiously attempting to apply the "two-pronged test" observes that "[t]he built-in subtleties [of the test] are such, however, that a slipshod application calls down upon us the fury of Murphy's Law." 313 A. 2d, at 860 (footnote omitted). The decision also suggested that it is necessary "to evolve analogous guidelines [to hearsay rules employed in trial settings] for the reception of hearsay in a probable cause setting." *Id.*, at 857.

all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case,⁵ which the opinion of the Supreme Court of Illinois would imply. 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.

III

This totality of the circumstances approach is far more consistent with our prior treatment of probable cause⁶ than is

"Totality of
circumstances
approach"

⁵The entirely independent character that the *Spinelli* prongs have assumed is indicated both by the opinion of the Illinois Supreme Court in this case, and by decisions of other courts. One frequently cited decision, *Stanley v. State*, 313 A. 2d 847, 861 (Md. App. 1974), remarks that "the dual requirements represented by the 'two-pronged test' are 'analytically severable' and an 'overkill' on one prong will not carry over to make up for a deficit on the other prong." See also n. 9, *infra*.

⁶Our original phrasing of the so-called "two-pronged test" in *Aguilar v. Texas*, 378 U. S. 108 (1969), suggests that the two prongs were intended simply as guides to a magistrate's determination of probable cause, not as inflexible, independent requirements applicable in every case. In *Aguilar*, we required only that:

the magistrate must be informed of *some of the underlying circumstances* from which the informant concluded that . . . narcotics were where he claimed they were, and *some of the underlying circumstances* from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Id.*, at 114 (emphasis added).

As our language indicates, we intended neither a rigid compartmentalization of the inquiries into an informant's "veracity," "reliability" and "basis of knowledge," nor that these inquiries be elaborate exegeses of an informant's tip. Rather, we required only that *some* facts bearing on two particular issues be provided to the magistrate. Our decision in *Jaden v. United States*, 381 U. S. 214 (1965), demonstrated this latter point. We held there that a criminal complaint showed probable cause to believe the defendant had attempted to evade the payment of income taxes. We com-

any rigid demand that specific "tests" be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." *Brinegar v. United States*, 338 U. S. 160, 176 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175. Our observation in *United States v. Cortez*, 449 U. S. 411, 418 (1981), regarding "particularized suspicion," is also applicable to the probable cause standard:

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in

mented that:

"Obviously any reliance upon factual allegations necessarily entails some degree of reliability upon the credibility of the source. . . . Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that each and every fact which contributed to his conclusions be spelled out in the complaint. . . . It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." *Id.*, at 224-225 (emphasis added).

probable
cause

"why not
more
likely
than
not"

many shapes and sizes from many different types of persons. As we said in *Adams v. Williams*, 407 U. S. 143, 147 (1972), "Informants' tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." *Ibid.*⁷

⁷The diversity of informants' tips, as well as the usefulness of the totality of the circumstances approach to probable cause, is reflected in our prior decisions on the subject. In *Jones v. United States*, 362 U. S. 257, 271 (1960), we held that probable cause to search petitioners' apartment was established by an affidavit based principally on an informant's tip. The unnamed informant claimed to have purchased narcotics from petitioners at their apartment; the affiant stated that he had been given correct information from the informant on a prior occasion. This, and the fact that petitioners had admitted to police officers on another occasion that they were narcotics users, sufficed to support the magistrate's determination of probable cause.

Likewise, in *Rugendorf v. United States*, 376 U. S. 528 (1964), we upheld a magistrate's determination that there was probable cause to believe that certain stolen property would be found in petitioner's apartment. The affidavit submitted to the magistrate stated that certain furs had been stolen, and that a confidential informant, who previously had furnished confidential information, said that he saw the furs in petitioner's home. Moreover, another confidential informant, also claimed to be reliable, stated that one Schweih's had stolen the furs. Police reports indicated that petitioner had been seen in Schweih's company and a third informant stated that petitioner was a fence for Schweih's.

Finally, in *Ker v. California*, 374 U. S. 23 (1963), we held that information within the knowledge of officers who searched the Ker's apartment provided them with probable cause to believe drugs would be found there. The officers were aware that one Murphy had previously sold marijuana to a police officer; the transaction had occurred in an isolated area, to which Murphy had led the police. The night after this transaction, police Ker and Murphy meet in the same location. Murphy approached Ker's car, and, although police could see nothing change hands, Murphy's *modus operandi* was identical to what it had been the night before. Moreover, when police followed Ker from the scene of the meeting with Murphy he managed to lose them after performing an abrupt U-turn. Finally, the police had a statement from an informant who had provided reliable informa-

Moreover, the "two-pronged test" directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." See nn. 4 and 5 *supra*. There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. See, e. g., *Adams v. Williams*, *supra*, 407 U. S., at 146-147; *Harris v. United States*, 403 U. S. 573 (1971).

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. See *United States v. Sellers*, 483 F. 2d 37 (CA5 1973).³ Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary. *Adams v. Williams*, *supra*. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles

tion previously, that Ker was engaged in selling marijuana, and that his source was Murphy. We concluded that "To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement." *Id.*, at 36.

³ Compare *Stanley v. State*, 313 A. 2d 847, 861 (Md. App. 1974), reasoning that "Even assuming 'credibility' amounting to sainthood, the judge still may not accept the bare conclusion of a sworn and known and trusted police-affiant."

his tip to greater weight than might otherwise be the case. Unlike a totality of circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the "two-pronged test" has encouraged an excessively technical dissection of informants' tips,⁹ with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.

As early as *Locke v. United States*, 7 Cranch. 339, 348 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its

⁹ Some lower court decisions, brought to our attention by the State, reflect a rigid application of such rules. In *Bridger v. State*, 503 S. W. 2d 801 (Tex. Crim. App. 1974), the affiant had received a confession of armed robbery from one of two suspects in the robbery; in addition, the suspect had given the officer \$800 in cash stolen during the robbery. The suspect also told the officer that the gun used in the robbery was hidden in the other suspect's apartment. A warrant issued on the basis of this was invalidated on the ground that the affidavit did not satisfactorily describe how the accomplice had obtained his information regarding the gun.

Likewise, in *People v. Palanza*, 371 N. E. 2d 687 (Ill. App. 1978), the affidavit submitted in support of an application for a search warrant stated that an informant of proven and uncontested reliability had seen, in specifically described premises, "a quantity of a white crystalline substance which was represented to the informant by a white male occupant of the premises to be cocaine. Informant has observed cocaine on numerous occasions in the past and is thoroughly familiar with its appearance. The informant states that the white crystalline powder he observed in the above described premises appeared to him to be cocaine." The warrant issued on the basis of the affidavit was invalidated because "There is no indication as to how the informant or for that matter any other person could tell whether a white substance was cocaine and not some other substance such as sugar or salt." *Id.*, at 689.

Finally, in *People v. Brethauer*, 482 P. 2d 369 (Colo. 1971), an informant, stated to have supplied reliable information in the past, claimed that L. S. D. and marijuana were located on certain premises. The affiant supplied police with drugs, which were tested by police and confirmed to be illegal substances. The affidavit setting forth these, and other, facts was found defective under both prongs of *Spinelli*.

usual acceptance, means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar, supra*, 338 U. S., at 173. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause." *Spinelli, supra*, 393 U. S., at 419. See Model Code of Pre-Arraignment Procedure §210.1(7) (Proposed Off. Draft 1972).

We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." *Ventresca, supra*, 380 U. S., at 108. Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause." See *Shadwick v. City of Tampa*, 407 U. S. 345, 348-350 (1972). The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are—quite properly, *ibid.*—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the context in which it must be applied, the "built-in subtleties," *Stanley v. State*, 313 A. 2d 847, 860 (Md. App. 1974), of the "two-

pronged test" are particularly troubling.

Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli, supra*, 393 U. S., at 419. "A grudging or negative attitude by reviewing courts toward warrants," *Ventresca, supra*, 380 U. S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant: "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, at 109.

If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U. S. 1, 9 (1977). Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U. S. 257, 271 (1960). See *United States v. Harris*, 403 U. S. 573, 577-583 (1971).¹⁰ We think reaffirmation

preference
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¹⁰ We also have said that "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should

of this standard better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determinations of magistrates than is the "two-pronged test."

Finally, the direction taken by decisions following *Spinelli* poorly serves "the most basic function of any government": "to provide for the security of the individual and of his property." "Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values." *Miranda v. Arizona*, 384 U. S. 436, 539 (1966) (WHITE, J., dissenting). The strictures that inevitably accompany the "two-pronged test" cannot avoid seriously impeding the task of law enforcement, see, e. g., n. 9 *supra*. If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips seldom would be of any value in police work. Ordinary citizens, like ordinary witnesses, see Federal Rules of Evidence 701, Advisory Committee Note (1976), generally do not provide extensive recitations of the basis of their everyday observations. Likewise, as the Illinois Supreme Court observed in this case, the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable. As a result, anonymous tips seldom could survive a rigorous application of either of the *Spinelli* prongs. Yet, such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes."

be largely determined by the preference to be accorded to warrants," *Ventresca, supra*, 380 U. S., at 109. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case. Even if we were to accept the premise that the accurate assessment of probable cause would be furthered by the "two-pronged test," which we do not, these Fourth Amendment policies would require a less rigorous standard than that which appears to have been read into *Aguilar* and *Spinelli*.

While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.

For all these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*.¹¹ In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. See *Jones v. United States*, *supra*; *United States v. Ventresca*, *supra*; *Brinegar v. United States*, *supra*. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed. *Jones v. United States*, *supra*, 362 U. S., at 271. We are convinced that this flexi-

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¹¹ The Court's decision in *Spinelli* has been the subject of considerable criticism, both by members of this Court and others. Justice BLACKMUN, concurring in *United States v. Harris*, 403 U. S. 573, 585-586 (1971), noted his long-held view "that *Spinelli* . . . was wrongly decided" by this Court. Justice Black similarly would have overruled that decision. *Ibid.* Likewise, a noted commentator has observed that "[t]he *Aguilar-Spinelli* formulation has provoked apparently ceaseless litigation." 8A Moore's Federal Practice ¶ 41.04 (1981).

Whether the allegations submitted to the magistrate in *Spinelli* would, under the view we now take, have supported a finding of probable cause, we think it would not be profitable to decide. There are so many variables in the probable cause equation that one determination will seldom be a useful "precedent" for another. Suffice it to say that while we in no way abandon *Spinelli's* concern for the trustworthiness of informers and for the principle that it is the magistrate who must ultimately make a finding of probable cause, we reject the rigid categorization suggested by some of its language.

ble, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States*, 290 U. S. 41 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas*, 378 U. S. 108 (1964). As in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits present 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*. Instead, the flexible, common-sense standard articulated in *Jones*, *Ventresca*, and *Brinegar* better serves the purposes of the Fourth Amendment's probable cause requirement.

IV

Our decisions applying the totality of circumstances analy-

sis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work. In *Jones v. United States*, *supra*, 362 U. S., at 269, we held that an affidavit relying on hearsay "is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." We went on to say that even in making a warrantless arrest an officer "may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Ibid.* Likewise, we recognized the probative value of corroborative efforts of police officials in *Aguilar*—the source of the "two-pronged test"—by observing that if the police had made some effort to corroborate the informant's report at issue, "an entirely different case" would have been presented. *Aguilar*, *supra*, 378 U. S., at 109, n. 1.

Our decision in *Draper v. United States*, 358 U. S. 307 (1959), however, is the classic case on the value of corroborative efforts of police officials. There, an informant named Hereford reported that Draper would arrive in Denver on a train from Chicago on one of two days, and that he would be carrying a quantity of heroin. The informant also supplied a fairly detailed physical description of Draper, and predicted that he would be wearing a light colored raincoat, brown slacks and black shoes, and would be walking "real fast." *Id.*, at 309. Hereford gave no indication of the basis for his information.¹²

¹²The tip in *Draper* might well not have survived the rigid application of the "two-pronged test" that developed following *Spinelli*. The only reference to Hereford's reliability was that he had "been engaged as a 'special employee' of the Bureau of Narcotics at Denver for about six months, and from time to time gave information to [the police] for small sums of money, and that [the officer] had always found the information given by Hereford to be accurate and reliable." 358 U. S., at 309. Likewise, the tip gave no indication of how Draper came by his information. At most, the detailed

On one of the stated dates police officers observed a man matching this description exit a train arriving from Chicago; his attire and luggage matched Hereford's report and he was walking rapidly. We explained in *Draper* that, by this point in his investigation, the arresting officer "had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, [the officer] 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.*, at 313.

The showing of probable cause in the present case was fully as compelling as that in *Draper*. Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gates were involved in drug trafficking. In addition to being a popular vacation site, Florida is well-known as a source of narcotics and other illegal drugs. See *United States v. Mendenhall*, 446 U. S. 544, 562 (1980) (POWELL, J., concurring); DEA, Narcotics Intelligence Estimate, The Supply of Drugs to the U. S. Illicit Market From Foreign and Domestic Sources 10 (1979). Lance Gates's flight to Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car, conveniently awaiting him in West Palm Beach, is as suggestive of a pre-arranged drug run, as it is of an ordinary vacation trip.

In addition, the magistrate could rely on the anonymous letter, which had been corroborated in major part by Mader's efforts—just as had occurred in *Draper*.¹³ The Supreme

and accurate predictions in the tip indicated that, however Hereford obtained his information, it was reliable.

¹³ The Illinois Supreme Court thought that the verification of details contained in the anonymous letter in this case amounted only to "the corroboration

yes

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Court of Illinois reasoned that *Draper* involved an informant who had given reliable information on previous occasions, while the honesty and reliability of the anonymous informant in this case were unknown to the Bloomingdale police. While this distinction might be an apt one at the time the police department received the anonymous letter, it became far less significant after Mader's independent investigative work occurred. The corroboration of the letter's predictions that the Gates's car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. "Because an informant is right about some things, he is more probably right about other facts," *Spinelli, supra*, 393 U. S., at 427 (WHITE, J., concurring)—including the claim regarding the Gates's illegal activity. This may well not be the type of "reliability" or "veracity" necessary to

ration of innocent activity," J. A. 12a, and that this was insufficient to support a finding of probable cause. We are inclined to agree, however, with the observation of Justice Moran in his dissenting opinion that "In this case, just as in *Draper*, seemingly innocent activity became suspicious in the light of the initial tip." J. A. 18a. And it bears noting that *all* of the corroborating detail established in *Draper, supra*, was of entirely innocent activity—a fact later pointed out by the Court in both *Jones v. United States*, 362 U. S. 257, 269–270 (1960), and *Ker v. California*, 374 U. S. 23, 36 (1963).

This is perfectly reasonable. As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands. We think the Illinois court attempted a too rigid classification of the types of conduct that may be relied upon in seeking to demonstrate probable cause. See *Brown v. Texas*, 443 U. S. 47, 52, n. 2 (1979). In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non-criminal acts.

satisfy some views of the "veracity prong" of *Spinelli*, but we think it suffices for the practical, common-sense judgment called for in making a probable cause determination. It is enough, for purposes of assessing probable cause, that "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay." *Jones v. United States*, *supra*, 362 U. S., at 269, 271.

Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letter writer's accurate information as to the travel plans of each of the Gates was of a character likely obtained only from the Gates themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gates's alleged illegal activities. Of course, the Gates's travel plans might have been learned from a talkative neighbor or travel agent; under the "two-pronged test" developed from *Spinelli*, the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letter writer's "basis of knowledge." But, as discussed previously, *supra*, —, probable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for . . . conclud[ing]" that probable cause to search the Gates's home and car existed. The judgment of the Supreme Court of Illinois therefore must be

Reversed.

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: APR 20 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-430

ILLINOIS, PETITIONER v. LANCE GATES ET UX.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ILLINOIS

[April —, 1983]

JUSTICE STEVENS, dissenting.

The fact that Lance and Sue Gates made a 22-hour non-stop drive from West Palm Beach, Florida, to Bloomingdale, Illinois, only a few hours after Lance had flown to Florida provided persuasive evidence that they were engaged in illicit activity. That fact, however, was not known to the magistrate when he issued the warrant to search their home.

What the magistrate did know at that time was that the anonymous informant had not been completely accurate in his or her predictions. The informant had indicated that "Sue drives their car to Florida where she leaves it to be loaded up with drugs . . . Sue flies back after she drops the car off in Florida." App. 1a (emphasis added). Yet Detective Mader's affidavit reported that she "left the West Palm Beach area driving the Mercury northbound." App. 12a.

The discrepancy between the informant's predictions and the facts known to Detective Mader is significant for three reasons. First, it cast doubt on the informant's hypothesis that the Gates already had "over \$100,000 worth of drugs in their basement," App. 1a. The informant had predicted an itinerary that always kept one spouse in Bloomingdale, suggesting that the Gates did not want to leave their home unguarded because something valuable was hidden within. That inference obviously could not be drawn when it was known that the pair was actually together over a thousand

*I'll
not
join*

*I think this is a highly convincing dissent.
It ~~convincing~~ convinced me to change my original
view that the case should be affirmed. I think a
GVR is a good idea. But this is inconsistent
with your views. Mike* (9+12)

miles from home.

Second, the discrepancy made the Gates' conduct seem substantially less unusual than the informant had predicted it would be. It would have been odd if, as predicted, Sue had driven down to Florida on Wednesday, left the car, and flown right back to Illinois. But the mere facts that Sue was in West Palm Beach with the car,¹ that she was joined by her husband at the Holiday Inn on Friday,² and that the couple drove north together the next morning³ are not probative of any unusual behavior at all.

Third, the fact that the anonymous letter contained a material mistake undermines the reasonableness of relying on it as a basis for making a forcible entry into a private home.

Of course, the activities in this case did not stop when the magistrate issued the warrant. The Gates drove all night to

¹The anonymous note suggested that she was going down on Wednesday, App. 1a, but for all the officers knew she had been in Florida for a month. App. 10b-13b.

²Lance does not appear to have behaved suspiciously in flying down to Florida. He made a reservation in his own name and gave an accurate home phone number to the airlines. Compare *Florida v. Royer*, — U. S. —, —, n. 2 (1983); *United States v. Mendenhall*, 446 U. S. 544, 548 (1980) (Stewart, J., announcing the judgment). And Detective Mader's affidavit does not report that he did any of the other things drug couriers are notorious for doing, such as paying for the ticket in cash, *Royer, supra*, at —, n. 2, dressing casually, *ibid.*, looking pale and nervous, *ibid.*; *Mendenhall, supra*, at 548, improperly filling out baggage tags, *Royer, supra*, at —, n. 2, carrying American Tourister luggage, *ibid.*, not carrying any luggage, *Mendenhall, supra*, at 564-565 (Powell, J., concurring in part and concurring in the judgment), or changing airlines en route, *ibid.*

³Detective Mader's affidavit hinted darkly that the couple had set out upon "that interstate highway commonly used by travelers to the Chicago area." But the same highway is also commonly used by travelers to Disney World, Sea World, and Ringling Brothers and Barnum and Bailey Circus World. It is also the road to Cocoa Beach, Cape Canaveral, and Washington, D.C. I would venture that each year dozens of perfectly innocent people fly to Florida, meet a waiting spouse, and drive off together in the family car.

Bloomington, the officers searched the car and found 400 pounds of marijuana, and then they searched the house.⁴ However, none of these subsequent events may be considered in evaluating the warrant,⁵ and the search of the house was legal only if the warrant was valid. *Vale v. Louisiana*, 399 U. S. 30, 33-35 (1970). I cannot accept the Court's casual conclusion that, *before the Gates arrived in Bloomington*, there was probable cause to justify a valid entry and search of a private home. No one knows who the informant in this case was, or what motivated him or her to write the note. Given that the note's predictions were faulty in one significant respect, and were corroborated by nothing except ordinary innocent activity, I must surmise that the Court's evaluation of the warrant's validity has been colored by subsequent events.⁶

Although the foregoing analysis is determinative as to the

⁴ The officers did not enter the unoccupied house as soon as the warrant issued; instead, they waited until the Gates returned. It is unclear whether they waited because they wanted to execute the warrant without unnecessary property damage or because they had doubts about whether the informant's tip was really valid. In either event their judgment is to be commended.

⁵ It is a truism that "a search warrant is valid only if probable cause has been shown to the magistrate and that an inadequate showing may not be rescued by post-search testimony on information known to the searching officers at the time of the search." *Rice v. Wolff*, 513 F. 2d 1280 (CA8 1975). See *Coolidge v. New Hampshire*, 403 U. S. 443, 450-451 (1971); *Whiteley v. Warden*, 401 U. S. 560, 565, n. 8 (1971); *Aguilar v. Texas*, 378 U. S. 108, 109, n. 1 (1964); *Jones v. United States*, 357 U. S. 493, 497-498 (1958); *Giordenello v. United States*, 357 U. S. 480, 486 (1958); *Taylor v. United States*, 286 U. S. 1, 6 (1932); *Agnello v. United States*, 269 U. S. 20, 33 (1925).

⁶ *Draper v. United States*, 358 U. S. 307 (1959), affords no support for today's holding. That case did not involve an anonymous informant. On the contrary, as the Court twice noted, Mr. Hereford was "employed for that purpose and [his] information had always been found accurate and reliable." *Id.*, at 313; see *id.*, at 309. In this case, the police had no prior experience with the informant, and some of his or her information in this case was unreliable and inaccurate.

house search, the car search raises additional issues because "there is a constitutional difference between houses and cars." *Chambers v. Maroney*, 399 U. S. 42, 52 (1970). Cf. *Payton v. New York*, 445 U. S. 573, 589-590 (1980). An officer who has probable cause to suspect that a highly movable automobile contains contraband does not need a valid warrant in order to search it. This point was developed in our opinion in *United States v. Ross*, — U. S. — (1982), which was not decided until after the Illinois Supreme Court rendered its decision in this case. Under *Ross*, the car search may have been valid if the officers had probable cause *after* the Gates arrived.

In apologizing for its belated realization that we should not have ordered reargument in this case, the Court today shows high regard for the appropriate relationship of this Court to state courts. *Ante*, at 6. When the Court discusses the merits, however, it attaches no weight to the conclusions of the Circuit Judge of DuPage County, Illinois, of the three judges of the Second District of the Illinois Appellate Court, or of the five justices of the Illinois Supreme Court, all of whom concluded that the warrant was not based on probable cause. In a fact-bound inquiry of this sort, the judgment of three levels of state courts, all of whom are better able to evaluate the probable reliability of anonymous informants in Bloomingdale, Illinois, than we are, should be entitled to at least a presumption of accuracy.⁷ I would simply vacate the

⁷ The Court holds that what were heretofore considered two independent "prongs"—"veracity" and "basis of knowledge"—are now to be considered together as circumstances whose totality must be appraised. *Ante*, at 18. "A deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Ibid.* Yet in this case, the lower courts found *neither* factor present. App. 12a. And the supposed "other indicia" in the affidavit take the form of activity that is not particularly remarkable. I do not understand how the Court can find that the "totality" so far exceeds the sum of its "circumstances."

judgment of the Illinois Supreme Court and remand the case for reconsideration in the light of our intervening decision in *United States v. Ross*.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

✓

April 21, 1983

Re: No. 81-430

Illinois v. Gates

Dear John,

Please join me in your dissent.

Sincerely,

BW

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 21, 1983

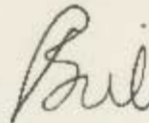
Re: No. 81-430

Illinois v. Gates

Dear Bill,

Although I shall be joining John's dissent, I will also circulate a separate opinion of my own. I hope to have it shortly.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill".

Justice Rehnquist

Copies to the Conference

13, 14, 25, 28

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

L7A

From: Justice Rehnquist

Circulated: _____

Recirculated: APR 22 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-430

ILLINOIS, PETITIONER v. LANCE GATES ET UX.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ILLINOIS

[April —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents Lance and Susan Gates were indicted for violation of state drug laws after police officers, executing a search warrant, discovered marijuana and other contraband in their automobile and home. Prior to trial the Gates' moved to suppress evidence seized during this search. The Illinois Supreme Court affirmed the decisions of lower state courts granting the motion. It held that the affidavit submitted in support of the State's application for a warrant to search the Gates's property was inadequate under this Court's decisions in *Aguilar v. Texas*, 378 U. S. 108 (1964) and *Spinelli v. United States*, 393 U. S. 410 (1969).

We granted certiorari to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip. After receiving briefs and hearing oral argument on this question, however, we requested the parties to address an additional question:

"Whether 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

Reviewed again on 4/27 L7P

Join? See my brief concurrences

Response to JPS on page 28;
other changes are technical. My original
comments still apply. Mike

that the search and seizure at issue was consistent with the Fourth Amendment."

We decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it. Rather, we consider the question originally presented in the petition for certiorari, and conclude that the Illinois Supreme Court read the requirements of our Fourth Amendment decisions too restrictively. Initially, however, we set forth our reasons for not addressing the question regarding modification of the exclusionary rule framed in our order of November 29, 1982, — U. S. —.

I

Our certiorari jurisdiction over decisions from state courts derives from 28 U. S. C. § 1257, which provides that "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." The provision derives, albeit with important alterations, see, *e. g.*, Act of December 23, 1914, c. 2, 38 Stat. 790; Act of June 25, 1948, c. 646, 62 Stat. 929, from the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85.

Although we have spoken frequently on the meaning of § 1257 and its predecessors, our decisions are in some respects not entirely clear. We held early on that § 25 of the Judiciary Act of 1789 furnished us with no jurisdiction unless a federal question had been both raised and decided in the state court below. As Justice Story wrote in *Crowell v. Randell*, 10 Pet. 368, 391 (1836), "If both of these requirements do not appear on the record, the appellate jurisdiction fails." See also *Owings v. Norwood's Lessee*, 5 Cranch. 344 (1809).¹

¹The apparent rule of *Crowell v. Randell*, *supra*, that a federal claim

More recently, in *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 435-436 (1940), the Court observed:

But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

Finally, the Court seemed to reaffirm the jurisdictional character of the rule against our deciding claims "not pressed nor passed upon" in state court in *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U. S. 154, 160 (1945), where

have been *both* raised and addressed in state court was generally not understood in the literal fashion in which it was phrased. See R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States* § 60 (1951). Instead, the Court developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in state court. See, *e. g.*, *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 435-436 (1940); *State Farm Mutual Insurance Co. v. Duel*, 324 U. S. 154, 160 (1945).

we explained that "Since the [state] Supreme Court did not pass on the question, we may not do so." See also *Hill v. California*, 401 U. S. 797, 805-806 (1971).

Notwithstanding these decisions, however, several of our more recent cases have treated the so-called "not pressed or passed upon below" rule as merely a prudential restriction. In *Terminiello v. Chicago*, 337 U. S. 1 (1949), the Court reversed a state criminal conviction on a ground not urged in state court, nor even in this Court. Likewise, in *Vachon v. New Hampshire*, 414 U. S. 478 (1974), the Court summarily reversed a state criminal conviction on the ground, not raised in state court, or here, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment. The Court indicated in a footnote, *id.*, at 479, n. 3, that it possessed discretion to ignore the failure to raise in state court the question on which it decided the case.

In addition to this lack of clarity as to the character of the "not pressed or passed upon below" rule, we have recognized that it often may be unclear whether the particular federal question presented in this Court was raised or passed upon below. In *Dewey v. Des Moines*, 173 U. S. 193, 197-198 (1899), the fullest treatment of the subject, the Court said that "if the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."² We have not attempted, and likely

²In *Dewey*, certain assessments had been levied against the owner of property abutting a street paved by the city; a state trial court ordered that the property be forfeited when the assessments were not paid, and in

would not have been able, to draw a clear-cut line between cases involving only an "enlargement" of questions presented below and those involving entirely new questions.

The application of these principles in the instant case is not entirely straightforward. It is clear in this case that respondents expressly raised, at every level of the Illinois judicial system, the claim that the Fourth Amendment had been violated by the actions of the Illinois police and that the evidence seized by the officers should be excluded from their trial. It also is clear that the State challenged, at every level of the Illinois court system, respondents' claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, 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.

The case, of course, is before us on the State's petition for a writ of certiorari. Since the Act of December 23, 1914, c. 2, 38 Stat. 790, jurisdiction has been vested in this Court to review state court decisions even when a claimed federal right has been upheld. Our prior decisions interpreting the "not pressed or passed on below" rule have not, however, involved a State's failure to raise a defense to a federal right or remedy asserted below. As explained below, however, we

addition, held appellant personally liable for the amount by which the assessments exceeded the value of the lots. In state court the appellant argued that the imposition of personal liability against him violated the Due Process Clause of the Fourteenth Amendment, because he had not received personal notice of the assessment proceedings. In this Court, he also attempted to argue that the assessment itself constituted a taking under the Fourteenth Amendment. The Court held that, beyond arising from a single factual occurrence, the two claims "are not in anywise necessarily connected," *id.*, at 198. Because of this, we concluded that appellant's taking claim could not be considered.

can see no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim.

We have identified several purposes underlying the "not pressed or passed upon" rule: for the most part, these are as applicable to the State's failure to have opposed the assertion of a particular federal right, as to a party's failure to have asserted the claim. First, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U. S. 437, 439 (1969). Exactly the same difficulty exists when the state urges modification of an existing constitutional right or accompanying remedy. Here, for example, the record contains little, if anything, regarding the subjective good faith of the police officers that searched the Gates's property—which might well be an important consideration in fashioning a good faith exception to the exclusionary rule. Our consideration of the modification of the exclusionary rule plainly would benefit from a record containing such facts.

Likewise, "due regard for the appropriate relationship of this Court to state courts," *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 435-436 (1940), demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions. Finally, by requiring that the State first argue to the state courts that the federal exclusionary rule should be modified, we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground. See *Cardinale*, *supra*, 394 U. S., at 439. Illinois, for example, adopted an exclusionary rule as early as 1923, see *People v. Brocamp*, 138 N. E. 728 (1923), and might adhere to its view even if it thought we would conclude that the federal rule should be modified. In short, the reasons supporting our refusal to

omit

Yee
hear federal claims not raised in state court apply with equal force to the State's failure to challenge the availability of a well-settled federal remedy. Whether the "not pressed or passed upon below" rule is jurisdictional, as our earlier decisions indicate, see —, *supra*, or prudential, as several of our later decisions assume, nor whether its character might be different in cases like this from its character elsewhere, we need not decide. Whatever the character of the rule may be, consideration of the question presented in our order of November 29, 1982, would be contrary to the sound justifications for the "not pressed or passed upon below" rule, and we thus decide not to pass on the issue.

The fact that the Illinois courts affirmatively applied the federal exclusionary rule—suppressing evidence against respondents—does not affect our conclusion. In *Morrison v. Watson*, 154 U. S. 111 (1894), the Court was asked to consider whether a state statute impaired the appellant's contract with the appellee. It declined to hear the case because the question presented here had not been pressed or passed on below. The Court acknowledged that the lower court's opinion had restated the conclusion, set forth in an earlier decision of that court, that the state statute did not impermissibly impair contractual obligations. Nonetheless, it held that there was no showing that "there was any real contest at any stage of this case upon the point," *id.*, at 115, and that without such a contest, the routine restatement and application of settled law by an appellate court did not satisfy the "not pressed or passed upon below" rule. Similarly, in the present case, although the Illinois courts applied the federal exclusionary rule, there was never "any real contest" upon the point. The application of the exclusionary rule was merely a routine act, once a violation of the Fourth Amendment had been found, and not the considered judgment of the Illinois courts on the question whether application of a modified rule would be warranted on the facts of this case. In such circumstances, absent the adversarial dispute necessary

to apprise the state court of the arguments for not applying the exclusionary rule, we will not consider the question whether the exclusionary rule should be modified.

Likewise, we do not believe that the State's repeated opposition to respondent's substantive Fourth Amendment claims suffices to have raised the question whether the exclusionary rule should be modified. The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally" and not "a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U. S. 338, 348 (1974). The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. See, e. g., *United States v. Havens*, 446 U. S. 620 (1980); *United States v. Ceccolini*, 435 U. S. 268 (1978); *United States v. Calandra*, *supra*; *Stone v. Powell*, 428 U. S. 465 (1976). Because of this distinction, we cannot say that modification or abolition of the exclusionary rule is "so connected with [the substantive Fourth Amendment right at issue] as to form but another ground or reason for alleging the invalidity" of the judgment. *Dewey v. Des Moines*, *supra*, 173 U. S., at 197-198. Rather, the rule's modification was, for purposes of the "not pressed or passed upon below" rule, a separate claim that had to be specifically presented to the State courts.

Finally, weighty prudential considerations militate against our considering the question presented in our order of November 29, 1983. The extent of the continued vitality of the rules that have developed from our decisions in *Weeks v. United States*, 232 U. S. 383 (1961), and *Mapp v. Ohio*, 367 U. S. 643 (1961), is an issue of unusual significance. Sufficient evidence of this lies just in the comments on the issue that members of this Court recently have made, e. g., *Bivens v. Six Unknown Named Agents*, 403 U. S. 388, 415 (1971)

(BURGER, C. J., dissenting); *Coolidge v. New Hampshire*, 403 U. S. 443, 490 (1971) (Harlan, J., concurring); *id.*, at 502 (Black, J., dissenting); *Stone v. Powell*, 428 U. S. 465, 537-539 (1976) (WHITE, J., dissenting); *Brewer v. Williams*, 430 U. S. 387, 413-414 (1977) (POWELL, J., concurring); *Robbins v. California*, 453 U. S. 420, 437, 443-444 (1981) (REHNQUIST, J., dissenting). Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we "promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions." *Mapp v. Ohio*, *supra*, 367 U. S., at 677 (Harlan, J., dissenting). Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of "untoward practical ramifications," *id.*, at 676 (Harlan, J., dissenting), not foreseen at the time of decision. The public importance of our decisions in *Weeks* and *Mapp* and the emotions engendered by the debate surrounding these decisions counsel that we meticulously observe our customary procedural rules. By following this course, we promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions. A wise exercise of the powers confided in this Court dictates that we reserve for another day the question whether the exclusionary rule should be modified.

II

We now turn to the question presented in the State's original petition for certiorari, which requires us to decide whether respondents' rights under the Fourth and Fourteenth Amendments were violated by the search of their car and house. A chronological statement of events usefully introduces the issues at stake. Bloomingdale, Ill., is a suburb

of Chicago located in DuPage County. On May 3, 1978, the Bloomingdale Police Department received by mail an anonymous handwritten letter which read as follows:

"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 flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 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 if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.

Lance & Susan Gates
Greenway
in Condominiums"

The letter was referred by the Chief of Police of the Bloomingdale Police Department to Detective Mader, who decided to pursue the tip. Mader learned, from the office of the Illinois Secretary of State, that an Illinois driver's license had been issued to one Lance Gates, residing at a stated address in Bloomingdale. He contacted a confidential informant, whose examination of certain financial records revealed a more recent address for the Gates, and he also learned from a police officer assigned to O'Hare Airport that "L. Gates" had made a reservation on Eastern Airlines flight 245 to West Palm Beach, Fla., scheduled to depart from Chicago on May 5 at 4:15 p.m.

Mader then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7:00 a.m. the next morning, Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove northbound on an interstate frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomingdale was approximately 22 to 24 hours.

Mader signed an affidavit setting forth the foregoing facts, and submitted it to a judge of the Circuit Court of DuPage County, together with a copy of the anonymous letter. The judge of that court thereupon issued a search warrant for the Gates's residence and for their automobile. The judge, in deciding to issue the warrant, could have determined that the *modus operandi* of the Gates had been substantially corroborated. As the anonymous letter predicted, Lance Gates had flown from Chicago to West Palm Beach late in the afternoon of May 5th, had checked into a hotel room registered in the name of his wife, and, at 7:00 a.m. the following morning, had headed north, accompanied by an unidentified woman, out of West Palm Beach on an interstate highway used by travelers from South Florida to Chicago in an automobile bearing a license plate issued to him.

yes!

At 5:15 a.m. on March 7th, only 36 hours after he had flown out of Chicago, Lance Gates, and his wife, returned to their home in Bloomingdale, driving the car in which they had left West Palm Beach some 22 hours earlier. The Bloomingdale police were awaiting them, searched the trunk of the Mercury, and uncovered approximately 350 pounds of marijuana.

A search of the Gates's home revealed marijuana, weapons, and other contraband. The Illinois Circuit Court ordered suppression of all these items, on the ground that the affidavit submitted to the Circuit Judge failed to support the necessary determination of probable cause to believe that the Gates's automobile and home contained the contraband in question. This decision was affirmed in turn by the Illinois Appellate Court and by a divided vote of the Supreme Court of Illinois.

The Illinois Supreme Court concluded—and we are inclined to agree—that, standing alone, the anonymous letter sent to the Bloomingdale Police Department would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gates's car and home. The 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's criminal activities. Something more was required, then, before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gates's home and car. See *Aguilar v. Texas*, 378 U. S. 108, 109, n. 1 (1964); *Nathanson v. United States*, 290 U. S. 41 (1933).

The Illinois Supreme Court also properly recognized that Detective Mader's affidavit might be capable of supplementing the anonymous letter with information sufficient to permit a determination of probable cause. See *Whitely v. Warden*, 401 U. S. 560, 567 (1971). In holding that the affidavit in fact did not contain sufficient additional information to sustain a determination of probable cause, the Illinois court applied a "two-pronged test," derived from our decision in *Spinelli v. United States*, 393 U. S. 410 (1969).³ The Illinois

³In *Spinelli*, police officers observed Mr. Spinelli going to and from a particular apartment, which the telephone company said contained two

fact
applied
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pronged
test" of
Spinelli

Supreme Court, like some others, apparently understood *Spinelli* as requiring that the anonymous letter satisfy each of two independent requirements before it could be relied on. J. A., at 5. According to this view, the letter, as supplemented by Mader's affidavit, first had to adequately reveal the "basis of knowledge" of the letter writer—the particular means by which he came by the information given in his report. Second, it had to provide facts sufficiently establishing either the "veracity" of the affiant's informant, or, alternatively, the "reliability" of the informant's report in this particular case.

test
(absurd)

The Illinois court, alluding to an elaborate set of legal rules that have developed among various lower courts to enforce the "two-pronged test,"⁴ found that the test had not been

telephones with stated numbers. The officers also were "informed by a confidential reliable informant that William Spinelli [was engaging in illegal gambling activities]" at the apartment, and that he used two phones, with numbers corresponding to those possessed by the police. The officers submitted an affidavit with this information to a magistrate and obtained a warrant to search Spinelli's apartment. We held that the magistrate could have made his determination of probable cause only by "abdication of his constitutional function," *id.*, at 416. The Government's affidavit contained absolutely no information regarding the informant's reliability. Thus, it did not satisfy *Aguilar's* requirement that such affidavits contain "some of the underlying circumstances" indicating that "the informant . . . was 'credible'" or that "his information [was] 'reliable.'" *Aguilar, supra*, 378 U. S., at 114. In addition, the tip failed to satisfy *Aguilar's* requirement that it detail "some of the underlying circumstances from which the informant concluded that . . . narcotics were where he claimed they were. We also held that if the tip concerning Spinelli had contained "sufficient detail" to permit the magistrate to conclude "that he [was] relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation," 393 U. S., at 416, then he properly could have relied on it; we thought, however, that the tip lacked the requisite detail to permit this "self-verifying detail" analysis.

⁴See, e. g., *Stanley v. State*, 313 A. 2d 847 (Md. App. 1974). In summary, these rules posit that the "veracity" prong of the *Spinelli* test has

satisfied. First, the “veracity” prong was not satisfied because, “there was simply no basis [for] . . . conclud[ing] that the anonymous person [who wrote the letter to the Bloomington Police Department] was credible.” J. A., at 7a. The court indicated that corroboration by police of details contained in the letter might never satisfy the “veracity” prong, and in any event, could not do so if, as in the present case, only “innocent” details are corroborated. J. A., at 12. In addition, the letter gave no indication of the basis of its writer’s knowledge of the Gates’s activities. The Illinois court understood *Spinelli* as permitting the detail contained in a tip to be used to infer that the informant had a reliable basis for his statements, but it thought that the anonymous letter failed to provide sufficient detail to permit such an inference. Thus, it concluded that no showing of probable cause had been made.

We agree with the Illinois Supreme Court that an informant’s “veracity,” “reliability” and “basis of knowledge” are

two “spurs”—the informant’s “credibility” and the “reliability” of his information. Various interpretations are advanced for the meaning of the “reliability” spur of the “veracity” prong. Both the “basis of knowledge” prong and the “veracity” prong are treated as entirely separate requirements, which must be independently satisfied in every case in order to sustain a determination of probable cause. See n. 5, *infra*. Some ancillary doctrines are relied on to satisfy certain of the foregoing requirements. For example, the “self-verifying detail” of a tip may satisfy the “basis of knowledge” requirement, although not the “credibility” spur of the “veracity” prong. See J. A. 10a. Conversely, corroboration would seem not capable of supporting the “basis of knowledge” prong, but only the “veracity” prong. *Id.*, at 12a.

The decision in *Stanley*, while expressly approving and conscientiously attempting to apply the “two-pronged test” observes that “[t]he built-in subtleties [of the test] are such, however, that a slipshod application calls down upon us the fury of Murphy’s Law.” 813 A. 2d, at 860 (footnote omitted). The decision also suggested that it is necessary “to evolve analogous guidelines [to hearsay rules employed in trial settings] for the reception of hearsay in a probable cause setting.” *Id.*, at 857.

all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case,⁵ which the opinion of the Supreme Court of Illinois would imply. 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.

III

This totality of the circumstances approach is far more consistent with our prior treatment of probable cause⁶ than is

⁵The entirely independent character that the *Spinelli* prongs have assumed is indicated both by the opinion of the Illinois Supreme Court in this case, and by decisions of other courts. One frequently cited decision, *Stanley v. State*, 313 A. 2d 847, 861 (Md. App. 1974), remarks that "the dual requirements represented by the 'two-pronged test' are 'analytically severable' and an 'overkill' on one prong will not carry over to make up for a deficit on the other prong." See also n. 9, *infra*.

⁶Our original phrasing of the so-called "two-pronged test" in *Aguilar v. Texas*, 378 U. S. 108 (1969), suggests that the two prongs were intended simply as guides to a magistrate's determination of probable cause, not as inflexible, independent requirements applicable in every case. In *Aguilar*, we required only that:

the magistrate must be informed of *some of the underlying circumstances* from which the informant concluded that . . . narcotics were where he claimed they were, and *some of the underlying circumstances* from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" *Id.*, at 114 (emphasis added).

As our language indicates, we intended neither a rigid compartmentalization of the inquiries into an informant's "veracity," "reliability" and "basis of knowledge," nor that these inquiries be elaborate exegeses of an informant's tip. Rather, we required only that *some* facts bearing on two particular issues be provided to the magistrate. Our decision in *Jaben v. United States*, 381 U. S. 214 (1965), demonstrated this latter point. We held there that a criminal complaint showed probable cause to believe the defendant had attempted to evade the payment of income taxes. We com-

'Totality of
circumstances'
approach

common
sense
practical
Q

any rigid demand that specific "tests" be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." *Brinegar v. United States*, 338 U. S. 160, 176 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175. Our observation in *United States v. Cortez*, 449 U. S. 411, 418 (1981), regarding "particularized suspicion," is also applicable to the probable cause standard:

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in

mented that:

"Obviously any reliance upon factual allegations necessarily entails some degree of reliability upon the credibility of the source. . . . Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that each and every fact which contributed to his conclusions be spelled out in the complaint. . . . It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." *Id.*, at 224-225 (emphasis added).

probably
cause -
a practical,
non-technical
conception

many shapes and sizes from many different types of persons. As we said in *Adams v. Williams*, 407 U. S. 143, 147 (1972), "Informants' tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." *Ibid.*⁷

⁷ The diversity of informants' tips, as well as the usefulness of the totality of the circumstances approach to probable cause, is reflected in our prior decisions on the subject. In *Jones v. United States*, 362 U. S. 257, 271 (1960), we held that probable cause to search petitioners' apartment was established by an affidavit based principally on an informant's tip. The unnamed informant claimed to have purchased narcotics from petitioners at their apartment; the affiant stated that he had been given correct information from the informant on a prior occasion. This, and the fact that petitioners had admitted to police officers on another occasion that they were narcotics users, sufficed to support the magistrate's determination of probable cause.

Likewise, in *Rugendorf v. United States*, 376 U. S. 528 (1964), the Court upheld a magistrate's determination that there was probable cause to believe that certain stolen property would be found in petitioner's apartment. The affidavit submitted to the magistrate stated that certain furs had been stolen, and that a confidential informant, who previously had furnished confidential information, said that he saw the furs in petitioner's home. Moreover, another confidential informant, also claimed to be reliable, stated that one Schweih's had stolen the furs. Police reports indicated that petitioner had been seen in Schweih's company and a third informant stated that petitioner was a fence for Schweih's.

Finally, in *Ker v. California*, 374 U. S. 23 (1963), we held that information within the knowledge of officers who searched the Ker's apartment provided them with probable cause to believe drugs would be found there. The officers were aware that one Murphy had previously sold marijuana to a police officer; the transaction had occurred in an isolated area, to which Murphy had led the police. The night after this transaction, police observed Ker and Murphy meet in the same location. Murphy approached Ker's car, and, although police could see nothing change hands, Murphy's *modus operandi* was identical to what it had been the night before. Moreover, when police followed Ker from the scene of the meeting with Murphy he managed to lose them after performing an abrupt U-turn. Finally, the police had a statement from an informant who had provided reliable in-

Moreover, the "two-pronged test" directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." See nn. 4 and 5 *supra*. There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. See, e. g., *Adams v. Williams*, *supra*, 407 U. S., at 146-147; *Harris v. United States*, 403 U. S. 573 (1971).

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. See *United States v. Sellers*, 483 F. 2d 37 (CA5 1973).⁸ Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary. *Adams v. Williams*, *supra*. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles

formation previously, that Ker was engaged in selling marijuana, and that his source was Murphy. We concluded that "To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement." *Id.*, at 36.

⁸ Compare *Stanley v. State*, 313 A. 2d 847, 861 (Md. App. 1974), reasoning that "Even assuming 'credibility' amounting to sainthood, the judge still may not accept the bare conclusion of a sworn and known and trusted police-affiant."

his tip to greater weight than might otherwise be the case. Unlike a totality of circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the "two-pronged test" has encouraged an excessively technical dissection of informants' tips,⁹ with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.

As early as *Locke v. United States*, 7 Cranch. 339, 348 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its

⁹ Some lower court decisions, brought to our attention by the State, reflect a rigid application of such rules. In *Bridger v. State*, 503 S. W. 2d 801 (Tex. Crim. App. 1974), the affiant had received a confession of armed robbery from one of two suspects in the robbery; in addition, the suspect had given the officer \$800 in cash stolen during the robbery. The suspect also told the officer that the gun used in the robbery was hidden in the other suspect's apartment. A warrant issued on the basis of this was invalidated on the ground that the affidavit did not satisfactorily describe how the accomplice had obtained his information regarding the gun.

Likewise, in *People v. Palanza*, 371 N. E. 2d 687 (Ill. App. 1978), the affidavit submitted in support of an application for a search warrant stated that an informant of proven and uncontested reliability had seen, in specifically described premises, "a quantity of a white crystalline substance which was represented to the informant by a white male occupant of the premises to be cocaine. Informant has observed cocaine on numerous occasions in the past and is thoroughly familiar with its appearance. The informant states that the white crystalline powder he observed in the above described premises appeared to him to be cocaine." The warrant issued on the basis of the affidavit was invalidated because "There is no indication as to how the informant or for that matter any other person could tell whether a white substance was cocaine and not some other substance such as sugar or salt." *Id.*, at 689.

Finally, in *People v. Brethauer*, 482 P. 2d 369 (Colo. 1971), an informant, stated to have supplied reliable information in the past, claimed that L. S. D. and marijuana were located on certain premises. The affiant supplied police with drugs, which were tested by police and confirmed to be illegal substances. The affidavit setting forth these, and other, facts was found defective under both prongs of *Spinelli*.

usual acceptance, means less than evidence which would justify condemnation It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Brinegar, supra*, 338 U. S., at 173. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause." *Spinelli, supra*, 393 U. S., at 419. See Model Code of Pre-Arraignment Procedure §210.1(7) (Proposed Off. Draft 1972).

We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." *Ventresca, supra*, 380 U. S., at 108. Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause." See *Shadwick v. City of Tampa*, 407 U. S. 345, 348-350 (1972). The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are—quite properly, *ibid.*—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the context in which it must be applied, the "built-in subtleties," *Stanley v. State*, 313 A. 2d 847, 860 (Md. App. 1974), of the "two-

pronged test" are particularly troubling.

Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli, supra*, 393 U. S., at 419. "A grudging or negative attitude by reviewing courts toward warrants," *Ventresca, supra*, 380 U. S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant: "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, at 109.

If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U. S. 1, 9 (1977). Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . concluding" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U. S. 257, 271 (1960). See *United States v. Harris*, 403 U. S. 573, 577-583 (1971).¹⁰ We think reaffirmation

¹⁰ We also have said that "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should

of this standard better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determinations of magistrates than is the "two-pronged test."

Finally, the direction taken by decisions following *Spinelli* poorly serves "the most basic function of any government": "to provide for the security of the individual and of his property." "Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values." *Miranda v. Arizona*, 384 U. S. 436, 539 (1966) (WHITE, J., dissenting). The strictures that inevitably accompany the "two-pronged test" cannot avoid seriously impeding the task of law enforcement, see, e. g., n. 9 *supra*. If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips seldom would be of any value in police work. Ordinary citizens, like ordinary witnesses, see Federal Rules of Evidence 701, Advisory Committee Note (1976), generally do not provide extensive recitations of the basis of their everyday observations. Likewise, as the Illinois Supreme Court observed in this case, the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable. As a result, anonymous tips seldom could survive a rigorous application of either of the *Spinelli* prongs. Yet, such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes."

be largely determined by the preference to be accorded to warrants," *Ventresca, supra*, 380 U. S., at 109. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case. Even if we were to accept the premise that the accurate assessment of probable cause would be furthered by the "two-pronged test," which we do not, these Fourth Amendment policies would require a less rigorous standard than that which appears to have been read into *Aguilar* and *Spinelli*.

While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.

For all these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*.¹¹ In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. See *Jones v. United States*, *supra*; *United States v. Ventresca*, *supra*; *Brinegar v. United States*, *supra*. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed. *Jones v. United States*, *supra*, 362 U. S., at 271. We are convinced that this flexi-

Abandon

test

¹¹ The Court's decision in *Spinelli* has been the subject of considerable criticism, both by members of this Court and others. Justice BLACKMUN, concurring in *United States v. Harris*, 403 U. S. 573, 585-586 (1971), noted his long-held view "that *Spinelli* . . . was wrongly decided" by this Court. Justice Black similarly would have overruled that decision. *Ibid.* Likewise, a noted commentator has observed that "[t]he *Aguilar-Spinelli* formulation has provoked apparently ceaseless litigation." 8A Moore's Federal Practice ¶ 41.04 (1981).

Whether the allegations submitted to the magistrate in *Spinelli* would, under the view we now take, have supported a finding of probable cause, we think it would not be profitable to decide. There are so many variables in the probable cause equation that one determination will seldom be a useful "precedent" for another. Suffice it to say that while we in no way abandon *Spinelli*'s concern for the trustworthiness of informers and for the principle that it is the magistrate who must ultimately make a finding of probable cause, we reject the rigid categorization suggested by some of its language.

ble, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. *Nathanson v. United States*, 290 U. S. 41 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. *Aguilar v. Texas*, 378 U. S. 108 (1964). As in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits present 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*. Instead, the flexible, common-sense standard articulated in *Jones*, *Ventresca*, and *Brinegar* better serves the purposes of the Fourth Amendment's probable cause requirement.

IV

Our decisions applying the totality of circumstances analy-

sis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work. In *Jones v. United States*, *supra*, 362 U. S., at 269, we held that an affidavit relying on hearsay "is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented." We went on to say that even in making a warrantless arrest an officer "may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Ibid.* Likewise, we recognized the probative value of corroborative efforts of police officials in *Aguilar*—the source of the "two-pronged test"—by observing that if the police had made some effort to corroborate the informant's report at issue, "an entirely different case" would have been presented. *Aguilar*, *supra*, 378 U. S., at 109, n. 1.

value
of
corroboration

Our decision in *Draper v. United States*, 358 U. S. 307 (1959), however, is the classic case on the value of corroborative efforts of police officials. There, an informant named Hereford reported that Draper would arrive in Denver on a train from Chicago on one of two days, and that he would be carrying a quantity of heroin. The informant also supplied a fairly detailed physical description of Draper, and predicted that he would be wearing a light colored raincoat, brown slacks and black shoes, and would be walking "real fast." *Id.*, at 309. Hereford gave no indication of the basis for his information.¹²

Draper

¹² The tip in *Draper* might well not have survived the rigid application of the "two-pronged test" that developed following *Spinelli*. The only reference to Hereford's reliability was that he had "been engaged as a 'special employee' of the Bureau of Narcotics at Denver for about six months, and from time to time gave information to [the police] for small sums of money, and that [the officer] had always found the information given by Hereford to be accurate and reliable." 358 U. S., at 309. Likewise, the tip gave no indication of how Hereford came by his information. At most, the detailed

On one of the stated dates police officers observed a man matching this description exit a train arriving from Chicago; his attire and luggage matched Hereford's report and he was walking rapidly. We explained in *Draper* that, by this point in his investigation, the arresting officer "had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, [the officer] 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.*, at 313.

The showing of probable cause in the present case was fully as compelling as that in *Draper*. Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gates were involved in drug trafficking. In addition to being a popular vacation site, Florida is well-known as a source of narcotics and other illegal drugs. See *United States v. Mendenhall*, 446 U. S. 544, 562 (1980) (POWELL, J., concurring); DEA, Narcotics Intelligence Estimate, The Supply of Drugs to the U. S. Illicit Market From Foreign and Domestic Sources 10 (1979). Lance Gates's flight to Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car, conveniently awaiting him in West Palm Beach, is as suggestive of a pre-arranged drug run, as it is of an ordinary vacation trip.

In addition, the magistrate could rely on the anonymous letter, which had been corroborated in major part by Mader's efforts—just as had occurred in *Draper*.¹⁸ The Supreme

and accurate predictions in the tip indicated that, however Hereford obtained his information, it was reliable.

¹⁸ The Illinois Supreme Court thought that the verification of details contained in the anonymous letter in this case amounted only to "the corroboration

Court of Illinois reasoned that *Draper* involved an informant who had given reliable information on previous occasions, while the honesty and reliability of the anonymous informant in this case were unknown to the Bloomingdale police. While this distinction might be an apt one at the time the police department received the anonymous letter, it became far less significant after Mader's independent investigative work occurred. The corroboration of the letter's predictions that the Gates's car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. "Because an informant is right about some things, he is more probably right about other facts," *Spinelli, supra*, 393 U. S., at 427 (WHITE, J., concurring)—including the claim regarding the Gates's illegal activity. This may well not be the type of "reliability" or "veracity" necessary to

ration of innocent activity," J. A. 12a, and that this was insufficient to support a finding of probable cause. We are inclined to agree, however, with the observation of Justice Moran in his dissenting opinion that "In this case, just as in *Draper*, seemingly innocent activity became suspicious in the light of the initial tip." J. A. 18a. And it bears noting that *all* of the corroborating detail established in *Draper, supra*, was of entirely innocent activity—a fact later pointed out by the Court in both *Jones v. United States*, 362 U. S. 257, 269-270 (1960), and *Ker v. California*, 374 U. S. 23, 36 (1963).

This is perfectly reasonable. As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands. We think the Illinois court attempted a too rigid classification of the types of conduct that may be relied upon in seeking to demonstrate probable cause. See *Brown v. Texas*, 443 U. S. 47, 52, n. 2 (1979). In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non-criminal acts.

satisfy some views of the "veracity prong" of *Spinelli*, but we think it suffices for the practical, common-sense judgment called for in making a probable cause determination. It is enough, for purposes of assessing probable cause, that "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay." *Jones v. United States*, *supra*, 362 U. S., at 269, 271.

Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letter writer's accurate information as to the travel plans of each of the Gates was of a character likely obtained only from the Gates themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gates's alleged illegal activities.¹⁴ Of

¹⁴The dissent seizes on one inaccuracy in the anonymous informant's letter—its statement that Sue Gates would fly from Florida to Illinois, when in fact she drove—and argues that the probative value of the entire tip was undermined by this allegedly "material mistake." We have never required that informants used by the police be infallible, and can see no reason to impose such a requirement in this case. Probable cause, particularly when police have obtained a warrant, simply does not require the perfection the dissent finds necessary. Moreover, the character of the informant's "mistake" does little to reduce the reliability of the informant's tip. Sue Gates's decision to revise her travel plans is no different from the last-minute changes that travellers frequently are wont to make. It scarcely is reasonable to require the informant to have predicted this kind of change, as well as the other details that he was right about.

Likewise, there is no force to the dissent's argument that the Gates's action in leaving their home unguarded undercut the informant's claim that drugs were hidden there. Indeed, the line-by-line scrutiny that the dissent applies to the anonymous letter is akin to that we find inappropriate in reviewing magistrate's decisions. The dissent apparently attributes to

course, the Gates's travel plans might have been learned from a talkative neighbor or travel agent; under the "two-pronged test" developed from *Spinelli*, the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letter writer's "basis of knowledge." But, as discussed previously, *supra*, —, probable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for . . . conclud[ing]" that probable cause to search the Gates's home and car existed. The judgment of the Supreme Court of Illinois therefore must be

Reversed.

the magistrate who issued the warrant in this case the rather implausible notion that persons dealing in drugs always stay at home, apparently out of fear that to leave might risk intrusion by criminals. If accurate, one could not help sympathizing with the self-imposed isolation of people so situated. In reality, however, it is scarcely likely that the magistrate ever thought that the anonymous tip "kept one spouse" at home, much less that he relied on the theory advanced by the dissent. The letter simply says that Sue would fly from Florida to Illinois, without indicating whether the Gates's made the bitter choice of leaving the drugs in their house, or those in their car, unguarded. The magistrate's determination that there might be drugs or evidence of criminal activity in the Gates's home was well-supported by the less speculative theory, noted in text, that if the informant could predict with considerable accuracy the somewhat unusual travel plans of the Gates, he probably also had a reliable basis for his statements that the Gates's kept a large quantity of drugs in their home and frequently were visited by other drug traffickers there.

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1983

Re: 81-430 - Illinois v. Gates

Dear Bill,

I will write separately in this case.

Sincerely,

Byrm

Justice Rehnquist

Copies to the Conference

cpm

lfp/ss 04/28/83

81-430 ILLINOIS v. GATES

JUSTICE POWELL, concurring.

I join the opinion of the Court as I think it is helpful to clarify the considerable confusion that has arisen - as illustrated by this case - in the application of Aguilar v. Texas, 278 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). I agree that the appropriate test, one familiar where common sense judgment is so essential, is the "totality of the circumstances analysis that traditionally has informed probable cause determinations". Ante, at 23.

I add, however, that this is a particularly easy case - at least for me. I could decide the case on the authority of Draper v. United States, 358 U.S. 307 (1959),

file
(Decided, however,
this is not
substantive
enough to
file)

a decision that emphasized that corroboration of an informant's "tip" often can be decisive. The anonymous informer's letter received by the Bloomingdale police department was corroborated in far too many significant details to leave any serious doubt as to its basic authenticity. See ante, at 10. The coordinated investigative efforts of Detective Mader and the DEA merit commendation.

April 28, 1983

81-430 Illinois v. Gates

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist


lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 11, 1983

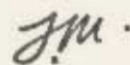


Re: No. 81-430-Illinois v. Gates

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

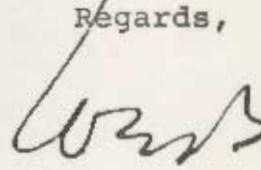
May 25, 1983

Re: No. 81-430, Illinois v. Gates

Dear Bill:

I join.

Regards,



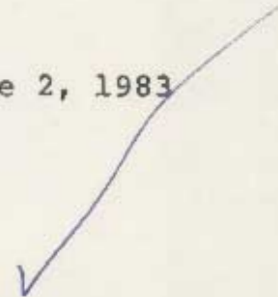
Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1983

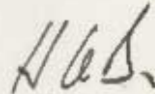


Re: No. 81-430 - Illinois v. Gates

Dear Bill:

Please join me.

Sincerely,



Justice Rehnquist

cc: The Conference

The way We See Justice

We don't like it when the police engage in warrantless raids, unjustified searches or stationhouse beatings—even if such official lawlessness produces solid evidence of criminality. We don't like it when an obviously guilty felon is let go because of some technical flaw in the way the evidence against him was obtained.

As a result, most of us are of two minds concerning the judicial principle that makes illegally obtained evidence inadmissible in court. That two-mindedness apparently extends all the way to the U.S. Supreme Court, which has agreed to take a second look at a case in which a bad warrant turned up good evidence. The fact that the court will take up the case again suggests that it may be on its way to a compromise on the vexing question of the "exclusionary rule."

The rule, also known as the suppression doctrine, has applied to federal criminal cases since a 1914 Supreme Court decision. In a 1961 ruling, it was extended to state cases. Its rationale is clear enough: that law enforcement officers should not be rewarded (with convictions) for violating the Fourth Amendment guarantee against unreasonable searches and seizures or the Fifth Amendment right of a suspect not to be required to testify against himself.

The rule seems reasonable in some cases. If an officer raids your home on a whim and finds evidence of criminal activity; if the police stop you on the street and search you because they don't like your attitude; if they suspect that you have been involved in a crime and proceed to torture you until you point them to the evidence they weren't able to discover on their own, you'd likely think it wrong that they should be able to use the evidence against you in court—even if it turned out to be reliable evidence.

But suppose the officer was acting in good faith and didn't know that the evidence was unlawfully obtained until the Supreme Court, perhaps in a split decision, told him so. Should the apparently guilty suspect be declared innocent?

That is pretty much what happened in *Illinois v. Gates*, the 1978 case the court agreed last week to rehear. Police in Bloomington, Ill., got an anonymous tip that Lance and Sue Gates were preparing to make a major narcotics deal in Florida. The officers checked the information, confirmed part of it, obtained a search warrant and raided the couple's home. There they allegedly found weapons, drug paraphernalia, a quantity of cocaine and 350 pounds of marijuana. The Illinois court barred the evidence on the ground that the warrant had been obtained on insufficient grounds—the anonymous tip. The state appealed the case, arguing that the police were acting in the good-faith belief that the warrant was valid. The Supreme Court, which first pushed that argument aside, now says it is willing to hear it.

Chief Justice Warren Burger, one of the six justices who voted to rehear the case (the other three noted a strong dissent), has been arguing since his days as a federal judge that the exclusionary rule needs to be modified.

Maybe now it will be, perhaps along the lines of legislation proposed by the Reagan administration—that evidence should be admitted if the officers who obtained it were acting in the "reasonable and good-faith belief" that their actions were lawful.

In coldly practical terms, it probably won't make much difference. Only a handful of cases are thrown out as a result of the exclusionary rule (though that handful tend to be highly publicized). Few criminals take the exclusionary rule into account when deciding whether to commit a crime. And few officers would be tempted to induce coerced confessions as a result of common-sense modification of the rule.

The major effect of modification would be in the public perception of justice—an important consideration all by itself.

81-430 Illinois v. Gates (Mike)
 WHR for the Court
 1st draft 4/11/83
 2nd draft 4/22/83
 3rd draft 5/17/83
 4th draft 6/1/83
 Joined by CJ, HAB, LFP, WHR
 WJB dissent
 1st draft 5/11/82
 2nd draft 6/2/83
 Joined by TM
 BRW concurring in the judgment
 2nd draft 6/3/83
 JPS dissent
 1st draft 4/20/82
 2nd draft 4/29/83
 3rd draft 5/6/83
 Joined by WJB

Schwartz

Brief is already
in Chambers

February 25, 1983 Conference
Supplemental List

No. 81-430

ILLINOIS

v.

GATES

Motion of the SG for Leave
to File Reply Brief as
Amicus Curiae

SUMMARY: After the Court restored this case to the calendar for reargument, the SG filed an amicus brief. Resps and other amici filed briefs and directed many of their arguments to the SG's brief. The SG now moves for special leave to file a reply brief as amicus so that he might address those arguments. He recognizes that Rule 36.5 of this Court's Rules disallows such filings but contends that the importance of the Fourth Amendment issue presented and the United States' substantial interest warrant an exception.

The brief is already available in chambers.
Granting the motion would do nothing
except create a bad precedent for future amici.

DISCUSSION: Rule 35.6 clearly states that "[n]o reply brief of an amicus curiae will be received." No exceptions are permitted within the Rule itself and the SG has presented none to support the relief he requests. His position has already been set out in his amicus brief and if he wishes to address the arguments raised by the resps and other amici he may use his time at oral argument (as amici) to do so.

The Court could of course, as the promulgator of its own rules, view this case and the offered brief as exceptional circumstances and grant the motion. However the precedential effect of such would counsel against that option.

Should the Court view the SG's brief as worthy of consideration, it might simply decline to act on the motion and direct the Clerk to lodge the brief; it would then be available for review. This latter option seems the more appropriate course.

There is no response.

February 23, 1983

Schlueter

mrd

Court
Argued 19...
Submitted 19...

Voted on....., 19...
Assigned , 19...
Announced , 19...

No. 81-430

ILLINOIS

VS.

GATES

Motion of the SG for leave to file reply brief as amicus curiae.

D

[illegible]

Mike makes a strong argument for not reaching the E/R issue - particularly that the S/CT didn't consider it because it was not raised below. This merits serious consideration.

But Mike's arguments against adopting a good faith exception to the E/R are not persuasive.

The definition of the exception requires case law. This can be met.

The E/R is not constitutionally mandated & we had the rule of law ~~for~~ until Weeks without it.

I know of no other country that has a comparable rule.

BENCH MEMORANDUM on REARGUMENT

No. 81-430

Illinois v. Gates

Michael F. Sturley

February 28, 1983

Question Presented

Should the Court recognize a good faith exception to the exclusionary rule in this case?

Outline of Memorandum

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I. Background

On October 13, the parties argued the question presented in the cert petn: Was the information provided by an anonymous tip, coupled with police corroboration of some of the innocent information, sufficient to provide probable cause for a search warrant? On November 29, the Court invited the parties to argue the additional possibility of a good faith exception to the exclusionary rule, despite the fact that the Court had denied the State permission to argue this question originally.

My bench memo in this case dated October 6, 1982, summarizes the factual background and the decisions below.

II. Discussion

My previous bench memo in this case discusses the question presented in the cert petn. In this bench memo I will only address the issue not previously discussed.

A. Assumptions

In addressing the good faith issue, I make two assumptions. First, I assume that the information provided by the anonymous tip in this case, when coupled with police corroboration of some of the innocent information, was sufficient to provide probable cause for the issuance of the search warrant. For the reasons given in my prior bench memo, I continue to believe that this assumption is wrong. But you have been unconvinced by my earlier arguments, and I assume your position is now settled. *True*

you

Second, I assume that some good faith exception to the exclusionary rule would be appropriate. In Brown v. Illinois, 422 U.S. 590 (1975), you wrote:

[I]n some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes....

All Fourth Amendment violations are, by constitutional definition, "unreasonable." There are, however, significant practical differences that distinguish among violations, differences that measurably assist in identifying the kinds of cases in which disqualifying the evidence is likely to serve the deterrent purposes of the exclusionary rule....

...

[There are] "technical" violations of Fourth Amendment rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional As we noted in Michigan v. Tucker [417 U.S. 433, 447 (1974)]: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence.

Id., at 608-609, 611-612 (POWELL, J., concurring in part). This language certainly suggests that there should be an exception to the exclusionary rule, at least for technical violations of the Fourth Amendment. See also Brewer v. Williams, 430 U.S. 387, 414 n. 2 (POWELL, J., concurring) ("technical, trivial, or inadvertent violations")

With these assumptions in mind, I see this reargument as presenting essentially two questions. Do the facts of this case

justify a good faith exception? And is this an appropriate case in which to announce a good faith exception?

B. This Case as an Appropriate Vehicle

I deal with the second question first. There are serious problems that counsel against using this case as the vehicle for creating the good faith exception. These include problems that are discussed in the briefs and problems of which counsel cannot be aware.

(1) Problems on the Public Record. The generally recognized problems have been discussed in the various briefs, so I will highlight only two of them here. The first problem is the fact that the State did not raise its good faith argument until February 8, 1982--more than a year after the Illinois Supreme Court rendered its final judgment in the case. Thus the Illinois state courts were never given the opportunity to pass on the possibility of a good faith exception, even in a petn for rehearing. *State didn't raise argument until Feb 8th*

If I were writing the pool memo in a federal case and petr sought review of an issue not raised below, I would point that fact out in my discussion and assume that nothing more needed to be done. See, e.g., cert pool memo in No. 82-1214, at 3. One of the Court's basic principles is that it will not review questions that were not raised below.¹

Since this case comes to True, but see

¹The principle is so well established it should not require citation, but ample authority is cited in the various briefs.

the Court from a state supreme court, there are not only the jurisprudential problems with deciding a question not raised or considered below, but serious jurisdictional problems, as well.² If the Court really wants to use this case to decide the good faith issue, it should remand the case to the state courts to give them an opportunity to pass on the issue first.

The second problem is perhaps an explanation for the first. Other than preserving the federal issue for review, the State probably would have accomplished nothing by raising the good faith issue in the state courts. Illinois has long had an exclusionary rule that exists entirely independently of its federal counterpart. Thus there is an independent and adequate state ground for the exclusion of illegally seized evidence. The creation of a good faith exception in this case would be nothing more than an advisory opinion.

State's
Brief
denies
this

* But 9th S/Ct in this case relied on
~~the~~ U.S. S/Ct. cases - particularly Aguilar

²There also seems to be a problem with the principles of federalism. Surely the Founders would not have intended the Supreme Court to reverse the judgment of the highest court of a sovereign state on the basis of an issue that the state court never had the opportunity to consider. These principles were discussed by the Court as recently as last Term. See Rose v. Lundy, 455 U.S. 509, 518 (1982) ("Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' Darr v. Burford, 339 U.S. 200, 204 (1950)."). Here the concerns are even stronger. In Lundy, the federal issue was necessarily dispositive, while here it is likely there was an independent and adequate state ground.

(2) Problems Not on the Public Record. Counsel (unaware of the Conference vote) have been unable to address the problems created by the fact that the judgment below will be reversed whatever happens on reargument. Assuming that the Court announces its decision on the merits, the creation of a good faith exception here will be mere dicta. The Court will be reaching out to decide an issue that is unnecessary to its judgment. It makes no difference to resps if the evidence is admitted against them because it was seized in compliance with the Fourth Amendment or because a good faith exception applies.

On the other hand, it would be an abdication of responsibility to reverse on the basis of a good faith exception without reaching the merits. While it might be convenient for courts to use the exception to avoid facing difficult questions, such a practice (at least by appellate courts) would be particularly bad policy. To the extent the exception makes sense in a case such as this, it is only because the police were unable to know that their actions violated the Fourth Amendment. If courts simply announce that, whether or not a violation took place, the exception applies,³ police never will know how to conduct themselves

³The SG encourages such decision-making (perhaps because it would inevitably lead to an erosion of Fourth Amendment rights). His analogy with the harmless error doctrine, however, is unpersuasive. When a court announces that a particular course of conduct was harmless, whether or not it was an error, it does not create the same problems, for good faith is not an issue. While prosecutors in a similar situation in a later case might not know if similar conduct will be error, this makes little difference to the resolution of the later case. Even if they know it to be error, it could still be harmless without regard to their knowl-

Footnote continued on next page.

Why?

to avoid Fourth Amendment violations in similar circumstances. If courts, however, announce that a violation took place, but that the good faith exception applies, then the evidence is available but future officers will (or should) know that similar conduct may not be repeated. Then the exclusionary rule can serve its deterrent purposes and the number of Fourth Amendment violations will be reduced.

C. The Good Faith Exception on These Facts

It is highly artificial to speak of an exception to a rule that, on the merits, does not even apply. I suspect that one of the reasons that it seems unfair to apply the exclusionary rule here is your belief that the police and the judge who issued the warrant complied with the Fourth Amendment. This is, of course, a good reason not to reach the good faith question. If the Court does reach the question, though, I assume it could hold that there was probable cause to support the warrant, but that even if there had not been probable cause the police acted in reasonable⁴ good faith. / yes

edge. When police learn that certain conduct violates the Fourth Amendment, however, they would be unable to claim a good faith exception. To avoid repeating old violations, therefore, it is necessary for the courts to announce what the violations are.

⁴The most commonly proposed formulations of a good faith exception would require subjective as well as objective good faith. There is no record on the officers' subjective good faith here, but on the evidence available it is hard to imagine that the officers did not act in subjective good faith. ?

Depends on one's view of what is subjective. Presence of a warrant is hardly subjective.

*but not an
by police. The
officer made an
judgment I would
have made*

(1) The Probable Cause Standard. The Fourth Amendment violation that arguably occurred here was the issuance of a search warrant on less than probable cause. I see no way that such an error can be described as a "technical, trivial, or inadvertent" violation. Issuing a warrant on less than probable cause violates the plain language at the very heart of the Fourth Amendment: "no warrants shall issue, but upon probable cause." As you recognized in Brown v. Illinois, there may be "technical" violations where officers in good faith arrest an individual in reliance on a warrant later invalidated. For example, the affidavit may be improperly authenticated, so that the constitutional "oath or affirmation" requirement is not satisfied. The issuing magistrate may fill out the form improperly,⁵ perhaps even failing to sign the warrant. Assuming that the magistrate's intention is clear, such an error would be "technical." Or the magistrate may fail to comply with a strictly procedural rule. A state, for example, may require the supporting affidavit to be attached to the warrant for the warrant to be valid. If the warrant is otherwise valid (and the affidavit is otherwise in order), failure to comply with this rule would be "technical," and the good faith exception would be appropriate.

⁵In one case I saw recently, the officer and the magistrate both used standard forms that referred to controlled substances--despite the fact that their intention was a warrant to search for something else. Each amended the standard form to delete the references, but their editing was weak. As a result, there were technical violations. This is clearly a case where a good faith exception would be appropriate.

There are, of course, a host of possibilities involving warrantless arrests, but again the error should be "technical." If the police incorrectly believe that they have authority to search, but the belief is based on some specific good faith error, then the exception could apply. For example, they may be mistakenly advised by radio that a warrant has been issued, when in fact the warrant is not issued until after the search is completed. Or they may conduct a search incident to arrest when the arrest is technically invalid. Or they may believe, on the basis of a good faith factual error, that they have probable cause and are not subject to the warrant requirement, but the belief would have been justified if their factual assumptions had been true.

The exception is not appropriate, however, when the police, knowing the true facts, mistakenly believe that those facts are sufficient to constitute probable cause. All an exception would do in such circumstances is to lower the Fourth Amendment standard from "probable cause" to "what a reasonable police officer believes is probable cause." In the grey area on the edge of probable cause, police will always make mistakes in both directions, no matter where the line is drawn. But these are not mistakes of fact that can be made in good faith. Rather, they are mistakes in judgment. The existence of an exception to the exclusionary rule effectively removes the "incentive to err on the side of constitutional behavior," United States v. Johnson, 459 U.S. ___, ___, 102 S.Ct. 2579, 2593 (1982), and provides an incentive to err in the opposite direction.

No
The standard would be whether the officers' belief was "reasonable" and made in "good faith"

What?
Since when was a mistake in judgment one not made in good faith? What about the difference between Mike's & my "judgment" in this case

(2) Appellate Review of Magistrates' Decisions. There is a strong temptation to view this case too narrowly, and to look only at the behavior of the police who executed the warrant. Assuming that they acted in subjective good faith, see note 4, supra, it is hard to fault them. I think they could easily have investigated their case in better detail, but having obtained enough evidence to satisfy a presumably impartial judicial officer, one can understand why they went no further. Thus there is a temptation to adopt the rule suggested by some of the amici: the exclusionary rule will never apply when the police act pursuant to a warrant, unless the warrant was, for example, based on perjury. Cf. Franks v. Delaware, 438 U.S. 154 (1978). Such a rule, however, takes too narrow a view of the system. The exclusionary rule deters not only the policeman who executes the warrant, but everyone else in the criminal justice system. It encourages the investigating officers to investigate fully before seeking a warrant and to make their best case to the magistrate when they do seek a warrant, it encourages the police bureaucracies to ensure that their officers observe the Fourth Amendment, it affects prosecutors working with investigators, and it encourages magistrates to apply the probable cause standard fairly.

I agree up to a point

Adopting the per se rule suggested, however, has the effect of insulating virtually every warrant decision of a magistrate from appellate review. This lack of appellate review would be intolerable when one remembers that (i) proceedings before the magistrate are invariably ex parte, (ii) the magistrate is not

necessarily a lawyer, (iii) the police generally can select the magistrate to whom the request for a warrant is directed, and (iv) if a magistrate declines to issue a warrant, the police may still seek a warrant from a second, third, or fourth magistrate. It is proper, of course, to give considerable deference to magistrate's decisions despite all of these problems. That is the best way to encourage police to at least go to a magistrate.⁶ But the possibilities for abuse are too great when there is no realistic avenue of appellate review. Although most magistrates undoubtedly act in good faith, it requires only one in a jurisdiction to seriously erode Fourth Amendment rights.

D. Retroactivity

Resps argue that if the Court does adopt a good faith exception in this case, the rule must be applied prospectively. Brief 60-66. Although it generally is true that sharp changes from earlier practice are not applied retroactively, resps' argument is silly here. The primary purpose of the exclusionary rule is to deter future violations of the Fourth Amendment, not to correct past violations. Since violations that have already occurred cannot now be deterred, there is no reason not to apply the good faith exception to them.

⁶Given your inclination to reverse, I would be happiest if the decision were based on the considerable deference that should be given to magistrate's decisions.

III. Conclusion

The Court should not reach the merits of the good faith exception issue here for a number of jurisprudential and jurisdictional reasons. If it does reach the merits, the exception should not apply to the facts of this case.

W. H. H. H.

Beebel (Ant AG of 2-ll) (miserable argument)

Probable cause - "more probable than not". It is established.. on basis of facts known at time warrant was issued.

(WithR suggests that reasonableness of police action may be viewed ~~to~~ in light of facts known to police at time of search. Here when warrant was issued, it was not known that car would return to 2-ll. ~~to~~ Police in 2-ll did know this)

The AG said he was leaving to SG to argue the "good faith" issue. The AG focused, rather, on whether the facts & circumstances known to Magistrate ~~could~~ justified a decision of probable cause.

Lee (SG)

Disagreement ~~at~~ among judges.

Purpose is to deter police conduct.

Lee (cont.)

As to Magistrate, her conduct may be secondarily implicated. The primary purpose of E/R is to deter police.

(My view: Our system is based on assumption ~~of~~ that magistrates are independent of law enforcement. If magistrates cannot be trusted, why all the insistence on a warrant.)

(["]Should overrule Nathanson" - Lee)

Re:

Reilly (Resp)

I see statute ~~has~~ established a state E/R. Established in Ill. before Mapp.

"Police has no discretion once a warrant is issued. He is commanded to enforce it."

Since Ill never raised this Q in courts below we should not reach it here.

Word "reasonable" already in in 4th Amend. A second reasonable test is unnecessary.

Justice Marshall

Affirm.
We have no prior.
There is all we need address

Justice Blackmun

Rev.

Regret we took case for re-argument.
Would decide case on the Aguilar &
cut back on it & ~~Spencer~~ Spencer
Good faith issue not raised below
There is a stronger case for ~~affirm~~
validity of warrant than ~~affirm~~
~~Draper~~ Draper

Justice Powell

Rev - cutting back on Aguilar (tentative)

In accord with my concurring opinion
in Brown v. Ill., I would adopt an
exception to the E/A where the officer
acts in the reasonable, good faith belief
that his search/seizure was lawful.
(i.e. consistent with 4th Amend.)

As 9th Court relied on our decisions, I have
no serious problem with "independent" ground.
I'm concerned that issue was not raised below.

*Williamson (CA 5) have adopted good faith rule.
But I would narrow on the Aguilar issue
& then make it reluctant to hear the good faith issue*

Justice Rehnquist

Rev ~~to~~ on Aguilar issue (Kutshalive)

Tenature view is that we do not have
juris. I'll Const. & statute are explicit.

Failure to raise Q below also is negligent
agent ~~reaching~~ good faith issue

Justice Stevens

If reach merits would off in or to lower; Rev as to
cost.

Wouldn't reach good faith issue.

Independent ground. - I'll law. Statute
ante-dated Mapp.

If good faith issue is reached, must
consider deterrence of Magistrate, who issued
warrant.

Strongest type case for good faith is,
where officer was confronted with exigent
circumstances.

Search of auto ok. But no probable cause
to search house. Discussed Nathanson.

Justice O'Connor

Rev on the Aguilar issue

The reargument was useful.

Rely on Draper

If reach good faith issue, will
provide the fifth vote. The exception
must be carefully framed. But prefer
not to reach in this case for reasons
noted by LFP, HAB & WHR.